

# CHAPTER TEN

## THE ROYAL PREROGATIVE

# Constitutional and Administrative Law

## THE ROLE OF THE MONARCHY

De Smith states that the Queen remains a symbol of national identity. The Queen is the focal point of national loyalty, transcending partisan rivalry and strengthening social cohesion. Coins and stamps bear her image - the national anthem is 'God save the Queen'. The Queen personifies the state and the nation, its history and continuity.

The Government is carried out in the Queen's name. Sovereignty is attributed to the Queen in Parliament. Wide legal powers are vested in Her Majesty or Her Majesty in Council. The courts are the Queen's courts. Coronations, Royal Weddings, Funerals and the Investiture of the Prince of Wales represent great national occasions, bringing the past into the present amidst splendid pageantry and ancient ritual. The Queen is pre-eminently a dignified element in the British Constitution. She is a pillar of the established church, an exemplar of family virtue, a person to whom deference is paid, by all in public life, in a society whose habits of deference are diminishing. The Queen embodies the hereditary principle at a time when it is under attack. She has the misfortune of living under a glare of publicity and reposed in her are expectations no ordinary mortal can hope to fulfil.

## THE EXECUTIVE STRUCTURE

### The Prime Minister & Cabinet

The Monarch and the Privy Council are common law institutions. The main institutions of the executive (the government) are based on conventions - recognised by, but rarely prescribed by the law.

### The Privy Council and the Monarch

The Queen is the head of state. Government is carried out in her name. Whilst the monarch's powers and role are limited under the constitution many important functions are still carried out by the Queen as Head of State. Whilst the sovereign at one time governed through and was advised by the Privy Council it is no longer such an important part of the structure today - though like the Queen it is a dignified and ancient institution.

### The Powers of the Monarch

The principle convention of the constitution is that the Queen will exercise the majority of her powers (formal and legal powers) upon and in accordance with the advice of her ministers.

This does not mean that the Queen is a mere cipher. She has the right to be consulted, to encourage and to warn. She can also advise. The Queen can receive cabinet papers and has to be kept adequately informed by the P.M. She has weekly meetings with the P.M. for this purpose. She receives foreign office documents, dispatches and telegrams and state papers. She is notified of proposed appointments to be made in her name and awards to be given in her name.

The Queen is allowed to express her opinions and views informally and is free to make such comments as she thinks fit, though how much notice is taken depends on a mixture of facts ... the status of the monarch and his / her experience. With regard to politically controversial issues to which the cabinet is committed it is difficult for her to press her point of view. Regarding non-policy matters. For example the appointment of non-political personalities she can hope to have more influence.

### The Role of the Monarchy.

See in particular the works of Jennings on the Role of the Monarchy. It is suggested that between 1910-36 George V may have had some influence over senior military appointments and other matters. Likewise between 1936-52 George VI, may well have influenced Attlee to reconsider and then to change his mind about putting Bevan in the Treasury and Dalton in the Home Office.

In times of national crisis the role of a non-partisan head of state as an intermediary can be significant. In 1914, during the Home Rule Crisis, George V took the initiative and convened a conference to examine the issue and addressed its opening session. De Smith argues that in times like this when the normal democratic machinery is in danger of breaking down the ill-defined residual powers may have to be exercised. Material on the present monarch is very limited as it is regarded as improper to publicise the role of whoever is the present monarch.

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**Potential circumstances for use of the residual power** i.e. circumstances in which the monarch may have the power to act against the advice of or without the advice of her ministers.

### **The Appointment of the Prime Minister.**

As long as one of the major parties returns a majority to the House there is no choice for the Queen. The leader of the winning party gets the prize. However, where there is no clear winner, or where a party loses its majority in the House, the Queen may be faced with the task of choosing the Prime Minister. From evidence of the past, she consults the leading statesmen to find out who can command a majority in the House. It is most likely that the parties will sort something out and she will have to go along with that.

### **Circumstances where the Queen can dismiss the government**

This would appear to be constitutionally proper if the government loses its majority in the Commons and yet insists in remaining in office despite the fact that it cannot pass any legislation, such a situation is unlikely.

Again if the government attempted gerrymandering, ie trying to rig the constituency boundaries, or some other subversion of the constitution such as an attempt to lengthen the life of Parliament outside wartime. However, that type of royal interference is fraught with danger for the continuance of the monarchy and would have to be a last resort, for it might amount to monarchical suicide.

### **Excessive recourse to the electorate**

The Queen could possibly say no to a P.M. if requested to dissolve parliament if, after a general election the P.M. wished to go too the polls again. The Queen might insist that the P.M. has another go at finding a compromise within the House.

### **Inopportune time for a election**

The Queen might refuse to dissolve Parliament when an election would not be in the national interest. Such a situation has never occurred so the principles involved are hard to identify. De Smith speculates that the Queen could refuse a dissolution if she felt that an alternative government that could control the House could be found within the Commons and that an election was against the national interest.

### **The coercion of the Lords**

Can the Queen refuse a P.M.'s request to create sufficient new peers in order to get a policy through the House of Lords? In 1712 Queen Anne was asked to and in fact created 12 new peers to secure the approval of the House of Lords of a peace policy (The War of the Spanish Succession had dragged on and peace was long overdue).

In 1832 William IV reluctantly accepted after initially rejecting it, advice to create sufficient numbers of Whig peers to pass a reform bill through the Lords. 50 would have been required. The Lords had rejected 3 bills in rapid succession. However, realising the inevitability of the situation they allowed the bill to go through by a major abstention of voting. Neither in the 1830s nor in 1911 did the monarch accept that there was no right to refuse to create the necessary peers. In fact, in 1911 the King instituted a wise corollary by asking the P.M. to go to the country to seek support for the major constitutional change on the Irish Question.

In practice, the need to coerce the Lords may never arise again, since their powers have been so drastically curtailed that they must now realise that they have no option but to give way to the Commons on the majority of matters - excepting those where the Lords has an absolute veto.

### **Can the Queen refuse the Royal assent?**

Such an action would appear to be unconstitutional and such a situation would be hard to imagine. Queen Anne was the last monarch to refuse to assent. However, what would the Queen do if asked to assent to the abolition of the monarchy or the House of Lords? In 1913 and again in 1914 George V appears to have thought that he had the power to refuse assent to the Home Rule Bill.

### **The Making of Awards : the Award of Honours : Ceremonial Functions.**

Certain Awards are entirely at the discretion of the Monarch e.g. the Order of Merit, though many are given on the advice of the P.M. The Queen carries out many social functions and ceremonies as the Head of State. She visits and receives many overseas dignitaries. Many things need the signature of the Queen. She attends meetings of the Privy Council, makes the Queen's Speech, receives Bishops, ambassadors and holds formal and informal audience.

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## List of Legal Rules

These are straight forward and can be found in most of the text books eg Crown's title is hereditary: Succession is partly defined by statute and partly by the common law.

- Only Protestant heirs of the Electress Sophia of Hanover can be the monarch :
- Sons succeed before daughters :
- Must not marry a catholic :
- Must not marry a divorcee and cannot divorce.

## THE ROYAL PREROGATIVE AND EXECUTIVE POWER

The main legal sources of executive power are the royal prerogative and legislation. The royal prerogative covers both those prerogatives personal to the crown and those which, whilst exercised in the name of the crown, are effectively executive / government prerogatives. Although predominantly related to executive affairs they include some residual legislative and judicial functions.

### The Royal Prerogative

**Dicey** : "*The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the crown.*" The problem with this definition is that it only talks of powers, though in its favour is the fact that it stresses the residual factor. Thus, Royal prerogatives have been diminished by statutes, eg the **Crown Proceedings Act 1947** which deprived the crown of certain immunities in civil litigation. In **BBC v Johns**,<sup>1</sup> the court stated that " .. it is 350 years and a civil war too late, for the Queen's courts to broaden the prerogative." Indicating that no new prerogative powers can come into being, though this does not mean that old prerogative powers cannot be used in a modern context. Thus interception of mail for security purposes could cover the interception of electronic communications.

**Wade**: "*The royal prerogative can be roughly described as those inherent legal attributes that are unique to the crown.*" The concept of the crown means numerous things e.g. The Queen herself or the government exercising the powers of the crown, or the STATE. Sometimes it is clear in which sense the term is being used, other times it is not.

The notion that the royal prerogative is inherent (existing in a part of something else) is true in the sense that the prerogative is derived from customary common law and exists because it can be discovered in the common law. In the same sense the royal prerogative is a legal attribute of the crown because it is recognised, determined and enforced by the courts. Prerogative powers are unique to the crown and are not shared by and with the subjects. If they were they would cease to be prerogative powers.

Prerogative powers are mainly executive governmental powers, eg the Crown has the power to conduct foreign relations, international affairs, to declare war and sue for peace, the use of the armed forces (to a certain degree), to appoint ministers, to dissolve Parliament, to assent to bills etc. Her Majesty cannot exercise the majority of these powers without the advice of the government of the day. This is true of the majority of the important powers. It is more accurate to describe the majority of these powers as the prerogative powers of the executive.

The Monarch can personally exercise some powers without the assent and advice of or even contrary to the advice of her ministers, e.g. to dissolve Parliament or to create peers to flood the House of Lords or even to assent to bills. Whilst the circumstances would have to be unusual today, a monarch may have to exercise these powers, though to do so might threaten the political immunity usually enjoyed by the monarch. The Queen also has certain minor constitutional powers which she can exercise as personal prerogative eg immunity from prosecution in the courts, some immunity from tax, proprietary interests in royal fish etc. Thus, The royal prerogative consists not only of powers, but also of rights, immunities, duties and other miscellaneous attributes such as the prerogative of mercy.

### Relationship between Statute and Royal Prerogative.

According to the **A.G. v De Keyser's Royal Hotel**.<sup>2</sup> where they clash statute will prevail over the prerogative. A variation on the relationship between statute and prerogative was raised in **R v Secretary of State for the Home Department, ex parte Fire Brigades Union**.<sup>3</sup> The **Criminal Injuries Compensation Scheme** had been given effect by the prerogative. In the **Criminal Justice Act 1988, ss. 108 to 117, schedule 6 and schedule 7**, that non-statutory

<sup>1</sup> **BBC v Johns** [1968]. Per Lord Diplock.

<sup>2</sup> **Attorney General v De Keyser's Royal Hotel** (1920).

<sup>3</sup> **R v Secretary of State for the Home Department, ex parte Fire Brigades Union** [1995] 2 AC 513.

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scheme was codified. It was to be brought into force on a day appointed by the minister by an order made by a statutory instrument, but until then the non-statutory scheme remained in force (s.171 (1)). No order was made, and compensation was paid, as before, under the prerogative. Subsequently the government decided to change the basis of compensation from common law damages to a tariff, which would have the effect of reducing payments made under the scheme.<sup>4</sup> The government purported to bring the new tariff based scheme into effect by the prerogative. This was successfully challenged in an application for judicial review.

The House of Lords held unanimously that the minister was under no legally enforceable duty to bring the statutory scheme into effect because of the discretion in s. 171(1). By a majority of three to two they held that this discretion was not unfettered and that while s.108 to s177 and schedules 6 and 7 were not in force, the minister was under a duty to consider if they should be brought into effect. The decision not to implement these provisions of the 1988 Act and to implement the tariff based scheme was an abuse of power involving an exercise of the prerogative which was inconsistent with that duty. Whilst the statute still provided for the implementation of the statutory scheme, only amending legislation and not the prerogative could displace it.

Royal prerogatives can cease to be unique by being shared. Commentators have suggested that the royal prerogatives may wither away and atrophy, e.g. the navy's power to press-gang. However, until a court declares that a particular prerogative is dead we may not be sure. Indeed one of the problems of the prerogative is whether or not a prerogative exists and not just as regards a continuation of an old prerogative but also as regards its application to new circumstances. In **R v Home Secretary ex parte Northumbria Police Authority**,<sup>5</sup> the Home Secretary made CS gas and baton rounds available to the police, to help them to deal with serious public disorder. The police authority objected and the court stated that the provision was lawful under the prerogative and also by the Police Act 1964. The court saw this as being part of the prerogative power to administer justice and to deal with crime.

De Smith stated that the crown has certain prerogative powers in times of grave national emergency e.g. to enter and take property, to destroy property, to requisition ships etc.<sup>6</sup> The nature and extent of these powers is unclear, though the lack of clarity is of no practical importance since these things would be dealt with on a statutory basis. However if one looks at reality, during the Falkland campaign the royal prerogative rather than statute was used to requisition ships on the basis of the **Broadmayne Case**.<sup>7</sup>

### Domestic Prerogative Powers and Prerogative Powers in Foreign affairs (Act of State)

#### Domestic affairs

These are largely composed of powers though there are duties and immunities as well:

1. To appoint government officials etc.
2. To appoint members to the armed forces.
3. Ecclesiastical prerogatives - appointment of Bishops etc (on the advice of the P.M.) The Crown assents to changes in the canons.
4. The Queen is the fountain of honours, awarded in her name, eg Peerages.
5. Emergency and defence. Residual power to use the armed forces as is reasonably necessary to put down riots and insurrection (to provide emergency fire fighting and refuse disposal)
6. The crown's responsibility (arguably a duty not a prerogative) to defend the realm by sea or land, e.g. to requisition property to carry out the duty.

#### The royal prerogative and citizens of the United Kingdom.

**Burmah Oil v Lord Advocate**.<sup>8</sup> The question arose as to compensation for loss and damage caused as a result of the exercise of the royal prerogative. Burmah Oil's installations were destroyed by order of the British Commanding Officer of forces in Burmah in 1942 to prevent them from falling into the hands of the invading Japanese. At the time Burmah was a British Colony. The House of Lords decided that there was no general rule that the prerogative could be exercised without compensation being paid therefore Burmah Oil should be compensated. This was a change in the law.

<sup>4</sup> (Cm 2434).

<sup>5</sup> **R v Home Secretary ex parte Northumbria Police Authority** (1989)

<sup>6</sup> compare the Falklands campaign, where merchant navy container vessels were used for transportation and the Q.E.II was refitted out as a hospital ship.

<sup>7</sup> **Broadmayne Case**

<sup>8</sup> **Burmah Oil v Lord Advocate** [1965]. House of Lords. 3-2 majority decision.

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The **War Damages Act 1965** was then passed, which retrospectively abolished the right to compensation from the crown in respect of lawful acts of damage to or destruction of property done by or under the authority of the crown during or in contemplation of a war, which the sovereign was or is engaged in. Effectively this nullified the decision in **Burmah Oil** so far as war damage was concerned. The **War Damages Act** does not apply to unlawful acts. The Act only applies to the destruction of property but not to the mere taking of property.<sup>9</sup> In **La Compagnie Sucriere De Bel Ombre v The Government of Mauritius**,<sup>10</sup> it was held that the right to compensation for non war related damage is not affected by the statute. Nonetheless, the **Sugar Industry Efficiency (Amendment) Act 1993** did not contravene the Constitution of Mauritius or entitle sugar cane plantation owners to compensation for expropriation.

### The Royal Prerogative and the Courts

The courts have frequently discussed and ruled on the existence or otherwise of prerogatives claimed by the crown. In **R v Hampden : The case of Ship Money**.<sup>11</sup> Charles I was prevented from raising finance otherwise than through Act of Parliament. **Darnel's Case : The 5 Knights' Case**.<sup>12</sup> Concerned and limited the power of the King to imprison, affirming the existence and issue of the writ of habeas corpus. It was held in the **Case of Proclamations** that the crown cannot, by proclamation, change the law of the land. The monarch can only legislate as part of Parliament. In **Prohibitions del Roy** it was held that disputes must be heard before the King's courts and not by the King personally.

The **Bill of Rights 1689** removed a significant number of the crown's prerogatives, and The **Crown Proceedings Act 1947** removed the crown's immunity for liability in contract and tort. Consider the effect of this in the ruling in **The Amphytrite**<sup>13</sup> where the court held that the UK Government was not bound by an assurance given to foreign ship-owners, which did not amount to an enforceable contract.

The courts can determine the source of executive power and can define the extent of and the limits of that power. In the past, the courts have distinguished between executive power arising under legislation, which could be questioned / scrutinized and controlled by the courts and executive power arising under the Royal Prerogative, the exercise of which was considered to be beyond the scope of judicial review. Times have changed, thus:

- a). The courts have long since been able to examine whether or not a prerogative power exists.
- b). The courts would further examine whether or not an act carried out ostensibly under prerogative powers actually fell within the ambit of such a power. If it did not and there was no other legitimating factor regarding the act then that act would be struck down for illegality.
- c). The exercise of statutory powers is now subject to judicial review to ensure that the power is reasonable used and may potentially also be subject to a form of proportionality test in the future.

**C.C.S.U. v Minister for Civil Service**<sup>14</sup> (The G.C.H.Q. case), established that the courts will examine the way in which prerogative power is used. The case represents the final outcome of a line of judicial development ranging from **Chandler v D.P.P.**,<sup>15</sup> **Laker Airways v Department of Transport**<sup>16</sup> and **Gouriet v Union of Post Office Workers**.<sup>17</sup>

In the **G.C.H.Q.** case Lord Scarman stated

*"My Lords, I would wish to add a few, very few, words on the reviewability of the exercise of the royal prerogative. Like my noble and learned friend Lord Diplock, I believe 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 justifiable, that is to say if it is a matter upon which the courts can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. Without usurping the role of legal historian, for which I claim*

<sup>9</sup> See later discussion in respect of **Nissan v A.G.**

<sup>10</sup> **La Compagnie Sucriere De Bel Ombre Ltee & Ors. v The Govt. of Mauritius** (1996). 13/12/95 PC (Lords Goff, Jauncey, Woolf, Steyn and Mr Justice Hardie Boys)

<sup>11</sup> **R v Hampden** [1637] 3 St.T.R. 825. But compare **Bate's Case** (1602) 2 St.Tr 371 (**The Case of Impositions**).

<sup>12</sup> **Darnel's Case : The 5 Knights' Case**. [1627] 3 St.Tr 1.

<sup>13</sup> **The Amphytrite** (1921) D.Ct.

<sup>14</sup> **C.C.S.U. v Minister for Civil Service** [1985] AC 374

<sup>15</sup> **Chandler v D.P.P.** (1964),

<sup>16</sup> **Laker Airways v Department of Transport** (1977)

<sup>17</sup> **Gouriet v Union of Post Office Workers** (1978)

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*no special qualification, I would observe that, the royal prerogative has always been regarded as part of the common law, and that Sir Edward Coke had no doubt that it was subject to the common law : The **Case of Prohibitions del Roy**,<sup>18</sup> and the **Case of Proclamations**,<sup>19</sup> In the latter case he declared that "the King hath no prerogative but that which the law of the land allows him". ....Just as ancient restrictions in the law relating to the prerogative writs and orders have not prevented the courts from extending the requirement of natural justice, namely the duty to act fairly, so that it is required of a purely administrative act, so also has the modern law, a vivid sketch of which my noble and learned friend Lord Diplock has included in his speech, extended the range of judicial review in respect of the exercise of prerogative power. Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."*

If this is correct then there may be times when exercise of the royal prerogative will be justiciable-indeed the case tells us that this will be the norm subject to exceptions. A list was provided by the court, though this was meant to be capable of development in the future. The list included matters of national security, the making of treaties, the appointment of Ministers and the granting of pardons.

*"The Revolution Settlement in the final years of the 17th century established the supremacy of Parliament. Legislation was superior to the prerogative but the courts seemed to take the view that all they could do in respect of prerogative power was to satisfy themselves of its existence and not review the manner of its exercise. The continuance of such an approach given the development of the law on judicial review of administrative action was strange. The ultra vires principle, which allows the courts to check that the exercise of statutory powers is confined within the limits of their grant, could also be applied to the exercise of the prerogative. The logic of this was accepted in **GCHQ**, where civil servants working at Government Communications Headquarters, Cheltenham, were deprived of the right to join independent trade unions. This was put into effect by a prerogative instrument made under the Civil Service Order in Council 1982. Lords Diplock, Roskill and Scarman were clear that the important factor in deciding if a could exercise its review jurisdiction was the subject matter of a power and not its source. Just as the exercise of statutory powers could be reviewed so could the exercise of the prerogative."*<sup>20</sup>

Review of the royal prerogative is nonetheless limited to areas where the legal rights and interests of the citizen are at issue. Where, as in foreign affairs and treaty making, individual rights are not at issue, judicial review is precluded. Thus in **Blackburn v A-G**,<sup>21</sup> it was held that the treaty-making powers of the Crown are immune from interference by the courts. Similarly in **Ex p Molyneux & Ors**,<sup>22</sup> a challenge to executive treaty-making power between the UK and the Republic of Ireland failed.

### The Judicial Prerogatives

The administration of justice is carried out in the Queen's name, in her courts. The Queen has certain immunities from prosecution, in addition to the prerogative of mercy, which is exercised by the Home Secretary on behalf of the crown, as are much of the powers in relation to parole. In **Hayward v Eames: Kirkpatrick v Harrigan**<sup>23</sup> it was held that the approval of a Lion Intoximeter was not the exercise of a legislative power but rather an executive power

Whilst Lord Roskill had included the prerogative of mercy as being a non-reviewable issue in **R v Secretary of State for the Home Department ex p Bentley**,<sup>24</sup> the majority decision in the Lords extended its scope to cover the area. In **Linsberth Logan v The Queen**<sup>25</sup> (1990) the Privy Council distinguished between the exercise of the prerogative of mercy and the right of appeal from a conviction by the court in Belize.

There is a general principle / presumption of statutory interpretation, that the crown will not be adversely affected by a statute unless it is clearly stated or it is necessary by implication, according to **Tamplin v Hannaford**.<sup>26</sup> It was held that in the absence of an express statement to the contrary, houses let by the crown

<sup>18</sup> **Case of Prohibitions del Roy** (1607), 12 Co. Rep. 63

<sup>19</sup> **Case of Proclamations** (1611) 12. Co. Rep. 74 ibid at p76

<sup>20</sup> See further the commentary on GCHQ by Thompson.

<sup>21</sup> **Blackburn v A-G** (1971) C.A.

<sup>22</sup> **Ex p Molyneux & Ors** (1986)

<sup>23</sup> **Hayward v Eames : Kirkpatrick v Harrigan** (1984).

<sup>24</sup> **R v Secretary of State for the Home Department ex p Bentley** (1993)

<sup>25</sup> **Linsberth Logan v The Queen** (1990) 21/2/96. The Judicial Committee of the Privy Council : Lords Keith, Browne-Wilkinson, Mustill, Steyn and Sir Brian Hutton.

<sup>26</sup> **Tamplin v Hannaford** [1950].

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were not affected by the **Rent Restrictions Act**. In **Bankvoor Handel en Scheepvaart N.P. v Administrator of Hungarian Property**,<sup>27</sup> the court held that the custodian of enemy property was a servant of the crown and then approved dicta of Blackburn J in **Mersey Docks & Harbour Board v Cameron**<sup>28</sup> to the effect that the following are immune from income tax and rates because they are considered to be acting on behalf of the crown:

- 1) Crown personalities i.e. H.M. E.II (now amended)
- 2) Crown servants
- 3) Certain lands used by the Crown and where funds are held by the crown eg Courts, Police Stations, prisons etc.

### THE CIVIL SERVICE : EMPLOYMENT & THE ROYAL PREROGATIVE

#### Introduction

The central issue here is the employment status of civil/crown servants, their rights of recourse to the courts for breach of the contract of employment (if any), recourse to employment tribunals and the scope of control exercised by the courts by way of judicial review of decisions by the employer (i.e. the Crown) in relation to their employment with particular reference to the payment of salary and dismissal.

#### Sources of Law on the Civil Service

The law relating to the Civil Service is not codified or rationalised in a single document. The sources are varied. Thus provisions regarding pay etc are to be found in Statutes, Statutory Instruments, Law Reports etc. The major source of law regarding civil service power and the control and operation of the civil service lies in rules based on the Royal Prerogative.

#### Conditions of service / appointment and security of tenure of civil servants.

It is clear from **GCHQ** and **Hughes v DHSS**<sup>29</sup> that the employment of a civil servant is carried out as an exercise of the Royal Prerogative.

The common law position is that they have no security of tenure at all. They can be dismissed at will by the crown without notice and without recourse to the courts for wrongful dismissal. **Shenton v Smith**.<sup>30</sup>

This would apply even where at the time of appointment of a civil servant it had been agreed that he or she would be employed for a fixed period or on advertised terms **Rodwell v Thomas**<sup>31</sup> or by an agreed code of practice **Riordan v War Office**.<sup>32</sup>

In **Dunn v The Queen**,<sup>33</sup> Dunn claimed he had been appointed for a three-year period as a consular agent by the High Commissioner of a protectorate. He was dismissed and claimed damages. The court decided that any contract with a civil servant would have a term implied that he could be dismissed at the pleasure of the crown. Thus, any express term in a contract that showed a contrary intention would be void.

Similar decisions have been made in subsequent cases - eg a stipulation of a period of notice has been held to be void and a clause that a civil servant should first be entitled to a hearing before dismissal has been held to be void. However, there have also been a couple of cases, which have perhaps cast a little doubt on this. It was stated in **Reilly v R**,<sup>34</sup> that "If the terms of the contract definitely prescribe a term and expressly provide for a power to determine for cause, it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded." There are a variety of views as to just what this meant.

If the term says that you must discover cause before dismissal then dismissal at pleasure is precluded. This is the exact opposite of the dicta in **Dunn v The Queen**. Thus **Reilly v R** and **Gould v Stewart**<sup>35</sup> the case which it relied on, are in direct conflict with **Dunn v The Queen**. However, the terms in **Reilly v R** were laid down by statute. It is possible then, that the dicta in Reilly's Case are only applicable to such statutory contractual

<sup>27</sup> **Bankvoor Handel en Scheepvaart N.P. v Administrator of Hungarian Property** [1954]

<sup>28</sup> **Mersey Docks & Harbour Board v Cameron** [1864]

<sup>29</sup> **C.C.S.U v Minister for the Civil Service** [1985] AC 374 and **Hughes v DHSS** [1985] AC 716.

<sup>30</sup> **Shenton v Smith** [1895] AC 229.

<sup>31</sup> **Rodwell v Thomas** [1944] 596

<sup>32</sup> **Riordan v War Office** [1959] 1 WLR 1046. : [1961] 1 WLR 210

<sup>33</sup> **Dunn v The Queen** [1896] 1 Q.B. 116,

<sup>34</sup> **Reilly v R** [1934] AC 176. Privy Council.

<sup>35</sup> **Gould v Stewart** [1896] AC 575



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situations. The clear words of The Reilly Case do not support this line and it would appear to be a tenuous argument. On the other hand the dicta was obiter and has not subsequently been followed.

**Riordan v War Office**<sup>36</sup> suggests that a civil servant is dismissible without notice Whilst Diplock.J stated that '...the terms and conditions of employment, to which assent of the employee was required, were mutually binding on both Crown and employee ...' this justified the payment of wages which had already been earned but did not prevent dismissal at will. In **Inland Revenue Commissioners v Hambrook**<sup>37</sup> Goddard CJ stated that '... the employment of a civil servant rests on appointment by the Crown and not on contract ..' echoing the decision in **Terrell v Secretary of State for the Colonies**.<sup>38</sup>

In **Kodeeswaran v A.G. for Ceylon**<sup>39</sup> the Privy Council restated the traditional view that "... it is now established in British Constitutional theory ... that any appointment as a crown servant, however subordinate, is terminable at will, unless it is expressly provided otherwise for, by legislation."

De Smith, whilst he considers that it is reasonably clear that any contractual term that purports to give security of tenure will be regarded as being void, states that the precise legal reason for this has never really been settled. There are a number of view points to be taken into account here :

- 1). Where an appointment is made by another civil servant, they would only have authority to make an appointment subject to the condition that there would be no security of tenure. To attempt to provide security of tenure would be Ultra Vires - though this raises the issue of estoppel.

If that view point were to be correct and one could not have security of tenure when one civil servant appoints another, arguably if the appointment were made by the crown, by Letters Patent, a term including security of tenure could be upheld. The reason for this is that there would be no limitation upon the power of the Crown. Conversely, can the Crown give up its power to dismiss at pleasure?

- 2). The crown should not be allowed to offer security of tenure because such a development might be contrary to public policy. This is the view put forward in **Rederiaktiebolaget Amphrite v R**.<sup>40</sup>

There is no fixed criteria for what does or does not constitute public policy. There are circumstances where it would appear be in the public interest to offer security of tenure to civil servants. Thus Judges have security of tenure under the **Act of Settlement 1700**. It is questionable whether or not there is a contract of employment between civil servant and the Crown. **Sutton v A.G.**<sup>41</sup> and **Riordan v War Office** suggest there is. As Bradley & Ewing have noted, whilst it was accepted in **R v Civil Service Appeal Board ex-parte Bruce**<sup>42</sup> that Civil servants could be employed by the crown on a contractual basis, that this does not prevent dismissal at will. **R v Lord Chancellor's Department ex parte Nangle**<sup>43</sup> made the same point. On the other hand **Lucas v Lucas**<sup>44</sup> and **Inland Revenue Commrs v Hambrook** support the opposite contention.

The Crown has argued both for and against the existence of a contract of employment depending on which argument was in the circumstances of the case most advantageous to the Crown.

- Where the other party is an ex-employee seeking to establish a contract of employment and to claim for breach of contract the crown seeks to establish that no such contract exists and that the claimant was dismissable at the pleasure of the Crown as demonstrated by the cases above.
- Where the other party is an employee of the crown who has acted contrary to the duties imposed by the law on an employee the Crown seeks to establish the existence of a contract of employment which will then bind that party to the terms of the contract eg an employee's duties of confidentiality to his employer.<sup>45</sup>

<sup>36</sup> **Riordan v War Office** [1961] 1 WLR 210.

<sup>37</sup> **Inland Revenue Commissioners v Hambrook** [1956] 2 QB 640.

<sup>38</sup> **Terrell v Secretary of State for the Colonies** [1953] 2 QB 482.

<sup>39</sup> **Kodeeswaran v A.G. for Ceylon** [1970] AC 1111 Privy Council.

<sup>40</sup> **Rederiaktiebolaget Amphrite v R** [1921] 3 KB 500.

<sup>41</sup> **Sutton v A.G.** [1923] 39 TLR 294

<sup>42</sup> **R v Civil Service Appeal Board ex-parte Bruce** (1988)

<sup>43</sup> **R v Lord Chancellor's Department ex parte Nangle** (1992)

<sup>44</sup> **Lucas v Lucas** [1943] Probate 68

<sup>45</sup> See **A.G. v Johnathan Cape** [1976] 1 Q.B. 752. **A.G. v Observer & Guardian** Times 26.7.86. **A.G. v Guardian** [1987] 3 All.E.R. 316. **A.G. v Observer** Times 11.2.88.

## Constitutional and Administrative Law

Whilst, as Fredman & Morris point out, the attitude of the Crown towards the existence or otherwise of a contract of employment is very pragmatic, it will later be seen, the attitude of civil servants towards the existence of such a contract has been equally pragmatic.

For certain limited purposes, contracts have by statute been deemed to exist: **Trade Union and Labour Relations Consolidation Act 1992**.

To establish a contractual relationship does not guarantee that you would get enforceable rights. **Rodwell v Thomas** suggested that you would not. **I.R.C. v Hambrook** thought that some terms were enforceable and the same point was made in **McLaren v Home Office**.<sup>46</sup> In **Bruce** the view was stated that the Crown has no power to vary terms at will.

### Statutory employment provisions regarding civil Servants

The previous considerations state the common law position. However in many situations the relationship is considerably altered by statute, of which there have been several the most recent being the Employment Rights Act 1996, replacing the **s13 Employment Protection and Consolidation Act**. The Act is of general application. It affects the Crown, subject to certain limitations.

The provisions of the Act can be excluded by a relevant minister if he issues a certificate to state that they should be excluded. The effect of certification was evident in the **G.C.H.Q.** case where a minister certified G.C.H.Q. employees so that the executive was able to remove the right of workers to join a trade union and to strike. The certification was upheld by the courts on the basis of national security.

An uncertified civil servant can complain to an Industrial Tribunal if he feels that he has been unfairly dismissed. The tribunal can, if it feels that he or she has not been fairly dismissed :-

- (a) Recommend reinstatement to the same or a similar job. If the employer does not reinstate, the amount of compensation will reflect that refusal.
- (b) Money compensation - where reinstatement is not considered to be the appropriate remedy or where the tribunal feels that reinstatement would not be possible in the circumstances. The levels of compensation are quite low - £2,000 - £5,000. The particular circumstances may lead to higher levels of compensation but this is unusual.

Because of this the plaintiff might prefer to rely on the common law for a remedy for breach of contract, despite its uncertainty. The problem is that the applicant must establish the existence of a contract of employment before he can claim damages for breach of that contract.

In general, statutes have considerably improved the legal standing of civil servants. In reality, Hood Phillips maintains that Civil servants have a very high degree of job security as a result of the agreed mechanisms and codes of practice in the Civil service for the dismissal of staff, which until recent years were at a much lower rate than in private industry. Similarly, Bradley and Ewing note that much of the regulation of Civil Servants is through the Civil Service Management Code, produced through prerogative powers, and they suggest that it could have an influence on the courts, though it does not appear to be enforceable as such.

Departmental rules clearly help as they provide procedures that have to be followed before action is taken against a Civil Servant. This will include the right to a hearing. Civil servants can appeal to the Civil Service Appeal Board (C.S.A.B.) composed of a trade union representative, a department official and an independent chairman. It can recommend that the decision be revoked or that compensation be paid. Its recommendations are generally followed and it publishes an annual report. The Board must give reasons for its decisions according to **R v Civil Service Appeal Board ex parte Cunningham**,<sup>47</sup> and a refusal to implement its decisions may well give a right to judicial review. Personnel matters it can be noted are one of the areas outside the remit of the Parliamentary Ombudsman though the Select Committee on the Ombudsman has suggested that they should not be.

<sup>46</sup> **McLaren v Home Office** (1990).

<sup>47</sup> **R v Civil Service Appeal Board ex parte Cunningham** (1991)

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### Judicial Review of the decision to dismiss.<sup>48</sup>

Like any other quasi judicial decision made by a public body affecting the legal interests of a private citizen, with locus standi, the decision to end the employment of a civil servant may be subject to judicial review in the Queens Bench Division of the High Court, providing all other remedies have been exhausted. If there is an appeals board available or if the applicant can apply to an industrial tribunal for unfair dismissal or if there is a contract of employment and he can apply to the courts for a remedy for breach of that contract, he must do so. Judicial review is not available as a method of appeal from the findings of tribunals and court hearings.

It as made clear in **O'Reilly v Mackman**,<sup>49</sup> that Judicial Review is only available for Public Law disputes, not civil law disputes, so the existence of a contract of employment precludes an application.<sup>50</sup> The fact that the Civil Service Pay and Conditions Code states that civil servants do not have a contract of employment enforceable in the courts,<sup>51</sup> has not been accepted as conclusive proof by the courts that no contract exists and has not prevented the courts making rulings on the issue up to date. A civil servant's best interests may therefore be best served by proving that he was not employed under a contract of employment. In **R v Civil Service Appeal board ex-parte Bruce**,<sup>52</sup> Bruce argued against the existence of a contract of employment in order to seek judicial review.<sup>53</sup>

The effect of a prerogative order of certiorari is to quash the decision to terminate employment. The result is that employment never ceases so that all back pay is recoverable. Judicial review does not however prevent the department from seeking supportable grounds to terminate the employment in the future providing a method, which the court would not find objectionable is employed. Judicial review examines the exercise of the decision to dismiss and rules on whether the decision was one that could reasonably have been reached under criteria developed in **Associated Picture Houses v Wednesbury Corp**,<sup>54</sup> not whether the court would in the circumstances have dismissed the applicant.

Judicial review examines the decision to dismiss to see if the decision to dismiss took into account relevant information and may examine the availability or otherwise of opportunities afforded to the employee to present his side of the argument and to defend himself as in **Ridge v Baldwin**.<sup>55</sup>

### The recovery of arrears in wages by Civil Servants.

It was decided in **Kodeeswaran v A.G**<sup>56</sup> that a civil servant is entitled to pay he has earned during his employment, confirming **Sutton v A.G.**<sup>57</sup> which had also held that arrears in wages are recoverable. However the extent of recover was limited in **Terrell v S.S. for the Colonies**<sup>58</sup> which held that wages up to the time of dismissal were recoverable but did not extend to post dismissal wages. Even less generous was the case of **I.R.C. v Hambrook**<sup>59</sup> which suggests that a quantum meruit for arrears of wages can be recovered.

According to **Mulvena v Admiralty**,<sup>60</sup> **Lucas v Lucas**<sup>61</sup> and **Gibson v East India Co.**<sup>62</sup> civil servants cannot claim arrears in pay: These however are rather old cases and it is most likely that the more recent authorities, which lean towards some degree of recovery, even if not total, would be followed today.

<sup>48</sup> Permission to bring an action is sought under the SCA 1998 and the Rule 54 CPR 1998.

<sup>49</sup> **O'Reilly v Mackman** [1983] 2 AC 237

<sup>50</sup> See also **R v East Berkshire A.H.A. ex pte Walsh** [1985] Q.B. 152, **Davy v Spelthorne B.C.** [1984] 1 AC 262, **R v S.S. for Home Dept ex pte Benwell** [1985] QB 554, **R v Liverpool C.C. ex pte Ferguson** [1985] I.R.L.R. 501. and **Home Office v Robinson** [1982] 1 C.R. 31.

<sup>51</sup> para 14 Civil Service Pay and Conditions Code

<sup>52</sup> **R v Civil Service Appeal board exparte Bruce** Q.B.D. June 19 [1987]

<sup>53</sup> See the Fredman & Morris article in Public Law 1988 pp58-77.

<sup>54</sup> **Associated Picture Houses v Wednesbury Corp** [1948] KB 223,

<sup>55</sup> **Ridge v Baldwin** [1964] AC 40.

<sup>56</sup> **Kodeeswaran v A.G** [1970] AC 1111

<sup>57</sup> **Sutton v A.G.** [1923] 39 TLR 294

<sup>58</sup> **Terrell v S.S. for the Colonies** [1953] 2 QB 482

<sup>59</sup> **I.R.C. v Hambrook** [1956] 2 QB 640. See also **Picton v Cullen** [1900].

<sup>60</sup> **Mulvena v Admiralty** [1926] Scotland 201

<sup>61</sup> **Lucas v Lucas** [1943] Probate 68

<sup>62</sup> **Gibson v East India Co** [1839] 5 Bing NC 262

# Constitutional and Administrative Law

## MAIN ISSUES

- 1 **Contract of Employment** – breach of contract – lost wages and arrears of wages – examine whether or not there was a contract and if so if the law allows recovery of wages.
- 2 **Employment Tribunal Rights:** to unfair and wrongful dismissal – re-instatement – double indemnity for refusal to reinstate – and exemplary damages for discrimination.
- 3 **Certification by Minister** – Judicial Review of Certification – was there a genuine issue of national security and was the decision to certify necessary / reasonable in the circumstances.
- 4 **Judicial Review of Executive Action** - Whether dismissal under Royal Prerogative power reasonable and proportionate exercise of that power.
- 5 **Judicial Review of conduct of disciplinary boards** – examines process for compliance with requirements of Natural Justice – not the merits of decision.

## Act of State : The Royal Prerogative in Foreign Affairs.

### What is an Act of State?

Acts of State relate to foreign states / foreign nationals. It deals with issues of war, peace, treaties, annexation of territory, the sending / receiving of diplomatic representatives and the recognition of foreign states.

### Definitions

**Professor Wade** : An Act of State is "... an act of the executive ....." an " .... act done by the Crown ...." An Act of State is "an act done by the Crown as a matter of policy, in relation to another state or in relation to an individual, who is not in allegiance of the Crown."

It was stated in **Salaman v Secretary of State for India**<sup>63</sup> by Fletcher Moulton L.J. that an 'Act of state is essentially an act of sovereign power and cannot be challenged, controlled or interfered with by the municipal courts.'

In **Nissan v A.G.**<sup>64</sup> Wilberforce L stated that Act of State signifies two broad rules, namely :-

- a) The Crown (or its servants) will have a defence to torts or crimes committed outside the jurisdiction if it can be shown that the act was that of the Crown or was authorised or, at least, ratified by it.
- b) The U.K. courts will not "generally" question actions authorised by the Crown or by a foreign government once convinced that the action constitutes an Act of State.

The word 'generally' signifies that there may be circumstances when the courts may be prepared to question such activities. It is in fact best seen as a bar to action rather than a defence.

Bradley & Ewing similarly state that Act of State may be used to refer to three distinct notions:

- a) an exercise of prerogative power.
- b) the exercise of prerogative power in foreign affairs.
- c) as a procedural device to oust the jurisdiction of the courts.

The above statements tell us something about the nature of Act of State and the relationship between Act of State and the courts, but leave several questions unanswered.

### Some Questions to Consider

- What amounts to an Act of State?
- Is the jurisdiction of the courts completely ousted by an assertion of Act of State by the Crown?
- Where can an Act of State occur?
- Who can and who cannot be adversely affected by an Act of State?
- Who owes allegiance to the Crown?
- What amounts to a foreign state?
- Who is protected by Act of State?
- What is the legal basis for the doctrine if it is not prerogative?

<sup>63</sup> **Salaman v Secretary of State for India**

<sup>64</sup> **Nissan v A.G.** [1970] AC 179

## Constitutional and Administrative Law

### What constitutes an Act of State? The 3 essential criteria :-

In order to qualify as an action falling into the Act of State category, it must be a matter of:

- High Policy,
- by the Crown exercising crown powers as
- a matter of necessity.

An Act of State is "an act of sovereign power" Fletcher Moulton in **Salaman v S.S for India** – i.e. of a power that is peculiar to the Crown, similar to, if not part of the royal prerogative, arising out of the common law, not by statute.

To be an Act of State, the act concerned, must have been authorised by the Crown either prior to execution or subsequently ratified. Thus in **Buron v Denman**<sup>65</sup> it was held that the Crown had retrospectively adopted a policy of actively suppressing slavery, albeit, sometime after the act had been carried out. An act, to come within the ambit of that policy must be necessary to the performance of that policy. If the policy could be achieved without a certain course of action then it may not be justified as an Act of State.

### Act of State and The Courts

It was stated by Fletcher Moulton L.J. in **Salaman v Secretary of State for India** that an 'Act of state...cannot be challenged, controlled or interfered with by the municipal courts.'

This does not mean that the executive can do anything merely by claiming Act of State. The courts retain jurisdiction to ascertain whether or not the act amounts to an act of state, in the same way that they will examine the existence and scope of the royal prerogative in relation to domestic affairs.

Thus the notion of the Act of State is that where a person suffers from an Act of State, they cannot bring an action in the courts, or more precisely, once the court has decided that an Act of State is involved, they will not allow the case to proceed.

### Where can an Act of State occur?

**R v Bottrill**<sup>66</sup> demonstrates that Act of State may occur within the U.K. territory, whilst **Buron v Denman** demonstrates that Act of State may occur outside the U.K. on the High Seas or on foreign territory. The deciding factor is perhaps therefore in relation to the status of the individual in conjunction with the location of the act concerned.

Reid and Wilberforce stated in **Nissan v A.G.** that "this House is not called upon to give a decision on the matter of the royal prerogative but there would be difficulty in holding that the prerogative recognised in **A.G. v De Keyser's Royal Hotel** and **Burmah Oil v Lord Advocate** could operate in foreign territory the implication being that certain acts which might be treated as exercise of the royal prerogative become Acts of State when carried out on foreign territory and are thus beyond the jurisdiction of the court.

### Act of State in relation to individuals

Act of State needs to be considered in relation to several classes of individual : British subjects within and outside U.K. territory, friendly aliens within and outside U.K. territory and enemy aliens within and outside U.K. territory.

### British subjects within British Territory.

**Walker v Baird**.<sup>67</sup> Following orders from the British Government, British naval officers took a lobster factory in Newfoundland (at that time British territory). In an action for damages for trespass to property the court held that the Crown could not plead Act of State as a defence against a British Subject within British territory.

Lord Reid in **Nissan v A.G.** stated that "*A British subject - at least a citizen of the U.K. & Colonies - can never be deprived of his legal right to redress by any assertion of the Crown that the acts complained of were Acts of State.*"

### British subjects abroad

Whilst Act of State cannot be pleaded against British subjects within U.K. territory it may just be possible against a British subject abroad.

<sup>65</sup> **Buron v Denman** (1848) 2 Ex 167

<sup>66</sup> **R v Bottrill (ex pte Kuechenmeister)** [1947] KB 41

<sup>67</sup> **Walker v Baird** (1892) AC 491

## Constitutional and Administrative Law

No clear ratio was established regarding British citizens abroad in *Nissan v A.G.* though Lord Reid thought it could not be pleaded.

Lords Morris, Pearce, Wilberforce and Pearson state in *Nissan v A.G.* that "It is not necessary to determine whether Act of State can in any circumstances be pleaded against a British subject in connection with acts done outside the realm."

### Friendly aliens within the U.K.

Act of State cannot be pleaded against a friendly alien in British territory. The reason is that whilst a person owes allegiance to the Crown, albeit only temporary allegiance through the issue of entry visas and passport controls, they come under the protection of the crown - though they can then be subject to the royal prerogative. *Johnson v Pedlar*,<sup>68</sup> concerned a naturalised US Citizen and ex patriot Irishman, who was involved in the 1916 Dublin Rebellion. At that time Dublin was part of the U.K. and Americans were considered to be friendly aliens. He had been arrested. On alleged executive authority. his money and passport were held by the Commissioner of Police. He sought their return. The court held that a plea of Act of State does not lie against a friendly alien for matters occurring within the U.K.

### Enemy aliens inside the U.K.

*R v Bottrill* related to a German National who had lived in England since 1928 but who had not become naturalised. He had been interned (detention without trial) by the Home Secretary during the 2nd World War. After the war he applied for a writ of Habeas Corpus. The court decided that the detention of enemy aliens is an Act of State and so the court action could not continue. From this it is clear that the Doctrine of Act of State applies to aliens within the U.K.

The existence or otherwise of a state of war with a foreign country was certified by the Secretary of State. Even though the war had ended a certificate to the effect that the U.K. was still at war with Germany was held by Scott LJ to be sufficient to bring his continued detention within the realm of Act of State.

Scott LJ "*In the British constitution, which is binding in all British Courts, the King makes both war and peace, and nonetheless so, in the eyes of the law, that he does so as a constitutional monarch upon the advice of his democratic cabinet. If the King says by an Act of State that the Commonwealth of countries over which he reigns is at war with a particular foreign state, it is at war with that state, and the certificate of the Secretary of State is conclusive.*"

However, in recent times the courts have rejected the conclusiveness of certificates by the government to the effect that a state of war exists - and have insisted on deciding whether or not such a situation exists on the facts, in commercial cases regarding insurance claims.

### All Aliens outside British Territory

In *Buron v Denman*,<sup>69</sup> a British warship captain had set fire to the property of a Spaniard and released his slaves, off the coast of Africa. The Spaniard tried a court action in the British courts. The court held that there was a general order to suppress slavery and therefore approved the captain's actions. The government had decided after the event that this was policy. The Spaniard could not continue his action in the court. From this it is clear that Act of State affects all foreigners outside British Territory.

### Who is a British subject ?

Since the status of an individual making a claim against the Crown is a central issue regarding the defence of Act of State it is important to know who is a British subject. Note that the status of an individual can change.

What exactly is the scope of the concept of 'owing allegiance' to the Crown? Note that it has been held that those using British Passports owe allegiance to the Crown.<sup>70</sup> Following *R v S.S. for Commonwealth Affairs ex p Everett*,<sup>71</sup> the courts will now review decisions relating to applications for and confiscation of passports.

What is the position regarding Commonwealth Citizens? Does the situation vary depending on whether or not the Commonwealth Country concerned still retains the Queen as Head of State? What is the status of people living in a British protected territory? These are difficult issues!

<sup>68</sup> *Johnson v Pedlar* [1921].

<sup>69</sup> *Buron v Denman* (1848) 2 Ex 167.

<sup>70</sup> *D.P.P. v Joyce* [1946] A.C. 347 - Lord Haw-Haw - who was tried for treason.

<sup>71</sup> *R v S.S. for Commonwealth Affairs ex parte Everett* 10.12.1987 Times.

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What is the effect of the **British Nationalities Act 1981**? Independent Citizens of commonwealth Countries are no longer British Citizens.

De Smith compares the terms "British subject" and "British Citizen" which if correct could result in a violation of the European Convention on Human Rights and the **Human Rights Act 1998**.<sup>72</sup>

### Act of State & the Royal Prerogative.

**Munroe** : "*The royal prerogative may be defined as comprising those attributes peculiar to the Crown which are derived from the common law, not statute, and which still survive.*" Compare this with the definitions provided above of 'Act of State'. Whilst some writers treat Act of State as merely the exercise of the royal Prerogative in relation to foreign affairs, De Smith points out that there are problems in so doing. Thus Reid and Wilberforce said in **Nissan v A.G.** that "*this House is not called upon to give a decision on the matter of the royal prerogative but there would be difficulty in holding that the prerogative recognised in A.G. v De Keyser's Royal Hotel and Burmah Oil v Lord Advocate could operate in foreign territory*" implying that Act of State is the Exercise of the royal prerogative in a foreign land.

Until recent cases such as **G.C.H.Q.** it was possible to state that exercise of the Royal Prerogative and Act of State were non-justiciable. Now it is clear that there are many circumstances where the exercise of the Royal Prerogative in domestic affairs is justiciable and that the courts are prepared to examine whether the exercise of a discretion is reasonable in all the circumstances of the case.<sup>73</sup> In **R v S.S. for the Home Department ex pte Ruddock**<sup>74</sup> a claim of national security failed to prevent the judge examining the issue of a warrant to tap the phone of C.N.D. members, since there was a legitimate expectation that Government Guidelines on phone tapping would be followed. In the event he found that the guidelines had not been breached.

**Nissan v Attorney General.** Nissan was a citizen of the U.K. and colonies (having become naturalised). He was the lessee of a hotel in Cyprus, which was an independent republic within the Commonwealth.

The hotel was occupied by soldiers (British Troops) under an agreement (during a cease-fire truce) between the U.K. and the Cyprus Government. The making of the agreement was clearly an Act of State. The occupation by the peace keeping force continued for several months. Then the soldiers were turned into a United Nations Peace Keeping Force. Nissan sought compensation from the Crown for an alleged lawful exercise of the royal prerogative, further claiming that he should be compensated for subsequent damage arising out of the exercise of that prerogative, following the decision in **Burmah Oil**. Since there was no war in progress the **War Damages Act 1965** did not preclude his claim. He lost the use of the hotel, his stores were consumed by the troops and property was damaged. After the British Troops left, a Finnish force occupied the hotel. Nissan had been told by the British High Commissioner that he would receive compensation and so alternatively claimed that there was a contractual obligation to pay.

It was held that the occupation was not an act of state. There was no state of war in operation and Cyprus was part of the Commonwealth i.e. British Territory and Nissan was a British citizen. Consequently Nissan could maintain a claim for compensation under the royal prerogative.

Lord Pearce "The prerogative is a right to take and pay. When the sovereign and subject meet through the operation of the prerogative in the army abroad there is no inherent reason why it should not be valid."

**Held** : British forces under U.N. control continue to be British Forces - acting under the royal prerogative so compensation was also payable for that period.

**Held** : There could be no claim for the period of Finnish occupation.

**Held** : There was a valid contractual claim. Under the Crown Proceedings Act 1947 contractual obligations can be enforced against the Crown.

Lords Reid and Wilberforce doubted that the findings of **Burmah Oil** were applicable to acts done on foreign soil.

<sup>72</sup> see the **East Africans Case**.

<sup>73</sup> See also **Laker Airways**

<sup>74</sup> **R v S.S. for the Home Department ex pte Ruddock** [1987] 2 All.E.R. 518

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### Who is protected by Act of State ?

The successful claim of Act of State removes the case from the court, protecting the executive (government ministers) and Civil servants / Crown servants (e.g. armed forces) and agents of the Crown from liability for actions carried out in the course of an act of state. It is important to establish the status of a person claiming to exercise prerogative powers. If the person claiming to have carried out an act of state does not act on behalf of the crown then the act concerned would not be an act of state.

### MAIN ISSUES

- 1 **British Citizen** (or otherwise owing allegiance) – Can Act of State be pleaded ? If not Crown entitled, subject to reasonableness etc, to take but with a duty to pay.
- 2 **Alien in the UK** – distinguish between friendly and alien
- 3 **Alien outside UK** – Act of State may be pleaded by the crown to take action out of court.
- 4 **Criteria to be an Act of State**
  - a) High Policy
  - b) Necessity
  - c) By someone acting on behalf of Crown
    - i) Not as agent of outside body eg UN or Foreign Government
    - ii) Not acting beyond scope of or outside authority of Crown – eg a jaunt of their own.
- 5 **Effect** : Protects Crown and exempts those carrying out the act from personal liability and deprives the claimant of compensation.



# Constitutional and Administrative Law

## ROYAL PREROGATIVE - ACT OF STATE MATRIX

### Definition : What is the Royal Prerogative and the consequences of its use?

A power, unique to the crown – arising out of or recognised by the common law, but not traditionally subject to judicial control, exercised by or on behalf of the Crown. In respect of those within the protection of English Law, it provides of the state with a right to take but subject to a duty to pay compensation to the individual where legal rights and interests of the individual are adversely affected by exercise of the power. **A.G. v De Keyser's Royal Hotel, Burmah Oil, Nissan v A.G.**

Where the power is used in relation to foreign affairs it may be classified as “Act of State” whereby the jurisdiction of the courts to examine the legality of the act are removed, thereby depriving a claimant of any right to compensation for losses arising out of the exercise of the power.

### Traditional relationship between the Courts and exercise of the Royal Prerogative

- 1 Courts will examine whether an asserted prerogative exists.
- 2 There can be no new prerogative powers but new uses of old powers permissible. **BBC v John.**
- 3 Statute prevails over prerogative and in case of conflict will displace the prerogative.
- 4 A prerogative cannot over-ride EC Law and will be subject to the Human Rights Act 1998.

### Modern Developments affecting Judicial Review of the Royal Prerogative

**GCHQ : Laker Airways** : The courts will now examine exercise of the Royal Prerogative requiring its use to be reasonable and thus possibly proportionate to the outcomes the executive seek to achieve. Diplock's 4 criteria for reasonableness following but distinct from Lord Green's Wednesbury Rules reasonableness test developed in relation to ultra vires and statutory powers.

The courts will not examine the exercise of prerogative powers in the absence of a personal legal interest – Treaty making powers are beyond the remit of the courts.

### Civil Servants, Conditions of Employment and the Royal Prerogative

- 1 **Contract of Employment** – breach – lost wages / arrears of wages.
- 2 **Employment Tribunal Rights**: unfair and wrongful dismissal, re-instatement – double indemnity.
- 3 **Certification by Minister** – Judicial Review of Certification – was there a genuine issue of national security and was the decision to certify necessary / reasonable in the circumstances.
- 4 **Judicial Review of Executive Action** – Reasonableness test.
- 5 **Judicial Review of conduct of disciplinary boards** – examines process for compliance with requirements of Natural Justice – not the merits of decision.

### The Royal Prerogative in Foreign Affairs : Act of State

- 1 **British Citizen** (or otherwise owing allegiance) – Can Act of State be pleaded ? If not Crown entitled, subject to reasonableness etc, to take but with a duty to pay.
- 2 **Alien in the UK** – distinguish between friendly and alien
- 3 **Alien outside UK** – Act of State may be pleaded by the crown to take action out of court.
- 4 **Criteria to be an Act of State** a) High Policy, b) Necessity, c) Within Crown Authority i. e. i) Not an agent of UN or Foreign Government and ii) Not on a jaunt of their own.
- 5 **Effect** : Protects Crown and exempts those carrying out the act from personal liability and deprives the claimant of compensation.