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JUDICIAL CONTROL OF PREROGATIVE POWERS IN FOREIGN AFFAIRS

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JUDICIAL CONTROL OF PREROGATIVE POWERS IN FOREIGN AFFAIRS IN THE UNITED KINGDOM

I. The nature of prerogative powers and their significance in foreign affairs

One of the first things which a British law student learns about the British Constitution is that it is virtually unique in its lack of form; we do not have a constitution in the same formal, documentary sense as almost every other country in the world[1]. In the absence of such a "written" constitution the sources of constitutional authority in Britain are the common law, as expounded by the superior courts, and laws enacted by Parliament. Prerogative powers as they are understood in the British Constitution, are an important part of the common law of the constitution; they are the common law powers of the Crown which are special to the Crown because of the constitutional functions which it has to perform. Historically, and still as a matter of strict law, the prerogative powers are vested in the sovereign in person. In reality the sovereign will only exercise those powers in accordance with the advice of the Government of the day. Thus in modern parlance the term "the Crown" is used to refer not only to Her Majesty in person, but also to Her Majesty's Government and those who act on its behalf. Although there is no one authoritative definition of these prerogative powers, it is possible to identify a number of characteristic fea-

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1 New Zealand and Israel have been identified as probably the only other countries without a "written" constitution; see O. Hood Phillips, Constitutional and Administrative Law (6th ed., 1978), at p. 6.

tures. First, they are a matter of common law and not of statute[2]. Second, they may be said to be legal attributes which are unique to the Crown in the sense that they are attributes which are not shared by ordinary citizens; they are powers which are inherent in and special to the Crown because of the constitutional role which the Crown plays, hence the term "Royal prerogative"[3]. Third, the prerogative powers are said to be residual[4]. The prerogative powers date from the times of a personal monarchy before Parliament as we know it existed. Since the establishment of a Parliament with supreme law-making powers, laws enacted by Parliament have tended to encroach upon and replace the prerogative powers. The Bill of Rights of 1688, for example, which laid the foundations of our modern constitution, disposed of the extravagant claims of the Stuart Kings to rule by prerogative right and asserted the authority of Parliament. Those prerogative powers which survive are not therefore for the benefit of the sovereign but to enable the government to function.

The prerogative powers may be conveniently classified under two principal headings: those which relate to domestic affairs and those which relate to foreign affairs. It is in relation to domestic affairs that the residual nature of the prerogative powers becomes very apparent. Most governmental authority in this area is now derived from statute, but a few important prerogative powers remain: for example, the summoning and dissolution of Parliament; the appointment and dis-

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2 United Kingdom courts generally regard all the common law powers of the Crown as prerogative powers, but this is challenged by some scholars: see H.W.R. Wade, Constitutional Fundamentals (1980), at p. 46, and the same author's "Procedure and Prerogative in Public Law", (1985) 101 Law Quarterly Review 180, at p. 190.

3 See W. Blackstone, Commentaries on the Law of England (10th ed., 1787), Vol. 1 at pp. 238, 239.

missal of ministers; the conferment of titles of honour; the power to pardon those convicted of crime[5]. But in relation to foreign affairs, the balance is clearly reversed. While some aspects of foreign affairs are regulated by statute (for example diplomatic and consular privileges[6] and matters of state immunity[7]) the foreign affairs of Britain are still principally carried out under prerogative powers. Important prerogative powers in this field are: treaty-making; the recognition of states and governments; and declarations of war and peace[8].

There is no simple answer to the question why these important aspects of our foreign affairs are still conducted under prerogative powers rather than under statutory powers. The survival of prerogative powers is partly a matter of history and partly an aspect of British pragmatism: if the prerogative powers in their ancient form provide the government with the necessary authority in the field of foreign affairs, why bother to modernise them. It must also be remembered that in relation to foreign affairs we are in the realms of policy and executive government. By retaining these common law powers the government enjoys a wider discretion than might be the case if the powers were statutory, particularly as far as parliamentary and judicial scrutiny are concerned.

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4 See A.V. Dicey, Law of the Constitution (10th ed., 1959), at p. 424.

5 For a modern account of the prerogative in domestic affairs, see S.A. de Smith, Constitutional and Administrative Law (5th ed., 1985), at p. 145.

6 See Diplomatic Privileges Act 1964; Consular Relations Act 1968; International Organisations Act 1968; Diplomatic and Other Privileges Act 1971.

7 See State Immunity Act 1978.

8 For a modern account of the prerogative in foreign affairs, see S.A. de Smith, op.cit., at p. 151.

II. Prerogative powers and the courts

It is clear, as a matter of principle, that the prerogative powers are limited by law. The principle of government under the law is one of great antiquity in England. In the first half of the Thirteenth Century the famous Devon lawyer Henry of Bracton, in what is commonly regarded as the first systematic treatise on English law, declared that the King himself ought not to be subject to man but subject to God and to the law, because the law makes him King[9]. This statement encapsulates the fundamental constitutional precept that the law is supreme, governing sovereign and subjects alike. This doctrine is also reflected in judicial attitudes towards prerogative powers as early as 1610 when in a leading case the court said that the King has no prerogative except that which the law of the land allows him[10]. Such a view of the nature of governmental authority generally and of prerogative powers in particular clearly provides a basis for some form of judicial control. But until recently the courts have adopted a very restrictive attitude to this. The courts have always exercised the right to determine whether an alleged prerogative power exists and to determine the extent of an admitted prerogative power. But they have traditionally regarded it as outside their competence to inquire into the way in which an admitted prerogative power has been exercised. In this, as in other areas, the views of the Nineteenth Century British constitutional lawyer Dicey have been influential. It was Dicey who said not only that the prerogative was "residual" but also that it was "discretionary or arbitrary"[11]. Until recent years the courts have adopted Dicey's views and have regarded prerogative powers as absolute in the sense that in respect of an admitted prerogative power the courts would

9 De Legibus et Consuetudinibus Angliae (S.E. Thorne, Ed., 1968), Vol. 2, at p. 33

10 The Case of Proclamations (1610) 12 Co. Rep. 74, at p. 76.

11 Loc. cit., in note 4, supra.

decline to consider or review the propriety or adequacy of the grounds on which it was exercised. An instance of the willingness of the courts to set limits to prerogative powers is provided by a decision of the English Court of Appeal in 1964 in which a claim that the Crown had a prerogative monopoly of broadcasting by radio and television was rejected[12]. One of the judges said: "It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension"[13]. Although that case was concerned with domestic matters the rule it lays down applies equally to foreign affairs. An instance in the field of foreign affairs in which the exercise of an acknowledged prerogative was held not to be subject to judicial control is a case which was decided by the House of Lords in 1928[14]. The question before the court concerned the method by which the status of a person claiming diplomatic privilege should be determined. The person in question was the defendant in an action for failure to pay rent. He claimed that he was a Consular Secretary at the German Embassy in London and as a consequence entitled to immunity from legal process. The plaintiff in the action wished to cross-examine the defendant on this claim. But a statement was submitted by the Foreign Office that the defendant was at the material time a member of the staff of the German ambassador and was entitled to immunity. The House of Lords in effect held that since it was a matter for the Crown by virtue of the prero-

12 British Broadcasting Corporation v. Johns /1965/Ch.32.

13 Ibid., per Lord Justice Diplock, at 79.

14 Engelke v. Musmann /1928/ A.C. 433.

15 Ibid., per Lord Buckmaster, at p. 443.

gative to grant diplomatic privilege, the Government statement that the defendant was so entitled could not be questioned in the courts[16].

The exercise of prerogative power is inherently discretionary, a quality it shares with many other governmental powers. One feature of the development of administrative law in England over the past thirty years or so has been the expansion by the courts of their powers to exercise judicial control, particularly over the discretionary powers of public authorities[17]. In the judicial decisions which have contributed to this development the courts have been concerned not so much with powers being exceeded but with powers being abused: "The justification for this is that the exercise of a discretion for an improper purpose or without taking into account all relevant considerations is regarded as failure to exercise the discretion lawfully"[18]. A landmark decision of the House of Lords in 1968[19] concerned a statutory discretion, which on the face of it seemed quite unrestricted. The court held that it could examine the reasons for the purported exercise of the discretion to see whether they were reasons which properly promoted the objects of the statute. Although most of the decisions subsequent to that case were concerned with discretion conferred by statute, some of the cases touched on the common law powers of the

16 Questions of diplomatic privilege are now regulated by statute; see the statutes cited in note 6, supra.

17 See Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374, per Lord Diplock at p. 407. For an account of the modern English law on judicial review see G. Aldous and J. Alder, Applications for Judicial Review (1985).

18 E.C.S. Wade and A.W. Bradley, Constitutional and Administrative Law (10th ed., 1985), at p. 630.

19 Padfield v. Minister of Agriculture [1968] A.C. 997.

Crown including prerogative powers. In a decision of the House of Lords concerning national security, which antedated the landmark decision mentioned above by four years, we find a member of the House doubting whether "the Government or a minister must always or even as a general rule have the last word"[20]. Another of their Lordships also implied that the courts might, in an appropriate case, investigate allegations of bad faith or abuse[21]. In a later case Lord Denning expressed the view that if the prerogative were to be exercised improperly or mistakenly it would be open to review[22]. In 1984 a case eventually came before the House of Lords[23] which provided an opportunity to consider the question of the judicial control of the prerogative against the background of the transformation of the law relating to judicial control of administrative action which has taken place over recent years. The case did not itself concern foreign affairs but a majority of the members of the House on that occasion adopted a broad view of the prerogative and referred specifically to foreign affairs powers.

The facts of the case concerned civil servants who worked at the Government Communications Headquarters (GCHQ), an establishment charged with ensuring the security of military and official communications and with supplying signals intelligence and involved in the handling of secret information vital to national security. Since 1947 staff employed

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20 Chandler v. Director of Public Prosecutions [1964] A.C. 763, per Lord Reid at p. 790.

21 Ibid., per Lord Devlin at p. 796.

22 Laker Airways Ltd. v. Department of Trade [1977] Q.B.643, at p. 705; the other members of the court disagreed.

23 Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374.

at the GCHQ had been permitted to join national trade unions which had been customarily consulted about any changes in the terms and conditions of employment. In recent years there had been a history of industrial action by trade unions at the GCHQ which in the government's view had been deliberately designed to disrupt and damage government agencies. Against that background the Minister responsible issued, without consultation, an instruction that the staff would no longer be permitted to belong to a national trade union. The conditions of service of civil servants are regulated by the prerogative and the instruction in question was issued under a prerogative power. One of the national trade unions involved challenged the validity of the instruction on the ground that there should have been prior consultation before it was issued. The challenge eventually failed because the House of Lords held that considerations of national security outweighed the civil servants' legitimate expectation of prior consultation. But their Lordships were unanimous in the view that but for the question of national security the exercise of the prerogative so as to deny a legitimate expectation would have been held to be invalid[24]. Three members of the House of Lords adopted a notably expansive view concerning judicial control of the prerogative[25]. Lord Scarman said that "the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon wich the court can adjudicate, the exercise

24 Ibid., per Lord Fraser at p. 401; per Lord Scarman at p. 407; per Lord Diplock at p. 412; per Lord Roskill at pp. 419-420; per Lord Brightman at pp. 423-424.

25 The other two members of the court limited their judgment to the narrow facts of the case which concerned delegated prerogative powers and reserved their position on the exercise of prerogative powers other than by delegation.

of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power"[26]. Lord Diplock agreed and said that he could see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review"[27] on any of the grounds of illegality, irrationality or procedural impropriety. Likewise, Lord Roskill said that if the government acts under a prerogative power so as to affect the rights of the citizens he could see no "logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory"[28].

The GCHQ case "is unquestionably a great breakthrough in principle"[29]. In earlier cases, like that of 1928 concerning the German diplomat, the courts declined to exercise judicial control because of the nature of the power in question as part of the royal prerogative; the courts were unwilling to trespass upon the prerogative. In the GCHQ case the House of Lords has held that the availability of judicial control does not depend on the nature of the power which is being challenged but is a question of what is justiciable in a court of law. The earlier view, as Lord Scarman put it, has ben "overwhelmed by the developing law of judicial review"[30].

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26 /1985/ A.C., at p. 407.

27 Ibid., at p. 410.

28 Ibid., at p. 417.

29 K.D. Ewing, "Prerogative - Judicial Review - National Security", /1985/ Cambridge Law Journal 1, at p. 2.

30 /1985/ A.C., at p. 407.

Whether in future English courts will exercise judicial control over prerogative powers will therefore depend on the criterion of justiciability[31]. On the basis of the judgments in the GCHQ case, whether the exercise of a prerogative power is justiciable, in the sense of being a matter upon which a court can adjudicate, will depend in large part on its subject matter[32], that is whether it falls within or without what were called the "excluded categories"[33]. Lord Roskill elaborated on that notion in the following passage from his judgment: "I do not think that the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could be properly made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm .... as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner ...."[34]. For broadly similar reasons Lord Diplock, while not completely excluding the possibility, doubted whether an exercise of a prerogative power which remains the only relevant decision-making power could in practice be challenged on grounds of irrationality: "Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking

31 An approach which was anticipated by D.G.T. Williams, "The Prerogative and Parliamentary Control", 1971, Cambridge Law Journal 178, at p. 179.

32 /1985/A.C., per Lord Scarman at p. 407.

33 Ibid., per Lord Roskill at p. 418.

34 Ibid.

one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another - a balancing exercise which judges by their upbringing and experience are ill-qualified to perform"[35]. The question of justiciability will therefore ultimately depend, I suggest, on whether in a given case the judges feel comfortable about and familiar with the issues in dispute. No doubt a factor which made the GCHQ case prima facie justiciable was that it concerned the terms and conditions of employment, a type of dispute which regularly comes before the courts.

III. The prospects for judicial control after the GCHQ case

Early commentators on the GCHQ case have doubted whether because of the "excluded categories" concept the declaration that prerogative powers are now subject to judicial control will significantly increase opportunities to challenge prerogative powers as a matter of practice[36]. We must now refer back to the examples of individual foreign affairs prerogatives which were mentioned earlier and consider the extent to which they may be susceptible to judicial control.

Treaty-making, as we have seen, was expressly mentioned in the GCHQ case as an "excluded category". There is indeed a strong body of case-law which supports this view and it is difficult to conceive that this will not continue to be fol-

35 Ibid., at p. 411.

36 See H.W.R. Wade, "Procedure and Prerogative in Public Law", (1985) 101 Law Quarterly Review 180, at pp. 197-199; K.D. Ewing, loc.cit., in note 29 supra; S. Lee, "GCHQ: Prerogative and Public Law Principles", (1985) Public Law 186.

lowed. Two cases will serve as illustrations. In a case, decided by the English Court of Appeal in 1971[37], the plaintiff, who opposed British membership of the European Community, brought an action in which he sought a declaration that by acceding to the Community treaties Her Majesty's Government would irreversibly surrender part of the sovereignty of Parliament and in so doing would be acting in breach of the law. The application was dismissed. Lord Denning, citing Nineteenth Century authority[38], said: "The treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts"[39]. The general principle that treaty-making is not justiciable has recently been confirmed in a post-GCHQ case[40]. In 1985 the United Kingdom Government and the Irish Government made the Anglo-Irish Agreement which established an Inter-governmental Conference concerned with the sectarian conflict in Northern Ireland and the relations between the two parts of Ireland. A number of citizens of Northern Ireland, who were opposed to the Agreement, applied for judicial review arguing, on a variety of grounds, that the Agreement was unlawful. The application was dismissed.

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37 Blackburn v. Attorney-General [1971] 1 W.L.R. 1037.

38 Rustomjee v. The Queen (1876) 2 Q.B.D. 69, per Lord Coleridge C.J., at p. 74.

39 [1971] 1 W.L.R., at p. 1040. The other members of the court agreed, ibid., at p. 1041.

40 Ex parte Molyneaux [1986] 1 W.L.R. 331.

In the words of the Judge: "The agreement ... is in the field of international relations. It is akin to a treaty. It concerns relations between the United Kingdom and another sovereign state and it is not the function of this court to inquire into the exercise of the prerogative in entering into such an agreement or by way of anticipation to decide whether the method proposed of implementing the agreement is appropriate"[41].

As a general rule treaty-making in the United Kingdom is an exclusively executive act exercised through prerogative powers with no involvement on the part of Parliament[42]. But there is one exception to this general rule which might, in the light of the GCHQ case, raise the possibility of judicial control. An Act of Parliament passed in 1978 provides, exceptionally, that "No treaty which provides for any increase in the powers of the (European Parliament) shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament"[43]. In this unique situation the British Parliament requires a specific form of treaty-making procedure to be followed involving not merely a reference to Parliament but also prior parliamentary approval. It follows that it would be unlawful for the United Kingdom to ratify a treaty which increases the powers of the European Parliament without the prior approval of an Act of Parliament[44]. Any attempt to make a treaty with such purpose

41 Ibid., per Mr. Justice Taylor at p. 336.

42 See Attorney-General for Canada v. Attorney General for Ontario (1937) A.C. 326. Since treaties are not self-executing in the United Kingdom, the intervention of Parliament is necessary to give treaty provisions the force of law in the United Kingdom.

43 European Assembly Elections Act 1978, s. 6.

44 For the first instance of the use of this procedure see the European Communities (Amendment) Bill 1986, clause 3 (4) which approves of articles 8 and 9 of the Single European Act 1986 which increase the powers of the European Parliament in respect of the admission of new members and associate members of the European Community.

by a simple exercise of prerogative powers would be potentially open to challenge. In terms of the nomenclature adopted by Lord Diplock in the GCHQ case, illegality would appear to be the appropriate ground of challenge in such a case in that those purporting to make the treaty on behalf of the Crown would have failed to understand correctly and give effect to the law which regulates their treaty-making power in this context[45]. An alternative means of challenging the making of such a treaty without reference to Parliament would be in the terms of the effect of the 1978 statute on the prerogative power in question. It has already been pointed out that prerogative powers are residual and that they may be encroached upon or even replaced by statute. It has long been settled law that the question whether a statute has affected the existence or exercise of a prerogative power is a justiciable issue[46]. The point is illustrated by a decision of the English Court of Appeal in 1977 which concerned the relationship between the Crown's prerogative in foreign affairs and a statute[47]. By virtue of the prerogative the Crown had made a treaty with the United States, the Bermuda Agreement of 1946, covering the granting and revocation of permits to operate transatlantic air services. In 1971 the British Parliament passed the Civil Aviation Act which made provision for the licensing of air transport. An airline had been given a permit under the treaty and had been issued with a licence under the Act. But pursuant to a change in government policy the Minister responsible subsequently exercised his prerogative power under the treaty to revoke the permit which had been granted under the Act. The Court of Appeal held

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45 /1985/ A.C., at p. 410. Any plaintiff would, of course, have to have sufficient interest to seek judicial review; as to which see G. Aldous and J. Alder, op.cit., Chapter 8.

46 See Attorney General v. De Keyser's Royal Hotel /1920/ A.C. 508.

47 Laker Airways Ltd. v. Department of Trade /1977/ Q.B. 643.

that that exercise of the prerogative was unlawful as being contrary to the Act since the Act had impliedly qualified the prerogative powers. Those powers could not now be used to deprive the airline of rights which had been granted by Act of Parliament. The principle in that case would be applicable to a purported exercise of treaty-making power under the prerogative to increase the power of the European Parliament since the effect of the 1978 Act is clearly to qualify the use of the prerogative for that purpose[48].

Another important prerogative in the field of foreign affairs is the power of the Crown to make a determination on a range of issues such as whether a state of war exists between the United Kingdom and a foreign state, and whether particular foreign states or governments are recognized by the United Kingdom. Whenever such issues as these are raised before a court it is the practice for the court to seek a ruling or certificate on the matter from the Foreign Secretary. The justification for this practice is said to be that such a certificate is the best and most authoritative source of evidence of facts which are peculiarly within the knowledge of the Foreign Office[49]. It has also been regarded as important for the courts and the government to adopt the same view on matters relating to foreign affairs[50]. The prevailing

48 Although it falls outside the terms of this paper, it must not be forgotten that any exercise of treaty-making powers by the Crown which conflicted with the United Kingdom's obligations as a member of the European Community would be subject to judicial control by the Court of Justice under the terms of articles 169 and 170 of the E.E.C. Treaty.

49 For an informed account of this whole matter, see E. Wilmshurst, "Executive Certificates in Foreign Affairs: The United Kingdom" (1986) 35 International and Comparative Law Quarterly 157.

50 See The Arantzazu Mendi /1939/A.C. 256, per Lord Atkin at p. 264.

view reflected in the case law is that such certificates are regarded by the courts as conclusive as to the facts which they assert[51]. Those facts may not, therefore, be challenged in a court and they must also be accepted for the purposes of court proceedings[52]. At least in relation to certificates issued under the prerogative it seems highly probable that the prevailing view outlined above will continue to be followed[53]. The most recent cases on executive certificates relating to foreign affairs have been concerned with certificates issued under statutory powers; a leading example is provided by litigation in the English courts involving two citizens of the Federal Republic of Germany resident in West Berlin. Both were occupiers of premises adjoining land at Gatow Airfield in the British Sector of the city. The land was occupied by the British Ministry of Defence and a machine-gun firing-range was being built there for use by British forces. The plaintiffs feared that they would suffer nuisance as a result of the use of the firing-range. Their initial attempts to bring an action in West Berlin failed: what one might call the domestic German courts in West Berlin had no jurisdiction over members of the Allied Kommandatura unless authorisation was given[54] and, for reasons which the law report does not reveal, authorisation was refused; nor was there any British Military Court in West Berlin which had any jurisdiction over the matter[55]. The plaintiffs then turned to the English courts. Their first action against the British Attorney-General was dismissed, essentially

51 See Duff Development Corporation v. Government of Kelantan /1924/A.C. 797.

52 See E. Wilmshurst, op. cit., at p. 163.

53 See C. Warbrick, "Executive Certificates in Foreign Affairs: Prospects for Review and Control", (1986) 35 International and Comparative Law Quarterly 138, at pp. 154-155. For a full discussion of the possible grounds on which the courts might control statutory certificates, see ibid., particularly pp. 142-154.

54 By virtue of Law No. 7 of the Allied Kommandatura Berlin.

because that functionary was held to have no legal interest in the proceedings[56]. With some encouragement from the court (which was somewhat embarrassed at the apparent absence of a judicial remedy) the plaintiffs brought a second action against General Lennox who was the British Military Commandant in Berlin and arguably responsible for the construction of the firing-range. The British Foreign Secretary issued a certificate under the State Immunity Act 1978[57] in which he stated that Germany was a state for the purposes of that Act and that the persons to be regarded as its government included the members of the Allied Kommandatura which included General Lennox! The Act provides that such a certificate is conclusive evidence on whether any territory is a state and as to the persons who are to be regarded as the government of that state[58]. The effect of the certificate was to make General Lennox "immune from the jurisdiction of the courts of the United Kingdom"[59]. The plaintiffs therefore sought to challenge the certificate on the ground of irrationality, namely that the Foreign Secretary had taken into account irrelevant considerations and had ignored relevant considerations. The argument in the English courts focussed on the conclusive nature of the certificates and whether that precluded judicial review. The Court of Appeal confirmed the judgment of the Divisional Court[60] that the contents of such certificates were conclusive of the matters stated in them and, in so far as they related to questions of the recognition of foreign states, they were matters within the realm of the royal prerogative and not subject to judicial

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55 Provision for such courts is in fact made by Ordinance No. 68 of the Berlin Military Government.

56 See Trawnik v. Lennox [1985] 1 W.L.R. 532.

57 S. 21.

58 Ibid.

59 Ibid., s.1 (1).

60 R. v. Secretary of State for Foreign and Commonwealth

review[61]. Therefore in addition to serving a statutory purpose the certificate also partook of the prerogative. It was conceded as a matter of principle that certificates were subject to review but only to determine whether the certificate was indeed a certificate which had been issued by the appropriate authority. If it was a genuine certificate, as it clearly was in this case, then the plaintiffs could not use information from any external source to challenge the statements which it contained[62]. It is also clear from the judgments in the Court of Appeal that certificates of the executive relating to foreign affairs come within Lord Roskill's "excluded categories" for the purposes of judicial review: "The matters certified in the certificates were matters of state relating to questions of recognition arising in the conduct of foreign relations and, once held to be so, were not reviewable by the courts"[63].

Executive certificates on questions of war and peace would also seem to come within this same category and be equally unreviewable. A case in point is one decided in the aftermath of the Second World War[64]. A German citizen who was resident in England was placed in internment during the war. After hostilities had come to an end he brought proceedings to secure his release from internment on the ground that the United Kingdom was no longer at war with Germany. The court obtained a certificate from the Foreign Secretary which stated that although hostilities had ceased no treaty of peace had been made and that therefore a state of war still existed.

Affairs, Ex parte Trawnik, The Times Law Report, 18 February 1986 (Divisional Court).

61 R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Trawnik, The Times Law Report, 21 February 1986 (Court of Appeal).

62 Loc.cit. in note 60 supra, per Mr. Justice Kennedy.

63 Loc.cit. in note 61 supra, per Lord Justice May.

64 R. v. Bottrill, ex parte Kuechenmeister [1947] K.B. 41.

The Court of Appeal held that that certificate was "binding at least in our municipal law, and therefore on all the King's courts"[65]. As a result the unfortunate internee failed in the attempt to secure his release because he was still regarded as having an enemy character.

While executive certificates remain conclusive as to the facts which they contain the courts do reserve the right to determine the legal consequences which result from those facts. A very striking example of this type of judicial activity is provided by litigation in the English courts in the 1960s which raised the question of the British government's attitude to the German Democratic Republic and to the laws in force there. The issue before the court was essentially a dispute between two entities both calling themselves the Carl Zeiss Stiftung and both engaged in the production of optical instruments. One of these, which was situated in the German Democratic Republic, claimed that the other, situated in the Federal Republic of Germany, had infringed its trademarks and it brought an action in the English courts to enforce its claim against British agents of the West German undertaking. The English courts will only enforce the laws of a foreign state or government if that state or government has been recognised by Her Majesty's Government. Two certificates were obtained from the Foreign Secretary. The first declared that Her Majesty's Government had not granted any recognition de facto or de jure to the German Democratic Republic or to its Government. The second, in answer to the question whether Her Majesty's Government recognised any states, governments or authorities as entitled to exercise governing authority in the area of Germany comprising the German Democratic Republic, stated that since June 1945 Her Majesty's Government had recognised the state and government of the Soviet Union as de jure entitled to exercise governing authority in that part of Germany. The English

65 Ibid., per Lord Justice Scott at p. 50.

courts to which these certificates were issued regarded them as conclusive but differed as to the legal effects to be attributed to them. The Court of Appeal took the view that since it was common knowledge that the Soviet Union had recognised the German Democratic Republic as an independent sovereign state, that fact and the lack of recognition by the British government meant that the laws made by that Republic could not be recognised and enforced in the United Kingdom[66]. But the House of Lords disagreed and said that English courts are bound by the Foreign Office certificates and are not entitled to rely upon extraneous evidence when interpreting them[67]. In the view of the House of Lords, whatever the Soviet Union may have purported to do in respect of the German Democratic Republic, the certificates obliged the court to regard the Soviet Union as retaining sovereignty over that Republic. It therefore followed on such a view of the facts that any laws in force in the German Democratic Republic must be with the approval of the Soviet Union, the de jure sovereign. Therefore the claim to enforce rights under those laws could be heard by an English court[68].

Since that case was decided the British government has abandoned the express recognition of governments so as to avoid the inference that recognition implies approval. This may

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66 Carl Zeiss Stiftung v. Rayner & Keeler Ltd. [1965] Ch. 525 and 596.

67 Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853.

68 Ibid., per Lord Reid at p. 904. The reasoning in the Carl Zeiss case has recently been applied, with similar effect, by the Court of Appeal to the relationship between South Africa and the South African "homelands"; see Gur Corporation v. Trust Bank of Africa Ltd. [1986] 3 W.L.R. 583. The courts are free to interpret the facts in an executive certificate in the context of commercial matters; see Re Al Fin Corporation's Patent [1971] Ch. 160.

strengthen the authority of English courts to determine the status of foreign regimes. The attitude of the British government towards a regime which comes to power unconstitutionally is now "left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal government to government basis"[69]. Although there are as yet no precedents, it seems likely that in future the courts will be able to deduce from the facts set out in a Foreign Office certificate whether a regime is to be regarded as a government[70].

IV. Conclusion

The claim has been made that the old restriction on the judicial review of prerogative powers "savours of the archaism of past centuries"[71] and has been "overwhelmed by the developing law of judicial review"[72]. But the reality, at least as far as foreign affairs powers are concerned, seems to be that very little has changed. Despite those brave words in the judgments in the GCHQ case the possibility of challenging in the courts the exercise of prerogative powers in relation to foreign affairs seems little greater than it was in the past. It is very significant that while the majority of members of the House of Lords in that case accepted the broad principle of the judicial review of the prerogative they not only expressly recognised that the application of that principle was qualified but they also signally omitted to overrule any past decision in the light of this new principle. Indeed one of the House of Lords' own leading cases on the absence of any judicial authority over the propriety of the exercise of prerogative powers[73]

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69 House of Commons Debates, Vol. 985, 23 May 1980, col. 385.

70 Cf. E.C.S. Wade & A.W. Bradley, op.cit., at p. 324; and E. Wilmshurst, op.cit., at p. 162.

71 /1985/ A.C. per Lord Roskill at p. 417.

72 Ibid., per Lord Scarman at p. 407.

73 See the case cited in note 46, supra.

was expressly stated by Lord Fraser to be "plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy .... which are unsuitable for discussion or review in the law courts"[74]. The fact of the matter is that that case still applies to the "excluded categories" of non-justiciable prerogative powers, outstanding examples of which have been discussed above in the field of foreign affairs. In that field the GCHQ case confirms that judges still regard themselves as unqualified to adjudicate on such matters of high policy. The case thus erects an important boundary stone limiting the scope of judicial review and indicating that it is not infinitely extendable. The realisation of that fact is by no means a bad thing. While it is in the interests of good government that the acts of the executive should be subject to scrutiny, an appreciation of the practical limitations on the role of the courts in this regard highlights other methods of scrutiny which are more appropriate for questioning government action in the realm of policy. Remedies for the abuse of the prerogative in foreign affairs lie more comfortably in the political than in the judicial field. Democratic control by the House of Commons or through its Select Committee on Foreign Affairs[75] provides a more appropriate and potentially more effective check on foreign policy than would be possible through the courts.

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74 /1985/A.C., at p. 398.

75 As to scrutiny by Parliament and parliamentary committees, see E.C.S. Wade & A.W. Bradley, op.cit., at pp. 204-209.