

INNER TEMPLE

10 NOVEMBER 2014

The text which follows forms a chapter of a forthcoming book, *Lions under the Throne: essays on the history of English public law*, to be published in 2015 by Cambridge University Press. It may not be reproduced in whole or in part.

THE ROYAL PREROGATIVE – THEN AND NOW

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The throne and the lions

If anyone imagines that judges overreaching themselves and interfering in politics is a complaint confined to modern judicial review, they need look no further than Bacon's essay "Of Judicature", published in 1625.

"Let judges also remember," Bacon wrote, "that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect, that they do not check or oppose any points of sovereignty."

Although few aspects of history have an identifiable beginning, much of the history of my topic tonight begins in Bacon's working lifetime, between his call to the bar by Gray's Inn in 1582 and his disgrace and demotion from the chancellorship in the early 1620s. It is a history which not only explains why Bacon wrote what he did about the proper place of the judiciary but also helps to explain why critiques continue to be directed at what is conventionally dubbed judicial activism¹.

Public law, as Bacon pointed out, has a proper sphere of operation which does not include the business of government. What Bacon was also taking care to point out, however, was that the state itself must operate within the law: that was the principle which the judicial lions were there to guard, and it is why he went on to say:

¹ The word has no jurisprudential meaning. A judge is either active or asleep.

“Let not judges also be so ignorant of their own right as to think there is not left them, as a principal part of their own office, a wise use and application of laws.”

The location of the borderline between public law and public administration is still disputed, but Bacon’s admonition is striking evidence that it had already become controversial by the end of the sixteenth century. Monarchs such as Elizabeth I or James I, ruling by divine right, ought to have been able to dictate both law and justice at will: yet by the first decade of the seventeenth century their judges, Coke prominent among them but by no means on his own, had established a measure of sovereignty for the common law which continues to this day and which is one of the shaping forces of the constitution.

Sir Edward Coke

The *Case of Prohibitions*² arose in 1607 out of a dispute which was brought before the king in person by the Archbishop of Canterbury, who asserted that scripture gave James power to decide it. Coke, with the backing of all the English judges, held otherwise. This is how he reported his own decision:

“A controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did belong to the common law: then the King said, that he thought the law was founded upon reason. And that he and others had reason, as well as the Judges: to which it was answered by me,” - wrote Coke – “that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that he should then be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege.*” [a king is not subject to men but is subject to God and the law]

Coke’s stance nearly cost him dear. A contemporary record describes the resulting confrontation in which, as the historian Theodore Plucknett put it, the king lost his dignity and Coke lost his nerve:

“His Majestie ... looking and speaking fiercely with bended fist offering to strike him, which the Lord Coke perceiving, fell flatt on all fower.”³

Bacon would have enjoyed the symbolism of the judicial lion being ordered back under the throne. So would Dr Cowell, the Oxford professor of civil law, who in the same year wrote: “I have heard some to be of opinion that the laws be above the King”, but asserted

² *Prohibitions del Roy* (1607) 12 Co. Rep. 63

³ Quo. T. Plucknett, *A Concise History of the Common Law*, 4th ed., p 49 fn.1

unequivocally that the king “is above the law by his absolute power; he may alter or suspend any particular law that seemeth hurtful to the publick estate.”⁴ But history was on Coke’s side.

Monopolies

One of the Tudor monarchy’s most profitable sidelines was the grant of monopolies – an exercise of the prerogative in its Blackstonian sense of power to do things that no individual could. Monopolies were, however, a serious handicap on trade: they stifled competition and inflated prices. When Parliament set about legislating to constrain their use, Elizabeth backed down. In November 1601 she issued a proclamation⁵ withdrawing a considerable number of them on the ground that they had been abused, and allowing anyone who had been harmed by such abuse to “take their ordinary remedy by her Highness’ laws of this realm”.

One of the grants she withdrew was a monopoly of the making and importation of playing cards, which she had issued to Edward Darcy, a groom of the privy chamber, in return for a fee of 100 marks a year. Earlier in 1601 Darcy had brought a lawsuit against a haberdasher named Allein who had infringed his monopoly⁶. Sir Edward Coke A-G, Darcy’s counsel in what has become known as the *Case of Monopolies*, accepted that the courts had control of the grant of monopolies but defended this one on the ground that the Queen was entitled to restrict the availability of playing cards for reasons of public morality. Popham CJ, speaking for the full court, held that all monopoly was contrary to common law because it restricted employment and for that reason lay beyond the prerogative power:

“The Queen could not suppress the making of cards within the realm, no more than the making of dice, bowls, balls, hawks’ hoods, bells, lures, dog-couples and other the like, which are works of labour and art, although they serve for pleasure, recreation and pastime, and cannot be suppressed but by Parliament....”

Popham’s court gave a second reason which is of interest because it prefigures the House of Lords’ decision in *Padfield’s Case*⁷ that administrative action may not run counter to the policy and objects of the enabling statute. The preamble of Darcy’s grant had recited that the Queen’s purpose in making it was to advance the public good; but since all it had done was fill Darcy’s pocket, said Popham, “the Queen was deceived in her grant” – that is to say the monopoly had failed in its purpose.

⁴ *The Interpreter*, Cowell’s law dictionary; quo. Bowen *The Lion and the Throne*, p. 255

⁵ *Tudor Royal Proclamations*, vol III, #812, ‘Reforming patent abuses’, Westminster, 28 November 1601.

⁶ *The Case of Monopolies, Darcy v Allein* 11 Co Rep 84

⁷ *Padfield v Minister of Agriculture* [1968] AC 997

Popham cited in support of his court's decision a 14th-century statute which had annulled the king's grant of a monopoly of importing sweet wines into London. Not for the first time, the pincer of the Commons and the judges was closing on the monarch's prerogatives. But the monarchy could still bite back. The following year, 1602, the Queen's Privy Council ordered some traders (who may have included Allein) to be gaoled for infringing Darcy's monopoly.

But the last word went to Coke. By the time he published his report of the *Case of Monopolies*, James I was on the throne and had published a book in which he declared all monopolies to be unlawful, "and therefore," Coke announced, "expressly commands that no suitor presume to move him to grant any of them".

All of this, however, concerned domestic monopolies: the courts were astute to see the link between job creation at home (which meant striking down domestic monopolies)⁸ and the exclusion or restriction of foreign imports (which meant upholding external ones). There was every reason to preserve the very different monopolies of the eleven international trading companies, among them the Merchant Adventurers and the East India Company, which by 1600 had been granted exclusive licences by royal charter⁹.

The judges and the prerogative

All of this helps to explain why Coke, in his time, did not stand alone. Modern work on the prerogative writ of habeas corpus has shown how, towards the end of Elizabeth's reign and into the reign of James I, at least three of the senior judges had made it their business to establish judicial oversight of local courts, bodies and functionaries which took it on themselves to deprive individuals of their liberty. The first was Sir John Popham, chief justice of the King's Bench from 1592 until his death in 1607¹⁰. The second was Sir Thomas Fleming, who succeeded him. Coke, who succeeded Fleming in 1613 but was ousted three years later, was the third. Of these chief justices, Paul Halliday says:

"Coke is by far the best known of these three today¹¹. But his two predecessors in King's Bench did more to transform habeas corpus from an instrument for moving around bodies as part of routine court business into an instrument for controlling other jurisdictions. They

⁸ A body of case-law held that the holders of chartered or de facto monopolies such as toll bridges and wharfs could only charge reasonable fees: see P.P.Craig, 'Constitutions, property and regulation' [1991] PL 538. Until the early 19th century the courts also penalised market manipulation: see S.Sedley *Freedom, law and justice* (1999) pp. 35-6. Unreasonable covenants in restraint of trade continue to be justiciable.

⁹ C.Arnold-Baker, *Companion to British History*, cap. 'Chartered companies'.

¹⁰ It was Popham who had decided the *Case of Monopolies* against Coke's arguments.

¹¹ Principally, however, through his tenure from 1606 of the office of Chief Justice of the Court of Common Pleas.

did this by capturing the king's prerogative for their own, then defending this capture with procedural innovations."¹²

This is the situation in which the lions begin to emerge from beneath the throne and the royal prerogative begins to be drawn into the portals of the common law¹³. In the *Case of Proclamations*¹⁴, in 1611, Coke articulated what had become and still is the foundational principle of a constitutional monarchy:

"The King hath no prerogative but what the law of the land allows him."

The prerogative strikes back

By the beginning of the seventeenth century the judges were in consequence not simply corralling the royal prerogative. As Halliday suggests, they were themselves exercising it. Fleming CJ made it quite clear that the writs of habeas corpus, prohibition, certiorari and mandamus – the prerogative writs as they continued to be called until the late twentieth century – were issued in the exercise by the judges of the monarch's own powers:

"This court," he said, "is the jurisdiction of the Queen herself. It is so high that in its presence all other jurisdictions cease."¹⁵

James I, who was no fool and had been accustomed as James VI of Scotland to something approaching complete deference from his judges¹⁶, denounced Coke's stricture on the monarch's personal use of the prerogative power as treason. But he could no more adjudicate without his judges than he could raise money without Parliament. Sometimes James got his way, as he did in 1606, when Coke was just taking office as chief justice of the Common Pleas and an acquiescent Court of Exchequer allowed him, in defiance of a statute of 1372 forbidding the Crown to raise taxes without Parliament's consent, to levy a duty on the import of currants on the pretext that he was merely regulating trade¹⁷ – a form of reasoning still familiar in the twenty-first century. His successor, Charles I, similarly persuaded a majority of the court of Exchequer Chamber¹⁸ in 1637 to endorse his demand, famously opposed by John Hampden and others, for ship money to equip a navy. It is not without interest that Finch CJ, in upholding the Crown's claim, held that "acts of parliament

¹² Paul D Halliday, *Habeas Corpus, from England to Empire* (2010), p. 22 (IT book prize)

¹³ As to the prerogative court of Star Chamber, which survived until 1641, see Ch.9

¹⁴ (1611) 12 Co.Rep.74; applied in *Pankina v Home Secretary* [ref], CA, affirmed on appeal on other grounds [ref].

¹⁵ [ref – Halliday?]

¹⁶ But not total deference, it seems. In 1599, before he ascended the throne of England, James had apparently been defied by the Court of Session in a lawsuit brought by Robert Bruce against Lord Hamilton. According to an eyewitness account sent to Sir Robert Cecil, the court found for Bruce in the face of James' intercession on behalf of Hamilton, holding that they did justice not according to the king's command but as their consciences led them. See Claire Palley, *The United Kingdom and Human Rights* (1991), p.20, esp.n.15.

¹⁷ *The Case of Impositions (Bate's Case)* (1606) 2 St Tr 371: "The revenue of the Crown is the very essential part of the Crown, and he who rendeth that from the King pulleth also his Crown from his head..."

¹⁸ *The Case of Ship Money (R v Hampden)* (1637) 3 St Tr 825

to take away [the] royal power in defence of the kingdom are void"; for here was Coke's notion of limited parliamentary supremacy¹⁹ being used not to mark out the fief of the common law but to preserve the fief of the prerogative. For a short time the jurisprudential pendulum was swinging back towards monarchical power. But the Long Parliament in 1640, in the run-up to the Civil War, reversed the decision and reasserted parliamentary control over taxation.²⁰

Dispensing with law

Following the Restoration, the courts attempted to restrict the royal power to dispense at will with legislation²¹; but James II, with the eventual acquiescence of his judges²², disappplied Parliament's laws for his own religious purposes until the Bill of Rights of 1689 eventually put an end to the dispensing power and restored a restriction which was already, in principle, centuries old.

We have learned to think that parliamentary control over taxation has consequently never since 1689 been contested. Yet in modern times the Crown, in its executive role as tax collector, has purported to waive Parliament's laws by letting major defaulters off the tax they owed. Until the discontinuance of the practice was announced in 2014, the Inland Revenue annually published a volume unblushingly entitled 'Extra-Statutory Concessions', setting out the situations in which it intended not to enforce the law laid down by Parliament. Until 2008, when it was put on a somewhat exiguous statutory footing, this was done in the exercise by ministers and civil servants of a power which can only have been the royal prerogative²³. Nobody appeared to be unduly troubled by the fact that the Bill of Rights three centuries earlier had abolished the Crown's dispensing power.

Thus, somewhat contrary to Tennyson's vision of the grand sweep of English history, freedom over these centuries has not simply broadened down from precedent to precedent. The acquiescence of many of the judges in the despotism of the later Stuarts led the historian George Trevelyan to treat Bacon's metaphor of lions under the throne as an image of servility rather than of vigilance²⁴. And it is the very ambiguity of the image – the king of beasts in a submissive role - which characterises both the history of public law and the controversy which continues to surround it.

¹⁹ See *Dr Bonham's Case* (1608/1610) 8 Co.Rep.113b, discussed in Ch. 7, 'The supremacy of Parliament and the abuse of power'

²⁰ The story is taken up in chapter 4, on the Interregnum, and chapter 3, on the Hanoverian confrontation.

²¹ *Thomas v Sorrell* (1674) Vaughan 330

²² *Godden v Hales* (1686) 11 St. Tr. 1165

²³ The process, which had been announced in Parliament, was known as "offering Hansard" to tax defaulters. Cf the discussion (below) of the supposed "third source" of governmental power. See, however, Ch. 5 in relation to the discretion of the DPP not to prosecute.

²⁴ G.M.Trevelyan, *England under the Stuarts* (1904), Folio ed., p.359

Nevertheless, the fact that it was not until 1701, when the Act of Settlement was passed, that the judges of the higher courts were made secure against dismissal at the will of the Crown makes striking the principled stand that some of them took, in the period following the Restoration, against regal autocracy. When James II set about packing the court that was to decide *Godden v Hales*²⁵, the case on the legality of his use of the dispensing power to allow Roman Catholics to hold military commissions, he told the Chief Justice of the Common Pleas, Sir Thomas Jones, that he must either give up his opinion or his place.

“For my place,” said Jones, “I care little. I am old and worn out in the service of the Crown. But I am mortified to find that Your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give.... Your majesty may find twelve judges of your mind, but hardly twelve lawyers.”²⁶

The long revolution

The history of public law thus offers a qualification to the conventional wisdom that it was in 1689, by what Trevelyan called “this beneficent Revolution”, that “the liberty of the subject and the power of Parliament were finally secured against the power of the Crown.” The principles of a constitutional monarchy had been laid down long before 1689. They had been fought over in a civil war which ousted a monarch who would not accept constitutional restrictions on his power. They had been flouted by the monarchs who returned after the failure of the Commonwealth and the collapse of the Protectorate. But, although consolidated in the Bill of Rights 1689²⁷, they have continued to be fought over - for the royal prerogative has not withered away in the four centuries since Coke’s time. It has changed in form, in content, and above all in its relationship with the law; but it remains the element in which central government lives and moves and has its being.

The Privy Council

Perhaps the most remarkable survivor of the centuries of constitutional conflict and vicissitude has been the Privy Council. Like the Privy Council, the great departments of state – the Treasury, the Home Office, the Foreign and Commonwealth Office – and many of the powerful government commissions and boards to which major executive functions were assigned in the course of the 18th and 19th centuries were emanations of the Crown: no parliament ever legislated to bring them into being. But while these departments and bodies have no lawmaking powers that have not been granted by Parliament or which can

²⁵ (1686) 11 St.Tr. 1165

²⁶ Macaulay, *The History of England from the Accession of James II* (1914 ed), vol. 2 p. 735 (quo. Bradley [2008] PL 471). Macaulay may have been imagining what Jones would have liked to say.

²⁷ The Bill of Rights was partly derived from the Instrument of Government 1653, by which the Protectorate was instituted: see Ch. 4

therefore escape the oversight of the courts, the Privy Council, with powers that derive in part from statute and in part from the royal prerogative, continues to be used as a means of introducing domestic and colonial laws without scrutiny or vote²⁸.

At a political level, the Privy Council today deliberates and legislates purely as an outgrowth of Cabinet. This is accomplished by excluding from its discussions all privy counsellors except those who are currently cabinet ministers, on the ground that it is only on the advice of her government that the Queen may act. The Privy Council's deliberations – most of them on deeply unexciting questions like the closure of burial grounds, but some on such important issues as the royal charter in support of press regulation – are accordingly conducted principally by inter-departmental memorandum; actual meetings are extremely rare. More significantly, there is no participation at any stage by privy counsellors from the opposition or by the large number of non-political privy counsellor who might have useful contributions to make.

These functions border on the administrative. But the Privy Council is also a legislative body. While it is known²⁹ that in 2002, 372 Orders in Council were made under statutory powers, as against 154 in the exercise of the prerogative, both classes are constitutionally problematical.

Statutory power to legislate by Order in Council was granted to the Privy Council, for example, by the United Nations Act 1946, in order to implement UN decisions³⁰. When this power was used in 2006 to enact an extra-judicial confiscation regime for use on terrorism suspects, the question arose whether, without explicit power to do so, a statutory order in council could take away the right of access to the courts. The Supreme Court held that it could not lawfully be done³¹. This was an orthodox judicial review of the use of statutory powers, albeit exercised by a prerogative body.

Orders in Council made under non-statutory, prerogative powers, which include the entire governance of Britain's remaining colonial territories, are subject to no such legislative

²⁸ See Patrick O'Connor QC, *The Constitutional Role of the Privy Council and the Prerogative* (Justice, 2009). Separately, and by statute (the Judicial Committee Act 1833), its judicial committee, composed of senior UK and Commonwealth judges, still functions as the final court of appeal for a small number of former colonies.

²⁹ From a parliamentary answer: see O'Connor op.cit., p.8

³⁰ A power of amendment was given to the Privy Council by the Scotland Act 1998. Using this power, an Order in Council (2013 no. 242) deleted an independence referendum from the scheduled list of reserved (i.e. undeveloped) matters. By undertaking to respect the result, the leaders of the three main parties, without the authority of Parliament, authorised a decisive plebiscite on the possible break-up of the United Kingdom in which the majority of the UK's population had had no vote. It will never be known whether, had the Yes side won in Scotland, the Westminster Parliament would have tamely repealed the Act of Union 1707 without a national mandate.

³¹ *A, K et al v HM Treasury* [2008] EWHC 869 (Collins J); sub nom. *Ahmed v HM Treasury* [2008] EWCA Civ 1187 (CA); [2010] UKSC 2. In a dissenting judgment in the Court of Appeal, at para. 127, I noted that measures already provided for in primary legislation "have been sidestepped by the making of ... Orders in Council requiring no prior parliamentary debate or scrutiny, and each of which confers on its maker a range of powers correctly described by Collins J [the trial judge] as draconic." A majority of the 9-judge panel in the Supreme Court took a similar view, striking down the Order.

control³². This was how Jack Straw, as Foreign and Commonwealth Secretary, was able, without the knowledge of Parliament and without any consultation with those affected, to take away the right of the exiled Chagos islanders to return to their home. Although the House of Lords, in a much-criticised majority decision, held this ministerial use of the royal prerogative to have been lawful on the facts of the case, the courts at every level³³ accepted that the prerogative power to make orders in council is today justiciable for abuse of power³⁴. Judicial review in this area, however, is no more than a longstop. At departmental level, a secretary of state can put a draft order in council before the Queen for signature without either the public or Parliament knowing about it until it is signed and sealed.

This is why it was one of the signal achievements of the common law during the 20th century to affirm the power of the ordinary courts to supervise the legality of prerogative acts of the Crown, whether in relation to the disbursement of ex gratia awards³⁵, the recognition of civil service unions³⁶, the liability of ministers for contempt of court³⁷ or the making of Orders in Council for the governance of colonies³⁸.

It is possible to regard the continued existence of such a narrowly constituted body, empowered to make legally binding enactments behind closed doors without public notice or debate, as an affront to the rule of law. But the Privy Council is by no means the only manifestation of the prerogative power of the Crown in the functioning of modern government, and the availability of judicial review to keep it within the law continues to matter.

A "third source" of power?

Are there nevertheless what Bacon, you will remember, called 'points of sovereignty' beyond the reach of the law? Were the Queen's privy counsellors entitled, as the lawyer John Hawarde alleged in 1597³⁹,

³² They are assimilated to primary legislation for the purposes of the Human Rights Act 1998: see s. 21(1)

³³ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [DC....]; [2007] EWCA Civ 498; [2008] UKHL 61.

³⁴ [ref to Roskill in GCHQ and Bancoult]. See also [*Vijayatunga*], where the jurisdiction of the High Court was invoked without contest to decide the fairness of the procedure adopted by an ad hoc committee of the Privy Council acting on behalf of a royal university visitor.

³⁵ *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864

³⁶ *CCSU v Minister for the Civil Service* [1985] AC 374

³⁷ *M v Home Office* [1994] AC 377

³⁸ *R (Bancoult) v Foreign and Commonwealth Secretary (No.2)* [2007] EWCA Civ 498; [2008] UKHL 61. The Court of Appeal in paras. 44-47 questions whether any of the high prerogative functions are today beyond the reach of public law.

³⁹ John Hawarde, *Les Reportes del Cases in Camera Stellata, 1593-1609*, p.78-9, cited in James S. Hart, *The Rule of Law 1603-1660*, p.6.

“to attribute to their councils and orders the vigour, force and power of a firm law, and of higher virtue and force, jurisdiction and pre-eminence, than any positive law, whether it be the common law or statute law”?

There is a doctrinal dispute about what the royal prerogative is. Is it purely the great functions of state which no private individual could perform - making war or peace, conferring honours, entering into treaties, appointing ministers, summoning or proroguing Parliament, pardoning crimes: what one can call the high prerogative⁴⁰? Or is it what can be called the broad prerogative: everything the state does which has no articulated authority in statute law or prerogative power but is ancillary to its express powers – the employment of staff, the formation of contracts, procurement of supplies, holding and disposal of land and so forth? The difference has come to matter in recent years because of a debate among public lawyers about a “third source” of state power⁴¹ which is said to originate neither in statute nor in the prerogative but in a previously unrecognised form of authority which places the state on a par with the private individual and allows it to do anything that the law does not explicitly forbid.

The ebb and flow of recent authority and commentary on the theory is an unusual instance of legal history in the making; but the theory itself is – I am going to suggest - a jurisprudential version of the emperor’s new clothes.

The Ram Doctrine

In 1945 Sir Granville Ram, the senior parliamentary drafter, explained in a memorandum that, unlike a statutory corporation – for example a local authority – which is limited to the powers given to it by law, a minister

“may, as an agent of the Crown, exercise any powers which the Crown has power to exercise, except so far as he is precluded from doing so by statute.”⁴²

The memorandum may have been correct at the time it was written in its suggestion that the only constraints on the use of prerogative power were statutory. Today, as the Attorney-General in 2013 told the House of Lords’ Constitution Committee, the power “is circumscribed by public law; by propriety; by human rights”⁴³. But Ram’s essential point, which is all that will have concerned him as senior parliamentary drafter, was perfectly

⁴⁰ This meaning is the one attributed to Blackstone by Sir William Wade: see Wade and Forsyth, *Administrative Law*, 10th ed., 182. But Blackstone was clear that even the high prerogative was created and bounded by law: “the prerogative of the Crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice” (Bl. Comm., I, 232, 239)

⁴¹ See B.V.Harris [1992] LQR 626; [2007] LQR 225; [2010] LQR 373.

⁴² Although widely used (and misused) in Whitehall, Ram’s memorandum was not published until 2003, when it was extracted by persistent parliamentary questions asked by Lord Lester QC.

⁴³ Report of the House of Lords Select Committee on the Constitution, ‘The pre-emption of Parliament’ (2013) §58. The A-G’s inclusion of human rights as a non-statutory constraint was correct: see Ch. 10.

correct: ministers have implied power to do what is reasonably ancillary to their role without Parliament having to spell out their authority to do it⁴⁴. This, however, is not what was made of his memorandum in Whitehall: it was recycled, in the words of the Treasury's submission to the Constitution Committee, as a doctrine that "ministers can do anything a natural person can do, unless limited by legislation"⁴⁵.

It would be reasonable to expect that this echo of the decades of unquestioned Whitehall supremacy has now been laid to rest by the response, last year, of the House of Lords' Constitution Committee:

"The Ram memorandum is not a source of law and ... not an accurate reflection of the law today The description of the common law powers of the Crown encapsulated by the phrase 'the Ram doctrine' is inaccurate and should no longer be used."⁴⁶

In the intervening years, however, the supposed Ram doctrine has made an inroad into the rule of law which it may take more than a parliamentary report to correct.

In 2000 a challenge came before the Court of Appeal to the maintenance by the Department of Health of a list of persons who ought not to work with children⁴⁷. There was no statutory authority to maintain such a list, but the Department relied on its inherent powers to authorise what it was doing. The court might have found the maintenance of the list to be reasonably ancillary to the Department's statutory functions, but that is not what it did. Without explicit reference to Ram, Hale LJ, giving the single reasoned judgment, adopted a passage from Halsbury's *Laws of England*:

"At common law the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual."⁴⁸

This passage, taken from a footnote in Halsbury's *Laws* which cited no authority, was something of a trap⁴⁹. That a corporation, including the Crown, may have the capacities, and

⁴⁴ Hence there was no need for empowering legislation to include comprehensive lists of ancillary departmental powers. As to local authorities' powers, see now s.1 of the Localism Act 2011.

⁴⁵ Report (ante) on 'The pre-emption of Parliament', §55.

⁴⁶ Report on 'The pre-emption of Parliament', 2013, §52, 54, 60. During my time at the Bar, in the course of which I argued cases against every Treasury Devil from Nigel Bridge to John Laws, I never heard the Ram doctrine mentioned, much less relied on. Lord Brown of Eaton-under-Heywood told the Committee in evidence that in the course of his 5 years as Treasury Devil from 1979 to 1984 he had never heard of the Ram doctrine. But his eventual successor, Sir Philip Sales (1997-2008), in October 2013 told an Oxford seminar that on his appointment he had been inducted into the doctrine, and that it "has always been followed and applied within central government" (Sales, 'Crown powers, the Royal Prerogative and fundamental rights', unpubd., fn.49).

⁴⁷ *R v Secretary of State for Health, ex p. C* [2000] FLR 627 (Lord Woolf MR, Hale LJ and Lord Mustill [who had retired as a law lord in 1997 and is misnamed in the report as Mustill LJ])

⁴⁸ Halsbury's *Laws of England* 4th ed, vol 8(2) "Constitutional Law and Human Rights", §101 (*cap.* "Fundamental rights and freedoms of the individual"), n.6. The footnote cited no authority but referred back to §6 of the same volume, a paragraph on the principle of legality in constitutional law which began: "The Crown is a corporation sole or aggregate and so has general legal capacity...." None of this supports the use made of it by the court and, in reliance on the court, by commentators.

even the liberties, of a natural person does not mean that it has their powers. The Crown and the individual share the capacity to dispense their money or property stupidly, maliciously or capriciously; but where the individual is also legally free to do so, the Crown is not. The reason is constitutionally fundamental: the Crown's powers exist not for its own benefit but for the public good⁵⁰.

In the course of arguing public law cases against every Treasury Devil from Nigel Bridge to John Laws, I never heard the Ram doctrine mentioned. Indeed John Laws' predecessor, now Lord Brown of Eaton-under-Heywood, told the Constitution Committee that he had never heard of it. And it is, I understand, no longer referred to by government lawyers. Instead they now speak of the common-law powers of the Crown. These, the Constitution Committee reminded us, "may be definitively determined only by the courts".

But there is little evidence⁵¹ that sufficient notice is being taken of what the Committee said next:

"[T]he constrained nature of the Crown's common law powers is seldom made clear in Government documents. We note in particular that the Cabinet Manual describes the power of a minister to exercise 'any of the legal powers of an individual'⁵², but makes no reference to the fact that, whereas private individuals are free to exercise their powers irrationally (for example), ministers are not. We recommend that, where Government publications refer to the Crown's common law powers, it is made clear that these powers are limited by the restraints of public law and constitutional principle."⁵³

Either the supposed third source of executive power is simply a recycling of the common law's longstanding recognition of a generous penumbra of ancillary powers of government, or it is a theory of government outside the law. If it is the latter, it is unacceptable. If it is the former, it is unnecessary. The courts have no power and no desire to micromanage the functioning of public bodies or to restrict their implied powers, but they have been there, as required, when central or local government has overstepped the mark. They were there when, in 1894, the Dublin councillors came to court to challenge the disallowance by the district auditor of the cost of a modest picnic on their annual inspection of the Varry waterworks in the Wicklow Hills.

"I have before me," said Sir Peter O'Brian CJ, giving judgment, "the items in the bill. Amongst the list of wines are two dozen champagne – Ayala 1885, a very good branch, at 84s a dozen; one dozen Marcobrunn hock – a very nice hock; one dozen Chateau Margaux – an excellent claret; one dozen fine old Dublin whiskey – the best whiskey that can be got; six bottles of

⁴⁹ Possibly for this reason, it does not appear in the 5th (2014) edition.

⁵⁰ See fn. 44 above. This, in fact, appeared to have been acknowledged by the Court of Appeal, for Hale LJ added that the power to maintain the contentious list had to be exercised fairly and reasonably. But this fails to tell us what the powers actually are.

⁵¹ In response to my enquiry, the Treasury Solicitor in June 2014 wrote that the training of all government lawyers now "makes explicit reference to the Committee's report and its comments on the 'Ram doctrine' (we tend to avoid using that label now)". But cf. the previous footnote.

⁵² *Cabinet Manual*, 2011, §3.31

⁵³ *Ibid.* §65

Amontillado sherry – a stimulating sherry; and the ninth item is some more fine Dublin whiskey ...

There is an allowance for brakes; one box of cigars, 100; coachmen's dinner; beer, stout, minerals in syphons, and ice for wine. There is dessert and there are sandwiches, and an allowance for four glasses broken – a very small number broken under the circumstances.

The Solicitor-General in his most able argument ... appealed pathetically to common sense.... He represented that the members of the Corporation would traverse the hills in a spectral condition unless they were sustained by lunch. I do not know whether he went so far as Ayala, Marcobrunn, Chateau Margaux, old Dublin whiskey and cigars. In answer to the Solicitor-General, we do not say that the members of the Corporation are not to lunch. But we do say that they are not to do so at the expense of the citizens of Dublin.”⁵⁴

So where tea and biscuits will no doubt fall within the ancillary powers of the state without having to be provided for by statute, champagne, claret, hock, sherry and Irish whiskey will probably not; and it is not very helpful to the rule of law to go in search of a separate source of power by which public administration can either replicate or circumvent these principles.

Power beyond law?

This said, the sovereignty which Bacon regarded as a reservoir of unreviewable monarchical power was not necessarily at odds with the royal prerogative which Coke held to be defined by the common law: both agreed that beyond the perimeter of the law the monarch possessed powers which the courts could not touch. The prerogatives of mercy and pardon would at the time have been in both their minds⁵⁵. But how much of the prerogative remains unreviewable by the courts in the twenty-first century?

It was in relation to the initial Criminal Injuries Compensation Scheme, set up by a White Paper in 1964⁵⁶ without any statutory authority, that the amenability of the prerogative to judicial review came directly in issue. In 1967 the government, faced with a challenge by a policeman's widow to a refusal of compensation, went confidently into the Divisional Court

⁵⁴ *R (Bridgeman) v Drury* [1894] 2 IR 489. Janet McLean has pointed out to me that until the passing of the Municipal Corporations Act 1835, local government was conducted by common-law corporations without statutory restrictions on their powers. Like the friendly societies which were bureaucratized by the National Insurance Act 1911, local corporations had a fraternal character not wholly inconsistent with convivial picnics.

⁵⁵ The prerogative of pardon was a valuable instrument in the 17th-century struggle to control piracy: a number of prolific buccaneers were induced to give up piracy by the grant of free pardons: see Adrian Tinniswood, *Pirates of Barbary* (2011), ch.5. In the years of the Black Act and the game laws the prerogative of mercy was a significant means of social control, allowing fortunate prisoners to escape the gallows by the ostentatious grant of royal clemency (exercised by the Home Secretary). Before 1717, when transportation was made available as a lawful sentence, reprieve was frequently granted by prerogative power on condition that the prisoner agreed to be transported. In recent years the prerogative of mercy has become a means of rewarding prison informers for giving (frequently mendacious) testimony against other prisoners: see e.g. P.Foot, *Murder at the Farm* (2nd ed., 1993), p. 271-2. In the US the presidential power of pardon is used to pay political debts or to secure political advantages: see Tom Bingham, *Lives of the Law* (2011), ch.15. The law has, however, consistently forbidden the Crown to exercise these prerogatives so as to defeat private law rights.

⁵⁶ Cmnd. 2323

to argue that the administration of the scheme was beyond the reach of the courts. To its surprise, it lost⁵⁷. In a farsighted judgment which recognised the historic character of the issue, Lord Justice Diplock held that the last prize of the English civil war, the royal prerogative, which ministers had jealously guarded as their final reserve of arbitrary power, was today subject to the supervisory jurisdiction of the courts – not in order to substitute the judges’ own decisions but in order to ensure that, in exercising the prerogative power to distribute bounty, the Home Office behaved fairly and followed the rules which it itself had published⁵⁸.

“It may be a novel development in constitutional practice,” said Diplock⁵⁹, “to govern by public statement of intention made by the executive government instead of by legislation. This is no more, however, than a reversion to the ancient practice of government by royal proclamation, although it is now subject to the limitations imposed on that practice by the development of constitutional law in the seventeenth century.”

Although *Ex parte Lain* is still rarely given the accolade it deserves, its importance was recognised by Lord Scarman two decades later in the *CCSU* case⁶⁰, where the reviewability of the prerogative – in the form of governmental action taken without statutory underpinning, in that case the employment of staff – was confirmed. Lord Scarman picked up the importance of *Ex parte Lain*, matching it with the *Case of Proclamations*.

But the *CCSU* case did not determine how far judicial review of the high prerogative could now reach. It may be that some things in the governance of the state are by nature non-justiciable, but what they are is by no means as apparent today as it was when the *CCSU* case was decided. Lord Roskill’s tabulation of prerogative functions which were probably unreviewable⁶¹ - the prerogative of mercy, the grant of honours, the defence of the realm, the making of treaties and of Orders in Council, the appointment of ministers, the dissolution of Parliament – invites the question whether experience might require us to think again about some of them. What if honours were to be granted in return for payment? What if a free pardon was given to a political associate? What if a war of aggression were to be launched in breach of international law? What if a prerogative Order in Council were to be made for ulterior purposes or corrupt reasons? Would the courts be forbidden by constitutional principle to intervene; or might constitutional principle, on the contrary, require them to do so?⁶²

⁵⁷ *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864

⁵⁸ Today this would be recognised as a class of legitimate expectation.

⁵⁹ *Ibid.* 886

⁶⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

⁶¹ At 418

⁶² In *Bancoult* (above) the justiciability for abuse of power of Orders in Council made by the Queen for the governance of colonies in the exercise of the high prerogative was recognised both by the majority of the House of Lords which found against the Chagos Islanders and by the minority which, together with two unanimous courts below, would have found for them.

Envoi

A state in which the executive possesses powers of governance beyond the reach of legality is a state in which the rule of law is deficient. The remark of Justice Berkeley in 1636 that “things that might not be done by the rule of law might be done by the rule of government”⁶³ crystallised an issue – the use of the royal prerogative to raise taxes without Parliament’s consent - that was shortly to erupt in civil war. In its wake, the 18th-century metamorphosis of regal power into ministerial authority⁶⁴ altered the form but not the substance of the dichotomy. Ministers, albeit appointed since the days of the Hanoverians on the advice of an elected prime minister, are not themselves elected to office, and the authority they deploy is not that of the legislature but that of the monarch. If it is the law of the land which still, to use Coke’s verb, allows the Crown’s ministers to deploy both high and broad prerogative powers, then the courts have a continuing obligation to ensure that these powers are exercised within the law.

⁶³ See Ch. 11

⁶⁴ See Ch. 3