The Royal Prerogative

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This note gives a brief explanation of what is meant by the royal prerogative and summarises recent parliamentary reports on the subject. It does not cover the use of the royal prerogative for initiating conflicts aboard; for this aspect please see Library Research Paper 05/56 *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill*

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A. Historical background

Historically, the medieval monarchy was both feudal lord and head of the kingdom. As such, the King had powers accounted for by the need to preserve the realm against external foes and an 'undefined residue of power which he might use for the public good'. He could exercise the 'royal prerogative' and impose his will in respect of decision-making.

Moreover certain royal functions could be exercised only in certain ways. The common law courts were the King's courts and only through them could the King decide questions of title to land and punish felonies. Yet the King possessed a residual power of administering justice through his Council where the courts of common law were insufficient.

In the 17th century, disputes arose over the undefined residue of prerogative power claimed by the Stuart kings. The conflict was resolved only after the execution of one King and the expulsion of another in 1649 (Charles I) and 1688 (James II), culminating in the Bill of Rights 1689, which declared illegal certain specific uses and abuses of the prerogative. (See House of Commons Factsheet G4: *The Glorious Revolution*) The second stage was the growth of responsible government and the establishment of a constitutional monarchy, spurred on by the various electoral reform acts of the 19th century.(See Library Research Paper 04/82 *The collective responsibility of ministers – an outline of the issues*)

It became established that the bulk of prerogative powers could be exercised only through and on the advice of ministers responsible to Parliament. Although the monarch retained formal power of appointment and removal of ministers and ministries, the development of collective ministerial responsibility made it increasingly difficult for the King or Queen to exercise such power freely against the wishes of the Prime Minister and Cabinet. However, the ability of ministers to rely on prerogative powers continues to give rise to problems of accountability[1]

B. General prerogative powers

Because of the diverse subjects covered by royal prerogative and because of the uncertainty of the law in many instances where an ancient power has not been used in modern times, it is difficult to give a comprehensive catalogue of prerogative powers. However, the constitutional lawyers Bradley and Ewing summarise the main areas where the prerogative is used today as follows:

- **Powers relating to the legislature,** e.g. - the summoning, proroguing and dissolution of parliament; the granting of royal assent to bills; legislating by Order in Council (e.g. in relation to civil service) or by letters patent; creating schemes for conferring benefits upon citizens where Parliament appropriates the necessary finance.
- **Powers relating to the judicial system,** e.g. - various functions carried out through the Attorney General and the Lord Advocate; pardoning of convicted offenders or remitting or reducing sentences; granting special leave for appeal to the Judicial Committee of the Privy Council.

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1 AW Bradley and KD Ewing, *Constitutional and Administrative Law,* 13th Ed, 2003, p105 & p246-247

- **Powers relating to foreign affairs,** e.g. – the making of treaties, the declaration of war and the making of peace; restraining aliens from entering the UK and the issue of passports.
- **Powers relating to the armed forces** e.g. – the Sovereign is commander in chief of the armed forces of the Crown and the control, organisation and disposition of the armed forces are within the prerogative.
- **Appointments and honours**, e.g. – appointment of ministers, judges and many other holders of public office; creation of peers and conferring of honours and decorations.
- **Immunities and privileges**, e.g. – the personal immunity of the Sovereign from being sued.
- **The prerogative in times of emergency**, e.g. – requisitioning of ships (where compensation would be payable).
- **Miscellaneous prerogatives** - various other historic powers relating to such things as royal charters, mining precious metals, coinage, franchises for markets, treasure trove, printing, guardianship of infants.[2]

C. The Crown's personal prerogative powers

There are three main prerogative powers recognised under the common law which still reside in the jurisdiction of the Crown.

Firstly, the appointment of a Prime Minister; the sovereign must appoint that person who is in the best position to receive the support of the majority in the House of Commons. However, this does not involve the sovereign in making a personal assessment of leading politicians since no major party could fight a general election without a recognised leader.

However, if after an election no one party has an absolute majority in the House (as in 1923, 1929 and February 1974) then the Queen will send for the leader of the party with the largest number of seats (as in 1929 and 1974) or with the next largest number of seats (as in January 1924). Alternatively, the sovereign would have to initiate discussions with and between the parties to discover, for example, whether a government could be formed by a politician who was not a party leader or whether a coalition government could be formed.

Secondly, the dissolution of Parliament, in the absence of a regular term for the life of Parliament fixed by statute, the Sovereign may by the prerogative dissolve Parliament and cause a general election to be held. The sovereign normally accepts the advice of the Prime Minister and grants dissolution when it is requested; a refusal would probably be treated by the Prime Minister as tantamount to a dismissal. These areas of the prerogative are the subject of continuing academic debate and for the most recent discussions see *Public Law, Autumn 2004* and *Spring 2005*.[3]

Thirdly, the giving of royal assent to legislation, in 1708 Queen Anne was the last sovereign to refuse royal assent to a bill passed by Parliament. Additionally, no monarchs since the

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2 AW Bradley and KD Ewing, *Constitutional and Administrative Law,* 13th Ed, 2003, p248-253

3 Robert Blackburn "Monarchy and the Personal Prerogatives" 2004; Rodney Brazier "Monarchy and the Personal Prerogatives- A personal response to Professor Blackburn" 2005

sixteenth century have signed Bills themselves and Queen Victoria was the last to give the Royal Assent in person in 1854.[4]

D. Ministerial prerogative powers

Recently there has been interest in Parliament about the scrutiny in the exercise of prerogative powers, largely in connection with the role of parliament in the deployment of troops, but also in relation to the powers of the Prime Minister. (See Library Standard Note SN/IA/1218, *Parliament and the Use of Force*)

This subject was also addressed, in March 2004, by the Select Committee on Public Administration's report: *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament.* HC 422 2003/04 (http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/1262/126202.htm)

> This report considers the prerogative powers of ministers. These include some of the most important functions of government, such as decisions on armed conflict and the conclusion of international treaties. The report describes how such powers have, over many years, come to be delegated by Sovereigns to ministers, and notes that they may be exercised without parliamentary approval or scrutiny. They are therefore best described as ministerial executive powers.
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> While recognising that such powers are necessary for effective administration, especially in times of national emergency, the report considers whether they should be subject to more systematic parliamentary oversight. It examines the arguments for scrutiny of some of the most significant prerogative powers, and concludes that the case for reform is unanswerable. There is discussion of the merits of various ways of dealing with this question, including a continuation of the current approach, by which individual prerogative powers are made subject to parliamentary control on a case-by-case basis as the necessity for such control is demonstrated.
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> The report concludes that a different approach is needed, and that comprehensive legislation should be drawn up which would require government within six months to list the prerogative powers exercised by Ministers. The list would then be considered by a parliamentary committee and appropriate legislation would be framed to put in place statutory safeguards where necessary. A paper and draft Bill appended to the Report, prepared by Professor Rodney Brazier, the specialist adviser to the inquiry, contain these provisions as well as proposals for early legislative action in the case of three of the most important specific areas covered by prerogative powers: decisions on armed conflict, treaties and passports. The Report recommends that the Government should, before the end of the current session, initiate a public consultation exercise on the prerogative powers of Ministers.

The Government's response to this report, in July 2004, was as follows:

> The Government acknowledges the useful work that the Committee has undertaken on this subject. The Government accepts and welcomes scrutiny of any of its actions, including those taken under the prerogative. However, it is not persuaded that the

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4 AW Bradley and KD Ewing, *Constitutional and Administrative Law,* 13th Ed, 2003, p238-244

Committee's proposal to replace prerogative powers with a statutory framework would improve the present position.

Ministers are already accountable to Parliament for action taken under prerogative powers, as for anything else. The use of prerogative powers is subject to scrutiny by Departmental Select Committees. Additionally the Prime Minister is subject to twice yearly questioning by the Liaison Committee. It is for Ministers to account for and to justify their actions to Parliament and for Parliament to hold Ministers to account. Such accountability is in itself a form of control exercised by Parliament over the executive.

It is long established law that Parliament can override and replace the prerogative by statute, where the individual circumstances make that appropriate. There have been a number of examples in recent years where such a change has been made, for example in the Regulation of Investigatory Powers Act. Parliamentary scrutiny and accountability can also be increased without statutory provision. The rules on scrutiny of EU proposals and the recent developments in parliamentary debate on armed conflict are examples of this.
The Government therefore agrees that it is often possible to make out a case for either the transfer of prerogative powers to a statutory basis, or for an increase in the level of non-statutory parliamentary scrutiny. It continues to believe, however, that these changes are best made on a case-by-case basis, as circumstances change. It does not therefore agree with the recommendation for a wide-ranging consultation exercise. This could only result in a snapshot at a fixed moment of what is inevitably a fluid and evolving situation.
(Source: http://www.dca.gov.uk/pubs/reports/prerogative.htm#part6)

Finally, on 11 August 2005, the House of Lords Constitution Committee announced that it would undertake an inquiry into the use of the royal prerogative power by Government to deploy the UK's armed forces. This committee started taking evidence on 23 November 2005.
(http://www.parliament.uk/parliamentary_committees/lords_constitution_committee.cfm)