CHAPTER 10:

CROWN PREROGATIVE: REINING IN THE POWERS

David V Williams

‘Every New Zealander goes to bed tonight knowing that Her Majesty reigns over us and the government rules.’
‘I think you can go to bed tonight knowing that Her Britannic Majesty the Queen of New Zealand reigns over New Zealand and that John Key is validly the prime minister.’

Christopher Finlayson, Attorney-General of New Zealand, 2014a/b

‘In assessing the propriety of the Governor General’s decision to prorogue Parliament, it is necessary to answer two questions: (1) Did the Governor General have a discretion to refuse the Prime Minister’s advice to prorogue Parliament; and (2) if so, did she make a wise decision in accepting the advice?’

Peter W. Hogg, legal adviser to the governor general of Canada, 2009

‘The government eventually acted more wisely than was at first proposed.’

Sir Paul Hasluck, former governor-general of Australia, 1979

‘Seven of the ten judges who were on the Chagos Islanders’ case agreed that using the prerogative power to exile the Chagos Islanders was an abuse of the royal prerogative and should be struck down. … The House of Lords overturned the decision, but even they agreed that there were legal limits to the use of the royal prerogative – they simply disagreed on whether those limits had been breached in that particular case. So the Chagos Islanders’ case has established, very importantly, that the royal prerogative was subject to the rule of law.’

Sir Stephen Sedley, retired Lord Justice of Appeal, UK, 2016

Reigning or Ruling

Westminster constitutions are now based on the supremacy of Parliament, and most governmental powers are exercised in accordance with rules prescribed by Acts of Parliament as interpreted and applied by courts. Nevertheless, there remain a number of important governmental powers that derive purely from royal prerogatives (Bartlett and Everett 2017). The exercise of Crown prerogatives can be potent political weapons for those who control the executive government. They may manipulate the paradoxical arrangement of powers sourced in monarchical sovereignty to legitimise actions taken with little or no democratic accountability in nations that purport to now be based on the will of the people as expressed in democratic politics. This was an issue close to the heart of the late British Labour politician Tony Benn, who said:

> We are told that power has moved over time from the throne to the Lords, from the Lords to the commons and from the commons to the people. But in practice power has now moved to the prime minister who then, exercising the powers of the crown without explicit consent from parliament, dominates the whole system. The House of Commons is the only elected part of Parliament and democratic principles should require that all prerogative powers be controlled by that house. (McKie 2000)

Benn's expectations have yet to be met.

Questions also arise as to the role of the courts in relation to prerogative powers. Richard Gordon observes that between 1688, the beginnings of constitutional monarchy, and 1985 prerogative power could not be challenged, any more of course than an act of Parliament could be challenged (Gordon, Interviews, 2016; Blick and Gordon 2016: 18). In the 1985 *GCHQ* case, a UK government prerogative decision to ban employees of the Government Communications Headquarters from joining a trade union was challenged. The restrictions on trade unions was eventually justified on national security grounds, but the

House of Lords established new law in holding that exercises of prerogative power were amenable to judicial review if illegality, irrationality or procedural impropriety could be shown (*Council of Civil Service Unions v. Minister for the Civil Service* [1985]).

That precedent was highlighted by many of those whom we interviewed in the UK on controversies involving contemporary uses of prerogative powers. Also important to this chapter is the notion, based on an aphorism in Thomas Macauley's *History of England* (1855), that a constitutional monarchy 'can be defined as a state which is headed by a sovereign who reigns but does not rule' (Bogdanor 1997: 1). So what is it to 'reign', and who actually 'rules'?

Reserve Powers

A few of the Crown prerogative powers, known as the reserve powers, have to be exercised by the monarch (or representative) in person. Canadian academic (and expatriate New Zealander) Peter Hogg describes the rare situations when the governor-general 'possesses a personal prerogative, which provides her with the discretion as to whether or not to accept any advice that is tendered' (Hogg 2009: 196–97). This was a matter of great significance in Canada in 2008 in a dispute over whether Parliament should be prorogued on the advice of a prime minister who may well have been about to lose the confidence of the House of Commons. Less controversial are the personal decisions the Queen, governors-general and lieutenant governors must make subsequent to each general election. As Sir Anand Satyanand, former governor-general of New Zealand, put it to us, 'the vital thing that the governor general has to do' was 'passing the parcel of power.' It is his personal responsibility to accept the resignation of an outgoing prime minister and 'pass the parcel' of political power to the person who now has a majority in the House (Interviews, 2015).

Over time prerogative powers have been circumscribed by constitutional conventions (Hazell and Morris 2017), and in some realms Cabinet Manuals clarify what the conventions now require of those who act in the name of the sovereign. They do not appear in any constitution or statute and they are not enforceable in courts. They are described as being part of the 'unwritten' constitution in Westminster systems based on parliamentary supremacy (Wade 1955; Eleftheriadis 2017; Willis 2015). The 'unwritten' nature of these conventions constraining prerogative powers was described to us by Martin Loughlin: 'Our whole tradition is one in which we don't write things down. Back to the common law. The common law is – in the classical expression – *lex non scripta*, unwritten law.' Further to that, he added, 'keeping things opaque but maintaining indivisible authority at the centre was always part of that governing tradition' (Interviews, 2016).

The Exercise of Reserve Powers

Given their origin in powers created by authoritarian English monarchs in the distant past, constitutional monarchs and their vice-regal representatives tend to be discreet in the exercise of reserve powers that might be perceived to undermine choices made by democratically elected heads of government. The reserve powers remain, however, and there are instances when they are invoked. Convention has it that it is not be appropriate to do so just because a government's policy is not liked by a governor-general, but they may be relied upon if there is a perceived danger that a government may be acting in breach of norms of legal and procedural propriety. Little is publicly known about specific instances, but Anne Twomey relies on her own personal knowledge and involvement in New South Wales to write that government ministers do indeed modify or rescind decisions in the light of vice-regal communications behind closed doors:

> [It has been] argued that if a monarch today were to reject prime ministerial advice … the Prime Minister would be likely to resign in protest. While that might be the

> academic and theoretical position, it is most unlikely to occur in practice. Few governments are prepared to give up the right to govern and resign because of disagreement with the head of state. … It is simply not worth the political capital to engage in the fight. (Twomey 2018: 113)

Even with freedom of information laws in place, those communications and their impact on acts or omissions of elected governments will not become a matter of public record until well after all relevant actors are dead. Perhaps even then they may not see the light of day. Some scholars have an intense interest in the role of Buckingham Palace (if any) in the dismissal of Gough Whitlam as prime minister of Australia by the governor-general, Sir John Kerr, in 1975. Evidence of the Queen's involvement has been alleged but archival material will not be made public any time soon. In 2018 the Federal Court ruled that the Palace letters between Kerr and the Queen relating to Kerr's dismissal of the Whitlam government are 'personal' and not Commonwealth records, thus continuing the embargo on their release at least until 2027 (*Hocking v. Director-General, National Archives of Australia* [2018]).

What we do know is that Westminster constitutions continue to bestow reserve powers on the sovereign. They include the appointment and dismissal of prime ministers and ministers and summoning, proroguing and dissolving parliaments. Clearly, these are matters of the highest constitutional significance. One of the crucial issues facing those who argue for a more formal written constitution to replace the flexibility of the Westminster system is how reserve powers and political conventions might be defined in a new constitution – especially if constitutional reform includes the move from constitutional monarchy to a republican head of state.

More in the public gaze are exercises of royal prerogative powers by members of the executive government on matters such as entering, ratifying and withdrawing from treaties, declaring war and dispatching armed forces personnel to theatres of war, and dealings with

British subjects in directly ruled Crown overseas territories. There is no requirement for a parliamentary mandate or public scrutiny when prerogative powers are exercised even though what the powers actually are, and when they can be appropriately used, remains ambiguous and debatable. While some argue that one of constitutional monarchy's chief merits is that there are checks on executive power, others maintain that the Crown's chameleon nature can provide a mask for the exercise of executive power without democratic mandate.

Genuflecting to Bagehot's *The English Constitution*

It was Walter Bagehot who drew attention to the importance of the monarchy's symbolic power. Though purporting to be merely describing the monarchy, Bagehot promoted the myth that Britain's constitution was or certainly ought to be understood as a 'disguised republic'. That notion was current in nineteenth-century English debates on the monarchy (Craig 2003), and it is a myth that resonates still in some quarters – including the emphasis, discussed in Chapter 6, that Australians for Constitutional Monarchy put on the 'crowned republic' to describe the status quo. Hence, they argue, there are no good reasons for republicans to advocate for constitutional change.

In debates on such issues in realms with a Westminster-based parliamentary system, Bagehot's name is invariably *the* primary authority on the role of the sovereign in a constitutional monarchy. For Craig, '[t]he spectre of Bagehot haunts the historiography of the monarchy' (2003: 168). Twomey notes a constant genuflection to Bagehot's 'extremely influential' ideas that have moulded "the view of the public and academics … even though they did not accurately reflect the reality" (2018: 94). Bogdanor observes that 'the writings of Bagehot were to attain canonical status' (1997: 40–41). He mentions that George V, George VI, Elizabeth II, and the Prince of Wales have all studied *The English Constitution*' (1997: 32–33), as has Prince William, it seems (Smith 2013: 89).

In one respect Bagehot's prominence in constitutional discourse is surprising. Bagehot studied law only briefly. His career was as a journalist. He co-founded the *National Review* and was editor-in-chief of *The Economist*. A series of articles in the *Fortnightly Review* were collated and published as *The English Constitution* in 1867. Yet his writings contain quotable passages about aspects of constitutional monarchy that reverberate strongly to this day. Amongst the best known are these:

- No one can approach to an understanding of the English institutions … unless he divide them into two classes. … first, those which excite and preserve the reverence of the population—the *dignified* parts, if I may so call them; and next, the *efficient* parts—those by which it, in fact, works and rules (1867: 4–5).
- A cabinet is a combining committee, —a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state. In its origin it belongs to the one, in its functions it belongs to the other (1867: 15).
- The sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn. (1867: 103).

The third excerpt is our focus in this chapter. Among Bagehot's arguments for the success of the English constitution is that it was unnecessary to explain to 'the mass of uneducated men' who 'really believe that the Queen governs … the recondite difference between "reigning" and "governing"' (1867: 40). This 'recondite difference' has morphed into the now trite aphorism attributed to Bagehot that 'the Queen reigns, but she does not rule' (British Monarchist League website). That precise wording can be found earlier than 1867 in Macauley's writings (Bogdanor 1997: 1), but Bagehot advocated the same dichotomy. The principle appears in Sir Kenneth Keith's introduction to New Zealand's *Cabinet Manual* as 'the Queen reigns, but the government rules' (Keith 2017: 3). The United Kingdom *Cabinet Manual*, which drew heavily on the New Zealand precedent (Hazell and Morris, Interviews, 2016), strongly reflects the influence of Bagehot's writings:

> The Sovereign is the Head of State of the UK, providing stability, continuity and a national focus. By convention, the Sovereign does not become publicly involved in the party politics of government, although he or she is entitled to be informed and consulted, and to advise, encourage and warn ministers. For this reason, there is a convention of confidentiality surrounding the Sovereign's communications with his or her ministers. The Sovereign retains prerogative powers but, by constitutional convention, the majority of these powers are exercised by, or on the advice of, his or her responsible ministers, save in a few exceptional instances (the 'reserve powers'). (Cabinet Office 2011: 3)

Challenge and Response in New Zealand, 2014

The enduring significance of Bagehot's assertions and Macauley's aphorism in constitutional discourse can be seen in government responses to a finding of New Zealand's Waitangi Tribunal in 2014. After a detailed inquiry into the significance and meaning of the Declaration of Independence 1835 and the Treaty of Waitangi 1840, the Tribunal found that those who signed the Treaty 'did not cede their sovereignty in February 1840: that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather they agreed to share power and authority with the Governor' (Waitangi Tribunal 2014: 526–27). In light of this finding of historical fact, what might be the status of Crown assertions as to the sovereignty of New Zealand now? How was British sovereignty acquired if not by that Treaty? Was it a colonialist imposition, followed by conquest in some areas, and eventually general acquiescence that the Queen's writ ran throughout the land in the decades that followed? The attorney-general, Christopher Finlayson, did not engage with such issues. Instead, he invoked the language of Bagehot and Macauley. There was no

question the Crown had sovereignty in New Zealand, and the report did not change that. As quoted in the preface to this chapter, his response to media inquiries included:

> I think you can go to bed tonight knowing that Her Britannic Majesty the Queen of New Zealand reigns over New Zealand and that John Key is validly the Prime Minister. (Finlayson 2014b)

This distinction between 'reigning' and 'ruling', as anthropologist Declan Quigley observes, quoting Lucien Scubla, is that 'to reign does not mean to govern or to give orders, but to guarantee the order of the world and of the society by observing ritual prescriptions' (Quigley 2005: 1).

Monarchs and Governors Do Not Always Follow Bagehot

The Bagehot tripartite mantra was that the monarch's job when responding to advice from ministers was restricted to the right to be consulted, to encourage and to warn. A modified version set out in the UK *Cabinet Manual* holds that the monarch has the right 'to be informed and consulted, and to advise, encourage and warn ministers' (Cabinet Office 2011: 8). Was that actually the case in 1867, and is it the case now? Harold Laski, writing in the late 1930s, argued that Queen Victoria was no 'passive instrument in the hands of her ministers' but rather an 'active and insistent agent in the conduct of government' – blocking army reforms, securing the appointment of some ministers and preventing the appointment of others, etc. (Laski 1938: 397). Later kings were also 'more interventionist in their relations with the government than Bagehot's constitutional idyll would have allowed' (Twomey 2018: 94, citing Laski 1938: 398–401). This suggests that Bagehot's work, far from being a description, is another instance from Victorian Britain of the 'invention of tradition' (Cannadine 1983). Bagehot sought to transform the monarchical constitution to that of a 'disguised republic', and he used his journalistic abilities with language to try to constitute

such a reality. Over 150 years later his myths have become much closer to actual constitutional practice. Yet, there are known instances of divergence from the Bagehot picture and perhaps many more examples that will never be known publicly.

A striking example of non-compliance was King George V's fateful intervention after the Menshevik revolution of February 1917 in Russia (but before the Bolshevik revolution of October 1917) to reverse government decisions to grant asylum to the Romanov royal family and to send a Royal Navy vessel to rescue them. Mindful that it would be taken amiss for a constitutional monarch to extend a hand of friendship to an autocrat, George V urged the foreign secretary, Arthur Balfour, and Prime Minister David Lloyd George to rescind the government's rescue offer. When Balfour responded that the offer had already been made and could not be taken back, the King through Lord Stamfordham (his private secretary) kept up the pressure anyway. If Bagehot's version of the constitution was correct, George V had no power to insist that the naval warship already on its way should be recalled, but the government bowed to the King's pressure and the mission was aborted. In hindsight, Lord Stamfordham and George V claimed that the King had wanted to rescue his cousin all along, and it was his wicked leftist prime minister who would not allow him to do it (Aronson 2015). Lloyd George never publicly disputed his King's highly inaccurate version of the facts. Only when the official government records were declassified in the 1980s was the maligned prime minister was posthumously vindicated (Rose 1983: 210).

Much more public was the decision in 1926 of the governor-general of Canada, Lord Byng, to refuse the advice of the prime minister of a minority government, W. L. Mackenzie King, to dissolve Parliament and call another general election. Instead the governor-general invited the leader of the somewhat larger party (in a multi-party House) to become prime minister, but he could not retain the confidence of the House either and a subsequent election

was won by King (Forsey 2013). This use (or abuse) of royal prerogative powers was a primary catalyst for the strong stance taken by Canadian delegations to imperial conferences in the 1920s that led to the enactment of the Statute of Westminster 1931 – thus entrenching the legal status of Dominions as independent nations within the British Empire.

Memories of the Byng–King crisis returned to centre stage in Canada in 2008. Several commentators suggested that the governor-general, Michaëlle Jean, would have been acting within her reserve powers if she had refused advice offered by Stephen Harper, the incumbent prime minister leading a minority government, in the light of a publicly notified agreement between three opposition parties (commanding an overall majority in the lower house) to pass a vote of no confidence in the government when Parliament was scheduled to reconvene four days later (Russell and Sossin 2009). After some deliberation, Jean eventually chose to act on Harper's advice. Unlike King in 1926, Harper's advice was not to dissolve Parliament shortly after an inconclusive general election but rather to have it prorogued for two months whilst the government prepared a budget to put before the re-assembled House of Commons. Though not at liberty to disclose his own confidential advice to Jean, Hogg is on public record as to his views of the constitutional issues in the answers to the questions he posed at the beginning of this chapter. In his estimation, the governor-general's personal prerogative, freed from the usual obligation to accept the advice of a prime minister, is in play if that prime minister has lost the confidence of the House and that this extends to a situation when the government is about to lose the confidence of the House. Jean did have the power and discretion to refuse Harper's advice, but in the actual political circumstances at the time (justified by later events), she chose wisely to exercise her discretion in favour of granting the prorogation that the prime minister sought.

Less dramatic, but highly pertinent to this narrative, are two New Zealand examples. Governor Gordon in 1881 commuted a death sentence to penal servitude for life 'according to my own deliberate judgment' (1881: 1). In 1941 Governor-General Newall stood his ground in the face of explicit advice in favour of clemency for prisoners (Twomey 2018: 110–11). Doubtless it is difficult to draw a line between the sovereign's representative exercising the Bagehot-approved right to warn and encourage – as Newall thought (Quentin-Baxter and McLean 2017: 209) – and his or her objections being seen as a blatant refusal to act on the advice proffered by ministers, as Acting Prime Minister Nash perceived it (Sinclair 1976: 204).

The English Constitution: From Desirable Myth to Agreed Convention?

In Chapter 2 I argued that Sir Edward Coke's efforts to limit Charles I's royal autocratic powers by the enactment of the Petition of Right 1627 were based on ahistorical myths about an ancient constitution and a romanticised Magna Carta. Yet those myths were transformed into constitutional fact half a century later following a Dutch invasion (the 'Glorious Revolution') and the supremacy of Parliament asserted in the Bill of Rights 1688. The strict confidentiality of communications between those acting for the sovereign and their ministers makes it difficult to know whether a similar argument can be advanced about Bagehot's writings on constitutional monarchy being in the nature of ahistorical myth. While these were not an accurate representation of how Queen Victoria acted during her long reign, has 'constant genuflection' to Bagehot nonetheless produced some firm conventions limiting the powers of the sovereign? Can the Queen or her vice-regal representatives in the realms, states and provinces on occasion intervene to divert a government from a course of action it had decided on? Should ministerial advice always be implemented straightaway?

Westminster constitutions do evolve. Bagehot's wording now appears in Cabinet Manuals in some realms. Yet, behind the scenes, can a long-serving monarch or an astute and respected vice-regal officer still deflect ministers from their initial decisions without breaching political conventions? It is unlikely to be true that the Queen's personal prerogatives have been so diluted during the course of her reign, as Hazell and Morris suggest, that the sovereign has no effective reserve powers left (2017: 6). Some of our interviewees suggested that Elizabeth II, whilst firmly avoiding party political issues, has exercised a good deal more influence than the phrase 'to encourage and to warn' would suggest (anonymous~~Mace~~ ~~Archer-Mills~~, Interviews, 2015 and 2016). A possible instance, late in her reign, is the suggestion that 'the Queen put her foot down' over the ill-conceived attempt of the Blair government in 2003 to abolish the office of Lord Chancellor without enacting legislation (Hardman 2012: 184–85).

Outside the UK, we do have published reflections of a person who fulfilled a vice-regal role. Sir Paul Hasluck was governor-general of Australia 1969–74. He is quoted in the third of the set of statements prefacing this chapter. Archival material shows that Hasluck managed to steer the Australian prime minister away from implementing a decision (without clear cabinet support) to dispatch defence forces to maintain order in Papua New Guinea (Twomey 2018: 100–102). Without breaching confidentiality in the details recounted, on Hasluck's own published account of his vice-regal tenure, there were four or five occasions on which major issues arose and 'the government eventually acted more wisely than was at first proposed' (Hasluck 1979: 40–41).

The Crown's Prerogative Executive Powers and War

If we cannot be certain about the full extent of the monarch's reserve powers, we are in a better position to assess public actions of the executive based on Crown or royal prerogative

powers. The executive branch of government frequently finds it useful and necessary – indeed 'efficient' in Bagehot's terms – to invoke prerogative powers. Though parliamentary supremacy is a pillar of the Westminster constitution, that does not mean that the executive branch of government must always seek legislative authority for its actions nor indeed seek any democratic scrutiny of decisions made. Ministers often act in important matters without much or indeed any reference to Parliament – though, ultimately, they are accountable to that institution whose confidence they must retain to remain in power unless and until voted out of office. This chapter now turns to canvas briefly a few controversial examples of the use of prerogative powers that cropped up in the interviews for our project.

One of the most controversial instances was the United Kingdom government decision to rely on the war prerogative when invading Iraq in 2003. British armed forces were ordered into combat by their government as an ally of the United States of America and other members of a coalition of states willing to take part in invading a foreign nation (other than in self-defence) without explicit authorisation from the Security Council of the United Nations. This triggered anti-war demonstrations in over 600 cities worldwide, including London, where an estimated 2 million people attended a rally in Hyde, making this perhaps the largest protest march in UK history (Jeffrey 2003). As it transpired, the prerogative power was utilised without full and frank disclosure of relevant facts to members of the British Parliament. The report of a Committee of Privy Counsellors (chaired by Sir John Chilcot) into Britain's role in the Iraq war was published in 2016 when a number of our interviews were in progress. That report found some severe failings in the manner the prerogative to enter into military hostilities was exercised by the then government. It concluded that the government of President Saddam Hussein did not pose an urgent threat to British interests, that intelligence regarding weapons of mass destruction was presented with unwarranted certainty, that peaceful alternatives to war had not been exhausted, that the United Kingdom

and United States had undermined the authority of the United Nations Security Council, that the process of identifying the legal basis for the entire enterprise was far from satisfactory, and indeed that war in 2003 was quite unnecessary (Committee of Privy Counsellors 2016). Sedley's comment on that report was that 'the power to make war is the ultimate prerogative power. And it was misused systematically by ministers' in 2003 (Interviews, 2016). Sir Edmund (Ted) Thomas, a retired New Zealand appellate judge, went so far as to frame a 12-point indictment of Tony Blair listing offences and misjudgments he had committed in ordering the Iraq invasion: 'Tony Blair, in foreign policy, exerted unbridled and unchecked power to pursue his personal vision. When that vision was threatened he was able to manipulate the political process to his own ends' (Thomas 2007: 48). Sir Stephen Laws, on the other hand, was more circumspect. A senior public servant who rose to be First Parliamentary Counsel and thus responsible for the drafting of all government legislation submitted to Parliament, he suggested to us that you have to distinguish between getting authorisation from Parliament for doing something and being accountable for doing it:

> I don't think there's any doubt at all that governments are accountable to Parliament for the way they carry on military conflict. In the last resort Parliament has control over the money. So, go back to the Middle Ages: you can't wage a war without money. And one of the proposals when Gordon Brown was thinking about giving more formality to the approval of military action was to do it via the voting of money.

As Laws noted, though 'various proposals were brought forward, nothing was ever enacted, certainly on war powers' (Interviews, 2016).

The various proposals included a Select Committee report in 2004, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*; a green paper, *Governance of Britain*, issued in 2007 by Gordon Brown when he became prime minister; a white paper, *The Governance of Britain – Constitutional Renewal*, along with a draft

Constitutional Renewal Bill 2008; and a 'Review of the Executive Royal Prerogative' in 2009 (Bartlett and Everett 2017: 16–18). Then, in 2014 the succeeding coalition government published a House of Commons Committee report, *Roles and Powers of the Prime Minister*, which also argued for 'more powers to be placed on a statutory footing, with parliamentary approval' (Bartlett and Everett 2017: 18–19). With respect to ratification of treaties and regulation of the civil service, prerogative powers were supplanted by the Constitutional Reform and Governance Act 2010. As for the rest of the ancient, ambiguous and significant executive powers of the Crown wielded by prime ministers and ministers, these remain intact in the UK.

Thus, the war prerogative power remains vested in the Crown, exercised by the executive, and there is no procedural legal requirement to seek parliamentary approval for executive actions. Yet whilst the Chilcot inquiry did not make findings concerning the criminal or civil liability of anyone responsible for the manner in which the war prerogative was used in 2003, the report did influence the political landscape and, for a while at least, the level of accountability to Parliament became more pronounced. For example, the House of Commons voted down a government motion to approve direct military action in Syria in 2013. When the vote was lost the prime minister, David Cameron, accepted that, in the light of the Commons decision, he should not seek alternative methods of authorisation for the desired military intervention. In 2015 the government returned to the Commons seeking support for the government's more limited proposal to order British air strikes against ISIS targets in Syria. On this occasion majority support was forthcoming. The coalition government in 2011 suggested that 'a convention had emerged by which Parliament would be consulted before the deployment of troops' (Bartlett and Everett 2017: 19) – although that wording may not cover other war actions such as missile attacks. In an interview Martin Loughlin suggested 'the government will not engage in [troop deployments] without tabling a

debate in Parliament and presumably will not precede with the military action unless Parliament has acquiesced by a majority vote. So that's another way in which those powers get regularised, institutionalised, rendered more accountable' (Interviews, 2016). The Chilcot Report doubtless contributed to rendering the executive more transparent and accountable when invoking a prerogative power than used to be the case. On the other hand, also in 2016, the minister of defence was firm that the government 'would not be bringing forward legislation to codify the convention into law, in order to "avoid such decisions becoming subject to legal action"' (Bartlett and Everett 2017: 20).

The Crown's Treaties Prerogative

What then might be the role of Parliament and/or the courts in relation to government decisions under prerogative powers to enter into treaties, to ratify them or to withdraw from them? In Commonwealth jurisdictions there is a strong trend towards seeking some form of parliamentary approval for treaties negotiated using prerogative powers, or at least offering Parliament the opportunity to veto ratification of a treaty that has been signed by the executive. In the UK, the Ponsonby Rule convention to that effect has been applied since 1924 and was codified into statute by the Constitutional Reform and Governance Act 2010 (Bartlett and Everett 2017: 14). It was the withdrawal element of the treaties prerogative, however, that became a white-hot political and legal issue in the UK in 2016 and 2017. The word 'Brexit' was coined to describe Britain's decision to withdraw from the European Union (EU) following a narrow majority for such an exit in a national referendum conducted on 23 June 2016. The government of the since-resigned prime minister, David Cameron, had stipulated no process as to how to deal with a vote in favour of exiting the EU. As Andrew Blick told us:

> It wasn't actually made clear in advance whether this would be a binding or non-binding referendum. There wasn't really much thought given to what would happen if one or more parts of the UK voted to remain if the UK as a whole voted to leave. So we've got that problem that Northern Ireland and Scotland both voted to remain, but the UK as a whole voted to leave. What do you do about that? That wasn't really thought through. (Interviews, 2016)

Paul McHugh suggested to us that Cameron's lack of forethought about such matters was utterly irresponsible: 'Why do you have representatives if they don't represent you?' (Interviews, 2017).

Nevertheless, the post-referendum government immediately deemed it a non-negotiable political reality that triggering Article 50 of the Treaty of Lisbon 2007 (which would enable exit negotiations to commence) must be implemented sooner rather than later. The incoming prime minister, Theresa May, indicated that this was a matter to be dealt with by the executive under prerogative powers. Other people had different ideas, and one of them was a British-Guyanese business owner, Gina Miller. She thought that if the statutory rights of British citizens under EC laws directly applicable in Britain were to be taken away, then only a parliamentary enactment could lawfully trigger Brexit negotiations. The litigation she launched, supported by counsel acting largely pro bono, provided ample food for thought and debate in academic circles (Young 2017; Robinson 2017) and very different responses indeed in other circles. The tabloid press in Britain, led by the *Daily Mail*, launched vitriolic personal attacks on members of the judiciary who found in favour of Miller's application and branded them 'enemies of the people' (Slack 2016). The government's strong preference for relying solely on prerogative powers was such that an appeal was taken to the Supreme Court. An 11-member full bench of the Supreme Court decided by an 8–3 majority to uphold the decision of the judges pilloried by the *Daily Mail*. The impact of triggering Article 50 on

statutory rights under EU laws was so significant, the court found, that explicit parliamentary consent was a condition precedent to triggering that article (*R (Miller) v. Secretary of State for Exiting the European Union* [2017]). As a consequence, the government was compelled to draft a statute for parliamentary scrutiny. It chose to draft and push through the Houses a minimalist measure enacted as the European Union (Notification of Withdrawal) Act 2017. The *Miller* litigation highlighted the contestation for legitimacy that reliance on ancient royal prerogative powers may provoke in a modern democracy, and especially so in the context of the antagonism between the principles of direct democracy and representative democracy that the Brexit referendum has provoked.

Prerogative Rule in British Overseas Territories

Of the vast territory and large populations of people that were once part of the Empire over which the sun never set, just a few specks of land with tiny numbers of inhabitants still remain under the direct rule of the United Kingdom government, though they are not part of the UK. There are 14 entities that are not part of the UK as such. Known as British Overseas Territories (BOTs), all of them are insignificant in terms of their area (except for territorial claims suspended under the Antarctic Treaty 1959). These BOTs along with the somewhat different, but still tiny, category of Crown dependencies (such as Jersey and Guernsey in the Channel Islands) attract a good deal more attention in world news than their size should warrant. This is because legal and financial advice firms based in British territories such as Bermuda, the Cayman Islands and the British Virgin Islands devise complex tax avoidance and tax minimisation regimes that enable wealthy individuals from other nations to hide their wealth and to avoid scrutiny as to how it was accrued. Customers availing themselves of their expertise hope and expect anonymity. Their expectations have been dashed by two immense troves of confidential information being put into the public domain. The Panama Papers in

2015 comprised some 11.5 million documents that 'show the myriad ways in which the rich can exploit secretive offshore tax regimes' (Harding 2016). The Paradise Papers added a further 13.4 million leaked documents on those 'who have sheltered their wealth in secretive tax havens' in Britain's offshore empire (Garside 2017). The scandal about the Panama and Paradise papers is that the millions of transactions they disclose are in fact in many instances entirely lawful. That is precisely the problem. How is it that territories ruled in the name of the British Crown can allow so much lawful latitude to the wealthiest people of the world so that they can contribute so little in tax revenues for the benefit of tax-paying citizens in the countries where their wealth was generated?

Protecting the interests of the super rich in Crown territories contrasts starkly with the history of the egregiously oppressive treatment of British subjects in the British Indian Ocean Territory (BIOT). Though BOTs are British, they are ruled by constitutional arrangements that puts the executive branch of the UK government in a position of power that is not all that different to the absolutist royal powers that Charles I sought to retain for himself in seventeenth-century England. There are few or no constitutional checks and balances, and there is no parliamentary body to which the executive is formally accountable. The majority of House of Lords judges in the decision on the Chagos Islands (*R v. Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)* [2008]) held that British subjects whose ancestors had lived on the islands for centuries never had a legal right of abode on their own islands, and could be denied any chance to return (even temporarily) to their homeland – now the site of a United States military facility. The quotation from our interview with Sedley – the last of the quotations that precede the text of this chapter – is the small solace that remained to him after the House of Lords reversed the Court of Appeal decision in which he had delivered the leading judgment (*R v. Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)* [2007]). In principle the royal prerogative

power used to dispossess the Chagos Islanders of their homeland was subject to the rule of law. Sedley and other lower court judges had applied the *GCHQ* precedent mentioned above. They held that actions by British government over a number of years in the BIOT were a flagrant abuse of the royal prerogative to issue Orders in Council and should be struck down. In the final outcome, though, the government's actions were found to be lawful. Even citation of the rights of subjects under the Magna Carta did not suffice to win the day in court.

That outcome has been subject to a great deal of adverse criticism from legal academics (Poole 2015), anthropologists (Vine 2011) and many others. Vine was particularly harsh in his comments on the final decision:

> Indeed, when one strips away the ideological and linguistic window dressing of the 'royal prerogative', the 'Crown', and 'Her Majesty's Government', the Chagossians' case is fundamentally about the power of one group of predominantly 'white' people to control the lives of another group of relatively powerless 'black' people. As the Chagossians' US lawyer Michael Tigar said of the British government one night after the court, 'Why do they get to make the choices? You're a subject people. That's why.' (Vine 2008: 27)

One author so despaired of the triumph of pragmatism over legal principle in *Bancoult (No 2)* that he compared it with the pragmatism of Chief Justice Mansfield in a case concerning the slave-trading ship the *Zong* (Arvind 2012). In 1772 Lord Mansfield famously held that a slave could not be owned in England and so 'the black must be discharged' (*Somerset v. Stewart* [1772]). Much less well known is that the same judge held as a matter of law – even if not conclusive for the outcome of the particular case – that an insurance claim concerning African slaves thrown into the sea to drown was rightly categorised as a claim for a loss of private property (*Gregson v. Gilbert* [1783]). The African slave trade was

considered vital to the British economy in the eighteenth century; providing military facilities for an ally was considered vital for Britain's national interests in the twenty-first century.

Concluding Comments

Undoubtedly the prerogative powers of the Crown have been used for good and important purposes of government, as well as for pragmatic and illiberal reasons of state. But should there be any such powers in a modern liberal democracy? Should British Overseas Territories continue to be governed by uncodified prerogative powers to permit financial sector activities to operate in ways that would not be countenanced in the metropolis? Sunkin and Payne were right to complain that Crown prerogative powers 'remain shrouded in uncertainty and continue to generate controversy' (Sunkin and Payne 1999: 1). Gordon Brown's efforts to modernise and define prerogative powers mostly came to nothing. The vestiges of absolute powers once vested in medieval English monarchs continue to permit a lack of effective constraints on executive government powers.

Some scholars, such as expatriate New Zealander Richard Ekins, are highly critical of the *Miller* decision. Ekins perceives no particular dangers in royal prerogative powers being exercised by the executive without supervision by the courts or parliaments (Ekins 2017). On the other hand Geoffrey Palmer and Andrew Butler have drafted a proposed constitution for New Zealand in which '[a]ll powers formerly exercisable by Ministers under the authority of the royal prerogative are abolished' (2018: 314). It remains to be seen whether that proposal will be any more successful than Brown's efforts were in the UK. For myself, I would favour constitutionalism and rule of law principles that enable courts to review and constrain potential excesses of executive power not otherwise subject to scrutiny. As E. P. Thompson put it, when reflecting on the importance of the rule of law in the very different context of Whig oligarchy rule in the eighteenth century, 'the inhibitions upon power imposed by law

seem to me a legacy as substantial as any' (Thompson 1977: 265). It is a moot point whether twenty-first century governments in the Commonwealth show sufficient respect for that legacy. The lyrics of a familiar anthem include 'Long to *reign* over us.' Whether or not some realms become republics in which the hereditary monarch ceases to reign – the subject of our next chapter – her prerogative powers most certainly do need to be codified to prevent abuses of power by those who *rule* over us.

Bibliography – Chapter 10

Aronson, Theo. 2015. *Crowns in Conflict: The Triumph and the Tragedy of European Monarchy 1910–1918.* London: Thistle Publishing.

Arvind, T. T. 2012. '"Though it Shocks One Very Much": Formalism and Pragmatism in the *Zong* and *Bancoult*.' *Oxford Journal of Legal Studies* 32(1): 113–51. Bagehot, Walter. 1867. *The English Constitution*. London: Chapman and Hall.

Bartlett, Gail, and Michael Everett. 2017. *The Royal Prerogative*. Briefing Paper No. 03861, August 17. London: House of Commons Library.

Blick, Andrew, and Richard Gordon. 2016. *Using the Prerogative for Major Constitutional Change: The United Kingdom Constitution and Article 50 of the Treaty on European Union.* London: The Constitution Society.

Bogdanor, Vernon. 1997. *The Monarchy and the Constitution*. Oxford: Clarendon Press.

British Monarchist League. Website. Accessed 14 April 2018 at www.monarchist.org.uk/the-constitution.html.

Cabinet Office. 2011. *The Cabinet Manual*. London: Cabinet Office.

Cannadine, David. 1983. 'The Context, Performance and Meaning of Ritual: The British Monarchy and the "Invention of Tradition" c. 1820–1977.' In *The Invention of Tradition*, edited by Eric Hobsbawm and Terence Ranger, 101–64. Cambridge; New York: Cambridge University Press.

Committee of Privy Counsellors. 2016. *The Report of the Iraq Inquiry*. London: Cabinet Office.

Craig, David M. 2003. 'The Crowned Republic? Monarchy and Anti-Monarchy in Britain, 1760–1901.' *The Historical Journal* 46(1): 167–85.

Ekins, Richard. 2017. ‘Constitutional Practice and Principle in the Article 50 Litigation.’ *Law Quarterly Review* 133: 347–53.

Eleftheriadis, Pavlos. 2017. ‘Two Doctrines of the Unwritten Constitution.’ *European Constitutional Law Review* 13(3): 525–50.

Finlayson, Christopher. 2014a. ‘Christopher Finlayson on Waitangi Finding.’ Radio interview, 14 November. *Checkpoint* programme, Radio New Zealand. Accessed 10 April 2018 at www.radionz.co.nz/national/programmes/checkpoint/audio/20157322/christopher-finlayson-on-waitangi-finding.

Finlayson, Christopher. 2014b. ‘Waitangi Tribunal Report.’ Radio interview, 14 November. Newstalk ZB. Accessed 10 April 2018 at www.newstalkzb.co.nz/on-air/larry-williams-drive/audio/chris-finlayson-waitangi-tribunal-report/.

Forsey, Eugene. 2013. ‘King-Byng Affair.’ *The Canadian Encyclopedia*. Accessed 16 April 2018 at www.thecanadianencyclopedia.ca/en/article/king-byng-affair/.

Garside, Juliette. 2017. ‘Paradise Papers leak reveals secrets of the world elite’s hidden wealth.’ *The Guardian*, 5 November. Accessed 14 May 2018 at www.theguardian.com/news/2017/nov/05/paradise-papers-leak-reveals-secrets-of-world-elites-hidden-wealth.

Gordon, Arthur. 1881. ‘Commutation of Sentence of Death Passed upon Wiremu Wharepa.’ *Appendices to the Journal of the House of Representatives, A.–1A.* Wellington: Government Printer.

Harding, Luke. 2016. ‘What Are the Panama Papers? A Guide to History’s Biggest Data Leak.’ *The Guardian*, 5 April. Accessed 14 May 2018 at https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers.

Hardman, Robert. 2012. *Our Queen*. London: Arrow.

Hasluck, Paul. 1979. *The Office of Governor-General*. Melbourne: Melbourne University Press.

Hazell, Robert, and Bob Morris. 2017. 'If the Queen Has No Reserve Powers Left, What Is the Modern Monarchy For?' *Review of Constitutional Studies* 22(1): 5–32.

Hogg, Peter. 2009. 'Prorogation and the Power of the Governor General.' *National Journal of Constitutional Law* 27: 193–203.

Jeffrey, Simon. 2003. 'UK's "biggest peace rally".' *The Guardian*, 15 February. Accessed 14 May 2018 at www.theguardian.com/uk/2003/feb/15/politics.politicalnews.

Keith, Kenneth. 2017. 'On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government.' In *Cabinet Manual 2017*, 1–6. Wellington: Cabinet Office, Department of the Prime Minister and Cabinet.

Laski, Harold. 1938. *Parliamentary Government in England.* London: Allen & Unwin.

Macauley, Thomas. 1855. *The History of England from the Accession of James the Second, Vol. IV*. Leipzig: Bernhard Tauchnitz.

McKie, David. 2000. 'How Ministers Exercise Arbitrary Power.' *The Guardian*, 6 December. Accessed 14 May 2018 at www.theguardian.com/uk/2000/dec/06/monarchy.comment4.

Palmer, Geoffrey, and Andrew Butler. 2018. *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand.* Wellington: Victoria University Press.

Poole, Thomas. 2015. *Reason of State: Law, Prerogative and Empire*. Cambridge: Cambridge University Press.

Quentin-Baxter, Alison, and Janet McLean. 2017. *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown*. Auckland: Auckland University Press.

Quigley, Declan. 2005. 'Introduction: The Character of Kingship.' In *The Character of Kingship*, edited by Declan Quigley, 1–23. Oxford: Berg.

Robinson, Tim. 2017. *Brexit Reading List: Legal and Constitutional Issues*. Briefing Paper 7702, 20 December. London: House of Commons Library.

Rose, Kenneth. 1983. *King George V.* London: Weidenfeld and Nicolson.

Russell, Peter, and Lorne Sossin (eds). 2009. *Parliamentary Democracy in Crisis*. Toronto: University of Toronto Press.

Sinclair, Keith. 1976. *Walter Nash*. Auckland: Auckland University Press.

Slack, James. 2016. 'Enemies Of The People.' *Daily Mail*, 4 November. Accessed 14 May 2018 at www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html.

Smith, David E. 2013. 'The Crown in Canada Today: How Dignified? How Efficient?' In *Canada and the Crown: Essays on Constitutional Monarchy*, edited by D. Michael Jackson and Philippe Lagassé, 89–100. Kingston/Montreal: McGill-Queen's University Press.

Sunkin, Maurice, and Sebastian Payne (eds). 1999. *The Nature of the Crown: A Legal and Political Analysis*. Oxford: Clarendon Press.

Thomas, Edmund W. 2007. 'An Indictment of Tony Blair, and the Failure of the Political Process.' *The Spokesman* 95: 12–48.

Thompson, Edward. 1977. *Whigs and Hunters: The Origin of the Black Act*. Harmondsworth: Penguin Books.

Twomey, Anne. 2018. *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems.* Cambridge: Cambridge University Press.

Vine, David. 2008. 'Decolonising Britain in the 21st Century? Chagos Islanders Challenge the Crown, House of Lords, 30 June–3 July 2008.' *Anthropology Today* 24(4): 26–28.

Vine, David. 2011. *Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia.* Princeton: Princeton University Press.

Wade, William. 1955. ‘The Basis of Legal Sovereignty.’ *Cambridge Law Journal* 13(2): 172–97.

Waitangi Tribunal. 2014. *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry, He Whakaputanga me te Tiriti – The Declaration and the Treaty*. WAI 1040. Wellington: Waitangi Tribunal.

Willis, Edward. 2015. ‘Unwritten Constitutionalism: A Study of the Principles and Structures That Inform New Zealand’s Distinctively Unwritten Constitution.’ PhD thesis. University of Auckland, Auckland, New Zealand.

Young, Alison L. 2017. *Democratic Dialogue and the Constitution*. Oxford: Oxford University Press.

Table of Statutes and Cases

Constitutional Reform and Governance Act 2010 (UK)

European Union (Notification of Withdrawal) Act 2017

Council of Civil Service Unions v. Minister for the Civil Service (the *GCHQ* case) [1985] AC 374 (House of Lords, UK)

Gregson v. Gilbert (1783) 99 ER 629 (King’s Bench, England)

Hocking v. Director-General of National Archives of Australia [2018] FCA 340 (Federal Court, Australia)

R (on the application of Miller and another) v. Secretary of State for Exiting the European Union [2017] UKSC 5 (Supreme Court, UK)

R v. Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2) [2007] EWCA Civ 498 (Court of Appeal, England and Wales)

R v. Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2) [2008] UKHL 61 (House of Lords, UK)

Somerset v. Stewart (1772) 98 ER 499 (King's Bench, England)