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Introduction

On 28 August 2019 advice was tendered to Her Majesty The Queen that Parliament should be prorogued until 14 October 2019. Her Majesty in Council made an Order to that effect, empowering the Lord Chancellor to prepare letters patent to prorogue Parliament. On 10 September 2019 Parliament was prorogued by a Royal Commission appointed under the letters patent.

On 24 September 2019, the Supreme Court, in *Cherry v Advocate General for Scotland* and *Miller v Prime Minister* [2019] UKSC 41 unanimously found that the advice tendered to Her Majesty The Queen for prorogation was unlawful, and quashed the Order in Council and the prorogation itself.

In the vivid language of Baroness Hale of Richmond and of Lord Reed, writing for the Court:

> *"[The Order in Council] led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect."*

However, prorogation was not the only business transacted by the Royal Commission on 10 September 2019. Before proroguing Parliament, the Commissioners signified Royal Assent to Bills on The Queen's behalf, as is customary at prorogation ceremonies. On that occasion only one Bill received Royal Assent, the Parliamentary Buildings (Restoration and Renewal) Bill, which became 2019 c. 27.

The parliamentary authorities have taken the view that because the Supreme Court has quashed the prorogation, everything else done by the Royal Commission in the morning of 10 September has been quashed as well. Accordingly, both the Speaker of the House of Commons and the Lord Speaker have indicated that Royal Assent for the Restoration and Renewal Bill would need to be signified again. Both Speakers also ordered the entries relating to Royal Assent to be expunged from the records of their Houses. The Act has since been removed from legislation.gov.uk. Thus, 2019 c. 27 has been purged from the Nation's official records.

At first sight, it would seem that a Bill, duly passed by the Commons and Lords in Parliament assembled, and assented to by Her Majesty, has been unmade by court order and erased from the statute books. Yet as every first-year law student knows, the courts of the United Kingdom cannot strike down Acts of Parliament.

This paper argues that the Speakers have wrongly understood the Supreme Court's judgment to have invalidated the signification of Royal Assent on 10 September. Their mistake is understandable, for the Court's

quashing of prorogation was an unprecedented act and the Court did not make clear, as it should have, the implications of its act.

However, when read closely, the Supreme Court's decision said nothing about, and had nothing to do with the validity of the Royal Assent given to the Restoration and Renewal Bill. No ministerial advice was tendered to The Queen regarding Royal Assent, and therefore the unlawfulness of the advice tendered at Balmoral on 28 August does not affect the validity of the Restoration and Renewal Act, which is still good law. Therefore, a second Royal Assent is not needed.

The validity of the Royal Assent to the Restoration and Renewal Bill was not challenged by the applicants in *Cherry/Miller*, was only mentioned in passing by one of the parties, and is not mentioned in the Supreme Court decision at all. It appears much more likely that the issue of Royal Assent, thought to be incidental to the main issue, was overlooked by the Supreme Court.[1] It is unfortunate that the Court did not make clear that its judgment had no bearing on the question of Royal Assent.

As recently as 2014, the Supreme Court reaffirmed that Royal Assent was shielded from judicial review. In *R (Barclay) v Secretary of State for Justice* [2014] UKSC 54, Baroness Hale said, in relation to Royal Assent, at paragraph 48:

"Nor is the analogy with Royal Assent to Acts of the United Kingdom Parliament exact: the Queen in Parliament is sovereign and its procedures cannot be questioned in the courts of the United Kingdom."

The Supreme Court's "blank sheet of paper" metaphor, whilst certainly memorable, caused considerable confusion, and it is unsurprising that it encouraged the parliamentary authorities to reason—or to fear—that Royal Assent had also been invalidated. The Court should have made crystal clear that its decision to quash the advice to prorogue and the prorogation itself had no effect on the signification of Royal Assent.

To extend the metaphor the Court used, the Royal Commission walked into the House of Lords with one sheet of paper, only part of which was blank. The connection between prorogation and royal assent is purely incidental, and the two are clearly severable from each other, following the principles laid out by Lord Bridge of Harwich in *DPP v Hutchinson* [1990] 2 AC 783.

There are very good reasons not to understand the Supreme Court's judgment to sweep away Royal Assent. For Royal Assent is paradigmatically an example of an act of The Queen-in-Parliament, that is to say The Queen acting in her capacity as one of the three components of Parliament. It is therefore shielded from judicial review by Article IX of the Bill of Rights 1689, which provides that "proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

In addition, the Restoration and Renewal Act is shielded by the enrolled bill rule, which protects Acts of Parliament, once enacted, from challenge in the courts on grounds of procedural improprieties during its passage. This is an important corollary of Parliamentary sovereignty which, as the Supreme Court reaffirmed in *Cherry*, is one of the "fundamental principles of our constitutional law". Once Royal Assent has been signified, and

1. Reference was made to Royal Assent in the Prime Minister and Advocate General for Scotland's Further Submissions on Relief of 19 September 2019, at paragraph 7, on the assumption that Royal Assent was clearly a "proceeding in Parliament".

the parliamentary authorities have recorded as much, the Bill is an Act of Parliament and its validity cannot be challenged in court.

Therefore, Royal Assent should not be re-signified to the Restoration and Renewal Act, which is a validly enacted Act of Parliament. Accepting that Royal Assent needs to be re-signified would set a problematic precedent, one which could be used to encourage the questioning of the validity of Acts of Parliament in the courts in the future, either on procedural or on substantive grounds. This would help undermine the doctrine of Parliamentary sovereignty, which is fundamental to our constitution, as the Supreme Court itself recognised in *Cherry/Miller*.

However, the Court's judgment has led the parliamentary authorities into error, and there is now a case for enactment of a short rectifying Act to put it beyond doubt that the Restoration and Renewal Bill became an Act on 10 September 2019.

The Relationship between Prorogation and Royal Assent

To understand what happened on 10 September 2019, it is necessary to explore one of the more obscure aspects of the British constitution, namely the process by which the Royal Commissioners, armed with white sticks, doff bicorns and tricorns to wigged clerks whilst sitting on a sack of wool. On that occasion, the Royal Commissioners were performing two vital, yet conceptually distinct functions.

The first function was to signify Royal Assent to Bills on behalf of and in the name of Her Majesty The Queen. Formerly Royal Assent was signified by the Sovereign in person, but the Royal Assent by Commission Act 1541, introduced so that Henry VIII did not have to assent in person to the legislative murder of his wife, provided that Royal Assent could be pronounced in Parliament by commissioners appointed by the King. The Act was repealed by the Royal Assent Act 1967 which, however, preserved the signification of Royal Assent in "the form and manner customary before the passing of this Act" as one of the three methods through which Royal Assent can be signified.

Royal Assent is given without ministerial advice to The Queen. The position is summarised by Anne Twomey in *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* at pages 627–28:

> *"In the United Kingdom, the Queen gives assent to bills by signing letters patent prepared by the Clerk of the Crown, listing every bill that has been passed by the Houses by the assent date. No advice is given by ministers and there is no involvement of the Privy Council. The list of bills ready for assent prepared by the Clerk of the Crown is authorised by the Clerk of the Parliaments. It is therefore Parliament that determines the bills to which the Queen grants royal assent."*[2]

The second function was to prorogue Parliament, again in the name and on behalf of The Queen. There is no specific statutory authority authorising the Sovereign to prorogue by Royal Commission, but it has invariably been signified in that manner since 1854, when Queen Victoria last prorogued Parliament in person.

Royal Assent and Prorogation by Commission

The process leading up to prorogation at the end of a parliamentary session begins when Her Majesty in Council, on the advice of Her ministers,

2. Rodney Brazier has expressed the contrary view that there is "government advice that royal assent be given to every Bill passed by both Houses (or by the Commons alone under the Parliament Acts)." John Finnis has expressed a similar view, additionally pointing to the text of the Great Seal Act 1884, although see *contra* Joseph Crampin's views on UKCLA blog. *Erskine May* takes a compromise view: The Lord Chancellor ultimately submits the list of bills for assent to The Queen (hence there is advice), but he has no authority to withhold a bill ready for assent from The Queen. Assuming, *arguendo*, that ministerial advice for Royal Assent exists, it is irrelevant to the lawfulness of the Royal Assent signified to the Restoration and Renewal Bill, which was not given pursuant to advice whose lawfulness was impugned in the courts.

makes an Order authorising the Lord Chancellor to prepare and issue a Commission in "the usual manner". The relevant officials then prepare letters patent under the Great Seal, authorising the Commissioners named therein to prorogue Parliament.

However, the same letters patent also authorise the Royal Commissioners to signify Royal Assent under the Royal Commission procedure preserved by the Royal Assent Act 1967.[3] This concatenation of two distinct legal authorities for two different acts in a single letters patent was the source of the confusion which led to the belief that Royal Assent to the Restoration and Renewal Bill is invalid, because it was authorised by the same "blank sheet of paper".

At the prorogation ceremony, the Royal Commissioners direct the clerks to read the Commission under the Great Seal, which successively authorises the Commissioners to pronounce Royal Assent in the presence of both Houses, and then to prorogue Parliament. Then, Royal Assent is pronounced using the famous formula ("La Reyne le veult"), the prorogation speech is read by one of the Commissioners, and Parliament is prorogued. Royal Assent and prorogation are recorded under separate headings in *Hansard* and as distinct items in the journals of the House of Lords.

The granting of Royal Assent at the prorogation ceremony has become so usual that The Crown Office (Forms and Proclamation) Rules 1992, which prescribes the wording for various letters patent, does not provide for a specific wording for letters patent for prorogation alone, but only for Royal Assent *and* prorogation. This is in contrast with the pre-1967 practice, when separate commissions were issued for Royal Assent and for prorogation, even if they were read one after the other.

However, nothing turns on this point. The same Rules provides that "such variations as are…necessitated by the circumstances to be provided for in the document" can be made to the prescribed wordings. It would be absurd to suggest that Parliament could not be prorogued unless The Queen or her representatives signified Royal Assent at the same time. In the past, there were examples of prorogation taking place without Royal Assent, most notably when the second 1948 session of Parliament was prorogued on 25 October 1948.

The view is also confirmed by the Attorney-General, Sir Elwyn Jones, who said during the debates over the Royal Assent Act 1967 that:

> *"Royal Assents by Commission will be held at Prorogation—if there are then any Bills awaiting Royal Assent"*
>
> (HC Deb 17 April 1967 vol. 745 c. 10).

Thus, the letters patent, though a single document, contained two distinct royal authorities, under two distinct heads of power, for the Royal Commissioners to carry out two distinct duties on behalf of the Sovereign.

3. This is also why these particular letters patent have to be affixed with the Royal Sign-Manual: s. 1(1) of the Royal Assent Act 1967 requires the letters patent for signifying Royal Assent be "signed with Her Majesty's own hand". Otherwise, letters patent can be issued under the authority of a warrant under the Royal Sign-Manual alone.

The Severability of the Letters Patent

This raises a question concerning the severability of the letters patent: what happens to the remainder of a legislative instrument when part of it is found to be *ultra vires*? The question was extensively discussed in *DPP v Hutchinson* [1990] 2 AC 783. Lord Bridge of Harwich, giving the leading judgment, explained that there were two tests of severability, at page 804:

> *"A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains of the text is still grammatical and coherent.*
>
> *A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect."*

If the language of the letters patent for prorogation and Royal Assent, as recorded in *Hansard*, is examined, it is obvious that they are severable under both tests. The section of the letters patent on prorogation, which follows the section on Royal Assent, is connected to the former by a single "And whereas". If the impugned section on prorogation is taken out, the remainder (which preceded it and was complete in itself) remains grammatically coherent and its legislative purpose remains unchanged.

Hence, the letters patent is severable, and the impugning of the section on prorogation does not affect the validity of the remainder.

In sum, Royal Assent and prorogation are two conceptually and legally distinct acts, carried out under different legal authorities contained in the same document at the same time. Unlike in the case of prorogation, no advice is tendered concerning Royal Assent at any stage, so there was no unlawful advice that could have led to the quashing of Royal Assent. The Supreme Court's quashing of prorogation, being premised on the unlawfulness of advice to prorogue, only affects the letters patent *pro tanto* of the unlawful advice. Finally, the letters patent is severable under both tests of severability. The fact that authority for both notification of Royal Assent and prorogation was written on the same sheaf of paper is neither here nor there.

Royal Assent and Parliamentary Sovereignty

Why does all of this matter? After all, it can be argued that the Parliamentary Buildings (Restoration and Renewal) Act could simply receive Royal Assent once again, as both the Speaker of the House of Commons and the Lord Speaker assume will occur.

In the short term, if anything had been done between 10 September and 24 September under the authority of the Restoration and Renewal Act, or continued to be done after 24 September, the validity of such actions could be open to challenge. Hence, even if Royal Assent was baldly re-signified, there might be a need to pass retrospective legislation

confirming the validity of such actions.

However, in addition to the fact that a second Royal Assent is not needed, for the reasons set out in the previous section, the consequences of re-signifying Royal Assent—and especially of taking for granted that Royal Assent needs to be re-signified—are potentially far more serious and consequential than has been appreciated to date by the parliamentary authorities, for it could undermine Parliamentary sovereignty.

If one accepts that Royal Assent needs to be re-signified because it fell with prorogation, it follows that the signification of Royal Assent has been quashed, albeit inadvertently and without acknowledgment, by court order. This would concede that Royal Assent *can* be questioned by the courts, which would open the door to litigation seeking to invalidate duly enacted Acts of Parliament by way of judicial review, an unwelcome development and one at odds with the Supreme Court's emphasis on parliament sovereignty in *Cherry*.

To accept that Royal Assent needs re-signifying is also contrary to recent Supreme Court authority. In *R (Barclay) v Secretary of State for Justice* [2014] UKSC 54, judicial review was brought on public law grounds against the validity of certain Orders in Council giving Royal Assent to legislation from the island of Sark, a Crown Dependency.

Rejecting the challenge, Baroness Hale of Richmond said at paragraph 48 that:

> *"Nor is the analogy with Royal Assent to Acts of the United Kingdom Parliament exact: the Queen in Parliament is sovereign and its procedures cannot be questioned in the courts of the United Kingdom."*

The statement was *dicta*, but restated uncontroversial propositions at the core of the doctrine of Parliamentary sovereignty: legislation made by The Queen-in-Parliament is the law of the land and cannot be reviewed by the courts once enacted, even when the claim is that assent ought to have been withheld for some reason known to public law.

Parliamentary sovereignty grounds, and is partly upheld and realised, by way of certain rules of law which establish the authority and validity of Acts of Parliament and prevent challenges to Acts by way of challenges to the law-making process. For present purposes two will be singled out: Article IX of the Bill of Rights 1689 and the enrolled bill rule, and it is argued that both protect Royal Assent from invalidation by the courts.

The Bill of Rights 1689

Article IX of the Bill of Rights reads *inter alia*:

> *"proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".*

The meaning and exact scope of "proceedings in Parliament" has been the subject of some controversy over the years. Twomey, for instance, states at page 621 of *The Veiled Sceptre* that:

> *"[T]he grant of assent is part of the legislative process, yet courts have not gone so far as to accept that the grant of assent, being a legislative process, is subject to the protection of art 9 of the Bill of Rights 1688 (UK), preferring to confine art 9 to proceedings within the Houses."*

In support of the statement she cites two Australian and New Zealand authorities, *McDonald v Cain* [1953] VLR 411 and *Westco Lagan Ltd v Attorney General* [2001] 1 NZLR 40.

However, the better view remains the one taken by the Supreme Court in *Barclay*, namely that Royal Assent is not open to challenge, at least in the courts of the United Kingdom.

In *McDonald*, Gavan Duffy J in the Full Court of the Supreme Court of Victoria recognised the differences between the Victoria and United Kingdom constitutions, which controlled the outcome of the case. He said at page 419:

> *"The principle that the Courts must take all Acts of Parliament as valid is understandable in England, where it has long been settled that Parliament has an unfettered supremacy. To apply it to this country is to overlook the difference between "controlled" and "uncontrolled" constitutions".*

In *Westco Lagan*, McGechan J in the High Court of New Zealand said at paragraph 97:

> *"[The] primary thrust [of Article IX] was to exclude monarchical activity – and threats – within Parliament's four walls. I am not persuaded the reference in art 9 to "proceedings of Parliament" refers to proceedings outside the Houses of Parliament, operating through some wider definition of "Parliament" to include the monarch and royal assent."*

However, this interpretation is dubious. "Parliament" is a term of art with a clear and unambiguous meaning, *viz*, in the case of the United Kingdom, the tripartite entity comprised of the House of Commons, the House of Lords, and The Queen. Judicial speculation as to seventeenth-century English politics cannot override the plain meaning of the statute.

As recently as in 2017, in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the Supreme Court reaffirmed the integral role of the Crown in law-making. At paragraph 43 it said:

> *"Parliament, or more precisely the Crown in Parliament, lays down the law through statutes – or primary legislation as it is also known – and not in any other way."*

If Royal Assent was not protected by Article IX as a "proceeding in Parliament" it would allow an end-run around the protection it affords to Parliament. It is no use to say that Article IX protects the activities of both Houses of Parliament if the result of their activities can be nullified by the courts at the Royal Assent stage.

Some have suggested that the Supreme Court's finding that prorogation was not a "proceeding in Parliament" means that Royal Assent is not either. On a preliminary view, I would suggest that, even under the logic of the

judgment in *Cherry*, Royal Assent remains a "proceeding in Parliament".

In *Cherry*, the Supreme Court said at paragraph 68:

> *"[Prorogation] cannot sensibly be described as a "proceeding in Parliament". It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end."*

As has been discussed earlier, Royal Assent is granted by The Queen in Parliament without the input of ministers, as a consequence of the decisions of both Houses (or of the House of Commons, acting in accordance with the Parliament Acts 1911 and 1949) to assent to a Bill. Hence, it should not be said to be "something which is imposed upon them from the outside".

Legislating is manifestly part of the core business of Parliament. Much of the discussions in both Houses of Parliament is concerned with the law-making process, and Royal Assent only brings the "essential business of Parliament to an end" in the sense that it is the last step in the law-making process. The signification of assent is an integral and anticipated part of that process, without which other parliamentary action would fail to result in its intended end – an *Act* of Parliament.

Reading the Supreme Court's decision in *Cherry* in this way, distinguishing between the fundamental nature of prorogation and of Royal Assent, is not only consistent with the Court's decision in *Barclay* and *Miller I*, but is also consonant with the purpose of Article IX and the principle of Parliamentary sovereignty itself, which would be put in doubt if courts could question the provision of assent by any constituent part of the Parliament.

Finally, it might be noted that when Royal Assent is notified under the procedure created under the Royal Assent Act 1967 (which is the most common method), the Speaker of the House of Commons and the Lord Speaker (or the person acting as Speaker) both have to notify their respective House of the signification of Royal Assent by The Queen for it to become effective, with the Act being deemed to have received Assent when the last House has been so notified.

It is hard to argue that a process which involves both Speakers notifying their respective Houses, and which is entered into the records of both Houses, is not a "Parliamentary proceeding". Moreover, it would be absurd to argue that Royal Assent notified in this manner is a "proceeding in Parliament" but that Assent pronounced by Royal Commission is not. In both cases, the Assent was "signified by Letters Patent under the Great Seal signed with Her Majesty's own hand" in accordance with the the Royal Assent Act 1967; in both cases the already signified assent was pronounced or notified under s. 1(1) of that Act; and in both cases was

entered into the records of the House. Such a distinction is not justified by either principle or by logic.

In sum, Royal Assent, which is a paradigmatic instance of an act of The Queen in her parliamentary capacity, is covered by the protection afforded to "proceedings in Parliament" afforded by Article IX and is not reviewable by the courts.

The Enrolled Bill Rule

The second protection is the common law rule known as the enrolled bill rule, sometime known as the enrolled act rule. The rule states in essence that once enacted by The Queen-in-Parliament, the manner through which an Act reached the statute book cannot be investigated by the courts.

In the classic formulation by Lord Campbell in *Edinburgh and Dalkeith Railway Company v Wauchope* (1842) 8 ER 279:

> *"all that a Court of Justice can do is look to the Parliament Roll; if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament, during its progress in its various stages through Parliament."*

This rule has been approved by successive generations of judges. In *Pickin v. British Railways Board* [1974] A.C. 765, the validity of a private Act of Parliament was challenged on the grounds that its promoters had defrauded Parliament to obtain its passage. Rejecting the challenge, Lord Reid said, concerning Lord Campbell's statement, at page 787:

> *"No doubt this was obiter but, so far as I am aware, no one since 1842 has doubted that it is a correct statement of the constitutional position"*

while Lord Simon of Glaisdale said at page 798:

> *"the courts in this country have no power to declare enacted law to be invalid. That being so, it would be odd if the same thing could be done indirectly, through frustration of the enacted law by the application of some alleged doctrine of equity."*

In *Manuel v Attorney-General* [1982] 3 WLR 821, the Canada Act 1982 was challenged as *ultra vires*. Rejecting the challenge, Sir Robert Megarry V.-C. referred to the statement in *Pickin* and said:

> *"The Canada Act 1982 is an Act of Parliament, and sitting as a judge in an English court I own full and dutiful obedience to that Act."*

Finally, in *R (Jackson) v Attorney General* [2006] 1 AC 262, the rule in *Pickin*, the authority of which was described as "unquestioned", was again judicially approved. Finding the question of the validity of the Hunting Act 2004 to be justiciable, Lord Bingham of Cornhill distinguished the position in *Jackson* from that in *Pickin* because the Hunting Act 2004 had been enacted under the Parliament Acts 1911 and 1949 without the concurrence of the

House of Lords. Lord Bingham said at paragraph 27:

> *"in Pickin, unlike the present case, it was sought to investigate the internal workings and procedures of Parliament to demonstrate that it had been misled and so had proceeded on a false basis. This was held to be illegitimate… Here, the court looks to the parliamentary roll and sees Bills (the 1949 Act, and then the 2004 Act) which have not passed both Houses."*

Lord Nicholls of Birkenhead also reaffirmed the rule in *Pickin*. In his view, *Jackson* was different because the question involved was one of statutory construction, namely the meaning of section 2(1) of the Parliament Act 1911, and of the limits of the legislative power it confers. As such, the validity of the Hunting Act 2004 could be examined by the courts only insofar it involved a question of statutory construction of the Parliament Act 1911, and not a question concerning the legislative process leading to the enactment of the 2004 Act. At paragraph 50, he said:

> *"In accordance with this principle [set out in Pickin and the Article IX of the Bill of Rights 1689] it would not be open to a court to investigate the conduct of the proceedings in Parliament on the Bill for the 1949 Act to see whether they complied with section 2 of the 1911 Act."*

Hence the enrolled bill doctrine shields a Bill, once it has been passed by both Houses and given Royal Assent, from judicial review. It also shields a Bill, passed by the House of Commons in accordance with the Parliament Acts 1911 and 1949 and given Royal Assent, from judicial review, subject to judicial interpretation of the scope of the 1911 Act.

In summary, the granting of Royal Assent is protected as a "proceeding in Parliament" by Article IX of the Bill of Rights 1689, by the enrolled bill rule, and by the general principle of Parliamentary sovereignty which underlies both. Recent Supreme Court judgments do not displace the orthodox view, which means that the granting of Royal Assent remains unreviewable, quite apart from the fact that there was no unlawful advice in the present case.

Next Steps

It would have been reasonable for the parliamentary authorities to have taken the view that Royal Assent has been properly signified and that there was therefore no need to take any further step. However, the premature actions of the Speaker of the House of Commons and of the Lord Speaker may have made this untenable. That is, their misunderstanding of the Supreme Court's judgment, a misunderstanding caused by the Court's "blank page" metaphor and inattention to this implication of its judgment, has introduced doubt about the validity of the Act.

It would be a mistake for the Government to consider approaching the Supreme Court, or any other court, for clarification as to the implications of its judgment for the validity of the Royal Assent signified on 10 September. Given the arguments set out above, the Court should find that the Restoration and Renewal Act was validly assented to, and that the effects of its ruling extend only to prorogation.

However, in view of the centrality of this question to the rights and prerogatives of Parliament, and the standing risk of judicial encroachment on Parliament's procedures, which Article IX is intended to repel, Parliament, as the master of its own procedures, should not leave the question to the courts to resolve. Parliament should instead take responsibility and correct the ambiguity in a matter which reaffirms its sovereignty and its rights to control its own proceedings.

Moreover, the lawfulness of anything done under the Restoration and Renewal Act since 10 September is now is open to question. Depending on the nature of activities of the relevant parties during this period, remedial legislation may be necessary in any case, whether Royal Assent is re-signified or not. All these considerations point to the need for rectifying legislation, which would simply provide authoritatively that the Restoration and Renewal Act received Royal Assent on 10 September. Finally, rectifying legislation would remove doubts as to date from which various parts of the Act enter into force under the provisions of section 14 of the Act.

A close analogy can be drawn with instances when Royal Assent was granted by mistake to bills which have not passed both Houses. In the United Kingdom, long-standing and consistent practice has been to pass a retrospective validating act when a bill mistakenly receives Royal Assent without having been passed by both Houses in its final version. As the 25th edition of *Erskine May* records at paragraph 30.87:

> *"In 1844 there were two Eastern Counties Railway Bills in Parliament. One had passed through all its stages, and the other was still pending in the House of Lords, when on 10 May the Royal Assent was given, by mistake, to the latter, instead of to the former.*
>
> *On the discovery of the error an Act was passed by which it was enacted that when the former Act: 'shall have received the Royal Assent it shall be as valid and effectual from 10 May as if it had been properly inserted in the commission, and had received the Royal Assent on that day; and that the other bill shall be in the same state as if its title had not been inserted in the commission, and shall not be deemed to have received the Royal Assent.'"*

Similar instances in 1821, 1829, and 1843 all led to the enactment of retrospective validating legislation. Thus, there is ample precedent for the enactment of rectifying legislation to remove doubts as to the validity of Royal Assent.

Parliament should follow its own long-standing practice and pass a short Act which confirms the validity of the Royal Assent given to the Restoration and Renewal Act on 10 September. This would reassert Parliamentary sovereignty and minimise the risk of its erosion.

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