
Prerogative and Reserve Powers

Introduction

The head of state in a country with a Westminster-style system of responsible government performs a largely symbolic role. That symbolism is given substance by the existence of the reserve powers – the discretionary powers of the head of state that may be used to uphold and maintain the fundamental constitutional principles of the system of government that the head of state represents.

The exercise of these powers is rarely observed. Even those reserve powers that are regularly exercised, such as the appointment of the chief minister or the dissolution of Parliament, tend to slip by quietly and are regarded as mere formalities because they are governed by well-accepted conventions. The sceptre of regal power, held by the head of state, remains veiled in the background. It is only when the reserve powers are exercised in a constitutional crisis that their existence becomes notable and their nature and scope become the subject of public debate.

The reserve powers are important because they are not only necessary for the operation of government,¹ but also provide the last line of defence against governmental actions in breach of fundamental constitutional principles. In this sense, the head of state is not only the symbolic guardian of the relevant nation's Constitution, but the one person with powers of last resort reserved for its protection.

This book addresses the exercise of the reserve powers vested in the Sovereign, his or her vice-regal representatives in the Realms, and the heads of state in countries which inherited, at least to some extent,

¹ The reserve powers are essential to the operation of Parliament, providing for its dissolution so that it can be re-elected by the people. They are also essential to the Executive, providing for the appointment and replacement of the chief minister.

aspects of the Westminster system of responsible government.² For ease of reference, those persons who may exercise the reserve powers will be collectively described as ‘heads of state’, even though vice-regal representatives in the Realms are not themselves heads of state, but rather exercise the powers of the Sovereign as his or her representative.³ Heads of government, including Prime Ministers, Premiers and First Ministers, will be described collectively as ‘chief ministers’.

The countries addressed in this book are primarily the Realms of Queen Elizabeth II and her successors, which as at 2017 are: 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, the Solomon Islands, Tuvalu and the United Kingdom.

In addition, consideration is given to relevant precedents and acts that occurred in countries while they were previously Dominions or Realms, such as Ceylon (now Sri Lanka), the Irish Free State, Nigeria, Rhodesia (now Zimbabwe), Sierra Leone and South Africa. Also addressed are relevant events in countries that have become republics or maintain their own monarchies, but which retain a sufficiently close connection to the Westminster system of government that their experiences remain relevant and instructive, or at least provide interesting comparisons.⁴ These countries include Dominica, Fiji, Guyana, India, Malaysia, Malta, Mauritius, Nepal, Pakistan, Samoa, Singapore, Tonga, Trinidad and Tobago and Vanuatu. In the South Pacific, the nations of Nauru and Kiribati are also considered, where relevant, despite having a fused head of state and head of government in a form of parliamentary presidency.⁵

The major difficulty in dealing with such a wide range of countries is that it is not possible to draw out every legal and political factor that has influenced a particular constitutional crisis. Nor is it possible to recognise

² For a discussion of the essential features of the Westminster model of government and the ‘export model’ developed for its former colonies, see Andrew Harding, ‘The “Westminster Model” Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States’ (2004) (Winter) *Oxford University Commonwealth Law Journal* 143.

³ See the discussion on whether a Governor-General in a Realm is ‘head of state’ in Chapter 11 at 734–9.

⁴ For a similar list, see Sir William Dale, ‘The Making and Remaking of Commonwealth Constitutions’ (1993) 42(1) *International and Comparative Law Quarterly* 67, 70.

⁵ Note MacSporran’s argument that the Constitution of Nauru has moved considerably far away from the classic Westminster model, although it retains a parliamentary system where ministers are responsible to Parliament: Peter MacSporran, *Nauru – The Constitution* (Seaview Press, 2007) 56.

every nuance involved. It is inevitable that errors will be made and relevant factors will be overlooked or undervalued. The benefits arising from taking a broad approach, however, are significant.

First, there is great benefit in being able to draw on real examples of constitutional controversies, rather than creating hypothetical ones that are likely to be dismissed as unrealistic and unworthy of serious consideration. While the human mind may be inventive, it cannot compete with reality in conjuring up unusual scenarios in which to test the application of the reserve powers. If such scenarios have already happened, then they are credible and need to be treated seriously. These scenarios make us think more broadly and seek out the common principles that underpin a wide variety of different cases, rather than obsessively focus on the narrow lessons that might be drawn from a small number of incidents.

Second, consideration by constitutional lawyers and political scientists of the reserve powers has largely been confined to a small number of crises, such as the King/Byng affair in Canada in 1926 and the dismissal of the Whitlam Government in Australia in 1975 – the entrails of which have been pored over for decades. Exercises of reserve powers in the Caribbean, the South Pacific and Asia have been commonly neglected, even though valuable insights can be drawn from them.

Asian examples are of interest because the constitutional controversies involved in countries such as Malaysia, Singapore, India and Pakistan have often been the subject of litigation, resulting in carefully considered judicial analyses that apply common constitutional conventions and principles. Controversies in the South Pacific and the Caribbean tend to be more extreme in nature given the small sizes of their legislatures and the capacity for majorities to change easily. Details of them, however, are often hard to find. Primary material is difficult to access and even court judgments are not always available. Considerable effort has been made in the writing of this book to document as many examples as possible from such countries so as to provide a much wider array of cases than is otherwise readily available.

While there are significant differences in the legal provisions that apply in these countries, the differences primarily arise from the level of prescription in the Constitution. Countries that obtained their independence in recent times tend to have more detailed Constitutions, permitting less discretion in the head of state, than the older Realms of the United Kingdom, Australia, Canada and New Zealand. Nonetheless, to the extent that discretion does exist, what is most remarkable is the almost uniform acceptance of the same constitutional principles,

precedents and conventions. Whether one is reading a judgment of the Supreme Court of India or the Court of Appeal of Tuvalu, both will commonly refer to the same precedents, principles and conventions. What these countries hold in common in relation to the reserve powers is far greater than the differences between them.

Third, one of the purposes of this book is to equip those who are responsible for the exercise of reserve powers with knowledge of the relevant principles and conventions, examples of how cases have been dealt with by others in the past, and awareness of the type of factors that should be considered or the different ways particular scenarios might develop. A head of state in a small nation which does not have its own books on constitutional law or constitutional history has little support when faced with unusual constitutional circumstances and considerable pressure from a self-interested chief minister. The head of state is immeasurably empowered if he or she can point to different examples of when a controversy of a similar kind has occurred – including in his or her region – how it was resolved and what factors needed to be considered. That is why so much of this book is focused on primary material documenting real examples. Each person reading it can draw upon these examples to reach his or her own conclusions about how the reserve powers should, or should not, be exercised in the applicable circumstances. Knowledge of what has happened in the past aids the anticipation of how events might develop in the future and permits a more considered and informed response.

Prerogative powers and reserve powers

Prerogative powers are the discretionary powers⁶ of the Crown that have been inherited from medieval times and have not been abrogated by legislation. They are ordinarily executive powers⁷ which may be exercised

⁶ Note the argument as to whether immunities or privileges are legitimately characterised as prerogatives, or whether they are simply a consequence of the existence of prerogative powers: B V Harris, 'Replacement of the Royal Prerogative in New Zealand' (2009) 23 *New Zealand Universities Law Review* 285, 293–4; Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25(1) *Oxford Journal of Legal Studies* 97, 105–6.

⁷ Note, however, that the exercise of these powers may have a legislative effect – such as the making of letters patent and orders-in-council with respect to colonies. Prerogatives may also be related to the exercise of judicial power, but have been largely abrogated by legislation.

by the Sovereign or his or her representatives without the need for legislative authorisation.⁸ Most prerogatives are exercised by ministers or upon the advice of ministers. The historic derivation of the prerogative means that no new prerogative powers can be established,⁹ although the application of a prerogative power can be adjusted to apply to changed circumstances.¹⁰

A non-exclusive list of prerogative powers in the United Kingdom as at 2013 included the powers to:

1. appoint a Prime Minister;
2. summon or prorogue Parliament;
3. give or refuse Royal Assent to bills;
4. legislate by prerogative orders-in-council (e.g. in relation to certain parts of the civil service) or by letters patent;
5. exercise the prerogative of mercy (e.g. to pardon convicted offenders);
6. make treaties;
7. wage war by any means and to make peace (including power over the control, organisation and disposition of the armed forces);
8. recognise states;
9. issue passports and to provide consular services;
10. confer honours, decorations and peerages; and
11. make certain appointments (including royal commissions).¹¹

⁸ Note that Blackstone confined his definition of the prerogative to those powers that uniquely belong to the Crown, whereas Dicey's broader definition encompasses all non-statutory powers exercisable by the Crown, including its capacities as a legal person: Sir William Blackstone, *Commentaries on the Laws of England* (1st ed facsimile, 1765) Vol 1, 232; A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 7th ed, 1908) 420.

⁹ *BBC v Johns* [1965] Ch 32, 79 (Diplock LJ). Note, however, Payne's observation that this is a simplistic view and that 'the objectives that prerogatives exist to serve may justify generating novel instances by virtue of necessity', rendering the class of prerogative powers 'open ended and indeterminate': Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown – A Legal and Political Analysis* (Oxford University Press, 1999) 77, 101–2.

¹⁰ See, eg, *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26.

¹¹ UK, Office of the Parliamentary Counsel, 'Queen's or Prince's Consent', October 2013, [2.7]; and UK, House of Commons Political and Constitutional Reform Committee, 'The impact of Queen's and Prince's Consent on the legislative process', HC 784 (26 March 2014) [6].

The above list excludes the prerogative to dissolve Parliament due to the application in the United Kingdom of the *Fixed-term Parliaments Act 2011* (UK), but it would have previously been included with the power to summon or prorogue Parliament.

A reserve power is a power exercisable by the head of state according to his or her discretion without, or contrary to, the advice of his or her responsible ministers. These powers are sometimes known as the ‘personal prerogatives’¹² of the monarch, as they may be exercised according to the monarch’s personal discretion, rather than on advice. Brazier, amongst others, has preferred the use of the term ‘reserve powers’ as a means of ‘emphasising that these powers are in reserve, to be used in exceptional cases, and are not at all powers which might be used regularly or routinely’.¹³ Such a statement can be confusing, however, because some reserve powers, such as the appointment of a chief minister or the decision whether to grant a request for a dissolution, are exercised regularly. Nonetheless, due to the application of accepted constitutional conventions, in most circumstances no personal discretion will be applied in exercising these powers, even though the head of state is not subject to binding constitutional advice in doing so. In accordance with convention, the head of state routinely appoints as chief minister the leader of the party that holds majority support in the lower House of Parliament and routinely grants a dissolution upon the request of the chief minister. It is only when exceptional circumstances arise, such as a hung Parliament or the loss of confidence in the government, that a head of state will consider acting differently, making these the notable exercises of the reserve powers because they occur outside the application of the generally accepted conventions.

Some prerogative powers are reserve powers, but most are not. A prerogative power to enter into a treaty is not one which can be exercised by a head of state without, or contrary to, the advice of

¹² Sir Ivor Jennings, *Cabinet Government* (Cambridge University Press, 3rd ed, 1961) 394; J R Mallory, *The Structure of Canadian Government* (Gage Educational Publishing, rev ed, 1984) 34; Robert Blackburn, ‘Monarchy and the personal prerogatives’ [2004] (Autumn) *Public Law* 546; A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (Pearson, 16th ed, 2015) 242. See also *Lali Media v Prince ‘Ulukalala Lavaka Ata and the Kingdom of Tonga* [2003] TOSC 27 (Supreme Court of Tonga).

¹³ Rodney Brazier, ‘Monarchy and the personal prerogatives’: A personal response to Professor Blackburn’ [2005] (Spring) *Public Law* 45, 47. See also Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press, 1984) 36.

responsible ministers. Equally, some reserve powers are prerogative powers, but others are not as they are expressly conferred by a Constitution or other legislation.¹⁴ For example, Sir Garfield Barwick pointed out in relation to the Australian Governor-General:

All the Governor-General's powers under the Constitution are statutory in nature: none are derivative or prerogative powers. Nothing in any instructions he may receive can conflict with the existence or exercise of these powers.¹⁵

Hence, he observed that the withdrawal of a Prime Minister's commission by the Australian Governor-General is the exercise of a statutory power, rather than a prerogative power, but it may still be 'convenient to refer to such a power as a "reserve" power in the sense that it is rarely to be used but always kept in reserve against the day when it must be used. In no other sense is it a reserve power.'¹⁶ Barwick, like Brazier, was focusing on the exceptional exercise of reserve powers, rather than their ordinary exercise within the bounds of generally applicable constitutional conventions.

For these reasons, the term 'personal prerogatives', while it might still have relevance in the United Kingdom, cannot be used to encompass such powers in use in most of the other Realms or countries with systems of responsible government. 'Reserve powers', while not an ideal term, is still the more appropriate one to use for those powers that may be exercised at the head of state's discretion, but subject to convention.

The abrogation of prerogative and reserve powers

Prerogative powers find their basis in history and politics, being powers exercised historically by the monarch. They were not created by the common law, but their limits are defined and recognised by the common law and they attract the same status as the common law.¹⁷ This means that prerogative powers may be abolished, restricted or replaced by statute. The Supreme Court of the United Kingdom observed that the residual nature of a prerogative power is such that it 'will be displaced in a field which becomes occupied by a corresponding power conferred or

¹⁴ J L Robson (ed), *New Zealand – The Development of its Laws and Constitution* (Stevens & Sons Ltd, 1954) 14.

¹⁵ Sir Garfield Barwick, *Sir John did his Duty* (Serendip Publications, 1983) 99.

¹⁶ Barwick, above n 15, 107. ¹⁷ Payne, above n 9, 87.

regulated by statute'.¹⁸ Hence, where a statutory scheme is established to govern a particular subject and it imposes limits on the government, the government cannot exclude itself from the legal requirement to comply with those limits by instead relying on a prerogative power.¹⁹ It has been held that it 'is clear that the Crown cannot act under the prerogative if to do so would be incompatible with statute'.²⁰

The prerogative has nonetheless proved itself to be tenacious of life. The prerogative and a statutory scheme in relation to the same subject may sometimes co-exist. This may be because the statutory scheme expressly permits or acknowledges the continuing existence of the prerogative.²¹ It may also be that the prerogative provides benefits to individuals or protects their rights and the statute has not expressed in clear and unequivocal terms the intention to deprive individuals of that benefit or protection.²² De Smith and Brazier have concluded that because 'the prerogative is tenacious and the Crown is not readily held to be bound by mere implication, the courts are unlikely to hold that a prerogative has been excluded by implication unless legislation evinces a very clear intention to cover the field in question exhaustively'.²³

In some countries where the Constitution is prescriptive in nature an attempt has been made to remove all or most discretion of the head of state. From time to time, it is argued that reserve powers have survived and been inherited by the head of state as part of the general executive power. Such an argument, as discussed below, has been made with respect to Fiji. It was accepted by the High Court of Fiji,²⁴ but was rejected by the Fiji Court of Appeal, which took the view that the

¹⁸ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [48] (Lord Neuberger, with whom Lady Hale and Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge agreed).

¹⁹ *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 148 (Lord Pearce).

²⁰ *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 44 (Croom-Johnson LJ).

²¹ See, eg, *Immigration Act 1971* (UK) s 33(5); *Royal Commissions Act 1902* (Cth) s 1A; and *Copyright Act 1968* (Cth) s 8A.

²² *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] QB 26, 53 (Purchas LJ).

²³ S A de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 8th ed, 1998) 139–40. See also Alison Quentin-Baxter, *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand* (Cabinet Office, Wellington, 1980) 14 [17].

²⁴ *Qarase v Bainimarama* [2009] 3 LRC 614, 653 (Gates ACJ, Byrne and Pathik JJ).

Constitution was deliberately drafted to exclude any discretionary powers of the head of state.²⁵

Similarly, in the Solomon Islands some judges recognised that the principle of necessity might support the continued existence of reserve powers, while others held that they do not apply, at least outside of an extreme emergency.²⁶ Brown J concluded that the Constitution was the supreme law and that there ‘are no Royal Prerogatives, then remaining, lurking in legal thickets, bar those prerogatives vested in the Governor-General and set forth in the Constitution’.²⁷

Difficulties may also arise where a reserve power that was originally a prerogative power has been given effect by statute but that statute has later been repealed. Can a prerogative power revive or, once abrogated by statute, has it ceased to exist? De Smith and Brazier contended that in such circumstances the prerogative ought not to be held to revive ‘unless it is a major governmental attribute or is otherwise consonant with contemporary conditions’. They concluded that where prerogative powers have been expressly abolished because they are archaic and no longer considered suitable, they should not revive once the legislation abolishing them has been repealed.²⁸

Bradley, Ewing and Knight considered that where a statute that restricts the prerogative is repealed, the prerogative would revive, subject to any words in the repealing statute that make it clear that it is not intended to revive.²⁹ This view was based in part upon the observation of Lord Pearce in *Burmah Oil Co Ltd v Lord Advocate* that ‘if the statutory power were repealed, the prerogative power would apparently re-emerge as it existed before the statute’.³⁰ More recently, the Supreme Court of the United Kingdom set out the more qualified view that if ‘prerogative powers are curtailed by legislation, they may sometimes be reinstated by the repeal of that legislation, depending on the construction of the statutes in question’.³¹

²⁵ *Qarase v Bainimarama* [2009] 3 LRC 662, 692 (Powell, Lloyd and Douglas JJA).

²⁶ See, eg, *Ulufa’alu (Prime Minister) v Governor-General* [1998] SBHC 50; [2001] 1 LRC 425 (Muria CJ); *Prime Minister v Governor-General* [1999] SBCA 6; *Ulufa’alu v Attorney-General* [2001] SBHC 178 (Palmer ACJ).

²⁷ *Maniau v Governor-General* [2004] SBHC 118 (Brown J).

²⁸ De Smith and Brazier, above n 23, 140.

²⁹ Bradley, Ewing and Knight, above n 12, 263. See also Payne, above n 9, 108–9.

³⁰ *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 148 (Lord Pearce).

³¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [112] (Lord Neuberger, with whom Lady Hale and Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge agreed).

Such a problem arose in New Zealand with respect to the power to summon Parliament, which commenced as a prerogative power and was later given statutory form in electoral legislation. This legislation was then repealed and substituted with a statute that did not contain an equivalent provision.³² The consequence was uncertainty as to whether the prerogative power had revived. Due to the importance of the power and the legal uncertainty, the question was ultimately resolved by express legislative provision.³³

The classification of the reserve powers

The reserve powers of the head of state have most commonly been classified by placing them in boxes, labelled according to the subject matter of the power. The most generally accepted boxes are: the appointment of a chief minister; the removal of a chief minister; and the refusal of a dissolution. The disputed boxes of reserve powers include: the refusal of royal assent; the forcing of a dissolution; the summoning of Parliament; and the prorogation of Parliament. Outside the concept of reserve power boxes, but still falling within recognised cases of the exercise of discretionary powers by a head of state, are: the refusal to act in breach of caretaker conventions; the refusal to act in breach of the Constitution or the law; and the exercise of powers pursuant to the doctrine of necessity to restore constitutional governance under a system of representative and responsible government.

The problem with designating a reserve power simply by reference to whether it falls within a particular box is that it results in a superficial analysis of what amounts to a reserve power and provides no context for its operation. Instead, it gives rise to the application of rigid and impractical rules about the operation of the reserve powers, which sometimes work against the constitutional system from which they are derived. It also results in an inability to explain why something does or does not fall within the reserve powers. One is then left with mere assertion, which cannot form a basis for understanding. Nor is there any reasoned basis upon which one can reconcile anomalous cases where discretion has been exercised and generally accepted as appropriate, but which do not fall within a recognised box.

³² Quentin-Baxter, above n 23, 73 [86].

³³ *Constitution Act 1986* (NZ) s 18. See also *Simpson v Attorney-General* [1955] NZLR 271.