8

The Parliamentary Executive

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I. The Beekeeper

At the outset of his book on the law of the Constitution, Dicey said that earlier generations had thought of the Constitution as something that the English had constructed by instinct, 'much as bees construct a honeycomb, without undergoing the degradation of understanding the principles on which they raise a fabric more subtly wrought than any work of conscious art'.[1]

Dicey was fascinated by what the bees do – he was an observer of their conduct, and his work was distinguished by his shrewd and novel focus on 'understanding the principles'. He was not a historian, and in fact he was wary of history. He concluded the preface to the first edition of his book by saying that the historical method, universally admired at the time, 'may induce men to think so much of the way in which an institution has come to be what it is, that they cease to consider with sufficient care what it is that an institution has become'.[2] The huge success of Dicey's book has a moral for any legal academic: give a statement of the principles that everyone will want to disagree with, and your work will be famous.

Contrast Dicey's title – *Introduction to the Study of the Law of the Constitution* – with the title of the very fine book published at about the same time by his friend and close colleague William Anson, the Warden of All Souls: *The Law and Custom of the Constitution*. In his preface, Anson wrote concerning Dicey that, 'He has done the work of an artist. I have tried to do the work of a surveyor'.[3] He said that he had tried 'to state the law relating to existing institutions, with so much of history as is necessary to explain how they have come to be what they are'.[4]

That was precisely the approach that Dicey had rejected. Anson's book sparkles with intelligent insights. For a law student in the 1880s, I think that it would

[1] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (London, MacMillan and Co, 1915) 3.
[2] ibid viii.
[3] W Anson, *The Law and Custom of the Constitution* (Oxford, Clarendon Press,1886) vi.
[4] ibid v.

have been just as good an introduction to the Constitution as Dicey's book, or better. Right from his title, Anson showed good sense by setting the constitutional significance of law and custom on a par, where Dicey distorted his account of the constitution by insisting that his subject was 'the Law of the Constitution'.[5] But Anson's excellent book is forgotten these days because it sprawled into two volumes, heavily laden with history, and he largely left it to his readers to identify the principles of the Constitution. It is a book with which is it not easy to disagree. Dicey's book, by contrast, is being read today; it exerts influence by giving other people something to disagree with.

Dicey's book also survives because the Constitution itself has survived. I will not focus on the two 'principles' that he identified: the rule of law and the sovereignty of Parliament. I want to focus on the surprisingly sustainable central structural element in the Constitution, which Dicey called 'the parliamentary executive'.[6] Dicey discerned the central features of the British scheme of executive governance. But in my attempt to articulate those features in this essay, I will follow in the long tradition of disagreeing with Dicey. I will be engaged in the same enterprise he undertook, trying to point out what is salient and worthwhile in the Constitution of the United Kingdom – what law students ought to grasp about it.

Then, I will outline how the parliamentary executive has survived the vicissitudes of the century since Dicey – a century in which the executive functions of the British government and their legal and political and constitutional context have changed fundamentally. Like Dicey, I am not actually aiming to do history, but to understand what the bees have constructed – what it is that the institution of executive government has become.

Here is the gist of my argument: the resilience and the usefulness of the parliamentary executive are demonstrated by the fact that the *very same constitutional device* serves the United Kingdom well in the changed conditions of the twenty-first century. It is a controversial argument to make, when so many people think that the way in which the United Kingdom Constitution institutes executive government is defective. In my conclusion, I will try to support my upbeat assessment through a discussion of Dicey's conjecture in 1915: in the future as he contemplated it – in our present day – he speculated that the parliamentary executive might evolve into a non-parliamentary executive, in which the House of Commons would function as an electoral college for a presidential government. I think it is very revealing that we have not moved in that direction, in spite of what anyone will tell you. That fact supports my conclusion about the sustainable usefulness of the parliamentary executive in changing political circumstances.

[5] In 'Dicey and Analytical Jurisprudence' in A Dickinson et al (eds), *Dicey + 100* (Cambridge, Intersentia, 2024) I argue that his focus on the law knocked his presentation of the Constitution somewhat off kilter, as if the structure of executive power were peripheral to the concerns of a constitutional lawyer.

[6] It is only the political leadership of the executive branch of government that is parliamentary (and not, eg, the military or the police or the National Health Service), but I will follow Dicey in using the term 'executive' for that leadership – ie in the United Kingdom case, the Ministers of the Crown.

There is something valuable in the parliamentary executive; it belongs with parliamentary sovereignty and the rule of law, right in the foreground of a clear picture of the United Kingdom Constitution.

II. The Structure of Executive Government

From the first edition of his book, Dicey addressed the executive rather obliquely in the discussion of the conventions of the Constitution in chapters XIV and XV. But starting with his fourth edition in 1893, you will also find it described in Note III in the Appendix, 'Distinction between a Parliamentary Executive and a Non-Parliamentary Executive'.[7] Dicey wrote in the preface to his fourth edition that the subject of Note III 'is of some novelty, and will be found to possess considerable importance'.[8] By the phrase 'parliamentary executive', he meant a form of representative government in which the legislature 'appoints and dismisses the executive'. The members of the executive are 'chosen from among the members of the legislative body',[9] and they 'hold office at the pleasure of parliament'.[10] He distinguished it from non-parliamentary regimes in which the executive is 'not appointed by the legislature';[11] he had in mind the United States in particular. In sum:

> The Cabinet is, in reality and in fact, a parliamentary executive, for it is in truth chosen, though by a very indirect process, and may be dismissed by the House of Commons, and its members are invariably selected from among the members of one or other House of Parliament.[12]

The influence of Walter Bagehot is evident here, in the insight about the significance of the Cabinet and also in the distinction between reality and appearance:

> in appearance and in name, the Cabinet is now what it originally was, a non-parliamentary executive; every Minister is the servant of the Crown, and is in form appointed and dismissible, not by the House of Commons, nor by the Houses of Parliament, but by the King.[13]

[7] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 4th edn (London, MacMillan and Co, 1893); I will refer to Note III as it appeared in Dicey 1915, 480 ff.

[8] Dicey 1893, *Introduction to the Study of the Law of the Constitution* iv.

[9] Dicey 1915, *Introduction to the Study of the Law of the Constitution* 480–81.

[10] ibid 482.

[11] ibid 481.

[12] ibid 483. Consider also this remark in the discussion of conventions in ch 14: 'the elective portion of the legislature in effect, though by an indirect process, appoints the executive government': 426.

[13] ibid 483. Dicey's debt to Bagehot is very significant; in the preface to his first edition, he mentioned 'works like Bagehot's incomparable *English Constitution*, which analyse the practical working of our complicated system of modern Parliamentary government', and said that he had a different purpose, because his book was 'a treatise on the principles of the law of the constitution': vi.

I think that there is great insight in describing the evolution of the Constitution from the 1660s to the 1880s as a movement from a non-parliamentary to a parliamentary executive. By the time of Dicey and Bagehot, relations between the ministry and the House of Commons had been transformed from what they were under Charles II, or even under George III. And Dicey appreciated the value of the new device. Executive government had become accountable to MPs in the House of Commons, in a form of responsible government – by which I mean that the executive was not free to act in whatever self-interested way it saw fit, but had to respond to the views of representatives of the electors. Dicey explained that 'a rule which gives the appointment and control of the government mainly to the House of Commons is at bottom a rule which gives the election and ultimate control of the executive to the nation'.[14]

Yet it seems to me that both Dicey and Bagehot misdescribed those relations. It is true that the members of the executive are 'chosen from among the members of the legislative body', and also that the executive holds office at the pleasure of the House of Commons, since (by a convention that was relatively new in Dicey's day) the Prime Minister and the whole government must resign after a vote of no confidence. But the legislature does not appoint the executive, and it did not do so in Dicey's day. It is not even the case that the executive is 'chosen, though by a very indirect process' by the House of Commons.[15] Perhaps Dicey got the idea from Bagehot, who made the same misstatement of the case: 'A cabinet government is the government of a committee elected by the legislature'.[16] Appointing, choosing, electing – these are intentional actions that an agent or an agency undertakes. But the House of Commons *does nothing* to make a person Prime Minister, or to fill any of the positions in the Cabinet. I think that it is an important aspect of the Constitution that a Prime Minister is not chosen by the House of Commons.

It may seem to make no difference, since the Prime Minister is chosen by the monarch on the basis of the number of MPs from each party in the House of Commons. You can, of course, see how Dicey came to say that the House of Commons appoints or elects a Prime Minister. But the best we can say for it is that he was speaking figuratively, perhaps as a way of emphasising the importance of executive accountability to the House of Commons. And as a figure of speech, this one is misleading.

After Lord Salisbury's coalition won 393 out of 670 seats in House of Commons in the general election of July 1886, Queen Victoria invited him to form a government; after Boris Johnson's party won 365 out of 650 seats in the general election of December 2019, Queen Elizabeth invited him to form a government. Perhaps in 1886, Victoria still thought of it as a matter of prudence on her part, to choose as her Prime Minister a man who could command the confidence of the House of

[14] ibid 426–27.

[15] *cf.* '… indirectly appointed by Parliament' (ibid 424), and Dicey's reference to Parliament's 'ability to appoint and dismiss the executive' (ibid 481). He held tenaciously to this idea.

[16] W Bagehot, *The English Constitution*, 2nd edn (Boston, Little, Brown, and Co, 1873) 191.

Commons. By 2019, Queen Elizabeth undoubtedly viewed it, instead, as her iron-clad constitutional duty (whatever she might think about the person in question). But still under Elizabeth II and under Charles III, it has remained constitutionally significant that it is the monarch, and not the House of Commons, who appoints the Prime Minister. In the appointment of a Prime Minister, there was in Dicey's time and there is today *no decision* for the House of Commons to take, *no business* for it to conduct. MPs have no power to decide. When a Prime Minister is appointed, they may well hear about it on the BBC. Likewise, when the Prime Minister advises the monarch on the appointment of ministers.

Dicey mentioned the election of a head of the executive by the National Assembly in the French Third Republic,[17] and the difference between that arrangement and the British parliamentary executive ought to have been in the front of his mind. It mattered that the National Assembly had to deliberate over the appointment, and that it was the responsibility of its members to make the appointment. The imaginary world in which the House of Commons elects a Prime Minister would be significantly different from the actual world. First of all, the symbolism that such arrangements carry would differ, making the Prime Minister beholden to the House for his or her appointment, and severing the symbolically significant notion of obligation to the Crown. In the real world, the Prime Minister is appointed by the monarch, and is at the mercy of a House of Commons that can force a resignation. In the imaginary world, the Prime Minister would owe his or her position to a decision of the House of Commons.

The difference is not only symbolic. Suppose that after each general election (or when a Prime Minister resigns), in the imaginary world, the House of Commons needed to meet to elect a new Prime Minister. After a general election like those in 1886 or 2019, everyone would know perfectly well who would be about to win the election in the House. But what about the 2010 general election (resulting in 306 seats for the Conservatives, 258 for Labour, and 57 for the Liberal Democrats)? In the real world, the allocation of executive power in 2010 was worked out through a negotiation behind closed doors among parties, until the discussions reached the point at which David Cameron had a coalition with the Liberal Democrats, so that it was clear to the Queen that he could command the confidence of the House. In the imaginary world, there would no doubt still be negotiations behind the scenes, but the *scene* itself would be a debate or a series of debates in the House of Commons. In the imaginary world, Gordon Brown's speech in the House of Commons in a debate on a resolution to elect David Cameron as Prime Minister would itself have been a significant political event.

Or consider the 2017 election, in which Theresa May's deeply divided Conservative Party lost its majority: in the imaginary world, the choice of Prime Minister in such a case would not be determined simply by party membership but by unpredictable ad hoc politicking, in which party divisions would create

[17] Dicey 1915, *Introduction to the Study of the Law of the Constitution* 483.

the possibility that rebellion or the crossing of the floor by a small number of MPs might bring down the leader of the party with the most seats.

If you want to picture an imaginary world in which the House of Commons elects a Prime Minister, consider the election of a Speaker in the United States House of Representatives: an appointment process decided by a vote of the House, the results of which can usually be predicted with confidence by counting party membership in the House. Usually, but not necessarily. When the Republican Party was divided in 2023, the election proceedings after the ousting of Speaker Kevin McCarthy became disruptive and unpredictable, and the very fact that the election ordinarily proceeds on party lines gave a particular political tenor and significance to radical politicking. In the appointment of a Prime Minister in the UK, it is significant that there is no such proceeding. If a Speaker of the US House of Representatives were appointed by a third party on the basis of the number of registered Republicans and Democrats in the House, then the 2023 opposition to McCarthy would have played out within the Republican conference, controlled by the party machine. It would not be business for the House, and McCarthy's position would have been solid.

So, I think it was a mistake for Bagehot and Dicey to say that the legislature elects the executive. I also think that Dicey misstated the implications of the vulnerability of a government to being thrown out on a vote of no confidence. He said that once the tenure in office of the executive is at the pleasure of the House of Commons, 'parliamentary government has reached its full development and been transformed into government by parliament'.[18] To be charitable, we might say that this was a figurative way of speaking by which Dicey was presumably trying to point out the importance of Parliament to the executive. However charitably we put it, though, we should see that the central functions of the House of Commons are not as a government agency, but as a legislative chamber, which serves as a *forum* in which the actual government – the ministers of the Crown – can be held to account or can be forced out of office.

The Cabinet is not an instrumentality by which the House of Commons carries out its policies. The House of Commons does not even have policies; the parties with seats in the House have policies. The House does not conduct the executive business of government – not even indirectly. And the government does not form or implement policy on behalf of the House of Commons. As a body, the House of Commons can throw a government out. But it cannot tell the government what to do. The House of Commons has no power of review over executive action. It cannot countermand an executive decision. Executive government in the United Kingdom is not government by Parliament. It is government by a ministry that is accountable to Parliament, and that is formed on the basis of party representation in the House of Commons.

[18] ibid 483.

The nature of the parliamentary executive is determined not only by the appointment of a Prime Minister, but also by the ways in which people stop being Prime Minister. Prime Ministers tender their resignation to the monarch, not to the House of Commons.[19] When, as Lord Rosebery did in 1895, a Prime Minister decides to resign after losing a vote in the House of Commons, the notion is that they owe it to their monarch to resign, because without the support of the House of Commons, they cannot carry out the service they owe to the monarch. They owe nothing similar to the House of Commons. To that House, they owe the duties of any MP, plus leadership in the deliberations of the House, plus readiness to answer questions in the House candidly and honestly on behalf of the government. Their executive duties are owed to the nation, and to the Crown, and to particular persons or groups affected by their decisions, and do not involve any duty to carry out the will of the House of Commons; they simply face the predicament that the House can force them to resign, any day, for any reason that a majority of MPs may consider sufficient.

Prime Ministerial resignations offer a poignant reminder of the character of the parliamentary executive. Consider a very dramatic difference between heads of government in the UK and in the non-parliamentary executive of the United States. In the United States, of 45 Presidents since 1789, only one – Richard Nixon – has resigned for political reasons during the four-year term of office. Three have been impeached, none of whom was removed from office. In the United Kingdom, just since 1945, *ten out of sixteen* British Prime Ministers have resigned while holding a majority in the House of Commons, without losing a vote of confidence or an election: Winston Churchill. Anthony Eden. Harold MacMillan. Harold Wilson. Margaret Thatcher. Tony Blair. David Cameron. Theresa May. Boris Johnson. Liz Truss. Each resigned the powerful office of Prime Minister for political reasons, while holding a majority that would not or could not help them; the list includes every Prime Minister in this century except Gordon Brown (who lost a general election) and Rishi Sunak. A majority in the House of Commons makes a person Prime Minister but does not give a Prime Minister tenure in power.

Think of two Prime Ministers who won large majorities in the House of Commons: Margaret Thatcher and Boris Johnson. The Constitution gave them extraordinary power as head of the government, and their party's majority gave them excellent prospects in securing passage of legislation, and the magnitude of their electoral successes made them seem invincible. But their power vanished when they undermined their own MPs' sense that their leadership would bring success at the next election. And when their ministers started resigning, each moved out of Downing Street into other accommodation. As for Johnson's successor, Liz Truss, it took less than two months for her premiership to be destroyed by

[19] That is still the case today: after losing a general election, the government stays in office until 'the Prime Minister tenders his or her resignation and the Government's resignation to the Sovereign': Cabinet Office, *The Cabinet Manual* (2011) 14.

the same mechanism: ordinary politics, focused by the Prime Minister's constitutional need for support in the House of Commons. Once more, a vote of no confidence was not needed; she had to go when her ministers started resigning. In her resignation statement on 20 October 2022, she said,

> I came into office at a time of great economic and international instability. Families and businesses were worried about how to pay their bills. Putin's illegal war in Ukraine threatens the security of our whole continent. And our country has been held back by for too long by low economic growth. I was elected by the Conservative Party with a mandate to change this.[20]

Notice that Liz Truss was only elected as *party leader* by the Conservative Party. She came into office as Prime Minister because Queen Elizabeth dutifully appointed the new leader of a party that had a majority in the House of Commons. I propose that in the best interpretation of the parliamentary executive, it is a structure of governance that confers *no personal mandate whatsoever*. Unlike the American presidency, it does not confer a term of office. The rules expose the Prime Minister to the arbitrary say-so of MPs who can throw out any government at any time. Anything that could be well described as a 'mandate' comes only from whatever dispositions the MPs of the Prime Minister's party may have to support the Prime Minister. The associated political pressure on the Prime Minister is intense and irresistible. When things are going well, as they did for Thatcher for years, for Johnson for months, and for Truss for a few days, that is because their MPs are content.

The executive is indeed parliamentary, as Dicey put it, but not in the sense that Parliament elects the executive, or that Parliament makes executive decisions. It does neither. The executive is parliamentary in the sense that a Prime Minister is appointed on the basis of a presumed capacity to command the confidence of the House of Commons, and in the sense that the Prime Minister and all the ministers are accountable in Parliament, and in the sense that they can be forced to resign in Parliament.

III. Flux in the Structure

The functions and operations of executive government were changing in Dicey's time and have changed since. I want to point out some of the changes, to set the scene for an argument as to the ongoing value of the parliamentary executive for the present and the future.

The first change to notice since Dicey is that the British Empire has been dismantled, and the Cabinet has lost its executive and legislative powers over some

[20] See 'Liz Truss Resignation Speech in Full' (*The Guardian*, 20 October 2022), https://www.theguardian.com/politics/2022/oct/20/liz-truss-resignation-speech-in-full.

aspects of government for a quarter of the world. The Empire was never static, and the dismantling process had already started before Dicey wrote his book, with Canadian self-government in 1867. It was largely completed by the wave of Caribbean and African decolonisation a century later.

Just before Dicey's death, the United Kingdom itself had been torn apart when the Anglo-Irish Treaty created the Irish Free State in 1921. Dicey had been right to foresee that Irish Home Rule, introduced by the Government of Ireland Act 1914 (the first statute passed via the Parliament Act 1911), would lead to independence. He had been vehemently opposed to Home Rule for any part of the United Kingdom (notice the tone of voice in his discussion of it).[21] In the twenty-first century, we have ended up with Home Rule in Scotland and Wales and Northern Ireland, and Dicey would no doubt have been averse to those devolutions, too. I think that those arrangements have not actually deprived Parliament in Westminster of its sovereignty (I cannot defend that view here; perhaps Dicey would have disagreed). But the establishment of devolved executives in Scotland, Wales, and Northern Ireland has very materially changed the role of the parliamentary executive in Westminster.

The democratisation of Parliament had been largely attained in Dicey's lifetime by the advent of votes for women and the removal of property requirements for men in the Representation of the People Act 1918. But it was only after Dicey that the Representation of the People Act 1928 gave women the vote on the same basis as men. Since then, democracy has changed the background to executive government, because of a feature of the parliamentary executive that is precisely the same today as it was in 1885: the parliamentary executive is very acutely subject to the power of the electors. So universal adult suffrage has changed the power dynamics of the executive. The electoral reforms of 1832 and 1867 were important in principle and substance, and so was the advent of the secret ballot in 1872. But when Dicey wrote his first edition in 1885, the parties' prospects at a general election – and therefore the prospects for forming or sustaining a ministry – were in the hands of a male franchise that was still very deliberately designed to exclude men without property. Those men were presumed not to have the stake in good government that men of property had, or to be vulnerable to undue influence because of their poverty, or both. When Dicey wrote that the parliamentary executive 'gives the election and ultimate control of the executive to the nation',[22] he was going along with those presumptions, counting decisions of the men with property as the decisions of the nation. Today, the adult franchise means that the parliamentary executive is democratic, and a successful government never forgets it.

[21] Dicey 1915, *Introduction to the Study of the Law* civ–cviii; see also Dicey 1887, *Introduction to the Study of the Law* and M Mulholland 'Revolution and the Rule of Law: Dicey on Irish Home Rule' in Dickinson et al (eds), *Dicey + 100* (Cambridge, Intersentia, 2024).

[22] Dicey 1915, *Introduction to the Study of the Law of the Constitution* 426–27.

Since 1945, the burgeoning welfare-and-regulatory-and-administrative state has also changed the executive, which now presides over a dramatically broadened range of governmental functions involving a more complex assemblage of institutions. Many of the new institutions have forms of independence in making government policy and in oversight (just think of the Monetary Policy Committee of the Bank of England), and some of them constrain the executive in new ways, and some of them carry out executive functions. I expect that the increased complexity of contemporary governance must have, to some extent, driven the growth in the parliamentary leadership of the executive itself: Rishi Sunak's government had 109 ministers, 23 of them in the Cabinet. In 1874, Disraeli's cabinet of 12 men ruled an empire. But I wonder if such populous ministries have also been a technique of management of the parliamentary executive, since they offer opportunities for giving incentives, and a way of getting 109 MPs to commit themselves to support government policy. Perhaps Dicey would count the bloated ministries of the twenty-first century as another increase in party government.

The forms of accountability of the executive outside the House of Commons have been transformed since Dicey's day; they include judicial review that is in some ways much more wide-ranging and more intrusive than in 1885, and also ombudsmen and tribunals, and public consultations on policy making, and freedom of information, and data protection. And processes within the House of Commons have changed since 1885, particularly through changes to the committee structures.

The operation of the parliamentary executive has been transformed through the progressive ascendancy of the House of Commons over the House of Lords since 1885. The great landmark in that ascendancy was the Parliament Act 1911; in his eighth edition in 1915 Dicey copied it into the appendix and said 'The Parliament Act is the last and greatest triumph of party government'.[23] That was a lament.

The ascendancy of the House of Commons has not only changed the legislature; it has changed executive government. When Lord Salisbury resigned (after a split in his Cabinet) in 1902, it would not have been obvious that he would be the last Prime Minister to run a government from the House of Lords. But some had already considered that the Prime Minister should be in the House of Commons. By 1940, Lord Halifax thought that he could not lead a government from the House of Lords after Chamberlain's resignation, because of 'the difficult position of a Prime Minister unable to make contact with the centre of gravity in the House of Commons'.[24] Things have changed further since then: it is not just a difficult position, it is unthinkable. And whereas Disraeli's Cabinet had six peers and six commoners, the only Cabinet ministers from the House of Lords in Rishi Sunak's government were the government's representative to the peers (the Leader

[23] ibid cx, 557.
[24] See https://history.blog.gov.uk/2013/04/24/prime-ministers-in-the-house-of-lords/.

of the House of Lords), and the very exceptional case of David Cameron as Foreign Secretary; 25 of the 86 junior ministers were in the House of Lords, the rest were in the House of Commons.

This list of changes since Dicey's time in the role and operation of the parliamentary executive is only meant to be illustrative; other significant changes could be added (I have not even mentioned the decline of the Liberals and the rise of Labour, or the ways in which 47 years in the EU changed British governance, or the transformation of communications media …). I think the changes I have jotted down support a striking conclusion: that the basic structure of the parliamentary executive is *just the same today* as in 1885, and has the same constitutional value, even though political and constitutional circumstances have changed dramatically.

Let me explain by outlining two changes in the rules of the parliamentary executive itself, both of which have further reduced the vestigial role of the monarch since Dicey's day: change in the way in which the monarch decides whom to appoint as Prime Minister; and the new convention that the monarch must not dismiss a Prime Minister who has the confidence of the House of Commons.

A. Choice of a Prime Minister

How is the monarch to choose whom to appoint as Prime Minister? Dicey said that 'The party who for the time being command a majority in the House of Commons, have (in general) a right to have their leaders placed in office', and, 'The most influential of these leaders ought (generally speaking) to be the Premier, or head of the Cabinet'.[25] It is a reminder that in Dicey's day, as now, it would be utterly impossible for the monarch to work out who could command the confidence of the House of Commons without the parties. Say what you like about them, we could not have a parliamentary executive without political parties.

Today, the *Cabinet Manual* offers a straightforward doctrine that the ability to command the confidence of the House of Commons is the defining qualification for a Prime Minister.[26] The crucial change since Dicey's day is that the main political parties have taken over the decision as to which person is to form a ministry, if the party has a majority. In Dicey's day, if a party won a majority, the question of which of its leaders was 'the most influential' could only be answered by an open-ended assessment of the political situation. It might be entirely obvious, but then again it might call for a sensitive grasp of the mood of a party, and the tendencies and expectations and allegiances and divisions of party members, and it might call for good judgement as to how things were likely to develop. The need for such an assessment gave Queen Victoria a significant resulting discretion.

[25] Dicey 1915, *Introduction to the Study of the Law of the Constitution* 417.
[26] Cabinet Office, *The Cabinet Manual* (2011) 14.

But Queen Elizabeth II was dutifully committed to exercising no such discretion. To avoid having to do so, she needed the parties to resolve the matter, and they have all developed selection processes for a party leader, settling the matter for the monarch. This change represents a further step since Dicey's day in the removal of the monarch's power over the executive.

The change really began with Edward Heath's 1965 election by Conservative MPs under new rules; since then, that party's rules have changed further, and Liz Truss's election as party leader and her 49 days in office as Prime Minister of the United Kingdom were due to the system of electing a party leader by vote of all party members. Conservative MPs would have chosen Rishi Sunak, but the rules put the decision in the hands of a constituency that was evidently swayed by Truss's dramatic plan to cut their taxes.[27] When Truss was forced to resign, the party carefully ensured that its party members would not get another choice of that kind, by modifying the rules so that there would only be one candidate. The fiasco shows a distinct drawback of the twenty-first-century parliamentary executive: selection of a Prime Minister may result not from a general election, but from a vote by members of a political club. The leading parties (Conservatives, Labour, Liberal Democrats, Scottish National Party) all have one-member-one-vote processes (with various requirements of support for nominations from the party's MPs or members). It is easy for a party to pretend that a vote by party members is democratic, but their members are not the *demos*. Their processes would be more democratic if a leader were chosen in such a situation by the parliamentary party, ie by the party's MPs. They, at least, were elected by actual voters, and are answerable in a general election.

B. Dismissing a Ministry

Dicey thought that 'there are certainly combinations of circumstances under which the Crown has a right to dismiss a Ministry who command a Parliamentary majority'.[28] He viewed it as protection against representatives who pursue policies that the voters do not actually support: 'A dissolution is allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation'.[29]

Today, by contrast, 'Prime Ministers hold office unless and until they resign'.[30] That pithy proclamation is in the *Cabinet Manual* – a statement of the rules of the parliamentary executive that was prepared by the Cabinet Secretary in 2011

[27] For a description of the process, see 'How Liz Truss Won the Conservative Leadership Race' (*BBC*, 5 September 2022), https://www.bbc.com/news/uk-politics-60037657.

[28] Dicey 1915, *Introduction to the Study of the Law of the Constitution* 428.

[29] ibid 429.

[30] Cabinet Office, *The Cabinet Manual* (2011) 14. This document, drafted by the Cabinet Secretary, Sir Gus O'Donnell, 'records rules and practices, but is not intended to be the source of any rule': iv.

at the request of Prime Minister David Cameron, in an initiative started by his predecessor, Gordon Brown. The *Manual* goes on to comment that 'Historically, the Sovereign has made use of reserve powers to dismiss a Prime Minister or to make a personal choice of successor, although this was last used in 1834 and was regarded as having undermined the Sovereign'.[31]

I think that it is patently sound to say that it is now a constitutional convention that the monarch cannot dismiss a Prime Minister who has the confidence of the House of Commons. I say so not only because of the regular practice since 1834, but because of a crucial matter of impression: that the sense of the role of the monarch today, in political circles, includes a shared opinion that he or she must not interfere with the democratic, representative executive.

Yet Dicey thought that in his time, the monarch's power to dismiss a ministry because of its policies was not only accepted by the political classes as constitutional, but was also supported by constitutional principle. As Dicey said with his accustomed candour, 'This looks at first sight like saying that in certain cases the prerogative can be so used as to set at nought the will of the nation'.[32] But he argued that it is, on the contrary, a protection against a problem with representative democracy: that 'the wishes of the legislature' might diverge from 'the wishes of the nation'.[33] The principle at stake was 'the fundamental principle of our existing Constitution that not Parliament but the nation is, politically speaking, the supreme power in the State'.[34] And he saw the authority of the House of Commons to be entirely derivative from the authority of its electors. Dicey thought that Queen Victoria could remove a government with a majority in the House of Commons (in fact, he thought that it was her duty to do so), if she could see that its policies were adverse to the will of the people.

A constitutional mechanism that would allow King Charles III to dismiss a misbehaving Prime Minister has an obvious advantage: it would authorise the King to solve a perennial problem with political representation. How are the current representatives to be forced to represent the people faithfully? Dicey thought that a parliamentary executive 'is likely to become the creature of the parliament by which it is created, and to share, though in a modified form, the weaknesses which are inherent in the rule of an elective assembly'.[35] If we had an authority that could decree that the government should face the electorate forthwith instead of years later, that might give the electorate the actual say just when it needs to have a say. And the mere possibility would structure the government's operations, incentivising the government not to act so as give the monarch cause, or even ostensible cause, to bring about such a crisis.

[31] ibid 14.
[32] Dicey 1915, *Introduction to the Study of the Law of the Constitution* 428.
[33] ibid 429.
[34] ibid 431.
[35] ibid 484.

But you see the drawback – the reason why it is constitutionally unthinkable for the Crown to exercise such authority today: the putatively democratic device would be a monarchical power of government. The idea that a monarch might legitimately do what William IV did in 1834 is the clearest survival of the institutional power of the monarch in Dicey's work. In 1834, the King did not trust the radical reformers among Lord Melbourne's Whig majority. The King dismissed Melbourne and his ministry and appointed Sir Robert Peel, a conservative. Peel formed a ministry, but failed to put together enough support to govern, and had to ask the King to dissolve Parliament to make way for a new general election. The Whigs won the election convincingly by 385 seats to 273, and after that it was obviously politically necessary for the King to put up with Melbourne as Prime Minister. Dicey wrote that whether the King's decision had been compatible with the principles of the constitution depended on 'the still disputable question of fact, whether the King and his advisers had reasonable ground for supposing that the reformed House of Commons had lost the confidence of the nation'.[36] You see what a dramatic monarchical power Dicey attributed to the monarch: it was the same power of dismissal of a government that the House of Commons wields in a vote of no confidence, with the proviso that the King was meant to exercise it on the basis of his sense of the mind of the voters. Dicey had inherited the mid-Victorian liberal picture of a mixed constitution in which the democratic element was on the one hand balanced and on the other hand protected by non-democratic structures of authority that were familiar to William Blackstone.

If Dicey's sense of things was behind the times, I do not think it was very far behind the times. But Queen Elizabeth II, with her well-informed and sensitive instinct for the requirements of the Constitution, knew that she had no authority to dismiss a government that was supported by a majority in the House of Commons. Today, the Constitution has given up the protection for democracy that, in Dicey's view, a monarch might provide by acting on his or her own assessment of a 'disputable question of fact': whether the House of Commons has lost the confidence of the nation.

IV. Conclusion: Dicey's Conjecture

Dicey thought the Parliament Act was 'the last and greatest triumph of party government'. What would he have thought of events in 2022? Party members selected Liz Truss as Prime Minister; she thought she had a mandate from the Conservative Party. The parties' own processes have taken over from the monarch in deciding who should be selected as Prime Minister if the party attains a majority in a general election. And the monarch cannot protect the electors against a party with a majority by forcing a general election.

[36] ibid 432.

Some, indeed, have thought that we have abandoned the parliamentary executive for a presidential system. Take Jacob Rees-Mogg, who served as a Cabinet minister under Boris Johnson and Liz Truss. In the early days of the trouble that led to Boris Johnson's resignation, while Rees-Mogg was Leader of the House of Commons, he told the BBC that 'we have moved, for better or worse, to an essentially presidential system. Therefore the mandate is personal rather than entirely party … any prime minister would be very well advised to seek a fresh mandate'.[37] Rees-Mogg was suggesting that if Boris Johnson were forced to resign, there ought to be a general election to secure a new, personal mandate for a new, presidential Prime Minister (presumably, he was offering his colleagues friendly advice against opposing Johnson). There is that word 'mandate' again. I propose that Boris Johnson, like any Prime Minister in the parliamentary executive, *had no mandate*: he was holding power at the pleasure of his party's MPs, and he only held it until he displeased them. If you want to call it a 'mandate', it is a mandate that is revocable at the drop of a hat.

The leader of a party may well have personal support among the voters that leads decisively to that party's securing a majority (I am sure that was the case in the December 2019 general election). That makes no change in our Constitution, which has simply preserved the parliamentary executive that had emerged by the 1880s. And indeed, the downfall of Johnson and then of Truss illustrates it in action. The head of government is radically dependent on the political judgement and sensibilities and action of Members of Parliament.

Dicey himself, in Note III on the parliamentary executive in his final edition, had said that already in 1915, 'a general election may be in effect, though not in name, a popular election of a particular statesman to the Premiership',[38] and he engaged in a conjecture about the future – that is, about our days:

> It is a matter of curious speculation, whether the English Cabinet may not at this moment be undergoing a gradual and, as yet, scarcely noticed change of character, under which it may be transformed from a parliamentary into a non-parliamentary executive. … the time may come when, though all the forms of the English constitution remain unchanged, an English Prime Minister will be as truly elected to office by a popular vote as is an American President.[39]

He was thinking of the Electoral College system in the US: a body of representatives of the people, elected to choose a president. A conventional rule had very swiftly developed (certainly by the 1830s) that ran just contrary to the design of the founders: a rule that those sent to the Electoral College were not free to use their own judgement, but had a duty to vote in favour of the candidate they had been

[37] K Nicholson, 'Jacob Rees-Mogg Now Thinks the UK is "Essentially" a Presidency' (*Huffington Post*, 26 January 2022) https://www.huffingtonpost.co.uk/entry/jacob-rees-mogg-partygate-presidency_uk_61f1210ae4b04f9a12b68d00.

[38] Dicey 1915, *Introduction to the Study of the Law of the Constitution* 483.

[39] ibid 483.

elected to support. I want to conclude by pointing out how deeply different the role of an MP in the House of Commons is today, from the role of an elector sent to the Electoral College in the US.

It is crucial that MPs are legislators, each with a vote on every Bill presented before Parliament. It is crucial that they are constituency representatives, in a political culture in which each is expected to attend to concerns and complaints of constituents (or, at least, to assemble a team that will do it). I have argued that they do not select a Prime Minister; the monarch does that on the basis of the mere fact that a particular number were elected as a party's candidates. It is crucial that, unlike the members of the US Electoral College, they can vote a government out of office. And that role – reflecting the requirement of the confidence of the House of Commons – is embedded in their general political role as constituency representatives in a legislature. But they do not generally need to hold a vote of no confidence in order to force a Prime Minister out. Votes of no confidence brought down ministries more than a dozen times in the nineteenth century; since then, they have only succeeded in 1924 (twice) and in 1979. In another significant development of party government, the destruction of a premiership ordinarily takes place not by a vote of no confidence, but through irresistible pressures within the governing party. The Cabinet itself serves an accountability function, because the ministers are still (just as much as in Dicey's day) leaders in the party, with the opportunity to catalyse the downfall of a Prime Minister.

So – for good and ill – we have party government in a *stronger* form than in Dicey's day. But we still have a parliamentary executive. It still gives the UK responsible executive government. Does it yield good government? Yes, of course it does, if the Prime Minister and the Cabinet respond well to the inescapable forces to which it subjects them.