Rule of Law, Parliamentary Sovereignty and Executive Accountability in English Legal Thinking: The Recent Revival of The King Can Do No Wrong

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1. *Introduction*

In this article[1], different understandings of the expression *the king can do no wrong* are analysed to offer a historical understanding of the English constitution[2], focusing on executive accountability. The argument presented is that *the king can do no wrong* captures the constitutional triad formed by the king's immunity and his ministers' and servants' correlative legal accountability before the courts and political accountability before Parliament. This triad is a result of the 17th-century constitutional arrangement and its subsequent evolution. After the English Civil War opposing Royalists and Parliamentarians and the regicide of King Charles I, Parliamentary sovereignty was established after the joint monarchs William and Mary ascended the throne in 1688 and accepted the terms of the Bill of Rights – and a more limited role as sovereigns of a parliamentary monarchy (the «Glorious Revolution»). Immunity from suit was granted to the king, but liability fell instead on the king's ministers and servants.

The constitutional triad composed of (1) the king's personal immunity, (2) his ministers' political accountability before Parliament, and (3) his ministers' and servants' legal liability before the courts, was most recently illustrated by two cases of the United Kingdom Supreme Court, *Miller I* and *Miller II*[3]. In *Miller I*, the Supreme Court dealt with the prerogative power to withdraw from treaties and found that the United Kingdom's withdrawal from the European Union could not be effectuated by the executive alone. In *Miller II*, the Supreme Court found that the Prime Minister's advice to the Queen to prorogue Parliament was unreasonable and therefore unlawful, with the effect that the prorogation flowing from that advice was null and of no effect.

In Part 2, I explain the historical constitutional approach I adopt in analysing *the king can do no wrong*, focusing on continuity in constitutional arrangements and institutions as well as on changes inherent

to them. In Part 3, I explain the concepts of Parliamentary sovereignty and of the rule of law that I rely on to illustrate how different understandings of *the king can do no wrong* can reflect the evolution of constitutional thinking in relation to the accountability of the executive. In Part 4, I outline different understandings of *the king can do no wrong* over time. These understandings, I argue in Part 5, are reflected in the above-mentioned recent decisions by the United Kingdom Supreme Court rendered in the wake of the United Kingdom's departure from the European Union – *Miller I* and *Miller II*.

The constitutional relevance of *the king can do no wrong* – understood as the deeply rooted subjection of the king and his ministers to law in English constitutional thinking, as the king's immunity from suit and political unaccountability since the 17th-century constitutional arrangement, and as the king's ministers' and servants' corresponding political accountability before Parliament and legal accountability before the courts – has been maintained and is apparent from *Miller I* and *Miller II*. The different understandings of *the king can do no wrong* date back to different periods in the evolution of English constitutional thinking, like new layers being added over more ancient ones. Hence *the king can do no wrong* can be conceived of as a unique heuristic tool, allowing us to understand the English historical constitution by identifying both continuity and change in its arrangement and institutions, and by shedding light on how the relationships between constitutional actors have evolved.

2. *A historical constitutional approach*

The approach adopted in this paper is the historical constitutional approach developed by Professor Allison, which focuses both on continuity in constitutional institutions and on arrangements and changes which are inherent to them[4]. My purpose is indeed «to elaborate upon a conception of a historical constitution to which change, continuity and their relative significance are central»[5].

Much like in Allison's study of the constitution's forms of accountability[6], the dichotomy between legal and political accountability of the executive is an important focus of this paper. These two forms of accountability – legal accountability before the courts and political accountability before Parliament – and the corresponding constitutional principles they give effect to – the rule of law and Parliamentary sovereignty – are also analysed. The legal and political accountability of the executive is also studied in relation to the king's immunity since the constitutional arrangement of the 17th century.

The approach in this article is historical, but the aim is not to analyse the evolution of English legal thinking to suggest avenues of reform or change[7]. Instead, the most prominent features in the field of executive accountability over time are highlighted, using the study of the various understandings of *the king can do no wrong* to attain that objective. Providing a detailed record of the historical context so as to describe in all its nuances the evolution of legal and political accountability in the history of English constitutional law would not be feasible here, and therefore the legal historical approach to the evolution

of legal thinking I adopt is not the orthodox approach to legal history or Maitland's «document-based best-evidence» method[8]. While history is used in this article partly in a conventional manner to shed light on context[9], the main objective is to demonstrate how legal thinking, throughout its evolution, has retained core features in relation to executive accountability, and that these core features can be found in the various understandings associated with *the king can do no wrong*.

The focus upon both change and continuity is manifested below through the demonstration, firstly, of how the understandings of *the king can do no wrong* have evolved in English legal thinking and, secondly, of how that evolution allows one to trace both the legal and political dimensions of executive accountability. In that endeavour, the study below joins Allison in being «of constitutional arrangements that have continued from the recent or distant past into the present with change or reform intrinsic to those arrangements»[10].

As I will argue below, the many understandings of *the king can do no wrong*, because they emerged at various times in English legal thinking, can, taken as a whole, offer an apt representation of the constitution. *The king can do no wrong*'s many understandings indeed developed incrementally, and new understandings were added to the layers of older understandings, which retained their relevance. This incremental sedimentation of successive layers of understandings of *the king can do no wrong* throughout the historical evolution of English legal thinking offers a rare opportunity to understand the constitution from a historical constitutional perspective[11]. *The king can do no wrong* can therefore act as a heuristic tool to apprehend the different dimensions and institutions of the constitution in light of each other's historical evolution.

In this paper, it is the accountability dimension of the constitution which is the focus of the analysis. It is «the [constitutional] principles concerning the conduct of public bodies and the relationships between them» – as identified by the United Kingdom Supreme Court in *Miller II*[12] – which are viewed through the lens of the various understandings of *the king can do no wrong* in the history of legal thinking.

3. *Parliamentary sovereignty, the rule of law and executive accountability*

The accountability dimension of the constitution which is captured by *the king can do no wrong* in this article includes, firstly, the forms of accountability which are associated with the two pillars of the constitution (the rule of law and Parliamentary sovereignty) as identified by Dicey in his influential *Lectures Introductory to the Study of the Law of the Constitution*, first published in 1885[13]. Secondly, *the king can do no wrong* also captures another aspect of the constitution that has been fundamental ever since the constitutional arrangement of the 17th century: the personal immunity from suit of the monarch – but no other public official. The constitutional triad captured by *the king can do no wrong* and composed of legal accountability, political accountability and the sovereign's personal immunity was most recently illustrated, it will be argued in Part 5, by the United

Kingdom Supreme Court's decisions in *Miller I* and *II*: the monarch is personally immune, but those acting in the Crown's name are accountable – in the courts and Parliament – in lieu of the monarch.

Dicey's first pillar of the constitution is Parliamentary sovereignty – Parliament has «the right to make or unmake any law whatever» and «no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament»[14].

The second pillar in Dicey's exposition of the constitution is the rule of law – the supremacy of law. The authorship of the term «rule of law» in English legal literature may never be precisely attributed, but there is little controversy amongst legal actors and scholars as to the instrumental role Dicey played in coining the phrase in the late 19th and early 20th centuries. For instance, Lord Justice Sedley, although highly critical of the quality of Dicey's analytical work on the rule of law, nevertheless acknowledged him as the concept's originator[15], and Allison has demonstrated the success of Dicey's coining of the term «rule of law» – as well as its interconnectedness with Dicey's prominent and pioneering role in defining constitutional law as a standalone discipline[16].

Dicey's definition of the «rule of law» is characteristic of English legal thinking and differs from the continental European notion of *Rechtsstaat* or État de droit (literally, «state of law» meaning «state under law»)[17]. État de droit and Dicey's «rule of law» are two distinct notions: in common law jurisdictions, notably Canada, the rule of law is not rendered in French as *État de droit* but reads instead «primauté du droit» (literally, «primacy of law»)[18].

In establishing the rule of law as one of the two pillars of English constitutional law along with Parliamentary sovereignty in his seminal *Introduction to the Law of the Constitution*, Dicey expanded on de Tocqueville's observations on the English constitution and defined the rule of law as the «rule, supremacy, or predominance of law»[19]. He identified three components of the rule of law: the supremacy of regular law (the absence of arbitrary powers on the part of the government); equality before the law (the equal subjection of all to the ordinary law of the realm and to the jurisdiction of ordinary tribunals, there being no exemption for governmental officials); and the ordinary law of the land (as developed by the courts and Parliament) as the source of individual rights and of the constitution[20].

Many have written in response to Dicey's conception of the rule of law, both critically and appreciatively. On the one hand, Dicey's conception of the rule of law has been criticised for being purely formal and providing no guiding principles[21]. Hayek, for example, put forward in response a substantive notion of the rule of law which drew upon the continental notion of *Rechtsstaat* but rejected its legal-formalism aspect – which he saw as insufficient for protecting individuals' freedom[22]. Allan, on the other hand, has argued that Dicey's concept of the rule of law can be conceived of as substantive: like Hayek's, it requires general rules that protect individual freedom precisely because they are general – i.e. not arbitrary[23]. In Allan's view, by referring to ordinary tribunals in his explanation of the notion of equality before the law, Dicey implied that the common law would provide boundaries to ensure the rule of law.

Dicey's writings and the controversy they led to in legal thinking have shaped 20th-century constitutional thinking and gave rise to the dichotomy between the political and legal views of the constitution – especially that between those who favour political constitutionalism and political accountability of the executive before Parliament and those who favour legal constitutionalism and legal accountability before the courts – a divide which has been characteristic of English legal thinking ever since[24]. Dicey's own work can be viewed as a response to Walter Bagehot's influential *The English Constitution*[25], which emphasised the constitution's political dimension[26]. Bagehot's political perspective was clearly apparent, for instance, in his treatment of the role of the monarch as entrusted with the fulfilment of the «dignified» parts of the constitution[27]. Such a concept of constitutional «dignity» can hardly be construed as legal or enforceable, and one would of course expect no better from an analysis by a political scientist such as Bagehot, whose main interest lay in the relationship between the Crown and Parliament[28]. In contrast, Dicey's view of the constitution was decidedly legal – including in relation to the courts' role in holding public officials accountable[29].

Dicey's legal view of the constitution famously spurred Ivor Jennings to write *The Law and the Constitution*[30]. In turn, Jennings's advocating for a resolutely political view of the constitution greatly influenced Griffith[31], Laski[32] and Tomkins[33], amongst others[34]. Dicey's discussion on administrative law in *The Law of the Constitution* has also shaped administrative law as a discipline, prompting later authors to focus on the modern governmental administration[35], remedies and judicial review – most famously de Smith[36] – as well as on political forms of executive accountability[37]. In short, although he has been maligned by some, Dicey's legacy in constitutional and administrative law and the schools of thought which followed and were delineated along the legal/political dichotomy in legal thinking is undeniable. That dichotomy was also apparent from the speeches of the majority and of the dissenters (particularly Lord Carnwath) in *Miller I*[38] as well as from the literature produced in the follow-up to *Miller II*[39].

The forms of accountability corresponding to each pillar – legal accountability before the courts as a corollary of the rule of law and political accountability before Parliament as a corollary of Parliamentary sovereignty – are both associated with understandings of *the king can do no wrong*. But as will be shown below, *the king can do no wrong* also conveys other important aspects of executive accountability.

Parliament is composed of the monarch, the elected House of Commons and the non-elected House of Lords – together the Queen-in-Parliament. Parliamentary accountability – political accountability – however, «centres on formal questioning, comment, and critical evaluation of past decisions or changes to existing or proposed practices or policy by MPs and peers, as reported in Hansard and other parliamentary publications»[40]. As for scrutiny by select committees, it is primarily the concern of the House of Commons[41].

Along with the political form of accountability giving effect to Parliament as sovereign is found legal accountability before the courts, giving effect to the rule of law. As Allan has argued, legal

accountability and political accountability – or ministerial responsibility – serve different purposes, the former ensuring a control of legality (and often of compliance with Parliamentary intention) and the latter a democratic control of the government's policies and efficacy in its pursuance of the general welfare in the public interest[42]. To Allan, political accountability cannot be substituted for legal accountability[43]. This view was espoused recently by the United Kingdom Supreme Court in *Miller II*[44], and it also featured in Lord Lloyd of Berwick's speech in *Fire Brigades Union*: «*No court would ever depreciate or call in question ministerial responsibility to Parliament […] [b]ut […] ministerial responsibility is no substitute for judicial review*»[45] and in Lord Diplock's speech in *National Federation of Self-Employed and Small Businesses Ltd*[46]:

> It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.

Another important constitutional aspect of executive accountability is the historical evolution of the prerogative powers and of the modalities of their exercise – and the corresponding immunity from suit which was granted to the monarch. «Originally, sovereignty was concentrated in the Crown», as the majority of Supreme Court justices reminded us in *Miller I*, and «the Crown largely exercised all the power of the state», before the prerogative powers, over time, «were progressively reduced as Parliamentary democracy and the rule of law developed»[47]. As Lord Browne-Wilkinson observed in *Fire Brigades Union* – an observation cited with approval by Lady Hale and Lord Reed in *Miller II*[48] – «[t]he constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body»[49]. Parliamentary supremacy, Dicey wrote, is the successor to the royal supremacy associated with the power of the Crown and the notion of the king as the unique source of law and justice[50].

The transfer of sovereignty from the king to Parliament in the 17th century and from the king to his courts in administering justice was the subject of the seminal cases decided and reported by Edward Coke at the time. These cases set out the fundamentals of the 17th-century constitutional arrangement which resulted in a parliamentary monarchy in England: the *Case of Proclamations* (the king cannot by his proclamation alter the common law or statutes enacted in Parliament, and cannot create offences: «the King hath no prerogative, but that which the law of the land allows him»)[51], the *Case of Prohibitions*, or *Prohibitions del Roy* (the king can no longer personally administer justice)[52], and the *Case of Non Obstante* (in regard to matters which are not incident solely and inseparably to the person of the king, but belong to every subject, an Act of Parliament may absolutely bind the king)[53].

As the king was divested of his prerogative of legislative sovereignty in favour of Parliament and of his prerogative in administering justice in favour of the courts, and as he progressively lost effective

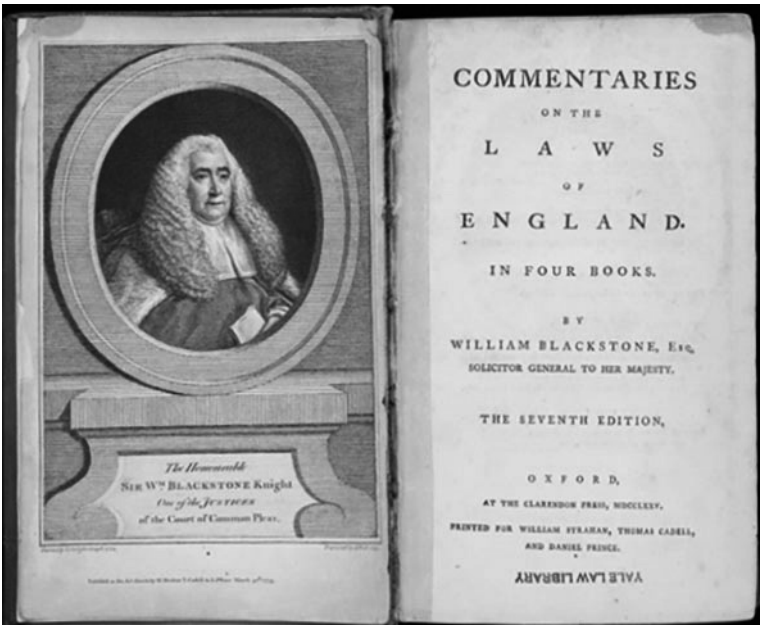
control of the exercise of his prerogative powers in favour of his ministers, from the 17th century onwards *the king can do no wrong* increasingly came to be understood as conveying the king's personal immunity from suit and his unaccountability, as will be further discussed below. Dicey vividly captured the culmination of this understanding of *the king can do no wrong* as the king's immunity from suit when he wrote[54]: «by no proceeding known to the law can the King be made personally responsible for any act done by him; if (to give an absurd example) the Queen [Victoria, reigning at the time] were herself to shoot Mr. Gladstone [the Prime Minister] through the head, no Court in England could take cognizance of the act». It is also clear from Dicey's use of the expression «as now interpreted by the courts»[55] that *the king can do no wrong* has been ascribed various meanings in legal thinking. The understandings of *the king can do no wrong* that have evolved over the course of history are analysed next.

4. *Different understandings of* the king can do no wrong *in the evolution of English legal thinking*

The king can do no wrong is capacious both in its nature and in its meaning. When it comes to its nature, the labels assigned to it in English legal thinking[56] include a «mystical notion»[57], a «principle»[58], a «constitutional principle»[59], a «maxim»[60] and – to Dicey – a «law of the constitution»[61]. Further, like the American expression «sovereign immunity» – which is used in a variety of contexts[62] – *the king can do no wrong* is also capacious in meaning. It has even been said to be the source of the concept of sovereign immunity at international law[63] and of the doctrine of Crown act of state[64]. In constitutional thinking, it conveys understandings as diverse as the king's incapacity to do wrong[65], the king's perfection and the king's prerogative[66], the monarch's personal immunity from suit[67], and the Crown's immunity from suit[68]. In addition, *the king can do no wrong* is used as a source for explaining ministerial responsibility[69] and various procedural immunities from remedies[70], such as injunctions[71]. It has also been associated – erroneously[72] – with the modern rule of statutory interpretation that statutes do not bind the Crown unless it is expressly mentioned or by necessary implication[73].

As Dicey himself wrote, if we are using words «full of vagueness and ambiguity», then «we must first determine precisely what we mean by such expressions when we apply them to the British constitution»[74]. The following analysis conforms to this guidance by shedding light on the various understandings of *the king can do no wrong* throughout the evolution of legal thinking in England, focusing on executive accountability.

As an expression, *the king can do no wrong* can be found in 16th-century reports of decisions by Edward Plowden – «the King cannot do any wrong, nor will his prerogative be any warrant to him to do an injury to another»[75]. It was most influentially coined by Edward Coke at the turn of the 17th century[76]. Coke relied on historical sources: in 13th century Middle Ages England, at the time when the *Treatise on the Laws of England* originally titled *De legibus et consuetudinibus Angliae* was edited



William Blackstone, Commentaries on the Laws of England, *Oxford, 7th edition*

by Bracton, amongst others[77], *the king can do no wrong* had not yet been coined[78]. Nevertheless, Bracton's understanding that «the king […] can do nothing save what he can do *de jure*» and «His power is that of *jus* not *injuria*»[79] were retained by Coke more than three centuries later. Coke cited to Bracton when he wrote that «the King being God's lieutenant cannot do a wrong»[80]. Later on, Blackstone also referred to Bracton when adopting the view that the king can only act *de jure* in his influential 18th-century *Commentaries on the Laws of England*[81].

Coke ascribed to *the king can do no wrong* the same understanding as Bracton did: the king is not entitled to do wrong. This understanding – that the law is the source of the king's power and that the king is not entitled to do wrong because the law does not give him that power – is the oldest one. While the expression may have been popularised by Coke in the 17th century, the principle it conveys was already centuries old when Coke wrote his *Institutes* and his reports of seminal constitutional cases of the early 17th century[82].

The 17th century was a decisive period in the emergence of understandings of *the king can do no wrong*[83]. Radical Royalists in the war that opposed them to Parliamentarians believed in the king's divine perfection, and their absolutist view, before the execution of king Charles I, was that *the king can do no wrong* conveyed the idea that everything the king does is lawful[84]. This was a minority view, even amongst Royalists; it did not accord with constitutional history; and it subsided over the following decades[85]. Later in the 17th century, the Royalists'

preferred interpretation of *the king can do no wrong* was that the king's wrongful acts were void but that the king did not intend them – his ministers had advised him poorly and were to be sued instead. The king's wrongful acts or orders were conceived of as void following Matthew Hale's theory of the invalidating power of the law: the directive power of the law also included the invalidating power of the law, so that acts done contrary to law became void, and the king's orders, being void, cannot serve as a defence to the benefit of the king's minister or servant[86]. The constitutional meaning of *the king can do no wrong* thus took shape in the 17th century. The responsibility of the monarch's ministers, officers and servants was subsequently confirmed in seminal cases in the 18th century[87].

Blackstone, in his *Commentaries*, acknowledged a distinction between legal liability and political liability. More precisely, in his discussion on the petition of right as a remedy for the private injuries of the king's subjects and on ministerial responsibility as a remedy for «political oppression»[88], he implicitly distinguished the two forms of accountability.

Maitland, Dicey and Loughlin all took *the king can do no wrong* to refer to the political and legal accountability of ministers and public officials[89]. Dicey wrote that *the king can do no wrong*, in addition to the king's immunity from suit, «means […] that no one can plead the orders of the Crown or indeed of any superior officer in defence of any act not otherwise justifiable by law» and that the «responsibility of Ministers» – understood as «[s]ome person is legally responsible for every act done by the Crown» – «results from the combined action of several legal principles, namely, first, the maxim that the King can do no wrong»[90].

The 17th-century constitutional understanding of *the king can no wrong* – if a wrong was done, it was the king's ministers' doing and could not be imputed to the king – was famously reaffirmed by Blackstone in his *Commentaries*, where he also emphasised that the government's doing is not to be understood as necessarily lawful[91]. The objective of preserving the king in the constitutional order, which Blackstone identified as «the constitutional independence of the crown», is obvious from his understanding of *the king can do no wrong*[92]. To Blackstone, the king's ministers are to blame: «For, as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished»[93]. Blackstone rejected the absolutist Royalist view that everything the king does is lawful, but he did revive one component of the Royalist understanding of *the king can do no wrong*, namely the king's absolute perfection: «the law also attributes to the king, in his political capacity, absolute perfection»[94]. That notion of the perfection of the king was then adapted over the course of the 19th century, as petition-of-right cases were instituted against Queen Victoria herself for the wrongs done to her subjects by Crown servants[95]. In this sense, *the king can do no wrong* came to be understood as reflecting the fiction that there can be no wrong in the king, and more generally as reflecting the king's immunity from suit, which has been associated over the course of the 20th and 21st centuries in an ahistorical manner with the king's feudal privilege not to be sued in his own courts[96].

In short, *the king can do no wrong* is conceived of as referring to the political and legal accountability of ministers and other public officials. Other understandings of *the king can do no wrong* relate more specifically to the king – his status in relation to law, his immunity, and fictions of kingly perfection. The latter two emerged after the constitutional struggles of the 17th century, and again in the 19th-century context of the revival of the petition of right. These latter understandings were intended to shield the monarch from constitutional upheavals and liability in a context where legislative sovereignty, the administration of justice and political decision-making, even in relation to prerogative powers, were gradually passed on to constitutional actors other than the king.

The accountability dimension of the constitution which is said to be reflected by various understandings of *the king can do no wrong* in this article could be conceived of as having Diceyan underpinnings. For example, the equality-before-the-law component of the Diceyan understanding of the rule of law and the liability of public officials before ordinary tribunals that it entails correspond to one important understanding of *the king can do no wrong*. Indeed, the two forms of accountability conveyed by that understanding of *the king can do no wrong* – legal accountability before the courts and political accountability before Parliament – are linked to the two pillars of the constitution identified by Dicey – the rule of law and Parliamentary supremacy. But *the king can do no wrong* is also capable of encompassing understandings of the constitution which were revived in reaction to Dicey's theory. For this reason, *the king can do no wrong* allows us to focus not only on the forms of accountability which ensure the realisation of the rule of law and Parliamentary supremacy, but also on the sovereign's immunity and on the historical arrangement which led to legal and political accountability of ministers and Crown servants. The king's immunity – and later the king's irresponsibility and the fiction that there can be no wrong in the king – is, historically, an important dimension of the constitutional arrangement reached in the 17th century. The counterpart of the king's immunity is public officials' accountability – before Parliament and before the courts. Hence the king's immunity, which is conveyed by *the king can do no wrong*, is the *raison d'être* of the political and legal accountability of the executive, which is also conveyed by *the king can do no wrong*[97]: «if an evil act is done, it, though emanating from the King personally, will be imputed to his ministers, for whose acts the king is in no way responsible»[98]. That when the king acts personally, responsibility is imputed to his ministers and servants, is one understanding of *the king can do no wrong*. Also implicit in the sovereign's immunity is the fact that exercise of executive power is in fact nowadays conducted by public officials – ministers and servants – and not by the sovereign. That the sovereign is not held accountable because power is no longer exercised by the sovereign is yet another understanding of *the king can do no wrong*[99].

As is clear from the above, *the king can do no wrong* is capable of capturing both the legal and political dimensions of the constitution and its historical underpinnings and evolution. Given the prominence of *the king can do no wrong* in the 17th-century constitutional struggles[100] and

their political outcome in Parliamentary sovereignty, the capacity of *the king can do no wrong* to reflect the constitution's political dimension is tied to its long continuity in English legal thinking. Dicey's association of *the king can do no wrong* with a legal view of the constitution – and particularly with the liability of public officials before the courts – can be traced to 18th-century cases, making it a relatively recent addition to the depth of understandings of *the king can do no wrong* added throughout the evolution of English legal thinking.

5. *The* Miller *cases: illustrations of* the king can do no wrong

In the follow-up to the Brexit referendum held in June 2016 in the United Kingdom, when the majority of the population voted to leave the European Union, the United Kingdom Supreme Court rendered two important decisions: *Miller I* in 2017 and *Miller II* in 2019[101]. Underlying the Court's reasoning in both *Miller I* and *Miller II* is the tension between the executive's power – the prerogative power to enter into and withdraw from treaties in *Miller I* and the prerogative power to prorogue Parliament in *Miller II* – and Parliamentary sovereignty. The cases are described below, with particular attention to *Miller II*, and I explain how the various understandings of *the king can do no wrong* relating to the sovereign's immunity and correlative ministerial responsibility before Parliament and legal accountability before the courts came into play without being expressly referred to by the Court in allowing it to reach its decision in *Miller I* and *Miller II*.

In the United Kingdom, the result of a referendum is not binding, legally speaking, in constitutional law. However, in the wake of the Brexit referendum, the Government announced that it would consider itself to be bound by the result and by the wish expressed by the majority of the electorate to see their country leave the European Union[102]. In October 2016, Prime Minister Theresa May announced that the United Kingdom's departure from the European Union would be triggered by sending notice to the European Council of the country's intention to withdraw, in accordance with Article 50 of the Treaty on European Union (TEU), by the end of March 2017[103]. The Prime Minister's decision to send the notice without prior parliamentary approval was challenged before the courts, which ultimately led to the Supreme Court's decision in *Miller I* in January 2017. The Supreme Court found that the United Kingdom's withdrawal from the European Union at the international level, because it would result in the taking away of individuals' rights in domestic law and would inevitably operate a constitutional change in putting an end to European law as a source of domestic law in the country, could not be effectuated by the executive alone using the prerogative power to terminate treaties[104]. Rather, Parliament's approval had to be given and legislation adopted prior to the notice being sent to the European Council. As a result of *Miller I*, the European Union (Notification of Withdrawal) Act 2017 authorising the Prime Minister to send the notice was adopted and received royal assent in March 2017[105].

Following *Miller I*, the issue of the lawfulness of Prime Minister Boris Johnson's advice to the Queen to exercise

her prerogative power to prorogue Parliament in the lead-up to the United Kingdom's exit from the European Union in the autumn of 2019 was decided by the United Kingdom Supreme Court in *Miller II*, rendered in September 2019. *Miller II* is also known as the *Case of Prorogations* – an allusion to the seminal cases reported by Edward Coke mentioned above: the *Case of Proclamations*[106], the *Case of Prohibitions*[107], and the *Case of Non Obstante*[108]. In fact, *Miller II* has been said by an expert on the history of prerogative powers to be «quite possibly the most significant judicial statement on the constitution in over 200 years»[109].

Following the European Union (Notification of Withdrawal) Act 2017, the United Kingdom had sent, on 29 March 2017, notice to the European Council under Article 50 TEU that it would withdraw from the European Union. In June 2018, the European Union (Withdrawal) Act 2018 came into force, providing for an «exit» day of 29 March 2019. Under that Act, however, Parliamentary approval was necessary for any withdrawal agreement reached by the United Kingdom Government to be ratified. In light of Parliament's repeated rejection of the agreement presented to it by the Government in the spring of 2019 and the adoption in April 2019 of the European Union (Withdrawal) Act 2019, an extension was sought from the European Union and was granted by the latter until 31 October 2019. The Prime Minister (or the Privy Councillors, as discussed below) advised Her Majesty Queen Elizabeth II in August 2019 to prorogue Parliament for a period between September and October 2019. Prorogation puts an end to the current session of Parliament and prevents the House of Commons and the House of Lords from meeting, debating or passing legislation[110]. The prerogative power to prorogue Parliament is still exercised personally by the Queen, but on the advice of the Privy Council[111]. The prorogation of Parliament sought by the Prime Minister for a period between September and October 2019 would therefore have occurred at a crucial time for Parliament to examine and vote on any withdrawal agreement (or to pass legislation requiring the Prime Minister to seek another extension) prior to the new exit day of 1 November 2019. Hence that prorogation would have increased the prospects of a «no deal» exit[112].

Lady Hale and Lord Reed found the Prime Minister's advice to prorogue Parliament to be unreasonable and therefore unlawful, with the effect that the prorogation flowing from that advice was null and of no effect[113].

According to a memorandum dated 23 August 2019, which was given as evidence, the Prime Minister was to call Her Majesty on 27 August 2019 to advise her formally to prorogue Parliament. Privy Counsellors – the Lord President of the Privy Council and Leader of the House of Commons, the Leader of the House of Lords, and the Chief Whip – also met with the Queen at Balmoral Castle on 28 August[114]. We do not know when exactly the advice was given to Her Majesty: the Supreme Court itself does not draw any conclusions but leaves that factual point shrouded in mystery: «The issue is whether the advice given by the Prime Minister to Her Majesty the Queen *on 27 or 28 August 2019* that Parliament should be prorogued from a date between 9 and 12 September until 14 October was lawful»[115]. Not only do we not know when the Prime Minister did in fact speak with the Queen directly – the date («*27 or 28* August 2019»[116])

remains unknown – we also do not know what was said, nor do we know whether Her Majesty received the same advice from the Privy Counsellors. The Supreme Court is adamant in that regard:

> We know that in approving the prorogation, Her Majesty was acting on the advice of the Prime Minister. We do not know what conversation passed between them when he gave her that advice. We do not know what conversation, if any, passed between the assembled Privy Counsellors before or after the meeting. We do not know what the Queen was told and cannot draw any conclusions about it.

Analytically speaking, the admission by the Court of its complete ignorance as to what the Queen was told could be seen as problematic, given that the issue before the Court was the reasonableness of the advice given by the Prime Minister in asking the monarch to prorogue Parliament. The Court, however, operated an implicit distinction between the reasons the Prime Minister gave the Queen for advising her to prorogue Parliament and the explanations the Prime Minister gave for advising Her Majesty: «The court then has to decide whether the Prime Minister's explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation having these effects»[117]. The advice given by the Prime Minister to Her Majesty may or may not have been the same as the reasons that were given by him to the courts. This deliberate acceptance of ignorance as to what the Queen was told or not, and by whom, and the resultant impossibility of drawing any conclusion whatsoever as to her decision to exercise her prerogative power according to her ministers' and counsellors' wishes, are illustrative of understandings of *the king can do no wrong* used to shield the monarch from any form of liability, whether political or legal: if the king does wrong, it is the king's ministers' fault for not advising the king rightly – and they must be held accountable instead. Further, an alternative understanding of *the king can do no wrong* as referring to the fact that the king does nothing anymore, since prerogative powers are exercised by ministers instead, is also apparent from the Court's reasoning in the excerpt below[118]:

> It is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept that advice. In the circumstances we express no view on that matter. That situation does, however, place on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament.

The Court's reasoning in the above excerpt also reflects the king's immunity from suit – and lack of any form of accountability: the issue as to whether the Queen was indeed bound by constitutional convention to follow the Prime Minister's advice is eschewed «[i]n the circumstances», without any substantive explanation. Any «constitutional responsibility» lies with the Prime Minister, «the only person with power» to adjudicate between multiple interests. That reasoning, which denies the sovereign any role in protecting the constitution, does not accord well with other constitutional conventions governing the constitutional role of the sovereign. The Lascelles Principles, for instance, allow the Queen to refuse a Prime Minister's request to dissolve Parliament under certain circumstances[119]. That prerogative power was in abeyance following the Fixed-term Parliaments Act 2011[120],

which was in force at the time when *Miller II* was decided, but it was recently revived in 2022 under the Dissolution and Calling of Parliament Act 2022[121]. Another example is the Tripartite Convention, which provides for the Queen's right to be consulted by, to encourage and to warn her Prime Minister[122]. In light of these conventions, it can be argued that the sovereign still retains a constitutional role of neutrality in preserving the constitutional order. Nevertheless, the 17th-century constitutional pact encapsulated by *the king can do no wrong*, with its crucial role in protecting the king in the constitutional order, was respected and appears to have been paramount in *Miller II*.

The distinction between the advice given by the Prime Minister and the exercise of the power to prorogue Parliament by the monarch personally was even glossed over by the Supreme Court in *Miller II* in deciding the issue of lawfulness: contrast «a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament)»[123], where the relationship between the advice and the exercise of the power is unclear, and «the justiciability of the question of whether the Prime Minister's advice to the Queen was lawful»[124], where the fact that the power is exercised by the Queen personally is omitted. Likewise, in addressing the subject of «the validity of the prorogation itself», the Court adopts «the logical approach» of starting with «the advice that led to it», thereby avoiding a detailed analysis of the validity of the exercise of the power itself by Her Majesty[125]. The Court focussed instead on the unlawfulness of the advice given *prior* to the exercise of the power and on the Order in Council issued *after* the exercise of the power – both null and of no effect – and emphasised the importance of the Order in Council and of the commission prepared by the Lord Chancellor in relation to the prorogation «which was as if the Commissioners had walked into Parliament with a blank piece of paper»[126]. The Crown as a source of executive power is but a symbolic vestige of the past, a historical pillar which no longer supports the weight of the constitutional architecture. This has created a need for ministers' legal and political accountability to buttress the two contemporary constitutional pillars identified by Dicey as the rule of law and Parliamentary sovereignty.

The reaffirmation of Parliamentary sovereignty in *Miller I* and of Parliamentary and legal accountability, as well as the implicit immunity of the sovereign, in *Miller II* are therefore reminiscent of the 17th-century constitutional arrangement. The conclusion in *Miller I* that parliamentary approval was necessary to allow the United Kingdom's exit from the European Union is a result of one aspect of the 17th-century constitutional arrangement: the sovereignty of Parliament over the executive's prerogative to make – and unmake – treaties when consequences ensue in the domestic legal order and the constitutional order is modified[127]. As for *Miller II*, it reflects the outcome of the 17th-century constitutional struggles and its evolution, as encapsulated in *the king can do no wrong* understood as the monarch's personal immunity from suit and the correlative accountability of ministers, public officials and Crown servants who exercise power in the name of the monarch. Indeed, even prior to the 17th-century constitutional pact which led to a parliamentary monarchy in England, the English king was not conceived of as

above the law, and *the king can do no wrong* understood in a Bractonian and Cokeian way conveyed the idea that the king was not entitled by the law to do wrong[128]. There is, therefore, continuity in the post-Glorious Revolution constitution, where the king's ministers and servants are accountable for their exercise of powers that were previously the king's[129] – they are no more above the law than the king was himself[130]. The justices' reasoning in *Miller I* – «Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do»[131] – is reminiscent of many of Coke's reported submissions in court and of his own writings: «the disinheritance of the subject, […] the King by prerogative cannot do; for the King (as it is said in our books) cannot do any wrong»[132] and «le Roy fairoit tort qu'il ne poit faire» [the king would do wrong, which he cannot do][133].

Miller II, considering the control the Supreme Court exercised there over the lawfulness of the Prime Minister's advice to the sovereign to exercise her prerogative power to prorogue Parliament, recalls the Diceyan notion of equality before the law of the Crown's ministers – a core component of the rule of law as Dicey defined it. But Lady Hale and Lord Reed's speech in *Miller II* is also illustrative of the Bractonian understanding of *the king can do no wrong* as conveying the idea that the king's power is subject to law – and, moreover, it reflects Hale's theory of the invalidating power of the law: because it was unlawful, the prorogation was invalidated.

But there is also, in Lady Hale and Lord Reed's speech, something of the reverence of 19th-century courts towards the Queen: if not quite Blackstone's notion of the perfection of the king, then at least the 19th-century understanding of *the king can do no wrong* as the fiction that there can be no wrong in the king, and the correlative accountability of the king's ministers and servants for having wrongly advised the king and having acted unlawfully. Although the prerogative power to prorogue Parliament is exercised personally by the Queen, she only does so in accordance with the advice given to her by her ministers, and no blame is ascribed to her in *Miller II*. Even the symbolic role of the monarch (Bagehot would have written the «dignified part»[134]) in relation to prorogation has been limited: although the Queen could come in person to Parliament to prorogue it, the last monarch to act thus, the Supreme Court takes pains to remind us in *Miller II*, was Queen Victoria[135].

The fact that forms of accountability in the English constitution can be seen as not exclusively «dichotomous or trichotomous because they have not been mutually exclusive, but complementary and mutually interactive»[136] is evidenced by the Supreme Court's reasoning in *Miller II*. Parliament's incapacity to ensure a check on the executive when it stands prorogued, and the ensuing encroachment on the constitutional principle of Parliamentary accountability, is palliated by the Court's reassertion of ministers' legal accountability before the courts[137]. In *Miller II*, legal accountability resulted in the Court declaring unreasonable and unlawful the Prime Minister's advice to Her Majesty to prorogue Parliament at a crucial time in the context of the United Kingdom's departure from the European Union[138], with the effect of annulling the prorogation and allowing Parliament to fulfil its role in accordance with the con-

stitutional principle of political accountability[139]. The Supreme Court reasoned in *Miller II* that the *existence* of ministerial accountability before Parliament cannot be construed as *negating* legal accountability before the courts – «The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts»[140]. Conversely, the risk of *absence* of political accountability supported a different conclusion in regard to legal accountability. Indeed, the fact that Parliament, when prorogued, cannot fulfil its role in terms of the political accountability of ministers clearly supports the Court's reassertion of the legal accountability of ministers of the Crown before the courts. The Court's analysis brought forth the necessarily complementary role of legal accountability and the interrelationship between the two forms of accountability. The province of the courts in judicially controlling the reasonableness of the executive's advice contributed to ensuring the effectiveness of Parliament's own role in holding the executive accountable for its actions.

6. *Conclusion*

The king can do no wrong can be conceived as a useful heuristic tool in capturing the historical constitution, especially in relation to executive accountability. *The king can do no wrong* pertains both to the rule of law and to Parliamentary sovereignty – the two constitutional pillars identified by Dicey – because it encompasses both the political accountability of ministers before Parliament and their legal accountability before ordinary courts. It also embodies the constitutional arrangement reached at the end of the 17th century by conveying the idea that the monarch is immune from suit, and the 19th-century fiction that no wrong can be ascribed to the monarch personally. *The king can do no wrong* in that latter sense also reflects the limitation of the monarch's role to the «dignified» parts of the constitution, and the correlated limited liability that follows from the monarch's exercise of the prerogative – which, for the most part, she can no longer exercise but according to her ministers' advice. *The king can do no wrong* therefore also encapsulates, albeit indirectly, the role of the executive understood as the ministers and public officials who are the true political decision-making organ of the constitution, including with regard to the prerogative – «the residue of powers which remain vested in the Crown, […] exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation»[141]. In summary, *the king can do no wrong* has many understandings, which developed at various points in the history of legal thinking, and this polysemy caused by incremental change and sedimentation aptly captures the many dimensions of the English historical constitution.

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[2] The historical constitutional approach to the English constitution was elaborated by J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects*, Cambridge, Cambridge University Press, 2007. See below, Part 1.

[3] *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (*Miller I*); *R(Miller) v Prime Minister* [2019] UKSC 41 (*Miller II*).

[4] Allison, *The English Historical Constitution*, cit. The approach was adopted in relation to *the king can do no wrong* in M.F. Fortin, *A Historical Constitutional Approach to The King Can Do No Wrong: Revisiting Crown Liability*, Thesis, University of Cambridge, 2019, doi: 10.17863/CAM.57613.

[5] Allison, *The English Historical Constitution*, cit., p. 5.

[6] J.W.F. Allison, *The Spirits of the Constitution*, in N. Bamford, P. Leyland (eds.), *Accountability in the Contemporary Constitution*, Oxford, Oxford University Press, 2014, p. 27. Allison demonstrated how the English constitution evolved over the course of the 20th century in a trichroic model of accountability – legal, political, and civil administrative.

[7] On the difference between the uses of history in public-law legal thinking, see J.W.F. Allison, *History to Understand, and History to Reform, English Public Law*, in «The Cambridge Law Journal», LXXII, n. 3, 2013, p. 526; Allison, *The Spirits of the Constitution*, cit., p. 27.

[8] Allison, *The English Historical Constitution*, cit., p. 19; F.W. Maitland, *Why the history of English Law has not been written*, in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, Cambridge, Cambridge University Press, 1911, vol. I, pp. 480-497.

[9] See Allison, *The Spirits of the Constitution*, cit., p. 27.

[10] Allison, *The English Historical Constitution*, cit., p. 16.

[11] On the English historical constitutional approach, see *ibidem*.

[12] *Miller II*, [40].

[13] A.V. Dicey (ed. by J.W.F. Allison), *Lectures Introductory to the Study of the Law of the Constitution: The Oxford Edition of Dicey*, Oxford, Oxford University Press, 2013, vol. I.

[14] Ivi, p. 27.

[15] S. Sedley, *Lions under the Throne: Essays on the History of English Public Law*, Cambridge, Cambridge University Press, 2015, p. 280.

[16] J.W.F. Allison, *Turning the Rule of Law into an English Constitutional Idea*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, Cheltenham, UK, Edward Elgar Publishing, 2018, p. 167, p. 168; Allison, *The Spirits of the Constitution*, cit., pp. 32-33; See also Allison's "Editor's Introduction to Volume One" of his re-edition of Dicey's seminal work: Dicey, *Law of the Constitution*, cit.

[17] See Allison, *The English Historical Constitution*, cit., p. 157.

[18] See e.g. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 SCR 31, and the French version of the report of that case, *Trial Lawyers Association of British Columbia c. Colombie-Britannique (Procureur général)*, [2014] 3 RCS 31, at [38]-[40]. Note however that the Supreme Court of Canada in that case referred to both the European – continental – understanding of the *État de droit* and the English, Diceyan, constitutional understanding of the rule of law at [40].

[19] Dicey, *Law of the Constitution* cit., p. 97.

[20] Ivi, pp. 97-119.

[21] P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework* in «Public Law», 1997, p. 467. See also J. Raz, *The Rule of Law and its Virtue* in «The Law Quarterly Review», XCIII, n. 2, 1977, p. 195.

[22] F.A. Hayek, *The Road to Serfdom*, Chicago, University of Chicago Press, 1944. See also *The Constitution of Liberty*, Chicago, University of Chicago Press, 1960 and *Law, Legislation and Liberty*, London, Routledge and Kegan Paul, 1982.

[23] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford, Oxford University Press, 2001. See also: T.R.S. Allan, *Dworkin and Dicey: The Rule of Law as Integrity*, in «The Oxford Journal of Legal Studies», VIII, n. 2, 1988, p. 266; T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, Oxford, Clarendon Press, 1993.

[24] Allison, *The Spirits of the Constitution*, cit., pp. 31-32.

[25] W. Bagehot, *Bagehot: The English Constitution*, coll. *Cambridge Texts in the History of Political Thought*, Cambridge, Cambridge University Press, 2001.

[26] Allison, *The Spirits of the Constitution*, cit., p. 31.

[27] Bagehot, *The English Constitution*, cit., p. 5.

[28] A. Tomkins, *"Talking in Fictions": Jennings on Parliament*, in «The Modern Law Review», LXVII, n. 5, 2004, p. 772, pp. 781-782.

[29] Allison, *The Spirits of the Constitution*, cit., pp. 31-32.

[30] I. Jennings, *The Law and the Constitution*, London, University of London Press, 1959[5].

[31] J.A.G. Griffith, *The Political Constitution*, in «The Modern Law Review», XLII, n. 1, 1979, p. 1; J.A.G. Griffith, *The Common Law and the Political Constitution*, in «The Law Quarterly Review», CXVII, n. 42, 2001, p. 117.

[32] H.J. Laski, *Parliamentary Government in England: A Commentary*, London, Allen and Unwin, 1938.

[33] A. Tomkins, *Our Republican Constitution*, Oxford, Hart, 2005.

[34] For an analysis of various 20th-century scholars' allegiance on the issue, see M. Loughlin, *Public Law and Political Theory*, Oxford, Clarendon Press, 1992;

A.P. Le Sueur, M. Sunkin, J.E. Murkens (eds.), *Public Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2013, pp. 41-46. See also: J Allison, *The Spirits of the Constitution*, cit. The dichotomy is reminiscent of the earlier debate between classical common lawyers of the 17th century – among which Edward Coke and Matthew Hale – and Thomas Hobbes; on the nature of that debate, see K. Bouchard, *Constitutionnalisme et common law dans la pensée juridique anglo-américaine*, coll. *Bibliothèque de la pensée juridique*, n. 15, Paris, Classiques Garnier, 2021, pp. 45-86.

35 For an account of the school of functionalism in administrative law, see M. Loughlin, *The Functionalist Style in Public Law*, in «University of Toronto Law Journal», LV, 2005, p. 361; M. Loughlin, *Modernism in British public law; 1919-79*, in «Public Law» 2014, p. 56.

36 S.A. De Smith, *Judicial Review of Administrative Action*, London, Stevens, 1959[1].

37 J.A.G. Griffith, H. Street, *Principles of Administrative Law*, London, I. Pitman, 1952.

38 *Miller I*, [249] (Lord Carnwath); see also [161] (Lord Reed).

39 Compare P. Craig, *The Supreme Court, Prorogation and Constitutional Principle*, in «Public Law», 2020, p. 248, pp. 264-269, and M. Loughlin, *A note on Craig on Miller; Cherry*, in «Public Law», 2020, p. 278, J. Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment*, London: Policy Exchange, 2019, <https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/>, April 2022; S. Tierney, *Prorogation and the Courts: A Question of Sovereignty*, UK Constitutional Law Association Blog, 17 September 2019, <https:// https://ukconstitutionallaw.org/2019/09/17/stephen-tierney-prorogation-and-the-courts-a-question-of-sovereignty/>, April 2022.

40 A. Le Sueur, *Parliamentary Accountability and the Judicial System*, in N. Bamforth, P. Leyland (eds.), *Accountability in the Contemporary Constitution*, Oxford, Oxford University Press, 2013, p. 200, p. 201.

41 On the role of critical scrutiny played by select committees, see P. Craig, *Administrative Law*, London, Sweet & Maxwell, 2016, pp. 3-010-3-016.

42 Allan, *Law, Liberty, and Justice*, cit., p. 53.

43 *Ibidem*.

44 *Miller II*, [33], see discussion below, Part 5.

45 *R v Secretary of State for the Home Department, Ex Parte Fire Brigades Union [1995]* 2 All ER 244, p. 273, [1995] 2 AC 513, pp. 572-573.

46 *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1991] 2 All ER 93, p. 107, [1982] AC 617, p. 644.

47 *Miller I*, [41].

48 *Miller II*, [41].

49 *R v Secretary of State for the Home Department, Ex Parte Fire Brigades Union* [1995] 2 All ER 244, p. 254, [1995] 2 AC 513, p. 552.

50 Dicey, *Law of the Constitution*, cit., p. 95.

51 (1611) 12 Co Rep 74, p. 76, «the king hath no prerogative, but that which the law of the land allows him».

52 (1607) 12 Co Rep 63.

53 (1611) 12 Co Rep 18.

54 Dicey, *Law of the Constitution*, cit., p. 21.

55 *Ibidem*.

56 The discussion in this paragraph is taken from Fortin, *A Historical Constitutional Approach to The King Can Do No Wrong*, cit., pp. 1-2. The various understandings of *the king can do no wrong* throughout the evolution of legal thinking in England from the Middle Ages up to the 21st century and their use in revisiting our current understanding of Crown liability are analysed in full in *Ibidem*.

57 J.W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public law*, revised ed., Oxford, Oxford University Press, 2000, p. 107.

58 *M v Home Office* [1994] 1 AC 377, p. 408 (Lord Woolf); Sir J. Baker, *The Reinvention of Magna Carta 1216-1616*, coll. *Cambridge Studies in English Legal History*, Cambridge, Cambridge University Press, 2017, pp. 45, 150; *Rahmatullah (No 2) v Ministry of Defence and another, Mohammed and another v Ministry of Defence and another* [2017] UKSC 1, [16] (Lady Hale).

59 G. Webber, *Loyal Opposition and the Political Constitution*, in «The Oxford Journal of Legal Studies» XXXVII, n. 2, 2017, p. 1, p. 7.

60 *Tobin v The Queen* (1864) 33 LJCP 199, p. 205 (Erle CJ); *Feather v. The Queen* (1865) 122 E.R. 1191 (CA), pp. 1205-1206 (Cockburn CJ); W. Hearn, *The Government of England: Its Structure and its Development*, London, Longmans, 1887, p. 20; Dicey, *Law of the Constitution*, cit., p. 21.

61 *Ibidem*.

62 V. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, in «George Washington International Law Review», XXXV, n. 3, 2003, pp. 521, 542, ft 87. *The king can do no wrong* has also been associated with the notion of «sovereign immunity» in Canada: A. Linden, B. Feldthusen (eds.), *Canadian Tort Law*, 9th ed., Markham, LexisNexis Canada, 2011, pp. 662-665; B. Feldthusen, *Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified*, in «The Canadian Bar Review», XCII, 2013, p. 211, p. 227.

63 M. Sunkin, *Crown Immunity from Criminal Liability in English Law*, in «Public Law», 2003, p. 716.

64 *Rahmatullah (No 2)* cit., [16].

65 W. Wade, C. Forsyth (eds.), *Administrative Law*, 10th ed., Oxford, Oxford University Press, 2009, p. 696.

66 W. Blackstone, *Commentaries on the Laws of England*, Facsimile of 1765-1769, Chicago, University

of Chicago Press, 1979, vol. I, pp. 238-239.

67 *Halsbury's Laws of England*, LexisNexis, 2014, vol. XXIX, "Crown and Crown Proceedings - The monarch can do no wrong", par. 52.

68 P.W. Hogg, P. Monahan, W.K. Wright (eds.), *Liability of the Crown*, Toronto, Carswell, 2011.

69 C. Roberts, *The Growth of Responsible Government in Stuart England*, Cambridge, Cambridge University Press, 1966; K. Pickthorn, *Early Tudor Government: Henry VII*, Cambridge, Cambridge University Press, 1934; J. Greenberg, *Our Grand Maxim of State: "The King Can Do No Wrong"*, in «History of Political Thought», XII, n. 2, 1991, pp. 209-228.

70 The seminal study of the Crown's procedural immunities is Hogg, Monahan, Wright (eds.), *Liability of the Crown*, cit.

71 *M v Home Office* [1994] 1 AC 377, pp. 407-408 (Lord Woolf).

72 M.F. Fortin, *Revisiting the Application of Statutes to the Crown: A Historical Constitutional Approach*, in «The Journal of Commonwealth Law», III, n. 1, 2021, pp. 271-329.

73 H. Street, *The Effects of Statutes upon the Rights and Liabilities of the Crown*, in «University of Toronto Law Journal», VII, n. 2, 1948, p. 357; D. Kinley, *Crown Immunity: A Lesson from Australia?*, in «The Modern Law Review», LIII, n. 6, 1990, p. 819; A. Gray, *Immunity of the Crown from Statute and Suit*, in «The Canberra Law Review», 2010, p. 1, p. 4; Fortin, *Revisiting the Application of Statutes to the Crown*, cit. The rule in its contemporary form is attributable to Lord du Parcq's speech in *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58.

74 Dicey, *Law of the Constitution*, cit., p. 97.

75 See Plowden's report of *Willion v Berkley* 1 Plowden 223, p. 246 (Brown J).

76 Fortin, *The King Can Do No Wrong*, cit., pp. 28, 30, 73-76, 83-90.

77 Henry de Bracton, S.E. Thorne transl., *Bracton on the Laws and Customs of England*, Cambridge, MA, Belknap Press of Harvard University Press, 1968, vol. I. For a summary of the debate as to the authorship of the treaty, see Fortin, *The King Can Do No Wrong*, cit., p. 29, ft 8.

78 Fortin, *The King Can Do No Wrong*, cit., pp. 89-90.

79 Henry de Bracton, S.E. Thorne transl, *Bracton on the Laws and Customs of England*, Cambridge, MA, Belknap Press of Harvard University Press, 1968, vol. II, pp. 305-306.

80 Fortin, *The King Can Do No Wrong*, cit., pp. 74-75. See, *inter alia*, *The Case of the Master and Fellows of Magdalen College in Cambridge* (1615) 11 Co Rep 66, 72; E. Coke, *The Second Part of the Institutes of the Laws of England*, London, Printed by M Flesher, 1644, p. 681.

81 Blackstone, *Commentaries on the Laws of England*, vol. I, cit., p. 232.

82 Coke, *The Second Part of the Institutes of the Laws of England* cit. On the cases reported by Coke and the dating of his reports, see: J.H. Baker, *Coke's Note-Books and the Sources of His Reports*, in «The Cambridge Law Journal», XXX, 1972, p. 59.

83 Fortin, *The King Can Do No Wrong*, cit., pp. 78 ss.

84 Ivi, p. 79.

85 Most Royalists believed – as Bracton had – that the king was limited by the law that made him: Ivi, pp. 78-79.

86 Matthew Hale, (edited by D.E.C. Yale), *Sir Matthew Hale's The Prerogatives of the King*, Selden Society, London, 1976, vol. XCII, pp. 176-177; Ivi, pp. 112-117, 173-174.

87 *Bankers' Case* or *The King v Hornby* (1700) 14 St Tr 1, 87 ER 500; *Entick v Carrington* (1765) 19 St Tr 1030, 95 ER 807; *Money v Leach* (1765) 3 Burr. 1742, 97 ER 1075.

88 Blackstone, *Commentaries on the Laws of England*, vol. I, cit., p. 236.

89 F.W. Maitland, *The Constitutional History of England*, Cambridge, Cambridge University Press, 1963, pp. 195-196; Dicey, *Law of the Constitution*, cit., p. 21; M. Loughlin, *Foundations of Public Law*, Oxford, Oxford University Press, 2010, pp. 255-256.

90 Dicey, *Law of the Constitution*, cit., p. 21.

91 Blackstone, *Commentaries on the Laws of England*, vol. I, cit., pp. 238-239.

92 *Ibidem*.

93 Ivi, p. 237.

94 Ivi, p. 238.

95 *Viscount Canterbury v The Attorney General* (1843) 1 Ph 306; *Tobin v The Queen* (1864) 16 CB NS 310; *Feather v The Queen* (1865) 6 B&S 257; see Fortin, *The King Can Do No Wrong*, cit., pp. 97, 145-151, 180-184.

96 See e.g. *Rahmatullah (No 2)* cit., [16] (Lady Hale); Fortin, *The King Can Do No Wrong*, cit., pp. 172-173.

97 Fortin, *The King Can Do No Wrong*, cit., pp. 12, 17.

98 E.W. Jowitt, *Jowitt's Dictionary of English Law*, London, Sweet & Maxwell, 2015, vol. II, p. 2119.

99 Fortin, *The King Can Do No Wrong* cit., p. 18; «The monarch simply has no control over government action»: G.I. Seidman, *The Origins of Accountability*, in «St. Louis University Law Journal», XLIX, n. 2, 2005, p. 393, p. 468.

100 J. Greenberg, *Our Grand Maxim of State: "The King Can Do No Wrong"*, in «History of Political Thought», XII, n. 2, 1991, pp. 209-228; J.L. Malcolm, *Doing No Wrong: Law, Liberty, and the Constraint of Kings*, in «Journal of British Studies», XXXVIII, n. 2, 1999, p. 161; Fortin, *The King Can Do No Wrong*, cit., pp. 78-121, see also C. Roberts, *The Growth of Responsible Government in Stuart England*, Cambridge, Cambridge University Press, 1966.

101 *Miller I* cit.; *Miller II* cit.

102 See the Supreme Court's summary of the factual context: *Miller II*, [7].

103 The facts and the legal mechanism to leave the European Union are succinctly described in *Miller II*, [8], [9].

[104] *Miller I*, [81], [82].
[105] European Union (Notification of Withdrawal) Act 2017, 2017 c. 9 (U.K.).
[106] (1611) 12 Co Rep 74, p. 76, «the king hath no prerogative, but that which the law of the land allows him».
[107] (1607) 12 Co Rep 63.
[108] (1611) 12 Co Rep 18.
[109] Thomas Poole, *Understanding what makes "Miller & Cherry" the Most Significant Judicial Statement on the Constitution in over 200 years*, in «Prospect Magazine», September 25, 2019, <http://www.prospectmagazine.co.uk/politics/understanding-what-makes-miller-2-the-most-significant-judicial-statement-on-the-constitution-in-over-200-years>, April 2022.
[110] *Miller II*, [1].
[111] The Court describes the current practice and procedure relating to prorogation in *Miller II*, [3].
[112] *Miller II*, [9]-[13].
[113] *Miller II*, [69].
[114] *Miller II*, [15], [19].
[115] *Miller II*, [1] (emphasis added).
[116] *Miller II*, [1] (emphasis added).
[117] *Miller II*, [51].
[118] *Miller II*, [30].
[119] C. Turpin, A. Tomkins (eds.), *British Government and the Constitution: Text and Materials*, Cambridge University Press, 2007, p. 364.
[120] Fixed-term Parliaments Act 2011, 2011 c. 14.
[121] Dissolution and Calling of Parliament Act 2022, 2022 c. 11 (U.K.).
[122] Bagehot, *The English Constitution* cit., p. 60.
[123] *Miller II*, [50].
[124] *Miller II*, [52].
[125] *Miller II*, [69].
[126] *Ibidem*; the Court describes the process in more detail at [3].
[127] *Miller I*, [81]-[82].
[128] Fortin, *The King Can Do No Wrong*, cit., pp. 28-36, 73, 86-100.
[129] See *M v Home Office* (1994) 1 AC 377 (HL) 395 (Lord Templeman): «The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown».
[130] For a recent judicial finding as to a monarch's – even a foreign one's – status as under the law, in this case in the context of the State Immunity Act 1978, 1978 c. 33 (U.K.), see *Sayn-Wittgenstein-Sayn v Borbon y Borbon* [2022] EWHC 668 (QB) [28]: «As Diplock LJ noted in *Empson v Smith* [1966] 1 QB 426, 438A, it is "elementary law" that state immunity is "not immunity from legal liability, but immunity from suit"».
[131] *Miller I*, [45].
[132] *The Case of the King's Prerogative in Saltpetre* (1607) 12 Co Rep 12, p. 12.
[133] *Welshes Case* (1595-96) Moo KB 413, p. 416 ,72 ER 664.
[134] Bagehot, *The English Constitution*, cit., p. 5.
[135] *Miller II*, [3].
[136] Allison, *The Spirits of the Constitution*, cit., p. 56.
[137] *Miller II*, [33].
[138] *Miller II*, [7]-[14]; P. Daly, *A Critical Analysis of the Case of Prorogations*, in «The Canadian Journal of Comparative and Contemporary Law», VII, 2021, p. 256, pp. 259-262.
[139] *Miller II*, [61], [69].
[140] *Miller II*, [33]; see also the discussion in *Miller I*, [92].
[141] *Miller I*, [47].