

## THE NATURE AND PROBLEMS OF THE ROYAL PREROGATIVE IN THE ENGLISH LEGAL SYSTEM

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### Abstract

The concept and role of the Royal prerogative in the United Kingdom remain unclear and controversial. Particularly, prerogatives of Charles III, who was newly ascended to the throne, and notable cases such as R (Miller) v The Prime Minister have reignited discussions on the position of prerogatives.

This article explains the concept, position, and functions of prerogatives to underscore their importance in the English legal system, contrary to claims that they are anachronistic and dysfunctional. To achieve this, the article explores traditional and contemporary definitions to comprehend the concept and then address the origin and evolution of prerogatives throughout history, examining the features they possess today because of these changes. This helps classifying them and addressing the limiting factors. Finally, the article demonstrates how ministers, and the monarch are prevented from violating the law when exercising prerogatives. Thus, it asserts the existence of prerogatives will endure within the UK constitution.

### Keywords

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- The Royal prerogative • The personal prerogatives • The political prerogatives
- The British Monarchy • The United Kingdom

## İNGİLİZ HUKUK SİSTEMİNDE KRALİYET İMTİYAZININ MAHİYETİ VE PROBLEMLERİ

### Öz

Birleşik Krallık'ta Kraliyet imtiyazı kavramı ve rolü hala belirsiz ve tartışmalı olmaya devam eder. Özellikle tahta yeni çıkan III. Charles'ın imtiyazlı yetkileri ve R (Miller) v The Prime Minister gibi önemli davalar, kraliyet imtiyazlarının konumuyla ilgili ilişkin tartışmaları artırdı.

Bu makale, çağdışı ve işlevsiz oldukları yönündeki iddiaların aksine, imtiyazlar kavramını, konumunu ve işlevlerini açıklamayı ve bunların İngiliz hukuk sistemindeki önemini vurgulamayı amaçlamaktadır. Bu amaca ulaşmak için makale, Kraliyet imtiyazı kavramını anlamak için geleneksel ve çağdaş tanımları ele alır. Daha sonra imtiyazların kökeni ve tarihsel süreç içindeki değişimi ele alınacak ve bu değişikliklerin sonucunda bugün sahip oldukları özellikler incelenecektir. Bu analiz, onların sınıflandırılmasına ve onları sınırlandıran faktörlerin ele alınmasına yardımcı olacaktır. Son olarak makale bakanlar ve hükümdarın imtiyazları kullanırken yasayı ihlal etmesinin nasıl önlendiğini gösterecek. Böylece makale Kraliyet imtiyazlarının varlığının Birleşik Krallık anayasası içerisinde devam edeceğini ileri sürmektedir.

### Anahtar Kelimeler

- Kraliyet imtiyazı • Kişisel imtiyazlar • Politik imtiyazlar • Britanya Monarşisi
- Birleşik Krallık

## INTRODUCTION

With the accession of Charles III to the throne, the position and powers of the British monarch, which are crucial factors influencing their role, have once again become a topic of debate. This article aims to elucidate the historical development of the monarch's powers and their exercise within the framework of modern British democracy. As discussed below, these powers are commonly referred to as Royal prerogatives. Interestingly, while prerogatives originated as the king's powers in medieval times, they are also recognized as significant sources of English law. In fact, their presence is considered necessary for the effective functioning of the government. This unique power is, on one hand, defined as an anachronistic remnant of monarchical institutions, yet

on the other hand, it serves as a resource employed in the state administration within a democratic structure.

To comprehend the prerogative, this article will first address the concept by attempting to define it in historical and present-day terms. The aim is to demonstrate that the concept is not fixed; rather, it takes on different meanings and features throughout its historical development.

Secondly, the article will delve into the origin of the prerogative and its historical process during the transition from the absolute position of the monarch to the constitutional monarchy. This exploration aims to understand its current function and position, asserting that the prerogative powers of the constitutional monarchy in the democratic system must evolve within the legal system.

Subsequently, the features of prerogatives will be addressed to understand their current characteristics and the areas where they are employed by the government today. The article will attempt to classify prerogatives, facilitating a better analysis. This will also help in analysing the limitations of prerogatives, a significant issue in the British Constitution. Since most prerogatives are utilized by ministers, their use is highly questionable in terms of the rule of law and democracy. In particular, these limitations will be discussed concerning statutes, judicial review, and constitutional conventions.

Finally, the position of the monarch will be explored to analyse the differences between political and personal prerogatives. The article aims to prove that while the monarch had no say in the use of political prerogatives, the use of personal prerogatives was controversial for a long time. However, the article demonstrates that the personal prerogatives used by the monarch are now subject to the rules within the democratic legal system, addressing the most significant personal prerogatives: Royal Assent, The Dissolution of Parliament, and the Appointment of a Prime Minister.

In conclusion, prerogatives are an effective and useful resource that continues to exist within the British legal system and is used by the government to fulfil its functions.

## I. THE CONCEPT OF PREROGATIVE

One of the sources of authority in the UK constitution that empowers the British government is the Royal prerogative.<sup>1</sup> Although the concept of the royal prerogative can be simply explained as the powers of the monarch that originated from medieval times, its nature and scope are quite problematic today. This article will attempt to describe a concept that is difficult to express plainly. There are two reasons for this difficulty: firstly, there is no certain definition of the royal prerogative accepted by all. Secondly, the definition of the royal prerogative may have changed in the historical process.<sup>2</sup> To overcome this, we will initially provide prominent scholars' definitions to understand the concept in the traditional sense. Then, we will address current definitions to see how the concept has developed and is comprehended today. This process is particularly relevant to the British Constitution, which is unwritten and uncodified, as the concept of royal prerogative is based on a historical process that continues to develop under UK Common Law.

One of the most well-known definitions of prerogative belongs to Dicey: "the remaining portion of the Crown's original authority, and it is therefore ... the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers." He also defined the prerogative as 'the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.'<sup>3</sup> Another well-known definition is by Blackstone: 'in its nature singular and eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.'<sup>4</sup>

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<sup>1</sup> TOMKINS, Adam. *Public Law*. Oxford ; New York: Oxford University Press, USA, 2003, p. 81.

<sup>2</sup> SUNKIN, Maurice – PAYNE, Sebastian (eds.). *The Nature of the Crown - A Legal and Political Analysis*. Oxford ; New York: OUP Oxford, 1999, p. 78.

<sup>3</sup> DICEY, Albert V. *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Fund Inc, 1982, p. 282.

<sup>4</sup> BLACKSTONE, Sir William. *Commentaries on the Laws of England*. London, 1765, p. 232.

Dicey's definition is broader and vaguer compared to Blackstone's. Blackstone asserted that the royal prerogative encompasses actions only the monarch can undertake. In other words, activities that ordinary citizens can do, such as lending money or employing individuals, are not considered prerogative. On the other hand, actions like declaring war or creating new peerages were exclusively within the monarch's purview and were thus deemed prerogative.<sup>5</sup>

Furthermore, Blackstone emphasized that the prerogative is not unlimited; rather, it constitutes a closed and identifiable list specific to governmental issues.<sup>6</sup> In contrast, Dicey's definition, which holds that everything the government can do in accordance with the law and enforceable by the courts is prerogative if its source is not statutory, is generally accepted.<sup>7</sup>

The Government possesses certain administrative powers that may be classified as prerogative according to Dicey's definition but not according to Blackstone's. According to Dicey, powers of the Crown not explicitly granted by statute are considered prerogative. In contrast, Blackstone's definition confines the prerogative to the unique superiority possessed by the king, surpassing all other individuals.<sup>8</sup>

Dicey's perspective includes administrative actions shared by the Crown and private individuals (or another corporate entity), such as engaging in contractual agreements and hiring personnel, which would not fall under Blackstone's definition.<sup>9</sup> Although Dicey's definition is somewhat vague due to the explanation of 'the residue of discretionary or arbitrary authority left in the hands of the Crown,' it can be understood

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<sup>5</sup> **LOVELAND**, Ian. *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*. Oxford University Press, 2018, p. 83.

<sup>6</sup> **TOMKINS**, Adam. *Public Law*, p. 81.

<sup>7</sup> **LOVELAND**, Ian. *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*, p. 83.

<sup>8</sup> **BLACKSTONE**, Sir William. *Commentaries on the Laws of England*, p. 239.

<sup>9</sup> **BARTLETT**, Gail – **EVERETT**, Michael. The Royal Prerogative. [online]. 2017, p. 11 [accessed 2019-04-23]. Available at: <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03861>>

as comprising three key concepts: the residual, discretionary or arbitrary authority, and the Crown.<sup>10</sup>

As a result of the nature of residue, it is challenging to provide precise information about when these prerogatives were granted. However, it is evident that in the past, there were prerogatives demonstrating the authority of the King. Although the power of the King has diminished over time, these prerogatives have endured as a residue. Historically, prerogative powers exclusively belonged to the Crown, hence the term 'Royal prerogative.' Through a lengthy process, many prerogatives transitioned from the King to the prime minister and ministers. Nonetheless, some prerogatives remain within the exclusive purview of the monarch.

Originally, the source of prerogative was the arbitrary authority of the king, unbound by statutes, courts, or other means. Over time, limitations were imposed to control the arbitrary powers of the king.<sup>11</sup> In essence, the concept of the royal prerogative has evolved as a result of the historical process.

In the case of *R (Miller) v Secretary of State* in 2017, the judges of the Supreme Court described the prerogative as encompassing the 'residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation.'<sup>12</sup> The concept of the royal prerogative denotes the allocation of certain powers, rights, privileges, and immunities to the Crown. However, in contemporary practice, these prerogatives are predominantly exercised by government ministers.<sup>13</sup>

Today, the government employs prerogatives when exercising its executive power to govern the state. As a source of legal power for the government, prerogatives hold significant importance since they do not

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<sup>10</sup> **MARKESINIS**, B. S. The Royal Prerogative Re-Visited. *The Cambridge Law Journal*. 1973, vol. 32, no. 2, p. 287.

<sup>11</sup> **MARKESINIS**, B. S. *The Royal Prerogative Re-Visited*.

<sup>12</sup> *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [online]. 2019 [accessed 2023-11-06]. Available at: <[www.supremecourt.uk/decided-cases/index.html](http://www.supremecourt.uk/decided-cases/index.html)>

<sup>13</sup> **BEINLICH**, Leander. Royal Prerogative. In: *Oxford Constitutions*. DOI: 10.1093/law-peccol/e773.013.773

originate from statutes.<sup>14</sup> They are grounded in common law, enabling their implementation without the need for approval from Parliament.<sup>15</sup> Additionally, the existence and scope of power are evidently governed by common law.<sup>16</sup>

The reason for the existence of prerogative in the UK lies in the absence of a written constitution. In countries with a written and codified constitution, the constitution serves as the primary source of the state's legitimacy, outlining the basic functions and powers of the government. However, as the United Kingdom lacks a written constitution, the prerogative of the monarch is used as a source of legitimacy.

## II. ORIGIN AND HISTORICAL DEVELOPMENT

To comprehend the scope and nature of the royal prerogative authority, it is imperative to examine the historical transition from an absolute monarchy to the contemporary constitutional monarchy in the United Kingdom.

During the historical eras of Anglo-Saxon and Norman rule, the English King wielded significant power, exercising control over the legislative, executive, and judicial domains. These powers were justified by the necessity to safeguard the kingdom from external threats and promote the public good.<sup>17</sup> Through a protracted historical process, the absolute monarch gradually transferred many powers to various institutions and actors, including parliament and ministers, resulting in

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<sup>14</sup> **MASTERMAN**, Roger – **MURRAY**, Colin. *Constitutional and administrative law*. Cambridge, United Kingdom ; New York, NY: Cambridge University Press, 2022, pp. 37–38.

<sup>15</sup> **BLACKBURN**, Robert. *King and Country: Monarchy and the Future King Charles III*. London: Politico's Publishing Ltd, 2006, p. 80.

<sup>16</sup> *The governance of Britain: review of the executive royal prerogative powers: final report* [online]. Great Britain Ministry of Justice, 2009, p.7. Available at: <<https://data.parliament.uk/DepositedPapers/Files/DEP2009-2493/DEP2009-2493.pdf>>

<sup>17</sup> **KEIR**, D.L. – **LAWSON**, F.H. *Cases in Constitutional Law*. Oxford University Press, 1979, p. 70.; **BARTLETT**, Gail – **EVERETT**, Michael. *The Royal Prerogative*, p. 21.

today's constitutional monarchy structure. This structure features a limited monarch who governs in conformity with the constitution.<sup>18</sup>

Three significant constitutional events—the Magna Carta (1215), the Civil War (1642-1649), and the Glorious Revolution (1688-1689)—played significant roles in curtailing the powers of the monarch.<sup>19</sup> These events aimed to limit the misuse or abuse of certain prerogatives by the monarch. In the 17th and 18th centuries, the relationship between the monarch and parliament was defined by the monarch's prerogatives.<sup>20</sup> In essence, parliament sought to prevent the monarch from acting arbitrarily by constraining their prerogative powers.

The issue of prerogative underwent two distinct phases. The first phase unfolded during the 17th-century conflict, culminating in the enactment of the Bill of Rights in 1689. This legislation deemed certain specific applications and misuses of prerogative as unlawful. The subsequent phase involved the evolution of accountable governance and the establishment of a constitutional monarchy.<sup>21</sup> Scholars argue that a 'preservation revolution' in the seventeenth century prevented a destructive revolution experience in the nineteenth century.<sup>22</sup> Consequently, monarch's prerogatives were not abolished but gradually transferred to ministers over time.

Furthermore, in the 19th and 20th centuries, the principle emerged that most prerogatives should be exercised only on the advice of ministers. Unlike the monarch, these ministers, being accountable to

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<sup>18</sup> **BOGDANOR**, Vernon. *The Monarchy and the Constitution*. Oxford: Oxford University Press, 1998, p. 1.

<sup>19</sup> **NORTON**, Philip. THE GLORIOUS REVOLUTION OF 1688 ITS CONTINUING RELEVANCE. *Parliamentary Affairs*. 1989, vol. 42, no. 2, p. 135.

<sup>20</sup> **CRAIG**, Paul. Prerogative, Precedent and Power. In: **FORSYTH**, Christopher – **HARE**, Ivan (eds.). *The Golden Metwand and the Crooked Cord Essays in Honour of Sir William Wade QC*. Oxford University Press, 1998, p. 66. DOI: 10.1093/acprof:oso/9780198264699.001.0001

<sup>21</sup> **BRADLEY**, A. W. – **EWING**, K. D. – **KNIGHT**, Christopher. *Constitutional and administrative law*. Harlow, England ; New York: Pearson Education Limited, 2022, p. 288.

<sup>22</sup> **BOGDANOR**, Vernon. The Monarchy and the Constitution. *Parliamentary Affairs*. 1996, vol. 49, no. 3, p. 409.



parliament, align with democratic principles in terms of accountability and legality. Notably, the monarch has retained certain prerogative powers, such as the Royal Assent and the appointment and dismissal of ministers, as discussed below.

In essence, while the monarchy hasn't been abolished in England, it has transformed into a democratic and modern institution by delegating the majority of the monarch's prerogatives to ministers or having ministers exercise them directly. Today, over 95 percent of these prerogatives are used by ministers.<sup>23</sup> Although termed as 'advice of ministers,' in practice, the monarch is obliged to adhere to them. Failure to do so may lead to constitutional and political crises, potentially making the monarchy's existence controversial among the public and political actors.

Historically, the principle that the monarch acts upon the advice of their ministers was established with the intention of safeguarding the interests of parliament and the public against the monarch's discretionary prerogative powers. In contemporary times, the role of the sovereign has undergone a significant transformation, primarily aimed at preventing the monarch from becoming involved in political activities.<sup>24</sup> Instead, the use of prerogative power by ministers, who are accountable to parliament and the public, serves to make the monarch neutral and apolitical, ensuring accountability.

### III. THE FEATURES OF PREROGATIVES

The concept of prerogative powers traces its roots back to the medieval era, where the monarch assumed a leadership role in the kingdom. However, it is crucial to emphasize that prerogative powers are not confined to the medieval period. Despite Lord Reid's characterization of the prerogative in 1965 as 'a relic of a past age,' a substantial portion of governmental operations continues to be carried out through the exercise of prerogative power. In contemporary times, the predominant utilization

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<sup>23</sup> Ibid., p. 414.

<sup>24</sup> **BOGDANOR**, Vernon. The Basic Constitutional Rules: Influence and the Prerogative. In: **BOGDANOR**, Vernon. *The Monarchy and the Constitution*. Oxford University Press Oxford, 1997, p. 66. DOI: 10.1093/0198293348.003.0003

of prerogative powers occurs through Ministers, either autonomously or through the advice they provide to the Sovereign, who is constitutionally obligated to adhere to such advice.<sup>25</sup> This underscores the evolution of the features of prerogatives over time.

Rodney Braizer summarizes the features of legal prerogatives as follows: Firstly, prerogatives are based on law, with most originating from common law, while some are influenced by acts of parliament. Some prerogatives may be anachronistic, lacking a modern function, such as rights over whales. The non-use of certain prerogatives for an extended period does not negate their existence; they may be invoked in emergencies. Courts or parliament can restrict or abolish prerogatives if deemed necessary. Some prerogatives are indispensable for the government to function, with a reciprocal influence between public interest and prerogatives.<sup>26</sup>

Crucially, certain realms of governmental engagement remain essential for the efficient functioning of the state, historically and presently, and are either unaddressed or only partially addressed by legislation. Activities such as the management of diplomatic affairs and engagement in warfare are inherently more suitable for ministers, reflecting the ongoing relevance of prerogative powers in contemporary governance.<sup>27</sup>

Furthermore, in times of emergency, such as war or terrorist attacks, ministers can wield prerogative powers more broadly.<sup>28</sup> As Lord Reid stated, 'the prerogative certainly covers doing all those things in an emergency which are necessary for the conduct of war.'<sup>29</sup> Additionally,

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<sup>25</sup> *The Cabinet Manual A guide to laws, conventions and rules on the operation of government* [online]. 2011 [accessed 2022-12-22]. Available at: <<https://assets.publishing.service.gov.uk/media/5a79d5d7e5274a18ba50f2b6/cabinet-manual.pdf>> Para 1-5.

<sup>26</sup> **BRAZIER**, Rodney. Constitutional Reform and the Crown. In: SUNKIN, Maurice – PAYNE, Sebastian (eds.). *The Nature of the Crown*. Oxford University Press, 1999, p. 347. DOI: 10.1093/acprof:oso/9780198262732.003.0013

<sup>27</sup> *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*.

<sup>28</sup> **BARTLETT**, Gail – **EVERETT**, Michael. *The Royal Prerogative*, pp. 10–11.

<sup>29</sup> *Burmah Oil Company (Burma Trading) Ltd. v Lord Advocate*, 1964.

the Civil Contingencies Act 2004 has granted extensive emergency powers, including the ability to seize property.<sup>30</sup> Moreover, the Review of the Executive Royal Prerogative in 2009 emphasized that 'Prerogative powers can provide flexibility in dealing with specific or exceptional circumstances that are not covered by statutory provisions.'

Compiling a comprehensive inventory of prerogative powers poses a significant challenge. This is due to the broad spectrum of topics encompassed by prerogative, and the lack of legal clarity concerning situations where archaic authorities have not been exercised in today's context. According to constitutional scholars Bradley, Ewing, and Knight, the contemporary utilization of prerogative powers can be succinctly outlined in key domains:<sup>31</sup>

1. Powers relating to the legislature

- The monarch possesses certain legislative prerogative rights, including the summoning and proroguing of Parliament.

2. Powers relating to the judicial system:

- This includes the act of granting pardons to those convicted of crimes and remitting or decreasing their sentences.

3. Powers relating to foreign affairs:

- The government manages international relations through prerogative powers, including the acquisition of additional territory and issuing passports.

4. Powers relating to treaties:

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<sup>30</sup> PARTICIPATION, Expert. *Civil Contingencies Act 2004* [online]. Statute Law Database, [accessed 2023-12-25]. Available at: <<https://www.legislation.gov.uk/ukpga/2004/36/contents>>

<sup>31</sup> **BRADLEY, A. W. – EWING, K. D. – KNIGHT, Christopher.** *Constitutional and administrative law*, pp. 289–298.

- Despite arguments for parliamentary involvement,<sup>32</sup> the executive currently exercises the right to make international agreements through prerogative power.

5. Powers relating to war and the armed forces:

- The declaration of war is a significant prerogative power, and the monarch holds the position of commander-in-chief of the armed forces through both prerogative and statutory authority.

6. Patronage, Appointments, and Honors:

- The King, on ministerial advice, appoints judges, ministers, and public officeholders, as well as creates peers and confers honors and decorations.

7. Immunities and Privileges:

- Statutes generally do not impose obligations on the Crown unless explicitly stated or clearly implied.

8. The prerogative in times of emergency:

- During emergencies, the executive utilizes prerogative powers with exceptional authority, including actions such as the confiscation or occupation of private property in times of war or major terrorist actions.

9. Miscellaneous Prerogatives:

- Historical prerogative rights, now predominantly governed by statute, include aspects such as mining precious metals, granting franchises, and the right to treasure trove.

#### IV. THE CLASSIFICATION OF PREROGATIVES

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<sup>32</sup> *R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)* [online]. 2020 [accessed 2022-12-12]. Available at: <<https://www.supremecourt.uk/cases/uksc-2019-0135.html>>; *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*.

Classifying prerogatives is a challenging task, and various attempts have been made to categorize them. In 2004, the Public Administration Select Committee identified three categories of prerogatives:<sup>33</sup>

a) The Sovereign's constitutional prerogatives:

- These are the discretionary powers of the Sovereign that have endured from the past to the present. They include the right to advise, encourage, and warn Ministers; appoint the Prime Minister and other Ministers; and assent to legislation.

b) The legal prerogatives of the Crown:

- Resulting from the principle that 'the Crown can do no wrong,' these prerogatives are not bound by statute except where express words or necessary implication dictate. Examples include the right to whales and swans and the right to impress men into the Royal Navy.

c) Prerogative executive powers:

- Originally belonging to the monarch, these powers are now exercised by government ministers on behalf of the Sovereign due to constitutional conventions. Examples include making and ratifying international treaties, conducting diplomacy, governing overseas territories, and deploying the armed forces.

Additionally, the Ministry of Justice expanded the classification to include archaic prerogative powers in its Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report. These archaic powers are either marginal or no longer relevant today.<sup>34</sup> Recognizing the complexity introduced by multiple categories, there is a growing consensus to simplify the classification. Presently, prerogatives are commonly accepted to fall into two groups: political (general prerogative)

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<sup>33</sup> *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament Fourth Report of Session 2003–04* [online]. House of Commons Public Administration Select Committee, 2004 [accessed 2022-12-24]. Available at: <<https://publications.parliament.uk/pa/cm200304/cmsselect/cmpublicadm/422/422.pdf>> Para 5-8

<sup>34</sup> *The governance of Britain: review of the executive royal prerogative powers: final report*, p. 6.

and personal prerogatives.<sup>35</sup> This simplified approach aids in better understanding and clarity.

A distinct division exists between political (general prerogative) and personal prerogatives. The former encompasses prerogatives utilized by the prime minister, ministers, and other officials on behalf of the monarch, constituting the majority of prerogatives. These are primarily related to the governance of the state, covering various essential domains: government and the civil service (Involving power over the civil service, including the appointment and regulation of most civil servants.), justice system and law and order (Encompassing prerogatives such as the prerogative of Mercy and the Power to keep the peace.), powers relating to foreign affairs (Including governance of Overseas Territories and making and ratifying international treaties.), powers relating to armed forces, war, and times of emergency (Involving the right to make war or peace, deployment and use of armed forces overseas, and requisitioning of ships or seizure of neutral property in times of war.) and miscellaneous prerogatives (Covering diverse areas such as mining precious metals, establishing corporations by Royal Charter, amending existing Charters, and powers concerning the visitatorial function of the Crown.)<sup>36</sup>

On the flip side, personal prerogatives refer to those prerogatives exclusively exercisable by the monarch.<sup>37</sup> According to Jennings, there are certain prerogative powers that the monarch exercises independently and can aptly be termed personal prerogatives.<sup>38</sup> While the specific prerogatives falling into this category may not be entirely clear, what is certain is that the monarch doesn't require the approval of ministers to exercise these personal prerogatives, such as the appointment of a prime minister.<sup>39</sup> Bogdanor further emphasized that even though the scope and

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<sup>35</sup> LEYLAND, Peter. *The constitution of the United Kingdom: a contextual analysis*. Gordonsville: Hart Publishing, an imprint of Bloomsbury Publishing, 2021, p. 84.

<sup>36</sup> *The governance of Britain: review of the executive royal prerogative powers: final report*, pp. 31–32.

<sup>37</sup> LEYLAND, Peter. *Constitution of the United Kingdom: A Contextual Analysis*. Hart Publishing, 2012, pp. 87–88.

<sup>38</sup> JENNINGS, Ivor. *Cabinet Government*. London: Cambridge University Press, 1969, p. 394.

<sup>39</sup> *Ibid.*

extent of these personal prerogatives remain unclear, it may be inherent in the notion of constitutional monarchy that they remain undefined.<sup>40</sup>

This ambiguity is especially prevalent in countries like Britain, lacking a codified and written constitution. While the absence of a codified constitution doesn't guarantee accuracy in the exercise of prerogatives, the possibility of clarity is higher.<sup>41</sup>

Among the personal prerogatives, three hold particular significance due to their substantial impact on British politics: a) Prime ministerial appointment b) Royal Assent to legislation and c) Dissolution of Parliament. Blackburn defines these as direct legal prerogatives of the monarch, also known as the royal prerogative. He characterizes the royal prerogative as 'the network of inherent powers, privileges, and immunities of the Crown, which have existed since time immemorial by virtue of past de facto judicial recognition.'<sup>42</sup> While the monarch is the sole authority to exercise these royal prerogatives personally, other prerogatives, such as treaty-making and the deployment of military forces overseas, are typically exercised by ministers.<sup>43</sup> It is essential to note that while it might seem that the monarch has unlimited discretion in using these personal prerogative powers, in practice, expectations exist for the monarch to adhere to established rules, including conventions, the rule of law, democracy, and the constitution.

## V. THE LIMITATIONS OF PREROGATIVES

Today, the exercise of prerogatives is subject to several limitations. Firstly, statutory power takes precedence over prerogative authority. According to the principle of parliamentary sovereignty, Parliament holds the authority to restrict and limit prerogative powers.<sup>44</sup> In cases of contradiction between an Act of Parliament and a prerogative on the same matter, the statutory law prevails, as seen in historical instances like the

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<sup>40</sup> **BOGDANOR**, Vernon. *The Monarchy and the Constitution*, p. 75.

<sup>41</sup> *Ibid.*

<sup>42</sup> **BLACKBURN**, Robert. *King and Country*, p. 80.

<sup>43</sup> *Ibid.*

<sup>44</sup> **LEYLAND**, Peter. *The constitution of the United Kingdom*, p. 84.

1611 Case of Proclamations<sup>45</sup> and the modern case of Attorney-General v De Keyser's Royal Hotel Ltd. The latter affirmed that prerogatives are not applicable when superseded by legislative power.<sup>46</sup>

Furthermore, if a statute grants specific powers to ministers, prerogative powers cannot be invoked to circumvent the enacted legislation. This principle was established in the case of Fire Brigades Union, emphasizing that the exercise of prerogative power is prohibited when it contradicts established legislation, even if that legislation is not yet in force.<sup>47</sup> The case of R (Miller) v Secretary of State underscored the capacity of statutory law to modify and eliminate prerogative powers, affirming that "Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses."<sup>48</sup>

Parliament employs three main avenues to limit prerogatives:<sup>49</sup> a. Legislation: Parliament can change or abolish prerogatives through Acts of Parliament. b. Accountability to Legislature: Under the parliamentary system, ministers are accountable to Parliament. The legislature can seek explanations from the government regarding its policies, express dissatisfaction through votes of no confidence, and force ministerial resignations for departmental problems. However, it should be noted that ministers are accountable to Parliament for the exercise of these powers, meaning they utilize prerogative powers without explicit permission from Parliament.<sup>50</sup> c. Approval of Expenditure by Parliament:

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<sup>45</sup> *Case of Proclamations*. 1611.; BARTLETT, Gail – EVERETT, Michael. *The Royal Prerogative*, p. 6.

<sup>46</sup> LEYLAND, Peter. *The constitution of the United Kingdom*, p. 84.

<sup>47</sup> *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, 1995. DOI: 10.1093/he/9780191995729.003.0042

<sup>48</sup> *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*.

<sup>49</sup> *The governance of Britain: review of the executive royal prerogative powers: final report*, pp. 8–9.

<sup>50</sup> *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament Fourth Report of Session 2003–04*, p. 8. Some argue that Parliament should have a more involved role in authorizing the use of prerogatives by ministers, especially in matters such as going to war, issuing passports, and negotiating treaties. See more information: *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament Fourth Report of Session 2003–04*



Parliament's control over public finances provides another avenue for oversight.

However, it's crucial to note that if the government holds a majority in Parliament, which is often the case under a two-party system, accountability of ministers for the use of prerogatives is less likely to be enforced by Parliament.

In particular, the supremacy of Parliament requires that the monarch uses personal prerogatives in certain ways. Otherwise, the monarch can bypass the Parliament, which violates the principle.<sup>51</sup> These ways include the appointment of ministers by the monarch according to the wishes of the Prime Minister, the dissolution of Parliament in line with requests, the granting of Royal Assent when advised by ministers, and finally, the appointment of the Prime Minister according to the arithmetic of the Parliament; a person who is a member of the House of Commons and can have its confidence should be appointed.

The second limitation is judicial review. Judicial review serves as a critical check on the exercise of prerogative powers. As ministers increasingly utilize prerogatives in the modern context, the judiciary plays a vital role in scrutinizing the legality, scope, and proper exercise of these powers. Judicial intervention ensures clarity in the application of prerogatives, resolves potential issues arising from their use by ministers, and helps delineate traditional prerogative powers and their exercise within the contemporary framework of government.<sup>52</sup> This involvement of the judiciary contributes to accountability and the proper functioning of the constitutional framework.

In the historical context, the exercise of prerogative powers by ministers was immune to judicial review. Courts were limited to

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<sup>51</sup> **BRAZIER**, Rodney. The Monarchy. In: BOGDANOR, Vernon (ed.). *The British Constitution in the Twentieth Century*. British Academy, 2004, p. 76.

<sup>52</sup> **LOUGHLIN**, Martin. The State, the Crown and the Law. In: SUNKIN, Maurice – PAYNE, Sebastian (eds.). *The Nature of the Crown*. Oxford University Press, 1999, p. 33. DOI: 10.1093/acprof:oso/9780198262732.003.0003

determining the existence, nature, and limits of prerogatives,<sup>53</sup> without the authority to challenge the ministers' use of these powers for their benefit. However, a significant shift occurred with the Council of Civil Service Unions v Minister for the Civil Service (the GCHQ) Case, acknowledging the potential for judicial scrutiny over the exercise of prerogative powers by ministers.<sup>54</sup>

The GCHQ case marked a significant decision, affirming that the judiciary could review the use of prerogative powers by ministers using ordinary grounds.<sup>55</sup> Despite this acknowledgment, the ruling also identified specific instances where the courts couldn't review the exercise of these powers, such as the appointment of ministers, matters related to national security, and the making of international treaties.<sup>56</sup> Subsequent cases, like *R. v Secretary of State in 1993*,<sup>57</sup> reiterated that certain issues, such as foreign and security policy decisions, were beyond the court's purview. In a similar categorization noted by De Smith, it is acknowledged that certain issues are not subject to legal process. These include a. Questions of pure international law or treaty-making. b. The prerogative power of royal assent to legislation. and c. Cases where the power has been exercised personally by the Sovereign.<sup>58</sup>

Today, there is a significant trend advocating that these specific prerogative powers should also be subject to judicial review.<sup>59</sup> In fact, it

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<sup>53</sup> WADE, William. The Crown, Ministers and Officials: Legal Status and Liability. In: SUNKIN, Maurice – PAYNE, Sebastian (eds.). *The Nature of the Crown*. Oxford University Press, 1999, p. 29. DOI: 10.1093/acprof:oso/9780198262732.003.0002

<sup>54</sup> *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374*, [online]. 1985 [accessed 2023-12-25]. Available at: <<https://www.oxfordlawtrove.com/display/10.1093/he/9780191995729.001.0001/he-9780191995729-chapter-13>>It is important to highlight that the judicial review application ultimately did not succeed. The Prime Minister provided persuasive evidence to justify the lack of sufficient consultation, citing legitimate concerns over national security risks.

<sup>55</sup> LEYLAND, Peter. *The constitution of the United Kingdom*, p. 86.; BARTLETT, Gail – EVERETT, Michael. *The Royal Prerogative*, p. 28.

<sup>56</sup> BRAZIER, Rodney. *Constitutional Reform and the Crown*, p. 359.; LEYLAND, Peter. *The constitution of the United Kingdom*, p. 86.

<sup>57</sup> *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. Lord Rees-Mogg*. 1993.

<sup>58</sup> WOOLF, Harry et al. *De Smith's judicial review*. London: Sweet & Maxwell, 2013.

<sup>59</sup> LEYLAND, Peter. *The constitution of the United Kingdom*, p. 86.

can be argued that the court can decide whether the exercise of prerogative power by ministers is compatible with constitutional principles, as seen in the *Burmah Oil* case.<sup>60</sup> It should also be noted that while the court can review prerogatives, it cannot create new ones.<sup>61</sup> Additionally, it can be said that, since the *GCHQ* case, courts have become increasingly willing to scrutinize the use of these powers, as demonstrated in the *Bentley and Fire Brigades Union* cases.<sup>62</sup> Finally, in the *British Broadcasting Company v Johns* case, the court decided that prerogative powers are incapable of being expanded.<sup>63</sup>

Another limitation on the use of prerogatives is constitutional conventions, which play a significant role in the British Constitution. While prerogatives grant certain powers to ministers and the monarch, conventions serve as guidelines on how to exercise these rights. As Dicey noted, constitutional conventions aim to regulate the use of prerogative powers by ministers and the monarch,<sup>64</sup> preventing abuse by restricting powerholders. This means that even though they possess power, they are obligated to use it in specific ways, such as in the appointment of the Prime Minister, as addressed below.

Constitutional conventions have been established to limit specific prerogatives, thus facilitating the functioning of the government.<sup>65</sup> In fact, there is an ongoing debate about whether the exercise of prerogatives should be constrained by conventions.

In general, prerogative power derives from convention regardless of whether a state has a codified constitution. This is also true for the UK, which lacks a codified constitution. While some argue that the position and actions of the sovereign should remain consistent with past precedents (conventions), determining the sovereign's position and role in advance is challenging. According to the second argument, it would

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<sup>60</sup> *Burmah Oil Company (Burma Trading) Ltd. v Lord Advocate*.

<sup>61</sup> *The governance of Britain: review of the executive royal prerogative powers: final report*, p. 8.

<sup>62</sup> CRAIG, Paul. *Prerogative, Precedent and Power*, pp. 84–85.

<sup>63</sup> BARTLETT, Gail – EVERETT, Michael. *The Royal Prerogative*, p. 31.

<sup>64</sup> DICEY, Albert V. *Introduction to the Study of the Law of the Constitution*, p. 283.

<sup>65</sup> LEYLAND, Peter. *The constitution of the United Kingdom*, p. 83.

not be right or practical to limit the sovereign based on precedents. The sovereign should act as required by the conditions of a particular situation, as each situation may have unique features that cannot be predicted in advance.<sup>66</sup> Lord Esher supported this argument by stating, "the principle is entirely dependent upon the circumstances in which the prerogative is used."<sup>67</sup>

## VI. THE MONARCH'S POSITION REGARDING PREROGATIVE

The monarchy transformed from an actively engaged political role to that of a uniting, impartial, and dignified figure, embodying the nation. Under constitutional monarchy, the prerogative was defined as the residue of the royal authority of the monarch, but this does not imply that these powers are neither exercised nor outdated. They still play important and practical roles in the English constitution, enabling the government to work effectively and granting discretionary powers to the executive.<sup>68</sup>

There are two ways in which this occurs: ministers can directly exercise prerogative power without the consent of the monarch or through ministerial advice and the consent of the monarch. When prerogatives are exercised by ministers, the duty of the monarch is clear: they must constitutionally accept the advice<sup>69</sup> and refrain from making partisan public statements about political disputes unless approved or advised by the government.

Concerning the personal prerogative power of the monarch, there is a challenge in striking a balance between the necessity for the monarch to be politically neutral and the undetermined discretion in exercising their prerogative power. It is evident that the neutrality of the monarch is essential, but there is also the issue of the monarch's discretion, which is not predefined. According to Bogdanor, reconciliation can be achieved by having the monarch, when exercising discretionary powers, refrain from acting in a partisan manner and avoid controversial situations that

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<sup>66</sup> **BOGDANOR**, Vernon. *The Monarchy and the Constitution*, pp. 75–76.

<sup>67</sup> *Ibid.*, p. 75.

<sup>68</sup> **SUNKIN**, Maurice – **PAYNE**, Sebastian (eds.). *The Nature of the Crown - A Legal and Political Analysis*, p. 87.

<sup>69</sup> **BARTLETT**, Gail – **EVERETT**, Michael. *The Royal Prerogative*, p. 5.

necessitate the intervention of political actors.<sup>70</sup> He further notes that in the twentieth century, the monarch has played a more formal and symbolic role in using personal prerogatives. Two reasons account for this: first, the two-party system minimizes occasions where the monarch must exercise their power because practices and conventions in this system are clear and uncontroversial. The second reason is that since 1914, there have been no extraordinary situations requiring the monarch's intervention. In the past, the monarch had been in a position to cooperate, mediate between political parties, and support governments during emergency situations. However, due to changes in political life, there is no longer a need for monarch intervention.<sup>71</sup>

The likelihood of encountering problems arises when there is a desire to use the personal prerogatives of the monarch alone. Some argue that, while the monarch usually acts according to the advice of ministers, they do not need to follow ministerial advice in emergency cases involving personal prerogatives or reserve powers, such as the dissolution of Parliament and the dismissal of ministers.<sup>72</sup> This viewpoint aligns with the traditional approach defended by scholars, such as Dicey and Jennings, who argued that the monarch should defend constitutional democracy when necessary.<sup>73</sup> However, this view is problematic for several reasons.

Firstly, there is no clear definition of what constitutes a constitutional emergency case. Events like war, terrorist attacks, and political crises could be considered examples. Refusing ministerial advice requires two conditions: a constitutional emergency and the necessity for the monarch to reject ministerial advice. These two requirements have not been met for a long time, leaving uncertainty about how it operates under modern democracy. The second issue is that even if it is accepted that these two criteria are met, there is no clear indication that the monarch can act better than ministers. Ministers are accountable to various entities, including the parliament and the people, while the monarch is

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<sup>70</sup> **BOGDANOR**, Vernon. *The Monarchy and the Constitution*, pp. 75–78.

<sup>71</sup> *Ibid.*, pp. 77–78.

<sup>72</sup> **BRAZIER**, Rodney. *The Monarchy*, pp. 81–82.

<sup>73</sup> **BOGDANOR**, Vernon. *The Basic Constitutional Rules*, pp. 76–77.

theoretically unaccountable. Consequently, it is generally accepted today that, even in emergencies or crises, the monarch should not act according to personal wishes but should follow the advice of ministers. Otherwise, it can be considered that the monarch can be seen as the final authority over constitutional issues.<sup>74</sup> It is also argued that if ministers abuse their powers, the judiciary can intervene to resolve the issue under the rule of law, especially after the establishment of the Supreme Court in 2009.

The absence of a codified constitution is considered advantageous<sup>75</sup> in preventing an ambitious monarch from exercising such power by citing previous examples. Today, the monarch cannot rely on past examples but must act on a case-by-case basis, guided by modern conventions. Additionally, ensuring the impartiality of the monarch is a crucial aspect of the British government, requiring them not to take political actions.<sup>76</sup> As Bagehot stated, the monarch occupies the dignified part of the British constitution rather than the effective part.<sup>77</sup> Therefore, it is deemed useful to prevent the monarch from exercising personal prerogatives, even in emergency cases.

Furthermore, Blackburn argues that the claim that the monarch can act freely is challenging to defend due to being outdated and misconceived. When Jennings presented his opinions in the 1930s, the social and political landscape was different from today, with a society based on class distinctions and an active role for the monarch in political life. Therefore, Jennings' argument does not reflect the contemporary constitution. For instance, while Jennings asserted that the monarch had a 'mediator' role in resolving political conflicts by leveraging their prestige or reconciling opposing actors, it is now impossible to assert that the monarch plays a mediator role in contemporary political life. Blackburn summarizes the constitutional position of the monarch as having three duties: a) exercising prerogative power in line with the

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<sup>74</sup> BRAZIER, Rodney. *The Monarchy*, pp. 81–82.

<sup>75</sup> BOGDANOR, Vernon. *The Monarchy and the Constitution*, p. 419.

<sup>76</sup> BRAZIER, Rodney. *Constitutional Reform and the Crown*, p. 340.

<sup>77</sup> BAGEHOT, Walter. *The English Constitution*. In: , p. 61 [accessed 2019-04-23]. Available at: <<https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/bagehot/constitution.pdf>>

advice and direction of the prime minister of the day, b) rejecting the advice of the prime minister if it is unconstitutional or against convention, and c) exercising prerogative powers following existing procedures to avoid doubt.<sup>78</sup>

There are some personal prerogatives, such as the appointment and dismissal of ministers, prorogation and summoning of Parliament. However, here, three of the most significant and problematic prerogatives—Royal Assent, dissolution of Parliament, and the appointment of the prime minister—will be addressed to understand whether the monarch has any real power to use them freely in practice.

## VII. THE PERSONAL PREROGATIVES OF THE MONARCH

### A. Granting Royal Assent

Today, the role of the monarch in granting Royal Assent to legislation is well-defined. To formalize a bill into law, cooperation is required from the House of Commons, the House of Lords, and the monarch. After receiving consent from both houses, the assent of the monarch becomes necessary.

Although Royal Assent is considered a personal prerogative, the monarch has not exercised the royal veto for three centuries. The last instance was in 1708 when Queen Anne declined royal assent to a bill, the Scottish Militia Bill, that had been approved by Parliament.

Additionally, the monarch retains the right to influence the government through the Royal Assent. The most recent occasion was during the reign of Queen Victoria. However, since the 16th century, no monarch has personally signed bills, and Queen Victoria was the last monarch to provide the Royal Assent in person in 1854. Today, the granting of Royal Assent is largely considered a formality. The monarch cannot reject assent to a bill after it has received approval from both houses, even if it goes against personal opinions and beliefs.<sup>79</sup>

It is important to note that if the monarch were to reject giving Royal Assent, there is a high possibility that their position would be subject to

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<sup>78</sup> BLACKBURN, Robert. *King and Country*, pp. 84–86.

<sup>79</sup> *Ibid.*, pp. 90–94.

discussion and criticism for being anti-democratic. This is because Parliament is considered representative of the people, while the monarch is an unelected entity.

## B. The Dissolution of Parliament

The second personal prerogative power of the monarch is the right to dissolve Parliament. To comprehend the dissolution of Parliament, it is essential to categorize it into three periods: before the Fixed-Term Parliaments Act 2011, during the Fixed-Term Parliaments Act 2011 (which continued until 2022), and finally, after the Dissolution and Calling of Parliament Act 2022.

Before the Fixed-Term Parliaments Act 2011, theoretically, the monarch had the personal prerogative right to dissolve Parliament, leading to a general election in the United Kingdom.<sup>80</sup> In practice, the monarch exercised this right on the advice of the prime minister, granting the dissolution of Parliament. Therefore, the request of the prime minister played a key role. There was a debate about whether the monarch could reject the request for dissolution even if the prime minister had made the request. According to political practice, if a prime minister with a majority in the Commons can determine the timing of a general election within the five years as per the Parliament Act 1911, it can be argued that there are two situations in which the monarch may refuse the prime minister's request to dissolve Parliament.

Firstly, if there was a minority government, it could be argued that the prime minister might seek dissolution for their agenda. Although this issue can be further debated with theoretical scenarios, there is a strong belief that the prime minister has the right to choose a general election.<sup>81</sup> Secondly, when the prime minister loses the support of their cabinet or party, they might request swift dissolution to prevent being deposed.<sup>82</sup> In such circumstances, it is claimed that the monarch can reject the prime

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<sup>80</sup> Ibid., p. 95. The Last two occasion that monarch use his discretionary to dissolve parliament 1681 by Charles II and 1818 by George III.

<sup>81</sup> Ibid., pp. 94–104.; BRADLEY, A W – EWING, K D – KNIGHT, C J S. *Constitutional and Administrative Law*. Pearson, 2018, pp. 250–252.

<sup>82</sup> BOGDANOR, Vernon. *The Basic Constitutional Rules*, pp. 79–80.



minister's request. However, such a decision would involve the monarch in politics and compromise their impartiality. Therefore, it is argued that the monarch should still follow the prime minister's request. In fact, British constitutional history has also supported this approach.<sup>83</sup>

The Fixed-Term Parliaments Act 2011 outlined that all future general elections would be held at fixed five-year intervals unless specific conditions, as per section 2 of the Act, were met.<sup>84</sup> This provision clearly stated the dates of elections. An early election could occur if a motion for it was approved by either a majority of at least two-thirds of the entire House or without a formal vote. Alternatively, an early election could be triggered if a motion of no confidence was voted, and no alternative government was established by the House of Commons within 14 days.<sup>85</sup>

The Fixed-Term Parliaments Act 2011 substantially restricted the power of the prime minister in dissolving Parliament and deciding on the timing of general elections. It explicitly stated the conditions under which early elections could take place, limiting the discretionary authority previously associated with the prerogative power. Therefore, in 2013, R. Hazel defined the act as 'a very significant surrender of prime ministerial power.'<sup>86</sup> The Explanatory Notes to the Act also clearly stated that 'The Queen does not retain any residual power to dissolve Parliament, which will occur automatically under the provisions in the Act.'<sup>87</sup>

In 2022, the Dissolution and Calling of Parliament Act nullified the Fixed-Term Parliaments Act 2011, establishing that the maximum

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<sup>83</sup> Ibid., pp. 79–81.

<sup>84</sup> Fixed-term Parliaments Act 2011. In: [accessed 2019-04-23]. Available at: <<http://www.legislation.gov.uk/ukpga/2011/14/section/1/enacted>>

<sup>85</sup> Fixed-term Parliaments Act 2011 - House of Commons Library. In: [accessed 2023-12-25]. Available at: <<https://commonslibrary.parliament.uk/research-briefings/sn06111/>>

<sup>86</sup> House of Commons - Political and Constitutional Reform - No - Minutes of Evidence: HC 975. In: [accessed 2023-12-25]. Available at: <<https://publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/975ii/130207.htm>>

<sup>87</sup> OFFICE, Cabinet. Explanatory Notes to Fixed-term Parliaments Act 2011. In: [accessed 2023-12-25]. Available at: <<https://www.legislation.gov.uk/ukpga/2011/14/notes/contents>>

duration of a Parliament, rather than the interval between general elections, is now five years.<sup>88</sup> This restoration of prerogative powers allows the monarch to dissolve Parliament upon the prime minister's request, reinstating the prime minister's ability to call a general election at their discretion. While there is a theoretical possibility that the monarch could refuse the prime minister's request by invoking personal prerogative rights, it is considered unlikely to happen due to the monarch's impartial and non-political position.

### C. The Appointment of a Prime Minister

The monarch holds the right to appoint the prime minister without consulting ministers, though in practice, this authority is constrained by various instruments, including constitutional conventions and political considerations. This prerogative is important in shaping the relationship between the head of state and the head of government. Under normal circumstances and in exceptional situations, the appointment of a prime minister is subject to different procedures, which have sparked controversy about whether the sovereign has the prerogative power to decide the prime minister.

Under normal circumstances, the leader of the majority party emerging from a general election is conventionally summoned to the palace by the sovereign. In this scenario, the sovereign does not have the right to personally choose the prime minister; instead, they are obligated to appoint the leader of the party that commands an overall majority in the House of Commons.<sup>89</sup> The Prime Minister contacts the palace to affirm their capability to form a government.<sup>90</sup> This arrangement is sensible as the prime minister should enjoy the confidence of the parliament to

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<sup>88</sup> Dissolution and Calling of Parliament Act 2022: Progress through Parliament - House of Commons Library. In: [accessed 2023-12-25]. Available at: <<https://commonslibrary.parliament.uk/research-briefings/cbp-9308/>>

<sup>89</sup> **TURPIN**, Colin – **TOMKINS**, Adam. *British government and the constitution: text and materials*. Cambridge; New York: Cambridge University Press, 2012, p. 379.; **BLACKBURN**, Robert. *King and Country*, p. 86.

<sup>90</sup> **BLACKBURN**, Robert. *King and Country*, p. 87. There was the hand kissing ceremony at the end, but the ceremony is no longer followed.

effectively govern the state, otherwise the government face dismissal by a vote of no confidence.

Similarly, if a prime minister dies or resigns, a new party leader is typically elected through the party's electoral process. The new party leader is then summoned to the palace by the sovereign and appointed as the prime minister. In cases of the death, resignation, or permanent incapacity of a prime minister, an interregnum period may occur until the new party leader is elected. For instance, Harold Wilson, the leader of the Labour party, resigned as the party leader, and James Callaghan was elected by the party as the new leader in 1976. Wilson resigned as the prime minister and then informed the queen of his decision and the new party leader. Callaghan was called to the Palace and appointed as the prime minister by the queen. There were six candidates within the Labour party for the leadership, so it took three weeks to choose the new leader. During this period, there might be an acting prime minister, often the minister temporarily appointed to replace the prime minister when absent.<sup>91</sup> As a result, in such normal circumstances, it is evident that the sovereign has no authority in appointing the prime minister, despite the absence of legal restrictions.

According to Bogdanor, there are two situations in which the monarch exercises discretionary power in determining the prime minister.<sup>92</sup> The first scenario arises in extraordinary circumstances, such as war or economic crises, necessitating the formation of a coalition government. The second situation occurs in a hung parliament, where no single party holds a majority, granting the monarch discretion in appointing the prime minister.

In the case of extraordinary circumstances, Bogdanor examines historical examples from the 20th century, particularly during war (in 1916 and 1940) and economic crises (in 1931). In 1916, despite the Conservative Party being the largest party, it lacked an overall majority. Recognizing the inadequacy of a minority government during wartime,

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<sup>91</sup> **BOGDANOR**, Vernon. *The Monarchy and the Constitution*, pp. 84–85.

<sup>92</sup> **BOGDANOR**, Vernon. The Appointment of a Prime Minister. In: **BOGDANOR**, Vernon. *The Monarchy and the Constitution*. Oxford University Press Oxford, 1997, pp. 88–89. DOI: 10.1093/0198293348.003.0004

discussions ensued, and a proposal for new elections was rejected by the monarch due to war conditions. A conference between parties took place, leading to the establishment of the Lloyd George government. The monarch played a facilitating role in the selection of a new prime minister for the coalition government during the war.<sup>93</sup>

Similarly, in 1940, Prime Minister Neville Chamberlain of the Conservative Party believed that a coalition government was necessary due to wartime conditions. Understanding that Labour and Liberal parties were unwilling to form a coalition government under his leadership, Chamberlain met with other parties, and with the approval of the monarch, Winston Churchill was elected as the prime minister of the coalition government.<sup>94</sup>

In the economic crisis of 1931, the Labour government faced a lack of sufficient majority in the House of Commons, necessitating inter-party cooperation for the adoption and implementation of an economic package. The monarch, recognizing the need to address the economic problem, used prerogative power to propose a solution. The monarch convened meetings with leaders from three political parties to establish a national government. Despite Ramsay MacDonald, the leader of the Labour party, expressing a desire to resign from the prime minister's office on multiple occasions, the monarch influenced him to reconsider and assume leadership of the National government. During this exceptional period, the monarch played an active role in facilitating the formation of the government.<sup>95</sup>

However, it's important to note that while historical examples demonstrate the monarch's active involvement in political life during emergencies, this does not imply that such involvement is always possible or applicable today. Contemporary political conditions and actors are vastly different. It is widely accepted in the present era that the monarch should refrain from direct involvement in politics and does not play a

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<sup>93</sup> **BOGDANOR**, Vernon. *The Monarchy and the Constitution*, pp. 99–101.

<sup>94</sup> *Ibid.*, pp. 101–103.

<sup>95</sup> *Ibid.*, pp. 104–112.

significant role in the process of appointing the prime minister, even during crises.

In the context of hung parliaments in the UK, where a single-party majority government is not established after a general election, controversy arises regarding whether the monarch has discretion in appointing the prime minister through the use of prerogative power. This situation has occurred five times in the twentieth century: in 1923, 1929, 1974, 2010, and 2017.

One argument suggests that the monarch can actively participate in the appointment of the prime minister during a hung parliament. Jennings supported this view by stating, 'There is no controversy that she need not accept advice as to the appointment of a Prime Minister,'<sup>96</sup> asserting that the monarch can appoint a prime minister by exercising prerogative power. This argument is based on the idea that in a hung parliament, there is no established rule for government formation. However, this viewpoint is challenging to accept, given that even in the absence of a codified constitution, there is a regular procedure for appointing a prime minister in a hung parliament. Blackburn outlines this procedure, stating that if there is no single-party majority in the House of Commons, the process for appointing a prime minister is as follows: 1) 'The incumbent Prime Minister has the first opportunity to continue in office and form an administration.' 2) 'If he or she is unable to do so (and resigns, or is defeated on the Address at the meeting of Parliament), then the leader of the largest opposition party is appointed Prime Minister.'<sup>97</sup>

After a general election, the incumbent prime minister may choose to stay in office and attempt to secure a majority in the House of Commons by negotiating with other parties. For example, in 1923, Prime Minister Stanley Baldwin pursued this option but was unsuccessful in obtaining a majority. The second option is that the incumbent prime minister may resign without waiting for the House of Commons to convene, as seen in the 1929, 1979, and 2010 elections. In this case, the

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<sup>96</sup> JENNINGS, Ivor. *Cabinet Government*, p. 394.

<sup>97</sup> BLACKBURN, Robert. *King and Country*, p. 88.

monarch may offer the position of prime minister to the leader of the largest opposition party.

Blackburn argues that there is no constitutional uncertainty in determining the prime minister under a hung parliament, and therefore, there is no political or customary basis to involve the monarch in this process. The monarch does not play a mediator or moderator role in deciding which party leader becomes the prime minister. It is evident that the intervention of the politically neutral monarch in the prime minister determination process does not align with constitutional and democratic principles.

Furthermore, today there is a Cabinet Manual produced by the government, explaining fundamental statutes, rules, and conventions regarding the functioning of the government. According to the manual, if a government in power wins an election and secures a majority of seats, it typically remains in office without requiring the Prime Minister to request continuation. In the event that another party wins a clear majority, the current Prime Minister and cabinet will resign, and the Sovereign will invite the leader of the winning party to form a new government.<sup>98</sup>

The Cabinet Manual also outlines that if there is a hung parliament, the current government will continue to hold office until the Prime Minister and the Government formally resign to the Sovereign. The incumbent government has the right to wait until the new Parliament convenes to determine if it can secure the support of the House of Commons. However, it is generally expected that the government will step down if it becomes evident that it cannot obtain the confidence of the House, and there is a clear alternative.

In situations where multiple governments are possible, political parties may engage in negotiations to determine which party is most capable of securing the support of the House of Commons and should be responsible for forming the next government. The Sovereign is not expected to participate in these negotiations, but individuals involved in the process are anticipated to keep the monarch informed.

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<sup>98</sup> *The Cabinet Manual A guide to laws, conventions and rules on the operation of government.*

The type of government that will be established depends on negotiations between political parties and any subsequent consensus reached. In cases where there is no clear majority, three main types of government can potentially be formed: a single-party government, a minority government, or a formal inter-party agreement leading to a coalition government.<sup>99</sup> As observed, the expectation is that political parties will decide who will be the prime minister to establish the government and secure confidence in the parliament, while the monarch remains impartial and refrains from involvement in the process.

## CONCLUSION

The concept of prerogative is a unique constitutional source, the definition and scope of which are considered challenging. The reason for this is that prerogatives have undergone significant changes in the historical process, which need to be analysed properly. Therefore, the article aims to comprehensively explain prerogatives to understand their position in the UK constitution. The article illustrates their origin, historical developments, features, and limitations to demonstrate that prerogatives remain an important source for the UK constitution. This uniqueness is attributed to the uncodified constitution and the existence of a constitutional monarchy.

The article demonstrates that the prerogative powers, once characterized by the monarch's unilateral, arbitrary, and unlimited right to use, have evolved into a legal resource. The majority of these powers are now utilized by ministers and can be subject to limitations through various instruments, such as statutes and judicial review. While the monarch theoretically maintains personal prerogatives exclusively for their use, the article illustrates that their contemporary use is restricted in accordance with principles of the rule of law and democracy. In practice, if issues arise due to prerogative use (by both ministers and the monarch), the courts are willing to intervene to resolve potential conflicts. Therefore, the claim that prerogatives are outdated, contrary to the rule of law and democratic principles, and that the monarch will use them, especially

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<sup>99</sup> Ibid., pp. 14–15.

personal prerogative rights, for personal interests, does not reflect the truth.

However, it can be argued that ministers, especially the prime minister, may use these powers for their political interests, leveraging the fact that ministers do not have to seek parliamentary approval for their use. The crucial aspect here is whether ministers employ them as a resource for the government to exercise its rightful executive power and whether they act in the public interest. As mentioned above, if used unlawfully and for personal benefit, both the court and parliament can actively restrict or prevent ministers from using these powers. Furthermore, additional pressure elements, such as public opinion, media scrutiny, and international law, act as deterrents against the improper use of prerogatives. Therefore, it would be inaccurate to view prerogatives as instruments that ministers can wield arbitrarily.

In conclusion, prerogatives and, by extension, the constitutional monarchy, continue to coexist unproblematically within the English legal system.



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