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Summary of Evidence

1. The concept of a prerogative power being put into abeyance should be rejected.
    a. Instead, the concept of *desuetude*—that a legal norm can lose its validity if it becomes ineffective for a period of time—better explains the status of a prerogative power displaced by statute.

2. Consequently, should the Fixed-Term Parliaments Act (FTPA) be repealed, it should be replaced by new legislation to fill this lacuna.
    a. Even if the concept of 'desuetude' is not accepted, such prerogative powers can be considered to have 'atrophied' meaning that although they may be *legally valid*, their restoration would be *politically illegitimate*. Consequently, new legislation is, nevertheless, necessary.

3. The Irish and Australian constitutions provide templates for how the status quo ex ante the enactment of the FTPA could be restored.

4. A close following of the Australian approach would lead to the codification of the prerogative power to prorogue parliament. This could be avoided by focusing wholly on dissolution rather than prorogation. That stated, it is submitted that the prerogative power to prorogue parliament should be abolished as a legislature ought not to sit at the discretion of the executive whom it is constitutionally obliged to hold to account.

1. The concept of a prerogative power being put into abeyance should be rejected.

<u>The Abeyance of Prerogative Powers</u>

The principal authority that prerogative powers are placed into abeyance by a statute regulating the same area is the judgment of Lord Atkinson in the seminal case of *Attorney General v De Keyser's Royal Hotel*.[1] However, in this case, the House of Lords was primarily concerned with the question of whether a prerogative power could co-exist simultaneously with a statute that regulated an over-lapping area. What was not a live issue in that case was whether such a prerogative power could be automatically revived once the statute in question was repealed. This is clear both from the facts of *De Keyser's Royal Hotel* and Lord Atkinson's judgment:

> It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do

[1] [1920] AC 508.

> the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same-- namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.[2]

Consequently, Lord Atkinson in *De Keyser's Hotel* is primarily concerned with the relation between the prerogative power and the statute 'after the statute has been passed, and while it is in force'. This is further underlined by Lord Parmoor in the same case:

> "… when the power of the Executive … has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament and, in exercising such authority, the executive is bound to observe the restrictions which Parliament has imposed in favour of the subject."

Lord Summer further stated that in *De Keyser's Hotel* the Defence Acts 'superseded' the prerogative.[3]

This means that the aspect of Lord Atkinson's judgment pertaining to the future question of what would happen to the previously existing prerogative power should the overlapping statute be repealed is strictly *obiter*; i.e. it does not form the *ratio decidendi*—the binding part of the judgment—of *De Keyser's Hotel* and, consequently, its authoritative legal status is advisory only.

It must, of course, be conceded that it is, nevertheless, highly persuasive legal authority given that it has been cited with approval in several subsequent cases and academic commentary. Nevertheless, it still remains advisory only.

Critiquing the concept of the abeyance of prerogative powers

The key issue with the concept of a prerogative power being placed into abeyance by a statute is this statement's detachment from the reality of the situation. This understanding of prerogative powers and, indeed, legal norms generally, ignores the important role of the effectiveness of a legal norm in securing its validity. A legal norm is thus not simply valid because it has been issued by an authoritative source; i.e. that it has been validated by a higher norm which, in turn, has been validated by a higher norm until one, by a process of regression reaches one final norm known as the basic norm, Grundnorm, or, in the words of HLA Hart, the rule of recognition.[4] While hierarchy of norms is fundamental to the validity of a legal norm, it cannot wholly validate a norm; instead, the *effectiveness* of a norm is an important factor to consider too.

A more accurate account of the validity of a norm therefore has regard to the role of the effectiveness of a norm. Consequently, many legal orders recognise the concept of

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[2] Ibid 539-540.
[3] Ibid 562.
[4] HLA Hart, *The Concept of Law* (2nd ed Clarendon Press, 1997) 91.

desuetude: that a norm or law can become invalidated if it falls into disuse and is ineffective for a substantial period of time.[5] This concept helps explain why certain laws which have not been enforced for prolonged periods of time can be disregarded by courts. While the concept of 'desuetude' has not been recognised by common law legal systems to the extent seen in civil legal systems, the primary reason for this is, it is submitted, not relevant to the question of a prerogative power falling into desuetude. The judiciary finding that a statutory provision had fallen into desuetude and so is no longer valid would, it is submitted, violate the principle of parliamentary sovereignty as the judiciary would be essentially invalidating legislation. This is not relevant, however, with regards to a prerogative power falling into desuetude as prerogative powers, by definition, do not derive from statute. It should also be noted that the concept of constitutional norms falling into desuetude has also been explored by constitutional theorists.[6]

The concept of a prerogative power falling into desuetude aligns with other theories as to the status of unused constitutional norms such as that of Adrian Vermeule's 'constitutional atrophy'.[7] Vermeule argues that certain constitutional provisions may, due to their disuse overtime, lose their political legitimacy such that a future attempt to revive the power amounts to 'an illegitimate attempt to change the rules of the political game.'[8] He gives the example of the British Monarch's prerogative to refuse Royal Assent to a statute as one such example.[9] The distinction between atrophy and desuetude appears to be this relation between validity and effectiveness with Vermeule stating that constitutional powers that have atrophied losing their legitimacy; he does not, however, go so far as to say they lose their legal validity. What is key, however is the idea that an attempt to revive a constitutional power that has not been in use for some time is politically illegitimate.

Conclusions: the legitimacy of new legislation

The idea of prerogative powers going into 'abeyance' therefore should be rejected as this, at a minimum, would be politically illegitimate. It is also submitted that a more accurate description of the status of a prerogative power that has been superseded by statute is that is has been rendered ineffective and, as such, has lost its validity through a process of desuetude. Regardless of whether the courts would recognise this argument of desuetude, the point that it would be politically illegitimate to revive an atrophied prerogative power stands. Consequently, the prerogative power to dissolve the House of Commons should not be revived; instead, new legislation should be enacted to replace the FTPA. Should the UK wish to essentially revive the status quo ex ante prior to the enactment of the FTPA, the constitutions of Ireland and Australia may be helpful in this regard.

[5] Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) 119-120.

[6] See Richard Albert, 'Constitutional Amendment by Constitutional Desuetude' (2014) 62 American Journal of Comparative Law 641; Alan Greene *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018) 86-90..

[7] Adrian Vermeule, 'The Atrophy of Constitutional Powers' (2012) 32(3) *Oxford Journal of Legal Studies* 421.

[8] Ibid 423.

[9] Ibid 432.

2. Comparative Constitutional provisions upon which a statute providing for the dissolution of parliament could be based.

Several Westminster-style parliamentary democracies have written constitutional provisions for the dissolution of their lower house in a manner similar to the operation of the prerogative in the UK prior to the enactment of the FTPA.

Ireland

Article 13.2.1° of the Irish Constitution, for example, provides that:

> Dáil Éireann shall be summoned and dissolved by the President on the advice of the Taoiseach.

Article 13.2.2° further states that:

> The President may in his absolute discretion refuse to dissolve Dáil Éireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dáil Éireann.

It must be stressed that Article 13.9 of the Irish Constitution states the following:

> The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.

Consequently, where the Constitution refers to powers of the Irish President that can only be exercised 'on the advice of the Taoiseach' or 'on the advice of the Government', the President *cannot* refuse to exercise the power in question. In essence therefore, the President's role is purely ceremonial and the power, in reality, lies with the Taoiseach or Government.

Finally, it should be noted that Article 16.5 of the Irish Constitution states that:

> The same Dáil Éireann shall not continue for a longer period than seven years from the date of its first meeting: a shorter period may be fixed by law.

The similarities between the Irish constitutional provisions on dissolution and the UK constitutional position prior to the FTPA was intentional on the part of the drafters of the Irish Constitution. The Irish Constitutional provisions in question therefore can essentially be seen as a codification of the UK constitutional position prior to the enactment of the FTPA. A statutory provision restoring the UK constitutional order to the status quo ex ante the enactment of the FTPA therefore could look as follows:

> The House of Commons shall be summoned and dissolved by Her Majesty on the advice of the Prime Minister.

If the UK also wished to clarify the role of the Monarch in the context of a Prime Minister who has lost the support of the House of Commons but where it may be possible for

another government to be formed under the extant parliamentary composition without the need for a general election, the following clause could also be inserted:

> Her Majesty may in her absolute discretion refuse to dissolve the House of Commons on the advice of a Prime Minister who has ceased to retain the support of a majority in the House of Commons.

In this scenario, Her Majesty would be free to either accept the Prime Minister's request to dissolve the House of Commons and call a general election, or invite another Member of Parliament—for example, the leader of the Opposition—to attempt to form a government.

Finally, a statutory limitation to the duration of the House of Commons to a maximum of five years would look as follows:

> The same House of Common shall not continue for a longer period than five years from the date of its first meeting.

Clauses could also be included stipulating the maximum amount time after dissolution that the polling date could fall,[10] and a requirement that the first meeting of the House of Commons take place before such time after the general election has taken place.[11]

In conclusion, the status quo ex ante the enactment of the FTPA could be restored as follows:

1. The House of Commons shall be summoned and dissolved by Her Majesty on the advice of the Prime Minister.
2. Her Majesty may in her absolute discretion refuse to dissolve the House of Commons on the advice of a Prime Minister who has ceased to retain the support of a majority in the House of Commons.
3. A general election for members of the House of Commons shall take place not later than thirty days after a dissolution of the House of Commons.
4. The House of Commons shall meet within thirty days from that polling day.
5. The same House of Commons shall not continue for a longer period than five years from the date of its first meeting.

Australia

Section 5 of Part 1 of the Commonwealth of Australia Constitution Act states the following:

> Prorogation and Dissolution:
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> The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or

[10] Article 16.3.2° states that, 'A general election for members of Dáil Éireann shall take place not later than thirty days after a dissolution of Dáil Éireann.' Consequently, the power to set the date of the general election lies with the Taoiseach.

[11] Article 16.4.2 of the Irish Constitution states that, 'Dáil Éireann shall meet within thirty days from that polling day.'

otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

> Summoning Parliament:
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> After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.
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> First session:
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> The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

Section 28 further states that:

> Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

The Governor-General is the representative of Her Majesty under the Australian Constitution.[12] Consequently, their powers are exercisable only on the advice of the Prime Minister.

Following the Australian approach, the FTPA could be replaced as follows:

1. Her Majesty may appoint such times for holding the sessions of the Parliament as she thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Commons.
2. After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.
3. Every House of Commons shall continue for five years from the first meeting of the House, and no longer, but may be sooner dissolved by Her Majesty.

Codification of the prorogation of parliament

It should be noted, however, that clause 1 above, inspired by the Australian Constitution, refers to prorogation as well as to dissolution. Such a clause would therefore place the power to prorogue Parliament on a statutory basis, effectively superseding the prerogative in this area. This reference to prorogation could be deleted so that the section only refers to dissolution. Prorogation therefore would remain subject to the exercise of the prerogative.

It should be noted that there is no power of prorogation under the Irish Constitution. The sitting of the Irish legislature—the Oireachtas— therefore is not dependent upon the discretion of the executive. Given the important function of a legislature in holding an executive to account,[13] it is submitted that this is the preferential constitutional position and

[12] Section 61 of Chapter 2 of the Commonwealth of Australia Constitution Act states that, 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'

[13] R (Miller) v Prime Minister; Cherry v AG for Scotland [2019] UKSC 41, [50].

that the power to prorogue parliament in the UK should be abolished. This is not to say that the State Opening of Parliament should also be abolished; rather, the authority as to when the legislature sits should reside with the legislature. The executive branch would and should still retain the constitutional function of setting the legislative agenda for parliament on behalf of Her Majesty. Such an agenda could be set out from time to time as the executive sees fit.

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