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Comparative account of the evolution of the Prime Minister's role in the United Kingdom and the other Commonwealth Realms: the constitutional relationship with the Head of State

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Introduction

I. Aim of the comparison

Comparing the constitutional systems of countries sharing a common historical, juridical and linguistic heritage may prove to be harder than it seems. This holds particularly true if the comparison's subject matter is the office of Prime Minister, probably the most "elusive" among those lying at the heart of every parliamentary regime, seen against the background of uncodified, largely unwritten, constitutions. A further layer of complexity is added by the peculiar focus of this work, namely the constitutional relationship between the Head of Government and the Head of State. It is indeed indubitable that, being the former able to exercise a wide range of powers in an apparently unrestrained fashion by keeping a firm grip on both the executive and the legislative powers,¹ the latter is called upon to carry out important control duties, often standing as the sole relevant counterweight in the way of a government whose abidance by the "best practices" of a modern constitutional monarchy is questionable. As evidenced by the dismissal of Prime Minister Gough Whitlam in Australia,² this unavoidable "clash" of competences may sometimes lead to intricate crises capable of casting a long shadow on the development of a constitutional order.

The level of instability inherently permeating the topics covered in this comparison increases in direct proportion to the degree of discretion enjoyed by the Head of State in the performance of his/her duties. The choice (and appointment as Prime Minister) of the Member of Parliament who is best able to command a majority in the lower House of the legislature, usually quite straightforward, can become dubious and difficult whenever a general election returns a hung Parliament, i.e. a situation in which no party can rely on a majority of the seats. Similarly, whenever a Head of State deems it necessary to exercise his/her reserve powers, namely to act without or contrary to the advice and consent of the Prime Minister, and proceeds accordingly, assessing whether the decision is constitutionally sound or not can be very difficult.

The fundamental aim of this work is to identify, within the field of the executive power, similarities and differences between the "variations on a theme" which originated from the

¹ As better explained in subparagraph 1.4.1, the British Prime Minister has been described by Quentin Hogg as an "Elected dictator" for the incredible influence he/she exerts on both the legislative and the executive branches of the State.

² See subparagraph 4.2.2 for further information on the subject.

transplant of a specific constitutional model, the Westminster system, into different realities that, in time, have followed distinct evolutionary paths. Many are the variables influencing the way in which each system works: from the typology of Parliament,³ the degree of constitutional rigidity⁴ and the form of State,⁵ to the government's structure,⁶ the role played by the upper House, if any,⁷ and the voting system.⁸ A further variable pertains to the position of the Sovereign. *De jure*, all the Commonwealth Realms have the Monarch as Head of State, but, *de facto*, this is true only for the United Kingdom. Indeed, in the other 15 Realms, the Crown⁹ is represented by a Governor-General,¹⁰ who temporarily exercises all the powers and functions attached to it. An entire chapter of this work¹¹ is devoted to the vice-regal representative, but some preliminary remarks on the topic could be immediately offered. A distinctive feature of the former British Dominions, the office of Governor-General has gradually moved away from its colonial past, adapting to the extraordinary changes caused by the progressive dismantling

³ Bicameral or, as in the case of New Zealand, unicameral.

⁴ Some portions of the Australian and Canadian constitutions are “entrenched”, as they cannot be amended through the ordinary law-making process. The United Kingdom and New Zealand have instead entirely flexible constitutions.

⁵ Federal for Australia and Canada, unitary for the UK and New Zealand.

⁶ In the classic Westminster system, the government is two-tiered: only the highest-ranking Ministers have a sit in Cabinet, the inner-committee where the most important decisions are taken. That being said, the overall structure of the executive is subject to considerable changes in each Commonwealth Realm.

⁷ While the UK and Canada have appointed upper Houses whose roles within the system are very different, Australia has an elective and highly influential Senate modelled on the Senate of the United States and New Zealand does not have an upper House.

⁸ The UK and Canada have maintained the first-past-the-post system, while Australia uses full preferential voting for the House of Representatives and single transferable vote proportional representation for the Senate. New Zealand has adopted the mixed-member proportional representation system in 1993.

⁹ It is important to remember that, by effect of the Balfour declaration (1926) and the Statute of Westminster (1931) the old united Crown has been divided into many different Crowns. Further remarks on the current structure of the Commonwealth can be found later in this introduction.

¹⁰ Please note that different spellings of “Governor-General” are used and accepted in the English-speaking world. For example, the hyphenless version (Governor General) is by far the most common in Canada, while the hyphenated one is used in Australia and New Zealand. Accordingly, in this work, “Governor General” has been preferred to “Governor-General” in all the subparagraphs dealing primarily with Canada. The opposite choice has been made in the parts devoted to Australia and New Zealand. Whenever the expression is used, as in this introduction, within a “neutral” context, its hyphenated version has been adopted.

¹¹ Chapter 3.

of the British Empire. The office's historical roots well explain its awkward, sometimes highly controversial, yet somehow successful position within the constitutional framework of the Commonwealth Realms: as the representative of an absent Monarch, the Governor-General lacks both the prestige of a "Dignified part of the Constitution", to put it in Bagehot's words, and the democratic legitimacy, either direct or indirect, of a President in a republican system. Appointed by the Sovereign on the advice of the Prime Minister and often chosen among former politicians, the Governor-General may face harsh criticism over a crucial decision or be accused of political partisanship, especially as far as reserve powers are concerned. On the other hand, a cautious approach towards the fulfilment of his/her constitutional duties could cost him/her the derogatory label of "rubber stamp". Various relevant episodes reviewed in this work¹² show that Crown representatives tend to behave in a fairly impartial, restrained way, perhaps encouraged, paradoxically, by the will to prove their critics wrong.¹³ Nevertheless, the office of Governor-General is seen, especially in Australia, as an obstacle to remove by those who advocate the transition from monarchy to republic, and has undergone a failed reform process in Canada.¹⁴

Prime Ministers and Heads of State play a leading role in this comparison. However, it would be wrong not to stress, in this introductory overview, the importance of Parliament, whose strong influence on the executive power is constantly scrutinised and finds due recognition in every chapter. A Prime Minister's mandate is invariably tied to parliamentary cycles, as the confidence of the lower House¹⁵ is the "fuel" each Cabinet needs to carry out its activities. Moreover, Royal Prerogative powers¹⁶ can only be limited, regulated and repealed by statutory law, which enjoys absolute pre-eminence over any other source of executive power in accordance with the principle of parliamentary sovereignty. The problems posed, in various

¹² Among others, Lieutenant Governor Judith Guichon's recent refusal to prematurely dissolve British Columbia's legislature on Premier Christy Clark's advice. See subparagraph 3.1.2.

¹³ An emblematic case is that of Keith Holyoake, Governor-General of New Zealand between 1977 and 1980. See subparagraph 3.1.4.

¹⁴ In 2012, Canadian Prime Minister Stephen Harper created the "Advisory Committee on Vice-Regal Appointments", entrusted with the task of carrying out a preliminary selection process for the positions of Governor General and Lieutenant Governor. See subparagraph 3.1.2.

¹⁵ The Westminster system is characterised by the principle of government's accountability to the lower House of Parliament. In subparagraph 4.2.2, a distinction between accountability and responsibility to Parliament within the framework of the Australian system will be drawn.

¹⁶ See paragraph 1.2 for a detailed analysis of the Royal Prerogative.

areas,¹⁷ by the concept of Royal Prerogative, “a relic of a past age”, as it has been aptly defined by Lord Reid in *Burmah Oil Co v Lord Advocate*,¹⁸ have been extensively addressed with a view to provide an up-to-date account of the courts’ case-law on the matter. Under this point of view, the “inherent power” doctrine developed by the Australian High Court¹⁹ stands out for its far-reaching impact on the traditional *summa divisio* between statutory and non-statutory executive powers.

II. The concept of “Commonwealth Realm” and the choice of Australia, Canada and New Zealand

The slow dissolution of the British Empire²⁰ has led to the establishment of the Commonwealth of Nations,²¹ an international organisation whose member states have a colonial past under British rule in common. The modern Commonwealth comprises republics,²² monarchies which do not share the same person (currently Queen Elizabeth II) as their Head of State²³ and monarchies which do. The States of the last group,²⁴ perfectly sovereign and independent, are called “Commonwealth Realms”. There is no complete agreement among scholars on the exact juridical qualification of the Commonwealth Realms’ status. The most

¹⁷ Among others, the management of the Civil Service (subparagraph 1.4.4 and paragraph 4.4), the treaty-making process and the exercise of war powers (subparagraph 1.4.5 and paragraph 5.5).

¹⁸ *Burmah Oil Co v Lord Advocate* [1965] AC 75, at p. 101

¹⁹ See subparagraph 4.1.2 for further information.

²⁰ The process, as better explained in other parts of this work, started in the 19th century, when many Crown Colonies were granted responsible government. Among them, Nova Scotia was the first to reach the milestone (January-February 1848). It was soon followed by New Brunswick and the United Province of Canada, while Australasian colonies had to wait until the 1850s. The 1907 Colonial Conference introduced the concept of Dominion as self-governing colony within the Empire. Later, the Balfour declaration (1926) and the Statute of Westminster (1931) paved the way to the Dominions’ complete and definitive independence. Many formal links to the former motherland were anyway severed years or even decades after the approval of the Statute of Westminster. For example, Canada “patriated” its Constitution in 1982 and New Zealand abolished appeals to the Judicial Committee of the British Privy Council only in 2003. It should be noted that not every Crown Colony of the Empire reached Dominion status, as many territories remained subject to direct British rule until independence or transfer to another State. Notable examples are Hong Kong, which became part of the Popular Republic of China in 1997 and Cyprus, which became independent in 1960.

²¹ The Commonwealth of Nations was created in 1931 as the “British Commonwealth”. The name change occurred in 1949.

²² For instance, India and Pakistan.

²³ For example, Brunei and Malaysia.

²⁴ 16 in number.

convincing theory describes them as distinct polities brought together under a *personal union*, with Queen Elizabeth II simultaneously wearing 16 different Crowns, one for each Realm.²⁵ Extremely common in the Middle Ages and in the early-modern era,²⁶ personal unions have become infrequent due to the abolition of many monarchies over the last centuries. In a personal union, each State maintains its distinct law system, boundaries, international legal personality, constitutional organs but shares the person of the Sovereign with all the others. A *real union* differs from a personal union in that it entails the “fusion” of the constituent States’ organs and institutions.²⁷

The constitutional systems of the United Kingdom, Australia, Canada and New Zealand are examined and compared in this work. While the choice of the United Kingdom is obvious and self-explanatory, the others may require a justification. First of all, United Kingdom set aside, Australia, Canada and New Zealand are perhaps the most influential Commonwealth Realms, both politically and economically, as they are members of the most important international organisations and are characterised by a high human development index. But the main reason behind the choice is of an historical nature. The three aforementioned States, or, in the case of Canada and Australia, the federal sub-units of the aforementioned States, were among the first Crown Colonies to gain responsible government²⁸ and, in their centuries-long constitutional experience, have had the opportunity to develop extremely peculiar features which are worth analysing. That said, occasional references to the other Commonwealth Realms or to former Commonwealth Realms can be found in the work.²⁹

III. Structure of the comparison

The first chapter is exclusively devoted to the United Kingdom, the birthplace of the Westminster system. A brief historical overview is followed by an analysis of the fundamental mechanics underlying the exercise of the executive power, namely the Royal Prerogative, the “responsible government” and the “Queen in Council” principles. Paragraphs 2.3 and 2.4 focus

²⁵ In alphabetical order: Antigua and Barbuda, Australia, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Solomon Islands, Tuvalu and the United Kingdom.

²⁶ For example, England has been in personal union with Scotland until 1707, when the Act of Union was approved by both the English and the Scottish Parliaments.

²⁷ An example of real union is Austria-Hungary in the period 1867-1918.

²⁸ Nova Scotia, currently a Canadian Province, was the first colony of the Empire to get responsible government in 1848.

²⁹ See subparagraph 2.2.3.

respectively on the “dynamic” and “static” dimensions of the Prime Minister’s office. In a dichotomy borrowed from physics, the expression “dynamic dimension” is used to describe all those constitutionally relevant events which lead, or are potentially able to lead, to the birth or the demise of a Cabinet, while all the aspects concerning the powers wielded by the Prime Minister during his/her tenure are described as pertaining to the “static dimension”. In chapters 2, 4 and 5 the same structure is applied to Canada, Australia and New Zealand. Chapter 3 is instead unique to the former British Dominions and has no equivalent in chapter 1, as it deals with the office of Governor-General, the representative of the Crown who acts as a *de facto* Head of State. Final remarks can be found in the last chapter, the sixth.

Particular attention has been paid to the constitutional crises that, in time, have shaped the relationship between the Prime Minister and the Head of State in each country, in the belief that comparing uncodified constitutions requires not only a careful assessment of the rules governing each system, but also a thorough examination of the way in which such rules are “actively” interpreted by the main constitutional actors. Among others, the following crises have been exhaustively covered: the “*King-Byng affair*”, one of the few cases of reserve powers’ exercise in Canada,³⁰ the dismissal of Australian Prime Minister Gough Whitlam by Governor-General Sir John Kerr in 1975,³¹ New Zealand Prime Minister Robert Muldoon’s attempt to appoint a member of his Cabinet as vice-regal representative.³²

³⁰ See subparagraph 5.3.1.

³¹ See subparagraph 4.2.2.

³² See subparagraph 3.1.4.

Chapter 1

Prime Minister and Sovereign in the United Kingdom

1.1 Origins and historical development of the Prime Minister office in the United Kingdom

1.1.1 Overview

Despite having reached the last stage of its development as early as the 18th century, the office of Prime Minister gained formal recognition only in 1917, when the Chequers Estate Act¹ mentioned it for the first time. The product of constitutional customs and conventions behind whose birth a series of historical contingencies, more than the will of men, is concealed, it slowly but relentlessly evolved from the medieval position of Lord High Treasurer, filling what may be described as a “*constitutional vacuum*” after the Glorious Revolution (1688) and eventually becoming the cornerstone of the executive power in the United Kingdom. Since the Prime Minister’s office, as many other pillars of the British constitution, was not created *ex nihilo*, it would be impossible to properly understand the powers and functions attached to it without looking back at its long history. To this end, it could be useful to conventionally identify,² starting from the 17th century, four major periods: the “*post-revolutionary phase*” (1689-1720), the “*stabilisation phase*” (1721-1832) the “*classic phase*” (1833-1910) and the “*contemporary phase*” (1911-). Each of the subsequent subparagraphs will be devoted to a brief description of one of the aforementioned periods.

One preliminary remark dealing with historical events which precede the Glorious Revolution should anyway be made. After the Norman conquest (1066), the English court was modelled on the Duchy of Normandy’s court. The so-called “lesser” *Curia Regis*,³ as introduced by William the Conqueror, would become, in time, the modern *Privy Council*. Within the lesser *Curia Regis*, officers⁴ like the Lord High Steward and the Lord High Chamberlain played a key

¹ Chequers Estate Act 1917 c. 55.

² Please note that the proposed periodization does not purport to be exhaustive or extremely accurate, as it has been conceived with juridical, more than historical, concerns in mind.

³ There were two kinds of *Curia Regis*: the great *Curia Regis* (*magnum concilium*), comprising tenants-in-chief and ecclesiastics, which was summoned on extraordinary occasions by the Sovereign, and the permanent “lesser” *Curia Regis*, whose members were the court’s officers. The two councils gradually evolved, respectively, into the Parliament and the Privy Council.

⁴ Initially, court’s officers carried over both household and governmental duties, but, in time, distinct figures with different, specific tasks, emerged.

role. In time, probably during the reign of Henry I,⁵ financial competences were stripped from the Chamberlain and assigned to a new officer, the Lord High Treasurer.

1.1.2 The post-revolutionary phase (1689-1720) and the emergence of new "constitutional needs"

In 1660, after the period known as *interregnum*,⁶ Charles II restored monarchy in England. However, his brother James II, who had converted to Catholicism during his exile in France, failed in gaining the trust of the largely Protestant political *élite* and, once ascended to the throne, adopted a tolerant religious policy⁷ which was met with scepticism. He also enlarged his standing army and indefinitely prorogued Parliament in 1685. When, in 1688, William of Orange,⁸ invited by seven Protestant nobles, invaded England, James II fled the country. He was therefore deposed⁹ by the reconvened Parliament and replaced by Mary (his protestant daughter) and William as joint Monarchs. Such events are commonly referred to as the Glorious Revolution. The post-revolutionary period was characterised by the approval of a series of statutes which strongly limited the Sovereign's powers, laying the foundations of the modern constitutional monarchy: among others, the Bill of Rights 1689,¹⁰ the Triennial Bill 1694,¹¹ the Treason Act 1695¹² and the Act of Settlement 1701.¹³ Analysing in detail each of the aforementioned statutes, collectively defined as the "Revolutionary settlement", would be outside the scope of this work. It is anyway important to note that, by effect of them, the balance of power definitely and irreversibly shifted from the Sovereign to Parliament. This transformation set the stage for the emergence of the Prime Minister's office, which was essentially a spontaneous answer to the problems posed by the new constitutional arrangements. The Sovereign, who was still actively involved in the exercise of the executive power, could

⁵ The traditional birth date of the Treasurer's office is 1126.

⁶ Between 1649, when Charles I was executed, and 1660, the year that marked the beginning of the Restoration, England experienced various forms of republican government under Oliver Cromwell.

⁷ In 1687, with the *Declaration of Indulgence*, James II tried to suspend penal laws imposing conformity to the Church of England, favouring Catholics and Protestant dissenters.

⁸ William of Orange, a Protestant, was the *stadtholder* of Holland, Zeeland, Utrecht, Gelderland and Overijssel in the Dutch Republic. He was both James II's nephew and son-in-law.

⁹ Actually, the Parliament declared that James II had abdicated the throne.

¹⁰ Bill of Rights 1689, 1 Will. & Mar. Sess. 2 c. 2.

¹¹ Triennial Bill 1694, 6 & 7 Will. & Mar. c. 2.

¹² Treason Act 1695, 7 & 8 Will. III c. 3.

¹³ Act of Settlement 1701, 12 & 13 Will. III c. 2.

not ignore Parliament anymore, but, finding it difficult to command a majority in the House of Commons, had to rely on someone who could serve as a liaison between him/her and the MPs. Among the Monarch's officers, the Lord High Treasurer, who was in charge of the Kingdom's financial management, was in the best position to act as the Crown's foothold in Parliament. In the years immediately following the Revolution, the Treasurer, together with other officials like the Lord of the Exchequer, started to regularly attend the Commons' sessions and gained a reserved seat to the Speaker's right, where Cabinet members still sit today. The Crown officials' position was further strengthened by the approval, in 1713, of the Standing Order 66, which granted the government the exclusive right of initiative in the field of budgetary and money appropriating bills. After more than three centuries, the provision is still in force¹⁴ and has become one of the main features of the Westminster system.

1714 was another crucial year for the office's development, as Queen Anne's death allowed the Hanoverians to inherit the throne of Great Britain. The first Hanoverian King, George I, born and raised in the German Electorate of Hanover, was not fluent in English and, consequently, became heavily dependent on his Treasurer. Knowing that the difficulties he was experiencing could lead to a further loss of power on the part of the Sovereign, he tried to curb the Lord High Treasurer's increasing prestige by transferring the powers attached to the office to a Commission. Since then, the Treasury has been managed by the so-called *Lord Commissioners of the Treasury*. Among them, the *First Lord of the Treasury* gradually became the modern Prime Minister. It is important to stress that the only official position held by the Prime Minister is still that of First Lord of the Treasury. For example, 10 Downing Street is the First Lord of the Treasury's, not the Prime Minister's, official residence.

1.1.3 The stabilisation phase (1721-1832)

1721 has been chosen as the starting year of the second development stage because it saw the beginning of Sir Robert Walpole's tenure as First Lord of the Treasury. Walpole is almost universally considered the first modern Prime Minister of Great Britain. This could seem surprising, as he was still, on paper, accountable to the King. Actually, Walpole's importance lies more in the precedents he set than in his constitutional relationship he established with the Sovereign, which, at least initially, differed little from that of his predecessors. Walpole was

¹⁴ The provision can currently be found in the Standing Order no. 48: "This House will receive no petition for any sum relating to public service or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund or the National Loans Fund or out of money to be provided by Parliament, or for releasing or compounding any sum of money owing to the Crown, unless recommended from the Crown".

the first to understand that parties would dominate British politics in the future and that Cabinet cohesion was crucial to the successful management of a majority in the House of Commons, which he believed would soon overshadow the House of Lords. Consequently, he took control of the Whig faction and requested total support for his policy to all the Cabinet's members, *de facto* introducing the concept of “*collective ministerial responsibility*”.¹⁵ Constitutionally speaking, his enduring legacy is probably tied to the last act he performed as Prime Minister: indeed, in 1741, though still enjoying the confidence of the Sovereign, he decided to resign from his positions¹⁶ following a vote of confidence he had narrowly won by a margin of three votes.¹⁷ By doing so, he indirectly made it clear that a Prime Minister could remain in office only as long as he/she enjoyed the confidence of the House of Commons, becoming one of the fathers of the “*Responsible government*” principle.¹⁸

Anyway, Walpole's conquests were not definitive, as the balance of powers between the Prime Minister and the Sovereign remained subject to frequent adjustments for the entire 18th century: depending on the prestige and the ability of those who, at a given time, held the positions of Prime Minister and Sovereign, progresses could give way to setbacks and vice versa. The definitive “stabilisation” of the Prime Minister's office occurred only in the early 1830s¹⁹ and was strongly favoured by the approval of the Reform Act²⁰ in 1832. The Reform Act extended the voting franchise, reinforcing the position of the House of Commons within the system, and rationalised the electoral constituencies, whose borders were still, in many cases, those drafted in the Middle Ages.²¹

¹⁵ For more information, see subparagraph 1.4.3.

¹⁶ Walpole held, simultaneously, the positions of First Lord of the Treasury and Chancellor of the Exchequer.

¹⁷ Richard Lawrence Leonard, *Eighteenth Century British Premiers: Walpole to the Younger Pitt* (Basingstoke: Palgrave Macmillan, 2008), page 27.

¹⁸ See subparagraph 1.2.5 for further information.

¹⁹ Interestingly, Prime Ministers used to deny their increasingly evident role of government leaders. Such ambivalent attitude towards the office was still common in the first half of the 19th century.

²⁰ Reform Act 1832, 2 & 3 Will. IV, c. 45.

²¹ The Reform Act 1832 is famous for having abolished the so-called “rotten boroughs” or “pocket boroughs”, namely those old constituencies whose electorate was so small that it could be easily exploited by powerful landlords to get a seat (or more) in the House of Commons. The most notable example of “rotten borough” was the constituency of Old Sarum. Once a town of considerable size (in the 12th century), Old Sarum was progressively abandoned, becoming almost uninhabited. Yet, in 1831, its constituency, which comprised no more than eleven voters, still elected two MPs. Old Sarum was used as a “pocket borough” by the Pitt family until 1802.

1.1.4 The classic phase (1833-1910)

By the end of the 1830s, the fundamental traits of the Westminster system were already defined. Soon, they would be exhaustively described by Walter Bagehot in his 1867 masterpiece “The English Constitution”. The office of Prime Minister reached and maintained its traditional configuration²² within a time frame that roughly corresponds to the British Empire’s acme, which is usually identified with the reign of Queen Victoria (1837-1901). During this period, King William IV dismissed Prime Minister William Lamb (1834) and unsuccessfully tried to form a government against the parliamentary majority in the House of Commons;²³ two statutes, the Representation of the People Acts 1867²⁴ and 1884,²⁵ further increased the total number of voters; many Crown colonies gained “responsible government”, borrowing from the motherland the entire set of customs and conventions upon which the office of Prime Minister had been built; men like the Marquess of Salisbury, William Gladstone and Benjamin Disraeli became the perfect prototype of the British Prime Minister. Throughout the “classic phase”, the Prime Minister was still seen as a *primus inter pares*, but this perception would radically change in the 20th century.

1.1.5 The contemporary phase (1911-)

In 1911 the first Parliament Act²⁶ was approved. By effect of it, the Lords lost their veto power on money and financial bills²⁷ and had their absolute veto on public bills replaced by a suspensory veto by effect of which they could delay the passing of legislation for two years. The supremacy of the lower House over the upper House was finally sanctioned, some years later, by the second Parliament Act,²⁸ which reduced the suspension period of vetoed public bills to one year. The effects of the aforementioned statutes, coupled with further suffrage extension²⁹ and the advent of mass politics, transformed the Prime Minister’s office, granting it further democratic legitimacy. The collegial nature of the Cabinet, which, in the classic era,

²² Hence the label “classic phase”.

²³ No other British Monarch has ever tried to do the same from then on.

²⁴ Representation of the People Act 1867, 30 & 31 Vict. c. 102.

²⁵ Representation of the People Act 1884, 48 & 49 Vict. c. 3.

²⁶ Parliament Act 1911, 1 & 2 Geo. V c. 13.

²⁷ The Lords could now delay the adoption of money bills for one month.

²⁸ Parliament Act 1949, 12, 13 & 14 Geo. VI c. 103.

²⁹ The Representation of the People Acts 1918 (8 Geo. V. c. 64) and 1928 (18 & 19 Geo. V c. 12) transformed the UK into a proper democracy by introducing women suffrage and removing property ownership requirements for voters.

had never been called into question, was progressively weakened by the increasing need to streamline the decision-making process during the first and the second world wars. As a result, Prime Ministers started to be perceived as the undisputed leaders of the government and their political weight grew enormously. The 20th century was indeed dominated by resolute and extremely popular Prime Ministers like Winston Churchill, Margaret Thatcher and Tony Blair, who strongly benefited from an unprecedented media exposure and the enormous growth of the welfare state.³⁰ Paradoxically, the progressive weakening of the two-party system³¹ started in the last decade of the 20th century and the increasing likelihood of coalition governments' formation seem to foreshadow a return to the traditional concept of "Cabinet government". More than in the past, the British Prime Minister is required to wisely employ his/her diplomatic skills with a view to strike a balance between the different political views emerging in a multi-party Cabinet.

1.2 The fundamental mechanics of the British constitutional monarchy

1.2.1 The Royal Prerogative

In order to properly understand how executive power is exercised in the United Kingdom and the Commonwealth Realms, it is absolutely crucial to define and deeply scrutinize the concept of "Royal Prerogative". The peculiar development process of the British constitutional order, a process that stands out for its complexity and the absence of relevant hiatuses, has led to a situation in which the modern institutions of a democratic constitutional monarchy co-exist with "*relics of a past age*".³² The Royal Prerogative is certainly one of such relics, being essentially a set of powers whose exercise continues to be vested in the Crown, even though nominally, as it was in the Middle Ages. Substantially speaking, Prerogative powers lie today in the hands of the Prime Minister (and the other Cabinet Ministers) and, despite having been severely reduced and limited by statutory law, they remain powerful instruments of government which afford the Cabinet a broad degree of discretion and a certain freedom of action in various areas. This is the reason why they are usually perceived as conflicting with important principles like the rule of law, accountability to Parliament or transparency of governmental action. In the following subparagraphs, the prerogative will be analysed. Attention will be paid to the

³⁰ Since 1968, Prime Ministers are also Ministers for the Civil Service.

³¹ See subparagraph 1.3.2 for further information.

³² In *Burmah Oil Co v Lord Advocate* [1965] AC 75, at p. 101, Lord Reid defined the Prerogative as: "A relic of a past age, not lost by disuse, but only available for a case not covered by statute".

principle of Parliamentary supremacy, which can indubitably be considered as the linchpin of the British constitutional system.

First, all the relevant sources of information on the subject will be gathered and compared. Then, an all-encompassing definition of “Royal Prerogative” will be proposed.

1.2.2 The concept of “Royal Prerogative” in legal scholarship

In his “Commentaries on the Laws of England” William Blackstone makes some interesting comments about the etymology of the word “Prerogative”:

“By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity. It signifies, in its etymology (from “prae” et “rogo”) something that is required or demanded before, or in preference to, all others. And hence it follows, *that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects*”.³³

Blackstone emphasises the “exclusive” character of the Prerogative: if a certain power of the Sovereign can be freely exercised by his/her subjects too, that power does not fall within the Royal Prerogative area. Adopting Blackstone’s definition, for example, the power of the Crown to stipulate mutual obligations with private parties, independently on its source, cannot be considered a Prerogative power, as every citizen is, in principle, capable of entering into contracts.

In the XIX century, justifying the existence and enduring importance of the Prerogative powers in the light of the rule of law theory was one of the main concerns felt by legal scholars. Therefore, in their analyses, they often focused on the relationship between Prerogative powers and the principle of Parliamentary supremacy.

For example, Albert Venn Dicey defines the Royal prerogative as follows:

“the remaining portion of the Crown’s original authority, and it is therefore [...] the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers. Every act which the executive

³³ William Blackstone, *Commentaries on the Laws of England Book I: of the rights of persons*, eds. Wilfrid Prest, David Lemmings (Oxford: Oxford University Press, 2016), page 155 (emphasis added).

*government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative”.*³⁴

Dicey saw the Royal Prerogative as a “residual” source of executive authority. According to him, all the Monarch’s powers whose legal basis cannot be found in statutes are Prerogative powers. This basic assumption enjoyed great success and laid the foundations for many subsequent developments.

Halsbury’s Laws of England describes the Prerogative as “That special pre-eminence which the Monarch has over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and includes all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England”.³⁵

In 1985 the famous (and until then fairly uncontested) Diceyan definition was harshly criticised by Sir William Wade, who thought that, by describing Prerogative powers as residual, Dicey had paved the way to the creation of “spurious prerogatives”.³⁶ Wade also developed a two-pronged test aimed at assessing whether a certain power can be considered a Prerogative power or not.

Wade’s test requires a Prerogative power: a) to “produce a legal effect at common law” and b) to be “unique to the Crown and not shared with other persons”.³⁷

The first requirement has been explained by Wade as follows: “The Prerogative consists of legal power, that is to say the power to alter people’s rights, duties and status under the law of this country”.³⁸ The second requirement is clearly reminiscent of Blackstone’s definition. Wade seems to aim at restricting the Prerogative as much as possible by means of a very strict test.

Recently, Peter Leyland and Gordon Anthony have focused on the Prerogative’s limits and constraints: “There are two important constraints on the prerogative. The first is that provided by Parliament, which can hold ministers to account for decisions that they take on the basis of the prerogative through, for instance, parliamentary questions and/or the workings of parliamentary committees. Parliament can alternatively enact legislation [...]. This has the

³⁴ Albert Venn Dicey, *An introduction to the study of the Law of the Constitution*, 10th edition (London: Macmillan, 1959), page 425 (emphasis added).

³⁵ Halsbury’s Laws of England (4th edition), volume 8 (2), paragraph 367.

³⁶ Henry William Rawson Wade, *Procedure and Prerogative in Public Law*, “The Law Quarterly Review”, Volume 101, 1985, page 198.

³⁷ Ibidem.

³⁸ Henry William Rawson Wade, *Constitutional Fundamentals*, revised edition (London: Stevens and Sons, 1989), page 58.

effect of extinguishing prerogative powers insofar as they overlap with the area governed by statute, something that corresponds with the understanding that the Westminster Parliament is legally sovereign. The other constraint is that imposed by the courts through judicial review”.³⁹

The issue of Parliamentary control is crucial. As specified above, Prerogative powers threaten Government’s full accountability to Parliament. Parliament usually reacts either by making use of enquiry instruments like questions or by putting Prerogative powers on statutory footing. The two main “constraints on the Prerogative” (statutory law and judicial review) have been the subjects of important decisions issued by British courts.

1.2.3 Relevant case-law about the Royal Prerogative

Courts’ decisions have deeply influenced the concept of Royal Prerogative. We can recognise three groups of cases: those dealing with the relationship between Prerogative powers and statutory law, those focusing on the limits of Prerogative powers’ judicial review and those about the way in which the Government should exercise Prerogative powers.

An analysis of the first group could start from the *Case of Proclamations* (1610), which marked the end of the Monarch’s power to lay down legal provisions by means of the Prerogative⁴⁰, overriding statutory law:

“*the King cannot change any part of the common law, nor create any offence, by his proclamation, which was not an offence before, without parliament*”.⁴¹

The principle is stated again in other parts of the judgement:

“*the King hath no prerogative, but that which the law of the land allows him*”.⁴²

The importance of such decision is invaluable. The King’s Bench, chaired by Lord Edward Coke, not only made clear that Prerogative powers could be subjected to judicial review, but introduced a principle that was later reinforced and implemented by statutes bearing constitutional value like the Bill of Rights of 1689.⁴³ The actual implications of the Case of Proclamations were clarified in the following centuries by many other decisions.

³⁹ Peter Leyland, Gordon Anthony, *Administrative law*, 7th edition (Oxford: Oxford University Press, 2013), page 85.

⁴⁰ British Monarchs believed they could lay down law provisions by issuing Royal Proclamations under the Prerogative, without Parliamentary consent.

⁴¹ Case of Proclamations [1610] EWHC KB J2 (emphasis added).

⁴² Ibidem (emphasis added).

⁴³ Many provisions of the Bill of Rights aim at curtailing the Royal Prerogative in the field of legislative power, thus reinforcing Parliament’s authority. An example: "Levying money for or to the use of the Crown by pretence

The House of Lords, in *Attorney-General v De Keyser's Royal Hotel Ltd*, sheds light on the consequences of putting a power previously exercised under the Prerogative on statutory footing:

“the constitutional principle is that *when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament*”.⁴⁴

The case dealt with the seizure of an hotel for war use in 1916. The Government believed not to owe any compensation to the rightful owners of the hotel, given the fact that it had exercised a Prerogative power. The House of Lords argued, however, that the seizure of land for war purposes was regulated by the Defence Acts 1842-1873, which required the payment of compensation, and that statutory law had therefore erased the Prerogative power used by the Government.

In *Laker Airways Ltd v Department of Trade*⁴⁵ the Queen’s Bench held that, whenever a certain objective can be achieved both by making use of the Prerogative and by following procedures laid down by statutory law, the Government should always choose the latter path. Private operators wishing to fly air routes from the United Kingdom to the USA could get a proper licence issued by the Civil Aviation Authority only after having been specifically “designated” by the Secretary of State of the United Kingdom. The power of designation was exercised by the Government under the Prerogative. At first, Laker Airways obtained the designation, but later the Secretary of State decided to withdraw it for changed market conditions. The Civil Aviation Act 1971⁴⁶ had introduced statutory-based instruments aimed at dealing with problems like changing market conditions, thus allowing the Government to stop Laker Airways operations without making use of a Prerogative power whose existence was anyway confirmed by the court. The withdrawal of the designation by the Secretary of State had therefore to be considered an unlawful and “unnecessary” use of the Prerogative.

of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal”.

⁴⁴ *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, [1920] UKHL 1 (emphasis added).

⁴⁵ *Laker Airways Ltd v Department of Trade* [1977] QB 643.

⁴⁶ Civil Aviation Act 1971, c. 75.

Recently, the Supreme Court of the United Kingdom has proposed a definition of Royal Prerogative. In *R (Miller) v Secretary of State for Exiting the European Union*, the Prerogative is described as:

“The residue of powers which remain vested in the Crown, and they are exercisable by ministers, *provided that the exercise is consistent with Parliamentary legislation*”.⁴⁷

The Court shows deference to Dicey’s classical definition by quoting it almost literally. It also puts great emphasis on the principle of Parliamentary supremacy: the Government’s decision to activate article 50 TEU without explicit Parliamentary approval is considered unlawful. Prerogative powers traditionally exercised by the Cabinet in the field of public international law, for example the power to sign and terminate treaties, are rendered ineffective by the mere fact that the European Communities Act 1972,⁴⁸ the statute which marked UK’s accession to the EU, has made EU law an integral part of British domestic law. Indeed, statutory law provisions cannot be altered or set aside by Prerogative powers. The fact that the Case of Royal Proclamations has been mentioned by the Court in this judgement does not surprise us, as similarities between the two situations are undeniable, despite the enormous time-span (more than 400 years) that separates them.

It follows from what has been said until now that Prerogative powers cannot override provisions included in an Act of Parliament. Statutory law enjoys absolute pre-eminence over Royal Prerogative and, should a conflict arise between the former and the latter, the former would always prevail. In the same way, while an Act of Parliament could potentially abolish or reform a Prerogative power, a Prerogative power could not be used in order to change statutory law.

It is now time to look at the problem of judicial review. It is widely accepted (since at least 1610, as we have seen above) that the courts have the final say when it comes to establishing the existence of a certain prerogative power, as the Ministry of Justice of the United Kingdom points out:

“the scope of the Royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, *making the courts the final arbiter of whether or not a particular type of prerogative power exists*”.⁴⁹

⁴⁷ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, paragraph 47.

⁴⁸ European Communities Act 1972, c. 68.

⁴⁹ United Kingdom, Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report*, 2009, paragraph 26.

Since *Council of Civil Service Unions v Minister for the Civil Service*⁵⁰, a 1984 House of Lords case, the power of the courts to review *how* a prerogative power is exercised is also uncontested.⁵¹

In *R (on the application of Bancoult) v Sec of State for Foreign & Commonwealth Affairs (No 2)*⁵² the House of Lords held that Prerogative Orders in Council are subject to judicial review. The case dealt with two Orders in Council issued by the Government under the Prerogative. Such Orders made Chagossians' return to Chagos Islands impossible.⁵³

We finally get the chance to examine the third group of cases. In this area, the courts' main concern is to avoid the unlawful broadening of Prerogative powers. The leading case is probably *British Broadcasting Company v Johns (HM Inspector of Taxes)*.⁵⁴ BBC believed to be exempt from income tax, being the beneficiary of an alleged monopoly of broadcasting established under the Royal Prerogative. We should remember that Crown monopolies can benefit from Crown immunity and, as a consequence, they are not liable to pay income taxes. The Court of Appeal denied the existence of a Prerogative-based monopoly on broadcasting and held that creating one would be an unlawful extension of existing Prerogative powers. Thus, BBC was not entitled to any fiscal exemption. *Prerogative powers can be limited, but cannot be broadened. It is also impossible to create new prerogative powers.* The comment made by Lord Justice Kenneth Diplock has become famous: "It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative".⁵⁵

1.2.4 Definition of Royal Prerogative and classification of Prerogative powers

The "Royal Prerogative" could, on the basis of the information collected, be defined as follows:

the Royal Prerogative is the remaining portion of the Crown's original authority, comprising that particular set of powers which are unique to the Queen and exercisable either by her on the advice of her ministers or directly by her ministers on her behalf, in compliance with

⁵⁰ Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 6.

⁵¹ Gail Bartlett, Michael Everett, *The Royal Prerogative*, (London: House of Commons Library, 2017), paragraph 1.4.

⁵² R (on the application of Bancoult) v Sec of State for Foreign & Commonwealth Affairs (No 2) [2008] UKHL 61.

⁵³ Chagos Islands belong to the British Indian Ocean Territory, which is a British Overseas Territory. Prerogative Orders in Council are commonly used in BOTs as instruments of government and for legislative purposes.

⁵⁴ British Broadcasting Company v Johns (HM Inspector of Taxes) [1964] EWCA Civ 2.

⁵⁵ Ibidem.

Parliamentary legislation to which they are always subject. Courts should be able to recognise a power as belonging to the Prerogative and to review the way in which it is exercised.

It would be impossible to make a complete list of all the powers falling within the Royal Prerogative area due to their customary nature. Except for the most important ones, they often turn out to be vestiges of a lost era which bears little resemblance to present-day world. Nevertheless, the collective effort of legal scholars and the Government of the United Kingdom has made it possible to recognise many Prerogative powers and to classify them into general categories. Bradley, Ewing and Knight have proposed an eight-categories classification based on the thematic area to which each power belongs.⁵⁶ In 2004 The Public Administration Select Committee of the House of Commons published a report called “Taming the Prerogative: Strengthening Ministerial Accountability to Parliament”.⁵⁷ The report expressed concern about the lack of complete parliamentary control over ministers’ actions when they are covered by the Royal Prerogative. This report is of particular interest to us, because it reviews Prerogative powers in their capacity as instruments of day-to-day government with a view to limiting them. The classification conceived by the committee identifies three categories of Prerogative powers:

1) *The Queen’s constitutional prerogatives*, defined as “The personal discretionary powers which remain in the Sovereign’s hands”.⁵⁸ The powers included in this first category are: “The rights to advise, encourage and warn Ministers in private; *to appoint the Prime Minister and other Ministers; to assent to legislation; to prorogue or to dissolve Parliament; and (in grave constitutional crisis) to act contrary to or without Ministerial advice*”.⁵⁹ The Committee underlines that “*The Queen, as a constitutional monarch, accepts Ministerial advice about the use of these powers if it is available*, whether she personally agrees with that advice or not. That constitutional position ensures that Ministers take responsibility for the use of the powers”.⁶⁰ It should be noted that, even in situations in which ministerial advice is not fully available, as better explained in the next subparagraph, the degree of discretion enjoyed by the Monarch is strongly reduced because of the application of other principles, like the responsible government principle or the democratic principle. For example, royal assent to bills approved by the

⁵⁶ Anthony Wilfred Bradley, Keith David Ewing, Cristopher Knight, *Constitutional and Administrative Law*, 16th edition (Harlow, Essex: Pearson Education, 2015), page 258.

⁵⁷ United Kingdom, Public Administration Select Committee of the House of Commons, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, 2004, pages 5-7.

⁵⁸ Ibidem.

⁵⁹ Ibidem (emphasis added).

⁶⁰ Ibidem (emphasis added).

Parliament is usually taken for granted as the last refusal dates back to 1708 under Queen Anne, who withheld royal assent to the “Scottish Militia Bill”.⁶¹ In this first group of powers we find also what is perhaps the greatest exception to the rules described above: the right “to act contrary to or without Ministerial advice” in extraordinary cases of emergency lays the foundations of the highly controversial “Reserve powers”, which will be discussed in detail in other sections of this work. The Report, published in 2004, does not take into account some major changes which have recently reshaped the Royal Prerogative. With regard to the powers belonging to this category, we must remember that, while the prorogation and summoning of Parliament remain Prerogative powers, the dissolution of Parliament, in particular if performed before its natural expiry date, is now a statutory power to be wielded in compliance with the rules laid down by the *Fixed-term Parliaments Act 2011*.⁶² The power to call snap elections was exercised as a Prerogative power by the Prime Minister prior to 2011.

2) *The legal prerogatives of the Crown*, described as rights “which The Queen possesses as the embodiment of the Crown”.⁶³ This category comprises many rights and powers whose importance has strongly decreased in time like “the Crown’s rights to sturgeon, certain swans, and whales, and the right to impress men into the Royal Navy”.⁶⁴ The principle that the Crown can do no wrong is considered to fall within this category too.

3) *Prerogative executive powers*, which are the most important ones in day-to-day government operations. Such powers are currently exercised directly by the Prime Minister and the other Cabinet members. This means that “*The connection between these powers and the Crown, or The Queen, is now tenuous and technical*”, and the label “Royal Prerogative” is apt to mislead”.⁶⁵ The Committee includes in this category, among others, the power to make and ratify treaties, to manage diplomacy, to deploy and use armed forces overseas or internally in support of the police, to grant and withdraw passports, to organise the Civil Service. These are the Prerogative powers that, as acknowledged by the Committee, pose the most serious threat to parliamentary accountability, because their scope is particularly broad and Parliament has

⁶¹ In 1708 the “Scottish Militia Bill” had been approved by both the House of Commons and the House of Lords, but Queen Anne refused royal assent, fearing that the “Scottish Militia” would eventually prove disloyal.

⁶² In 2017 Theresa May has become the first Prime Minister to meet the super-majority requirements in the Commons requested by the Fixed-Term Parliaments Act 2011 for early dissolution of the Parliament.

⁶³ United Kingdom, Public Administration Select Committee of the House of Commons, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (n 24).

⁶⁴ Ibidem.

⁶⁵ Ibidem.

never had a say in the process of their transition from the Monarch to the Prime Minister and Cabinet. “This constitutional position”, says the Committee, “means that these prerogative powers are, *in effect though not in strict law, in the hands of Ministers. Without these ancient powers Governments would have to take equivalent authority through primary legislation*”.⁶⁶ Important changes have occurred also in this field. By virtue of the *Constitutional Reform and Governance Act 2010* both the power of appointment and regulation of civil servants and the power to ratify treaties have been placed on statutory footing. In the latter case, the Act of Parliament gave statutory substance to a constitutional convention which dates back to 1924, the “Ponsonby Rule”.⁶⁷

1.2.5 Responsible Government

The principle of responsible government is another of the pillars on which executive power is based within the framework of the Westminster system. Even though strictly linked to the relationship between Cabinet and Parliament, such principle has heavily influenced the way in which the Prime Minister and the Head of State interact as well, making one of the most important prerogative powers still exercised, at least partially, by the Monarch on his/her own,⁶⁸ the power to appoint the Prime Minister, subject to strict limitations. Broadly speaking,

"responsible government" means that the Cabinet must always be accountable to the lower House of Parliament for the actions it performs and the decisions it makes. The Cabinet can exercise its powers only by obtaining and then retaining the confidence of the lower House. Once this confidence is lost, the lower House can, through a vote of no confidence, oust the

⁶⁶ Ibidem (emphasis added).

⁶⁷ This constitutional convention is named after Mr Arthur Ponsonby (Under-Secretary of State for Foreign Affairs in Ramsay MacDonald's first Government) who, in 1924, during the Second Reading Debate on the Treaty of Peace of Lausanne, in a famous speech, expressed the Cabinet's will to submit signed international treaties to both Houses of Parliament for 21 sitting days before ratification. It may be worth noticing that, to put it in Ponsonby's own words, “The absence of disapproval may be accepted as sanction”. This means that Parliament was not expected to vote on each and every treaty. Since 1924, this rule has been complied with by any subsequent Government, with some exceptions. With the adoption of the Constitutional Reform and Governance Act 2010, the ratification procedure for international treaties has been put on statutory footing. See subparagraph 1.4.5. for further details.

⁶⁸ Although the Sovereign is expected to follow the government's advice even in the appointment of the Prime Minister, it is undeniable that in such a situation, more than in others, the Head of State retains some sort of discretion. This discretion is strongly reduced by the application of the principles described in this paragraph but might also reappear in extraordinary cases when reserve powers are used. See subparagraph 1.4.1 for further details.

Cabinet out of office by majority, forcing the Prime Minister and, by extension, the other Cabinet members to resign.

Historically, the emergence of this principle in its modern form within the British system can be traced back to the 19th century. The office of Prime Minister itself, despite being the result of the increasing need for parliamentary support on the part of the Monarch, was not characterised by full accountability to the House of Commons right from the start. In a passage of his famous work of 1867 "The English Constitution", Walter Bagehot writes:

"a century ago the crown had a real choice of ministers, though it had no longer a choice in policy. During the long reign of Sir R. Walpole he was obliged not only to manage Parliament but to manage the palace. He was obliged to take care that some court intrigue did not expel him from his place. The nation then selected the English policy, but the crown chose the English ministers. They were not only in name, as now, but in fact, the Queen's servants".⁶⁹

So, in the days of Walpole, who served as Prime Minister until 1742, responsible government as we know it did not exist yet, the Prime Minister being a sort of "link in the chain" between the increasingly powerful parliament and the not-yet exauthorated Monarch. The latter could still choose his/her ministers, Premier included, and dismiss them without the Parliament's consent. At this stage of its development, the UK system shared some features with what would later be known as "Prussian Constitutionalism",⁷⁰ though being more parliament-oriented already ("The nation then selected English policy, but the Crown chose the English ministers" to put it in Bagehot's own words). The growth in importance of democratic legitimacy progressively marginalized the Monarch's role in the management of daily government affairs

⁶⁹ Walter Bagehot, *The English Constitution* (London: Chapman and Hall, 1867), page 12.

⁷⁰ "Prussian Constitutionalism" is the expression used in political science and constitutional law to designate the constitutional system introduced in Prussia by the 1850 Constitution. It can be found, for instance, in Albert Venn Dicey, *Lectures on Comparative Constitutionalism*, ed. John W. F. Allison (Oxford: Oxford University Press, 2013). The government was, according to the Prussian 1850 Constitution, not accountable to the *Preußisches Abgeordnetenhaus*, the lower chamber of the Prussian parliament, and the King of Prussia had the power to appoint and dismiss ministers at will (see *Verfassungsurkunde für den Preußischen Staat*, title III art. 45). It should be noted that, on paper, even the Commonwealth of Australia Constitution Act 1900, the Constitution Act 1986 (New Zealand) and the British North America Act 1867 (Canada) seem to vest in the Governor-General the power to appoint and dismiss the Prime Minister and the other Ministers without any restriction. However, these constitutions cannot be properly understood without taking into due account the various customs and conventions at work beneath the surface. Such customs mark the difference between the system as it appears and the system as it actually works.

and the appointment of ministers, eventually leading to the birth of the modern responsible government principle. A major turning point was, in this respect, the adoption of the *Reform Act 1832*,⁷¹ which extended the voting franchise and rationalised the constituency system, abolishing the so-called “*rotten boroughs*”.⁷² The last attempt at appointing a government against a parliamentary majority was made by King William IV in 1834, when he decided to dismiss Whig premier Lord William Lamb, Viscount of Melbourne, in order to give Tories' leader Sir Robert Peel the chance to form a government. Peel failed to achieve the objective, thus paving the way to the 1835 general election, which saw Lamb as the winner. From then on, the constitutional relationship between the Prime Minister and the Monarch definitely changed. By making the Cabinet and its leader subject to parliamentary support, the responsible government principle had ended up reshaping the Head of State's powers, preventing him/her from both choosing ministers who didn't enjoy the Commons' support and dismissing them at will. While the choice of the other members of the Cabinet became a power *de facto* exercised by the Prime Minister under the Royal Prerogative, the choice of the premier remained in the hands of the Monarch, but was completely deprived of its arbitrary character. Although formally still able to appoint whomever he/she pleases to the office, the Monarch had now to abide by the newly established convention which required the Prime Minister to be the leader of the parliamentary majority.

Identifying the Member of Parliament who can command a majority in the House of Commons could sometimes become a very difficult task. Major problems do arise when a general election returns what is commonly known as “hung-parliament”, namely a parliament (or better a lower House) in which no party can rely on absolute majority. What is the Monarch supposed to do when faced with such a situation? Potentially, there are two options available, as suggested by Hilaire Barnett in “Constitutional and Administrative Law”: either appointing the leader of the party having the largest number of seats or choosing “the leader of the party which will hold the balance of power”.⁷³ Both choices are potentially compatible with the principle of responsible government, but they apply it in a different way. While the former seems to be, theoretically speaking, more respectful of the democratic principle, the latter could be, on certain occasions, better suited to guarantee the formation of a stable Cabinet. It follows from what has been said that the principle of responsible government must be interpreted in a

⁷¹ Reform Act 1832, 2 & 3 Will. IV, c. 45.

⁷² See subparagraph 1.1.3.

⁷³ Hilaire Barnett, *Constitutional and Administrative Law*, 10th edition (New York: Routledge, 2013), page 94

rather flexible and pragmatic way. When a certain party secures an absolute majority in the Commons, its leader will be appointed as Prime Minister. But when no party reaches the absolute majority threshold, even the leader of a political faction which has failed to obtain a plurality of seats, though by a small margin, can start negotiations to form a Cabinet and eventually succeed. In such a case, we could witness a slight decoupling between the democratic legitimacy principle and the responsible government principle, which are usually strongly intertwined.

It is fair to say that the appointment of the Prime Minister, a prerogative power still exercised by the Monarch on his/her own for self-evident reasons, turns out to be so deeply limited by the responsible government principle and the constitutional conventions it gave birth to, that the actual degree of discretion enjoyed by the Monarch in the process is, in ordinary circumstances, near to zero.

1.2.6 Queen in Council

Formally, the executive authority in the United Kingdom and the other Commonwealth Realms is exercised by the “Queen in Council”, namely by the Sovereign (or the Governor-General) on the advice and consent of his/her Privy Council (In the United Kingdom and Canada at federal level) or Executive Council (in Australia, New Zealand and the Canadian Provinces). The concept is strictly linked to the mechanics underlying the Royal Prerogative, but covers some other important issues. First of all, it should be useful to understand what a Privy Council/Executive Council is. The Privy Council was a committee of the Monarch’s private advisors, entrusted with the task of giving advice on matters of public affairs. The Anglo-Saxon *Witenagemot* was a sort of *ante-litteram* Privy Council, later replaced by the *Curia Regis* introduced by Norman kings. The *Curia Regis* played a major role in the development of English institutions, becoming the centre around which both the executive power and the judiciary started to take shape. Abolished by Oliver Cromwell, the Council was later restored by King Charles II. The modern Cabinet was at first just a committee of the Privy Council, and formally speaking, so it is today. The composition of the Privy Council is rather complex, in that it comprises also members of the Royal family, representatives of the Church of England, justices of the Supreme Court, First Ministers of devolved Countries and even officials from other Commonwealth Realms. Appointments are made by the Sovereign on the advice of the Government, but well-established conventions require all the Cabinet ministers and the leader of Her Majesty’s Most Loyal Opposition to instantly become members. Every Counsellor is appointed for life. Full meetings of the Council take place only in cases of *Demise*

of the Crown, namely when the Monarch dies or abdicates. Normally, only the Prime Minister and the Cabinet ministers involved with the subject-matter of a certain Council meeting attend it.

The Privy Council remains crucial for the issuing of important legal instruments, such as Orders *in* Council and Orders *of* Council, which are, in practice, conceived and drafted by the Cabinet. We can say that most powers wielded by the Prime Minister and Cabinet, particularly those falling within the Royal Prerogative, are actually exercised through Orders approved by the “Queen in Council”.

The main difference between Orders in Council and Orders of Council resides in the role played by the Sovereign. While in the former case Queen’s approval is needed, in the latter the Order is issued by the Council itself, without Queen’s assent. Orders in Council’s approval procedure is quite simple and straightforward: the Order, already drafted and signed by the relevant minister, is read in front of the Queen, who says: “Approved”. Clearly, the Head of State is supposed to approve each and every Order submitted to her during Privy Council sessions.

Both Orders in Council and Orders of Council come in two different kinds: statutory Orders and Prerogative Orders. A statutory Order finds its legal basis in an Act of parliament, while, clearly, a Prerogative Order is enacted under the Royal Prerogative, therefore it lacks any connection with parliamentary legislation.

Prerogative Orders in Council can be defined as “primary legislation made under the Prerogative”.⁷⁴ Nevertheless, as we already know, an Act of Parliament can always override provisions laid down through the Prerogative. A statutory Order in Council, instead, is always a peculiar kind of statutory instrument, the others being “Regulations”, “Schemes” and “Rules”.⁷⁵ A statutory instrument is an instrument of “subordinate” or “delegated” legislation, because it is issued by the Government or by an executive authority on the basis of a power conferred by an Act of Parliament. The relevant provisions about statutory instruments can be found in the *Statutory Instruments Act* 1946.⁷⁶

⁷⁴ United Kingdom, Office of Public Sector Information, *Statutory Instrument Practice*, 4th edition, 2006, paragraph 1.5.2.

⁷⁵ Richard Kelly, *Statutory Instrument* (London: House of Commons Library, 2016), paragraph 1.1.

⁷⁶ Statutory Instruments Act 1946 c. 36.

Both kinds of Orders in Council can be challenged before a court. Prerogative Orders, as expressions of Prerogative powers, are always subject to judicial control,⁷⁷ while a statutory Order in Council's compliance with the parent Act of Parliament is also a matter that falls under courts' scrutiny. To put it in Kelly's words: "The courts can question whether a Minister, when issuing a statutory instrument, is using a power he or she has actually been given by the parent Act; whether the purported exercise of the power is unreasonable, or insufficiently certain; or that there has been a procedural deficiency or irregularity".⁷⁸

Many rules pertaining to Orders in Council apply also to Orders of Council. An interesting example of interplay between the two kinds of instruments can be found in the field of Chartered bodies. Prerogative Orders *of* Council are often used to change the by-laws of a chartered body. Royal Charters are in turn usually issued in the form of Prerogative Order *in* Council. For example, in august 2017, an Order *of* Council has been used to amend the by-laws of the "Chartered Institute of Marketing".⁷⁹

The "Queen in Council" principle performs two important tasks at the same time. On the one hand, it strengthens the role of the Queen as a "Dignified part of the Constitution"⁸⁰ by formally placing her at the helm of the executive power, on the other, it shapes the mechanics behind the issuing of important legal instruments like the Orders in Council.

1.3 The dynamic dimension of the Prime Minister's office

1.3.1 Introduction

Before focusing on the powers vested in the Prime Minister and the Cabinet as a whole, it should be useful to explain how a Prime Minister's term in office can start and end. The life of an executive can follow the "physiological" path or the "pathologic" one. In the former case,

⁷⁷ See above: *R (on the application of Bancoult) v Sec of State for Foreign & Commonwealth Affairs*.

⁷⁸ *Ibidem*.

⁷⁹ Privy Council of the United Kingdom, [privycouncil.independent.gov.uk](https://privycouncil.independent.gov.uk/wp-content/uploads/2017/09/8.-August-2017.pdf). <https://privycouncil.independent.gov.uk/wp-content/uploads/2017/09/8.-August-2017.pdf> (accessed September 13, 2017).

⁸⁰ Walter Bagehot, in "The English Constitution" introduced the distinction between "dignified" and "efficient" parts of a Constitution: "In such constitutions there are two parts. First, those which excite and preserve the reverence of the population — the dignified parts, if I may so call them; and next, the efficient parts — those by which it, in fact, works and rules. There are two great objects which every constitution must attain to be successful, which every old and celebrated one must have wonderfully achieved. Every constitution must first gain authority, and then use authority, it must first win the loyalty and confidence of mankind, and there employ that homage in the work of government".

the Cabinet will remain in office from one general election to the next one, namely for five years,⁸¹ unless its supporting majority gets re-elected. In the latter case, the Prime Minister could experience problems that force him/her to resign, or be ousted out of office by a vote of no-confidence. Not only the circumstances that lead to the end of a Cabinet, but also those leading to its beginning could stray from the ordinary road: general elections often produce a clear-cut outcome (the ruling party wins again or is defeated by the opposition), but this is not always the case. They could also result in a hung parliament, where no party is strong enough to command a stable majority on its own. In such cases, the formation of a Cabinet is considerably more difficult and requires co-operation between different parties. In each of the following subparagraphs, the dynamic dimension of the Prime Minister's office will be explored, taking into due account both the "physiological" and the "pathologic" side of the topic.

1.3.2 Prime Minister's appointment process and Cabinet formation

All the operations connected to the appointment of the Prime Minister and the formation of the Cabinet are governed by customary rules and constitutional conventions. Only recently, by means of the Fixed-terms Parliaments Act 2011, some rules that indirectly affect such customs have been clarified and put on statutory footing. As explained before,⁸² the Prime Minister of the United Kingdom must be the leader of the parliamentary majority in the House of Commons. This necessarily ties the fate of a Parliament to the Cabinet's own fate, as the two almost always overlap. General elections and the renewal of the House of Commons will therefore be the first subjects dealt with.

The Fixed-terms Parliaments Act 2011 is not the first statute ever to have regulated the length of a Parliament. The Meeting of Parliament Act 1694⁸³ required new general elections to be held every three years. In 1716 the Septennial Act⁸⁴ extended the maximum time-span between two consecutive General Elections to seven years. Then, in 1911, the Parliament Act⁸⁵ was approved. It reduced the Parliament's length to five years. These Statutes set a specific time-limit for the dissolution of a Parliament but said nothing about *how* a Parliament should be dissolved. As a matter of fact, until 2011, the power to dissolve Parliament was exercised under

⁸¹ Fixed-terms Parliaments Act 2011 c. 14, s. 1(3).

⁸² See subparagraph 1.2.5.

⁸³ Meeting of Parliament Act 1694, 6 & 7 Will. & Mary c. 2.

⁸⁴ Septennial Act 1716, 1 Geo. I St 2 c. 38.

⁸⁵ Parliament Act 1911, 1 & 2 Geo. V c.13.

the Royal Prerogative: the Sovereign, initially on his/her own and then on Prime Minister's advice, issued a Royal Proclamation whose effect was the dissolution of the House of Commons and the scheduling of a new general election. Clearly, the Prime Minister had, *de facto*, the power to order Parliament's dissolution at will, by simply advising the Sovereign to this effect. The so called "Snap-election" was therefore a powerful and easy-to-use instrument in the hands of the Prime Minister, who could, at any time, decide to use it with a view to strengthen his/her parliamentary majority (or at least try to), escape a political deadlock or solve a crisis.⁸⁶

The revolution brought by the Fixed-terms Parliaments Act 2011 in this field lies in the fact that now, 25 working days before the date of a general election,⁸⁷ the Parliament is automatically dissolved by virtue of the application of the aforementioned Statute. No Prerogative power is involved in the process anymore. Early elections continue to be an option, but only in two cases:

- a) when a motion of no confidence is approved, subject to certain conditions,
- b) when two-thirds of the House of Commons' members approve the decision to hold early elections.

The Prime Minister can therefore still hope to solve a political crisis by means of an early election, but such undertaking could prove to be harder than it was in the past.

Our analysis will start from the easiest scenario: an ordinary General Election that produces a clear output. First off, it should be noted that, while Parliament is dissolved, the Prime Minister and the other Cabinet ministers remain in office during the period immediately preceding a general election. By convention, their administrative action in this time frame should be limited to day-to-day management of current affairs⁸⁸ and discretion should be observed "In initiating any new action of a continuing or long-term character".⁸⁹ If the incumbent majority party manages to win, the Cabinet will resume full operations as soon as

⁸⁶ For example, in 1955, Anthony Eden was able, through a snap-election, to increase the Conservatives' majority from 17 to 60 seats. Again, in 1966, Labour Prime Minister Harold Wilson succeeded in strengthening his parliamentary majority by calling a snap-election that brought the Labour's advantage over the Conservatives from just one seat (after the 1965 by-elections) to 96 seats.

⁸⁷ Fixed-terms Parliaments Act 2011 c. 14, s. 3(1) as amended by Electoral Registration and Administration Act 2013 c. 6, s. 14(1). Originally, Parliament was to be dissolved 17 working days before the polling day of a General Election.

⁸⁸ See subparagraph 4.2.3 for a brief account of the problems posed in New Zealand by the concept of "caretaker government".

⁸⁹ United Kingdom, Cabinet Office, *Cabinet Manual 2011*, 2011, paragraph 2.27.

possible without particular formalities.⁹⁰ When, instead, the majority party is defeated, the incumbent Prime Minister and government are expected to immediately tender resignation. The Sovereign will then invite the leader of the winning party to form a new Cabinet. He/she will accept office at a private audience with the Sovereign.⁹¹ Upon appointment, the Prime Minister also becomes First Lord of the Treasury, Minister of the Civil Service⁹² and member of the Privy Council. The first task he/she has to accomplish is the appointment of the other Cabinet ministers. This is a power that continues to be exercised under the Royal Prerogative, with the Sovereign acting on Prime Minister's advice. According to the Ministerial Code "The Prime Minister is responsible for the overall organisation of the executive and the allocation of functions between Ministers in charge of departments".⁹³ This means that it is the Prime Minister's duty not only to appoint ministers but also to oversee the entire process of government building. Clearly, the Premier's overall responsibility over Cabinet's composition and operations entails also the power to dismiss ministers, which is again exercised under the Royal Prerogative.

Usually, in the second week of parliament's sitting, the Sovereign's Speech takes place. During a complex ceremony, the Monarch reads a document written by the Cabinet, whose aim is to outline the government's legislative programme. Four or five days of debate, known as "address in reply to the Speech from the Throne", follow. The debate and the ensuing vote allow the government to test the confidence of the House of Commons for the first time. Actually, the Speech from the Throne is held every year at the end of the prorogation period and must always follow a general election. Thus, if, in a certain year, two general elections take place, there will be two different Sovereign's Speeches, as it happened in 1974.

General elections could return a hung parliament, namely a Parliament in which no party is able to command a stable majority in the House of Commons. Historically, this is not something that occurs too frequently in the United Kingdom. The political system, built upon the predominance of two strong parties (the Conservatives and the Liberals, later replaced by the Labour Party), and the first-past-the-post voting method applied to single-member electoral constituencies have often secured the formation of stable, one-party, parliamentary majorities throughout the last two centuries. Two-party system and reluctance to political compromise are

⁹⁰ Ibidem, paragraph 2.11.

⁹¹ Ibidem, paragraph 3.2.

⁹² Since 1968, when the office was created, it's always been held by the Prime Minister.

⁹³ United Kingdom, Cabinet Office, *Ministerial Code 2016*, 2016, paragraph 4.1.

so deeply rooted in British political culture to have even influenced the architecture of the House of Commons. The first permanent Commons' Chamber, St Stephen's Chapel, which was used from 1547 to 1834, the year of the great fire of Westminster, already showed the "Adversarial layout"⁹⁴ we are now accustomed to. Unlike continental Europe's Parliamentary chambers, with their hemicyclic, fan-shaped structure derived from the French political practice, the Commons Chamber is characterised by two benches facing each other. The Cabinet sits among its supporting majority's MPs and not in a specifically-designed area at the centre of the hemicycle as in continental European Parliaments.

However, recent developments in British politics are fostering a change. Since 1999, proportional representation has been adopted in European elections,⁹⁵ triggering an interesting process of minor parties' strengthening that has affected, over time, the political scenario both at the European and the national level. Proportional systems, with their relatively small margin of "wasted votes", are well-known for enticing voters to avoid tactical or "insincere" voting, thus favouring small parties' growth at the expense of big political actors. Both new political factions like UKIP and historical parties like the Liberal-Democrats, benefiting from the renewed political climate, have started gaining momentum in European Parliament elections. Then, the so-called "spillover effect", namely the phenomenon making "voting patterns in European Parliament elections spill over onto national elections, especially among voters not yet socialized into patterns of habitual voting",⁹⁶ has, over time, strongly reinforced such parties also within the context of national general elections, undermining the traditional concept of "two-horse race". Something similar happened in the first decades of the 20th century, when the Labour Party rose to prominence, breaking the duopoly enjoyed by the Conservatives and the Liberal Party, successors to the historical factions of the Tories and the Whigs respectively. For a certain period of time, hung parliaments became more frequent.⁹⁷ Then, Labour succeeded in replacing the Liberals as one of the two major parties and "restored" the two-party system.

⁹⁴ Parliament of the United Kingdom, [parliament.uk](http://www.parliament.uk/about/living-heritage/building/palace/architecture/palace-s-interiors/commons-chamber/). <http://www.parliament.uk/about/living-heritage/building/palace/architecture/palace-s-interiors/commons-chamber/> (accessed October 14, 2017).

⁹⁵ The European Parliamentary Elections Act 1999 has changed the voting system for the elections of Members of the European Parliament (MEPs) from a classical first-past-the-post to an unprecedented proportional representation system.

⁹⁶ Elias Dinas, Pedro Riera, *Do European Parliament Elections Impact National Party System Fragmentation?*, Comparative Political Studies, 2017: pages 1-30, at page 1.

⁹⁷ Both the General Elections held in 1910 returned a hung-parliament. It happened also in 1929.

Since the end of the Second World War, we have witnessed hung parliaments in 1974 (February elections), 2010 and 2017 only.

The Cabinet Manual 2011 contains a detailed account of the procedures to follow in case of hung parliament. By convention, priority is granted to the incumbent Cabinet, which will remain in office until it is clear that it cannot command a majority in the Commons.⁹⁸ This rule applies also to cases in which the incumbent Cabinet's supporting party has failed to achieve not only absolute, but also relative majority. For example, in 1974, Edward Heath's Conservatives won 297 seats, while Harold Wilson's Labour secured 301 seats. Neither party had absolute majority. Heath, incumbent Prime Minister, did not tender resignation at first, believing to be in a better position than Wilson to reach an agreement with the liberal party. But such agreement was never found, so Heath eventually made a step back, letting Wilson become Prime Minister for the second time. In turn, Wilson proved not to be able to form a cabinet and a new general election was held in 1975. A similar situation emerged, with role reversal, in 2010, when Labour secured fewer seats than the Conservatives, but incumbent Prime Minister Gordon Brown tried to reach an agreement with the Liberal-Democrats, choosing not to resign at first. He did it a few days later, when it became evident that the Liberal-Democrats had found an agreement with conservative leader David Cameron.

When, potentially, various coalition cabinets could be formed, political parties will "hold discussions to establish who is best able to command the confidence of the House of Commons and should form the next government".⁹⁹ The Sovereign is clearly not involved in political negotiations, but is kept informed by the Cabinet secretary. It is also important to remember that, until the fate of the incumbent Cabinet remains unclear, the same restrictions to governmental operations seen above with regard to the period immediately preceding a general election do apply to it. There are three possible solutions to the impasse created by a hung parliament:

- a) the formation of a single-party minority Cabinet that will rely on "a series of ad hoc agreements based on common interests",¹⁰⁰
- b) a formal agreement between two parties (the so called "Confidence and Supply Agreement"), like the Liberal-Labour pact 1977-78 or the Conservatives-Democratic Unionist Party agreement of 2017,

⁹⁸ United Kingdom, Cabinet Office, Cabinet Manual 2011 (n 50), paragraph 2.12.

⁹⁹ Ibidem, paragraph 2.13.

¹⁰⁰ Ibidem, paragraph 2.17.

c) an actual coalition Cabinet, with ministers from various political parties, like the Cameron-Clegg Cabinet in office from 2010 to 2015, which comprised members from both the Conservatives and the Liberal-Democrats.

When none of these options is available, the only solution is represented by early elections. The difference between options b and c is simple: option b leads to a minority one-party executive that relies on external support, while option c gives birth to a multiparty Cabinet that can actually command an absolute (multiparty) majority in the House of Commons. A coalition Cabinet is certainly the best option in terms of stability, but history shows that options a and b have always represented the most common solutions. It is not surprising that the Cameron-Clegg Cabinet (2010-2015) was the first coalition government to be formed since Winston Churchill's war Cabinet.

Eminent law scholar Vernon Bogdanor, despite showing a critical attitude towards minority cabinets, believes that their preferability over coalition cabinets is covered by constitutional conventions: "The conventions of the constitution thus provide for a minority government, rather than a majority coalition, to be formed in a hung parliament. It is arguable, however, that these conventions do not necessarily make for good government. In the past, minority governments have been short lived and ineffectual. Moreover, minority governments tend also to frustrate the canons of democracy".¹⁰¹ Bogdanor is worried by the prospect of hung Parliaments (and, as a consequence, minority cabinets) becoming the norm. He suggests a transition to proportional representation and the consequent development of new constitutional conventions. The Sovereign's political neutrality could be preserved even in such a scenario by adopting solutions which have proved successful in various continental parliamentary monarchies, like the *informateur/formateur* system adopted by Belgium and the Netherlands.¹⁰² New Zealand, which has adopted mixed-member proportional representation in 1993, could be a valuable example to follow.¹⁰³

A hung parliament is usually the result of uncertain general elections, but, surprisingly, this is not always the case.

A Parliament controlled by a narrow absolute majority could also become, in time, a hung Parliament. When the majority is not particularly broad, by-elections, MPs' resignations or defections to opposition parties can easily erode it. John Major's Conservative government

¹⁰¹ Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Oxford University Press, 1997), page 162.

¹⁰² Ibidem, page 168.

¹⁰³ See subparagraph 4.2.3 for further information.

faced similar problems between 1996 and 1997, when it lost its majority in the Commons due to by-elections losses and defections. Major managed to survive until April 1997, leading what had *de facto* become a minority government.¹⁰⁴

1.3.3 The end of the Prime Minister's term in office

A Prime Minister could decide to resign “from his or her individual position”.¹⁰⁵ When this happens at a time in which the Cabinet enjoys a majority in the House of Commons, “it is for the party or parties in government to identify who can be chosen as successor”.¹⁰⁶ A remarkable case of “individual” resignation is that of Sir Anthony Eden, who resigned as Prime Minister on 9 January 1957, after a year of political turmoil centred around the Suez crisis, which saw France, Israel and the United Kingdom intervene against Nasser's Egypt. Eden was forced to withdraw British troops shortly after the beginning of the war due to heavy internal and external pressure put on his Cabinet against the invasion. The episode strongly damaged Eden's popularity and caused health problems that eventually led to his resignation. At that time the Conservative Party lacked a formal procedure for the selection of a new leader. Thus, Queen Elizabeth II appointed Harold Macmillan as Eden's successor on advice of Conservative party's most experienced representatives. In response to these events, the major political forces decided, at different times, to introduce an electoral system for the leadership. Margaret Thatcher and Tony Blair resigned in order to make room for their successors in party leadership, respectively in 1990 and 2007.

We have few examples of Prime Ministers died in office, the last one dating back to 1865, when Lord Palmerston was succeeded by John Russel.¹⁰⁷ However, it is highly likely that, in such a situation, the same rules described above for the individual resignation would apply. In both cases, the Cabinet and its supporting majority in the Commons remain in place (although reshuffles are certainly possible), fully operational, but the Prime Minister changes.

A Prime Minister can fall together with his/her Cabinet. This happens, for instance, when a Parliament ends. If a certain Cabinet manages to survive for the entire length of a Parliament, it will remain in office until new general elections take place. Then, depending on the results,

¹⁰⁴ David Butler, Dennis Kavanagh, *The British General Election of 1997* (London: Palgrave Macmillan, 1997), page 13.

¹⁰⁵ United Kingdom, Cabinet Office, *Cabinet Manual 2011* (n 50), paragraph 2.18.

¹⁰⁶ *Ibidem*.

¹⁰⁷ M.J.D. Roberts, *The deathbed of Lord Palmerston*, *Cultural and Social History*, Volume 5, Issue 2, 2008: 183-196, at pages 183-184.

it could resume operations in case of victory or resign to be replaced by a new Cabinet in case of loss.

A Prime Minister might call a parliamentary vote with a view to trigger an early election under s. 2(1) of the Fixed-term Parliaments Act 2011. In the past, this was a power he/she exercised under the Royal Prerogative. Now, a qualified majority of two thirds of the Commons' members is necessary in order for early-elections to be approved.

Finally, a Cabinet could be defeated in the House of Commons. Even in this field, the Fixed-term Parliaments Act 2011 has brought some simplifications and changes. If a motion that "this House has no confidence in Her Majesty's Government" is approved by simple majority in the House of Commons, the government is not forced to immediately resign. Instead, a period of 14 days starts,¹⁰⁸ during which three things could happen:

a) the incumbent government manages to regain the confidence of the House of Commons,¹⁰⁹ which approves a motion that 'this House has confidence in Her Majesty's Government'. In such a case, the incumbent government overcomes the political crisis and resumes operations,

b) an alternative government "is formed from the House of Commons as presently constituted".¹¹⁰ Even in this case, the House of Commons would have to pass the motion mentioned under letter a,

c) the period of 14 days expires and neither a) nor b) have happened: new General Elections are scheduled.

It goes without saying that, when the events described under letter b occur, "The Prime Minister is expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence".¹¹¹ Option b is particularly interesting because it envisages the possibility of a Cabinet backed by a different majority entering into office during the same Parliament, a solution to Cabinet crises that, at least in the 20th century, has been chosen on one occasion only.¹¹² Paragraph 2.20 of the Cabinet Manual 2011 goes even beyond by saying that "Where a range of different

¹⁰⁸ Fixed-term Parliaments Act 2011 c. 14, s. 2(3)(b).

¹⁰⁹ United Kingdom, Cabinet Office, Cabinet Manual 2011 (n 50), paragraph 2.19.

¹¹⁰ Ibidem.

¹¹¹ Ibidem.

¹¹² In January 1924, the House of Commons approved a motion of no-confidence against Stanley Baldwin's Cabinet. Baldwin resigned but the House of Commons was not dissolved. On the contrary, a new Cabinet led by Ramsay MacDonald was formed.

administrations could be formed, discussions may take place between political parties on who should form the next government”.¹¹³ This means that parties would be faced with the same challenges arising from a hung Parliament, this time with a further complication: the 14 days time limit which, once expired, automatically triggers early elections.

1.4 The Prime Minister’s powers

1.4.1 Is the British Prime Minister an “Elected dictator”?

The Prime Minister of the UK wields, directly and indirectly, a wide range of powers. Leading not only the Cabinet but also the parliamentary majority in the House of Commons, he/she usually exerts great influence over both the executive and the legislative branches of the State.¹¹⁴ For this reason, his/her role has been compared to that of a hypothetical “Elected dictator”. Lord Hailsham, who served as Lord Chancellor for many years under Edward Heath and Margaret Thatcher, introduced the expression in his “Dilemma of Democracy: Diagnosis and Prescription”.¹¹⁵ Hailsham highlighted the potential threats to democracy posed by the combined effect of the first-past-the-post electoral system, strong party discipline and insufficient control exercised by the House of Lords on Cabinet’s bills.¹¹⁶ The Prime Minister’s powers and their constraints will be analysed in this subparagraph, in order to assess whether or not the label “Elected dictator” is appropriate. We will start from the Government’s influence on the House of Commons and the law-making process.

A strong connection between government and Parliament is an inherent feature of every parliamentary system. While a president elected on a mandate of his/her own does not owe his/her political survival to a parliamentary majority (and vice versa), a Prime Minister does. This certainly makes the Prime Minister’s position potentially more unstable but, on the other hand, creates also a strong bond between the government and the majority which backs it. In the United Kingdom, such bond was further strengthened by constitutional conventions that

¹¹³ United Kingdom, Cabinet Office, Cabinet Manual 2011 (n 50), paragraph 2.20.

¹¹⁴ That of Prime Minister is probably the last position which somehow still embodies the concept of “Fusion of powers” as traditionally applied to the British system. Prior to the Constitutional Reform Act 2005, the Prime Minister was overshadowed, in this area, by the Lord Chancellor, who was, at the same time, a Cabinet minister, the presiding officer of the House of Lord, the head of the judiciary in England and Wales and the presiding judge of the High Court of Justice’s Chancery Division, thus having a foot in each of the traditional Montesquieian powers.

¹¹⁵ Quintin Hogg, *Dilemma of Democracy: Diagnosis and Prescription* (London: Collins, 1978).

¹¹⁶ The Parliament Acts 1911 and 1949, working in conjunction with the Salisbury Convention, strongly limited the role played by the House of Lords in the law-making process.

made early elections the most common solution to Cabinet crises,¹¹⁷ thus putting, in many cases, the executive and its parliamentary majority in a “*Simul stabunt simul cadent*” scenario. There is also another important factor to take into account when discussing the government’s control over legislative power. A well-established convention requires ministers (not only senior ministers, but also junior ministers and whips) to be members of one of the Houses of Parliament. The combined effect of this rule and the principle of governmental collective responsibility guarantees a Prime Minister the unconditional support of a considerable number of MPs, who would have to resign from their government positions if they wanted to vote against a bill introduced to Parliament by the Cabinet under its right of initiative. This highly-discussed phenomenon is known in British political jargon as “Payroll-vote”. We will elaborate more on the subject,¹¹⁸ focusing also on statutory limits that have been put in place with a view to safeguard Parliament’s independence from the executive power. For the time being, we can resume our brief comparison with presidential systems by saying that also the President of the United States will rely on loyal Members of Congress in order to have policy-implementing statutes approved, but, for the reasons discussed above, his/her grip on legislative power will necessarily be weaker than the British Prime Minister’s. That being said, the Premier’s powers in this area are not unlimited. Despite the existence of a strong mechanism devoted to the enforcement of party discipline, commanding a majority in the House of Commons and using it as a law-making instrument can easily become a very difficult task. Even when the Cabinet enjoys the support of broad majority (an event that has recently become quite uncommon), changes in leading party’s hierarchies could put the Prime Minister in a very awkward position and even force him/her to personal resignation.¹¹⁹ We should anyway acknowledge that, in this field, prime ministerial powers’ boundaries are mostly marked by factors of political, rather than juridical, nature.

¹¹⁷ As specified in the previous paragraph, recent developments in British politics and constitutional reforms are slowly changing the way in which Cabinet crises are solved, with the Fixed-terms Parliaments Act 2011 overtly enabling the possibility of new Cabinets backed by alternative majorities to be formed after the approval of no-confidence motions by the Commons. While a motion of no confidence under the Fixed-terms Parliaments Act 2011 has not been voted yet, we know that, at least in the 20th century, votes of no confidence have in most cases paved the way to early elections. For example, it happened in 1924 (Ramsay MacDonald) and 1979 (James Callaghan).

¹¹⁸ See subparagraph 1.4.3.

¹¹⁹ The events leading to Margaret Thatcher’s personal resignation stand as an example of how changes in the majority party’s balance of powers can affect the fate of a Prime Minister.

If it is true that the Prime Minister encounters political constraints on the “legislative side”, it is fair to say that also his/her executive powers are strong but not unlimited. Such powers find their basis either in the Royal Prerogative or in statutes, with the latter growing in importance year after year.

Statutory powers are inherently limited. Any Act of Parliament introducing new government powers or placing existing ones on statutory footing will invariably subject them to specific limits and rules whose infringement can be challenged in courts. Prerogative powers, on the other hand, are usually broader in scope but not exempted from courts’ scrutiny.¹²⁰ That said, is judicial review the only counterweight to a potential arbitrary exercise of Prerogative powers by the government? What would happen if a certain Prime Minister decided to act contrary to customary rules and breach the constitutional order by means of Prerogative powers? We know that, in a modern constitutional monarchy like the United Kingdom, the Sovereign is only entitled “To warn, to encourage, and to be consulted”,¹²¹ while a government accountable to the lower house of Parliament, and, indirectly, to the people, takes decisions and makes choices on his/her behalf. The monarch’s passive attitude towards Cabinet actions and political controversy is, normally, instrumental in upholding the democratic principle and protecting constitutional values. But would this be true if the Cabinet’s aim were precisely to set such values aside? Who or what would stand in the government’s way in such a situation? We are now faced with a problem lying at the very foundations of every legal order: who ought to be the guardian of the constitution?¹²² Answering this question is always challenging, but probably it is even more so when it comes to uncodified constitutions like the British one.

In absence of a constitutional court, many law scholars see the Sovereign as the ultimate guardian of the British constitution. When threats to the stability of the system reach a point of no return, the Head of State should avert its demise by exercising the so-called “reserve powers”. In 1936, Arthur Berriedale Keith wrote: “The Crown remains in fact an authority

¹²⁰ See subparagraph 1.2.3.

¹²¹ Walter Bagehot, *The English Constitution* (n 36), page 103.

¹²² This specific question is the title of a famous essay by Hans Kelsen: “Wer soll der Hüter der Verfassung sein?” (1931). About Kelsen, the guardian of the constitution should be a court entrusted with the task of checking statutory laws’ conformity to constitution. Such court must be entitled to act as a “Negative legislator”, namely to repeal statutes or statutes’ parts which it finds to be contrary to the constitution. Different views on the subject are supported by Carl Schmitt: in his “Der Hüter der Verfassung” (1931), he puts the ultimate responsibility of safeguarding the constitution in the hands of the Head of State.

charged with the final duty of preserving the essentials of the constitution”.¹²³ Sir Ivor Jennings went even further by saying that, in exceptional circumstances, the Sovereign should be, in principle, allowed to refuse assent to government policy “which subverted the democratic basis of the Constitution, by unnecessary or indefinite prolongations of the life of Parliament, by a gerrymandering of the constituencies in the interests of one party, or by fundamental modification of the electoral system to the same end”.¹²⁴ More recently, Vernon Bogdanor has returned on the topic, trying to recognise a point “at which the limitation of the power of the Sovereign [...] should stop”.¹²⁵ Such point is reached when “the constitution itself, which determines the role of the head of state, appears to be under threat”.¹²⁶ In this circumstance, “the sovereign 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”.¹²⁷

About Keith, Jennings and Bogdanor, the Sovereign’s *pouvoir neutre et préservateur*, as Benjamin Constant would define it, is a solution to any potential threat posed to the constitutional order. It is currently impossible to definitively validate such claims, given the fact that the United Kingdom has never found itself in a situation as difficult as the one described above. Lack of empirical evidence always requires a certain caution to be observed, especially when we deal with a subject which is, borrowing a famous expression used by Sir Hersch Lauterpacht to describe international humanitarian law, at the “vanishing point”¹²⁸ of constitutional law. We could anyway remember that an official document released by the Public Administration Select Committee of the House of Commons in 2004 explicitly lists the power to “To act contrary to or without Ministerial advice”¹²⁹ in grave constitutional crisis among the

¹²³ Arthur Berriedale Keith, *The King and the Imperial Crown: the powers and duties of His Majesty* (New York: Longmans, Green & company, 1936), page 183.

¹²⁴ Ivor Jennings, *Cabinet government*, 3rd edition (Cambridge: Cambridge University Press, 1969), page 412.

¹²⁵ Vernon Bogdanor, *The Monarchy and the Constitution* (n 62), page 65.

¹²⁶ Ibidem.

¹²⁷ Ibidem.

¹²⁸ The exact quote by Hersch Lauterpacht is: “If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law”. It can be found in: Hersch Lauterpacht, *The problem of the Revision of the Law of War*, British Year Book of International Law, Volume 29, 1952: 360-382, at page 382.

¹²⁹ United Kingdom, Public Administration Select Committee of the House of Commons, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (n 24), page 5.

Sovereign's constitutional prerogatives. The idea of reserve powers should therefore not be considered anymore as a simple product of law scholarship's speculation.

It is fair to say that the alleged Prime Minister's omnipotence and the label "Elected dictator" belong to the field of overstatements and useful exaggerations: the Premier of the United Kingdom is indubitably powerful, but the rule of law, accountability to Parliament, judicial review and the Sovereign's reserve powers work as effective counterweights to his/her powers.

1.4.2 Appointment and dismissal of Ministers and Cabinet building

Until now, words like "government", "executive" and "Cabinet" have been used interchangeably. This is usually acceptable, but, before going any further, some useful distinctions should be drawn. While "executive" and "government" can be used to describe the entire machinery underlying the exercise of executive powers, "Cabinet" has a specific meaning, designating that particular committee of the Privy Council which is considered to be ultimately responsible for governmental action. Therefore, a Cabinet member is invariably also a member of the overarching government, but the opposite is not always true. The Cabinet Manual identifies four categories of Ministers: "senior ministers; junior ministers; the Law Officers; and whips".¹³⁰ That of senior Ministers is a group comprising Secretaries of State and a series of other important figures whose titles still reveal their ancient nature of "Sovereign's companions": the Chancellor of the Exchequer, the Lord High Chancellor, the Lord Privy Seal and the Lord President of the Council. The last two are nowadays mainly ceremonial positions, while the first two are comparable to a Minister of economy and finance and to a Minister of justice respectively.¹³¹ Only senior ministers are Cabinet members. This means that the majority of the overarching government's members (junior ministers, Law Officers and whips) do not have a seat in Cabinet. Junior ministers are a heterogeneous group made up of "Ministers of state, Parliamentary under secretaries of state and Parliamentary secretaries".¹³² They are "Ministers within a government department and their function is to support and assist the senior minister in charge of the department".¹³³ It is important to distinguish between junior ministers and Parliamentary Private Secretaries (PPSs). The PPSs are MPs who work as senior Ministers' personal assistants in Parliament. They are not government members and do not receive a government salary, but they are bound by government collective responsibility. Law Officers

¹³⁰ United Kingdom, Cabinet Office, Cabinet Manual 2011 (n 50), paragraph 3.7.

¹³¹ Actually, since 2007, the title of Lord High Chancellor is held by the Secretary of State for Justice.

¹³² United Kingdom, Cabinet Office, Cabinet Manual 2011 (n 50), paragraph 3.13.

¹³³ Ibidem.

like the Attorney-General are selected among the ruling party's MPs and are government's Ministers (but not Cabinet members), who act as legal advisors of the government and also represent it in court in some specific, important cases. Finally, we have the Whips, who can be defined as enforcers of party discipline whose duties include "keeping members informed of forthcoming Parliamentary business, maintaining the party's voting strength by ensuring that members attend important votes, and passing on to the party leadership the opinions of backbench members".¹³⁴ The Prime Minister appoints Whips both in the House of Commons and in the House of Lords.

It should now be clear that "appointing Ministers" is not a simple task for the Premier of the day, as the whole government team sitting in the House of Commons usually exceeds 100 units. All these appointments are made under the Royal Prerogative, with the Sovereign acting on advice of the Prime Minister, who, being responsible "for the overall organisation of the executive and the allocation of functions between Ministers in charge of departments",¹³⁵ is in total control of Cabinet's composition. Government "reshuffles" can happen for many reasons. The Ministerial Code clearly states that "Ministers only remain in office for so long as they retain the confidence of the Prime Minister".¹³⁶ This means that Ministers find themselves in a rather peculiar situation, being accountable at the same time both to Parliament and to the Prime Minister in a system that does not see the head of government as a *primus inter pares* anymore. Lack of political trust is not, however, the only possible reason for a Minister's dismissal. The Ministerial Code, which, despite not having binding effects, is regarded as an effective instrument of "soft law", grants the Prime Minister a "judge of last resort" role when it comes to his/her Ministers' personal conduct. First of all, the Code specifies that "Ministers of the Crown are expected to behave in a way that upholds the highest standards of propriety".¹³⁷ Among the principles they must comply with, we find that of "Collective responsibility", on which we will elaborate more later,¹³⁸ and the "Seven Principles of Public Life", included in Annex A to the Code. Whether or not a Minister has behaved correctly, it is up to the Prime Minister to decide: "She is the ultimate judge of the standards of behaviour expected of a

¹³⁴ Ibidem, paragraph 3.17.

¹³⁵ United Kingdom, Cabinet Office, Ministerial Code 2016 (n 54), paragraph 4.1.

¹³⁶ Ibidem, paragraph 1.5.

¹³⁷ Ibidem, paragraph 1.1.

¹³⁸ See subparagraph 1.4.3.

Minister and the appropriate consequences of a breach of those standards”.¹³⁹ This provision has given rise to controversy. The point, as Turpin and Tomkins point out, is that “the Code is a prime-ministerial document in the sense that successive Prime Ministers make alterations to it on their own authority”.¹⁴⁰ Deriving from “Questions of procedure for Ministers”, an informal Cabinet document which had never been disclosed to public until 1992, the Code remains devoid of binding legal effects and its amending process is entirely in the hands of the Prime Minister of the day. This means that the Premier is at the same time the one who imposes standards of conduct and the one who checks Ministers’ compliance with them: “That the Ministerial Code should be ‘the Prime Minister’s property’ has been deplored as a ‘constitutional anomaly’ with disturbing implications for the accountability of Prime Minister and ministers alike”.¹⁴¹

Whenever the Prime Minister deems fit, be it for political or “disciplinary” reasons, he/she can advise the Sovereign with a view to exercise the power of dismissal under the Royal Prerogative. By convention, however, the Prime Minister should follow this path only when, upon request, a certain Minister refuses to spontaneously resign.

1.4.3 Relationship with Parliament and involvement in the law-making process

In the United Kingdom, majority-party discipline enforcers, the Whips, are official members of the government. While their role is not unheard of in other countries, it is not particularly common to have them listed among executive officials in non-Westminster systems. Comparable “continental” positions, like the German *Parlamentarischer Geschäftsführer* or the Italian *Capogruppo*, are not considered as “governmental” and their holders, consequently, are not recognised as members of the government. Whips are usually granted *sinecure* positions in order to let them have a seat in Cabinet or, at least, receive a salary from the government. For example, the Chief Whip in the House of Commons is appointed “Parliamentary Secretary to the Treasury”, a Cabinet position. Whips’ complete assimilation into government sheds light on how Cabinet and the ruling party are meant to work in unison, especially in the Commons, where most of the law-making process takes place. The etymology of “Whip” itself is also particularly revealing. The word is borrowed from hunting lexicon: “The term ‘whipper-in’ is defined by the Oxford Dictionary as ‘a huntsman’s assistant who keeps the hounds from straying

¹³⁹ Ibidem, paragraph 1.5.

¹⁴⁰ Colin Turpin, Adam Tomkins, *British Government and the Constitution*, 7th edition (Cambridge, Cambridge University Press: 2011), page 397.

¹⁴¹ Ibidem, page 398.

by driving them back with the whip into the main body of the pack””.¹⁴² Cohesion within parliamentary majority is further enhanced by the intersection between a rule of customary nature, that requiring all members of the government to be also MPs, and the principle of governmental collective responsibility, which is binding on every minister of the overarching government (junior minsters, Whips and Law officers included), as specified by the Ministerial Code: “The principle of Government responsibility applies to all Government Ministers”.¹⁴³ Before making some remarks on the domino effect created by the combined application of these two rules, we should elaborate more on the subject of collective responsibility by quoting an interesting definition given by Lord Salisbury during a debate in the House of Lords.

THE MARQUESS OF SALISBURY: “[...] Now, my Lords, am I not defending a great Constitutional principle, when I say that, for all that passes in a Cabinet, each Member of it who does not resign is absolutely and irretrievably responsible, and that he has no right afterwards to say that he agreed in one case to a compromise, while in another was persuaded by one of his Colleagues”.¹⁴⁴

Under the collective responsibility principle every government member is required to publicly defend and support Cabinet’s decisions. It is certainly possible to dissent, but such a choice can only be made at the cost of resignation from Government. If it is fair to ask Ministers who have contributed to a certain decision to uphold it, some problems could arise when collective responsibility is applied to the government as a whole, given the fact that, clearly, not all its members always take part to the decision-making process. The principle must anyway be read as imposing an obligation of Cabinet decisions’ support also on those members of government who have not had any actual involvement in the events leading to the adoption of a certain decision.

The “payroll-vote” phenomenon is now easily explainable. If all members of the Government must support Cabinet decisions unless they decide to resign and, also, all members of the Government are at the same time members of the House of Commons, then we will have a considerable number of Commoners obliged to vote in favour of Cabinet’s bills by the principle of governmental collective responsibility (unless they decide to resign from the government, losing money or, in case of unpaid positions like that of Parliamentary Personal

¹⁴² Jennifer Walpole, Richard Kelly, *The Whip’s Office* (London: House of Commons Library, 2008), paragraph 1.1.

¹⁴³ United Kingdom, Cabinet Office, Ministerial Code 2016 (n 54), paragraph 1.2.

¹⁴⁴ HL Deb 8 April 1878, vol 239, col 833.

Secretary, prestige or chances to climb the so called “ministerial ladder”). It goes without saying that such mechanism is often heavily exploited by Prime Ministers with a view to strengthen their parliamentary majorities. As a result, government building operations are carried out taking into due account also questions of political patronage and political reward. This is proven by the enormous growth of government members’ number in the last decades, as highlighted by the Public Administration Select Committee of the House of Commons: “In 1900 there were 60 ministers, by 1950 this had increased to 81, and by January 2010 the figure was 119. The Cabinet grew by four posts, from 19 in 1900 to 23 in 2010. However, the number of ministers below Cabinet rank increased much more substantially, from 41 in 1900 to 96 in 2010—with the majority of the growth occurring in the 1930s, 1960s and 2000s”.¹⁴⁵ Such enlargement could certainly be explained, at least partially, by the increasing complexity of government. Anyway, says the Committee, “the ever-upward trend in the size of government over the last hundred years or more is striking and hard to justify objectively in the context of the end of Empire, privatisation, and, most recently, devolution to Scotland, Wales and Northern Ireland”.¹⁴⁶ It is undeniable that the practice of payroll-vote poses a threat to parliamentary independence as it reduces the number of MPs that can freely exercise their activity of Cabinet control. The whole concept of “Responsible government” is therefore at stake.

In the past, Parliament has tried to limit payroll-vote. The House of Commons Disqualification Act 1975 fixed the number of ministerial office holders in the House of Commons to 95.¹⁴⁷ In the same year, the Ministerial and other Salaries Act has limited the number of ministerial salaries that can be paid.¹⁴⁸ These interventions had little success, since Parliamentary Personal Secretaries are not considered “ministerial office holders” and do not receive any government salary, despite being subject to collective government responsibility, as evidenced by the Cabinet Manual: “Parliamentary private secretaries are not members of the Government, although by convention they are bound by collective agreement”.¹⁴⁹ Therefore, by appointing PPSs, it is possible to increase the payroll-vote quota without infringing the statutory limits seen above. PPSs can be considered, ultimately, as “Trojan horses” easily

¹⁴⁵ United Kingdom, Public Administration Select Committee of the House of Commons, *Too many Ministers?*, 2010, page 3.

¹⁴⁶ Ibidem, page 4.

¹⁴⁷ House of Commons Disqualification Act 1975 c. 24, s. 2(1).

¹⁴⁸ Ministerial and other Salaries Act 1975 c. 27, sch. 1, pt. V, para. 2.

¹⁴⁹ United Kingdom, Cabinet Office, Cabinet Manual 2011 (n. 50), paragraph 3.22.

employable by the Prime Minister to make use of the aforementioned statutes' loopholes. According to a recent briefing paper published by the House of Commons Library, May's 2017 government can count on 93 Ministers of any rank sitting in the House of Commons in addition to 46 Parliamentary Private Secretaries.¹⁵⁰ This brings payroll-vote quota in the Commons to 139 MPs, 21% of the total. The record belongs anyway to Tony Blair, whose government could rely, in 2001, on 146 "payroll" MPs, with 58 PPs.¹⁵¹

In 2010, the Public Administration Select Committee of the House of Commons proposed two solutions for this problem: 1) an amendment to the Ministerial Code limiting the number of PPSs to one for each department or Cabinet minister.¹⁵² 2) an amendment to the House of Commons Disqualification Act 1975 aimed at extending the limit to the number of Ministers sitting in the House of Commons set therein to PPSs, who are, as we have seen, currently excluded.¹⁵³

An amendment to the Ministerial Code like the one envisaged by the Select Committee is highly unlikely because only the Prime Minister could decide to make it, but such a move would be detrimental to his/her hopes of commanding a stable and disciplined majority in the House of Commons. On the other hand, a change to the House of Commons Disqualification Act 1975 would probably entail an across-the-board political consent capable of overcoming resistance of the government of the day. Being the payroll-vote mechanism potentially useful to any party in case of a general election victory, the feasibility of such solution is doubtful. We are faced with a classical principal-agent problem. If we think of Government as Parliament's and, ultimately, people's agent, we will not fail to understand that, in this particular situation, the principal's best interest (a smaller, more efficient and less expensive government) does not perfectly correspond to the agent's best interest (House of Commons' dominance and, consequently, political survival). It is therefore very difficult to find a definitive solution for this problem. Perhaps, removing the Ministerial Code from the Prime Minister's exclusive *dominium* could represent a first step in the right direction.

¹⁵⁰ Lucinda Maer, Richard Kelly, *Limitations on the number of ministers* (London: House of Commons Library, 2017), page 6.

¹⁵¹ Ibidem.

¹⁵² United Kingdom, Public Administration Select Committee of the House of Commons, *Too many Ministers?* (n 103), page 12.

¹⁵³ Ibidem.

1.4.4 Civil Service appointments

The Prime Minister has always been in charge of the Civil Service,¹⁵⁴ despite having obtained formal recognition to this effect only in 1968, when, after the creation of the Civil Service Department, the office of Minister for the Civil Service was also created. Since then, such office has always been held by the Prime Minister.

Civil Service is one of the fields in which the Constitutional Reform and Governance Act 2010 has brought significant changes, putting Prime Minister's powers, once exercised under the Royal Prerogative, on statutory footing. The reform has seen the Civil Service Commission, created in 1855 in accordance with the Northcote–Trevelyan Report's recommendations,¹⁵⁵ become a statutory body: "There is to be a body corporate called the Civil Service Commission".¹⁵⁶ The independent Commission, whose members are chosen on merit following public advertisement and a fair and open selection competition, has three main duties:

- 1) granting assent to Civil Service appointments made by Ministers and administrative bodies in certain specific cases,
- 2) publishing the "Recruitment Principles",¹⁵⁷ a set of rules that must be followed in every Civil Service appointment and investigating on claims that such rules have not been complied with,
- 3) hearing complaints by civil servants who believe Civil Service Code¹⁵⁸ has been infringed and making "recommendations about how the matter should be resolved".¹⁵⁹

In appointing civil servants, a Prime Minister must therefore follow the Recruitment Principles and, in certain cases, even ask for the Commission's assent. In the past, it was commonly believed that a civil servant could be dismissed *ad nutum*. this rule was considered to be based on an implied term in the contract of employment of every civil servant. For example, in *Dunn v. Queen*, Lord Herschell observed: "It seems to me that it is the public interest which has led to the term which I have mentioned being imported into contracts for employment in the service of the Crown. The cases cited shew that, such employment being for

¹⁵⁴ Civil servants can be defined as "Servants of the Crown" who don't hold political or judicial offices.

¹⁵⁵ The Northcote–Trevelyan Report was published in 1853. It strongly supported Civil Service's independence, warning against the risks of subjecting civil servants' appointing process to political influence.

¹⁵⁶ Constitutional Reform and Governance Act 2010 c. 25, s. 2(1).

¹⁵⁷ Constitutional Reform and Governance Act 2010 c. 25, s. 11(1).

¹⁵⁸ The Civil Service Code is a document outlining Civil Service's core values, and the standards of behaviour expected of all civil servants.

¹⁵⁹ Constitutional Reform and Governance Act 2010 c. 25, s. 9(5)(b).

the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown”.¹⁶⁰ Protection against unfair dismissal was over time progressively extended to public sector employees, the major improvement being perhaps provided by the Employment Rights Act 1996.¹⁶¹ As of today, we can say with Turpin and Tomkins that “in practice civil servants are not notably insecure in their employment, although dismissals for inefficiency or disciplinary offences do occur and some civil servants have lost their jobs when departments have been merged or dissolved or functions have been contracted out to the private sector”.¹⁶²

1.4.5 Foreign policy, treaty-making power and war powers

Foreign policy is managed by the Government by virtue of Royal Prerogative powers. The Prime Minister and the Secretary of State for Foreign and Commonwealth Affairs, as Government officials bearing full powers, are therefore responsible for negotiating and signing international treaties. This subparagraph deals with the major issues linked to the phase which follows the signing of a treaty: the ratification procedure. It should be noted that, in the context of public international law, signing and ratification are two different stages of a process that leads to the entry into force of a treaty. By merely signing a treaty, a State or an international organisation becomes subject to a generic obligation to avoid acts that could potentially hinder the object and purpose of the treaty itself. It is only through ratification that the State confirms its will to be bound by an already-signed treaty. The power of treaties’ ratification falls within the Royal prerogative area, and, consequently, is exercised, on the Sovereign’s behalf, by Ministers through Orders in Council.¹⁶³ Formally speaking, no parliamentary assent to ratification is required. This basic rule must anyway be understood in the light of the Parliamentary supremacy principle: whenever a treaty is capable of changing domestic law or constitutional arrangements, Parliament’s involvement in the treaty-making process is in a way or another unavoidable.

For decades, a principle of customary nature known as “Ponsonby rule” has regulated the treaties’ ratification process, granting Parliament some control powers. By effect of the Constitutional and Reform Act 2010, such principle has gained statutory recognition, with some

¹⁶⁰ *Dunn v. Queen* [1896] 1 QB 116.

¹⁶¹ Employment Rights Act 1996, c. 18.

¹⁶² Colin Turpin, Adam Tomkins, *British Government and the Constitution* (n 98), page 440.

¹⁶³ John Alder, Keith Syrett, *Constitutional and Administrative Law*, 11th edition (London: Palgrave, 2017), page 201.

changes and specifications. The Government is now obliged to lay before Parliament each signed Treaty, accompanied by an Explanatory Memorandum outlining its provisions and the reasons behind the decision to seek its ratification. From the moment in which a signed treaty is brought to Parliament's notice, a period of 21 days starts, during which either House is given the opportunity to approve a motion "that the treaty should not be ratified".¹⁶⁴ If Parliament fails to approve such a motion, the treaty can be ratified. Otherwise, the Government must release a statement setting out the reasons behind its decision to ratify irrespective of Parliament's objections. Then, another period of 21 days is triggered, within which ratification is forbidden and the Commons (not the Lords anymore) have the chance to block it for a further period of 21 days. Potentially, by voting motions every 21 days, the House of Commons has the power to completely stop the treaty's ratification process.

This mechanism strongly resembles the one in place before 2010. Today, as then, Parliament is not involved in treaties' negotiation, a process that firmly remains in the exclusive domain of the executive, and, therefore, cannot amend them. It is simply entitled to make a "Take it or leave it" choice.

There are clearly some major exceptions to the rules described above. First of all, Memorandums of Understanding (MoUs) are excluded from the application of the 2010 Act's provisions¹⁶⁵ and, consequently, fall outside the area of Parliament's scrutiny and control. The MoU is described by the Foreign and Commonwealth Office's official handbook as an instrument which "records international "commitments", but in a form and with wording which expresses an intention that it is not to be binding as a matter of international law".¹⁶⁶ MoUs are often used when a certain matter must be regulated in a technical and detailed way, making it desirable to avoid treaties' complicated formalities. They can be very useful even when it comes to implementing existing treaties or when inherently variable technological standards are to be dealt with. Parliament's lack of control over MoUs has never raised concerns, given their peculiar nature of technical agreements.

The second major exception to the ordinary ratification process as described by the Constitutional Reform and Governance Act 2010 is represented by EU treaties.¹⁶⁷ Such

¹⁶⁴ Constitutional Reform and Governance Act 2010 c. 25, s. 20(1)(c).

¹⁶⁵ Constitutional Reform and Governance Act 2010 c. 25, s. 25(1).

¹⁶⁶ United Kingdom, Foreign and Commonwealth Office, *Treaties and Memoranda of Understanding: guidance on practice and procedures*, 2014, page 1.

¹⁶⁷ Constitutional Reform and Governance Act 2010 c. 25, s. 20(1).

international agreements are capable of bringing great changes to domestic law, constitutional arrangements and citizens' rights, thus calling for a deeper Parliament's involvement. The European Union Act 2011 requires each treaty amending or replacing TEU or TFEU to be approved by an Act of Parliament,¹⁶⁸ and also provides for a referendum to be held whenever a certain EU treaty broadens the Union's exclusive or shared competences.¹⁶⁹ As already specified, also withdrawal from the EU must be approved by Parliament. In *Miller*¹⁷⁰ the Supreme Court has ruled that, despite enjoying the power to sign and terminate treaties, Ministers "are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law unless statute, i.e. an Act of Parliament, so provides".¹⁷¹ The importance of Parliament's involvement is further stressed in other parts of the decision: "We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation".¹⁷²

The last category of treaties whose ratification is not regulated by the ordinary procedure is that of international taxation agreements. As many statutes point out,¹⁷³ such treaties are, as usual, signed by government's officials bearing full powers (normally, the Foreign Secretary or the Prime Minister) and then presented to the Commons in the form of Orders in Council. They enter into force only if the House approves a specific resolution granting them legal effect.

If Government's powers are subject to many limitations whenever a treaty alters domestic law, the same cannot be said when treaties lay down provisions which affect the United Kingdom's position under public international law without making changes to the British legal order. For this reason, a transition from negative to affirmative resolution procedure has been proposed. Indeed, following the current ratification mechanism, a treaty is automatically ratified *unless* a specific motion is approved by the House of Commons. The idea is to change the system, making treaties unratifiable *unless* they are explicitly approved by Parliament. This view has been supported, in particular, by David Cameron and the Conservative party. In "Power to the people: rebuilding Parliament", a report released in 2007 by the Conservative

¹⁶⁸ European Union Act 2010 c. 36, s. 2(1).

¹⁶⁹ European Union Act 2010 c. 36, s. 4(1).

¹⁷⁰ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹⁷¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, paragraph 5.

¹⁷² *Ibidem*, paragraph 82.

¹⁷³ *Ex plurimis* Inheritance Tax Act 1984 c. 51, s. 158 and Finance Act 2006 c. 25, s. 173.

Democracy Task Force, the affirmative resolution procedure is proposed as a solution to Parliament's lack of control over foreign policy. Another option could be represented by a system letting Parliament, and in particular the relevant select committee of the House of Commons, be involved in negotiations taking place prior to signature and ratification of a treaty. Such system, in the words of professor Michael Bowman, could "minimise the risk of the Legislature and the Executive subsequently finding themselves at odds over the desirability of ratification and serve as a means by which Parliament could enhance its expertise in relation to the treaty-making process generally".¹⁷⁴

Another aspect of pivotal importance in the field of foreign policy is represented by the power to declare war and deploy troops abroad. Traditionally vested in the Sovereign, it is now exercised by the Prime Minister on his/her behalf, like many other Prerogative powers.

Before starting our analysis on the subject, we should remember that declaring war on a sovereign State is forbidden under public international law. As the United Nations Charter clearly states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state".¹⁷⁵ This means that war is, in principle, justified only in case of self-defence or when the Security Council of the United Nations deems it appropriate to allow the use of force with a view to avert threats to international peace. Nevertheless, wars break out on a regular basis all over the world and involvement in conflicts is anything but inconceivable for a country like the United Kingdom, which, despite having made no formal war declaration since that against Siam (modern Thailand) in 1942,¹⁷⁶ has taken part to various war operations during the last 60 years. Potential risks for the lives of British troops and financial impact of armed conflicts on state budget should make the case for effective parliamentary control over government's decisions in this area but, formally speaking, such control is non-existent, as the Prime Minister could decide to deploy troops abroad without obtaining Parliament's approval. For obvious reasons, no Premier has ever tried to start a war without calling Parliament into question, the principle of accountability and potential recourse to the vote of no confidence by MPs working as solid

¹⁷⁴ United Kingdom, Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 2008, page 341 (opinion submitted by professor Michael Bowman as written evidence).

¹⁷⁵ United Nations Charter, article 2, paragraph 4.

¹⁷⁶ United Kingdom, Constitution Select Committee of the House of Lords, *Waging war: Parliament's role and responsibility*, 2006, paragraph 10.

counterweights to arbitrary exercise of war powers.¹⁷⁷ Anyway, since the Second Gulf War (2003), the idea of a stricter and formally recognised parliamentary control has started to gain momentum. In a comprehensive report released by the Public Administration Select Committee of the House of Commons in 2004 about Royal Prerogative powers, an entire paragraph is dedicated to war powers. The Committee highlighted the importance of making Parliament's control on armed conflicts compulsive and unavoidable by placing it on statutory footing: "Rt Hon Tony Benn was more strongly persuaded of the need for legislation, calling for a statutory requirement for Ministers to consult Parliament in cases of conflict and advocating a measure along the lines of the United States War Powers Act".¹⁷⁸ Two years later, also the House of Lords' Constitution Select Committee decided to examine the problem. The Lords' first concern was to establish the limits of the Prime Minister's war powers in both domestic and international law. Domestically, such powers do not encounter any significant restraint of a juridical character, given the fact that even courts consider them to be outside their jurisdiction: "The United Kingdom's courts have taken the view that the exercise of the deployment power is neither justiciable nor subject to review in domestic courts. In consequence, not only is the exercise of the power immune from judicial review, but such actions are legal as a matter of domestic law".¹⁷⁹ With these words, the Committee was making reference to the famous case "Council of Civil Service Unions v Minister for the Civil Service",¹⁸⁰ which we have already encountered.¹⁸¹ In that decision, the general principle of Prerogative powers' justiciability was introduced, but specific exceptions were also made. In particular, war powers were considered to be exempt from courts' jurisdiction because of the lack of a legal standard by which to assess their exercise. If domestic law does not provide any limit to the Prime Minister's powers, the situation is entirely different in the domain of international law: not only war is justifiable only

¹⁷⁷ It's common knowledge that one of the main forces leading to the birth of Parliament in England was actually the need, initially perceived only by barons and tenants and then also by middle-class taxpayers, to curb the government's military expenditure.

¹⁷⁸ United Kingdom, Public Administration Select Committee of the House of Commons, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (n 24), page 9.

¹⁷⁹ United Kingdom, Constitution Select Committee of the House of Lords, *Waging war: Parliament's role and responsibility* (n 132), paragraph 28.

¹⁸⁰ *Council of Civil Service Unions v Minister for the Civil Service*, [1983] UKHL 6.

¹⁸¹ See subparagraph 1.2.3.

in certain specific cases (see above) according to the United Nations Charter,¹⁸² but the International Criminal Court, which has jurisdiction on individuals rather than on States, is now, after the entry into force of the second amendment to the Statute of Rome on May 8th, 2013, able to judge on the crime of “Aggression” (at the time of the HL Committee’s report this was not possible yet). There would be also other important constraints to take into account, like those imposed by international humanitarian law as enshrined in the Geneva conventions, but they deal with the lawfulness of the way in which a certain conflict is fought, and, therefore, are not strictly linked to the subject we are focusing on. In light of such international rules, the Committee considered its support to the idea of a deeper Parliament’s scrutiny over government’s war powers as decisive in upholding not only the democratic principle but also the highest standards of compliance with international obligations. The final outcome of the Lords’ report was anyway different from that of the Common’s Committee. If the latter had suggested the approval of a statute regulating Parliament’s participation to the exercise of war powers, the former proposed the development of a new constitutional convention requiring the Prime Minister to always subject any decision having military consequences to Parliament’s substantive approval: “it has been suggested that a convention should be developed, the central theme of which would be a requirement for Parliament to be informed by Government of deployment proposals or developments, and asked to give its approval to them. This was considered a more flexible arrangement than a statutory scheme and one which avoided the legal consequences of a statutory provision”.¹⁸³ As we will see, the Lords proved to be very far-sighted by proposing the establishment of a constitutional convention.

In a consultation paper issued in 2007,¹⁸⁴ the Ministers of justice, defence and foreign affairs identified various solutions to the problem of war powers but did not give any indication about whether such solutions should be implemented by statute or through the development of a constitutional convention. The government seemed to focus more on the actual instrument to be given to Parliament (a detailed resolution, a general resolution and so on), while ensuring

¹⁸² The United Kingdom was a defendant in an International Court of Justice case concerning exactly the legality of use of force: International Court of Justice, *Legality of Use of Force, Serbia and Montenegro v. United Kingdom*, 2004.

¹⁸³ United Kingdom, Constitution Select Committee of the House of Lords, *Waging war: Parliament’s role and responsibility* (n 132), paragraph 85.

¹⁸⁴ United Kingdom, Ministry of Justice, Ministry of Defence, Foreign and Commonwealth Office, *War powers and treaties: Limiting Executive powers*, 2007.

that increased parliamentary control on war powers did not undermine secrecy and flexibility of certain military operations and also army's morale.¹⁸⁵

Despite the interesting debate started in 2004, until now, no formal step has been made in the direction of approving a statute limiting the Prime Minister's war powers. Nevertheless, looking at many recent events, it is possible to identify an interesting trend towards change. In the period going from the end of World War II to 2001, the only substantive vote on a military operation has taken place in 1950, when the UK took part to the Korean conflict.¹⁸⁶ Then, other major interventions were made (Falklands, Afghanistan or Kosovo to name a few) with Parliament being simply able to start adjournment debates¹⁸⁷ *after* hostilities had already started.¹⁸⁸ Things changed in 2003, when Tony Blair became the first Prime Minister since Clement Attlee to ask Parliament's formal assent *before* starting military operations. On that occasion, the Commons approved UK's participation to the Iraq invasion. In the light of the following developments, this vote by the House of Commons could be seen as the first building block of a new constitutional convention of customary nature granting Parliament stronger control over government's war powers. David Cameron sought Parliament's approval before committing military forces to war actions on four different occasions: in 2011,¹⁸⁹ when the Commons voted in favour of the establishment of a no-fly zone over Libya's territory, in 2013¹⁹⁰ and 2015¹⁹¹, when intervention in Syrian civil war was at stake, and again in 2014,¹⁹² when air strikes against Islamic State in Iraq were discussed. Cameron, like Blair before him, could have made use of his Prerogative powers, avoiding Parliament's vote. Instead, he felt the need to subject his action to the Commons' scrutiny as if it were juridically necessary. The 2013 vote, unlike the other three, saw Cameron lose, preventing him from starting operations in Syria

¹⁸⁵ Ibidem, paragraphs 38-39.

¹⁸⁶ Ibidem, paragraph 31.

¹⁸⁷ Adjournment debates are used to start a debate on a certain issue when it is impossible to vote on a substantive motion having binding effects on government's activities.

¹⁸⁸ United Kingdom, Ministry of Justice, Ministry of Defence, Foreign and Commonwealth Office, War powers and treaties: Limiting Executive powers (n 132), paragraph 31.

¹⁸⁹ Patrick A. Mello, *Curbing the royal prerogative to use military force: the British House of Commons and the conflicts in Libya and Syria*, West European Politics, Volume 40, Issue 1, 2017: 80-100, at page 86.

¹⁹⁰ James Strong, *Interpreting the Syria vote: Parliament and British foreign policy*, International Affairs, Volume 91, Issue 5, 2015: 1123-1139, at page 1123.

¹⁹¹ Peter Rowe, *Legal Accountability and Britain's Wars 2000-2015* (New York: Routledge, 2016), page 78.

¹⁹² Ibidem, page 73.

(bombings started two years later after the 2015 vote, anyway). In Britain's recent history, it was probably the first time in which Parliament proved successful in blocking a military intervention. About Kaarbo and Kenealy, with the 2013 vote, the House of Commons "inflicted the first defeat on a Prime Minister over a matter of war and peace since 1782",¹⁹³ when Frederick North was ousted out of office by a motion of no-confidence after the British defeat at Yorktown, during the American War of Independence. The only exception to Cameron's strict abidance by Parliament's will in the exercise of war powers can perhaps be found in the 2013 decision to deploy a small team of British troops to provide non-combat support to French forces in Mali,¹⁹⁴ but the classification of the operations performed by the British troops on Malian soil is highly controversial, as they provided simple logistic support to the French forces, without being engaged in actual battles.

Generally speaking, customs are considered as the product of a certain behaviour repeated in time (*diuturnitas*) in the belief of its necessary nature (*opinio iuris sive necessitatis*). Within the specific framework of British constitutional law, various definitions of "Constitutional convention" have been proposed. Peter Leyland, despite stressing that "there is no way of knowing with certainty what an established convention is, except from the behaviour of the sovereign, politicians, or other officials responsible for operating it as part of the constitution",¹⁹⁵ describes constitutional conventions as "rules of political practice which are regarded as binding by those to whom they apply".¹⁹⁶ Perhaps, the most accurate and influential test ever developed in this area remains that proposed by Sir Ivor Jennings. About Jennings, a certain practice can be qualified as a constitutional convention when it is possible to answer affirmatively to three specific questions: "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?".¹⁹⁷ Looking at what we have said about the use of war powers in the last 14 years, it is impossible to deny that an uninterrupted series of influential precedents exists. The only objection that could be raised is represented by the recent Syrian air strikes, which have been

¹⁹³ Juliet Kaarbo, Daniel Kenealy, *No, Prime Minister: explaining the House of Commons' vote on intervention in Syria*, European Security, Volume 25, Issue 1, 2016: 28-48, at page 28.

¹⁹⁴ Patrick A. Mello, Curbing the royal prerogative to use military force: the British House of Commons and the conflicts in Libya and Syria (n 145), page 81.

¹⁹⁵ Peter Leyland, *Constitutional conventions and the preservation of the spirit of the British constitution*, Rivista Telematica dell'Associazione Italiana Costituzionalisti, Issue 4, 2014, page 7.

¹⁹⁶ Ibidem.

¹⁹⁷ Ivor Jennings, *The law and the constitution*, 5th edition (London: Hodder and Stoughton, 1959), page 136.

carried out without previous parliamentary approval, but the fact that Prime Minister Theresa May has sought to justify her decision not to allow a preliminary vote on the subject¹⁹⁸ can arguably be considered as a further evidence of the custom's existence.¹⁹⁹ The second question is certainly harder to answer, but parliamentary debates held prior to the votes listed above, and in particular those preceding the 2013 Syria vote, show that "the executive acted as if bound by the rule of a parliamentary prerogative".²⁰⁰ Again, as highlighted by Mello, "throughout the three months of debate and deliberation over Syria, various cabinet ministers repeatedly acknowledged the existence of a convention on parliamentary approval".²⁰¹ With regard to the third and last question of the Jennings' test, we can say that the rationale behind this new rule could be the strengthening of Government's accountability to Parliament and the necessity to confine war powers within the limits imposed by respect of the democratic principle.

Taking into account all the evidences collected in this subparagraph, it is fair to say that a constitutional convention subjecting the exercise of the Prime Minister's war powers to substantial assent by the House of Commons has developed or, at least, is developing in the United Kingdom.

¹⁹⁸ HC Deb 16 April 2018, vol 639, col 42.

¹⁹⁹ Prime Minister May has explained her decision to the House of Commons as follows: "The speed with which we acted was essential in co-operating with our partners to alleviate further humanitarian suffering and to maintain the vital security of our operations. This was a limited, targeted strike on a legal basis that has been used before. And it was a decision that required the evaluation of intelligence and information, much of which was of a nature that could not be shared with Parliament. We have always been clear that the Government have the right to act quickly in the national interest". It could perhaps be argued that May's behaviour has set the precedent for an important exception to the custom of subjecting the exercise of war powers to parliamentary scrutiny: whenever a certain military action requires an important degree of secrecy, previous parliamentary approval will be sacrificed.

²⁰⁰ Patrick A. Mello, *Curbing the royal prerogative to use military force: the British House of Commons and the conflicts in Libya and Syria* (n 145), page 94.

²⁰¹ *Ibidem*, page 93.

Chapter 2

An introduction to Australia, Canada and New Zealand

2.1 From Crown Colonies to sovereign States: a constitutionally meaningful historical development

2.1.1 Canada

The Constitution Act 1982 can be defined as the cornerstone of the overarching Canadian Constitution for both historical and juridical reasons. Historically speaking, the Act marks the end of the long process known by the name of “patriation”, leading to Canada’s full sovereignty and complete independence from the United Kingdom. Under the juridical point of view, it officially recognises the Constitution of Canada as the “supreme law of the land” by stating, in section 52, that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.¹ Section 52 also subjects constitutional amendments’ approval to the rules laid down by part V of the Act² (without making explicit reference to them) and provides a list of the documents to be considered as parts of the overarching Constitution, namely “(a) the Canada Act 1982, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b)”.³ Among the Acts and orders under letter (b) we find a series of statutes approved over time by the British Parliament, including the British North America Act 1867,⁴ which has served as the sole central written document of the Canadian Constitution until 1982, and the Statute of Westminster 1931. The overarching Constitution comprises also all the relevant legal instruments (statutes, Royal Proclamations, Letters Patent) mentioned, in turn, by the documents already entrenched in the Constitution by effect of the aforementioned section 52(2) of the Constitution Act 1982,⁵ and the constitutional conventions, which play a major role

¹ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 52(1).

² Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 52(3).

³ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 52(2).

⁴ The British North America Act 1867 has been renamed “Constitution Act 1867” by the Constitution Act 1982 itself.

⁵ For example, section 25 of the Constitutional Act 1982, by simply making reference to the Royal Proclamation 1763, confers constitutional dignity upon it.

within the system.⁶ Though being rigid⁷ and revolving around two main written documents (the Constitution Acts 1867 and 1982), the Canadian Constitution, similarly to the British Constitution from which it derives, appears as a “patchwork” of codified acts and uncoded conventions. An interesting example of such mixed structure is easily offered by the legal status of the Prime Minister and the Governor General, the main objects of our analysis. While the office of the former is almost entirely regulated by customs and conventions,⁸ that of the latter is carefully described and disciplined by the Constitution Act 1867 and the Letters Patent 1947.

British rule in Canada was established in 1763, when, by virtue of the Paris treaty,⁹ a vast territory located north of the St. Lawrence river and the Great Lakes was transferred from France to the UK (at the time Great Britain). Such territory, known as French Canada, was renamed Province of Québec pursuant to the Royal Proclamation¹⁰ issued by King George III in the same year. The Proclamation of 1763, as stated above, is still considered as an integral part of the overarching Canadian Constitution and represents one of the main legal grounds on which aboriginal peoples’ rights are protected.¹¹ The Clergy Endowments (Canada) Act 1791,

⁶ Many British constitutional conventions have been adopted by Canada, as evidenced by the preamble to the Constitution Act 1867: “Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom* [...]”.

⁷ All the provisions recognised as parts of the overarching Constitution enjoy the protection afforded by s. 52(3) of the Constitution Act 1982 and can therefore be amended only by following specific procedures which are, in most cases, different from (and more demanding than) the law-making process used to approve ordinary statutes. Therefore, in the Canadian hierarchy of law sources, the Constitution is certainly placed above any other legal source. It should be noted, anyway, that the effects of the so-called “*notwithstanding clause*” (Constitution Act 1982, section 33) on Constitutional provisions’ supremacy are so relevant that the notion of constitutional rigidity within the framework of the Canadian legal order must be interpreted *cum grano salis*, at least in certain specific cases. We will elaborate more on this subject in subparagraph 2.2.1.

⁸ Suffice it to say that in the Constitutional Act 1867 the office is never mentioned, while in the Constitutional Act 1982 we encounter the expression “Prime Minister” for the first time in subsection 35.1 about the aboriginal peoples’ participation to the amendment process of constitutional provisions pertaining to their rights.

⁹ The Paris treaty was one of the peace treaties signed after the end of the Seven Years’ War (1756-63), which saw Great Britain and its allies victorious against a coalition led by France and Austria.

¹⁰ The use of Royal Proclamations as law-making instruments has been found unlawful by British courts in the 17th century (see subparagraph 1.2.3 for further information), but it was anyway fairly common in the management of colonial affairs.

¹¹ The Royal Proclamation of 1763 set new boundaries for British North American holdings, drawing a line along the Appalachian Mountains and forbidding new settlements west of this line.

now known as the Constitutional Act 1791, was responsible for introducing some important changes. It divided the Québec province into two different colonial entities, Lower and Upper Canada, and granted them, for the first time, a basic form of political representation through the establishment of Legislative Assemblies (lower houses elected by qualified voters) and Legislative Councils (upper houses whose members were appointed for life by the Lieutenant Governors). Waves of unrest hit Upper and Lower Canada in 1837-38. John George Lambton, Earl of Durham, was consequently sent to the North American colonies by the British government to discover the reasons behind the rebellions and make proposals for the eradication of any eventual problem. The result of Durham's inquiry was the "Report on the Affairs of British North America", published in 1839, in which he suggested the reunification of the two Canadas and the introduction of "*responsible government*",¹² namely of a system that ensured the Government's accountability to the lower house of Parliament. While the first proposal was made effective shortly after by the Act of Union 1840,¹³ the second was implemented only in 1848, when Governor General Lord Elgin appointed Robert Baldwin and Louis-Hippolyte La Fontaine as joint Premiers of the Province of Canada,¹⁴ believing that they could command a majority in the House of Assembly. In the same 1848 *responsible government* was achieved also by other North American colonies: Nova Scotia and New Brunswick. The next major turning point took place in 1867, when the first North America Act, now known as Constitution Act 1867, was approved by the British Parliament. Such statute created Canada as a federal Dominion comprising the formerly-distinct Provinces of Canada (which was again split into two parts: Ontario and Québec), New Brunswick and Nova Scotia. The Constitution Act 1867 laid the foundations of the modern Canadian State, creating a separate Canadian Privy Council and defining the structure of the House of Commons, the Senate, the office of Governor General and the judiciary. Despite the fact that, after the entry into force of the Act at issue, the word "Dominion", meaning semi-autonomous polity, started to be referred to the newly-established federal State, the relationship between the former colony and the motherland did not actually change as a result. Internal self-rule had been indeed achieved by all the Provinces in 1848 and was simply inherited by the new federal entity, while the United Kingdom retained its supremacy. The Parliament of Westminster could legislate on every matter and enjoyed pre-

¹² See subparagraph 1.2.5 for a detailed description of the principle.

¹³ The Act of Union 1840 created the United Province of Canada.

¹⁴ Each Canada's Government was at the time led by two Premiers, one from the west half of the United Province and the other from the east half.

eminence over the Canadian Parliament, as set forth by the Colonial Laws Validity Act 1865,¹⁵ the court of last resort in the Canadian judiciary remained the Judicial Committee of the British Privy Council and the Governor General was still appointed by the Sovereign on advice of the British Prime Minister. Canada was therefore, unquestionably, a part of the British Empire. This changed in 1931, with the Statute of Westminster, whose section 4 gave Canada (and the other Dominions) full legislative sovereignty: “*No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof*”.¹⁶ The Statute repealed the Colonial Laws Validity Act 1865¹⁷ and transformed Canada into a quasi-sovereign¹⁸ State. As a result, since 1931, the Governor General has been chosen by the Monarch on advice of the Canadian Prime Minister. The last step towards full sovereignty was taken only in 1982, when, by effect of the Constitution Act, not only a Charter of Rights and Freedoms¹⁹ was introduced, but any form of British interference in the amending process of the Constitution was definitely removed.²⁰ The long process of “patriation” was finally over, with Canada becoming a fully sovereign federal monarchy featuring a Crown of its own.

2.1.2 Australia

The history of modern Australia starts in 1770, when navigator and explorer James Cook unilaterally claimed British sovereignty over the land known, at the time, by the name of New Holland, after having reached its eastern coast. Despite the presence on Australian soil of an Aboriginal civilisation with its own “traditional customs and rules, generally of a religious nature”,²¹ with the establishment of the *New South Wales* penal colony in 1788, British law replaced any pre-existing juridical system and became the basis for all the subsequent constitutional developments. Ironically, after more than two centuries, the Australian *High*

¹⁵ Colonial Laws Validity Act 1865, 28 & 29 Vict. c. 63 (UK).

¹⁶ Statute of Westminster 1931, 22 Geo. V c. 4, s. 4 (UK).

¹⁷ Statute of Westminster 1931, 22 Geo. V c. 4, s. 2 (UK).

¹⁸ Canada is *de facto* a sovereign State since 1931, but the circumstance that constitutional amendments had to be approved by the British Parliament upon request by the Canadian legislative assembly made it impossible to define it as fully sovereign State before 1982.

¹⁹ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, ss. 1-34.

²⁰ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, ss. 38-49.

²¹ Gerard Carney, *The constitutional systems of the Australian states and territories* (Cambridge: Cambridge University Press, 2006), page 35.

Court, in the landmark case *Mabo v. Queensland (No 2)*,²² found the doctrine of *terra nullius*, invoked by the Kingdom of Great Britain as the basis for the integral transplant of its legal order to the recently-claimed land, inapplicable to those Australian territories which, before Cook's arrival, were already inhabited by indigenous people, irrespective of the fact that, in the 18th century, such people were regarded as "uncivilised". However, at least until the 20th century, aboriginal law has exerted little if any influence on the development of the Australian Constitution.

Following the evolutionary path of each Australian Colony is beyond the scope of our work. We will therefore focus on the most important one: New South Wales (NSW).²³ Initially, NSW was subject to "autocratic" rule: the Governor's powers were undefined and almost entirely sourced in the Royal Prerogative, while a local legislative assembly was not in place. In the early 19th century, with the arrival of many free settlers to NSW's shores, demand for increased control over executive authority began to gain momentum. In a famous 1803 essay,²⁴ Jeremy Bentham, a harsh critic of the concept of "penal colony" as a whole,²⁵ denounced the lack of an adequate statutory basis for the exercise of the Governor's powers. In 1819, the British government entrusted John Thomas Bigge with the task of determining the future of NSW. Bigge produced three official reports, published in 1822, in which he proposed to reform the mechanism through which the colony was governed, strongly limiting the Governor's powers. Such reports paved the way to the approval of the *New South Wales Act 1823*,²⁶ which established a Legislative Council and the Supreme Court of NSW. The Council comprised

²² *Mabo v. Queensland (No 2)*, [1992] HCA 23, (1992) 175 CLR 1.

²³ NSW was not only the first-established but also the most influential colony in Australia. Tasmania, formerly known as Van Diemen's Land, was part of NSW before becoming a separate colony. The same can be said for Victoria and Queensland.

²⁴ Jeremy Bentham, *A Plea for the Constitution: showing the enormities committed to the oppression of British Subjects, innocent as well as guilty, in breach of Magna Charta, The Petition of Right, the Habeas Corpus Act, and the Bill of Rights; as likewise of the Several Transportation Acts; in and by the Design, Foundation and Government of the penal colony of New South Wales: including an inquiry into the right of the Crown to legislate without Parliament in Trinidad, and other British Colonies* (London: Mawman, Poultry and Hatchard, 1803).

²⁵ Bentham believed that the transportation of convicts to penal colonies was illegal, inefficient and expensive. He supported his own concept of prison, the "*panopticon*", seen as the best option available for a State whose aim is to reform convicts, and not just to punish them. Bentham's views on the subject can be found in "*Panopticon versus New South Wales*" (1802).

²⁶ *New South Wales Act 1823*, 4 Geo. IV c. 96 (UK).

seven appointed members²⁷ and, therefore, was not an independent, elected body. Nevertheless, the fact that the Governor, for the first time, was obliged to seek the Council's approval in the law-making process meant that his "autocratic rule" was over. After the creation, by Royal Letters Patent, of an Executive Council in 1828,²⁸ the *Australian Constitutions Act 1842*²⁹ introduced partial political representation. The new Legislative Council, reformed by the aforementioned statute, was indeed partly elected (24 members, two thirds) and partly appointed (12 members, one third). Another turning point in the history of the Australian Constitution was marked by the *Australian Colonies Government Act 1850*.³⁰ It extended political representation to the other Australian colonies³¹ and authorised the approval of colonial Constitutions which would introduce bicameral legislatures. Such Constitutions, once drafted by the local assemblies, had to be laid before both Houses of the Imperial Parliament for at least 30 days before being granted Royal Assent directly by the British Sovereign.³² The Constitution of NSW³³ obtained Royal Assent in 1855, after having been amended by the Imperial Parliament.³⁴ Some Australian colonies had their Constitution approved the same year, others later.³⁵

Nowhere in these Constitutions can be found an explicit reference to responsible government.³⁶ Nevertheless, after their adoption, the appointment of a Prime Minister who

²⁷ Gerard Carney, *The constitutional systems of the Australian states and territories* (n 21), page 39.

²⁸ The Royal Letters Patent commissioning Sir Ralph Darling as Governor, issued on 19 December 1825, created the Executive Council as the Governor's executive advisory body. It was the beginning of Cabinet government in NSW.

²⁹ *Australian Constitutions Act 1842*, 5 & 6 Vict. c. 76 (UK).

³⁰ *Australian Colonies Government Act 1850*, 13 & 14 Vict. c. 59 (UK).

³¹ The same 2:1 ratio seen at work in the NSW Legislative Council (two thirds elected members and one third appointed members) was applied to the assemblies of the other Colonies.

³² *Australian Colonies Government Act 1850*, 13 & 14 Vict. c. 59 (UK), s. 32.

³³ *Constitution Act 1855 (NSW)*, 18 & 19 Vict. c. 54 (UK).

³⁴ NSW's Legislative Council had sought to exclude Imperial veto powers from matters of strictly local significance. The British Colonial Office imposed the powers of disallowance and reservation also on those matters.

³⁵ Tasmania and Victoria saw their Constitutions approved in 1855, South Australia in 1856, Queensland in 1859.

³⁶ The NSW Constitution included some provisions which, indirectly, could convey the idea of responsible government. For example, sections 1 and 54 established parliamentary control over finance.

could command a majority in the Legislative Assembly³⁷ became unavoidable. As the Province of Canada had proven in 1848,³⁸ responsible government was the natural consequence of the establishment of elective legislatures. It should be borne in mind, however, that elective legislatures and responsible government did not mean legislative sovereignty. Indeed, the *Colonial Laws Validity Act* 1865,³⁹ restated the colonies' subordination to the United Kingdom by keeping the repugnancy system⁴⁰ alive.

The first steps towards a federation of colonies were taken in the second part of the 19th century, when increasing concerns for German and French activities in New Guinea prepared the ground for a conference of the six Australian colonies held in November 1883.⁴¹ The main outcome of such conference was the establishment in 1885 of the *Federal Council of Australasia*,⁴² a common legislative body whose competence was limited to certain specific matters, namely, among others, the relationships with the Pacific islands, fisheries, marriages and copyright laws. The short-lived Council⁴³ proved to be scarcely productive, with just nine Acts passed. This was partly due to the fact that New South Wales had decided not to join it. Additionally, in the 1890s, when the far-reaching idea of full federation was conceived, the concept behind the Council inevitably lost its appeal.

³⁷ The colonial Constitutions approved in the 1850s introduced bicameral Parliaments whose lower Houses were called, and are still called today, "Legislative Assembly".

³⁸ In 1848, Baldwin and LaFontaine became the first "responsible" Prime Ministers of the Province of Canada. See Chapter 3 for more information.

³⁹ Colonial Laws Validity Act 1865, 28 & 29 Vict. c. 63.

⁴⁰ About the repugnancy doctrine in its purest, original form, a colonial statute is void if inconsistent with ("repugnant to") the law of the United Kingdom, English common law included. With the approval of the Colonial Laws Validity Act, the repugnancy system remained in place, but its scope was limited. Colonial legislatures had now to seek complete compliance with Imperial Acts of "Paramount force" only. British statutes without "Paramount force" were therefore applicable only to the UK and left colonial law systems unchanged.

⁴¹ The meeting took place in Sidney and was also attended by representatives of the New Zealand and Fiji Crown Colonies.

⁴² The Council was established by the *Federal Council of Australasia Act* 1885, 48 & 49 Vict. c. 60. It comprised two representatives for each colony and was required to meet at least once every two years. Royal assent to the bills approved during a certain Council's meeting was given by the Governor of the Colony in which such meeting had been held.

⁴³ The Council's members met for the last time in 1899. The Council was officially abolished by the Commonwealth of Australia Constitution Act 1900.

The first draft of the federal Constitution was framed in 1891 at the Sidney Constitutional Convention of the Australian colonies⁴⁴ under the influence of Sir Samuel Griffith, the Premier of Queensland. Though rejected by the various Colonial Parliaments, it became the basis for each subsequent development. In addition to the draft Constitution, the 1891 Convention approved several resolutions whose content can help us shed light on the “suspicious” attitude showed by the colonies towards the proposed Federation. The first two resolutions⁴⁵ are particularly valuable, because they reveal the future Australian States’ will to preserve their territorial integrity and privileges. Australian territorial sub-units, more jealous of their own autonomy than their Canadian counterparts, have made great efforts in order to limit unwanted Federal interference in their affairs. We will later see how such peculiarity has shaped the relationships between the Commonwealth, the Australian Monarch and the States themselves in such a way as to affect, ultimately, the powers of the Federal Prime Minister too.

A Premiers’ Conference held in 1895 convened a new Constitutional Convention, whose participants had to be directly elected by the people of the Colonies. The new Convention met in three different sessions, between which draft Constitutions were sent to the various Legislative Assemblies for review and amendment purposes.⁴⁶ The final draft was approved by popular referendum in all colonies but New South Wales. Then, NSW’s Legislative Assembly proposed a series of amendments which were adopted by a new Premiers’ Conference in January 1899. The final draft constitution was approved by the people of the six constituent Colonies between June and September 1899, before being submitted to the Imperial Parliament

⁴⁴ The Convention was attended by seven representatives for each colony, all appointed by the relevant Legislative Assemblies.

⁴⁵ The text of the two resolutions, as reported in William Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd edition (Melbourne: Charles F. Maxwell, G. Partridge and Company, 1910) pages 41–42, is the following: “1) the powers and privileges and territorial rights of the several existing Colonies shall remain intact except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government. 2) No new State shall be formed by separation from another State, nor shall any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned as well as of the Federal Parliament”. The reference made in the second resolution to new States (not) to be formed “by separation from another State” calls to mind the British North American Act 1867, whose section 5 created the Provinces of Ontario and Québec by dividing the territory of the United Province of Canada, one of the constituent colonies of the new Dominion.

⁴⁶ The first session took place in Adelaide from 22 March to 5 May 1897, the second in Sidney in September 1897, the third in Melbourne from 20 January to 17 March 1898.

in London. The *Commonwealth of Australia Constitution Act 1900*⁴⁷ was granted Royal Assent on 9 July 1900 and eventually came into effect on January the 1st 1901.

One striking difference emerges at first glance between Canada's and Australia's federative processes: while the former did not receive direct popular sanction,⁴⁸ the latter did. It is also important to note that, pursuant to the 1891 resolutions, no constituent Colony (now State) was subjected to territorial changes and no new State was created by the Constitution. Australian States' Constitutions,⁴⁹ which predate the Commonwealth Constitution itself, are explicitly recognised as part of the overarching Constitution in Chapter V, section 106.⁵⁰ No mandatory obligation is imposed over States in Chapter V with regard to their Constitutional structure. Interestingly, also the British North America Act 1867 devotes its Part V to the Provinces, but, unlike the Australian Constitution Act, it carefully regulates many aspects of the Provincial executive and legislative powers.⁵¹ A similarity between the North-American Dominion and the Pacific Commonwealth can instead be found in the status they shared from 1901 to 1931, when both of them were semi-autonomous polities which, despite having achieved internal self-rule and responsible government, had not gained full sovereignty yet. Australian Governors-General were, during those years, still appointed by the British Monarch on advice of the British Cabinet, the Judicial Committee of the Privy Council could hear appeals from both the High Court of Australia⁵² and State supreme courts, statutes approved by the Commonwealth Parliament had to always be consistent with British laws of paramount force in order not to be

⁴⁷ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (UK).

⁴⁸ Canada's federative process was carried out by Provincial delegates through two important conferences held in 1864, respectively in Charlottetown and Québec City. The Québec conference produced the so-called "72 resolutions", which, once adopted by the Provincial legislatures, became the basis for the final version of the Constitution, drafted at the London Conference in 1866 and subsequently approved by the Parliament of Westminster.

⁴⁹ As we have seen earlier, most Colonies approved Constitutions in the 1850s, pursuant to the Australian Colonies Government Act 1850. Some of them felt the need to draft new Constitutions after the establishment of the Commonwealth of Australia, as NSW did in 1902. It is important to remember that, unlike the Federal one, State Constitutions are flexible and can be amended by ordinary statutes.

⁵⁰ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (UK), s. 116: "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State".

⁵¹ See British North America Act, 1867, 30 & 31 Vict. c. 3 (UK), ss. 58-90.

⁵² Established in 1903, the High Court is the federal supreme court of Australia.

found void for repugnancy and foreign policy was entirely managed by the British Foreign Office. A major change for both countries took place between 1926, with the so-called “*Balfour declaration*” and 1931, with the adoption of the *Statute of Westminster*.⁵³ The latter deeply affected the Commonwealth Parliament’s powers by repealing the Colonial Laws Validity Act 1865 and, consequently, abolishing the repugnancy doctrine: it was now possible for the Commonwealth to legislate inconsistently with British paramount statutes. Conversely, it became impossible for the British Parliament to pass statutes applicable to the Commonwealth of Australia, unless the Commonwealth itself requested it. Australia adopted the Statute of Westminster through the *Statute of Westminster Adoption Act* 1942.⁵⁴ Another proof of the high degree of autonomy from the Federal government Australian States have always pursued as compared to Canadian Provinces lies in the unwillingness of the former to support the Colonial Laws Validity Act’s repeal. In the belief that maintaining certain ties to the United Kingdom could serve the purpose of reinforcing their position towards the Commonwealth, Australian States, almost unanimously,⁵⁵ chose to remain outside the scope of the Statute of Westminster and made their voice heard, hoping to reach their goal. They eventually succeeded, if it is true that the provisions of the Statute dealing with the issue of repugnancy to Imperial Acts were applicable to the Canadian Provinces but not to them. Only in 1986, with the adoption of the *Australia Act*,⁵⁶ Australian States acquired complete independence from the UK under the legislative point of view.⁵⁷ The Australia Act is the latest milestone in the history of the Australian Constitution: among other things, it abolished the powers of disallowance and reservation that were still present in the Constitutions of the States⁵⁸ (ss. 8-9) and *de facto* removed any residual possibility of bringing cases before the Judicial Committee of the Privy Council (s. 11).

⁵³ Statute of Westminster 1931, 22 & 23 Geo. V c. 4 (UK).

⁵⁴ Statute of Westminster Adoption Act 1942 (Cth).

⁵⁵ Victoria was a notable exception.

⁵⁶ Australia Act 1986 (Cth)/Australia Act 1986 c. 2 (UK).

⁵⁷ Australia Act 1986 (Cth), ss. 1-3.

⁵⁸ It should be noted that, while in Canada the powers of disallowance and reservation, still formally existent, are, at Province level, exercised by the Federal government through the mechanism of the Governor General-in-Council, in Australia, prior to 1986, they were at the British Cabinet’s disposal. With regard to States’ legislation, the Commonwealth has never had powers comparable to those potentially exercisable by Canada.

2.1.3 New Zealand

The circumstances that led to the establishment of British sovereignty over New Zealand are rather peculiar. While the annexation of Canada to the Empire was the consequence of a military success⁵⁹ and New South Wales, though initially serving as a penal colony, hosted many settlements which gradually grew into proper colonies,⁶⁰ Māori people “voluntarily” transferred their sovereignty rights on New Zealand to the British. In 1835, 35 northern Māori chiefs, actively encouraged by the British Resident Minister in the island, James Busby, signed the “*Declaration of the Independence of New Zealand*”, a document proclaiming the birth of the “*United Tribes of New Zealand*” confederation. In 1840, through the Treaty of Waitangi,⁶¹ the confederation became a Crown Colony under direct British control. New Zealand obtained self-government six years later, with the never fully implemented *New Zealand Constitution Act* 1846,⁶² soon replaced by the *New Zealand Constitution Act* 1852.⁶³ The latter statute is extremely important, as it remained in place until 1986, when a new *Constitution Act*⁶⁴ was approved by the House of Representatives in Wellington. The 1852 Constitution introduced a bicameral legislature, the General Assembly,⁶⁵ and an Executive Council as the Governor’s advisory body. Despite the absence of an explicit provision aimed at establishing a confidence link between the lower House of the General Assembly and the Cabinet, the first “responsible”

⁵⁹ The Seven Years’ War, see subparagraph 2.1.1.

⁶⁰ See subparagraph 2.1.2.

⁶¹ The Treaty was signed by representatives of the British Crown, including Lieutenant-Governor William Hobson, and various Māori leaders. The sovereignty shift is sanctioned by the first article: “The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess [...]”. The treaty, which formally guarantees Māori “the full exclusive and undisturbed possession of their Lands”, was almost completely ignored over the course of the 19th century, when battles between Māori tribes and the British Army over disputed land purchases became the norm (the so-called New Zealand Wars ended in 1872). Only in 1975 the *Treaty of Waitangi Act* officially recognised the binding nature of the 1840 Treaty, which is currently considered as a source of constitutional law. The Act, amended on various occasions, created the *Waitangi Tribunal*, a judicial body tasked with the investigation of any alleged breach of the Treaty.

⁶² New Zealand Constitution Act 1846, 9 & 10 Vict. c. 103 (UK).

⁶³ New Zealand Constitution Act 1852, 15 & 16 Vict. c. 72 (UK).

⁶⁴ Constitution Act 1986 (1986 No 114).

⁶⁵ The General Assembly comprised the elective House of Representatives and the entirely-appointed Legislative Council.

ministry took office as early as 1856, when Henry Sewell, the leader of the majority party in the House of Representatives, was appointed Premier by Governor Sir Thomas Robert Gore Browne. Having decided not to join the six Australian colonies in their federative process,⁶⁶ New Zealand followed its own evolutionary path: yet a semi-autonomous Dominion since 1907,⁶⁷ with the *Statute of Westminster Adoption Act* 1947,⁶⁸ a domestic statute implementing the provisions of the *Statute of Westminster* 1931,⁶⁹ it gained legislative sovereignty, namely the power to set aside British Imperial statutes, whose “paramount force” had been safeguarded, until then, by the *Colonial Laws Validity Act* 1865.⁷⁰ Since certain provisions of the Constitution Act 1852 were left outside the scope of the Statute of Westminster, New Zealand acquired the power to autonomously amend its Constitution by effect of the *New Zealand Constitution Amendment Act* 1947,⁷¹ a British statute explicitly requested by the Wellington Parliament through the *New Zealand Constitution Amendment (Request and Consent) Act* 1947.⁷² The new amendment power was exercised for the first time in 1950, when the upper House of Parliament, the Legislative Council, was abolished.⁷³ The last part of the 20th century brought many changes to the New Zealand constitutional framework. In 1986, a new Constitution Act was approved to replace both the Constitution Act 1852 and the Statute of Westminster Adoption Act 1947. The new fundamental statute, one of the most up-to-date written accounts of the Westminster system’s evolution,⁷⁴ made it impossible for the United Kingdom to pass legislation for New

⁶⁶ Although New Zealand representatives attended many Federal Conventions in the second part of the 19th century, the colony eventually decided not to become an Australian State.

⁶⁷ At the 1907 Imperial Conference, held in London, British colonies were granted “Dominion” status.

⁶⁸ Statute of Westminster Adoption Act 1947 (No 38).

⁶⁹ Statute of Westminster 1931, 22 & 23 Geo. V c. 4 (UK).

⁷⁰ Colonial Laws Validity Act 1865, 28 & 29 Vict. c. 63 (UK).

⁷¹ New Zealand Constitution Amendment Act 1947, 10 & 11 Geo. VI c. 46 (UK).

⁷² New Zealand Constitution Amendment (Request and Consent) Act 1947 (1947 No 44).

⁷³ Prime Minister Sidney Holland had to appoint many new Councillors to pass the *Legislative Council Abolition Act* 1950. Such Councillors are still remembered as “The suicide squad”. Those Councillors who, in 1922, supported the abolition of Queensland’s Legislative Council were given the same nickname.

⁷⁴ The Canadian Constitution Act 1982 introduced the “Charter of Rights and Freedoms”, a procedure for the amendment of constitutional provisions and the “Supremacy clause”. It did not deal with the architecture of the State, which is still regulated by the British North America Act 1867. The same can be said for the Australia Act 1986, which removed some ties to the former motherland, leaving the Commonwealth of Australia Constitution Act 1900 almost unaffected. The New Zealand Constitution Act 1986, instead, repealed the old 1852 Constitution and replaced it in its entirety.

Zealand,⁷⁵ thus severing one of the last ties to the former motherland. In 1988, with the *Imperial Laws Application Act*,⁷⁶ a list of British statutes considered to be in force in New Zealand, some of which of constitutional relevance, was released: among them, the Statute of Westminster 1275⁷⁷ and the Bill of Rights 1689⁷⁸ can be found. A proper charter of rights was introduced in 1990,⁷⁹ while in 2003 the *Supreme Court Act*,⁸⁰ later repealed by the *Senior Courts Act* 2016,⁸¹ abolished appeals to the judicial committee of the British Privy Council and established the *Supreme Court of New Zealand*, which replaced the *High Court* at the highest rank of the judicature.

2.2 Constitutional systems in comparison: main departures from the British model

2.2.1 Canada

Despite sharing, for obvious historical reasons that we have tried to summarise,⁸² many similarities with the United Kingdom, Canada is characterised, in its structure, by considerable variations on the original theme. The first and most evident difference between the two models can be found in the federal nature of Canada, on which it is certainly necessary to elaborate more. First, it should be noted that Canada, although predominantly a federal State, can be also described as unitary if one looks at the relationship between central government and the so called “*Territories*”. Canada is indeed composed by 10 Provinces⁸³ and 3 Territories⁸⁴. While Provinces, many of which predate the Federal State itself, derive their powers directly from the Constitution Act 1867, whose Part VI is entirely devoted to the distribution of legislative

⁷⁵ After the adoption of the Statute of Westminster, the British Parliament could potentially still legislate, on request, for New Zealand. As we have seen, in 1947 British intervention was crucial for the amendment of the Constitution.

⁷⁶ Imperial Laws Application Act 1988 (1988 No 112).

⁷⁷ Statute of Westminster 1275, 3 Edw. I (UK).

⁷⁸ Bill of Rights 1689, 1 Will. and Mar. Sess. 2 c. 2 (UK).

⁷⁹ New Zealand Bill of Rights Act 1990 (1990 No 109).

⁸⁰ Supreme Court Act 2003 (2003 No 53).

⁸¹ Senior Courts Act 2016 (2016 No 48).

⁸² See subparagraph 2.1.1.

⁸³ Ontario, Québec, Nova Scotia and New Brunswick, the original Provinces, were joined, in time, by Manitoba (1870), British Columbia (1871), Prince Edward Island (1873), Saskatchewan and Alberta (1905), Newfoundland and Labrador (1949).

⁸⁴ Northwest Territories, Yukon and Nunavut.

competences between the Provinces and the Federal Parliament,⁸⁵ Territories, consisting mainly in vast but scarcely populated lands located in the northern part of the Canadian territory, exercise powers conferred upon them by the central government through ordinary Statutes, like the Yukon Act.⁸⁶ Therefore, while having legislatures of their own and enjoying some forms of autonomous government, they are more similar to the British devolved countries than to federal sub-units, in that their powers can be revoked at any time, unilaterally, by the central government.

Canadian federalism is also peculiar for two other reasons: its “slight” asymmetry and the fact that its Provinces are actually monarchies sharing the person of the Sovereign with the Federal Government itself.

While mostly symmetrical, Canadian federalism presents some asymmetrical features, the aim of which is to preserve the special status enjoyed by Québec among the Provinces. The majority of Québec’s population speaks French and an influential sovereignty movement, the *Parti Québécois*,⁸⁷ strongly supports the Province’s independence from Canada. Rules aimed at protecting Québec’s specificities are therefore in place. For example, section 6 of the Supreme Court Act states that “*At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province*”.⁸⁸ While technically contained in a statutory provision, the aforementioned rule bears constitutional value, as explained by the Supreme Court of Canada in the famous case *Reference Re Supreme Court Act, ss. 5 and 6*.⁸⁹ As a result, it could be changed only by means of the amendment procedure described in section 41 of the Constitution Act 1982.⁹⁰ Another important privilege enjoyed by Québec pertains legislative competences. Section 94 of the Constitution Act 1867 grants the Federal Parliament the power to lay down provisions in the field of property and civil rights with a view to harmonise the Provinces’ legal systems. Québec, which, differently from the rest of the country, has always adopted *civil law*,

⁸⁵ British North America Act, 1867, 30 & 31 Vict. c. 3, ss. 91-95.

⁸⁶ Yukon Act, S.C. 2002, c. 7.

⁸⁷ The Parti Québécois was born in 1968 as a result of the merger between the Mouvement Souveraineté-Association and the Ralliement National. Since then, it has always taken part to Québec’s Legislative Assembly elections. It was the main political force behind the two referendums on Québec’s independence, held in 1980 and 1995.

⁸⁸ Supreme Court Act, R.S.C. 1985, c. S-26, s. 6.

⁸⁹ Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433.

⁹⁰ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 41.

is excluded from the application of Section 94⁹¹ and can consequently preserve its centuries-long tradition.

The second peculiarity of Canadian federalism will give us the chance to outline the basic structure of the Provinces' government. Each Province has the Canadian Monarch as Head of State. The Sovereign is represented by the Governor General at federal level and by Lieutenant Governors at provincial level.⁹² Lieutenant Governors are appointed by the Governor General on advice of the federal Prime Minister. Provinces' Parliaments are unicameral, even though in the past they had upper-houses.⁹³ The legislative process is governed by the "Lieutenant Governor in Parliament" principle. This means that the provincial vice-regal representative must grant Royal Assent to any Bill approved by the provincial Parliament. The Province's Head of Government is the Premier, namely the leader of the parliamentary majority who presides over the Executive Council and advises the Sovereign's representative on the use of Royal Prerogative powers. The relationship between a Canadian Province and its legally separate Crown⁹⁴ is not as direct and straightforward as that existing between an Australian State and its Crown.⁹⁵ Not only Australian Governors are directly appointed by the Sovereign (and not by the federal Governor-General, to whom they are not subordinate) on the relevant State Premier's advice, but each Australian State has its own royal succession laws, while Canadian Provinces do not.⁹⁶ This difference also emerges in the field of reservation and withdrawal powers.⁹⁷

Another important feature of the Canadian legal order as compared to the British one will be now explored: the rigidity of the Constitution and its implications. As surprising as it might sound, in this field we are not faced with a complete departure from the original model. The

⁹¹ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 94.

⁹² British North America Act, 1867, 30 & 31 Vict. c. 3, s. 58.

⁹³ Québec was the last Province to abolish its upper house, the Legislative Council, in 1968.

⁹⁴ For instance, between British Columbia and the Crown in Right of British Columbia or between Ontario and the Crown in Right of Ontario.

⁹⁵ For example, between New South Wales and the Crown in Right of New South Wales.

⁹⁶ In 2011, at the biennial Commonwealth Heads of Government Meeting, the Prime Ministers of the 16 Commonwealth Realms reached an agreement, known as the Perth Agreement, on an amendment to royal succession laws that would replace male-preference primogeniture with absolute primogeniture and remove the disqualification of those married to Roman Catholics. To give effect to this agreement, each Commonwealth Realm amended its succession laws. While Canada simply approved its Succession to the Throne Act, 7 new royal succession statutes were passed in Australia, the first by the Commonwealth and the other six by each of the States.

⁹⁷ See subparagraphs 3.3.1 and 3.3.2.

supremacy of constitutional provisions in the country's hierarchy of law sources is undisputed. Both the existence of constitutional amendment procedures which differ from the ordinary law-making process and the general principle enshrined in section 52(1) of the Constitution Act 1982 do confirm it. Anyway, there are some elements worth considering before moving to conclusions. The first concerns the constitutional amendment procedures themselves. Part V of the Constitution Act 1982 introduces five different amendment procedures. Three of them, those described in sections 38(1), 41 and 42(1), are actually different and more demanding than the ones followed to approve ordinary statutes. The other two, those introduced by sections 44 and 45, are instead substantially identical, respectively, to the federal and the provincial *iter legis*, as they require simple approval by the legislative assemblies concerned. Such procedures have a very limited scope of application and can be qualified as residual. Nevertheless, it is certainly possible to say that, in some specific cases, the Canadian Constitution can be amended through the ordinary legislative procedure, as it happens in the United Kingdom. Another factor potentially capable of altering our perception of the Canadian constitutional rigidity is provided by section 33(1) of the Constitution Act 1982: "*Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter*".⁹⁸ This provision, known as the "*notwithstanding clause*", allows federal and provincial parliaments to enact legislation inconsistent with sections 2 or 7-15 of the Constitution Act 1982.⁹⁹ The overriding effect lasts for 5 years¹⁰⁰ or less, if a shorter duration has been indicated in the Act of Parliament or of the legislature at issue. The declaration activating the clause's effects can be re-enacted,¹⁰¹ giving both federal and provincial legislatures the power to indefinitely suspend or ignore constitutional rights and liberties. Section 33 can also be easily used with a view to challenge and set aside unfavourable outcomes of the judicial review of legislation carried out by Canadian courts, as it happened in 1989, when the notwithstanding clause was invoked by Québec after a Supreme Court's decision, *Ford vs Québec (AG)*,¹⁰² had declared those parts of the *Charter of the French*

⁹⁸ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 33(1).

⁹⁹ Among the rights protected by such sections we find freedom of thought (s. 2), right to life, liberty and security (s.7) and equality before and under the law (s. 15).

¹⁰⁰ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 33(3).

¹⁰¹ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 33(4).

¹⁰² *Ford v. Québec (Attorney General)*, [1988] 2 S.C.R. 712.

*Language*¹⁰³ placing restrictions on the use of commercial signs written in languages other than French unconstitutional. *Bill 178*, approved by Québec's National Assembly and equipped with a declaration ex section 33(1) Constitution Act 1982, protected Québec's legislation on commercial signs from judicial review until 1993, when, finally, the entire discipline was reformed in such a way as to solve any problem of inconsistency with the Constitution.

The fact that some constitutional rights can be altered by ordinary statutes casts shadows on Canadian Constitution's rigidity and shows us how much the British doctrine of parliamentary supremacy has influenced the development of Canada as an autonomous constitutional order. A certain deference towards legislative power is also evidenced by Canadian courts' strong reliance on suspended declarations of constitutional invalidity, which grant the relevant legislative assembly a certain period of time to amend unconstitutional legislation. Declarations of invalidity have been suspended by the Supreme Court on numerous occasions in the last 20 years, for example in cases dealing with agricultural workers' rights of association,¹⁰⁴ restriction on eligibility to minority language education,¹⁰⁵ and prostitution.¹⁰⁶ While in some circumstances suspension is used as an effective instrument to avoid temporary lack of legal regulation, in others, in particular when only parts of regulatory regimes are struck down, it seems to be based on the Court's will to show respect towards legislative power's prerogatives. Interesting comparisons have been drawn between Canadian suspended declarations of constitutional invalidity and the declarations of incompatibility made by British judges under section 4 of the Human Rights Act.¹⁰⁷

Each of the subjects covered in this subparagraph shows us how British influence over Canada's legal order endures to this day. Federalism, constitutional rigidity and judicial review of legislation seem to hint at a complete divergence between the two models, but, if one looks closely, they all present some features that remind us of the United Kingdom: Territories are similar to devolved countries, the Constitution can, in certain cases, be altered through ordinary statutes and courts often delay the effects of their constitutional invalidity declarations in order to wait for legislative power's actions.

¹⁰³ Charter of the French Language, RSQ, c C-11.

¹⁰⁴ *Dunmore vs Ontario*, 2001 SCC 94, [2001] 3 S.C.R. 1016.

¹⁰⁵ *Nguyen vs Québec*, 2009 SCC 47, [2009] 3 S.C.R. 208.

¹⁰⁶ *Canada vs Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

¹⁰⁷ Peter Oliver, Patrick Macklem, Nathalie Des Rosiers, "The Oxford Handbook of the Canadian Constitution" (Oxford: Oxford University Press, 2017), page 683.

2.2.2 Australia

In 1980, Elaine Thompson introduced the famous expression “*Washminster mutation*” (a portmanteau of the words “Washington” and “Westminster”) to describe the Australian political system.¹⁰⁸ It is certainly possible to identify, in the Australian Constitutional “genome”, both British and American “genes”. The influence of the 1874 *Swiss Constitution* is also considerable, especially in the field of Constitutional amendments, which always subject to popular referendum.¹⁰⁹ The basic structure of the relationship between the federal government and the Parliament is entirely borrowed from the Westminster system. Australia is indeed a parliamentary constitutional monarchy, in which the Prime Minister must command a majority in the lower House of Parliament, the House of Representatives, in order to acquire and retain power. The first major departure from the British model, set aside the form of State, which in Australia is federal and not unitary, is probably represented by the role of the Parliament’s upper House, the Senate. Unlike the British House of Lords and the Canadian Senate, it is an elective legislative assembly.¹¹⁰ As such, its influence over the legislative process is equal to that exerted by the lower House, the only difference being the right to originate tax and money appropriating bills, which, following the long-standing British tradition, belongs to the House of Representatives only. As we will see in detail later,¹¹¹ controlling the Senate can be as important as controlling the House of Representatives for the government of the day, since passing bills requires both Houses’ consent: the Whitlam-Kerr constitutional crisis of 1975, which led to Prime Minister Whitlam’s dismissal, was caused by lack of support for the approval of appropriation bills in the Senate. Commanding a majority in the Senate can anyway be very

¹⁰⁸ Elaine Thompson, *The “Washminster” Mutation*, in “Responsible government in Australia”, eds. Patrick Weller, Dean Jaensch (Richmond, Victoria: Drummond Publishing on behalf of The Australasian Political Studies Association, 1980).

¹⁰⁹ It is no coincidence that one of the most important framers of the Constitution, Andrew Inglis Clark, was an admirer of the Swiss Constitution. During the Constitutional Convention of 1891, he wrote in a confidential memorandum that Switzerland “presents several unique and very instructive features in the purely democratical organisation of society”. Andrew Inglis Clark’s “*Memorandum to Delegates*” can be found in John Matthew Williams, *The Australian constitution: a documentary history* (Carlton, Victoria: Melbourne University Press, 2005).

¹¹⁰ The Senate currently comprises 76 members who serve for 6-years terms, 12 from each State and 2 for each Territory (Australian Capital Territory and Northern Territory). They are elected through single transferable vote proportional representation. At each federal election, only half of the Senate seats are contested (half-Senate election), unless the election is held as a consequence of a double dissolution.

¹¹¹ See subparagraph 4.2.2 for further information.

difficult, since the upper House is elected through proportional representation. In 1949, when single transferable vote (STV) replaced instant run-off voting as the Senate's voting system, Australia embraced what Arend Lijphart would call "strong bicameralism".¹¹² The Australian Senate resembles the US Senate in many respects: its members stay in office for longer terms than Representatives do,¹¹³ it is smaller than the lower House,¹¹⁴ and, most importantly, comprises the same number of members from each State. Canada, which like Australia is a federal State, not only has an appointed, though quite active, Senate modelled on the British House of Lords, but does not allocate the same number of Senators to each Province.¹¹⁵ Unlike the US Senate, the Australian one can potentially be entirely dissolved in case of double dissolution.

The hybrid nature of the Australian Parliament, with its borrowings from both the British and the American traditions, is probably summarised by the peculiar structure of the Senate, which, far from being an obstacle to the proper functioning of the democratic system, proves to be "necessary to prevent responsible government from remaining or becoming little more than an empty formalism".¹¹⁶

¹¹² In his "Patterns of Democracy", Arend Lijphart describes "strong bicameralism" as the situation in which the two houses of a Parliament are "symmetrical" and "incongruent". He calls "symmetrical" those houses which enjoy equal or moderately unequal constitutional powers and democratic legitimacy and "incongruent" those houses which are elected by different methods. More information can be found in Arend Lijphart, *Patterns of democracy: government forms and performance in thirty-six countries*, 2nd edition (New Haven: Yale University Press, 2012).

¹¹³ Representatives' mandate lasts three years. Clearly, early elections can prematurely put an end to a legislature.

¹¹⁴ Section 24 of the Commonwealth of Australia Constitution Act 1900 establishes a nexus between the size of the House of Representatives and the size of the Senate: "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators".

¹¹⁵ For the purpose of Senate appointments, Canada is divided by the Constitution Act 1867 into four areas: Ontario, Québec, Maritime Provinces (Nova Scotia, New Brunswick and Prince Edward Island) and Western Provinces (Manitoba, British Columbia, Saskatchewan, and Alberta). Every area must be represented by an equal number of Senators. Consequently, while both Ontario and Québec have 24 Senators, each of the Western Provinces has 6 Senators, and, in the Maritime Provinces group, Nova Scotia and New Brunswick have 10, but Prince Edward Island has 4. The situation is further complicated by Newfoundland and Labrador, which does not belong to any group and is represented by 6 Senators, and the three Territories, each of which has only a seat in the Canadian Senate.

¹¹⁶ Stanley Bach, *Platypus and parliament: the Australian Senate in theory and practice* (Canberra: Department of the Senate Parliament House, 2003), page 364.

Compared not only to the United Kingdom, whose Constitution is extremely flexible, but also to Canada, Australia is characterised by an unmatched level of constitutional rigidity, to which a particularly demanding amendment procedure heavily contributes.¹¹⁷ Additionally, the *notwithstanding clause*,¹¹⁸ which in Canada allows the federal Parliament or the legislature of a Province, through ordinary statutes, to indefinitely suspend the application of certain sections of the Constitution Act 1982, does not exist in Australia. If it is true that the Australian Constitution does not contain a proper *bill of rights* to which a clause of such kind could be applied *en bloc*, it is also true that it anyway confers upon individuals many explicit¹¹⁹ and implicit¹²⁰ rights recognised by the High Court. If a notwithstanding clause existed, such rights could be potentially paralysed.

In Australia, judicial review of legislation follows the US model and, consequently, is carried out not only by the court of last resort, but also by lower courts. Anyway, the doctrine of *stare decisis* puts the High Court in a privileged position for obvious reasons. No Constitutional provision explicitly authorises judicial review. As Kathleen E. Foley has written, “despite the lack of express authorization in the Constitution, judicial review has been an accepted part of Australia’s constitutional system since Federation”.¹²¹ In the famous *Communist Party Case*,¹²² Fullagar J stated: “In our system the principle of *Marbury v. Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs”.¹²³ Such

¹¹⁷ About section 128 of the Commonwealth of Australia Constitution Act, a Constitutional amendment is approved if three conditions are met: 1) an amendment bill is approved by absolute majority in both the Houses, 2) the bill, subjected to popular referendum, is backed by the majority of the electors voting in a majority of States and, at the same time, 3) by the majority of all electors across Australia (Territories included). On some occasions, namely when the amendment is capable of altering the provisions dealing with a specific State, of modifying its boundaries or of reducing its representation in either House of Parliament, the State in question must necessarily be one of those in which the amendment has been approved. Other issues, specifically dealing with the powers of the Prime Minister in the Constitutional amendment process, will be covered in the following paragraphs.

¹¹⁸ See subparagraph 2.2.1 for further information.

¹¹⁹ For example, the right to jury trial (s. 80) and the freedom of religion (s. 116).

¹²⁰ Among others, the freedom of political communication: see *David Lange v Australian Broadcasting Corporation (ABC)* [1997] HCA 25, (1997), 189 C.L.R. 520.

¹²¹ Kathleen E. Foley, *Australian Judicial Review*, Global Studies Law Review, Volume 6, Issue 2, 2007: pages 281-338, at page 337.

¹²² *Australian Communist Party v Commonwealth* (1951) 83 C.L.R. 1.

¹²³ *Ibidem*, at 263 (Fullagar J).

“respect” for the legislative organs, it seems, should never prevent the Court from immediately striking unconstitutional legislation down. In *Ha v New South Wales*,¹²⁴ the High Court addressed the issue of *prospective overruling*¹²⁵ in the following terms: “The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power [...]. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law”.¹²⁶ It is likely that the High Court would use the same argument if faced with the need to adopt a position on *suspended declarations of constitutional invalidity*, which, as we have seen,¹²⁷ are widely used by the Supreme Court of Canada. The effects of both instruments are indeed similar: while giving Parliament enough time to alter legislation or fill regulatory gaps, they temporarily frustrate individuals’ hope to find judicial remedies capable of restoring rights unjustly violated by unconstitutional statutes. It is fair to conclude that, perhaps due to US influence, Australian courts show a less deferential attitude towards the principle of Parliamentary sovereignty than their Canadian counterparts.

Another distinctive feature of the Australian federalism, as compared to the Canadian one, is the constitutional status enjoyed by its sub-units, the States. In formal constitutional terms, executive power at State level is exercised by the Governor-in-Council, namely by the Governor as the Australian¹²⁸ Monarch’s representative acting on advice of his/her Executive Council.¹²⁹ It is interesting to focus for a while on a problem that may appear of little interest *prima facie*: why the vice-regal representative is called, at local level, “Governor” in Australia and “Lieutenant Governor” in Canada? The word “Lieutenant”, often used in military contexts, means “a deputy or substitute acting for a superior”.¹³⁰ It reveals the true nature of the Canadian

¹²⁴ *Ha & anor v State of New South Wales & Ors* (1997) 189 C.L.R. 465.

¹²⁵ Prospective overruling is a judicial tool whose aim is to delay the application of a new interpretation of a certain rule or principle. Such interpretation will be applied to future cases but not to the case which has led the Court to reconsider its reasoning on the matter.

¹²⁶ *Ha & anor v State of New South Wales & Ors* (n 124), at 503-504.

¹²⁷ See subparagraph 2.2.1.

¹²⁸ Until the approval of the Statute of Westminster, the British Monarch.

¹²⁹ At both federal and State level, the Australian equivalent of the British Privy Council is the “Executive Council”.

¹³⁰ Oxford Dictionaries, s.v. “lieutenant”, accessed January 28, 2018, <http://en.oxforddictionaries.com/definition/lieutenant>.

office, which originally was perceived as accountable not (directly) to the Monarch but to the Dominion's Governor General. The "Lieutenant Governor" was therefore the "second in command" of the Governor General in a specific Province. It is no coincidence that the "Lieutenant Governor" is appointed by the Governor General on advice of the Canadian Privy Council (in substantial terms, the federal Prime Minister) and not directly by the Sovereign. Similarly, the power of disallowance, still formally active, is potentially exercisable, at Provincial level, by the Governor General on the Prime Minister's advice, and not directly by the Queen. Australian Governors are instead direct representatives of the Crown in the States, and as such they are appointed by the Queen on advice of the relevant Executive Council, namely the relevant State Premier.¹³¹ This means that the Australian Prime Minister is not as capable of influencing States' politics as the Canadian one and, at the same time, that Australian States enjoy a higher degree of autonomy from the federal government than Canadian Provinces.

2.2.3 New Zealand

New Zealand is a unitary State. The six original Provinces were abolished in 1875 by the *Abolition of Provinces Act*.¹³² Although, as we have seen,¹³³ some of the mechanics of a unitary State¹³⁴ are, well concealed beneath the surface, actually at work in Canada, New Zealand is, among the Commonwealth Realms analysed in this work, the one that most closely resembles the United Kingdom with regard to the form of State. But this is not the sole similarity one can find between the two systems, as they are both based on an uncoded, flexible constitution, consisting of written and unwritten parts. While the label "uncoded constitution" could be applied also to the Australian and the Canadian systems, it would be wrong to say that the

¹³¹ Before 1986, the Queen appointed State Governors on advice of her British Privy Council. This was due to the fact that the Statute of Westminster 1931 applied only to the Commonwealth, leaving the States under imperial control. Although a practice had developed letting State Premiers be consulted before appointments were made, British influence was very strong. For example, in 1976, Queensland's Premier Joh Bjelke-Petersen tried to obtain the extension of Governor Colin Thomas Hannah's mandate, but the British Government refused to advise the Queen accordingly because it believed Hannah lacked impartiality.

¹³² *Abolition of Provinces Act 1875 (No 21)*.

¹³³ See subparagraph 2.1.2.

¹³⁴ Among other things, we should remember that, in Canada, the powers of reservation and withdrawal could be potentially exercised by the Governor General in Council to block provincial legislation and that the Lieutenant Governors' appointment process is dominated by the federal Prime Minister. Additionally, alongside the Provinces we find three Territories (Northwest Territories, Yukon and Nunavut), whose status is similar to that of the British devolved Countries.

Australian and the Canadian constitutions are entirely flexible. Both the Commonwealth of Australia Constitution Act 1900¹³⁵ and those parts of the overarching Canadian constitution explicitly mentioned by section 52(2) of the Constitution Act 1982¹³⁶ cannot be altered by an ordinary statute, since complex amendment procedures must be complied with in order to change them. The entirely-flexible constitution, coupled with the unitary form of State and the absence of supranational constraints as relevant as those posed on the United Kingdom by the rules and mechanisms underlying the operation of those international treaties the UK is part to,¹³⁷ makes New Zealand the purest modern example of a system based on the principle of parliamentary sovereignty: potentially, the New Zealand House of Representatives could set aside, repeal or amend each and every part of the Constitution by statute.

Probably, New Zealand's most important departure from the orthodoxy of the Westminster system is the choice of a unicameral Parliament. Among the 16 Commonwealth Realms, unicameral legislatures are not unheard of (Papua New Guinea, Saint Vincent and the Grenadines,¹³⁸ Saint Kitts and Nevis,¹³⁹ Solomon Islands and Tuvalu all have unicameral Parliaments), yet the path chosen by New Zealand remains peculiar and somehow controversial if it is true that no other major Commonwealth Realm has decided to follow it.¹⁴⁰ Paradoxically, even in this respect, New Zealand ends up resembling its former motherland. At first sight, we might be surprised to see a unicameral legislature likened to the archetypical bicameral

¹³⁵ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (UK).

¹³⁶ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 52(2) (Canada).

¹³⁷ Among others, the EU treaties (at least until the end of the process informally known as "Brexit") and the European Convention on Human Rights (ECHR), whose implementation in the British law system gave rise to many theoretical disputes about the relationship between the convention's provisions and ordinary statutes. The declaration of incompatibility introduced by section 4 of the *Human Rights Act* 1998 serves the purpose to uphold the pre-eminence of the Convention's provisions over statutory ones without (formally) infringing the principle of parliamentary supremacy.

¹³⁸ Saint Vincent and the Grenadines' House of Assembly comprises 23 members. Despite the fact that 15 of them are elected and 6 of them, the "Senators", are appointed by the Governor-General (the remaining two members are the appointed Attorney-General and the Speaker, elected by the majority members), the system must be classified as unicameral.

¹³⁹ Saint Kitts and Nevis' National Assembly, similarly to its Saint Vincent and the Grenadines' equivalent, comprises both elected (11) and appointed members (3 plus an attorney-general), called "Senators".

¹⁴⁰ If we look at Canada and Australia, we find unicameral legislatures only at provincial/State level. Currently, no Canadian Province has a bicameral legislature, while the Australian State of Queensland has abolished its upper House in 1922.

Parliament, but the comparison is not as strange as it seems. The approval of the two Parliament Acts (1911¹⁴¹ and 1949¹⁴²) and the birth of the Salisbury convention have relegated the British House of Lords to a minor role in the law-making process.¹⁴³ On the contrary, Australia has an elective (and, therefore, extremely relevant) upper House, and the Canadian Senate, though appointed, is still technically as powerful as the House of Commons.¹⁴⁴ This means that, if we had to arrange the upper Houses of the States covered in this work in descending order of importance for the legislative process, we would place the British House of Lords at the bottom of the list. In other words, we could say that the United Kingdom's Parliament is, substantially speaking, more similar to the New Zealand's legislature than one may think. The actual difference between the two legislatures lies in the electoral system: as we will explain in detail later,¹⁴⁵ New Zealand adopted mixed-member proportional representation in 1993.

¹⁴¹ Parliament Act 1911, 1 & 2 Geo. V c. 13 (UK).

¹⁴² Parliament Act 1949, 12, 13 & 14 Geo VI c. 103 (UK).

¹⁴³ Since the approval of the Constitutional Reform Act 2005, the House of Lords has also lost its judicial role of court of last resort.

¹⁴⁴ See subparagraph 2.3.5 for further information on Justin Trudeau's attempt to reduce the Senate's political partisanship.

¹⁴⁵ See subparagraph 4.2.3.

Chapter 3

The office of Governor-General

3.1 The Governor-General as representative of the Crown and *de facto* Head of State

3.1.1 Introduction

The office of Governor-General is one of the most distinctive features of the Canadian, Australian and New Zealand constitutional systems. It is indeed impossible to understand the actual nature of the role without being aware of the peculiar historical contingencies that gave birth to it. As Anthony Wood has written, “it is not easy [...] to fit a Governor-General into a genuinely autochthonous constitution. The office is entirely bound up with the institutions and history of the British component of the nation”.¹ Once Imperial Officials chosen by (and subject to) the British Cabinet, Governor-Generals have gradually become the *de facto* Heads of State of fully sovereign polities without losing their role of representatives of an absent Monarch. Over the last 200 years, their evolutionary path has closely followed a repeating pattern in the history of British constitutional law: nothing has formally changed on the exterior, yet everything has actually changed. When the Statute of Westminster 1931, one of the consequences of which was the division of the once united imperial Crown into many distinct, legally-autonomous Crowns, was approved, it was not necessary for Canada to amend the British North America Act 1867 nor for Australia and New Zealand to do the same with, respectively, the Commonwealth of Australia Constitution Act 1900 and the New Zealand Constitution Act 1852.² Everything remained unchanged on paper, but constitutional customs were significantly altered. Governor-Generals were not chosen by the British Colonial Office anymore. They ceased to represent the Imperial Crown, becoming the embodiment of the Canadian, Australian and New Zealand Crowns. The peaceful transformation of structures conceived with colonial rule in mind³ into fundamental institutions underlying the functioning

¹ Anthony Wood, *New Zealand* in “Surrogates and Sovereigns: Constitutional heads of State in the Commonwealth”, eds. David Butler, Donald Anthony Low (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 1991), page 116.

² New Zealand would anyway approve a new Constitution Act in 1986.

³ It is important to remember that, prior to the granting of responsible government, Governors-General enjoyed almost unlimited powers and were not accountable to the local legislative assemblies.

of modern, autonomous, democratic States is, at the same time, a paradox and a miracle we owe to the extreme versatility which characterises British constitutional law.

That said, it is impossible not to acknowledge that vice-regal representatives are neither Monarchs in their own right nor Heads of State of a Republic. Consequently, they lack both the authority and the impassible neutrality of the former and the direct or indirect democratic legitimacy of the latter. Usually chosen among former politicians, they are sometimes accused of partisanship, especially when they enjoy a certain degree of discretion in their choices.

In the following subparagraphs, a detailed account of the office of Governor-General as it has evolved (and continues to evolve) in Canada, Australia and New Zealand will be offered. The same original concept has adapted to the peculiarities of each constitutional system. If the Canadian Governor General is probably the one that most closely resembles the British Sovereign, the Australian vice-regal representative stands out for the power to act as an “honest broker”⁴ whenever a dispute between the two Houses of Parliament needs to be settled. The New Zealand Crown representative, on the other hand, has, since the introduction of the mixed-member proportional voting system, played an increasingly important role in the process of government formation.

3.1.2 Canada

The Governor General acts as the Canadian Monarch’s representative at federal level. The office is currently regulated by the Constitution Act 1867 and the Letters Patent issued by King George VI in 1947. Section 10 of the Constitution Act 1867 defines the Governor General as an official “carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated”.⁵ It is important, in order to avoid misunderstandings, not to consider the Governor General’s position as equal to the Sovereign’s. The Monarch’s powers are not vested in the Crown’s representative, who just temporarily exercises them. As in the United Kingdom, the three branches of the State are formally headed by the Sovereign as the sole Head of State of Canada and governed in accordance with the traditional principles: we have the “Queen in Council” for the executive power, the “Queen in Parliament” for the legislative power and the “Queen on the bench” for the judiciary. The Governor General is therefore only a substitute of the Sovereign, entitled to act within a certain period of time on his/her behalf. That being said, substantially speaking, Royal Prerogative powers are exercised by the Governor General on Prime Minister’s or Cabinet’s advice. Being the Monarch’s

⁴ He/she can do that by deciding whether or not to grant a double dissolution.

⁵ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 10.

representative, the Governor General must perform constitutional as well as ceremonial duties like State visits.

The role of the Governor General as a *de facto* Head of State is capable of considerably altering the traditional Westminster model, which, in its pure form, requires the presence of a “dignified figure”, completely detached from the political arena, at the apex of the system. Governors General, appointed by the Sovereign on Prime Minister’s advice, are usually chosen among former politicians or even former Crown Ministers.⁶ Such practice could deprive the office of its non-partisan character, which is essential especially when it comes to managing Cabinet crises or solving the problems posed by a hung Parliament.

In the appointment of Governors General, Prime Ministers are not bound by any specific rule, with the exception of a custom by virtue of which each anglophone must be followed by a francophone and vice versa. In 2012, Conservative Prime Minister Stephen Harper created the “*Advisory Committee on Vice-Regal Appointments*”, an independent body consisting of the Canadian Secretary to the Queen, who served as chairman, and two federal delegates, an anglophone and a francophone. The Committee was meant to carry out a selection process for the offices of Governor General and Lieutenant Governors.⁷ At the end of the process, a list of candidates would be submitted to the Prime Minister, who would then choose his favourite name and advise the Sovereign accordingly. The creation of the Committee was an attempt at reducing the degree of discretion enjoyed by the Prime Minister in the appointment of the Governor General but, unfortunately, the system seems to have been already abandoned by Harper’s successors. In 2017, Justin Trudeau appointed Julie Payette without making use of the Committee, thus discontinuing the newly-created custom. The choice of a non-partisan and highly-reliable figure is again entirely in the hands of the Prime Minister of the day. Governor General’s popularity, which in the past was strongly undermined by the “imperial” nature of the office, perceived as a symbol of foreign rule, is today negatively affected by lack of political and democratic legitimacy. Problems of such kind, it is argued by many scholars, could potentially prevent the Governor General from exercising his/her powers, including reserve powers, in a resolute manner. About James Russell Mallory “circumstances have created a

⁶ In 1977, Sir Keith Holyoake was still serving as a Cabinet Minister when Robert Muldoon advised his name to the Sovereign for the position of Governor-General of New Zealand. For further information, see subparagraph 3.1.4.

⁷ When the committee worked to identify people suited for the office of Lieutenant Governor, two other members from the relevant Province were temporarily added.

situation in which the Constitutional Head's functions are perceived to be essentially automatic. In the case of the Governor General, this was a consequence of a simple-minded perception of the dissolution crisis of 1926".⁸ Mallory makes reference to the famous "King-Byng affair",⁹ which will be covered in detail later, to introduce the so-called "rubber stamp" theory: "It somehow came to be believed that the emancipation from control by London also meant that the Governor General had no discernible constitutional role save a ceremonial one".¹⁰ But is this general perception of the vice-regal officials as "rubber stamps" supported by facts? The answer is, arguably, no. First, the democratic principle imposes a duty of self-restraint on the Head of State of every Commonwealth Realm (United Kingdom included), allowing us to read the phenomenon differently: strict abidance by Government's advice is not necessarily a sign of weakness or unwillingness to act. Additionally, there have been cases, especially at provincial level, in which vice-regal Sovereign's representatives have actively fulfilled their duties. In 2017, British Columbia's General Election returned a hung Parliament, with incumbent Premier Christy Clark's Liberals, John Horgan's New Democratic Party and Andrew Weaver's Green Party securing respectively 43, 41 and 3 seats. New Democratic Party and Green Party reached a confidence and supply agreement, which would let John Horgan lead a minority Government. Nevertheless, Christy Clark, invoking the long-standing convention that gives the incumbent Premier a chance to seek the legislative assembly's support before resigning in case of hung Parliament,¹¹ decided to remain in office, just to be defeated by a no-confidence vote shortly after the first sitting day of the new Parliament. Then, Clark asked Lieutenant Governor Judith Guichon to dissolve the legislature, calling a snap-election. Clark's behaviour was non-conventional and, probably, also unfair: her opponents had found an agreement and, consequently, had the right to form a Cabinet after her failure to do so. The Lieutenant Governor, recognising that the Premier's advice, once enforced, was capable of trespassing the boundaries set by the Constitution and political fairness, decided to act contrary

⁸ James Russell Mallory, *Canada* in "Surrogates and Sovereigns: Constitutional heads of State in the Commonwealth", eds. David Butler, Donald Anthony Low (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 1991), page 45.

⁹ In 1926, when the Statute of Westminster had not been approved yet, Governor General George Byng refused a request by Prime Minister Mackenzie King to dissolve Parliament, triggering a famous political and constitutional crisis. For further information, see *infra*, subparagraph 4.3.1.

¹⁰ James Russel Mallory, *Canada* (n 4).

¹¹ As we have explained in subparagraph 1.3.2, in the UK this convention has recently been sanctioned by official documents like the Cabinet Manual 2011.

to it and invited Horgan to build a minority Cabinet with the Green Party's help. Early Parliament dissolution requests were explicitly denied on three occasions at the end of the 19th century: in Québec (1879), New Brunswick (1882) and Prince Edward Island in 1890.¹² In other, more recent, cases, "the knowledge that a request would be refused forestalled the request".¹³ All these events, which share some similarities with those of the "King-Byng affair", show that the role of vice-regal representative remains a relatively active one. We should remember that acting contrary to the Prime Minister's advice is commonly classified as a reserve power¹⁴ and that exercising reserve powers is not exactly what one would expect from a "rubber stamp" figure. Attempts at refuting such view by defining the examples mentioned above as irrelevant could be based on the assertion that the Lieutenant Governor/provincial Premier relationship is different from the Governor General/federal Prime Minister relationship, because, in the latter case, the Crown's representative is directly appointed by him/her who later advises the same representative, while, in the former, the Lieutenant Governor is chosen by a third person, the federal Prime Minister, and can consequently be deemed more independent. Aside from the fact that the co-existence in office of the Governor General and the Prime Minister who has chosen him/her is far from being always guaranteed,¹⁵ we can counterargue by saying that the Lieutenant Governor, being a federal official, could feel the political need to favour, whenever a degree of discretion is allowed to him/her, one party or another depending on the federal Government's priorities. Thus, in so far as we suspect the Governor General of being biased towards the Prime Minister to whom he/she owes his/her office, we should, to be fair, also suspect the Lieutenant Governor of being faithful to the federal Government which has appointed him/her and not take his/her non-partisanship for granted, as the critical question we are faced with revolves around political links and (covert or overt) accountability rather than on personal relationships and gratitude feelings. Once it has been established that examples concerning Lieutenant Governors' actions are indeed relevant to the problems we are discussing, we can ask ourselves whether or not the Lieutenant Governor, in the 2017 case mentioned above, acted in such a way as to favour the federal Government. Judith

¹² David J. Bellamy, Jon H. Pammett, Donald Cameron Rowat, *The Provincial political systems: comparative essays* (Toronto: Methuen, 1976), page 299.

¹³ *Ibidem*.

¹⁴ See subparagraphs 1.2.4 and 1.4.1.

¹⁵ As we will see in the next subparagraphs, a Parliament lasts 4 years, while the mandate of the Governor General conventionally consists of 5 years. Early elections, votes of no-confidence and Prime Minister's personal resignations are capable of further complicating the situation.

Guichon was appointed as Lieutenant Governor of British Columbia in 2012 by Conservative Prime Minister Stephen Harper and denied Parliament dissolution to B.C. Liberal Party's Christy Clark in 2017, under the federal Prime Ministership of Liberal Party's Justin Trudeau. Setting temporarily aside the lawfulness of the Lieutenant Governor's choice, which, as we have said earlier, is juridically sound and logically irreproachable, and focusing only on the political side of the issue, we can say that Guichon's actions pass the non-partisanship test. The British Columbia Liberal Party represents an *unicum* in Canadian politics, as it bears the "Liberal" designation but has severed any formal link with its federal counterpart in 1987, under Gordon Wilson, only to gradually reposition itself as a political force located in the centre-right of the Canadian political spectrum. It therefore enjoys the support of those who, at federal level, vote for the Conservatives as well as of those who, at federal level, vote for the Liberals. After all, being the B.C. New Democratic Party (formerly B.C. Co-operative Commonwealth Federation) a strong social-democratic party, Liberal and Conservative voters have often put up a united front against it, especially during the Cold War period. So, even taking it for granted that the two main players of Canadian federal politics were in a way or another interested in the outcomes of British Columbia's General Elections, Lieutenant Governor Judith Guichon's actions might have easily disappointed them both. In other words, it is possible to say that Guichon, with a single move, has fallen short of the expectations shared by the Prime Minister who appointed her, a Conservative, and the Prime Minister in office at the time of her actions, a Liberal. This brief political analysis further reinforces the idea that, even though appointed by federal Prime Ministers, Canadian Governors General and Lieutenant Governors can hardly be defined as "rubber-stamps" or partisan figures. Surely, after the "King-Byng affair", that took place in a period in which Governors General were still appointed on advice of the British Cabinet, there have not been proper litmus tests at federal level, but it is highly likely that, should the situation require it, the Governor General would not hesitate to actively fulfil his/her constitutional duties.

3.1.3 Australia

The office of Governor-General is regulated by the Commonwealth of Australia Constitution Act 1900 and the Letters Patent issued by Queen Elizabeth II in 2008.¹⁶ The former defines the role of the federal vice-regal representative with regard to the exercise of the executive power by stating that "The executive power of the Commonwealth is vested in the Queen and is

¹⁶ Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia, 2008.

exercisable by the Governor-General as the Queen's representative [...]”.¹⁷ As the Australian Monarch's direct representative, the Governor-General is the *de facto* Head of State of Australia, potentially entitled to wield, as long as he/she remains in office, any power which belongs to the Sovereign. The classic principle of the Queen-in-Council is therefore replaced by the Governor-General-in-Council, while the Queen-in-Parliament and the Queen-on-the-Bench principles make way, respectively, to the Governor-General-in-Parliament and the Governor-General-on-the-Bench.

By reading the provisions of the Commonwealth Constitution literally, one may think that the country is ruled by an autocratic dictator, the Governor-General, whose unlimited power closely resembles that vested in the British Sovereigns before the Glorious Revolution. This is due to the fact that the Constitution is written in formal terms, namely without making a single direct reference¹⁸ to the actual way in which the Governor-General carries out his/her duties, in order not to “put on paper” the constitutional conventions which, in Australia as in the UK, New Zealand or Canada, represent the “engine” of the entire constitutional system. Almost all the actions a Governor-General can perform by virtue of the Constitution and/or the Royal Prerogative¹⁹ are indeed attributable to the Prime Minister or the Cabinet as a whole, as it is the rule in every modern constitutional monarchy. The Australian peculiarity lies in the fact that the Governor-General is just the representative of an absent Sovereign and, moreover, is chosen by the said Sovereign on advice of the Prime Minister.²⁰ As we know, in most cases, self-restraint and respect for the democratic principle dictate, on the part of the Governor-General, absolute abidance by the advice of a Cabinet directly accountable to an elected Parliament. This is why Governors-General are often described in a derogatory manner as “Rubber stamps”. There are anyway some situations in which they are not only entitled but compelled to exercise a certain degree of discretion. For example, whenever a federal election returns a hung Parliament, the choice of the Prime Minister to appoint is not obvious. Similarly, the Governor-General is required to act in accordance with his/her own idea of “constitutional

¹⁷ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (UK), s. 64.

¹⁸ Only section 63 vaguely hints at Prime Minister's control over Governor-General's powers: “The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council”.

¹⁹ See subparagraph 4.1.2 for an in-depth analysis of the Royal Prerogative concept as interpreted by the Australian High Court.

²⁰ Prior to 1931, the Governor-General was chosen by the British Cabinet. Only with the Statute of Westminster the Australian Prime Minister's advice became the norm in the choice of the federal viceroy.

appropriateness”²¹ if the use of reserve powers is at stake. In such cases, the only guidance he/she can seek is that offered by precedents, if available. Since hung Parliaments are quite rare in Australia at federal level, with only two cases recorded after 1910,²² Governors-General rarely encounter problems in appointing Prime Ministers. Conversely, there has been one extremely important case of reserve powers use in 1975, when Governor-General Sir John Kerr dismissed Prime Minister Gough Whitlam. It is important to understand that the power of dismissal is probably the one that collides the most with the rules and best practices of a constitutional monarchy. The fact that, as we know,²³ the last dismissal of a British Prime Minister took place in 1834 speaks for itself. A detailed account of the 1975 crisis goes beyond the scope of this subparagraph and will be offered later.²⁴ For the time being, we should focus on all the problems arising from the mere idea of a Head of State dismissing a Prime Minister supported by a democratically elected Parliament. Such a choice would be controversial even if, hypothetically, made by a Monarch, who, being outside the political arena, is usually considered a neutral figure. It will therefore be regarded as extremely disputable if operated by a Governor-General appointed by the said Monarch on the advice of the Prime Minister. A Governor-General lacks both the typical democratic legitimacy enjoyed by a President in a parliamentary republic and the prestige a Monarch inherently derives from being, in Bagehot’s words, a “dignified part of the Constitution”. His/her actions must therefore be as cautious and constitutionally sound as possible. Brian Galligan has written on the topic: “Kerr’s conduct showed that the office of Governor-General is too powerful unless it is occupied by a wise, prudent and restrained person. Such qualities in healing successors have restored public respect for the office and allowed its enormous potential power to be retained”.²⁵ An analysis of the

²¹ Within the framework of a constitutional monarchy, acting without (or contrary to) the advice of the Prime Minister is clearly perceived as a last resort, something acceptable only insofar as the Head of State is faced with the need to protect the constitutional order from serious attacks, potentially capable of weakening or even destroying it. Assessing whether a certain action is “constitutionally appropriate”, and therefore respectful of the Constitution and its conventions, or not, is completely up to the Head of State him/herself.

²² After the birth of a solid two-party system in the first decades of the 20th century, elections returned hung Parliaments only in 1940 and 2010.

²³ See subparagraph 1.2.5 for further information.

²⁴ See subparagraph 4.2.2.

²⁵ Brian Galligan, *Australia*, in “Surrogates and Sovereigns: Constitutional heads of State in the Commonwealth”, ed. David Butler, Donald Anthony Low (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 1991), page 74.

1975 crisis carried out on purely juridical grounds²⁶ leads to the conclusion that the Prime Minister's dismissal might actually have been an undue constitutional stretch on the part of Kerr. Consequently, it does not come as a surprise that, as it appears evident from the words quoted above, the office of Governor-General was negatively affected, in terms of popularity, by the events of 1975. It would anyway be inaccurate to state that, after the recovery of "public respect" described by Galligan, the peculiar status enjoyed by the Crown's representative ceased to attract criticism. On the contrary, being simultaneously the symbol of Australia's colonial past and the monarchy, the Governor-General has continued to be seen as an obstacle on the way that leads to the establishment of a republic. We should remember that, in 1998, a Constitutional Convention approved a project for the abolishment of the monarchy and the substitution of the Governor-General with a Head of State elected by Parliament. Despite the fact that the project was rejected by the Australian electorate, support for the republic has not declined and it is stronger than in Canada or other Commonwealth Realms. The future of the monarchy and its representative is ultimately tied to the charisma and political reliability of the Queen's heirs. Should the royal family lose its prestige, it is highly likely that Australia will become a republic.

Differently from what we have seen while analysing Canada, it is possible to establish a perfect parallelism between the Australian Governor-General and the State Governors: they are all appointed directly by the Sovereign and exercise, on advice of the relevant Head of Government, the same powers.

With the exception of New South Wales' 1932 constitutional crisis, which brought to the dismissal of Premier Jack Lang by Governor Philip Game, there is only one relevant case of reserve powers use at State level: the decision, taken in 1925 by NSW Governor Sir Dudley de Chair, not to appoint twenty-five new Legislative Council members on Premier Jack Lang's request. Lang's advice was aimed at taking complete control of NSW's upper House in order to abolish it.²⁷ Other minor episodes were centred around the refusal to dissolve State Legislatures.

²⁶ Political partisanship does not explain in a convincing manner the actions made by Kerr. Even assuming that his political affiliation was less clear than it appeared on the surface, he had anyway been appointed by the same Prime Minister he dismissed, Gough Whitlam, and was believed to be close to the Labor Party, whose leader was the same Whitlam. For further information see subparagraph 4.2.2.

²⁷ At the time, NSW's Legislative Council comprised only appointed members, thus resembling Canada's Senate or the British House of Lords. It became a directly elected body only in 1978. Queensland's upper House was

Australian State Governors may be appointed as “Administrators” of the Commonwealth. Whenever the Governor-General dies, resigns or is unable to carry out his/her duties, one of the Governors, the “Administrator”, temporarily replaces him/her until either a new Governor-General is appointed or the incumbent one resumes his/her activities. By convention, the longest-serving State Governor will be chosen as Administrator. At State level, an absent Governor is usually replaced by a Lieutenant-Governor elected by the Sovereign on advice of the State’s Premier or, in a subordinate position, by the Chief Justice of the State’s Supreme Court.

3.1.4 New Zealand

The Governor-General represents the Crown in Right of New Zealand.²⁸ As in the other Commonwealth Realms, he/she is temporarily entitled to exercise all the Sovereign’s powers, thus holding the keys to the Royal Prerogative. The office is regulated by two main sources: the Constitution Act 1986 and the Letters Patent issued by Queen Elizabeth II in 1983,²⁹ as amended in 1987 and 2006. The almost perfect equivalence between the Sovereign and the Governor-General is evidenced by section 3(1) of the Constitution Act 1986: “Every power conferred on the Governor-General by or under any Act is a royal power which is exercisable by the Governor-General on behalf of the Sovereign, and may accordingly be exercised either by the Sovereign in person or by the Governor-General”.³⁰ The 1999 amendment to the 1986 Constitution³¹ sets out specific rules pertaining to the Executive Council in its capacity of vice-regal advisory body by stating that, in principle, the Head of State should always take part to the Council’s meetings in which consent to the exercise of a specific function or power is expressed, unless he/she “is prevented from attending the meeting by some necessary or reasonable cause”.³² Among those covered in this work, New Zealand’s Constitution is the only one to explicitly require the Governor-General’s “physical” attendance at his/her advisory body’s meetings whenever advice is formally given. Though strongly restricted in scope by the provisions of section 3A(3), which make it impossible to judicially challenge the validity of a vice-regal power’s exercise on the ground that the Head of State’s absence from the relevant

entirely appointed also, but it was abolished in 1921. Today, Queensland is the only Australian State to have a unicameral legislature.

²⁸ Constitution Act 1986 (1986 No 114), s. 2(2).

²⁹ The Letters Patent 1983 completely repealed those issued in 1917.

³⁰ Constitution Act 1986 (1986 No 114), s. 3(1).

³¹ Constitution Amendment Act 1999 (1999 No 86).

³² Constitution Act 1986 (1986 No 114), s. 3A(1).

meeting of the Executive Council was not duly justified, the rules introduced by the 1999 amendment are worth mentioning as a distinctive trait of the New Zealand Constitution.

Historically speaking, the office of Governor-General in New Zealand has followed a specific evolutionary path: born as a mere offshoot of the Imperial Crown, completely controlled by the British Cabinet, it has gradually become the embodiment of national sovereignty. Such transformation was the combined result of three simultaneous processes, namely the transition of the power to advise the Sovereign with regard to vice-regal appointments from the British Cabinet to the New Zealand Prime Minister, the choice of New Zealand-born candidates, the so-called “patriation” of the Letters Patent. The Statute of Westminster 1931 allowed Dominions’ Prime Ministers to replace the British Government in the appointment process of the Sovereign’s representatives. However, in New Zealand (and Newfoundland),³³ formal advice to the Sovereign would continue to be tendered by the British Colonial Office for many years. The first Governor-General appointed on advice of a New Zealand Prime Minister was Cyril Newall in 1941.³⁴ The office was anyway still perceived as deeply linked to the old imperial institutions and, as a consequence, no New Zealand-born Governor-General was appointed until 1967.³⁵ Since Denis Blundell,³⁶ each and every vice-regal representative has been chosen among New Zealand-born and resident candidates. The Letters Patent 1983, issued by Elizabeth II as “Queen of New Zealand”, marked the end of the office’s “patriation” process by formalising an almost complete delegation of the Royal Prerogative to the Crown representative. At first, the abrupt shift from the classic adversarial model to the typical collegiality of the MMP electoral system was believed to be fraught with consequences for the appointment of the Sovereign’s representative: what once had been an exclusive competence of the Prime Minister and, by extension, of the majority party, was now perceived by all the forces represented in the legislative assembly as a common and shared responsibility. However, in 1994, answering to a parliamentary question about the procedure to

³³ Newfoundland, once an independent Dominion, became a Canadian Province in 1947 and, in 2001, was renamed “Newfoundland and Labrador”. Due to a financial crisis occurred after the First World War, Newfoundland “gave up responsible government”, namely requested the suspension of the Constitution and a direct British intervention in its internal affairs. The Dominion was therefore ruled by a six-member commission, entirely appointed by the British Cabinet and presided over by the Governor of Newfoundland, until 1947.

³⁴ Noel Cox, *The Evolution of the Office of Governor-General of New Zealand*, Mounbatten Journal of Legal Studies, Volume 5, 2001: 51-77, at pages 55-56.

³⁵ Sir Arthur Porritt became the first New-Zealand born viceroy in 1967.

³⁶ Denis Blundell served as Governor-General of New Zealand from 1972 to 1977.

follow for the appointment of the next Governor-General, Prime Minister Jim Bolger said that the old mechanism would remain in place.³⁷ Current practice calls for early notification of the proposed appointee's name to the Leader of the Opposition, followed by a confidential communication to the other party leaders before formal advice to the Sovereign is given.³⁸

The powers of the New Zealand Governor-General differ little from those wielded by his/her counterparts in the other Commonwealth Realms. As a *de facto* Head of State,³⁹ the Governor-General is the “keeper” of the Royal Prerogative. During his/her tenure of office, which usually lasts five years but is not rigidly defined,⁴⁰ he/she is called upon to exercise the absent Monarch's powers on Cabinet's advice, following the conventions and best practices of a modern constitutional monarchy. On certain specific occasions, for instance when a general election returns a hung Parliament or when the exercise of a reserve power is concerned, the Governor-General will enjoy a certain degree of discretion and independence from the Executive Council. For this reason, it is of the utmost importance for the Governor-General to refrain him/herself from any action that could be interpreted as an expression of political partisanship. Neutrality was precisely the main issue concerning Prime Minister Robert Muldoon's decision to appoint a sitting Minister as Governor-General in 1977. A former Prime Minister⁴¹ and National Party leader, Sir Keith Holyoake was serving as Minister of State⁴² when Robert Muldoon advised his name to the Queen, who acted accordingly. Despite all the scepticism surrounding his appointment, Holyoake, who felt the need to resign from Parliament and, consequently, from the Government, before being sworn in as Governor-General, remained in charge for three years, carrying out his duties in a fair and respectful way. The high

³⁷ Alison Quentin-Baxter, Janet McLean, *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown* (Auckland: Auckland University Press, 2017), page 123.

³⁸ *Ibidem*.

³⁹ The only power the true Head of State, the Sovereign, does not share with his/her representative is the “constituent” power, namely the authority to task an official with the duty of representing the Crown. The Governor-General would not be able to act (or, better, would not exist) without specific Letters Patent “constituting the office of Governor-General” issued by the Sovereign. If this power and those directly attached to it (appointment and dismissal of each Crown's representative) did not belong to the Monarch, the Governor-General would be a Head of State in his/her own right and New Zealand would not be a monarchy.

⁴⁰ As it is the case in other Commonwealth Realms, the Governor-General of New Zealand serves at the Sovereign's pleasure. This means that, potentially, the Prime Minister could advise the Monarch to dismiss a Governor-General or to extend his/her mandate.

⁴¹ Sir Holyoake served as Prime Minister for a short period in 1957 and then for twelve years, from 1960 to 1972.

⁴² A sinecure position specifically created for Holyoake.

risk of “partisan” appointments is one of the major flaws one can identify in the constitutional structure of a Commonwealth Realm. Indeed, no counterweight to the Prime Minister’s power to appoint whoever he/she deems appropriate as vice-regal representative does exist. This problem was particularly relevant in those Dominions which experienced a quick transition from Crown Colony status to self-government.⁴³ Setting aside the power of granting Royal Assent to legislation, the New Zealand Governor-General does not play any significant role in the legislative process. As we have seen,⁴⁴ this is not always true for Australia, where the Governor-General, by deciding whether to grant a double dissolution or not, may act as the “honest broker” of a dispute or a disagreement between the two Houses of Parliament. By contrast, the New Zealand Governor-General has usually more room for manoeuvre than his/her Canadian or Australian counterparts as far as Cabinet formation is concerned. Though not infrequent even during the first-past-the-post era,⁴⁵ hung Parliaments are the norm in New Zealand since the first general election held after the adoption of the MMP system.⁴⁶

In order to avert serious threats to the stability of the constitutional system, the New Zealand Governor-General could decide to act contrary to or without the Executive Council’s advice, thus exercising the so-called reserve powers. Under this respect, the role played by the representative of the Crown in New Zealand resembles that of the British Monarch more than

⁴³ A famous example of appointment powers’ misuse is provided by the constitutional history of Ceylon, which is still a Commonwealth Nation under the name of “Democratic Socialist Republic of Sri Lanka”. Ceylon was granted Dominion status only in 1948, after more than a century of British rule. The second Governor-General of the island, Lord Soulbury, was chosen by Prime Minister Don Stephen Senanayake in 1949. Senanayake and Soulbury were close friends, having previously worked together on the constitutional reform of 1948 (Soulbury presided over the Constitutional Commission). The partisan (and almost “private”) nature of Soulbury’s appointment became evident in 1952, when Stephen Senanayake died in office due to a stroke. John Kotelawala, deputy leader of the United National Party, experienced Minister (he had continuously held a sit in Cabinet since 1936) and Leader of the House of Representatives, was widely regarded as the only convincing successor to Stephen Senanayake. Nevertheless, Soulbury appointed Dudley Senanayake, Stephen’s son, as Prime Minister of Ceylon without holding a single meeting with the National Party’s representatives. Dudley Senanayake, who was Minister of Agriculture at the time of his appointment, remained in office for a year and a half. More information about this controversial appointment can be found in James Manor, *Setting a Precedent by Breaking a Precedent: Lord Soulbury in Ceylon, 1952*, in “Constitutional Heads and Political Crises: Commonwealth Episodes 1945-85” ed. Donald Anthony Low (Basingstoke: Macmillan, 1988).

⁴⁴ See subparagraph 3.3.2 for further information.

⁴⁵ Hung Parliaments occurred in 1911, 1922, 1928, 1931 and 1993.

⁴⁶ The 1996 general election.

those of the Australian and Canadian vice regal officials. Indeed, while in Australia or Canada some important portions of the overarching constitution are entrenched and, as such, endowed with a certain degree of constitutional rigidity, the British and the New Zealand constitutions are entirely flexible and amendable by ordinary statute. This means that, in New Zealand, it would be easy for a Prime Minister who commands a stable and cohesive majority in the House of Representatives to indefinitely extend the duration of the Parliament or to make an undesired use of the Prerogative powers. The New Zealand Governor-General, like the British Monarch, is the sole guardian of the Constitution and cannot even rely on a Supreme Court striking down unconstitutional legislation. Reserve powers have been exercised on one occasion only. In 1891, John Ballance, the leader of the New Zealand Liberal Party, rose to power. As a forward-thinking politician and a strong supporter of women's suffrage,⁴⁷ Ballance needed a majority in the (at that time not yet abolished) Legislative Council in order to promote his economic and social reforms. Only nine of the twelve Legislative Council appointments he advised were effectively accepted by Lord Glasgow, the Governor-General. The dispute between Ballance and Glasgow was eventually settled by the Secretary of State for the Colonies, a British Cabinet Minister, who supported Ballance's views and forced the Governor-General to abide by his Prime Minister's advice. It could be argued that Lord Glasgow's reaction was prompted by the zeal of an Imperial official worried for the unpredictable outcomes of certain proposed reforms, rather than by proper constitutional considerations, yet the exercise of reserve powers in the case at hand is undeniable.

Whenever the office of Governor-General is vacant or the person holding it is unable to perform his/her duties, the *Administrator of the Government* will temporarily replace him/her.⁴⁸ The last amendment to the Letters Patent (2006) provides that the Chief Justice of New Zealand⁴⁹ should become Administrator of the Commonwealth. In case of Chief Justice's inability to assume office, the most senior judge of the Judicature should act as Administrator. The Administrator of the Government is the New Zealand equivalent of the Australian Administrator of the Commonwealth,⁵⁰ an office held by the longest-serving State Governor.

On a final note, we should remember that, in addition to that of "Governor-General", the New Zealand Crown representative also holds the title of "Commander-in-Chief". No particular

⁴⁷ Women's suffrage was actually introduced in 1893.

⁴⁸ Constitution Act 1986 (1986 no 114), s. 3B(1).

⁴⁹ Since 2004, the Chief Justice is the presiding judge of the Supreme Court of New Zealand.

⁵⁰ See subparagraph 3.1.3.

power is attached to such title, as the Governor-General is, formally, the Head of the Armed Forces in every Commonwealth Realm. Further remarks on the exercise of war powers and the deployment of troops abroad will be made later.⁵¹

3.2 The Royal Prerogative and the Governor-General's powers

3.2.1 Overview

Governors-General are entitled to exercise, on Prime Minister's and Cabinet's advice, all the powers vested in the Sovereign for the entire duration of their mandate. Traditionally, such duration is not specified, as the Crown representatives serve *at Her Majesty's pleasure*, but, usually, a new Governor-General is appointed every five years.

We now offer a list of the most important vice-regal powers. Each of them will be discussed in the chapter dedicated to the Prime Minister's powers,⁵² as he/she is the actual *dominus* of the Royal Prerogative. Only the power to grant Royal Assent to statutes will be immediately covered.

The Governor-General:

- appoints the Prime-Minister,
 - appoints and dismisses the Ministers of the Crown,
 - prorogues the lower House of Parliament,
 - dissolves the lower House of Parliament,
 - grants Royal Assent to Bills approved by the Parliament,
 - appoints the court of last resort's justices,
 - issues Royal Proclamations and Orders-in-Council,
 - in exceptional circumstances, acts without or contrary to the Prime Minister's advice, dismissal
- exercises all the other powers that fall within the Royal Prerogative, for example international treaties' ratification or war powers. In some cases, Crown Ministers directly exercise such powers on his/her behalf.

The powers listed above are common to the Governors-General of Canada, Australia and New Zealand. In addition to them, the Canadian and the Australian vice-regal representatives also wield the following exclusive powers:

⁵¹ See subparagraph 5.5.3.

⁵² Chapter 5.

- the Australian Governor-General can dissolve both the House of Representatives and the Senate through a double dissolution,
- the Canadian Governor General appoints Senators and the Lieutenant Governors.

3.3 Royal Assent

3.3.1 Canada

As far as Royal Assent is concerned, the Constitution Act 1867 gives the Governor General three options: “Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen’s Assent, he shall declare [...] either that he assents thereto in the Queen’s Name, or that he withholds the Queen’s Assent, or that he reserves the Bill for the Signification of the Queen’s Pleasure”.⁵³ Even though, normally, the path followed is the first one, it is interesting to note that, in some exceptional cases, the Governor General may, on paper, still decide to submit the bill directly to the Sovereign. We should anyway remember that the British North America Act 1867 was meant to be the central written document of a semi-autonomous colony’s constitution: current political and constitutional landscape makes the hypothesis of a Royal Assent granted directly by the Monarch highly unlikely. Section 56 of the Constitution Act 1867 is also particularly interesting, as it allows the “Queen-in-Council” to withdraw the Royal Assent previously granted to a certain statute within two years from the day such statute has entered into force.⁵⁴ This power, which can be found also in the Australian Constitution, is known as “*disallowance*” and, together with the “*reservation*” power described above, was conceived as an instrument through which the Imperial Government could overrule colonial legislation. Although formally still existent, it can be certainly considered a “relic of a past age”.

The powers of reservation and disallowance also operate at provincial level, by virtue of section 90 of the Constitution Act 1867.⁵⁵ The former was used for the last time in 1961, when Saskatchewan Lieutenant-Governor Frank Lindsay Bastedo reserved a bill concerning mineral contracts for the consideration of the Governor General who, advised to this effect by the federal Cabinet, granted Royal Assent to it.⁵⁶ The latter found application in 1943, when the Governor

⁵³ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 10, s. 55.

⁵⁴ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 10, s. 56.

⁵⁵ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 10, s. 90.

⁵⁶ James Russell Mallory, *The Lieutenant Governor's Discretionary Powers: The Reservation of Bill 56*, The Canadian Journal of Economics and Political Science/Revue canadienne d'Economie et de Science politique, Volume 27, Issue 4, 1961: 518-522, at page 518

General disallowed the Royal Assent granted by Lieutenant-Governor John Campbell Bowen to a Bill passed by the legislature of Alberta.⁵⁷ Given the strict limitations such powers impose on provincial autonomy, it is highly unlikely that they will be used again in the future.

3.3.2 Australia

Section 58 of the Australian Constitution explicitly confers upon the Governor-General, whenever a certain statute has been passed by both Houses of the Parliament and presented to him/her, the power to act in four different ways: “he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen’s name, or that he withholds assent, or that he reserves the law for the Queen’s pleasure. The Governor-General may return to the house in which it originated any proposed law so presented to him/her, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation”.⁵⁸ In addition to the obvious clear-cut options (Royal Assent granted or withdrawn), the Constitution makes two other choices available to the Governor-General. The first one, the reservation of the law “for the Queen’s pleasure”, is explained in detail by section 60: a reserved bill shall not have any force unless, within two years since the day the reservation was made by the Governor-General, it receives the Sovereign’s direct Assent. The last of the four choices is the most interesting, as it is unknown to the other Commonwealth Realms covered in this work. the Governor-General has indeed the chance to send a bill back to the House in which it originated, proposing amendments. Such power, somehow reminiscent of the presidential veto recognised by the Constitution of the United States,⁵⁹ must anyway be interpreted *cum grano salis*: being exercisable only on Prime Minister’s advice, it substantially belongs to the Head of Government.

The last provision of the Australian Constitution dealing with Royal Assent is that contained in section 60, which allows the Sovereign to personally withdraw Royal Assent from a bill previously sanctioned by his/her representative. The power of withdrawal can be exercised within a period of one year since the vice-regal representative’s assent and works similarly to a

⁵⁷ The Bill’s title was “An Act to Prohibit the Sale of Lands to any Enemy Aliens and Hutterites for the Duration of the War”.

⁵⁸ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 58. Please note that between the first and the second sentence, immediately after the full stop, a subtitle can be found: “Recommendations by Governor-General”.

⁵⁹ U.S. Constitution, Art. I, sect. 7.

repealing statute passed by the Parliament, as it is capable of removing the effects of a certain Act of Parliament *pro futuro* and not *ex tunc*.

It is important to remember that the powers of disallowance and reservation are, for obvious reasons, almost dead letter. Furthermore, since the adoption of the Australia Act 1986, they do not exist anymore at State level. This means that, paradoxically, The Commonwealth Parliament is, on paper, less independent from the Australian Monarch's discretion than State legislatures.

3.3.3 New Zealand

The powers of disallowance and reservation, still formally active in Australia and Canada, do not exist anymore in New Zealand, where the Constitution Act 1986 has completely repealed the 1852 Constitution. The only section devoted to Royal Assent by the 1986 Constitution is section 16, which does not explicitly provide for the possibility of Assent denial.

Chapter 4

The office of Prime Minister in Canada, Australia and New Zealand

4.1 The Prime Minister's role

4.1.1 Canada

The office of Prime Minister is regulated almost entirely by constitutional conventions and customs. Despite laying down many provisions about the executive power, the Constitution Act 1867 does not mention the expression “Prime Minister” a single time and offers an incomplete and distorted portrait of the Canadian Government's leader. Ronald Cheffins has written: “To read the British North America Act would be to get a totally misleading impression of the constitution, leading the untutored observer to conclude that the country was, in fact, ruled by the Governor General, seeking the advice of the Privy Council”.¹ In the Constitution Act 1982, which is more focused on human rights and Constitution amendment, nothing is said about any of the fundamental rules governing the office.

Like the British one, the Canadian Prime Minister exerts great influence on both the executive and the legislative power, leading the Cabinet and the parliamentary majority in the House of Commons. Unlike the British one, he/she is also involved in the appointment of Supreme Court justices, chooses the *de facto* Head of State, and, through the selection of Lieutenant Governors, has the opportunity to slightly (and indirectly) affect the Provincial governments. As if this were not enough, many prime ministerial powers that in the United Kingdom are currently regulated and limited by statute, in Canada remain entirely within the Royal Prerogative area, among them the power to obtain early dissolutions of Parliament. This means that, if possible, The Canadian Head of Government is even more powerful than his/her British counterpart.

Robert Baldwin and Hippolyte La Fontaine are considered the first modern Canadian Prime Ministers. Actually, they jointly led the Executive Council of the Province of Canada, when the Federal State as we know it today did not exist yet. In 1848, they were chosen by Governor General Lord Elgin on the assumption that their Government would be, for the first time, accountable to the elected House of Assembly rather than to him, and indirectly, to the British Cabinet. From that moment on, responsible government became the standard for Canada. Accordingly, today the most important counterweight to the Prime Minister's powers is the House of Commons, which can approve a motion of no-confidence and oust the Cabinet out of

¹ Ronald I. Cheffins, *The Constitutional Process in Canada* (Toronto: McGraw-Hill, 1969), page 12.

office. As in the United Kingdom, Prerogative powers, though not clearly defined and very broad in scope, can be scrutinised by Canadian courts, in particular when suspected to infringe the rights protected by the Constitution Act 1982. In *Operation Dismantle vs. The Queen* (1985), dealing with the federal Cabinet's decision to let the US Government test cruise missiles over Canadian territory, the Supreme Court held that "since there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also".² Other decisions have in time reinforced this principle. For example, in 2007 the Federal Court of Appeal stressed that the issuance of passports, an important Prerogative power, is subject to judicial review,³ and, in 2009, the Federal Court forced the Government to allow the return of a Canadian citizen suspected of terrorism who was living in a Canadian embassy in Sudan,⁴ thus intervening in a matter, foreign affairs, which has always been managed through the Prerogative.

The exercise of reserve powers by the Governor General is another factor to take into account whenever the limits of Prime Minister's authority are concerned. The last time a Governor General decided to act contrary to prime ministerial advice dates back to 1926, even before the approval of the Statute of Westminster which granted Canada the status of fully-independent State (even though certain ties with the United Kingdom remained unsevered until 1982). This means that we cannot have a clear and defined idea of what would happen today if the Prime Minister advised the vice-regal representative in a way that the latter would consider constitutionally inappropriate. Those who follow the "rubber-stamp" theory would probably have a hard time believing that the Governor General could actually decide to fulfil his/her constitutional duties so decisively, turning against the same person who appointed him/her. As we have seen before,⁵ in the absence of proper federal examples, our analysis can rely only on comparable events that took place at provincial level. For what it is worth, such events suggest us that, despite not enjoying the same degree of neutrality which, for self-evident reasons, is unique to a Monarch, or the same political and democratic legitimacy of a Head of State elected by the Parliament (as it happens in parliamentary republics), the Governor General of Canada

² *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441, at 464, per Dickson J.

³ *Veffer v. Canada (Minister of Foreign Affairs)*, 2007 FCA 247, [2008] 1 F.C.R. 641, at paragraph 23.

⁴ *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 F.C.R. 267.

⁵ See subparagraph 2.2.1.

should be able to stand in the way of a Prime Minister acting outside the limits imposed by the Constitution.

Theoretically speaking, the Canadian Prime Minister is able to exert great influence over the Provinces. First, he/she is entitled to appoint the Lieutenant Governors. We know that such federal officials work as the Monarch's representatives in the Provinces, exercising Royal Prerogative powers on the provincial Premiers' advice. Lieutenant Governors can refuse Royal Assent to Bills approved by provincial legislatures, or reserve them for the consideration of the Governor General, who, in turn, will be advised on the matter by the Prime Minister.⁶ This gives federal Prime Ministers the chance to oversee the law-making process of each territorial sub-unit, even in areas exclusively reserved to provincial legislative power by article 92 of the Constitution Act 1867. We should also remember that, through the power of disallowance, the Prime Minister could invalidate a provincial statute within two years since its entry into force. As if this were not enough, being Lieutenant Governors appointed *at Her Majesty's Pleasure*, the Prime Minister could dismiss them.⁷ Control over Lieutenant Governors means also control over provincial Cabinets' crises, requests of early dissolutions by provincial Premiers and provincial hung Parliaments' outcomes.

If all the powers we have just listed were actually exercised by the Prime Minister of the day with a view to exert influence on the Provinces, Canadian federalism would exist only on paper. Actually, as we have seen, the powers of Royal Assent's reservation and disallowance are almost obsolete, having the last dismissal of a Lieutenant Governor taken place in 1879, and provincial vice-regal representatives usually carry out their duties in a non-partisan, self-restrained way, paying due respect to both the democratic principle and provincial autonomy. One of the most fascinating aspects of uncoded constitutions, or better not-entirely codified constitution like the Canadian one, lies exactly in the enormous difference between the system as it appears and the system as it actually is and works. Constitutional conventions, are, alone, capable of marking the difference between federal dominance over territorial sub-units and a high degree of provincial autonomy.

Actual federal influence can be seen at work in the judiciary, as the federal Government (formally speaking, the Governor-in-Council) appoints not only the Supreme Court's justices,⁸

⁶ See subparagraph 2.2.1 for further information.

⁷ For example, Luc Letellier de Saint-Just, Lieutenant Governor of Québec, was dismissed in 1879.

⁸ At federal level, the Government appoints the members of two other courts: the Federal Court and the Federal Court of Appeal.

but also the members of the superior-level and appellate provincial courts. For example, in New Brunswick, the members of the Court of Queen's Bench and the Court of Appeal are chosen by the federal Government, while the provincial Government (formally speaking, the Lieutenant Governor in Council) is only entitled to appoint the Provincial Court's judges. It is important to stress that Provincial Courts represent the first tier of the provincial judiciary, while the Queen's Bench and the Court of Appeal (with different names depending on the Province) are placed, respectively, at the second and the third tier.

4.1.2 Australia

Particularly resistant to codification, the role played by the Head of Government in a system built on the Westminster model is dynamic and strongly reliant on long-established, slowly-changing constitutional conventions. This is especially true in the case of Australia, where the office of Prime Minister is the cornerstone on which executive power is built, despite not being regulated nor mentioned by the Commonwealth Constitution.

The Australian Prime Minister, similarly to his/her Canadian counterpart, can be aptly described as a Janus Bifrons who simultaneously faces the House of Representatives to which he/she is responsible and the Governor-General, whom he/she advises. Standing at the crossroads between the executive and the legislative powers, he/she is indeed able to control both when backed by a solid parliamentary majority. Nevertheless, the Australian system features many peculiarities whose analysis is crucial to a proper understanding of the Prime Minister's role.

On the legislative side, the Australian Prime Minister encounters an obstacle unknown to his/her British, Canadian and New Zealand colleagues: the existence of an elective Senate placed on an equal footing with the lower House of Parliament. While the Prime Minister is formally accountable only to the House of Representatives, lack of support on the part of the Senate can make the adoption of statutes impossible, thus frustrating the government's agenda, and, ultimately, triggering a crisis. Commanding a majority in the Senate has become significantly harder since 1949, when single transferable vote replaced instant run-off voting as the Senate's electoral system. This weakness is partially countered by a power unique to the Australian Prime Minister: the power to advise a dissolution of both the Houses of Parliament, the so-called "double dissolution", which will be described in detail later.

The Prime Minister's executive power is sourced in section 61 of the Commonwealth Constitution and is described as an authority "extending to the execution and maintenance of

this Constitution, and of the laws of the Commonwealth”.⁹ The expression “execution” has been interpreted as referring to statutory executive power, namely that kind of power conferred upon government by statutes and by the same statutes regulated and limited, while “maintenance” evokes non-statutory executive power. The generic wording of the article leaves many doubts on the table as to the actual nature of the latter power, its boundaries and its relationship with both statutory law and the Constitution. The High Court of Australia, together with the other federal courts, has sought, over the years, to shed light on the matter. Its early case-law (1900-1951) dealt with the problem by exploring the classic concept of Royal Prerogative as developed by British courts and law scholars, with little, if any, variations. For comprehensible reasons,¹⁰ article 61 was perceived as a generic “codification” of the ancient prerogatives vested in the Monarch and exercised by the Governor-General. In the *Wool Tops Case* (1922),¹¹ the government’s power to enter into agreements with a company producing wool tops and other wool’s by-products is under scrutiny as a preliminary question.¹² Isaacs J’s approach to the problem appears to be almost entirely grounded on a case decided by the House of Lords in 1920, *Attorney-General v De Keyser's Royal Hotel Ltd*,¹³ which has already been examined¹⁴ in other parts of this work: “It is equally undoubted law that in presence of national danger in time of war, the prerogative attracts, by force of the circumstances that exist, authority to do acts not otherwise justifiable”.¹⁵ In *New South Wales v Bardolph*,¹⁶ a 1934 decision, Evatt J compares the legal capacity of the government to stipulate mutual obligations with private parties to the capacity of the King as it would be described by the Courts of common law. The King, he argues, “never seems to have been regarded as being less powerful to enter into

⁹ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 61.

¹⁰ Prior to 1931 Australia was still part of the British Empire.

¹¹ *The Commonwealth and the Central Wool Committee v. the Colonial Combing, Spinning and Weaving Co. Ltd* [1922] HCA 62, (1922) 31 CLR 421.

¹² The plaintiffs (the government itself and its “Central Wool Committee”) claimed damages for the breach of contractual obligations arising from three agreements between the parties. In order to assess whether or not such obligations had been actually breached, it was necessary to ascertain whether the agreements had been validly entered into in the first place. It is important to bear in mind that, during the Great War, the British government imposed on Australia, for military purposes, a duty to strictly control the production and supply of wool products.

¹³ *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, [1920] UKHL 1.

¹⁴ See subparagraph 1.2.3.

¹⁵ *Wool Tops Case* (n 77), at 442 (Isaacs J).

¹⁶ *New South Wales v Bardolph* (1934) 52 CLR 455.

contracts than one of his subjects”.¹⁷ The first signs of a move towards a different reading of article 61 can be found in the *Communist Party Case* (1951),¹⁸ where Dixon J introduces the concept of “inherent” or “implied” power of a polity by making reference to the US Constitution.¹⁹ In the 1970s, the classic “common law” interpretation of non-statutory executive power remained dominant, as evidenced by *Johnson v Kent* (1975),²⁰ a case concerning the Commonwealth’s power to build a multi-purpose tower on public land: “the executive, unless its power is relevantly reduced by statute, may in my opinion do in the Territory upon or with respect to land in the Territory anything which remains within the prerogative of the Crown”.²¹ Nevertheless, the first extensive description of the new “inherent power” doctrine is provided by *Victoria v Commonwealth*,²² a decision issued in 1975, the same year of *Johnson v Kent*: “Secondly, the Commonwealth enjoys, apart from its specific and enumerated powers, *certain implied powers which stem from its existence and its character as a polity* [...]”.²³ In *Ruddock v Vadarlis*,²⁴ a judgement of the Federal Court of Australia dealing with the sensitive topic of asylum seekers, French J writes: “The scope of the executive power conferred by s 61 of the Constitution *is to be measured by reference to Australia’s status as a sovereign nation and by reference to the terms of the Constitution itself*. [...] *Australia’s status as a sovereign nation is reflected in its power to determine who may come into its territory and who may not and who shall be admitted into the Australian community and who shall not*”.²⁵ Since 1951, Australian courts have felt an ever-increasing need to free themselves from the Royal Prerogative paradigm and have acted accordingly. It is likely that the will to stress Australia’s independence from the United Kingdom, US influence and a certain aversion towards the Royal Prerogative, seen as inconsistent with the core values of a federal democracy based on popular sovereignty (the rule of law in particular), are the factors that best explain such behaviour. We should not forget that the Royal Prerogative is the last standing pillar of a demolished palace, that of absolute monarchy. Prerogative powers are undefined, broad in scope and, from the

¹⁷ Ibidem, at 474-475 (Evatt J).

¹⁸ *Communist Party Case* (n 50).

¹⁹ Ibidem, at 188 (Dixon J).

²⁰ *Johnson v Kent* [1975] HCA 4, (1975) 132 CLR 164.

²¹ Ibidem, at 170 (Barwick CJ).

²² *Victoria v Commonwealth* [1975] HCA 52, (1975) 134 CLR 338.

²³ Ibidem, at 397 (Mason J) (emphasis added).

²⁴ *Ruddock v Vadarlis* [2001] FCA 1329, (2001) 110 FCR 491.

²⁵ Ibidem, at 542–3 [191]–[193] (French J), (emphasis added).

Parliament's point of view, difficult to control. The Courts' efforts are therefore aimed at completely rethinking the very foundation of non-statutory executive power, which should not be the "obscure" Prerogative, but article 61 of the Commonwealth Constitution. Such assumption, which, as we will see, is perhaps less obvious than it may seem, has been recently reinforced by three landmark cases: *Pape*,²⁶ *Williams [no 1]*²⁷ and *Williams [no 2]*.²⁸ In *Pape*, the constitutional validity of the *Tax Bonus for Working Australians Act (No 2) 2009*²⁹ was challenged. The statute, which granted a tax bonus to certain "working Australians", was part of a complex strategy conceived by Prime Minister Kevin Rudd's Labor government in an effort to stimulate Australian economy and prevent its collapse during the great recession triggered by the global financial crisis (2007-2013). *Pape* claimed that the Commonwealth Parliament could not authorise one-off payments to taxpayers, as the power to legislate to this effect was not recognised by the Constitution. On the contrary, the Commonwealth, which joined as a defendant to the action, believed that the statute was actually covered by sections 81 and 83 of the Constitution about money appropriation. The High Court held that such sections could not be invoked as a proper source of legislative power, making a distinction between the power of appropriation and the power of expenditure: while the former finds its legal basis in sections 81 and 83, the latter does not.³⁰ Anyway, by a 4:3 majority, it was decided that the Parliament's power to authorise Government's expenditure in case of financial crisis could be justified by section 51(xxxix), read in conjunction with section 61.³¹ Section 51(xxxix), similarly to the "necessary and proper clause" of the US Constitution,³² grants the Commonwealth Parliament the power to legislate with respect to "matters incidental to the execution of any power vested by this Constitution [...] in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth".³³ If we believe, as the Court does, that the executive power of the Commonwealth as described by section 61 extends also to "the power to expend public moneys for the purpose of avoiding or mitigating the large scale adverse

²⁶ *Pape v Commissioner of Taxation* [2009] HCA 23, (2009) 238 CLR 1.

²⁷ *Williams v Commonwealth of Australia* [2012] HCA 23, 248 CLR 156.

²⁸ *Williams v Commonwealth of Australia* [2014] HCA 23, 252 CLR 416.

²⁹ *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).

³⁰ *Pape* (n 92), at [113] (French CJ).

³¹ *Ibidem*, at [133], [136] (French CJ), [232]–[233] (Gummow, Crennan and Bell JJ).

³² U.S. Constitution, Art. I, sect. 8, cl. 18.

³³ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 51(xxxix).

effects of the circumstances affecting the national economy”,³⁴ then we must conclude that the Commonwealth Parliament can validly exercise its legislative power with a view to authorise public money expenditures, being such expenditures incidental to the execution of a power vested by the Constitution in the government. Executive power is seen by the Court as something that goes beyond the mere dichotomy between statutes and the Royal prerogative: “Section 61 is an important element of a written constitution for the government of an independent nation. *While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government*”.³⁵ If statutes or the Prerogative do not provide a sufficient legal basis for governmental action, a third kind of power can be potentially invoked: that stemming from the Commonwealth’s status as an independent and sovereign nation. Provided that it is exercised in compliance with the Constitution and that it does not impair the distribution of legislative competences between the Commonwealth and the States nor the separation of powers,³⁶ such power can be wielded in the way that best suits the government’s purposes. Williams [no 1] and Williams [no2] deal with funding agreements between the Commonwealth and Scripture Union Queensland, a no-profit Christian organisation, for the provision of chaplaincy services at a State school in Queensland. In the former case, the agreements lacked a statutory basis, while in the latter they did not, because in the period between the first and the second decision, the *Financial Framework Legislation Amendment Act (No 3)*³⁷ was approved. In Williams [no 1], the funding agreements were declared invalid by the Court. In the absence of statutory authority, section 61 could not be considered as a legitimate source of executive power because Williams, “unlike Pape, does not involve a natural disaster or national economic or other emergency in which only the Commonwealth has the means to provide a prompt response. [...] The States have the legal and practical capacity to provide for a scheme such as the NSCP”.³⁸ A departure from the ordinary distribution of competences between the Commonwealth and the States (public schools are operated by the States in Australia) cannot be justified by the Government’s will to enact a programme whose aim is not to counter an emergency. A clear application of the

³⁴ Pape (n 92) at [8] (French CJ).

³⁵ Ibidem, at [127] (French CJ) (emphasis added).

³⁶ Ibidem.

³⁷ Financial Framework Legislation Amendment Act (No 3) 2012 (Cth).

³⁸ Williams [no 1] (n 93), at [146] (Gummow and Bell JJ).

principles developed for the first time in *Pape*, this judgement stresses the Constitution's capacity to limit the Government's non-statutory executive power, even when such power derives from the mere existence of Australia as a nation. Apart from its practical implications for the NSCP (National School Chaplaincy Programme),³⁹ *Williams* [no 2] is remembered as the decision through which the High Court tried to explicitly limit the influence exerted by the constitutional tradition of the United Kingdom on the theory of non-statutory executive power: "Consideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history. But the determination of the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power. [...] By no means follows from this observation that the Commonwealth can be assumed to have an executive power to spend and contract which is the same as the power of the British Executive".⁴⁰

As observed by Nicholas Condylis,⁴¹ the classic view that regards the Prerogative as the sole source of non-statutory executive power is still upheld by many law scholars in Australia, who feel that "the orthodox approach to s 61 should have been left undisturbed".⁴² The proponents of the traditional "common law" theory (among others, Peter Gerangelos, Anne Twomey and George Winterton) believe that "the prerogative as recognised by the common law establishes legally discernible criteria against which the courts can test the constitutionality of executive action and, by its very nature, is amenable to legislative abrogation".⁴³ Paradoxically, the Prerogative is preferred to inherent power based on nationhood for legal certainty reasons. This is not as surprising as it may seem at first sight: while the inherent power theory, being a relatively recent product of the High Court's case-law, is still extremely undefined in several respects, the Royal Prerogative, which, in turn, can hardly be described as "defined" or "certain", has been shaped, after all, by centuries of judicial review and scholarly debate. This means that the Prerogative is regulated by some universally accepted principles, one of them being the idea that statutory law can always repeal and reform Prerogative powers on the assumption that the Parliament is sovereign. As evidenced by *Pape* and *Williams* [no 1], the

³⁹ In *Williams* [no 2], the Court struck down the statute passed by the Commonwealth Parliament, the Financial Framework Legislation Amendment Act (No 3) 2012.

⁴⁰ *Williams* [no 2] (n 94), at [81]-[82] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁴¹ Nicolas Condylis, *Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power*, Melbourne University Law Review, Volume 39, Issue 2, 2015, pages 385-433.

⁴² *Ibidem*, at page 400.

⁴³ *Ibidem*.

Constitution represents, at the moment, the only known counterweight to the inherent power. Is statutory law capable of limiting it? Reasoning in purely hierarchical terms, the answer should be negative. While the Royal Prerogative is simply evoked by section 61 as one of the pillars of non-statutory executive power (the only one for decades) but is sourced in and regulated by centuries-long traditions that have little to do with the Constitution, inherent powers exist precisely because (and as long as) the Australian Constitution exists, they are the direct product of a specific interpretation of the Constitutional charter made by the Australian High Court, and can consequently be considered as powers enjoying constitutional status in the narrow sense. It follows from this assumption that it would be impossible for an Act of Parliament to override, repeal, regulate or amend a power outranking it. This argument is implicitly confirmed by a recent decision, *Plaintiff M68/2015 v Minister for Immigration and Border Protection*,⁴⁴ in which the High Court is again faced with immigration problems, and, specifically, with the detention of asylum seekers in the Nauru Regional Processing Centre. One of the topic addressed is the relationship between the government's inherent powers and deprivation of liberty: "That inherent constitutional incapacity of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty *is a limitation on the depth of the non-prerogative non-statutory executive power of the Commonwealth conferred by s 61 of the Constitution. As such, it cannot be removed by a law enacted by the Parliament of any State: "from its very nature" it must be outside the legislative power of a State to alter. Nor can the inherent constitutional incapacity be removed by a law enacted by the Commonwealth Parliament under s 51(xxxix) of the Constitution; it is not "incidental to the execution" of executive power to change an inherent characteristic of that power*".⁴⁵ We could summarise the Court's reasoning as follows: an inherent incapacity, namely a limitation on the depth⁴⁶ of a

⁴⁴ *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA, (2016) 257 CLR 42.

⁴⁵ *Ibidem*, at [162] (French CJ, Kiefel and Nettle JJ) (emphasis added).

⁴⁶ The Court accepts George Winterton's distinction between the "depth" and the "breadth" of the Commonwealth's executive power. The concept of "breadth" refers to the boundaries of the Federal executive power as compared to the States' executive power. It is therefore strictly connected to the distribution of legislative competences operated by the Constitution in section 51. "Depth" is a category that applies to a certain executive power once it has been established that it belongs to either the Federal government or a State government. It strives to answer this question: "How far (how deep) a government can go in the exercise of a power it rightfully owns?". Further information about this influential Winterton's theory can be found in: George Winterton, *The Limits and Use of Executive Power by Government*, Federal Law Review, Volume 31, Issue 3, 2003: 421-444.

non-prerogative, non-statutory executive power⁴⁷ (in simple terms, a limitation of an inherent power) enjoys constitutional status in the narrow sense and, therefore, cannot be removed by a Statute passed by either the legislature of a State or the Commonwealth Parliament. If this is true, it will be also true that, conversely, an inherent capacity, namely an inherent power, can be limited or repealed only by an amendment to the Constitution and not by an Act of Parliament.

The existence of an inherent executive power directly sourced in the Constitution makes the role played by the Prime Minister in Australia even more decisive than expected and calls for enhanced control on the part of the Governor-General.

4.1.3 New Zealand

Not surprisingly, the expression “Prime Minister” is never used in the Constitution Act 1986. Two conspicuous sections,⁴⁸ comprising two and three sub-sections respectively, are nevertheless devoted to the Executive Council in its capacity of vice-regal advisory body. Only a couple of meagre provisions about the Federal Executive Council can be found in the Commonwealth of Australia Constitution Act 1900⁴⁹ and the Canadian Privy Council’s functions are briefly outlined in part III of the British North America Act 1867.⁵⁰ Though not exponential, a certain increase, both quantitative and qualitative,⁵¹ in the depth of the executive power’s “explicit” regulation within the constitutional framework of the Commonwealth Realms is easily noticeable. In time, as the office of Prime Minister grew in importance, it has become progressively more difficult to hide it beneath the surface for flexibility reasons. The reader of the Constitution Act 1986 will therefore have very few chances of being deceived into believing that the Governor-General is the actual ruler of the country.

⁴⁷ Here, inherent executive power is described by the Court in negative, residual terms: it is not a statutory power nor a Prerogative power, but a *tertium genus* of power.

⁴⁸ Constitution Act 1986 (1986 No 114), ss. 3-3A.

⁴⁹ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (UK), ss. 62-63.

⁵⁰ British North America Act, 1867, 30 & 31 Vict. c. 3 (UK), ss. 12-13.

⁵¹ The Constitution Act 1986 goes as far as to lay down provisions concerning the consequences of an Executive Council’s advice given *in absentia*, namely when the Governor-General does not attend the Council’s meeting for unjustified reasons.

Initially, the Prime Minister office was often held in conjunction with the office of Colonial Secretary.⁵² This is not surprising, because responsible government was granted to New Zealand only in 1856 and, before the establishment of the Premiership, that of Colonial Secretary was the office whose powers and duties most closely resembled those of a modern Prime Minister. The Colonial Secretary was a deputy of the Governor-General, to whom he was responsible until 1856. In 1907, the title of Colonial Secretary was eventually abolished and the functions attached to it were acquired by the Minister of Internal Affairs.

Once the majority party leader in the legislative assembly of a Dominion subject to foreign rule, the New Zealand Prime Minister has gradually evolved into the Head of Government of a fully independent State. In the process, an increasing number of powers, from those concerning external relations and the management of foreign policy to war powers, have become available to him/her.

Two are the sources of the New Zealand Prime Minister's powers: statutory law and the Royal Prerogative, which he/she controls as the principal adviser of the Governor-General. Introduced in New Zealand as part of the broader common law system, the Prerogative has more or less maintained its original features: though generic and undefined, it is subject to judicial review and can be limited or even entirely removed by statute. Speaking of the Prerogative, the High Court⁵³ case *Fitzgerald v Muldoon and others*⁵⁴ deserves our attention.⁵⁵ The *New Zealand Superannuation Act 1974*,⁵⁶ requiring employees and employers to make compulsory contributions to a superannuation fund, was fiercely opposed by Robert Muldoon, who pledged to repeal it as soon as the National Party regained a majority in the House of

⁵² Among the Prime Ministers that have also been Colonial Secretaries we find Henry Sewell, the first "responsible" Prime Minister, William Fox, Alfred Domett, Frederick Weld, Edward Stafford, George Grey and John Hall.

⁵³ Supreme Court when the case was decided.

⁵⁴ *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

⁵⁵ Muldoon's acts were described by Wild CJ as made "by regal authority" within the meaning of the Bill of Rights 1689. While the concept of "regal authority" seems to be similar to that of "Royal Prerogative", it is true that no Prerogative power has ever existed allowing the Sovereign to suspend legislation. The English Sovereign believed, prior to the Case of Proclamations, that the Prerogative was a valid source of law and that it could be used, through proclamations, to override statutory provisions introduced by Acts of Parliament. However, suspending the effects of a Statute is not the same as overriding or repealing it. Subtle distinctions set aside, Muldoon's statements can at least be classified as an improper and unlawful attempt, on the part of the executive power, to threaten Parliamentary sovereignty.

⁵⁶ Superannuation Act 1974 (1974 No 41).

Representatives. In December 1975, shortly after being sworn in as Prime Minister, Muldoon released two official statements, by which he announced that the compulsory requirement for employee deductions and employer contributions would cease for pay periods ending after 15 December 1975. Muldoon was planning to introduce a bill in Parliament⁵⁷ to revoke the Superannuation Act.⁵⁸ The aim of his statements was therefore to immediately suspend the application of the 1974 statute in anticipation of its final repeal. He succeeded, as both government departments and employers immediately abode by his statements. Mr Fitzgerald, a civil servant, believing that the Government's move was unlawful, brought an action against Muldoon and the members of the Superannuation Board before the High Court. The Court found Muldoon's suspension attempt "illegal as being in breach of s 1 of the Bill of Rights".⁵⁹ Indeed, section 1 of the Bill of Rights 1689 states that "the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal".⁶⁰ Comparing *Fitzgerald v Muldoon* with *R (Miller) v Secretary of State for Exiting the European Union*,⁶¹ the case concerning UK's withdrawal from the European Union,⁶² both a great similarity and a great difference do emerge. The former lies in the subject-matter of the judgments, which in either case is the relationship between the executive and the legislative power seen under the light of the parliamentary supremacy principle. The latter can be summarised as follows: while, in *Miller*, the British Government has indirectly set aside a statute, the *European Communities Act 1972*,⁶³ by terminating an international convention under the Royal Prerogative, in *Fitzgerald v Muldoon* the New Zealand Prime Minister has not exercised a recognised Prerogative power nor, through his statements, has he actually repealed the New Zealand Superannuation Act 1974. He has instead purported to suspend its application. If that of the British Government is a case of Prerogative misuse, Muldoon's behaviour can be considered as completely arbitrary.

⁵⁷ In an excerpt of the statement released on 15 December 1975, the following words can be found: "Mr Muldoon said that early in the next Parliamentary session legislation would be introduced to carry out the government's election promises relating to the New Zealand Superannuation Scheme. In particular the compulsory element in the law would be removed with retrospective effect".

⁵⁸ Parliament had not been summoned yet in December 1975.

⁵⁹ *Fitzgerald v Muldoon* [1976] 2 NZLR 615, at 623.

⁶⁰ Bill of Rights 1689, 1 Will. and Mar. Sess. 2 c. 2 (UK), s.1.

⁶¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁶² See subparagraph 1.2.3 for further information.

⁶³ *European Communities Act 1972* c. 68 (UK).

4.2 Start and end of a Prime Minister's mandate

4.2.1 Canada

The Canadian prime Minister's fate is strictly linked to that of the House he/she is accountable to, namely the House of Commons. It is therefore crucial for our analysis to identify the physiological and pathological patterns underlying the start and end of a Parliament in Canada. Section 50 of the Constitution Act 1867 limits the duration of each Parliament to 5 years. The *Canada Elections Act*, on the other hand, establishes that the time-span between one General Election and another should be 4 years.⁶⁴ The ordinary duration of the House of Commons is therefore 4 years.

Three are the possible outcomes of a general election: the victory of the incumbent majority party, its defeat or a hung Parliament where no party can command an absolute majority. The first two cases are quite straightforward and do not require particular explanations: if the incumbent majority party wins, there will not be any change at all and the incumbent Cabinet will resume operations, if it loses, the Prime Minister will resign to leave room for the new Cabinet. We should remember that the new Prime Minister, once appointed by the Governor General, becomes a member of the Canadian Privy Council, of which the Cabinet he/she will form is only a committee. Things get more difficult in case of hung Parliament. The electoral system in Canada is based on the classical first-past-the-post model we have seen at work in the United Kingdom: the State's territory is divided into 338 constituencies colloquially called "*ridings*". In each riding, the candidate who gets a plurality of votes is elected. Despite the adoption of this strongly majoritarian mechanism, Canadian political landscape has not always been dominated by two strong parties and it is not today. The Conservatives and the Liberals are by far the most important political factions, but other parties like the New Democratic and the Bloc Québécois are not irrelevant and usually secure many seats. For this reason, hung Parliaments have been frequent in Canada, the last one lasting from 2008 to 2011. As evidenced by the Manual of Official Procedure of the Government of Canada, in such cases the Governor General is expected to carry out consultations with all the possible candidates to the leadership of the House: "Except in most unusual circumstances there will be no doubt as to the person to be called since the parliamentary situation or an electoral result will have made the designation clear. However, if it is not clear, a Governor General may consult possible candidates as he sees

⁶⁴ Canada Elections Act, S.C. 2000, c. 9, s. 56.1(2).

fit”.⁶⁵ The Manual, written in 1968, sees uncertainty in the selection of the Prime Minister as a “most unusual” circumstance, but this is not the case anymore. The main objective a Governor General should pursue while consulting candidates is, of course, to choose the person who is in the best position to command a stable majority in the House of Commons, in compliance with the principle of responsible government. As in the United Kingdom, the incumbent Prime Minister is usually given a chance to seek the confidence of the Parliament. Therefore, his/her resignation must not be taken for granted even when the party he/she leads fails to secure not just the majority, but also a plurality of seats. Being the Canadian political culture even more ill-disposed towards the idea of coalition Cabinets than the British one, it does not come as a surprise that there have been cases of incumbent Prime Ministers leading relatively successful minority Governments while enjoying the direct support of a small portion of MPs. A prominent example of such scenario is offered by Mackenzie King’s Cabinet after the 1925 General Election. King, who had already managed to survive as Prime Minister in a fairly troubled Parliament,⁶⁶ obtained only 101 seats, thus failing to reach not only the majority but also the plurality of seats in the House of Commons. He decided not to resign and survived for almost one year thanks to the support of the Progressives. Led either by the incumbent Prime Minister or by a new one, minority Cabinets represent the most common way to solve the political deadlock created by indecisive elections. Coalition Governments, with perhaps a single notable exception,⁶⁷ are almost unknown to Canada. This is so true that, in the Canadian political jargon, the expression “hung parliament” is rarely used. It is replaced directly by “minority Government”. Such detail is revealing of how much hung Parliaments and minority Cabinets are considered to be interrelated, with the latter seen as the only option at hand when no party can command a proper majority.

Independently on how it is formed, a Cabinet can last an entire Parliament, or, rather, end prematurely. First of all, the Prime Minister could die in office or resign for personal reasons. Two Prime Ministers have died in office until now: Sir John Macdonald in 1891⁶⁸ and Sir John

⁶⁵ Henry F. Davis, André Millar, *Manual of Official Procedure of the Government of Canada*, (Ottawa: Privy Council Office, 1968), page 448.

⁶⁶ In 1921, King obtained a narrow majority of seats, but by-elections transformed his Government into a minority Government. King regained the majority, again through by-elections, only in 1924.

⁶⁷ In 1917, Conservative Prime Minister Sir Robert Borden, faced with the challenges posed by World War I, asked the Liberals to form a coalition Government, which came to be known as the Union Government.

⁶⁸ Donald Creighton, *John A. Macdonald: The Old Chieftain* (Toronto: The Macmillan Company of Canada Limited, 1955), pages 564-578.

Thompson in 1894.⁶⁹ On both occasions, the Governor General chose experienced Cabinet members as replacements, respectively John Abbott and Mackenzie Bowell, who were Senators at the time of their appointment. It is likely that, should such an unfortunate event happen today, the Governor General would do the same, acting on advice of the ruling party's senior members. Differently from the UK, that has seen various Prime Ministers resign for personal reasons,⁷⁰ in Canada the most recent cases of personal resignation date back to the 19th century. British parties have established procedures aimed at choosing successors to resigning Prime Ministers since the days of Sir Anthony Eden. Provided that such procedures are in place in Canada, there is a chance the Governor General would abide by the ruling party's decision on who should be the next leader to appoint the new Prime Minister in case of personal resignation.

Both death in office and personal resignation put an end to the mandate of a Prime Minister without leading to the Cabinet's demise. Even though, in strict legal terms, the new Cabinet is different from the previous one, the supporting parliamentary majority remains the same and, except for minor reshufflings, in most cases Ministers keep holding their positions. This is not the case when the Government loses its parliamentary support after the approval of a motion of no-confidence or a defeat on a matter that is considered crucial for political survival. Hung Parliaments can be seen as a constant in recent Canadian history. Clearly, being minority Cabinets' vulnerability to votes of no-confidence extremely high, Canadian political system's inclination towards indecisive General Elections has strongly increased the chances of Governments being defeated in the House of Commons. In 1926, after the denied Parliament dissolution that brought King's ministry to an end, Conservative Meighen was appointed Premier by Governor General Byng. He was anyway defeated shortly after by a motion of no-confidence.⁷¹ Other defeats took place in 1963⁷² (Diefenbaker), 1974⁷³ (Pierre Trudeau), 1979⁷⁴

⁶⁹ Peter Busby Waite, *The Man from Halifax: Sir John Thompson, Prime Minister* (Toronto: University of Toronto Press, 1985), pages 415-431.

⁷⁰ For example, Sir Anthony Eden resigned in 1957 due to health problems, Margaret Thatcher decided to leave her office after having been defeated by John Major as party leader in 1990. Further information can be found in subparagraph 1.3.3.

⁷¹ Canada, Parliament, House of Commons, Journals, 15th Parliament, 1st session, 1926, pages 507-508.

⁷² Canada, Parliament, House of Commons, Journals, 25th Parliament, 1st session, 1962-63, pages 472-475.

⁷³ Canada, Parliament, House of Commons, Journals, 29th Parliament, 2nd session, 1974, pages 175-176.

⁷⁴ Canada, Parliament, House of Commons, Journals, 31st Parliament, 1st session, 1979, pages 345-347.

(Clark), 2005⁷⁵ (Martin) and 2011 (Harper).⁷⁶ Parliament was dissolved by the Governor General on all five occasions. We should remember that, traditionally, the Prime Minister is entitled to choose between dissolution and simple resignation when faced with a loss in a vote of no-confidence. In the latter case, a new Cabinet can be formed within the same Parliament.⁷⁷ This option seems not to be particularly appealing in Canada, and, for sure, it has not been so in the UK during the second part of the 20th century, if it is true that the only case of approved motion of no-confidence occurred within such time-frame led to the dissolution of the House of Commons.⁷⁸ While in the former motherland the matter is now strictly regulated by the Fixed-term parliaments Act 2011,⁷⁹ which seeks to avoid dissolution by granting another Cabinet or even the defeated Cabinet a chance to gain/regain the confidence of the House within 14 days, constitutional customs still remain the only relevant point of reference in Canada. Judging by the precedents listed above, it is possible to argue that dissolution of Parliament is a solution strongly suggested by constitutional practice when Cabinets lose the House of Commons' support.

Set aside, for the time being, all the issues surrounding the Prime Minister's power to request a dissolution even when the Cabinet still enjoys the confidence of the House, we should now focus on a very peculiar, though probably obsolete, power vested in the Governor General as Monarch's representative. It is capable of bringing a Prime Minister's mandate to an end, just like all the situations we have already described and can perhaps be defined as the ultimate prerogative power: the power of dismissal. Unlike Lieutenant Governors,⁸⁰ Governors General

⁷⁵ Canada, Parliament, House of Commons, Journals, 38th Parliament, 1st session, 2004-2005, pages 1352-1353.

⁷⁶ Canada, Parliament, House of Commons, Journals, 40th Parliament, 3rd session, 2010-2011, pages 1421-1423.

⁷⁷ For example, in the UK, Stanley Baldwin, after having been defeated by a motion of no-confidence in 1924, resigned without asking for dissolution. A minority Labour Cabinet led by Ramsay Macdonald was formed.

⁷⁸ James Callaghan advised the Queen to this effect after having been defeated by the House of Commons in 1979.

⁷⁹ See subparagraph 1.3.3.

⁸⁰ Today, the use of the power of dismissal by a federal official against a Provincial Premier would be almost unthinkable. Actually, in the past, provincial Premiers have been dismissed five times between 1867 and 1903, in Québec (Charles Boucher de Boucherville in 1878, Honoré Mercier in 1891) and British Columbia (John Herbert Turner in 1898, Charles Augustus Semlin in 1900, Edward Gawler Prior in 1903). In 1991, Bill Vander Zalm, involved in a conflict of interest concerning the sale of his amusement park, resigned as Premier of British Columbia. As pointed out by Ronald Cheffins in *The Royal Prerogative and the Office of Lieutenant Governor*, David Lam, Lieutenant Governor of British Columbia at the time of Vander Zalm's resignation, speaking to Asian newspaper *South China News*, revealed that if Vander Zalm had not resigned, he would have made use of the Prerogative power of dismissal.

have never made use of this power as of today, but there is at least one case in which something similar happened. In 1896, Conservative Prime Minister Sir Charles Tupper was defeated by Wilfried Laurier's Liberals.⁸¹ Despite the unambiguous victory obtained by Laurier, which called for immediate resignation, Tupper refused to step down. His behaviour was difficult to justify in the light of the majority threshold reached by the Liberals, as, by convention, precedence is granted to the incumbent PM only when general elections return hung Parliaments. There was no doubt Tupper was trying to retain power despite his lack of support in the House of Commons. It is possible that, if Tupper's selfish commitment to political survival had exceeded a certain limit, Governor General Aberdeen⁸² would have applied the ultimate measure of control, dismissing him. Instead, he took a softer path and simply refused to appoint the Ministers Tupper was advising him to appoint. Tupper, faced with the prospect of not being able to carry on his duties as Prime Minister, eventually decided to resign. Aberdeen's behaviour was smart, in that, in compliance with his duty of self-restraint, he sought to put pressure on Tupper by exercising less severe reserve powers than that of dismissal.

4.2.2 Australia

The Australian Constitution indirectly fixes the ordinary duration of the Prime Minister's mandate by stating, in section 28, that "every House of Representatives shall continue for three years from the first meeting of the House, and no longer".⁸³ The chance of an early dissolution is recognised by the second part of the same section: "but (the House of Representatives) may be sooner dissolved by the Governor-General".⁸⁴

The House of Representatives currently comprises 150 members elected from single-member constituencies known in Australian political jargon as "*electorates*". The electoral system, based on the concept of *instant run-off/full preferential voting*, differs from a pure *first-past-the-post* primarily in that a candidate must obtain 50% of votes cast plus one in the constituency to be elected. In the United Kingdom and Canada, as we know, each seat is instead won by the candidate who gets a mere plurality of votes cast. A 50% plus one threshold can be found, sometimes further reinforced, in other majoritarian systems.⁸⁵ The Australian peculiarity

⁸¹ It was actually a clear-cut victory, with the Conservatives and the Liberals securing respectively 86 and 117 seats.

⁸² John Campbell Hamilton-Gordon, Earl of Aberdeen, served as Governor General of Canada from 1893 to 1898.

⁸³ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 28.

⁸⁴ *Ibidem*.

⁸⁵ For example, in France, a candidate to the *Assemblée nationale* is elected in the first round if he/she gets 50% of votes cast plus one and a vote total equal to at least one quarter of eligible voters in the *Circonscription*

lies in the fact that, thanks to full preferential voting, the threshold is always met in the first round and, consequently, no second-round is held. Full preferential voting works as follows: voters are not required to choose their favourite candidate but to rank all the candidates in order of preference by placing a number next to each name. First preference votes are counted first. If no candidate has obtained 50% plus one first preference votes, the candidate who got the fewest number of first preference votes is eliminated and the second preference votes from the ballots that placed the eliminated candidate first are allocated to the remaining candidates. If the threshold has not been reached yet, the next candidate with the fewest votes is eliminated and the procedure described above is repeated until a winner is proclaimed. Instant run-off voting replaced first-past-the-post in 1918: at the Swan by-election,⁸⁶ the Country Party's growth split the conservative electorate to the benefit of the Labor candidate. The Nationalist government led by William Hughes promptly reacted by changing the voting system in such a way as to ensure that conservative parties could support their own candidates without giving too much advantage to the Labor Party, which, alone, enjoyed the support of the entire progressive electorate. The instant run-off system, already introduced at State level in Victoria and Western Australia, was therefore adopted also at federal level by means of the *Commonwealth Electoral Act 1918*.⁸⁷ Although inspired by reasons of political partisanship, such choice proved enduring and successful, contributing to the birth of a stable two-faction system. Using the expression "two-party system" would be technically misleading, as the Labor Party is usually faced by a coalition of two conservative parties: the Liberal Party, formerly known as the Nationalist Party and then as the United Australia Party, and the National Party, the current incarnation of the Country Party.

Hung Parliaments are infrequent in Australia, as, in most cases, the majority of the seats in the House of Representatives is secured by either the Labor Party or the Liberal-National Coalition. However, convention dictates that "if, after an election, no-one emerges with the confidence of a majority of the House, the incumbent Prime Minister, as the last person to hold

législative. If no candidate reaches this threshold, a run-off among the candidates whose score amounts to at least 12,5% of registered voters is held. Whichever candidate gets more votes in the second round wins, regardless of whether the 50% mark has been reached.

⁸⁶ In 1918, the sitting member of the Division of Swan, a constituency located in Western Australia, suddenly died. Such event triggered a by-election which saw the Labor candidate, Edwin Corboy, profit from the split of the conservative electorate between the Country Party and the Nationalist Party. Corboy secured the Swan seat with just 34,4% of the votes cast.

⁸⁷ Commonwealth Electoral Act 1918 (Cth).

a majority, has the right to remain in office and test his or her support on the floor of the House.”⁸⁸ In 1940 and 2010, the only recent cases of hung Parliament, such rule has been rigorously applied. On both occasions, the incumbent Prime Minister has retained the House’s control by reaching an agreement with a small group of *crossbenchers*.⁸⁹ Crossbenchers are those MPs who sit on the crossbench, namely that portion of the horseshoe-shaped House of Representatives Chamber in Canberra linking the majority’s bench with the minority’s. Being independent from both the major factions, they are particularly precious when the Prime Minister is not able to easily command a majority in the House. We find crossbenchers also in the Australian Senate, whose architectural structure is identical to that of the House.

If the possible outcomes of a federal election are essentially three (incumbent majority party’s victory or defeat, hung Parliament), many are the ways in which the mandate of a Prime Minister can come to an end. Setting aside the natural and uncontroversial dissolution of the House of Representatives after three years since its first meeting, a Prime Minister could: 1) die in office, 2) resign for personal or political reasons, 3) advise snap elections or double dissolutions, 4) be ousted out of office by a vote of no-confidence and, in exceptional circumstances, 5) be dismissed by the Governor-General.

This subparagraph will cover points 1, 2, 4, 5, while point 3 will be analysed later.⁹⁰

Three Australian Prime Ministers have died in office: Joseph Lyons in 1939, John Curtin in 1945 and Harold Holt in 1967. Holt’s case is extremely peculiar, because he disappeared while swimming, probably caught by a rip current. Declared dead *in absentia*, his body was never found.⁹¹ On all the aforementioned occasions, deputy Prime Ministers have served as *interim* Prime Minister for a short period of time.⁹² Then, the majority parties’ new leaders have been

⁸⁸ Cathy Madden, Nicholas Horne, *Hung parliament* (Canberra: Parliamentary Library, 2010).

⁸⁹ In 1940, Robert Menzies, the leader of the United Australia Party, was able to remain in office thanks to two crossbenchers who withdrew their support to his Cabinet in 1941. Menzies decided to resign when, after having spent four months in the United Kingdom to take part to Churchill’s war Cabinet meetings, he returned to Australia and became aware of having lost the support of the House of Representatives. In 2010, Julia Gillard obtained the support of four out of six Independent and Green Party crossbenchers, thus being able to command a majority in the House of Representatives for three years. The 2010 federal elections resulted in a 72-72 perfect tie between Labor (Gillard’s party) and the Coalition.

⁹⁰ See subparagraph 3.3.6.

⁹¹ Tom Frame, *The Life and Death of Harold Holt* (Crows Nest, NSW: Allen & Unwin, 2005), pages 246-271.

⁹² Country Party’s Earle Page served as interim Prime Minister after Joseph Lyons’ death, Frank Ford and John McEwen did the same after, respectively, John Curtin’s death and Harold Holt’s disappearance.

appointed by the Governor-General.⁹³ In Australia, party leadership is contested whenever a *leadership spill* motion is successfully proposed. A lost leadership spill vote forces the “deposed” leader to also resign as Prime Minister, despite the fact that the House of Representatives’ confidence is still formally intact. Personal resignations for leadership reasons have lately become more common: in 2010, Julia Gillard replaced Kevin Rudd as both Labor Party leader and Prime Minister, but, in 2013, she was defeated by Rudd and resigned. In 2015, Malcolm Turnbull successfully challenged PM Tony Abbott’s Liberal Party leadership, causing his resignation. Other famous cases of “political” resignation are those of John Gorton in 1971⁹⁴ and Robert Hawke in 1991. The principle that any change in the majority party’s leadership should be invariably followed by a change of the same kind in the Cabinet’s leadership is well established within the political framework of the Commonwealth Realms. As we have already seen,⁹⁵ it has found application on some occasions also in the United Kingdom (Thatcher resigned for political reasons in 1990, Tony Blair did the same in 2007). It would anyway be impossible to deny that, in Australia, Prime Ministers’ political leadership is much more unstable than it is in the former-motherland. Sometimes, even a sudden drop in the opinion polls can be enough for influential majority MPs to question their leader’s authority. Such behaviour, coupled with the unusually short ordinary duration of the House of Representatives (three years), puts enormous pressure on the Prime Minister of the day when it comes to policy implementation, discouraging sober analysis and rewarding impulsiveness. Constitutionally speaking, it could be argued that the practice of forcing a Prime Minister’s resignation “behind closed doors”, namely without passing a proper motion of no-confidence in the House, though consistent with established political traditions, does not comply with the high standards of transparency one would expect from an advanced democracy like Australia. If the said practice becomes the norm, losing its exceptional nature, something should be done in order to contain it in a way or another. Due deference to political parties’ independence as private organisations requires “internal” solutions. Under this point of view, Labor Party’s 2013 voting reform warrants our attention. Proposed by Kevin Rudd and approved by the ALP’s caucus,⁹⁶ namely

⁹³ Robert Menzies, Ben Chifley and John Gorton replaced, respectively, Joseph Lyons, John Curtin and Harold Holt as party leaders and Prime Ministers.

⁹⁴ The leadership vote resulted in a tie, but Gorton decided to resign because he felt that a tie was not enough for him to enjoy his party’s support.

⁹⁵ See subparagraph 1.3.3.

⁹⁶ Anika Gauja, *Party Reform: The Causes, Challenges, and Consequences of Organizational Change* (Oxford: Oxford University Press, 2017), pages 141-142.

the body comprising all the Party's elected members in both Houses of Parliament, the reform subjects the decision to hold a leadership spill vote involving a sitting Prime Minister to the approval of a motion by a qualified majority of 75% of the Caucus' members. If the party does not command a majority in the House when its leadership is challenged, the threshold drops to 60%. These new rules have attracted criticism within the party. Former Prime Minister Julia Gillard said: "The new rules represent exactly the wrong approach to address the so-called "revolving door" of the Labor leadership. These rules protect an unsupported, poorly performing, incumbent rather than ensuring that the best person gets chosen and supported for the best reasons".⁹⁷ Gillard's words seem to describe internal competition as a healthy instrument of "natural selection" in the Darwinian sense, rather than as a major hindrance to the work of a stable Cabinet. In her political life, she has both been favoured and penalised from the mechanism, yet her defence of the "survival of the fittest", as the continuous struggle for leadership in Australian politics could be defined, is unconditional. Arguably, the adoption of qualified majority voting for the approval of a leadership spill motion is an effective solution to the problem and, as such, should be encouraged.

No explicit motion of no-confidence in the Government has ever been successfully approved by the House of Representatives. That being said, on eight occasions⁹⁸ Prime Ministers have felt compelled to either resign or advise an early dissolution of the House after having been defeated in key policy-related votes. For example, in 1904, the *Commonwealth Conciliation and Arbitration Bill* caused the resignation of two Prime Ministers: Alfred Deakin⁹⁹ and Chris Watson.¹⁰⁰ In 1941, Arthur Fadden resigned after the approval of an opposition's amendment to the budget bill, which reduced the first expenditure item in the estimates to the nominal sum of £1.¹⁰¹ Government's defeats in key votes can be considered as implied withdrawals of parliamentary confidence, but this is not always true. As pointed out by Ivor Jennings in his authoritative work "*Cabinet Government*", "what the Government will treat as a matter of sufficient importance to demand resignation or dissolution is, primarily, a question for the

⁹⁷ Ibidem.

⁹⁸ Bernard Wright, *House of Representatives practice*, 6th edition (Canberra: Department of the House of Representatives, 2012), page 324.

⁹⁹ Ibidem.

¹⁰⁰ Ibidem.

¹⁰¹ Ibidem, at page 325. It should be noted that, prior to 1966, when it was replaced by the Australian Dollar, the Australian pound was the official currency of the State.

Government”.¹⁰² In other words, in the absence of a formal motion of no-confidence, it is up to the Government to establish whether a certain matter should be considered as “of confidence” or not. This means that even minor defeats could be enough for a Prime Minister to be ousted out of office and that, conversely, not every major defeat is capable of triggering a Cabinet crisis.

Predicting how confidence issues will be handled in the future may be an impossible task. We should therefore confine ourselves to two simple but convincing assumptions: first, no evidence supporting a drift towards the latest developments occurred in the United Kingdom can be currently found in the Australian parliamentary practice. We should remember that, in the United Kingdom, the Fixed-terms Parliaments Act 2011¹⁰³ has formally recognised the defeated Government’s right to regain the confidence of the Commons within 14 days since a motion of no-confidence’s approval. Additionally, incumbent Prime Minister’s resignation is now compulsory only if an alternative Government can be formed, while dissolution has become the main answer to political deadlocks. Such statutory changes, favoured by the crisis of the traditional two-party system,¹⁰⁴ are in line with the trends observed over the entire 20th century: the last two successful motions of no-confidence¹⁰⁵ have indeed led to a dissolution of the House of Commons rather than to the Prime Minister’s resignation. Australian history reveals, on the contrary, a certain preference for resignation, triggered in six out of eight cases of implied withdrawal of confidence.¹⁰⁶

Second, given the enduring stability of the Australian two-faction system and the consequent low chance of federal elections resulting in a hung Parliament, it is unlikely that the recently formalised British habit of giving the defeated Prime Minister a chance to regain the confidence of the lower House will ever be borrowed by Australia.

On a final note, we should briefly consider the issue of Senate’s motions of censure against individual members of the Government. The Senate is certainly capable of influencing a Prime Minister’s fate, as its veto power on legislation is absolute. Such assumption should not deceive us into believing that a confidence link between the Government and the upper House of Parliament does exist. As in the UK, Canada or New Zealand, a Prime Minister only needs the

¹⁰² Ivor Jennings, *Cabinet government*, 3rd edition (Cambridge: Cambridge University Press, 1969), page 495.

¹⁰³ Fixed-term Parliaments Act 2011 c. 14 (UK).

¹⁰⁴ See subparagraph 1.3.2 for further information.

¹⁰⁵ Ramsay McDonald (1924) and James Callaghan (1979).

¹⁰⁶ Wright, *House of Representatives practice* (n 128), at pages 324-325.

confidence of the lower House in order to remain in charge. The Senate has anyway approved motions of censure on many occasions and, apparently, the practice is progressively becoming “common occurrence”.¹⁰⁷ Such motions targeted not only Ministers who sat in the Senate,¹⁰⁸ but also House Ministers. It is probably redundant to say that no legal effect, direct or indirect, is attached to initiatives of this kind. They can consequently be described as instruments of “moral suasion”, whose main aim is to put political pressure on a certain Minister.

Australia has seen a Prime Minister’s mandate end in the most “traumatic” way when Gough Whitlam was dismissed by Governor-General Sir John Kerr. Reserve powers are extremely controversial, as their exercise, infringing some of the fundamental conventions underlying a constitutional monarchy, entails a temporary re-emergence of the Monarch’s absolute powers from the deep abyss where they have been confined by the rise of Parliament as the sole and actual Sovereign in 17th century England. Acting contrary to (or without) the advice of a government enjoying the confidence of a democratically elected Parliament is inconsistent with both the idea of “responsible government” and the democratic principle. This is the main reason why such behaviour is tolerated only insofar as it is justified, as a measure of last resort, by the duty to avert a serious threat to the stability of the constitutional order. The power of dismissal is the strongest reserve power. It is indeed capable of setting aside the golden rule expressed by the following words: “A Prime Minister shall be exclusively responsible to the lower House of Parliament (and not to the Sovereign or his/her representative)”.

The events leading to Whitlam’s dismissal in 1975 are somehow as important as the dismissal itself, because they give us the chance to delve into sensitive topics like the role played by the Senate in the system and the rules pertaining to the filling of casual vacancies. We will therefore start by providing an outline of such events.

In 1972, Gough Whitlam’s Labor Party defeated the Liberal/Country coalition led by William McMahon, securing 67 House of Representatives seats out of 125. Usually, House elections are held in conjunction with half-Senate elections, but, due to an early dissolution of the lower House of Parliament in 1963 and the consequent loss of synchronisation, only one Senate seat was contested in 1972.¹⁰⁹ In the Senate, the Coalition was therefore able to maintain

¹⁰⁷ Ibidem, at page 327.

¹⁰⁸ As we will see in detail later, Ministers can theoretically be chosen among Senators, even though convention dictates that they have to be members of the House of Commons.

¹⁰⁹ In 1971, Queensland Liberal Senator Annabelle Rankin resigned. Queensland’s Legislative Assembly appointed Neville Bonner to fill the vacancy. Bonner managed to maintain the seat at the 1972 elections.

a slight advantage over Labor. Incapable of actively challenging the Government, a hostile Senate will necessarily leverage its veto power to block statutes approved by the House, appropriation bills in particular.¹¹⁰ This is exactly what happened. The Coalition threatened a supply block for the first time in 1974, following the so-called “Gair affair”,¹¹¹ but its attempted boycott was overcome when Whitlam obtained a double dissolution on the ground that six bills¹¹² approved by the House of Representatives had been rejected twice by the Senate.¹¹³ The ensuing elections resulted in another Labor victory, though by a reduced margin, in the House. The Senate was instead the theatre of a perfect tie between Labor and the Coalition (29:29), with two independent crossbenchers holding the balance of power.¹¹⁴ Shortly after the new Parliament’s opening, Paul Hasluck’s mandate as Governor-General came to an end. Whitlam chose Sir John Kerr, Chief Justice of New South Wales, as his successor, believing that Kerr’s former affiliation with the Labor Party¹¹⁵ could be interpreted as a sign of “political reliability”. In December 1974, Whitlam’s Cabinet was shaken by the “loans affair”.¹¹⁶ The opposition, led

¹¹⁰ The Senate is only entitled to either approve or reject appropriation bills, it cannot amend them.

¹¹¹ Queensland Senator Vincent Gair, a Labor’s opponent, was appointed Ambassador to Ireland by Whitlam shortly before half Senate elections. The aim was to create a casual vacancy in order to have 6 (and not 5) Queensland seats contested. Gair had not resigned yet from office when news of the manoeuvre spread, precipitating Coalition-led Queensland Government’s counterattack: Queensland Premier immediately advised the State Governor to issue writs for the elections of just 5 Senators. Whitlam’s use of the “promoveatur ut amoveatur” tactic was certainly not irreprehensible as he was employing the power to appoint diplomats as a political instrument.

¹¹² The bills were crucial to the implementation of Whitlam’s political agenda. One of them introduced universal health insurance through the establishment of Medibank. After the double dissolution, all the bills were passed by a special joint sitting of the two Houses under section 57 of the Constitution.

¹¹³ See subparagraph 5.3.2 for a detailed analysis of double dissolutions.

¹¹⁴ Steele Hall of the Liberal Movement and Michael Townley, a conservative independent who became a member of the Liberal party in February 1975.

¹¹⁵ Further information on Kerr can be retrieved in John Kerr, *Matters for judgment: an autobiography* (London: Macmillan, 1979).

¹¹⁶ In a meeting of the Federal Executive Council, Minister for Mineral and Energy Rex Connor was authorised to borrow USD 4 billion overseas. Funds would be used to build energy infrastructure like natural gas pipelines and then repaid after 20 years. The Government did not actually raise any loan in the following months, but Whitlam was harshly criticised for having held an Executive Council meeting without the Governor-General’s knowledge and for having allegedly infringed the Commonwealth-State Financial Agreement of 1927. The “loan affair” caused Deputy Prime Minister Jim Cairns’ dismissal and Minister Rex Connor’s resignation.

since March 1975 by Malcolm Fraser,¹¹⁷ “pursued the Government for many months over the ‘Loans Affair’ alleging impropriety and incompetence”.¹¹⁸

An already fragile balance in the Senate was then upset by two events: Senator Lionel Murphy’s appointment as Justice of the High Court in February and Senator Bert Milliner’s death in June. In the upper House, casual vacancies are filled in accordance with the rules set out by section 15 of the Australian Constitution: “the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens”.¹¹⁹ Convention dictated that to a deceased or resigning Senator had to succeed a person of the same political party, but, when Murphy, a Labor Party member, left his seat vacant, the Coalition-controlled NSW Parliament chose Cleaver Bunton, an independent, as a replacement. This move, clearly aimed at further reducing Labor’s influence on the Senate, openly breached a constitutional convention, establishing a precedent that would soon be followed. The impact of Bunton’s appointment on Labor’s political stability was anyway immaterial, as the newly sworn in Senator decided to back the Government on budget matters, thus contributing to the stalemate.¹²⁰ Senator Bert Milliner’s death in June was the actual turning point that paved the way to an irreversible Government crisis. Milliner, a Labor Senator, was indeed replaced by Albert Field, who, despite being a nominal Labor Party member, was known as a fierce Whitlam’s opponent.¹²¹ Once again, a Coalition-controlled State legislature (Queensland in this

¹¹⁷ Fraser won a leadership spill vote against Billy Snedden in March 1975.

¹¹⁸ George Winterton, 1975: *The Dismissal of the Whitlam Government*, in “Australian Constitutional Landmarks”, eds. H.P. Lee, George Winterton (Cambridge: Cambridge University Press, 2003), page 234.

¹¹⁹ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 15.

¹²⁰ On supply matters, the Coalition could rely on 30 Senators: 29 elected in the 1974 federal elections and a former crossbencher, Michael Townley, who, in February 1975, had joined the Liberal Party. The Labor Party was backed by 30 Senators as well: 29 elected in the 1974 federal election and the independent Steele Hall, who opposed Whitlam but supported his Government exclusively on supply matters. The replacement of a Labor Senator, Lionel Murphy, with the independent Cleaver Bunton left things unchanged, as Bunton, like Hall, decided to support Whitlam. Consequently, before Bert Milliner’s death, we had a 30:30 perfect tie.

¹²¹ Winterton, 1975: *The Dismissal of the Whitlam Government* (n 148), at page 235.

case) showed complete disregard for constitutional conventions and political fair play. Albert Field was never able to vote against the Government because his appointment was immediately challenged before the High Court on the grounds that he was still a public servant when his designation was made effective.¹²² With the replacement of Milliner and the subsequent suspension of Field, the Coalition finally obtained a narrow majority in the Senate (30:29). Malcolm Fraser was now able to announce that the opposition would defer supply in the Senate until Whitlam agreed to advise a snap-election of the House. The opposition's leader could not have played this card before, because his objective was precisely to use deferral of appropriation bills' consideration (and not appropriation bills' rejection) as a political weapon. As stressed by Brendan Lim, "despite a disciplined party system, there were opposition senators who had reservations about the propriety of blocking supply".¹²³ By indefinitely deferring supply bills' consideration, Fraser could put enormous pressure on the Government without risking a defeat. Deferral was anyway more onerous, politically speaking, than outright rejection. We should remember that, pursuant to section 23 of the Australian Constitution, "questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative".¹²⁴ This means that a 30:30 perfect tie in the Senate was already enough for the Coalition to block supply bills, but not to indefinitely defer their consideration, as any potential motion to this effect would have been rejected by virtue of the same section 23 rule. The Coalition needed a majority in the Senate to approve supply deferral motions: this is the reason why Senator Milliner's death (and the choice of Field as his replacement) was so important in the development of the crisis.

Whitlam did not advise an early dissolution of the House, thus triggering the Coalition's reaction. Supply was deferred by the Senate on three occasions: 16 and 22 October, 6 November 1975.¹²⁵ In the meantime, Solicitor-General Robert Ellicott and Chief Justice Garfield Barwick

¹²² Prior to being appointed Senator, Field worked at the Queensland Education Department. He had resigned, but without giving the required two weeks' notice. Section 44 (IV) of the Australian Constitution states that a person who "holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth [...] shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives".

¹²³ Brendan Lim, *Australia's Constitution after Whitlam* (Cambridge: Cambridge University Press, 2017), page 48.

¹²⁴ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 23

¹²⁵ Winterton, 1975: The Dismissal of the Whitlam Government (n 148), at page 236.

expressed the view that a Prime Minister's dismissal was possible or even unavoidable if supply continued to be deferred in the Senate.¹²⁶ Five days after the third supply deferral, Governor-General John Kerr dismissed Gough Whitlam,¹²⁷ replacing him with Malcolm Fraser. Fraser was appointed Prime Minister on condition that he secured appropriation bills' approval and, immediately thereafter, advised a double dissolution of the federal Parliament. Both tasks were accomplished at the earliest opportunity, while the House of Representatives was passing a "constructive" motion of no-confidence¹²⁸ in Fraser's Government. The motion proved ineffective, as both Houses of Parliament had already been dissolved when it was submitted to the Governor-General. At the elections held in December 1975 the Coalition obtained a majority in both the House of Representatives and the Senate.

The events of 1975 require a detailed assessment that should focus on the following points: 1) was the attitude showed by both factions towards constitutional conventions fair enough? 2) Did the Senate have the power to indefinitely block supply? 3) If it is true that reserve powers can be exercised only as a last resort, was Whitlam's dismissal the only choice Kerr could have made? Was it consistent with the role of Governor-General and, above all, was it a constitutionally-sound move? 4) Was Fraser's appointment as a care-taker Prime Minister correct?

1) Both parties showed little political fairness in dealing with the crisis: while Labor seized the opportunity offered by a diplomatic appointment to strengthen its position in 1974, the Coalition openly breached a well-established constitutional convention on two different occasions. Certainly, the Government was the first to use its powers in a "tactical" way, but the

¹²⁶ In a statement entitled "Public advice to the Governor-General", Ellicott wrote that, given the Government's inability to get supply from the Senate, "it would be within the Governor-General's power and his duty to dismiss his Ministers and appoint others". Barwick expressed similar ideas in a letter to the Governor-General: "a prime minister who cannot ensure supply to the crown, including funds for carrying on the ordinary services of government, must either advise a general election or resign. If, being unable to secure supply, he refuses to take either course, your Excellency has a constitutional authority to withdraw his commission as prime minister". The excerpts above are taken, respectively, from Paul Kelley, *November 1975: The Inside Story of Australia's Greatest Political Crisis* (Sydney, Allen & Unwin, 1995), page 319 and Geoffrey Sawer, *Federation Under Strain: Australia 1972-1975* (Melbourne: Melbourne University Press, 1977), pages 203-204.

¹²⁷ Whitlam's dismissal remains, to this day, an isolated case at federal level. At State level, something comparable happened in 1932, when New South Wales' Governor Philip Game dismissed Premier John Thomas Lang on the grounds that his decision to withdraw all the State's funds from bank accounts was illegal.

¹²⁸ Whitlam's Government passed a motion which not only expressed the House's "want of confidence" in Fraser, but also invited Kerr to consider a reappointment of Whitlam.

Coalition's behaviour was more aggressive. Conventions' true virtue lies in their flexibility: evolving in an automatic fashion, they do not need to be constantly updated, like written rules, to reflect changes in the balance of power. This flexibility is at the same time a weakness, in that it can be easily exploited to reach unexpected objectives in a rather simple way. Conventions require stable and Constitution-abiding political factions to work properly. Whenever the implied covenant between such factions is unilaterally rejected, they are easily set aside and only a proper process of "codification", or entrenchment, can restore their authority. For this reason, in 1977, section 15 of the Australian Constitution has been amended. It currently comprises a thorough specification of the rules a State legislature must comply with when it is called upon to replace a Senator: "Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, [...] shall [...] be a member of that party [...]".¹²⁹

2) The Coalition's decision to block supply in the Senate by indefinitely deferring appropriation bills' consideration has been highly criticised, but section 53 of the Australian Constitution confers upon Senate the power to block supply. Sending appropriation bills back to the House of Representatives with a request of amendment is an explicitly recognised option.¹³⁰ We must anyway ask ourselves whether a convention that the Senate should not deny supply is in place or, better, was in place in 1975. Prior to Whitlam's dismissal, the Senate had effectively never blocked appropriation bills. Does this prove the existence of a specific custom or convention? The mere willingness to back the Government on supply matters, though persistent throughout the decades, could be justified in many different ways. The fact that, in most cases, both the Houses of Parliament were dominated by the same party could, for example, easily explain it. What is certain is that, in all likelihood, Senators did not feel compelled to pass appropriation bills by the belief that it was precisely their duty, legally speaking, to do so. We should therefore dismiss the claim that a convention existed to the effect that the Senate could not intervene in supply matters.

3) Kerr's decision to dismiss Whitlam was based on the following assumption: whenever a Prime Minister is unable to obtain supply, he/she should either resign or advise a dissolution of

¹²⁹ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 15.

¹³⁰ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (UK), s. 53 (emphasis added).

Parliament. If he/she refuses to do so, it is the Governor-General's duty to dismiss him/her.¹³¹ Kerr has applied to the issue of supply denial, by analogy, the same principles that come into play in case of confidence loss. He actually established an equivalence between withdrawal of confidence (implied or explicit) by the lower House and supply block by the upper House. If the classification of supply deferral as an implied withdrawal of confidence is uncontroversial, a problem arises when the lower House and the Senate are put on an equal footing with regard to confidence matters: by saying that a supply block on the part of the Senate is equal to a vote of no-confidence, Kerr recognises the existence of a confidence link between the upper House and the Government, openly contradicting the principle of exclusive governmental responsibility to the lower House of Parliament. Should we therefore conclude that, in Australia, a Government must seek and retain the confidence of both Houses in order to stay in office? Let us concede for a while this is true. In this case, every defeat suffered by a Prime Minister in the Senate on a "matter of confidence" should bring the Government down. But such hypothesis is falsified by section 57 of the Australian Constitution, which, by subjecting the validity of a double dissolution request to the condition that a bill approved by the House has been rejected twice by the Senate in an interval of three months, implicitly confirms a Government's ability to overcome two important setbacks in the Senate (appropriation bills' rejections included) without facing demise. Taken to its logical conclusion, Kerr's reasoning reveals its inconsistency with the Constitution. It is built on a misconception of the relationship between the Government and the Senate. Borrowing Winterton's distinction between responsibility and accountability,¹³² we may say that the Australian Government is both accountable and responsible to the House of Representatives, but is simply accountable, and not responsible, to the Senate. In Winterton's nomenclature, the word "accountability" describes governments' obligation to "explain and justify their behaviour and policies"¹³³ to a certain House of Parliament, while "responsibility" means that a link of confidence does exist

¹³¹ Upon Whitlam's dismissal, Kerr released the following official statement: "Because of the federal nature of our Constitution and because of its provisions the Senate undoubtedly has constitutional power to refuse or defer supply to the Government. Because of the principles of responsible government a Prime Minister who cannot obtain supply, including money for carrying on the ordinary services of government, must either advise a general election or resign. If he refuses to do this I have the authority and indeed the duty under the Constitution to withdraw his Commission as Prime Minister". This and other parts of the statement can be found in Geoffrey Sawyer, *Federation Under Strain: Australia 1972–1975* (n 126).

¹³² Winterton, 1975: *The Dismissal of the Whitlam Government* (n 148), at page 245.

¹³³ Ibidem.

between a Government and a certain House and that, consequently, once the confidence of that House is lost, a Prime Minister is required to choose between dissolution and resignation.

That said, our analysis, like Kerr's reasoning, is affected by an over-simplification. So far, we have indeed failed to acknowledge that supply bills are inherently different from any other bill, in that they appropriate the money a Government needs to carry out its operations. A Government without supply, we could say, is like a car without fuel. Consequently, a supply block is far more dangerous for the stability of the whole system than a "simple" legislation block. Section 83 of the Australian Constitution subjects public money expenditure to "*appropriation made by law*".¹³⁴ This means that a failure in the approval of supply bills makes any governmental expenditure inconsistent with the Constitution, unless it is made under the "emergency mechanism" introduced by the second paragraph of section 83.¹³⁵

Whitlam's dismissal could have therefore been justified on the grounds that it is the Governor-General's duty to prevent a Government from running out of money. Being the use of statutorily unappropriated financial resources contrary to the Constitution, Kerr could have invoked the risk of a major breach of the Constitution, and not an alleged lack of confidence in the Government, as the legal basis for his decision to exercise the strongest reserve power. Yet such a choice would have been awkward, as Kerr intervened prematurely, at a stage in which, despite the dangerous deadlock in the Senate, it was not possible to say with absolute certainty that the Government would not be able to secure supply. Obviously, Kerr could not wait for too long, but was that of dismissal the sole reserve power he could exercise to solve the problem? It follows from what we have said that two equal and opposite rights were at stake: on the one hand, the Parliament's right to challenge the Government by deferring supply, a right that, historically speaking, predates any other parliamentary right and that, in Australia, belongs also to the democratically elected Senate; on the other, the Government's right to remain in office unless confidence is withdrawn by the lower House. In order to avoid chaos, one of such rights had to be sacrificed. The ideal move would probably have been a forced double dissolution. Acting this way, Kerr would have let Whitlam stand in elections as incumbent Prime Minister.

¹³⁴ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 83 (emphasis added).

¹³⁵ The Governor-General in Council, namely the Government, can, for one month after the first meeting of the Parliament, spend money without proper statutory appropriation. This is not an Australian *unicum*, as similar clauses can be found in other Constitutions. An example of "emergency clause" is offered by article 81 of the Italian Constitution, which enables the "provisional use of the budget". Compared to the Australian one, the Italian clause is more limited in scope, as its application is triggered by a specific statutory authorisation, but, at the same time, it covers four months instead of a single month.

Additionally, he would have solved the stalemate in a less traumatic way, temporarily taking Whitlam's place instead of dismissing him. It is no coincidence that, in 1909, British Prime Minister Herbert Henry Asquith advised an early dissolution of the House of Commons when faced with the rejection of the so-called "People's budget" by the House of Lords.¹³⁶ Whitlam himself, in 1974, decided to request a double dissolution when the Coalition threatened to block supply in the Senate for the first time. The solution to the problem was undoubtedly Parliament's dissolution. Since Whitlam, fearing defeat, was not willing to advise him to such effect, Kerr, acting without his advice, had to dissolve both Houses, perhaps after having warned the Prime Minister of what was going to happen if he stood firm on his position. It is therefore fair to say that the Governor-General made various mistakes in handling the crisis: first, he provided a weak legal justification for his intervention, then, by refusing to choose the least aggressive measure available, he exercised his reserve powers in the wrong way. Whitlam's dismissal was not, all things considered, a constitutionally-sound move.

4) Fraser's appointment as a care-taker Prime Minister was not incorrect in itself. Once Whitlam had been (wrongly) dismissed, the Coalition's leader was the only choice available to secure supply bills' approval. The problem lies in the way in which Fraser was appointed. As noted above, Fraser's agenda as Prime Minister was the result of a negotiation between Fraser himself and Kerr. But is it possible for a Head of State to determine, though partially and within the framework of an emergency situation, the content of a Prime Minister's mandate? Since a Head of State should not, in a parliamentary system, set or suggest policy guidelines, the question must be answered in the affirmative.

4.2.3 New Zealand

Section 17(1) of the Constitution Act 1986 fixes the Parliament's ordinary duration at three years from the return of the writs issued for the previous general election. Consequently, under normal conditions, a Prime Minister's mandate should last three years as well. Section 17(1) is listed among the so-called "reserved provisions" by the Electoral Act 1993.¹³⁷ This means that it cannot be amended unless a proposal to this effect is approved by a majority of 75% of the House of Representatives' members or by popular referendum.¹³⁸ It would anyway be inappropriate to say that Section 17 is the only "entrenched part" of the Constitution Act 1986, since section 268 of the Electoral Act 1993, the supposed entrenchment clause, is not

¹³⁶ It was the beginning of the *querelle* that brought to the approval of the Parliament Act 1911.

¹³⁷ Electoral Act 1993 (1993 No 87), s. 268(1).

¹³⁸ Electoral Act 1993 (1993 No 87), s. 268(2).

entrenched and could consequently be repealed by a statute approved through the ordinary law-making process.

The Electoral Act 1993 replaced the classic first-past-the-post system (FPP) with mixed-member proportional representation (MMP).¹³⁹ In New Zealand each voter is able to cast two¹⁴⁰ votes: one for a constituency candidate and the other for a political party.¹⁴¹ In every constituency, the candidate who gets a plurality of valid votes obtains a seat. The total number of Parliament seats a certain party will be entitled to is determined by the number of party votes that party has received nationwide.¹⁴² A threshold of 5% of party votes is in place, preventing parties which do not pass it from taking part to seats distribution, unless they have been successful in one or more constituencies. A party's seats share is firstly filled by its successful constituency candidates. If the total number of seats earned through party votes is higher than the number of constituencies won, the remaining portion of the seats share will be allocated to candidates drawn from predefined party lists. Conversely, if the number of constituencies won by a certain party is higher than the number of seats earned through party votes by the same party, that party will be awarded one or more “*overhang*” seats. This means that the New Zealand House of Representatives, like the German *Bundestag*, does not have a fixed number of seats.¹⁴³ Whenever a party wins one or more constituencies but does not pass the 5% threshold, it gets both its constituency seats and proportional representation in the House.

The existence, alongside the ordinary ones, of seven special Māori constituencies, the *Māori electorates*, is another peculiarity of the New Zealand electoral system. Eligibility to vote and stand as candidate in such constituencies is reserved to those citizens of Māori descent who have chosen to register on the Māori electoral roll rather than on the general one.

Little discretion on the part of the Governor-General is involved in the appointment of the Prime Minister when a general election returns clear-cut outcomes. On the contrary, in a hung Parliament scenario, identifying the MP who can command a stable majority in the House is

¹³⁹ The transition to MMP was decided by referendum in 1993.

¹⁴⁰ It is also possible to cast one vote, for either the party or the constituency candidate.

¹⁴¹ The current Italian electoral law (2017) has introduced a peculiar parallel voting (PP) system, in which voters are entitled to a single vote with a two-fold effect for a party list (62.5% of the seats are allocated proportionally to party lists) and the candidate of the selected party's coalition (37.5% of the seats are awarded to coalition-supported constituency candidates who have obtained a plurality of votes in their constituencies).

¹⁴² The order in which the seats are allocated is decided by applying the mathematical formula known as the Sainte-Laguë formula.

¹⁴³ Nominally, the House comprises 120 seats, but the number may increase due to overhang seats.

significantly harder. In New Zealand, due to the adoption of the MMP voting system, hung Parliaments are not, as in the other Commonwealth Realms considered in this work,¹⁴⁴ the exception, but the norm. According to the *Cabinet Manual* 2017, the Governor-General, in case of hung Parliament, “might wish to talk to party leaders”.¹⁴⁵ These words should not be underestimated: through them, though still in a rather cryptic way, an official document released by the Government of a Commonwealth Realm is openly admitting that the *de facto* Head of State could be directly involved in political negotiations and hold meetings with parties’ representatives. It may be useful to compare the sentence reported above to its equivalent in the British Cabinet Manual 2011: “Where a range of different administrations could potentially be formed, political parties may wish to hold discussions [...]. *The Sovereign would not expect to become involved in any negotiations*, although there are responsibilities on those involved in the process to keep the Palace informed”.¹⁴⁶ The role of the British Sovereign is a passive one even when no agreement can be reached in Parliament on who should be appointed as Prime Minister. Political parties are expected to find a solution on their own before making the Queen aware of the *fait accompli*. The “active” attitude of the New Zealand Governor-General towards government formation is further evidenced by the peculiar duties the Executive Council’s Clerk¹⁴⁷ is entrusted with immediately after a general election: “The Clerk of the Executive Council provides official, impartial support directly to the Governor-General, *including liaising with party leaders as required on behalf of the Governor-General*”.¹⁴⁸ It is impossible not to think of the Dutch *informateur*¹⁴⁹ while talking about the Executive Council’s Clerk. Within the framework of the Dutch Constitutional Monarchy, the *informateur*, usually an expert

¹⁴⁴ It is anyway important to remember that, in the UK, hung Parliaments are becoming increasingly frequent.

¹⁴⁵ New Zealand, Cabinet Office-Department of the Prime Minister and Cabinet, *Cabinet Manual* 2017, 2017, at paragraph 6.44.

¹⁴⁶ United Kingdom, Cabinet Office, *Cabinet Manual* 2011, 2011, at paragraph 2.13 (emphasis added).

¹⁴⁷ The involvement of civil servants in “constitutionally meaningful” activities seems to be a recurring theme in both Australia and New Zealand. For example, the New Zealand House of Representatives is presided over by the House Clerk during the election of the House Speaker. The same happens in the Australian House of Representatives and the Australian Senate. In the United Kingdom, the House Clerk was replaced in 1971 by the so-called “Father of the House”, namely the MP with the longest period of unbroken service, as the House of Commons’ chairman during the election of the Speaker. In Canada, the “Father of the House” is known as the “Dean of the House” and carries out the same duties.

¹⁴⁸ New Zealand, Cabinet Office, *Cabinet Manual* 2017 (n 23), at paragraph 6.46 (emphasis added).

¹⁴⁹ Not to be confused with the *formateur*, who takes action once the *informateur* has fulfilled his/her task. The *formateur* is usually the Prime Minister *in pectore*.

politician not anymore involved in active politics, assesses whether or not a certain coalition government¹⁵⁰ would be backed by a majority in the *Tweede Kamer*, the Dutch lower House. Three are the main differences between the Dutch informateur and the New Zealand Clerk. First, the latter is not a politician but a senior civil servant whose appointment, according to the Cabinet Manual 2017, should be modelled on the Chief Executive selection procedure as outlined by section 35 of the *State Sector Act* 1988.¹⁵¹ Second, while the informateur's mandate ends as soon as his/her specific constitutional task is fulfilled, the New Zealand Clerk, who also acts as *Cabinet Secretary*, remains in office for the entire duration of his/her mandate independently on the events connected to government formation, performing a wide variety of duties.¹⁵² Third, following a 2012 amendment to the *Rules of Procedure* of the Tweede Kamer, the lower House itself, and not the Sovereign, appoints the informateur.¹⁵³ Thus, the post-2012 informateur is accountable to Parliament, and not, like the New Zealand Clerk, to the Head of State.

Comparisons aside, it is fair to assume that MMP has injected into the New Zealand system some extraneous, non-Westminster elements, as far as hung Parliaments are concerned. As a result, minority and coalition cabinets have become extremely frequent. The current government, for example, is a minority-coalition government in which Prime Minister Jacinda Ardern's Labour and Winston Peters' New Zealand First are represented. Both parties have signed a confidence and supply agreement with the Green Party, whose external support in the House of Representatives is crucial for the Cabinet's survival.

Two New Zealand Prime Ministers have died in office: William Massey in 1925 and Michael Joseph Savage in 1940. The former was replaced by Francis Bell (*ad interim*) and Gordon Coates, the latter by Peter Fraser. On both occasions, the successors were chosen by the relevant party through leadership votes. While many Australian Prime Ministers have personally resigned after having lost a leadership spill vote, in New Zealand it is far more likely that a Prime Minister resigns from Government before being officially defeated. The 42nd Parliament (1987-1990) saw three different Labour Prime Ministers: David Lange, Geoffrey

¹⁵⁰ In the Netherlands, proportional representation and a multi-party system make it almost impossible for a single party to command a majority in the Tweede Kamer.

¹⁵¹ New Zealand, Cabinet Office, Cabinet Manual 2017 (n 23), at paragraph 5.87.

¹⁵² Ibidem, at paragraph 5.86.

¹⁵³ Kingdom of the Netherlands, House of Representatives of the Netherlands, *Rules of Procedures*, s. 139a.

Palmer and Mike Moore. Neither Lange's¹⁵⁴ nor Palmer's leadership was officially challenged, as they both chose to resign before risking a loss. More recently, in 2016, John Key decided to resign from both government and National Party's leadership.

Votes of no-confidence are rare in New Zealand and only one Prime Minister, Thomas Mackenzie, has been ousted out of office following an unfavourable vote in Parliament.¹⁵⁵ Given the absence of specific statutory rules like those introduced in the United Kingdom by the Fixed-terms Parliaments Act 2011,¹⁵⁶ it is fair to say that, should a Prime Minister lose the confidence of the House of Representatives today, he/she would have to choose between resignation and a request of early dissolution of Parliament. Snap-elections occurred in 1951, 1984 and 2002, but, again, no departure from the classic Westminster model can be observed in this area.

Changes of government have sometimes been problematic in New Zealand. In 1984, amidst a currency crisis, outgoing Prime Minister Robert Muldoon refused to devalue the New Zealand dollar as requested by David Lange. Lange had led Labour to a landslide victory on 14 July 1984 but, when the currency crisis broke out, he had not been sworn in as Prime Minister yet.¹⁵⁷ At first, Muldoon, believing that a devaluation would negatively affect the economy in the medium term, ignored Lange's complaints and stood firm in his position. Then, on 18 July 1984, when influential members of the National Party threatened to strip him of his leadership, he made a step back and went ahead with the devaluation. Lange became Prime Minister on 26 July 1984. This short but intense crisis, which is usually considered, perhaps inappropriately, a "constitutional crisis" in New Zealand, favoured the establishment of the *Officials Committee on Constitutional Reform*, whose reports became the basis of the Constitution Act 1986. Surprisingly, the problems posed by the so-called "*caretaker government*", namely a government which, despite being formally still in office, will be soon replaced, were not solved by the Constitution Act 1986. Instead, a "*caretaker convention*", whose importance is stressed also by the Cabinet Manual 2017, has developed. According to it, whenever, after a general

¹⁵⁴ Actually, Lange interpreted Labour Party's Caucus decision to reinstate Roger Douglas to his post of Minister of Finance as an internal vote of no-confidence in his leadership and resigned. Lange had replaced Douglas with David Caygill in order not to implement Douglas' economic programme (informally known as "Rogernomics"), which was based on the introduction of a flat income tax and the so-called "guaranteed minimum family income" (GMFI).

¹⁵⁵ Mackenzie lost the confidence of the House in 1912.

¹⁵⁶ See subparagraph 1.3.2.

¹⁵⁷ Lange officially became Prime Minister on 26 July 1984.

election or a confidence withdrawal in the House of Representatives, it is not clear which party or parties will form the next government, the outgoing government should take care of ordinary business, implement decisions taken before the start of the caretaker period and refrain from taking new policy initiatives. Emergencies should be handled by finding an agreement with the other political parties represented in Parliament.¹⁵⁸ If, instead, under the same circumstances described above, it is clear which party or parties will form the next government, similar rules apply, but, in case of emergency, the outgoing government must act on the advice of the incoming government, even though the former “disagrees with the course of action proposed”¹⁵⁹ by the latter.

¹⁵⁸ New Zealand, Cabinet Office, Cabinet Manual 2017 (n 23), at paragraph 6.25.

¹⁵⁹ Ibidem, at paragraph 6.29.

Chapter 5

The Prime Minister's powers in Canada, Australia and New Zealand

5.1 Appointment of Ministers and Cabinet building

5.1.1. Canada

Ministers are chosen by the Prime Minister but, as it is always the case when a Prerogative power is exercised, are formally appointed by the Governor General. A distinction must be drawn between the Cabinet, which in formal constitutional terms, is just a committee of the Privy Council, and the overarching Government, because not all those who can rightfully claim to be members of the Government have also a seat in Cabinet. We can identify three different categories of Ministers: Ministers of the Crown, who are placed at the helm of Government's departments, Ministers of State, who can be defined as junior Ministers whose task is to support the Minister of the Crown with whom they work, and, finally, Parliamentary Secretaries, who give assistance to Cabinet members when they deal with parliamentary business. The position of Whips within the Canadian Government is rather peculiar and will be covered later.

While, in the United Kingdom, the Cabinet comprises few members, in Canada it is usually broader, as it encompasses also junior Ministers (the Ministers of State we have introduced above). This means that the need to grant key political figures *sinecure* positions is less prominent than it is in the United Kingdom.¹ For example, the office of Leader of the House of Commons has been tied to the "President of the Queen's Privy Council for Canada" *sinecure* for many years, until Brian Mulroney's prime ministership (1984-1993). From that moment on, Leaders of the House of Commons have taken part to Cabinet meetings as simple Ministers of State. Parliamentary Secretaries are not Cabinet or Government members but receive a salary in addition to their regular allowances as MPs and are bound by Government's collective responsibility. As we have seen, their peculiar legal status gives rise to many controversies in the United Kingdom, because it is easily exploitable by the Prime Minister of the day with a view to safely expand the so called "Payroll vote". In Canada, the number of Parliamentary Secretaries has been subjected to statutory regulation at an early stage with the *Parliamentary*

¹ In the United Kingdom historical offices like those of the Great Officials of State (Lord president of the Council, Lord Privy Seal and so on) are commonly used to give a seat in Cabinet to Government members that otherwise would not have it, like the Leader of the House of Commons or the Chief Whip.

Secretaries Act 1959, which fixed a limit of 16 PSs.² Since 1985, the rules governing the office can be found in the *Parliament of Canada Act*,³ whose section 46,⁴ by making a reference to section 4.1 of the *Salaries Act*,⁵ ties the total allowed number of PSs to the total number of Ministers whose salary is fixed by the aforementioned Act, namely 34. This statutory threshold should prevent Prime Ministers from appointing a disproportionate number of PPs.

Before moving to dismissal of Ministers and the issues connected thereto, we should add that Ministers' choice is made more difficult in Canada by the conventional requirement to pay attention to Provinces', visible minorities' and women's representation in the Cabinet. Provinces' representation is so important that, if the ruling party has not won any riding in a certain Province, the Prime Minister will likely appoint a Senator as representative of that Province. Visible minorities can be defined as groups consisting of people who do not have neither European nor Aboriginal ancestry. The current Canadian Cabinet led by Justin Trudeau, had, at the beginning, 30 Ministers, of whom 15 were men and 15 were women. There were 2 people with disabilities and representatives of both Aboriginal groups and visible minorities, respectively 2 and 5.

The Canadian Prime Minister can be hardly defined as a *primus inter pares*. He/she manages the overall business of the Cabinet and fixes the Government's agenda. As Ministers are appointed *at Her Majesty's Pleasure*, the Prime Minister can dismiss them and make reshuffles by simply advising the Governor General to this effect. Usually, Ministers are dismissed either for political or disciplinary reasons. We should remember that all the members of the overarching Government (and, *de facto*, also Parliamentary Secretaries) are subject to collective ministerial responsibility. In 2015, the Government of Canada has released an official document called "*Open and Accountable Government*",⁶ which shares some similarities with the British *Ministerial Code*. The document describes collective ministerial responsibility in a very effective and straightforward way: "Policies presented to Parliament and to the public must be the agreed policies of the Cabinet. Ministers cannot dissociate themselves from or repudiate the decisions of Cabinet or their Ministry colleagues unless they resign from the Ministry".⁷ It is

² Michael Dewing, *The role of Parliamentary Secretaries* (Ottawa: Library of Parliament, Parliamentary Information and Research Branch, 2006), page 4.

³ Parliament of Canada Act, R.S.C., 1985, c. P-1.

⁴ Parliament of Canada Act, R.S.C., 1985, c. P-1, s. 46(2).

⁵ Salaries Act, R.S.C., 1985, c. S-3, s. 4.1(3).

⁶ Canada, Privy Council Office, *Open and Accountable Government*, 2015.

⁷ Canada, Privy Council Office, *Open and Accountable Government*, 2015, part I.2.

clear that, should a dissenting Government member not resign from his/her position after having publicly denied his/her support to governmental action, the Prime Minister would probably dismiss him/her. The document also sets out specific conduct obligations for Government members: “Ministers and Parliamentary Secretaries must act with honesty and must uphold the highest ethical standards so that public confidence and trust in the integrity and impartiality of government are maintained and enhanced”.⁸ The fulfilment of such obligations is not attained “merely by acting within the law”.⁹ This means that the behaviour expected from Ministers is not measured in terms of mere legality. Abidance by law is just a precondition that, taken alone, is not always capable of making a ministerial act ethically irreproachable. An obligation having a non-juridical (or better a not entirely juridical) character as the one at issue can be enforced only at political level, in this case through the exercise of the dismissal power by the Prime Minister, who, therefore, becomes the ultimate judge of his/her fellow Ministers’ conduct. Given the fact that also “*Open and Accountable Government*” has been drafted by the Prime Minister’s office, we are faced again with the problem we encountered while explaining the dynamics underlying the functioning of the British Cabinet. Is it fair to let the Head of Government both conceive the rules and enforce them when it comes to Ministers’ standard of conduct? Isn’t such system too vulnerable to political exploitation? The establishment of a specific, collegial, committee internal to Cabinet, tasked with monitoring Ministers’ activity and compliance with the obligations described above would perhaps be a solution better suited to safeguard the small degree of independence still enjoyed by Cabinet members, but, in an era in which the Prime Minister has become the undisputed *dominus* of the Government, such idea is almost certainly doomed not to be implemented.

5.1.2 Australia

Pursuant to section 64 of the Australian Constitution, the Governor-General in Council, namely the Governor-General on the Prime Minister’s advice, is entitled to appoint and dismiss Ministers of State. The same section 64 requires Ministers of State to be (or, if they are not at the time of their appointment, to become within three months) members of either the House of Representatives or the Senate. Given the elective nature of the upper House, Ministers are often chosen among Senators. The Government’s structure is three-tiered. At the top of the pyramid we find the Cabinet, which comprises the Prime Minister and a limited number of Ministers. The Cabinet is, formally speaking, just a committee of the Federal Executive Council, the body

⁸ Canada, Privy Council Office, *Open and Accountable Government*, 2015, part IV.1.

⁹ Ibidem.

in which the Constitution officially vests the power to advise the Governor-General. Outside the Cabinet, there is the so-called “Outer Ministry”, whose members cannot attend Cabinet’s meetings. Parliamentary Secretaries, recently renamed “Assistant Ministers” by Prime Minister Malcolm Turnbull, enjoy a status which is different from that of their British or Canadian counterparts: they are fully-fledged Ministers of State, though the lowest-ranking ones, paid by the Government.

In Australia, the payroll vote area is not expandable at will, as the *Ministers of State Act* 1952¹⁰ sets specific limits to the size of a Government: the total number of members cannot exceed the 42 units threshold (30 Ministers and 12 Parliamentary Secretaries).¹¹ This is a clear-cut solution to a problem that remains unsolved in the United Kingdom.

Ministers are dismissed on Prime Minister’s advice for either political or disciplinary reasons. Within the Cabinet, the Governance Committee is specifically devoted to the enforcement of the rules set out by two official documents: the *Statement of Ministerial Standards* and the *Lobbying Code of Conduct*. The former shares many similarities with other codes we have already analysed¹² and requires Ministers to act “with due regard for integrity, fairness, accountability, responsibility, and the public interest”.¹³ Ministers’ activity is regulated in detail by provisions dealing with conflicts of interest,¹⁴ family members¹⁵ and even romantic relationships.¹⁶ The Lobbying Code of Conduct forbids lobbying activities between members of the Government and non-registered lobbyists.¹⁷ Being at the same time the law maker and, as chairman of the Governance Committee, the enforcer of the rules he/she creates, the Australian Prime Minister enjoys absolute control over his/her Cabinet. The boundaries of such control are extremely vague, as many of the obligations imposed on Ministers by the aforementioned documents are of a non-juridical character.

¹⁰ Ministers of State Act 1952 (Cth).

¹¹ Ministers of State Act 1952 (Cth), s. 4.

¹² The British “Ministerial Code” and the Canadian “Open and accountable Government”.

¹³ Australia, Department of the Prime Minister and Cabinet, *Statement of Ministerial Standards*, 2018, paragraph 1.2.

¹⁴ Ibidem, paragraph 2.11.

¹⁵ Ibidem, paragraph 2.17.

¹⁶ In February 2018, Prime Minister Malcolm Turnbull introduced paragraph 2.24: “Ministers must not engage in sexual relations with their staff. Doing so will constitute a breach of this code”.

¹⁷ Australia, Department of the Prime Minister and Cabinet, *Lobbying Code of Conduct*, 2013, paragraph 4.1.

Ministers, being primarily MPs or Senators, could be excluded from Government by factors connected to parliamentary eligibility. Section 44 of the Australian Constitution subjects eligibility to a series of conditions, among which the requirement not to hold another citizenship in addition to the Australian one.¹⁸ Due to citizenship issues, Senator Matt Caravan, the Minister for Resources, resigned from Government in July 2017. He was then found eligible by the High Court¹⁹ in October.²⁰ Fiona Nash, a Senator who held various positions in Turnbull's Ministry, was instead found to be a British citizen and, therefore, ineligible.²¹ She lost both her seat in the Senate and her place in the Government.

5.1.3 New Zealand

Ministers of the Crown are appointed and dismissed by the Governor-General on Prime Minister's advice. Ministers must be Members of Parliament.²² The Prime Minister of the day, as the Cabinet's leader, can dismiss Ministers at will, either for political or disciplinary reasons. As in the UK, Canada and Australia, the Prime Minister is the ultimate judge of his/her Ministers' behaviour. An extensive account of the standards of conduct a Minister of the Crown is called upon to comply with can be found in the Cabinet Manual 2017, whose sections 2²³ carefully regulates a wide range of Ministerial activities (with frequent forays into non-strictly ministerial issues): from travel abroad and within New Zealand²⁴ to speaking engagements,²⁵ gifts received²⁶ and conflicts of interest.²⁷

The New Zealand Government is two-tiered: there is the Cabinet, namely the engine of the entire system, whose members, the highest-ranking Ministers, are also Executive Councillors,

¹⁸ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (UK), s. 44 (I).

¹⁹ The High Court, in its capacity of Court of Disputed Returns, has jurisdiction over eligibility matters.

²⁰ *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45, 91 ALJR 1209.

²¹ *Ibidem*.

²² According to the Constitution Act 1986, s. 6(2), a person who is not a member of Parliament can be appointed as Minister, but he/she has to become a MP within 40 days from the appointment in order not to lose his/her ministerial position. A Minister who ceases to be a MP while still in office will be stripped of the ministerial position after 28 days from the day in which he/she has ceased to be a MP.

²³ New Zealand, Cabinet Office-Department of the Prime Minister and Cabinet, *Cabinet Manual 2017*, 2017, at paragraphs 2.53-2.128.

²⁴ *Ibidem*, at paragraph 2.128.

²⁵ *Ibidem*, at paragraphs 2.94-2.98.

²⁶ *Ibidem*, at paragraphs 2.84-2.93.

²⁷ *Ibidem*, at paragraphs 2.72-2.81.

and a series of other officials who belong to the overarching Government but do not have a sit in Cabinet. The Cabinet Manual 2017 draws a distinction between Ministers holding full portfolio positions and Ministers of State without portfolio responsibilities.²⁸ Full portfolio positions are not exclusively reserved to Cabinet members. Parliamentary Under-Secretaries are Government's (but not Cabinet's) members, while Parliamentary Private Secretaries are not even considered Government members.

5.2 Government's involvement in the law-making process

5.2.1 Canada

The Canadian Prime Minister is able to exert great influence on the legislative power through the activity of party discipline enforcers, the Whips, and the "side effects" of collective ministerial responsibility. If we compare it to the British, Canadian legislative process is characterised by a deeper involvement of the upper House, the Senate, whose members are appointed by the Governor General on Prime Minister's advice. Indeed, while the House of Lords encounters a wide range of limits to its legislative activity,²⁹ the Canadian Senate is theoretically placed on an equal footing with the House of Commons. There are only two exceptions to this general principle: tax and public revenue appropriating Bills cannot originate in the Senate³⁰ and amendments to the Constitution cannot be delayed by the Senate for more than 180 days.³¹ Outside such limitations, the Senate enjoys unrestricted veto and amendment powers. Clearly, in most cases, respect for the democratic principle and self-restraint make Senate's intervention unlikely and enhance its nature of "chamber of sober second thought", as the first Prime Minister of the Dominion of Canada, Sir John Macdonald, defined it. That being said, if we consider that New Zealand has a unicameral Parliament, Canada's upper House is probably, among those analysed in this work, the most involved in the legislative process with the exception of the Australian Senate, which is elective. The Canadian Senate has blocked the adoption of several important bills approved by the House of Commons, among which Bill C-

²⁸ Ibidem, at paragraph 2.30.

²⁹ Parliaments Acts 1911 and 1949 have turned the Lords' absolute veto into a suspensory veto, which is capable of delaying the adoption of a Bill approved by the House of Commons, at most, for two parliamentary session within one year. Such rule is subject to few exceptions. The Salisbury convention also imposes over the Lords a duty not to hinder the approval process of Bills implementing the Government's electoral manifesto.

³⁰ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 53.

³¹ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c. 11, s. 47(1).

43 on abortion in 1991.³² Such “aggressive” attitude showed by Senators over the years has urged the Government to create a structure devoted to party discipline enforcement also in the upper House of the Parliament. Ruling party’s leaders and Whips are appointed also in the British House of Lords, but the tasks they perform do not match exactly those pertaining to their counterparts in the Commons.³³ On the contrary, in Canada, Senate’s Leaders and Whips are often involved in party management.

Justin Trudeau’s Government might anyway have taken the first steps in a process that could change the role of the Senate. The position of Leader of the Government in the Senate has always been assigned to a Senator whose affiliation with the ruling party was out of question. Often, the selected Senator served also as Cabinet Minister. Justin Trudeau decided, in 2016, to appoint an independent Senator as *Leader of the Government in the Senate*, or better, *Representative of the Government in the Senate*, as the position has been renamed to underline its alleged reduced partisanship. In the same year, an *Independent Advisory Board for Senate Appointments* has been created. The five-member Board “is an independent and non-partisan body whose mandate is to provide non-binding, merit-based recommendations to the Prime Minister on Senate appointments”.³⁴ Whenever a Senate seat becomes vacant,³⁵ the Board accepts applications from qualified Canadians who meet the requirements for appointment to the Senate fixed by the Constitution Act 1867.³⁶ After having assessed the applications, the three federal members of the commission, assisted by two additional members from the relevant Province, make appointment suggestions to the Prime Minister, the non-binding nature of which is justified by the fact that the Constitution should have been amended if the Government had decided to grant the Board the power to make binding suggestions.³⁷ The Board shares

³² Karine Richer, *Abortion in Canada: twenty years after R. v. Morgentaler* (Ottawa: Library of Parliament, Parliamentary Information and Research Branch, 2008), page 5.

³³ The role of a Lords Whip closely resembles that of a Parliamentary Private Secretary in the House of Commons. The duties connected to mere party management are negligible.

³⁴ Government of Canada, canada.ca. <https://www.canada.ca/en/campaign/independent-advisory-board-for-senate-appointments/members.html> (accessed November 17, 2017).

³⁵ Unlike British Lords, Canadian Senators are not appointed for life anymore, but their mandate ends when they reach the age of 75, pursuant to section 29(2) of the Constitution Act 1867.

³⁶ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 10, s. 23.

³⁷ In formal constitutional terms, Senators are appointed by the Governor General on advice of the Privy Council. Clearly, no restriction can be placed on the Privy Council’s power to advise the Governor General without constitutional amendment. In *Reference Re Senate Reform* (2014 SCC 32, [2014] 1 S.C.R.704) the Supreme Court

striking similarities with another body we have already described,³⁸ the *Advisory Committee on Vice-Regal Appointments* created by Conservative Prime Minister Stephen Harper in 2012. The common thread linking the two bodies is the need for a reduction of the discretion degree enjoyed by Prime Ministers in their appointments, which, in turn, could favour a decrease in the appointees' partisanship, be they Senators or vice-regal representatives. If it is true that Harper's praiseworthy initiative has already been put in a limbo by Trudeau himself, it will be interesting to see what future awaits Trudeau's own attempt at establishing a new constitutional custom. How will such attempt endure the challenge posed by practice? Will Trudeau's successors wearing different political colours regard it as a step in the right direction, or rather, as a threat to avert at all costs? Only time will tell. What it is certain is that the current Canadian Prime Minister's moves can be seen as pieces of an overarching strategy aimed at changing the Senate's role. Such strategy entails also strictly political decisions, like that taken in 2014, when Trudeau invited Liberal senators to leave the *Senate Liberal Caucus*, namely the historical Liberal parliamentary group in the Senate. As a result of many Liberal Senators' passage to the recently-created *Independent Senators Group* and of the first appointments made in compliance with the Advisory Board's suggestions, independent Senators do now hold a plurality of seats in the Senate.³⁹

We will now elaborate more on all the factors capable of giving Government the upper hand on the law-making process. Our focus will be on the House of Commons, but, as it appears evident from what we have said until now, most of the information we will provide can be applied to the Senate too, unless Trudeau's crusade for a non-partisan Senate succeeds in the long term.

Party discipline is enforced in the House of Commons in a very effective manner. The offices of Leader of the House and Whip are somehow different than their British counterparts. In the United Kingdom, the Chief Whip is granted a *sinecure* position allowing him/her to have a seat in Cabinet. This rarely happens in Canada, where Whips are not necessarily Government members and play a more limited role. They make sure that important votes are attended by as many MPs as possible and give instructions on how to behave in the best interest of the party,

of Canada has stressed that any change to the method of selecting Senators must be done in accordance with the general amending procedure, the so-called 7/50 formula.

³⁸ See subparagraph 3.1.2.

³⁹ The historical result has been achieved in October 2017, when the Independent Senators Group has overcome the Conservative Senate Caucus.

but lack control over parliamentary strategies, which fall entirely within the domain of the House Leaders. The House's agenda is indeed set by the meeting of the House Leaders. As stressed by Martin Westmacott, "British House leaders are not directly involved in inter-party negotiations, and there is no British equivalent of House leaders' meetings where the details of the parliamentary timetable are negotiated".⁴⁰ This means that "British whips, not their House leaders, transmit important information and advice directly to the party leader regarding parliamentary strategy and tactics".⁴¹ Resuming the comparison we were drawing between Whips and equivalent continental European offices,⁴² we can say that the Canadian Leader of the House closely resembles the Italian *Capogruppo*, while the Canadian Whip shares many similarities with the Italian *Delegato d'aula*.

Party discipline in the House of Commons is so strict that, in 2004, Paul Martin's Government announced the adoption of the "*three-line voting system*".⁴³ The expression derives from British Whips' habit of providing their party's MPs with a list of the votes of the day. On the list, each vote is underlined once, twice or three times, in ascending order of importance for Cabinet's stability and confidence supply. In Canada, the system is expected to work as follows: one-line votes are essentially free votes, because each MP is entitled to vote as he/she deems appropriate; two-lines votes require abidance by party's instructions on the part of Government members and Parliamentary Secretaries, while ordinary backbenchers are potentially still free to choose; three-line votes, like votes of-no confidence or on matters of capital importance for the Government's agenda, do not allow any deviation from party discipline by the ruling party's MPs. In the document "*Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*",⁴⁴ officially released by the Canadian Government, "the government explained that most votes would be either one-line or two-line free votes, meaning that support by government Members would not be taken for granted".⁴⁵

⁴⁰ Martin Westmacott, *Whips and Party Cohesion*, Canadian Parliamentary Review, Volume 6, Issue 3, 1983: 14-19, at page 15.

⁴¹ Ibidem.

⁴² See subparagraph 1.4.3.

⁴³ Howard Chodos, Megan Furi, Élise Hurtubise-Loranger, James R. Robertson, *Party Discipline and Free Votes* (Ottawa: Library of Parliament, Parliamentary Information and Research Branch 2006), page 3.

⁴⁴ Canada, Privy Council Office, *Responsibility, Accountability: An Action Plan for Democratic Reform*, 2004.

⁴⁵ Canada, Library of Parliament, Parliamentary Information and Research Branch, *Party Discipline and Free Votes* (n 43).

One final note on the “Payroll-vote” phenomenon. Although the issue is less debated in Canada than in the United Kingdom, we should keep in mind that, in the Canadian House of Commons, the number of ruling party’s MPs bound by collective ministerial responsibility and/or paid by the Government of the day is pretty high. In the famous report “*Too many Ministers?*” issued by the Public Administration Select Committee of the British House of Commons it is stated that Canada had, in 2010, 63 Ministers (including Parliamentary Secretaries) sitting in the lower House of Parliament.⁴⁶ While such number could seem to be not so impressive at first sight, especially if compared to the numbers usually reached by Governments in the United Kingdom (139 for May’s current Government, 146 for Blair’s), it is certainly impressive if put in relative terms. In 2010, Canada’s House of Commons had 308 seats (now 338), while United Kingdom’s 650. A simple comparison of ratios will tell us that, in 2010, the payroll vote area covered roughly 20% of the overall number of MPs in the Canadian House of Commons.

5.2.2 Australia

Collective ministerial responsibility and party discipline enforcement give Government the upper hand in the Australian law-making process. As in the other Commonwealth Realms, each member of the Government, from Cabinet Ministers to Parliamentary Secretaries, is required: 1) not to disclose sensitive information collected during Government meetings (the so called “Confidentiality”), 2) to publicly and unconditionally support the Government and its actions (“Solidarity”). Failure to comply with these obligations unavoidably leads to resignation from the Government. Being the Government’s size (and, consequently, the payroll vote area) statutorily fixed,⁴⁷ Australian Prime Ministers do not seek to exploit the advantages of collective ministerial responsibility by appointing as many junior Ministers and Parliamentary Secretaries as possible. The enforcement of party discipline is entrusted to the Whips, who are accountable to the Leader of the House and to the Manager of Government Business in the Senate. While the Leader and the Manager usually hold ministerial offices, Whips do not.

The Australian Prime Minister can exert great influence also on the process of constitutional amendment. Section 128 of the Australian Constitution requires each proposed amendment to be approved by absolute majority in both the Houses of Parliament before being subjected to popular referendum. If either House passes an amendment while the other rejects it, or amends

⁴⁶ United Kingdom, Public Administration Select Committee of the House of Commons, *Too many Ministers?*, 2010, page 4.

⁴⁷ See previous subparagraph.

it in a way that the first House finds inappropriate, and, after three months, the amendment is re-adopted by one House and blocked by the other, “*the Governor-General may submit the proposed law as last proposed by the first-mentioned House [...] to the electors in each State and Territory qualified to vote for the election of the House of Representatives*”.⁴⁸ By simply advising the Governor-General to this effect, a Prime Minister is potentially able to override the Parliament’s veto power, even when it has been exercised twice in the space of three months by one of the Houses. Clearly, even in this case, the people of Australia will have the last word on the proposed amendment’s approval.

5.2.3 New Zealand

All Government’s members⁴⁹ are bound by the principle of Cabinet collective responsibility. Even when a certain issue has been vigorously discussed “behind closed doors” in Cabinet meetings, as soon as a common position is agreed on, it must be unconditionally supported even by those who opposed it. A Minister wishing to distance him/herself from a certain Cabinet decision can do so only after having resigned from Government. As we have observed on many occasions, the rules underpinning collective responsibility place major restrictions on Government’s members’ independence. This is especially true in modern times, when the Prime Minister, ceasing to be a simple *primus inter pares*, has become the undisputed leader of the Cabinet. In order to minimise the adverse effects of collective responsibility, consensus should be reached on as many matters as possible, but this goal is probably harder to achieve in New Zealand than in the other Commonwealth Realms, given the fact that most Governments are supported by a coalition of parties. Proportional representation has favoured the development of a peculiar custom, unknown to Australia, Canada and the United Kingdom: coalition Government can indeed choose to adopt “agree to disagree” procedures,⁵⁰ which allow Ministers “to maintain, in public, different party positions on particular issues or policies”.⁵¹ Clearly, dissent on matters falling outside the “agree to disagree” area is not accepted nor is it possible to oppose the Government’s policy once a final decision on a controversial issue has been taken.

⁴⁸ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 128 (emphasis added).

⁴⁹ Parliamentary Private Secretaries are clearly excluded.

⁵⁰ New Zealand, Cabinet Office, Cabinet Manual 2017 (n 23), at paragraph 5.27.

⁵¹ *Ibidem*.

A duty of confidentiality is also attached to collective ministerial responsibility, meaning that no Government member is allowed to disclose sensitive information or the content of individual views expressed at Cabinet meetings.

Party discipline in the House of Representatives, to the management of which collective ministerial responsibility strongly contributes, is enforced by the Whips. New Zealand Whips, like their Canadian counterparts, work under the direction of the House Leader, who is the highest Government's representative in Parliament.

The New Zealand Government, thanks to the mechanisms inherited from the former motherland and briefly described above, controls the legislative process, but, due to the fragmented nature of its supporting majority, which often comprises more than one party, and the absence in Parliament of a payroll vote area as extensive as the British one, is probably, as far as law-making is concerned, the least powerful among those described in this work. It is anyway important to remember that the unicameral nature of the New Zealand Parliament makes the adoption of Government bills quicker.

5.3 Parliament's dissolutions and prorogations

5.3.1 Canada

In Canada, the Head of Government is still able to trigger Parliament dissolutions by means of the Royal Prerogative, thus paving the way to early-elections. This power has been exercised on numerous occasions with a view to solve a political deadlock and pursue the ruling party's interests.

The King-Byng affair, which can be considered as the most important constitutional crisis ever happened in Canada, was centred around an attempt at triggering early-elections. After having obtained a dissolution from Governor General Julian Byng in 1925, Liberal Prime Minister Mackenzie King failed at securing a majority of seats in the House of Commons. Liberals couldn't even rely on a plurality, as Arthur Meighen's Conservatives were the strongest party in the House. Anyway, King decided not to resign and, with the external support of the Progressive Party, led a minority Cabinet, managing to survive as Prime Minister for some months. Then, in 1926, a bribery scandal involving the Department of Customs and Excise, whose members had been appointed by King, put Progressives' support at risk. Faced with the prospect of being defeated in a vote of no-confidence, the Prime Minister asked Byng a new dissolution, which the Crown representative refused. It was the first, and, as of today, the last time a Governor General exercised the reserve powers, acting contrary to the Prime Minister's advice. Byng argued that early elections were not unavoidable, as there was a chance an

alternative Conservative Government could be formed. King was consequently forced to resign, letting Meighen lead a new Cabinet. Meighen was soon defeated by a motion of no-confidence and Byng accepted his request of dissolution. Denounced by King as a partisan act and an undue interference in Canadian affairs by an official who pursued the interests of the British Empire,⁵² Byng's decision to refuse dissolution marked the beginning of an intense debate on the limits of the Governor General's power and the mechanism through which the vice-regal representative was appointed, not only in Canada, but in the British Empire as a whole. The affair had a huge impact on the 1926 Imperial Conference and its outcome document, the Balfour Declaration,⁵³ whose main concepts, among which the idea of a Commonwealth of Nations comprising independent and equal Dominions, laid the foundations for the approval of the Statute of Westminster in 1931. Even the so-called *Lascelles principles*,⁵⁴ a milestone in the domain of the dissolution power, were influenced by the events described above. Theoretically speaking, the only recent event comparable to the King-Byng affair is probably Lieutenant Governor Judith Guichon's refusal of the dissolution request made by the Premier of British Columbia Christy Clark in 2017.⁵⁵ There is anyway one crucial difference: Clark, unlike King, requested dissolution after having been defeated by a vote of no confidence and, differently from her political opponents, did not have any chance of remaining in charge as Premier after the 2017 elections.

That of Parliament prorogation is another strong power at Prime Minister's disposal. By effect of it, a parliamentary session ends. Prorogation differs from dissolution in that the latter ends not only the session but also the Parliament. Furthermore, while dissolutions are explicitly mentioned in the Constitution Act 1867,⁵⁶ a reference to prorogations is made only by the Letters Patent 1947: "And We do further authorize and empower Our Governor General to exercise all powers lawfully belonging to Us in respect of summoning, proroguing or dissolving

⁵² At that time, the Governor General was appointed by the Sovereign on British Government's advice.

⁵³ The document was named after Arthur Balfour, who served as Prime Minister of the United Kingdom from 1902 to 1905 and as Lord President of the Council from 1925 to 1929.

⁵⁴ In 1950 Sir Alan Lascelles, private secretary to King George VI, wrote a letter to *The Times* ("Dissolution of Parliament: Factors in Crown's Choice") under the pseudonym "Senex", supporting the view that the Sovereign has the right to refuse a request to dissolve Parliament made by the Prime Minister, in particular if: 1) the existing Parliament is still capable of doing its job, 2) a General Election would be prejudicial to the national economy, 3) an alternative Government backed by a solid majority can be formed.

⁵⁵ See subparagraph 2.2.1.

⁵⁶ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 10, s. 50.

the Parliament of Canada”.⁵⁷ In the past, when moving across a vast territory was both difficult and time-consuming, prorogation played a crucial role in Canada, because the suspension of parliamentary business between one session and another gave MPs enough time, usually several months, to return to their “ridings”. Today, suspensions last just few days and prorogation is therefore used for political reasons, like delaying a vote of-no confidence or “letting things cool down” when the pressure generated by a particular event is potentially capable of reducing the support enjoyed by a minority Cabinet.

The latest controversial use of this legal instrument took place in 2008, when Governor General Michaëlle Jean accepted Conservative Prime Minister Stephen Harper’s request to prorogue Parliament. When the Liberals and the New Democratic Party reached an agreement on a coalition Cabinet and threatened a vote of no-confidence, Harper tried to survive by delaying it, hoping that, in the meantime, his enemies’ alliance would collapse. Jean’s decision gave rise to controversy, as it always happens whenever the Governor General enjoys a certain degree of discretion in the fulfilment of his/her constitutional duties. However, despite the obvious political objective concealed behind the Prime Minister’s request, it is fair to say that, constitutionally speaking, Jean behaved in the right way. The usual “rubber-stamp” claims can be dismissed if we consider that the decision was taken after a meeting lasted two and a half hours with Harper on December 4, 2008,⁵⁸ and that the same Harper advised the prorogation of Parliament until January 26, 2009, thus requesting a relatively short suspension. By acting on Harper’s advice, Jean did not deny the opposition the right to oust the Prime Minister out of office, as a motion of no-confidence could have been easily introduced in the House of Commons right after the opening of the new parliamentary session in January. At the beginning of the new session, not only such motion was not tabled, but Harper managed to get the new budget, specifically drafted to meet the requests of the Liberals, approved. He was anyway defeated two years later, in 2011, on grounds that had nothing to do with the highly controversial prorogation.⁵⁹

⁵⁷ United Kingdom, Privy Council, Letters Patent Constituting the Office of Governor General of Canada (Imperial Order-in-Council), 1947, s. VI.

⁵⁸ Eric Adams, *The Constitutionality of Prorogation*, Constitutional Forum/Forum Constitutionnel, Volume 18, Issue 1, 2009: 17-20, at page 17.

⁵⁹ Harper’s Government was found “*in contempt of Parliament*” by a Commons’ committee, among other things, for not having disclosed enough information on the costs incurred for the purchase of stealth combat jets.

5.3.2 Australia

The power of prorogation is, together with the power of dissolution of the House, explicitly recognised by the Australian Constitution at section 5: “The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives”.⁶⁰ While prorogations put an end to a certain parliamentary session without also causing the end of the legislature, dissolutions necessarily trigger new elections. Prorogations have the effect of terminating all business pending before the Houses. Consequently, despite the negligible time interval between one session and the other, they can be used as “tactical” instruments with a view to avert or delay the vote on a motion of no-confidence. Australian Prime Ministers, unlike their Canadian counterparts,⁶¹ have seldom relied on prorogations: between 1977 and 2016,⁶² for example, the Parliament has never been prorogued.

While prorogations affect the Parliament as a whole, ordinary dissolutions are capable of prematurely terminating the House of Representatives only: the lower House, modelled after the British House of Commons, has retained its ancestor’s fundamental nature and can consequently be dissolved at Prime Minister’s will. On the contrary, Senators sit, in principle, for a fixed term of six years, which cannot be altered by the Government of the day. This is the result of a compromise reached at the constitutional conventions held in the 1890s, where both the British and the US model were long debated.⁶³ The former was applied to the House of Representatives and the latter to the Senate, though not in its pure form. It is indeed possible for the Prime Minister, in exceptional circumstances, to dissolve the Senate too by means of a double dissolution. Sourced in section 57 of the Australian Constitution, the power to advise a double dissolution is carefully regulated and subjected to the fulfilment of many conditions. Since the framers of the Constitution saw the Senate as a “States’ house”, in which the representatives of each former colony, equal in number, would vote with State concerns in

⁶⁰ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 5.

⁶¹ See subparagraph 2.3.6 for further information.

⁶² In 1977, a prorogation was requested by Malcolm Fraser in order to let Queen Elizabeth II open a new session of the Parliament. In March 2016, Malcolm Turnbull advised a prorogation for the first time in 39 years. He wanted the Senate to reject certain bills, so that he could request a double dissolution.

⁶³ In his *Platypus and parliament: the Australian Senate in theory and practice*, Stanley Bach compares the Australian Parliament to a platypus. “The Parliament” he writes, “like the platypus, also is ‘a bundle of adaptations’ that make it ‘an elegant solution’ to the challenges posed by the context of democratic governance in Australia”.

mind, and not according to their party affiliation,⁶⁴ disagreement between the Houses was perceived as a serious threat to the stability of the system. In the House, States are not represented equally: the bigger the population of a State is, the higher will be the number of seats contested in that State.⁶⁵ For these reasons it was believed, in the 1890s, that the House would be dominated by Victoria and New South Wales, the biggest States in terms of population, while the Senate would uphold the interests of the smaller States. The power of double dissolution was therefore introduced to avoid deadlocks.

A Prime Minister can advise a double dissolution if a bill (informally known as the “trigger bill”) approved by the House of Representatives has been rejected or amended in a way that the House deems unacceptable by the Senate,⁶⁶ and, after three months, in the same session of Parliament or in the subsequent one, the House approves the same bill and the Senate rejects it for the second time. We must also remember that the requested dissolution cannot not take place within six months before the natural expiration of the House of Representatives.

The Governor-General is, in principle, bound by the Prime Minister’s advice and should dissolve the Houses upon request. Clearly, if one or more of the conditions listed above is not fulfilled, the representative of the Crown may, exercising his/her reserve powers, refuse to act.

If, after the double dissolution, the “trigger bill” is again approved by the House of Representatives just to be again rejected by the Senate (third rejection), a special joint sitting of the Houses may be convened. Such joint sitting will decide on the controversial bill by absolute majority of its members.

To date, there have been seven double dissolutions. On one occasion only (1974) a joint sitting of the Houses was actually convened after the dissolution.

5.3.3 New Zealand

In New Zealand, prorogations are rarely used as political weapons, because ending a session does not abruptly terminate parliamentary business. Under this point of view, section 20 of the Constitution Act 1986 draws a distinction between prorogations and dissolutions: “Any Bill, petition, or other business before the House of Representatives [...] does not lapse on the

⁶⁴ This interpretation of the Senate’s role was disproved by parliamentary practice in the Senate, which was dominated, right from the start, by party politics.

⁶⁵ Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12 (Imperial), s. 24.

⁶⁶ It is important to note that this condition is not fulfilled if, conversely, a bill approved by the Senate is rejected by the House of Representatives.

prorogation of that Parliament and may be resumed in the next session of Parliament”.⁶⁷ On the contrary, in case of dissolution or expiration, any business before Parliament “lapses [...], but may be reinstated in the next session of Parliament”.⁶⁸ No other Constitution, among those considered in this work, explicitly regulates the impact of prorogations on parliamentary business, yet countries like Canada would certainly benefit from a specific and unequivocal discipline of the matter.⁶⁹

5.4 Management of the Civil Service

5.4.1 Canada

Unlike the United Kingdom, whose Civil Service has undergone a major reform only in 2010, after centuries of management under the Royal Prerogative, Canada has always regulated Public Service through statutory law. This choice has reduced the impact of Prime Minister’s and Cabinet’s decisions on the public sector. First, appointments are made by a specific and independent administrative body, the *Public Service Commission*, which was created by the *Civil Service Amendment Act* in 1908 and reformed by the *Public Service Employment Act* in 1967. Another *Public Service Employment Act*, approved in 2003 but entered into force only in 2005, has made further changes to its powers. The Commission, among other things, is responsible for appointing persons “to or from within the public service”⁷⁰ and for conducting “investigations and audits”.⁷¹ It can anyway delegate, with some exceptions, its powers to the “deputy heads” of the various governmental departments: “The Commission may authorize a deputy head to exercise or perform, in relation to his or her organization, in the manner and subject to any terms and conditions that the Commission directs, any of the powers and functions of the Commission under this Act”.⁷² Deputy-heads are essentially deputy-ministers who are chosen by the Governor General in Council, namely by the Prime Minister, among the most experienced senior civil servants. They are subject to the spoil system and responsible for the management of day-to-day operations.

This brief description of the mechanism through which the Canadian public service works cannot ignore the role played by another body: the *Treasury Board*. Its status is rather peculiar

⁶⁷ Constitution Act 1986 (1986 no 114), s. 20.

⁶⁸ Ibidem.

⁶⁹ See subparagraph 5.3.1 for further information.

⁷⁰ Public Service Employment Act, S.C. 2003, c. 22, ss. 12, 13, s. 11.

⁷¹ Ibidem.

⁷² Ibidem, s. 15(1).

because it is formally a committee of the Privy Council, but it has been created by a statute, the *Financial Administration Act*.⁷³ Among the main activities carried out by the Board we find: the “organization of the federal public administration”,⁷⁴ “financial management, including estimates, expenditures, financial commitments, accounts, fees or charges”,⁷⁵ “human resources management in the federal public administration”,⁷⁶ and “internal audit in the federal public administration”.⁷⁷ The Public Service Commission and the Treasury Board cover, together, all the relevant fields of activity connected to civil service: appointments, management, financial control and internal organisation.

5.4.2 Australia

The Australian Public Service (APS) was established in 1901. Currently, it is regulated by the *Public Service Act* 1999,⁷⁸ as partially modified by the *Public Service Amendment Act* 2013.⁷⁹ Indirectly accountable to Parliament through the Ministers presiding over each Department, the APS is entirely managed on a statutory basis. Its main constitutive units are Departments and Statutory Agencies. The highest-ranking official in each Department is the Secretary, appointed by the Prime Minister for a period up to five years and directly answerable to the Department’s Minister. Statutory Agencies are instead led by Agencies Heads. Departments and Agencies appoint and promote public servants in accordance with the relevant provisions of the Public Service Act.⁸⁰ Therefore, appointments are not made by a centralised body like the Canadian Public Service Commission.⁸¹ The Governor-General, through Orders in Council, can establish Executive Agencies, which, legal basis set aside,⁸² are similar to their statutory counterparts. Section 13 of the Public Service Act introduces a series of rules, the “Code of Conduct”, enforced by each Agency Head, the Prime Minister and the other Ministers. An Australian Public Service Commission does exist, but its aim is essentially to “uphold high

⁷³ Financial Administration Act, R.S.C., 1985, c. F-11.

⁷⁴ Financial Administration Act, R.S.C., 1985, c. F-11, s.7(1)(b).

⁷⁵ Financial Administration Act, R.S.C., 1985, c. F-11, s.7(1)(c).

⁷⁶ Financial Administration Act, R.S.C., 1985, c. F-11, s.7(1)(e).

⁷⁷ Financial Administration Act, R.S.C., 1985, c. F-11, s.7(1)(e.2).

⁷⁸ Public Service Act 1999 (Cth).

⁷⁹ Public Service Amendment Act 2013 (Cth).

⁸⁰ Public Service Act 1999 (Cth), s. 22(1).

⁸¹ See subparagraph 2.3.8 for further information.

⁸² Executive Agencies’ establishment is covered by the Royal Prerogative.

standards of integrity and conduct in the APS”⁸³ and to “monitor, review and report on APS capabilities within and between Agencies to promote high standards of accountability, effectiveness and performance”.⁸⁴ At the helm of the Public Service Commission we find a Commissioner appointed by the Governor-General in Council, who can inquire into alleged breaches of the Code of Conduct by an Agency Head⁸⁵ or an ordinary employee.⁸⁶ Infringements made by employees should in principle be dealt with by Agency Heads, but they can also be the object of a Commissioner’s inquiry if the Prime Minister or the relevant Agency Head requests it and the Commissioner him/herself deems it appropriate.

5.4.3 New Zealand

The New Zealand Civil Service is currently regulated by the State Sector Act 1988,⁸⁷ the last of a series of statutes devoted to the regulation of the public sector. Civil Service management, once entirely based on the Royal Prerogative, was put on statutory footing by the *Public Service Act* 1912,⁸⁸ then replaced by the *State Services Act* 1962.⁸⁹ The heart of the system is the *State Services Commission*, which, similarly to the Canadian *Public Service Commission*,⁹⁰ exercises a wide range of powers, particularly in the field of appointments and standards of conduct enforcement. The State Services Commissioner presides over the Commission and can be considered as the key figure of the entire system. Appointed by the Governor-General in Council, namely by the Governor-General on the Prime Minister’s advice,⁹¹ he/she is called upon to act independently.⁹² A major exception to this rule is provided by the procedure for the appointment of chief executives, the highest ranking civil servants. New Zealand has embraced a radical version of the New Public Management theory,⁹³ which advocates the adoption, in the public sector, of new forms of corporate governance. Chief executives are the most prominent

⁸³ Public Service Act 1999 (Cth), s. 41(1)(b).

⁸⁴ Public Service Act 1999 (Cth), s. 41(1)(c).

⁸⁵ Public Service Act 1999 (Cth), s. 41A(1).

⁸⁶ Public Service Act 1999 (Cth), s. 41B(1).

⁸⁷ State Sector Act 1988 (1988 No 20).

⁸⁸ Public Service Act 1912 (1912 No 23).

⁸⁹ State Services Act 1962 (1962 No 132).

⁹⁰ See subparagraph 2.3.8.

⁹¹ State Sector Act 1988 (1988 No 20), s. 3.

⁹² *Ibidem*, s. 5.

⁹³ Janet McLean, *New Public Management New Zealand Style*, in “The Executive and Public Law: Power and Accountability in Comparative Perspective”, eds. Paul Craig, Adam Tomkins (Oxford, Oxford University Press, 2006), page 124.

example of this approach. They are directly accountable to Ministers and represent the link between the independent, rigidly-structured administrative machinery and the political leadership of each department. For this reason, the appointment of chief executives is a complex process in which both the State Services Commissioner and Ministers have a say. Whenever it is necessary to fill a vacancy, the choice of the name to be recommended to the relevant Minister is left to an *ad hoc* panel comprising the State Services Commissioner, his/her deputy and one or more persons appointed by the Commissioner after consultation with the relevant Minister.⁹⁴ It is possible for the Governor-General in Council to decline the recommendation⁹⁵, proposing a named person for the position.⁹⁶

According to section 57 of the State Sector Act 1988, the State Services Commissioner is entitled to set “minimum standards of integrity and conduct that are to apply”⁹⁷ to the Public Service.

5.5 Treaty-making process and war powers

5.5.1 Canada

In Canada, foreign policy falls completely within the Royal Prerogative area. This is partly due to the fact that, when the Constitution Act 1867 was drafted, Canada was still a British colony and, as such, was not recognised as a subject of international law. The power to make treaties was therefore entirely delegated to the British Crown, with the Canadian Parliament enjoying only treaty-implementing powers. Section 132 of the Constitution Act 1867 still states: “The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries”.⁹⁸ Canada established its first international relationships only in 1926, by effect of the Balfour declaration, but it was only through the Statute of Westminster of 1931 that it started to be acknowledged as a *de facto* independent State within the international community. The complete lack of constitutional regulation, caused by self-evident reasons of historical nature, has clearly favoured the adoption of the long-standing British conventions giving Government total control over the management of foreign policy.

⁹⁴ State Sector Act 1988 (1988 No 20), s. 35(4).

⁹⁵ *Ibidem*, s. 35(9).

⁹⁶ *Ibidem*, s. 35(11).

⁹⁷ *Ibidem*, s. 57(1).

⁹⁸ British North America Act, 1867, 30 & 31 Vict. c. 3, s. 10, s. 132.

The treaty-making process is indeed dominated by the executive. Negotiations are usually carried out by the Minister of Foreign Affairs and also require the involvement of various governmental departments, depending on the subject of the Treaty. Once signed by an official bearing full powers, a treaty must be ratified to enter into force. While, in many countries, Parliament's role in the ratification process is crucial, as the legislative assembly is entitled to accept or deny ratification, this is not the case in Canada, where the "Cabinet prepares an Order in Council authorizing the Minister of Foreign Affairs to sign an Instrument of Ratification or Accession. Once this instrument is deposited with the appropriate authority, the treaty is officially ratified".⁹⁹ That being said, accountability to the House of Commons makes it impossible for the Government of the day not to seek, in a way or another, Parliament's involvement in the treaty-making process. It must be also remembered that Canada is a dualist country in which treaties do not have internal legal effect unless they are properly implemented through specific statutes. Necessary implementation gives Parliament a chance to review the international obligations to whose fulfilment Canada has been committed by the Cabinet. For example, in 1988, the *Canada-United States Free Trade Agreement Implementation Act* was blocked by the Senate and Prime Minister Brian Mulroney found himself compelled to call a snap-election in an attempt at solving the ensuing political impasse. Control over implementation is nevertheless perceived as a not entirely satisfactory way of enabling Parliament's control over treaties. For this reason, in 2008, the Government published an important document: "*Policy on Tabling of Treaties in Parliament*".¹⁰⁰ This document, heavily influenced by British practice under the Ponsonby Rule, expressed the executive's will to enhance Parliament's role in the treaty-making process by tabling signed treaties in the House of Commons and allowing MPs to debate and even approve motions on the matter within a period of 21 sitting days since the treaty is tabled. The procedure is very similar to that introduced in the United Kingdom two years later by the *Constitutional Reform and Governance Act 2010*, but, while the Canadian Parliament's votes continue to have no binding legal effect, the power of the British House of Commons to block ratification is sanctioned by a statute and, therefore, is capable of actually preventing the Government from ratifying treaties. In conclusion, we can say that, in Canada, "passing treaties through the House of Commons remains a courtesy on the part of the executive, which retains full authority to decide whether

⁹⁹ Laura Barnett, *Canada's Approach to the Treaty Making Process* (Ottawa: Library of Parliament, Parliamentary Information and Research Branch, 2008), page 2.

¹⁰⁰ Government of Canada, *Policy on Tabling of Treaties in Parliament*, 2008.

to ratify the treaty after the parliamentary review”.¹⁰¹ Another important problem linked to the treaty making process pertains to the federal nature of Canada. The federal Government, being the only constitutional body entitled to negotiate and sign international treaties, could indirectly alter existing legislation also in areas that the Constitution reserve to the Province’s exclusive domain. Such risk calls for Federal Government-Provinces co-operation but, as one might expect from a system based almost entirely on conventions, we do not have any specific legal instrument dealing with this problem, which is usually solved through informal consultation: “While provincial consent is not required for ratification, the federal government nonetheless has a policy of consulting with the provinces before signing treaties that touch on matters of provincial jurisdiction”.¹⁰²

The power to deploy Canadian troops abroad gives rise to concerns that, in many respects, are comparable to those surrounding the treaty-making process. Even in this field, the Royal Prerogative shows its well-known Achilles’ heel: reduced if not negligible parliamentary control on powers exercised by the Government under its aegis. Like his/her British counterpart, the Canadian Prime Minister could easily decide to deploy troops abroad without Parliament’s consent, by simply issuing an Order-in-Council. Control over Government’s war powers is only indirect: MPs can make their voice heard only by approving motions of no-confidence or curtailing military funds.

Within the framework of Canadian statutory law, only one provision dealing with Parliament’s review of war powers can be found. It is laid down by section 32 of the *National Defence Act*: “Whenever the Governor in Council places the Canadian Forces or any component or unit thereof on active service, if Parliament is then separated by an adjournment or prorogation that will not expire within ten days, a proclamation shall be issued for the meeting of Parliament within ten days”.¹⁰³ In any case, such rule, whose aim is to make it impossible for the Government of the day to benefit from deploying troops when parliamentary activity is suspended due to prorogations or adjournments, gives Parliament no formal power to vote or arrange debates and leaves the situation almost unchanged.

Taking a look at the practice, we can say that formal votes on Canadian military operations have been few and have often taken place *after* the decision of deploying troops had already been made by the Government. For example, in 1960 the House of Commons voted on

¹⁰¹ Laura Barnett, *Canada’s Approach to the Treaty Making Process* (n 96), page 3.

¹⁰² *Ibidem*, page 6.

¹⁰³ *National Defence Act*, R.S.C., 1985, c. N-5, section 32.

Canada's participation to ONU peacekeeping operations in Congo.¹⁰⁴ It did it again in 1990 when involvement in the Gulf War was at stake¹⁰⁵ and in 2005 when the Government tabled an amendment to extend Canadian forces' commitment in Afghanistan.¹⁰⁶ On many important occasions like those offered by participation to international operations in Kosovo or Yugoslavia, no vote was held,¹⁰⁷ while, in others, there was even no debate.

Two solutions can be envisaged to solve the problems posed by complete lack of Parliamentary control over governmental war powers: the approval of a War Powers Act capable of repealing the Prerogative by subjecting decisions on troops deployment to parliamentary scrutiny or the development of a constitutional convention to the same effect. The former solution, supported, among others, by Christopher Dunn,¹⁰⁸ would let Canada follow the footsteps of its influential neighbour, the United States.¹⁰⁹ The latter would instead be more consistent with Canada's strong British heritage and, also, with the recent trends towards conventional curbing of Prerogative war powers observed in the United Kingdom.¹¹⁰

5.5.2 Australia

Since Australia is a dualist country, ratified treaties are unable to alter internal legislation unless implemented through statutes. This is one of the few parliamentary counterweights to the Government's power to negotiate, sign and ratify international conventions under the Royal Prerogative. Like Canada, the Commonwealth has reached complete independence in the management of international affairs only in 1931,¹¹¹ with the approval of the Statute of Westminster. In the 1890s, when the Constitution was framed, Australian colonies were still semi-autonomous polities which, far from being able to establish relationships with other

¹⁰⁴ Michael Dewing, Corinne McDonald, *International Deployment of Canadian Forces: Parliament's Role* (Ottawa: Library of Parliament, Parliamentary Information and Research Branch, 2006), Appendix 2, page II.

¹⁰⁵ Ibidem, Appendix 2, page IV.

¹⁰⁶ Ibidem, Appendix 2, page XI.

¹⁰⁷ Ibidem, Appendix 2, pages VIII-IX.

¹⁰⁸ Christopher Dunn, *Democracy in the 21st Century: Canada Needs a War Powers Act*, Canadian Parliamentary Review, Volume 30, Issue 3, 2007.

¹⁰⁹ The Congress of the United States passed the *War Powers Resolution* in 1973 with a view to limit the powers vested in the executive as far as war is concerned.

¹¹⁰ See subparagraph 1.4.5.

¹¹¹ Actually, in Australia, the provisions of the Statute of Westminster entered into force in 1942, by virtue of the Statute of Westminster Adoption Act.

countries, had not gained complete legislative sovereignty yet. Hence the obvious choice not to regulate the matter and the consequent adoption of British customs and conventions.

Two are the problems posed, in a federal democracy, by a treaty-making process based on the Royal Prerogative: 1) little, if any, Parliament's involvement (democratic deficit), 2) serious risk of undue federal interference in areas falling within the residual legislative competence of the States.

The first problem is only partially mitigated by the implementation mechanism: a ratified, though not implemented (self-executing) treaty could, even in a dualist country, confer immediately-enforceable rights upon individuals or be adopted by courts as a source of law. This means that a Parliament's intervention *ex post facto* is often meaningless and, as such, cannot be considered as a proper substitute of debates and votes that should take place before the ratification of a treaty. The second of the issues described above is centred around section 51(xxix) of the Australian Constitution, which allows the Commonwealth's Parliament to make laws with respect to "external affairs". Courts have interpreted such expression broadly, thus justifying indirect limitations to States' legislative sovereignty. For example, in *Commonwealth v. Tasmania*¹¹² (1983), the High Court found that the *World Heritage Properties Conservation Act 1983*,¹¹³ a statute implementing the *Convention Concerning the Protection of the World Cultural and Natural Heritage*,¹¹⁴ was not inconsistent with the Constitution. The statute authorised the Government to stop the proposed construction of a hydro-electric dam on the Gordon River in Tasmania, even though the management of water resources is not recognised by section 51 as a "federal matter". Mason J wrote: "Accordingly, it conforms to established principle to say that s. 51(xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900".¹¹⁵ Section 51(xxix), as interpreted by the High Court, could potentially, it is argued, "reduce State

¹¹² *Commonwealth v. Tasmania*, [1983] HCA 21, (1983) 158 CLR 1.

¹¹³ *World Heritage Properties Conservation Act 1983* (Cth).

¹¹⁴ *Convention concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

¹¹⁵ *Commonwealth v. Tasmania* (n 194), at 487 [16] (Mason J).

Parliaments and Governments to little more than administrative agencies of the Commonwealth”.¹¹⁶

So far, no step has been taken in the direction of placing the treaty-making power on a statutory footing. Nevertheless, in 1996, Howard’s Government, drawing inspiration from an inquiry carried out by the Senate,¹¹⁷ introduced a series of measures aimed at improving the situation. By effect of such measures, Australia’s treaty-making process currently works as follows: first, Government representatives bearing full powers negotiate treaties. At this stage, Parliament involvement is still not contemplated. States are instead entitled to make their voices heard through the Treaties Council, an advisory body comprising the Prime Minister, States’ Premiers and Chief Ministers. The Treaty Council is assisted by a Standing Committee on Treaties, a technical panel whose task is to constantly monitor the Government’s international activity with a view to submit reports and relevant information to the Treaties Council. The relationship between the federal Government and the States is regulated by a set of principles agreed upon by both parties in 1982 and subsequently revised in 1992 and 1996, the *Principles and Procedures for Commonwealth-State Consultation on Treaties*, which “provide for consultation on matters which are of particular sensitivity or importance to the States and Territories in relation to both the negotiation and implementation of treaties”.¹¹⁸ Once treaties have been signed, the Government tables them in Parliament for 15 days before ratification.¹¹⁹ We should remember that it is only through ratification that treaties become binding under public international law. Each treaty is accompanied, when laid before Parliament, by a document called “National Interest Analysis” (NIA), whose aim is to outline the convention’s main provisions and to explain the advantages it could bring to Australia if ratified. Among the measures introduced in 1996 to strengthen Government’s accountability to Parliament in the treaty-making process, we find the establishment of the Joint Standing Committee on Treaties (JSCOT), which “represents a significant departure from Australia’s traditional approach to

¹¹⁶ Andrew Naylor, *Australia’s Treaty-Making Process*, Australian Law Reform Commission-Reform Journal, Issue 67, 1995: pages 34-43, at page 38.

¹¹⁷ Australia, Senate Standing Committees on Legal and Constitutional Affairs, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 1995.

¹¹⁸ Ibidem, at paragraph 13.20.

¹¹⁹ Initially, treaties were tabled before Parliament for 12 sitting days. The British Ponsonby Rule was introduced in Australia by Prime Minister Robert Menzies in 1961. For further information see Cheryl Saunders, *Articles of Faith or Lucky Breaks? The Constitutional Law of International Agreements in Australia*, Sidney Law Review, Volume 17, Issue 2, 1995.

treaty making, and appears to be unique among Westminster system countries”.¹²⁰ The JSCOT is called upon to inquire and report on matters arising from treaties. As we know, in the UK, the *Constitutional Reform and Governance Act 2010*¹²¹ has placed the Ponsonby Rule on statutory footing.¹²² Under the new rules, each treaty is submitted to the Commons and the Lords for 21 sitting days. Both in Australia and in the UK, ratification is not subject to Parliament’s sanction. If, within, respectively, 15 or 21 days since the treaty’s introduction to Parliament, no vote is held on the matter, the Government will ratify the treaty.

Despite the improvements showed above, Australian treaty making process still suffers from a democratic deficit, as evidenced by a recent report of the Senate on the matter: “it is pointless for JSCOT inquiries to begin after agreements are signed. This does not provide an adequate level of oversight and scrutiny. Parliament should play a constructive role during negotiations and not merely rubber-stamp agreements that have been negotiated behind closed doors”.¹²³

War powers, as in the other Commonwealth Realms, are believed to fall in the exclusive domain of the Government. Section 68 of the Constitution vests the command-in-chief of the Australian forces in the Governor-General. Since the Crown representative can act only on Prime Minister’s advice, the power to deploy troops, a Prerogative power, actually belongs to the Prime Minister him/herself. Australian military commitments have always been examined by Parliament *ex post*, when the decision to declare war had already been taken by the Government.¹²⁴ While in the United Kingdom a new constitutional convention subjecting the exercise of the Prime Minister’s war powers to substantial and preventive House of Commons’ assent is slowly developing,¹²⁵ Australia seems to be leaving things unchanged. Currently, Parliament could, in principle, indirectly curtail Government’s war powers only by rejecting

¹²⁰ Ann Capling, *Can the Democratic Deficit in Treaty-Making be Overcome? Parliament and the Australia-United States Free Trade Agreement*, in “The Fluid State: International Law and National Legal Systems”, eds. Hilary Charlesworth, Madelaine Chiam, Devika Hovell, George Williams (Sidney: The Federation Press, 2005), page 67.

¹²¹ Constitutional Reform and Governance Act 2010, c. 25.

¹²² See subparagraph 1.4.5 for further information.

¹²³ Australia, Senate, Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, 2015, page IX.

¹²⁴ Deirdre McKeown, Roy Jordan, *Parliamentary involvement in declaring war and deploying forces overseas* (Canberra: Parliamentary Library, 2010).

¹²⁵ See subparagraph 1.4.5.

bills aimed at financing controversial military operations, or, as a last resort, by approving a motion of no-confidence in the Government.

5.5.3 New Zealand

In New Zealand, as in Canada, Australia and the United Kingdom, the treaty-making process is dominated by the Government, with Parliament playing a minor, though increasingly important, role. This is due to the fact that entering into treaties has always been considered a Prerogative power in the Commonwealth Realms. Inadequate parliamentary involvement is always a problem, as it unavoidably produces a democratic deficit, but in New Zealand, where minority Governments are often formed, the risk of irresponsible actions is even higher. The traditional counter-argument used to downplay the adverse effects of an excessively strong Government is based on the assumption that, in a dualist country, no right or obligation can be conferred upon individuals by an international convention which has not been implemented through specific statutes. This is only partially true, as self-executing treaties never require implementation and approval *ex post facto* cannot be equated to preliminary scrutiny. The fact that New Zealand, perhaps drawing inspiration from its neighbour Australia,¹²⁶ has recently taken important steps in the direction of enhancing parliamentary control over treaty-related Prerogative powers, should therefore be favourably received. A change to the House of Representatives' *Standing Orders* has imposed over the Government the duty of tabling all signed treaties in Parliament for 15 sitting days before ratification.¹²⁷ Signed treaties¹²⁸ must be accompanied by the so-called *National Interest Analysis* (NIA),¹²⁹ namely an official document highlighting advantages and disadvantages of the proposed international commitment, the financial costs of complying with the treaty and many other useful information. Each treaty is examined by the Foreign Affairs, Defence and Trade Committee, but, if needed, also other Committees can come into play.¹³⁰ If the relevant Committee's report contains recommendations to the Government, a Government's response must be sent back to the House within 60 working days from the date in which the report was issued.¹³¹ It is important to

¹²⁶ See subparagraph 5.5.2.

¹²⁷ New Zealand, House of Representatives of New Zealand, *Standing Orders*, 2017, s. 397.

¹²⁸ Treaties are negotiated by Government's representatives bearing full powers and then signed. Under public international law, ratification, and not signature, is binding.

¹²⁹ New Zealand, House of Representatives of New Zealand, *Standing Orders* (n 123), s. 398.

¹³⁰ *Ibidem*, s. 399.

¹³¹ New Zealand, Cabinet Office, *Cabinet Manual* 2017 (n 23), at paragraph 7.119.

remember that Parliament cannot actually block the approval of an undesired treaty, as the Government retains the power to freely proceed with ratification.

Not surprisingly, even in New Zealand, war powers fall within the Royal Prerogative area and are exercised by the Governor-General, as the Commander-in-Chief of the New Zealand Defence Force, on advice of the Prime Minister and the Minister of Defence. The Defence Act 1990,¹³² whose aim is to outline the basic structure of the armed forces, has brought little changes, if any, to the constitutional framework within which war powers are wielded: as in Canada and Australia, any decision to hold votes on proposed troops deployments is just a courtesy on the part of the executive and, consequently, parliamentary control can only be indirectly carried out, either by voting a motion of no-confidence in the Government or by rejecting the budget. Anyway, over the last 30 years, debates on military operations have taken place in Parliament on many occasions, both before and after the announcement of decisions on deployments.¹³³

¹³² Defence Act 1990 (1990 No 29).

¹³³ New Zealand, Parliamentary Library, *Troops deployments abroad: parliamentary consent*, 2014, page 2.

Chapter 6

Final remarks

6.1 Comparison's outcomes

6.1.1 The extreme flexibility of the Westminster system

Despite sharing a common starting point in their constitutional evolution, The United Kingdom, Canada, Australia and New Zealand have, over the course of time, embarked on different and even divergent paths. Yet it would be difficult not to recognise, in each system, the basic patterns underlying the operation of the government in a classic Westminster model: the dichotomy between statutory and non-statutory executive powers, the “advice and consent” mechanism, the control duties carried out by the Parliament and, to a lesser extent, by the Head of State. The high degree of adaptability to different “constitutional environments” is certainly one of those features which, coupled with obvious historical factors, have determined, all over the world, the success and widespread adoption of many British customs and conventions in the field of constitutional law.¹ The secret behind such adaptability can arguably be found in the unwritten and uncoded nature of the rules pertaining to the regulation of the Prime Minister's office and powers. With the exception of the United Kingdom, all the States analysed in this work have, at least, one² central constitutional document. Such constitutional document is “entrenched”, namely unamendable by ordinary statute, in Canada and Australia, but not in New Zealand, and invariably devotes some provisions to the executive power.³ Nevertheless, as shown in chapter 4,⁴ even in New Zealand's Constitution Act 1986,⁵ the expression “Prime Minister” is never used and the “open secret” concerning the actual *deus ex machina* concealed behind the seemingly “omnipotent” Head of State is religiously kept. Similarly, Prerogative powers are not exhaustively enumerated nor, in most cases, accurately described. It is worth noting that other long-standing British customs, for instance the principle whereby budgetary

¹ British influence is not limited, in this respect, to the member States of the Commonwealth of Nations. Countries like post-war Japan, a constitutional monarchy, and Israel, a republic, have, among others, modelled their constitution on the Westminster system.

² Actually, Canada has two central constitutional documents: the Constitution Act 1867 and the Constitution Act 1982.

³ For Canada Chapter III of the Constitution Act 1867, for Australia Chapter III of the Commonwealth Constitution 1900, for New Zealand Part II of the Constitution Act 1986.

⁴ See subparagraph 4.1.3.

⁵ Constitution Act 1986 (1986 No 114). (NZ)

and money-appropriating bills must originate in the lower House of Parliament, have easily gained written recognition.⁶ This means that the “cryptic” and elusive nature of both the Prime Minister’s office and the Prerogative powers he/she wields is purposely preserved. After all, the prime ministership’s very existence was stubbornly denied even in the first part of the 19th century, when the fundamental features of the office were already in place. Sir Spencer Walpole has written on the topic: “It was remarked in Parliament in 1806 that the constitution “abhors the idea of a Prime Minister”, and even in 1829 Lord Lansdowne affirmed that “nothing could be more mischievous or unconstitutional than to recognize in an Act of Parliament the existence of such an office””.⁷ This attitude towards the office of Prime Minister, shared by the fathers of the Canadian and the Australian Constitutions, has enormously favoured flexibility, allowing the constitutional actors involved in the management of the executive power to gradually find the right place within each system.

6.1.2 The unstable constitutional relationship between Prime Ministers and Heads of States

In the Commonwealth Realms, the constitutional relationship between Prime Ministers and Heads of State is characterised by a high degree of instability. Periods of relative stasis are followed by abrupt crises, capable of redefining long-established principles. Generally, the exercise of reserve powers by the Head of State marks a point of no return, affecting not only the office of Prime Minister, but the constitution as a whole. As the dismissal of Australian Prime Minister Gough Whitlam in 1975⁸ has taught us, conflicting interpretations of apparently straightforward concepts are likely to emerge whenever the powers of a State do not work in unison. The ensuing debate often leads to important changes and/or to the codification of previously uncoded rules, like those regulating the filling of casual vacancies in the Australian Senate.⁹ In New Zealand, the problems posed by caretaker governments rose to prominence after Prime Minister Robert Muldoon’s refusal to devalue the New Zealand dollar in what is commonly described as the “1984 constitutional crisis”.¹⁰ The so-called “caretaker

⁶⁶ See section 53 of the Canadian Constitution Act 1867 and section 53 of the Commonwealth of Australia Constitution Act 1900, which can be almost “synoptically” read.

⁷ Spencer Walpole, *The History of Cabinet*, in “Essays political and biographical”, ed. Francis Holland (London: T. Fisher Unwin, 1908), pages 213-214.

⁸ See subparagraph 4.2.2.

⁹ Article 15 of the Australian Constitution, dealing with the filling of casual vacancies in the Senate, was amended shortly after Whitlam’s dismissal, in 1977.

¹⁰ See subparagraph 4.2.3 for further information.

convention” is now, unsurprisingly, recognised and thoroughly described by the New Zealand Cabinet Manual.

In Canada and Australia, the inherent instability of the system is partially counterbalanced by the rigidity of certain parts of the constitution, enforced by courts through judicial review of legislation. The same cannot be said for the United Kingdom and New Zealand, where, as a consequence, the role played by the Head of State is characterised by a stronger focus on control and stabilisation duties.

6.2 The office of Prime Minister in the Commonwealth Realms: trends and prospective developments

6.2.1 The increasing importance of statutory law and the end of the two-party system as driving factors behind the transformations undergone by the office of Prime Minister in the United Kingdom

The first part of the 21st century has seen the adoption of two fundamental statutes: the Constitutional Reform and Governance Act 2010¹¹ and the Fixed-term Parliaments Act 2011.¹² By effect of the former, the treaty-making power and the management of the civil service have been regulated by Parliament for the first time. The latter has instead placed the power to request an early dissolution of the House of Commons on statutory footing and laid down provisions concerning the outcomes of a vote of no-confidence in the government.¹³ The result of this reaffirmation of Parliament as the “actual Sovereign” was a retreat of the Royal Prerogative from areas which, in the past, were unquestionably dominated by the unrestrained authority of the Prime Minister. Such developments have been favoured by the crisis of the two-party system, which, in turn, can be considered, at least partially, a by-product of the adoption of proportional representation as the voting system in the European elections. The progressive fragmentation of the political framework has given birth to coalition¹⁴ and minority Cabinets,¹⁵ once exceptional in the United Kingdom, eroding the prestige of the Prime Minister. The British

¹¹ Constitutional Reform and Governance Act 2010, c. 25. (UK)

¹² Fixed-term Parliaments Act 2011, c. 14. (UK)

¹³ See paragraph 1.3 for further information.

¹⁴ the Cameron-Clegg Cabinet (2010-2015) was the first coalition government to be formed since Winston Churchill’s war Cabinet.

¹⁵ The current May ministry is a minority Cabinet supported by the Conservatives and the Democratic Unionist Party and based on a confidence and supply agreement.

Head of Government is now required to lead multi-party cabinets, putting to good use his/her diplomacy skills, rather than his/her leadership skills.

6.2.2 The future of the Canadian Prime Minister's powers

The Canadian constitution resembles the British one in many respects, the federal form of State being the most relevant difference between the two systems. However, the “partisan” nature of the appointed Canadian Senate, which is put on an equal footing with the elective House of Commons by the Constitution Act 1867, has always represented an important departure from the classic Westminster system. Since no Canadian “Salisbury convention” is in place, current Prime Minister Justin Trudeau’s attempt at transforming the upper House of Parliament into a body of actual “sober second thought”¹⁶ could, if successful, prove to be extremely meaningful for the future development of the Prime Minister’s office. Indeed, exerting as much influence as possible on the law-making process is crucial to the implementation of every Cabinet’s electoral manifesto.

Speaking of the relationship with the Provinces, we should not forget that the Canadian federal government, unlike its Australian counterpart, is entitled to appoint the Lieutenant Governors, thus holding a firm grip, at least on paper, on each Provincial Cabinet. Whether a constitutional convention requiring the federal Prime Minister to consult with the relevant Province’s Premier on the appointment of the Provincial vice-regal representatives will develop in the future, it remains to be seen. For the time being, practice seems to suggest that such a development will not occur in the foreseeable future.

6.2.3 The Australian Prime Minister and the emergence of a new source of executive power

The so-called “inherent” executive power sourced in article 61 of the Commonwealth of Australia Constitution Act 1900¹⁷ is capable of significantly altering the role played by the Australian Prime Minister. A product of the Australian High Court’s case-law, it is unknown to the other Commonwealth Realms analysed in this work and warrants attention for two main reasons. First, it defies the classic, widely-accepted, dichotomy between statutory and Prerogative powers. Second, it could be limited or regulated by Parliament exclusively by means of a constitutional amendment, as evidenced by the case *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.¹⁸ This peculiarity makes a power based on article 61

¹⁶ See subparagraph 5.2.1 for further information.

¹⁷ See subparagraph 4.1.2 for further information.

¹⁸ *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA, (2016) 257 CLR 42.

of the Australian Constitution even stronger than a Prerogative power. Indeed, while both are broad in scope and subject to judicial review, only the latter can be limited, amended, regulated or repealed by ordinary statute. It is impossible, as of today, to predict the evolution of the High Court's case-law on the subject. A wise and restrained use of the inherent power doctrine is anyway desirable, as the risk of creating a general and undefined justification for each and every government action, to be used whenever the Royal Prerogative or statutory law cannot be invoked, is tangible.

6.2.4 Could New Zealand's relevant departures from the classic Westminster model bring the office of Prime Minister back to its origins?

The adoption of proportional representation has deeply changed the constitutional framework within which the New Zealand Prime Minister wields his/her powers: hung parliaments and coalition cabinets have become the norm, specific procedures aimed at facilitating the formation of stable majorities in the House of Representatives, somehow reminiscent of the practices followed after a general election in countries like the Netherlands, have emerged.¹⁹ Similar developments, though triggered by different factors, can be observed in the United Kingdom, where, not surprisingly, the transition from first-past-the-post to proportional representation has been proposed by influential scholars.²⁰

The apparent paradox contained in the title of this subparagraph can be easily explained if one looks at Bagehot's classical definition of Prime Minister as a "first among equals" or "primus inter pares". As previously seen,²¹ Prime Ministers have progressively acquired a privileged position within Cabinet, in the United Kingdom as in the other Commonwealth Realms, due to media exposure and centralisation of the decision-making process. The transformation has been so profound that an alleged "presidentialisation" of the office of Prime Minister has taken place according to some political scientists.²² Independently on the validity of such claims, it is interesting to note that, in New Zealand as in the United Kingdom, the opposite trend is gaining momentum. In the future, the loss of prestige and power suffered by

¹⁹ See subparagraph 4.2.3.

²⁰ Vernon Bogdanor is probably the most notable supporter of proportional representation in the United Kingdom.

²¹ See subparagraph 1.1.5 for further information.

²² Ex plurimis, Richard Heffernan, Paul Webb, *The British Prime Minister: Much More Than "First Among Equals"*, in "The Presidentialization of Politics: A Comparative Study of Modern Democracies", eds. Thomas Poguntke, Paul Webb (Oxford: Oxford University Press, 2005). A refutation of the "presidentialisation" theory can be found in Keith Dowding, *The Prime Ministerialisation of the British Prime Minister*, *Parliamentary Affairs*, Volume 66, Issue 3, 2013: 617-635.

the New Zealand Prime Minister as a consequence of the two-party system's dissolution is likely to highlight the similarities, rather than the differences, between the current version of the office and the classic one.

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