

W201 The Individual and the State

Study notes on the Royal Prerogative

A definition

Dicey's definition - that the Royal Prerogative is the residue of the powers of the crown which have not been replaced by powers authorised by Act of Parliament - remains valid today.

The history

In the 17th century Stuart Kings relied heavily on prerogative powers in their attempts to govern without the sanction of parliament. Charles I used prerogative powers to raise taxes (ship money) and James II used prerogative powers to favour Catholics (suspending and dispensing with laws and their penalties).

The attempts of the Stuart Kings to establish royal power and independence from parliament mirrored similar developments in other European countries where absolute monarchies (at the expense of parliaments) tended to be the rule. Louis XIV reigned in France from 1643 - 1715 and established an absolute monarchy which was eventually overthrown by the French Revolution in 1789 and the execution of Louis XVI in 1793.

In England the efforts of Charles I resulted in the Civil War and his execution and the efforts of James II resulted in his overthrow and the Glorious Revolution of 1688.

The Bill of Rights in 1689 established that the royal power to tax and maintain a standing army was subject to parliamentary approval and powers to suspend and dispense with laws and penalties were illegal.

Parliament's sovereignty was established in 1689 and since then prerogative powers have only continued in so far as parliament has not regulated or removed them.

The position today

The problem in defining the Royal Prerogative is that it represents an accumulation of powers by the crown over hundreds of years (up to 1688) and includes any powers not specifically abolished or curtailed by parliament. In other words it is difficult to list its limits exhaustively.

One thing is clear - there are not going to be any new prerogatives - only those in existence in 1688. As Lord Diplock put it in **BBC v Johns** 1965 Div Ct:

“... it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative”.

A current list might include:

Foreign affairs

- declarations of war and peace
- recognition of foreign states
- treaties
- diplomatic relations
- armed forces

Domestic affairs

- summoning and dissolving parliament
- appointment of ministers
- royal assent to bills
- granting honours
- defence of the realm
- keeping the peace
- prerogative of mercy
- the civil service.

In reality it is usually no longer important to decide where a statutory power ends and a prerogative power starts because most prerogative powers are exercised by the government of the day and **not** by the monarch personally.

Sometimes prerogative powers are referred to as common law powers to distinguish them from powers which are statutory in origin and to reflect the fact that the power will be recognised and enforced by the common law.

Of those powers still exercised by the monarch some are only exercised on the advice of the prime minister or the departmental minister (this in itself is a convention of the constitution) and some are restricted by other conventions eg the granting of the royal assent to a bill which by convention is never refused.

Examples of the Royal Prerogative

Dissolution of Parliament by the monarch

The last time a monarch dissolved parliament on his own initiative without his Prime Minister's advice was William IV in 1835!

If the power exists at all today it is by convention subject to the advice of the Prime Minister and possibly his cabinet.

If the monarch ignored the convention and dissolved parliament regardless of advice the consequence would be political not legal. The governing party would fight an election and seek a new mandate which could include curtailing the prerogative power!

Refusal of royal assent to a bill

No bill has been refused royal assent since Queen Anne (the last Stuart Queen) in 1708.

The granting of royal assent to a bill duly passed by both houses of parliament remains a convention and the sanction for a royal refusal would be political ie a general election and a possible removal of the prerogative power by parliament.

The prerogative of mercy

1) the pardon

A pardon removes the penalty not the conviction.

The monarch exercises the power on the advice of the departmental minister the Home Secretary.

The Home Secretary's decision can in some situations be challenged by judicial review. **R v Secretary of State for the Home Department ex parte Bentley** 1993 Div Ct (In 1992 Kenneth Clarke then Home Secretary read the case papers and refused a pardon. The court held that the formulation of policy for the grant of a free pardon was not justiciable but a failure to recognise that the prerogative of mercy was capable of being exercised in many different circumstances and over a wide range was. Such a failure was reviewable.)

2) a nolle prosequi

The Attorney General in the name of the crown (in proceedings on indictment) can enter a nolle prosequi which stops the proceedings. This is not subject to the approval of the judge.

The granting of honours

The monarch still has the personal right to grant the Order of the Garter, Thistle, Order of Merit and Royal Victoria Order.

Other honours are on the advice of the Prime Minister.

Issuing passports

Traditionally this is classed as a prerogative power arising from the crown's power to regulate the boundaries of the realm.

The power to grant or withhold a passport is subject to judicial review. **R v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett** 1989 Div Ct.

Acts of state

The crown (through its government) deals with recognition of foreign states declarations of war and peace and making treaties as part of the prerogative. Parliament is not involved unless the treaty means that domestic law is to be changed. At that point an act of parliament is required eg The European Communities Act 1972 (UK entry to the EC).

Control of the prerogative

This happens in two ways. First there is political and statutory control by parliament. Secondly there is judicial control usually through judicial review proceedings. Relate this to the separation of powers and the checks and balances involved. The executive or government exercises the prerogative powers. Political and statutory control therefore represents control of the executive by the legislature. Judicial review represents control of the executive by the judiciary.

Political and Statutory control by parliament

Political control of the prerogative through debate and questions in parliament is limited. Conventions and procedures have grown up over the years which exclude the exercise of many prerogative powers from challenge. The Speaker excludes parliamentary questions on the granting of honours, defence and national security, the dissolution of parliament and on advice given by the Prime Minister to the Crown in relation to the royal prerogative.

In the area of statutory control there are no limits. The basic rule since 1688 has been that parliament is sovereign and can abolish amend or curtail prerogative powers.

Where parliament legislates for a matter previously falling within the prerogative but

doesn't abolish the prerogative power **statute will prevail** and the prerogative power goes into abeyance. **A G v De Keyzers Royal Hotel Ltd** 1920 Lords (Compensation claim for billeting troops in wartime under statutory power - the government tried to pay a lesser discretionary sum on the basis it was also a prerogative power. Held - the statute prevailed.) **Laker Airways v Department of Trade** 1977 C A (Laker had a licence to fly the Atlantic granted under statute. The government relied on its prerogative power to block the licence by asking the CAA and US Government to stop Laker's company from operating. Held - the government could not use prerogative power to defeat statutory power.)

The court will however look for 'unequivocal' terms in the statute that the prerogative power is intended to be replaced. If the statute does not replace but **complements** the prerogative power the government can exercise either. **R v Home Secretary ex parte Northumbria Police Authority** 1988 C A (The Home Secretary's decision to supply police forces with CS gas and plastic bullets under the royal prerogative (the power to maintain the Queen's peace) was upheld even though the police authorities did not want them under their powers in the Police Act 1964.)

The courts do however draw the line where a prerogative power is used to defeat a statutory power **R v Secretary of State for the Home Department ex parte Fire Brigades Union** 1995 Lords (The Home Secretary failed to implement a statutory system of payments under the Criminal Injury Compensation Scheme and produced a cheaper scheme under his prerogative powers. Held - the prerogative could not be used to avoid a statutory duty.)

Control by judicial review

Historically the monarch's judges have been reluctant to question the exercise of the monarch's prerogative powers and this form of judicial deference continued into the 20th century. Because the monarch was no longer involved in day to day government and there was no meaningful distinction between a government action based on statutory or prerogative power this approach was an anachronism.

Lord Denning pointed this out in the **Laker** case in the Court of Appeal in 1977:

“Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power that is vested in the executive”.

A year later Lord Denning was the dissenting judge in the Court of Appeal in **Gouriet v AG** 1978 when the majority refused to review a decision of the Attorney General not to commence relator proceedings (a prerogative power) to protect the public interest and challenge possibly illegal strike action by the Post Office Workers Union. The Lords upheld the Court of Appeal.

The turning point came in 1985 when in the **GCHQ** case the Lords established that there could be judicial review of a prerogative power - in that case the termination of the right of workers to belong to Unions at GCHQ by prerogative order. The Unions failed on a separate point because their work related to national security and that aspect was non justiciable. Non justiciability based on national security would have been a bar whether the origin of the power in question was statute or the prerogative.

The Lords went on to indicate the following matters were non justiciable:

- appointment of ministers
- dissolution of parliament
- the grant of honours
- treaties
- national security

In **R (Gentle) v Prime Minister** 2008 Lords Lord Bingham referred to: “the restraint traditionally shown by the courts in ruling on what has been called high policy — peace and war, the making of treaties, the conduct of foreign relations”. Lord Hope added: “the conduct of international relations between states is a matter of political judgment. It is a matter for the conduct of which ministers are answerable to Parliament and, ultimately, to the electorate. It is not part of domestic law reviewable here”.

However these categories apart the principle is now established that prerogative powers are capable of review.

Since 1985 Courts have agreed to review prerogatives especially where they have little policy content and relate to individual rights or interests:

- refusal of a passport **R v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett** 1989

- expelling friendly aliens **R v Home Secretary ex parte Beedasee** 1989

- the prerogative of mercy **R v Home Secretary ex parte Bentley** 1993

- exclusion of members of the armed forces (on the ground of sexual orientation) **R v Ministry of Defence ex parte Smith** 1996.

Reform

In July 2007 the Government published a Green Paper “The Governance of Britain” which discussed reform of the Royal Prerogative. It proposed that “in general the prerogative powers should be put onto a statutory basis”. This was followed by a White Paper (with a draft Constitutional Reform Bill included) in March 2008. The White Paper contained proposals for reform of the Attorney General’s powers, for placing the

civil service on a statutory footing and for greater parliamentary control over deploying the armed forces abroad and ratifying treaties. Issuing passports was to be placed on a statutory footing separately by future legislation.

The Constitutional Reform and Governance Act 2010 will (when it comes into force) place the civil service on a statutory footing and allow parliamentary scrutiny of treaty ratification (in the form of a resolution of the House of Commons).