Part II

Monarchical Functions

3

Constitutional Functions of the Monarchy

Contents

3.1. INTRODUCTION

Professor Robert Hazell, The Constitution Unit, University College London

This chapter is about the monarch's constitutional role. In all the countries under review, except for Sweden, the monarch retains important prerogative powers. These are summarised in Table 3.1, with the relevant provisions from each country's constitution. They are the power to appoint and dismiss ministers, and so to form new governments, and bring them to an end; the power to summon and dissolve

parliament; and the power to give royal assent to laws and decrees. In all the countries these powers have become tightly circumscribed by convention, and in some cases regulated by law, so that the monarch is left with little or no discretion in exercising these powers.

One question to be explored is whether the monarch is left with any real power in exercising these constitutional functions. How much discretion is left to the monarch in the process of government formation, or summoning or dissolving parliament? And should the monarch retain discretionary powers; or should they be removed, as in Sweden? Another question is to ask how much difference there is between Sweden, where formally the King has no role; and Denmark or Norway, where the constitution prescribes a role, but in practice there is none.

A third set of questions asks whether it still makes sense, on a precautionary basis, for the monarch to retain deep reserve powers, even if they might never be exercised. What does it mean, for the monarch to be the ultimate guardian of the constitution? In a constitutional crisis, would the monarch still have effective powers? In what circumstances would they be exercised? These questions are debated amongst constitutional scholars, and receive different answers in the different countries surveyed below.

Table 3.1 Main constitutional functions of the monarchy

Country	Appoint and dismiss ministers	Summon and dissolve parliament	Royal Assent to legislation	Immunity of monarch, accountability of ministers	Oath to observe the Constitution
Belgium	Article 96	Articles 44 and 46	Article 109	Article 88	Article 91
Denmark	Article 14. Constitutional convention of *Dronningerunden*	Article 32	Article 14	Article 13	Article 8
Luxembourg	Article 77.	Articles 72 and 74	No: Article 34 amended in 2009 to remove Royal Assent	Articles 4 and 78: ministers are responsible	Article 5
Netherlands	Articles 43 (general provision), 44 (departments, ministers), 48 (prime minister)	Article 64 (dissolution by royal decree: requires ministerial countersignature)	Articles 47 and 87 (legislation requires consent of parliament and King, counter signed by a minister)	Article 42.2 for immunity of the king and accountability of ministers	Article 32 for the king, Article 37.4 for the Regent

(continued)

Table 3.1 (***Continued***)

Country	Appoint and dismiss ministers	Summon and dissolve parliament	Royal Assent to legislation	Immunity of monarch, account-ability of ministers	Oath to observe the Constitution
Norway	By the King in Council. Article 12 (appointment), Article 22 (dismissal)	Article 69: King can summon parliament during vaca-tions etc. Parliament cannot be dissolved	By the King in Council. Articles 77 to 81	Article 5	Article 9
Spain	Section 62.d, 62.e	Section 62.b	Section 62.a	Section 56.3	Section 61
Sweden	No. Speaker appoints the prime minister on behalf of the Riksdag. 1974 Instr of Gov, Ch 6 Art 6	No	No	Criminal immunity. 1974 Instr of Govt, Ch 5 Art 8	New monarch is expected to give declara-tion of office before the Riksdag
UK	Yes. Cabinet Manual paras 2.7–2.20	Power to dissolve rests with Parliament itself, under Fixed Term Parliaments Act 2011. Monarch summons Parliament on ministerial advice	Royal Assent last withheld in 1708. Monarch would only refuse Royal Assent on ministerial advice	Civil and criminal immunity at common law	Coronation oath includes promise to govern the peoples of the UK and realms according to their respec-tive laws and customs

Note: The Table records the formal position, as set out in each country's constitution. In practice, many of the functions are exercised only on the advice of the government: for details, see the text on each country below.

3.2. CONSTITUTIONAL FUNCTIONS OF THE MONARCHY IN THE UK

Professor Robert Hazell, The Constitution Unit, University College London

INTRODUCTION: THE LOSS OF THE MONARCH'S RESERVE POWERS

All of the important prerogative powers remaining in the hands of the monarch in the UK have been removed or diluted in recent years. In particular the power to choose a Prime Minister, and the power to dissolve Parliament have been significantly curtailed.

Most prerogative powers are now exercised directly by government ministers. But the Queen still exercises some prerogative powers herself, known variously as her reserve powers, constitutional powers, or the personal prerogatives (a term first coined by Jennings, 1959). The most important powers are:

- To appoint and dismiss ministers, in particular the Prime Minister;
- To summon, prorogue and dissolve Parliament;
- To give royal assent to bills passed by Parliament.

The sections which follow demonstrate that in exercising these powers the monarch no longer has any effective discretion. This introduction summarises the overall argument.

The constitutional conventions about the appointment of the Prime Minister have been codified in the 2011 Cabinet Manual, which explains that it is for the parties in Parliament to determine who is best placed to command the confidence of the House of Commons, and communicate that clearly to the monarch.

The prerogative power of dissolution was abolished by the Fixed Term Parliaments Act 2011. Parliament is now dissolved automatically after five years, or earlier if two thirds of the House of Commons vote for an early election, or the government loses a no confidence motion and no alternative government can be formed. The power of prorogation was exercised in 2019 to close down Parliament for five weeks, an order subsequently declared to be unlawful. Following that judgement, future prime ministers who wish to prorogue Parliament for more than a few days will have to provide good reasons.

Royal assent to a bill has not been refused since 1708. It would only be withheld now (as then) on the advice of ministers. That might happen with a minority government which could not otherwise prevent the passage of legislation against its wishes, but it would be very controversial.

The Queen might still have to exercise discretion in very exceptional circumstances: for example, if the Prime Minister suddenly died, or refused to resign following a formal vote of no confidence. So the monarch remains the ultimate constitutional longstop.

The Appointment of the Prime Minister

The appointment and dismissal of ministers is made on the advice of the Prime Minister. The last time a Prime Minister was dismissed was in 1834: few would maintain that the power could be exercised today, save as a deep reserve power (Blackburn 2004: 551; Twomey 2018 ch 4).[1] As the Cabinet Manual records:

> Historically, the Sovereign has made use of reserve powers to dismiss a Prime Minister or to make a personal choice of successor, although this was last used in 1834 and was regarded as

[1] Blackburn, in an article aimed at restricting any discretionary use of the monarch's personal prerogatives, suggested that 'A monarch is duty bound to reject prime ministerial advice, and dismiss the Prime Minister from office, when the Prime Minister is acting in manifest breach of convention'. The example he gave was if a Prime Minister, after a successful no confidence motion, refused to resign or call a general election. The consequence of no confidence motions is now regulated by the Fixed Term Parliaments Act 2011.

> having undermined the Sovereign (Cabinet Office 2011:14. The episode was King William IV's dismissal of Lord Melbourne and replacement by Sir Robert Peel).

Until 2010, the conventions governing the appointment of a Prime Minister were to be found only in the academic literature, as in Denmark (see 3.3 below). But they have now been codified in the Cabinet Manual. It states that when a party wins an overall majority in a general election the result is clear, and the Queen appoints the party's leader as Prime Minister. When the result is unclear because no party has an overall majority, the Queen will appoint that person who is most likely to command the confidence of the House of Commons.

The key paragraphs in the Cabinet Manual about a hung parliament are as follows:

> **Parliaments with No Overall Majority in the House of Commons**
>
> 2.12 Where an election does not result in an overall majority for a single party, the incumbent government remains in office unless and until the Prime Minister tenders his or her resignation and the Government's resignation to the Sovereign. An incumbent government is entitled to wait until the new Parliament has met to see if it can command the confidence of the House of Commons, but is expected to resign if it becomes clear that it is unlikely to be able to command that confidence and there is a clear alternative.
>
> 2.13 Where a range of different administrations could potentially be formed, political parties may wish to hold discussions to establish who is best able to command the confidence of the House of Commons and should form the next government. The Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed.

The Cabinet Manual goes on to describe what happens if the Prime Minister resigns mid-term, stating that it is for the party or parties in government to identify who can be chosen as the successor (paragraph 2.18). So the monarch is left with no discretion in any circumstances in which she may be required to appoint a Prime Minister, whether post-election or mid-term. Indeed the Cabinet Manual makes clear that the whole purpose is to remove any residual discretion:

> In modern times the convention has been that the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons (para 2.9).

One further reform which has been advocated would be to hold an investiture vote on the floor of the House of Commons as the first piece of business after an election, to determine who commands the confidence of the new parliament (Commons Political and Constitutional Reform Committee 2015: paras 62-63). This is the practice followed in Scotland and Wales, under section 46 of the Scotland Act 1998, and section 47 of the Government of Wales Act 2006. It would help clearly to distance the monarch from the political process; but it has not yet found favour with the government at Westminster (Schleiter et al 2016).

The Power to Summon and Dissolve Parliament

The summoning and dissolution of Parliament has also been done by the personal prerogative. By convention, it has been the constitutional right of the Prime Minister to determine the timing of a dissolution and hence of the next election, and to advise the monarch accordingly. The majority view amongst constitutional experts has been that the monarch could refuse an untimely request for dissolution, even though there has been no refusal in modern times (Blackburn 2004: 554–61; Brazier 2005: 45–47). But any doubt or dispute is now academic, because the prerogative power of dissolution has been abolished by the Fixed Term Parliaments Act 2011. Dissolution in the UK is now regulated by statute not the prerogative; and it is a matter for Parliament, not the executive.

The Fixed Term Parliaments Act 2011 provides for five year parliaments, with automatic dissolution 17 working days before the next election. Section 3(2) states boldly, 'Parliament cannot otherwise be dissolved'. There is provision for mid-term dissolution in section 2, but again by statute not under the prerogative. Section 2 allows for a mid-term dissolution in only two circumstances: if two thirds of all MPs vote for an early general election; or if the House passes a formal no confidence motion 'that this House has no confidence in Her Majesty's Government', and no alternative government which can command confidence is formed within 14 days. The procedure for forming an alternative government has not yet been tested. It might require exercise of the Queen's powers to appoint or dismiss a Prime Minister. She might be called on to appoint a new Prime Minister, if it appears that there is an alternative Prime Minister who could command confidence. She might also be called on to dismiss the incumbent Prime Minister, if there is a successful no confidence motion, but the Prime Minister refuses to resign (Howarth 2018; but see Laws 2019).

The Power to Prorogue Parliament

The prerogative power to prorogue Parliament remains. Prorogation happens at the end of a parliamentary session (normally each year); dissolution happens at the end of a Parliament, to dissolve Parliament before an election. The Cabinet Manual explains prorogation as follows:

> 2.24 Prorogation brings a parliamentary session to an end. It is the Sovereign who prorogues Parliament on the advice of his or her ministers. The normal procedure is for commissioners appointed by the Sovereign to prorogue Parliament in accordance with an Order in Council. The commissioners also declare Royal Assent to the Bills that have passed both Houses, so that they become Acts, and then they announce the prorogation to both Houses in the House of Lords.

Until 2019 prorogation had generally been exercised without the kind of controversy which has occurred in Canada (Russell and Sossin 2009). That changed dramatically when in August 2019 the new Prime Minister Boris Johnson advised the Queen to prorogue Parliament for five weeks, leading to accusations that he was closing down

Parliament in order to avoid scrutiny of his Brexit plans. A successful court challenge led the Supreme Court to declare not merely that the advice to prorogue for such a lengthy period was unlawful, but that the prorogation order itself was null and void (*R (Miller)* v *The Prime Minister* [2019] UKSC 41). The subsequent prorogation to end the session in October was for just three sitting days. In future Prime Ministers who wish to prorogue Parliament for more than a few days will have to provide good reasons, which may be scrutinised by the Palace in the light of the principles laid down by the Supreme Court: neither the monarch nor the Prime Minister will want any future prorogation to be declared unlawful. But post-Brexit, legislation may be introduced to require parliamentary consent to prorogation, or to remove the power from the Prime Minister and hand it to the House of Commons – as has happened with the power of dissolution.

Giving Royal Assent to Bills

Royal assent to a bill was last refused in 1708, when Queen Anne, on the advice of her ministers, withheld royal assent to a bill to arm the Scottish militia. In 1914, King George V nearly withheld his assent to the Irish Home Rule Bill but was persuaded not to, again on ministerial advice. It is inconceivable that the monarch would withhold royal assent today, save on the advice of ministers. Robert Blackburn suggests that the monarch's role is limited to one of due process, and royal assent is a certificate that the bill has passed through all its established parliamentary procedures (Blackburn 2004: 554). Rodney Brazier has argued that a monarch might still veto a bill which sought to subvert the democratic basis of the constitution, but accepts that this leads to grave difficulties of definition. Mike Bartlett's play *King Charles III* (2014) is predicated on the new King Charles refusing royal assent to a bill restricting the freedom of the press. Even in such an extreme case, Brazier would prefer the monarch to find a means other than withholding royal assent to express his concerns (Brazier 2005: 47).

The only circumstance in which it is conceivable that royal assent might be withheld is if a bill had been passed by both Houses against the wishes of the government, and it afforded the government a last ditch means of preventing the bill from becoming law. That might happen with a minority government which could not prevent the passage of legislation by the opposition majority, but did not wish to see it enacted. Brexit has now provided such a circumstance. In January 2019 the *Daily Telegraph* reported that 'a senior government minister confirmed that one option was for the Queen to be asked not to give royal assent to any backbench legislation' designed to frustrate Brexit (Hope 2019).

This raises the question whether royal assent is a legislative power that is triggered by successful passage of a bill through the two Houses of Parliament, or an executive power effectively in the hands of the government. Recent precedent suggests that it is an executive power. Anne Twomey records that the 'Sovereign has … frequently and recently refused assent to bills passed by the legislatures of British colonies'. This includes former colonies: in 1980 the UK government prepared to advise the Queen to refuse royal assent for a bill from New South Wales, which forced the New South Wales government to let it lapse to prevent a formal refusal (Twomey 2018: 638).

Writing about the application of these precedents to blocking Brexit legislation, Robert Craig concluded

> [t]he better view is probably that [the Queen] must follow the ministerial advice. The Queen could not legitimately be criticised for following the advice of a Government that has the confidence of Parliament. All criticism ought to be directed at her Government which is democratically accountable to Parliament and whose constitutional role is to absorb such criticism instead of the monarch (Craig 2019).

So if the Queen is advised to withhold royal assent, she would have to follow the government's advice. The remedy for parliamentarians frustrated at their legislation being blocked would be to put down a motion of no confidence, and seek to remove the government.

The Retention of a Deep Reserve Power

So to conclude, the monarch's personal prerogative powers contain no real political power. The Queen has no effective discretion in deciding whom to appoint as Prime Minister; in deciding whether to summon, dissolve or prorogue Parliament; or to grant royal assent to bills. It is true that the monarch might, in very exceptional circumstances, still have to exercise a choice: for example if the Prime Minister were killed, or suddenly died. In that event, there would be no time to hold a vote of the party membership. An interim prime minister would need to be appointed until the party had elected a new leader; the monarch would look to the Cabinet to nominate the caretaker (Norton 2016). Other hypothetical examples are possible: if the Prime Minister refused to resign after a successful no confidence motion, even though the House of Commons had voted confidence in an alternative; or if the Prime Minister sought an unduly long prorogation, or a sudden prorogation in order to avoid a parliamentary vote of no confidence (Twomey 2018: ch 8). In such circumstances the monarch retains a deep reserve power to dismiss the Prime Minister; or, strengthened by the judgement of the Supreme Court in *Miller*, to refuse or to modify an improper request for prorogation.

The monarch is the ultimate constitutional longstop. In 2016 I wrote, in a paper to mark the Queen's 90th birthday just before the Brexit referendum, that 'in Britain's political culture, it is hard at present to see those longstop powers ever needing to be exercised' (Hazell and Morris 2016: 9). That judgement now seems complacent, and premature. The fevered politics of Brexit have seen conventions being stretched to the limit, and beyond. Conventional wisdom is that reserve powers should remain in the background, never needing to be deployed because politicians will not wish to push the boundaries, and will certainly want to avoid dragging the Queen into politics. But Brexit has smashed that wisdom, and those certainties. In October 2019 the Sunday Times had the histrionic headline, 'Sack me if you dare', Boris Johnson will tell the Queen' (Shipman and Wheeler 2019). It is hard to believe the Prime Minister would really defy the Queen in this way; but Brexit has challenged so much conventional wisdom about the constitution, it could yet yield more surprises.

3.3. THE MONARCH'S CONSTITUTIONAL FUNCTIONS IN DENMARK

Helle Krunke, Professor of Law, University of Copenhagen

Introduction

In Denmark, the King is the head of state while the Prime Minister is the head of government. A foreign reader of the present Danish Constitution with no knowledge of Danish constitutional law might get the impression that the monarch plays an important role in the governing of Denmark. The 'King' is mentioned in many articles concerning constitutional powers. For instance, in article 3 it states 'Legislative authority shall be vested in the King and the Folketing, the Danish Parliament, jointly. Executive authority shall be vested in the King'. Other examples are prerogatives like the foreign affairs prerogative in article 19: 'The King shall act on behalf of the Realm in international affairs'. In most of the articles in the Constitution, the 'King' is contemporarily interpreted as the government (including article 3 and article 19). The former royal prerogatives are nowadays governmental prerogatives. There are in fact only a few important constitutional competences left for the King personally. These competences will be discussed below.

The Council of State is Presided over by the King

The Council of State has its legal basis in article 17 of the Constitution. The body of ministers form the Council of State. The Council of State is presided over by the King (article 17, part 1). It has given rise to discussion whether the King has the right to vote in the Council like the members. The King cannot be considered a member of the Council (Andersen 1954: 180-81). The King's role in the Council of State is discussed in more detail in Chapter 4.3.

The King Signs Resolutions Relating to Legislation and Government

The King signs resolutions relating to legislation and government (for instance the appointment of ministers) according to article 14, third sentence: 'The signature of the King to resolutions relating to legislation and government shall make such resolutions valid, provided that the signature of the King is accompanied by the signature or signatures of one or more ministers'.

Whereas many articles in the Constitution, which only mention the term 'King' can today easily be interpreted as meaning the 'government', article 14 mentions both the King and the government (ministers). A distinction is made between the King and the government. The reason for this is that article 14 stems from the 1849 Constitution and has survived several revisions of the Constitution.

A constitutional convention has emerged according to which the King can sign resolutions outside the Council of State and the Council can then give its approval to the resolution at a following meeting (Zahle 2006: 173).

Article 14 gives rise to two related questions: can the King refuse to sign a bill? And is a bill, which is not signed by the King, valid?

Generally, it is unthinkable that the King should refuse to sign a bill. In contemporary constitutional theory it has been argued that the monarch does not have the right to decline to sign a bill laid before him. According to the constitutional scholar Zahle (2001: 301), this 'corresponds to the Monarch's non-political position and practice'. Apparently, Zahle refers to article 13 according to which 'the King shall not be answerable for his actions; his person shall be sacrosanct. The ministers shall be responsible for the conduct of government; their responsibility shall be defined by statute'. This means that the monarch acts on the responsibility of a minister and in this way has no independent political role to play.

If article 13 is interpreted as containing an obligation for the King to act according to the wishes of the ministers (Andersen 1954: 97), the King violates the Constitution by not signing a bill.[2] Thus, he would violate the solemn declaration that he signed before the Council of State prior to his accession to the throne. According to article 8, the King must declare that he will faithfully adhere to the Constitutional Act. On the other hand, if the King refuses to sign a bill because he finds that the bill violates the Constitution, he would partly be true to his own solemn declaration. The King might have the support of the people in such a situation. The Constitution does not give the government and Parliament a specific right to depose the King from his throne, but if he violates the Constitution, the precondition for his right to reign has lapsed.

The refusal to sign a bill would without doubt create a political crisis. The King would be under substantial political pressure if he refused to sign a bill; this pressure would almost certainly lead to his resignation. In practice, the monarch always signs legislation laid before him.[3]

The second question – whether a bill that is not signed by the King would be valid – is also of great significance. One might argue that by not signing a bill laid before him the King violates the whole idea of parliamentary government, which is an essential constitutional principle. This principle was established in 1901 when the King accepted that it is Parliament and not the King that decides who should be in government. The legal basis for this principle was a constitutional convention until 1953, when it was then codified in article 15 of the Constitution:

(1) A Minister shall not remain in office after the *Folketing* has approved a vote of no confidence in him.
(2) When the *Folketing* passes a vote of no confidence in the Prime Minister, he shall ask for the dismissal of the Ministry unless writs are to be issued for a general election.

[2] According to Andersen, it follows from article 13 of the Constitution that the King normally has an obligation to act according to the wishes of the ministers.

[3] An instruction from the Ministry of State states how the Queen should be addressed in the Council of State when asked to sign a bill, which the government is going to introduce, or to give royal assent to a bill passed by Parliament. Interestingly, terms like 'petition/request' and 'it may please your Majesty to approve' are used. See Vejledning om ekspedition af statsrådssager, 14 January 2002.

> Where a vote of censure has been passed on a Ministry, or it has asked for its dismissal, it shall continue in office until a new Ministry has been appointed. Ministers who remain in office as previously mentioned shall perform only what may be necessary to ensure the uninterrupted conduct of official business.

If article 14 is read and interpreted against the principle of parliamentary government, it seems that the King's signature cannot be mandatory in a modern democracy for a bill to become valid. Otherwise, the King would be able to block bills adopted by the legislature (Parliament and government), which is elected by the people.

However, there exists a very interesting case, which supports the proposition that bills actually need the monarch's signature in order to be valid. On 26 June 1998, a bill, which amended another bill on social pensions, was adopted in the Danish Parliament (L 109, 26 June 1998, session 1997-98). According to article 22 of the Constitution, a bill must receive royal assent not later than 30 days after it was finally passed. This royal assent is carried out as described in article 14. The King and a minister sign the bill. By mistake, the Ministry of Social Affairs did not manage to get the Queen's signature on the bill within 30 days. The bill was then introduced once more before Parliament on 13 November 1998 (L 85, 13 November 1998, session 1998-99). The explanatory notes said the following:

> The bill is an unchanged introduction of bill no L 109, parliamentary session 1997-98, which was adopted by the Parliament on 26 June 1998. Due to a mistake in the Ministry of Social Affairs the bill did not receive Royal Assent and thus it lapsed.

Under the (very short) discussion of the bill in the Danish Parliament it was accepted by representatives from several political parties that the bill needed the Queen's signature in order to become valid.[4] Additionally, the Minister of Social Affairs expressed the necessity of the second introduction of the bill (and thereby of the Queen's signature). This precedent suggests that it would seem incorrect to claim that a bill can be valid without the King's signature. It is interesting to see this in connection with the first question on whether the King can refuse to sign a bill. If we follow this line of thought, the King might have a constitutional obligation to sign bills; but if he disagrees with the content of a bill and fails to sign it, it might not be valid. If this is the case, it seems to place the King in a powerful position, if he does not want to sign a bill.

Treaties

According to article 19 of the Constitution, the King acts on behalf of the state in international affairs. Today the 'King' is interpreted as the 'government'. Nevertheless, the King still signs international agreements of importance. The Prime Minister or the Minister of Foreign Affairs countersigns such agreements and the King signs under the

[4] See the discussion in Parliament regarding the re-introduction of the bill on 13 November 1998. Most clear is the comment from *Fremskridtspartiet*, but in their comments other parties as *Venstre, SocialistiskFolkeparti*, and *Dansk Folkeparti* also seem to consent in the necessity of a new introduction of the bill. *Enhedslisten* also seemed to recognise the necessity, but the party spokesman added the following: '… but I have to say that if one could quit the little silly formality which rests in this signature and if one could change the conditions so that it was the parliamentary majority which decided when the adoption of a bill was definite/final, then we would not have needed this farce'.

responsibility of the minister (article 14). In practice, the Minister of Foreign Affairs (or other ministers) sign the less important international agreements without involving the King.

The King Dismisses and Appoints the Members of the Government

The King appoints and dismisses the members of the government. The Constitution does not describe the departure of an old government and the formation of a new government in detail. Two articles in the Constitution are important: article 14, first sentence: 'The King shall appoint and dismiss the Prime Minister and the other ministers', and article 15: 'A minister shall not remain in office after the *Folketing* has approved a vote of no confidence in him'.

When reading these two articles one might get the impression that they are inconsistent. Article 14 originates from the first Danish Constitution from 1849. Article 15 originates from 1953, but the parliamentary principle actually goes back to 1901. The King's competence in article 14 has a formal character, in practice. The King dismisses the government when it tenders its resignation to the King.[5] The King signs off the resignation which is counter-signed by the Prime Minister.[6] The King does not decide when the government should resign. The last time the King dismissed a government without its consent and appointed a new government by his own choice was during the Easter Crisis of 1920. King Christian X ordered the Prime Minister to include Central Schleswig in a programme of re-unification with Denmark, even though 80 per cent of the population had voted to remain part of Germany. The Prime Minister resigned, and the King dismissed the rest of the government and appointed a caretaker Cabinet. But the dismissal caused an almost revolutionary atmosphere in Denmark, and threatened the future of the monarchy. After a few days, the King had to dismiss the new government he had appointed.

An interesting situation would occur if the Prime Minister refused to tender his government's resignation to the King after Parliament had approved a vote of no confidence in him (and he did not call an election as described in article 15, part 2), or if he did not call a general election before the expiration of the period for which the Parliament has been elected (four years according to article 32, part 1). The latter is the duty of the Prime Minister according to article 32, part 3. No doubt it would result in a constitutional crisis, but would the King in this situation have competence to dismiss the Prime Minister on the King's own initiative? In practice the King's involvement in the dismissal of the government has a formal character, but does this practice also have a legal character? In the situation of a vote of no confidence, the action of the King would protect the parliamentary principle in article 15, and he would be safeguarding the Constitution. According to article 8 of the Constitution, the King must, prior to his accession to the

[5] An ordinary minister has to resign after a vote of no confidence. When the Prime Minister receives a vote of no confidence, the whole government must resign unless the Prime Minister calls for an election. See article 15 of the Constitution.

[6] The government will remain in office until a new government has been appointed. However, the ministers may only perform what may be necessary to ensure the uninterrupted conduct of official business. See article 15, part 2, of the Constitution.

throne, make a solemn declaration in writing before the Council of State that he will faithfully adhere to the Constitutional Act. In the case described, the King's dismissal of the government would probably not be condemned by the Parliament and the public because the King would actually be supporting the democratic process by dismissing the government. The King is still an actor on the political scene and he might play a role especially in a state of emergency. Nevertheless, the democratic process would of course be even more secured if Parliament succeeded in forcing the government to tender its resignation (Zahle 2001: 205).[7]

The situation draws close to a constitutional emergency, if the Prime Minister refuses to tender his resignation after Parliament has approved a vote of no confidence. One could therefore argue that the King can dismiss the Prime Minister on this ground (Zahle 2001: 207). However, by accepting the constitutional emergency argument one accepts a space for the King to act without any other legal basis than emergency. Then it becomes important that the King is still an actor on the constitutional scene even though his powers are mostly (or normally) of a limited substantive nature. Under these specific circumstances, the King's role can change quickly from an insignificant player to an active, powerful political player. Accepting article 15 combined with article 8 as the legal basis of the King's ability to dismiss the Prime Minister in such a situation would be less controversial.

The King still plays a part in the formation of a new government. In Danish, the formation of a new government is called *dronningerunden* (*Dronning* meaning 'Queen' and *runde* meaning 'session/round'). This is not described in detail in the Constitution. However, some guidelines have developed in practice. They are characterised by their origin in concrete situations and of course the political course of events may vary from time to time (Zahle 2001: 209, and 2006: 157). The normal procedure is as follows. The King consults with representatives from the political parties in Parliament. According to the current Cabinet Secretary, Henning Foged, the sequence follows the number of votes each party has received in the election starting with the party with the most votes. The representatives bring two copies of their considerations on which parties should form a new government, one copy for the King and one for the Cabinet Secretary (Matzon 2019:53). After all the consultations, the Cabinet Secretary together with the Head of the Ministry of State write an analysis of who has the most support to form a new government. On the basis of the consultations, a leader of the subsequent negotiations is selected and this will be the person with the best chance of forming a government. This person is given a mandate by the King to negotiate with the political parties in order to examine the possibilities of forming a government. On the basis of these inquiries, the leader of negotiations may form a government or a new leader of negotiations may be selected. A majority government must be preferred to a minority government (Zahle 2001: 210).

This might be a difficult process because the King may receive conflicting advice given by the different political parties. If the situation becomes difficult to solve, the King should not decide the further developments of the case by himself, he should follow the advice of the retiring Prime Minister. At least, this is the clear starting point (Zahle 2006: 157). The King's actions are throughout the process carried out on the

[7] Zahle is under the impression that a minister who does not tender his resignation after Parliament has approved a vote of no confidence in him can be dismissed. However, Zahle does not clarify who dismisses him and on what legal basis.

responsibility of the retiring Prime Minister. At the end of the process, the King appoints a new Prime Minister, as well as new ministers. In 1988, it turned out to be very difficult to form a new government. Four *dronningerunder* were needed in order to reach an agreement. Some of the mandates were broader than just finding a leader of the negotiations and forming a new government. All things being equal, the broader the mandates are, the more the King will be involved in the political process (Hansen 1988).[8]

The legal status of the guidelines just described is unclear and they may vary dependent on the concrete parliamentary situation (Zahle 2006: 157). Some constitutional theorists argue that the guidelines are legally binding (Zahle 2001: 207 ff, 214 ff).[9] Others argue that the guidelines only have a political status (Christensen 1990: 197 ff; Jensen 1997: 84 ff). The unclear state of the law seems to provide the King with a certain flexibility when forming a new government, at least from a legal point of view. Especially, in a situation where a majority government cannot be established and there is more than one possibility of minority governments, there appears to be a certain room for manoeuvre (Ross 1983: 430). However, as mentioned earlier in practice there is a close cooperation between the Cabinet Secretary and the Head of the Ministry of State.

3.4. THE KING AND PUBLIC POWER IN THE MINIMALIST MONARCHY OF SWEDEN

Henrik Wenander, Professor of Public Law, Lund University

Introduction

Under the current Swedish Constitution, the distribution of powers to the monarch is based on one overarching principle, namely that the monarch shall have no formal power. This principle is based on the political compromise that formed the basis for the adoption of the current central fundamental law, the 1974 *Regeringsform* (Instrument of Government). In international comparison, Sweden stands out as formally limiting the role of the monarch to an extent that has made at least one foreign commentator question Sweden's status as a monarchy (Smith 2017: 215).

From the 1809 Instrument of Government to Constitutional Reform in 1974

The immediate predecessor to the current central fundamental law was the 1809 Instrument of Government. This fundamental law stated that the Realm should be governed by a King as a hereditary monarchy (article 1). He should govern the Realm alone, albeit for the most part on the advice of his counsellors (articles 4 and 7), then acting as *Kungl. Ma:jt i statsrådet* (Royal Majesty in the Council of State). The Council

[8] In the article, Hansen describes the process of forming a new government.

[9] According to Zahle, the parliamentary principle entails that the political parties play an important role in the appointment of a new government, see also Zahle 2001: 210, 34.

of State met in the weekly *konselj* (cf French 'conseil'). In some duties, the King acted by personal power. This was the case for his role as the Commander-in-Chief (article 14) and as head of the royal court (article 48).

The overall structure of the 1809 Instrument of Government grew ever more obsolete over the decades. Without constitutional amendments, the Council of State developed from being the King's counsellors to a government, accepted by a majority in the Riksdag. In this way, parliamentary rule was established around 1918. According to constitutional convention, the King from now on always followed the advice of his ministers (Herlitz 1969: 99).

In the general modernisation of Swedish society, a constitutional reform project started in 1954. One central question was whether Sweden should remain a monarchy. The Social Democratic Party wanted Sweden to become a republic, while the more conservative parties wanted to retain the monarchy. The work of a cross-party committee of inquiry, supported by legal and political experts, ended in the so-called Torekov Compromise in 1971, named after a bathing resort in southern Sweden where the inquiry convened (Åse 2009: 29 ff).

This compromise meant that Sweden should remain a monarchy, but that the King should be stripped of all his constitutional functions, leaving a purely ceremonial and symbolic role. The formal legislative and political powers vested in the monarch under the 1809 Instrument of Government should be transferred to other constitutional actors. Under the leading principle of popular sovereignty, the new constitutional body of the *Regering* (government), consisting of the prime minister and the other ministers, should replace Royal Majesty in the Council of State. Other features of Swedish monarchy, not directly related to the exercise of public power, were to remain as they were, notably the legal status of the royal court as a special body under the direct and individual leadership of the king (SOU 1972:15, 80).

The proposal of the drafting committee meant a total constitutional reform with a new Instrument of Government to replace the 1809 Instrument. The proposal was for the most part accepted by the government, which proposed a government bill to the Riksdag (Prop. 1973:90). The Committee on the Constitution accepted the proposal without further comments on the role of the monarch (Bet. KU 1973:26, 29 ff). The new Instrument of Government was adopted by the Riksdag in 1974 and entered into force in 1975.

The Current Role of the King

Under the 1974 Instrument of Government, the King or Queen occupying the throne in accordance with the Act of Succession is the head of state (Chapter 1, article 5). If the King or Queen is unable to perform his or her duties, the member of the royal house in line of succession shall assume the duties of head of state as regent *ad interim* (Chapter 5c, article 4). Although the text of the Instrument of Government uses the term head of state, for simplicity we refer to the King in what follows.

The fundamental role of the King is regulated in the written constitution by the absence of formal powers (Warnling Conradson et al 2018: 110). Thus, the Swedish King neither signs new legislation, nor does he appoint the government (Nyman 1982: 182).

Also, the remaining tasks of the King are to a large extent left unregulated in the fundamental laws. Some clarity, however, is offered by the legislative materials to the 1974 Instrument of Government. The government bill makes rather vague references to the King's role according to custom and public international law. It especially mentions the King's state visits to other countries, his tasks relating to foreign and Swedish ambassadors and other representative tasks. The King's public activities 'shall be characterised by his role of representing the nation as a whole' (Prop. 1973:90, 173 ff, Nyman 1982: 183).

Relating to this latter role, the King may act as a unifying symbol in times of crisis. In this way, the King in January 2005 made a televised speech at a memorial ceremony for over 500 Swedish victims of the tsunami in Asia a few days earlier. The speech was very favourably received by public opinion (Åse 2009: 133 ff).

The legislative materials underline that the King may not give the impression of tensions between the monarch and the political branches of government. He should furthermore avoid taking part in activities that concern controversial social issues (SOU 1972:15, 139; Prop. 1973:90, 174; Nyman 1982: 183).

On some occasions, the King's public statements have given rise to debates relating to his neutrality. This was the case in 1989, when a televised documentary film on the brutal hunting of seal pups in Norway raised general indignation in Sweden. The King commented critically on the role of the Norwegian Prime Minister. This in turn spurred criticism from both Norway and political leaders in Sweden (Ögren 2006: 85; Åse 2009: 40).

There is no form of legal or political control of the King's actions. Further, the King cannot be prosecuted for his actions (chapter 5, article 7 of the 1974 Instrument of Government). This criminal immunity applies to both the official and the private capacity of the King's actions. However, this provision does not prevent Sweden from fulfilling its obligations towards the International Criminal Court or other such courts (chapter 10 article 14). The absence of criminal sanctions, however, does not imply that the King is above the law (Nyman 1982: 184).

The King shall also under the current constitutional order act as the head of *Kungliga Hovstaterna* (the royal court) and the royal family (Prop. 1973:90, 172 ff). The latter role is reflected in the provisions of the Act of Succession on marriage and travel abroad (see Calissendorff in chapter 8).

The King, acting within *Kungl. Maj:ts Orden* (The Order of his Majesty the King), may decide on royal orders according to *Ordenskungörelsen* (The Ordinance on Orders, 1974:768). A further competence – not regulated in any piece of legislation – is the possibility to award the status of *Kunglig hovleverantör* (purveyor to the royal court) (Föreskrifter rörande hovleverantörskap 2015).

Strömberg (2001-02: 723 ff) identifies a number of other tasks of the King, including participation in public festivities such as the award of the Nobel Prizes in Stockholm as well as acting as a patron of various private and quasi-public organisations. A special debate relating to this latter function concerned the King's role as patron of the Swedish Academy, founded in 1786 as a Royal Academy. Following a scandal in the Academy in 2018, the question arose whether the King had the power to amend the statutes. The King held the view that the statutes adopted by his predecessor King Gustav III were at his disposal, and decided on an amendment. The decision was legally founded on the view that the King as patron had retained this competence over this quasi-public body

ever since 1786, and that nothing in the 1974 Instrument of Government meant that the government had taken over this function (Sunnqvist and Wenander 2018: 570 ff). It is plausible that the government, concerned about the reputational damage to Sweden, and uncertain about the scope of its own legal authority, was content for the King to act. But in the ensuing debate, critics remarked that this could be seen as an attempt to strengthen royal power, which would be at odds with the principles behind the Torekov Compromise (eg Gustafsson 2018).

The King and the Riksdag

Under the principle of popular sovereignty underlying the 1974 Instrument of Government, all public power shall proceed from the people with the Riksdag as the people's foremost representative (chapter 1 articles 1 and 4). The 1974 Instrument of Government therefore has limited the King's role to a minimum (Nyman 1982: 182). Still, the constitutional relationship between the King and the Riksdag is not entirely clear (Bull and Sterzel 2015: 144). Not least, the written Constitution is silent on the scope for adopting further legislation on the King and the royal court. Sterzel (2009: 153) concludes that the Riksdag could only regulate the King's duties and status by constitutional amendments.

However, the Riksdag may regulate the King's activities indirectly, since it decides on the national budget, including the public funding of the royal court (Bull and Sterzel 2015: 144). This has opened up parliamentary discussions on the royal court's use of resources and on requirements of transparency (Bet. 2013/14: KU1, 12 ff). However, this is complicated by the partially unclear boundaries between public property and the private possessions of the King and the royal family (Sterzel 2009: 161 ff): see also Chapter 7. *Riksrevisionen* (The National Audit Office), an independent administrative authority under the Riksdag, may audit parts of the royal court, viz *Kungliga Slottsstaten* (the Palace Administration) and *Kungliga Djurgårdens Förvaltning* (the Royal Djurgården Administration) (article 2 of *lagen* [2002:1022] *om revision av statligverksamhet m.m.*, the Act on Audit of State Activities).

When a new King or Queen accedes the throne, he or she may give an *ämbetsförklaring* (declaration of office) before the Riksdag (chapter 6, article 17 of the 2014 Riksdag Act; Prop. 1973:90, 270). Since there has been no succession to the throne under the current Instrument of Government, this provision has not yet been applied.

The King and the Government

How the King works with the government is described in Chapter 4.6. A new government takes office at a special Council of State before the King, in the presence of the Speaker of the Riksdag. The latter issues a letter of appointment on behalf of the Riksdag (Chapter 6, article 6 of the 1974 Instrument of Government). According to convention, the King concludes that a new government has taken office. After this, behind closed doors, the Prime Minister informs the King on the programme of the new government (Holmberg et al 2012: 310).

The Constitution contains an unusual provision if Sweden is at war, which may stem from Sweden's observation of what happened in Denmark and Norway during World War Two. In the event of war, the King shall accompany the government. Should the King be on occupied territory, or be separated from the government, he shall be considered unable to carry out his duties (chapter 15, article 10 of the 1974 Instrument of Government). The reason for this is the risk of an occupying power trying to use the symbol of the King for its own purposes (Prop. 1973:90, 462).

Conclusions

To conclude, the overall impression of the constitutional framework for the Swedish monarchy is that the Torekov Compromise has been carried out effectively. The scope for a King or reigning Queen to legally interfere with the work of the Riksdag or the government, or to take any formal political role is very limited. A special case is the curious legal status of the Swedish Academy, where the King actually made a formal decision in a much-debated matter. It is highly unlikely that there are other such hidden competences in the Swedish public or, in this case, quasi-public, sector.

Equally important are the more 'soft' constitutional powers of the King. The recurrent contacts with the Prime Minister may establish a certain scope for informal influence. The core of the constitutional role of the King is, however, his role as a symbol of the whole nation. A concrete example of this function is the King's speech at the memorial ceremony for the victims of the tsunami catastrophe. This is further reflected in the provisions on the King's role in situations of war.

The Swedish monarchy, resting on the 1971 Compromise, is an idiosyncratic model founded on a political compromise. Whereas certain aspects are indeed stretching the understanding of the concept of a constitutional monarchy, it also retains some archaic features which have not been changed by the 1974 Instrument of Government. In the latter category we find the role of the King as the head of the royal court and the royal family. The King's status outside of the constitutional structure based on the idea of popular sovereignty, the interplay between modern and archaic features and the combination of written and of unwritten law makes the constitutional role of the Swedish King partially unclear.

3.5A. CONSTITUTIONAL FUNCTIONS IN THE NETHERLANDS

Rudy Andeweg, Professor of Political Science, Leiden University

Introduction

The Netherlands is one of the few states that transformed from a republic into a monarchy, and this transformation was largely imposed on the Dutch by France and the United Kingdom. In 1806, the Emperor Napoleon created a Kingdom of Holland with his brother on the throne, but after only four years Louis Bonaparte was forced to abdicate and the Netherlands were annexed outright by France. The monarchical experiment had

no lasting effects, except for the fact that a few years later King William I did fall back on some of the arrangements of 1806-10. The British contribution may have been more important. On his return to the Netherlands after the Napoleonic period, in 1813, the Prince of Orange was accompanied and advised by Lord Clancarty, who saw himself as the midwife and guardian of the new Dutch state. A few patricians, acting of their own accord and without any legitimate basis, offered the Prince the sovereignty of the country: he became Sovereign Prince, and the Netherlands became a monarchy in all but name. The name and legitimation came on 12 February 1815 when the Congress of Vienna, acting on a British proposal, created the Kingdom of the Netherlands, comprising both the former Republic of the Seven United Provinces and the Austrian Netherlands, now known as Belgium. There are several theories about the British motivation for setting up this Kingdom, ranging from a geopolitical desire to have a strong buffer state north of France, to giving the Prince of Orange satisfaction for the fact that the English Princess had broken off their engagement. Although 'The Dutch monarchy is no home-grown product' (Cramer 1980), a return to republican government has never been proposed in earnest, except for a half-hearted attempt at a socialist revolution in 1918.

The eight monarchs since 1815 (four Kings and four Queens) have gradually seen their political functions reduced: in 1840 the ministerial countersignature on all bills and decrees was introduced; in 1848 ministerial responsibility was introduced; in 1866–68 it became clear that the confidence of a parliamentary majority in the government trumped the confidence of the monarch; in 1904 the royal throne was removed from the Second Chamber of Parliament; in 1939 the immediate dismissal by Parliament of a government formed by the monarch alone signaled a reduction of the role of the monarch in the formation of coalition cabinets; in 1983 the royal appointment of Speakers of Parliament was abolished; in 2003 the Office of the Queen (now of the King) was brought under the responsibility of the Prime Minister; and in 2012 the Second Chamber ended the involvement of the monarch in coalition formation.

This contribution starts with the role of the monarch in forming a government coalition. The abolition of that role is too recent to conclude that it may never return.

Coalition Formation

The constitutional basis of the monarch's involvement in the formation of a government is the provision that the King appoints the ministers. The current wording stipulates merely that the Prime Minister and the other ministers are appointed and dismissed by royal decree, but until 1983 the Constitution read that the King appoints and dismisses ministers 'at his pleasure'. Actually, that had already been a dead letter since the incident in 1939, mentioned above, when a government appointed by Queen Wilhelmina entirely at her pleasure, was censured by Parliament immediately after the royal appointment. Since then, the practice developed that the monarch's role was more to initiate and oversee the process of government formation by the party leaders. As no political party has ever controlled a majority of the seats in the Second Chamber of Parliament, the formation of a government includes more than just the appointment of individual heads of ministerial departments: it involves first the choice of political parties to make up the coalition, the drawing up of a coalition agreement spelling out the coalition's

policy plans, and the allocation of ministerial portfolios to the prospective governing parties. The most important instrument of the monarch was the appointment of one or more individuals who chaired the negotiations. Originally, such an individual was called a *formateur* but since 1951 the term *informateur* was used as well. The distinction between *formateurs* and *informateurs* is of little significance. In practice, it is now customary for *informateurs* to leave only the recruitment of new ministers to a *formateur*, who is the Prime Minister designate.

Before appointing an *informateur*, the monarch would consult all parliamentary party leaders after the election results had become known, or after an incumbent government had collapsed prematurely. If a likely coalition emerged from these consultations the monarch would follow the advice of the party leaders and appoint a politician from one of the potential governing parties, usually the largest one. If the political situation was more complicated, she would first appoint a less partisan politician such as the vice-president of the Council of State as *informateur* to explore which combination of parties was most likely to succeed in forming a coalition. If trust between the potential governing parties was too low for them to accept an *informateur* from one of the parties, a duo or troika would be appointed. In this way the monarch sought to avoid making politically controversial decisions. Nevertheless, as soon as the appointment was made public, the appointee's past was scrutinised like the entrails of a sacrificial beast by Roman augurs for any sign of a royal coalition preference.

In exceptional cases the monarch has been known to intervene personally. During the coalition formation of 1981, for example, an elder statesman from the Christian Democratic Party appeared on television to criticise his own party leader for refusing to accept the political reality that the coalition that had made up the outgoing government no longer had a parliamentary majority. The next day Queen Beatrix appointed him as *informateur* against the advice of the party leaders. In 1994, a three-party coalition was needed for a majority government, but each potential combination was vetoed by one of the party leaders. When this impasse was reported to Queen Beatrix by the *informateur*, she publicly ignored his advice and appointed the leader of the Labour Party as the new *informateur*, the only one who had not yet vetoed any combination. The monarchs probably saw it as their role to ensure that the process of forming a new government was not unduly delayed, but such personal interventions were inevitably criticised as revealing personal political preferences.

This was certainly the case in 2010 when negotiations were initiated to form a minority Cabinet of Liberals and Christian Democrats, supported in Parliament by a majority coalition comprising these parties and the populist Freedom Party. The cooperation with the populists created considerable controversy within the Christian Democratic Party, and when Freedom Party leader Geert Wilders estimated that division within the Christian Democratic Party would deprive the coalition of its parliamentary majority, the *informateur* reported to Queen Beatrix that the attempt had failed. While the Queen was still considering her next move, the leaders of the three parties suddenly decided to resume their negotiations. The Queen was not amused and appointed the vice-president of the Council of State (and a member of the Labour Party, which was opposed to this prospective coalition) as *informateur* to see if the negotiators were now serious. In contrast to the monarch's general role, this intervention actually delayed the formation process, and was interpreted as a sign of the Queen's personal displeasure regarding the inclusion of Mr Wilders – a staunch critic of her televised Christmas messages – in a governing coalition.

It may be no coincidence that soon after this episode Parliament restricted the monarch's role in the formation of a new government to the swearing in of the new ministers. The King is kept informed of the progress of the negotiations, but the Second Chamber appoints the *(in)formateurs* after some consultations by the Speaker. This procedure had actually been approved by Parliament in a resolution in 1971, but a parliamentary majority was not able to converge on a choice of *(in)formateur.* Sceptics point out that the increasing electoral fragmentation may well lead to a future failure to find a majority for a choice of *informateur*, and that the monarch's role will have to be revived. The fact that the new procedure has produced a result twice (in 2012, and 2017) provides no guarantee for future success.

Royal Assent to Bills

The Constitution stipulates that all Acts of Parliaments and Royal Decrees must be signed by the King and by one or more ministers. There is no provision in the Constitution for the resolution of a conflict between monarch and ministers leading to the refusal of the monarch to sign a bill. Such a refusal is 'the nuclear option' in such a conflict. The few cases of such a conflict that have become known all date back to the reign of Queen Juliana. After the Second World War the death penalty had been reintroduced for war criminals. The Queen, however, was a strong opponent of the death penalty. She refused to sign the death sentences of several German war criminals and the government avoided a constitutional crisis by commuting the death sentences to life imprisonment. The most famous case of a conflict between monarch and ministers is the attempt by the Biesheuvel I Cabinet (1971–72) to legislate for a reduction in the number of members of the royal family for whom the ministers would be responsible. Queen Juliana feared the introduction of first and second-rank Princes and Princesses. According to then Home Secretary Geertsema:

> I had to deal with the Queen because it was my task to draft a bill on membership of the royal house. The Queen and I had completely different views on that issue. Eventually, the Prime Minister and I had a final meeting with her in which we reached the conclusion that the Queen did not want what we wanted, and that we definitely did not want what the Queen wanted. [Former Prime Minister and Vice-President of the Council of State] Beel made an attempt to mediate, but when that failed we put the legislation on hold …. If the Queen said 'If you get that bill through Parliament I will not sign it', and that happened once in a blue moon, you had a constitutional crisis for which our constitution offers no solution. In such cases you may have to stop the legislative process, although it is extremely difficult because you cannot openly explain why you do so (interview by the author).

3.5B. THE NETHERLANDS: FROM PERSONAL REGIME TO LIMITED ROLE

Dr Paul Bovend'Eert, Professor of Constitutional Law, Radboud University Nijmegen

Introduction

This contribution discusses the position of the King in the constitutional monarchy and parliamentary democracy of the Netherlands. It specifically focuses on the development

of the (prerogative) powers of the King within the government, his role in the process of government formation and termination, and his position in case of a political conflict ending up in a dissolution of parliament. The Dutch Constitution only uses the term 'King'. In the history of the Dutch constitutional monarchy successive Queens (Queen regent Emma 1879-90, Queen Wilhelmina 1890-1948, Queen Juliana 1948-80, Queen Beatrix 1980-2013) have exercised powers in government for more years than Kings (King William I 1814-40, King William II 1840-49, King William III 1849-79, King Willem-Alexander 2013-). Nevertheless, we will use the constitutional term King, applying to the King as well as the Queen.

We first examine briefly the development of the King's governmental powers and position in general since 1814. We then separately address the position of the King in the government, his role in the formation of a new Cabinet, and in a dissolution of parliament. Lastly, we examine the changing role of the King in the Dutch system of government.

The Dutch Constitutional Monarchy Since 1814

The initial period of the constitutional monarchy (1814-48), after the adoption of the Constitution of 1814, was marked by a strong position of the King within the governmental system. The King appointed and dismissed his Cabinet ministers 'as he pleased'. And he made ample use of this power (Kranenburg 1928: 139). In addition, he exerted significant influence on the composition of the two Houses of the States General. King William I conducted a personal regime during his period of government (1814-1840). His ministers were subordinate public officials who carried out his orders. The King used to have meetings together with his ministers, called the Cabinet Council. But all matters of any importance the King eventually decided autonomously (Oud 1967: 251).

The constitutional reforms of 1840 and 1848 changed the intergovernmental relationships drastically (Besselink 2014: 1193). The introduction of the ministerial countersignature for royal decrees (government decrees) as part of the constitutional revision of 1840 led to the removal of the King's power to take governmental decisions on his own, without the involvement of his Cabinet ministers. Meetings between the King and his ministers in the so called Cabinet Council became a rare phenomenon. As a result, the King lost his central position in the government, although a general awareness that the King was no longer head of the government did not penetrate the political reality until much later.

The adoption of ministerial responsibility (1848) and the unwritten rule of confidence (1868), the rise of political parties at the end of the nineteenth century, and the introduction of general suffrage in the early twentieth century (1917) led to the establishment of fully-fledged parliamentary democracy in the Netherlands. This no longer allowed room for a leading position for the King as head of the government. Instead of the King, it was the Council of Ministers, and in its wake the Prime Minister, that played a leading role as the twentieth century progressed. At the end of the 1960s, there was even talk in constitutional theory of 'the dominion of the Council of Ministers' (Van Maarseveen 1968). For a long time, Cabinet ministers were still inclined to refer to themselves as 'servants of the Crown', but in fact, they had become servants of a majority in Parliament. The King was increasingly forced to the background.

The Role of the King in a Modern Parliamentary Democracy

It is certainly remarkable that the position of the King in the Dutch government remained so strong for such a relatively long time after the establishment of a fully-fledged parliamentary democracy early in the twentieth century. Queen Wilhelmina (1898-1948) kept a dominant position in government although the political coalition between the Cabinet and the majority in Parliament had become the primary foundation of government policy. The Queen nevertheless participated actively in the decision making process within the government. She had a special interest in foreign affairs and matters concerning the Dutch armed forces. On several occasions she personally prepared government policy notes and discussed them with the ministers in a Cabinet Council, the last examples of these meetings between Queen and Cabinet ministers in Dutch constitutional history. She also refused to sign government decrees on several occasions.

Queen Wilhelmina can be considered the last Dutch monarch with a strong position in government in the Netherlands. Her successor Queen Juliana (1948-80) did not take an active part any more in the decision making process within the government. A modern constitutional monarchy within a system of a parliamentary democracy was eventually established during the reign of Queen Juliana. In this modern concept of a monarchy the role of the King in the government is limited to what Bagehot described for the British King: the rights to be consulted, to encourage and to warn.

This limited role of the King in the government however did not exclude occasional exceptions in constitutional practice. Apparently it was accepted by the ministers in this concept of a modern monarchy that in exceptional circumstances the King was allowed to put aside his limited role in government and take up his traditional position to take joint decisions with his ministers. Queen Juliana refused on repeated occasions to grant her cooperation to government decrees proposed by ministers (see the examples cited by Andeweg above). In particular, Queen Juliana actively participated in government decisions concerning the monarchy. She played a predominant role in establishing new legislation on the funding of the monarchy (Van Baalen, Bovend'Eert et al 1972). And she refused to sign an Act of Parliament concerning (limitations on) membership of the Royal House. Nevertheless, these interventions of Queen Juliana were, as far as we know, incidental and exceptional.

As for Queen Beatrix (1980-2013), there are still no official documents available to analyse her role in government affairs. But it is likely that she continued to take up a limited role in the government as well.

These altered relationships between King and ministers within the government were for the first time reflected in the general revision of the Dutch Constitution of 1983. With this revision, the Constitution lost its strongly monarchical character. Significant attention was given, both in the text of the new Constitution of 1983 and in the explanatory notes, to the position of the King and his relation to the Cabinet members. According to the new article 42, paragraph 1, of the Constitution ('The government shall comprise the King and the ministers') the King is a constituent part of the Dutch government, not head of the government. This means that all the government decisions, referred to in article 47 of the Constitution as 'royal decrees', shall be co-signed by the King and one or more Cabinet ministers. The limited role of the King in the government is addressed in the explanatory notes to article 42 and article 47 of the Constitution. In these notes it

is finally clearly explained by the government that the King shall confine himself to the exercise of 'the rights to be consulted, to encourage, to warn' as formulated by Bagehot for the British monarch (Tweede Kamer den Staten-Generaal, Kamerstukken II 1980/1981, 16035, 8: 2). In Chapter 4 we will address further this limited role of the King in government, when we discuss the day to day political functions of the monarchy.

The King and the Formation of Government

Until 1848 the King personally decided on the appointment and dismissal of 'his' ministers, and for quite some time after 1848 the King continued to play an important role in the composition of the Cabinet. Nonetheless, in the new era after 1848 he increasingly took into account the majority positions in the Parliament, in particular with the directly elected majority in the Second Chamber (Lower House). This development, of growing parliamentary influence on the formation of Cabinets, accelerated because of the adoption of the rule of confidence in the parliamentary system (1866-68). Regarding the formation of a new government, the practice developed wherein the King appointed a *formateur* (one of the political leaders in the Parliament or the Cabinet) to form a Cabinet following elections (or, in case of a Cabinet crisis, between elections) that could count on the support of a parliamentary majority. The *formateur* would then hold consultations with the leaders of the various political parties in the Parliament in order to establish a majority coalition. The involvement of the Parliament in the formation of a new government increased over time. As from 1946, it became standard practice for the King to consult all party leaders from the Lower House at the start of the formation process. Based on the recommendations of the majority, the King next appointed one or more *formateurs* or *informateurs* to conduct coalition negotiations with the political leaders in the Parliament. In the multi-party system that characterises the Dutch Parliament, involving an electoral system of proportional representation, it is often a cumbersome exercise to form a majority coalition after a general election. Quite intensive negotiations between political leaders, sometimes lasting for months, are needed to form a Cabinet. In this new formation practice, the King continued to be closely involved in the complicated formation process, as he would appoint, at the start of the proceedings or in case the coalition negotiations reach a deadlock, one or more *formateurs* or *informateurs* based on the advice of the leaders of the parties constituting a majority (Van Baalen and Van Kessel 2012). The King fulfilled a key – but altogether neutral – role in the formation process. In this role, he acted as an independent head of state. On a few occasions involving the appointment of a *formateur* or *informateur*, the King's personal preference turned out to be decisive, in particular when the party leaders were heavily divided about the direction that the Cabinet formation should take.

The formation process thus grew out of organically developed practices, as the Constitution simply provides that Cabinet ministers are to be appointed and dismissed by royal decree, with the Prime Minister and the King together signing the decrees (articles 43 and 48 of the Constitution). The rule of confidence is of decisive importance, in that it requires that a Cabinet must be able to count on the support of a parliamentary majority.

The year 2012 saw an abrupt change in the formation proceedings that had developed over time. The Second Chamber adopted in its Standing Orders a regulation for new

formation proceedings (article 139a of the Standing Orders of the Second Chamber), which set out that the Second Chamber must appoint *informateurs* or *formateurs* itself after elections (or between elections in case of a cabinet crisis), who are charged with the formation of a (new) Cabinet (Bovend'Eert, Van Baalen and Van Kessel 2015). This new regulation made the involvement of Parliament in the formation process even more explicit. For the first time, the Netherlands had a written rule of procedure, in which the Second Chamber assigned itself the principal role. The King was removed from his role in the formation process. He no longer needed to appoint *formateurs* or *informateurs* based on consultation with the political leaders.

This new rule of procedure was first applied during the formation of the Rutte II Cabinet (2012-2017), following the elections of September 2012, and it turned out that the Second Chamber was quite capable of forming a new Cabinet without the intermediary role of the King. Various parties expected that the politicians would ultimately crawl back to His Majesty, for him to take the lead again. But in fact the formation of 2012 went rather smoothly, and it was not clear what role (if any) the King could still have fulfilled. Some parties wanted to keep the King away from the process, and not even to keep him informed. Others considered it appropriate to keep the King involved under the new procedure as well. In the end, the King was hardly kept up to date about the progress of Cabinet formation in 2012. An evaluation committee later advised the Second Chamber to keep the King better informed in future. After all, the King is still a constitutive element of the government; and he must place his signature under the appointment decrees for the new ministers and the dismissal decrees for the departing ministers (Bovend'Eert, Van Baalen and Van Kessel 2015). The Second Chamber accepted this advice, and during the Cabinet formation of 2017, the longest in Dutch history, the King was kept informed on a regular basis.

Since 2012 the King has lost his role due to the introduction of a new procedure by the Second Chamber. That is a remarkable development considering that until recently the 'monitoring' role of the King was in general much appreciated. After the Cabinet formation that followed the general election of 2010, this view faltered among various political parties, partly because Queen Beatrix was accused – rightly or not – of having made personal choices regarding the appointment of specific *informateurs*. A parliamentary majority subsequently introduced a new rule of procedure in the Standing Orders, making the King's role redundant.

However, despite the growing involvement of the Parliament in government formation, the government is not to be regarded as a committee of the Parliament. The Cabinet is a separate state authority, and the Prime Minister and the cabinet members are not appointed by the Parliament. They are appointed by royal decree, with the signature of the Prime Minister and the King. In this constellation, it is logical and wise that the King continues to fulfil a certain role in the formation process and that he is kept sufficiently informed.

The King and the Dissolution of Parliament

The Constitution of 1848 gave the government the power to dissolve each of the two Houses of Parliament. The introduction of the power of dissolution was closely linked to

the enhancement of the position of the Parliament through the constitutional revision of that same year. As of 1848, the government was much more dependent on the cooperation of Parliament for the execution of its political programme. Should an unbridgeable gap arise between government and Parliament, new elections could resolve the situation (Bovend'Eert and Kummeling 2017: 450).

In the first three dissolutions of Parliament after 1848, the King still played a leading role. The first dissolution of the Second Chamber (in 1853) was the direct result of an internal conflict in the government between King William III and the Thorbecke Cabinet concerning a religious issue. The Cabinet ministers offered their resignation. Since a majority in the Parliament supported the Thorbecke Cabinet, the government (the King plus the new ministers) decided to dissolve the Parliament.

The dissolutions of Parliament in 1866 and 1868 had special significance since a battle of principle between the government and the Parliament was fought and decided, regarding the question whether not only the approval of the King but also the approval of a parliamentary majority was needed for the Cabinet ministers to stay on. King William III initially refused to bend to the Parliament. He proceeded to dissolve the Second Chamber and, in 1868, even went so far as to call upon the citizenry in a personal proclamation to support his government in the elections. But it turned out that a majority of the newly elected Second Chamber rejected the government's policy as well. King William III considered dissolving the Second Chamber a second time, but ultimately yielded to parliamentary pressure.

After 1868, the King no longer played a central role in dissolutions of Parliament. During the course of the twentieth century the practice arose that, in case of a serious political conflict with the Parliament, the Cabinet ministers would first offer their resignation. This was then followed by an attempt to re-form a government, to see whether the party leaders could lend it their support, or whether a dissolution of Parliament was the only way to resolve the crisis. In such a crisis, the King fulfilled a similar role as in government formation after elections, described by Andeweg above. Based on the majority advice of the party leaders he would then appoint a *formateur* or *informateur* to find a way out of the crisis.

The current rule of procedure in the Standing Orders of the Second Chamber (article 139a) provides that also in case of a mid-term loss of confidence, it is not the King, but the Second Chamber which itself appoints a *formateur* or *informateur* to resolve the crisis.

Conclusion

In a modern parliamentary democracy it is unacceptable that the King would have a leading position in the government, in the formation of a government or in the dissolution of parliament. The power to make governmental decisions lies with the ministers who are responsible to the Parliament and require the confidence of a parliamentary majority. Over the years the Parliament has gained a dominant position. The King no longer has effective powers when it comes to government formation and the dissolution of Parliament. His role within the government has also changed drastically. In general, the King now only holds an advisory role.

3.6. CONSTITUTIONAL FUNCTIONS IN BELGIUM

Quentin Pironnet, Lecturer in Public Law, University of Liège

Introduction

Belgium has been a monarchy since its independence in 1830 (although the first King was crowned on 21 July 1831). However, this regime was not pre-ordained. A majority of the members of the National Congress in 1830 wanted Belgium to be a republic; but they worried the new state would not be recognised. The Netherlands did not recognise the breakaway state, and the Belgians feared that Britain, France, Germany and Russia would not recognise them either. After agonised debates in the assembly, the monarchists won by 174 to 13. The argument also had a theoretical turn, based in particular on the work of Montesquieu and Burke, and reflected a pragmatic conservatism (de Dijn 2002: 244). But in the end, a monarchy was seen as more stable.

Given the republican sentiment, it is unsurprising that the assembly chose a weak model of monarchy. The King's powers would be curtailed by the supreme text and his government would be accountable to Parliament. Inspired by the Westminster model, the founding fathers of the Kingdom of Belgium imagined their country as a parliamentary system in which ministers are fully accountable to the House of Representatives (article 101 Belgian Constitution).

On 3 February 1831, the Belgian National Congress presented the Crown to the Duke of Nemours, the second son of the French King Louis-Philippe. Faced with numerous international pressures, mainly British, Louis-Philippe declined the throne for his son on 17 February 1831. It was not until 4 June 1831 that Congress agreed to offer the Crown to Prince Leopold of Saxe-Coburg and Gotha, who was notably uncle of Queen Victoria of England. He was sworn in on 21 July 1831.

The constitutional functions of the King are not transferred to him at the time of the death or abdication of his predecessor, but on the day of the swearing of an oath before the assembled legislative chambers, pursuant to article 91 of the Belgian Constitution. During the interregnum, it is the 'ministers meeting in Council' who, jointly, are the recipients of the sovereign's powers.

These constitutional functions are of several kinds, and have been interpreted differently throughout Belgian history. First, it should be noted that the King has no purely personal power, since a minister must always take responsibility for his own actions. This is the primary rule of ministerial countersignature (article 106). The King is also inviolable (article 88), which led Joseph Lebeau, one of the founding fathers of the Kingdom, to conclude early on that royalty was not a real power (Senelle 2006: 55).

Since the conclusions of the Soenens Committee in 1949, the King has been restricted in his constitutional power, and ministerial responsibility is absolute. The rise of political parties and predominantly coalition governments have now constricted the King's real power(Velaers 2019, 2: 447), so that when one talks about the King's constitutional prerogatives, a word still used in the Constitution, these powers in practice are exercised by the government.

The principle of the Belgian constitutional monarchy assumes that, according to article 105 of the Constitution, 'The King has no powers other than those formally attributed to him by the Constitution and by specific laws passed by virtue of the Constitution itself'. Thus, only the Constitution grants a number of constitutional functions to the King of the Belgians (and not the King *of Belgium*, since the dynasty had been chosen by the elected representatives themselves (Delpérée 2017: 2122).

If the executive power is fully vested in the King (article 37), with ministerial countersignature, the sovereign is also part of the legislative branch, as the third actor alongside the House of Representatives and the Senate pursuant to article 36 of the Constitution. As such, the King is notably competent to give assent to bills, as confirmed by article 109 of the Constitution.

Royal Assent to Bills

The royal assent is the last step in the process of law making by the legislative branch; it marks the agreement of the King and the government on the text submitted, and is carried out by a signature of the King with the countersignature of a minister (or, to a lesser extent, a secretary of state, a kind of deputy minister). The King, head of state, by sanctioning a bill, attests to the regularity of its adoption process (Behrendt & Vrancken 2019: 198). As the King is politically irresponsible, he is in principle required to sign and has no discretionary power in that matter, except, according to some legal scholars, in the case of manifest fraud.

However, Belgium has a famous exception. In 1990, Parliament passed a bill that decriminalised, under certain conditions, the practice of abortion. King Baudouin informed the Prime Minister of his unwillingness to sign, though his signature was necessary to give the bill its force of law (Ergec 1990: 265-67). Baudouin insisted that he did not oppose the democratic will expressed in parliament; rather, it was a 'case of conscience' of the sovereign, who was deeply Catholic. Prime Minister Wilfried Martens' office, therefore, found an ingenious legal solution. This consisted of making use of article 93 of the Constitution and finding that the King was – for reasons of conscience – unable to rule. This provision, directly inspired by British constitutional law and the experience of the 'mad King' George III, was not originally intended for this purpose, and had only been applied once in the history of the kingdom, for King Leopold III then a prisoner in Germany in 1944 (when his brother Charles was appointed as Regent). It was the Council of Ministers which was consequently able to exercise the royal prerogatives and gave assent to the law on abortion on 3 April 1990. Two days later, both the House and the Senate lifted the ruling on Baudouin's '*impossibilité de régner*'.

Appointment and Dismissal of Ministers/Dissolution of Parliament

The two most important powers attributed to the King by the Constitution are undoubtedly the power to appoint and dismiss ministers (article 96) and to dissolve Parliament (article 46).

The King appoints and dismisses his ministers by simple royal decree, which must be countersigned by a minister. Beyond the constitutional rule, it was quickly understood by the sovereign, notably Leopold I, that the way in which governments were to be formed was entirely undefined. Chapter 4 will further discuss how governments have historically been formed in Belgium. This is indeed a more political aspect of the Belgian sovereign's power. However, we should already note the existence of the use of the 'countersignature of courtesy', which traditionally requires that, when a new government is inaugurated, the outgoing prime minister countersigns the order appointing his successor, who in turn countersigns his predecessor's resignation (Behrendt & Vrancken 2019: 282). However, this practice is not mandatory, so it is legally possible for the King, in the event of a deadlock, to appoint a new Prime Minister who will countersign both his own appointment and the resignation of his predecessor. In any event, this new Prime Minister will be accountable to the House of Representatives and will be required to face a vote of confidence.

The dissolution of Parliament is another important constitutional prerogative of the King, or at least it has been. In the early days of the kingdom's history, dissolution was considered, in the words of MP Paul Devaux, as a 'right of royal prerogative' (Stengers 2008: 79). It was accepted that the King could decide to summon the voting population if he considered that the Chambers no longer reflected the political forces of the moment. Article 46 of the Constitution has since been substantially revised in 1993 with the introduction of a 'rationalised parliamentary system' (see Velaers 2019, 2: 165-71). Dissolution now requires the approval of the House of Representatives, either directly (article 46 §3) or indirectly when a vote of no confidence is passed (and no successor to the prime minister is proposed) or a vote of confidence is rejected (article 46 §1). However, when an early dissolution happens nowadays, most of the time it is triggered by the process of constitutional amendment, which requires the dissolution of both chambers (article 195).[10]

With regard to the parliamentary session, articles 44 and 45 of the Constitution, which literally allow the King to convene or adjourn the two chambers, have fallen into disuse (Belmessieri 2008: 803). The King no longer has any personal power in matters of summoning and adjourning parliament; nor does the government use these powers. Indeed, parliamentary sessions are most of the time automatically fixed and adjourned.

Implementation of Laws

The King has the exclusive prerogative to implement the law, whether by general authorisation (article 108), or special authorisation enshrined in a law. In practice, it is the government that does it. This consists first of all of the promulgation of the law by the same signature as the one that gives rise to assent. The laws are commenced by royal decrees, signed by the King and a minister. In principle, Belgium does not have a system

[10] One particularity of Belgian constitutional law, which would take too long to explain, is to revise the Constitution over two parliamentary terms. The first step, the 'declaration of revision of the Constitution', automatically leads to the dissolution of both chambers (see Velaers 2019, 3: 670-709).

of 'special powers'. However, case law has now accepted that, under certain conditions, provisions of a law may be adopted by the government alone. These are Royal Decrees of Special Powers and Extraordinary Orders of Powers in Wartime.

International Relations

The King directs international relations, which includes negotiating and signing treaties but also commanding the army in wartime. If, nowadays, the King no longer has personal power in this matter, leaving this to his government, this has not always been the case.

At the beginning of the kingdom's history, the King of the Belgians sought to exercise certain foreign policy prerogatives himself. Leopold I, with a strong European dynastic personal network, always considered international relations as his own ministry, countersignature being only a formality (Stengers 2008: 259-71). However, his independent diplomatic action was an exception in the country's history. All his successors have since taken a low-profile role, leaving this responsibility to the government.

The King's personal command of the Belgian army was considered a personal prerogative of the sovereign, without ministerial countersignature, until the end of the Second World War. Article 167 states: 'The King shall command the armed forces and declare a state of war and the end of hostilities'. As commander-in-chief of the Belgian armed forces, the King holds the highest rank in the military hierarchy. Thus, three monarchs decided the military fate of Belgium independently, communicating with their generals with very little consultation with the government, as the Prime Minister in exile during the Second World War attested (Pierlot 1947: 28-33). During the Franco-Prussian war of 1870, Leopold II placed Belgium in a state of war and mobilised the army as a preventive measure. It was then the turn of King Albert during the First World War, and Leopold III in the Second World War, to personally take over the reins of the army. Following the King's disputed choices in 1940, the Soenens Committee in 1949 definitively classified this King's personal prerogative as ancient history.

Currently, the government is responsible for international relations, including in the event of war. The King, as head of the Belgian state (and no longer only of the federal government), also ratifies mixed treaties (article 167), i.e. those that deal with both federal and federated matters.

Additional Constitutional Powers

Among the other functions entrusted to the King by the Constitution, but which are in practice exercised by the government, we can mention:

- The right of pardon (article 110);
- The right to issue coins (article 112), which has been rendered a dead letter in view of Belgium's participation in the euro zone;
- The right to confer titles of nobility (article 113);
- The right to confer military orders (article 114).

3.7. CONSTITUTIONAL FUNCTIONS IN NORWAY

Eivind Smith, Professor of Public Law, University of Oslo

Introduction

Norway has been a monarchy for a thousand years or so. From 1319, however, different dynastic accidents led to a kind of union, first with Sweden, then with Denmark. The latter lasted four centuries (until 1814). During that period, Norway gradually lost most of its central state institutions. The Napoleonic wars ended with Norway's declaration of independence and the adoption of a new Constitution in May 1814.

The story of the present constitutional monarchy thus starts with the breakaway from the absolute Danish-Norwegian monarchy that subsisted in Denmark until 1849. In 1814, the Constituent Assembly elected the resident Governor-Prince of Denmark-Norway as King of Norway by virtue of the new Constitution. In conformity with the terms of the cease-fire concluded between himself, as King of Norway, and the King of Sweden in August 1814 in the aftermath of the Swedish military attack, however, the first constitutional monarch of Norway abdicated a few months later. Instead, the country's first elected parliament elected King Carl XIII of Sweden as King Karl II of Norway. The leading political figure in the military and political manoeuvring against Norway, French Marshal Jean Baptiste Bernadotte, acted in his capacity as elected Crown Prince of Sweden. In 1818, he succeeded the childless king as King Karl XIV of Sweden and Karl III of Norway.

If the union of two Crowns remained for almost a century, the legal and political institutions of the two countries were almost entirely separate and the polities evolved in different ways. In 1905, Norway finally broke away from the personal union with Sweden by unilaterally declaring that the actual king (Oscar II) was no longer king of Norway. For present purposes, we do not need to enter the political drama, military mobilisation etc. that unfolded before Sweden finally accepted the union's dismantlement.

After the replacement of the constitutional provisions for the personal union by those initially adopted in 1814, a referendum called on his demand gave an 80 per cent majority in favour of the Danish Prince Carl as the next King of Norway. Once elected by Parliament, the King took the historic name Haakon VII, whereas his young son, renamed Olav, later became King Olav V and the father of present king Harald V. In political terms, the fact that Haakon VII's spouse (Queen Maud) was a daughter of King Edward VII was regarded as an important means for ensuring British support should Sweden create problems following the Norwegian breakaway.

Constitutional Background and Functions

Notwithstanding numerous amendments, the 1814 text remains the world's oldest constitution still in use, after that of the United States. During two centuries when its institutional environment has changed significantly, most of the provisions on the monarchy have remained relatively unchanged. The form of government remains a 'limited and

hereditary monarchy' (article 1). No qualification like 'parliamentary' has appeared in the text. In fact, one had to wait until 2007 to see the core element of a parliamentary system of government: the government's obligation to demand its dismissal once Parliament has declared its loss of confidence, written into the text of the Constitution (article 15).

Within the overarching framework drawn up by article 1, the Constitution's Part B is devoted to 'The executive power, the King and the Royal Family and Religion'. The opening words of the chapter, 'The executive power is vested in the King' (article 3), should be read in contrast to article 49 according to which 'The people exercises the legislative power through the *Storting* [Parliament]', and the title of part D on 'The judicial power', namely article 88 ('The Supreme Court pronounces judgment in the final instance').

Within this classic separation of powers scheme, the monarchy represents by far the most stable element; in fact, the present King is only the third since the new dynasty arrived in 1905. Does this reflect a similar permanence in the monarch's constitutional functions?

In the constitutional text, the reader will find the word 'King' in a great number of provisions. In order to grasp the constitutional functions of the monarch, however, one needs to discern two different groups of such provisions.

A first group may be qualified as dynastic because it deals with the monarch and his family as individual persons. Examples include articles 4 ('The King shall at all times profess the Evangelical-Lutheran religion'), 5 (personal immunity), 6-11 (succession, age of majority, oath, travel), 23 (the right to bestow orders), 24 (the royal household), 34-37 (royal titles, heir, marriages, immunity for princes and princesses) and 47 (education during minority).

A second group is much more important for the understanding of the constitutional functions of the monarch as head of state and, indeed, of the executive power. Examples include the monarch's role regarding government formation (article 12), provisional legislation or decrees (article 17), pardons (article 20), appointments and dismissals of high civil servants [*embetsmenn*] (articles 21-22), military command (article 25), international relations (article 26) and legislation (articles 77-78).

In sum, the number and importance of the constitutional functions devoted to 'the King' as head of state and of the executive are impressive. In order to properly understand their significance, however, it is important to recall that both the so-called 'royal prerogatives' and other constitutional functions have to be executed by the King in Council. Composed of the King or, in his absence, the Crown Prince (if of age), on the one hand, and the members of his government (or at least half of them), on the other, this highest executive body meets every Friday at 11 am in the Palace (articles 27-31). In the King's absence, the Crown Prince acts as regent, chairs the council meetings and signs the decisions.

The necessity of deciding in Council has been in force ever since the original 1814 Constitution. This explains why there is no routine of weekly audiences with the Prime Minister, as in other countries. It does not stand in the way, however, of separate albeit less frequent meetings between the King and the Prime Minister and other senior government figures.

Even the provision requiring the Prime Minister's countersignature on 'royal resolutions' (article 31) stands since 1814. Originally seen as a mechanism for ensuring the correctness of the relevant royal resolution, however, the legal function of the Prime

Minister's countersignature changed radically by a constitutional amendment adopted in 1911, only a few years after the dynastic change in 1905. Since then, the amendment makes it explicit that the countersignature is a condition for the validity of any decision taken under the royal seal ('royal resolutions'). This way, the consent of both the monarch and the Prime Minister is required.

If we read the considerable number of constitutional provisions that refer to the monarch as head of state and of the executive in combination with those that regulate the Council, we thus see that 'the King' actually means 'the King in Council'. At the same time, the latter is the only institutional form of legally binding decision-making available to the government as a collective body. By virtue of delegation from the King in Council, the next level of formal decision-making is the individual ministers as heads of the relevant parts of central government, or decisions taken under the responsibility of the relevant minister. Today, the bulk of formal decision-making at the executive's top level belongs to this second level, with no role for the monarch.

Between the two levels of formal decision-making, a sophisticated system of government meetings has emerged. Presided over by the Prime Minister with no role for the monarch, they take place at least once a week and at a number of other occasions (related to the preparation of the annual budget, for instance) in order to discuss and, in political terms, actually decide a considerable number of political issues. Decisions that are of an overarching political character will need subsequent formalisation by the King in Council or by individual ministers. In such cases, however, the outcome will provide no surprise.

The monarch can no longer decide in his capacity as head of state and of the executive without the Prime Minister's explicit approval within the framework of formal Council meetings. In practice, approvals are not given without the support of a majority among the ministers (or – more likely – of the entire government). By consequence, what remains for the monarch is the possibility of refusing to sign, a possibility to which none of the three Kings of the present dynasty has had recourse (see further in chapter 4 on the political functions of the monarch). That situation fits well with the fundamental provision in article 5 of the Constitution that the monarch enjoys complete legal immunity ('The King's person cannot be censured or accused', whereas the 'responsibility rests with his Council').

We are now in a position to grasp key aspects of the constitutional role of the Norwegian monarch as head of state and of the executive. Reading the separate provisions on these functions in conjunction with articles 27-31, we see that it is for the King in Council – for instance – to appoint high civil and military civil servants, permanent judges included. The same goes for decisions under a number of other provisions, some of which are of great political importance. For instance, the authorisation to engage Norwegian F16 planes to bomb Libya was given by royal resolution of 23 March 2011 by virtue of article 25 on the King as supreme commander of the military forces. Those Acts of Parliament that are to become formal statutes are approved under article 78; however, the veto power has not been in use since the dynastic change in 1905. The adoption of any kind of decisions taken by the King in Council requires the monarch's personal approval. However, no decision passes without the counter-signature of the Prime Minister. That it is for the King in Council to grant royal pardons has been specified *expressis verbis* all the time since 1814 (article 20).

Even the decisions to appoint or dismiss individual ministers and the entire government (article 12) follow this scheme, as a consequence of the facts that the monarch enjoys full legal immunity (article 5) and that the country should always have a responsible government. Once the identity of a new government has been identified, the King in Council would typically meet in the morning in order to dismiss the outgoing team and to appoint the new government. The dismissal would be given effect from noon of the same day, when a new council meeting with the newcomers will gather. The new government then 'apportions the business' among its members (article 12 paragraph 2) by deciding who should be Minister of Foreign Affairs, Finance and so on. Similarly, new Secretaries of State (that are not members of the government) are appointed (article 14).

According to the text of the Constitution, the appointment of a government and the distribution of ministerial responsibilities are decided the way the King himself 'deems appropriate'. Even these provisions must be read in conjunction with article 27-31 of the Constitution, however. This implies that the monarch has no freedom to appoint ministers or to distribute the portfolios between them in a way not accepted by the government itself. On the role of the monarch during government formation, see in chapter 4 on his political role.

In political terms, therefore, we easily discern the leading political actor among the two under present day conditions: *de facto*, the monarch's role at the Council meetings is to approve and give legal effect to proposals of which the politically responsible element has already defined the substance.

The Constitution of Norway no longer leaves it to the monarch to summon Parliament. Instead, it specifies on which day of the year it shall assemble (article 68); it sits until the next session is assembled. Once the Parliament has finished the necessary internal business (such as electing its Presidents and distribution of seats in the permanent commissions), it remains for the monarch to conduct the formal opening of the annual sessions (article 74 paragraph 1). At this occasion, he even gives the speech from the throne in which Parliament shall be informed 'of the state of the realm and of the issues to which he particularly desires to call the attention of the *Storting*'. Since 1905, the Prime Minister prepares the text and hands it over to the monarch during the solemn ceremony itself.

Unlike any other parliament in parliamentary democracies, it has never been possible to dissolve the *Storting* during its four year electoral term (article 71).

3.8. LUXEMBOURG: GRAND DUKE HENRI'S REFUSAL, IN 2008, TO SIGN THE BILL LEGALISING EUTHANASIA

Professor Dr Luc Heuschling, University of Luxembourg

In his play *King Charles III*, the British author Mike Bartlett imagined how Charles, once crowned, would refuse his assent to a bill restricting press freedom. In Luxembourg, this hypothesis became real in 2008. In European 'neutralised' monarchies, where monarchs are not supposed to play any major political role (exceptions: Liechtenstein and Monaco), such refusal has become extremely rare since the end of the (long) nineteenth century.

In 1912, after decades of political abstinence of the previous Grand Dukes Adolphe and Guillaume IV, the young Grand Duchess of Luxembourg Marie-Adélaïde wished to become more involved in politics. Being a devout Catholic, she considered in 1912 refusing her assent to the bill secularising schools, but, eventually, signed it. She did refuse, however, various appointments of civil servants and mayors. In 1915, after appointing a Catholic government against the wishes of the Chamber of Deputies dominated by a coalition of liberals and socialists, she dissolved Parliament. In 1919, although she was legally covered by immunity (article 4 Constitution), Marie-Adélaïde was forced to abdicate (the main reason was her perceived support for the German occupying forces during the First World War and her previous political actions). Abroad, since the end of WWI, there are only two cases where a monarch, in a 'neutralised' European monarchy, has refused royal assent: in Belgium in 1990, with King Baudouin's famous refusal of the bill on abortion (see chapter 3.6); and in the Netherlands in 1972, when Queen Juliana resisted a bill limiting membership of the royal house, leading the government to drop the proposal (see chapter 3.5 above). Given the close links of Luxembourg to both countries, those precedents may have played an essential part in Grand Duke Henri's reasoning in 2008.

Henri's (in)action must be placed in the broader context of his reign. From the start, in a famous interview given with his wife in 2000, Henri announced his will (or even 'their' will) to reshape the monarchical tradition going back to Charlotte and Jean. He introduced a series of major changes, some of which were consensual, being in line with the Zeitgeist; others were rather startling, and others were highly controversial. These reforms, or revolutions, included the abolition, in all legal texts, of the outdated formula 'Grand Duke of Luxembourg *by God's Grace*', the much more active role of his wife Grand Duchess Maria Teresa, the more popular style of public communication, the unearthing of the totally forgotten prerogative of the Grand Duke to open, in person, the parliamentary session, the claim in 2004 of the right to vote in the referendum on the EU Constitution, the reform and publication in 2011/12 of the previously secret house laws and, in 2008, the refusal of the bill on euthanasia.

The political situation in December 2008, in the midst of the global financial crisis, was all but simple. First, in contrast to King Baudouin, Henri did not clarify, and justify, in public his own position at the crucial moment when the constitutional conflict was disclosed by Prime Minister Jean-Claude Juncker in his famous, but also short press conference of 2 December(Juncker 2008). At the time, it was public knowledge that Henri invoked *moral* grounds, based on his Catholic faith (he did not mobilise any *legal* argument such as the infringement, by the bill, of a higher legal norm such as a constitutional norm, or a European or international norm as did some citizens: Jacobs et al 2008). What was not, and even today is still not, clear, is whether he wished (a) to block, definitely, the reform on euthanasia or (b) to allow this reform to go through, but without him being involved. Whereas in Belgium Baudouin's action fell clearly under the second hypothesis, and was held in high esteem by people, in Luxembourg the first reading, put forward in the prime minister's statement to the press, largely prevailed in public opinion, which led to a major legitimacy crisis of the monarchy. The support for a republic suddenly rose to 36 per cent in an opinion poll made just after the announcement of Henri's refusal; 31 per cent wanted Henri to abdicate (Le Jeudi 2008). In his later Christmas speech of 2008, Henri presented a totally different narrative: just like Baudouin, whose words he almost literally copied, Henri asserted that he did not have, and never claimed to have, any right

to veto a bill (reading (b); Grand Duke Henri 2008). But this message, which came rather late, failed to convince. Public confidence was lost. Second, by putting forward his moral scruples as a Catholic, Henri not only took sides in a highly controversial debate which risked dividing society; he also put in an uncomfortable position the Christian-Social Party, which was leading the government, but which had allowed its coalition partner (the socialists) to propose this reform and to pass it through Parliament with the help of the opposition. Third, although most people agreed to qualify Henri's action as unwise, especially against the historical backdrop of Marie-Adélaïde's tragic fate, its legal assessment was less easy.

The Tricky Distinction between the Still Vast Prerogatives of the State Organ 'Grand Duke of Luxembourg' and the Shrinking Discretion of its Main Incumbent (the Individual Monarch)

In 2008, as in most other monarchies with the famous exception of Sweden, the 1868 Constitution of Luxembourg continued to vest a long list of prerogatives, especially the so-called 'executive power', not in the Council of Government but in the state organ called 'Grand Duke of Luxembourg'. The powers to negotiate and ratify a treaty (article 37 § 1), to submit an ordinary bill or constitutional amendment to parliament (article 47; article 114), to sanction and promulgate bills and constitutional amendments (article 34; article 114), to enact regulations (article 32 § 3; article 36; article 37 § 4; article 76), to declare and implement a state of emergency (article 32 § 4), to appoint ministers and civil servants (article 77; article 35 § 1), to supervise the actions of local authorities (article 107 § 3) were all granted by the Constitution to the head of state. However, in order to get a full picture of the situation, one had to combine this first series of legal norms with other norms, either legal or non-legal, a state of affairs I have called '*normativité à deux voix*' (Heuschling 2013). The two-voices-normativity technique consists in the coexistence of two sets of contradictory norms which, together, are supposed to define what remains of the monarch's personal discretion. Classically, the first set of norms, which are all legal norms, grant a long list of state competencies to the state organ 'Grand Duke / King / Emperor', and seemingly bestow on its main or most visible incumbent (the monarch as physical person) a very large discretion: it is he, or she, who is supposed to decide how to use these powers. The aim of the second set of norms, which may be legal or even non-legal (the 'constitutional conventions' in the UK, the 'custom' and/or 'political practice' in other countries, including Luxembourg), is to reduce or even abolish this discretion by various means. A classic example in Luxembourg (article 45) and in many other continental monarchies is the rule of countersignature: a norm taken by the organ 'Grand Duke of Luxembourg' is only valid if it is signed both by the monarch and a minister (according to my theoretical understanding, the minister, in this context, should be considered as the second, less visible incumbent of the state organ 'Grand-Duke', and not as the incumbent of another state organ whose approval would be necessary to the organ 'Grand-Duke').

As a result of these contradictory norms, the legal question of whether Henri could veto a bill, was not as clear as one might have wished in 2008. At the time, article 34 of the Constitution still provided, just as in the nineteenth century: 'The Grand Duke

sanctions and promulgates the laws within three months of the vote of the Chamber'. A bill adopted by the Chamber of Deputies only became a legal norm when 'sanctioned' by the state organ 'Grand Duke of Luxembourg'. In the nineteenth century, it was clear that the monarch (physical person) could refuse to sanction (he or she did not need a ministerial countersignature for withholding it). Let's call this historical model solution (a). But to what extent was this solution still valid in 2008? Did there exist any legal (or extra-legal?) norm which ran against it? If so, what was its exact content? In the abstract, one can envisage three new possible outcomes (b, c, d). Solution (b): The state organ 'Grand Duke' is still entitled to say either 'yes' or 'no', but the exercise of that discretion would need to derive from a co-decision of both incumbents, both monarch and minister having to agree freely. Solution (c): The state organ 'Grand Duke' is still entitled to veto, but it is the minister (subject to the guidelines of the government) who decides; the monarch is simply executing (his/her 'no' is not free any more). Solution (d): The Grand Duke, as state organ, has lost in law any discretion to refuse on moral or political grounds the assent to bills (the organ's answer must be 'yes'): hence, both incumbents (monarch and minister) are obliged to sign.

In the pre-2008 legal literature, the most influential scholars, who were all close to the monarchist Christian-Social party (Pierre Majerus, Pierre Pescatore and Marc Thewes; for a critical analysis see Heuschling 2013: 123 ff), considered that, according to law, notwithstanding all democratic reforms of the 1868 Constitution since 1919, the state organ 'Grand Duke' was still endowed by article 34 with an 'absolute veto right'. They did not clarify, however, whether, in law, solution (a), (b) or (c) prevailed, as they omitted to discuss the impact of article 45 (countersignature) or of any other legal norm. But, according to these scholars, it would have been politically inconceivable for the monarch to use this prerogative. In its influential commentary on the Constitution, the Council of State maintained this absolute veto right, but, in light of article 45, excluded option (a) (Conseil d'État 2006: 149 ff). Whether this implied solution (b) or (c) remained obscure. A different path had been taken by the jurist Léon Metzler who, already in 1949, stated that the veto right in article 34 had been abolished by recent customary norms, given the overall democratisation of the system (solution d; Metzler 1949: 299). But this reasoning implied that custom could abrogate written constitutional norms, a thesis which was and is highly contestable in Luxembourg (see Heuschling 2014: part 2). In 2008, one could have argued, however, that the veto power in article 34 was abrogated implicitly (solution d) not by custom, but by some new abstract provision of the constitutional text: in 1919, there was enshrined the principle of 'sovereignty of the nation' (article 32 § 1), in 1948 the principle of 'parliamentary democracy' (article 51 § 1), in 1998 the principle of 'democracy' (article 1) and the general definition of the 'symbolic' role of the head of state (article 33). Yet, in the literature, these principles were rarely quoted in relation to article 34.

In his press conference of 2 December 2008, when announcing Henri's refusal, Prime Minister Jean-Claude Juncker remained extremely vague on legal arguments: all he said was that 'constitutional practice' would argue against Henri's view (Juncker 2008; also ambiguous: Frieden 2008). Later, in 2009, the Minister of Justice Luc Frieden asserted, without further details, that the government had always defended solution (d) (Frieden 2009). Public statements of prominent socialist politicians, very critical of Henri, oscillated implicitly between theses (d), (c) and (b) (Bodry 2008; Goebbels 2008).

The Commission on the Constitution of the Chamber of Deputies put forward thesis (c), but also, ambiguously, thesis (b) (CIRC 2008: 2). The opinion of the Council of State of 9 December 2008 can be read, mostly, as a defence of solution (d), in contrast to its 2006 commentary (Conseil d'État 2008).

But none of these various arguments made Henri change his mind. Nor did the government resign in order to 'force' the monarch to comply (this classic, nineteenth century solution is totally inadequate, in case of inertia of the monarch; furthermore it punishes society, and the people, rather than the monarch). The government had even proposed to Henri: (a) to sign the bill *and* (b) to make a public statement recording his moral criticisms; yet he refused (Frieden 2009: 541).

The Outcome of the 2008 Crisis: Towards a Swedish Model in Luxembourg?

The crisis was overcome by a common decision of all political parties to amend the Constitution and to delete the term 'sanction' in article 34 of the Constitution (Loi de révision du 12 mars 2009; parl. doc. n°5967). Thereafter, the bill on euthanasia was definitively adopted by the Chamber of Deputies and was 'promulgated' by Henri. During the debate on the constitutional revision, the Council of State took the time to clarify that the state organ 'Grand Duke' had no discretion regarding 'promulgation', an issue which was not beyond all doubt (Conseil d'État 2008).

As a consequence of this crisis, the Chamber of Deputies decided, in 2009, to launch a total reform of the old 1868 Constitution, in order to adapt the largely outdated text to political reality, to establish more transparent formulations and to reform, in depth, the monarchy. The initial version of this project (Meyers 2009) opted for a radical solution: the Swedish model. The state organ called now officially 'head of state', instead of 'Grand Duke', was stripped of almost all competencies, which were vested directly in the state organ 'government'. Furthermore, the monarch as an individual person, who would still wear the title of Grand Duke or Grand Duchess, lost part of his/her immunity: in exceptional circumstances, he/she could be held accountable for 'infringement of his/her constitutional functions' by the Chamber of Deputies and be forced to abdicate by a vote of two thirds of all deputies (for a first, analogous precedent to this extremely rare solution, see French Constitution of 1791, title III, chap II, articles 5-7). Later, however, due to the pressure of the Court and of the Council of State, which were afraid that the Swedish model would ultimately lead to the introduction of a republic, the Chamber changed its mind. The Commission on the Constitution (CIRC) reintroduced largely the classic two-voices-normativity technique; yet, it still kept the new rule of accountability of the monarch, which may make things even more complicated in the future (once the monarch is personally accountable, the meaning of the provision on countersignature will change; its grip on the monarch will weaken). The text of this reform project is currently still under discussion; its future is rather uncertain, as it must be approved by the opposition which, in 2019, became increasingly reluctant to do so. At the end the reform would also be submitted to referendum. Thus, the long term consequences, on a constitutional level, of the 2008 crisis are still not settled. The Swedish model is, definitely, off the table. The question is whether Luxembourg will keep the current, and old, two-voices-normativity system or opt for a slightly new two-voices-normativity system.

In either case, the classic legal issue of the monarch's power will remain a tricky question in Luxembourg.

How Risky is it, for a Monarch, to Refuse Royal Assent? A Comparative Conclusion

On a more general, comparative, level, the study of the 'neutralised' monarchies which have recently experienced a royal veto for moral or political reasons – the Netherlands in 1972, Belgium in 1990, Luxembourg in 2008 – shows that the very frequent political and scholarly discourse, asserting that a refusal of royal assent would be highly improbable because it would inevitably lead to a crisis of the monarchy must be seriously reconsidered. The empirical data tends to prove rather the contrary. None of the three cited monarchs, not even Henri who was involved in the worst of all three scenarios, has been forced to abdicate. None of the three regimes has become a republic. In two of the three examples (Netherlands, Belgium), the veto has generated no major constitutional shift. In Luxembourg, the final outcome is still unknown: the constitutional caesura could be far less dramatic than initially foreseen, the Swedish solution being definitely discarded. Thus, for an activist monarch, to dare to veto a bill appears far less risky than is generally assumed. This conclusion may be rather uncomfortable for constitutionalists and citizens living under a system in which the royal veto may still be legal, but whose use, at the same time, is downplayed as 'unreasonable and highly improbable'. Such discourse belittles how dangerous such an outdated legal situation may be – not so much for the monarchy, but for democracy.

3.9. SPAIN: THE COUP OF FEBRUARY 1981

Charles Powell, Director of the Elcano Royal Institute, Madrid

Juan Carlos I of Spain resolutely performed his function as guardian of the Constitution during the country's turbulent transition from Francoist authoritarianism to incipient democracy between the years 1975-81. The new constitutional and democratic order was met with unrest by sections of the military, unhappy with reforms which, in their calculation, amounted to emasculation and a loss of control. This unrest found expression in a series of failed plots in the late 1970s and early 1980s, culminating in the audacious attempted coup of 1981. The King, far from oblivious to such agitation, sought to placate those figures most uneasy about what democracy in Spain meant for the military, all the while emphasising his duty and commitment to upholding the Constitution. In conversations with disgruntled military men during 1979-80, the King made this commitment clear, anticipating his response to the 1981 coup:

> I listened to them carefully, and when their arguments struck me as departing too far from reality, I tried to make them see reason. But I also made it clear that in no case could they count on me to cover up for the slightest action against a constitutional government like our own. Any such action, I told them, would be regarded by the King as a direct attack on the Crown (de Villalonga 1994: 125).

The 1981 plot was instigated by Captain General of the Valencia military region, Jaime Milans del Bosch, and General Alfonso Armada. Of the shared opinion that the then Prime Minister, Adolfo Suarez, was incapable of navigating a way through Spain's perilous economic difficulties, both men saw an increased military presence in government as not only desirable, but necessary. Interestingly, at a decisive meeting of the two in late 1980, General Armada, who was formerly head of the royal household and spoke with the King on a regular basis, led Milans del Bosch to believe that Juan Carlos himself shared their concerns about Suarez. From the outset the conspirators knew that any disruption to the democratic settlement required the King's approval, tacit or otherwise.

After canvassing support for the plot from various elements within the army, the coup, which at an operational level was to be spearheaded by Lieutenant-Colonel Antonio Tejero, finally went ahead in February 1981. By that time Suarez had already left office, replaced by Leopoldo Calvo-Sotelo, an appointment which did little to appease those intent on strengthening the military's presence within government. In the wake of Suárez's resignation, a highly influential right-wing journalist published an article encouraging the King to seize this opportunity to replace him with 'a politically blessed outsider', and suggested General Armada as the best candidate. This gave rise to fresh rumours of an imminent 'operación Armada' (a pun on 'armed solution' and 'Armada solution'). However, the fact that the King did not act on this advice suggests that, at best, he was always lukewarm about a De Gaulle/Armada solution to the crisis. In the course of the consultations that later led to the appointment of Leopoldo Calvo-Sotelo as Suárez's successor, Juan Carlos made no mention whatsoever of a possible coalition led by Armada. He confined himself, as was his constitutional duty, to listening to the spokesmen of the various parliamentary groups. At a subsequent meeting with the King, held on 13 February, Armada warned him that his prestige within the armed forces was at its lowest point since Franco's death, but failed in his efforts to make the King reconsider his support for Calvo-Sotelo and appoint him instead. Following the monarch's instructions, the General agreed to meet the Minister for Defence, who later recalled him frothing with rage, insisting that Juan Carlos was wrong to replace Suárez with another civilian.

On 23 February, at 6.23 pm, some 320 civil guards under Tejero arrived at the Parliament, and approximately half of them burst into the chamber brandishing pistols and submachine guns, effectively taking the government and all 350 deputies hostage. To lend credence to the notion that Juan Carlos was behind the coup, Tejero repeatedly shouted 'in the name of the King' as he burst in. Having secured the Parliament, Tejero telephoned Milans del Bosch, who declared a state of emergency in the Valencia region at 6:45 pm and issued a proclamation stating that 'in light of the events in the capital and the consequent vacuum of power, it is my duty to guarantee order in the military region under my command until I receive instructions from His Majesty the King'. The proclamation ordered the militarisation of all public service personnel, imposed a curfew and banned all political and trade union activity. For greater effect, tanks were rolled out to guard important public buildings.

The coup began to run into trouble when the head of the Brunete Armoured Division, General Juste Fernández, grew suspicious of the claims of his co-conspirators to the effect that the uprising enjoyed the King's full support. These suspicions were confirmed when, on telephoning La Zarzuela, the monarch's official residence, he tried to speak to Armada, only to be informed that he was not there, nor was he expected (Juan Carlos was

getting ready to play squash with several friends when the Parliament was taken, another indication that he was not privy to the conspiracy). As a result, the Brunete units that were preparing to advance on Madrid quickly stood down.

The track-suited monarch and his closest advisers spent the rest of the evening trying to dismantle the coup by telephone. Given that the executive was being held hostage, Juan Carlos ordered the creation of a provisional government consisting of the Secretaries of State and Under-Secretaries of each Ministry, under the direction of Francisco Laína, Director of State Security at the Ministry of the Interior. This body later issued a statement explaining that they had 'gone into permanent session, on the instructions of His Majesty the King, to ensure the government of the country through civilian channels', and guaranteed that 'no act of violence will destroy the democratic coexistence that the people freely desire and which is enshrined in the text of the Constitution that both civilians and the military have sworn to uphold'.

Crucial to the coup's failure was the King's ability to speak to most of Spain's Captain Generals personally, only a few of whom got in touch with La Zarzuela of their own accord to reassure him of their loyalty. What these conversations revealed was that, once the King made it clear that, contrary to what the insurgents were claiming, the coup did not enjoy his support, they invariably offered him their obedience. In other words, had the King wanted the coup to succeed, as has been claimed, it would have been very easy for him to secure an outcome favourable to the insurgents. The Captain-General of Madrid, Guillermo Quintana Lacaci, would later explain to the Minister of Defence, that

> I fought in the Civil War, so you can well imagine my way of thinking. But Franco gave me the order to obey his successor and the King ordered me to stop the coup on 23 February. If he had ordered me to assault the Cortes, I would have done so.

Eventually, even Milans del Bosch, who spoke to the King on three occasions, agreed to stand down, though not until Juan Carlos sent him a telex reaffirming his determination to defend the Constitution, and a warning that 'after this message, I cannot turn back'. By this he meant that unless del Bosch obeyed immediately, he would hold him responsible for the consequences of the coup (during the subsequent trial, this text was quoted as evidence of the King's alleged hesitation). The telex also stated unequivocally that 'no coup d'état of any kind whatsoever can hide behind the King, it is against the King', and concluded: 'I swear to you that I will neither abdicate nor leave Spain'. The occupation of Parliament was also eventually abandoned, at midday on the 24th, some 18 hours after it began.

In a television message broadcast at 1.15 am on the night of the occupation, the King powerfully underlined the importance of the monarch's role as custodian of the country's fragile democracy. After announcing that he had ordered all civilian and military authorities to defend the democratic status quo, the King solemnly proclaimed that

> the Crown, symbol of the permanence and unity of the fatherland, cannot in any way tolerate the attempts of any persons, by their actions or their attitude, to interrupt by force the democratic process determined by the constitution and approved by the Spanish people by means of a referendum.

On 27 February some 3 million people demonstrated across the cities of Spain in support of democracy and the King.

3.10. CONCLUSIONS

Professor Robert Hazell, The Constitution Unit, University College London

This chapter has been about the monarch's constitutional role, in three important respects: the power to appoint and dismiss ministers, to summon and dissolve parliament, and to give royal assent to laws and decrees. In all the countries under review these powers have gradually been reduced over the last two centuries, to the point where the monarch has little or no discretion. And they are still being reduced: not just in Sweden, where the monarch lost all formal power in 1974, but in other countries we have seen further reductions, just in the last decade. In Luxembourg the Grand Duke has lost the power to assent to the laws made by the parliament; now his role is merely to promulgate them. In the Netherlands the monarch is no longer involved in the process of government formation: that role has passed to the lower house of parliament. And in the UK the prerogative power to dissolve parliament has been abolished; it is now the House of Commons which decides upon early dissolution and fresh elections.

Yet the monarch still remains the ultimate guardian of the constitution, whose role in an emergency is to safeguard democratic and constitutional values. The most dramatic illustration of that was in Spain in 1981, when King Juan Carlos helped to foil an attempted coup d'état by the Civil Guard, by going on television in uniform, declaring that the coup was illegal, and ordering the armed forces as their Commander-in-Chief to return to their barracks. And there was a similar episode in Norway, when after the German invasion of Norway in 1940 King Haakon VII told his Cabinet that although it was their decision, he would rather abdicate than accept Quisling as head of the new government. That episode is still remembered today; and in both countries the courageous example set by the King helped to reinforce the legitimacy of the monarchy as an institution.

One other circumstance where the monarch might need to act to safeguard democratic values would be if the prime minister acted in breach of the constitution, and there was no other legal or political remedy to prevent him. An example could be if there was a formal vote of no confidence in the government, but the prime minister tried to remain in office, refusing either to resign or to advise fresh elections. The only remedy then might be for the monarch to dismiss the prime minister. There was an episode which came close to this in Denmark in 1993, when the Conservative People's Party prime minister Poul Schlüter wished to retire, and hand over the leadership to a Conservative successor; but he was reminded by the Palace that the majority in parliament had shifted, and the new prime minister was appointed from the Social Democrats, reflecting the new majority. In countries like Denmark and the Netherlands where no party has an overall majority and governments are often composed of multi-party coalitions, it can be a difficult matter of judgement to determine which potential coalition is most likely to form a stable and effective government. The monarch inevitably risks being criticised when making these difficult judgements, and is sometimes accused of allowing their personal preference to affect the outcome – as happened with the accusations levelled against Queen Beatrix of the Netherlands in 2010 by politicians such as Geert Wilders and the Freedom Party.

Withholding Royal Assent could be another way in which a monarch can prevent the parliament from enacting legislation which breaches fundamental constitutional values.

But none of the recent examples has involved an attempt to safeguard the constitution. Queen Juliana's opposition to the death penalty (1952), King Baudouin's to legalising abortion (1990), and Grand Duke Henri's to euthanasia (2008) were motivated by personal conscience, not constitutional values. In Luxembourg the outcome was dramatic, with an immediate constitutional amendment removing the requirement for royal assent, and subsequent proposals for further reductions in the Grand Duke's powers.

These proposals in Luxembourg include making the monarch more accountable, and giving power to the parliament to require the monarch to abdicate. What this episode shows is that the monarch may formally be the guardian of the Constitution; but ultimately the exercise of the monarch's reserve powers depends upon popular support. This was also evident in the Easter crisis of 1920 in Denmark, when King Christian X lost his Prime Minister and dismissed the rest of the government, after he insisted upon the re-unification of Central Schleswig against the wishes of the local population, and the government. The dismissal caused demonstrations threatening the future of the monarchy, and the King was forced to back down. When deploying reserve powers against the government, a wise monarch will ensure that the people are on his side.

None of the constitutions save one contains a specific power of the kind proposed in Luxembourg, giving power to the Parliament to require the monarch to abdicate. The exception is the Netherlands, where article 35 provides that, on a proposal from the Council of Ministers, the Parliament can declare the King incapable of exercising his royal authority. But most of the constitutions require the monarch to take an oath to be faithful to the constitution. Helle Krunke has written, 'The Constitution does not give the government and Parliament a specific right to depose the King from his throne, but if he violates the Constitution, the precondition for his right to reign has lapsed' (3.3 above).The guardian of the constitution must himself observe the constitution. But it may not even require a violation of the constitution; we might broaden the principle to say, if the monarch by his conduct loses the support of the government or his people, he puts his throne at risk. We have seen four examples of this over the last century: in the abdication of Grand Duchess Marie Adélaïde of Luxembourg in 1919, of the British King Edward VIII in 1936, the Belgian King Leopold III in 1951, and the Spanish King Juan Carlos in 2014. Ultimately, the continuation of the monarch in office depends upon continuing popular support. We might even broaden that one stage further to say, ultimately the continuation of the monarchy as an institution depends upon the continuing support of the people.