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Article
THE USE OF MINISTERIAL POWERS WITHOUT PARLIAMENTARY AUTHORITY:
THE RAM DOCTRINE
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Abstract: Sets out government legal advice given by Sir Granville Ram in 1945 and made public in 2003 that a minister of the Crown may exercise any powers that the Crown may exercise, except in so far as the minister is precluded from doing so, either expressly or by necessary implication. Explores how this advice is used currently as the basis for exercising ministerial and departmental powers without parliamentary authority and examines the claimed sources for such powers. Challenges the constitutional legitimacy of the Ram doctrine as interpreted by the present Government and argues for reform of the prerogative powers exercised by Government.

*415 This note examines government legal advice, given in 1945 but not made public until recently. The central issue raised by this advice, and by the government's current understanding and use of it, is whether it accords either with contemporary principles of British parliamentary democracy or with a modern system of public law for ministers and their departments to exercise public powers without parliamentary authority. We shall argue that the position is unsatisfactory and cries out for reforming legislation placing ministers and civil servants under Parliament rather than the Crown, and setting limits to their powers.

The Ram doctrine

The legal basis for current government practice is traced to advice given by Sir Granville Ram, who was First Parliamentary Counsel between 1937 and 1947. [FN1] What is known within Whitehall as the "Ram doctrine" was set out in a memorandum of November 2, 1945. It stated that a minister of the Crown may exercise any powers that the Crown may exercise, except in so far as the minister is precluded from doing so, either expressly or by necessary implication. The advice was made public on January 22, 2003, in a parliamentary written answer, [FN2] in which the minister explained that "generally, legally privileged advice to government is not disclosed, but, given the age of this advice, we are content to do so in this case". What may be more relevant to the need for public disclosure is not so much the antiquity of the advice, but the way in which the Ram doctrine is relied upon to this day as the basis for exercising ministerial powers without parliamentary authority. [FN3]

In subsequent written answers, the government has provided more information about current thinking and practice. Baroness Scotland of Asthal has explained that [FN4]:

The Ram doctrine reflects a well-established principle of constitutional law. Like many other persons, Ministers and their departments have common law powers which derive from the Crown's status as a corporation sole. Ministers and their departments also exercise prerogative powers of the Crown. [FN5] Common law and prerogative powers may be limited by statute either expressly or by necessary implication and in this respect are subject to direct parliamentary control. The courts have recognised the legitimacy of these principles.

Whether legislation is necessary or appropriate to authorise government actions depends on the circumstances and the matters in issue. Sometimes it will be clear that legislation is
needed, for example, when the proposed action might substantially interfere with human rights. In such cases a clear and reasonably accessible legal framework is required in order to comply with human rights law. At other times, the legal necessity for legislation will not be clear, in which case a political as well as a legal judgment has to be made as to whether legislation is desirable. Such a judgment may take into account a number of factors, including whether the proposed action is a priority and whether authorising that action by legislating represents a good use of Parliamentary time.

The principles governing the use of the annual Appropriation Act to provide authority for the exercise of functions by government departments where such functions may involve financial liabilities extending beyond a year are stated in the Public Accounts Committee Concordant [sic], 1932 (see Annex 2.1 of Government Accounting 2000). [FN6]

During the past five years, as in previous periods, the common law powers of the Crown have often been relied upon as the legal basis for government action. Common law powers form the basis of such governmental actions as entering into contracts, employing staff, conveying property and other management functions not provided for by statute either expressly or by implication. To require parliamentary authority for every exercise of the common law powers exercisable by the Crown either would impose upon Parliament an impossible burden or produce legislation in terms that simply reproduced the common law.

Finally, the circumstances that gave rise to the Ram doctrine are that the Ram opinion (the text of which was made available when an earlier Question [HL595] was answered on 22 January 2003) was given when the Ministers of the Crown (Transfer of Functions) Bill was being considered. This Bill later became the Ministers of the Crown (Transfer of Functions) Act 1946. The opinion addresses the need for legislation to confer power to add new functions to existing government departments by order. At that time Ministers were considering machinery of government changes following the Second World War. The final paragraph of that account indicates the limited basis upon which the legal advice was given; a narrow foundation upon which to base what has become official doctrine in Whitehall. It is also an account which raises further important questions. These were addressed in a subsequent written answer, by Baroness Scotland [FN7]:

Ministers can act only within the law. It follows that an extension of ministerial power will always require legislation (or, conceivably, a change in the common law). Legislation will also be necessary where what is proposed requires not only the exercise of powers but also, for example, the imposition of legal obligations, the creation of offences, or the raising of taxes.

If, however, it is proposed that Ministers exercise powers that are already available at common law to private individuals, or to the Crown by virtue of the prerogative, there is no legal requirement for legislation.

The case for putting existing powers onto a statutory footing will therefore depend not on strict law but on the matters of convention, good governance and practicality discussed in the previous Answer. These include the considerations of propriety addressed by the Public Accounts Committee Concordat mentioned in that Answer. They include also the principles of legal certainty, accessibility and clarity, which the government regard as important in their own right, quite apart from human rights considerations.

In considering the possibility of legislation, the Government indeed have in mind all their international treaty obligations. As well as the European Convention on Human Rights, these include the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights and the International Labour Organisation Conventions.

*418 The use of non-statutory powers was discussed by the House of Lords in the Fire Brigade Union case [1995] 2 AC 513. The Ram doctrine is being considered by the Court of Appeal in a current case, R (Hooper) v Secretary of State for Work and Pensions. [FN8] Finally, in a further written answer to a question seeking information about the main examples of circumstances in recent years in which the government decided, in accordance with the Ram doc-
trine, that legislation was undesirable, Baroness Scotland replied, "[o]ccasions on which the Government has chosen not to legislate in order to provide statutory authority for an action that is in any event lawful at common law are necessarily difficult to categorise. No list is maintained ..." [FN9]

The prerogative as a source of ministerial power

The United Kingdom is unusual among modern democratic states in its system of government, in that it lacks a comprehensive constitutional charter which establishes and gives limited powers to the institutions of government; confers and protects the civil and political rights of citizens and others within the United Kingdom [FN10]; may be repealed or amended only in accordance with special procedural requirements; and enjoys particular sanctity. [FN11] We are governed under a hybrid constitution, partly written, partly parliamentary, partly monarchical. The legal sources of executive powers are derived from statutes, and, more obscurely, from the royal prerogative, and common law powers claimed as being derived from the legal personality of the Crown.

*419 On the other hand, the rule of law is a fundamental principle of the British Constitution, that is to say, the supremacy not only of the common law but the whole of British law, both statute law and case law, interpreted and applied by the independent judiciary. Inherent in the rule of law is the principle of legality which means that the executive must be able to demonstrate a lawful authority for its actions, whether under statute, common law or prerogative. [FN12] Halsbury's Laws of England sums up the complex interface between executive power and the common law principle of legality in this way:

The traditional way in which the executive exercises power is through legislation which is enforceable by the courts. In practice the state has a monopoly of coercive power. The rule of law or principle of legality has imposed legal restrictions on the exercise of this kind of power, which has been called "imperium" or "condign" power.

Nowadays other methods of exercising power are also significant, including the use of government resources in the form of property and money raised in taxation to induce individuals and organisations to behave in accordance with government policy or to enter into negotiated relationships with individuals, organisations and collectivities: this sort of power has been termed "dominium" or "property" power ... [FN13]

The exercise of the so-called "dominium" or "property" power, which has become an increasingly important supplement to "imperium" over the past quarter-century, is neither politically nor legally controversial. Plainly, the institutions of government--whether central, devolved, regional or local--must be able, like any individual or private organisation--to enter into contracts, employ staff, convey property and carry out other management functions without requiring parliamentary authority. Such functions are normally to be characterised as "private" rather than "public" in nature, even though they are exercised by public authorities. [FN14]

However, their ability to do so is surely not, in the minister's words, on account of "common law powers of the Crown which derive from the Crown's status as a corporation sole" but is instead part and parcel of the freedom given by Parliament and the common law to everyone, including the Crown (as corporation sole) and other public authorities to make contracts, convey property and manage their affairs. In terms of public law principles, such activities are sometimes "public" rather than "private" in nature. [FN15]

*420 What is controversial is the exercise of coercive powers of "dominium" without parliamentary authority. That is the area in which the legitimacy or otherwise of the Ram doctrine really matters as the claimed legal basis for the exercise of the prerogative or common law powers derived from the Crown's status as a corporation sole. As a leading textbook on constitutional law observes:

In many instances governments, of whatever political hue, prefer to achieve their objectives by "extra-legal" means, rather than introduce legislation with the possible embarrassment of Parliamentary criticism and, subsequently, the risk of challenge in the Courts. Employers are "persuaded" to follow government guidelines on pay, under the threat of losing grants and government contracts. A "voluntary" system of censorship relating to matters
of defence and security insulates decisions taken by the responsible officials from any form of review. In some instances sections of the community may be prepared to reach informal agreements with a government in order to avoid being subjected to what they fear will be stricter control by legislation. [FN16]

Ram did not refer in his memorandum to ministers and their departments as having common law powers which derive from the Crown's status as a corporation sole. That reference to the corporate personality of the Crown is contained in the minister's written answer of February 25, 2003 that glosses Ram's advice.

The constitutional illegitimacy of the Ram doctrine

It is inappropriate for the executive to seek to base the exercise of ministers' and civil servants' powers without parliamentary authority on medieval concepts of the Crown as a corporation sole. Those concepts were appropriate for a feudal landowning monarch but they are wholly outdated as a basis for the exercise of ministers' powers within a modern system of government based upon parliamentary democracy and the rule of law. As Lord Diplock observed, [FN17] the concept of the Crown was a legal fiction and some of the confusion associated with that fiction would be eliminated if instead of speaking of "the Crown" we were to speak of "the government". Legal vocabulary apart, it is important to be clear that the public powers of the central government are not based in law upon so-called "common law powers", except to the extent that this refers not to the Crown's status as a corporation sole but to prerogative powers.

*421 As we have already noted, [FN18] in its recent paper on Privacy and data-sharing: the way forward for public services, the Cabinet Office's Performance and Innovation Unit asserted that one of the sources from which a government department derives its powers is "the 'Ram' doctrine--i.e. a department can do anything that a natural person can, provided it is not forbidden from doing so". However, Sir Granville Ram's memorandum did not express his understanding of the position in that way. What he advised was that 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". In other words, he did not claim that a government department can do anything that a natural person can do.

Legal support for the Cabinet Office viewpoint might be based upon Malone v Metropolitan Police Commissioner, where Sir Robert Megarry V.-C. observed, in the context of a challenge to telephone tapping by the police, that England "is not a country where everything is expressly permitted; it is a country where everything is permitted except what is expressly forbidden". [FN19] Accordingly, he decided that, in the absence of statutory provisions or judicial precedent to the contrary, the Home Secretary was not precluded from authorising the tapping of private telephones, though he added that the situation cried out for legislation. That decision, equating the freedom of the police with that of an ordinary citizen, resulted in a finding by the European Court of Human Rights that the United Kingdom was in breach of the Convention principle of legal certainty. The government failed to convince the court that its telephone tapping regime had a sufficiently clear legal basis; a mere administrative practice regulating such tapping which was regularly adhered to was held to be insufficient. [FN20] We submit that Malone does not correctly state the present state of the law. [FN21]

The notion that a minister or government department can do anything that a natural person can do, provided it is not forbidden from doing so, fails to have regard not only to the United Kingdom's obligations under the European Convention but also to the modern constitutional position of public authorities, including ministers and their departments. Public authorities have legal obligations by virtue of the public nature of their functions as servants of the public. So much is clear from the principles of public law, including the principle of legality, and from the constitutional scheme contained in the *422 Human Rights Act 1998, and the devolution legislation. These principles preclude arbitrary action by the executive or any other public authority. It is therefore disappointing to find civil servants within the Cabinet Office propounding what is now a constitutional and legal heresy. [FN22]

The correct position was explained by Laws J. in Ex p. Fewings, [FN23] as follows:

Public bodies and private persons are both subject to the rule of law; nothing could be
more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books ... But for public bodies the rule is opposite, and so of another character altogether. It is that any action taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed it exists for no other purpose. I would say that a public body enjoys no rights properly so called ... [I]n every instance ... where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performance of its duties for whose fulfilment it exists. Under our law, this is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.

Although this statement of principle was made in the context of local authority powers, at least since the coming into force of the Human Rights Act 1998, it applies to all public authorities, including ministers and civil servants, acting as Crown agents. That was the implication of the minister’s written answer, in explaining the government’s current understanding of the Ram doctrine, when she acknowledged that, "legislation is needed, for example, when the proposed action might substantially interfere with human rights. In such cases a clear and reasonably accessible legal framework is required in order to comply with human rights law.” [FN24]

This is not because of a requirement imposed by the Human Rights Act, for, although s.6 requires all public authorities to act in a way that is compatible with the Convention rights, it does not include a failure to introduce in, or lay before Parliament a proposal for legislation. [FN25] The need for legislation arises because of the principle of legal certainty embedded in the Convention itself.

The European Convention is only one among the international human rights treaties by which the United Kingdom is bound. These other instruments, like the European Convention, require compliance with the principle of legal certainty. [FN26] They are as much part of “human rights law” as is the European Convention, and the rights they cover are as important as the Convention rights. It is therefore to be welcomed that the government has acknowledged that the need to seek parliamentary authority where human rights are involved is not limited to the demands imposed by Convention.

This acknowledgment is important, for example, in the context of prerogative powers over British passports. There is no enforceable right to a passport in UK law, and successive governments have been unwilling to relinquish its prerogative powers controlling the grant and withdrawal of passports. [FN27] By contrast, Art.12 of the International Covenant on Civil and Political Rights guarantees freedom of movement from and to this country, without restrictions except such as are "provided by law". That would be a compelling reason for introducing legislation enshrining the right to a passport in statute, along with procedural rules designed to ensure fair decisions about them. [FN28] It remains to be seen whether the government will now agree to introduce such legislation.

Another area in which there is an especially compelling argument for legislation to regulate prerogative powers is the parliamentary scrutiny and approval of treaties prior to ratification. [FN29] These days, treaties reach into the nooks and crannies of most aspects of life. It is the prerogative which empowers the executive to negotiate and ratify treaties, and in consequence there are many matters of fundamental importance to the peoples of the United Kingdom (including their human rights), which have been settled without any parliamentary debate, scrutiny or approval. [FN30] The practice of laying treaties before Parliament prior to their ratification allows for “comment and debate if Parliament so desires” [FN31] but no more. [FN32] This democratic deficit has been criticised, among others, by the House of Commons Defence Select Committee in its Report on NATO enlargement. [FN33] In its response to the evidence of the Minister of State at the Foreign and Commonwealth Of-
Mr Tony Lloyd MP, it commented:

It is unclear how the views of Parliament would have been taken into account, should the Minister of State prove wrong in having "no belief that the view of Parliament ... will be anything other than that enlargement is consistent with our national ambitions" since the Government could then ignore Parliament's view. [FN34]

The only circumstances in which the government's recent written answers recognise the necessity for legislation is where proposed action would substantially interfere with human rights, or where it involves the imposition of legal obligations, the creation of offences, or the raising of taxes. Yet surely in a modern democratic society, based on parliamentary government and the rule of law, it should not be left to the executive to decide whether legislation is needed to authorise executive action.

As Brazier, among other recent commentators, has argued persuasively:

[The state of executive powers is unsatisfactory. Ministers rely daily on those powers to do what would otherwise lack legal foundation, in circumstances which are very agreeable for ministers. For in relying on the prerogative as authority, ministers, obviously, are not limited by the terms of any Act of Parliament ... Ministers do not have to consult, or even to inform, Parliament when they have it in mind to do things by virtue of the prerogative. They do not have to worry in every case whether the courts might review the manner in which they use those powers ... [T]he royal prerogative is an elastic concept, the apparent limits of which may be stretched by ministers; and in doing so they are safe in the knowledge that anyone aggrieved will have to mount a challenge, after the event, through judicial means--if such means are open, and if the citizen has the inclination and perseverance to do so. Once again, an old constitutional notion has proved itself to be exceptionally helpful to governments. If ministerial responsibility to Parliament amounted to a real check on executive power then this would matter less. But on the whole it does not amount to very much. [FN35]

The future of the prerogative

How much scope remains in practice for the extension under the prerogative of the powers of ministers and government departments? The prerogative is created and limited by the common law, and the Sovereign can claim no prerogative except such as the law allows. [FN36] The courts have jurisdiction, therefore, to inquire into the existence or extent of any alleged prerogative. [FN37] The extent of the prerogative may not be enlarged. When the BBC unsuccessfully claimed that the Crown had a monopoly of broadcasting exercised through the Crown, and that the Corporation was entitled to Crown exemption from income tax, Diplock LJ said, [FN38] "it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative".

However, being part of the common law, the prerogative is adaptable and elastic, and "the distinction between adapting a recognized prerogative and claiming a new power may be difficult to draw, as in Malone v Metropolitan Police Commissioner where Megarry V-C held that the Home Secretary had a limited power to authorize telephone tapping as an extension of the power to open articles sent through the post". [FN39]

*426 Because of the development of modern principles of judicial review, the courts now have the power to review alleged abuses of prerogative powers as well as of statutory powers. [FN40] But the political accountability of ministers and civil servants to Parliament when they exercise powers without parliamentary authority is weak and ineffective.

Ours is a system of parliamentary representative government in which, according to constitutional theory, Parliament exercises supreme control over all branches of government, except for the devolved governments of Scotland, Wales and Northern Ireland. In addition to its supreme legislative powers, Parliament supervises the general conduct of the executive. However, when ministers or civil servants exercise public powers under cover of the prerogative, there is no systematic and effective parliamentary supervision, whether by either House of Parliament or by their specialist committees.

For example, the Lords Select Committee on Delegated Powers and Regulatory Reform is concerned [FN41] with the over-broad delegation of
legislative power and the lack of sufficient parliamentary scrutiny of the exercise of delegated legislative power. It is not concerned with the situation where Parliament has not legislated at all. The Lords Select Committee on the constitution is empowered "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution". However, it has not considered prerogative powers or the issues raised by this note as to the exercise of public powers by ministers and civil servants without parliamentary authority. The terms of reference of the Joint Select Committee on Human Rights include consideration of matters relating to human rights in the United Kingdom. Its main focus is upon the scrutiny of Bills for their compatibility with the European Convention and other international human rights instruments by which the United Kingdom is bound. It has no mandate to consider the issues raised by this note except in the context of human rights.

However, the Public Administration Select Committee has recently undertaken to review the honours system as part of a wider investigation into the use and scrutiny of the prerogative. In announcing its review, the Chairman of the Committee, Tony Wright MP, said:

A review of the prerogative powers exercised by British governments is long overdue. These are powers which have passed from monarchs to ministers without Parliament having a say in how they are exercised. It is time to examine whether this arrangement is satisfactory. There has been discussion and concern over the years about the exercise of prerogative powers, but there has not been a systematic review. That is the purpose of this inquiry. [FN42]

This review indicates both a much needed recognition of the important and complex part which the prerogative continues to play in government, and a desire on the part of parliamentarians to challenge the ways in which less concerted attempts at scrutiny have been dismissed in the past. [FN43] This, in turn, reflects the concern of politicians from across the political spectrum who, for different reasons, believe that the prerogative jeopardises the effective monitoring and control of legislatively unconstrained executive action. [FN44]

And parliamentarians are surely right to be concerned about a means of legitimating action which is so useful in government that it seduces those who have been, when in opposition, its fiercest critics. For example, in 1994 Jack Straw MP wrote robustly that:

The royal prerogative has no place in a modern western democracy ... Accountability of the executive is fundamental to any democracy. Where power is based not upon statute but upon the Royal Prerogative it is this accountability which suffers ... Much of the discussion about the Royal Prerogative centres on the way in which it has been used as a smokescreen by ministers to obfuscate the use of power for which they are insufficently accountable. That is entirely right. [FN45]

We respectfully agree, but the government of which Mr Straw is a senior member shows no sign of being willing to place the prerogative under parliamentary authority.

*428 Any attempt to ensure effective scrutiny of the prerogative must engage with the role and constitutional status of civil servants, [FN46] just as it must engage with the means by which prerogative powers might be put on a statutory footing. [FN47] Each of these is important if we are to secure the principles of legal certainty and democratic accountability which underpin the rule of law.

In 1854, the Northcote-Trevelyan Report recommended the enactment of a Civil Service Act. That recommendation has never been implemented. Instead, the Civil Service Commission was established in 1855 under an Order in Council. [FN48] The present government is committed in principle to a Civil Service Bill, but has yet to publish its proposals; and it seems unlikely that it will seek to restrict its prerogative powers by statute. [FN49] The time is over-ripe to place the civil service and the Civil Service Commission on a statutory basis, and to define and limit the powers of ministers and their departments. [FN50]

Anthony Lester [FN*] and Matthew Weait [FN**]

FN1. Of Sir (Lucius Abel John) Granville Ram (1885-1952), the Dictionary of National Biography (Oxford University Press) says: "Ram was not a lawyer of academic stamp and he relied a good deal on the researches of his assistants. He was inclined
to be impatient when the niceties of the law or the details of administration got in the way of the form a Bill should take. His strength lay in his creative approach, his refusal to be defeated by difficulties, and his resource in finding solutions which were politically acceptable.” Ram was responsible for drafting both the original and revised forms of Emergency Regulation 18B seeking to meet Home Office anxiety that it could not be challenged in the courts: see generally, G. Lewis, Lord Atkin (Hart Publishing, Oxford, 1999), pp.149-151. His work succeeded when the majority of the House of Lords rejected a legal challenge in Liversidge v Anderson [1942] A.C. 206, Lord Atkin dissenting.

FN2. HL Deb., Vol.643, col.WA98, January 22, 2003, the Parliamentary Secretary, Lord Chancellor's Department, Baroness Scotland of Asthal. The existence of the Ram doctrine was revealed in para.3.46 of a Report on Privacy and Data Sharing, issued by the Performance and Innovation Unit of the Cabinet Office: www.cabinetoffice.gov.uk/innovation/2002/privacy/report/index.htm. The Report stated, "[w]hen considering what powers one has to share data, one must first consider the type of public body one is dealing with. Generally speaking, a government department derives its powers from a number of different sources:-- Specific statutory powers--known as information gateways--to share information with others;--Implied powers--the power to do anything that is necessarily incidental to express powers; and--The 'Ram' doctrine--i.e. a department can do anything that a natural person can, provided it is not forbidden from doing so." A footnote reference simply explained that "[t]his derives from advice by Sir Granville Ram, First Parliamentary Counsel 1937-1947". It continued (para.3.47) "[b]y contrast, statutory bodies derive their power to act from their creating statute, and have no vires to act outwith their statutory powers". The PIU Report was discussed at a seminar, Privacy: Lost or Found?, convened by JUSTICE and Sweet & Maxwell in December 2002, notably by R. Jay in her paper "Exchange of Information: What Price the Greater Good?". Jay (a solicitor at Masons) observed in her paper (p.6) that she had been told that “all civil servants know of it [i.e. the Ram doctrine] but I could not find it on the LCD website and I do not know how one can find a publicly available copy”. It was this that prompted the authors of this note to table parliamentary questions on the subject.

FN3. The full text of the Memorandum may be found at http://pubs1.tso.parliament.uk/pa/ld200203/ldlwa/30122wa1.pdf.


FN5. Prerogative powers include: the maintenance of the civil service, the grant and revocation of passports, the granting of pardons and the staying of prosecutions, the making and ratification of treaties, the recognition of states, the governance of British territories overseas, the use of the armed forces to support the police in maintaining the peace, deploying armed services overseas (the Royal Navy is maintained under the prerogative); and the Prime Minister's right to appoint and dismiss ministers, recommend the dissolution of Parliament and advise on the bestowal of honours.

FN6. The text of the Concordat may be found at www.government-accounting.gov.uk/current/content/ga_02_5.htm.


FN8. In R. (on the application of Hooper) v Secretary of State for Work and Pensions, [2003] EWCA Civ 875, the Court of Appeal considered the Ram Doctrine in the context of sex discrimination in the provision of Widow's Payment and Widowed Parent's Allowance, paid to widows but not to widowers, in breach of Art.14 read with Art.8 of the ECHR and Art.1 of Protocol No.1. One issue concerned whether the Secretary of State has a common law power to make extra-statutory payments to place widowers in the same position as widows. The Court of Appeal held that, before the coming into force of the Human Rights Act 1998, there was no such power but that, once that Act was in force, its requirements altered the restraint upon the Secretary of State resulting from the principle on AG v De Keyser's Royal Hotel [1920] A.C. 508 (HL). There is a presumption that Parliament does not intend legislation to infringe the ECHR, and in so far as the Human Rights Act placed upon the Secretary of State an obligation to make extra-statutory payments, no constitutional impropriety or illegality
could be involved in his putting in place a scheme to give effect to that obligation, and, if necessary, seeking from Parliament appropriation of funds to implement the scheme.

FN9. The answer continues, "[h]owever, the Government recognizes limits to the reliance that should be placed on non-statutory authority. For example, in accordance with Government Accounting, para.11.3.33, departmental estimates should identify expenditure which rests on the sole authority of the Appropriation Act. This is done by the use of symbols in the notes to the estimates. Departments are also required constantly to review provision, to ensure that it complies with the 1932 Concordat (referred to in previous Written Answers) so far as possible. It follows that scrutiny of the estimates for each year should disclose the main cases in which expenditure rested on the Appropriation Act, without other statutory provision.", HL Deb., Vol.647, col.WA38, April 9, 2003. For the paragraph to which Baroness Scotland refers, see www.government-accounting.gov.uk.

FN10. Although the ECHR, as incorporated via the Human Rights Act 1998, and the devolution legislation, now provides important constitutional and legal protection.


FN12. The common law principle of legality also means that, in the absence of express language or implication to the contrary, the courts will assume that even the most general statutory words were intended to be subject to the basic rights of the individual: R. v Secretary of State for the Home Department Ex p. Simms [2000] 2 A.C. 115, HL, at 130E-G (Lord Steyn), and 131F-G (Lord Hoffmann).

FN13. ibid. at [366].


FN16. O. Hood Phillips and P. Jackson, Constitutional and Administrative Law (8th ed., Sweet & Maxwell, 2000), para.2-027. It is worth emphasising that such decisions, grounded in political judgment and political accountability, may amount to the illegitimate abuse of power and so be subject to review by the courts. For a modern, critical, account of the deployment of prerogative powers as a means of evading allegations of illegality see the Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (the Scott Report), (HMSO, 1996), especially Vol.1, paras C1.10, C1.108.

FN17. See Town Investments, n.16 above, at 380 (Lord Diplock).

FN18. See n.2 above.

FN19. [1979] Ch. 344 at 357.


FN21. In R. v Secretary of State for Health Ex p. C [2000] 1 F.L.R. 627, CA and R. v Worcester CC Ex p. SW [2000] 3 F.C.R. 174, QBD, the Court of Appeal and the High Court respectively were concerned with the legality of the Consultancy Service Index (CSI). The CSI, which at the material time was maintained by the Secretary of State for Health without statutory authority, was a database from which employers could glean information as to whether a prospective employee was unsuitable to work with children. In both cases it was held that the Secretary of State was entitled to maintain the database, just as a natural person would be. In Ex p. C it was held that although the use made of the database engaged competing rights (of the prospective employee's privacy and the prospective employer's right to know), the operation by the minister of the CSI was not an unlawful and unreasonable exercise of his discretion.

FN22. To be fair to the authors of the paper on pri-
vacy and data-sharing, in other passages in their paper they recognised that handling personal information about citizens (such as health records, tax returns, welfare benefits, law enforcement records, driving licence information and so on) raises a wide range of issues about privacy and the balance between individual rights and the common good; they also recognised that the legal framework for human rights issues and privacy has been evolving rapidly and will lead to significant changes in the relationship between the citizen and the state. Our criticism is confined to the reference to the Ram doctrine and its use as a source of governmental powers.


FN24. See n.4 above.

FN25. s.6(6).

FN26. e.g. under Art.2(2) of the International Covenant on Civil and Political Rights, where not already provided for by existing legislative or other measures, each state party undertakes "to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant"; and other provisions require compliance with the principle of legal certainty. The public authorities of the states parties must ensure that the principle of legal certainty prevails in relation to the various civil and political rights protected by the Covenant. Not all of the Covenant rights are included in the Convention, or are incorporated into UK law. Under Art.4 of the International Covenant on Economic, Social and Cultural Rights, the states parties recognise that, "in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only so far as this may be compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society".

FN27. Lord Filkin, Minister of State at the Home Office, has explained: "British passports are issued to British nationals in the United Kingdom at the discretion of my right honourable friend the Home Secretary and, at overseas posts, at the discretion of my friend the Foreign Secretary, both exercising the Royal Prerogative. The essential requirements are that the intended holder has British nationality and is the person described by the personal details to be entered in the passport. Passports are therefore not issued to persons who are not British nationals and/or whose identity cannot be authenticated. Passport facilities are refused or can be withdrawn in certain other well defined categories, which have been reported to Parliament from time to time. These are: (i) a minor whose journey is know to be contrary to a court order, to the wishes of a parent or other person or authority in whose favour a residence order has been made or awarded custody or care and control, or to the provisions of s.25(1) of the Children and Young Persons Act 1933, as amended by s.42 of the Children and Young Persons Act 1963, or s.56 of the Adoption Act 1976, as amended by the Children Act 1989; (ii) a person for whose arrest a warrant has been issued in the United Kingdom or who is wanted by the police on suspicion of a serious crime; (iii) in very rare cases, a person whose past or proposed activities are so demonstrably undesirable that the grant or continued enjoyment of passport facilities would be contrary to public interest; (iv) a person repatriated at public expense, until the debt has been repaid. The refusal or withdrawal of passport facilities in these circumstances is rare and cases are considered on their individual merits. On the basis of the limited case law it is clear that such action is open to scrutiny by the courts. The possibility of introducing a statutory right to passports has been debated in Parliament in the past but successive governments have taken the view that the current system has worked well and change is not required."


FN29. This is what the Treaties (Parliamentary Approval) Bill 1996 sought to do.

FN30. Under the Ponsonby rule, the practice is that treaties requiring ratification, acceptance, approval
or accession are laid before Parliament for 21 days before the government deposits the instrument of ratification, acceptance or approval.


FN32. Prior parliamentary approval, usually in the form of statute, is required in certain limited circumstances. These are where a treaty requires an amendment to UK law, where it affects private rights, where it creates a charge on public funds, where it attributes new powers to the Crown, or where it cedes British territory (ibid. col.1557). See generally D. Limon and W. McKay, eds, Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, (22nd ed., Butterworths, London, 1997).


FN34. ibid. para.103.

FN35. ibid. at 356.


FN37. ibid.


FN39. Hood Phillips and Jackson, n.16 above, para.15-004. In R. v Secretary of State for the Home Department Ex p. Northumbria Police Authority [1989] Q.B. 26, the Court of Appeal held that under the prerogative the Home Secretary had authority to act at all times, and not only in times of actual emergency, to maintain the Queen’s peace and to keep law and order, unless any such action would be incompatible with statute. The Home Secretary had issued a circular to chief officers of police and clerks to police authorities informing them that in future police requirements for plastic baton rounds and CS gas, for use in the event of serious public disorder, would be met from a Home Office central store. A police authority challenged the issue of the circular on the grounds that the Home Secretary had not power, either by virtue of the Police Act 1964 or otherwise, to maintain a central supply of such equipment or to supply it without the relevant police authority's approval, except in a situation of grave emergency.


FN41. The Committee’s terms of reference are "to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny".


FN43. In reply to a parliamentary question by Jeremy Corbyn MP, when he asked the Home Secretary if he would introduce legislation to bring the exercise of the prerogative under parliamentary scrutiny, the Minister, Mike O’Brien MP replied, "No. With very few exceptions, the Royal Prerogative is exercised only on the advice of Ministers. This provides accountability to Parliament for its exercise" (HC Deb., Vol.344, col.865w, February 22, 2000). An attempt at general legislative curtailment of the prerogative was embodied in Tony Benn MP’s private Member’s Bill, the Crown Prerogatives (Parliamentary Control) Bill (HC Bill 55, 1998-99).


FN45. J. Straw, "Abolish the Royal Prerogative” in
A. Barnett, ed., Power and the Throne: The Monarchy Debate, (Vintage, London, 1994), pp.125-9 (extracts). Although the Conservative Party has expressed concern about executive scrutiny generally (see above, n.43, it supported the use of the prerogative when in government. In a debate on the prerogative in 1993, the then junior Home Office Minister, Charles Wardle MP, said, "[i]n any parliamentary democracy, the Government must not be above the law and are subject to parliamentary scrutiny. It is open to Parliament to restrict the prerogative powers exercised by Ministers further, if it wishes to do so, by introducing new Acts of Parliament. However, there is no sensible option of a blanket approach ... The case must be made and considered specifically, in each area" (HC Deb., Vol.223, cols 489-494, April 21, 1993).


FN47. One way would be to entrench such a provision in a written constitution. Art.40.1 of the IPPR's proposal for a UK constitution, for example, provides that "[t]he executive power for the United Kingdom is vested in, and, subject to this constitution, shall be exercised by, the Government of the United Kingdom". That government would comprise the Prime Minister and members of Parliament appointed as ministers (Art.40.2). A Constitution for the United Kingdom (Institute of Public Policy Research, London, 1991).


FN49. T. Daintith and A. Page, The Executive in the Constitution (Oxford University Press, 1999) observe that there is "little obvious incentive for the executive to limit its capacities in this way. Thus the powers conferred by the Ministers of the Crown Act 1975 are without prejudice to 'any power exercisable by virtue of the prerogative power of the Crown in relation to the functions of Ministers of the Crown' (s. 5(5))".

FN50. Although not dealing specifically with the prerogative, this is one of the recommendations of the most recent Report of the Wicks Committee (Committee on Standards in Public Life, Ninth Report: Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service, Cm 5775 (April 2003). See, especially, Recommendation 34. The Report may be found at www.publicstandards.gov.uk/reports/9threport/report/report.pdf.


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