WHAT THE CROWN MAY DO

1. It is now established, at least at the level of the Court of Appeal (so that Court has recently stated)[1], that, absent some prohibition, a Government minister may do anything which any individual may do. The purpose of this paper is to explain why this rule is misconceived and why it, and the conception of the "prerogative" which it necessarily assumes, should be rejected as a matter of constitutional law.

2. The suggested rule raises two substantive issues of constitutional law: (i) who ought to decide in what new activities the executive may engage, in what circumstances and under what conditions; and (ii) what is the scope for abuse that such a rule may create and should it be left without legal control.

3. As Sir William Wade once pointed out (in a passage subsequently approved by the Appellate Committee[2]),

> "The powers of public authorities are...essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion."

If a minister may do anything that an individual may do, he may pursue any purpose which an individual may do when engaged in such activities. He may also act just as unfairly or as unreasonably as any individual may do when doing such things. In conducting such activities his discretion will be as unfettered as any individual's is. Thus, when considering a blacklist policy that the Government had adopted in the 1970s, Sir William stated that[3]

> "In placing its contracts as and how it wishes the government is exercising the ordinary liberty possessed by anyone (and I hope no one will call it prerogative). The government's duty not to abuse that liberty is constitutional rather than legal...Unconstitutional, yes; illegal, no."

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[1] See ***R (Shrewsbury & Atcham BC and Congleton BC) v the Secretary of State for Communities and Local Government and Shropshire CC*** [2008] EWCA Civ 148 per Carnwath LJ at [44] and [49], per Richards LJ at [72].

[2] See ***R v Tower Hamlets LBC ex parte Chetnik Developments Ltd*** [1988] AC 858 at p872.

[3] See *Constitutional Fundamentals* 1989 rev ed at p71.

If a minister may do anything an individual may do, judicial review of the reasonableness of what he does or of the purposes which he may pursue when engaged in such activities ought not to be available.

4. In the decision which is said to have to established the rule, ***R v the Secretary of Health ex p C***[4], however, the Court of Appeal accepted that, in doing what any individual may do, a minister may not act unfairly or unreasonably (apparently oblivious of the fact that this also meant that a minister may not do anything that an individual may do). More recently, in ***R (Shrewsbury & Atcham BC and Congleton BC) v the Secretary of State for Communities and Local Government and Shropshire CC***[5], the members of the Court of Appeal were divided on whether ministers may only act "for the public benefit" or for "identifiably governmental purposes". Richards LJ, whose decision at first instance had been upheld by the Court of Appeal in ***ex p C***, considered (consistently with the supposed rule) that there were no such limitations on the purposes for which a minister may act when doing something that an individual may also do. Carnwath LJ considered that there were such limitations (consistently with the development of public law in providing protection against the abuse of governmental powers).

5. Underlying this disagreement is the other substantive issue of constitutional law that the supposed rule raises. The Crown and ministers have powers for particular purposes which are vested in them by enactment. The Crown is also recognised at common law to have established non-statutory powers for particular purposes (which ministers may exercise as agents of the Crown). The question is: who is to decide in what new activities may ministers engage, in what circumstances and under what conditions? The executive or Parliament? Any rule that, in the absence of some prohibition, a minister may do anything which an individual may do gives that decision to ministers rather than to Parliament.

6. To appraise the justifications offered for this rule, however, it is necessary to consider in what circumstances authority may be required for government action and what the sources of such authority may be. In particular it is necessary to consider what the "prerogative" consists of, as the supposed rule that a minister may do anything that an individual may do can arise

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4 [2000] 1 FLR 627, [2000] 1 FCR 471, [2000] All ER D 215.

5 *Supra.*

only if Blackstone's conception of the prerogative, rather than Dicey's, is adopted.

SOURCES OF AUTHORITY FOR GOVERNMENT ACTION

7. It is said that a Government minister may do anything that any individual may do because that is what the Crown may do. Now, as Maitland famously said[6],

> "there is one term against which I want to warn you, and that term is 'the crown'. You will certainly read that the crown does this and the crown does that. As a matter of fact we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers...the crown is a convenient cover for ignorance: it saves us from asking difficult questions... do not be content until you know who legally has the power - is it the king, is it one of his secretaries: is this power a prerogative power or is it the outcome of statute?"

8. The assumption that Maitland apparently made was that the only two sources from which ministers might derive a legal power to act were an Act of Parliament or the prerogative. That assumption was explicitly reflected in Dicey's conception of the prerogative. For Dicey[7] the prerogative is

> "the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers. *Every act which the executive government can lawfully do without the authority of an Act of Parliament is done by virtue of this prerogative*."(emphasis added)

9. Dicey's conception of the prerogative gains added constitutional significance when combined with two further principles of English constitutional law. The first, established in ***the Case on Proclamations***[8], is that "the King hath no prerogative, but that which the law of the land allows him." The second is that new prerogatives cannot be created. As Lord Bingham recently stated[9], "over the centuries the scope of the royal prerogative has been steadily eroded

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6 *The Constitutional History of England* CUP 1908 at p418.

7 See *The Law of the Constitution* (1915) 8th ed p421.

8 12 Co Rep 74 at 76.

9 See ***R (Bancoult) v Foreign Secretary (No 2)*** [2008] UKHL 955 at [69]. Although Lord Bingham was dissenting in this case, the point of dissent did not relate to this proposition. The Crown has an indisputable prerogative power to enact primary legislation for a ceded or conquered territory and indeed to legislate for citizenship and immigration control in such territories. The issue was whether it was necessary to find a precedent for the exercise of that prerogative power in that specific context in a particular way (as Lord Bingham assumed) or whether the nature of a primary legislative power is not so constrained. See also eg

and it cannot today be enlarged". The effect of these two principles, when coupled with Dicey's conception of the prerogative, is two-fold. First any new activity on which the executive wishes to embark in respect of which there is no existing statutory or established prerogative power requires authorisation from an Act of Parliament. It thus imposes Parliamentary control over the executive's capacity to undertake such new activities. The second effect, since the Crown has no prerogative but that which the law allows, has been to enable the court not only to determine what non-statutory powers the executive has but also, increasingly, to exercise judicial control over any abuse of such powers where the issues are justiciable[10].

10. Blackstone's conception of the prerogative, however, was more limited than Dicey's. Blackstone thought[11] that the term

> "can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with the subject it would cease to be prerogative any longer."

Sir William Wade espoused an even more limited conception of the prerogative than Blackstone. He suggested[12] that "the two tests for a genuine prerogative power seem to me to be (a) does it produce legal effects at common law and (b) is it unique to the Crown and not shared with other persons?"[13]. This would have excluded in his view activities which many

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per Diplock LJ ***BBC v Johns*** [1965] Ch 32 at p79 ("it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative"); per Lord Reid ***Burmah Oil v the Lord Advocate*** [1965] AC 75 at p101 and 108("the proper approach is a historical one: how was [the prerogative] used in former times and how has it been used in modern times...the prerogative, having been virtually dormant or in abeyance, should not, in my view, be regarded as any wider today than it was three centuries ago"); per Dillon J ***Attorney-General of the Duchy of Lancaster v GE Overton (Farms) Ltd*** [1981] Ch 333 at p341 ("the Crown cannot unilaterally extend its prerogative rights. That is a matter for Parliament.") affd [1982] Ch 277.

10 The most striking recent illustration is the assertion by the Appellate Committee in ***R (Bancoult) v Foreign Secretary (No 2)*** [2008] UKHL 955 that there was "no reason why" the prerogative power to enact primary legislation, and give a constitution to, a conquered or ceded territory "should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action": per Lord Hoffmann at [35].

11 *Commentaries on the Laws of England* Vol1 p239.

12 HWR Wade "*Procedure and Prerogative in Public Law*" (1985) 101 LQR 180 at p193.

13 As Professor Paul Craig has pointed out, ""Professor Wade's definition of the prerogative was even narrower than Blackstone's in demanding not only that genuine prerogative powers have the quality of being unique [to the executive and not possessed by ordinary persons], but in stipulating also that they produce legal effects at common law in some immediate sense": see P. Craig "*Prerogative, Precedent and*

would regard as exercises of the prerogative, such as the power to appoint and dismiss ministers, to issue passports and even to enter treaties[14]. But, even if the wider approach that Blackstone endorsed is adopted, it is plain that there are things that ministers may do which are not authorised by statute which ordinary individuals may also do. Given this conception of the prerogative, therefore, unless any such activity is unlawful, there must be some "third source" of authority for government action other than Parliament and the prerogative or no requirement for one[15].

11. There are two candidates which have been advanced as the "third source" of authority for government action. The first (and generally preferred) basis is the claim that the Crown is a corporation sole at common law and that such a corporation may itself do anything any individual may do. The second (but less well regarded) basis is that the monarch is Herself an individual and that, as Her agents, ministers of the Crown may, therefore, do anything an individual may do. The alternative theory (which is perhaps even less well regarded) is that there is no need for the Crown to have any source of authority for doing something that any individual may do. The Crown may do it simply because it is not prohibited from doing it.

WHAT IS THE 'THIRD SOURCE' OF GOVERNMENT POWER OR IS ONE REQUIRED?

12. In order to assess the strength of the arguments advanced in support of the contention that the Crown may do anything an individual may do, it is necessary to refer to legal history, if only to understand some of the anachronisms and misconceptions that have confused recent consideration of this contention.

13. That history illustrates that it cannot be inferred that the Crown may do anything an individual may do merely from the fact that the Crown may be recognised as a corporation or

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Power" in C. Forsyth and I. Hare eds *The Golden Metwand and the Crooked Cord* OUP 1998 at p86.

14 See Sir William Wade *Constitutional Fundamentals* 1989 rev ed at p59, 60, 63.

15 The issues are discussed *inter alia* in BV Harris "*The 'third source' of authority for government action*" (1992) 108 LQR 626-651; Phillip A Joseph "*The Crown as a legal concept*" (1993) NZLJ 126-130 (Part I) and 179 (Part II); Lord Lester of Herne Hill and M Weait "*The Use of Ministerial Powers without Parliamentary Authority: the Ram doctrine*" [2003] PL 415-428; M Cohn "*Medieval chains, invisible inks: On non-statutory powers of the executive*" (2005) 25 OJLS 97-122; BV Harris "*The 'third source' of authority for government action revisited*" (2007) 123 LQR 225-250; Woolf, Jowell and Le Sueur *De Smith's Judicial Review* 6th ed at [5-022]-[5-025]; C Lewis QC *Judicial Remedies in Public Law* 4th ed at [2-046]-[2-051]; HWR Wade and CF Forsyth *Administrative Law* 10th ed 2009 at p181-183.

from the fact that Her Majesty is an individual. The attempt to equate the Crown's powers or capacities with those of other corporations or an individual ignores the fact that in law the Crown is unique. The attempt to infer that the Crown may do anything an individual may do from the absence of any prohibition on such activities also ignores this fact and begs the question it attempts to answer. Nonetheless this historical background does not of itself necessarily show that the suggested rule is wrong. It merely shows that the justifications mainly relied on for it are unpersuasive. What the Crown may do is a question to be answered by reference to more fundamental constitutional considerations.

14. The history relating to the powers of the Crown also illustrates the confusion that results from a failure to distinguish between (a) the capacity in which something may be done, (b) what may be done in that capacity and (c) the legal status of the actor as a corporation or as an individual.

(a) the emergence of the notion of the Crown as a corporation

15. It is, of course, impossible to escape from the fact that the monarch is an individual. But it is sometimes suggested that, even in the medieval period, no distinction was drawn between the monarch and the Crown. That appears to be incorrect[16]: by the time of the English Civil War, "the distinction..between the office and the person of the king....was many centuries old and known in England"[17]. But there was an obvious practical impediment to a logical development fully recognising the different capacities, public and personal, in which the monarch might act: the fear of endorsing treason.

16. The distinction between the Crown and the individual who was the monarch for the time being was clearly made in the Declaration of 1308 by the Lords Ordainer. There it had been asserted that:

> "Homage and oath of allegiance are more by reason of the Crown than by reason of the King's person, and are more bound to the Crown than to the person. And that appears from the fact that, before the estate of the Crown has passed by descent, no allegiance is due to the person. Wherefore, if it happen that the king is not guided by reason in regard to the estate of the Crown,

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16 See Ernst H Kantorowicz *The King's Two Bodies* Princeton 1957 at p336-383; Michael Prestwich *Plantagenet England 1225-1360* OUP 2005 p34-36.

17 See Ernst H Kantorowicz *The King's Two Bodies* Princeton 1957 at p21 footnote 36.

his lieges, by oath sworn to the Crown, are justly bound to lead the king back to reason and to repair the estate of the Crown or else their oath would be violated.."[18]

It appears that reliance on the Declaration of 1308 formed part of the indictment on which the younger Hugh Despenser was tried and subsequently brutally executed in 1321[19]. As the judges stated in ***Calvin's Case*** (1607)[20],

> "In the reign of Ed. 2. the Spensers, the father and son, to cover the treason hatched in their hearts, invented this damnable and damned opinion, that homage and oath and ligeance was more by reason of the King's Crown (that is, of his politic capacity), than by reason of the person of the King, upon which opinion they inferred execrable and detestable consequences...All of which were condemned by two Parliaments."

17. This problem did not mean that no distinction was drawn between the public and personal capacities of the king. As *Calvin's Case* itself recognised, by 1607 the courts had themselves recognised that the king had different capacities. As Sir Francis Bacon put it, "it is one thing to make things distinct, it is another to make them separable"; the king's person and the Crown were "inseparable, though distinct"[21]. The legal theory through which these distinct things were rendered inseparable was the theory that the king had two bodies, a natural body and a "politic body". This theory emerges in three cases reported by Plowden in early part of Queen Elizabeth I's reign[22]. Maitland said that he did "not know where to look in the whole series of our law books for so marvellous a display of metaphysical - or we might say metaphysiological - nonsense" than these cases[23]. Thus in one the Judges declared[24], for example, that:

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[18] See Ernst H Kantorowicz *The King's Two Bodies* Princeton 1957 at p364-5. The coronation oath in 1307 on Edward II's accession distinguished between the king and the Crown: *ibid* at p360.

[19] See Michael Prestwich *Plantagenet England 1225-1360* OUP 2005 at p198-9.

[20] (1607) 7 Co Rep 1a at 11a-b.

[21] See Ernst H Kantorowicz *The King's Two Bodies* Princeton 1957 at p365.

[22] ***Case of Dutchy of Lancaster*** (1561) 1 Plow 212 at 213, 75 ER 325 at p326; ***Willion v Berkeley*** 1 Plow 223 at p243, 244-5, 250, 75 ER 339 at p370, 374, 383 ; ***Sir Thomas Wroth's case*** (1573) 1 Plow 452 at p457, 75 ER 678 at p685. These cases are discussed in FW Maitland "*The Crown as Corporation*" (1901) 17 LQR 131-146 (reprinted in Hazeltine, Lapseley and Winfield eds *Selected Essays* CUP 1936) and Ernst H Kantorowicz *The King's Two Bodies* Princeton 1957 at p7-23; see also JWF Allison *English Historical Constitution* CUP 2007 p50-54.

[23] FW Maitland "*The Crown as Corporation*" (1901) 17 LQR 131-146, reprinted in his *Selected Essays* ed by Hazeltine, Lapseley and Winfield CUP 1936 at p109.

[24] ***Case of Dutchy of Lancaster*** (1561) 1 Plow 212 at 213, 75 ER 325 at p326.

> "to [the monarch's] natural Body is conjoined his Body politic...and the Body politic includes the Body natural, but the Body natural is the lesser, and with this the Body politic is consolidated. So he has a Body natural, adorned and invested with the Estate and Dignity royal; and he has not a Body natural distinct and divided by itself from the Office and Dignity royal, but a Body natural and a Body politic together indivisible; and these two Bodies are incorporated in one Person, and make one Body and not divers, that is the Body corporate in the Body natural, *et e contra* the Body natural in the Body corporate."

18. The point of investing the King with two bodies was to enable the law to recognise the different capacities, public and personal, in which he or she might act whilst not distinguishing between the office and the man (or woman) who held it and in particular to ensure that allegiance was owed to the monarch as an individual, not to the office that he or she held. That emerges clearly from judgment in *Calvin's Case* in which it was reaffirmed that allegiance was owed to the monarch as an individual. In that case the Judges recognised that[25]:

> "It is true that the King hath two capacities in him: one a natural body, being descended of the blood Royal of the realm; and this body is of the creation of Almighty God, and is the subject of death, infirmity and such like; the other is a politic body or capacity so called, because it is framed by the policy of man...; and in this capacity the King is deemed to be immortal, invisible, not subject to death, infirmity, infancy, noneage &c. Now, seeing that the King hath but one person and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland, it is necessary to be considered, to which capacity ligeance is due.....The reasons and cause wherefore by the policy of the law the King is a body politic, are three, viz. 1. *causa majestatis*, 2 *causa necessitatis*, and 3. *causa utilitatis*. First, *causa majestatis*, the King cannot give or take but by matter of record for the dignity of his person. Secondly, *causa necessitatis*, as to avoid the attainder of him that hath a right to the Crown..lest in the interim there be an *interregnum*, which the law will not suffer. Also by force of this politic capacity, though the King be within age, yet he may make leases and other grants, and the same shall bind him; otherwise his revenue shall decay, and the King should not be able to reward service, &c. Lastly, *causa utilitatis*, as when lands and possessions descend from his collateral ancestors, being subjects,..to the king, now is the King seised of the same *in jure Coronae*, in his politic capacity; for which cause the same shall go with the Crown....And these are the causes wherefore by policy of the law the King is made a body politic: so as to these special purposes the law makes him a body politic, immortal and invisible, wheretofore our ligeance cannot appertain."

19. It was shortly after *Calvin's Case* that the judges, when setting out the background in relation to the law on corporations in 1611 in the *Case of Sutton's Hospital*, stated "that every corporation or incorporation or body politic or incorporate, which are all one, either stands

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[25] See 7 Co Rep 1a at 10a and 12a-b.

upon one sole person, as the King, bishop, parson &c or aggregate of many" and that such incorporation required lawful authority by one of four means, one of which was "by the common law, as the King himself, &"[26]. This appears to be the first explicit recognition that that the Crown was a corporation sole at common law[27]. Maitland, who regarded the notion of a corporation sole (which he thought had been developed in relation to ecclesiastical offices[28]) as a "curious freak of English law", treated this doctrine as the "parsonification" of the Crown[29].

20. The idea that the Crown was a corporation sole, reflecting the statements made in *Calvin's Case* and the *Case of Sutton Hospital*, was repeated by Blackstone in his *Commentaries on the Laws of England*[30]. But, as Sir William Holdsworth stated[31], these

> "speculations as to....the corporate character of the king....remained as complimentary mystifications, not as legal doctrines from which any real deductions were drawn. Though the king was said to be a corporation sole, though he was said never to die, it has been necessary to pass many statutes, from the sixteenth century to the nineteenth, to make it clear that the king can own property in his private capacity as distinguished from his politic capacity, and to prevent 'all the wheels of the state stopping or even running backwards' on the demise of the crown."

Thus, at common law, notwithstanding the recognition of the Crown as a corporation sole, on the death of the reigning monarch Parliament was dissolved, legal proceedings abated and royal commissions, whether civil or military, were abrogated with the effect of rendering

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26 See 10 Co Rep 1a at 29b.

27 In the ***Case of Magdalen College, Cambridge*** (1572) 11 Co Rep 66b at 70a the Court had found that an enactment that applied to "any person or persons, bodies politic or corporate" applied to the Queen as She was a person and a body politic. The judges did not say that she was a body corporate as such.

28 The Dutchy of Lancaster was made a corporation by Act of Parliament in the reign of Edward IV in effect owned by the monarch for the time being in right of the Crown: see Ernst Kantorowicz *The King's Two Bodies* Princeton 1957 at p401-2.

29 FW Maitland "*The Crown as Corporation*" (1901) 17 LQR 131-146 reprinted in his *Selected Essays* ed by Hazeltine, Lapseley and Winfield CUP 1936). He had traced the origins of the notion of a corporation sole in an article of that name also reprinted in that collection.

30 see at i 469-470.

31 *History of English Law* Vol 9 p5-6.

subsequent acts of office holders void unless they were reinstated by the succeeding monarch[32].

21. Other developments, however, reflected and gave effect to the increasing separation between the monarch's public and personal capacities. The period after the publication of Blackstone's *Commentaries* witnessed the transformation of the King from one who ruled to one who reigned, a transformation reflected (particularly after the Reform Act of 1832) in the vesting of statutory powers in ministers of the Crown, and, associated with that, the transformation of the King from a monarch who was intended to live off his own to one who lived on a salary[33]. To accommodate this change, detailed statutory provision had to be made, for example, for the monarch to have personal possessions which She may deal with free from controls and restrictions which otherwise govern the Crown Estate and the revenues of the Crown, and which She may dispose of (for example) by will[34].

22. This does not mean that the conception of the Crown as a corporation sole was lost from view. Statute brought other corporations sole into line with the Crown in certain respects. Thus, for example, where any property or any interest therein has been vested in "a corporation sole (including the Crown)" it now passes to the successors from time to time of that corporation (unless and until it is otherwise disposed of by the corporation)[35]. Similarly the fact that the Crown was to be regarded a "corporation sole" as a matter of law was occasionally alluded to subsequently in cases after the Stuart period[36]. It was restated by Lord Diplock in ***Town Investments Ltd v the Department of the Environment***[37]. By contrast, however, in that case

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[32] Notwithstanding decisions that its operation depended on prior notice and an Act of 1696 suspending the legal consequences of a royal demise for six months after the monarch's death, this caused particular difficulties in the colonies: see BH McPherson *The Reception of English Law Abroad* 2007 Supreme Court of Queensland Library at p96-97. For the legal effects of a demise of the Crown: see Halsbury's Laws of England Vol 12(1) *Crown and the Royal Family* 4th ed reissue at [15]-[17].

[33] See RC van Caenegem *An Historical Introduction to Western Constitutional Law* CUP 1995 at p78, 125; FW Maitland *The Constitutional History of England* CUP 1908 p430-447.

[34] See Halsbury's Laws of England Vol 12(1) *Crown and the Royal Family* 4th ed re-issue at [65], [67], [68], ibid *Crown Property* at [355]-[363].

[35] See section 180(1) of the Law of Property Act 1925. Parliament also provided that, on the demise of the Crown, all property, real and personal, vested in the Crown as a corporation sole devolves on his successor: see section 3(5) of the Administration of Estates Act 1925. Neither provision appears to have changed the position of the Crown substantially: see footnote [56] below.

[36] See some of the cases referred to below.

[37] [1978] AC 359 at p384.

Lord Simon thought[38] that the Crown

> "should be considered as a corporation aggregate headed by the Queen. The departments of state including the ministers at their head (whether or not either the department or the minister has been incorporated) are then themselves members of the corporation aggregate of the Crown."

The choice between either view was unnecessary for the decision in that case. But, as Lord Woolf subsequently said ***in re M*** [39],:

> "at least for some purposes, the Crown has a legal personality. It can be appropriately described as a corporation sole or a corporation aggregate...The Crown can hold property and enter into contracts."

23. Of more significance was the principle which was necessary to the decision in ***Town Investments Ltd v the Department of the Environment***, that (as Lord Diplock put it) "executive acts of government that are done by any [minister] are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law"[40]. That principle in its application to the exercise of statutory powers was subsequently effectively abandoned by the Appellate Committee as being constitutionally inappropriate, whether the Crown was a corporation sole or a corporation aggregate, in ***in re M***[41]. In that case the Appellate Committee recognised that what was done in the exercise of a minister's statutory functions relating to immigration was done in his capacity as a minister, not as an agent for the Crown, and that the minister could be liable in that capacity, and not merely as an individual, for what was done in the discharge of such functions[42].

24. By 1998 the position that had been reached, as Halsbury's Laws then said, was that the practical consequences of the Crown being recognised as a corporation sole to which Crown immunities may also apply (apart from meaning that in law Crown never dies and is not regarded as a minor and that the mention of the monarch in statutes includes his successors)

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38 *Ibid* at p400.

39 *Ibid* at p424.

40 *Ibid* at p381; cf Lord Simon at p399-400 (minister is not an entity separate from the Crown).

41 [1994] 1 AC 377; HWR Wade and CF Forsyth *Administrative Law* 10th ed p40 and footnote 6.

42 See at p426-7.

were apparently "meagre"[43].

(b) the contention that as a corporation the Crown may do anything an individual may do

25. The case which is said to have established shortly afterwards, at least in the Court of Appeal, that, as a corporation sole, the Crown may do anything that an individual may do is ***R v the Secretary for Sate for Health ex p C***[44]. One issue in that case was whether the Secretary of State had power to maintain a "Consultancy Service Index", which was a unpublished list of people about whom there were doubts as to their suitability to work with children, which the Secretary of State expected all employers in the child care field to consult before employing anyone. There was then no statutory power for him to maintain such a list. The Court of Appeal held that, as any individual could lawfully have done what the Secretary of State did, maintaining the list was lawful. The Court of Appeal simply followed a statement in a footnote elsewhere in Halsbury's Laws of England (for which no authority was cited) that "at common law the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual"[45].

26. The basis for this statement[46] was Blackstone's doctrine that there "five powers inseparably incident to every corporation, at least to every corporation aggregate", the first of which (necessarily and inseparably incident to all corporations in his view) was the power "to sue or be sued, implead or be impleaded, grant or receive, by its corporate name *and do all other things as natural persons may*"[47]. The origin for this doctrine appears to be statements in the report of

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43 See Halsbury's Laws of England Vol 12(1) *Crown and the Royal Family* 4th ed reissue at [7] and footnote 10. This repeated what Sir William Holdsworth had said in an earlier edition.

44 [2000] 1 FLR 627, [2000] 1 FCR 471, [2000] All ER D 215.

45 Ibid at [17] referring to footnote 6 to paragraph [101] to Halsbury's Laws of England Vol8(2) *Constitutional Law and Human Rights* 4th ed. At first instance Richards J gave no reason for making the same assertion: see [1999] 1 FLR 1073, [1999] Fam Law 295.

46 The footnote in Halsbury's Laws refers to paragraph [6] of the same volume of Halsbury's Laws which states that "the Crown is a corporation sole or aggregate and *so* has general legal capacity, including (subject to some statutory limitations and limitations imposed by European law) the capacity to enter into contracts and to own and dispose of property" (emphasis added).

47 See *Commentaries on the Laws of England* i.475-6. The two which are possibly inseparably linked only to corporations aggregate were a corporate seal and the power to make by-laws for the better government of the corporation. This doctrine is presumably the basis for the statement in *Chitty on Contracts* 29th ed Vol 1 at [10-004] that "as a non-statutory corporation sole the contracts of the Crown are not subject to the *ultra vires* doctrine.

the *Case of Sutton's Hospital* about the incidents of incorporation by the Crown[48] which do not include the words italicised. It may be doubtful whether this addition was then justified in relation chartered corporations[49]. However this doctrine, for whatever it may be worth, did not survive the recognition in the nineteenth century that the powers which a statutory corporation created for specific purposes may lawfully use must either be expressly conferred or derived by reasonable implication from the provisions of any relevant enactment[50]. The doctrine has nonetheless remained the conventional view about chartered corporations[51], albeit with the modification that a chartered corporation may be restrained by one of its members from doing anything which its charter does not authorise[52]. It thus leads to the paradoxical result that a corporation created by statute has less power than one created by an exercise of a prerogative power. But in any event, as the House of Lords held in ***Hazell v Hammersmith LBC***[53], "the doctrine applies only to a corporation created by an exercise of the Royal Prerogative". The Crown is not such a corporation.

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48 See 10 Co Rep 1a at 30a-31a.

49 There are, of course, certain subsidiary powers which are normally incident to any person, legal or physical. The nearest the report comes to Blackstone's doctrine is the statement that, if the charter of incorporation imposes a restraint on alienation or of alienation in a particular form, "that is an ordinance testifying the King's desire, but it is but a precept, and doth not bind in law". Generalising from that statement (which may merely reflect contemporary legal restraints on imposing restrictions on alienation such as the statutes relating to mortmain), as Blackstone appears to, so that a corporation can do anything a natural person may regardless of any limitation in its constitution, is an assumption which may not have been justified: see Percy T Cardon "*Limitations on the powers of common law corporations*" (1910) 26 LQR 320-330.

50 See per Lord Watson ***Baroness Wenlock v the River Dee Corporation*** (1885) 10 App Cas 354 at p362-3; ***The Ashbury Railway Carriage and Iron Company (Limited) v Riche*** (1875) LR 7 HL 653

51 See per Blackburn J and Archibold J (obiter) in ***Riche v Ashbury Railway Carriage and Iron Company*** (1874) LR 9 Exch 224 at p263-4 and p292. In consequence the assumption was repeated by other judges subsequently: see eg per Bowen LJ ***Baroness Wenlock v. River Dee Co*** (1886) 36 Ch D 675 n, 685n; ***British South Africa Company v De Beers Consolidated Mines Limited*** [1910]; per Lord Denning ***Institution of Mechanical Engineers v Cane*** [1961] AC 696 at p724-5; ***Dickson v the Pharmaceutical Society*** [1970] AC 403 per Lord Upjohn at p434. The assumption also underlay a number of cases dealing with municipal corporations created by Royal Charter under the Municipal Corporations Act 1834. It was found not to be correct in such cases in ***Hazell v Hammersmith LBC*** [1992] 1 AC 1.

52 See ***Dickson v the Pharmaceutical Society*** [1970] AC 403 following ***Jenkin v the Pharmaceutical Society*** [1921] 1 Ch 392.

53 [1992] 2 AC 1 at p39. It thus did not apply to a municipal corporation created by royal charter issued pursuant to a statute. Following ***Bonanza Creek Gold Mining Co. Ltd. v. The King*** [1916] 1 AC 566, the Appellate Committee held that "where a statute authorises the grant of a Royal Charter, then, the extent of the powers exercisable by a corporation created by a charter granted pursuant to the statute will depend on the true construction and intent of the statute": see [1992] 2 AC 1 at p41.

27. Any attempt to treat the Crown as if it is like any other corporation is not sustainable[54]. As Sir Francis Bacon once said[55], "the corporation of the Crown utterly differeth from all other corporations within the realm." Thus the Crown could take personal estate or the benefit of a personal contract even when a corporation sole could not (except by special custom)[56]. As Littledale J stated in that regard[57], "the King is altogether on a different footing from other corporations sole." Similarly a grant of land had formerly to be made expressly to the corporation sole and his successors, otherwise the actual holder of the office took an estate for life in his personal capacity[58]. By contrast at common law the monarch could not hold land in his natural capacity (except in the right of the Duchy of Lancaster) and land acquired by the monarch vested in the Crown as a corporation sole[59]. Unsurprisingly, as Romer J once stated, the Crown differs "in many respects" from other corporations sole[60]. Indeed, simply looking at Blackstone's list of powers, which he and the judges in the *Case of Sutton's Hospital* thought were necessary incidents of incorporation, the Crown does not generally have the very first powers there mentioned as a matter of English law, the power to be sue and be sued[61]. As Lord

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54 It is not obvious that Blackstone himself ever made the attempt. As he said, "corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. *In this sense* the king is a sole corporation..,,the king..is made a corporation to prevent in general the possibility of an interregnum or vacancy of the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is..in full possession of the regal rights and dignity": *Commentaries on the Laws of England* i. 469-470.

55 *Post-nati* in J Spedding and DD Heath eds *The Works of Sir Francis Bacon* 1892 at p667.

56 For the position generally: see ***Fulwood's Case*** (1598) 4 Co Rep 64b at 65a and ***Power v Banks*** [1901] 2 Ch 487 at p495. Accordingly, in the case of other corporations sole, personal estate on death went to the personal representatives, executors or administrators of the holder of a corporation sole (rather than to his successor in that office): see ***Mirehouse v Rennel*** (1833) 1 Clark & Finnelly 527 HL. The position of the Crown was different: see ***Howley v Knight*** (1849) 14 QB 240 per Coleridge J at p253 and Wightman J at p255; ***Mirehouse v Rennel*** *supra* per Gaselee J at p563 and Baron Bayley at p567 contrasting the position of the Crown. The position is now different for corporations sole generally in consequence of sections 180(1) of the Law of Property Act 1925 and section 3(5) of the Administration of Estates Act 1925 cf per Russell LJ ***Hayward v Chaloner*** [1968] 1 QB 107 at p123; Halsbury's Laws of England Vol 9(2) *Corporations* 4th ed reissue at footnote 5 to [1248].

57 ***Rennell v the Bishop of Lincoln*** (1827) 7 B&C 113 at p168, 108 ER 667 at p 686.

58 See Halsbury's Laws of England Vol 9(2) *Corporations* 4th ed reissue at [1248]. The position was changed by section 60 of the Law of Property Act 1925.

59 See Halsbury's Laws of England Vol 12(1) *Crown and Royal Family* 4th ed reissue at [65].

60 See ***in re Mason*** [1928] 1 Ch 385 at p402.

61 Prosecutions and claims for judicial review may be brought in the name of the Crown.

Woolf has pointed out[62], "even after the [Crown Proceedings] Act of 1947, [the Crown] cannot conduct litigation except in the name of an authorised government department or, in the case of judicial review, in the name of a minister". It is also plain that as a matter of English law the Crown lacks the capacity to be sued. Indeed that incapacity led the Court of Appeal at one stage (erroneously) to think that the Crown had no legal personality at all[63]. There is thus no necessary identity between the capacity of the Crown as a corporation and the capacity of other corporations.

28. Indeed, even the Court of Appeal in ***R v the Secretary for State for Health ex p C,*** who thought that ministers (as agents of the Crown regarded as a corporation sole) could do anything that an individual may do, did not accept the logical consequence of that approach. Inconsistently with that approach, but consistently with the development of public law, they also took the view that in that case the Department could not "have an unfettered discretion to operate the list in whatever way it chooses" and, if exercised unreasonably or unfairly, such powers as it thus had would not be lawfully exercised[64]. On that basis, ministers exercising any powers that the Crown may have as a corporation sole are not free to do anything that an individual is free to do.

29. More crudely what may underlie this approach (and indeed Blackstone's view of corporations generally) is a view of what having legal personality involves. As it was once put, "in the absence of any superadded disability, legal personality implies the plenary powers of a natural person"[65]. But this is simply wrong. Statutory corporations, although they are legal persons, do not have "any superadded disability". Nor do others recognised as having legal personality necessarily have "the plenary powers of a natural person". For example, the

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62 ***In re M*** [1994] 1 AC 377 at p424.

63 See ***M v the Home Office*** [1992] QB 270 per Sir John Donaldson at p300-302, 307, per McCowan LJ at p308; ***In re Pan American World Airways Inc. and others' application*** [1992] QB 854, 860. This was found to be an error by the Appellate Committee in ***M v the Home Office*** [1994] 1 AC 377 at p424.

64 *Supra* at [23]-[24], [28] and [31].

65 See Phillip A Joseph "*The Crown as a legal concept (1)*" (1993) NZLJ 126-130 at p126. This is how Underhill J interpreted the decision of the Court of Appeal in *R v the Secretary of State for Health ex p C*: he thought that in that case the Court of Appeal had thought that the Crown was able to do anything anyone may do as "it was within the powers of the Crown simply by virtue of its having legal personality": see ***Shrewsbury & Atcham BC v the Secretary of State for Communities and others*** [2007] EWHC 2279 (Admin) at [16]. Newman J interpreted the decision of the Court of Appeal in the same way in ***R v Worcester CC ex p SW*** [2000] EWHC 392 (Admin) at [22].

councils of London boroughs are not statutory corporations but they have a legal personality recognised by law and can sue and be sued. Yet they have no powers other than those vested in them by enactment[66].

30. Seeking to derive the Crown's powers from those which other corporations may have, or from the recognition that the Crown has legal personality, begs the relevant questions. Treating the Crown as a corporation or as a legal person is a recognition that there is an office which is distinct from the holder of the office for the time being. But of itself that does not reveal anything about what may be done by virtue of that office. Any assumption that the answer to this question is to be found as a matter of constitutional law today by reference to the conception developed in the late sixteenth century of the King's two Bodies or the incidents of chartered or ecclesiastical corporations at that time or subsequently does not merely display a poor historical understanding, one which fails to recognise that the Crown is unique: it is an attempt to avoid the need for any legal analysis of the constitutional position of the Crown. What may be learnt from the history of the Crown as a corporation is that there is a public and private capacity in which Her Majesty may act which has been progressively recognised. That is reflected, for example, in the Crown Proceedings Act 1947, which does not apply to proceedings by or against "His Majesty in His private capacity"[67], and in the legislation giving the Queen private possessions which She may deal with free from controls and restrictions than would otherwise limit what She might do with such revenues and property in her public capacity. But what may be done in each capacity is another question.

(c) the contention that the Crown as a natural person may do anything an individual is free to do

31. Another basis for contending that a government minister may do anything which an individual may do is that the monarch is a natural person and that the minister is merely acting as that individual's agent.

32. This assertion is frequently made in connection with the Crown's capacity to contract[68]. The

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66 See ***Hazell v Hammersmith LBC*** [1990] 2 QB 697 CA at p779; [1992] AC 1.

67 See section 40(1) of the Crown Proceedings Act 1947.

68 See eg C Turpin *Government Contracts* 1972 p19; T Dainteth *Regulation by Contract*: *the New Prerogative* (1979) 32CLP 42 at p42; Hogg and Monahan *Liability of the Crown* 3rd ed; ACL Davies *The Public Law of Government Contracts* OUP 2008 p43.

issue in this area is not whether the Crown has any capacity to enter into contracts - plainly it has. The question is whether it has a power to enter into a contract for any purpose or involving anything that an individual may do because the monarch is a natural person. Moreover, precisely because any person's powers cannot be enlarged merely by entering into an agreement with others, this assertion about the Crown's contractual capacity must be parasitic on the more general proposition that the Crown may do anything an individual may do merely because the monarch is a natural person.

33. There are two cases in the Canadian Supreme Court which support this proposition, ***Verreault & Fils v Attorney General of the Province of Quebec*** [1977] 1 RCS 41 and ***Attorney General of Quebec v Labrecque*** [1980] SCR 1057. In the first, it was simply stated that"Her Majesty is clearly a physical person" who may authorise contracts[69]. In the second it was stated[70] that "the Crown is also the Sovereign, a physical person who, in addition to the prerogative, enjoys a general capacity to contract in accordance with the rule of ordinary law"[71].

34. Apart from these two cases in the Canadian Supreme Court, however, it is difficult to find any decisions which purport to decide that this is what gives the Crown its contractual capacity and that this is its contractual capacity[72]. It is sometimes suggested, for example, that the rule

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69 Per Pigeon J at p47.

70 Per Beetz J p1082.

71 It was on the basis of this case that it was stated in HWR Wade and CF Forsyth *Administrative Law* 9th ed at p792 that "the Crown is free to make contracts (though not to spend money) without statutory authority since it enjoys the powers of a natural person."

72 Professor Arrowsmith has argued that "in the field of contract it was held in *the Bankers' Case* (which concerned a contract to borrow money) that the Crown had all the powers of a natural person, including the power to enter into contracts. Thus it was concluded that the Crown could make a contract for any purpose without obtaining the approval of Parliament": see *The Law of Public Procurement and Utilities Procurement* 2nd ed p40; cf also her *Civil Liability and Pubic Authorities* (1992) at p7. In fact that case did not involve any such ruling: see the reports of the case at 14 ST 1 and Skinner 602. It involved a suit for failure to pay annuities (which had been granted by letters patent under the great seal) out of Charles II's hereditary excise. The annuities were payable in respect of moneys which had been borrowed by the Crown to finance a war. It was held that the monarch had such a power of alienation of its own revenues. The case is mainly of significance as it established that a petition of right would lie for breach of contract resulting in unliquidated damages: see ***Thomas v the Queen*** (1874) LR 10 QB 31 at p39-44. Holt CJ thought that "the intent and wording of the act [that vested the revenue for an estate in fee] that the king should have a right and liberty of alienating and charging this estate". Given that, his observation that "it is against the nature of the being of a king that he should have less power than his people" was *obiter.* He also referred to the

that the Crown has the capacity to enter into any contract which it is not prohibited from entering, expressly or by implication, is illustrated by the decision in ***New South Wales v Bardolph***[73]. The reference normally made is to the judgment at first instance by Evatt J. He stated *obiter* that at common law "the King...never seems to have been regarded as being less powerful to enter into contracts than one of his subjects"[74]. But, in looking at the power of the Crown in Australia, he thought that, to be enforceable, the contract had to be "entered into in the ordinary and necessary course of Government administration"[75]. In that case it was: it concerned the acquisition of advertising space for the Government Tourist Board. This was not regarded as an irrelevant matter. When the case was heard in the High Court, Dixon J (with whom Gavan Duffy CJ agreed) considered that "no statutory power to make a contract in the ordinary course of administering a recognised part of the government of the State appears to me to be necessary in order that, if made by the appropriate servant, it should become the contract of the Crown, and, subject to the provision of funds to answer it, binding upon the Crown" and that, accordingly in that case, "it is a matter of primary importance that the subject matter of the contract, notwithstanding its commercial character, concerned a recognised and regular activity of Government in New South Wales"[76]. Similarly, according to Rich J[77], "the Crown has a power independent of statute to make such contracts for the public service as are incidental to the ordinary and well recognised functions of Government." This decision thus recognises the subsidiary nature of a power to contract and requires the primary function in the discharge of which the contract assists to be an established function of government.

35. To base the government's power to act or to make contracts today, however, on the fact that the monarch is an individual, a "physical person", may appeal to those whose conception of

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monarch's need to alienate his revenue in order to borrow in cases of need but there appears to have been no issue about whether the King had power to borrow or whether, if there had been any limitations on it, they might have affected the validity of the letters patent: see 14 ST 1 at p30. This case does not appear to have decided even in 1700 that the Crown may do (and has a contractual capacity to do) anything an individual is free to do by virtue of the fact that the monarch is an individual. The case dates, however, from a different legal era in terms of the use of public revenues (a concept which indeed scarcely existed when the letters patent in that case were granted in 1677). Moneys are now payable out of the National Loans Fund under statutory authority: see section 1(3) National Loans Act 1968.

73 (1934) 52 CLR 455.

74 see at p475.

75 see at p474.

76 See at p508 and 507.

77 at p496.

government remains feudal. As Lord Diplock has said[78],

> "the continuous evolution of the constitution of this country [is] from that of personal rule by a feudal landowning monarch to the constitutional monarchy of today; but the vocabulary used by lawyers in the field of public law has not kept pace with this evolution and remains more apt to the constitutional realities of the Tudor or even the Norman monarchy than to the constitutional realities of the 20th century."

When a minister enters a contract "the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries"[79].

36. Of course the monarch may now enter into contracts in Her private capacity but the contracts entered into by ministers in exercising the Crown's executive powers are not entered into for the monarch as an individual. They are entered into by the executive in Crown's public capacity. Thus, if Ministers were acting on behalf of the physical person who is the monarch for the time being, it would produce odd and unacceptable consequences. One of the reasons why the Crown was recognised as having a body politic, and thus as being a corporation sole, was to avoid the consequences in terms of a monarch's incapacity or diminished capacity when a child or otherwise suffering from a disability[80]. Similarly the public executive capacity in which the monarch acted gave rise to the vesting of real property in the Crown as a corporation sole and to the Crown, unlike other corporations sole, being able to hold personal property and take the benefit of personal contracts[81]. Treating revenues payable to Exchequer which should not have been obtained by the Crown as having been received by the individual who was the monarch could once have left the person entitled to the money with no claim against the monarch's successor. The doctrine that the Crown was a corporation sole may have been capable of being invoked to avoid that unjust result[82].

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78 ***Town Investments Ltd v Department of the Environment*** [1978] AC 359 at p380.

79 Per Lord Roskill ***Council of Civil Service Unions v the Minister for the Civil Service*** [1985] AC 374 at p417h.

80 see paragraph [18] above.

81 See paragraph [27] above.

82 One of the rights of the Crown is to payment as *bona vacantia* of the personal estate of an intestate who leaves no next of kin to the Treasury Solicitor and thus (under the arrangements for the Civil List) into the Exchequer. In one case the Treasury Solicitor, acting as nominee for the Crown and for the use and benefit of His Majesty, having obtained letters of administration, in error (as there were in fact such kin) paid an intestate's estate to the King's Proctor and it was received on behalf of George III. In ***Attorney General v Kohler*** (1861) IX HLC 654 the House of Lords held that a subsequent Treasury Solicitor would not have been liable for the error of his predecessor but for an admission of liability. However, although there had

37. Moreover treating contracts made by the Crown as if they were made by the physical person who is the monarch would also produce ludicrous results in terms of the relations between the different territories in respect of which executive power is vested in the Queen. As the judges in *Calvin's Case* stated, the King had several "politic" capacities, one for England and one for Scotland. Further the Crown became "separate and divisible" in relation to different overseas territories in right of which the monarch was Head of State so that *inter alia* the debts incurred by the Crown in respect of one territory were not the debts of the Crown in another[83]. An agreement between the governments of two separate territories would plainly be an agreement between two different legal persons even though the executive power may be vested in each territory in Her Majesty[84]. Each such legal person may be described as a corporation sole. But what would make no sense would be to describe such an agreement as one in respect of which each party was the same physical person.

38. Despite its peculiarity, what that doctrine of the King's two Bodies (and the cases) recognised was that the Crown had two capacities which needed to be distinguished in each territory in respect of which the government was the Queen's: public and private. As Thomas

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not been full argument, Lord Cranworth expressed the view *obiter* that, although the Crown is a corporation sole, Queen Victoria (like others who may be a corporator sole) could not be liable for money paid in error to, and spent by, a predecessor (a view also shared by Lord Chelmsford): see at p671-3, 687-8. A subsequent attempt in ***in re Mason*** [1928] Ch 385 to make the Crown liable in a similar case foundered on a defence of limitation. But Romer J (again *obiter*) thought that the Crown should have been liable on the basis that the money was received by it as a corporation sole, thus providing a remedy for money wrongly received as public revenues. Romer J also thought that the analogy drawn by Lord Cranworth between the Crown and other corporations sole was "a false analogy" as in the case of devolution of property on death "the Crown differs from most other corporations sole...It differs, too, in many other respects": see at p402.

83 See ***Attorney-General v Great Southern and Western Ry. Co. of Ireland*** [1925] AC 754, at p773-4, 779; ***Tito v Waddell (N° 2)*** [1977] Ch 106 at p231-2; ***R v Foreign Secretary ex p Indian Association of Alberta and others*** [1982] QB 892 CA at p916-8, 920-3, 928-33. Thus the Crown Proceedings Act 1947 does not apply in respect of any proceedings in respect of any liability of the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom or the Scottish Administration: see section 40 of the Crown Proceedings Act 1947. Within the United Kingdom, the position that property, rights and liabilities may be held by the Crown in right of different areas is reflected in section 99 of the Scotland Act 1998 and section 89 of the Government of Wales Act 2006.

84 This is supported by the decision in ***In re Holmes*** (1861) 2 J&H 527 where the suppliants invoked the jurisdiction of the English Courts to determine a dispute about land in Canada vested in Her Majesty on the ground that She was physically present in the United Kingdom. As Sir William Page said at p543, "it is said that the Queen is present here, and therefore amenable (by virtue of the recent Act) to the jurisdiction of this Court. But it would be at least as correct to say that, as the holder of Canadian land for the public purposes of Canada, the Queen should be considered as present in Canada, and out of the jurisdiction of this Court. This alone supplies a sufficient answer to the argument of the suppliants."

Hobbes put it, "the distinction between natural and politick Capacity...is good: For natural capacity, and politick Capacity signifie no more than private and public right"[85]. Thus, as Lord Diplock stated[86],

> "to use as a metaphor the symbol of royalty, "the Crown," was no doubt a convenient way of denoting and distinguishing the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will."

There is no convincing reason why constitutional law should approach what the Crown may do as if the constitution was at an even earlier stage in its evolution when it could not be said that there was a constitutional monarchy. Reflecting that development, what the Crown does (with the exception of the monarch's private acts in Her personal capacity) should be treated as being done by the Crown in its public, institutional capacity, not by a physical person, but rather (if so desired) by the Crown as a corporation sole. Treating what the government may do as being done by the physical person who is the monarch is antiquarianism masquerading as contemporary legal analysis.

39. But, even if what the Crown does in its public capacity should be regarded as being done by the physical person who is the monarch, it simply begs the question to assume that when acting in that capacity the monarch may do anything that an individual may do. The monarch is not able to do everything that an individual may do. The monarch cannot sue or be sued. After an individual becomes the monarch, that individual cannot not acquire real property and dispose of it by will as he or she chooses as an ordinary individual may (other than in the exercise of the statutory powers referred to above), as land which the monarch acquires is vested in the Crown as a corporation sole. The physical person who is the monarch cannot disclaim contracts made while a minor. Indeed in its public capacity the Crown has seemingly been incapable of employing servants on terms which did not make them dismissible at will. It is thus wrong, and almost on a par with the "meta-physiological" confusions that beset the doctrine of the King's two Bodies, to assert that "when the institutional crown evolved as a legal concept, kingship imported to it all the natural gifts and endowments of human

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[85] Thomas Hobbes ed J Cropsey *A Dialogue between a Philosopher and a Student of the Common Laws of England* 1971 Univ of Chicago Press at p162.

[86] ***Town Investments Ltd v Department of the Environment*** [1978] AC 359 at p380.

personality"[87].

40. There is a fundamental problem, therefore, with trying to answer the question of what ministers may do by reference to what a corporation sole or an individual may do[88]. It is to seek an answer by equating the Crown with something else ignoring the legal fact that the Crown is unique.

(d) the theory that it is the absence of a prohibition that gives the Crown freedom to act

41. The final basis which has been suggested for the rule that the Crown may do anything that any individual may do is radically different. It disclaims the need to find any source of authority for that freedom. It is said to be sufficient that the Crown is not prohibited from doing something. This appears to be what is sometimes called the "Ram doctrine", named after a memorandum by the then First Parliamentary counsel, Sir Granville Ram, in November 1945, that "a Minister may do anything that he is not precluded from doing"[89].

42. If there is any legal basis for this approach it rests on a particular conception of what in law constitutes a power. As Sir William Wade put it "legal power..is..the ability to alter people's rights, duties or status under the laws of this country which the courts of this country enforce"[90]; "power in the legal sense means doing something which can have an effect on

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87 See Phillip A Joseph *The Crown as a legal concept II* (1993) NZLJ 179 at p179-180.

88 See eg G Winteron *The Prerogative in novel situations* (1983) 99 LQR 407 at p409: "deriving from the fact that the monarch is a natural person as well as a corporation sole, unless the common law or statute provides to the contrary, the executive can do whatever private citizens can do, and that is whatever is not legally forbidden to them." This contention has the added obscurity of envisaging unspecified common law prohibitions on the executive doing what a private citizen may do. But this obscurity should not conceal the fact that the formulation involves a recognition that the proposition that the executive may do whatever a private citizen may do is untrue and that the equation of the Crown's powers with those of an individual, whether derived from the comparison with the powers of a corporation sole or a natural person is false.

89 The Memorandum was reprinted as an Annex to Appendix 3 to the Eighth Report of the Joint Committee on Statutory Instruments. *Craies on Legislation* 9th ed 2008 contains a series of Parliamentary Questions on this doctrine by Lord Lester of Herne Hill and answers given by the then Parliamentary Secretary in the Lord Chancellor's Department, Baroness Scotland of Asthal in 2003 at p885-889. In those answers she sought to base this doctrine on the Crown's status as a corporation sole: see p886. As Lord Lester subsequently pointed out in"*The use of ministerial powers without Parliamentary authority: the Ram Doctrine*" [2003] PL 415 at p420, Sir Grenville Ram, unlike Baroness Scotland, did not rely on the Crown's status as a corporation sole as the legal justification for his views.

90 See *Constitutional Fundamentals* 1989 rev ed at p58.

someone's legal position"[91]. It is this conception of a power which underlay his restricted conception of the prerogative[92]. On this view there is a fundamental distinction to be drawn between the capacity, freedom or liberty to do something, and the powers of the Crown and indeed those of any other person. On this basis "the Crown's natural capacities are not legally powers" and it is important to make that distinction (so one of its advocates stated) since "the truth is that, once the Crown's natural capacities (liberties/freedoms) are committed to the legal categories of 'powers', it becomes relevant to ask the source of those powers, and perforce to deny any exist"[93].

43. The theory that there is a marked distinction between a person's legal capacity and his legal powers implies implausibly that a person has a capacity or legal ability to do what he has no legal power to do. But the conception of a legal power on which this approach rests is not merely implausible: it is false. There are innumerable enactments enabling statutory bodies to do things that individuals are free to do, such as providing financial assistance to others and disposing of property. No one has the slightest difficulty in recognising such enactments as conferring the legal power to do such things on the statutory bodies concerned. Similarly there is nothing linguistically improper in describing the Crown's capacity to issue passports, to bind the United Kingdom in international law or to request the extradition of an offender from a State with whom the United Kingdom has no treaty[94] as legal powers it has, even though those powers do not alter anyone's rights, duties or status as a matter of domestic law. Indeed Blackstone in the passage dealing with the powers inseparably incident to a corporation regarded the ability to do all things as a natural person may as one of those powers.

44. This attempt to base the Crown's ability to do anything that an individual may do if it is not prohibited from doing it on its legal capacity rather than on any powers that it may have also shares the same fundamental difficulty as the other attempts considered above based on the status of the Crown as a corporation and on the fact that the monarch is a natural person. It begs the relevant question about what legal capacity the Crown has when acting in a public

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91 Letter to the Times May 18th 1989 quoted in BV Harris "*The 'third source of authority' for government action*" (1992) LQR 626 at p645.

92 See paragraph [10] above.

93 See Phillip AJ Joseph "*The Crown as a legal concept II*" (1993) NZLJ 179 at p181-2.

94 Cf ***Barton v Commonwealth*** [1974] HCA 20; (1974) 131 CLR 477; ***Oates v Attorney-General*** (Cth) [2003] HCA 21; 214 CLR 496.

capacity. This argument has necessarily to assume that the Crown has a "natural" legal capacity which is identified by equating that capacity with that which any natural person has. This argument again thus ignores the fact that legally the Crown is unique. Quite apart from any statutory powers, its legal capacity is, for example, by virtue of its prerogative powers (even on the definitions suggested by Blackstone and Sir William Wade) and its immunities, quite unlike the legal capacity of anyone else.

45. The most notorious case that may be said to support the approach that a minister may do anything that he is not prohibited from doing is ***Malone v the Metropolitan Police Commissioner***[95]. It is doubtful whether the decision in that case in fact supports that conclusion. The case concerned the legality of recordings of telephone conversations by the Post Office for use by the police in the prevention or detection of crime. Section 80 of the Post Office Act 1969 provided that a requirement could be laid on the Post Office to do what was necessary to inform designated persons holding office under the Crown concerning matters and things transmitted, or in the course of transmission, by means of postal or telecommunications services "for the like purposes and in the like manner as, at the passing of this Act" (which made the Post Office a statutory corporation), a similar requirement could have been laid on the Postmaster General. How that requirement could have been imposed was also revealed by another provision of the 1969 Act which provided a defence to various offences of disclosure by employees of the Post Office if the act "was done in obedience to a warrant under the hand of the Secretary of State". As Sir Robert Megarry found, therefore, in the 1969 Act itself "Parliament has provided a clear recognition of the warrant of the Home Secretary as having an effective function in law, both as providing a defence to certain criminal charges, and also as amounting to an effective requirement for the Post Office to do certain acts"[96]. In other words the 1969 Act assumed that the Home Secretary had power to issue a warrant imposing the relevant requirement and the enactments could not be given effect without giving effect to that assumption. Accordingly, whether or not the assumption was correct, the 1969 Act gave it legal effect[97].

46. What gives the judgment its notoriety, however, was a reason Sir Robert Megarry gave for

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95 [1979] Ch 344.

96 See [1979] Ch 344 at p370c-372c with the conclusion at p372b-c.

97 Cf ***Birmingham Corporation v West Midlands Baptist Trust*** [1970] AC 874 per Lord Reid at p898.

rejecting the contention that telephone tapping was unlawful as there was no authority conferred to undertake it. As he put it,

> "The underlying assumption of this contention, of course, is that nothing is lawful that is not positively authorised by law. As I have indicated, England is not a country where everything is forbidden except what is expressly permitted. One possible illustration is smoking. I inquired what positive authority was given by the law to permit people to smoke. Mr. Ross-Munro accepted that there was none; but tapping, he said, was different...I do not find this argument convincing...Neither in principle nor in authority can I see any justification for this view, and I reject it. If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful."

47. In fact these observations were avowedly *obiter dicta* since the only telephone tapping in issue in that case was pursuant to a Home Office warrant with which the Post Office was required by statute to comply and Sir Robert Megarry's decision was expressly limited to that[98]. Insofar as this case sheds any light on the Crown's capacity when the Post Office was not a statutory corporation, however, the light thus cast is in fact against these *dicta*. Section 80 of the Post Office Act 1969 indicated that the Home Secretary's capacity to require crown servants to do as he wanted in this respect was not the same as any other employer (assuming that such an analogy was possible): his requirement had to be expressed in a particular manner and could only be imposed for certain purposes. It is thus unsurprising that Taylor J (as he then was) was subsequently prepared in ***R v the Home Secretary ex p Ruddock***[99] to consider on an application for judicial review whether a warrant issued by the Home Secretary had been issued for an improper purpose or whether no reasonable person could have thought that its issue fell within the guidelines which the Home Secretary had promulgated for issuing such warrants.

48. The notion that Government ministers may do anything which there is no law prohibiting them from doing and that the search for any authority to do any such thing is misconceived has attracted others[100]. In particular Hobhouse LJ (as he then was) based his dissenting judgment

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[98] See [1979] Ch 344 at p382h-383b, 383h-384c.

[99] [1987] 1 WLR 1482.

[100] See eg per Griffiths CJ ***Clough v Leahy*** (1904) 2 CLR 139 at p157. Both Mason and Brennan JJ disowned the analogy he drew between an individual's freedom to make any enquiry he chooses and the Crown's power to conduct inquiries in ***Victoria v Australian Building Construction Employees' and Builders Labourers***

on it when dealing with criminal injuries compensation in the Court of Appeal in ***R v the Home Secretary ex Fire Brigades Union***[101]. But, by contrast, both members of the majority and those who dissented in the Appellate Committee in that case considered that payment of such compensation was something which ministers were authorised to do by virtue of the prerogative (even though any individual might pay such compensation) and was thus a power which was capable of being unlawfully abused, although they disagreed on whether it had been[102].

(e) conclusion

49. The justifications mainly relied on for the alleged rule that the Crown may do anything that an individual may do are unpersuasive. It cannot be inferred that the Crown may do anything an individual may do merely from the fact that the Crown may be recognised as a corporation or from the fact that Her Majesty is an individual. The attempt to equate the Crown's powers or capacities with those of other corporations or of an individual ignores the fact that in law the Crown is unique. Similarly the attempt to infer that the Crown may do anything an individual may do from the absence of any prohibition on such activities also ignores this fact and begs the question it attempts to answer. There is now plainly a distinction between what the Crown may do in its public or private capacity. Increasingly it may make sense to align that distinction with the distinction between things done by the Crown in its corporate capacity and in the capacity which the monarch now has as an individual. But none of this of itself answers the question of what the Crown may do in its public capacity. Indeed each of these argument may be seen, as Maitland put it, as "a convenient cover for ignorance: it saves us from asking difficult questions".

Federation (1982) 152 CLR 25 at p89 and p156-7. In neither case, however, was it necessary to decide whether the source of the power to hold an inquiry to obtain information for public purposes was a prerogative power or simply a freedom to do something anyone might do: see per Gibbs CJ *ibid* at [17].

101 See [1995] 2 AC 513 at p531b-c, 533f, 534h-535b.

102 *Ibid* per Lord Browne-Wilkinson at p549e-g, 554a-h, Lord Nicholls at p573g, 578b-c; Lord Keith (diss) at p545a-h, 546d-e; Lord Mustill (diss) at p561c-d, 564g-565a. Lord Lloyd also recognised that the power to pay compensation involved an exercise of the prerogative but did not decide the case on the basis that it had been abused: see p573c-d.

WHAT THE CROWN MAY DO IN ITS PUBLIC CAPACITY

(a) the nature and importance of the issue

50. In a written answer on February 25th 2003, responding to a question from Lord Lester of Herne Hill about the circumstances in which, and the number of occasions on which, Ministers of the Crown and their departments had relied upon the Ram doctrine as the legal basis for the exercise of their public powers, the then Parliamentary Secretary in the Lord Chancellor's Department, Baroness Scotland of Asthal, said that:

> "During the past five years, as in previous periods, the common law powers of the Crown have often been relied upon as the legal basis for government action. Common law powers form the basis of such governmental actions as entering into contracts, employing staff, conveying property and other management functions not provided for by statute expressly or by implication. To require parliamentary authority for every exercise of the common law powers exercisable by the Crown either would impose upon Parliament an impossible burden or produce legislation that simply reproduced the common law."

51. This was a carefully crafted answer. The only specific examples provided of the activities which the "common law" powers of the Crown are said to justify are examples of activities falling within the *subsidiary* powers which are ordinarily incidental to the discharge of, and thus implied by, the primary powers which a person may have. The legal issue concerns such *primary* powers. No one has suggested that the Crown's primary powers are limited to such statutory powers as Her Majesty may have. There are also established "prerogative" powers authorising primary activities - whether those powers fall within the definition of the prerogative given by Blackstone or within that given by Dicey such as (for example) bounties by way of redress of hardship. The issue concerns new *primary* activities which are not authorised by such an established non-statutory power and who is to decide whether, and if so, in what circumstances and on what terms the executive may engage in them.

52. It is obviously true that finding that the Crown may do anything an individual may do does not mean that it can interfere with the rights or property of others, use force or change the law. But such a rule would still give the executive substantial powers in practice, powers that it may abuse. It would enable the executive (for example) to spend money, to provide others with financial assistance, goods or services, to deploy or use property[103] and other resources, obtain

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[103] Disregarding for this purpose the Crown Estate which is under the management of the Crown Estate

any information and seek to persuade others to do things in just the same way and for the same purposes as anyone else may. No doubt there are nonetheless some limitations on what the executive may thus do. These may arise by virtue of statutory prohibitions, express or implied. Thus a minister may not act incompatibly with an individual's Convention rights or with European law or with the proper discharge of his own statutory functions. Ministers must also obtain authority for any sums required to be taken out of the Consolidated Fund. But the issue of what ministers may do is important as a matter of constitutional law. The question may have had more limited practical significance when the monarch was dealing with his own limited resources; taxation was less frequent and lighter; and the institutions and functions of government were less extensive. But the legal issue inevitably becomes of more significance practically as the resources and capabilities at the disposal of the executive, and its role in economic life, have expanded. It is now, as Lord Nicholls has said[104], "a difficult question with far-reaching constitutional implications".

(b) the scope for abuse of unfettered power

53. English public law has traditionally been concerned with limiting the scope for abuse of powers that public authorities may have. The prerogative was once regarded as immune from that concern. The courts would consider the existence and extent of any prerogative power claimed but not the propriety of its exercise. But that immunity from judicial review of any abuse of such a power was recognisably lost as a result of the *GCHQ* case in 1984[105].

54. The claim that the Crown may do anything an individual may do logically involves a claim that Ministers have an unfettered discretion in doing such things. But, as Sir William Wade once pointed out (in a passage subsequently approved by the Appellate Committee[106]),

> "The powers of public authorities are...essentially different from those of private persons... a public authority [must act] reasonably and in good faith and upon lawful and relevant grounds

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Commissioners.

104 See ***R (Hooper) v the Secretary of State for Work and Pensions*** [2005] UKHL 29, [2005] 1 WLR 1681, at [5]-[6].

105 See ***Council of Civil Service Unions and others v the Minister for the Civil Service*** [1985] AC 374 at p397g-400d, 407a-g, 409b-d, 411c-h, 414c-415c, 416c-419c, 423h-424b; ***R (Bancoult) v the Foreign Secretary*** [2008] UKHL 61, [2008] 3 WLR 955, at [35], [71], [105], [120], [162] et seq.

106 See ***R v Tower Hamlets LBC ex parte Chetnik Developments Ltd*** [1988] AC 858 at p872.

of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good".

Indeed the existence of the tort of misfeasance in public office is itself a refutation of any theory that there is no legal difference in the ways in which individuals and public authorities may act.

55. Unsurprisingly, therefore, the courts have been willing to review the propriety of things which the executive has done which an ordinary individual may also do. Indeed the *GCHQ* case, which concerned the terms upon which persons were to be offered employment by the Crown at that establishment, is just such a case as are cases about the dismissal of civil servants and of members of the armed forces[107]. Thus, for example the courts have been prepared to review a number of activities which ministers have undertaken which any individual may also do to ascertain whether there has been an abuse of power, for example in relation to the payment (or non-payment) of compensation under schemes for domestic criminal injuries[108], overseas criminal injuries[109]; miscarriages of justice and wrongful arrest[110] and for imprisonment by the Japanese during the last World War[111] . Even when the Court of Appeal held in *R v the Secretary of State for Health ex p C* that the Crown, as corporation sole, could do anything any individual may do, it nonetheless held (oblivious of this obvious contradiction) that the court could find that what it did was unlawful as an abuse of power[112].

56. It may nonetheless be asked whether the assertion that what a minister thus does is subject to judicial review on ordinary grounds is sufficient to prevent the abuse of power against which judicial review may normally afford protection. In this respect, the crucial problem concerns how the purposes which a minister may or may not pursue, and how what may be

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107 See ***Ministry of Defence v Smith*** [1996] QB 517.

108 See ***R v CICB ex p Lain*** [1967] 2 QB 864; ***R v CICB ex p Ince*** [1973] 1 WLR 1334; ***R v CICB ex p P*** [1995] 1 WLR 845; ***R v Home Secretary ex p Fire Brigades Union*** [1995] AC 513.

109 See ***R v the Ministry of Defence ex p Walker*** [2000] 1 WLR 806 HL.

110 See ***In re McFarland*** [2004] UKHL 17, [2004] 1 WLR 1289; ***R (Mullen) v the Home Secretary*** [2004] UKHL 18, [2005] 1 AC 1 per Lord Bingham at [12] indicating that the grounds for review were not as narrow as suggested in ***R v the Home Secretary ex p Harrison*** [1988] 3 All ER 86.

111 ***Gurung v the Ministry of Defence*** [2002] EWHC 2463 (Admin) (military scheme); ***R (ABCIFER) v the Defence Secretary*** [2003] EWCA Civ 473 (civilian scheme).

112 See ***R v the Secretary of State for Health*** *supra.*

a legally irrelevant consideration, can be identified.

57. The purposes which a minister may pursue when exercising a statutory power and the considerations that may be relevant to its exercise are to be identified by construing the relevant statute[113]. In the case of a prerogative power, its extent and purpose is normally clear from its nature. But a power to do anything that an individual may do is not limited by reference to any purpose. Lord Bridge even thought that that meant that it would not even be possible to assess whether or not its exercise was unreasonable[114].

58. None of this means that, if the Crown may do anything that an individual may do, judicial review is not available. It may still be available if what is done involves unfairness or an unjustified breach of a legitimate expectation. It may also be available on the ground of irrationality if the means adopted to meet the objective a minister may have chosen to pursue has no reasonable justification[115]. But any assumption that the Crown may do anything an individual may do leaves a minister free to pursue whatever purposes an individual may. But those may be purposes which no court would accept as being proper in the context of any

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113 See eg per Lord Bridge ***R v Environment Secretary Ex p. Hammersmith LBC*** [1991] 1 AC 521 at p597 ("If the court concludes, as the House did in the *Padfield* case [1986] AC 997, that a minister's exercise of a statutory discretion has been such as to frustrate the policy of the statute, that conclusion rests upon the view taken by the court of the true construction of the statute which the exercise of the discretion in question is then held to have contravened. The administrative action or inaction is then condemned on the ground of illegality. Similarly, if there are matters which, on the true construction of the statute conferring discretion, the person exercising the discretion must take into account and others which he may not take into account, disregard of those legally relevant matters or regard of those legally irrelevant matters will lay the decision open to review on the ground of illegality.) and per Lord Nicholls ***R v Secretary of State ex p Spath Holme*** [2001] 2 AC 349 at p ("the purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation.")

114 As he put it about non-statutory advice in ***Gillick v West Norfolk and Wisbeach Area Health Authority*** [1986] AC 112 at p192-3, "Such a review must always begin by examining the nature of the statutory power which the administrative authority whose action is called in question has purported to exercise, and asking, in the light of that examination, what were, and what were not, relevant considerations for the authority to take into account in deciding to exercise that power. It is only against such a specific statutory background that the question whether the authority has acted unreasonably, in the Wednesbury sense, can properly be asked and answered."

115 See ***R (ABCIFER) v Defence Secretary*** [2003] EWCA Civ 473, [2003] QB 1397, at [40].

statutory power[116].

59. The difficulty inherent in the court's contradictory approach may be illustrated by the disagreement between Carnwath LJ and Richards LJ in ***Shrewsbury & Atcham BC and another v the Secretary of State for Communities and Local Government***[117]. This case concerned the Secretary of State's consideration of proposals to replace two-tier local government in some parts of the country with unitary authorities. There was a statutory procedure for achieving this in the Local Government Act 1992 which was to be conducted under the auspices of the Electoral Commission and the Boundary Committee for England. The Secretary of State decided to implement a new simplified procedure before Parliament changed the legislation, involving local authorities and the public but without this independent element, recognising that its outcome could only be implemented once the existing legislation had been replaced. By the time the case reached the Court of Appeal the question whether the Secretary of State could have done any of this before the legislation was changed had become academic as new statutory provisions which had by then been enacted specifically allowed what had been done before the new legislation was enacted to be taken into account under it.

60. Bound as the Court was (as it considered itself to be) to find that the Secretary of State has all the powers of a natural person, Carnwath LJ nonetheless thought that[118],

> "as a matter of capacity, no doubt, [the Crown] has power to do whatever a private person can do. But as an organ of government, it can only exercise those powers for the public benefit and for identifiably 'governmental' purposes within limits set by the law."

By contrast Richards LJ thought[119] that it was

> "unnecessary and unwise to introduce qualifications along the lines of those suggested by

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116 For example, an individual may pay others for services or support they may provide to the political party whose members currently form the Government; an individual may prefer to employ members of the political party of which he is a member; and an individual may not to allow others to use his property or may refuse to assist others for such idiosyncratic reasons as he may choose. But, if the ministers may do such things for such purposes as individual may do, why would they not be lawful?

117 [2008] EWCA Civ 148.

118 See at [48]. He considered that he was bound, as he said at [44], by ***R v Secretary of State ex p C*** *supra* to hold that the Crown had all the powers of a natural person.

119 See at [74].

Carnwath LJ...to the effect that [such powers] can only be exercised 'for the public benefit' or for 'identifiably 'governmental' purposes". It seems to me that any such limiting principle would have to be so wide as to be of no practical utility or would risk imposing an artificial and inappropriate restriction upon the work of government."

As Waller LJ put it[120],

"The question is thus whether there should be an ability to challenge as unlawful an action taken "not for the public benefit" or which has not been taken for identifiably governmental purposes"."

61. This disagreement illustrates the fundamental incompatibility with public law as it has developed of the notion that the Crown may do anything a natural person may do. The position Richards LJ adopted is logically consistent with that notion but it only achieves such consistency by having to abandon any notion of an improper purpose in this context. By contrast Carnwath LJ's approach is consistent with the modern development of public law that public powers are not unfettered but it is in substance inconsistent with the notion that the Crown may do anything which a natural person may do.

62. Carnwath LJ's judgment also shows the difficulty of formulating some general criterion by reference to which the legality of what ministers may do may be assessed, independently of any recognised powers which they may have for specific purposes. Rather than seeking to define in general terms a limitation on the purposes for which the executive may act, such purposes may be identified less idiosyncratically by seeking to ascertain (in accordance with the court's normal approach to prerogative powers) what powers it is established that the Crown has. These are more clearly limited by purposes such as the relief of individual hardship in certain cases arising (for example) from the operation of prize courts and criminal justice system or from criminal activities[121].

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120 See at [80].

121 It may be thought that the problem of the purposes the executive may pursue might be eased by referring to Appropriation Acts which limit the purposes for which money drawn from the Consolidated Fund may be used. It would certainly be unlawful to use such money for other purposes. But resort to an Appropriation Act is no solution for the fundamental difficulty. It is simply concerned with the use of such funds. Not all activities by the executive which a natural person may also undertake will involve a specific allocation of such funds and such an allocation cannot retrospectively render lawful or unlawful what may have been done before any appropriation which, as explained below, may come later.

63. When the Court of Appeal in ***R v the Secretary of State ex p C*** held that the rule is that a minister may do anything that an individual may do but that what he thus does is unlawful if it involves an abuse of that power, it was in reality recognising that the rule it propounded was inconsistent with public law as it has developed in this country. Moreover the inconsistency which it apparently unconsciously embraced conceals the scope for abuse of such powers that the approach overall retains by leaving the purposes for which a minister may act at large. No doubt the scope for abuse of such powers as the executive thus retains is limited to some extent by the requirements to act compatibly with Convention rights, to comply with EU law in the procurement of goods works and services and to comply with obligations imposed by enactments relating to discrimination in the discharge of public functions. But those requirements (which themselves recognise the difference between public authorities and others) do not eliminate the scope for possible abuse, any more than they do with other public authorities. Whilst it may be possible to limit the scope for abuse by requiring the executive to show (a) that the nature of the activity it wishes to undertake is a "governmental" activity and (b) that it is being undertaken for a public, governmental purpose, such limitations are inherently vague (and would appear to replicate some of the difficulties, discussed below, encountered in defining the "executive power" which is conferred in written constitutions). No doubt such limitations are to be preferred, despite their vagueness, to their absence. But there is no need to resort to them if the executive is only recognised as having such powers which may be exercised for such purposes as have already been established (as the approach in *New South Wales v Bardolph* might suggest).

(c) who ought to decide what activities the executive may engage in

i. the democratic answer to the issue of institutional competence

64. As Professor Paul Craig has shown, "the leading cases on the prerogative were concerned with the balance of power as between the Crown and Parliament...the judicial focus was concerned with demarcating the respective spheres of competence of Crown and Parliament"[122].

65. The corollary of the rules, that "the King hath no prerogative, but that which the law of the

[122] P Craig "*Prerogative, Precedent and Power*" in CF Forsyth and I Hare eds *The Golden Metwand and the Crooked Cord* OUP 1998 p65-89 at p65, 66.

land allows him"and that new prerogatives cannot be created, is that only Parliament may authorise the executive to undertake activities which do not fall within an established prerogative. The effect of defining the prerogative in the limited manner in which Blackstone did and recognising a rule that the Crown may undertake any new activity which any individual may undertake is thus to give the executive, not Parliament, the competence to decide in which such new activities the executive should be able to engage, in what circumstances and on what conditions. It is hardly consistent with the approach adopted by the courts in the seventeenth century, much less the democratic principle which our constitutional law now embraces, for the courts to recognise any such executive competence.

ii. how freedom for ministers to do anything an individual may do fits within modern constitutional law (apart from the question of abuse of power)

66. Recognition of a rule that the Crown may do anything an individual may do would also sit uneasily with the way in which constitutional law has evolved reflecting the principle that new executive powers should be derived from authority to undertake them granted by Parliament.

67. As Maitland pointed out as early as 1887, given the volume of legislation vesting statutory powers in ministers since 1832, "we can no longer say that the executive power is vested in the king: the king has powers, this minister has powers, and that minister has powers."[123]. Such legislation sits most uneasily with the theory that the Crown has the legal capacity or powers that enable it (and therefore ministers as agents of the Crown) to do anything an individual may do.

68. There are only two ways of regarding such legislation in the light of that theory.

(1) The first is to interpret such legislation, if possible, as merely imposing (expressly or by implication) limitations, restrictions or conditions on what the

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[123] See FW Maitland *Constitutional History of England* CUP 1908 at p415-7: "the traditional lawyer's view of the constitution has become very untrue to fact and law..according to that view..what is called the executive power is vested in the king alone and consists of the royal prerogative..this old doctrine is not even true to law. To a very large extent indeed England is now ruled by means of statutory powers which are not in any sense, even as strict matters of law, the powers of the king". They are vested among others in government ministers. "Of this vast change [since 1832] our institutional writers have hardly yet taken any account. They go on writing as though England were governed by the royal prerogatives, as if ministers had nothing else to do than advise the king as to how his prerogatives should be exercised". The lectures on which this book was based were delivered in 1886-7.

minister could otherwise do as an agent of the Crown, rather than giving him any ability to do something he previously had no ability to do. But the need to interpret enactments if possible systematically to mean something (and have an effect which is) different from what they say indicates that such an approach is simply an expedient to save the theory which prompts it from refutation by the legal facts. Moreover it may not be possible: "the statute book contains numerous provisions, and even whole acts, which serve no legislative purpose because they confer express power for a Minister to do something which he could do anyway without statutory power" on this basis[124].

(2) The second alternative is possibly worse. It involves taking seriously the effect of the decision in the House of Lords in ***ex p M*** that what a minister does in the exercise of his statutory powers is not done by him as an agent for the Crown. On this basis such enactments simply confer a power on the minister in his own right, not as agent of the Crown. Thus any limitations, restrictions or conditions with which the minister must comply when exercising a statutory power vested in him as such, he need not observe when exercising any capacity which the Crown has to do the same thing. Then he is not doing such things under the statutory power at all but under a different power. This again makes such enactments wholly otiose and observance of any limitations imposed by Parliament effectively optional. That may be why the House of Lords simply assumed in ***R (Hooper) v the Secretary of State for Work and Pensions***[125] that any limitations inherent in a statutory scheme governing payments by a minister likewise limited any capacity that he may have had as agent of the Crown to make similar payments.

69. Both alternatives, therefore, produce absurd consequences. The reason they do is that both are attempts to ignore constitutional developments since 1832 which recognise, and are premised on, the assumption that ministers of the Crown need statutory authority to do things which have not been established historically as things which the Crown may do, even if they are things that other persons may do without statutory authority.

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124 D Greenberg *Craies on Legislation* 9th ed 2008 p56.

125 [2005] UKHL 29, [2005] 1 WLR 1681.

70. It may be said that the same points might be made about prerogative powers as defined by Blackstone. There too statutory powers are sometimes conferred on ministers enabling them to do what the Crown may have a prerogative power in that sense to do. But the problem there is far less acute as in many cases the statutory powers conferred are likely to be wider than such prerogative powers and, even if they are arguably not wider, there is still a good practical reason for conferring them, namely to provide greater certainty about the precise extent of such powers, particularly if they have not been exercised frequently. By contrast conferring a power on a minister to do something that any individual may do is wholly otiose if the Crown has power to do such things in any event.

iii. is the need for Parliamentary authority for expenditure a sufficient answer?

71. Parliamentary authority has to be obtained for the use of any money in, or otherwise destined for, the Consolidated Fund. It is sometimes suggested that this should be regarded as sufficient to meet the objection to the executive having the competence to decide for itself in what new activities it may engage, in what circumstances and under what conditions.

72. Parliamentary control over expenditure (such as it is) will not, of course, affect the executive's ability to do things which may not involve expenditure to be met out of the Consolidated Fund. Moreover it is now recognised in any event that an Appropriation Act does not make lawful what is otherwise unlawful[126] and to assume that an appropriation is sufficient fails to explain the numerous enactments vesting powers in ministers to do what individuals may also do.

73. But, quite apart from that, however, the process by which expenditure is authorised is not something which can realistically be said to convey Parliamentary endorsement for any specific activity or which can be used to determine the legality of any activity as it occurs. In order to appreciate why that is so, some points need to be explained by way of background[127].

74. It has been Government policy that departmental estimates should identify in an explanatory note any expenditure which may ultimately rest on the sole authority of an

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[126] See eg ***Commonwealth v Colonial Ammunition Co Ltd*** (1924) 34 CLR 198.

[127] For a general description of the process see eg Halsbury's Laws of England Vol 8(2) *Constitutional Law and Human Rights* 4th ed re-issue at [711]-[713].

Appropriation Act[128]. Provision is made for debates and votes on such estimates in the House of Commons[129]. However, no amendment to increase an estimate may be made and it appears that amendments to reduce an estimate are normally treated as an issue of confidence by the Government[130]. It appears, therefore, that "in modern times the Commons has not rejected an estimate and the scrutiny function appears a limited one": "the supply procedures required to enable the House of Commons to vote supply, and provide the Government with funds from the Consolidated Fund, are technical and formal. Little substantial scrutiny is involved in such procedures. The policy objectives on which the money is spent are not determined by the Commons but by the government of the day"[131]. Thus even HM Treasury accepts that "the approval process [for such estimates] does not provide a meaningful opportunity for detailed scrutiny"[132].

75. The estimates as such, however, are not incorporated in any Act of Parliament. In practice Consolidated Fund Acts may simply authorise payment from that Fund of a global figure (which may be spent before any specific subsequent appropriation by an Appropriation Act). The Bill which leads to an Appropriation Act (which effectively governs previous authorisations from Consolidated Fund Acts for the year retrospectively) may identify services and purposes to which large sums may be devoted based on the estimates voted upon[133]. But

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128 See now paragraph [1.2] of the HM Treasury's *Supply Estimates Guidance Manual* (2007).

129 See Halsbury's Laws of England Vol 34 *Parliament* 4th ed re-issue at [969]-[973].

130 See I Harden and others "*Value for Money and Administrative law*" [1996] PL 661 at p663.

131 John McEldowney "*The Control of Public Expenditure*" in J Jowell and D Oliver eds *The Changing Constitution* 5th ed at p382, 381. See also Halsbury's Laws of England *Parliament* 4th ed reissue at [974]: "detailed scrutiny of the estimates is largely perfunctory" and D Greenberg *Craies on Legislation* 9th ed 2008 at p59, "for practical purposes it is too easy to 'hide' expenditure within an entry in a Consolidated Fund Act, and even if displayed prominently an entry in an Act of that kind does not make it possible for the principle and practicalities of the service to which the expenditure relates to be debated and amended."

132 HM Treasury *Managing Public Money* (2007) at [2.3.1].

133 See eg section 4 of, and Schedule 2 to, the Appropriation Act 2009. The terms of any appropriation can be very vague in any event. In Australia, for example, the Constitution provides that the Consolidated Revenue Fund must "be appropriated for the purposes of the Commonwealth..in the manner imposed by this Constitution" and a proposed law for that purpose cannot be passed "unless the purpose of the appropriation" has been recommended in a particular manner. But there it has been held that "departmental expenditure" (whatever that might mean) is a sufficient identification of that purpose: see ***Combet v the Commonwealth*** [2005] HCA 61, (2005) 224 CLR 494 per Gummow, Hayne, Callinan and Heydon JJ at [128] and [136] but see also per contra McHugh and Kirby JJ at [81]-[95] and [232]-[236] respectively. In the United Kingdom there is nothing to prohibit even vaguer appropriations or alternatively authorisations referring to no purpose whatsoever: see section 15 of the Exchequer and Audit Departments

that Bill "is not normally subject to any debate"[134]. Indeed "since 1982, proceedings on Consolidated Fund and Appropriation Bills have been purely formal. The question on the second reading is put forthwith, no order is made for the committal of the bill and the question for third reading is also put forthwith"[135]. As money bills, they are not subject in practice to scrutiny in the House of Lords[136].

76. Whilst in practice such procedures may enable the House of Commons to control the total volume of expenditure financed from the Consolidated Fund and its general use, they are plainly not apt in practice to appraise whether any proposed new activities (if they are sufficiently identified) are ones in which the executive should engage, in what circumstances and on what conditions[137].

77. In recognition of the limited nature of Parliamentary scrutiny of the details of its estimates, the Government has made statements giving assurances that in effect seek to make acceptable the principle (which it maintains is the law) that activities which anyone can do are things that ministers can do without statutory powers to engage in them.

78. The first is the misnamed 'Public Accounts Committee Concordat' of 1933 or the 'Baldwin Convention'. The exchanges between the Treasury and the Public Accounts Committee[138] to which these labels refer can scarcely be described as resulting in an agreement. The Committee thought that support for expenditure in an Appropriation Act "does not furnish adequate ground for the abandonment of attempts to place such expenditure on a constitutional footing". The Treasury Minute in reply merely stated that, where an Appropriation Act had authorised "continuing grants", it would "endeavour to" take the "opportunity....to insert regularising clauses in any appropriate legislation that may be in contemplation". The Treasury had previously stated that it would "continue to aim at the observance of [the] principle" that,

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Act 1866 as amended.

134 John McEldowney "*The Control of Public Expenditure*" in J Jowell and D Oliver eds *The Changing Constitution* 5th at p381.

135 See Halsbury's Laws of England Vol 34 *Parliament* 4th ed reissue at [979].

136 The last substantive discussion in the House of Lords appears to have been in 1907: see Erskine May *Parliamentary Practice* p568.

137 Cf per McCombe J ***Gurung and others v the Ministry of Defence*** [2002] EWHC 2463 (Admin) at [41].

138 Some of the exchanges are partially quoted by Granville Ram in his Memorandum in November 1945 and in Annex 2.1 to HM Treasury's *Managing Public Money* (2007).

"where it is desired that continuing functions should be exercised by a government department...it is proper that the powers and duties to be exercised should be defined by specific statute". Such statements only relate to "continuing activities" and even then the only apparent commitment is to aim at the observance of a principle and to endeavour to take opportunities to "regularise" the position if appropriate legislation may be in contemplation. It is not a commitment to observe the principle[139]. Treasury Counsel has described such statements as "flexible conventions and not legally binding"[140].

79. Just how flexible a few examples may suffice to show. (i) It appears that university funding, which began in 1919, continued only on the basis of Appropriation Acts until the Education Reform Act 1988[141], nearly 60 years later. (ii) The scheme for criminal injuries compensation came into force on August 1st 1964. In 1978 the Pearson Commission on Civil Liability and Compensation for Personal Injury recommended that the scheme be put on a statutory basis. Ultimately statutory provision was made in 1988 for that purpose but it was not brought into operation, leading to a successful claim for judicial review[142]. After that the existing scheme was given statutory effect as from November 8th 1995[143], a mere 31 years after its introduction. (iii) A Criminal Injuries Compensation (Overseas) Scheme was launched by the Ministry of Defence in 1979. It still appears to have no statutory basis thirty years later. (iv) Payments have been made *ex gratia* to those wrongly convicted or charged for many years. They were put on a more systematic footing in 1976 and the criteria were elaborated in ministerial statements in 1985. Although there was an opportunity to legislate on the subject in 1998 which was taken to enact one part of the scheme, the rest remained un-enacted[144] and operative until withdrawn in April 2006 on the apparent ground that "the existence of the second, discretionary [non-statutory]

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[139] The Treasury has stated that Ministers "must normally seek Parliamentary authority for specific legislation to empower any significant new commitment which seems likely to persist. In the Concordat of 1932.. the Treasury undertook to aim that departments would respect this requirement": see *Managing Public Money* at [2.1.1].

[140] See ***R (Hooper) v the Secretary of State for Work and Pensions*** [2005] UKHL 1681, [2005] 1 WLR 1681, at [46].

[141] TC Dainteth *"The Techniques of Government"* in J Jowell and D Oliver eds *The Changing Constitution* 3rd ed p209-236 at p217.

[142] ***R v the Home Secretary ex p Fire Brigades Union*** [1995] 2 AC 513.

[143] Section 12 of the Criminal Injuries Compensation Act 1995.

[144] See per Lord Bingham ***In re McFarland*** [2004] UKHL 17 at [8]-[9].

scheme is confusing and anomalous"[145].

80. The second attempt to provide to provide reassurance about the Government's legal claims comprise statements about what may be included "with Treasury approval" by Departments in their estimates "in order to avoid an undue burden on the Parliamentary timetable". Provision may be made in such estimates for expenditure (so it is said) which meet the following conditions: the expenditure is no more than £1.5m a year or it is expected to last for no more than two years; any existing explicit statutory limits are respected; and no specific legislation on the matter in question is before Parliament[146]. It may be noted that the first of these conditions in effect dilutes the so-called 'Public Accounts Committee Concordat' or 'Baldwin Convention', since it envisages a function continuing without statutory authority on the basis of an Appropriation Act provided the amount involved does not exceed a specific figure. These are, of course, rules which are unenforceable since no court may prohibit Ministers from putting forward whatever Bill they choose for payments out of the Consolidated Fund. Moreover HM Treasury also recognises that last condition may be circumvented by drawing on the Contingencies Fund with its approval provided that the proposed expenditure must be genuinely urgent and in the public interest; that the relevant bill must have successfully passed second reading in the House of Commons; that Parliament must have been made aware of the intended steps in appropriate detail when relevant previous legislative steps were taken; that the planned legislation must be certain, or virtually certain, to pass into law in the near future, and usually within the financial year; and that the department responsible must explain clearly to Parliament what is taking place, why, and by when matters should be placed on a "normal" footing[147].

81. Both these types of attempted reassurance relying on the controls exerted by HM Treasury are statements designed to indicate how limited a reliance (which the public is in effect invited to assume) that the Government will place on any rule that activities which anyone can do are things that ministers can do without statutory powers to engage in them. But the constitutional propriety of the claimed power cannot rest on how for the time being the executive may condescend not to use it or to use it only in certain ways. The significant question is whether,

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[145] See the Home Secretary's statement on April 19th 2006: http://press.homeoffice.gov.uk/Speeches/compensation-miscarriage-justice.

[146] See HM Treasury *Managing Public Money* at [2.3.3] and Annex 2.5 at [A2.5.15].

[147] See HM Treasury *Managing Public Money* at [2.4.3] and Annex 2.5 at [A2.5.16-19].

even in relation to those activities which require expenditure from the Consolidated Fund to be authorised, the process of authorisation is something which can realistically be said to convey Parliamentary endorsement for any specific new activity or the circumstances and conditions upon which the executive ought to engage in it. Realistically even the Government does not claim it can. Moreover it is a process of Parliamentary authorisation which in practice circumvents the need for bicameral approval of legislation otherwise required for authorising executive activities precisely because the concern whether or not to enact such money bills is financial.

82. There is a further problem in seeking to treat such legislation as providing any Parliamentary approval of any new activity. When any expenditure is incurred or falls to be defrayed, there may be no appropriation which may be said to endorse the purpose for which the expenditure is incurred. First the executive has access to a Contingencies Fund whose use does not in practice require prior Parliamentary approval for any estimate[148]. This fund may not exceed 2% of the authorised supply expenditure for the previous financial year[149], which is not a small sum[150]. The Fund may be used to make advances for "urgent services" in anticipation of Parliamentary provision (as well as for certain cash-flow management purposes)[151]. Secondly Consolidated Fund Acts may authorise a total amount to be withdrawn from the Consolidated Fund without any statutory appropriation of that amount to any specific purpose. The Appropriation Act for the year (which may appropriate amounts for expenditure previously authorised under a Consolidated Fund Act) may only be enacted towards the end of the financial year in question. Thus, for example, the Consolidated Fund Act 2008 authorised the Treasury to issue £32,112,484,000 out of the Consolidated Fund and to apply it to the service of the year ending with 31 March 2009 without any specific appropriation. It was only in the Appropriation Act 2009 enacted shortly before the end of that financial year on March 12th 2009 that that sum (and a further £12,049,636,000 which was authorised to be issued and applied in the same way) was appropriated to certain services and purposes. Thus, when expenditure is defrayed, there may be no statutory appropriation which can be said to provide

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148 The origins of this fund are described in John McEldowney "*the Contingencies Fund and Parliamentary Scrutiny of Public Finance*" (1988) PL 232-245.

149 See section 1 of the Contingencies Fund Act 1974.

150 The Treasury was authorised to issue £12,049,636,000 out of the consolidated fund in respect of the financial year 2008-09: see section 4 of the Appropriation Act 2009. 2% of that amount (for example) is £240,992,720.

151 See section 3 of the Miscellaneous Financial Provisions Act 1946.

a Parliamentary endorsement of any activity involved or by reference to which the legality of the activity on which any particular expenditure is incurred may be assessed.

iv. other constitutional arguments

83. There are other constitutional arguments that are sometimes advanced for the view that the Crown may do anything a natural person may do. Lying behind some views is a notion about royal dignity. Thus, for example, in the *Bankers' Case*, Holt CJ thought that "it is against the nature of the being of a king that he should have less power than his people"[152]. Similarly in 1904 Griffiths CJ stated in the High Court in Australia that "that which is lawful to an individual can surely not be denied to the Crown, when the advisers of the Crown think it in the public interest...it would be a strange thing if Courts of Justice were to assert the right to inquire into the propriety of executive action"[153]. If notions about royal dignity and that immunity of the purposes of executive action from legal scrutiny are perhaps less intuitively compelling today, a claim invoking notions of equality for ministers to be accorded at least the same treatment as others may appear more compelling. But neither claim can survive the recognition that the position of ministers and the public powers they may have are fundamentally different from the position and powers that others may have.

v. the consequences of requiring, or not requiring, statutory powers for new executive activities

84. Baroness Scotland attempted to defend the Government's claims by stating that "to require parliamentary authority for every exercise of the common law powers exercisable by the Crown either would impose upon Parliament an impossible burden or produce legislation that simply reproduced the common law." Since she appears to have assumed (wrongly) that every exercise of a subsidiary power would need a separate statutory authority in addition to the primary power to which it is subservient, she appears to have misunderstood what may be required. What would be required is merely statutory power to undertake activities which there is no existing established power in the Crown to undertake.

85. Such activities ought already to be identified in the estimates which the Government

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152 see 14 ST 1 at p30.

153 See ***Clough v Leahy*** (1904) 2 CLR 139 dealing with a commission of inquiry for the purpose of ascertaining whether any alteration of the law and, if so what, was necessary. His approach has been subsequently disowned by Mason and Brennan JJ: see footnote [100] above.

prepares. It is not clear why deciding whether the executive should have power to undertake them and, if so, in what circumstances and under what conditions would impose an "impossible burden" on Parliament. It is in fact an important function that it might be thought Parliament exists to discharge.

86. If Parliament wishes to legislate to give the executive some general authority to undertake new activities because the burden of considering them individually would be too great, that is a matter for Parliament. It is theoretically possible that it might enact a statutory provision that the Crown or Secretary of State may do anything for any purpose whatsoever which is not unlawful for an individual to do. However unlikely the prospect of such an enactment may be in practice given the abuses to which it could give rise, the choice is ultimately one for Parliament in accordance with the democratic principle which our constitutional law now reflects. The authority for new executive action should be derived from Parliament, not the Crown. What the legal rule which the Government advocates in practice does is to give the executive the power never to have to ask Parliament whether it is prepared to grant it such unfettered power.

87. "The main argument" for treating the executive as being free to do anything which an individual may do has been said to be "the practical day-to-day needs of government. The government is able to respond quickly, flexibly and relatively unhindered with the action it considers appropriate to meet, sometimes unexpected, societal needs"[154]. This argument echoes that which Locke advanced for the prerogative, although he thought it justified a discretion to act for the public good not only "without the prescription of the law" but also "sometimes even against it"[155]. But, quite apart from the fact that the power being claimed is not one limited to meeting "societal needs" or "the public good" (since individuals need not act in that way), the argument is remarkably weak. Parliament now meets regularly and is in session for much of the year. Any urgent need for authority to do something not already authorised without waiting for such specific statutory powers to be conferred as Parliament thinks appropriate can be met by general legislation enabling emergency powers to be conferred[156]. The substantive issue is not one about the need to respond urgently if there is a need to do so. It is about who

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[154] See BV Harris "*The 'Third Source' of Authority for Government Action revisited*" (2007) 123 LQR 225 at p237.

[155] See J Locke *Second Treatise on Civil Government* Chapter XIV "Of Prerogative".

[156] See eg Part 2 of the Civil Contingencies Act 2004.

decides what new activities the executive should be able to undertake, in what circumstances and under what conditions. Constitutionally that should now be a matter for Parliament, not the executive.

(d) the implications of devolution and a glance abroad

88. Any rule that the Crown may do anything an individual may do will also sit uneasily with devolution within the United Kingdom. In Scotland the functions "of Her Majesty's prerogative and other executive functions which are exercisable on behalf of Her Majesty by a Minister of the Crown" are exercisable by the Scottish Ministers "so far as they are exercisable within devolved competence"[157]. Although this provision does not identify what powers Scottish Ministers may exercise when dealing with matters on which the Scottish Parliament has competence, it raises the question whether this provision carries with it a limitation on the matters which ministers in London may exercise any such powers and whether, for example, both sets of Ministers have to exercise such powers in any event for their relevant governmental purposes.

89. Federal constitutions overseas have created similar problems. In Australia section 61 of the Constitution provides that "the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." In Canada section 9 of the Constitution Act 1867 provides that "the Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen". In each country there are also executives at the state or provincial level respectively. In those countries questions about what activities are appropriate to the executive at each level cannot be avoided. Those questions may not have been resolved there yet with success partly because of the vagueness of the constitutional provisions themselves but also because of tension caused by changing conceptions of what functions governments at each level should undertake. Moreover the case law is often not clear whether the issue concerns the limits on the scope of

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157 Section 53(2) of the Scotland Act 1998. It is outside devolved competence to exercise the function (or exercise it in any way) so far as a provision of an Act of the Scottish Parliament conferring the function (or, as the case may be, conferring it so as to be exercisable in that way) would be outside the legislative competence of the Scottish Parliament: see sections 54(3) and 29 of the Scotland Act 1998 and Part III of Schedule 4 to that Act. It does not appear that any non-statutory powers have been transferred to Welsh Ministers under section 58 of the Government of Wales Act 2006.

what the executive may do or the powers which it may use within that scope. Further, because the executive power is vested by the Constitution in the Crown, there may be a question about whether, and to what extent, the powers of the Crown at common law are relevant to its scope or to what may be done within it.

90. This latter point is an issue in Australia. There it has been said that one should not look to the content of the prerogative in England but rather to section 61 of the Constitution and that the prerogative may be an historical antecedent of the power which that section confers but that it does adequately illuminate the origins of executive power in section 61[158]. The current position in respect of contracts and other expenditure by the Commonwealth government appears to be that the Crown in that capacity is limited to those matters over which the Commonwealth has legislative competence or which are derived from the executive's status as a national government[159]. The former delimited area of competence may reflect the need to maintain a distinction in capacity between the Commonwealth and State executives (by reflecting the respective competences of their legislatures)[160] and the latter (albeit potentially in conflict with the first) to deal with matters over which it is thought that the national government should have competence. This is inherently vague. Mason J once said, for example, that it provided "a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation"[161].

91. In Canada the distribution of executive powers between the national and provincial governments in substance likewise follows the distribution of legislative powers[162]. But, unlike

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[158] See per Gummow J ***Re Ditford*** (1988) 19 FCR 347 at p369, per French J ***Ruddock v Vadarlis*** [2001] FCA 1329 at [179]. For discussion on the nature and extent of the executive power: see G Winterton "*The limits and use of executive power by government*" [2003] FedLRev 10; B Selway "*All at sea — constitutional assumptions and ' the executive power of the commonwealth*" [2003] FedLRev 12; Leslie Zines *The High Court and the Constitution* 5th ed 2008 at p341 et seq.

[159] See Leslie Zines *The High Court and the Constitution* 5th ed 2008 at p341-359, 360-1; ***Commonwealth v Australian Shipping Board*** (1926) 39 CLR 1; ***Commonwealth & Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd*** (1922) 31 CLR 421; ***Victoria v the Commonwealth*** (1975) 134 CLR 338; ***Davies v the Commonwealth*** (1988) 166 CLR 79.

[160] See eg per Mason CJ, Deane and Gaudron JJ ***Davies v the Commonwealth*** (1988) 166 CLR 79 at p93-94.

[161] See per Mason J ***Victoria v the Commonwealth*** (1975) 134 CLR 338 at p397, a view endorsed by Brennan J in ***Davis v the Commonwealth*** (1988) 166 CLR 79 at p111.

[162] See ***Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick*** [1892] AC 437 at

the Commonwealth Parliament in Australia, the Canadian Parliament has legislative competence in respect of all matters not coming within the classes of subject assigned exclusively to the legislatures of the Provinces[163]. Moreover the Canadian Parliament has specific competence over "the Raising of Money by any Mode or System of Taxation" and "the Public...Property" on the basis of which it has been inferred that it may finance activities in the public interest which fall outside the federal Parliament's specific legislative competence, although the extent of this power may not be unlimited when funds are used for matters which fall within the competence of the provinces in Canada[164]. The provinces may likewise have a similar so-called "spending power"[165].The scope of executive action at each level may thereby be correspondingly expanded[166]. That of itself does not necessarily mean that the executive at either level has power to anything falling within that scope without statutory authorisation or prerogative power. But there appears to be an assumption that they may[167], a view also

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p442; ***Bonanza Creek Mining Co Ltd v the King*** [1916] 1 AC 566 at p580-1; ***Operation Dismantle v the Queen*** [1985] 1 SCR 441 per Wilson J at [50].

163 See per Viscount Haldane ***Attorney General for Australia v Colonial Sugar Refining Co*** [1914] 237 at p252-4.

164 See section 91 of the Constitution Act 1867. Cf also Part III of the 1982 Constitution which deals with Equalisation and Regional Disparities. Section 36 provided that "Parliament and the government of Canada are committed to the principle of making equalisation payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public service at reasonably comparable levels of taxation". On the potential limitation on the Parliamentary use of funds: see ***Attorney General for Canada v Attorney General for Ontario*** [1937] AC 355 ("It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence.") and ***Canada Mortgage and Housing Corp. v Iness*** (2004) 70 OR (3rd) 148, (2004) 236 DLR (4th) 241, at [25]-[33] ("The power to spend or lend federal money, however, is not unlimited. The exercise of that power will be considered to impermissibly trench on the exclusive jurisdiction of a province if the exercise of the power is in reality an attempt to regulate a matter within the provincial jurisdiction."); by contrast see Hogg *Constitutional Law of Canada* 5th ed [6.8(a)] ("the better view of the law is that the federal Parliament may spend or lend its funds to any government or institution or individual it chooses, for any purpose it chooses...there is no compelling reason too confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects") and at [29.3].

165 ***Lovelace v Ontario*** [2000] 1 SCR 950 at [111].

166 The power of the Federal Government to fund job creation schemes appears to be inferred from the powers of the Federal Parliament to levy taxes, to legislate in relation to "public property", and to appropriate federal funds: see per Sopinka J ***YMHA Jewish Community Centre of Winnipeg Inc. v Brown*** [1989] 1 SCR 1532.

167 *Ibid.*

reflected in the view espoused by the Supreme Court in Canada (already referred to) that the Crown may do anything an individual may do as the monarch is a physical person.

92. It remains to be seen, therefore, whether the advent of devolution itself brings with it a limitation of what non-statutory powers which the Crown is recognised to retain in England.

(e) the court's approach in this country

93. In this country there is no general and unlimited capacity that the Crown has to spend money on whatever it may wish which has been established by any decision of the courts. In most cases the issue has not arisen: claimants have no interest in disputing a minister's power to pay them the money they want. However what is notable about cases in which payments have been made to relieve hardship is that the authority to make them has been ascribed to the prerogative, "a power of bounty by way of redress of hardships"[168]. Thus, for example, the schemes for criminal injuries compensation and for compensation for wrongful conviction have been specifically attributed to the prerogative[169]. But such an established power is not unlimited in scope.

94. Indeed this may be thought that this is a better explanation for the decision of the House of Lords in ***R (Hooper) v the Secretary of State for Work and Pensions***[170]. In that case social security legislation conferred a statutory *right* on widows to certain benefits based on their husband's contributions[171]. If the claimants had been women they would have been entitled

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168 See ***The Odessa*** [1916] 1 AC 145 PC at p162 (redress of hardship for subjects and neutrals from decrees of the Prize Court: prerogative unimpaired by legislation); cf per Lord Diplock ***Council of Civil Service Unions v Minister of the Civil Service*** [1984] 1 AC 375 at p410a (referring to the Crown's prerogative power of bounty); contrast his earlier view in ***R v CICB ex p Lain*** [1967] 2 QB 864 at p886 that "the only limitation upon the power of the executive government to confer benefits upon subjects by way of money payments is a practical one, to wit, the necessity to obtain from Parliament a grant-in-aid for that purpose". Would it now really be suggested that the only limitation on the executive's power to confer a monetary benefit on members of the party forming the current administration was obtaining an appropriation act authorising payments to encourage participation in political parties? But, even this formulation, does not imply a power to spend money on other things.

169 See ***R v Home Secretary ex p Fire Brigades Union*** [1995] 2 AC 513 *supra*; ***R v Home Secretary ex p Harrison*** [1988] 3 All ER 86 at p91, 93; ***In re McFarland*** [2004] UKHL 17, [2004] 1 WLR 1289 per Lord Scott at [40]-[41].

170 [2005] UKHL 29, [2005] 1 WLR 1681.

171 See sections 36 to 38 of the Social Security (Contributions and Benefits) Act 1992.

to such benefits. The Claimants asserted that the Crown had power to pay them the same amounts and that it had to do so to avoid discrimination. The House of Lords held that, even if any of statutory provisions involved discrimination and assuming that the Crown had power to make such payments, it was not required to do so as the Secretary of State was giving effect to the statutory provisions in not making such payments to persons who were not widows[172]. The reasoning involved is unpersuasive. The fact that Parliament may impose a *duty* on the Secretary of State to provide certain benefits to certain persons in certain circumstances is in no respect incompatible with a *power* to provide others with them in similar circumstances[173]. Nonetheless the result is perfectly intelligible. The Crown has never exercised a power to provide social insurance benefits for those in respect of whom contributions have previously been made. Social insurance has never been an established function of the Crown, any more than providing relief generally against poverty. Relief of the poor generally was a matter of local administration from the Poor Law Act 1601 until the poor law was repealed in 1948 and replaced by a scheme of national assistance (now in the form of income-based jobseeker's allowance and income support). For the Crown to provide social insurance or a general national scheme for the relief of poverty would be to embark on a wholly new activity without Parliamentary authority and for that reason it ought to have been regarded as unlawful[174].

95. Similarly it is notable that the Court of Appeal in ***R v the Home Secretary ex p Northumbria Police Authority*** did not approach the question whether the Secretary of State had power to provide certain goods (plastic baton rounds and CS gas) to Chief Constables (in the absence of any statutory power to do so) by saying that anyone may provide goods or services. It derived the Home Secretary's power from the prerogative power to maintain the Queen's Peace and to keep law and order[175].

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172 See at [6], [47]-[52], [77]-[81], [94]-[95], [122]-[124].

173 Indeed that appears to be the only basis on which the House of Lords could have regarded the fact that Parliament provided for a right compensation in certain circumstances to those wrongly convicted under section 133 of the Criminal Justice Act 1988 as not precluding the Home Secretary providing such compensation in others as a matter of discretion: see ***In re McFarland*** [2004] UKHL 17, [2004] 1 WLR 17, at [12].

174 This was not an argument advanced in that case since it was in the interests of both parties to assert that the Crown had powers to make payments to others. The notion that the Crown could now embark, for example, on providing housing for all nationally without any specific Parliamentary authorisation, making itself a housing authority, would be open to the same objection.

175 See [1989] 1 QB 26 per Croom-Johnson LJ at p42-45; per Purchas LJ at p45-47e, p51c-52a, per Nourse LJ at p56d-59a.

96. Such cases do not support any contention that a minister has a general power to spend, or to provide goods or services, for any purpose for which an individual may do so. Of course traditionally the executive has done many things which individuals may also do such as hold inquiries for public purposes (for example by holding Royal Commissions) or providing advice and guidance. Such things may relate to how ministers are to exercise powers they themselves have. However they may go wider than that[176]. But the existence of such recognised primary activities is no real argument that the same activities may be carried out by the executive for non-public[177] or different purposes.

97. The few cases in which activities on the part of ministers have been found to be lawful simply on the basis of the Crown's alleged power (either as a corporation sole or given the absence of any prohibition) to do anything an individual may do are often disturbing. Should the government have power to operate what is in practice a blacklist, appearance on which will in practice deny an individual an opportunity to pursue a career he chooses, without statutory authority and without Parliament stating under what conditions and with what protections for individuals it should operate[178]? To say that an individual might maintain such a list having the same effects as one maintained by a Minister of the Crown is simply fanciful. Equally, when Parliament has enacted a procedure to be followed before local government can be reorganised involving independent elements, should a minister have power to embark on a procedure not involving such elements as if the legislation had already been changed by Parliament (incidentally requiring information from local authorities involved under statutory powers) but which was to be completed until after any change, thus pre-empting legislation and creating

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[176] the *Case on Proclamations* where the judges recognised that "the King for the prevention of offences may by proclamation admonish his subjects that they keep the laws, and do not offend them" and that disregard of such advice may be regarded "as a circumstance [which] aggravates the offence" may be regarded as an early recognition of a power to issue non-statutory guidance to others: see (1611) 12 Co Rep 74 at p75-6.

[177] In ***Jenkins v Attorney General*** (1971) 115 Sol J 674 an application for an interlocutory injunction to restrain the printing, publishing and distributing of a leaflet about entry to the common market was refused on the basis that "it could not be held on an interlocutory application that the Government's right to communicate was so circumscribed that it could not tell the people what it proposed to do and why it so proposed". This does not necessarily mean that the executive may publish anything for any purpose. For example in ***R v the Environment Secretary ex p Greenwich LBC*** [1989] COD 530 it was stated that the distribution of an information leaflet in the exercise of the prerogative might be restrained if it misstated the law or if the guidance or advice given were manifestly inaccurate or misleading. It is hard to believe that, if the executive tried to publish material designed to persuade voters to support those currently in office or their political party in a forthcoming election, it would not be regarded as doing something for an improper purpose.

[178] Cf ***R v the Secretary of State for Health ex p C*** *supra.*

facts that Parliament could scarcely be expected to ignore[179]. Any analogy with what an individual could have done in such a case would have been absurd. No individual can in practice engage in local government re-organisation. Both these cases involved conduct by Government ministers without any Parliamentary approval, therefore, which in practice no individual could have undertaken with the same effects. No doubt they did not involve doing anything which was expressly prohibited and they did not involve the exercise of what Sir William Wade would have described as a legal power (any more than issuing a passport does). But the notion that their legality can be established merely by invoking the Crown's capacity as a corporation sole is as spurious as the analogy of such conduct with that of an individual. Such cases sit ill with those (such as the *Fire Brigade Union's* case[180]) which find the Minister's power to act in the prerogative, an analysis that recognises a need for it to have been shown that such things have been established as capable of being done under the prerogative if they are to be lawful.

CONCLUSION

98. There is little to be said for the legal arguments which have been advanced to support the supposed rule that *prima facie* a Government minister may do anything which an individual may do. The fact that there may be no prohibition, express or implied, on a minister doing something does not necessarily mean that he has the capacity in law to do it. Any assumption that he does, as he is the agent of the Crown, simply begs the question about what the Crown may do when acting in its public capacity. The suggestion that the minister when acting as the agent of the Crown in its public capacity may do anything an individual may do because the monarch is an individual "savours of the archaism of past centuries". Treating the constitutional position of the Crown today as it may have been under the Angevins ignores the subsequent transformation of the monarchy and the consequent recognition of the different public and private capacities that the Crown now has. Similarly deriving such powers, as the Court of Appeal has tried to do, from the recognition that the Crown is a corporation sole at common law and by treating it as having the same powers as those which all other corporations were (wrongly) assumed necessarily to have, ignores the fact that at common law

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179 See ***R (Shrewsbury & Atcham BC) v the Secretary of State for Communities and Local Government*** [2007] EWHC 2279; [2008] EWCA Civ 148 contrast Carnwath LJ at [50]-[61] and Waller LJ at [82] with Richards LJ at [75].

180 See paragraph [48] above.

the Crown was different from other corporations sole. Each of these arguments ignores the fact that legally the Crown is unique. Each of these arguments also ignores the fact that, when the government does things which an individual may also do, in practice the effects are by no means necessarily comparable.

99. More fundamentally these arguments divert attention from the substantive constitutional issues raised by the contention that ministers may do whatever an individual may lawfully do. That contention in substance involves a claim (a) that it is for the executive, not Parliament to decide, in what new activities the government may engage, in what circumstances and under what conditions and (b) that ministers have an unfettered discretion in relation to what they thus do, provided that in each case they do not do anything unlawful or which they are prohibited from doing.

100. The latter claim creates scope for the abuse of public power that the courts have rejected in line with the development of modern public law. The position which the Court of Appeal adopted in ***R v the Secretary of State ex p C***, that a minister may do anything which an individual may do provided that he does not abuse that power, denies in that proviso the general proposition which that court purported to endorse. However the Court of Appeal's position (which is also the position adopted by the Government) is not merely internally inconsistent. It also fails to provide the protection against the abuse of public power which was no doubt the reason why the court adopted such a proviso. By leaving unlimited the purposes for which ministers may act and thus also the considerations which they may take into account, it allows public powers to be exercised other than in the public interest and other than for public purposes.

101. The former claim should also be rejected in the line with the development of other aspects of modern constitutional law. It is inconsistent with the democratic principle that modern constitutional law now embraces that the executive should derive its powers to undertake new activities from Parliament. Indeed the rule that the executive may do anything an individual may lawfully do is in stark contrast to legislation over the last two hundred years which confers powers on ministers to do such things which cannot sensibly be interpreted consistently with that suggested rule. Such a rule would mean that much legislation must be treated as being either redundant (in conferring powers on ministers which they otherwise

had) or as meaning systematically something other than what it says (where possible treating such legislation not as conferring new powers on ministers as it ostensibly does but merely as imposing restrictions or limitations on what they may do). The suggested rule is thus incompatible with the structure of modern constitutional law. Nor can Parliamentary authorisation for such new activities be regarded as having been conferred by any statutory authorisation for expenditure from the Consolidated Fund. Such enactments are money bills, concerned with control of public expenditure rather than with authorising the executive to engage in the particular activities on which money may be spent. Indeed the assurances that the Government feels it necessary to give about how little reliance it will place on its alleged capacity to do anything an individual may do are themselves an indication of the anomalous nature of its claim.

102. Any rule that a Government minister may do anything that an individual may do, therefore, should not be accepted. Nor should Blackstone's conception of a prerogative power which creates the possibility for such a rule. Etymologically no doubt Blackstone's conception of what a prerogative power is may be correct. But it creates a conundrum concerning the source of the executive's power to do things that the Government has undoubtedly done but which individuals may also do and even whether ministers need any authority to do things at all. Dicey's conception of the prerogative, as being the authority for every act which the executive may do without the authority of an Act of Parliament, avoids this conundrum. But, more significantly, when combined with the established rules that prerogative powers are limited to those which the law allows and which have already been established, it enables effect to be given to the democratic principle which the constitution now embraces that new activities on the part of the government should be authorised by Parliament and it restricts the scope for abuse of such public powers consistently with the development of modern public law. Dicey's conception of the prerogative, which courts have regularly endorsed and applied to those things that both the executive and individuals may do, is thus legally, if not linguistically, to be preferred. Given that the prerogative is limited in what it may authorise to things which it has been established may be done under it, any rule that ministers may do whatever an individual may do is thus one which is not only inconsistent with constitutional principle and practice generally[181] but also with such decisions.

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[181] There are, of course, cases in which ministers have acted without any specific reliance on an established prerogative power: see paragraph [97] above.

103. No doubt the limitations on what the Crown may thus be able to do would astonish, for example, those living in the reign of Edward II. But law is not unchanging. In Edward II's reign juries were expected to bring their own knowledge of every breach of the law, criminal and civil, to their deliberations and could be amerced for failing to do so. In the reign of Elizabeth II jurors now have to be warned not to make their own investigations or rely on anything which is not evidence which they have heard in court[182]. Just as the functions of the jury have changed radically since the time of Edward II, so also have those of the Crown, even though the name of each institution may remain the same. As the Judges in *Calvin's Case* recognised, the King has "a politic body or capacity...framed by the policy of man". As a corporation sole or when acting in a public capacity, what the Crown may do is not an inalienable and invariable endowment conferred by nature. It is a variable legal capacity which has evolved in conjunction with other features of constitutional law in response to changing political, social and legal views and pressures.

John Howell QC

[182] See James Oldham *The varied life of the self-informing jury* (2005) Selden Society at p9-10; ***R v Karakaya*** [2005] EWCA Crim 341 at [24]-[26].