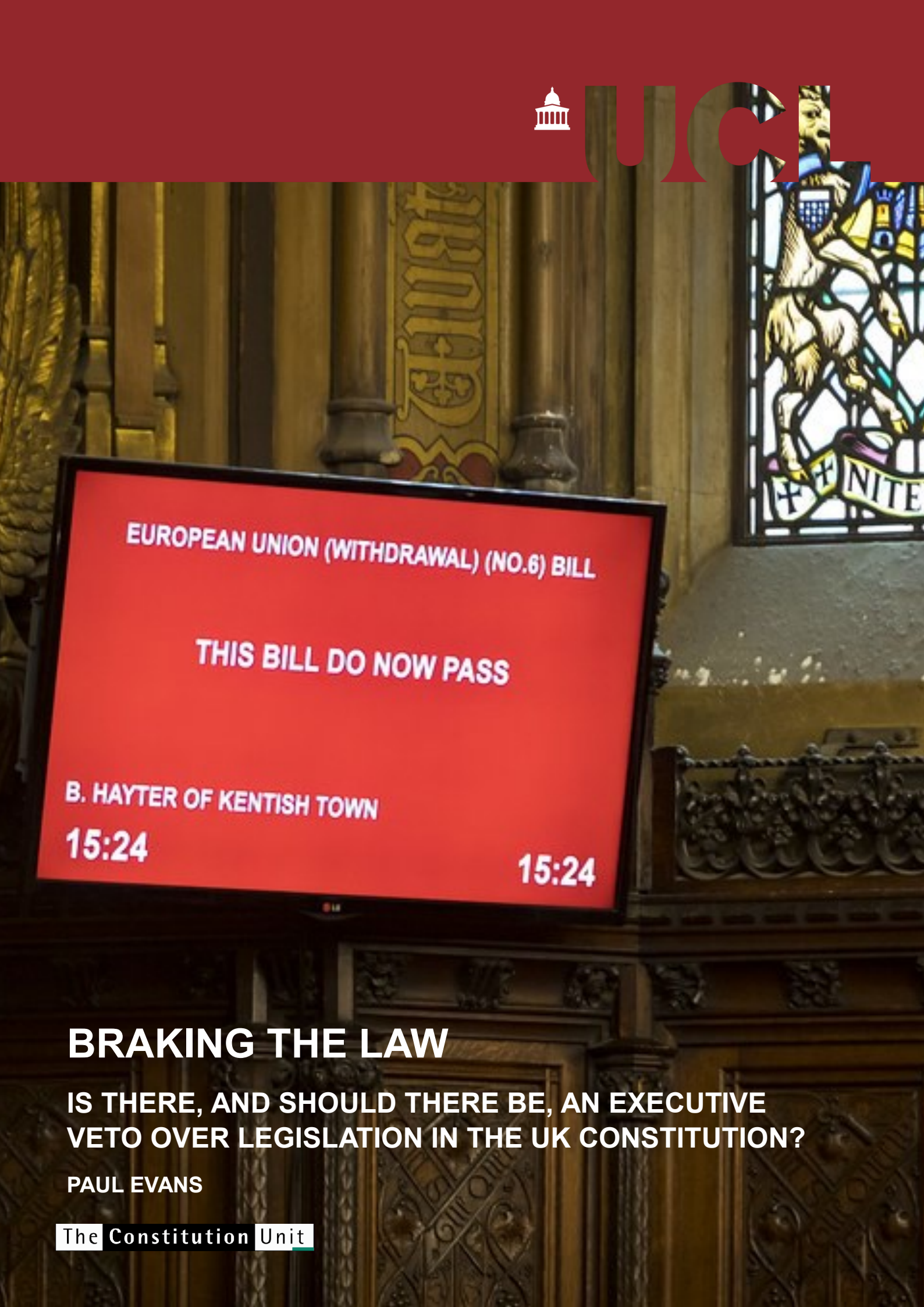

BRAKING THE LAW

IS THERE, AND SHOULD THERE BE, AN EXECUTIVE VETO OVER LEGISLATION IN THE UK CONSTITUTION?

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Executive summary

- In some constitutional democracies, most famously the US, it is explicit that the executive (in that case the President) can exercise a veto over bills passed by the legislative branch (though often this tends to be counterbalanced, as it is in the US, by a legislative override power). But the UK is surely different? It is a parliamentary democracy, with no written constitution, where the head of state is unelected. The political executive lacks any separate democratic mandate – instead depending on its ability to command the confidence of the legislature.

- Through much of 2019 the UK government was unable to command a majority in the House of Commons. On two occasions parliament initiated and passed legislation in contradiction to the government's policy: the 'Cooper-Letwin' and 'Benn-Burt' Acts, both designed to forestall the possibility of a 'no deal' Brexit and requiring the government to seek an extension to the Article 50 period. There were some suggestions at the time that the government might try to veto the legislation by advising the Queen to refuse the royal assent to these Acts after they were agreed by parliament. In the event, this was not tried and the bills became law. But the disagreement over the executive's ability to exercise a retrospective veto over legislation passed by parliament was never explicitly resolved.

- This report examines some of the issues thrown up by these episodes, asking, where the government is unable to block unwelcome legislation by winning a House of Commons vote, what means might be available to it to prevent parliament from legislating against the executive's wishes.

- Part 1 of the report assesses the different types of veto which might in theory be available to the executive under the UK constitution. It concludes that the idea of applying a retrospective veto after a bill has completed its parliamentary stages, by refusing royal assent, is a dead letter. Nonetheless there may be types of 'anticipatory veto' – that is, vetoes which would prevent a bill from being passed in the first place – available to the executive in the UK.

- The first and most commonly used way of blocking unwelcome legislation is not a veto as such but relies on the government's effective monopoly over the agenda of the House of Commons. For procedural reasons – mainly the availability of time – it is very difficult for private members' bills to be agreed at Westminster against the government's wishes. But where the government cannot safely command a majority this barrier can be overcome, as it was on the two bills in 2019.

- A more obscure possibility for the exercise of an anticipatory veto which has sometimes been advanced is the need to obtain the 'Queen's consent' for a narrow category of bills which touch upon the prerogative powers of the sovereign. But the report demonstrates that this is merely a constitutional courtesy and not an executive instrument. Even were the government to use its function as the channel of communication between parliament and the sovereign as a means of delay, parliament could, if it chose to, simply bypass the executive.

- The second means of exercising an anticipatory veto is the 'rule of Crown initiative', which prevents the House of Commons from initiating or increasing public expenditure through legislation. The effect of this rule does severely limit MPs' ability to pass legislation with which the executive disagrees. The report concludes that the rule of Crown initiative is a

significant factor in balancing legislative power in favour of the executive, even where the government cannot be guaranteed to command a majority in the House of Commons.

- Part 2 of the report asks whether it is desirable for the executive to have a veto over legislation supported by parliament, informed in part by examples from other democracies. It examines the arguments in favour of the kind of 'reference back' or suspensory veto which exists in some systems as a check on an overreaching legislature acting as a majoritarian elected dictatorship and how, if at all, this might inform the developing UK constitution.

- Part 2 also notes that variations on the rule of Crown initiative appear in many other constitutions, and not only in those parliamentary systems which derive many of their operating principles from Westminster. This demonstrates a widespread recognition of the need to balance the executive's duty to manage the national budget with the role of the legislature in having not only the final say over the allocation of resources but also the right to advance alternative policies and test different fiscal priorities.

- The report concludes that the constitutional conventions and customs surrounding the mechanisms described in Part 1 are insufficiently clear. It proposes that it is made absolutely clear that royal assent cannot be refused to an Act agreed by both houses of parliament (perhaps underlined by a renaming of the practice)

- The report recommends dispensing with the practice of Queen's consent (by explicitly stating that parliament can legislate to abrogate prerogative powers, a power which, in reality, was surrendered to it long ago).

- The report advocates greater transparency and clearer agreement about the conventions and customs surrounding the application of the rule of Crown initiative – including renaming it.

- The report's conclusions are guided by the principle that parliament is, for the time being until we have a written constitution, the sovereign decision-maker in the British constitution. While the legislature and the executive should, in a balanced system, act as a check on each other, the executive should not, in the end, be able to thwart the will of the majority in the House of Commons if it cannot win a vote there.

Part 1: Is there an executive veto over legislation in the British constitution?

Why are we talking about this now?

During 2019 both the previous and present prime ministers were confronted with unwelcome legislation agreed against their wishes by the two houses of parliament. The immediate cause of this turn of events was of course that the Conservative governments of 2017–19 were unable to command a majority in the House of Commons (nor, less surprisingly, in the House of Lords). The legislation in question came in the form of the 'Cooper-Letwin' Act[1] of April 2019 and the 'Benn-Burt' Act[2] of September 2019. The question was raised in some quarters as to whether the Prime Minister could veto such bills, after they had been agreed by parliament, by advising the Queen to withhold her assent to them. In the event, both Acts were duly assented to and no actual (as opposed to rhetorical) attempt to claim a veto power was made. Nonetheless this raised the question of whether an executive veto over legislation exists in the UK system.

That is the first question addressed by this report. Executive vetoes do exist in many democracies with written constitutions – particularly those with presidential systems, as discussed further in part 2 of this report. In most cases such vetoes exist in some kind of 'suspensory' form – that is, a veto which suspends the law until it can be reconsidered, rather than annulling it entirely. Examples of an absolute and unilateral executive veto seem very rare. But, before turning to such comparative examples, does a veto of any kind exist at Westminster?

A key problem in trying to examine this question is that the UK constitution is rather like an ice sculpture – no sooner have you put the finishing touches to a description of it and placed it on display, it begins to melt. In the following argument, for example, at least three uses of the idea of the 'Crown' are in play. The first is the sovereign law-maker in the shape of the Crown-in-parliament (relevant to the discussion of royal assent). The second is the acknowledged paramount administrative and organising force of the nation in the shape of the Crown operating as the executive government of the day (relevant to the discussion of the rule of Crown initiative). The third is the sovereign as a private person and, incidentally, the ceremonial Head of State (relevant to the discussion of Queen's consent). The veto capacity of each of these manifestations are considered in turn. In Part 2, an attempt is made to suggest ways in which we might disentangle and clarify the proper scope of the conventions surrounding the exercise of 'veto' powers by each of these manifestations of 'the Crown' – including possibly by renaming them.

In 2019 the UK seemed to have found itself in a place where the 'Crown' bit of the 'Crown-in-parliament' had lost control of the 'parliament' bit. In normal times the control exercised by the government of the day over legislation made by parliament is straightforward – it can use its majority in the Commons to vote down a bill on second or third reading and to defy unwelcome amendments in between, as well as any subsequently made by the Lords. This is an open and

[1] The European Union (Withdrawal) Act 2019 (last accessed 10 February 2020).
[2] The European Union (Withdrawal) (No. 2) Act 2019 (last accessed 10 February 2020).

undisguised assertion of majoritarian power, for which a government must take responsibility and which it can be forced to defend in debate. But it is parliament that takes the decision. Thwarting the will of parliament by procedural means which avoid testing the government's ability to command a majority in the Commons may look undemocratic and underhand. Paul Seaward in a History of Parliament blog on the veto quoted the writer Thomas Gisborne, who expressed this view very clearly in 1795:

> … it is not to be denied, that the rejection of an obnoxious bill by a direct negative would be a measure far less injurious to the public good, than its defeat by secret and unconstitutional influence. The one step would at least be an open and manly exercise of a legal right; the other by its very concealment would betray the consciousness of guilt, and would tend in its effects to extinguish public spirit, to encourage future venality, and to subvert the foundations of national freedom.[3]

So our normal understanding has been that the properly constitutional way in which a government resists unwelcome legislation in parliament is to ask its MPs to vote it down in the House of Commons (though, as discussed below, it often resorts to the weapon of delay to kill a bill).

In the circumstances of 2019, where governments could not command a majority, this understanding was complicated by the existence of the Fixed-term Parliaments Act 2011 (FTPA). Before 2011, if a government found itself on the ropes and struggling to command a majority in the Commons, it could seek to designate a particular vote as a 'matter of confidence' and threaten to use its prerogative power to give effect to a dissolution and general election if it were defeated. Under the FTPA that prerogative power was no longer unilaterally available, leaving the coercive instruments available to a government which could not command a majority on a key issue significantly blunted.

That situation was one factor which gave rise to the debate about what other avenues of resistance might be available to the government. Can they apply the brakes to the legislative process against parliament's wishes?

Is royal assent a thing? Can it be withheld?

In the UK the generally accepted constitutional dogma is that legislative sovereignty is fused in the Crown-in-parliament. The final confirmation for legislation passed by parliament is the signifying of 'royal assent'. The main question raised in 2019 by those who viewed the Cooper-Letwin and Benn-Burt bills as somehow illegitimate was whether in these circumstances the Crown could somehow be extracted from parliament and advised by the government to refuse royal assent. This could without exaggeration be described as the nuclear option. Had the Crown-as-government sought to exercise a veto over the Crown-in-parliament the elements of the constitution which we normally view as fused in the sovereign parliament would have somehow been split. That would be a situation requiring us to rewrite the textbooks – if society were in a state to want textbooks by then.

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[3] Quoted in The History of Parliament, 'The Veto', *History of Parliament blog*, 15 April 2019 (last accessed 10 February 2020).

The UK, as is well known, has no single constitutional document. The patchwork nature of our constitutional texts means that there is no obvious place to turn to in order to discover whether there is an agreed set of rules or conditions for the circumstances in which legislation which has been agreed by parliament could be denied final enactment. We would also be left in a state of uncertainty over who might be the referee if an attempt were made to exercise a veto of this kind, through the refusal of royal assent. All the written authorities within government and parliament appear to assume that there are no such circumstances. For example: the leading constitutional text on the law of parliament, *Erskine May*, blithely asserts that royal assent 'must be forthcoming';[4] a statement which the Cabinet Manual quotes without comment;[5] and which the guidance produced by the parliamentary drafters of the Office of the Parliamentary Counsel also appears to confirm by its silence on what might be the mechanics of refusal.[6] This lacuna strongly suggests that there is no contemporary recognition of such a veto mechanism in the British constitution.

The rationale for the silence about an executive veto which could be exercised *after* parliament has agreed a law in the UK looks fairly straightforward. The government of the day governs in the name of the Crown, but the sovereign lawmaker is parliament, of which the Crown is only one element. The 'Crown' in parliament is represented by the sovereign's ministers (in other words the cabinet) who are members of one or the other house of parliament. Prime ministers appoint the cabinet, but their authority to do so derives from their ability to command the confidence of the House of Commons. The idea that the 'Crown' and 'parliament' (not to be confused with the 'government' and 'parliament')[7] could hold opposing views on legislation agreed in parliament looks like a logical fallacy. For the purpose of passing Acts the Crown is part of parliament, even if it also has another existence as the government outside parliament. The Crown-in-parliament is a different constitutional creature to the Crown (or more plainly described, the executive) outside parliament. As Mark Elliott argued at the time of the controversy over the Cooper-Letwin bill, the 'Crown' is operating in these circumstances in two different 'domains' of constitutional convention.[8] That latter, executive, manifestation of the Crown is ultimately subservient to the sovereign lawmaker, parliament.[9]

Abstract principle would appear to support observational deduction here. Unlike those polities with a directly-elected head of state (almost all of which have some form of constitution or basic law), the Prime Minister does not possess a democratic mandate separate from that of parliament.

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[4] David Natzler and Mark Hutton (eds.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edition, 2019, LexisNexis, London, section 30.36 (hereafter *Erskine May's Parliamentary Practice*).
[5] Cabinet Office, *The Cabinet Manual*, first edition, 2011, para 1.1.
[6] Cabinet Office, *Guide to Making Legislation*, 2017, para 41.1.
[7] The Supreme Court of Canada ruling in *Mikisew* ([2018] 2 SCR 765) may, it has been argued, have some relevance here. The Court found that the Crown-in-parliament (in its legislative capacity) is distinct from the Crown-in-Council (executive capacity): a ruling which could have an impact in terms of how the separation of powers and executive-legislative fusion are considered in other parliamentary systems. Royal assent is argued to be granted by the Crown-in-parliament acting on the advice of the parliament, not the Crown-in-Council acting on the advice of ministers.
[8] Mark Elliott 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?', *Public Law for Everyone blog*, 21 January 2019 (last accessed 17 July 2020).
[9] It is true that the Crown outside parliament retains some unilateral law-making powers which it exercises under prerogative powers – the 2019 illegal prorogation was the most high-profile example in recent times. It is also the case that parliament, by statute, frequently delegates law-making powers to ministers (so-called 'delegated legislation'). Unlike parliament's law-making, however, both of these are subject to the oversight of the courts.

They have no democratic basis on which to make a legitimate claim to thwart the will of the elected legislature. If the Prime Minister discovers that he or she cannot stomach what parliament has decided, the only escape routes that seem to be available are to resign and advise the Queen to appoint a PM who can, or to swallow the bitter pill. Prior to the Fixed-term Parliaments Act 2011 they might have sought a dissolution to trigger a general election, but that would not be a way to invalidate an Act already agreed by parliament.[10]

The British constitution is famously dynamic, and the status of the sovereign as the embodiment of the Crown vis-à-vis parliament has not been fixed since time immemorial. The title of the Crown-in-parliament may have persisted but the substance behind it has changed; the sovereign no longer exercises a personal veto over legislation. Royal assent has not been refused since 1708 (or 1707 – depending on whether you prefer to use the old or new calendar).[11] As long ago as 1867 Walter Bagehot was able to assert with typical rhetorical brio that:

> The popular theory of the English Constitution involves two errors as to the Sovereign. First, in its oldest form at least, it considers him as an 'Estate of the Realm', a separate co-ordinate authority with the House of Lords and the House of Commons. This and much else the Sovereign once was, but this he is no longer. That authority could only be exercised by a monarch with a legislative veto. He should be able to reject bills, if not as the House of Commons rejects them, at least as the House of Peers rejects them. But the Queen has no such veto. She must sign her own death warrant if the two Houses unanimously send it up to her. It is a fiction of the past to ascribe to her legislative power. She has long ceased to have any.[12]

The last time the notion of denying royal assent seems to have been seriously discussed was with George V on the Irish Home Rule Bill in 1913/14, the first to have been presented for royal assent under the Parliament Act 1911 (that is, without the consent of the Lords, a factor which may account to a limited extent for Walter Bagehot's dead parrot getting back on its perch).[13] Vernon Bogdanor described the events surrounding this crisis in his 1995 book *The Monarchy and the Constitution*. In that case, the pressure for the veto came not from His Majesty's ministers (the Liberal government led by Asquith) but from the leaders of his 'loyal' opposition. Bogdanor quotes the Conservative leader Arthur Balfour at the time of the 1913 crisis arguing that 'It is surely obvious that if a prerogative *ought* rarely to be used, it cannot become obsolete *merely because* it is

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[10] The Conservative manifesto for the 2019 general election proposed to scrap the Fixed-term Parliaments Act 2011, and this pledge was repeated in the 2019 Queen's speech, but at time of publication no action has yet followed. Separately, both the House of Commons Public Administration and Constitutional Affairs Committee, and the House of Lords Constitution Committee, have launched inquiries into the operation of the Act and the potential options for reform.

[11] The reasons for Queen Anne's refusal of royal assent to the Scottish Militia Bill remain shrouded in a degree of uncertainty, as described in a blog by The History of Parliament (n3). It may have just been a misunderstanding. The blog also gives the dates of 'refusals' by William III in the immediately preceding decades.

[12] Walter Bagehot, *The English Constitution*, Sussex Academic Press, Eastbourne, 1997, p33.

[13] In her 1996 TV drama *Giving Tongue*, Emma Fortune toyed with the idea of the Queen refusing her assent (on grounds purely of her personal opinion) to a bill banning foxhunting. In the event, the Hunting Act 2004 was agreed under the Parliament Act procedure without the consent of the Lords, but there was no suggestion at the time that the Queen had any ability to refuse royal assent, although it was generally assumed (without evidence) that she would have personally opposed the Act given the choice.

rarely used'.[14] He also cites a letter to *The Times* from Sir William Anson, MP for the University of Oxford, Warden of All Souls and supposedly a constitutional expert, offering a similar argument:

> The Government have taken advantage of a combination of groups in the House of Commons to deprive the Second Chamber of its constitutional right to bring about an appeal to the people on measures of high importance which have never been submitted to the consideration of the electorate. While this part of our Constitution is in abeyance they are pressing on legislation which will shortly lead to civil war. Our only safeguard against such disaster is to be found in the exercise of the prerogatives of the Crown. I am not ready to admit that, under such circumstances, these prerogatives have been atrophied by disuse.[15]

This claim that the royal prerogatives included the power to refuse royal assent was briefly revived early in 2019, in commentary around the anticipated Cooper-Letwin bill. Importantly though, the argument (insofar as there was one) seemed to be based on the assumption that the sovereign would be permitted or obliged to refuse royal assent only on the advice of ministers. One claim for the revival of the Crown veto in this unprecedented form was put in a somewhat apocalyptically (but also ironically) titled pamphlet for Policy Exchange, published in March 2019 at the height of the controversy over what evolved into the Cooper-Letwin bill:

> The process of Royal Assent has become a formality but if legislation would otherwise be passed by an abuse of constitutional process and principle facilitated by a rogue Speaker, the Government might plausibly decide to advise Her Majesty not to assent to the Bill in question: it would be MPs, not the Government, that had by unprincipled action involved the monarch.[16]

This improbable-looking suggestion generated a vigorous response from other academic constitutional law experts. Some (Jeff King and Mark Elliott for example) argued, plausibly, that there was no existing mechanism through which the refusal of assent could be effected, and that it was not an action which relied on the advice of ministers but depended solely on fact that parliament had agreed an Act.[17]

The general descriptions of the actual mechanics of the process, which are purely parliamentary and do not involve ministers, seem to support this line of argument.[18] Even those experts who

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[14] Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995, p127.
[15] ibid, p125. The reference to the Parliament Act 1911 having placed the Lords' legislative veto 'in abeyance' is a particularly nice touch with the benefit of hindsight. Whether Anson would, a century after its passing, be yet 'ready to admit' that the Parliament Act 2011 was an enduring constitutional settlement would be interesting. No case put forward in modern times for the reform of the membership and/or powers of the Lords, even as 'a Second Chamber constituted on a popular instead of hereditary basis' (to quote the preamble to the Parliament Act) has proposed restoring to it the absolute veto over legislation enjoyed by the House of Lords before 1911.
[16] Stephen Laws and Richard Ekins, *Endangering Constitutional Government: The Risks of the House of Commons Taking Control*, Policy Exchange, London, 2019, p3 (last accessed 11 February 2020).
[17] Jeff King, 'Can Royal Assent to a Bill Be Withheld If So Advised by Ministers?', *UK Constitutional Law Association blog*, 5 April 2019 (last accessed 17 July 2020); and Mark Elliott et al. 'Royal Assent: Letter to The Times', *Public Law for Everyone blog*, 3 April 2019 (last accessed 17 July 2020).
[18] Although John Finnis argued in an article in the Daily Telegraph published on 1 April 2019 ('Only one option remains with Brexit – prorogue Parliament and allow us out of the EU with no deal'), glossed by a subsequent blog (Royal Assent – A Reply to Mark Elliott', *UK Constitutional Law Association blog*, 8 April 2019, last accessed 18 July

clung to the idea that the prerogative power to withhold assent endured could at the most agree that it could only conceivably be invoked at a moment of profound, possibly unimaginable, constitutional crisis.[19] It is hard to argue that the Cooper-Letwin and Benn-Burt Acts would have met that test. Nonetheless, claims were circulated at the time in some parts of the media that a veto was being contemplated.

Anne Twomey, in chapter 9 of *The Veiled Sceptre: Reserve Powers of the Heads of State in Westminster Systems* inferred that, at least so far as Westminster itself is concerned, the continued existence of the power is theoretically claimable but the circumstances in which it could be imagined to be exercisable were vanishingly remote and certainly could not rely simply on the political inconvenience to government of parliament's decisions. She cites the example of a Governor of New Zealand. In 1877 Lord Normanby declined to accept the New Zealand Prime Minister's advice to refuse royal assent to a bill of the dominion legislature promoted by the previous government, which the subsequent government had failed to have amended to its taste. He 'noted that Ministers were entitled to oppose the Bill in Parliament, but he could not see why they should be able to defeat it at the royal assent stage if they could not do so in Parliament'. Lord Normanby prevailed by threatening to veto the Appropriation Bill and deprive the government of funds, a rather pleasing double-or-quits gambit. When the New Zealand Prime Minister sought to appeal to the UK government against the Governor, his case was dismissed.[20]

In Westminster in 2019 neither Theresa May nor, subsequently, Boris Johnson heeded any of the suggestions that they might advise the Queen to exercise a royal veto either on supposed grounds of unconstitutionality or simply because they disagreed with legislation passed by parliament; and neither made any overt attempt to block either the Cooper-Letwin or Benn-Burt bills by advising the Queen to deny them royal assent. Indeed, during the debate on the motion that paved the way to the Benn-Burt Act, the Leader of the House, in response to a question about whether the government would seek to deny the bill royal assent, said: 'The law will be followed. We are a country that follows the rule of law and this Government assiduously follow constitutional conventions'.[21]

Since the 1913 crisis over the Irish Home Rule Bill a further hundred years have passed without the withholding of royal assent apparently being seriously considered. Since the 'political' British constitution is always said to be based at least as much on practice as on theory, it seems unproductive to try and adjudicate on the academic debates about whether it is theoretically possible for royal assent to be refused. For all practical purposes, the absence of any attempt to

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2020), that the Lord Chancellor could delay seeking the royal assent (rather than the PM advising against granting it), possibly up to and beyond the point of a prorogation.

[19] See, for example, Robert Craig 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?', *UK Constitutional Law Association blog*, 22 January 2019 (last accessed 17 July 2020).

[20] Anne Twomey, *The Veiled Sceptre: Reserve Powers of the Heads of State in Westminster Systems*, Cambridge University Press, Cambridge, 2018, pp646-7. For a detailed review of the question of royal assent in New Zealand in the period before the Statute of Westminster, see John E Martin, 'Refusal of Assent – A Hidden Element of Constitutional History in New Zealand', *Wellington University Law Review*, 41, 2010, pp51-84 (last accessed 17 June 2020). He also discusses the Normanby case of 1877 in more detail than Twomey at pp71-2. Twomey also noted some cases in the Commonwealth of the Sovereign withholding assent, but in those cases (as John Finnis has also remarked – see J. Finnis, 'Royal Assent – A Reply to Mark Elliott', n18) it seems it was not on the advice of the ministers in the legislature concerned but of her UK ministers.

[21] *House of Commons Hansard*, 3 September 2019, c.97.

advise against royal assent by the May and Johnson administrations in the cases of the Cooper-Letwin and Benn-Burt Acts has confirmed that the idea that it could be withheld is no longer a thing. At the only moment in modern times when it might have been attempted to revive the theoretical notion of the continued existence of a veto power no such attempt was made. This surely confirms the continuance of the centuries-long dormancy of the idea that this is an available route to an executive veto on grounds of political disagreement. If we were to seek to clarify our constitutional vocabulary it would be more accurate to describe royal assent as 'promulgation': a formal announcement, rather than a decision point. President Mitterand described the role of the President in promulgating laws under the French constitution as that of a 'notary'.[22] That seems a pretty good summary of the role of the Crown under the UK's constitution too.

The events of 2019 demonstrate that in all foreseeable circumstances short of a revolution (or counter-revolution perhaps) there is no executive veto in the British constitution over legislation *after* it has been agreed by parliament. In Part 2 of this report, the question of whether we should take a leaf out of the constitutions of other democracies and invent such a veto on exclusively constitutional rather than political grounds is considered. But meanwhile, what other weapons are available to a government under siege to frustrate the will of parliament? There are, it has been suggested, two other potential types of anticipatory veto: Queen's consent; and the rule of Crown initiative. But before considering these, there follows a brief examination of the key factor that gave rise to the constitutional excitements of 2019 – the temporary loss of government control over the agenda of the House of Commons.

The key pre-emptive control: executive dominance of legislative initiative

It is a matter of long controversy that the rules of the House of Commons, in normal times, make non-government legislation which might be supported by a majority of MPs but to which the government is hostile (or even just studiedly neutral) next to impossible to put to the test in a vote. The consequence is that the executive can forestall its Commons majority even being tested by legislative initiatives emanating from any source outside government, whether that majority is secure or not.

This dominance has not existed throughout parliamentary history, but the doctrine of the mandate, secured through near universal suffrage and structured by party cohesion, became dominant over the course of the twentieth century. This was seen to legitimise majoritarian control of the agenda of the House of Commons and therefore of legislative initiative. This control was formalised through the delegation by the Commons of almost complete control of its agenda to the government of the day (particularly in Standing Order No. 14, first passed in its recognisable modern form in 1902, which states that 'government business has precedence at every sitting' unless otherwise specified in the order).[23] Any opportunity for non-government legislative

[22] 'L'entretien télévisé du président de la République', *Le Monde*, 16 July 1993.
[23] The History of Parliament, 'Standing Order No.14', *History of Parliament blog*, 28 March 2019 (last accessed 10 February 2020).

initiatives to emerge or progress without at least the tacit consent of the executive was pretty much extinguished.

Nowadays the sole remaining regular and recognised opportunity for non-government MPs to initiate legislation is the widely derided 'private members' bills' (PMB) system, also set out in S.O. No. 14.[24] In each session 20 bills are, through a ballot, granted a modicum of procedural advantage. But the time available for these (and the many other non-balloted PMBs presented in every session, including those brought from the Lords) is so limited that, in the absence of timetabling provisions ('programming' as the Commons' standing orders call it) there is, in effect, a single MP veto. If a backbencher is not prepared to exercise that veto a minister usually will, by 'talking out' a bill at one or other of its stages on a Friday afternoon. As the House of Commons Procedure Committee put it in a 2013 review of the PMB system:

> It is entirely legitimate for the Government to oppose a private Members' bill and to use its majority in the House to prevent it from passing. But, as we have seen, instead other means are too often found of delaying a bill and defeating it through lack of time instead of through a vote in the House. Government Ministers themselves may 'talk out' a bill, preventing progress …[25]

The PMB system has long been regarded as something between a gross deception of the public and a process that might have been deliberately designed as a way of showing the Commons in the worst possible light. Its own Procedure Committee described the PMB process as presently operated as bringing 'increasing discredit on the House because of the way it is now largely reduced to an exercise in futility'.[26] Many schemes have been brought forward for reform over recent decades – most recently by the Procedure Committee in 2016.[27]

The irony is that, despite the best efforts of the Procedure Committee in a sustained campaign over nearly four years, not one of these schemes has even been debated by the House of Commons, least of all on the basis of a plausible set of proposals for reform of the standing orders. The ability of the government to exercise almost complete control over the Commons legislative agenda through Standing Order No. 14 and the other devices available to it means that any

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[24] In theory there may be other opportunities for non-government legislative initiatives. Legislation could possibly be debated during opposition or backbench time – again allocated in S.O. No. 14. But this is undoubtedly a controversial and contestable claim. Paragraph 6(c) of S.O. No. 14 excludes from the category of backbench business 'private Members' bills under paragraphs (8) to (13) below'. The paragraphs cited refer to the balloted and other bills taken on PMB Fridays. Arguably any PMB not taken on one of those Fridays is not excluded – otherwise the reference to 'paragraphs (8) to (13) below' would be otiose. However, this is a largely theological point which is highly unlikely to be tested in practice. The question of whether opposition time could be used for legislation (or, more probably, a motion relating to future legislation) hangs on interpretation of S.O. No.14 (and specifically the word 'matters' in paragraph (2)). This seems a question more likely to be tested, but it is hard to imagine the circumstances in which the official opposition could command a majority for a clearly partisan move against the express wishes of the government.

[25] House of Commons Procedure Committee, Second Report of Session 2013-14, *Private Members' Bills*, HC 188-I, para 14; see also Fifth Report of Session 2013-14, *Private Members' Bills: Government Response and Revised Proposals*, HC 1171.

[26] House of Commons Procedure Committee, Third Report of Session 2015-16, *Private Members' Bills*, HC 684, para 9.

[27] See n25 and 26. Also: House of Commons Procedure Committee, Second Report of Session 2013-14, *Private Members' Bills*, HC 188-I; Second Report of Session 2016-17, *Private Members' Bills: Observations on the Government Response to the Committee's Third Report of Session 2015–16 HC 684*, HC 701.

proposal to loosen its grip on the windpipe of backbench power of initiative cannot even get on the agenda.[28] It is the very perfection of Catch-22.

Although the Cooper-Letwin and Benn-Burt bills were nominally PMBs they had nothing to do with the arrangements for PMBs set out in Standing Order No. 14. Instead, the means by which they were introduced and passed depended on the overriding of that standing order by backbench motions. These were made possible through a complicated series of events. An amendment tabled by Conservative backbencher Dominic Grieve to a Business of the House motion was agreed by the Commons on 4 December 2018. Its effect was to make subsequent motions relating to any withdrawal agreement after the first 'meaningful vote' amendable. On 25 March, the Commons agreed an amendment to a government motion which allowed MPs to take control of the house's agenda for the purpose of holding 'indicative votes' on 27 March (all of which were negatived) and to suspend the standing order again on 1 April for further indicative votes. On 1 April, on which none of the next batch of indicative votes secured a majority, the House agreed to suspend S.O. No. 14 yet again on 3 April – on which day it was able to agree a further business motion to take the Cooper-Letwin bill through all its stages on that day.[29] Thus, as a consequence of the 'daisy chain' of motions which started on 25 March, and was only broken by a tied vote on 3 April, the house was able to demonstrate its support for the introduction of the bill and to enable it to become law. On 3 September, a controversial decision by the Speaker to grant an emergency debate on what was in effect another backbench Business of the House motion enabled the House again to suspend S.O. No. 14 on the following day in order to pass the Benn-Burt bill.[30]

Standing Order No. 14 is not an executive veto – it is a self-imposed rule of the House of Commons. The Cooper-Letwin and Benn-Burt Acts demonstrate that the government's control of the Commons agenda could be lifted, given an exceptional coincidence of majority support, procedural opportunity and an adventurous Speaker. It is highly unlikely that such a coincidence will occur again in the foreseeable future. But even if it were to happen again, a government without a secure majority may have other potential means by which to stymie or delay a bill. These are discussed in the next two sections of this report.

Queen's consent: a Commons (and Lords) courtesy

Bills which directly affect the sovereign's private interests or prerogative powers (which are relatively few and far between)[31] are expected to have Queen's consent signified to the House by

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[28] The Backbench Business Committee is prevented from scheduling any debate to amend S.O. No. 14 by paragraph (6)(e) of that standing order.

[29] See Votes and Proceedings of the House of Commons for 25 March 2019, item 4; 27 March 2019, item 7; 1 April 2019, item 3; 3 April 2019, items 5 to 9; 8 April 2019, items 6 and 12.

[30] Ibid 3 September 2019, items 4 and 6; 4 September 2019, items 4 to 8; 9 September 2019, items 3 and 12. The House had rejected a similar attempt by the opposition on 12 June.

[31] It is difficult to give an accurate picture of the proportion of bills to which the requirement for consent applies, but it is a small minority. In the long 2017-19 session there are nine entries in the Votes & Proceedings of the House of Commons indicating that consent was signified. As 64 bills received royal assent in that session (14 of them PMBs), consent was indicated in 13.4% of cases, all but two relating to interests rather than prerogatives and only two relating to PMBs. But it is not possible to derive from published data how many of the 306 PMBs introduced in that session which did not reach third reading might have required consent. It is safe to say that very few if any would have been likely to relate to the prerogative.

a Privy Counsellor before their third reading can be moved. A full explanation can be found in a 2014 report from the Political and Constitutional Reform Committee (PCRC) on the subject.[32]

To be clear from the outset – Queen's consent is not an executive power and cannot be said to have the character of an executive veto. With one recent exception it has only ever been a matter of public controversy insofar as it was suspected of being a covert personal pre-emptive veto which might be exercised by members of the royal family.[33] Unlike royal *assent*, described above, or the royal *recommendation*, described below, this *consent* is genuinely a matter for the royal household to deal with, not something done by the government. It is, however, confusing that this practice relates to parliament's possible encroachment on prerogative powers which would in practice be exercised only on the advice of ministers, as well as regarding the straightforwardly private interests of the sovereign (and their heir) as private, property-owning individuals. This muddles the Crown as symbolic head of state with the Crown as the individual who reigns. So the slipperiness of that signifier 'Crown' once again causes constitutional confusion. Only the question of prerogatives is really relevant to the discussion of executive vetoes.

The practice of seeking the sovereign's consent appears to date from only 1728 – in other words, roughly the day before yesterday in Westminster time.[34] Before 2015 the practice distinguished between degrees of effect on the sovereign (essentially whether such effects were central to a bill's purposes or incidental) to decide whether consent was required before second reading (potentially blocking *any* debate or vote on the bill) or before third reading (only before its final approval). As a result of the PCRC's 2014 report, the Commons Procedure Committee recommended that the signifying of consent should be confined to a prerequisite only to the third reading of any applicable bill.[35] This recommendation was unusually swiftly acted upon by both the Lords and Commons.[36] The process is repeated in both chambers – meaning consent signified in the Commons has to be resignified in the Lords when a bill reaches that House, and *vice versa*. The rule requires consent in each chamber to be signified by a member of the Privy Council – it does not require it specifically to be done by a minister, although that is what usually occurs.

This requirement is not set out in statute or standing orders – we must rely on *Erskine May* for the description of its source and application, which also tells us that the range of bills which potentially

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[32] House of Commons Political and Constitutional Reform Committee, 11th Report of Session 2013-14, *The Impact of Queen's and Prince's Consent on the Legislative Process*, HC 784, p5. For further details see also Andrew Makower, 'Queen's Consent', *The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments*, 87, pp35-44, 2019, which provides another excellent summary of the process, its purposes and its practice.

[33] A Freedom of Information Act request (initially resisted by the Cabinet Office on the grounds that it contained legal advice but overruled by the Information Commissioner and then by the Information Tribunal) to release the official guidance on Queen's and Prince of Wales' consent seems to have been provoked by a controversy over letters from the Prince of Wales (the 'black spider memos') to successive Ministers on matters of government policy which were blocked from release under the FoIA by a series of Ministers between 2010 and 2015, when the Supreme Court eventually ordered their release; see *R (on the application of Evans) and another (Respondents) v Attorney General (Appellant)*, [2015] UKSC 21, on appeal from [2014] EWCA Civ 254.

[34] House of Commons Political and Constitutional Reform Committee, n32, written evidence from the Clerk of the Parliaments and the Clerk of the House of Commons.

[35] House of Commons Procedure Committee, Fourth Report of Session 2014-14, *Queen's and Prince of Wales's Consent*, HC 871, para 13.

[36] House of Commons Votes and Proceedings, 24 February 2015, item 10; House of Lords Minutes of Proceedings, 30 October 2014, item 9.

entail this procedure is narrow.[37] The process of deciding whether Queen's consent is required and obtaining it was usefully described in a recent article by the Clerk of Legislation in the House of Lords.[38] The decision as to whether it is required is a matter of negotiation between officials of the two Houses and the parliamentary drafters of the Office of the Parliamentary Counsel. Since so little is at stake, it is rarely a matter of controversy, but in the unlikely event of disagreement the final decision rests with the Speaker of either House.[39] This emphasises that the rule is a self-imposed one by parliament, not a fundamental constitutional principle. As the PCRC noted in its 2014 report:

> Consent is a matter of parliamentary procedure. If the two Houses of Parliament were minded to abolish Consent, they could do so by means of addresses to the Crown, followed by a resolution of each House. Legislation would not be needed.[40]

In that same report the PCRC concluded:

> The Queen has the right to be consulted, to advise and to warn… Consent serves to remind us that Parliament has three elements—the House of Commons, the House of Lords, and the Queen-in-Parliament—and its existence could be regarded as a matter of courtesy between the three parts of Parliament.[41]

The requirement for Queen's consent does not, therefore, have the character of a fundamental constitutional check but of a constitutional courtesy designed, as the PCRC said, to signify comity between parliament and the Crown. The recent article by the Clerk of Legislation in the House of Lords tends to confirm this interpretation.[42]

That view would also appear to have been confirmed by the decision of both Houses to abandon the requirement for certain bills to have the consent signified before second reading. It is reinforced by the government's comment in its response to the 2014 PCRC report:

> It is not the Government's policy or practice to refuse to seek the Queen's or the Prince's Consent to a Private Member's Bill in order to block it. The Government will generally seek Consent for Private Member's Bills upon request, even where it opposes the Bill, on the basis that Parliament should not be prevented from debating a matter on account of Consent not having been sought. However, the Government will not generally seek Consent if it is clear from the parliamentary timetable that a Bill has no real prospect of making progress or the text of the Bill has been submitted without enough time to seek Consent.[43]

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[37] Erskine May's Parliamentary Practice, n4, section 30.79.
[38] Andrew Makower, n32.
[39] See for example the Speaker's response to points of order relating to the Cooper-Letwin bill at *Commons Hansard*, 3 April 2019, cc 1130-31, where without being specifically invited to do so he rules that it does not require consent. A previous ruling on a similar question had been given in 1952.
[40] Political and Constitutional Reform Committee, n32, para 20.
[41] Ibid, para 41.
[42] Andrew Makower, n32.
[43] House of Commons Political and Constitutional Reform Committee, First Special Report of Session 2014-15, *The Impact of Queen's and Prince's Consent on the Legislative Process: Government Response to the Committee's Eleventh Report of Session 2013-14*, HC 244, Appendix, para 8.

Although the requirement of consent is but a courtesy, the current edition of *Erskine May*, perhaps a little too confidently in the light of the PCRC's analysis, asserts that 'If the Queen's consent has not been obtained, the question on the third reading of a bill for which consent is required cannot be proposed'. As things currently stand, *Erskine May* is of course correct. But it does not admit of the possibility that either House could choose to dispense with the requirement, or suggest that a failure to obtain consent by the time a bill had reached third reading stage could be considered a failure by ministers to comply with the rules of parliament. This may be an example of the ever-present risk in the British way of constitution-making that description becomes prescription. *Erskine May*, however, goes on to qualify this assertion (including examples where bills had received a third reading without consent through inadvertence). Most significantly, for the purposes of considering whether this requirement has the true character of a pre-emptive veto power, it states:

> The Government's usual practice is to advise the granting of consent even to bills of which it disapproves. The understanding is that the grant of consent does not imply approval by the Crown or its advisers, but only that the Crown does not intend that, for lack of its consent, Parliament should be debarred from debating such provisions.[44]

Twomey also briefly considers consent in *The Veiled Sceptre*. Her main conclusion is that the rule requiring it reinforces the assumption that royal assent could not be refused on personal or prerogative grounds after a bill had been agreed by parliament because the opportunity for royal intervention is available at an earlier stage.[45] Makower draws attention to the fact that while the consent process is embodied in statute for the Scottish and Welsh parliaments it is expressed in those provisions only as being required in circumstances where it would be required for a bill at Westminster – although in those cases it relates only to the minor and unconstitutional matter of the private interests of the sovereign as neither body would have power to legislate on prerogatives.[46] And, intriguingly, it is not a requirement in the foundational statute of the Northern Ireland Assembly, which further suggests that even if it is just a courtesy it is not a necessary one.

The Office of the Parliamentary Counsel's guidance on the obtaining of consent devotes less than two pages out of 20 to the question of prerogatives – the remainder deals with the minutiae of what constitutes a private interest.[47] It includes in its list of prerogative powers those to: appoint a prime minister; summon or prorogue parliament; give or refuse royal assent to bills;[48] legislate by Order in Council; make treaties; wage war; recognise states; issue passports; and make certain appointments or confer honours. In a limited but potentially important number of cases a

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[44] Erskine May's Parliamentary Practice, n4, section 9.7.

[45] Twomey, n20, pp680-683. She gives some examples where in Commonwealth states the Palace has negotiated changes in a bill's provisions before it is introduced, but these interestingly only seem to relate to objections raised by the Palace to legislative proposals to enlarge the prerogative rather than to restrict it. Her interpretation that consent helps pre-empt later issues about assent may be supported by the evidence in Makower (n32) that the first record of consent being signified is in 1728, only 20 years after the last example of royal assent being refused.

[46] Scotland Act 1988, Sch 3(7), Rule 9.11 of the Scottish Parliament; Government of Wales Act 2006, s 111(4), S.O. 26.7 of the Welsh Parliament.

[47] The guidance is available here (last accessed 12 February 2020).

[48] Intriguingly, in connection with the discussion above, although the list of prerogative powers in the guidance implies that there is such a power to withhold royal assent, at para 7.12 it bluntly states as a fact that 'Royal Assent is of course never refused for a bill that has successfully made its way through Parliament'. The guidance at para 7.12 is, of course, correct. So it is at least disputable whether it makes sense to treat the granting of royal assent as a prerogative power at all, or if the guidance confirms that it is in fact a purely ceremonial function.

government could therefore, in theory, refuse to seek, or delay seeking, the sovereign's consent to a bill affecting its prerogative powers (the question of personal interests of the sovereign is pretty much irrelevant to real politics) as a means of stymying legislation which it was not confident of being able to defeat in a straight vote. However, as stressed above, the rule is a parliamentary one. If there were a majority in one or other house to dispense with the requirement, it would require no other permission for parliament to do so.

An interesting example of where this could have been an issue recently occurred in connection with amendments made to the Northern Ireland (Executive Formation) Bill 2019. The bill itself (introduced by the government) sought to restart devolved government in Northern Ireland, after the collapse of power-sharing in January 2017. But during its passage through parliament, rumours began to circulate of a plan to prorogue parliament in order to forestall any parliamentary tampering with the default position in the Withdrawal Act that the UK would leave the EU with or without a withdrawal agreement on the day specified as exit day. Backbench amendments to the bill were made against the government's will, requiring regular reporting to parliament on the process of executive formation in Northern Ireland and entailing the recall of parliament if necessary to debate them. As amended the bill clearly did touch on the prerogative power of prorogation. Yet consent was not required, presumably because the provisions in the amendments were hung on the Recall of Parliament Act 1797, and to that extent were a statutory alteration to an aspect of the prerogative which was already bound by statute.[49]

It could also have been argued, in connection with the Cooper-Letwin and Benn-Burt bills, that through imposing a mandatory requirement on the government to seek an extension to the Article 50 notice these bills were touching on the prerogative relating to treaties, and indeed it was so argued.[50] However, given the decision in *Miller 1* that the triggering of Article 50 required the authorisation of parliament and could not therefore be sensibly regarded as an 'interference' in a non-statutory prerogative power, that would have been unpersuasive.[51]

Ministers have no say over whether consent or not is required, but they could in theory fail to act on the request from a backbench MP to seek it for a bill for which it is deemed to be required. Previous editions of *Erskine May* cited no examples later than the 1870s where ministers had apparently declined to take the necessary steps to obtain consent where it was deemed to be required, and intriguingly give examples where both houses of parliament had resorted to addressing the Queen directly to request consent where ministers had refused to make such a

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[49] Section 3 of what is now the Act was amended, in each case against the government's will, by: first, requiring certain progress reports to be laid at specified intervals (two amendments made in committee of the whole House of Commons on 9 July 2019 by 294 to 293); second, making it a mandatory requirement for a minister to move a motion on the floor of the House of Commons within five days of such a report being made; and third, providing that if on the relevant final date the House of Commons was adjourned or parliament prorogued it would be mandatory to recall the House under the provisions of the Meeting of Parliament Act 1797 (an amendment made by the Lords on 17 July by 272 to 168; accepted by the Commons, with a further amendment relating to prorogations added, on 18 July by 315 to 272 and 315 to 273; and accepted in this amended form by the Lords on 22 July by 260 to 146).

[50] See R. Craig, 'Why Royal Consent Is Required for the Proposed Article 50 Extension Bill', *UK Constitutional Law Association blog*, 25 February 2019 (last accessed 2 September 2020).

[51] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5; see also n39 above.

request.[52] In fact Makower, who also gives a list of apparent failures to obtain consent in five cases between 1868 and 1999, cites evidence that at least as late as 1952 it was the normal practice for the Houses to make a direct request to the sovereign for consent through an Address to the Crown in the case of PMBs.[53] In the blogpost cited above, Robert Craig suggested that the Cooper-Letwin bill could have been thwarted (had it been deemed to require consent) by ministers dragging their feet about obtaining consent. As Andrew Makower described in connection with the Cooper-Letwin bill: 'We decided Consent was not required. A decision the other way would have had serious consequences for the Bill's passage, not because Her Majesty might have refused Consent but because of the time it would have taken to obtain it'.[54]

So in theory a government could seek to delay the passage of a bill it disagreed with by messing about with the process. Where time is of the essence, that might be an effective weapon, but the kind of cliff-edge circumstances that surrounded the Cooper-Letwin and Benn-Burt bills are unlikely to recur. In other circumstances such a line of resistance would be futile. The requirement of consent is a self-imposed parliamentary rule, which parliament can dispense with. The relatively recent delegation of the mechanics of seeking consent to the government where it is required for a PMB could at any point be withdrawn, and parliament could seek the consent through its own channels (which it is perfectly well equipped to do).

In cases where a government bill was amended against its wishes in a way that triggered the rule, trying to use delay in seeking consent could be a very blunt weapon. For example, in the case of the Northern Ireland Bill noted above, since the consent would, if deemed to be required, have come only before third reading, withholding it would have postponed further progress on the whole bill, not just on the offending provisions inserted against the government's wishes.

Although consent to interference in the prerogative powers may, therefore, on superficial inspection look like it could be used as a form of veto, it is in reality the same as the requirement for consent to interference in the sovereign's private interests. Both are simply an obeisance to good manners – they do not suggest that the sovereign can refuse parliament its right to legislate on any matter it chooses, if it is determined to do so. If there is a majority to get on with it, then parliament can just set the requirement aside. A failure to signify consent by virtue of deliberate obstruction by ministers would be a breach of parliament's legitimate expectations and an assumption of a power which the government does not have.

If such a situation did arise it would not be in the slightest degree unconstitutional for the Commons to override the government, presuming there were a majority to do so. To achieve this there would be two options: either to pass a resolution dispensing with the requirement for consent; or to pass a humble address to petition the sovereign for her consent directly (as was a regular practice until the mid-twentieth century). Whether the Lords could be persuaded to follow suit would be a nice question, but in the unlikely situation where the Commons had acted to circumvent an unconstitutional government attempt to thwart parliament, it might be expected that the Lords would feel obliged to follow.

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[52] See Donald Limon and William McKay (eds.) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edition, 1997, LexisNexis, London, p605.
[53] Makower, n32, p38.
[54] ibid, p35.

The requirement for Queen's consent does not, therefore, amount to a veto power, whatever the possibilities might theoretically be for a government to behave badly in discharging its role as the messenger who brings the notice of consent to parliament. In Part 2 of this paper options for making it clear that parliament is in the driving seat are briefly discussed.

Holding firm to the purse strings: the rule of Crown initiative

Royal assent and Queen's consent are not capable of being used as final and unilateral vetoes over legislation that parliament is prepared to agree to. The former cannot be refused; the latter could, if it came to a stand-off, be set aside. There is, however, available to the executive a more meaningful, and potentially fatal, form of pre-emptive veto over unwelcome legislation that might otherwise be supported by a majority in parliament.

It stems from the operation of the so-called 'rule of Crown initiative'; a manifestation this time of the 'Crown' in its form as the executive – the government of the day. In a nutshell, the rule of Crown initiative holds as a foundational constitutional principle that parliament cannot propose new forms of public spending or revenue raising – only the Crown (otherwise the government) can do so, and all that the Commons can do is either assent to or refuse to sanction such spending (the House of Lords is irrelevant here as it has no part in authorising the raising and spending of public money).

The interplay between the 'Crown' in this context and parliament was well summed-up by Lord Campion in 1947:

> The English [*sic*] financial system depends, in principle, on a division of functions between the Crown and the House [*of Commons*], whereby, while ultimate control is left to the House of Commons, the initiation of policy and the management of details remain with the Crown, acting through its Ministers in the House and through the Treasury outside. In effect, the House of Commons directly, or through the Treasury, controls the modern financial system, and it does so according to principles whose roots lie far back in history. But while the influence of the past is strongly reflected in the procedure of the House, the powers of the Treasury do not come to it directly from their origin in the prerogative, but through Parliament. It has been modernized into the instrument through which the House controls the infinitely vast and infinitely minute machinery of national finance.[55]

In its application to legislation at Westminster the rule of Crown initiative means that a non-ministerial MP cannot introduce a bill of which the *main* purpose would be to give rise to some new form of public expenditure or taxation. But it also requires that any clause of any bill which would entail novel expenditure or create a new 'charge upon the people' must be sanctioned by a separate 'financial resolution' before it can proceed to its committee stage.[56] This means that the

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[55] Gilbert Campion, *An Introduction to the Procedure of the House of Commons*, second edition, Macmillan, London, 1947, p253.

[56] Such clauses are shown in the printed version of a bill in italics, though unhelpfully the significance of this typography is not explained anywhere on the actual print of a bill. There are essentially two classes of financial resolution – 'money resolutions' give authority for new or increased public spending and 'ways and means

rule of Crown initiative encompasses not only non-government bills, but also amendments to government legislation; any amendment to a government bill which had the effect of creating new expenditure outside the scope of the existing provisions of the bill would also require a financial resolution to have been agreed in advance before it could even be proposed. Without the 'cover' that this provides, any amendment entailing significant revenue implications proposed to a bill at any stage of its career would be ruled out of order by the chair and would not be selected for debate or decision. There is, however, a *de minimis* standard applied in the Commons; broadly speaking, proposals which entail recurrent annual expenditure of less than £500,000 do not require a money resolution.[57]

A motion for a money resolution – in accordance with the rule as set out in Standing Orders Nos. 48 to 52 of the House of Commons – can only be moved by a minister. Compliance with the requirement is noted on the Commons Order Paper, somewhat gnomically, as the motion for a resolution having had the 'Queen's recommendation signified', but there is no implication (unlike with Queen's consent) that the sovereign herself has *actually* been consulted on the matter. Here again, that slippery signifier of the 'Crown' or the 'Queen' sows confusion. The signifying of the 'Queen's recommendation' is simply a function of the Treasury on behalf of government, with neither the sovereign nor the royal household involved in any way. For a government bill, such motions are almost always moved immediately after second reading when the standing orders provide for them to be taken without debate (although they may be moved later in a bill's career to enable amendments which would otherwise have been inadmissible to be made – when the debate is limited to 45 minutes but a decision is guaranteed).[58]

The absence of a money resolution in the House of Commons blocks the progress of a bill for which one is required beyond second reading. In a number of other legislatures discussed in Part 2 of this report the block applies even to a bill's introduction – 'presentation and first reading' as it would be known in Westminster parlance.

In the past if a PMB obtained a Commons second reading and contained provisions which might give rise to new forms of public expenditure, the government would subsequently bring forward a motion for a money resolution to cover those costs as a matter of constitutional courtesy.[59] The

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resolutions' provide authority for new, renewed or increased forms of taxation and certain other levies and 'charges on the people'. The distinction is based in historical precedent but is nowadays largely technical, though there are important procedural distinctions between the two forms. The most significant ways and means resolutions are those (often dozens) debated and voted upon following the presentation of the budget, which give authority for the continuation and levying of all key taxes, and which form the authority for the contents of the ensuing Finance Bill. Money resolutions are typically agreed without debate after the second reading of a government bill but are also the form in which the House of Commons approves the 'Estimates' authorising almost all annual public expenditure, which then form the basis for the regular Appropriation Acts. A full description of the distinction between the two types of financial resolution is given in Part 5 of *Erskine May* (n4). Ways and means resolutions are of very limited relevance to non-government bills.

[57] The types of expenditure included and excluded from the requirement for cover of a financial resolution are set out in sections 35.2 to 35.15 of *Erskine May's Parliamentary Practice* (n4). Section 35.15 states that 'likely annual expenditure of less than £500,000 is generally treated as notional', though this statement is qualified; and the guidance issued by the Office of the Parliamentary Counsel on financial resolutions (last accessed 13 February 2020) advises at para 3.8 that it should be 'treated with caution', though it also usefully makes clear that 'it will be for the Commons [Public Bill Office] to decide where to draw the line'.

[58] S.O. No.52 of the House of Commons.

[59] House of Commons Procedure Committee, HC 188-II, n27, Ev. 84, Q344 (Rt hon Andrew Lansley MP giving evidence as Leader of the House of Commons, 13 March 2013). In March 2018 the then Leader of the House, Rt

absence of a financial resolution would not be used to block the bill's progress and deny its sponsors any chance to test whether it had the support of a Commons majority at stages after second reading.

However, this assumption of constitutional good manners has recently come under strain, especially in cases where a government has been insecure about its ability to defeat a bill in open battle. During the later stages of the 2010-15 coalition government, the Liberal Democrats frustrated the progress of Conservative backbench MP Robert Neill's PMB to provide for an EU referendum by refusing to agree to the tabling of a money resolution to cover the referendum's costs. This was partly a tit-for-tat response to their Conservative coalition partners' refusal to table a money resolution for Liberal Democrat backbench MP Andrew George's PMB, which would have effectively abolished the so-called 'bedroom tax', thus increasing social security expenditure.[60]

More recently, in the 2017-19 Session, a PMB introduced by Afzal Khan MP secured its second reading by 229 votes to 44, but was prevented from making any further progress after the government refused to table a money resolution. The bill sought to amend the Parliamentary Voting System and Constituencies Act 2011 in two key ways: first, to reverse the proposed reduction of the number of MPs from 650 to 600; and second, to ease the new electoral quota tolerances which that Act had introduced requiring constituencies across the UK to be very similar in the size of their electorates. The additional money that the resolution would have been required to cover looks to have been that needed to finance the additional 50 MPs and further and more frequent Boundary Commission reviews.[61] By the time of the bill's second reading, a considerable number of the government's own backbenchers openly opposed the cut in the size of the House of Commons and it was by no means certain that the government would prevail at third reading, so this pre-emptive veto probably looked to the whips like a desirable precaution.[62]

There was an attempt (by a motion moved in official opposition time) partially to suspend the rule, in order to allow the bill at least to complete its committee stage. This motion was debated on 19 June 2018, but failed by a narrow margin.[63] Given the unspecified source of the fundamental authority for this rule, we can only speculate as to whether a motion to suspend the rule beyond the committee stage would have been allowed by the chair to be moved without it in its turn having had the Queen's recommendation somehow signified. It seems clear that on that occasion the

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hon Andrea Leadsom MP, described the government as bringing forward money resolutions 'on a case-by-case basis', *House of Commons Hansard*, 22 March 2018, c.407.

[60] Which obtained a second reading by 306 to 231 votes (an astonishing turnout on a private members' Friday); see Votes & Proceedings of the House of Commons, 5 September 2014.

[61] The Explanatory Notes to the bill stated the following at paras 14 and 15: 'The bill would require the Boundary Commissions to conduct reviews on the basis of 650 seats rather than 600. This would require more work giving rise to additional expenditure. The bill would also result in the number of Members of Parliament reverting back to 650 from the plan, under the current boundary reviews, to reduce the number to 600. This would mean that the savings from the planned decrease in expenditure on Members of Parliament would be foregone, and as a result the provisions of this bill would give rise to a potential increase in expenditure, although the planned decrease in costs has yet to be realised. The potential increase in expenditure would be likely to include 50 additional salaries for Members of Parliament, associated Member expenses, pension costs, and election costs. The government has estimated that the reduction in the number of MPs will save approximately £13.1 million each year.' (Last accessed 8 May 2020).

[62] Although, ironically, the current Conservative government has introduced legislation to maintain the number of seats at 650; see the Parliamentary Constituencies Bill 2020.

[63] By 284 to 299; Votes & Proceedings of the House of Commons, 19 June 2018, item 8(2).

opposition decided not to push its luck this far – but whether that was a political or a procedural calculation, and whether there might be a window of opportunity for the Commons to circumvent the rule of Crown initiative in the future, we may never know.

In the case of the Cooper-Letwin and Benn-Burt bills, the risk of inviting the deployment of such a pre-emptive veto may also have been a factor in dissuading the drafters from including any provisions relating to a further referendum on membership of the EU. Even without including an undoubtedly cost-bearing referendum, by envisaging the reversal of the decision of the EU (Withdrawal) Act 2018 (entailed by any 'Remain' victory in a future referendum) it could have been argued that any extension beyond the date of 31 March 2019 set in that Act could give rise to continuing UK contributions to the EU budget. Whether such expenditure could really be deemed 'novel' might, however, might have reasonably been open to debate. In the event, the Speaker of the House of Commons was satisfied that in neither case did the bills require cover of a financial resolution.[64]

As discussed in more detail in Part 2, variations on the rule of Crown initiative are internationally very commonplace. The Westminster system is not the most draconian in its deployment of the rule, but that may be because in the UK the government can generally rely on its control of the House of Commons agenda and its stranglehold on time. Where coalition and minority governments are more common, or cohabitation between an executive and a legislature of different political complexions are more likely, the rule may tend to be more rigid.

The Cooper-Letwin and Benn-Burt bills surmounted the obstacles of initiative and time, and managed to avoid the problem of having to circumvent the rule of Crown initiative. The events of 2019 therefore leave unanswered the question of whether in future this further line of defence available to the executive against an adverse majority in the Commons could also be neutralised. The rule is not embodied in statute, so if there were a majority in the Commons for dispensing with the standing orders which give procedural effect to the rule (Nos. 48 and 49) it must, in theory, be possible for the Commons to do so. *Erskine May* in fact cites some precedents in footnotes from World War Two and just after, with the last in 1953.[65] But it also notes that the waiver motions were accepted by the chair for debate and decision on the basis that the Crown's recommendation had previously been signified to them (as was implicit in their moving by a minister).

What of the House of Lords in all this money business? In most accounts of the UK constitution the Lords is seen as one of the checks on elective dictatorship by the Commons – a role as constitutional guardian which the reformed Lords has since 1999 been keen to emphasise.

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[64] See *Commons Hansard*, 3 April 2019, cc 1130-31. The Speaker said: I recognise… that extending the period under article 50 would, in effect, continue the UK's rights and obligations as a member state of the EU for the period of the extension, which would have substantial consequences for both spending and taxation. I am satisfied that the financial resolutions passed on Monday 11 September 2017 give fully adequate cover for the exercise by Ministers of their powers under section 20(3) and (4) of the European Union (Withdrawal) Act 2018 to move exit day in order to keep in lockstep with the date for the expiry of the European treaties, which of course is determined by article 50 of the Treaty on European Union … Accordingly, my ruling is that the European Union (Withdrawal) (No. 5) Bill does not require either a Ways and Means motion or a money resolution.

[65] Erskine May's Parliamentary Practice, n4, section 33.18.

Governments nowadays rarely enjoy a solid majority in the Lords, even at the best of times. However, the Lords is constitutionally (and statutorily to some extent, under the Parliament Act) disbarred from determining matters relating to public expenditure and taxation.[66] Standing Order No. 80 of the House of Commons forbids the 'taking-up' of any bill brought from the Lords which would require a financial resolution. In relation to bills which start in the Lords (including government bills) this problem is circumvented by a polite fiction. To the last clause of any bill which is sent from the Lords to the Commons which would on the face of it require the cover of a money resolution there is tacked the so-called 'privilege amendment'. This states that 'Nothing in this Act shall impose any charge on the people or on public funds, or vary the amount or incidence of or otherwise alter any such charge in any manner, or affect the assessment, levying, administration or application of any money raised by any such charge'. This insincere disclaimer allows a bill to progress in the Commons and for any necessary financial resolution to be secured after its second reading in that chamber. If a financial resolution is agreed, the fictional words are then removed by the Commons in committee. This means that the ability of a government to stifle non-government legislative initiatives which carry any financial implications through denying them the cover of a financial resolution extends to those originating from members of the House of Lords.[67]

So, does the executive have a legislative veto at Westminster?

Under our constitutional arrangements as we currently understand them, where a government cannot command a majority in the House of Commons, it seems clear that the UK constitution continues in practice to assign the sovereign law-making power to the legislature, potentially in defiance of the wishes of the executive branch. The theoretical possibility of the denial of royal assent to an Act passed by both chambers of parliament is too dormant to be relevant to the current constitutional settlement. Nor can the theoretical possibility that the government might seek to postpone the signifying of royal consent to a bill affecting the Crown's private interests or the prerogative be regarded as a significant constitutional impediment to a parliament determined on a particular course, if there is a majority to support legislation to that effect.

The executive's key defence against the risk of parliament passing unwelcome legislation lies in its control over the House of Commons agenda, allowing it to deny sufficient time and certainty for real legislative initiative by non-government actors. That defence can be circumvented in exceptional circumstances if there is a determined parliamentary majority which wishes to do so, as in the case of the Cooper-Letwin and Benn-Burt bills in 2019, where the government was in a minority on the question of keeping a 'no deal' Brexit in play as a negotiating strategy with the EU.

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[66] Section 1 of the Parliament Act 1911 removed the Lords' ability to disagree to or amend 'money bills', though the definition of a money bill is considerably narrower than the definition of a cost-bearing bill under the rule of Crown initiative.

[67] The Commons' claim to 'financial privilege' also enables it to stymie unwelcome money-bearing legislative initiatives that the Lords may tack on to its bills by way of amendment without needing to test its majority in the Lords again. This is explained in: Meg Russell and Daniel Gover, *Demystifying Financial Privilege: Does the Commons' Claim of Financial Primacy on Lords Amendments Need Reform?*, Constitution Unit, London, 2014 (last accessed 11 February 2020).

Those bills also benefited from being the first ever non-government bills to be governed by timetabling provisions in the Commons, again against the wishes of the government.

There remains, however, a key element of the UK constitution as it currently operates using which the 'Crown' – in other words the executive – can frustrate the progress of unwelcome legislation during its passage, even if it cannot command a consistent majority in the House of Commons to defeat such bills or amendments in open combat. This is by withholding prior consent to any potentially cost-bearing provisions under the rule of Crown initiative. The Cooper-Letwin and Benn-Burt Acts managed to escape this trap by not entailing any significant new expenditure. But bills to promote, for example, a second referendum, or a Norway-style trade relationship with the EU, or to revoke Article 50 completely, probably would have been caught. Such bills were never tried, perhaps partly for this reason – even at a stage where there might have been an outside chance of one or other of them commanding a majority in the House of Commons.

So, it all comes down to money in the end. If there is an executive veto in the UK constitution, and there is, it comes in the form of the pre-emptive veto enshrined in the rule of Crown initiative. Beyond a minimal provision of half-a-million pounds a year,[68] there is no real money available to do anything unless the government of the day is prepared to recommend it. Recent examples show how the expectation that the government would normally do so if the legislation was supported by the House of Commons at second reading can no longer be relied on. And without money to spend, the scope of politics is pretty limited – though not, as the Cooper-Letwin and Benn-Burt bills demonstrated, completely voided.

[68] See n57 above.

Part 2: Should there be an executive veto over legislation in the British constitution?

We have seen that there is some uncertainty expressed in public debate over whether there is an executive veto over legislation at Westminster. There are essentially three possibilities discussed above (beyond the government using its power of agenda control to deny time to an unwelcome bill): the withholding of royal assent to an Act passed by parliament; deliberate delay in securing the Queen's consent to bills affecting the sovereign's prerogatives or private interests; and the refusal to bring forward motions for financial resolutions to allow non-government bills, or amendments to government bills, to proceed. In each case the use of these powers is governed by constitutional conventions or parliamentary usage rather than explicit rules or statutes. Although the idea of refusing royal assent to an Act seems far-fetched, there are still those prepared to argue that it is possible, and even desirable. The status of royal consent to legislation affecting the prerogative – a purely parliamentary rule – is not clearly articulated in any authoritative text, and its purpose is open to misinterpretation. The rule of Crown initiative is well established, but even so its status (whether a fundamental or a contingent element of our constitutional arrangements) is not clear, and whether parliament could choose to set it aside is a contestable question. The detail and purpose of its application in practice is also less than wholly transparent; and the discretionary element in its use and the identity of any final arbiter were it disputed are asserted rather than rather than based on any specified authority.

The second part of this report considers whether there is a case for clearing up some of these imprecisions and uncertainties. It begins by considering some discussions of the role of conventions in the UK constitution, and how times of political conflict may put these under strain and necessitate greater clarity and codification. It then considers what can be learnt from international comparisons regarding both retrospective and pre-emptive veto powers in other democracies. Finally, it asks whether there is any obvious need or justification for veto mechanisms in the UK's parliamentary democracy and whether they serve an effective and necessary constitutional purpose; and considers options for change in the mechanics of the UK constitution with regard to the balance of power between the executive and parliament in making law.

Is there a case for codification of veto powers?

Much of the discussion so far about potential vetoes – both royal assent and the various possible anticipatory vetoes – has hinged on constitutional conventions. Are the conventions about the executive veto sufficiently clear?

One of the more elegant descriptions of the benefits of constitutional conventions is contained in the 1930 report of the Conference on the Operation of Dominion Legislation. Its authors opined that:

> The association of constitutional conventions with law… has permeated both executive and legislative power. It has provided means of harmonising relations where a purely legal solution of practical problems was impossible… or would have failed to catch the spirit which gives life to institutions. Such conventions take their place among the constitutional principles and doctrines which are in practice regarded as binding and sacred whatever the powers of Parliaments may in theory be.[69]

But as Harold Laski, who quoted this passage in his 1938 book on socialism and parliamentary government, remarked:

> … men regard constitutional principles as 'binding and sacred' because they accept the ends they are intended to secure. Will they so regard them if they are doubtful about those ends…? For it is certain that the limits of the prerogative would be judged, not on the precedents, which are doubtful by their antiquity, but by the approval or disapproval by citizens of the purpose for which the prerogative was invoked.[70]

Brexit seems to have been one of those disagreements about ends which threatened to unravel the binding and sacred nature of some of these conventions. Events which gave rise to the impetus to write this report also gave rise to a feeling in some circles that parliament needed to have its wings clipped. The return to an era of majority government in the UK post-2019 may (and perhaps should) turn the conversation round to how parliament can best protect us against an over-mighty executive. As Laski put it back in 1938:

> Each generation will interpret [the conventions of our constitution] in the climate of its predominant opinion. Where that climate is calm, they admit of a generous interpretation; where it is stormy, their construction is gradually narrowed until the interpretation put on them by one side is unintelligible in its spirit to the other.[71]

It is a widely shared perception that 2019 saw a breakdown of mutual understanding about some of the UK's constitutional conventions. This reinforces the view of some observers that a degree of codification of matters previously taken for granted might help to stabilise the way we make decisions of national importance and at least produce a wider degree of consensus about process, even when the competing ends remain apparently irreconcilable.

Many of the issues discussed in Part 1 of this report only emerged into prominence because we experienced more than two years of minority government during a period when the UK faced one of the most difficult constitutional readjustments it has ever had to confront (following hard on the heels of five years of the UK's first post-war peacetime coalition government). But the hope that we can now return complacently to 'business as usual' may be ill-founded. In any event, the lessons from this crisis period could have something to teach us about the reconciliation of constitutional disagreements in placid times, just as the 1929 Conference quoted above saw sense in forestalling future conflict by proposing the codification of the conventions that had previously governed relations between the imperial and dominion governments and legislatures. Jonathan

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[69] Conference on the Operation of Dominion Legislation and Merchant Shipping, 1930, *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping*, Cmd. 3479, para 56.
[70] Harold J. Laski, *Parliamentary Government in England*, George Allen & Unwin, London, 1938, pp53-5.
[71] ibid, p65.

Sumption recently made a similar point about the impact of Brexit on the constitution as that made by Laski when writing in the turbulent 1930s:

> The world is full of countries whose democratic constitutions have been subverted entirely legally by governments set on exploiting legal forms to undermine democratic substance… But although conventions matter everywhere, they are particularly important in an informal and political constitution such as the British one. In our system, they are the main barrier against the ministerial despotism which would otherwise be implicit in our quasi-monarchical constitution. The problem about constitutional conventions is that they depend on a shared political culture. A shared political culture means the mutual acceptance that the constitution must be made to work in the interests not just of one side, but of the system as a whole. It means a common sentiment about what the limits are of political propriety. It means that not everything that legally can be done, should be done.[72]

It should not be particularly controversial to say that the executive in the UK (especially if it enjoys a majority in the Commons) is far more likely to present a clear and present danger to the constitution than occasional informal and ad hoc coalitions of non-ministerial MPs ever could. The conflict in parliament and the courts over the illegal prorogation of parliament in September 2019 is a vivid recent illustration of the risks.

A written constitution for the UK seems like a still distant prospect. And written constitutions are no guarantee of safety from elective dictatorship. Even in stable and tolerant societies they do carry dangers with them, particularly the risk of ossification, with the consequence that they offer only obsolete solutions to problems unforeseen by their framers. Nonetheless, it is sometimes worthwhile to articulate the conventions of the constitution even if they are not to be set in stone. Understanding what our legitimate expectations are gives us the ammunition to assert and defend them and may pave the way to that 'mutual acceptance' that Sumption wants to embed. Over the last quarter of a century, the UK has codified many of its constitutional arrangements in different statutes and documents. This process might now perhaps usefully be extended to the question of the legislative veto. Too much is at stake to leave it exclusively to the controversies of the academies.

Opponents of codification sometimes declare themselves to be adherents of the *political* constitution rather than the *legal* constitution.[73] Advocates of the political constitution often proclaim adherence to a 'strong' executive or a 'strong' legislature. Advocates of the legal constitution, in contrast, tend to favour statutory and constitutional constraints on the executive (and maybe legislature) and an independent judiciary with power to determine constitutional questions. Some advocates of the political constitution dislike coalitions and legislatures without single-party dominance. This makes the distinction between the strong executive and strong legislative branches easy to elide in a situation where sovereignty is fused in an executive-dominated legislature. But when, as in 2019, a government does not dominate parliament and great matters are at stake, adherents of the political constitution may be faced with a discombobulating

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[72] Jonathan Sumption 'Brexit and the British Constitution: Reflections on the Last Three years and the Next Fifty', *Political Quarterly*, 91(1), pp107-115.

[73] A very useful and wide-ranging discussion of the concept of the political constitution can be found in the 2019 special issue of the *King's Law Journal* 'The Political Constitution at 40'. The anniversary being marked was that of the publication of J. A. G. Griffith's Chorley lecture of that title in *Modern Law Review*, 42(1), 1979, pp1-21.

choice between the strong executive and the strong parliament. The situation becomes more confused when the sovereignty of 'the people' is invoked by way of a referendum, especially when the message of that referendum is legitimately contestable.

In practice, of course, when the gloves come off each side tends to raid their opponents' rhetorical arsenal for anything that may prove useful to securing advantage for the underlying aim or ideology which they seek to advance, either in general or in the particular case. So it seems to be with the recent arguments about Brexit and parliament's role in delivering it – both sides of the argument (parliament is sovereign against parliament is overreaching itself and somehow acting 'undemocratically') borrow freely from the language of liberalism and legalism and that of tradition and authority to justify their actions and excoriate those of their opponents. It all gets very confusing.

For the next few years it seems likely that we will have a government with a secure majority in the House of Commons. It is, therefore, unlikely that we will be faced with constitutional dilemmas of the kind raised by the Cooper-Letwin and Benn-Burt bills in 2019. Nevertheless, we might do well to take the opportunity to consider the issues blown into view in the great storms of 2019 during this period of relative constitutional calm.

Retrospective vetoes elsewhere

In constitutional democracies with elected heads of state, even when essentially parliamentary rather than presidential in structure, more or less constrained executive vetoes are pretty much the norm (though the German Basic Law is an exception). In parliamentary democracies, where the government depends on the confidence of the legislature as is the case at Westminster, such veto powers seem to tend to be restricted to a backstop against laws that the head of state considers 'unconstitutional', possibly relying on final adjudication by some form of constitutional court. Presidential democracies, more along the Washington model, where the executive is elected separately from and does not sit in the legislature, tend to include a less constrained veto power, but provide for an override by the legislature (sometimes by a super-majority and sometimes by a simple one).

Article 1, section 7.2 of the US Constitution is probably the best known and most frequently used example: the President can exercise a veto over any bill passed by Congress. If a bill is sent back to Congress, it can override a presidential veto by a two-thirds majority of each house. Similar rules exist in other presidential systems, many of which draw on the US model. The Argentinian constitution, for example, allows the executive to veto legislation in whole or part; as in the US, this can be overturned by a two-thirds majority in each chamber.[74] In Brazil, presidential vetoes are examined in a joint session of both houses, and can be overturned by a majority of those entitled to vote.[75]

In France the presidential veto seems to have its roots in the idea of the head of state as protector of the constitution (in the absence of a constitutional court), dating from the Directory government of 1795. This role became more emphatic in the second and third republics, but the

[74] 'National Parliaments: Argentina', Library of Congress website (last accessed 16 July 2020).
[75] 'National Parliaments: Brazil', Library of Congress website (last accessed 16 July 2020).

veto soon became suspensory rather than absolute. Article 10 of the current French Constitution provides that the President must promulgate an Act within 15 days of its being transmitted from parliament to the government but that, before the expiry of this time limit, the President can, with the concurrence of the Prime Minister, require parliament to reopen debate on the Act or any sections of it.[76] The constitutional jurisprudence is pretty clear that this power can only be used legitimately in cases where there is doubt about the constitutionality of the legislation or its compliance with the principles of the rule of law. The concurrency requirement for the Prime Minister's consent means it cannot be used to block laws made by a legislature which is simply of a different political complexion to the presidency.[77] Since in current French practice the Conseil Constitutionnel is normally asked to consider such issues before a law is presented to the President for promulgation, the situation is even less likely to arise. If the President acts in this way the parliament is not obliged to revise the law, and in the event of an impasse the President could potentially use the power of dissolution (or the Assemblée Nationale the power of impeachment). On a number of occasions it has been made clear that the President does not have discretion to block laws.[78]

Iceland provides an interesting variation. Under Article 26 of its Constitution the President can veto a bill passed by the Althing, but it must then be put to a national referendum to confirm or reject the presidential veto.[79] When this happened for the first time in 2010, and then again in 2011, on legislation relating to compensation to overseas investors in the spectacularly failed Icesave bank, the President's veto was supported by respectively 98% and 60% of those voting.[80]

In Ireland the President can, under Article 26 of the Constitution, refer a bill (with certain limitations mainly relating to money bills) to the Supreme Court where they consider that it or any part of it may be 'repugnant to the Constitution'. The court's decision is final.[81] Up to 2004 this procedure had been used on 15 occasions, but it seems since to have fallen out of fashion.[82]

Do we need royal assent?

In Part 1 it was established that, for all practical purposes, royal assent cannot be denied to a bill agreed upon by parliament. Those who raised the spectre of resurrecting this constitutional dead letter during the early part of 2019 generally rested their argument on the claim that the putative bills to restrain the government from leaving the EU without a deal would somehow have been

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[76] Constitute Project, *France's Constitution of 1958 with Amendments Through 2008* (last accessed 12 February 2020).
[77] The power has been used only three times since 1958.
[78] According to President Mitterrand, once a bill is agreed, the President merely becomes a 'notaire'; see n22. In 2006 President Chirac promulgated a law but then asked officials not to apply it (Loi dite CPE L. n° 2006-396 du 31 mars 2006, JORF, 2 avril 2006, texte n° 1, art. 8 (modifié par la L. n° 2006-457 du 21 avril 2006, JORF, 22 avril 2006, texte n° 1, art. unique); 'Jacques Chirac promulgue la loi sur le CPE, mais repousse son application', *Le Monde*, 31 March 2006.
[79] Constitute Project, *Iceland's Constitution of 1944 with Amendments Through 2013* (last accessed 12 February 2020).
[80] Benjamin Leruth, 'Iceland's economy has entered a period of recovery since 2011, however the on-going Icesave dispute has reduced public support for EU membership and the country's government', *LSE European Politics and Policy Blog*, 14 August 2012 (last accessed 15 July 2020).
[81] 'Constitution of Ireland', Electronic Irish Statute Book website (last accessed 12 February 2020).
[82] 'Article 26 References', The Supreme Court of Ireland website (last accessed 12 February 2020). See also Gerard Hogan, David Kenny, Rachel Walsh, 'An Anthology of Declarations of Unconstitutionality' in *The Irish Jurist*, 2015, v54.

unconstitutional. So, if there is no retrospective veto in the British constitution, would it be in line with international constitutional best practice to invent one to forestall the risk of parliament legislating in an unconstitutional way? It certainly seems possible for a parliamentary democracy to survive without one – in Sweden for example. In monarchical systems where the concept of royal assent survives – Denmark for example – it has been made clear that it cannot be withheld.[83]

Where retrospective vetoes are explicitly provided for in constitutions elsewhere they are often surrounded by constraints requiring that the veto can only be exercised where there are grounds for doubting the constitutionality of a law (or where it may have not been made in accordance with due process).

The idea of the Queen as a constitutional longstop is certainly appealing, but it cannot obviously coexist with an insistence on her inability to act against or without the advice of her ministers, so it seems not to be a possible model under the British constitution. But during the controversy leading up to the illegal prorogation of parliament in September 2019 the question was asked in some quarters as to what the point of a 'constitutional monarchy' was if the sovereign had no role as a defender of the constitution.[84]

If, in codifying the veto power of the head of state, the principal mischief you were seeking to guard against was a rogue government with a solid majority attempting to legislate against 'shared' or 'sacred and binding' constitutional norms, the obvious option taken from other constitutions would be to codify a power for the Crown to decline to promulgate an Act which appeared potentially repugnant to the constitution or the rule of law, or which appeared to have defects in its process of making. If there were a written constitution, such a veto could be final, subject to the decision of a constitutional court – as in Ireland. But while the doctrine of parliamentary sovereignty remains intact, such a solution seems unavailable – the veto could only be suspensory, leaving the final decision with the legislature as to whether to press on with legislation which was so suspect. But for that function to be created, the Crown would have to have a separate source of advice from the executive or parliament. The obvious existing candidate is the Supreme Court, to which a bill might be referred for an opinion, but that would be controversial, and would tend to blur the boundaries of the separation of powers. Writing in *The Times* in July 2019 Lord Sumption instead proposed that there should be a committee of Privy Counsellors to advise the sovereign on 'the legal and conventional limits of the use that ministers can make of her

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[83] But elsewhere the ambiguity surrounding royal assent remains. Famously in Belgium in 1990, when King Badouin felt unable for reasons of conscience to assent to an abortion law reform bill, the regency powers in the constitution were used to suspend his rule for two days to allow the Council of Ministers to exercise the royal prerogative. A similar problem arose in Luxembourg in 2008 over the question of euthanasia. See Robert Hazell and Bob Morris (eds.), *The Role of Monarchy in Modern Democracy: European Monarchies Compared*, Hart, Oxford, 2020, pp28, 33 and 46. Where monarchical vetoes are identified as having (very rarely) been invoked in this work it seems to be on personal grounds rather than as an expression of executive control. One contributor (Luc Heuschling) warns that this: '…may be rather uncomfortable for constitutionalists and citizens living under a system in which the royal veto may still be legal, but whose use, at the same time, is downplayed as "unreasonable and highly improbable". Such discourse belittles how dangerous such an outdated legal situation may be – not so much for the monarchy, but for democracy' (p57).

[84] Walter Bagehot (n12) of course, described the English constitution as not so much a constitutional monarchy as a 'disguised republic', p159 n2.

constitutional powers'.[85] Though this idea was not obviously directly concerned with the exercise of the prerogative of royal assent it might be adapted to such a purpose. The advisory body would not necessarily be exclusively comprised of judges (as Sumption suggests it should not), but its composition would have to be carefully designed and protected.

Although the discussion of the possibility of refusing assent to the Cooper-Letwin bill in 2019 was generally couched in terms of the bill being somehow unconstitutional, underlying that claim was an implication that for parliament to legislate contrary to the wishes of government was *ipso facto* unconstitutional because it destabilised constitutional assumptions about the nature of 'responsible government'.[86] This is a highly inhibiting view of parliament's role as the sovereign lawmaker. Royal assent cannot be used as a way of ensuring that parliament does not legislate in defiance of the executive – that power does not exist in our present constitutional arrangements. To make constitutional sense, such a position would require the executive veto-holder in some way to hold a separate mandate from, or otherwise be above (or at least outside) the politics of, the legislature – as in the classic presidential system most familiarly embodied in the US constitution. So long as in the UK we hold to the doctrine of the Crown-in-parliament as the sovereign lawmaker, then that particular construction of a respectable case for an executive veto does not stack up.[87] But it is dangerous for both democracy and the monarchy to allow the idea to endure, even in vestigial form, that somehow this reserve power is available. The classic argument is that if the government cannot command the confidence of the House of Commons it should go to the country. But there may be circumstances in which constant resort to general elections is not the right answer. Mankind cannot bear too many elections, and there are perfectly respectable arguments to be advanced for fixed-term parliaments. If the mischief that a constitutional innovation was seeking to address were the risk of parliament legislating regularly against the wishes of the executive, thereby making effective and efficient government unattainable, a new constitutional settlement would be needed. That would likely take, on international comparisons, the form of a suspensory veto power for the executive which could be repudiated in the final analysis by the legislature, under more or less stringent conditions. Such provisions do exist is some parliamentary democracies.[88] If you were inclined towards plebiscitary democracy, you might have a very longstop position where the Act could be put to a confirmatory referendum under certain (desirably quite exceptional) conditions.

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[85] Jonathan Sumption, 'Brexit, the Queen and Proroguing Parliament: How to Solve This Constitutional Conundrum', *The Times*, 17 July 2019.

[86] John Finnis, for example, argued that 'Westminster democracy depends on balancing the elected branch and the executive so that neither can pursue a particular policy without the acquiescence of the other' and that there was an 'imminent risk that Her Majesty might be confronted with conflicting advice, by the two Houses for assent to a Bill and by her ministers to withhold that assent', see n18.

[87] As Lord Sumption has put it (n72) 'In overtly presidential constitutions like those of United States or France, there are constitutional documents from which the executive can derive legitimacy for its acts, independent of the legislature. There is nothing equivalent in Britain'. p109.

[88] See, for example, s58 of the Commonwealth of Australia Constitution Act. The *Handbook for the Parliament of the Cook Islands* describes its process thus: 'On receipt of a Bill for signature, the Queen's Representative has two options: signing the Bill whereupon it becomes law on commencement; or summoning the Executive Council if she or he does not sign. The Executive Council may then decide not to return the Bill to parliament in which case it proceeds into law. Alternatively, the Executive Council may return the Bill to parliament for reconsideration with or without amendments. Where Parliament passes the Bill with the amendments proposed, or in its original form, the QR will sign the Bill into law. Where Parliament passes the Bill with new amendments originating in Parliament then the Bill proceeds to the QR as if it were a new Bill.' (Last accessed 22 June 2020).

If the UK were to attempt some codification of the practice and constitutional limits of royal assent then the starting point should be finding some way of finally knocking on the head the idea that the sovereign's role in granting assent involves any discretion to deviate from the decision of parliament, so deterring any future dangerous speculation by constitutional experts that such a course is a genuinely available option. Although we could probably manage perfectly well without royal assent, most constitutions have some final act by which a law is 'sealed' which provides a public guarantee that a legislative instrument is valid. Perhaps assent could be restyled the 'royal promulgation'. Or, it is suggested above, such codification could give clear and bounded areas of discretion concerning issues of constitutionality, due process and the rule of law where the sovereign could ask parliament to think again, based not on the advice of ministers but on that of some other trust-bearing body. On the pattern of other constitutions, the last word might be left with a super-majority in each chamber of parliament, although experience elsewhere in the world shows us that super-majority requirements are not a watertight protection against elective dictatorship – and the overriding of the Fixed-term Parliaments Act 2011 in order to call the December 2019 general election shows that, in the UK system anyway, super-majority requirements can be circumvented.

The constitutional organicists would, of course, bridle at any such suggestion of codifying and clarifying the rules about royal assent, perhaps claiming that the preservation of an ill-defined but theoretically unconstrained and absolute royal veto would be a prophylactic against some imponderable future crisis. In his 2014 play *King Charles III*, Mike Bartlett had some thought-provoking fun imagining such a scenario. The story did not end happily – in fact it ended with a palace coup.[89]

Do we need royal consent?

We should quickly dismiss the minor question of the sovereign's consent to bills affecting the prerogative, which as we have seen anyway form a distinct minority of the class of bills deemed to require the Queen's consent before third reading. As was demonstrated in Part 1, this byway of the UK constitution has nothing to do with the 'Crown' as the executive government of the day, which acts only as a messenger. It is not even really a 'constitutional' thing at all, but a parliamentary rule embedding good manners towards the ceremonial head of state. But its existence engenders an unnecessary degree of uncertainty about its scope and purpose, and the risk that an unscrupulous executive would try to use it as a way of delaying unwelcome legislation where it was at risk of losing the argument and the vote in parliament. We should be safely able to assume, and therefore codify as a convention, that the Crown has put its prerogatives at the disposal of parliament in perpetuity – an undertaking which might be ceremonially repeated at the start of each new parliament. Although the House of Commons Political and Constitutional Reform Committee did not quite dare say so in 2014, the requirement of consent to bills touching upon the prerogatives should be quietly dispensed with. Circumscribing the prerogative is what parliament does.[90]

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[89] Mike Bartlett, *King Charles III*, Nick Hern Books, London, 2015.

[90] As Lord Browne-Wilkinson observed in the Fire Brigades Union case, 'the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body'; [1995] UKHL 3.

The process of consent to matters affecting the private interests of the sovereign and the heir could be retained purely as a matter of courtesy, since the Crown has no other means of expressing an opinion by voice or vote. There is no real need for it to be part of the formal and public legislative process at all.

Do we need the royal recommendation?

As noted in Part 1, the only real veto currently held by the executive at Westminster is the anticipatory veto embodied in the rule of Crown initiative. The question of how this power might be clarified or codified raises some complex considerations and the potential solutions look more contestable and various. The discussion below is accordingly more lengthy.

Within the UK itself the rule of Crown initiative is reproduced in the practice of all three devolved legislatures, but somewhat inconsistently. Although Westminster did not see it as necessary to insert it into their foundational Acts as a mandatory requirement, both the Scottish Parliament and Welsh Senedd include a version of it in their standing orders – Rule 9.12 and Standing Orders 26.68 to 26.74 respectively. It is, therefore, a self-imposed discipline of these legislatures which they could in theory shrug off, and can certainly amend.[91]

It was revised in Holyrood in 2001 on the basis of recommendations from a parliamentary working group, and Annexe B of that working group's report remains a very good analysis of its purpose and operation.[92] The most notable change that arose from a recommendation of the group was that the rule blocking progress in committee is explicitly to be interpreted by the presiding officer (not by officials) and applies only where the presiding officer considers the increase in expenditure to be 'significant' (Rule 9.12.5). The formulation used in the Welsh Senedd is nearly identical (standing order 26.71). The use of the requirement for a financial resolution has been used as a bargaining counter between the Welsh government and Senedd members, although its use for this purpose has been made explicit in a way which does not obviously happen in the House of Commons.[93] The requirement that the expenditure involved should be 'significant' seems to have been quite austerely applied in Cardiff Bay, at far less than the £500,000 *de minimis* guide for annual recurrent expenditure at Westminster.[94]

At Stormont, in contrast, Westminster embedded the rule in the founding Act of the Northern Ireland Assembly but it is not referred to in its standing orders.[95] Consequently, there is no impediment to a PMB progressing without cover of a financial resolution through all but its final stage. A PMB could be referred for its committee stage without a resolution, though the committee

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[91] The rule was included in the original standing orders of the Scottish Parliament (imposed by the UK government by means of a statutory instrument), but there is nothing in the 1998 Act which would now prevent the parliament removing it. See Schedule to the Scotland Act 1998 (Transitory and Transitional Provisions) (Standing Orders and Parliamentary Publications) Order 1999, SI/1999/1095.

[92] Report of the Procedures Committee of the Scottish Parliament, First Report 2001, *Changes to Chapters 9 and 9A of the Standing Orders of the Scottish Parliament* (last accessed 20 February 2020).

[93] For example in the cases of the Nurse Staffing Levels (Wales) Bill 2015 and the Public Services Ombudsman (Wales) Bill 2018 – the latter a committee bill.

[94] It seems that the Wild Animals and Circuses Bill 2019 (a government bill, not a PMB) was the first Welsh bill which the presiding officer decided did *not* require a financial resolution: see this letter from the Llywydd (last accessed 25 February 2020).

[95] Section 63 of the Northern Ireland Act 1998. Its inclusion there may possibly reflect its presence in modified form in the Government of Ireland Act 1920 as section 16(2).

would be expected to consider and report on the issue of the non-recommendation and for this to be addressed during the course of the amending stages. Ultimately, should a resolution be deemed to be required but not be provided by the time a bill reached its final stage, the Speaker could not then allow that stage to be moved (as the Assembly could not pass this final stage without breaching section 63 of the 1998 Act). This arrangement means that any negotiation over money between a bill's sponsors and ministers can potentially be iterated at several stages during its passage.

However, the rule in different forms is not a phenomenon exclusively found in the UK, other Westminster-derived democracies or constitutional monarchies. Some international comparisons are discussed below.

The US: the origination clause

In the US the power of financial initiative essentially resides in the House of Representatives. Article I, Section 7, clause 1 of the Constitution states:

> All Bills for raising Revenue shall originate in the House of Representatives…[96]

As James Madison commented in Federalist Paper No. 48, 'the legislative department alone has access to the pockets of the people', and in Federalist Paper No. 58 he went further, stating that

> The House of Representatives cannot only refuse, but they alone can propose, the supplies required for the support of the government… This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people…

France: Article 40 of the Constitution

Article 40 of the current French Constitution states:

> Private Members' Bills and amendments introduced by Members of Parliament shall not be admissible where their enactment would result in either a diminution of public revenue or the creation or increase of any public expenditure.

Interestingly, this reversed the position set out in Article 17 of the 1946 Constitution of the Fourth Republic which made explicit that 'The Deputies of the National Assembly shall have the power to initiate expenditures' (though it denied any such right to members of the Conseil – the then upper chamber). Its insertion in the 1958 Constitution looks like evidence of the distrust of 'parliamentarianism' that led to support for de Gaulle's almost monarchist constitution. However, the article does not appear to have been the cause of any great controversy since 'cohabitation' (where the party which holds the presidency does not have a majority in the National Assembly) has been an insignificant phenomenon since 1962.

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[96] Commonly known as the 'origination clause', to be read together with Article I, section 1. Article II, on the executive, makes no mention of money.

Germany: Article 113 of the Basic Law

Germany is an example of an elaborately-designed parliamentary and federal system. Its Basic Law is (perhaps predictably) more complicated on this issue, as well as more permissive than in France. Article 113 states broadly in paragraph 1 that:

> Laws that increase the budget expenditures proposed by the Federal Government or entail or will bring about new expenditures shall require the consent of the Federal Government. This requirement shall also apply to laws that entail or will bring about decreases in revenue.

But it goes on in subsequent paragraphs to provide an example of a suspensory but not final veto which involves reference-back procedures and a requirement for the executive to explain its objections when invoking the delaying mechanism, leaving the final word with the legislature.

Ireland: Article 17 of the Constitution

Ireland is, of course, quite heavily steeped in the Westminster tradition. The equivalent of the rule of Crown initiative as applied in the Dáil Éireann derives from Article 17.2 of the Irish Constitution which states:

> Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach [Prime Minister].[97]

This provision has recently become an area of considerable parliamentary controversy. The Irish government between 2016 and 2020 did not enjoy a secure majority in the Dáil. As the opportunities for non-government legislative initiative are, in theory at least, much freer there than at Westminster the consequence was that non-government Deputies successfully brought forward a number of PMBs, towards which the government was hostile or unenthusiastic, which secured a second reading. However, the standing orders of the Dáil place much stricter requirements for the cover of a 'money message', as they are called there, than the criteria for requiring cover of a financial resolution in the UK House of Commons – its standing order 179.2 provides that

> The Committee Stage of a Bill which involves the appropriation of revenue or other public moneys, *including incidental expenses* [emphasis added], shall not be taken unless the purpose of the appropriation has been recommended to the Dáil by a Message from the Government.

The inclusion of that innocuous phrase 'including incidental expenses' (which does not appear in the Dáil standing orders governing the *introduction* of bills) extends its scope into almost every

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[97] Article 37 of the 1922 Constitution of the Irish Free State had read: 'Money shall not be appropriated by vote, resolution or law, unless the purpose of the appropriation has in the same session been recommended by a message from the Representative of the Crown acting on the advice of the Executive Council'. It had the virtue, in this context, unlike parallel provisions in Canada, Australia and New Zealand discussed below, of specifying that the Crown's representative acted only on the advice of the executive.

corner of a proposed bill, since hardly anything could be done legislatively without some 'incidental' expense – even if it were only the cost of a stamp to send a letter to Brussels.

As a consequence, something of the order of 50 opposition bills (the figure is disputed) were stymied from going into committee on the basis of the absence of a money message during the 2016–20 Oireachtas.[98] During the controversy over this issue in late 2019, a minority grouping of opposition TDs (members of the Dáil) sought to amend the standing orders to remove this blockage. The Ceann Comhairle (presiding officer) refused to allow the motion on the order paper on the grounds that it was of doubtful constitutionality. An attempt to challenge that decision on the floor of the Dáil was defeated on 5 November 2019. The disappointed TDs threatened to take the Ceann Comhairle to the courts in an attempt to overturn his decision to block the original motion (partly on the grounds that the presiding officer had no power to determine questions of constitutionality), and that the fact that the wider question was being considered by a committee on the reform of the Dáil should have precluded a pre-emptive ruling.[99] In the summary of an opinion cited in the successful application by the dissenting TDs for leave to take the matter to court, David Kenny and Eoin Daly of Trinity College Dublin argued that:

> … the broad interpretation of the procedure seems to place unjustified limits on the capacity of the legislature to pass any legislation independently of the executive organ… Article 17.2 [should not be] read to vest a veto over law-making in the executive… the government's power under Article 17.2 is not entirely discretionary; it must be exercised responsibly for a purpose related to finances and not for any other purpose, such as purely political opposition to a Bill … the use of the money message procedure must be at least in some way limited to ensure that the legislature can, in some real sense, make law, which is its exclusive constitutional responsibility under Article 15.[100]

This illuminates the question raised earlier in this report of whether the House of Commons could vote to overrule the chair's ruling in similar circumstances – the difference being that the reservation of the right of financial initiative to the executive in Ireland is a black-letter constitutional fact rather than an historically developed convention.

Canada: section 54 of the Constitution Act 1867

The Canadian House of Commons – also profoundly shaped by the legacy of Westminster – displays some instructive parallels. Broadly the rule of Crown initiative applies there much as it does at Westminster. Westminster had inserted the rule into the British North America Act 1867 (which founded the Canadian Federation) as section 54, which reads:

> It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or Bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that House by message of

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[98] For a fuller description of these events see David Kenny and Conor Casey, 'The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019', forthcoming in 2021 in *Public Law*.

[99] The Taoiseach gave an intriguing explanation to the Dáil of the grounds for blocking money messages on 4 December 2019. It included the claim that some of the bills were 'unconstitutional' – not a matter on which the Taioseach is empowered to judge by the Constitution.

[100] David Kenny and Conor Casey, 'Opinion on the Constitutional Limits of the Money Message Procedure Under Article 17.2 of the Constitution of Ireland', published on academia.edu, 2019 (last accessed 21 February 2020).

> the Governor General in the session in which such vote, resolution, address, or Bill is proposed.

By virtue of section 52 of the Canadian Constitution Act 1982 this passage remains part of the constitution to this day and is incorporated into the standing orders of the Canadian House of Commons (79(1)). In 1968 the requirement in Ottawa for an actual resolution to be tabled and voted on was abandoned and a notification of the royal recommendation deemed sufficient (rather on the lines of the Irish money message procedure). The relevant standing order now reads:

> This House shall not adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to the House by a message from the Governor General in the session in which such vote, resolution, address or bill is proposed.

Procedure for PMBs in Ottawa was amended in 1994 to allow non-government bills to progress as far as third reading before being blocked by the failure to produce a notice of recommendation, rather than being blocked on introduction (as had been the case previously) by its absence.[101] This rule change seems partly to have been a recognition that PMBs never made any progress anyway, but in 2003 procedure in Ottawa was again altered to guarantee a vote to a number of PMBs. When this was followed by a period of minority administrations from 2004 to 2011 the problem became much more neuralgic for the government. Clearly, by the time a bill is ready for third reading it has already surmounted a considerable number of procedural obstacles and avoided several opportunities for defeat (although the process in Ottawa appears to be much less heavily weighted against the backbencher than at Westminster). The argument over the royal recommendation will therefore take place in a rather different political context than it would in the UK House of Commons.

However, in contrast to the situation which once appeared to pertain at Westminster, in Canada the notion of a presumption that a PMB will receive government-sponsored financial cover in the form of a 'royal recommendation', if supported by a majority at second reading, seems not to have taken root. This may be because, before 1994, the bills were blocked at introduction. In fact, the Canadian government has provided a royal recommendation for only three PMBs since 1994 (and in all three cases the bills' sponsors were government backbenchers). Under the minority Conservative governments of 2006–11, at least five PMBs progressed to third reading at which point the Speaker declined to put them to a vote as they did not have a royal recommendation.[102] The refusal of financial cover became in effect a way for the Canadian federal government to veto any bill supported by a majority in the House of Commons that it did not agree with.

In general, the Canadian House of Commons is a place where questions of procedure are more openly contested than at Westminster and the writ of the presiding officer is more subject to a requirement of justification. The application of the rule of Crown initiative has been often controversial and relatively frequently argued over in some detail (this debate mainly takes place at

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[101] Marc Bosc and André Gagnon, *House of Commons Procedure and Practice*, third edition, Éditions Yvons Blais, Montréal, 2017, chapter 21.
[102] Information provided by staff of the Canadian House of Commons.

second reading which gives an opportunity for the offending provisions to be removed in committee).

The third (2017) edition of the Canadian *House of Commons Procedure and Practice* does not contemplate the possibility of setting the rule aside. In an impressively Olympian manner in chapter 18 it states:

> The Speaker has the duty and responsibility to ensure that the Standing Orders pertaining to the royal recommendation, as well as the constitutional requirements, are upheld. There is no provision under the rules of financial procedure that would permit the Speaker to leave it up to the House to decide or to allow the House to do so by unanimous consent. These imponderables apply regardless of the composition of the House.[103]

A 2010 article examined around 80 rulings by Speakers from 1969 onwards on the application of the rule.[104] It concluded that:

> There does appear to be a desire to better define the territory between the Crown's constitutional authority to initiate a request for spending and a parliamentarian's right to make legislative proposals. It must be acknowledged that this legislative empowerment of private Members raises a lot of interesting issues relating to the responsibility of the Crown for the management of public monies. Granted, even if private Members cannot directly increase spending authorizations, indirectly their proposals could result in greater workloads for government departments… Could it be argued that these scenarios compromise the government's ability to manage public monies? And more intriguing, is the character of our system of government – where 'the Crown proposes and Parliament disposes' – evolving slowly into something else?

That evolution does not appear to have gone very far since 2010, but maybe the return of minority government in Canada in 2019 will stimulate further mutations.

New Zealand: the 'executive financial veto'

The New Zealand parliament, consistently with New Zealand's wider political culture, has taken a more radically modernising approach to the question of the rule of Crown initiative. Like Canada and Australia, the rule was originally incorporated by Westminster into the founding statute of the dominion, as section 54 of the New Zealand Constitution Act 1852, and was carried over into the New Zealand Constitution Act 1986 as section 21.[105] It was, however, repealed by the Constitution Amendment Act 2005, as it was judged no longer to have any relevance to the organisation of public finances. As a consequence the rule, including its form and interpretation, became the sole property of parliament rather than an external statutory control.

Even before that constitutional change, however, a 1995 report from the Standing Orders Committee of the House of Representatives recommended that the rule, which it described as

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[103] Marc Bosc and André Gagnon, n101, chapter 18, footnote 62 (last accessed 13 February 2020).
[104] Michael Lukyniuk, 'Spending Proposals: When is a Royal Recommendation Needed?', *Canadian Parliamentary Review*, 33(1), 2010 (last accessed 25 February 2020).
[105] A similar provision was included in Section 56 of the Commonwealth of Australia (Constitution) Act.

'inconsistent in both its expression and its application' should be replaced by what it called the 'executive financial veto'.[106] The committee noted disapprovingly that the rule as it then stood prevented 'a private member from moving any proposal that, even incidentally, involves the smallest amount of expenditure' without the government's say-so. In proposing the financial veto procedure, however, the committee recognised that the government of the day was 'accountable for the Crown's financial performance and position' and that it therefore needed to have control over the fiscal aggregates that determined that position. The changes to standing orders were introduced in 1996 (currently 326-30), and make no mention of that slippery idea of the 'Crown' but place responsibility firmly with the government of the day.[107] Standing order 327(1) of the parliament (which has, of course, since 1950 been unicameral) now states:

> A certificate by the Government not concurring in a bill, amendment, or motion on the ground that, in its view, the bill, amendment, or motion would have more than a minor impact on the Government's fiscal aggregates must state with some particularity the nature of the impact on the fiscal aggregate or aggregates concerned and the reason why the Government does not concur in the bill, amendment, or motion.

The standard work on the practice and procedure of the New Zealand House of Representatives describes the purpose of the veto as follows:

> The Government's financial veto… resulted from dissatisfaction with the operation of the House's previous appropriation rule, whereby bills or amendments involving an appropriation of public money were ruled out of order by the Speaker or Chairpersons at various stages of the legislative process. It was felt that this rule operated capriciously, protecting some expenditure proposals but not others and having no application at all regarding revenue. Where it did operate, it could operate too harshly, preventing members moving proposals that even incidentally involved the smallest amount of expenditure. The appropriation rule thus did not in any event protect the Crown's overall financial position, and was a source of frustration in relation to worthwhile projects involving small amounts of expenditure.[108]

Much of that critique could be readily applied to the situation in Westminster.

As a New Zealand parliamentary information note commented in 2016, after the government had issued a financial veto certificate in respect of the Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill:

> Financial veto certificates are not used often. *A Government will normally use its majority of votes in the House to reject proposals it does not support* [emphasis added]. The last certificate related to an amendment proposed to the Social Security (Youth Support and Work Focus) Amendment Bill on 17 July 2012. This is the first time the Government has exercised financial veto in respect of an entire bill since the procedure's establishment in 1996.

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[106] Standing Orders Committee, 1995, *Review of Standing Orders,* AJHR I.18A.
[107] Between 1996 and 2005 (when s.21 of the Constitution Act was repealed), a double mechanism, where non-government bills both were subject to possible veto and also needed an appropriation message, prevailed.
[108] David McGee, *Parliamentary Practice in New Zealand*, fourth edition, Oratia Books, Auckland, 2017, p515.

It also noted:

> The Speaker must be satisfied that the certificate states with some particularity the nature of the impact on the fiscal aggregates and states that the Government does not agree with the bill. The Speaker does not question the Government's judgment on the impact on the fiscal aggregates and will not allow the validity of the certificate to be challenged by point of order.[109]

In a 2017 report,[110] the House of Representatives Standing Orders Committee reconsidered the executive financial veto (as it had in 2014).[111] It did so on the basis of a petition which had argued that the veto was undemocratic, because it was designed to be used when the government disagreed with a majority of members of parliament. The Committee rejected the argument, countering that:

> The financial veto procedure is founded on the principle that the Government is responsible for the Crown's financial performance and position, and therefore needs to have control over the fiscal aggregates. This principle is then balanced with the desire of members to promote policies that may have financial implications.
>
> The abolition of the veto was considered by the Standing Orders Committee in 2014. The committee strongly endorsed the principled basis for the veto, stating that the Government could not retain ultimate responsibility for the administration of the country if fiscal decisions were imposed upon it. The committee noted that, until 2005, the Government's ability to maintain control of public finance was protected under the Constitution Act 1986. That provision was repealed precisely because Parliament's financial veto mechanism existed. Revoking the mechanism now would be a significant constitutional step.[112]

However, the 2017 committee did propose a significant change in the procedure. It noted that:

> … the use of the veto to bar a decision favoured by the majority of the House carries a need for political accountability.

and the committee recommended:

> … that the current procedure be amended to require a Minister exercising a financial veto to present the veto certificate in the House, rather than deliver it to the Clerk as is currently required. This will enhance the visibility of the Government's decision and the responsibility for taking it. The certificate will be debatable and given effect to in the same manner as it currently is.[113]

This change was accordingly incorporated into the House's standing orders.

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[109] 'Financial Veto Certificates Explained', New Zealand Parliament website (last accessed 10 May 2020).
[110] Standing Orders Committee of the House of Representatives, *Review of Standing Orders*, 2017 (last accessed 15 May 2020).
[111] Refreshingly, the House of Representatives expects its Standing Orders Committee to review the standing orders comprehensively during each term of parliament.
[112] Standing Orders Committee, n110, p33.
[113] ibid, p33-4.

Do we need an executive financial veto in Westminster?

The examples above suggest that, especially where it is seen in the old dominions, the rule of Crown initiative was a device to keep potentially unruly legislatures which might have different ideas from the local executive (or the imperial government) in check. Article 40 of the French Constitution of 1958 seems to have been designed to serve much the same purpose. This pattern is reinforced to an extent by the inconsistent application of the rule to the devolved legislatures of the UK. In the USA and some other presidential systems, the balance of power in the tug of war over the purse strings between the legislature and the executive branches is reversed.

Amongst the various supposed veto or delaying powers of the Crown discussed in this report, the rule of Crown initiative provides an especially interesting case study. It is the one where there is the clearest conflict between principles which command a reasonable degree of consent on both sides of the argument. Most people would agree that it is desirable for the executive to be able to deliver a costed programme of government. The UK parliament's own authority on practice and procedure adduces the conventional rationale for the rule quite persuasively,[114] and as we see it is replicated in some form or other throughout many, if not most, democracies. Yet most people would also agree that in a parliamentary democracy alternative programmes should be given some genuine hearing in the legislature, and that a government should be required to justify its opposition to those alternatives and defend them against a potential parliamentary majority, not merely snuff them out through the application of procedural devices. It is reasonable to ask how our constitutional conventions might seek to balance these principles, and whether that balance is currently healthy.

To take a slightly fanciful example, the current cost of HS2 is estimated at something over half-a-billion pounds per mile (and is rising).[115] The cost of the 2016 referendum on membership of the EU was about £130 million. Is it entirely obvious that the whole machinery of accountable government would have come tumbling down if parliament had voted to have another referendum and in exchange required the government to delay for a year a quarter of a mile of HS2? Or, to take a different matter of controversy which almost certainly commanded a parliamentary majority in 2019, would it have constituted a financial catastrophe if parliament had been allowed to decide for itself whether to pay for the extra 50 MPs proposed in the Parliamentary Constituencies (Amendment) Bill 2019 (which the cost of HS2 would have covered for about 6000 years) rather than wait for the government to come round to the majority's way of thinking a year or so later? These comparisons may point to an absence of proportionality in the way in which the rule of Crown initiative is applied. On the other hand, you may believe that it is only by looking after the pennies that the pounds are enfranchised to look after themselves.

Unlike the international comparisons discussed above, the rule of Crown initiative as it applies to the Westminster parliament is not contained in constitution or statute. Without a written agreement or code, we may have fallen into the habit where the constitutional conventions surrounding the standing orders of the House of Commons are consistently assumed to be understood in light of the expectation that the Crown is dominant and anything else is a

[114] Erskine May's Parliamentary Practice, n4, section 33.2.
[115] The new high-speed rail line connecting London to Birmingham and slightly beyond, expected to be completed some time after 2030.

deviation.[116] Yet that assumption is just that – an assumption, not an unchallengeable and eternal constitutional verity. It is the cloudy idea that this rule is inherent in the 'Crown' as the source of all sovereignty that impedes any clear understanding of its modern purpose. It is not the 'Crown' which claims this control – it is the government of the day.

Standing Order No. 48 of the House of Commons, which embodies the rule of Crown initiative as part of parliamentary procedure, only dates from 1713 (albeit preceded by a resolution of 1706). It was created by a decision of the House in the same way as any other standing order. However deep its historical roots may lie, it is a parliament-made thing, and as we know, according to received constitutional wisdom no parliament can bind its successors.

However, this does not necessarily mean that the rule could be easily or readily set aside, even were a majority of the Commons to favour that. If parliament did, somehow, succeed in passing an Act to which the rule would apply without having received the royal recommendation it is conceivable, although a little far-fetched, that a challenge could be mounted on grounds of unconstitutionality.[117] Consider, conversely, a situation in which parliament were prevented from launching any attempt to set the rule aside by virtue solely of an executive fiat. Would an executive decision to withhold a financial resolution covering a bill which had been supported at second reading, purely in order to stymie its progress, be considered non-justiciable? We could expect the courts in the UK to defer to Article IX of the Bill of Rights 1689 which forbids the questioning of parliamentary proceedings in a court. But can we still assume that with complete confidence, in the light of the Supreme Court's decision in *Cherry-Miller (No. 2)*[118]? As with prorogation, if a decision to withhold a money resolution were challenged as unconstitutional, a court might, not entirely unreasonably, consider that such a decision is a process which takes place outside parliament and merely has *consequences* for parliament.[119]

However, any court might also reasonably conclude that this was a matter which the Commons itself could resolve by choosing to dispense with the requirement. Which would leave us where we started. In short, the solution is unlikely to lie in litigation. Far better instead that the status and scope of the rule be better defined and agreed.

International variations on the rule of Crown initiative range from an effective interdiction on even the introduction of legislation, through mechanisms which allow an executive to prevent a majority in a legislature expressing its opinion, through a variety of models involving negotiable deals and suspensory vetoes, to the theoretical free-for-all in Washington. Some consequences of that power of initiative accorded to the legislature under the US Constitution may include a politics of log-rolling, pork-barrelling, horse-trading and fiscal cliff-hanging which we tend to regard from our perspective as barbaric. However, there are other models from which to learn.

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[116] I am indebted to Dr David Kenny of Trinity College Dublin for this insight. See, for example, David Kenny and Conor Casey, n98.

[117] That such a move would be unconstitutional was broadly the argument advanced by Stephen Laws and Richard Ekins (n16) but they, implausibly, suggested that the remedy would be the withholding of royal assent.

[118] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*; [2019] UKSC 41.

[119] 'The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a "proceeding in Parliament". It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside'; ibid para 68.

While the UK House of Commons may appear on the face of it to have a relatively relaxed attitude to the application of the rule to PMBs, this seems to be driven as much by the low level of threat from such legislative initiatives as by any degree of open-mindedness on the government's part or the previously well-established understanding to give parliament a fair crack of the whip. Where, under minority government, the threat level rises, then governments have been willing to use the rule as an ex ante veto mechanism but, unlike some other jurisdictions, Commons procedures do not then facilitate open negotiation about what costs the government might be prepared to swallow. And the imprecision of both the quantum of the *de minimis* provision applied in the House of Commons and the method by which potential future expenditure is calculated means that the rule could in future be further tightened or more rigidly applied without any explicit consent from parliament.

There does indeed seem to be evidence that the interpretation of the rule at Westminster has narrowed over time. If one looks back to as recently as the late 19th century, the rules relating to parliament's financial procedures appear more relaxed and the opportunity for the Commons to propose different ways of spending the same quantum of money that the government was requesting more real (though the opportunities were not much taken).[120] It is a common complaint of observers of Westminster that the Commons does not take the business of public finance seriously. That is not perhaps so surprising given the way in which the rule of Crown initiative has progressively tightened so as to disempower parliament of any real responsibility for prioritising government expenditure. One argument often advanced for the increased executive control over spending and the large-scale abandonment of this fundamental constitutional duty of the Commons is that MPs have ceased to focus on reining-in government expenditure and are only interested in finding new things to spend public money on. But the present arrangements seem designed to reinforce fiscal irresponsibility by the legislature rather than to make it confront the consequences of its own choices.

The New Zealand solution seems to offer a more honest and open way of handling the issue (even the language of 'executive financial veto' is more plain and honest). It makes clear that the choice of where to strike the balance ultimately lies with the legislature, but that the need for the government to balance its books is fundamental. And while it is not the subject of this report, the way in which the New Zealand system applies to appropriation and supply may also have lessons to teach us about a different balance between executive duty and legislative responsibility. As Albert Weale recently wrote of government and parliament in a period of uncertain majorities:

> What is needed instead are fair and open ways of institutionalising political negotiation… in a way that embraces an incentive towards encompassing different interests and opinions.[121]

There is probably a better equilibrium between the visions of anarchy and constitutional collapse put forward by those who adhere to the most stringent defence of the rule of Crown initiative and the somewhat unrealistic aspirations of those who think parliament could, given the opportunity,

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[120] See, for example, Colin Lee, 'Archibald Milman and the 1894 Finance Bill', *The Table: The Journal of the Society of Clerks-At-The-Table in Commonwealth Parliaments*, 86, 2018, pp10-39; and 'Archibald Milman and the Failure of Supply Reform', ibid, 87, 2019, pp7-34.

[121] Albert Weale, 'Three Types of Majority Rule' in Andrew Gamble and Tony Wright (eds.), *Rethinking Democracy*, Wiley, Chichester, 2019, p75.

information and tools, ruthlessly settle on priorities in public expenditure. But maybe the people's representatives *should* be able to decide whether they want to exchange an aircraft carrier for a better-resourced NHS; and there are a lot of smaller questions of resourcing that they might well be better placed to decide than the executive. The advantages sought in any reform should be to enable backbench MPs to negotiate with ministers about the cost of any proposals they make, consider whether there are more cost-effective ways of achieving what they seek, and for them to face up seriously to the trade-offs involved in spending money on their project rather than another.

If we were to develop any agreed and codified constitutional conventions about the application of the rule of Crown initiative the first step would be to acknowledge that it is for parliament to decide, not the 'Crown'. The rule should be renamed – and the New Zealand expression 'executive veto' seems a perfectly sensible clarification. There is no obvious reason why the veto should halt progress of a bill before third reading – which would enable the committee and report stages to be used for negotiation between a bill's sponsor and the government. Some mandatory degree of information provision and negotiation (as they have in New Zealand and provide for in Germany) which could pave the path to the middle ground of a strong and purposeful legislature alongside a manageable government machine would be desirable. At the very least, the executive should be obliged to give reasons for its withholding financial cover, rather than simply to exercise a veto over any initiative supported by a majority in both houses of parliament by saying and doing nothing.

In rationalising the rule of Crown initiative, a version of the New Zealand solution seems the most likely to command widespread support.

Conclusion

In 2019 the UK went through a turbulent constitutional moment, where both parliament and the 'Crown' were challenging our apparently settled constitutional conventions. We have been warned that what once appeared solid can melt into air. During periods of majority government the question of whether the executive has a veto over legislation supported by a majority in parliament should remain largely theoretical. But it might be as well to be prepared for another crisis, and to look for a common understanding now rather than at the point when one occurs. There would be a strong case for bringing some of these shadowy elements of the machinery of the constitution into the light, and making them clear, comprehensible and shared.

If John Griffith was right that the British constitution is no more and no less than what happens,[122] then we can be confident that the notion that it still includes the possibility that royal assent could be withheld from an Act agreed by parliament is unconstitutional. If it did not happen in the circumstances of the two European Union (Withdrawal) Acts of 2019, then it is never going to happen. It has been dead for over three centuries. The evidence that the arguments from constitutional legal theory and parliamentary and administrative practice support this conclusion is helpful, but incidental. It is dead and decayed far beyond the possibility of resuscitation. It is dangerous both for democracy and for the monarchy to allow the myth of the existence of a royal veto to persist.

If there is, therefore, no real or functioning retrospective veto over legislation agreed by parliament, should thought be given to inventing one? It is almost certainly possible to manage without one, as many parliamentary democracies do. If there is a feeling abroad that, in the interests of political stability, the executive ought to be given some means of applying the brakes to the parliamentary process of making the law when it cannot command a majority there, then it would require a wholesale rethink of our constitution. And the only democratically respectable solution would be to invent some form of suspensory veto, with the final word left with parliament.

However, the situation we are presently in means that there may, perhaps, be a gap in our constitution which might leave our democracy at the mercy of an executive determined to legislate in defiance of our constitutional norms and the rule of law with the support of a parliamentary majority. In many parliamentary democracies the head of state is the final bulwark against such a threat, with power to refer a law that is repugnant to the constitution to some independent arbitrator. That arrangement is not plausible in the British constitution as presently understood, where the head of state is able to act only on the advice of her ministers – in other words that potentially rogue executive. But to ask what the point of a constitutional monarchy is if the monarch cannot defend the constitution is not unreasonable. If the notion of refusing the royal assent were to be revived for such a purpose, then we would need to devise a system where that decision was not made on the advice of the executive. And it would be unreasonable and unpersuasive to leave it as the sole and private responsibility of the monarch. There would need to be some other final arbiter of constitutionality to advise. That advice would need to be public and transparent.

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[122] See n73.

The idea that the sovereign's permission should be required in advance of parliament passing legislation touching on prerogative powers has sometimes been suspected of being a form of anticipatory executive veto. But the requirement is not in any way a constitutional principle, it is simply a parliamentary rule. Its purpose is to signify comity between the sovereign and parliament. Such polite rituals should not be too readily dismissed. But to avoid any erroneous impression that such consent is necessary, the present arrangement for signifying it should be reversed. The sovereign should formally place their prerogatives at the disposal of parliament – as in practice they already are – at the beginning of each parliament, or at some other suitable juncture (such as accession).

Because the sovereign and their heir have no vote in the election of the House of Commons, and no voice within parliament, it is right that there should be some way of consulting them on legislation touching on their private interests. But the present system for doing so seems too cumbersome for this purpose to suit modern circumstances.

The rule of Crown initiative prevents parliament passing legislation which would require significant new expenditure or increase existing expenditure without the prior consent of the government. It is reasonable to argue that some such arrangement is necessary in a parliamentary democracy to enable prudent forward planning of expenditure by the executive, which must be held to account for its management of the national budget. But the operation of the rule is shrouded in imprecision and obscurity, and the conventions and understandings surrounding it are shifting and unclear. The claim implicitly made for the rule that it is somehow so deeply rooted in antiquity and in the very essence of the British constitution that it can never be rationalised is unconvincing. It is part of the contract between parliament and the executive. It is renegotiable. And ultimately, if parliament chose to dispense with it, either in general or in a particular case, it could. This should all be made transparent. It should be clear that it is an executive financial veto, that it is ultimately capable of being overturned by parliament, and the conditions for its exercise should be clearly set out in the standing orders of the House of Commons.

For the true believer in the doctrine of parliamentary sovereignty there can be no vetoes over laws made by parliament, whether anticipatory or retrospective. But, left untrammelled, parliamentary sovereignty can carry dangers. Whatever in theory the powers of parliaments may be, to work effectively in delivering stable government and protecting citizens they need to be circumscribed to some degree by constitutional conventions and accepted practices. Those in turn need be clear, shared, mutually understood by the key actors and to enjoy so far as is possible the informed consent of the electorate. The conventions and understandings surrounding the various aspects of executive and Crown powers described in this report do not pass those tests. In that context there are certainly good arguments for at least beginning to revise some of our constitutional terminology in this area, even if the challenge of fuller codification is unlikely to command immediate support. We could begin by abandoning the imprecise use of 'the Crown' as a synecdoche for so many different elements of our constitutional arrangements.

Normally the UK government can expect to decide the fate of any bill introduced into parliament. But twice in 2019, at the height of the debate over Brexit, parliament passed legislation against the government's wishes. On both occasions, there were controversial suggestions that ministers should advise the Queen to refuse royal assent to the bills that parliament had agreed, thus exercising a last-ditch veto over the legislation. Such an event would have amounted to a constitutional earthquake.

This report examines the issues raised by the exceptional circumstances of 2019. It asks whether, in the UK's parliamentary system, there are or should be mechanisms by which the executive can unilaterally block unwelcome legislation if it cannot command a majority in parliament. Drawing on international comparisons, it examines the different types of executive veto which have been alleged to exist at Westminster. It concludes that the only effective unilateral executive power is the government's ability to block legislative proposals which entail new or increased public expenditure. But doubt remains about whether or not parliament could override an attempt to use this as a political veto.

The opacity of the conventions and customs surrounding these procedures is a constitutional hazard. The controversies of 2019 showed how previously settled understandings can begin to unravel when under stress. Even if the prospect of a fully codified constitution remains remote, an opportunity should be taken to remove any lingering doubts about who has the final say when it comes to making the law.

About the Constitution Unit

The Constitution Unit is a research centre based in the UCL Department of Political Science. We conduct timely, rigorous, independent research into constitutional change and the reform of political institutions. Since our foundation in 1995, the Unit's research had significant real-world impact, informing policy-makers engaged in such changes – both in the United Kingdom and around the world.

About the author

Paul Evans worked as a Clerk in the House of Commons from 1981 to 2019, ending his career as the Clerk of Committees. He has published extensively on matters of parliamentary practice and in 2017 edited a volume of essays on the history of parliamentary procedure to celebrate the 200th anniversary of the birth of Thomas Erskine May. He is an Honorary Senior Research Associate at the Constitution Unit. In 2019 he was awarded a CBE for services to parliament.

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