a JUSTICE report

THE CONSTITUTIONAL ROLE OF THE PRIVY COUNCIL AND THE PREROGATIVE

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ISBN 978-0-907247-47-0

JUSTICE Registered charity No 1058580.
A company limited by guarantee and registered in England No 3216897. Registered office as above.

C L I F F O R D

C H A N C E

JUSTICE is grateful to Clifford Chance for its support of this publication

Printed by Hobbs the Printers Ltd, Southampton

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Foreword

The Privy Council is shrouded in mystery. As Patrick O'Connor points out, even its statutory definition is circular: the Privy Council is defined by the Interpretation Act 1978 as the members of 'Her Majesty's Honourable Privy Council'. Many people may have heard of its judicial committee, but its other roles emerge from the constitutional fog only occasionally – at their most controversial, to dispossess the Chagos Islanders of their home, more routinely to grant a charter to a university.

Tracing its origin back to the twelfth or thirteen century, its continued existence, if considered at all, is regarded as vaguely charming and largely formal. But, as the vehicle that dispossessed those living on or near Diego Garcia, the Privy Council can still display the power that once it had more widely as an instrument of feudal rule. Many of its Orders in Council bypass Parliament but have the same force as democratically passed legislation. They are passed, unlike such legislation, without any express statement of compatibility with the European Convention on Human Rights. What is more, Orders in Council are not even published simultaneously with their passage. Two important orders relating to the treatment of the Chagos Islanders were made public only five days after they were passed.

Patrick, originally inspired by his discovery of the essay that the great nineteenth century jurist Albert Venn Dicey wrote for his All Souls Fellowship, provides a fascinating account of the history and continuing role of the Privy Council. He concludes by arguing that its role, and indeed continued existence, should be subject to fundamental review.

JUSTICE is immensely grateful to Patrick for his work on this topic. He has opened up a murky corner of the constitution and one which we very much hope we will be able to explore more fully. The Privy Council needs to be considered in the context of the process of constitutional reform promised by the government and probably now unavoidable given the stresses and strains on the existing settlement of powers. In any 'renewal' or reconsideration of the constitution, the maintenance of undemocratic elements that hark back to feudal times when the monarchy ruled by Divine Right is, at best, questionable. This paper will contribute to discussion of the constitution generally and the future of the Privy Council in particular. The use of the Council in relation to the Chagos Islanders was nothing less than scandalous. Patrick raises issues with which JUSTICE is deeply engaged and we intend to take his work further. We publish this paper to stimulate debate and without, as yet, it being our formal policy. We welcome contributions in response.

Roger Smith OBE
JUSTICE Director
January 2009

I am delighted for Clifford Chance to be associated with this publication. Whether or not the Privy Council should actually be abolished, Patrick O'Connor is surely right that it should be reviewed and its continued existence justified. The government has commendably committed itself to a process of 'constitutional renewal' and the Privy Council should not be omitted from it. The Council is part of a constitutional legacy, as Patrick points out, that dates back to feudal times. Contemporary demands for democracy and transparency probably mean that no government of any complexion will be able to avoid continuing the process of revising our constitutional arrangements. I hope that this report will be seen, as it should be, as a substantial contribution to this process.

Michael Smyth
Clifford Chance LLP
January 2009

Introduction

The Privy Council inhabits one of the more obscure corners of our unwritten constitution. Even amongst those living and breathing Westminster politics, few know, or care much, about this 'ancient and dignified institution of government'.[1] It receives little more than passing reference by the commentators. De Smith and Brazier suggest that 'Unlike the monarchy, it is not an important feature of the British constitutional system.'[2] Apparently without irony, on the very next page, they continue:

> *The dissolution, summoning and prorogation of Parliament are effected by royal proclamation in Council; so are the declaration and termination of a state of war, and the declaration of a state of emergency.*

This paper examines the history, development and current role of the Privy Council. It will try to throw light upon its procedures and practices and ask what role can be played in a modern 21st century constitution by such a body. Constitutional reform is in the air. Can a new spirit of transparency and democratic accountability penetrate even as far as the Privy Council? Is the Privy Council robust enough to safeguard the real public interest in a national emergency? On the other hand, is it a weak point, a tempting resource for evading democracy in a crisis? Is such a body necessary at all? What role should the 'prerogative powers' play? Are they controlled, or even controllable?

The initiative for this project arose well before the current government's green paper, The Governance of Britain.[3] Its broad proposals for rationalisation of certain prerogative powers are very welcome. They set a propitious context for open-minded discussions about reform, with a real prospect of concrete result. The government calls for a 'national conversation'. The green paper's proposals are discussed below. Somewhat surprisingly the Privy Council itself is not even named once in its 63 pages.

The green paper states 'Sometimes, the evolution of the constitution has failed to keep pace with the evolution of society, or government has been unwilling to recognise the need for reform, or an institution has been stretched so far that further evolutionary reform is impossible. In those circumstances legislative intervention has proved necessary'[4] and recognises that 'Constitutions should allow the citizen to understand and engage with the state and state institutions'.[5]

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[1] Stanley de Smith and Rodney Brazier, Constitutional and Administrative Law, 8th edn, Oxford University Press, 1998, p159.
[2] Ibid.
[3] Cm 7170, July 2007.
[4] Ibid, para 4.
[5] Ibid, para 211.

Is the Privy Council 'stretched' beyond possible 'evolutionary reform'? Can the citizen understand or engage with this institution?

What is the Privy Council?

The Privy Council (PC) is a body of advisers to the monarch who are called Privy Counsellors. It is defined unhelpfully by s5 and Schedule 1 to the Interpretation Act 1978: 'the Privy Council means the Lords and others of Her Majesty's Most Honourable Privy Council'. They advise upon the exercise of the duties, powers and privileges of the monarch. Some of these powers are purely symbolic and ceremonial: some are of constitutional importance and high sensitivity. In the latter cases, the advisory role is often a fiction: the PC is a vehicle for executive decisions by the government, formally issued under the name of the monarch.

The Council issues decisions mainly by way of Orders in Council (OICs) and proclamations. Many of its decisions become law, equating to delegated or primary legislation. The Cabinet is effectively its standing committee, in that it supplies the only Counsellors normally summoned to its meetings. Government ministers provide the drafts of the OICs. These are approved as a matter of course.

The Lord President of the Council, who is always a Cabinet minister, is responsible for Privy Council business, and is head of the Privy Council Office. He or she is normally also the Leader of the House of Commons or House of Lords. The PC Office administers the business of the Privy Council, and includes the Registry for the Judicial Committee of the Privy Council, an important final court for certain appeals.

Functions

Official accounts of PC functions betray an absence of consistent rationale. Any explanation seems to descend into a list of apparently random subjects.[6]

The Lord President of the Council gave the following description of the 'duties and functions of the Privy Council' to Parliament in 1995:[7]

> *The PC advises the sovereign on the making of royal proclamations and O.I.C.s, and on the grant and amendment of royal charters. It approves rules made by statutory registration councils responsible for the medical and certain other professions, and*

[6] A later section of this paper will deal with the role of the Judicial Committee of the PC as a court of law.
[7] 255 HC Debates 636, 2 March 2005.

makes instruments of Government for higher education corporations. The PC is also responsible for certain appointments to statutory councils and to the governing bodies of universities and colleges, and for the appointment of high sheriffs.

The Privy Council website[8] states in several places that it is 'that part of Her Majesty's government which advises on the exercise of prerogative powers and certain functions assigned to the Queen and Council by Act of Parliament'. It also comments that 'The Privy Council is one of the oldest parts of Government, but it has, over time, adapted to reflect the fact that the United Kingdom is a constitutional monarchy. Appointment to the Privy Council is for life, but only Ministers of the democratically elected Government of the day participate in its policy work'. It continues:

Much of the day-to-day work of the Privy Council Office is concerned with the affairs of Chartered Bodies, the 400 or so institutions, charities and companies who are incorporated by Royal Charter. The Privy Council also has an important part to play in respect of certain statutory regulatory bodies covering a number of professions and in the world of higher education.

The PC Office Departmental Plan for 2006-7 states:[9]

Under today's constitution, the Privy Council is synonymous with the government, and is the mechanism through which interdepartmental agreement is reached on those items of government business which for historical or other reasons, fall to Ministers as Privy Counsellors rather than as Departmental Ministers. This includes much business under the Royal Prerogative, including the affairs of Chartered bodies, as well as statutory areas where an Act of Parliament has given order making powers to the Privy Council.

The description of the PC as 'synonymous with government' is puzzling. There are many hundreds of surviving Privy Counsellors who have nothing to do with the current government. The words 'the mechanism through which interdepartmental agreement is reached' are equally obscure. I have been informed by officials at the PC Office that this relates to what they do upon receipt of an 'Order of Council'. Since this will not already have been signed by a minister (by contrast with OICs), the PC Office contacts the government departments which will be affected to obtain the agreement of at least two ministers. This is a particularly abstruse part of PC Office work, again inadequately explained or transparent to the public.

[8] www.privy-council.org.uk
[9] www.privy-council.org.uk/files/pdf/Dept%20Plan%202006-07.pdf, at p5.

A snapshot

There were thirteen formal meetings of the PC between January and December 2007. A review of the substantive business transacted includes the following:

- The proclamation of Bank Holidays for the following year;
- The closure of burial grounds;
- The constitutions and territorial seas of the British Virgin Islands, the Turks and Caicos Islands and Anguilla;
- The statutes of Jersey, Guernsey and Sark;
- Consents under the Royal Marriages Act, 1772;
- Armed Services pay and pensions, including local naval and marine personnel in Hong Kong and Malta;
- UN Sanctions against North Korea;
- Relations with Liberia, Iran and Lebanon;
- The charters of universities, professional associations and the Royal Shakespeare Company;
- Electoral boundaries in Northern Ireland;
- The appointment of a new Chairman of the BBC;
- Supervision of the veterinary profession;
- The formation of a guild of international bankers;
- Proclamations about the issue of new platinum coinage;
- The grant of a Charter of Incorporation to the Institute of Plumbing and Heating Engineering;
- The appointment of Her Majesty's Inspectors of Education in Scotland;
- The Charter of the Royal Caledonian Horticultural Society;
- The Double Taxation Relief and International Tax Enforcement (Taxes on Income and Capital) (Faroes) Order 2007 (SI); and
- The Digital Switchover (Disclosure of Information) (Isle of Man) Order 2007 (SI).

There can be no consistent rationale for these diverse functions. They are little more than a rag bag of historical accidents. In terms of reform, this poses a formidable challenge. It is certainly beyond the capacity of this paper to invent a rational re-organisation. This bewildering array of functions is a fairly effective formula for inaction: an anaesthetic against the kind of motivation necessary for change.

Membership

Members of the Privy Council are appointed for life by the Queen on the Prime Minister's advice. They take an oath of office and are entitled to be addressed as 'Right Honourable.' They are listed in the annual Whittaker's Almanac.

Members are described as 'invariably chosen by the Crown from amongst noblemen of high rank, persons who have held or hold high political, judicial or ecclesiastical office, distinguished politicians from other parts of the Commonwealth, persons eminent in science or letters or very senior civil servants'.[10]

Fourteen offices and positions are identified as qualifying for membership. These include the near relatives of the monarch, the Archbishops, Great Officers of State and of Household, the Queen's Private Secretary and the senior judiciary. However, so obscure are the processes that the authors tentatively suggest that they are from the nature of their position and offices 'generally understood to have a claim to appointment.'[11]

Membership for life brings with it certain oddities. In the 1970s there were only about 360 Counsellors. Of today's 543, over 90 were appointed in the 1980s. About 67 survive from the 1970s, and about ten from the 1960s. It is difficult to understand the reason for the increase in numbers – and indeed for life long membership. Once out of high government, no Counsellor is ever consulted or summonsed to meetings, save upon the sovereign's demise or marriage. Ian Paisley was made a Privy Counsellor in 2005. The timing might suggest that this was a sweetener for the Northern Ireland peace process. The rapid expansion in numbers of Counsellors in recent decades leaves the impression that the PC is another resource for government patronage.

Practices and procedures

Drafts of proposed OICs are sent to the Privy Council Office (PCO) by the relevant government department. The staff of the PCO currently do not include a qualified lawyer, but they check the draft order for correct grammar and language, and in relation to any claimed statutory power for the order. If made under the Royal Prerogative, the office will check to see if the draft falls within one of the traditional areas of prerogative. It does not usually second guess the implicit assertion of the government department as to legality and will assume that internal legal advice has already been taken.

[10] Halsbury's Laws, Vol 8(2), para 522.
[11] Ibid.

The quorum for meetings of the PC is apparently only three. Four members are conventionally summonsed to attend. Officials were unable to identify for me any written requirement for this quorum number: it relies on long standing practice, probably originating with the personal wishes of Queen Victoria. Indeed, many Privy Council processes seem to be founded upon practice, without any formal or documented source.

Normally those attending are government ministers. They may or may not have something to do with the nature of the business at hand, since they are normally summonsed well before that is known. Typically, there is one meeting per month, each lasting perhaps 30 minutes. A briefing paper is sent to Buckingham Palace in advance, together with the headings of business. The draft orders are not. No discussion ever takes place. Those attending remain standing. The Lord President stands to the right of the monarch and reads out the titles of any proposed OICs. The monarch assents by saying 'Approved.' She may ask the occasional question. The orders are then signed and sealed by officials. In 2002, there were 526 OICs, of which 372 were statutory and 154 under a prerogative power.[12] The Clerk to the Council decides who is to be summonsed to attend. Such a summons overrides all other business. If the monarch is available only in Balmoral or elsewhere, then ministers must travel for the meeting. It is, however, possible for other members of the Royal Family to preside.

A meeting of the full Privy Council is summoned upon an announcement of the monarch's intention to marry and his/her death. A new monarch is declared by all those present 'with one heart, mind and voice.' Richard Crossman was scathing about the ceremonial of the PC.[13] He describes how the incoming Labour Cabinet had to spend over an hour at Buckingham Palace rehearsing how to stand, kneel, raise right hands and retreat: 'I don't suppose anything more dull, pretentious or plain silly has ever been invented.'[14]

History and development[15]

The Norman and Plantagenet Kings of the 12th century, by custom, gave and received counsel from the noblemen. The presence and participation of the latter did not serve to limit, but to acknowledge sovereign power. This council mirrored the baronial councils, attended by local vassals.

[12] HC Written Answer, col 396W, 13 March 2003.
[13] The Diaries of a Cabinet Minister: Minister of Housing 1964-66 Vol 1, Hamish Hamilton Ltd, 1975.
[14] Ibid, p29.
[15] There are four leading sources for the history of the Privy Council. These are A V Dicey in his published Arnold Prize essay for his Fellowship of All Souls College, Oxford, written in 1860, and published in 1887 by Macmillan; James Baldwin, The King's Council in England during the Middle Ages, Clarendon, 1913; Sir Almeric Fitzroy, The History of the Privy Council, Murray, 1928; and Edward Turner, The Privy Council in 17th and 18th Century England, John Hopkins Press, 1927.

The council became prominent as a council of regency during the minority of Henry III, in the early 13th century, quickly assuming definite form as the concilium regis. Under Edward I, 'its members take an oath; they are sworn of the council – swearing to give good advice, to protect the king's interests, to do justice honestly, to take no gifts'.[16]

Gradually, a smaller group of senior advisers to the King formed a Permanent or Continual Council. The Common Council, the progenitor of Parliament, then separated from the Permanent Council of advisers, which later became the Privy Council. In 1331, there were the first complaints about the power of the Permanent Council under Edward III. Tensions between the nascent rival centres of power developed. In October 1353, there was a 'Protest of Parliament against Legislation by Ordinance' claiming that the House of Commons was being by-passed by the Privy Council for law-making purposes – a debate that continues today. The Commons insisted that all articles should be approved and registered by Parliament, since otherwise they 'be not of record'. The King agreed and in May 1354 it was ordered that all additions or repeals to the approved measures should be 'done in Parliament and in no other manner.[17] Dicey suggests that the council was fully formed by 1377, upon the death of Edward III, and was separate from the two Houses of Parliament and the courts.[18] The Counsellors were now sworn to secrecy, appointed for the life of the King and paid a salary.

By 1389, every bill or document signed by the King bore the Great Seal as guarantee of authenticity. This was in the permanent keeping of the Chancellor, the senior legal officer of state and of the council. The King would seek to avoid this supervision, by keeping the Great Seal to himself, or using lesser seals, such as the Privy Seal. These different seals eventually combined, so that the Chancellor would affix the Great Seal upon receipt of any bill endorsed with the Privy Seal. By 1404, under Henry IV there were 19 Counsellors, of whom three were bishops, nine peers and six knights. The proportion of commoners to nobility fluctuated with the relative power of Crown and aristocracy.

The term Privy Council (PC) was first used under Henry V in the early 15th century. The PC had by now acquired the jurisdiction to deal with finance, aliens and trade, the Church and the preservation of the King's Peace. To the latter end, the PC could summons offenders before the Bar, suppress riots and try rioters. In 1494, Poynings Act placed the Irish Parliament under the control of the PC: Guernsey and Jersey followed.

The PC became a body of officials:[19]

[16] Frederic Maitland, The Constitutional History Of England, Cambridge University Press, 1911, p91.
[17] See George Adams and H Morse Stephens, Selected Documents of English Constitutional History, Macmillan, 1924, pp126-127.
[18] See n15 above, at p6 and p24.
[19] David Lindsay Keir, The Constitutional History of Modern Britain, 1945-1951, 5th edn, Adam & Charles Black, 1955.

> *But it seems clear that the Tudors inherited and perpetuated a Council emancipated from aristocratic predominance. Its members were, in the main, men of the middle class, professional government servants ... Henry VII's chief advisers ... were ecclesiastics, knights, and lawyers. The Crown had won the contest over the composition of the central organ of government. The victory was not wholly due to its own action. It was the natural result of the decline of the baronage in a world undergoing profound social and economic change.*

Dicey too emphasises this seismic change in class relations:[20] 'The promotion of such men was a national blessing: but it increased immensely the power of the Crown, by undermining the independence of the Council'. The attraction of this form of rule proved irresistible to Henry VII, who also established similar Councils of the North, of the Marches and of Wales.

The Proclamations of Henry VIII, issued through the PC, were struck down by the judges as not creating new law. In 1539, the King managed to obtain from a 'supine Parliament' the Statute of Proclamations, whereby his proclamations 'made by the King's Highness, with the advice of his honourable council' were equated with statute. This was repealed in 1547.[21]

By 1553, under Edward VI, there were 40 members and five committees of the Privy Council. Their secretaries, originally merely messengers between the sovereign and the council, gained influence and are the origin of our present secretaries of state. The most active and powerful committee became 'a committee for the state': the origin of Cabinet government.

The Petition of Right 1627 complained of various abuses being carried out through the Privy Council in the name of Charles I:[22]

> *... by meanes whereof your people have been in divers places assembled and required to lend certaine somes of mony unto your Majestie, ... and have been constrayned to become bound to make apparance and give attendance before your Privie Councell and in other places; and others of them have been therefore imprisoned confined and sondry other waies molested and disquieted ... by Comaund or Direccion from your Majestie or your Privie Councell against the Lawes and free Customes of the Realme.*

The petition to end such abuses became law with the historic last line endorsement of the sovereign: 'R. Soit droit fait come est desire.'

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[20] See n15 above, pp86-87.
[21] 1 Edw VI Cap 12, s4: see Dicey, n15 above, pp91- 93.
[22] S2.

The division of judicial business according to subject matter brought about the creation of separate courts of Exchequer, Common Pleas and the King's Bench. These were later hived off, leaving the Privy Council to deal with special cases or remedies. Later still, the extraordinary jurisdiction of the Chancellor, who presided over the council in its judicial capacity, developed into the law of equity, running in parallel with the common law administered by the existing courts.

The Court of Star Chamber

What remained of the judicial role of the council became, in 1487, the Court of Star Chamber. This infamous court was not just a child of the Privy Council: it was the Privy Council, meeting in the 'Starred Chamber' with its patterned ceiling. Though created by statute, its authority derived from the prerogative.

Cases were transferred there from the ordinary courts, expanding its original jurisdiction. The Star Chamber consisted of the chief officers of state and the most senior judges. Initially, it had jurisdiction over unlawful riots and assemblies, offences of sheriffs, and jurors. This was later extended to offences against royal proclamations. The Star Chamber specialised in supervising the press and public morality. This court was merely the latest expression of the dual role of the Privy Council, as a branch of the executive and as a court of law, especially in matters of the prerogative to keep the King's Peace.

Dicey explains the 'procedure' of the court.[23] Secret evidence was heard, neither the crime nor the identity of the accuser was communicated to the suspect and there was no cross-examination of witnesses. The death penalty was not imposed, but torture was regularly employed.

Maitland and Montague in A Sketch of English Legal History suggest:[24]

> *... it earned its infamy ... a whipping, nose-slitting, ear-cropping court; a court with a grim, unseemly humour of its own, which would condemn to an exclusive diet of pork the miserable puritan who took too seriously the Mosaic prohibition of swine's flesh ... It had held itself aloof from jurisprudence; it had been a law unto itself, ... therefore, men were not at pains to collect its decisions.*

[23] See n15 above, at p102.
[24] GP Putnam's Sons, 1915, at p119.

The Star Chamber summonsed jurors who had acquitted the defendant(s) in treason trials. In one year 40 of them were punished for 'perjury' in failing to reach the 'correct verdicts'.[25] In 1641, the Star Chamber was abolished, in terms which prohibited the establishment of any such court again.[26]

Modern History

In 1660, the Restoration Parliament happily endorsed the continuing role of the PC as a political body. Former proposals, for example, that only Parliament should appoint the Counsellors, did not surface again. Charles II, coveting power without restraint, increased the number of Counsellors, thus creating a need to retain confidentiality within a smaller sub-group.[27] Only a special committee or 'cabinet' was entrusted with policy work.

The important role of the Privy Council in the development of the British Empire is mapped out by Fitzroy. Starting with the receipt and disposal of a burgeoning number of petitions from the colonies, the Privy Council rapidly developed into an instrument for colonial administration. Again, this lies naturally upon the bedrock of its powers: the Royal Prerogative. Councils of Trade and of the Plantations were established in the late 17th century. Many Royal Charters granted under the prerogative, on the advice of the PC, were instrumental to the spread of British imperialism. The Honourable East India Company was granted its Royal Charter by Elizabeth I on 31 December 1600, and many followed, including the Hudson's Bay Company Canada (1670), the Royal African Company (1672), and the South Sea Company (1711). They normally exploited trade and slaving monopolies and privileges.

In 1860 Dicey[28] suggested that the PC had 'the same political powers which it had when Henry VIII ascended the throne ... Through privy counsellors and through them alone, can the monarch act: and hence the powers of the Crown are in a sense the powers of the Council'.

It was from the ranks of Privy Counsellors in the 19th century that various boards were established to administer the developing departments of government: the Boards of Trade, Agriculture and Education, the Local Government Board etc. At the turn of the 20th century, these gradually became today's departments of state. One board that remains is the 'Treasury Board': hence all Prime Ministers are also sworn in at a Privy Council meeting as 'First Lord' of the Treasury Board. Dicey[29] concludes that 'Our Parliaments and our Courts are but the

[25] Dicey, n15 above, at pp113-114.
[26] 16 Charles I c10.
[27] See Fitzroy, n15 above, pp199-202.
[28] See n15 above, p144.
[29] Ibid, p146.

outgrowth of the Council.' It is, however, over-generous to credit the Privy Council with being the parent, or even the midwife, of our current democratic constitutional arrangements.

The Oath

As recently as 1994 the Lord President of the Council refused to answer a formal question in the House of Commons about the terms of the Privy Counsellor's oath, on the grounds of the confidentiality of PC business.[30] The Oath is:[31]

> *You do swear by Almighty God to be a true and faithful Servant unto The Queen's Majesty as one of Her Majesty's Privy Council. You will not know or understand of any manner of thing to be attempted, done or spoken against Her Majesty's Person, Honour, Crown or Dignity Royal, but you will lett and withstand the same to the uttermost of your power, and either cause it to be revealed to Her Majesty Herself, or to such of Her Privy Council as shall advertise Her Majesty of the same. You will in all things to be moved, treated and debated in Council, faithfully and truly declare your Mind and Opinion, according to your Heart and Conscience; and will keep secret all matters committed and revealed unto you, or that shall be treated of secretly in Council. And if any of the said Treaties or Counsels shall touch any of the Counsellors you will not reveal it unto him but will keep the same until such time as, by the consent of Her Majesty or of the Council, Publication shall be made thereof. You will to your uttermost bear Faith and Allegiance to the Queen's Majesty; and will assist and defend all civil and temporal Jurisdictions, Pre-eminences, and Authorities, granted to Her Majesty and annexed to the Crown by Acts of Parliament, or otherwise, against all Foreign Princes, Persons, Prelates, States, or Potentates. And generally in all things you will do as a faithful and true Servant ought to do to Her Majesty, so help you God.*

Peter Hennessy comments:[32] 'The Privy Counsellors Oath is not some antiquarian residual, kept for reasons of ceremony and no more. It has life and bite.' He is right. It is used as the basis for many Privy Council inquiries and for the sharing of information between political leaders of opposing parties. In the 1950s, some Conservative MPs sought to have Aneurin Bevan prosecuted for violation of his PC oath, by reason of his opposition to the Suez invasion.[33] The

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[30] See 238 HC Debates 59, 21 February 1994. This is particularly strange since Chitty, in 1820, set it out in some detail, though not verbatim, at p410 (A Treatise on the Law of the Prerogatives of the Crown: and the Relative Duties and Rights of the Subject, Butterworth, 1920) as did Halsbury's Laws, Vol 8(2), at para 523, and the precise terms are at Rodney Brazier, Constitutional Texts: Materials on Government and the Constitution, Oxford University Press, 1990, pp294-295. Perhaps this refusal is symptomatic of the excessive reverence, even today, engendered by our constitutional obscurantism.

[31] www.privy-council.org.uk/files/word/Privy%20Counsellor's%20Oath.doc.

[32] Whitehall, Secker and Warburg, 1990, at p350, under the chapter 'Secrecy, Neutrality and Probity'.

[33] By a curious route, all Cabinet Ministers must be Privy Counsellors. Under s5 Promissory Oaths Act 1868 and Art 1 Promissory Oaths Order 1939, SI 1939 No 916 they must all take their oaths of office 'in the presence of Her Majesty in Council.' It is suggested without explanation that only Privy Counsellors can be present at such a meeting: see Rodney Brazier, Ministers of the Crown,

PC website now reveals some sensitivity to any aura of secrecy around its proceedings, with specific reference to the oath.[34] It is suggested that the oath usefully facilitates the conveying of sensitive information between Privy Counsellors upon inquiries, for example into the conduct of the Falklands War and the potential use of telephone tap evidence. The oath is then a disproportionate means of achieving that end. Individual and specific undertakings, together with security checks, upon appointment to any sensitive inquiry, would be equally effective.

Current powers

The PC's current powers are not systematically recorded or regulated. There seem to be the following mechanisms by which decisions taken in the Privy Council are expressed:

- OICs: made in the presence of the sovereign and authenticated by the signature of the Clerk of the Council.
- Orders of Council (a different and lesser form of statutory order): made in the absence of the sovereign and only statutory instruments if expressly stated.
- Proclamations: which are signed by the monarch. By these instruments, for example, Parliament is dissolved, summoned and prorogued, war is declared and terminated.

OICs are the most common and the most important. In turn, they fall into three categories:

- Judicial OICs are merely the formal route for promulgating decisions on appeals to the Judicial Committee of the Privy Council, in the form of advice to the sovereign.
- Statutory (or legislative) OICs. These involve the exercise of powers delegated by statute to government ministers and are very common. When issued they have exactly the same effect and are published in exactly the same way as other delegated legislation, produced by ministers.[35] They are laid before Parliament and may be subject to the usual negative or affirmative procedure.[36] De Smith and Brazier comment that there is nothing here of substance that could not be exercised by the relevant departments of state, who after all draft the relevant orders. They suggest that the point is 'partly traditional and partly psychological. It is more dignified and impressive ... for example when granting an independence constitution, or altering constituency boundaries.'[37] In other words, it

Oxford University Press, 1997, pp82- 83. Thus, in order to be present at their own oath taking, they must all be Privy Counsellors. Therefore, all Cabinet ministers have to take the oath of allegiance, then the Privy Counsellor's oath, before their oath of office as minister.

[34] www.privy-council.org.uk/OutPut/Page25.asp.

[35] See s1 Statutory Instruments Act 1946.

[36] Under ss4, 5 or 6 of the 1946 Act.

[37] See n1 above at p161.

is purely cosmetic. What Parliament has delegated, it can of course just as easily reallocate.

- Finally, OICs may be founded upon the Royal Prerogative. They become primary legislation:[38]

> *Primary legislation means any —*
> *(a) public general Act; ...*
> *(f) Order In Council —*
> *(i) made in exercise of Her Majesty's Royal Prerogative;*

This of course gives prerogative OICs a protected status equivalent to a conventional statute.[39] The prerogative OIC central to the GCHQ litigation, which abolished the right to membership of a trade union, was held to equate to primary legislation by Lord Fraser.[40] Similarly the Administrative Court in the first Chagos Islanders decision said 'An O.I.C. may in the context of the Crown's powers to make law for a colony, amount to an act of primary legislation under the prerogative'.[41]

Prerogative Orders in Council are not laid before Parliament, at any time. One of the important checks and balances in the Human Rights Act 1998 is therefore also evaded. The responsible minister does not have to make a 'statement of compatibility' with rights under the European Convention on Human Rights.[42] They are obscurely published as annexes to the annual volume of statutory instruments: it takes a good librarian to find them. This meant that in the *Bancoult* litigation, the Chagos Islanders case, it was only on 15 June 2004 that a written ministerial statement was placed before the House of Commons,[43] five days after the passage of two prerogative OICs. As Waller LJ said: 'So far as [Prerogative] O.I.C.s are concerned, there is simply no opportunity for debate and no opportunity for scrutiny. It involves a Minister acting without any constraint.'[44] Hence, in that case, the Court found an even greater need for judicial scrutiny.

This is a problem of real substance: well beyond mere harmless and quaint ceremonial. It is surely a loophole in our constitutional safety net: a way in which hard law can be directly created, affecting fundamental rights, whilst by-passing Parliament and any prior accountability. The very same issue was a matter of controversy between the Tudor Kings and

[38] S21(1) Human Rights Act 1998 (HRA), the interpretation section and *R (Bancoult) v SSFCO* [2008] 61 at para 34.
[39] Under ss3 and 4 of the HRA.
[40] *CCSU v Minister for the Civil Service* [1985] 1 AC 374 at p399 C.
[41] *R (Bancoult) v Foreign Secretary* [2001] 2 WLR 1219 at para 35.
[42] S19 HRA 1998.
[43] HC Debates, col 32WS, 15 June 2004.
[44] *R (Bancoult) v SSFCO (No 2)* [2007] EWCA Civ 498; [2007] 3 WLR 768.

their courts and Parliaments. This battle between autocracy and democracy was won by Parliament over 450 years ago. Has this victory now been ceded by default? What is the effective difference between the proclamations of the Tudors and a modern prerogative OIC?

Recent changes

In the spring of 2007, following a Machinery of Government review, the Privy Council Office (PCO) was split between the Cabinet Office and the Constitution Directorate of the Ministry of Justice (MoJ). The PCO took on the further role of supporting the government whips in both Houses of Parliament. No doubt this is what has prompted the departmental plan (see footnote 9 above) to suggest that the Privy Council is now 'synonymous with government'.

The PCO now has three functions:

1. to support the President of the Council, the Leaders of both Houses of Parliament, and the government whips in both Houses: here operating within the Cabinet Office.
2. to provide a secretariat for the PC. This is located in Carlton Gardens, London.
3. to act as the Registry for the Judicial Committee of the Privy Council (JCPC). This is located with the court room of the JCPC in Downing Street, and will soon move with the Court to the new Supreme Court building.

In a backward step for transparency, there will no longer be any separate departmental plans for the PC Office, since it will no longer be classed as a separate department. There is a concern that underneath all the talk of modernisation, rationalisation and new transparency, the reality of such changes results in greater obscurity, centralisation and control. There is an element of these changes that reinforces the role of the Privy Council, at the heart of government, without any examination of whether it is a suitable vehicle for these powers at all.

The Judicial Committee of the Privy Council

The Judicial Committee Act 1833 ('An Act for the better Administration of Justice in His Majesty's Privy Council') formally created the Judicial Committee of the Privy Council (JCPC), both as a final court of appeal for non-domestic jurisdictions, and, for example, to deal with ecclesiastical and admiralty appeals.

A century later, the last edition of the leading textbook[45] was able to boast that 'The sphere of jurisdiction of the Privy Council now embraces more than one-fourth part of the world.'

[45] Norman Bentwich, The Practice of the Privy Council in Judicial Matters, 3rd edn, Sweet & Maxwell, 1937.

Following the Statute of Westminster 1931, which enabled the dominions to discontinue appeals, the Judicial Committee's overseas jurisdiction has greatly declined. Canada withdrew its criminal appeals before World War II, its civil and constitutional appeals soon after; India gave it up on independence in 1947; and since then appeals from Ceylon, Africa, Australia, Malaysia, Singapore and, most recently, Hong Kong and New Zealand have all been withdrawn.

That still now leaves a list of many former colonies and current UK overseas territories, mainly in the Caribbean and one wholly independent state, Brunei. Closer to home, the committee also hears appeals from the Channel Islands and the Isle of Man, admiralty appeals from the Cinq Ports and (in time of war) the Prize Courts, disciplinary appeals involving doctors and dentists, and appeals on certain matters from ecclesiastical courts. A major new jurisdiction involves the so-called 'devolution issues'. These are constitutional disputes concerning the powers of the devolved assemblies and Parliament, arising under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998.

The five judges who sit are merely a 'board' of the Judicial Committee, which is itself just one of a number of the Privy Council's standing committees. They are almost entirely composed of our House of Lords judges, Lords of Appeal in Ordinary, supplemented occasionally by distinguished foreign judges. They do not make decisions like other courts. Instead they 'humbly advise Her Majesty' whether to grant or refuse an appellant's petition. In the case of Brunei, the committee reports its opinion directly to the Sultan. Many important and enlightened decisions involving the legality of the death penalty have emanated from this Court recently.[46]

One potential use of the Judicial Committee seems to have been unappreciated:[47]

> *His Majesty may refer any other Matters to Committee. It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.*

We have here an embryonic, but unused, constitutional court.

The future of the Judicial Committee will naturally be affected by any reform of the wider Privy Council. Thereby, this jurisdiction could be transferred to our new Supreme Court. Happily for

[46] See generally de Smith and Brazier, n1 above, pp163-165.
[47] By s4 Judicial Committee Act 1833.

this purpose, it is planned that the JCPC will sit in the new Supreme Court premises, when completed in 2009.

Other recent PC committee functions

The PC is used as a pool of 'the great and the good' to conduct inquiries into issues which are regarded as sensitive by the government of the day under the PC oath of confidentiality. A brief survey of such enquiries is instructive and includes:

- The Burkett committee appointed to inquire into the interception of communications.[48] This broadly approved the continued use of telephone tapping as a detection technique.
- The Parker committee considered 'authorised procedures for the interrogation of persons suspected of terrorism' in Northern Ireland.[49] The majority found the relevant techniques to have been technically illegal, but arguably morally justifiable. The European Court of Human Rights condemned them as violations of Article 3 of the European Convention on Human Rights.[50] Lord Gardiner gave dissenting conclusions:[51]

  > *The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and highly successful wartime interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe still to be the greatest democracy in the world.*
- The Franks committee, reviewing the events leading up to the invasion of the Falklands in 1982, contained damning criticism of the intelligence agencies and cleared the government of all blame. Its six members heard evidence entirely in private and took six months to report. The terms of reference were to 'review the way in which the responsibilities of government ... were discharged'. Much of the report of just 100 pages was devoted to the work of MI6 and assessments by the joint intelligence organisation in the Cabinet Office.
- A Privy Council committee reported in December 2003 on the Anti Terrorism, Crime and Security Act 2001. This was a statutory review under s122 of the Act. It robustly questioned whether the detention orders against terrorist suspects could be a sustainable way of attaining security objectives.

[48] Cmnd 283, October 1957.
[49] Cmnd 4901, March 1972.
[50] *Ireland v UK* (1978) EHRR 25.
[51] Conclusion, para 21.

- In 2004, a committee of Privy Counsellors, under the former Cabinet Secretary Lord Butler, reviewed intelligence on weapons of mass destruction[52] in the lead up to the Iraq war. A Conservative MP was made a Privy Counsellor so that he could sit on the committee. As for the report, it is perhaps most merciful simply to recollect that the conclusions did not command public confidence. In a signal breakdown of the normal trust and confidence within these political echelons, the Liberal Democrats did not nominate a member and the Conservatives withdrew their nominee.

  An authoritative *Daily Telegraph* article[53] reported that a key paragraph was watered down at the last minute to dilute apparent criticism of Tony Blair's role. Lord Butler revealed at the Hay on Wye festival in 2007 that had he been asked, at any press conference, the right/wrong question about the role of Prime Minister Blair, he would have been obliged to answer in a way which could well have triggered the latter's resignation. Can the public interest be reduced to a game of 'blind man's buff'?

The record of inquiries by specially constituted committees of Privy Counsellors is decidedly mixed. The Privy Council cannot be justified on the sole, or even partial, basis that it provides a ready pool of the trustworthy 'great and good' for sensitive inquiries. They can readily be found when needed, without needing the initials PC after their names. William Hague PC gave evidence to this effect to the House of Commons Public Administration Select Committee 2004 report, *Taming the Prerogative*.[54] Undertakings of confidentiality on an ad hoc basis would be perfectly effective to preserve the public interest in cases of sensitivity.

Strong or weak point?

A comment piece in the *Daily Mail*[55] strongly defended the independent constitutional role of the PC from perceived attack by the Blair government. Putting aside the hyperbole, it is interesting how that 'independence' was expressed:

> *But the Privy Council still possesses one very rare and valuable quality. It is totally free of any taint of political bias, because it owes loyalty purely to the monarch.*

This appearance may be precisely its attraction for some, in the event of a serious civil emergency in the UK. The PC has always been deeply involved in such contingencies by its prerogative and ministers' delegated statutory powers.[56]

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[52] HC 898, 2004.
[53] 'The great escape', Patrick Hennessy and Melissa Kite, 18 July 2004.
[54] Public Administration Select Committee, *'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament'*, Fourth report of session 2003-2004, HC 422.
[55] 'Blair's coup d'etat on the Privy Council', 10 March 2007.

The PC is a body imbued with undemocratic values and practices, under the illusion that it is above democracy on a higher plane. It is both institutionally as a whole, and severally by its individual membership, inherently remote from any democratic instinct.

The lack of accessibility and transparency of the PC means that almost no one understands its processes. In a serious emergency, the British people would simply be presented with its products: proclamations and OICs having various formal legal effects upon the rights and duties of us all. As the respected commentator Bruce Anderson wrote, contemplating the internment without trial of the putative '2,000 or so' suspected Islamic terrorists in the UK:[57] 'But in a crisis, the government could always declare a state of emergency and use O.I.C.s to give itself the necessary powers.'

Appeals to 'national unity' are the common vocabulary of suspensions of democracy, even of crude third and second world military coups. The rhetoric always claims to be rising above partisan politics and preserving the public interest against perceived threat. The PC would be the perfect vehicle for such an intervention, not least because of its obscurity and the cloak of respect for the person of the current monarch. Certainly, one way or another, in a real constitutional crisis, this country would be ruled by OICs, whether founded upon the prerogative powers or under statute such as the Civil Contingencies Act 2004. This was how the jurisdiction of Northern Ireland was effectively administered during the many suspensions of the Stormont Parliament.[58]

The Prerogatives of the Crown

Discussion of the Privy Council is integrally bound up with the role of the prerogative. A full treatment of the prerogative is far beyond the scope of this paper. It is one of the more obscure creatures of the common law: or, perhaps more accurately, has operated with occasional recognition by the common law. To discuss its principles, breadth and boundaries is to enter a quagmire of vague principle, uncertain practice and wraith-like exceptions and limitations, largely by way of 'convention'.[59] It cannot, however, be simply ignored, since those prerogative powers which are of constitutional significance are exercised through the Privy Council, by way of OICs and proclamations. It is by means of the former that laws can be made. If prerogative powers of constitutional significance are to remain, then there must be a forum for their

[56] As to the former see s1 Emergency Powers Act 1920, now repealed, and now s20 Civil Contingencies Act 2004.
[57] 'Brown is learning ...', The *Independent*, 19 November 2007.
[58] See Schedule 1 Northern Ireland Act 1974, s85 Northern Ireland Act 1998 and the Schedule to the Northern Ireland Act 2000.
[59] I recommend the general treatment at chapter 12 of Anthony Bradley and Keith Ewing, Constitutional and Administrative Law, 14th edn, Pearson Education Ltd, 2007 and chapters 4 and 13 of Maurice Sunkin and Sebastian Payne, The Nature of the Crown: A Legal and Political Analysis, Oxford University Press, 1999, respectively by Sebastian Payne and Rodney Brazier. Much of what follows is sourced from those works, without further attribution.

exercise. Hopefully this would be a more transparent and accountable forum than the current PC. If the Crown were shorn of significant prerogative powers, whether of the monarch personally, or of ministers of the Crown, the Privy Council would be shorn of its major constitutional function. Thus the future of the Privy Council is linked with the future of the prerogative.

The Privy Council historically developed for the purpose of providing advice to the sovereign in the exercise of constitutional powers. If the monarch in reality no longer has such powers, then no advice is required. If the 'advice' is a fiction, which disguises the exercise of power by the 'advisor', ie a minister, then transparency of language and procedure disappear. Lord Roskill referred to the unreality of the pretence that prerogative acts are those of the sovereign: and referred to 'the clanking of mediaeval chains of the ghosts of the past ... the archaism of past centuries'.[60] Perhaps, if it be a charade, it can be dispensed with?

As Sedley LJ said of the relevant OIC:[61]

> *The recital that the Orders are made by Her Majesty 'by and with the advice of her Privy Council' is purely formal: in reality the Privy Council plays no role beyond the placing by one of its members, a minister, of the instrument before the Monarch, who is called upon by constitutional convention to approve it.*

As pointed out in the same decision, at para 32, the curtain slipped when the minister explained to Parliament that 'the government decided to legislate ...' by this OIC.

On the other hand, when the sovereign really needs advice about the exercise of the personal prerogative powers, the PC is completely by-passed. The monarch's Private Secretary 'solicits advice from unpublicised and unknown sources'.[62]

In a 1989 paper, *Meet the challenge: Make the change*, the Labour party promised to review and bring the prerogative under more effective parliamentary control. The Labour party manifesto for the 1992 general election promised to 'end ministerial misuse of the Royal Prerogative'. In a 1993 review of ministerial powers, *A New Agenda for Democracy*, the Labour party said: 'It is where power is exercised by government under cover of royal prerogative that our concerns are greatest ... Here massive power is exercised by executive decree without accountability to Parliament and sometimes even without its knowledge'.

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[60] In the *CCSU* case, n40 above, at p417B and H.
[61] *SSFCO v R (Bancoult)* [2007] EWCA Civ 498, 23 May 2007, at para 16.
[62] Professor Robert Blackburn, 'Monarchy and Personal Prerogative', [2004] *Public Law* 546, at fn48.

In 1994, a then Opposition MP wrote:[63]

> *[T]he [royal] prerogative has no place in a modern western democracy ... [It] has been used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable.*

That politician is today the Rt Hon Jack Straw, Privy Counsellor, Secretary of State for Justice and Lord Chancellor: and sponsor of the *Governance of Britain* green paper. Ironically, he was also the Foreign Secretary at the time of the 'Bancoult' OICs in 2004, which emanated from the Foreign Office and are discussed below.

Definition

There are difficulties over the definition of both the meaning and the extent of the prerogative. Blackstone's definition was 'that special pre-eminence which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity'.[64] John Locke wrote 'this power to act accordingly to discretion for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative'.[65] Dicey's version was:[66]

> *The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, ... the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers. Every act which the executive government can lawfully do without authority of the Act of Parliament is done in virtue of this prerogative.*

Swinfen Eady MR suggested a concise definition: 'Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative'.[67] In the *CCSU* case Lord Fraser cited Dicey[68] and Lord Diplock came up with: 'a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent on any statutory authority but nevertheless have consequences on private rights or legitimate expectations of other people'.[69]

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[63] See Bradley and Ewing, see n59 above, at p257, fn97.
[64] At 1 Blackstone's Commentaries 250.
[65] Second Treatise of Civil Government, 1690, ch 14, sect 160.
[66] At pp425-426, 10th edn, 1959. The editor cites Lord Dunedin at p526 in *Att Gen v De Keyser's Royal Hotel Ltd* [1920] AC 508 for the core of this definition. This was later approved in *China Navigation* [1932] 2 KB 197 at p214 by Scrutton LJ and stated not to get anyone very far by Lord Reid at p99F in *Burmah Oil*. The limitations of each of the Locke, Blackstone and Dicey definitions are summarised at pp94- 95 in Sebastian Payne's chapter 4 of Sunkin and Payne, n59 above.
[67] *Att Gen v De Keyser's Royal Hotels* [1919] 2 Ch 197.
[68] At p398B.
[69] At pp409-410.

Perhaps there is no better demonstration of the opacity of the prerogative than the mystification of the Law Lords in *Burmah Oil v Lord Advocate*.[70] Lord Reid at p101 said 'It is not easy to discover and decide the law regarding the Royal Prerogative and the consequences of its exercise ... There is difficulty in relating the prerogative to modern conditions... The prerogative is really a relic of a past age.'[71] Lord Radcliffe at p113E said 'As we know only vaguely what this prerogative is and have even vaguer information as to when and on what occasions it has been asserted throughout history, I have become more and more uncertain what it is that we are really talking about.' Lord Pearce at p148D said 'The law and Parliament have so altered and curtailed (and in parts confirmed) the various aspects of the prerogative that the whole subject is obscure and difficult.'

On the other hand, the courts have sometimes interpreted long term invisibility in a somewhat counter-intuitive way. In 1989, Nourse LJ said: 'the scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does'.[72]

Governments of the day have been positively obstructive of previous enquiries about the extent and operation of these powers.[73] Both Prime Ministers Major and Blair refused to list the occasions upon which prerogative powers had been used by their governments, on the grounds of impracticability and cost.

Categories

The broad division of 'Crown prerogative' powers separates the personal prerogatives of the monarch from those exercised by government ministers. Both encompass powers of great constitutional sensitivity.

The *personal prerogatives* of the monarch include the powers to appoint the Prime Minister, to dissolve Parliament, to assent or refuse to assent to a bill passed by Parliament and to dismiss ministers. It is sometimes suggested that, by convention, no element of personal discretion is involved here, since these powers are 'always' or 'normally' exercised on the advice of the Prime Minister. Indeed they are said to be justified as a 'safety net' for democracy in a crisis.

[70] [1965] AC 75.
[71] Cited by Lord Bingham in *R (Bancoult) v SSFCO* [2008] UKHL 61 at para 69 where he added that '... the royal prerogative to legislate by order in council is indeed an anachronistic survival'.
[72] *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] 1 QB 26.
[73] See HC Debates, col 19W, 1 March 1993 and HC Debates, col 19W, 18 November 2002.

Many would be surprised that the sovereign retains an absolute veto over bills affecting the personal prerogative. Erskine May[74] states that 'The Prerogatives of the Crown are however subject to limitation and change by legislative process *with the consent or authority of the Sovereign*.' Any bill passed without such consent would be null and void.[75] Absence of consent prevented the second reading of a bill in 1999 attempting to render military actions against Iraq subject to Parliamentary approval.[76]

Though exercised through the Privy Council, and of profound potential controversy, these powers lie beyond the scope of this paper. There has been no recent alleged abuse of these powers, though their nature, limits and mode of exercise are entirely opaque. They must be reviewed as part of any thorough project for constitutional reform.[77]

This paper will now focus upon the *prerogative powers exercised by government ministers*. Thereby, they may obtain OICs without any statutory powers and without authorisation from, or prior scrutiny by, or announcement to, Parliament.

Under this power, for example, ministers may legislate by OIC for the remaining overseas territories and in respect of the civil service. Relevant to the latter was the OIC excluding any trade union for GCHQ staff. This led to the leading case of *CCSU v Minister for the Civil Service*.[78] Similarly, by a 1997 amendment to Article 3(3) of the Civil Service OIC of 1995, three nominated 'special advisers' were given authority to give instructions to civil servants. One of these proved to be Alastair Campbell, and another, Tony Blair's chief of staff, Jonathan Powell. This caused widespread concern about the 'politicisation' of the civil service. It was rescinded as one of the first acts of Gordon Brown's premiership, of course by OIC.

The few judicial pronouncements within the last century upon the 'prerogative' include:

- *Attorney General v De Keyser's Royal Hotel* [1920] AC 508: the prerogative is in abeyance, whilst there is comprehensive statutory provision.

- *China Navigation v Attorney General* [1932] 2 KB 197: prerogative right as to disposition and use of armed forces, no duty to protect citizens abroad.

[74] 23rd edn, Butterworths Law, 2004, at p14. Emphasis added.
[75] For a discussion of this rule see Rodney Brazier, 'Legislating about the Monarchy', *Cambridge Law Journal*, 2007, at pp95-97.
[76] HC Debates. col 541, 16 April 1999.
[77] See further 'Monarchy and Personal Prerogative', Robert Blackburn, [2004] *Public Law* 546; Rodney Brazier in reply, at [2005] *Public Law* 45, and Anne Twomey, [2006] *Public Law* 580.
[78] [1985] AC 374.

- *Burmah Oil v Lord Advocate* [1965] AC 75: compensation payable for property destruction under the war prerogative.

- *CCSU v Minister of for the Civil Service* [1985] AC 374: changes of civil service terms of employment, for reasons of national security under the prerogative, not reviewable because of subject matter, but in principle, exercise of prerogative powers are subject to judicial review.

- *R v Home Secretary, ex p Northumbria Police Authority* [1989] QB 26: prerogative to keep the peace of the realm justifies provision of police equipment by Home Secretary to Chief Constables despite opposition of local police authority.

- *R (Bancoult) v SSFCO* [2001] 2 WLR 1219, *SSFCO v R (Bancoult)* [2007] EWCA Civ 498, 23 May 2007 and *R (Bancoult) v SSFCO* [2008] UKHL 61: described in detail below.

The prerogative under scrutiny

Surprisingly, it was only in 2004 that the House of Commons Public Administration Select Committee[79] felt obliged to call for the prerogative powers to be identified by the government. Upon the government's response, the committee's press release proclaimed: 'This is the first time they have ever been listed'. This was a strange kind of triumph. In fact, the response of the Treasury Solicitor appeared in an annexe to the report stating: 'It remains impossible to define the exact limits of the prerogative.'[80] The same response continued at para 7:

> *However, because the prerogative is not codified or frozen at a particular point of time, it can still to some extent adapt to changed circumstances. The Lord Privy Seal, in written answer in the House of Lords on 1st February 1996 to the question "what are the categories of powers exercised by ministers exclusively under the royal prerogative" said "the government shares the view of Wade and Bradley, in their work Constitutional and Administrative Law (11th Ed. 1993), that it is not possible to give a comprehensive catalogue of prerogative powers". This government also shares that view.*

However, the response listed 'those powers which have been consistently recognised by the courts in the past'. These conflate the prerogative of ministers with the monarch's personal prerogatives, (and the so-called 'legal prerogatives', or immunities of the sovereign):

[79] See n54 above.
[80] Ibid, pp59-61.

Domestic Affairs

4. Although this is the area in which legislation has increasingly been introduced thereby limiting the extent of the prerogative, some significant aspects of the prerogative survive in the area of domestic affairs. These include:

- *the appointment and dismissal of Ministers;*
- *the summoning, prorogation and dissolution of Parliament;*
- *royal assent to Bills;*
- *the appointment and regulation of the civil service;*
- *the commissioning of officers in the armed forces;*
- *directing the disposition of the armed forces in the UK;*
- *the appointment of Queen's Counsel;*
- *the prerogative of mercy. (This no longer saves condemned men from the scaffold but it is still used e.g. to remedy errors in sentence calculation);*
- *the issue and withdrawal of UK passports;*
- *the granting of honours;*
- *the creation of corporations by Charter;*
- *the King (and Queen) can do no wrong (for example the Queen cannot be prosecuted in her own courts)*

Foreign Affairs

5. The conduct of foreign affairs remains very reliant on the exercise of prerogative powers. Parliament and the courts have perhaps tended to accept that this is an area where the Crown needs flexibility in order to act effectively and handle novel situations.

6. The main prerogative powers in this area include:

- *the making of treaties;*
- *the declaration of war;*
- *the deployment of the armed forces on operations overseas;*
- *the recognition of foreign states;*
- *the accreditation and reception of diplomats.*

The more recent *Governance of Britain* green paper, discussed below, lists those areas in which the government acts under prerogative powers, therefore excluding the monarch's personal prerogatives:[81]

The Government exercises prerogative powers to:

- *Deploy and use the Armed Forces overseas*

[81] See n3 above, at para 24.

- *Make and ratify treaties*
- *Issue, refuse, impound and revoke passports*
- *Acquire and cede territory*
- *Conduct diplomacy*
- *Send and receive ambassadors*
- *Organise the Civil Service*

The Government makes recommendations to the Monarch to exercise her powers to:

- *Grant honours or decorations*
- *Grant mercy*
- *Grant peerages*
- *Appoint Ministers*

subject to the mandate of the people's representatives.

Accountability

The government asserted to the 2004 Public Administration Select Committee that there was effective accountability in the exercise of the prerogative powers by means of Parliament's control of supply and the ability to hold ministers to account.[82] These were hopelessly outdated arguments, which have now been abandoned in the *Governance of Britain* green paper. Parliament does not have effective control of 'supply' so as to pre-empt executive action by a minister of a modern first world state. The post facto sanction of the relevant minister losing his/her job does not provide proportionate and effective accountability for executive actions, which may carry enormous consequences for the country and more widely for our interconnected world.

By contrast, the major concern now in the *Governance of Britain* green paper is a lack of 'accountability'.[83]

In any case there is an inherent contradiction between accountability and the notion of a prerogative. The Shorter Oxford English Dictionary puts the first meaning of 'prerogative' as 'The special right or privilege exercised by a monarch or head of state over all other people, which overrides the law and is in theory subject to no restriction.' As Scrutton LJ said at p214 in the *China Navigation* case: 'I am reluctant to discuss the matter under the head of "Prerogative" because, as Professor Dicey said, the word introduces the political controversies of an earlier age

[82] See paras 13 and 14 of the response.
[83] At paras 14-16.

as to the existence of a royal sovereign power which could not be superseded, regulated, or abolished by Act of Parliament.'

The Governance of Britain green paper

The green paper[84] devotes many pages to the use of the Royal Prerogative by ministers.[85] An early footnote however excludes 'the legal prerogatives of the Crown' and 'the Monarch's constitutional or personal prerogatives'.[86]

The core problem is stated to be the difficulty of holding the executive to account in Parliament, when it has acted under the royal prerogative:[87]

> *14. For centuries the executive has, in certain areas, been able to exercise authority in the name of the Monarch without the people and their elected representatives in their Parliament being consulted. This is no longer appropriate in a modern democracy. The Government believes that the executive should draw its powers from the people, through Parliament.*
> *15. The flow of power from the people to government should be balanced by the ability of Parliament to hold government to account. However, when the executive relies on the powers of the royal prerogative – powers where government acts upon the Monarch's authority – it is difficult for Parliament to scrutinise and challenge government's actions. If voters do not believe that government wields its power appropriately or that it is properly accountable then public confidence in the accountability of decision-making risks being lost.*
> *16. That is why the Government is proposing immediate and specific changes to strengthen our democracy – changes that will restrict the power of the Prime Minister and the executive.*

In the executive summary, the green paper says:[88]

> *Limiting the powers of the executive.*
> *The Government will seek to surrender or limit powers which it considers should not, in a modern democracy, be exercised exclusively by the executive (subject to consultation with interested parties and, where necessary, legislation).*
> *These include powers to:*

[84] See n3 above.
[85] See paras 14- 51.
[86] Fn2, p17.
[87] Identified at para 15.
[88] At p6.

- *deploy troops abroad;*
- *request the dissolution of Parliament;*
- *request the recall of Parliament;*
- *ratify international treaties without decision by Parliament;*
- *determine the rules governing entitlement to passports and for the granting of pardons;*
- *restrict parliamentary oversight of the intelligence services;*
- *choose bishops;*
- *have a say in the appointment of judges;*
- *direct prosecutors in individual criminal cases; and*
- *establish the rules governing the Civil Service.*

Necessity?

Is there any need for a law-making power by OIC under the Royal Prerogative? Surely not. Any such law could be passed or approved by Parliament, under conventional primary or secondary legislation.

There is a fundamental question about why government ministers need to have recourse to any prerogative OICs at all: why they should ever need to create primary legislation, or be allowed to bypass Parliament in order to do so? Why cannot all the powers of ministers to make law be defined by statute, as many now are? We have seen how by a simple rubber-stamping procedure, ministers may obtain OICs, drafted by their departments and approved by the monarch as a formality. These statutory orders create secondary legislation, which is of course subject to the usual regime of Parliamentary scrutiny, under the Statutory Instruments Act 1946. There is a fundamental question mark over this procedure too, though at least here prior scrutiny and accountability do exist.

Statutory regulation: an example

The law relating to civil emergencies has now been comprehensively covered by the Civil Contingencies Act 2004, whereby very wide ranging powers are given to the relevant ministers. Its terms are a helpful example of how the field of prerogative can be subjected to modern statutory codification. There is however a sting in the tail.

Under s1(4) it is for a minister of the Crown to decide whether a state of emergency exists. Under ss20(1) and (2) emergency regulations may be enacted by an OIC, and by senior ministers if that would involve harmful delay. Under s22(3) 'Emergency regulations may make

provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative ...' and then 17 non exclusive examples are listed.

The 2004 Act replaced the Emergency Provisions Acts 1920 and 1964. Under these Acts, a state of emergency was declared by Royal Proclamation and OICs would then delegate to ministers the necessary powers to preserve the peace and secure supplies. 12 such proclamations were made between 1920 and 1974, all relating to industrial action. On one such occasion, on 9 January 1974, for the approval of the Emergency Powers (No. 2) Regulations 1974, SI No 175, the Queen Mother and Princess Margaret represented the Queen in giving approval. Such regulations usually suspended the basic rules of evidence and permitted previous convictions and character evidence to be used to prove offences such as 'loitering for a purpose prejudicial to public safety.' This is a useful insight into the effect of the prerogative upon former basic rules of law. It is likely that orders under the new Act would be in similar terms.

So now, under the 2004 Act, the trigger for emergency powers is no longer a Royal Proclamation: and the source for the powers of ministers is no longer an OIC made under the specific emergency, but a permanent statute. Ss 21 and 23 of the Act establish various limitations upon these powers. It seems clearly implied from the wording of s22(3) that in this area the prerogative persists in parallel with this statute. The wording is in the present tense: 'of any kind that could be made by the exercise of the Royal Prerogative', rather than eg 'could formerly have been made'.

Even accepting that it may be impossible to foresee the nature and consequences of all conceivable civil emergencies, the terms of the 2004 Act are both comprehensive and flexible. There is little point in codifying the prerogative powers if they remain as undefined shadows in the background. The prerogative is capable of providing a fig leaf of legality for almost any state excess. Maybe that is the role of the prerogative now: a sort of 'extra cover' in the great cricket game of our constitution.

The Chagos Islanders

OICs have been used as devices in the perpetration of one of the most scandalous episodes in modern UK political history. There is no better illustration of the opportunities for state abuse in this obscure corner of our constitution. The history is set out in two court decisions.[89]

Between 1964 and 1966 the UK and US governments negotiated an agreement whereby the US could build a major air-base on Diego Garcia, the chief island of the Chagos Archipelago in the

[89] *R (Bancoult) v SSFCO* [2001] 2 WLR 1219 and *SSFCO v R (Bancoult)* [2007] EWCA Civ 498, 23 May 2007.

Indian Ocean. The Chagos Islands were inhabited and then part of the British colony of Mauritius. The whole of the indigenous Ilois people were forcibly removed by 1971, the majority to Mauritius, over 1,000 miles away, and a few to the Seychelles and thereafter prevented from returning. The litigation concerned the legality of their treatment.

Mauritius was about to become an independent state in the mid-1960s, and political interference from that source would have been 'unacceptable' to the UK and US governments. By OIC, therefore, the British Indian Ocean Territory Order 1965[90] became law, detaching the Chagos Islands from Mauritius and constituting a newly named British Indian Ocean Territory (BIOT). This was effectively ruled by a commissioner, with certain law making powers. In due course and under orders from the Foreign Office, he created an Immigration Ordinance, which authorised the forcible removal and exclusion of the inhabitants. This was all part of a long term scheme of pretence and deception as revealed by internal documents set out in the court judgments.

The legal basis for the OIC was not statutory, but the Royal Prerogative.[91] No doubt, granted the documented official concerns at the relevant time, the use of the Privy Council was deemed a more suitable venue for pursuing this odious enterprise, than Parliament. The twin covert aims of avoiding political scrutiny and ultimately of population cleansing, were thereby achieved.

In the 2001 *Bancoult* decision of the Divisional Court, the Immigration Ordinance was found to have been outside the vires of the BIOT Order, and thus the expulsions and exclusions were unlawful. The court doubted whether the prerogative could lawfully authorise such steps anyway, and held that only statute could do so.[92] The government accepted the ruling, and initiated a feasibility study into the return of the Islanders. A new Immigration Ordnance facilitated their return.

However, in 2004, the lure of law-making by OIC once again proved irresistible. In the words of the 2007 judgement:

> *11. Then on 10 June 2004, ... two O.I.C.s were placed by ministers before Her Majesty for approval: ... In the Divisional Court's words, the first of these Orders 'declared that no person has the right of abode in BIOT nor the right without authorisation to enter and remain there. The Chagossians were thus effectively exiled.'*

[90] SI 1965/1920.
[91] See para 2 of the 2001 judgment.
[92] Para 61.

12. It was not until 15 June 2004 that a written ministerial statement was placed before the House of Commons, citing the feasibility study (now two years old) and ... [security reasons] ...
13. Thus, despite a candid ministerial acknowledgment to Parliament less than a month later that 'the decisions made by successive governments in the 1960s and 1970s to depopulate the islands do not, to say the least, constitute the finest hour of UK foreign policy', those decisions were replicated in 2004.

Thus, the question of the validity of these OICs was litigated. Both at first instance and on appeal in 2007 they were held to be invalid. The government strenuously argued that the court had no jurisdiction to question their validity, in particular because made under the Royal Prerogative. The court rejected the fiction that these OICs were acts of the sovereign, rather than ministerial, and thus found them amenable to judicial review:

36. This case, correspondingly, concerns not a sovereign act of the Crown but a potentially justiciable act of executive government. Were we to hold otherwise we would be creating an area of ministerial action free both of Parliamentary control and of judicial oversight, defined moreover not by subject-matter but simply by the mode of enactment. The implications of such a situation for both democracy and the rule of law do not need to be spelt out.

The court concluded:[93]

The point is that the two OICs negate one of the most fundamental liberties known to human beings, the freedom to return to one's homeland, however poor and barren the conditions of life, and contingent though return may be on the property rights of others; and that they do this for reasons unconnected with the wellbeing of the people affected.

And at para. 78:

The unannounced withdrawal of the Chagossians' right of return by the two O.I.C.s in 2004 has been defended in court not on the ground of an ineluctable change of circumstance and policy but on the ground that, by using O.I.C.s, ministers could do with impunity something which was known to be unlawful when done by Ordinance. If, as I would hold, there is no prior inhibition either under the 1865 Act or at common law upon the jurisdiction of the courts to adjudicate upon the validity of O.I.C.s, the

[93] Para 71.

> *critical question is whether the instant case is a proper case for the court's intervention. Notwithstanding the great latitude which the prerogative power of colonial governance enjoys, I consider the material Orders to have been unlawfully made, because both their content and the circumstances of their enactment constitute an abuse of power on the part of executive government.*

There are many poignant illustrations of the injustice done to the Chagos Islanders. It was the USA military who wanted to have the area cleansed of any local population. The original quid pro quo for the eviction was probably a secret cheap 'Polaris' missile deal for the UK. They call their airbase 'Camp Justice' and the shape of the archipelago 'the footprint of freedom'. The base website bears the slogan 'One Island, One Team, One Mission'.[94] Though the military website displays several historical photographs of the Islanders in their fishing boats and villages, the only reference to the fate of the inhabitants says 'Plantations on Diego Garcia were closed in 1971'. Even now, as they are excluded from their homeland, an international yacht marina gives facilities for visitors who have no other interest than re-supply of their yachts, and perhaps a few cocktails. They are not required to have permits. The archipelago is over 200 kilometres in extent, with Diego Garcia at the southern end. Any security concerns ascribed to occupation of the outer islands could hardly bear scrutiny. Despite all the 'feasibility studies' for rehabilitation of the Islanders, little or no attention seems to have been paid to the easiest option of all. A significant proportion could join the massive workforce at and around the base itself, and earn a good income. Many Filipinos and Mauritians are so employed. Anyway, as the US official website says: 'Some of the world's finest fishing is at our doorstep.' It also emphasises, without irony, that the UK and US authorities 'have made every effort to maintain the ecological integrity of Diego Garcia'.

The government won the House of Lords appeal by a 3-2 majority.[95] No doubt was cast upon the immorality of the original expulsion of the Chagos Islanders, which was variously described by their Lordships as 'callous disregard', 'in many respects disgraceful', and causing judicial 'distress and indignation'.

The House of Lords unanimously held that the validity of prerogative OICs could be subjected to judicial review, thus confirming and extending the *CCSU* decision.[96] Further, where they engage fundamental human rights, they should be subjected to heightened scrutiny.[97]

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[94] www.dg.navy.mil/web/index.htm.
[95] *R (Bancoult) v SSFCO* [2008] UKHL 61.
[96] See paras 35, 69, 71, 105 and 122.
[97] See paras 52-53 and 131.

This is not the place to deconstruct the controversial merits of the majority or (heroic) minority opinions. The majority found that the prerogative to legislate for 'ceded territories' gave the vires for such a measure, even one excluding people from their home land;[98] that the rationality of the impugned OIC was not justiciable by the Court;[99] and anyway could not be regarded as irrational, when examined against the position in 2007, in the light of the alleged unfeasibility of re-occupation of the outer islands;[100] and that the Islanders had no 'legitimate expectation' of return to occupation.[101]

The tragedy of the Chagos Islanders well illustrates the combined defects of the remaining prerogative and the Privy Council through which it operates. The dismal inability or unwillingness of the House of Lords to vindicate the rights of the victims of this abuse provides further confirmation of the need for fundamental change.

Lord Rodger openly encouraged reform:[102]

> *That lack of direct political control over them [OICs] may well be considered undesirable in today's world. If so, the appropriate remedy is for Parliament, not the courts, to get involved in scrutinising the substance of such orders in council.*

His prescription unfortunately ignores the fact that use of the prerogative is precisely intended to avoid such scrutiny; that its very definition is inconsistent with any such restraint outside the executive; and that with the thinnest veneer of an excuse in this very case, the Foreign Office avoided even giving advance notice to the Foreign Affairs Committee of the House of Commons.[103]

Further scrutiny by the courts

The courts seem to be increasingly sensitive to the anomalies of law-making by OICs. In *A, K and ors v H M Treasury*[104] the court was asked to review the legality of counter-terrorism asset freezing orders under two OICs made in 2006. Under s1(4) United Nations Act 1946 such an order 'shall, forthwith after it is made, be laid ... before Parliament'. The Administrative Court noted that 'there is no procedure which enables Parliament to scrutinise or to amend any Order',[105] and that 'Parliament has been by-passed by use of OICs'.[106] The power to make such

[98] See paras 44-45, 98 and 129.
[99] See paras 50, 109 and 130.
[100] See paras 53-58, 110-114 and 132.
[101] See paras 59-63, 115, 133-135.
[102] At para 109.
[103] See para 27.
[104] [2008] EWHC 869 (Admin), Collins J, 24 April 2008.
[105] At para 3.

orders was therefore narrowly confined to that which was strictly necessary to the relevant UN resolutions. Though these were statutory orders, it was held that the 1946 Act reproduced all the vices of the prerogative orders, enabling directly created primary legislation. No exercise of prerogative power was actually involved.

The Court of Appeal allowed the government appeal by a majority.[107] It was noted that the lack of effective Parliamentary scrutiny could not of itself found a vires challenge.[108] The very widely drafted statutory power to make OICs for the relevant purpose was held to be decisive.[109]

In a coruscating dissent, Sedley LJ was much troubled by the lack of prior democratic scrutiny of OICs which create draconian executive powers. He held that only express delegation by Parliament to the executive could authorise OICs which encroach on basic rights such as access to the courts.[110]

Conclusions

1. The Privy Council matters. The suggestion may be advanced that it is merely a neutral conduit for decisions elsewhere and the powers of others, such as government ministers. This is to forget that those powers and decisions would go nowhere without the authority of the PC as a body. OICs could not exist without a council meeting. It is there, and at the moment of approval and seal setting, that the prerogative creates law. It is the coming together of the monarch and the executive, nominally as her advisers, which exercises this constitutional authority. The fact that the actual meetings are by convention reduced to pure formality, cannot disguise the real powers exercised in the PC.

Dicey wrote in 1860 'the powers of the Crown are in a sense the powers of the Council'.[111] If he was right, what of substance has changed since then? Is there no point to the government's recent integration of the PCO into the heart of government business? Do the jealously guarded prerogatives of the Crown, in all their varieties, matter so little that the vehicle for their exercise has no value or significance? Does the PC with all its 'formalin-drenched' deference to the monarch, have no ripple effect upon our constitutional culture?

The PC is the interface between the monarch and the executive. It provides an avenue by which the executive can evade the scrutiny of Parliament and create immediately effective laws. It is

[106] At para 35.
[107] [2008] EWCA 1187.
[108] At para 3.
[109] See paras 32-50.
[110] See paras 127-131 and 144.
[111] At n15 above, p144.

the venue for the exercise of prerogative powers, which are now subject to sustained and critical analysis for the first time. It perpetuates fictions which conceal the reality of the exercises of power. It is at the heart of our outdated culture of deference. The PC matters a great deal.

2. The Privy Council is a dysfunctional body. There is no rationale which can justify the eclectic range of its work. It currently ranges from being in part 'synonymous with government', to an independent court: from a forum for the monarch's real remaining personal prerogative powers, to a theatre for benign historic ceremonial. This has all arisen by historical accident, and has never been analysed rationally. Do the charters of universities and professional associations have to be administered by the same body as produces the laws of Guernsey, and proclaims bank holidays and our coinage? Does Parliament have to be dissolved by the same body as approves royal marriages, closes burial grounds and approves pensions for the marine personnel in Hong Kong? Does the same office have to support the government chief whips in both Houses of Parliament and deal with the affairs of the Institute of Plumbing and Heating Engineering and the Royal Caledonian Horticultural Society?

This dysfunction manifests itself on the PC Office website.[112] It fails to give a transparent and accurate account of the functions of the PC. It must be admitted that in light of the above, this is no easy task. The repeated reference to an 'advisory' role, and the absence of any acknowledgement that the PC is a vehicle for the direct exercise of constitutional powers is less than transparent. This is the most important of the many fictions surrounding the PC, cloaked in a fog of outdated language.

3. The Privy Council fails the two tests in the *Governance of Britain* green paper, set out in the introduction. It is an 'institution' 'stretched' beyond possible 'evolutionary reform'. It is not an institution which the citizen can understand or engage with. That paper[113] identifies four goals, two of which are 'to clarify the role of government' and 'to rebalance power between Parliament and government and give Parliament more ability to hold the government to account'. This paper's proposals in relation to the Privy Council lie at the heart of such a project.

4. The Privy Council must be considered as part of any debate on the prerogative. The *Governance of Britain* green paper does not mention the Privy Council once. By an early footnote, it excludes many of the prerogative powers from the proposed debate. The present government shows every sign of stretching this body yet further, integrating it into the heart of government business, presumably in order to use its archaic forms of power more

[112] See n8 above.
[113] At para 10.

frequently and without the rational analysis which has yet ever to be applied to the Privy Council and to the prerogative. The government cannot be permitted to control and foreclose the debate in this way. Indeed, a great opportunity for energising debate opens up if we can elucidate these obscure corners of our constitution and attempt to rationalise them. The key role of the PC in the exercise of prerogative powers surely puts it at the heart of our 'state'. For this reason alone, the PC cannot remain untouched by any meaningful constitutional reform project.

5. The Privy Council is the forum for the exercise of significant constitutional powers. These largely involve the various forms of prerogative powers. Without them, the Privy Council would be an entirely benign and largely ceremonial body, which can safely be left to its own quaint devices. If posing a question mark against even the survival of the PC seems a little subversive, there is high level academic support. De Smith suggested that, with the exception of the Judicial Committee, the PC could be abolished and it would not be noticed.[114] De Smith and Brazier are decidedly luke-warm about the raison d'etre for the PC. They say: 'Hence the PC is not entirely superfluous. Although all its non-judicial functions could be transferred to the Cabinet or Departments of State, and its committees could be detached as autonomous statutory bodies or as advisory bodies to departments, such a re-distribution would not in every instance be as convenient as the present arrangements, and in some cases the retention of ancient forms is of political value'.[115] 'Convenience' and the political (ie cosmetic) value of 'ancient forms' are hardly the most striking endorsement.

6. The PC and the exercise of the Crown Prerogatives embrace many fictions and abuses of language. These do not come without a price. They perpetuate the obscurities of our constitution and alienate the vast majority of the electorate. Clarity of language goes with transparency of practice. The fiction that the senior members of the elected government of the day, merely 'advise' the monarch as to the making of law, should disappear. It is demeaning to our democracy, and a symptom of an anachronistic culture of deference. Conversely, and strangely, the Cabinet, the institution with the greatest power under our arrangements, has no status in law at all, as many commentators from Dicey onwards have pointed out.

7. The need for the executive to have flexible, discretionary powers does not justify the current form in which those powers reside. Indeed, it would surely be in the interests of the executive that such powers should not be subject to such doubts and uncertainties as now prevail. The Interception of Communications Act 1985, the Security

[114] Stanley de Smith, Constitutional and Administrative Law, 2nd edn, Penguin, p141.
[115] See n1 above at pp162-163.

Services Act 1989, the Intelligence Services Act 1994, and the Civil Contingencies Act 2004 are all successful examples of this codification process.

8. There is no need for statutory OICs. There is no need for the government of the day to use the Privy Council to make law. Statutory powers are capable of granting ample powers to ministers to make regulations, rules, orders, and schemes. As de Smith and Brazier put it 'the only cosmetic point of the O.I.C. route is to enhance the dignity of the resulting measure'.[116]

9. There is no need for ministerial prerogative powers at all. Prerogative OICs become primary legislation, without any Parliamentary or indeed any other scrutiny. It is unacceptable for primary law to be created by ministers by the prerogative route through the Privy Council, avoiding Parliament. In light of the anomalies and abuses pointed up above, these powers should be abolished. Alternatively, if they are to be retained, a statute should oblige the sponsoring minister to comply with a procedure equivalent to that required when presenting a bill to Parliament.

10. The recommendations of the House of Commons Public Administration Select Committee 2004 report, *Taming the Prerogative*, should be followed, especially a comprehensive and open minded review of all ministerial prerogative powers and immediate steps towards full Parliamentary scrutiny of decisions on armed conflict, the conclusion and ratification of treaties, and the issue and revocation of passports. Professor Rodney Brazier put it simply in his paper for the committee: 'Governments should not have imprecise powers. As a matter of basic constitutional principle, the user of a power should be able- and if asked should be obliged- to identify the source of that power and to describe its nature and extent.'[117] A select committee of both Houses of Parliament should now begin the task of reviewing them and preparing any legislation necessary for their regulation. Lord Sumner rightly referred to this as 'the whole trend of our constitutional history for over two hundred years'.[118] There is already an excellent precedent for the necessary legislation limiting or removing the war prerogative. By s3 Act of Settlement 1700 all wars of a certain kind were made subject to 'the consent of Parliament'. The category of such wars can easily be expanded.

11. Accordingly, fundamental consideration should be given to the future role, and even continued existence, of the Privy Council.

[116] See n1 above, p161.
[117] Brazier was a 'specialist adviser' to the Committee, and this quote is from para 1 of his paper which is at Appendix 1 to the Report, n54 above.
[118] At p562 in the *De Keyser's Hotel* case.

Appendix

Arcania

Privy Counsellors 'enjoy precedence following Knights of the Garter and of the Thistle, next after the eldest sons of barons'.[119]

According to Whittaker's Almanac:[120]

> *It is incorrect to use the letters PC after the name in conjunction with the prefix 'The Right Hon.', unless the Privy Counsellor is a peer below the rank of Marquess and so is styled 'The Right Hon.' Because of his/her rank, in this case only, the post-nominal letter may be used in conjunction with the prefix The Right Hon.*

High Sheriffs are appointed by the PC (save apparently for those within the Duchies of Lancaster and Cornwall). There is an annual ceremony at the PC of 'pricking' the Sheriffs. The monarch 'pricks' a roll of names with a bodkin, next to the name of each appointee.

As preserver the peace, and guardian of the constitution, the PC had the power to 'commit offenders to safe custody to take their trials for high offences against the government'.[121] Thus in February 1820, the Cato Street conspirators, having been apprehended for a plot to assassinate the Cabinet, were taken immediately before the Privy Council, mainly their intended victims, in Whitehall and committed to the Tower for treason and murder.[122]

There was a rule of practice in the House of Commons that a Privy Counsellor will take precedence over any other MPs whom the Speaker calls to speak, and may speak for longer. This has only recently been abolished.

[119] Halsbury's Laws, Vol 8(2), para 524.
[120] 2007, p123.
[121] See Chitty, n30 above, p411.
[122] See the graphic account at An Authentic History of the Cato Street Conspiracy, George Wilkinson, Kelly, 1820, pp20-23 and pp57-62.

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"This is a problem of real substance, well beyond mere harmless and quaint ceremonial. It is surely a loophole in our constitutional safety net – a way in which hard law can be directly created, affecting fundamental rights, whilst by-passing Parliament and any prior accountability. The very same issue was a matter of controversy between the Tudor Kings and their courts and Parliaments. This battle between autocracy and democracy was won by Parliament over 450 years ago. Has this victory now been ceded by default?"

Thus Patrick O'Connor describes prerogative Orders in Council – a means by which ministers, acting through the Privy Council, can create primary legislation without recourse to Parliament. And his concern is not hypothetical – as recently as 2004 Orders in Council were used to block the return of Chagos Islanders forcibly removed from Diego Garcia in 1971.

In *The Constitutional Role of the Privy Council and the Prerogative* Patrick O'Connor examines the history, membership and powers of the Privy Council. His conclusions are damning. The Privy Council exercises considerable power, yet is a dysfunctional relic of an outdated culture of deference. It is an institution that is, in the words of the government's *Governance of Britain* green paper, 'stretched beyond evolutionary reform'. Its future role, even its continued existence, should be subject to fundamental consideration.

C L I F F O R D

C H A N C E

JUSTICE is grateful to Clifford Chance for its support of this publication

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ISBN 978-0-907247-47-0

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