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**USING THE PREROGATIVE FOR  
MAJOR CONSTITUTIONAL  
CHANGE:**

**The United Kingdom Constitution and  
Article 50 of the Treaty on European  
Union**

**By Dr. Andrew Blick & Richard Gordon QC**

THE  

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CONSTITUTION  

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SOCIETY

# **USING THE PREROGATIVE FOR MAJOR CONSTITUTIONAL CHANGE: The United Kingdom Constitution and Article 50 of the Treaty on European Union**

**By Dr. Andrew Blick and Richard Gordon QC**

## **About the Authors**

Dr. Andrew Blick is Lecturer in Politics and Contemporary History at King's College London. He specialises in the study of constitutional history and contemporary democratic reform in the United Kingdom. He has published widely. His next book, *The Codes of the Constitution*, a study of the use of codes and manuals across different branches of the UK constitution, will appear in 2016. He was research fellow to the first ever public official inquiry into whether the UK should adopt a written constitution, conducted by the House of Commons Select Committee on Political and Constitutional Reform during the 2010-15 Parliament. With Professor Roger Mortimer, he is co-editor of the forthcoming edition of *British Political Facts*, previously edited by David Butler. In 2015 he became director of History & Policy, an organisation based at King's and the University of Cambridge dedicated to bringing together historians and policy-makers. In his role at The Constitution Society he focuses on strategy and research.

Richard Gordon QC is a practising barrister specialising in constitutional and administrative law. He is the author of many works in this area including *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, 2010) and (as a contributor) to the festschrift for Vernon Bogdanor *The British Constitution: Continuity and Change* (Hart 2013). He has co-authored three previous papers for the Constitution Society (with Amy Street) *Select Committee Powers – Clarity or Confusion* (2012); (with Sir Malcolm Jack) *Parliamentary Privilege – Evolution or Codification* (2013) and (with Rowena Moffatt) *Brexit: The Immediate Legal Consequences* (2016). He is a contributor to *The Brexit Effect* to be published by Cambridge University Press in 2017.

He is a member of the Advisory Board of the Constitution Society and has given evidence on constitutional issues to several parliamentary select committees. In 2014 he was appointed as a specialist adviser to the Public Administration Select Committee for its inquiry into Civil Service Impartiality. He has advised all the major political parties on constitutional matters and is a Visiting Professor in Law in the Faculty of Laws, University College London and at Hong Kong University.

## **Executive Summary**

1. Use of the prerogative to give effect to major constitutional change has come into sharp focus as a result of the EU referendum. Cessation of membership of the EU will result in major constitutional changes. In its turn, the way in which that process is commenced – specifically by the triggering of Article 50 of the Treaty on European Union - is also an event of momentous constitutional importance. At present the Government intends to trigger Article 50 by the use of prerogative powers.
2. If the prerogative were to be used for such a purpose, Parliament would be a bystander to the triggering of the EU disengagement process.
3. The flexibility of the UK's informal constitutional arrangements has often been viewed as a strength enabling it to adapt to constitutional change incrementally. Yet that flexibility can render these arrangements vulnerable to abuse as lacking mechanisms for identifying and giving effect to principled constitutional change.
4. Improvement of legislative processes has lately been considered as a means of effecting principled systemic change. But some changes do not involve statute. They may engage, for instance, changes in convention, or the deployment of the royal prerogative.
5. The exercise of prerogative power has changed over time. Historically, the prerogative started life as a set of powers exercised personally by the monarch. However, the gradual development of Parliamentary supremacy, especially in the period following the Bill of Rights in 1689 led to the prerogative becoming both a residual source of power (potentially subject, always, to override by the legislation of Parliament) and being largely devolved to ministers (i.e. being in substance a power source for the executive in the sense of a government resting on the confidence of the Commons, rather than the monarch).
6. It may be that a new constitutional norm is emerging whereby the prerogative should not be the power source for important governmental activities, including

the implementation of significant constitutional (or other) change and that, instead, Parliament should provide the basis. There has been an increased transfer of previously prerogative powers to a statutory basis. Correspondingly, use of the prerogative to give effect to significant decisions and to carry out major policy activities has, in recent years, proved controversial.

7. This norm appeared to crystallize in 2007 with the publication of *The Governance of Britain*, a set of proposals by the Gordon Brown Government that included as a central feature general reform of the prerogative. These proposals found some (albeit incomplete) reflection in certain provisions of the Constitutional Reform and Governance Act 2010.
8. Many exercises of prerogative power have been amenable to judicial review since a landmark case in the House of Lords in 1985. In legal terms arguments that use of the prerogative to trigger Article 50 is so inappropriate as to be irrational (and, therefore, unlawful) appear to provide a more satisfactory basis for judicial remedy than narrower arguments (whether or not technically correct in law) founded on statutory interpretation or a focus upon individual rights. No definitive view is offered in this paper as to the soundness or appropriateness of any legal arguments aimed at questioning deployment of the prerogative in triggering Article 50. Nonetheless, the authors submit that the irrationality approach, underpinned by the proposition of an emerging norm of a preference for statute over prerogative, merits consideration.

## Outline of main themes

In the wake of the ‘leave’ outcome of the European Union (EU) referendum on 23 June, a key focus of interest is upon the manner in which the United Kingdom (UK) can give constitutional as well as legal effect to that outcome. Law is a necessary constituent element of our constitutional arrangements although notions of constitutionality and legality do not always dovetail.

The most likely means of giving effect to the referendum result is within the framework provided by the Treaty on European Union (TEU). Article 50 TEU provides that a member state may decide to leave ‘*in accordance with its own constitutional requirements*’ (Article 50 [1], TEU). After a two-year period, unless all member states have agreed to an extension, the state in question ceases to be a member of the European Union (Article 50 [3], TEU). If an exit agreement comes into force sooner, EU membership can potentially end before two years.<sup>1</sup> The negotiations taking place during this period and their outcomes are clearly matters of critical importance. So too is the conceptual conflict between principles of direct democracy as manifested through the referendum, and representative democracy, of which the UK Parliament is the primary organ. The present paper focuses on the most immediate issue: the ‘*constitutional requirements*’ that apply in the UK to the instigation of the Article 50 process.

Cessation of membership of the EU, as well as being an epochal decision with respect to the external orientation of the UK and its conduct of internal public policy, is an act of momentous constitutional significance. It will lead, potentially, to a radical change to the legal system and citizenship rights in the UK. Moreover, once it has occurred, unlike most constitutional alterations, the ability to reverse it at some point in the future, should the UK wish to do so, would not be fully within the gift of the UK. It would be dependent on the agreement of the EU, negotiating with the UK as an outside entity. The cooperation of the EU could not be guaranteed. Since the activation of Article 50 alone can bring about such a weighty outcome, with no further action by the UK or EU

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<sup>1</sup> See, further, Richard Gordon QC and Rowena Moffatt, *Brexit: The Immediate Legal Consequences* (The Constitution Society, 2016).

inevitably required, the way in which the Article is triggered is, in turn, an issue of enormous constitutional importance.

The Government appears to take the view that:

- a) the Prime Minister has the legal power to activate Article 50 of the Treaty on European Union (TEU) under the royal prerogative; and
- b) (implicitly) to do so would be not only legally but constitutionally appropriate.

Moreover, it seems that, at the time of writing, the UK government intends to use the prerogative to activate Article 50, without seeking to establish an express statutory basis<sup>2</sup> for such an action, or securing the endorsement of the House of Commons through a vote on a resolution. Whether or not the Government's view of its legal position is correct, Parliament would if the prerogative were to be used in this fashion become a bystander to the triggering of the EU disengagement process, and would be required to pass subsequent legislation only to give effect to a prior executive decision in which it had played no part.

With the prospect of this use of the prerogative in mind, this paper considers, first, the traditional approach to constitutional change in the UK. It discusses the arguments for and against the UK model, and how the terms of the debate appear to have shifted in recent times.

Secondly, the authors discuss the respective roles of prerogative power and Acts of Parliament as constitutional sources of authority. They identify a particular long-term historical trend that has seen a recent intensification, from which a new constitutional norm<sup>3</sup> may be emerging. The norm (*italicized*) is that, *in general, statutory authority is preferable to, and constitutionally more appropriate than, prerogative authority as a*

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<sup>2</sup> As explained later, the Government is likely to suggest that the Parliamentary source of authority for triggering Article 50 is contained in the European Communities Act 1972.

<sup>3</sup> As used in this paper, a norm represents an underlying constitutional value. This is to be contrasted with a convention which is referred to as an operational rule and that is but one (non-statutory) means of giving expression to an underlying constitutional value.

*basis on which to carry out actions of major importance, including those that entail significant constitutional change.*

A norm of this kind does not, of itself, imply either that departure from it is unlawful or that the UK courts would necessarily wish or be prepared to adjudicate on its legality. Nonetheless, once the existence of such a norm is accepted, questions may arise (both legal and constitutional) as to the *appropriateness* of using the prerogative to trigger profound constitutional changes such as those involved in initiating the Article 50 process.<sup>4</sup>

Conversely, and on the footing that there is such a norm, it may plausibly be contended, at least in constitutional terms, that the government should obtain authority through an Act of Parliament (or endorsement by Parliament) before instigating significant constitutional change. The advantage of a statute over Parliamentary endorsement would be that a specific Act of Parliament (here concerned with the Article 50 process) could contain within it provisions for parliamentary oversight of UK participation in negotiations pertaining to its withdrawal from, and future relationship with, the EU, including requirements for further express approval for the terms of agreements reached.

Finally, this paper considers the legal dimension. At the time of writing legal challenges have been (or are shortly to be) made against the Prime Minister using the prerogative to trigger Article 50. Whilst the authors do not purport to comment definitely on the merits or demerits of arguments being deployed by the lawyers (and which are merely outlined here) they suggest a constitutional position which might be encompassed within a legal framework, namely that a constitutionally inappropriate use of the prerogative might in some circumstances be considered to be irrational in the legal sense and, hence, unlawful. Nonetheless, no view is offered here as to whether such an argument would succeed or be entertained in the courts.

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<sup>4</sup> Whether or not these questions can be formulated in terms of mounting a legal argument against such use of the prerogative is examined below albeit without final comment on the strength of that argument.



## Constitutional change in the United Kingdom

Traditionally, advocates of the UK's informal constitutional arrangements have advanced flexibility as its distinctive strength.<sup>5</sup> In other countries with so-called 'written constitutions', so the argument ran, it was necessary to adhere to cumbersome amendment procedures to bring about express changes in the fundamental rules of the political system. In the UK, on the other hand, arrangements were less rigid and could alter to accommodate changed circumstances. Through this intrinsically flexible capacity for adaptation it was possible to avoid more abrupt, disruptive breaks in continuity.

Moreover, so its supporters have argued, the UK model is more democratically satisfactory than that of other systems. This school of thought emphasises that, in the UK, majority votes in Parliament – within which the elected chamber, the Commons, is predominant – can attain a particular course of action, without being restrained by procedural requirements (such as legislative supermajorities) which in effect mean that a minority has a veto.

Moreover, it could be held that the UK's approach limits the capacity for constitutional change through judicial reinterpretation of the kind that (either expressly or implicitly) exists in most countries with codified constitutions.<sup>6</sup> Those who dislike this sort of role for the courts maintain that the judiciary, lacking a direct democratic mandate, should not be able to wield such influence. Consequently, they prefer the UK system, under which Parliament, containing an elected component, has the final say over whether and how the constitution alters.

However, the continuing feasibility of this model has been seriously brought into question in recent decades. Parliament has subjected itself to restrictions, in particular through the *European Communities Act 1972* and the *Human Rights Act 1998*. If it

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<sup>5</sup> For a summary of both sides of the argument that follows, see: House of Commons Political and Constitutional Reform Committee, *A new Magna Carta?*, (Stationery Office, 2014) HC 463, 'Part I: Arguments For and Against Codifying the UK Constitution', pp.19-28.

<sup>6</sup> See, further, Richard Gordon Q.C. *Repairing British Politics: A Blueprint for Constitutional Change* (Hart Publishing, 2010).

wishes to amend or repeal either of these Acts it must do so in express terms (though the future of both is now very uncertain).

There has also been evidence of a growing perception among commentators that the UK approach to constitutional modification is vulnerable to abuse. The principled defence of the more rigorous requirements for amendment contained in written constitutions is that changes to the fundamental rules should be treated as of a different order to more regular political decisions; and that certain principles and rights should be protected from majoritarian violation. Against these background concerns, observers have noted a tendency in recent decades for rapid, casual and piecemeal constitutional change, leading to problematic outcomes. Indeed, some argue that the constitution has come to be reduced to the level of simply another policy area, subject to daily management and intervention by the government of the day.

Matters that have arguably failed to receive sufficient attention when constitutional change was being contemplated or executed have included:

- the potential contradictions between the use of referendums and the concept of a supreme or ‘sovereign’ UK Parliament;
- the consequences of devolution for the non-devolved territories and for the central UK constitution;
- the full implications of the attempt to abolish the office of Lord Chancellor and establish a UK Supreme Court when it was first announced in 2003; and
- the potential for stalemate in the House of Commons arising from the *Fixed-term Parliaments Act 2011*.<sup>7</sup>

Moreover, in the face of the risks posed by unprincipled constitutional change, effective protection of individual rights can also seem vulnerable. Some changes now in

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<sup>7</sup> See eg: Andrew Blick, ‘Constitutional Implications of the Fixed-term Parliaments Act 2011’, *Parliamentary Affairs*, published online 5 April 2015.

prospect, such as exit from the EU and – if it remains on the Government’s agenda – repeal of the Human Rights Act, could be regarded as entailing the use of simple majorities to compromise basic freedoms.

While some potential criticisms of the UK constitutional model have gained in force, the case in favour of the traditional UK system may at the same time be in danger of being eroded. It is increasingly difficult to sustain the idea that the UK polity is characterised by gradual, limited change. For example, changes such as the introduction of devolution amount to more than simply an incremental alteration (especially from the perspective of the territory to which power has been devolved).<sup>8</sup> So too does our joining – and perhaps now leaving – the EU. This latter reversal could represent a substantial break in constitutional continuity, just as our entry did in 1973.

The plan to leave the EU undermines traditional constitutional thinking in another way. It represents the clearest challenge to the practical authority of Parliament by referendum to date, since a majority of MPs were seemingly opposed to idea of leaving, which 52 per cent of those who voted supported. In this sense, it becomes harder to depict our system as one in which Parliament exerts sole control over the constitution, including constitutional changes, even if, in terms of legal theory, it does.

There is a further sense in which the EU referendum outcome could be connected to a bypassing of Parliament. The mechanism formally provided since 2009 for EU member states to exit the organisation is Article 50 TEU. The activation of the Article is all that is required for the UK to leave, after two years has lapsed.<sup>9</sup> The potential constitutional implications of such a departure are immense. They entail the ending of UK participation in the law-making system of which it has been a part since 1973. They also mean the removal of European citizenship rights from UK citizens; and the removal of equivalent rights for EU citizens who are present within the UK at the time. Moreover, once the UK has exited the EU, if it should come to the view at some point that it would like to rejoin and restore these prior constitutional arrangements, the final

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<sup>8</sup> Devolution previously existed in Northern Ireland alone from 1921-1972, but the Labour government elected in 1997 soon re-introduced it to Northern Ireland, and established devolved institutions in Wales and Scotland (as well as Greater London).

<sup>9</sup> Though an extension by mutual agreement between the departing member state and the Council is possible.

decision about whether it can do so will not be in its gift, but will rest with the EU, to which the UK will be an outside entity.<sup>10</sup> Reversibility, then, is far from straightforward, adding to the gravity of the initiation of Article 50. The activation of this Article, then, is likely to lead on directly to constitutional change on an unsurpassed scale, that will be difficult to renege upon. Yet there is a prospect (indeed current intention) that it will be triggered without express authority from Parliament.

### **The royal prerogative and constitutional change**

Those who have shown a concerned interest in constitutional change lately have tended to focus on legislative processes and how they might be reformed to ensure a more considered, inclusive approach (though little if any progress has been made in this regard).<sup>11</sup> But there are other ways in which systemic alteration can take place. It can occur through changes in norms (that is underlying constitutional principles) or conventions (that is values or rules that do not have obvious legal force, that are one means of giving expression to underlying norms). Important constitutional conventions include those applying to the way in which the Prime Minister and Cabinet operate. A separate norm or perhaps convention that some might hold to have appeared lately is that ministers and Parliament must act to implement the outcome of referendums, though they are not legally bound by them, and even if they are opposed to the course of action involved.

Another means by which constitutional change can occur has, unlike a convention, a clear legal basis, but not one that is of parliamentary derivation. The royal prerogative began life as a set of authorities that monarchs once wielded personally. This first incarnation of (royal) prerogative power may be regarded, historically, as the ‘first age’ of sovereignty in the sense that constitutional power lay centrally with the Crown in the sense that it meant the holder of the office of monarch.

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<sup>10</sup> In theory the exit agreement agreed under Article 50 could include a special mechanism for UK reentry, but in practice this proposition seems unlikely.

<sup>11</sup> House of Lords Select Committee on the Constitution, *The Process of Constitutional Change* (Stationery Office, 2011) HL 177; Andrew Blick, David Howarth and Nat le Roux, *Distinguishing Constitutional Legislation: a modest proposal* (The Constitution Society, 2014).

However, prerogative powers largely came to be in practice devolved to ministers, on whose advice the head of state exercises them. In turn, ministers became – in theory – accountable to Parliament for the use made of these powers, as they are accountable for the full range of their activities.

This arose principally as a consequence of the immense struggles of the seventeenth century against Stuart absolutist inclinations, and a crucial constitutional principle that established itself. It was that the monarch acting alone was legally subordinate to the King or Queen in Parliament. Statute could curb the royal prerogative, which, furthermore, could not be extended.<sup>12</sup> While the realisation of this principle is subject to the niceties of judicial interpretation, it is fundamental to our system of government and the subsequent emergence of democracy in the UK. It means that the executive is ultimately subject to the foremost representative institution in the UK political system, Parliament.

From this perspective, the Royal Prerogative appears a residual power source, any particular manifestation of which may exist only for the time being, until Parliament chooses to supplant it. The supremacy or ‘sovereignty’ of Parliament converting, as it did, the prerogative into a residual power source may be regarded as the ‘second age’ of sovereignty in the sense that constitutional power lay centrally in Parliament but with the executive exercising residual prerogative power.

However, the use of the royal prerogative even as a residual source of constitutional power has come to be seen as problematic. The problem is one of limits. As a matter of law, it is well established that the prerogative falls into abeyance in an area where Parliament *has* legislated. Yet, increasingly (and recently with gathering momentum) the question is whether the prerogative should be used at all in an area where Parliament *should* legislate. Put shortly, in areas of serious constitutional concern it is possible to see the emergence of a constitutional norm whereby such areas are uniquely for Parliament and not for the executive to address. The emergence of such a norm has been gradual and may, even now, be disputed. Indeed, the perception of abuse of

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<sup>12</sup> For an official account of the prerogative, see: *Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009).

prerogative power, whether personally by the monarch or on the advice of malign influence from counsellors, has been a central feature of many disputes in English and UK constitutional history. What is relatively new, however, at least in its current intensity, is the nature of the controversy that deployment (as opposed to abuse) of prerogative rather than parliamentary power is engendering.

The so-called ‘Glorious Revolution’ of 1688 culminating in the Bill Rights of the following year marked the transference of power to Parliament precisely because of the abuse of the prerogative by the Crown.<sup>13</sup> While it established its primacy in principle, the actual assertion by Parliament of the primacy of its own powers vis-à-vis the executive has been more gradual. Concerns may, though, be traced back at least to the nineteenth century.

Thus, one area in which the prerogative has been relied upon heavily is that relating to external policy of various kinds, such as diplomacy, military combat and security.<sup>14</sup> Referring to the use of the prerogative to ratify treaties, as long ago as 1872 Walter Bagehot noted that it was possible for these agreements to be as important as legislation. Yet while the consent of Parliament was needed ‘*to every word of the law*’, such approval was not required ‘*even as to the essence of the treaty*’. Bagehot found this discrepancy to be ‘*prima facie, ludicrous*’. In time, spurred partly by perceptions that secret agreements had helped trigger the First World War, a convention developed providing for the possibility of a degree of parliamentary scrutiny of treaties prior to their being ratified. Known as the ‘Ponsonby Rule’<sup>15</sup> it was eventually provided with a statutory footing by Part Two of the *Constitutional Reform and Governance Act 2010* (CRAG). The 2010 Act also made it theoretically possible for the House of Commons to veto the ratification of a treaty, though ratification itself still takes place under the prerogative.

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<sup>13</sup> Full acceptance of parliamentary supremacy over the prerogative did not, however, take hold immediately after the Bill of Rights, though this document is clearly a critical landmark in the development of this principle. For a standard work on the role of the Crown within the UK constitution, see: Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999).

<sup>14</sup> For the discussion that follows, see: Andrew Blick, ‘Emergency powers and the withering of the Royal Prerogative’, *International Journal of Human Rights*, Vol. 18, Issue 2 (2014).

<sup>15</sup> Named after Arthur Ponsonby, the Labour Parliamentary Under-Secretary of State for Foreign Affairs who initiated it in 1924.

The period since 2003, when the UK controversially took part in the invasion of Iraq, has seen sustained interest in another prerogative power: to deploy military forces overseas in circumstances that are or might become hostile. In advance of the Iraq operation, the government chose to hold three votes in the Commons on substantive motions in support of its policy. But the divisive nature of the engagement served to draw concerned attention to the ability of the executive to enter into armed combat under the prerogative, with no legal obligation to obtain the express approval of Parliament, either in advance or later. Subsequently, there were efforts to promote the idea of a convention that the Commons should, wherever practically possible, be given the opportunity to approve (or block) such operations prior their initiation. They have met with a degree of success, and the balance of opinion seems to have shifted to the view that this convention exists. Yet, for some, a convention is not sufficient. In 2011 the then Foreign Secretary, William Hague, undertook to enshrine the rights of Parliament in this area in an Act of Parliament, though this commitment was never, in fact, fulfilled.

While this particular proposed legislation did not materialise, that it was seriously contemplated is indicative of a broader tendency dating at least as far back as the 1980s for important provisions (whether constitutional or otherwise) to be moved from a prerogative to a statutory basis. Areas covered since then include:

- the interception of communications (first given a statutory basis under the *Interception of Communications Act 1985*);
- the security and intelligence agencies (beginning with the *Security Service Act 1989*, followed by the *Intelligence Services Act 1994*); and
- the dissolution of Parliament (under the *Fixed-term Parliaments Act 2011*).

This increased use of the legislative power of Parliament accompanied as it has been, in recent years, by controversy over the use of the prerogative without recourse to Parliament suggests that we may now be entering a ‘third age’ of sovereignty where

matters of serious policy or constitutional concern are regarded as *uniquely* within the remit of Parliament and not the executive.

A norm of this kind appeared to crystallise in 2007 when, upon becoming Prime Minister, Gordon Brown launched a constitutional reform programme that he intended to be the central feature of his premiership. An official paper launched in July of that year with the title *The Governance of Britain* set out his key ideas, to which reform of the prerogative was central. It discussed how over the centuries it had been possible for the executive ‘*to exercise authority in the name of the Monarch without the people and their elected representatives in their Parliament being consulted*’. *The Governance of Britain* held this manner of operating to be ‘*no longer appropriate in a modern democracy*’.<sup>16</sup> The implication here was that it was not a particular prerogative power that was a problem, but the prerogative more generally. The main (albeit incomplete) outcome of this aspect of the Brown programme was CRAG, mentioned above, one of the effects of which was to create a statutory process for the scrutiny of treaties, and their potential veto by the Commons. A further dimension to CRAG is discussed below.

Given these developments, the idea of utilising the royal prerogative to bring about major constitutional transformation now appears more difficult to justify than previously.

In particular, although some might argue that even legislative processes leading to an Act of Parliament are insufficiently rigorous for fundamental systemic change, the use of the royal prerogative, which is normally subject to no specific legally prescribed parliamentary control whatever, is fundamentally and intrinsically different and may be used covertly to bring about constitutional changes.

So, for example, governments can, and do, deploy the prerogative without recourse to Parliament in ostensibly deliberate pursuit of such changes. They have done so through using the prerogative as the basis for the issuing of documents such as the *Ministerial Code* and *Cabinet Manual*, through which the executive can seek to define conventions and other constitutional norms in ways which suit its particular purposes. There is often

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<sup>16</sup> *The Governance of Britain* (London, Ministry of Justice, 2007) CM 7170, p.15 paragraph 14.



pressure for a heightened parliamentary role in these texts, and even for them to be provided with a statutory basis.<sup>17</sup>

Documents such as these relate to what is sometimes described as ‘soft law’. Historically, too, governments have been able to use the prerogative to bring about ‘hard’ legal constitutional change. The Civil Service Commission was created on this basis in 1855. It became the upholder of the constitutionally crucial principle of Whitehall recruitment taking place on a basis of merit, through open competition. Yet the 1854 ‘Northcote Trevelyan’ report credited as inspiring the concept of an impartial Civil Service had recommended that its proposals be included in an Act of Parliament.

Nonetheless, emphasis on the importance of Parliament, as opposed to the prerogative, dealing with significant constitutional concerns of these kinds has never gone away. As suggested above it surfaced during the period of the Blair, Brown and Cameron governments. Indeed, the political controversy caused when the prerogative has been used as a principal rather than residual power has reached such a level that it is possible to discern a new constitutional norm that important constitutional issues must always be addressed by Parliament.

Thus, when Tony Blair became Prime Minister in 1997 he used the prerogative to vest executive authority over career officials in his two most senior special advisers, Jonathan Powell and Alastair Campbell, despite their being partisan appointments.<sup>18</sup> This decision demonstrated the continued potential to deploy the ancient, non-statutory, power source for significant constitutional measures. But the use of the prerogative in this way caused acute concern, in turn helping to generate momentum for the introduction of a Civil Service statute. Eventually this provision was included in Part 1 of CRAG, slightly more than a century-and-a-half after it was first proposed. Once more, the norm of statute being preferable to the prerogative had asserted itself.

Another use of the prerogative which can impact on the constitution and may reflect the new norm is in the conduct of diplomacy, one of the most important remaining

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<sup>17</sup> See: Andrew Blick, *The Codes of the Constitution* (Hart Publishing, 2016).

<sup>18</sup> See: Andrew Blick, *People Who Live in the Dark: the history of the special adviser in British politics* (Politico’s/Methuen, 2004), esp. Introduction.

spheres of activity provided for under this legal authority. A traditional defence of the arrangement whereby governments can operate on the international stage under the prerogative would probably rest on the principle that any changes to domestic law arising from external undertakings require parliamentary authorisation. The UK tends towards the so-called ‘dualist’ model under which treaties exist only as external commitments and are not (as is the case in more ‘monist’ systems) fully incorporated into the internal legal hierarchy without specific legislative action (though they can provide a background informing judicial decisions). However, there are now certain statutory mechanisms in place to provide Parliament with a formal role in overseeing treaty-making, including the procedure contained in CRAG. There are also requirements under the *European Union Act 2011* that certain treaties and decisions pertaining to the EU should be subject not only to referendums but also require the passing of an Act of Parliament.

The European Union Act appears to be a further acknowledgement of the principle of a preference for Acts of Parliament over the prerogative. Yet the triggering of Article 50 TEU seemingly does not come within the remit of such provision.

Few would argue that governments should be required to secure specific parliamentary backing for every external and diplomatic action they undertake. But the activation of Article 50 – which leads, as discussed, directly on to UK exit from the EU – is clearly an act of major constitutional importance, and one lacking in any statutory basis. Certainly parliamentary approval will be necessary to any consequential changes of domestic law but the crucial (and difficult or impossible to reverse) act of withdrawal, entailing the removal of EU citizenship rights from UK citizens, and the severance of the UK from a legal system into which it has been incorporated since 1973, will, if the Government’s present intention is given effect, have been brought about under the prerogative. Far from passing an Act to authorise the government action, Parliament (and within it the Commons) may not even be asked expressly to endorse it in the form of a vote.

In constitutional terms this would be contrary to a principle (if it exists) that statute is generally a preferable power source to the royal prerogative, and that the more significant the action involved, the more desirable statute becomes; and that in the case

of major constitutional change, statute is essential. On the other hand, giving effect to such norm would be best achieved with the introduction of a bill creating a power for the government to activate Article 50, and also containing within it specific provision to enable parliamentary oversight of UK participation in the negotiations that followed. It could also require express Commons consent to terms arrived at in negotiations. The diplomacy within the remit of the proposed Act would include that directly connected to Article 50, covering exit from the EU, and the development of arrangements for the future relationship between the UK and the EU. Since it seems unlikely that the UK intends to commence Article 50 proceedings before the end of 2016 at the earliest, there is certainly time available to draft, debate and pass such a legislative measure. Such an important constitutional process as exit from the EU could not be subject to criticism (constitutional or legal) if it was implemented following such a process and it would, indisputably, rest on a sound constitutional footing.

If the government is not willing to seek to establish parliamentary endorsement for its conduct, then Parliament's options are, necessarily, limited. The Commons can hold a debate and vote in non-government time, but it would have only informal force. The Commons could also seek to bring down the government – a nuclear option that is unlikely in practice to happen.

### **The Legal Dimension**

Prior to 1985 the exercise (as opposed to the existence) of prerogative powers was thought to be immune from legal challenge in the courts. However, the landmark ruling of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*<sup>19</sup> ('*GCHQ*') established that the exercise of prerogative power was, in principle, susceptible to judicial review with certain exceptions such as matters of national security which were considered, of their nature, to be non-justiciable.

Since that time many prerogative powers have been successfully reviewed by the courts. The rationale for judicial review of most exercises of the prerogative lies in the nature of the power being exercised rather than its source. In *R (Bancoult) v. Secretary*

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<sup>19</sup> [1983] UKHL 6.

*of State for Foreign and Commonwealth Affairs (No 2)*<sup>20</sup> the House of Lords explained that an Order in Council (a reflection of prerogative power) was a product of the executive and, as such, lacked the ‘*representative character*’ that comes with parliamentary authority and approval.

Executive power exercised under statute has always been amenable to judicial review and the House of Lords in both *GCHQ* and *Bancoult* saw no distinction in principle between judicial review of executive power under statute and judicial review of executive power exercised through the prerogative.

The distinction between the exercise of what is, in substance, executive rather than parliamentary power is at the heart of why the courts will, in principle, be prepared to review executive acts that are given effect through prerogative power but will not (because of parliamentary sovereignty) review primary legislation (in the form of Acts of Parliament) unless Parliament has itself expressly authorised such review as it has done in the case of EU law and (to a lesser extent) under the *Human Rights Act 1998*.

Therefore, if the Government were to trigger Article 50[1] TEU by use of the prerogative it is materially possible that the court would consider that it possessed jurisdiction to hear and determine proceedings for judicial review to challenge such use. However, that is not to say that the court would necessarily accept that there was a proper basis for seeking judicial review. Traditionally, the courts have been reluctant to entertain challenges to the exercise of prerogative power involving treaty-making. In part, whether or not the court accepted jurisdiction would probably depend on the nature of the arguments being advanced.

The legal arguments being discussed around the use of the prerogative to trigger Article 50 have, thus far, been based on a cluster of jurisdictional points. It is contended, for example, that (consistently with the common law principle of legality) because only Parliament may limit or abrogate existing rights it follows that Article 50 may, because of its ultimate effect on domestic rights, only be triggered by Parliament and not by the prerogative.

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<sup>20</sup> [2008] UKHL 61.

Another argument based on an asserted lack of jurisdiction is that as a matter of statutory interpretation of the European Communities Act 1972 ('ECA') the amendment of, or withdrawal from, an EU Treaty may only be authorized by Parliament.

These types of argument would, of necessity, be founded on precise legal submissions. Whether they have merit is for the courts to decide. In terms of detailed analysis they go beyond the intended scope of this paper.

Submissions, consistent with these kinds of argument, would, no doubt, be focused on: (i) the nexus between the triggering of Article 50 and its ultimate effect on domestic rights and/or (ii) on what exactly the ECA permits in terms of its requirements for invoking Article 50.

As to (i), it would at least in theory be possible for Article 50 to be invoked and for no further action to be taken. If that occurred the single act of triggering Article 50 through the prerogative might be argued to have led to the altering of domestic rights by default. Nonetheless, the counter-argument would presumably be that it is only under the ECA that Article 50 has become part of domestic law and that any withdrawal or amendment of existing domestic rights would necessarily require a new Act of Parliament before it could take effect as a matter of domestic law.

As to (ii) it is to be inferred that competing arguments will be advanced around whether or not the ECA permits use of the prerogative to trigger Article 50. Some commentators find authority under the ECA (either through s. 2(1) or s. 2(2)) to invoke the prerogative; others dispute this contending, instead, that the effect on domestic rights (outlined above) means that such authority is lacking and that any attempt to invoke the prerogative is outside the object and purpose of the ECA.

But legal submissions of this kind necessarily focus on hard law as opposed to constitutional reality. They appear to depend, for their resolution, on a binary approach, namely on the answer to the question '*what are the relevant constitutional requirements*

*within the meaning of Article 50[1]?* To such a question there is only one answer – that which the court decides is the law.

However, as foreshadowed earlier, constitutional analysis (certainly constitutional reality) does not necessarily depend for its legitimacy upon a single answer to a hard-edged question of law but, rather, upon more nuanced considerations such as exemplified by constitutional practice over time and constitutional norms and conventions of the kind already mentioned.

Leaving aside narrow considerations of how to apply the common law principle of legality or how to construe detailed provisions in the ECA, the authors suggest that it is possible to look more widely at the legal dimension (following an advisory referendum) of using the prerogative under executive authority rather than proceeding under the authority of Parliament.

As explained, the use of the prerogative to trigger Article 50 having regard to the outcome of the referendum with the regional and generational divisions that it has engendered appears to cut across a relatively new constitutional norm to the effect that it is a matter for Parliament rather than the executive (acting through the prerogative) to authorise because of the very serious constitutional consequences flowing from its deployment.

Given that an exercise of prerogative may be subject to judicial review and that one of the grounds for obtaining judicial review is that a decision-maker has acted irrationally (see *GCHQ*), it may be that a court would be prepared to address a legal submission to the effect that use of the prerogative to trigger Article 50 was so constitutionally inappropriate in the present circumstances as to be irrational.

The authors offer no view as to whether such an argument would be likely to succeed but its advantage over a hard-edged submission as to asserted legal violation may be that it focuses upon the specific result of the EU referendum. Submissions of law that focus uniquely on individual rights or statutory interpretation are in danger of being perceived as missing the wider constitutional realities or, indeed, the particular and highly unusual outcome of the referendum in terms of its potential impact on the

constituent parts of the United Kingdom and, indeed, for the future of the United Kingdom in its present form.

One may take the following hypothetical to test the impact that deploying the prerogative might have in this area:

Recently, there has been discussion of a ‘reverse Greenland’ scenario whereby through Treaty amendment under Article 48 the UK might seek a new arrangement with the EU whereby Scotland would remain in the EU but England (and Wales, though the position of Northern Ireland may be in doubt as well) would leave. This paper does not consider the merits of such an arrangement. The concern for present purposes is that, because Article 48 is as much a part of UK law under the ECA as Article 50, the Prime Minister could seek to implement a ‘reverse Greenland’ in exercise of the prerogative by invoking Article 48 instead of effecting withdrawal under Article 50. Arguably, she would have more of a mandate under the ‘advisory’ referendum to do this given the voting outcome in Scotland. Indeed, she might plausibly argue that this was her mandate and that, moreover, there were legal advantages in that amendment under Article 48 would not trigger the draconian time limits in Article 50.

In this hypothetical scenario there would not solely be a ‘contest’ between prerogative and parliamentary power but, rather, a triadic relationship in which the Prime Minister using the prerogative would interpret the popular will and decide how best to give effect to the referendum outcome. In such fashion, the prerogative could be used to trump parliamentary sovereignty in order to give effect to a momentous constitutional change affecting not only our relationship with the EU but also the constitutional arrangements between different parts of the United Kingdom and the EU.

Whether or not the courts should become involved in governmental decisions as to how (or whether) to implement the referendum, the above hypothetical is illustrative of the proposition that using the prerogative in a context such as the present is arguably out of kilter with emerging constitutional norms if not constitutional reality.

## Conclusion

Deployment of royal prerogative power may, especially in areas where urgent executive action is needed, sometimes be a necessity. But the use of the prerogative for significant constitutional change (or other substantial purposes) carries with it the risk of exposing our informal constitutional arrangements to the charge that they lack the necessary mechanisms for principled development.<sup>21</sup> Not only that; increasingly such use has the potential to dislocate a relatively fragile set of consensual arrangements without any involvement by Parliament.

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<sup>21</sup> For further analysis of the need for principled mechanisms of constitutional change, see Richard Gordon Q.C. 'Constitutional Change and Parliamentary Sovereignty – the Impossible Dialectic' in Matt Qvortrup (ed.) *The British Constitution: Continuity and Change* (2013, Hart Publishing).