

Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power

Noel Cox

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The concept of prerogative power is difficult to pin down in both nature and scope.¹ Noel Cox attempts to shed some light on these difficulties in *Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power*.² While this undefined and historical power may be less prevalent in this ‘age of statutes’,³ Cox demonstrates that engaging with prerogative power remains practically important in the 21st century.

The Royal Prerogative and Constitutional Law may be broadly separated into four main sections: prerogative itself,⁴ historical extension to the colonies,⁵ modern use of the power,⁶ and the curtailment of the power.⁷ The structure lays a solid historical foundation for understanding prerogative power before examining its applications in the contemporary world.

The first section explores the origins, nature, scope of prerogative power, as well as how the various discrete powers which fall under the umbrella of the prerogative may be classified. Acknowledging that it is remnant of ‘ancient powers of the Crown’ and its true origins are ‘not always certain’,⁸ Cox utilises natural law theory to understand the discovery of law through the nature of common law and the recognition of royal prerogatives.⁹

¹ Noel Cox, *Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (Routledge, 2020) 1.

² Ibid.

³ Janina Boughey and Lisa Burton Crawford, ‘Executive Power in an Age of Statutes’ in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 1, 1; Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) 1.

⁴ Cox (n 1) chs 1–4.

⁵ Ibid ch 5.

⁶ Ibid chs 6–8.

⁷ Ibid ch 9.

⁸ Ibid 20

⁹ Ibid 34.

Much like its origin, the nature of the prerogative is also ill-defined. Cox explores the competing views, from the narrow definition of special pre-eminence of the King through the common law,¹⁰ to the broadest definition, as residual discretionary or arbitrary authority left in the hands of the Crown.¹¹ As Cox explains, the theoretical view as to the breadth of the power informs courts' willingness to restrain exercises of such power.¹² Cox ultimately finds that the Crown provides legal and political legitimacy to governmental action, including the use of the prerogative power, for the purpose of governance.¹³

Due to the prerogative's origins in the UK, its historical usage in the former colonies is not at the forefront of Cox's analysis. Nevertheless, the book adds to the theoretical discussion throughout the Commonwealth because it provides a greater understanding of the scope of the prerogative power.¹⁴ While some authors focus on doctrinal questions, such as the interpretation of executive power under s 61 of the Australian Constitution,¹⁵ Cox takes a holistic view of the prerogative as a tool of political evolution. One helpful illustration of this point is New Zealand's use of the war prerogative to declare war on Germany in World War II.¹⁶ This discussion is used as a demonstration of how the prerogative power may manifest in jurisdictions in ways extending beyond its historical origins.

In Chapters 6 to 8, Cox turns his attention to key questions regarding the modern role of the prerogative: its interaction with statute and susceptibility to review by courts. The prerogative may be overridden, abolished or limited by statute.¹⁷ Cox highlights this interplay between prerogative and statute, focusing particularly on those statutes which guide the executive in the execution of its prerogative powers.¹⁸ He also explores

¹⁰ Ibid 42.

¹¹ Ibid 44.

¹² Ibid 45.

¹³ Ibid 52.

¹⁴ Ibid 133.

¹⁵ See, eg, Catherine Greentree, 'The Commonwealth Executive Power: Historical Constitutional Origins and the Future of the Prerogative' (2020) 43(3) *University of New South Wales Law Journal* 893.

¹⁶ Cox (n 1) 123.

¹⁷ Ibid 168. See, eg, *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 204 [14] (French CJ), 228 [94] (Gummow, Hayne, Heydon and Crennan JJ); *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [33] (Black CJ), 539–40 [181]–[182] (French J).

¹⁸ Cox (n 1) 176.

the way in which judicial review is used to scrutinise the use of prerogative power, and adds to the existing literature through an analysis of recent judicial review decisions which confine prerogative power.¹⁹ These recent decisions include an important analysis of *R (Miller) v The Prime Minister*,²⁰ which concerned the 2019 UK constitutional crisis arising from the prorogation of parliament.

The use of powers, privileges and immunities granted by prerogative is politically expedient due to the lack of clearly defined parameters on the use of the power.²¹ Yet exercising these prerogative powers poses a challenge to the rule of law. For example, in Australia, the modern era of administrative law reforms²² is a clear indication of the expectation of governmental accountability.²³ Cox acknowledges recent discussion for the curtailment and abolishment of the prerogative power²⁴ to allow greater parliamentary control over executive power. However, he argues that this may disrupt ‘the constitutional balance’²⁵ by granting the legislature control over executive action,²⁶ a point Cox illustrates with examples drawn from Ireland’s curtailment of the prerogative. At least in the United Kingdom, Cox argues that parliamentary sovereignty rests on the supremacy of the Crown-in-Parliament, the executive.²⁷

The breadth of Cox’s exploration of the prerogative power is both a strength and weakness of his book. It is a strength of his book in that he differs from the majority of current literature on the royal prerogative by canvassing a broad range of prerogative powers. But this may go too far. Cox incorporates rarely exercised or claimed prerogatives, such as the prerogative right to royal fish,²⁸ despite its rare use due to endangerment of the creatures. Understanding these obscure powers may be helpful in the

¹⁹ Cf HV Evatt, *The Royal Prerogative* (Law Book Company, 1987).

²⁰ *R (Miller) v Prime Minister* [2020] 1 AC 373.

²¹ Cox (n 1) 40.

²² See *Administrative Decisions (Judicial Review) Act 1977* (Cth).

²³ Cox (n 1) 203. See also Noel Cox ‘The Gradual Curtailment of the Royal Prerogative’ (2012) 24 *Denning Law Journal* 1.

²⁴ Cox (n 1) 203.

²⁵ *Ibid* 214.

²⁶ *Ibid* 206

²⁷ *Ibid* 209.

²⁸ *Ibid* 74.

analysis of more complex contemporary prerogatives, but perhaps not to the extent assumed by Cox.

Overall, Cox provides a 21st century insight into the operation of this fundamental aspect of constitutional law. In the Australian context, Cox provides an important contribution to the existing literature by updating Evatt's classic and comprehensive work, which was written in the first half of the 20th century.²⁹ It is hoped that *Royal Prerogative and Constitutional Law* will be read by practitioners, students, and the academy alike.

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²⁹ See Evatt (n 19).

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