The Royal Prerogative and Constitutional Law

This book examines the royal prerogative in terms of its theory, history, and application today.

The work explores the development of the royal prerogative through the evolution of imperial government, and more recent structural changes in the United Kingdom and elsewhere in the Commonwealth. While examining specific prerogative powers, the development of justiciability of the prerogative, and the exercise of the prerogative, it lays bare the heart of constitutionality in the Westminster system of government. There is said to be a black hole of unaccountable authority at the heart of the constitution and it is this which this book examines. The focus is upon the constitutional development of the United Kingdom and the old dominions of Canada, Australia, and New Zealand. This approach is comparative and historical, using specific case studies of such events as the dissolution of Parliament and the appointment and dismissal of Prime Ministers.

The book will be of interest to academics and researchers working in the areas of constitutional law and politics.

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The Royal Prerogative and Constitutional Law

A Search for the Quintessence of Executive Power

Noel Cox

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A Search for the Quintessence of
Executive Power

Noel Cox

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To my dearly beloved wife Katy, whose support, patience and understanding are always appreciated, and to my late twin brother John, with whom many of the issues covered in this work were discussed, and to whom they were ever important.

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Preface

The British constitution is marked by the unusual characteristics of being unwritten and uncoded. Thus, although it embraces such concepts as the rule of law and the separation of powers, all is not certain, settled or predictable. It is certainly not immutable or unchanging. As an example, the well-known doctrine of the separation of powers has been but imperfectly applied, despite Montesquieu's description of it as being central to the British constitution in the eighteenth century, and judicial support for the view that the constitution is firmly based on the doctrine. Indeed, the departure from the simplistic purity of the doctrine seems to have been pivotal to the success of the Westminster system of parliamentary democracy. This dichotomy is at the heart of the British constitution, and arguably helps give it its flexibility and longevity. Another of the distinctive features of the common law constitution in the British tradition is the nature and characteristics of the executive power, the historic core of which is the royal prerogative. In addition, conventions provide a significant gloss on the notional or nominal powers of the executive (as well as the substantive), which are at least formally extensive, and govern the conduct of the legislature and judiciary, and their relationship with each of the other parts of government. Excepting, in most instances, its unwritten and unentrenched nature, this constitutional model was exported to the countries of the Commonwealth, and many others which have been influenced by British constitutional thought and practice and by the common law legal system.

The constitution is distinguished, amongst other things, by the existence of the royal prerogative. This may be described as the residual powers, privileges and immunities which the Crown, as personification of the State (or the Sovereign as head of State, depending upon the specific prerogative, and the circumstances), retains which are not dependent upon the legislative authority of the Sovereign-in-Parliament. The prerogative has a number of elements which continue to be of use regularly today by the executive branch of government. One is the honours prerogative. This has been used to control the use of armorial bearings, and to regulate matters which, in England and Scotland, are the concern of specialist courts, as well as to bestow honours and decorations. More politically sensitive prerogatives include the war powers, and the control of the civil and military services – though both the latter are now in part at least regulated by statute. Perhaps

most important today, constitutionally speaking, are the political prerogatives of the appointment and dismissal of Prime Ministers, and the summoning, prorogation and (until the passage of the Fixed-term Parliaments Act 2011 (U.K.)) the dissolution of Parliament. All of these prerogatives have, at some time in the past, been the subject of controversy, and in some cases remain so. At the very least they have been the focus of attention when the royal prerogative, or rather its curtailment, is discussed. Many, if not most, apply in almost all those countries which have been influenced by British constitutional theory, excepting some where it was abolished, expressly or by implication, and always subject to any statutory abrogation or reform.

The royal prerogative remains a unique and separate area of law, founded in custom and the necessary attributes of kingship, or executive government as we would more usually say today. In such an environment, of a gradually waning prerogative, it might be questioned why one would embark upon a major new study of the prerogative, particularly since it might be thought that prerogative powers were either very well understood, or were facing extinction. But the answer lies partly in the question. There hasn't been a full systematic analysis of the scope and nature of the royal prerogative for many years – perhaps not since Chitty in 1820. When we are considering codifying, or abolishing the prerogative, it would be logical to proceed from the basis of a thorough understanding of what we are reviewing. One must also distinguish between the factual existence of the prerogative and the normative role it plays, and between the concept of the Crown and the exercise of the prerogative. Recent events, such as the judicial review of the royal prerogative of prorogation, have again placed the prerogative in the spotlight, and raised questions about the role of the prerogative.

The scope of the royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, making the courts the final arbiter of whether or not a particular type of prerogative power exists. The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all. In such circumstances, the Government, Parliament and the wider public are left relying on statements of previous Government practice and legal textbooks, the most comprehensive of which is now 200 years old.

This uncertainty has been criticised. Professor Rodney Brazier has written,¹

... the demand for a statement of what may be done by virtue of [the royal prerogative] is of practical importance. Yet it has been said judicially that such a statement cannot be arrived at, because only through a process of piecemeal judicial decisions over the centuries have particular powers been seen to exist, or not to exist, as the case may be.

1 Brazier, Robert, "Constitutional Reform and the Crown" in Sunstein, Maurice & Sebastian Payne (eds.), *The Nature of the Crown* (1999), p. 339.

It would seem that the royal prerogative is sufficiently flexible that it may be exercised in ways and circumstances different to those traditional to it – more on this when we consider *Black's case*. This is of increasing importance at a time when governments are finding it again necessary to have resort to executive authority to meet the exigencies of a resurgent terrorist threat.

Recent government papers, particularly *The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report* (2009), have canvassed the situation, albeit relatively briefly. Key is the observation that:

The current Review has provided an opportunity for Government to examine the current state of the prerogative and, in this report, to provide for the first time a consolidated list of prerogative powers and to assess the case for further, wide-scale reform of those powers. The previous chapter summarised the difficulties to which any further narrowing of the prerogative could give rise [T]he Justice Secretary has said that he will explore alternative options for dealing with the exercise of the Royal prerogative in relation to applications for free pardons. Some of the remaining prerogative powers could be candidates for abolition or reform, but their continued existence has – at the minimum – no significant negative effects. In many cases it is positively useful. Legislation to replace some of them could itself give rise to new risks: of unnecessary incursions into civil liberties on the one hand, or of dangerously weakening the state's ability to respond to unforeseen circumstances on the other.

This leaves us with the difficulty that, as Brazier noted, the prerogative remains important but lacks a definitive definition. The identification of that is what is here proposed, though as has been observed by Poole,

The defining characteristic of the prerogative is that its exercise does not require the approval of Parliament. Beyond this bare account, there is little agreement either on the definition of the concept itself – those two giants of English public law scholarship, Blackstone and A. V. Dicey, gave contrasting accounts – or even as to the precise scope of the powers still extant.²

The intention of this work is not to cover the well-trodden paths of judicial review of the prerogative (though the expansion of that procedure is explored). Instead, it will seek to review the origins, nature and classifications of the prerogative, in search of a hitherto common element – beyond the simple (or not so simple) definitions given above. It is unapologetically historical, for as Sir Walter Scott observes in *Guy Mannering*,

2 Poole, Thomas, “United Kingdom: The royal prerogative” (2010) 8(1) *I•CON* 146–155, 146.

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.³

Identifying a common element, or a coherence, to the prerogative may aid both in understanding the prerogative power and also assist in any endeavours to codify or replace it.

Whilst the abolition or codification of the prerogative might not inherently reduce the role of the Crown as the centrepiece of the constitutional framework, nonetheless, relocating authority, hitherto focussed on the executive branch of government, in the legislative or judicial, would constitute a rebalancing of the constitution, and should only be done with due care and attention not merely to detail but to the principles which have governed our polity for much of the past thousand years.

I would like to thank the various scholars, commentators, reviewers and myriad other people who are inevitably involved to some degree in the production of any work of this sort. As always, any errors and omissions remain mine alone.

Noel Cox

3 Scott, Sir Walter, *Guy Mannering* (1815).

Introduction

This work is a study of the royal prerogative, that particular if not peculiar cluster of legal powers, privileges and immunities which were and to some extent still are, vested in the person and institution of the Sovereign of the United Kingdom and of the states which derive their constitutional form from that original. Whilst individual powers, privileges and immunities may, in particular countries, have been abolished, fallen into disuse, or been constrained by statutory intervention, the general form and nature of the royal prerogative remains in existence in the United Kingdom, and all those states which remain as Westminster-style constitutional monarchies, and in some countries in which, though now republics, the system was preserved. In general, this study focuses on the situation in the United Kingdom, but, although not strictly a comparative study, it is not limited to that country.

As Payne observed ‘There is no single accepted definition of the royal prerogative. The various definitions appear to conflict with each other’.¹ This presents difficulties for anyone attempting to understand the nature of the prerogative.² The difficulty lies at the heart of the constitution, for, according to Blackstone (1765), the law of the constitution clothes the person of the Sovereign with supreme sovereignty and pre-eminence.³ Moreover, the rights, privileges, immunities and other legal attributes that make up the royal prerogative are derived

- 1 Payne, Sebastian, “The Royal Prerogative” in Maurice Sunkin & Sebastian Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (1999), p. 78.
- 2 In general, throughout this book the term ‘prerogative’ is preferred to ‘royal prerogative’. This is not, unlike Markesinis, because of any belief that the expression ‘royal’ is a misnomer or anachronism, but simply for brevity. It must be noted, however, that it invites the criticism that there is a conceptual distinction between prerogative and royal prerogative. However, the reader’s indulgence is begged, that allowance be made for this small liberty; c.f. Markesinis, Basil S., “The Royal Prerogative Revisited” (1973) 32 *Cambridge L.J.* 287.
- 3 Blackstone, Sir William, *Commentaries on the Laws of England* ed. E. Christian (14th edn., 1803), p. 241. This statement can be reconciled with the realities of the modern constitution only if it is understood that the Sovereign can lawfully and constitutionally act only in certain ways. Blackstone’s enunciation of the Sovereign’s sovereignty and pre-eminence is in fact the basis of the corollaries expressed, with qualifications.

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from ancient custom and the common law.⁴ However, the Sovereign is bound by the terms of the coronation oath, and in what we might today blandly describe as constitutional conventions, to observe and obey the law.⁵

This is further complicated by the reality that the prerogative, though exercised by or in the name of the Sovereign, is (generally at least) exercised at the behest of ministers responsible to Parliament. In the Canadian case of *Black v. Chrétien*,⁶ the Court observed: ‘As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative.’⁷ This conclusion was based upon the judgment of Wilson J., in *Operation Dismantle*, that the prerogative power may be exercised by cabinet ministers and therefore does not lie exclusively with the Governor-General.⁸ This does not mean that a minister (or ministers collectively) can alone exercise a prerogative power, but rather the exercise of the prerogative is on the advice of these ministers – though when executed by means of an Order-in-Council, the ministers have an executive as well as advisory role. This terminology, however, illustrates the difficulty at time found in distinguishing between the factual existence of the prerogative and the normative role it plays, and between the practical exercise of the prerogative (generally) at the behest of Ministers of the Crown.

In a similar manner, in 2014 the House of Commons Political and Constitutional Reform Committee released a report on the *Role and powers of the Prime Minister*. The report broadly argued for more powers to be placed on a statutory footing, with parliamentary approval. The Report referred to a previous attempt by the Committee’s Chair to promote placing the Prime Minister’s powers under the prerogative on a statutory footing. In a private member’s Bill, included in the report as an appendix, Graham Allen M.P. suggested a fixed, exhaustive list of prerogative powers exercisable by the Prime Minister:

- 1 To make Orders in Council.
- 2 To declare war or commit United Kingdom forces to armed conflict, but only after the House of Commons has given its approval.
- 3 To issue lawful command to the armed forces.
- 4 To require persons to perform military service or other service to the state in times of armed conflict or emergency.
- 5 To sign or ratify treaties.
- 6 To recognise foreign governments.

4 See Anson, Sir William, *The Law and Custom of the Constitution* ed. A.B. Keith (5th edn., 1922).

5 As to the common law, see Bracton, de, Henry, *On the Laws and Customs of England (Henri de Bracton de Legibus et Constuetudinibus Angliæ)* ed. G.E. Woodbine; trans. S.E. Thorne (1968) (Bracton), lib. I, c. 8 (Bracton); Blackstone, Sir William, *Commentaries on the Laws of England* ed. E. Christian (14th edn., 1803), pp. 241–242.

6 *Black v. Chrétien* (2001) 199 D.L.R. (4th) 228 (Court of Appeal of Ontario).

7 Ibid, para. 32 per Laskin J.A.

8 *Operation Dismantle Inc. v. The Queen* [1985] 1 S.C.R. 411 (S.C. Canada).

- 7 To appoint ambassadors, permanent secretaries of departments, the heads of the security services, members of the Defence Staff, Royal Commissions and members of public bodies.
- 8 To declare a state of emergency.
- 9 To order the confiscation, forfeiture or seizure of property and assets.
- 10 To issue pardons and detail felons or the insane during pleasure.
- 11 To institute or quash legal proceedings.
- 12 To assert Crown immunity in any legal proceedings and to grant public interest immunity certificates.
- 13 Powers in relation to intestacy, the failure of charitable trusts, treasure trove, mineral rights, wrecks, sturgeon, swans, whales, territorial waters and the ownership of the foreshore of the United Kingdom.⁹

Unfortunately, this contains a number of conceptual problems, from the mis-application of prerogatives actually in the hands of the law officers of the Crown, to the more fundamental mis-conception that these prerogatives are those of the Prime Minister; where some discretion remains in the hands of the Sovereign (however uncertain), these cannot be categorised as prerogatives controlled by the Prime Minister, much less his or her prerogatives. The report was not acted upon by Government.

The 1688 revolutionary settlement and the Bill of Rights (1688 or 1689) established beyond any doubt the supremacy of parliamentary statutes over the prerogatives of the monarch. The Sovereign's exercise of her executive prerogative powers in the modern constitution are regulated by conventions and the principles of ministerial responsibility,¹⁰ and now also by the growing justiciability of the prerogative.

Dicey (1885) gives what is generally regarded as the standard definition of what prerogative powers are:

The prerogative appears to be historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the crown. The prerogative is the name of the remaining portion of the Crown's original authority ... Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of the prerogative.¹¹

The Diceyan view is the one most commentators follow, but some constitutional lawyers prefer the definition given a century earlier by William Blackstone:

By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the

9 Political and Constitutional Reform Committee, *Role and powers of the Prime Minister*, First Report of Session 2014–15, H.C. 351, 24 June 2014, Appendix 2.

10 See Marshall, Geoffrey, *Constitutional Conventions – The Rules and Forms of Political Accountability* (1986).

11 Carroll, Alex, *Constitutional and Administrative Law* (4th edn, 2007), p. 246.

4 Introduction

ordinary course of common law, in right of his regal dignity ... it can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects.¹²

The two views are of course significantly divergent, if not inconsistent. Blackstone maintains that the prerogative simply covers those actions that no other person or body in the United Kingdom can undertake, such as the dissolution of Parliament. Powers which belong to subjects also cannot, *ipso facto*, be prerogative powers. Dicey would however regard these as prerogative powers, on the basis that 'every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of the prerogative'.¹³ This does not allow for the fact that some powers of the Crown are those which they share with the subject; and not all the prerogative is comprised of powers – it has always included immunities and privileges also. Yet, it is his definition which has garnered more judicial support. This will be considered at more length in Chapter 9.

The distinction between prerogative and statutory authority isn't the only way of approaching this issue. Wade argued¹⁴ – though Gordon wasn't persuaded by this – that Dicey was right when he, Dicey, used the distinction between legal sovereignty and political sovereignty.¹⁵ Parliament (strictly the Crown-in-Parliament) was the legal sovereign, and could not be bound; the prerogative was not vested in the Crown-in-Parliament, and therefore wasn't supreme law.

However, as Gordon argued, in the words of Loughlin,

[t]he basic question for constitutional lawyers is not whether we have a legal or political constitution: it is how the idea of law within the political constitution (i.e. the constitution of the polity) might best be conceptualized.¹⁶

Gordon prefers the definition offered by Jennings over that of Wade.¹⁷ Jennings argued that Parliament can bind its successors, as what Dicey called the supremacy of Parliament cannot be truly sovereign since it was limited by such as public opinion.¹⁸ Jennings argued that legal sovereignty is not sovereignty as the

12 Blackstone, Sir William, *Commentaries on the Laws of England* ed. E. Christian (4th edn., 1978), Vol. 3, article 2, section 1. Here and elsewhere the spelling (and occasionally punctuation) is modernised for any early quotation, though the text is otherwise unaltered.

13 Carroll, Alex, *Constitutional and Administrative Law* (4th edn, 2007), p. 246.

14 Wade, Sir William, "The Basis of Legal Sovereignty" (1955) *Cambridge L.J.* 172–197.

15 Dicey, Albert, *Introduction to the Study of the Law of the Constitution* (8th edn. 1915), pp. 70–74.

16 Loughlin, Martin, "Towards a Republican Revival?" (2006) 26(2) *Oxford Journal of Legal Studies* 425–437.

17 Gordon, Michael, "The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade" (2009) *Public Law* 519–543.

18 Jennings, Sir Ivor *The Law and the Constitution* (5th edn., 1959), p. 147.

legislative power of Parliament is derived from the common law.¹⁹ A true sovereign cannot be bound. However, although Parliament is not truly sovereign, it can alter the procedure by which law is enacted, in manner and form.

Whilst these arguments may appear semantic or overly technical, they do expose the diverse attitude to the fundamental core of the constitution – a lack of clarity that is inevitable in an evolutionary historic constitution that is not the product of a single directing formative mind.

Whichever definition of the prerogative is preferred (and even Dicey's is now over a century old, and showing signs of increasing age), we must first briefly canvas the history of the prerogative.

The royal prerogative may be defined as being that special pre-eminence which the Sovereign has over and above all other persons by virtue of the common law,²⁰ but out of its ordinary course, in right of her regal dignity,²¹ and includes all the 'special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England'.²²

19 Ibid, pp. 150, 156.

20 In theory, the Sovereign has supreme sovereignty and pre-eminence, and under the doctrine of perfection, can do no wrong: see Blackstone, Sir William, *Commentaries on the Laws of England* ed. E. Christian (14th edn., 1803), pp. 241–242, 245–246; *Re M.* [1994] 1 A.C. 377, sub nom *M. v. Home Office* [1993] 3 All E.R. 537 (H.L.).

21 Blackstone, Sir William, *Commentaries on the Laws of England* ed. E. Christian (14th edn., 1803), p. 239. Literally, the term 'prerogative' (*praerogative*) means something demanded before or in preference: *ibid*, p. 239. According to Sir Henry Finch 'by the prerogative that is law almost in every case of the King which is law in no case of the subject': Finch, Sir Henry, *Discourse on the Law* (reprinted 1759, first published 1627), lib. ii, p. 85. The prerogative was described by Dicey as 'both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown' (*Law of the Constitution* (10th edn.), p. 424). This statement has been cited in a number of judgments, e.g. in *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508, 526 per Lord Dunedin (H.L.), but it is not strictly accurate, because the prerogative also includes rights and privileges of various kinds. The Lord Privy Seal, in a written answer in the House of Lords to the question 'what are the categories of powers exercised by ministers exclusively under the royal prerogative', said 'the government shares the view of Wade and Bradley, in their work on constitutional law, that it is not possible to give a comprehensive catalogue of prerogative powers': 568 H.L. Official Report (5th series), 1 February 1996, written answers, col 118; Wade, Sir Henry, Q.C. & Bradley, A.W., *Constitutional and Administrative Law* (11th edn., 1993, first published 1931), p. 264.

22 Comyns, Sir John & Hammond, A., *A Digest of the Laws of England* (5th edn., 1822) ('Com. Dig.'). Prerogative, A. Powers specially conferred upon the Crown cannot be said to form part of the prerogative, although the prerogative has frequently been defined and regulated by statute: see *Convocations' Case* (1611) 12 Co. Rep. 72; and the statute *Prerogativa Regis* (temp incert), the unrepealed portion of which declares the law on certain points as to wreck of the sea, royal fish (c 13) and the construction of royal grants (c 17) (see also (1891) 6 *English Historical Review* 367).

The use of the term 'the Crown' conveys the correct implication that prerogative powers are, with very few exceptions, exercised not by the Sovereign in person but in her name by her servants. Even where the Sovereign acts in person, she normally acts in accordance with the advice given to her by ministers. See Wade, Sir Henry, Q.C. &

The prerogative is thus derived from²³ and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows.²⁴ In particular, no prerogative may be recognised that is contrary to Magna Carta or any other statute,²⁵ or that interferes with the liberties of the subject.²⁶

The extent of the prerogative being necessarily somewhat vague, it has been necessary at various times to define its limits more accurately by statute.²⁷ The principal provisions, from a constitutional standpoint, were said to be found in four great statutes or charters by which the rights and liberties of the subject are preserved and 'acts of tyranny' by the Crown or its ministers restrained. The four great statutes or charters are Magna Carta of Edward I (1297) (Eng.); the Petition of Right (1627) (Eng.); the Bill of Rights 1689 (Eng.), confirmed by the Crown and Parliament Recognition Act 1689 (Eng.); and the Act of Settlement 1701 (Eng.).²⁸ However, these statutes must not be regarded as curtailments of existing

Bradley, A.W., *Constitutional and Administrative Law* (11th edn., 1993, first published 1931), pp. 244–245, 261–264; and de Smith, S.A. & Rodney Brazier, *Constitutional and Administrative Law* (7th edn, 1994), pp. 139–142.

- 23 Historically it is incorrect to say that the prerogative is 'created' by the common law, because it is the residue of royal authority left over from a time before it was effectually controlled by law; but, since the time of Bracton, who founded the royal authority on law, it has been legally correct to use that term.

24 Com Dig, Prerogative, A; *Case of Proclamations* (1611) 12 Co. Rep. 74, 75.

25 2 Co. Inst. 36, 54.

- 26 Blackstone, Sir William, *Commentaries on the Laws of England* ed. E. Christian (14th edn., 1803), p. 245. See also *ex parte Barnsley* (1744) 3 Atk. 168, 171; *Case of Proclamations* (1611) 12 Co. Rep. 74. The scope of the prerogative in home affairs has been so severely curtailed by statute that it is difficult to see how any act by or authorised by the Crown causing damage to a subject within the realm could be justified as having been lawfully done by virtue of the prerogative. But if that could possibly have occurred in time of peace, it seems that the subject would have a claim to compensation see *Burmah Oil Co. (Burma Trading) Ltd v. Lord Advocate* [1965] A.C. 75, [1964] All E.R. 348 (H.L.), not overruled on this point by the War Damage Act 1965 (U.K.).

- 27 The prerogative may also, in effect, be in abeyance where statute has enacted provisions which enable what might have been done under the prerogative to be done under the statute.

- 28 Magna Carta was first assented to by King John in 1215. It was confirmed, and sometimes extended but more frequently curtailed, more than 30 times between the reigns of Henry III and Henry IV. The confirmation and reissue of 1297, known as Magna Carta of Edward I (1297) is still in force as to cc. 1, 9, 29, 37, and to that extent still binds the Crown. The same applies to various of the confirming charters, namely the statute 25 Edw. 1 (Confirmation of the Charters) (1297), cc. 1 (in part), 6; the statute 25 Edw. 3 stat. 5 (Executors) (1351–2), c. 5; the statute 28 Edw. 3 (1354), c. 3; the statute 7 Hen. 4 (Liberties, Charters and Statutes Confirmed) (1405–1406), c. 1; the statute 4 Hen. 5 stat. 2 (Confirmation of Charters and Statutes) (1415–16); and the statute 2 Hen. 6 (Confirmation of Liberties) (1423), c. 1. Constitutionally the most important of these charters is now Magna Carta of Edward I (1297) (25 Edw. 1).

The Petition of Right (1627) was drawn up by the Commons in 1627, and recited in particular Magna Carta of Edward I (1297) and the statute 25 Edw. 1 (Statute Concerning Tallage) (1297) (25 Edw. 1), of which c. 1 is still in force. To the petition

prerogatives, but as declarations of the fundamental laws of England (and now of the United Kingdom).²⁹

The royal prerogative originated as the personal powers of the monarch. From the thirteenth century in England, as in France, the Sovereign was powerful, but what could have been almost absolute power was checked by Bracton's formulation that the King 'must not be under man but under God and under the law, because law makes the King',³⁰ and by 'the recrudescence of feudal turbulence in the fourteenth and fifteenth centuries'. During the sixteenth century, this turbulence began to recede, and the Sovereign became truly independent, building the modern state around the conception of the sovereign. The rise of Parliament in this period, however, was ultimately problematic for the position of the Sovereign. While the Sovereign was 'the predominant partner in the English constitution', the courts stopped short of declaring him all-powerful, recognising the role that Parliament played in the English constitution.³¹ In *Ferrer's Case*,³² this was recognised, the court expressly noting that the King was far more powerful with the consent of Parliament than without it. Nowhere was this more apparent than in the matter of taxation, over which a number of seminal decisions were made by the courts in the early years of the seventeenth century, in particular. Sir Thomas Smith and other writers of the period pointed out the Sovereign could not impose taxation without Parliament's consent.³³

At around the same time, King Henry VIII and his immediate descendants normally followed the views of the courts, despite the fact that they were theoretically not bound by judges in respect of the prerogative, provided the claimed prerogatives were accepted by the courts. Holdsworth inferred that by regularly asking the legal officers of the Crown and the judiciary for advice and consent, Henry VIII recognised the need for a stable government to follow the law. He also contended that the view that the law is supreme over all 'was the view of all the leading lawyers and statesmen and publicists of the Tudor period'.³⁴ It was accepted that while the King had 'unfettered discretion', he was limited in areas where the courts had imposed conditions on the use of the prerogative, or where

itself Charles I appended the answer '*Soit droit fait come est desire*' (let right be done as is desired).

29 See Coke, Sir Edward, *Coke upon Littleton* (19th edn., 1979), Vol. II, proëm 3; Blackstone, Sir William, *Commentaries on the Laws of England* ed. E. Christian (14th edn., 1803), p. 128.

30 I.e. *rex non debet esse sub homine, sed sub Deo et lege, quia lex facit regi*. Bracton, lib. I c. 8; 12 Co. Rep. 65; Fleta 2 c. 5; Chitty, Joseph, *A Treatise on the Law of the Prerogatives of the Crown; And the Relative Duties and Rights of the Subject* (1978), p. 5.

31 For instance, by extolling the pre-eminence of the law over all institutions, including the King.

32 *Ferrer's Case* (1598) 6 Co. Rep. 9a; 77 E.R. 266.

33 Smith, Sir Thomas, *De Republica Anglorum; A Discourse on the Commonwealth of England* ed. L. Alston (1970, first published 1583).

34 Holdsworth, Sir William, "The Prerogative in the Sixteenth Century" (1921) 21(6) *Columbia L.R.* 554-571, 556.

he himself had chosen to do so.³⁵ The latter is particularly interesting, and resembles a form of self-adopted convention.

The first challenge to this stability – based on mutual restraint between Sovereign and courts – came about in 1607, with *Prohibitions del Roy*.³⁶ King James I claimed that, as Sovereign, he had a divine right to sit as a judge and interpret the common law as he saw fit. Led by Sir Edward Coke, the judiciary rejected this idea, stating that while the Sovereign was not subject to any individual, he was subject to the law. Until he had gained sufficient knowledge of the law, he had no right to interpret it; Coke pointed out that such knowledge ‘demanded mastery of an artificial reason ... which requires long study and experience, before that a man can attain to the cognizance of it’.³⁷ Whilst this may be a somewhat artificial argument (it opened up the prospect of a legally trained Sovereign asserting their authority over the common law), it nonetheless restrained royal interference in the sphere of responsibility of the judiciary. Similarly, in the *Case of Proclamations* in 1611, Coke held that the Sovereign could only exercise those prerogatives he already had, and not create new ones.³⁸ This did not, however, preclude the development and redefinition of prerogatives to suit changing conditions.

With the so-called Glorious Revolution, the House of Stuart fell, and William III became King of England. At the same time, the Bill of Rights 1689 (Eng.)³⁹ was drafted, implementing in formal law the political reality of the Sovereign’s growing subservience to Parliament. It specifically limited the royal prerogative, with Article 1 holding that the ‘power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal’, and article 4 confirming that ‘levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal’. The Bill also confirmed that Parliament had the right to limit the use of remaining prerogatives, as later shown by the Triennial Act 1694 (Eng.),⁴⁰ which required the Sovereign to dismiss and call Parliament at certain times.⁴¹

Although most prerogatives are now exercised at the behest of ministers, some remain in the hands of the Sovereign. One of the Sovereign’s prerogatives is – or was (in the United Kingdom) – the dissolution of Parliament, which is, in the words of Barnett, ‘perhaps the most important residual prerogative exercised personally by the Sovereign, and presents the greatest potential for controversy’.⁴² This

35 Ibid, 561.

36 *Prohibitions del Roy* (1607) 12 Co. Rep. 63; 77 E.R. 1342 (‘the Case of Prohibitions’).

37 Ibid.

38 *Case of Proclamations* (1611) 12 Co. Rep. 74; 77 E.R. 1352 (K.B.).

39 1 Will. III & Mary sess. 2 c. 2.

40 6 & 7 Will. III & Mary II c. 2.

41 Loveland, Ian, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (5th edn., 2009), p. 91. The Triennial Act 1694, also known as the Meeting of Parliament Act 1694 (6 & 7 Will. & Mar. c. 2), required Parliament to meet annually and to hold general elections once every three years.

42 Barnett, Hilaire, *Constitutional & Administrative Law* (7th edn., 2009), p. 106.

prerogative is normally exercised at the request of the Prime Minister, either at his or her discretion or following a motion of no confidence. The last time the Sovereign unilaterally dissolved Parliament was in 1835, when Earl Grey resigned as prime minister; although he had a fully functioning cabinet capable of carrying on without him, when King William IV chose to force it out of office.

Constitutional theorists have differing views as to whether this would be possible today (subject to the statutory reforms in the United Kingdom having now suppressed the prerogative with respect to dissolution); Jennings wrote that dissolution involves ‘the acquiescence of ministers’, and as such the Sovereign could not dissolve Parliament without ministerial consent; ‘if ministers refuse to give such advice, she can do no more than dismiss them’. Dicey – a hundred years earlier – however, believed that in certain extreme circumstances the Sovereign could dissolve Parliament single-handedly, on the condition that

an occasion has arisen on which there is fair reason to suppose that the opinion of the House is not the opinion of the electors ... A dissolution is allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation.⁴³

It is interesting that Dicey is better known today for his interpretation of the powers of the Crown which limit the discretion of the Sovereign than he is for those which impart an element of independence. It is, however, unlikely that he was correct in his view of the personal prerogative to dissolve Parliament. At least, even if he were right in the early twentieth century, this particular exercise of the prerogative is dead or dormant today. Under the Fixed-term Parliaments Act 2011 (U.K.), as amended, Parliament is dissolved automatically 25 working days ahead of a general election. Elections ordinarily take place five years after the previous general election, but may be held sooner if the Prime Minister loses a vote of confidence, or if two-thirds of the members of the House of Commons vote in favour of an early election. Under section 3(2), Parliament cannot otherwise be dissolved, and, in the United Kingdom, the prerogative with respect to dissolution, is abrogated.

The dissolution of the United Kingdom Parliament on 30 March 2015, to make way for the general election to be held on 7 May 2015, was the first time Parliament had ever dissolved automatically, as opposed to being dissolved by Royal Proclamation (although provision was made by the Septennial Act 1715 (G.B.) for Parliament to dissolve automatically after seven, and later five years, in practice dissolution was always effected shortly before the end of the five-year period by means of a Royal Proclamation).⁴⁴

Section 3(1) of the Fixed-term Parliaments Act 2011 (U.K.) originally stated that Parliament should be automatically dissolved 14 working days before a

⁴³ Ibid, p. 107.

⁴⁴ In New Zealand, Parliament was, on at least one occasion, automatically dissolved, due to a miscalculation of the length of the parliamentary term.

polling day of a general election. This was subsequently amended by the Electoral Registration and Administration Act 2013 (U.K.) to 25 working days. Section 1 of the Act provides for such polling days to occur on the first Thursday in May of the fifth year after the previous general election, starting with 7 May 2015. The Prime Minister has the power, by order made by Statutory Instrument under section 1(5), to provide that the polling day is to be held up to two months later than that date. Such a Statutory Instrument must be approved by each House of Parliament.

Section 2 of the Act also provides for two ways in which a general election can be held before the end of this five-year period:

If the House of Commons resolves ‘That this House has no confidence in Her Majesty’s Government’, an early general election is held, unless the House of Commons subsequently resolves ‘That this House has confidence in Her Majesty’s Government’. This second resolution must be made within fourteen days of the first.

If the House of Commons, with the support of two-thirds of its total membership (including vacant seats), resolves ‘That there shall be an early parliamentary general election’.

In either of these two cases, the monarch (on the recommendation of the prime minister) appoints the date of the new election by proclamation. Parliament is then dissolved 25 working days before that date.

The Sovereign can theoretically force the dissolution of Parliament through a refusal of royal assent to legislation; this almost inevitably would lead to a government losing the confidence of the House of Commons. However, by convention, the Sovereign always assents to Bills. The last time the royal assent was not given was in 1708 during the reign of Queen Anne – and even then it was on the advice of ministers. This does not necessarily mean that the right to refuse has altogether died; King George V believed he could veto the Third Irish Home Rule Bill; Jennings wrote that ‘it was assumed by the King throughout that he had not only the legal power but the constitutional right to refuse assent’.⁴⁵ The distinction between a legal power and a constitutional right is of course central to this question. It may well be that the power of dissolution existed where the government lacks a parliamentary majority, but not otherwise.

The appointment of the Prime Minister is also governed by the royal prerogative. Technically, the Sovereign may appoint whoever he or she wishes as Prime Minister, but in practice the appointee is that person who commands a majority in the House of Commons. Usually, this is the leader of the political party which is returned to Parliament with a majority of seats after a general election. Difficulties may result with a so-called ‘hung Parliament’, where no party commands majority support. In this situation, constitutional convention is that the previous incumbent has the first right to form a coalition government and seek

45 Barnett, Hilaire, *Constitutional & Administrative Law* (7th edn., 2009), p. 109.

appointment.⁴⁶ If the Prime Minister decides to retire in the middle of a parliamentary session, as Sir Anthony Eden did in 1957, the Sovereign has little scope for the exercise of discretion. There is usually a 'Prime Minister-in-waiting' who commands the support of the majority of the Commons; he or she will, in the words of Barnett, near-automatically be appointed.⁴⁷ But that is not to say that there is no scope for personal discretion, particularly where there isn't an obvious successor. Normally, a Prime Minister will remain in office until their successor emerges, by whatever means their party has of resolving this.

The most noted prerogative power that affects the judicial system is the prerogative of mercy, which has two elements: the granting of pardons and the granting of *nolle prosequi*. Pardons may be used to eliminate the 'pains, penalties and punishments'⁴⁸ which come from a criminal conviction, although they do not (generally) remove convictions themselves. This power is commonly exercised, in the United Kingdom, on the advice of the Secretary of State for the Home Department; the Sovereign has no direct involvement in its use. Exercise of this power may also take the form of commutations, a limited form of pardon where the sentences is reduced, on certain conditions. The granting of a pardon is not subject to judicial review, as confirmed by *Council of Civil Service Unions v. Minister for the Civil Service* (generally known as the G.C.H.Q. case),⁴⁹ but nonetheless the courts have chosen to criticise its application or lack thereof, as in *R. v. Secretary of State for the Home Department, ex parte Bentley*.⁵⁰

Granting *nolle prosequi* is done by the Attorney-General of England and Wales (or the Scottish or Northern Irish equivalent) in the name of the Crown, to stop legal proceedings against an individual. This also was not reviewable by the courts, as confirmed by *R. v. Comptroller of Patents*,⁵¹ although newer cases suggest that this is no longer the situation,⁵² and as it does not count as an acquittal, the defendant may be brought before the courts on the same charge at a later date.

The prerogative is in much use in the realm of foreign affairs. It is the Sovereign who recognises foreign states (although several statutes regulate the immunities enjoyed by their heads and diplomatic representatives), issues declarations of war and peace, and enters into international treaties. The Sovereign also has the power to annex territory, as was done in 1955 with the island of Rockall.⁵³ Once territory has been annexed, the Sovereign (through their ministers) has complete discretion as to what extent it will take over the former government's liabilities; this

46 Ibid, p. 114.

47 Ibid, p. 115.

48 *R. v. Foster* [1984] 2 All E.R. 679 (C.A.).

49 *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 (H.L.).

50 *R. v. Secretary of State for Home Department, ex parte Bentley* [1994] Q.B. 349; [1993] 4 All E.R. 443.

51 *R. v. Comptroller of Patents* [1899] 1 Q.B. 909.

52 *R. v. General Council of the Bar, ex parte Percival* [1990] 3 All E.R. 137.

53 Though this power has also been questioned; Edeson, W.R., "The Prerogative of the Crown to Delimit Britain's Maritime Boundary" (1973) 89 *L.Q.R.* 364.

was confirmed in *West Rand Central Gold Mining Company v. The King*.⁵⁴ The Sovereign also has the power to alter British territorial waters and cede territory. His or her freedom to do this in reality rather than theory is doubtful, in that it would involve depriving British citizens of their nationality and rights. When the island of Heligoland was ceded to Germany in 1890, parliamentary approval was first sought.⁵⁵ The Sovereign can also regulate colonies and dependent territories by exercising the prerogative through Orders-in-Council. The courts have long fought the Sovereign's use of this power; in *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*,⁵⁶ the Court of Appeal ruled that using Orders-in-Council to frustrate judicial rulings was an unlawful abuse of power, although this was later overturned in the House of Lords.⁵⁷

Passports are also regulated by the prerogative, although there are statutory provisions. Under the common law, citizens have the right to freely leave and enter the United Kingdom, but under statute and in administrative practice it is extremely difficult to do so without a passport. In *R. v. Foreign Secretary, ex parte Everett*,⁵⁸ the courts held that it was their right to review situations where a British citizen has been granted or withheld a passport. The writ of *ne exeat regno* was also used to prevent a person leaving the country, although it has recently been described as a 'charming historical relic but must be regarded as an anachronism given the availability of the modern form of order'.⁵⁹ The right to form treaties is arguably a disputed prerogative power; under Blackstone's definition, a prerogative power must be one unique to the monarch. However, because a treaty cannot interface with United Kingdom law without an enabling Act of Parliament (such as the European Communities Act 1972 (U.K.)), the Sovereign alone cannot bring one into force.⁶⁰ As recent case law establishes, nor can the Sovereign revoke such a treaty with the consent of Parliament, where such action would

54 *West Rand Central Gold Mining Company v. The King* [1905] 2 K.B. 391.

55 Loveland, Ian, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (5th edn., 2009), p. 120.

56 *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] U.K. H.L. 61; [2008] 3 W.L.R. 955 (H.L.).

57 *Ibid.*

58 *R. v. Foreign Secretary, ex parte Everett* [1989] Q.B. 811, [1988] E.W.C.A. Civ. 7, [1989] 2 W.L.R. 224.

59 *Bhura v. Bhura* [2012] E.W.H.C. 3633 (Fam.), per Mostyn J.

60 Although the international approach varies between monist and dualist extremes, the United Kingdom is traditionally seen as exemplifying the dualist position, with treaties having no effect in domestic law unless incorporated by statute. However, where legislation is capable of two interpretations, one consistent with a treaty obligation and one inconsistent, then the courts will presume that Parliament intended to legislate in conformity with the treaty and not in conflict with it. Customary international law is considered to form part of the common law (see *Keyu v. Secretary of State for Foreign and Commonwealth Affairs* [2015] U.K.S.C. 69). It has been established that an international convention may be used as an aid to statutory interpretation, particularly when it comes to human rights, or be something to which the court can have regard in the exercise of judicial discretion (see *Morgan v. Hinton Organics (Wessex) Ltd* [2009] E.W.C.A. Civ. 107).

involve changes to statute law.⁶¹ This would have the effect of requiring parliamentary involvement in almost every conceivable case, as few treaties would not have statutory implications.

The Sovereign also has power to exercise his or her prerogative over the granting of honours, the regulation of the armed forces and (for the established Church of England) ecclesiastical appointments. Although the granting of most honours is normally determined by the executive, the Sovereign is still the person who technically awards them. Exceptions to this rule are membership of the Order of the Garter, the Order of the Thistle, the Royal Victorian Order and the Order of Merit, which the Sovereign has complete discretion to grant.⁶² In relation to the armed forces, the Sovereign is the Commander-in-Chief,⁶³ and members are regulated under the prerogative.⁶⁴ Most statutes do not apply to the armed forces, although some areas, such as military discipline, are governed by specific Acts of Parliament. The Sovereign is the sole authority for the armed forces, and as such their organisation, disposition and control cannot be questioned by the courts.⁶⁵ This exercise of prerogative power gives the Crown authority to recruit members of the armed forces, appoint commissioned officers, and establish agreements with foreign governments to station troops in their territory.⁶⁶ The prerogative empowers the Sovereign to appoint bishops and archbishops in the Church of

61 *R. (Miller) v Secretary of State for Exiting the European Union* [2017] U.K.S.C. 5.

62 See Cox, Noel, "The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity" (1998–1999) 14 *Australian Journal of Law and Society* 15–42.

63 The term 'Commander-in-Chief' has a loose and uncertain meaning. The Sovereign is, by virtue of that status and position, deemed to be commander-in-chief, although the term is rarely used (unlike in the United States of America, where it has assumed a life quite separately from that of the style of President, though the term Commander-in-Chief is likewise undefined, and indeed shares the same origins as that used by the British Sovereign). In New Zealand, it is stated in Defence Act 1990 (N.Z.), s. 5 that the Governor-General may from time to time, in the name and on behalf of the Sovereign, continue to raise and maintain armed forces. Although the precise effect of s. 6 is unclear, it states that the Governor-General, as Commander-in-Chief of New Zealand, shall have such powers as pertain to the office of Commander-in-Chief. He or she is appointed, under the Letters Patent Constituting the Office of Governor-General 1983 (S.R. 1983/225), amendments S.R. 1987/8, S.R. 2006/219, Governor-General and Commander-in-Chief. Elsewhere, Governors of separate colonies and Governors-General are habitually appointed Commander-in-Chief; in the Falkland Islands, after the recovery of the islands from Argentinian invaders, the positions of Governor and Commander-in-Chief were temporarily separated, with the commander of the garrison being appointed Commander-in-Chief.

64 However, the Bill of Rights 1688 (1 Will. & Mary Sess. 2 c. 2) (Eng.) Art. 6 prohibits the 'raising and keeping a standing army within this kingdom, in time of peace, without consent of Parliament'. See *Curtis v. Minister of Defence* [2002] 2 N.Z.L.R. 744 (C.A.).

65 Loveland, Ian, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (5th edn., 2009), p. 119.

66 Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (2009).

England,⁶⁷ and to regulate the printing and licensing of the authorised Church of England version of the *Bible*.⁶⁸

R. v. Secretary of State for the Home Department, ex parte Northumbria Police Authority,⁶⁹ recognised that the prerogative also includes the power to ‘take all reasonable steps to preserve the Queen’s peace’, and in *Burmah Oil Co. (Burma Trading) Ltd v. Lord Advocate*,⁷⁰ the House of Lords took the view that it extended to ‘doing all those things in an emergency which are necessary for the conduct of the [Second World] War’.⁷¹

Today, the Sovereign exercises the prerogative almost exclusively in accordance with the advice of her government.⁷² Leyland notes that:

The present Queen ... is kept very closely in touch with the exercise of governmental power by means of a weekly audience with the prime minister during which she is fully briefed about the affairs of government ... [But it] should be emphasised that the prime minister is not under any obligation to take account of royal opinions.⁷³

In simple terms, the prerogative is used to govern the United Kingdom and the realms in the name of the Crown; although the Sovereign has the ‘right to be consulted, the right to encourage, and the right to warn’,⁷⁴ his or her role – at least in normal circumstances – involves no personal exercise of discretion.⁷⁵

Prerogative powers were formerly exercised by the Sovereign acting alone, and later on the advice of ministers. Since the nineteenth century, the advice of the Prime Minister or the cabinet – who are then accountable to Parliament for the decision – has been required in order for the prerogative to be exercised. The Sovereign is constitutionally empowered to exercise the royal prerogative against the advice of the Prime Minister or the cabinet,⁷⁶ but does so only in emergencies or where existing precedent does not adequately apply to the circumstances in question.

67 See Cox, Noel, “The nature of ministerial authority in the Anglican Church in New Zealand” (2005) 119(2) *Churchman* 105–136; Cox, Noel, *Church and State in the Post-Colonial Era: The Anglican Church and the Constitution in New Zealand* (2008).

68 Though based on statutory authority also; Appointment of Bishops Act 1533 (25 Hen. VIII c. 20) (Eng.), ss. 3–5 (amended by the Statute Law Revision Act 1888 (U.K.)); Cathedrals Measure 1931 (21 & 22 Geo. V no. 7) (U.K.), s. 23 (repealed).

69 *R v. Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] Q.B. 26; [1988] 1 All E.R. 556 (C.A.).

70 *Burmah Oil Co. (Burma Trading) Ltd v. Lord Advocate* [1965] A.C. 75 (H.L.).

71 *Ibid.*

72 Wade, Sir Henry, Q.C. & Bradley, A.W., *Constitutional and Administrative Law* (11th edn., 1993), pp. 244–245, 261–264; de Smith, S.A. & Rodney Brazier, *Constitutional and Administrative Law* (7th edn., 1994), pp. 139–142.

73 Leyland, Peter & Gordon Anthony, *Textbook on Administrative Law* (6th edn., 2007), p. 74.

74 Bagehot, Walter, “The English Constitution” in *The Collected Works of Walter Bagehot*, ed. Norman St. John-Stevens (1974), Vol. 5.

75 *Ibid.*

76 Bagehot, Walter, *The English Constitution* (2001), p. 111.

Today, the royal prerogative is concerned with several areas critical to the government of the United Kingdom (and other states), including the conduct of foreign affairs, defence and national security. The Sovereign has a significant constitutional presence in these and other areas, but very limited power, because the prerogative is nowadays in the hands of the Prime Minister and other ministers or other government officials.

Some key functions of the British Government are still executed by virtue of the royal prerogative, but generally the usage of the prerogative has been diminishing as functions are progressively put on a statutory basis.⁷⁷

The courts have jurisdiction to look into the existence or extent of any alleged prerogative,⁷⁸ it being a maxim of the common law that ‘the King ought to be under no man, but under God and the law, because the law makes the King’.⁷⁹ If any prerogative is disputed, the courts must decide the question whether or not it exists in the same way as they decide any other question of law. If a prerogative is clearly established, they must take the same judicial notice of it as they take of any other rule of law.⁸⁰

77 See Chapter 7.

78 The instances in the books are numerous. For examples of cases where the courts have determined the extent of prerogative rights, see *Darcy v. Allen* (1602) 11 Co. Rep. 84b (‘the Case of monopolies’) (monopolies); *Case of Monopolies, East India Co. v. Sandys* (1685) 10 State Tr. 371 (exclusive trading licences). For a recent decision, see *R. v. Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] Q.B. 26; [1988] 1 All E.R. 556 (C.A.), where the Home Secretary’s decision to issue the police with CS gas and plastic baton rounds to deal with serious public disorder was upheld by the Court of Appeal, even though the police authority had refused to approve the supply. It was held that the policy could be justified by virtue of the Crown’s prerogative power to act to meet an actual or apprehended breach of the peace. For an article critical of this decision see Bradley, A.W., ‘Police Powers and the Prerogative’ [1988] *Public Law* 298.

79 I.e. *rex non debet esse sub homine, sed sub Deo et lege, quia lex facit regi*. Bracton, lib. I, c. 8; 12 Co. Rep. 65; Fleta 2 c. 5; Chitty, Joseph, *A Treatise on the Law of the Prerogatives of the Crown; And the Relative Duties and Rights of the Subject* (1978), p. 5.

80 ‘We are indeed bound to take notice of everything that belongs to the Queen’s privilege’: *Elderton’s Case* (1703) 2 Ld. Raym. 978, 980 per Holt C.J.; ‘but if officers of the Crown claim procedural privileges by virtue of the prerogative, they must make out clearly the prerogative’: *Attorney-General to Prince of Wales v Crossman* (1866) L.R. 1 Exch. 381, 386 per curiam. The courts cannot broaden the prerogative: see *B.B.C. v. Johns (Inspector of Taxes)* [1965] Ch. 32, 79; [1964] 1 All E.R. 923, 941 per Diplock L.J. (C.A.). In a classical summary of the subject Frederic Maitland, *The Constitutional History of England – a course of lectures* ed. H.A.L. Fisher (1980, first published 1908), pp. 418–421 said there is often great uncertainty as to the exact limits of the royal prerogative. Although there is no such doctrine that a prerogative may cease to exist because it is not used, many old prerogative powers, even if not actually abolished by statute, have become clumsy and antiquated and have fallen into disuse. The Crown usually prefers to act under definite statutory powers. See also de Smith, S.A. & Rodney Brazier, *Constitutional and Administrative Law* (7th edn., 1994), pp. 144–145. For an article expressing doubts as to a prerogative power, see Edeson, W.R., ‘The Prerogative of the Crown to Delimit Britain’s Maritime Boundary’ (1973) 89 *L.Q.R.* 364; and Bradley, A.W., ‘Police Powers and the Prerogative’ [1988] *Public Law* 298.

There have been several influential decisions of the House of Lords, and now the Supreme Court, which have significantly limited the freedom of use of prerogatives. In 1915, the Lords decided *Re Petition of Right*,⁸¹ which concerned the British Army's seizure of a commercial airfield for military purposes during wartime. The government argued it was to defend against an invasion; the courts held that for the prerogative to be exercised, the government must demonstrate that an invasion situation exists; this was a remarkable instance of the courts departing from the rule of restraint which kept them from making determinations on purely or primarily political questions or matters of high policy. This was backed up by *The Zamora*,⁸² where the Judicial Committee of the Privy Council held generally that to exercise a power not granted by statute (such as a prerogative) the government must prove to the court that the use is justified.⁸³ The next limitation came in *Attorney-General v. De Keyser's Royal Hotel Ltd*,⁸⁴ where the House of Lords confirmed that no new prerogative powers could be created,⁸⁵ and that a statutory provisions in an area where prerogative powers are in use 'abridges the Royal Prerogative while it is in force to this extent – that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance'.⁸⁶

This principle of statutory and indeed judicial superiority was extended in *Laker Airways Ltd v. Department of Trade*,⁸⁷ where it was confirmed that prerogative powers could not be used to frustrate a statutory provision, and that in situations where the power and the statute were designed to be used side by side, the power could only be used to further the aim of the statute. Another extension came with *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union*,⁸⁸ where the Court of Appeal held that even if a statute (in this case the Criminal Justice Act 1988 (U.K.)) had not yet come into force, the prerogative could not be used to alter this statute to 'conflict with Parliament's wishes'.⁸⁹ This was unusual, in that the statute had been passed, but the relevant provisions required a commencement order to come into effect. The court did not decide that passing legislation created a statutory duty for the Secretary of State to bring the provisions of the Act into force at any particular time, and indeed the Criminal Justice Act 1988 (U.K.) was subsequently repealed, having never been in force, and replaced by the Criminal Injuries Compensation Act 1995 (U.K.).

81 *Petition of Right, In re a* [1915] 3 K.B. 649 ('the Shoreham Aerodrome case').

82 *The Zamora* [1916] 2 A.C. 77; 32 T.L.R. 436 (P.C.).

83 Loveland, Ian, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (5th edn., 2009), p. 93.

84 *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508 (H.L.).

85 *Ibid.*

86 Loveland, Ian, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (5th edn., 2009), p. 97.

87 *Laker Airways Ltd v. Department of Trade* [1977] Q.B. 643 (C.A.).

88 *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513, [1995] 1 All E.R. 888 (C.A.).

89 *Ibid.*

Despite these cases, the courts were traditionally unwilling to subject prerogative powers to judicial review. Judges were only willing to state whether or not powers existed, not whether they had been used appropriately.⁹⁰ The courts therefore applied only the first of the *Wednesbury* tests;⁹¹ namely, whether the use was illegal. Constitutional scholars such as Blackstone would have probably considered this appropriate:

In the exertion therefore of those prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution. And yet if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the Parliament will call his advisers to a just and severe account.⁹²

Accountability was therefore political rather than legal.

Until recently the courts would not enquire into the way in which a prerogative power had been exercised.⁹³ During the 1960s and 70s, the attitude of the courts began to change,⁹⁴ with the development of the scope of judicial review,⁹⁵ and

90 *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508 (H.L.).

91 Based on *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223.

92 Loveland, Ian, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (5th edn., 2009), p. 102.

93 See *China Navigation Co. Ltd. v Attorney-General* [1932] 2 K.B. 197 (C.A.) (manner of disposition of armed forces); *Blackburn v Attorney-General* [1971] 2 All E.R. 1380; [1971] 1 W.L.R. 1037 (C.A.) (entry into a treaty); *Hanratty v. Lord Butler of Saffron Walden* (1971) 115 Sol. Jo. 386 (prerogative of mercy); *Gouriet v. Union of Post Office Workers* [1978] A.C. 435; [1977] 3 All E.R. 70 (H.L.) (Attorney-General's consent to the bringing of relator actions).

94 Examples of successful challenges to the exercise of powers conferred by royal prerogative include *R. v. Secretary of State for the Home Department, ex parte Ruddock* [1987] 2 All E.R. 518; [1987] 1 W.L.R. 1482 (the court acknowledged jurisdiction to examine the issue of a warrant to intercept telephones); *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] Q.B. 811; [1989] 1 All E.R. 655 (C.A.) (refusal of a passport); *R. v. Secretary of State for the Home Department, ex parte Bentley* [1994] Q.B. 349; [1993] 4 All E.R. 442 (D.C.) (mercy: refusal of a posthumous free pardon); *Attorney-General of Trinidad and Tobago v. Phillip* [1995] 1 A.C. 396; [1995] 1 All E.R. 93 (P.C.). See also *R. v. Secretary of State for the Home Department, ex parte R.P. and T.G.* [1994] C.O.D. 507 (C.A.) (refusal by Criminal Injuries Compensation Board to make an award for an offence of sexual abuse by a parent of a child committed before 1979, when compensation for offences committed 'under the same roof' was not recoverable); *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513; [1995] 2 All E.R. 244 (H.L.) (refusal of Secretary of State to bring statutory provisions into force). The exercise of the prerogative of mercy under the Constitution of the Bahamas, arts. 90 and 92 in death sentence cases was not amenable to judicial review: *Reckley v. Minister of Public Safety and Immigration* (No. 2) [1996] 1 A.C. 527; [1996] 1 All E.R. 562 (P.C.); following *De Freitas v. Benny* [1976] A.C. 239; [1975] 3 W.L.R. 388 (P.C.).

95 As to judicial review, see Civil Procedure Rules 1998 (S.I. 1998/3132) (formerly R.S. C. Ord. 53).

the courts have been more willing to review the exercise of discretionary power, whether derived from statute or common law, and hence the courts may be willing to review exercises of the prerogative.⁹⁶ The test for reviewability of a prerogative is not the source of the power, but the nature of the function to which it relates and whether it is justiciable.⁹⁷

In *R. v. Criminal Injuries Compensation Board, ex parte Lain*,⁹⁸ the courts held that prerogative powers could be reviewed if they were being used to perform a 'judicial' task; the issues at hand were ones that the courts were easily able to decide. *Laker Airways Ltd v. Department of Trade* lent further weight to the idea that prerogative powers should be subject to stronger judicial review, with Lord Denning saying that 'seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive'.⁹⁹ The most authoritative case on the matter is the G.C.H.Q. case.¹⁰⁰ The House of Lords confirmed that the application of judicial review would be dependent on the nature of the government's powers, not their source. Foreign policy and national security powers were considered outside the scope of judicial review, while the prerogative of mercy is considered within it, as in *R. v. Secretary of State for the Home Department, ex parte Bentley*.¹⁰¹

96 See *R. v. Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 Q.B. 864; [1967] 2 All E.R. 182 (C.A.) (award by Criminal Injuries Compensation Board, set up under the prerogative, held subject to judicial scrutiny by way of certiorari); *Laker Airways Ltd v. Department of Trade and Industry* [1977] Q.B. 643; [1977] 2 All E.R. 182 (C.A.) (withdrawal of designation of airline to operate a transatlantic service); *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374; [1984] 3 All E.R. 935 (H.L.).

97 The most important case in relation to this development has been *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374; [1984] 3 All E.R. 935 (H.L.), in which the Secretary of State for the Foreign and Commonwealth Office decided to exclude trade unions from Government Communications Headquarters (G.C.H.Q.), where civil servants were employed. The House of Lords held that such action was in principle reviewable because it concerned the terms of employment of people who, prima facie, had a legitimate expectation that advantages which they had hitherto enjoyed would not be discontinued without their being consulted. The Secretary of State's invocation of the interests of national security, however, served to remove his decision from judicial scrutiny. Lord Roskill thought that the right of challenge was not unqualified. 'It must, I think, depend on the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process' (418 and 956 per Lord Roskill). See also *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Butt* [1999] C.O.D. 470 (C.A.).

98 *R. v. Criminal Injuries Compensation Board, ex parte Lain* [1967] Q.B. 864 (C.A.).

99 *Laker Airways Ltd v. Department of Trade* [1977] Q.B. 643 (C.A.).

100 *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 (H.L.).

101 *R. v. Secretary of State for Home Department, ex parte Bentley* [1994] Q.B. 349; [1993] 4 All E.R. 443.

As may be seen from the above, the prerogative is both extensive in scope and also constrained by political reality, by Parliament, and the uncertain control of the courts. Former left-wing Labour M.P. Tony Benn campaigned unsuccessfully for the abolition of the royal prerogative in the United Kingdom in the 1990s, arguing that all governmental powers in effect exercised on the advice of the prime minister and cabinet should be subject to parliamentary scrutiny and require parliamentary approval. The Ministry of Justice undertook a 'Review of executive Royal Prerogative powers' in October 2009.¹⁰² Later the government argued that such is the breadth of topics covered by the royal prerogative that requiring parliamentary approval in each instance where the prerogative is currently used would overwhelm parliamentary time and slow the enactment of legislation.¹⁰³ However, it remains important to understand, not merely what comprises the prerogative, but also its nature and form, in order to prepare for any possible reform or abolition, and to make better use of the existing governmental powers, privileges and immunities.

The royal prerogative, based as it is on the common law rather than statute, has been described as a 'black hole' of unaccountable authority at the heart of the constitution.¹⁰⁴ This work seeks to show that, whilst it is something of an enigma, in the sense that it remains uncertain in detail, the flexibility and historic legitimacy of the royal prerogative, combined with its increasing reviewability by the courts, means that it is neither unaccountable nor obsolete; its separation from the authority of the legislature is the very source of its legitimacy and continued relevance. Given the expansion of the scope and reach of judicial review, and parliamentary accountability, of the royal prerogative, it is also not unaccountable.

The approach taken to this task is to canvas the familiar territory covered by Blackstone, Chitty and Dicey, while seeking to ascertain, not the specific attributes and powers, but the sources and justifications for such powers. In so doing a more historically sound classification of the prerogative powers is possible, as well as a clearer understanding of the justification for specific powers and for the prerogative itself.

Throughout the work, the terms 'King' and 'Queen' are used interchangeably, with Queen taken to mean Queen regnant, unless the meaning is otherwise defined; 'Sovereign' or 'monarch' likewise are used, unless the context suggests otherwise, without distinction. Similarly, the term 'Crown' is used to refer to the institution, whether it is seen as a corporation sole or corporation aggregate, of which the Sovereign is the personal, human, manifestation. Likewise, the masculine includes the feminine and vice versa, and the singular the plural, as appropriate.

102 Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (2009).

103 McKie, David, "How ministers exercise arbitrary power", *The Guardian* (London, 6 December 2000) <<https://www.theguardian.com/uk/2000/dec/06/monarchy.comment4>> Retrieved 11 September 2017.

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