

Examining how Commonwealth Caribbean Constitutions Enable Prime Ministerial Absolutism, With Reference to the Reserve Power

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ABSTRACT

This thesis seeks to answer the question: *should the head of state in a Westminster system possess reserve powers to safeguard the constitution?* By answering this question in the affirmative, this thesis casts doubt on the method of codification adopted in most Commonwealth Caribbean constitutions, particularly relating to the removal of the head of state's reserve power to prevent unconstitutional uses of certain executive powers. Therefore, this thesis has two primary objectives. The first is to establish the importance of the reserve power of the head of state to Westminster constitutionalism generally. The second is to show how the absence of the reserve power in Caribbean constitutions has led to constitutional crises in the past, and ultimately, may lead to more in the future.

The thesis commences with an analysis of Westminster constitutional conventions and their essential qualities of being normative and regulatory. This analysis demonstrates how certain executive powers must be used in line with prevailing constitutional principles, failing which, political sanctions may be imposed. Next, the thesis argues that the reserve power is a power of last resort exercised by the head of state to deter and sanction breaches of these conventions and principles. Thus, the thesis justifies the reserve power not as a historical legacy, but as a modern necessity of parliamentary government. Consequently, the head of state in a Westminster system is not a mere constitutional cipher but rather a constitutional guardian with the ultimate power to reel in unconstitutionality. Lastly, I show that by removing the reserve power from their constitutional edifice, Caribbean constitutions removed an important sanction mechanism for breaches of constitutional conventions and principles. Consequently, Caribbean prime ministers are empowered to

arbitrarily wield certain executive powers in breach of fundamental conventions and principles.

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INTRODUCTION

In 2022, St. Kitts-Nevis's Prime Minister Timothy Harris fired two-thirds of his cabinet after they requested Governor-General S.W. Tapley Seaton to dismiss Harris and replace him with someone who commanded parliament's confidence. Seaton denied that he had such power under the constitution. Harris's former colleagues desired to change the leadership of the governing coalition while maintaining the parliamentary situation (not an unusual request in a parliamentary democracy). The fired ministers then brought a no-confidence motion to parliament. Knowing he would lose the vote, Harris dissolved the parliament, which was early into its term. To draw an analogy, it was like a schoolboy bringing his cricket ball to play with his friends, but when he is caught out, he decides he no longer wishes to play, collects his ball, and heads home.

A few persons argued that Seaton's decision was wrong. These persons believed that the head of state's power to dismiss the prime minister was implied into the constitution as a corollary of his power to appoint him. This argument has no basis in constitutional law or theory.

There was no debate—and has been none since—in St. Kitts-Nevis or the Commonwealth Caribbean generally (hereafter "Caribbean"), about how or why this crisis unfolded. No mention was made of constitutional conventions and principles, the proper role of the head of state under a Westminster constitution, or the reserve power. These phenomena have been largely under-researched in Caribbean constitutional theory and underappreciated by the general population. We understand little about the constitutional system which we chose over sixty years ago to govern us.

Seaton's decision was right in law. The constitution of St. Kitts-Nevis, like most Caribbean constitutions, removed the head of state's reserve powers that are fundamental for parliamentary government. These powers help to check unconstitutional uses of key executive powers by the prime minister.

The reserve power forms part of the historical fabric of the Westminster constitution. But it is not only justified by reference to history. The reserve power is justified on a proper theoretical account of the modern constitutional edifice. In short, the reserve power acts as a political sanction for breaches of fundamental constitutional conventions and principles. Without the power, many of these breaches would go unremedied since they do not amount to breaches of law.

What we often fail to appreciate in the Caribbean is that a constitution is much more than the strict rules codified in a document. It encompasses political rules, embodying conventions and principles that operate outside the bounds of strict law. Many conventions are codified in Caribbean constitutions, but they are expressly denied justiciability. Ordinarily, these political rules are applied and sanctioned by political actors. The head of state is one such political actor, and the reserve power is one such political sanction. But under most Caribbean constitutions, heads of state do not have their ordinary powers of last resort. Thus, there is no constitutional body—legal or political—which can act as a check against the prime minister's use of certain executive powers. The result of this omission is evident in crises like what occurred in St. Kitts-Nevis. Seaton's decision was right, because Caribbean constitutions are defective on this point.

This thesis strives to shed light on the reserve powers in Westminster constitutionalism. By doing this, I hope to spark further commentary on the topic in a

period where Caribbean states undergo another wave of constitutional reform¹. Furthermore, I believe that this thesis may prove useful to Caribbean heads of state in countries with constitutions that retain reserve powers by equipping them with the understanding of their constitutional roles and powers.

This thesis will be divided into four chapters. Chapter one introduces the reader to Westminster constitutional conventions and principles. I will discuss their normative nature. They are not merely constitutional practices, but contain normative reasons tied to the prevailing political philosophy. Additionally, I will show that conventions do not simply limit conduct but also empower political actors to sanction breaches thereby acting as internal regulating devices for the constitutional system.

In chapter two, I will examine the reserve power and its importance to parliamentary systems like the Westminster system. In doing so, I will adopt the theoretical framework of Anne Twomey who links the exercises of the reserve power with fundamental constitutional principles. I will build on her account by highlighting the political role of the head of state and the importance of the office under a Westminster constitution.

In chapter three, I will comparatively analyse post-WWII Westminster constitutions outside the Caribbean, to show how countries recognised the value of the reserve powers and maintained them within their post-independence constitutional structure. I will also analyse Caribbean pre-independence constitutions—which provided for reserve powers—and contrast these constitutions with their post-independence counterparts. I will then analyse archival records to understand the reasons for the omission of the reserve power in post-independence Caribbean constitutions.

¹ OPM Communications, ‘Government Commits to Phased Approach for Constitutional Reform’ *OPM* (24 May 2024) <<https://opm.gov.jm/news/government-commits-to-phased-approach-for-constitutional-reform/>> accessed on 1 July 2024.

In chapter four, I will scrutinise a few constitutional crises that occurred in the Caribbean and recast them in light of the exposition had on the reserve powers. I will show that some of the past constitutional crises in the Caribbean can be linked to the lack of reserve powers.

I. Conventions and Principles of Westminster Constitutionalism

The short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas.

Ivor Jennings¹

Introduction

On gaining independence, Caribbean states followed the field of burgeoning Westminster-model constitutions by codifying British constitutional conventions into their written constitutions². The intention was to model the constitutional structure of their new states on the established constitutional system of Britain that had been introduced in their pre-independence self-governing constitutions³. It was an act of constitutional continuity. It was not the intention of the constitution-drafters to transform these conventions into justiciable law⁴. On the contrary, these constitutions expressed that these provisions were not to be enquired into in any court⁵. These matters were appropriately left to be regulated by the political actors in the political fora such as parliament and the electorate. The problem is that constitution-drafters then stripped the head of state of reserve powers which function as a deterrent and sanction mechanism. The result of this omission is that there is

¹ Ivor Jennings, *The Law and the Constitution* (5th edn, UoL Press 1959) 81-82.

² Margaret DeMerieux, 'The Codification of Constitutional Conventions in the Commonwealth Caribbean Constitutions' (1982) 31(2) ICLQ 263.

³ Lloyd Barnett, *Constitutional Law of Jamaica* (OUP 1977); Trevor Munroe, *The Politics of Constitutional Decolonization Jamaica 1944-62* (ISER 1972).

⁴ Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens 1966). See also Tracy Robinson, Arif Bulkan, and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet & Maxwell 2021).

⁵ E.g., see Jamaica (Constitution) Order in Council 1962, S.I. 1962/1550, s32(4) ("JAM Const.").

no effective sanction for breaches of important constitutional conventions whether, legal or political, thereby eroding the principle of democratic accountability.

This is a snapshot of my entire thesis, but what is particularly relevant for this chapter is understanding British constitutional conventions—their nature and purpose in a Westminster constitution and how they relate to the reserve power.

1.1. The nature of constitutional conventions

The British constitution is famously uncoded. There is no formal document that contains all the important laws of state and establishes the structure and principles of government. The constitution comprises a variety of sources which Philip Norton classifies under four headings: statute, common law, convention, and works of authority⁶. Despite this range, the constitution is not ad hoc; it is internally coherent, in large part due to constitutional conventions that help to bind together its various organs. The constitution is the product of a long historical evolution. Much of the state's executive power is derived from the ancient prerogative powers of the monarch. Today, many of these powers have formed the basis of statutory regulation and would not properly encompass the term 'prerogative powers'⁷. Nonetheless, there are a few residual prerogatives that remain legally vested in the monarch. The constitution is nevertheless a democratic constitution. It has been able to democratise without radical change or codification, with the aid of constitutional conventions.

⁶ Philip Norton, *The Constitution in Flux* (Martin Robertson 1982) 5.

⁷ William Wade, *Administrative Law* (Clarendon Press 1961) 13.

1.1.1. Normativity of constitutional conventions

Dicey described constitutional conventions as the ‘rules intended to regulate the exercise of the whole of the remaining discretionary power of the Crown’⁸. Dicey is specifically referring to conventions which regulate the exercise of the monarch’s legal power, including summoning, proroguing, and dissolving parliament⁹. While this does not capture the full breadth of constitutional conventions operating within a Westminster constitution—since conventions permeate all levels and departments of government—this definition usefully limits the range of conventions to those I am most interested in in this thesis¹⁰.

Constitutional conventions are normative. They act as a constitutional regulatory technique guiding the conduct of political actors in the exercise of their constitutional powers¹¹. They did not emerge unexpectedly merely from long use or practice; they embody the principles of the constitutional edifice. Geoffrey Marshall considers that the normativity of conventions is unsettled since some commentators believe that conventions need not serve a purpose and may arise merely from long constitutional practice or custom¹². The supposed disagreement concerning the normativity of constitutional conventions may, however, be overstated.

It is generally settled that conventions typically arise in two ways: (1) where a practice, sometimes termed ‘usage’ acquires a strong obligatory character over time; or (2)

⁸ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 426.

⁹ Wade (n7).

¹⁰ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984).

¹¹ Panagiotis Doudonis, *The Normativity of Constitutional Conventions, with Special References to the UK, USA and Greece* (DPhil thesis, University of Oxford 2020).

¹² Marshall, *Constitutional Conventions* (n10).

where there is agreement among the people who will be bound by a proposed convention which did not arise from custom or usage¹³. In this thesis, I will focus on the first.

In Marshall's monograph, he classified conventions into two possible branches—positive morality, that the existence of conventions is tied to the subjective historical beliefs of the constitutional actors regarding what is required of them, and critical morality, that conventions are the rules that the actors ought to feel obliged by had they considered the precedents and reasons correctly. Marshall prefers the critical morality account—as do I—since it allows for a justified disagreement as to the existence of a convention where there is no principled reason for it or where its reason is debatable. A constitutional convention should have some constitutional reason that justifies its emergence as an obligatory rule within the larger constitutional framework.

The alternative view, that, a convention may exist simply after long usage of a constitutional practice, paired with the subjective belief of the constitutional actor—however unfounded—that he was bound by said practice is ill-founded. Nicholas Barber posits that constitutional actors do not actually return to the reasons when they apply constitutional conventions in their day-to-day functions and that this lends itself to the view that conventions may be created simply from long use and subjective beliefs¹⁴. This is true in usual circumstances. It does not negate the idea that a constitutional actor should appeal to the reasons for the convention during extraordinary circumstances which place the existence of the 'convention' in doubt—and that those reasons are in fact essential to the existence of the convention.

¹³ Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (OUP 1991).

¹⁴ Nicholas Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) 100.

For instance, it is a constitutional practice that the prime minister requests a dissolution from the head of state. The practice is generally understandable since the prime minister is the voice of cabinet and it would be inconvenient to go behind every prime ministerial request to dissolve to ascertain the position of each member of cabinet. It is sometimes alleged that this practice has evolved into the convention that ‘the Prime Minister of the day has an absolute right to decide the date of the election’¹⁵. This is certainly false. This stems from the mistaken view of British Prime Minister Lloyd George in 1918 that he could seek a dissolution without the approval of his cabinet¹⁶. But occupancy of the position of prime minister is not in itself a constitutional reason for having a right to request a dissolution. The prime minister’s ability to request the dissolution is hinged on him remaining the voice of cabinet—which is the advisor to the head of state.

If the head of state is aware beforehand that the prime minister, in requesting the dissolution, is acting contrary to his cabinet—which still commands parliamentary support and with which the prime minister is at odds—the prudent course would be for the head of state to resort to the reasons for the practice. This would relieve him from being bound by the prime minister’s request since there is no constitutional reason for it to apply in the circumstances. Accordingly, in this context, it would be wise for the cabinet to advise the head of state as to the parliamentary situation, since, if the head of state is unaware of the position, he has no reason to act contrary to the usual constitutional practice.

Additionally, it appears to me that the idea that there have long been two strands of thought on this issue is misplaced. Kenneth Wheare is often cited for the proposition that a convention is ‘a rule of behaviour accepted as obligatory by those concerned in the working

¹⁵ George Clark, ‘Mr Short and Left Wing in Dispute on Queen’s Freedom of Choice’, *The Times*, May 11, 1974.

¹⁶ Marhsall (n10) 48; Ivor Jennings, *Cabinet Government* (3rd edn, CUP 1959) 417-419. C.f. §1.3.

of the Constitution’¹⁷. Reading this, one is led to believe that Wheare did not necessarily view conventions as normative in terms of being grounded in constitutional principle. That conventions could arise merely from the subjective and possibly mistaken belief of any misguided constitutional actor. Yet his subsequent writings around that period suggest otherwise. Wheare stated that before a usage transforms into a convention, it must, (1) be repeatedly adopted whenever a given set of circumstances recurs, and (2) possess a ‘sufficient reason’ for acquiring the obligatory force of a convention¹⁸. Moreover, he asserted that a convention may also arise after a single precedent where there exists sufficient reason for its existence. On Wheare’s account then, conventions are obligatory after they are formed, but they only form after they take the critical step from usage status or arise from a single precedent. But both scenarios are premised on sufficient reasons for their existence being present. Wheare clearly views conventions as being normative since, in his view, their normativity is exactly what separates them from mere usages.

Similarly, Hood Phillips is also listed among the positive morality conventionalists since he indicated that conventions were ‘rules of political practice which are regarded as binding by those to whom they apply...’¹⁹. Yet Hood Phillips qualified his statement by adding that the belief of a constitutional actor that a convention is obligatory ‘is not conclusive as they may be mistaken’²⁰. Evidently, if the constitutional actor’s belief is not enough, there must be some objective reason for the rule which justifies its existence and the subsequent sense of obligatoriness.

¹⁷ Kenneth Wheare, *Modern Constitutions* (OUP 1951) 179.

¹⁸ Kenneth Wheare, *The Statute of Westminster and Dominion Status* (5th edn, OUP 1953) 10.

¹⁹ Owen Hood Phillips, *Constitutional and Administrative Law* (6th edn, Sweet & Maxwell 1978) 104-105.

²⁰ *ibid.*

To that end, the oft-cited authorities of positive morality conventionalism are no real authorities on the matter. The true position, I argue, is, and always has been, that stated by Ivor Jennings in his highly regarded tripartite test on the existence of a convention. Jennings outlines that the critical questions to ask are these:

First, what are the precedents, secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?²¹.

This requires subjective and objective elements. Subjectivity is important because the constitutional actors must feel obligated to follow the rule. But a rule is still not properly a constitutional convention unless it is shown to be grounded in some constitutionally principled reason.

1.1.2. Conventions as internal political regulators

Before delving into the ‘reasons’ for constitutional conventions, I must outline other relevant features of constitutional conventions. Constitutional conventions are rules which allow political actors to navigate the political constitution without interference from non-political actors. The British Constitution, and its ‘Westminster’ derivatives, are political constitutions²². Political responsibility and accountability are vested in the hands of political actors through conventions which often contradict the legal constitution. This does not mean that political actors are omnipotent or that they exist within an unregulated space. A constitution is made up of both legal and political rules. These political rules, i.e., conventions, provide the limits, powers, and sanctions that regulate the behaviour of the

²¹ Jennings, *Law and the Constitution* (n1) 136.

²² J.A.G. Griffith, ‘The Political Constitution’ (1979) 42(1) MLR 1.

political actors. In Eugene Forsey's words: conventions are 'political in their birth, political in their growth and decay, and political in their application and sanctions'²³.

The concept of political sanctions is extremely important—for this thesis, and also to dispel the erroneous suggestion that constitutional conventions could be breached with impunity since they are not legal rules. Mark Elliott²⁴ and Trevor Allan²⁵ believe that there is room now for constitutional conventions to be backed by legal sanctions given the values and principles that conventions are imbued with. This also seems to be the position of the Supreme Court in *Miller* 2²⁶. Elliott further believes that given the growing trend of judicial intervention in matters pertaining to the royal prerogative, many of the once non-justiciable parts of the constitution are becoming justiciable, and this would by implication include constitutional conventions²⁷. These arguments fail to appreciate that constitutional conventions do not need legal sanction to be effective at regulating behaviour.

Marshall explains that constitutional conventions can be 'duty-imposing' or they can be 'entitlement-conferring' (sometimes described as 'power-conferring')²⁸. Duty-imposing conventions impose limits on political actors rendering them accountable in the use of their constitutional powers. For example, the government must resign if it loses the confidence of a majority of the elected representatives. This spurs the question, what happens when a political actor acts outside of these limits? More specific to our example—is there an available sanction should the prime minister refuse to tender his government's

²³ Eugene Forsey, 'The Courts and the Conventions of the Constitution' (1984) 33 UNBLJ 11, 13.

²⁴ Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order' (2002) 22 LS 340.

²⁵ T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 62.

²⁶ *R (Miller) v Prime Minister* [2019] UKSC 41; cf. §2.3.2.

²⁷ For critique of Elliot, see Joseph Jaconelli, 'Do Constitutional Conventions Bind? (2005) 64(1) CLJ 149.

²⁸ Marshall, *Constitutional Conventions* (n10) 8.

resignation and/or continue to tender advice to the head of state? The prime minister will not face legal sanction since no law was broken. But, the prime minister can expect to face political sanction by other political actors such as his political party, parliament, or the head of state.

This is where power-conferring conventions enter the scene. If the political actor breaches the convention and begins to act outside of the constitutional limits of his powers, constitutional conventions also confer power on other political actors to act in order to safeguard the constitution. Thus, to continue our example, should the prime minister refuse to resign notwithstanding his lack of parliamentary support, the head of state is conferred with a power to impose a sanction. Marshall classifies the convention that the head of state may in some circumstances refuse the request of the prime minister as a power-conferring convention²⁹. However, Jaconelli believes that this should simply be regarded as an exception to the duty-imposing convention that the head of state acts on advice³⁰. Marshall's classification is helpful—even if only as a descriptive label—since it underscores the sanction component of constitutional conventions. The corollary of an executive convention imposing a duty on one political actor is the conferral of power on another political actor to enforce the duty. Doudonis describes conventions as a shield, but also a 'sword' which provides political actors with the power to fulfil their constitutional roles³¹. But power-conferring conventions are not duty imposing and the holder of the power is not obligated to exercise it³². This does not render the power ineffective; it merely

²⁹ *ibid.*

³⁰ Jaconelli (n27); Doudonis (n11) 72-74.

³¹ Doudonis (n11) 70.

³² *ibid*

reflects its political nature, and the importance of being flexible in politically charged situations.

When one views constitutional conventions in this way, it becomes clear that describing them as political or non-legal is by no means pejorative. Given their political nature, they are regulated differently from legal rules. This is why constitutional conventions are non-justiciable³³. Non-justiciability does not imply that they are less important than justiciable constitutional rules. It simply means that there is a more appropriate forum in which to adjudicate—and I use this term carefully—their application and breaches. ‘Law is not and cannot be a substitute for politics’³⁴. Griffith’s apposite remark stresses the importance of the dichotomy between law and politics. Both are tremendously, but uniquely, important to the constitution and ought not to trespass into the domain of the other. The Canadian Supreme Court in the *Patriation Reference* case captures this distinction well:

It is because the sanctions of convention rest with institutions of government other than courts, such as the Governor-General or the Lieutenant Governor, or the Houses of Parliament, or with public opinion and ultimately, with the electorate, that it is generally said that they are political...

That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence³⁵.

The appropriate forum for enforcing conventions in Westminster parliamentary democracies is primarily parliament—who can, among other things, censure, express lack of confidence, raise questions, or more radically, create a change in the law or constitutional

³³ Colin Munro, ‘Laws and Conventions Distinguished’ (1975) 91 LQR 218.

³⁴ Griffith (n22) 16.

³⁵ *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, 882-3.

edifice³⁶. Nonetheless, political parties, the head of state, and the electorate also serve as additional fora to enforce political sanctions particularly where parliament's ability to do so is hindered³⁷.

1.2. The reasons for constitutional conventions

I explained that constitutional conventions were normative because they act as rules that regulate political behaviour. But they only achieve this feat because they are viewed by political actors as obligatory given that they possess reasons for their existence. When it is said that constitutional conventions should have reasons for their existence, this does not mean that any arbitrary and irrelevant reason will suffice. These reasons are constitutional reasons relevant to the overarching constitutional system.

As the epigraph states, conventions keep the constitution in touch with the growth of ideas. What this means is that constitutional conventions embody the prevailing constitutional and political principles of the period from which they emerged³⁸. Holdsworth highlights that 'the conventions of the nineteenth and twentieth centuries are directed to secure the political predominance of the House of Commons'³⁹. What Holdsworth is suggesting is that today's constitutional conventions seek to reinforce the principle of responsible government—that the government is only the government for as long as it has the support of parliament. This is essentially the Diceyan position. Dicey indicated that the

³⁶ Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution* (5th edn, Hutchinson 1971).

³⁷ cf. chapter 3.

³⁸ W.S. Holdsworth, 'The Conventions of the Eighteenth Century Constitution' (1932) 17 Iowa LR 161.

³⁹ *ibid* 163.

ultimate object of constitutional conventions was to secure the supremacy of the House of Commons, which was the voice of the people whom he termed the political sovereign⁴⁰.

Many other commentators similarly argue that reasons are essential, though they do so at varying degrees of normativity. Most take the same approach to that of Holdsworth and Dicey linking the reasons to constitutional principles. For Barber, convincing reasons would include principles like representative government, constitutional monarchy, and the separation of powers, rather than ‘assertions about the morally, or prudentially, correct course of action’⁴¹. Doudonis believes the reasons are linked to democratic accountability⁴². Similarly, Marshall views them as necessary for the working of political and governmental accountability⁴³. Jaconelli concurs with the foregoing position and further writes that the reasons are ‘not to be derived from abstract considerations of correct governmental conduct’⁴⁴.

Most commentators on this subject plainly believe that reasons are critical for the existence of constitutional conventions and that these are derived from the internal principles of the constitutional system. Nonetheless, as Marshall and Moodie point out, the term ‘constitutional principles’ is vague and may mean different things⁴⁵. This difficulty is highlighted when one assesses Allan’s conception of the reasons for constitutional conventions. Allan takes a much stronger approach regarding the values he believes conventions should comprise. Allan draws references to political values, independent of

⁴⁰ Dicey (n8).

⁴¹ Barber (n14) 98.

⁴² Doudonis (n11) 144.

⁴³ Marshall, *Constitutional Conventions* (n10).

⁴⁴ Joseph Jaconelli, ‘The Nature of Constitutional Conventions’ (1999) 19(1) LS 24, 46.

⁴⁵ Marshall and Moodie (n36) 33-34.

their immediate context⁴⁶. Allan believes that constitutional conventions are constructions of reason determined when the political actors reflect on principles of justice, good governance, fairness, propriety, and political morality. Thus, Allan's view of the reasons for constitutional conventions is much more expansive than the consensus view. It would appear to include principles that the political system ought to reflect rather than the principles it actually reflects.

Allan's argument extends the normative content of constitutional values beyond what is generally agreed to by most commentators, and beyond what is desirable. Constitutional conventions are already criticised for their vagueness; Allan's account would increase it. It would also become impossible to determine whether a constitutional convention exists, or should exist, since each political actor may perceive concepts like good governance very differently. This would transform conventions into mainly subjective constitutional practices. Accordingly, it is very difficult to pinpoint the constitutional principles that conventions secure for Allan.

I believe a more tempered and objective approach is appropriate, consistent with the majority position. It is best that the reasons for constitutional conventions be objective and discernible. This is the benefit of relying on the concrete, internal principles which Westminster constitutionalism is already accepted to be premised on. Many of the Westminster constitutional conventions facilitate the current philosophy of the constitution—that the government is accountable to parliament who in turn is accountable to the people.

⁴⁶ *ibid* 64.

1.3. The principles of the constitution

There are four major principles of the British constitution as affirmed by Jennings: it 'is democratic; it is parliamentary; it is monarchical; and it is a Cabinet system'⁴⁷.

The constitution is democratic since there are periodic elections through which the people choose their representatives to carry on the affairs of state. Emphasis must be placed on the word periodic. When the electorate speaks at an election, the result should be respected even if it does not result in the optimal parliamentary situation for one party or another. Thus, a parliament should be given the opportunity to serve its time before another election is held⁴⁸. As Lord Balfour puts it, 'no constitution can stand a diet of dissolutions'⁴⁹. This is obviously subject to the parliament being able to carry on, and there being no major issue of policy that requires the electorate's determination⁵⁰.

The constitution is parliamentary since the democratically elected representatives sit in an elected chamber in parliament which is the supreme political organ of the state. Parliament ensures that government is held accountable and responsible. Due to the presence of written constitutions in Caribbean states, parliament is not fully sovereign in the British sense; rather, legislation must conform to the terms of the constitutions⁵¹. Nonetheless, parliament is still the highest political organ of the state charged with holding the government accountable⁵². That a government must resign or request a dissolution should it lose the confidence of a majority of elected representatives is a convention that

⁴⁷ Jennings, *Cabinet Government* (n16) 13.

⁴⁸ Peter Hennessy, *The Prime Minister: The Office and its Holders since 1945* (Penguin 2001).

⁴⁹ Quoted in Eugene Forsey, *Freedom and Order* (McClelland & Stewart 1974) 44.

⁵⁰ Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018).

⁵¹ A.R. Carnegie, 'Floreat: The Westminster Model?' (1996) 6(1) Caribbean LR 1.

⁵² cf. §3.2.3.

upholds the parliamentary principle. On the other hand, Caribbean constitutions contradict this principle when they enable a government to prorogue parliament for, in some instances, up to twelve months notwithstanding its lack of parliamentary confidence⁵³.

The constitution is monarchical because the titular head of state is a monarch as distinct from the head of government who manages the day-to-day governance of the state in the monarch's name⁵⁴. But this principle has more to do with the splitting of the executive role—into 'formal' and 'efficient' halves—than it has to do with the presence of the institution of monarchy itself⁵⁵. I will therefore refer to this principle as the dual-executive principle. Accordingly, this principle applies equally to most Caribbean states that adopted republican form Westminster constitutions since they maintain the dual-executive feature whereby the head of state is largely a ceremonial position. One of the most recited constitutional conventions today is that the head of state always acts on the advice of the prime minister. Yet, this represents a severe misstatement of the convention. It undermines one of the main benefits of the dual-executive principle which is the checks and balances erected over the use of the executive power by separating its possessor from its wielder. The correct formulation is that the head of state always acts on the constitutional requests of the prime minister. This acknowledges the head of state's reserve power to refuse an unconstitutional request. This forms the subject of chapter two.

The constitution is a cabinet system because responsibility for the government rests with a committee of individuals sitting in cabinet and not one person. Nonetheless, cabinet speaks with one voice. While its members may disagree amongst themselves within the

⁵³ See chapters three and four.

⁵⁴ Jennings, *Cabinet Government* (n16).

⁵⁵ Walter Bagehot, *The English Constitution* (Chapman & Hall 1867). E.g., Dominica, Barbados, and Trinidad-Tobago.

confines of their meetings, by convention they must stand united behind the agreed government policy in public⁵⁶. As mentioned, this renders the alleged convention regarding the prime minister's right to dissolve dubious. Such a right has historically been that of the cabinet as a body. Hence, Jennings argues it would be unconstitutional for 'the Queen to agree with the Prime Minister for the dissolution of the Government in order to allow the Prime Minister to override his [cabinet] colleagues'⁵⁷. The prime minister is still no doubt the most important member of the cabinet given that he has the power of appointment and dismissal. But his dominance is entirely dependent on his standing with the wider parliamentary party⁵⁸. Should his cabinet colleagues acquire equal or greater support of the parliamentary party, his dominance withers, and he would do well to realise this. Hence, when over fifty of Prime Minister Boris Johnson's ministers resigned *en masse*, the message of disapproval was too strong even for a steadfast Johnson to ignore⁵⁹.

Constitutional conventions thus help to fully realise these main principles of the constitution. There are other principles canvassed above such as the separation of powers and the rule of law that are extremely important to the constitution, but not so much to the conventions I am concerned with here. Others, like representative and responsible government are important, but they are essentially different or conjoined formulations of Jennings' four principles. For instance, representative government can be a synonym for the democratic principle. Moreover, responsible government is the logical consequence of both the parliamentary and cabinet principles.

⁵⁶ Geoffrey Marshall (ed), *Ministerial Responsibility* (OUP 1989); *Ministerial Code* (Cabinet Office, 2022), para 2.1.

⁵⁷ Jennings, *Cabinet Government* (n16) 86.

⁵⁸ Harold Laski, *Parliamentary Government in England* (George Allen & Unwin 1938).

⁵⁹ Kieran Devine, Daniel Dunford, and Ganesh Rao, 'Boris Johnson Suffers More Ministerial Resignations than Any PM in Modern History' *Sky News* (7 July 2022) <<https://news.sky.com/story/boris-johnson-suffers-more-resignations-in-one-day-than-any-prime-minister-in-history-12647012>> accessed 28 June 2024.

1.4. Bringing it home: the Caribbean problem

As mentioned, Caribbean constitutions codified some of the main Westminster constitutional conventions⁶⁰. However, a crucial deviation was made. In matters of dissolution and prorogation, heads of state always act on the advice of the prime minister i.e., prime ministers have absolute rights to exercise these important executive powers. No room was left for the reserve power to intervene. This may not seem like a problem for most countries since the two-party system is firmly established given the unique constitutionalisation of the office of Leader of the Opposition⁶¹. Yet, it is not firmly entrenched in all countries nor is it guaranteed to be in others. The consequence is that a prime minister can wield key executive powers in breach of constitutional conventions, i.e., unconstitutionally, and there will be no political or legal sanction available to deter or stop him. The court's jurisdiction has been ousted—and quite properly so. Parliament will be helpless since the prime minister is empowered to prorogue parliament for lengthy periods of time and remain in government. Or the prime minister could go nuclear and dissolve the parliament against the wishes of his own cabinet colleagues and the wider parliamentary party. I am not aimlessly theorising or drawing on far-fetched possibilities; these scenarios have already occurred in the Caribbean and will form the subject of chapter four.

Needless to say, to act in such a manner would be patently unconstitutional, i.e., against constitutional principle. Yet under the terms of Caribbean constitutions, they would be—on the letter of the law—entirely constitutional. My argument is that this constitutional

⁶⁰ cf. §3.2.2.

⁶¹ The JAM Const., s80 constitutionalised this office for the first time ever. See Robinson, Bulkan, and Saunders (n4) 106. For why this alleviates the issue, c.f. §2.3.1.

lacuna that would ordinarily be filled by the reserve power of the head of state, is glaringly missing and ought to be reincorporated into the constitutional edifice—absent a more suitable form of deterrent or sanction being found, that is.

Conclusion

The purpose of this chapter was to introduce the importance of constitutional conventions to the Westminster constitutional edifice. I have done so by discussing how they guide the behaviour of political actors under the constitution. They do this because constitutional conventions are not arbitrary constitutional practices that have developed over time. They are important political rules that help to align the legal constitution with important political principles of the period. They also act as internal regulators, drawing the boundaries of proper political practice, thereby equipping political actors with the means to enforce conventions and deter or sanction breaches. In the Caribbean, constitutional conventions were codified into constitutions as rules. Apart from the flexibility issues this raises, a bigger problem with this codification is apparent. An important mechanism for deterring and sanctioning breaches of fundamental constitutional conventions is missing—the reserve power of the head of state. It is to this reserve power my attention now turns.

II. The Reserve Power

The danger of royal absolutism is past; but the danger of Cabinet absolutism, even of Prime Ministerial absolutism, is present and growing. Against that danger the reserve power of the Crown...is in some instances the only constitutional safeguard.

Eugene Forsey¹

I fear that some people when they nominate some distinguished man to be Governor-General...imagine that he is their humble, obedient servant...It is not only an insult to the holder of the office, but it converts the Governor-Generalship into a merely automatic post...If this is what a Governor-General is for, we might just as well not have one.

Robert Menzies²

Introduction

I have established that constitutional conventions exist to regulate the behaviour of political actors and that they do this by imposing duties and conferring powers on them to carry out their constitutional functions. The reserve power is one such power that is conferred on a political actor—the head of state—to uphold the constitution when political actors seek to act unconstitutionally. I aspire, in this chapter, to convince the reader that this power is not an undemocratic, undesirable or even archaic feature of Westminster constitutionalism; rather, it is an essential political sanction—or safeguard—to be employed when fundamental constitutional principles are in danger. It is an indispensable part of the political constitution.

This chapter builds on the previous by discussing the circumstances where the reserve power is most relevant, linking that power with the breaking down of constitutional conventions and principles alluded to in chapter one. As earlier indicated, my main concern

¹ Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (2nd edn, OUP 1968) 259.

² Letter from Robert Menzies to Governor-General John Kerr, 19 November 1975, archived at the National Archives of Australia, AA1984/609, Pt.2

is with the conventions governing the exercise of prerogative powers. For the most part, I will focus on the prerogatives of dissolution and prorogation.

2.1. The reserve power of the head of state

The starting point of my discussion on the reserve power is Anne Twomey's authoritative work, *The Veiled Sceptre*. Twomey defines the reserve powers as 'the discretionary powers of the head of state that may be used to uphold and maintain the fundamental constitutional principles of the system of government that the head of state represents'³. Twomey's definition is useful since it aligns with the discussion in chapter one that the reserve power is effectively a political sanction—sometimes termed a power-conferring convention—that is available to deter and sanction breaches of important constitutional conventions. When political actors attempt to act outside the conventional limits of their power, the head of state is conferred with a power to uphold the constitution. Thus, although by convention, the head of state normally acts on the constitutional request of a prime minister, when an unconstitutional request is made, those same conventions empower the head of state with a discretion to act in the interest of the constitution and sanction the unconstitutional behaviour. This shows that, contrary to popular belief, heads of state under Westminster constitutions—whatever the office may be termed—are, ideally, not mere ceremonial figures, but, in some cases, the only constitutional actor with power to safeguard the constitution.

Some commentators refer to the reserve powers as the 'personal prerogatives' of the head of state⁴. But this terminology may give the impression that these powers are

³ Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018) 1.

⁴ Ivor Jennings, *Cabinet Government* (3rd edn, CUP 1959) 394.

entirely within the gift of the head of state to exercise as he sees fit whatever the circumstances⁵. That is not the argument being made here. I should also specify that when I refer to the reserve power I am speaking of those powers exercised by the head of state without or contrary to ministerial advice in exceptional cases⁶. I am therefore not referring to the routine, conventional uses of the prerogative powers by the head of state.

Breaking away from the usual analysis which looked at the reserve power through the subject matter prerogative (e.g., whether dissolution, prorogation, dismissal etc, was a reserve power), Twomey's analysis systematically changed the way reserve powers are discussed. Instead of the superficial analysis of whether a certain prerogative power was viewed as a reserve power, Twomey looked at reserve powers with reference to the constitutional principles they sought to uphold. By doing this, she emphasises the reasons for the reserve power rather than accepting it as a historical fact. This makes it easier to justify certain reserve powers that may not have historically been regarded as such, e.g., prorogation⁷; or those that have not been so regarded in recent years, e.g., royal/presidential assent⁸.

Accordingly, this chapter builds on Twomey's model of explaining reserve powers by reference to core constitutional principles. This will cast the reserve power as a valuable constitutional mechanism within the context of the larger constitutional edifice. In doing so, I will emphasise not just the utility, but the importance of the reserve power, given the political and conventional spaces it occupies.

⁵ Robert Blackburn, *King & Country* (Politico 2006).

⁶ Rodney Brazier, "Monarch and the Personal Prerogatives": a Personal Response to Professor Blackburn' (2005) PL 45.

⁷ Canada, Privy Council Office, *Manual of Official Procedure of the Government of Canada* (Ottawa, 1968).

⁸ R.Q. Quentin-Baxter, 'The Governor-General's Constitutional Discretions' (1980) 10 Victoria U Wellington LR 289.

2.1.1. The prerogative power and the reserve power

The reserve power is intertwined with the prerogative power. The prerogative power is the royal power of the monarch. It is also described as executive power that ordinarily does not need legislative authorisation⁹. Dicey famously described it as ‘the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown’¹⁰. Some of the remaining prerogative powers include (i) appointing and dismissing a prime minister; (ii) summoning, proroguing and dissolving Parliament; (iii) giving or refusing royal assent to bills; and (v) exercising the prerogative of mercy. The reserve power, on the other hand, refers more to the manner in which the prerogative is exercised. It is exercised—or not—without or contrary to ministerial advice. The prerogative power—ordinarily exercised on ministerial advice—is open to being abused; the head of state’s reserve power is the ultimate mechanism to stop that abuse particularly where no other effective sanction is available.

Since Dicey described the prerogative as arbitrary and residuary, it has often been regarded as an undemocratic anachronism that has no place in the modern-day constitutional edifice¹¹. Yet, as Timothy Endicott argues, this is not entirely correct since the prerogative power has many modern and important functions and is subject to responsible uses¹². One of the constraints is the convention that the prerogative is ordinarily exercised by ministers responsible to parliament thereby ensuring its democratically

⁹ Twomey (n3) 5. This term better suits codified Caribbean constitutions.

¹⁰ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 424.

¹¹ See Anne Twomey, ‘Miller and the Prerogative’ in Mark Elliott, Jack Williams, and Alison Young (eds), *The UK Constitution After Miller* (Hart Publishing 2018) 86 for illustrations of these criticisms.

¹² Timothy Endicott, *The Stubborn Stain Theory of Executive Power* (Policy Exchange 2017).

legitimate use. Another constraint is the reserve power which ensures that those democratically legitimate ministers exercise the prerogative in accordance with constitutional conventions and principles.

But since the reserve power is a discretionary use—or non-use—of the prerogative by the head of state, who is typically unelected and ideally ceremonial (and in some cases, hereditary), it is often subject to similar or harsher criticisms¹³. Despite this, the reserve power has modern, democratic significance.

2.2. The reserve power as a constitutional safeguard

The modern importance of the reserve power is that it serves to empower the head of state to act as a constitutional safeguard when needed. In so doing, the head of state is able to deter and sanction breaches of constitutional conventions which undermine important constitutional principles. In that regard, the reserve power is but one of the many political sanctions that the constitutional edifice provides to uphold the political constitution. It is typically employed when other sanctions prove futile. In other words, the reserve power is a power of last resort to uphold fundamental constitutional principles when ordinary political safeguards are ineffective.

2.2.1. The reserve power as a power of last resort

Though none has been as systematic as Twomey, many other theorists regard the reserve power as an essential safeguard of the political constitution typically by referring to it as a power of last resort¹⁴. Lord Blake, a former advisor to Elizabeth II¹⁵, expressed his belief

¹³ Robert Blackburn, 'Monarchy and the Personal Prerogatives' (2004) Aut PL 546.

¹⁴ Philip Joseph, *Constitutional and Administrative Law in New Zealand* (5th edn, Thomson Reuters 2021).

¹⁵ Twomey (n3) 72.

that they are ‘political powers of the last resort—very much ones of ultimate reserve and not to be used save in extreme circumstances’¹⁶. Many respected constitutional authorities echo this view but provide different formulations. Vernon Bogdanor explains that where the constitution is under threat, the head of state ‘has the right to exercise his or her discretion, to act as a constitutional guardian, to ensure that the values which lie at the foundation of a constitutional system are preserved’¹⁷. Twomey notes that the reserve powers are ‘necessary for the operation of government’ since they ‘provide the last line of defence against governmental actions in breach of fundamental constitutional principles’¹⁸. Likewise, Andrew Heard states that the reserve powers equip the head of state to ‘defend the basic operation of the political process, or the existence of some fundamental principle of the constitution’¹⁹. Stanley de Smith and Rodney Brazier also assert that in times of national crisis, the non-partisan head of state must fulfil his role as a bridge-builder and restore the machinery of democratic government by resorting to the residuary discretionary powers²⁰.

Stressing that the reserve powers are exceptional powers is certainly necessary. Indeed, most authorities do this and provide examples of precedents and circumstances where the reserve power was or could be appropriately used²¹. And while this is, without a doubt, extremely important, these accounts insufficiently justify exactly why the reserve

¹⁶ Lord Blake, ‘The Monarchy’ (Gresham Special Lecture, London, 3 July 1984) 18 <<https://www.gresham.ac.uk/watch-now/monarchy>> accessed 25 June 2024.

¹⁷ Vernon Bogdanor, *The Monarch and the Constitution* (Clarendon Press 1995) 65.

¹⁸ Twomey (n3) 1.

¹⁹ Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (OUP 1991) 19.

²⁰ Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th edn, Penguin 1998) 121.

²¹ Rodney Brazier, *Constitutional Practice* (2nd edn, Clarendon Press 1994).

power is needed in a modern democratic constitution, and when is it to be employed. Consequently, sceptics of the reserve power, like Robert Blackburn, criticise its proponents for relying on dated authorities and being too fanciful²².

Twomey's approach is invaluable because it provides a unifying theme for the so-called exceptional circumstances which would necessitate this power of last resort. This is where the political principles of the constitution are being subverted. Therefore, Twomey's account justifies the existence and the need for the reserve power even in a modern democratic constitution. Nonetheless, Twomey's account does not sufficiently explain why heads of state are tasked with a political power like the reserve power. Furthermore, Twomey is also unclear about why ordinary political sanctions may be ineffective in certain situations thereby requiring the intervention of the head of state. Accordingly, I am adopting Twomey's model, and, at the same time, I endeavour to build on it by discussing these further queries.

2.2.2. The head of state as a political actor under the constitution

One of the greatest misconceptions about the role of head of state under a Westminster constitution is that it is entirely a ceremonial position²³. It is true that the position is ordinarily formal today²⁴. The head of state does not engage in the day-to-day governance, or the efficient functioning of the executive. Yet, the office retains important political functions under the constitution which would be unwise to overlook²⁵.

²² Blackburn, *King & Country* (n5).

²³ Robert Blackburn, 'The Formal Powers of the Royal Head of State: Terminology, Concepts, and Practice', *U.K. Const. L. Blog* (23 November 2023) <<https://ukconstitutionallaw.org/2023/11/23/robert-blackburn-the-formal-powers-of-the-royal-head-of-state-terminology-concepts-and-practice/>> accessed 22 March 2024.

²⁴ Walter Bagehot, *The English Constitution* (Clapman & Hall 1867).

²⁵ Bogdanor (n17).

The head of state is no mere automaton or rubber-stamp for his ministers²⁶. While the head of state must remain politically neutral, he remains a political actor with important political functions. As Peter Hennessy writes:

[t]he monarchy is not *party* political; but it does, if its famous reserve powers have any enduring vitality, have real political functions which, even if only occasionally exercised, are absolutely central to the British political process if their exercise becomes even a possibility²⁷.

Malcolm Jack, former Clerk of the House of Commons, similarly opines that ‘the Monarch is not drawn into party politics, but the Monarch is certainly drawn into politics’²⁸ What Hennessy and Jack are suggesting is that it is indeed correct to say that the head of state should be removed from the thrust of party politics. The head of state should therefore express no preference for one party or its representatives over the other. He must accept the advice of his responsible ministers without fear or favour irrespective of their political colour. Nonetheless, in accordance with the principle of responsible government, the great determinator should be the ministers’ responsibility. Thus, although acceptance of the advice is not contingent on party affiliation, it is, as Robert Hazell writes, ‘dependent on that Prime Minister commanding confidence’ since the advice of a prime minister who lacks confidence ‘is no longer binding on the monarch’²⁹.

But in order to enforce this principle, the head of state has to exercise a political function. Political neutrality, then, is an unsatisfactory reason for not acting when circumstances require real political discretion to be exercised by the head of state in the interest of the constitution. As earlier explained, conventions impose duties, but they also

²⁶ Eugene Forsey, *Freedom and Order* (McClelland & Stewart 1974).

²⁷ Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (Indigo 1996) 50.

²⁸ Joint Committee on Fixed-Term Parliaments Act, *Oral Evidence: Review of the Fixed-term Parliaments Act*, 17 December 2020, HC 1046, Q49.

²⁹ Joint Committee (n28), 28 January 2021, Q226.

confer rights on the head of state which should not be disavowed for the sake of neutrality, especially when to do so would be tantamount to a dereliction of constitutional duty. Although a head of state would prefer not to exercise his power, he cannot shirk his obligations in moments that demand his intervention³⁰.

Indeed, many see the constitutional role of the head of state as being the guardian of the constitution. This reinforces the notion that the head of state's reserve powers are powers of last resort. Arthur Keith long said that the monarch was the 'authority charged with the final duty of preserving the essentials of the constitution'³¹. Former Governor-General of Canada, Adrienne Clarkson, described the role as 'the guarantor of responsible government and of our parliamentary democracy'³². Former Governor-General of Australia, John Kerr, shared this view³³. Even Blackburn claimed that '[o]ur royal head of state still has an important role and duty to perform as guardian of the constitution, and it is to ensure that the Prime Minister acts and advises her in accordance with established constitutional law'³⁴. However, to act in this role of guardian of the constitution—which means guardian of the political and not the legal constitution—the head of state must retain reserve powers and act as a political actor.

The view that the head of state is a constitutional non-entity that simply acts on advice and performs mere ceremonial functions is also routinely maintained in the Caribbean³⁵. Such a view provokes me into asking an even profounder question. What

³⁰ Lord Hailsham, 'Foreword' in John Kerr, *Matters for Judgment* (Macmillan Press 1979).

³¹ A.B. Keith, *The King and the Imperial Crown* (Longmans, Green & Co 1936) 183. This view is vociferously advocated by Eugene Forsey in his cited works.

³² Adrienne Clarkson, *Heart Matters* (Viking Canada 2006) 189-190.

³³ Kerr (n30).

³⁴ Blackburn, *King & Country* (n5) 107.

³⁵ Ellis Clarke, 'The West Indies' in David Butler and D.A. Low (eds), *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (Palgrave Macmillan 1991).

would really be the point of such an office? Echoing Menzies's sentiment in the epigraph, if that is the contemporary role of a governor-general (or president), there might just as well not be one. Commonwealth heads of state do not benefit from long-established heritages which make their performance of symbolic, representational, and ceremonial functions innate like their European counterparts³⁶. Actually, Caribbean heads of state are sometimes still perceived as being lineal descendants of their elitist and oppressive colonial predecessors³⁷.

Thus, if the automatic/rubber-stamp view is correct and the head of state should have no real constitutional power save to certify the acts of his ministers, it would be more convenient—and even financially prudent—to just subsume the limited responsibilities of the head of state into the office of the prime minister and some other essential public office. The constitutional edifice would ostensibly remain unchanged, and the excess fat would be trimmed.

But this would bring a radical and undesirable change to the constitutional edifice. It throws the baby out with the bathwater. The head of state is not a constitutional cipher; he is the custodian of the state's executive power which he holds for the sovereign people³⁸.

MacKinnon explains that history devised a unique solution to stop the abuse of the executive power by separating the legal possessor and the wielder of the power into two different institutions. One of the benefits of this dual-executive is that it erects a system of checks and balances over the use of the executive power thereby ensuring that no one

³⁶ Juli Minoves-Triquell, *Monarchy, a Democratic Paradox: The Head of State in European Parliamentary Democracies* (PhD thesis, Yale University 2011).

³⁷ Clarke (n35) 185.

³⁸ Frank MacKinnon, *The Crown in Canada* (Glenbow-Alberta Institute 1976).

institution has total control over this important reservoir of state power³⁹. MacKinnon likens it to a trustee-beneficiary relationship. The legal owners of executive power (the people—through their custodian, the head of state) give their trustees (the government) the authority to wield the power. In that way, the government controls it but does not own it, and the head of state owns it but does not control it⁴⁰. But as any fiduciary knows, since he does not own the property, he must act in the best interest of the beneficiaries; and if he breaches his trust, he is liable to be sanctioned and replaced with new trustees. Similarly, a government who loses the confidence of the people's representatives, or attempts to exercise the prerogative power unconstitutionally, is liable to be sanctioned by the head of state and ultimately replaced by the electorate.

Elizabeth II alluded to this in a speech to the Quebec legislature in which she outlined that the role of a constitutional monarch is:

to personify the democratic state, to sanction legitimate authority, to ensure the legality of its measures, and to guarantee the execution of the popular will⁴¹.

Therefore, the head of state is indeed a political actor with a clearly defined, modern constitutional role. The head of state acts as a custodian of state power. The custodian's role is ordinarily simple: do nothing and allow the government possessing the confidence of the people's representatives to use the executive power as they see fit. In that way the power is exercised legitimately and according to the democratic principles of the constitution. But where confidence is withdrawn—which, in a parliamentary system can be at any time—the legitimacy of the government is called into question, and it no longer

³⁹ András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017). Another example of the splitting of executive functions is the creation of a separate constitutional office overseeing criminal prosecutions.

⁴⁰ *ibid* p17.

⁴¹ Quoted in Twomey (n3) 691.

has a basis to use the people's power. From that moment, the custodian's role becomes more difficult. He must not simply act on advice; he must ensure that the power he holds is used in the interests of the constitution he ultimately protects.

2.3. A political sanction for unconstitutionality

Now that I have highlighted how the head of state's political role fits within the modern democratic constitutional framework, I now resolve to show how it benefits it.

2.3.1. Sanctioning breaches of constitutional conventions

The reserve power ultimately serves to ensure compliance with constitutional conventions thereby upholding constitutional principles and guaranteeing constitutional behaviour. As outlined in chapter one, responsible government is a core principle embodying other principles like the parliamentary and cabinet principles. Peter Hogg believes that '*a system of responsible government cannot work without a formal head of state who is possessed of certain reserve powers*'⁴². This is because without a head of state with reserve powers, a key component of the regulatory capability of constitutional conventions would be missing.

This principle of responsible government is embodied in the convention that a government who loses the confidence of parliament should resign or request a dissolution. But what if the prime minister refuses to resign and squats in office? Should he nonetheless be able to exercise executive power? Certainly not. The prime minister has lost the only basis on which he had the authority to use the power in the first place. As Patrick Monahan

⁴² Peter Hogg, *Constitutional Law of Canada* (3rd edn, Carswell 1992) 253. Emphasis added.

indicates, in such a scenario, the head of state would be justified in dismissing the prime minister and appointing a caretaker prime minister who would request the dissolution⁴³.

Governor-General John Kerr did this in Australia in 1975 when Prime Minister Gough Whitlam was unable to obtain supply and refused to seek a dissolution. Kerr dismissed Whitlam and appointed Malcolm Fraser as prime minister who then obtained supply and advised a double dissolution of parliament. Garfield Barwick, who was Chief Justice at the time, and who advised Kerr that it was within his power to so act, later wrote that Kerr's actions were undoubtedly constitutional since ultimately they allowed the electorate to issue parliament with a fresh mandate and thus upheld the democratic principle⁴⁴.

Let us also suppose that the prime minister lost the support of his party or coalition partners and nonetheless refused to resign. In such a scenario, his former colleagues may find it unattractive to instigate formal no-confidence proceedings in parliament against their own government. Admittedly, a formal no-confidence mechanism would be clear evidence of a loss of support, but it cannot be reasonable for an illegitimate prime minister to remain in office on a technicality when there are other forms of credible evidence which may be presented. For example, the prime minister's former colleagues could send a signed letter to the head of state indicating their withdrawal of support and its placement in another member of parliament. This occurred in the Western Region of Nigeria in 1962 when the governor removed the premier after receiving a signed letter from a majority of the elected members of parliament to the effect that they no longer supported the premier⁴⁵.

⁴³ Patrick Monahan, 'The Constitutional Role of the Governor General' in Jennifer Smith and D Michael Jackson (eds), *The Evolving Canadian Crown* (McGill-Queen's UP 2012).

⁴⁴ Garfield Barwick, *Sir John Did His Duty* (Serendip Publications 1983).

⁴⁵ *Adegbenro v Akintola* [1963] AC 614.

The reserve power is equally important in cases where the government seeks to evade parliament's formal withdrawal of confidence. For instance, where a majority of parliamentarians express their lack of confidence in the government and signal their intention to formally register this non-confidence in parliament, could the government prorogue parliament and rule without parliamentary support? In my view, the head of state would be justified in refusing to prorogue parliament where the government faces an imminent vote of no-confidence. Schleiter and Fleming argue that the view that a prime minister possesses the right to prorogue parliament at will, would represent the antithesis of the democratic model since it would allow the executive to short-circuit parliamentary accountability by governing in the absence of parliamentary confidence and advancing policies with no legislative support⁴⁶. Hogg therefore contends that a head of state ought not to wait until the prime minister formally loses confidence in parliament⁴⁷. He argues that an imminent loss of confidence is sufficient to unlock the head of state's reserve power to refuse a prorogation request. Any other view would mean that 'a Prime Minister could always avoid (or at least postpone) a pending vote of no-confidence simply by advising the prorogation (or dissolution) of the pesky Parliament'⁴⁸. It is hard to disagree with Hogg's opinion. A motion of no-confidence would be rendered nugatory if it is always subject to the whim of the prime minister whose responsibility is in question. It is hardly realistic to expect a prime minister to submit willingly to his impending defeat when he has no incentive for doing so and possesses the power to spite his former colleagues.

⁴⁶ Petra Schleiter and Thomas Fleming, 'Parliamentary Prorogation in Comparative Context' (2020) 91(3) *Political Quarterly* 641.

⁴⁷ Peter Hogg, 'Prorogation and the Power of the Governor General' (2009-2010) 27 *National Journal of Constitutional Law* 193.

⁴⁸ *ibid* 198.

In Canada in 2008, Prime Minister Stephen Harper lost the support of a minor party helping to sustain his minority government. Harper decided that instead of yielding to a hostile parliament with a viable alternative government-in-waiting, he would advise Governor-General Michaëlle Jean to prorogue parliament. Jean accepted the request but not before informing Harper that she would not be a rubber-stamp for his decision but would consider the appropriate course in light of the prevailing circumstances⁴⁹. She took legal advice and weighed her decision for over two hours. She also attached conditions on the granting of the request including that the initial proposed prorogation length be reduced, and a new budget be presented upon parliament's return⁵⁰.

One may disagree with Jean's ultimate decision to accept the request⁵¹, but it does not negate the fact that this was still a creditable use of the reserve power. Jean made it clear that she was in no way bound by Harper's decision and would exercise her independent judgment before granting the prorogation. She also managed to escape the embarrassment of the collapse of a potentially unstable alternative government while at the same time reducing the prorogation length to a very short and undisruptive period⁵². This is precisely the way the reserve power should be exercised where it becomes necessary. Its value is not measured simply by the overt refusal of advice, but instead, by its ability to resolve political crises in a manner least damaging to the constitution.

Similarly, if the government's parliamentary support becomes doubtful while parliament is prorogued, should the government be able to resist summoning it by not

⁴⁹ Michael Valpy, 'GG Made Harper Work for Prorogue', *Globe and Mail* (5 December 2008) <<https://www.theglobeandmail.com/news/politics/gg-made-harper-work-for-prorogue/article1067273/>> accessed 28 April 2024.

⁵⁰ Twomey (n3) 591.

⁵¹ Andrew Heard, 'The Governor General's Suspension of Parliament' in Peter Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis* (UoT Press 2009).

⁵² C.E.S. Franks, 'To Prorogue or Not to Prorogue' in Russell and Sossin (n51); Hogg (n47).

advising the head of state accordingly? This question should also be answered in the negative. While the principle of responsible government requires the head of state to act only on advice, this principle applies where there is a government in possession of parliament's confidence. By refusing to summon parliament, the government would be circumventing parliament's constitutional role of holding the government to account by blocking its ability to express confidence or lack thereof. Given that parliament is typically only legally required to meet once or twice a year, the absence of a legal provision requiring the summoning of parliament when confidence is in doubt may be abused by a government who seeks to continue in office for excessive lengths of time without parliamentary support⁵³. In such circumstances, the head of state would be supporting responsible government by summoning parliament on his own motion⁵⁴. But even if the head of state does not wish to act in this way, he could instead choose to refuse acting on any advice tendered by the government until the issue of confidence is resolved. As the court in Solomon Islands rightfully asserts:

a Prime Minister who hangs on to office while conceding that he has no majority is in no position to insist that the Governor-General's functions can only be exercised on his advice⁵⁵.

Thus, a head of state seized with this situation has three options. The most drastic is to dismiss the government and appoint a caretaker prime minister who would summon parliament and allow it to express its support for a new government. As Twomey points out, such a drastic measure may likely prejudice the new government and should be avoided⁵⁶. The second option is for the head of state to summon parliament on his own

⁵³ E.g., Australia, St. Lucia: 12 months; Jamaica, Trinidad-Tobago: 6 months.

⁵⁴ Michael Crommelin, 'Powers of the Head of State' (2015) 38 Melbourne University LR 1118.

⁵⁵ *Hilly v Governor-General of Solomon Islands* [1994] 2 LRC 27, 33.

⁵⁶ Twomey (n3) 582.

motion. This would prove less controversial since it passes the baton to parliament to fulfil its constitutional role of placing its confidence—or not—in the government⁵⁷. The last option is to refuse to act on the prime minister's advice until he can confirm his parliamentary support.

Recall the convention that the government should resign or request a dissolution if it loses the confidence of parliament. Should all requests to dissolve by an ousted prime minister be granted? Not only has this proposition been repeatedly rejected by various heads of state across the Commonwealth, but, if one bears in mind the reason for this convention, such a proposition would appear unsound on many bases⁵⁸.

By convention, a prime minister is not obligated to resign after an election; he has the right to face the new parliament and be defeated on the Throne Speech⁵⁹. It would be subversive to the principle of representative government if a prime minister who lost an election nonetheless had the right to demand another dissolution instead of giving way to the newly elected parliament. This notion that a prime minister has such a right could substitute the will of the electorate for the wishes of the prime minister. If a parliament is recently elected and is capable of being sustained, it should be allowed to function for as long as it could effectively do so. Evatt states that 'a series of repeated dissolutions' could be used to delay and defeat the true popular will and thus 'represent a triumph over, and not a triumph of, the electorate'⁶⁰. Forsey similarly puts it that an appeal to the electorate 'is not necessarily democratic. It may be demagogic, pseudo-democratic, even anti-

⁵⁷ This was done in the Solomon Islands: *Hilly* (n55) and *Ulufa'alu (Prime Minister) v Governor-General* [2001] 1 LRC 425.

⁵⁸ See Forsey, *Royal Power* (n1); Twomey (n3); H.V. Evatt, *The King and His Dominion Governors* (Frank Cass 1936).

⁵⁹ Forsey, *Royal Power* (n1).

⁶⁰ Evatt (n58) 109.

democratic’⁶¹. A reserve power to refuse a dissolution in these circumstances would thus be warranted.

Furthermore, a prime minister’s dissolution request should not be automatically granted where there exists an alternative government available that could command parliamentary support. If the executive can control the life of parliament, this would relegate parliament to a subsidiary role under the constitution. This would be irregular considering that the Westminster system is a parliamentary system. George VI’s Private Secretary, Alan Lascelles famously pronounced that the monarch could refuse a dissolution request, but only if:

(1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons⁶².

It is generally agreed that the second element of these ‘Lascelles Principles’ is too value-laden and politically charged for a head of state to determine and has accordingly been removed in modern iterations of these principles⁶³. However, the other two principles are extremely important and have to do with the existence of an alternative, stable government being available. This is consistent with the principle of responsible government since it is parliament’s confidence which appoints and sustains a government, and consequently, it should be parliament’s confidence which removes and replaces it.

Accordingly, the head of state may refuse a dissolution request, but the essential requirement is that a stable alternative government is available. This requirement

⁶¹ Forsey, *Freedom and Order* (n26) 44.

⁶² Senex, ‘Dissolution of Parliament. Factors in Crown’s Choice’ *The Times*, May 2, 1950.

⁶³ Bogdanor (n17); Peter Hennessy, *The Prime Minister: The Office and its Holders since 1945* (Penguin 2001).

nonetheless proves unattainable in most circumstances given the relative stability of the two-party system in Westminster systems. Basil Markesinis argues that in countries where the two-party system prevails, dissolution will obviously be the correct course of action in most cases⁶⁴. This is sensible since the defeat of a government under a two-party system does not necessarily mean the defectors would be willing to support the alternative party in government. But even if the defectors were willing to form a partnership with their former political adversaries, such a coalition would seem patently unstable.

Bogdanor believes that important factors for the head of state to consider are whether the alternative government would (i) have solid support from the populace; and (ii) consist of individuals or parties who would be breaching pledges made to the electorate which formed the basis of their elections⁶⁵. In my view, however, the latter consideration is fundamentally party political and thus undesirable for the head of state to consider. It does not seem appropriate for the head of state to decide issues about electoral pledges since it is in the political interests of parliamentarians themselves to ponder such questions before entering into any agreements. Those questions are not merely political, they are entirely party political. In contrast, measuring public support may be appropriate in assessing the alternative government's stability but would be a minor consideration in that regard. Nonetheless, it is a legitimate concern particularly under a two-party system where political defections may create what may be viewed as unnatural and unstable political alliances. This difficulty is increased in states with small parliaments where parliamentary majorities may be lost after the defection of one or two members⁶⁶.

⁶⁴ Basil Markesinis, *The Theory and Practice of Dissolution of Parliament* (CUP 1972).

⁶⁵ Bogdanor (n17).

⁶⁶ Matthew Bishop, 'Slaying the "Westminster" in the Caribbean?' (2011) 13 BJPIR 420; Dag Anckar, 'Westminster Lilliputs?' (2007) 60(4) Parliamentary Affairs 637.

Still, this reserve power is not completely irrelevant under a two-party system, particularly where the prime minister was or is about to be replaced as leader of his party—which still commands majority support in parliament—and seeks to use dissolution to assert his authority over them. Dissolution has been regarded by some as a sword to be wielded by the prime minister as an instrument of discipline over his party colleagues⁶⁷. This is an unfortunate byproduct of the mistaken interpretation of the constitutional convention regarding who has authority to request a dissolution discussed in chapter one⁶⁸. Nonetheless, many countries, including the Caribbean states under review, have codified the mistaken interpretation that dissolution is on the advice of the prime minister.

Accepting this to be the case, should the head of state grant a dissolution request to a prime minister who was removed, or is in the process of being removed, from the leadership of his party? This would clearly be subversive to both the parliamentary and cabinet principles. A prime minister determined to stay in office would never willingly resign or submit to any form of accountability—least of all from his own colleagues—when he could instead go nuclear and subject them to the loss of their seats. Any astute politician would understand how detrimental this would be to his political career if he was subjected to an election under those circumstances⁶⁹.

That a prime minister could seek and gain a dissolution against the wishes of his colleagues in cabinet and the wider parliamentary party is therefore not only a misguided suggestion, but a dangerous one. Most commentators reject it and recognise the reserve power in these circumstances. Former British Prime Minister Harold Wilson noted that a

⁶⁷ Markesinis (n64).

⁶⁸ cf. §1.1.1 and §1.3.

⁶⁹ Harold Wilson, *The Governance of Britain* (Weidenfeld & Nicolson 1976).

prime minister would be ‘certifiable’ to attempt this⁷⁰. De Smith and Brazier argue that a refusal of a dissolution request is appropriate where it was made by a prime minister to ‘forestall the prospect of his imminent supersession’⁷¹. Blackburn asserts that a prime minister who is removed as the leader of the governing party has no legal authority to advise the head of state, and thus, when a leadership contest is ongoing, the head of state is not only able, but duty bound, to reject a dissolution request⁷².

A government, and by extension the prime minister, owes his position to the support of his parliamentary party. Hence, as Colin Howard writes, the prime minister

is not entitled to reverse the argument and claim that because he is Prime Minister it is his advice that the Governor-General must listen to. The criterion of his qualification to be Prime Minister is fundamental. His personal occupancy of that office is only a temporary consequence of the application of the criterion and cannot outlive its relevance⁷³.

There is a view that British Prime Minister Rishi Sunak called an early general election without the knowledge and approval of his cabinet colleagues, and that he may have done so to prevent being ousted by his party⁷⁴. Realistically, there was little room for Charles III to refuse a request in this situation since there was no official indication that Sunak lacked confidence as roughly only two ministers openly opposed the move⁷⁵. So, the likelihood of an alternative government was slim. Moreover, the parliamentary term was expiring in a matter of months; thus Sunak’s decision to seek a dissolution could hardly be seen as cutting the parliamentary term unduly short.

⁷⁰ *ibid* 40.

⁷¹ De Smith and Brazier (n20) 125.

⁷² Blackburn, *King & Country* (n5).

⁷³ Colin Howard, *Australian Federal Constitutional Law* (3rd edn, Law Book Company 1985) 129.

⁷⁴ David Maddox, ‘Minister Warned Sunak it Was Not Common Sense to Have a Snap Election’ *Independent* (27 May 2024) <<https://www.independent.co.uk/news/uk/politics/rishi-sunak-common-sense-minister-general-election-b2552003.html>> accessed 3 July 2024.

⁷⁵ *ibid*

It could certainly be maintained that the prime minister is not merely a delegate of the parliamentary party and that he, in all likelihood, was the face of an electoral campaign in which the party presented him to the country as its prime minister-in-waiting. Correct as this may be, it is equally maintainable that parliament is not a mere extension of the executive and the prime minister, but is in fact the most important branch of the state under the Westminster constitution. The concern about the prime minister's popularity may be relevant to the question of whether the reserve power ought to be exercised in a particular situation (particularly when gauging the stability of an alternative government), but it is not relevant in determining whether this reserve power exists or ought to exist in the Westminster system.

Consequently, the head of state could be seen as acting in a partisan political manner by accepting the prime minister's advice over the advice of his colleagues in the parliamentary party he once led⁷⁶. In 1939 in South Africa, Prime Minister Hertzog's dissolution request was refused by Governor-General Patrick Duncan when Hertzog lost the support of his political party. After the party selected its new leader, Hertzog was replaced as prime minister with the new leader of the party. Similar positions were held in Britain in 1969 when it was feared that Prime Minister Wilson would seek a dissolution against a potential party revolt⁷⁷; and in 1990 when it was feared that Prime Minister Margaret Thatcher would do the same⁷⁸.

In a multi-party system, the role of the head of state becomes less formal since the operation of many of the constitutional conventions are likely to form the subject of

⁷⁶ Jennings (n4) 86.

⁷⁷ Editorial, 'The Right to Dissolve', *The Times*, April 15, 1969; Anthony King, 'The Queen and the Politics of Dissolution', *The Times*, May 10, 1969.

⁷⁸ Robert Rhodes James, 'The British Monarchy' (1994) 142 RSA Journal 21, 25.

controversy⁷⁹. A prime minister and his government are more likely to attempt to breach constitutional conventions where usual fora for political sanctions such as the parliament or the political party are undergoing periods of volatility. Thus, in cases where there are minority governments or coalitions, stable alternative governments are more frequently available as there may be various parliamentary groupings ready, willing, and able to form a government to allow the parliamentary term to continue.

Pimlott wrote of Britain's 1974 elections that 'one consequence of the crisis was a new awareness that, in the multi-party conditions thrown up by a volatile electorate, the Monarchy could not be ignored'⁸⁰. Pimlott's comments relate to the hung-parliament situation in 1974. Pimlott reveals that after the February 1974 election, the Queen—through her Private Secretary—played no mere formal role. The Queen even issued a reassurance to a hesitant Prime Minister Wilson that a dissolution request would be granted if he requested it in the circumstances⁸¹.

It is often touted that the instances where the reserve power to refuse a dissolution was used or contemplated are old and outdated. Actually, they typically reflect periods where the multi-party system existed and thrived. This reserve power was hotly debated in Britain in the late nineteenth and early twentieth centuries when the multi-party system began to thrive, and in the mid to late twentieth century at instances when third parties managed to capture enough seats to disrupt the prevailing two-party system such as 1950, 1964, and 1974. Additionally, Commonwealth territories have supplied most of the precedents of this reserve power since their parliamentary situations have frequently

⁷⁹ Vernon Bogdanor, *Multi-Party Politics and the Constitution* (CUP 1983).

⁸⁰ Ben Pimlott, *The Queen: Elizabeth II and the Monarchy* (Diamond Jubilee edn, HarperPress 2012) 423.

⁸¹ *ibid*

consisted of multiple parties⁸². In these circumstances, Bogdanor contends that the precedents most useful to guide the head of state's conduct would be precedents from a multi-party era⁸³.

One famous precedent occurred in Canada in 1926. Governor-General Lord Byng refused to grant Prime Minister Mackenzie King a dissolution in circumstances where a multi-party system existed, and the government was supported by a confidence and supply arrangement. This support was withdrawn when the government was plagued with scandal and an impending vote of no-confidence. Byng appointed Arthur Meighen to lead the alternative government. His government fell three days later due to the withdrawal of support from a minor party. Byng's decision is usually criticised since the alternative government's almost immediate collapse suggests it was not stable⁸⁴.

Yet, the collapse of Meighen's government was due to an entirely unforeseen and unusual circumstance surrounding Meighen's use of a technicality to evade a legal procedure⁸⁵. It would be unfair to argue that Byng improperly concluded that Meighen was able to form a stable, alternative government. Before Byng appointed Meighen as prime minister, he had his assurance that he could form a stable government. Furthermore, Byng received a memorandum from the minor party indicating their commitment to supporting Meighen. Meighen did in fact manage to form an alternative government which was able, for three days, to win votes in parliament with an average higher than that enjoyed by the previous government⁸⁶.

⁸² Forsey, *Royal Power* (n1).

⁸³ Bogdanor, *Monarchy and the Constitution* (n17).

⁸⁴ Evatt (n60).

⁸⁵ Forsey, *Royal Power* (n1).

⁸⁶ *ibid*

Nonetheless, many of Byng's critics overlook a very important reason for the refusal of King's dissolution request. There was at the time a pending vote of no-confidence on the floor of parliament. A pending no-confidence vote, particularly when it is apparent that it is likely to succeed, squarely places the confidence of the government in doubt. Parliament has a right to hold the government to account; to request a dissolution while a no-confidence vote is on the floor flies in the face of the parliamentary principle. As Charles Cahan stated, 'no ministry has the right to attempt to dissolve the court before which it is being tried until a verdict has been rendered upon the issues in question⁸⁷'. The view that a prime minister could avoid defeat in parliament by dissolving it would—similar to a prorogation in these circumstances—be detrimental to the concept of responsible government. This would make it extremely difficult for parliament to ever hold a government to account since its life could be unceremoniously cut short if it tried. Whenever a prime minister becomes aware of a possibility of defeat, he would simply dissolve the parliament and claim a record of unbroken parliamentary success⁸⁸.

2.3.2. The need for the ultimate sanction: a matter of forum

Many of the abovementioned circumstances and precedents describe situations where the reserve power is or would be called on after all ordinary attempts to uphold constitutional behaviour in the other political fora proved futile. For instance, before resorting to a prime minister being dismissed, a no-confidence motion might be lodged in the hopes that the prime minister recognises the need to resign. Or his political party may remove him from the leadership indicating that it is time for him to step down. Or a general election may be

⁸⁷ Ottawa Correspondent, 'Canada: Short Parliament Modest Programme', *The Scotsman*, May 10, 1927.

⁸⁸ Forsey, *Royal Power* (n1).

appropriate in cases where the parliament was already allowed to complete most of its term. It is still the case that many of these political fora prove useful in most scenarios and there is little need for the reserve power.

This has been successful for the most part and it is generally agreed amongst political actors that they would conduct themselves in a manner that there is no need for the head of state to be brought into political controversy. Hennessy calls this the ‘good chap theory’. This is the understanding that ‘the government shall be carried on in a certain spirit and an orderly way’⁸⁹. In the Dissolution Principles attached to the UK Dissolution and Calling of Parliaments Act 2022, it was agreed that it is the responsibility of those involved in the political process to ensure that the Sovereign was not drawn into the political arena in light of the revival of the reserve power⁹⁰.

It is important to understand the importance of the good chap theory. Many of the political principles developed are outside the space of legal sanction. In some cases, the head of state may alone be able to effectively sanction the breach of key constitutional conventions and principles. Thus, to prevent the ultimate political sanction—the reserve power—from being employed, political actors agree to act on their best behaviour.

The good chap theory was manifest when Prime Minister Clement Attlee, having received a very slim parliamentary majority and fearing defeat on the Throne Speech in 1950, stated to his cabinet that he would not consider asking for another dissolution if he lost the vote. Rather, he suggested the proper course was to advise the King to send for Winston Churchill to attempt to form a government instead⁹¹. The theory was also evident

⁸⁹ Hennessy, *Hidden Wiring* (n27) 61.

⁹⁰ HM Government, ‘Dissolution Principles’: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940028/Dissolution-Principles.pdf> accessed 22 June 2024.

⁹¹ Quoted in Hennessy, *Hidden Wiring* (n27) 54.

when Prime Ministers Margaret Thatcher and Boris Johnson peacefully stepped aside in the face of cabinet revolts rather than request a dissolution in defiance. It was highlighted when Prime Minister Churchill publicly rebuked a member of parliament for suggesting he could demand a dissolution from the Queen and expressed that ‘it would be most improper on my part to use any language which suggested that’⁹².

In short, the political constitution is refereed by the political actors themselves and not by outside adjudicators like the court. On most occasions, political actors willingly abide by the rules of the game. On other occasions, political sanctions imposed by the political party and parliament may be effective in forcing the resignation or correcting the behaviour of a rebellious prime minister and government. In some scenarios, simply allowing the electorate to have their say on the matter may be best. But if a prime minister is unyielding in the face of a cabinet revolt or a loss of parliamentary confidence, how could these political actors effect his removal without the threat or exercise of the reserve power? What would stop a prime minister in these scenarios from simply dismissing his insubordinate ministers or immediately dissolving or proroguing the pesky parliament?

The parliament can register its lack of confidence, or a political party can change its leadership, but they cannot remove a prime minister and his government from office. In the same vein, parliament cannot prevent or correct an immediate unconstitutional prorogation or dissolution. But the constitution could never truly claim to be based on the principle of responsible government if there was no way of defending against prime ministerial and executive excesses. This is why the ultimate sanction of the reserve power exists.

Nevertheless, acknowledging the occasional ineffectiveness of other political fora in sanctioning breaches of constitutional conventions and principles is not to advocate for

⁹² HC Deb 29 March 1944 vol 398 cc1480-524, 1516,

the imposition of a legal sanction in their place. It is simply to highlight why the reserve power is needed in the constitutional edifice. Therefore, in my view, the decision of the UK Supreme Court in *Miller 2*⁹³ represents an incursion into the political arena by a legal/non-political actor. To that extent, I think the decision is wrong, and may have undesirable effects on the constitution system near and far⁹⁴.

In chapter one, I mentioned that the sanction for breaches of constitutional conventions was political not legal⁹⁵. This chapter illustrates the political sanctioning of breaching conventions. The court in *Miller 2* by judicial sleight-of-hand imposed a legal sanction on an alleged breach of a political principle—which it declared was in fact a legal principle⁹⁶. They did this without even acknowledging that there was a more appropriate sanction available to remedy the breach—the reserve power.

In 2019, Prime Minister Boris Johnson advised Elizabeth II to prorogue parliament for five weeks. Many believed that Johnson’s intention was to avoid parliamentary scrutiny during the Brexit crisis. Nevertheless, evidence was produced on Johnson’s behalf which claimed to justify the prorogation date and length. The Queen accepted the prorogation request and proceedings were brought challenging the legality of the advice given to the Queen by the prime minister. The Supreme Court ruled that Johnson’s advice was unlawful since the prerogative was exercised beyond its limits which were subject to legal principles

⁹³ *R (Miller) v Prime Minister* [2019] UKSC 41.

⁹⁴ The decision was followed in Lesotho in *All Basotho Convention v Prime Minister* Case 06/2020. See Hoolo Nyane, ‘The Changing Nature of the Power of Prorogation in Lesotho’ (2022) 25(1) Law, Democracy and Development 193.

⁹⁵ cf. §1.1.2.

⁹⁶ Paul Yowell, ‘Is Miller (No 2) the UK’s Bush v Gore?’ (UK Const L Blog, 7 October 2019) <<https://ukconstitutionallaw.org/2019/10/07/paul-yowell-is-miller-no-2-the-uks-bush-v-gore/>> accessed 1 May 2024.

of parliamentary sovereignty and parliamentary accountability. This has been persuasively challenged as a misguided extension of both principles⁹⁷.

Furthermore, the court failed to appreciate that this matter concerned the application of a constitutional convention—that the Queen acts on the constitutional request of the prime minister—and was on that account non-justiciable. The Supreme Court had, as recently as 2017, correctly declared that:

[j]udges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question...but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world⁹⁸.

Yet, in *Miller 2*, the court did exactly this. It gave a legal ruling on the scope of a convention—which was entirely erroneous—and failed to consider how it may have been sanctioned in the political world.

The court began its reasoning on the mistaken footing that ‘[i]t is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept that advice. In the circumstances, we express no view on that matter’⁹⁹. This statement echoed the mistaken assertion in the appellant’s written submissions that there was no such suggestion¹⁰⁰. But the fact is, there was indeed such a dispute, and this was expressly raised in the prime minister’s written case:

Contrary to the suggestion at §8 of the Appellant’s written case, it is not (and never has been) asserted that Her Majesty enjoys no personal

⁹⁷ John Finnis, ‘The Unconstitutionality of the Supreme Court’s Prorogation Judgment’ (Policy Exchange 2019); Timothy Endicott, ‘Making Constitutional Principles into Laws’ (2020) 136(Apr) LQR 175; Richard Ekins, ‘Parliamentary Sovereignty and the Politics of Prorogation’ (Policy Exchange 2019); Noel Cox, *The Royal Prerogative and Constitutional Law* (Routledge 2021).

⁹⁸ *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, [146].

⁹⁹ *Miller 2* (n93) [30].

¹⁰⁰ Lord Pannick and Tom Hickman, ‘Written Case for the Appellant, Mrs Gina Miller’ <<https://www.supremecourt.uk/docs/written-case-for-mrs-gina-miller.pdf>> accessed on 5 May 2024, [8].

prerogative in this context or that she is obliged to accept the advice of the Prime Minister. However, this is not an issue which arises for determination on the present appeal. Nor is it a matter for the court. Whether Her Majesty enjoys a personal prerogative in any particular case is a question of constitutional convention, not law¹⁰¹.

Counsel for Johnson even referenced Twomey for the proposition that there may exist scope for reserved decision-making by Her Majesty regarding prorogation¹⁰². Consequently, contrary to the court's assessment that there was no suggestion that the Queen had a reserve power to refuse the request, it was indeed suggested but with the caveat that it was outside the court's jurisdiction. Nevertheless, even if the court was of the view that it was not suggested, such an issue was critical for it to raise on its own motion since the rest of its judgment hinged on whether there were sufficient checks in place to oversee the prime minister's use of the prerogative. For the court to continue its judgment based on the incorrect assumption that the Queen was obliged to accept Johnson's advice to prorogue parliament was therefore fatal to the rest of its reasoning. For if the court had considered that there existed a reserve power for such circumstances, it could not then hold that there were insufficient checks on the prime minister's use of the prerogative.

The court stated that it had to determine 'where a legal limit lies in relation to the power to prorogue Parliament, and whether the Prime Minister's advice trespassed beyond that limit...'¹⁰³ Two things are objectionable with this statement. Firstly, it has long been accepted that matters like dissolution were non-justiciable notwithstanding the growing trend towards justiciability of the prerogative. There are simply no legal standards to apply

¹⁰¹ James Eadie QC and Lord Keen of Elie QC, 'Written case for the Prime Minister and Advocate General for Scotland' <<https://www.supremecourt.uk/cases/uksc-2019-0192.html>> accessed 5 May 2024, [35].

¹⁰² *ibid* [83].

¹⁰³ *Miller 2* (n93) [37].

to such political matters. Prorogation ought to be treated similarly since it is so closely related. Lord Bingham recently opined that

matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, *even if to a diminished extent, of the Crown (whether to grant a dissolution)*¹⁰⁴.

This statement shows that the court should accord due deference to the political actors when dealing with issues concerning the political constitution. But Lord Bingham's statement also draws out my second objection. Lord Bingham properly separates the act of seeking a dissolution from that of its granting. Yet the court in *Miller 2* assimilates the advice of the prime minister with the exercise of the prerogative by the Queen¹⁰⁵. These are two entirely different acts. The court suggests that it is empowered to impugn the exercise of the prerogative based on the unlawfulness of the advice. But this cannot be since the Queen may have accepted the request based on additional or different reasons to those given by the prime minister to her or to those supplied to the court.

Finally, the court made its ruling on the basis that there were insufficient limits on the prime minister's power to request prorogation (notwithstanding its recitation of the various statutory limitations)¹⁰⁶. This implies that the court believes that there ought to be a legal limit or sanction for every part of the constitution, including the political rules and principles. The court failed to consider that there were more appropriate fora to sanction Johnson's questionable prorogation request. For instance, as the Divisional Court rightly noted 'Parliament could, if there were time to do so, enact legislation which would have the effect of removing the prorogation before it began. It has not done that in the days

¹⁰⁴ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [12]. Emphasis mine.

¹⁰⁵ Cox (n97) 160-161.

¹⁰⁶ *Miller 2* (n93) [44].

which were available’¹⁰⁷. Parliament chose not to reverse the prorogation in the same way it chose not to bring a motion of no-confidence against Johnson’s government¹⁰⁸. But the point remains, parliament was well within its right to do so since the prorogation was not immediate. Parliament’s decision not to impose a political sanction for the government’s behaviour is no justification for imposing a legal sanction instead.

Furthermore, the court failed to appreciate the very real possibility that the Queen may have privately disagreed with Johnson’s request for a prorogation—which was within her right as Sovereign—and may therefore have attached conditions on the granting of the request (as Governor-General Jean did in Canada in 2008). This was not revealed by Johnson to the court or the public since a prime minister’s conversations with the head of state are, by convention, strictly confidential¹⁰⁹.

To compound the issue, the court failed to consider that, if indeed it was felt that parliament was being constrained in carrying out its constitutional role, the Queen—as the guarantor of the political constitution—could have imposed the ultimate political sanction on Johnson and refused his prorogation request altogether¹¹⁰. That this did not occur is no justification for the court’s intervention in the matter and its consequent supplanting of the political actors in the performance of their duties.

Miller 2 should be treated as a one-off decision given the peculiar context in which it was decided. Thus, it must not be seen to reverse centuries worth of constitutional understandings and decisions from various countries, effectively nullifying the constitutional role of the head of state. On the strength of *Miller 2*, a head of state would

¹⁰⁷ *Cherry v Advocate General* [2019] CSIH 49, [52].

¹⁰⁸ Endicott (n97).

¹⁰⁹ *Evans v Information Commissioner* [2012] UKUT 313 (AAC), [82]

¹¹⁰ Cox (n97) 161; Endicott (n97) 180.

likely abdicate his constitutional responsibility and leave the matter to the court to address sometime down the line. The head of state's reserve power, along with other political constraints, play an important role in upholding the political constitution and ought not to be substituted or supplanted by legal sanctions.

2.4. Reserve power in a wider context

The parliamentary principle would be severely undermined if the executive could easily determine parliament's life or restrict its ability to hold the government to account. As explained, the reserve power acts as a safeguard to prevent this from occurring. But this is not to suggest that this power must be vested in the head of state since other countries adhering to the parliamentary principle have placed this power in other constitutional actors like the Speaker of the Parliament¹¹¹. It is outside the scope of this thesis to assess whether the head of state is the best political actor to possess this function. Nevertheless, giving the power to political actors like the Speaker would attract similar or even more potent criticisms given their likely partisan affiliations¹¹². Suffice it to say, there ought to be some political actor(s) empowered to defend the parliamentary principle against its derogation by a government.

This is not a uniquely Westminster issue nor is it only relevant in constitutional monarchies. In various Westminster-style republican constitutions or continental European parliamentary systems, the head of state exercises some constitutional power to prevent the executive from stifling parliament in carrying out its constitutional function.

¹¹¹ e.g., Constitution of Sweden 1974 (revised to 2012), ch.6.

¹¹² Ferdinand Mount, *The British Constitution Now: Recovery or Decline?* (Heinemann 1992).

The 1937 republican Constitution of Ireland instructs a prime minister who has lost the support of a majority in the elected legislature to resign unless the president grants him a dissolution¹¹³. The constitution gives the president an absolute discretion to refuse a dissolution to a prime minister who has lost majority support in parliament¹¹⁴. Eamon de Valera explained that there were situations where a government defeated in parliament should be granted a dissolution and there were situations where it should not. He thus noted that '[i]n order to try to distinguish between these two cases, we bring in a third person...as arbiter'¹¹⁵. Although the constitution does not outline the instances where such a refusal would be appropriate, it is apparent that it is only possible to refuse a dissolution where there is a stable, alternative government available¹¹⁶. Nevertheless, the president has never exercised this reserve power although there have been about five instances where it could arguably have been used¹¹⁷.

Similarly, in Spain, the prime minister's control over dissolution is constrained under the Spanish Constitution of 1978. Although the prime minister could dissolve parliament (after deliberating with cabinet), the constitution provides a timeframe of one year that the parliament must sit for before it may be dissolved (unless it is unviable)¹¹⁸. This seeks to ensure that parliament is given a chance to transact the business it was elected to transact. Furthermore, a prime minister could not propose to dissolve parliament where

¹¹³ Constitution of Ireland 1937, art 28(1).

¹¹⁴ *ibid*, art 13(2)(2).

¹¹⁵ Wed, 26 May 1937. Dáil Éireann (8th Dáil) – Vol. 67 No. 9.

¹¹⁶ Michael Gallagher, 'Republic of Ireland' in Robert Elgie (ed), *Semi-Presidentialism in Europe* (OUP 1999).

¹¹⁷ Michael Gallagher, 'The Political Role of the President of Ireland' (2012) 27(4) *Irish Political Studies* 522.

¹¹⁸ Constitution of Spain 1978, art 115(3).

a motion of no-confidence was before the parliament¹¹⁹. Thus, the King, as the possessor of the constitutional power to dissolve parliament, would be duty-bound to reject any such request. Accordingly, the prime minister may not simply dissolve parliament when he knows his government is about to be censured by parliament. Additionally, motions of no-confidence must propose another member as having the confidence of parliament. Therefore, if the motion passes against the prime minister, he must resign, and the King will subsequently appoint the other member as prime minister¹²⁰. This occurred for the first time in 2018 when Prime Minister Mariano Rajoy lost the vote in favour of Pedro Sánchez who replaced him as prime minister¹²¹. Spain's provisions thus uphold the parliamentary principle, and the head of state plays a central role in this.

In Italy, the prime minister has no control over dissolution. The Constitution of the Italian Republic gives the president the power to dissolve one or both Houses of Parliament in consultation with the presiding officers of each¹²². Nonetheless, as President Sergio Mattarella indicated, the dissolution of the parliamentary chamber 'is always the last choice' to make¹²³. Thus, when confidence is withdrawn, the president attempts to procure an alternative government which would allow parliament to function for the remainder of its term. It is only where parliament is unviable that the president seeks to dissolve it.

¹¹⁹ *ibid*, art 115(2).

¹²⁰ *ibid*, art 114(2).

¹²¹ Sam Jones, 'Mariano Rajoy Ousted as Spain's Prime Minister', *The Guardian* (1 June 2018) <<https://www.theguardian.com/world/2018/jun/01/mariano-rajoy-ousted-as-spain-prime-minister>> accessed 24 June 2024.

¹²² Constitution of the Italian Republic, art 88.

¹²³ Nicole Winfield and Frances D'Emilio, 'Italy Heads to Early Election After Draghi's Coalition Fails', *AP News* (21 July 2022) <<https://apnews.com/article/elections-legislature-italy-802d6ab0965feebf4e3f7bda1659df42>> accessed 25 June 2024.

The Greek Constitution also illustrates the importance of the head of state in the functioning of a parliamentary democracy. As is the case in the other states, the Greek Government must always enjoy the confidence of parliament¹²⁴. If parliament withdraws its confidence from the cabinet, the president is responsible for removing the cabinet from office and seeking out the leaders of the other parliamentary groupings to ascertain if an alternative government is possible¹²⁵. If no alternative is possible then the president dissolves parliament. Additionally, the president may dissolve the parliament where two governments have resigned or have been voted out by parliament thereby compromising the stability of the government¹²⁶. A dissolution can also be obtained by the cabinet but only where it is backed by a vote of confidence from parliament and is for the purpose of renewing their mandate to deal with an issue of exceptional importance¹²⁷. The president is therefore charged with ensuring that parliament can exercise its constitutional functions and is not hamstrung in doing so by the government¹²⁸.

2.5. Further critiques of the reserve power

I have already illustrated that the reserve power is not an undemocratic power but serves to enhance the core principles of the constitution including democratic accountability. Another frequent critique of the power is that it has dried up due to lack of use over the years and that this is evidence that these powers have fallen into desuetude¹²⁹. Such an

¹²⁴ Constitution of Greece 1975, art 84

¹²⁵ *ibid*, art 38; art 37.

¹²⁶ *ibid*, art 41(1).

¹²⁷ *ibid*, art 41(2).

¹²⁸ *ibid*, art 30(1).

¹²⁹ Blackburn, *King & Country* (n5).

assertion, which ultimately looks at the reserve power as a historical residue instead of a modern constitutional mechanism, may be rebutted in several ways.

Firstly, the reserve power is a power of last resort. It would be illogical if a power that ought to be used only on rare occasions could be said to be out-of-date because its use is rare. Therefore, any assertion that the reserve power has seldom been used in modern times does not weaken but is consistent with the argument for it¹³⁰. This argument shows that the reserve power has correctly been rarely employed, and is therefore being used appropriately by those who are in positions to wield it.

Secondly, the success of the reserve power is not solely judged by its open use. In fact, the efficacy of the reserve power lies in its ability to alter political behaviour without having to resort to the public rejection of ministerial advice. Twomey describes the reserve power as a stick that the head of state must occasionally point to, to ensure compliance with constitutional conventions and principles¹³¹. Quentin-Baxter considers that the use of the reserve power would signify to the populace that fundamental constitutional conventions and principles have been broken by the government. Therefore, ‘their exercise causes a government to pause and think’ since no government would want to be seen as acting unconstitutionally¹³². The value of the reserve power is thus much deeper than perhaps realised. Ultimately, it helps to deter breaches of constitutional conventions since political actors would bear in mind that they may provoke the use of the ultimate constitutional safeguard should their behaviour transgress beyond the bounds of constitutionality.

¹³⁰ Twomey (n3).

¹³¹ *ibid*

¹³² Quentin-Baxter (n8) 309.

Thirdly, the belief that the reserve power has fallen into desuetude through lack of use is often based on an inaccurate interpretation of constitutional events. Constitutional crises highlighted by rubber stamp theorists as providing evidence of their claim may actually provide evidence of the existence of the reserve power. This is because the most valuable evidence is typically contained in archival papers and biographies that are only published decades later. For example, in 1928, Keith wrote that in 1924 George V immediately granted Ramsay MacDonald's dissolution request 'without even considering whether the Government could be carried on without a dissolution', and he claimed that this established a precedent that the King possessed no independent judgment in matters of dissolution even in multi-party situations¹³³. However, the official biography of George V, released in 1952, showed that George V accepted MacDonald's dissolution request reluctantly. Indeed, George V seriously contemplated refusing the dissolution, and sent his Private Secretary to the leaders of the other two major parties to ascertain whether they would agree to form a coalition that would allow the parliament to carry on—they declined the offer¹³⁴.

A view of precedents as consisting only of public uses of the reserve power is myopic. A contemplated public use, or even a private use, also counts as weighty evidence of the existence of the power, and the public may not be privy to these circumstances for years or perhaps decades later. Accordingly, by asserting that Elizabeth II 'has never come near to using the personal prerogatives' or, that 'the Queen quite properly simply accepted Wilson's request' for a dissolution, Blackburn sets himself on a similar trajectory to Keith almost a century earlier, and thereby exposes his claims to later disproof since Elizabeth II's acts are, and will be, uncertain until her official biography and other official papers are

¹³³ A.B. Keith, *Responsible Government in the Dominions* (2nd edn, Clarendon Press 1928) 148.

¹³⁴ Harold Nicolson, *King George the Fifth: His Life and Reign* (Constable 1952).

published¹³⁵. Indeed, we do now know, according to Pimlott's unofficial but highly regarded biography of Elizabeth II, that she reserved her right to refuse Wilson's request for a dissolution and that this was communicated to Wilson¹³⁶.

Fourthly, the reserve powers emanating as they do from common law prerogative powers cannot dry up due to lack of use. Although length of time since their last use is certainly relevant to a head of state's determination regarding whether to exercise his reserve powers in a particular situation, it is not determinative of whether these powers still exist. To be abolished, these powers must be abrogated by the express words or necessary intent of legislation¹³⁷. Hence, when the British parliament sought to repeal the prerogative of dissolution—and with it the reserve power—it achieved this by passing the Fixed-term Parliaments Act 2011 (now repealed).

Conclusion

In this chapter, I have argued that the reserve power is a necessary and desirable feature of a Westminster parliamentary system since it ensures that political actors uphold the principles of the political constitution which are typically unsuitable to legal sanctions. It achieves this by conferring power on the head of state to act as a constitutional safeguard in moments of crises when other political sanctions prove futile.

¹³⁵ Blackburn, 'Monarchy and the Personal Prerogatives' (n13) 558 and 561.

¹³⁶ Pimlott (n80) 422

¹³⁷ Rodney Brazier, 'The Monarchy' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2003).

III. The Reserve Power in Caribbean Constitutions

[In Jamaica and Trinidad and Tobago] the Governor-General has no power whatsoever to reject a Prime Minister's advice to dissolve. In their anxiety to evade Scylla the constitution-makers may indeed have steered into Charybdis.

S.A. de Smith¹

Indeed, the irony...is that [Trinidad-Tobago's] most democratic form of self-government seems to have existed during [its] colonial period of 1945-56, when [it] did not have national sovereignty, but [it] did have a higher degree of parliamentary government than now exists.

Kirk Meighoo and Peter Jamadar²

Introduction

I have shown that the reserve power is not an undemocratic relic but a modern, desirable, and important feature of the Westminster constitution. Without this power, there is no real impetus for political actors to observe constitutional conventions. Independence Caribbean constitutions attempted to codify some of the main conventions discussed in chapters one and two. Their conventional character was maintained due to the ousting of the court's jurisdiction. While this is desirable since conventions are political in their nature and application, most Caribbean constitutions also stripped heads of state of reserve powers that are useful in sanctioning breaches of these conventions. By removing the reserve power, many conventions have, as a result, been gravely mischaracterised. The head of state must now, in summoning, proroguing, and dissolving parliament, act wholly on the advice of the prime minister. Thus, there is now no effective political sanction to deter or prevent unconstitutional behaviour by the prime minister. Consequently, Caribbean heads

¹ S.A. de Smith, *The New Commonwealth and its Constitution* (Stevens & Sons 1964) 100.

² Kirk Meighoo and Peter Jamadar, *Democracy & Constitutional Reform in Trinidad and Tobago* (Ian Randle Publishers 2008) xiv.

of state have been largely transformed from constitutional safeguards into constitutional ciphers.

This chapter seeks to highlight the mischaracterisation of Westminster constitutional conventions in the Caribbean. In doing so, I will firstly examine how other post-WWII constitutions codified the reserve powers. I will then contrast this with the models adopted in the Caribbean—pre-and-post-independence—using Jamaica and Trinidad-Tobago as the standard-bearers. Lastly, I will attempt to explain the deviation by highlighting concerns raised during the drafting process of these independence constitutions.

3.1. Reserve powers in post-WWII Westminster constitutions

As discussed in chapter two, it is a constitutional convention of the Westminster system that a prime minister requests—rather than demands—a dissolution and prorogation of parliament from the head of state. This request will be granted provided that it is constitutional. A residual discretion is left in the hands of the head of state to exercise a judgment contrary to that of the prime minister in instances where to accept the prime minister's request would be to subvert the basic tenets of the democratic constitution. But constitutional conventions of another country do not automatically become incorporated into a newly self-governing or independent country's constitution simply because that new country adopts a comparable constitutional framework. As the Privy Council opined in *Adegbenro v Akintola*, the codified Westminster constitution stands in its own right, and though British practice and doctrine may be relevant in interpreting a doubtful phrase, in the end, the wording of the constitution can never be overridden³. Accordingly, a basic challenge was codifying these conventions in a manner that recognises the pre-eminence

³ [1953] AC 614, 632.

of the prime minister and cabinet while allowing the head of state to remain as a constitutional safeguard in times of crises.

Some countries opted to tie the exercise of the dissolution prerogative to the prime minister's ability to sustain his parliamentary support. Under Singapore's Westminster-republican constitution, the president acts on the advice of the prime minister when dissolving parliament. However, the president is not obliged to accept the advice unless he is satisfied that the prime minister commands the confidence of parliament⁴. In this way, the constitution endorses the principle of responsible government and confers due authority on parliament as the elected branch of the state. But the wording is such that it places no obligation on the president to deny the prime minister a dissolution either. He is not obliged to accept the request once the prime minister's parliamentary support is lost, but he is also not obliged to deny it since there may be no other individual whom he could appoint as prime minister, or the prevailing circumstances may lean in favour of granting the request. Accordingly, there may be occasions where even though the prime minister has lost the confidence of parliament, he is still able to have his dissolution.

Other countries attempted to codify the Lascelles Principles⁵. This type of codification is more popular and detailed than its Singaporean counterpart. It was adopted in the independence constitutions of many countries including Kenya, Nigeria, and Sierra Leone. In these constitutions, the dissolution prerogative is vested in the governor-general who exercises it on the advice of the prime minister. However, the governor-general is not always bound by that advice:

if the Prime Minister at any time advises a dissolution and the Governor-General considers that the government of Kenya can be carried on without

⁴ Constitution of the Republic of Singapore 1965, s65(3).

⁵ cf. §2.3.1.

a dissolution and that a dissolution would not be in the interests of Kenya, he may refuse to dissolve Parliament...⁶

Elliot Bulmer considers this formula to be ‘balanced, reasonably comprehensive, flexible, yet robust’ and would ‘cause a Prime Minister to think twice’ about refusal before requesting a dissolution in controversial circumstances⁷. I agree since the latter part is contingent on there being an alternative government available, or as put here, whether the government ‘can be carried on without a dissolution’. Only after being satisfied of this is the head of state then able to consider the national interests. By convention, a prime minister whose advice is refused, ought to resign immediately. Thus, this provision works best if there is an effective dismissal provision available for the head of state to resort to should this convention be defied⁸.

In some instances, the head of state is left with a general power to refuse a dissolution. In these cases, the constitution assumes that the power will be wielded according to the appropriate constitutional conventions. Under the Malaysian constitution, the head of state is obliged to act on advice generally. However, one of the expressed occasions where the head of state may exercise his independent discretion is ‘the withholding of consent to a request for the dissolution of Parliament’⁹. One may argue that such a broad discretion is open to being abused. However, the possibility that a head of state would exercise this discretion contrary to established convention is remote. For

⁶ Constitution of Kenya 1963, s65(2)(b). Identical provision in Constitution of Nigeria 1960, s63(4)(a); Constitution of Sierra Leone 1961, s55(4)(a). See Hamid Ghany, ‘The Evolution of the Power of Dissolution’ (1999) 5(1) *Journal of Legislative Studies* 54.

⁷ W. Elliot Bulmer, *Westminster and the World* (Bristol UP 2020) 191-192.

⁸ E.g., Nigeria Constitution, s81(10)(a); Sierra Leone Constitution, s58(8)(a).

⁹ Constitution of Malaysia 1957 (revised to 2007), s40(2)(b).

instance, despite having this power, the Malaysian head of state, the Yang di-Pertuan Agong, has never exercised it even in instances where the possibility was raised¹⁰.

The 1997 Constitution of Fiji provides an intriguing method of codifying the convention. A prime minister defeated on a confidence vote has the obligation to advise the president—if he believes another person can form a government—of the name of that person, and thereafter resign¹¹. If he does not do this and instead advises a dissolution to the president, the president is empowered with the discretion to ascertain whether there is another person commanding parliament's confidence¹². If there is such a person, the president will request the prime minister to resign failing which he will be dismissed¹³. If there is no such person, the prime minister's dissolution request will be granted¹⁴. Additionally, if an alternative prime minister is appointed and fails to attain parliament's confidence, the president must dismiss him, reappoint the previous prime minister, and grant his original dissolution request¹⁵.

The final codification method worthy of note is the express incorporation of Westminster conventions into constitutions. This is exemplified in the independence constitutions of Ceylon and Ghana. These constitutions gave the governor-general a very general power of dissolution¹⁶. However, it had to be exercised 'in accordance with the

¹⁰ Yiswaree Palansamy, 'Agong Would be Right to Refuse Parliament Dissolution if GE15 Coincides with Massive Floods' *Yahoo News* (20 September 2022) <<https://malaysia.news.yahoo.com/kit-siang-agong-refuse-parliament-093400737.html>> accessed 17 May 2024.

¹¹ Constitution of Fiji 1997, s107.

¹² *ibid*, s108(1).

¹³ *ibid*, s108(1)(a).

¹⁴ *ibid*, s108(1)(b).

¹⁵ *ibid*, 108(2). Many argue this was the course Lord Byng should have followed in Canada in 1926. See Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (2nd edn, OUP 1968).

¹⁶ Ceylon Constitution and Independence Orders in Council, 1946 and 1947 (Consolidated), s15(1); Constitution of Ghana 1957, s47(1).

constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty'¹⁷. This would effectively be an incorporation of the Lascelles Principles. However, the drawbacks of this approach are that it assumes that heads of state are familiar with the conventions applicable in Britain. This is a huge assumption to make. But more fundamentally, it may be viewed as out of place for such a reference to be included in an independence constitution¹⁸.

Similarly, in many of these constitutions, a prime minister would not be able to abuse the prorogation prerogative since the head of state is empowered with the reserve power to dismiss the prime minister. For instance, the Singaporean President is authorised to remove the prime minister if he is satisfied that 'the Prime Minister ceased to command the confidence of a majority of the Members of Parliament'¹⁹. Consequently, if it appears the prime minister has lost or is about to lose parliamentary confidence, and seeks to prorogue parliament, the president has several options. He could remove the prime minister and appoint a caretaker who would dissolve parliament; he could remove him and appoint another individual as prime minister to carry on the parliament, or he could signal his intention to remove the prime minister and allow him to request a dissolution instead. This was similarly applicable in Nigeria's independence constitution which allowed the governor-general to remove the prime minister where 'it appeared to him that the Prime Minister no longer commands the support of a majority of the members of the House of Representatives'²⁰. Fiji's constitution uniquely gives the president a discretion to summon

¹⁷ Ceylon Constitution, s4(2); Ghana Constitution, s4(2).

¹⁸ de Smith (n1).

¹⁹ *ibid* s26(1)(b).

²⁰ Nigeria Constitution, s81(10)(b).

parliament where 18 or more members writes to him to request that parliament be summoned ‘to meet to consider without delay a matter of public importance’²¹.

Accordingly, these post-WWII Westminster constitutions confer reserve powers on their heads of state to exercise in order to safeguard fundamental constitutional principles.

3.2. Reserve powers in Caribbean constitutions

The Wooding Commission of Trinidad-Tobago asserted that the Westminster system had a ‘propensity to become transformed into dictatorship when transplanted in societies without political cultures which support its operative conventions’²². I certainly agree with this sentiment, but I think it could apply to a presidential or perhaps any political system. The Westminster system is not uniquely subject to this kind of risk. But if misunderstood, one runs the risk of disregarding its fundamental features. I believe that the importance of the reserve power and its role in guaranteeing constitutional behaviour was overlooked, deliberately and/or unconsciously, by the draftsmen of Caribbean constitutions beginning with those in Jamaica and Trinidad-Tobago.

In this section, I will largely discuss the constitutions of Jamaica and Trinidad-Tobago since they represent the older territories in the region which progressed to self-government and independence at a greater pace. Smaller territories took a more circuitous route to independence, and when they achieved it, they largely patterned their independence constitutions on those of the older territories²³.

²¹ Fiji Constitution, s68(3)(b).

²² Constitution Commission of Trinidad and Tobago, *Report of the Constitution Commission* (1974), para 27.

²³ Fred Phillips, *Freedom in the Caribbean: A Study in Constitutional Change* (Oceana Publications 1977); Tracy Robinson, Arif Bulkan, and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet & Maxwell 2021).

3.2.1. Immediate pre-independence reserve powers of the head of state

Immediately before their independence in 1962, Jamaica and Trinidad-Tobago had rapidly progressed through a series of constitutions in under two decades culminating in the Jamaica 1959 constitution and the Trinidad-Tobago 1961 constitution. Both constitutions implemented full self-government, and governors had no reserved legislative powers except to disallow legislation that contravened the international position of the colonial government²⁴.

These constitutions followed the usual post-WWII pattern of codifying Westminster constitutions. Thus, governors acted in accordance with the advice of their premiers. Although conventions were codified, they maintained their conventional character through the introduction of constitutional ouster clauses. These clauses directed that questions concerning whether the head of state acted on the recommendation, consultation, or advice tendered to him, or whether he acted in accordance with constitutional conventions ‘shall not be enquired into in any court’²⁵.

Nevertheless, these constitutions did not create a vacuum where the premier could rule unimpeded by constitutional checks since the governor of each territory possessed reserve powers to exercise in cases where the political actors sought to breach the constitutional conventions and principles. These powers—possessed by heads of state in self-governing territories—were not the residuary powers of the colonial governor. They were the constitutional mechanism installed to sanction unconstitutional political behaviour.

²⁴ Jamaica (Constitution) Order in Council 1959, S.I.862/1959, s37; Trinidad and Tobago (Constitution) Order in Council 1961, S.I.1961/1192, s36.

²⁵ Jamaica 1959 Constitution, s9(4)-(5). Trinidad-Tobago 1961 Constitution, s6(5), s41(4).

Accordingly, in Jamaica, the constitution provided that the governor ‘acting in his discretion’ may at any time dissolve parliament²⁶. On its face, one may consider such a provision diametrically opposed to self-government and ministerial responsibility. Yet, it was a qualified discretion. The constitution provided that where a provision outlined that the governor was to exercise his discretion, he had to do so ‘in accordance with any constitutional conventions applicable to the exercise of any similar function of Her Majesty in the United Kingdom’²⁷. As earlier outlined in relation to the Ceylonian and Ghanaian provisions, this would incorporate Westminster conventions which prescribe that the head of state must act on the constitutional request of a prime minister, but not otherwise.

The constitution did not give the governor a discretion to act in terms of prorogation. However, the governor was equipped with the power to revoke the appointment of the prime minister where the House of Representatives so resolved²⁸. I would thus assert that a governor faced with a prorogation request while a no-confidence motion was before the House, or was about to be placed before the House, was best advised to delay acceding to the prorogation request until the motion was decided. Where the House passed the resolution to revoke the premier’s appointment, the governor was empowered to ‘consult’ the premier, and if he ‘requested’ a dissolution, the governor could, in his discretion, accept the request²⁹. As I will soon show, the use of the term ‘consult’ here is important as the constitution outlines that where the governor is required to consult, he is not obliged to act according to the advice of the person consulted³⁰.

²⁶ Jamaica 1959 Constitution, s42(2).

²⁷ *ibid* s9(6).

²⁸ *ibid* s49(1)-(2).

²⁹ *ibid*

³⁰ *ibid*, s9(4).

The pre-independence governor of self-governing Jamaica therefore possessed the reserve power to refuse a dissolution from a prime minister not in command of parliament's confidence where there was a stable alternative government available. This is the preferred position and the one in line with responsible government.

In Trinidad-Tobago, the 1961 constitution similarly outlined that the governor may have prorogued or dissolved parliament at any time³¹. But this power was also qualified to be exercised in accordance with the constitutional conventions applicable to like powers in the United Kingdom³². A key difference to its Jamaican counterpart is that this constitution also subjected the prorogation power to Westminster conventions. The argument could then be made that under the Trinidad-Tobago constitution, the governor had the power to refuse an unconstitutional prorogation request. Additionally, the governor had the power to remove the premier where it was apparent that the premier ceased to command the support of a majority of parliament³³. Like Jamaica, the governor was required to consult the premier to see if he preferred a dissolution, but it was open to the governor to refuse the request³⁴. The constitution affirmed that where the governor was directed to consult, he did not have to accept the advice³⁵.

The region's pre-independence self-governing constitutions were therefore, in my view, in line with wider Commonwealth practice, and depicted, more appropriately, a Westminster constitutional system to the extent that they furnished their heads of state with reserve powers to sanction breaches of constitutional conventions. In light of this, the government could not arbitrarily wield executive powers to undermine core principles like

³¹ Trinidad-Tobago 1961 Constitution, s41(1).

³² *ibid*, s41(4).

³³ *ibid*, s51(1).

³⁴ *ibid*.

³⁵ *ibid*, s6(4).

representative and responsible government. It is no wonder, then, that Meighoo and Jamadar claim in the epigraph to this chapter, that parliamentary government flourished to a greater extent under pre-independence Caribbean constitutions than under their post-independence counterparts. The reason is that there was a sanction mechanism imbedded in these constitutions to prevent the subversion of parliamentary government.

Unfortunately, after independence, the constitutional landscape drastically changed as the head of state's reserve powers were stripped in most constitutions.

3.2.2. Post-independence reserve powers of the head of state

Caribbean post-independence constitutions did well to maintain the constitutional ouster clauses limiting the court's jurisdiction in political matters like their pre-independence counterparts³⁶. However, most of the constitutions then went on to strip heads of state of the reserve powers. Consequently, there is no constitutional mechanism whatsoever to deter or sanction acts contrary to constitutional principle. Thus, these constitutions enable their prime ministers to wield key executive powers unconstitutionally.

Under the 1962 Jamaican constitution, the governor-general's power to dissolve parliament is strictly defined to be exercisable on the advice of the prime minister³⁷. The only instance in which the governor-general could dissolve without advice is where parliament passes a motion of no-confidence. Even in such instance, the governor-general must dissolve on the resolution's passing, and has no discretion in the matter—not even to assess the viability of an alternative government³⁸.

³⁶ Jamaica (Constitution) Order in Council 1962, S.I. 1550/1962, s32(4); Trinidad and Tobago (Constitution) Order in Council 1962, S.I. 1875/1962, s63(2); Constitution of the Republic of Trinidad and Tobago 1976, s80(2).

³⁷ Jamaica 1962 Constitution, s64(5).

³⁸ *ibid*

There is however a great contradiction in these provisions, which is probably due to the oversight of the draftsmen. Like the pre-independence constitution, the 1962 constitution outlines that where parliament passes a resolution to revoke the appointment of the prime minister, the governor-general must ‘consult’ with the prime minister to see if he would ‘request’ a dissolution instead of being dismissed³⁹. Further, the 1962 constitution, like its pre-independence counterpart, provides that where the governor-general is directed to consult, he does not need to follow the advice obtained during the consultation⁴⁰. So far, so good.

However, unlike the pre-independence constitution, the 1962 constitution further states that if, during the consultation, the prime minister ‘requests’ a dissolution after parliament votes for his dismissal, the governor-general ‘shall’ grant it⁴¹. Such a change in the provision obscures the meaning of the entire clause given its historical context which empowered the head of state to assess the viability of an alternative government before granting the request. It is therefore illogical for the altered provision in the 1962 constitution to direct the governor-general to ‘consult’ with the ousted prime minister, while at the same time, bind him to acting on the request obtained from the consultation. Any request made during a consultation should not be binding⁴². But even on ordinary principles of interpretation, it is plainly undesirable to follow up words like ‘consult’ and ‘request’ with a mandatory word like ‘shall’.

To add to the problem, the governor-general must always act on the prorogation advice of the prime minister⁴³. Accordingly, it is possible that motions to revoke the prime

³⁹ *ibid*, s71(3).

⁴⁰ *ibid*, s32(3).

⁴¹ *ibid*, s71(3).

⁴² *ibid*, s32(3).

⁴³ *ibid*, s64(5).

minister's appointment or, of no-confidence, may never make it to a parliamentary vote since any prime minister facing imminent defeat would, in all probability, pre-emptively advise the parliament's prorogation or dissolution.

The 1962 constitution of Trinidad-Tobago stipulated that the governor-general, in proroguing and dissolving parliament, acted on the advice of the prime minister⁴⁴. There are no exceptions to this rule, not even in the limited instances provided by the Jamaican constitution. If the House of Representatives passed a resolution to remove the prime minister, it was still his absolute right to obtain a dissolution⁴⁵. Nonetheless, it is highly unlikely that such a resolution would ever be passed since the prime minister would likely exercise his other absolute right to prorogue the parliament and govern without parliamentary support.

Ten years after independence, the Wooding Commission recommended that the independence constitution be replaced with a republican constitution which would include certain changes. One of its recommendations was that the prime minister's absolute right to a dissolution be removed. In their words, '[a] Prime Minister who has lost majority support...should not necessarily have the power to demand an election'⁴⁶. That advice fell on deaf ears and the provisions remain the same in the current 1976 republican constitution⁴⁷.

Although the standard set by Jamaica and Trinidad-Tobago of removing the head of state's reserve powers has been followed in most independent Caribbean states, the pre-independence and wider Commonwealth model have been implemented in Belize, St.

⁴⁴ Trinidad-Tobago 1962 Constitution, s50(1).

⁴⁵ *ibid*, s59(1).

⁴⁶ Wooding Commission (n22), para 276.

⁴⁷ Trinidad-Tobago 1976 Constitution, s68(1) and s77(1).

Lucia, and St. Vincent and the Grenadines. Since they all adopt the same style of codification, I will use St. Lucia's to represent the group.

In St. Lucia, the governor-general's power to dissolve parliament is ordinarily exercised on the advice of the prime minister. However, there are circumstances where the governor-general may refuse the advice. The constitution follows the model which codifies the Lascelles Principles:

if the Prime Minister advises a dissolution and the Governor General, acting in his or her own deliberate judgment, considers that the government of Saint Lucia can be carried on without a dissolution and that a dissolution would not be in the interests of Saint Lucia, he or she may, acting in his or her own deliberate judgment, refuse to dissolve Parliament⁴⁸.

As outlined, this approach is much more flexible and appropriate. But it is not without difficulty. The constitution does not provide the governor-general with an effective removal mechanism. The governor-general is empowered to remove the prime minister if a no-confidence motion is passed against him and he does not, within three days, either resign or advise dissolution⁴⁹. It follows that advice tendered in this scenario still falls within the abovementioned proviso permitting the governor-general's discretion.

By convention, a prime minister whose advice is refused, ought to resign. But what happens if the St. Lucian Prime Minister decides to defy this convention? It appears that there is no provision empowering the governor-general to remove the prime minister in such scenario. Although the advice was refused, the prime minister may argue that since the advice was tendered, that in itself is sufficient to render the two conditions which activate the dismissal power—that the prime minister does not resign *or advise* dissolution—unfulfilled⁵⁰. In my view, the provision should instead read that the governor-

⁴⁸ Saint Lucia Constitution Order 1978, S.I. 1901/1978, s55(4)(a).

⁴⁹ *ibid*, s60(6).

⁵⁰ See *Phoofolo v Prime Minister* (C of A (CIV) 17/2017) 2017 LSCA 8 (12 May 2017), [72]-[74].

general is empowered to remove the prime minister if a no-confidence motion is passed against him and he does not, within three days, either resign *or obtain* a dissolution. The power of dismissal would therefore be triggered regardless of any (unconstitutional) advice that may have been tendered to the governor-general.

Accordingly, the current St. Lucian provision will lack effectiveness if faced with a defiant prime minister, and the governor-general will ultimately have to accede to the dissolution request thereby nullifying the reserve power. Nevertheless, the provision may still have some bite since the prime minister will still have succumbed to a successful motion of no-confidence (assuming, of course, that the prime minister does not prorogue parliament for twelve months instead).

3.2.3. Drafting the independence constitutions

In this section, I endeavour to highlight how the reserve powers were stripped from heads of state by the constitutional draftsmen, and to assess their reasons for so doing.

By all accounts, the political establishment desired a constitution that reflected the Westminster model. The Joint Committee of Parliament in Jamaica, which agreed to the terms of the constitution, outlined that parliament was to have 'legal supremacy within the framework of the Constitution' and the cabinet was 'collectively to be responsible to the Parliament'⁵¹. Jamaican Premier Norman Manley proclaimed that the British constitution was the best in the world and the only good system of government⁵². Thus, as he admitted, they 'did not attempt to embark upon any original or novel exercise in constitutional

⁵¹ Joint Committee of the Houses of Representatives, *Report of the Committees of the Legislature to Prepare Proposals for a Constitution to Take Effect on Independence*, Gordon House, 11 January, 1962 (Pam 342.7292 Ja, Jam) [12].

⁵² Louis Lindsay, *The Myth of Independence: Middle Class Politics and Non-Mobilization in Jamaica* (1975) ISER Working Paper, No. 6 (UWI).

building'⁵³. Manley was essentially acknowledging that the independence constitution was going to be fashioned according to its pre-independence base. Around this time, Eric Williams, soon-to-be Chief Minister and later Premier and Prime Minister, quipped that 'the British Constitution, suitably modified, can be applied to Trinidad and Tobago'⁵⁴. Yet, both their governments proceeded to draft documents which ostensibly appeared Westminster, but ran counter to some of its essentials. The deviations made to the reserve powers of the head of state were not 'suitable modifications'; rather, they were modifications which had the effect of undermining parliamentary government on which the constitution was premised.

The drafting process was rushed and dominated by the political class⁵⁵. The drafts of the constitutions were produced locally and submitted to the Colonial Office for review. In Jamaica, the process was done behind closed doors and the public and press were banned from participating in the meetings of the Drafting Committee. Notwithstanding this level of secrecy, Trevor Munroe has provided an account of what transpired in the Committee meetings based on the Verbatim Report of its proceedings, which I will rely on⁵⁶.

Manley admitted that the section of the constitution concerning the dissolution of parliament was 'the hardest drafting point other than the...Bill of Rights' as the constitution-drafters were conflicted between not giving the prime minister enough power and giving him too much⁵⁷. It appears they opted for the latter.

⁵³ Norman Manley, Proceedings of the Jamaican House of Representatives 1961-62, January 24, 1962, 766.

⁵⁴ Eric Williams, *Constitution Reform in Trinidad and Tobago* (Teachers' Educational and Cultural Association, Public Affairs Pamphlet No. 2 1955) 30-31.

⁵⁵ Trevor Munroe, *The Politics of Constitutional Decolonization Jamaica 1944-62* (ISER 1972).

⁵⁶ *Verbatim Report of the Proceedings of the Joint Constitutional Committee 1961-62 (unpublished)* quoted in Munroe (n55).

⁵⁷ Quoted in Munroe (n55) 140.

The first draft of the constitution gave the governor-general a discretion to refuse a dissolution request subject to a vote of endorsement in the House. However, the Committee felt that this proposal would make a prime minister with a slim majority unduly vulnerable to crossings of the floor, and that the dissolution power should be firmly lodged in the hands of the prime minister instead. Manley warned against this proposal since it would allow the prime minister to bully the entire cabinet and his parliamentary party. Nevertheless, Manley's concerns gained no sympathy. His own deputy opposed him and argued that 'in truth and in fact a Prime Minister is a dictator for five years...if he is a sensible man he will listen to the views of his Ministers'⁵⁸. Another member of the Committee and future prime minister, Edward Seaga, endorsed this view and added, '[q]uite rightly and if any Minister can't get along, the Minister must resign as only one Minister must rule'⁵⁹. This is an obviously unsatisfactory exposition of the office of prime minister in a Westminster system. A prime minister's adherence to constitutional conduct should not depend on whether he is sensible or willing to share his power; it should depend on the political sanctions he may face if he does not. It is also incorrect to assert that only one minister must rule since a core principle of the Westminster constitution is the cabinet principle⁶⁰.

Manley made another attempt and suggested that the formulation in the 1959 constitution—which permitted the governor-general a discretion exercisable according to British conventions—remain in the 1962 constitution. His view was again rejected, and it was argued that such a reference was out of place in an independence constitution⁶¹.

⁵⁸ *Verbatim Report* p. 320., quoted in Munroe (n55) 170.

⁵⁹ *ibid*, p.323.

⁶⁰ cf. §1.3.

⁶¹ Munroe (n55).

Eventually these forces proved too strong for Manley. This birthed the phenomenon of a prime minister with an absolute power over dissolution in the Caribbean.

Nonetheless, Manley was not alone in his view that the proposed draft was counter to Westminster practice. In a now declassified Colonial Office file, a paper under the signature of G.P. Lloyd dated May 25, 1961, summarised Jamaican Governor Kenneth Blackburne's recommendations for the function of the constitutional monarch of independent Jamaica. Blackburne recommended that 'subject to the cases in which the Governor must obviously act in his discretion...he should always act in accordance with the advice of the appropriate authority'⁶². These 'obvious' cases were said to include the appointment of a premier and the dissolution of the legislature⁶³. Blackburne opined that he 'thought that Mr. Manley—and Jamaican opinion generally—might well favour the retention of discretion in this matter too'⁶⁴. Well Manley certainly did—as the Verbatim Record shows—and perhaps the public would have too, had they been given a say in the matter; but this view was not held by a majority of the political class that made up the Drafting Committee. Accordingly, they removed all discretion from the head of state thereby lodging the dissolution power firmly in the hands of the prime minister.

The handling of this issue was perhaps even more concerning in Trinidad-Tobago since it occurred in the open as opposed to the closed-door process in Jamaica. The Constitutional Advisor, Ellis Clarke (future governor-general and later, president), had supplied the Colonial Office with the first draft of the constitution for review. As per the now declassified Colonial Office file, this draft contained the later highly notorious provision—section 54(5)—which replicated section 41(4) of the pre-independence

⁶² The National Archives ("TNA") CO 1031/3198.

⁶³ *ibid*

⁶⁴ *ibid*

constitution⁶⁵. This section outlined that the power to prorogue and dissolve had to be exercised as nearly as possible in accordance with constitutional conventions applicable to a like power in Britain.

The first draft of the 1962 constitution therefore gave the governor-general the reserve power to refuse an unconstitutional prorogation and dissolution request by the prime minister. However, by February 23, 1962, JH. Whitelegg of the Colonial Office wrote to another official (Mr. Peck) that the first draft that was received had already been altered in key respects by the Trinidad-Tobago constitutional-draftsmen⁶⁶. One such alteration was that the second draft placed an absolute right of dissolution in the hands of the prime minister. This immediately raised concerns with the Colonial Office since it did not accord with Westminster practice. Footman expressed that the second draft's dissolution provision 'goes somewhat further than the accepted view, both in this country and in other Commonwealth countries'⁶⁷. In response to that letter, Footman also expressed his concerns with the unusual provision noting that a preferable wording for the section was to give the governor-general a discretion to refuse a dissolution where he considered that the government could be carried on without a dissolution. Footman was thus advocating for the provision which codified the Lascelles Principles.

Nevertheless, the Trinidad-Tobago delegation held steadfast to stripping the governor-general of the reserve power. While the Trinidad-Tobago leaders were not as express in their desire to create a prime ministerial dictatorship as their counterparts in Jamaica, circumstances occurring around that period suggests that they had the same intention.

⁶⁵ TNA CO 1031/3226.

⁶⁶ *ibid*

⁶⁷ *ibid*, memo with reference number WID.26/33/1.

At all times, Ellis Clarke appeared to understand the principles of the Westminster model, and no doubt, this influenced his first draft of the constitution. Clarke explained to the cabinet in a memorandum concerning the first draft:

the Governor-General of an independent country is not only the Queen's representative but enjoys a position almost exactly analogous to that of the Queen. Just as the Queen does not act (*save in very limited circumstances*) except in accordance with the advice of her responsible Ministers, so the Governor-General cannot act (*save for certain very limited specified exceptions*) except in accordance with the advice of his responsible Ministers⁶⁸.

But while this perfectly explains Clarke's first draft, it certainly does not explain his second. His change of heart, then, can only be explained as being instructed from a higher authority. In a Secret Briefing Paper circulated among the British delegates that oversaw the independence constitutional conference, it was noted that some of the provisions in the constitution were 'likely to pander to Dr. Williams' dictatorial tendencies and love of power' and were 'objectionable on grounds of principle'⁶⁹.

Local opposition politicians were also questioning these provisions. The opposition encouraged the government to adopt the provision which codified the Lascelles Principles. However, this suggestion was rejected by the government as not conforming with British practice⁷⁰. This is undoubtedly incorrect since the Lascelles Principles are well-accepted as being British constitutional practice. Additionally, the opposition parliamentarians vociferously questioned the mysterious deletion of section 54(5) (they did not have the benefit of seeing the first draft). They put together a theory that the missing section placed

⁶⁸ ibid (n65). Emphasis mine.

⁶⁹ ibid, Brief No.13.

⁷⁰ Trinidad and Tobago Hansard, *Proceedings and Debates in the First Session (1961-62) of the First House of Representatives of Trinidad and Tobago*, Friday, 11th May, 1961 (14th Sitting), speech by P.G. Farquhar in TNA CO 1031/3239.

a discretion in the governor-general and that its exclusion was orchestrated by the government:

[T]hese words have been deleted in the printing draft, on whose authority I do not know; so I make three points about it. First of all, the suggestion of the Attorney General that there was never any subsection (5) in any previous draft is clearly untrue; secondly...the suggestion that...it was a typographical error...is clearly an absurdity; and thirdly...the deletion of something which was passed in Select Committee, without any reference to Select Committee at all, is something that is indefensible! And it is indefensible...because it is quite clear that whoever is responsible for this surreptitious deletion is trying to pull wool over our eyes'⁷¹.

We can now confirm this to be true. The missing section—which lies on the Colonial Office file—did leave a discretion to refuse dissolution with the governor-general, and it was deliberately removed, and later falsely declared a typographical error.

Premier Williams disregarded these assertions and argued that his government believed that independence encompassed full internal responsibility and that the government 'will not give a discretion to somebody they call a governor general'⁷². The then Attorney-General added that the constitution reflected the principles of political responsibility and thus any attempt to weaken the powers of the prime minister, is an attempt to weaken the powers of government⁷³. Even Ellis Clarke, who showed himself well-informed of Westminster principles, later obscured the argument by asserting that the exclusion was correct. He stated that all the authorities affirmed that the Queen could not dissolve without advice, and that this meant that the Queen, and by extension the governor-general, ought not to act otherwise than in accordance with advice⁷⁴. This is a non-sequitur. It does not follow that, because the Queen could not dissolve without advice, this means

⁷¹ ibid

⁷² ibid, speech by Dr. Eric Williams.

⁷³ TNA CO 1031/3238, *Verbatim Notes of Proceedings of Meetings on Draft Constitution held at Queen's Hall, Port of Spain, 25th to 27th April 1962* (Wednesday 25th April 1962).

⁷⁴ ibid

that she must always act on advice. The question was not whether the head of state could dissolve parliament on his own motion, but whether he had the constitutional authority to refuse a request for dissolution. Perhaps this appeared to those listening at the time, as a trifling distinction, but it was a different matter altogether.

Accordingly, like in Jamaica, the Trinidad-Tobago government's erroneous views surrounding the head of state's reserve powers won favour and formed the provisions adopted in the independence constitution. These constitutions became precedents for most Caribbean constitutions that followed.

Conclusion

Caribbean independence constitutions thus depart from their pre-independence and wider Commonwealth counterparts by stripping heads of state of important reserve powers. In doing so, they took away critical powers that act as deterrents and sanctions for breaches of constitutional conventions. Now, when prime ministers attempt to defy constitutional conventions, there is no power to prevent this from occurring. I will now highlight the consequences of this omission.

IV. Caribbean Constitutional Crises in Hindsight

In Barbados, any Prime Minister can play the part of a Samson and drag the temple down with him, since even if he loses a vote of confidence, the Prime Minister is not obliged to resign and be replaced by another member who can command a majority.

Tom Adams¹

[E]ven after a prime minister has lost the only basis on which he could be appointed, which is the support of a majority of members of the House, he yet retains the power of life or death over parliament...

Patrick Emmanuel²

Introduction

Caribbean constitutions declare that the cabinet shall be responsible to parliament³. But how could this be when the provisions of these same constitutions strip the head of state of fundamental reserve powers thereby subjecting the life of parliament to the unfettered whims of the prime minister. Looking at the current constitutional design, one would be justified in supposing that parliament was responsible to cabinet who was in turn responsible to the prime minister. Granted the lack of reserve powers is not the only issue and there are many others such as the limitless size of cabinets⁴, it is still a core issue since parliamentary government cannot function optimally without a head of state possessed of certain reserve powers to exercise in times of constitutional crises. Often when these crises occur, Caribbean nationals treat them simply as political conflicts, or as par for the course

¹ Quoted in Kirk Meighoo and Peter Jamadar, *Democracy and Constitution Reform in Trinidad and Tobago* (Ian Randle Publishers 2008) 30.

² Patrick Emmanuel, *Governance and Democracy in the Commonwealth Caribbean* (ISER 1993) 73.

³ Constitution of Jamaica 1962 ("JAM Const"), s69(2); Constitution of the Republic of Trinidad and Tobago 1976 ("T&T Const"), s75(1); Constitution of Saint Kitts and Nevis 1983 ("SKN Const"), s53(3).

⁴ René Leon Monteil, 'Constitution Reform for Responsible Government in Trinidad and Tobago' (2015) 15(2) OUCLJ 245.

with Caribbean politicians. Yet, these undemocratic flurries unearth deep-seated problems concerning our contradictory constitutional design.

This chapter seeks to highlight a few constitutional crises in the region and contextualise them within the larger discussion had throughout this thesis. This entails highlighting how constitutional conventions and principles were violated in each case, and the role that the reserve power should have played.

4.1. The consequences of constitutional contradiction

In chapter three, I elaborated on the prime minister's unencumbered right to dissolve and prorogue parliament in certain Caribbean states. But even in the case of states like St. Lucia that appropriately left some power to the head of state to exercise in strictly defined circumstances, the efficacy of this power is dubious given that the constitution lacks an effective dismissal mechanism.

Compounding the problem, heads of state typically serve at the pleasure of their prime ministers. There have been in the Caribbean, and in St. Lucia in particular, many episodes surrounding the appointment and early dismissal or retirement of governors-general after changes in government thereby ensuring that they are more amenable to the prime minister⁵. In so doing, the reserve power is somewhat neutralised. This is not to say that, where an effective dismissal mechanism exists, the prime minister cannot be removed before the governor-general is dismissed from his post⁶. Nor am I implying that the British monarch must accept a request to remove his viceregal representative by the prime minister

⁵ Kate Quinn, "A Quaint and Unimportant Anachronism?" The Office of the Governor General and Constitutional Controversies in the Commonwealth Caribbean' in Harshan Kumarasingham (ed), *Viceregalism: The Crown as Head of State in Political Crises in the Postwar Commonwealth* (Palgrave Macmillan 2020).

⁶ E.g., 1975 Australia, see John Kerr, *Matter for Judgment* (Macmillan Press 1979); 2013 Tuvalu, see Anne Twomey, 'The Race to the Palace from Tuvalu' in Kumarasingham (n5).

of an independent nation. Some maintain, and I would tend to agree, that there is room for such a request to be refused or, at a minimum, stalled⁷.

Nevertheless, the point is that although the focus of this thesis is on the reserve powers of dissolution and prorogation, to be fully effective, they must be paired with a mechanism to remove the head of government, and some level of security of tenure for the head of state. Given the inapplicability of the former, and the uncertainty of the latter, the prime minister's control over the powers of dissolution and prorogation in the Caribbean is dangerous and potent. This has had the effect of increasing the supremacy of the prime minister over his own cabinet and parliamentary colleagues.

Prime Minister Ralph Gonsalves described dissolution as a power that may be used to 'cow and frighten recalcitrant elected representatives'⁸. Knowing that the prime minister can bring down the entire parliament should his colleagues dare to oppose his leadership is likely to cause ministers and the wider parliamentary party to pause and think before questioning his leadership. As it stands now in the Caribbean, as Meighoo and Jamadar capture it, '[w]e cannot conceive of a Parliament being more important than a prime minister'⁹. How then could it be said that cabinet, and particularly its head, is accountable to parliament? I started this chapter with a quote by former Barbadian Prime Minister Tom Adams. He went on to opine that in his view the prime minister should not have the power, particularly in small democracies, to bring down parliament if his colleagues chose to remove him as their head. This is an obvious and incontrovertible proposition. Yet, not only do Caribbean constitutions allow this, but they also empower their prime ministers to

⁷ Vernon Bogdanor and Geoffrey Marshall, 'Dismissing Governor-Generals' (1996) Sum PL 205.

⁸ Quoted in Meighoo and Jamadar (n1) 31.

⁹ *ibid* 29.

suspend parliament and run minority governments for extended periods of time without parliamentary oversight.

In Britain, a five-week prorogation was held unconstitutional since it had the effect of undermining the principle of responsible government¹⁰. In Jamaica and Trinidad-Tobago, on the other hand, their constitutions endow the cabinet, and by virtue of this, the prime minister, with an absolute right to prorogue parliament for up to six months¹¹; in St. Lucia, it is up to twelve¹².

Obviously given the constitutions' Westminster framework, it was intended for the prorogation prerogative to be exercised according to constitutional conventions and principles. But without the reserve power to deter and sanction unconstitutional uses of the power, these constitutions essentially endorse its abuse. Caribbean constitutions recognise responsible government as a core constitutional principle, then construct provisions which enable, and lead to, its collapse.

In that regard, I will now examine four separate constitutional events that took place in Grenada and St. Kitts-Nevis to illustrate the dangers that such constitutional contradictions may cause, and the effects they have on core constitutional principles.

4.1.1. Grenada 1989

Resulting from the 1984 election in Grenada, the New National Party ("NNP"), then a new political entity formed out of a coalition of various political forces, won fourteen out of fifteen parliamentary seats and Herbert Blaize was made prime minister. His term was however marred by infighting among his parliamentary and cabinet colleagues. By 1989,

¹⁰ *R (Miller) v Prime Minister* [2019] UKSC 41.

¹¹ JAM Const., s63(2); T&T Const., s67(2).

¹² Constitution of Saint Lucia 1978, s54(1).

he was leading a minority government with only six seats¹³. Nonetheless, Blaize showed no signs of wanting to step aside. A no-confidence motion was lodged against Blaize's government by the new leader of the NNP. Facing imminent defeat, and wanting to carry on his term, Blaize sought out the governor-general, Paul Scoon who, in his own memoir, admitted to taking 'the unusual step to *advise* Prime Minister Blaize that the way to get out of his dilemma was to prorogue Parliament'¹⁴.

Blaize was very receptive to this advice as he had every intention of finishing his five-year term. Preparing for the prorogation was then orchestrated privately between Blaize and Scoon. Scoon admitted that the prorogation 'was a closely guarded secret' and that it was 'prepared not in the Attorney General's office as was customary, but in my office'¹⁵. Parliament was prorogued on August 23, 1989. Blaize was able to continue leading his minority government for three months and would have been able to complete his entire term ending in March 1990 had he not passed away on December 19, 1989.

Neither Scoon nor the Grenadian public understood that though this was admittedly permitted on the strict letter of the constitution, it was completely contrary to the principle of responsible government and the convention requiring Blaize to resign upon losing parliament's confidence—which the Grenadian constitution is premised on. Thus, it was equally unconstitutional since a constitution consists of both legal and political rules. Remarkably, in Scoon's view:

Blaize outwitted his parliamentary colleagues by silencing Parliament. *He did it with constitutional rectitude*. The latest action of his never aroused animosity. It did not provoke any demonstration. Life in Grenada went on as usual¹⁶.

¹³ Paul Scoon, *Survival for Service: My Experiences as Governor General of Grenada* (Macmillan Caribbean 2003).

¹⁴ *ibid* 257. Emphasis mine.

¹⁵ *ibid*

¹⁶ *ibid*. Emphasis mine.

Curiously, Scoon even credits Blaize for knowing and understanding the provisions of the constitution and never attempting to ‘bend the rules in any way for the sake of political expediency’¹⁷.

This situation thus demonstrates that while the reserve power is certainly necessary for parliamentary government to flourish, it is equally essential that heads of state properly understand their constitutional roles and duties under a Westminster constitution.

4.1.2. Grenada 2012

The National Democratic Congress won the 2008 general election, securing eleven of fifteen parliamentary seats; Tillman Thomas became prime minister. However, he later faced threats from within the cabinet concerning his leadership ability and the direction of the country¹⁸. His term as prime minister saw two no-confidence motions being tabled against him. He survived the first in May 2012. However, by September 2012, he was facing another motion filed by his cabinet colleague and supported by three other members of the governing party¹⁹. Now commanding the support of only seven members, he recognised that he would not be able to survive this second motion. Thus, Thomas announced on September 10, 2012, that he had advised the governor-general to prorogue parliament. This allowed Thomas to limp on with his minority government until February 2013.

¹⁷ ibid 258

¹⁸ Derek O’Brien, ‘The Principle of Responsible Government in the Commonwealth Caribbean’ (2022) 60(1) *Commonwealth and Comparative Politics* 27; Hamid Ghany, ‘Prorogation, Motions of No Confidence and Political Survival in the Commonwealth Caribbean’ paper presented to the *15th Workshop of Parliamentary Scholars and Parliamentarians 30-31 July 2022*.

¹⁹ O’Brien (n18).

4.1.3. St. Kitts-Nevis 2012-2015

The period from December 2012 to February 2015 was a tumultuous period in St. Kitts-Nevis history and the country experienced various constitutional crises. Although the prime minister did not abuse the prorogation or dissolution prerogative, the same constitutional principles were undermined. Thus, this episode reveals that the principle of responsible government may be flouted in many ways, particularly where the head of state has no reserve powers to intervene. It also highlights how ineffective parliament may be in maintaining responsible government without the aid of the reserve power.

In January 2010, Prime Minister Denzil Douglas was returned to power following the general election. Together with his allied party in Nevis, he commanded seven of the eleven elected parliamentary seats. The parliament is unicameral, and the government is allowed up to three unelected senators while the opposition receives one²⁰.

Around September 2012, Douglas had fallen out with his deputy, Sam Condor and another minister, Timothy Harris. In December 2012, the opposition filed a no-confidence motion against Douglas's administration. In January 2013, Douglas fired Harris from cabinet and Condor subsequently resigned. The two men formed their own political party, joined into a coalition with the other opposition parties called 'Team Unity', and signalled their intention to support the no-confidence motion. At this point, Douglas commanded only five of the eleven elected parliamentary seats. Destined to lose the motion, Douglas delayed its debate for twenty-six months without even proroguing parliament²¹.

²⁰ SKN Const, s26.

²¹ Charles Wilkin, *Breaking the Cycle: Politics, Constitutional Change and Governance in St. Kitts and Nevis* (Ian Randle Publishers 2015).

Despite it being a Westminster constitutional convention that no-confidence motions should be tabled as matters of urgency²², the Speaker of the National Assembly, acting in concert with Douglas, refused to place the motion on the Order Paper²³. Their argument was that since the constitution was express in many areas, the absence of express provisions regarding the timeframe for tabling the motion, suggested that there was no constitutionally mandated timeframe.

On March 1, 2013, six opposition members wrote to Governor-General Edmund Lawrence indicating that they supported the motion and asked him to advise Douglas to immediately have the motion debated or face dismissal. They requested that Lawrence appoint Harris who now commanded majority support in parliament. In other words, they were requesting that Lawrence exercise his reserve powers as head of state to set the constitution back on its proper course in line with responsible government. Lawrence never responded to their letters.

Douglas therefore continued in office unmoved by the parliamentary situation relying on the support of his unelected senators—which gave him a numerical majority to pass legislation for over two years—notwithstanding he lacked the confidence of a majority of elected representatives²⁴. Douglas eventually dissolved parliament after managing to complete his five-year term on January 16, 2015. The motion was never debated or voted on.

The matter also went to court which delivered its judgment on November 7, 2017, four years and seven months after the court was initially moved and two years and nine

²² Mark Hutton (ed), *Erskine May: Parliamentary Practice* (25th edn, LexisNexis Butterworths 2019); Joint Committee on the Fixed-Term Parliaments Act, *Report* (HL 2019-21, 253) [236].

²³ Wilkin (n21).

²⁴ This poses another obstacle to the proper functioning of responsible government but is outside the scope of this thesis.

months after the election of 2015 after which Team Unity had already managed to remove Douglas's administration by way of the ballot box. I analyse this judgment below.

4.1.4. St. Kitts-Nevis 2022

Having been returned to power in the general election of June 5, 2020, the Team Unity coalition had won nine out of eleven elected parliamentary seats, and Timothy Harris remained prime minister. By March 2022, it became clear that there was a rift in the coalition between Harris and his coalition partners. On April 21, 2022, six of the nine elected coalition representatives (representing an elected majority in parliament), wrote to Governor-General S.W. Tapley Seaton declaring that they no longer supported Harris. That being the case, they requested that Seaton dismiss Harris as prime minister, and appoint Shawn Richards in his stead, as he now commanded majority support. The coalition partners wished to replace their head while it was relatively early within the parliamentary term. As shown in chapter two, this is the prototypical situation where the reserve power to refuse a dissolution and/or remove the prime minister could be exercised.

Receiving no communication from Seaton, on April 25, 2022, a no-confidence motion was tabled in parliament. On May 3, 2022, Seaton declared that he had no power to grant their request to dismiss Harris under the provisions of the constitution²⁵. Since the motion was about to be debated in parliament, Harris quickly dismissed the six members from his cabinet and dissolved the parliament on May 10, 2022. Harris did not choose to prorogue parliament, but if he did (which was within his right under the constitution), he

²⁵ Devonne Cornelius, 'Governor-General Denies Request for Prime Minister Removal; Cabinet Ministers Yet to Respond' *WINN Media SKN* (4 May 2022) <<https://www.winnmediaskn.com/governor-general-denies-request-for-prime-minister-removal-cabinet-ministers-yet-to-respond/>> accessed 11 January 2024.

could have gained an additional nine months' time to continue operating his minority government²⁶.

4.2. Untangling the contradictions

Meighoo and Jamadar argue that Caribbean parliaments—using Trinidad-Tobago as a model—are not ‘autonomous, fearless, representative, effective, and responsible institution[s] at the heart of the system of government, as the constitution on paper would have it’²⁷. The crises I have highlighted support this view. However, Meighoo and Jamadar lay most of the blame on the parliament itself and those who compose it. They state:

Parliament has never passed a motion of no-confidence or censure against the prime minister and cabinet, it has never called the prime minister and cabinet to account before it for any matters, serious or otherwise, and it has not (as a body, as opposed to merely the opposition wing of it) ever even symbolically sanctioned or reprimanded the executive²⁸.

Meighoo and Jamadar are correct in their assessment that, in the Caribbean, the wider parliamentary party which lends its support to the prime minister and his cabinet, ergo, who maintains them as the government, plays little to no role in holding the government to account. But they later admit that even where they do try to give backbench scrutiny, the members who opposed are removed when possible or the entire parliament is dissolved by the prime minister to secure a fresh, compliant majority.

Herein lies the true problem which is supported by the cases I have just described. It is not that parliament does not try to hold the government to account, but rather that, under the terms of the constitutions, they simply cannot.

²⁶ Six months prorogation plus additional three months between dissolution and election.

²⁷ Quoted in Meighoo and Jamadar, (n1) xiv.

²⁸ *ibid*

The four crises highlight how difficult it is to hold a prime minister to account when he has unfettered control over the powers of prorogation and dissolution, i.e., where there is no reserve powers²⁹. In both Grenadian cases, the prime ministers had lost majority support of the representatives, including those in their own party. In 1989, Blaize even lost the party leadership and managed to form his own party while continuing as prime minister³⁰. In these circumstances, it is nonsensical that Blaize and Thomas were able to retain the right to advise the head of state let alone secure prorogations. It was parliament's right to express its lack of confidence in them, and to have the consequences of that lack of confidence follow.

By convention, Blaize and Thomas ought to have either resigned, or asked for dissolutions. Given that the former party of Blaize was fragmented by the time of his prorogation request, and that Thomas's former cabinet colleagues had broken ranks, it is doubtful whether there was any alternative government available in either case. Therefore, a dissolution would have been appropriate in both circumstances. Instead, Blaize and Thomas were allowed to lead minority governments for three and six months respectively without any sort of parliamentary intervention. Charles Wilkin believes that 'the vote of "no confidence" is the counter balance created by the constitution to the overwhelming powers given to the prime minister'³¹. But this only holds true if motions make it to a vote rather than being tactically avoided. In a parliamentary system, the purpose of the no-confidence motion is not solely to trigger an election. In some cases, its purpose is to bring down the government with a view to replacing it with another.

²⁹ Furthermore, small Caribbean parliament sizes makes it possible for the entire parliamentary party to be included in cabinet.

³⁰ Scoon (n13).

³¹ Wilkin (n21) 79.

To return to Meighoo and Jamadar then, it is not surprising that no-confidence motions are not routine in the Caribbean, nor is it surprising that government backbenchers—where there are any—are not in the business of holding the government to account since their likelihood of a favourable outcome is slim. Their success seems entirely dependent on the political and constitutional conscience of the prime minister.

If the governor-general was possessed with reserve powers, he could have first warned each prime minister that if they requested an unconstitutional prorogation, he would refuse their requests. This warning would not be hollow since it would be backed by the threat of the reserve powers. This would have likely led to their immediate resignation—which would be the conventional course to take—or if they persisted, to the motion of no-confidence proceeding to a vote. The reserve power would not have been necessary since the threat of its use would be an effective device of persuasion. However, if they still requested prorogation, the governor-general could have then exercised the ultimate sanction and refused the request. This would have led either to resignation or to the no-confidence vote proceeding—their inevitable defeat—and the holding of a general election.

Similarly, in St. Kitts-Nevis, the principle of responsible government was severely undermined since both Douglas and Harris continued in government for extended periods of time notwithstanding their loss of parliamentary support. Twomey writes that where the constitution expressly requires the prime minister to be defeated on a no-confidence motion before his dismissal, this tends to encourage ‘procedural manoeuvring’ to ensure that motions are never brought to a vote³². This is exactly what Douglas did, and he managed to successfully do so for over two years. Nevertheless, the silence of the governor-general,

³² Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018) 288.

and the delayed response of the courts, did not help the situation. Twomey writes on these events that ‘the political system and the courts failed to give effect to the principles of responsible government, allowing an irresponsible government to continue to govern for an unconscionable period of time without democratic recourse’³³.

The reason the situation in St. Kitts-Nevis managed to be prolonged for 26 months is, I hope by now, obvious. With the removal of the reserve power from the constitution, there was no effective sanction mechanism to prevent this situation from occurring or to correct it. Twomey argues that the principle of necessity empowers the governor-general to act in these types of situations. This was done in the Solomon Islands and Tuvalu where the governors-general and courts quickly fashioned remedies to ameliorate the situation despite their prescriptive constitutions³⁴. Nevertheless, where the constitution does not empower the head of state to act, it is a huge risk to do so, and I can sympathise with a head of state who, in these circumstances, chooses to remain on the sidelines while the political actors act against constitutional principle.

The post-hoc attempt made by the court in *Brantley v Martin* to fashion a remedy is commendable, but wrong³⁵. The judgment was rendered when the crisis had already run its course. The court should have then declared the matter academic and left it to parliament to enact legislation to remedy the issue—which it eventually did³⁶.

Instead, the court went about transforming a constitutional convention into justiciable law. The court held that there was an implied right in each elected member of parliament to have a motion of no-confidence heard without undue delay³⁷. I admire the

³³ *ibid* 301.

³⁴ *ibid*; *Hilly v Governor-General of Solomon Islands* [1994] 2 LRC 27.

³⁵ *Brantley v Martin* Claim No. SKBHCV2013/0090.

³⁶ Motion of No Confidence Act 2019 CAP 2.07.

³⁷ *Brantley* (n35) [56].

court's ingenuity, but there is simply no such right. That a no-confidence motion should be heard expeditiously is a classic constitutional convention³⁸. The difficulty faced was how this convention—which was a political rule—would be enforced. Ordinarily, political rules are enforced by political sanctions like the reserve power. As there was no reserve power in St. Kitts-Nevis, the court answered the question by transforming the convention into a constitutional right and enforcing it legally. This is wholly inappropriate. Not all constitutional rules are legal; some are political and ought to be enforced politically. If Douglas was wilfully delaying a no-confidence motion, this suggests he lacks confidence. If he lacks confidence, he ought to resign or request a dissolution. If he does not, the head of state—in this case, Lawrence—should be empowered to remove him from office. The reserve power is the solution to the problem not the invention of a constitutional right. If there is no remedy available, it is not the court's task to create one.

Given that the constitution did not construct any adequate sanction to deal with the crisis—thereby creating a constitutional lacuna—it was only Lawrence who could set the constitution back on its track by dismissing Douglas and appointing a caretaker prime minister to dissolve parliament. If Lawrence chose not to act, he cannot be blamed for the constitution's unfortunate oversight. If he chose to act, he would be doing so pursuant to the principle of necessity. Such a course may have potentially disastrous consequences. But Lawrence would have been justified in trying.

The 2022 St. Kitts-Nevis crisis was troubling for two primary reasons. First, it confirms that it is virtually impossible for a party or coalition to change its leader during a parliamentary term unless the leader agrees. Second, it demonstrates the ineffectiveness of no-confidence motions as a weapon against prime ministerial excess in the Caribbean.

³⁸

Hutton (n22); Joint Committee (n22).

In chapter two, I showed that a head of state is not and ought not to be bound to accept the dissolution request of a prime minister who lacks the confidence of parliament. In rare circumstances, there may be an alternative government available. While this is, in most instances, irrelevant in cases where the two-party system holds, this is more likely where multiple parties are operating. Multiple parties operated in Grenada in the 1980s after the US invasion, they operated in Trinidad-Tobago in the 2010s, and they operate in St. Kitts-Nevis since the 1970s with the rise of indigenous political parties on the island of Nevis. The Caribbean is not immune from such experiences.

A very eminent Caribbean constitutional authority, Lloyd Barnett, wrote (about the Jamaican constitution) that the provisions giving the prime minister an absolute right to dissolve parliament would not come into play under a stable two-party system. To some extent, I agree. This is subject to the situation where the governing party is set on changing its leadership while in office. In Jamaica—without the reserve power—this may only occur if the prime minister bows out gracefully.

However, Barnett goes on to seemingly suggest, and relies on Jennings in doing so, that the prime minister's abuse of the dissolution prerogative in a multi-party system is not a constitutional problem but a political problem:

the resultant political instability would not have been due to defects in the constitutional mechanism but in the breakdown of the political framework in which it was designed to operate³⁹.

It is true that Jennings believed the reserve powers to be dormant, and that this was the case due to the two-party status quo in Britain at the time. However, Jennings stated this after recording the long history of the reserve power and had concluded by saying, '[i]f the major parties break up, the whole balance of the Constitution alters; and then, possibly, *the*

³⁹ Lloyd Barnett, *Constitutional Law of Jamaica* (OUP 1977) 94.

Queen's prerogative becomes important'⁴⁰. Thus, Jennings was not suggesting that the two-party system was the political framework within which the Westminster constitution was designed to operate. Given Britain's electoral history of multi-party politics, he could make no such suggestion⁴¹. Jennings was merely saying that Britain's strong two-party climate, at the time he wrote, suggested that the Queen would likely have no chance to refuse a dissolution request. But should the political climate alter, the constitution was flexible enough to revive the Queen's reserve powers which, in the new circumstances, may become important.

The Westminster system can sustain instances of multi-party politics. The history of the entire Commonwealth reveals this. Admittedly, Jamaica's two-party system has held firm since responsible government was introduced in the state. But this does not mean that it will hold forever. At one point in time, a third party was gaining prominence in Jamaica⁴². And if the situation ever changes, there will be no effective protection against a prime minister seeking to act contrary to constitutional principle.

Following on, St. Kitts-Nevis, which has had a history of multi-party politics will forever be condemned to events like 2013, and especially 2022, where a prime minister is able to wield key executive powers against his own cabinet, parliamentary colleagues, and coalition partners. It will always be challenging for parliament to hold any government to account, since attempting to do so will be to lead itself down a path of self-destruction. It is extremely difficult for the multi-party system to operate when the prime minister will

⁴⁰ Ivor Jennings, *Cabinet Government* (3rd edn, CUP 1969) 427.

⁴¹ See Vernon Bogdanor, *The Coalition and the Constitution* (Hart Publishing 2011); Vernon Bogdanor, *Multi-Party Politics and the Constitution* (CUP 1983). As recently as 2010, Britain had a coalition government.

⁴² Tracy Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet & Maxwell 2021) 106;

always overshadow his own coalition partners, and it will be virtually impossible to remove a coalition leader since he will always have a dissolution in his pocket.

If Seaton had reserve powers, he could have refused Harris's dissolution request since the parliament was relatively new and the coalition partners—holding a numerical majority of elected seats—confirmed their desire to continue in government together under a change of leadership. In other words, there was a stable, alternative government available. Upon being refused, Harris would have likely resigned. Had he not, Seaton would have been empowered to remove him as prime minister and send for Richards.

Conclusion

The lack of reserve powers in most Caribbean states has led to a lack of any effective political sanction being available for serious breaches of constitutional conventions and principles. This is a real problem that is worth forming the subject of constitutional reform. If this is not remedied, parliamentary government will be unable to truly flourish, or perhaps worse, the courts may find it necessary to begin fashioning ill-fitting legal sanctions for breaches of political rules. The problems I have highlighted often arise in situations where a multi-party system is operating—though it is not confined to these instances. The current inapplicability of this phenomenon in most Caribbean states, however, does not make it any less of a concern. We should never wait for a problem to arise before thinking of a solution.

CONCLUSION

This thesis has stressed the importance of the reserve power as a means of enforcing fundamental Westminster constitutional conventions and principles. The core principles of Caribbean constitutions are the democratic principle, the parliamentary principle, the dual-executive principle, and the cabinet principle. Constitutional conventions are political rules that ensure that political actors who wield important executive powers do so in accordance with these core constitutional principles. For these political rules to operate in the manner they were intended to, they must be backed by an effective sanction mechanism which ensures that the obedience of political actors is not simply optional.

Throughout this thesis, I have argued that the reserve power is the political sanction that achieves fidelity to the political rules of the constitution. Not only because the head of state will have the power of last resort to sanction unconstitutional behaviour, but also because political actors understand that the head of state's intervention in contentious political matters should be avoided at all costs.

In justifying the reserve power, I showed that the assertion that the head of state should be a mere constitutional cipher is misplaced. It is incorrect as a matter of historical fact, but more importantly, it is incorrect as a matter of constitutional principle. That a prime minister must approach the head of state and request the use of important executive powers is not a useless constitutional rigmarole. The head of state, as custodian of the executive power, must ensure that the request is constitutional, and where it is not, he must act in the interests of the constitution and ultimately, the people.

Notwithstanding that Caribbean constitutions are codified constitutions, they are documents rooted in history. Caribbean constitution-drafters deliberately maintained the Westminster model of parliamentary government that was introduced in their pre-independence

constitutions. Notwithstanding the codification of constitutional conventions, Caribbean constitutions intended for conventions to remain political rules regulated by political actors—hence the introduction of constitutional ouster clauses. Nonetheless, the constitutional drafters in most Caribbean states failed to recognise, and, in some cases, deliberately undermined the important role of heads of state in upholding constitutional conventions when they stripped them of their reserve powers. By doing this, they constructed a system where the use of key executive powers is unchecked. Heads of state are no longer custodians; instead, they are ciphers. And the once valuable arrangement of separating the possessor from the wielder of executive power is now nothing more than a useless rigmarole.

If there is no check on the powers of prorogation and dissolution, there can be no parliamentary government. If there is no power to remove a prime minister without his consent, there is no cabinet system. A defiant prime minister will not yield to an institution he controls, or gracefully accept defeat when he can drag the rebels down with him.

My inspiration for writing this thesis has been to diagnose the reasons for constitutional crises like that in St. Kitts-Nevis in 2022. The reason is simple: the drafters of Caribbean constitutions removed an important constitutional power—the reserve power—from the constitution. Whatever the reason for doing so may have been (a few were canvassed in chapter three), the result is that there is now a deep-seated constitutional contradiction in these documents. Although Caribbean constitutions express that cabinet is responsible to parliament, in truth, parliament, and even cabinet, is responsible to the prime minister. Both parliament and cabinet live and die according to the caprice of the prime minister. This contradicts all four core principles that Caribbean constitutions are premised on.

To end where I began, then, Governor-General Seaton's decision was right, because Caribbean constitutions are not. They contradict themselves. The reality is that Seaton really had no power under the constitution to remove Harris as prime minister unless Harris willingly

agreed to step aside. But make no mistake, this is an extraordinary admission to make for a parliamentary system.

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