

## Chapter 6 Problem scenario: The royal prerogative and constitutional conventions

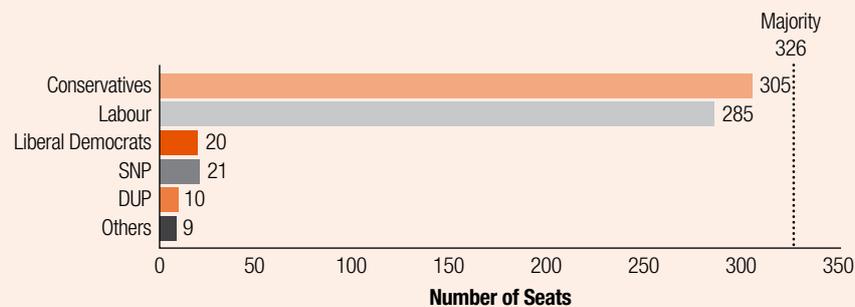
Following the conclusion of the Brexit negotiations in March 2019, the Conservative Government negotiated a new treaty which forms the basis of a new free trade agreement with the United States of America. This has proven to be extremely controversial because the treaty requires that the UK Government opens up the NHS to allow private American companies to provide healthcare services. This is controversial because many see this as a threat to the NHS, as services may no longer be provided by hospitals organised by the state, but by private healthcare providers. Some fear that this is the thin end of the wedge, and the next step would be to allow healthcare providers to charge patients directly for the services they provide. This would run against the principle that healthcare provided by the NHS should be free at the point of use. Some politicians have argued that the treaty heralds the 'privatisation' of the NHS, while others believe that the free trade agreement is vital for the UK's future economic prosperity.

Debate over the free trade agreement with the United States and its impact on the NHS has dominated politics for several months. Protests against the treaty have been led by several campaign groups who are now urging the Queen to intervene. They are asking Her Majesty to speak out against the treaty and prevent the government from ratifying it.

As required by the Constitutional Reform and Governance Act 2010, the government laid the treaty before Parliament. Immediately, the Opposition tabled a motion in the House of Commons, stating that the treaty should not be ratified. The next day, MPs voted against the treaty, triggering an immediate political crisis. The government is concerned that this controversy is only going to continue as several other trade deals currently in negotiation with other countries contain similar provisions.

Consequently, the Prime Minister feels that the crisis can only be resolved through an early general election, and requested that the House of Commons voted to hold an early general election in accordance with the Fixed-term Parliaments Act 2011. The main opposition party agreed, and over 580 MPs out of 650 voted for an early general election.

The general election held in November 2019 delivered the result shown in Figure 6.1.



**Figure 6.1** The result of the 2019 General Election

Imagine that you were presented with this problem scenario and asked to consider how the royal prerogative operates in relation to these events. The scenario raises several issues about individual prerogative powers. In particular, the central issue is the prerogative power to enter into and ratify international treaties. Other issues include the ability of the Queen to actively get involved in politics and the role she plays when appointing a Prime Minister following a general election. As can be seen in the discussion of this scenario throughout Chapter 6, the exercise of the prerogative can be controlled by statute or constitutional convention.

The free trade deal with the United States is an example of the prerogative power to enter into and ratify international treaties. This is an important power and is exercised by

ministers. This is also an example of how the exercise of the prerogative can be made subject to requirements imposed by statute, because the government are unable to ratify the free trade deal with the United States until the procedure outlined in the Constitutional Reform and Governance Act 2010 has been complied with. The fact that the government has decided against holding a second vote, is an example of how the bare legal rules are often overlaid with a variety of political considerations. This blend of law and politics is a key feature of public law and means that gaining an understanding of the legal rules alone can be far from understanding the whole picture. Had the treaty been less controversial, the government may well have insisted on holding a second vote.

The difference between the legal rules and political reality is also shown by the demands from campaigners that the Queen should personally intervene and prevent the ratification of the treaty. This clearly would be going against the 'cardinal convention', the convention that the monarch always acts on the advice of the government.

A common theme between the controls over the power to enter into treaties and limitations on the political activities of the monarch is democracy and accountability. The government can be required to account to Parliament for how they have negotiated an international treaty. If Parliament disagrees with a treaty, they can require the government to at least reconsider, or explain further why they wish to ratify the treaty. Similarly, the refusal of the monarch to intervene, ensures that it is the elected politicians who are accountable for the decisions that the government makes. Not only are politicians accountable to Parliament, but they are also accountable to the electorate at a general election. Should the monarch become actively involved in political issues, they would interfere with this process and weaken the accountability of the government to both Parliament and the electorate.

The position of Parliament over the Crown was shown in *R (Miller) v Secretary of State for Exiting the European Union*,<sup>1</sup> which is discussed at length in 6.4.3. Because sovereignty rests with Parliament and not the Crown, the view of the Supreme Court was that Parliament was required to pass legislation to invoke Article 50, as Parliament in enacting the European Communities Act 1972 had removed this power from the royal prerogative. Ultimately, it is Parliament and not the royal prerogative that can change the law. However, the decision of Miller is unlikely to be applied to other treaties because of the unique nature of the EU treaties.

As we have seen the vote of the House of Commons against the treaty with the United States has caused an early general election in November 2019. Here, we can see that the prerogative power to appoint a new Prime Minister is heavily constrained by convention, leaving extremely little scope for the monarch to make any personal choice. The constitutional conventions operate to ensure that the democratic will of the people as expressed in the general election is fulfilled. In a hung Parliament, who the electorate wish to form the government can be far from clear and the result of the election raised a series of different possibilities. Although, as the *Cabinet Manual* makes clear, it must be stressed that the task of determining who should form the next government falls to politicians and not the monarch.

It is through constitutional conventions that the strict legal position of significant governmental powers deriving from the Crown takes account of modern demands for democracy. However, as discussed in 6.6 some have argued that the prerogative should be radically reformed or abolished entirely. They believe that the royal prerogative is an anachronism and that in principle the powers of government should only stem from Parliament and nowhere else. They consider that this would enhance the ability of Parliament to scrutinise the government. However, as can be seen with criticisms levelled at the Fixed-term Parliaments Act 2011, sometimes reforming or abolishing a royal prerogative power can raise more questions than it answers.

As can be seen from this discussion, the issues that this scenario raises show how fundamental a part the royal prerogative still plays in the constitution.

<sup>1</sup> [2017] UKSC 5.