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**Research Briefing**

By David Torrance

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# The royal prerogative and ministerial advice

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Mrs May, with her humble duty to The Queen, has the honour to recommend the attached list of ministerial appointments for Your Majesty's most gracious approval.

Summary

**Credits**
With thanks to Jason Loch, Rich Greenhill and Mark Scott for their comments on an earlier version of this paper.

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# Contents

# Summary

Legal powers used under the royal prerogative are those which do not require parliamentary authority. Historically, these executive, legislative and judicial powers would have been exercised by a monarch directly but, over time, the majority have been abolished, delegated to ministers or replaced by statute. Some, however, remain, for example the dissolution of Parliament or the prerogative of mercy. Most are guided by constitutional conventions and what is known as ministerial advice.

## Types of prerogative power

Prerogative powers can be exercised by the King acting alone (the appointment of a Prime Minister and conferral of certain honours), by the King on the advice of ministers (public appointments), by Ministers of the Crown (treaties and foreign affairs) or by the King in Council (a meeting of the Privy Council at which the King is present). Separately, ministerial advice also informs statutory powers carried out by the King or the Privy Council.

The exercise of most prerogative powers results in some sort of legal "instrument", a formal document containing an expression of "the King's will". The main types are an Order in Council, a Royal Order, Commission or Warrant made under the Royal Sign Manual (the monarch's personal signature), or Proclamations, Writs or Letters Patent issued under the Great Seal.

Where there is a conflict between the prerogative and statute, statute prevails. Use of the prerogative remains subject to the common law duties of fairness and reason and can be subject to judicial review in most cases. While the prerogative can be abolished or abrogated by statute, it has been argued that it can be revived.

## Ministerial advice

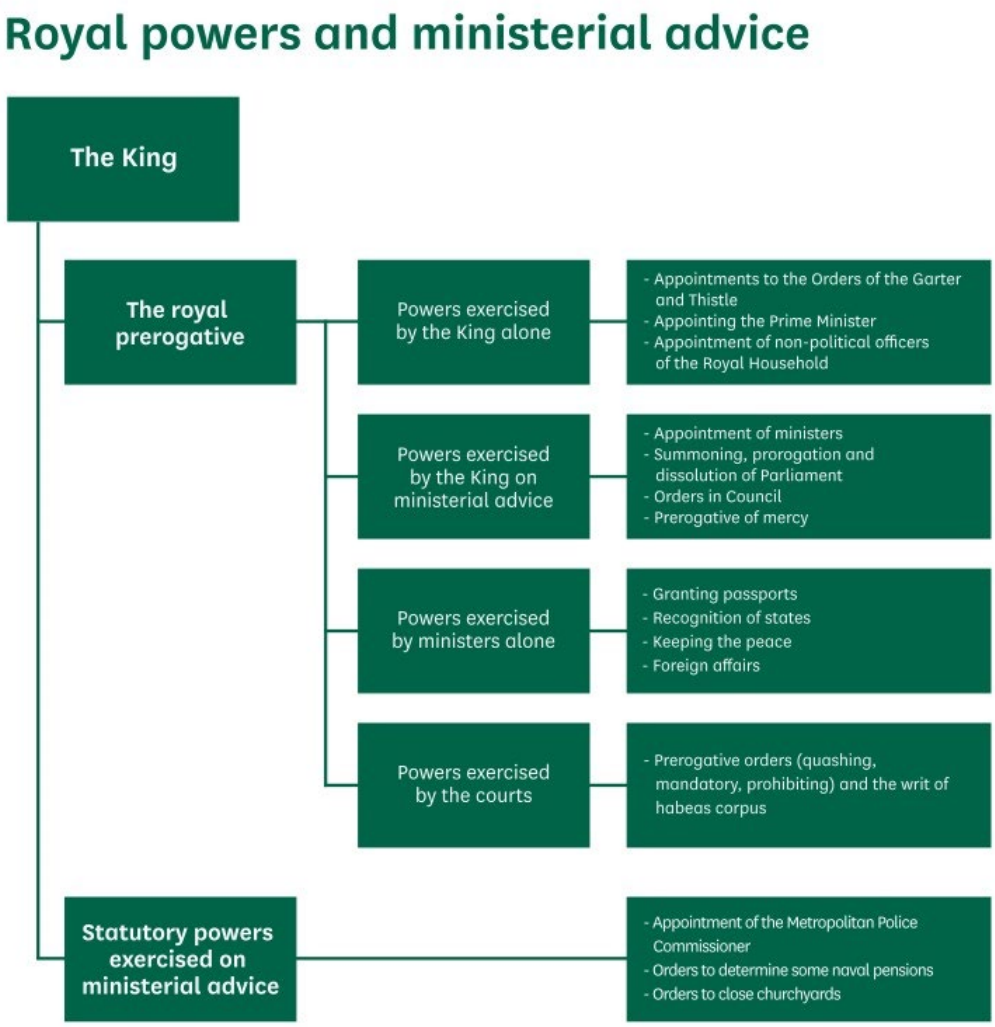
Most of the King's prerogatives and all his statutory powers depend upon "advice" from ministers. The responsibility for the monarch's actions based on that advice rests with the minister who gave it, and that minister is accountable to Parliament. Advice can also come from the Cabinet, Parliament, the Privy Council and judges. Formal advice is constitutionally binding and must be followed by the monarch.

# The prerogative today

Although this briefing includes an examination of the historical development of the prerogative, its main focus is on the prerogative as it stands today: its different categories, how it is used and by whom.

Although much diminished in scope, the prerogative remains an important source of constitutional law in the UK and continues regularly to be exercised by ministers on a UK-wide basis or, where responsibility for its use is devolved, in England (or England and Wales) alone, Scotland, Wales and in Northern Ireland.

This briefing also examines the courts and the prerogative as well as proposals for its reform (or abolition) since the early 1980s.



# 1 What is the royal prerogative?

The relationship between the executive, judicial and legislative powers of the Crown is complex and – in the absence of a codified constitution – not ultimately based on any specific rules of law. As the Stair Memorial Encyclopaedia on the Law of Scotland has observed:

> The unitary common law power of the Crown from which they have evolved is known as 'the royal prerogative' or 'the prerogative', and in so far as it has not been superseded by statute, it is this prerogative power which is utilised by the Crown and its ministers and servants in exercising the functions of government.[1]

Despite the absence of a legislative basis, the royal prerogative[2] is nevertheless a significant source of constitutional law in the United Kingdom. Sometimes, all these legal powers are simply grouped together as "the Crown", but as the legal historian F.W. Maitland once warned his students:

> the crown is a convenient cover for ignorance: it saves us from asking difficult questions [...] do not be content until you know who legally has the power – is it the king, is it one of his secretaries: is this power a prerogative power or is it the outcome of statute?[3]

## 1.1 Types of prerogative power

There are four main types of prerogative powers, to which we can add two further categories which are statutory but involve the advice of ministers:

- Prerogative powers exercised by the King alone;[4]
- Prerogative powers exercised by the King on the advice of ministers;
- Prerogative powers exercised by ministers;
- Prerogative powers exercised by the King in Council (the Privy Council);

1 Stair Memorial Encyclopaedia of the Laws of Scotland Volume 7, The Crown, LexisNexis, 1995.

2 The word, originally an adjective, is derived from the centuria praerogativa, or century which voted first on a proposed law (rogatio) in the Roman comitia centuriata (1911 Encyclopædia Britannica).

3 F. W. Maitland, The Constitutional History of England, Cambridge: Cambridge University Press, 1908, p418.

4 A Regent or Counsellors of State can exercise all the prerogative (and statutory) powers of a monarch except granting royal assent to a bill which alters the line of succession or the Scottish system of Presbyterian religion (Commons Library research paper CBP9374, Regency and Counsellors of State).

- Statutory executive powers of the Crown on the advice of ministers.[5]
- Statutory powers exercised by the King in Council on the advice of ministers.

## Prerogative powers exercised by the King alone

- Choice of Prime Minister (though guided by strong convention)
- Appointment to the Orders of the Garter or Thistle, to the Royal Victorian Order and the Order of Merit, and to some Royal Household positions
- Dissolution of Parliament (in exceptional circumstances)

## Prerogative powers exercised by the King on the advice of ministers

- Appointment of UK ministers and Privy Counsellors
- Creation and award of medals and honours
- Prerogative of mercy
- Certain public appointments
- War prerogatives
- Foreign affairs

## Prerogative powers exercised by ministers

- Aspects of treaties and foreign affairs
- State recognition
- Right of law officers to litigate on behalf of the Crown

## Prerogative powers exercised by the King in Council (the Privy Council)

- Prerogative Orders in Council (in relation, for example, to Overseas Territories)
- Orders assenting to legislation from Guernsey and Jersey
- The granting and amendment of Royal Charters

[5] Stair Memorial Encyclopaedia of the Laws of Scotland Volume 7.

### Statutory executive powers of the Crown on the advice of ministers

- Appointment of Comptroller and Auditor-General
- Other public appointments

### Statutory powers exercised by the King in Council on the advice of ministers

- Orders made under the Naval and Marine Pay and Pensions Act 1865 (which determine the pay of the Navy)
- Orders made under the Burial Act 1853 (which provide for the closure of churchyards which no longer have room for burials)

## 1.2 What form do prerogative powers take?

Most prerogative powers result in some sort of legal instrument, a formal document containing an expression of the King's will. The main types are:

- An Order in Council;
- A Royal Order, Commission or Warrant made under the Royal Sign Manual (the monarch's personal signature);
- Proclamations, certain Writs or Letters Patent issued under the Great Seal.

An **Order in Council** can be statutory or prerogative and is made by the King at a meeting of the Privy Council. These begin:

*At the Court at Buckingham Palace*

THE 17th DAY OF MAY 2023

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY
IN COUNCIL

A **Proclamation** is the public announcement of an executive prerogative act, such as the dissolution of Parliament or determining coinage. For example:

**BY THE KING**

**A PROCLAMATION**

**DETERMINING THE SPECIFICATIONS AND DESIGNS FOR A NEW SERIES OF FIVE HUNDRED POUND, TWO HUNDRED POUND, ONE HUNDRED POUND AND TWENTY-FIVE POUND GOLD COINS; A NEW SERIES OF TEN POUND, FIVE POUND AND TWO POUND SILVER COINS; AND A NEW SERIES OF FIVE POUND CUPRO-NICKEL COINS**

Proclamations (which can also be statutory or prerogative) are prepared by the Privy Council Office, which obtains the King's signature at a meeting of the Privy Council. These are then sent to the Crown Office for Wafer Sealing together with covering order (directing the sealing) signed by the Clerk of the Privy Council.[6]

A **Royal Order** approves Treasury spending,[7] a **Commission** appoints an officer in the Army,[8] while a **Warrant** could be either a substantive act or merely a direction to affix the Great Seal to another document (see below). There are two versions of a Warrant:

- **By Warrant under The King's Sign Manual**: these are submitted to King by a Secretary of State (usually the Secretary of State for Justice) having been prepared by the Crown Office on receipt of "giving effects letter" from the originating department. After the King has signed the Warrant, the submitting minister countersigns and, once it has been returned to the Crown Office, the Lord Chancellor signs it too (known as "the recipe").[9]

- **By The King Himself**: this is An Immediate Warrant, which is submitted to King direct by the Lord Chancellor. This version is used for senior judicial appointments and King's Counsel.[10]

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6 Crown Office General Guidance for Warrants and Patents, p2. A Patent Roll entry for Proclamations is typed in the Crown Office and inserted at the back of a bound volume in due course.

7 Jason Loch @JasonLoch), X (Twitter), 14 July 2023 [Accessed 6 October 2023].

8 Commissioning certificate for an officer, Great War Forum website. Modern Commissions are stamped with a facsimile of the King's signature. They also include the wording "We have caused these Our Letters to be made Patent", which suggests they are a type of Letters Patent.

9 This can produce a scenario in which the same person signs a Warrant twice, initially as Justice Secretary and then as Lord Chancellor. Under the Great Seal Act 1884, section 2(1), two Lords Commissioners of His Majesty's Treasury can also countersign a Warrant.

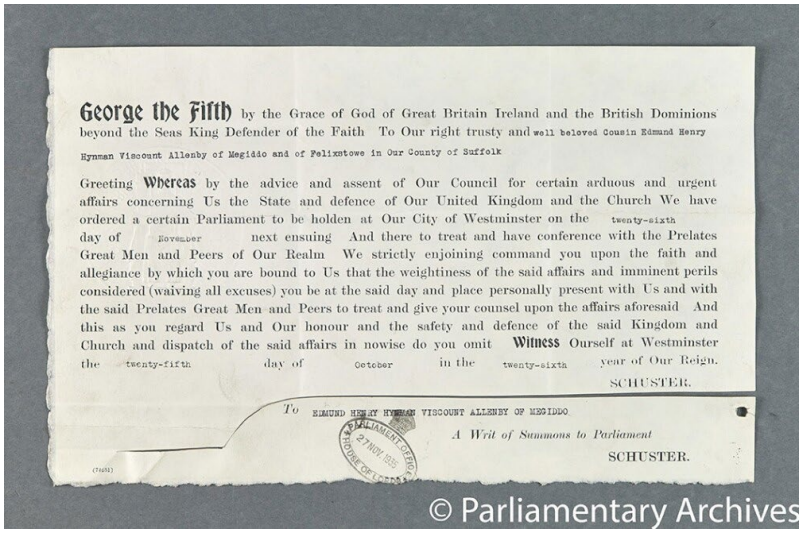
10 Crown Office General Guidance for Warrants and Patents, p1. Royal Warrants of Appointment are single documents on A4 cream paper prepared by the Crown Office and submitted direct to the King. They are used for circuit judges and other judicial offices.

A Warrant instructs the Lord Chancellor to prepare **Letters Patent**, one of three instruments (the others being Proclamations and Writs) issued under the Great Seal. These instruments either have a wax impression of the Great Seal applied ("Great Sealed") or a wafer (embossed paper) version ("Wafer Great Sealed").[11]

Letters Patent are an "open" document which may make a public appointment.

Letters Patent granting Lord Mayoralty to Oxford

Letters Patent are either Great Sealed or Wafer Great Sealed and can either be typed or handwritten on vellum. A Patent Roll entry is bound together at end of each regnal year (5 February) and sent to the National Archives together with Warrants for permanent retention.[12]



A Writ of Summons (Parliamentary Archives: GB61_HL_PO_JO_10_10_1129A)

[11] Crown Office General Guidance for Warrants and Patents, p1.

[12] Crown Office General Guidance for Warrants and Patents, p1.

A **Writ** is a mandate addressed to an individual requiring him or her to carry out, or refrain from carrying out, a particular act. For example, certain judges and Law Officers of the Crown receive Writs of Assistance (or Attendance) to attend the State Opening of Parliament.[13] Following the sealing of a dissolution Proclamation, the Crown Office issues Writs – each sealed individually with the Wafer Great Seal – to returning officers in every UK constituency.

Some prerogative acts, such as the monarch's appointment of a Prime Minister, lack any documentary basis (see **Section 4.2**).

Statutory Instruments from 1992, 1996, 2000 and 2002 lay down the wording for certain documents. In all other cases, wording follows precedent. Another SI from 1988 specifies which documents are to be prepared on vellum or on paper and lists those to be Wafer Great Sealed. Nevertheless, precedent can be followed if "more convenient". Finally, The Crown Office Fees Order 2013 sets out the fees payable for Letters Patent (reviewable by the Treasury every three years). Crown Office General Guidance for Warrants and Patents from the reign of Queen Elizabeth II is also available online.

## 1.3 Defining the royal prerogative

The royal prerogative is a notoriously difficult concept to define. As Sebastian Payne has observed, there is "no single accepted definition", with "various definitions" appearing to "conflict with each other".[14]

The classic definition was provided by the constitutional theorist A.V. Dicey, who described it as:

> 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 [...] Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of the prerogative.[15]

The English jurist Sir William Blackstone described the prerogative more tightly, as the:

> 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

[13] William Anson, The Law and Custom of the Constitution Volume II Part I (4th edition), Oxford: Clarendon Press, 1935, pp62-65. The writ for a Commons by-election, by contrast, passes under the Great Seal under the sole warrant of the Speaker of the House of Commons, without any royal involvement.

[14] Sebastian Payne, The Royal Prerogative in Maurice Sunkin and Sebastian Payne (eds), The Nature of the Crown: A Legal and Political Analysis, Cambridge: Cambridge University Press, 1999, p78.

[15] A. V. Dicey, Introduction to the Study of the Law of the Constitution (8th edition), Carmel, India: Liberty Fund, 1982, pp282-83.

> alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects.[16]

Dicey's definition would include administrative actions that the Crown has in common with private citizens, such as the ability to enter into contracts and to take on employees; Blackstone's interpretation would not. Case law exists to support both views, but a clear distinction has not been necessary. According to Robert Hazell and Timothy Foot, the:

> important thing to note is the tension between these two definitions: Dicey is too expansive; Wade perhaps narrower than expected. As a result of its origin in the murky world of political power, 'the prerogative' does not have clean edges.[17]

The Cabinet Manual states that the prerogative is the "residual power inherent in the Sovereign, and now exercised mostly on the advice of the Prime Minister and Ministers of the Crown".[18] Erskine May echoes this point in stating that:

> the prerogatives of the Crown itself are [...] subject to limitations and change by legislative process with the consent and authority of the Sovereign; and in the exercise of the prerogatives and powers of the Crown the Sovereign now, by constitutional convention, depends on the advice of Ministers of the Crown, who continue to serve in that capacity only so long as they retain the confidence of Parliament.[19]

This is also encapsulated in the Ram doctrine, which was first set out in a memorandum by the then First Parliamentary Counsel, Sir Glanville Ram in 1945. This explained that as a matter of law a Minister of the Crown may exercise any powers that the Crown has power to exercise, unless precluded by statute either expressly or by necessary implication.[20]

As Thomas Poole has observed, the "defining characteristic" of the prerogative is that its use "does not require the approval of Parliament".[21]

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16 William Blackstone, Commentaries on the Laws of England, Chicago: University of Chicago Press, 1979, p111. The Oxford English Dictionary echoes Blackstone in defining the royal prerogative as the "special right or privilege exercised by a monarch over all other persons".

17 Robert Hazell and Timothy Foot, Executive Power: The Prerogative, Past, Present and Future, London: Bloomsbury, 2022, p19. For a summary version of this book, see Robert Hazell and Charlotte Sayers-Carter, Reforming the Prerogative, The Constitution Unit, December 2022.

18 The Cabinet Manual: A guide to laws, conventions and rules on the operation of government, UK Government, October 2011, p2.

19 Erskine May, para 1.4.

20 Ram doctrine, Thomson Reuters Practical Law website.

21 Thomas Poole, United Kingdom: The royal prerogative, International Journal of Constitutional Law 8:1, January 2010, pp146–55.

## 1.4 Identifying prerogative powers

Identifying the full scope of the royal prerogative has long evaded scholars and politicians. Writing in 1867, Walter Bagehot observed that if someone were to read about the prerogative, they would:

> find the Queen has a hundred such powers which waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if she tried to exercise them. Some good lawyer ought to write a careful book to say which of these powers are really usable, and which are obsolete. There is no authentic explicit information as to what the Queen can do, any more than of what she does.[22]

And as Maitland has written:

> Our course is set about with difficulties, with prerogatives disused, with prerogatives of doubtful existence, with prerogatives which exist by sufferance, merely because no one has thought it worthwhile to abolish them.[23]

In a written answer on 1 February 1996, the then Lord Privy Seal, Viscount Cranborne, said it was "not possible to give a comprehensive catalogue of prerogative powers".[24] This remained the view of the government in 2003:

> The Government do not maintain a list of the public functions performed by Ministers otherwise than under statute. Given the range of government activity it would not be practicable to compile such a list; nor do the Government maintain a list based on any narrower definition of the prerogative. Such definitions are a matter of generalisation from the analysis of particular legal decisions.[25]

As part of the Governance of Britain review in 2007, the Ministry of Justice conducted a "scoping exercise". That review's final report stated that:

> The extent of prerogative powers has never before been explored or codified on a systematic basis within Government. In order to determine the scope of such powers the Government conducted a survey across all central Government departments and agencies between November 2007 and May 2008. Sixty-four departments and agencies were asked to identify prerogative powers used to perform executive functions, the exercise of which had effectively been delegated to Ministers.

Despite this exercise, "the nature, range and complexity of the prerogative powers" meant the survey "did not attempt to provide an exhaustive list of all those that may exist".[26]

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22 Walter Bagehot, The English Constitution, London: Fontana, 1963, p99.

23 F. W. Maitland, The Constitutional History of England, p421.

24 HL Deb 1 February 1996 Vol 568 c118WA [Prerogative Powers]

25 HL Deb 11 June 2003 Vol 649 cWA40 [Royal Prerogative: Ministers of the Crown]

26 The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report, Ministry of Justice, October 2009, p5.

## 1.5 Principles of the prerogative

Three principles of the royal 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 virtue of the prerogative;[27]
- 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.

### Supremacy of statute

Parliament can pass legislation to abolish a prerogative power or restrict how that prerogative power can be exercised. Where the Crown is empowered by statute to do something that it could previously do under the prerogative, it can no longer act under the prerogative but must act within the statutory scheme. The rationale here is that as the Crown, through the monarch, has given Royal Assent to the legislation in question, they are consenting to the changes that the Act of Parliament makes to the royal prerogative.[28]

Prerogative powers can be abolished by clear words in statute or where the abolition is necessarily implied. Since it is comparatively rare for statutes to abolish prerogatives explicitly, it is often a matter of legal judgment as to whether the prerogative has been abolished by implication. This involves judges assessing whether the statute in question "covers the field" of a particular prerogative.[29]

Statute has often "preserved" (retained) aspects of the prerogative. For example, the Crown Proceedings Act 1947 included an express saving at section 11 that the provisions of that Act did not extinguish or abridge pre-existing prerogative powers.

### Judicial review

See **Section 9** on the courts and the prerogative.

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27 This principle has not always been followed. Prior to the coronation of King George VI, for example, a Proclamation (a prerogative instrument) dated 20 February 1937 purported to amend section III of the Coronation Oath Act 1688.

28 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

29 The Governance of Britain – Review Final Report, p8.

## Cannot be broadened

As Lord Diplock observed in 1965:

> it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension.[30]

It appears, however, that prerogative powers can be revived. In written evidence to the Public Administration Select Committee in 2005, the Treasury Solicitor said it was:

> 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.[31]

This was the approach taken by the Dissolution and Calling of Parliament Act 2022, section 2 of which provided that:

> The powers relating to the dissolution of Parliament and the calling of a new Parliament that were exercisable by virtue of Her Majesty's prerogative immediately before the commencement of the Fixed-term Parliaments Act 2011 are exercisable again, as if the Fixed-term Parliaments Act 2011 had never been enacted.

Lord True, then Minister of State at the Cabinet Office, told the House of Lords that the government had "a sound legal basis for the position that prerogative powers can be revived, and there is no doubt on this question if this is made clear in statute".[32]

According to the 1911 edition of the Encyclopædia Britannica, the Regulation of the Forces Act 1881 was an example of the prerogative being "extended" by statute. By this act, the jurisdiction of lords-lieutenant of counties over the auxiliary forces was revested in the Crown.[33]

30 *British Broadcasting Corporation v Johns* [1965] Ch 32 CA.

31 House of Commons Public Administration Select Committee, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, HC 422, Ev 15.

32 UIN HL5459 24 January 2022 [Royal Prerogative: Statute Law]. For a full discussion of this aspect of the Dissolution and Calling of Parliament Act 2022, see Joint Committee on the Fixed-Term Parliaments Act, Report, HC 1046, 24 March 2021, pp30-39.

33 Regulation of the Forces Act 1881, section 3.

# 2 Ministerial advice

Most of the King's prerogatives and all his statutory powers depend upon "advice" from ministers. The responsibility for the monarch's actions based on that advice rests with the minister who gave it, and that minister is accountable to Parliament. The source of advice for prerogative powers is based largely on convention. For statutory powers (usually in relation to public appointments), legislation will often specify which minister (or body) is to provide the advice.

Historically, this principle was, as Sir Vernon Bogdanor has observed, "designed to protect parliament and people from the arbitrary use of royal power". Today, the same principle has "a quite different function", that of "protecting the sovereign from political involvement".[34] According to Rodney Brazier, it does both, preventing:

> an unelected head of state exercising her undoubted legal powers in her own discretion, but rather requires her to use them as advised by the government Ministers must then bear any criticism that follows.[35]

The convention was further explained in the 1954 Cabinet Office Precedent Book, which was a sort of constitutional handbook for senior civil servants:

> Under this system Ministers must be prepared to assume responsibility for every act or omission of the King which has political significance. This is a fundamental constitutional doctrine and it follows as a necessary corollary that on all such matters Ministers have the right to tender advice.

Where the King has acted on advice he is "entitled to expect the support of his Ministers", while ministers "in their turn are entitled to expect the confidence of the King".[36] Robert Blackburn has called this a "shield", something that once extended to an incoming government taking responsibility for the dismissal of the previous administration.[37]

## 2.1 What is ministerial advice?

As Sir Vernon Bogdanor has pointed out, the term "advice" is a euphemism:

34 Vernon Bogdanor, The Monarchy and the Constitution, Oxford: Clarendon Press, 1995, p66.
35 The Times, 4 April 2019.
36 Cabinet Office, Precedent Book: Part V – Relations with Buckingham Palace, CAB 181/7, Kew: The National Archives, Annex p1. Chapter 11 of the 1992 Precedent Book, Relations with Buckingham Palace, remains redacted and unreleased.
37 Robert Blackburn, The Queen and Ministerial Responsibility, Public Law Autumn 1985, p364.

> In everyday speech, to offer advice to someone is to offer an opinion or make a suggestion as to how that person should act. The person to whom the advice is given is quite free to accept or to reject it. The term 'advice' used in connection with constitutional monarchy, however, has a quite different meaning. When ministers offer advice to the sovereign, that advice is binding and the sovereign has normally no option but to accept it.[38]

In other words, advice is actually an instruction from ministers to the monarch to act in a certain way.

Some advice is communicated orally – in person or by telephone – for example the Prime Minister's "request" that Parliament be prorogued or dissolved, although it is the subsequent Proclamation and associated Order in Council which actually prorogues or dissolves Parliament. Most routine advice takes written form, particularly that of advising the monarch to appoint Privy Counsellors, ministers or other public appointments. This is called a "submission", and at Westminster at least, they have some stylistic peculiarities. There is no greeting or valediction, and the writer is generally referred to in the third person, while the Sovereign is usually addressed in the second person. The first line contains a reference to the Minister "presenting [their] humble duty".

According to the constitutional expert Jason Loch, this and the use of the third person have been standard in submission documents since at least the 19th century.[39] Submissions are "typically brief and to-the-point, and they often make no effort to explain why the Monarch should undertake the action recommended". Some submissions are explicitly advisory; others "lean into the constitutional fiction that the Sovereign is making an autonomous decision".[40]

In many cases, the monarch signifies their acceptance of a submission by writing "approved" (sometimes abbreviated) along with their initials at the top of the document. It is not clear when this practice began, though it was in place by the time of Queen Victoria's reign. Previously, the monarch often signified their acceptance of ministerial submissions by hand-written letter.[41]

Under section 37(1)(a) of the Freedom of Information Act 2000, information which "relates to" communications with the monarch is exempt from disclosure. This exemption expires after 20 years or five years after the relevant monarch's death, whichever is longer. Since 2010, this has been absolute, meaning the government is not obliged to consider any public interest arguments. Some submissions have, however, been released outwith the terms of the Act.

38 Vernon Bogdanor, The Monarchy and the Constitution, p66.

39 The Queen And Government Appointments, A Venerable Puzzle blog, 10 January 2018.

40 The Language Of Ministerial Submissions, A Venerable Puzzle blog, 31 August 2023.

41 The Language Of Ministerial Submissions, A Venerable Puzzle blog, 31 August 2023.

## 2.2 Sources of advice

There are several sources of advice, not all of it from ministers.

### Prime Minister

On matters of a constitutional nature, such as the appointment of ministers and the dissolution of Parliament, the King is advised by the Prime Minister. On matters affecting only individual departments, for example the Ministry of Defence or Foreign, Commonwealth and Development Office, the monarch is advised by the relevant Secretary of State, and in some cases by a more junior minister, provided they are also a Privy Counsellor.

As the Cabinet Office Precedent Book observed: "Naturally the relationship between the Prime Minister and the King is closer than that of any other Minister."[42] While premier, Sir Tony Blair described his role as both "the head of Her Majesty's Government" and "her principal adviser".[43]

### Cabinet

Advice can also come from the Cabinet as a whole. According to the Precedent Book, Cabinet minutes "carry a formal constitutional significance as representing the Cabinet's advice to the King". On this basis, it was also necessary to obtain the King's consent before disclosing any Cabinet "conclusions" publicly.[44]

The King's Speech agreed by the Cabinet has, since 1841, been accepted as a statement of ministerial policy for which the Sovereign accepts no personal responsibility. In 1841, Lord John Russell told the House of Commons "it was the result of advice of Ministers, and Ministers alone are responsible for it".[45]

Between 1916 and 1939, Cabinet Conclusions were sent to the King "under cover of a submission".[46] During the 1950s, meanwhile, it was:

> normal practice that, when matters affecting the King personally are to be dealt with in Cabinet documents, the proposals are first mentioned to the King by the Prime Minister.[47]

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42 Cabinet Office, Precedent Book: Part V, Annex p1.

43 HC Deb 15 October 2001 Vol 372 c818W [Prime Minister's Powers]. Blair added that the Prime Minister's "exercise of powers under the royal prerogative, have evolved over many years, drawing on convention and usage, and it is not possible precisely to define them".

44 Cabinet Office, Precedent Book: Part V, pp2-3.

45 Ivor Jennings, Cabinet Government (3rd edition), Cambridge: Cambridge University Press, 1961, p402.

46 Cabinet Office, Precedent Book: Part V, p4. These began: "The Prime Minister presents his humble duty to His Majesty the King and has the honour to include herewith a copy of the Conclusions of a Meeting of the Cabinet held on…"

47 Cabinet Office, Precedent Book: Part V, p5.

Until the early 20th century, the Cabinet would often convey advice on sensitive topics, ie the potential creation of peers to pass the Parliament Bill in 1910, in a formal minute.[48]

## Parliament

Royal assent for bills is requested in a formal submission from the Lord Chancellor, although by long custom this automatically follows "advice and consent" from both Houses of Parliament or, if the Parliament Acts have been applied, from the House of Commons alone.

Every Act of the UK Parliament commences with the following preamble:

> Be it enacted by the King's most Excellent Majesty, by and with the **advice and consent** of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: –

The monarch customarily authorises Commissioners to indicate assent on his behalf by signing a Royal Commission.[49]

## Privy Council

The Privy Council also provides a "mechanism for Ministerial advice to The King".[50] An Order in Council or Proclamation made under the royal prerogative is made "by and with the advice of the Privy Council", a form of words which appears in the instrument itself. In reality, the advice will come from the responsible department.

In this sense, the Cabinet and Privy Council operate in concert. The Cabinet decides on a particular course of action or policy, and if this requires an instrument issued under the prerogative, then it is approved at a meeting of the Privy Council. Usually only serving Cabinet ministers – who are required to be Privy Counsellors – attend regular Council meetings.[51]

## Judges/law officers

Decisions by judges can also take the form of advice to the King. The Judicial Committee of the Privy Council, for example, "humbly advises His Majesty" that an appeal should be allowed or dismissed, or a judgment varied. This advice is given effect by Order in Council.[52] According to Sir William Anson, "no member of the committee which advises is summoned to the Council at which the order is made".[53]

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48 Ivor Jennings, Cabinet Government, p440.

49 For full details of the procedure, see Commons Library research paper CBP9466, Royal Assent.

50 Privy Council, Privy Council Office website.

51 As per the Promissory Oaths Act 1868, Schedule.

52 Judicial Committee Act 1833, section 21.

53 Sir William Anson, The Law and Custom of the Constitution Volume II Part II, p328.

The primary function of the Attorney General for England and Wales is to provide legal and political advice to the UK government. He or she, however, may also provide legal advice to the monarch. In rare cases this advisory role is formalised.[54]

## 2.3 Formal and informal advice

By long-standing convention, the monarch always accepts ministerial advice.

Several scholars, however, have drawn a distinction between "formal" and "informal advice". In the past, Buckingham Palace has referred to this as "capital A advice" and "small a advice". According to Anne Twomey:

> The critical difference between formal and informal advice arises due to the application of the principle of responsible government [...] when formal advice is given to the head of state by responsible ministers, the responsibility for the actions taken by the head of state pursuant to that advice is transferred from the head of state to the relevant ministers [...] When informal advice is given, however, there is no obligation to act upon it and there is no shift in responsibility for the actions undertaken.[55]

The King may seek and receive – often via his Private Secretary – informal advice regarding factual, legal or political matters.[56] In the past, this has come from former ministers, judges and constitutional experts. In 1930, for example, George V sought advice from Lord Macmillan, a former Lord Advocate, regarding the appointment of Sir Isaac Isaacs as Governor-General of Australia. In 1939, George VI consulted Sir Cyril Asquith, then a Justice of the King's Bench, concerning his powers to refuse a dissolution. In 1957, Elizabeth II relied upon advice from elder statesmen such as Sir Winston Churchill and Lord Kilmuir as to who should succeed Sir Anthony Eden as Prime Minister.[57]

However, as the Precedent Book stated, "in the last resort the King accepts the advice of his Ministers, although this does not in any way derogate from his right and indeed duty to make known to Ministers his views about or objections to any course of action they propose".[58]

Walter Bagehot identified this as one of the monarch's "rights", "the right to be consulted, the right to encourage, the right to warn".[59] In a letter to The

54 Anne Twomey, The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems, Cambridge: Cambridge University Press, 2018, p55.
55 Anne Twomey, The Veiled Sceptre, p52.
56 Sir Vernon Bogdanor refers to the monarch "obtaining information from others" (Monarchy and the Constitution, p201).
57 Anne Twomey, The Veiled Sceptre, pp66-71.
58 Cabinet Office, Precedent Book: Part V, Annex p1.
59 Walter Bagehot, The English Constitution, p111.

Times, Sir William Heseltine, then Private Secretary to Queen Elizabeth II, took "three points to be axiomatic":

1. The Sovereign has the right — indeed a duty — to counsel, encourage and warn her Government. She is thus entitled to have opinions on Government policy and to express them to her chief Minister.
2. Whatever personal opinions the Sovereign may hold or may have expressed to her Government, she is bound to accept and act on the advice of her Ministers.
3. The Sovereign is obliged to treat her communications with the Prime Minister as entirely confidential between the two of them.[60]

According to Anne Twomey, the monarch could attempt to persuade ministers to "alter their formal advice" in advance of it being given:

> It addresses the fine line between the rejection of ministerial advice and the persuasion of ministers not to pursue their advice or to acquiesce in alternative action by the head of state.[61]

Examples of this include George V's attempt to persuade David Lloyd George to retain Sir William Robertson as Chief of the Imperial General Staff in 1918, and the same monarch's resistance to receiving an ambassador from the Soviet Union in 1929. In the first case, the King backed down when Lloyd George threatened resignation, and in the second when Arthur Henderson, the then Foreign Secretary, made clear it was the Cabinet's collective advice.[62] See also **Section 8.4**.

## 2.4 Rejection of advice

As Sir Vernon Bogdanor has written, the consequence of the monarch rejecting formal advice "would normally be the resignation of the government":

> [E]ven if the sovereign were able to find another government, that government would be in office as the personal choice of the sovereign. The consequence would be to put the sovereign in a position in which he or she was opposed by one of the great parties of the state. No constitutional sovereign can survive for long once he or she comes to be seen as a partisan.[63]

But while Anne Twomey acknowledged this might be the "academic and theoretical position", she considered it "most unlikely to occur in practice":

> Few governments are prepared to give up the right to govern and resign because of disagreement with the head of state [...] It is simply not worth the political capital to engage in the fight.[64]

60 The Times, 28 July 1986.
61 Anne Twomey, The Veiled Sceptre, p44.
62 Ivor Jennings, Cabinet Government, p336.
63 Vernon Bogdanor, Monarchy and the Constitution, p66.
64 Anne Twomey, The Veiled Sceptre, pp113-14.

In his memorandum on the King's position regarding the Irish Home Rule Bill, H. H. Asquith acknowledged the monarch's "undoubted" power to change (or rather dismiss) his advisers, although he pointed out that on the last occasion this had happened – which Asquith believed was King William IV in 1834 – the "authority of the Crown was disparaged, and Queen Victoria, during her long reign, was careful never to repeat the mistake of her predecessor".[65]

In advising George V, the courtier Viscount Esher observed that:

> If the Sovereign believes advice to him to be wrong, he may refuse to take it, and if his minister yields the Sovereign is justified. If the minister persists, feeling that he has behind him a majority of the people's representatives, a constitutional Sovereign must give way.[66]

## Asking for advice in written form

According to Sir Harold Nicolson (writing in 1952) in cases when:

> he feels the advice given him is either dangerous or opposed to the wishes of the people as a whole, [the King] is to insist that the Cabinet shall furnish him with that advice in written form so that he also may have the opportunity of recording, in writing, that he follows that advice with misgiving and reluctance.[67]

When, in November 1965, Harold Wilson wanted to despatch Lord Mountbatten, the then Chief of the Defence Staff, to Rhodesia to bestow a KCVO (an honour) on the Governor, Humphrey Gibbs, Sir Michael Adeane, the Queen's Private Secretary, recorded that he:

> had raised the matter with The Queen. The Queen Herself had stressed that, although She had been attracted by the idea when it was mentioned to Her by the Prime Minister at his Audience on Tuesday, November 16, She had only given Her agreement to its being explored. If the Prime Minister wished to pursue the proposal She would want very definite advice, in terms, in writing and preferably publishable. Moreover, since this was a matter in which She was involved personally, it must be recognised by the Prime Minister that a negative answer might be returned.[68]

## Reversing advice

Following the Russian Revolution in 1917, the Cabinet advised the King to offer asylum to the Tsar (George V's cousin) and his family. An invitation was sent, but when Lord Stamfordham, the King's Private Secretary impressed upon Lloyd George "the King's strong opinion that the Emperor and Empress of

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65 J. A. Spender, Life of Herbert Henry Asquith II, pp30-31. To these observations, George V replied: "While you admit the Sovereign's undoubted power to change his advisers. I infer that you regard the exercise of that power as inexpedient and indeed dangerous."

66 Ivor Jennings, Cabinet Government, p337.

67 Harold Nicolson, King George V: His Life and Reign, London: Constable, 1952, p115.

68 Peter Hennessy, The Hidden Wiring: Unearthing The British Constitution, London: Weidenfeld & Nicolson, 1995, p67.

Russia should not come to this country", the government withdrew its invitation.[69]

### Conflicting advice

On occasion, the monarch has received conflicting advice from their advisers in different Commonwealth Realms. In 1932, for example, the Irish Free State (then a Dominion) wanted to merge the positions of Governor-General and President of the Executive Council (Prime Minister). The UK Attorney General, however, believed this would breach the Anglo-Irish Treaty of 1921. The King refused to act given this conflicting advice.[70]

See also **Section 8.4** on the Commonwealth Realms.

### Choosing not to tender advice

According to the Precedent Book, Ministers of the Crown were:

> Responsible not only for every act but also for any omission of the King which has political significance, and Ministers cannot avoid responsibility in any particular case by not choosing to tender advice. This would be a deliberate decision on their part and therefore they would still remain responsible [...] the tendency has been to regard more and more matters as having political significance.[71]

Consistent with this was Enoch Powell's assertion in 1984 that "Ministerial advice that ministerial advice is not required is also ministerial advice, for which ministers must take responsibility and stand question".[72] Lord Blake, however, responded that "if ministerial advice is not needed, ministerial advice that it is not needed is also not needed".[73]

## 2.5 Matters not requiring advice

In the same letter, Lord Blake said there were, "and long have been, matters (a few) on which the Crown does not need to take ministerial advice".[74] The examples he gave were the contents of the monarch's Commonwealth Day message and of their traditional Christmas speech, which is broadcast across the Commonwealth.[75] As the Commonwealth is not a constitutional entity, the

69 Jane Ridley, George V: Never a Dull Moment, London: Chatto & Windus, 2021, p258.
70 Anne Twomey, The Veiled Sceptre, pp76-77.
71 Cabinet Office, Precedent Book: Part V, Annex p1.
72 The Times, 26 January 1984.
73 The Times, 27 February 1984.
74 The Times, 27 February 1984.
75 The latter convention was established by George V, who was the first monarch to make a Christmas broadcast.

Head of the Commonwealth (the King), must from time to time speak or act in relation to the Commonwealth as a whole without ministerial advice.[76]

Following criticism of Queen Elizabeth II's 1983 Christmas broadcast by the Ulster Unionist MP Enoch Powell, Margaret Thatcher said:

> The Queen makes her Christmas broadcasts as head of the Commonwealth. She does not, therefore, make them on the advice of United Kingdom Ministers. The broadcasts are greatly valued, as a personal message from the Queen at Christmas, in homes throughout Britain and the Commonwealth.[77]

In practice, however, governments have often requested changes to the Christmas speech on receiving sight of a draft. In 1968, a reference to the UK's "serious economic difficulties" was removed, while in 1973 Edward Heath advised the Queen against including a section on the deteriorating economic situation.[78]

Advice is also not required for the award of certain honours: the Orders of the Garter and Thistle, the Order of Merit, the Royal Victorian Order and the Royal Victorian Chain (see **Section 4.7**).

According to Sir Vernon Bogdanor, in a "few situations, at the beginning or the conclusion of a ministry", the monarch "may or must act without ministerial advice". For example, in appointing a Prime Minister, although this choice is instead heavily regulated by non-legal rules called constitutional conventions.[79]

## 2.6 Parliamentary scrutiny of advice

There is no legal requirement that Parliament is informed about the exercise of prerogative powers. In 1993, Sir John Major said it was "for individual Ministers to decide on a particular occasion whether and how to report to Parliament on the exercise of prerogative powers".[80]

Questions in Parliament may be asked of ministers "who are among the confidential advisers of the Crown regarding matters relating to those public duties for which the Sovereign is responsible". It has been ruled, however, that the Prime Minister cannot be questioned as to advice tendered regarding honours,[81] ecclesiastical appointments,[82] the appointment and dismissal of

76 Philip Murphy, The Empire's New Clothes: The Myth of the Commonwealth, London: C. Hurst, 2021, p97.
77 HC Deb 24 January 1984 Vol 52 c763 [Engagements]
78 The Times, 21 January 1984.
79 Vernon Bogdanor, Monarchy and the Constitution, p66.
80 HC Deb 1 March 1993 Vol 220 c19W [Prerogative Powers]
81 Erskine May, para 22.16.
82 Speaker's private ruling, 9 March 1923.

Privy Counsellors,[83] or, in certain circumstances, the exercise of the prerogative of mercy.[84]

In 1979, reference was made to the Commons' "well-established rule" that:

> any references to the Royal Family must be phrased in courteous language and must not reflect upon the conduct of the Sovereign. This does not, however, inhibit the full discussion of any advice which may or may not have been given to Her Majesty.[85]

Petitions from members of the public which relate to certain prerogative powers, for example the granting of honours, are also not permitted.[86]

## 2.7 Consequences of "wrongful" advice

In rare cases ministers have been criticised – and suffered political penalties – for providing certain advice.

Rodney Brazier gave the example of the "loss of political support" experienced by David Lloyd George following his abuse of the honours system during his 1916-22 premiership.[87] More recently, Boris Johnson was criticised for advising the Queen to prorogue Parliament for five weeks in 2019 (see below and **Section 4.5**).

According to Sir Ivor Jennings, if "advice was due to the negligence of or to an error of judgment by a minister, and the House disapproves, the minister will resign",[88] but there are no examples of this having happened in practice.

### Justiciability

Ministerial advice is also justiciable. In September 2019, the Supreme Court considered whether advice, "given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019" to prorogue Parliament was lawful. Although Justices did not know "what conversation passed between them when he gave her that advice", or "what conversation, if any, passed between the assembled Privy Counsellors before or after the meeting", they decided that it was "logical" to:

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83 Speaker's private ruling, 24 June 1926. This has not always been followed (see **Section 4.5**).

84 For previous practice regarding questions relating to capital sentences, see Erskine May (22nd edition), 1997, p298 fn9.

85 HC Deb 21 November 1979 Vol 974 c402 [Mr. Anthony Blunt]

86 Remove the titles Duke and Duchess of Sussex from Prince Harry and Meghan Markle, UK Parliament website.

87 Rodney Brazier, Ministers of the Crown, Oxford: Clarendon Press, 1997, p216. Under the Honours (Prevention of Abuses) Act 1925, abuses in connection with the grant of honours is an indictable offence.

88 Ivor Jennings, Cabinet Government, p449.

> to start at the beginning, with the advice that led to [the prorogation]. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect [...] It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed.[89]

This judgment was consistent with the Canadian experience. In one instance, the government of Canada argued that ministerial advice was tendered pursuant to convention rather than law and was thus not reviewable judicially. Section 11 of the Constitution Act, 1867, however, places a legal responsibility on Canadian Privy Counsellors (ministers) to "aid and advise in the Government of Canada".[90]

89 *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

90 Mark D. Walters, Judicial Review of Ministerial Advice to the Crown, Constitutional Forum constitutionnel 25:3, 2016, pp33-42.

# 3 Historical background

Originally, a wide range of prerogative powers – executive, legislative and judicial – were exercised by English and Scottish monarchs acting on their own initiative. Anglo-Saxon kings in England were also provided with "counsel" or advice on exercising these powers by bodies such as the Witenagemot or Witan, which comprised senior aristocrats and clerics. Scottish monarchs also received advice.[91]

The limits of the prerogative, however, were unclear and in 1387 King Richard II of England attempt to define its scope for the first time.[92]

## 3.1 Civil wars and the Glorious Revolution

During the 17th century, disputes arose over the prerogative powers claimed by Stuart monarchs, who after 1603 were both Kings of England and Scotland. This centred on five main questions:

> Could the King raise taxes without the consent of Parliament? Could he maintain a private army? Could he institute special Royal courts of justice? And could he suspend the operation of laws passed by Parliament or grant his subjects a dispensation from obeying them?[93]

In the 1607 Case of Prohibitions, King James I of England claimed he enjoyed the right to adjudicate legal cases. The English jurist Sir Edward Coke rejected this on the basis that "causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law".[94] When the King objected to the idea that he might be subject to the law, Coke quoted Bracton: "Quod Rex non debet esse sub homine, sed sub Deo et lege" (The King must not be under man but under God and the law). In the subsequent Case of Proclamations, Coke ruled that the king could only exercise existing prerogatives, not create new ones. "The King hath no prerogative," said Sir Edward, "but that which the law of the land allows him."[95]

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91 For a detailed account of advice (or counsel) in England and Scotland between the late 13th and early 18th centuries, see Jacqueline Rose (ed), The Politics of Counsel in England and Scotland, 1286-1707, Oxford: Oxford University Press, 2016.

92 S. B. Chrimes, Richard II's questions to the judges 1387, Law Quarterly Review lxxii, 1956, pp365-90.

93 Harold Nicolson, King George V, p109.

94 [1607] EWHC KB J23.

95 *Case of Proclamations* [1610] 77 ER 1352, 12 Co Rep 74.

In Scotland, King Charles I shared his father's belief in an unlimited or absolute power to make policy via the prerogative, bypassing the Parliament of Scotland and the General Assembly of the Church of Scotland. This contradicted George Buchanan's notion of an elective and limited monarchy.[96] When new church canons and a prayer book were issued via Letters Patent and Proclamation, the 1638 National Covenant rebellion began in Scotland. This resulted in some limitations on the prerogative in 1640-41.[97]

These disputes in England and Scotland were resolved following the execution of King Charles I in 1649, although upon the Restoration of King Charles II in 1660, Scottish limitations on the prerogatives were lost:

> For the first time the king's prerogative powers relating to [the] parliament [of Scotland] received statutory definition and the privileges of the crown outlined therein were extensive, covering the appointment of all significant personnel, the summons and dissolution of parliament and ratification of its acts, foreign policy, supremacy in ecclesiastical matters, and oversight of government in general. The executive role of parliament as imagined in such legislation was diminished compared to the political influence that the estates had enjoyed in recent decades.[98]

More radical reforms followed the "abdication" of King James VII/II in 1688. William III and Mary II were invited to accept the English and Scottish Crowns on the explicit basis they would not assert the prerogative powers of their Stuart predecessors. This "Glorious Revolution" was underpinned by a statutory Coronation Oath which offered "a theoretical limitation on the exercise of the royal prerogative".[99]

The Parliaments of England and Scotland also legislated in this regard. Article 1 of the (English) Bill of Rights 1689 prevented the monarch suspending or executing laws without the consent of Parliament, while Article 4 made it illegal to use the prerogative to levy taxes "without grant of Parliament". The (Scottish) Claim of Right Act 1689 also set out the roles of the Scottish Parliament and Crown with similar restrictions. The Act of Settlement 1701 included provision that all Privy Council resolutions were to be signed by those who "advised" and consented to them.[100]

In 1703-05 Andrew Fletcher of Saltoun led a campaign for additional limitations on the prerogative in Scotland, one of which required Scottish parliamentary approval before Queen Anne could involve her Scottish realm

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96 George Buchanan's writing attempted to show that the Scottish realm (or kingdom) had been founded on a principle of elective monarchy by which a king could be removed if he did not respect the law.

97 Karin Bowie, 'A Legal Limited Monarchy': Scottish Constitutionalism in the Union of Crowns, 1603-1707, Journal of Scottish Historical Studies 35:2, 2015, pp131-54.

98 Keith Brown and Alan R. MacDonald (eds), The History of the Scottish Parliament Volume 3: Parliament in Context, 1235-1707, Edinburgh: Edinburgh University Press, 2010, p24.

99 Noel Cox, The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power, Oxford: Routledge, 2020, p197.

100 This provision was repealed early in Queen Anne's reign, as many Privy Counsellors ceased to offer advice (I. Naamani Tarkow, The Significance of the Act of Settlement in the Evolution of English Democracy, Political Science Quarterly 58:4, December 1943, p547).

in English wars.[101] That requirement did not survive the 1707 Union between England and Scotland (which formed Great Britain). Although Lord Cullen believed the legislation of Queen Anne had the effect of "extending to Scotland the royal prerogatives generally according to the law of England in relation to all proceedings for the recovery of Crown revenue", Lord President Strathclyde disagreed, regarding it as "inconceivable that the whole prerogative doctrines of English law could be imported almost by a side-wind in the manner suggested".[102]

Lord Browne-Wilkinson observed in 1995 that the:

> constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature [Parliament] as the sovereign body. The prerogative powers of the crown remain in existence to the extent to which parliament has not expressly or by implication extinguished them.[103]

Some prerogatives were abolished, some fell into disuse, others took statutory form or became governed by convention.

## 3.2 Ministerial advice

Despite the Glorious Revolution, British monarchs after 1707 still possessed significant power to influence government policy, particularly in the field of foreign affairs. However, over time:

> a distinction was drawn between the Monarch acting in his or her individual capacity and the powers possessed by the Monarch as an embodiment of the State. As the governance of the realm became more complex, power was devolved from the Monarch and exercised by his or her advisers.[104]

Although the monarch was not yet bound to follow the advice of her or his advisers – Queen Anne refused assent for several English and Scottish bills – over time the convention that such advice be followed became more and more consistently binding.

An important event in that regard came in 1714, when King George I – the first Hanoverian monarch – stopped attending meetings of his Cabinet, largely on account of his poor grasp of English. In the monarch's place, a Prime Minister emerged and instead of a king or queen governing through their ministers, ministers came to "govern through the instrumentality of the Crown".[105] Royal

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101 Queen Anne had used her prerogative to involve Scotland in the War of the Spanish Succession (1702-14).

102 For a full discussion, see J. D. B. Mitchell, The Royal Prerogative in Modern Scots Law, Public Law, Winter 1957, pp304-20.

103 *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] UKHL 3

104 The Governance of Britain – Review Final Report, p7.

105 Sir William Anson, The Law and Custom of the Constitution Volume II The Crown Part II (4th edition), Oxford: Clarendon Press, 1935, p54.

assent was last withheld in 1708, while the last government dismissed by a monarch (under the prerogative) was in 1834.[106]

As Sir Ivor Jennings has observed:

> The King acted on the "advice" of the Cabinet ministers; and in practice he could not refuse to take that advice unless he could find another set of ministers who could keep a majority in the House of Commons. Hence there was by constitutional convention a transference of the royal prerogative to the Cabinet.[107]

From this also grew the practice of the Cabinet "submitting unified advice to the monarch, without indication of any internal dissent".[108] This meant a monarch could not side with dissenting ministers who supported their view of a particular policy. By 1807, Lord Erskine felt able to tell the House of Lords:

> No man in England [sic], my lords, is less disposed than I am to abridge the king's prerogative, or to degrade the dignity of his high office, by reducing him to a cypher [but] No act of state or government can [...] be the king's; he cannot act but by advice; and he who holds office, sanctions what is done, from whatever source it may proceed. This, my lords, is not the legal fiction of the constitution, but the practical benefit and blessing of it.[109]

Another important development were the English and Scottish Reform bills of 1832, which meant UK governments increasingly governed on the basis of popular support rather than the favour of the Crown. If a certain party enjoyed a majority in the House of Commons, then a monarch's choice of Prime Minister (under the prerogative) was limited by that electoral mandate. As Jennings also observed:

> Unless the King could appeal to the people against his Government he had to accept its advice; and if he appealed to the people against the Government he must expect the Government to appeal to the people against the King.[110]

By the reign of King Edward VII in the early 20th century, it had become a firmly established constitutional tenet that virtually all prerogative powers were exercised by the monarch following binding ministerial advice. When King George V contemplated withholding assent for a bill granting Home Rule to Ireland, the then Liberal Prime Minister, H. H. Asquith, wrote to the monarch in the following terms:

> The part to be played by the Crown [...] has happily been settled by the accumulated traditions and the unbroken practice of more than seventy years. It is to act upon the advice of the Ministers who for the time being possess the confidence of the House of Commons, whether that advice does or does not conform to the private and personal judgement of the Sovereign. Ministers will

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106 Other constitutional historians have identified 1783 as the last occasion, for example Sir Ivor Jennings (Cabinet Government, p403).

107 Ivor Jennings, The Law and the Constitution (5th edition), London: University of London Press, 1959, p87.

108 G. H. L. LeMay, The Victorian Constitution, New York: St. Martin's Press, 1979, pp105-06.

109 HL Deb 13 April 1807 Vol 9 cc362-63 [Change of Administration]

110 Ivor Jennings, Cabinet Government, p404.

> always pay the utmost deference, and give the most serious consideration, to any criticism or objection that the Monarch may offer to their policy; but the ultimate decision rests with them; for they, and not the Crown, are responsible to Parliament.[111]

## 3.3 Imperial prerogatives

The belief in an "indivisible" Crown initially meant the existence of common royal prerogatives throughout the British Empire. Although the Scottish constitutional lawyer A. B. Keith thought the suggestion that the King might "act directly on the advice of Dominion Ministers" a "constitutional monstrosity",[112] the right to do so was increasingly used by Canada, South Africa, Australia and others as a means of acquiring greater autonomy from Westminster.[113]

By 1919, most prerogative powers in the UK's Dominions and self-governing colonies were, in practice, exercised on the advice of their respective governments. As the Crown became "divisible", so too did the prerogative, something acknowledged by the Imperial Conference of 1926; formal advice to the Crown was transferred from "Imperial" to local ministers. A key moment was the appointment in 1930 of Sir Isaac Isaacs as Governor-General of Australia, to which George V reluctantly agreed having been repeatedly pressed by John Scullin, the Prime Minister of Australia.[114]

The right to advise the Crown on the prerogatives of war and peace, however, was initially kept in the hands of UK ministers, as it was for "imperial concerns" such as nationality, shipping, and defence. Following the Statute of Westminster in 1931, the war and peace prerogative was delegated by the King to his Governor-Generals.[115] In 1939 some Dominions such as Canada and South Africa chose to make separate Proclamations of war against Germany.

This constitutional autonomy allowed Ireland to remain neutral during the Second World War. While King George VI retained some prerogative powers with regards to Eire (as the Irish Free State had become), its 1937 constitution stated that "the powers, functions, rights and prerogatives held by the Irish State" prior to 11 December 1936 had been inherited by the new constitution.[116]

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111 J. A. Spender, Life of Herbert Henry Asquith, Lord Oxford and Asquith Volume II, London: Hutchinson, 1932, pp29-31.

112 A. B. Keith, Responsible Government in the Dominions Volume I, Oxford: Clarendon Press, 1928, pxviii.

113 H. V. Evatt, The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions, Oxford: Oxford University Press, 1936.

114 Anne Twomey, The Veiled Sceptre, pp744-45. See also John Waugh, An Australian in the Palace of the King-Emperor: James Scullin, George V, and the Appointment of the First Australian-Born Governor General, Federal Law Review 39:2, June 2011, pp213-34.

115 Noel Cox, The Control of Advice to the Crown and the Development of Executive Independence in New Zealand, Bond Law Review 13:1, 2001, pp166-89.

116 Kevin Costello, The Expulsion of Prerogative Doctrine from Irish Law: Quantifying and Remedying the Loss of the Royal Prerogatives, Irish Jurist 32, 1997, pp145-94.

The King's outstanding prerogative powers were relinquished when Ireland declared itself a republic in 1949.

## 3.4 20th and 21st-century developments

As the constitutional specialists Robert Hazell and Timothy Foot wrote in 2022, the "trend over the last 30–40 years has been to make the prerogative more transparent, more accountable, and to reduce the breadth of executive discretion".[117]

The Security Service Act 1989 and Intelligence Services Act 1994, for example, placed the UK's three intelligence services under statutory rather than prerogative authority.[118] Labour governments between 1997 and 2010 also significantly curtailed the royal prerogative. The Civil Contingencies Act 2004 displaced much (if not all) of the prerogative in relation to emergencies. The Armed Forces Act 2006 provided a statutory framework for inquiries into naval incidents. Reform was stepped up during the premiership of Gordon Brown (2007-10). The Constitutional Reform and Governance Act 2010 codified the procedure for Parliament to scrutinise treaties prior to ratification and placed the Civil Service Commissioners on a statutory footing. Following the formation of the Conservative-Liberal Democrat coalition in 2010, the remaining personal prerogatives of the Crown were described (if not codified) for the first time in a Cabinet Manual published in 2011.[119] Votes on military action in Libya in 2011 and Syria in 2013 also extended the convention that Parliament sanction any use of the war prerogative.

Despite significant constraints on the royal prerogative, Noel Cox viewed the "preservation" of some prerogative powers as "marked":

> Parliament does not always wish to intervene in those areas of executive government which are operating well, where questions of parliamentary regulation or oversight are not significant or appropriate, or where, indeed, Parliament has no wish to venture.[120]

Writing in 2010, however, Thomas Poole said one might call the royal prerogative "a constitutional anachronism" were it not for the fact it worked much like the "rest of the U.K.'s ramshackle Constitution":

> In fact, in its historicity, in its monarchical form, in the disjunction between its past and present use, and in the thinness of the (formal) legal norms that apply to it, the prerogative might even be said to represent the very essence of the British Constitution.[121]

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117 Robert Hazell and Timothy Foot, Executive Power: The Prerogative, Past, Present and Future, p294.

118 Prior to 1989, MI5 had been constituted under the prerogative.

119 An updated version of the Cabinet Manual is due to be published by the Cabinet Office in late 2023.

120 Noel Cox, The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power, Oxford: Routledge, 2020, p178.

121 Thomas Poole, United Kingdom: The royal prerogative, pp146-55.

# 4 The King's constitutional prerogatives

The Ministry of Justice's 2009 scoping exercise categorised what it called the King's "constitutional" or "personal" prerogatives as follows:

- Appointment and removal of ministers
- Appointment of Prime Minister
- Power to dismiss government
- Power to summon, prorogue and dissolve Parliament
- Assent to legislation
- The appointment of Privy Counsellors
- Granting of honours, decorations, arms and regulating matters of precedence
- King's personal honours – Order of the Garter, Order of the Thistle, Royal Victorian Order and the Order of Merit
- A power to appoint judges in a residual category of posts which are not statutory and other holders of public office where that office is non-statutory
- A power to legislate under the prerogative by Order in Council or by Letters Patent in a few residual areas, such as Orders in Council for British Overseas Territories
- Grant of special leave to appeal from certain non-UK courts to the Privy Council
- May require the personal services of subjects in case of imminent danger
- Grant of civic honours and civic dignities
- Grant of approval for certain uses of Royal names and titles[122]

[122] The Governance of Britain – Review Final Report, p33.

The term "personal prerogatives" was first used by Sir Ivor Jennings in 1936. Professor Robert Blackburn, however, has argued that the word "personal" serves to "exaggerate" the true nature of these particular prerogatives, in that most are no longer truly discretionary.[123]

The Cabinet Manual refers to some of these prerogatives, ie the dismissal of a government or a refusal to dissolve Parliament, as "reserve powers", only to be used by the monarch (without ministerial advice) "in a few exceptional instances".[124] Robert Hazell and Bob Morris have also used the term "deep reserve power" to describe powers which theoretically exist but have not been used for a long time.[125]

## 4.1 Appointment and removal of ministers

The Cabinet Manual states that:

> It is for the Prime Minister to advise the Sovereign on the exercise of the Royal Prerogative powers in relation to government, such as the appointment, dismissal and acceptance of resignation of other ministers.[126]

On becoming Prime Minister in July 2016, for example, Theresa May made a formal submission to Queen Elizabeth II recommending the appointment of her new government. This began:

> Mrs May, with her humble duty to The Queen, has the honour to recommend the attached list of ministerial appointments for Your Majesty's most gracious approval.

The Queen signified her acceptance of the advice by writing "Approved" along with her initials in the upper right-hand corner of the submission.[127] Some senior ministers receive seals of office,[128] while the appointments of more junior ministers "generally take effect from when the Sovereign accepts the Prime Minister's recommendation of the appointment".[129]

The 1992 edition of the Cabinet Office Precedent Book describes ministerial appointments requiring only oral approval in urgent cases, albeit only as a prelude to a formal written submission:

> Informal as well as formal approval should be sought for the appointment of senior Ministers. Informal approval may be sought verbally by the Prime Minister at an audience, by [the] Private Secretary, letter to the Queen's

123 Robert Blackburn, Monarchy and the Personal Prerogatives, Public Law, Autumn 2004.
124 The Cabinet Manual, p3.
125 Robert Hazell and Bob Morris, The Queen at 90 The changing role of the monarchy, and future challenges, London: Constitution Unit, 2016, pp8-9.
126 The Cabinet Manual, p21.
127 The Queen And Government Appointments, A Venerable Puzzle blog.
128 For a full list, see Commons Library research paper CBP7460, The Privy Council: history, functions and membership, p57.
129 The Cabinet Manual, p23.

> Private Secretary or, if there is extreme urgency, by telephone conversation between the Private Secretary and the Palace. When the submission is made it should be stated whether the Minister is to be in the Cabinet or not.[130]

Submissions for the approval of (statutory) appointments of Scottish and Welsh Government ministers are made by their respective First Ministers. In April 2014, for example, the then First Minister of Scotland, Alex Salmond, wrote to the Queen in the following terms:

> Your Majesty
>
> With my humble duty, I write to seek Your Majesty's approval to make appointments under section 47 of the Scotland Act 1998.
>
> I propose to appoint the following Members of the Scottish Parliament as Scottish Ministers under section 47 of the Scotland 1998 to serve as members of the Scottish Government [...] The Scottish Parliament has today agreed to my seeking Your Majesty's approval to make these appointments.
>
> I have the honour to be, Madam, Your Majesty's humble and obedient servant.
>
> Alex Salmond[131]

Although Scottish and Welsh Government ministers "hold office at His Majesty's pleasure", they "may be removed from office by the First Minister".[132] Ministers in the Northern Ireland Executive (when functioning) are not appointed by the King.[133]

The last recorded case of a monarch influencing a Prime Minister's selection of his Cabinet colleagues was when George VI persuaded Clement Attlee to appoint Ernest Bevin rather than Hugh Dalton as Foreign Secretary in 1945.[134] However, according to the Royal commentator Robert Hardman, when Tony Blair's government proposed abolition of the Office of Lord Chancellor, the Queen "put her foot down" and influenced its retention.[135]

Under the 2010 Coalition Agreement for Stability and Reform, David Cameron agreed that a number of prerogative powers, including the appointment of ministers and Privy Counsellors would only be exercised following consultation with the Deputy Prime Minister, Nick Clegg.[136]

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130 Cabinet Office, Precedent Book: Chapter 5 part 1, 1992, Annex B, p61.

131 Courtesy of Jason Loch.

132 Scotland Act 1998, section 47.

133 Northern Ireland Act 1998, section 16A.

134 Charles Douglas-Home and Saul Kelly, Dignified and Efficient: The British Monarchy in the Twentieth Century, Brinkworth: Claridge Press, 2000, p167. The King personally disliked Dalton.

135 Robert Hardman, Our Queen, London: Arrow Books, 2012, pp184-85.

136 Coalition agreement for stability and reform – May 2010, Prime Minister's Office, 20 May 2010.

# 4.2 Appointment of Prime Minister

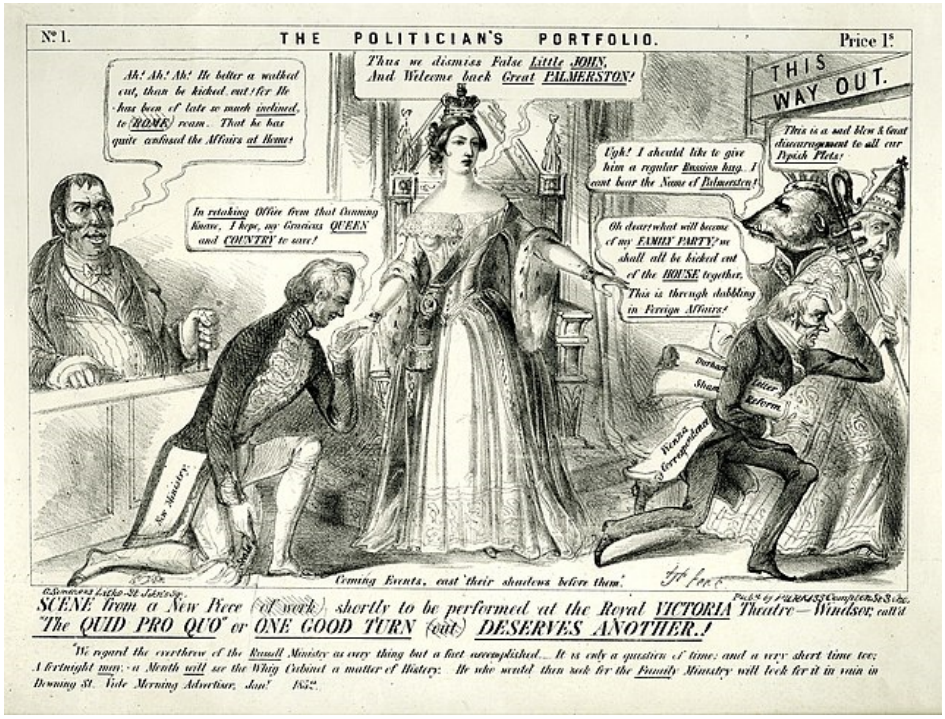
As Rodney Brazier has written:

> The office of Prime Minister exists by virtue of the royal prerogative. The Sovereign could lawfully appoint anyone to be Prime Minister, but is guided by constitutional conventions when making a choice.[137]

## Appointment

The King has no formal adviser when it comes to appointing a new Prime Minister. The outgoing premier is occasionally consulted, but his or her advice is not considered binding.

Personal discretion over the choice of a Prime Minister was last exercised in 1963 by Queen Elizabeth II, following the resignation on grounds of ill health of Harold Macmillan. Even then, her choice of the Earl of Home followed broad consultation with the Conservative Party. When Winston Churchill wished to appoint Sir Anthony Eden "Deputy Prime Minister" in 1951, George VI objected on the basis it undermined his prerogative choice of a successor should Churchill die or resign.[138]



A satirical view of Lord Palmerston kneeling to kiss the hand of Queen Victoria, while the previous administration led by Lord John Russell departs.

137 Rodney Brazier, Choosing a Prime Minister: The Transfer of Power in Britain, Oxford: Oxford University Press, 2020, p167.

138 John W. Wheeler-Bennett, King George VI: His Life and Reign, London: Macmillan, 1958, p544. Churchill withdrew his proposal. The King had previously asked Churchill to tender formal advice regarding his successor should he die during the Second World War.

Following an election, the monarch is bound by strong convention to appoint the person who holds, or is most likely to hold, the confidence of the House of Commons. If this is unclear, for example if an election has produced a hung Parliament, then the Cabinet Manual states that it is for political parties to reach an agreement.[139] If a Prime Minister has resigned mid-term, then the choice is guided by the choice of MPs or party members as to who ought to succeed them as party leader. While an outgoing Prime Minister will have indicated their intention to resign, they do not formally do so until clear advice can be given to the Sovereign as to who should be asked to form a government.[140] In the event of the permanent incapacity of a Prime Minister, then the appointment is a matter for the King "acting under the Royal Prerogative",[141] although, in practice, this would follow informal advice and constitutional convention.

The Prime Minister accepts office by attending the King in private audience. The appointment – together with that as First Lord of the Treasury – takes effect from that moment.[142] At the audience, the new Prime Minister is said to "kiss hands", though they do not literally do so.[143]

## Dismissal

A Prime Minister (and therefore his or her government) can be dismissed by the monarch, although this last occurred in 1834.[144] It has happened more recently in other Commonwealth Realms. For example, Sir John Kerr, the then Governor-General of Australia, dismissed the Labor Prime Minister Gough Whitlam in 1975. The Speaker of the House of Representatives appealed to Queen Elizabeth II to intervene, but the Palace said it was a matter for the Governor-General.[145]

The constitutional lawyer Robert Blackburn has argued that a monarch would be "duty bound" to dismiss a Prime Minister from office if he or she was "acting in manifest breach of convention". The example he gave was if a Prime Minister, after a successful no confidence motion, refused to resign or call a general election.[146] Lord Armstrong, a former Cabinet Secretary, told the House of Lords Constitution Committee, that the "very existence" of this power "should serve to ensure that it never needs to be exercised".[147]

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139 The Cabinet Manual, p15.

140 The First Ministers of Scotland and Wales are nominated following a vote in the Scottish and Welsh Parliaments, which circumscribes any requirement for "advice".

141 As it did when Harold Macmillan resigned in 1963 (UIN 143136, 11 May 2018, Prime Minister).

142 This is certainly the view of the Palace, but there is an argument that a Prime Minister only becomes First Lord when Treasury Commission Letters Patent are issued.

143 How is a Prime Minister appointed?, Commons Library Insight.

144 This was William IV's dismissal of Lord Melbourne and his replacement with Sir Robert Peel.

145 This incident has been extensively debated in Australia ever since. See The Crown's Irresponsible Adviser, the Governor General, and the Australian Constitutional Crisis of 1975: A Smoking Gun?, Oxford University Politics Blog.

146 Robert Blackburn, Monarchy and the Personal Prerogatives, p551.

147 Supplementary memorandum to the House of Lords Constitution Committee HL 107, 8 February 2011.

## 4.3 Power to summon, prorogue and dissolve Parliament

As Erskine May states:

> The prerogatives of the Crown, in connection with the legislature, are of paramount importance. The legal existence of Parliament results from the exercise of royal prerogative.[148]

### Dissolution

The last unilateral dissolution of Parliament by a monarch occurred in 1835. During the Irish Home Rule crisis, The Times asserted that this personal prerogative had become "atrophied by disuse".[149]

Until 1910, advice to dissolve Parliament was submitted by the Prime Minister on the decision of the Cabinet, but since 1918 the decision has usually been taken by the Prime Minister alone, although he or she will naturally consult Cabinet colleagues.[150] Once a Prime Minister has made the decision to call a general election, "no formal document need pass at any point from the Prime Minister to The [King], to the Privy Council Office, or to Parliament", although the premier must seek an audience with the King or, if he is abroad, "a written exchange".[151]

During the 19th century, it was generally assumed the refusal of a request for dissolution would lead to the resignation of ministers.[152] Queen Victoria, Edward VII and George V all "insisted upon their right to refuse a dissolution", while their respective Prime Ministers "approached the monarch on the same understanding".[153] In November 1910, George V apparently refused a dissolution and the Cabinet decided to resign, before the King changed his mind. The same monarch agreed to requests for dissolution in 1918, 1923 and 1924 extremely reluctantly, although "the grant of a dissolution to Mr MacDonald in 1924 settled the issue. George V could have taken no other decision."[154]

When, in 1950, there was speculation Clement Attlee might seek a second election, Sir Alan Lascelles, Private Secretary to George VI, wrote to The Times

148 Erskine May, para 1.5.

149 Ivor Jennings, Cabinet Government, p415.

150 Ivor Jennings, Cabinet Government, p418.

151 Cabinet Office, Precedent Book: Chapter 5 part 2, 1992, Annex B, pp5 and 29. In 1950, Clement Attlee wrote to King George VI at Sandringham, while in 1966 Harold Wilson communicated with Queen Elizabeth II while she was in the West Indies.

152 Ivor Jennings, Cabinet Government, p423. Lord Byng, the Governor-General of Canada, refused a dissolution request in 1925, as did Sir Patrick Duncan, Governor-General of the Union of South Africa, in 1939.

153 Ivor Jennings, The Law and the Constitution, p135.

154 Ivor Jennings, Cabinet Government, p428.

(under the pseudonym "Senex") explaining that "no wise sovereign" could deny a dissolution request unless he or she was satisfied that:

> (1) the existing Parliament was still vital, viable, and capable of doing its job;
>
> (2) a General Election would be detrimental to the national economy;
>
> (3) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons.[155]

By the 1990s, however, Sir Vernon Bogdanor believed the Crown's right to refuse a dissolution only existed if such a request "would be an affront to, rather than an expression of, democratic rights".[156]

When, in 2022 there was speculation that Boris Johnson might request a dissolution rather than resign as Prime Minister, several writers have described a plan by senior officials at the Palace and Downing Street to prevent the Prime Minister providing such advice to Queen Elizabeth II. According to a "senior Whitehall insider" quoted by the Financial Times:

> "If there was an effort to call an election, Tory MPs would have expected [Sir Graham] Brady [chairman of the 1922 Committee] to communicate to the palace that we would be holding a vote of confidence in the very near future and that it might make sense for Her Majesty to be unavailable for a day." Another senior official confirmed it would be politely communicated to Downing Street that Her Majesty "couldn't come to the phone" had Johnson requested a call with the intention of dissolving parliament.[157]

The courtier Lord Esher regarded "delay" as one of a constitutional monarch's prerogatives, describing them as rights of "criticism and delay, of personal influence and of remonstrance".[158]

Parliament is dissolved by a Proclamation under the Great Seal or by automatic operation of law upon the expiry of its statutory maximum duration.[159]

## Prorogation

The normal procedure is for the Sovereign to approve a Prerogative Order in Council directing the Lord Chancellor to prepare a Commission for prorogation that will receive the Royal Sign Manual and the Great Seal. This document empowers several peers who are Privy Counsellors (known as

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155 The Times, 2 May 1950.

156 Vernon Bogdanor, Monarchy and the Constitution, pp159-62.

157 In the Bunker: Boris Johnson's last stand, Financial Times, 18 November 2022.

158 Anne Twomey, The Chameleon Crown – The Queen and Her Australian Governors, Alexandria, NSW: Federation Press, 2006, p253.

159 Dissolution and Calling of Parliament Act 2022, section 4. 12. A dissolution Proclamation needs normally to be sealed by the early afternoon on the day of its issue. It is signed by the King at a meeting of the Privy Council.

"Lords Commissioners") to notify both Houses of Parliament of the monarch's decision to prorogue the legislature.

In modern times, there is no known precedent for the UK monarch refusing to approve a prorogation. However, it is unclear to what extent the monarch is now bound by ministerial advice in this context, and practice varies in other Commonwealth countries.[160]

### Summoning

The dissolution Proclamation also summons a new Parliament and sets a date for it to meet. That issued on 6 November 2019 highlighted various aspects of this prerogative and accompanying "advice":

> Whereas We, by and with the advice of Our Privy Council, being desirous and resolved, as soon as may be, to meet Our People, and to have their Advice in Parliament, do publish this, Our Royal Proclamation, and do hereby make known to all Our loving Subjects Our Royal Will and Pleasure to call a new Parliament to be holden at Westminster on Tuesday the seventeenth day of December next: And We do hereby also, by this Our Royal Proclamation under Our Great Seal of Our Realm, require Writs to be issued by Our Lord High Chancellor for causing the Lords Spiritual and Temporal who are to serve in the said Parliament to give their Attendance in Our said Parliament on the said date.[161]

In a letter to the Political and Constitutional Reform Committee, the then Deputy Private Secretary to the Queen said the monarch would "always act on the advice of the Government of the day" when it came to setting the date of the first meeting of a new Parliament.[162]

The power to recall the House of Commons is not a prerogative power, but rather rests with its Speaker following a request from the government.[163]

## 4.4 Assent to legislation

Formally, a request for Royal assent to bills passed by both Houses of Parliament takes the form of a written submission from the Lord Chancellor:

> The Lord Chancellor with his humble duty to your Majesty submits for Your Majesty's signature, if you shall so please, a Commission for giving the Royal Assent to certain Bills, the Titles of which are herewith enclosed.[164]

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160 Commons Library research papers CBP8589, Prorogation of Parliament and CBP9006, The Prorogation Dispute of 2019: one year on.

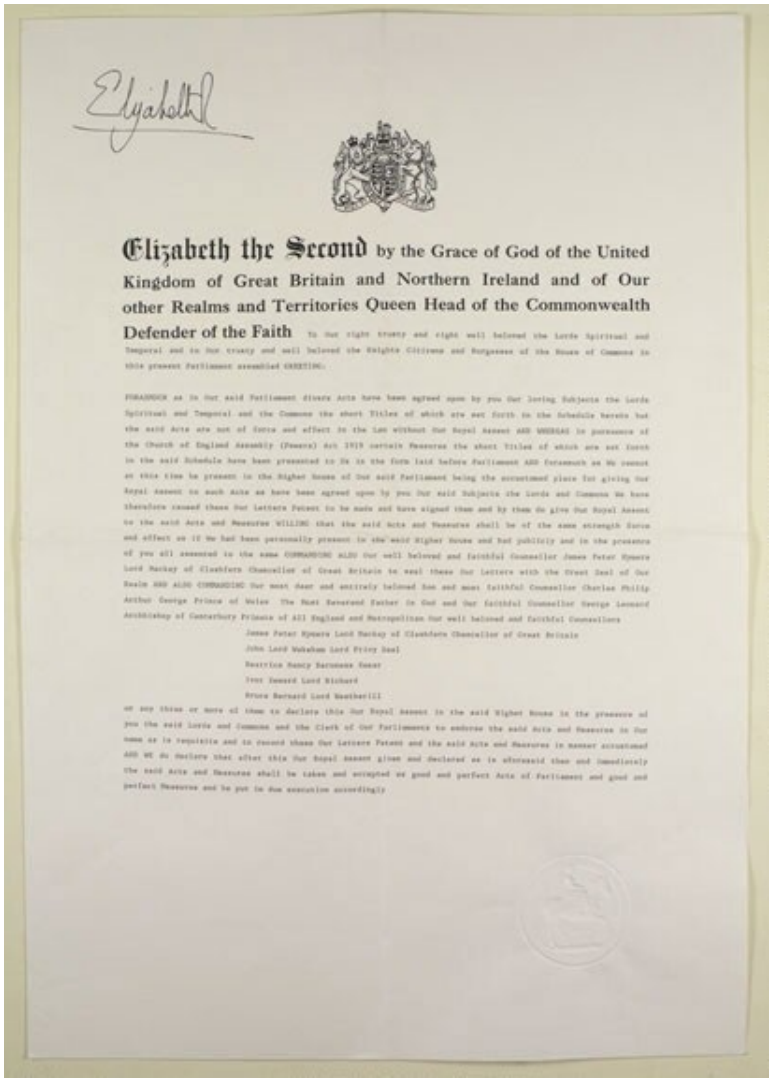
161 The Gazette, 8 November 2019.

162 Political and Constitutional Reform Committee, Government formation post-election, HC 1023, 26 March 2015, Appendix 4.

163 Recall of Parliament, UK Parliament website.

164 HL Deb 16 March 1967 Vol 281 c454 [Royal Assent Bill Hl]

Although the wording of this submission – "if you shall so please" – suggests that the monarch could refuse Assent, strong constitutional convention dictates that the monarch has, since 1708, always agreed. Following receipt, the Palace returns the Lord Chancellor's submission endorsed by the King along with the signed Commission.[165] Commissions are single documents signed by King himself.[166]



Elizabeth the Second by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen Head of the Commonwealth Defender of the Faith

A Commission for Royal Assent and Prorogation signed by Queen Elizabeth II (Parliamentary Archives: GB61_HL_PO_JO_10_11_2808A)

According to Anne Twomey, the history of Royal assent in the UK and in other Commonwealth Realms "suggests that an underlying discretion may continue to exist, albeit one that is heavily circumscribed by constitutional convention". This would:

> prohibit such a discretion being exercised on policy grounds alone. It could only be legitimately exercised to uphold fundamental constitutional principles

[165] Commons Library research paper CBP9466, Royal Assent, p22.

[166] As well as Royal Assent, these are used for the King's "approbation" (approval) of the House of Commons' choice of Speaker and to appoint deputy Speakers in the House of Lords.

> such as representative and responsible government, and then, only in circumstances where the matter could not be dealt with by the courts.[167]

## 4.5 Appointment of Privy Counsellors

Appointments to the Privy Council are made by the King on the advice of the Prime Minister. A submission from the 1940s took the form:

> Mr Attlee, with his humble duty to the King, has the honour to submit for Your Majesty's most gracious approval that the persons named in the attached list be sworn to Your Majesty's most honourable Privy Council.

George VI indicated his agreement by writing "app'd GRI" on the submission. Individuals formally become Privy Counsellors once they have taken the Privy Council oath at a meeting of the Privy Council, though if they cannot be present, they can be appointed by Order in Council and take the oath at a later date.[168]

"Enforced removal" of a Privy Counsellor is also a matter for the Sovereign under the prerogative.[169] In June 2023, the Liberal Democrat MP Vera Hobhouse asked Penny Mordaunt, the Lord President, if "she would recommend that Boris Johnson be stripped of his title as a right hon. Privy Counsellor", as his actions in office were "not right, and they were not honourable". The Lord President replied that:

> such a thing would be advice from the Prime Minister given to the King, and I would prefer His Majesty to be kept out of such matters [...] I do not think it is an appropriate course of action in this instance.[170]

## 4.6 Granting of honours

Most honours are conferred by the monarch under the royal prerogative.

Nominations are examined by ten subject-specialist committees, whose chairs (together with the Cabinet Secretary, the Permanent Under Secretary of the Foreign, Commonwealth and Development Office and the Chief of the Defence Staff) collectively form the Cabinet Office's Main Honours Committee (MHC).

The MHC then sends a list to the Prime Minister's Office, and it is for the Prime Minister to recommend the list to the King. Names may be added or removed by the Prime Minister from the list recommended by the Committee. The

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167 Anne Twomey, The Refusal or Deferral of Royal Assent, Public Law, Autumn 2006, pp580-602.

168 Commons Library research paper CBP7460, The Privy Council: history, functions and membership, pp39-40.

169 HL Deb 26 October 2009 Vol 713 cWA106

170 HC Deb 22 June 2023 Vol 734 c947

Foreign Secretary is also responsible for compiling the diplomatic and overseas list, while the Defence Secretary is responsible for awards in the three services.[171] The Home Secretary advises on the King's Police Medal for Distinguished Service in England and Wales and in Northern Ireland.[172] Subsequently, the monarch often has to sign an instrument to finalise certain appointments.[173]

Although convention dictates that the monarch always accepts advice on honours, according to the historian Kenneth Rose, on a couple of occasions in the early 1980s Queen Elizabeth II asked for "more information" when "controversial names" were put forward for honours, thus indicating her concern and initiating a change.[174]

Honours can also be taken away under the prerogative, something known as "forfeiture". This is the responsibility of the Cabinet Office Forfeiture Committee, which considers whether individual honours recipients should be required to forfeit their awards because of their misconduct. Upon forfeiture, the honour is cancelled and annulled under the prerogative, either by Letters Patent (for knights bachelor) or by direction of the King and erasure from the register of the relevant Order (for other honours). A notice of forfeiture is placed in The Gazette.[175] This cannot occur posthumously.

Existing medals are awarded on ministerial advice,[176] and new ones are created on advice under the prerogative. The Committee on the Grant of Honours, Decorations and Medals (HD Committee) provides advice to the King on "new forms of official national recognition".[177]

The recognition in the UK of foreign honours also falls under the royal prerogative and is "governed by convention".[178] If a Commonwealth Realm advises the King to confer honours on its citizens, then this is acknowledged in the Gazette. For example:

> The KING has been graciously pleased, on the advice of His Majesty's Tuvalu Ministers, to give orders for the following appointment [...][179]

171 Commons Library research paper SN02832, Honours: History and reviews.

172 Police Honour List, 12 November 2014.

173 Warrant of Appointment for an Officer in the Civil Division of The Most Excellent Order of the British Empire, London Medal Company website. The King also uses the prerogative to issue and modify the statutes governing various chivalric orders.

174 Kenneth Rose, Kings, Queens and Courtiers: Intimate Portraits of the Royal House of Windsor from its foundation to the Present Day, London: Weidenfeld & Nicolson, 1985, p92.

175 Forfeiture – UK Honours System, Cabinet Office website.

176 Six new award designs featuring The King's image are revealed, Cabinet Office, 3 October 2023.

177 UIN 23344, 22 June 2022, Police Deaths on Duty: Medals.

178 UIN 22935, 18 January 2016, Commonwealth: Honours.

179 The Gazette, 25 October 2023.

## Peerages

The power to create hereditary peers is a prerogative power.[180] Although this still exists, the last non-royal to receive a hereditary peerage (with a seat in the Lords) was Harold Macmillan, the 1st Earl of Stockton, in February 1984.[181] The most recent royal peerage creation was the Duke of Edinburgh (Prince Edward), although his Letters Patent specified that it was for life.

The King's power to create life peers with a seat in Parliament is statutory.[182] They are appointed on the advice of the Prime Minister, which takes the following form:

> Mr Cameron, with his humble duty to The Queen, has the honour to recommend for Your Majesty's most gracious approval that
> SIR ROBERT WALTER KERSLAKE
> To be created a Baron for Life
> By the style and title of
> BARON KERSLAKE,
> of Endcliffe in the City of Sheffield
> David Cameron
> March 2015

In this case, the Queen indicated her acceptance by writing "Approved" on the submission, after which the following "giving effect" letter was sent to the Crown Office on 4 March 2015:

> Dear Mr Denyer
> Her Majesty THE Queen has been graciously pleased to agree the title and territorial description which Sir Bob Kerslake wishes to appear in the Letters Patent creating him a Baron in the United Kingdom
> SIR ROBERT WALTER KERSLAKE
> To be created a Baron for Life
> By the style and title of BARON KERSLAKE,
> of Endcliffe in the City of Sheffield
> I have been asked by the Prime Minister to request that the necessary steps may be taken to give effect to Her Majesty's commands.
> I am sending a copy of this letter to the Garter Principal King of Arms.
> Yours sincerely
> LAURA WYLD[183]

As in other cases, the initial submission is only part of a larger process. Following approval of a peerage, the monarch must sign a Warrant

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180 This prerogative power has been used – or rather proposed – to guarantee the passage of controversial measures. Queen Anne agreed to the creation of 12 peers in 1711-12 in order to win Lords approval of the Treaty of Utrecht through the Lords. In 1832 and 1911 – regarding the Reform and Parliament Bills – a threat to create more peers proved adequate (Ivor Jennings, Cabinet Government, pp428-29 & 445).

181 It appears that Queen Elizabeth II offered Macmillan an earldom in 1963 without ministerial advice. See Lee David Evans (@LeeDavidEvansUK), X (Twitter), 18 October 2021 [Accessed 21 October 2023].

182 Life Peerages Act 1958, section 1. The Appellate Jurisdiction Act 1876 had previously allowed the monarch to appoint Lords of Appeal in Ordinary for life.

183 Sir Bob Kerslake Information, WhatDoTheyKnow website.

authorising the sealing of the necessary Letters Patent. A life peer can only take their place in the House of Lords on receiving a Writ of Summons.

Since 2000, appointments have been regulated by the House of Lords Appointments Commission (HoLAC), an advisory, non-departmental public body created under the prerogative. In 2020, a Prime Minister (Boris Johnson) over-ruled advice from HoLAC for the first time.[184]

In 2001, Tony Blair advised the Queen to confer a peerage on Conrad Black, who was a Canadian citizen. When Jean Chrétien, the then Prime Minister of Canada, offered contrary advice due to Canada's long-standing opposition to titular honours, Black sued Chrétien. He lost, but the Ontario Court of Appeal ruled that Chrétien was "exercising the prerogative power of the [Canadian] Crown relating to honours".[185] The litigation raised "the question of what happens when conflict occurs between the Crown's advisors in different realms".[186]

## Royal Arms

The 1707 and 1800 Acts of Union left the Royal (coat of) Arms in the disposition of the monarch. This generally takes the form of a Proclamation such as that issued by Queen Anne following the Union of Scotland and England. The authority for the present Royal Arms is a Proclamation made by Queen Victoria on 26 July 1837. A form with the lion rampant in the first and fourth quarters was approved for use in Scotland by an Order in Council of 24 April 1902. According to the Stair Memorial Encyclopaedia, any alteration "would presumably be on ministerial advice".[187] Artistic changes appear to be a purely personal prerogative.

## Style and Title

It was held in *MacCormick v Lord Advocate* that the choice of regnal names and numbering fell under the royal prerogative. The designation "the Second" adopted by Queen Elizabeth upon her succession to the throne was challenged on the basis that it breached the Anglo-Scottish Acts of Union. The Inner House of the Court of Session ruled that the Treaty of Union had no provision concerning the naming or numbering of monarchs – this was part of the royal prerogative – and that the petitioners therefore had no title to sue the Crown.[188]

Acts of Parliament had long made provision for Statutory Proclamations to give effect to a monarch's choice of Style and Title. Since the Royal Titles Act 1953, this prerogative has been exercisable subject to advice from each

184 Boris Johnson Overrules House Of Lords Watchdog To Hand Peerage To Former Tory Treasurer Who Gave The Party £3.5m, Politics Home website, 22 December 2020.

185 *Black v Chrétien* [2001] 199 DLR (4th) 228 (Court of Appeal of Ontario). In order to accept the title, Lord Black had to give up his Canadian citizenship.

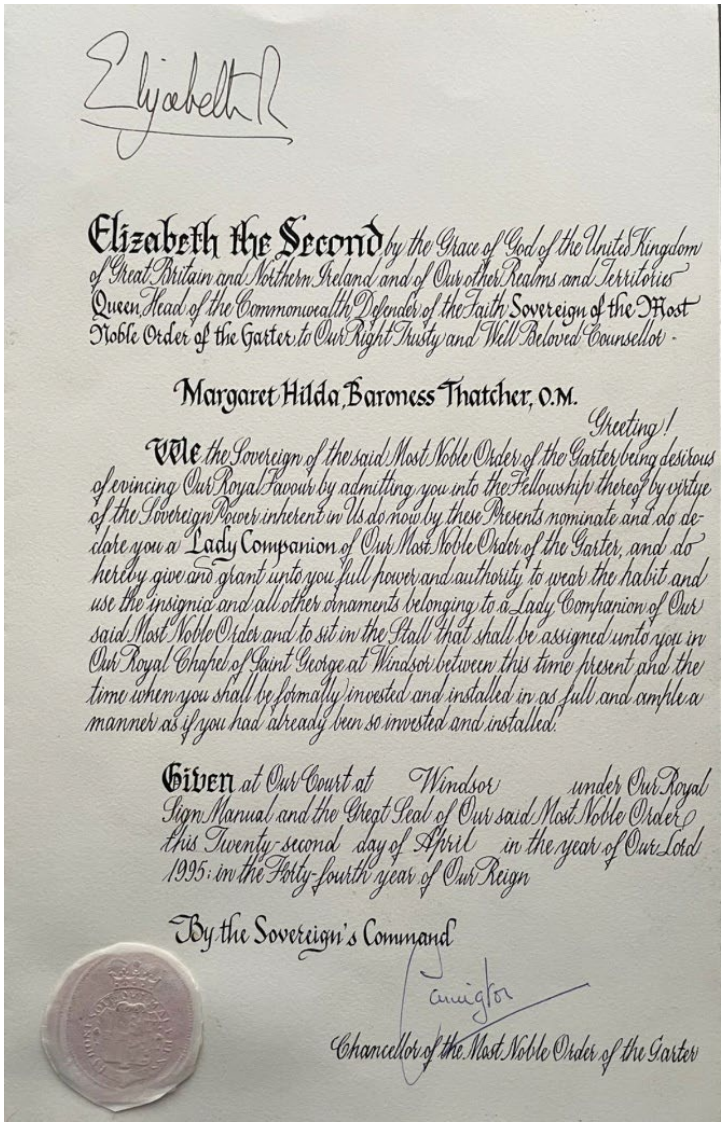
186 Noel Cox, The Royal Prerogative and Constitutional Law, p125.

187 Stair Memorial Encyclopaedia of the Laws of Scotland Volume 7.

188 *MacCormick v Lord Advocate* [1953] SC 396.

Commonwealth Realm, where the Style and Titles vary considerably. Within the UK Realm (which includes the Overseas Territories and Crown Dependencies), the monarch may by Proclamation adopt "such style and titles as His Majesty may think fit".[189] The Australian Royal Style and Titles Act 1973 was "reserved for Her Majesty's pleasure", which meant any changes required her personally to assent to the legislation. Reports suggest Queen Elizabeth II agreed to the removal of "Defender of the Faith" and "United Kingdom" but not "by the Grace of God".[190]

## 4.7 The King's personal honours



Elizabeth R

Elizabeth the Second by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen Head of the Commonwealth Defender of the Faith Sovereign of the Most Noble Order of the Garter to Our Right Trusty and Well Beloved Counsellor

Margaret Hilda Baroness Thatcher, O.M.

Greeting!

We the Sovereign of the said Most Noble Order of the Garter being desirous of evincing Our Royal Favour by admitting you into the Fellowship thereof by virtue of the Sovereign Power inherent in Us do now by these Presents nominate and do declare you a Lady Companion of Our Most Noble Order of the Garter, and do hereby give and grant unto you full power and authority to wear the habit and use the insignia and all other ornaments belonging to a Lady Companion of Our said Most Noble Order and to sit in the Stall that shall be assigned unto you in Our Royal Chapel of Saint George at Windsor between this time present and the time when you shall be formally invested and installed in as full and ample a manner as if you had already been so invested and installed.

Given at Our Court at Windsor under Our Royal Sign Manual and the Great Seal of Our said Most Noble Order this Twenty-second day of April in the year of Our Lord 1995 in the Forty-fourth year of Our Reign

By the Sovereign's Command

Carrington

Chancellor of the Most Noble Order of the Garter

A signed Warrant of Appointment for Baroness Thatcher to become a member of the Order of the Garter (courtesy of the College of Arms).

189 Royal Titles Act 1953, section 1.

190 Royal Style and Titles Act 1973, Schedule.

Certain honours known as the King's personal honours do not require ministerial advice. These are the Orders of the Garter and the Thistle, the Order of Merit and the Royal Victorian Order. The Ministry of Justice has called these the "truly personal, executive prerogative" of the monarch.[191]

The Royal Victorian Order was founded by Queen Victoria in 1896 to honour those who gave service to the monarchy. The Order of Merit was founded in 1902 by Edward VII and is a special mark of honour conferred by the Sovereign on individuals of exceptional distinction in the arts, learning sciences and the military.[192] It was agreed between Edward VII and Lord Salisbury, the then Prime Minister, that appointments to the Order should:

> as in the case of the Royal Victorian Order, be made on the initiative of the Sovereign and not on that of his advisers, but the Sovereign might, of course, receive unofficial assistance from the Prime Minister in choosing members.

According to Sir Ivor Jennings, either the monarch or the Prime Minister may initiate an award of the Order of Merit, and the same practice has applied to the Order of the Garter and the Order of the Thistle since December 1946 and June 1947 respectively, before which the two Orders were subject to advice.[193]

## 4.8 Power to appoint judges and other holders of public office

### Judicial appointments

Most senior judges in England and Wales and Northern Ireland are now appointed by the King under statute.[194] In Scotland, it appears most senior judges are still appointed by the monarch under the prerogative:[195] the Lord President of the Court of Session,[196] the Lord Clerk Register,[197] Lord Justice Clerk,[198] and Senators of the College of Justice.[199] Statute does, however, provide for the process to be followed before a recommendation for appointment is made to the King.[200]

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191 Ministry of Justice, The Governance of Britain – Review Final Report, p6.

192 Orders and Medals – UK Honours System, Cabinet Office website.

193 Ivor Jennings, Cabinet Government, p462.

194 Senior Courts Act 1981, section 10. The provides that the King "may, on the recommendation of the Lord Chancellor, by letters patent appoint a qualified person" to specified senior offices.

195 For a full guide to the process see Recommendations, Judicial Appointments Board for Scotland website. The College of Justice Act 1532 established what became the Court of Session but was not explicit as to who appointed its "cunning and wise men". See also Alan Page, Constitutional Law of Scotland, Edinburgh: W. Green, 2015, paras 6-19-6-28.

196 Lord Carloway appointed as Lord President, Scottish Legal News website, 18 December 2015.

197 New Lord Clerk Register of Scotland, Scottish Courts website, 5 June 2023.

198 Appointment of Lord Justice Clerk, Scottish Courts website, 13 April 2016.

199 Senators appointed to College of Justice, Scottish Government, 17 March 2017. The Judicial Appointments Board for Scotland has a statutory role in selecting Court of Session judges.

200 See Scotland Act 1998, section 95 and Judiciary and Courts (Scotland) Act 2008, Chapter 3.

In England and Wales there are 108 High Court judges, around 600 Circuit judges, and more than 2,500 others, including District Judges and Recorders, together with several thousand tribunal appointments.[201] Since 2006, selection for these appointments has been the responsibility of the statutory Judicial Appointments Commission (JAC).[202] The more senior of these appointments (High Court and above) are made (under statute) by the King on the advice of the Lord Chancellor and/or the Prime Minister.[203] Under the Crime and Courts Act 2013, the power to recommend all lower-level judicial appointments was transferred from the Lord Chancellor to senior judges.[204]

Although the JAC makes recommendations to the Lord Chancellor, it identifies a single name for each vacancy. The Lord Chancellor can accept or reject this recommendation or request its reconsideration.[205] The Lord Chancellor remains responsible for submitting advice to the monarch on appointments to all levels of the judiciary.[206] A submission takes the following form:

> The Lord Chancellor, with their humble duty to Your Majesty, submits for Your Majesty's approval, if you shall so please, the attached list of names of persons for appointment as Justices of Your Majesty's High Court.
>
> Also in the event of Your Majesty being graciously pleased to approve the appointment, the Lord Chancellor submits for Your Majesty's signature, if you shall so please, Warrants for their appointment to be Justices of Your Majesty's High Court.[207]

As Jason Loch has observed, the fact the Lord Chancellor submits the Warrants for the necessary Letters Patent at the same time "makes it clear" that the monarch "is expected to appoint these individuals".[208]

## Ecclesiastical appointments

Under the Appointment of Bishops Act 1533, in holding an "election" for a new bishop, the dean and chapter of a cathedral were bound to elect the candidate selected by the monarch.[209] Over time, however, the choice of bishops and archbishops in the Church of England came to be made on the advice of ministers. The 2007 Governance of Britain Green Paper stated that:

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201 The Governance of Britain: Judicial Appointments, CM 7210, October 2007, para 4.21.

202 A Commission for Judicial Appointments had been established under the prerogative in 2001, although this had only a review role.

203 See, for example, Appointment of Lord Chief Justice, Prime Minister's Office, 15 June 2023.

204 Crime and Courts Act 2013, Schedule 13 Part 4.

205 In practice, the Lord Chancellor nearly always accepts these recommendations, with only five occasions (from nearly 3,500 recommendations) between 2006-13 when this was not so.

206 The Governance of Britain: Judicial Appointments, para 4.21.

207 Crown Office Disclosures (@crownofffoids), X (Twitter), 21 January 2021 [Accessed 1 October 2023].

208 The Language Of Ministerial Submissions, A Venerable Puzzle blog, 31 August 2023.

209 It could be argued that the 1533 Act is procedural and that the monarch's power of choosing bishops is not statutory, the Act's provisions assuming, and being ancillary to, the exercise of a prerogative power.

> Diocesan and Suffragan Bishops, as well as 28 Cathedral Deans, a small number of Cathedral Canons, some 200 parish priests and a number of other post-holders in the Church of England are appointed by The Queen on the advice of the Prime Minister.[210]

There are also some 450 parishes and a few canonries to which the Lord Chancellor makes appointments on the Sovereign's behalf. The Chancellor of the Duchy of Lancaster advises the monarch on ecclesiastical appointments that are in their gift in right of the Duchy. Most of these are statutory.

A submission from the 1930s took the form:

> Mr. Chamberlain, with his humble duty to the King, respectfully recommends to Your Majesty the appointment of the Reverend John Willie Davis, Vicar of St. Faith, Lincoln, to the Vicarage of St. Mary Magdalene, Gedney, vacant by the death of the Reverend Theodore Crombie Gobat, M.A.

George VI indicated his approval by signing "App'd GRI" at the top of the submission.[211]

The Roman Catholic Relief Act 1829 placed restrictions on who could offer advice to the Crown regarding Church of England (and Church of Scotland) appointments.[212] Under that Act, it remains a "high misdemeanour" for a Catholic to do so.[213] This applies to the Prime Minister, the Prime Minister's Secretary for Appointments and the Lord Chancellor. Under section 4 of the Jews' Relief Act 1858, Jews are also barred from advising the Crown on ecclesiastical matters. In either case, this aspect of the Prime Minister's duties can be transferred to another Minister of the Crown not similarly barred.[214] If an incoming Lord Chancellor is Catholic, an Order in Council passed under section 2 of the Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974 can transfer his ecclesiastical functions to the Prime Minister.[215] Under section 17 of the 1829 Act, patronage lapses to the Archbishop of Canterbury in the interim.

In 1976, James Callaghan announced the creation of the Crown Appointments Commission (since 2003 the Crown Nominations Commission) which provided

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210 The Governance of Britain – Constitutional Renewal, Cmnd 7170, July 2007, para 58.

211 For the process thereafter, see Commons Library research paper CBP8886, The relationship between church and state in the United Kingdom, p22.

212 In the case of the Church of Scotland, the 1829 Act could relate only to such appointments as the Dean of the Chapel Royal, royal chaplains, the Dean of the Thistle, chaplains to the forces, etc. Lay patronage (including the Crown's patronage) was abolished by the Church Patronage (Scotland) Act 1874.

213 Roman Catholic Relief Act 1829, section 18.

214 When the Chancellor of the Duchy of Lancaster is a Catholic or a Jew, the Clerk of the Council of the Duchy, who is a full-time Duchy official (and not a Minister of the Crown), takes his or her place in advising the Queen on certain benefices in the Church of England of which she is patron (see HC Deb 24 May 1976 Vol 912 c28 [Ecclesiastical Patronage])

215 If the Prime Minister is also a Catholic, an Order under the 1974 Act could transfer the Lord Chancellor's patronage to another minister.

the Church with a greater say in the appointment of diocesan bishops.[216] However, he noted that the:

> Sovereign must be able to look for advice on and that must mean, for a constitutional Sovereign, advice from Ministers [...] In giving that final advice, the Prime Minister would retain a real element of choice.

Thereafter the Commission presented two names, between which the Prime Minister had discretion over which would be submitted to the Queen. This discretion was exercised by Margaret Thatcher and Tony Blair. According to Kenneth Rose, when asked what she "could do if a Prime Minister submitted a name for an ecclesiastical appointment with which she was not happy", Queen Elizabeth II replied: "Nothing constitutionally, but I can always say that I should like more information. That is an indication that the Prime Minister will not miss."[217]

In 2007, Gordon Brown indicated he would not exercise this discretion, although the Prime Minister retains the right to reject the Commission's now single nominee or even recommend a candidate of their own choosing. According to the Cabinet Office, under these reforms, "the Prime Minister does not choose or advise on ecclesiastical appointments. His or her role is limited to conveying the name of the nominated candidate to The Queen." Jason Loch has disagreed with this interpretation, arguing that:

> In the absence of a statutory definition, it seems safe to conclude that 'advice' in this context encompasses a Minister of the Crown's formal recommendation that the Monarch should appoint someone to an ecclesiastical office. Despite the 2007 changes, the Prime Minister almost certainly continues to make formal submissions to the Monarch regarding ecclesiastical appointments.[218]

Under the prerogative, the King also dissolves the Convocations of Canterbury and York (thus triggering dissolution of the General Synod).[219] Another Prerogative Order in Council directs the Lord Chancellor to issue Writs calling together new Convocations. Canons are also approved by the monarch on ministerial advice, provided the Canon does not conflict with the prerogative, the common or statute law or any custom of the Realm.[220]

## Other public appointments

Whenever the government wishes to appoint someone to a role for which there is no statutory authority, they do so under the prerogative. According to Robert Hazell and Timothy Foot: "No one knows how many, and there is no official list." In 1999, the then Prime Minister Sir Tony Blair observed that the "majority" of Queen Elizabeth II's functions "in respect of which she receives

216 The change of name highlighted the advisory rather than appointing role of the Commission.

217 Kenneth Rose, Kings, Queens and Courtiers, p92.

218 When Is Advice Not Advice?, A Venerable Puzzle blog, 8 August 2023.

219 For the form of these, see The Crown Office (Forms and Proclamations Rules) Order 1992, Schdule.

220 Commons Library research paper CBP9466, Royal Assent, p43.

advice from a Minister of the Crown [...] relate to the making of appointments and the use of the Royal prerogative".[221]

Examples include chairs of non-statutory public inquiries, appointments to permanent non-statutory bodies such as the chair and board members of the BBC, or the Committee on Standards in Public Life; or ad hoc positions such as the appointment of Kate Bingham as head of the UK Vaccine Taskforce, or Louise Casey as Homelessness Tsar.[222]

Other examples include Regius Professorships at certain UK universities,[223] although since the late 1990s the practice has been "to convey the wishes of the institutions" to the King "without interference",[224] and ad hoc appointments like that of Sir Tom Winsor to review the circumstances surrounding the departure of Metropolitan Police Commissioner Dame Cressida Dick in 2022.[225]

By custom, the King approves the appointment (or re-appointment) of the Lord Mayor of London. The submission takes the following form:

> The Lord Chancellor, with his humble duty to Your Majesty, submits to Your Majesty that William Anthony Bowater Russell, has been re-elected by the City of London Lord Mayor for the ensuing year, and will present himself, according to custom, to hear from the Lord Chancellor whether Your Majesty is pleased to approve the re-appointment, and the Lord Chancellor begs leave to ask Your Majesty's pleasure therein.[226]

In other respects, the King has a statutory duty to make certain appointments upon ministerial advice.

The Commissioner for Public Appointments, established in 1995, ensures that almost all public appointments (whether prerogative or statutory) to arm's length public bodies are made following fair and open competition.[227]

## 4.9 A power to legislate under the prerogative

Prerogative Orders in Council are made under the inherent power of the Crown to act on matters for which Parliament has not legislated. They become primary legislation without being laid before Parliament.

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221 HC Deb 30 June 1999 Vol 334 cc215-6W [Devolution (Scotland)]

222 Robert Hazell and Timothy Foot, Executive Power: The Prerogative, Past, Present and Future, p138.

223 The Queen to award prestigious Regius Professorships to 12 universities, Cabinet Office, 26 October 2016.

224 Political and Constitutional Reform Committee, Written evidence submitted by Lord Hennessy, The role and powers of the Prime Minister, HC842, 7 March 2011.

225 Winsor Commission – Report, 24 August 2022.

226 The Language Of Ministerial Submissions, A Venerable Puzzle blog, 31 August 2023.

227 Public Appointments Order in Council, 6 November 2019. There are equivalent bodies in Scotland and Northern Ireland.

The drafting of Orders approved by the King in Council is undertaken by the relevant government department. They are then sent to the Privy Council Office (PCO) for checking and formatting. The PCO also checks any claimed statutory power for an Order or whether it falls within one of the traditional areas of the prerogative.[228]

Like Orders in Council, Royal Proclamations have the force of law, although they cannot take effect until the Great Seal has been affixed. The authority for sealing a Proclamation is a Prerogative Order in Council, which is approved at the same Privy Council meeting as the Proclamation itself. Examples of Proclamations include those dissolving Parliament.

## 4.10 Grant of civic honours

City status and Lord Mayor (or Provost) status, and the grant of the style "Right Honourable" to Lord Mayors (or Provosts) are civic honours granted by the King acting on the advice of his ministers under the royal prerogative.[229] A number of new cities were created to celebrate the Platinum Jubilee of Queen Elizabeth II in 2022. City status is granted via Letters Patent.

## 4.11 Grant of approval for certain uses of Royal names and titles

In July 2023, the Cabinet Office published guidance regarding permission for the naming of buildings, parks, pubs or businesses after the late Queen Elizabeth II. This stated that:

> Permission to use the title 'royal', or the names and titles of members of the royal family, including the name of the late queen, and other protected royal titles is a mark of favour granted by the sovereign, acting on the advice of his ministers.
>
> The protected Royal titles are sparingly granted and strict standards are applied. As a matter dealt with under the Royal Prerogative, information about any criteria which may exist and the reasons for the grant or refusal of an application are not disclosed.[230]

228 Patrick O'Connor, The Constitutional Role of the Privy Council and the Prerogative, JUSTICE, January 2009, p7.

229 UIN HCWS75, Platinum Jubilee Civic Honours Competition, 8 June 2021.

230 Royal Names Memorialisation Public Guidance, Cabinet Office website, 4 July 2023.

## 4.12 Other Royal matters

Although not included in the 2009 Ministry of Justice list, the prerogative (and ministerial advice) also concerns broader matters relating to the Royal Family and the Royal Household.

### Abdication

In 1936 there was prolonged discussion as to whether abdication could be subject to ministerial advice. Stanley Baldwin, the then Prime Minister, told the House of Commons that:

> no advice has been tendered by the Government to His Majesty [King Edward VIII] These matters were not raised first by the Government but by His Majesty himself in conversation with me some weeks ago when he first informed me of his intention to marry Mrs Simpson whenever she should be free. The subject has, therefore, been for some time in the King's mind and as soon as His Majesty has arrived at a conclusion as to the course he desires to take he will no doubt communicate it to his Government in this country and the Dominions.

Baldwin added that it would then be for those governments "to decide what advice they would feel it their duty to tender to him in the light of his conclusion".[231]

The submission of formal constitutional advice by the Prime Minister, and its acceptance by the King, came in an exchange of letters dated Wednesday 9 December. The first, from Baldwin to the monarch, took the form of a Cabinet minute offering a "prayer" that the King's intention was not irrevocable, thus avoiding a direct instruction to abdicate if he still intended to marry Mrs Simpson. In response, the monarch wrote:

> The King has received the Prime Minister's letter of the 9th December, 1936, informing him of the views of the Cabinet. His Majesty has given the matter his further consideration but regrets that he is unable to alter his decision.[232]

In considering a future abdication, Anne Twomey believes that:

> If the Sovereign of the United Kingdom were to abdicate in favour of the heir apparent and this were done by instrument without ministerial advice, then there would be a demise of the Crown and the laws of succession as part of the law of each of the Realms would apply so that the heir apparent became Sovereign in each Realm without the need for separate action in each Realm. If, however, the abdication occurred upon the advice of British Ministers, it is likely that advice would also be needed from the Prime Ministers of the Realms to give effect to the abdication of each Crown, as British Ministers could not be

231 The December Crisis, The Table 5, 1936.

232 Duke of Windsor, A King's Story: The Memoirs of H.R.H. The Duke of Windsor KG, London: Cassell, 1951, p403.

responsible for advice to the Sovereign of Canada, the Sovereign of New Zealand, or the Sovereign of Australia to abdicate from that office.[233]

## Marriage

There was also considerable discussion in 1936 as to whether it was appropriate for ministers to tender advice regarding the marriage.

Although the lawyer Sir Maurice Gwyer believed that it was, "since it could affect the prestige of the Crown", on the other hand he added that "the choice of a spouse seemed to fall on the personal side".[234] In the event, the government did offer advice against the King's idea of a morganatic marriage.[235]

Under the Royal Marriages Act 1772 (now repealed), no descendant of King George II was "capable of contracting matrimony without the previous consent of his Majesty".[236] In 1955, the Cabinet was prepared to advise the Queen to grant permission to her sister Princess Margaret to marry Peter Townsend subject to certain conditions (including a renunciation of her place in the line of succession). Five years later, the Cabinet absolved the monarch from the duty to seek advice before giving permission for Margaret to marry Anthony Armstrong-Jones.[237]

But when the Earl of Harewood, the Queen's cousin, sought to divorce and remarry in 1967, the Queen did not wish to take sole responsibility for the decision to grant permission and thus asked Harold Wilson, the Prime Minister, formally to advise her. According to formula devised by Wilson and Lord Goodman, a lawyer, "the Cabinet has advised the Queen to give her consent and Her Majesty has signified her intention to do so".[238] It then fell to Richard Crossman, the Lord President, "formally to give her the Cabinet's advice which of course she was duty-bound to take".[239]

## Titles

Following the abdication of Edward VIII in 1936, it was "deemed opportune politically to advise the Crown to issue letters patent conferring on the Duke of Windsor the style and title of H.R.H. and, within the intention of the Act of Abdication, restricting the style and title to him exclusively".[240]

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233 Anne Twomey, Royal Succession, Abdication, and Regency in the Realms, The Crown in the 21st Century 22:1, 2017, pp47-49.

234 Sir Harold S. Kent, In on the Act: Memoirs of a Lawmaker, London: Macmillan, 1979, p69.

235 Such a marriage would have prevented the King's privileges being passed to Mrs Simpson, or any children born of their marriage.

236 Royal Marriages Act 1772, section 1.

237 Ben Pimlott, The Queen: A Biography of Elizabeth II, London: HarperCollins, 1996, p373.

238 Ben Pimlott, The Queen, p374.

239 Richard Crossman, The Diaries of a Cabinet Minister Volume Two, p448.

240 The drafting of the letters patent of 1937, heraldica website.

During discussions about the possibility of giving the Duke of Edinburgh a princely title in 1955, Viscount Kilmuir, the then Lord Chancellor, considered whether the Queen should act on formal advice. He concluded it would be "expedient" that "in this matter [...] She should have the advantage of receiving formal advice, although it is a matter that touches Her so personally that no objection, in my opinion, could be taken if She declined to act upon the advice".[241]

In 1908, Edward VII made the Russian Tsar an honorary Admiral of the Fleet without ministerial advice. The King later apologised to Asquith, his Prime Minister.[242] In 1928, after taking advice, George V asked the Prince of Wales to assume the title of "Master of the Merchant Navy and Fishing Fleets."[243]

## Royal Household

Although senior appointments to the Royal Household have been a personal matter for the monarch since 1924 (when several ceased to be political), the Prime Minister continues to tender formal advice on:

> the three Great Offices of State, (the Lord Chamberlain, the Lord Steward and the Master of the Horse) and on non-political Lords in Waiting. Appointments to other senior positions in the Queen's Household are subject to informal discussion with Government Ministers, as in the past have been some senior appointments in the Household of the Prince of Wales.[244]

## Speeches

With the exception of the monarch's Commonwealth Day message and Christmas broadcast, all other speeches the King makes in the UK are made on the advice of UK ministers. As Lord Blake observed of Queen Elizabeth II in 1984:

> All speeches which she makes in a Commonwealth monarchy, for example Canada or Australia, are made on the advice and responsibility of the prime minister of the country concerned [...] All speeches which she makes when visiting a Commonwealth republic. e.g. recently Kenya, Bangladesh and India, are made on the advice and responsibility of UK ministers. This convention is fully understood by the presidents and governments of those republics.[245]

This was true even when, to quote Enoch Powell, "the political content may appear to be minimal or non-existent".[246]

Even with the "shield" of ministerial advice, such speeches have occasionally caused controversy. When the Queen's reply to an Address from Parliament on her Silver Jubilee in 1977 appeared to include remarks sceptical of

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241 Duke of Edinburgh: Title of Prince, heraldica website.

242 Ivor Jennings, Cabinet Government, p461.

243 The Times, 14 February 1928.

244 HL Deb 19 December 1995 Vol 567 cWA134 [Royal Household: Appointments]

245 The Times, 20 February 1984.

246 Guardian, 21 January 1984.

proposals for devolution to or the independence of Scotland, the SNP MP Donald Stewart asked the Prime Minister if he accepted "responsibility" for the speech. James Callaghan replied:

> Unlike the speech from the Throne, the Queen's reply to the Loyal Addresses was not a statement of Government policy. It was a personal response by the Queen, but it should certainly be regarded as having been made on the advice of Ministers, as are all Her Majesty's speeches. I saw it myself before it was delivered and I saw no reason to propose any alteration.[247]

## Travel

State Visits by the King and other senior members of the Royal Family are subject to advice from ministers. George VI was prevented by his ministers from visiting India during his reign, while in 1952 the Cabinet considered advising Queen Elizabeth II not to fly to London from Kenya, where she had succeeded to the throne. In October 1970, Edward Heath, the then Prime Minister, advised the Queen not to attend the Commonwealth Heads of Government Meeting in Singapore early the following year. In 1973, the Prime Minister of Canada, Pierre Trudeau, formally advised the Queen of Canada to attend the Commonwealth summit in Ottawa.

In some cases, ministers have decided not to tender advice. When the February 1974 general election produced a hung Parliament in the UK, the Queen flew back to London from Canberra. As uncertainty as to which party or parties would form the next government continued, the Queen's Private Secretary raised the fact that the Queen would have to decide whether to go back to Australia as planned on 6 March or to delay her departure. The civil servant Robert Armstrong concluded that this decision "was one for The Queen to make without ministerial advice either from British ministers or from Australian ministers, since only She was in a position to balance the conflicting considerations".[248]

Reports suggested that both Liz Truss and Rishi Sunak advised King Charles III against attending the COP27 climate change summit at Sharm el Sheikh in late 2022.[249] According to The Times, Mr Sunak later changed his mind, although it was too late to make arrangements for the King's attendance.[250]

## Coronation

While many aspects of a coronation ceremony are personal matters for the monarch, others are subject to ministerial advice. For example, in 1996 Queen Elizabeth II agreed "on the advice of Her Majesty's Ministers" that the Stone of

247 HC Deb 5 May 1977 Vol 931 c642 [Prime Minister (Engagements)]

248 Philip Murphy, The Empire's New Clothes, pp90-91.

249 Liz Truss advised King Charles to stay away from Cop27 climate summit, Sunday Times (£), 1 October 2022.

250 Rishi Sunak ditched plan to stop King Charles attending Cop27, The Times (£), 3 November 2022.

Scone (or Destiny) – which for centuries had been used during coronation ceremonies – should be returned to Scotland.[251]

For the coronation of King Charles III in May 2023, the government advised that no Court of Claims be constituted under the prerogative,[252] while those selected to present the regalia during the service itself were also "chosen on the advice of Government".[253]

[251] HC Deb 3 July 1996 Vol 280 c973 [Stone of Destiny]

[252] Coronation Claims Office to look at historic and ceremonial roles for King Charles III's Coronation, Cabinet Office, 5 January 2023.

[253] Roles to be performed at the Coronation Service at Westminster Abbey, Royal Family website, 27 April 2023.

# 5 Ministerial executive prerogatives

Another category of prerogative powers often do not involve any "personal" input from the monarch, such as decisions on armed conflict and some aspects of international treaties. In a 2004 report, the House of Commons Public Administration Committee described these as "ministerial executive powers".[254] In 2009, the Ministry of Justice sub-divided these powers into several categories.[255]

## 5.1 Government and the Civil Service

- Powers concerning the machinery of government
- Powers concerning the Civil Service
- Powers concerning the existence, membership and powers of the Security Vetting Appeals Panel, the Commissioner for Public Appointments, the Advisory Committee on Business Appointments, the Civil Service Appeal Board and the House of Lords Appointments Commission[256]

### Machinery of government

The Ministers of the Crown Act 1975 requires the transfer of statutory functions and the abolition of departments to be given effect by Order in Council.[257] Otherwise, the prerogative suffices for distribution of unspecified administrative functions, including allocation to a specific Secretary of State of those assigned statutorily to simply "the Secretary of State".[258]

In the past (see below), this has involved a formal submission to the monarch. Today, it is the custom that the Prime Ministers makes a statement to the House of Commons regarding any such change.[259]

254 House of Commons Public Administration Committee (PAC), Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, Fourth Report of Session 2003–04, HC 422, 16 March 2004, p3.

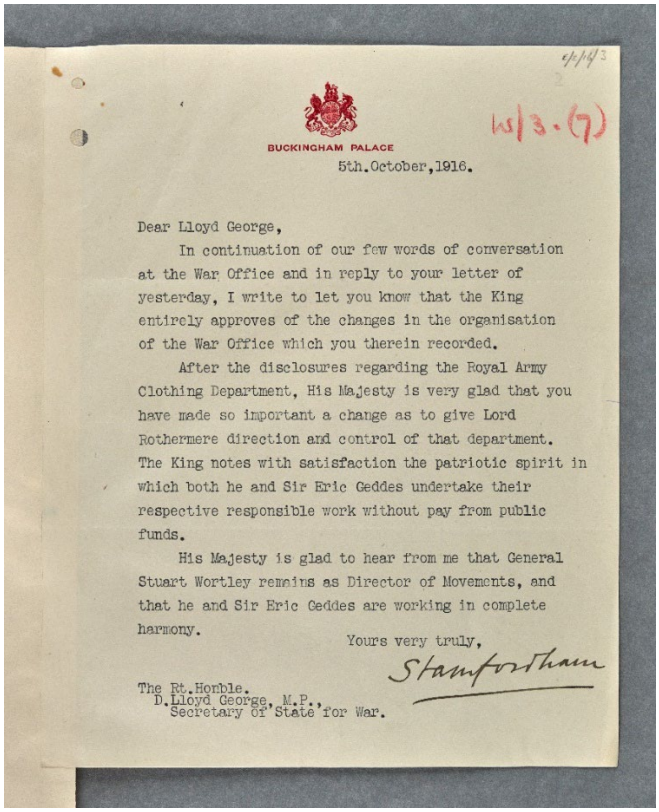
255 In 2022 the government still divided the prerogative into two "broad categories": constitutional or personal prerogatives and prerogative executive powers (UIN HL5459, 17 January 2022, Royal Prerogative: Statute Law).

256 The Governance of Britain – Review Final Report, p31.

257 Ministers of Crown Act 1975, section 1.

258 Ministerial Code, Cabinet Office, December 2022, p11.

259 UIN HCWS636, Machinery of Government, 24 February 2022.



BUCKINGHAM PALACE

5th.October,1916.

Dear Lloyd George,

In continuation of our few words of conversation at the War Office and in reply to your letter of yesterday, I write to let you know that the King entirely approves of the changes in the organisation of the War Office which you therein recorded.

After the disclosures regarding the Royal Army Clothing Department, His Majesty is very glad that you have made so important a change as to give Lord Rothermere direction and control of that department. The King notes with satisfaction the patriotic spirit in which both he and Sir Eric Geddes undertake their respective responsible work without pay from public funds.

His Majesty is glad to hear from me that General Stuart Wortley remains as Director of Movements, and that he and Sir Eric Geddes are working in complete harmony.

Yours very truly,

Stamfordham

The Rt.Hon.ble.
D.Lloyd George, M.P.,
Secretary of State for War.

King George V's Private Secretary's response to a submission regarding reorganisation of the War Office in 1916 (Parliamentary Archives, LG/E/2/16/3).

## Civil Service

The Civil Service was traditionally regulated by Orders in Council made under the prerogative. The Constitutional Reform and Governance Act 2010 (CRAG), however, placed the Civil Service Commission on a statutory basis. Section 3(1) provided the Minister for the Civil Service (by convention the Prime Minister) with a statutory power similar to the old prerogative power "to manage the civil service".

CRAG did not extend to MI5, MI6, GCHQ or the Northern Ireland Civil Service. Therefore, the prerogative still exists in some respects, most notably in relation to security vetting.[260]

## Powers concerning certain bodies

The Security Vetting Appeals Panel was established in July 1997 to provide a final means of challenging a decision to refuse or withdraw national security vetting.[261] The Commissioner for Public Appointments has a number of functions including ensuring that ministerial appointments are made in accordance with the Governance Code and the principles of public

[260] Constitutional Reform and Governance Act 2010, section 3(4).

[261] About us – Security Vetting Appeals Panel

appointments.[262] The Advisory Committee on Business Appointments considers applications under the government's business appointment rules for former ministers and senior Crown servants,[263] while the Civil Service Appeal Board decides whether the decision being appealed against was fair, examples of which include compensation, pensions and political activity.[264] The House of Lords Appointments Commission is covered in **Section 4.6**.

The role of the non-statutory Forensic Science Regulator was established in 2007 under the prerogative to set standards for forensic science and ensure compliance with those standards.[265]

## 5.2 Justice system and law and order

Under the prerogative, the Crown can create new courts in England and Wales, but only to administer the common law.[266] This power has not been used in some time. There also exist:

- Powers to appoint King's Counsel
- Power to make extradition requests
- The prerogative of mercy
- Power to keep the peace[267]

### Powers to appoint King's Counsel

King's Counsel (KC) are barristers, advocates or solicitor advocates who have been recognised for excellence in advocacy. They are appointed by the King under the prerogative.

In England and Wales, the King's Counsel Selection Panel is responsible for recommendations to the Lord Chancellor, who sends a final list to the King for formal approval. The issue of Letters Patent completes the appointment process.[268] In Scotland, the First Minister seeks nominations from the Lord Justice General.[269] In Northern Ireland, applicants are recommended to the Minister of Justice, or the person(s) exercising their functions.[270] KC Honoris

262 Commissioner for Public Appointments
263 About us – Advisory Committee on Business Appointments
264 How to appeal to the Civil Service Appeal Board, Cabinet Office, 15 June 2023.
265 HC Deb 12 July 2007 Vol 462 c67WS [Forensic Science Regulator]
266 F. W. Maitland, Constitutional History of England, p420.
267 The Governance of Britain – Review Final Report, p31.
268 Summary of Revised Process for QC Award for England and Wales, June 2023.
269 Appointment of King's Counsel in Scotland 2023, Scottish Government, 13 September 2023.
270 Appointment of Queen's Counsel in Northern Ireland 2019 Silk Call: Guide for Applicants (password protected), Law Society of Northern Ireland, pp8-9.

Causa, or an Honorary KC, can also be appointed by the King on the advice of the Lord Chancellor.[271]

## Power to order extradition requests

Extradition is the formal process where one country asks another to return a person in order to stand trial or to serve a sentence. Under multilateral conventions and bilateral extradition treaties the UK has extradition relations with more than 100 territories around the world. Most outgoing extradition requests are processed under Part 3 of the Extradition Act 2003, but outgoing extradition requests to territories outside of the scope of the 2003 Act are made under the royal prerogative.[272]

## The prerogative of mercy

The prerogative of mercy is the power of the monarch to show mercy towards an offender, by mitigating or removing the consequences that follow conviction for an offence. Its use is reflected in the promise to administer justice "in mercy" in the Coronation Oath.

The power is exercised by the King on ministerial advice. The Secretary of State for Justice is responsible for recommending the exercise of the prerogative of mercy in England, Wales and the Channel Islands,[273] except in relation to members of the Armed Forces convicted and sentenced under the Services justice system, where the responsibility is carried by the Secretary of State for Defence. In the Isle of Man, by constitutional convention, this responsibility rests with the Lieutenant Governor. In Scotland, it is held by the First Minister, and in Northern Ireland by the Minister of Justice.[274] It is given effect via a Warrant under the Royal Sign Manual.[275] By convention, the Clerk of the Crown in Chancery has in the past placed a notice of free pardons granted in England and Wales in the London Gazette.[276] When the prerogative is used to shorten, rather than to waive or remove sentences, by convention no public notice is given.[277]

Not since the 19th century has the monarch attempted to exercise this prerogative personally. King George IV wished to influence the Lord Lieutenant of Ireland in exercising the prerogative of mercy in relation to a death sentence for an inhabitant of Clare who had burned his own house down. When Sir Robert Peel, the then Home Secretary, threatened

271 Honorary King's Counsel nominations, Ministry of Justice, 14 June 2023.

272 Extradition: processes and review, Home Office, 26 March 2013.

273 Previously, the Home Secretary tendered advice regarding the prerogative of mercy.

274 UIN HL2637, 4 November 2014, Prerogative of Mercy. A request to exercise this prerogative has also taken the form of an Address from the House of Lords (HL Deb 20 July 1998 Vol 592 cc653-72 [Guardsmen Fisher and Wright]).

275 PQ 199271, Letters Patent, 5 June 2014. Until the 1990s this prerogative was given effect via Letters Patent.

276 UIN 221302, 20 January 2015, Prerogative of Mercy.

277 UIN HL3802, 8 November 2021, Prerogative of Mercy: Northern Ireland.

resignation, the King gave way.[278] Cases of persons sentenced to death at the Old Bailey were once considered by the monarch at a meeting of the Privy Council. George IV often advocated mercy until over-ruled by his advisers. The practice was discontinued to prevent discussing cases of "an unnamable character" in the presence of Queen Victoria.[279]

The use of this prerogative as it related to miscarriages of justice declined after the Criminal Appeal Act 1907 established the Court of Criminal Appeal in England and Wales. Free pardons continued to be used in relation to magistrates' court convictions until the Criminal Appeal Act 1995 created the Criminal Cases Review Commission.[280] Section 16(1) provides that the Commission must consider any matter referred to it by the Secretary of State in his consideration of whether to recommend the exercise of the prerogative of mercy.[281] The first ever reference was made in February 2020, followed by two further cases in 2020-21.

The prerogative of mercy was used frequently in relation to persons convicted and sentenced for terrorist offences in Northern Ireland. It was used to shorten sentences in relation to individuals who, for technical reasons, were not eligible for the early release scheme established under the Northern Ireland (Sentences) Act 1998.[282] This formed part of the Belfast/Good Friday Agreement.

As the Northern Irish Court of Appeal recognised in the case of *McGeough v Secretary of State for Northern Ireland*, the prerogative of mercy is now generally restricted to three exceptional situations:[283]

- **Special remission**, a means of reducing the effect of a sentence once it has been imposed, by releasing a prisoner from having to serve some or all of the remainder of his or her sentence in custody. This applies in four circumstances:
  - on compassionate grounds;[284]
  - provision of information helping to bring others to justice;[285]

278 William Anson, Law and Custom of the Constitution Volume II Part I, p57.

279 The Times, 6 September 1920.

280 The Governance of Britain – Review Final Report, p15. The courts' powers to quash a conviction is considered to provide a more satisfactory means of rectifying miscarriages of justice.

281 There appears to be no similar provision for the equivalent Scottish Commission.

282 UIN HL3801, 8 November 2021, Prerogative of Mercy: Northern Ireland. The names of those who received the prerogative of mercy in relation to terrorist convictions in Northern Ireland were made public in the judgement issued in the case of *Rodgers, re Judicial Review* [2014] NIQB 79.

283 *McGeough v Secretary of State for Northern Ireland* [2012] NICA 28.

284 In England and Wales statutory powers are now available under section 248 of the Criminal Justice Act 2003 for fixed/determinate sentence prisoners. There are other provisions for other types of prisoner, eg section 30 of the Crime (Sentences) Act 1997 in relation to any prisoner serving an indeterminate sentence.

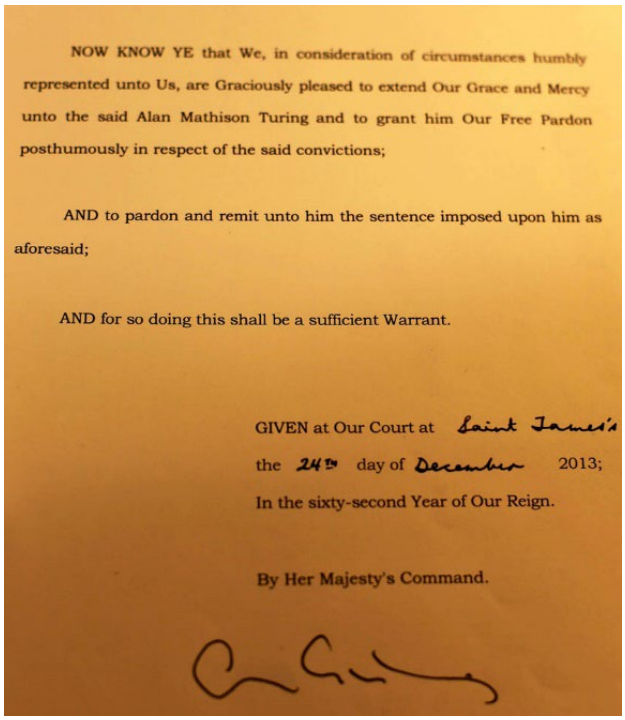
285 This was narrowed in Northern Ireland by section 74 of the Serious Organised Crime and Police Act 2005. Equivalent provisions for England and Wales form part of the Sentencing Act 2020.

  - prevention of escape, injury or death; and
  - where the prison authorities have miscalculated a release date or released a prisoner early by mistake

- A **conditional pardon**, which substitutes one type of sentence for another
- A **free pardon**, which releases a person from the effect of a penalty or a consequence of a sentence

The most recent example of special remission was in 2020, when Steven Gallant had his 17-year minimum term for murder reduced by 10 months. He had used a narwhal horn to waylay a terrorist on London Bridge in November 2019.[286]

Conditional pardons were used during the 20th century almost exclusively to substitute a life sentence in place of the death penalty for murder. The last conditional pardon was granted to Derek Bentley, posthumously, in 1993.[287] Its future use is likely limited since the death penalty no longer exists.



NOW KNOW YE that We, in consideration of circumstances humbly represented unto Us, are Graciously pleased to extend Our Grace and Mercy unto the said Alan Mathison Turing and to grant him Our Free Pardon posthumously in respect of the said convictions;

AND to pardon and remit unto him the sentence imposed upon him as aforesaid;

AND for so doing this shall be a sufficient Warrant.

GIVEN at Our Court at Saint James's
the 24th day of December 2013;
In the sixty-second Year of Our Reign.

By Her Majesty's Command.

The free pardon issued for Alan Turing in 2013

Before the free pardon granted to Michael Shields in September 2009, none had been granted since 1996. The High Court's ruling in the case of *R (Shields) v Secretary of State for Justice* emphasised the breadth and flexibility of the

286 London Bridge attack: Steven Gallant up for early release after confronting knifeman, BBC News online, 18 October 2020.

287 Bentley granted limited pardon, Independent, 31 July 1993.

royal prerogative of mercy, together with the Secretary of State's right to formulate appropriate policies and criteria for its application.[288]

A free pardon is only normally granted when the person is innocent of the offence and where a request has been made by someone with a vested interest such as a family member. Uniquely, in 2013 a posthumous free pardon was issued without either requirement being met, reflecting the exceptional nature of Alan Turing's achievements.[289]

### Power to keep the peace

In *R v Secretary of State for the Home Department*, the Court of Appeal confirmed that the Home Secretary has a prerogative power to act at all times (not only in times of actual emergency) to maintain the King's peace and to keep law and order, unless any such action would be incompatible with statute. This meant the Home Secretary could supply equipment (CS gas and plastic batons) from a central store to chief police officers for use in the event of serious public disorder, without the need for police authorities' approval. Nourse LJ commented that "the scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does."[290]

## 5.3 Powers exercised by the Attorney General

The Attorney General's Office consulted on the role of the Attorney General for England and Wales in 2007. This identified functions which are non-statutory and have been described as prerogative powers:[291]

- Functions in relation to charities
- Functions in relation to criminal proceedings
- Functions in relation to civil proceedings, including relator proceedings[292]

### Functions in relation to charities

The Attorney General has statutory powers to intervene before the First-tier and Upper Tribunal in any charity proceedings and to refer questions involving the operation or application of charity law to the relevant Tribunal.[293] This has its origins in the Crown's ancient jurisdiction as parens

288 *R (Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin).
289 Royal pardon for WW2 code-breaker Dr Alan Turing, Ministry of Justice, 24 December 2013.
290 *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 (CA).
291 The Governance of Britain: A Consultation on the Role of the Attorney General, CM 7192, 2007, pp25-26.
292 The Governance of Britain – Review Final Report, p33.
293 Charities Act 2011, sections 318 & 326.

patriae (parent of the nation) which provided the power for an official to act where it was necessary to do so for the protection of vulnerable citizens and charitable interests.

Most of the functions previously exercised in this context by the Attorney General are now exercised in practice by the statutory Charity Commission for England and Wales. However, the Charities Act 2015 frames the Commission's statutory powers with reference to the existing powers (including prerogative) of the office of the Attorney General. Certain Charity Commission powers can only be exercised with the agreement of the Attorney General.[294]

## Functions in relation to criminal proceedings

The Attorney General exercises a prerogative power to enter what is known as a nolle prosequi on an indictment. This broad discretionary power allows criminal proceedings effectively to be stayed (suspended).[295] Equivalent powers are possessed by the Lord Advocate in Scotland and the Attorney General for Northern Ireland.

In modern times it is used mainly where there are compassionate grounds for discontinuing a criminal trial for an indictable offence (eg if the defendants fall very ill or are otherwise incapacitated).[296] This is not reviewable by the courts, as confirmed by *R v Comptroller-General of Patents*,[297] and it does not count as an acquittal, as the defendant may be brought before the courts on the same charge at a later date.

## Relator proceedings

When a member of the public (this can include local authorities or companies) wishes to enforce a right which belongs to the public as a whole rather than a right which has an exclusively private character (which can be asserted by individuals), they can ask the Attorney General to allow legal proceedings to be brought to assert that public right. These proceedings are known as a "relator action".

Ordinarily an individual must be able to show they are individually affected to obtain standing to bring forward legal proceedings to enforce the right. The Attorney General (for England and Wales or for Northern Ireland) may confer standing upon an individual or body to take proceedings. In such circumstances proceedings are taken in the name of the Attorney General at the instance of the person or body upon whom the Attorney confers relator

294 Commons Library research paper CBP8919, The Law Officers: a Constitutional and Functional Overview.

295 More formally, this is "an undertaking entered on record by leave of the Attorney General to forebear to continue proceedings wholly or partially" (Law Commission, Consents to Prosecution, LC255, 20 October 1998). This prerogative can also be used to halt a private prosecution.

296 Commons Library research paper CBP8919, The Law Officers: a Constitutional and Functional Overview.

297 *R v Comptroller-General of Patents, ex parte Tomlinson* [1899] 1 QB 909 (CA).

status. In practice, the Attorney General takes no direct part in the proceedings.[298]

### Crown privilege

Under a prerogative known as "crown privilege", ministers may issue certificates allowing them to deny access to certain documents to parties in legal proceedings on the grounds that disclosure would be against the public interest or would interfere with the proper functioning of the public service.

This was last used in the Matrix Churchill case (subsequently examined by the Scott Inquiry), when four ministers refused the defence access to inter-departmental minutes they believed would show that a company's activities were known to the security services. The Attorney General announced in December 1996 that the government would no longer claim immunity on a class basis and certificates would only be used when disclosure would cause "real damage or harm".[299]

## 5.4 Powers relating to foreign affairs

Prerogative powers relating to territory and diplomacy have for centuries formed the basis for the conduct of British foreign policy. They operate in conjunction with legislation such as the Consular Relations Act 1968, the Territorial Sea Act 1987 and the International Organisations Act 1968 "to provide the necessary flexibility over a very wide field". These are:[300]

- Powers to send ambassadors abroad and receive and accredit ambassadors from foreign states
- Recognition of states
- Governance of British Overseas Territories
- Power to make and ratify treaties
- Power to conduct diplomacy
- Power to acquire and cede territory
- Power to issue, refuse or withdraw passport facilities
- Responsibility for the Channel Islands and Isle of Man

298 Relator Information Leaflet, Attorney General for Northern Ireland.
299 How ministers exercise arbitrary power, Guardian, 6 December 2000.
300 The Governance of Britain – Review Final Report, p6.

- Granting diplomatic protection to UK citizens abroad[301]

## Ambassadors

Under the prerogative, the King appoints Ambassadors and High Commissioners to represent the UK abroad.

New ambassadors from other countries present the King with Letters of Credence from their head of state which assure the monarch that these diplomats can speak on behalf of their respective countries. High Commissioners of Commonwealth Realms use Letters of Introduction which are exchanged between heads of government and do not involve the Sovereign (or their representative).[302] Such High Commissioners may still meet with the King upon their appointment, but they do not present any documents.[303] High Commissioners from Commonwealth republics present Letters of Commission, which are presented to the King upon the High Commissioner's arrival.[304]

Meetings between the King and international leaders usually occur following ministerial advice.[305] In March 2023, the Palace said the King was "pleased to meet any world leader if they are visiting Britain" and stressed that it was "the government's advice that he should do so". The Prime Minister's official spokesman, however, said it was "fundamentally" a decision for Palace, adding that Mr Sunak "firmly believes it's for the king to make those decisions".[306]

## Recognition of states

The recognition of states is another prerogative power. This is given effect through inter-governmental contact, for example in a letter from the Prime Minister and Foreign Secretary to their counterparts in the state to be granted recognition.[307] The normal criteria are that a state:

> should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations.[308]

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301 The Governance of Britain – Review Final Report, p31.

302 Canada's High Commissioner to Solomon Islands Presents Letter of Introduction to Government, Solomon Times, 9 October 2023.

303 Court Circular, 1 July 2023.

304 Court Circular, 9 February 2023.

305 King Edward VII was the last monarch to exercise any independent discretion over foreign affairs. He often gave audiences to foreign representatives without any minister or official present.

306 King Charles' first political row is about Brexit because of course it is, Politico website, 27 February 2023. The meeting in question was with Ursula von der Leyen, the President of the European Commission.

307 HC Deb 13 June 2006 Vol 447 cc52-3WS [Republic of Montenegro]

308 HC Deb 16 November 1989 Vol 160 c494W [State Recognition]. These criteria are broadly based on the 1933 Montevideo Convention.

Recognition usually follows membership of the United Nations, but not always, as was the case with Kosovo in 2008.[309]

## Governance of British Overseas Territories

There are 14 British Overseas Territories (BOTs) for which the UK is responsible. These enjoy varying degrees of autonomy. The prerogative includes the power to make constitutions for the BOTs, although this has been augmented by statute. The constitutions of Gibraltar and the British Indian Ocean Territory, however, were made solely by Prerogative Order in Council.

Following a House of Lords ruling in 2005, it was held that the Crown acting through a UK Secretary of State in the context of the government of a Territory does not act on the advice of the UK government, but in its role as monarch of each territory (except when it comes to fulfilling the UK's international responsibilities) and under territory law.[310] To comply with the court's decision, the Crown's representative in each BOT, the governor, began to act on the advice of each territory's executive in certain respects.[311]

Anne Twomey, an Australian constitutional lawyer, has criticised the *Quark* judgment on the basis that it ran contrary to the idea of the BOTs forming part of a single UK realm. As she has observed:

> A new Crown is created when the Queen is directly advised by the responsible Ministers of a territory, regardless of whether or not that territory is 'independent' [...] The extension of the divisibility of the Crown to the subordinate governments of British Overseas Territories [...] may well prove a Pandora's box of litigious disputes in areas not yet even imagined.[312]

Governors (or their equivalent) of the Overseas Territories are appointed by the King on the advice of the Foreign Secretary, usually under statute.

## Power to make and ratify treaties

Treaties are another important prerogative power which does not have a statutory basis. Although the King is head of state, he does not "sign" treaties. Instead, it is:

> established practice for [Foreign, Commonwealth and Development Office] ministers and certain UK Representatives to hold General Full Powers signed by the Monarch [...] giving them authority to sign any treaty (in practice subject to being instructed by the FCDO in each case).

Those in possession of General Full Powers (which take the form of Letters Patent) may in turn authorise someone else to represent the UK in performing

309 UK to recognise independent Kosovo – PM, Number 10 website (archived), 18 February 2008.

310 *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 52.

311 Some BOT governors/commissioners continue to possess "reserve powers" in relation to defence and financial services.

312 Anne Twomey, Responsible Government and the Divisibility of the Crown, Public Law, Winter 2008, pp742-67.

certain actions in relation to the conclusion of a treaty, including signing a specified treaty. Specific Full Powers are normally signed by the Foreign, Commonwealth and Development Secretary.[313] According to Sir William Anson:

> When a treaty is concluded it is signed and sealed in duplicate by the ministers representing their respective countries with their own seals. When ratification is decided upon a warrant is again issued under the [Royal] sign manual, countersigned by the Secretary of State, for affixing the Great Seal to an instrument ratifying the treaty. The instrument of ratification, which is in fact the treaty with the Great Seal affixed to it, is then exchanged, by the minister empowered to do so, for a ratification with corresponding forms from the other side.[314]

The treaty prerogative is constrained in two ways. First, it has been the practice of successive governments to make sure that domestic law is in line with its proposed new treaty obligations before ratification. Second, the Constitutional Reform and Governance Act 2010 gave the House of Commons the power to delay (but not veto) ratification, although this does not cover non-binding agreements or amendments made to binding treaties.[315] Political pressure has been applied in other respects. The outcry which followed the conclusion of the Hoare-Laval Pact in 1935 forced Sir Samuel Hoare to resign.[316]

Normal practice is for a treaty to be signed (under the prerogative), for Parliament to pass the relevant legislation, after which the treaty is ratified. An exception to this was Edward Heath's signing of the Treaty of Accession to what was then the European Economic Community (EEC) in January 1972. This followed approval by both Houses.[317] A bill was then laid before Parliament which received Royal assent on 17 October 1972, the day after which ministers ratified the Treaty, again under the prerogative. The UK became a member of the EEC on 1 January 1973.

In *R (Miller) v Secretary of State for Exiting the European Union*, the Supreme Court held in 2017 that the government could not use the prerogative to serve notice of termination of the UK's membership of what had become the European Union (see **Section 9.4**), as it could not be used to remove rights, in domestic law, which had been provided for via the UK's membership.

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313 Foreign, Commonwealth & Development Office, Treaties and MOUs: Guidance on Practice and Procedures, 22 March 2022. The Great Seal is affixed to a General Full Powers instrument on the authority of a Royal Warrant countersigned by the Foreign Secretary. For the precise wording of General and Specific Full Powers documents, see Sir Ivor Roberts, Satow's Diplomatic Practice (7th edition), Oxford: Oxford University Press, 2018, paras 7.58-7.60.

314 William Anson, The Law and Custom of the Constitution Volume II Part I, pp65-66.

315 This placed the Ponsonby Rule, a constitutional convention first set out in 1924, on a statutory basis. See Commons Library research paper CBP9247, How Parliament treats treaties.

316 Sir Samuel Hoare, 2nd Baronet, Britannica website.

317 Into Europe, UK Parliament website.

## Power to acquire and cede territory

The prerogative includes the power for the UK to acquire additional territory (for example, the island of Rockall in September 1955) and to declare or alter the limits of UK territorial waters.[318] This was most commonly used during the existence of the British Empire. For example, the League of Nations-approved mandate for the UK to rule Palestine was given effect under a Prerogative Order in Council.[319] This power also covers the ceding of territory. Although parliamentary approval is not necessary, it was sought in 1890 before the island of Heligoland was ceded to Germany,[320] and again in 1927 regarding Jubaland.[321]

A controversial example was the detachment of the Chagos Archipelago (and some other islands) from the then UK colony of Mauritius in 1965 by a Prerogative Order in Council.[322] The British Indian Ocean Territories Order 1965 created the British Indian Ocean Territory under powers contained in the Colonial Boundaries Act 1895.[323] Mauritian Government ministers agreed to the detachment prior to the country's independence in 1968 and accepted UK Government undertakings to cede the Archipelago to Mauritius when no longer needed for defence purposes. From 1968 to 1973, the local population, known as Chagossians or Ilois, were removed to Mauritius. In 1966, a treaty was concluded between the United States and the UK, again under the prerogative, which enabled the island of Diego Garcia to be leased to the US military. These acts have been subject to decades of litigation under international law.[324]

## Power to issue, refuse or withdraw passports

There is no statutory right to a passport in the UK. Rather, the decision to issue, withdraw, or refuse a UK passport is at the discretion of the Home Secretary under the royal prerogative.[325] The Immigration Act 1971 provided that it should "not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative".[326]

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318 *Post Office v Estuary Radio Ltd* [1968] 2 QB 740. The Queen issued a Royal Warrant on 14 September 1955 which directed the captain of HMS Vidal to take possession of Rockall and declared that it would become part of Scotland. Parliament later passed the Island of Rockall Act 1972.

319 The Palestine Order in Council (Palestine Constitution), 1922, Institute for Palestine Studies website.

320 HL Deb 10 July 1890 Vol 346 cc1258-92

321 HC Deb 24 July 1924 Vol 176 c1547W [Jubaland Convention]

322 See Commons Library research briefing, British Indian Ocean Territory: UK to negotiate sovereignty 2022/23, November 2022, for more on the dispute and the position of the UK and Mauritian governments.

323 *R (On the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61.

324 ICJ to hear Chagos Islands case, UNA-UK website, 1 February 2013.

325 Royal Prerogative, Home Office, 21 May 2021, p4. Withdrawal and cancellation of a passport are the same thing (*R (XH and AI) v Secretary of State for the Home Department* [2017] EWCA Civ 41).

326 Immigration Act 1971, section 33(5).

Ministers in successive governments have pointed out, however, that there are non-statutory rules about denying a passport to a citizen.[327] A passport will be refused or denied for:

- Certain minors, whose journey would be contrary to a court order or the wishes of a parent or to specified statutes.
- Anyone for whom an arrest warrant has been issued or who is wanted for a serious crime.
- Anyone whose activities would make the issue of a passport contrary to the public interest.
- Anyone who has been repatriated at public expense, until the debt is paid.[328]

In this field, the prerogative operates alongside legislative powers introduced by the Terrorism Prevention and Investigation Measures Act 2011. Although non-statutory, policy has often been published, most recently in a written ministerial statement by the then Home Secretary, Theresa May, on 25 April 2013. This redefined the "public interest" justification for refusing or withdrawing a passport.[329] The threshold in this respect has been reduced over time.[330] Home Office guidance states that such decisions will usually involve national security, for example someone seeking to travel abroad to engage in terrorism-related activity and who would return to the UK with enhanced capabilities to do the public harm.[331]

## Responsibility for the Channel Islands and Isle of Man

The Privy Council has a role in extending, upon request or agreement, UK legislation to Jersey, Guernsey and the Isle of Man. When, on rare occasions, it is agreed that UK legislation should apply directly, then a Prerogative Order in Council directs that the relevant Act be registered in the Royal Courts of Jersey and Guernsey.[332]

Primary legislation passed by legislatures in the Bailiwicks of Jersey and Guernsey and reserved Isle of Man legislation also requires Royal Assent. Again, this is given effect via a Prerogative Order in Council, following scrutiny

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327 In Canada, similar rules have been codified in prerogative legislation (the Canadian Passports Order 1981).

328 HL Deb 25 July 2002 vol 638 cc106-7WA [British Passports]

329 HC Deb 25 April 2013 Vol 561 cc69WS-70WS [Passports]

330 Reforming the prerogative, Constitution Unit, December 2022, p44.

331 HM Passport Office, Royal Prerogative: caseworker guidance, 24 November 2022, p7. See also Commons Library research paper SN06820, Deprivation of British citizenship and withdrawal of passports. The Home Office periodically publishes date regarding the number of passports removed or refused under the prerogative (see Passports removed or refused using the Royal Prerogative from 2013 to 2014, Home Office, 5 January 2015).

332 This last occurred with the Court of Appeal (Channel Islands) Order 1949.

by and advice from the relevant Privy Counsellor (usually the Secretary of State for Justice).[333]

Many public appointments in the three Crown Dependencies are also made by the King under statute and the prerogative.[334]

## 5.5 Powers relating to armed forces, war and times of emergency

The royal prerogative is central to the existence and organisation of the UK's Armed Forces, although it sits alongside a range of primary and secondary legislation which regulates matters such as service discipline and certain functions of the Secretary of State for Defence. The relevant powers are:[335]

- Government and command of the Armed Forces is vested in His Majesty
- Right to make war or peace or institute hostilities falling short of war
- Deployment of the Armed Forces in situations of armed conflict
- Maintenance of the Royal Navy
- Use of the Armed Forces in combat operations in the UK
- Control, organisation and disposition of Armed Forces
- Requisition of British ships in times of urgent national necessity
- Commissioning of officers in all three Services
- Armed Forces pay
- Certain Armed Forces pensions now closed to new members
- War pensions for death or disablement due to service before 6 April 2005[336]
- Crown's right to claim Prize (enemy ships or goods captured at sea)
- Regulation of trade with the enemy

333 Commons Library research paper CBP8611, The Crown Dependencies.

334 See, for example, Letters Patent for various roles (FOI), Government of Jersey, 25 March 2020.

335 The Governance of Britain – Review Final Report, p13. See also The Governance of Britain – War powers and treaties: limiting Executive powers, CM 7239, Ministry of Justice, October 2007.

336 Social Security (Miscellaneous Provisions) Act 1977, section 12 provides that this prerogative may be exercised by Order in Council.

- Crown's right of angary, in time of war, to appropriate the property of a neutral which is within the realm, where necessity requires
- Powers in the event of a grave national emergency, including those to enter upon, take and destroy private property[337]

## Command of the Armed Forces

The King, as head of the state, is in supreme command of the Army and Navy for the defence of the realm. This right, contested by the Long Parliament, was declared by the (English) King's Sole Right over the Militia Act 1661 and the (Scottish) Prerogative Act 1661. The latter referred to the King's "Prerogative in the Militia and in making of Peace and War or treaties and leagues with [foreign] Princes or Estates".[338]

The exercise of most prerogative and statutory functions in relation to defence is divided between the Defence Council and the Defence Secretary. The Defence Council,[339] members of which are appointed by the King under the prerogative, is chaired by the Secretary of State and includes among its membership all Defence ministers and Service Chiefs. Under Letters Patent consistent with the terms of the Defence (Transfer of Functions) Act 1964 it is given responsibility for the command of the Armed Forces, appointments and for such aspects of its administration as the Secretary of State may direct.[340]

The Defence Council also has statutory functions, for example in relation to the redress of complaints, the holding of service inquiries and the deployment of the Armed Forces within the UK in an emergency.[341]

## Right to make war

War was last formally declared (via diplomatic notification) by the UK in 1941.[342] In 2003, the then Attorney General, Lord Goldsmith, explained that the "existence or not of a legal state of war is nowadays irrelevant for most purposes of international law".[343]

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337 The Governance of Britain – Review Final Report, p32. The order and wording has been changed slightly for accuracy and comprehension.

338 Prerogative Act 1661. The English Act was later repealed.

339 The Defence Council has "powers of command and administration over Her Majesty's armed forces" under the Defence (Transfer of Functions) Act 1964, section 1.

340 Our governance, Ministry of Defence.

341 The Governance of Britain – Review Final Report, p14.

342 On Finland, Hungary and Romania, see Edinburgh Gazette, 12 December 1941. This was followed by a Prerogative Proclamation specifying items which were consequently to be considered contraband.

343 HL Deb 19 February 2003 Vol 644 c1139 [Declaration of War: Parliamentary Approval]. See also Declaration of war | How does law protect in war?, ICRC website.

## Deployment of the Armed Forces in situations of armed conflict

In the same parliamentary answer, Lord Goldsmith confirmed that:

> The decision to use military force is, and remains, a decision within the Royal prerogative and as such does not, as a matter of law or constitutionality, require the prior approval of Parliament.[344]

In recent years, it has become the convention to seek parliamentary approval when deploying the Armed Forces in military action overseas, as in 2003 (Iraq), 2011 (Libya)and 2013 (Syria). The latter vote against military action was considered binding by the then government.[345] In 2018, however, Theresa May repudiated this convention by unilaterally authorising bombing in Syria on humanitarian grounds.[346]

Under the Reserve Forces Act 1996, the King may make an order authorising the "call out" of reservists in the event of "national danger, great emergency or attack on the UK".[347] The monarch would do so on ministerial advice.[348]

At the outbreak of the Suez conflict in 1956, a Proclamation was authorised by Queen Elizabeth II while she was staying at Arundel Castle.[349] This authorised the emergency mobilisation of reserves.

## Maintenance of the Royal Navy

The Royal Navy traces its origins to the early 16th century and is the oldest of the UK's three Armed Services. As it was originally created under the prerogative, its members are not required to take an oath, unlike their counterparts in the Army and Royal Air Force (which are maintained under statute).[350]

The King approves the names of new ships. The naming of a new ship or a class of ship is the responsibility of the Royal Navy Ships' Names and Badges Committee (SNBC). The SNBC presents its recommendations to the Navy Board. The Navy Board chooses the name(s) and forwards its choice to the Secretary of State for Defence, before being submitted to the King for approval.[351] When Winston Churchill was First Lord of the Admiralty, he was unable to persuade George V to allow the naming of a battleship after Oliver Cromwell.[352]

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344 HL Deb 19 February 2003 Vol 644 c1139 [Declaration of War: Parliamentary Approval]

345 Commons Library research paper CBP7166, Parliamentary approval for military action, p4.

346 Commons Library research paper CBP7166, Parliamentary approval for military action, Section 3.3.

347 Reserve Forces Act 1996, section 52.

348 The Defence Secretary also has the power to make an order authorising the callout of reservists for duty. See Reserve Forces Act 1996, section 56(1B).

349 The Gazette, 3 August 1956.

350 Commons Library research paper CBP8885, The Crown and the constitution, p54.

351 HC Deb 13 January 2020 c4P

352 HMS Cromwell? On the Naming of Warships, Churchill Project website.

## Use of the Armed Forces in combat operations in the UK

The deployment of the British Army in combat operations in the UK is provided for under royal prerogative[353] "in exceptional circumstances".[354]

This would be to provide military support to complement civil authorities' capabilities, such as the police or the Border Force.[355] This has not been necessary in Great Britain for a long time, although it is well known in Northern Ireland, particularly during the period known as The Troubles.[356]

## Requisition of British ships

Two days after Argentina invaded the Falkland Islands, the prerogative right to requisition ships was given effect by the Requisitioning of Ships Order in Council of 4 April 1982.[357] Its scope was extensive:

> A Secretary of State or the Minister of Transport [...] or the Lords Commissioners of the Admiralty may requisition for Her Majesty's service any British ship and anything on board such ship wherever the ship may be.

The Prerogative Order was used to requisition numerous private vessels, including the transatlantic liner Queen Elizabeth 2.[358] The Minister for Trade, Iain Sproat, told the Commons that:

> There is a prerogative power to requisition in times of war or acute national emergency any merchant ship within United Kingdom jurisdiction. The Order in Council made on 4 April applies only to British ships—as defined in the order—though it does so whether or not they are within United Kingdom jurisdiction.[359]

## Commissioning of officers

Members of the Armed Forces are appointed "at will" by the Crown under the royal prerogative.[360] This means they are not employed under a regular employment contract. Officers are granted a Commission, a formal document of appointment stamped with the monarch's signature. Enlisted soldiers of the Army do not receive a Commission.[361]

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353 UIN 9867, 10 September 2015, Army: Rules of Engagement. Statutory authority to use Service personnel in operations under Military Aid to the Civil Authorities (MACA) is governed by section 2 of the Civil Contingencies Act 2004.

354 UIN 228070, 4 March 2019, Armed Forces: Deployment.

355 Joint Doctrine Publication 02: UK Operations: the Defence contribution to resilience, fourth edition, 31 December 2021, section 3; Commons Library research paper CBP9601, Deploying the armed forces in the UK.

356 Commons Library research paper CBP8352, Investigation of Former Armed Forces Personnel Who Served in Northern Ireland.

357 Statutory Instrument No 1982, p1693.

358 Elizabeth Chadwick, Merchant Ship 'Conversion' in Warfare, The Falklands (Malvinas), and the Requisition of the QE2, Nottingham Law School.

359 HC Deb 30 April 1982 Vol 22 c356 [Merchant Ships (Requisitioning)]

360 *K Singh v Advocate General for Scotland as rep MOD* 4102617/2018.

361 British Army ranks, National Army Museum website.

During the 19th century, the accumulation of Commissions awaiting Queen Victoria's signature reached 15,000. The Officers Commissions Act 1862 eased the burden by allowing the monarch to issue Commissions "without affixing Her Royal Sign Manual thereto". Victoria's son, Edward VII, still had "such arrears to make good that he was compelled to use a stamp".[362]

## Armed Forces pensions

A public service pension scheme can be established by or under an enactment, the royal prerogative or a Royal Charter, unlike other occupational pension schemes which are set up under trust.[363]

Periodically, a Royal Warrant is made under section 2 of the Pensions and Yeomanry Pay Act 1884 in respect of soldiers, and under prerogative powers in respect of officers. This is submitted by the Defence Secretary and takes the following form:

> Submitted to Your Majesty with Humble Duty:–
>
> That Your Majesty may be graciously pleased to approve the new Royal Warrant that makes provision for Army Pensions.
>
> An explanatory memorandum is attached.[364]

The Gurkha Pension Scheme was also made by Royal Warrant for those who served [365]between 1949 and 2007.

## Trade with the enemy

According to the Stair Memorial Encyclopaedia, the Crown's prerogative powers are extended during war, so as, for instance, to prohibit trading with the enemy and to permit the quartering of troops.[366] Section 16 of the Trading with the Enemy Act 1939 provided that it "shall be without prejudice to the exercise of any right or prerogative of the Crown".[367]

## Crown's right of angary

Angary is the name given to the right of a belligerent to seize and apply for the purposes of war (or to prevent the enemy from doing so) any kind of property on belligerent territory, including that which may belong to subjects or citizens of a neutral state.

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362 William Anson, Law and Custom of the Constitution Volume II Part I, p71.

363 UIN 131920, 12 March 2018, Pensions.

364 Army Pensions: AFPS 1975 and attributable benefits scheme amendment order 2012, Ministry of Defence, 2012.

365 Royal Warrant, The Gurkha Pension Scheme.

366 Stair Memorial Encyclopaedia of the Laws of Scotland Volume 7.

367 Trading with the Enemy Act 1939, section 16.

During the Second World War, this enabled the War Office to requisition the village of Imber on Salisbury Plain to train US soldiers. 150 residents were given formal notice to quit their properties, and although it was under no legal obligation to do so, the Ministry of Defence offered to meet any expenses.[368] In 1948, the War Office decided that Imber should "remain permanently unoccupied by civilians and be used as a street and village fighting area for army training purposes".[369]

## Emergency powers

The prerogative also covers a range of possible actions during a state of emergency. In 1965, the House of Lords held that the prerogative permitted the Army to destroy private property to prevent it from falling into the hands of an advancing enemy. In the judgment, Lord Reid held that the government had the power to do "all those things in an emergency which are necessary for the conduct of war",[370] although it could not do so without being liable to pay compensation. This right to damages is, however, now excluded where the act took place during or in contemplation of the outbreak of war.[371]

Although emergency scenarios have also been covered by statute, these have reserved the prerogative. For example, section 9 of the Emergency Powers (Defence) Act 1939 (no longer in force) provided that the powers "conferred by or under this Act shall be in addition to, and not in derogation of, the powers exercisable by virtue of the prerogative of the Crown".

Similarly, section 22(3) of the Civil Contingencies Act 2004 provides that emergency regulations "may make provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative", meaning it "subsists in a narrow range of circumstances".[372] The view of the Ministry of Justice in 2009 was that the prerogative:

> might need to be relied on in place of the Civil Contingencies Act in particularly extreme and urgent circumstances and on a strictly time-limited basis; indeed these may be the only ways in which it can lawfully be used.[373]

The use of prerogative powers in an emergency is also limited, to some extent, by a requirement for compatibly with the European Convention on Human Rights, particularly Article 8 (right to respect for private and family life) and Article 1 of Protocol 1 (protection of property), although Article 15

368 Imber Then, ImberVillage website.

369 The Times, 29 March 1948.

370 *Burmah Oil Company (Burma Trading) Ltd v The Lord Advocate* [1965] AC 75. Lord Reid also remarked that the prerogative was "really a relic of a past age, not lost by disuse, but only available for a case not covered by statute".

371 This was because the War Damage Act 1965 reversed the House of Lords' ruling in the *Burmah Oil* case.

372 The Governance of Britain – Review Final Report, p9.

373 The Governance of Britain – Review Final Report, p20.

permits derogations "in time of war or other public emergency threatening the life of the nation".[374]

## 5.6 Miscellaneous prerogatives

- Power to establish corporations by Royal Charter and to amend existing Charters
- The right of the Crown to ownership of treasure trove
- Power to hold public inquiries
- His Majesty's Stationery Office:
  - power to appoint the Controller
  - power to hold and exercise all rights and privileges in connection with prerogative Crown copyright
- Sole right of printing or licensing the printing of the Authorised Version of the Bible, the Book of Common Prayer, state papers and Acts of Parliament
- Power to issue certificates of eligibility in respect of prospective inter-country adopters (in non-Hague Convention cases)
- Powers connected with the design of prepaid postage stamps
- Powers concerning the visitorial function of the Crown[375]

### Royal Charters

Royal Charters, which are granted by the King on the advice of the Privy Council, have a history dating back to the 13th century. Nowadays, new Charters are normally reserved for bodies that work in the public interest (professional institutions and charities) and which "can demonstrate pre-eminence, stability and permanence" in their field.[376] More than 1,000 Charters have been granted. The grant of a Royal Charter can be subject to judicial review.[377]

Non-chartered bodies can "pray" (Petition) for the grant of a **Charter of Incorporation** to the King in Council. These conclude with the words:

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374 European Convention on Human Rights. See also Derogation.

375 The Governance of Britain – Review Final Report, p32.

376 Royal Charters, Privy Council Office website. See also House of Lords Library Note, Royal Charters and Parliamentary Scrutiny.

377 *R (Project Management Institute) v Minister for the Cabinet Office and others* [2016] EWCA Civ 21.

> Your petitioners therefore most humbly pray that Your Majesty may be graciously pleased in the exercise of Your Royal Prerogative to grant a Charter (or Supplemental Charter) to Your Petitioners in the terms of the draft herewith submitted or in such other terms as may to Your Majesty seem proper.[378]

Existing Chartered Bodies can petition the Privy Council for changes to their governing arrangements in the form of a **Supplemental Charter**. Both involve the use of Prerogative Orders in Council.

Perhaps the most high-profile Charter is that held by the British Broadcasting Corporation (BBC). This is granted by Prerogative Order in Council and renewed every decade or so.[379] Unlike most Royal Charters, it is usually debated in both Houses of Parliament, although Parliamentary approval is not necessary. Older (pre-1992) universities also operate under a Royal Charter.[380]

Royal Charter of the Open University with affixed Great Seal of the Realm.

## Treasure trove

Until 1997, all treasure (valuable found objects) belonged to the Crown under the prerogative. The Treasure Act 1996 now applies to all objects found on or after 24 September 1997, but the prerogative remains relevant for a small number of objects found before that date which subsequently come to light.[381]

This Act only applies in England, Wales and Northern Ireland. Under Scots law, all "portable antiquities of archaeological, historical or cultural significance" remain subject to claim by the Crown and must be reported to the Treasure Trove Unit at the National Museums of Scotland.[382] The King's

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378 Applying for a Royal Charter, Privy Council Office website.

379 Copy of Royal Charter for the continuance of the British Broadcasting Corporation, Cmnd 9365, December 2016. The regulation of the BBC and the licence fee are statutory.

380 Higher Education, Privy Council Office website.

381 The Portable Antiquities Scheme is managed by the British Museum and records archaeological finds discovered by the public.

382 Information for Finders, Treasure Trove Scotland website.

and Lord Treasurer's Remembrancer, a branch of the (Scottish) Crown Office, reviews all finds.[383]

## Power to hold public inquiries

While the Inquiries Act 2005 consolidated and codified existing legislation, it did not displace non-statutory ministerial powers to establish inquiries.[384] Examples include ad hoc committees comprising Privy Counsellors.[385] One consultation identified several advantages, that they "may be convened and concluded more quickly and perhaps more cheaply than a statutory Inquiry, because witnesses are less likely to need legal representation".[386]

Members of a Royal Commission can also be appointed by Royal Warrant on the advice of ministers. These have been used in the past to inquire into specific instances that have caused public concern, for example the UK constitution in the late 1960s and early 1970s. Modern Royal Commissions have instead focused on broader and longer-term issues. The last in the UK looked at House of Lords reform in 1999-2000. They are more frequently used in some Commonwealth Realms.[387]

## King's Printer and HMSO

The King's Printer, a post awarded under the prerogative via Letters Patent, has the nearly exclusive right of printing, publishing and importing the Authorised Version of the Bible and Book of Common Prayer within the UK. There are three exceptions:

- In Scotland, rights to the King James Bible are administered for the Crown by the Bible Board, which holds the office of His Majesty's sole and only Master Printers.[388]

- Separate Letters Patent also grant Oxford and Cambridge University Presses the right to print and distribute the Authorised Version of the Bible and the Book of Common Prayer.

Cambridge University Press and Assessment became The Queen's Printer in 1990 when it took over the bible publishing arm of Eyre & Spottiswoode. It is now The King's Printer.[389]

The Controller of His Majesty's Stationary Office (HMSO) is appointed by Letters Patent to the office of King's Printer of Acts of Parliament, who is appointed by the King on recommendation by the head of the Home Civil

383 Metal detecting boom prompts change to rules on buried treasure, The Times (£), 24 April 2023.
384 Inquiries Act 2005, section 44(4).
385 Commons Library research paper SN 06410, Statutory public inquiries: the Inquiries Act 2005.
386 The Governance of Britain – Review Final Report, p25.
387 See Lords Library research briefing LLN-2020-0094, Royal Commissions: Making a Comeback?
388 Stair Memorial Encyclopaedia of the Laws of Scotland Volume 7. Currently this is the publisher HarperCollins.
389 Royal connections, Cambridge University Press website.

Service.[390] The King's Printer of Acts of Parliament is the Keeper of Public Records at the National Archives, currently Jeff James. He is also Government Printer of Northern Ireland and is responsible for The Gazette, state papers and UK Acts of Parliament.[391] HMSO was founded in 1786 and is the holder of all Crown copyright.[392]

The King's Printer for Scotland is a statutory position and reports to Scottish Ministers.[393] Legislation provides for the holder to be the King's Printer of (UK) Acts of Parliament (ie the Keeper of Public Records).

## Postage stamps

There exist prerogative powers connected with the design of prepaid postage stamps. It also appears that the monarch has discretion to ignore, or at least resist, ministerial advice in this area, provided they have the Prime Minister's support.

An example arose in 1965 when Tony Benn, the then Postmaster-General, sought to remove the Queen's head from stamps. He faced significant resistance from the Palace. As Ben Pimlott observed in his biography of Queen Elizabeth II, Benn's ministerial advice to the Queen was only as binding as the Prime Minister's support for it, and the Prime Minister (Harold Wilson) was not prepared to stand firm on the subject of stamps. Benn was apparently told by the Prime Minister's private secretary that in some circumstances the Queen could reject the advice of her ministers and that he must not proceed with his "headless" stamps.[394]

The portrait used on stamps featuring Charles III were "personally approved" by the King.[395]

## Visitorial function

Prerogative Orders in Council also appoint clerics, judges and members of the Royal Family as Visitors at universities throughout the UK. A Visitor is an overseer of a charitable institution, often a hospital or university, who can (theoretically) intervene in the internal affairs of that institution.[396] At several universities, the Lord President of the Council acts as Visitor on the monarch's behalf.[397]

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390 HC Deb 2 November 1998 Vol 594 c15

391 About Us, legislation.gov.uk website.

392 The Copyright, Designs and Patents Act 1988, section 163, provides a statutory basis for Crown copyright within the UK.

393 Scotland Act 1998, section 92. King's Printer for Scotland, Scottish Government website.

394 Ben Pimlott, The Queen, pp362-66.

395 Stamps featuring King Charles go on sale but prices increase, BBC News online, 4 April 2023.

396 Commons Library research paper CBP7460, The Privy Council: history, functions and membership, p29.

397 Under the Higher Education Act 2004, visitors lost their ability to hear complaints from students and staff.

# 6 Archaic prerogative powers

In its 2009 review of the prerogative, the Ministry of Justice defined some powers as "archaic", "residual powers relating to small, specific issues or which are a legacy of a time before legislation was enacted in that area". It was "unclear", added the review, "whether some of these prerogative powers continue to exist".[398] These are:

- Guardianship of infants and those suffering certain mental disorders
- Right to bona vacantia
- Right to sturgeon, (wild and unmarked) swans and whales as casual revenue
- Right to wreck as casual revenue
- Right to construct and supervise harbours
- By prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast, or by arms of the sea or public navigable rivers, and also of the foreshore, or land between high and low water mark
- Right to waifs and strays
- Right to impress men into the Royal Navy
- Right to mint coinage
- Right to mine precious metals (Royal Mines); also to dig for saltpetre
- Grant of franchises, eg for markets, ferries and fisheries; pontage and murage.
- Restraining a person from leaving the realm when the interests of state demand it by means of the writ ne exeat regno
- The power of the Crown in time of war to intern, expel or otherwise control an enemy alien[399]

[398] The Governance of Britain – Review Final Report, p34.
[399] The Governance of Britain – Review Final Report, p34.

## Guardianship/wardship of infants

As parens patriae, the monarch is ex officio guardian of "infants, idiots and lunatics". This jurisdiction was:

> not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.[400]

The parens patriae prerogative is reserved by section 100 of the Children Act 1989.[401] The "inherent jurisdiction" of the High Court also includes wardship powers "to ensure that a child who is the subject of proceedings is protected and properly taken care of".[402]

## Right to bona vacantia

In cases where there is no legal owner, property may become bona vacantia ("ownerless property") and revert to the Crown. Bona vacantia may include the estate of a person who dies intestate, assets that were beneficially owned by a company that has been dissolved and, in certain circumstances, assets that were the subject of a failed trust (for example, on the dissolution of a club). This is now largely statutory in England and Wales and in Northern Ireland.[403]

Depending on where they are located, bona vacantia pass to the Crown, the Duchy of Lancaster or the Duchy of Cornwall. The Bona Vacantia Division of the Government Legal Department is responsible for this function in England, Wales and Northern Ireland.[404] Bona vacantia in the Duchies of Lancaster and Cornwall are dealt with by Farrer & Co Solicitors.[405]

Bona vacantia also exists in Scots law although the first category above is known as ultimus haeres, which refers to an estate where a person has died without a will and with no known or traced relatives.[406] In the other two categories of bona vacantia, the King's and Lord Treasurer's Remembrancer

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400 *R v Gyngall* [1893] 2 QB 23.

401 John Seymour, Parens Patrice and Wardship Powers: Their Nature and Origins, Oxford Journal of Legal Studies 14:2, Summer 1994, pp159-88.

402 Practice Direction 12D – Inherent Jurisdiction (Including Wardship) Proceedings, Ministry of Justice.

403 Administration of Estates Act 1925, section 46, Companies Act 2006, section 1012 and the Administration of Estates Act (Northern Ireland) 1955, section 16.

404 Bona vacantia and the Crown Solicitors Office of Northern Ireland, Treasury Solicitor's Department, 1 November 2013. The Crown Solicitor for Northern Ireland carries out Bona Vacantia work as nominee for the Treasury Solicitor.

405 Commons Library research paper SN06989, Land law: frequently asked questions (England & Wales), pp10-11.

406 No heir, mygov.scot website. This is preserved in the Succession (Scotland) Act 1964, section 7.

pays the value of the assets into the Scottish Consolidated Fund (the main bank account of the Scottish Government).[407]

## Right to sturgeon, swans and whales

The Prerogativa Regis of 1322 (an act of the English Parliament) declares that the:

> King shall have [...] throughout the Realm, Whales and [great Sturgeons] taken in the Sea or elsewhere within the Realm, except in certain Places privileged by the King.[408]

The Wild Creature and Forest Laws Act 1971 abolished "any prerogative right of Her Majesty to wild creatures (except for royal fish and swans)".[409] "Royal fish" historically referred to sturgeon and porpoise.[410]

The Crown can still claim the right to claim ownership of all mute swans in the UK that are unmarked and swimming in open waters. This applies to dead as well as live birds and to any parts thereof.[411]

## Right to wreck as casual revenue

There are three types of wreck which are subject to prerogative claim. Goods that float on the water and come from a shipwrecked vessel are known as "flotsam", while "jetsam" is cargo, ship parts, or equipment that was thrown overboard to lighten a ship in distress and that sinks and remains under the water. "Lagan" is cargo thrown overboard and sunk but marked with a buoy so that it can later be retrieved.

## Right to waifs and strays

Under the prerogative, the Crown has a right to "waifs" – things stolen and thrown away by a thief in flight – and "[e]strays", valuable animals of a tame or reclaimable nature found wandering and whose owner is unknown.

## Right to mint coinage

The Royal Mint owes its origins to the prerogative. The Royal Mint Design Advisory Committee was also established under the prerogative in 1922.[412] The Coinage Act 1971 grants the King the power to regulate coinage by Proclamation while preserving "any matter relating to coinage which was,

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407 Ownerless goods, mygov.scot website.

408 Prerogativa Regis. Of the King's Prerogative (1322), section xiij.

409 Wild Creature and Forest Laws Act 1971, section 1.

410 Jonathan Gutoff, Like a Sturgeon?: Royal Fish, Royal Prerogative and Modern Executive Power, Roger Williams University School of Law Faculty Papers 3, 2007.

411 Licence to sell dead wild birds (GL17), Natural England.

412 The Royal Mint Advisory Committee, Royal Mint Museum website.

before the passing of the Coinage Act 1870, within the prerogative of the Crown and is not provided for by this Act nor was provided for by that Act".[413]

Maitland considered the monarch's right to "debase" the coinage to have fallen into desuetude "because for a very long time past statutes have fixed the amount of gold and silver in the coins".[414]

New coin designs are "personally approved" by the King.[415]

## Royal Mines

"Mines Royal" is the historic name for naturally occurring gold and silver, virtually all of which deposited in England, Wales and Northern Ireland is owned by the Crown Estate.[416]

## Right to impress men into the Royal Navy

The Crown's right to naval impressment – compelling male citizens to join the Royal Navy – existed until the beginning of the 19th century. Although still legal, this practice in the 21st century would likely be considered politically unacceptable.[417]

413 Coinage Act 1971, section 3.
414 F. W. Maitland, The Constitutional History of England, p50.
415 By Royal Approval: the United Kingdom's New Definitive Coins, Royal Mint website, 12 October 2023.
416 Commercial exploration of Mines Royal, Crown Estate website.
417 Press Gangs, Historic UK website.

# 7 Legal prerogatives of the Crown

The legal prerogatives of the Crown are powers the monarch possesses as an embodiment of the Crown. Sometimes described as Crown "privileges or immunities", since the Crown Proceedings Act 1947, many of these privileges (particularly in England) have been lost.[418] Those remaining are:

- The Crown is not bound by statute
- Crown immunities in litigation, including that the Crown is not directly subject to the contempt jurisdiction and the Sovereign has personal immunity from prosecution or being sued for a wrongful act
- Tax not payable on income received by the Sovereign
- Crown is a preferred creditor in a debtor's insolvency
- Time does not run against the Crown (ie no prescriptive rights run)
- Priority of property rights of the Crown in certain circumstances[419]

## Crown is not bound by statute

The principle that the Crown is not bound by statute is actually a common law rule of statutory interpretation rather than, as such, a feature of the prerogative. The basic rule is that an Act of Parliament "does not bind the Crown unless it does so expressly or by necessary implication".[420]

The presumption was originally a rule of the law of England and was not recognised by Scots law prior to the parliamentary union of England and Scotland in 1707. However, the House of Lords made it clear in *Lord Advocate v Dumbarton District Council* that the presumption is now one that applies to all parts of the United Kingdom.[421] Since 2010, the presumption has not applied in relation to Acts of the Scottish Parliament,[422] and since 2020 to Acts of the Senedd.[423] In both cases, all Acts now bind the Crown unless express provision is made to the contrary.

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418 Long before the Crown Proceedings Act 1947, the Crown **could** be sued in Scotland by means of an action directed against the Officers of State or, after 1857, against the Lord Advocate (Halsbury's Laws of England Volume 20, 2023, para 66).

419 The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report, p34.

420 Reaffirmed by the Supreme Court in *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81.

421 Crown Application, Office of the Parliamentary Counsel, 21 September 2021, pp1-2.

422 Interpretation and Legislative Reform (Scotland) Act 2010, section 20.

423 Legislation (Wales) Act 2019, section 28(1).

King's or Prince's Consent is a parliamentary process. This is necessary when legislation fundamentally affects the prerogative, hereditary revenues, personal property or interest of the Crown, the Prince of Wales or the Duchy of Cornwall. This is usually signified at Commons second reading.[424] Similar rules apply to devolved legislation in Scotland and Wales. In response to Guardian reports about the Queen "vetoing" bills, the Palace stated that:

> Queen's consent is a parliamentary process, with the role of sovereign purely formal. Consent is always granted by the monarch where requested by government. Any assertion that the sovereign has blocked legislation is simply incorrect [...] If consent is required, draft legislation is, by convention, put to the sovereign to grant solely on advice of ministers and as a matter of public record.[425]

Erskine May has a comprehensive list of when Queen's Consent was sought in respect of the prerogative,[426] and in respect of her interest.[427] In 2014, Andrew Lansley, the then Leader of the House of Commons, told the House of Commons Political and Constitutional Reform Committee that a ministerial request for consent carried "with it by implication Ministerial advice that consent should be granted". The Committee also observed that it is "not actual written advice; there is simply a presumption that when Consent is sought by Ministers, it will be granted by the Queen or the Prince of Wales."[428]

On certain occasions, the monarch communicates via a written message under the Royal Sign Manual (the King's personal signature) to either House singly, or to both Houses separately. These messages usually relate to the making of provisions for the exercise of the royal authority, the prerogatives or property of the Crown, or provision for the Royal Family.[429]

## Income Tax not payable

Until the early 1990s, it was often claimed that Queen Elizabeth II did not pay income tax because of the royal prerogative. However, it flows from the rule of statutory interpretation above that she did not do so because no fiscal statute expressly obliged her to.[430]

In 1992, the late Queen volunteered to pay income tax and capital gains tax on her personal income,[431] and the current King does the same.

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424 Queen's or Prince's Consent, Office of the Parliamentary Counsel, 19 December 2012, p14.

425 Queen lobbied for changes to three more laws, documents reveal, Guardian, 8 February 2021.

426 Erskine May, para 30.79.

427 Erskine May, para 30.80.

428 House of Commons Political and Constitutional Reform Committee, The impact of Queen's and Prince's Consent on the legislative process, HC 784, 26 March 2014, p7.

429 Erskine May, para 9.2.

430 For a discussion, see Phillip Hall, Royal Fortune: Tax, Money and the Monarchy, London: Bloomsbury, 1992, pp19-21.

431 HC Deb 11 February 1993 Vol 218 cc1113-21 [Royal Taxation]

# 8 Territorial prerogatives

The Ministry of Justice's 2009 scoping exercise was only concerned with prerogative powers available to UK government ministers "to be exercised [...] either in relation to the United Kingdom as a whole or in relation to England (and Wales, where applicable)".[432]

The prerogative, however, has distinctive features in Scotland, Wales and Northern Ireland. Powers in relation to the Royal Charters of bodies operating within devolved areas are exercised, as necessary, by ministers of the devolved administrations.[433] The Privy Council also liaises with those administrations to "deal with certain prerogative matters relating to devolved functions".[434]

## 8.1 Scotland

According to Halsbury's Laws of England, the concept of the prerogative powers of the Crown is "in broad terms the same in both English and Scots law". However, the "detailed powers and other interests of the Crown are not identical in the two jurisdictions".[435]

On 1 July 1999, certain prerogative powers exercised by UK Ministers of the Crown were transferred to Scottish Ministers, which is the collective name for members of the Scottish Government.[436] In cases where the monarch exercised a function within devolved competence under the Scotland Act 1998, Queen Elizabeth II now did so on the advice of the First Minister rather than the Secretary of State for Scotland.[437]

Some of these have already been noted, ie the appointment of ministers, appointment of King's Counsel, the prerogative of mercy, a nolle prosequi, bona vacantia and treasure trove. Scottish Ministers advise on public appointments under the prerogative.[438] For example, the King, on the advice

[432] The Governance of Britain – Review Final Report, p2.
[433] The Governance of Britain – Review Final Report, p22.
[434] Privy Council Office Resource Accounts 2005-06, HC 1313, London: HMSO, 17 July 2006, p3.
[435] Halsbury's Laws of England Volume 20, 2023, para 66.
[436] Scotland Act 1998, section 53. No formal order was required to give effect to these transfers, which were carried out by administrative arrangement.
[437] "Prerogative Powers" bestowed upon Scottish Ministers: FOI release, Scottish Government, 16 July 2019.
[438] The Lord High Commissioner to the General Assembly of the Church of Scotland is appointed by the King on the advice of the Prime, rather than First, Minister. It is not clear why.

of the First Minister, appoints regius professors at Scottish universities. One submission took the form:

> First Minister Salmond presents his humble duty to The Queen and begs respectfully to recommend to Your Majesty the appointment of Professor Leroy Cronin at present Gardiner Chair of Chemistry, University of Glasgow to the Regius Chair of Chemistry, University of Glasgow which has been vacant since the thirtieth day of September 2010.[439]

The First Minister also advises the King on a range of statutory public appointments in Scotland. As bank holidays are devolved, Scottish Ministers provide advice for the necessary Proclamation.[440]

## 8.2 Wales

Unlike in Scotland, section 58A of the Government of Wales Act 2006 specifically excluded prerogative powers from the definition of "executive ministerial functions" transferred to Welsh Ministers. This means that they cannot exercise any prerogative powers on behalf of the Crown. Until 2012, the monarch received advice from the Secretary of State for Wales in respect of prerogative and statutory functions exercised in relation to Wales. By convention, the Secretary of State took advice from Welsh Ministers regarding devolved matters before advising the Queen.

Following a "formal request" from the then First Minister of Wales, Carwyn Jones, the then Lord President of the Council, Nick Clegg, agreed that the First Minister would "henceforth" advise the monarch when it came to the exercise of devolved functions. Each of these functions were statutory:

- The appointment of the chief inspector and inspectors of education and training in Wales under section 19 of the Education Act 2005;[441]
- Functions in relation to further and higher education in Wales under the Education Reform Act 1988; and
- The appointment of fire inspectors in Wales under section 28 of the Fire and Rescue Services Act 2004.

The First Minister of Wales can only advise the King so long as the office holder is a member of the Privy Council, which by custom he or she always is. The Secretary of State for Wales continues to advise in respect of the King's other functions in relation to Wales.[442]

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439 Courtesy of Jason Loch.

440 Scotland to mark the Royal Coronation, Scottish Government, 6 November 2022. The equivalent UK press release stated that the Prime Minister, rather than the King, had "decided to proclaim an additional bank holiday".

441 Section 19(6) was amended accordingly.

442 HC Deb 15 October 2012 Vol 551 c1WS [First Minister of Wales (Functions as Privy Counsellor)]

## 8.3 Northern Ireland

Section 23(2) of the Northern Ireland Act 1998 provides that in transferred (or devolved) areas, prerogative and other executive powers of the King in relation to Northern Ireland are "exercisable on [His] Majesty's behalf by any Minister or Northern Ireland Department". The King, however, does not receive advice directly from the Northern Ireland Executive, even when it is fully functioning. The distinctive aspects of the prerogative in Northern Ireland are:

- Powers in relation to the Northern Ireland Civil Service (NICS) are exercised by the First Minister and the deputy First Minister acting jointly, although this can be delegated to another minister or department;[443]
- The same is true with respect to the Commissioner for Public Appointments for Northern Ireland;
- The prerogative of mercy, which since 2010 has been exercisable only by the minister in charge of the Department of Justice (NI), but only in respect of transferred matters.[444]

The prerogative in relation to the NICS was used in 2016 to appoint an additional Northern Ireland Executive press adviser.[445] The Functioning of Government (Miscellaneous Provisions) Act (Northern Ireland) 2021 made further appointments using the prerogative subject to the approval of the Northern Ireland Assembly.

Regarding public appointments, although Northern Ireland has a separate Judicial Appointments Commission, the appointment of the Lord Chief Justice and Lord Justices of Appeal remain with the King on the recommendation of the Prime Minister. This follows consultation with the First Minister and deputy First Minister, together with the outgoing Lord Chief Justice or Senior Lord Justice of Appeal.

Section 23(2) of the 1998 Act has been interpreted widely. In the *JR80* case, the Northern Ireland Court of Appeal ruled that Northern Ireland Ministers had the prerogative power to make ex gratia payments from public funds, unless this was curtailed or abrogated by statute.[446]

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443 Northern Ireland Act 1998, sections 23(3) and 23(4).

444 Northern Ireland Act 1998, section 23(2A). Pardons in relation to terrorism, for example, are outwith devolved competence in Northern Ireland.

445 David Gordon appointment: 'Law changed' to hire press advisor, BBC News online, 17 September 2016. This required a Prerogative Order in Council.

446 *Application by JR80 for Judicial Review* [2019] NICA 58

## 8.4 Commonwealth Realms

The King is vested with supreme executive power in 14 other Commonwealth Realms where he is also head of state.[447] In each, a Governor-General acts on his behalf in exercising prerogative and statutory powers.[448] Each Governor-General acts on the advice of the government of that realm. In certain limited respects, for instance when proposed legislation impacts the prerogative, the King himself will act on the advice of each realm government. As Lord Glenarthur stated in 1989:

> it is for the government of each Commonwealth country of which the Queen is Head of State to make its own arrangements for proffering ministerial advice to Her Majesty.[449]

After 1930, a custom developed whereby realm premiers first gave informal advice to the monarch's Private Secretary, followed by formal advice once approval had been given: "This meant that the palace could scuttle unpalatable advice by raising concerns or indicating the Queen's displeasure, before anything was laid before her."[450]

### Australia

Australia gave rise to several points of tension given its federal nature. In 1972, there was a dispute between the Australian Commonwealth (federal government) and the States of Queensland and Tasmania regarding ownership of the seabed adjacent to the States. The States petitioned Queen Elizabeth II to refer the matter to the Judicial Committee for an advisory opinion, but Canberra maintained that only Commonwealth ministers could advise the monarch. The Queen instead asked UK ministers for advice.[451]

In 1975, on the eve of independence from Australia, Papua New Guinea invited the Queen to become its head of state. Because it was not yet independent, she accepted the throne on the advice of the Australian government.[452]

Until 1986, the UK Foreign Secretary advised the Queen on the appointment of Australian State Governors and "Imperial" honours. The then Prime Minister,

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447 In Canada, the office of the King is constitutionally entrenched through section 41 of the Constitution Act, 1982, which includes key prerogative powers such as the summoning, proroguing and dissolving of the Canadian House of Commons.

448 The conduit for this is usually an Executive Council, which is roughly analogous to the UK Privy Council. See The Australian system of government, Parliament of Australia website. Only Canada and Jamaica possess bodies called a Privy Council. Such advice tends to be more explicit recommendatory than in the UK.

449 HL Deb 14 February 1989 Vol 504 c71 [Commonwealth Governments: Advice To The Queen]

450 Queen Elizabeth dies: The magic of a monarch who made her power seem invisible, Financial Review, 9 September 2022.

451 Anne Twomey, Responsible Government and the Divisibility of the Crown, Legal Studies Research Paper No 08/137, November 2008, p111.

452 Jason Loch @JasonLoch), X (Twitter), 5 October 2023 [Accessed 7 October 2023].

Bob Hawke, advised that the Queen "should receive advice directly from the Premiers of the respective States". Separately, UK ministers advised the Queen to approve the termination of Australian appeals to the Judicial Committee. Baroness Young, the then UK Minister of State for Foreign Affairs, made the following submission on 14 August 1985:

> The Baroness Young, with her humble duty to The Queen, begs to draw attention to the Advice of Her Majesty's Government of the United Kingdom that it is in agreement with the proposals contained in the Request and Consent legislation which the Federal Government of Australia intends to introduce in order to sever certain residual constitutional links between Britain and Australia [...] Would Her Majesty be pleased to accept this Advice?

The Queen accepted this advice on 15 August 1985.[453] Section 7 of the Australia Act 1986 subsequently provided that "advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State".[454]

## Southern Rhodesia

Prior to Rhodesia's Unilateral Declaration of Independence in 1965, the UK government made clear it "would not be prepared to advise Her Majesty to accede to any request that she should become a separate sovereign of a territory which has rebelled". Acting on the advice of UK ministers, the Queen approved her Governor-General's request to resign. When Ian Smith attempted to advise the Queen on the appointment of a successor, the Commonwealth Relations Office advised that as it no longer recognised Smith as premier, this advice would be a petition from an ordinary citizen.[455]

## Fiji

Following a coup in Fiji in May 1987, the Queen terminated her role as Queen of Fiji without ministerial advice. Although Margaret Thatcher, the then Prime Minister, was opposed to this "abdication", the Queen had also received informal advice from premiers in neighbouring Commonwealth Realms (Australia and New Zealand), and from the UK Foreign Office. When he proved unable to reverse the coup, Timoci Bavadra was dismissed as premier by the Fijian Governor-General. When Bavadra later tried to meet with and advise the Queen, she refused to meet him as he was no longer her "responsible" adviser. Fiji became a republic in December 1987.[456]

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453 Anne Twomey, The De-Colonisation of the Australian States, Sydney Law School Research Paper No. 07/19, 2006.

454 This mainly relates to advice regarding the appointment of State Governors.

455 Anne Twomey, The Veiled Sceptre, pp321-25.

456 Anne Twomey, The Veiled Sceptre, pp86-87.

# 9 The courts and the prerogative

The royal prerogative is recognised by the common law. Until the 1970s, courts took the view that judicial review did not extend to the exercise of prerogative powers. Judges would go no further than determining the existence and extent of a power.[457] Important cases included:

- ***Burmah Oil Co (Burma Trading) Ltd v Lord Advocate***. This established that even when prerogative powers were still extant, the Crown might not be able to use them in the same manner as in the past, in this case the destruction of oil installations without payment of compensation.[458]
- ***British Broadcasting Corporation v Johns (HM Inspector of Taxes)***. This confirmed that prerogative powers can never be broadened. The BBC had claimed that as a Chartered Body it did not need to pay income tax.[459]
- ***Blackburn v Attorney-General***. In this challenge to the UK's accession to the European Economic Community, it was held that treaty-making power rested with the Crown acting on the advice of ministers and could not be challenged or questioned in court.[460]
- ***Laker Airway Ltd v Department of Trade***. This case, which concerned the revocation of a commercial airline operator's licence, 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.[461]

## 9.1 GCHQ

The House of Lords finally recognised in *Council of Civil Service Unions v Minister for the Civil Service* that the source of executive power (prerogative or statute) was irrelevant to the question of justiciability. The Prime Minister (as Minister for the Civil Service) had banned employees of Government

[457] In this respect, the role of the courts in relation to the exercise of the prerogative has developed in the same way in the UK's three legal jurisdictions (England and Wales, Scotland and Northern Ireland).

[458] *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75. See **Section 5.5**.

[459] *British Broadcasting Corporation v Johns (HM Inspector of Taxes)* [1964] EWCA Civ 2.

[460] *Blackburn v Attorney-General* [1971] 1 WLR.

[461] *Laker Airway Ltd v Department of Trade* [1977] 2 All ER 182; [1977] QB 643.

Communications HQ (GCHQ) from joining trades unions, by an Order in Council issued under the prerogative. Lord Roskill said he was unable:

> to see [...] that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries.

At the same time, Lord Roskill held that some prerogative powers remained unreviewable due to their sensitive nature, chiefly the:

> making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others.[462]

## 9.2 Judicial consideration

There are three stages of judicial consideration of a prerogative power:

- Does the power exist?
- Is the extent of the power limited by the common law and statute?
- Was the exercise of the power lawful?

Only the last of these does not apply to Lord Roskill's "excluded categories".[463]

Outside those categories, the scope of judicial review is broadly the same as that for the exercise of statutory powers: that a decision may be reviewed on grounds of illegality, irrationality or procedural impropriety (including a failure to honour legitimate expectations).[464]

In general, rules of common law, including the prerogative, do not lapse by disuse.[465] But as the Ministry of Justice observed in 2009, the "difficulty" with the courts acting as "final arbiter" of whether a particular prerogative still existed was 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

462 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The prerogative of mercy was subsequently recognised as justiciable.

463 Robert Hazell and Timothy Foot, Executive Power: The Prerogative, Past, Present and Future, p250.

464 Stair Memorial Encyclopaedia of the Laws of Scotland Volume 7.

465 A. Bradley, K. Ewing and C. Knight, Constitutional and Administrative Law (16th edition), London: Pearson, 2015, pp260-61.

> statements of previous Government practice and legal textbooks, the most comprehensive of which is now nearly 200 years old.[466]

Common law doctrine also holds that courts cannot create new prerogatives. Courts, however, can recognise prerogatives that were previously of doubtful provenance or adapt old prerogatives to modern circumstances. For example, the Home Secretary's prerogative power to act to maintain law and order where no emergency exists was not widely recognised until identified by the Court of Appeal in 1989.[467]

Constitutional conventions, ie long-standing practice or rules as applied to the exercise of certain prerogatives, are not enforceable by the courts.[468]

## 9.3 Notable cases

Notable cases concerning the prerogative since 1985 include:

- ***R v Secretary of State for Foreign and Commonwealth Affairs Ex p. Lord Rees-Mogg***. As per Roskill, this confirmed that the establishment of a foreign and security policy was a legitimate exercise under the prerogative, and that the court had no jurisdiction to consider it.[469]
- ***R v Secretary of State for the Home Department, ex parte Fire Brigades Union***. A prerogative scheme for criminal injuries compensation had been replaced with a statutory scheme which was essentially the same. A subsequent attempt by the government to replace the old prerogative scheme with a new prerogative scheme was held to be ultra vires so long as the statutory scheme remained on the statute book.[470]
- ***R (on the application of Bancoult) v Sec of State for Foreign & Commonwealth Affairs (No 2)***. This established that Prerogative Orders in Council, despite being a type of primary legislation, are also subject to the ordinary grounds for judicial review.[471]

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466 The Governance of Britain – Review Final Report, p7. This was a reference to Joseph Chitty's A Treatise on the Law of the Prerogatives of the Crown, which was first published in 1820.

467 The Cabinet Manual, p25.

468 Joint Committee on Conventions, Conventions of the UK Parliament, HL Paper 265-I/HC 1212-I, 3 November 2006,

469 *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. Lord Rees-Mogg* [1994] QB 552.

470 *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 All ER 244, [1995] 2 WLR 464 HL.

471 *R (on the application of Bancoult) v Sec of State for Foreign & Commonwealth Affairs (No 2)* [2008] UKHL 61. This concerned Orders prohibiting native Chagos Islanders returning to their home.

- ***R (on the application of Wheeler) v Office of the Prime Minister***. The government's decision not to hold a referendum on the Lisbon Treaty was not shown to be either unlawful or unreasonable.[472]
- ***R (on the application of Sandiford) v The Secretary of State for Foreign Affairs***. Generally, prerogative powers are 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.[473]

## 9.4 Miller I and II

In *R (Miller) v Secretary of State for Exiting the European Union*, the Supreme Court held that the government could not use the prerogative to serve notice of termination of the UK's membership of the European Union. The Court reasoned that such a notice would affect rights under domestic law, therefore frustrating the intention of Parliament to confer those rights.[474]

The Supreme Court's 2019 *Miller II* judgment also established that the prerogative of prorogation was not absolute.[475]

Gavin Phillipson has argued that while *Miller II* was "a (rare) example of a court putting real limits around a prerogative power", far more typical were judgments which "either do nothing to define the scope of a given prerogative (Northumbria) or actually expand understandings of its scope (Bancoult)".[476]

In considering the constitutional implications of the same case, Anne Twomey argued that as the Supreme Court had ruled the prerogative of prorogation as justiciable, then the question of whether the monarch could refuse prorogation in a similar situation should not arise:

> When it comes to reserve powers, if there are issues in relation to legality and constitutionality, the Queen does not need to act if the matter is justiciable and it can be determined by a court. What the court is doing is fulfilling that role by making it justiciable. That means that the Queen has no obligation to act and fulfil the role. Therefore, the court might be seeing that it is doing this as a way

472 *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin).

473 *R (on the application of Sandiford) v The Secretary of State for Foreign Affairs* [2014] UKSC 44.

474 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Legal authorisation to serve a notice in accordance with Article 50 was subsequently provided by the European Union (Notification of Withdrawal) Act 2017. For an argument that the royal prerogative could be used to dissolve the Anglo-Scottish Union, see Article 50, the Articles of Union and using the Royal Prerogative to end the union between Scotland and England, University of Aberdeen School of Law blog, 11 July 2016.

475 *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

476 Gavin Phillipson, The Case of Prorogation: Process not Substance; Exception, not Rule (unpublished, draft on file with author).

of protecting the Queen from having to behave in a way that may be seen as controversial.[477]

## 9.5 Prerogative writs

Prerogative writs began as extraordinary remedies only available to the King, although later individuals could apply for them in the King's name. This is why judicial review proceedings are formally brought by "The King (on the application of X)".

Now known as prerogative orders, these are issued by the High Court in exercising its supervisory jurisdiction over inferior courts, tribunals and public authorities. As set out in Part 54 of the Civil Procedure Rules, the judicial review procedure must be used in a claim for judicial review where the claimant is seeking:

- a mandatory order (mandamus)
- a prohibiting order (prohibition), or
- a quashing order (certiorari)[478]

The procedure for habeas corpus is set out in Part 54 of the Civil Procedure Rules.[479] This enables a person to report an unlawful detention to a court and request that it order a custodian to bring that prisoner to court to determine whether their imprisonment was lawful.

Two other prerogative writs, procedendo[480] and quo warranto,[481] are now obsolete.

[477] House of Commons Public Administration and Constitutional Affairs Committee, Oral Evidence: Prorogation and the Implications of the Supreme Court Judgment, HC 2666, 8 October 2019, Q14.
[478] Part 54 – Judicial review and statutory review, Civil Procedure Rules.
[479] Part 87 – Applications for writ of habeas corpus, Civil Procedure Rules.
[480] To send a case from an appellate court to a lower court with an order to proceed to judgment.
[481] Requiring a person to show by what authority they exercise a power.

# 10 Reforming the prerogative

Since the 1980s, there have been calls to reform the royal prerogative, chiefly by placing most powers on a statutory basis. The Labour MP and former Cabinet minister Tony Benn argued in 1982 that the prerogative represented a:

> major reversal of the advances that we made towards democracy, even allowing for the fact we hadn't in any case completed the democratic process begun in the seventeenth century.[482]

With the support of the Campaign Group of Labour MPs, Benn introduced the Reform Bill in 1985 and the Crown Prerogatives (House of Commons Control) Bill three years later.[483] These were designed to transfer to the Speaker of the House of Commons responsibility for advising the monarch on most prerogative powers, subject to Commons agreement. Both were dropped at second reading.

In 1994 Jack Straw, also a Labour MP and future Lord Chancellor, wrote that the prerogative had "no place in a modern western democracy" and had been "used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable". He added:

> Where power is based not upon statute but upon the royal prerogative it is this accountability which suffers [...] Over time – and it is bound to take time – we should aim for a situation where all powers exercised by the executive, and by the monarch, are based upon statute, sometimes (as with voting systems) reinforced by direct decisions of the electorate through referenda.[484]

A Crown Prerogatives (Parliamentary Control) Bill was introduced to the Commons in March 1999. It did not proceed. In late 2003, Lord Lester of Herne Hill also promoted an Executive Powers and Civil Service Bill in the House of Lords.

## 10.1 Public Administration Committee

In 2004 the House of Commons Public Administration Committee (PAC) recommended "that comprehensive legislation should be drawn up which would require government within six months to list the prerogative powers

482 Tony Benn, Parliament, People and Power: Agenda for a Free Society, London: Verso, 1982, p44.

483 HC Deb 24 May 1985 Vol 79 c1253 [Reform] and HC Deb 16 March 1988 Vol 129 c1109 [Crown Prerogatives (House of Commons Control)].

484 Jack Straw, Abolish the Royal Prerogative in A. Barnett (ed), Power and the Throne: The Monarchy Debate, 1994, pp125 & 129.

exercised by Ministers".[485] A paper and draft Bill prepared by Professor Rodney Brazier, the specialist adviser to the inquiry, were appended to the report. Another proposal was a "sunset clause" whereby "any prerogative powers which were not expressly confirmed by subsequent primary legislation by a date specified in the act would be abolished".[486]

At the same time, the PAC acknowledged that the prerogative offered:

> much-needed flexibility to government and is a well-established part of the constitution. Ministers need executive powers [...] and some of those things have to be done quickly in a complex and dangerous world.[487]

The then government's response in July 2004 rejected the PAC proposals:

> 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. [The government] 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.[488]

## 10.2 Constitution Committee

In 2005-06, the House of Lords Constitution Committee undertook an extensive inquiry into the war prerogatives.[489] Rather than a statutory response, it favoured the development of a parliamentary convention which might be formalised by a resolution of the House of Commons.[490] This was set out in a motion approved by the House of Commons on 15 May 2007.[491]

Lord Lester's Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill was introduced to the Lords on 17 January 2006. This was approved by the Upper House but did not proceed in the Commons.

485 House of Commons Public Administration Committee, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, HC 422, 16 March 2004, p3.

486 Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, p29,

487 Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, p15.

488 Government Response to the Public Administration Select Committee's Fourth Report of the 2003-4 Session, Department for Constitutional Affairs, July 2004.

489 For a full account of the debate around reforming the war prerogatives, see Commons Library research paper CBP7166, Parliamentary approval for military action, p16-23.

490 House of Lords Constitution Committee, Waging War: Parliament's role and responsibility, HL 236, 27 July 2006.

491 HC Deb 15 May 2007 Vol 460 cc481-582 [Armed Conflict (Parliamentary Approval)]

## 10.3 Governance of Britain

In its July 2007 Green Paper, The Governance of Britain, the then Labour government said exercising powers "in the name of the Monarch without the people and their elected representatives in their Parliament being consulted" was "no longer appropriate in a modern democracy". It added that:

> The Government believes that in general the prerogative powers should be put onto a statutory basis and brought under stronger parliamentary scrutiny and control [...] No changes are proposed to either the legal prerogatives of the Crown or the Monarch's constitutional or personal prerogatives, although in some areas the Government proposes to change the mechanism by which Ministers arrive at their recommendations on the Monarch's exercise of those powers.[492]

The government proposed a consultation on whether the Ponsonby Rule should be given a statutory footing, whether the Commons should (by convention) approve a dissolution request by the Prime Minister, and if other powers relating to the prerogative of mercy and passports "might be transferred elsewhere or even abolished". The consultation also covered the Prime Minister's advice regarding ecclesiastical appointments.[493]

In March 2008, a White Paper, The Governance of Britain – Constitutional Renewal, proposed that the deployment of the Armed Forces, treaty ratification, judicial appointments and the running of the Civil Service be put on a statutory footing or otherwise made subject to increased Parliamentary oversight. A Final Report in 2009, however, concluded that making the war prerogatives "more closely subject to the mandate of Parliament would be a highly complex and lengthy undertaking". The Report continued:

> Some of the remaining prerogative powers could be candidates for abolition or reform, but their continued existence has – at the minimum – no significant negative effects. In many cases it is positively useful. Legislation to replace some of them could itself give rise to new risks: of unnecessary incursions into civil liberties on the one hand, or of dangerously weakening the state's ability to respond to unforeseen circumstances on the other [...] the Government believes that any further reforms in this area should be considered on a case-by-case basis, in the light of changing circumstances.[494]

The White Paper's other proposals were given effect in the Constitutional Reform and Governance Act 2010 and the Crime and Courts Act 2013.[495]

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492 The Governance of Britain, CM 7170, Ministry of Justice, July 2007, pp15-17.

493 The Governance of Britain, pp23-26. The General Synod of the Church of England had agreed in February 2008 to give, in future, the Prime Minister a single nomination for diocesan bishoprics.

494 The Governance of Britain – Review Final Report, pp14 and p29.

495 The latter act became law during the Conservative-Liberal Democrat coalition of 2010-15.

Writing in 2022, Robert Hazell and Timothy Foot believed that the "clear lesson from the Brown government" was that "complete codification of the prerogative is unachievable".[496]

## 10.4 Other reform proposals

The House of Commons Political and Constitutional Reform Committee, which existed during the 2010-15 Parliament, examined the role and powers of the Prime Minister. A report argued for more of these to be placed on a statutory footing. In a Private Member's Bill, which was included in the report as an appendix, the then Labour MP Graham Allen proposed a fixed list of prerogative powers exercisable by the Prime Minister.[497]

Writing in The Times in July 2019, the former Supreme Court Justice Lord Sumption proposed the establishment of a committee of Privy Counsellors to advise the sovereign on "the legal and conventional limits of the use that ministers can make of her constitutional powers".[498]

In its 2019 election manifesto, the Conservative Party stated that:

> After Brexit we also need to look at the broader aspects of our constitution, the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative.[499]

This proposed review has yet to take place.

496 Robert Hazell and Timothy Foot, Executive Power: The Prerogative, Past, Present and Future, p300.
497 Political and Constitutional Reform Committee, Role and powers of the Prime Minister, HC 351, 24 June 2014, Appendix 2.
498 Brexit, the Queen and proroguing parliament: how to solve this constitutional conundrum, The Times (£), 17 July 2019.
499 Get Brexit Done: Unleash Britain's Potential, London: Conservative Party, 2019, p48.

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