

THE ROYAL PREROGATIVE AND OPEN GOVERNMENT

by Francis Bennion

The following was prepared for an interview by FB with Nicholas Jones broadcast on the BBC2 *Scrutiny* television programme transmitted on 20 March 1993. To see the interview return to the website and click 1993.013.VID in the Site Map or the List of FB's writings

The Royal Prerogative (R) is another name for Government power which is not conferred by statute but exists under common law. It does not include powers which anyone has (eg to own and dispose of property). The only exception (where the Queen exercises R by herself) is where there is no effective Government. In practice this can happen only where (1) the Government lose a vote of confidence, or (2) the PM dies in office, or (3) at a General Election the electorate have voted against the Government. If a party command a majority in the Commons, and have an elected leader (even though he or she is not at the moment PM), the Queen has little choice in how she uses R (eg over whether to grant a dissolution).

Examples of Royal Prerogative powers

Foreign policy and international relations, eg treaty making, declaring and ending war, recognising foreign states and governments, annexing territory, parting with territory, declaring the limit of territorial waters, opening and closing embassies. Lord Coleridge CJ said of the Queen in a 1876 case that in treaty making 'her acts are not to be examined by her own courts'. This applies even where sovereignty is renounced. In 1971 Raymond Blackburn tried to stop the Government joining the Common Market by acceding to the Treaty of Rome. Lord Denning said: 'these courts will not impugn the treaty-making power of Her Majesty'. An act of state (eg declaring war) has the force of law¹.

R may be regulated by statute. Thus the treaty making power is regulated by the European Communities Act 1972 as amended. Section 2 of this enables requirements of 'the Community Treaties' to be carried into British law by Order in Council. The meaning of 'the Community Treaties' is periodically enlarged as the Community develops, either by Act (for major enlargements) or by Order in Council (for lesser ones). The current Maastricht Bill aims to enlarge the definition to cover parts of the Maastricht Treaty on European Union. It does not extend to 'those parts which relate to co-operation in the sphere of foreign policy and security policy or justice and home affairs matters . . . because they do not give rise to Community rights and obligations' (Explanatory Memo on European Communities (Amendment) Bill). It requires another Act before the UK moves to the third stage of economic and monetary union.

Civil and armed services, eg numbers of personnel, make up of departments and units, operational deployment, nature of armaments, requisitioning. The prerogative remains an important reserve power of government in time of war and emergency. Thus merchant ships were requisitioned under it at the time of the Falklands War.

¹ See F A R Bennion, *Statutory Interpretation* (4th edn 2002), p 194.

Home affairs There is still scope for R here. Thus the Criminal Injuries Compensation Scheme was set up under R in 1964. A corporation, with powers equal to those of a natural person, can be set up by R (grant of a charter). Under R a person can be forbidden to leave the country (writ *ne exeat regno*).

Annual report of the Government?

The limits on the exercise of R are largely financial, bringing in the Commons power to grant aids and supplies (taxation) and appropriate their produce (tax revenue) to specific heads by the Appropriation Act.

When it comes to revealing how they have used R powers the Government is often reactive rather than proactive, though there are exceptions (eg publishing the Honours List). I believe it should always be proactive except where national security is involved.

The exercise of statutory powers is usually open, because it is necessary to make an order etc. The exercise of R powers, or the powers of an ordinary person, need not be open unless the Government chooses. The tendency is for information about what the government has done to be discovered only when someone gets on to it (eg investigative journalism or a parliamentary question).

The National Audit Office reports on many fields of Government expenditure, but this is not the same as reporting on Government *activity*.

I propose that the government should publish an Annual Report to the Nation, setting forth in outline all it has done in the previous year. This could then be compared with statements of intent, such as election manifesto commitments.