The Royal Prerogative

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Summary

The Royal Prerogative is one of the most significant elements of the UK’s constitution. The concept of prerogative powers stems from the medieval King acting as head of the kingdom, but it is by no means a medieval device. The prerogative enables Ministers, among many other things, to deploy the armed forces, make and unmake international treaties and to grant honours. In modern times, Government Ministers exercise the majority of the prerogative powers either in their own right or through the advice they provide to the Queen which she is bound constitutionally to follow.

Three fundamental principles of the prerogative are:

- The supremacy of statute law. Where there is a conflict between the prerogative and statute, statute prevails. Statute law cannot be altered by use of the prerogative;
- Use of the prerogative remains subject to the common law duties of fairness and reason. It is therefore possible to challenge use of the prerogative by judicial review in most cases;
- While the prerogative can be abolished or abrogated by statute, it can never be broadened. However, Parliament could create powers by statute that are similar to prerogative powers in their nature.

Court rulings have restricted the circumstances in which prerogative powers can be used, determined when prerogative powers are subject to judicial review, and established how statute law interacts with prerogative powers.

The intended use of prerogative powers to activate Article 50 of the Treaty of the European Union was recently challenged in the Supreme Court, in R. (on the application of Miller) v Secretary of State for Exiting the European Union.

There have been calls to reform prerogative powers, chiefly because they are exercised without any parliamentary authority. In the 2001 and 2005 Parliaments, the Public Administration Select Committee, repeatedly examined the prerogative, calling for its reform. The 2007 government of Gordon Brown also examined prerogative powers, producing draft legislation and an important green paper on the governance of Britain. Calls for reform of the prerogative have subsided somewhat in recent years, though there have been prominent reforms. The Constitutional Reform and Governance Act 2010 put the regulation of the civil service on a statutory basis, and introduced a statutory role for Parliament in treaty ratification. In addition, the Fixed-term Parliaments Act 2011 abolished the former prerogative power to dissolve Parliament. These moves that put prerogative powers on a statutory footing are usually considered to permanently abridge prerogative power.
1. What is the Royal Prerogative?

The Royal Prerogative is one of the most significant elements of the UK’s government and constitution. It enables Ministers to, among many other things, deploy the armed forces, make and unmake international treaties and to grant honours. Prerogative powers are possessed by the Crown (that is, the Government) and in some cases reside in the Sovereign personally.

1.1 Definitions

There is no single accepted definition of what constitutes the Royal Prerogative. In 2009, the Ministry of Justice summarised the issue thus:

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.¹

In the 2017 case of *R (Miller) v Secretary of State for Exiting the European Union*, Supreme Court judges defined the prerogative as encompassing the “residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation”.²

The nineteenth century constitutional theorist A. V. Dicey described the Royal Prerogative as:

the remaining portion of the Crown's original authority, and it is therefore … the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers.³

Dicey also claimed all of the Crown’s powers that are not provided by statute are prerogative powers. This definition would arguably include all of those powers that are also held by the populace, such as the making and unmaking of contracts. In Blackstone's *Commentaries on the Laws of England* (1778), the prerogative was limited to “that special pre-eminence, which the king hath, over and above all other persons”.⁴ This definition excludes the powers of the Crown that have no statutory authority, but are held in common with the Crown’s subjects. These actions are sometimes called the Crown’s administrative powers, rather than prerogative powers.

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² Para 47
⁴ Blackstone, *Commentaries on the Laws of England* (8th edn 1778), Book 1, ch 7, p 239
Sir William Wade, a constitutional lawyer, argued in 1985 that there were two tests for a prerogative power:

(a) does it produce a legal effect at common law; and

(b) is it unique to the Crown and not shared with other persons.\(^5\)

Legal and constitutional opinion on precisely what constitutes the Royal Prerogative is therefore far from clear-cut. The Public Administration Select Committee identified three categories of prerogative powers in 2004 thus: \(^6\)

- The **Sovereign’s constitutional prerogatives** – that is, the discretionary powers which remain in the Sovereign. These include: the right to advise, encourage and warn Ministers; to appoint the Prime Minister and other Ministers; and to assent to legislation.

- The **legal prerogatives of the Crown** – such as the right to sturgeon, whales, certain swans, and the right to impress men into the Royal Navy. More significantly, the legal principle that the Crown can do no wrong, and that the Crown is not bound by statute save where by express words or necessary implication.

- **Prerogative executive powers** – the powers which historically have resided with the Sovereign but which now, by constitutional convention, are exercised by Government Ministers acting in the Sovereign’s name. They include: the making and ratifying of international treaties; the conduct of diplomacy; the governance of overseas territories; and the deployment of the armed forces.

These different categories of prerogative power are explored in greater detail in Section 2.

### 1.2 Prerogative powers and ‘modern’ government

The concept of prerogative powers stems from the medieval King acting as head of the kingdom, but it is by no means a medieval device. Although the prerogative was described by Lord Reid in 1965 as “a relic of a past age”, much of the day to day work of government is conducted using prerogative power. \(^7\) Today, most prerogative powers are exercised by Ministers, either in their own right (without needing the approval of the Sovereign) or through the advice they provide to the Sovereign, which she is constitutionally bound to follow. \(^8\)

The powers to deploy the armed forces or to enter into international agreements are perhaps the most striking examples of the use of the prerogative. However, Ministers also use it to, for example, issue passports, hold non-statutory inquiries, \(^9\) and to grant royal pardons. As

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\(^7\) *Burma Oil Co (Burma Trading) Ltd v Lord Advocate (1965)* AC 75 para 101

\(^8\) Cabinet Office, *Cabinet Manual*, October 2011, para 1.5

\(^9\) That is, inquiries not held under the *Inquiries Act 2005*. 
the Supreme Court noted in the 2017 case of \textit{R (Miller) v Secretary of State for Exiting the European Union}:

There are important areas of government activity which, today as in the past, are essential to the effective operation of the state and which are not covered, or at least not completely covered, by statute. Some of them, such as the conduct of diplomacy and war, are by their very nature at least normally best reserved to ministers just as much as in modern times as in the past.\footnote{\textit{R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017]}: UKSC , para 49}

Similarly, in their 2004 report on prerogative powers exercised by Ministers, the House of Commons Public Administration Committee recognised that some prerogative powers “are necessary for effective administration, especially in times of national emergency”.\footnote{Public Administration Committee, \textit{Taming the Prerogative: Strengthening Ministerial Accountability to Parliament}, 16 March 2004, HC 422, p. 3}

\section*{1.3 Supremacy of Statute Law}

Statute law authorized by Parliament, either through Acts or by instruments authorized by those Acts, is the highest form of law in the UK. No prerogative power is unassailable to an Act of Parliament, and where a conflict arises it is statute law that prevails. This was recognised as early as the 1611 \textit{Case of Proclamations}:

The King hath no prerogative, but that which the law of the land allows him.\footnote{\textit{Case of Proclamations} (1611) 12 Co. Rep. 74 at 76 (Sir Edward Coke)}

The ability for statute law to adjust and abolish prerogative powers was set out in the High Court judgment in the case of \textit{R (Miller) v Secretary of State for Exiting the European Union}, in November 2016:

Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen.\footnote{\textit{R (Miller) v Secretary of State for Exiting the European Union [2016]} EWHC 2768 (Admin)}

The prerogative is usually held to be residual, meaning that it is what is left of the power of the Crown as a ruler with absolute power over the realm. Dicey says:

The prerogative appears to be 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. The prerogative is the name of the remaining portion of the Crown’s original authority.\footnote{A.V. Dicey, \textit{An Introduction to the study of the Law of the Constitution}, Tenth Edition, 1959}

This position has been affirmed multiple times, such as in the landmark case \textit{Attorney-General v De Keyser’s Royal Hotel Ltd.}\footnote{[1920] AC 508} Further detail on that case can be found in the appendix to this paper.
1.4 The courts and the prerogative

The courts play an important role in determining the existence, extent and lawful use of prerogative powers.

Judicial review

The Government’s use of, and claim to, a prerogative power, can be challenged in judicial review proceedings. Until the 1984 House of Lords case of *Council of Civil Service Unions v Minister for the Civil Service*\(^\text{16}\) (the GCHQ case), it was thought that the courts would not review how the prerogative powers were exercised, only whether they existed. In the GCHQ case, the House held that prerogative powers, if the subject matter is justiciable, were subject to the same standards of judicial review as statutory powers. In the more recent case of *Bancoult (No 2)* in 2008, which concerned whether Orders-in-Council prohibiting native Chagos Islanders from returning to the islands were legal, the House of Lords went further than the GCHQ case in holding that Orders in Council were also subject to the ordinary grounds of judicial review.

The courts and modern constitutional principles

In general, rules of common law, including the prerogative, do not lapse by desuetude. This presents problems when the archaic powers being used are no longer in step with societal norms:

> In general, rules of common law do not lapse through desuetude. But it is difficult to see why a court should be required to give new life to an archaic power which offends modern constitutional principles, merely because its existence had been recognised several centuries ago.\(^\text{17}\)

Because of this, the courts may rule that a prerogative power does exist, but that it should be subject to certain provisions so that it does not offend modern constitutional principles. This was the case in *Burmah Oil v Attorney-General*,\(^\text{18}\) where the prerogative power to seize and destroy property during wartime was held to continue to exist, but that the Government still had a common law obligation to pay compensation.

Are all prerogative powers subject to the supervision of the courts?

While the GCHQ case established that prerogative powers may be subject to judicial review, it also established that some questions of prerogative power are not justiciable (in that case, a question regarding national security, which was considered to be political).

Bradley, Ewing and Knight expand on the case, stating that the GCHQ case does not mean that all prerogative powers are subject to judicial review in this case:

> It does not follow, however, that all prerogative powers would be subject to review in this way. According to the House of Lords, it depends on the nature of the power, and in particular whether

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\(^{16}\) [1984] UKHL 6

\(^{17}\) Bradley, Ewing and Knight, *Constitutional and Administrative Law*, 16th ed (2015), pp 260-1

\(^{18}\) [1965] AC 75
the power in question is justiciable, ie whether it gives rise to questions which are capable of.

*De Smith’s Judicial Review* gives three areas in which the supervision of the courts may not apply. These are:

- Questions of pure international law or treaty-making.
- The prerogative power of royal assent to legislation.
- Where the power has been exercised personally by the Sovereign, who is not subject to legal process. The provisions of the *Crown Proceedings Act 1947*, which allows claims to be brought against the Crown (generally, meaning the Government) do not apply to the monarch personally.  

### The Miller judgement

The *Miller* case before the Supreme Court concerned the triggering of Article 50 to initiate the UK’s withdrawal process from the European Union. The Government had contended that it could use the recognised prerogative power to make an unmake treaties to trigger Article 50 without Parliamentary approval. The applicant against the Government argued that that the act of giving Article 50 notification would inevitably lead to major changes to UK law, and that such changes could only be made with the authority of primary legislation rather than through the prerogative. The Supreme Court ruled that, while the Government can use prerogative power to make and withdraw from international treaties, whenever treaty changes require a change to domestic law, the Government must always "seek the sanction of Parliament".  

The Supreme Court therefore ruled that it would not be legal for the Government to use prerogative powers to trigger Article 50: instead primary legislation was required.

More detailed information on how the courts have defined prerogative powers over time can be found in the appendix of this paper.

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20 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017], UKSC, para 57
2. Types of prerogative power

2.1 General prerogative powers

It is difficult to give a comprehensive catalogue of prerogative powers. This is because prerogative covers diverse subjects and there is uncertainty of the law in many instances where an ancient power has not been used in modern times. Constitutional lawyers Bradley, Ewing and Knight summarise the main areas where the prerogative is used today as follows: 21

- **Powers relating to the legislature**, e.g. - the summoning and proroguing of parliament; the granting of royal assent to bills; legislating by Order in Council (such as for overseas territories) or by letters patent; creating schemes for conferring benefits upon citizens where Parliament appropriates the necessary finance.

- **Powers relating to the judicial system**, e.g. - various functions carried out through the Attorney General and the Lord Advocate; pardoning of convicted offenders or remitting or reducing sentences;

- **Powers relating to foreign affairs**, e.g. – the power to acquire additional territory; the making of treaties (although Parliament has had a veto over treaty-making powers in some circumstances since 201022), the declaration of war and the making of peace; restraining aliens from entering the UK and the issue of passports.

- **Powers relating to the armed forces** e.g. – the Sovereign is commander in chief of the armed forces of the Crown and the control, organisation and disposition of the armed forces are within the prerogative.

- **Appointments and honours**, e.g. – appointment of ministers, judges and many other holders of public office; creation of peers and conferring of honours and decorations.

- **Immunities and privileges**, e.g. – statutes do not bind the Crown unless expressly stated (usually by the formulation “this Act binds the Crown” or similar)

- **The prerogative in times of emergency**, e.g. – requisitioning of ships or seizure of neutral property in a time of war.

- **Miscellaneous prerogatives** - various other historic powers relating to such things as royal charters, mining precious metals, coinage, franchises for markets, treasure trove, printing, guardianship of infants.

This should not be considered an exhaustive list.

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22 *Constitutional Reform and Governance Act 2010*
2.2 The Sovereign’s personal prerogative powers

There are three main prerogative powers recognised under the common law which still reside in the jurisdiction of the Sovereign. While these powers are recognised as in the jurisdiction of the Sovereign personally, this does not mean that the Sovereign does not act according to the advice of the Government. In all of these cases, the Government provides advice which would be expected to be followed.

The appointment of a Prime Minister

The Sovereign appoints the Prime Minister, but must appoint that person who is in the best position to receive the support of the majority in the House of Commons. The Cabinet Manual is a Government document that sets out the main laws, rules and conventions affecting the conduct and operation of government. It says that in the necessity of discussions on who will form a Government following an election, “The Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed.”

Prorogation and summoning of Parliament

The prorogation and summoning of Parliament remains a prerogative power of the Crown, although its dissolution is now a statutory provision under the Fixed-term Parliaments Act 2011. The Deputy Private Secretary to HM The Queen confirmed, in a letter to the Chair of the Political and Constitutional Reform Committee of 16 March 2015, that The Queen would “always act on the advice of the Government of the day” as to setting the first meeting of a Parliament.

Royal Assent to legislation

In 1708, Queen Anne was the last Sovereign to refuse royal assent to a bill passed by Parliament. Additionally, no monarchs since the sixteenth century have signed Bills themselves and Queen Victoria was the last to give the Royal Assent in person in 1854. De Smith’s Judicial Review suggests that the power of Royal Assent may fall outside the court’s jurisdiction as being concerned with the processes of Parliament, and therefore may not be able to be challenged by judicial review.

2.3 The prerogative in times of emergency

The prerogative is usually held to be wider in times of grave national emergency. For example, the Burmah Oil case concerned the seizure and destruction of oil fields during the Second World War. The House of Lords, while granting that the Burmah Oil Company should receive

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23 Cabinet Office, Cabinet Manual, October 2011, p 15; See also the House of Commons Library briefing paper, What happens after an indecisive election result?


25 AW Bradley and KD Ewing, Constitutional and Administrative Law, 13th Ed, 2006, p238-244

26 Woolf et al, De Smith’s Judicial Review, 7th Ed., 2013, p 133
compensation, held that the action was lawful. Lord Reid said that “the prerogative certainly covers doing all those things in an emergency which are necessary for the conduct of war”.27

Parliament has since granted extensive emergency powers through the Civil Contingencies Act 2004, by which ministers can make regulations that can perform all manner of actions, including seizing property with or without compensation.28

The 2009 Review of the Executive Royal Prerogative claimed that the 2004 Act did not place the prerogative powers to act in the case of grave emergency in abeyance:

Prerogative powers can provide flexibility in dealing with specific or exceptional circumstances that are not covered by statutory provisions. For example, they provide a basis on which it would be possible for a government to act outside the framework of the Civil Contingencies Act 2004 in circumstances of exceptional urgency or disruption... Enacting a statutory power to do this could result in either an undesirably broad statutory power or one that is insufficiently flexible.29

Bradley, Ewing and Knight agree that if grave emergency arose it would be possible to take action at common law outside of the framework of the 2004 Act.30

The current status of the prerogative and military action is discussed in section 4.5 of this paper.

2.4 The Crown’s administrative powers

There are administrative powers that the Government holds that could be considered prerogative powers under the definition proposed by Dicey, but not by the definition proposed by Blackstone. Dicey claimed that all of the Crown’s powers that are not provided by statute are prerogative powers. However, in Blackstone’s Commentaries on the Laws of England (1778), the prerogative was limited to “that special pre-eminence, which the king hath, over and above all other persons”.31

The Dicey view would therefore include administrative actions that the Crown has in common with private citizens (or another corporation sole) such as the ability to enter into contracts and to take on employees. Blackstone’s position would not include these.

One example of these administrative powers could be the ability to enter into contracts. In the Supreme Court, Lord Sumption said that “It has long been recognised that the Crown possesses some general administrative powers to carry on the ordinary business of government

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27 Burmah Oil Company (Burma Trading) Ltd. v Lord Advocate, [1964] 2 W.L.R. 1231, p 100
28 Civil Contingencies Act 2004, ss 18-22
30 Bradley, Ewing and Knight (16th edition, 2015), p 259
31 Blackstone, Commentaries on the Laws of England (8th edn 1778), Book 1, ch 7, p 239
which are not exercises of the Royal Prerogative and do not require statutory authority”, but that the “extent of these powers and their exact juridical basis are controversial”. 32

32 R. (on the application of New London College Ltd) v Secretary of State for the Home Department [2013] UKSC 51, para 28
3. Recent changes to the Royal Prerogative

3.1 Appointment and regulation of civil servants – Constitutional Reform and Governance Act 2010

Prior to the 2010 Act, the power of appointment and regulation of civil servants was a prerogative one. The 2010 Act provided a statutory basis for management of the civil service, placing the Civil Service Commission, which had existed since 1855 following the Northcote-Trevelyan report,33 on a statutory footing and granting the Minister for the Civil Service the power to manage the civil service. More information on the arrangements for the civil service under the Act are found in the library briefing paper The Civil Service Code.

Under the 2010 Act, the Minister for the Civil Service (invariably the Prime Minister) must publish a Civil Service Code, with minimum requirements set out in the Act. The Civil Service Code had previously existed, but it was produced under the Royal prerogative. Notably, the Act did not apply to the conditions of employment of the security services.

The Act has led to some civil service contracts of employment being challenged in Employment Tribunals. The Act created a statutory responsibility for appointments to the civil service to be made on the basis of fair and open competition.34 In April 2017, the Employment Appeal Tribunal reversed a decision of the Employment Tribunal, and decided that it was wrong to draw a distinction between appointment and employment in the context of the 2010 Act. The contracts of employment that the claimants were under were found to be ultra vires.

Importantly, this presents one of the events that can happen where a prerogative power is changed into a statutory one. Because the statute codifies how the new statutory powers must be used, the Government loses any discretion to change its behaviour, as any deviation from the statutory boundaries can be found to be ultra vires.

3.2 Treaties - Constitutional Reform and Governance Act 2010

The decision for the executive to sign a treaty is a prerogative power, and is not justiciable.35 However, the 2010 Act contained provisions for

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33 HC Deb 20 Oct 2009: Vol 497, Cols 800-01
34 Constitutional Reform and Governance Act 2010, section 10(2)
35 Blackburn v Attorney general [1971] 1 WLR 1037
codifying the “Ponsonby Rule”, a convention that had applied to the ratification of treaties since 1924.36

The Act codifies the convention, effectively giving the House of Commons a veto on treaties. Under the provisions of the Act, most37 treaties must be laid before Parliament and may not be ratified unless 21 sitting days pass without the House of Commons resolving that the treaty not be ratified, whether or not the House of Lords does so. The Government has the option of continuing to ratify a treaty if only the House of Lords resolves that the treaty should not be ratified.

Detailed information on Parliament’s new role in ratifying treaties can be found in the library briefing paper Parliament’s role in ratifying treaties.

3.3 Dissolution of Parliament - Fixed-term Parliaments Act 2011

Prior to the commencement of this Act, the maximum duration of a Parliament was five years, as dictated by the Septennial Act 1715, as amended by the Parliament Act 1911. However, the power to dissolve Parliament before it expired automatically under the 1715 Act could be exercised as a discretionary prerogative power by the Crown.38

The Fixed Term Parliaments Act repealed the 1715 Act, and provides for fixed days for polls for parliamentary general elections. Unless the provisions of section 2 of the Act are met (as they were in 2017), an early general election cannot occur, and the length of a Parliament is five years.

The Explanatory Notes to the Act, which are not approved by Parliament, explicitly state that the prerogative power has been abolished, and that “The Queen does not retain any residual power to dissolve Parliament”.39 This statement does not, however, form any part of the legislation itself.

Professor Robert Hazell, of University College London, described the Fixed-term Parliaments Act as “a very significant surrender of prime ministerial power” in 2013.40

Possible effects of repeal of the Fixed-term Parliaments Act 2011

Repeal of the Fixed-term Parliaments Act presents a potential issue with regard to the prerogative. Repeal of the Act was a part of the 2017

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37 There are some types of treaties excluded from the Act, such as EU treaties and “double taxation” agreements.
38 There were circumstances in which the Sovereign may have been able to refuse a request by the Prime Minister to dissolve Parliament. These were set out by Sir Alan Lascelles in a letter to The Times in 1950. See “Dissolution of Parliament: Factors in Crown’s Choice”, The Times, 2 May 1950, page 5
39 Fixed-term Parliaments Act 2011, Explanatory Notes to the Act, para 6
40 Political and Constitutional Reform Committee, Role and powers of the Prime Minister, Minutes of Evidence, HC 975, 7 February 2013, Q82
Conservative Party manifesto.\footnote{Conservative and Unionist Party, \textit{The Conservative and Unionist Party Manifesto 2017}, May 2017, p 43} The possible implications have attracted some discussion from constitutional lawyers.

As per the provisions of the \textit{Interpretation Act 1978}, a repeal of 2011 Act would not reverse the repeal of the \textit{Septennial Act 1715}, unless words are explicitly added doing so. This is a well-established rule in statute law, and words in the repealing Act reviving the 1715 Act could be used.

Section 16 of the Act also says that a repeal of a repealed Act does not, “unless the contrary intention appears […] revive anything not in force or existing at the time at which the repeal takes effect”.

The 1978 Act does not explicitly make reference to prerogative powers. This “anything” would appear to suggest that without an explicit statement in the repealing Act, any repeal of the 2011 Act would not result in the prerogative power being revived.

Any revival of a prerogative power could arguably be at odds with Diplock’s statement in \textit{BBC v Johns}, that it is “350 years and a civil war too late” to broaden the scope of the Royal Prerogative.

In a 2005 piece of written evidence to the Public Administration Select Committee, the Treasury Solicitor’s Department said that the situation was unclear:

> It is not altogether clear what happens when a prerogative power has been superseded by a statute and the statutory provision is later repealed but it is likely to be the case that the prerogative will not revive unless the repealing enactment makes specific provision to that effect.\footnote{Public Administration Select Committee, \textit{Taming the Prerogative: Strengthening Ministerial Accountability to Parliament}, Fourth Report of Session 2003-04, HC 422, Ev 15}

If the prerogative is irrecoverably lost upon repealing the 2011 Act, then provision could have to be made in statute setting out when Parliament could be dissolved, making dissolution a statutory power.

Writing for the UK Constitutional Law Association, Alexander Horne and Richard Kelly have said that despite a possibly unclear legal situation in the event that the 2011 Act be repealed, “it would be [a brave] court that would rule that Parliament could not be dissolved in order to hold a general election”.\footnote{Alexander Horne and Richard Kelly, “Prerogative Powers and the Fixed-term Parliaments Act”, \textit{www.ukconstitutionallaw.org}, 19 November 2014}
4. Reforming the Prerogative

4.1 Public Administration Select Committee Report, *Taming the Prerogative*, 2004

The House of Commons Public Administration Select Committee published an inquiry into the Royal Prerogative in March 2004. The Report, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, recognised that such powers are necessary for effective administration, especially in times of national emergency, however, it considered whether they should be subject to more systematic parliamentary oversight. The report concluded that the case for reform was unanswerable.

The report also recommended that comprehensive legislation should be drawn up which would require government within six months to list the prerogative powers exercised by Ministers. The list would then be considered by a parliamentary committee and appropriate legislation would be framed to put in place statutory safeguards where necessary.

A paper and draft Bill appended to the Report, prepared by Professor Rodney Brazier, the specialist adviser to the inquiry, contained these provisions as well as proposals for early legislative action in the case of three specific areas covered by prerogative powers. Decisions on:

- armed conflict
- treaties and
- Passports

The Report recommended that the Government should, before the end of the then current session, initiate a public consultation exercise on the prerogative powers of Ministers.

The Government’s response (July 2004) rejected this approach, favouring a case by case consideration of statutory safeguards:

> It is often possible to make out a case for either the transfer of prerogative powers to a statutory basis, or for an increase in the level of non-statutory parliamentary scrutiny. It continues to believe, however, that these changes are best made on a case-by-case basis, as circumstances change. It does not therefore agree with the recommendation for a wide-ranging consultation exercise. This could only result in a snapshot at a fixed moment of what is inevitably a fluid and evolving situation.45

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44 Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, HC 422 2003-04

4.2 Proposed reforms in the Labour Government under Gordon Brown

The Governance of Britain Green Paper 2007

The Labour Government under Gordon Brown’s premiership published the *Governance of Britain* Green Paper in July 2007.46 The Green Paper set out plans for wide-reaching constitutional reforms, stating that “in general the prerogative powers should be put on a statutory basis”.47

The Government then outlined plans to reform the following aspects of the Royal prerogative:

- Deploying the Armed Forces abroad;
- Ratifying treaties;
- Dissolving Parliament; and
- Placing the Civil Service on a statutory footing.

The Government also announced that it would undertake a wider review of prerogative powers of ministers. This led to the publication of a draft Bill and a white paper in 2008.


The Government set out more detailed proposals in a White Paper and draft Bill in March 2008, *The Governance of Britain – Constitutional Renewal*.48 The draft Bill addressed some areas of the prerogative, including placing the civil service on a statutory basis. It also gave some more information about the more general review of the prerogative powers proposed in the Green Paper the preceding year. The Government explained:

… The Government is conducting an internal scoping exercise of the executive prerogative powers – those which remain in use and those which have been superseded in whole or in part by statute, such as the power to grant pardons and remission to prisoners. The Government will consider the outcome of this work and will, in the coming months, launch a consultation on the next steps. …49

The Draft Bill and White Paper were scrutinised by a Joint Committee established for this purpose under the chairmanship of Michael Jabez Foster MP. The Public Administration Select Committee also published a report on the White Paper.50

The Joint Committee commented on the Government’s wider review of prerogative powers as follows, welcoming a review of prerogative powers but noting that certain prerogative powers mentioned in the

46 For more information see House of Commons Library Research Paper 07/72, *The Governance of Britain Green Paper*
47 Ibid, para 24
49 Ibid, paras 245-246
Green Paper, such as the issuing and revoking of passports, were not included in the draft Bill.

We commend the Government for undertaking the cross-departmental review of prerogative powers. Like the Public Administration Select Committee, we trust that the results of the review will be published as soon as possible. This is an important element of constitutional reform. Ideally, reform of the prerogative should be approached in a coherent manner, not in a piecemeal fashion.\footnote{Joint Committee on the Draft Constitutional Renewal Bill, \textit{Draft Constitutional Renewal Bill}, HL Paper 166-I HC Paper 551-I 2007-08, para 254}

### 4.3 Review of the Executive Royal Prerogative, October 2009

In October 2009 the Government published the review of prerogative powers first promised in the \textit{Governance of Britain Green Paper} in July 2007.\footnote{Ministry of Justice, \textit{The Governance of Britain}, CM 7170, July 2007} The paper discussed definitions of the prerogative and the uncertainty over its extent. The Review went on to state that there are a number of ways in which the exercise of prerogative powers can be controlled and examined by Parliament, including through legislation, accountability to Parliament and Parliamentary approval of expenditure.

The Review explained that the Government had conducted a survey across all central government departments and agencies in order to identify prerogative powers used to perform executive functions, the exercise of which had effectively been delegated to ministers. A list is included as an annex to the report, and is not exhaustive but rather is an overview of areas where prerogative powers are exercised or have recently been exercised.

The Review considered action to be taken or proposed in respect of prerogative powers, first outlining the proposals to be taken forward in the \textit{Constitutional Reform and Governance Bill} and reform of others underway through non-legislative means. For example, the Government stated that they were preparing a draft of a detailed House of Commons resolution setting out processes the House of Commons should follow in order to approve any deployment of the Armed Forces in conflict overseas.

### 4.4 Political and Constitutional Reform Committee, \textit{Role and powers of the Prime Minister}, 2014

The Political and Constitutional Reform Committee was a committee of the House of Commons set up for the 2010-15 Parliament. In June 2015, the Committee published its report into 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 MP 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.
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.53

The Bill would also have removed Crown immunity from the Prime Minister enacting these powers, and require any use of these powers to be reported to the House of Commons within seven days. The report described this as an “example Bill” of how the powers of the Prime Minister could be codified in statute.

No response from the Government to the report was published.

4.5 The prerogative and military action

The situation up to 2016 can be found in the library briefing paper Parliamentary approval for military action.

In 2011 the Coalition Government suggested that a convention had emerged by which Parliament would be consulted before the deployment of troops. In a May 2011 report the Political and Constitutional Reform Committee called “for greater clarity on

53 Political and Constitutional Reform Committee, Role and powers of the Prime Minister, First Report of Session 2014-15, HC 351, 24 June 2014, Appendix 2
Parliament’s role in decisions to commit British forces to armed conflict abroad”.\textsuperscript{54}

In a written statement to the House of Commons on 18 April 2016, the Secretary of State for Defence, Michael Fallon, said that the Government would not be bringing forward legislation to codify the convention into law, in order to “avoid such decisions becoming subject to legal action”.\textsuperscript{55}

The commitment of troops to military action therefore remains a prerogative power, despite any convention having developed.

\textsuperscript{54} Political and Constitutional Reform Committee, \textit{Parliament’s role in conflict decisions}, Eighth Report of Session 2010-12, HC 923, 17 May 2011

\textsuperscript{55} Armed Forces Update: Written statement - HCWS678
5. History of the prerogative

5.1 Absolute rulers
During the medieval period the Monarch was both feudal lord and head of the kingdom. As such, the King had powers accounted for by the need to preserve the realm against external foes and an ‘undefined residue of power which he might use for the public good’.56

As feudal lord the King could not be made a defendant in his own courts. During the early medieval period this was hardly a prerogative, as it was shared by other lords, being merely an application of the feudal rule that a lord could not be sued in his own court. Gradually, however, as the King’s courts became the national courts (i.e. the common law courts), absorbing the greater part of the legal business of the country, ‘the King’s immunity cease to have any real connection with feudalism’.57 The idea that the King could not be sued in the courts therefore became regarded as a prerogative. In addition, the King continued to have a residual power of administering justice through his Council where the common law courts were insufficient.

The King was also generally regarded as having an unrestricted power with regards to the conduct of foreign policy, although he was restricted in practice by his inability to raise money for this by taxation without Parliament’s consent.

5.2 The Civil War
In the seventeenth century, disputes arose over the use and undefined residue of prerogative power claimed by the Stuart kings. The conflict was resolved only after the execution of one King in 1649 (Charles I) and the expulsion of another in 1688 (James II).

Following the overthrow of James II, and the so-called Glorious Revolution of 1688, the Bill of Rights was passed in 1689, which declared illegal certain specific uses and abuses of the prerogative.

5.3 Further historical development
Historically, the medieval monarchy was both feudal lord and head of the kingdom. As such, the King had powers accounted for by the need to preserve the realm against external foes and an ‘undefined residue of power which he might use for the public good’. He could exercise the ‘royal prerogative’ and impose his will in respect of decision-making.

Moreover certain royal functions could be exercised only in certain ways. The common law courts were the King’s courts and only through them could the King decide questions of title to land and punish felonies. Yet the King possessed a residual power of administering justice through his Council where the courts of common law were insufficient.

56 D L Keir & F H Lawson, Cases in Constitutional Law, 6th edition, 1979, p70
57 Ibid.
In the 17th century, disputes arose over the undefined residue of prerogative power claimed by the Stuart kings. The conflict was resolved only after the execution of one King and the expulsion of another in 1649 (Charles I) and 1688 (James II), culminating in the Bill of Rights 1689, which declared illegal certain specific uses and abuses of the prerogative.\(^{58}\) The second stage was the growth of responsible government and the establishment of a constitutional monarchy, spurred on by the various electoral reform acts of the 19th century.\(^{59}\)

It became established that the bulk of prerogative powers could be exercised only through and on the advice of ministers responsible to Parliament. Although the monarch retained formal power of appointment and removal of ministers and ministries, the development of collective ministerial responsibility made it increasingly difficult for the King or Queen to exercise such power freely against the wishes of the Prime Minister and Cabinet. However, the ability of ministers to rely on prerogative powers continues to give rise to problems of accountability.\(^{60}\)

The October 2009 Government Review of Executive Royal Prerogative Powers explained that prerogative powers have been difficult to define in general terms:

26. A V Dicey defines the Royal prerogative as ‘The residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown’ [A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, p424]. William Blackstone however describes the prerogative more tightly, as those powers that ‘the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subjects’ [William Blackstone, *Commentaries on the Laws of England, a facsimile of the first edition of 1765-1769*, 1979, p111]. Blackstone’s notion of the prerogative being those powers of an exclusive nature was favoured Lord Parmoor in the *De Keyser’s Royal Hotel* case of 1920 [*Attoney-General v De Keyser’s Royal Hotel Limited* [1920] AC 75, p105], but Lord Reid in the *Burmah Oil* case of 1965 expressed some difficulty with this idea [*Burmah Oil Company (Burma Trading) v Lord Advocate* [1965] AC 75, p105]. Case law exists to support both views, and a clear distinction has not been necessary in any relevant cases. The question may never need to be settled by the courts as there are few cases that deal directly with the prerogative itself.

27. 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 King hath no prerogative, but that which the law of the land allows him”; see the *Proclamations Cast* (1610) 12 Co Rep 74, 76]. 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

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58 House of Commons Factsheet G4, *The Glorious Revolution*
59 See Library Research Paper 04/82 *The collective responsibility of ministers – an outline of the issues*
statements of previous Government practice and legal textbooks, the most comprehensive of which is now nearly 200 years old [Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, 1820].

28. This uncertainty has been criticised. Professor Rodney Brazier has written [R Brazier, ‘Constitutional Reform and the Crown’ in M Sunkin and S Payne (eds), *The Nature of the Crown*, 1999, p229), ‘…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 [R v Secretary of State for the Home Department, ex parte Northumbria Police Authority [1989] QB26, (CA) p56 (Nourse LJ) that such a statement cannot be arrived at, because only through a process of piecemeal judicial decisions over the centuries have

The limits and definition of the prerogative have built up over centuries of case law.

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6. Appendix: Legal development of the prerogative

The lawful use of the Royal Prerogative has developed over a multitude of court decisions. This appendix is a compilation of important cases that has determined or codified aspects of the lawful law of prerogative powers. It is not intended to be a complete, authoritative list.

Some of these cases established principles, whereas others provide good examples of the principles being used, while not being the codifying example.

6.1 The effect of statute on prerogative powers

**Attorney-General v De Keyser’s Royal Hotel Ltd [1920]**

This case established that prerogative powers cannot be used when statutory powers replace them. They are placed in abeyance.

The De Keyser’s case has proved essential for clarifying the abeyance principle, which defines what happens to prerogative powers once statute is passed concerning those powers.

De Keyser’s hotel in London was seized by the Government for war use in 1916. The Government claimed that this had been done using a prerogative power without any obligation to pay compensation. However, the Defence Acts 1842-1873 made provision both for the seizure of land for these purposes and for the payment of compensation. The Government argues to the House of Lords that the royal prerogative had not been curtailed by the Acts and that, effectively, it could choose to use the prerogative power rather than the power under the Acts.

The House of Lords rejected this argument, establishing that the statute takes priority, effectively suspending the prerogative power when an Act is passed.

The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament

[…]

I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

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62 [1920] AC 508
63 Ibid., p 576
This principle informs any further discussion regarding the effect of the prerogative on law. Because statute law is the supreme law of the land, it overrules prerogative power. De Keyser’s is referred to repeatedly in subsequent cases involving the Royal Prerogative, including Miller.

**Laker Airways Ltd v Department of Trade [1977]**

Prerogative powers, even where still available for use, cannot be used in order to frustrate a statutory provision.

Laker Airways Ltd proposed to fly a route from the UK to the USA. Under the convention in use by the UK and the USA at the time, air carriers between the two nations had to be “designated” before they could be granted permission to fly routes. This power arose under a Treaty, and is separate to the granting of a licence by the Civil Aviation Authority.

Because the power to make treaties resides with the Crown alone, this designation was a prerogative power, and had not been placed in abeyance by the Civil Aviation Act 1971. The Secretary of State granted a designation to Laker Airways, at which point the CAA began to evidence on granting a licence.

The licence was granted, though British Airways, opposing the licence, appealed to the Secretary of State by British Airways. The appeal process was set out in the 1971 Act, and the appeal was rejected.

A period of time then passed before Laker could begin operation, since the US Government has not granted the designation as per the Bermuda Agreement. In this period, the British Airways board made a further application to the CAA to revoke the licence as market conditions had changed in the intervening period. This application was rejected and, this time, the board did not appeal to the Secretary of State.

Before Laker Airways could begin operation, however, the Secretary of State told the House of Commons the designation would be withdrawn.

The Secretary of State cited changing market conditions. In court, the Attorney-General claimed that the power to withdraw the designation was a prerogative power arising under a Treaty, and therefore lawful.

The Court held that while the prerogative power did exist, the purpose of the Secretary of State’s decision was to stop Laker Airways operating, in effect subverting the process of licences being granted by the CAA, which had ended when the British Airways board did not lodge a further appeal. The licence was useless without the designation. There were statutory routes under the Civil Aviation Act 1971 for stopping Laker Airways from operating if there was a proper case for it.

The Court held that the use of the prerogative power here was to achieve the result of a lawful revocation under the statute, and that this was unlawful. Lord Justice Roskill called this the Government trying to

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64 [1977] QB 643
65 HC Deb 29 July 1975 vol 896 cc1502-12
“achieve by what I have called the back door that which cannot lawfully be achieved by entry through the front”.66

**R v Secretary of State for the Home Department, ex p. Fire Brigades Union [1995]**67

Prerogative powers cannot be used where they conflict with enacted legislation, even when that enacted legislation is not yet in force.

The Criminal Injuries Compensation Scheme had been introduced by prerogative power, it being a relatively rare example of the Crown’s power to establish a benefits scheme if Parliament approves the required finance. In 1988, Parliament enacted legislation to put the scheme on a statutory footing,68 but the legislation required a commencement order in order to come into force.69

The commencement order had still not been made when, in March 1994, the Home Secretary announced that those sections of the **Criminal Justice Act 1988** related to the statutory scheme would be repealed, having never been commenced, and that new terms would be introduced to the existing non-statutory scheme which would introduce a lower level of compensation payments.

The Court of Appeal held that by using the prerogative power in a way that was contrary to the enacted legislation is to frustrate the will of Parliament, and the fact that the legislation had not yet been brought into force does not negate this. Enacted legislation awaiting commencement is still enacted legislation. This decision was affirmed on appeal to the House of Lords.

It should be noted that 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.

The 1988 Act was subsequently repealed, having never been in force, and replaced by the **Criminal Injuries Compensation Act 1995**.70

**R (On the Application Of XH and AI) v The Secretary of State for the Home Department [2017]**71

The test for whether statute abridges a prerogative power is strict – powers omitted from related statute may still be exercisable by prerogative.

Specifically, the issue and cancellation of passports are still prerogative powers despite the **Terrorism Prevention and Investigation Measures Act 2011**

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66 [1977] QB 643, p 722
67 [1995] AC 513
68 The **Criminal Justice Act 1988**, Part VII
69 Commencement orders are now commencement regulations. See the library briefing paper **Statutory instruments**
70 The 1998 Act was repealed in the **Criminal Injuries Compensation Act 1995** Sch.1 para.1
71 [2017] EWCA Civ 41
The Home Secretary had exercised the Royal Prerogative to cancel the passports of the appellants XH and AI. The prerogative power to issue a passport has been established to be subject to judicial review, in *R v Foreign Secretary, ex p Everett*. The policy of using the prerogative to cancel passports was set out in a written ministerial statement of 25 April 2013, which states:

> There is no entitlement to a passport and no statutory right to have access to a passport. The decision to issue, withdraw, or refuse a British passport is at the discretion of the Secretary of State for the Home Department (the Home Secretary) under the Royal Prerogative.

Separately, Section 2 of the *Terrorism Prevention and Investigation Measures Act 2011* contains provisions that allow the Secretary of State to require an individual to surrender their passport, and a requirement not to seek to obtain a passport.

The appellants argued that the prerogative power to cancel passports had been superseded by these provisions of the Act. Thus, as per the rule in *De Keyser’s*, the prerogative power would be placed in abeyance.

The appellants argued that in much the same way that, in *Laker Airways*, Parliament could not have intended an unfettered prerogative power to control the commercial right to fly to continue after the passage of the *Civil Aviation Act*, Parliament could not have intended the right to cancel a passport by prerogative to continue after passage of the 2011 Act.

The Court of Appeal disagreed, and held that the test for necessary implication was strict, and that the cancellation of a passport was “conspicuously absent” from the measures in the Act, which only required an individual to surrender or not seek to obtain a passport. The measures included in the Act are to compel action (or a lack of action) on an individual, which is distinct from the power of the Crown to issue and cancel a passport.

The Court said that it was “fanciful” to assume that Parliament had overlooked that the power to cancel a passport existed, and that it was highly unlikely that Parliament intended to abolish the power. The omitted power was, therefore, still exercisable using prerogative powers.

More information on the withdrawal of passport facilities can be found in the library briefing paper *Deprivation of British citizenship and withdrawal of passport facilities*.

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72 [1989] QB 811
73 HC Deb 25 April 2013; Column 69WS
74 [2017] EWCA Civ 41, para 91
6.2 Prerogatives powers and judicial review

_Council of Civil service Unions v Minister for the Civil Service (the GCHQ case) [1984]_\(^{75}\)

This case established that the use some prerogative powers can be challenged using the ordinary grounds for judicial review.

The Government had banned intelligence officers working for GCHQ from joining trade unions, citing national security concerns. The decision was taken under powers conferred on the minister by the Civil Service Order in Council 1982.

The unions challenged this decision, claiming that the courts could review the decision despite it having been made under prerogative powers, something that was previously considered to be not examinable by the courts. They claimed that the Government hadn’t consulted with workers, and therefore there was a ground (procedural unfairness) for judicial review since a legitimate expectation of prior consultation had been established.

The House of Lords affirmed a lower court’s decision that a minister acting under a prerogative power may be under the same duties to act fairly as if they were acting using a statutory power. This landmark decision moved the courts from a position of deciding whether prerogative powers existed to deciding if they were being carried out lawfully.

The House of Lords ultimately rejected the unions’ argument, because national security concerns are the purview of the executive, and a question regarding national security is not considered to be justiciable. It was not for the courts to decide whether the concerns of national security outweighed those of fairness.

Writing in _Public Law_ in January 2010, Sir Louis Blom-Cooper QC and Richard Drabble QC revisited the case, calling it the “_locus classicus_ of a modern public law” and noting that it “effectively buried the old concept that the prerogative power was unreviewable judicially”.\(^{76}\)

This case is particularly important in the field of public law because of Lord Diplock’s codification of some grounds for judicial review in the House’s judgment.

_R (on the application of Bancoult) v Sec of State for Foreign & Commonwealth Affairs (No 2) [2008]_\(^{77}\)

This case established that Orders in Council, despite being primary legislation, are also subject to the ordinary grounds for judicial review.

This case was part of the long-running dispute over the eviction of the native inhabitants of the Chagos Islands, now part of the British Indian

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\(^{75}\) [1984] UKHL 6


\(^{77}\) [2008] UKHL 61
Ocean Territory. In this case, the claimant was challenging two Orders in Council that prevented islanders from returning to the islands.78

The GCHQ case also involved an Order in Council, but in a different way. In the GCHQ case, the Order in Council conferred certain powers on ministers, and it was the use of these powers that was challenged. *Bancoult* differs in that it was the Orders themselves that were challenged.

On appeal to the House of Lords, the Government argued that the courts had no power to review an Order in Council because they are primary legislation,79 which the Government argued the courts can no more review than they can an Act of Parliament.

While the majority decision was that the Orders in Council were not unlawful, the House decided that Orders in Council are subject to the ordinary grounds for judicial review.

Lord Hoffman said that while they were primary legislation, they lack the “unique authority Parliament derives from its representative chamber” and should therefore be subject to judicial review.

The fact that such Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone.

[...]

I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.80

The House did, however, rule that the Orders evicting the inhabitants were lawful, primarily due to the interdiction of the *Colonial Laws Validity Act 1865*. Mark Elliot, now Professor of Public Law at the University of Cambridge, criticised the final decision of the House, calling it a case of “pyrrhic public law”:

> Jurisdiction to determine the existence and extent of prerogative power was asserted by the courts as long ago as the *Case of Proclamations*. There was therefore nothing ground-breaking in principle about the claimant’s contention in *Bancoult (No.2)* that s.9 of the Constitution Order was invalid because the prerogative did not permit the enactment of legislation banishing the entire population of the colony.

[...]

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78 British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004

79 That is, they are not authorised by any superior legislation. An Act of Parliament is the most common form of primary legislation.

80 [2009] 1 A.C. 453 para 35
The majority in Bancoult interprets English public law as offering a dismally modest check on the Executive’s extra-territorial exercise of prerogative power: one more such victory could utterly undo British courts’ maintenance of the rule of law in colonial affairs. 81

The case garnered some attention in Parliament, though little of the discussion focused on issues surrounding the prerogative. As Chair of the All-Party Group on the Chagos Islands, Jeremy Corbyn MP criticised the use of Orders in Council, saying that it was “bypassing Parliament” which “cannot be right under any circumstances”,82 and in a 2009 debate that “as a democrat, I object to all Orders in Council”.83

In the 2010 debate, Sir William Cash said that “it is simply outrageous to have a situation in which the prerogative is used to achieve this tangle and undergrowth of injustice”.84

R (on the application of Sandiford) v The Secretary of State for Foreign Affairs [2014]85

Generally, prerogative powers have to be approached on a different basis to statutory powers in judicial review. Specifically, the rule against fettering discretion does not apply to prerogative powers.

A British national, Lindsay Sandiford, had been imprisoned in Indonesia for drug offences and sentenced to death. While the UK Government had provided some consular support, it refused to provide legal help, citing a rigid policy against doing so in such situations. The claimant argued that the refusal was unlawful.

A public authority may not create limits on its statutory discretionary powers which lead to cases not being considered on their individual merits. This is known as fettering discretion.86 In this case, the rigid policy had been applied on a prerogative power.

The Supreme Court found that the rule against fettering discretion did not apply in the case of prerogative powers, which must be considered differently to statute.

The basis of the statutory principle is that the legislature in conferring the power, rather than imposing an obligation to exercise it in one sense, must have contemplated that it might be appropriate to exercise it in different senses in different circumstances.

But prerogative powers do not stem from any legislative source, nor therefore from any such legislative decision, and there is no external originator who could have imposed any obligation to exercise them in one sense, rather than another. They are intrinsic

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81 Mark Elliot, “Pyrrhic public law: Bancoult and the sources, status and content of common law limitations on prerogative power”, Public Law, October 2009, pp 697-722.
82 HC Deb 10 Mar 2010: Vol 507, Col 73WH
83 HC Deb 23 Apr 2009: Vol 491, Col 165WH
84 HC Deb 10 Mar 2010: Vol 507, Col 73WH
85 [2014] UKSC 44
86 See De Smith’s Judicial Review, Chapter 9
6.3 Exercising and broadening prerogative powers

_Burma Oil Co (Burma Trading) Ltd v Lord Advocate_[^88]

This case established that even when powers are still extant, the Crown may not be able to use them in the same manner as the ancient usage.

During the Second World War, British forces destroyed oil installations in Burma to stop them falling into the hands of the approaching forces of Japan. The Government claimed that this was done by a prerogative power and that no compensation would be payable to the Burmah Oil Company, who owned the installations.

The House of Lords held that while the Government’s actions were a lawful use of the prerogative, the company was entitled to compensation. This was on the basis of the actions were, effectively, for the public good at private expense, and the private company should therefore be compensated from public funds.

> The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute.^[89]

The prerogative power was held to still exist, since prerogative powers are not “lost to disuse”, but it had become contrary to the common law for the Crown to be able to seize property under the prerogative without compensation. This is therefore an example of the prerogative power being adjusted in how it can be used, despite still being available.

In response, Parliament passed the _War Damage Act 1965_, which abolished the right to compensation for damage or destruction of property by acts lawfully done during war, and dismissed all proceedings currently open regarding such compensation. Therefore, no compensation was paid to Burmah Oil despite this judgment.

_British Broadcasting Company v Johns (HM Inspector of Taxes) [1964]^[^90]

This case established that prerogative powers can never be broadened.

The BBC claimed to be a Crown monopoly and therefore not liable to pay income tax, as it was entitled to Crown immunity. The argument for the BBC was that the Crown has the prerogative right to grant a monopoly of broadcasting.

The Court of Appeal held that the Crown had not asserted a monopoly over broadcasting and that to do so would be the broadening of settled

[^87]: [2014] UKSC 44, para 61
[^88]: [1965] AC 75
[^89]: Lord Reid said in Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75, at p. 101.
[^90]: [1964] EWCA Civ 2
prerogative power, something that is impossible. Lord Justice Diplock commented that it was “350 years and a civil war too late for the Queen’s courts to broaden the prerogative”. 91

6.4 Prerogative powers and the European Union


Generally, the courts do not have jurisdiction to consider questions of pure international law.

Specifically, the establishment of a foreign and security policy was a legitimate exercise of a prerogative power, and the court has no jurisdiction to consider it.

Title V of the Treaty on European Union (The Maastricht Treaty) made provision for a common foreign and security policy between Member States of the European Union.

The claimant argued, inter alia, that ratification of Title V of the Maastricht Treaty was unlawful. The claimant argued that entering into a common foreign and security policy would transfer prerogative powers (the power to undertake foreign relations) from the Crown to the European Union. There were other arguments raised in the case that are less relevant to the prerogative and will not be outlined here.

In the GCHQ case, it was found that while prerogative powers may be justiciable, there are certain executive actions that are not justiciable. One of these such actions are those concerning pure international law or the making of treaties.

The Court refused judicial review, holding that creating a common foreign and security policy was an exercise of the prerogative, not an abrogation of it. Since the question was one of pure international law, the court had no jurisdiction to consider it.

R (on the application of Wheeler) v Office of the Prime Minister93

The Government’s decision not to hold a referendum on the Lisbon Treaty was not shown to be either unlawful or unreasonable.

The Government would usually use prerogative powers to ratify the Lisbon Treaty, however Section 12 of the European Parliamentary Elections Act 2002 provides that no treaty which provides for an increase in the powers of the European Parliament is to be ratified by the United Kingdom unless it has been approved by an Act of Parliament.

The claimant argued that the Government had created a legitimate expectation of a referendum on the Lisbon Treaty, because of the

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91 Ibid.
92 [1994] Q.B. 552
93 [2008] EWHC 1409 (Admin)
Government’s promise to hold a referendum on the Constitutional Treaty (Lisbon’s predecessor).

The Court held that the decision not to hold a referendum was neither unlawful nor unreasonable, and that Parliament had already in effect decided on whether to hold a referendum by passing the European Union (Amendment) Act 2008.

**R (on the application of Miller) v Secretary of State for Exiting the European Union [2017]**

The Government could not trigger Article 50 of the Treaty on European Union without explicit parliamentary consent.

In this case, the Government had sought to give notice to the European Commission of its activation of Article 50 of the Treaty on European Union, starting the process for the UK’s exit from the European Union. The Government had claimed that this was an exercise of a prerogative power, since treaty-making was the domain of the Crown.

The majority in the Supreme Court rejected the Government’s argument, applying principles established in many of the cases previously outlined in this paper. The Government’s case was also made through application of these principles.

The Government argued that there is nothing in the European Communities Act 1972 which expressly or by necessary implication abrogated ministers’ prerogative powers to withdraw from the Treaties. As the test for necessary implication is strict, the Government argued that the prerogative powers must still be extant.

The majority decided, however, that the ECA had made EU law into domestic law. The Crown cannot alter statute law by use of the prerogative, and Parliament had not intended to enable ministers to use the prerogative to remove a source of domestic law.

Since the 1972 Act makes provision for the effect of the EU treaties in domestic law, and notification under article 50(2) will sooner or later result in the treaties ceasing to have effect in domestic law, it is argued that there is a conflict between the exercise of the prerogative to give notification and the statutory scheme. Following *De Keyser*, that conflict should be resolved in favour of the statute, by holding that the prerogative must be constrained.  

Notably, both sides agreed that the European Union Referendum Act 2015 did not implicitly grant the Government the power to trigger Article 50 using the prerogative – the Government claimed that the power was theirs regardless. This is in contrast to, for example, the Parliamentary Voting System and Constituencies Act 2011, which contained provisions to “automatically” make changes to the law in the event of a referendum result in favour of the Alternative Vote system.

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94 * [2017] UKSC 5
95 * [2017] UKSC 5, para 170
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