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# **DAMNED IF YOU DO AND DAMNED IF YOU DON'T: THE USE OF PRIME MINISTERIAL DISCRETION AND THE ROYAL PREROGATIVE**

Lorenzo Cladi

This is the accepted version of an article which is going to be published in *Parliamentary Affairs*

## **Abstract**

*The royal prerogative is one of the most significant elements of the UK's government and constitution. During the premiership of Gordon Brown and the Conservative-Liberal Democrat coalition led by David Cameron, there was momentum for a reform of the royal prerogative. During the Conservative premiership of Theresa May, the impetus for reform of the royal prerogative has seemingly diminished. This article analyses how the UK Government has made use of the royal prerogative in terms of deploying the armed forces, making and unmaking international treaties and proroguing Parliament. It asserts that whilst such powers have not been compromised, the ability of Prime Ministers to use them without parliamentary consent has been subject to greater contestation. This has appeared to rein in the discretion of Prime Ministers. However, this article argues that Prime Ministers' discretion has in fact become more meaningful as their political capital is invested in decisions concerning prerogative powers.*

## **1. Introduction**

A Prime Minister (PM), on behalf of the government, should react swiftly to international crises and to pressing threats. Nevertheless, elected MPs should have the opportunity to scrutinise each decision a PM takes on behalf of the government. The unwritten British Constitution preserves the right for a PM to use the royal prerogative in a number of policy areas: in so doing, the PM is not obliged to report to parliament or can do so at his/her discretion. The right of parliament to monitor the way the government operates and to bring it down if it so wished, is also preserved.

A lot of the day-to-day work of a government can be conducted by using the royal prerogative: when ministers issue passports or grant royal pardons, for instance, parliament rarely gets involved. However, there are other areas of governmental activity where an insufficient level of accountability of the government to parliament can give rise to political embroilment.

Therefore, it is not surprising that disputes over the royal prerogative have been, and continue to be, a regular occurrence in British politics. In recent years, the theme concerning the royal prerogative in connection with prime ministerial power and autonomy has attracted scholars' attention (Foley, 2004; Dowding, 2013; Bennister and Heffernan 2012 ; Heffernan 2003, 2005; Ihalainen and Matikainen, 2016; Strong 2015a, 2015b; 2018; Kaarbo and Kenealy, 2016). For some scholars (Weaver and Rockman, 1993) prime ministerial power has obvious underpinnings. The PM is only as strong as the Cabinet permits; and a legislative majority is, in turn, an important condition of autonomy. After all, that a government must have majority support in the House of Commons is Britain's most 'fundamental constitutional principle' (Bagehot 1936, p. 125). A PM's position is further strengthened by his/her ability to appoint ministers, allocate portfolios and assign responsibilities (Dewan and Hortala-Vallve, 2011). However, other scholars have argued that the autonomy of PMs, especially in the realm of foreign affairs and the use of force has waned, even in the presence of these conditions, due to a greater role for Parliament (Kaarbo and Kenealy, 2017; Kaarbo, 2018; Mello and Peters, 2018). Furthermore, in-depth studies (see for instance McCormack, 2019) have looked into the royal prerogative over war powers in the UK, showing how the executive can still sidestep parliament and arguing that the war powers convention should be put on a statutory basis. Scholars have also examined how the royal prerogative has withered because it has lost scope and legitimacy (Blick, 2014).

Missing from the literature is an article which examines manifestations of prerogative powers in connection with prime ministerial discretion. This article examines prerogative powers in the areas of deploying armed forces, treaty making and annulment, and prorogation of Parliament where the use of greater prime ministerial discretion has been key to give effect to important decisions at a time of unprecedented changes in British politics. This article makes the following assertions. Firstly, during the premiership of Gordon Brown there was momentum for a reform of

the royal prerogative in favour of putting prerogative powers on a statutory basis. Secondly, such momentum continued during the Conservative-Liberal Democrat coalition government but slowed down during the tenure of PM Theresa May. By looking at different manifestations of prerogative powers (deploying force, ratifying and annulling a treaty as well as proroguing parliament), this article argues that prerogative powers have not been compromised but the ability of Prime Ministers to use them without parliamentary consent has been subject to greater contestation, leading, for instance, to more substantial involvement of the Courts. Whilst this has appeared to rein in the discretion of prime ministers, the article argues that prime ministerial discretion has become more meaningful as political capital is invested in decisions concerning prerogative powers.

The article proceeds as follows. It firstly discusses the royal prerogative in respect of prime ministerial power. It then looks at the manifestations of prerogative powers. It does so by analysing the decisions taken by successive British governments in terms of deploying forces abroad. Secondly, it delves into the prerogative power to ratify and annul treaties. Thirdly, it looks at the prorogation of Parliament which occurred soon after Boris Johnson was sworn in in 2019. The final section wraps up the argument.

## **2. The Royal prerogative and prime ministerial power**

There is no universally accepted definition of royal prerogative. To borrow from A.V. Dicey (1959, p. 24), a royal prerogative is 'the residue of discretionary arbitrary authority, which at any given time is legally left in the hands of the Crown.' William Blackstone (1979, p. 111) opted for a tighter definition of prerogative powers being those the 'the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subjects. As Gavin Phillipson (2016, p. 1064) has recently put it, 'the ambiguities surrounding the royal prerogative, including its definition, scope and the roles of both parliament and courts in checking its exercise, may be aptly described as one of the central problems of the UK constitution.' In a similar vein, Andrew Blick has described the royal prerogative as a 'democratically unsatisfactory anomaly' (2011, p. 10).

The exercise of the royal prerogative is the result of custom and practice and it derives from arrangements which preceded the 1689 **Bill** of Rights (Hennessy, 2000). In light of the establishment of parliamentary authority after the 1689 Declaration of Rights, prerogative powers increasingly became subject to being overridden by parliamentary legislation and to being mainly exercised by ministers (Blick and Gordon, 2016). The scope of the prerogative has changed over time as it has been 'affected both by the common law (as developed by the courts) and by statutes (as enacted by Parliament)' (The Cabinet Manual 2011, p. 35). As Gail Bartlett and Michael Everett (2017, p. 4) remind us, there are three fundamental principles of the prerogative. Firstly, statute law is supreme and cannot be altered by the use of the prerogative. Secondly, the prerogative is subject to 'common law duties of fairness and reason' and therefore, it can be challenged by judicial review in most cases. Thirdly, 'while the prerogative can be abolished or abrogated by statute, it can never be broadened'.

Prominent reforms have taken place in recent years to review prerogative powers. In some cases, they have achieved success. The Constitutional Reform and Governance Act 2010, for instance, provided a statutory basis for the management of the civil service; prior to the 2010 Act, the power of appointment and regulation of civil servants was a prerogative one (Bartlett and Everett, 2017). The Fixed-term Parliaments Act 2011 abolished the prerogative power to dissolve parliament and introduced fixed-term elections (Bartlett and Everett, 2017). Yet, attempts to reform prerogative powers have taken into account the instances where a prerogative tends to be salient nowadays. In fact, there are many subjects covered by the royal prerogative (Blick, 2014), in some cases even dating back to the Middle Ages and therefore, the law is uncertain.

Nevertheless, attempts to identify and list prerogative powers have taken place. In 2004, the Public Administration Select Committee (PASC) identified 'three main groups of prerogative powers.' The first, 'the Queen's constitutional prerogatives' are largely anachronisms and deal with the formalities of how the Sovereign and government interact. The second, 'the legal prerogatives of the Crown' contain certain historical curiosities (the Crown's right to sturgeon, swans and whales) but, more importantly, through extension to government is indicative of important assumptions about the British state: state agencies including government are not, for instance,

bound by statute as a matter of course but rather through express legislative articulation. In practice, both these categories matter much less than the third – ‘prerogative executive powers.’ These have their origins in ministers acting to further the will of the Crown without recourse to parliamentary legislation. The link back to the Sovereign is now effectively redundant given the development of a constitutional monarchy. The consequent delegation of powers away from the Crown means that ‘these prerogative powers are, in effect though not in strict law, in the hands of Ministers’ (PASC 2003/04, p. 6). These powers are thus best understood as ‘ministerial executive’; the royal connection is ‘formal’ (PASC 2003/04, p. 6).

In October 2009, the Ministry of Justice published a review of prerogative powers following a promise made in the British Government’s White Paper in July 2007 to review the executive functions based on the royal prerogative. The White Paper outlined plans to reform aspects of the royal prerogative such as deploying the armed forces abroad, ratifying treaties, dissolving parliament and placing the civil service on a statutory footing (Ministry of Justice, 2009; UK Government, 2007). The review identified prerogative powers, which are still in use and divided them into four main categories: a) prerogative powers exercised by ministers (b) executive constitutional/personal prerogative powers exercised by the Sovereign (c) legal prerogatives of the Crown (d) archaic prerogative powers, most of which are either marginal or no longer needed. An important difference to the PASC report was the inclusion of the fourth category but the review followed PASC’s example in exempting legal prerogatives of the Crown, as ministers do not exercise these powers (Ministry of Justice, 2009). The first category (prerogative powers exercised by ministers) is divided into five groups, namely (a) government and the civil service (b) justice system and law and order (c) powers relating to foreign affairs (d) powers relating to armed forces, war and times of emergency and (e) miscellaneous.

### **3. The prerogative power to deploy armed forces**

An important trend of parliamentary assent before the deployment of UK armed forces has developed in recent years. Following British participation in NATO’s Operation

Allied Force (OAF) against Serbia in 1999, the Foreign Affairs Committee debated the operation and found that it was morally justified despite the absence of an international (i.e. United Nations) mandate (House of Commons, 2000). It was asserted that the House of Commons should be able 'to express its view' through a vote on a substantive motion tabled by government 'at the earliest opportunity after the commitment of troops to armed conflict' (House of Commons, 2000). This, then, did not amount to a demand for parliamentary consent *before* intervention only, in fact, for retrospective endorsement. This distinction is important, as the Commons subsequently went further, obtaining a say in policy before the commitment of forces to hostilities.

Significantly, a vote in the House of Commons to approve British military involvement in Iraq took place on March 18, 2003. Support for the deployment passed by 412 to 149. That vote was dismissed as 'purely symbolic' and 'not binding on the government' (The Guardian, 2005). Moreover, as Dirk Peters and Wolfgang Wagner (2011, pp. 183-184) have argued, 'when the involvement of Parliament is exclusively at the government's discretion, there is a fine line between meaningful consultation with parliament and the goal of simply having executive decisions rubber-stamped'. **It should still be noted, however, that Prime Minister Tony Blair's stance on Iraq suffered a backbench revolt as more than 123 Labour MPs defied the government's position in February 2003. This vote was record-breaking until a subsequent vote, taking place the following month, when 217 MPs voted on an amendment saying the case for intervention was 'not yet established' (The Guardian, 2003).**

The 2010 Conservative-Liberal Democrat coalition was the first multiparty cabinet in the UK since 1945 (Kaarbo and Kenealy, 2016; Heffernan, 2013). During his tenure as PM (2010-2015), Cameron dealt with four conflicts that saw British military involvement: Libya, Mali, Syria and Iraq. Except for Mali, where the UK provided logistical, non-combat support to French forces, all decisions on UK policy were put to parliamentary vote. Of notable importance were the dynamics of coalition government. In fact, the Liberal Democrat Deputy PM Nick Clegg was an advocate of a 'strengthened' and as 'fixed as possible' role for parliament (House of Lords Constitution Committee, 2013, p. 8). In the case of British participation in support of UN-backed resolution 1973, approving a 'No-Fly Zone' and authorising 'All Necessary

Measures' to protect civilians in Libya in March 2011, MPs backed the government motion with a majority of 544, albeit the vote occurred on 21 March, which was two days after the British participated in the initial strikes as part of Operation Odyssey Dawn (BBC News, 2011). The convention remains a 'statement of intent on the part of Government with respect to consulting Parliament on the deployment of military forces' (Mills, 2018, p. 40). However, Foreign Secretary William Hague promised to go further than that: during a debate in the House of Commons on 21 March 2011, he asserted 'we will also enshrine in law for the future the necessity to consult Parliament on military action' (House of Commons, 2011).

Cameron's decision to ask MPs to vote on British air strikes towards Syria in 2013 was therefore important for at least two reasons. First, it confirmed, following 'what several MPs and ministers have long suggested, that there is now in place a political convention', a new 'parliamentary prerogative governing the use of force overseas that sits alongside and qualifies the legal position' (Strong 2015b, p. 605). Second, by losing the parliamentary vote on military intervention (by 272 votes to 285 – an opposition majority of 13) Cameron became the first PM since Lord North in 1792 to face a Commons' defeat on such an issue (Strong, 2015a, p. 1123; The Guardian 2013). As James Strong (2018, p. 20) reminds us, Cameron was 'trapped by his own rhetoric into permitting a further vote on Syria and lost. In accepting defeat, he further cemented the new convention'.

Yet, Cameron was under no obligation to pull back on military action in Syria. He exercised his own discretion in abiding by the will of the House of Commons and thus explained his decision: 'it is very clear tonight that, while the House has not passed a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly' (The Guardian, 2013). Cameron subsequently abided by the convention, as exemplified by the December 2015 vote by the House of Commons, to authorise UK air strikes against the Islamic State in Syria (UK Parliament, 2015). The MPs approved the motion on the Islamic State with a majority of 174 (397 in favour and 223 against).

Despite the fact that a new convention had developed that governments should permit the House of Commons the opportunity to veto military deployments (Strong, 2018),

PM Theresa May authorised the launch of air strikes against Syria in April 2018 without a parliamentary consultation and vote beforehand. In responding to the alleged chemical weapons attack committed by the forces of Syrian President Assad in Douma, Syria, May's decision indicated that the prerogative power to deploy armed forces had not been compromised. Theresa May's decision gave rise to domestic political contestation as Labour leader Jeremy Corbyn accused the PM of a 'flagrant disregard' for the recent convention (The Times, 2018). In fact, parliamentary debate took place afterwards as Corbyn tabled a motion saying MPs had 'considered parliament's rights in relation to the approval of military action by British forces overseas' (The Guardian, 2018a). Mrs May won the vote 317 to 256 and received the backing of her party. Furthermore, Lord Hague of Richmond, the former foreign secretary who had first pledged to enshrine into law the convention that parliament should be consulted, said he had been mistaken. It was impossible to codify the convention without dangerously constraining executive action, he added, agreeing that it could also lead to legal challenges (The Times, 2018).

#### **4. The prerogative power to **make and unmake international** treaties**

In the UK, the Foreign Secretary ratifies treaties on behalf of the Crown under the Royal Prerogative (House of Commons, 2015, p. 4). Parliament is involved 'if domestic law needs to be changed in order to implement a treaty' (Lang, 2017, p. 3). Thus, while treaty negotiation and ratification are subject to prerogative powers, these powers do not extend 'to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament' (Courts and Tribunal Judiciary, 2016). Equally, while UK government is not required to find parliamentary time to consider motions relating to its intention to ratify a treaty, an important constitutional convention has taken hold. This is the Ponsonby rule (dating from 1924 and named after the Parliamentary Under-Secretary of State for Foreign Affairs in Ramsey MacDonald's government) according to which treaties are laid before parliament and proceed as a matter of course unless parliamentary disapproval is made known within three weeks (The Right Honourable The Lord Templeman, 1991). During those 21 days, if either House resolves against ratification, the government is obliged to explain why it still wishes to proceed.

Parliament can therefore effectively block ratification by passing repeated resolutions (Lang, 2017). The Constitutional Reform and Governance Act of 2010 gave the Ponsonby rule a statutory basis, thus introducing a statutory role for parliament in treaty ratification (Bartlett and Everett, 2017). Parliamentary powers over ratification were enhanced, albeit no right was afforded to parliament to amend treaties or be involved in treaty negotiation.

The peculiarity of EU treaties in this context is that they have always required an Act of Parliament to come into effect (Miller, 2015; Lang, 2017). The Ponsonby rule has not applied to EU treaties, and prerogative powers in this area have been limited since the UK joined the EC back in 1973. In fact, the UK joined the EC through the 1972 European Communities Act (ECA). PM Ted Heath could not sign a Treaty of Accession before the approval of the ECA by the House Commons. Subsequent bills relating to EU Treaty amendments (the Single European Act and the Treaties of Maastricht, Amsterdam, Nice and Lisbon) in effect, amended the ECA of 1972 and therefore required a new Act of Parliament. Vaughne Miller (2015, p. 4) summarizes the position thus: 'successive European Community (Amendment) Bills have been designed to make all the legislative provisions necessary for the implementation of a new treaty, clearing the way for the Government to deposit an instrument of ratification after the Bill has received the Royal Assent and become an Act of Parliament.'

With the Maastricht Treaty of 1992, PM John Major had secured an important concession in 1991 in order to win the support of his parliamentary party, namely an opt-out from the Protocol on Social Policy (the so-called 'Social Chapter') (Shaw, 2005). The Labour Party, however, favoured the Social Chapter's inclusion. With a slim majority and a divided party, the Major Government entered troubled waters. The European Community (Amendment) Act obtained a Commons majority in July 1993, but its passage required acceptance of a Labour amendment that a subsequent vote be held on the Social Chapter opt out. Conservative rebels took this as an opportunity to side with Labour to subvert Commons support of the Maastricht Treaty. The Labour Amendment was defeated only following a casting vote by the Speaker of the House, whereupon Major recast the issue as a vote of confidence. That vote his government easily won (with a majority of 40) thereby allowing the Maastricht Treaty and European Community (Amendment) Act to enter into law.

Subsequent acts made clear that European Union treaties would have to be approved by parliament before ratification. The European Parliamentary Elections Act 2002 in section 12(1) stated that '[n]o treaty which provides for an increase in the powers of the European Parliament is to be ratified by the United Kingdom unless it has been approved by an Act of Parliament' (European Parliamentary Elections Act, 2002). The European Union (Amendment) Act 2008 specified in section 5 that those treaties which modified the 1957 Treaty of Rome or the Treaty on the European Union as amended by the Treaty of Lisbon 'may not be ratified unless approved by an Act of Parliament' (European Union (Amendment) Act, 2008). The European Union Act 2011 reiterated this requirement and, crucially, added a referendum condition, this being that '(a) the Act providing for the approval of the treaty provides that the provision approving the referendum about whether the treaty is not to come into force until a referendum about whether the treaty should be ratified has been held throughout the United Kingdom or, where the treaty also affects Gibraltar, throughout the United Kingdom and Gibraltar, (b) the referendum has been held, and (c) the majority of those voting in the referendum are in favour of the ratification of the treaty' (European Union Act, 2011).

#### **4.1** *The government position*

In an effort to use prerogative powers to trigger Article 50 of the Lisbon Treaty, starting the process of withdrawal of the UK from the EU, the government proved resistant to letting parliament vote on the matter. As Under-Secretary of State and Conservative MP John Penrose pointed out in a Commons debate, on 'the question of how to invoke parliamentary discussion around triggering Article 50 [...] I simply remark that Government lawyers believe it is a royal prerogative issue' (House of Commons, 2016a). Former Brexit Secretary David Davis, when challenged by Labour MP Mike Gapes that 'if we are a sovereign, supreme Parliament, why is this Parliament not going to have the decision as to when we trigger Article 50?' (House of Commons, 2016b), responded 'we did – it was called the Referendum Act, which was passed by a ratio of 6:1 in this parliament' (House of Commons, 2016b). Conservative MP Charlie Elphicke said in support 'I think it is important for us to understand, agree with, and endorse the position that the matter of Article 50 is a matter for the PM alone. She has

the mandate of the masses, given to her – or to the PM, and the Government – on the 23<sup>rd</sup> of June, and it is right for her to invoke it’ (House of Commons, 2016c). On October 10, 2016, David Davis reasserted ‘the mandate to leave the European Union is clear, overwhelming and unarguable. As the PM has said more than once, we will make a success of Brexit, and no one should seek to find ways to thwart the will of the people expressed in the referendum on 23 June’ (House of Commons, 2016d). This was a position open to challenge, however. In a Commons’ debate two days’ later, the Shadow Secretary of State for Exiting the EU, Keir Starmer stated ‘it is frankly astonishing that the Government proposes to devise the negotiating terms of our exit from the EU, then to negotiate and then to reach a deal, without a vote in this House [...] in the absence of anything in the manifesto, in the absence of anything on the referendum ballot form and in the absence of any words from the PM before she assumed office’ ‘Where’, he continued, is the mandate?’ (House of Commons, 2016e). To which, Conservative MP Mr Stuart Jackson replied laconically ‘the referendum’ (House of Commons, 2016e).

#### 4.2 Court rulings

A possible delay to the government’s plan to trigger Article 50 came from a ruling of the High Court in the case of *Miller v the Secretary of State for Exiting the European Union* [2016] EWHC 2768. The intention of Gina Miller, who brought the case, was to ‘answer a fundamental legal question about the powers that can be used by the PM and whether they can sidestep Parliament’ (The Guardian 2016). The ruling of the High Court, published on November 3, 2016, spelled out that ‘as a general rule applicable in normal circumstances, the conduct of international relations and the making and unmaking of treaties on behalf of the United Kingdom are regarded as matters for the Crown in the exercise of its prerogative powers’ (Courts and Tribunals Judiciary, 2016). Nevertheless, the High Court ruled that ‘the Secretary of State does not have the power under the Crown’s prerogative to give notice pursuant to Article 50 of the TEU for the United Kingdom to withdraw from the European Union’ (Courts and Tribunals Judiciary, 2016). Specifically, it was ruled that ‘by making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of

Parliament confer rights on individuals or deprive individuals of rights' (Courts and Tribunals Judiciary, 2016). 'The Crown', it continued, 'through exercise of its prerogative powers, would have deprived domestic law rights created by the ECA of that effect' (Courts and Tribunals Judiciary, 2016). The government reacted to the High Court's judgement with the intention to appeal.

In the words of David Davis, 'our argument in the High Court was that decisions on the making and withdrawal from treaties are clear examples of the Royal Prerogative, and that Parliament, while having a role in the process...has not constrained the use of the prerogative to withdraw from the EU. Our position in the case was that the Government was therefore entitled to invoke the procedure set out in Article 50' (House of Commons, 2016f). In its appeal to the Supreme Court, the government reiterated that it could trigger Article 50 by using the royal prerogative. If ministers can generally enjoy the freedom to enter into treaties without recourse to parliament, so the reasoning went, prerogative powers should include the right to withdraw from them also (Supreme Court, 2017). However, by a majority of eight to three, the Supreme Court endorsed the ruling of the High Court, specifying that the PM would have to secure parliamentary consent before triggering Article 50. It was thus asserted once more, that the government could not exercise its prerogative and change UK laws, unless 'authorised to do so by Parliament' (The Guardian, 2017e). In order to trigger Article 50, primary legislation was required (Bartlett and Everett 2017, p. 8).

The judgement of the Supreme Court notwithstanding, MPs had already backed the government's plan to trigger Article 50 by the end of March 2017. On December 7, 2016, MPs backed a Labour motion by 448 to 75 asserting that it was parliament's responsibility to scrutinise the government over Brexit. The government added a proviso to the motion, which specified that March 2017 was its preferred date for triggering Article 50. MPs backed that proviso by a margin of 372 (461 votes to 89) (BBC News, 2016).

As the Supreme Court delivered its judgement, the government had thus already obtained reassurance in the House of Commons that it could meet its own deadline. The reaction of the government to the Supreme Court's judgement was similar to that following the ruling of the High Court: it was firm in restating the need to respect the will of the British people and that the referendum result could not be overturned.

However, Davis conceded ‘we believe in and value the independence of our judiciary, the foundation on which the rule of law is built. So, of course, it goes without saying that we will respect the judgment’ (House of Commons, 2017a). Davis promised that the government would introduce legislation such that parliament has ‘the legal power to trigger Article 50 and begin the formal process of withdrawal’ (House of Commons, 2017a).

The government published the European Union (Notification of Withdrawal) Bill at the end of January 2017 (The Guardian, 2017e). In a mere 137 words and two clauses, the PM gave notice to parliament of ‘the United Kingdom’s intention to withdraw from the EU’ (Coleman and Newson, 2017). By so doing, Theresa May effectively conceded to the Supreme Court’s judgment that a prior Act of Parliament would be necessary for withdrawal to occur.

#### *4.3 The European Union (Withdrawal Bill)*

The Bill debated in January – March 2017, was a rehearsal for a second, more substantive bill, presented to the Commons for its first reading in July 2017. Just weeks after the May government saw its parliamentary majority wiped out in a snap general election, the task of dealing with the Commons on this occasion promised to be even more fraught. In March 2017, the government published a white paper on Legislating for the United Kingdom’s Withdrawal from the United Kingdom. The white paper specified that the bill would perform three functions. First, it would give legal effect to the UK’s decision to leave the EU by repealing the 1972 legislation that took the country into the European Community. Second, it would transfer existing European rules and regulations on to the British statute book in time for the UK to leave the EU on March 29, 2019. Third, the bill would create powers to make secondary legislation. This would enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK left the EU. It would ensure that the UK legal system continues to function correctly outside the EU, and also enable domestic law to reflect the content of any withdrawal agreement under Article 50 (UK Government, 2017).

The EU Withdrawal Bill was published on 12 July 2017 (UK Parliament, 2017a). The bill passed its second reading but MPs proposed 136 amendments. One of the most

important amendments was to require parliament's approval of the final Brexit deal (Financial Times, 2017). The government tabled its own amendment, formally committing the UK to leave the EU at 11 pm on 29 March 2019. Facing the prospect of defeat on an amendment laid down by former Attorney General Dominic Grieve that would enshrine the charter of fundamental rights into UK law, David Davis promised new legislation allowing parliament to vote on the final Brexit deal (The Guardian, 2017a).

The bill proved contentious as it could afford government the right to utilise statutory instruments for quasi legislative purposes (the so-called Henry VIII clauses). While these powers were limited to two years after withdrawal, the sum effect was seen by commentators as 'an executive power grab' unparalleled in modern British history (New Statesman, 2017). As Labour MP Stephen Timms noted in the debate on the bill's second reading on September 7, 2017, this amounted to ministerial 'rule by decree' (House of Commons, 2017b). The bill passed its second reading on September 11 by 326 votes to 290.

The question was about the terms of departure: ministers contended that parliament had already had the final say with the European Union (Notification of Withdrawal) Bill. With the amendment proposed by Dominic Grieve, the government could only make provision for implementing the withdrawal agreement if it is subject to the prior enactment of a statute by parliament approving the final terms of withdrawal of the United Kingdom from the European Union. Grieve's amendment concerned clause 9 of the bill, which 'provides the Government with the legislative authority to use secondary legislation to implement any withdrawal agreement agreed with the European Union under Article 50 (2) Treaty of European Union' (UK Parliament, 2017b).

The government suffered defeat on December 14, 2017 as MPs backed Grieve's amendment by 309 to 305, marking Theresa May's first Commons defeat over Brexit (The Guardian, 2017b). Nevertheless, the bill completed its passage through the Commons on 17 January 2018 as it passed a third reading by 324 votes to 295.

While the government ultimately defeated all the amendments in the House of Commons, it still made some concessions along the way. Theresa May defeated Grieve's amendment on June 20, 2018 by 319 votes to 303 (The Guardian, 2018b). The government made an amendment saying it would ultimately be up to John Bercow to decide whether MPs got a meaningful vote on a no-deal withdrawal from the EU. The government then accepted the amendment in lieu, by 324 votes to 298, which set out how parliament would approve the withdrawal agreement and that, should it not approve it, a minister would make a statement setting out how the government 'proposes to proceed' within 21 days (European Union Withdrawal Act, 2018). The EU Withdrawal Bill received royal assent on June 26.

## **5. Prorogation of Parliament**

Following the resignation of Theresa May, Boris Johnson became Prime Minister in July 2019. Soon after Johnson was sworn in, another constitutional issue concerning prerogative powers arose. This was about the prorogation of Parliament. Prorogation signals the formal end of a parliamentary session: it ends the vast majority of parliamentary activities, including most bills and all motions. No further sittings in the House of Commons or in the House of Lords take place. It is not the same as dissolution, which happens when parliament is brought to an end shortly before a general election. Prorogation should also be distinguished from adjournment which occurs when Parliament adjourns for holiday such as the summer recess (Loughlin, 2019). Proroguing parliament is a royal prerogative power which the Monarch can exercise following the advice of the Prime Minister. Typically, the UK parliament's prorogation has been short, rarely lasting more than two weeks and it has always led to the dissolution of the current Parliament (prior to a general election) or the start of a new Parliamentary session (Cowie, 2019). As prorogation falls under prerogative powers, there is no clear-cut legal basis through which Parliament can constrain its exercise. Prorogation has mostly been a formality of the UK constitution.

At the end of August 2019, an order was made at the meeting of the Privy Council held by the Queen at Balmoral Castle, specifying that Parliament should be prorogued (Kumarasingham, 2020). Johnson's request was to prorogue Parliament between the

second week of September and 14 October, with a view to starting a second session of Parliament with a Queen's speech (BBC News, 2019a). The length of this prorogation was exceptional because, to expand upon a point made above, between 1930 and 2017, the mean average length of prorogation was about 5 calendar days (Purvis, 2019). There were arguments in favour and against a long prorogation, the reason for which, as was suggested by some, was seen as facilitating a so-called 'no deal Brexit' (Financial Times, 2019). On the one hand, as Parliament had already expressed its legislative intention through the EU Withdrawal Act of 2018, subsequent commons resolutions would not override that type of statutory commitment. On the other hand, a government seeking a long prorogation to deliver a no-deal exit from the EU would defy the wishes of the majority of MPs. MPs voted against a no deal on numerous occasions in the House of Commons. On 13 March 2019, for instance, MPs rejected the UK leaving the European Union without a withdrawal agreement and framework for a future relationship (House of Commons, 2019).

At the end of August 2019, Johnson asked the Queen to prorogue Parliament for five weeks, between 9 September and 14 October (BBC News, 2019b). Parliament was prorogued on 9 September as planned. However, the courts intervened in the process. In early September 2019, the High Court of Justice heard a challenge to prorogation brought by Gina Miller and concluded that the decision of the Prime Minister was not justiciable (Royal Court of Justice, 2019). However, Scotland's higher civil court overturned the verdict of the High Court as it declared that '...the prime minister's advice to HM the Queen and the prorogation which followed thereon was unlawful and is thus null and of no effect' (The Guardian, 2019).

Hearing the appeals from Gina Miller against the High Court and from the government against the ruling by Scotland's higher civil court, the Supreme Court ruled unanimously on 24 September that the Prime Minister's advice to the Queen was justiciable and that prorogation was unlawful (Supreme Court 2019); reasonable justification was lacking as to the need to prorogue parliament for an extensive period of time. Parliament resumed the following day. Looking back over the prorogation controversy, it is clear how the Prime Minister exercised discretion in proroguing Parliament, but it is equally significant that the courts intervened in the process again. This was not long after having intervened to make sure the UK government would start

the process of withdrawing from the EU only after an Act of Parliament permitting it to do so.

## 6. Conclusion

As Theresa May became Prime Minister in 2016, momentum for reform of prerogative powers had been underway. Previous attempts to reform the royal prerogative led to notable results such as the introduction of the Fixed Term Parliament Act and the management of the civil service.

Before Theresa May's tenure as PM, a convention had emerged according to which a PM would seek parliamentary approval before committing British troops to a conflict. Despite the fact that conventions have no formal enforcement and, in the words of Lord Hennessy, 'can crumble at the touch of a powerful, insensitive and determined executive' (House of Commons, 2013), they are capable of obtaining a customary quality (Dicey, 1959). Therefore, it now appears unlikely that a PM would authorise the deployment of UK armed personnel to dangerous, prolonged or controversial missions without previous parliamentary approval. Yet, it would still be a discretionary power of the PM to seek parliamentary approval. The commitment of troops to military action remains a prerogative power. There is still no legally established mandate for parliament in such decisions and the government is not bound by its will. Furthermore, as evidenced by the April 2018 air strikes against Syria, the prerogative to deploy armed forces without previous parliamentary approval was exercised by Theresa May.

During the May government, the prerogative powers to ratify and annul treaties have also been in the spotlight. May's government sought to exercise the royal prerogative to trigger article 50 and initiate the process of withdrawal of the UK from the EU. In this case, subsequent rulings of the courts have made clear that this is not a prerogative power: parliamentary approval before the triggering of Article 50 was necessary. In fact, by joining the EC in 1973, the UK needed an Act of Parliament before Ted Heath could sign the Treaty of Accession. Up until the Lisbon Treaty, subsequent Acts of Parliaments were needed before ratification. Put differently, the process of ratification of an EU treaty has not been a prerogative power before so there has not been a

compromise of the power to conclude and ratify treaties, which remains a prerogative power with parliament having a statutory role.

After the European Union Notification of Withdrawal bill received royal assent, Theresa May lost her majority following the June 2017 election. With an even weaker majority in the House of Commons, the European Union Withdrawal Bill gave rise to concerns over parliamentary oversight of the government ministers. The repeal of the ECA places a considerable amount of EU law on the UK statute book, but as we discovered, the terms of the European Union (Withdrawal) Bill also allowed the executive to exercise its autonomy where that legislative transfer was deemed ambiguous. The House of Commons has, in turn, asserted itself against so-called Henry the VIII powers, allowing the government to change an Act of Parliament, or even to repeal it, after it has been passed and without the need to go through parliament a second time. The government of Theresa May made concessions in terms of MPs having a meaningful say. Shortly after Boris Johnson began his premiership, another constitutional dispute took place, this time involving the prerogative power to prorogue Parliament. In an historical verdict, the Supreme Court ruled unanimously that prorogation was justiciable and unlawful.

As we have seen, the use of prime ministerial discretion remains an important element in the use of prerogative powers, giving rise to far-reaching decisions with immediate effect. Nevertheless, the contestation of prime ministerial discretion has gained more ground, both as a result of attempts to previously reform the royal prerogative and of the courts' intervention in matters, which are justiciable. Brexit acted as a context which arguably empowered MPs to move against decisions taken by the government, making prime ministerial discretion more rather than less important. Looking ahead, future contributions could look into the evolving relationship between the government and the courts, especially in light of the promise made in the 64 page 2019 Conservative party manifesto (The Conservative and Unionist Party Manifesto, 2019) to look at the relationship between government, parliament, the courts and the Royal prerogative.

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