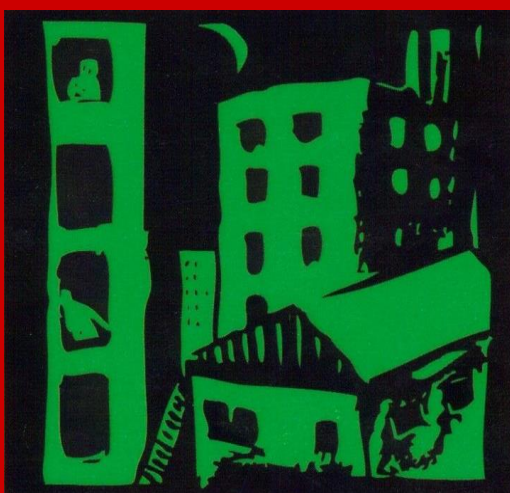
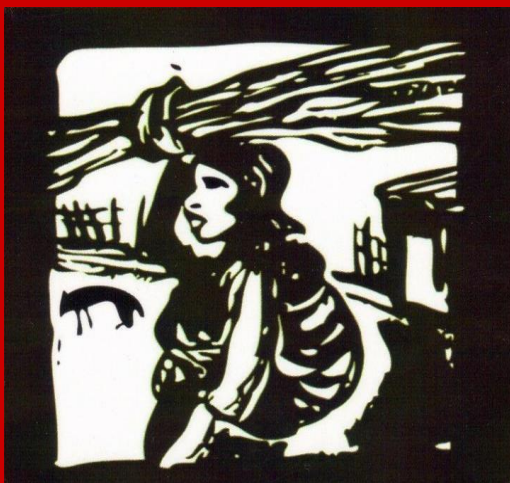


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The changing nature of the power of prorogation of Parliament in Lesotho: from absolute prerogative to rationality?

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ABSTRACT

The Constitution of Lesotho vests the power to prorogue parliament in the King. Like all executive powers, the power of prorogation is exercisable on the advice of the Prime Minister. In the past, this power was understood as an absolute prerogative that needed no justification, provided it was done in terms of the Constitution. Successive Prime Ministers in Lesotho have used prorogation as a potent political weapon to ward off any political turbulence in Parliament that posed an existential threat to their governments. These Prime

Ministers operated under the long-held view that the power to prorogue Parliament is an absolute prerogative. There are clear indications that this orthodox view is rapidly changing. The recent decision of the Constitutional Court in All Basotho Convention v Prime Minister (2020) seems to be ushering in a new approach. In effect, the decision suggests that it is no longer enough that Parliament can be prorogued in terms of the express provisions of the Constitution; the exercise of such power must also be justifiable. This new approach seems to be in keeping with general trends in public law, namely, that the exercise of public power must not only be sourced in law, but must also be rational. The main question is whether prorogation has indeed drifted from being absolute to being exercisable based on rationality as an incident of the doctrine of legality. The purpose of this article is to investigate this question.

Key words: Prorogation; prerogative; Constitution of Lesotho; justification; rationality; justiciability; legality.

1 INTRODUCTION

Lesotho is a former colony of Britain.¹ It was one of the High Commission Territories, together with Botswana and Swaziland.² Lesotho became independent in 1966,³ and adopted a written Constitution of Lesotho (Constitution).⁴ Although the Constitution was written, unlike that of Britain, it created a constitutional structure based on British constitutional conventions.⁵ To that end, the Constitution provided that the King should

¹ The country became a British Protectorate on 12 March 1868. See generally Machobane LBBJ *Government and change in Lesotho, 1800–1966: a study of political institutions* Basingstoke & London: 1990). See also Gill SJ *A short history of Lesotho from the late stone age until the 1993 elections* Morija: Morija Museum & Archives (1993).

² Crawford JR “The history and nature of the judicial system of Botswana, Lesotho and Swaziland: introduction and the superior courts” (1969) 86 *South African Law Journal* 476; Spence JE “British policy towards the High Commission territories” (1964) 2 (2) *Journal of Modern African Studies* 221; Hailey WM *Native administration in the British African territories: The High Commission territories: Basutoland, the Bechuanaland protectorate and Swaziland* London: HMSO (1950).

³ Botswana gained independence in 1966 while Swaziland became independent two years later, in 1968.

⁴ Constitution of Lesotho, 1966.

⁵ Palmer VV & Poulter SM *The legal system of Lesotho* Virginia: The Michie Company (1972) at 305-316. In *Law Society of Lesotho v Ramodibedi* (Constitutional Case No 1 of 2003) [2003] LSHC 89 (15 August 2003) Maqutu J shared a similar view at para 7: “It seems to me that the present constitutional dispensation is a continuation of a tradition that Lesotho has inherited from Britain. Time and time again when constitutional problems arise Britain is our first reference point.”

exercise his powers “in accordance with any constitutional conventions applicable to the exercise of a similar function by Her Majesty in the United Kingdom”.⁶

One of the enduring British based constitutional devices in Lesotho is the prerogative to prorogue Parliament.⁷ This prerogative has been ingrained in the Constitution since independence in 1966. When the country adopted the current Constitution in 1993, the prerogative of prorogation was cast in the new Constitution in exactly the same way as it had been cast in the independence Constitution – that it is a power of the King, exercisable on the advice of the Prime Minister.⁸ It has been fairly well-established, by both the judiciary and scholars, that when a power is exercisable by the King on the advice of the Prime Minister, it effectively means the power belongs to the Prime Minister as the King may not ignore the advice of the Prime Minister.⁹ Despite prorogation being a potent political weapon against Parliament that migrated from the King to the Prime Minister,¹⁰ the prerogative of prorogation was rarely used and had been less controversial in Lesotho after the return to constitutional democracy in 1993. While Parliament hardly ever completes its five-year term because of early dissolutions in Lesotho, it rarely gets prorogued.¹¹ It was not until 2012, when the country commenced the journey of coalition politics, that Prime Ministers controversially started invoking the prerogative of prorogation.¹² It then became a significant and controversial constitutional issue in the country, and various questions emerged: Can the King ignore the Prime Minister’s advice to prorogue Parliament when the advice is not in the interests of the country, or for some other reason? Do contemporary constitutional devices – such as, legality, rationality, justification, reasonableness, proportionality and constitutionality – that are applicable to the exercise of public

⁶ Section 76(2) of the Constitution.

⁷ Hicks BM “The Westminster approach to prorogation, dissolution and fixed date elections” (2012) 35(2) *Canadian Parliamentary Review* 20; Forsey E *The royal power of dissolution of parliament in the British Commonwealth* Toronto: Oxford University Press (1943 reprinted 1968).

⁸ Sections 83(1)-(5) of the Constitution.

⁹ Newman WJ “Of dissolution, prorogation, and constitutional law, principle and convention: maintaining fundamental distinctions during a parliamentary crisis” (2009) 27 (1) *National Journal of Constitutional Law* 217; Blackburn R “The dissolution of parliament: The Crown Prerogatives (House of Commons Control) Bill” (1988) 52(6) *Modern Law Review* 837.

¹⁰ See Tremblay G “Limiting the government’s power to prorogue parliament” (2010) 33(2) *Canadian Parliamentary Review* 16; Davison CB “Prorogation: a powerful tool forged by history” (2009) 34(2) *Law Now* 13.

¹¹ Unlike in other Westminster systems, such as Britain, where prorogations are regular, Parliament in Lesotho ordinarily runs with one session. It only gets prorogued under exceptional circumstances.

¹² See Nyane H “The advent of coalition politics and the crisis of constitutionalism in Lesotho” in Thabane M (ed) *Towards anatomy of political instability in Lesotho, 1966-2016* Morija: Morija Printing (2017) 77.

power in general, apply to the exercise of the power to prorogue Parliament? The first question has already received adequate judicial and scholarly attention.¹³

The second has not received much attention because the exercise of the power to prorogue or dissolve parliament was regarded as an absolute discretion of the monarch that had *de facto* shifted to the Prime Minister.¹⁴ The view that the royal prerogative is non-justiciable has been widely held in Lesotho. That is why Prime Ministers, since the advent of fragile coalition governments in 2012, have been using it against Parliaments with relative certainty that they will not be challenged. For instance, in June 2014, hardly two years into a five-year parliamentary term that had started in 2012, Prime Minister Thomas Thabane sent Parliament into a nine-month prorogation in order to pre-empt the impending motion of no confidence against his coalition government.¹⁵ His government had become divided because his Deputy, Mothejoa Metsing, had broken ranks.¹⁶ Consequently, the government lost its majority in the National Assembly. In order to avoid being ousted as a result of a vote of no confidence, the Prime Minister prorogued Parliament. The decision to prorogue Parliament led to a great deal of controversy that even attracted the attention of the international community. The Prime Minister was ultimately pressurised into revoking the prorogation,¹⁷ and Parliament resumed in October 2014.¹⁸ The prorogation was not challenged in the courts, presumably because of the widely held view that prorogation is the prerogative power of the King on the advice of the Prime Minister. It was not until March 2020, when the Prime Minister invoked the same prerogative to suspend Parliament, that he was challenged in court in *All Basotho Convention v Prime Minister*.¹⁹ In this case the rationality of the Prime Minister's decision to prorogue Parliament was questioned. The

¹³ Mahao NL "The constitution, the elite and the monarchy's crisis in Lesotho" (1997) 10(1) *Lesotho Law Journal* 165. See also 'Nyane H "Re-visiting the powers of the king under the constitution of Lesotho: does he still have any discretion?" (2020) 53 *De Jure* 159; *Phoofolo v The Right Honourable Prime Minister* (C of A (CIV) No 17/2017) LSCA 8 (unreported, decided on 12 May 2017).

¹⁴ Mahao NL "Chieftaincy and the search for relevant constitutional and institutional models in Lesotho: historical perspective" (1993) 9(1) *Lesotho Law Journal* 149.

¹⁵ Weisfelder RF "Free elections and political instability in Lesotho" (2015) 14(2) *Journal of African Elections* 50.

¹⁶ *Attorney General v His Majesty the King & others* C of A (CIV) 13/2015 LSCA 1 (12 June 2015). For a commentary, see 'Nyane H "Commentary on the case of *Attorney General v His Majesty the King and Others*" (2015) 23(1) *Lesotho Law Journal* 177.

¹⁷ The revocation was done in terms of Legal Notice No 74 of 2014. However, the Prime Minister agreed to revoke the prorogation on condition that Parliament would be dissolved and a snap election called in 2015. See Letsie TW "Lesotho's February 2015 snap elections: a prescription that never cured the sickness" (2015) 14(2) *Journal of African Elections* 81.

¹⁸ Legal Notice No 74 of 2014 was approved and signed on Friday (3 October 2014) by His Majesty the King, instructing the opening of both houses of Parliament on 17 October 2014.

¹⁹ *All Basotho Convention v Prime Minister* Constitutional Case 06/2020.

Court invalidated the decision of the Prime Minister to prorogue Parliament on the basis that the decision was irrational, amongst other reasons.²⁰ In effect, the decision suggests that Parliament cannot be prorogued in terms of the express provisions of the Constitution alone; the exercise of such power must also be justifiable.

This new approach seems to be in keeping with the general trends in public law, namely, that the exercise of public power must not only be sourced in law, but must also be rational and justifiable.²¹ The vexed question is whether prorogation has changed from being absolute to being exercisable based on rationality. This article investigates this question and the ramifications of the changing nature of the power to prorogue Parliament. The article comprises two main parts. The first part revisits the vagaries of the prerogative of prorogation, in both its classical and contemporary conceptions. The second part deals with the constitutional framework in Lesotho and the newly emerging judicial approach to the royal prerogative in general and prorogation in particular.

2 RE-VISITING THE PREROGATIVE OF PROROGATION

2.1 The history and rationale

The prerogative of prorogation as it is envisaged and practised under the Constitution of Lesotho is a relic of the classical prorogation as it was practised by the Tudors in England.²² In its classical nature, prorogation is a reserve power of the monarch; it was one of the prerogatives that the monarch had against Parliament.²³ Alongside dissolution, prorogation is an instrument of control, and it was used by monarchs to control Parliament. Prior to the Glorious Revolution in England, the monarch had

²⁰ *All Basotho Convention v Prime Minister* at para 108.

²¹ Cohen-Eliya M & Porat I “Proportionality and the culture of justification” (2011) 59(2) *American Journal of Comparative Law* 463; Dyzenhaus D “Law as justification: Etienne Mureinik’s conception of legal culture” (1998) 14(1) *SAJHR* 11; Mureinik E “A bridge to where? Introducing the interim Bill of Rights” (1994) 10(1) *SAJHR* 31. See also Van der Walt J & Botha H “Democracy and rights in South Africa: beyond a constitutional culture of justification” (2000) 7(3) *Constellations* 341. See also Rautenbach IM “Rationality standards of constitutional judicial review and the risk of judicial overreach” (2018) 8(1) *Journal of South African Law* 1.

²² Macartney WJA “African Westminster? The parliament of Lesotho” (1970) 23(2) *Parliamentary Affairs* 121. See also Graves M *Tudor parliaments, the crown, lords and commons, 1485–1603* London: Routledge (2014).

²³ Twomey A “Prorogation: can it ever be regarded as a reserve power?” (2016) 27(2) *Public Law Review* 144; Russell PH “Discretion and the reserve powers of the crown” (2011) 34(2) *Canadian Parliamentary Review* 19.

excessive powers, which meant that Parliament was subservient to the crown.²⁴ As one commentator observes: “The sovereign was originally considered to be barely less than a god, and he was afforded – or claimed – broad and unrestrained powers as such.”²⁵ The Crown could dissolve or prorogue Parliament at will. After the Glorious Revolution, the powers of Parliament against the Crown steadily increased. The Revolution brought far-reaching changes to the constitutional edifice of England,²⁶ and a key change was the supremacy of Parliament.²⁷ The doctrine gave Parliament unsurpassed powers, and had various implications for the exercise of monarchical prerogatives. The power of the monarch started to visibly decline. As Bogdanor argues, during the nineteenth century, “two interconnected factors, the expansion of franchise and the development of organized political parties, were to limit, not the power of the sovereign but his or her influence”.²⁸

In the post-Revolution dispensation, the prerogatives of dissolution and prorogation still reposed in the monarch but with slight variations. They became processes of management of parliamentary practice rather than instruments of control. Dissolution became the process that ended Parliament when it had run its course, or under certain circumstances.²⁹ Prorogation became a process by which Parliament was suspended after the completion of the legislative programme as reflected in the Crown’s speech. As Twomey observes, prorogation “ends a session of Parliament, creating a recess until the next session of Parliament commences or Parliament is dissolved”.³⁰ It has implications for the legislative programme. It not only ends the life of the business of Parliament, Bills that had not yet completed the legislative route at the time of prorogation, motions and questions, but “[i]t may also terminate sessional

²⁴ Goodlad G “Before the glorious revolution: the making of absolute monarchy?” (2007) 58 *History Review* 10; Cox GW “Was the glorious revolution a constitutional watershed?” (2012) 72(3) *Journal of Economic History* 567.

²⁵ See Davison (2009) at 13.

²⁶ Harrison G “Prerogative revolution and glorious revolution: political proscription and parliamentary undertaking, 1687–1688” (1990) 10(1) *Parliaments, Estates and Representation* 29.

²⁷ Goldsworthy J *Parliamentary sovereignty: contemporary debates* Cambridge: Cambridge University Press (2010); Wade W “Sovereignty: revolution or evolution?” (1996) 112(4) *Law Quarterly Review* 568; Allan TRS “Parliamentary sovereignty: law, politics, and revolution” (1997) 113(3) *Law Quarterly Review* 443.

²⁸ Bogdanor V *Monarchy and the constitution* London: Oxford University Press (1995) at 16.

²⁹ Normally those circumstances are: (a) when the Prime Minister feels that the government has completed the mandate on which it was elected (typically after about four years or so); or (b) when the Prime Minister informs the King that he or she has lost the confidence of the House. See MacDonald N & Bowden J “No discretion: on prorogation and the governor general” (2011) 34(1) *Canadian Parliamentary Review* 7.

³⁰ Twomey A *The veiled sceptre: reserve powers of heads of state in Westminster systems* Cambridge: Cambridge University Press (2018) at 584.

parliamentary committees and prevent committees from sitting or continuing an enquiry during the period of prorogation”.³¹

However, prorogation is no longer invoked only when the government has completed the legislative programme that was stated in the Crown’s speech. Prorogation also serves other political purposes.³² The first purpose is that governments normally use prorogations to ward off an impending motion of no confidence. This is a common political use of prorogation. In 2014, in Lesotho, the Prime Minister sent Parliament to a nine-month prorogation to avoid the impending motion of no confidence in the National Assembly. There are other examples in Westminster constitutional models, such as, in Sri Lanka (2001), Canada (2008), the Turks and Caicos Islands (2009), Grenada (2012) and Guyana (2014–15).³³

The use of prorogation for this purpose has come under immense criticism because it “directly contradicts the fundamental principle of parliamentary democracy that the government’s authority to rule depends on parliamentary confidence”.³⁴ This is because, as Twomey rightly observes, in a parliamentary system the government cannot remain in office when it has lost the confidence of Parliament.³⁵ This is a basic rule of the Westminster constitutional design.³⁶ Another political purpose for which prorogations have been deployed in recent times is when the government plans to implement a policy for which there is clearly no parliamentary or popular support. Boris Johnson’s prorogation of the UK Parliament in 2019 is a case in point.

The Prime Minister “advised the Queen to prorogue parliament in what was widely viewed as a means of disabling Parliament while the government prepared to deliver its preferred form of Brexit on 31 October”.³⁷ Another political use of prorogation in recent history is when the government wants to circumvent parliamentary accountability, particularly during a period close to an election, because the government is concerned that accountability to Parliament may not portray government in a good light to the electorate. Examples include the United Kingdom in 1997, under Prime Minister John

³¹ Schleiter P & Fleming TG “Parliamentary prorogation in comparative context” (2020) 69(1) *The Political Quarterly* 2.

³² See Schleiter & Fleming (2020) at 3.

³³ Schleiter & Fleming (2020) at 3–4; Twomey (2018) at 593.

³⁴ Schleiter & Fleming (2020).

³⁵ Twomey (2018) at 594.

³⁶ See Schleiter P & Evans G “The changing confidence relationship between the UK executive and parliament in comparative context” (2021) 74(1) *Parliamentary Affairs* 1; Schleiter P, Belu V & Hazell R “Hung parliaments and the need for clearer rules of government formation” (2017) 88(3) *The Political Quarterly* 404; Rasmussen J “Constitutional aspects of government formation in a hung parliament” (1987) 40(2) *Parliamentary Affairs* 139.

³⁷ Schleiter & Fleming (2020) at 3.

Major, and Canada in 2003 during the transition from Prime Minister Jean Chretien to Paul Martin.³⁸

2.2 The orthodox legal position

Prorogation is classically a royal prerogative,³⁹ and should be understood within the broader legal framework governing prerogatives.⁴⁰ The notion of prerogative is malleable, and it has eluded any attempt to give it a precise meaning.⁴¹ Nevertheless, many scholars have examined the historical evolution of the notion of prerogative and its conceptual obscurity,⁴² and it is therefore not necessary to cover this ground here. For purposes of the argument being made here, it may suffice to observe that, in its classical permutation, the notion of prerogative is associated with the residual powers of the monarch,⁴³ which are “powers left over from when the monarch was directly involved in government, powers that now include making treaties, declaring war,

³⁸ Schleiter & Fleming (2020) at 3.

³⁹ See Brazier R “Monarchy and the personal prerogatives- a personal response to Professor Blackburn” (2005) 1 *Public Law* 45.

⁴⁰ For a general discussion of the legal ramifications of prerogative powers, see Carpenter G “Prerogative powers: an anachronism?” (1989) 22(2) *Comparative and International Law Journal of Southern Africa* 190.

⁴¹ Payne S “The royal prerogative” in Sunkin M & Payne S (eds) *The nature of the crown: a legal and political analysis* Oxford: Oxford University Press (1999) 77 at 78. The author states as follows: “There is no single accepted definition of the royal prerogative. The various definitions appear to conflict with each other. Nevertheless, the working definition of the royal prerogative is the one provided by the British constitutional authority, Dicey: a royal prerogative is ‘the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.’” See Dicey AV *Introduction to the study of the law of the constitution* 10th ed London: MacMillan (1967) at 424. See also the Canadian Supreme Court decision in *Effect of exercise of royal prerogative of mercy upon deportation proceedings* [1933] SCR 269 (SCC); See also *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC).

⁴² See generally Forsey (1968); Markesinis BS *The theory and practice of dissolution of parliament: a comparative study with special reference to the United Kingdom and Greek experience* New York: Cambridge University Press (1972); Cox N “The gradual curtailment of the royal prerogative” (2012) 24(1) *Denning Law Journal* 1; Markesinis BS “The royal prerogative re-visited” (1973) 32(2) *Cambridge Law Journal* 287.

⁴³ Poole T “United Kingdom: the royal prerogative” (2010) 8(1) *International Journal of Constitutional Law* 146.

deploying the armed forces, regulating the civil service, and granting pardons”.⁴⁴ In the British context, with the shift towards a Cabinet government, most of the monarch’s prerogatives have been taken over by the Cabinet.⁴⁵ As Markesinis contends, this shift of power from the Crown to the government of the day has also affected the nature of the prerogative. “The inevitable result of all this was that the prerogative powers became increasingly dependent, in one way or another, on the government of the day.”⁴⁶ The prerogative has thus changed: “what then had started as a royal prerogative became to all intents and purposes government or even prime ministerial prerogative”.⁴⁷

The orthodox legal position has been that prorogation is not susceptible to judicial review.⁴⁸ This view is ably captured by De Smith, who contends that powers that “derive from the royal prerogative are unreviewable on any ground whatsoever”.⁴⁹ This position has been expressed in several writings and judicial pronouncements in England.⁵⁰ The rationale for this position has not remained static. Initially the rationale was based on the pre-Revolution conception that the powers of the monarch are absolute and therefore “the King can do no wrong”.⁵¹ This rationale has not been sustainable with the ascendancy of post-Revolution constitutionalism in the United Kingdom. Consequently, a new justification for the non-reviewability of executive prerogative was developed. The new rationale was based on the nature of the power. As Wheeler has recently contended, “judges have claimed of some prerogative discretions that they are unexaminable by reason of their ‘subject matter’, or because their exercise involves matters of ‘political judgment’ which matters are not appropriate for judicial determination”.⁵² This rationale gained currency in the United States of America with the ascendancy of the political question doctrine.⁵³ The doctrine is neatly captured by Henkin thus:

⁴⁴ See Poole (2010) at 147.

⁴⁵ See generally Jennings I *Cabinet government* London: Cambridge University Press (1965).

⁴⁶ See Markesinis (1973) at 288.

⁴⁷ See Markesinis (1973) at 288.

⁴⁸ See Markesinis (1973) at 287; Elliott M “Judicial power and the United Kingdom’s changing constitution” *Legal Studies Research Papers Series Paper* No 49/2017 October 2017.

⁴⁹ De Smith SA *Judicial Review of Administrative Action* London: Stevens (1959) at 118.

⁵⁰ *Chandler v DPP* [1964] AC 763; *Blackburn v Attorney-General* [1971] 1 WLR 1037; *Laker Airways v Department of Trade* [1973] QB 643.

⁵¹ Wheeler F “Judicial review of prerogative power in Australia: issues and prospects” (1992) 14(4) *Sydney Law Review* 432; Barry H “The king can do no wrong” (1925) 11(5) *Virginia Law Review* 349.

⁵² See Wheeler (1992) at 434; See also Harris BV “Judicial review, justiciability and the prerogative of mercy” (2003) 62(3) *Cambridge Law Journal* 631.

⁵³ Barkow RE “More supreme than court: the fall of the political question doctrine and the rise of judicial supremacy” (2002) 102(2) *Columbia Law Review* 237; Choper JH “The political question doctrine: suggested criteria” (2004) 54 *Duke Law Journal* 1457.

“That there are political questions – issues to be resolved and decisions to be made by the political branches of government and not by the courts – is axiomatic in a system of constitutional government built on the separation of powers. The federal courts exercise neither the ‘legislative Powers’ nor ‘The executive Power’ of the United States.”⁵⁴

Consequently, Prime Ministers across the Commonwealth constitutional models have used prorogation for political purposes because they often rely on the orthodox legal position.⁵⁵

2.3 The contemporary position

The recent development of public law in favour of justification and rationality has forced the courts to abandon the classical position in relation to royal prerogative in general.⁵⁶ In the United Kingdom, where the notion of royal prerogative originated, the trajectory started with *Ridge v Baldwin*⁵⁷ in the early 1960s, in which the Court confirmed that even decisions that are executive in nature are reviewable. Lord Hodson stated as follows:

“[T]he answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity, as if that was the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial, but rather executive or administrative, have been held by the courts to be subject to the principles of natural justice.”⁵⁸

This approach was confirmed in *Council of Civil Service Unions (CCSU) v Minister of the Civil Service*.⁵⁹ In this case, the Minister of the Civil Service in the United Kingdom had issued an instruction to the effect that the terms and conditions of civil servants at Government Communications Headquarters (GCHQ) would be revised so as to exclude membership of any trade union other than a departmental staff association approved by the director of GCHQ. That instruction, which was issued without prior consultation with the staff at GCHQ, was issued pursuant to the Minister’s power under the Civil Service Order in Council of 1982. The appellants, the Association of Civil Service Unions,

⁵⁴ Henkin L “Is there a ‘political question’ doctrine?” (1976) 85(5) *Yale Law Journal* 597.

⁵⁵ See Carpenter (1989) at 190.

⁵⁶ Allott P “The courts and the executive: four House of Lords decisions” (1977) 36(2) *Cambridge Law Journal* 255. See also Daly P “The culture of justification in administrative law” *UK Constitutional Law Blog* (6 July 2020) available at <https://ukconstitutionallaw.org/> (accessed 16 July 2020).

⁵⁷ *Ridge v Baldwin* [1964] AC 40.

⁵⁸ *Ridge v Baldwin* (1964) at para 113.

⁵⁹ *Council of Civil Service Unions (CCSU) v Minister of the Civil Service* [1984] 3 All ER 935.

a union official and five civil servants employed at GCHQ, applied for judicial review of the Minister's instruction, seeking, inter alia, a declaration that it was invalid because the Minister had acted unfairly in removing, without consultation, their fundamental right to belong to a trade union. The Minister's argument was that the power was based on royal prerogative and was therefore not susceptible to judicial review. The Court disagreed with the Minister's argument. Lord Diplock stated:

"I see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'."⁶⁰

Therefore, it can safely be contended that contemporary developments in public law point definitively to the demise of the orthodox position.⁶¹ This position was recently confirmed by the decision of the UK Supreme Court in *R (on the application of Miller) v Prime Minister and Cherry & others v Advocate General for Scotland (Miller (2019))*,⁶² a case that dealt specifically with the reviewability of the Prime Minister's decision to advise the Queen to prorogue Parliament in the United Kingdom.⁶³

⁶⁰ *Council of Civil Service Unions (CCSU)* (1984) at para 950.

⁶¹ See *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC); *R v Home Secretary, ex p Bentley* [1994] QB 349 (DC). Also see the New Zealand case, *Burt v Governor* [1992] 3 NZLR 672 (CA). Baxter L *Administrative Law* Cape Town; Juta(1984) at 392: "The traditional view now shows signs of change. As the courts have developed more fully the principles by which discretionary powers may be reviewed, some judges have begun to regard some prerogative powers as an historical anachronism, as powers which might as easily have originated from statute, and as powers to which the normal principles of review should be applied by analogy. If this approach is accepted – and since the scope of review will always be affected by the question of justiciability – it is possible that the prerogative will gradually lose all its significance in administrative law."

⁶² [2019] UKSC 41.

⁶³ For an analysis of the decision see Craig PP "The supreme court, prorogation and constitutional principle" (2020) 2 *Public Law* 248; Larkin J "The Supreme Court on prorogation and its justiciability" *Judicial Power Project* available at <http://judicialpowerproject.org.uk/john-larkin-the-supreme-court-on-prorogation-and-its-justiciability/> (accessed 16 July 2020); Tierney S "Turning political principles into legal rules: the unconvincing alchemy of the Miller/Cherry decision" *Judicial Power Project* available at <http://judicialpowerproject.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-the-unconvincing-alchemy-of-the-millercherry-decision/> (accessed 16 July 2020).

3 PROROGATION IN LESOTHO: THE CONSTITUTIONAL FRAMEWORK AND JUDICIAL ATTITUDE

As a typical Westminster-based constitution,⁶⁴ the Constitution of Lesotho provides for the prorogation of Parliament.⁶⁵ In terms of section 83(1), the King may at any time prorogue Parliament. It is critical to note that the Constitution does not, as is the practice in some Commonwealth countries, provide for any regularity which the King must follow in proroguing Parliament. All the Constitution provides is that Parliament may not be prorogued for a period exceeding two months.⁶⁶ The two-month limitation is a new innovation that was introduced by the Ninth Amendment to the Constitution; the original position was that Parliament could be prorogued for a period not exceeding twelve months.⁶⁷ Following the mischievous prorogation of Parliament in June 2014 for nine months, it became apparent that the time for which Parliament may be prorogued had to be reduced.⁶⁸ It is intriguing to note that the Ninth Amendment changed only the duration of the prorogation without taking issue with the substance of prorogation itself, namely, the reasons for which prorogation may be invoked.⁶⁹ In 2014, Prime Minister Thabane not only exploited the long period (of twelve months) provided by the Constitution,⁷⁰ he also abused the open-ended nature of the provision relating to the reasons for prorogation. He advised the King to prorogue Parliament because he was facing a motion of no confidence in the House.⁷¹

⁶⁴ See Macartney (1970). See also Ankar D “Westminster lilliputs? Parliaments in former small British colonies” (2007) 60(4) *Parliamentary Affairs* 637. Ankar argues that the term “Westminster refers to the main characteristics of British parliamentary and governmental institutions”. See also De Smith SA *The new commonwealth and its constitutions* London: Stevens (1964) and De Smith SA “Westminster export model the legal framework of responsible government” (1961) 1(1) *Journal of Commonwealth Political Studies* 2.

⁶⁵ There is no statute providing for prorogation or for other parliamentary affairs in Lesotho. Parliament is largely regulated in terms of the Constitution and the Standing Orders promulgated directly in terms of the Constitution. See secs 82, 83 and 154 of the Constitution.

⁶⁶ See Ninth Amendment to the Constitution of Lesotho, 2020.

⁶⁷ Section 82 of the 1993 Constitution provides :

“(1) Each session of Parliament shall be held at such place within Lesotho and shall begin at such time as the King shall appoint: Provided that—(a) the time appointed for the meeting of Parliament after Parliament has been prorogued shall be not later than twelve months from the end of the preceding session;”

⁶⁸ Section 2(a) of Ninth Amendment to the Constitution of Lesotho, 2020.

⁶⁹ For the possibilities of limiting the power to prorogue Parliament, see Tremblay (2010).

⁷⁰ Section 82(1)(a) of the Constitution.

⁷¹ See Weisfelder (2015); Letsie (2015) .

In exercising the power to prorogue Parliament, the King is advised by the Prime Minister.⁷² Unlike with dissolution, where the King is empowered to reject the advice of the Prime Minister when dissolution is not in the interests of the country,⁷³ the Constitution does not create an avenue for the King to reject the advice of the Prime Minister in relation to proroguing Parliament.⁷⁴ There is a relative consensus in the country and throughout the Commonwealth that the King will ordinarily accept the advice of the Prime Minister, not only on matters relating to prorogation, but in general.⁷⁵ The concept of “acting on the advice of” was definitively interpreted in *Makenete v Lekhanya*.⁷⁶ The Court held that “[t]he words ‘on the advice of the chairman’ can only mean, therefore, that the King is obliged to act in accordance with the advice of the Chairman”.⁷⁷ In a similar vein, the Court of Appeal of the Republic of Singapore in *Yong Vui Kong v Attorney-General*,⁷⁸ when determining whether the President has any discretion in a situation where the Constitution provides that he or she may grant clemency to convicts, held that the President shall act “on the advice of Cabinet”. The Court stated:

“It is trite law that the Head of State in a Constitution based on the Westminster model, such as the Singapore Constitution, is a ceremonial Head of State who:
(a) must act in accordance with the advice of the Cabinet in the discharge of his

⁷² See Russell (2011); Heard A “The reserve powers of the crown: the 2008 prorogation in hindsight” in Smith J & Jackson M (eds) *The evolving Canadian crown* Montreal: McGill-Queen’s University Press (2012) 87.

⁷³ Prior to the Ninth Amendment, sec 83(4)(a) of the Constitution empowered the Prime Minister who has lost the confidence of the House to advise that Parliament be dissolved. However, in terms of the section, the King had the option of rejecting the advice if, after being advised by the council of state, he determines that the dissolution will not be in the interest of the country. See also *Phoofolo v The Right Honourable Prime Minister* (C of A (CIV) No 17/2017) LSCA 8 (unreported, decided on 12 May 2017), available at <https://lesotholii.org/node/10843> (accessed 19 November 2019). However, the Ninth Amendment has removed that power from the Prime Minister. If the Prime Minister loses a vote of no confidence, he is obliged to resign. See sec 3(a) of the Ninth Amendment to the Constitution, 2020.

⁷⁴ Section 83(1) of the Constitution of Lesotho, 1993.

⁷⁵ See Heard (2012) ; Monahan J *Constitutional law* Toronto: Irwin Law (2006). The author captures the argument pointedly at 75–76: “As a general rule, the governor general should continue to act on the advice of the prime minister, assuming that he/she continued to enjoy the confidence of the House and should leave issues of legality or constitutionality to be adjudicated before the courts. ... There may be one exception to this rule arising where a government was persisting with a course of action that had been declared unconstitutional or illegal by the courts. In the event that the government sought the governor general’s participation in a decision or action that had previously been declared unconstitutional, it might well be appropriate for the governor general to refuse to approve or participate in the illegal or unconstitutional conduct.”

⁷⁶ *Makenete v Lekhanya* [1991–1996] LLR 486.

⁷⁷ See *Makenete* (1991).

⁷⁸ *Yong Vui Kong v Attorney-General* [2011] SGCA 9.

functions; and (b) has no discretionary powers except those expressly conferred on him by the Constitution. In our local context, Art 22P is not a provision which expressly confers discretionary powers on the President.”⁷⁹

While there is a relative consensus that the King would ordinarily act in accordance with the advice of the Prime Minister or his Cabinet,⁸⁰ exceptions have been identified where the King may reject the advice. The clearest example is when the advice is unlawful or unconstitutional.⁸¹

There is paucity of judicial pronouncements specifically on the power to prorogue Parliament in Lesotho, arguably because the attitude of the judiciary in Lesotho, until recently, has been that prerogatives are not justiciable. The flagbearer of this deferential judicial attitude is the High Court’s decision in *Retselisitsoe Sekhonyana v Prime Minister of Lesotho*.⁸² In this case the applicant sought the nullification of the Report of the Commission of Inquiry into the political instability that had plagued the country during the period November 1993 to April 1994. The Court declined to nullify the Report. After extensive reliance on English authorities on the orthodox approach to prerogative,⁸³ the Court said:

“Despite the existence of the Constitution, nothing is firmly settled. Parliament can adjust the powers of the Government’s exercise of both prerogative and existing statutory powers If Parliament wanted the Courts to interfere it would have made its intention clear in that respect. What Applicant is asking

⁷⁹ *Yong Vui Kong* (2011) at para 19.

⁸⁰ Section 91(1) of the Constitution provides: “Subject to the provisions of section 137(4) of this Constitution, the King shall, in the exercise of his functions under this Constitution or any other law, act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution or any other law to act in accordance with the advice of any person or authority other than the Cabinet.”

⁸¹ Heard A “The governor general’s decision to prorogue parliament: a chronology and assessment” (2009) 18(2) *Constitutional Forum* 1. In relation to the controversial Canadian prorogation of 2008, the author argues : “The Governor General has a duty to act on any constitutional advice offered by a prime minister who enjoys the confidence of the House of Commons. But the advice to prorogue Parliament is arguably unconstitutional. The Prime Minister’s authority to advise the Governor General was undermined by the existence of a signed agreement for an alternative government supported by the majority of MPs, only two weeks into a newly elected Parliament.”

⁸² *Sekhonyana v Prime Minister of Lesotho* (CTV/APN/207/95) [1995] LSHC 143 (25 September 1995).

⁸³ The Court relied on *China Navigation Co Ltd v Attorney General* [1932] 2 KB 197. Lord Scrutton said at 217: “The matter is left to the uncontrolled discretion which he exercises by his Ministers. The Courts cannot question it, though Parliament by vote of no confidence or pressure in Parliament may influence it.” See also *Chandler* (1964); *Burmah Oil Co v Lord Advocate* [1964] 2 All ER 348. In the final analysis the Court in *Sekhonyana* stated: “It follows therefore that Applicant had no title to sue in this matter because in bringing this application, he is in fact interfering with the government’s prerogative to govern.”

the Court to do is to interfere with the relations between an elected government and Parliament. This is the area of the Crown's prerogative and politics ... In the area of prerogative such as this one, of how government governs and deals with armed forces and appoints Commissions of Inquiry and the like, the jurisdiction [of the] courts is circumscribed. The individual right to challenge acts of government is similarly limited."⁸⁴

Nevertheless, the attitude of the courts towards the justiciability of prerogative powers seems to be changing,⁸⁵ as it is in the rest of the Commonwealth.⁸⁶ The law relating to prorogation in Lesotho came under the spotlight in the celebrated decision of the Constitutional Court in *All Basotho Convention & others v The Prime Minister & others* (*All Basotho Convention* (2020)).⁸⁷ The case concerned the prorogation of Parliament by the Prime Minister, purportedly in terms of section 91(3) of the Constitution. The section provides that where the King is required by the Constitution to do any act in accordance with the advice of the Prime Minister,⁸⁸ and the King does not do that act, the Prime Minister may do such act.⁸⁹ Consequently, such act will be deemed to have been done by the King. At 18h00 on 20 March 2020, the Prime Minister wrote to the King, advising him to prorogue Parliament, and citing the COVID-19 pandemic as the reason for such prorogation.⁹⁰ In the letter advising prorogation, the Prime Minister indicated that if the King did not comply with the advice by 21h00 the same day, which was effectively a three-hour ultimatum, the Prime Minister would invoke section 91(3)

⁸⁴ See *Sekhonyana* (1995) at para 10.

⁸⁵ In *Principal Secretary, Ministry of Foreign Affairs and International Relations v Maope* (C of A (CIV) 52/18) [2019] LSCA 12 (31 May 2019) at para 38, the Court of Appeal said: "The exercise of all public power is subject to constitutional and statutory control. Thus, even constitutional and statutory decisions by the executive to recall diplomats otherwise than in terms of their contracts of engagements, can be and have been challenged in our courts. In my opinion, executive's exercise of powers and functions can be reviewed on the basis of the principle of legality or rationality that stem from the rule of law."

⁸⁶ *R (Sandiford) v Secretary of State for Foreign Affairs* [2014] 1 WLR 2697; *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35; Nehushtan Y "Prorogation and justiciability" *UK Constitutional Law Blog* (16 September 2019) available at <https://ukconstitutionallaw.org/> (accessed 16 July 2020).

⁸⁷ (Constitutional Case No 0006/2020) [2020] LSHCONST 1 (17 April 2020).

⁸⁸ Sections 83(1) & (4) of the Constitution empower the King to prorogue Parliament on the advice of the Prime Minister.

⁸⁹ Section 91(3) of the Constitution of Lesotho, 1993.

⁹⁰ However, the Court found that the real reasons for prorogation were political. Two important political processes seem to have precipitated the decision to prorogue Parliament: (a) the National Assembly had just passed the Ninth Amendment to the Constitution which, amongst others, prevents a Prime Minister who has lost the confidence of the House from calling an early election, and (b) there was a pending motion of no confidence against the Prime Minister. See para 2 of the judgment.

of the Constitution and prorogue Parliament himself. Indeed, the King did not comply, and the Prime Minister consequently went ahead and prorogued Parliament the same day.⁹¹ The prorogation was, for the first time in the history of the country,⁹² challenged in the courts of law. It is important to note that the Constitution of Lesotho not only empowers the Prime Minister to prorogue Parliament, it also empowers him, if he is satisfied that the King has declined the advice, to do the act himself.⁹³

In a sense, the Prime Minister's proroguing of Parliament in March 2020 followed the "black letter" of the law. In terms of the orthodox approach, the Prime Minister would be protected not only by the doctrine of non-justiciability of royal prerogatives,⁹⁴ but he could also successfully claim to have followed the law as it stood. Nevertheless, the Court nullified the prorogation, thus signaling a paradigmatic shift in the judicial approach to the royal prerogative. The Court invoked the contemporary devices of constitutionalism as they apply in South Africa, such as, legality and rationality, and ruled the prorogation to be unconstitutional.⁹⁵ In particular, the Court reasoned that when the Prime Minister exercises his executive powers in terms of the Constitution, his exercise of those powers is constrained by the principle of rationality.⁹⁶ The court therefore thrust the notion of rationality to the centre of the law relating to the prorogation of Parliament, and arguably to the exercise of all public power in Lesotho. Now it is no longer enough to base a decision to prorogue Parliament on the

⁹¹ Legal Notice 21 of 2020.

⁹² In Lesotho prorogation, unlike dissolution, has always been a less controversial prerogative because it has seldom been invoked. It has become very controversial since 2014 when Prime Minister Thomas Thabane invoked it; it was controversially invoked again in 2020.

⁹³ Section 91(3) provides in no uncertain terms : "Where the King is required by this Constitution to do any act in accordance with the advice of any person or authority other than the Council of State, and the Prime Minister is satisfied that the King has not done that act, the Prime Minister may inform the King that it is the intention of the Prime Minister to do that act himself after the expiration of a period to be specified by the Prime Minister, and if at the expiration of that period the King has not done that act the Prime Minister may do that act himself and shall, at the earliest opportunity thereafter, report the matter to Parliament; and any act so done by the Prime Minister shall be deemed to have been done by the King and to be his act."

⁹⁴ *Sekhonyana* (1995); *R (on the application of Miller) v Secretary of State for Exiting the European Union* 2017 UKSC 5; *R (on the application of Miller) v Prime Minister and Cherry and Others v Advocate General for Scotland* [2019] UKSC 41 (the *Cherry* case).

⁹⁵ The Court relied on decisions of the Constitutional Court of South Africa on legality and rationality. See *Democratic Alliance v President of South Africa & others* 2013 (1) SA 248 (CC); *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC); *Affordable Medicines Trust & others v Minister of Health* 2006 (3) SA 247 (CC); *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC); *President of the Republic of South Africa* (2000) .

⁹⁶ *All Basotho Convention* (2017) at para 82.

empowering provisions of the Constitution, as the Prime Minister did with the March 2020 prorogation. The exercise of such power must also pass the rationality test.⁹⁷ In effect, the decision must be justifiable. The rationality test is clearly different from the reasonableness test.⁹⁸ The former is a lower test: it merely demands a rational connection between the exercise of power and the purpose for which the power was given.⁹⁹ The reasonableness test demands more: weighing up the options available to the decision maker and determining whether the decision maker chose the best option.¹⁰⁰ Both of them are constitutional constructs, and they are now part of Lesotho's constitutional law.

Rationality is an incident of legality, not reasonableness.¹⁰¹ The Court correctly observed this distinction and said that the rationality standard is lower. It requires only "that the decision be rationally related to the purpose for which the power was given".¹⁰² In this case, the Court placed a lot of weight on the justification provided by the Prime Minister that Parliament was being prorogued because of COVID-19, and the short ultimatum given by the Prime Minister to the King. In the end, the Court found that the Prime Minister acted irrationally.¹⁰³ In effect, the decision of the Prime Minister could not be justified.

⁹⁷ The principle is now fairly well established at Westminster. In the *Cherry* case the Court said at para [31]: "The power to prorogue Parliament was accordingly justiciable and reviewable on grounds of irrationality and other judicial review principles ... It was at least not unfettered. The Government could not use the prerogative to affect individuals ... The power was lawfully exercised only if it was consistent with constitutional principle. It had to be exercised for a proper purpose. Prorogation was subject to the ordinary principles of legality, rationality and procedural impropriety as with other Governmental action ...".

⁹⁸ Nehushtan Y "The unreasonable perception of rationality and reasonableness in 2019 UK public law" (2019) *UK Constitutional Law Blog* available at <https://ukconstitutionalaw.org/> (accessed 12 July 2020).

⁹⁹ In *Pharmaceutical Manufacturers Association* (2000) the Constitutional Court of South Africa said at para 85: "Decisions must be rationally related to the purpose for which the power is given otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement." See also Du Plessis M "The variable standard of rationality review: suggestions for improved legality jurisprudence" (2013) 130(3) *South African Law Journal* 597.

¹⁰⁰ Pillay A "Reviewing reasonableness: an appropriate standard for evaluating state action and inaction" (2005) 122(2) *South African Law Journal* 419.

¹⁰¹ This distinction is more important in Lesotho in view of the influence that the *dictum* of Lord Diplock in *CCSU* (1984) exerts in Lesotho. See, for instance, the decisions of the Court of Appeal in *Brigadier Mareka & others v Commander Lesotho Defence Force* (C of A (CIV) 52 of 2016) [2016] LSCA 9 (29 April 2016); and *Seeiso v Hon Minister of Home Affairs & others* (C of A (CIV) No. 21 of 1994) LSCA 139 (10 August 1994).

¹⁰² *All Basotho Convention* (2017) at para 85.

¹⁰³ *All Basotho Convention* (2017) at para 54.

Besides being influenced by the doctrines of legality and rationality, as they apply in South Africa, the Court was also influenced by the jurisprudence of the UK Supreme Court in *R (on the application of Miller) (Appellant) v The Prime Minister*.¹⁰⁴ The Court borrowed three principles from the *Miller* case, which it said constituted “a relevant and useful legal template to be used by any Prime Minister in advising the King to prorogue Parliament and even in those instances where the Prime Minister decides to overreach the King”.¹⁰⁵ The first principle is parliamentary accountability. By its very nature, prorogation affects parliamentary accountability, which is the ability of Parliament to hold the executive accountable and to scrutinise it. As a result, prorogation may not be used to circumvent parliamentary accountability and scrutiny. While the Courts in both *All Basotho Convention* and *Miller*, on which the former is based, were not dealing with a situation where prorogation was being used to avoid an impending motion of no confidence, it is implicit that they would not accept prorogation that is used to avoid a motion of no confidence. The motion of no confidence is a means of accountability.¹⁰⁶ It therefore fits squarely within the first principle, that prorogation may not be used to avoid accountability. The Constitutional Court of South Africa in *Economic Freedom Fighters & others v Speaker of the National Assembly (Economic Freedom Fighters (2018))*¹⁰⁷ defined the motion of no confidence as an accountability mechanism thus:

“In *UDM* this Court held that Question and Answer sessions in the National Assembly involving the Executive, including the President, motions of no confidence in the President in terms of section 102 and motions for the removal of the President in terms of section 89 are accountability mechanisms that can be used and are used by the National Assembly to hold the Executive, including the President accountable. This Court also referred to the mechanisms provided for in sections 89 and 102 of the Constitution. Those are, respectively, the motions for the removal of the President from office and the motion of no confidence in the President.”¹⁰⁸

Furthermore, the principle of accountability is offended when Parliament is prorogued for a long period of time. A long prorogation is therefore prima facie unconstitutional.

¹⁰⁴ [2019] UKSC 41.

¹⁰⁵ At para 115.

¹⁰⁶ In *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) the Constitutional Court of South Africa said at paras 43 and 44: “A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action [The right that flows from section 102(2) is central to the deliberative multi-party democracy ... A motion of this kind is perhaps the most important mechanism that may be employed by parliament to hold the executive to account, and to interrogate executive performance.” See also *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC).

¹⁰⁷ See *Economic Freedom Fighters & others v Speaker of the National Assembly* 2018 (2) SA 571 (CC).

¹⁰⁸ See *Economic Freedom Fighters* (2018) at para 90.

As the Court in *Miller* (2019) put it, the principle of parliamentary accountability is not necessarily jeopardised “if Parliament stands prorogued for a short time. But the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model”.¹⁰⁹

The second principle is rationality. This principle thrusts justification to the centre of the prerogative that was initially absolute and not subject to justification. The new approach is that the Prime Minister must not only have reasons for prorogation but “[i]n his reasons to advise prorogation, the Prime Minister must address the competing merits of going into recess versus prorogation and its length”.¹¹⁰ Under the new model, the Prime Minister must be able to justify that prorogation is the most preferable avenue, as opposed to the ordinary adjournment of Parliament. With the 2020 prorogation, Prime Minister Thabane could not justify why, if the Covid-19 pandemic was the real reason for prorogation, as he alleged, he did not request the ordinary adjournment of Parliament, even if it would be *sine die*.

The third principle is that, in contemplating prorogation, the Executive must respect the independence of Parliament. As the Court in *Miller* put it, “the Prime Minister has the constitutional responsibility, as the only person with power to advise in the matter, to have regard to the interests of Parliament”.¹¹¹ While the remarks were made against the backdrop of parliamentary sovereignty in the United Kingdom, they are not of lesser value to a constitutional model based on constitutional supremacy, like Lesotho. In Lesotho, the animating doctrine for inter-branch relationships is the separation of powers.¹¹² Clearly, if the prerogative to prorogue Parliament remains absolute, and without need for justification, it is an affront to the principle of separation of powers that is an integral part of constitutionalism in Lesotho.¹¹³

¹⁰⁹ At para 114.3.

¹¹⁰ *Miller* (2019) at para 114.4.

¹¹¹ *Miller* (2019) at para 114.1.

¹¹² See *Judicial Officers' Association of Lesotho & another v The Right Honourable the Prime Minister* (CONST/C/3/2005) [2006] LSHC 32 (04 July 2006). See also Nwafor AO “The Lesotho Constitution and doctrine of separation of powers: reflections on the judicial attitude” (2013) 6(1) *African Journal of Legal Studies* 49.

¹¹³ In *Development for Peace Education v Speaker of the National Assembly* (No 5/2016) [2017] LSHC 5 (13 March 2017), the Court said at para 21: “It should at all times be recognised that the Parliament of Lesotho has the power under the Constitution to make laws and to regulate its own procedure and processes and in particular to make rules for the orderly conduct of its own proceedings. This is a fundamental aspect of its legislative power vested in it by the Constitution and one that is indeed expressive of the doctrine of ‘separation of powers’.”

4 CONCLUSION

The foregoing discussion has laid bare the reality that the power to prorogue Parliament is rapidly changing in Lesotho. Although there is so far only one decision of the superior courts in Lesotho on the changing nature of the power to prorogue Parliament, it exists together with a number of judicial and scholarly approaches that confirm that the exercise of prerogative power is not only justiciable but must also be justifiable.¹¹⁴ This is a remarkable shift in constitutional law that has had an effect in Lesotho as well. In the past, Prime Ministers in Lesotho used the dissolution and prorogation of Parliament as potent weapons in their arsenal when Parliament was recalcitrant. This is no longer the case: the exercise of prerogative power is not immune from judicial scrutiny, even if it is exercised according to the “black letter” of the law. The Constitutional Court’s decision in *All Basotho Convention (2020)* is a trailblazer for the new approach to the exercise of not only the prerogative of prorogation but also the exercise of public power in general in Lesotho. Henceforth, the exercise of public power, regardless of its nature, must at least be rational. Rationality is emerging as the new threshold for the exercise of public power.¹¹⁵ Moreover, the Court has breathed further content into the power to prorogue Parliament: there are now new guiding principles for the Prime Minister who contemplates advising the King to prorogue Parliament. In the future, prorogation will have to be invoked to enhance, rather than frustrate, the work of Parliament.¹¹⁶

This huge development notwithstanding, the Constitution will still need to be amended to cater for the new conception of the prerogative of prorogation. An opportunity has been missed to recast prorogation both substantively and formally in the Ninth Amendment to the Constitution. The amendment has only nominally dealt with the question of reducing the period for which Parliament may be prorogued.¹¹⁷ The principles outlined in *All Basotho Convention (2020)* already point to the constitutional amendments that will have to be made.

¹¹⁴ *R (on the application of Miller) v Prime Minister, Cherry and Others v Advocate General for Scotland* [2019] UKSC 41; Craig (2020).

¹¹⁵ *All Basotho Convention (2020)* at para 85.

¹¹⁶ It will be difficult for the Prime Minister in the future to prorogue Parliament to avoid accountability in the form of an impending vote of no confidence. As Heard (2009) at 9 observes, “serious doubts about Parliament’s confidence in the government must normally be settled in relatively short order. Precedents suggest that between a week and ten days is an appropriate length of time”.

¹¹⁷ See sec 2(a) of the Ninth Amendment to the Constitution of Lesotho, 2020.

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