Royal Prerogative
Leander Beinlich

Content type: Encyclopedia entries
Product: Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]
Article last updated: March 2019

Subject(s):
Separation of powers — Common law — Monarchy

Published under the direction of the Max Planck Foundation for International Peace and the Rule of Law. General Editors: Rainer Grote, Frauke Lachenmann, Rüdiger Wolfrum.
A. Definition and Overview

1. The royal prerogative, sometimes also referred to as ‘crown prerogative’, assigns certain powers, rights, privileges, and immunities to the monarch or Crown which are today mostly exercised on the advice of government ministers. While forming part of the constitutional system of many monarchical common law jurisdictions, the prerogative is neither based on statute nor on common law but rather relates to the original powers of the monarch. In its origins, stemming from the age of the Normans in which far reaching powers were vested in the king as the sole sovereign, the extent of these powers diminished over time as democratic governance and the rule of law expanded. Since the nineteenth century, the prerogative has commonly been described as the ‘residue of discretionary power’ left with the Crown (Dicey 424). Even though a ‘relic of the past’ (Burmah Oil (1965) (UK) at 10) the royal prerogative still features as an important tool ‘exercisable by the executive government for the public good in certain spheres of governmental activity for which the law has made no provision’ (Laker Airways (1977) (UK) at 705). The nature of the prerogative remains contested and is, partly due to its inherent flexibility, difficult to define adequately. As a result, contemporary legal discourse often uses ‘royal prerogative’ as an umbrella term encompassing particular powers, rights, privileges, and immunities of the Crown or monarch that lack a statutory basis and were traditionally perceived to fall under the royal prerogative.

2. While most modern executive powers are derived from statutes, unwritten prerogative powers continue to play a significant role. The most important field is foreign affairs inter alia pertaining to diplomatic relations, the deployment of armed forces, and the making of international treaties. Besides this, the prerogative has been, and partly still is, understood to embrace personal privileges and immunities (eg immunities from liability) and political prerogatives (eg appointing powers). The prerogative, apart from conceptual and definitional struggles, triggers several difficult legal questions. One of these is its relationship with statutes. Other issues arise regarding the scope of the prerogative, as well as judicial review and parliamentary control.

3. The concept of vesting certain (special) powers in the hands of heads of state and government is, of course, not exclusive to common law systems or monarchies. Functionally, the royal prerogative has equivalents in civil law monarchies (cf. reserve powers in some civil law monarchical constitutions) as well as in republican states. Some states, however, share a common line of tradition in this regard and developed a characteristic meaning of ‘royal prerogative’. These are, namely, the remaining Commonwealth realms, which this contribution focuses on.

B. Historical Evolution

4. The historical development of the royal prerogative has to a considerable extent been shaped by English and British practice. Its origins are commonly traced back to the powers of the medieval monarch as feudal (over-)lord and head of the kingdom. Whilst initially relating mainly to landholding, the monarch’s powers were expanded to include imposing taxes, making or suspending laws without parliamentary consent, and administering justice. On a broader level, the prerogative empowered the monarch to defend the realm and maintain peace. Yet, according to a custom, the monarch regularly consulted with the monarch’s council before exercising the prerogative. Two cases in the early seventeenth century marked the beginning, or the intensified resumption, of struggles over the royal prerogative between the Crown and a parliament increasingly keen to assert itself. In Prohibitions del Roy of 1607 (Eng), Sir Edward Coke declared that the courts could review the extent and the existence of the prerogative and that the king ‘in his own person cannot adjudge any case’ but through ‘some Court of Justice’. Coke, again, stated in the Case of Proclamations of 1611 (Eng) that ‘the King hath no prerogative, but that which the law of
the land allows him’ and thereby established the supremacy of statute law over the prerogative. These two cases were, however, largely ignored by the king and by governmental practice in the direct aftermath. On the contrary, the struggles between parliament and king continued, in particular with regard to extra-parliamentary taxation powers. In a series of cases (Bate’s Case (1606) (Eng); Five Knights Case (1627) (Eng); and Ship Money (1637) (Eng)) the king succeeded in enforcing his full and undiminished powers before the courts, leading to further disputes with parliament.

5. The Glorious Revolution, the → Bill of Rights (1689) (UK), and the establishment of a constitutional monarchy contributed to transforming the royal prerogative from an extensive and (nearly) absolute power into a collection of finite and limited powers. The Bill of Rights (1689) declared illegal the practice of ‘suspending the laws or the execution of laws by regal authority’ (Art. 1) as well as ‘levying money for or to the use of the Crown by pretence of prerogative’ (Art. 4) unless approved by parliament. In addition, it was established that no new powers may be created by the monarch under the prerogative. These developments of constraining the prerogative power contained the seed of Dicey’s conceptual understanding of the royal prerogative as a ‘residue’ of powers. In the eighteenth century, a constitutional convention evolved that prerogative powers could only be exercised on, or rather through, the advice of ministers responsible to parliament. This marked a decisive shift away from the original conception of the royal prerogative into a tool of (responsible) government in a constitutional monarchy. The sharing of competences between monarch and government regarding the prerogative and its exercise has since been set out relatively clearly. Questions as to its scope and the delimitation of competences between the government and parliament, however, continue to appear on a regular basis.

C. Main Constitutional Features of the Royal Prerogative

1. United Kingdom
   (a) Scope and Content

6. In today’s constitutional system of the UK the vast majority of prerogative powers are devolved to the government, which exercises them through advising the monarch, who is bound by constitutional convention to follow the advice. Still, the monarch retains personal discretion with regard to a limited set of cases. Absent an authoritative list, the content of the royal prerogative can vaguely be grouped in five categories. The first one comprises immunities and privileges of either the Crown or the monarch in his or her personal capacity, which have today lost most of their significance (→ immunity of heads of state under constitutional law). The immunity of the Crown from civil proceedings was removed by the Crown Proceedings Act of 1947 (UK), yet left the sovereign’s personal immunity untouched. Another remnant is that statutes do not bind the Crown unless the contrary intention is expressly stated or necessarily implied in the statute. Under a second category, the Crown has retained several political prerogative powers inter alia with regard to patronage, the conferral of honours, and appointments, including those of ministers.

7. Third, the royal prerogative still grants certain limited → legislative powers, for instance with regard to the civil service as well as to the overseas territories through orders in council (Bancoult (No 2) (2008) (UK)) or letters patent (→ Overseas Territories, Australia, France, Netherlands, New Zealand, United Kingdom, United States of America). Before a bill that would affect the royal prerogative is debated in parliament, the Queen’s Consent is required, again following ministerial advice. In addition, the monarch grants royal assent to bills. Finally, the prerogative entitles the monarch to summoning and proroguing parliament, though its dissolution has now been regulated by statute (Fixed Term Parliaments Act 2011 (UK)). A fourth category relates to the judicial system. The Crown
holds the → pardon power as a form of its prerogative of mercy. Besides this, the Attorney General may stop prosecutions on indictment by entering a nolle prosequi.

8. A fifth category consists of (traditional) executive powers. A typical example is that the royal prerogative might confer powers upon the government during times of emergency (→ types and effects of emergency). These cases traditionally related to powers in war times (Ship Money (1637) (Eng)) which are today largely regulated by statute. As wide emergency powers have also been granted to the executive by parliament in other fields (see International Terrorism (Emergency Powers) Act 1987 (NZ); and ss 19–22 of the Civil Contingencies Act 2004 (UK)), the prerogative might have lost its significance in this area. Besides this, the majority of executive prerogative powers pertain to the conduct of foreign affairs. This includes restraining aliens from entering the territory of the United Kingdom, issuing passports to citizens, diplomacy, the recognition of foreign states, and the power to make (and unmake) treaties (→ treaty power). Also, the organization, disposition, and, more importantly, the deployment of armed forces falls under the prerogative, although a (nascent) constitutional convention obliges the government to consult the parliament prior to deployment (Mills; → control of use of military forces).

(b) Relation between Prerogative and Statute

9. As was recognized as early as the seventeenth century, if not strictly followed until later, the monarch cannot ‘change any part of the common law, or statute law’ through the exercise of the prerogative (Case of Proclamations (1610) (Eng) at 76). Rather, the exercise of those powers must be compatible with existing statute law and may not frustrate the purpose of a statute and thereby conflict with the intention of parliament. A recent case in this context is R (Miller) (2017) (UK) dealing with the question whether the prerogative included the power to initiate the withdrawal from the European Union according to Article 50 of the Treaty on the Functioning of the European Union (TFEU). The Supreme Court held that triggering Article 50 TFEU would inevitably have effects on the laws of the United Kingdom. Therefore, the royal prerogative, while encompassing the power to (un)make treaties, ‘cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form’ (para. 86).

10. Another consequence of the supremacy of statute law, or more broadly → parliamentary sovereignty, is that the exercise of prerogative powers may not infringe upon → individual rights. This rule, however, comes with an exception, namely when the infringement is inherent in the particular prerogative power. Emergency powers, for instance, were found to include the power to destroy property—although giving rise to an obligation to compensate (Burmah Oil (1965) (UK); → state interference with private property). Similarly, the power to decide upon terms of the civil service includes the power to terminate contracts (GCHQ (1985) (UK); → civil servants).

11. Furthermore, the supreme legal force of statute means that prerogative powers may be curtailed or abrogated by statute (De Keyser’s (1920) (UK); Fire Brigades (1995) (UK)). Whether a statute displaces prerogative powers in any particular instance is a matter of interpretation, without having a ‘universally applicable legal test’ at hand (BB Saunders 390). According to the predominant view, prerogative powers are displaced where this is clearly intended or necessarily implied by the respective statute (De Keyser’s (1920) (UK)). An intention to replace the prerogative might be discerned from the fact that a statute comprehensively regulates a subject matter (De Keyser’s (1920) (UK); cf. BB Saunders 368–371). In case the statute is found to prevail over a prerogative power that traditionally applied to the same or similar subject matter, the question arises whether this affects the continued existence of the respective prerogative power. The House of Lords’ decision in De Keyser’s (1920) (UK) seems to suggest that the prerogative is not abridged or ‘merged into’ the statutory power (Joseph 677–678). Although the Crown cannot make recourse to these

From: Oxford Constitutions (http://oxcon.ouplaw.com). (c) Oxford University Press, 2015. All Rights Reserved.date: 11 April 2020
displaced prerogative powers, they arguably continue to exist and might potentially revive if the statute is repealed.

(c) Judicial Review of the Prerogative

12. Historically, judicial review over the prerogative was limited pursuant to the maxim ‘the King can do no wrong’. While courts had the authority to rule on the existence of a disputed prerogative power in abstracto, the actual exercise of the power could not be questioned by the judiciary until the second half of the twentieth century (cf. Chandler (1964) (UK)). Lord Denning held in Laker Airways (1977) (UK) that he could see no reason why the prerogative powers should be treated differently from ‘any other discretionary power that is vested in the executive’ by exempting its exercise from judicial review. This development towards more reviewability culminated in the seminal case GCHQ (1985) (UK). There, the House of Lords held that the exclusion of trade unions from the Government Communications’ Headquarters (GCHQ) by way of order in council could be adjudicated upon by courts. Since then, the formerly predominant a priori denial of judicial review gave way to a reviewability in principle. In the intervening years courts have inter alia reviewed the refusal of a passport (R ex parte Everett (1989) (UK), the power to expel (friendly) aliens (R ex parte Beedassee (1989) (UK), the prerogative of mercy (R ex parte Bentley (1993) (UK)), as well as legislative powers with regard to overseas territories (Bancoult (No 2) (2008) (UK)).

13. It is established that the exercise of prerogative power is generally to be measured against the ordinary standards of judicial review such as the → legality principle, → reasonableness, and rationality. This does not mean, however, that all questions of prerogative power can or will indeed be reviewed. Courts still deny judicial review, often termed → judicial deference, when the subject-matter is deemed non-justiciable. Courts will do so notably with regard to matters of high policy, especially on the international plane (see recently with regard to treaty-making powers R (Miller) (2017) (UK) at 55 and 92). Review is more likely or even required when routine administrative decisions and individual rights or legitimate expectations are involved. In conclusion, the decisive issue with regard to judicial control is not any more the label ‘royal prerogative’ but the subject-matter of the dispute at hand.

(d) Reform Efforts and Debates

14. One of the most intensely discussed issues surrounding the royal prerogative is (the lack of) parliamentary control and democratic → legitimacy. With the exercise of prerogative powers neither presupposing prior consent nor requiring ex post approval, parliament is left with only an indirect control through the accountability of ministers to parliament and its approval of the budget (→ public finance). A 2004 report by the UK Public Administration Select Committee ‘Taming the Prerogative: Strengthening Ministerial Accountability to Parliament’ suggested that parliament should systematically consider and identify areas of the prerogative in need of statutory safeguards in order to adopt appropriate legislation. Similar themes were raised and recommendations made in a governmental Green Paper in 2007 (CM 7170 (UK)). Neither, however, has directly resulted in systematic reform efforts, as governments and other actors continued to stress the need for flexibility, which is fulfilled by and through the prerogative. A 2009 report by the UK Ministry of Justice on ‘The Governance of Britain: Review of the Executive Royal Prerogative Powers’ provided a non-exhaustive list of ‘all areas where prerogative powers are currently relied upon’ (para. 114 et seq). Apart from this scoping exercise, certain incremental steps towards constraining the prerogative have been made. Section 20 of the Constitutional Reform and Governance Act of 2010 (UK) established that most international treaties must be introduced to parliament prior to ratification, although it stopped short of giving parliament a veto power. Part 1 of the same Act gave the civil service a statutory
footing, though without displacing prerogative powers. With regard to military activities, a (nascent) constitutional convention arguably requires the government to seek parliamentary approval prior to the deployment of the armed forces (Mills). Notwithstanding these small advances, systematic reform efforts are not likely to gain momentum in the near future. Rather, piecemeal legislative changes might continue to shrink or at least further regulate the scope and the exercise of the royal prerogative.

2. Other Commonwealth Realms

15. As an ‘important tool of colonial governance’ (Poole (2010) 147) the royal prerogative took root in the colonies of the British Empire (colonization). While some distinctions have been drawn between the legal effects in settled colonies on the one hand and conquered or ceded colonies on the other, the laws of England, including the royal prerogative, were in principle applicable throughout the colonies (Kielley (1842) (UK); cf Cox (2007) 612–613). After gaining independence the prerogative continued to form part of the laws of the former dominions but was affected by and integrated into their legal and constitutional systems. Today, the prerogative is, in addition to the United Kingdom, still part of the legal systems of fifteen states that remain Commonwealth realms. It largely covers the same subject areas and follows the same principles as in the United Kingdom. As a structural difference the monarch is represented by the Governor-General to the respective Commonwealth realm. The following paragraphs will briefly outline the status and scope of the prerogative in three of the most important realms, namely Australia, Canada, and New Zealand.

(a) Australia

16. Under the Australian constitutional system the executive power of the Commonwealth is vested in the Queen but exercised on her behalf by the Governor-General (s 61 Commonwealth of Australia Constitution Act: 9 July 1900 (as Amended to 31 October 1986) (Austl)). According to the principles of responsible government, the Governor-General only acts on the advice of his or her ministers, who are in turn accountable to parliament (Appleby 221). While the bulk of prerogative powers are therefore exercised at the behest of the government, the Governor-General as representative of the Queen retains some ‘reserve powers’ which can be exercised without or even against the advice of the Prime Minister and Cabinet. These include appointing and dismissing a government, last exercised in 1975, and to dissolve, or to refuse to dissolve, parliament. On a vertical level, prerogative powers are divided between the Commonwealth and the State Crowns, mirroring the federal division of powers in Australia. A characteristic feature of the Australian context is that important areas of the traditional prerogative powers have been confirmed by or transformed into statutory or constitutional provisions. While, for instance, royal assent (s 58 of the Constitution Act (Austl)) and the command of the armed forces (s 68) are expressly attributed to the executive, other traditional prerogative powers such as the one to issue passports have been codified and ‘fall within legislative rather than executive power’ (C Saunders 632). In terms of judicial review, the reasoning of the GCHQ case and the subsequent development have been followed by Australian courts (cf. Kirk 522 et seq).

17. The constitutional basis of the royal prerogative remains unclear, an issue forming part of a bigger debate about the scope, nature, and inter-relation of (inherent) executive powers under the Australian Constitution. The prerogative is commonly understood as forming part of the ‘executive power of the Commonwealth’ which Section 61 of the Constitution Act (Austl) vests in the Queen. Others categorize it as a source of executive power in its own (Ratnapala and Crowe 44). Some traditional prerogative powers, for instance relating to emergencies, could also be subsumed under a different part of Section 61, namely the power to ensure ‘the execution and maintenance of the Constitution’ (C...
Saunders 632). It is equally unclear whether Section 61 provides for ‘some larger source’ of inherent executive power (Black CJ in *Tampa* (2001) (Austl) at 30)—besides that derived from legislation or the prerogative. It is in this context that a so-called nationhood power is discussed as a ‘residual power derived from Australia’s nationhood’ (Ratnapala 46; Aroney et al 451–459). In *AAP* (1975) (Austl), Mason J understood this concept as ‘a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’. Themselves two contested concepts, it remains difficult to delineate the prerogative from the ‘nationhood power’—as well as from other inherent executive powers.

(b) Canada

18. In Canada, executive powers comprise both powers delegated by parliament and prerogative powers which are vested in the Queen (see ss 9 et seq of the Constitution of Canada: 1867 (as Amended to September 2008) (Can)). As part of the Canadian Constitution, the prerogative is constrained by the concept of responsible government and constitutional conventions. It is exercised by the Governor-General on the advice of the Prime Minister and his or her ministers who form part of the Federal Executive Council. The distribution of prerogative powers between the different levels of government in principle aligns with the federal division of powers in Canada (Forcese 159). Judicial review is accepted and arguably implicitly acknowledged in Section 2(1) of Canada’s Federal Courts Act of 1985 (cf Forcese 166). The review authority of courts is, in turn, subject to constitutional limitations barring courts from examining a case when this would overstep the role of the judiciary in a system of → separation of powers. This is likely the case in matters of high policy such as the making of treaties or the granting of honours which was held to be non-justiciable in *Black* (2001) (Can). In contrast, the → justiciability of the exercise of prerogative powers is indicated when the case involves individual rights or legitimate expectations (*Black* (2001) (Can) at 51) or other constitutional norms such as federalism (Forcese 165–168).

19. Certain parts of the prerogative have been transformed into written constitutional law (ss 55 (royal assent), 15 (command over armed forces), and 38 (prorogation of Parliament) Constitution (Can)) and/or have been subjected to constitutional conventions. Besides this, certain matters that have traditionally fallen under the prerogative have been made the subject of statutory regulation without entirely superseding or displacing the concurring prerogative powers. For instance, the Governor-General retains a limited prerogative of mercy, despite that pardons are usually granted by the Governor in Council on the basis of Sections 748 and 748.1 of the Criminal Code (Can). Similarly, the statutory regulation on the issuing of passports and related matters (Canadian Passport Order) is expressly designed not to affect the concurring prerogative (s 4(3)). Other classic areas of the prerogative have not been directly influenced by or transformed into statutory or constitutional provisions. The deployment of armed forces remains an unwritten prerogative power and rests exclusively with the executive. Parliament’s role is limited to debating the deployment according to a nonbinding tradition (Forcese 161). Under another traditional prerogative power, the Governor-General appoints the Prime Minister and other public officials, an act which is now, however, regarded rather as a constitutional convention (Forcese and Freeman 28).

(c) New Zealand

20. The royal prerogative features as part of New Zealand’s unwritten constitution. The executive powers of the Queen are principally exercised by the Governor-General (s 3(a) of the Letters Patent (NZ)). In parallel to the situation in Australia and Canada, constitutional conventions and the principle of responsible government oblige the Governor-General to act only according to ministerial advice except for in extraordinary circumstances. Formally the
advice is given by the Executive Council of New Zealand, factually by the Cabinet and the Prime Minister as members of the Executive Council. This ensures that the executive power is eventually exercised under some form of parliamentary accountability. Prerogative powers have been partly reflected in or transformed into written legal instruments. The Letters Patent, without being an exhaustive enumeration of prerogative powers, spells out some of the powers assigned to the Governor-General (appointing and dismissing inter alia ministers of the Crown (clause 10) and the prerogative of mercy (clause 11)). The Constitution Act of 1986 (NZ) vests the Crown with the power to summon, prorogue, and dissolve parliament which is exercised by proclamation of the Governor-General (s 18). Defence and wartime prerogatives including the deployment of armed forces continue to be vested in the Crown but are partly put on a statutory basis (ss 5–7 Defence Act of 1990 (NZ)). Finally, the Crown is, according to the prevailing understanding, not bound by statutes unless expressly provided for by the enactment (see s 27 of the Interpretation Act of 1999 (NZ); and Joseph 669–674).

21. The courts of New Zealand followed the change in case law initiated by the GCHQ case and deny an a priori non-reviewability of the exercise of prerogative powers (see Burt (1992) (NZ)). Judicial review of the prerogative may be required by the Bill of Rights Act of 1990 (NZ) when the exercise of prerogative powers engages the right to justice under its Section 27(1) (Joseph 720–721). In New Zealand, too, there have been calls to abolish the royal prerogative in its current form inter alia by putting it on a statutory footing. Proponents of the abolition argue that the unclear nature and scope lead to unnecessary difficulties and cause tensions with regard to the rule of law.

D. (Comparative) Assessment and Outlook

22. The prerogative(s) in the different realms share a common origin and history and largely follow the same principles, for instance, with regard to judicial review or the relationship between the prerogative and statutory regulation. Mirroring the emergence of independent legal systems in the realms, however, the prerogative turned from a (single) imperial prerogative (exercised by the British monarch on the advice of British ministers) to national prerogatives (exercised by or on the advice of ministers of the respective realm). This led to several differences between the realms and the United Kingdom, but also within the realms themselves, inter alia with regard to the levels of codification, the curtailment of prerogative powers, as well as the extent to which constitutional conventions govern the use of prerogative powers. In Australia, Canada, and New Zealand—and less so in the United Kingdom—important aspects of prerogative powers have been confirmed by or transformed into constitutional or statutory provisions. The royal prerogative has thus been curtailed to a considerable extent—varying with regard to the different systems. Major prerogative powers such as the making of treaties and the deployment of the armed forces have been exempted from this development and continue to exist as unwritten prerogative powers, though mostly subject to conventions. The systems of Australia, Canada, and New Zealand are particularly characterized by a (complicated) web of conventions, constitutional provisions, statutes, and (curtailed) prerogative powers, as well as different actors.

23. A characteristic feature common to the legal systems discussed is that the respective governments are, at least indirectly, accountable to parliament when exercising powers under the royal prerogative. Of course, this is a limited form of control as it presupposes neither ex ante consent nor ex post approval. Yet, for instance, the powers of the president of the United States are subject to a far more limited control by Congress, even though they were mostly drawn from British prerogative powers and are largely identical in scope.
24. What is furthermore common to the states discussed is the recurring criticism and the calls to abolish the royal prerogative by replacing it with statutory regulation. The critique refers to the unclear and obscure scope of the prerogative and corresponding tensions with the rule of law and civil liberties as well as to a lack of (direct) parliamentary control. Another strand of critique, on a more abstract level, concerns the nature and rationale of the prerogative. The residue of formerly absolute monarchical powers is perceived as an anachronistic remnant that is ill fitted in the context of contemporary constitutional legal systems. Along this line, some question the ‘continued existence of the royal prerogative as a meaningful juridical category within UK constitutional law’ or at least call for an adaptation of constitutional terminology (Poole (2018) 42, for instance, proposes the term ‘general executive powers of the government’). Others do not want to give up the royal prerogative, arguing that it still functions as a needed and ‘well developed, flexible and venerable’ category of executive powers (Cox (2012) 19). According to this view, the curtailed scope, the increased standard and intensity of judicial review, and the manifestations of the principle of responsible government (inter alia through conventions) have already established sufficient limitations on the use of the prerogative. This, it is argued, renders its abolishment unnecessary or even unwise.

25. Nevertheless, it seems plausible that a reform(ulation) could indeed reduce, at a minimum, terminological uncertainty. Still, with regard to the scope and content of inherent executive powers a certain degree of uncertainty, or flexibility, would most probably remain after a codification or reformulation of the prerogative. This is arguably even warranted by governmental necessities in the fields the prerogative applies to, especially in foreign affairs. Also, discretionary Crown powers would not necessarily be reduced in scope or subjected to a closer parliamentary control solely because they have been put on statutory footing.

26. Against this background it is useful to distinguish distinctive characteristics of the royal prerogative from more general features common to all constitutional systems. For instance, it is a common task of constitutional systems to find a balance between flexible governmental powers on the one side and parliamentary and judicial control of the government on the other. Apart from touching upon such questions of separation of powers, the royal prerogative has several characteristic features. These include the historical connotations that the concept ‘royal prerogative’ induces, its unclear framing, as well as its traditional raison d’être which was to confer exclusive and special powers upon the monarch. This special, historical legacy and its remnants have for a long time shaped the conceptual character and understanding of the royal prerogative—and to some extent continue to do so. At the same time, however, the royal prerogative is increasingly curtailed, subjected to judicial as well as parliamentary control, and thereby integrated into modern constitutional orders—a development that one may call ‘normalization’ (cf. Poole (2018)). This results in a tension between the historical roots, the arguably anachronistic framing, and the traditional special nature of the royal prerogative on the one hand, and the normalized and more restricted role that it assumes in today’s constitutional systems on the other. It is this tension that informs many of the current struggles which concern the scope, nature, and rationale of the royal prerogative and go beyond those common to other constitutional systems.

Select Bibliography

Poole, T, ‘The Strange Death of Prerogative in England’ (2018) 43.2 University of Western Australia Law Review 42.

Select Cases

Attorney-General v De Keyser’s Royal Hotel Ltd [1920] AC 508 (UK).
Bates’s Case (Case of Impositions) [1606] 2 St Tr 371 (Eng).
Black v Canada (Black v Chrétien) [2006] 199 DLR (4th) 228 (Can).
Burmah Oil v Attorney-General [1965] AC 75 (UK).
Campbell v Hall [1774] 1 Cowp 204 (UK).
Chandler v DPP, [1964] AC 763
Five Knights [1627] KB 3 How St Tr 1 (Eng).
GCHQ (Council of Civil Service Unions v Minister for the Civil Service) [1985] AC 374 (UK).
Kielley v Carsen [1842] 4 Moo PC 63, 13 ER 225 (UK).
Laker Airways v Department of Trade [1977] QB 643 (UK).
Proclamations [1611] KB 12 Co Rep 74 (Eng).
Prohibitions del Roy [1607] KB 12 Co Rep 67 (Eng).
R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] AC 513 (UK).
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (Bancoult No. 2) [2008] UKHL 61 (UK).
R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 (UK).
Ship Money [1637] KB 3 St Tr 825 (Eng).
R v Secretary of State for the Home Department, ex parte Beedassee [1989] COD 525 (UK).
R v Secretary of State for the Home Department, ex parte Bentley [1994] QB 349 (UK).
Tampa (Ruddock v Vadarlis) [2001] FCA 1329 (Austl).