

# Why the government has got the Royal Prerogative wrong

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*I [noted yesterday](#) that Lord Keen, the Scottish Advocate General had argued during the Article 50 case that no legislative consent motion on Brexit is needed from Scotland, Wales, Northern Ireland because no legislation is needed to trigger Brexit. To put it another way, he argued that our membership of the EU is maintained at the whim of the Prime Minister.*

*I made clear that I was shocked by this, and also felt it profoundly inaccurate. I was not alone. To continue a current theme of promoting valuable comments on this blog to being posts in their own right I feel it appropriate to share this comment from Andrew Dickie (who is a barrister) on the origins of the Royal Prerogative in which he argues that the government has got his understanding on this issue completely wrong by wholly misunderstanding its origin:*

I am truly astonished that it should have been a Scots legal officer, the Scottish Advocate General, Lord Keen QC, who could have come up with so pernicious a doctrine as you have described, given that almost all the upheavals in UK politics in the 17th century are attributable, at least in part, to the doeful fact that the ruling dynasty, the Stuarts, were Scottish, with, at least initially, and probably right to the Glorious Revolution of 1688, a poor grasp of the realities of English (used advisedly) Parliamentary politics.

The Scots Parliament had none of the hard-won effectiveness that it had even under Henry VIII, and certainly had under Elizabeth I, where it was recognised as a power to be reckoned with, where the Scottish Parliament under the Stuarts was more like the Bourbon Etats GÃ©nÃ©rales, or the Tsar's Duma — a sort of Royal echo chamber.

Each of the Stuart rulers of the UK, until Mary I, misunderstood the system: so James VI & I attempted to sit as a judge, and was told in no uncertain terms by Lord Coke that the King's justice must be carried out in the King's name, but NOT by the King personally.

Charles I, of course, thought he could arrest MP's with impunity, and effectively sparked

of a Civil War by such actions, along with his practice of personal rule, without benefit of Parliament, exactly as if he were a Romanov!! That cost him more than his crown, as we all know.

Then cunning old Charles II, who, after his experiences of wandering, and fully recognising that it was Parliament, or at least a “grand Committee of the great and the good who had invited him to retake his throne, should have known better — even he thought he could act like his father, and entered the Commons in person, sitting in Oxford, I think, and used his personal authority, his “Royal prerogative” to dissolve Parliament, which is why, even now, the Commons is, apart from the City of London, the ONLY place the monarch cannot enter as of right, but must send her “Gentleman Usher of the Black Rod”, to ask permission to enter the Commons as her representative.

This summary dissolution stored up hostility to the Crown, which James VII & II amply fuelled by compounding ALL the errors of his grandfather, father and brother — manipulation of Parliament, arrests and imprisonments — adding to them something even Charles I might have baulked at, namely, that the “Royal Prerogative” allowed him, Humpty Dumpty style, to decide what a law meant, irrespective of its plain meaning, and so allowed him to go ahead and appoint Catholics to posts the Test Act expressly forbade.

And so this sorry tale brings us to “the Glorious Revolution”, and “the Bill of Rights”, and the truly CRUCIAL fact that William and Mary were NOT monarchs by either of the traditional routes open to them: Mary all was NOT Queen by right of succession, as her father, the “anointed monarch” was still alive, leading many (including Bishop Thomas Ken, whom James had imprisoned!), to be “non-jurors”, feeling they could not in conscience swear allegiance to Mary while James was alive.

Equally, William did NOT take the throne “by right of conquest”, as had Henry VII and William the Conqueror. No, the CRUCIAL fact is that both William and Mary — whatever the constitutional icing and decoration put on the cake — were ELECTED by Parliament!!!

The really KEY conclusion to draw from this is the following: after the Glorious Revolution Parliamentary sovereignty was NO LONGER an outgrowth of the Royal Prerogative, but rather the EXACT opposite was the case: the Royal Prerogative was an appendage upon Parliamentary sovereignty, and without the protection of such sovereignty, the Royal Prerogative is null and void, a mere artifice, lacking substance. Clearly, therefore, ANY attempt to invoke Article 50 without the sanction of Parliament would also be void for illegality.

That Theresa May — a Tory — should be seeking not only to implement what I have long argued was always Thatcher’s aim, namely the re-feudalization of society into Barons with all the rights, and serfs with none of the rights, but also to reverse the

settlement arrived at in 1688, shows that the Tories do indeed have long memories, for the Glorious Revolution was always seen as a Whig achievement, to which the Tories only grudgingly assented, until they regained their ascendancy under the last Stuart monarch, Queen Anne.

With that in mind, am I being hyper-sensitive in seeing the Tory manifesto pledge to have a new (English??) Bill of Rights, and to withdraw from the European Convention on Human Rights (a Convention, incidentally, largely crafted by an earlier generation of Conservative politicians and lawyers of somewhat more liberal sensibilities, and deeper attachment to liberty, not to speak of profounder intellects and more humane instincts) as part of the same agenda?