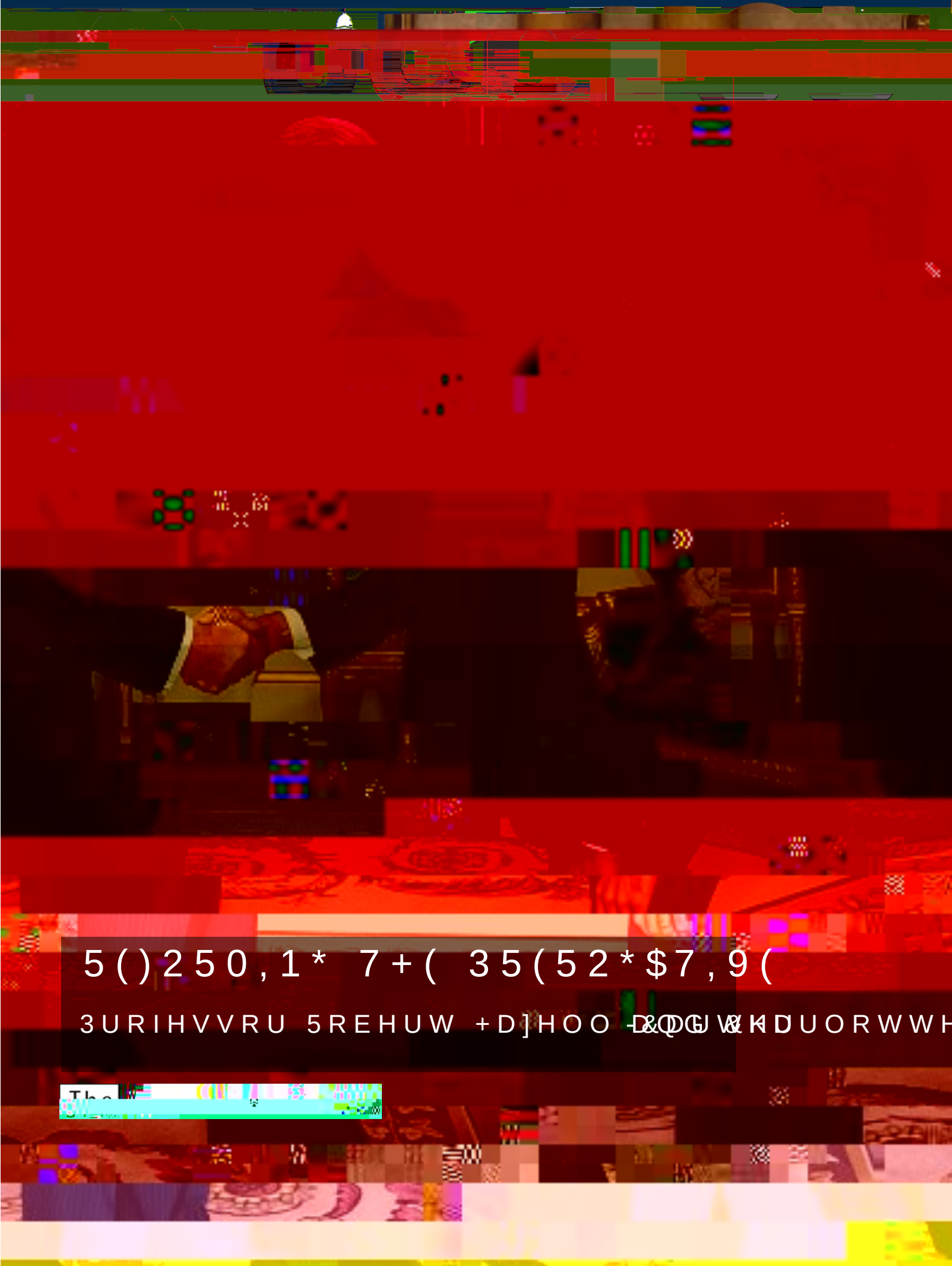
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REFORMING THE PREROGATIVE

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Executive Summary

This report summarises the key findings of our book Executive Power: The Prerogative, Past, Present and Future. That is a long book of 19 chapters, with detailed analysis of 11 different prerogative powers. This much shorter report selects five powers to analyse the scope for reform through codification in statute, soft law, or by clearer and stronger conventions.

The prerogative derives from the original executive powers of the Crown. Over the years these have been overlain and superseded by statute, and most powers have transferred to ministers. The monarch retains the power to summon, dissolve and prorogue parliament; to grant royal assent to bills passed by parliament; to appoint and dismiss ministers. The main prerogative powers in the hands of ministers are the power to make war and deploy the armed forces; to make and ratify treaties; to conduct diplomacy and foreign relations; to grant peerages and honours; to grant pardons; to issue and revoke passports.

The underlying issue regarding all prerogative powers is whether the Executive should be able to exercise (pow)s to solve a have to wield that power; with what degree of supervision from parliament or the courts; or (more rarely) from the monarch. Underlying competing concepts of executive autonomy are the Whitehall and Westminst 12 etre the
derives its democratic legitimacy, and authority, from parliament. Under the Whitehall 03 T5(w)] TJETQq0.000

Dissolution r are exemplified in the
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to develop a shared vision of the respective roles of government and parliament in initiating and approving military intervention of all kinds.

Public Appointments. Prerogative powers confer wide discretion on ministers to appoint peers to the House of Lords, and a wide range of other public appointments. That patronage has become circumscribed by three new regulatory bodies: the House of Lords Appointments Commission (HoLAC), the Office of the Commissioner for Public Appointments (OCPA), and the Judicial Appointments Commission (JAC). But recent Prime Ministers have loosened the controls over public appointments generally, and in particular over the appointment of new peers. For regulation to be effective, and not subject to backsliding, HoLAC and OCPA would be better protected if enshrined in statute, with clear statutory powers and functions.

Passports. Passports are issued by the Crown under the prerogative. The criteria for their withdrawal are not governed by legislation, but set out in a parliamentary statement by the Home Secretary, most recently in 2013. Successive statements have relaxed the criteria. Instead there should be a statutory right to a passport, with codification of the criteria for withdrawing one.

1. Why the Prerogative Matters

> 7KH UR\DO SUHURJDWLYH KDV QR SODFH LQ D PRGHUQ
> insufficiently accountable for their executive decisions as a result of their use of prerogative powers. By the same token, the monarchy has been scarcely accountable at all for its conduct of this crucial institution at the heart of our constitutional arrangements.
>
> Jack Straw (1994)[1]

The Prerogative and Brexit

In August 2019 the Queen held a meeting of the Privy Council at Balmoral. The main item of business was to order the prorogation of parliament, which was prorogued for five weeks. There followed a storm of protest against parliament being closed down for over a month, when it looked as though the Brexit negotiations might end with no deal. There also followed a dramatic court challenge, which led to the Supreme Court declaring that the order of prorogation was null, void and of no effect.[2] And there followed a lot of questioning about prorogation, and the prerogative powers. How is it in a modern democracy that parliament can be closed down by the monarch on the advice of the Prime Minister? What other prerogative powers does the monarch have, and the government? And in what ways can they be better controlled?

That is what this report is about: the royal prerogative, what the main prerogative powers are, and how they might be reformed. It is not a comprehensive account: for that readers must turn to our book Executive Power: The Prerogative, Past, Present and Future (Hart Publishing, 2022). That is a long book of 19 chapters and 140,000 words. We have tried to distil the key findings of the book in this much shorter report of seven chapters and 25,000 words.

Until Brexit the prerogative had seldom been the subject of much political attention. It has long been shrouded in mystery. Then Brexit came and shone a terrible spotlight on this dark and dusty corner of the constitution. Obscure powers suddenly became the talk of parliamentarians and newspaper leader writers. There was fierce debate over whether $UWLFOH WULJJHUL withdrawal from the EU) could be authorised without an Act of Parliament, spilling over from parliament into the courts.[3] This was followed by wild speculation that the Queen might be advised to withhold royal assent from the European Union (Withdrawal) Act 2019 (the Cooper-Letwin Act SDVVHG DJDLQVW WKH JRYHUQPHQW·V ZLVKHV 7KHQ less wild) that Boris Johnson might prorogue parliament to prevent it heading off a no deal Brexit. And finally, there were repeated votes as Johnson sought to find a way round the Fixed-term Parliaments Act 2011 to dissolve parliament and hold a general election.

All four controversies involved different aspects of the prerogative. They raised fundamental questions about the balance of power between parliament and the executive; and the role of the courts. How much power should parliament have to scrutinise and approve (or block) the

[1] J. 6WUDZ ¶$EROLVK WKH BBaarrkkeerr ((dd)),, PPoowweerr aanndd tthhee WWaarr:: TThhee MMoonnaarrcchhyy DDeebbaattee Vintage, 1994), 125-9.

ratification of treaties, traditionally a prerogative of the executive? Is royal assent a legislative function, or an executive function? Is prorogation a discretionary power of the Crown; or is the Queen bound to fo O O R Z W K H 3 U L P H 0 L Q L V W H U · V D G Parliament's $ Q G Z K

· (in grave constitutional crisis) to act contrary to or without ministerial advice.[4]

In 2007 Gordon Brown picked up the challenge laid down by PASC. Within a week of becoming Prime Minister he published a wide ranging agenda for reforming the prerogative. His green paper The Governance of Britain stated that prerogative powers should be put on a statutory basis, and outlined plans for reforming the war making power, dissolution and recall of parliament, ratification of treaties, the rules for the issue of passports and granting of pardons, the appointment of bishops and judges, and the rules governing the civil service.[5] [6] Most of these plans were included in the Constitutional Reform and Governance Bill. But Brown's bold plans for comprehensive reform ended with a whimper. The war powers resolution, legislation on passports, restricting the

Westminster views. Howarth posited these two different views of the constitution and the way the political system operates:

> According to the Westminster view, Parliament, and especially the House of Commons, sits DW WKH FHQWUH RI WKH, the Whitehall view, posits that the Crown, now largely in the form of its ministers, is the centre of the system. Effective government requires ministers to be able to act quickly and authoritatively.[8]

These competing views are not merely about the centre of power, but from where that power derives its legitimacy, and to whom it is accountable. On the Westminster view, the government derives its democratic legitimacy, and authority, from parliament. The government is chosen by parliament and is accountable to parliament: this is the classic model of responsible government. In the Whitehall view, the government derives its democratic legitimacy from the people. Long before Brexit, Anthony Birch showed how the rise of mass political parties with the doctrine of an electoral mandate had endowed governments with a sense of legitimacy, independently of that derived from parliament: people feel they have a direct channel of communication to the government, and the government feels directly accountable to the people.[9] This view was exemplified by Boris Johnson with his frequent references to the mandate from the 14 million people who had voted for him.[10]

Brexit served to throw these competing views into particularly sharp relief, with the 2016 referendum seen as a mandate from the people to the government, which had to respect the SHRSOH · Von Prime Minister Theresa May illustrated when Theresa May said at the Conservative Party conference that those who maintained the approval of parliament was necessary before initiating the process for leaving the EU were not standing up for democracy but trying to subvert it.[11] The Prime Minister relied on the referendum result as her democratic mandate, and the prerogative as the source of her unfettered executive power to withdraw from treaties as well as make them. In R (Miller) v Secretary of State for Exiting the European Union (Miller 1), the Supreme Court ruled that she needed the approval of parliament before triggering Article 50 of the Treaty on European Union, thus upholding the Westminster view of the constitution.[12]

The Whitehall view, with the requirement for ministers to be able to act quickly and authoritatively, is the classic defence of prerogative power. Executive autonomy is another way to express this: the need for the executive to be able to act effectively and decisively, without interference from parliament or the courts. It may have particularly strong appeal in the UK, where a similar justification is given for the first past the post voting system ² namely, that it delivers strong and

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[8] D. + R Z D U W K ¶ : H V W P L Q V W H U Y H U V X V : K L W H K D O O Y L H Z V ¶ , 8 . & R Q V W L W X W L R Q D O F R P S D W L Law Association Blog, 10 April 2019, www.ukconstitutionallaw.org/2019/04/10/david-howarth-westminster-versus-whitehall-two-incompatible-views-of-the-constitution/. For a longer exegesis, see D. Howarth, ¶ : H V W P L Q V W H U Whitehall: What the Brexit Debate Revealed About an Unresolved Conflict at the Heart of W K H % U L W L V K & R Q V W L W X W L R Q ´ in J. Doyle, A. Lynch and J. Murkens (eds), The Brexit Challenge for Ireland and the United Kingdom (Cambridge: Cambridge University Press, 2021).

[9] A.H

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2. Dissolving and Proroguing Parliament

The 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.

Lord Browne-Wilkinson (1995)[14]

Introduction

Historically, the monarch has controlled the sittings of the legislature through the prerogative power to summon, dissolve, and prorogue parliament. Dissolution brings a parliament to an end, leading to a general election. Prorogation brings a parliamentary session to an end, and normally lasts less than a week before the next parliamentary session begins. The summons is made by proclamation commanding a newly elected parliament to convene on an appointed day.

The prerogative powers are essential to the operation of parliament: if parliament is dissolved or prorogued, it cannot function. This enabled the Stuarts to rule without parliament for prolonged periods, leading to Article 13 of the Bill of Rights 1689 which called for frequent parliaments. Since that time, the prerogative power has become constrained by convention, by legislation, and most recently by the courts following the Fixed-term Parliaments Act 2011 (FTPA), which transferred the power from the executive to parliament. But the Johnson government repealed the FTPA, and revived the prerogative power.

The fundamental question underlying debates about the power of dissolution and of prorogation is about the balance of power, and the respective roles of executive and legislature. Is it right for the executive to control the sittings of parliament, or should parliament decide for itself when it should sit, and for how long?

Dissolution of Parliament

Before the FTPA: the Prerogative Power of Dissolution

This being a reserve power, the monarch is not obliged to grant a dissolution. The draft Cabinet Manual published in December 2010 summarised the pre-FTPA understanding of the conventions as follows:

> A Prime Minister may request that the Monarch dissolves Parliament so that an election takes place. The Monarch is not bound to accept such a request, although in practice it would only be in very limited circumstances that consideration is likely to be given to the

[14] R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513, 552.

> exercise of the reserve power to refuse it, including when such a request is made very soon after a previous dissolution. In those circumstances, the Monarch would normally wish to know before granting dissolution that those involved in the political process had ascertained that there was no potential government that would be likely to command the confidence of the House of Commons.[15]

So far as we know, in the UK no request for dissolution has been refused in modern times. But after the Labour government saw its majority slashed to just five seats in the 1950 election, there was speculation whether Clement Attlee might properly seek a second election. This prompted the Private Secretary to King George VI (Sir Alan Lascelles) to write a letter to The Times explaining that the monarch might justifiably refuse dissolution in three circumstances:

> (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who could carr \ RQ KLV *RYHUQPHQW « ZLWK D ZR

7KH /DVFHOOHV SULQFLSOHV FDPH WR WKH IRUH LQ WK speculation that he might call a snap election to face down his backbench rebels. The Cabinet Secretary was quizzed by the Public Administration and Constitutional Affairs Committee (PACAC) DERXW WKH SULQFLSOHV FRQFOXGLQJ WKDW ¶,W ZR put the sovereign in a difficult position constitutionally .'[17] It was reported that the Queen might EH XQDYDLODEOH LI -RKQVRQ UHTXHVWHG D GL²VROXWL particular the third - were met.[18]

The Prerogative Power is Called into Question

From the 1990s onwards, the unfairness of allowing the incumbent Prime Minister to choose the timing of the next election was increasingly called into question. Fixed-term parliaments were a prominent pledge for Labour in 1992, and in the Liberal Democrat manifesto for 1992 and 1997. *RUGRQ %URZQ·V The Government of Britain included a proposal that the Prime Minister should have to seek the approval of the House of Commons before asking the monarch to dissolve parliament.

Meanwhile, fixed terms were being successfully introduced elsewhere in the Westminster world, in Australia and Canada.[19] Closer to home, the Labour government had introduced fixed terms for the devolved legislatures in Scotland, Wales and Northern Ireland in the devolution legislation passed in 1998.

The arguments for fixed terms were the same elsewhere in the world. Allowing the incumbent government to decide the timing of elections was unfair; it gave the executive too much power over parliament; fixed terms enabled better civil service planning and longer term thinking; they

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[15] Cabinet Office, The Cabinet Manual: A Draft (London: HM Government, 2010), para 58.

[16] 6HQH[¶'LVVROXWLRQ RUGHUV LQ &RXQFLO¶ 3XEOLF /DZ (May) 1956.

[17] S. Case, Oral evidence to the Public Administration and Constitutional Affairs Committee, HC 212, 26 June 2022, QQ 210-217.

[18] O. Wright, C. Smyth, M. Dathan, ¶7RULHV IHDU VQDS HOHFWLRQ WR 7XPSLDQ The Times, 7 July 2022; Payne, above n10.

[19] R. Hazell, Written evidence to the Joint Committee on the Fixed-term Parliaments Act, HC 1046 HL 253 FTP0013, 21 January 2021.

also enabled better planning for political parties, for electoral administrators, and for regulating election spending.[20] In the 2010 election, the arguments returned to Westminster, with both the Liberal Democrats and Labour renewing pledges to introduce fixed term parliaments. The &RQVHUYDWLYHV GLG QRW PDNH WKLV VSHFLILF FRPPLWP

rid of the Fixed Term Parliaments Act [sic] [24] it has led to paralysis when the country needed G H F L V L Y H D F W L R Q ·

The government published a Draft Fixed-term Parliaments Act 2011 (Repeal) Bill, scrutinised by a Joint Committee of both Houses. The bill sought to revert to the previous system and restore the prerogative power of dissolution. But it went beyond simple restoration, by adding an ouster clause to prevent any judicial oversight of the power, and a statement of Dissolution Principles enabling the Prime Minister to advise rather than request a dissolution. The committee was

> accountability and public confidence in our democratic arrangements; and, above all, placing the British people at the heart of the resolution of any great national crisis.[28]

In the ensuing debate, most peers who spoke supported the repeal of the FTPA. But there was fierce criticism of the ouster clause from all sides, including from the Conservatives. Despite this, an amendment to remove the ouster clause was defeated at the report stage of the bill. But an additional amendment was inserted to require a vote in the House of Commons before parliament could be dissolved. Moving the amendment, Crossbencher Lord (Igor) Judge explained that its purpose was to ensure that the ultimate power of dissolution lay with parliament, and not the executive; and to avoid the need for the monarch or the courts to become involved. He invited the Commons to have second thoughts, while acknowledging that the view of the elected chamber must prevail.[29] The Commons rejected the amendment, and the b

As a result of the court ruling, parliament immediately resumed sitting, and the subsequent prorogation to end the session in October was for just three sitting days. The Supreme Court confidently asserted that the case had arisen in circumstances which were unlikely ever to recur. But if in future a Prime Minister has the temerity to take a chance, the court laid down clear guidelines by which to judge any questionable request:

> « WKH UHOHYDQW OLPLW RQ WKH SRZHU WR SURURJX
> advise the monarch to prorogue) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In judging any justification which might be put forward, the court must of course be sensitive to the responsibilities and experience of the Prime Minister and proceed with appropriate caution.

would remove the risk of the monarch being drawn into political controversy, avoiding a repeat of what happened in 2019.

Conclusion

This chapter has been about the prerogative power to dissolve and prorogue parliament. Underlying it are fundamental differences of view about where the power lies, where it should lie, and how it should be exercised. The evidence submitted to the Joint Committee on the Fixed-

3. The War-Making Power

If there be a prerogative of the Crown which no one has ever challenged, it is the prerogative of the Crown to declare peace or war without the interference of Parliament, by her Majesty alone, under the advice of her responsible Ministers.

Benjamin Disraeli (1864)[39]

Introduction

The prerogative powers of waging war are some of the most potent the government possesses. Although the King is formally Commander-in-Chief of the armed forces, ultimate decision-making rests with the Prime Minister. In former times the approval of p

¶IDOVH LPSUHVVLRQV· DEURDG WKDW WKH &RPPRQV GLG parliamentary report asserted WKDW DIWHU WKH ZDU WKHUH DURVH ¶D F will FRQVXOW WKH +RXVH RI &RPPRQV WR HQVXUH WKDW W UHIOHFWV WKH ZLOO RI WKH SHRSOH¶ However, while the main thrust of the report was to stress continuity in its proposed approach to prospective parliamentary control, all of the parliamentary debates before 2003 were retrospective and few ever culminated in a vote.[44]

That changed in 2003. On 18 March, after a long debate, the House of Commons approved a motion supporting military action in Iraq. The motion noted the HRXVH·V SUHYLRXV HQG RI 81 6HFXULW\ &RXQFLO 5HVROXWLRQ UHFRJQLVHG W DQG VHFXULW\· DQG VXSSRUWHG ¶WKH 8QLWHG .LQJGRP·V PHDQV QHFHVVDU\ WR HQVXUH WKH GLVDUPDPHQW RI ,U opening speech, 7RQ\ %ODLU VWDWHG WKDW LW ZDV ULJKW WKDW the democracy that is our right, EXW WKDW RWKHUV· It was also, of course, politically convenient: the Commons vote gave the deployment a legitimacy it had failed to achieve through the UN. Nonetheless, no previous decision to go to war in modern times had been backed by prior parliamentary approval on a substantive motion. Ever since, it has stood as a precedent for the consultation of parliament before the deployment of military forces.

%ODLU·V VWDWHPHQW ZDV LPPHGLDWHO\ VXSSRUWHG RQ E\ Committee (PASC) in its report, Taming the Prerogative: Strengthening Ministerial Accountability Parliament 3$6& VXJJHVWHG ¶WKDW DQ\ GHFLVLRQ WR HQJDJH Parliament, if not before military action WKHQ DV VRRQ DV SUDFWLFDEOH DIWHU Furthermore, the committee advocated legislation to enforce this practice.[49]

In

> A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter. We propose to observe that convention except when there is an emergency and such action would not be appropriate.[57]

Just over one week later WKH JRYHUQPHQW RUGHUHG D PLVVLOH VWUL WKH 0RQGD\ DIWHU WKH VWULNH WKH 3U[LPH0LQLVWHU V a sweeping majority of 557 to 13 votes. The vote ² particularly in the context of Sir George <RXQJ·V VWDWHPHQW ² was suggestive of a shift in attitude in government. Parliamentary approval was now an expectation.

As in 2003, parliamentary actors leapt upon these government statements. In May 2011, the House of Commons Political and Constitutional Reform Committee (PCRC) published a short report, 3DUOLDPHQW·V UROH LQ GHFLVLRQV RQ WKH GHSOR WH[W IRU SDUOLDPHQWDU\ GHFLVLRQ·, which argued that a convention had developed in Parliament that before troops were committed the House of &RPPRQV VKRXOG KDYH D and remains the most authoritative (although not the most complete) statement of the new convention to date.[61]

The motion did not seek to give final Commons approval to troop deployments, which would be subject to a further vote. Despite this, the motion was defeated by 272 to 285. The Prime Minister was forced to drop his plans.

The force ² both real and symbolic ² of that August 2013 vote was substantial. Not only did it stop the government in its tracks in deploying military forces; it was also hailed as the moment at which the convention of prior parliamentary approval gained its teeth. As one commentator LPPHGLDWHO\ SXW LW ¶LW LV QRZ KDUG WR VHH KRZ DQ ;military action without the support of Parliament, or indeed of the ZLGHU [65]SXEOLF·

Post 2013: Syria, Iraq and Targeted Killings

On 26 September 2014, David Cameron once again consulted the Commons, this time for air strikes against ISIS in Iraq. The motion explicitly ruled out the deployment of ground troops in combat operations as well as any air strikes in Syria without approval of the House.[66] It was carried by a landslide of 542 to 43.[67]

operating with our partners to alleviate further humanitarian suffering and to maintain the vital VHFXULW\ RI RXU RSHUDWLRQV·

However, May went further. She suggested that prior authorisation would not have been desirable because of a need to keep ¶LQWHOOLJHQFH DQG LQIRUPDWLRQ VRXUFHV ZLWK 3DUOLDPHQW· Jeremy Corbyn, disagreed. In his short response, he said that it was now necessary

in armed conflict, and to consult and seek prior authorisation from the House before HQJDJLQJ LQ PLOLWDU\ FRQIOLFW H[FHSW LQ WKH

The exceptions included compromising the effectiveness of UK operations, and the safety of British serviceme Q WKH 8.·V VRXUFHV RI VHFUHW LQWHOOLJHQFH 8.·V RSHUDWLRQDO SDUWQHUV *LYHQ WKH DOWHUQDWLY past precedents (such as drone strikes), it is understandable that the committee resorted to more principle based drafting. But the risk of such an open textured approach is that the government can pray in aid one or more of the exceptions in almost any situation.

The Future of the Convention

We close with four observations. First, it is notable that PACAC did not favour statutory constraints, wary of placing too rigid a shackle on government action and of the possibility of increased judicial review.[81] The difficulties of drafting legislation are even greater than with a parliamentary resolution, which can be more open textured.

Second, development of the convention has arisen as much from policy as practice. It originated in a declaration of principle in 2003, evolved through governmental and parliamentary reports (especially under Gordon Brown) and was recognised in the Cabinet Manual in 2011. For so long as the convention remains as much a matter of government policy as of precedent, it will be vulnerable to change in that policy. Successive gove U Q P H Q W V · or flexibility and executive autonomy have hindered the emergence of a predictable convention. Contrast the Johnson JRYHUQPHQW·V DWWLWXGH WR WKH SUHURJDWLYH DQG polar opposite of those under Gordon Brown, seeking to defend executive power rather than place more controls upon it.

Third, the convention risks being dislocated from the actual practice of going to war. Each time the question arises, warfare has progressed a little further. For example, the emergence of drone warfare appears to have created a further exception to the convention.[82]

latest report, parliament continues to play that role. However, it is the weaker partner, unable to bring about greater codification on its own.

The process of codification would be better effected by parliament and government together. The Cabinet Manual should reflect the expectations p

4. Treaties

Treaties are quite as important as most law, and to require the elaborate assent of representative assemblies to every word of the law, and not to consult them even as to the essence of the treaty, is prima facie ludicrous.

Walter Bagehot (1872)[83]

Introduction

The conclusion of treaties is a prerogative power of the Crown. The UK signs a wide variety of international instruments under this power, including unilateral and bilateral treaties, agreements requiring ratification and those that do not, legally binding documents and non-binding understandings. International instruments also range across a wide field of subject areas. Following Brexit, attention has recently been focussed on trade agreements; but the UK is a signatory to over 14,000 treaties, including international human rights instruments, environmental pledges and data-sharing arrangements.

However, the treaty-making power cannot change obligations or rights in domestic law, even if it places the UK under obligations in international law.[84] Where a treaty obligation requires a change in UK domestic law, the executive must turn to parliament for primary legislation or make the necessary changes through secondary legislation.[85] Where such a treaty requires ratification, it is government practice not to ratify the treaty before the domestic legislation is in place.[86]

Parliamentary scrutiny is largely restricted to treaties that require ratification. Furthermore, it has traditionally been restricted to the post-negotiation, pre-ratification period. The last twenty years and more have seen consistent calls from parliamentary committees and others to strengthen this scrutiny, to expand its scope to other types of agreements, and to different stages of the treaty-making process. For the past few decades, some further scrutiny was afforded through the structures of the European Union (EU). Its ability to conclude trade agreements relieved the negotiating burden on the UK while the UK was a member state. Furthermore, the European parliament has significant powers of treaty scrutiny, with a veto power, a power to propose amendments to treaties, and the right to information and consultation during negotiations.[87] The 8.·V H[LW IURP WKH (democratic scrutiny we have within the EU no longer apply. This shift has unleashed a renewed parliamentary interest in reforming our own domestic provisions, which are weaker than those in Europe.[88]

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[83] W. Bagehot, The English Constitution, 2nd edn (London: H.S. King, 1872), xxxix.

[84] Walker v Baird [1892] AC 491. For the limited lawful effects of treaties on domestic law, see A. 7 Z R P H \ ¶ 0 L O O H U DQG WKH 3 U H U R J D W L Y H and LQ Young (eds), The UK Constitution After Miller: Brexit and Beyond (Oxford: Hart Publishing, 2017), 76-80.

[85] JH Rayner (Mincing Lane) Ltd v Department of Trade [1990] 2 AC 418.

[86] HM Government, Government Response to the Constitution Committee Report: Parliamentary Scrutiny of Treaties (London: HM Government, 2019), 8; Reference on the Continental Shelf Bill [2019] UKSC 64, [29].

[87] Treaty on the Functioning of the European Union, art 218(6).

[88] E.g. Exiting the European Union Committee, Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship (Sixth Report of Session 2017-19) HC 1240 2017-19 (London: House of

From Ponsonby to CRAG

The Ponsonby Rule

Prior to 2010, p D U O L D P H Q W · V U R O H L Q V F U X W L Q L V L Q J W U H D W L
constitutional convention set out by Parliamentary Under-Secretary for Foreign Affairs, Arthur
Ponsonby, in 1924. During a debate on the Treaty of Peace (Turkey) Bill, Ponsonby stated it was
¶ W K H L Q W H Q W L R Q R I + L V 0 D M H V W \ · V Houses of Parliament very W R O D
W U H D W \ Z K H Q V L J Q H G I R U D S H U L R G R I G D\ DIWHU

However, while section 20(4) of the a F W R X W O L Q H G W K H ¶ Q H J D W L Y H U H V R
Ponsonby, it only grants parliament the power to delay ratification, not to veto it.[98] If the Commons resolves against ratification, this delay may continue indefinitely but, if the Lords do so, then the government may continue to ratify the agreement once an explanatory statement for doing so has been laid before the House. CRAG did not, therefore, add very much meat to the bones of the pre-existing convention. Indeed, it did not entirely codify the convention, because the definition R I ¶ W U H D W L H V · F R Q W D L Q H G L Q V H F W L[99] R Q R I & 5 $ * L V Q D

Nor did CRAG add any new mechanisms for scrutiny. Despite a Foreign Office undertaking to give them relevant information,[100] Commons departmental select committees have played only a limited role. However, Brexit has stimulated a more proactive approach elsewhere. Initially constituted as a sub-committee of the House of Lords European Union Committee,[101] the International Agreements Committee (IAC) became a full sessional committee of the House of Lords in January 2021

A final reason why parliament should have greater powers to scrutinise treaties is that the courts do not generally have jurisdiction over how the government exercises the treaty-making power.[103] In Miller 1 the Supreme Court went to great lengths to emphasise the unique circumstances that led it to intervene.[104] The courts only have authority to rule on domestic law and, unlike parliament, cannot provide effective scrutiny of treaty-making or treaty-keeping.

Reform

Despite this strong case for greater parliamentary involvement, and renewed interest following Brexit, very little has changed since 1929. There are two broad areas in which reforms are now needed: in scrutiny during the negotiation of treaties; and in scrutiny after negotiations but before ratification. In each, it will be necessary to consider whether there is the political will, the capacity and the institutional competence to succeed.

Scrutiny During Negotiations

There is an obvious need for secrecy and flexibility during negotiations. However, this must be balanced by ongoing scrutiny if parliament is to be presented with any real choice in approving the content of concluded treaties and any implementing legislation.

The most obvious way in which parliament can balance the need for secrecy with the transparency required for scrutiny is through committees. Each House already has some capacity for pre-ratification scrutiny by committees. For example, the IAC has received evidence in private and had access to confidential briefings on the progress of certain trade negotiations.[105] Unsurprisingly, given the context of Brexit, most progress has been made on trade negotiations. In 2019, the Department for International Trade set out the processes that would enable scrutiny of future free trade agreements, which include the provision of sensitive information to committees during the course of negotiations on a confidential basis.[106] In May 2022, the government pledged to undertake a public consultation on new FTAs and publish its negotiation objectives, after which the IAC in the Lords or the International Trade Committee (ITC) in the Commons could request a debate and publish regular updates and give evidence (both publicly and privately) to the relevant committee.[107]

At present, treaty scrutiny is fragmented, dealt with separately by each House and further split across the departmental select committees in the Commons. In its 2008 report, the Joint Committee on the Draft Constitutional Renewal Bill recommended the formation of a joint committee of both Houses to scrutinise treaties.[108] This suggestion has recently been taken up again, and the House of Commons Liaison Committee noted in its 2019 report the need to work

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[103] Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 417-418. An (exceptional) contrary view was given by Lord (Tom) Denning in Laker Airway Ltd v Department of Trade [1977] QB 643.

[104] Miller 1 above n3.

[105] International Agreements Committee, Working Practices: One Year On (Seventh Report of Session 2021-22) HL 75 2021-22 (London: House of Lords), para 46.

[106] Department for International Trade, Processes for making free trade agreements after the United Kingdom has left the European Union CP 63 (London: HM Government, 2019).

[107] Letter from Lord (Gerry) Grimstone to Baroness (Dianne) Hayter, 19 May 2022.

[108] Joint Committee on the Draft Constitutional Renewal Bill, Report HL 166 HC 551 2007-08 (London: House of Lords and House of Commons), para 238.

closely with its House of Lords counterpart to discuss future options, including a joint committee.[109] A joint committee would address the current discrepancy between the predominant weight of actual scrutiny being performed by the Lords and the predominant strength of the powers under CRAG resting in the Commons. Furthermore, it might well be better resourced, like the Joint Committee on Human Rights.

Pre-ratification Scrutiny

The House of Lords Constitution Committee and IAC have both suggested that the current provisions of CRAG for scrutiny between the conclusion of negotiations and ratification are deficient.[110]

First, the CRAG rules produce an extremely short timetable of just 21 sitting days for the relevant committee to scrutinise the treaty and produce a report.[111] If a debate is to take place as well, time is under even greater pressure. Ministers already possess the power, under section 21 of CRAG, to extend the period, and the Lords Constitution and International Agreements Committees have repeatedly invited the government to commit to extensions to allow for proper scrutiny.[112] Notably, the government refused to extend this period in order to allow the ITC to conclude its inquiry and publish a report on the Australia FTA.[113]

Second, the negative resolution model means that only some treaties are debated on the floor of the House, and few parliamentarians are truly involved in scrutiny. One possible reform is to shift W R D Q ¶ D I I L UPQ·WP[114] however, parliamentary capacity is extremely limited and there would need to be a filter to select the most important treaties for consideration. A better solution would be to retain the current negative resolution model, but to change the provisions of CRAG to give powers to the committees to recommend debates on particular treaties.[115] The IAC already has power to draw particular treaties to the attention of the House, but not all of thes1 0 0 1 o02 Tm6

&RPPRQV· GHOD\LQJ SRZHU LV WKHRUHWLFDO ,WtR ORQJ will remain difficult to hold one vote, let alone multiple votes every 21 sitting days.

)RXUWK &5$* GRHV QRW DSSO\ WR DQ\ ¶UHJXODWLRQ U PDGH XQGHU D WUHDW\· QRU WR DQ\ LQWHUQDWLRQDO law.[119] In April 2022, the government signed the UK-Rwanda MoU on the relocation of asylum seekers. Then, in May, the government signed bilateral security assurances with Sweden and Finland, which provided that the UK would assist either country in the event of an attack.[120] Neither agreement was subject to parliamentary scrutiny. 7KDW LV FRQWUDU\ WR 3R promise to draw to pa U O L D P H Q W · V D W W H Q W L R Q

> other agreements, commitments and understandings which may in any way bind the nation to specific action in certain circumstances and which may involve international

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5. Public Appointments

should not simply pack their own side in the Lords, but there is no enforcement mechanism other than self-restraint. However, in the last 25 years, the power to award peerages has become slightly more restricted by the creation of the House of Lords Appointments Commission.

HoLAC is an advisory, non-departmental public body which was created under the prerogative in 2000. Its first function is to nominate individuals to serve as independent Crossbenchers. Successive Prime Ministers have undertaken to approve without amendment the commiss L R Q · V recommendations, and during its first ten years the commission nominated 53 Crossbench peers. But the Prime Minister still controls the numbers. Under David Cameron those have been greatly reduced: in 2012, he asked the commission in future to nominate only two individuals per year, and the 2010-15 parliament saw only eight nominations. At the same time, Cameron expanded his power to nominate in each parliament up to ten distinguished public servants.[123] Under Boris Johnson, the number nominated by the commission has shrunk even further: he invited no nominations from the commission for almost three years, between June 2018 and February 2021, when two more Crossbenchers were

Conservative peers in or

be appointed.[136] WLWKLQ PRQWKV -RKQ 0DMRU·V JRYHUQPHQW KDG Order in Council and appointed the First Commissioner, Len Peach. This swift action illustrates the advantages of operating under the prerogative: the Commissioner has never been a creature of VWDWXWH DQG VXEVHTXHQW FKDQJHV PDGH E\ 2UGHUV LQ &RXQFLO KDYH EHHQ Orders in Council.

7KH &RPPLVVLRQHU·V SULPH WDVN LV WR HQVXUH WKDW open and fair competition. Ministers make the final decision, but the Commissioner helps to ensure that they select from a short list of appointable candidates, chosen from a strong and diverse field. The Commissioner regulates public appointments by issuing additional guidance, investigating complaints, and conducting regular audits.

The system has been subject to occasional reviews. In 2015, David Cameron asked Gerry Grimstone to conduct a review, with a view to streamlining the system, but also to reassert ministerial control. Grimstone obliged, proposing a Governance Code agreed by ministers in place RI 2&3$·V &RGH RI 3UDFWLFH EHLQJ VDIHJXDUGV WKDW DSSRLQWPHQWV DUH independent assessors. Having been a central player in helping to organise appointment competitions, the Commissioner was reduced to being a referee.

The government warmly welcomed the Grimstone report, but the outgoing Commissioner, Sir 'DYLG 1RUPLQJWRQ SURWHVWHG DW WKH GLPLQXWLRQ R

restraint and the preparedness of the Commissioner to speak out against breaches of the letter or WKH VSLULW RI WKH &RGH·[139]

In November, CSPL went further, recommending that the Commissioner needed to be put on a VWDWXWRU\ EDVLV ¶UHJXODWRUV ZKLFK H[LVW VROHO\ WR EH DEROLVKHG RU [140] The Committee received evidence from Sir David Normington, who spoke from his experience as First Civil Service Commissioner as well as Commissioner for Public Appointments:

> « WKH &LYLO 6HUYLFH OHJLVODWLRQ, which I knew, and knew JDYH PH WKDW WKRVH SRZHUV « except by going back to Parliament. In contrast, my powers as Public Appointments Commissioner were in an Order in Council which I knew could be changed by a stroke of the pen and a nod of the Privy Council. $QG WKDW GLG PHDQ , VXGGHQO\ IHOW YHU\ YXOQH gove UQPHQW·V SRZHU ZLWK YHU\ OLWWOH SXEOLF GHE change the rules.[141]

Judicial Appointments

The appointment of judges is the sphere in which the prerogative power of appointment has most effectively been curbed. A once cosy and informal system presided over by the Lord Chancellor, with few checks and balances, has been transformed into a statutory system where the Lord4(em)-161(w)-2

Created by Part 4 of the Constitutional Reform Act 2005, the JAC completely changed the appointment process. In place of secret soundings and taps on the shoulder, all judicial vacancies are now advertised, from the highest to the lowest. There is then a formalised selection process involving short listing, interviews, and for some posts, presentations or role-playing. The JAC was created as a recommending body, but in identifying a single name for each vacancy, it effectively functions as an appointing body. The Lord Chancellor could accept or reject this recommendation, or request its reconsideration. In practice, Lord Chancellors have nearly always

Conclusion

In the last 25 years, the patronage wielded by ministers in making public appointments has become significantly circumscribed thanks to the creation of three new regulatory bodies (OCPA, JAC, and HoLAC). But the power of these bodies varies greatly, and in recent years Prime Ministers have loosened the controls over public appointments generally, and in particular, over the power

6. Passports

Passports are an administrative device, and in this country there is virtually no law about them. Governments have always insisted that passports are granted, withheld or revoked under the royal prerogative [2] that is to say at the discretion of ministers; that no one has a legal right to a

requirements across Europe for aliens to hold passports became permanent.[156] By the middle of the twentieth century, the policy focus had turned to the withdrawal of a passport rather than its

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> The Foreign Secretary has the power to withhold or withdraw a passport at his discretion, although in practice such power is exercised only very rarely and in very exceptional cases. First, in the case of minors suspected of being taken illegally out of the jurisdiction; secondly, persons believed on good evidence to be fleeing the country to avoid prosecution for a criminal offence; thirdly, persons whose activities are so notoriously undesirable or dangerous that Parliament would be expected to support the action of the Foreign Secretary in refusing them a passport or withdrawing a passport already issued in order to prevent their leaving the United Kingdom; and fourthly, persons who have

grounds of legality, rationality, and procedural impropriety.[163] Applying the reasoning of the House of Lords in Council of Civil Service Unions v Minister for the Civil Service,[164] the court in Everett held that the justiciability of a prerogative power depended on whether or not its subject matter Z D V ¶ K L J K T h e R o u t l a w i t a[165]

this might be possible.[173] However, the scope of and policy for use of the prerogative would remain within the control of the g R Y H U Q P H Q W D Q G H [S D Q G L Q J W K H F R X U W V · human rights grounds would not prevent future Home Secretaries expanding their stated criteria even further.

The second avenue is the implementation of a statutory right to a passport. In many countries, the right to a passport and the processes of issuance and cancellation are set out in law.[174] New Zealanders have had a statutory right to a passport since the Passports Act 1980.[175] Even before this, the power to grant passports had been rendered statutory (although with an apparently wide discretion) by the Passports Act 1946. In Australia, the right to a passport is relatively recent,[176] but the power to cancel a passport appears to have been made statutory by the wide-ranging section 6 of the Passports Act 1920. As for Canada, although passports are still managed under the prerogative, the Canadian Passport Order 1981 governs the criteria for cancellation. There have been occasional calls for a statutory right to a passport in the UK, including private m H P E H U V · b

I consider that including non- V W D W X W R U \ S R Z H U V Z L W K L Q W K H , Q G H would again risk diluting the clarity of that remit, and may set an unhelpful precedent given that Prerogative powers are also used in a range of other contexts across Government. Furthermore, not all refusals of passports under these criteria may necessarily be on the grounds of terrorism-related activit

7. Conclusions

Prerogative, Past, Present and Future

This report has focused on evolution of the prerogative in the last 30-40 years. These have seen huge changes, with tighter regulation of the prerogative by the courts, and by parliament, alongside a process of greater codification. That applies to the personal prerogatives of the monarch as well as to prerogative powers of the executive, and this process of tighter regulation is the main theme running through this final chapter. But it has been an incremental process, in fits and starts, with two steps forward, one step back: reactive as much as proactive, driven by external events as much as changing constitutional norms.

The Role of Conventions

Traditionally, the prerogative has been regulated by convention, not law. Dicey described F R Q Y H Q W L R Q V L Q W H Q G H G W R U H J X O D W H W K H H[H U F L V H of the whole of the remaining discretionary powers of the Crown, whether these powers are exercised by the King himself or by the 0 L Q L V W H U V .[182] Conventions are unwritten rules of governmental morality. Their strength is that they can evolve and adapt to changing circumstances; their weakness is that they are unenforceable ² they work only so long as political actors consider them to be binding.

This report contains examples of apparent conventions which ultimately lacked that binding quality: the proportionality principle in appointments to the House of Lords, violated by David Cameron and Boris Johnson (chapter 5); the requirement to consult the House of Commons before engaging in military action overseas, ignored by Theresa May (chapter 3). One reason for proposing stronger measures, typically through codification in soft law or hard law, is that conventions are flouted. But codification may also be proposed simply for greater transparency: the Cabinet Manual was not initially compiled to prevent abuse, but to explain the rules on government formation ² including the continuity convention, the caretaker convention, and the confidence convention.[183]

Even when incorporated in a code, conventions remain largely unenforceable save in the political realm.[184] There is a simplistic spectrum, in terms of rising enforceability and durability, of convention to soft law to hard law. It is true that unwritten conventions are the most easily flouted; and soft law codes like the Ministerial Code can be ² and have been ² changed by a new Prime Minister.[185] But codification in statute is not always more durable: the provisions in the

[182] A.V. Dicey, Introduction to the Study of the Law of the Constitution, 9th edition (London: Macmillan, 1939), 426.
[183] Hazell and Foot, above n7 at 42-4.
[184] On the enforceability of conventions, see F. Ahmed, R. Albert and A

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Constitutional Reform and Governance Act 2010 (CRAG) for ratifying treaties failed the stress test of Brexit, and the Fixed-term Parliaments Act 2011 (FTPA) has proved transitory. So ultimately whether a convention or practice continues to be observed depends on continuing political consensus about its value: something we return to below.

consolidate under David Cameron, was considerably watered down by Theresa May in 2018. As

support: come the 2019 election, both Labour and the Conservatives were committed to its repeal, subsequently implemented in the Dissolution and Calling of Parliament Act 2022.

Codification needs to build consensus if it is to endure. That applies to codification in soft law as

criminal appeals, and the creation in 1995 of the Criminal Cases Review Commission. The dismissal of ministers remains a matter for the Prime Minister, but since 2006 he or she has been advised by the Independent Adviser on Minister VI nterests.[193]

There is continuing debate about the independence of these various watchdogs, with the Committee on Standards in Public Life (CSPL) pressing for some of them to be given greater security by being put on a statutory basis. In the final report of its Standards Matter 2 review, the committee concluded:

> « WKH GHJUHH RI In the Qregulation Hof the QMinisterial Code, public appointments, business appointments, and appointments to the House of Lords falls below what is necessary to ensure effective regulation and maintain public credibility. The Committee recommends that the government gives a statutory basis to the Independent $GYLVHU RQ 0LQLVWHUV· ,QWHUHVWV WKH 3XEOLF $S the codes they regulate, through new primary legislation. The Committee believes a statutory House of Lords Appointments Commission should be considered as part of a EURDGHU +RXVH RI /RUGV UHIRUP DJHQGD «[194]

But Further Regulation is Required

Despite the tighter regulation described above, there remain important gaps where the prerogative remains unregulated, or insufficiently regulated. These range from serious gaps to minor ones, from gaps in the law to gaps in parliamentary procedure, to the need for stronger conventions. This illustrates the great variety of prerogative powers, and the need for tailored solutions rather than a one-size-fits-all approach. Previous chapters about the individual prerogative powers have identified suitably tailored proposals for reform, which are summarised in the table below.

Table 1: Recommendations for tighter regulation of the Prerogative

Chapter	Topic	Recommendations
2	Dissolution, Prorogation, and Recall of Parliament	

out certain themes which run through all the recommendations. First is the Westminster versus Whitehall view of the constitution (see chapter 1). On dissolution and prorogation, the war making power, and the ratification of treaties, we come down firmly on the side of Westminster. Dissolution and prorogation should not be triggered solely by the executive, but subject to a parliamentary vote. The unstable convention about parliamentary approval of military deployment needs to be formalised in a resolution of the House of Commons. And parliament needs closer involvement in the negotiation and ratification of treaties.

The second connecting theme is the need for greater independence of some of the specialist watchdogs. As recommended by the CSPL, three watchdogs ² the House of Lords Appointments Commission, the Commissioner for Public Appointments, and the Independent Adviser on Ministe U Mterests ² all need to be put on a statutory basis.

A third theme is the need for greater transparency, and accountability, which runs through all the recommendations: from the negotiation of treaties, to the issue and withdrawal of passports.

A final theme is the need for further codification: for most of these recommendations to happen, it would require codification ² in statute, in changes to parliamentary Standing Orders, in tightening of the Cabinet Manual and the Ministerial Code.

The Prerogative Can Never be Fully Codified

Although further codification is required, complete codification of the prerogative is unachievable. 7KDW ZDV WKH FOHDU OHVVRQ IURP WKH %URZQ JRYHUQ

Codification of an open-ended prerogative into an equally open-ended statutory power does little to reduce the fuzziness of the law. Statutes can also be open-ended, grant extensive discretion, or allow wide delegation: those who recommend codification need to think hard about the content of the new law – otherwise the risk is that codification merely replicates the fuzziness of the prerogative.[199]

Conclusion: The Endless Tug of War Between Government, Parliament and the Courts

This final chapter has summarised how the last 30-40 years have seen gradually tighter regulation of the prerogative by parliament, by the courts, and by specialist watchdogs. On a Whig view of history it might be thought that process would steadily continue; but the Johnson government provided a stark reminder that reform of the prerogative is not all one way. In a vigorous reassertion of executive power, it reversed previous reforms such as the FTPA, pushed back against judicial review, and undermined constitutional watchdogs.

We said in chapter 1 that the underlying issue in all the debates about the prerogative is power: how much autonomy the executive should have to wield that power; with what degree of supervision (if any) from parliament or the courts; or (more rarely) from the monarch. If our conclusions in chapter 2 are accepted, the monarch would not be expected to exercise any real supervisory power, because dissolution and prorogation should be a matter for the House of Commons; but the monarch remains the ultimate guardian of the constitution, with deep reserve powers in the event of constitutional emergencies.

As for the courts, they also uphold the constitution in extremis, which is perhaps the best way of understanding their rulings in Miller 1 and Miller 2, when they reminded the government of the importance of two fundamental constitutional principles: parliamentary sovereignty, and the H [H F X W L Y H · V DaFiEeRnX QuWiDtEeLnGiLnWg by the courts are likely to be very rare, and for day-to-day supervision of the prerogative we must look to parliament. But for parliament to be effective requires political will and institutional leadership, both of which are in short supply. It also requires the right structures, and resources: an encouraging recent sign is the willingness of the House of Lords to create dedicated machinery to scrutinise treaties. But we have to be realistic in our expectations of Parliament, so long as it remains dominated by the executive.

Despite those difficulties, it is in parliament that the main tug-of-war over the prerogative will be played out. It is a tug-of-war endlessly fought in other countries between executive and legislature, as described in chapters 15 and 16 of our book. And even if in future the Whig (or Westminster) view prevails, and more prerogative powers are codified, the tug-of-war will still continue: the fascination of the prerogative, as of reserve powers in other systems, is that they never reach a steady state.

[199] M. Cohn, A Theory of the Executive Branch: Tension and Legitimacy (Oxford University Press, 2021).

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