

A law unto itself? Is the British Government's use of archaic Royal Prerogative power sufficiently regulated by legal and political avenues? An analysis, with special reference to the prosecution of war.

Nasser Amin

Abstract

The executive branch of the British state retains a significant gamut of powers which it inherited from the absolute monarchies of the past that existed until the major constitutional upheaval of the 1688 'Glorious Revolution'. Known as Royal Prerogative powers, these archaic rights remain largely outside of Parliamentary scrutiny, and Ministerial use of a number of the powers has been deemed to be not fully justiciable by the courts. Thus, their reform is seen by commentators as 'unfinished constitutional business'. This paper explores whether the use of these powers is sufficiently regulated through current legal and political avenues within the British constitution. It focuses on the recent history and controversies of one of the most momentous of prerogative powers: the prosecution of war. Parliamentary possesses no legally enshrined or constitutional role in decisions for Britain to go to war. Operational and political shortcomings should a notional 'War Powers Act' emerge are discussed, though these particular concerns could be accommodated within an imaginative legislative form. Arguing that the use of Prerogative powers is not subject to adequate scrutiny currently despite a clear caselaw trajectory – particularly since the watershed GCHQ case in 1984 - in favour of the review of the Executive's use of it through the emergence by the courts of a 'sliding scale' approach which allows a higher intensity adjudication on matters pertaining to rights, with a lighter touch on those concerning the political, this paper nonetheless rejects the view that codification into statutory form of the Prerogative would wholly redeem it. The paper does so by advancing the view that even in the event of constitutional reform that ended any residual impregnability of extant Prerogative powers by replacing them within Parliamentary Acts, the thorny question of the appropriateness of the Courts making decisions on political actions by the State would nonetheless remain intact within a codified dispensation – thus failing to resolve all of the manifold faults of the status quo. This is because the English courts' notable and long-established normative caution in handling cases of a policy or high political nature holds whether the relevant governmental powers issue from parliamentary acts or the application of the Royal Prerogative.

Key Words: Royal Prerogative; British Constitution; Parliamentary supremacy; English Law; Justiciability; Rule of Law; Judicial Review; War Powers.

Introduction

This paper provides a summary and critical analysis of the main themes of the debate, central to modern British constitutional law, of the ongoing function of Royal Prerogative discretionary powers, their current regulation by various mechanisms and the pitfalls and advantages of their codification into statute, with a particular focus on the prerogative power that arguably has the most gravity, that of prosecuting wars.

Defining Prerogative Powers

The continued existence of Prerogative powers within the British constitutional arrangement is one of its most curiously vestigial components, and one which has significant import given

the wide-ranging powers it currently places under the purview of the Executive, and, more narrowly, in the hands of the Monarch. Prerogative powers were originally the exclusive right of monarchs to enact decrees that were binding on all of those within the Kingdom; with the 1688 settlement that initiated the sovereignty of Parliament, and the attendant primacy of statutory law, many of these powers continued to be recognised in Common Law but were transferred by constitutional convention – but not through statute - to the domain of the Executive branch of the Government.

Extant discretionary powers can be categorised into three broad categories.¹ Firstly, the Monarch's personal Prerogative powers. These are mainly the assent to primary legislation; appointing – or removing - senior Cabinet Ministers, including the Prime Minister; providing advice to Ministers; and dissolving/proroguing Parliament. Attendant to this are various legal Prerogatives, which include the right to own various birds and mammals, and the press-ganging of adult males into the Royal Navy. Commentators also include the significant established legal principles that the Crown is not bound by statute (except when expressly stated within legislation), and legal immunity from prosecution for the Sovereign himself into this second category². The third category, which is arguably the most constitutionally significant and controversial and which this paper focuses on, are the powers that are delegated to respective Ministers; *inter alia*, the conduct of external governmental relations, including the making and withdrawal from treaties; the pardoning of those convicted of criminal offences; recognition of new states; issuing or revoking British passports; the governance of former British colonies, foreign policy in general, and significantly, the defence of the realm. Prerogatives can be applied directly, or through indirect devices known as 'Orders in Council' – the latter is very similar to statute in the authority it provides for Ministers.

The History of a Constitutional Problem

The courts were faithful to a tradition – until 1984³ – of regarding as inadmissible attempts to subject prerogative powers to full judicial review. Critics charged that placing in the hands of the Executive apparently unfettered powers of great political and social import that have not been subject to Parliamentary deliberation and scrutiny (and on account of their not possessing a statutory basis can be beyond the justiciability of the Courts) was an unconscionably archaic practice that has no place in a modern democracy.

The maintenance of these relics was considered to be at odds with three indispensable features of the British constitutional settlement: Parliamentary Sovereignty, the Separation of Powers and the Rule of Law. Prerogative powers were said to jar with the notion of the supremacy of Parliament in that they appeared to give the Executive primacy in these areas over and above lawmakers, while the fact that these powers do not derive from primary legislation meant that not all of them were susceptible to full Judicial Review – the main mechanism within the British system for the judiciary to hold the Executive to account for abuses of power or to uphold individual rights, within the Separation of Powers. A coach and horse was driven through Rule of Law principles in that the Government in its use of these powers placed itself beyond the reach of legal reproach and did not have to have a legal justification beyond the power itself. Given that the Executive's Prerogative powers incorporate matters of life and death (for instance in the prosecution of war) and individual rights of British

¹ Derived from Bartlett and Everett

² *Ibid.*, p9.

³ Until the landmark GCHQ case that we discuss below.

passport holders, the violation of the Rule of Law inherent in Executive discretionary powers extended from its basic procedural conceptions to more substantive and normative notions.⁴

From the mid-1980s onwards, however, cases were adjudicated upon in the courts concerning how a prerogative power has been exercised. We shall examine the significance of the GCHQ case from 1984 below.

How the Courts have dealt with the Problem

The history of case law reveals a gradual but *in toto* substantial eroding of the variety and exercise of governmental non-statutory discretionary power over the centuries to the extent that today the Courts play a vitally important constitutional role in clarifying not just the existence and degree of these prerogative powers, but also whether they have been lawfully deployed, in much the same way that decisions issuing from Acts of Parliament are. This trajectory calls into question an assumption that existing legal means have insufficiently regulated the Prerogative.

Even within the pre-revolutionary era, it was recognised that the then exclusively *Royal* Prerogative did not allow monarchs to summon up seeming prerogative powers *ex nihilo*.⁵ This suggested that the Prerogative of the King, subsequently bequeathed to a non-Monarchical Executive, could not be expanded in scope. The finite nature of the Prerogative was further clarified centuries later in the *BBC v Johns* case (1965), where the broadcaster argued that it ought to be exempt from income tax on the basis that it was a statutory body created by a supposed Prerogative power. This was roundly dismissed, with Lord Diplock memorably commenting in his judgement that it was:

*350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens of the UK without any statutory authority are now well settled and incapable of extension.*⁶

Whilst these decisions have been ordinarily cited as closing the book on the possibility of the expansion of Prerogative power beyond that which it has been regarded as encompassing, two problems present themselves here. The first concerns the lack of clarity as to the totality of all extant Executive prerogative power – where is the exhaustive list of all such powers contained? Whilst it is established that the Courts are authoritative in determining whether a particular Prerogative exists, what of the many Prerogatives for which, as Bartlett and Everett remind us, there are “no recent judicial authority and sometimes no judicial authority at all.”⁷ Such opaqueness makes it difficult to decisively determine that Lord Diplock was correct, for, in order to be certain that the extant prerogatives cannot be added to, one would surely need a definitive list of them. The second issue is related but suggests that even with an authoritative list, the supposed circumscription of the Prerogative may fall prey to an identical complication that has afflicted statute: the pace of technological change may occasion a novel interpretation by the Executive of prerogative powers that effectively brings into existence a new one. This possibility was vividly hinted to by the 1915 *Petition of Right* case, wherein the Court utilised its powers of interpretation to support the Executive's contention that the notion of ‘invasion’ by a foreign power could be extended to mean the presence of a German airship within British airspace, something which was not a possibility before the then recent advent of

⁴ As laid out by Bingham.

⁵ The 1611 Case of Proclamations

⁶ *BBC v F.D. Johns* (HM Inspector of Taxes) (1965)

⁷ Ministry of Justice in Bartlett and Everett, p4

air travel⁸. There is reason to conclude therefore that the Courts may broaden the ambit of legally acceptable prerogatives in light of changes in technology, or indeed wider social or political developments, for, as Loveland reminds us “prerogative powers are – like statutes – ‘always speaking.’”⁹ Three hundred and fifty years and a civil war have not necessarily silenced all of them, *pace* Lord Diplock.

In the 1920 case of *De Keyser v Attorney-General* the Law Lords importantly clarified that in instances in which Acts of Parliament have been passed on the same terrain as an established prerogative, the latter cannot be enforced¹⁰. The case concerned the requisition by the Government of a private hotel for use by the armed forces during the First World War. De Keyser, the hotel owner, attempted to claim compensation from the Government under the Defence Act 1842, a statutory law passed by Parliament. The Government rejected this and argued that the seizure of the hotel had been undertaken by right of *Prerogative*, and thus no compensation was payable to the claimants, despite the 1842 law stipulating that it ought to. The court rejected the Government’s attempt to rely on the Prerogative at the expense of statutory law, arguing that statute takes precedence over prerogative powers where the former concerns the same ground as the latter. This major judgement muzzling the Executive’s ability to deploy a ‘pick n mix’ approach nonetheless preserved an element of discretionary power in its perplexing determination on the status of a prerogative so abridged. Lord Atkinson said: “[T]he Crown can only do the particular thing in accordance with its statutory provisions, and that its prerogative power to do that thing is in abeyance.”¹¹ That the particular prerogative side-lined in judgement here is merely suspended rather than decisively overruled according to the statutory interpretation offered can be seen as a limitation on confidence that the judicial review and other legal means are in fact ‘chipping away’ at these archaic relics. This is because an analogous scenario with respect to some notional fresh primary legislation would see the implied repeal of an existing statute with which it was inconsistent. Yet that principle is not being applied in this judgement.¹²

Indeed, the 1989 case concerning *Northumbria Police and the Home Secretary*¹³ further underscored this limitation since it contained a judicial decision to the effect that the statutory power of the police to issue weaponry co-existed with the discretionary power of the Minister in question indicating, as Loveland states, that “the doctrine of implied repeal does not apply to prerogative powers”¹⁴, suggesting that the means of revoking specific prerogatives is through Parliament *expressly* repealing them, rather than legal means in the form of statutory interpretation by judges.

A feature of the foregoing judgements was that the Courts had remained at a superficial level in their approach to the Executive’s deployment of the prerogative; the matters investigated were the existence of the powers, and their interplay with statute. That discretionary powers were treated differently from cases where the power in question derived from an Act of Parliament was a significant lacuna in judicial oversight: cases of the latter can and do involve determinations on whether the Executive had acted unlawfully. Yet, if individual’s rights had been violated by the state, it would in nearly all instances not matter whether the source of the

⁸ Loveland, p82

⁹ *ibid.*

¹⁰ *De Keyser v Attorney-General* (1920)

¹¹ *ibid*

¹² Loveland, p86.

¹³ *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* (1989)

¹⁴ *ibid*

violation was as a result of the misuse of statute or the unlawful application of Ministerial discretion. It was in this context that arguments for codifying on a statutory basis all existing Governmental powers that did not derive from statute but have a significant effect would be a progressive step in the direction of high-level accountability, placing the full gamut of Executive power under the scrutiny of Parliament, and, by extension, the review of the Courts.

The landmark GCHQ case¹⁵ in 1984 brought in place a sea change in the regulation of prerogative powers of the Executive as for the first time the judiciary made determinations on the manner and lawfulness of its use. The case was lodged by the Council of Civil Service Unions following the decision of the Thatcher Government to ban employees of GCHQ from joining trade unions on the grounds of national security. The Government did so on the basis on an Order-in-Council deriving from a Prerogative power. The House of Lords determined that prerogative powers can indeed be subject to review by the Courts, overturning the Court of Appeal's prior decision in this case that it was a non-justiciable matter. However, despite this unprecedented incursion into the Executive's hitherto exclusive domain, with the court acknowledging that the terms of civil service employment were indeed a justiciable matter even though they issued from a prerogative power, the claim failed as the Government successfully argued that it can be lawful to frustrate a legitimate expectation (on the grounds of national security). Lord Roskill, in a significant obiter statement in the 1984 judgement, suggested that some powers may continue be beyond the purview of judicial deliberation. These were "the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers."¹⁶

Thus, the sanctity of core Executive functions seemed to remain beyond the oversight of any body within the constitution. Significantly, the judgement has led to the development of a 'sliding-scale' approach in cases which are deemed justiciable, with a differential amount of intensity shown depending on the case to be pronounced on.¹⁷ A higher intensity is to be expected on matters that are administrative, that concern legality or individual rights; the judiciary are less inclined, by contrast, to delve fully into claims connected to high policy matters – in such scenarios, a light touch shall be applied. It should be noted that this scale applies as much to statute-based powers as it does to the exercise of prerogative powers.

Britain's withdrawal from the European Union provided the recent context for the Supreme Court to show its increasing confidence in pronouncing upon matters that Ministers nonetheless held to be political in nature. Both of these EU-related 'Miller cases' can be said to demonstrate, in different ways, the readiness of the judiciary to protect Parliamentary supremacy from the dictates of Governmental use of the prerogative. In the first Miller ruling, the Supreme Court ruled that the use of prerogative powers by the May Government could not frustrate a piece of established legislation, namely the European Communities Act 1972.¹⁸ The second Miller decision was even more momentous with the Court overturning as unlawful the Johnson Government's prorogation of Parliament (which occurred through the deployment of a prerogative power), determining that "An unlimited power of prorogation [of Parliament] would [...] be incompatible with the legal principle of Parliamentary sovereignty."¹⁹

¹⁵ Council of Civil Service Unions v Minister for the Civil Service (1984)

¹⁶ In *ibid*

¹⁷ Loveland, p568

¹⁸ R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (2017)

¹⁹ in R (on the application of Miller) v The Prime Minister (2019)

Political and Conventional Regulation: the War Powers debate

As a prerogative power exercised by the Cabinet, in conjunction with senior military commanders and the National Security Council, decisions to engage Britain in military conflict contain no current legal requirement to seek approval by Parliament. Given the gravity of the decisions made, and concerns about legality of wars, this can be seen as a rather serious deficiency in our system. The UK's participation in the controversial 2003 Iraq War, which many have argued was prosecuted on the basis of falsehoods and a spurious international legal basis²⁰, highlighted the perils of Executive action being made by a small coterie of politicians in conjunction with foreign powers, arguably without proper scrutiny. However, it is important to recall that in the run up to the commencement of the conflict in March 2003, the Labour Government did accede to calls for a vote in the House of Commons, which was comfortably passed. Whilst the fact the Conservative opposition supported the decision to go to war may be taken together with the shortcomings of the unenforceable Ministerial Code (which some commentators deemed Ministers to have broken)²¹ to be seen as a profound deficit in political regulation of the Prerogative, the vote itself is regarded by commentators as a defining moment in the process that governments are expected to follow in future when going to war. This is because it represented the first time in the modern era that a British Government had sought Parliamentary approval to go to war. Although the Blair Government was confident beforehand that it had the numbers to prevail and, as Mills observes, the timing of the debate, only 48 hours before the war formally began, created something of an inevitability about the outcome of the vote²², this nonetheless has been seen by many as establishing a convention on future Executive war-making decisions.²³ Indeed, when the coalition Government lost a Parliamentary vote in 2013 to deploy airstrikes against Syrian Government installations, the intended military action did not go ahead.²⁴

Does this convention create an effective Parliamentary brake on future Executive decisions to go to war? It seems unlikely, but the convention to consult would appear to hold. Mindful of the limitations of this emerging convention, some, such as former Leader of the Opposition, Jeremy Corbyn, have called for codifying Parliament's role in authorising future military action, thus effectively placing the current prerogative on a statutory footing:

*It is for this House to take matters into its own hands and to take back control—as some might put it. I am clear that, as an absolute minimum, Parliament should have enshrined in law the opportunity to ask the following questions before the Government can order planned military action: is it necessary; is it legal; what will it achieve; and what is the long-term strategy?*²⁵

This view was echoed in the aftermath of the Iraq war in the Public Administration Select Committee's final report which went further in calling for all Prerogative powers to be transformed into Acts of Parliament:

The Government should initiate before the end of the current session [2003-04] a public consultation exercise on Ministerial prerogative powers. This should contain proposals for legislation to provide greater

²⁰ eg Professor Philippe Sands QC in Carrell and Verkaik

²¹ in Woolf

²² Mills, p63

²³ Mills, p24

²⁴ Mills and other commentators rightly see this as a turning-point in terms of conventions, but perhaps understate the differential geo-political pressures on British governments in 2013 versus 2003: clearly the Bush White House was far more gung-ho in embarking upon war in the Middle East than the Obama Administration was a decade later. This created a markedly different level of British Executive interest in prosecuting war on each of these two occasions – although one should also state that this is a *political* observation, rather than one with strictly legal-constitutional import.

²⁵ Cited in Mills p38

parliamentary control over all the executive powers enjoyed by Ministers under the royal prerogative. This exercise should also include specific proposals for ensuring full parliamentary scrutiny of the following Ministerial prerogative actions: decisions on armed conflict; the conclusion and ratification of treaties; the issue and revocation of passports. This is unfinished constitutional business.²⁶

Such a move would herald the possibility of challenges in English courts to decisions to go to war. Ministers, senior military officials and other commentators have raised serious issues with a legislative approach to determining military engagement, underscoring the propensity of statute to hamstring the fleetness of foot of the Executive to conduct its affairs, in this case diplomacy and going to war. One retired General highlights an adverse effect on operational effectiveness and agility, as a Parliamentary debate would undermine the “secrecy, security and surprise” that is necessary for success on the battlefield.²⁷ It is also argued that the expanding definition of military action to include special forces operations and the advent of unmanned aircraft further complicate attempts to neatly enshrine war powers into law²⁸, reiterating the point above about statute not necessarily keeping pace with social or technological developments. As a counter to this view, it might be said that a notional ‘War Powers Act’ could be imaginatively drafted to incorporate procedural requirements and palpable limitations that could accommodate these operational, ‘on-the-ground’ exigencies.

Conclusions

The prerogative is a vestigial component of the British constitution that can be seen to afford excessive and unwarranted arbitrary power to the Executive in a manner that may serve to undermine Parliamentary supremacy and the Separation of Powers and is contrary to the Rule of Law. Despite valiant attempts by much of the judiciary over particularly the last four decades, firstly in the GCHQ case and most recently in the Miller rulings, a significant portion of the discretionary powers remain protected from scrutiny. Existing conventional (and still less purely political) avenues of regulation have been found to be unsatisfactory in reining in Ministers in their use of the Prerogative.

Nonetheless, the oft-demanded codification into statute of these powers would not be a panacea. Indeed, it would raise fresh complications of its own. We have seen how statute can circumscribe too heavily and not keep up with changes on the ground; this could be a particular concern in the rapidly changing theatre of war. But more fundamentally, the fact that the basis of judicial reticence in cases involving ‘high policy’ is their claimed *non-justiciability* is a practice that would presumably continue to hold even in the event of all Prerogative powers being fully susceptible to Judicial Review because they had all been subject to legislative action. As Loveland remarks:” The GCHQ Civil Servants would not have won their case if their employment derived from statute rather than the prerogative.”²⁹ Britain’s participation in the Iraq War is still likely to have occurred if statute had mandated the Parliamentary vote that took place.

Indeed, one senses that the debate rather misses the point: it is perhaps not the lack of codification into statute that currently makes Courts queasy about regulating much of these powers, so much as the Judiciary’s considered opinion that, consistent with the UK’s

²⁶ Cited in Mills, p16

²⁷ Cited in Mills, p61

²⁸ *ibid*, p47

²⁹ Loveland, p99

constitutional settlement, they do not have a lawful basis on which to ask searching questions of policy decisions made by an elected government.³⁰

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³⁰ Beyond the constitutional necessity of fidelity to the Separation of Powers, the English courts continue to show a 'deference to expertise' approach in some other fields too. Notable cases concerning academic matters within the Higher Education sector have also been deemed to be beyond consideration by the judiciary, and this may also be the case in confessional issues, or those concerning artistic merit or value:

"disputes suitable for adjudication under [the University's] procedures may be unsuitable for adjudication in the courts. This is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate. This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class." (Sedley LJ in *Clark v University of Lincolnshire and Humberside* (2000))