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Prime Ministerial Exercise of the War Prerogative in the Iraq Affair: An Analysis.

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MPhil

2009

Prime Ministerial Exercise of the War Prerogative in the Iraq Affair: An Analysis

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This thesis is submitted in partial fulfilment
of the requirements for the award of
Master of Philosophy of the University of
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Abstract

'Prime Ministerial Exercise of the War Prerogative in the Iraq Affair: An Analysis'

This study sets out to investigate an arcane, ancient and currently unreformed area of the British constitution; the war prerogative. This Crown power continues to lie with the monarch at law, though in political reality it is exercised by the Prime Minister with the support of Parliament. The war power has come to vest in the Prime Minister due to the office's colonisation and resultingly close interrelationship with the institution of monarchy. The study will argue that there are prevailing cultural, structural and legal influences of monarchy which potentially benefit the premier in his exercise of the war prerogative. This and related issues will be afforded specific and detailed consideration in the context of the March 2003 decision to deploy troops in Iraq. The Iraq affair constitutes an invaluable case study as one of the most controversial warfare decisions in recent history, one that generated topical debate and new scrutiny of the war prerogative.

This study conducts a detailed investigation of the legal and constitutional checks and balances upon the prime ministerial war prerogative with specific focus upon their operation in the Iraq affair. The study discusses significant shortcomings in the functioning of constitutional checks in the lead up to military action in Iraq, particularly the convention of collective Cabinet responsibility and the requirement that Parliament supports warfare. The study also appraises the efficacy of legal checks upon the war and related prerogatives in the judicial arena; it considers developments over the course of the broad Iraq period, paying specific attention to advances in judicial review. The roles of constitutional components such as the Crown and conventions in these constitutional dynamics are identified and analysed where relevant. Furthermore, the extent to which post-Iraq proposed reforms might overhaul the area and address constitutional inadequacies will be considered.

In undertaking its investigation into this constitutional area the study employs two analytical devices which provide illuminating insights upon the war power, the checks upon it and its exercise by Mr Blair in the Iraq affair. The first device involves the identification and exploration of divergences between the legal framework governing this area and the political reality occurring beneath. Applying this device exposes material contradictions between the law and reality in this area, allows the accuracy and efficacy of legal terminology to be assessed and finally reveals assumptions or ideologies underlying the legal framework. Over the course of this study it is argued

that the various disparities between the law and political reality in this area act to benefit the Prime Minister in his exercise of the war prerogative.

The second device entails careful consideration of the role of boundaries between law and non-law (particularly politics) in this area. Such boundaries play a central role in judicial understandings of both conventions and prerogative power, and are vital to the maintenance of coherence and legal purity in this area. This study focuses particularly upon the judicial erection of boundaries that distinguish between justiciable and non-justiciable prerogatives such as the war power. It demonstrates that despite appearances of progress in judicial review, these boundaries are based upon selective judicial interpretations and approaches to evidence which inherently act to favour government. Thus, in disputes concerning the war and related prerogatives the judiciary is institutionally incapable of political neutrality, instead being geared towards the support of strong government.

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The material in this study is current up to 14th March 2009, though it takes account of more recent material where possible.

Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is entirely my own work.

Name: Rebecca Moosavian

Signature:

Date:

Introduction

'Prime Ministerial Exercise of the War Prerogative in the Iraq Affair: An Analysis'

Despite the constitutional significance of the office of Prime Minister there is a dearth of analysis by constitutional academics, particularly lawyers, of the office itself and the constitutional mechanisms that play an integral role in its operation. Instead, academic debate concerning the premiership has primarily focussed on the political-historical context,¹ perceived increases in prime ministerial power² or concerns about presidentialism.³ The reason that constitutional lawyers have tended not to explore the arcane territory of the Prime Minister is perhaps due to its informal status and the sparsity of legal regulation surrounding the office and Cabinet. Referring to the latter, Maitland comments, "*this is certainly a most curious state of things, that the law should not recognize what we are apt to consider an organ of the state second only in importance to the parliament.*"⁴ However, though the premiership is not created by law, law does remain inextricably linked to the constitutional-legal concepts (such as the Crown, prerogative and conventions) that create it. The office of Prime Minister and its powers is therefore a worthwhile and fertile area for legal analysis and critique.

As its title suggests, this study is specifically concerned with providing an account and analysis of the British war prerogative - a power to declare war or undertake other military action abroad. A recent government green paper stated that such a decision is amongst the most important in politics,⁵ yet incongruously the authority to undertake military action still stems from an ancient Crown power that is exercised by Prime Ministers.

¹ See the excellent study by P Hennessy, *The Prime Minister, The Office and its Holders Since 1945* (Penguin, London, 2001).

² For example see: A H Brown, 'Prime Ministerial Power (Part 1)' [1968] P.L. 28, p 29; K O Morgan, 'New Labour and the New Premiership', featured in *The Law, Politics & the Constitution, Essays in Honour of Geoffrey Marshall* (Ed: Butler, Bogdanor & Summers), Oxford University Press, Oxford, 1999, p 32.

³ M Foley, *The British Presidency* (Manchester University Press, Manchester, 2000).

⁴ F W Maitland, *The Constitutional History of England* (Cambridge University Press, Cambridge, 1931) p 388.

Debates concerning the prime ministerial war power gained prominence over the premiership of Mr Tony Blair between 1997 and 2007. Over this decade the war prerogative was used by Mr Blair on no less than six occasions. Peter Hennessy has written that Mr Blair “*presiding over British involvement in five military conflicts over six years (Iraq in December 1998, Kosovo, Sierra Leone, Afghanistan, Iraq 2003) [held] a strike-rate unprecedented since 1945 if you exclude the colonial emergencies which were running at the same time as Korea and Suez.*”⁶ But despite undertaking military action across a range of countries and circumstances Mr Blair’s most controversial and high-profile use of the war prerogative was undoubtedly his decision to conduct military operations in Iraq in March 2003. Such was the controversy of the Iraq decision it resulted in up to 1 million protestors marching through London in February 2003, the largest demonstration in British history.⁷ The Iraq decision furthermore generated a wealth of literature, commentary and legal challenge. Finally it initiated a spate of parliamentary activity in the form of select committee reports and reforms proposed by government,⁸ much of which occurred in the recent post-Blair period. As a result of this material, this study will focus upon the Iraq decision as a revealing example of prime ministerial exercise of the war prerogative.

Aims of Study

In its coverage and analysis of the prime ministerial war prerogative over the course of the Iraq affair, this study will specifically aim to achieve the following:

- (1) To establish a detailed understanding of the three key constitutional components that play a fundamental role in the prime ministerial exercise of the war power, namely conventions, prerogative powers and the Crown.

⁵ “*There are few political decisions more important than the deployment of the Armed Forces into armed conflict.*” Secretary of State for Justice and Lord Chancellor, ‘The Governance of Britain’ (CM 7170, 2007) para 25, p 18.

⁶ P Hennessy, ‘Informality and Circumscription: The Blair Style of Government in War and Peace’, *Political Quarterly*, 2005, Vol. 76(1), p 3. Hennessy does not include the September 1999 UK deployment as part of a UN force in East Timor in his list.

⁷ ‘Million’ march against Iraq war’, *BBC Online* (London, 16th February 2003) <<http://news.bbc.co.uk/1/hi/uk/2765041.stm>> accessed 15th May 2008.

⁸ To be discussed in Chapter 4.

- (2) To consider how these constitutional concepts operated and interacted in the period leading up to, during and after the decision to deploy troops in Iraq in March 2003.
- (3) To identify and discuss the deeper insights that the Iraq affair reveals about the prime ministerial war prerogative and the effectiveness of constitutional checks and balances that regulate it.

In the process of addressing these three aims this study will, where necessary, employ the two analytical devices outlined at the end of this introduction.

Emergence of the Office

A brief account of the evolution of the premiership is vital at the outset because it provides important background context which aids understanding of current constitutional arrangements. The office of Prime Minister is the most prominent political position within the British constitution. The holder is leader of the country's democratically elected government, Minister for the Civil Service and 'First Lord of the Treasury'.⁹ The position has emerged by fortune rather than design, a 'product of indigenous dynamics'.¹⁰ Its origins can be traced back over centuries, through an ongoing combination of political events, constitutional culture and even the personal idiosyncrasies of prominent political players.

The foundations for the premiership germinated in an informal fashion in the mid-sixteenth to early seventeenth centuries. Early English monarchs had always relied to a varying extent on trusted advisers and confidants.¹¹ However, Elizabeth I's heavy reliance on Sir William Cecil (Lord Burghley) is viewed by some as a precursor to the sovereign-Prime Minister relationship.¹² A further significant development can be found during the reign of Charles II. This period saw the inception of an embryonic 'Cabinet' (or 'cabal'), a select group within the Privy Council, that ancient collective of advisers to successive monarchs. At this time,

⁹ *Halsbury's Laws of England* (4th edn, Butterworths, London, 1996) vol 8(2), para 395.

¹⁰ Foley (n 3) 26.

¹¹ "For centuries monarchs had their principal advisers: in Tudor times Henry VII's Morton, Henry VIII's Wolsey and Cromwell". H Wilson, *The Governance of Britain* (Weidenfeld & Nicholson, London, 1976) p 12.

¹² F W G Benney, *The Elected Monarch, The Development of the Powers of the Prime Minister* (Harrap & Co, London, 1965) pp 2-4.

Cabinet members remained very much ministers of the King, being chosen by and answerable to him only. “*Cabinet government ... meant at this stage government by favourites*”,¹³ and ministers faced initial parliamentary hostility to their positions.¹⁴

The Glorious Revolution in 1688 and subsequent Bill of Rights was a further event that indirectly contributed to a shift towards the prime ministerial position because it essentially emasculated monarchical power by placing Parliament above the King and in charge of the national purse strings. The monarch of the day, William III, maintained close connections with the Whig party who had supported him, appointing them to occupy the leading positions in government. “*By the close of 1695 the Whig party was in power in a sense in which no party had ever been in power before.*”¹⁵ However, the King was still firmly in command and did not always deign it necessary to discuss state business with his Cabinet.

The reign of George I (1714-1727) saw an increase in Cabinet power, primarily caused by his frequent absences from Cabinet meetings due to poor English and prolonged European visits. Cabinet chairmanship inevitably became the task of the leading minister, and decisions were necessarily made without monarchical sanction. In 1721 Sir Robert Walpole came to hold the position of First Minister and is commonly acknowledged as the ‘first prototype of the modern Prime Minister’¹⁶ and ‘*de facto* father of the breed’.¹⁷ Nevertheless, the title ‘Prime Minister’ was still not attached to the office at this stage. Instead, it was occasionally used by opponents as a derogatory term against the First Minister.¹⁸ Upon the accession of George II in 1727, Walpole continued as First Minister despite concerted efforts by the former to replace him. The King failed in his attempts due to the fact that there was no viable alternative candidate able to control the House of Commons. However, it is important to note that Walpole’s power was not institutional, but arose from a combination of fortuitous circumstances and personal attributes which many of his later counterparts did not enjoy. His revolutionary approach emphasised a firmer

¹³ M Taylor Blauvelt, *The Development of Cabinet Government in England* (The Macmillan Company, New York, 1902) p 32.

¹⁴ Benemy (n 12) 6.

¹⁵ Blauvelt (n 13) 78.

¹⁶ Hennessy (n 1) 22.

¹⁷ Ibid 39. Walpole’s premiership is viewed by Elizabeth Wicks as one of eight key moments in British constitutional history: E Wicks, *The Evolution of a Constitution* (Hart Publishing, 2006, Oxford) ch 3.

¹⁸ Wilson (n 11) 12; Hennessy (n 1) 39.

trinity of Cabinet unity, strong leadership and parliamentary support.¹⁹ According to Hennessy, during Walpole's time as Prime Minister “*the enduring DNA-like strands were spun which continue to determine the strength and scope, as well as the vulnerabilities of the job.*”²⁰

During the reign of George III another pivotal figure in prime ministerial history emerged; William Pitt (the Younger), who held office for 18 years between 1783 and 1801. Pitt was responsible for the continuing increase in Cabinet unity during this period. Cabinet became a tighter machine, replacing previous models which had been “*loosely compacted bodies lacking in unity, definition and solidarity*”. Instead, Cabinet discussions were now “*confined to persons actually holding office and in agreement with the views of their colleagues.*”²¹ Because the Cabinet now acted as a unit, the King's capacity to intervene in its business was curtailed. Related to this development was an upsurge in the dominance of the Prime Minister in relation to his Cabinet colleagues, though this was primarily due to Pitt's autocratic style of leadership.²² Additionally, communications between the King and ministers were channelled through Pitt, a role that his modern counterparts continue to this day.²³ Despite these practices, the Prime Minister was viewed as *primus inter pares* (first among equals).²⁴

These combined factors led ultimately to a “*substitution of the authority of the Prime Minister for that of the King*”, the latter of whom according to Keir was “*was slowly, but quite unmistakably, losing effective leadership of his own government.*”²⁵ George III continued his efforts to maintain royal influence in government,²⁶ but was hindered by well-documented mental problems which incapacitated him for lengthy periods.

¹⁹ “*The Whig administration of Sir Robert Walpole sets the precedent for party ministries and thenceforward, though there are occasional aberrations, the bonds of party are drawn tighter.*” Maitland (n 4) 395.

²⁰ Hennessy (n 1) 41.

²¹ D L Keir, *The Constitutional History of Modern Britain since 1485* (9th edn, Adam & Charles Black, London, 1975) p 382.

²² Carter writes that during this time “*it was the Prime Minister's authority vis-à-vis his ministerial colleagues which expanded most noticeably, not his independence of the King.*” B Carter, *The Office of Prime Minister* (Faber & Faber, London, 1956) p 29.

²³ The Prime Minister “*acts as medium of communication between Cabinet and Crown*”. Halsbury's *Laws of England* (n 9) para 412.

²⁴ Benemy (n 12) 6.

²⁵ Keir (n 21) 383.

²⁶ “*Throughout Pitt's long ministry, George III continued in countless ways to rule as well as to reign. He criticised and even opposed the policy of his ministers, discussed legislative proposals, and controlled appointments to office.*” Ibid 380.

Maitland claims that in the circumstances, “*George III’s attempt to govern as well as to reign was, we may now say, a retrograde attempt.*”²⁷

The nineteenth century saw further consolidation of prime ministerial office, partly as a result of the changing political and constitutional climates in that century. The *Reform Acts* of 1832²⁸ and 1867²⁹ extended voting rights and indirectly contributed to the prime ministerial role in a number of ways. Firstly, the act whittled down the King’s prerogative power of patronage; his ability to appoint government ministers and his resulting influence in both Parliament³⁰ and Cabinet³¹ was diluted. Secondly, Cabinet was now increasingly reliant upon a majority following in Parliament. A stable majority required strong party discipline and leadership combined with loyalty of members in the House of Commons, as well as in Cabinet.

Furthermore, in the nineteenth century there emerged a series of prominent Prime Ministers who bolstered the powers and profile of the office. Robert Peel acted as premier between 1841-6, and for nearly a twenty year period between 1868 and 1885 the office swung pendulously between the Conservative Benjamin Disraeli and Liberal William Gladstone. To obtain and preserve electoral support the Liberal and Conservative parties inevitably became stronger and centralised organisations. The ties of party loyalty became tighter, impacting heavily upon the independence of MPs.³² The resulting shift in the Commons from once unpredictable factions of MPs towards more compliance along party lines bolstered the position of the Cabinet. Because government was more able to rely on a solid base of support it came to exert *de facto* control over Parliament rather than vice versa:

²⁷ Maitland (n 4) 397.

²⁸ The 1832 Act extended the electorate by half to bestow voting rights on one thirtieth of the total population. The increase was restricted to the affluent middle classes, whose property was worth more than £10 per year. Additionally, the *Reform Act* modified the distribution of seats in the House of Commons. Large industrial towns such as Manchester were now represented, and the seats of corrupt ‘rotten boroughs’ were removed. For an interesting account of the passage of the 1832 Act see Wicks (n 17) ch 4.

²⁹ This Act continued the impetus of its predecessor by awarding household suffrage, thus doubling the electorate to include urban working class male voters.

³⁰ This was highlighted in November 1834 when the King (William IV) dismissed the entire ministry of Viscount Melbourne and appointed Robert Peel as Prime Minister, despite the fact that the latter did not have a majority in the Commons. An election was called and Peel failed to gain a parliamentary majority. He resigned in April 1835 after a series of parliamentary defeats. The King was no longer able to construct a government of his choice. See I Jennings, *Cabinet Government* (3rd edn, Cambridge University Press, Cambridge, 1965) p 406.

³¹ Keir (n 21) 405.

³² “*Party discipline within Parliament became more rigid as the battles grew keener and the issues tended to resolve themselves into holding or gaining power.*” J Mackintosh, *The British Cabinet* (3rd edn, Stevens & Sons, London, 1977) p 203.

*"Ever tougher whipping and tautened parliamentary procedure were reducing the behavioural scope of the individual member, and the power to initiate legislation was moving steadily away from Parliament and into the executive."*³³

Gaining the ultimate prize of office came to resemble the familiar contest between two men and their parties. The *"gulf between the two principal parties was aggravated by animosity and rivalry of the leaders, Disraeli and Gladstone."*³⁴ Thus surfaced a second feature of the period, overlapping with the strengthening of party: the personalisation of politics. Carter writes:

*"The effect of the suffrage extension was to personalize elections in such a way that they were to a large degree personality contests between party leaders."*³⁵

Events of the twentieth century, particularly two world wars, bolstered the prime ministerial role yet further. Additionally, this was the first century in which the office was recognised formally³⁶ and statutorily.³⁷ The post-World War period also contributed to prime ministerial power. *"When the war ended the State stood possessed of such a range of authority as the constitution had never previously conferred"*,³⁸ primarily due to the vast legislative powers that had been bestowed upon the upper executive.³⁹ The newly elected Labour Party, headed by Clement Attlee, utilised these latent powers⁴⁰ to enable creation of the vast welfare state⁴¹ and

³³ Hennessy (n 1) 41.

³⁴ Benemy (n 12) 8.

³⁵ Carter (n 22) 37.

³⁶ Halsbury's states that the first reference to the prime ministerial office was on 2nd December 1905 when a Royal Warrant was placed in the London Gazette: *"The warrant is noticeable as containing an official recognition of the office of Prime Minister."* The only earlier reference seems to be when Lord Beaconsfield signed the Treaty of Berlin describing himself as Prime Minister. *Halsbury's Laws of England* (n 9) para 395 footnote.

³⁷ *The Chequers Estate Act 1917*.

³⁸ Keir (n 21) 461.

³⁹ Rossiter writes: *"The most significant change worked by the war is the permanent establishment of government by administrative decree, the cutting edge of the sword of delegated legislation. In this instance as in many others however, the experience of the war only capped a long and steady progress in this direction."* C Rossiter, *Constitutional Dictatorship, Crisis Government in the Modern Democracies* (Princeton University Press, Princeton, 1948) p 204.

⁴⁰ "The wartime centralisation of power in the person of the Premier was in no way reduced by Mr Attlee; ... the point of decision, which in the 1930s still rested inside the Cabinet, was now permanently transferred either downwards to ... powerful Cabinet committees, or upwards to the Prime Minister himself." R H S Crossman, Introduction to W Bagehot, *The English Constitution* (Collins, London, 1963) p 49.

⁴¹ "The extending reach of the state through the nationalized industries and the expanded welfare apparatus meant a considerable growth in the flow of appointments and patronage that passed through No 10." Hennessy (n 1) 169-70.

the associated necessary economic controls.⁴²

So it seems that the current office of Prime Minister is a result of the cumulative effect of a myriad of influencing factors and forces interacting over centuries. Many of the modifications have emerged organically and imperceptibly. But the overall trajectory follows the waning of monarchical authority and inversely proportionate bolstering of the prime ministerial role, reflecting the fact that “*the powers of the prime minister ... have been wrestled away from the Throne.*”⁴³ Because of this, the relationship between premier and monarch remains a key element in constitutional understandings of modern prime ministerial power.

The Blair Premiership

The period with which this study is concerned is limited to the broad period leading up to, during and after the Iraq affair. This decision was taken by then Prime Minister Mr Blair who led the Labour government from May 1997 to June 2007 following three successive general election victories.⁴⁴ Over the course of this decade a number of issues related to the office of Prime Minister gained topical relevance and became the object of public debate. For example: how should premiers exercise powers of patronage?⁴⁵ Do autocratic styles of conducting Cabinet undermine its traditional collegiate basis?⁴⁶ How is the political neutrality of the senior civil service to be preserved?⁴⁷ All of these issues relate to a Prime Minister’s ancient prerogative powers and, despite their current importance, are by no means new dilemmas raised solely by the Blair premiership.

As confirmed above, this study will explore just one of the Prime Minister’s prerogative powers: that of declaring war, a power that falls within the wider prerogative to conduct foreign affairs. The power to conduct foreign affairs has

⁴² “In December 1945 the Atlee government secured the passage of the Supplies and Services (Transitional Powers) Act which authorized a five-year extension of the war controls over labor, prices, transport and materials.” Rossiter (n 39) 204.

⁴³ T Benn, *Arguments for Democracy* (Penguin, London, 1982) p 20.

⁴⁴ In May 1997, June 2001 and finally May 2005.

⁴⁵ Public Administration Select Committee, ‘A Matter of Honour: Reforming the Honours System’, HC (2003-04) 212-I; Public Administration Select Committee, ‘Propriety and Peerages’, HC (2007-08) 153.

⁴⁶ Foley (n 3).

⁴⁷ Committee on Standards in Public Life, ‘Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service’ (Cm 5775, 2003).

always been a vital one for premiers, though its role is arguably increasingly important due to the onset of globalisation and the escalating interaction between countries at international level in recent decades. It enables a Prime Minister to carry out a variety of activities on behalf of the country, such as entering treaties and conducting diplomatic relations with foreign nations.⁴⁸ In a topic of this nature one cannot overlook the Secretary of State for Foreign and Commonwealth Affairs,⁴⁹ the Cabinet minister charged with specific responsibility for that task. Over the Blair premiership the office was held by three individuals: Robin Cook acted as Foreign Secretary over the course of Blair's first term between May 1997 and June 2001. Following the Labour Party's second electoral victory Cook was replaced with Jack Straw who acted until May 2006 when the position was taken over by Margaret Beckett. Mrs Beckett left the post in June 2007 when Mr Blair's premiership ended. Though Foreign Secretaries will often utilise the prerogative powers to conduct foreign affairs, history is replete with Prime Ministers who have personally undertaken the task. In 1951 Laski wrote that "*while the position of Foreign Secretary remains, under all circumstances, an important one, it is nevertheless always true that a Foreign Secretary must work under what it is difficult not to call the direct supervision of the Prime Minister.*"⁵⁰ In recent decades Prime Ministers have continued to take a central role in this task; research conducted by Hennessy into prime ministerial files since 1945 indicates that foreign policy and defence are political priorities which occupy the most prime ministerial time and have thus been an integral part of the premier's role throughout the twentieth century.⁵¹ This relative predominance in the foreign affairs field was illustrated throughout the Blair premiership which displayed a strong international dimension, particularly following the terrorist attacks in New York on September 11th 2001.⁵² The 1997-2007 period thus continued to demonstrate the truth of Hennessy's claim that "*war is an intensely prime ministerial activity*".⁵³

⁴⁸ To be discussed further in Chapter 4.

⁴⁹ Hereinafter referred to as 'the Foreign Secretary'.

⁵⁰ H Laski, *Reflections on the Constitution* (Manchester University Press, Manchester, 1997) pp 103-4.

⁵¹ Hennessy (n 1) 91-98. Former minister Blunkett confirms that foreign affairs and defence matters dominate Cabinet discussion; David Blunkett, *The Blunkett Tapes, My Life in the Bear Pit* (Bloomsbury, London, 2006) p 11.

⁵² See for example, A Seldon, *Blair* (Free Press, London, 2005) pp 498-507; ibid (Blunkett) pp 311, 316, 320.

⁵³ Hennessy (n 1) 103.

Overall Structure of Study

This study will investigate three constitutional components that are integral to the prime ministerial office and its powers, namely conventions, prerogative and the Crown. The complex and esoteric interaction of these elements is essentially what forms the premiership in its constitutional context. Indeed, mention of a prime ministerial ‘office’ is slightly misleading as no formal office exists *per se*. As Ward states, “*Prime Ministers, it seems, just are. The office of Prime Minister is what they do.*”⁵⁴ Nevertheless, consideration of the premier and war prerogative over the course of the Iraq affair involves understanding this intricate fusion of Crown, prerogative and convention.

Chapter 1 sets out the vital political and factual background to Mr Blair’s use of the war prerogative in the Iraq affair, the leading and most scrutinised example of his use of the war power. This chapter provides a basis for subsequent discussion in Chapters 2-5 by setting out a chronological account of the main political and constitutional events of that episode before identifying relevant constitutional issues to be elaborated upon in later chapters.

Chapter 2 explores the enigmatic concept of ‘the Crown’, the symbolic apex of the British constitution embodied by the monarch. The Crown is the source of all prerogative power available to a premier and thus all foreign affairs are conducted in the name of the Crown. Therefore an understanding of this legal framework governing the area is important at the outset. This chapter will pay specific attention to the unique relationship between monarch and premier, particularly the extent to which the institution of the former continues to influence and underpin the latter. This relationship forms the root cause of many of the issues regarding the Prime Minister and the war power discussed in Chapters 3-5.

Chapter 3 investigates the nature and operation of constitutional conventions, non-legal norms viewed as playing a vital regulatory role within the British constitution. Conventions are particularly significant in relation to the premiership because firstly, the office and its powers have emerged as a matter of convention and secondly, conventions continue to regulate a Prime Minister’s use of prerogatives, including the war power. Chapter 3 will consider and analyse the specific conventions that were

⁵⁴ I Ward, *The English Constitution, Myths and Realities* (Hart Publishing, Oxford, 2004) p 71.

materially relevant to Mr Blair's exercise of the war prerogative over the course of the Iraq affair.

Chapter 4 considers the prerogative itself, the residue of absolute power once wielded by monarchs of old. In keeping with the historic lineage of the office, current prime ministerial powers still primarily stem from the prerogative; it covers a broad range of areas enabling a premier and his Cabinet to undertake a range of activities that are necessary to govern the country, including the conduct of foreign affairs and engagement in warfare. Chapter 4 will conduct detailed investigation of the war prerogative and other select prime ministerial prerogatives that impacted upon Mr Blair's exercise of the former in the Iraq affair.

Chapter 5 considers judicial views on the war and related prerogatives over the broad Iraq period. These years saw a number of important cases which challenged ministerial prerogative decisions. The Iraq deployment and related foreign affairs decisions triggered a number of legal challenges to this traditionally non-justiciable area, and these cases will be discussed and analysed in detail. Specific attention will be paid to the effectiveness of judicial checks upon the prime ministerial war prerogative and the rationales that determine the courts' approaches to such cases.

Finally, a **conclusion** will draw together and summarise discussion of Mr Blair's exercise of the war prerogative in the Iraq affair covered in Chapters 1-5. The conclusions drawn will specifically address the three aims of this study outlined at the start of this Introduction.

Analytical Approach to be Adopted in this Study

The investigation of the prime ministerial war prerogative across Chapters 1-5 considers caselaw and mainstream academic views of their respective subject matter. Much leading British constitutional literature encourages one to see the constitution in terms of a legal framework of statute and common law supplemented by longstanding concepts such as the rule of law, conventions and the separation of powers etc. Such views tend to depict the constitution as a self-contained, self-regulating totality; essentially the definitive article. This has important implications for ongoing critique and reform of the British constitution. First it requires criticism of existing constitutional features to be couched in the terminology, framework and

values of these particular mainstream understandings. Second, any reforms are likely to be devised from *within* the existing system by utilising or modifying prevailing models.

In its investigation of the area, this study will employ two analytical devices to critically explore the mainstream approaches: first, it will identify and investigate divergences between the legal framework and political reality in this area and second, it will consider the role of boundaries between law and non-law in this area. These two analytical devices are drawn from themes that recur across the range of literature in this area and allow this study to look *behind* mainstream representations of the constitution where relevant. They encourage it to consider the extent to which these views may be outmoded, ineffective or even a contributory factor towards perceived inadequacies in the area of prime ministerial power. This method materially differs from general mainstream approaches which tend to attribute constitutional failures to particular weaknesses in the workings of existing models, failures which could therefore be rectified by mere modification. Instead, the two devices in the context of this study lead one to question whether central constitutional components such as the Crown and conventions could be the very source of certain problems in this area. Specifically, applying the analytical devices will allow this study to assess how constitutional components concerning the prime ministerial war prerogative may fail to adequately check political power, or even how they may actually provide *opportunities* for the exercise of power in politically or morally dubious ways.

The following preliminary explanations of the two analytical devices can be made:

[1] Divergence between constitutional framework and practice

The first analytical device adopted in this study will involve investigating the extent to which developments within the British constitution, such as the emergence of the premiership outlined above, may have resulted in a discrepancy between the traditional legal-constitutional framework and constitutional reality. A distinction will be made between the legal edifice concerning the war prerogative and its exercise by Mr Blair in practice. To what extent might there be a rupture between *de jure* and *de facto* understandings of the Prime Minister and the war powers he exercises, particularly over the broad Iraq period? To what extent may these legal and factual positions even oppose or inherently contradict one another?

Distinguishing between legal models and constitutional reality engenders an array of further supplementary issues: to what extent do legal labels and constitutional reality in this area accurately correspond? Have political or other developments outpaced the dominant legal models governing the Prime Minister and war, leaving constitutional lawyers tied to obsolete concepts that no longer reflect practice? What are the implications of such developments on the labels used by constitutional lawyers? Is the lawyer's view of the premiership and war power merely a misrepresentative facade? Considering these issues in relation to convention, Crown and the prerogative generally where relevant may yield deeper insights about the prime ministerial war power.

It is not the claim of this study that theory and practice must exactly correspond. Indeed, the existence of 'gaps' between the constitutional framework and political reality is an inherent aspect of most constitutions. Feldman has written:

*"In the UK's constitution, as in all constitutions, what appears on the surface is often an illusion, and what appears to be absent is sometimes present (although often in an unexpected form). In every constitution there are gaps between appearance and reality."*⁵⁵

Nevertheless, considering the accuracy of prevailing constitutional components (such as convention, Crown and prerogative) will lead to an assessment of their constitutional role and efficacy in relation to the premier and his war power. Furthermore, exploring the gaps between law and practice in this area can enhance understanding of, and afford deeper insights into, the former by revealing any assumptions or ideologies underlying it.

[2] The role of boundaries between law and non-law

A second analytical device adopted by this study will involve considering the role of legal boundaries in the area of the premiership and its war power where relevant. It will be seen that boundaries of various sorts are erected by the judiciary when considering legal issues relating to the war prerogative. This study will identify and investigate instances where such boundaries or limits are utilised by the judiciary. It will pay particular attention to the boundaries between law and non-law, between

⁵⁵ D Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)', C.L.J. 64(2), July 2005, pp 329-351, p 331.

legal issues or considerations which are the concern of the courts and wider non-legal matters (such as policy, politics or ethical issues) which are not. The following quote by Douzinas and Warrington epitomises this position:

*"Jurisprudence sets itself the task of determining what is proper to law and of keeping outside law's empire the non-legal, the extraneous, law's other. It has spent unlimited energy demarcating boundaries that enclose law within its sovereign terrain, giving it its internal purity, and its external power to hold court over other realms ... Jurisprudence's task is to impose upon law the law of purity and of order, of clear boundaries and of well-policed checkpoints."*⁵⁶

This study will consider the extent to which such a claim is accurate in relation to the prime ministerial war prerogative, a highly political and frequently contentious field where legal regulation is limited. What is the impact of judicially-drawn boundaries in this area and, vitally, what are the principles or reasons that inform where and how those boundaries are drawn? How consistent, how concrete or contingent, are their foundations? Contemplating these questions will provide vital deeper insights into the war prerogative and the effectiveness of judicial checks upon it. They prove particularly significant over the Iraq period which witnessed a number of high profile cases where various groups sought to legally challenge the deployment and related prerogative decisions. The challenge facing the judiciary in such cases is acknowledged by Jowell who has stated:

*"The appropriate balance between those decisions which are in the province of politicians and those which belong to the law is one of the most fundamental questions in all constitutional theory and has great practical importance."*⁵⁷

Discussion in subsequent chapters will examine how caselaw concerning the war prerogative has approached this most fundamental of questions.

⁵⁶ C Douzinas, R Warrington & S McVeigh, *Postmodern Jurisprudence, The Law of Text in the Texts of Law* (Routledge, London, 1991) p 25. See also M Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?' (1997) O.J.L.S. 17(4) pp. 551-586.

⁵⁷ Professor Jowell quoted by the Constitutional Affairs Committee, 'Constitutional Role of the Attorney General' HC (2006-7) 306, para 3, p 5.

Chapter One

Use of the War Power in Iraq:

Political Background

Before considering the constitutional issues concerning the Prime Minister and his war prerogative, an overview of the important events in the Iraq affair is essential at the outset. The factual account in this chapter will form the basis for wider discussion of the roles of convention, prerogative and Crown in the war prerogative in Chapters 2-5. This chapter therefore focuses upon the political and parliamentary context of Mr Blair's exercise of the war prerogative in relation to Iraq.

Part 1 of this chapter provides a detailed, descriptive account of the decision to conduct military action in Iraq, providing a comprehensive background chronology of the main political and constitutional events concerning the decision.¹ Drawing upon preceding discussion, Part 2 summarises the relevant constitutional issues that arose in the Iraq affair; subsequent chapters conduct detailed investigation of these matters in their constitutional context.

[1] Background to the Iraq ‘War’: Chronology

[1.1] Early 2002: Policy Towards Iraq Changes

The roots of the UK’s current military involvement in Iraq can be viewed in the first Gulf War in 1991 and the subsequent Operation Desert Fox in 1998.² Following the

¹ For a useful general overview see also Information Commissioner Decision Notice FS50165372 (19/2/09), paras 16-28.

² Operation ‘Desert Fox’ involved four days of air attacks upon Iraq undertaken by the UK and US between 16th and 20th December 1998. The operation was instigated as a result of Saddam Hussein’s expulsion of UN weapon inspectors in November 1997 and subsequent obstructions over the course of 1998; A Seldon, *Blair* (Free Press, London, 2005) pp 387-9; A Rawnsley, *Servants of the People, The*

9/11 terrorist attacks in New York there was a shift in UK government policy towards Iraq in early 2002.³ This shift towards stronger attempts to ‘enforce Iraqi disarmament’⁴ was a result of increased concerns based on intelligence assessments about the proliferation of nuclear and chemical weapons⁵ in Iraq⁶ and other countries.⁷

Coates and Krieger outline four related justifications for invading Iraq that were typically advanced by the UK and US governments from 2002. Those justifications included: (1) potential links between terrorist groups such as Al Qaida and the Iraqi regime under Saddam Hussein, (2) the dangers of allowing the Iraqi regime to develop weapons of mass destruction, (3) Iraq’s record as a ‘rogue’ state responsible for internal human rights abuses and invasions of neighbouring states and (4) the undermining of global governance caused by Iraq’s persistent breaches of UN resolutions.⁸ Coates explains that the weighting and emphasis of each of these justifications varied over the course of the Iraq war.⁹ A detailed exploration of these justifications is beyond the scope of this study.

Inside Story of New Labour (Penguin, London, 2001) ch 14. The aim of operation ‘Desert Fox’ was the containment of the Iraqi weapons program. No free-standing UN Security Council resolution was passed to specifically authorise Operation Desert Fox. Instead the UK and US relied on *United Nations Security Council Resolution 678* ((29 November 1990) UN Doc S/RES/678) which was passed prior to the 1991 Gulf War. Domestically, though decisions regarding the operation were made by ministers via prerogative, the House of Commons had given approval to use of military force if necessary in February 1998 (Hansard HC vol 307, cols 173-187 (24 Feb 1998)). Intermittent air strikes in Iraq continued across 1999, 2000 and 2001.

³ Report of a Committee of Privy Counsellors (chair: Lord Butler), ‘Review of Intelligence on Weapons of Mass Destruction’, HC (July 2004) 898, paras 257-258. See D Coates & J Krieger, *Blair’s War* (Polity Press, Cambridge, 2004) pp 27-33 for an outline of the US position.

⁴ *Butler Report*, ibid para 258.

⁵ Ibid para 257.

⁶ Ibid para 255.

⁷ Ibid para 256.

⁸ Coates & Krieger (n 3) ch 5. Another interesting justification for the Iraq invasion is explored by Naomi Klein who suggests that advancing the free-market democratic state model was an important motivating factor; N Klein, *The Shock Doctrine, The Rise of Disaster Capitalism* (Penguin, London, 2008), part 6, specifically pp 325-331.

⁹ See also Lord Alexander QC, ‘The pax Americana and the law’, Justice website (London, 14th October 2003) <<http://www.justice.org.uk/images/pdfs/Iraq-thePaxAmericanaandthelaw.pdf>> accessed 3rd April 2009

[1.2] April 2002 onwards: Cabinet Weakened

One critical constitutional development occurred in the lead-up to the Iraq decision; collective Cabinet responsibility weakened. Collective Cabinet responsibility is a constitutional convention that requires Cabinet to make important policy decisions collectively.¹⁰ Such decisions are binding on all government members.¹¹ Despite the *Ministerial Code* setting out specific provisions, the collective Cabinet responsibility convention is generally viewed as flexible.¹² This quality enabled it to be marginalised in the lead-up to the Iraq invasion. It appears that Cabinet was often bypassed as a decision-making body in the period from April 2002 leading up to the Iraq deployment.¹³ Evidence suggests that many important decisions regarding Iraq were made outside of Cabinet¹⁴ which inevitably acted to limit the Blair Cabinet's involvement in such decisions. This trend was confirmed by the findings of the July 2004 Butler Report which expressed concerns with the lack of collectivity in the government's formulation of Iraq policy.¹⁵ Leading commentator Hennessy concurs, claiming that the Iraq affair saw a 'systems failure' of Cabinet government.¹⁶ Chapter 3 conducts detailed investigation of the operation of collective Cabinet responsibility in the Iraq affair, drawing upon a range of vital evidence such as ministerial diaries, the Butler Report and leading literature.

Significantly, the weakening of collective Cabinet responsibility is arguably attributable in part to Mr Blair's use of the Cabinet chairmanship powers. As Prime Minister Mr Blair possessed powers to determine the Cabinet agenda, the papers that went before Cabinet and the frequency of its meetings, in addition to chairing and summing up those meetings.¹⁷ Over the course of his premiership, and particularly during the Iraq affair, Mr Blair exercised his chairmanship powers in a

¹⁰ Ministerial Code (Cabinet Office, July 2005) para 2(2)(a)
<http://www.CabinetOffice.gov.uk/media/CabinetOffice/propriety_and_ethics/assets/ministerial_code.pdf> accessed 16th August 2008.

¹¹ Ibid para 2(3)

¹² *Attorney-General v Jonathan Cape Ltd. & Others* [1976] Q.B. 752. Though there is essential agreement about the core tenets of collective Cabinet responsibility, uncertainty arose in this case as to its wider application and a range of opinions as to the scope of this convention created difficulties; see Lord Widgery, p 764.

¹³ *Butler Report* (n 3) para 609.

¹⁴ This evidence will be discussed in detail in Chapter 2.

¹⁵ *Butler Report* (n 3) para 611.

¹⁶ P Hennessy, 'Informality and Circumscription: The Blair Style of Government in War and Peace', *Political Quarterly*, 2005, Vol. 76(1), p 3, p 9.

¹⁷ *Halsbury's Laws of England* (4th edn, Butterworths, London, 1996) vol 8(2), paras 398, 405, 407, 408.

particularly distinctive way. Evidence discussed in Chapter 4 establishes that under Mr Blair's direction Cabinet meetings were frequently brief, informal and not subject to a detailed agenda.¹⁸ It furthermore suggests that in the lead-up to the Iraq deployment information-sharing within Cabinet was limited and papers were not circulated in advance of meetings. Vitally, there was a lack of substantive policy discussion in Cabinet; from April 2002 discussions regarding Iraq were taken by the Prime Minister and a small informal group of advisers outside of Cabinet and war Cabinet.¹⁹ Evidence indicates that ministers were not always privy to substantive discussions regarding Iraq and did not always have the necessary papers or information to assess the emerging situation. Though not necessarily undertaken in bad faith, the exercise of prime ministerial power in the way outlined above effectively contributed to the marginalisation of collective Cabinet responsibility. Chapter 4 details the prime ministerial prerogative powers, including his Cabinet chairmanship powers. It considers how Mr Blair's use of these powers may have impacted upon his exercise of the war prerogative in relation to Iraq.

[1.3] September 2002: Dossier Published

Over the course of 2002 questions surrounding potential military action in Iraq were widespread across the UK public and media.²⁰ In response to this on 3rd September 2002 the government commissioned a dossier to outline the threat posed by Iraq's weapons of mass destruction (WMD).²¹ The dossier was based on various existing intelligence assessments that had been previously produced by the Joint Intelligence Committee (JIC).²² The JIC took responsibility for authorship of the dossier.²³ The document, entitled '*Iraq's Weapons of Mass Destruction*' was published on 24th September 2002, the day Parliament was recalled. The Prime Minister made a statement to House of Commons introducing the report.²⁴

¹⁸ See Chapter 4, Part 2.2.

¹⁹ Seldon (n 2) 580.

²⁰ Butler Report (n 3) para 309.

²¹ Ibid para 290. Elsewhere the Butler Report confirms that the dossier was 'not explicitly intended to make a case for war'; para 315.

²² Ibid para 290.

²³ Ibid paras 320-321. "*The advantage to the Government of associating the JIC's name with the dossier was the badge of objectivity that it brought with it and the credibility which this would give to the document.*" para 323.

²⁴ Hansard HC vol 390, cols 1-155 (24 Sept 2002) specifically cols 3-4.

[1.4] November 2002 - March 2003: UN Negotiations

On 8 November 2002 United Nations Security Council passed *Resolution 1441*²⁵ unanimously. *Resolution 1441* stated that Iraq was in breach of its obligations to provide full disclosure and allow UN inspection of its weapons programmes under previous resolutions.²⁶ Furthermore it demanded that Iraq ‘co-operate immediately, unconditionally, and actively’ with inspections²⁷ or face ‘serious consequences’.²⁸ In a later legal challenge, CND claimed that the omission to include the term ‘all necessary means’ (terminology which includes the option of force) in *resolution 1441* was significant.²⁹ There had been much disagreement and negotiation between UN members over the precise wording of resolution 1441³⁰ and as a result it contained what Seldon terms ‘several fudges’. Different interpretations of the resolution’s meaning prevailed.³¹ The most problematic ambiguity related to the nature of the UN’s response in the event of a further Iraqi breach. Seldon writes: “*The end compromise [stated in the resolution] was that the Security Council would meet, but it remained unclear whether this would be a consultation meeting prior to war (the American view) or the forum to debate a second resolution (the French view). Herein lay the seed of the future battle*”.³²

It became clear that Iraq would fail to fully comply with resolution 1441 by late 2002.³³ The UK government began attempts to obtain support among UN members for a second resolution authorising military action. Ultimately this arduous task was made impossible by a number of factors including a lack of effort to build up UN support on the part of the US,³⁴ the claim by France, Germany and Russia that they would not allow a resolution authorizing force to pass³⁵ and a further French

²⁵ *United Nations Security Council Resolution 1441* ((8 November 2002) UN Doc S/RES/1441).

²⁶ Ibid pre-amble and para 1.

²⁷ Ibid para 9.

²⁸ Ibid para 13.

²⁹ *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister and others* [2002] EWHC 2777 (admin), [2002] All ER (D) 245 (Dec) para 10. See also *Alexander QC* (n 9).

³⁰ Seldon (n 2) 586.

³¹ Coates (n 3) 38.

³² Seldon (n 2) 587; J Kampfner, *Blair’s Wars* (Free Press, London, 2004) p 220. See also the comments of Sir George Young M.P. in the March 2003 parliamentary debate; Hansard HC vol 401, col 824 (18 Mar 2003).

³³ Seldon writes that Saddam ‘complied partially, thereby splitting the allies straight down the middle.’ ibid 587. Coates similarly writes: “*Inconclusive UN [weapons inspection] reports ... sent the USA off towards war but its critics off towards peace.*” (n 3) 40.

³⁴ Seldon, ibid 592.

³⁵ Coates (n 3) 41.

statement on 10th March that it would veto any second resolution.³⁶ At a press conference on 17th March the US reiterated its view that a second resolution was not necessary and had been pursued solely to assist allied countries to obtain public support for involvement.³⁷ Attempts to gain a second resolution were abandoned and no second resolution was obtained.

[1.5] March 2003: The Attorney General's Advice

Ongoing problems obtaining a second UN resolution caused problems for Mr Blair. At a meeting on 28th February 2003 the Attorney General, Lord Goldsmith, initially provided advice to the Prime Minister regarding the legality of undertaking military action without a second UN resolution, advice later confirmed in a formal minute on 7th March.³⁸ The Attorney-General's initial advice on this issue was qualified and reticent about military action, concluding that 'there would be no justification for the use of force against Iraq on the grounds of self-defence against an imminent threat'.³⁹ Though Goldsmith accepted that 'a reasonable case' could be made that military action would be authorised without a second resolution, he made a vital qualification to this point. The qualification was this: that proceeding without a second resolution and relying solely on resolutions 678 and 1441 "will only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity [to comply]. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-co-operation."⁴⁰ This initially private advice was later publicised in the Butler Report.⁴¹

On 11th March the Chief of Defence Staff, Admiral Sir Michael Boyce, indicated to the Prime Minister that the international lawfulness of any military action must be clearly

³⁶ Seldon (n 2) 591-2; Kampfner (n 32) 286-7.

³⁷ Coates (n 3) 41.

³⁸ Butler Report (n 3) para 378.

³⁹ Ibid para 374.

⁴⁰ *R (on the application of Gentle and another) v Prime Minister and others* [2006] EWCA Civ 1689, [2007] QB 689 CA, para. 16. The Attorney General's advice continued: "you will need to consider carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity."

⁴¹ Though the government initially opposed the release of this information; Hennessy (n 16) 8.

confirmed before he could order forces to take action.⁴² Vitally the Attorney General later changed his opinion regarding the international legality of military action. On 17th March, days after his initially sceptical advice, the Attorney-General produced advice indicating an alternative legal view.⁴³ His new advice (drafted by Professor Christopher Greenwood)⁴⁴ contained none of its earlier qualifications and claimed that ‘the authority to use force under resolution 678 has revived and so continues today’.⁴⁵ This new advice was provided to Parliament and Cabinet, the latter body meeting to discuss the emerging situation on 13th March,⁴⁶ and more significantly, on 17th March. The Attorney attended this later meeting and his amended advice was presented to ministers.⁴⁷ The Information Tribunal recently commented that “*it may have been that members of Cabinet without a legal background were inclined to rely on the Attorney’s [shorter and more certain] advice.*”⁴⁸

This apparent u-turn in legal advice has proved controversial and, in the words of the House of Lords Constitutional Select Committee, “*the differences [in advice] ... gave rise to speculation that the Attorney had been placed under political pressure to temper his opinion to align it with the government’s intentions.*”⁴⁹ This episode in the Iraq affair highlights the potential significance of another constitutional feature; namely that the Attorney-General is a government minister appointed by the Prime Minister. As Prime Minister, Mr Blair was able to exercise the Crown power to

⁴² *R (on the application of Gentle and another) v Prime Minister and others* [2008] UKHL 20, [2008] 1 AC 1356, para 46. See also Seldon (n 2) 596. A failure to obtain such confirmation would leave British troops potentially liable for war crimes.

⁴³ *Butler Report* (n 3) Annex D, 182. It seems that there were diverging views on this issue in government. Clare Short writes that ‘Foreign Office lawyers had disagreed on the legality of war under Resolution 1441’; *An Honourable Deception? New Labour, Iraq, and the Misuse of Power* (Free Press, London, 2005) p 174. See also P Sands QC, *Lawless World* (Penguin, London, 2006) pp 194-5.

⁴⁴ Vitally Robin Cook writes: “*It was not the Attorney General himself who drafted the new advice, as he invited a professor of international law to write the opinion for him. What made this procedure all the more curious is that the professor he chose, Christopher Greenwood, was one of a small minority of experts in international law who believed that an invasion would be legal without a further resolution and had already gone public with that view in The Times.*” Emphasis added. *The Point of Departure, Diaries from the Front Bench* (Pocket Books, London, 2004) p 344.

⁴⁵ *Butler Report* (n 3) Annex D, 182. For a detailed critique of the Attorney General’s second advice see Sands (n 43) 184-201, who has written: “*The argument is well spun and could, at a pinch, win the prize for the most plausible response to the question: what is the best possible argument to justify the use of force in Iraq in March 2003? But it masks a host of complex issues. It is a bad argument, and very few states and virtually no international lawyers see its merits.*” p 189. See also Alexander QC (n 9).

⁴⁶ Information Commissioner Decision Notice FS50165372 (19/2/09), para 21.

⁴⁷ Ibid para 23. The substantive content of these meetings is at present unknown for reasons to be outlined in Chapter 3, Part 3.

⁴⁸ *Cabinet Office and Dr. Christopher Lamb v Information Commissioner*, EA/2008/0024 & 0029 (27/01/2009) para 85.

⁴⁹ Select Committee on the Constitution, ‘Reform of the Office of Attorney General’, HL (2007-8) 93, para 14.

appoint and dismiss ministers, including the Attorney-General. The potential interrelation of this prerogative and the war power in the Iraq affair is discussed further in Chapter 4. Additionally the domestic legal significance of the Attorney's above advice will be discussed in Chapter 5.

[1.6] 18th March 2003: The Parliamentary Vote

Though the power to conduct military action or declare war lies in fact with the Prime Minister, parliamentary support for a deployment is politically vital.⁵⁰ However debate has surrounded whether parliamentary approval of war is required as a matter of constitutional convention.⁵¹ During the Iraq affair questions arose as to the precise role of Parliament in approving warfare, specifically whether such parliamentary approval required a debate or a more onerous formal vote on the matter.⁵² Chapter 3 outlines the attempts of government minister Robin Cook to obtain a substantive parliamentary vote and will detail the potential significance of the Iraq vote as a constitutional precedent.

Parliamentary approval was particularly vital in relation to Iraq because the decision to deploy was controversial and British public opinion was hostile to the idea.⁵³ Ultimately a Commons debate and substantive vote to determine whether troops should be deployed took place on 18th March 2003.⁵⁴ Extensive background negotiations were undertaken by ministers to ensure Labour backbench support in the lead-up to the vote.⁵⁵ There was clearly uncertainty among MPs (and indeed the wider populace) as to the international legality of conducting military operations in Iraq, a point made repeatedly in the Commons debate.⁵⁶ Nevertheless following

⁵⁰ Select Committee on the Constitution, 'Waging War: Parliament's Role and Responsibility', HL (2005-06) 236-I, para 14; *Cook* (n 44) 187-188.

⁵¹ To be discussed in detail in Chapter 2, Part 3.3.

⁵² To be discussed in detail in Chapter 2, Part 3.3.

⁵³ Between 750,000-1,000,000 people joined an anti-war protest in London on 15th February, the largest demonstration in British history. 'Million' march against Iraq war', *BBC Online* (London, 16th February 2003) <<http://news.bbc.co.uk/1/hi/uk/2765041.stm>> accessed 15th May 2008.

⁵⁴ *Hansard* (n 32). See also *Hansard* HC vol 400, cols 265-367 (26 Feb 2003).

⁵⁵ *Seldon* (n 2) 595-6; *Kampfner* (n 32) 306-7; P Cowley & M Stuart, 'Parliament: More Bleak House than Great Expectations' (2004) *Parl. Aff.* Vol 57, No 2, p 301-314, p 307.

⁵⁶ See *Hansard* (n 32) cols 792, 796, 880.

intensive discussions a motion in support of war was passed by majority of 396 to 217.⁵⁷

The parliamentary vote regarding military action in Iraq was viewed by some, for example Cook, as a constitutional victory in that it established Parliament's right to formally vote on such matters.⁵⁸ Nevertheless, the practical significance of the vote in the Iraq decision was arguably limited. The outcome approved military action and thus endorsed the Prime Minister's preferred exercise of the war power. This may have been partly attributable to two vital leverage devices utilised by Mr Blair, both involving a fusion of convention and prerogative. First, prior to the Iraq vote Mr Blair publicly stated that he would resign if he lost the vote.⁵⁹ This incident represented the functioning of two established constitutional features: first, a Prime Minister's power to advise the monarch to use Her prerogative to dissolve Parliament,⁶⁰ and second, the long-standing constitutional convention that a premier and his government must resign if they lose a vote of confidence in Parliament.⁶¹ The nature of this combination of convention and prerogative, and vitally its implications upon the war power in the Iraq affair are afforded further consideration in Chapter 4. A second integral point must also be noted; the defence prerogative which authorises the conduct of defence matters⁶² had already been exercised when Parliament voted on 18th March. The defence prerogative authorised the prior deployment of troops; forces had been installed and were awaiting orders near the Iraqi border when the parliamentary debate took place. The impact of this exercise of the defence prerogative upon the war prerogative in Iraq will also be investigated in Chapter 4.

[1.7] July 2004: Dossier discredited

Over a period of months questions were raised about the reliability of the content of the government's 2002 dossier, '*Iraq's Weapons of Mass Destruction*'. In early 2004 a committee of Privy Counsellors headed by Lord Butler was appointed to investigate the matter. The original JIC intelligence assessments which formed the

⁵⁷ Ibid cols 907-911.

⁵⁸ Cook (n 44) 190.

⁵⁹ Seldon (n 2) 597, 598; Coates (n 3) 61.

⁶⁰ To be discussed in Chapter 4.

⁶¹ See Chapter 3.

⁶² Halsbury's (n 17) para 886.

basis of the dossier did raise concerns about Iraq's attempts to develop WMD but the Butler Report found that the strength of their respective evidential bases varied greatly. Some of the intelligence assessments, particularly those relating to missile development, were based on strong evidence.⁶³ But it is clear that other intelligence was much weaker. For example, assessments from March 2002 presented some of the information in qualified, provisional terminology and specified potential deficiencies in sources.⁶⁴ Another assessment from August 2002 was identified by the Butler Report as lacking a solid factual basis and a balanced approach to analysis.⁶⁵ A further JIC assessment featured in the dossier indicated that select Iraqi WMD could be deployed within 45 minutes. This claim was also highlighted by the Butler committee as one that should have been stated in more accurate and careful terms.⁶⁶

The Butler Report confirmed that there was no evidence that government had embellished the dossier.⁶⁷ However the committee did conclude that in its translation from JIC assessments to the dossier, certain qualifications to the information were 'lost' and the "*language in the dossier may have left readers with the impression that there was fuller and firmer intelligence behind the judgements than was the case.*"⁶⁸ The report further identified a degree of disparity between the motives of the government and JIC:

*"The Government wanted an unclassified document on which it could draw in its advocacy of its policy. The JIC sought to offer a dispassionate assessment of intelligence and other material on Iraqi nuclear, biological, chemical and ballistic missile programmes."*⁶⁹

Ultimately the Butler committee concluded that in these circumstances publication of the dossier in the JIC's name 'had the result that more weight was placed on the

⁶³ "We have examined the intelligence underpinning these judgements on missile development and found it substantial." *Butler Report* (n 3) para 281. Elsewhere the report stated: "there was strong evidence of continuing work on ballistic missiles." para 306(c).

⁶⁴ *Ibid* paras 270–281.

⁶⁵ "The JIC made clear that much of the [August] assessment was based on its own judgement ... But we were struck by the **relative thinness of the intelligence base** supporting the greater firmness of the JIC's judgements in Iraqi production and possession of chemical and biological weapons, especially the **inferential nature of much of it**. We also noted that the JIC **did not reflect in its assessment**, even if only to dismiss it, material in one of those reports suggesting that most members of the Iraqi leadership were not convinced that it would be possible to use chemical and biological weapons." Emphasis added. *Ibid* para 304.

⁶⁶ *Ibid* para 509, 511.

⁶⁷ *Ibid* para 310.

⁶⁸ *Ibid* chapter 8 conclusions, para 33. Para 34 continues: "the limitations of the intelligence were not made sufficiently clear in the dossier."

⁶⁹ *Ibid* para 31, 32. See also paras 325-327 of main report.

intelligence than it could bear'.⁷⁰ A 2003 Foreign Affairs Select Committee additionally concluded that the Prime Minister's original presentation of the dossier to Parliament 'misinterpreted its status and thus inadvertently made a bad situation worse'.⁷¹

[1.8] March 2008-Present: Military Involvement in Iraq

The bombing of Iraq began on 20th March and UK troops crossed the border into Iraq on 21st March.⁷² UK and US forces achieved victory within a month.⁷³ Subsequent instability and violence arose in Iraq following the invasion⁷⁴ and this led to ongoing UK military involvement beyond the end of Blair's premiership in June 2007. No weapons of mass destruction have yet been found in the country.⁷⁵

Subsequent UN resolutions were passed authorising creation of a multi-national force in October 2003⁷⁶ and affirming sovereignty to the Iraqi Interim Government in June 2004.⁷⁷ The official withdrawal of British troops from Iraq began in late March 2009, with US troops to follow in late 2011.⁷⁸ Nevertheless over the course of engagement in Iraq strong opposition has continued in the UK and internationally,

⁷⁰ Ibid chapter 8 conclusions, para 35. A similar finding was made by a parliamentary select committee: "We conclude that the 45 minutes claim did not warrant the prominence given to it in the dossier, because it was based on intelligence from a single, uncorroborated source. We recommend that the Government explain why the claim was given such prominence." House of Commons Foreign Affairs Committee, 'The Decision to go to War in Iraq' HC (2002-03) 813-I, p 4.

⁷¹ The full paragraph reads: "We further conclude that by referring to the document on the floor of the House as 'further intelligence' the Prime Minister – who had not been informed of its provenance, doubts about which only came to light several days later – misrepresented its status and thus inadvertently made a bad situation worse." Ibid 5.

⁷² Coates (n 3) 61.

⁷³ Seldon (n 2) 597-8.

⁷⁴ For an interesting argument as to the reasons why this occurred see Klein (n 8).

⁷⁵ Butler Report (n 3), paras 388-397. The Butler Report states: "We conclude that it would be a rash person who asserted at this stage [July 2004] that evidence of Iraqi possession of stocks of biological or chemical agents, or even of banned missiles, will never be found." para 392. However, it does also later state: "From the evidence that has been found ... it appears that prior to the war the Iraqi regime ... did not, however, have significant - if any - stocks of chemical or biological weapons in a state fit for deployment, or developed plans for using them." para 397.

⁷⁶ United Nations Security Council Resolution 1511 (16 October 2003) UN Doc S/RES/1511.

⁷⁷ United Nations Security Council Resolution 1546 (8 June 2004) UN Doc S/RES/1546.

⁷⁸ 'UK troops begin Iraqi withdrawal', BBC Online (London, 31st March 2009)

<<http://news.bbc.co.uk/1/hi/uk/7973403.stm>> accessed 5th May 2009; 'UK combat operations end in Iraq', BBC Online (London, 30th April 2009) <<http://news.bbc.co.uk/1/hi/uk/8026136.stm>> accessed 5th May 2009.

critics claiming that the invasion constituted a crime of aggression in international law.⁷⁹

On 15th June 2009 Prime Minister Gordon Brown announced to Parliament that he was ordering an independent inquiry into the Iraq affair to be undertaken by a committee of Privy Counsellors chaired by Sir John Chilcot.⁸⁰ The inquiry is charged with the specific objective of identifying lessons to be learnt from the eight-year period of British involvement in Iraq. The inquiry was initially to be held in private, though following widespread criticism most of the proceedings will now be public.⁸¹ Recent Lords⁸² and Commons⁸³ debates have highlighted other concerns about the inquiry, including its predicted year-long timescale and the fact that it was originally not to apportion any blame for the Iraq affair.

[2] Relevant Constitutional Issues Identified

It is clear from the preceding discussion that a combination of prime ministerial-related conventions and prerogatives played a subtle but significant role in the exercise of the war prerogative in the Iraq affair. The specific operation and interaction of these constitutional components, as well as their cumulative impact upon the checks and balances regulating the premier's war prerogative in the Iraq deployment will be considered in Chapters 3 and 4.

Discussion in this chapter has identified a number of constitutional conventions that played a role in the use of the war prerogative in Iraq: first, collective Cabinet responsibility which required the warfare decision to be made by Cabinet collectively; second, the potential 'convention' that Parliament must vote to approve military

⁷⁹ Rome Statute of the International Criminal Court, Article 5. A detailed discussion of this issue of international law is beyond the scope of this study.

⁸⁰ Hansard HC vol 494, cols 23-24 (15 Jun 2009).

⁸¹ P Webster & M Evans, 'Gordon Brown forced into Iraq inquiry secrecy climbdown', *Times Online* (London, 19th June 2009) <<http://timesonline.co.uk/tol/news/politics/article6528096.ece>> accessed 24th June 2009; K Sengupta, 'Chilcot backs public hearing on Iraq', *The Independent website* (London, 23rd June 2009) <<http://www.independent.co.uk/news/uk/politics/chilcot-backs-public-hearing-on-iraq-1714129.html>> accessed 24th June 2009.

⁸² Hansard HL vol 711, cols 1226-1264 (18 Jun 2009). See specifically the views of Lord Butler at cols 1244-1246.

⁸³ Hansard (n 80) cols 895-901 (24 Jun 2009).

action. Chapter 3 will investigate in detail these constitutional conventions and others of relevance that impacted upon Mr Blair's exercise of the war prerogative in Iraq. From the account in Part 1 it is also clear that a number of prime ministerial prerogative powers may have played a material role in Mr Blair's exercise of the war prerogative specifically. In addition to the war power, four main prerogatives have emerged as potentially significant in some way to the Iraq deployment: first, the premier's powers of Cabinet chairmanship; second his power to appoint and dismiss ministers, particularly the Attorney General; third his power to request that the monarch dissolves Parliament; and fourth, the defence prerogative which authorised the deployment of troops prior to the parliamentary vote. Chapter 4 will conduct in-depth discussion of these prerogative powers and their operation in the Iraq war decision. Finally, though the factual account provided in this chapter entails little discussion of '*the Crown*', Chapters 2-4 demonstrate that the concept does occupy a central role in the office of Prime Minister, its powers and the war power itself. The relative silence of '*the Crown*' in this chapter reflects the fact that as a concept it appears to have little direct bearing upon political reality, though closer scrutiny of the British constitution reveals it as immensely important to the premiership and its war power both culturally, structurally and legally; an initial investigation of this concept is therefore necessary.

Chapter Two

The Crown and Prime Minister

A variety of prerogatives, including the war power, are exercised by the Prime Minister.¹ At law ‘the Crown’ is the source of these prerogative powers. The powers vest in the monarch by virtue of Her being the embodiment of the Crown,² yet Chapter 3 will establish that a network of non-legal conventions alters legal appearances by requiring the monarch to exercise those powers according to the advice of the Prime Minister and Cabinet. This places these Crown powers in the *de facto* control of elected ministers.

The Crown is of vital importance to the subject matter of this study in two main respects. First it demonstrates the inherent and continued influence of monarchy in the office of Prime Minister and its prerogative powers. Second an understanding of the Crown and its presence at the apex of the legal framework of the British constitution is important in order to understand how political practices concerning the premier and war power might diverge from the legal model that governs them. A general understanding of the Crown itself is thus necessary at the outset.

The Crown is an arcane concept with a variety of meanings across a range of different contexts. For example, the definition of ‘the Crown’ in *Halsbury’s Laws of England* provides no less than three potential meanings,³ and judgments in the few leading cases which have considered the nature of ‘Crown’ continue this trend.⁴ The

¹ To be discussed fully in Chapter 4.

² “‘Her Majesty’ in constitutional legal usage ... generally personifies the powers of ‘the Crown’”. *Town Investments Ltd v Department of the Environment* [1978] AC 359 HL, Lord Simon, p 397.

³ “The term ‘the Crown’ has a number of meanings. Historically it referred to the monarch in whom were united executive, legislative and judicial functions. Thus it may be used to refer to the person of the monarch, although this is less commonly used in modern parlance. More frequently the Crown refers to the executive or government. ... However, the term ‘the Crown’ may also be used to apply to an officer or servant of the Crown, or to ‘a minister acting in official capacity.’” *Halsbury’s Laws of England* (4th edn, Butterworths, London, 1996) vol 8(2), para 353.

⁴ The approach is exemplified by the dissenting judgment of Lord Morris in *Town Investments* (n 2): “The expression “the Crown” may sometimes be used to designate Her Majesty in a purely personal capacity. It may sometimes be used to designate Her Majesty in her capacity as Head of the Commonwealth. It may sometimes be used to designate Her Majesty in her capacity as constitutional monarch of the United Kingdom. ... The expression may sometimes be used in a broad sense in reference to the functions of government and the public administration.” p 393.

result is that “*while the Crown may be at the heart of the constitution, the nature of the Crown and its powers remain shrouded in uncertainty and continue to generate controversy.*”⁵ Despite the cumulative contributions of judges and theorists over the course of decades, there remains no one definitive understanding of what ‘the Crown’ within the British constitution actually is.

This chapter considers the role of ‘the Crown’ with specific reference to the Prime Minister and his prerogatives. It starts by considering three of the interchangeable and overlapping meanings which it is generally afforded: monarchy, government and state. It then considers the role of the Crown within the legal system. In light of these discussions Part 3 makes some preliminary observations regarding the relationship between the Crown and premier, before proceeding to analyse the potential disparities between law and reality in the area. This forms an important basis for understanding of the prime ministerial office and the exercise of his powers in the Iraq affair outlined in Chapter 1, and is also relevant to understanding judicial approaches to the war power discussed in Chapters 4 and 5.

[1] The Three Meanings of ‘The Crown’

Constitutionally, the Crown is a multi-faceted concept that appears to have three potential meanings. All three usages must be understood before investigating the relationship between it and the Prime Minister.

[1.1] The Crown as Monarch

The first and most basic meaning of the term ‘Crown’ is that of the monarchy within the British constitution. This use draws upon the symbolic connection between the Crown and its royal wearer. Wade subscribes to this narrow view, stating that “*in*

⁵ M Sunkin & S Payne (eds), *The Nature of the Crown, A Legal and Political Analysis* (Oxford University Press, Oxford, 1999) 1.

truth, ‘the Crown’ means simply the Queen.”⁶ In its monarchical sense the Crown is viewed as a corporation sole, i.e. “*a body politic having perpetual succession constituted in a single person*” which has a double legal capacity, both corporate and individual.⁷ Nevertheless, the view of ‘Crown’ as monarchy does not appear to have been widely adopted in caselaw in this area. Though the monarchy may be seen as coming within the ambit of ‘the Crown’ or as being just one of many potential meanings of the term,⁸ it has generally not been employed to denote the Queen exclusively.

In the earliest period of British constitutional history the individual monarch was absolute and the source of all authority: “*Historically, the principal source of legislative, executive and judicial power was the monarch and it still is the case that the exercise of many of these powers is carried out in the name ... of the monarch.*”⁹ The term ‘Crown’ almost certainly developed to differentiate between the king acting in his private affairs and his public duties¹⁰. However, at law, no distinction was made between his person and the throne he held, as stated in *Calvin’s Case*.¹¹ The monarch is the Crown personified¹² and thus “*the concept of the Crown cannot be disentangled from the person of the monarch*”.¹³ This is evidenced by the rules of succession to the throne. In legal terms the monarch never dies¹⁴ and “*in legal theory the monarch is regarded as immortal and there is no moment in which the throne is vacant.*”¹⁵ Brazier writes:

⁶ W Wade, ‘Crown, Ministers and Officials: Legal Status and Liability’ in *Sunkin & Payne* (n 5) 24.

⁷ *Halsbury’s* (n 3) vol 9(2), para 1111.

⁸ See Lord Morris in *Town Investments* (n 2); *Re M (On Appeal from M v Home Office)* [1994] 1 AC 377 (HL) where Lord Templeman stated “*The expression ‘the Crown’ has two meanings; namely the monarch and the executive.*” p 395.

⁹ *Halsbury’s* (n 3) para 15.

¹⁰ “*‘The Crown’, was no doubt a convenient way of denoting and distinguishing the monarch when doing acts of government in his official capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will.*” Lord Diplock, *Town Investments* (n 2) 380.

¹¹ (1608) 7 Co. Rep. 25 a, 77 ER 1. “*It is true that the King hath two capacities in him: one a natural body, being descended of the blood Royal of the realm; and this body is of the creation of Almighty God, and is subject to death, infirmity, and such like; the other is a politic body or capacity, so called, because it is framed by the policy of man (... a mysticall body;) and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy ... The natural person of the King (which is ever accompanied with the politic capacity, and the politic capacity as it were appropriated to the natural capacity)*”. p 388-9.

¹² *Town Investments* (n 2) 397.

¹³ M Loughlin, ‘The State, the Crown and Law’ in *Sunkin & Payne* (n 5) pp 58-9.

¹⁴ *Halsbury’s* (n 3) vol 12(1), paras 7, 11; vol 8(2), para 40.

¹⁵ *Ibid*, vol 12(1), para 11.

*"A demise of the Crown occurs on the death of the monarch or on ... abdication. On either event the Crown passes immediately to the next person in line who is qualified to receive it. ... There is no interregnum: the king never dies"*¹⁶

So upon the death of a monarch, the Crown passes to His successor, thus clearly following rules of inheritance which treat it as a transferable entity. Viewing the Crown in this way has enabled the system of hereditary monarchy to continue at law, unchanged for centuries; it has continued largely intact and has not been subject to major substantive reform for much of the later twentieth century.¹⁷

As monarch, the Queen is ceremonial head of state. In Bagehot's terms she forms "*the head of the dignified part of the Constitution*",¹⁸ forming a convenient window dressing for working government. 'The Crown', he maintained, is the 'fountain of honour'¹⁹ suggesting perhaps, that 'the Crown' is the source of monarchical status and dignity as well as the prerogative powers at law. The common law maxim that 'the Queen can do no wrong'²⁰ is consistent with such a view; the Crown bestows personal legal immunity upon the monarch, effectively placing Her beyond law.

Vitally, in addition to bestowing prerogative powers, it appears that the Crown bestows legal sovereignty; it is the very source of sovereignty. Constitutionally, the term 'sovereignty' is used in respect of Parliament because it enacts the supreme source of law in the country.²¹ Yet things are not quite as they appear. The term '**sovereignty**' has inherent monarchical associations and historically it was the King who enjoyed unbridled sovereignty by virtue of his law-making powers. Over a period of centuries, including the Glorious Revolution in 1688, sovereignty gradually transferred to Parliament. Yet Parliament itself is not technically sovereign; at law it is referred to as 'the Queen in Parliament' (i.e. the Crown in Parliament). The position is set out by *Halsbury's* which states: "*the Crown may not exercise primary legislative powers except with the consent of Parliament.*"²² So the Crown is actually the source of these primary legislative powers and Parliament is legally sovereign by virtue of the Crown's occupation of it. "*The Crown is ... a necessary party to primary*

¹⁶ R Brazier, 'A British Republic', C.L.J. 61(2), July 2002, pp 351-385, p 353.

¹⁷ R Brazier, 'Legislating About the Monarchy', C.L.J. 66(1), March 2007, pp 86-105.

¹⁸ W Bagehot, *The English Constitution* (Collins, London, 1963) p 66.

¹⁹ *Ibid* p 66.

²⁰ *Halsbury's* (n 3) vol 12(1) para 48.

²¹ *Ibid* para 232. But note the influence of *R v Secretary of State for Transport, ex parte Factortame Limited* (No. 2) [1991] 1 AC 603 (HL).

²² *Halsbury's* (n 3) para 15.

United Kingdom legislation, and neither House of Parliament ... has any power of making primary legislation without the Crown.”²³ The concept of Crown as monarch is therefore the root of both prerogative and statutory power in law, an arrangement somewhat reminiscent of the age of Divine Right. One may question why or how this antiquated arrangement which positions ‘Crown’ as the source of legislative power has persisted. Gladstone’s explanation of its endurance is thus: “*The ‘Crown’ (or Queen) in Parliament has survived as a formula **because** rather than in spite of its ultimate meaninglessness: it has not so far been in anybody’s interest to clarify it. There has been no constitutional crisis severe enough to test it.*”²⁴

[1.2] The Crown as Government

In recent decades the term ‘the Crown’ has come to be used as a generic term to describe government. Much government activity is conducted on behalf of the Crown using its prerogatives and thus the two have become synonymous. This meaning uses ‘Crown’ in its widest sense to encompass central government (including the monarch). For example, writing in 1919, Laski used the term in this expansive sense to encompass the entire executive limb:

“Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with the money bags of the State behind them.”²⁵

This ‘governmental’ meaning of Crown entails viewing its status as a corporation aggregate rather than sole, that is as a “*collection of individuals united into one body ... having perpetual succession under an artificial form*”,²⁶ and able to have only one legal capacity; corporate.

In recent years the governmental definition of the Crown has gained some legal support. For example, *Halsbury’s* puts forward the concept of ‘Crown’ as broadly

²³ Ibid para 202.

²⁴ Emphasis added. D Gladstone, written evidence in Public Administration Select Committee, ‘Taming the Prerogative: Strengthening Ministerial Accountability to Parliament’, HC (2003-04) 422, Ev 5.

²⁵ H Laski, ‘The Responsibility of the State in England,’ (1919) 32 Harv.L.R. 447, p 472.

²⁶ *Halsbury’s* (n 3) vol 9(2) para 1109.

meaning central government.²⁷ Similarly, this meaning was adopted by certain Law Lords in *Town Investments*,²⁸ a leading case involving a dispute over a lease.²⁹ The case required the Law Lords to decide whether ‘the Crown’ or the relevant minister as ‘Secretary of State’ had entered into the agreement. In their determination of the case the Lords considered whether the Crown was a corporation ‘sole’ (consistent with its monarchical meaning) or ‘corporation’ aggregate (consistent with Crown as government).³⁰ If the latter view was adopted then ‘the Crown’ would be deemed tenant and occupier of the premises. Unfortunately *Town Investments*, was inconclusive in establishing which corporate view of ‘the Crown’ should apply. There was disagreement between the Law Lords as to which type of corporation, sole or aggregate, best represented the Crown and no conclusive judicial decisions have subsequently clarified the issue. The judgment of Lord Simon in *Town Investments* adopted the wider view of Crown as government:

“‘The Crown’ and ‘Her Majesty’ are terms of art in constitutional law. They correspond, though not exactly, with terms of political science like “the Executive” or “the Administration” of “the Government”, barely known to law, which has retained the historical terminology.”³¹

Lord Simon’s definition indicates that despite the Crown’s monarchical heritage and historical terminology, it represents modern government. This use of Crown arguably reflects the fact that government now effectively runs the country using Crown powers and in the name of the Crown. Lord Simon was firmly of the opinion that the Crown is aggregate in nature. He maintained that domestically “a minister or Secretary of State is an **aspect** or **member** of the Crown”,³² and that therefore a

²⁷ “The terms ‘government’ or ‘Her Majesty’s government’ embrace the whole of central government and they are generally coterminous with ‘the Crown’.” Halsbury’s (n 3) para 354.

²⁸ *Town Investments* (n 2).

²⁹ The dispute occurred when landlords wanted to substantially increase rent on London premises. The premises were rented and used by a government department. Counter-inflation laws had been passed which restricted rent increases on any premises occupied for ‘business purposes’. The landlords claimed that this legislation did not apply to the premises as they were not being used for ‘business purposes’, thus enabling them to substantially increase the rent payable. In its resolution of the case the Lords had to consider who was tenant and occupier of the premises: ‘the Crown’ or the relevant Secretary of State. It also had to consider whether occupation was for ‘business purposes’. The Lords allowed the government’s appeal and held that Crown (as a general term for government) was tenant and occupier. Furthermore Crown did occupy premises for business purposes. The counter-inflation laws thus applied to prevent the proposed rent increases.

³⁰ The case report notes that *Crown Proceedings Act 1947* points were not raised by the executive respondents in this case.

³¹ *Town Investments* (n 3) Lord Simon, p 398. Though also see the judgment of Lord Morris who rejected this view and preferred to see the Crown as a corporation sole; pp 393-395.

³² Emphasis added. Ibid 400.

clear distinction between them could not be maintained.³³ A corporation aggregate headed by the Queen provided the ‘best fit’ for representing the contemporary Crown.³⁴ Along with the majority, Lord Simon held ‘the Crown’ to be tenant.

Lord Diplock’s³⁵ consideration of the Crown was arguably the most interesting of the Law Lords’, though it appears *prima facie* paradoxical. He maintained that ‘the Crown’ is legally a corporation sole (i.e. adopting the monarchical meaning), though he provided no specific authority for this point.³⁶ Yet Lord Diplock also found that ‘the Crown’ was tenant through the minister’s actions, specifically dismissing the argument that the minister could have been acting in a corporate capacity as ‘Secretary of State’ distinct from the Crown.³⁷ These two positions appear diametrically opposed; a corporation sole is constituted in a single individual so how could the minister’s actions have bound a ‘Crown’ of this nature which did not encompass him? Lord Diplock’s resolution of this issue will be afforded further consideration in Part 4.

The prevailing uncertainty as to the precise nature of the Crown was exacerbated in ‘Re: M’,³⁸ a later House of Lords case which involved Home Secretary Kenneth Baker removing an asylum applicant contrary to an undertaking that had been made to court confirming that no removal would be made. The issue to be decided was whether the Home Secretary was in contempt of court and if so, in what capacity.

The dilemma in ‘M’ was that if the Lords strictly followed the finding in *Town Investments* (i.e. that the actions of a minister could technically represent the actions of ‘the Crown’), the legal position would be untenable due to an apparent conflict between two irreconcilable legal positions: firstly, the common law maxim that the Queen can do no wrong (Crown immunity)³⁹ and secondly, in accordance with the

³³ To illustrate his point, Lord Simon drew an analogy with a hand and pen: “It is true to say: ‘My hand is holding this pen.’ But it is equally true to say – it is another way of saying: ‘I am holding this pen.’ What is nonsensical is to say: ‘My hand is holding this pen as my agent or trustee for me.’” Ibid.

³⁴ “The departments of state including the ministers at their head … are then themselves members of the corporation aggregate of the Crown.” Ibid.

³⁵ With which Lord Kilbrandon concurred, ibid 401.

³⁶ Ibid 384.

³⁷ Lord Diplock stated “the fallacy in this argument [that the minister was acting in a corporate capacity as Secretary of State] is that it is not private law but public law that governs the relationships between Her Majesty acting in her political capacity, the government departments among which the work of Her Majesty’s government is distributed, the ministers of the Crown … and civil servants.” Ibid 380.

³⁸ *Re M* (n 8).

³⁹ See comments of Lord Templeman, ibid, 395.

Diceyan rule of law,⁴⁰ the notion that government ministers should be accountable for legal transgressions.⁴¹ Yet to find the minister, as part of the wider ‘Crown’, in contempt would be to undermine an ancient common law maxim.⁴²

Unable to make a finding of contempt against Kenneth Baker personally,⁴³ the finding was ultimately made against him in his official capacity as Secretary of State.⁴⁴ In his leading judgment Lord Woolf claimed that ‘the Crown’ could be described as a corporation sole or aggregate:

[A]t least for some purposes the Crown has a legal personality. ... The Crown can hold property and enter into contracts. On the other hand, even after the [Crown Proceedings] Act of 1947, it cannot conduct litigation except in the name of an authorised government department or, in the case of judicial review, in the name of a minister.”⁴⁵

Here Lord Woolf seemed to claim that ‘the Crown’ can vary in corporate nature depending upon the legal contexts in which it operates. Or, in alternative terms, the monarchical corporation sole meaning of Crown would sometimes be appropriate and on other occasions the wider aggregate governmental meaning would be appropriate. As a result, the Crown could be afforded its wide governmental definition (thus encompassing ministers) in some respects but afforded its narrow monarchical meaning (thus excluding government ministers) in others. No further guidance was provided regarding the precise circumstances where each respective definition would apply.

⁴⁰ “We mean ... when we speak of the “rule of law” ... [that] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”. AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan, London, 1985) p 193.

⁴¹ To include a government minister within Crown immunity would offend democratic principles and the rule of law and “establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War”. *Re M* (n 8) 395.

⁴² Tomkins argues that the inherent difficulties in *M v Home Office* were primarily due to the fact that both the courts and ministers derive their authority from the Crown. A Tomkins, *Our Republican Constitution* (Hart Publishing, Oxford, 2005) p 118-121.

⁴³ Lord Templeman declared: “I am satisfied that Mr Baker was throughout acting in his official capacity, on advice which he was entitled to accept and under a mistaken view as to the law. In these circumstances I do not consider that Mr Baker personally was guilty of contempt.” *Re M* (n 8) 396.

⁴⁴ “I do not believe there is any impediment to a court making such a finding [of contempt], when it is appropriate to do so, not against the Crown directly, but against a government department or a minister of the Crown in his official capacity.” Lord Woolf, *ibid* 424.

⁴⁵ *Ibid*, 424.

[1.3] The Crown as ‘State’

The third potential meaning of ‘the Crown’ is as a British alternative to the concept of ‘state’. This is not formally acknowledged as a free-standing meaning of the term though, as discussed in Chapter 4, ‘the Crown’ represents the UK state at international level and foreign affairs are conducted in its name.⁴⁶

Unlike its European counterparts the British constitution never adopted or developed a concept of ‘state’.⁴⁷ Marshall writes that the “*technical status [of ‘State’] in the actual fabric of English law is notoriously uncertain. The Crown is known to the law. ... But the State, on the face of it, seems to be missing.*”⁴⁸ Akin to the notion of ‘state’, the Crown has persisted as the central unifying component reflecting the continuity and endurance of the British constitution. Instead of the more modern concept of ‘State’, the Crown remains, and with it the vestige of absolute monarchy.

Of course, the concept of ‘State’ is itself vested with numerous meanings,⁴⁹ but the view of ‘State’ as “*an abstract entity above and distinct from both government and governed*”⁵⁰ displays certain characteristics comparable to the British Crown. The latter, with its monarchical associations, has been seen to represent a national ideal, the ‘soul’ of the state and a source of authority over society which transcends party politics. Nevertheless, Loughlin writes that “*the Crown has, in practice, provided a poor substitute for the idea of the State.*”⁵¹ He continues that though the Crown can act as a metaphor representing “*the power and majesty of the community, ... thereafter [it]... stubbornly refuses to do much real work*”,⁵² thus questioning the efficacy of the Crown as a legal concept.

⁴⁶ Halsbury’s (n 3) para. 801. Also see the comments of Lord Denning in *Blackburn v Attorney-General* [1971] 1 W.L.R. 1037, p 1040.

⁴⁷ N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999) p 28.

⁴⁸ G Marshall, *Constitutional Theory* (Clarendon Press, Oxford, 1971) p 15.

⁴⁹ Marshall considers three notions of ‘State’: (1) a civil state, estate, order or condition (as compared to a military state), (2) a nation or people considered as a unit, (3) the whole or part of government machinery. Ibid pp 15-6.

⁵⁰ Shennan quoted by Loughlin in *Sunkin & Payne* (n 5) p 40.

⁵¹ Ibid 33.

⁵² Ibid 57.

[2] The Crown and Law

Despite ambiguities regarding its precise definition, the proposition that the Crown is somehow central to law in the British constitution cannot be doubted. Consideration of the intimate link between Crown, monarch and law is necessary to inform further discussion of the Crown and Prime Minister in Part 3.

[2.1] The Apex of Legal Power

The Crown represents the point of fusion of the three state limbs; legislative, executive and judicial, and “*the greater part of the machinery of central government is still regarded, historically and substantially, as an emanation from the Crown*”.⁵³ This foundational feature of the Crown means that it is ultimately the source of *all* Cabinet legal authority in two ways: either directly by prerogative or indirectly by statute.

First it has been established that the executive prerogative powers to be outlined in Chapter 4 emanate from the Crown which, at law, is the fountain of such powers. It has also been explained that these powers, as part of ‘the Crown’ title, legally vest in the monarch of the day but are exercised upon the advice of ministers according to convention.⁵⁴ So at law the Crown provides the Prime Minister (and his ministers) with prerogative powers. Second Part 1.1 of this Chapter has shown that the legislative ‘sovereignty’ of Parliament is actually a result of the presence of the Crown in Parliament. A valid Act of Parliament, the supreme source of authority in Britain, requires royal assent (i.e. the approval of the Crown) to be legitimate, though convention reduces this monarchic power to a mere passive role by requiring Her assent to any bill that has been passed by Parliament.⁵⁵ Because government has gradually come to dominate the House of Commons, it has the capacity to instigate

⁵³ *Halsbury’s* (n 3) para 15.

⁵⁴ To be discussed in Chapter 3.

⁵⁵ *Halsbury’s* (n 3) para 17. Lord Diplock in *Town Investments* (n 2) explains the position in the following terms: “*We very sensibly speak today of legislation being made by Act of Parliament – though the preamble to every statute still maintains the fiction that the maker was Her Majesty and that the participation of the members of the two Houses of Parliament had been restricted to advice and acquiescence.*” Emphasis added. p 381.

and pass legislation and essentially steer the legislative programme of Parliament. This is particularly so in times of a strong government majority in the Commons, as was the case for Mr Blair's first two parliamentary terms.⁵⁶ So at law the Crown in Parliament also provides ministers with statutory powers. This could lead one to question the extent to which reform to the war prerogative⁵⁷ will alter the position in the legal edifice. Though statutory or other reform of the war power would formally shift the power to approve military action into parliamentary hands, it has been established that this would still in essence place the power in the control of the Crown (in Parliament), thus remaining influenced by the notion of monarch.

In summary, “*legally, an unquantifiable amount of power remains in the Crown (as part of the Crown in Parliament), together with all the authority that remains legally vested personally in the monarch by the royal prerogative.*”⁵⁸ These ‘unquantifiable’ legal powers of prerogative and statute authorise Cabinet action in a vast range of areas and at law they emanate from a single source, the Crown. So it is evident that the legal framework around which government power is organised is structured in an autocratic, pyramidal formation with one individual, the monarch, at its centre.

[2.2] The Role of Monarch in Law

Chapters 3 and 4 demonstrate the extent to which the premiership and its powers are closely entwined with monarchy. In turn the monarch as personification of the Crown is central to and therefore closely interwoven with law. The link between law and monarch can be seen in early cases such as *Calvin’s Case* where the court referred to “*the law itself so inseparably and individually annexed to his Royal person*”.⁵⁹ Yet such archaic imagery and obsequiousness continue to the present day. *Halsbury’s* states, in somewhat grandiose terms, that “*the law of the constitution clothes the person of monarch with supreme sovereignty and pre-*

⁵⁶ In the 1997 election the Labour Party won 417 seats in the House of Commons (a ‘landslide’ majority of 179). In the 2001 election Labour won 413 seats (maintaining a very comfortable majority of 165). In 2005 the government won 356 seats and saw the Commons majority reduced to 67.

⁵⁷ To be discussed in Chapter 4, Part 3.2.

⁵⁸ *Brazier* (n 16) 366.

⁵⁹ (n 11) p 407.

*eminence.*⁶⁰ Elsewhere it propounds similar curiosities such as: “*The law clothes the monarch’s person with absolute perfection.*”⁶¹

‘The Crown’ itself is a free-standing notion, but its material existence depends upon it vesting in, and thus bestowing title upon, an individual person; the monarch. Indeed, *Halsbury’s* states that “*in law the monarchy remains legally central to the powers of government*”.⁶² It is interesting to note that this integral role is limited to the legal plane, reflecting the fact that elected government has replaced the monarch as the *politically* central entity within the British constitution.

Michel Foucault’s work on law and monarchy offers useful insights that appear to resonate with understandings of the Crown in English law. Foucault sees law and monarchy as intrinsically linked. He argues that the King forms the conceptual basis for Western legal systems and indeed continues to retain a legally central position in what he terms the ‘juridical edifice’.⁶³ According to Foucault:

“The juridical edifice was, then, formed around the royal personage, at the demand of royal power, and for the benefit of royal power. When in later centuries this juridical edifice escaped from royal control, when it was turned against royal power, the issue at stake was always, and always would be, the limits of that power, the question of its prerogatives.”⁶⁴

Foucault reiterates elsewhere his claims that law and monarchy are naturally connected because the legal system was initially constructed around the monarch.⁶⁵ Yet in the extract above he also claims that this legal framework came to be controlled or dominated by others and used against the King.⁶⁶ This is certainly correct in England where the Glorious Revolution saw the emergence of Parliament’s ascendancy over the King.⁶⁷ In Bagehot’s famed proclamation, “*a republic has insinuated itself beneath the folds of a monarchy.*”⁶⁸ Indeed Foucault does claim that in England “*the person of the king ... was displaced within the*

⁶⁰ *Halsbury’s* (n 3) vol 12(1), para 46.

⁶¹ *Ibid* para 48.

⁶² Emphasis added. *Ibid* vol 8(2) para 351.

⁶³ M Foucault, *Power/Knowledge, Selected Interviews and Other Writings 1972-1977* (Longman, Essex, 1980) p 119.

⁶⁴ M Foucault, *Society Must be Defended* (Penguin, London, 2004) pp 25-6.

⁶⁵ “*The juridical edifice was, then, formed around the royal personage, at the demand of royal power, and for the benefit of royal power.*” *Ibid* 25-6. See also Foucault (n 63) 94.

⁶⁶ “*Law, particularly in the eighteenth century, was a weapon of the struggle against the same monarchical power which had initially made use of it to impose itself.*” Foucault (n 63) 141.

⁶⁷ See Introduction

⁶⁸ *Bagehot* (n 18) 94.

system of political representations, rather than eliminated,⁶⁹ i.e. the King's legal framework remained intact and Parliament supplanted his command of it. So Foucault is not claiming that domination by monarchical will continues in present times. Instead, law once promulgated by monarchs to put their edicts into practical effect later came to be used against them (to check or curb their activities) as legislative power slipped from their grasp into the hands of parliaments. But despite these developments, law and monarchy remain, for Foucault, indelibly linked.

Foucault's claims regarding the integral role of the monarch in our understanding of law appear inappropriate in a present context where the monarchical role appears to have been relegated to mere ceremony and modern monarchs bear little similarity to their more powerful predecessors. However, it is important to understand that Foucault's arguments relate to the legal and constitutional framework rather than political reality:

*"I believe that the King remains the central personage in the **whole legal edifice** of the West. When it comes to the general organisation of the legal system in the West, it is essentially with the King, his rights, his power and its eventual limitations, that one is dealing."*⁷⁰

In England Foucault's propositions about monarchy and law appear almost self-evident.⁷¹ There is a clear, uninterrupted lineage between the absolute monarchy of centuries past and democratic government of the present which continues to function within ancient legal structures based on monarchy, namely the 'Crown' and 'the Crown in Parliament'. Furthermore, by virtue of a synthesis of prerogative and convention to be outlined, there remains a clear symbiosis between Prime Minister and monarch on the basis of the former's gradual and silent colonisation of the latter's formal powers.

In England the monarch-based forms or institutions remained intact, though the King's prerogative and legislative powers were gradually colonised by Cabinet ministers and Parliament respectively. Yet neither the *structure* nor *form* of

⁶⁹ Emphasis added. Foucault (n 63) 39.

⁷⁰ Emphasis added. Ibid 95.

⁷¹ It is important to note that despite being peculiarly pertinent to the British constitution, Foucault directed his arguments at all 'Western liberal states' whose systems still follow what he terms a juridical command model. He wrote: "*one fact must never be forgotten: In Western societies, the elaboration of juridical thought has essentially centred around royal power ever since the Middle Ages. The juridical edifice of our societies was elaborated at the demand of royal power, as well as for its benefit, and in order to serve as its instrument or its justification. In the West, [legal] right is the right of the royal command.*" Foucault (n 64) 25.

prerogative or statutory powers has changed in nature despite these developments. They still bear the essential features of command and prohibition that Foucault outlines.⁷² For Foucault this is outmoded and unsatisfactory, and he makes a dramatic call to ‘cut off the King’s head’ in political (and thus by implication legal) theory.⁷³

[3] The Crown and Prime Minister

It is constructive to now reflect upon any initial insights into the Prime Minister and his prerogatives that the discussion in Parts 1 and 2 of this chapter may afford. It appears that there is no clear consensus among the legal community as to what ‘the Crown’ actually is, and this ambiguity is likely to remain. Though the concept contains shades of monarchy, government and state, none of these three views can provide an adequate account of ‘Crown’ when viewed in isolation; the concept is multi-faceted in meaning.⁷⁴ Gladstone questions the overall efficacy of the Crown as a result of this, suggesting ‘reform’ of the core concept may be necessary: “*The ‘Crown’ is an ambiguous term meaning the monarch, the government, the state or the public interest depending on the context. It harks backwards when what is needed is a completely new approach.*”⁷⁵

The Crown enjoys up to three interchangeable meanings and adoption of any of the Crown’s three meanings concerns the Prime Minister in some capacity. A premier’s exercise of prerogative power in law is closely reliant on the monarch, ‘the Crown’ personified. He is political leader of the executive government which is often termed ‘the Crown’. Finally he acts on behalf of the Crown (the British ‘State’ substitute) when conducting foreign affairs with sovereign states at international level. Yet because of the various definitions of ‘Crown’, the precise nature of the relationship

⁷² Foucault (n 63) 139-40.

⁷³ Ibid 121.

⁷⁴ “*The problem is that ‘The Crown’ is used to encompass a range of distinct meanings. It has the advantage of then avoiding the need to distinguish which particular meaning is applicable so difficult questions need not be asked or answered. It has the disadvantage of making a single definition impossible to devise and leading to arguments at cross-purposes when people are seeking to define different concepts or bodies by one term.*” A Twomey, ‘Responsible Government and the Divisibility of the Crown’ [2008] P.L. 742, p 747.

⁷⁵ Gladstone (n 24) Ev 6.

between it and the Prime Minister inevitably remains somewhat opaque. Yet two general certainties can be stated: first the Crown plays an arcane, unspecified role in modern prime ministerial power; second, despite enduring questions regarding the meaning of ‘Crown’, ‘monarch’ is clearly a factor inherent in each of the Crown’s various meanings. The indeterminacies which permeate the Crown as source of the prime ministerial power potentially enable premiers to exercise their powers in a less transparent, organised way.

The Influence of ‘Monarch’ on Prime Minister

This study establishes that ‘monarchy’ plays an integral role in the Prime Minister and his powers. Legally, structurally and culturally a premier’s powers are inextricably linked to monarch as embodiment of the Crown. The extent to which outmoded features of monarchy taint the office of Prime Minister and his exercise of the war prerogative is investigated in subsequent chapters.

The Crown itself seems to operate as an intangible construction with an elusive, independent theoretical existence, taking material form by vesting its powers in an individual who then becomes monarch. The appearances of significant monarchical power at law are misleading as modern monarchs do not enjoy the unbridled political command of their predecessors due to a series of conventions, particularly the ministerial advice convention. In this sense the monarch, in her politically constrained position as personification of the Crown, is effectively a conduit between Crown powers and the individual politicians who in reality use them.

The monarch appears legally omnipotent but politically impotent, whilst the Prime Minister is legally powerless but enjoys a position of political leadership. Thus the premier and monarch need one another; the prerogative powers must be exercised by a process of symbiosis. The relationship is inescapably reciprocal; the Prime Minister requires the monarch as a legitimate outlet to exercise Crown powers and the monarch is incapacitated without prime ministerial advice and direction. In this sense the premiership remains inherently fused to the monarch.

Ultimately it is apparent that at law the Prime Minister's position has continued many characteristics of the monarchical predecessor it sought to replace and better.⁷⁶ Because the office of Prime Minister gradually gleaned its powers away from the monarch it never established its own independent foundations and is resultantly parasitic on monarchy; the autocratic structure and culture of monarchy thus infiltrate it.

The Prime Minister is the sole individual with access to monarchical powers of old. This is not to claim that the premier has effectively *become* the monarch. Accusations that he is an 'elected monarch' are in many respects inaccurate. Nevertheless, without wishing to overstate his power, Chapter 4 demonstrates that the Prime Minister controls many aspects of the monarch's role in the legal edifice; he is arguably a proxy monarch of sorts. Chapter 4 further considers the impact of these monarchical connections on the constitutional checks and balances upon the war prerogative in the Iraq affair. Chapter 5 touches upon similar issues in the context of Iraq-era prerogative caselaw.

[4] Disparity: the Crown as a 'Legal Fiction'

The respective roles of convention and prerogative in the law-reality discrepancies concerning the Prime Minister and war prerogative are discussed in subsequent chapters. But it seems that 'the Crown' plays the fundamental role in these disparities because it enables 'monarchy' to continue to centrally occupy the legal framework of the English constitution. This centrality of the Crown inadvertently privileges the parasitic premiership that has evolved on the underside of 'the Crown' and colonised many of its most important powers.

The cleavage between the Crown at law and constitutional practice occurring beneath is widely acknowledged in mainstream constitutional thought. The Crown

⁷⁶ "The prime minister is able to use the government to bring forward the policies which he or she favours; and to stop those to which he or she is opposed. ... To this extent the conduct of government business can be said to reflect a personal and autocratic rather than a collective and democratic spirit." T Benn, *Arguments for Democracy* (Penguin, London, 1982) p 29.

has been termed ‘a convenient abstraction’,⁷⁷ a ‘legal fiction’.⁷⁸ Maitland commented that:

“The Crown is a convenient cover for ignorance: it saves us from asking difficult questions ... I do not deny that it is a convenient term, and you may have to use it; but I do say that you should never be content with it.”⁷⁹

Here Maitland claims that the concept Crown ‘covers’ complexities or mysteries of which we are ‘ignorant’. He does not say exactly *how* the Crown covers such ignorance, but he sees the concept as one with which we should not be satisfied. So in the view of a leading historian, this British constitutional apex is an area of ignorance concealed by a convenient but, by implication, unsatisfactory concept. This resonates with Bradley and Ewing’s general point that “*Legal writers on the constitution are handicapped by the unreality of many of the terms which they must sometimes employ.*”⁸⁰ Interestingly, here one sees leading academics resorting to distinctions between law and reality in their attempts to explain the Crown.

Vitally, the acknowledgement of such disparities between law and practice is also widespread in Crown-related caselaw. For example, Lord Diplock’s *Town Investments* judgment reinforced this view that legal ‘fictions’ mask constitutional realities. Closer scrutiny of his judgment indicates that he considered the Crown on two different levels; the legal ‘fiction’ of ‘the Crown’ (a corporation sole at law) and the political reality of government. For Lord Diplock the Crown is merely a legal façade for government (a corporation aggregate in practice).⁸¹ It represents government at law,⁸² though not very accurately because the term ‘Crown’ “*remains more apt to the constitutional realities of the Tudor or even Norman monarchy than*

⁷⁷ C Munro, *Studies in Constitutional Law* (2nd edn, Butterworths, London, 1999), p 255.

⁷⁸ Lord Diplock in *Town Investments* (n 2) 381.

⁷⁹ F W Maitland, *The Constitutional History of England* (Cambridge University Press, Cambridge, 1931) p 418.

⁸⁰ A W Bradley & K D Ewing, *Constitutional & Administrative Law* (14th edn, Pearson, Harlow, 2007), p 31.

⁸¹ This is similar to a point made by Maitland as early as 1901. Referring to confusion caused in cases or statutes where use the term ‘Crown’ appeared to have been used in relation to State or government rather than in the strict sense of monarch he said: “*The way out of this mess, for mess it is, lies in a perception of the fact, for fact it is, that our [monarch] is not a ‘corporation sole,’ but is head of a complex and highly organised ‘corporation aggregate of many’ – of very many. I see no great harm in calling this corporation a Crown.*” Emphasis added. F W Maitland, ‘The Crown as Corporation’ (1901) 17 L.Q.R. 131, p 140.

⁸² “*In my opinion, the tenant was the government acting through its appropriate member or, expressed in the term of art in public law, the tenant was the Crown.*” *Town Investments* (n 2) 381.

*to the constitutional realities of the 20th century.*⁸³ Lord Diplock accused the legal vocabulary of ‘the Crown’ of failing to keep pace with constitutional evolution and suggested that a clear line should be drawn between the Crown and government in practice:

*“To continue nowadays to speak of “the Crown” as doing legislative or executive acts of government, which, **in reality as distinct from legal fiction**, are decided on and done by human beings other than the Queen herself, involves risk of confusion.”⁸⁴*

This comment echoes the view of Maitland by claiming the ‘fiction’ of ‘Crown’ may cause ‘confusion’. This confusion hinges upon the fact that in reality elected individuals undertake the tasks of legislating and governing. Elsewhere in *Town Investments* Lord Simon also distinguished between law and practice by stating: “The legal concept [of Crown] still does not correspond to the political reality. The legal substratum is overlaid by constitutional convention.”⁸⁵ Recent cases such as *Bancoult*⁸⁶ in the Court of Appeal have continued this trend, specifically referring to altered relations between ministers and monarchs. In this case Sir Clarke MR and Sedley LJ both cited the following quote by Anson: “The position of affairs has been reversed since 1714. Then the King or Queen governed through Ministers, now Ministers govern through the instrumentality of the Crown.”⁸⁷ Yet according to the legal edifice of the British constitution the Queen still does govern through ministers.⁸⁸ Though the arrangement has inverted in political reality, the legal position remains intact. Not only do law and political reality diverge, but they specifically oppose one another because the former view sees monarch as directing ministers whereas the latter places ministers in the dominant position. Such manifest contradictions require judges to supplement their account of ‘the Crown’ at law with a corresponding account of the opposite political reality as cases such as *Town Investments* and *Bancoult* indicate. The array of academic and judicial views considered here suggests a consensus that the Crown and its legal framework not

⁸³ Ibid 380. This echoed similar sentiments expressed by Lord Diplock in one of his earlier judgments: “To use the expression “the Crown” as personifying the executive government of the country tends to conceal the fact that the executive functions of sovereignty are of necessity performed through the agency of persons other than the Queen herself.” Emphasis added. *British Broadcasting Corporation v Johns* [1965] Ch 32, p 79.

⁸⁴ Emphasis added. *Town Investments*, ibid 380-1.

⁸⁵ Ibid 400.

⁸⁶ *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498, [2008] QB 365 (CA).

⁸⁷ Ibid para 114; Sedley LJ, para 32.

⁸⁸ See also *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 (HL) discussed in Chapter 3.

only greatly diverges from working constitutional reality but also to a certain extent misrepresents it.

The original meaning of ‘Crown as monarch’ was clearly appropriate when Kings exercised their prerogative powers personally. Yet such Crown powers have over centuries trickled down from monarch to ministers. In short, *de jure* ownership of the Crown power has remained with monarch but *de facto* ownership has shifted to government and this leakage has caused confusion and a lack of clarity regarding the concept of ‘Crown’. The concept of ‘Crown’ has been reinterpreted to encompass government in order to meet these changing constitutional developments.⁸⁹ Yet still one is left with what Loughlin describes as “*a gulf between substance and form in our institutions of government*”.⁹⁰ Such gulfs need not be problematic; indeed identification of constitutional fictions, and acceptance of their potential benefits, can be traced back to Bagehot.⁹¹ But when such fictions cease to effectively function as legal concepts then their future must be questioned.⁹² From the discussion in this chapter and Chapter 3 there is arguably evidence that ‘the Crown’ as a legal concept is increasingly outmoded or obsolete and can only be coherently understood with reference to non-law.

It is clear that the Crown at law and its divergence from constitutional reality plays a crucial role in relation to the prime ministerial office and its exercise of war prerogative. Overall, the Prime Minister benefits from this disparity; he appears to be subject to the political reality of democratic accountability but closer inspection of the diverging legal framework shows that in law his office is parasitic upon and closely interwoven with the anti-democratic notion of ‘Crown’. Chapter 4 considers the extent to which this may enable the premier to benefit from a cluster of unreformed, opaque and extremely useful powers that formerly belonged to monarchs in practice. The Prime Minister can tap directly into these immense Crown powers at law, but to what extent will political-constitutional reality constrain the extent to which they can be utilised? Subsequent chapters demonstrate that the Crown-based constitutional edifice may have enabled Mr Blair (and his predecessors) to exercise Crown powers, particularly the war prerogative, without clear legal limitations, transparency or

⁸⁹ This reinterpretation of ‘the Crown’ holds parallels with, and may be linked to, Dicey’s re-rendering of the definition of prerogative outlined in Chapter 4.

⁹⁰ Loughlin in *Sunkin & Payne* (n 5) 47.

⁹¹ He saw reliance on fictions as a strength of the British constitution; *Bagehot* (n 18) 60-65.

⁹² Tomkins argues that the Crown and its prerogative powers should be abolished; (n 42) p 131-4, 139-40.

thorough parliamentary or judicial oversight. This is reflected in the criticism of a 2006 Lords select committee which stated:

*"the exercise of the Royal prerogative by the Government to deploy armed force overseas is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st century democracy."*⁹³

For these reasons it seems that the premier's parasitic relationship with the Crown potentially benefits the office holder, a proposition which will be considered further in Chapters 3-5.

⁹³ Select Committee on the Constitution, 'Waging War: Parliament's Role and Responsibility', HL (2005-06) 236-I, para 103.

Chapter Three

Conventions, the Prime Minister and the War Prerogative

The office of Prime Minister and the constitutional apex it occupies is an area where specific legal regulation is sparse and convention steps in to regulate. Conventions are thus integral to the functioning of the premiership and its utilisation of prerogative powers. As Benemy states, “*The existence of a Prime Minister is purely conventional. He is chosen by the Sovereign in a conventional manner. He chooses and dismisses his Cabinet Ministers and manages his Cabinet according to convention.*”¹ The intricate network of conventions creates an arrangement whereby the premier is able to exercise prerogative powers in fact. In light of this, an understanding as to what conventions actually are and how they affect the premiership is essential.

This chapter outlines the leading constitutional conventions that regulate the office of Prime Minister. It then attempts to gain a detailed understanding of the nature of conventions by considering leading definitions. Part 3 investigates the operation of specific conventions relevant to the premier’s war prerogative over the course of the Iraq affair. Finally this chapter applies the two analytical devices to this preceding discussion.

[1] Conventions Concerning the Prime Minister

Conventions were first identified by AV Dicey, though the cumulative and incremental contributions of earlier theorists have also been noted.² Dicey viewed

¹ F W G Benemy, *The Elected Monarch: The Development of the Powers of the Prime Minister* (Harrap & Co, London, 1965) p 220.

² Such theorists included Blackstone, Bagehot, J S Mill and especially Edward Freeman. See O Hood Phillips, ‘Constitutional Conventions: Dicey’s Predecessors’, MLR (1966) Vol. 29, 137.

conventions as a form of ‘constitutional morality’³ and much of his groundwork continues to set the frame of reference for modern explorations of the subject.

Conventions play an important role in most constitutions, but their role in the British constitution is all the more vital due to its uncodified nature. Despite being non-legal, conventions regulate the activities and relations between government and Parliament, thus contributing to the overall system of constitutional checks and balances. Their mutable nature and large number mean “*it is not practicable either to enumerate all the conventions applicable to the working of the British Constitution or to define most of them with any great precision.*”⁴ As with other aspects of the constitution considered in this study (such as ‘Crown’ and ‘prerogative’), there does not appear to be one single clear understanding of ‘convention’. A review of relevant literature indicates that there remains disagreement about various aspects of conventions, though a core of consensus is also discernible. Many of the commentaries on conventions are heavily reliant upon practical working examples, and much of the work arguably fails to get to the essence of conventions. It is perhaps useful to start by outlining the conventions that are directly relevant to the premiership.

Conventions operate across a wide constitutional area, though the most important of these regulate the exercise of the royal prerogative and Cabinet workings⁵ thus impacting directly upon the premiership. First, it must be noted that the creation of the office of Prime Minister is actually a result of convention: “*His special duties and privileges, and his relations with the Crown, the Cabinet and Parliament, are defined not by common law or, in general, by statute law but by recognised usage and practice.*”⁶ This is also true of the Cabinet the premier is responsible for managing.⁷ The conventional status of both institutions is due to their organic emergence over a period of centuries in response to changing political climates.⁸

³ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan, London, 1985) p 24.

⁴ P Jackson & P Leopold, *O Hood Phillips and Jackson, Constitutional and Administrative Law* (8th edn, Sweet & Maxwell, London, 2001) p 145.

⁵ Ibid. O Hood & Phillips divide conventions into 3 groups: (1) conventions that regulate the exercise of the royal prerogative and Cabinet workings, (2) conventions regulating Parliament, (3) conventions regulating relations with UK and former Commonwealth countries.

⁶ *Halsbury’s Laws of England* (4th edn, Butterworths, London, 1996) vol 8(2), para 395.

⁷ “*The Cabinet does not have its origins in any statute, though it is recognised by statute law, and the rules which regulate ... [it] depend on the conventional usages which have sprung into existence since 1688.*” Ibid para 403.

⁸ A brief overview is provided in the Introduction to this study.

It is the constitutional role of the monarch to appoint a Prime Minister and government by prerogative, and there are no *legal* restrictions on whom She can appoint.⁹ However, the monarch's choice is limited by a 'principal' convention which requires her to appoint a Prime Minister who is leader of largest party in the House of Commons, and to appoint government ministers according to the premier's recommendations.¹⁰ Furthermore, according to *Halsbury's*, the 'paramount' convention of the British constitution is that the monarch must exercise prerogatives according to the advice of ministers, particularly the Prime Minister.¹¹ This latter convention essentially provides the premier with access to the extensive prerogative powers of the Crown. Along with the office of Prime Minister this convention inadvertently crystallised over centuries; as a result the modern monarch, when exercising prerogative, is essentially a passive conduit directed by government.¹² Recent instances of a monarch defying ministerial advice regarding prerogative are non-existent and tend to be discussed by constitutional academics in mere hypothetical terms.

A number of other important conventions regulate the Cabinet and Prime Minister. For example, the convention of collective Cabinet responsibility requires that "each administration is collectively responsible to Parliament for its conduct of government. The three elements of this convention are the requirements of unanimity, confidentiality and confidence."¹³ Related to this, the convention of ministerial accountability requires that each individual minister is directly answerable to Parliament for his department.¹⁴ More detailed guidance on ministerial responsibilities is set out in the *Ministerial Code*¹⁵ which is said to have the status of convention, though this is doubted in some quarters.¹⁶ Vitally, this document can be

⁹ 'Nominally the monarch is unfettered in the choice of her ministers, and may summon who she pleases to fill the office of Prime Minister'. *Halsbury's* (n 6) para 394.

¹⁰ *Ibid* paras 21, 394.

¹¹ *Ibid* para 21.

¹² R Blackburn, 'Monarchy and the Personal Prerogatives' [2004] P.L. 546; R Brazier, 'Monarchy and the Personal Prerogatives': A Personal Response to Professor Blackburn' [2005] P.L. 45.

In 1986 the Queen's Private Secretary confirmed select principles that govern monarch-minister relations. First, '*the sovereign has the right – indeed a duty – to counsel, encourage and warn her Government*' and second, '*she is bound to accept and act upon the advice of her ministers*' irrespective of her own opinions. G Marshall, 'The Queen's Press Relations' [1986] P.L. 505, p 506.

¹³ *Halsbury's* (n 6) para 417.

¹⁴ *Ibid* para 416.

¹⁵ Formerly termed *Questions of Procedure for Ministers*. Ministerial Code (Cabinet Office, July 2005) <http://www.CabinetOffice.gov.uk/media/CabinetOffice/propriety_and_ethics/assets/ministerial_code.pdf> accessed 16th August 2008.

¹⁶ Sir Robin Butler, former Cabinet Secretary, has stated "*I do not regard [QPM] as having a constitutional force at all ... It would be perfectly possible for an incoming Prime Minister to scrap the whole thing and to devise entirely new rules.*" Quoted by P Hennessy, *The Hidden Wiring, Unearthing*

amended and redrafted by Prime Ministers who are also responsible for interpreting and enforcing the provisions.¹⁷ So this conventional power enables a Prime Minister to lay down the ground rules by which the ministers he appoints must operate.

A number of other conventions also concern the premiership in one form or another. For example, the monarch must not attend Cabinet meetings, a convention instigated by George I.¹⁸ A further long-standing convention provides that the Prime Minister and his government must resign if he loses a vote of confidence in the House of Commons. The rationale for this convention is that a premier who no longer commands the support of Parliament occupies an untenable position and should not be permitted to continue in office without it. In such circumstances the premier “must either recommend a dissolution of Parliament or tender the resignation of himself and the government.”¹⁹ Though this resignation convention activates only on a very occasional basis due to the party system in Parliament, Chapter 1 indicated that this convention actually played a role in relation to the Iraq deployment in March 2003; this is discussed in detail in Chapter 4.

The conventions outlined here serve a variety of constitutional functions, for example, by providing political accountability and regulating relations between constitutional actors. But these conventions also provide a Prime Minister with significant powers, as summed up by Benemy, who writes:

“Perhaps this loose, obscure, nebulous system is one of the sources of the immense power of the Prime Minister. He is not hedged about by constitutional laws that tie him down tightly, making him conform to a legal pattern, and allowing him little scope for his own individual interpretation of his office.”²⁰

¹⁷ *the British Constitution* (Indigo, London, 1996), pp 32-34. This view is also held by Former Cabinet Secretary, Lord Wilson of Dinton; ‘The Robustness of Conventions in a Time of Modernisation and Change’ [2004] P.L. 407, p 410. See also, G Marshall, *Constitutional Conventions, The Rules & Forms of Political Accountability* (Clarendon, Oxford, 1984) pp 54 – 55.

¹⁸ P Hennessy, *The Prime Minister, The Office and its Holders Since 1945* (Penguin, London, 2001), p. 65-66.

¹⁹ This practice emerged during the reign of George I (as outlined in the Introduction). Though it has questioned whether this is a fully fledged convention, *Halsbury’s* does indicate that it is an issue of constitutional propriety at the very least: “*the monarch’s presence at any meetings of ministers where deliberations or discussions take place is now clearly recognised as being contrary to constitutional practice.*” *Halsbury’s* (n 6) para 411.

²⁰ *Ibid* para 21. This convention was initiated by Sir Robert Walpole whose premiership ended in resignation following a House of Commons defeat on a vote of confidence, a practice that became engrained as constitutional precedent.

²⁰ *Benemy* (n 1) 209-10.

The web of conventions accumulated over centuries provides a Prime Minister *de facto* access to Crown powers. Yet whilst enabling the premier and Cabinet to utilise such powers, conventions also act to regulate their activities by placing obligations and restrictions upon the use of these powers.

So formally the monarch still enjoys the wide legal Crown powers wielded by Her predecessors, exercising powers to dissolve Parliament and appoint ministers etc.²¹ However, conventions informally modify this position by effectively placing these powers in the hands of democratically elected government ministers, particularly the premier. For Marshall, conventions provide a system of political accountability: “*the major purpose of the domestic conventions is to give effect to the principles of government accountability. ... that accountability is allocated in accordance with political reality rather than legal form.*”²² Interestingly, the latter part of this statement makes a distinction between ‘political reality’ and ‘legal form’. Marshall’s statement clearly situates conventions in informal political reality as opposed to the concrete constitutional structure.

So at this initial stage a potential discrepancy between the constitutional framework and reality is immediately apparent. As a matter of convention an arrangement emerged which has essentially enabled the premier (and to a lesser extent Cabinet ministers) to effectively colonise the prerogative powers of the King. Thus the prime ministerial office is founded upon the co-existence of strong political leadership with a position of formal impotence.

In light of this summary of the main constitutional conventions of importance, attention will now focus upon the exact nature of these conventions.

[2] Conventions Defined

It must be noted at the outset that offering a precise definition of conventions is an arduous task, particularly as the very existence of certain conventions may be

²¹ This will be investigated further in Chapter 4.

²² Marshall (n 16) 18.

uncertain²³ (for example, the parliamentary vote on military action to be discussed in Part 3 of this Chapter). Conventions do not emanate from a common source or share a systematic framework. Unlike laws, their creation cannot be traced back to a particular institution or ultimate rule. This is confirmed by *Halsbury's* which states, “*there can ... be no authoritative source to which reference can be made to ascertain whether a convention exists or what it is.*”²⁴ Thus there is no focal point with which to ground and cohere the range of conventions operating in the British constitution. Instead, they form disparate and separate strands of varying ages that randomly and often gradually come into existence by virtue of political or other circumstance. The existence of a law (particularly from a positivist stance) is a clear yes/no issue. However, the existence of a convention may well be a matter of degree. Morton argues that

“[the] conditions necessary for the existence of [non-legal constitutional norms] are a set of sociological facts, to be found in ill-defined circumstances of acceptance and substantive enforcement. And these are matters which cannot always be easily or conclusively established for a variety of reasons”.²⁵

Marshall and Moodie make a similar point, claiming that one cannot solely rely on the historical example to ascertain the existence of a convention.²⁶ Instead conventions must be viewed in the appropriate political context and in light of the prevailing constitutional culture of the day.²⁷

There is little primary legal material that offers detailed accounts or definitions of conventions, though many constitutional academics have attempted formulations. Marshall and Moodie suggest that one way of answering the question ‘what are the conventions of the British constitution?’ is to list them.²⁸ In addition to the examples outlined above, there are many other conventions including those relating to civil service neutrality, judicial independence and relations between members of the

²³ Though, as *Halsbury's* states, “*the existence of some conventions is certain and they can be defined accurately, the nature and existence of others are subject to varying degrees of doubt.*” *Halsbury's* (n 6) para 20.

²⁴ *Ibid* para 20.

²⁵ Emphasis added. P A Morton, ‘Conventions of the British Constitution’ (1991) *Hold.L.R.*, 114-180, p 139.

²⁶ “*Precedents of themselves can never provide conclusive justification for the continuing existence of a general rule.*” G Marshall & G Moodie, *Some Problems of the Constitution* (5th edn, Hutchinson, London, 1971) p 33.

²⁷ Particular circumstances to be considered include “*the prevailing political beliefs, the distribution of power in society, and the nature and urgency of the political problems facing the Government*”. *Ibid* 33.

²⁸ *Ibid* 21.

Commonwealth.²⁹ However, drawing up a definitive list is impossible because conventions are vast in number, disparate in nature and subject to change. As a result this approach is of limited use and reveals little about the nature of conventions.

[2.1] Common Definitions

It is arguable that many of the definitions exposed by leading theorists in this area are also in some respects deficient and this part identifies and discusses shortcomings. The initial striking feature common to all the definitions is that they are rendered in very wide terms. A sensible starting point is the definition offered by Dicey who defines conventions as "*rules consist[ing] of conventions, understanding, habits or practices which, though they may regulate the conduct of ... [various] officials, are not in reality laws at all since they are not enforced by the courts.*"³⁰ This definition consists of three main elements: firstly, conventions are 'rules', though these may take various forms such as habits or practices; secondly, they regulate the behaviour of officials; and thirdly, conventions are distinct from laws. This formulation has proved influential, and though it has been modified by subsequent theorists, it has not been subject to substantial overhaul.

Another early definition of convention was put forward by Jennings who set out three requirements for a convention to exist: "*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 [conventional] rule?*"³¹ In this definition, a number of issues emerge. First, to ascertain a convention one must look for 'precedents' which indicates that conventions are rooted in past events. Furthermore, Jennings introduces a new normative or ethical element to conventions in that there must be an underlying justification or reason for the rule. Interestingly, the second aspect of Jennings' definition introduces a subjective element into 'convention' by referring to the views of individual officials; this has since been subject to criticism.³²

²⁹ Halsbury's (n 6) para 21.

³⁰ Dicey (n 3) 24.

³¹ I Jennings, *The Law and the Constitution* (5th edn, University of London Press, London, 1959) p 136.

³² See Part 2.1.2 of this chapter.

An authoritative and more current definition can be found in Halsbury's which defines conventions as "*rules and practices that are not to be found in the formal sources of law but which are nevertheless habitually obeyed and generally regarded as binding.*"³³ This definition largely corresponds to the Diceyan model and four elements emerge from it. First, it describes conventions as 'rules and practices'. This appears to be wider than the other Diceyan definition that defines them as rules '*which consist of*' practices etc. Second, the definition makes the commonly accepted distinction between conventions and law as the former have no legal basis. The third element of this definition is that a convention, to exist, must be 'habitually obeyed', i.e. it must be generally (though not necessarily always) followed. Finally, conventions must be 'regarded as binding', though the definition does not specify by whom.³⁴

An array of modern definitions are also offered by constitutional commentators. Marsall and Moodie define conventions as "*certain rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognise their existence), nor by the presiding officers in the Houses of Parliament.*"³⁵ Again, this definition does not stray too far from the dominant Diceyan model. It views conventions as 'rules', sees them as binding upon constitutional operators (or officials) and states that they are not legally enforced (though acknowledging they may be judicially recognised nonetheless). It elaborates slightly on the Diceyan definition by distinguishing conventions from rules of parliamentary practice (as the former will not be recognised by presiding parliamentary officers).

Phillips' definition of conventions continues the traditional view, stating that they are "*rules of political practice which are regarded as binding by those to whom they apply but which are not laws as they are not enforced by the courts or by the Houses of Parliament.*"³⁶ Again, the three features in this definition have already been identified in the preceding ones, namely that conventions are (1) 'rules of practice' that are (2) 'binding' upon the constitutional actors to whom they apply, and (3) are 'not laws'. Like Marshall and Moodie, Phillips further distinguishes conventions from parliamentary procedures.

³³ Halsbury's (n 6) para 19.

³⁴ Ibid.

³⁵ Marshall & Moodie (n 26) pp 23-4.

³⁶ Jackson & Leopold (n 4) 137.

Jaconelli argues that our understanding of conventions ‘must be more narrowly drawn than has hitherto been common in literature’.³⁷ He sets out 2 fundamental features of conventions: first, they are rules that have a normative quality and second, they are not enforced in the courts.³⁸ As with the Diceyan model, the conventions are unenforceable non-legal rules. Like Jennings’ rendering of conventions, this definition includes a normative or moral dimension. Jaconelli explains that this ethical aspect must have a constitutional quality rather than a political one.³⁹

Briefer definitions have been put forward by academics who are also concerned with the normative aspect of conventions. Morton defines conventions very broadly as “*unenacted norms whose breach will raise questions of principle.*”⁴⁰ Instead of using the common term ‘rule’, Morton refers to the much wider term ‘norm’ which can be taken to mean “*a rule; a pattern; an authoritative standard; a type; the ordinary or most frequent value of state; an accepted standard of behaviour within a society.*”⁴¹ However, his definition does appear to make the common distinction between statutory law and conventions; conventions are ‘unenacted’. Finally, Morton indicates that ethical or moral considerations are an essential part of convention in that breaches will raise potential issues of principle. Allan also includes this aspect in his account of conventions, describing them as “*a rule of practice that is grounded in political principle*”.⁴²

There are a number of superficial similarities between the above definitions. It is possible to isolate certain features upon which there appears to be a broad consensus among constitutional observers. The following four essential features of ‘convention’ recur across the range of definitions covered: (1) it is a constitutional rule or practice, (2) it is distinct from a law and is not enforced in courts, (3) it has a binding quality, nevertheless, (4) it has an ethical, normative or moral dimension. Each of these elements will now be briefly considered in turn and the potential deficiencies within these standard definitions will be exposed.

³⁷ J Jaconelli, ‘The Nature of Constitutional Convention’ (1999) 19 Leg Studs, 24, p 45.

³⁸ J Jaconelli, ‘Do Constitutional Conventions Bind?’ C.L.J. 64(1), March 2005, pp. 149-176, p 151.

³⁹ Ibid; Jaconelli (n 37) 35.

⁴⁰ Morton (n 25) 173.

⁴¹ *The Chambers Dictionary* (10th edn, Chambers, Edinburgh, 1994) pp 1150-1151.

⁴² T R S Allan quoted by Jaconelli (n 38) 160.

[2.1.1] A convention is a constitutional rule or practice

From the definitions above it appears that there is a broad acceptance that conventions are a type of rule. However, many of these definitions are blurred or stretched to indicate that conventions may also take the form of a ‘practice’. For example, the *Halsbury’s* definition indicates a convention could be either a rule or a practice. Others, such as Phillips and Dicey see conventions as rules, but rules *about* practices or that *include* practices (or a host of other non-legal norms). Despite initially defining them collectively as rules, Dicey later describes conventions as “*customs, practices, maxims or precepts*”.⁴³ This latter type of definition arguably causes confusion because it attempts to include a variety of wider terms (such as practice) within the narrower ambit of ‘rule’ and uses ‘rule’ to embrace things that are clearly not rules. This creates uncertainty as it is evident that a ‘rule’ and a ‘practice’ (for example) are two very different things. For a clear understanding as to what a convention actually is it must be possible to pinpoint which of these terms is applicable and this is not always possible.

The narrow view: conventions as rules

A number of commentators view conventions as a form of rule. Jennings viewed them in this way⁴⁴ and Brazier has made similar claims that conventions should be distinguished from constitutional practices which are lower in the constitutional hierarchy.⁴⁵

Jaconelli also claims that a distinction between rules and practices is of vital importance as conventions only take the form of rules, not practices. He uses the positivist models of Hart⁴⁶ to distinguish between a ‘habit (or *practice*, or usage)’ and a rule.⁴⁷ He argues that the integral point about a rule is that it goes beyond “*merely ... an observed uniformity in the past; the notion includes the expectation that the uniformity will continue in the future. It is not simply a description, it is a prescription.*

⁴³ Dicey (n 3) 417.

⁴⁴ Jennings (n 31) 134-6.

⁴⁵ R Brazier, ‘The Non-Legal Constitution: Thoughts on Convention, Practice and Principle’ (1992) NILQ, vol. 43, 262, p 267; Lord Wilson (n 16) 417.

⁴⁶ Hart outlines 3 differences between a habit and a rule: (1) deviation from a rule generally results in criticism whereas deviation from a habit or practice does not, (2) such criticism is generally regarded as justified in the case of rules, and (3) rules have an ‘internal aspect’ that habits do not. H L A Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford, 1997) pp 55-57.

⁴⁷ Jaconelli (n 37) 31.

*It has a compulsive force.*⁴⁸ Jaconelli goes on to claim that, unlike prescriptive conventions, “*mere constitutional habit [or practice], ... for however long a period, does not have normative consequences.*⁴⁹ Jaconelli’s distinction raises a number of points. First, rules, unlike practices, are not just backward-looking or a continuation of historical habits. Instead, rules go further than this and prescribe modes of desirable future behaviour. Second, practices have no normative or ethical consequences whereas rules do. Finally, unlike practices, rules have a binding quality (a ‘compulsive force’), perhaps because they are prescriptive and normative. These features appear to be related but it is unclear exactly how.

In any event, Jaconelli claims that the ingredients of bindingness, prescriptiveness and normativity are necessary for a conventional ‘rule’ to exist. He also denies that practices (which are looser and encompass many forms regularised behaviour) could be prescriptive or have normative consequences.

There is an essential problem with this first element in the definition of a convention (i.e. whether it a rule or practice) in that it is basically reliant upon other elements within the definition (e.g. the bindingness and normative force of conventions). To determine clearly whether a convention is a rule or a practice one must have a relatively clear and certain understanding as to what those other elements mean. As will be demonstrated in Parts 2.1.2 and 2.1.3, this is not necessarily possible.

The broader view: conventions as rules, practices and other phenomena

An alternative view is that conventions cannot and should not be narrowly viewed as merely non-legal rules. Morton subscribes to this view, stating that it is ‘seriously and systematically misleading to present ... conventions generally as rules’.⁵⁰ He accuses constitutional lawyers of viewing conventions in law-like terms, trying to fit conventions into legal frameworks and imbuing them with legal characteristics.⁵¹ For Morton, conventions should not be viewed as non-legal rules; they are different in nature⁵² and should not be forced into legal categories with which they do not fit. This is why he uses the wider term of ‘norm’ in his definition of conventions. This approach avoids problems inherent in a ‘rule-based’ view of conventions, namely

⁴⁸ Emphasis added. *Jaconelli* (n 37) 31.

⁴⁹ *Ibid.*

⁵⁰ *Morton* (n 25) 174.

⁵¹ *Ibid* 131.

⁵² *Ibid* 144.

that it becomes reliant on other factors within the definition. Indeed, such difficulties arguably demonstrate Morton's point that conventions and rigid legal forms are perhaps incongruous.

However, a broader approach causes problems of its own because an array of other non-legal forms of constitutional regulation co-exist with conventions. As Marshall states, "*a concise enumeration of such rules is not easy to make since they shade off into what might be called 'traditions', 'principles' and 'doctrines'*."⁵³ Conventional rules 'shade off' so that no clear line exists between conventions and non-conventions even if a broader approach is taken.

So confusion and doubt occur at the very outset over the basic elements of conventions. It is agreed that conventions are of vital importance to the constitution yet it cannot be properly decided whether they are just rules, or can extend to include practices or other matters. Uncertainties arise if either approach is adopted. It is arguable that this dilemma arises from two important and related characteristics of conventions: firstly, many are unwritten and secondly, they can be uncertain in scope.

[2.1.2] A convention has a binding quality

A convention 'must be regarded as binding'.⁵⁴ In other words, conventions impose obligations upon political actors to behave in accordance with them and "*the notion of conventional conduct does include a strong element of what is customarily expected, in the sense of ordinary or regular behaviour.*"⁵⁵ Such obligations will be "*morally and politically, but not legally, binding.*"⁵⁶ Nevertheless, Dicey claimed that "*the conventional rules of the constitution, though not laws, are, ... nearly if not quite as binding as laws. They are, or appear to be, respected quite as much as most statutory enactments, and more than many.*"⁵⁷ Though this is certainly true of 'strong' or 'core' conventions (such as the convention that the monarch must provide royal assent to acts passed by Parliament), Dicey perhaps overstated the case and it

⁵³ Marshall (n 16) 3; P Jackson, 'Comment' [1985] P.L. 649, pp 650-51.

⁵⁴ Halsbury's (n 6) para. 20.

⁵⁵ A W Bradley & K D Ewing, *Constitutional & Administrative Law* (14th edn, Pearson, Harlow, 2007) p 20.

⁵⁶ Marshall (n 16) 17.

⁵⁷ Dicey (n 3) 440.

is questionable whether such a statement applies to all conventions. For example, the convention of collective Cabinet responsibility is generally seen as wider and potentially more flexible;⁵⁸ it is not clearly binding in the same concrete terms as the ‘royal assent’ convention. So, as with many other aspects of conventions, their bindingness appears variable. Jaconelli writes that “*Laws are either binding ... or not. Conventions, by contrast, would appear ... to be characterised by various possible degrees of ‘bindingness’*.”⁵⁹ The measure of conventions comes down to a matter of degree, with narrower more binding conventions shading off into the looser, less binding variety. The factor of ‘bindingness’ is too crude to take account of such subtle degrees of variation, thus undermining the efficacy of standard definitions.

Questions also surround whether conventions are subjectively binding (i.e. from the viewpoint of officials themselves) or objectively binding (i.e. an external standard by which they ought to feel bound). The former proposition is clearly problematic because it involves judging the existence of a convention according to the views of individuals whose conduct they regulate. Jaconelli states that this appears to be “*an extremely flimsy basis for the existence of constitutional conventions.*”⁶⁰ Marshall⁶¹ and former Cabinet Secretary Lord Wilson⁶² have also claimed a subjective approach is unhelpful. Yet it is also difficult to obtain a clear understanding of how an objectively binding standard applies. How is it to be determined what conduct objectively ‘ought’ to be carried out? In the end, bindingness does seem to largely rest to some extent on shared views of officials within the system.⁶³ This may prove problematic in respect of imprecise conventions such as joint Cabinet responsibility. Though there is essential agreement about its core tenets, uncertainty has often

⁵⁸ “[T]he convention is not rigid dogma. It has adapted over the years (particularly in the aftermath of war) and we see no reason why it should not continue to do so. Factors influencing its development may include changes in the standards of behaviour in public life.” Information Tribunal in *Cabinet Office and Dr. Christopher Lamb v Information Commissioner EA/2008/0024 & 0029* (27/01/2009) para 77.

⁵⁹ Jaconelli (n 37) 34.

⁶⁰ Jaconelli (n 38) 149.

⁶¹ Marshall & Moodie (n 26) 29.

⁶² “I have difficulty with the definition of conventions as rules which are regarded as binding by those to whom they apply. If you are in the position ... of advising someone that they are obliged to observe a particular convention and they are inclined to question why they should do so, it is not much use telling them that the convention is binding on them because they regard it as binding. ... [I]n practice these things cannot be entirely subjective.” Lord Wilson (n 16) 409.

⁶³ McHarg attempts to clarify this matter in the following way: “The solution to this paradox lies in the realisation that the moral commitment involved in abiding by conventions flows not from a personal morality, but rather from a role morality. In other words, for a norm to have the status of a constitutional convention, it must be accepted as a correct and binding account of constitutionally appropriate behaviour by anyone who occupies the relevant role”. A McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’, MLR (2008) 71(6) 853-877, p 860.

arisen as to its wider application. The range of opinions as to the scope of this convention created difficulties for Lord Widgery in *A.G. v Jonathan Cape*⁶⁴ who admitted ‘it is not surprising that different views on this subject are contained in the evidence before me.’⁶⁵ The case involved an action brought by the Attorney General to prevent publication of the diaries of a deceased former Cabinet minister approximately 10 years after he had last held office. The action was based upon breach of confidence but inevitably raised issues relating to collective Cabinet responsibility. As part of their arguments, the claimants and defendants adduced opposing evidence as to the proper ambit of collective Cabinet responsibility. The Attorney General sought to rely on the opinions of former ministers, including Lord Hailsham who took the view that Cabinet confidentiality should be viewed in wide and inflexible terms: “*He [the Cabinet minister] is sworn to keep secret all matters committed and revealed unto him or that shall be treated secretly in [the Privy] Council.*”⁶⁶ But, as Lord Widgery stated, ‘the defendants … also called distinguished former Cabinet ministers who do not support this view of Lord Hailsham’⁶⁷ though unfortunately his judgment does not provide further details. Yet ambiguities regarding bindingness extend to more concrete conventions. For example Waldron, considering the ‘strong’ convention of monarchical appointment of a Prime Minister writes “*the procedure … is expressed in phrases ‘It is generally agreed that…’ and ‘It is understood that…’ and ‘Everyone agrees…’*”⁶⁸ Jennings also supports this claim, stating “*opinions about constitutionality are as important as facts.*”⁶⁹

[2.1.3] A convention has an ethical, normative or moral dimension

That a moral or ethical element is part of conventions has been accepted since their initial identification when Dicey viewed them as the ‘constitutional morality of the day’,⁷⁰ thus accepting that, like social morality,⁷¹ their moral basis may be subject to change rather than being unalterable. For Dicey this morality was based on the overall purpose of conventions “*to secure that Parliament, or the Cabinet which is*

⁶⁴ *Attorney-General v Jonathan Cape Ltd. & Others* [1976] QB 752.

⁶⁵ *Ibid* 764.

⁶⁶ Emphasis added. *Ibid* 766.

⁶⁷ *Ibid* 767.

⁶⁸ J Waldron, *The Law* (Routledge, London, 1992) p 59.

⁶⁹ I Jennings, *Cabinet Government* (3rd edn, Cambridge University Press, Cambridge, 1969) p 10.

⁷⁰ Emphasis added. *Dicey* (n 3) p 422.

⁷¹ See Professor Hart’s arguments in the Hart-Devlin debate, featured in *Law, Liberty & Morality* (Oxford University Press, London, 1966).

indirectly appointed by Parliament, shall in the long run give effect to the will of ... the true political sovereign of the State- the majority of the electors or ... the nation.”⁷² So Dicey saw a vague democratic ideal underlying conventions; that the will of the nation (in the form of majority of voters) should be given effect.

Despite being viewed as an important part of conventions, the normative aspect is often overlooked; it tends not to be explored in any great depth and so remains yet another obscure element of conventions. This marginalisation is perhaps due to the cautious and narrow approach of theorists who primarily utilise prevailing positivist models,⁷³ preferring to focus on the procedural, describable aspects of conventions. But when looking at conventions, merely observing raw, factual data is insufficient; “*there must exist in addition, some ‘point’ or ‘reason’ that furnishes a rationale to the empirical data in question.*”⁷⁴

The view of conventions as having some form of moral facet has endured and is shared by numerous academics in the field. Jennings claimed that one must always consider the purpose of a convention; a convention must have an underlying reason.⁷⁵ More recently, Jaconelli also considered the normative dimension of conventions writing that “*many constitutional conventions ... are permeated by values – democracy, the separation of powers, responsible government – which are generally regarded as possessing independent and permanent worth.*”⁷⁶ The values he describes cover a wider sphere than Dicey’s ‘democratic will’, though all are arguably reducible to and compatible with this core value. The latter part of Jaconelli’s statement implies that these underlying political values are constant, that they are not subject to change and that they remain impervious to constitutional developments. It suggests they are the foundations of conventions and will prevail irrespective of the modifications that may occur in the form or scope of conventions. Jaconelli continues: “*The ‘reasons’ which animate many a constitutional convention are among the highest values of political theory.*”⁷⁷ So Jaconelli creates a value-laden, distinctly political element to conventions. Similarly, Jennings identifies four

⁷² Dicey (n 3) 429.

⁷³ See Part 2.1.4 for a thorough discussion of the role of positivism in this area.

⁷⁴ Jaconelli (n 37) 34.

⁷⁵ Jennings (n 69) 7. See also *The Law and the Constitution* (n 31) where Jennings states of conventions: “*Practice alone is not enough. It must be normative. ... A single precedent with a good reason may be enough to establish a rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded themselves as bound by it.*” pp 135-6.

⁷⁶ Jaconelli (n 37) 44.

⁷⁷ Ibid 29.

main principles underlying all conventions. These are: “[1] *The British Constitution is democratic*; [2] *it is parliamentary*; [3] *it is monarchical*; and [4] *it is a Cabinet system78 Like Dicey, Jennings claims that the most ‘fundamental’ of these is the principle of democracy. As with other accounts, these principles are inevitably somewhat vague in nature. It is also arguable that the final three principles are not values as such, but merely statements as to the features of the British constitution (i.e. descriptive). Finally, Morton places prime emphasis on the normative dimension of conventions, stating that this must be fully appreciated to have a proper understanding of law and the constitution.⁷⁹ He criticises the approach of legal academics who gloss over and afford insufficient weight⁸⁰ to the normative aspect of conventions. He argues that “*fundamental values of liberal constitutionalism .. find their expression in .. conventions*”⁸¹ For Morton, conventions are tied up with British constitutional tradition (which is made up of political ideals, ethical standards and ceremony).⁸² “*A failure to tie conventions securely to this tradition is to grossly misrepresent them.*”⁸³*

The ethical dimension appears to be an essential component of a convention, in many circumstances forming part of its very definition. Because of this and the vital role that conventions play in regulating the constitutional apex, normative elements inevitably infiltrate the study and description of the constitution, yet positivist approaches are not equipped to deal with this as Part 2.1.4 demonstrates.

[2.1.4] A convention is distinct from a law and is not enforced in courts

The final feature of conventions, their distinction from law, is a vital feature that requires more detailed consideration. Conventions’ distinction from laws is perhaps the only aspect of conventions upon which there is almost unanimous agreement, though it has been questioned in the past, most famously by Jennings.⁸⁴ It is widely accepted that there is a clear distinction between laws and conventions in that the

⁷⁸ Numbers added. *Jennings* (n 69) 13; *Marshall & Moodie* (n 26) 31.

⁷⁹ *Morton* (n 25) 114-180.

⁸⁰ *Ibid* 125, 129.

⁸¹ *Ibid* 117.

⁸² *Ibid* 116.

⁸³ *Ibid* 120.

⁸⁴ *Jennings* (n 69) 3, 5; *Jennings* (n 31) 117-132. Many of Jennings’ points in this respect have been subject to debate.

former are enforceable by courts whereas the latter are not. Brazier writes “*to distinguish conventions from laws properly so called is easy and uncontroversial.*”⁸⁵

Conventions are not enforceable in courts of law; their consequences are not legal but political. Munro terms ‘the court-enforcement criterion … an adequate litmus test to distinguish’ between law and convention.⁸⁶ The case of *Adegbenro*⁸⁷ confirms the distinction. It concerned a Nigerian constitutional provision which allowed the Governor to dismiss a premier if the latter no longer commanded majority support in the legislative assembly (a provision influenced by the British convention). The plaintiff premier had been dismissed from office but challenged his removal on the basis that there had not been a formal vote in the assembly. Instead, a letter signed by a majority of assembly members had been drawn up. The Privy Council held that the Nigerian premier’s dismissal had been conducted within the scope of the constitutional provision and was therefore lawful. In its judgment the court distinguished between legal and political (or ‘conventional’) restrictions on the Governor’s power to remove the premier. Viscount Radcliffe stated that there are “*considerations of policy and propriety which it is for [the Governor] to weigh on each particular occasion: they are not legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into a written document and make it his legal duty to observe.*”⁸⁸ The implication of this was that legal restrictions would be enforced but wider matters of principle or propriety, the realm of conventions, would not. The recent case of *Hemming v Prime Minister*⁸⁹ displays broad parallels with *Adegbenro*. The MP applicant had encountered difficulties in obtaining ministerial answers to questions and sought a judicial review of the Prime Minister’s failure. In a very brief judgment Mr Justice Bennett in the High Court deemed the applicant’s case ‘simply unarguable’ because ‘there is no legal duty’ on ministers to respond to MPs’ questions.⁹⁰ Instead Bennett J found that ‘the Ministerial Code is a matter for enforcement in Parliament and is not amenable to judicial review.’⁹¹ This provides confirmation that the ministerial accountability convention is clearly beyond the ambit of the courts. Yet despite being legally

⁸⁵ *Brazier* (n 45) 268.

⁸⁶ C Munro, ‘Laws and Conventions Distinguished’ (1975) 91 L.Q.R. 218, p 231.

⁸⁷ *Adegbenro v Akintola* [1963] AC 614 HL (PC).

⁸⁸ *Ibid* 630.

⁸⁹ *R (on the Application of John Hemming MP) v The Prime Minister* [2006] EWHC 2831 (Admin).

⁹⁰ *Ibid* para 4.

⁹¹ *Ibid*.

unenforceable, conventions are recognised by courts as cases like *Carltona*⁹² and *Liversidge*⁹³ indicate.

In *Carltona*, Lord Greene's judgment referred in passing to the existence of the convention of ministerial accountability.⁹⁴ The convention formed part of his explanation as to why it was not the role of the courts to intervene with ministerial decisions in this case. A similar approach was taken in the wartime House of Lords case *Liversidge v Anderson*. This case concerned the meaning of a provision which allowed a suspect to be detained if the Secretary of State 'had reasonable cause to believe' the individual to have 'hostile associations'. In his judgment Viscount Maugham recognised the convention of ministerial accountability, noting that a Secretary of State was 'answerable to Parliament for a proper discharge of his duties'.⁹⁵ He listed this as the fourth of 'a number of circumstances which tend[ed] to support' his preferred interpretation of the provision to require a subjective reasonable belief, thus favouring the minister.⁹⁶ The convention of ministerial accountability thus formed one indirect factor behind Maugham's interpretive approach. Furthermore, in *AG v Cape*⁹⁷ the convention of collective Cabinet responsibility was afforded consideration and acted as a background influence in the case. However, this was relevant to determining breach of confidence, rather than as a free-standing category.

A Clear Distinction?

Its distinction from law is arguably the most clear and certain characteristic of a convention. The above cases demonstrate that conventions are not legally enforceable but may be recognised by the courts. These cases also establish that though conventions are not directly enforceable, they do play an important part in legal discourse. They inform and assist the judicial interpretation of laws so arguably do have a degree of legal influence. Indeed Marshall and Moodie claim that conventions can be viewed as "*non-legal rules regulating the way in which legal*

⁹² *Carltona Ltd. v Commissioners of Works & Others* [1943] 2 All ER 560.

⁹³ *Liversidge v Anderson* [1942] AC 206 (HL).

⁹⁴ *Carltona v Commissioner of Works* (n 92) 563.

⁹⁵ *Liversidge v Anderson* (n 93) 222.

⁹⁶ *Ibid* 220.

⁹⁷ *A-G v Jonathan Cape* (n 64).

*rules shall be applied.*⁹⁸ So conventions can influence judgments by virtue of the assistance they can afford to legal interpretation.⁹⁹

Positivist models are highly influential in the distinction between conventions and laws and mainstream literature in this area is predicated on positivism. In a general sense positivism is concerned with defining a legal rule based on its observable features. This approach involves eliminating other elements such as morality, sociology and politics. Because of its clarity and methodical, structured approach to distinguishing law from non-law, positivist theories, especially the work of HLA Hart,¹⁰⁰ are often referred to in studies of constitutional convention¹⁰¹ and they influence judicial approaches in the area.

Yet the distinction between convention and law can be questioned. Despite the general agreement that laws and conventions are distinct entities, some have contended that laws and conventions are not entirely unrelated or even completely separate.¹⁰² For example, Wilson claimed that by imposing a distinction between law and convention “*it is impossible to present constitutional law as a coherent subject or relate it in a meaningful way to the functions it has to fulfil or the social and political context in which it has to operate*”¹⁰³ In other words, conventions play such an integral role in regulating the constitution and bedding law in its political context that considering law in isolation is impoverished and deficient. Barber has also recently questioned the nature and extent of the law/convention distinction by claiming that ‘the differences between them are a matter of degree’ and that the distinction is ‘soft’.¹⁰⁴ Finally, Elliott puts forward a novel argument that conventions can *indirectly* acquire legal force via judicial use of principle.¹⁰⁵ First, he argues that the normative, ethical dimension of conventions should be properly acknowledged. He then refers

⁹⁸ Marshall & Moodie (n 26) 24-5.

⁹⁹ Jennings (n 31) 82-3.

¹⁰⁰ Hart (n 46).

¹⁰¹ See for example, see Munro (n 86) pp 231-4; Jaconelli (n 38) 150, 156; N W Barber, ‘Laws and constitutional conventions’ (2009) 125 L.Q.R. 294.

¹⁰² For example, though Dicey viewed laws and conventions as distinct, he thought that breach of conventions would ultimately lead to illegality; Dicey (n 3) 445-6. Though Dicey did not elaborate on how this would occur, his inference that the force of law backs up conventions, albeit indirectly, indicates some form of arcane link between the two. In any event, this aspect of his account of conventions has since been subjected to doubt though Munro defends Dicey on this point, claiming that Dicey’s claims were more qualified than many assume; C Munro, ‘Dicey on Constitutional Conventions’ [1985] P.L. 637, p 640.

¹⁰³ G Wilson quoted by Munro (n 86) 224.

¹⁰⁴ He considers the strengthening ‘law-like’ *Ministerial Code* as an example which supports his thesis. Barber (n 101) 309.

¹⁰⁵ M Elliott, ‘Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality & Convention’ (2002) 22 Leg Studs, 340, p 363.

to caselaw where the principles underlying convention (as opposed to the convention itself) have acquired legal recognition and shaped legal content. “*Given [the] relationship between constitutional principle and law, and given that constitutional conventions (properly so-called) are underpinned by constitutional norms, there is no reason why the constitutional principles which underlie conventions should not also, in appropriate circumstances, operate to influence the evolution of constitutional law.*”¹⁰⁶ This argument, Dworkinian in nature,¹⁰⁷ inevitably blurs the distinction between laws and conventions. Though it accepts that they may be different creatures, they are connected by constitutional ethics that infiltrate and underlie both; the law/convention distinction is thus not as obvious as first appears. Munro would dismiss such arguments and maintain that law and conventions are distinct, claiming that “*The courts may, under the head of judicial notice, recognise the existence of all manner of things, but this does not ipso facto give them the status of being laws.*”¹⁰⁸ This is correct, but just because conventions are not directly enforceable does not mean that they have no legal effect, as *Bancoult*¹⁰⁹ and *Liversidge* demonstrate. Elliot’s arguments do not propose that conventions are the same as laws, merely that there is a common ethical basis that links the two, and this aspect of conventions may thus acquire legal force.

[2.2] The Flexibility of Conventions

From the preceding discussion it is apparent that conventions defy a definitive definition and this is arguably due to their inherently flexible nature. There is a broad spectrum of conventions, ranging from precise to vague, from strong to pliable, though more tend towards the latter end of the spectrum. It has been shown that many conventions are fluid and capable of evolving; even a ‘core’ or ‘strong’ convention (such as royal assent to acts of Parliament) will have been subject to evolution in its earliest stages, emerging in response to constitutional and political

¹⁰⁶ Ibid 363.

¹⁰⁷ Ronald Dworkin, a prominent critic of positivism, argues that moral considerations are a part of law because they become enmeshed into law by judges who use principles to guide their discretion in hard cases. *Taking Rights Seriously* (Duckworth, London, 2004) chs 2-4.

¹⁰⁸ Munro (n 86) 231.

¹⁰⁹ To be discussed at Part 3.1 of this chapter.

realities.¹¹⁰ This is why, as Wilson states, “*it is important to analyse conventions in the context of dynamic political events.*”¹¹¹

The flexibility of conventions is intrinsically linked to their non-legal nature and the multitude of uncertainties regarding them; indeed it has been said that so much uncertainty surrounds conventions that the usefulness of the term is affected.¹¹² Three reasons for such difficulties can be identified. Firstly, conventions are frequently unwritten in nature.¹¹³ As Viscount Radcliffe has stated, “*the British Constitution works by a body of understandings which no writer can formulate.*”¹¹⁴ This is a source of uncertainty because a written formulation enables one to identify with certainty whether and in what circumstances a convention will apply. Without this there is no fixed anchor-point or definitive statement of the convention so individuals cannot clearly ascertain its scope or even its existence. This is further exacerbated by the fact that there is no authoritative body capable of settling disputes as to the precise meaning or scope of conventions.¹¹⁵ Secondly, related to their unwritten nature, conventions may be vague in ambit, though some are more precise. This is acknowledged by Dicey who said conventions are “*multifarious, differing, as it might at first sight appear, from each other not only in importance but in general character and scope.*”¹¹⁶ As a result ‘many questions of constitutional propriety remain unsettled’.¹¹⁷ Finally, as Jaconelli states, “*constitutional conventions can, and do, change over time.*”¹¹⁸ It is no surprise that due to their fluid nature, many conventions, particularly the more indeterminate variety, are prone to evolve according to constitutional and other developments. This fluidity was first noted by Dicey who wrote that conventions or understandings “*vary from generation*

¹¹⁰ Brazier considers the example of the ‘strong’ convention of royal assent to acts of Parliament. He argues that this would once have been a practice rather than a convention and considers historical examples of occasional refusals of assent by past monarchs. This demonstrates that this convention was “*at [one] stage, at best a practice (or custom or usage) that royal assent would be forthcoming, but it was a practice which allowed for refusal on the grounds of the Sovereign’s personal disagreement without any universal suggestion that he or she was behaving “unconstitutionally” by refusing.*” However, with the waning of monarchical authority this practice has ‘hardened’ into convention so that refusal of royal assent to an act in the present day would amount to a breach. *Brazier* (n 45) 269-70.

¹¹¹ *Wilson* (n 16) 410.

¹¹² *Brazier* (n 45) 268.

¹¹³ “*Constitutional conventions ... are only exceptionally the subject of verbal or written formulation.*” *Jaconelli* (n 38) 169.

¹¹⁴ Quoting Lord Bryce in *Adegbenro v Akintola* (n 87) 632.

¹¹⁵ *Marshall* (n 16) 214; *Jaconelli* (n 38) 163.

¹¹⁶ *Dicey* (n 3) 422.

¹¹⁷ *Marshall* (n 16) 5.

¹¹⁸ *Jaconelli* (n 38) 167.

to generation, almost from year to year.”¹¹⁹ So even in Dicey’s day, there was recognition that conventions could alter rapidly and be shaped by current attitudes. It is therefore to be expected that some conventions will be affected or even shaped by political, technological and other developments in any given era.

The Enduring Fluidity of Conventions

The fluid nature of many conventions is primarily attributable to the fact that they are often not recorded in a definitive document. It is the case that some conventions are indeed fixed in writing, one such example being the *Ministerial Code*.¹²⁰ But, as Jaconelli states, “*when they are [written], the formula records, rather than creates, the convention.*”¹²¹ Furthermore, as Bradley and Ewing have claimed, though some conventions have been fixed to writing, overall codification of all conventions would entail two practical difficulties. Firstly, “*they cover so diverse an area that they could not be included within a single code.*”¹²² This would result in the need for multiple codes to co-exist alongside one another. Secondly, if all-encompassing codification occurred “*it would be impossible to stop the process by which formal rules are gradually modified by informal rules, principles and practices from starting over again.*”¹²³ This is a very interesting statement because it implies that reducing conventions to written rules would not ultimately settle the position because constitutional activity continues to change over time so such rules would in time become inadequate and in need of further elaboration; conventions would continue to develop afresh. The implication is that political-constitutional practice remains fluid so that written conventional rules would ultimately require supplementation.

So by their very nature, it seems that conventions are incompatible with reduction to a written code; they evade permanent fixation. The fluid nature of conventions is thus enduring. No amount of codification will secure them because, as an inevitable consequence of political change, new conventions will always organically arise to

¹¹⁹ He continues thus: “*The opinions ... which prevail to-day differ (it is said) from the opinions or understandings which prevailed thirty years back, and are possibly different from the opinions or understandings which may prevail ten years hence.*” Dicey (n 3) 30.

¹²⁰ *Ministerial Code* (n 15).

¹²¹ Jaconelli (n 38) 169.

¹²² A W Bradley & K D Ewing, *Constitutional & Administrative Law* (13th edn, Longman, Harlow, 2003) p 27.

¹²³ Ibid. Morton makes a similar claim: “[W]hatever the intended scope, no matter how extensive the [written] code, the informal process of growth (in response to changing circumstances) goes on.” (n 25) 159.

supplement the written arrangements. Conventions are changing on the underside of the fixed, formal, legal-constitutional framework. New modes of activity occur beneath and around the legal edifice, developing beneath and around the rules. So it is arguable that conventions facilitate constitutional advancement by enabling wider political developments and changes in political practices to be factored into the constitution without the need for formal, legal changes.

[3] Conventions throughout the Iraq Affair

Having outlined the conventions relevant to the prime ministerial office and explored key characteristics of conventions, this chapter will now consider select examples of conventions over the course of Mr Blair's premiership. As stated earlier, the main conventions relevant to the premier's war prerogative are two-fold: firstly, that the monarch must act upon the advice of ministers and secondly, collective Cabinet responsibility. This part will consider these two conventions over the course of the Iraq affair. Additionally, it will consider a potential convention which gained prominence in the Iraq affair as Chapter 1 indicated, namely parliamentary approval of warfare.

Important primary source material here is ministerial memoir, particularly as official Cabinet documentation relating to the Iraq affair will not be available for a thirty-year period.¹²⁴ This is as a result of the recent ministerial overriding¹²⁵ of rulings by both the Information Commissioner¹²⁶ and Information Tribunal¹²⁷ which ordered the disclosure of Cabinet minutes from the March 2003 meetings. A number of ex-ministers have produced diaries of their time in office, including Clare Short,¹²⁸ Robin Cook¹²⁹ and David Blunkett.¹³⁰ These diaries provide some revealing insights into

¹²⁴ Freedom of Information Act 2000, ss 35-36, 62-63.

¹²⁵ See statement by Secretary of State for Justice, Mr Jack Straw, to the House of Commons; Hansard HC vol 488, cols 153-156 (24 February 2009). In this statement Mr Straw confirmed he was using the Freedom of Information Act 2000, s 53 to override the tribunal's decision.

¹²⁶ Decision Notice FS50165372 (19/2/09).

¹²⁷ *Cabinet Office and Dr. Christopher Lamb v Information Commissioner* EA/2008/0024 & 0029. (27/01/2009).

¹²⁸ Secretary of State for the Department of International Development between May 1997 and May 2003.

¹²⁹ Secretary of State for the Department of Foreign and Commonwealth Affairs between May 1997 and June 2001, then Leader of the House between June 2001 and March 2003.

the operation of premiership-related conventions during the Blair years. Nevertheless, such diaries are primarily available due to the disagreements or controversies that caused the individuals to leave office; such memoirs must therefore be considered against the background of potentially subjective agendas.

[3.1] The Monarch Must Act Upon Ministerial Advice

Of all conventions within the British constitution, the requirement that the monarch exercises prerogative powers upon ministerial advice is ‘paramount’, playing a central role in the conduct of government. The ‘ministerial advice’ convention is a narrow, concrete convention which limits the monarch’s political role and transfers substantive decisions to democratically elected ministers. It is therefore a clear example of a strongly binding conventional rule underpinned by democratic ideals. The convention itself has been stable and consistently adhered to since the early twentieth century. Because disputes rarely arise regarding this convention it remains a significant but background presence within the constitution. In light of this and of the limited material available it might appear that little can be said of the ‘ministerial advice’ convention over the broad Iraq era. However, buried within select cases are interesting remarks about the convention which call into question the proposition that conventions are not legally enforced. Three highly relevant cases in this respect are *GCHQ*¹³¹ (from 1985) which concerned a prime ministerial decision under prerogative, and the more recent cases of *Bancoult*¹³² and *Quark*.¹³³

In *GCHQ* the Prime Minister used prerogative powers to abolish the trade union rights of civil servants based at Government Communication Headquarters without prior notification. In their rulings, three out of five Law Lords agreed that the government’s *manner* of exercising prerogative was judicially reviewable. Lord

¹³⁰ Secretary of State for Education between May 1997 and June 2001, then Secretary of State for Home Affairs from June 2001 to December 2004. Finally, Secretary of State for Work and Pensions between May and November 2005.

¹³¹ *Council of Civil Service Unions & Others v Minister for Civil Service* [1985] AC 374 (HL). Hereinafter referred to as ‘GCHQ’.

¹³² *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2008] 4 All ER 1055 (HL).

¹³³ *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 (HL).

Roskill's judgment contains important and insightful comments upon conventions and the legal edifice. Consider for example the following passage:

*"To speak today of the acts of sovereign as "irresistible and absolute" when modern **constitutional convention** requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the constitutional development ... by harking back to ... 'the clanking medieval chains of the ghosts of the past.'"¹³⁴*

His Lordship referred to 'modern constitutional convention'. To consider the legal view of an absolute sovereign without taking account of this integral convention would hinder constitutional caselaw by tying the judiciary to outmoded legal outlooks which had been superseded by political evolution. The legal view of 'sovereign acts' in isolation was archaic¹³⁵ and by implication, inadequate.

GCHQ appears to offer a vital counter-example to the prevailing view that conventions are legally unenforceable; it appears that the ministerial advice convention was enforced or recognised in this case. The GCHQ judgment and headnotes are clear that the premier *in fact* made the decision to remove union rights and viewing this decision as the sovereign's at law would be retrograde and 'inaccurate'. This surely *assumes* the operation of the ministerial advice convention. If such an assumption had not been made, and the case had been viewed in purely legal terms, then the decision to remove union rights would have been the Queen's rather than the premier's because it is She who exercises the prerogative at law. Yet Lord Diplock specifically rejected such an archaic approach. So though the convention was not *expressly* enforced, judicial *assumption* of its operation enabled the court to make a finding that the prime ministerial manner of exercising prerogative power could be reviewable.

The *Bancoult* Litigation

Bancoult required the courts to consider the legality of a prerogative Order in Council.¹³⁶ Such Orders are made by the Queen at law, though their content is

¹³⁴ Quoting Lord Atkin, *GCHQ* (n 131) 417.

¹³⁵ "To talk of that act as the act of the sovereign savours the archaism of past centuries." Ibid.

¹³⁶ *Bancoult* involved a dispute between the UK government and a group of Chagosians, natives of an island in the British Indian Ocean Territory ('the Territory'). In 2004 the Chagosians were effectively exiled from their island by the enactment of a prerogative Order in Council. This was to enable the island to be used for UK and US defence purposes. The claimant, an exile, applied for

decided by ministers (in this case the Foreign Secretary) who advise her as a matter of convention. In *Bancoult* the government defence initially argued that legally the Order was that of the Queen and thus, by implication, not subject to judicial review.¹³⁷ *Bancoult* ultimately came before the House of Lords where the Law Lords affirmed the Divisional and Appeal courts' rulings that orders in council were capable of being judicially reviewed. However, a narrow majority of the Lords departed from the earlier courts' decisions and disappointingly found in the government's favour, concluding that the Order exiling the islanders was not unlawful.¹³⁸ Despite this outcome, the courts at every level rejected defence arguments and found that the Order was 'in reality' that of the Foreign Secretary¹³⁹ thus implicitly acknowledging the existence and operation of the ministerial advice convention. Illuminating insights relevant to the ministerial advice convention were made across the Lords, Court of Appeal and Divisional Court judgments.

Bancoult in the House of Lords [2008]¹⁴⁰

In the House of Lords the monarch-based argument was not afforded detailed attention because by this time the defence arguments had moved away from claims that the orders in council were immune from judicial review because they were made by the monarch at law.¹⁴¹ Nevertheless, this point was briefly touched upon but dismissed by Lords Rodger and Mance. The former Law Lord claimed to be unimpressed by this argument, dismissing it as 'little more than makeweight' and stating "*[it] is nothing more than a rule of English procedural law: it does not reach the substance of the challenge.*"¹⁴² Here Lord Rodger drew a distinction between the 'substance' of this case, namely that government ministers are responsible for drafting orders in council and their actions via prerogative are generally capable of review, and the 'procedure' (or form) that courts cannot make findings against the

judicial review and sought a declaration that the Order was unlawful. Two issues arose here: first, whether the Order could be challenged by judicial review, and if so, second, whether it was unlawful.

¹³⁷ This is because the monarch enjoys legal immunity as discussed in Chapter 2. One must surely question the ethical integrity of any government willing to ban islanders from their homes then rely on outmoded principles of monarchy to protect the action from judicial scrutiny.

¹³⁸ But see the dissenting judgments of Lords Bingham and Mance.

¹³⁹ For example, see *R (on the application of Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2006] EWHC 1038 (Admin), [2006] All ER (D) 149 (May) paras 5, 163.

¹⁴⁰ *Bancoult*, HL (n 132).

¹⁴¹ The defendants had modified their arguments to claim that the immunity of orders in council primarily stemmed from their status as a form of primary legislation akin to acts of Parliament. However this argument was also rejected by the Law Lords on the basis that statutes enjoy a democratic legitimacy and degree of open debate and scrutiny which differentiates them from prerogative orders. *Ibid* paras 35, 109.

¹⁴² *Ibid* para 106.

Crown. Lord Rodger indicated that the substance (or reality) of the case was of primary importance and must be afforded precedence over ‘procedure’ in the resolution of this case. He was unwilling to accept the defence argument that rested on mere procedure, or in alternative terms, a skeletal view of the law in isolation. Similarly, Lord Mance stated:

“A recognition that a legislative order in council is invalid by a judgment given ... against the Minister responsible for the making of the order no more involves the making of an impermissible order against the Sovereign than a successful challenge to any other prerogative act undertaken in Her name.”¹⁴³

In this passage Lord Mance argued that the exercise of prerogative by order in council must logically be reviewable in the same way as any other decision taken via prerogative; reviewing either form of prerogative need not involve ruling against the monarch who exercises the prerogative at law. Yet it does not necessarily entail this outcome because, as in *GCHQ* and the earlier *Bancoult* judgments to be discussed, the courts premise their judgments upon the factual reality that ministers, not the monarch, make such decisions in the first place. This approach surely involves a form of silent recognition of the ministerial advice convention.

*Bancoult in the Court of Appeal [2007]*¹⁴⁴

The Court of Appeal also considered the disputed issue of whether a prerogative order in council was a ministerial act or a sovereign (and therefore legally immune)¹⁴⁵ act of the Crown. The court reiterated the earlier Divisional Court ruling that an order in council was an executive act susceptible to judicial review and that the 2004 Orders were unlawful.¹⁴⁶

Each judge referred to constitutional reality or practice (as distinct from the legal framework) in this area. Lord Diplock’s *GCHQ* claim that prerogative power ‘*in constitutional practice is generally exercised by those holding ministerial rank*’ was

¹⁴³ Ibid para 141.

¹⁴⁴ *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2007] EWCA Civ 498, [2008] QB 365 CA.*

¹⁴⁵ See Chapter 2 which outlined the legal maxim ‘the Queen can do no wrong’.

¹⁴⁶ Moules writes “*The decision represents an important vindication of the rule of law by denying the executive a sphere of action, defined merely by mode of enactment that is free from both parliamentary and judicial scrutiny.*” R Moules, ‘Judicial Review of Prerogative Orders in Council: Recognising the Constitutional Reality of Executive Legislation’, C.L.J. 67(1) 2008, 12-15, p 15.

quoted and approved by both Sedley LJ¹⁴⁷ and Sir Clarke MR¹⁴⁸. Similarly Waller LJ stated:

*"Matters have gradually developed over the years so that now, constitutionally, the Crown **never** acts other than on the advice of her ministers, and the decision to exercise the 'royal prerogative' is actually taken ... by the government or by ministers individually."*¹⁴⁹

According to Sedley LJ the government "submits that constitutionally and legally it is the Monarch and not the minister who makes a colonial Order in Council, and – what does not necessarily follow – that this places the process outside the jurisdiction of the courts."¹⁵⁰ Yet the primary reason that this did not necessarily follow was because the courts in cases such as *Bancoult* and GCHQ have viewed the legal arrangements here in their real political context with discreet reference to working constitutional convention rather than in narrow legal terms.

Bancoult in the Divisional Court [2006]¹⁵¹

The Divisional Court also initially rejected defence arguments that the disputed Order was made by the Monarch in law.¹⁵² The latter part of its judgment was heavily influenced by Lord Roskill's GCHQ terminology. For example, reference was made to the 'medieval unreality' of legal forms in this area¹⁵³ and Hooper LJ stated:

*"In our view the [government's] approach to this case involves much clanking of the 'chains of ghosts of the past'. [The defence advocate's] persistent references to 'the Queen in Council' during the course of argument cannot **hide** the fact that 'the act in question [was] the act of the executive'."*¹⁵⁴

Here the court claimed the defence arguments based on the premise that the disputed Order was the Queen's were outdated; again, the implication was that this view, which relied on seeing the legal position in isolation from convention, was

¹⁴⁷ "If this is right, and modern authority repeatedly holds that it is, any amenability to judicial review in relation to the use of the royal prerogative is that of ministers, not of the Monarch in whose name they govern. Hence, for instance, the title of these proceedings." *Bancoult*, CA (n 144) para 32.

¹⁴⁸ Ibid para 114.

¹⁴⁹ Emphasis added. Ibid para 87.

¹⁵⁰ Ibid para 33.

¹⁵¹ *Bancoult*, DC (n 139).

¹⁵² Ibid paras 5, 163.

¹⁵³ Ibid paras 158-9.

¹⁵⁴ Emphasis added. Ibid para 163. Note the influence of terminology from Lord Roskill's GCHQ judgment here.

erroneous. Interestingly, Hooper LJ declared that the defendant's narrow legal arguments were unable to 'hide' (i.e. conceal) the 'facts' (i.e. the political reality that the Foreign Secretary had made the Order). The Order was the act of the executive and thus amenable to judicial review. In *Bancoult* Hooper LJ refused to place legal form over substance. He specifically rejected government counsel's arguments which relied heavily on legal appearance of an absolute and legally immune monarch. If the Order was actually that of the Queen, it would not be reviewable and this is why the defence presented its arguments based on ancient constitutional arrangements without reference to conventional changes.

So it appears that an undeclared recognition of the ministerial advice convention impacted upon the judicial decisions in *Bancoult*. The convention had legal effect, albeit silently. This convention had to be recognised in order to frustrate government's attempts to clothe its actions in the monarchical immunity of old. This indicates that in relation to ministerial prerogative decisions, it is potentially no longer viable to make judicial verdicts solely on a narrow view of the law in isolation without wider reference to this convention.

Quark Fishing Ltd. [2005]¹⁵⁵

Quark provides further support for the proposition that courts deciding caselaw concerning Crown and ministers must include wider reference to the ministerial advice convention in order to retain constitutional coherence. The case provides an interesting contrast to the approach in *Bancoult*. It involved a dispute regarding the Commonwealth territory South Georgia and South Sandwich Islands¹⁵⁶ ('the Islands'). The territory had its own constitution created by British statutory instrument¹⁵⁷ which created a Commissioner based on the nearby Falklands. This Commissioner enjoyed such '*powers and duties as Her Majesty may from time to time be pleased to assign him*' and he was to conduct his office '*according to such instructions, if any, as Her Majesty may from time to time see fit to give him through a Secretary of State.*'¹⁵⁸ The British Foreign Secretary instructed the Commissioner to restrict the allocation of fishing licenses. The claimant, a fishing company, had

¹⁵⁵ *Quark* (n 133).

¹⁵⁶ A British Overseas Territory near the Antarctic Circle and south of the Falkland Islands. The territory was uninhabited except for a small team of scientists but included commercially valuable fishing waters.

¹⁵⁷ The South Georgia and South Sandwich Islands Order 1985, SI 1985/449.

¹⁵⁸ Section 5(1), SI 1985/449.

obtained ongoing licenses over a number of years but found its license refused as a result of the decision. The claimant challenged the lawfulness of the Foreign Secretary's decision and sought damages for the infringement of his property rights under the *Human Rights Act 1998*. *Quark* reached the House of Lords on appeal. The court had to consider whether the instruction given to the Commissioner came from the Queen in her capacity as Head of State to the UK or as Head of State to the Islands.

The government argued that the Queen was Head of State and source of authority in the Islands. In issuing the order the Foreign Secretary was merely acting as her 'mouthpiece or medium', simply 'passing on her instructions'.¹⁵⁹ The Claimant put forward an alternative view that the case could not merely be resolved by looking at constitutional arrangements alone; 'an evaluation of facts underlying the exercise of power' (such as the 'political and diplomatic motivation of the Secretary of State') was also needed. Taking this approach would "suggest that this was, *in truth*, an exercise of power on behalf of Her Majesty's Government of the United Kingdom, not Her Majesty's Government of [the Islands]."¹⁶⁰ The decision was therefore concerned with UK interests rather than those of the territory. Disguised within this argument is a request that the court acknowledge the ministerial advice convention.

The Lords ruled in the Secretary of State's favour, with Lord Nichols and Baroness Hale dissenting. The majority found that the instruction had been given by the Queen, through the Foreign Secretary, in her capacity as Head of State to the Islands. The Islands' constitution provided authority to Her Majesty; it did not provide the Foreign Secretary any power to instruct the Commissioner. Instead, the Foreign Secretary had merely acted as a medium for Her Majesty's instructions, and had not acted independently as UK Foreign Secretary. The Lords oddly concluded that the Foreign Secretary was a medium or conduit for the monarch's powers, a view which clearly reverses the arrangements in political reality. This conclusion, which clearly defies the universally acknowledged working political realities of the British government, highlights the problems and absurdities of slavishly following constitutional theory and legal form divorced from the political context that the claimant argued should be considered.

¹⁵⁹ *Quark* (n 133) para 10

¹⁶⁰ Emphasis added. *Ibid* para 11.

Lords Bingham and Hope rejected the claimant's arguments to consider the underlying political realities in their judgments. In contrast to *Bancoult* the court limited itself to a solely legal view and deemed the Queen Head of State of the territory as per the statutory instrument. Lords Bingham and Hope both drew a line here and would not entertain factual, diplomatic and political factors (i.e. non-legal considerations) that occurred prior to the monarch's instructions.¹⁶¹

Lord Bingham found that the instruction was passed to the Commissioner by Foreign Secretary but “*Such power and authority can only be exercised by the Queen, who in this context is (and is only) the Queen of [the Islands]. It is in my view correct in constitutional theory to regard the Secretary of State as her mouthpiece and medium.*”¹⁶² In resolving this issue Lord Bingham resorted to constitutional theory as distinct from the alternative reality. The judgment of Lord Hope followed a similar mode of reasoning to Lord Bingham’s, also accepting the Foreign Secretary’s arguments that he was merely a medium: “*The Secretary of State is not acting ... on behalf of Her Majesty as Head of State of the United Kingdom. What he is doing is providing the vehicle by which, according to the constitution of [the Islands], instructions were given ... by Her Majesty as Head of State.*”¹⁶³ This begs the question; who gave Her Majesty the instructions in the first place? an issue both Law Lords studiously avoided.

These approaches excluded the ministerial advice convention which, if taken into consideration, would have shown that the Foreign Secretary was the substantive decision-maker advising the Queen, who in turn instructed him regarding the territory.¹⁶⁴ This is clearly an idiosyncratic constitutional arrangement, but the true position nevertheless. Instead Lords Bingham and Hope fenced off a solely legal view and disregarded the ministerial advice convention. This led to an incomplete picture of the constitutional arrangements in which monarch appeared in law as ultimate decision-maker and the Foreign Secretary her mouthpiece. The logical absurdity of this view is clear.

So the courts accept that the Prime Minister or ministers make policy decisions rather than the monarch; legal judgments are predicated on this factual reality and

¹⁶¹ Ibid, paras 19, 78-9.

¹⁶² Emphasis added. Ibid para 12.

¹⁶³ Ibid para 76.

¹⁶⁴ This point is supported in a recent article by A Twomey, ‘Responsible Government and the Divisibility of the Crown’ [2008] P.L. 742-767, p 761.

the alternative legal view is correspondingly sidelined. The ministerial advice convention must be *assumed* in order to reach a coherent, realistic decision thus casting further doubt upon the certainty of the law-convention distinction. Furthermore *Bancoult* and GCHQ specifically demonstrate two vital points regarding the significance of the ministerial advice convention to prime ministerial power (including the war power). First, the concrete quality and silent legal effect of this convention provides cogent evidence of the importance of the link between monarch and premier in this area. Though the convention is not explicitly recognised, its strength clearly enables a Prime Minister and ministers to freely and directly access the monarch's legal prerogative powers (including the war power) with ease. Second, subtle recognition of the ministerial advice convention has been necessary in order to enable the courts to potentially check ministerial power by judicially reviewing their actions despite the legal framework which places the monarch as decision-maker.

[3.2] Collective Cabinet Responsibility

Chapter 1 established that in the lead-up to the Iraq war collective Cabinet responsibility was weakened or marginalised; this issue will now be investigated in further detail. Paragraph 2(2) of the current *Ministerial Code* states that Cabinet business primarily consists of questions of government which 'raise major issues of policy or are of critical importance to the public',¹⁶⁵ this clearly encompasses any decision to undertake military action. Implicit in this provision is that important decisions like commencing war will be made by Cabinet (i.e. collectively) in confidence. The convention of collective Cabinet responsibility applies to such decisions, requiring Cabinet to act unanimously and maintain the confidentiality of business discussed therein.¹⁶⁶

Cabinet decisions are binding on all members of the Government¹⁶⁷ and thus to preserve the appearance of unanimity, ministers must either publicly agree with

¹⁶⁵ *Ministerial Code* (n 15) para 2.2 (a).

¹⁶⁶ "Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached." *Ibid* para 2.1.

¹⁶⁷ *Ibid* para 2.3. All current Code provisions referred to in this chapter were also contained in the Ministerial Codes over the course of Mr Blair's premiership.

policy or resign.¹⁶⁸ Yet despite provisions of the Ministerial Code which clarify certain issues, collective responsibility remains a convention so malleable in nature that it is extremely difficult to ascertain its degree of bindingness, whether it is a rule or practice etc. This part will investigate the operation of the convention during the lead up to the Iraq decision.

The collectivity of Cabinet decision-making has often spanned the spectrum from autocratic to collegiate depending upon a range of factors, for example the political support for and individual style of the Prime Minister of the day. Current evidence suggests that the collegiate form of Cabinet was often marginalised over the course of the Blair premiership. An early instance of the marginalisation of this convention can be seen at the very outset of Mr Blair's premiership when the power to determine interest rates was granted to the Bank of England prior to the first Cabinet meeting.¹⁶⁹ Cabinet ministers were thus afforded no opportunity to discuss or evaluate a central policy of the government of which they were a part. In May 2007 loyal minister David Blunkett wrote that this method of decision-making would not be restricted to isolated incidents: "*It is quite clear that not a great deal is going to be discussed at Cabinet. Instead, business is going to be done informally, one to one with Tony, or through Cabinet Committees.*"¹⁷⁰ Blunkett's diaries refer to a number of subsequent instances where there was a lack of prior consultation with Cabinet, sometimes in advance of important decisions.¹⁷¹

More relevant examples occurred in the field of foreign affairs and defence. In keeping with constitutional custom, Mr Blair created War Cabinets prior to Iraq 1998, Kosovo in 1999 and the Afghan war in October 2001. This latter War Cabinet (officially titled the 'Committee on Overseas Policy and Defence') was charged with the conduct of operations in relation to Afghanistan and Iraq. However, rather than these formal bodies, Blair relied on a small circle of close aides to make decisions.¹⁷² Seldon writes that Blair found both full Cabinet and the War Cabinet "*too formal and insignificantly focussed and so he secretly established a smaller formal meeting*

¹⁶⁸ Halsbury's (n 6) para 417.

¹⁶⁹ C Foster, 'Cabinet Government in the Twentieth Century', MLR (2004) 67(5) 753-771, pp 764-5; A Rawnsley, *Servants of the People, The Inside Story of New Labour* (Penguin, London, 2001) p 33; P Hennessy, *The Prime Minister, The Office and its Holders Since 1945* (Penguin, London, 2001) pp 480-1.

¹⁷⁰ D Blunkett, *The Blunkett Tapes, My Life in the Bear Pit* (Bloomsbury, London, 2006) p 11.

¹⁷¹ For example, emergency legislation following the Omagh bombing (p 92); the Iraq bombing in February 2001 (p 247); the budget preparations in February 2001 (p 251); co-operation with the US Star Wars project (p 442). *Ibid.*

¹⁷² A Seldon, *Blair* (Free Press, London, 2005) pp 499, 580.

*before each OPD [War Cabinet]. It was this group that was the real decision-making body.*¹⁷³ This appears consistent with the account of ex-minister Claire Short who has written of Cabinet in the lead-up to Iraq:

*"There were frequent informal discussions at Cabinet after the summer of 2002 but there were never any papers or proper analysis of the underlying dangers and the political, diplomatic and military options. The whole crisis was handled by Tony Blair and his entourage with considerable informality."*¹⁷⁴

Short argues that 'no decisions were made in Cabinet',¹⁷⁵ though this claim has been doubted by Seldon¹⁷⁶ and was rejected by then Cabinet Secretary Sir Andrew Turnbull¹⁷⁷ and then Foreign Secretary Jack Straw.¹⁷⁸ Nevertheless, in its report, *The Decision to go to War in Iraq*, the House of Commons Foreign Affairs Select Committee expressed concern about the degree of Cabinet and Committee engagement in this policy area.¹⁷⁹ Further evidence of the sidelining of Cabinet in relation to Iraq is present in David Blunkett's diaries. Though Blunkett refers to numerous Cabinet discussions regarding Iraq over 2002-3,¹⁸⁰ he also claims that in March 2003, the month of deployment, he was obtaining information from the media rather than Cabinet briefings despite being a member of the War Cabinet.¹⁸¹

¹⁷³ This informal group included: Mr Blair, John Scarlett (Head of the Joint Intelligence Committee), Sir Richard Dearlove (Head of MI6 between 1999-2004), Admiral Sir Michael Boyce (Chief of Defence Staff), David Manning (prime ministerial adviser), Jonathan Powell (Head of Policy from 2001), Alastair Campbell (Director of Communications) and Sally Morgan (political adviser to Blair from 2001). *Ibid* 580.

¹⁷⁴ C Short, *An Honourable Deception? New Labour, Iraq, and the Misuse of Power* (Free Press, London, 2005) p 147. See also the evidence Ms Short gave to the House of Commons Foreign Affairs Committee, 'The Decision to go to War in Iraq' HC (2002-03) 813-I, para 141.

¹⁷⁵ *Ibid* 151.

¹⁷⁶ Seldon (n 172) 599.

¹⁷⁷ In his evidence to a select committee in 2005 he stated: "Cabinet met 24 or 25 times and discussed Iraq over a period of a year and discussed it more than any other item. I do not think it is true that Cabinet members lacked the opportunity to express their view." House of Commons Public Administration Select Committee, Minutes of Evidence, Thursday 10th March 2005, Q 192-334, Q 193. See also Q 201.

¹⁷⁸ In his evidence to a 2003 select committee Mr Straw confirmed that "The Cabinet discussed Iraq at every Cabinet meeting between 23 September 2002 and 22 May 2003, which is 28 meetings." *The Decision to go to War in Iraq* (n 174) para 142.

¹⁷⁹ *Ibid* para 146.

¹⁸⁰ He refers to a Cabinet discussion March 2002 where an hour long discussion on Iraq took place (p 359). Cabinet discussions on this issue are also referred to in November 2002 (p 413), January 2003 (p 444), February 2003 (p 446) and March 2003 (p 457). Blunkett (n 170).

¹⁸¹ "I was as aware as anybody as to exactly what was happening because I had listened to Radio 5 from six a.m. that day! This point was confirmed by Gordon [Brown] later in the day when I met him ... and he confirmed that he knew more from the media than we are being given at those morning meetings." *Ibid* 470.

Additional highly illuminating insights into Cabinet responsibility are included in the findings of the July 2004 Butler report.¹⁸² It found that Iraq policy was discussed frequently in Cabinet the year before the war. But from April 2002 this shifted to small group discussions and decisions made outside of Cabinet,¹⁸³ which effectively limited Cabinet discussion and replaced it with frequent oral briefings;¹⁸⁴ such briefings are surely qualitatively different to the substantive probing and debate which convention indicates should occur in Cabinet. The Butler Report concluded “we are concerned that the informality and circumscribed character of the Government’s procedures which we saw in the context of policy-making towards Iraq risks reducing the scope for informed collective political judgement.”¹⁸⁵ Implicit in this statement is the down-grading and indirect circumvention of Cabinet. Hennessy goes further, claiming that Butler’s ‘trenchant and fundamental criticism’ of the serving Blair government was unprecedented.¹⁸⁶

The Butler Report is integral because it underscored the potential dangers of informal processes and failure to effectively share information in Cabinet. Such failures undermined collective Cabinet responsibility during Iraq in two ways. First, they negatively impacted upon accountability¹⁸⁷ and secondly critical appraisal of vital decision-making was impaired so that Cabinet became a ‘rubber-stamping’ forum rather than a hub of informed, substantive policy-creation. Former Cabinet Secretary Lord Wilson elaborates on the implications thus: “*the risk is that informality can slide into something more fluid and unstructured, where advice and dissent may either not always be offered or else may not be heard. This is certainly a matter which engages collective responsibility.*”¹⁸⁸ Lord Wilson’s remarks appear to be supported by Robin Cook who confirmed that there was plenty of time to discuss Iraq in Cabinet ‘but most in Cabinet had lost the habit of dissent.’¹⁸⁹ Nevertheless, the link between informal processes and the marginalisation of collective Cabinet

¹⁸² Report of a Committee of Privy Counsellors (chair: Lord Butler), ‘Review of Intelligence on Weapons of Mass Destruction’, HC (July 2004) 898.

¹⁸³ Ibid para 609.

¹⁸⁴ Ibid para 610.

¹⁸⁵ Ibid para 611.

¹⁸⁶ P Hennessy, ‘Informality and Circumscription: The Blair Style of Government in War and Peace’, *Political Quarterly*, 2005, Vol. 76(1), p 3, p 6.

¹⁸⁷ A senior Foreign Office official expressed concerns over the informal Blair Cabinet system and is quoted by The House of Commons Foreign Affairs Select Committee thus: “[T]here is a danger that you do not get properly recorded decisions and properly analysed decisions. ... There is also the question of accountability. ... it does not mean that worse policy is made. It does mean that policy is less embedded in the government as a whole.” (n 174) para 145.

¹⁸⁸ Former Cabinet Secretary Richard Wilson, quoted by Hennessy (n 174) 7.

¹⁸⁹ Ibid 5.

responsibility is challenged by Blunkett who has defended the Blair Cabinet against Butler's accusations. He disputes the report's claims that more formality would have led to a 'correct' decision, claiming that such procedural rigidity would have impeded the efficiency and progress of government.¹⁹⁰

Overall it is clear that Blair's preference was often for tight-knit, informal group decision-making outside of Cabinet; this is viewed by Seldon as one key feature of his premiership,¹⁹¹ a feature that facilitated what Foley has called 'prime ministerial detachment from Cabinet'¹⁹² and arguably led to a 'systems failure' of Cabinet government in relation to Iraq as Chapter 1 outlined.¹⁹³ Vitally the available evidence suggests that major decisions regarding Iraq were also detached from Cabinet along with the premier. It seems that this characteristic inevitably impacted upon the convention of collective responsibility during the Iraq affair in the ways discussed above. However it had another significant consequence identified by ex-minister Clare Short:

*"The term collective responsibility is now being used to demand loyalty to decisions on which Cabinet members were not consulted, let alone that were reached collectively."*¹⁹⁴

This statement indicates that the convention has the capacity to morph from a constitutional check which ensures vital decisions are made collectively, into a potential source of prime ministerial strength vis-à-vis his ministerial colleagues. It is a view not merely held by aggrieved former ministers; Sir Christopher Foster has similarly claimed that because of the informality of the Cabinet system "*the convention of collective responsibility has altered from an agreement not to disagree publicly after there had been Cabinet discussion, or the opportunity for one, into a binding discipline to accept the prime minister's decisions, even where there had been no opportunity for serious discussion.*"¹⁹⁵ So the unanimity requirement may act to bind ministers to decisions that they may have had little opportunity to discuss

¹⁹⁰ "The most upsetting thing about the Butler Report was the suggestion that if only we put everything through very formalised Cabinet Committees, then everything would be well, the civil service would be able to give their 'advice' and there would be no danger or wrong decisions – or at least that was the implication." Blunkett (n 170) 667.

¹⁹¹ Seldon (n 172) 695-6.

¹⁹² M Foley, *The British Presidency* (Manchester University Press, Manchester, 2000) p 109.

¹⁹³ Hennessy (n 186) 9. Elsewhere in this article Hennessy writes of the "accumulations of failures to scrutinise and question [policy] within the privacy of the Cabinet Room [which] amount[ed] to a dereliction of Cabinet government comparable only to the autumn of 1956." p 8.

¹⁹⁴ Short (n 174) 71.

¹⁹⁵ Foster (n 169) 755.

or properly judge. The flexibility and inchoate nature of the convention enables this distortion and its non-legal status ensures that the courts are unconcerned with such developments. However it must be noted that collective Cabinet responsibility was not entirely ineffectual during the Iraq affair; the deployment still led to three ministerial-level resignations.¹⁹⁶ With more comprehensive information and discussion in Cabinet would there have been more? Would affording Cabinet the opportunity to act as an ‘informed’ forum for discussion have enabled it to act as a more effective political brake upon Mr Blair’s exercise of the war prerogative? Earl Atlee suggests so; in a 2008 Lords debate on the war power he argued that failures in Cabinet government were the important issue in Iraq and proposed reforms to the war prerogative ‘do not … deal with the mischief’.¹⁹⁷ The Iraq-era Cabinet Secretary has claimed otherwise, arguing that the failures lay in intelligence, not Cabinet.¹⁹⁸

Chapter 4 will investigate Mr Blair’s exercise of the prime ministerial Cabinet chairmanship powers that facilitated the subversion of collective Cabinet responsibility.

[3.3] Parliamentary Approval of War

Chapter 4 will establish that the declaration of war is a decision taken by the executive, specifically the Prime Minister, using prerogative power. The endorsement of Parliament in such matters is not legally required, though its support is politically essential and it must approve the financial funding of military action.¹⁹⁹

Prior to the Blair premiership it had been questioned whether a parliamentary vote prior to the deployment of troops was required as a matter of constitutional convention. As Chapter 1 indicated, this became a live issue over the Iraq affair and subsequent period and is covered in some detail in the diary of Robin Cook who held

¹⁹⁶ In addition to Robin Cook there were two ministerial resignations prior to Iraq vote: John Denham (Minister for State in the Home Office) and Philip Hunt (Health Minister in the Lords). *Blunkett* (n 170) 463-4.

¹⁹⁷ Hansard HL vol 698, cols 783-4 (31 Jan 2008).

¹⁹⁸ *Public Administration Select Committee Minutes of Evidence* (n 177) Q 192-334, Q 194, Q 199, Q 223.

¹⁹⁹ Select Committee on the Constitution, ‘Waging War: Parliament’s Role and Responsibility’, HL (2005-06) 236-I, para 14; R Cook, *The Point of Departure, Diaries from the Front Bench* (Pocket Books, London, 2004) 187-188; Bradley & Ewing (n 55) p 344.

the Cabinet position of Leader of the House between June 2001 and March 2003. Cook's diaries detail his efforts to ensure that Parliament approved the deployment of troops in Iraq on a substantive Commons vote (rather than a lesser 'adjournment' vote).²⁰⁰ He claimed the existing position that the decision to deploy troops could be taken independently of Parliament was inconsistent with the political reality which made parliamentary approval of war imperative for any government.²⁰¹ Cook reveals that he and Blair initially had differing views as to whether a substantive vote was appropriate. Regarding one private discussion about the issue between both men, Cook wrote: "*I mildly demurred [with Blair], pointing out that the precedents were more mixed, and that there was adequate historical precedent for the House getting a vote on a substantive motion before the commitment of troops.*"²⁰² This incident highlights ambiguities that may arise concerning the bindingness of a convention (or a potentially emerging one). Part 2 confirmed that conventions are binding, albeit to varying degrees, and it outlined difficulties with this feature. Two such issues are illustrated by Cook's account. First it indicates that the bindingness of the 'parliamentary approval' convention (or quasi-convention) was determined subjectively by the relevant politicians whose conduct it potentially regulated, surely supporting Hough's claim that 'conventions are at the kernel of an 'insider's constitution'.²⁰³ Uncertainties arose when opinions diverged and individuals viewed the precedents differently. It seems that here the subjective views of bindingness held by politicians were of central importance, despite Jaconelli's concerns regarding the fragility of such foundations.²⁰⁴ A second issue raised by this example is the indeterminate scope of the (potential) convention's bindingness. If convention required parliamentary approval for military action, what form must that approval take? Could approval be expressed by debate or a vote? If the latter applied, should the vote be procedural or substantive? So Cook's example shows that the weight and scope of the convention's bindingness appears to vary depending on the political context. Ultimately these matters in relation to the Iraq deployment were indeed resolved politically. Yet interestingly Mr Blair's initially preferred view of limited parliamentary approval was not the one that prevailed.

²⁰⁰ "In reality the Adjournment Debate is a device to enable the Commons to hold a debate without any serious risk of division at the end of it." Cook, *ibid* 187.

²⁰¹ *Ibid* 188.

²⁰² *Ibid* 186.

²⁰³ B Hough, 'Conventions and Democracy' (2000) 29 Anglo-Am. L. Rev. 368, p 372.

²⁰⁴ Jaconelli (n 38) 149.

Cook's diaries detail his ongoing behind-the-scenes attempts to secure a Commons substantive vote on the deployment of troops. At a press conference in September 2002 he publicly stated his view that it would be 'inconceivable' that Britain could go to war without parliamentary consent and cited the vote on the 1991 Gulf War as a supporting precedent.²⁰⁵ He reiterated his views to the Commons in early March 2003.²⁰⁶ Cook's tactics succeeded and a Commons vote on the deployment of troops in Iraq took place on 18th March 2003. The vote approved military action,²⁰⁷ yet Cook wrote:

*"Irrespective of the outcome, the very fact that a vote took place at all was a major advance. For the first time in the history of Parliament, the Commons formally took the decision to commit Britain to conflict. Now that the Commons has established its right to vote on the commitment of British troops to action, no future government will find it easy to take away again."*²⁰⁸

Is Cook's claim correct? Was the Iraq vote a pyrrhic victory of sorts? Did the Iraq affair witness the strengthening of a practice into a convention?²⁰⁹

Did a convention emerge?

In order to ascertain the status of the parliamentary approval requirement the available evidence must be considered. As one may expect in this area, such evidence consists of the subjective views of relevant political players. Numerous individuals have expressed opinions on the matter, including Mr Blair himself. In 2005, speaking of the Iraq vote, he told a House of Commons Liaison Committee:

²⁰⁵ In adopting this tactic he conceded that "Number 10 would almost certainly rather the world was not reminded of the precedent, and will decode what I was up to", but nevertheless he viewed his actions as constraining the government if they should try to refuse a substantive vote. *Cook* (n 199) 198.

²⁰⁶ *Ibid* 316.

²⁰⁷ This will be discussed further in Chapter 5.

²⁰⁸ *Cook* (n 199) 190. However a recent government consultation paper contradicts Cook's claim that the substantive vote on Iraq was the first such vote in the history of Parliament: "*The second Iraq war was the first occasion since Korea in July 1950 where the House of Commons was invited to hold a vote on a substantive motion before armed forces were engaged.*" Secretary of State for Justice and Lord Chancellor, 'The Governance of Britain, War Powers and Treaties: Limiting Executive Powers' (Cm 7239, 2007) para 31.

Like Cook, Tomkins claims that the Iraq vote represented an unequivocal strengthening of Parliament. A Tomkins, *Our Republican Constitution* (Hart Publishing, Oxford, 2005) p 129.

²⁰⁹ Feldman claims that this may be the case: "*It is just possible that, following the parliamentary debates that preceded the second Gulf War in 2003, there is now a constitutional convention that no military invasion of another country will be initiated without parliamentary approval*". D Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)', C.L.J. 64(2), July 2005, pp 329-351, p 341.

*"if the urgency of the situation does not demand otherwise, then I suspect that [a substantive vote] is what will happen in future conflicts, but I do not think that is setting a constitutional precedent strictly."*²¹⁰

This was a cautious and noncommittal view and indicated that (in Blair's opinion) the Iraq vote did not represent a significant or permanent constitutional development towards increased parliamentary involvement in war decisions. Upon being pressed further Blair revealed the reasons for his view:

*"I am slightly reluctant to go and bind whatever future governments may do ... I suspect, for political rather than constitutional reasons, that will be more like the norm in the future"*²¹¹

There are two interesting aspects to this statement. First, it denotes an understanding on Blair's part that his opinion of the vote may have future constitutional consequences for exercise of the war prerogative and may be used as a basis for arguments should a dispute regarding a parliamentary vote arise in the future. Second, Mr Blair carefully distinguishes between political and constitutional justifications, claiming the former are more significant factors determining whether a substantive parliamentary vote will be held on a given occasion. Again, this is arguably an attempt to effectively minimise the potential long-term constitutional implications of the Iraq vote. However, in light of the close interconnection between convention and politics, particularly the fact that conventions are moulded by political context and mores, it is arguable that the distinction drawn is tenuous and of limited practical effect. Mr Blair's view that a convention governing parliamentary approval of war does not exist is supported by Lord Falconer. In his evidence to a House of Lords Select Committee in late 2005 the latter stated that "*The idea of a convention [since the Iraq vote] seems to me to be neither necessary nor supported by history at the moment.*"²¹² Lord Falconer therefore conceded that though his view was that a convention did not exist, there was a possibility that future constitutional events may change this. His statement emphasises the importance of an accretion of precedents upon which to found a convention. Overall it reflects the fluid and inchoate nature of a potentially emerging convention.

²¹⁰ Emphasis added. House of Commons Liaison Committee, HC (2004-05) 318-I, Minutes of Evidence, Q 31.

²¹¹ Ibid Q 32.

²¹² Emphasis added. *Waging War: Parliament's Role and Responsibility* (n 199) Minutes of Evidence, Q 272.

The alternative views of some leading ministers in the Blair Cabinet indicate that the constitutional significance of the Iraq vote was more decisive. In 2006 Jack Straw claimed that the vote ‘set a **clear** precedent for the future’.²¹³ Blair’s successor, Mr Gordon Brown, has also been more receptive to parliamentary involvement in the war power and has introduced proposed reforms to be discussed in Chapter 4. Yet even in 2005 during Blair’s tenure, Mr Brown stated of Iraq: “*Now that there has been a vote on these issues so clearly and in such controversial circumstances, I think it is unlikely, except in the most exceptional circumstances a government would choose not to have a vote in Parliament.*”²¹⁴ Though Mr Brown did not make express reference to constitutional convention in this passage, he stressed the importance of a parliamentary vote (bar exceptional circumstances) in unequivocal terms. The divergence in the views of politicians regarding the status and scope of the parliamentary approval ‘convention’ demonstrates that subsequent interpretations of the Iraq vote are inconclusive, impacting upon the ‘convention’ itself. Nevertheless the views of Straw and Brown were corroborated by a decisive development towards the end of the Blair era; on 15th May 2007 the House of Commons debated and passed a resolution, supported by government, that “*This House welcomes the precedents set by the Government in 2002 and 2003 in seeking and obtaining the approval of the House for its decisions in respect of military action against Iraq; is of the view that it is inconceivable that any Government would in practice depart from this precedent.*”²¹⁵ It furthermore ‘call[ed] upon government ... to come forward with more detailed [reform] proposals for parliament to consider.’ This resolution represents the most explicit Blair-era recognition that parliamentary approval is a pre-requisite to military action. It was the culmination of ongoing debate and select committee investigation.²¹⁶ Thus the post-Iraq period of Mr Blair’s premiership witnessed an occurrence of parliamentary scrutiny and a crystallisation of the view that the war prerogative needed reform.

It is not possible to conclusively establish whether a formal convention existed at the end of the Blair premiership. Though the evidence up until this date is mixed, it does seem to tilt in favour of the presence of a consensus that a convention requiring parliamentary approval for deployment existed by the time Blair left office. In any event it is clear that most views saw the Iraq vote as ‘binding’ in some way, whether

²¹³ Emphasis added. Quoted *ibid* para 98.

²¹⁴ Quoted *ibid* para 87.

²¹⁵ Hansard HC vol 460, col 582 (15 May 2007).

²¹⁶ To be discussed in Chapter 4.

politically or constitutionally. Yet drawing a distinction between the two is artificial; ultimately there was a shift towards more concrete parliamentary involvement, whether or not the term ‘convention’ is used to describe this shift. Parliamentary approval of war has always been a political necessity. However, by moving towards more express statements of the position and potentially extending approval to require a substantive vote, the nature of parliamentary involvement arguably changed. This trend constituted a key development concerning the prime ministerial war prerogative over the broad Iraq period by emerging as a new, stronger potential check on the power. Of course, whether it forms a practice or convention, parliamentary approval of military action in March 2003 was ultimately given, which perhaps also indicates the limitations of such a convention as a constitutional check on the war prerogative and the extent to which its effectiveness may have been undermined by countervailing constitutional features.

Post-Blair reforms

The emerging convention question is vital to the broad Iraq period which is this study’s concern. However the debate has to an extent been superceded by, and should be viewed in light of, post-Blair reform proposals. Proposed reforms, to be discussed in Chapter 4, suggest formalising parliamentary approval of military action by written convention,²¹⁷ though the extent to which conventions can be created by a single explicit declaration has been subject to question.²¹⁸ Furthermore, the inherent flexibility of constitutional conventions is one reason why some individuals favour placing parliamentary involvement on a statutory footing.²¹⁹ These reforms will be discussed in Chapter 4.

²¹⁷ See Chapter 4, Part 3.2.

²¹⁸ McHarg (n 63).

²¹⁹ “I have an increasing feeling that many of the conventions of government, the constitution and political life in this country are now very much weakened. ... We have seen quite a lot of less important conventions swept away quite inexorably in recent years, not just under the present government.” Kenneth Clarke MP quoted in *Waging War: Parliament’s Role and Responsibility* (n 199) para 89.

[4] Analysis

Parts 1-3 of this chapter have explored the nature of conventions in detail and provided an account of the three vital conventions that played a role in prime ministerial exercise of the war prerogative over the course of the Iraq affair. The two analytical devices outlined in the introduction will now be applied to the preceding discussion in order to obtain deeper insight into the operation of conventions in relation to the premier's war power.

[4.1] Conventions and the Discrepancy Between the Constitutional Framework and Reality

[4.1.1] The Distinctions Identified

This chapter has identified and investigated two vital disparities between law and constitutional reality of the war prerogative: first the monarch exercises the war prerogative at law though in reality it is exercised by the Prime Minister, and second war can lawfully be declared without parliamentary involvement though in political practice its countenance is integral. Conventions occupy the gap between law and practice in both of these examples, namely the 'ministerial advice' and 'parliamentary approval' conventions respectively.

The Ministerial Advice Convention

The Prime Minister is impotent in law but enjoys *de facto* access to the monarch's prerogatives (including war power) by virtue of the ministerial advice convention. This convention thus ensures that such decisions are in effect diverted from the hereditary monarch to elected politicians. So a contradiction between law and reality here is clearly present; a different individual exercises the power depending on whether the position is viewed at law or in practice. This contradiction extends to the normative basis of each position; the political-conventional view reflects the democratic reality of government, yet the legal outlook remains rooted in traditions of monarchy, an issue that was considered in Chapter 2. Judges in a number of cases

have struggled with this disparity. Blair-era cases such as *Bancoult* (based on GCHQ) demonstrate that though the courts do not expressly state they are applying the ministerial advice convention, it has on occasion been afforded silent legal effect of sorts. The non-legal ministerial advice convention has legal effect even though legal appearances suggest otherwise. For example, the judgment of Hooper LJ in *Bancoult* [2006]²²⁰ refused to resort to narrow legal fictions which would have led him to conclude that the offending Order in Council was that of the Queen herself: “*To talk of [an executive] act as the act of the sovereign savours the archaism of past centuries.*”²²¹ Yet if the law had been viewed strictly in isolation, the Order was the Queen’s. So in order to effectively and coherently resolve the case the court was required to take account of wider non-legal political developments or convention. Furthermore, when courts have refused to take silent account of the ministerial advice convention, as in *Quark*, it has led to the clearly absurd and factually incorrect view that the monarch is ultimate decision-maker. When implicitly recognised, the ministerial advice convention comes to act as a constitutional check on ministers, including the Prime Minister, by enabling the court to hold them to account. Perhaps such cases reflect Feldman’s claim that “*the constitution ... seems ... to flourish in the gaps between appearance and reality: that which is not is made to appear to be, and the processes producing that which is will often be disguised by showmanship and magic incantations.*”²²² These constitutional gaps, the realm of conventions, are for Feldman an area of great constitutional significance. The ministerial advice convention enables ‘what is not’ (a legally powerful Prime Minister) to ‘appear to be’ and disguises this with ‘showmanship’ or ceremony, surely a reference to the ritual and spectacle of monarchy.

The Parliamentary Approval Convention

The parliamentary approval ‘convention’ acts as a non-legal check upon the legally unrestrained monarchical exercise of the war power according to ministerial advice. The convention does this by requiring parliamentary support for military action notwithstanding the dearth of formal legal provisions to this effect. The convention thus mirrors the political reality that parliamentary support for warfare is imperative.

²²⁰ *Bancoult, DC* (n 140).

²²¹ *Ibid* para 159 (quoting Lord Roskill).

²²² *Feldman* (n 209) 331.

Part 3 established that in the period following the Iraq vote the requirement for parliamentary approval of warfare strengthened and arguably achieved the status of ‘convention’. Though more formal measures have been proposed in the post-Blair era, the trend over the broad Iraq period perhaps reflected a shift in constitutional culture towards the ethos that Parliament should act as a stronger potential check by playing a greater role in relation to the war prerogative. In this sense it supports Dicey’s claim that conventions represent an evolving ‘constitutional morality’ and will be forged by political developments of the time. The parliamentary approval convention thus allowed a change in constitutional mores and practice to be factored into the constitution without the need for formal changes to the legal framework (though these were later proposed). Thus by the end of the Blair premiership the disparity between law and political reality had ruptured further.

The significance of the ‘parliamentary approval’ example is its corroboration of Pierre Schlagg’s claims that what happens in the ‘gaps’ between legal rules can be of greater significance than rules themselves. He identifies this area as the ‘shadow law’, “*a huge, constantly rearranging assembly of ties, loyalties, debts and obligations ... [I]t is the secret economy of the law operating in the interstitial spaces left by the rational structure of explicit doctrinal law.*”²²³ So the behaviour and informal agreements between individuals working within a legal framework is vital, and formal rules will have a more limited role to play. In a constitutional context this point is supported by Jennings²²⁴ and also Ewing and Bradley who claim “*textbooks on constitutional law often exaggerate the extent to which rules govern political life.*”²²⁵ The circumvention and distortion of collective Cabinet responsibility during the Blair premiership provides another supporting example of such claims; the operation of the convention was formed by the action (or inaction) of individual ministers, particularly Mr Blair himself.

The parliamentary approval convention provides a second example of a direct contradiction between legal framework and political reality. The former places power in an individual hereditary monarch and the latter in a parliament of elected representatives. The contradiction extends to their respective ideological bases, namely of hereditary right on the one hand and democracy on the other. Ultimately the legal view of war decisions can only be viewed as coherent and accurate when

²²³ P Schlag, ‘Normativity and the Politics of Form’ 139 U. Pa. L. Rev. 1990-1991, 801, pp 855-857.

²²⁴ Jennings (n 69) 2.

²²⁵ Bradley & Ewing (n 122) 27.

the parliamentary approval ‘convention’ is also taken into account, providing further evidence of conventions’ vital role in enmeshing law in its political context and occupying the gulf between law and reality.

[4.1.2] The Role of ‘Convention’ in the Disparity

It seems that conventions arguably act to mitigate the cleavage between static legal models rooted in earlier centuries and modern developments which have seen political practice shift further away from such frameworks. The view that conventions act to bridge the gap between legal form and political reality is shared by a number of leading constitutional lawyers. Feldman subscribes to this view, claiming “*Conventions of the constitution are means of holding in check the tension between the formal, legal appearance of the constitution and the current practice.*”²²⁶ Here Feldman accepts that tensions between the law and practice may exist and that conventions have a role (albeit unspecified) in reconciling them. Similarly Marshall makes the distinction between law and reality, writing that conventions ‘*give effect to the principles of government accountability*’ and ensure that “*accountability is allocated in accordance with political reality rather than legal form.*”²²⁷ A broadly consistent view was expressed by Lord Simon in *Town Investments*²²⁸ who stated of the Crown: “*The legal concept still does not correspond to the political reality. The legal substratum is overlaid by constitutional convention.*”²²⁹ So conventions create and sustain a sub-legal network of arrangements that operate beyond the relatively stable legal framework of Crown, a framework that has remained intact across centuries.

Yet if it is accepted that conventions operate in constitutional gaps between law and reality, it is unclear precisely *how* they do this. Preceding discussion indicates that perhaps constitutional academics have inadvertently adopted the term ‘convention’ to *explain* the discrepancies between constitutional form and practice. Conventions in this sense are best understood as the constitutional terminology that lawyers use to explain real-life deviations from the legal framework (such as why the Prime

²²⁶ Emphasis added. *Feldman* (n 209) 333.

²²⁷ Marshall (n 16) 18. See also Ewing & Bradley who claim that conventions “*may be used for discreetly managing the internal relationships of government while the outward legal form is left intact.*” *Bradley & Ewing* (n 55) 23.

²²⁸ *Town Investments Ltd v Department of the Environment* [1978] AC 359 (HL).

²²⁹ Ibid 400. This was discussed in Chapter 2.

Minister and not the legal holder of the prerogative always makes such decisions in reality). The very nature of conventions tends to support this proposition in that they vary greatly from one another across a variety of features and differences are often a matter of degree. Leading understandings are deficient and it is difficult to force all conventions into any meaningful, definitive all-encompassing lawyerly definition. As a result, the same definition is applied to conventions such as ministerial advice and collective Cabinet responsibility despite their clearly disparate natures.

The proposition that ‘convention’ is a term utilised to explain or reconcile disparities between law and political reality has important implications for constitutional understanding of the premier and war power. It must be questioned whether the concept of ‘convention’ is viable *per se* or whether it merely thinly veils an inconvenient, chaotic ‘multiplicity of facts’.²³⁰ If the latter is correct, this may result in potentially greater room for manoeuvre for Prime Ministers in two ways; first by glossing over important distinctions between vastly different conventions, and second by concealing the subtle political dynamics that may allow some less rigid conventions (such as collective Cabinet responsibility) to be emasculated by the actions of individuals whose conduct they are meant to regulate. However, more positively the use of ‘convention’ as a generic term ensures that the mismatch between legal labels and reality is by no means fatal. ‘Convention’ offers a convenient means to make sense of the divergence between constitutional law and political reality of central government and prevents the former from being misrepresentative, incoherent and removed from reality. So conventions provide an explanation of how the premier actually exercises war and related prerogative but beyond this their utility is difficult to ascertain.

[4.2] The Role of Boundaries in Relation to Conventions

Boundaries between law and non-law play an important role in prevailing understandings of constitutional conventions. Part 2.1.4 established that the courts are keen to maintain a clear distinction between law and non-legal conventions

²³⁰ M Foucault, *Power/Knowledge, Selected Interviews and Other Writings 1972-1977* (Longman, Essex, 1980) p 83.

(notwithstanding their inadvertent acceptance of the ministerial advice convention discussed at Part 3.1)

Conventions are clearly *not* equivalent to laws, but perhaps the sharp distinction using positivist models is misleading in this area. The rigid positivist approach creates formal distinctions that may in limited cases be of practical use to lawyers in courts who are solely concerned with identifying a valid law. However, such formal distinctions are perhaps unduly narrow when attempting to obtain an accurate and realistic picture of the constitution itself. The positivist model explicitly and artificially eliminates normative features from consideration, yet these are arguably a central feature of conventions and the context of law. The positivist model acts to exclude and marginalise conventions, yet these bear more resemblance to constitutional reality and are the primary method of regulation at the constitutional apex. By claiming to exclude conventions from their sphere the courts are effectively excluding themselves from becoming engaged in the maintenance, clarification, development and enforcement of conventions and therefore the activities of central government. The predominance of positivist models in judicial views of convention therefore tacitly protects the Prime Minister and central government from greater scrutiny and enables conventions to be bypassed or moulded to political preferences or necessities.²³¹ But if dominant positivist models are left aside then the position is arguably more blurred than many theorists assume. Munro warns against overrating the strength of conventions or blurring the distinction with laws; this could be dangerous.²³² He states that maintaining a distinction need not involve overlooking conventions.²³³ This is arguably correct, yet the consequence of the positivist model is that for lawyers concerned with law, deeming conventions ‘non-law’ inevitably marginalises them.²³⁴ The absurd implication of this was seen in *Quark* where law maintained its ‘internal purity’²³⁵ at the cost of coherence.

So maintaining of the law/convention distinction relies on what Margaret Davies calls the ‘oppressive purity of legal thought’²³⁶ and forms an example of law’s concern with eliminating non-law from its ambit. Davies claims that “*the iniquitous thing about law*

²³¹ Hough (n 203)

²³² Munro (n 86) 235.

²³³ Ibid 224.

²³⁴ Munro (n 102) 648-9.

²³⁵ C Douzinas, R Warrington & S McVeigh, *Postmodern Jurisprudence, The Law of Text in the Texts of Law* (Routledge, London, 1991) p 25.

²³⁶ M Davies, *Delimiting the Law, Postmodernism and the Politics of Law* (Pluto Press, London, 1996) p 20.

at the present time is the myths of its purity, closure and fixity: the blind insistence that ‘proper’ law is separate from the other sorts of norms which order society.”²³⁷

Mainstream academic and judicial views of conventions clearly demonstrate this approach in action and further illustration of this ethos is provided by the war prerogative caselaw discussed in Chapter 5.

It is not suggested that prevailing views of the law-convention distinction are always erroneous. Indeed laws and conventions are clearly different in nature in that conventions are not *directly* or *expressly* enforced in courts. However, it is arguable that conventions do have the capacity for *indirect* or *silent* legal effect which blurs the distinction, particularly if the dominant positivist models that prevail in this area are departed from. Ultimately, the distinction between law and convention must be viewed in light of their symbiotic relationship: “*The laws of the constitution could stand alone, although the constitution would then be antiquated and static; but the conventions would be meaningless without their legal context. Every constitutional convention is closely related to some law or laws, which it implies.*”²³⁸ This does not necessarily involve the claim that the positivist approach is obsolete. But it does indicate that the dominant positivist method of viewing the constitution (and conventions) is not the *only* analytical method available. If the area is considered from alternative (but equally valuable) jurisprudential perspectives it may lead to the conclusion that some mainstream assumptions about conventions are not set in stone. By adopting (for example) an alternative Dworkinian view it seems that in some respects the difference between law and convention is not so apparent. So the clarity and extent of the distinction between law and convention is actually dependent upon the jurisprudential model that is adopted. Yet even the adoption of an apparently neutral, apolitical positivist model is not a value-neutral decision as it involves preferencing one outlook above others. In Chapter 5 it will be seen that rigid adherence to positivist ideals separating law from non-law is itself a political stance of sorts which has political consequences. As Phillips, summarising the work of Freeman, states “*mischief [is] done, not only to our understanding of history but to the course of history itself, by lawyers’ interpretations and lawyers’ ways of looking at things … [particularly] the natural tendency of the legal mind towards conservatism and deference to authority.*”²³⁹ Ultimately, it seems at the very least appropriate to

²³⁷ Ibid 37.

²³⁸ Emphasis added. *Jackson & Leopold* (n 4) 141.

²³⁹ Work of Edward Freeman described by *O Hood Phillips* (n 2) 145.

view any distinction between law and convention in light of their inherently reciprocal relationship.

Chapter Four

Prerogative and Prime Minister

The focus of this study is the war prerogative, just one of a range of prerogative powers which are exercisable by the Prime Minister. In order to fully understand the war prerogative it is necessary to understand the various individual powers prerogative affords the premier as well as the nature of that power itself. The office of Prime Minister entitles its holder to what has been called a ‘formidable battery’¹ of personal powers, nearly all of which are exercised by virtue of the ancient ‘prerogative’ which emanates from the Crown. The prerogative, or ‘royal prerogative’, ‘with its roots in the age of divine right’² is in essence what remains of the absolute monarchical authority that once ruled Great Britain, though now relatively diminished from these once omnipotent proportions. It is comprised of customary powers which have remained intact despite centuries of constitutional whittling by events such as Glorious Revolution and the Bill of Rights in the seventeenth century³ and statutory and judicial developments in the twentieth. Despite such changes, “*Prerogative remains central to the way Britain is governed today, both symbolically and practically*”,⁴ leading a 2004 Select Committee to suggest that ‘the case for reform [of the significant prerogative powers] is unanswerable.’⁵

Prerogative is exercised in two forms, though the legal status of each is identical.⁶ Firstly, prerogative power can be exercised directly in the name of the Crown,

¹ T Benn, *Arguments for Democracy* (Penguin, London, 1982) p 26.

² D Gladstone, ‘What Shall We Do with the Crown Prerogative?’ *Journal of Legislative Studies*, Vol. 4, No. 3, Autumn 1998, p1, p 8

³ The Bill of Rights essentially emasculated monarchical power by placing Parliament above the King and in charge of the national purse strings. However, as Carter has stated, “*the executive power was still firmly concentrated in the hands of the King. What had been decided, in admittedly imprecise fashion, was that the King could not act in some areas without the consent of Parliament.*” B Carter, *The Office of Prime Minister* (Faber & Faber, London, 1956) p 15. See also Select Committee on the Constitution, ‘Waging War: Parliament’s Role and Responsibility’, HL (2005-06) 236-I, para 4.

⁴ D Gladstone in Public Administration Select Committee, ‘Taming the Prerogative: Strengthening Ministerial Accountability to Parliament’, HC (2003-04) 422, Written Evidence, Ev 2.

⁵ Ibid 3.

⁶ But see the impact of the Human Rights Act 1998, s 21. Section 21(1)(f)(i) defines ‘primary legislation’ to include prerogative Orders in Council. This is significant because the Act allows judges to ‘strike down’ subordinate legislation (such as a statutory instrument) which is contrary to the HRA

usually in the form of a decision or command by a premier or government minister. Alternatively, prerogative power can be exercised by an ‘Order in Council’. This second mode is effected with the additional procedural formality of being approved by a meeting of the Privy Council, though this is essentially a ‘rubber stamping’ exercise.⁷ In the words of Sedley LJ, “*The recital [on Orders in Council] that ... [they] are made by Her Majesty ‘by and with the advice of her Privy Council’ is purely formal: in reality the Privy Council play no role beyond the placing by one of its members, a minister, of the instrument before the Monarch, who is called upon by constitutional convention to approve it.*⁸ Prerogatives relating to matters such as regulation of the armed forces tend to be exercised by way of Order in Council.

Prerogative, then, is the collection of powers vested in the Crown that are recognised by common law as constitutional custom. In keeping with their monarchical origins, many of these Crown powers continue to be exercised by the monarch at law. However, in constitutional reality their use is now directed by Prime Minister and Cabinet by virtue of a web of conventions that effectively ensures *de facto* ministerial control. As outlined in Chapter 3, the ‘paramount’ convention of the British constitution requires the monarch to exercise her prerogatives according to the advice of Cabinet ministers, especially the Prime Minister,⁹ thus ensuring political leadership is undertaken by democratically elected individuals. Nevertheless, the inherently monarch-based character of prerogative powers requires a degree of interaction between the Queen and Her ministers.

This chapter first briefly considers the nature of prerogative power itself by detailing the two alternative views of prerogative among leading constitutional theorists; the first depicting it in narrow terms, and the second ascribing it a more expansive ambit.

(s. 6(1)), but restricts them to issuing a declaration of incompatibility regarding legislation of the primary sort (s. 4(2)).

⁷ See *R (on the application of Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2006] EWHC 1038 (Admin), [2006] All ER (D) 149 (May), Hooper LJ, para 5. The procedure of creating Orders in Council is as follows: the order will be made under prerogative by a government minister. A meeting of between 4-5 members of the Privy Council will later be held (as a matter of convention, all Cabinet ministers are members of the Privy Council). The relevant measure will be approved by the sovereign. The procedure tends to be viewed as a minor formality. See also AW Bradley & KD Ewing, *Constitutional & Administrative Law* (14th edn, Pearson, Harlow, 2007) pp 253-4.

⁸ *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498, [2008] QB 365 CA, para 16. When *Bancoult* reached the House of Lords, Lord Bingham claimed “*the royal prerogative to legislate by order in council is indeed an anachronistic survival.*” *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2008] 4 All ER 1055 (HL) para 69.

⁹ *Halsbury’s Laws of England* (4th edn, Butterworths, London, 1996) vol 8(2), para 21.

It then outlines the prerogative powers specifically enjoyed by the Prime Minister with particular attention to the war prerogative. Discussion of these prerogatives draws upon caselaw and salient examples of Mr Blair's exercise of such powers in relation to his use of the war power as outlined in Chapter 1. Finally this chapter considers the divergences between law and practice and the role of boundaries that have become apparent from the preceding discussion. The account of prerogative at common law discussed here forms an important grounding for Chapter 5 which investigates the war and related prerogatives over the broad period of the Iraq affair.

[1] Legal Views of Prerogative

An initial account of the nature of the prerogative and its status at law is required in order to establish a detailed understanding of its nature. Generally, two conflicting views of prerogative exist.¹⁰ Debate surrounds which of these accounts most accurately depicts prerogative powers. Definitions remain 'far from clear cut'¹¹ and uncertainty exists because, like the conventions that regulate them, the nature and scope of prerogative powers are largely unrecorded.

[1.1] Narrow Prerogative

The 'narrow' view of prerogative originates from the writings of William Blackstone in the eighteenth Century who viewed prerogative in strict terms as:

¹⁰ Though Brazier categorises prerogatives into 3 kinds: (1) Constitutional prerogatives (including appointment of a Prime Minister and dissolution of Parliament) (2) legal prerogatives (such as Crown immunity), (3) Ministers' executive prerogatives (such as the prerogative to conduct foreign affairs). M Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) O.J.L.S. 25(1) pp. 97-122, p 105-6.

¹¹ S Payne, 'The Royal Prerogative', in M Sunkin & S Payne (eds), *The Nature of the Crown, A Legal and Political Analysis* (Oxford University Press, Oxford, 1999) p 78.

“That special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity.”¹²

A vital characteristic of Blackstone’s prerogative was that it *only* encompassed “those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects”.¹³ The essence of this definition is that prerogatives are unique powers particular to the monarch by virtue of his position and exercisable by him only. It distinguishes the monarch from ‘others’ and prerogative powers from ‘ordinary’ powers that other subjects may also enjoy. This would obviously include prerogative powers such as dissolving Parliament and bestowing honours which regular individuals do not possess. By implication, this is a tight rendering of prerogative.

The leading modern adherent of Blackstone’s thesis is Wade who also advocates prerogative in its ‘narrow sense’. Wade defines prerogative as “a bundle of miscellaneous powers and rights which are inherent in the Crown and no-one else”.¹⁴ He subscribes to Blackstone’s proposal that such powers are “unique to the Crown and are possessed by no subject”,¹⁵ and puts forward a two stage test for determining a genuine prerogative power:

“(a)does it produce effects at common law, and (b) is it unique to the Crown and not shared with other persons?”¹⁶

True prerogative therefore emanates from the Crown and is restricted to specific immunities and privileges of political or constitutional importance. For Wade prerogative represents a precise set of powers. Yet one problem with Wade’s definition is that it is tight to the point of being unduly restrictive. For example, the first requirement of his two stage test, namely that a prerogative must produce effects at common law, rules out many widely accepted Crown prerogatives. Wade admits this, and states that entering into international treaties and selection of Cabinet personnel are commonly misclassified as prerogatives when they are not.¹⁷ But these powers are inexorably entwined with the Crown and synonymous with

¹² W Blackstone (ed, G Jones) *The Sovereignty of the Law, Selections from Blackstone’s Commentaries on the Laws of England* (Macmillan, London, 1973) p 90.

¹³ Ibid.

¹⁴ H W R Wade, ‘Procedure and Prerogative in Public Law’ (1985) 101 L.Q.R. 180, p 191.

¹⁵ Ibid.

¹⁶ Ibid 193.

¹⁷ Ibid.

executive activity making such a claim highly questionable. Wade nevertheless claims that his definition does encompass the war prerogative because its exercise impacts upon the common law. Thus in any event the war power is universally categorised as a prerogative power.

[1.2] Wider Diceyan Prerogative

The second ‘wider’ view of prerogative encompasses the narrow prerogatives (as defined by Blackstone and Wade) and a vast area beyond these. A V Dicey, sage of the British constitution, is the leading adherent of this view. In characteristically positivist terms, he claimed:

“The prerogative appears to be both historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority, which at any time is legally left in the hands of the Crown.”¹⁸

Dicey’s definition is couched in negative terms; he views prerogative as all government authority that remains free **from** the legal encroachments of statute and common law. This is epitomised by his use of the word ‘residue’, a term that has since been widely adopted by generations of constitutional lawyers to describe the character of prerogative. It could be argued, however, that though the word ‘residue’ is technically correct, its connotations of insignificance or sparsity are misleading. On this Diceyan definition, prerogative can be viewed in Millsian terms as a vast sphere of action, within which the government enjoys the ability to exercise its authority or use its discretion as it sees fit (albeit within legal boundaries). This is supported by another of Dicey’s statements:

“Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.”¹⁹

Again Dicey’s statement about prerogative begins in expansive, all encompassing terms by taking ‘every government act’ as his starting point. However, there are two restrictions applied to limit the scope of prerogative. Firstly, any government power

¹⁸ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan, London, 1985) p 424.

¹⁹ Ibid 425.

which emanates from statute is excluded. Statute provides an alternative and superior source of authority for government action, namely parliamentary sovereignty. Prerogative power is extra-statutory. The second, and perhaps more subtle, of Dicey's requirements is the element of lawfulness. At all times government must adhere to the ordinary laws of the land.²⁰ Prerogative cannot ever empower ministers to exercise authority beyond this domain. Reflected in this second limitation is the rule of law; the procedural ideal that Dicey propounded as a guiding light and fundamental tenet of the British constitution.²¹ This second requirement in Dicey's formulation is very interesting. It is in keeping with the spirit of the British constitution, which had traditionally viewed individual liberty in negative terms. There existed a thread of common law reasoning that the individual was entitled to do anything that was not prevented by the law: "*England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what expressly forbidden*".²² By viewing prerogative as residual, this principle is extended to government.

It is clear that according to Dicey's definition prerogative is a highly flexible form of power. Dicey casts the prerogative as a fluid entity operating between two core constitutional pillars: the rule of law and parliamentary sovereignty. He does this by viewing prerogative as providing authority for *any* government activity *except* where a statutory power already exists (because parliamentary law is sovereign) or where an act is already forbidden by law (because the rule of law applies to government officials as well as individuals). So prerogative is what remains *after* these two fundamental constitutional pillars have been accounted for. As Sedley has perhaps optimistically commented: "*Once ... the prerogative is grasped in its modern form as being not a historic residue of extra legal power held by the executive government, but the power, within the law, to fill constitutional spaces and exercise governmental choice, it takes place within and not beyond the rule of law.*"²³

²⁰ According to Dicey, in England "*every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen*" Ibid 193.

²¹ Ibid ch IV.

²² Megarry VC in *Malone v Metropolitan Police Commissioner* [1979] Ch 344, p 357. It should be noted that the enactment of the *Human Rights Act 1998* has since enshrined a series of express, positive individual rights.

²³ S Sedley, 'The Sound of Silence: Constitutional Law Without a Constitution' (1994) 110 L.Q.R. 270, p 290.

So the prerogative, when viewed residually, allows government to undertake a vast range of extra-statutory activities including all of the premier's powers to be detailed in Parts 2 and 3 of this chapter. Additionally, all other extra-statutory, lawful activities that government shares with its citizens, such as the ability to enter into binding contracts or to employ personnel (essentially, the ability to do anything the law does not forbid) are also included within Dicey's residual 'prerogative'. Unlike the narrow definitions which focus on what prerogative *is*, Dicey's conception of prerogative is defined by what it *is not*, or what it cannot be; it is not statutory and it cannot authorise unlawful actions. It will always be possible to determine with relative certainty whether executive activity is authorised by a statute, and whether such activities are unlawful. By being able to claim with certainty what the law *is*, one can state with similar certainty the prerogative is *not*. This is perhaps why the Diceyan view is the more widely accepted of the two views. Within these wide boundaries, prerogative can authorise any government act.²⁴ This can be contrasted with the narrow view of prerogative which cannot account for the extra-statutory no-man's-land of arbitrary authority that exists between 'core' prerogative and unlawfulness.²⁵

The extraordinary scope for government action that Diceyan prerogative authorises is evident, and has been subject to criticism. Zellick, for example, claims that

*"If the official and the citizen are treated alike, it follows that he is not only constrained when the citizen is constrained but that he is unrestrained where the citizen is unrestrained. Herein lies the mischief of this doctrine."*²⁶

Such problems were highlighted by the case of *Malone*,²⁷ at which much of Zellick's criticism was directed. Here the court was required to determine whether the Home Secretary had acted *ultra vires* when he authorised the telephone tap of a suspected

²⁴ See reference to the 'Ram doctrine'; *Taming the Prerogative* (n 4) para 12.

²⁵ Harris argues that the distinction between 'narrow' prerogative powers, and the wider ability of government to do whatever the law does not forbid is correct. He refers to this no-man's-land of power as the "third source of authority for government action", the first two sources being statute and 'true' prerogative. Harris warns of the "potential for arbitrary action under the third source". B V Harris, 'The "Third Source" of Authority for Government Action' (1992) 109 L.Q.R. 626, and more recently, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 L.Q.R. 225-250. Harris' notion of the 'third source' was utilised by the Court of Appeal in *R (on the application of Shrewsbury & Atcham Borough Council and another) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148: see Carnwath LJ (paras 45-7) and Richards LJ (paras 72-3).

²⁶ G Zellick, 'Government Beyond Law' [1985] P.L. 283, p 294. A similar point is made more recently by Cohn: "Personification/corporatization, which relies on an analogy between the state and other juristic persons' freedom to act as long as they are not prohibited by law, is gaining force, but it misdirects attention from the particularities of public power. Analogies to legal bodies ... disregard the 'democratic deficit' problem." Cohn (n 10) 121.

²⁷ *Malone v MPC* (n 22).

criminal using prerogative power. At the time, such activity was not prevented by any specific legislation or privacy right, leading Megarry VC to the following conclusion:

*"If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can be done simply because there is nothing to make it unlawful."*²⁸

Despite a subsequent contrary European Court of Human Rights judgment²⁹ Malone highlights shortcomings in the Diceyan formulation of prerogative in that it enabled prerogative to authorise and legitimise surreptitious government activity merely because no legislation expressly prohibited the conduct.

The Diceyan view has been subject to additional criticisms. For example, Lord Lester has accused it of "*fail[ing] to have regard not only to the United Kingdom's obligations under the European Convention [of Human Rights] but also to the modern constitutional position of public authorities, including ministers and their departments.*"³⁰ More relevant in the context of this study is Cohn's criticism that a Diceyan-based view of prerogative makes formal regulation of government power more difficult: "*Arbitrariness and covert practices are more likely to flourish in an informal climate, rendering review and other accountability channels less effective.*"³¹ The extent to which this is the case in relation to the war and related prerogatives has been discussed in preceding chapters and will be considered further in Chapter 5.

Despite such shortcomings, Dicey's influence can be detected running through numerous influential judgments. It was unanimous approval by the Law Lords in *Burmah*,³² despite Lord Reid stating "*The definition of Dicey ... always quoted with approval ... does not take us very far. It is extremely difficult to be precise.*"³³ Dicey's view has also been cited in the leading cases on prerogative, *De Keyser's*

²⁸ Ibid, Megarry VC 367.

²⁹ *Malone v United Kingdom* [1984] 7 EHRR 14. Here the European Court of Human Rights found that UK law had violated the applicant's Article 8 right to respect for his private life. This was because the law did not clearly set out the scope and nature of the power and failed to protect against arbitrary interferences with private life

³⁰ A Lester & M Weait, 'The Use of Ministerial Powers without Parliamentary Authority: the Ram Doctrine' [2003] P.L. 415, p 421.

³¹ Cohn (n 10) 116.

³² *Burmah Oil Company v Lord Advocate* [1965] AC 75 (HL). See judgments of Lord Reid, p75; Viscount Radcliffe, p117; Lord Hodson, p137; Lord Pearce, p148; Lord Upjohn, p165.

³³ Ibid Lord Reid, p 75. Approved by Waller LJ in *Bancoult, CA* (n 8) para 82.

*Royal Hotel*³⁴ and *GCHQ*,³⁵ and continues to impact upon more recent cases of *Fire Brigades Union*,³⁶ *Northumbria Police Authority*,³⁷ *Hooper*³⁸ and *Bancoult [2008]*.³⁹

This is indicative of what Wade terms the judicial addiction to the ‘free and easy’ Diceyan conception of prerogative.⁴⁰

The influence of Diceyan prerogative extends beyond the courts. For example it was adopted by a 2004 House of Commons Select Committee.⁴¹ More significantly the recently publicised long-standing Civil Service ‘Ram Doctrine’ which set out the position regarding ministerial powers states that a “*Minister of the Crown ... may ... exercise any powers that the Crown has power to exercise, except so far as he is precluded from doing so by statute. In other words, in the case of a Government Department, one must look at the statutes to see what it may not do ... the governing principle is that an express statutory provision is not necessary to enable a Minister to exercise functions.*”⁴² This statement of government executive powers is consistent with the Diceyan view.⁴³

³⁴ *Attorney General v De Keyser’s Royal Hotel Limited* [1920] AC 508, Lord Dunedin p 526. But contrast this view with the judgment of Lord Parmoor who subscribes to the ‘narrower’ view, pp 571-2.

³⁵ *Council of Civil Service Unions & Others v Minister for Civil Service* [1985] AC 374, HL. Hereinafter referred to as *GCHQ*.

³⁶ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union & Others* [1995] 2 AC 513, HL, Lord Birkenhead at p 573.

³⁷ *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26, CA. Nourse LJ: “*It is important to remember that the Royal prerogative was never regarded as a collection of mere powers to be exercised or not at the will of the sovereign.*” p 56.

³⁸ *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, All ER(D) 60 (May) HL, specifically Lord Hoffman, para 46. Though see Laws LJ in *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 which provides a counter-example where the court held that government must point to positive laws to justify its actions.

³⁹ *Bancoult*, HL (n 8). Here the Diceyan definition was adopted by Lord Bingham (para 69) and Lord Mance (para 141). But see Carnwath LJ in *Shrewsbury v Secretary of State* (n 25).

⁴⁰ *Wade* (n 14) 194.

⁴¹ *Taming the Prerogative* (n 4) para 3.

⁴² *Lester & Weait* (n 30).

⁴³ For a discussion and analysis of the Ram doctrine see *ibid*.

[2] Significant Prerogative Powers of the Prime Minister in the Iraq Affair

Despite their ancient roots prerogative powers continue to be integral to the modern office of Prime Minister. Such is their importance to government that in 1993 Prime Minister John Major in parliamentary questions claimed “*it would be impracticable, and would lead to disproportionate cost, to list all the occasions when action was taken under the prerogative.*”⁴⁴ Furthermore, it is testament to their importance that many controversies regarding the Blair premiership have involved prerogative powers in some capacity.⁴⁵ As with constitutional conventions, a definitive list of ‘core’ prerogatives is unattainable. Radcliffe in *Laker Airlines*⁴⁶ claimed that “*in our history the prerogatives of the Crown have been many and various, and it would not be possible to embrace them under a single description*”,⁴⁷ a view later reiterated by the Lord Privy Seal.⁴⁸ Nevertheless a 2004 Commons Select Committee did attempt to list the main prerogative powers and called for a definitive inventory of government prerogatives to be produced.⁴⁹ The government later commenced a cross-departmental review of prerogative powers.⁵⁰ Though, according to Lord Reid, “*It is not easy to discover and decide the law regarding the royal prerogative and the consequences of its exercise*”,⁵¹ the following prerogative powers exercisable according to the advice of the premier can be identified with relative certainty:

⁴⁴ Quoted by B Hadfield, ‘Judicial Review and the Prerogative Powers of the Crown’ in *Sunkin & Payne* (n 11) 204. For a similar statement by Tony Blair see *Taming the Prerogative* (n 4) para 43.

⁴⁵ See Introduction.

⁴⁶ *Laker Airways Limited v Department of Trade and Industry* [1977] QB 643.

⁴⁷ Ibid 114. See also the comments of Nourse LJ: “*It has not at any stage in our history been practicable to identify all the prerogative powers of the Crown. It is only by a process of piecemeal decision over a period of centuries that particular powers are seen to exist or not to exist, as the case may be.*” *Northumbria Police Authority* (n 37) 56.

⁴⁸ “*The government shares the view of Wade and Bradley, in their work on constitutional law, that it is not possible to give a comprehensive catalogue of prerogative powers.*” Quoted in *Halsbury’s* (n 9) para 367 footnote.

⁴⁹ *Taming the Prerogative* (n 4) paras 59-60 and written evidence Ev 13-14.

⁵⁰ “*The Government is conducting an internal scoping exercise of the executive prerogative powers – those which remain in use and those which have been superseded in whole or in part by statute ... The Government will consider the outcome of this work and will, in the coming months, launch a consultation on the next steps.*” Lord Chancellor & Secretary of State for Justice, ‘The Governance of Britain – Constitutional Renewal’ (Cm 7342-I, II & III 2008) vol I, para 246.

⁵¹ *Burmah Oil* (n 32) 99.

[2.1] Power to Appoint Cabinet Ministers

[2.1.1] The Appointment Power: General Points

Constitutionally, it is the monarch's proper role to appoint ministers, yet convention dictates that She must exercise this prerogative according to the Prime Minister's recommendations.⁵² Therefore, indirectly, prerogative allows a Prime Minister almost complete control over the personnel of his Cabinet. It allows the office holder the technical capacity to appoint and dismiss Cabinet ministers at will, reflecting "*the legal position that Ministers are appointed and hold office at the pleasure of the Crown.*"⁵³ In a wider context, the power of government appointments ensures the Prime Minister solid House of Commons support of at least 95 of his ministers⁵⁴ who are obliged to support government policy by virtue of the convention of collective responsibility.

Nevertheless, there remain practical and political restraints on a premier's use of the prerogative to appoint and dismiss ministers. The exercise will frequently involve a political balancing act taking into account factors such as the need to reconcile diverging opinions within party, the need to maintain political alliances and to avoid opposing counter-alliances.⁵⁵ Ultimately, the premier's advice to the monarch will rest largely upon the political climates of the day and the behaviour of politicians. Kier sums up the position by claiming "*How far ... [the Prime Minister] is effectively in a position to impose his own choice is of course dependent on circumstances, personal and otherwise, which hardly lend themselves to constitutional analysis.*"⁵⁶ Despite such limitations, the premier's power to appoint and dismiss Cabinet ministers is clearly a political asset, affording a position of relative predominance *vis-a-vis* his party in Parliament and individual Cabinet ministers.

⁵² Halsbury's (n 9) paras 21, 394.

⁵³ R Brazier, *Ministers of the Crown* (Clarendon Press, Oxford, 1997) p 205.

⁵⁴ The *House of Commons Disqualification Act 1975*, Section 2(1)-(2) indirectly prevents the appointment of more than 95 ministers by providing that if the number of ministers exceeds this threshold the excess shall not be entitled to vote in the Commons.

⁵⁵ A H Brown, 'Prime Ministerial Power (Part 1)' [1968] P.L. 28, p. 37; H Laski, *Reflections on the Constitution* (Manchester University Press, Manchester, 1997) p 98; R Brazier, *Constitutional Practice* (3rd edn, Oxford University Press, Oxford, 1999) p 63.

⁵⁶ D L Kier, *The Constitutional History of Modern Britain since 1485* (9th edn, Adam & Charles Black, London, 1975) p 499.

Examples of Mr Blair's exercise of the 'Cabinet personnel' prerogative over the course of his premiership are extensive and a definitive account is beyond the scope of this study. Instead this Part will consider the potential significance of this prerogative to Mr Blair's exercise of the war prerogative in Iraq. In matters of war, the premier will work with the Foreign Secretary, Defence Secretary and the Attorney General, all of whom are ministers that he has appointed and who play significant roles in decisions to undertake military action. Chapters 1 explained how the ministerial role of the Attorney-General in particular was a significant factor in the Iraq decision.

[2.1.2] Prime Ministerial Appointment of the Attorney General

Mr Blair appointed Lord Goldsmith to the post of Attorney General in 2001. By virtue of his appointment power a premier will inevitably occupy a position of relative hegemony in relation to the Attorney General, though the strength of this predominance will vary according to political climates and alliances.

The Attorney General is a government minister,⁵⁷ though his role can be divided into two categories of duty: legal and ministerial.⁵⁸ The office has 'traditionally been at the junction of law and politics in England and Wales'⁵⁹ and a recent Commons select committee identified resulting 'tensions' in this dual role.⁶⁰ One of the Attorney's primary official duties is legal adviser to the Crown⁶¹ and this was his formal role in the Iraq affair. This responsibility is 'non-ministerial', is 'not subject to collective responsibility' and requires the A-G to 'act independently of the Government'.⁶² However in evidence to a recent House of Lords committee,

⁵⁷ Select Committee on the Constitution, 'Reform of the Office of Attorney General', HL (2007-8) 93, paras 8-9.

⁵⁸ Ibid para 22.

⁵⁹ Ibid para 1.

⁶⁰ Ibid para. 55.

⁶¹ Ibid paras 4-5. See also Constitutional Affairs Committee, 'Constitutional Role of the Attorney General', HC (2006-7) 306, paras 11, 68.

⁶² *Reform of the Office of Attorney General*, ibid para 9. The sequence of events set out in here and in Chapter 1, Part 1.5 appears *prima facie* at odds with Lord Goldsmith's comments on the A-G role to a 2006 Lords committee: "*it is not the Attorney-General's job to construct a legal case for a policy which in fact does not have a proper legal base ... It is the job of the Attorney-General to give his best and honest opinion of whether or not the course of action which he is being asked to advise on is lawful or not.*" *Waging War: Parliament's Role and Responsibility* (n 3) para 34.

Professor Jowell questioned whether such independence on the part of an Attorney is possible when his role as a member of government is at least partly political.⁶³

Full information about discussions between the Prime Minister and Lord Goldsmith in the crucial February to March 2003 period is not currently available. However two facts can be stated with relative certainty. First the Attorney did change the nature and tone of his legal advice within a brief timeframe, and second, as leader of the government of which the A-G was a member, the Prime Minister was in a position to exert influence upon him (whether this was done or not).⁶⁴ It cannot be conclusively established whether or not Mr Blair did place political pressure on Lord Goldsmith. However, as Jowell states, ‘the appearance of [the Attorney’s] lack of independence is what matters.’⁶⁵ Jowell goes on to argue that the A-G’s dual role ‘induces an appearance of partisanship’ and potentially offends the rule of law and the separation of powers.⁶⁶ The transgression of these principles was demonstrated in the Iraq affair where the Attorney ultimately declared the actions of the government (of which he was a member) internationally lawful. It is therefore arguable that the Prime Minister’s *de facto* prerogative power to appoint the Attorney General as a minister of his government *may* have played a discernible role in enabling him to secure the deployment of troops (which was entirely reliant upon a clear statement of legality).⁶⁷ Mr Blair *may* have been able to exert influence or persuasion to ensure that Lord Goldsmith produced legal advice in support of his preferred exercise of the war prerogative. Vitally it was Lord Goldsmith’s amended advice upon which Parliament voted to approve war on 18th March 2003. This advice also proved significant in the context of prerogative caselaw and is discussed further in Chapter 5.

⁶³ *Reform of the Office of Attorney General*, ibid paras 32-33. See also the comments of Professor Bradley at ibid para 36. Elsewhere, Jowell expresses support for an independent, non-party Attorney General; Public Administration Select Committee, ‘Constitutional Renewal: Draft Bill and White Paper’, HC (2007-08) 499, para 83.

⁶⁴ As Chapter 1, Part 1.5 confirmed, a 2008 House of Lords Select Committee report stated: “*The differences between the original advice and [that] ... disclosed at the time gave rise to speculation that the Attorney General had been placed under political pressure to temper his opinion and align it with the government’s intentions.*” *Reform of the Office of Attorney General* (n 57) para 14. See also P Sands QC, *Lawless World* (Penguin, London, 2006) ch 12.

⁶⁵ Jowell states of the A-G’s advice in the Iraq war: “*however scrupulously impartial it was in practice, his dual role gave rise to a widespread view that the advice was tailored to political convenience.*” Ibid, appendix 3, paras 9-10.

⁶⁶ Ibid.

⁶⁷ See Chapter 1, Part 1.5.

The controversy surrounding the Attorney General's advice in the Iraq decision has been cited as one event⁶⁸ which has highlighted inadequacies in the post. Reforms to the office were proposed in the post-Blair era,⁶⁹ a process which is ongoing. Proposed reforms to the war prerogative (to be discussed in Part 3.2.3) have also entailed discussion of changes to the A-G role⁷⁰ and whether his legal advice regarding warfare should be routinely published.⁷¹ That such attention has focussed upon reform of this area perhaps supports the proposition that these were material factors influencing the Iraq decision.

[2.2] Cabinet Chairmanship Powers

Chapter 1 indicated that in the lead up to the Iraq deployment Cabinet was marginalised as a substantive decision-making body. Chapter 3 considered the operation of the collective Cabinet responsibility convention during the Iraq affair. As these chapters also confirm, Mr Blair's use of the prime ministerial Cabinet chairmanship powers were relevant to this sidelining of Cabinet. These prerogative powers that the Prime Minister enjoys in relation to Cabinet derive from his status as its chairman.⁷² The chairmanship of Cabinet is necessary to ensure Cabinet efficiency.⁷³ As Cabinet chairman a Prime Minister inevitably has a greater

⁶⁸ *Constitutional Role of the Attorney General* (n 61) outlines another two incidents commonly cited as reasons for proposed reforms of the Attorney General office: (1) the 'cash for honours' affair (paras 38-42); (2) the Serious Fraud Office investigations into the BAE systems affair (paras 43-46).

⁶⁹ For example, in July 2007 a Commons select committee suggested that the Attorney General role be split and that the legal advice function be vested in a non-party official: "*We have concluded that legal decisions in prosecutions and the provision of legal advice should rest with someone who is appointed as a career lawyer, and who is not a politician or a member of the government.*" Ibid para 105.

⁷⁰ *The Governance of Britain – Constitutional Renewal* (n 50). The Draft Constitutional Renewal Bill, Part I, covered legislative changes regarding the office of Attorney General. It sets out limited reforms to the Attorney General role, e.g. that the A-G should remain a minister and his advice should not be routinely disclosed; para 66.

⁷¹ A 2006 House of Lords constitutional select committee considered whether future reform proposals to the war prerogative to be discussed in Part 3.2.3 should also include a provision to ensure publication of the A-G's advice. The committee identified problems with such a measure, e.g. that knowledge of future publication of Attorney General's advice may lead to it being diluted or less candid; *Waging War: Parliament's Role and Responsibility* (n 3) paras 29, 71. See also *Constitutional Renewal: Draft Bill and White Paper* (n 63) para 85.

⁷² P Hennessey, *The Prime Minister, The Office and its Holders Since 1945* (Penguin, London, 2001) pp 58-9.

⁷³ Mackintosh has stated that "*a body the size of the Cabinet, loaded with business, will simply fail to operate unless it is subordinated to a chairman who can guide, summarise and close the discussions.*" J Mackintosh, *The British Cabinet* (3rd edn, Stevens & Sons, London, 1977), p 428.

opportunity to dominate discussions and express his views.⁷⁴ It is he who decides when and how often Cabinet meetings will occur. Following a Cabinet discussion it is the Prime Minister's task as chairman to sum up and confirm the decision of Cabinet.⁷⁵ Because it is rare that a Cabinet vote will be taken on any issue,⁷⁶ this permits the Prime Minister scope to decide or exert a directing influence upon the Cabinet position on a particular issue.

The position of Cabinet chairman also allows the Prime Minister a large degree of control over the Cabinet agenda,⁷⁷ i.e. matters which are to come before Cabinet for discussion. The Prime Minister's control of the Cabinet agenda extends to personal authority over wider policy generally. For example, “*as head of the Government the Prime Minister has the right to interfere in any department at any time*”.⁷⁸

Some distinct features of Mr Blair's use of prime ministerial chairmanship powers can be ascertained. As Chapter 3 outlined, under Blair there was a move towards greater informality and flexibility within Cabinet⁷⁹ which was confirmed by the findings of the 2004 Butler Report.⁸⁰ Reports indicate that Cabinet discussions were often brief.⁸¹ Vitaly, there were often few advance papers, and there was no detailed agenda.⁸² Though evidence in some quarters indicates that minutes of meetings were rarely taken,⁸³ it is clear from recent Freedom of Information requests that minutes relating to vital Cabinet meetings in March 2003 do exist.⁸⁴ Ex-minister Clare Short has written of Cabinet meetings:

⁷⁴ *Brown* (n 55) 49.

⁷⁵ *Brazier* (n 55) 89.

⁷⁶ *Halsbury's* (n 9) para 407.

⁷⁷ *Ibid* para 398.

⁷⁸ *Brazier* (n 53) 155.

⁷⁹ C Foster, ‘Cabinet Government in the Twentieth Century’, MLR (2004) 67(5) 753-771, pp 765-6.

⁸⁰ Report of a Committee of Privy Counsellors (chair: Lord Butler), ‘Review of Intelligence on Weapons of Mass Destruction’, HC (July 2004) 898. The Butler Report did acknowledge that some Cabinet informalities were long-standing: “*We received evidence from two former Cabinet members, one of the present and one of a previous administration, who expressed their concern about the informal nature of much of the Government's decision-making process, and the relative lack of use of established Cabinet Committee machinery.*” para 606.

⁸¹ *Hennessy* (n 72) 481; C Short, *An Honourable Deception? New Labour, Iraq, and the Misuse of Power* (Free Press, London, 2005) p 70.

⁸² *Hennessy*, *ibid* 481-2.

⁸³ *Foster* (n 79) 769. See also Robin Cook: “*High spot of the day is my long-promised meeting on the House of Lords with the Prime Minister. Encouragingly he has none of his officials in to take notes, which is always a good sign that he wants to open up.*” *The Point of Departure, Diaries from the Front Bench* (Pocket Books, London, 2004) p 138. David Blunkett also provides evidence of a lack of detailed minuting in *The Blunkett Tapes, My Life in the Bear Pit* (Bloomsbury, London, 2006) pp 22-3.

⁸⁴ Information Commissioner Decision Notice FS50165372 (19/2/09) para 4. Two Cabinet meetings which considered the Attorney General's advice on 13th and 17th March 2003 have been the subject of FOI requests.

*"There were no papers other than the legislative programme. The agenda was the same for almost every meeting and simply listed home affairs and foreign affairs and then Tony would bring up whatever he had in mind."*⁸⁵

Robin Cook wrote of Blair's chairmanship style:

*"I am told ... that in the old days Prime Ministers would sum up the balance of view in the discussion. ... However, Tony does not regard the Cabinet as a place for decisions. Normally he avoids having discussions in Cabinet until decisions are taken and announced to it."*⁸⁶

Additionally, Blair had a preference for 'bilaterals', private one-to-one meetings with individual ministers.⁸⁷ The cumulative effect of these characteristics of Blair's chairmanship style was the apparent marginalisation of collective Cabinet responsibility, as discussed in Chapter 3.

Vitally, the accounts of ex-ministers and political commentators are corroborated by the Butler Report which highlighted and expressed concerns about informalities in the running of Cabinet in the lead up to and conduct of the Iraq war. Regarding the papers and information provided to ministers the report stated:

*"Without papers circulated in advance, it remains possible but is obviously much more difficult for members of the Cabinet outside the small circle directly involved to bring their political judgement and experience to bear on the major decisions for which the Cabinet as a whole must carry responsibility."*⁸⁸

It appears that Mr Blair's exercise of the chairmanship powers was a novel and distinguishing feature of his premiership. Certain moves towards greater Cabinet informality had the (possibly inadvertent) result of facilitating prime ministerial 'room for manoeuvre' and indirectly fostering a subtle autocracy of sorts. Yet it is difficult to claim that Mr Blair acted in breach of or beyond his powers because no concrete benchmarks or boundaries apply in this area; the chairmanship powers and conventions that regulated it are inchoate and resultingly did not prohibit such practices. If one is left dissatisfied with the situation it is perhaps because the

⁸⁵ Short (n 81) 70.

⁸⁶ Cook (n 83) 115.

⁸⁷ A Rawnsley, *Servants of the People, The Inside Story of New Labour* (Penguin, London, 2001) p 53; Foster (n 79) 768-9; Blunkett (n 83) 11.

⁸⁸ Butler Report (n 80) para 610.

conduct of the Iraq Cabinet appears to demonstrate the relative ease with which the utilisation of simple and seemingly minor adjustments such as changes to chairmanship practices can have significant and wide-ranging effects, upon decisions of war for example. It demonstrates that other lesser prerogative powers available to a Prime Minister may afford him the opportunity to manage or influence the exercise of a more significant prerogative, such as the war prerogative, according to his preference. As discussed in Chapter 3, the actions outlined above achieved this by limiting collective Cabinet responsibility as a potential check on Mr Blair's preferred exercise of war prerogative in the lead-up to the Iraq decision.

[2.3] Power to Request a Dissolution of Parliament

The prerogative to dissolve Parliament acts as a constitutional check by preventing Parliament from sitting indefinitely. Through his power to advise the monarch to dissolve Parliament, a Prime Minister is able to determine the date of general elections. The power is only subject to the statutory requirement that the maximum duration of Parliament is five years.⁸⁹ The power to advise a dissolution under prerogative formerly lay with the Cabinet, though since 1918 it has been established that the power to dissolve belongs to the Prime Minister solely.⁹⁰ The chief advantage of this power is that it allows a Prime Minister to instigate an election at a time most advantageous to his party. The dissolution decision is thus inevitably made predominantly on party political grounds. Aided by increasingly sophisticated polling systems a Prime Minister can now more precisely gauge public opinion, allowing him to maximise the tactical benefit that the power to request dissolution bestows.⁹¹

Interestingly, the prerogative power to advise a dissolution has also come to act as a method of prime ministerial restraint over his own parliamentary party. Its function as a disciplinary mechanism stems from its interaction with the constitutional convention, outlined in Chapter 3, that a Prime Minister will resign if he loses a vote

⁸⁹ *Parliament Act 1911, section 7.*

⁹⁰ Depicted by I Jennings, *Cabinet Government* (3rd edn, Cambridge University Press, Cambridge, 1965), pp 418-9; Mackintosh (n 73) 453; H Laski, *Reflections on the Constitution* (Manchester University Press, Manchester, 1997) p 102.

⁹¹ Brown (n 55) 42; R K Alderman & J A Cross, 'The Prime Minister and the Decision to Dissolve' (1974-5) *Parl. Aff.* vol 28, p 386, p 394-5.

of confidence in the Commons thus triggering a general election. The power can be used as a potential last-resort sanction against party dissent because the threat of dissolution at an inopportune moment with the resulting potential to lose their parliamentary seats will often compel backbenchers to follow the government line. Labour Prime Minister Clement Attlee stated that though the power was rarely resorted to, it was ‘essential’ to party discipline.⁹² However, the threat of its use also entails an inherent risk for the premier who chooses to resort to it.

In light of the Blair government’s large Commons majorities, particularly in the first two terms, there was little recourse to the dissolution power other than for scheduled general elections. This was because government could draw upon support from a large pool of Labour MPs to pass its legislative programme. One significant instance where the power to advise a dissolution was used highly effectively by Mr Blair to discipline Labour MPs was in January 2004 when the government sought to pass the *Higher Education Bill 2004* which introduced top-up fees for university students in England and Wales.⁹³ The Bill was passed by the slenderest of majorities; a mere five votes.⁹⁴ However, Mr Blair’s most vital threat to use the dissolution power was in relation to the Commons debate regarding Iraq in March 2003.⁹⁵ As a result, MPs voting on whether to approve military action in Iraq did so in the knowledge that failure to provide such approval would result in the resignation of Mr Blair and his government and the calling of a general election whilst the Labour Party was in disarray. Evidence from the 18th March debate indicates that the potentially damaging effects of a general election was arguably a factor influencing the debate and vote, though its effects should not be overstated.

The 18th March debate was not conducted along strict party lines and the Iraq deployment was supported by many Conservative MPs. A number of Labour members including Malcolm Savidge,⁹⁶ John McDonnell⁹⁷, Barry Gardiner⁹⁸ and

⁹² W Andrews, ‘Some Thoughts on the Power of Dissolution’ (1959-60) *Parl. Aff.* vol 13, p 286, p 286.

⁹³ Mr Blair publicly stated that he would resign if he lost the Commons vote: ‘Blair: No Retreat on Top-up Fees’, *BBC Online* (London, 2nd December 2003).

<http://news.bbc.co.uk/1/hi/uk_politics/3254816.stm> accessed 15th March 2008.

⁹⁴ 316 MPs voted in favour of the Bill and 311 voted against it; Hansard HC, vol 417, cols 276-80 (27 Jan 2004).

⁹⁵ A Seldon, *Blair* (Free Press, London, 2005) pp 597-8; D Coates & J Krieger, *Blair’s War* (Polity Press, Cambridge, 2004) p 61. Though this was not a formal ‘confidence’ vote per se, the effect of the premier’s pre-vote claim was identical in practical terms; it acted to unite party interests against the political fallout of a general election that would occur in the event of a negative vote.

⁹⁶ (Voting against government). “*The issue is too serious [for a party loyalty test]. It should transcend careers, whether we are Back Benchers or Front Benchers.*” Hansard HC, vol 401, col 817 (18 March 2003). Elsewhere: “*It is not an internal party matter in any case.*” col 819.

Lindsay Hoyle⁹⁹ made speeches emphasising that the deployment vote should transcend party and career interests. Nevertheless, Chapter 1 confirmed that the Blair government conducted extensive background negotiations to build up Commons support prior to the vote¹⁰⁰ and references to its utilisation of the Whip system were made by Malcolm Savidge¹⁰¹ and John McDonnell, the latter of whom stated:

*"The Prime Minister said that he wants people to vote not out of loyalty but on the basis of understanding and supporting the argument. I respect him for that. I would respect him even more if he gave us a free vote instead of a three-line Whip, and if the Whips were called off from trying to persuade people in their normal manner."*¹⁰²

Other references to the impact of the Iraq vote on the future of the Labour government were made in the debate. Labour MP Bill Tynan (voting against government) acknowledged that this was an issue upon which the Prime Minister could be 'displaced'.¹⁰³ Similarly Labour MP Peter Pike (abstaining) expressed concern that a vote against deployment would damage the Prime Minister, government and party.¹⁰⁴ Elsewhere Conservative MP Sir Patrick Cormack (supporting deployment) asked Labour MP Tony Banks (voting against) the following question: "*Does he accept that the logical consequence of his vote this evening, whether or not he regards it as a rebel vote, would be the defeat of his Prime Minister?*"¹⁰⁵

⁹⁷ (Voting against government). "*Last week, in a desperate attempt to gain support for war, the Ministry of truth at No. 10 tried to portray the [anti-war] Campaign group's position as a challenge to the party leadership. Let us make it clear that today's vote has nothing to do with the leadership. It is a vote on principle: one is either for war or against it.*" Ibid col 875.

⁹⁸ (Voting with government in support of military action). "*I will not support the Prime Minister out of loyalty. I will support him out of the conviction that what he and the Government are doing is right.*" Ibid col 822.

⁹⁹ (Voting with government in support of military action) ibid col 885. See also the comments of Conservative MP John Randall, col 828.

¹⁰⁰ See Chapter 1, Part 1.6.

¹⁰¹ "*We know how the Front Benchers, Whips and others will argue that support for the war is a vital party loyalty test – whether that is support for the Conservative party or for the Labour party – but the issue is too serious for that.*" Malcolm Savidge, ibid col 817. See also cols 828, 875.

¹⁰² Ibid col 875.

¹⁰³ "*This [vote] is a profound matter of conscience, not a loyalty test. If it were a loyalty test, I would fail it tonight. Anyone who examines my record on voting in the House of Commons will realise that this is an issue of conscience and that I do not vote to displace a Prime Minister. I am just not convinced that war is justified now.*" Ibid col 867. Emphasis added.

¹⁰⁴ "*The last thing that I want to do is to damage the Labour party and the Government, who are so ably led by our Prime Minister.*" Ibid col 889.

¹⁰⁵ Ibid col. 881.

Evidence from the Iraq debate indicates that express references to the potentially fatal impact upon the Labour Party of failure to approve warfare were made at various points. Additionally, Cowley and Stuart claim this issue was laboured in background negotiations with Labour MPs prior to the vote.¹⁰⁶ This suggests that the dissolution threat was present as an influencing factor, though it did not occupy a major explicit role in the debate. Nevertheless the silent, underlying role of the dissolution device upon the voting Labour MPs cannot be discounted or indeed quantified. It remains arguable that Mr Blair's threat to advise exercise of the dissolution prerogative constituted a further cumulative factor in favour of his preferred exercise of the war power. By enabling the Prime Minister to mobilise support for war, it acted as another device which curtailed the vigour of countervailing parliamentary checks upon the power.

Interestingly the Iraq example demonstrates how two constitutional checks (namely the prerogative power to dissolve Parliament and conventional requirement that a premier who cannot command a Commons majority resign) have paradoxically combined over time to create a prime ministerial leverage device. Dissolution is a power that the premier can threaten to use in order to unite party interests in extraordinary circumstances and thus it assists him to obtain approval for controversial or politically unpopular measures. Despite the ongoing disagreements within the Labour party regarding military action in Iraq, the threat of an impending general election increased the stakes and was influential in bringing dissenting or reluctant factions into line. Importantly the war prerogative reforms to be discussed in Part 3.2.3 do not investigate the potential impact of the confidence vote/dissolution device on a parliamentary warfare decision. Though there may be important reasons for keeping this device intact (e.g. ensuring a government discredited on a vital issue does not remain in power) the executive-favoured inclination of the device in matters of warfare should be acknowledged and warrants further attention.

The Blair-era dissolution prerogative should be viewed in light of recent developments. When Gordon Brown took over the premiership in July 2007 he gave a speech on constitutional reform which indicated that the power to request the dissolution of Parliament would be subject to reform¹⁰⁷ and the green paper that

¹⁰⁶ P Cowley & M Stuart, 'Parliament: More Bleak House than Great Expectations' (2004) *Parl. Aff.* Vol 57, No 2, p 301-314, p 307-8; J Kampfner, *Blair's Wars* (Free Press, London, 2004) p 307.

¹⁰⁷ Mr G Brown, 'Constitutional Reform Statement' (London, 3rd July 2007)

accompanied his speech, *The Governance of Britain*, proposed that advance commons approval for dissolution should be sought.¹⁰⁸

[2.4] Additional Wider Prerogative Powers

There are further areas in which the prerogative is a significant source of prime ministerial power. These prerogative powers are less specific than those already discussed. They cover broader areas of government activity which makes their effects potentially wide-ranging. For example the premier has broad prerogatives regarding patronage, organising Cabinet and central government and general authority over the civil service and wider executive. A full exploration of these powers is beyond the scope of this study. However two prerogatives are highly relevant to this study and must be afforded further consideration; the prerogatives to conduct foreign affairs and to defend the realm. The premier enjoys a high degree of involvement in these fields and caselaw concerning these prerogatives over the broad Iraq era will be investigated in further detail in Chapter 5.

[2.4.1] The Foreign Affairs Prerogative at Law

'Foreign affairs' is generally a vast and vital area of prime ministerial involvement. The Introduction to this study confirmed that since 1945 foreign policy and defence have formed an essential part of the British premier's role.¹⁰⁹ It also confirmed that the Secretary of State for Foreign and Commonwealth Affairs (the Foreign Secretary) also plays a central role in foreign affairs. Yet despite the inevitably close working relationship between Prime Minister and Foreign Secretary acknowledged by Robin Cook,¹¹⁰ the former occupies a position of relative predominance in the field

<<http://www.number10.gov.uk/output/Page12274.asp>> accessed 1st August 2008. For Blackburn's comments on reform of the dissolution power see *Constitutional Renewal: Draft Bill and White Paper* (n 63) Oral and Written Evidence, Ev 10.

¹⁰⁸ "The Government believes that the convention should be changed so that the Prime Minister is required to seek the approval of the House of Commons before asking the Monarch for a dissolution." Secretary of State for Justice and Lord Chancellor, 'The Governance of Britain' (CM 7170, 2007) para 35.

¹⁰⁹ Hennessy (n 72) 91-98.

¹¹⁰ Cook (n 83) 7.

attributable in part to his leadership role and prerogative to appoint and dismiss Cabinet ministers (discussed at part 2.1).

The foreign affairs prerogative enables the Prime Minister and Foreign Secretary to undertake a variety of activities necessary to conduct business with other sovereign states on behalf of the country. The two most vital activities authorised by this prerogative are entering international treaties and declaring war and peace.¹¹¹ Nevertheless it also authorises activities such as recognising foreign governments, sending and receiving ambassadors, agreeing territories as well as undertaking general negotiations and diplomatic relations with other states, thus enabling the nation's foreign affairs to be conducted.¹¹² The influence of the Diceyan view upon the foreign affairs prerogative is evident. For example, *Halsbury's* states it is not possible to provide an exhaustive list of all foreign affairs functions.¹¹³ Significantly, it states that a definitive list is not possible because 'such categories are never closed'.¹¹⁴ This appears consistent with the wider Diceyan view of prerogative as a wide area of non-statutory authority subject to the ordinary laws. Because prerogative is viewed in this manner rather than as a specific set of narrow, definable functions, the tasks that the foreign affairs prerogative has the capacity to encompass can never be closed. This enables government to adapt and undertake new activities that may be required by changing developments in international relations.

Historically, the foreign affairs power was once exercised by monarchs and retains monarchical associations. *Halsbury's* states:

*"The Crown is the representative of the nation in the conduct of foreign affairs, and what is done in such matters by the royal authority is the act of the whole nation, and binding, in general, upon the nation without further sanction."*¹¹⁵

Halsbury's continues, "By English law, for external purposes, the Crown represents the community".¹¹⁶ Decisions taken by government in conduct of foreign affairs are

¹¹¹ "War can be commenced or terminated only by the authority of the Crown." *Halsbury's* (n 9) vol 18(2) para 606.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid

¹¹⁵ Ibid, vol 8(2) para 801. Also see the comments of Lord Denning in *Blackburn v Attorney-General* [1971] 1 W.L.R. 1037, p 1040.

¹¹⁶ *Halsbury's*, ibid vol 18(2), para 606.

categorised as ‘acts of state’ defined as “*a prerogative act of policy in the field of foreign affairs performed by the Crown in the course of its relationship with another state or its subjects.*”¹¹⁷ Because prerogative is an executive power flowing from the Crown *through* monarch, the involvement of Parliament is limited. Parliament does not have prior approval of the exercise of the foreign affairs prerogative but can subject it to later scrutiny. The scrutiny of courts is also limited in this area because, as *Halsbury’s* states, “*an act of state is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts.*”¹¹⁸ However a degree of *laissez faire* is arguably necessary due to the nature of foreign affairs; government must be able to conduct business with foreign governments efficiently and free from domestic encumbrances. This was acknowledged in the late seventeenth century by John Locke who wrote that the federative power (which included the power of war, peace and conducting foreign affairs)¹¹⁹ should not be separated from the executive; to do so would cause ‘disorder and ruin’.¹²⁰

The specific prerogative to enter international treaties enables the Prime Minister and his Foreign Secretary to agree treaties at their discretion on behalf of the country. Such decisions are generally not challengeable in English courts¹²¹ and the power is subject to only three legal or constitutional limits. First, the treaty making prerogative could be fettered by an express act of Parliament.¹²² Second, though a treaty entered into by a Prime Minister (or Foreign Secretary) binds the country, it does require implementation by statute if it is to become domestic law.¹²³ Finally, Parliament plays a supervisory role by scrutinising the terms of treaties that have been entered into by government.¹²⁴ Though such scrutiny was a matter of convention and not a legal requirement, the treaty-making prerogative has been an area of recent debate and proposed reform. A government white paper and draft

¹¹⁷ Ibid para 613.

¹¹⁸ Ibid para 614.

¹¹⁹ John Locke, *Two Treatises of Government* (Cambridge University Press, Cambridge, 2002) p 365.

¹²⁰ Ibid 366.

¹²¹ *Blackburn v A-G* (n 115); *R (on the application of Wheeler) v Office of Prime Minister* [2008] EWHC 936 (Admin), where the Divisional Court confirmed that the decision to ratify a treaty “*is not generally subject to judicial review*” (para 21) but “*is not altogether outside the scope of judicial review*” (para 55).

¹²² *R v Secretary of State for Foreign Affairs ex parte Lord Rees-Mogg* [1994] QB 552, p 567.

¹²³ *Blackburn v A-G* (n 115); *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976.

¹²⁴ Under the Ponsonby Rule a government that has just signed a treaty is to put that treaty before the House of Lords and the House of Commons for a period of 21 days. Recent reform proposals suggest placing the Ponsonby Rule on a statutory footing; *The Governance of Britain* (n 50).

bill¹²⁵ in March 2008 proposed putting ‘the present arrangements for parliamentary scrutiny of treaties ... on a statutory footing’.¹²⁶ Additional developments at EU level are also likely to impact upon the treaty-making prerogative generally¹²⁷ but a detailed discussion of this prerogative is beyond the scope of this study.

One significant aspect of the foreign affairs prerogative, declaring war and conducting related military action, is the focus of this study and will be afforded further specific consideration in Part 3 of this chapter.

[2.4.2] The Defence Prerogative at Law

The war prerogative inevitably involves a degree of overlap between foreign affairs and defence matters, both of which are conducted according to prerogative. Nevertheless the power to initially declare war, undertake military action or deploy troops under the foreign affairs prerogative can be distinguished from the actual day-to-day conduct of military action which is governed by statute and the general prerogative to defend the realm.¹²⁸ The categorisation of the war power as falling within the ambit of the foreign affairs prerogative rather than defence is confirmed elsewhere. For example the Iraq decision and surrounding events were viewed as within the particular remit of the House of Commons Foreign Affairs Select Committee which produced a report in 2003 entitled ‘*The Decision to go to War in Iraq*’.¹²⁹

The prerogative to defend the Queen’s realm, frequently cited as the Crown’s foremost duty,¹³⁰ puts the Prime Minister and his Defence Secretary in control of the nation’s military forces.¹³¹ Halsbury’s states that:

¹²⁵ *The Governance of Britain – Constitutional Renewal* (n 50). The Draft Constitutional Renewal Bill in Part I covered legislative changes regarding the ratification of treaties

¹²⁶ *Ibid*, Part II, para 157.

¹²⁷ But note The Treaty of Lisbon (amending the Treaty on European Union and the Treaty establishing the European Community) 2007 (also known as The Reform Treaty). This treaty, signed on 13th December 2007, included measures to create a post of High Representative for Foreign Affairs to ensure EU consistency in matters concerning foreign affairs.

¹²⁸ *Halsbury’s* (n 9) vol 2(2) para 1.

¹²⁹ House of Commons Foreign Affairs Committee, ‘The Decision to go to War in Iraq’ HC (2002-03) 813-I.

¹³⁰ *R (on the application of Marchiori) v The Environment Agency* [2001] EWCA Civ 03, [2002] All ER (D) 220 (Jan) CA, para 38.

*“The supreme government and command of all forces by sea, land and air, and of all defence establishments is vested in the Crown by prerogative right at common law and by statute.”*¹³²

The prerogative authorises decisions about military appointments, the grouping and disposal of military units and matters regarding the organisation, personnel and maintenance of military forces.¹³³ However, decisions regarding the conduct of warfare operations are not the concern of this study; the initial decision to commit to warfare is its sole focus and, as confirmed above, this technically falls within the ambit of the foreign affairs prerogative.

Though new prerogatives cannot be created,¹³⁴ in keeping with its common law heritage prerogative has the potential capacity to adapt to new situations. *Re Petition of Right*¹³⁵ effectively illustrates this point in relation to the defence of the realm prerogative. Here, the Court of Appeal unanimously rejected arguments from the supplicants that this prerogative power was, according to previous ancient authorities, only effective upon the actual landing of an enemy upon British shores. The court explained that regard must be given to modern developments in warfare such as ‘the invention of gunpowder and the use of aeroplanes’¹³⁶ which meant that threats to the country could now come without the need for physical invasion. Warrington LJ commented:

*“So to limit the prerogative would in these days be to render it practically useless for the purpose for which it is entrusted to the King. The circumstances under which the power may be exercised and the particular acts which may be done in the exercise thereof must of necessity vary with the times and the advance of military science.”*¹³⁷

So here one sees the legal updating of the defence prerogative. This power, which at one time involved merely reacting to an enemy landing, had now changed. The formal power itself remained unaltered; a general prerogative to defend the realm

¹³¹ Bradley & Ewing write: “In the case of the army, for example, the line of command runs upwards from the private soldier, through his or her commanding officer and higher levels of command to the Chief of the Defence Staff and the Secretary of State for Defence.” Bradley & Ewing (n 7) p 346.

¹³² Halsburys (n 9) para 886.

¹³³ Ibid para 885.

¹³⁴ Lord Diplock: “It is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints upon citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension.” British Broadcasting Corporation v Johns [1965] Ch 32, p 79.

¹³⁵ [1915] 3 KB 649 (CA).

¹³⁶ Lord Cozens-Hardy MR, ibid 660.

¹³⁷ Warrington LJ, ibid 666.

continued. Yet in *practical* or *real* terms the power had expanded to take account of new technologies and changing methods of warfare. Despite its subtlety, this is a vital principle with far-reaching implications; it suggests the defence prerogative can authorise pre-emptive defence policies of the kind initially advanced by the government to justify military action in Iraq.

The area of defence is somewhat opaque and subject to little external supervision due to ‘national security’ issues associated with the exercise of this prerogative. The courts in particular have traditionally been receptive to government arguments involving ‘national security’ or related issues.¹³⁸ Generally, operational decisions taken according to the defence prerogative are not judicially reviewable. This was confirmed by the Court of Appeal which held in *Marchiori [2002]*¹³⁹ that the ‘merits or demerits’ of government defence policy are not subject to judicial scrutiny. *Marchiori* involved a challenge to the Environment Agency which had granted permission to Ministry of Defence installations to discharge nuclear waste. In his judgment Laws LJ summarised the position thus: “*it seems to me ... to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy.*”¹⁴⁰ Laws LJ proceeded to outline two primary reasons for this: first the courts are ‘unequipped’ to effectively evaluate such defence-related decisions, and second, the appropriate balance of power and responsibility between constitutional limbs requires that these decisions be made by democratically elected and accountable government.¹⁴¹ *Marchiori* reasoning continued longstanding justifications underlying judicial caution in this area and the utilisation of these reasons in the Iraq caselaw will be discussed in Chapter 5. Parliamentary limitations on the defence prerogative are more substantial and include the annual approval of defence budgets by *Armed Forces Acts* as well as the general scrutiny of a parliamentary select committee.¹⁴²

¹³⁸ *Duncan v Cammell Laird* [1942] AC 624; *Liversidge v Anderson* [1942] AC 206; *GCHQ* (n 35).

¹³⁹ *Marchiori v Environment Agency* (n 130).

¹⁴⁰ *Ibid* para 38.

¹⁴¹ “The second [reason] touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome.” *Ibid*.

¹⁴² The House of Commons Defence Committee is “*appointed to examine ... the expenditure, administration and policy of the Ministry of Defence*”. Information available at <www.parliament.uk/parliamentary_committees/defence_committee.cfm> accessed 12th December 2008. Since 2003 the committee has published a series of reports concerning the conduct of ongoing operations in Iraq, though it is concerned with matters beyond the scope of this study. See for example ‘Lessons of Iraq’ HC (2003-04) 57-I.

The preceding discussion demonstrates that the prerogative to defend the realm is viewed as a separate power to the war prerogative. However, Chapter 5 establishes that prerogatives in this area are not self-contained and tend to be blurred. Though the specific power to declare war is categorised firmly within the foreign affairs prerogative, it may often be the case that such military action also serves to defend the nation. As a result, a deployment decision may frequently fall within the overlap of foreign affairs and defence prerogatives.

The Significance of the Defence Prerogative in Iraq

Chapter 1 confirmed that at the time of the parliamentary vote to approve military action in Iraq British troops had already been deployed and were waiting for the order to enter the country. This divides the initial conduct of military action into two distinct stages: first the preparatory action of deploying troops in readiness for potential combat, and secondly the order to actively engage in combat. The second stage, the order to commence warfare, is the prerogative power with which this study is concerned. However, the former preparatory action would be authorised by the defence prerogative which covers operational matters.¹⁴³

The prior deployment of UK troops in the Iraq affair was by no means an unusual or unlawful use of prerogative. This exercise of the defence prerogative to deploy troops in advance may have been undertaken for cogent operational reasons, for example to avoid delay between a parliamentary vote and the grouping of forces which may have proved advantageous to the Iraqi regime. Parliamentary approval was not required for the initial preparatory deployment. Yet vitally it is arguable that this exercise of the defence prerogative to arrange troops at the Iraqi border (combined with the timing of the vote)¹⁴⁴ had a discernible impact upon the parliamentary debate because it increased pressure on MPs to approve military action. Evidence from the 18th March debate indicates support for this proposition.

A separate non-parliamentary committee, the Intelligence and Security Committee is charged with ‘examin[ing] the policy, administration and expenditure’ of various intelligence bodies. See <<http://www.CabinetOffice.gov.uk/intelligence.aspx>> accessed 12th December 2008. For an analysis of the committee’s efficacy and role see A Defty, ‘Educating Parliamentarians about Intelligence: the Role of the British Intelligence and Security Committee’ (2008) *Parl. Aff.* vol 61, 621-641.

¹⁴³ *Halsburys* (n 9) vol 2(2) paras 1, 2.

¹⁴⁴ To be discussed in Part 2.3.2. Post-Blair reforms to the war prerogative favour the Prime Minister retaining discretion over the timing of a vote. *Constitutional Renewal: Draft Bill and White Paper* (n 63) para 308.

In the debate Liberal Democrat MP Michael Moore argued that the troops waiting on the Iraqi border should not influence a vote in favour of war.¹⁴⁵ Yet other members' statements suggest that this was indeed a factor and references to the fact that the army was awaiting orders were made by a number of MPs over the course of the debate.¹⁴⁶ The speeches of four MPs who supported the war particularly demonstrate the influence of the prior deployment of troops. Conservative MP Sir Patrick Cormack specifically raised the impact on servicemen and women of the failure to obtain a yes vote.¹⁴⁷ Labour MP Hugh Bayley also mentioned this as a reason favouring war.¹⁴⁸ The preparatory deployment featured more prominently in the speech of Labour MP Donald Anderson who encapsulated the heightened stakes in the following terms:

*"We are faced with this problem as we seek to come to a decision: should we now stand down our troops, and should we fundamentally change our strategy? In theory, we could indeed fold our tents and glide away, forgetting about the fact that there are men and women representing our country on the borders of Kuwait and Iraq. ... To withdraw at this stage would be unthinkable. ... We cannot easily turn back without undermining our own credibility and the authority of the United Nations."*¹⁴⁹

A final example is provided by Conservative MP John Maples who in similar terms summarised the consequences of a no-vote thus:

*"If on the verge of battle, ... [our troops] were withdrawn, that would destroy the credibility of British foreign and security policy for a generation. ... We would damage immensely, if not terminally, our alliance with the United States."*¹⁵⁰

On the basis of this evidence it appears that an influential factor in the debate was the potential international damage to the UK's reputation and interests if troops on the Iraqi border were incapacitated by a negative parliamentary vote and forced to return to their bases. In this sense it appears that ministerial exercise of the defence

¹⁴⁵ (Voted against government). "We must not go to war simply because the forces have turned up and are ready to roll." Hansard (n 96) col 831.

¹⁴⁶ Ibid. See Sir George Young (col 825); John Randall (col 828); Ian Paisley (col 861); Michael Jack (col 866); John Burnett (cols 849-50).

¹⁴⁷ Ibid col 885.

¹⁴⁸ "We now face only two alternatives – to commit those troops in the very near future to the enforcement of the UN resolutions or to pull them out of the theatre. If we pull them out, Iraq will immediately end what limited compliance it has shown with the UN's requirements. We cannot keep those forces on stand-by in tents in the desert and bobbing up and down in ships on the Indian ocean for a further 120 days". Ibid col 841.

¹⁴⁹ Ibid col 829.

¹⁵⁰ Ibid col 839-40.

prerogative to arrange troops in readiness for action did facilitate the premier's preferred exercise of the war prerogative to engage in warfare (whether this was intentional or not). Exercising the defence prerogative in this way, combined with the timing of the vote, constituted a further factor pressurising MPs to vote in favour of war.¹⁵¹ Even though this factor may have been arguably minor or unquantifiable in nature, it was one of a number which undermined the potential strength of the parliamentary vote to act as an effective check on Mr Blair's war power.

[3] The War Prerogative

The suite of prerogative powers available to a Prime Minister in relation to his Cabinet, party and the wider conduct of government has been outlined. Against that background this part will now focus upon the specific prerogative power to declare war, a power which lies in fact with the Prime Minister.¹⁵²

Any formal declaration of war or peace will be made by the government of the day via prerogative. *Halsbury's* confirms that the format of such a declaration is not prescribed; "*war may be initiated by proclamation, by an Order in Council ... or informally without any declaration.*"¹⁵³ Interestingly, despite appearances to the contrary, Britain has not been in a state of war in law since World War II. This was confirmed in the recent case of *Amin*¹⁵⁴ which involved a property dispute. One of the legal arguments raised in this case required the court to consider whether there was a legal state of war in relation to Iraq. The court held not, following government guidance which it regarded as definitive on the issue. Collins J stated that "*War was a technical concept, which began either by declaration of war, or by an act of*

¹⁵¹ This view is also shared by Lord Anderson of Swansea. In a 2008 Lords debate on the war power Lord Anderson highlighted the shortcomings of the Iraq parliamentary vote in the following terms; "*The case study of Iraq is not helpful. When Parliament did have a substantive vote, the war drums were already beating, there was a certain momentum and our forces, along with coalition forces, were already at the border*". Hansard HL vol 621, col 750 (31 January 2008).

¹⁵² "*It is commonly accepted that the prerogative's deployment power is actually vested in the Prime Minister, who has personal discretion in its exercise and is not statutorily bound to consult others, although it is inconceivable that he would not do so in practice.*" *Waging War: Parliament's Role and Responsibility* (n 3) para 12.

¹⁵³ *Halsbury's* (n 9) para 1406.

¹⁵⁴ *Amin v Brown* [2005] EWHC 1670 Ch, [2005] All ER (D) 380 (Jul).

*force which the attacked state treated as creating a state of war*¹⁵⁵ Referring to the Iraq ‘war’ he continued: “*The fact that the conflict was widely referred to in the media as a “war” does not mean that it was a state of war in law.*¹⁵⁶ This disregards the fact that references to the ‘war’ extended beyond the media, and can be confusingly found in parliamentary debates¹⁵⁷ caselaw¹⁵⁸ and government rhetoric. Collins J continued:

“The traditional concept of war has virtually disappeared from state practices since the Second World War. Unhappily, armed conflict has continued to be an instrument of state policy. But it is almost never necessary to invoke the traditional legal concept of war.”¹⁵⁹

So the term ‘war’ ‘has both popular and legal connotations’;¹⁶⁰ a legal state of war does not formally exist in relation to events in Iraq and previous conflicts in the Falklands and Kosovo were not wars at law either. Indeed a recent House of Lords committee confirmed that a formal declaration of war by the UK has not been made since 1942¹⁶¹ and furthermore stated ‘it is unlikely there will ever be another’ due to developments in international law.¹⁶²

The meaning of the prerogative power to declare war must therefore be taken to include its modern equivalent; the power to engage in military operations despite the fact that they may not be legally classified as ‘war’. This understanding has been widely adopted by select committees¹⁶³ and parliamentary debates.¹⁶⁴ In summary, military action may take various forms or degrees of severity but it will always be authorised by the foreign affairs ‘war’ prerogative, despite lacking the legal status of ‘war’.¹⁶⁵

¹⁵⁵ Ibid para 25.

¹⁵⁶ Ibid para 17.

¹⁵⁷ Hansard (n 15) col 747.

¹⁵⁸ See *R (on the application of Gentle and another) v Prime Minister and others* [2008] UKHL 20, [2008] 1 AC 1356, Lord Mance, para 73; *R (on the application of Gentle and another) v Prime Minister and others* [2006] EWCA Civ 1689, [2007] QB 689 CA, para 71; *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister and others* [2002] EWHC 2777 (admin), [2002] All ER (D) 245 (Dec) Brown LJ, para 44.

¹⁵⁹ Amin (n 154) para 28.

¹⁶⁰ *Waging War: Parliament’s Role and Responsibility* (n 3) para 9.

¹⁶¹ The declaration was made against Siam (now Thailand); ibid para 10.

¹⁶² Ibid.

¹⁶³ “*In the report, when we use the word ‘war’, we use it in the popular sense, conscious of its limitations as a definition suitable to our purposes in the modern world.*” Ibid para 10.

¹⁶⁴ Hansard (n 151).

¹⁶⁵ For example in 2003 the House of Commons Foreign Affairs Select Committee investigated the decision to go to war in Iraq. The decision and surrounding events were viewed as within the remit of the Foreign Affairs Select Committee; *The Decision to go to War in Iraq* (n 129).

As discussed in Part 1 the widely accepted Diceyan view of prerogative entails viewing the executive power as subject to the control of the other two limbs of the constitutional scales, the legislature (parliamentary sovereignty) and the judiciary (via the rule of law). It is therefore useful to outline the main legal and constitutional checks and balances that govern the war prerogative, particularly as a basis for further discussion in Chapter 5. Despite the presence of select constitutional checks on the war prerogative a 2006 House of Lords Select Committee stated “*the deployment power’s status as a prerogative power means that there are few restrictions to its use, other than those that have arisen from precedent or convention.*”¹⁶⁶

[3.1] Judicial Involvement with the War Prerogative

[3.1.1] Judicial Review of Prerogative: General Principles

Judicial review acts as a significant potential limit to governmental exercise of prerogative. For many centuries prerogative remained the exclusive and undisputed domain of executive government. However some nineteen years after *Wednesbury*,¹⁶⁷ where the doctrine of judicial review was born, came the turning point of *Lain*.¹⁶⁸ *Lain* “explicitly swept into the judicial sphere of control the last disputed prize of the constitutional conflicts of the seventeenth century, the royal prerogative.”¹⁶⁹ *Lain* did this by deciding that actions of the Criminal Injuries Compensation Board [CICB] that had been set up under prerogative, and thus derived its ultimate power from that source, could be subject to judicial review. Lord Diplock summarised the position in the following terms:

“I see no reason in principle why the fact that no authority from Parliament is required by the executive ... should exempt the [CICB] board from supervisory control by the High Court.”¹⁷⁰

¹⁶⁶ *Waging War: Parliament’s Role and Responsibility* (n 3) para 16.

¹⁶⁷ *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.

¹⁶⁸ *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864.

¹⁶⁹ *Sedley* (n 23) 285.

¹⁷⁰ *Lain* (n 168) Lord Diplock, 888.

Lain was later viewed by the House of Lords in *GCHQ*¹⁷¹ as a landmark case.¹⁷² As Chapter 3 confirmed, in *GCHQ* the applicants sought to challenge the prime ministerial decision to abolish trade union rights for civil servants. The Law Lords in this case were logically able to extend the principles of justiciability set out in *Lain* to the manner in which actual decisions taken under prerogative were exercised by ministers. Lord Diplock, in language bearing striking resemblance to that which he had employed in *Lain*, claimed:

*"I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should **for that reason only** be immune from judicial review."*¹⁷³

Lord Roskill concurred, adding that "*in either case the act in question is the act of the executive.*"¹⁷⁴ In *GCHQ* three out of five Law Lords agreed that the government's exercise of prerogative was judicially reviewable. Prerogative was again given its broad residual meaning; Lord Roskill cited the formula in his judgment,¹⁷⁵ and Lord Diplock's own definition was decidedly Diceyan.¹⁷⁶ Because Dicey's extensive definition was used, a wider sphere of executive activity could now potentially be subject to the supervision of the courts. However, *GCHQ* also confirmed that, unlike statutory checks, judicial supervision would not extend to all prerogative powers; instead the scope of judicially reviewable prerogative would be limited. Though the range of government action authorised by prerogative extended to all lawful activities, their Lordships segregated certain powers within this expansive range as impervious to judicial scrutiny. The approach is epitomised in the judgment of Lord Roskill, who claimed that the right to challenge governmental exercise of prerogative by judicial review must depend upon the *subject matter* of the power, and he recited the following list of 'excluded categories':

¹⁷¹ *GCHQ* (n 35)

¹⁷² *Ibid*, Lord Scarman, 407.

¹⁷³ Emphasis added. *Ibid* 410.

¹⁷⁴ *Ibid* 417.

¹⁷⁵ *Ibid* 416.

¹⁷⁶ "Whatever label may be attached to them there have unquestionably survived into the present day a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon statutory authority." *Ibid* 409.

*"Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process."*¹⁷⁷

Note that entering treaties and defence matters are listed by Lord Roskill first, arguably because they are the most evident examples of prerogative areas that are non-justiciable. The Law Lords thus indicated that courts would steer clear of applying their judgements to more political or traditional prerogatives. These areas would be termed 'non-justiciable', i.e. beyond the competence of the courts.¹⁷⁸ These self-imposed limitations were arguably influenced by separation of powers reasoning; they demonstrate the judiciary choosing not to stray beyond its respective sphere into the realm of 'high politics'. Approaching prerogative according to subject matter thus ensured that the domain of judicially unchecked executive activity, such as defence and foreign affairs, would remain so. According to Allan, under the doctrine of justiciability as set out in GCHQ, "*The courts abandon their ordinary function of ensuring legality, within the relevant [ring-fenced] fields, leaving protection of the rights of those affected to the operations of the political process, which may or may not in time provide a remedy.*"¹⁷⁹ This doctrine will be explored further in the context of the Iraq decision in Chapter 5.

Interestingly, in GCHQ neither Lords Roskill or Scarman elaborated upon the exact reasons *why* the subject matter of the above-listed 'excluded categories' should be beyond judicial reach, though it will be seen in Chapter 5 that the courts have attempted to give more extensive reasons in recent caselaw. The GCHQ ruling ensured that many of the Prime Minister's prerogative powers would be left intact and immune from judicial scrutiny. However this must be viewed in light of subsequent cases such as *Bentley*,¹⁸⁰ *Everett*¹⁸¹ and the Iraq caselaw to be discussed.

¹⁷⁷ Ibid 418. Lord Scarman concurred: "*Today ... the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.*" p 407.

¹⁷⁸ "*Justiciability decisions are decisions about where public decision-making responsibility should best reside. A decision that a matter is not justiciable will remove that matter from the jurisdiction of the court.*" BV Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy', C.L.J. 62(3), November 2003, pp. 631-660, p 634.

¹⁷⁹ T R S Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"', C.L.J. 65(3), November 2006, pp. 671-695, p 671.

¹⁸⁰ *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349. This case concerned the prerogative of mercy.

[3.1.2] The Judiciary and the War Prerogative

Until the recent Iraq caselaw there had not been a legal challenge which requested that the judiciary assess a specific decision to declare war. However, a number of cases had considered closely-related matters involving the conduct of war and national security generally. Traditionally, the exercise of prerogative power to declare war or deploy troops has not been judicially reviewable. In *Chandler*¹⁸² it was held that the Crown alone was entitled to make decisions regarding the operation of the armed forces and that such decisions would not be questioned in the courts. The court deemed such conduct a matter of high policy beyond the judicial ambit,¹⁸³ a rationale epitomised in the judgment of Viscount Radcliffe who stated:

*"The question whether it is in the true interests of this country to éclair, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think there in anything amiss with a legal ruling that does not make this issue a matter for judge or jury."*¹⁸⁴

Underlying Viscount Radcliffe's comments are two related propositions. The first is that military-related decisions are highly complex, nuanced and politically-charged. The second is that such decisions are not appropriate for judicial determination. The comments of Lord Parker in *The Zamora* follow a similar rationale:

*"Those who are responsible for the national security must be the **sole judges** of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."*¹⁸⁵

Lord Parker's comments display a strong reluctance to engage with defence-related issues. He claims that government must be the sole body responsible for such decisions, implying that no external or open scrutiny is appropriate. The influence of Montesquieu's separation of powers is evident across this area. The doctrine propounds that the legislative, executive and judicial powers of a state should remain

¹⁸¹ *R v Secretary of State for Foreign Affairs, ex parte Everett* [1989] QB 811. This case concerned the prerogative to issue passports.

¹⁸² *Chandler and Others v Director of Public Prosecutions* [1964] A.C. 763.

¹⁸³ *Ibid*, Lord Hodson pp 800-1; Lord Devlin p 803.

¹⁸⁴ *Ibid*, Viscount Radcliffe pp 798-9; Lord Reid, pp 790-791.

¹⁸⁵ *The Zamora* [1916] 2 A.C. 77, p 107.

independent from one another.¹⁸⁶ This separation of functions maintains balance within a constitution and avoids concentrations of power that could prove fatal to individual freedoms.¹⁸⁷ The separation of powers drives judicial desires to remain politically neutral and reluctance to become drawn into the quagmire of policy. This rationale has proved particularly enduring and its influence in recent caselaw will be considered further in Chapter 5.

Internationally, the prerogative to deploy troops is subject to international law. However international law is not enforced in English courts unless such law has been expressly enacted.¹⁸⁸

[3.2] Parliamentary Involvement with the War Prerogative

[3.2.1] Parliament and Prerogative: General Principles

Prerogative is regulated by Parliament in two vital respects. The first sense in which Parliament controls prerogative, albeit indirectly, is via the constitutional convention of ministerial accountability outlined in Chapter 3. According to the ideal, Parliament is able to hold the executive government to account by questioning and discussing ministerial activity, including ministerial use of prerogative. In practice, the efficacy of this constitutional check may often be diluted for a number of reasons: first, it will inevitably be exercised retrospectively, second, the full and accurate information regarding government activity required for effective scrutiny may not always be available, and finally the ministerial accountability convention is nebulous in nature.¹⁸⁹ The cumulative effect of these factors means that "*the political accountability of ministers and civil servants to Parliament when they exercise [prerogative] powers without parliamentary authority is weak.*"¹⁹⁰

¹⁸⁶ Montesquieu, *The Spirit of the Laws* (Cambridge University Press, Cambridge, 2002) p 157.

¹⁸⁷ Ibid 155.

¹⁸⁸ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees Mogg* [1994] QB 552; *R v Lyons* (n 123) Lord Hoffman, para 27.

¹⁸⁹ Lord Wilson concedes that the ministerial accountability convention "has never really been as clear-cut as one would like for as long as anyone can remember." Lord Wilson of Dinton, 'The Robustness of Conventions in a Time of Modernisation and Change' [2004] P.L. 407, p 419.

¹⁹⁰ *Lester & Weait* (n 30) 426.

The primary parliamentary check on prerogative power is therefore the enactment of legislation which is superior to prerogative. In the words of Lord Mustill,

“Once the superior power of Parliament has occupied the territory the prerogative must quit the field ... Until [then] ... there is a legislative void, and the prerogative exists untouched.”¹⁹¹

As supreme source of law in Britain, statute can overrule any area of prerogative in its narrow¹⁹² or wider Diceyan sense.¹⁹³ Statute acts to abolish or curtail prerogative powers by placing them on a statutory footing, thus replacing these formerly informal arrangements with an act of Parliament that sets forth and regulates government activity. But statute can limit prerogative in a second way because it can act to reduce prerogative by legally protecting individual rights, the *Human Rights Act 1998* being an obvious example. Acts such as the *HRA* render certain activities unlawful, thus technically restricting the arena of lawful activity available to the executive government. For example, the *HRA* allows government to act according to prerogative only if it does not impinge upon certain individual rights without appropriate justification. The ability of the *HRA* to potentially restrict the exercise of the war and related prerogatives in this fashion will be discussed in select Iraq cases in Chapter 5.

[3.2.2] Parliament and the War Prerogative

In light of the general points outlined above, this Part will briefly explain four ways in which Parliament acts as a check upon the war prerogative specifically. As a prerogative power, the war power is subject to the two methods of parliamentary check outlined in Part 3.2.1 above, i.e. ministerial accountability for the exercise of prerogative power and the enactment of statutes that curb, restrict or replace prerogatives. So, for example, if Parliament were to pass proposed legislation to reform the war power and place it on a statutory footing this would overrule the existing prerogative arrangements. Until such a reform takes effect the power remains intact. Parliament acts as political check on the premier's war power in a

¹⁹¹ *Fire Brigades Union* (n 36) Lord Mustill, p 564.

¹⁹² This is demonstrated by the Bill of Rights 1688, Chapter 2 which curbed the monarch's exclusive prerogative to suspend laws and levy taxes.

¹⁹³ The passing of the Interception of Communications Act 1985 (now repealed) following *Malone* is a prime example of this; this legislation provided express authority for the sort of surveillance activity that had previously been permitted simply because it was not unlawful.

third sense because it must approve the financing of any military action on an annual basis.¹⁹⁴ However the strength of this check is undercut by the reality that a government which enjoys a parliamentary majority will rarely, if ever, encounter problems passing such a bill, particularly once military action is underway. Parliament acts as a fourth and final check by virtue of the ‘emerging convention’ that it must approve military action. Chapter 3 explained that though Parliament’s support for proposed military action is politically indispensable, no express parliamentary approval is *legally* required to commence hostilities.¹⁹⁵ It also discussed the possibility that the approval of Parliament to deploy troops may have ossified into a constitutional convention, even if a combination of other constitutional features may act to undermine the effectiveness of this check. For example, it must be acknowledged that at the time of the Iraq vote in March 2003 the Labour government enjoyed a comfortable majority of around 165¹⁹⁶ and thus a higher degree of *de facto* control over Parliament; Parliament’s function as a check was resultantly inhibited. A 2006 Lords Select Committee highlighted this as a major problem with the current arrangements for warfare approval, stating that due to parliamentary majorities, the whip system and other mechanisms, the efficacy of Parliament as a constitutional safeguard has been diluted. The committee claimed that as a result of these developments,

“it could be said that the ability of the United Kingdom governments to use the royal prerogative power to engage in conflict is paradoxically less democratic than when the Monarch exercised the power personally.”¹⁹⁷

So despite the appearance of modern government exercising the war power subject to appropriate democratic checks and balances, the Lords committee claimed that because of its streamlined control of the parliamentary system, government is often in a superior position to monarchs of old. This fundamental shortcoming arguably undermines the recent proposed reforms to the war prerogative which seek to change the nature of Parliament’s oversight and regulation of war decisions.

¹⁹⁴ *Waging War: Parliament’s Role and Responsibility* (n 3) para 14.

¹⁹⁵ See Chapter 3, Part 3.3. Robin Cook stated “*It is a curiosity of the British constitution that there is no formal requirement on the Prime Minister to seek the authority of Parliament before declaring war.*” *Cook* (n 83) 187.

¹⁹⁶ In the 1997 election The Labour Party won 417 seats in the House of Commons (a ‘landslide’ majority of 179). In the 2001 election Labour won 413 seats (maintaining a very comfortable majority of 165). In 2005 the government won 356 seats and saw the Commons majority reduced to 67.

¹⁹⁷ *Waging War: Parliament’s Role and Responsibility* (n 3) para 40; *Hansard* (n 151) Lord Thomas of Swynnerton, col 773.

[3.2.3] Post-Blair Proposed Reforms to the War Prerogative

Though this study is concerned with the war prerogative in the Iraq affair it must take account of recent proposed reforms to the power and Parliament's involvement with it. The origins of these reforms germinated in the last three years of Mr Blair's premiership when the war power was investigated by both House of Commons¹⁹⁸ and House of Lords¹⁹⁹ select committees, and was the subject of three private members' bills.²⁰⁰ However formal proposals to overhaul the war power were not instigated until Mr Blair left office. Within days of becoming Prime Minister Mr Gordon Brown's government introduced a green paper on constitutional renewal.²⁰¹ Mr Brown made an accompanying speech to Parliament proposing that the war prerogative was one particular area that warranted reform.²⁰² The subsequent period witnessed the publication of a government consultation paper on the war and treaty-making powers in October 2007²⁰³ and a white paper and draft bill on constitutional renewal in March 2008.²⁰⁴ The government's proposals have been subject to scrutiny by two select committees.²⁰⁵ However, in December 2008 it was confirmed that constitutional reform measures, including overhaul of the war prerogative, have been put on hold in light of changing priorities due to the global economic downturn.²⁰⁶

Though no formal changes have yet been effected numerous options for reform of the war prerogative's current position have been discussed. Three main options

¹⁹⁸ *Taming the Prerogative* (n 4).

¹⁹⁹ *Waging War: Parliament's Role and Responsibility* (n 3).

²⁰⁰ Full details are set out *ibid*, para 80.

²⁰¹ *The Governance of Britain* (n 108).

²⁰² "For centuries [the Prime Minister and executive] have exercised authority in the name of the monarchy without the people and their elected representatives being consulted. So now I propose that in twelve areas important to our national life, the Prime Minister and executive should surrender or limit their powers – the exclusive exercise of which by the Government should have no place in a modern democracy." *Constitutional Reform Statement* (n 107).

²⁰³ *The Governance of Britain* (n 108).

²⁰⁴ *Ibid*. The Draft Constitutional Renewal Bill, Part I, covered legislative changes regarding the office of Attorney General and the ratification of treaties. There are no statutory provisions covering the war power because the government's preferred reform option is non-statutory (i.e. a convention or parliamentary resolution). However, Parts II and III of the paper discussed how consultations on the war power had proceeded.

²⁰⁵ *Constitutional Renewal: Draft Bill and White Paper* (n 63). Two months later in July 2008 the joint committee on the Draft Constitutional Renewal Bill published its report; 'Draft Constitutional Renewal Bill' (2007-8) HL 166-I, HC 551-I.

²⁰⁶ Queen's Speech, Hansard, HL vol 706, cols 1-3 (3rd December 2008). See also Monitor Newsletter, *The Constitution Unit, UCL* (Issue 41, January 2009) p 1.

<http://ucl.ac.uk/constitution-unit/files/publications/monitor/Monitor41_Jan_2009.pdf> accessed 19th February 2009.

have been considered. The first possible reform, evaluated by a 2005 House of Lords committee, is to formalise the war power's position by vesting it in the Prime Minister according to statute.²⁰⁷ This would place Parliament as the legal source of the power rather than the Crown. But this conceptual change in the nature and basis of the power would be insignificant in practical terms and the war power itself would remain largely intact. Because it would insufficiently change the current position the committee did not favour this option²⁰⁸ and it has not been discussed as a viable option since. A second potential option is enacting a statute which makes prior parliamentary approval of war a legal requirement to deploy (though subject to specified emergency exceptions).²⁰⁹ This reform option has been supported by leading academics such as Brazier²¹⁰ and Hennessy,²¹¹ the former on the basis of the strength that a legal provision would provide.

The third reform option is to require prior parliamentary approval of war according to written convention in the form of a parliamentary resolution rather than statute. This option would also be subject to specified emergency exceptions. The convention option was first proposed by the Lords select committee in 2005 which recommended a written convention requiring government to seek advance parliamentary approval for the deployment of troops outside of the UK.²¹² In emergency deployments where advance approval is not possible, information on the deployment should be provided within 7 days and retrospective approval should be sought.²¹³ Compulsory prior parliamentary approval of war in a non-legal format was also the favoured of four reform options²¹⁴ considered in the government's 2007 consultation paper.²¹⁵ The government's subsequent white paper proposed that a detailed parliamentary resolution setting out the procedures for obtaining parliamentary approval of deployments as the best way forward.²¹⁶ This view was

²⁰⁷ *Waging War: Parliament's Role and Responsibility* (n 3) paras 64-5.

²⁰⁸ *Ibid* para 105.

²⁰⁹ *Ibid* paras 79-80. This option was also outlined as one reform option in the government consultation paper; Secretary of State for Justice and Lord Chancellor, 'The Governance of Britain, War Powers and Treaties: Limiting Executive Powers' (Cm 7239, 2007) para 96.

²¹⁰ *Taming the Prerogative* (n 4) appendix 1, paras 6-7.

²¹¹ *Constitutional Renewal: Draft Bill and White Paper* (n 63) para 77.

²¹² *Waging War: Parliament's Role and Responsibility* (n 3) paras 85-93.

²¹³ *Ibid* para 110.

²¹⁴ The four options are: (1) a detailed Commons resolution setting out position, (2) reform on a statutory basis, (3) a general Commons resolution covering the position, (4) a hybrid of resolution and statute. *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers* (n 209) para 96.

²¹⁵ *Constitutional Renewal: Draft Bill and White Paper* (n 63) para 311.

²¹⁶ *The Governance of Britain – Constitutional Renewal* (n 50) part 2, para 215. The proposed resolution is outlined at Annex A, pp 53-56.

shared by the joint committee set up to oversee the bill's progress.²¹⁷ Ultimately a parliamentary resolution requiring the House's approval of war, a form of 'soft law',²¹⁸ seems the most likely reform option. This may fall short of legal change, but, as a Commons select committee argued in May 2008, it could represent a move towards that eventual outcome: "*A parliamentary resolution may, for the moment at least, be the pragmatic way forward, as a first step towards establishing a legal principle for parliamentary involvement in conflict decisions.*"²¹⁹

Vitally the decision to reform the war power raises a host of associated dilemmas that also require attention. Three main issues seem to recur across the range of parliamentary and governmental publications. First, how should 'war' or 'military action' be defined? As the government's 2007 consultation paper stated, "*If ... parliament's role is to be more explicit ... then it will be essential to have an understanding of what the meaning of the term 'armed conflict' is.*"²²⁰ How should such a term be defined or, as Brazier claims, could the existence of armed conflict simply be left as a factual question of 'common sense'?²²¹ Similar interpretive ambiguities could equally arise in relation to the meaning and extent of emergency exceptions to the parliamentary approval requirement.²²² A second vital issue concerns the information that should be provided to Parliament when it decides whether to approve military action. The efficacy of Parliament in its new formalised role would remain heavily reliant on appropriate information being available to it.²²³ The 2005 Lords select committee's reform proposals therefore included suggestions for deployment information²²⁴ that should be placed before Parliament to enable it to properly undertake its role.²²⁵ The government's 2007 consultation paper similarly considered practical questions concerning the information that should be supplied to Parliament in the event of a proposed deployment.²²⁶ Though the paper expressed

²¹⁷ "We agree that there is a case for strengthening Parliamentary involvement in armed conflict decisions. We also agree with the House of Lords Constitution Committee that the Government's detailed resolution approach is a well balanced and effective way of proceeding." *Draft Constitutional Renewal Bill* (n 205) para 318.

²¹⁸ A McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law', *MLR* (2008) 71(6) 853-877, p 862.

²¹⁹ *Constitutional Renewal: Draft Bill and White Paper* (n 63) para 79.

²²⁰ *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers* (n 209) para 45.

²²¹ Paper by R Brazier in *Taming the Prerogative* (n 4) appendix 1, para. 11.

²²² *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers* (n 209) paras 44-60.

²²³ *Waging War: Parliament's Role and Responsibility* (n 3) paras 42-3, 55-56.

²²⁴ Specifically its 'objectives, its legal basis, likely duration and ... an estimate of its size'; *ibid* para 110.

²²⁵ *Ibid* paras 66-80.

²²⁶ *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers* (n 209) paras 66-75.

concern that information which could benefit an adversary must not be publicised,²²⁷ general information such as the size of a deployment and its legal basis could be provided if the Prime Minister deemed it appropriate.²²⁸ The provision of information to Parliament is an integral issue and will indeed be a material factor influencing its decision, as the Iraq affair amply demonstrated.

One final major issue raised by proposed reforms is the extent of discretion that the Prime Minister should continue to enjoy over various aspects of the parliamentary vote. In May 2008 a Commons select committee expressed disappointment with this aspect of the government's proposals, stating that its "*draft resolution on war-making powers leaves too much discretion in the hands of the Prime Minister.*"²²⁹ It expressed specific concerns regarding prime ministerial control of information to Parliament: "*A Prime Minister should not ... be able to present information to parliament in a way which is partial or subjective, leading Members of the Commons perhaps to support a conflict which they might not support if more information was available to them.*"²³⁰ The committee therefore suggested a number of improvements that could be made to the government bill, including additional checks on the prime ministerial discretion over the publication of military information.²³¹ Two months later a joint parliamentary committee²³² charged with considering the draft constitutional renewal bill investigated concerns regarding prime ministerial discretion over aspects of the parliamentary approval process including the information provided to Parliament, the timing of a vote and his proposed capacity to determine when the exceptional circumstances provision should apply.²³³ In their evidence to the joint committee leading experts, including Payne, Weir and Tomkins, indicated that these prime ministerial discretions undermined the proposed reforms to the war prerogative and served to limit their effectiveness.²³⁴ Despite this evidence the committee accepted that prime ministerial retention of discretion in these matters was appropriate on the basis that he will be best placed to make such decisions.²³⁵

²²⁷ Ibid para 67.

²²⁸ Ibid para 68.

²²⁹ *Constitutional Renewal: Draft Bill and White Paper* (n 63) p 3.

²³⁰ Ibid, 'conclusions and recommendations', para 24.

²³¹ Ibid paras 72-74.

²³² The committee was appointed on 30th April 2008 to consider and report on the Draft Bill; *Draft Constitutional Renewal Bill* (n 205).

²³³ *Constitutional Renewal: Draft Bill and White Paper* (n 63) para 322.

²³⁴ *Draft Constitutional Renewal Bill* (n 205) para 324.

²³⁵ "*In respect of the war powers proposals, we agree that it is appropriate that the executive should retain discretionary powers over such issues as the information provided to Parliament, the timing of a*

The Implications of a Formalised Parliamentary Role

Despite the ongoing issues outlined above there has been a clear movement towards greater parliamentary involvement in the war power that started in the post-Iraq stage of the Blair premiership. This trend has continued despite the concerns about more explicit parliamentary involvement expressed in some quarters. Across the range of select committee investigations three key concerns emerge. The first relates to potential delays to deployments that parliamentary involvement may cause. This concern was expressed by senior military figures in their evidence to a Lords committee in 2006; greater parliamentary involvement would hinder operational effectiveness²³⁶ and may result in less flexibility in emergency situations. The government consultation paper in October 2007 stated that the eventual reform “must provide sufficient flexibility for deployments which need to be made without prior approval for reasons of urgency or necessary operational secrecy.”²³⁷ Furthermore, the potential impact of any reform upon multi-national organisational deployments (e.g. Nato or U.N. actions) must be carefully considered.²³⁸ The potential problem of delay to military action is discussed at Part 3.3 below.

A second concern regarding greater parliamentary involvement with the war power is that it may lead the decision to be dictated by public opinion and/or allow greater media influence.²³⁹ This is arguably an unconvincing argument, particularly when recourse to the importance of democratic accountability is so often made in caselaw and parliamentary reports in this area.²⁴⁰ It essentially implies that government should be insulated from such pressures when making decisions of war and thus specifically aims to prevent the views of the populace from acting as a more effective brake upon the war power. The 2006 Lords Select Committee, cited evidence from the *Geneva Centre for the Democratic Control of Armed Forces* that: “drew attention to ... the ‘double democratic deficit’ of the use of force under ... international auspices, arguing that there was inadequate accountability at the domestic level in some states, not compensated for at the international-level of decision-making.”²⁴¹

vote, and a judgement as to whether the exceptional circumstances procedure should apply. We also recognise that the Prime Minister is in the best position to make an informed decision on such factors.” Ibid para 332.

²³⁶ *Waging War: Parliament’s Role and Responsibility* (n 3) paras 48-50.

²³⁷ *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers* (n 209) para. 38.

²³⁸ Ibid para 40.

²³⁹ *Waging War: Parliament’s Role and Responsibility* (n 3) para 82.

²⁴⁰ See Chapter 5 for a thorough discussion of caselaw.

²⁴¹ *Waging War: Parliament’s Role and Responsibility* (n 3) para 17.

The key point highlighted here is that accountability is institutionally lacking at national and international level, allowing warfare decisions to be made by elites without the support or involvement of the populace. This study reveals the extent to which such criticisms are applicable to the British system, particularly in the Iraq affair.

A final concern regarding proposed reforms is that an additional express requirement of parliamentary approval (particularly in legal form) may undermine the legal certainty of a decision to go to war,²⁴² for example if a dispute arises as to whether the ‘exceptional circumstances’ justifying military action without prior approval are present. Related to this are concerns that formalising the position may draw the judiciary into this area.²⁴³ Though such issues should be considered carefully, they fail to take account of the fact that the national or international legality of a deployment may be questionable irrespective of such reforms, thus undermining its credibility in any event as demonstrated by the Iraq affair. Furthermore, legal challenges to the Iraq war and its conduct have drawn the judiciary into this area despite the continued absence of legal reform, as Chapter 5 discusses.

Despite numerous concerns regarding reform to the war power, there are practical and theoretical benefits to ensuring greater parliamentary involvement with the war power. Supporters of reform suggest that parliamentary involvement will increase the legitimacy and accountability of deployment decisions.²⁴⁴ Justifications for greater legislative control of the war power can be traced back to arguments propounded by the framers of the US constitution who rejected the British monarchical model, instead choosing to place the US war power with the legislative body. By adopting this framework in America, the US constitution, according to James Madison writing in 1798, “*supposes, what the History of all Govts demonstrates, that the Ex. Is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl.*”²⁴⁵ So the founders of the US constitution recognised that the executive limb was institutionally the most geared towards war and thus sought to curb its tendencies by placing the power in the legislature (which, unlike the British model, is a separate institution not subject to the direct control of the executive). Similarly

²⁴² Ibid paras 58-59.

²⁴³ Ibid para 33.

²⁴⁴ Ibid paras 36-43.

²⁴⁵ Madison quoted in original note form by L Fisher, *Presidential War Power* (2nd edn, University Press of Kansas, Lawrence, 2004) p 10.

Justice Joseph Story of the US Supreme Court recognised dangers of the executive holding war-making powers: “*The power of declaring war is not only the highest sovereign prerogative; ... it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. ... It should therefore be difficult in a republic to declare war; but not to make peace.*”²⁴⁶ It will be demonstrated in Part 3.3 that these rationales directly conflict with those traditionally employed to justify the British war power.

[3.3] Traditions of Leadership and the War Prerogative

It is clear from the above discussion that the British constitution has traditionally placed only limited judicial and parliamentary checks upon executive prerogative decisions to undertake military action. This tradition continued over the broad Iraq era and to the present day, notwithstanding recent proposed reforms. Such limited checks allow considerable freedom of manoeuvre for the Prime Minister who, in conjunction with the Foreign Secretary and Defence Secretary, plays a central role in this area. As stated in the Introduction to this study, “*War is an intensely prime ministerial activity*”,²⁴⁷ and this is arguably attributable to the legal symbiosis between premier and monarch. As a Crown prerogative the conduct of war was once the preserve of the King. As Lord Reid stated in *Burmah*:

“*The reason for leaving the waging of war to the King (or now the executive) is obvious. A schoolboy's knowledge of history is ample to disclose some of the disasters which have been due to parliamentary or other outside attempts at control. ... it would be very strange if the law prevented or discouraged necessary preparations until a time when it would probably be too late for them to be effective.*”²⁴⁸

²⁴⁶ Quoted ibid 4. Ironically, despite vesting the war power in Congress, in recent decades according to Fisher, a series of US presidents have made warfare decisions without the involvement or scrutiny of Congress. Jenkins writes: “*The significance of [US examples] to contemporary British debate about prerogative reform is that even a constitutionally entrenched requirement of legislative authorisation for executive military actions brings with it a multitude of interpretational and enforcement difficulties, ultimately dependent upon future, unforeseeable judicial and legislative attitudes. As such, legal requirements and structural prophylactics against unilateral executive military action can have only limited efficacy, in the face of a countervailing institutional reluctance to hold the executive branch to account.*” D Jenkins, ‘Constitutional Reform Goes to War: Some Lessons from the United States’ [2007] P.L. 258, p 266.

²⁴⁷ Hennessy (n 72) 103.

²⁴⁸ *Burmah Oil* (n 32) 100.

This passage raises two interesting issues. Firstly, Lord Reid identifies the historical basis for the link between the King and his prerogative to ‘wage war’. This prerogative has now passed via convention to the executive (in reality but not in law). Thus modern government’s conduct of war (and its underlying rationale) is rooted in the notion of monarchy, a link that was initially explored in Chapter 2. This association has been criticised by Gladstone who has stated of the war power, “*Like all prerogative powers, this one harks back to the medieval notion of the Crown as absolute sovereign.*”²⁴⁹ Similarly Lord Lester has criticised such medieval prerogatives as anomalous.²⁵⁰ This perhaps highlights why, as Fisher’s discussion of the US war power explains, the framers of the US constitution deliberately chose to depart from the British monarch-centred system.²⁵¹

The second related issue discussed by Lord Reid is the justification for leaving this patriarchal, autocratic system intact. He indicates that any other constitutional arrangement, particularly one involving stronger scrutiny could result literally in ‘disaster’. By highlighting the potentially catastrophic results of such checks in ‘emergency’ situations, Lord Reid employs what Poole has more recently termed ‘the rhetoric of risk’,²⁵² a device that continues to exert a subtle influence in recent cases as Chapter 5 demonstrates. Such ‘disaster’, Lord Reid indicates, would stem from the delays that scrutiny would cause. Implicit in this reasoning is the assumption that decisions regarding war must be made rapidly. This is clearly going to be the case regarding the day-to-day conduct of military operations (such as the WWII decision to destroy Burmese oilfields to prevent their use by the advancing Japanese army as in *Burmah*), but will it always be true of the initial decision to engage in warfare? A 2006 House of Lords select committee report distinguished between ‘wars of necessity’ and ‘war of choice’,²⁵³ the former being relatively atypical. In his evidence to the committee Professor Freedman suggested that the decision to engage in war of choice “*frequently evolves more slowly, allowing governments to weigh up the*

²⁴⁹ In rather overly dramatic and speculative terms this extract continues: “*Contemplating the invasion of Iraq, Mr Blair will have felt like Henry V, musing on the burdens of Kingship on the eve of Agincourt. But many voters, if not MPs, would nowadays like to share the burdens.*” D Gladstone in House Taming the Prerogative (n 4) Written Evidence, Ev 4.

²⁵⁰ “*It is anomalous that the Crown is able, on the basis of medieval notions of kingship, through the Queen’s Ministers, to exercise public powers without parliamentary authority.*” Waging War: Parliament’s Role and Responsibility (n 3) Minutes of Evidence, Q3.

²⁵¹ Fisher (n 245) 3-8.

²⁵² T Poole, ‘Courts and Conditions of Uncertainty in Times of Crisis’ [2008] P.L. 234, pp 243-247.

²⁵³ ‘Wars of necessity’ involve (e.g.) self-defence. ‘War of choice’ are interventions ‘for reasons other than to preserve the state’s own vital territorial interests’ or those ‘waged in the national interest if that ‘interest’ is given a very broad definition’. Waging War: Parliament’s Role and Responsibility (n 3) para 21. See also Hansard (n 96) col 758 (Lord Bramall).

*factors involved before deciding whether and how to intervene.*²⁵⁴ The Lords committee concluded thus: “*Although there have been exceptions, ... recent history shows that the processes leading up to the deployments are generally protracted, allowing plenty of time not only to evaluate and plan for the action but to obtain parliamentary support. The fact that it might be inconvenient for the Government to seek this support is hardly a justification for denying it.*²⁵⁵ A long build-up was arguably present in the Iraq decision which was discussed at national and international level in the months leading up to the deployment as Chapter 1 outlined. So it seems that the second issue raised by Lord Reid is outmoded and has been overtaken by a change in political culture. Similarly Part 3.2.3 has demonstrated that Lord Reid’s traditional assumption that declarations of war are best made by an unfettered executive have been modified in recent years. For example the government’s own war powers consultation paper published in October 2007 does not view parliamentary involvement as potentially disastrous. It first accepts that the waging of war will not *always* be subject to time constraints and second, proposes practical measures that could apply in such circumstances.²⁵⁶

Nevertheless despite recently shelved reform activity it remains the case that domestically the prerogative to conduct military action is presently subject to fewer formal parliamentary or judicial controls than other prerogative areas, and the extent to which this was the case over the course of the Iraq affair is the concern of this study.

[4] The Prerogative Analysed

This Chapter has afforded a detailed understanding of the prime ministerial prerogatives, including the war power which is the focus of this study. It has investigated in detail the prerogatives used by Mr Blair in the Iraq affair as outlined in Chapter 1. It has considered the nature of prerogative power and the constitutional checks upon it which will form the basis for further investigation of Mr Blair’s use of the war and related prerogatives during Iraq in Chapter 5. This part will now reveal

²⁵⁴ *Waging War: Parliament’s Role and Responsibility* (n 3) para 22.

²⁵⁵ *Ibid* para 101.

²⁵⁶ *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers* (n 209).

insights arising from application of the two analytical devices to the preceding discussion.

[4.1] Disparity Between Legal Framework and Reality

From the preceding discussion of the premier's prerogatives it appears that there is a clear disparity between the prerogative at law and practice; the prerogatives are powers exercised by the monarch at law, but not in reality. All of the vital prerogative powers discussed in this chapter emanate from the Crown and legally vest in the monarch. The monarch undertakes a range of tasks at law using these powers, from dissolving Parliament and appointing ministers to declaring war. Yet it is clear that current constitutional reality bears little relation to this ancient legal view because these powers are utilised in fact by the Prime Minister and ministers by virtue of the conventions discussed in Chapter 3. The disparity between the legal and factual positions of prerogative is not merely restricted to *who* actually exercises the power because this very issue directly determines the degree of scrutiny the prerogative power will be subject to, both at law and in political practice.

The disjunction between law and political reality was acknowledged by Lord Roskill in the leading case of *GCHQ*. Commenting on historical depictions of prerogative he stated "*fascinating as it is to explore this mainstream of our legal history, to do so in connection with the present appeal has an air of unreality*" which inevitably involved "*the clanking medieval chains of ghosts of the past.*"²⁵⁷ Lord Roskill's comments here are arguably consistent with the proposition that the historical legal framework that creates and sustains prerogative power is perhaps misrepresentative or 'unreal', acting as an illusory surface which veils real events beneath. As will be seen in subsequent chapters, Lord Roskill's comments have proved influential, and are cited in recent cases.²⁵⁸ The recurrence of historical ghosts and their medieval chains across prerogative caselaw is surely no accident. This striking and evocative imagery is used by judges attempting to resolve disputes regarding modern government power according to a legal framework that does not accord with it. It is a phrase adopted to indirectly concede that the medieval legal edifice of monarchical

²⁵⁷ *GCHQ* (n 35) 417.

²⁵⁸ *Bancoult, CA* (n 8) para 88; *R (on the application of Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2006] EWHC 1038 (Admin), [2006] All ER (D) 149 (May) para. 158.

prerogative power does not accord with the political workings occurring within it, and indeed may conflict with them. It is clear that in political terms, monarchy has been relegated to a peripheral political role and its prerogatives are now exercised in fact by ministers. It is thus clear that legal understandings have not accorded with constitutional reality for centuries, a proposition that was investigated in Chapter 2.

What are the implications of this divergence for the constitutional efficacy of ‘prerogative’ generally? ‘Prerogative’ has proved to be remarkably enduring as a concept which explains executive power at common law. Yet accepted views of it have changed drastically from its Blackstonian origins as a narrow set of powers vested only in the King Himself. Dicey’s wider formulation moved away from emphasis upon the King’s personal powers, though it still utilised ‘the Crown’ (in an abstract sense) as an essential component of prerogative. Dicey’s version encompassed the specific monarchical powers and a vast range of activities beyond these.²⁵⁹ In this sense Dicey’s reformulation of ‘prerogative’ seems to have enabled the term to continue as a basis for modern governmental power. Essentially, with the growth and complexity of the modern capitalist liberal state in the nineteenth and twentieth centuries, Dicey’s wide yet fluid rendering of prerogative enabled two things; first, government could become involved in a wider range of activities without further legislative prerequisites or obstacles; and second, the judiciary could continue to keep the constitution as an ordered, self-contained totality notwithstanding these developments. So according to current legal understanding Diceyan prerogative is by no means obsolete; indeed it could be asked whether ‘prerogative’ would have survived as a viable concept without Dicey’s changes to its definition and resulting nature. However despite its convenience, the prerogative’s survival has not necessarily been constitutionally beneficial. In its present form it could be claimed that the prerogative obscures a full and proper understanding of modern government power, stagnates reform,²⁶⁰ and potentially hampers constitutional development.²⁶¹

²⁵⁹ Similarly Tomkins suggests that the monarchical Crown-based constitutional order directly results in the broad nature of the government’s prerogative power. This is because in monarchical constitutions power ‘starts at the top’ therefore ‘any power not expressly dealt with by the law of the constitution will remain with the Crown’ providing a ‘reservoir of hidden, uncodified power’. *Our Republican Constitution* (Hart Publishing, Oxford, 2005) p 57-61.

²⁶⁰ “Reliance on a historically fuzzy concept promotes expansive judicial exercises that broaden older prerogatives’ ambit or practically invent new ones under old guises. ... [This] encourages stagnation of legislative reform.” Cohn (n 10) 105.

²⁶¹ GCHQ (n 35) 417.

In some respects the success of Dicey's 'prerogative' has enabled the traditional monarch's prerogatives to remain intact. For example it is arguable that the Law Lords in *GCHQ* reintroduced the spirit or influence of the Blackstonian view into the law, albeit discreetly. They did this by drawing a distinction between two types of prerogative, despite the fact they emanate from the same source. This distinction took the form of ring-fencing from judicial scrutiny the narrow, high prerogatives most closely associated with the monarch. The Law Lords did not explicitly state that they were immunising the monarch's personal prerogatives, instead citing 'subject matter' as the determining factor. Yet it seems particularly coincidental that the prerogatives most closely associated with monarch, such as defence of the realm and dissolution of Parliament, were the ones bestowed immunity on the basis of 'subject matter'. Prime ministerial powers inevitably benefitted as their exercise is particularly entwined with monarch. The premier's powers therefore appeared to be shielded from judicial review by their association with monarch; the extent to which this is correct in the Iraq-era war prerogative caselaw will be discussed in Chapter 5.

The War Prerogative

Disparities between law and reality in relation to the war prerogative should also be afforded particular attention. Legal views of the British war power are inherently tied to the notion of 'monarch'. This is to be expected in light of the fact that monarchs historically used this power and it continues to be exercised by the monarch at law. Importantly, a number of cultural assumptions associated with an autocratic monarch can be detected in caselaw in this area. Frequently cited as justifications for judicial deference to executive exercise of the war and related prerogatives are the potentially damaging consequences of hindering or intervening in government powers, as well as the importance of maintaining national security. Perhaps most significantly judges start from the premise that 'government knows best', i.e. that it is in the best position to make informed decisions regarding warfare and related issues of national security. The influence of these reasons in the Iraq-era prerogative caselaw will be discussed in Chapter 5.

The political reality of the war prerogative diverges from the legal view discussed above, both in its actual exercise and the principles employed to justify it. The political reality is more nuanced and less clear cut than its legal counterpart. In practice the war prerogative is exercised by the Prime Minister, though Parliament's support for war is essential and its role arguably strengthened towards the end of the

Blair premiership. Proposed reforms aim to formalise and galvanise Parliament's involvement further. The justifications underpinning parliamentary control of the war power materially conflict with those advanced in favour of the monarchical model. Such justifications include the need for greater democratic accountability, the importance of fully debating the implications of warfare and finally ensuring that governments that may be inclined to conduct war are effectively checked. Nevertheless, the emerging strengthened position of Parliament should not be overstated and should be viewed in light of three important political realities. First the executive can control Parliament by virtue of its party majority in the Commons. More importantly there will always be a need for individual leadership in warfare and the Prime Minister remains the one individual with direct access to the war power because he has the exclusive capacity to advise the monarch regarding use of the war power at law. Finally clusters of monarchical prerogatives can be used in combination to facilitate a premier's achievement of his (or his government's) preferred use of the war prerogative. For example during the Iraq affair Mr Blair used his exclusive access to the prerogative powers of Cabinet chairmanship, dissolving Parliament and conducting defence matters in a very specific and highly effective way as identified in Chapter 1 and detailed in Part 2 of this chapter.

So in political reality it appears that there is an ongoing complex and fluctuating balance of power between Prime Minister (and government) and Parliament in relation to the war prerogative, and in some limited respects this echoes the struggles between the monarch and Parliament in previous centuries. *De facto* control of war power remains in prime ministerial hands but there is a *relative* shift of political influence in Parliament's favour. This modification is occurring beneath the unchanging legal framework that places the monarch in *de jure* control of the war power, and which will continue to do so unless and until proposed reforms are put on a statutory footing. Thus, as Chapter 3 confirmed, the rupture between the law and reality of the war prerogative is increasing as the latter continues to evolve away from the former. The preceding discussion has thus established that there is a clear disparity between the respective legal and political positions of the war prerogative. Additionally there is a corresponding conflict between the principles that animate each respective position.

[4.2] The Role of Boundaries in Prerogative

Discussion in this chapter has afforded detailed understanding of prerogative generally and the war power specifically, including the checks and balances upon it. It is clear from this discussion that boundaries play a vital role in understandings of the prerogative power. They are erected by the judiciary in relation to prerogative in two distinct ways.

First, boundaries are used to determine the very scope of prerogative. It has been shown that the prevailing Diceyan view defines prerogative by what it is not (it is *not* statutory and it is *not* unlawful). By declaring the proper scope of statutes and by setting out the boundaries of lawful conduct, a remaining (or residual) area authorised by prerogative is created. Thus it is the boundaries of law as declared by the courts that essentially *create* prerogative. As Part 1 confirmed, these boundaries are informed by the two Diceyan constitutional fundamentals of parliamentary sovereignty and the rule of law. Determining these boundaries (and thus the corresponding perimeter of prerogative) is a matter of legal interpretation and the courts are ideally placed to undertake this task in relatively clear and consistent terms.

The second, and most significant use of boundaries in relation to prerogative are those employed to distinguish between different *types* of prerogative exercised by government. Part 3 explained that in GCHQ the Law Lords differentiated prerogatives that the courts would be willing to scrutinise from those they would not by ring-fencing those in the area of ‘high policy’. Though the GCHQ ring-fencing must be viewed in light of subsequent caselaw in Chapter 5, it will be confirmed that a distinction of sorts remains intact between justiciable and non-justiciable prerogatives (or in Jowell’s terms, between those matters that fall within the law’s ambit and those which lie within the ‘appropriate province of politicians’).²⁶² The viability of this distinction between matters of law and policy is arguably artificial and somewhat arbitrary. Harris, for example, has questioned it in the following terms:

²⁶² Jowell quoted in *Constitutional Role of the Attorney General* (n 61), para 3.

*"The theoretical position that the courts should not review, and consequently not make policy decisions, does not correspond exactly with the practical needs of the community, or the way that courts operate in reality. ... Policy, to a greater or lesser degree, permeates most judicial decision-making."*²⁶³

The construction of these second boundaries acts to protect the war power which is situated firmly within the ring-fenced area of non-justiciability. The boundaries also ensure that the Prime Minister's cluster of prerogatives, including appointing ministers, chairing Cabinet and dissolving Parliament, are similarly immune to judicial scrutiny. These powers are central to the office and may provide a premier with political leverage in relation to Cabinet and his parliamentary party. Such powers will be immune from judicial scrutiny, however partisan or unorthodox their exercise may appear.

The second type of boundary is of vital importance because the foundations upon which they are constructed are more ambiguous and elusive than the more concrete legal ones sustaining the borders of prerogative. Can the underlying principles that determine the positioning of these second boundaries be clearly ascertained, particularly in matters of war, defence and foreign affairs? Cases such as *Chandler*, *The Zamora* and more recently *Marchiori* indicate that up to three interconnected rationales have arguably influenced judicial approaches in this area. First, vague notions of the separation of powers indicate that the three state limbs should undertake their proper functions and not stray beyond their allocated roles; thus the judiciary should adjudicate according to the law and the executive should govern (which includes managing matters of defence and foreign affairs). Second, there exists an unequivocal desire on the part of judges to avoid involvement in political matters, which is perhaps attributable to the influence of the separation of powers doctrine and the culture of positivism as discussed in Chapter 3. Finally, related to the preceding points, there is an acknowledged lack of expertise in matters of defence and national security on the part of the judiciary.

The lack of clarity and blurring of these notions which underpin the boundaries between justiciable and non-justiciable has a consequential impact on the boundaries themselves. However, it is also arguable that the three rationales above are reducible to, or certainly compatible with, the basic and fundamental aim to keep non-legal decisions, particularly matters of wider politics or policy, out of the

²⁶³ *Harris* (n 178) 639.

courtroom. In this sense, caselaw involving the war and related prerogatives demonstrates judicial concern with maintaining what Douzinas calls law's 'internal purity' by eliminating 'law's other' from the law itself.²⁶⁴ Yet, as Chapter 5 reveals, this task is arduous, complex and perhaps not always entirely successful. How 'well policed' are the 'checkpoints' between law and non-law in this area?²⁶⁵ Can these boundaries be clearly and precisely rendered? Not necessarily, according to Harris who claims that judges may disagree as to where such boundaries should be drawn.²⁶⁶ Furthermore, "*[I]n some contexts it may be difficult for the court to manage delineation between justiciability and non-justiciability in such a way as to maintain community confidence in the line which is being drawn.*"²⁶⁷ Such difficulties encountered in the Iraq caselaw are subjected to detailed investigation in Chapter 5.

²⁶⁴ C Douzinas, R Warrington & S McVeigh, *Postmodern Jurisprudence, The Law of Text in the Texts of Law* (Routledge, London, 1991) p 25.

²⁶⁵ Ibid.

²⁶⁶ "[T]he absence of clear and firm lines between justiciability and non-justiciability means that the potential exists for different judges to believe the line should be drawn in different places." Harris (n 178) 634.

²⁶⁷ Ibid 633.

Chapter Five

Caselaw Concerning the War and Related Prerogatives During and After the Iraq Affair

The Blair government's conduct of the Iraq 'war' triggered a number of legal challenges. Much of the resulting caselaw specifically considered the Crown prerogative to wage war and a range of associated legal issues. This Chapter provides an account of prominent caselaw concerning the war prerogative over the broad Iraq period which must be considered against the wider political and constitutional events outlined in previous chapters.

Previous chapters established that the Crown prerogative power to wage war (along with other powers) is exercised by the monarch at law but is in reality exercised by the Prime Minister (and Foreign Secretary) according to the 'paramount' ministerial advice convention.¹ Specifically, Chapter 4 established a detailed understanding of prerogative power and confirmed that judicial checks upon the war prerogative are limited. These matters form the basis for discussion in this chapter.

A number of points regarding the Iraq caselaw must be noted at the outset. First, all of the cases to be discussed in this Chapter involve the war prerogative or related powers that are categorised within the general prerogative to conduct foreign affairs. Though this study is specifically concerned with the war prerogative, consideration of cases involving the prerogative to conduct international diplomacy are important and require attention because its exercise in these cases was linked to UK action in Iraq and the 'war on terror' and, more importantly, it has occupied the same ring-fenced area as the war prerogative and is therefore viewed by the judiciary in similar terms. Second, though these cases involve challenging various prerogatives related to conduct the Iraq war, it will be seen that the specific prerogatives referred to are often blurred or uncertain, though all involve foreign affairs and/or defence in some

¹ Conventions play a lesser role in this chapter due to the judicial approaches explained in Chapter 3 that expressly exclude conventions from judicial concern.

capacity. Third, despite covering a range of disputes, most of the cases in this chapter hinge upon two issues: jurisdiction and justiciability.

The justiciability issue is the primary concern of this study in that it directly concerns the legal view of the prime ministerial war prerogative at English law.² This chapter accordingly isolates and discusses judicial approaches to various foreign affairs-related decisions made via the prerogative, specifically whether they fall within subject matter capable of being reviewed by the courts. The second issue, jurisdiction, has required the courts to decide whether international law can apply domestically without express enactment, i.e. whether English courts have jurisdiction regarding disputes of international law.³ Many of the cases discussed in this Chapter, primarily in the area of judicial review, involve a range of complex, interwoven issues.⁴ Issues involving matters of jurisdiction or international law will be covered only to the extent that they are relevant to the aims of this study.

This chapter starts by providing a general overview of emerging developments in war and related prerogative caselaw over the broad Iraq period. Parts 2 and 3 proceed to undertake detailed discussion of these select cases through the prism of the two analytical devices outlined in the Introduction. These parts isolate and extensively analyse two important issues which emerge from the Iraq caselaw; namely the role of judicially erected boundaries between law and non-law in this area and the identification of any disparities between the Iraq caselaw and reality operating beneath. This analysis of the Iraq-era caselaw yields deeper insights into the war prerogative and judicial checks upon it.

² As a result, there are other high-profile Iraq-related cases that will not be considered as the focus must remain on judicial approaches to the war prerogative in English law. Other high-profile cases include: *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 3 All ER 28; *R (on the application of Al-Skeini & Others) v Secretary of State of Defence* [2007] UKHL 26, [2008] 1 AC 153; *R (on the application of Smith) v Assistant Deputy Coroner for Oxfordshire* [2008] EWHC 694 (Admin), [2008] 3 WLR 1284.

³ The traditional position regarding international law is summarised by Lord Denning thus: “*We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.*” *Blackburn v Attorney-General* [1971] 1 W.L.R. 1037, p 1382. Note that Denning’s comment relates to international treaties but the rationale extends to all forms of international law.

⁴ Problematically, judicial consideration of jurisdiction and justiciability in the Iraq caselaw often lacks a structured approach that clearly distinguishes both respective issues. There does not always appear to be clarification of precisely how these two issues overlap or interact with one another (or indeed with other legal issues in dispute). For example see *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister and others* [2002] EWHC 2777 (Admin), [2002] All ER (D) 245 (Dec) to be discussed.

[1] Overview of Developments in Legal Checks over the Broad Iraq Period

Chapter 4 confirmed that select high policy prerogatives, including ‘making treaties’ and ‘defence of the realm’, were deemed non-justiciable in the leading case of *GCHQ*.⁵ It also confirmed that subsequent cases have made incursions into certain formerly ring-fenced areas.⁶ This part provides an overarching account of war and related prerogative caselaw over the broad Iraq period and considers emerging developments. It seeks to identify and discuss the operation and efficacy of judicial checks upon the war and related prerogatives, with specific attention to the justiciability of prerogatives in this area. To aid this overarching account of emerging developments, the cases will be discussed chronologically.

[1.1] *Abbasi v Foreign Secretary [2002]*

The first case of significance is *Abbasi* which involved a challenge to the foreign affairs prerogative of conducting diplomacy rather than conducting military action. It specifically concerned the provision of diplomatic assistance to British subjects whose human rights may be violated by a foreign state. In *Abbasi* the mother of a British national detained by US government in Guantanamo Bay applied for judicial review of the Foreign Secretary’s refusal to make representations to the US government on her son’s behalf. The application was refused and she appealed. One of the two main issues raised by this case was whether executive action in the conduct of diplomatic and foreign affairs was capable of judicial review.⁸ Despite its concerns about the Guantanamo camp,⁹ on the facts before it the Court of Appeal

⁵ *Council of Civil Service Unions & Others v Minister for Civil Service* [1985] AC 374, HL. Hereinafter referred to as ‘GCHQ’.

⁶ *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349; *R v Secretary of State for Foreign Affairs, ex parte Everett* [1989] QB 811.

⁷ *R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598, [2002] All ER (D) 70, CA.

⁸ The other was whether the legitimacy of an action taken by a foreign sovereign state (i.e. the US) was within the jurisdiction of the court.

⁹ Sands writes of the *Abbasi* judgment: “the [Court of Appeal] judgment made clear that silence was not an option. The Court expressed the hope that its deep concern and anxiety would be drawn to the attention of the American courts.” P Sands QC, *Lawless World* (Penguin, London, 2006) p 166

answered this issue in the negative and the application was dismissed.¹⁰ The court's reasoning regarding justiciability is of particular significance.

The Foreign Secretary argued that executive decisions when dealing with foreign states were *not* subject to judicial scrutiny; Lord Phillips accepted that such reasoning was based on 'formidable' and 'powerful' authorities.¹¹ Nevertheless, he elsewhere considered authorities indicating that "*the issue of justiciability depends ... on subject matter and suitability in the particular case*", suggesting that the subject matter of the disputed prerogative was not the sole determining factor. The court ultimately refused to accept an outright blanket ban on the judicial review of all matters involving government refusal to render diplomatic assistance; such decisions *could* be justiciable. Though it was clearly situated within the previously ring-fenced area of foreign affairs,¹² this specific, narrow function *might* be judicially reviewable. Lord Phillips put forward three reasons for this proposition.

Firstly, the relationship between judicial review and prerogative could not automatically rule out the prospect. Lord Phillips drew upon two features of caselaw that left this issue open. First, the principle of 'legitimate expectation'¹³ may apply where government pursued 'a regular practice that the claimant can reasonably expect to continue'.¹⁴ Additionally, caselaw indicated that once ring-fenced areas of prerogative had gradually come within the ambit of judicial review;¹⁵ there was therefore a logical possibility that such developments could continue in the future. The second reason as to why the conduct of diplomacy might be reviewable was that the Foreign Office had previously published and acted in accordance with a policy indicating "*a clear acceptance by the government of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice*"¹⁶ thus providing a legitimate expectation of assistance in such circumstances. The final reason for the court's decision was the government's

¹⁰ Despite the Court of Appeal's ruling the British government formally requested the return of the British detainees in spring 2004. *Ibid* 171.

¹¹ *Abassi* (n 7) paras 37-38.

¹² *GCHQ* (n 5).

¹³ *Ibid.*

¹⁴ *Abassi* (n 7) para 82.

¹⁵ *Bentley* (n 6); *Everett* (n 6).

¹⁶ *Abbas* (n 7) para 92.

successfully-deployed arguments in previous cases that diplomatic means rather than the court interference was the appropriate method of resolving such situations.¹⁷

Despite finding that the government's refusal to provide diplomatic assistance could be justiciable in limited circumstances,¹⁸ the Abbasi application was nevertheless dismissed. The Foreign Office was obliged to *consider* taking diplomatic action on an individual's behalf and refusal to undertake such consideration *could* be reviewable.¹⁹ So reviewability applied in a very limited capacity and did not extend to substantive decisions regarding the conduct of diplomacy, or what the court maintained was still a 'forbidden area'.²⁰ The caution and discomfort of the judgment in this foreign affairs area was evident. Lord Phillips spoke of the need for 'delicate diplomacy'²¹ and great 'circumspection' regarding 'interven[tion] where diplomats fear to tread'.²² Furthermore he stated that "*The expectations are limited and the discretion is a very wide one*".²³ The government had been making ongoing representations to the US government regarding the Guantanamo detainees and in the court's view this was sufficient to meet Abbasi's reasonable expectations and discharge the Foreign Secretary's obligations.²⁴ The court concluded:

*"On no view would it be appropriate to order the Secretary of State to make specific representations to the United States, even in the face of what appears to be a clear breach of fundamental human right, as it is obvious that this would impact on the conduct of foreign policy, and impact upon such policy at a particularly delicate time."*²⁵

So the *Abbasi* judgment indicated that though judicial review was technically possible in the specific area of diplomatic assistance, the potential effect of this development was limited. In real terms the possibility of review was minimal, and indeed the court acknowledged that judicial review would 'kick in' only in 'extreme case[s]'.²⁶ Despite this point, Kilroy noted the potential future impact of *Abbasi* in

¹⁷ Ibid paras 96-8. Underlying this final reason was the rationale that government could not put forward legal arguments that directly contradicted those previously made now that these did not favour their position in the present case.

¹⁸ Ibid para 106 (iv)-(v).

¹⁹ Emphasis added. Ibid para 106(iv). The obligation is limited to considering.

²⁰ Ibid para 106(iii),(iv).

²¹ Lightman J, quoted ibid para 37

²² Donaldson MR, quoted ibid.

²³ Ibid para 106(iii).

²⁴ Ibid para 107(i).

²⁵ Ibid para 107(ii).

²⁶ Ibid para 104.

broadening the scope of judicial review;²⁷ discussion in Parts 1.2-1.5 considers the extent to which subsequent cases developed this potential.

[1.2] C.N.D. v Prime Minister [2002]²⁸

CND was a highly significant case brought in the lead up to the Iraq war, prior to invasion, when the UN Security Council negotiations were ongoing. It demonstrates the courts being asked to specifically engage with prime ministerial exercise of the war prerogative.

Two preliminary points about *CND* can be noted at the outset. Firstly the claimants named the Prime Minister as defendant in the action. The case was brought to challenge his anticipated prerogative decision regarding military action in Iraq. *CND* therefore continues the assumed and silent operation of the ministerial advice convention and provides a further instance of the legal framework in this area being viewed in its wider conventional context.²⁹ However, interestingly the judgment avoids any reference to the Prime Minister, other than in the title of the proceedings.

A second interesting aspect of the *CND* judgment is the way it illustrates the ambiguities surrounding specific prerogative powers; there was judicial divergence regarding exactly which specific prerogatives the case involved. Brown LJ claimed that the prerogative of defence of the realm was being exercised.³⁰ Kay J indicated that the subject-matter of the case was foreign policy generally and the deployment of armed forces,³¹ and similarly Richards J stated that the claim involved foreign affairs and defence prerogatives.³² These disparities were by no means a central issue in the case because in practical terms it makes little difference which specific category of prerogative authorises the decision. As Chapter 4 demonstrated, prerogative covers government action in all of these areas, none of which are self-contained and some of which may overlap. But significantly, the failure of the

²⁷ C Kilroy, ‘R. (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs: reviewing the prerogative’ (2003) E.H.R.L.R. 222, p 228.

²⁸ *CND v Prime Minister* (n 2).

²⁹ See Chapter 3, Part 3.1.

³⁰ *CND v Prime Minister* (n 2) para 18.

³¹ *Ibid* para 50.

³² *Ibid* para 59.

judiciary to attribute a clear distinct prerogative under which the decision would be taken demonstrates the fluid and inchoate nature of prerogative power consistent with its Diceyan definition.³³

In *CND* the claimants wanted the court to provide a ‘true’ interpretation of *UN Resolution 1441*,³⁴ particularly clarifying whether it permitted military action by the UK and US *without* the need for a further UN resolution if Iraq failed to comply with its terms. *CND* applied to the Divisional Court for a declaration that any military action taken by the government against Iraq without a further UN Resolution would be in breach of international law. In any event, this substantive point was never covered because in keeping with other caselaw in this area the two main issues of jurisdiction and justiciability arose, thus requiring the court to initially consider whether it had the appropriate capacity to consider this legal issue.

The three Divisional Court judges put forward similar reasons for their rejection of the *CND* claim, each concluding that providing a declaration regarding resolution 1441 would impinge upon the governmental (or specifically prime ministerial) exercise of the war-related defence and foreign affairs prerogatives. Despite this, the judges structured their arguments in different ways and their respective approaches to the justiciability issue are interesting.

CND, drawing on a variety of judgments, including *Abbasi*, argued that the excluded prerogatives set out by Lord Roskill in *GCHQ* no longer applied, or in short, ‘there [were] no longer any no-go areas for the court’.³⁵ The judges’ approaches to this issue varied and ultimately no conclusive statement on the matter was put forward.

Of the three judgments, Kay J afforded justiciability the greatest weighting in his resolution of the case, citing it as ‘the first reason’ why the *CND* application must fail.³⁶ Furthermore, his treatment of the ring-fencing issue was the clearest, refusing to accept the claimants’ arguments that the blanket protection of high prerogatives has been removed completely. Though Kay J conceded that the areas set out in *GCHQ* had been reduced, the immunity in relation to the foreign affairs and warfare prerogative remained intact: “*the authorities provide no hint of retreat in relation to the subject-matter of the present case. This is hardly surprising. Foreign policy and*

³³ See Chapter 4, Part 1.

³⁴ Discussed in Chapter 1, Part 1.4.

³⁵ *CND v Prime Minister* (n 2) para 18.

³⁶ *Ibid* para 50. He did not consider the ‘jurisdiction’ issue at all.

*the deployment of the armed forces remain non-justiciable.*³⁷ Thus Kay J attempted to maintain the ring-fencing of the high policy prerogatives in this case despite cases such as *Abbasi* that potentially called this tradition into question.

The judgments of Kay J's colleagues were less conclusive regarding the ring-fencing issue. Brown LJ did not make specific reference to the high policy prerogatives or ring-fencing, though he did cite the 'illuminating' *Abbasi* judgment that had refused to automatically rule out review whilst also identifying 'forbidden areas'.³⁸ Furthermore he briefly quoted the court in *Rehman*³⁹ that it is "*well established in caselaw that issues of national security do not fall beyond the competence of the courts*".⁴⁰ This brief extract was not conclusive and Brown LJ did not provide further elaboration upon either authority. Nevertheless their inclusion by Brown LJ appeared to indicate that the courts would not automatically refrain from becoming involved in cases solely on the basis that they involved high policy areas such as national security. However Brown LJ still went on to find that a court declaration would be damaging to national interests.⁴¹

Adopting *Abbasi* terminology Richards J claimed that issuing a declaration would entail the court entering 'forbidden areas'; foreign affairs and defence must be the sole preserve of the executive.⁴² He continued: "*Of course the field of activity alone does not determine whether something falls within a forbidden area: 'Justiciability depends, not on general principle, but on subject matter and suitability in the particular case.'*"⁴³ Thus Richards J seemed to accept that the ring-fencing of forbidden areas prevailed, but the decision regarding where to ring-fence would now be more refined and would depend on the 'suitability' of court intervention and not solely upon subject-matter. In any event Richards J concluded that a declaration regarding resolution 1441 would encounter problems in relation to both suitability and subject matter. CND's claim was an attempt to restrict the Government's room for manoeuvre regarding military action and prior diplomacy. He claimed in unequivocal terms that this attempt could not succeed:

³⁷ *Ibid* para 50.

³⁸ *Ibid* para 28.

³⁹ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153.

⁴⁰ *CND v Prime Minister* (n 2) para 42.

⁴¹ *Ibid* paras 41, 45.

⁴² *Ibid* para 59.

⁴³ Emphasis added. *Abbasi* (n 7) cited *ibid* para 59.

*"That takes [the claim] squarely into the fields of foreign affairs and defence. In my view it is **unthinkable** that the national courts would entertain a challenge to a Government decision to declare war or authorise the use of armed force against a third country. That is a **classic example** of a non-justiciable decision."*⁴⁴

Richards J's view here was expressed in somewhat emphatic terms. Despite appearing to qualify the earlier GCHQ ring-fencing approach in light of recent developments such as *Abbasi*, he went on to effectively ring-fence the more specific war prerogative.

[1.3] Al Rawi v Foreign Secretary

Like *Abbasi*, the *Al Rawi* case involved the foreign affairs prerogative to conduct diplomacy rather than to deploy troops. Indeed the facts of the case were very similar to *Abbasi* but the claim was brought by non-UK nationals who were detained at Guantanamo Bay. The Guantanamo detainees were long-term residents of the UK but did not have British national status.⁴⁵ On this basis the defendant Foreign Secretary declined to make a formal request to the US for the detainees' return, claiming that he was under no such obligation under international law. A judicial review application challenging the Foreign Secretary's refusal was brought by the detainees and their families. Human rights arguments based on Articles 3⁴⁶ and 8⁴⁷ were raised.⁴⁸ The claimants submitted that, like British nationals, they had a legitimate expectation that a formal request would be made on their behalf.

The *Al Rawi* case was initially considered by the Divisional Court where the applications were dismissed. The claimants appealed and the matter was afforded further consideration by the Court of Appeal. The salient points made by each court regarding the ring-fencing issue are now discussed chronologically.

⁴⁴ Emphasis added. *Ibid* para 59(ii).

⁴⁵ The first three claimants were long term residents in the UK. The second and third claimants had been granted refugee status. The fourth to seventh claimants were families of the Guantanamo detainees, some of whom were British nationals.

⁴⁶ The right against inhuman and degrading treatment

⁴⁷ The right to respect for private and family life.

⁴⁸ A full discussion of these issues is beyond the scope of this chapter.

[1.3.1] *Al Rawi* in the Divisional Court [2006]⁴⁹

The Divisional Court held that requiring the Foreign Secretary to make a formal request to the US in the absence of a clear legal duty would constitute an interference in relations between sovereign states. Furthermore, in terms of justiciability, the Foreign Secretary's prerogative decision was one of foreign policy and the court was not equipped to assess such judgements in this area.

Latham LJ's joint judgment considered the justiciability of prerogative decisions in this area. In doing so he drew heavily upon the *Abbas* judgment.⁵⁰ Following that case, Latham LJ claimed that decisions affecting foreign affairs (undertaken by prerogative) were a 'forbidden area'.⁵¹ Yet despite the connotations of protected or ring-fenced high prerogatives this raised, it seems that the court did not continue the GCHQ approach. The area was not *automatically* forbidden because (following Lord Bingham's comments in *Jones*)⁵² Latham LJ stated:

"Clearly this could not deflect us from giving relief in restricted terms ... We would undoubtedly have been entitled to intervene".⁵³

So *Al Rawi* indicated that the courts were technically capable of judicially reviewing the foreign affairs prerogative. This appeared to crystallise the position emerging from earlier caselaw and represented a departure from the legal position set out by the House of Lords in *GCHQ*. The ring-fencing around this high policy or political prerogative had arguably been removed; this area of prerogative would not now enjoy blanket protection. Nevertheless, the court made it clear that the exceptional

⁴⁹ *R (on the application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (Admin); [2006] All ER (D) 46 (May).

⁵⁰ *Ibid* paras 4 –55.

⁵¹ *Ibid* para 89

⁵² *Regina v Jones (Margaret) and others* [2007] 1 AC 136, HL. Here Lord Bingham found that accepting defence arguments in this criminal appeal would inevitably entail the court casting judgement upon the government's exercise of prerogative. This was not appropriate because "*there are well established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law.*" Emphasis added, para 30. Note here that Lord Bingham's language referred to a general reluctance on the part of the courts (they will be 'very slow') to get involved. But this did not categorically rule out the possibility of reviewing the foreign affairs prerogative, indeed it implicitly assumed that review may be technically possible but would be undertaken sparingly.

⁵³ *Al Rawi*, DC (n 49) para 90. The passage proceeds to list requirements for such an intervention: "*if we were to conclude that he would appear to have failed to take into account either appropriately or at all any relevant material. ... [or] if we had considered that he had made an error at law.*" See also para 84.

requirements⁵⁴ to justify judicial intervention would make it ‘difficult for the claimants to succeed’ in their request that the defence make a formal request.⁵⁵ The requisite conditions for judicial involvement were not present here and even if they were, the court would merely require the defendants to re-take decision rather than issue a formal request.⁵⁶

So Latham LJ’s judgment confirmed that the courts were not prevented from reviewing a prerogative decision in foreign affairs *per se*. However, there would be limitations on judicial scrutiny in certain areas, particularly in relation to foreign affairs where the executive had wide discretion.⁵⁷ Summarising *Abbassi*, Latham LJ stated:

“whilst a decision in relation to diplomatic intervention was not immune from judicial scrutiny, that scrutiny had to take into account the very special nature of foreign policy considerations which are not in themselves justiciable.”⁵⁸

The interesting point about this statement is its emphasis on the foreign affairs prerogative as ‘very special’; decisions here generally concerned matters of policy which were viewed as beyond the judicial remit. This clearly distinguished foreign affairs from other non-‘special’ prerogatives. Significantly, implied distinctions between foreign affairs and regular prerogatives were evident elsewhere in Latham LJ’s judgment. For example he adopted the language of caution when considering the foreign affairs prerogative, referring to it as a delicate area⁵⁹ and furthermore “one in which the courts have consistently trod cautiously.”⁶⁰

So it is clear that though foreign affairs areas of prerogative were not automatically immune, the courts still viewed them differently. A distinction of sorts between this high policy prerogative and regular prerogatives was therefore maintained, or in basic terms subject matter would still be an issue. Nevertheless, the departure from GCHQ appears to be two-fold: first the *automatic* immunity from scrutiny afforded to foreign affairs has been down-graded to a mere strong presumption *against* scrutiny,

⁵⁴ One of two necessary conditions must have been present: either the defendants’ decision must have failed to take account of recent international proposals regarding the status of refugees, or alternatively the defendants’ decision must have been based upon an unrealistic approach to detainee conditions in Guantanamo. *Ibid* para 93.

⁵⁵ *Ibid* para 90.

⁵⁶ *Ibid* paras 90, 93.

⁵⁷ *Ibid* para 54: “the limits of the court’s scrutiny were clearly set by the nature of the decision under consideration.”

⁵⁸ Emphasis added. *Ibid* para 54.

⁵⁹ *Ibid* para 97

⁶⁰ *Ibid* para 89.

and second, if courts are willing to undertake a degree of scrutiny in relation to this higher prerogative, it will be extremely limited in scope. So rather than ring-fencing prerogatives by subject matter the courts now appear to ring-fence their scrutiny; in the area of foreign affairs prerogative any scrutiny will be very tightly limited. This seems to be a discernible shift experienced during the Iraq era caselaw.

[1.3.2] Al Rawi in the Court of Appeal [2007]⁶¹

Laws LJ's joint Court of Appeal judgment dismissed the appeal and confirmed the Divisional Court's findings regarding the non-justiciability of prerogative in this area. The judgment made some interesting comments in relation to this issue. It confirmed at the outset that the conduct of foreign affairs "*is so particularly the responsibility of the government that it would be wrong for the courts to tread such ground*".⁶² The Court of Appeal also made some general comments that provided a further indication of a move away from the GCHQ ring-fencing of high policy prerogatives. For example it stated that "*The scope of judicial review relating to security questions is tightly constrained, though not as severely as in the past.*"⁶³ This comment clearly summarised the general trend; a discernible relaxation of restrictions on judicial review in this area. Nevertheless, the statement was couched in somewhat vague terms and did not pinpoint the precise mechanics of this development.

Elsewhere Laws LJ dealt more explicitly with the notion of ring-fencing. In response to defence arguments (based on *Abbas*) that the claimants wanted the court to enter 'a forbidden area'⁶⁴ Laws LJ stated:

*"This is a powerful submission, but we do not think it has the force without more to carry the whole case in [the government's] favour."*⁶⁵

This seems to indicate that the court was unwilling to allow the government to simply rely on the basic argument that foreign affairs was an immune, non-justiciable area;

⁶¹ *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs and another (United Nations High Commissioner for Refugees intervening)* [2006] EWCA Civ 1279, [2007] 2 WLR 1219, CA.

⁶² *Ibid* para 2. Furthermore acknowledging that "*the courts have not the competence to pass objective judgement ... in so intricate an area of state practice.*"

⁶³ *Ibid* para 42.

⁶⁴ *Ibid* para 63.

⁶⁵ *Ibid* para 64.

'more' was required and the court indicated that the matter must be considered 'point by point'. Again this provided further indication that the automatic ring-fencing of this prerogative had been removed. But despite this apparent progress, the court still deemed the Foreign Secretary's conduct non-justiciable because the claimants' arguments to the contrary '[fell] foul of two principles'.⁶⁶ First such arguments required "*the court to enter into what in Abbasi ... was described as a 'forbidden area', that is, the conduct of foreign relations.*"⁶⁷ Citing this as a factor seems ambiguous and somewhat inconsistent with the court's earlier comments outlined above because it indicates that notions of 'forbidden areas' and ring-fencing may still prevail. Nevertheless, it is arguable that the court was saying that instead of applying automatically, the notion of 'forbidden area' now constituted only one factor (arguably a major one) which determined whether a court would scrutinise a prerogative decision. The second principle which led the court to reject the claimant's arguments was as follows; "*what is and what is not a relevant consideration for a public decision-maker to have in mind is (absent a statutory code of compulsory considerations) for the decision-maker, not the court, to decide.*"⁶⁸ Thus the court indicated that it was unwilling to be prescriptive about how the Foreign Secretary should make this kind of decision; a wide margin of discretion in the prerogative of foreign affairs would remain.⁶⁹

So as one would expect, the Court of Appeal resolutely refused the claimants' request to play a greater supervisory role in government foreign policy decisions. To do so would 'represent an outlandish view of the relation between the judiciary and executive'.⁷⁰ Ultimately to justify judicial involvement in such an area the claimants would have to establish 'at the least' that the Foreign Secretary's decision was 'frankly perverse'.⁷¹ This onerous and exceptional benchmark was not satisfied in *A/ Rawi*.

⁶⁶ Ibid para 131

⁶⁷ Ibid. The court's reason for this was as follows; "[The claimants] seek to persuade us to order the Foreign Secretary to adopt a different judgement as to the conduct of negotiations with the United States, upon a delicate policy issue, from that which, upon mature consideration, she has already made. That offends the first principle", para 132.

⁶⁸ Ibid para 131. The court's reason for this was as follows; "[The claimants'] judicial review grounds list something like 37 factors which it is said should have been taken into account. ... They have all been constructed by the lawyers, as if for all the world it is for the court to decide what the Foreign Secretary should and should not bear in mind in deciding what policy to adopt. That offends the second principle", para 132.

⁶⁹ In foreign affairs decisions "the class of factors ... which it is open to the decision-maker to treat as relevant or not, must be particularly wide." Ibid para 140.

⁷⁰ Ibid para 134.

⁷¹ Ibid para 141.

[1.4] Gentle v Prime Minister

Gentle was another significant case in this area that considered the prerogative regarding international relations and warfare, and approved *Abbasi*,⁷² and *CND*.⁷³ In *Gentle* the Prime Minister was named as lead defendant along with the Defence Secretary and the Attorney General, again demonstrating the central prime ministerial role in this area. Furthermore, following *CND*, it continued the assumed operation of the ministerial advice convention and the viewing of the legal framework in its wider conventional context.

The claimants were mothers of soldiers who had died whilst on duty in Iraq. They sought an independent inquiry into whether the government had taken *reasonable steps* to ensure the invasion of Iraq was lawful under international law.⁷⁴ They argued that Article 2 of the *Human Rights Act 1998* (the right to life) had been breached as it appeared that the government had not taken reasonable steps, therefore an inquiry was necessary.⁷⁵ The government refused to hold an inquiry claiming, among other reasons, that the extra-territorial actions of a state were non-justiciable. The claimants sought permission to judicially review this decision, pursuing the case ultimately to the House of Lords. The respective judgments of the Court of Appeal and Law Lords are now discussed in turn.

[1.4.1] Gentle in the Court of Appeal [2006]⁷⁶

The Court of Appeal unanimously dismissed the claimants' application, holding that Article 2 did not impose an obligation to ensure that military action was lawful

⁷² *Abbasi* (n 7).

⁷³ *CND v Prime Minister* (n 2).

⁷⁴ As distinct from whether the invasion itself was in accordance with international law.

⁷⁵ The claimants argued that human rights are protected in all areas including high policy areas. Their arguments thus attempted to increase the field of 'unlawfulness' that government must avoid by widening the scope of the Article 2 right, thus limiting Diceyan prerogative. If successful this would have had the effect of limiting the war prerogative because government would always have to take *reasonable steps* to ensure its use of the prerogative was internationally lawful (though arguably this need not have necessarily set a particularly onerous standard for a government to meet if it had followed proper procedures).

⁷⁶ *R (on the application of Gentle and another) v Prime Minister and others* [2006] EWCA Civ 1689, [2007] QB 689 CA.

internationally.⁷⁷ The government was therefore under no obligation to set up an inquiry. Furthermore, according to the separation of powers this area concerned the executive rather than the courts. The issue of justiciability recurred, the defendant arguing that its extra-territorial actions were not subject to judicial review. Non-justiciability formed one of four reasons why the defence claimed it was under no obligation to take reasonable steps to ascertain the international lawfulness of invasion.⁷⁸ The court accepted this defence point, reiterating the basic proposition that the conduct of foreign and military affairs outside of the UK was not justiciable.

As a starting point the Court of Appeal claimed that the lawfulness of sending forces to Iraq was not justiciable for ‘one or both’ of two reasons;⁷⁹ first, the court was not in a position to provide a ruling on international law, and second, the issue in dispute fell within foreign affairs and defence policy which was the exclusive concern of government prerogative. The court declared that these two issues, jurisdiction and justiciability, were ‘closely bound up together’ because considering the international law would inevitably impinge upon government’s exercise of the prerogative.⁸⁰ This demonstrates that prime ministerial or ministerial decisions in matters of war will be situated in the area of overlap between the two prohibited areas of non-jurisdiction and non-justiciability, effectively dual-insulating ministerial decisions in this field from judicial scrutiny.

The Court of Appeal in *Gentle* did not provide a clear, explicit statement on whether the high prerogatives of war, defence and foreign affairs were to remain formally ring-fenced or not. Its position on this point remained somewhat ambiguous and the court cited various mixed authorities that provided little clear indication of the direction this ring-fencing may be taking. On one view the judgment cited numerous authorities that tilted in favour of the view that ring-fencing of high prerogatives had been removed. The first indication was the court’s reference to *Abbasi*,⁸¹ the case that potentially called the automatic ring-fencing of the high policy foreign affairs prerogative into question and suggested that in exceptional circumstances the

⁷⁷ Ibid para 42.

⁷⁸ Ibid para 25. The first 3 reasons put forward by the defence included: (1) the *Article 2* right did not extend to decisions to deploy armed forces, (2) the international lawfulness of warfare was irrelevant to any investigation into the deaths, (3) *Article 2* is not applicable to extra-territorial deaths that occur outside the UK.

⁷⁹ Ibid para 33

⁸⁰ Ibid. The court followed *CND v Prime Minister* (n 2) in this respect, particularly the approach of Kay J.

⁸¹ Ibid para 27

exercise of this prerogative might be technically reviewable.⁸² However, the *Gentle* court did not build upon or develop any of the detail set out in *Abbasi*. Elsewhere the court drew upon the authority of *Marchiori*.⁸³ Though the extract cited from this case was arguably mixed on the issue of ring-fencing, it broadly appeared to indicate that the formal ring-fences had been removed. In the extract, Laws LJ stated that in matters of defence the judiciary would police the transgression of constitutional bounds “*no matter how grave the policy issues involved*”, though he immediately qualified this assertion with the concession that the courts were in ‘no position’ to set limits on defence matters.⁸⁴ This seemed to indicate that no high policy area could be automatically declared off-limits but also that no judicial limits could be applied to the defence prerogative. These appear to be contradictory statements despite Laws LJ’s claim to the contrary. However, more conclusively he later stated “*judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy.*”⁸⁵

Taking an alternative view, the strongest indication that the formal immunity of high prerogatives remained intact lay in the repeated references to ‘forbidden areas’⁸⁶ that were the ‘exclusive’ responsibility of government. Such points were corroborated elsewhere in the judgment; for example, though the court cited the *Abbasi* judgment as mentioned above, the extract from that case which it chose to include in its own judgment set out the traditional GCHQ ratio that prerogatives involving high policy subject matter were unsuitable for judicial review because the judiciary were unequipped to assess such areas.⁸⁷ Together these potentially supported the proposition that the GCHQ ring-fencing of high policy prerogatives remained largely intact. In summary, the stance of the Court of Appeal in *Gentle* was inconclusive and relied on mixed authorities. This perhaps reflects the fact that caselaw in this area was in a transitional phase and judges were not yet ready to explicitly commit to one view or the other.

⁸² Ibid para 27. Here the court cited the following part of the *Abbasi* judgment outlined above: “*the issue of justiciability depends ... on subject matter and suitability in the particular case.*” Emphasis added.

⁸³ Ibid para 40.

⁸⁴ Ibid para 40.

⁸⁵ Ibid para 40.

⁸⁶ Ibid paras 31, 32.

⁸⁷ Ibid para 27.

[1.4.2] Gentle in the House of Lords [2008]⁸⁸

The claimants in *Gentle* appealed and the case was heard by a nine member panel of the House of Lords who unanimously dismissed the appeal. The Law Lords confirmed that *Article 2* did not extend to obliging a government to take reasonable steps to obtain full and proper advice regarding the legality of military action. Three reasons for this ruling were put forward. The second reason, of primary relevance for the purposes of this study,⁸⁹ was that the *HRA* was not an appropriate mechanism for resolving questions about warfare. An inquiry according to *Article 2* would involve drawing the judiciary into matters which they were ill-suited to consider. Furthermore the traditional caution of the courts in high policy areas such as war and foreign relations was an issue that counted heavily against the right.

In their judgments the Lords were primarily concerned with *Article 2* arguments, though limited consideration was paid to justiciability issues, particularly by Lord Bingham and Baroness Hale. Lord Bingham's leading judgment put forward the reasons mentioned above, which the other Law Lords approved. He was quite clear that this area did involve governmental high policy and interpreting the *Article 2* right as the claimants requested would draw the judiciary into areas they were reluctant to enter.⁹⁰ Interestingly Lord Bingham implied that warfare and foreign affairs must continue to be viewed in a different way to other areas, even in the context of resolving human rights disputes rather than judicial review:

*"The restraint traditionally shown by the courts in ruling on what has been called high policy – peace and war, the making of treaties, the conduct of foreign relations – does tend to militate against the existence of a right."*⁹¹

Lord Bingham was essentially saying that it was technically possible for individual rights to exist in this field, but an important factor against finding in favour of the existence of a wider right in this case was the fact that it occurred in a high policy area. So when determining the scope of the statutory restraints that regulated the executive's conduct of warfare matters, the court's approach to interpretation started

⁸⁸ *R (on the application of Gentle and another) v Prime Minister and others* [2008] UKHL 20, [2008] 1 AC 1356.

⁸⁹ The first reason was that there was no logical link between lawfulness of military action and the risk of fatalities. The third reason was that the application of the ECHR was limited in this case to the jurisdiction of the UK.

⁹⁰ *Gentle v Prime Minister, HL* (n 88) para 7.

⁹¹ *Ibid* para 8.

from a more deferential basis because of the prerogative subject matter in question. Though the high policy prerogatives may no longer be formally ring-fenced from judicial review, they remain relatively immune from such scrutiny, and this rationale may even apply in *HRA* disputes that occur in high policy areas. Lord Bingham's judgment seemed to imply that human rights may be weaker when confronting governmental conduct of defence and warfare which is ironic because high policy areas such as these are perhaps ones in which human rights are most likely to be threatened by utilitarian considerations.

Despite the sympathetic tone of Lady Hale's judgment she likewise found against the claimants and approved Lord Hoffman's judgment. She provided clear and explicit confirmation that formal ring-fencing on the sole basis of subject matter is redundant in the context of *HRA* disputes:

*"It is now common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate it must. The subject matter cannot preclude this."*⁹²

This statement was made in relation to *HRA* issues and did not refer to judicial review specifically. However, strong evidence suggests that it arguably extends to judicial review in light of trends outlined in the preceding cases such as *Abbasi* and *Al Rawi*. Furthermore, other judicial review authorities explicitly support the proposition that automatic ring-fencing of high policy areas is no longer the correct approach. For example in *Roth v Home Secretary*⁹³ Laws LJ said of the defence prerogative:

*"The first duty of government is the defence of the realm. It is well settled that executive decisions dealing directly with matters of defence, while not immune from judicial review (**that would be repugnant to the rule of law**), cannot sensibly be scrutinised by the courts on grounds relating to their factual merits"*⁹⁴

Significantly if automatic immunity is not available to defence, often acknowledged as a central prerogative most exclusively the concern of government, then surely it is not available to other lesser policy prerogatives. Thus the entire notion of ring-

⁹² Ibid para 60.

⁹³ [2003] QB 728, CA.

⁹⁴ Emphasis added. Ibid para 85.

fencing is called into question. Similarly, in *Bancourt* at the Court of Appeal⁹⁵ Sedley LJ said of Lord Roskill's ring-fenced prerogatives:

*"a number of his examples [of immune subject matters] could today be regarded as questionable: the grant of honours for reward, the waging of a war of manifest aggression or refusal to dissolve Parliament at all might well call in question an immunity based purely on subject matter."*⁹⁶

When the Iraq caselaw is viewed in the context of these authorities it strongly indicates a move away from the formal immunity of GCHQ so that court involvement in these high policy areas cannot be automatically ruled out. In disputes concerning judicial review or human rights the courts *could* now technically get involved.

[1.5] Summary of Developments

Over the trajectory of the Iraq judgments there occurred a degree of legal progress in two respects: first, the broadening possible scope of judicial review and second, the potential for the *HRA* to limit government conduct in any policy area. The GCHQ ring-fencing that traditionally automatically immunised high policy prerogatives from judicial scrutiny was arguably being dismantled. This occurred gradually, the seeds of potential being sown in earlier cases such as *Abassi*,⁹⁷ and the position crystallising across subsequent judgments. The potential removal of ring-fencing technically meant that, in law, prerogatives such as war and defence would no longer be granted routine formal exemption from the scrutiny of the courts solely on the basis of subject matter; technically the appearance of a relative strengthening of the judicial limb in relation to these prerogatives thus occurred. This was a definite legal development which potentially impacted upon the war and related prerogatives.

Yet despite this change to the legal position, in the Iraq cases the courts without exception refused to scrutinise ministerial prerogative-based decisions in relation to foreign affairs and warfare etc. on the basis that such decisions fell within the overlap of two areas traditionally avoided by the judiciary, namely non-jurisdiction and more

⁹⁵ *R (on the application of Bancourt) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498, [2008] QB 365 CA.

⁹⁶ *Ibid* para 46.

⁹⁷ *Abassi* (n 7).

significantly non-justiciability. In relation to this latter issue a distinction of sorts was still adopted by the judiciary between ‘special’ and ‘non-special’ prerogatives.⁹⁸ Though automatic immunity was removed, a strong presumption against scrutiny of war and related prerogatives prevailed. This was supplemented by the further concession that any judicial review of such areas would be extremely limited in scope or, in other terms, any scrutiny would be tightly ring-fenced (as evidenced in *Al Rawi*).⁹⁹ Thus the approach of the courts to such prerogatives in the Iraq caselaw was little more than a modest refinement and, vitally, of little practical consequence in reality. Parts 2 and 3 now apply the two analytical devices to the preceding caselaw to see whether they can provide any underlying insights into why the judiciary continued to evade oversight of the high prerogatives despite their removal of the ring-fencing.

[2] The Law-Politics Boundaries in Iraq Caselaw

It has been established that judicially erected boundaries play a vital role in the constitutional components relevant to the premier and war prerogative. For example Chapter 3 discussed judicial and academic use of boundaries in relation to conventions where the prevailing approach has been to separate and distinguish laws from non-legal, political conventions. More significantly Chapter 4 discussed how the creation of legal boundaries around and within prerogative is a central aspect of the mainstream legal understanding of it. The boundaries governing prerogative power take effect in two ways. First, the extent of prerogative power itself is determined by statute and common law. Second, boundaries have been utilised to distinguish between different areas of prerogative, some of which are subject to a greater degree of judicial scrutiny than others. Part 1 of this chapter has established that though the GCHQ ring-fence of immunity which previously encircled high policy prerogatives is now questionable, a similar form of ring-fencing of the likelihood and scope of judicial scrutiny in these high policy areas has replaced it. The war prerogative (and related high policy prerogatives) is arguably an area where boundaries to judicial scrutiny should be drawn. Perhaps problematically it is the

⁹⁸ *Al Rawi DC* (n 49) para 54.

⁹⁹ Ibid. Discussed in Part 1.3.1.

judiciary that must reason how, why and where these boundaries will be created and maintained. What are the precise underlying ideas that inform or influence such decisions?

The boundaries which separate law from wider politics (informed by positivism and the separation of powers) become significant in judgments concerning the prime ministerial war and related prerogatives as further discussion of select Iraq caselaw now demonstrates. The leading cases of *CND*, *Al-Rawi* and *Gentle* demonstrate the dilemmas facing the judiciary in this area particularly effectively. They highlight the difficulties and ambiguities inherent in judicial attempts to preserve a coherent and certain view of the war and related prerogatives at law.

[2.1] CND v Prime Minister

CND's arguments in its legal challenge to the Prime Minister included the claim that the court did have the capacity to make a ruling on a pure point of international law (namely whether military action would be unlawful without a second UN resolution).¹⁰⁰ In making such arguments *CND* adopted positivist-style reasoning, claiming the court could focus solely on the legal issue of determining the resolution's meaning without having to consider the wider policy issues of the premier's decision. The court rejected this argument for three interconnected reasons.¹⁰¹ The main reason of interest to this discussion was that the issue of international law could not be divorced from the surrounding political and diplomatic context and the resolution's meaning was not an isolated legal issue. For Brown LJ interpreting the resolution was "*not the clear-cut question of construction suggested by CND but rather is fact-sensitive and dependent upon the developing international*

¹⁰⁰ It put forward a novel legal argument which attempted to circumvent the traditional position that international law must be enacted to have effect in English law. The first stage of this argument involved the claim that customary international law formed part of the English common law without the need for express enactment. Next the claimants argued that the unlawful use of force was part of customary international law and therefore part of the English common law. *CND* thus claimed that the court was able to provide a ruling on a pure point of international law. In Brown LJ's words, *CND* "submit that [their case] raises a sharp-edged question of law involving no consideration of policy, no disputed areas of fact, no consideration of the developing international situation. It is thus an issue upon which the court can and should decide." *CND v Prime Minister* (n 2) para 10.

¹⁰¹ The reasons included: (1) *Resolution 1441* had no effect in English law, (2) the resolution's meaning was not an isolated legal issue, and (3) English courts do not police international events.

*situation.*¹⁰² Essentially it was not possible to view the legal issue in isolation. Brown LJ proceeded to outline reasons for his findings:

*"I reject [CND's] submission that it would be permissible in principle to isolate and rule upon legal issues e.g. as to whether the decision was taken in breach of international law. The nature and subject matter of such a decision require it to be treated as an indivisible whole rather than breaking it down into legal, political, military and other components and viewing those components in isolation for the purpose of determining whether they are suited to judicial determination."*¹⁰³

The reasoning here is interesting. Brown LJ indicated that in relation to this *prima facie* legal issue, law and political considerations were blurred and therefore it could not be scrutinised. Political and other non-legal elements fed into the legal issue and were inseparable. This clearly demonstrates Brown LJ appearing to uphold and maintain the long-held law-politics distinction. Because the political, legal and other factors merged in this way, the boundary between 'legal' and 'non-legal' could not be clearly identified and drawn. This was a mixed issue and Brown LJ therefore segregated the entire point as beyond the capacity of the court, despite the fact that a legal question of interpretation clearly lay at its core.

It is important to consider the detailed basis for Brown LJ's finding that the interpretation of resolution 1441 was an issue where law and politics conflated. One major factor was his heavy emphasis on defence evidence, particularly the witness statement of a senior Foreign Office official;¹⁰⁴ detailed and significant extracts of this statement were included in his judgment.¹⁰⁵ Note for example the following Foreign Office claim that:

*"it is an unavoidable feature of the conduct of international relations that issues of law, politics and diplomacy are usually closely bound up together. **The assertion of arguments of international law by one state is in practice regarded by other states as a political act, and they react accordingly.**"¹⁰⁶*

In this extract the Foreign Office official effectively claimed that law and politics are blurred at international level. Brown LJ accepted this point as 'not merely persuasive

¹⁰² *CND v Prime Minister* (n 2) para 13.

¹⁰³ *Ibid* para 59(ii).

¹⁰⁴ Mr Ricketts, Director General for Political Affairs at the Foreign and Commonwealth Office.

¹⁰⁵ *Ibid* paras 11, 12.

¹⁰⁶ Emphasis added. *Ibid* para 11, para 3 of statement.

but in large part self-evident'.¹⁰⁷ Richards J also accepted this defence evidence, using it as a basis for his own reasoning¹⁰⁸ and rejected CND's 'neat attempt to isolate a purely judicial issue'.¹⁰⁹

It is of course appropriate that in a case such as *CND* involving governmental discretionary powers the court should pay careful attention to the detailed views and reasons put forward by government. Furthermore it is certainly the case that refusing to enforce unenacted international law reflected the prevailing view in English law. Nevertheless there is a logical difficulty inherent in this approach. By accepting the defence statement absolutely, Brown LJ tacitly agreed that in such circumstances it is correct in English law for the courts to defer to the government's preferred interpretation of international law. He furthermore accepted that in reality such an interpretation will be motivated by the political interests of the country (as defined by the government). This led to the somewhat unsatisfactory position in the Iraq affair that a party political Cabinet minister answerable to the premier (the Attorney General) was permitted primary responsibility for deeming the conduct of the government (of which he was a member) internationally lawful or otherwise. Judicial refusal to intervene, however cogently reasoned, meant that the government's view of its own legality was afforded priority in English law. It is perhaps a legitimate claim that English courts are not suited to the role of interpreting international laws, but surely the same claim could apply to government. Other cases such as *Gentle*¹¹⁰ and *Jones*¹¹¹ show that the separation of powers doctrine is influential in this area. Yet the approach of the *CND* court offended the separation of powers in two respects; firstly, the executive is institutionally unsuited to undertake the role of legal interpretation,¹¹² and secondly, tacitly enabling the government to definitely declare its own actions internationally lawful (albeit in English law) constituted an overlap or concentration of power.¹¹³

¹⁰⁷ *Ibid* para 41; para 13.

¹⁰⁸ *Ibid* para 59(i).

¹⁰⁹ *Ibid* para 59.

¹¹⁰ *Gentle v Prime Minister, CA* (n 76).

¹¹¹ *R v Jones* (n 52) para 29.

¹¹² CND made arguments along similar lines in its case against the Prime Minister: "[The courts] cannot justifiably accord to the executive the exclusive right to determine this question; on the contrary, it is a question altogether more appropriate from decision by the court". *CND v Prime Minister* (n 2) para 22.

¹¹³ Montesquieu, *The Spirit of the Laws* (Cambridge University Press, Cambridge, 2002) pp. 154-166. Montesquieu saw such concentrations of power as potentially fatal to individual liberties.

The difficulty remains that in *CND* the court accepted defence evidence that the issue the claimants sought to bring before the court (i.e. the interpretation of resolution 1441) was mixed, that it involved a fusion of law and politics. Law was clearly a vital aspect of the question but the issue was nevertheless categorised as political and delineated as a ‘forbidden’ area.¹¹⁴ Evidently the court in *CND* was faced with a difficult dilemma. Nevertheless the decision to avoid political considerations, particularly in an inherently politically contentious case such as *CND*, was an unavoidably political decision in itself. Davies makes such a point in relation to law generally:

“Excluding politics as an explicit part of [legal] theory is as political an approach as including it, especially when it is only too obvious that the object under description reflects a particular political standpoint.”¹¹⁵

Bringing politically contentious cases such as *CND* before the courts forces them to engage with these highly charged arguments in any event. Even the judicial preference for disengagement and their cautious refusal to intervene here was itself not a neutral or dispassionate position as it inevitably and ultimately favoured the political aims of the Blair government. As Allan claims, “*deference to the judgement of others is rarely neutral: it is likely, in practice, to disguise an endorsement of the views acceded to, though implicit rather than fully or persuasively reasoned.*”¹¹⁶ The cases in this chapter highlight the judiciary’s natural inherent conservatism and tacit protection of strong government in matters involving war, foreign affairs and defence.¹¹⁷ The judiciary’s effectiveness as a check on such powers is thus institutionally compromised.

¹¹⁴ *CND v Prime Minister* (n 2) para 50.

¹¹⁵ M Davies, *Delimiting the Law, Postmodernism and the Politics of Law* (Pluto Press, London, 1996) p 55.

¹¹⁶ T R S Allan, ‘Human Rights and Judicial Review: A Critique of ‘Due Deference’’, C.L.J. 65(3), November 2006, pp. 671-695, p 682.

¹¹⁷ This is arguably supported more generally by Lord Hoffman’s judgment in *R v Jones* (n 52) paras 90, 93. See also *Government of the Republic of Spain v S.S. Arant-Zazu Mendi (The Arantzazu Mendi)* [1939] AC 256, HL which considered a dispute over the immunity of a ship requisitioned by the Spanish government. Here the Law Lords claimed “*Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.*” p 264.

[2.2] *Al Rawi* (Divisional Court)

A further example of judicial insulation of the legal from the political is evidenced in the Divisional Court's *Al-Rawi* judgment. One essential point of dispute between the parties in *Al Rawi* was the most effective way of handling the diplomacy surrounding the claimant detainees. The claimants' and defendants' respective views regarding the appropriate exercise of the foreign affairs prerogative differed, and the court's decision involved it having to select which view should ultimately prevail. Latham LJ outlined the claimants' arguments, a number of which took issue with points put forward by the defence.¹¹⁸ It was this conflict with the Foreign Office view, according to the judge, which was the 'real problem facing the claimants'.¹¹⁹ He stated;

*"[The claimants'] arguments are strong arguments in the context of political debate. But the question which we have to determine is not whether these arguments would or should prevail in the political arena, but whether or not they are sufficient to justify the conclusion that [the Secretary of State] has failed to exercise his judgement [under prerogative] in a proportionate way."*¹²⁰

Latham LJ was claiming these arguments were good¹²¹ but essentially political. The court's sole concern was determining a legal issue, namely the domestic lawfulness of the Foreign Secretary's exercise of prerogative. Latham LJ's judgment thus affords a further illustration of law's concern with eliminating non-law from its ambit; it was solely concerned with resolving a legal issue and only arguments based in law would be considered for such purposes. In adopting this approach Latham LJ essentially insulated the minister's decisions from substantive criticism in the case because he effectively categorised the claimants' non-legal criticisms as irrelevant and unrelated to the legal issues *per se*, thus effectively marginalising them. As Davies writes,

¹¹⁸ *Al Rawi*, DC (n 49) para 87. The court identified 6 arguments made by the claimants. For example, the following points demonstrate the claimants taking specific issue with the Foreign Office evidence: (b) the Foreign Office placed undue deference or trust upon US assurances that Guantanamo detainees have not been subject to inhuman or degrading treatment; objective evidence suggested otherwise, (e) there was no evidence beyond Foreign Office assertions to indicate that the US would respond to a formal request for non-nationals differently to such a request for UK nationals, (f) the Foreign Office claim that a formal request would be counter-productive was 'wholly inconsistent' with other evidence.

¹¹⁹ *Ibid* para 92.

¹²⁰ *Ibid* para 89.

¹²¹ "The claimants' case has much to commend it." *Ibid* para 87. Elsewhere he referred to "the powerful submissions made on behalf of the claimants" para 96.

*"This separation protects law ... from fundamental critique, because any analysis [or argument] which does not have as its first point of departure law's story about itself is by definition not centrally about law, but about something else."*¹²²

Al Rawi demonstrates the courts appearing to implicitly protect government decisions regarding foreign affairs in this area from wider political-constitutional criticism, or effectively limiting the grounds on which criticism can be made, albeit in the context of a courtroom.

[2.3] Gentle in the Court of Appeal

The law-politics boundary was also a material issue in the Court of Appeal's *Gentle* judgment when the court considered whether *Article 2* required the government to take reasonable steps to ensure the international lawfulness of warfare. It concluded that *Article 2* did not require this¹²³ and the 'principal' reason it put forward is interesting. The court looked at two aspects of undertaking military action; first the duty to ensure that such action is lawful (i.e. the legal issue) and second the duty to ensure such action is 'militarily or politically desirable or sensible' (i.e. the political issue). The court found that these two aspects of a decision to take military action (the legal and the political) were inherently linked and could not be separated,¹²⁴ a proposition that formed the first stage in the reasoning which led it to its ultimate finding. This approach bore significant similarities with the earlier *CND* ruling. Indeed the Court of Appeal approved the *CND* finding that a clinical point of (international) law could not logically be divorced from its wider non-legal context in a positivist sense:

¹²² Davies (n 115) 37.

¹²³ *Gentle v Prime Minister, CA* (n 76) para 42

¹²⁴ *Ibid* para 42. Also: "what distinction can there be between the existence of [an Art. 2] duty ... to take reasonable care to ensure that the operation is lawful under international law on the one hand and to ensure that it is militarily or politically desirable on the other[?]. [It is not possible to spell out] .. a duty in the one case and not the other. In this respect the position seems to us to be the same as that described by Richards in the *CND* case. It is not possible to isolate a purely judicial or legal issue as a "clinical point of law"." para 44.

*"the court in CND rejected the submission that it would be possible to consider legal questions of international law while respecting the principle of the non-justiciability of non-legal issues of policy. It was in our opinion correct to do so because we can see no basis upon which it would be possible sensibly to consider one without the other. They are closely bound up together."*¹²⁵

In the second stage of its reasoning, the court looked at the 'political issue', concluding that member states have *no* legal duty under Article 2 to ensure that military action is politically sensible¹²⁶ because this is an issue for government alone to determine; "*these are questions of policy and within the exclusive discretion of the state.*"¹²⁷ From here, the court appeared to reason that because the two issues of international legality and political wisdom of military action were intricately connected, if the latter could not come within the scope of Article 2 then neither could the former. In basic terms, because the two were inseparable the legal issue must logically enjoy the same immunity from judicial scrutiny as the political issue. As the court stated:

*"the position seems to us to be the same as that described by Richards in the CND case. It is not possible to isolate a purely judicial or legal issue as a "clinical point of law"."*¹²⁸

In this sense Gentle affords a further example of law's concern with eliminating non-law (or even law *tainted* with non-law) from its ambit.¹²⁹ Here the legal issue was tainted by the political and the only appropriate response by the courts in such circumstances was to provide an interpretation of Article 2 which avoided it. But could the reasoning of the court not equally be logically reversed? Could the legal core of the issue not have made it the concern of Article 2 (and therefore the court) notwithstanding its political elements? The response to this must be in the negative. It is clear that a wider approach of this kind would be inconsistent with the fundamental ethos animating and underpinning law in this area which attempts to "*[keep] outside law's empire the non-legal, the extraneous, law's other. ... to impose upon law the law of purity and of order, of clear boundaries and of well-policed*

¹²⁵ Ibid para 33.

¹²⁶ Ibid para 42: "*It is not, as we understand it, suggested that a member state owes a duty to take reasonable steps to check whether the particular operation is militarily or politically desirable or sensible.*"

¹²⁷ Ibid para 43.

¹²⁸ Ibid para 44

¹²⁹ Davies (n 115).

checkpoints.”¹³⁰ The Iraq caselaw provides textbook examples of the courts struggling to undertake this very task in difficult and complex circumstances. In *Gentle* this led the Court of Appeal to appear to state, somewhat paradoxically, that the (international) lawfulness of military action in Iraq was primarily a *political* issue.¹³¹ This surely neglected the basic point made by Allan that “*Insofar as any question arising is understood as having, in principle, a correct legal answer, it raises a matter of law for the court to determine.*”¹³² In seeing the legal and political issues as inherently linked, the pretence of a discernible partition between law and politics arguably collapsed or, in Davies’ terms, “*The myth of closure [of law from non-law] breaks down at certain points, taking with it the whole edifice of normative certainty.*”¹³³

The role of the separation of powers in the law-politics divide

The Court of Appeal in *Gentle* essentially deemed the international lawfulness of military action a mixed issue and this was a major factor which prohibited Article 2 from imposing a duty on government to ensure such lawfulness. This issue combined with separation of powers reasoning as a justification for declining to expand the ambit of Article 2. The court stated that because the issue was ‘political’ the alternative forum of Parliament (directed by ‘public opinion and the ‘ballot box’) was more appropriate to raise complaints and debates about the legality of the Iraq invasion.¹³⁴ This separation of powers-based reasoning was also used to justify a similar form of judicial restraint in the House of Lords judgment¹³⁵ and other cases such as *CND*¹³⁶ and *Jones*.¹³⁷ But in the Court of Appeal’s *Gentle* judgment this

¹³⁰ C Douzinas, R Warrington & S McVeigh, *Postmodern Jurisprudence, The Law of Text in the Texts of Law* (Routledge, London, 1991) p 25.

¹³¹ *Gentle v Prime Minister*, CA (n 76) para 43. This is a view shared by the House of Lords select committee: “*it is difficult if not impossible to adjudicate on the [international] lawfulness of a state’s decision to deploy forces into conflict. In reality, judgements are usually political ones taken at the United Nations.*” Select Committee on the Constitution, ‘Waging War: Parliament’s Role and Responsibility’, HL (2005-06) 236-I, para 33.

¹³² Allan (n 116) 678.

¹³³ Davies (n 115) 120.

¹³⁴ *Gentle v Prime Minister*, CA (n 76) para 43. “[The lawfulness and political desirability of military action] are questions of policy and within the exclusive discretion of the state. ... It does not of course follow that those concerned cannot complain about it, but their complaints must be aired at what is sometimes called the bar of public opinion and resolved at the ballot box.”

¹³⁵ “*The question [the legality of the Iraq invasion] is one which has been the subject of much debate and more speculation, but it is clear that the proper place for it is in the court of public opinion and the forum of Parliament, not before the House sitting in its judicial capacity.*” *Gentle v Prime Minister*, HL (n 88) Lord Carswell, para 62.

¹³⁶ *CND v Prime Minister* (n 2) para 60.

¹³⁷ *R v Jones* (n 52) Lord Bingham, paras 28, 29. See also A J Tucker, ‘Legitimate Expectations and the Separation of Powers’ (2009) 125 L.Q.R. 233-238 for an analysis of how the court used the separation

rationale can be questioned in two ways. First it surely glosses over the fact that there was wider uncertainty amongst MPs and the wider populace about both the constitutional propriety of government conduct and the international legality of military action in Iraq.¹³⁸ The court's refusal to order an inquiry arguably allowed damaging uncertainty surrounding these issues to prevail. Was 'public opinion' and the 'ballot box' really a more appropriate domestic forum to determine whether the war was internationally lawful? A second problem with the use of separation of powers reasoning in *Gentle* (and other Iraq caselaw) is that it was based upon a selective interpretation of the doctrine. It failed to acknowledge that the English constitution has a fused executive and legislature and that this concentration of power can act to skew the constitutional balance and limit parliamentary checks on the war and foreign affairs prerogative as discussed in Chapters 1 and 4. Judicial references to alternative and superior parliamentary checks on government's war and foreign affairs prerogatives neglected to acknowledge one vital fact; that legislative-executive overlap (in addition to other monarch-based prerogatives available to a premier)¹³⁹ can fundamentally undermine the efficacy of such safeguards, particularly in times of strong governmental majorities. By absolving itself of involvement in this area the judiciary tacitly transferred the task of scrutiny solely to Parliament, whilst failing to acknowledge that latter's own non-legal inadequacies in this respect.

The separation of powers was often cited as a factor underlying judicial restraint in relation to the war and defence prerogative yet this doctrine *could* be utilised by judges in a pro-active manner because the original doctrine was put forward to prevent concentrations of power and thus protect individual liberties.¹⁴⁰ Nevertheless the courts have historically preferred an executive-favoured interpretation of the doctrine which avoids politics and thus limits their role. The interpretive approach of either pro-activity or deference is viable, but emphasis on the latter is more consistent with (and perhaps attributable to) the centralised, monarch-based system of the English constitution (and indeed other western states).¹⁴¹ Yet the potential problem of adopting this deferential interpretation of the separation of powers doctrine is identified by Allan who writes:

of powers doctrine in *R (on the application of Wheeler) v Office of Prime Minister* [2008] EWHC 936 (Admin).

¹³⁸ See Chapter 1, Part 1.6.

¹³⁹ See Chapters 1 and 3.

¹⁴⁰ *Montesquieu* (n 113) 157.

¹⁴¹ See Chapter 2, Part 2.2.

“A rigid doctrine of separation of powers, which assigned exclusive competence over particular questions either to Parliament or the executive, would weaken judicial review to the point of futility.”¹⁴²

It seems from surveying the Iraq caselaw that the judiciary rendered itself impotent in real terms in relation to government conduct of war and foreign affairs despite paying a degree of lip service to the contrary.

The role of the Attorney General’s advice in the law-politics divide

Vitally the inseparability of legal from other non-legal issues in *Gentle* did, according to the Court of Appeal, ‘receive some support’¹⁴³ from the reasoning process behind the Attorney-General’s legal advice to government regarding the international lawfulness of military action in Iraq. As discussed in Chapter 1, the Attorney General’s advice was initially cautious and negative in tone though days later he changed his opinion to more supportive, positive terms.¹⁴⁴ This series of events is catalogued in the *Gentle* judgment¹⁴⁵ and the court accepted defence witness evidence that the significant change in advice was a result of the Attorney’s fresh consideration of further background political and diplomatic material.¹⁴⁶ Nowhere in the *Gentle* judgment was the question raised as to why this material information was not considered *prior* to the A-G’s initial advice bearing in mind the fundamental importance of ensuring that advice was as full and accurate as possible. Furthermore the court at no point commented upon the procedural propriety of the steps taken by government to ascertain the international lawfulness of military action (even on an *obiter* basis). This was perhaps partly attributable to the lack of legal or formal conventional regulation in central government; the dearth of applicable concrete benchmarks rendered such a task impossible.

Judicial treatment of the A-G’s advice in *Gentle* was very interesting and displayed a degree of deference. The chain of reasoning started with the court’s willing

¹⁴² *Allan* (n 116) 677. For similar comments in a *HRA* context see R Clayton, ‘Judicial deference and ‘democratic dialogue’: the legitimacy of judicial intervention under the Human Rights Act 1998’ [2004] P.L. 33, p 36.

¹⁴³ *Gentle v Prime Minister, CA* (n 76) para 45.

¹⁴⁴ *Ibid* para 18.

¹⁴⁵ *Ibid* paras 13-20.

¹⁴⁶ “The Attorney confirmed in that discussion that, after further reflection, having particular regard to the negotiating history of resolution 1441 and his discussions with Sir Jeremy Greenstock [UK Ambassador to the UN at the time of resolution 1441] and the representatives of the US Administration, he had reached the conclusion that the better view was that there was a lawful basis for the use of force without a second resolution.” Quoted *ibid* para 18.

acceptance of this defence evidence as (a) unquestionable fact, and (b) not an improper or *prima facie* questionable way to provide legal advice. This led to the court to accept (as per defence evidence) that (a) overt political factors did inevitably motivate the A-G's interpretation, and (b) that it was entirely legitimate (in English law) that interpretations of international law could be directed by the political views of central government ministers, particularly the Prime Minister. Finally, the courts used this as a justification to *not* become involved with the issue because distinguishing law and politics here was impossible, thus leading to the conclusion that an inquiry would be inevitably political.¹⁴⁷ It appears therefore that the court's finding that law and politics were blurred in *Gentle* was perhaps partly based on government actions that had acted to fuse the legal and political more fully than might otherwise have been the case, and the importance the judges attached to government witness statements to that effect. There is a clear circularity in this approach.

[2.4] Summary of Discussion

This Part has identified and investigated instances in high prerogative caselaw where boundaries between law and non-law were utilised by judges. Such boundaries are central to legal understandings of the war and related prerogatives; their presence is common across the Iraq cases because all involve politically contentious legal issues. Cases such as *CND* and *Gentle* demonstrate the efforts of judges to exclude non-legal considerations, impose clear boundaries and maintain the purity of their discipline. Clear practical problems would occur if courts did not delineate in this fashion. Nevertheless such attempts to maintain clarity and certainty do inevitably involve concessions in other respects.

One potentially negative impact of boundaries in the war prerogative area is apparent; in the process of striving to exclude politics from the legal domain the judges marginalise their potential scrutinising role in relation to high prerogatives. This is particularly so in Britain's 'political constitution',¹⁴⁸ and even more so in the inherently political area of the war and related prerogatives where ministerial decisions will always be contentious. Excluding politics in such circumstances

¹⁴⁷ Ibid para 47.

¹⁴⁸ J A Griffith, 'The Political Constitution', MLR (1979) 42(1) 1.

severely limits the efficacy and vigour of the judicial role as a check on the ministerial foreign affairs and related prerogatives.¹⁴⁹ Such limits need not be problematic *per se* if alternative constitutional checks are effective but, as previous chapters have indicated, this was not necessarily the case over the Iraq affair. Yet, as Jenkins claims, it is perhaps unrealistic to expect the judiciary to compensate for the relative weakness of Parliament in this respect.¹⁵⁰

The consistency and overall coherence of the foundations upon which the law-politics boundaries were erected in Iraq caselaw can also be questioned in certain respects. Though the decisions in these cases were certainly correct at law and though the judgments took great care to avoid political opinion or comment, it appears that a silent, subtle form of politics did infiltrate both judicial reasoning and outcomes in this area. Closer analysis has established that reasoning in these judgments was at times predicated upon inconsistent and selective use of the separation of powers doctrine and a positivist refusal to consider political issues, both of which acted to favour government. Both doctrines continue to underlie the longstanding and logical judicial desire to restrict their focus to solely legal issues and avoid contentious political debate. So decisions regarding where boundaries were drawn were more provisional and agenda-driven than the judiciary expressly acknowledged. This is not to criticise the judges in these cases whose positions were difficult and constrained, but to acknowledge that despite attempts to maintain a facade of impassive political neutrality (or what Griffith terms ‘the myth of neutrality’)¹⁵¹ the judicial role is institutionally and structurally geared towards supporting government in this context.

Furthermore, the actual outcome of each Iraq case was unavoidably political¹⁵² because declaring ministerial prerogative decisions domestically lawful inevitably

¹⁴⁹ Lord Alexander QC states: “I believe the time has arrived when the courts should not be so diffident where an important aspect of the legality of foreign policy is challenged. ... Where public law has evolved so far and now considers on a daily basis wide-ranging issues of varying importance, it seems strange for the courts not to be able to give rulings on the legality of an act as fundamental as the invasion of another sovereign state by an act of war. The knowledge that the courts might be willing to do so would surely promote greater responsibility and thoroughness in the giving of advice.” ‘The pax Americana and the law’, p 21, Justice website (London, 14th October 2003) <<http://www.justice.org.uk/images/pdfs/Iraq-the Pax Americana and the law.pdf>> accessed 3rd April 2009.

¹⁵⁰ “Care should be taken that the judiciary does not find itself in a new, awkward position of having to carry what should be Parliament’s burden in holding Government accountable.” D Jenkins, ‘Constitutional Reform Goes to War: Some Lessons from the United States’ [2007] P.L. 258, p 278.

¹⁵¹ J A G Griffith, *The Politics of the Judiciary* (4th edn, Fontana Press, London, 1991) p 271.

¹⁵² As Griffith states, “judges in the United Kingdom cannot be politically neutral because they are placed in positions where they are required to make political choices” *ibid* 319.

validated them (albeit in a limited legal sense). The practical effect of these judgments is that ministerial prerogative decisions regarding war, foreign affairs and defence are legally unrestrained domestically. Additionally a strong centralised government is fostered and effectively immunised from meaningful legal scrutiny in all but the most exceptional cases. For these reasons the Iraq caselaw illustrates the fallacy and contingency of maintaining a clear law/politics boundary.

[3] Disparities between Law and Reality

[3.1] Disparities Identified

From the discussion in this chapter it seems that three disparities between the legal appearance of the war power and its constitutional reality can be briefly identified. First the Iraq cases show judges removing the legal limits on scrutiny in relation to the high policy prerogatives, including those relating to the conduct of foreign affairs. But nevertheless it seems that this legal progress has had minimal practical effect in reality. Second, caselaw in this area repeatedly demonstrates judges professing to avoid matters of policy and attempting to distinguish legal and non-legal issues, studiously avoiding the latter. Yet in reality it is arguable that the judicial approaches in this politically contentious area are inevitably more political than they appear (as discussed in Part 2). Third, the notion of monarch which historically forms the foundations for the premiership and has underpinned the area of foreign affairs and war (as demonstrated in Lord Reid's *Burmah* judgment)¹⁵³ has continued despite the emergence of democratic government. Though recent Iraq caselaw avoided any overt monarchical references, it arguably indicated that the notion of monarch (or remnants of it) still prevailed in this legal area, both structurally and culturally. Closer consideration of these three disparities between the law and underlying reality indicates that they are all united by one common issue, namely knowledge or expertise. Knowledge has a fundamental role to play in each of the three disparities; it underpins and interlinks each respective disparity and the ways in which it does this will now be briefly outlined in turn.

¹⁵³ *Burmah Oil Company v Lord Advocate* [1965] AC 75 (HL) p 100.

The Appearance of Progress regarding Legal Limits upon Scrutiny

The appearance of potentially strengthening judicial checks in relation to many central government prerogatives has been discussed in Part 1. Yet this must be considered against the backdrop that in reality such changes have made little difference to the actual outcomes in cases so far, and would be unlikely to do so in future unless the circumstances were exceptional.¹⁵⁴ It is difficult to envisage a situation where a judgment in this area might be unfavourable to the government's preferred exercise of the war or related prerogatives because as a basic minimum any applicant would have to establish incredibly onerous conditions. So despite the appearance of increased possibilities for judicial scrutiny the reality remains that the courts continue to adopt deferential stances in relation to the war and related prerogatives as demonstrated in Iraq caselaw. Vitally this is because the deference has shifted from the once explicit acknowledgement of such a position (exemplified by the formal immunity of high prerogatives in GCHQ) to a more subtle and silent (but just as powerful) form. The Iraq caselaw clearly indicates that the courts are highly deferential in their approach to government information and evidence in the field of foreign and defence policy, an issue that will be considered further in Part 3.2. As a result of this more implicit judicial deference, *prima facie* changes in the law (such as the potential removal of formal ring-fencing) lead to identical outcomes in fact. As Allan has stated, "*Due deference turns out, on close inspection, to be non-justiciability dressed in pastel colours.*"¹⁵⁵

The Appearance of Avoiding Policy and the Non-Legal

A second disparity between legal appearance and reality has been established in this chapter; in war prerogative caselaw the courts seek to avoid entanglement in policy matters and to maintain an appearance of political neutrality, yet by selectively utilising boundaries between law and non-law and evading engagement in certain areas they still make silent political decisions and become inherently involved in a less explicit form of politics. Additionally, the politically neutral appearance of the courts can be also questioned in another, more fundamental, way; do the courts treat evidence or information in war prerogative caselaw impartially or do they automatically afford the government a privileged position in relation to knowledge? Discussion of Iraq caselaw in Part 3.2 will argue that the latter is correct. In

¹⁵⁴ See *Abbasi* (n 7) para 104; *Al Rawi*, CA (n 61) para 141.

¹⁵⁵ *Allan* (n 116) 689.

particularly contentious cases such as these, this privileging of government information is unavoidably political because it acts to reinforce executive power in foreign affairs and defence matters and creates an uneven playing field for potential challengers. This is consistent with Foucault's claim that knowledge itself is a political issue.¹⁵⁶

The Continued Underlying Influence of Monarchy

Chapter 2 explained that the office of Prime Minister is parasitic upon the Crown and prerogative powers are based upon and influenced by monarchy. In caselaw concerning the war prerogative attachment to the notion of a strong protective monarch (or his modern counterpart) who knows best and will protect the nation continues and subtly underpins judicial views. Lord Hoffman's utilisation of the Hobbesian social contract as a justification for the state's monopoly on force in *Jones* is one such example.¹⁵⁷ A further example is found in CND where Brown LJ outlines the following extract from *Marchiori*:

*"The defence of the realm ... is the Crown's first duty ... Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions."*¹⁵⁸

This paternalist passage indicates that the Crown defence prerogative lies firmly within government hands and indeed constitutes its foremost role. Furthermore people will 'look to government'; this assumes they seek strong leadership which will defend the country. Finally government will make 'wise' decisions, or the right decisions on the basis of its 'wisdom' or knowledge. Such archaic assumptions are arguably entwined with the monarch-based legal framework in this area. Of course national security or defence risks must never be treated flippantly or casually, but nor should default assumptions in this area always prevail as a matter of course.

¹⁵⁶ "Behind all knowledge [savoir], behind all attainment of knowledge [connaissance], what is involved is a struggle for power. Political power is not absent from knowledge, it is woven together with it." M Foucault, *Power, Essential Works of Foucault 1954-1984, Volume 3* (Penguin, London, 2002) p 32. See also: M Foucault, *Power/Knowledge, Selected Interviews and Other Writings 1972-1977* (Longman, Essex, 1980), pp 131-132; JF Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester University Press, Manchester, 2004) pp 5, 8-9.

¹⁵⁷ *R v Jones* (n 52) para 77. The Hobbesian social contract proposed an absolute sovereign (preferably a monarch) who is not in any way restrained by the contract. "There can happen no breach of Covenant on the part of the Soveraigne; and consequently none of his Subjects ... can be freed from his Subjection". T Hobbes, *Leviathan* (Penguin, London, 1985), Pt 2, Ch 18, p 230.

¹⁵⁸ *CND v Prime Minister* (n 2) para 21. Note that this authority was used by CND in its arguments.

Each of the three interlinked disparities between law and reality has now been identified and outlined. This chapter now considers specific examples of the role played by knowledge in these disparities arising in the Iraq caselaw.

[3.2] Views of Knowledge and Expertise in Iraq Caselaw

The basis upon which the courts distinguish between justiciable and non or limited-justiciable areas has been the subject of much academic debate.¹⁵⁹ However, the Iraq caselaw indicates that one major factor determining the relative immunity of war and foreign affairs is knowledge, i.e. the respective knowledge or expertise of the government and courts in such matters. That knowledge is a material factor determining the justiciability of an area of prerogative is acknowledged in constitutional literature¹⁶⁰ and the case of *Roth v Home Secretary [2003]*¹⁶¹ where Laws LJ identified four principles governing when and how the courts should show deference to other branches of government.¹⁶² The third and fourth factors are interrelated and particularly relevant in the context of the Iraq caselaw. The third principle emphasises the specific roles and responsibilities allocated by the constitution to the respective state limbs: “*greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts.*”¹⁶³ This statement seems to imply that deference can be a matter of degree and that the degree may be determined by where a particular subject-matter lies in the spectrum between ‘legal’ and ‘policy’. Laws LJ supplemented this principle with an illustration of the defence prerogative claiming, as outlined in Part 1.4.2, that even defence matters cannot enjoy blanket immunity from judicial review, despite epitomising a prerogative area which is

¹⁵⁹ B V Harris, ‘Judicial Review, Justiciability and the Prerogative of Mercy’, C.L.J. 62(3), November 2003, pp. 631-660; Lord Steyn, ‘Deference: A Tangled Story’ [2005] P.L. 346-359.

¹⁶⁰ See T Poole, ‘Courts and Conditions of Uncertainty in Times of Crisis’ [2008] P.L. [2008] 234; *Allan* (n 116).

¹⁶¹ (n 93).

¹⁶² The first two principles he outlined were: (1) greater deference must be paid to Acts of Parliament, (2) there is greater scope for deference where the HRA requires a balance to be struck when considering a right; *ibid* paras 83-84. For a critique of this judgment and other doctrines of deference see *Allan* (n 116). In this article Allan argues that no generally applicable deference criteria is possible; instead deference should be approached on a case by case basis.

¹⁶³ *Ibid* para 85.

inherently unsuitable for judicial involvement.¹⁶⁴ These two propositions were presented alongside one another despite the fundamental contradiction between them. Accepting their co-existence involves a form of legal double-think until one accepts that *de facto* immunity of such prerogatives continues to operate beneath legal appearances. Laws LJ's fourth principle holds that the degree of deference to be adopted by a court will also depend upon the respective expertise of state limbs, specifically "*whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts*"¹⁶⁵ This assumes that any dispute can be neatly partitioned into judicial or executive realms and fails to account for the fact that legitimate legal disputes may occur in areas of government expertise so that either or both types of expertise could technically be employed.

Consistent with *Roth*, a clear, observable feature running through judicial reasoning in the Iraq cases is a general deference to executive information, usually witness statements, in the conduct of military action and related foreign affairs prerogatives. This rationale can be traced back through earlier cases¹⁶⁶ and is epitomised by the following statement of Lord Parker in *The Zamora* [1916]:

*"The judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact"*¹⁶⁷

Here Lord Parker indicated that executive statements regarding national security would be treated as 'fact' or 'truth', thus affording government a privileged position if litigation in this area arose. The reasonable basis for this deference is the courts' acknowledgement that firstly, the executive has particular expertise in these matters and secondly, the government has exclusive access to the necessary information upon which such decisions are based. This was demonstrated by the Court of Appeal in *Abbasi* which indicated that dealing with foreign states was

*"a matter for the Executive and no-one else, with their access to information and local knowledge. It is clearly not a matter for the courts. It is clearly a high policy decision of a government in relation to its foreign relations.."*¹⁶⁸

¹⁶⁴ Ibid.

¹⁶⁵ Ibid para 87.

¹⁶⁶ See Chapter 2, Part 2.

¹⁶⁷ Emphasis added. *The Zamora* [1916] 2 A.C. 77, pp 106-7.

¹⁶⁸ Emphasis added. Henry LJ quoted in *Abbasi* (n 7) para 37.

A further example was afforded by Richards J in *CND* who referred to the courts' self imposed 'limitations' to justiciability 'in recognition of the limits of judicial expertise'.¹⁶⁹ Arguably the approach of the courts here is logical and justified; clearly the executive limb is concerned with military functions, will inevitably have the best information upon which to base its decisions and should be accorded relative hegemony in such fields on this basis. Additionally judicial involvement in such areas entails inherent risks and may leave the judiciary vulnerable to criticism.¹⁷⁰ Furthermore, perhaps as Lord Reid indicated, a more interventionist approach from the courts could result in delay and 'disaster'.¹⁷¹ Nevertheless, a more detailed exploration of the executive's apparent monopoly on knowledge in this area may yield fresh insights. What is the extent and effect of the executive's superior position in relation to defence and warfare information and knowledge in a judicial context? This matter will now be considered in further detail with reference to two interesting examples: the cases of *CND* and *Al-Rawi* respectively.

Knowledge and Expertise in CND v Prime Minister

In *CND* Brown LJ found that a court declaration confirming the meaning of UNSC resolution 1441 would be damaging to national interests.¹⁷² This finding was heavily based on defence evidence, specifically the contents of a senior Foreign Office

¹⁶⁹ Emphasis added. *CND v Prime Minister* (n 2) para 60. Similar concessions as to expertise were also repeatedly made by the Law Lords in the Belmarsh case (*A and others v Secretary of State for the Home Department* [2005] 2 AC 68, HL) despite the fact it is generally viewed as an instance where the judiciary adopted a less deferential approach to government in the area of national security (for example, see A Kavanagh, 'Judging the Judges under the Human Rights Act: deference, disillusionment and the war on terror' [2009] P.L. 287).

The perceived non-deference of the Law Lords to government evidence in Belmarsh must not be overstated and is by no means inconsistent with the approaches of the judiciary in the Iraq caselaw. The Belmarsh court did on occasion engage critically with government evidence (e.g. paras 119, 179-81) and affirmed the constitutional appropriateness of robust judicial scrutiny (paras 42, 176). However, the tone of the judgments is mixed and cautious, deferential statements regarding the respective roles and expertise of the judiciary and democratic bodies are made at numerous points: see Lord Bingham (para 29); Lord Hope (paras 112, 116); Lord Rodger (paras 166, 175); Lord Walker (para 192); Baroness Hale (para 226). In any event, Belmarsh is of limited direct relevance to this study as the dispute did not concern prerogative power or judicial review and it occurred in a statutory area which squarely engaged *ECHR* Articles 5 and 14.

¹⁷⁰ In the context of anti-terrorism caselaw Poole writes: "[T]he more courts engage in the scrutiny of government risk assessments here, the more they accept a measure of responsibility for the conduct of counter-terrorism policy—and thus open themselves up to more blame should things go wrong." Poole (n 160) 247-8.

¹⁷¹ *Burmah Oil* (n 153) 100. See Chapter 4, Part 3.3. However, see also Roth (n 93) where Brown LJ stated "Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts." para 54.

¹⁷² *CND v Prime Minister* (n 2) paras 41, 45.

official's evidence.¹⁷³ Significant extracts of the official's statement were included in his judgment.¹⁷⁴ Referring to the substantive contents of Mr Ricketts' statement he claimed 'all this is surely obvious'. Significantly he proceeded to state:

*"Even, however, were all this not obvious, we would at the very least be bound to recognise Mr Ricketts's **experience and expertise** in these matters and that the executive is better placed than the court to make these assessments of the national interest with regard to the conduct of foreign relations in the field of national security and defence. We could not reject Mr Ricketts's views unless we thought them plainly wrong."*¹⁷⁵

This epitomises judicial deference to government evidence in this area. Brown LJ's starting point was that the government's account of the appropriate exercise of the foreign affairs prerogative (some of which was disputed by the claimants) was clearly (or 'obviously') correct, thus applying a presumption of truth to this evidence. Brown LJ then took this deference further, claiming that even where the substantive content of government evidence may appear questionable, the intrinsic expertise and knowledge of the government in these areas was a vital fact that must be recognised; such recognition surely continues *Zamora*-type evidential presumptions favouring government by automatically assuming the strength and credibility of such evidence even where its content may be contentious or questionable. This was acknowledged when Brown LJ quoted the following:

*"It is ... **self-evidently right** that the national courts must give **great weight** to the views of the executive on matters of national security."*¹⁷⁶

Brown LJ thus resorted to 'self-evidence' to justify the courts' treatment of government evidence. The term 'self evident' indicates that the position adopted by the courts is so obvious that it requires no further reasoning to be advanced in its favour. Yet why should this be the case? Allan argues that deference to government need not "*dictate the surrender of judgement; nor should any claims of [governmental] special knowledge or expertise go untested.*"¹⁷⁷ The automatic deference displayed in *CND* and other Iraq cases is surely a further indication that in matters of war, foreign affairs and defence the courts are incapable of providing

¹⁷³ The Director General for Political Affairs at the Foreign & Commonwealth Office, Mr Ricketts.

¹⁷⁴ Ibid paras 11, 12.

¹⁷⁵ Ibid para 42.

¹⁷⁶ Lord Steyn, quoted ibid para 42.

¹⁷⁷ Allan (n 116) 695. See also Clayton (n 142) p 39-40.

effective checks upon ministerial prerogative, instead being institutionally geared towards deference in one form or another.¹⁷⁸

The claim that the government has particular expertise in warfare etc. which places it in a superior position to make judgements is in one sense a clear and indisputable factual proposition based on observable evidence. Furthermore, there are clearly very cogent reasons for judicial caution and deference regarding intervention in these prerogatives.¹⁷⁹ However, the proposition that government has superior expertise which must be accounted for could be viewed in alternative terms which are less neutral and more political.

The Prime Minister and relevant offices of state undertake specific functions such as defence and foreign affairs as ascribed by the constitution. In the course of exercising power and undertaking these functions central government produces information. For example, activities such as international diplomacy, conducting the military and security services will lead to the production of records, expertise and knowledge as an inherent by-product of these functions.¹⁸⁰ Vitally, the executive also controls the access to and distribution of information relating to such matters. The government is seen as specialist in the conduct of defence and foreign affairs. The knowledge produced by the government in this respect is (and must be) viewed by the courts and others as authoritative. So essentially, by virtue of the production and control of this ‘official’ knowledge the government occupies a position of relative power. The executive’s knowledge regarding matters of foreign affairs, warfare and national security inevitably affords it a superior position in relation to other parties or institutions; this knowledge asymmetry leads to more significant inequalities in power. This is supported by Poole who, in the context of terrorism caselaw, argues that “*marginal advantages in terms of access and understanding to information relating to possible risks generate claims for enormous disparities in power.*”¹⁸¹ Such disparities are also clearly demonstrated in the Iraq caselaw. In summary, from the knowledge that arises as an intrinsic part of carrying out its functions in this area, an

¹⁷⁸ As Allan states “A doctrine of deference is pernicious if ... it permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgements about the implications of rights in specific cases may well be wrong.” ibid 675.

¹⁷⁹ Poole (n 160) 247-8.

¹⁸⁰ This point is loosely based upon Foucault’s work on power-knowledge; *Foucault, Power/Knowledge* (n 156) 51-2.

¹⁸¹ Poole (n 160) 259.

automatic and entrenched monopoly or position of dominance for government is created.

In light of the weight that courts must institutionally place on government evidence regarding defence and foreign affairs, it appears that government's position when its exercise of war or related prerogatives is legally challenged will be relatively secure. For example, government may be able to claim with relative ease that an issue is 'political' thus affording it *de facto* immunity from judicial scrutiny due to the weight that the courts must attach to executive evidence; vitally this is equivalent to ring-fencing high policy prerogatives in practical terms. Though it is not formal immunity from judicial scrutiny at law, it arguably constitutes a license for government to claim it in reality. Similarly, in reality, deposing the executive from this privileged position will be an onerous and almost impossible task for challengers. Allan is critical of judicial presumptions of government's 'superior institutional competence', instead arguing that "*The soundness of any conclusion, even on a matter involving specialist expertise, must be capable of demonstration by argument; there is otherwise no opportunity for the litigant to challenge the government's course of action.*"¹⁸² Cogent though this criticism appears, it arguably overlooks the fact that judicial prioritisation of governmental evidence in matters of defence and war is an unavoidable consequence of the existing state structure that allocates such roles to government and is historically rooted in a strong, autocratic monarch;¹⁸³ judicial approaches in these cases merely reflect this.

Knowledge & Expertise in Al Rawi (Divisional Court)

A similar approach to *CND* was adopted by the Divisional Court in *Al-Rawi* where the Foreign Office claimed a formal request for the return of Guantanamo detainees would be 'ineffective and counter-productive'.¹⁸⁴ As in *CND*, the government relied on the statement of a senior foreign office official¹⁸⁵ and the court drew heavily on parts of the official's evidence. Mr Richmond's statement explained that negotiation

¹⁸² Allan (n 116) 692. Poole, speaking in the context of terrorism caselaw, is similarly concerned that inequalities in access to information may lead to an uneven playing field for litigants wishing to mount challenges: "*This relationship has the potential to transform a contest between 'players' mired in similar conditions of uncertainty into a game played out on different levels of uncertainty and ignorance. ... [O]nly the government has access to intelligence information on the basis of which an informed assessment of risk can be based. This privileged access to superior resources is carefully guarded: partial information is released, and only then at a time and in a manner of the government's own choosing.*" Ibid 246.

¹⁸³ See Chapter 2, Part 2.

¹⁸⁴ *Al Rawi, DC* (n 49) para 92.

¹⁸⁵ Mr Richmond, Director of General Defence and Intelligence at the Foreign Office

with the US over its Guantanamo detainee policy ‘has been, and remains, a complex process.’¹⁸⁶ Furthermore, in a familiar line of argument, he claimed that “Such assessments of whether, when and how to press another State require fine judgements to be made by Ministers, drawing on the FCO’s **experience and expertise.**”¹⁸⁷ Again, the point essentially being made was that government was best placed to make such decisions in light of its superior information. The Divisional Court accepted such arguments and indeed referred to its own relative lack of expertise on no less than three occasions across the judgment.¹⁸⁸ The court stated that properly assessing the government’s judgement was ‘impossible’ without knowledge of UK-US discussions,¹⁸⁹ that it ‘simply [did] not have the tools to evaluate’¹⁹⁰ Foreign Office policy judgements in this area, and instead decisions “must to a significant extent depend upon the subjective assessments of the Foreign Office officials who have dealt face to face with their United States opposite numbers.”¹⁹¹ Such claims provide further demonstration of the weight routinely attributed to government statements in this area.

Importantly, the court acknowledged that its incapacity to assess government evidence applied even though the government’s preferred method of attaining release of the detainees ‘may not be a judgement with which we agree [politically].’¹⁹² Overall these passages indicate that precedence was afforded to executive evidence regarding foreign affairs etc. irrespective of the court’s own views and irrespective of the fact that such deference ultimately led to what the court conceded was arguably an ‘uncomfortable’ and ‘unsatisfactory’ outcome.¹⁹³ Allan is critical of assumed judicial deference to government evidence in such circumstances, stating:

¹⁸⁶ Ibid para 39

¹⁸⁷ Emphasis added. Ibid para 40

¹⁸⁸ Ibid paras 92, 96, 97.

¹⁸⁹ Ibid para 96. The full extract reads: “It is impossible for the court, without knowledge of how those discussions [between the UK and US governments] have progressed to make a judgement about the way in which they can best be progressed in order to achieve the aims of United Kingdom foreign policy.”

¹⁹⁰ Ibid para 92. See also para 97.

¹⁹¹ Emphasis added. The extract continues thus: “What is said publicly is inevitably only part, and probably a small part, of the diplomatic dialogue.” ibid para 92.

¹⁹² Ibid para 97.

¹⁹³ The court concluded that the claimants’ ‘powerful’ arguments “founder, perhaps **uncomfortably and unsatisfactorily**, on the rock [of non-justiciability] which prevented the Abbasi claim from succeeding, and for the same reasons.” Emphasis added. Ibid para 96.

“A judge who allows his own view on the merits of any aspect of the case to be displaced by the contrary view of public officials – bowing to their greater expertise or experience or democratic credentials - forfeits the neutrality that underpins the legitimacy of constitutional adjudication.”¹⁹⁴

Allan’s point here is consistent with the arguments made in Part 2 of this chapter that the position of the judiciary in politically contentious cases such as the Iraq caselaw cannot be impartial or apolitical. Allan indicates that a more critical judicial approach could address such shortcomings, but the likelihood that this partiality is inherent within the judicial role in matters of war and defence cannot be eliminated.

Knowledge and Expertise in Al Rawi (Court of Appeal)

When *Al Rawi* came before the Court of Appeal the deference to government evidence continued in a similar vein. Though the judgment did provide two minor examples of the Court adopting a slightly more critical stance to government evidence, such examination was extremely limited, brief and barely discernible.¹⁹⁵ Like the Divisional Court, the Court of Appeal set out lengthy extracts of Foreign Office¹⁹⁶ and Home Office¹⁹⁷ evidence in its judgment, reciting them with a lack of any genuine examination. Significantly, after reciting the Foreign Office statement passages for many paragraphs the court stated: “*The narrative we have given generally suffices for the resolution of the issues.*”¹⁹⁸ In other words the factual basis on which case was to be decided was based very heavily on the government’s account of situation; this stance surely represents a continuation of Lord Parker’s dictum in *The Zamora*.¹⁹⁹ It also contradicts the court’s later claim that “*the ascertainment of the weight to be given to the primary decision-maker’s view (very often that of central government) can be elusive and problematic.*”²⁰⁰ This statement

¹⁹⁴ Allan (n 116) 675-6.

¹⁹⁵ First, the court appeared to doubt (though in very delicate terms) Mr Richmond’s claim that US assurances and its human rights record are of great weight in UK government’s view; *Al Rawi, CA* (n 61) paras 26-7. Second, the court seemed to note that the respective statements of Mr Richmond and another government Home Office witness, Mr Nye, regarding the dangers to national security posed by the non-national detainees contradicted one another. Though the contradiction was identified it was not explored in any more detail. Instead the court merely invited readers to ‘compare’ the statements; para 51.

¹⁹⁶ Ibid paras 32-36, 38, 44, 46, 47, 124 and 133.

¹⁹⁷ Extracts of a statement by Mr William Nye, Director of the Counter-Terrorism and Intelligence Directorate at the Home Office are set out ibid, paras 49, 51, 55.

¹⁹⁸ Ibid para 56. The use of ‘we’ in this statement is questionable bearing in mind the degree of the court’s reliance on the government’s account of facts.

¹⁹⁹ (n 167).

²⁰⁰ The quote in full reads thus; “*Reasonableness and proportionality are not formal legal standards. They are substantive virtues, upon which, it may be thought, lawyers do not have the only voice: nor*

does not reflect the reality, demonstrated in the Iraq caselaw, that the courts consistently attach a great deal of weight to government's evidence as a matter of course. The caselaw does not at any point indicate the courts agonising about how to balance or resolve conflicting views of the situations.

Later the Court of Appeal specifically dealt with the government's decisions. It rejected the claimants' arguments²⁰¹ on the basis that they would require the court to "judge, not only of the legality, but also of the **wisdom**, of government action in this field" which would be "an elementary mistake."²⁰² The court here acknowledged that it simply could not and would not question the 'wisdom' of government foreign affairs or defence-related decisions, even against legal standards such as reasonableness or proportionality. In this context the government was therefore afforded a kind of monopoly on 'wisdom'. But what was the basis for this monopoly of sorts? The court went on to explain why government is afforded 'special responsibility' in foreign and defence matters: "*It arises in part from considerations of competence, in part from the constitutional imperative of electoral accountability.*"²⁰³ The Court of Appeal thus reiterated the dual factors of 'competence' and 'accountability' to justify the government's privileged evidential position in cases concerning defence and foreign affairs. The first reason reflects the fact that government is specifically charged with the functions of defence and foreign affairs and will thus be viewed as enjoying a particular competence or expertise in such areas; this acknowledges the inherent power-knowledge relationship as discussed in the *CND* case above. The second factor, the need for democratic accountability of such decisions, is partly based on a selective reading of the separation of powers doctrine as outlined in Part 2.3. As discussed, the political neutrality, consistency and certainty of both factors can be questioned in certain respects. Nevertheless the *Al Rawi* judgment provides further verification that knowledge is clearly a significant, material factor determining the

necessarily the wisest. Accordingly, the ascertainment of the weight to be given to the primary decision-maker's view (very often that of central government) can be elusive and problematic." *Al Rawi, CA* (n 61) para 146.

²⁰¹ Arguments that new evidence cast doubt on the defendant's earlier decisions.

²⁰² *Ibid* para 137.

²⁰³ *Ibid* para 147. The court supported these dual factors of 'competence' and 'accountability' with reference to the following authority by Lord Hoffman in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; "*It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions ... require a legitimacy which can be conferred only ... through the democratic process.*" Emphasis added.

reviewability of prerogative areas of this sort, and one frequently cited by the courts.²⁰⁴

Another aspect of Michel Foucault's work on knowledge is relevant in this context and thus worth briefly outlining. Foucault claims that there was a shift in approaches to knowledge in the eighteenth century which has prevailed to the present. Statements had previously been judged according to whether they were acceptable to religious orthodoxy or not; in other words, they were judged on their substantive content.²⁰⁵ Foucault documents a change which saw statements no longer being assessed according to whether their actual content was acceptable, but according to the source from which they had come; i.e. whether they were from an authoritative, 'official' source.²⁰⁶ In basic terms, the requirement for orthodoxy of content became replaced with orthodoxy of source. As Foucault states:

*"The problem is now: Who is speaking, are they qualified to speak, at what level is the statement situated, what set can it be fitted into, and how and to what extent does it conform to other forms and other typologies of knowledge."*²⁰⁷

This rationale exemplifies the judicial approaches to information in the Iraq caselaw. The courts would not engage with the substantive contents or merits of opposing views in these cases. Instead they prioritised evidence on the basis of its source; witness statements produced by government were automatically afforded precedence on the basis that they came from an (or rather *the*) authoritative source.

As outlined above, it is arguable that the government's expertise inevitably arises as a result of carrying out its proper duties and that it is entirely proper for a less knowledgeable institution such as the judiciary to defer on this basis. However, it is also vital to remain alert to the potential dangers of applying such automatic assumptions as a matter of course. The deferential approach to government evidence in the Iraq caselaw potentially leads to one of two unsatisfactory conclusions: either the courts are unable to acknowledge the possibility that government may make political or constitutional errors in the conduct of war and foreign affairs; or they accept that mistakes may be made by government in such

²⁰⁴ See Part 3.2 which discussed the third and fourth principles outlined by Laws LJ in *Roth v Home Secretary* (n 93).

²⁰⁵ M Foucault, *Society Must be Defended* (Penguin, London, 2004) pp 183-4.

²⁰⁶ Ibid 184.

²⁰⁷ Ibid.

matters, but concede these cannot be the courts' concern, even where legal disputes concerning rights may arise as a result. As Allan states, deferential judicial approaches of this sort “[amount] to abandonment of impartiality between citizen and state: in acceding to the supposedly superior wisdom of the public agency ..., the court is co-opted into the executive ..., leaving the claimant without any independent means of redress for an arguable violation of rights.”²⁰⁸ It is interesting that while the courts in Iraq caselaw viewed government witness statements regarding foreign affairs as largely definitive of the situation, elsewhere Lord Butler's report was discrediting information provided to Parliament by the same government. The Butler report provided a salient reminder that government creation and presentation of information to justify or support its conduct of military action may be flawed or incorrect.²⁰⁹ It furthermore afforded a stark lesson that one cannot always assume the truth or accuracy of statements solely on the basis that they emanate from a government that ‘knows best’. The high profile judgment in the recent *Mohamed v Foreign Secretary*²¹⁰ and subsequent controversy surrounding the Foreign Office’s tactics in that case²¹¹ provides a further cautionary tale.

The operation of an inquisitorial and somewhat more circumspect judicial approach to government evidence would be welcome, particularly where the court is deliberating on cases with wider implications of the utmost importance. However, such an approach is inconsistent with the internal rationale of the judiciary and the dynamics of its relationship with the executive in matters of war and defence; as has been established, the judicial role in this area is to protect or insulate ministerial

²⁰⁸ Allan (n 116) 675-6.

²⁰⁹ This was later judicially acknowledged in the *Belmarsh* case (n 169) by Lord Hoffman (para 94) and Lord Scott (para 154).

²¹⁰ *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin). In this case the Divisional Court reluctantly agreed to omit from its judgment a brief edited paragraph regarding the applicant’s detention by the US government at Guantanamo Bay and elsewhere. Despite expressing the view that this information did not compromise national security the court was faced with evidence from the Foreign Secretary that its publication would damage intelligence sharing with the US, and documents from the US government confirmed this. As a result the court agreed to excise the information from its judgment. Continuing the trend in the Iraq caselaw discussed in this chapter, this outcome was directly attributable to the weight the court had to afford to the views of the Foreign Secretary and the US documentation: paras 75-77, 79, 82, 106.

²¹¹ “The Foreign Office (FCO) solicited the letter from the US State Department that forced British judges to block the disclosure of CIA files documenting the torture of a British resident held in Guantanamo Bay, the Observer can reveal. ... [A US State Department source] said ‘The Foreign Office asked for it in writing. They said: ‘Give us something in writing so that we can put it on the record.’ If you give us a letter explaining you are opposed to this, then we can provide that to the court.’” P Harris and M Townsend, ‘Foreign Office link to torture cover-up’ *The Guardian* website (London, 15th February 2009) <<http://www.guardian.co.uk/world/2009/feb/15/foreign-office-guantanamo-torture>> accessed 19th February 2009.

decisions from legal resistance, even in the case of an unpopular, controversial war of questionable international lawfulness.

Conclusion

'Prime Ministerial Exercise of the War Prerogative in the Iraq Affair: An Analysis'

This study has conducted an in depth investigation and analysis of prime ministerial exercise of the war prerogative in the lead-up to, during and after the Iraq decision in March 2003. It is now possible to draw together the extensive material covered in the preceding chapters and present select conclusions about the area. These will be structured to specifically address the three aims of this study that were outlined in the Introduction. In the process of addressing these three aims this study, where necessary, employed the two analytical devices of investigating divergences between law and reality and the role of legal boundaries; significant or illuminating points raised by these devices will be included where relevant.

[1] Aim 1: Understandings of the three key constitutional components established

This study has undertaken a detailed investigation of conventions, prerogative and the Crown, attempting to establish an understanding of each component and its respective role in prime ministerial exercise of the war prerogative. The following concluding points can be made.

[1.1] The Crown

Though the notion of 'the Crown' has been inherently tied to monarchy, it is now a multi-faceted concept with no single clear meaning. Because it can be used to represent the monarch, government or the state, the Crown's utility as a legal concept to assist in the resolution of modern disputes concerning government power is questionable. However, this is not to detract from the fact that the Crown is situated at the apex of British constitutional law, perhaps reflecting Foucault's claim

that the ancient legal frameworks of western states were initially constructed around the monarch.¹

Despite its arcane, ancient nature, ‘the Crown’ plays a fundamental role in modern prime ministerial use of the war power because legally, structurally and culturally a premier’s powers are inextricably linked to the monarch as embodiment of the Crown. The office of Prime Minister covertly evolved on the underside of the legal framework of monarchy, colonising the latter’s Crown powers and fusing itself to that institution in the process. In the exercise of the war and other prerogatives, this arrangement has necessitated a reciprocal relationship between the legally strong monarch and politically powerful premier. This relationship, which leads Hennessy to describe Britain as a ‘double headed nation’,² is arguably the root of many of the issues concerning the war power discussed in this study. These will be summarised further in Parts 2 and 3, but two initial insights regarding the benefits accruing to the Prime Minister because of this symbiosis with the monarch can be outlined. First, the indeterminacies which permeate the Crown as the source of prime ministerial power (combined with additional layers of ambiguity in prerogative powers and the regulatory conventions) enable premiers to exercise their powers in a relatively unstructured, opaque arena of *laissez faire*. Second, the existing arrangements bestow upon a premier a beneficial collection of once-monarchical powers which remain obscure and fundamentally unchanged from their medieval nature and form. Thus due to the Crown-based constitutional edifice, Prime Ministers have been able to utilise many prerogative powers subject to fewer constitutional or legal restraints; the Iraq affair demonstrated this occurring in relation to the war prerogative specifically.

In light of the influence of the Crown in this area, it is arguable that criticisms that recent Prime Ministers, including Mr Blair, have acted presidentially, dominantly or exercised their powers against the spirit of the constitution are erroneous. On the contrary, using power in this way is entirely consistent with the structure and culture of the British constitution which remains monarchical, autocratic and based on a central individual figurehead.³ What Bagehot termed the ‘dignified’ window dressing

¹ M Foucault, *Society Must be Defended* (Penguin, London, 2004) pp 25-6.

² P Hennessy, *The Prime Minister, The Office and its Holders Since 1945* (Penguin, London, 2001) ch 3.

³ For example, Morgan asks whether Blair’s personal ascendancy (in first term of his premiership) was a temporary phenomenon, “*Or is there something more rooted in our constitutional history that has seen the premiership ... become something different, perhaps presidential, almost papal, in the*

of monarchy⁴ cannot and should not detract from the failings of this arrangement in the respects outlined in this study.

[1.2] Conventions

A number of specific conventions play a vital role in prime ministerial use of the war power. First and foremost, the paramount ministerial advice convention enables elected ministers to govern and specifically diverts the *de facto* war decision from monarch to premier. This is supplemented by more general conventions which operate as constitutional checks in this area, e.g. collective Cabinet responsibility which requires Cabinet to make important decisions in matters such as warfare collectively, the resignation convention which necessitates the resignation of a government which loses a confidence vote in the Commons, and finally the potential or quasi-convention that Parliament must approve decisions of war. These conventions play a pivotal role in the absence of legal regulation in this area. Yet as Chapter 3 established, if one attempts to proceed beyond listing specific conventions, they are a curious, evasive and inchoate phenomena whose free-standing status rests upon foundations of certain fragility. No meaningful definition is able to encompass all conventions and any attempt to pinpoint the specific core features of conventions (e.g. their bindingness or ethical basis) proves impossible. Even the most certain of a convention's characteristics, namely its distinction from law, is principally premised on a dominant positivist outlook which erects clear boundaries between the two. In any event, this distinction appears to have been at times silently and necessarily departed from in order to reach coherent, realistic decisions in select cases concerning Crown powers, as *Bancoult*⁵ and *GCHQ*⁶ demonstrate. The nature of conventions acts to potentially favour the Prime Minister in his preferred exercise of the war power in two key ways.

circumstances of modern politics and modern technology?" K Morgan, 'New Labour and the New Premiership' in D Butler, V Bogdanor & R Summers (eds), *The Law, Politics & the Constitution, Essays in Honour of Geoffrey Marshall* (Oxford University Press, Oxford, 1999) p 35. The answer to this must be a resounding 'yes'; his office is derived from monarchy and displays important structural similarities to Kings of the past.

⁴ W Bagehot, *The English Constitution* (Collins, London, 1963) p 66.

⁵ *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2008] 4 All ER 1055 (HL); [2007] EWCA Civ 498, [2008] QB 365 (CA); [2006] EWHC 1038 (Admin), [2006] All ER (D) 149 (May).

⁶ *Council of Civil Service Unions & Others v Minister for Civil Service* [1985] AC 374, HL.

First, conventional regulation benefits a Prime Minister because, by virtue of their non-legal status, they are generally excluded from the concern of courts.⁷ By adopting this positivist approach the courts have disqualified themselves from making potentially valuable contributions to the preservation and advancement of the conventions that regulate central government. This tacitly protects the Prime Minister and Cabinet from greater judicial scrutiny and leads the courts to disregard the bypassing or re-moulding of some conventions.⁸ Second, common understandings of conventions as free-standing rule-like phenomena create an impression of informal, but largely effective, checks regulating ministerial conduct. This fosters a large, minimally-regulated field in which a Prime Minister can operate, and furthermore acts to placate the perceived need for more stringent regulation of central government.⁹ If one adopts an alternative and perfectly viable view that ‘convention’ *explains* discrepancies between law and political reality then the capacity of ‘conventions’ *per se* to act as meaningful constitutional checks upon a premier or ministers is compromised and the impetus for reform becomes more pressing.

[1.3] Prerogative

Chapter 4 provided three vital insights into the nature of prerogative, each of which has particular significance for the Prime Minister and/or the war power. First, prerogative power is inherently monarchical in nature; it flows from the Crown, is comprised of the remnants of the King’s once absolute power and continues to be exercised by the monarch at law. The nature of prerogative power thus necessitates a somewhat idiosyncratic interaction between ministers and the monarch, and benefits the premier in his use of the war power in the specific ways discussed at Parts 1.1 and 2.1. Second, the prevailing wide Diceyan view of prerogative redefined the power away from its early Blackstonian definition as a narrow set of powers enjoyed solely by the King. Ironically the success of Dicey’s modern redefinition of prerogative may be one vital reason why the power has remained viable and thus many of the monarch’s traditional prerogatives, particularly the ones discussed in this study, have remained unreformed and intact. Finally, boundaries

⁷ Notwithstanding the silent acceptance of the ministerial advice convention in cases like *Bancoult* (n 1).

⁸ As demonstrated in *R (on the application of Gentle and another) v Prime Minister and others* [2006] EWCA Civ 1689, [2007] QB 689 CA.

⁹ B Hough, ‘Conventions and Democracy’ (2000) 29 Anglo-Am. L. Rev. 368, pp 370-1.

play a vital role in legal understandings of prerogative power by determining its scope but, most vitally, distinguishing between different types of prerogative, specifically those that are justiciable and those that are not. The earliest such boundaries (or ring-fences) were constructed firmly on the basis of subject matter.¹⁰ However, the Iraq caselaw altered the appearance and basis for distinguishing between reviewable and non-reviewable prerogatives. A summary of these developments is detailed at Part 3.2.

[1.4] Summary of Findings regarding Disparities in this Area

From investigation of these three components it is clear that important and interrelated disparities exist between the legal appearance and the constitutional-political reality of the premiership and its powers. This is because the formal, archaic terms used to label arrangements at the apex of the British constitution have remained intact, despite being superseded by political developments that have transformed the political workings of government in practical terms. A number of significant points about such disparities can be outlined and these gaps lie at the root of many of the issues concerning the Prime Minister and war power outlined in this conclusion.

There exists wide academic and judicial acceptance of a divergence between the Crown at law and the political reality occurring within; its status as a 'legal fiction' very much reflects this. Though the Crown's legislative and executive powers have been colonised by Parliament and government ministers respectively, their legal structure and form have remained intact and unaltered. This has resulted in an overt disparity between law and reality at the very apex of the constitution; the law views the monarch as embodiment of the Crown as directing ministers whereas in political reality ministers are in the dominant position.¹¹ In this respect the legal and political arrangements (as well as their respective ethical bases) specifically oppose or contradict one another and thus the Crown and its surrounding legal framework can only be understood with reference to non-law, specifically constitutional conventions that supplement and explain the law. Similar acknowledgement of the vital disparity

¹⁰ GCHQ (n 2) 418.

¹¹ Chapter 2 suggested that perhaps the ambiguities in the meaning of 'The Crown' are linked to leakage in *de facto* prerogative power from monarch to ministers, which in turn is arguably attributable to Dicey's wider, modern re-definition of prerogative power.

continues in judicial accounts of prerogative power, most prominently acknowledged by Lord Roskill in *GCHQ*,¹² whose comments have revealingly been adopted in subsequent judgments.¹³ Conventions occupy the cleavage between the law and reality of the war power. They act to *explain* discrepancies between the legal framework and the political reality occurring within, thus providing a coherent representation of the constitution despite these gaps.

Overall, for the Prime Minister and ministers the divergence between appearance and reality is to some extent useful. The mainstream legal-constitutional concepts adopted to provide an explanation of the British constitution (such as conventions, parliamentary sovereignty and the rule of law) arguably act as reassuring facades, or in Ward's terms 'myths'.¹⁴ These allow the academic community to congratulate the democratic and accountable aspects of the British constitution whilst marginalising the autocratic, monarchical legal structures which may act to negate or undermine the apparently progressive features of the constitution. More specific points about precisely how this divergence benefits Prime Minister and his exercise of the war prerogative are made in Parts 2 and 3.

[2] Aim 2: Conclusions regarding the operation and interaction of relevant constitutional components in the Iraq decision

Certain caveats must be made before outlining any conclusions about the operation of constitutional components over the course of the Iraq affair. Historically the Iraq affair represents a relatively brief and recent period. It is therefore difficult to assess the permanent significance of some of the patterns, and views may change as more information emerges. Nevertheless, three main conclusions about the operation and

¹² *GCHQ* (n 2) 418.

¹³ *Bancoult, CA* (n 1) para 88; *Bancoult, DC* (n 1) para 158.

¹⁴ As Ward has stated of the prerogative of mercy, "*There is something very wrong in a system of justice which reduces human life to the whims of a jurisprudence that is rooted in the relics of a medieval constitutional fantasy.*" I Ward, *The English Constitution, Myths and Realities* (Hart Publishing, Oxford, 2004), p 65. Ward's statement appears even more relevant to the prerogative to conduct military action. See also P Schlag, 'The Empty Circles of Liberal Justification' (1997) 96 Mich. L. Rev. 1. Here the author explores the role of myth in liberal justification, ultimately accusing liberalism of replacing one myth (religion) with another.

interaction of the constitutional elements discussed in Part 1 and their impact upon the war prerogative can be made.

[2.1] The operation and interaction of the ministerial advice convention and the Crown

The operation of the ministerial advice convention is a key factor in prime ministerial use of the war power; this convention enables the premier to tap into the Crown and its prerogatives authorising war and a host of other actions. The convention plays this integral constitutional role despite its tendency to discreetly operate beneath the legal radar due to its non-legal status.

The important case of *Bancoult*,¹⁵ drawing upon the earlier rationale in *GCHQ* demonstrates that resolving cases involving ministerial prerogative power requires the courts to look beyond the archaic, narrow and inadequate legal framework that situates the monarch as ultimate decision-maker, and instead requires acknowledgement of modern constitutional convention. At all levels the courts in *Bancoult* rejected government arguments, based on a narrow view of the legal framework in isolation, that prerogative Orders in Council were legally immune acts of the monarch.¹⁶ This argument could not ‘hide the fact[s]’ according to Hooper LJ.¹⁷ The courts here founded their judgments on the constitutional reality that elected ministers made the disputed decisions. This entailed implicit recognition of the ministerial convention, affording it a form of inchoate legal effect. Vitally, it also demonstrates that the judicial boundaries between legal rules and non-legal conventions which are excluded from enforcement, can be silently departed from in this particular context despite similar boundaries being strictly adhered to elsewhere in the Iraq caselaw.

Because the ministerial advice convention enables the Prime Minister to access many of the monarch’s powers in the legal edifice, these powers at law can only be understood with reference to this ‘paramount’ convention. The convention acts to entwine the premiership with the monarch as embodiment of the Crown, leading the Prime Minister to function as a form of ‘proxy monarch’. This interaction of Crown

¹⁵ *Bancoult litigation* (n 1).

¹⁶ This issue was considered in most detail in the Divisional Court and Court of Appeal hearings.

¹⁷ *Bancoult*, DC, *ibid* para 163.

and convention affords the premier two important benefits. First, the premiership's attachment to the structurally and culturally autocratic and undemocratic Crown and its powers potentially offsets to some extent the democratic accountability to which he is subject in political practice, as further discussion in Parts 2.2 and 2.3 demonstrates. Related to this, the interconnection between Prime Minister and the Crown enables the office-holder to potentially exploit a collection of unreformed, vague and amorphous powers, many of which remain free from lawful restraint or the effective scrutiny of the legislative and judicial limbs. The war prerogative is just one such power. Second, the Prime Minister-monarch symbiosis fostered by the ministerial advice convention provides subtle benefits to a premier in a judicial context, as caselaw concerning the war and related prerogatives demonstrates. Chapters 4 and 5 highlighted longstanding judicial attachment to a strong executive and wise, knowledgeable leadership which will defend and protect the country.¹⁸

[2.2] The operation and interaction of the collective Cabinet responsibility convention and the Prime Ministerial chairmanship powers

The close interaction between collective Cabinet responsibility and the chairmanship powers was a material issue in Mr Blair's exercise of the war prerogative in the Iraq decision. Mr Blair used his monarch-based Cabinet chairmanship powers in a novel and distinctive way in the lead-up to the Iraq war. This had the effect of bypassing or marginalising collective responsibility's capacity to act as a potential check upon his exercise of the war power.¹⁹

Interestingly, one issue unites the various distinct ways in which Mr Blair used his chairmanship powers to consult with small groups of aides outside of Cabinet and war Cabinet, to replace detailed Cabinet discussions with briefings, and finally to dispense with detailed Cabinet agendas, minutes and papers circulated in advance. Common to all of these developments is a failure to effectively share information. The substantive decision-making in Iraq, the knowledge vital to gauging these

¹⁸ See Chapter 4, Part 3.3 and Chapter 5, Part 3 specifically.

¹⁹ Chapters 3 and 4 established that supporting evidence to this effect is wide-ranging, spanning from Cabinet ministers to the Butler Report which expressed concern about the 'reduced scope for informed political judgement' of Cabinet as a result of the way it was conducted; Report of a Committee of Privy Counsellors (chair: Lord Butler), 'Review of Intelligence on Weapons of Mass Destruction', HC (July 2004) 898, para 611.

decisions, and therefore the accountability for them, were all detached from Cabinet, along with the Prime Minister himself. This demonstrates that knowledge-power imbalances do not only infiltrate caselaw concerning the Iraq decision, but have a more extensive influence upon the exercise of the war prerogative. It is arguable that Mr Blair's exercise of the chairmanship powers served to monopolise valuable knowledge concerning the Iraq decisions and thus influenced the operation of collective responsibility, arguably morphing it from a constitutional check into a source of prime ministerial strength by binding ministers to policy they had not properly considered or discussed.

[2.3] The operation and interaction of the parliamentary approval 'convention' and a cluster of key prime ministerial prerogatives

Perhaps the most complex and arcane interaction between convention and prerogative in the Iraq affair was the way in which the strengthening parliamentary approval 'convention' was largely undercut by a cluster of prime ministerial prerogatives that enabled Mr Blair to exert an influence over the parliamentary vote, and therefore the efficacy of the convention itself. This cluster of prerogatives included: the power to appoint the Attorney General, the defence prerogative to authorise the prior deployment of troops and the power to advise a dissolution of Parliament.

Chapter 3 confirmed that the 'conventional' status of the parliamentary approval of warfare requirement is ambiguous and views of its scope and future bindingness vary among political players (notwithstanding post-Blair reform proposals which sought to formalise the position). As a result it could not be conclusively established that a formal convention existed following the Iraq affair, though available evidence tilted in favour of its presence. Irrespective of its status, evidence suggests there was a shift towards more concrete parliamentary involvement in the exercise of the war prerogative up to and following the Iraq decision,²⁰ reflecting a corresponding shift in constitutional culture. Nevertheless the effectiveness of this newly strengthened check is arguably undermined by countervailing constitutional features,

²⁰ Chapter 3, Part 3.3 outlines key evidence supporting this, including: (1) the extending of parliamentary 'approval' to include a substantive vote, and the holding of such a vote in the Iraq decision, and (2) an increase in express statements regarding a strengthened parliamentary role from various prominent politicians.

specifically the party majorities enjoyed by government, the Whip system and, the focus of this study, the cluster of prime ministerial prerogative powers specified above that in the Iraq affair enabled the premier to exert an influence upon the vote and weighted the process in his favour. All of these powers stem from the prime ministerial office's colonisation of the Crown and their impact upon the vote is now summarised.

A Prime Minister instructs the monarch to appoint government ministers including the Attorney General, and this affords the premier a relative hegemony over ministers. During the Iraq affair, in the space of 10 days the Attorney General changed his advice regarding the international legality of warfare, and as Prime Minister, Mr Blair was in a position to influence him. Whether or not such influence was exerted, it is not unreasonable to view this chain of events with a degree of circumspection. The Attorney's amended advice enabled Mr Blair to order the engagement of troops which was entirely reliant on a clear statement of legality. It was furthermore the basis upon which Cabinet and Parliament judged the suitability of military action. It is therefore difficult to argue that this was not a material factor in facilitating Mr Blair's preferred use of the war prerogative regarding Iraq; his position in relation to the Attorney at the very least appears to have played a discernible role in enabling him to secure deployment. Furthermore this incident reiterates the powerful role of knowledge in such decisions, and the privileged position enjoyed by government (or the premier) in this respect.

A further factor assisting Mr Blair to obtain parliamentary approval for engagement in Iraq was the exercise of the defence prerogative to deploy troops on the Iraqi border in advance in readiness for combat. Though this prerogative decision was almost certainly taken for operational reasons, and its effect on the vote is arguably limited and difficult to quantify, evidence from the parliamentary debate indicates that this was a factor increasing pressure on MPs to vote in favour of war. In this respect it aided Mr Blair's exercise of the war prerogative and correspondingly undermined the vote as a substantive check on the war power. Finally, the prime ministerial *de facto* prerogative to dissolve Parliament by advising the monarch acts as a disciplinary device over dissent in his parliamentary party, albeit when combined with the confidence vote resignation convention. Mr Blair utilised this device in the Iraq vote which acted to heighten the stakes for Labour MPs; failure to obtain approval would result in a damaging general election. Like the defence prerogative, the precise

influence of this dissolution device is difficult to quantify and must not be overstated, though evidence in Chapters 1 and 4 indicate that it was a further influential factor enabling Mr Blair to mobilise parliamentary support for war.

It is arguable that these uses of prerogative in the Iraq decision, particularly defence and dissolution, had at least a modest impact upon the parliamentary vote. But it is the cumulative effect of these prerogatives which proves particularly significant; they demonstrate that a Prime Minister, using the Crown-based powers of monarchs of old, can manoeuvre a vital parliamentary vote, arguably stripping the vote of some of its meaning and justifying the later concerns of the House of Lords Constitutional Select Committee.²¹ These prerogatives are all longstanding constitutional features that have been utilised by governments in the past. However, the *specific* combination in which they operated and their cumulative effect in the Iraq decision was arguably unique and unprecedented. The specific characteristics of the Blair premiership and its surrounding political context *at that time* caused these constitutional features to come together, allowing the premier to authorise military action effectively despite the strength of opposition to such plans.

[3] Aim 3: Deeper insights into the efficacy of checks and balances upon the war prerogative afforded by the Iraq affair

This study's detailed investigation of the Iraq affair has offered numerous insights into the efficacy of checks and balances upon the war prerogative. Overall, it has established that despite the *appearance* of strengthening checks in both parliamentary and judicial contexts, the actual constraints upon prime ministerial use of the war prerogative continue to be severely limited. Astute prime ministerial use of prerogatives in Cabinet and Parliament can potentially facilitate the evasion or taming of political resistance in those institutions, whilst ministerial war and related

²¹ Chapter 4 outlined the following quote from the committee's 2006 report: “*it could be said that the ability of the United Kingdom governments to use the royal prerogative power to engage in conflict is paradoxically less democratic than when the Monarch exercised the power personally.*” Select Committee on the Constitution, ‘Waging War: Parliament’s Role and Responsibility’, HL (2005-06) 236-I, para 40.

prerogative decisions enjoy *de facto* immunity from legal resistance in the courts.²² It seems that the autocratically structured British constitution may be essentially geared to support war, and the Iraq affair demonstrates that this may even apply in the case of a controversial war of dubious international legality.

Specific insights into both the constitutional and legal checks upon the war prerogative respectively are now outlined.

[3.1] Effectiveness of constitutional checks on the war prerogative

Some conclusions regarding the precise operation of constitutional checks and balances have been outlined in Aim 2. Building upon some of the specific points made therein, some deeper insights regarding the war power and constitutional checks upon it can be identified. Two main insights emerge:

[3.1.1] The efficacy of constitutional checks during the Iraq affair can be contrasted with their efficacy after it

The Iraq affair demonstrates the relative weakness of parliamentary checks on the war prerogative. In the March 2003 vote Mr Blair's use of the war prerogative was subject to limited challenge from Parliament and this was partly attributable to the factors outlined in Part 2.3, particularly Mr Blair's exercise of clusters of monarchical prerogatives which acted to manoeuvre the parliamentary vote in favour of military action.

The Iraq decision arguably does highlight a 'democratic deficit'²³ regarding warfare decisions at national level. Evidence shows that the prerogative decision was made in disregard of the views of the British populace by a small isolated elite and with limited input or meaningful scrutiny from Cabinet or Parliament. The following claim by Gladstone encapsulates the position cogently:

²² "The powers that Prime Ministers wield, mostly derived from the 'mystical but mighty' powers of prerogative, are enormous, the constitutional constraints upon their office negligible. This should concern us." Ward (n 14) 72. Ward's claim is especially pertinent in the context of military action.

²³ Geneva Centre for Democratic Control of the Armed Forces quoted in *Waging War: Parliament's Role and Responsibility* (n 21) para 17.

*"If it secures no other British national interest, the Iraq 'war' has awoken millions of British subjects to their powerlessness in the face of [Lord Roskill's] ghosts [of the past]."*²⁴

Despite inadequacies in checks at the time of the decision, it is arguable that the post-Iraq period has heralded *prima facie* more positive developments in relation to checks on the war power.²⁵ First, light was ultimately shed upon the dubious practices of the Blair Cabinet by the 2004 Butler Report.²⁶ Second, the inquiry the courts refused to order in *Gentle* has been recently instigated.²⁷ Finally, the post-Iraq era has witnessed an increase in scrutinising activity by parliamentary select committees²⁸ and the introduction of proposals to formalise parliamentary involvement. It seems that the constitutional failures of the Iraq affair did generate incremental adjustments in response to specific problems. Admirers of the British constitution may claim that this is an apt illustration of its enduring flexibility. But an approach comprised of piecemeal post-event responses is hardly ideal; where were effective checks when they were needed in March 2003?

[3.1.2] The post-Iraq proposed reforms to the war prerogative will be of limited effect

Tabled reforms to the war prerogative²⁹ proposed the introduction of a parliamentary resolution setting out the terms for its approval of war. Though the reforms indicated a *prima facie* potential increase in the strength of parliamentary checks upon the war power, this study demonstrates that they would not necessarily constitute a panacea; their effect would be limited for four interrelated reasons.

First, the proposed reforms left untouched important shortcomings in existing checks. Under proposals the Prime Minister retained an advantageous degree of discretion over various aspects of the parliamentary vote, for example, its timing and the information to be provided to Parliament.³⁰ These factors materially favoured Mr

²⁴ David Gladstone, Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament', HC (2003-04) 422, Written Evidence, Ev 2.

²⁵ However, the effect of these developments should not be overstated for the reasons discussed in Parts 2.2-2.3 and 3.1.2.

²⁶ *Butler Report* (n 19).

²⁷ Hansard HC vol 494, cols 23-24 (15 Jun 2009).

²⁸ See Chapter 4, Part 3.2.3.

²⁹ Lord Chancellor & Secretary of State for Justice, 'The Governance of Britain – Constitutional Renewal' (Cm 7342-I, II & III 2008).

³⁰ Public Administration Select Committee, 'Constitutional Renewal: Draft Bill and White Paper', HC (2007-08) 499, p 3.

Blair's preferred exercise of the war power in the Iraq affair. Second, the proposed reforms arguably overlooked one of the central constitutional failures that occurred in the Iraq affair, namely the sidelining of collective Cabinet responsibility as discussed in Part 2.2. However this study has found that though the failure of Cabinet responsibility was undoubtedly important in the Iraq affair, the decision to undertake military action was facilitated by a range of complex, interacting factors, all of which can be ultimately traced back to the prime ministerial prerogative powers in some capacity. Third, the proposed reforms left intact the monarch-based structures and culture that benefit the premier and government in relation to the war prerogative. For example, the Prime Minister would still enjoy the dissolution device and the defence prerogative. Ultimately, the inherent ties between Prime Minister and monarch have led to war becoming 'an intensely prime ministerial activity'³¹ where once it was an intensely monarchical activity; the proposed reforms did little to alter this arrangement. The final reason that proposed reforms, even those of a legal nature, may have been limited is illustrated by the US constitution which departed from the British monarchical model and vested the war power with Congress. Despite this arrangement, there has occurred a gradual presidential usurpation of the war power and a correlating waning of congressional involvement in recent decades.³² The problems facing the US power³³ indicate that formally transferring the war power to the British Parliament would not necessarily be sufficient to temper it *per se*.³⁴ Instead such measures can only operate effectively with a vigilant, inquisitive and independent culture amongst the elected representatives.³⁵ Yet perhaps such a culture is inconsistent with what Foucault identifies as the autocratic, monarch-structured western legal systems and traditions.

³¹ Hennessy (n 8) 103.

³² "Presidents have routinely exercised war powers with little or no involvement by Congress." L Fisher, *Presidential War Power* (2nd edn, University Press of Kansas, Lawrence, 2004) preface and ch 1.

³³ "The last nine years have underscored the extent to which the power of war has shifted to the presidency, with little restraint by Congress or the courts and little comprehension by the general public of the damage done to constitutional values, representative government, and democracy." Ibid, preface.

³⁴ Interestingly, calls for reform of the US war power are also under discussion in America. See 'Panel Demands US war power reform', *BBC Online* (London, 16th December 2008) <<http://news.bbc.co.uk/1/hi/world/americas/7496587>> accessed 7th January 2009.

³⁵ "What is perhaps most needed in undertaking reform, therefore, is neither a limiting statute nor questionable attempts to 'make' a new convention, but a more fundamental evaluation of the political unwillingness of MPs, under the current party system, to exercise Parliament's legislative sovereignty and hold the Crown to account for its military adventures." D Jenkins, 'Constitutional Reform goes to War: Some Lessons from the United States' [2007] P.L. 258, p 260.

[3.2] Efficacy of legal checks upon the war prerogative

Cases also yield deeper insights into judicial treatment of the war prerogative at law. The Iraq caselaw demonstrated a gradual broadening of the potential reach of judicial review due to the removal of GCHQ ring-fencing which had previously shielded high policy prerogatives. However, despite the comparative strengthening of judicial checks on prerogative power in this respect the courts ultimately refused to engage with prerogative decisions in war and related matters in any event. Prerogatives in these areas were still afforded special treatment by the judiciary and thus the removal of formal ring-fencing had minimal impact in practical terms.

The two following important insights into the relationship between the judiciary and the war and related prerogatives at law were revealed:

[3.2.1] Insights regarding boundaries between law and non-law

In this area the judiciary employ boundaries between law and non-law, specifically eliminating political or policy issues from their concern. However, the way in which the courts do this is selective and inconsistent, ultimately acting to favour the government of the day. In Iraq caselaw the law-politics boundary was used by the judiciary as a basis for eliminating from their responsibility not just political issues, but also tainted legal issues, i.e. legal issues which were inherently entwined with political ones. Seeking to maintain the ‘internal purity’³⁶ of law in this way led the courts to refuse to provide an interpretation of Resolution 1441 in *CND*, to the marginalisation of otherwise ‘powerful’ arguments³⁷ by the claimants in *Al Rawi* and finally in *Gentle*, to the finding that *Article 2 HRA* could not be interpreted to require government to take reasonable steps to ensure its military action was internationally lawful.

Yet paradoxically, despite evading political engagement the judicial position is implicitly political in a more subtle way. The Iraq cases involved inherently political litigation with therefore unavoidably political outcomes; the judicial inclination for disengagement in the ‘political’ issues outlined above was not a neutral position as it

³⁶ C Douzinas, R Warrington & S McVeigh, *Postmodern Jurisprudence, The Law of Text in the Texts of Law* (Routledge, London, 1991) p 25.

³⁷ *R (on the application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (Admin); [2006] All ER (D) 46 (May), paras 96, 87.

ultimately favoured the Blair government's political aims. Judgments in the Iraq caselaw show that by attempting to eliminate politics from the legal domain the judiciary incapacitated itself in reality as a potentially meaningful and effective check on government's conduct of war and foreign affairs, despite the *prima facie* strengthening of judicial review mentioned above. Thus it is arguable that the 'myth of neutrality'³⁸ barely disguises the reality that the judicial institution can do little else but tacitly protect strong government in the context of war, defence and related matters.

[3.2.2] Insights regarding disparities between law and reality

Chapter 5 identified important disparities between the legal view and reality of the war prerogative.³⁹ Vitally, it provided the insight that knowledge or expertise is a key factor underlying and explaining these disparities.⁴⁰

Authorities concerning defence matters indicate that executive views in this area have always enjoyed precedence in the courtroom. This privileged position continued over select Iraq cases, though the judges in these cases articulated the rationale for this privileging in more detail than previously seen. Defence evidence concerning both matters of opinion and fact was clearly afforded great weight across cases like *CND* and *Al Rawi*, and this is *prima facie* logically justified on the basis that government has superior expertise and exclusive access to information in this area. Yet such treatment of government evidence translates into vast power inequalities; the automatic, entrenched knowledge monopoly the executive enjoys as an inherent part of its defence and foreign affairs functions makes challenging government decisions incredibly onerous and the prospects of success for claimants negligible. Judicial deference to ministerial prerogative decisions on the basis of subject matter has been replaced with a *de facto* deference to government evidence, resulting in the equivalent position in real terms. Despite its shortcomings perhaps the old position had the benefit of candour, whereas the new position more readily

³⁸ J A G Griffith, *The Politics of the Judiciary* (4th edn, Fontana Press, London, 1991) p 271.

³⁹ Two main disparities of significance relate to the discussion in this part so far: first, at law the explicit legal ring-fencing of the war and related prerogatives has been removed, but in reality it has been replaced with a subtle form of *de facto* immunity which results in identical outcomes in fact (as per Part 3.1); second, despite expressly claiming to avoid involvement in politics, the judiciary in reality adopts a silent form of politics and is by no means a neutral arbiter in war-related disputes between government and challengers (as per Part 3.2.1).

⁴⁰ The recurring theme of knowledge/power has arisen throughout the investigation of checks and balances in this area. A more detailed exploration of the role of knowledge or information is beyond the scope of this study but would make an interesting field for further investigation.

conceals these imbalances. However, one benefit of the new arrangement, as demonstrated in *Abassi* and *Al Rawi* for example, is that defending its case now requires government to explain in detail the reasoning behind its policies. Though Lord Hoffman in *Jones*⁴¹ criticised the use of litigation for such purposes,⁴² it is a legitimate form of challenge and arguably highlights a lack of openness and transparency elsewhere.

Chapter 5 provided a further related and significant insight into judicial checks upon the war prerogative; the weight that courts afford government evidence in such areas is institutionally mandatory and an inevitable part of the respective functions of the judiciary and executive within existing state structures. Judicial failure to engage with the substantive content of government witness statements in the Iraq judgments, and their unquestioning acceptance of the merits of such statements on the sole basis that they emanated from an ‘official’ expert source merely reflected this. This provides further demonstration that the judiciary in war, foreign affairs and related cases cannot be strictly impartial; institutionally having to afford precedence to government views has the *de facto* effect of protecting ministerial decisions from legal challenge. In this sense the judicial treatment of knowledge in these cases is fundamentally though subtly political and, in Allan’s terms, impartiality between citizen and state is abandoned.⁴³ For these reasons it must be concluded that the courts are incapable of effectively checking ministerial prerogative in war and related matters.

⁴¹ *Regina v Jones (Margaret) and others* [2007] 1 AC 136, HL.

⁴² Commenting on the ‘phenomenon’ of ‘litigation as the continuation of protest by other means’ Lord Hoffman stated: “*By this means [challengers] invite the court to adjudicate upon merits of their opinions and provide themselves with a platform from which to address the media on the subject. They seek to cause expense and, if possible, embarrassment to the prosecution by exorbitant demands for disclosure, such as happened in this case.*” Ibid para 90.

⁴³ T R S Allan, ‘Human Rights and Judicial Review: A Critique of “Due Deference”’, C.L.J. 65(3), November 2006, pp. 671-695, pp 675-6.

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