

Papers from the Lloyd George Society Weekend School

held at the

Abernant Lake Hotel, Llanwrtyd Wells

On the weekend of the
6th/8th of February 2004

The Crown Prerogative

David Gladstone

The Welsh Arts Council

Geraint Talfan Davies

Unfortunately it was not possible to reproduce the papers presented by William Keegan, Glyn Tegai Hughes, and Alan Wýburn Powell so as chairman I have used my prerogative to include my paper “The Hot Air Economy” which was held in reserve at the week end, to provide some padding

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The Lloyd George Society is a loose combination of like minds that meets in Wales for a week end school on topical subjects of the day, usually once a year and usually in February avoiding the dates of rugby football internationals.

The schools have been taking place for over fifty years though until the nineteen seventies they were called the Welsh Liberal weekend schools.

The schools have always tried to attract speakers expert in their field to provide plenty of food for thought and a leavening of controversy. But the schools are best enjoyed for their good fellowship with many members who have attended regularly for decades.

The papers are not, as ever, a complete record of the school as not all our speakers were able to produce the necessary copy but we owe a debt of gratitude to all those who contributed to the school.

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David Gladstone

The Royal, or Crown, Prerogative

Introduction

When I first suggested giving a talk about the Royal Prerogative, I thought that the Public Affairs Select Committee would have completed their investigation of the issue by Christmas and I could take its report as my point of departure. The PASC will now not be reporting before the spring, but it may be helpful to you to have some background against which to interpret, or criticise, the Committee's findings when they are published..

Luckily Lord Hutton has come to my rescue. Whether or not he intended it, and we know thanks to him that these things can come about sub-consciously, his report has spot-lighted some of the ways power is exercised at the dark heart of government.

Hutton's remit only allowed him investigate, rather partially, *why* Mr Blair decided to go to war in Iraq. Among many other interesting questions he did not address was *how* the Prime Minister was able to take this country into a war that so few even of his own natural supporters wanted and against the clearly expressed wishes of at least half the population. I aim to fill in that gap.

The Background

A Shakespeare play is as good a starting point for my inquiry as any. With a wicked sense of timing, the National Theatre mounted a revisionist production of Henry V last summer. Remember the opening lines:

O for a muse of fire, that would ascend
The brightest heaven of invention,
A desert for a stage, generals to act,
And monarchs to behold the swelling scene!
Then should the warlike Tony, like George Bush,
Assume the port of Mars; and at his heels,
Leashed in like hounds, should famine, shock and awe,
Crouch for employment.

The build-up to the invasion of France in 1415 which preceded the battle of Agincourt bears a striking resemblance to the build-up to the invasion of Iraq in 2003. In both cases a hyper-active monarch is impatient to invade a foreign country but is worried about the legalities. Henry V took legal advice. The Archbishop of Canterbury assured him that since Salic law originated in Germany, not France, the French king had no right to the French throne and Henry was perfectly justified in seizing it by whatever means he chose, including war. Thus fortified, Henry sallied forth, won a one-sided battle and returned triumphant.

Fast-forward 600 years and only the names have changed. To-day's monarch, dressed as a man of the people, seeks legal justification for the unprovoked invasion of a foreign country, this time from his Attorney-General. Lord Goldsmith delves into a complex web of UN Resolutions, a modern version of Salic Law, and again comes up with the justification his monarch needs so that he can wage his war with a clear conscience.

I was myself once a Crown Servant, but had never fully understood why my actions could not be challenged by the courts or by Parliament. Knowing however that it had something to do with a thing called the Royal Prerogative, when I later joined the Council of Charter 88 I offered to research the subject for them, unsure what I would find.

It soon became clear that, far from being of no account as one expert had assured me, the Royal Prerogative lay at the very heart of our system of government. It is defined in constitutional text-books as "the gradually diminishing residuum of customary authority, privilege and immunity, recognised at common law as belonging to the Crown and the Crown alone". A prerogative is something that an authority can demand before or above all others. So in simple language the Royal Prerogative is the last vestige of the absolute power which English monarchs wielded in the Middle Ages.

To understand how it has remained embedded in our supposedly democratic age, we have to go back to the Norman Conquest, the Big Bang from which all our constitutional arrangements originate, and trace our subsequent history from this narrow perspective. As a continental monarch, William I had ruled Normandy by Divine Right of Kings. Once he had defeated the English army, he ruled his new kingdom by right of conquest as well. The two rights added up to uncontested and absolute power.

Gradually this absolute power was whittled away. Habeas corpus, Magna Carta, the deposition of Richard II, the rise of Parliament, the execution of Charles I all stepping stones. But then a funny thing happens. The process stalls. In theory Divine Right died with Charles I. But its ghost returned with the Restoration and put on flesh again when Parliament invited William of Orange to become the world's first constitutional monarch.

Now William was no fool and knew well that the Board of Directors of England plc needed him as much as he needed the throne. So, like any self-respecting incoming Chief Executive he negotiated a very satisfactory package for himself:

- He agreed to give up his predecessors' rights to maintain a standing army and raise taxation without Parliament's consent.
- But in return he got to keep some of the monarchy's most important prerogative powers. Three in particular:
 - o to choose his own Ministers;
 - o to make his own policy (especially foreign policy, including the right to declare war); and
 - o to influence opinion in Parliament by means of elections and patronage.

It is little appreciated that political and constitutional life in this country is still shaped by the so-called Glorious, but in fact half-hearted, Revolution of 1688. Parliament *looks* different since the once dominant house of Lords has been relegated to the side-lines by the Commons. The people vote governments in and out. The monarch no longer plays a political role. But what has actually happened is that some of the monarch's traditional powers and attributes have been perpetuated under the guise of the so-called Crown.

Ah, the Crown. The Constitutional lawyer's nirvana, the subject experts can discuss all day without leaving the non-expert any the wiser. I sometimes feel it resembles nothing so much as Lewis Carroll's Snark which the Bellman and his motley crew pursued with forks and hope. The term 'Crown' has no fixed meaning. It means different things depending on context. Sometimes it means The Queen. But Crown Servants are not directly employed by the monarch, nor is Crown Property owned by her. For many purposes it approximates to 'Government'. Whatever it is, one leading authority has called it the "central organising principle" of what passes for our constitution.

It is easy to make fun of this piece of typically British nonsense. In the paper I eventually wrote for Charter 88 I described it as "a richly embroidered carpet on which those engaged in the practical business of governing the realm can walk with confidence, leaving the academics and lawyers to retrieve and make sense of all the awkward abstract issues that have been swept underneath." But some of these issues are actually very serious.

There is the little matter of sovereignty for one. As most schoolchildren used to know, sovereignty in Britain is vested not in Parliament but the Crown-in-Parliament. But nobody knows exactly what this formula is supposed to mean. It sounds, and is no doubt intended to sound, portentous and reassuring, but it carries unfortunate echoes of the 17th century struggle between King and Parliament. It is I believe a fudge, masking the continuing failure to settle the relationship between executive and legislature that lies at the heart of our unwritten constitution. "The question is", said Humpty-Dumpty, which is to be master – that's all." We still don't quite know the answer.

By sleight of hand most of the monarch's residual powers have over the past 300 years been passed down to the Prime Minister, who nowadays acts as a kind of Viceroy when he's not impersonating the actual monarch.

The Powers

Let us now look at the surviving prerogative powers and how they work in practice. Last year the PASC persuaded the government to publish a list of the powers. Many, such as the well-known ownership of swans, are unimportant. But the more important ones turn out to be strikingly similar to the powers William of Orange managed to hang on to.

I want to focus on four groups of them: those directly affecting Parliament; those involving patronage; those affecting the machinery of government; and those involving foreign policy including war.

First Parliament.

A British Prime Minister has weapons at his disposal which we take for granted but which are denied to his counterparts in virtually every other western democracy. Within the five year span enforced by the 1911 Parliament Act, he can call an election at any time of his choosing. He sets the legislative timetable and introduces all major pieces of legislation. He appoints all his ministers, which sounds uncontroversial until one realises that he appoints far more ministers than any other western head of government. This thinly-disguised job-creation scheme gives him enviable powers of patronage and ensures that a good proportion of potentially troublesome back-benchers are safely muzzled on the government's pay-roll.

The rules of our parliamentary game have in fact been deliberately designed to give the government of the day, and in particular the Prime Minister, the initiative. The text-books take it as read that constitutionally speaking Government is more important than Parliament. Like the server in tennis, if one imagines a parliamentary session approximating to one game, the PM has the advantage, providing he knows how to capitalise on it.

Patronage does not stop there. Remember William of Orange's placemen? Their counterparts to-day are the heads of quangos such as Regional Health Authorities. The PM also gets to choose the heads of public corporations such as the BBC and the Head of the Anglican Church. He advises The Queen on the appointment of the Dean of Christ Church.

But his most potent weapon is control of the honours system. That system has come in for some criticism lately, but most of it seems to have missed the fundamental flaw, which is that at bottom it remains what it always was, an extension of royal and hence political patronage. Even the award of MBE's to England's rugby players is a political act. The award of peerages is a much more serious matter, not so much because it has for long been so obviously a political act, and as such an abuse of the ideal of honour, as because of its constitutional implications. In any other western country it would seem preposterous that a single politician should have the power to alter the composition of Parliament.

Regulation of the Civil Service does not appear to be on William's list until one remembers that throughout the 18th and 19th centuries, until Mr Gladstone's reforms of the 1860's, civil servants or their equivalents were viewed primarily as subjects of patronage – jobs for the favoured boys.

Gladstone thought his reforms had put paid to all that, but never thought it necessary to have them enshrined in law. So we still find a very senior civil servant 'sub-consciously' – to quote my learned friend Lord Hutton – seeking to please his master.

More and more people are now calling for a Civil Service Act. One can understand why the government is dragging its feet: it makes life much easier if it can rely on the machinery of state to keep quiet and do its political bidding. Civil servants are so used to being 'owned' by the government of the day that few of them can readily distinguish the public's interest from that of the government. We saw it at the time of the Scott Report, we have seen it again in the emails carrying us to a second Iraqi debacle.

The fourth power covers the **conclusion of treaties and the conduct of foreign policy** generally.

This is something I know about first-hand. In my first job as a third secretary in the Foreign Office I negotiated a treaty with the United States of America with precious little oversight from my superiors in the office because none of them knew anything about the subject matter (liability for accidents involving nuclear-powered merchant ships.) Once I had got the Foreign Secretary to sign it I arranged for the precious document to be laid in the Library of the House of Commons where it sat untouched for 3 weeks and then automatically came into force. Without knowing it I had exercised a prerogative power.

Foreign relations generally are handled by the government without reference to Parliament, although occasionally the government, which of course sets the parliamentary agenda, stages a debate to allow MP's to let off steam.

The power to deploy the armed forces overseas and to declare war can be seen as a sub-set of the foreign policy prerogative, but it is of course the most important power of all. It is certainly the one the public is by now most aware of.

Intriguingly it is also the power which is most in danger of falling apart in this PM's hands. Blair deployed British armed forces to the Gulf under prerogative powers without consulting anybody. He was then constitutionally able to declare war off his own bat. However, the opposition was by then so strong that he felt obliged to put the question to Parliament. By doing so he has probably set a precedent that neither he nor his successors will be able to ignore. The prerogative power has not been abolished but it may in future prove to be a dead letter.

Does all this matter?

Not if like David Blunkett you regard civil liberties as airy-fairy stuff. If on the other hand you believe, as I do, that our hard-won liberties underpin what passes for democracy in this country, we should not acquiesce quietly in a state of affairs that assumes that government always knows best and can impose its views on us through a Parliament condemned normally to play second fiddle to it.

Lord Hutton preferred to turn a blind eye to the tendency of all governments to become corrupted by the exercise of power. The rest of us would I believe do better to assume that even the best-intentioned and most righteous Prime Ministers will become despotic unless kept in check. They are powerful enough already without being able to call on the archaic and unaccountable powers enshrined in the Prerogative.

One can see the Royal Prerogative either as a charming and harmless English eccentricity in the Lewis Carroll mode, or as a potentially dangerous hang-over from a pre-democratic age which is wholly incompatible with 21st century views of the proper relationship between government and governed.

There are also hidden costs in a prerogative-based system. By increasing the already great power of the Prime Minister, it also promotes centralisation of decision-making. By putting

additional trump cards in the executive's hand, it strengthens its hold over the legislature and insidiously demoralises the people's representatives in Parliament. What is the point in rebelling if you know that the other side has a trump card up its sleeve? Why take an interest in foreign affairs and Britain's place in the world when you know that the government can legitimately disregard your views?

Perhaps the simplest way to understand how the prerogative operates is to see it as the default mode of government. When anything important needs to be done, such as setting up yet another Inquiry into What Went Wrong, the automatic assumption is that No. 10 will decide the form, choose the people, make the announcement and of course spin the outcome.

What's to be done?

Many politicians and even independent experts will argue that nothing much needs to be done because Prerogative powers are being steadily eroded by judicial review and in cases where they are being clearly misused Parliament can and sometimes does step in and override them. I hope that the PASC will not come to that comforting conclusion because it is not supported by the evidence.

The optimists have to surmount two basic hurdles.

The first is the inherent limitation on the scope of judicial review. In the end, judges can only review those decisions and actions of government that Ministers through Parliament allow them to.

The second is the unreconstructible nature of government itself. Neither this government nor any conceivable successor is going to surrender voluntarily the freedom of action implicit in prerogative powers. It is hopelessly optimistic to suppose that our rulers will sit on their hands while the RP withers on the vine.

I found evidence to support this jaundiced view when I was researching the paper I submitted to the PASC last May. With no doubt sub-conscious irony the government buried it in of all places the 1998 Human Rights Act.

A little background. Using Royal Prerogative powers, the government can by-pass the normal legislative process and introduce decrees called Orders-in-Council which are not debated by Parliament. These decrees can only be made in areas, particularly foreign affairs, covered by the prerogative. In the light of court rulings in the 1920's, it came to be understood by all players that they rank as Secondary legislation which can always be over-ridden by Primary legislation, ie an Act of Parliament.

However, in the 1998 Human Rights Act, the government has slipped in a sub-sub-sub clause (Section 21 (1) (f) (ii)) defining primary legislation so as to include Orders-in-Council made in the exercise of Her Majesty's Prerogative. The practical result is that Ministers have discretion to ignore any declarations of incompatibility made by domestic UK courts or even by the European Court of Human Rights. One does not need to be a jurist to see that the constitutional implications are breath-taking: our present-day government is seeking to turn

the clock back a hundred years and reverse the steady encroachment on the scope of prerogative powers that has been the norm over the past two centuries.

No, we cannot trust governments to do the decent, democratic thing of their own accord. We cannot afford to go on brushing the Royal Prerogative under the Crown's richly embroidered carpet. Something has to change.

There are three basic options.

1. Do nothing, which for me is no longer an option.
2. Continue slicing away prerogative powers one by one as occasion arises. But this would take a long time, because the government of the day will always be fighting a rear-guard action, and it will be very hard for Parliament to achieve and sustain a cross-party consensus to carry through a whole series of constitutional measures in the teeth of government obstruction.
3. Go the whole hog and legislate for the abolition of the Prerogative in one Bill. I think this is LibDem policy. As far as I am concerned it is the only possible policy.

Conclusion

Many professional jurists would argue that the picture I have painted is biased and would not stand up in a court of law. But I'm not trying to be fair: the British constitution is unbalanced and rooted in an adversarial approach both in law and in politics. The status quo has a long history as well as powerful defenders and will not be changed by the weighing of nice points of law.

As long as these anachronistic powers exist Britain can never become a true democracy. They are the apron strings that bind us to our medieval playground and if as a society we want to grow up and join the modern world we shall have to summon the courage to sever them. Are we ready for such a momentous step? Thanks to the invasion of Iraq we just might be. It would be most ironic if Mr Blair's crowning achievement turned out to be the fatal weakening of his over-mighty power base.

Footnote. The Attorney-General, the officer Mr Blair consulted about the legality of pre-emptive invasion of sovereign states, in response to a question by Lord Hooson, told Parliament in February when war was in the offing that: "the conduct of foreign affairs and defence policy are matters that fall within the Royal Prerogative. It would therefore be lawful and constitutional for the Government, in exercising the Royal Prerogative, to make a declaration of war or to engage United Kingdom forces in military action without the prior approval of Parliament."

A List of Surviving Prerogative Powers

In domestic affairs

- Appointment and dismissal of Ministers
- Summoning, prorogation and dissolution of Parliament
- commissioning of officers in armed forces
- directing and disposition of armed forces in UK
- appointment of QC's and administration of justice
- prerogative of mercy
- issue and withdrawal of passports
- granting of honours
- creation of corporations by Charter
- immunity of sovereign from prosecution
- regulation of the civil service
- public appointments
- running of Royal Navy
- acquisition of territory (eg Rockall)
- immunity from planning requirements for government departments
- exemption from tax for the Sovereign and government departments
- granting of franchises, including right to hold market and fairs
- collection of tolls from bridges or ferries
- issue of coinage
- rights over sturgeon, whales and some swans

Foreign affairs

- making of treaties and conduct of foreign policy
- declaration of war
- deployment of armed forces overseas
- recognition of foreign states
- accreditation and reception of diplomats
- appointment of ambassadors and senior officials
- government of Dependent Territories through Governors

William III's List of Reserved Powers

- o to choose his own Ministers;
- o to make his own policy (especially foreign policy, including the right to declare war);
- o to influence opinion in Parliament by means of elections and patronage.

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The arts community has every reason to applaud loudly the way in which cultural development climbed so quickly up the agenda in the National Assembly's very first term, when it would have been all too easy to put it to one side. During that first term it was significant and encouraging that support for the arts extended across all parties: particularly from the first post-16 Education Committee under the chairmanship of Cynog Dafis of Plaid Cymru, through the first Welsh Culture Minister, Liberal Jenny Randerson and crucial support from the then Finance Minister, Labour's Edwina Hart. A key task during the Assembly's second term will be to maintain this broad cross-party support in a more difficult financial climate.

This focus on culture and the arts, together with a substantial increase in funding for the Arts Council of Wales has undoubtedly lifted morale in the arts community. But it has also created a false impression that all problems are solved.

Wales is a society undergoing massive change, economic social, cultural and political. The fault lines that are the stuff of art criss-cross Wales in many different forms: physical, economic, and emotional. Decline and growth, our two languages, rural and urban, prosperity and poverty, confidence and despair all rub shoulders. These fault lines generate, even demand, an artistic response. Any small country can be prone to conservatism and complacency. Wales needs the independent spirit of artists, their insight and sometimes their very bloody-mindedness to challenge us constantly.

We are seeing a flowering of the arts in Wales. We have, already, a wonderfully creative community. We are hugely successful in opera and music. The visual arts are on-song as was seen at the first Welsh exhibition at the Venice Biennale last summer or the Artes Mundi prize exhibition - a gift from Wales to the world. The list of excellent Welsh actors is very long. We are world leaders in community arts.

But we must not forget that the recovery of the last three years, is only that. We have undone some of the worst effects of the 1990s. There is a still massive task ahead to fulfil the cultural potential of this society. This is an area where the Assembly has made a difference and where it can continue to make a difference. There is still a powerful case for continuing increased investment. It is very encouraging that the governing party, Labour, made a manifesto commitment in May 2003 to increase the Culture Fund by 60% by 2006/07.

The Arts Council must continue to make the case for bringing the arts higher up the list of priorities of all public bodies so that, in the words of the Assembly's own cultural strategy the arts become "indivisible from the rest of our living".

Art may be its own justification but we can put a sound, pragmatic case before Government and before the public. Arts spend is an efficient spend. You do not have to wait years for an effect. We can invest money today and see an increase in output and impact within months. Very little of that investment leaks out of the Welsh economy. The arts are also labour intensive,