

PART 3 : Constitutional duty versus judicial discretion

3.1 Introduction

In this part I shall consider the legal case for a proposition, which both Lords Bingham and Hoffmann raised, all be it obliquely and some what reservedly, as underpinning their ruling on the non-adoption of aggression. This is the proposition that the existence of certain immunities, alleged to be enjoyed under common law, from the inquisitorial jurisdiction of the courts, either by the Crown, meaning thereby the executive government of the United Kingdom, when in the exercise of certain of its most important prerogative powers, such as those for waging war and ministering to national security, or else, by the governments of foreign powers, would have the effect of rendering the determination of any alleged crime of aggression, non-justiciable by a municipal court, were it to be a part of our domestic law. Lord Bingham put this contention (@ para 30 of his opinion) as follows :

“ A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty's Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law. The first of these rules is vouched by authorities such as *Chandler v Director of Public Prosecutions* [1964] AC 763, 791, 796; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398; *Lord Advocate's Ref. No 1 of 2000* (2001) JC 143, para.60; *R (Marchiori) v The Environment Agency*, [2002] EuLR 225, paras 38-40. “

Whilst, undoubtedly entitled to declare his own judicial timidity, when faced with the raw exercise of executive power, commenting that whilst the courts will not refuse absolutely to enquire into the “*the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services*”, none the less they will be “very slow” to do so ; I submit that, the renowned authorities, which Lord Bingham cites, cannot logically be said to have established a constitutional rule on ‘judicial reluctance or diffidence’, in the face of such executive powers, being amongst the most important and consequential aspects of the power of government. There ought, I submit, to be some clearer and more certain dividing line upon the limit of the inquisitorial powers of the judiciary, other than that they will examine if required to do so, “*but only very slowly*”, and respectfully I submit that there is.

3.2 The Authorities cited by Lord Bingham

Taking the authorities in order, in *Chandler v Director of Public Prosecutions* [1964] AC 763, the point that was put in issue by the appellants' case was whether or not it was, as a matter of fact rather than law, beneficial or prejudicial to the safety and interests of the state for the Crown to have invited US nuclear bombers to be stationed on an airfield in Essex. As Lord Devlin put it in his opinion it was for the Crown, as the executive government in the realm to decide, in its discretion, as to what was necessary to secure the defence of the realm, every bit as much as it would be for the owner of a factory to decide what was in the best financial interests of that business ; and it would be no more reasonable to admit evidence from the appellants in that case, as to what they instead thought was best for the interests of the state, than it would be to permit someone accused of trespassing in a factory for such a purpose, to give evidence as to what their view was as to what were the best financial interest of that business. It was in that sense, I submit, that Lords Reid & Devlin, in their opinions, make reference to the earlier statement of Lord Parker of Waddington, in his opinion in the matter of *The Zamora* [1916] 2 AC 77 (PC), given during the midst of the ravages of the first world war, when he had said (@ p.106) that :

“Those responsible for the national security must be the sole judges of what the national security requires. It would be undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.”

Lord Devlin, in particular though, was keen that such an obvious deference to the evidence of the executive on questions of the factual needs of our national security, should not be taken to imply that it then followed the courts would be reluctant to hold the executive to account for the lawfulness of its actions, per any abuse of its prerogative powers, even in the field of national security. He said (@ p.809-810) as follows :

“ When Lord Parker of Waddington in *The Zamora* said that “*Those who are responsible for the national security must be the sole judges of what the national security requires,* “ he was not, I think, laying down any special constitutional doctrine about the powers of the Crown in relation to national security. He was simply stating the reason why the court should declare those powers to be discretionary.

The second comment is that inquiry is not altogether excluded. The courts will not review the proper exercise of discretionary power but they will intervene to correct excess or abuse.

Men can exaggerate the extent of their interests and so can the Crown. The servants of the Crown, like other men animated by the highest motives, are capable of formulating a policy ad hoc so as to prevent the citizen from doing something that the Crown does not want him to do. It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative.”

The next case mentioned by Lord Bingham (as above) is the equally notorious matter of the *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, usually referred to as “*the GCHQ Case*”, and in particular to the now famous dictum of Lord Roskill (@ p.398) that :

“Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the granting of honours, the dissolution of Parliament and the appointment of ministers 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 or Parliament dissolved on one date rather than another.”

However, what is not so often re-called, either by treasury counsel nor our judges, is the earlier observation by Lord Diplock in his opinion in the same case (@ p.391) as follows :

“ My Lords, that a decision of which the ultimate source of power to make it is not a statute but the common law (whether or not the common law is for this purpose given the label of ‘the prerogative’) may be the subject of judicial review on the ground of illegality is, I think, established by the cases cited by my noble and learned friend, Lord Roskill, and this extends to cases where the field of law to which the decision relates is national security, as the decision of this House itself in *Burmah Oil Co. Ltd. v the Lord Advocate* [1964] SC (HL) 117 shows.”

Lord Diplock makes this observation but only moments after having laid down his now notorious three part grounds for judicial review, viz “illegality”, “irrationality” and “procedural impropriety”, and it is, I submit, most important to recall, especially also in order to put Lord Roskill’s later dictum in context, that the point at issue in this case was whether or not Mrs Thatcher (acting then as the Minister for the Civil Service) had proceeded “improperly”, as a question of her administrative law obligations, by revoking the right of the GCHQ employees to belong to a trades union, without first consulting them on the proposal. There was no sense, in the facts of this case, that, in so revoking that entitlement, she had gone so far as to “abuse” her prerogative powers, still less that in so acting she had committed a criminal offence.

Accordingly, I submit, that the only means whereby we may satisfactorily reconcile both the views of Lords Diplock and Roskill, in the *GCHQ Case* as above, and indeed reconcile Lord Roskill’s view in that case with Lord Devlin’s earlier observations in *Chandler* (as above), is to differentiate between, on the one hand, the constitutional duty in the courts to investigate and correct an illegal abuse in the exercise of

executive prerogative powers, even when exercised in relation to the defence of the realm and the national security ; and, on the other hand, their discretion as to whether to intervene, when in exercise of their (lesser) supervisory jurisdiction in regards to the administrative law judicial review of executive action, on grounds of “reasonableness” or “propriety”. On the basis that, in relation to the latter, it is always open to the courts, in their discretion, to decline to judicially review, if they consider that, the “subject matter” of the application is not amenable to such a procedure ; but that where the jurisdiction of the courts is engaged on the investigation of an allegation that the executive has abused its prerogative powers, especially so to the point of the commission of a criminal offence, their constitutional “rule of law” duty to hold the executive to account supersedes their administrative law judicial review discretion.

The next authority cited (but not quoted) by Lord Bingham is that of the *Lord Advocate's Ref. No 1 of 2000* (2001) JC 143, wherein Lord Prosser giving the view of the High Court in Scotland sitting as an Appeal Court, said (@ para.60) as follows :

“ In our view it is not at all clear that if this issue had been fully debated before us the incorporation of Trident II in the United Kingdom's defence strategy, in pursuance of a strategic policy of global deterrence, would have been regarded as giving rise to issues which were properly justiciable. *Chandler* remains binding authority in this court. Such developments as have taken place seem to have left untouched the status of the prerogative in matters relating to the defence of the realm. However, we have not been asked to dispose of the case on this basis, and we see no alternative but to reserve the issue for another occasion.”

Given their Scots Lordships commendable reluctance to speculate on the subject, when they had not had the benefit of hearing full argument on a point, it ill behoves I submit an English Law Lord to then cite their tentative suppositions as authority which “vouches for a rule”. The suggestion is in fact nothing less than absurd, and so I shall move quickly on to consider the last of the authorities cited by Lord Bingham. That is in the matter of *R (Marchiori) v The Environment Agency*, [2002] EuLR 225, wherein Laws L.J., giving the judgement of the Court of Appeal and having conducted a review of much of the earlier authorities, including specifically *Chandler*, held (@ para 38) as follows :

“ Taking all these materials together, it seems to me, first, to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy. Without going into other cases which a full discussion might require, I consider that there is more than one reason for this. The first, and most obvious, is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome. The defence of the realm, which is the Crown's first duty, is the paradigm of so grave a matter. Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions. Of course they may or may not be satisfied, and their satisfaction or otherwise will sound in the ballot-box. There is not, and cannot be, any expectation that the unelected judiciary play any role in such questions, remotely comparable to that of government. “

This sentiment is, of course, not merely consistent with Lord Bingham's “*but only very slowly*” constitutional limit on the judicial oversight of executive action in the field of national security, it in fact goes much further and suggests that there is no place whatever for judicial enquiry, in so far as regards the “merits” of a policy or act undertaken by the Crown in such matters. For what it's worth let me comment that, together with Laws L.J. I would equally have thought that the common sense and reasonableness of such an observation is manifest. Under the theory of our constitutional settlement, we do not elect a government in this country, only to have the unelected judiciary then second-guess that government's policy decisions “on its merits”, and I would have thought that principle would apply to all government activity, whether in the specially sensitive areas of national security and foreign relations, or otherwise. However, even Laws L.J. then also goes on to make the following qualifying observations, lest his overall judgement be left unbalanced. He says (@ para. 40) of his judgement, as follows ;

“ Secondly, however, this primacy which the common law accords to elected government in matters of defence is by no means the whole story. Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds. There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness. Judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy. In the British State I assume that is overwhelmingly unlikely in practice. “

Accordingly, as I'm bound to observe, howsoever likely or not one considers bad faith on the part of a British Minister, this balanced view of Laws L.J. is, I submit, fully consonant with the resolution of the differing position in the *GCHQ Case*, as I offered above. Indeed, let me not sound as though I am putting the matter too highly, for in my view, in the end it does nothing more than reflect common sense. The courts will not intervene to second-guess the executive government on the merits of their policy decisions and actions, most especially in politically sensitive areas such as national security and international relations. However, that said, it remains the indispensable constitutional duty of the courts to hold the executive to account for the legality (and most especially the criminal lawfulness) of its conduct, in whatever area of its activities, be that exercised under statutory authority or pursuant to prerogative common law powers.

3.3 Comment on Bingham's conclusions

It is to be recalled that the ultimate point at issue in the present appellant's case, was whether or not, in planning and preparing to attack, and then invade and occupy the state of Iraq, in March of 2003, the leaders of the executive government of this nation state, were thereby guilty of committing the gravest possible of all war crimes, namely the commission of a crime against peace. Lord Bingham, having cited (but not quoted) the authorities which I have now gone through in detail, then concludes his comments (@ para 30) on this part by observing, most perversely, that issue in the present case is not one of justiciability, despite the fact that this was what half the Crown's case was dedicated to. Having said that justiciability is not in issue, he then concludes that paragraph as follows :

“ In considering whether the customary international law crime of aggression has been, or should be, tacitly assimilated into our domestic law, it is nonetheless very relevant not only that Parliament has, so far, refrained from taking this step but also that it would draw the courts into an area which, in the past, they have entered, if at all, with reluctance and the utmost circumspection. “

I would observe, that it may very well just be that it was in no small measure precisely because, those very Ministers of the Crown responsible for the allegedly aggressive war plans and preparations in question, knew that they could fully rely on that “*reluctance and utmost circumspection*” in the courts of this country, that they felt so free to pursue those plans to their ultimate deadly fruition, without too great regards as to their legal responsibilities. After all if you know in advance that the judges are not going to undertake their constitutional oversight duty jealously, but rather reluctantly, not proactively but rather circumspectly, then there is every reason to suppose that, even when your own Attorney-General advises confidentially (as he did @ para 34 of his later published advice of 7th March 2003) that :

34. “ Aggression is a crime under customary international law which automatically forms a part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts. “

- there is nevertheless good reason to suppose that the judges can equally be relied upon to find some reason or other for holding that “aggression” can not be so prosecuted in the UK courts. There is, I submit, a point at which circumspection becomes outright cowardice, and that, as all commanders in field know, is the point when you use it as an excuse for avoiding the performance of your duty. I am emboldened to think that this is a fair assessment of the dangers with which we now are faced in this country, by the recent observations of another well respected Law Lord, Lord Steyn, who, in his F. A. Mann Lecture delivered at Lincoln's Inn Old Hall on 25th. November 2003, said thus :

“ The theory that courts must always defer to elected representatives on matters of security is seductive. But there is a different view, namely that while courts must take into account the relative constitutional competence of branches of government to decide particular issues they must never, on constitutional grounds, surrender the constitutional duties placed on them.”

3.4 Hoffmann on non-justiciability and “discretionary” powers.

Where Lord Bingham offers “reluctance” and “circumspection” as the watch-words, in respects to the courts’ constitutional duty to hold the executive to legal account, Lord Hoffman goes the next step and abuses the natural and ordinary meaning of the English language in order to free the executive entirely of all liability whatever to observe the rule of law. He begins with an examination of the commentary attached to Art 16 of the UN International Law Commission’s Draft Code on Offences Against the Peace and Security of Mankind (1996) which sets out the ILC’s proposal for a definition of the crime of aggression, and goes on in the commentary to note that aggression, while a crime only being capable of being committed by an individual, is “*intrinsically and inextricably linked*” to the commission of aggression by the state over who’s policy for waging war those individuals exert control and organisation. He then continues (@ para.65) as follows :

“ How, consistently with our constitution, is liability for such a crime to be determined in a domestic court? First, there is the theoretical difficulty of the courts, as the judicial branch of government, holding not merely that some officer of the state has acted unlawfully (as in, for example, *M v Home Office* [1994] 1 AC 377) but, as a sine qua non condition, that the state itself, of which the courts form part, has acted unlawfully. Secondly, there is the practical difficulty that the making of war and peace and the disposition of the armed forces has always been regarded as a discretionary power of the Crown into the exercise of which the courts will not enquire. I say that it is a practical difficulty because, as Lord Devlin pointed out in *Chandler v Director of Public Prosecutions* [1964] AC 763, 806-812, the reason why the courts cannot enquire is not the technicality that the powers form part of the royal prerogative. Lord Devlin's view that the prerogative origin of the powers did not in itself exclude judicial control was affirmed by the House in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. It is because of the discretionary nature of the power itself. ...“

He then quotes the first part of the passage from Lord Devlin’s opinion in *Chandler* (@ p.809-810), which I have already quoted above, dealing with the context of “discretionary powers” in which we should now read the earlier passage of the speech of Lord Parker of Waddington in *the Zamora*, and then concludes (@ para 66) as follows

“ It is of course open to the court to say that the act in question falls wholly outside the ambit of the discretionary power. But that is not the case here. The decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs. “

This is of course sophistry of the highest order plain and simple. The case for the Appellant’s in this present matter was not that they were entitled (under s.3 of the CLA 1967) to act to prevent the war preparations merely because they thought that the decision to go to war was “wrong” and a politically mistaken exercise of the Crown’s discretionary powers. They claimed that right because, they sought to establish, as a question of law, that under colour of the exercise of that wider and unquestioned political discretion, to minister to the needs of our national security and the defence of the realm, the Crown, in this particular instance, acting on the instructions of its most senior Ministers, was engaged in the commission of a criminal offence of the gravest and most heinous nature conceivable. The planning and preparation of a war of aggression.

If that assertion, of the gravest and most serious character imaginable, were to be proven correct, then it could matter not one jot that the general defence powers of those Ministers concerned are discretionary. It would be nothing short of an abuse of the language to interpret that expression, "discretionary", as used by Lord Parker in the *Zamora*, and Lord Devlin in *Chandler*, to mean that, under the guise of such powers, the Crown is empowered to act in blatant disregard of the law, most especially the criminal law.

Many, I would hazard to suggest most, of the powers enjoyed by ministers of the Crown are exercised at their unfettered discretion. This means that they are at liberty to act, or not, as their policies and their consciences dictate - none may go to court to seek to force them to, or to prevent them from, acting within the scope of their discretion. Yet to suggest, as Lord Hoffmann by necessary implication does here, that such "discretionary powers" also carry with them the right to act in flagrant disregard of the laws of the land, is not so much a novel constitutional innovation, as a downright fascist one. There is an appropriate word for discretionary powers exercised beyond the scope of the rule of law, and that is arbitrary. It was the claim of the seventeenth century Stuart kings to enjoy just such powers as that, which once led this country into a civil war, and a so-called glorious revolution, to re-assert the principle of government subject to the rule of law, as the fundamental constitutional settlement in the land. Lord Hoffmann concludes his examination of this topic with the following observation at his para 67, as follows :

"The discretionary nature or non-justiciability of the power to make war is in my opinion simply one of the reasons why aggression is not a crime in domestic law. It follows that an intention to prevent aggression cannot be a defence under section 3 of the 1967 Act."

The concept of a "non-justiciable crime" may sound, to those unfamiliar with the lexicon of modern English administrative law jurisprudence, like somewhat of an oxymoron, and that is because, unlike many modern legal advocates for the supremacy of state power, the likes of Lord Hoffmann, they would still have a grasp of common sense. In the end this is not a necessarily complicated question, for at its simplest it may, I submit, be put thus : is the crime 'justiciable' because it is a 'crime' , or is it not a 'crime' because it is 'non-justiciable'? Those who would conclude the former are aptly brought within the rubric of they that hold to "the supremacy of the rule of law" as the fountain of peace and justice in this fragile world. Whilst those who favour the latter, such as Lord Hoffmann, are acolytes of the rubric that the State, and not the law, is the supreme and sovereign power in the land, and the State is unchallengeable, certainly as respects its most important and consequential powers, all be it that it is capable of changing its mind, whether upon a change of administration, or of regime !

Despite, indeed just at present because of, this very statist opinion as expressed by Lord Hoffmann, I am still proud to say which formulation, even unto this present day of "the war on terrorism", I hold to be closer to the natural affinity and common sense of ordinary Englishmen, whose instincts I still trust and believe stand four square behind Sir Hartley Shawcross, His Majesty's Attorney-General, when he concluded his submission before the Nuremberg Tribunal in 1946 thus :

" This trial must form a milestone in the history of civilisation, not only bringing retribution to these guilty men, not only marking that right shall in the end triumph over evil, but also that the ordinary people of the world (and I make no distinction now between friend and foe) are now determined that the individual must transcend the State. The State and the law are made for man, that through them he may achieve a fuller life, a higher purpose and a greater dignity. States may be great and powerful. Ultimately the rights of men, made as all men are made in the image of God, are fundamental. When the State, either because as here its leaders have lusted for power and place, or under some specious pretext that the end may justify the means, affronts these things, they may for a time become obscured and submerged. But they are immanent and ultimately they will assert themselves more strongly, still, their immanence more manifest. And so, after this ordeal to which mankind [p. 471] has been submitted, mankind itself - struggling now to re- establish in all the countries of the world the common, simple things - liberty, love, understanding - comes to this Court and cries: "These are our laws - let them prevail."