

= Royal prerogative in the United Kingdom =

The royal prerogative is a body of customary authority , privilege , and immunity , recognised in the United Kingdom as the sole prerogative of the Sovereign and the source of many of the executive powers of the British government .

Prerogative powers were formerly exercised by the monarch acting on his or her own initiative . Since the 19th century , by convention , 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 monarch remains constitutionally empowered to exercise the royal prerogative against the advice of the prime minister or the cabinet , but in practice would only do so in emergencies or where existing precedent does not adequately apply to the circumstances in question .

Today the royal prerogative is available in the conduct of the government of the United Kingdom , including foreign affairs , defence , and national security . The monarchy has a significant constitutional presence in these and other matters , but limited power , because the exercise of the prerogative is in the hands of the prime minister and other ministers or other government officials .

= = Definition = =

The royal prerogative has been called " a notoriously difficult concept to define adequately " , but whether a particular type of prerogative power exists is a matter of common law to be decided by the courts as the final arbiter . A prominent constitutional theorist , A. V. Dicey , proposed in the nineteenth century that :

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 .

While many commentators follow the Diceyan view , there are constitutional lawyers who prefer the definition given by William Blackstone in the 1760s :

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 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 .

Dicey 's opinion that any action of governance by the monarch beyond statute is under the prerogative diverges from Blackstone 's 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 . Case law exists to support both views . Blackstone ? s notion of the prerogative being the powers of an exclusive nature was favoured by Lord Parmoor in the De Keyser ? s Royal Hotel case of 1920 , but some difficulty with it was expressed by Lord Reid in the *Burmah Oil* case of 1965 . A clear distinction has not been necessary in the relevant cases , and the courts may never need to settle the question as few cases deal directly with the prerogative itself .

= = History = =

The royal prerogative originated as the personal power of the monarch . From the 13th century in England , as in France , the monarch was all @-@ powerful , but this absolute power was checked by " the recrudescence of feudal turbulence in the fourteenth and fifteenth centuries " . An early attempt to define the royal prerogative was stated by Richard II 's judges in 1387 .

During the 16th century , this " turbulence " began to recede , and the monarch became truly independent . Under Henry VIII and his successors , the king was the head of the Protestant English church , and therefore not answerable to the clergy . The rise of Parliament in this period , however , was problematic . While the monarch was " the predominant partner in the English constitution " ,

the courts stopped short of declaring him all @-@ powerful , recognizing the role that Parliament played . In Ferrer 's Case , Henry recognised this , noting that he was far more powerful with the consent of Parliament than without . Nowhere was this more apparent than in the matter of taxation : Sir Thomas Smith and other writers of the period pointed out the monarch could not impose taxation without Parliament 's consent .

At the same time , Henry and his descendants normally followed the will of the courts , despite the fact they were theoretically not bound by judges . William Holdsworth infers that by regularly asking the legal officers of the crown and judiciary for legal advice and consent , Henry recognised the need for a stable government to follow the law . He also contends 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 " . 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 he had chosen to do so .

The first dent in this stability came about in 1607 , with the Case of Prohibitions . James VI and I claimed that as monarch , 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 monarch 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 " . Similarly , in the Case of Proclamations in 1611 , Coke held that the monarch could only exercise those prerogatives he already had , and not create new ones .

With the Glorious Revolution , King James VII and II was replaced by Queen Mary II and her husband King William III . At the same time the Bill of Rights 1689 was drafted , which cemented the monarch 's 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 evidenced by the Triennial Act 1694 , which required the monarch to dismiss and call Parliament at certain times .

= = Prerogative powers = =

= = = Legislature = = =

One of the monarch 's historic prerogatives was the dissolution of Parliament , which was " perhaps the most important residual prerogative exercised personally by the sovereign , and represents the greatest potential for controversy . " This prerogative was normally exercised at the request of Parliament and the prime minister , either at his or her discretion or following a motion of no confidence . Constitutional theorists have had differing views as to whether a unilateral dissolution of Parliament would be possible today ; Sir Ivor Jennings wrote that a dissolution involves " the acquiescence of ministers " , and as such the monarch could not dissolve Parliament without ministerial consent ; " if ministers refuse to give such advice , she can do no more than dismiss them " . A. V. Dicey , however , believed that in certain extreme circumstances the monarch 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 . "

The monarch could force the dissolution of Parliament through a refusal of royal assent ; this would inevitably lead to a government resigning . By convention , the monarch always assents to bills ; the last time the royal assent was not given was in 1704 during the reign of Queen Anne . This does not mean that the right to refuse has died : George V believed he could veto the Third Irish Home Rule

Bill ; Jennings writes that " it was assumed by the King throughout that he had not only the legal power but the constitutional right to refuse assent " . The royal prerogative to dissolve Parliament was abrogated by the Fixed Term Parliaments Act 2011 . Section 6 (1) of the Act however specifically states that the monarch 's power to prorogue Parliament is not affected by the Act .

The appointment of the prime minister is also , theoretically , governed by the royal prerogative . Technically the monarch may appoint as prime minister anyone she wants to appoint , but in practice the appointee is always the person who commands a majority in the House of Commons . Usually , this is the leader of the political party that is returned to Parliament with a majority of seats after a general election . Difficulties may result with a so called hung parliament , in which no party commands majority support , as last occurred in 2010 . In this situation , constitutional convention is that the previous incumbent has the first right to form a coalition government and seek appointment . If the prime minister decides to retire in the middle of a parliamentary session , as Anthony Eden did in 1957 , the monarch has no discretion . There is usually a " prime minister in waiting " who commands the support of the majority of the Commons ; he or she will near automatically be appointed .

== = Judicial system == =

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 eliminate the " pains , penalties and punishments " from a criminal conviction , though they do not remove convictions themselves . This power is commonly exercised on the advice of the Secretary of State for the Home Department ; the monarch has no direct involvement in its use . Exercises 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 , but 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 . Granting nolle prosequi is done by the Attorney General of England and Wales (or the equivalent in Scotland or Northern Ireland) in the name of the crown , to stop legal proceedings against an individual . This is not reviewable by the courts , as confirmed by R v Comptroller of Patents , and does not count as an acquittal ; the defendant may be brought before the courts on the same charge at a later date .

== = Foreign affairs == =

The royal prerogative is in much use in the realm of foreign affairs . It is the monarch who recognises foreign states (although several statutes regulate the immunities enjoyed by their heads and diplomatic representatives) , issues declarations of war and peace , and forms international treaties . The monarch also has the power to annex territory , as was done in 1955 with the island of Rockall . Once territory has been annexed , the monarch has complete discretion as to the extent to which the government will take over the former government 's liabilities ; this was confirmed in West Rand Central Gold Mining Company v The King . The monarch also has the power to alter British territorial waters and cede territory . Her freedom to do these things in practice is doubtful , in that they might deprive British citizens of their nationality and rights . When the island of Heligoland was ceded to Germany in 1890 , Parliamentary approval was first sought . The monarch can also regulate colonies and dependent territories by exercising the prerogative through Orders in Council . The courts have long fought against the monarch 's use of this power : in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) , the Court of Appeal ruled that using Orders in Council to frustrate judicial rulings was an unlawful abuse of power , although this ruling was later overturned .

British passports are also issued under the prerogative , though these are also covered by statute law . Under the common law , citizens have the right freely to leave and enter the United Kingdom . In R v Foreign Secretary ex parte Everett , the courts held that it was their right to review the

granting of passports to , and the withholding of passports from , British citizens . The writ of ne exeat regno is also used to prevent a person leaving the country . The right to make treaties is a disputed prerogative power : under Blackstone 's definition , a prerogative power must be one unique to the monarch .

= = = Other prerogative powers = = =

The monarch also has power to exercise her prerogative over the granting of honours , the regulation of the armed forces and ecclesiastical appointments . Although the granting of most honours is normally decided by the executive , the monarch 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 Order of Merit , the Royal Victorian Order and the Royal Victorian Chain , which the monarch has complete discretion to grant . In relation to the armed forces , the monarch is the Commander in Chief , and members are regulated under the royal prerogative . Most statutes do not apply to the armed forces , although some areas , such as military discipline , are governed by Acts of Parliament . Under the Crown Proceedings Act 1947 , the monarch is the sole authority for the armed forces , and as such their organisation , disposition and control cannot be questioned by the courts . 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 . The prerogative empowers the monarch to appoint bishops and archbishops in the Church of England , and to regulate the printing and licensing of the authorised Church of England version of the Bible .

R v Secretary of State for the Home Department , ex parte Northumbria Police Authority , recognised that the prerogative also includes the power to " take all reasonable steps to preserve the Queen 's peace " , and in *Burmah Oil Co. v Lord Advocate* , 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] . "

= = Use = =

Today , the monarch exercises the prerogative almost exclusively in line with the advice of her government . 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 .

In simple terms , the prerogative is used to govern the realm in the name of the Crown ; although the monarch has the " right to be consulted , the right to encourage , and the right to warn " , her role involves no exercise of discretion .

Today , some prerogative powers are directly exercised by ministers without the approval of Parliament , including the powers of declaring war and of making peace , the issue of passports , and the granting of honours . Prerogative powers are exercised nominally by the monarch , but on the advice of the prime minister (whom the monarch meets weekly) and of the cabinet . 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 .

= = = Limitations = = =

Several influential decisions of the House of Lords have determined the limited scope for the use of prerogative powers . In 1915 , an appeal was made to the House of Lords , *Re Petition of Right (' Shoreham Aerodrome Case ')* , but during the appeal the case was settled and the appeal withdrawn when the Crown agreed to pay compensation . The appeal was from a unanimous

decision of the Court of Appeal that the Crown , both under the statutory Defence of the Realm Regulations and by the royal prerogative , was entitled to take and occupy , for military purposes in wartime , a commercial airfield on the south coast . The government argued that this action was to defend against an invasion ; the courts held that for the prerogative to be exercised , the government must demonstrate that a threat of invasion exists . This was backed up by *The Zamora* (1916) , where the Privy Council , on appeal from the Prize Court , held generally that to exercise a power not granted by statute (such as a prerogative power) the government must prove to the court that the exercise is justified . The next decision came in *Attorney General v De Keyser 's Royal Hotel Ltd* (1920) , where the House of Lords confirmed that a statutory provision 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 " .

This principle of statutory superiority was extended in *Laker Airway Ltd v Department of Trade* , concerning the revocation of a commercial airline operator 's licence (December 1976) , where it was confirmed that prerogative powers could not be used to contradict a statutory provision , and that in situations to which the power and the statute both applied , 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* , where the Court of Appeal held that even if a statute had not yet come into force , the prerogative could not be used to alter this statute to " conflict with Parliament 's wishes " .

= = = Judicial review = = =

Before the modern judicial review procedure superseded the petition of right as the remedy for challenging the validity of a prerogative power , the courts were traditionally only willing to state whether or not powers existed , not whether they had been used appropriately . They therefore applied only the first of the *Wednesbury* tests : whether the use was illegal . Constitutional scholars such as William Blackstone consider 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 .

During the 1960s and 70s this attitude was changing , with Lord Denning saying in the *Laker Airway* case 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 . " The most authoritative case on the matter is *Council of Civil Service Unions v Minister for the Civil Service* , generally known as the *GCHQ* case . 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 are considered outside the scope of judicial review , while the prerogative of mercy is considered within it , as per *R v Secretary of State for the Home Department , ex parte Bentley* .

= = Reform = =

Abolition of the royal prerogative is not on the immediate horizon , and recent movements to abolish the role of the monarchy and its royal prerogative in government have been unsuccessful . The Ministry of Justice undertook a " review of executive Royal Prerogative powers " in October 2009 . Former Labour MP and cabinet minister 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 . Later governments 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 .