Reforming the royal prerogative in Canada

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Overview

- Three phases:

- First, independence in post-First World War era
  - Parliament and treaty/war powers as means of asserting Canadian autonomy.
  - Wanes as this autonomy is effectively assured post-Second World War.

- Second, 1990—2015
  - Populist calls for reform. Legal challenges. Parliamentary calls for change.
  - Largely executive-driven and benefiting the executive.
  - Party discipline and limited backbench influence.
  - Constitutional amending formula.

- Third, 2015-today
  - Executive-driven reforms may be more constraining.
  - New skepticism about prerogative power.

Prerogative and independence

- Post-First World War relationship with the Crown wrapped up in debate about autonomy.

- Equally true for the royal prerogative.

- William Lyon Mackenzie King:
  - Parliamentary scrutiny of treaties as of 1926 (coinciding with Cdn control of foreign policy coming out of Imperial Conference)
  - ‘Parliament will decide’ if Canada goes to war; distance from UK; national unity; Cdn autonomy.

Post-Second World War

- St-Laurent government:
  - Abandoned Commons consultation for military deployments
  - On and off since
- Pearson government:
  - Ending regular tabling of treaties that don’t require legislation
- Independence and autonomy debate no longer pertinent

Post-1982

- Patriation of Constitution in 1982
  - Leaves prerogatives unaddressed
  - Amending formula: general, s41(a) Office of the Queen, Governor General, Lieutenant Governors, s44 and s45

- Reform movement in 1990s and early 2000s:
  - Parliamentary control of military deployments, treaties, fixed-date elections
  - Sense that Liberal party abusing these powers

- Litigation:
  - Turp and Black

Martin and Harper

- ‘Democratic Deficit’
- Martin: Supreme Court appointee hearings
- Harper: Deployment votes, treaty policy, fixed-date elections, vice-regal appointments
- Keys:
  - None affected the prerogative in law or the executive’s discretion (constitution/courts/Kyoto)
  - Served the executive’s interests: laundering, vetting, ignoring
  - Confusion about the rules

Since 2015

- Military deployments and treaties: Liberals sticking with narrow practice and laundering
- Fixed-date elections: May be harder to ignore federally during majority parliaments
- Appointments: New Senate procedure, SCC back, vice-regal gone
- Prorogation: black cloud follows it; UKSC will likely have an impact
- NSICOP: questioning legitimacy of defence intelligence prerogative
  - Debate here will be an interesting testing ground for how the prerogative is understood today

Conclusion

- Prerogative not on the radar
- Executive generally drives reforms ensuring that their discretion is retained
- This is reinforced by the constitution and the courts
- However, certain practices may cement over time.
- As we've seen in the past, though, a determined government may choose to disregard well established practices.