

# The Royal Prerogative

## Introduction – the historical problem

Mid 17<sup>th</sup> century

who was sovereign ?

Parliament ? King ? Natural law ?

*Shipmoney* (1637)

*Godden v Hales* (1686)

King judges if military threat exists

King may dispense with/suspend statutes

1688 revolution

Parliament can remove prerogative

Bill of Rights 1689

Prerogative is residual; no new ones

What powers ?

list

Defining

Blackstone  
Dicey

peculiar and eccentric  
everything not statutory

## 1. Parliamentary sovereignty

*Mortensen v Peters* (1906)

treaties must be incorporated by Act to have domestic effect

*Burmah Oil* (1964)

reversed by War Damage Act 1965

*AG v De Kayser Hotel* (1920)

statute overrides prerogative

↓  
*Laker Airways* (1977)

interlocking statute controls prerogative

↓  
*Fire Brigades Union* (1995)

non-implemented statute 'freezes' prerogative: (dissents)

↓  
*R v John* (1965)

Crown cannot create new prerogative powers

↑  
*Northumbria Police* (1989)

court may find 'lost/forgotten' prerogative powers

## 2. Rule of law

### Judicial review as an indicator of intensity of judicial control

#### 2.1 Grounds of review – traditional – source not nature

**Statute** (*Wednesbury 1948*)

- 1 **Illegality**
- 2 **Irrationality**
- 3 **Procedural unfairness**

**Prerogative**

- 1 **Illegality**

*R v Allan* (1862)      nulle prosequi; inconvenience; political control

*China Navigation* (1932)      armed forces; beyond judicial control

*Gouriet* (1978 HoL)      AG's relator; too political to control ?

#### 2.2 Problems with differential standards of review

### Parliamentary sovereignty and the rule of law

**Why the difference ?**

- A formalistic difference
- A qualitative difference

### Doubts re the difference

Easier for government to make/change policy via prerogative than statute

Government can make irrational or procedurally unfair decisions under and commencement of relator

*Lain* (1967)      criminal injuries compensation  
quasi-judicial function  
Affects rights of individuals

*Laker*(1977)      Denning sees no good reason for difference;  
general or issue specific?

*Gouriet* (1977)      CoA distinguishes between refusal

## 2.3 Ending the difference – nature not source

**GCHQ** (1985) same standard of review for prerogative and statutory powers

*Justiciability - the crucial concept; excluded categories*

## 2.4 The meaning of 'justiciability'

### **Walker (1987) Public Law**

**Molyneux** (1985) Treaty (Anglo-Irish accord) not justiciable

**Everett** (1989) passport – court divides foreign policy up

**Bentley** (1993) mercy – no longer necessarily non-justiciable

**Abbassi** (2002) foreign policy in broad sense not reviewable

## Conclusion

Non-justiciability of statutory powers;

**Liversidge** (1942)  
**Chandler v DPP** (1964)

The width of the concept

the more actions that are justiciable, then  
the more judicial review, then  
the more intense the rule of law ?

Non-justiciability as a common law ouster clause

**Links** – other aspects of greater judicial control of government decisionmaking

Capacity of Commons to control government esp Lord Mustill in

**Fire Brigades Union**

More relaxed views re standing

**Greenpeace; Pergau Dam**