

# Modernising the Constitution: A Constitution Act

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*This article is a conclusion to 7 prior articles. It concludes as follows. There are c. 300 pieces of constitutional legislation which should be consolidated into 6 Acts, then, 4. One would be a Constitution Act of c. 100 sections. There are also c. 180 Crown prerogatives (CPs). At least, 85% are obsolete. They should be abolished and the remainder placed in legislation. If so, the legal concept of the 'Crown' is unnecessary.*

## 1. INTRODUCTION

This article is a conclusion to various other articles that have been written. The contention throughout all of them is that our legal system must respond to modern realities. It should be business-like, clear, efficient and give people justice in an expeditious manner. However, these days, none of these targets are achieved. Our legal system is trapped in a Victorian structure that has failed to move with the times. Much of this is due to the fact that the law is so out-of-date. Previous articles have focused on *constitutional law*. In a nutshell, these articles highlighted the following 4 problems:

- There are c. 300 pieces (bits) of legislation that apply to constitutional matters when there should be 4 at most;
- There are c.180 distinct Crown prerogatives ('CPs') still in existence (there may also be some minor sub-prerogatives). However, at least, 85% are obsolete. They should be abolished. Further, the remainder are not CPs actually exercised by the sovereign (or the Crown) using any *executive power* (save for 2). Instead, it is others now exercising it. Thus, they are purely formal and they should be placed in legislation. In short, only 2 out of 180 CPs are actual prerogatives of the sovereign (or the Crown) today;
- Constitutional law is predicated on a legal fiction which is now wholly out of kilter with reality. It is predicated on the sovereign in the body politic - that is, the Crown - being in charge of government (including quangos), ministers, civil servants and the armed forces, who are all accountable to the Crown in return. However, this role - as well as accountability - has long been assumed by Parliament.

There is nothing difficult about achieving the above. Further, such consolidation would (manifestly) be of benefit to the general public - as well as to lawyers. As it is, this article argues that there is a simple way to achieve the first two points of the above. All constitutional legislation - and all non-obsolete Crown prerogatives - can (without difficulty) be consolidated into just 6 pieces of legislation *viz.* a:

- (a) Crown Act;<sup>1</sup>
- (b) Parliament Act;<sup>2</sup>
- (c) Courts Act;<sup>3</sup>
- (d) Government Act<sup>4</sup> - which will include material on quangos;<sup>5</sup>
- (e) British Territories and Foreign Relations Act;<sup>6</sup>
- (f) Armed Forces Act.<sup>7</sup>

<sup>1</sup> GS McBain, *Modernising the Constitution - A Crown Act*, (2021) International Law Research ('ILR') (2021), vol 10, no 1, pp 13-100.

<sup>2</sup> Ibid, *Modernising the Constitution - A Parliament Act* (2021) ILR, Ibid, pp 101-184.

<sup>3</sup> Ibid, *Modernising the Constitution - A Courts Act* (2022) ILR, Ibid, pp 195-248.

<sup>4</sup> Ibid, *Modernising the Constitution - Quangos* (2022) ILR, vol 11, no 1, pp 1-61.

<sup>5</sup> Ibid, *Modernising the Constitution - A Government Act* (2022) ILR, Ibid, pp 62-116.

<sup>6</sup> Ibid, *Modernising the Constitution - British Territories and Foreign Relations Act: Parts 1 & 2* (2022) ILR, Ibid, pp 117-62 & 163-96.

<sup>7</sup> Ibid, *Modernising the Constitution - An Armed Forces Act* (2022) ILR, Ibid, pp 197-258.

The material in (a), (b) and (e)<sup>8</sup> could, then, be consolidated into one **Constitution Act** of less than 100 sections (see *Appendix A*). As for the remainder,<sup>9</sup> these could, also, be consolidated into a Constitution Act. However, since these are more likely to be amended more often, it would seem best to leave them as they are.

***In conclusion, all constitutional law can be consolidated into 6 Acts. Then, into 4 Acts.***

## **2. HOW MANY CROWN PREROGATIVES ARE THERE?**

One of the current problems dealing with Crown prerogatives ('CPs') is that (perhaps, amazingly) no one has bothered to list them. Yet, it is possible to do so - see *Appendix B* - as well as to indicate how many of these are obsolete or inappropriate<sup>10</sup> and how many others should be placed in legislation. These CPs are analysed in this article. *Are there any others?* There is a relatively simple way to determine this, which is to read through the various legal texts on constitutional law down the centuries. In particular, those which have considered CPs in some detail, viz:

- Chitty Jun, *A Treatise of the Law of the Prerogatives of the Crown* (1820) ('Chitty');<sup>11</sup>
- Bowyer, *Commentaries on Constitutional Law* (1846) ('Bowyer');<sup>12</sup>
- Maitland, *English Constitutional History* (1908) ('Maitland');<sup>13</sup>
- Feilden, *Short Constitutional History of England* (1922) ('Feilden');<sup>14</sup>
- Chalmers & Asquith, *Outlines of Constitutional Law* (1922) ('Chalmers');<sup>15</sup>
- Wade & Phillips, *Constitutional Law* (1<sup>st</sup> ed, 1931) ('Wade');<sup>16</sup>
- Ridges, *Constitutional Law of England* (1934) ('Ridges');<sup>17</sup>
- Anson, *The Law and Custom of the Constitution* (1935) ('Anson');<sup>18</sup>
- Dicey, *Introduction to the Study of the Law of the Constitution* (1948 ed) ('Dicey');<sup>19</sup>
- Plucknett, *Taswell-Langmead's Constitutional History* (1960) ('Plucknett');<sup>20</sup>
- Jennings, *Cabinet Government* (1969) ('Jennings');<sup>21</sup>
- Brazier, *Constitutional Practice* (1994) ('Brazier');<sup>22</sup>
- Bogdanor, *The Monarchy and the Constitution* (1997) ('Bogdanor');<sup>23</sup>
- De Smith & Brazier, *Constitutional and Administrative Law* (1998) ('DeSmith');<sup>24</sup>
- Munro, *Studies in Constitutional Law* (1999) ('Munro');<sup>25</sup>
- Sunkin & Payne, *The Nature of the Crown* (1999) ('Sunkin');<sup>26</sup>
- Phillips & Jackson, *Constitutional and Administrative Law* (2001) ('Phillips');<sup>27</sup>

<sup>8</sup> In part, that is - the material on British territories.

<sup>9</sup> i.e. (c), (e) (insofar as it covers foreign relations) and (f).

<sup>10</sup> Inappropriate because - although done in the name of the sovereign or the Crown - there is no *executive* input. It is purely formal, save for just 2 cases: (a) the appointment of a Prime Minister (the 'PM'), in certain cases: (b) the awarding of certain honours (orders of knighthood viz, the Order of the Garter, Order of Merit and the Royal Victorian Order). Both these CPs should be placed in legislation and any discretion removed from the sovereign in order to uphold the principle that the sovereign must always act *under advice* (which is why immunity from prosecution is accorded). The appointment of certain members of the royal household by the sovereign is not a CP. Rather, it is an accommodation reached with the government, see also De Smith, n 24, p 128.

<sup>11</sup> J Chitty Jun, *A Treatise of the Law of the Prerogatives of the Crown* (1820).

<sup>12</sup> G Bowyer, *Commentaries on the Constitutional Law of England* (1846).

<sup>13</sup> FW Maitland, *English Constitutional History* (1<sup>st</sup> ed, 1908) (it contained a course of lectures delivered in 1887-8 at Cambridge university).

<sup>14</sup> HC Feilden, *Short Constitutional History of England* (1922).

<sup>15</sup> D Chalmers & C Asquith, *Outlines of Constitutional Law* (1922). Also, 5<sup>th</sup> ed (in 1936, edited by C Asquith).

<sup>16</sup> ECS Wade & GC Phillips, *Constitutional Law* (1<sup>st</sup> ed, 1931).

<sup>17</sup> EW Ridges, *Constitutional Law of England* (5<sup>th</sup> ed, 1934, ed AB Keith).

<sup>18</sup> WR Anson, *The Law and Custom of the Constitution* (ed AB Keith, 4<sup>th</sup> ed, 1935).

<sup>19</sup> The first edition was in 1885. Reference in this article is to AV Dicey, *Introduction to the Study of the Law of the Constitution* (9<sup>th</sup> ed, 1948, ed ECS Wade).

<sup>20</sup> TFT Plucknett, *Taswell-Langmead's English Constitutional History* (1960).

<sup>21</sup> I Jennings, *Cabinet Government* (9<sup>th</sup> ed, 1969, ed ECS Wade).

<sup>22</sup> R Brazier, *Constitutional Practice* (2<sup>nd</sup> ed, 1994).

<sup>23</sup> V Bogdanor, *The Monarchy and the Constitution* (1997).

<sup>24</sup> S De Smith & R Brazier, *Constitutional and Administrative Law* (1998).

<sup>25</sup> CR Munro, *Studies in Constitutional Law* (2<sup>nd</sup> ed, 1999).

<sup>26</sup> M Sunkin & S Payne, *The Nature of the Crown* (1999).

<sup>27</sup> OH Phillips & P Jackson, *Constitutional and Administrative Law* (2001).

- Leyland, *The Constitution of the UK* (2012) ('**Leyland**');<sup>28</sup>
- Bradley *et al*, *Constitutional and Administrative Law* (2018) ('**Bradley**');<sup>29</sup>
- Barnett, *Constitutional and Administrative Law* (2020) ('**Barnett**').<sup>30</sup>

Prior to Chitty (in 1820), there were various texts dealing with the Crown prerogative:

- Staunford, *An Exposition of the King's Prerogative* (1567-1607) ('**Staunford**');<sup>31</sup>
- Coke, *Institutes of the Laws of England* (1628-41) ('**Coke**');<sup>32</sup>
- Hale, *Prerogatives of the King* (written 1640's) ('**Hale**');<sup>33</sup>
- Blackstone, *Commentaries on the Laws of England* (1765-9) ('**Blackstone**');<sup>34</sup>
- Bacon, *A New Abridgment of the Law* (5<sup>th</sup> ed, 1795-8) ('**Bacon**').<sup>35</sup>

*Are there any other CPs apart from those listed in these texts?* There may be one or two and they could be dealt with in due course. However, generally, one can assume that - if CPs are not discussed in:

- Blackstone (1765-9);
- Chitty (1820);
- Halsbury, *Laws* (1<sup>st</sup> ed 1907- to date); or
- Wade (1931, now Bradley, 2018)

their existence is dubious.<sup>36</sup> And, if there are any, they can be dealt with in due course.

### **3. FORM OF A CONSTITUTION ACT**

The *form* of a **Constitution Act** would seem uncomplicated. Thus, it should deal with, in descending order:

- Parliament
- Sovereign
- Crown
- Duchy of Cornwall
- *Duchy of Lancaster (if not abolished)*
- Crown Estate
- British Territories

A Constitution Act would, also, be able to dispose of the legal fiction of the Crown in the *body politic* (the political body) as distinct from the sovereign in the *body natural*. This fiction was developed to deal, in particular, with three problems facing the sovereign as a person:

- Minority;
- Mortality;
- Imperfection.

As to these:

- **Minor - but Regency.** The law held (and still does, with slight qualification) that a minor was *incapable* of performing legal acts since they lacked sufficient mental capacity to know what they were doing.<sup>37</sup> To get round this in the case of the sovereign, the courts invented the legal fiction that the sovereign - in the body politic - could not be a minor.<sup>38</sup> This difficulty has been solved in modern times in a more realistic fashion. One, that avoids the artificiality of a legal fiction. This is, that the sovereign *can* be a

<sup>28</sup> P Leyland, *The Constitution of the United Kingdom* (2012).

<sup>29</sup> AW Bradley, KD Ewing & CJS Knight, *Constitutional and Administrative Law* (2018). This text is the successor to Wade, see n 16.

<sup>30</sup> H Barnett, *Constitutional and Administrative Law* (13<sup>th</sup> ed, 2020).

<sup>31</sup> W Staunford, *Exposition of the Kinges Prerogative collected out of the great Abridgement of Fitzherbert, and other olde writers of the lawes of England; [with] the process to the same prerogative appertayning.* The first edition was in 1567. Later editions were published in 1567, 1568, 1573, 1577, 1568-77, 1590 and 1607. For texts prior to Staunford dealing with constitutional law see McBain, n 1 (*Crown*), pp 62-3.

<sup>32</sup> E Coke, *Institutes of the Laws of England* (W Clarke & Sons, London, last ed, 1824).

<sup>33</sup> DEC Yale (ed), *Sir Matthew Hale's Prerogatives of the King*, Selden Society, vol 92 (London, 1976).

<sup>34</sup> W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1<sup>st</sup> ed, 1765-9, University of Chicago Press rep 1979).

<sup>35</sup> M Bacon, *A New Abridgment of the Law* (5<sup>th</sup> ed, 7 vols, 1798). Volume 5 (*prerogative*) contains material on the Crown prerogative. The first edition of Bacon was in 1736-66 (5 vols). The last was in 1832 (8 vols). Bacon is useful since it bridged the historical period from Blackstone (1765) to Chitty (1820) and it was detailed. It is clear that Chitty used Bacon when compiling his own text.

<sup>36</sup> As noted, there are various CPs which are, quite frankly, dubious since there appears to be no evidence that the same ever arose from any original privilege granted to the sovereign by the common law (or any franchise of the same).

<sup>37</sup> This is no longer wholly so in the field of contract, see Minors' Contract Act 1987.

<sup>38</sup> Chalmers, n 15. Also, 5<sup>th</sup> ed (in 1936, edited by C Asquith), p 101 'The king is never an infant...[t]he law holds the king always capable of transacting business. The custom, however, is to provide beforehand for a royal minority by statute.'

minor but - when such occurs - a *regency* shall take effect. Provision can be inserted in a Constitution Act to deal with this - dispensing with the need to retain the legal fiction;

- **Sovereign Dies**. The sovereign - like all people - dies. Thus, the courts created the legal fiction that the sovereign in the body politic is immortal. The last breath of one sovereign is the first breath, *eo instante*, of his (or her) successor and, in law, they are the *same sovereign*, albeit, a different person - something not unakin to Dr Who.<sup>39</sup> Another problem was that, in early times, offices held of the Crown (being personal) were terminated on the death of the sovereign. However, legislation has dealt with this.<sup>40</sup> Today, it is more consonant with reality to provide in a Constitution Act that - on the death of a sovereign - the successor becomes the next sovereign the same instant. Such will dispense with the legal fiction of an immortal sovereign but prevent any gap in time;
- **Imperfection of the Sovereign**. The sovereign in the body natural is as imperfect as any human being. Hence, the legal fiction was developed by the courts that the sovereign - in the body politic - was perfect. A sort of divinisation of the sovereign which may have mis-led rather foolish kings such as James I (1603-25). This fiction enabled the courts to, also, hold that any act of the sovereign was, actually, performed on the advice of ministers and servants. Thus, the sovereign could not be charged with illegality or iniquity.<sup>41</sup> Today, there is recognition that the sovereign can be imperfect (and sovereigns are, often, happy to prove the truth of this). Further, the legal fiction was mis-cast. The issue is not one of perfection - but whether the sovereign should be *immune from prosecution* - both civilly and criminally.

The above related to the sovereign operating in the body politic with reference to his being a *corporation sole*. However, the sovereign can also operate in the body politic as a *corporation aggregate*. That is, the legal fiction of the 'Crown' such as when the sovereign acts together with her servants such as ministers, civil servants and the armed forces.<sup>42</sup> Since 1688 when Parliament became the supreme organ of government and power was taken from the sovereign, the legal fiction of the body politic has declined in relevance and meaning. Today, it is wholly threadbare since the sovereign is, now, a *titular* (i.e. formal) head of state (and a titular C-in-C) - a person no longer exercising an *executive* role. Thus, both the sovereign and the Crown are - *in fact* - wholly subject to Parliament (not the other way around)<sup>43</sup> and a **Constitution Act** should reflect the same.

***In conclusion, a Constitution Act of less than 100 sections can encapsulate the law relating to Parliament, the sovereign, the Crown, the duchies of Cornwall and Lancaster<sup>44</sup> the Crown Estate and the British Territories. It will also dispense with the need for the legal fiction of the sovereign in the body politic in most - if not all - cases.***

#### **4. BENEFIT OF A CONSTITUTION ACT**

We live in difficult times, where democracy is under threat from dictatorships around the world. Part of the success in their attacks on the West is that our Parliamentary and government system is so opaque. One entrapped in a morass of old and obsolete law. However, at base, it is still serviceable and no new Constitution Act - or Bill of Rights<sup>45</sup> - is necessary (anyway, no one would agree on a new one in a month of Sundays, since opinions are so diverse). By stripping away the old law, the underlying constitution is revealed without all the excrescences and historical glitches. Thus, a Constitution Act can reflect the present reality without seeking to re-invent the wheel. Further, if the material on the sovereign, the Crown and Parliament is gathered together in a Constitution Act such would be invaluable for the 54 Commonwealth countries whose constitutions, in most instances, are based on the Westminster model. They could, then, modernise their own systems on the back of the same. Finally, it goes without saying that a Constitution Act would save huge amounts of money and time for government, commerce and the taxpayer. As for the present motley collection of constitutional legislation and common law, it is almost unserviceable.

***In conclusion, a Constitution Act would benefit everyone. It would remove dead law and legislation, as well as all CPs.***

#### **5. LIST OF ALL CROWN PREROGATIVES**

As noted, for a list of all CPs, see **Appendix B**. At least, 85% (indeed, 95%) of these are obsolete or inappropriate. The remainder should be inserted into legislation. Both to modernise them. And, to reflect the fact that the sovereign and the Crown are no longer in control of the same. This article considers CPs in the following order:

<sup>39</sup> Ibid, p 99, 'The king has the attribute of immortality'. *Viscount Canterbury v AG* (1843) 1 Phill, p 321 'the king never dies, the demise is immediately followed by the succession. There is no interval; the sovereign always exists, the person only is changed.'

<sup>40</sup> See the Demise of the Crown Act 1702 *etc.* See n 110.

<sup>41</sup> Chalmers, n 15, p 98 'Not only can the king do no wrong, but he cannot think wrong.'

<sup>42</sup> Thus, when the sovereign sat in the Great Council (*magnum concilium*) now obsolete - and the smaller version, the Privy Council (now only formal) and the even smaller version, the Cabinet - the sovereign was the head and they the body of a *corporation aggregate*. This still applies even though the first is now obsolete, the second now only has formal power and, in the third, the PM sits *in lieu* and the sovereign no longer has any executive control over his actions. For the sovereign's 3 (not 2) bodies and the reason for the confusion, see **20**.

<sup>43</sup> For the two exceptions, see n 10. However, in both these the sovereign can (and should) act under advice.

<sup>44</sup> This assumes the duchy of Lancaster is retained.

<sup>45</sup> The Bill of Rights 1688 was a case of *subjects* asserting their legal rights against the exercise of CPs. However, if CPs are placed in legislation (excising obsolete ones) there is no need for any Bill of Rights.

- Parliament
- The Sovereign
- Crown
- Courts
- Government (this will include material on quangos)
- British Territories and Foreign Relations
- Armed Forces

## 6. PARLIAMENT

A previous article has considered the *legislation* on this. Much is obsolete and the remainder (c. 66 Acts) could be (easily) consolidated into a Parliament Act.

- As for CPs, many are *obsolete*. That is, there is no practical chance of their being re-activated since they have been superceded by legislation. Or, Parliament has abrogated them;
- Others are *inappropriate* since they are wholly nominal today and - if the sovereign sought to re-activate them - <sup>46</sup> such would provoke a constitutional crisis. Others are inappropriate since they seek to control the internal regulation of Parliament which is, now, wholly the province of Parliament itself. However, they do so only nominally since - more than 200 years ago - Chitty (in 1820) correctly asserted: '*With respect to their internal arrangements, Parliaments are, by the constitution of the country, and, indeed, their nature requires that they should be, distinct from, and independent of, the Crown.*'<sup>47</sup>

### (a) Obsolete CPs

The following are obsolete since they derive from the sovereign *in person* exercising them, something she no longer does. Thus, they should be abolished. Not least, since Parliament now has full control over its procedures. Any CP for the sovereign to:

1. Approve the *speakers* of the HC (or HL). \*\*
2. Confirm the *privileges* of the HC. \*
3. Attend *debates* of the HC (or HL). \*\*
4. Licence the use of *proxies* in the HL. +
5. *Fine* or *imprison* HC (or HL) members for non-attendance at Parliament. \*\*
6. Have the power to appoint new MPs. \*
7. Originate any *Act of Grace*.
8. Communicate with Parliament *orally*.
9. Limit the *meetings* of Parliament (i.e. control the time(s) when Parliament could meet).\*
10. *Adjourn* Parliament. \*\*

In the case of those marked with an \* legislation has superceded any CP. In the case of those with a + Parliament has abrogated the same. In the case of those with a \*\* these are internal matters for Parliament and any attempt by the sovereign to re-assert authority over the same would be to revert to the position *pre-1688* and, likely, provoke a constitutional crisis. That is, it would undermine the paramount nature of Parliament. The following may be noted in respect of these CPs:

- (1). **Sovereign approving Speakers**. In the distant past - because MPs assembled and sat in Parliament and the latter was the sovereign's royal palace to which they had been summoned - the sovereign controlled their assembling and the process of debate.<sup>48</sup> However, since 1688, Parliament has been the supreme body of government (and has the right to appoint the sovereign).
  - **HC**. The last time the Crown refused to approve the nomination of a speaker by MP's was in 1678. Any approval is purely formal now since the HC has long declared its '*undoubted right and privileges*' to elect its speaker.<sup>49</sup>
  - **HL**. Its speaker was the Lord Chancellor - a Crown servant. This is no longer the case. The HL elects its Lord Speaker - and can require the resignation of the same - any approval of the sovereign being purely formal.
- (2). **Sovereign confirming HC Privileges**. Formerly, the sovereign confirmed the privileges of the HC (possibly, since 1477). These privileges are now statutory - being: (a) freedom of election; (b) freedom of speech; and (c) *freedom from*

<sup>46</sup> It would seem useful for the courts to confirm that CPs cannot be re-activated when superceded by legislation. This, to avoid uncertainty.

<sup>47</sup> McBain, n 2 (*Parliament Act*), p 104.

<sup>48</sup> The mace reflects this; it represents the presence of the sovereign.

<sup>49</sup> See McBain, n 2 (*Parliament*), p 104.

*arrest/imprisonment*.<sup>50</sup> Further, the HC, itself, cannot create any more privileges, absent legislation.<sup>51</sup> Nor can the Crown.<sup>52</sup> In any case - if the Crown refused to confirm the privileges of the HC it would have no legal effect - these privileges being statutory.

(3). **Sovereign attending Debates**.

- **HC.** Probably, the only time the sovereign sought to attend a HC debate in the last 400 years was Charles I (on 4 January 1642). It provoked a constitutional crisis: the civil war and the loss by Charles I of his head.
- **HL.** Attendance by the sovereign at HL debates was discontinued in the reign of George I (1714-27).<sup>53</sup>

(4). **Sovereign approving HL Proxies**. The use of proxies in the HL was discontinued by a standing order in 1868. However, before that, the sovereign had long given up approval to permit (licence) the same. At least, before 1810.<sup>54</sup>

(5). **Sovereign punishing for Non-Attendance**.

- **HC.** Any Crown practice to fine or imprison MPs (which is different from the power of *Parliament* to fine or imprison) ended long ago. Thus, any CP to fine for non-attendance after summons<sup>55</sup> ended with statutory provision being made - the Summons to Parliament Act 1382 (extant).<sup>56</sup> The exercise of such a power by the HC, itself, over MPs ended by 1666; and for the HC to take a person into custody (i.e. to imprison MPs as a punishment for an infraction of Parliament's procedures) ended by 1785 at the latest.<sup>57</sup> Since the HC's power to fine and imprison has ended it is (very) unlikely the Crown could seek, today, to revive any CP to fine or imprison for leaving Parliament early without licence (for non-attendance, the fine (there is no imprisonment) is statutory, see the 1382 Act mentioned above). Legislation would be needed;
- **HL.** The HL was a *court of record* since, from olden days, it sat in judgment as a court (to deal with trials for impeachment etc).<sup>58</sup> As a court of record, it could fine or imprison. However, the HL no longer sits as a court - since the Judicial Committee of the HL has had its functions assumed by the Supreme Court. Thus, the HL is no longer a court of record. Not being such, it has no power to fine or to imprison (it, also, no longer has a prison). In any case, the HL appears not to have exercised such a power for a very long time.<sup>59</sup> Since the power of the HL to fine or imprison has ended, it is (very) unlikely that the Crown could seek, today, to revive any CP to fine or imprison. Legislation would be required.<sup>60</sup>

(6). **Sovereign Creating MPs & Peers**.

- **HC.** The last time the sovereign exercised a CP to create new *MPs* (by empowering an unrepresented town to send such to Parliament) was in 1673.<sup>61</sup> Today, such would not be possible to do, since legislation on Parliamentary elections covers this field. It would, also, be an infringement of the supremacy of Parliament - as well as an unwarranted interference with democracy.
- **HL.** The sovereign can add to the number of *peers*. However, this is not done *in person*, today and - if tried - such would, likely, provoke a constitutional crisis.<sup>62</sup> Instead, peers are created (nominated) by the PM after a review by the HL Appointments Commission, and the sovereign in person does not have a power of choice over the same. Further,

<sup>50</sup> The (limited) freedom of MPs from arrest or imprisonment is generally accepted as obsolete today, see McBain, n 2 (*Parliament Act*), p 141 ('*extremely remote*' quoting D Natzler & M Hutton, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (25th ed, 2019)).

<sup>51</sup> See McBain, n 2 (*Parliament Act*), p 145 (resolution of 1704).

<sup>52</sup> The Crown cannot since Parliament, itself, cannot, without legislation; and the Crown is not greater than Parliament. It is also too late for the Crown to seek to create new CPs. Lord Diplock in *BBC v Johns* [1965] Ch 32 at 79 'It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative.'

<sup>53</sup> See McBain, n 2 (*Parliament Act*), n 1, p 105.

<sup>54</sup> *Ibid*, p 106.

<sup>55</sup> Departing from Parliament, when sitting, without licence, was a statutory offence under an Act of 1514, now repealed. See McBain, n 2 (*Parliament Act*), p 107.

<sup>56</sup> *Ibid*, pp 106-7. Such an Act should be repealed and - if really required - re-stated in a Constitution Act.

<sup>57</sup> *Ibid*, p 107.

<sup>58</sup> For example, impeachment trials first arose from 1376, see GS McBain, *Abolishing High Crimes and Misdemeanours etc* (2011) 85 Australian Law Journal, pp 810-79. Also, McBain, n 2 (*Parliament Act*), p 103.

<sup>59</sup> A distinction must always be made - when discussing the content of these CPs - from the different cases of: (a) the act being an exercise of a power (privilege) of the Crown (i.e. a CP); or (b) the act being an exercise of the inherent power of the HC and the HL to regulate their own procedures; (c) Parliament empowering the Crown (this is not a CP. It is a statutory power which can be expanded or curtailed as Parliament requires by subsequently amending the legislation). See also, as to (c), Munro, n 25, p 258 'new rights or powers may be conferred by statute, but these would then be not prerogative, but statutory, powers.'

<sup>60</sup> In any case, the Crown can only create common law courts, see 10. Cf. May (2019), n 50, p 227, n 1, suggests that the HL may still be a court of record. However, a court of record refers to a *court of law* and it is no longer that, after the decamping of the law lords to the Supreme Court.

<sup>61</sup> See n 1, (*Crown Act*), p 107. See also May (2019), n 50, p 6.

<sup>62</sup> e.g. if the sovereign said '*I like Mr so and so. I have just created him a peer*' (by grant or induction as a knight). In any case, such a peer would not have a right to sit in the HL since the House of Lords Act 1999.

the sovereign creating peers *in bulk* to enable the passage of legislation would, almost certainly, provoke a constitutional crisis.<sup>63</sup>

(7). **Sovereign initiating an Act of Grace**. Invariably, Parliament originates legislation. However, in one instance, the Crown may originate legislation - in the form of an Act of Grace (that is, a general pardon for crimes, usually for high treason) and not Parliament. However, such Acts are obsolete in any case - the last occasion being after the Jacobite rebellion of 1745 more than 275 years ago. Today, such Acts would be most unlikely. In any case, all legislation should be initiated by Parliament as the supreme body of government these days.<sup>64</sup> Thus, this CP is obsolete.

(8). **Sovereign communicating with Parliament Orally**. The sovereign, in olden times, communicated formally with Parliament orally (not least, since some sovereigns were illiterate). This was when the same attended Parliament. However, attendance today only occurs on the opening of Parliament, with the reading of a speech prepared by the government and not the sovereign.<sup>65</sup> Otherwise, communication is in writing between the sovereign and Parliament. Today, oral communication would not be appropriate anyway since such should be in writing. Not least, for there to be a written record (report) of the same (it may be noted that the sovereign can only be informed of Parliament by report and so the position would become the same for both). Thus, this CP is obsolete in practice and should be abolished.<sup>66</sup>

(9). **Sovereign controlling the Term of Parliament**. In very early times the Crown had some control over how regularly Parliament had to meet. Indeed, at first, this would have been wholly at the discretion of the sovereign since the same was calling them to assemble for a period of time in his palace. However, legislation has replaced this since - at least - 1330 when it provided for Parliament to meet at least once a year (or more often, should there be need).<sup>67</sup> More recently, the Fixed Term Parliaments Act 2011 deals with term.<sup>68</sup> Thus, any CP as to the frequency of Parliament meeting has, in fact, long been superceded by legislation. Thus, this CP is obsolete.

(10). **Sovereign Adjourning Parliament**. The sovereign, technically, has the CP to command Parliament to adjourn itself. However, such was last exercised more than 200 years ago (on 1 March 1814)<sup>69</sup> and, if exercised today, such would (likely) provoke a constitutional crisis since Parliament has - thereafter - always made it clear that it can adjourn itself without any such consent.<sup>70</sup>

***In conclusion, it is asserted all the above CPs are obsolete for the reasons given and they should be abolished.***

**(b) Inappropriate CP's - Sovereign no longer Acts**

The following CPs technically exist. One says '*technically*' since the sovereign no longer exercises any *personal input*. Therefore, any Crown power of appointment, assent, summoning *etc* is, actually, purely formal since the sovereign cannot controvert the decisions of Parliament (or the government) on this. Given such - and to ensure greater accountability - these CP's are no longer appropriate and they should be abolished in order to enable to real party making the decision to be identified. These CPs comprise the following, the power of the sovereign to:

11. Appoint a Clerk of the Parliaments (for the HL) and other Parliamentary officers.
12. Appoint disciplinary officers, *viz.* the sarjeant-at-arms of the HC (and Black Rod, for the HL).
13. Appoint a Clerk of the Crown in Chancery.
14. Appoint Lords Commissioners.
15. Appoint Ministers.
16. Summon Parliament.
17. Open Parliament.
18. Prorogue Parliament.
19. Dismiss Parliament.
20. Give Royal Assent to bills of Parliament.

The following may be noted in respect of these CPs:

<sup>63</sup> See AB Keith, *The King and the Imperial Crown* (1936), p 197. See also De Smith, n 24, pp 126-7.

<sup>64</sup> See McBain, n 1 (*Parliament Act*), p 108.

<sup>65</sup> Even when the sovereign was present, the Lord Chancellor, often, gave the speech. From 1867, where the Lords Commissioners opened Parliament and not the sovereign, the speech was framed as that of the sovereign not that of the Lords Commissioners, see McBain, n 2 (*Parliament Act*), p 115, fn 83. Today, the speech is that of the government.

<sup>66</sup> *Ibid*, pp 109-1 which also indicates the position in 1844 (an oral message when a MP is arrested by the Crown) which is now obsolete (including trial of MPs by court martial).

<sup>67</sup> See McBain, n 2 (*Parliament Act*), p 116 *et seq.*

<sup>68</sup> This Act was not well drafted (or well thought out). The common law position was better since, in dissolving Parliament, the PM (and the party in power) risk losing all.

<sup>69</sup> See McBain, n 2 (*Parliament Act*), p 132.

<sup>70</sup> It may be noted that the Meeting of Parliament Act 1799 - which empowers the sovereign to reduce the period of adjournment when determined on - should be repealed. The speaker, presently, has this power (but only by way of a standing order; it should be statutory). McBain, n 2 (*Parliament Act*), p 122.

(11). **Sovereign appointing Parliamentary Officers.** The appointment of the Clerk of the HC - and the Clerk of the Parliaments (for the HL) - and their deputies<sup>71</sup> and other Parliamentary officers has long been a formality since the sovereign does not interfere in the process. Nor propose candidates. Nor, pay or discipline the same. Thus, any CP should be abolished. Parliament should regulate such matters which it does in practice.

(12). **Sovereign appointing Parliamentary Disciplinary Officers.**

- **HC.** The right of the HC to appoint a sarjeant at arms was restored to the HC in 1962 - although, technically, it is a still a gift of the sovereign. This office was (and is) a disciplinary one - that of maintaining order in the House.
- **HL.** In 1971, the office of sarjeant-at arms was merged with the office of Black Rod. This office is, also, disciplinary.

Both these offices are paid for by Parliament. And, these officers do not serve the sovereign who exercises no choice in their appointment - any approval being a formality. Further, it is appropriate that such be servants of Parliament in a modern democracy since these officers report to (and are subject to) Parliament - including for misconduct. In other words, the sovereign no longer exercises discipline in the HC (or the HL).<sup>72</sup>

(13). **Sovereign appointing a Clerk of the Crown in Chancery.** This person (who is also permanent secretary to the Ministry of Justice) and any deputy, are Parliamentary officers. Although, technically, appointed by the sovereign the same exercises no personal input and does not pay them.<sup>73</sup> Thus, any Crown involvement (appointment under the sign manual) is only formal.

(14). **Sovereign appointing Lords Commissioners.** These are commissioned (authorised) to act as proxies (the agent) for the sovereign, albeit their function is much reduced. Any approbation of the sovereign to their appointment is purely formal. Further, there is a conflict of interest since the Lord Speaker of the HL (for example) is a Lord Commissioner.<sup>74</sup> So too, the leaders of the three major parties in the HL. If all CPs of the sovereign relating to Parliament were abolished Lords Commissioners would not be needed<sup>75</sup> and any communication could be by the sovereign with the Speakers of the HC and the HL (who represent their House and, together, Parliament)<sup>76</sup> by way of a written message under the royal sign manual.

(15). **Sovereign Appointing Ministers.** In olden times, the sovereign had some say in the appointment of ministers. However, at least from 1717, the sovereign has not done so. Thus, the sovereign cannot demand that the PM appoint - or not appoint - ministers (or dismiss them). Such would be unconstitutional and a reversion to the '*king's friends*' of the time of George III (1760-1820) which proved disastrous and which he, himself, put an end to after 1784, nearly 240 years ago.<sup>77</sup> In practice, the PM appoints, dismisses (and accepts the resignation of) ministers and the approval of the sovereign is purely formal.<sup>78</sup>

(16). **Power of Sovereign to Summon Parliament.** The sovereign used to summon Parliament to assemble (usually, to her palace at Westminster). This sole power ended in 1660. In that year - and in 1688 - Parliament assembled by its own authority without a sovereign, due to the lack of the same.<sup>79</sup> There was nothing amiss in this since Parliament was (and is) supreme and, thus - subject to any legislation to the contrary - can control its own meeting.<sup>80</sup> Also, in the Triennial Act 1640, Parliament enabled writs of summons to be issued in the event that the sovereign failed to call a Parliament within 3 years.<sup>81</sup> Further, the sovereign does not employ the persons who prepare and issue the summons. These are Parliamentary officers. Nor, the mode of summons (proclamation) this being stipulated by legislation (the Meeting of Parliament Act 1870). Finally, today, the sovereign has no personal input in summoning Parliament and, if the sovereign refused to summon Parliament - or exercised personal discretion in this matter - such would have no practical effect since Parliament can summon itself (albeit, it might provoke a constitutional crisis). Therefore, any CP is purely formal now.

(17). **Power of sovereign to Open Parliament.** The sovereign has a CP to open (the older word was '*convene*') Parliament. That is, to declare *when it legally commences* its business. However:

- **No Attendance in Person.** The sovereign need not attend in person (strictly, she is invited to attend).<sup>82</sup> Instead, she can use Lords Commissioners (or others) to act as her proxies;

<sup>71</sup> See McBain, n 2 (*Parliament Act*), pp 152-3.

<sup>72</sup> Ibid, p 108 *et seq.*

<sup>73</sup> Ibid, pp 108-9.

<sup>74</sup> Ibid, p 115.

<sup>75</sup> It may be noted that Lords Commissioners were stand-ins for the Lord Chancellor in the past.

<sup>76</sup> It may be noted that Parliament is a corporation aggregate established by the sovereign heading two chambers (formerly one). The corporate officers of the HC and HL are (appropriately) corporations sole (Corporate Bodies Act 1992), these being individuals.

<sup>77</sup> See McBain, n 5 (*Government Act*), p 69, n 78.

<sup>78</sup> Ibid, pp 74-6.

<sup>79</sup> Charles I (1629-40) having been executed in 1649 and, in 1668, James II (1685-9) having fled. See McBain, n 2 (*Parliament Act*), p 113. For an early case of Parliament summoning itself, in 1399 after Richard III (1377-99) was deposed, Ibid, n 72.

<sup>80</sup> The power of Parliament over the Crown is a fundamental principle of the constitution. It is the bedrock of modern democracy and government. If controverted, it simply leads - by way of a disastrous reversion - to events *pre-1688* to which there is no solution. May, n 50 (in 1844) put this elegantly. 'The power of Parliament over the Crown is distinctly affirmed by the statute law, and recognised as an important principle of the constitution'. See McBain, n 2 (*Parliament Act*), p 103.

<sup>81</sup> Act of 1640 (16 Car 1 c 1, rep). It enabled peers, of their own authority, to send out writs to summon the HL and the HC. This, to prevent sovereigns evading legislation as to how often Parliament should meet. See also McBain, n 1 (*Crown Act*), p 117.

<sup>82</sup> For the last occasion where a sovereign arrived uninvited, see 6(a)(3) (Charles I (4 January 1642, entering the HC)).



- **Opening Speech**. At the opening, the sovereign gives a speech - either herself or by proxy (i.e. by her Lords Commissioners). The speech reflects not the personal view of the sovereign, but that of the government. Further, Parliament is not obliged to consider this speech alone (or proceed at once to any consideration of it).

It is unclear when a sovereign *refused* to open Parliament against government advice. Or, *demanding* to open Parliament against government advice (i.e. to exercise a CP). Certainly, it seems to have been *pre-1837* and, possibly, *pre-1688*.<sup>83</sup> Today, even if the sovereign refused, it is not relevant. Parliament can open itself. This was determined in 1399, 1640, 1660 and 1688.<sup>84</sup> Thus, any CP to open Parliament is formal today.

(18). **Power of sovereign to Prorogue Parliament**. While CPs as to the *meeting* or *adjournment* of Parliament are obsolete, the sovereign has a CP to prorogue Parliament without its consent. That is, to command Parliament to suspend its sitting.<sup>85</sup> However, in practice, as a recent case has indicated (*Miller, 2019*),<sup>86</sup> the power of the sovereign in this matter is now purely formal since the decision is taken by the PM not the sovereign. Further, legislation governs the period of time in some instances.<sup>87</sup> Thus, prorogation is now a matter for the government and not for the sovereign in person. Therefore, any CP to prorogue Parliament is formal today.

(19). **Power of sovereign to Dissolve Parliament**. In early times, the sovereign would have had the power to dissolve Parliament without more ado. This was not unreasonable since Parliament met to *advise the sovereign* on what to do. However, for centuries, Parliament meets on a completely different basis. Parliament meets to regulate the operation of government and to reflect the will of the country (the people). Thus, it is much more like the old Anglo-Saxon *folk moots* (the assembly of the *folk*, the people) than the autocratic rule of sovereigns *post-1066*. As it is, the last time the sovereign dissolved Parliament in person was 10 June 1818.<sup>88</sup> *When was the last time that the sovereign refused to dissolve Parliament against government advice or dissolved Parliament against government advice?* It seems to have been *pre-1837* and, possibly, *pre-1688*.<sup>89</sup> Thus, dissolution is now a matter for the government and not for the sovereign in person. The case of *Miller (2019)* re-inforces this (see (18) above).<sup>90</sup>

(20) **Sovereign to give Royal Assent**. The sovereign gives the royal assent to bills of Parliament to give them legal effect. However, this is, in practice, purely formal. The last time the sovereign refused to give royal assent was more than 300 years ago (in 1707) and it is generally recognised that a refusal by the sovereign to give royal assent today would provoke a constitutional crisis.<sup>91</sup> Further, the sovereign rarely gives royal assent in person - such as when *proroguing* Parliament (the last time the latter was done in person was in 1854). And when the sovereign did, there was no debate - only a simple nod. In short, assent is wholly formal now.

***In conclusion, it is asserted that all the above CPs are inappropriate for the reasons given and they should be abolished. They are inappropriate since the sovereign no longer exercises any executive power (influence) over the same and, indeed, if the sovereign were to now do so (in some cases, after hundreds of years) it would simply provoke a constitutional crisis (without solving anything).***<sup>92</sup>

### (c) **Current CPs**

Leaving aside the CPs referred to above which are obsolete - or in which the sovereign's role is purely formal now - *are there any remaining CPs relating to Parliament in which the sovereign has, still, some degree of personal involvement?* There would seem to be 2. However, since these (very much) apply to political matters -

<sup>83</sup> See McBain, n 2 (*Parliament Act*), pp 152-3.

<sup>84</sup> This issue is quite separate from: (a) the sovereign opening Parliament in person (she does not have to); (b) the sovereign having to give an Address (she does not have to). As it is, given that the Address is wholly political now, there would be much merit in it being read by the government in Parliament (and challenged by the opposition) and not at the opening.

<sup>85</sup> In early times, new Parliaments were called each year. Thus, there was no prorogation. The practice of proroguing may have arisen in the reign of Richard II [1377-99] to continue Parliaments which he had packed with his supporters. McBain, n 2 (*Parliament Act*), p 116.

<sup>86</sup> *Supreme Court in R (Miller) v Prime Minister (2019) ('Miller')* [2020] AC 373.

<sup>87</sup> This is legislation which *empowers* the Crown, as opposed to a CP. See the Meeting of Parliament Act 1797 and the Prorogation Act 1867. These should be abolished. Instead, legislation should specify the maximum duration of any prorogation. And, that the PM can shorten the same if in the public interest. See McBain, n 2 (*Parliament Act*), pp 123-9.

<sup>88</sup> See McBain, n 2 (*Parliament Act*), p 132. This was, probably, ill-advised since it went against a convention from, at least, 1688 that dissolution be effected by proclamation.

<sup>89</sup> Crucially, the advice of Lord Aberdeen (PM 1852-5) in 1852 to Queen Victoria (1837-1902) reflects the modern position, even though given nearly 170 years ago. He told the sovereign that he 'never entertained the slightest doubt that, if the minister advised the queen to dissolve [Parliament] *she would, as a matter of course, do so.*' (*italics supplied*). One would suggest that politeness was involved and that '*she would*' meant '*she must*'.

<sup>90</sup> Although this case held that the role of the sovereign was a formal one only in the case of *prorogation*, it would be bizarre if a court were, then, to hold the contrary in the case of any *opening, summoning, adjournment* or *dissolution* of Parliament since they are all interconnected.

<sup>91</sup> See McBain, n 2 (*Parliament Act*), p 137. See also RFV Heuston, *Essays on Constitutional Law* (1964), p 67 'the royal assent is given on the advice of ministers and it is *inconceivable that a monarch would refuse it* since the development of the doctrine of responsible government.' (*italics supplied*)

<sup>92</sup> It would not solve anything since the sovereign cannot be brought before her own courts and is immune from prosecution. Thus, even if was shown that the sovereign deliberately interfered in, for example, the appointment of a Parliamentary officer, the courts would be stymied. All the better, therefore, to simply cancel any CP.

it is asserted that *legislation* should now deal with the same, abolishing any CP and removing any personal involvement. These CP's comprise the following, the power of the sovereign to:

21. Appoint the PM
22. To recommend, or consent to, any bill of Parliament (or its content).

As to these:

(21). ***Appointment of PM***. In times past, the sovereign appointed the PM since he was his (her) servant and represented her in Parliament and in Cabinet.<sup>93</sup> Today, generally, any power of appointment is purely formal in the following circumstances.

- ***PM - Leader of Party with HC majority***. The sovereign *has* to appoint the leader of the political party which can command a majority in the HC. If the sovereign refused to this, such would create a constitutional crisis.
- ***PM - No overall majority***. If there is no overall majority (i.e. a hung Parliament) the incumbent PM remains in office until he tenders his (and his government's) resignation to the sovereign. He may wait until the meeting of a new Parliament to see whether he can command a new majority. If he cannot (or he is defeated on the Address at the meeting of a new session of Parliament) the leader of the largest opposition party in the HC will (*must*) be appointed by the sovereign.

Although the above are constitutional conventions<sup>94</sup> - and, thus, cannot supplant any CP - if the sovereign sought, today, to act contrary to the above - such would provoke a constitutional crisis. In this context, the last occasion where a sovereign may have dismissed a PM to engineer the appointment of one more to his liking, appears to have been in 1834 - more than 180 years ago. Indeed, it may have been even before that, in 1783.<sup>95</sup> However, since (doubtless) the sovereign does not wish to be involved in such a nakedly *political decision* these days - one which is a minefield<sup>96</sup> legislation should now cover the field and any CP to appoint a PM should be abolished in respect of the above. If so, this still leaves room for the sovereign having to appoint a PM in the following cases. If:

- (a) the PM resigns suddenly; or
- (b) dies suddenly; or
- (c) becomes incapable (physically or mentally); or<sup>97</sup>
- (d) there is a coalition government.

It would seem wise for legislation to close out these eventualities.<sup>98</sup> In particular, to provide for a Deputy PM and/or Acting PM.<sup>99</sup> In short, any CP to appoint a PM should be removed from the sovereign in this (very) contentious area. Another CP is as follows:

(22). ***Sovereign to Recommend or Consent to any Bill of Parliament (or content)***. The procedures of:

- (a) royal recommendation;
- (b) royal consent (which is different from royal assent); and
- (c) the Crown placing its interests at the disposal of Parliament,<sup>100</sup>

<sup>93</sup> If not, no CP of the sovereign could have been exercised. Thus, when George I [1714-27] no longer sat in cabinet, someone had to exercise his CPs for him (*in lieu*). From then, and today, that person is the PM and any assent to (or confirmation of) his decisions by the sovereign is mere formality. If all CPs are abolished, this will clarify the true position which is that the PM is responsible to Parliament for political decisions which he makes. He is also responsible to his own cabinet (since ministers can resign if they disagree). Also, to his party (since, these days, they can force him to resign). He is also responsible to his electors in his own constituency. And, to the electorate in general who can refuse to vote for him in future. In short, the PM is in a bear pit - endlessly seeking to convince others of his acts and views but also accountable to many. Surely, the best exercise of democracy - wide accountability for the exercise of power - whereas dictatorship simply produces the opposite.

<sup>94</sup> It is suggested that Halsbury (5<sup>th</sup> ed), vol 29, para 51 states the correct position 'The most important of the monarch's direct prerogative powers today is the appointment of a PM... While in former times the monarch's personal judgment and discretion played a role in the choice of the [PM], today this role and function of the royal head of State is performed *exclusively* in accordance with established procedures and convention.' (*italics supplied*)

<sup>95</sup> See McBain, n 5 (*Government Act*), n 5, p 69. The position as to the dismissal of Lord Melbourne in 1834 is unclear. Phillips, n 27, p 360 thought the discretion (i.e. ability to choose) of the sovereign ended by 1855 since Victoria (1837-1902) was forced to accept as PM persons she did not prefer.

<sup>96</sup> Phillips, n 27, pp 362-4.

<sup>97</sup> *Ibid*, p 362 'The most difficult case is where a [PM] dies in office or resigns on personal grounds, such as health or age, leaving no obvious successor.'

<sup>98</sup> A useful chapter on this is Bogdanor, n 23, ch 4. See also Bradley, n 29, pp 247-50.

<sup>99</sup> *Ibid*. The Deputy PM would have no right of succession; the Acting PM would only be an interim successor. The key is to ensure that time is given for the party with the majority to (expeditiously) elect a successor.

<sup>100</sup> See McBain, n 2 (*Parliament Act*), pp 152-3.

are not ancient and they seem to have ‘*crept in*’ as it were, without any formal sanction of Parliament.<sup>101</sup> In each case (including any consent of the duchy of Cornwall) they could be seen as an attempt by the Crown (and the duchy) to interfere with the democratic process, in order to protect its own interests. That is, by the back door, to enable the same to secretly engineer legislation to benefit the sovereign or the Crown or the duchy of Cornwall. That said, (c) appears to be, today, to be much the same as (b) and (a) tends to be technical without any direct executive interference by the sovereign. There is no doubt that this whole area is very opaque and - as Chitty noted (in 1820), more than 200 years ago - it was inappropriate for the Crown, in effect, to recommend what laws ought to be passed.<sup>102</sup>

This CP is troubling since it is (clearly) an area where corruption can creep in. The pedigree of any such CP is dubious (indeed, it may be nothing more than a Parliamentary practice). There is no evidence (whatsoever) that the courts have ever upheld such a privilege at common law which is the only way in which a CP can be recognised as lawful.

***In conclusion, all the above CPs should be abolished and provision made in legislation instead (where required) in order to protect the sovereign from direct involvement in the political process.***

#### **(d) Not CPs - Parliamentary Practices**

It should be noted that the following are not CPs:

- **Parliamentary privileges & practices**. Parliament cannot create new privileges for itself, as previously noted. However, it has many practices, some of which are obsolete such as: (a) the formal reading of a bill *pro-forma* after the Queen’s speech; (b) an Address of both Houses in reply to the Sovereign; (c) the use of parchment; (d) written HL protests; (e) petitions. These are not CPs. That is, Parliament is not acting pursuant to any authority derived from the Crown exercising any prerogative. In any case these obsolete practices should be abolished.
- **Crown Courtesies**. Certain courtesies *viz*: - (a) any right of access by MPs or peers to meet the sovereign (whether corporate or individual); or (b) any right of favourable construction in respect of the HC proceedings - were never legal rights accorded by the sovereign (they are, also, not CPs since they do not comprise privileges given to her). And, they are not required in any case.<sup>103</sup> Thus, they should be abolished. They are no longer meaningful.

***In conclusion, Crown courtesies are not CPs. However, they should be abolished as obsolete (as well as the above Parliamentary practices).***

#### **(e) Conclusion**

One would suggest there are c. 22 CPs relating to Parliament (and 2 courtesies). All should be abolished since the sovereign no longer exercises an executive role in respect of them. *Would the sovereign object?* One would suggest not. The opposite. Most are obsolete, none bring in any extra money to the sovereign and all controvert the undisputed supremacy of Parliament which was acknowledged as long ago as 1688. Further, they simply confuse the law; turning Parliament (at times) into something akin to the House of Lord Groan.<sup>104</sup> Also, importantly, legal texts on Parliament (including May) and on constitutional law avoid discussing most Parliamentary CPs in any detail - a sure indication that the same believe they are not of much importance (indeed, they are a clog on transparency and accountability).

***In conclusion, all CPs in connection with Parliament should be abolished - including 2 where the sovereign may still have some personal executive input. A Parliament Act could easily achieve this<sup>105</sup> with the same, later, being placed into a Constitution Act of c. 100 sections (see Appendix B).***

## **7. SOVEREIGN**

A previous article has considered the *legislation* on this, the modern component of which is summarised in (a) below.<sup>106</sup> Much is obsolete, as indicated. As for CPs relating to the sovereign as a *corporation sole* (that is, to her personally)<sup>107</sup> it is asserted there are c. 33 CPs, many of which are (manifestly) obsolete since legislation - or the

<sup>101</sup> Phillips thought that it was Parliamentary practice, n 27, p 319 ‘*It is a parliamentary custom that legislation affecting the prerogatives or property of the Crown should be preceded by a message from the Crown; and the speaker [of the HC] must not allow a Bill that affects the prerogative to be read a third time unless the royal consent has been signified by a privy councillor.*’ (*italics supplied*). Whether a parliamentary custom or a CP, it would not seem appropriate in modern times and should be abolished.

<sup>102</sup> Chitty (writing in 1820), n 11, p 3 ‘the Crown has no power to propound laws; and it would have a dangerous tendency and influence, if the king were allowed to recommend from the throne what laws ought to be passed; as was done by some of our arbitrary sovereigns...’ See McBain, n 1 (*Parliament Act*), pp 152-3.

<sup>103</sup> *Ibid*, pp 141-2.

<sup>104</sup> See M Peake, *Gormenghast* (1950). One says this since it is highly likely that very few MPs (including ministers) have a basic understanding of the arcane law and practices of Parliament. The result is to weaken democracy. Also, to give inordinate power to the clerks (not that they actually want it since they, also, are grappling with old cases and obscure conventions that bear little connection to modern times).

<sup>105</sup> A Parliament Act could cut out all the dead law and, then, a couple of years later, a Constitution Act could exclude the repealed provisions.

<sup>106</sup> See McBain, n 1 (*Crown Act*), p 16.

<sup>107</sup> That is, the sovereign does not exercise these in communion with others, her servants. If she did, they would be prerogatives of the Crown. However, the word ‘*Crown*’ is often mis-used. Thus, these CPs are, often, called such, when they are *personal* prerogatives of the sovereign. See also 20.

courts - have prevented the implementation of such. First, however, mention is made of legislation affecting the sovereign.

**(a) Legislation**

Legislation determines who the sovereign is (the descendent of the electress Sophia of Hanover).<sup>108</sup> However, this should be modernised. Legislation, also, provides for the following, the:<sup>109</sup>

- Style and title of the sovereign (Royal Titles Act 1953)
- Death (demise) of the sovereign (Demise of the Crown Act 1702)<sup>110</sup>
- Regency (Regency Acts 1837, 1943, 1953)
- Property held by the sovereign in a personal capacity (Crown Private Estate Act 1800)<sup>111</sup>
- Funding of the sovereign (the Civil List) (Sovereign Grant Act 2011)<sup>112</sup>
- Succession to the Crown (Settlement Act 1700)<sup>113</sup>
- Sovereign as Supreme Governor of the Church of England ('CoE') (Act of Supremacy 1588)<sup>114</sup>

The above - being *legislative* - are not CPs. Further, they cannot really be treated as '*privileges*' (special rights) of the sovereign as such. Rather, they define the *nature* of the sovereign. The next may be regarded as a legislative right of the sovereign - the need for the consent of the sovereign to the:

- Marriage of 6 persons closest to the throne<sup>115</sup> (Succession to the Crown Act 2013)

There are, also, certain statutory *limitations* on the sovereign. Thus, the sovereign:

- Must observe (obey) the law (Act of Settlement 1700)<sup>116</sup>
- Cannot suspend laws (or their execution) (Bill of Rights 1688)
- Cannot dispense with laws (or their execution) (Bill of Rights 1688)<sup>117</sup>
- Must give a coronation oath (Coronation Oath Act 1688)<sup>118</sup>
- Cannot be a catholic (Bill of Rights 1688)<sup>119</sup>

There are, also, other statutory limitations which - because of their date (1688) and the context (the behaviour of James II (1685-8)) - definitely applied to the sovereign but, these days, tend to be applied to the Crown (the sovereign acting with others in the body politic) also. These are that the sovereign cannot:

- Restrict a subject's right to petition the same (Bill of Rights 1688)
- Interfere in the grant of bail by a court (Bill of Rights 1688)
- Interfere in the fining of a person by a court (inc. the amount) (Bill of Rights 1688)
- Interfere in the punishment of a person by a court (Bill of Rights 1688)
- Interfere in the selection (empanelling) of a jury (Bill of Rights 1688)
- Impose tax (that is, a forced payment) (Bill of Rights 1688)<sup>120</sup>
- *Pardon an impeached person.* (Act of Settlement 1700)<sup>121</sup>

The legal nature of the sovereign may, also, be adverted to. The sovereign - *qua* sovereign and not *qua* the Crown - is a corporation sole.<sup>122</sup> Finally, the sovereign is entitled, by statute, to the following in limited cases:

<sup>108</sup> See Settlement Act 1700. Also, McBain, n 1 (*Crown Act*), p 16, n 20. Sophia was the grand-daughter of James I (1603-25).

<sup>109</sup> Ibid, p 16.

<sup>110</sup> Also, Succession to the Crown Act 1707, Demise of the Crown Act 1727, Representation of the People Act 1867 s 51, Sheriffs Act 1887, s 3(3) and the Demise of the Crown Act 1901.

<sup>111</sup> Also, various of other pieces of legislation, including the Status of Children Born Abroad Act 1350-2 and the Succession to the Crown Act 2013.

<sup>112</sup> Also, Civil List Act 1837.

<sup>113</sup> There are other relevant Acts, see McBain, n 1 (*Crown Act*), p 16, n 20.

<sup>114</sup> See s 19 (rep). Since this statutory provision has been repealed, this title could (probably) be dispensed with, without the need for legislation. Cf. McBain, n 1 (*Crown Act*), pp 47-8 (*re* Act of Supremacy 1588, s 9, albeit, there is no express mention of the title).

<sup>115</sup> Probably, this could be reduced to 4.

<sup>116</sup> See the picturesque wording in the Act of Settlement 1700, which reflects Bracton (c. 1250), see McBain, n 1 (*Crown Act*), p 17.

<sup>117</sup> For this limitation and the one above, see McBain, n 1 (*Crown Act*), p 38.

<sup>118</sup> McBain, (*Crown Act*), n 1, p 49.

<sup>119</sup> Ibid, pp 51-2. If the sovereign has no CPs and is no longer Supreme Governor of the CoE, this issue would seem to be solved (since the sovereign could have no influence on any religious matter. Thus, this legislation could be repealed in whole).

<sup>120</sup> Ibid, p 38.

<sup>121</sup> This is obsolete in practice since impeachment is obsolete, given that the HL no longer acts as a court. See n 58.

<sup>122</sup> Elizabeth Mountbatten-Windsor ('**Elizabeth Windsor**') as a person is not a corporation sole or aggregate. A corporation sole is a person and his (or her) successors performing a public office or station who are incorporated in law. As a person performing a public office - that of

- homage and fealty (Appointment of Bishops Act 1533)<sup>123</sup>
- fealty (City of London (Various Powers) Act 1959)<sup>124</sup>

*All the above should be set out in a Constitution Act (save where otherwise abolished in a Crown Act or other legislation).*

**(b) CPs relating to the Sovereign - Obsolete**

There are a number of CPs which apply to the sovereign as a corporation sole (and not to the Crown). Further, they are obsolete. Thus, the sovereign:

1. Is never treated as a minor (i.e. is imputed with legal capacity even though a minor).
2. Has the right to eat royal fish (sturgeon, whales, and - possibly - porpoise, walrus, narwhals).<sup>125</sup>
3. Has the right to eat royal swans.
4. Can sit as a judge.
5. Can withdraw a case from a court (that is, order a court to refuse to hear it).
6. Can order a court to delay judgment.
7. May sue in whatever court the sovereign pleases.
8. May use special forms of court procedure.
9. Does not pay (or receive) legal costs.
10. Has personal property exempt in the case of: (i) wreck (at common law); (ii) strays; (iii) waifs; (iv) customary rates and tolls; (v) distress for rent.
11. Is exempt from the enforcement of any lien, pledge or debt in execution against the same.
12. Must approve the marriage of a queen dowager.
13. Can exempt a person from any liability imposed by: (i) legislation; or (ii) the common law.<sup>126</sup>
14. Can pardon (or relieve from execution) a person (this is in a direct personal capacity).
15. Acts as a visitor in the case of chartered corporations.
16. Can dispose of the Crown jewels, by way of a life interest, by letters patent (it seems).

As to these obsolete CPs:<sup>127</sup>

- (1). This should be abolished, with legislation making provision for a regency when the sovereign comes to the throne as a minor. The Regency Acts 1937, 1943, 1953 effectively do this. However, a regency should *automatically* be triggered in such a case.
- (2) and (3). In 1971, the sovereign indicated that she no longer wish to have such a CP (these are protected species in any case). As for wild, unmarked, cygnets (young swans) they were a delicacy in medieval times. Recent sovereigns have evinced no desire to eat the same (besides, wild, unmarked, swans are a protected species).
- (4)-(6). Caselaw in the time of James I (1603-25) sought to preclude the exercise of these (at a cost to England's foremost judge, but to his great credit; Coke lost his place as a chief justice). Such CPs should be abolished to put the matter beyond doubt. As it is, recent sovereigns have shown no inclination to try their hand at the law and, in practice, the assertion of such CPs ended in 1607-1616.
- (7). This CP was based on a section of Magna Carta (ch 11) now repealed. Further, the structure of the courts are wholly different to what they were in medieval times. Thus, this CP is obsolete and, in any case, unnecessary.
- (8). Halsbury refers to the entitlement of the sovereign to proceed by way of: (a) information; (b) inquisitions or inquests of office; (c) extents; (d) scire facias; (e) quo warranto;<sup>128</sup> (f) mandamus. The first three are generally obsolete and there is no need for the sovereign to have the others (the sovereign may waive any CP anyway).
- (9). There is no need for this CP in respect of the sovereign.

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being sovereign (head of state) she is a corporation sole (an individual cannot be a corporation aggregate). See Blackstone, n 34, vol 1, p 457 'the king is a corporation sole.' Also, G McBain, *Abolishing Deeds, Specialties and Seals: Part 1* (2006) Commercial Law Quarterly (an Australian publication), vol 20(1), p 26 (there are very few corporations sole existing under English law). The Crown is a corporation aggregate. See also Phillips, n 27, p 309. Also, 20.

<sup>123</sup> McBain, (*Crown Act*), n 1, p 40. This was obsolete since the Abolition of Tenures Act 1660, but seems to have been missed.

<sup>124</sup> Ibid. The City of London is no longer held by the sovereign in burgage (not even, since 1929, technically so). It may, also, be noted that grand and petty sarjeanty were preserved after the 1660 Act (see note above) but they are purely honorary and do not require any service obligation to be actually performed. They should be abolished (save in the case of the former in respect of any coronation service, which service is not obligatory and should not require homage or fealty).

<sup>125</sup> It is unclear the extent of this prerogative in olden times. However, *post*-1688, sovereigns have evinced no inclination to eat the same.

<sup>126</sup> The Bill of Rights 1688 has limited this greatly in any case.

<sup>127</sup> These are dealt with in detail in McBain, n 1 (*Crown Act*).

<sup>128</sup> If all CPs are abolished so too should be the writ of *quo warranto*.

(10). There is no need for this CP since the legal concepts of strays and waifs are obsolete, common law distress has been abolished and wreck is now statutory.<sup>129</sup> Further, tolls and customary rates are obsolete in practice and the exemption does not apply to any *statutory* toll which will be governed by legislation *re* any exemption.

(11). This is unnecessary if legislation provides for civil immunity. In any case, such may be presumed to be very unlikely to happen, in practice. Such would not prevent recovery being sought by an action against the Attorney-General.

(12). This CP is not required and (likely) the Succession to the Crown Act 2013 has superceded it. It last seems to have been exercised in Tudor times.

(13). This was banned by the Bill of Rights 1688 *re* dispensations by *non obstante*. However, this did not wholly cover the field. It is obsolete since the sovereign has not sought to exercise the same since 1688.

(14). This is obsolete, since the role of the sovereign is now formal only (and the death penalty abolished).

(15). The role of the sovereign is now formal only since the courts (King's Bench) have long exercised jurisdiction in place of the same.

(16). The Crown jewels are not owned by the sovereign. Thus, the sovereign cannot sell them, give them away, pledge them, create a lien over them or give a life interest in them to another.<sup>130</sup>

***In conclusion, all these CPs of the sovereign are obsolete and there is no evidence that recent sovereigns have sought to exercise the same. Or, that their abolition would be contentious.***

### **(c) CPs relating to the Sovereign - Creating Corporate Bodies**

The sovereign is a corporation sole. That is - by way of a legal fiction that the natural person has a body politic - the same is treated as a legal person.<sup>131</sup>

- As a legal person, the sovereign can also create others of which the sovereign is the *fons et origo*. Thus, the sovereign can create - at common law - other *corporations sole* (the dukes of Lancaster and Cornwall, for example). And, the sovereign can create *corporations aggregate* although the sovereign as creator (like Christ) does so as a corporation sole (the one and only) and not as a corporation aggregate. It is to be noted that the conceptualisation of the sovereign was, originally, ecclesiastical - not legal - in this sphere.
- The sovereign did this (and still) does by handing over *seals*. Seals evidenced (manifested) that a legal act was taking place. And, the transfer of possession (*seisin*) of the particular seal in question signified the transfer of power to someone else to perform a particular function - ecclesiastical, trading, political *etc.*

Prior to the Norman Conquest (1066), the transfer of power by seal was unlikely (or rare) since the Anglo-Saxons generally do not seem to have used them.<sup>132</sup> However, Norman kings, being illiterate, did. Further, a transfer of power by the sovereign can be seen in, for example:

- **Royal Household (Wardrobe)**. The privy seal was transferred by the sovereign to a member of the royal household (the controller of the wardrobe) in 1312 to govern, and operate, the royal household.<sup>133</sup>
- **Parliament**. The Great Seal was transferred to the lord chancellor<sup>134</sup> for him to act *in lieu* of the sovereign (also, for safety since kings - like king John (1199-1216) - were profligate). The precursor to Parliament was the Great Council (*magnum concilium*) deriving from the Anglo-Saxon *witan gemote* (assembly of the wise (the great men)). The lord chancellor - when Parliament was unicameral - '*spoke*' (i.e. communicated) between the sovereign and the chamber. When the chambers physically separated, the lord chancellor spoke for the HL. His power to do so was by virtue of the physical transfer of power by his having possession (*seisin*) of the Great Seal.

<sup>129</sup> Noted by Chalmers in 1922, n 15, p 118 'The whole matter is now regulated by the Merchant Shipping Act, 1894'. It included *fLOTSAM*, *JETSAM* and *LIGAM*.

<sup>130</sup> For profligate sovereigns seeking to do so up to the time of Charles I (1625-49) see McBain, (*Crown Act*), n 1, p 41.

<sup>131</sup> Thus, Elizabeth Windsor is an *individual*. As sovereign she is a *corporation sole*. As head of Parliament, the privy council and the cabinet, they (together) comprise a *corporation aggregate* - she, the head, they the body (members). However, while - in the eye of the law - she is head of Parliament, the privy council and cabinet, her place has been assumed *in lieu* (irrevocably) by others (the speakers, the president of the privy council and the PM). This transfer of power was, generally, effected by handing over seals - the seal being evidence of a transfer of power. See also **Appendix C** which identifies present *common law* corporations sole and aggregate (the latter in the political sphere only).

<sup>132</sup> That said, Edward the Confessor (1042-66) appears to have done so. However, he lived on the continent for much time and, therefore, he (probably) would have been aware of chancery practice at the Vatican. Indeed, it seems likely that - *pre-Conquest* (1066) - the Anglo-Saxons had: (a) a king with a seal (his privy seal); (b) a lord chancellor (holding the great seal to transact public business); (c) a lord treasurer (holding an exchequer (treasury) seal to deal with all matters relating to finance). These would have all been part of the royal household (palace) at Westminster. Even if (c) did not so exist, it is likely that William I (1066-87) would have brought the idea of a treasury (exchequer) with him. Also, the concept of the seal as evidence of a legal transaction. And, its being handed over (permanently) as evidence of a transfer of power from the sovereign (in this case) to other officers of estate.

<sup>133</sup> For the early history of its development see LM Larson, *The King's Household in England before the Norman Conquest* (1904). The date at which it was held by servants may have been earlier, see HD Hazeltine *et al* (ed) *Maitland, Selected Essays* (1936), p 23 (John of Berwick in 1299 ('*domini regis secretarius*')).

<sup>134</sup> The Lord Chancellor being '*custodian*' of the Great Seal may have dated back to the time of Edward the Confessor (1042-66) when the Lord Chancellor was, already, chief secretary to the sovereign. See also, Halsbury, *Laws*, (1<sup>st</sup> ed, 1909), vol 7, p 58, n (*t*).

- **Curia Regis, Privy Council, Cabinet.** Prior to Parliament, the lord chancellor would have been the head of the:
  - *Curia Regis* (king’s council) (*obs*);
  - of which the Privy Council; and (from c. 1660);
  - the Cabinet, were smaller versions.

Thus, today, the giving of seals to ministers (and their kissing hands - the offer of the acceptance of the political power being transferred) continues in the case of secretaries of state.

- these ministers<sup>135</sup> derive their power (albeit, this is slightly altered by legislation now) from (originally) a single secretary.<sup>136</sup> The sovereign transferred his political power to that secretary by handing possession (*seisin*) of one of the sovereign’s seals to the same - his secret seal (the signet). This, probably occurred (at the latest) in the time of Henry III (1216-72).<sup>137</sup> This power (irrevocably given), then, was ‘dispersed’ (flowed out) to other secretaries (later, called ministers) in due course. Thus, by the time of Henry VIII (1509-47), there were 2 secretaries of estate (the title likely derives from the time of Elizabeth I (1558-1603). By 1909 there were 5 *etc*;<sup>138</sup>
- in all the above, it is easy to determine when the transfer of power (political power in this case) - that is, the exercise of a CP in a particular case - has the effect of (legally) creating a body aggregate at common law since the recipients are called ‘servants’ (the English for the French word, *ministre*) or ‘members’. Thus, *members* of Parliament, *members* of the privy council, *members* of cabinet (also, called cabinet ministers).

Doubtless, the original *legal* conceptualisation for the above derived from an earlier ecclesiastical *conceptualisation* which equated the sovereign to the servant of Christ (his ‘servant’ on earth in the domain politic).<sup>139</sup> Thus:

Christ	Sovereign
Disciples ( <i>alter egos</i> )	Corporations sole <sup>140</sup>
Church <sup>141</sup>	Corporations aggregate

The transfer of power (in ecclesiastical terms) was by drinking from Christ’s *cup* - the source (*fons et origo*) from which his spiritual flowed into.<sup>142</sup> In the case of the sovereign, there was no cup but there were 4 seals (rings<sup>143</sup> of power !) by which the sovereign (as it turned out, irrevocably) transferred political power (by franchise)<sup>144</sup> to his servants *viz*.

<u>Seals of the Sovereign</u>	<u>Seal Holder</u>	<u>When Transferred?</u>
Great Seal	Lord Chancellor	<i>pre-1066?</i>

<sup>135</sup> The PM does not receive a seal, likely, because, *post-1717* (when George I no longer sat in cabinet), no one knew what to make of his post (that of acting *in lieu* of the sovereign himself in respect all political CPs). Further, this is still the case since the PM is not officially recognised in law. He should be - but by legislation (it is too late for the sovereign to ‘seal’ him). See also Halsbury, *Laws*, (1<sup>st</sup> ed, 1909), vol 7, p 45, note (e).

<sup>136</sup> The very word ‘secret-ary’ means that the same held a seal (the signet) of the sovereign which would have used for very private correspondence. By 1909, there were 5 secretaries of state, each capable in law of performing the duties of all or any other department.

<sup>137</sup> Henry III was mentally adrift. Thus, probably it was given to the clerk temporarily. However, the practice simply continued. From this clerk the power of all present ministers of the Crown (cabinet and non-cabinet) derives. See McBain, n 5 (*Government Act*), p 76. Cf. Maitland, n 133, p 17, n 1 who notes that John Banstead was keeper of the privy seal in 1299 and that ‘the king, at times, seems to have one yet [i.e. yet one] more intimate clerk who is known as his secretary [a reference to the holder of the signet].’

<sup>138</sup> McBain, n 5 (*Government Act*), p 76.

<sup>139</sup> This was taken to its extreme length when Henry VIII (1509-47) was proclaimed by legislation the ‘Supreme Head’ of the CoE. However, this was thought to be overkill and, later, downgraded to ‘Supreme Governor’, which title prevails today.

<sup>140</sup> This is reflected in the fact that the sovereign can exist in another corporation sole (*qua* Duke of Lancaster or Duke of Cornwall) but cannot change his nature. Thus, the Duke of Lancaster can never be a minor. And, the dukedoms of Lancaster and Cornwall are inalienable since, when held by the sovereign, they are held by him as a corporation sole (not personally).

<sup>141</sup> Sunkin, n 26 (article by Loughlin), p 52 cites the bull *Unam Sanctam* (1302) of pope Boniface VIII which represented Christ and his church as a mystical body, of which Christ was the head (and they the members).

<sup>142</sup> Later, for bishops, it was the pope (acting like a sovereign) giving a *pallium* (not a seal) to pass his power to bishops. This, doubtless, was to emphasise an ecclesiastical aspect. That bishops derive from a single source - St Peter - to whom power on earth was given by Christ as the foremost disciple (and who, presumably, drank first from the cup).

<sup>143</sup> Seals were, originally, rings, with the seal impressed (a signet). In Roman times, to convey acceptance of a business deal (i.e. to conclude a contract) a Roman would send his ring (by a slave) to the offeror. The mark on the seal identified as much as a signature does today. The words ‘seal’, ‘sign’, ‘sign[ature]’, ‘mark’ and ‘handshake’ (hand seal) are all synonyms - deriving from the hebrew ‘*oth*’ (pronounced oath) since - in the earliest times - mutual oaths (promises witnessed by the gods) was the means of contracting. See 20.

<sup>144</sup> The sovereign acts by franchise and can do so commercially as well as politically (i.e. giving a franchise of his right to treasure trove or to wreck or to coin money *etc* to another).

Exchequer (Treasury) Seal	Lord Treasurer <sup>145</sup>	14 <sup>th</sup> c.
Privy Seal	Lord Privy Seal	1312
Signet	Secretaries of State (ministers) <sup>146</sup>	<i>pre</i> -1299

All this is (perhaps, forgotten) history and some of it was expressed in the *Case of the Duchy of Lancaster* (1561) *viz.*

the king has in him two bodies *viz.* a body natural, and a body politic...His body natural... is a body mortal...his body politic is a body that cannot be seen or handed, consisting of policy and government, and consisting of the direction of the people, and the management of the public weal...<sup>147</sup>

The problem with this quotation (and case) was that it was referring to the *body politic* of the *sovereign only* in *one of two* possible *legal* capacities - although Plowden (who reported the case) did not make this particularly clear. That is, this case dealt with:

- the sovereign (a corporation sole) creating *another* (the duke of Lancaster is a corporation sole).<sup>148</sup> Thus, this case was not dealing with the sovereign (a corporation sole) creating a *corporation aggregate*.
- further, it was implicit in this case that the originating power was that of the *sovereign*<sup>149</sup> - as a *corporation sole* - creating a *corporation sole*. Not that of Henry of Lancaster (a former subject i.e. a natural person) creating a corporation sole, something an ordinary person could not do.

The power of the sovereign to create a *corporation aggregate* is better reflected in *Willion v Berkley* (1559) an earlier case to that above in which Southcote J stated:

The king has two capacities, for he has two bodies, the one whereof is a body natural...the other is a body politic, and the members thereof are his subjects, and he and his subjects together compose the corporation...and he is incorporated with them, and they with him, and he is the head, and they are the members, and he has sole government of them...<sup>150</sup>

In short, the *legal body* of the sovereign can exist in two forms: (a) corporation sole; (b) corporation aggregate of which he is the head.<sup>151</sup> This all very well since one is referring to the *sovereign*. However, the same, also, has a natural body. Therefore, it is best for legal analysis to accept that the sovereign (at present, Elizabeth Windsor) has *three* bodies, a:

- natural body - one which cannot create a corporation<sup>152</sup>
- public body - one which can create a corporation sole (including a political one)

<sup>145</sup> See for these seals generally: J Brydall, *Jus Sigilli* (1673); J Otway-Ruthven, *The King's Secretary and the Signet Office in the Fifteenth Century* (1939); TF Tout, *Chapters on the Administrative History of Medieval England* (1920-33); NH Nicholas, *Observations on the Offices of Secretary of State, Lord Privy Seal and Lord Chamberlain of the King's Household with remarks on the Great Seal of England* (1837).

<sup>146</sup> The Great Seal is now regulated by statute, the privy seal and signet abolished. Thus, it is asserted that any CP to re-create them (or other seals) has gone, in reality. The Great Seal should also be abolished since, in practice, the role of the same is now purely formal and the power has been irrevocably transferred (i.e. if the sovereign asked for her seal back it would not be given).

<sup>147</sup> See *The Commentaries or Reports of Edmund Plowden*, Part 1 (1816), p 213.

<sup>148</sup> Further, this is clear from the context. Neither the *duchy* of Lancaster - nor the *duchy* of Cornwall, for that matter - are corporations sole, but the dukes of the same are. Thus, the sovereign acting as a corporation sole can franchise (transfer) his sovereign power to create himself a duke. In the case of the *duchy* of Lancaster, Henry IV (1399-1413) held it as a *subject* before he came to power.

<sup>149</sup> Thus, the originating power was not the individual doing this without the adornment of kingly office. 'So that he has a body natural, adorned an invested with the estate and royal dignity...'. Ibid n 147, p 213. Further, this is clear from the context. Neither the *duchy* of Lancaster - nor the *duchy* of Cornwall - are corporations sole (or aggregate) since they are held *of* the sovereign.

<sup>150</sup> (1559) Plowden 233a. See also Sunkin, n 26 (*article of Loughlin*), p 52. See, also, an earlier case of 1522 (14 Hen VIII f 3 pl 2) cited by Maitland, n 133, p 79 where Fineux CJ states 'A corporation [aggregate] is an aggregation of head and body: not a head by itself, nor a body by itself...'. Fineux then continues 'For albeit the king desires to make a corporation [aggregate] of JS [an individual], that is not good, for common reason tells us that it is not a permanent thing and cannot have successors'. This seems wholly clear in that Fineux was saying that a *natural person* cannot be a corporation aggregate - because an individual [JS] dies and is not permanent (i.e. the head of the corporation aggregate dies). Instead, the head has to be a *legal person*. However, Maitland reads this is a wholly different sense - that the sovereign cannot make an individual a corporation sole, which seems quite wrong since the common law courts can recognise (and have) that an individual can have a legal body (body politic) in order to get round problems of infancy, mortality and imperfection. Maitland later notes, Ibid, p 80.that Fineux CJ 'denies that this phenomenon exists where only one man is concerned'. One would agree. An individual cannot be a corporation aggregate (because there is the lack of a body, a group of others).

<sup>151</sup> Francis Bacon (1561-1626) noted this - that the sovereign and the Crown were 'inseparable but distinct'. Indeed, they are. One is a corporation sole; the other a corporation aggregate. See also Sunkin (*article of Loughlin*), n 26, p 56. However, Loughlin is wrong in stating, Ibid p 56, that the 'Crown is a corporation sole'. It cannot be because the 'Crown' refers to when the sovereign is head of a body of which there are *other members*. Thus, the Crown is a corporation aggregate. A corporation sole is always an individual alone - including the sovereign alone. An individual cannot be a corporation aggregate (it needs more than one). Wade, also, is wrong in stating that the 'sovereign is the Crown'. Ibid, pp 1 & 24 (*article* by Sunkin). The sovereign is not. The sovereign is a *corporation sole*. The Crown is a *corporation aggregate* - the head of which is the sovereign (a corporation sole). Thus, a cabinet minister is a member of a corporation aggregate.

<sup>152</sup> Bracton (c. 1250) (*lex facit regem*, the law makes [i.e. recognises] the king [and his legal nature]). If not a sovereign Elizabeth Windsor has no power to create corporations.



- public body - one which can create a corporation aggregate (including a political one).

Using this analysis, the answers (and the correct nomenclature) would appear to be simple.

- Elizabeth Windsor - natural body
- The sovereign - Elizabeth Windsor acting as a corporation sole
- The crown - the *sovereign* (not Elizabeth Windsor) acting as head of a corporation aggregate.

Thus, one would suggest that Lord Simon correctly stated the legal position in *Town Investments Ltd v Dept of the Environment* (1978) in which he stated:

the Crown [is] a corporation aggregate headed by the Queen [i.e. the sovereign - a corporation sole]<sup>153</sup>

The root of any error may well be Maitland who asserted that the:

‘*sovereign...is not a ‘corporation sole’, but is head of a ‘corporation aggregate of many’.*<sup>154</sup>

The first statement - that the sovereign is not a corporation sole - is contradicted Blackstone (1765)<sup>155</sup> and Coke (1628)<sup>156</sup> and appears quite wrong. Thus, Coke referred to:

Persons capable of purchase [purchasing land] are of two sorts, persons natural...and persons incorporate or politique [juristic] created by the policy [i.e. the legal art] of man (and therefore they are called bodies politique [juristic or legal bodies]);<sup>157</sup> and those be of two sorts *viz*, either sole, or aggregate of many [persons].<sup>158</sup>

Indeed, and Maitland appears to have accepted this - there are only two forms of artificial (i.e. legal or juristic) corporations.<sup>159</sup> Coke also noted:

this body politic, or incorporate, may commence, and be established three manner of ways, *viz* by prescription, by letters patent, or by act of Parliament [i.e. statutory]<sup>160</sup>...

And, in the *Case of Sutton’s Hospital* (1612):

<sup>153</sup> [1978] AC 359. Also, Sunkin (*article of Loughlin*), n 26, p 63. Cf. Lord Woolf was incorrect in stating that the *Crown* ‘can be appropriately described as a corporation sole or a corporation aggregate’ see Sunkin, n 26, p 72 (article by Loughlin) referring to *M v Home Office* [1993] 3 WLR 433. This is not so. The Crown is a corporation aggregate, the sovereign is a corporation sole. Also, *per* Woolf ‘While the Crown can hardly be both a corporation sole and aggregate as they are quite different entities there are reasons for using both descriptions and it is difficult to say which description is the more appropriate.’ Not so. One simply has to look at what CP the sovereign is undertaking (i.e. in what capacity as a body public the sovereign is acting). If the sovereign is working with ‘members’ (i.e. *members* of Parliament, *members* of the privy council, *members* of the cabinet (including ministers) the sovereign (a corporation sole) is acting as part of a body aggregate. Thus, reference is to the Crown. When the sovereign is exercising personal prerogatives, the sovereign is acting as a corporation sole. And, when Elizabeth Windsor is driving her car on private business she is acting as Elizabeth in her natural (i.e. non legal) body. Not difficult! Cf. Sir Stephen Sedley ‘it is not inexorable in a constitutional monarchy that the monarch [the reference should be to Elizabeth Windsor] cannot be given a parking ticket like the rest of us’. One would agree. See Sunkin, n 26, p 72 (article by Loughlin).

<sup>154</sup> Maitland, n 133, p 117. The root of this inaccuracy is his previous statement that the ‘Crown is not, I take it, among the persons known to our law, unless it is merely another name for the king.’ The answer is ‘no’. The ‘*Crown*’ is the legal term when the sovereign acts as head of a corporation aggregate (head of Parliament, head of the privy council, head of the cabinet *etc*). The ‘*sovereign*’ is the legal term when he is exercising a personal prerogative - such as eating sturgeon, giving out medals, controlling the education of his children or acting as Lord High Admiral (to claim his *droits*). Maitland simply forgot to ask - *in what legal capacity is the sovereign acting?* The truth is that Maitland became tripped up by his own use of terminology. He convinced himself that reference to the ‘*sovereign*’ was to the personal body of the same when it is reference to the body public (juristic). From then on, he simply proved his own case to his own satisfaction. I think his ‘*The Corporation Sole*’ is (possibly) the least satisfactory of all his writings - rambling, caustic and without regard to the fact that the sovereign (as corporation sole) was creating corporations at the time of the Conquest (counts palatine). And, that the Anglo-Saxons - by the time of king Alfred (886-91 AD) - clearly distinguished the personal estate of the sovereign and the royal estate (which was inalienable)

<sup>155</sup> Blackstone, n 34, vol 1, p 457 ‘the king is a corporation sole’. He cites Coke, n 32, vol 1, 43 in which Coke did not indicate the same words but referred to the *Duchy of Lancaster Case* (1561) with Coke stating ‘when the royal body politic [i.e. the sovereign] does meet with the natural capacity in one person, the whole body shall have the quality of the royal politic, which is the greater and more worthy, and wherein is no minority.’ (i.e. the legal capacity of sovereign supplants any incapacity of the individual).

<sup>156</sup> *Case of Sutton’s Hospital* (1612) 10 Rep 29b ‘every corporation or incorporation, or body politic or incorporate...either stands upon one sole person, as the king, bishop, parson, *etc* or aggregate of many, as mayor, commonalty, dean and chapter *etc*...’

<sup>157</sup> Maitland, n 133, p 110 seems confused as to the meaning of ‘politic’ (‘whatever ‘politic’ may mean.’). However, surely, it simple means ‘legal’ or ‘juristic’. One invented by the ‘policy’ (i.e. the legal art) of man.

<sup>158</sup> Coke, n 32, vol 1, 2a. In 341a, Coke gave an example of a corporation aggregate in an ecclesiastical context ‘aggregate of many, as the dean and chapter, master and confreres...’. Also ‘Of hospitals, some are corporations aggregate of many; as of master or warden *etc* and his confreres...’ (spelling modernised). See also Coke, n 32, at 250a ‘bodies politike, or corporate, which have succession perpetual, and not to natural men.’ Maitland, n 133, p 98.

<sup>159</sup> Maitland, n 133, p 73 ‘Persons are either natural or artificial. The only natural persons are men. The only artificial persons are corporations. Corporations are either aggregate or sole.’

<sup>160</sup> Coke, n 32, vol 1, 250a. Prescription presupposes a prior Crown grant, now lost. Likely, the Chamberlain of the City of London being a corporation sole would fit into this category.

capacity to take in succession cannot be without incorporation; and the incorporation cannot be created without the king...<sup>161</sup>

Maitland also appears to have accepted this. That is, the sovereign (or legislation) is the creator of any corporate body - whether sole or aggregate. However, where he made a (fundamental) slip (it is asserted) is that Maitland:

- failed to distinguish the simple fact that the ‘*sovereign*’ refers to a single person (not to a group or aggregate). And that it refers to a *juristic person* - not to the *individual*, even though two cases had already made this clear.<sup>162</sup>
- thus, the juristic person is a *corporation sole*. However, this juristic person (the sovereign) when acting with others (its members, such as in Parliament, to assent to legislation) is the head of a *body aggregate* called the *Crown*. And he is head as *sovereign* - not head by virtue of being an individual.
- further, there is need for the sovereign being a *corporation sole* since it solves the problems of minority, mortality<sup>163</sup> and imperfection (see 3). It also enabled the sovereign to franchise personal prerogatives (his right to royal fish and animals, right to wreck and treasure trove *etc*).

*After all, was Maitland seriously suggesting that Elizabeth Windsor - when she sits on the throne and addresses Parliament (a body aggregate with her, a body sole, as the head) - does so as Elizabeth Windsor?!*

As to why Maitland may have been confused is that he (like Dicey and Wade) may not have known about the use of seals to pass political power. Also, Maitland had a considerable dislike for things religious.<sup>164</sup> Thus, he did not know (or did not wish to acknowledge) the mystical theology of the medieval catholic church that Christ was both.<sup>165</sup>

- (a) a man (i.e. had a *body natural*); and
- (b) divine (God, sovereign; i.e. he had a *body divine - a body sole*); and
- (c) as God was head of his church (i.e. in his *divine body*, head of a body aggregate, his church).<sup>166</sup>

All that happened was that ecclesiastical lawyers substituted the word ‘*sovereign*’ for Christ in the above formulation: *viz.*

- (a) Elizabeth Windsor
- (b) the sovereign - a legal body comprising a corporation sole
- (c) the Crown - a reference to when the sovereign was head of a corporation aggregate (such as Parliament, Privy Council, the Cabinet *etc*).

Thus, to determine whether the sovereign is acting as a body sole - or as part of a body aggregate - the only question to be asked is – what CP is being exercised? For more, see 20. Be that as it may, the sovereign (presently, Elizabeth Windsor acting as a corporation sole) has the following powers (CPs), the power to:

17. Appoint members of the privy council (PC) (a corporation aggregate, of which she is head)<sup>167</sup>
18. Have the PC effect the ‘*royal pleasure*’ (i.e. carry out the royal will, purely formal now)
19. Order the UK Great Seal to be attached to certain legal documents (charters, writs *etc*)
20. Create corporations sole
21. Create corporations aggregate.

In respect of these:

- (17). The sovereign is advised by the PM who should be appointed to the PC. Thus, the role of the former is purely formal now and any CP should be abolished. For its part, the PC is clinically obese with some 700 members of whom only 3-4 attend on a

<sup>161</sup> *Sutton’s Hospital Case* (1612) 10 Rep 26b. See also Maitland, n 133, p 110.

<sup>162</sup> See text to ns 147 & 150. Also, *Sir Thomas Wroth’s Case* (1573), see Plowden n 147, p 456a ‘the body politic of the *king* is charged, which body politic is perpetual, and has perpetual continuance, and never dies, although the body natural, in which the *body politic* is reposed, dies’. Thus, the situation of Dr Who, see n 39. In other words, all references to the *sovereign* are to him as a single person (not aggregate) but in a juristic body. See also *Calvin’s Case* (1608) 7 Co Rep 10a.

<sup>163</sup> As Bowyer pointed out, n 12, p 409.

<sup>164</sup> Maitland, n 133, p 87 ‘Mystical theories break down: persons who can never be in the wrong are useless in a court of law.’ Really? That is exactly what the common law courts held (and still do) - the sovereign, *qua* sovereign, can do no wrong (doctrine of perfection).

<sup>165</sup> *Ibid*, p 109 seems to have regarded it as ‘metaphysiological nonsense.’

<sup>166</sup> The parson was the same. He was Joe Bloggs in the body natural but a corporation sole when a ‘reverend’ (to stop him claiming that church property belonged to him and could be passed to his children, see Blackstone, n 34, vol 1, p 458). As a corporation sole (the rev) he was, also, head of his little church comprising his parishioners (together, a corporation aggregate). The rev. (and his parishioners) were also part of a wider corporation aggregate comprising the pope (also, a corporation sole) as head of a universal church of which the body was all priests and bishops and all parishioners (with the rev, in his case, being a corporation sole, part of a corporation aggregate). No different to Christ (a corporation sole) franchising to St Peter the power to appoint priests (including bishops) as corporations sole to head up a worldwide church in which all, then, were part of a corporation aggregate - with Christ (a corporation sole) as the *head* of a church and they, the members. See also Blackstone, n 34, vol 1, pp 458-73.

<sup>167</sup> This power to appoint is only formal now. In the case of cabinet, it has been lost. The PM appoints his ministers.

daily basis.<sup>168</sup> Since the PC has no deliberative function it is a purely formal body - the cabinet and ministries doing all the work which documents it merely rubber stamps - this latter function should now be wholly undertaken by the former.<sup>169</sup> Doubtless, abolition would save a great deal of money. And, remove a pointless exercise for the sovereign and those 3-4 government ministers who operate the PC in actuality. Such will, also, ensure *proper Parliamentary oversight* (this includes all material relating to British territories (i.e. the Channel Islands, Isle of Man and BOT).

(18). The royal pleasure (will) is expressed by means of: (a) orders in council ('SI'); (b) proclamations; (c) orders, commissions or warrants under the UK Great Seal; (d) writs, patents or other documents under the UK Great Seal. All this should be modernised *with SI* replacing the remainder (to ensure accountability to Parliament) or under the royal sign manual (in the rare cases where still required).

(19). The UK Great Seal was to deal with the illiteracy of sovereigns. From the time of Henry VIII (1509-47) the royal sign manual was also used. Today, sovereigns can sign their name (the royal sign manual). The UK Great Seal is not needed and should be abolished, not least because any common law requirement to use it is no longer necessary with the formation of the Crown Estate.<sup>170</sup> Any legislative requirement is also not needed.<sup>171</sup> If the UK Great Seal is not abolished the legislation relating to the use of it should be modernised.<sup>172</sup>

(20). There are few corporations sole apart from CoE priests. Probably less than 50.<sup>173</sup> The vast majority of these are statutory. Therefore, any need for a CP to create a corporation sole is unnecessary. Thus, this CP should be abolished. Also, all non-statutory corporations sole (and quasi-corporations sole)<sup>174</sup> should be abolished - or become statutory corporations sole (very few are required).<sup>175</sup> Legislation should also provide that all legal matters relating to the constitution (or dissolution) of a corporation sole and its powers may be laid down in a SI.<sup>176</sup>

(21). There is no need for the sovereign to be able to create corporations aggregate (by grant). Legislation should provide for this and all existing corporations aggregate should become statutory bodies by virtue of SI. At present, there is no real accountability to Parliament. Nor, proper legislative oversight (the privy council deals with such bodies, however, it no longer has any former power). There are relatively few common law corporations aggregate existing (c. 900) and the Government Legal Department should deal with them and their modernisation. As for political corporations aggregate, see *Appendix C*. In the case of cabinet, it should be recognised in legislation by means of a *Government Act* (so too, the PM).

#### **(d) CPs relating to the Sovereign - Other CPs**

Presently, other CPs relating to the sovereign are as follows, the sovereign:

22. Has criminal and civil immunity (the principle or doctrine of perfection).
23. Cannot be arrested.
24. Cannot be negligent.
25. Cannot have *laches* (i.e. sloth or delay) attributed to him (*this also applies to the Crown generally*).
26. Can control the education (and custody) of royal children who are minors.
27. Can give certain titles to members of the royal family (such as HRH).
28. Can confer certain hereditary peerages (but not (probably) create new ones or create life peerages).
29. Can award certain decorations (for bravery).
30. Can award certain medals.
31. Can award certain orders of knighthood.<sup>177</sup>

<sup>168</sup> Phillips, n 27, p 334 (writing in 2001) said that privy council comprised c. 300 members. Thus, it has more than doubled in size in 20 years. He also noted that the last full meeting of all the members was in 1839. *Ibid*, p 335. Also, *Ibid*, p 335, n 13, 'RHS Crossman...described meetings of the [PC] as 'the best example of pure mumbo jumbo you can find.' (*Diaries of a Cabinet Minister*, vol 2, p 44).

<sup>169</sup> McBain n 5, (*Government Act*), p 81. The Government Legal Department could handle the 900 or so charters presently said to exist. The terms of all of them are either obsolete or could be reflected better in the form of a SI (with rare exceptions) since then there is accountability to Parliament.

<sup>170</sup> The Great Seal was used to deal with the transfer of Crown land, prior to 1760. In particular, when held by the sovereign, which lands sovereigns often dissipated. See generally, GS McBain, *Modernising the Monarchy in Legal Terms - Part 5* (2014) King's LJ, vol 25, pp 440-66.

<sup>171</sup> *Ibid*.

<sup>172</sup> McBain n 1, (*Crown Act*), pp 72-3.

<sup>173</sup> See McBain, n 122, vol 20(1), pp 15-54.

<sup>174</sup> *Ibid*. These comprise the Lord Chancellor, Lord Chief Justice and the Chamberlain of the City of London. However, the Lord Chancellor is treated as a corporation sole for certain purposes, see Legal Aid, Sentencing and Punishment of Offenders Act, s 37(3)(*re legal aid*).

<sup>175</sup> CoE priests do not need to be corporations sole (other religious orders are not). Nor do non-statutory Secretaries of State (all ministers should be declared to be corporations sole by legislation). The sovereign should be declared to be a corporation sole in a Constitution Act. The Master of Pembroke College, Oxford no longer needs to be a (common law) corporation sole.

<sup>176</sup> Any need for corporations sole to use a seal should be abolished. The law on this is quixotic. See McBain, n 122, pp 26-7.

<sup>177</sup> Those in which the sovereign is said to have personal discretion are the Order of Merit, Orders of the Garter and the Thistle and the Royal Victorian Order. See n 10, Phillips, n 27, p 316 and Bradley, n 29, p 263.

[32] *Can award certain 'courtesy' styles and titles (this is, likely, not a CP as such).*

[33] *Can appoint certain members of the royal household (Ibid).*

As to these:

(22) This should be stated in legislation, perhaps, with criminal immunity being limited to crimes other than those in which a life sentence is imposed. Placing the same in legislation will dispense with the legal fiction of 'perfection'.

(23) This should be stated in legislation.

(24) & (25). These are corollaries to (22) and may not need to be stated in legislation as such if all CPs are abolished.

(26). The position was too widely stated by (somewhat compliant) judges in 1717 and 1772. Thus, legislation should (probably) restrict the same to minors of the royal family (see 27 below).

(27). *Royal Titles*. Given recent scandals *etc*, it would seem appropriate to consider limiting the same to the sovereign (their consort) and to the direct line of succession. The extent to which the sovereign can confer other royal titles is a grey area.<sup>178</sup> The position should be set out in legislation with any CP abolished.<sup>179</sup>

(28). *Hereditary Peerages*. These presently comprise the titles of: duke, marquess, earl, viscount and baron. The sovereign (probably) cannot create any *new* hereditary titles. And, since 1958, it seems, that new hereditary peerages have been restricted to the royal family. Yet, this is a grey area and legislation would be appropriate to prevent abuse, with the abolition of any CP. As for life peerages, since these were a new form of title, legislation was used (Life Peerage Act 1958) which supercedes any potential CP.<sup>180</sup>

(29). *Decorations for Bravery*. This is a grey area. The position should be laid down in legislation and a SI (to enable it to be updated from time to time).<sup>181</sup> Originally, these decorations were limited to conspicuous bravery (i.e. gallantry, courage) in wartime and then extended to the civil sphere. Some are also obsolete since they relate to imperial times. The position should be set out in legislation, with any CP abolished.

(30). *Medals*. This is a grey area. It is unclear how efficiency and long service medals fit in today. And, a number are prior to the Commonwealth. The position should be set out in legislation.<sup>182</sup>

(31). *Orders of Knighthood*. This is a grey area. These were, originally, orders of knighthood (such as the Order of Garter) for military service. However, the obligation to perform knight service was abolished in 1660. Thus, these are sinecures today (no actual service required).

(32). *Courtesy Titles*. This is a grey area. The fact that these are 'courtesy' titles militates against their being created pursuant to a CP deriving from the common law (that is, recognition by way of a judicial decision). Thus, in Anglo-Saxon times, there were port Reeves (i.e. town Reeves) and shire Reeves (i.e. sheriffs). In the case of the port reeve, the Anglo-Norman sovereigns (likely) changed the title of the chief civil magistrate appointed by them to 'maire' (mayor). London was (probably) the first to have a mayor (in 1189 or 1192). These titles were accorded by sovereigns when they owned the town (such as in the case of London and other towns). Today, this should be left to legislation. The title of 'right honourable' (for members of the privy council) would not be required if the privy council was abolished. The title of 'esquire' is convoluted and no longer used in any especial context. In short, legislation should abolish all courtesy titles.<sup>183</sup>

(33). In times past, the sovereign could appoint members of her household. However, this, often, led to profligacy and to corruption. The result was that the sovereign was, often, bankrupt in all but name.<sup>184</sup> In 1760 (1 Geo III c 1), the sovereign surrendered (gave up) the assets of the same in return for a large civil list (salary) being revenues of £800k. This has continued. From the time of Victoria (1837-1902) the government sought to impose controls on the royal household, to prevent undue influence. Today, it seems that - *by convention* - the sovereign can appoint certain members of the royal household. This should be set out in legislation to prevent abuse.<sup>185</sup> Indeed, all royal household employees should be appointed under advice only and, thus, any CP or convention should end.

<sup>178</sup> See *Appendix B* for suggested wording in a Constitution Act.

<sup>179</sup> For the obsolete privileges of a queen consort (and dowager) see McBain, (*Crown Act*), n 1, p 20, n 58.

<sup>180</sup> Legislation should prevent any new hereditary titles being created (i.e. abolish any possible CP). Also, legal provision should be made for the removal of such titles for misconduct. Also, to limit any hereditary titles as *per* (28). Further, to abolish all other royal titles in abeyance or not presently allocated.

<sup>181</sup> It would best to limit the same for the original purpose (exceptional bravery in the military and civil context). Further, to abolish any CP so that they can only be awarded by a Committee the equivalent to a House of Lords Appointments Committee, in order to prevent abuse (that is, after due inquiry and review).

<sup>182</sup> See also *Appendix B* for suggested wording in a Constitution Act.

<sup>183</sup> Obviously, legislation could preserve any required. However, it is suggested that all these are not required. See generally, McBain (*Crown Act*), n 1, p 30. The Parliamentary practice of using 'right honourable' would seem to be just that and not by virtue of a CP (or franchise of the same).

<sup>184</sup> Henry III (1216-72) was one for pawning the Crown jewels as well as Charles I (1625-49). Edward II (1307-27), Richard II (1377-99) and George IV (1820-37) were, also, hugely profligate. So too, William III (1688-1702) - especially with Crown land.

<sup>185</sup> There is also a problem in that the sovereign can appoint such people and effectively employ them but cannot be held legally responsible. For the problem of Edward III (1327-77) giving away Crown jewels to his mistress, the Lady of the Sun, see McBain, n 58, pp 837-8. She was impeached after his death.

***All these CPs should be set out in legislation. Especially, matters relating to royal titles, orders of knighthood, decorations and medals where - because of the uncertainty of the legal position concerning the CP - there is potential for corruption and abuse.***

**(e) Limitations on the Sovereign**

There are various limitations imposed on a sovereign, viz, the sovereign cannot:<sup>186</sup>

1. Be a trustee.
2. Be an executor.
3. Be a joint tenant (or tenant in common) with a person. *(also applies to the Crown generally).*
4. Reserve (alienate) rent. *(also applies to the Crown generally).*
5. Give evidence in a court of law in her own cause.<sup>187</sup>
6. Act as a minister of the Crown.
7. Hold a Crown office.
8. Sit (or attend) Cabinet
9. Alter succession to the Crown in her will.
10. Arrest a person.<sup>188</sup>

These limitations are (manifestly) not CPs - being restrictions on the sovereign and not privileges. A previous article has argued that all of 1-4 be abolished. And, that the remainder be statutory. None of this would appear to be contentious. In the case of no 9, Henry VIII (1509-47) sought to dictate the order of succession in his will. However, this was ignored.

**(f) Conclusion**

As can be (readily) seen, a large number of CPs relating to the sovereign are obsolete and should be abolished (also, some limitations). Others should be retained but placed in legislation, in order to clarify them. The main ones which are essential for the performance of the office of sovereign are:

- Criminal and civil immunity (albeit, the extent of the former should be reviewed)
- Immunity from arrest.

As for all other members of the royal family, they do not have common law prerogatives, save for a queen consort or a queen dowager.<sup>189</sup> However, none of the former need them. And, the few common law prerogatives for a queen consort (or queen dowager) are obsolete and should be abolished.<sup>190</sup> This should be clarified in legislation, to prevent abuse.

***In conclusion the sovereign in person has c. 33 personal CPs (and is subject to some limitations). Most are obsolete and they should be abolished. The others should be placed in legislation - to clarify them and to prevent abuse.***

**8. THE CROWN**

While all CPs - originally - only applied to the sovereign in early times, a large number were extended to the Crown, such being a *corporation aggregate*. Quite when this legal fiction was created (recognised) is uncertain. However, it dealt with the legal situation where the sovereign shared his sovereign power with others (leading them, in time, to actually take it over from him).

- Thus, with the establishment of the Great Council (the *magnum concilium*) by the Normans<sup>191</sup> (which council took over from the Anglo-Saxon *witan gemote* (the assembly of the *witan*, the wise) the sovereign sat with his advisers (counsellors, later called his ministers) to govern the country.<sup>192</sup>
- In so doing, the above comprised - as Parliament later did - a corporate body.<sup>193</sup> That is, the sovereign (himself a corporation sole) was the *head* and the advisers (his servants, his members) were the *body*.

<sup>186</sup> See generally, McBain, n 1 (*Crown Act*), especially, pp 19-20.

<sup>187</sup> Cf. the sovereign giving written evidence to a UK court in a civil case between subjects.

<sup>188</sup> See McBain, n 1 (*Crown Act*), especially pp 19-20.

<sup>189</sup> Neither the courts, nor Parliaments have seen fit to grant privileges to other members of the royal family. See McBain, (*Crown Act*), n 1, p 20.

<sup>190</sup> *Ibid.*

<sup>191</sup> The *Curia Regis* (king's council) became obsolete by the 12<sup>th</sup> century, its power of government being transferred to the Privy Council (i.e. the smaller, that is, inner council). However, by the time of Charles II (1660-85) the power of the Privy Council, itself, had become transferred to small group of Privy Council members, being called the Cabinet. The Cabinet was (and is) a *corporation aggregate* with the sovereign being the head (albeit, his place is now taken by the PM) and the ministers comprise the body (the members).

<sup>192</sup> Thus, the concepts of the sovereign being a corporation sole and being a corporation aggregate were latent in Anglo-Saxon England, but never stated since the law givers (judges, *asegae*) did not indulge in speculative legal rationalisation.

<sup>193</sup> The 'members' of Parliament are the body, the head is the sovereign.

This fiction was useful to deal with the position arising in the Tudor period where there arose an expanding apparatus of government which was (increasingly) distant from the royal household. Thus, the legal fiction - which still prevails - is that the sovereign in the body politic has a vast number of 'servants' who perform her will - these being (besides members of the royal household):

- (a) the government (the PM and ministers, who advise);
- (b) civil servants (who implement the actions of (a));
- (c) any others performing Crown functions (judges), the armed forces *etc.*

These 'servants' are (also) somehow accountable to the sovereign, although the sovereign is never accountable to them. It has been indicated in prior articles that there is a simple means of regularising this situation. Dispense with the legal fiction and accept the reality that all of (a)-(c) work for (are paid by and are accountable to) Parliament, not the Crown, in which case the latter legal fiction can end.<sup>194</sup> However, for present purposes, it is useful to list remaining CPs relating to the Crown; those in respect of the:

- (i) courts;
- (ii) government;
- (iii) British territories and foreign relations; and the
- (iv) armed forces,

are dealt with under separate headings (see **10** *et seq.*).

#### **(a) Legislation**

Legislation dealing with the Crown (excepting (i)-(iv) above) is considered in the article on the Crown and it is not dealt with further.<sup>195</sup> As for limitations on the Crown (as well as the sovereign) in the Settlement Act 1700 and the Bill of Rights 1688, these have been considered (see **7(a)**).<sup>196</sup>

#### **(b) Obsolete CPs**

It is best to list all these under headings for ease of reference, as has been done in the article on the Crown.<sup>197</sup> Thus, there are CPs relating to the following (the number of the same being in brackets as well as indication where legislative provision might be needed):

<u>CPs relating to:</u>	<u>Legal Provision Needed</u>
• Royal Mines (1)	No <sup>198</sup>
• Commerce (12)	Yes <sup>199</sup>
• Borders (3)	No
• Prisons (3)	No
• Coinage (3)	No
• Printing (3)	Yes <sup>200</sup>
• Ports & Harbours (4)	No
• Local Government (5) <sup>201</sup>	No
• <i>Parens Patriae</i> (3)	No
• Crown Grants (5)	No

<sup>194</sup> In *Town Investments Ltd v Dept of the Environment* [1978] AC 359, Lord Diplock indicated that some of the confusion as to the meaning of the word the 'Crown' could be dispensed with by speaking of the 'government'. The answer is 'Yes, but it is better to abolish the concept of the Crown.' If such is done, the legal concept of 'Crown Estate' will remain. However, this is fine since it is legislative, a body which should hold all the former Crown lands that belong to the nation.

<sup>195</sup> See McBain (*Crown Act*), n 1.

<sup>196</sup> *Ibid*, pp 56-8.

<sup>197</sup> See McBain (*Crown Act*), n 1, s 8.

<sup>198</sup> *Ibid*, p 85. Legislation relating the same would be repealed (the Royal Mines Acts 1688 and 1693).

<sup>199</sup> To avoid any problem with abolition a SI may temporarily suspend the effect of the same, *Ibid*, p 85. However, this is (likely) unnecessary in most instances.

<sup>200</sup> If required, amendment could be made to the Copyright, Design and Patents Act 1988, s 164(1). *Ibid*, p 86. It may be noted that the monopoly over the printing of bibles did not apply to new translations, *Universities of Oxford and Cambridge v Eyre and Spottiswoode* [1964] Ch 736. See also Bradley, n 29, p 265.

<sup>201</sup> Generally, no CPs applied to local government. However, *counties palatine* were a form of local government created by the sovereign by franchising a CP he held (see *Appendix C*). They should be abolished as obsolete. They comprise those of Chester (and the title Earl of Chester), Durham and Lancaster. See McBain, n 1 (*Crown Act*), p 72. There were also CPs to create a: (a) *county palatine*; (b) *county corporate (or royal county corporate)*; (c) status of a city; (d) *status of a borough (or royal borough)*; and (e) status of a town or royal town. These should be abolished (or placed in legislation). Those in italics are obsolete anyway (and in the case of (d) can only apply now to London boroughs).

- Legal (5) No

Thus, in total, there are some 47 CPs which still exist (it seems) relating to the Crown (that is, to the sovereign in the body politic). All these should be abolished and, if required, legislation deal with the same. This is not required in most cases since legislation already covers the field. Assuming the abolition of all these in a Crown Act, there would be no need to make any provision for the same in a **Constitution Act**. *Would the abolition of these CPs be contentious?* It is asserted the answer is 'no'. They do not affect the sovereign in person and the subject matter is not contentious.

***In conclusion, the majority of CPs extant today relate to the Crown, not to the sovereign in person. All should be abolished and in most cases - apart from abolition - no other legislative amendment is needed, since legislation covers the field.***

## 9. **'CROWN' PROPERTY**

At this juncture, it would seem useful to deal with certain properties alleged to be owned by the Crown (i.e. the sovereign in the body politic). They cannot be owned by the sovereign since, otherwise, they would be governed by the Crown Private Estate Act 1800 and sovereigns since 1800 have never asserted this.<sup>202</sup> Thus, these are, technically, treated as being owned by Crown (or the Crown Estate) for want of another owner. However, in fact, they are owned by the nation. In other cases, legislative clarification is necessary. Thus, provision should be made in a **Constitution Act** on the following:

- Crown Jewels (these are treated as heirlooms)
- Royal Palaces (there appear to be 14 royal palaces)<sup>203</sup>
- Royal Collections (Royal Collections Trust, Philatelic Collection, Carriages)
- Osborne Estate (Osborne Estate Act 1902)<sup>204</sup>
- Parliament (formerly, a royal palace)<sup>205</sup>
- *Duchy of Lancaster* (held by the sovereign in the body politic)<sup>206</sup>
- *Duchy of Cornwall* (held by the sovereign in the body politic)
- Crown Estate (Ibid)

If clarity was sought in these matters - and all other CPs abolished - it would, then, seem possible to abolish the legal fiction of the '*Crown*' which has outlived its legal usefulness.

***In conclusion, a Constitution Act should make provision on these matters which are not CPs as such.***

## 10. **COURTS ACT**

In Anglo-Saxon times, courts of justice were established by the various petty kings as a form of CP.<sup>207</sup> Those that survived the Norman Conquest 1066 continued. Further, it was accepted that the sovereign had a right to establish common law courts. By Coke's time there were a large number of different types of court.<sup>208</sup> Today, this been

<sup>202</sup> Further, although traditionally - at the outset of each reign - the sovereign surrenders the hereditary revenues held by the Crown (i.e. the sovereign in the body aggregate) this is unnecessary and should be abolished. Since 1066, a large number of sovereigns have been utterly profligate and have cost the nation the value of the Crown estates many times over. Examples include: Henry III, Edward I, Edward II, Richard III, Henry VI (where revenue from Crown lands sank to £5k pa), Edward IV, Henry VIII, James I, Charles I, Charles II and James II. This continued, *post*-1688, with William III, George IV and Edward VIII. Even in Victoria's reign huge sums were paid off to settle debts of various princes (see Keith, n 63, p 393, *re* criticism in 1871). As it is, at the surrender in 1760 by George III of his interest in Crown lands for £800k, this would have been very much in his favour (the annual revenue from the Crown land during his first 25 years was only £6K). Thus, the loser has always been the taxpayer (including from the fact that sovereigns and dukes of Cornwall did not pay income tax nor death duties until fairly recently and it is unclear whether they paid the same on their private estates from 1800 in the case of the sovereign (probably not)). Thus, the nation has paid for all the above assets (land, palaces, crown jewels) many times over and has often had to resort to Acts of Resumption to claw back Crown land sold, such as in 1450, 1456, 1467, 1473, 1495 and 1515. Further, after 1660, Charles II received a hereditary excise on beer, ale and cider and various wine licences as well as post office revenues (from 1685) and 4 and ½% duties from certain West Indian islands. This is not to say that sums given from 1760 (i.e. by way of a civil list) were wholly used for the sovereign in person (they also went to meet salaries of judges, ambassadors *etc*) although these were, progressively, excluded from the civil list. See generally, Feilden, n 14, pp 175-6; Keith, n 63, ch 16; Bogdanor, n 23, ch 7 and Maitland, n 13, pp 430-8. See also Halsbury, *Laws*, (1<sup>st</sup> ed, 1909), vol 7, pp 110 and p 111 (where it noted that any attempt to reverse any surrender would be 'beyond the contemplation of practice'). Halsbury calculated the surrender value of the Crown Estates in 1760 as being £89k. *Ibid*.

<sup>203</sup> See McBain (*Crown Act*), n 1, p 88.

<sup>204</sup> There is a saving for use by the royal family in s 2, which would seem unnecessary. See also Keith, n 63, p 397 'Edward VII...determined...to dedicate...Osborne for public purposes.'

<sup>205</sup> Who actually owns the freehold of the same? See McBain, n 1 (*Parliament Act*), pp 163-4.

<sup>206</sup> This assumes the same is not abolished since it no longer holds any *jura regalia* of any worth. For their non inclusion in the civil list, see Keith, n 63, p 395 (nor those of Duchy of Cornwall and the principality of Scotland). The duchies of Lancaster and Cornwall have seals but are not corporations sole for good reason, they are corporations aggregate with the sovereign as their head.

<sup>207</sup> See generally, JM Kemble, *The Saxons in England* (1876), vol 2, ch 3.

<sup>208</sup> List in Coke, n 32, vol 4. He listed some 50 different types of court.

slimmed down. However, a *Courts Act* should consolidate some 20 pieces of legislation relating to the courts.<sup>209</sup> This is not considered further. As for CPs relating to courts:

**(a) Obsolete CPs**

The sovereign (and, later, the Crown) had a CP to create common law courts. Also, commissions exercising a judicial function. The latter was challenged in the time of Coke and under the Bill of Rights 1688.<sup>210</sup> These 2 CPs, the power to create a:

1. Common law court.
2. Commission exercising a judicial function.

are obsolete and should be abolished. As for common law courts, most courts, today, are statutory.<sup>211</sup> Yet, some obsolete *common law* courts still remain.<sup>212</sup> These should be abolished. If a *Courts Act* provides for the above, there is no need to provide for the same in a **Constitution Act**.

**(b) Other CPs**

There are other CPs. These were personal ones of the sovereign (but are more in the nature of being exercised by the Crown and, thus, are mentioned in this section). These are the power to:

3. Appoint judges where such is not otherwise statutory.
4. Appoint Queen's Counsel.
5. Appoint an Attorney-General.
6. Appoint a Solicitor-General.
7. Exercise mercy (and reprieve).
8. Have priority in the cases of (a) insolvency/bankruptcy; (b) *bona vacantia*; (c) *escheat*. It is unclear whether there are any other CPs concerning priority, besides (a)-(c).
9. Exercise *nolle prosequi* - by the AG so declaring.
10. Create criminal law.
11. Impose punishments for infraction of the criminal law (e.g. imprisonment, fines).

In respect of these:

- (3). If the obsolete courts referred to in the *Courts Act*, (see (a)) were abolished there would be no need for this CP and it can be abolished.
- (4). This CP has not been dealt with in previous articles. It is not of great import and it can be dealt with in a *Courts Act*.
- (5) & (6). This has been partly dealt with in a *Government Act*.<sup>213</sup> Both these were Crown appointments. However, today, they are made by the PM (i.e. they are political appointments). Legislation should clarify this, with any CP being abolished. It is also suggested that the title '*Solicitor General*' be abolished (the expression means nothing) and replaced with that of Deputy AG.
- (7). This CP should be wholly set out in legislation (any CP for the sovereign in person, also, being abolished). The reference to reprieve is obsolete since the death penalty has been abolished. This CP has not been dealt with in previous articles. It is not of great import and it can be dealt with in a *Courts Act*.<sup>214</sup>
- (8). In the case of (a) this has been superceded by legislation to a considerable extent.<sup>215</sup> To the extent not, the same should be set out in a *Crown Act* which, also, deals with (b), *bona vacantia*.<sup>216</sup> A Crown Act should also abolish (c), *escheat*, which is obsolete.<sup>217</sup>
- (9). As Wade noted, every criminal prosecution must be in the name of the Crown.<sup>218</sup> And the Crown can end a prosecution by entering a *nolle prosequi*. This CP is not necessary and should be abolished.

<sup>209</sup> These are dealt with in a *Courts Act*. See McBain, n 3 (*Courts Act*).

<sup>210</sup> McBain (*Crown Act*), n 1, p 38.

<sup>211</sup> See McBain (*Courts Act*), n 3.

<sup>212</sup> *Ibid*, p 229-31.

<sup>213</sup> McBain, (*Government Act*), n 5, p 110.

<sup>214</sup> See also Barnett, n 30, pp 107-8.

<sup>215</sup> McBain (*Crown Act*), n 1, pp 44-5. See also Insolvency Act, ss 178 & 315. See also GS McBain, *Modernising English Land Law - Part 2* (2019) International Law Research, vol 8, no 1, pp 98-9.

<sup>216</sup> *Ibid*, pp 44-5.

<sup>217</sup> See McBain, n 170, pp 97-9. *Escheat* for want of heirs and felony have been abolished and any other escheat to the Crown will now be rare.

<sup>218</sup> Wade, n 16, p 68 'In criminal proceedings every prosecution must be in the name of the Crown; it is the Crown alone which can stifle a prosecution, Either by declining to offer evidence, or entering a formal *nolle prosequi*.' See also Bradley, n 29, p 259. Also, Halsbury, *Laws*, (1<sup>st</sup> ed, 1909), vol 7, p 74.



(10). After the departure of the Romans from England in AD 410, likely, the legal system broke down wholly.<sup>219</sup> Thereafter, various rulers sprang up who asserted their right to impose criminal law. This by means of courts which determined what acts constituted crimes - as well as determined guilt and the punishment. At first, everyone being illiterate, the law would have been oral and the list of crimes and punishments, therefore, would have been held in the memory of the *asegae* (the judges) who recited it orally and (likely) those who actually delivered judgment were not them but the *folk* (the people) who assembled to hear the case (much as the jury of today). However, from the earliest Anglo-Saxon doom (AD 616) most crime - and the punishment allotted<sup>220</sup> - appears to have been set out in legislation (dooms). This increased in subsequent Anglo-Saxon legislation. Until 928 AD, there was no king over all England. Thus, each king had only limited territorial control over parts of the country - including legal jurisdiction. By the time of the Norman Conquest (1066) there were 3 laws prevailing in England (Mercian Law, West Saxon and Danelaw (Law of the Vikings)).<sup>221</sup> In the Anglo-Saxon period there were frequent references in legislation to the '*king's peace*' (*frith, pacem regis*). This was a reference to the king's jurisdiction over crimes. That is, the right to impose punishment for disturbances of the peace (crimes) committed in the jurisdiction which the king controlled.<sup>222</sup> In short, in return for allegiance (obedience to the sovereign) the king gave protection. This was against foreign enemies and domestic malefactors; the latter in the form of punishing crimes (to avoid individuals and family members of resorting to private revenge - the blood feud or *lex talis*). William I (1066-87) claimed title to all England although, in practice, he did not have the power to fully assert his '*peace*' (criminal law) over all England. However, by the reign of his son Henry I (1100-35) the sovereign was asserting his '*peace*' (criminal jurisdiction) over all the land - albeit, local courts still asserted their peace. Thus, when Bracton wrote (c.1250) he referred to the '*king's peace*' (criminal jurisdiction), but also to: (a) the sheriff's county court; (b) the courts leet (i.e. criminal courts of barons); (c) other seigniorial courts. In time, the criminal jurisdiction of all these has ended.<sup>223</sup> Further, it soon became that the sovereign was able no longer to sit as a judge himself to declare the criminal law and impose the punishment (because he was not qualified).<sup>224</sup> Today, most courts are statutory and most crimes are statutory. Further, there is *no need for the sovereign (or the Crown) to have the CP to create crimes or punishments (or common law courts). This is for Parliament and legislation. Thus, any CP to create crimes and punishments (i.e. judicially created crimes and punishments) should be abolished. Further, all common law crimes still extant should be placed in legislation (many are obsolete).*

(11). The Anglo-Saxons imposed various punishments for breaches of the criminal law (breaches of the peace). For breaches of the criminal law, apart from fines and imprisonment, there was the death penalty. Possibly, there was also the pillory (though this may have been a *post-Conquest* punishment) and the tumbrel (for carting people).<sup>225</sup> The death penalty has been abolished, the pillory was abolished in 1837. It is unclear whether the tumbrel (which is not the same as the cucking stool) has ever been abolished.<sup>226</sup> Although, as mentioned above, there are common law crimes still existing, there is *no need for the sovereign (or the Crown) to have the CP to create them or criminal punishments. Thus, any CP should be abolished and all common law punishments be placed in legislation.*

***In conclusion, there are c. 11 CPs relating to legal matters in the context of the courts. Nos 1-3, 6, 8 (relating to escheat) and 9-11 should be abolished. The others should be set out in legislation and the CP abolished.***

## **11. GOVERNMENT ACT**

Just as there are CPs relating to Parliament, there are CPs relating to the government. Also, limitations.

<sup>219</sup> The issue of the king's peace (criminal law) and the breach of it is dealt with in detail in GS McBain, *Modernising the Law: Breaches of the Peace and Justices of the Peace* (2015) Journal of Politics and Law, vol 8, no 3, pp 158-222. The meaning of breach of the peace in *R v SS for the Home Dept. ex p Northumbria Police Authority* [1989] QB 29 was not canvassed in detail.

<sup>220</sup> There would have been few prisons. Punishment was (generally) by fine. However, where the fine was *bot less* (i.e. the fine could not be paid in lieu of death) then execution (hanging, possibly with drowning for some crimes) was inflicted. For the best texts on Anglo-Saxon laws, see FL Attenborough, *The Laws of the Earliest English Kings* (1963) and AJ Robertson, *The Laws of the Kings of England from Edmund to Henry I* (1925).

<sup>221</sup> See also Downer (ed, *Laws of Henry I* (c.1113), p 97 which still refers to these 3 separate legal systems: 'The kingdom of England is divided into three parts: Wessex, Mercia, and the Danelaw.'

<sup>222</sup> As well as the king's peace there was also that of the (catholic) church and of lords of the manors. Ibid, pp 171-2.

<sup>223</sup> For details, see article in n 219. Thus, Blackstone, n 34, vol 1, p 258 in (1765) could state 'All offences [crimes] are either against the king's peace [i.e. treated as personal crimes against him], or his crown and dignity.'

<sup>224</sup> Coke made this clear to James I (1603-25) in *Prohibitions del Roy (Case of Prohibitions)* (1607). However, the Stuarts still tried to meddle in court matters, which the Bill of Rights 1688 sought to put a stop to. See also Heuston, n 91, p 60 (the sovereign in person cannot create law).

<sup>225</sup> For rape, William I (1066-87) imposed castration and having the eyes put out. This was later abolished. The penalty for high treason was hanging, drawing and quartering. Today, it is imprisonment. Henry VIII imposed (by statute) death by boiling in the case of poisoning. This was later repealed. Death by drowning (for witchcraft), which the Anglo-Saxons probably imposed, has been abolished. Not least, because witchcraft is no longer a criminal offence.

<sup>226</sup> The tumbrel was not the same as the cucking stool. These were usually reserved for punishing people who committed nuisances such as breaches of Assizes, see GS McBain, *Abolishing the Crime of Public Nuisance and Modernising that of Public Indecency* (2017), vol 6, no 1, pp 1-108, including p 29.

**(a) Legislation**

A previous article on a Government Act has argued that present legislation relating to the government should be consolidated into a *Government Act*.<sup>227</sup>

**(b) Obsolete CPs**

In respect of government and its operation, there are 6 CPs which were the basis for the operation of such. However, these CPs are central to the legal fiction of the sovereign in the body public, acting as a corporation aggregate (the Crown). These CPs are that the sovereign (later, the Crown) has the right (the prerogative) to appoint, control, discipline and dismiss:

1. cabinet ministers (including the PM).<sup>228</sup>
2. other ministers.<sup>229</sup>
3. civil servants.
4. members of the armed forces.
5. members of the royal household.
6. others holding Crown (public offices) such as judges.

All the above - in olden times - were personal 'servants' of the sovereign. For example, the word 'minister' comes from the French 'ministre' meaning a servant. Today, the word 'servant', generally, has been replaced by the word 'employee' since it has a less negative connotation. However - in the past - a 'servant' was one appointed by a master who paid, disciplined and could dismiss the same. As it is, these CPs still exist, but by way of a legal fiction.<sup>230</sup> *That is, in reality, the sovereign has no control over the same.* In short, these CPs are long obsolete and it is possible to indicate when this happened:

(1) Unlike earlier sovereigns George I (1714-27) no longer presided over his 'cabinet' (his inner circle of privy council advisers being his 'servants', i.e. paid and dismissed by him). In part, because of language difficulties (he did not speak English). More importantly, perhaps, because he recognised that his ministers were no longer accountable to him but to Parliament, as he noted in 1717.<sup>231</sup> Today, this CP is obsolete because the inner circle of the privy council (the cabinet) is appointed and dismissed (as well as their resignations accepted) by the PM. Also, all cabinet ministers (including the PM are responsible to, and paid by, Parliament, using taxpayers' money). Thus, all are now the servants of Parliament - not personal servants of the sovereign; nor servants of that legal fiction the 'Crown'. Thus, any CP should be abolished.

(2). Other ministers were members of the wider privy council. Today, the privy council is a formal body only and it has no executive function. Thus, they are servants of Parliament and any CP should be abolished.

(3). Although there has been some movement to recognising the reality that civil servants are paid and appointed by Parliament and that they are accountable to the same,<sup>232</sup> the legal fiction continues. It should be abolished to remove the confusion and lack of accountability.

(4). The sovereign was commander-in-chief ('C-in-C') of the shire militias (abolished in 1907) and of the standing armed forces (the army and navy) from their creation in 1689 (prior to that there was no standing army). However, the sovereign gave up the role of C-in-C in 1793 (and ceased fighting in 1743). Thus, although the members of the armed forces were accounted as servants of the sovereign once ('his' armed forces) and, today, they are accounted as servants of the Crown; in reality, they are employees and paid by a ministry (the MOD) presided over by a cabinet minister who is (like all ministers) accountable to Parliament. Thus, it is Parliament to whom the armed forces are accountable in reality (and who pays the bills). Not to the sovereign or the Crown.

(5). A few royal household employees are appointed by the sovereign in person (pursuant to an agreement with the government). However, the Royal Palaces are effectively owned by the nation - through the Crown (in the legal fiction) and the Crown Estate - and maintained by ministries (who pay staff salaries and pensions). Thus, legislation should confirm that *all* these employees are those of the relevant ministry or (in a few instances) the cabinet. In this fashion the legal fiction of the Crown is dispensed with and any Royal Palaces actively retained as such can, then, be covered by direct government funding. as opposed to the Civil List

<sup>227</sup> McBain, (*Government Act*), n 5, pp 96-9.

<sup>228</sup> These advisers to the sovereign were an inner group of members of the privy council. The formation of this inner group occurred in the time of Charles II (1660-85) - though there is some evidence of a prior existence in the time of his father, Charles I (1625-49). See McBain, n 5, (*Government Act*), p 66. The word 'cabinet' reflects the fact that they met in an inner chamber (room) in Whitehall.

<sup>229</sup> This was the outer cabinet - the Privy Council - of whom the inner cabinet (the Cabinet) were also members.

<sup>230</sup> For example, Wade (writing in 1931), n 16, p 159 'Legally the cabinet is responsible to the Crown whose servants the members are.' In fact, this applies to all ministers and not just to cabinet ministers. Further the word 'legally' only refers to the legal fiction. Today, *actually*, the cabinet is responsible to Parliament.

<sup>231</sup> The last time a sovereign attended cabinet was in 1781, see McBain, n 5 (*Government Act*), p 67, n 58. Also, *Ibid*, p 74.

<sup>232</sup> See Crown Proceedings Act 1947 and Constitutional Reform and Governance Act 2010, see McBain, n 5, (*Government Act*), pp 85-6.

(see 18).<sup>233</sup> More particularly, any practice of the sovereign employing, or appointing, the same should end. The sovereign can (and should) only act under advice.

(6). In earlier times, judges were directly appointed by the sovereign.<sup>234</sup> This is no longer so and due separation of the powers is accepted.<sup>235</sup> Further, by the time of Coke (indeed, long before), the sovereign could not sit as a judge to create crimes or other law. Thus, any CP to appoint judges - or anyone else - to a public office should now end.<sup>236</sup> It is unnecessary and it will enable greater accountability as well as the abolition of the concept of the Crown. It may, also, be noted that there are many public office sinecures that should be abolished.<sup>237</sup>

**In conclusion, these CPs should be abolished, as obsolete, since they reflect the legal fiction and not the reality.**

**(c) False CPs**

It is said the Crown has a CP to create non-statutory agencies.<sup>238</sup> *However, is this true?*

- **Chartered Corporations.** The Crown did have (and has) the power to create corporations sole and aggregate by charter, which they did from an early time (see 7);
- **Prior to Quangos.** Prior to quangos, from the Victorian period, various boards were created. However, these were, invariably, created pursuant to legislation. So too in the 20<sup>th</sup> century.<sup>239</sup> Others, such as the BBC, were created pursuant to a charter;
- **Quangos.** There cannot be a CP to create quangos<sup>240</sup> since the term was only invented in the 1960's and such a power would be a new CP which is not possible.

In short, there would seem to be no CP - in earlier times - to create legal bodies that were not *corporations*. Not least, since the idea had not been conceived.<sup>241</sup> However, the Criminal Injuries Compensation Board (CICB) was established on the basis of a CP in 1964 (to make *ex gratia* payments to victims of crime). It was, later, re-constituted under legislation (the Criminal Justice Act 1988) the provisions of which were not brought into operation.<sup>242</sup> To the extent that the House of Lords held that such a body could be established pursuant to the exercise of a CP, surely, such was wrong<sup>243</sup> (leaving aside the separate issue considered by the court of the effect - where Parliament has provided a statutory basis - of such not being brought in operation).<sup>244</sup>

- More particularly, to argue that the sovereign has such a CP is to assert that the sovereign, in olden times, had an *absolute* (i.e. an unlimited) power to create CPs - and that this power still exists. However, *post*-1688, CPs have always been *residual*, not *absolute*.<sup>245</sup> Further, to argue the latter is a revision to *Bate's Case* (1606)<sup>246</sup> where the

<sup>233</sup> See McBain, n 1 (*Crown Act*), p 83 which contains the Sovereign Grant Act 2011 which makes provision as follows 'The Secretary of State [for the Environment] has no duties under [the Crown Lands Act 1851, s 21] in relation to the maintenance of the Royal Palaces and related land so far as they are maintained by [HM] out of the Sovereign Grant.'

<sup>234</sup> Cf. Heuston, n 91, p 65.

<sup>235</sup> Ibid, p 69 'since the Act of Settlement [1700], judges, though appointed by the Queen [by letters patent], are in effect independent in the exercise of their functions.'

<sup>236</sup> The matter should be set out in legislation. Cf. Sunkin, n 26, p 351 (article by Brazier) 'In the vast bulk of the honours, the Queen's prerogative has been acquired by the [PM] for his own purposes. The [PM] has a role to play in ecclesiastical appointments [nearly 400], and he has many other general patronage powers. Thus the chairman and governors of the BBC, the governor and directors of the Bank of England, the comptroller and auditor-general, the Parliamentary Commissioner for Administration, the Chairman of the Public Accounts Committee, the Regius Professors, the chairman and members of Royal Commissions and other inquiries, and many others, are all appointed by or on behalf of the [PM], in general by prerogative acts. All this patronage can clearly encourage the deference shown to any [PM]. Over the past fifteen years or so, that patronage has been increased sharply by the ability of most ministers to appoint individuals to quangos.'

<sup>237</sup> See McBain, n 1 (*Crown Act*), pp 91-2.

<sup>238</sup> e.g. Barnett, n 30, p 103.

<sup>239</sup> For example, AB Keith, *The Constitution of England from Queen Victoria to George VI* (1940), p 268 '*semi-public services*', the Central Electricity Commission, London Passenger Transport Board, Port of London authority (all statutory) and the BBC (charter).

<sup>240</sup> See McBain, n 4 (*Quangos*), pp 1-4.

<sup>241</sup> Trusts and corporations were conceived of. But the legal person not linked to a '*body*' was not conceived in law. Yet, many quangos are not statutory nor corporations. They do not seem to have any legal basis. In short, associations without any legal basis (or responsibility).

<sup>242</sup> *R v SS for the Home Dept ex p Fire Brigades Union* [1995] 2 AC 513. See also *R v Criminal Injuries Compensation Board ex p Lain* [1967] 2 QB 864, 881 *per* Parker CJ. See also Munro, n 25, p 259 'By describing the authority for action as '*prerogative*' - albeit loosely or questionably - the court had set a precedent, the full implications of which were only to become apparent almost twenty years later, in a case involving the government's withdrawal from employees at the Government Communications Headquarters (GCHQ) at Cheltenham the right to be a member of a trade union. But it is a long road to Cheltenham.' The root of the problem is that the Dicey's definition of a CP was far too wide - and just a personal one. See also Munro, n 25, pp 273-4. Also Dicey, that the CP was 'the name for the residuary of discretionary power left at any moment in the hands of the Crown' and '[e]very act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative.' See Sunkin, n 26 (article by Loughlin), p 67.

<sup>243</sup> Barnett, n 30, p 108 'the government is effectively given a choice in the manner of establishing such bodies: a surely questionable prerogative?'

<sup>244</sup> The purpose of relying on the CP was to enable less generous payments to be made than if under the relevant legislation.

<sup>245</sup> See e.g. Phillips, n 27, p 306.

<sup>246</sup> *Bate's Case* (1606) 2 ST. Also, called *The Case of Impositions*. See also Munro, n 25, pp 264-5.

courts, effectively, held that the sovereign could do anything (i.e. had any CP) when he conceived it to be in the public interest.<sup>247</sup>

- Yet, *Bate's Case* (1606) was contradicted by the *Case of the Proclamations* (1611) which provided that '*the king hath no prerogative but that which the law of the land allows him*'.<sup>248</sup> This latter statement accords with Anglo-Saxon law since the very first Anglo-Saxon legislation still extant (a doom from AD 616) places prerogatives of the sovereign in legislation, which seems to have continued thereafter in Anglo-Saxon times, save for the grant (and franchise) of more minor CPs relating to tolls *etc* (see also 20).

Thus, since the sovereign (and the Crown) has no power, today, to *create new* CPs - nor to *enlarge* CPs<sup>249</sup> - any CP to create non-statutory agencies (which are *not corporations*) is not possible. The courts recognising such as a CP, also, undermines the authority of Parliament to control and review such organisations as they, otherwise, do with statutory bodies (companies, statutory public corporations *etc*). The deleterious effect of this is apparent in practice. There are now so many quangos (c. 550 or more) that even the government does not know how many there are. Nor, who is responsible for regulating them.<sup>250</sup> In short, a disaster.

#### **(d) Conclusion**

All these CPs relating to government are out of touch with reality in that the body to which all government is accountable is Parliament, not the Crown. Thus, they should be abolished and the true position set out in legislation.

## **12. BRITISH TERRITORIES & FOREIGN AFFAIRS**

### **(a) Legislation**

There are c.113 pieces of legislation relating to British Territories and Foreign Affairs.<sup>251</sup> This is not considered further.

### **(b) CPs - British Territories**

In the past, the sovereign claimed various CPs in respect of colonies. In particular, CPs to:

1. Establish a constitution for the colony
2. Establish a legislature (or legal assembly similar to Parliament, however called)
3. Establish government
4. Appoint a ruler (usually, called a governor)
5. Impose and create legislation (with royal assent to the same) - including criminal legislation and punishment
6. Establish courts and make judicial appointments
7. Establish prisons
8. Control trade
9. Provide for the defence of the colony, including military appointments<sup>252</sup>
10. Provide for the foreign relations of the colony
11. Appoint civil servants
12. Exercise the use of the great seal
13. Exercise the power to pardon and reprieve
14. Dispose of Crown land
15. Suppress piracy.<sup>253</sup>

In short, the sovereign claimed the above CPs in *colonies* (with few exceptions) as he claimed in England (and, later, the UK). However, all this is history and such only apply now to the British territories - both domestic and overseas.<sup>254</sup> And - as discussed in a previous article -<sup>255</sup> most of these CPs have been superceded by legislation passed by local legislatures or by the UK. And, to the extent not, a *BTFR* is intended to wholly supercede the

<sup>247</sup> The military counterpart to this is *lex salus*, see McBain n 7 (*Armed Forces Act*) s 15. Cf. T Smith, *Governance of England* (written c 1562-5) quoted by Munro, n 25, p 262 that the Crown (Royal) prerogative was 'declared...in the books of the laws and lawyers of England'. One is uncertain whether one can find any evidence of such in respect of the cases referred to in n 242 from a review of the texts referred to in 1 or earlier ones.

<sup>248</sup> 12 Co Rep 74 at 76.

<sup>249</sup> Munro, n 25, p 257 'Enlargement, unlike diminution, is not possible.'

<sup>250</sup> See McBain, n 4 (*Quangos*).

<sup>251</sup> These are dealt with in McBain, n 6 (*BTFR*).

<sup>252</sup> The Governor was (usually) appointed C-in-C and admiral.

<sup>253</sup> These powers were given explicitly to governors of the colonies. However, their nature and extent varied depending on how the colony had been acquired (settled, conquered *etc*).

<sup>254</sup> i.e. Channel Islands, Isle of Man and BOT.

<sup>255</sup> See McBain, n 6 (*BTFR*).

need for any CP, by confirming that the UK has the power to pass legislation (whether general or a SI) to cover what could, otherwise, be effected legally by a CP. In this way, the law can be made more certain and local legislatures are empowered to deal with most legal matters.

### (c) **Obsolete CPs**

Besides the CPs referred to above, there is one CP which is, also, obsolete and which does not need to be replaced by legislation, the power of the sovereign (and, later, the Crown):

16. To make an alien a denizen (obsolete c. 1870).<sup>256</sup>

It may be noted that the sovereign (nor the Crown) has never had a power to *naturalize* an alien and, if required, legislation should confirm this.<sup>257</sup> Also, abolished should be 2 more CPs *viz.* to:

17. Divest a British subject of nationality without their consent.<sup>258</sup>

18. Control the entrance (and exit) of aliens (foreigners) to the realm in peace time.<sup>259</sup>

This latter CP has not been dealt with in prior articles. However, it should be abolished and provision made in legislation.

### (d) **Other CPs**

Besides these CPs, there are more general CPs relating to diplomacy which were discussed in the second part of the article on a *BTFRA*. These comprise CPs to:

19. Conduct diplomacy

20. Enter into treaties (as well as to ratify the same)

21. Appoint ambassadors, commissioners, consuls and other diplomatic officials

22. Issue, refuse, impound and revoke passports

23. Acquire foreign territory (including by way of annexation)

24. Give up (cede) foreign territory

These CPs have, also been superceded to a considerable extent. And - to the extent they have not - they should be abolished, with their content (as modernised) being placed in legislation. The case of no 25 is (likely) a false CP. Thus:

**FCDO Certification.** It seems that the FCDO can certify, for judicial purposes, the recognition of a foreign state or government. This does not appear to be a CP as such since there would seem to be no evidence of the sovereign ever certifying such for courts - the *sine qua non* of a true CP. Be that as it may, it would be useful to place it in legislation. Not least, to make them compatible with other FCDO certification (see 13). That said, legislation seems to have covered the field (State Immunity Act 1978).

***In conclusion, c. 24 CPs relating to British territories and foreign affairs should be placed in legislation, with the relevant CPs being abolished.***

## **13. ARMED FORCES**

A previous article on the Armed Forces<sup>260</sup> has considered the legislation on this. Much is obsolete, as indicated. As for CP's relating to military matters it is asserted there are c. 29 CPs, many of which are (manifestly) obsolete since legislation now covers the field. Or, they have been superceded by events.

### (a) **Obsolete CPs**

The following appear to be manifestly obsolete (and have been dealt with in considerable detail in prior articles, a CP to:

1. Billet any member of the army and navy (only) on the general public.<sup>261</sup>

2. Impose martial law (including the jurisdiction of courts martial) on civilians.

3. Conscript civilian able-bodied male subjects for army or navy service.<sup>262</sup>

4. Issue letters of marque and reprisal.

5. Dig for saltpetre (for gunpowder).

6. Enter private land to dig for saltpetre.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid. This can only be done by cession today and such will, invariably be made by legislation. Today, legislation enables a British subject to renounce their nationality if they wish. However, this is voluntary.

<sup>259</sup> For war time, see 13.

<sup>260</sup> McBain n 1, (*Armed Forces Act*), n 7.

<sup>261</sup> These CPs were prior to the statutory formation of the royal air force.

<sup>262</sup> This is on the basis of Cicero's maxim '*salus populi suprema lex*' which was not a principle of Roman law as such but given in the context of a military commander in war time. See also Phillips, n 27, p 317. Cf. *Re Shipton* [1915] 3 KB 676, 684 (*obiter*).

7. Castellate (that is, to build a castle or fortified residence).
8. Erect military fortifications on private land.
9. Impose a toll for murage (in order to build city or town defensive walls).
10. Export UK military equipment in war time or peace time.
11. Trade with the enemy in war time.
12. Military requisition of real property in war time or peace time.

As to these, billeting (no 1) is now statutory (and billeting on the general public ended more than 200 years ago). Martial law (no 2) is prohibited in peace time and it has not been exercised, anyway, in the UK since 1627. Also, the Civil Contingencies Act 2004 now governs matters. Conscripting civilian able-bodied male subjects for service in the army or navy (no 3) is now statutory and, in any case, it is dubious whether such a CP ever existed in the case of the army. Issuing letters of marque and reprisal (for privateering, no 4) is no longer possible since privateering was abolished in 1856. Saltpetre (pigeon guano) (nos 5 & 6) to make gunpowder was obsolete by the 19<sup>th</sup> century. Building fortified private residences (no 7) for defensive purposes - as well as a toll for murage - (no 9) ended by the 15<sup>th</sup> century, due to the changing nature of warfare. Nos 8 and 10-2 are now statutory. There are other CPs also obsolete, the right of the:

13. Sovereign to be C-in-C of the Armed Forces (see also 7(b)).<sup>263</sup>
14. Sovereign (later, the Crown) to take prize,<sup>264</sup> booty<sup>265</sup> and ransom<sup>266</sup> in war time.<sup>267</sup>

As to these, the sovereign gave up the active role of C-in-C in 1793 (no 13) and, therefore, any such title is purely honorary now. In the time of Edward III (1327-77) the Crown claimed substantial prize and booty as well as ransoms from prisoners (no 14).<sup>268</sup> It franchised the prize to the Lord High Admiral, a post now a sinecure.<sup>269</sup> Members of the army and navy were, also, entitled to prize, booty (and to ransom, in early times) - by way of franchise - to incentivize them to defeat the enemy (privateering was a similar activity).<sup>270</sup> Today, it is asserted that prize and booty and ransom (which are regulated by statute in part in the case of prize)<sup>271</sup> should be abolished as obsolete.

***In conclusion, there is no need for any of the above CPs.***

**(b) Uncertain or Inappropriate CP's**

Other CPs are inappropriate since the sovereign in person is no longer involved in the same, nor the Crown - this role having been taken wholly over by the government in the form of the Ministry of Defence (MOD) or ministers (including the cabinet). These CPs comprise those to:

15. Make (i.e. wage) war
16. Declare war
17. Make peace
18. Declare peace
19. Manage and operate the UK's armed forces (also, the territorial army)
20. Manage and operate the UK's military installations
21. Impose an embargo
22. Impose a blockade (*almost obsolete*)<sup>272</sup>

<sup>263</sup> The sovereign should be a formal (titular, non-executive) C-in-C, which should be stated in legislation.

<sup>264</sup> F Stroud, *The Judicial Dictionary* (2<sup>nd</sup> ed, 1903)(prize) 'A prize of war, as distinguished from booty, is a belligerent capture [i.e. during war] of an enemy's ship or other property at sea.'

<sup>265</sup> Booty is prize but on land. Stroud, 264 (*booty*), 'Booty consists in whatever can be seized upon land by a belligerent force irrespectively of its own requirements, and simply because the object seized is the property of the enemy. In common use, the word is applied to arms and munitions in possession of an enemy force, which are confiscable as booty although they may be private property but rightly, the term includes also all property which is susceptible of appropriation.'

<sup>266</sup> This was of prisoners in medieval times. However, it has become obscure thereafter, see GS McBain, *Modernising the Law of Prize* (2014) *Journal of Business Law*, no 6, pp 478-9.

<sup>267</sup> All this, and legislation relating to prize, should be abolished, with a more simple provision being inserted in legislation. See McBain (*Armed Forces Act*), n 5, p 37

<sup>268</sup> See McBain *Armed Forces Act*, n 5, p 37 (position in 1350s). Also, McBain, n 266.

<sup>269</sup> When the LHA came on the scene is unclear. Perhaps, c 1300. However, his Admiralty rights (*droits*) probably came later, see McBain, n 266, p 476. These *droits* became obsolete by 1806. *Ibid.* As for prize bounty for the men, it was abolished by the Prize Act 1948, s 9(1). *Ibid.*

<sup>270</sup> Privateers were licensed to cruise (attack) enemy vessels (also, possibly, neutral vessels carrying enemy property). This was greatly abused.

<sup>271</sup> See also *Armed Forces Act 2006*, s 37.

<sup>272</sup> See McBain, n 266, p 479 'The object of a blockade is to prevent access to (or egress from) the enemy's coasts or ports. To be binding, the blockade: (a) [must] be effective: and (b) a neutral ship must be accorded with notice of it. A neutral ship is liable to capture - or condemnation - if it breaks (or attempts to break) the blockade. Halsbury notes, as to blockade: 'Conditions of modern warfare have rendered obsolete close

23. Impose angary (i.e. to requisition neutrals' property during war time)

24. Requisition British (or BOT) civilian ships in wartime or other emergency.

For the reasons given in the *Armed Force Act*,<sup>273</sup> these CPs should be abolished and provision made in that Act instead.

#### (c) False CPs

As to these:

- **FCDO Certification**. It seems the FCDO can certify, for judicial purposes, whether: (i) a *state of war* exists between the UK and another state; (ii) a state is a *neutral state* or not.<sup>274</sup> These do not appear to be CPs as such since there would seem to be no evidence of the sovereign originally certifying this for the courts - the *sine qua non* of a true CP. Be that as it may, it would be useful to place (i) and (ii) in legislation. Not least, to make them compatible with other FCDO certification.
- **Military Intervention Abroad (inc. Peace Keeping)**. Another false CP is that of using the armed forces for military intervention falling short of *war* (including peace keeping) abroad. Usually, with NATO or UN military forces. There is no evidence of the sovereign once undertaking this. Indeed, such has only occurred, *post-WW1* (1914-8). Thus, it is better for this to be in legislation in any case.

#### (d) Limitation on the Sovereign (Crown) - Standing Army

There was - and is - also, a limitation on the sovereign (and, after 1793, the Crown) in the military sphere. That is, they were prevented by legislation from maintaining a standing army in peace time without an annual renewal of legislation (this, by the Bill of Rights 1688).<sup>275</sup> If all the above military CPs were placed in legislation - and the role of the Crown replaced with that of the MOD and ministers - then, neither the sovereign nor the Crown has any involvement in commanding, managing or operating the armed forces. As a result, any need for renewal (i.e. any limitation on a standing army) may be abolished (since Parliament is in control of such matters).

#### (e) Other CPs

There are 2 other CP's relating to military matters that have not been dealt with in previous articles by the author. These are CP's of the Crown (originally, of the sovereign) to:

25. Take the goods of *pirates* on the High Seas (the navy is involved).<sup>276</sup>

26. Exclude (or restrict) the entrance - or exit - of *enemy aliens* from the realm, in war time.

The first is probably obsolete in practice (and, doubtless, would have been linked to privateering, now obsolete). The second should be in legislation.

#### (f) Conclusion

All armed forces legislation (c. 106 Acts) should be placed in an *Armed Forces Act*.<sup>277</sup> Obsolete military CPs should be abolished and the remainder put in legislation.

### 14. ANY OTHER CPs?

What has not been dealt with in prior articles is legislation relating to the *Crown Estate*, which legislation should be modernised and inserted (in due course) into a *Constitution Act*. This is a separate area of study and it is better considered *after* the material in this article is dealt with. There are various CPs applying with respect to the Crown Estate *viz.* those relating to the:

- Sea (including the bed, the *fundus*)
- Seashore (foreshore)
- Tidal rivers (including the bed)
- Public navigable rivers (including the bed)
- Fishing rights (free fishery *etc.*)

Other CPs cited in the legal texts are powers to:

- permit (and administer) *pre-paid* postage stamps
- issue of certificates of eligibility to prospective *inter-country* adopters in non-Hague convention cases

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coastal blockade and the authorities relating to it.' The reason is that modern submarines and missiles have rendered blockade unnecessary since ships can be targeted and destroyed if they seek to enter (or leave) an enemy port.

<sup>273</sup> See McBain, n 7 (*Armed Forces Act*).

<sup>274</sup> Certification *re* diplomatic and sovereign immunity is now in legislation. For the recognition of foreign states, see **12(d)**.

<sup>275</sup> See McBain, n 7 (*Armed Forces Act*).

<sup>276</sup> This should be in criminal legislation.

<sup>277</sup> As noted in the article on the *Armed Forces Act* (see n 7) much material would be better off in a SI since it is simply administrative and, given its nature, need not be in a general Act including: (a) armed forces pensions; (b) armed forces wills; (c) Greenwich and Chelsea hospitals; (d) armed forces housing loans; (e) the registration of armed forces births, deaths and marriages; (f) services complaints; (g) the protection of military remains *etc.*

- hold public inquiries (including royal commissions)<sup>278</sup>
- regulate the security of the State.<sup>279</sup>

All these are fairly simple and should be statutory. It is unclear whether the first two can be said to be CPs given their recent nature.

## 15. CONCLUSION - ABOLITION OF CPs

It is essential that our constitution reflect modern day realities. Not the dust of ages when such is obsolete and simply creates confusion. At present, the heart of the confusion is caused by the legal fiction of the ‘*Crown*.’

- The reality is that the Crown lies in the Tower of London - as Maitland pointed out.<sup>280</sup> The fiction was useful to surmount certain problems relating to the changed role of the sovereign in that the same, once, controlled all the apparatus of government (ministers, civil servants, armed forces) but no longer does so. However, it is essential that the law be updated to reflect this (major) change.
- As it is, from 1965,<sup>281</sup> the English (and Scots) courts have, increasingly, dispensed with this legal fiction (one created by the courts) and have been prepared to look ‘*beyond the veil*’. The recent case of *Miller* (2019) illustrates this.<sup>282</sup> Regardless of the decisions in the case - as it wended its way up to the Supreme Court - there is no doubt that *all* counsel and *all* judges accepted that the role of the sovereign in the exercise of this major Crown prerogative<sup>283</sup> was purely *formal*. That is, the sovereign had no executive input in respect of any decision on whether to prorogue Parliament or not. And, since this was a major CP this, logically, should apply to any other CP (especially those relating to Parliament) - save for those where there is still clear evidence of an executive power (discretion) being exercised by the sovereign.<sup>284</sup>

While it is possible for the courts to dispense with this legal fiction of the ‘*Crown*’ - it would be better (and cleaner) if legislation does so. Not least, because there are some ‘*false*’ CPs which should also be placed in legislation. In conclusion, this article (and prior ones) makes two simple propositions:

- Some 300 Acts (or, rather, bits of Acts) on constitutional matters should be placed in legislation;
- All obsolete CPs should be abolished with the remainder (which are few) being placed in legislation.

It is asserted that the quickest (as well as the easiest and most comprehensive) method of doing this would be to deal with all CPs in 6 pieces of legislation, these being, as noted at the beginning of this article (see **1**): a

- Crown Act
- Parliament Act
- Courts Act
- Government Act
- British Territories and Foreign Affairs Act
- Armed Forces Act

The Crown Act, Parliament Act and the British Territories part of the British Territories and Foreign Affairs Act could, then, be consolidated into one Constitution Act of c 100 sections (see **Appendix B**). *How long would this take for 6 Acts to be drafted and all CPs reviewed in respect of them?* One would suggest, not even 2 years since most of them could be worked on at the same time. Thus:

- ***Crown Act***. Cabinet should be responsible for this, and dealing with the sovereign. Drafting this Act would be easy since it mainly involves listing obsolete CPs.
- ***Parliament***. Cabinet should also be responsible for this. The Parliamentary clerks should be asked whether there are any other CPs they believe exist apart from those listed. And, since - after 1688, Parliament was recognised as the supreme organ of government - it would seem obvious that *all* CPs relating to Parliament should be abolished and any content still required set out legislatively.

<sup>278</sup> Parliament should exercise the power to commission public inquiries. And, royal commissions should be abolished. Not least, since the word ‘*royal*’ has no meaning, the sovereign *is* not involved in ordering the same.

<sup>279</sup> Any CP has been much reduced by MI5 and MI6 being placed on a statutory basis. However, all should now be on a statutory basis.

<sup>280</sup> Maitland, n 13, p 418. Munro, n 25, p 255 ‘the concept of the Crown is a convenient abstraction’. Ibid, p 256 ‘The concept of the Crown is also liable to obscure the political realities...[t]he Queen is Head of State, but is not the effective [i.e. the executive] head of government...For practical purposes the power has passed from the monarch to the politicians.’

<sup>281</sup> The statement of Lord Diplock in *BBC v Johns* [1965] Ch 32 at 79, ‘It is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative.’ hit the nail on the head. CP’s cannot be expanded; they can only be abolished or increasingly limited in ambit since Parliament is supreme and now regulates all government in practice.

<sup>282</sup> See n 86.

<sup>283</sup> Besides war and peace, the only major prerogatives now relate to Parliament and to the appointment of a PM. However, dissolution and term are, presently, governed by legislation. Thus, ‘the list grows thin’.

<sup>284</sup> See n 10.



- ***Courts Act***. The MOJ should be responsible for this. Abolishing *obsolete courts* would hardly seem contentious. The case for setting out the few other CPs in legislation (where required) would seem overwhelming.
- ***Government Act***. Cabinet should be responsible for this.
- ***British Territories & Foreign Affairs Act***. The FCDO should be responsible this. Abolishing CPs would mean that the law on British *domestic* and *overseas* territories could be matched up.
- ***Armed Forces Act***. The MOD should be responsible for this. Drafting an Armed Forces Act would not be difficult since the present armed forces legislation is a good basis (and non-controversial).

The key thing would be to leave the above ministries consolidating all *legislation*. And for legal experts to advise on which *CPs* should be abolished - as well as what legislation should be repealed. Retired senior judges or law commissioners would be best for such a role - since they would have no vested interest and they would be able to review all CPs (as well as potentially obsolete legislation) as a *whole* - something greatly lacking at present. Once this legislation was in place and enacted - in a couple of years - as indicated, some could be consolidated into a *Constitution Act*. This would be useful since it would cut out all repealed matter. Also, to make it definitive that all CPs were abolished - avoiding the need to constantly look back.

## 16. CONSEQUENCES OF ABOLISHING ALL CPs - WILL THE SKY FALL?

The problem with legal fictions is that they can assume a '*hallowed*' quality in the minds of (some) lawyers and civil servants in that there arises a great fear that - if abolished - the sky will fall (examples are legal fictions relating to market overt and to consideration).<sup>285</sup> This is the great fear of Vitalstatistix in the Asterix series.

Vitalstatistix, the chief of the tribe...has only one fear, he is afraid that the sky may fall on his head tomorrow. But as he always says, tomorrow never comes.<sup>286</sup>

If all CPs were abolished, the sky would not fall. It would *clear*. The consequences would be this:

### (a) **Sovereign**

The effect would be to recognise the sovereign as a titular Head of State and a titular C-in-C.<sup>287</sup> However, this is the present *reality*. Thus, no change.

- The effect would, also, be to specify the few personal privileges the sovereign actually needs *today*. And, to excise all those which she cannot (or does not) wish to exercise anyway. The crucial ones are civil and criminal immunity (also, immunity from arrest);
- More importantly, abolition takes away the burden of the sovereign being involved in acts of the government (the executive) and all the unpleasantness involved. Thus, if the Privy Council is abolished (or its powers transferred) the sovereign no longer has to sign - or nod to - legal documents which she has not the least time to read or digest. It would also mean that the sovereign is no longer involved with matters relating to the internal affairs of Parliament. Her only choice would be to *open* Parliament (as and when requested).

One would suggest that this will re-vitalise the institution of the monarchy which, otherwise, is coming close to collapse due to endless scandal. Much arising from too close a connection with government.

### (b) **The Crown**

Abolishing the legal fiction of the Crown will mean that the same will lie in the Tower and nothing more. However, it will bring a big change in accountability to Parliament. It will make it clear that all of: ministers, civil servants and the armed forces, are accountable to Parliament. In practice, this is (almost) the position anyway and it is entirely appropriate. It will, also, simplify the court process and allow individuals to sue the relevant ministry directly (or, perhaps, the AG)<sup>288</sup> avoiding all legal fictions (and old forms of writ). In short, this should '*free up*' the entire process of government - making it more transparent, accountable, accessible and possessing a modern, streamlined, architecture. One unencumbered by the nebulous presence of the '*Crown*.'

Further, abolishing all CPs mean the current lack of clarity as to whether a CP has been abolished impliedly - or curtailed or suspended or disused or whether it can be re-vivified - would go. At present, all these matters are as clear as mud. So too, supposed constitutional '*conventions*.'

### (c) **Acts of State**

Abolishing all CPs will simplify the concept of '*Acts of State*'. The term is not a helpful one since the concept of '*State*' has no core of legal meaning under English law - whether judicial or legislative - as Marshall pointed out.<sup>289</sup>

<sup>285</sup> See GS McBain, *Abolishing the Doctrine of Consideration* [2018] ILR, vol 7, no 1, pp 1-197.

<sup>286</sup> R Goscinnny and A Uderzo, *Asterix and the Normans* (1967), p 2.

<sup>287</sup> Whether the sovereign remains '*Supreme Governor*' remains a separate issue.

<sup>288</sup> There is much to be said for one central body handling these matters.

<sup>289</sup> G Marshall, *Constitutional Theory* (1971), ch 2.

- It is better to refer to acts involving the Crown<sup>290</sup> which are *non-justiciable*. This, because they are *political* in content.<sup>291</sup> In this case, given the doctrine of the separation of the powers, any remedy (or punishment) must be left to Parliament.
- Also, perceiving Acts of State to be an exercise of an ‘*absolute*’ power is misconceived. A misconception which goes back to *Bate’s Case* (1607).<sup>292</sup> It is misconceived because the courts *never* held that sovereigns (in particular, James I (1603-25)) had absolute power - albeit, *Bates’ Case* is a high watermark on that road.

Instead, a more modern perception should be that certain acts (Acts of State) comprise acts of a purely political nature made by government. Ones which are non-justiciable since to make them otherwise would be to trespass on the separation of powers between the courts, Parliament and the Crown. If all CPs are abolished, these governmental acts will be more easily determined. Also, Parliament can directly provide in legislation that the same are *non justiciable* by virtue of being wholly ‘*political acts*’.<sup>293</sup> Examples, even when all CPs are abolished, would be government powers to:

- declare war and peace
- make treaties
- appoint a PM
- the PM appointing, dismissing - and accepting the resignation of - ministers.

It would, also, be useful for there to be a review - once all CPs are abolished - of all prior legal decisions involving Acts of State, to ensure the same are now wholly covered by legislation.<sup>294</sup>

**(d) Conclusion**

It is suggested that abolishing all CPs - and placing the few still required (less than 5% of the present total) in legislation - would be hugely beneficial in helping everyone to understand the nature of the constitution. It would, also, solve the present state of there being a marked lack of accountability in respect of CPs to Parliament. Further, there is nothing, actually, difficult in this.

**17. MODERNISING THE ARCHITECTURE OF GOVERNMENT**

Consolidating constitutional legislation and abolishing all CPs - as well as assisting the sovereign - will modernise the architecture of government which is, presently, clinically obese. However, it can (and should) be slimmed down. Thus, starting from the top and looking at *central government* only:<sup>295</sup>

<u>Present Position</u>		<u>Optimal</u>
Parliament	(HC and HL)	Abolish/Reform HL
Sovereign		Abolish CPs <sup>296</sup>
Crown		Abolish CPs <sup>297</sup>
Duchy of Lancaster	(exists by charter)	Abolish or merge with Crown Estate
Duchy of Cornwall	(exists by charter)	Put in legislation
Counties Palatine	(Lancaster, Durham, Chester)	Abolish
Crown Estate	(exists by legislation)	Modernise legislation
<u>Also:</u>		
Cabinet	(inc Cabinet and PM Offices)	Make no change
18 Ministries		Ibid
20 Non-Ministerial Government Depts	(NMGDs)	Abolish concept
104 High Profile Groups	(HPGs)	Abolish concept

<sup>290</sup> Acts of state tended to be limited to foreign affairs at one time. In particular, acts of foreign states (e.g. Phillips, n 27, pp 320-6). However, they are now wider than that. See also Wade, n16, p 76 ‘*Act of State*’ in its wider sense, means an act of the executive as a matter of policy performed in the course of its relations with another State.’ Perhaps, a good working modern definition would be that Act of State ‘means a wholly political act’. Cf. Bradley, n 29, p 260.

<sup>291</sup> See *GCHQ Case* [1985] AC 374 *per* Lord Diplock at p 412 (*re* a matter of national security) ‘It is *par excellence* a non-justiciable question. The judicial process is totally inept to deal with the sort of problem which it involves.’ See also Keith, n 239, pp 362-3 who noted that Act of State ‘has been limited within the most narrow confines.’

<sup>292</sup> See n 246. Wade (writing in 1931), n 16, p 71 ‘The exercise of the absolute discretion in foreign affairs cannot be questioned in a court of law, but only by attacking the ministers concerned in Parliament...’.

<sup>293</sup> It may be noted that constitutional law has, as part of its fossilization, clung on to out-dated legal expressions and modes of thoughts which are unhelpful. Surely, it is time to dispense with these and use modern, direct, terms.

<sup>294</sup> As De Smith noted, n 24, p 155, many decisions on act of State have an ‘archaic flavour’.

<sup>295</sup> For local government, see McBain (*Government Act*), n 5, pp 87 *et seq.* It also needs to be streamlined.

<sup>296</sup> With the few needed being placed in legislation.

<sup>297</sup> Ibid.

c. 400 other quangos	(inc. public corporations)	Reduce to 80-100 <sup>298</sup>
Privy Council		Abolish
Law Officers	(AG and SG)	Make SG a Deputy AG
Sinecures <sup>299</sup>	(Lord Lieutenant. High Sheriff <i>etc</i> )	Abolish

#### **Other Issues**

Proclamations		Abolish
UK Great Seal		Abolish

*Would the above be controversial?* Obviously, abolishing the HL would be. *Or would it?* One would suggest that 90% of the country would have no problem with that (and, on a free vote in the HC, the figure would, likely, be much the same).<sup>300</sup> As for the privy council it has been superseded by the cabinet for, at least, 300 years and simply ‘*rubber stamps*’ documents originating from ministries or the cabinet office. It would be no loss. Abolishing sinecures,<sup>301</sup> the obsolete title of Solicitor General, proclamations<sup>302</sup> and the UK Great Seal would, it is asserted, generally, be non-controversial (the public care or know nothing of them) and none of the same are needed, legally, anyway. Reducing quangos from 550 to 100 or less would save huge amounts of money, free up government, give back ministries some purpose and (likely) be very popular.<sup>303</sup>

### **18. SOVEREIGN GRANT & TAXATION**

#### **(a) Sovereign Grant (SG)**

Along with the abolition of all CPs, the Sovereign Grant (civil list)(‘**SG**’) should be reformed,<sup>304</sup> to further clarify the same. Thus:

- **Royal Palaces.** There appear to be 14 of these at present (excluding Parliament and Osborne House).<sup>305</sup> If the Royal Family is slimmed down, then, no more than (say) 4 palaces should be retained as operating palaces.<sup>306</sup> The reason is that, after 1800, the sovereign could (and does) own private property. Thus, many operating palaces are not needed by the sovereign. Nor by other members of the present Royal Family.<sup>307</sup>
- **Non-Operating Royal Palaces.** These should be removed from the SG completely and be maintained (or sold) by the Department of Digital, Culture *etc.* (‘**DoC**’) or the Department for Environment (‘**DoE**’) who should, also, be responsible for all staff (current and former) salaries and pensions. The same should apply to Osborne House (and any use by the Royal Family removed).<sup>308</sup> In the case of Westminster Palace, Parliament should acquire the freehold and leaseholds of the same, without cost.
- **Operating Royal Palaces.** The remaining *operating* royal palaces should be maintained by the DoC (or DoE) who should be responsible for the pay and pensions of all royal palace and royal household staff. In this fashion all of such could be removed from the Civil List. It may be noted that the Royal Family - in any case - rarely use Holyroodhouse (Scotland) or Hillsborough (NI). Thus, they should be open to the public as much as possible. So too, Buckingham Palace.
- **Royal Collections, Royal Carriages.** These - including all staff pay and pensions - should be paid for by the DoC (or DoE).
- **Pensions - Civil List 1837.** Parliament should take over any Civil List 1837 pension (if the same is still required).<sup>309</sup>
- **Balmoral & Sandringham.** On the demise of Queen Victoria (1837-1903), Osborne House was given to the Crown Estate by her successor. It is maintained by the DoE. Hopefully, on the demise of the present sovereign, the same

<sup>298</sup> These should be public corporations, which have legal status. Not quangos which have no legal basis in law in most cases.

<sup>299</sup> See n 1 (*Crown Act*), pp 91-2.

<sup>300</sup> Alternatively, the HL should be reformed by excluding (perhaps): (a) all hereditary peers; (b) CoE bishops; and (c) peers over 75. As it is, it has assumed vast proportions and the need for reform, at least, is urgent.

<sup>301</sup> The only people who would complain would be those that hold them. However, they invariably hold other public offices any way.

<sup>302</sup> They are an anachronism since SI have replaced them.

<sup>303</sup> None need be in situated in London anyway and any matters concerning Scotland, Wales and NI should be transferred to government there.

<sup>304</sup> The Civil List was very clear, then unclear. The Sovereign Grant is the latter. It should be very simple and reflect only the annual salary paid to the sovereign for acting as Head of State. See also Bogdanor, n 23, ch 7 and Bradley, n 29, pp 244-5. See also the Sovereign Grant Act 2011.

<sup>305</sup> See n 1 (*Crown Act*), p 88.

<sup>306</sup> i.e. Buckingham Palace and Windsor (England), Holyroodhouse (Scotland) and Hillsborough (NI).

<sup>307</sup> Thus, the Queen has Balmoral and Sandringham besides other residences. Prince Charles owns various private residences (including Highgrove Estate) and so does Prince William.

<sup>308</sup> Osborne House Act 1902, s 2.

<sup>309</sup> Are these still required? The maximum amount is only £15k a year.

will occur in respect of Balmoral and Sandringham (to the extent not otherwise used as royal palaces).<sup>310</sup> In any case, all maintenance, staff and pensions for these two buildings should be handled by the DoC (or DoE).

- **Royal Travel.** This should not be part of the SG but a separate matter for the Department of Transport ('DOT'), including the royal yacht.

Given the considerable ages of the present sovereign (95) and her successor (73) the above seeks to look to the future - to prevent Prince William and family (i.e. just a few people) having a surplus of palaces which could be otherwise used to help pay off the SG.

- **Older Members of the Royal Family.** A number of these are now elderly and they have their own properties.<sup>311</sup> Surely, it is appropriate to consider the retirement of all of the same.<sup>312</sup>

In such manner, any new succession would be transparent and get off to a good start. Further, the great merit of having one principal government ministry controlling the above is that all these would be subject to one budget and control.<sup>313</sup> Further, if the duchy of Lancaster is abolished and became part of the Crown Estate, this would cut out bureaucracy and simplify things. Any income from the duchy (now the Crown Estate) should be retained by the same. The effect would be to make the SG more transparent (and perhaps, avoid criticism of the royal family, some of it misplaced). As for taxation, the position should be regularised, to avoid scandal.

- **Duke of Cornwall.** Prince Charles should pay all taxes since he is a subject.<sup>314</sup> The basis on which he was exempted from paying income tax ('IT') *qua* Duke of Cornwall in 1921 is unclear. Since 1993 payment of IT has been made. However, IT should be at the appropriate rate on *all* private income (including from duchy)<sup>315</sup> and legislation should provide for this. In other words, the tax position of Prince Charles (including capital gains tax and inheritance tax ('IHT')) should be the same as that of every other taxpayer (one which applies, it seems, to other members of the royal family).<sup>316</sup> Assuming the duchy of Cornwall is inalienable - and that title to the same is held by the sovereign - the duke would not own the freehold for any IHT purposes.
- **Sovereign.** In the case of the sovereign - assuming all royal palaces, collections, carriages, the duchies of Lancaster and Cornwall and the Crown Estate are inalienable (i.e. held on behalf of the nation) - the sovereign should pay tax on *all* private income (including from the duchy of Lancaster (if retained) and on private property)<sup>317</sup> and IHT on the same. From 1993, the sovereign has paid tax on her private income it is said.<sup>318</sup> However, clarification of all this is needed.

## (b) Conclusion

*In conclusion, the SG should simply comprise a (generous) annual payment (salary) to a Head of State who represents the UK and the Commonwealth.* There is nothing particularly novel to this, Maitland (in 1887-8) said:

Practically... we have come to have a king with a salary.<sup>319</sup>

Further, all matters relating to the public functions of the sovereign (including all palaces, staff and pensions) should be wholly controlled by one government ministry (DoC or DoE). Further, the sovereign should employ no-one, always make decisions as Head of State *under advice* and avoid all scandal. Otherwise, it seems fairly clear that the monarchy will not long survive. Indeed, it is suggested that the long term survival of the monarchy - given increasing global intrusion on the same - should be predicated on some clear legal understandings. That the sovereign:

1. is a titular Head of State (and Head of the Commonwealth);
2. receives an annual payment (a salary in the form of a SG) for undertaking such roles;<sup>320</sup>

<sup>310</sup> Presumably, if these properties are retained in private possession, then, inheritance tax is due. Under the civil list, the privy purse was used to maintain Sandringham and Balmoral (as well as pay pensions for employees), albeit these residences were (and are) private.

<sup>311</sup> Surely, there should be a retirement age, even for royals as there is for Supreme Court judges and others (say, 75).

<sup>312</sup> Doubtless, they will benefit under the will of the sovereign.

<sup>313</sup> To the extent the Crown Estate has title to the palaces such should pass to the Doc or DoE to minimise bureaucracy.

<sup>314</sup> Sunkin, n 26, p 347, n 43 (article by Brazier) 'The Prince of Wales has always paid tax on his personal income, and agreed in 1993 to pay tax on his Duchy of Cornwall income which has been previously exempt.'

<sup>315</sup> This is unless the duchy is accepted as being owned by the nation (i.e. inalienable).

<sup>316</sup> Bogdanor, (in 1997), n 23, p 192 'The Prince of Wales, from the 1993/4 tax year, has been paying income tax on a voluntary basis on the revenues which he receives from the duchy of Cornwall, and continues to pay other taxes. Other members of the royal family continue to be taxed on the same basis as any other taxpayer.' However, this was before the Sovereign Grant Act 2011, see McBain (*Crown Act*), n 1, pp 80-4. See also Bradley, n 29, p 245.

<sup>317</sup> If Balmoral and Sandringham remain private property, presumably, (substantial) IHT will be paid on the same.

<sup>318</sup> Bradley, n 29, p 245 'In 1992... it was announced that the Queen had undertaken to pay tax on her private income with effect from 1993, but this does not extend to *inheritance tax*.' Cf. De Smith, n 24, p 133 who noted that the sovereign in 1992 'offered to pay income tax, capital gains tax and *inheritance taxes*.' (*italics supplied*)

<sup>319</sup> Maitland, n 13, p 437. See also Bogdanor, n 23, p 184 'In 1760 the prime minister told the king [George III, 1760-1820] that the civil list was 'Your majesty's own money; you may do with it, what you please.'

<sup>320</sup> There is no reason why the sovereign and the Duke of Cornwall could not receive a (generous) annual payment. This would be far better than the endless time that has been wasted arguing over the nature of the civil list (later, the sovereign grant) since 1760. Indeed, it can be greater than they would otherwise receive under any SG. They should be subject to tax on the same as with any other individual (again, time

3. continues to bear criminal and civil immunity, in return for:
  - (a) employing no one when acting in a public capacity;<sup>321</sup>
  - (b) taking all actions, *under advice* - when acting in a public capacity;<sup>322</sup>
  - (c) not being guilty of misconduct;<sup>323</sup>
  - (d) having no personal CPs, other than (very limited) statutory ones.<sup>324</sup>

In the case of the heir(ess) to the throne (the duke or duchess of Cornwall)<sup>325</sup> point 2 should also apply as well as (a)-(c) and the same having no CPs. *Is this fair?* The answer is 'yes'. Everything should be open and transparent. Further, it avoids scandal. As for other means of avoiding scandal:

- **Royal Titles.** These should be set out in legislation and only granted to a (slimmed down) Royal Family. They should be removable for misconduct (some should be abolished in any case).
- **Hereditary Peerages.** Any CP to *create* new ones should be abolished, They should only granted to a (slimmed down) Royal Family. They should be removable for misconduct (some should be abolished in any case).
- **Titles of Honour.** All (including the Order of the Garter, Order of Merit and the Royal Victorian Order) should be only granted under advice.<sup>326</sup> Those capable of being granted should be set out in a SI (and many obsolete or inappropriate ones abolished). They should be removable for misconduct.
- **Decorations & Medals.** All should be only granted under advice. Those capable of being granted should be set out in a SI (and many obsolete or inappropriate ones abolished). They should be removable for misconduct.
- **Military Ranks.** Only the sovereign should hold the same (as a titular C-in-C). No other member of the (slimmed down) Royal Family should be awarded the same, unless a serving member of the Armed Forces (and there should be no up-grade).<sup>327</sup>
- **Employment & Merchandizing.** The sovereign and heir should not have any other employment other than as Head of State and heir. Also, neither should be involved in any merchandising. Other members of the (slimmed down) royal family should not be involved in any merchandising and should finance themselves through their own employment.

Doubtless, it would also greatly assist things if legislation were to also provide that all honours, decorations and medals could only be awarded on merit and that such are not open to MPs (or ex MPs) save in the case of bravery. The latter have (life) peerages open to them and this should be quite sufficient.

***In conclusion, the legal position as to any SG and taxation should be resolved so that any successor to the sovereign gets off to a good start.***

## **19. AUSTRALIA, CANADA & COMMONWEALTH**

Regardless of any constitutional reform in the UK, it is asserted that Australia and Canada (as well as other Commonwealth countries) should review - and abolish - old colonial legislation. Also, any CPs. This, in order to modernise their constitutions (without reducing any goodwill to the UK which, surely, should continue). Otherwise, like the UK, their constitutional position is stuck in a time warp, like that of the UK. This lack of accountability and transparency would seem unwise in light of the rise of military and civil dictatorships around the world.

## **20. WHY ALL THE DIFFICULTY?**

The reason why there has been (and is) so much difficulty in understanding CPs today is (perhaps) that:

- many CPs are very old. Indeed, many derive from Anglo-Saxon times.
- there is a marked tendency among academics to consider too much in the abstract - as opposed to actually *looking at the totality of CPs presently existing*. That is, to see things in the round.
- much conceptualisation is, often, too rigid. Also, too often based on a couple of academic views, as opposed to looking at the historical means by which power has progressively flowed from the sovereign to Parliament and to government.

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and money would be saved through seeking to not pay the same). *What would be a generous sum?* That must be left to Parliament. The resolution of this would enable both to concentrate on the real function of being UK and Commonwealth ambassadors to the world.

<sup>321</sup> See n 10.

<sup>322</sup> Keith (in 1936), n 63, pp 61-2 'All royal official actions must be done, under the principles of the modern constitution, on the final authority of a minister of the Crown or the Cabinet, the authority of the ministers being derived from the fact that they command the support of the majority for the time being in the [HC]... Logically it is the due outcome of the doctrine that the king can do no wrong.'

<sup>323</sup> In the cases of prior sovereigns this resulted in the abdication of Edward II (1307-27) and Richard III (1377-99).

<sup>324</sup> The intent should, also, be to reduce the huge volume of documents sent to the sovereign for her reading/execution.

<sup>325</sup> Surely, the position of primogeniture should be removed in the case of the duchy of Cornwall, so that the position is the same as with the sovereign.

<sup>326</sup> i.e. by a Political Honours Scrutiny Committee (one not containing politicians or privy council members).

<sup>327</sup> On what legal basis members of the royal family have their military ranks upgraded is unclear. There has never been a CP in respect of the same.

To consider two of these points:

**(a) Sovereign has Three Bodies**

The sovereign, actually, has *three* bodies (two in law) and not *two*. To see things only in terms of two bodies has confused legal thinking and decisions. Thus, Elizabeth Windsor<sup>328</sup> has a:

- body natural;
- body politic (as a corporation sole);
- body politic (as a corporation aggregate).

To give homely proof of this:

When Elizabeth Windsor eats kippers for breakfast she is not exercising any function as a sovereign. She is simply a person in the *body natural*. However, if she eats sturgeon she is doing so as *sovereign* (i.e. acting in the *body sole*) since this is a royal fish which she can only eat. And when she sits in Parliament<sup>329</sup> and assents to legislation on fish passed by the members of Parliament she is sovereign in the *body aggregate*, she being the *head* and the assembly of commons and lords being the *body* (the members).

Why this has been overlooked is because of historical change. For example, Parliament still sits in a royal palace, but MPs and peers are autonomous and no longer members of her household. And, apart from opening Parliament, the sovereign no longer sits there (so, the image of her in aggregate with her members is no longer there). And, the members are no longer servants of her household. As to Elizabeth Windsor and her three bodies:

- Body Natural. If Elizabeth Windsor resigns (abdicates) she loses any *legal persona* (whether sole or aggregate). She becomes an individual again and there is no reason why she cannot sue - and be sued - as the same. Indeed, it would seem appropriate for Elizabeth Windsor - when acting in the body natural (*even while Queen*) - to be capable of suing - and being sued - in court over certain matters when they have no public content.<sup>330</sup>
- Body Politic - Corporation Sole. It is asserted the sovereign was the first corporation sole (the *fons et origo*) under English law - albeit, recognition of such by the courts was only later accorded. As a corporation sole, Elizabeth Windsor has (by legal fiction) a *legal persona*. Likely, this was recognised as long ago as the time of king Alfred (886-91AD) or before, since there was recognition in Anglo-Saxon times that the sovereign could own *royal* estates which were not part of his *personal* estates - but that he could not alienate the same by sale or by will.<sup>331</sup> This was expressly not spelt out as such in Anglo-Saxon dooms but would have existed under the common (customary) law of the time. As a corporation sole, the sovereign can undertake all legal acts, *qua* sovereign. He could also create other corporations sole (by franchising his legal capacity) as well as corporations aggregate.
- Body Politic - Corporation Aggregate. This is something of the '*missing link*'. In Anglo-Saxon times there was a great assembly (the *witan gemote*, assembly of the wise). The extent to which, as in the aftertimes, the ordinary people - the folk (*volk*) attended is uncertain.<sup>332</sup> This assembly continued after the Norman Conquest (1066) but it was probably much more restricted - being a great council (*magnum concilium*) containing tenants in chief, senior clergy and judges. Further, the Normans were reluctant to cede legal power (indeed, they were building up it, being invaders). Likely, therefore, the first recognition of corporations aggregate existed politically - with regard to:
  - the royal household;
  - the privy council (*curia regis*); and
  - Parliament (c. 1285).

As noted, this was effected by the sovereign transferring political power to others (as a group, an assembly). The sovereign did this by passing possession (*seisin*) of a seal to the head of the relevant body, to act in his stead when he was not physically present. The formation of these corporations aggregate, in practice, would - in time - have

<sup>328</sup> Let us hope that the royal name reverts to this simpler English name.

<sup>329</sup> Parliament means a building. In Anglo-Saxon times, the house ('*hus*') of the sovereign (also, called a royal palace). Today, we speak of the 'house of commons' and the 'house of lords'. However, once it was unicameral. Thus, the sovereign summoned his great council (*magnum concilium*) to his house (at Westminster) to advise him and to agree to establishing laws (dooms). Anglo-Saxon law reflects this, e.g. Attenborough, n 220, p 25, *Laws of Wihfred*, 'These are the decrees [laws] of Wihfred...king of Kent in [695 AD] in a place ...called Barham [possibly, near Barham], there was assembled a deliberative council of the notables...There the notables, with the consent of all, drew up these decrees, and added them to the legal usages of the people of Kent, as is hereafter stated and declared...'. The notables were various bishops and every order of the church and the loyal laity.

<sup>330</sup> For example if, when out driving, Elizabeth Windsor gets a parking ticket - or, if she fails to pay council tax on properties she owns, or if she has personal jewellery re-set and fails to pay the bill - she should be capable of being sued and required to pay (if she otherwise refuses to) just like everyone else. Needless to say, all of such are most unlikely.

<sup>331</sup> Kemble, n 207, vol 2, p 30 'His personal rights, or royalties, consisted in the possession of large domains which went with the crown... which were his own property only while he reigned, and totally distinct from such private estates as he might purchase for himself...' The will of king Alfred (886-91 AD) (extant) deals with private estates and not, for example, London which he owned as king (probably, tenants paid him a farm (*feorme*, for rent) in the form of food, livestock *etc*).

<sup>332</sup> These would have been freemen (thus, no women, slaves or serfs and only boys over 12 years).

given lawyers the means of rationalising (positing) a legal existence to the same.<sup>333</sup> That is, to perceive the sovereign as head of an apparatus of government. As for other, non-political forms, the first corporation aggregate for trading purposes appear to have been in the time of Edward III (1327-77).<sup>334</sup> From there, the concept took off in the business world. In the case of the government, it expanded beyond the royal household and it became concentrated in ministers (comprising first, the privy council and, then, the smaller cabinet) which ministers established ministries (a corps of civil servants) to undertake the actual royal work. These ministries and civil servants, however, are not corporations aggregate *per se*. Instead, they derive from ministers - who, themselves, derived from one secretary of state being given a seal by the sovereign, to perform governmental work. In short, something of a '*Great Chain of Being*', this being in the political world:

<u>Anglo-Saxon</u>	<u>Norman</u>	<u>Later</u>	<u>Post-1660</u>
Great Council ( <i>Witangemote</i> )	<i>Concilium Magnum</i>	Parliament	Parliament
Smaller Council	<i>Curia Regis</i>	Privy Council	Cabinet

Today, all government (privy council, cabinet, ministers, ministries, civil servants and the armed forces) is, in reality, quite distinct from the sovereign and it is accountable to Parliament. Given the above, one would suggest that it is perfectly correct to speak - and to important to distinguish - Elizabeth Windsor from the sovereign and from '*the Crown*'.

As to whether these 3 bodies are still required:

- The Crown. The body politic in the form of the '*Crown*' - the legal fiction of the sovereign as a *corporation aggregate* - has become, after 1688, wholly artificial *in reality*. That is, the sovereign neither hires, fires - nor accepts the resignation of - '*her*' servants, those who govern. Such are now accountable to, and servants of Parliament. Thus, all CPs relating to the same should be abolished.
- The Sovereign (Corporation Sole). As for the sovereign in the body politic (as a *corporation sole*) this, also, is now wholly artificial when the sovereign is performing governmental acts<sup>335</sup> since, in so doing, the sovereign is performing them formally (ritually) only. The power has gone and cannot return - apart from a couple of instances.<sup>336</sup> Therefore, it is best to place these in legislation and dispense with the common law. This can be achieved by legislation indicating that the sovereign is a statutory corporation sole. Any personal CPs still needed can, also, be provided in a Constitution Act.

Thus, the concept of the '*Crown*' can be abolished. Also, the need for a Great Seal.

Why the above has been overlooked, surely, relates - in part - to the loss of memory as to the power of the seal. Seals were introduced by the Normans in the main because they were illiterate and could not sign their names (the king was the same).

- The use of seals, however, can be found in Anglo-Saxon times and, such (likely) developed from their use by the Roman Curia (Vatican). However, the use of seals goes much further back to Roman times, to the Bible and, prior to that, to Mesopotamian times. The seal (like the signature) was a *sign of legal power being exercised*. And, prior to the seal, was the oath.<sup>337</sup>
- All of such: seals, signatures, marks, handshakes, a drink to seal the bargain and oaths were *evidence* of a person exercising *legal power* - for the breach of which there was *legal accountability* (punishment). The root of all was the oath (the promise delivered before the gods - that is, with them as witnesses). In olden times, breach of an oath to the king was death; a man was accursed to the gods. In later times, it was death if the oath was one of allegiance.<sup>338</sup> Further, often, more than one sign (that is, evidence of a legal act) was given.<sup>339</sup>

<sup>333</sup> It is noteworthy that the so-called Laws of Henry I, see n 221 (c. 1113), the first English legal text, R Glanvil (trans. G Hall) *Treatise on the Law and Customs of the Realm* (OUP, c 1189) and H Bracton, (trans. S Thorne), *On the Law and Customs of England* (1968-77, c. 1250) make no mention of corporations. Nor, the legal texts: Britton (trans MA Nichols, 1865, c. 1290), Fleta (c. 1290, Selden Society, vol 72) and the Mirror of Justices (c.1290) Selden Society, vol 7, p 15. Thus, there was no legal discussion as to the nature of a corporation (i.e. recognition of such a legal entity), at least, before 1290.

<sup>334</sup> See, for example, the right of the sovereign to approve certain marriages. This power is now statutory.

<sup>335</sup> Especially so in the commercial and military fields.

<sup>336</sup> See n 10.

<sup>337</sup> The Hebrew '*oth*' (pronounced *oath*) and latin '*sigillum*' was, usually, translated as '*sign*', '*token*', '*mark*', '*proof*', '*evidence*'. Thus, the transfer of a seal (a sign) to a minister (i.e. adviser, servant) by the Crown was a transfer of legal power to the same.

<sup>338</sup> A man gave *homage* or *fealty* to the sovereign and was held to have pledged *allegiance* if a subject. If he broke it by opposing the king's standard when raised on the battlefield, the law martial applied (in which the courts were '*closed*' and killing him was not murder). This raising of the royal standard (the sign, the evidence of the king) applied from, at least, the reign of Henry III (1216-1272) to 1745. See GS McBain, *Abolishing the Crime of High Treason* (2007) 81 ALJ 94-134.

<sup>339</sup> e.g. Bible, Book of Ezekiel (it concerns certain visions of the prophet c 953-571 BC though it may not be of that date). The king of Babylon entered into a treaty with the royal family in Jerusalem and required the latter to give an oath to keep it which was broken. God indicated the punishment - the latter would die in exile (in Babylon) - since 'He despised the oath by breaking the covenant [agreement]. Because he has given his hand in pledge [hand shake or strike] and yet did all these things, he shall not escape.' See McBain, n 285, p 23.

Thus, all government acts can be seen as acts performed by a corporation aggregate (ministers)<sup>340</sup> with the PM acting for (in lieu) of the sovereign. Thus, the only issue, then, for the courts is - *who is empowering these acts - that is, the exercise of the relevant CP?*

- If it is not the sovereign *in actuality* (where the same has immunity from prosecution)<sup>341</sup> the courts can - and always should - to ensure accountability - look behind the 'veil' and punish for breach of any mal-exercise of the CP.
- However, given the doctrine of the separation of the powers, it should be left to *Parliament* to punish (not the courts) where the exercise of the CP is a *purely political one*.<sup>342</sup> In such a case, the courts should declare the matter *non-justiciable*. Yet, if the court feels that there may have been a breach of the law, they should make it clear - in their judgment - that Parliament *should* investigate and punish.<sup>343</sup>

Therefore it was not (it is asserted) inaccurate for Lord Woolf to assert that the Crown '*can be appropriately described as a corporation sole or a corporation aggregate*'.<sup>344</sup> In which capacity Elizabeth Windsor is acting - whether as corporation sole (sovereign) or corporation aggregate (the Crown), depends on the CP purporting to be exercised. Yet, this, rarely, is the crucial point which is - *who is empowering these acts?* Since, in the large majority of cases, it will not be sovereign (since power has move on) save by way of a legal fiction, all the more reason to abolish all CPs and place those still needed in legislation. This would not be at all difficult since so many CPs are obsolete or cannot be exercised anyway.

### (b) Anglo-Saxon Law

The CPs can only be understood in context, which is Anglo-Saxon law. *However, who considers this these days - whether academics or the courts?* Yet, such is the answer to the *nature* of CPs and the fact that they were narrowly construed. Their source would have been the older Germanic law.<sup>345</sup> Further, the relationship between the sovereign (a military leader) and his people was quite different to more academic (and ecclesiastically moulded) legal conceptions of later times. Thus, Kemble, stated (accurately, one would assert) the position:

In strict theory of the Anglo-Saxon constitution the king was only one of the people, dependent upon their election for his royalty, and upon their support for his maintenance. But he was nevertheless the noblest of the people, and at the head of the state, as long as his reign was felt to be for the general good, the keystone and completion of the social arch. Accordingly, he was invested with various dignities and privileges, enabling him to exercise public functions necessary to the weal of the whole state, and to fill such a position it belonged to its chief magistrate.<sup>346</sup>

It is in this context, it is suggested, that the *origin* and *nature* of CPs (including those of today) must be judged.

- The early Anglo-Saxon kings would have little more than thugs - the leaders of war-bands who lived off fighting and booty.<sup>347</sup> This was no different to that of their north German forebears. They were warriors (fighters) *elected* by their band to win (to survive). They were not men of the soil. If their leader failed in battle that was the end of him; they choose another.
- The position of being an elected leader (surely) indicates that the CPs of the same ('*theoden, king*') would have been closely regulated, since they intruded on the rights of those who elected him (the people, the *volk*). That is, his power was not *absolute* but *restricted*. Thus, it was set out in legislation which was assented to by his people or upheld only through being a long-standing custom.<sup>348</sup>

Key CPs were the fact that the sovereign held - apart from his private land - land only in right of his kingship which he could not alienate. Thus, even at this stage, there was some sort of legal recognition of the king as: (i) a person; and (ii) as a sovereign (i.e. having a body politic).<sup>349</sup> As for other CPs in a political context, the sovereign:

- was C-in-C of the local militia (the *fryd*)

<sup>340</sup> The PM, legally, sits *in lieu* of the sovereign and is empowered by kissing hands to exercise the political CPs which the sovereign would, otherwise, exercise if sitting in cabinet in person. See also Halsbury, *Laws* (1<sup>st</sup> ed, 1909), vol 7, para 52.

<sup>341</sup> Whether in the body politic acting as a corporation sole or aggregate.

<sup>342</sup> It is legitimate for the government (and Parliament) to complain if the courts do this because the courts are, then, simply substituting their own subjective opinion(s) for ministers (or Parliament). For example, if the government declares war, this is not a justiciable issue, because the issue of whether it was a reasonable (or not) must be left to a PM and Parliament to decide. And, punishment should be meted by Parliament and the electorate.

<sup>343</sup> In times past, Parliament did by the criminal process of impeachment. However, this is, now, obsolete.

<sup>344</sup> Sunkin, n 26, p 24 (article by *Wade*). One would suggest that professor Wade got it wrong in saying that the Crown 'means simply the Queen.' This is too simplistic.

<sup>345</sup> See Kemble, n 207, vol 2, ch 6.

<sup>346</sup> *Ibid*, p 29. See also J Hudson, *The Oxford History of the Laws of England*, vol 2, 871-1216 (2012).

<sup>347</sup> Tacitus, *On Germany and Britain* (1954), p 101 *et seq* sums up the German forebears of the Anglo-Saxons and, probably, little changed in respect of the early Anglo-Saxon kings.

<sup>348</sup> For both see GS McBain, *Modernising the Monarchy in Legal Terms - Part 5* (2014) King's LJ, vol 25, pp 440-66.

<sup>349</sup> The need for positing a body public would not have been necessary for the later purposes of dealing with the issues of *minority, mortality* or *imperfection* (see 3) since the office of sovereign was elective.



- had personal protection - from his personal bodyguard (*huscarles*, house troops) and from the law<sup>350</sup>
- upheld the power of the courts and could pardon
- had territorial control in which he enforced his 'peace' (the criminal law)
- received allegiance (a pledge to serve him, from men over 12 years old)
- controlled defences including roads, bridges and ports - as part of his obligation to defend (protect) his folk
- maintained a royal estate while sovereign.

Most other CPs they would have been *financial*, for the upkeep of the status of the king. Kemble mentions:

- escheat (and forfeiture) of land and goods for breaches of the criminal law
- money from criminal fines
- treasure trove
- purveyance
- wreck
- money arising from issuing coinage (by his moneyers)
- the right to require freemen to work on defences (bridges and town walls)
- tolls (from markets, salt mines, the transport of goods (i.e. ship tolls on goods, harbour tolls) *etc*)
- wardship and marriage
- heriot.

The fact that these CPs were few - and closely expressed - may be seen with regard to Anglo-Saxon charters and the so-called *Laws of Henry I*.<sup>351</sup> In short, although all (or most) of the above CPs have long been superceded or are obsolete it is important to note that there is little evidence that the sovereign had *absolute* power. Or, that CPs were complex and not closely defined. Or, that these CPs did not have to be shown to have an existence in *legislation* or long standing custom. Thus, the definition of Blackstone as to CPs - certain special rights accorded to a sovereign<sup>352</sup> - is preferable to that of Dicey.<sup>353</sup> And, the Anglo-Saxon dooms bear this out.

### (c) Conclusion

One wonders whether the current analysis on the legal '*bodies*' of the sovereign is correct. And, whether this is causing a strained analysis. *Further, was the perception of CPs from Dicey onwards correct?* Both issues may have resulted in *ex-post facto* rationalisation. And, over analysis. As it is, it is suggested that the current approach should be very simple. All CPs should be abolished, with the few needed placed in legislation. They will not, then be CPs, but legislative powers granted by Parliament. In the case of the sovereign, very few are required.<sup>354</sup>

## 21. NOTE ON THE CORONATION

The successor to the sovereign, prince Charles, has indicated that he intends the coronation to be slimmed down. Such would seem appropriate in modern times. In particular, consideration might be given to the following:

### (a) Abolish Court (Committee) of Claims

In medieval times, various retainers claimed that they were *entitled* to attend the coronation of a sovereign by virtue of their being required to perform various services for the sovereign at the same.<sup>355</sup> These services were adjudicated by a Court of Claims, comprising commissioners appointed by the sovereign (the court was not a judicial court as such - the word being used in the older sense of an '*assembly*').

- The first court is said to have been in the time of Richard II (1377-99).<sup>356</sup> For the coronation of Elizabeth II in 1952, 21 claims were upheld (16 of which had been upheld in previous coronations).
- For the next coronation, to speed things up - and to clarify matters - it is asserted that a SI should indicate which are obsolete, such as: the bed services, the coronation procession outside Westminster Abbey, the assembly of peers in

<sup>350</sup> Thus, fines for killing him, fighting in the royal palace, stealing from him, attacking his advisers *etc* were very high.

<sup>351</sup> See n 221.

<sup>352</sup> Blackstone, n 34, vol 1, p 232 'By the prerogative we usually understand the special eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity...And hence it...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...'

<sup>353</sup> See n 242. Wade pointed that the effect is to create great 'spurious [i.e. false] prerogatives'. One would agree, see Sunkin (article by Payme), n 26, p 83.

<sup>354</sup> For the only legislative powers that would need to be granted to the Crown see *Appendix B*.

<sup>355</sup> See GS McBain, *Abolishing Obsolete Offices* (2012) Coventry Law Journal, vol 17, no 2, pp 45-50.

<sup>356</sup> *Ibid*.

Westminster Hall, the placing of the sovereign in his seat thereat. Also, any post-service banquet (with the ceremonial champion appearing). These are no longer required, nor necessary.<sup>357</sup>

#### **(b) Other Services**

For the coronation of Elizabeth II, there were, *inter alia*, the following claims to render personal service to the sovereign during the coronation:<sup>358</sup>

- 1-3. CoE claims. Those of the Dean of Westminster, Bishop of Durham and Bishop of Bath and Wells;
4. *Barons of the Cinque Ports. These were to bear a canopy. However, that practice ended in 1821.*
5. *Walker Trustees. To be present by deputy by virtue of the office of hereditary usher of the white rod or principal usher for Scotland (this office was abolished, in effect, in 1707).*
6. *Clerk of the Crown. To record proceedings in Westminster Abbey (with the registrar of the privy council to assist).*
7. Lyon King of Arms. To attend the service without any service obligation.
8. Heralds and Pursuivants of Scotland. The same.
9. *Lady Erroll. To have her deputy attend as Lord High Constable of Scotland.*
10. *Lord Shrewsbury. To carry a white wand as the symbol of his office as Lord High Steward to Ireland.*
11. Lord Cholmondeley. To attend as Lord Great Chamberlain.
12. Lord Mayor of London. To bear the crystal mace.
- 13-14. *Lord Hastings and Lord Churlston. To carry the great spurs.*
15. Lord Dunhope. To carry the royal standard of Scotland, as standard bearer for Scotland.
16. *Lord of the manor of Worksop. To present a glove for the king's right hand.*

It is suggested that any claim to attend to bear a canopy (no 4) should no longer be upheld (since it has not been performed for 200 years, since 1821). Nos 5 and 16 are without merit since the right has been *bought* and the whole point of these rights was that they applied to specific individuals; not to legal persons (corporations) or to those who had bought the same. The performance relating to the spurs would seem out of place today (nos 13-14). No 6, also, is not required today since the entire world press (or almost) will be recording the same. Further, the need for a High Constable (and any Scots equivalent and the Lord High Steward of Ireland) is otiose since these offices have long been sinecures, re-vitalised solely for the purpose of the coronation. In short, all these matters should be placed in a SI.

#### **(c) Coronation Oath**

A previous article has analysed this in detail.<sup>359</sup> The religious part of the tripartite oath is very confused and it is unclear whether it can only apply to the CoE today. However, it is suggested that this part be abolished and, indeed, the need for an oath (which is not legally binding) should be dispensed with generally. This would require the repeal of the Coronation Oath Act 1688.

## **22. CONCLUSION**

The monarchy will only survive into the 21<sup>st</sup> century if it is seen as *relevant* by the general public.

- To achieve this, the sovereign (it is asserted) should be a purely titular Head of State. One distanced from the rough and tumble (and corruption) of politics. *One who performs all public acts under advice* - the obverse to the same having complete civil and criminal immunity.
- Further, the royal family should be slimmed down. And the legal position of the sovereign (including the tax position) should be transparent and clear.

In this way, public trust in the institution can be retained. Further, this would help the Head to State to devote more time to the Commonwealth which is (sadly) neglected (Commonwealth countries comprise more than a third of world by population and, if they worked in unison, such would help defeat the rise of fascism). *As for CPs, all should be abolished* and those still needed placed in legislation. *Why would this be useful?* To quote, once again, Munro (in 1999):

To sum up, the exercise of prerogative powers is imperfectly subject to parliamentary control.<sup>360</sup>

Also:

there would be several advantages in replacing the existing prerogatives with statutory powers, such as the government more usually acts under. If that were done, the purposes and content of the powers could be clearly set out, whereas much of the law concerning the prerogative is obscure and derived from ancient precedents. Supervision of the exercise of the powers could be more efficiently carried out by Parliament and the courts. The opportunity for

<sup>357</sup> Ibid, p 48.

<sup>358</sup> Ibid.

<sup>359</sup> GS McBain, *The Religion of the Queen - Time for Change* (2011) Queensland LR, pp 1-48.

<sup>360</sup> Munro, n 25, p 278.

members of Parliament to consider and debate the appropriate limits of such powers would also provide an occasion for other arrangements to be mooted.<sup>361</sup>

It is suggested that the view of Munro reflects the general view of most (or all) legal texts on constitutional law at present.<sup>362</sup> Thus, it is hardly controversial. In conclusion, the position can be summed up in a few lines:

- **Consolidate Legislation.** All constitutional legislation - which comprises c. 300 pieces of legislation - should be consolidated in 6 Acts. Then, 4. This will give back 'body' to constitutional law and make the same intelligible. In particular, there is only needed one Constitution Act of c.100 sections.
- **Abolish all CPs.** There are c.180 CPs presently existing, see *Appendix B*. However, this power is no longer exercised save in the case of 2 ! Further, at least, 85% are wholly obsolete or they have been superceded by legislation. Thus, it would seem (manifestly) obvious that all should be abolished and the few still needed placed in legislation. This will mean that the concept of the 'Crown' can also be abolished. And, the concept of 'Act of State' can simplified and modernised.

Simple, no? So who should do it?

<u>Act</u>	<u>Ministry</u>
Crown Act	Cabinet Office ('CO')
Parliament Act	CO
Courts Act	MOJ
Government Act	CO
British Territories & Foreign Relations Act	FCDO
Armed Forces Act	MOD

**APPENDIX A - LIST OF CROWN PREROGATIVES**

**(a) Parliament**<sup>363</sup>

	<u>Comment</u>
1. Approve the Speakers of the HC (or HL)	Obsolete, Abolish
2. Confirm the privileges of the HC	Ibid
3. Attend Parliamentary debates	Ibid
4. Licence the use of proxies in the HL	Ibid
5. Fine (or imprison) a member of the HC (or HL) for non-attendance <sup>364</sup>	Ibid
6. Appoint new MPs	Ibid
7. Originate any Act of Grace	Ibid
8. Communicate with Parliament orally	Ibid
9. Limit the meetings of Parliament	Ibid
10. Adjourn Parliament	Ibid
11. Appoint a Clerk of the Parliaments & other Officers	Abolish. Put in Legislation <sup>365</sup>
12. Appoint Disciplinary Officers: Sarjeant-at-Arms of the HC and Black Rod	Ibid
13. Appoint a Clerk of the Crown in Chancery	Ibid
14. Appoint Lords Commissioners	Abolish <sup>366</sup>
15. Appoint Ministers (for the PM, see 21)	Abolish. Put in Legislation <sup>367</sup>
16. Summon Parliament	Ibid
17. Open Parliament	Ibid

<sup>361</sup> Ibid, p 291. This is little different to Maitland, n 13, (1877-8), p 421 'prerogatives disused, with prerogatives of doubtful existence, with prerogatives which exist by sufferance, merely because no one has thought it worthwhile to abolish them.' Ibid, p 418, there is 'often great uncertainty as to the exact limits of the royal prerogative...the old prerogative powers have become clumsy and antiquated, and have fallen into disuse: the very uncertainty as to their limits has made them impracticable...'.  
<sup>362</sup> e.g. Barnett, n 30, p 120 'parliamentary control over the exercise of the prerogative is less than adequate...there exists a reservoir of power, much of which is undefined or at best ill defined, which is not amenable to either judicial or parliamentary control.' Bradley, n 29, p 274 'willingness of lawyers to try to develop means of holding government to account in the courts for the exercise of prerogative powers'.  
<sup>363</sup> Given their nature, none of these CPs were franchised (Lords Commissioners are proxies, not franchisees).  
<sup>364</sup> Also, for leaving Parliament early (later, governed by statute, see n 55). Other grounds for imposing a fine (or imprisonment) are a matter of Parliamentary practice.  
<sup>365</sup> Parliament would have the power to appoint instead.  
<sup>366</sup> The Speakers of the HC and HL would take over these roles.  
<sup>367</sup> The PM has the power to appoint now.

18. Prorogue Parliament	Ibid
19. Dismiss Parliament	Ibid
20. Give Royal Assent	Abolish
21. Appoint PM	Abolish. Put in Legislation
22. <i>Recommend (or Consent) to Bills (this is, likely, not a CP anyway)</i>	Abolish
<i>Also, abolish obsolete Parliamentary practices (5) and courtesies (2).</i>	
<b>(b) Sovereign</b> <sup>368</sup>	
1. Never treated as a minor	Abolish
2. Right to royal fish *	Abolish. Not wanted.
3. Right to royal swans *	Abolish <sup>369</sup>
4. Can sit as a judge	Abolish
5. Can withdraw a case from a court (i.e. order a court to refuse to hear it)	Abolish
6. Can order a court to delay judgment.	Abolish
7. May sue in whatever court the sovereign pleases	Abolish
8. May use special forms of court procedure	Abolish
9. Does not pay (or receive) legal costs	Abolish
10. Has personal property exempt in the case of: (i) wreck (at common law); (ii) strays; (iii) waifs; (iv) customary rates and tolls; (v) distress for rent	Abolish
11. Exempt from the enforcement of any lien, pledge or debt in execution	Abolish
12. Must approve the marriage of a queen dowager	Abolish
13. Can exempt a person from any liability imposed by (i) legislation; (ii) common law <sup>370</sup>	Abolish
14. Can pardon (or reprieve from execution) in person <sup>371</sup>	Abolish
15. Acts as a visitor in the case of chartered corporations	Abolish
16. Can dispose of the Crown jewels, by way of a life interest, by letters patent	Abolish
17. Has criminal and civil immunity (the principle or doctrine of perfection)	Abolish Put in Legislation.
18. Immunity from arrest	Ibid
19. Cannot be negligent	Ibid
20. Cannot have <i>laches</i> (i.e. sloth or delay) attributed to him	Ibid
21. Can control the education (and custody) of royal children who are minors	Ibid
22. Can grant certain titles to members of the royal family (such as HRH)	Ibid
23. Can grant certain hereditary peerages (or, possibly, create new ones)	Ibid <sup>372</sup>
24. Can grant certain decorations (for bravery)	Ibid
25. Can grant certain medals	Ibid
26. Can grant certain orders of knighthood (Knight of the Garter <i>etc</i> )	Ibid
27. <i>Can award certain 'courtesy' styles and titles (likely, this is not a CP as such)</i>	Abolish
28. Can appoint certain members of the royal household	Ibid
29. Can have the PC effect the ' <i>royal pleasure</i> ' (i.e. the royal will)	Transfer to ministries/cabinet
30. Can order the UK Great Seal to be attached to certain legal documents (charters, writs)	Abolish seal
31. Can create corporations sole	Abolish. Put in Legislation
32. Can create corporations aggregate	Ibid
As for <b>limitations</b> : the Crown cannot:	
1. Be a trustee.	Abolish
2. Be an executor	Ibid

<sup>368</sup> Those marked with an \* were franchised, but not now.

<sup>369</sup> Current franchises could be preserved *viz.* Company of Vintners (only for swan upping on the Thames), Company of Dyers (only for swan upping on the Thames) and the Ilchester family (for the swan breeding colony at Abbotsbury in Dorset).

<sup>370</sup> The Bill of Rights 1688 limited this greatly in any case.

<sup>371</sup> A example of a group pardon by the sovereign was an Act of Grace, see Parliament above (a), no 7.

<sup>372</sup> Hereditary peerages are now limited to members of the royal family.

3. Be a joint tenant (or tenant in common) with a person <sup>373</sup>	Ibid
4. Reserve (alienate) rent <sup>374</sup>	Ibid
5. Give evidence in a court of law in her own cause <sup>375</sup>	Put in Legislation
6. Act as a minister of the Crown	Ibid
7. Hold a Crown office	Ibid
8. Sit (or attend) Cabinet	Ibid
9. Alter succession to the Crown in her will	Ibid
10. Arrest a person.	Ibid
<b>(c) <u>The Crown</u></b>	
The Crown can:	
1. Appoint cabinet ministers (including the PM)	Abolish. Put in legislation
2. Appoint other ministers	Ibid
3. Appoint civil servants	Ibid
4. Appoint members of the armed forces	Ibid
5. Appoint members of the royal household	Ibid
6. Appoint others holding Crown offices (such as judges)	Ibid <sup>376</sup>
7. Create criminal law (i.e. create crimes)	Abolish <sup>377</sup>
8. Create punishments for crimes	Ibid
Also:	
<b>(i) <u>Crown - Commercial</u></b>	
1. Right to treasure trove *	Abolish. Obsolete
2. Right to dig for treasure trove on private land	Ibid
3. Right to wreck (as well as flotsam, jetsam, ligan and derelict) *	Ibid
4. Right to create (and dissolve or amend) a chartered corporation	Abolish. Put in Legislation
5. Has power to make byelaws for a chartered corporation	Ibid
6. Can operate markets and fairs *	Ibid
7. Can operate ferries	Abolish. Obsolete
8. Can charge any customary rate or toll	Ibid
9. Can regulate weights and measures	Ibid
10. Can license a commercial monopoly	Ibid
11. Can grant a patent for any invention	Abolish. Put in legislation
<b>(ii) <u>Crown - Border</u></b>	
1. Can issue a letter of safe conduct (precursor of the passport)	Abolish. Obsolete
2. Can prohibit a subject from leaving the realm (inc. by writ of <i>ne exeat regno</i> )	Ibid
3. Can order a subject to return to the realm	Ibid
4. Control the entrance, and exit, of aliens to and from the realm, in peace time <sup>378</sup>	Ibid. Put in legislation
<b>(iii) <u>Crown - Prisons</u></b>	
1. Can establish a new prison *	Abolish. Obsolete <sup>379</sup>
2. Can operate a prison	Ibid
<b>(iv) <u>Crown - Coinage</u></b>	
1. Can issue (that is, mint) coin of the realm and fix its denomination or value) and render it current*	Abolish. Obsolete

<sup>373</sup> Probably also applies to the Crown generally.

<sup>374</sup> Ibid.

<sup>375</sup> Cf. the sovereign giving written evidence to a UK court in a civil case between subjects.

<sup>376</sup> As noted, there are many sinecures, see *Crown Act*, n 1, pp 91-2.

<sup>377</sup> That is, remove the capacity of judges to create common law crimes. And put all present common law crimes (many are obsolete) in legislation.

<sup>378</sup> For wartime, see Armed Forces below (f).

<sup>379</sup> This used to be franchised. However, all franchises ended in Victorian times.

2. Can legitimate foreign coin		Ibid
3. Can decay coin of the realm (making it no longer current)		Ibid
<b>(v) <u>Crown - Printing</u></b>		
1. Sole right (monopoly) to print certain books		Abolish. Put in Legislation
<b>(vi) <u>Crown - Concerning the Sea</u></b>		
The Crown can:		
1. Establish public ports and harbours (havens)		Abolish. Obsolete
2. Regulate public ports and harbours (havens)		Ibid
3. Charge for services provided at 1		Ibid
4. Erect lighthouses and beacons (inc. on a subject's land without consent)		Ibid
<b>(vii) <u>Crown - General Constitutional</u></b>		
The Crown can:		
1. Create a county palatine		Abolish.
2. Create a county corporate or royal county corporate		Ibid
3. Grant the status of a city		Ibid
4. Grant the status of a borough (or royal borough)		Ibid
5. Grant the status of a town (or royal town)		Ibid
6. Supervise the persons and estates of minors & the mentally ill (as <i>parens patriae</i> )		Ibid. Put in legislation <sup>380</sup>
7. Supervise any charity (as <i>parens patriae</i> )		Ibid <sup>381</sup>
<b>(viii) <u>Crown - Styles &amp; Titles</u></b>		
The Crown can:		
1. Grant style & title of lord mayor (or deputy lord mayor)		Abolish. Obsolete
2. Grant style & title of 'right honourable'		Ibid
3. Can grant style & title of 'esquire'		Ibid
4. Create hereditary peerages (style & title of: duke, marquess, earl, viscount or baron)		Ibid
5. Create any new title or style (inc. any royal or hereditary title)		Ibid
<b>(ix) <u>Crown - Legal Prerogatives</u></b>		
1. Priority, in the case of the joint ownership of property with a private person		Abolish. Obsolete
2. Exercise a right of distress.		Ibid
3. Re-enter (on a default under a Crown lease) without having to make any demand (or to give any notice).		Ibid
4. Not have to give a receipt (an acquittance) acknowledging the payment (or discharge) of any debt to the Crown		Ibid
5. Not be bound by an estoppel		Ibid
6. Compel a person to accept a public office		Ibid
7. Prevent (or inhibit) the arrest of any person in a royal palace		Ibid
8. Not be bound by any legal fictions		Ibid
9. Have a Crown grant construed in favour of the Crown		Ibid
10. Have a lost Crown grant presumed		Ibid
11. Be presumed to be deceived (or mistaken) in a Crown grant		Ibid
12. Be presumed, in a Crown grant, to reserve an advowson <sup>382</sup>		Ibid
As for <b>limitations</b> : the Crown cannot:		
1. Restrict a subject's right to petition the Crown	(Bill of Rights 1688)	Abolish
2. Interfere in the selection (or empanelling) of a jury	(Ibid)	Ibid
3. Interfere in the grant of bail by a court	(Ibid)	Ibid
4. Interfere in the fining of a person by a court (inc. the amount)	(Ibid)	Ibid

<sup>380</sup> The courts seem to have wholly assumed this CP anyway, see De Smith, n 24, p 144.

<sup>381</sup> Legislation seems to have wholly assumed this. See De Smith, n 24, p 144.

<sup>382</sup> Unless the grant expressly states otherwise. This is also dealt with in the Act, *Prerogativa Regis* (c. 1324) which should be repealed.

- |  |        |                   |
|--|--------|-------------------|
| 5. Cannot franchise any court fine   | (Ibid) | Ibid              |
| 6. Cannot grant a pardon under the Great Seal to impeached person (Act of Settlement 1700) |        | Obsolete. Abolish |

**(d) Courts**

The sovereign can:

- |  |  |                             |
|--|--|-----------------------------|
| 1. Establish a common law court  |  | Abolish                     |
| 2. Establish a commission exercising a judicial function                   |  | Ibid.                       |
| 3. Appoint judges  |  | Abolish <sup>383</sup>      |
| 4. Appoint Queen’s Counsel   |  | Abolish. Put in Legislation |
| 5. Appoint an Attorney-General *   |  | Ibid                        |
| 6. Appoint a Solicitor- General  |  | Ibid                        |
| 7. Exercise mercy (and reprieve)   |  | Ibid <sup>384</sup>         |
| 8. Exercise rights of priority - <i>bona vacantia</i> and <i>escheat</i>   |  | Ibid. Abolish escheat       |
| 9. Empower the exercise of <i>nolle prosequi</i> by the AG. <sup>385</sup> |  | Abolish                     |

**(e) British Territories & Foreign Affairs**

The Crown can:

- |   |  |                                    |
|---|--|------------------------------------|
| 1. Establish a constitution for the colony  |  | Abolish                            |
| 2. Establish a legislature  |  | Ibid                               |
| 3. Establish government   |  | Ibid                               |
| 4. Appoint a ruler (usually, called a governor)   |  | Ibid                               |
| 5. Create legislation (with royal assent to the same)   |  | Ibid                               |
| 6. Establish courts and make judicial appointments  |  | Ibid                               |
| 7. Establish prisons  |  | Ibid                               |
| 8. Control trade  |  | Ibid                               |
| 9. Provide for the defence of the colony (inc. military appointments)                                 |  | Ibid                               |
| 10. Provide for the foreign relations of the colony   |  | Ibid                               |
| 11. Appoint civil servants  |  | Ibid                               |
| 12. Exercise the use of the great seal  |  | Ibid                               |
| 13. Exercise the power to pardon and reprieve   |  | Ibid                               |
| 14. Dispose of Crown land   |  | Ibid                               |
| 15. Suppress piracy (see also below, <i>re</i> armed forces)  |  | Ibid.                              |
| 16. Make an alien a denizen (obsolete c. 1870)  |  | Abolish                            |
| [ ] <i>Naturalize an alien</i>  |  | <i>Not Possible</i> <sup>386</sup> |
| 17. Divest a British subject of nationality without their consent.                                    |  | Ibid                               |
| 18. Control the entrance, and exit, of aliens (foreigners) to the realm, in peace time <sup>387</sup> |  | Ibid. Put in legislation           |
| 19. Conduct diplomacy   |  | Ibid                               |
| 20. Enter into treaties (as well as ratify the same)  |  | Ibid                               |
| 21. Appoint ambassadors, commissioners, consuls and other diplomatic officials                        |  | Ibid                               |
| 22. Issue, refuse, impound and revoke passports   |  | Ibid.                              |
| 23. Acquire foreign territory (including by way of annexation)  |  | Ibid                               |
| 24. Give up (cede) foreign territory  |  | Ibid                               |
| 25. <i>Recognise foreign states by certification (FCDO)(likely, not a CP anyway)</i>                  |  | Ibid                               |

**(f) Armed Forces**

The Crown can:

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<sup>383</sup> This assumes all common law courts are abolished or put in legislation.  
<sup>384</sup> This is in the body politic. For doing so personally, see (b), no 14.  
<sup>385</sup> Wade, n 16, p 68 ‘In criminal proceedings every prosecution must be in the name of the Crown; it is the Crown alone which can stifle a prosecution, Either by declining to offer evidence, or entering a formal *nolle prosequi*.’ See also Bradley, n 29, p 259.  
<sup>386</sup> It would be useful for legislation to state that there was no such Crown prerogative.  
<sup>387</sup> For war time, see armed forces below.

1. Billet any member of the army and navy (only) on the general public	Abolish
3. Conscript civilian able-bodied male subjects for army or navy service	Ibid
4. Issue letters of marque and reprisal	Ibid
5. Dig for saltpetre (for gunpowder)	Ibid.
6. Enter private land to dig for saltpetre	Ibid
7. Castellate (that is, to build a castle or fortified residence)	Ibid
8. Erect military fortifications on private land	Ibid
9. Impose a toll for murage (in order to build city or town defensive walls)	Ibid
10. Export UK military equipment in war time (or in peace time)	Ibid
11. Trade with the enemy in war time	Ibid
12. Requisition for the military real property in war time (or peace time)	Ibid.
13. Sovereign to be C-in-C of the armed forces (formal only)	Ibid. Put in legislation
14. Sovereign (later, the Crown) to take prize, booty and ransom in war time	Ibid. Put in legislation
15. Make (i.e. wage) war	Ibid
16. Declare war	Ibid
17. Make peace	Ibid
18. Declare peace	Ibid
19. Manage and operate the armed forces (also, the territorial army)	Ibid
20. Manage and operate the UK's military installations	Ibid
21. Impose an embargo	Ibid
22. Impose a blockade <sup>388</sup>	Ibid
23. Requisition neutrals' property during war time (called angary)	Ibid
24. Requisition British (or BOT) civilian ships in wartime (or in an emergency)	Ibid
[ ] <i>Recognise that a state of war exists with a foreign state by certification (FCDO)</i>	Ibid. Likely not a CP
[ ] <i>Recognise a state as a neutral state by certification (FCDO)</i>	Ibid
[ ] <i>Use the armed forces for military intervention (including peace keeping) short of war</i>	Ibid
25. Take the goods of <i>pirates</i> on the High Seas (the navy is involved) <sup>389</sup>	Ibid
26. Exclude or restrict the entrance (or exit) of <i>enemy aliens</i> from the realm, in war time	Abolish. Put in legislation
<b>As for limitations on the Crown:</b>	
1. The need to renew the right of the Crown to keep a standing army	Abolish
<b>(g) Crown Estate</b> <sup>390</sup>	
1. Ownership of the sea (including the sea bed)	Abolish. Put in legislation.
2. Ownership of the seashore (foreshore)	Ibid
3. Ownership of tidal rivers (including the river bed, the <i>fundus</i> )	Ibid
4. Ownership of pubic navigable rivers (including the river bed, the <i>fundus</i> )	Ibid
5. Fishing rights (inc. creation of free fishery, several fishery <i>etc.</i> )	Ibid

#### **(h) Other CPs mentioned in Legal Texts**

The Crown can:

1. Permit (and administer) <i>pre</i> -paid postage stamps	Put in Legislation
2. Issue of certificates of eligibility to prospective inter-country adopters <sup>391</sup>	Ibid

<sup>388</sup> See McBain, n 266, p 479 'The object of a blockade is to prevent access to (or egress from) the enemy's coasts or ports. To be binding, the blockade: (a) be effective: and (b) a neutral ship must be accorded with notice of it. A neutral ship is liable to capture - or condemnation - if it breaks (or attempts to break) the blockade. Halsbury notes, as to blockade: 'Conditions of modern warfare have rendered obsolete close coastal blockade and the authorities relating to it.' The reason is that modern submarines and missiles have rendered blockade unnecessary since ships can be targeted and destroyed if they seek to enter (or leave) an enemy port.

<sup>389</sup> This should be in criminal legislation.

<sup>390</sup> The Crown Estate was established by legislation. However, there are certain CPs exercised by the same.

<sup>391</sup> This is in non-Hague convention cases.



3. Hold public inquiries (including royal commissions);<sup>392</sup> Ibid
4. Regulate State security.<sup>393</sup> Ibid

**Grand Total no of CPs - c. 180**

**APPENDIX B - MODERNISING THE CONSTITUTION: THE ACT**

*An Act to consolidate the constitution of the United Kingdom.*

**Parts**

- Part 1 Parliament<sup>394</sup>
- Part 2 Sovereign
- Part 3 Crown
- Part 4 Duchy of Cornwall
- Part 5 *Duchy of Lancaster*<sup>395</sup>
- Part 6 Crown Estate
- Part 7 British Domestic Territories
- Part 8 British Overseas Territories
- Part 9 General

**PART 1**

**Parliament**

1. Title
2. Meaning
3. Summons
4. Opening
5. Meeting
6. Prorogation
7. Adjournment
8. Dissolution
9. Term

**Members of Parliament (MPs) and Peers**<sup>396</sup>

10. Qualification
11. Disqualification
12. Privileges
13. Resignation
14. Recall
15. Death
16. Taxation

**Legislation**

17. General or Local

**Prime Minister**

18. Prime Minister
19. Deputy and Acting Prime Minister

**Officers of Parliament**<sup>397</sup>

20. Speaker(s)<sup>398</sup>
21. Clerks

<sup>392</sup> Parliament should exercise the power to order public inquiries (and royal commissions, as such, should be abolished not least since the word 'royal' has no meaning, the sovereign in person not being involved in ordering the same).

<sup>393</sup> Any CP has been much reduced by MI5 and MI6 being placed on a statutory basis. However, all should now be on a statutory basis.

<sup>394</sup> This assumes the HL is retained.

<sup>395</sup> This assumes the duchy is not abolished (or merged with the Crown Estate).

<sup>396</sup> Reference is also made to peers of Parliament (assuming the HL is retained).

<sup>397</sup> Ibid.

<sup>398</sup> This will refer to 'speakers' if the HL is retained.

22. Commissioner of Standards

23. Other Officers

**Constituencies**

24. Parliamentary Constituencies

**Parliament Bodies**

25. House of Commons Commission

26. House of Commons *and House of Lords* as Corporate Bodies

27. *Joint Departments*<sup>399</sup>

**Other Parliament Matters**

28. Parliamentary Papers

29. Costs

30. Standards

31. Rule Book

32. Code of Conduct

33. Petitions

34. Contempts of Parliament

35. Communications

36. Erskine May

37. Westminster Palace

38. Chequers and Chevening Estates

39. High Court Jurisdiction

**PART 2**

**Sovereign**

40. Person

41. Style and Title

42. Legal Nature

43. Privileges and Limitations

44. Coronation

45. Regency

46. Death

47. Succession

48. Private Property

49. Funding (Civil List)

50. UK Laws

51. Taxation

**PART 3**

**Crown**

52. Sovereign in the Body Politic

53. Crown Jewels, Royal Palaces and Collections

54. Royal Arms, Royal Standard and Union Jack

55. Royal Family

56. Royal Household

57. Royal Notices *and Proclamations*<sup>400</sup>

58. Peerages

59. Orders of Knighthood, Decorations and Medals

60. Applicability of Legislation

61. Power to Tax

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<sup>399</sup> Not required if the HL is abolished.

<sup>400</sup> This assumes the same is retained.

62. Royal Signature<sup>401</sup>

63. *UK Great Seal*<sup>402</sup>

64. *Privy Council*<sup>403</sup>

#### **PART 4**

##### **Duchy of Cornwall**

65. Nature

66. Ownership

67. Management

68. Succession

69. Taxation

#### **PART 5**<sup>404</sup>

##### **Duchy of Lancaster**

70. *Nature*

71. *Ownership*

72. *Management*

#### **PART 6**<sup>405</sup>

##### **Crown Estate**

[Add in updated Crown legislation]

#### **PART 7**

##### **British Domestic Territories (BDT)**

73. Channel Islands and Isle of Man

74. Legislation

75. Defence and foreign affairs

76. Responsible UK ministry

77. Statutory Instrument

78. *Appeal to Supreme Court*

79. Rockall

#### **PART 8**

##### **British Overseas Territories (BOT)**

80. BOT

81. Legislation

82. Defence and foreign affairs

83. Responsible UK ministry

84. Statutory Instrument

85. *Appeal to Supreme Court*

86. St Helena

87. Admiralty Jurisdiction

#### **PART 9**

##### **General**

88. Abolition of Crown Prerogatives

89. Repeals

90. Interpretation

91. Application

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<sup>401</sup> The older term is '*royal sign manual*'.

<sup>402</sup> This assumes the same is retained.

<sup>403</sup> Ibid.

<sup>404</sup> This assumes the duchy is retained. In any case, the NI privy council should be abolished.

<sup>405</sup> This will include the present legislation on the Crown Estate as modernised.

### **1. Title**

- (1) The UK shall be represented by one UK Parliament which shall be styled:
  - (a) the '*Parliament of the United Kingdom of Great Britain and Northern Ireland*'
  - (b) foreshortened to the '*UK Parliament*' or to '*Parliament.*'

### **2. Meaning**

- (1) Parliament means the HC *and the HL* in Parliament assembled.<sup>406</sup>

### **3. Summons**

- (1) MP's, *and members of the HL*, shall be summoned to Parliament by a summons<sup>407</sup> issued by the
  - (a) HC Speaker; *and/or the*
  - (b) *Lord Speaker*,<sup>408</sup>or their deputies.

### **4. Opening**

- (1) Parliament shall open on the date specified in the summons referred to in s 3(1) which date shall not be:
  - (a) less than 6 days
  - (b) from the date the summons is issued.
- (2) Parliament may be opened by the sovereign *delivering an address*<sup>409</sup> *or it being delivered by:*
  - (a) *a member of the Royal Family; or*
  - (b) *another person appointed by the sovereign.*<sup>410</sup>
- (3) The opening of Parliament in (2) is a ceremonial act. It shall not affect the obligation of Parliament to meet in (1).

### **5. Meeting**

- (1) In any one year Parliament shall meet, and sit, for a minimum period of [200-250] days.
- (2) Parliament shall sit in Westminster Palace save where:
  - (a) such is not physically possible; or
  - (b) the Civil Contingencies Act 2004 applies; or
  - (c) legislation provides otherwise.

### **6. Prorogation**

- (1) Parliament shall be prorogued by means of an announcement made by the PM in the HC.
- (2) The announcement in (1) shall state the date when Parliament shall reconvene which date shall not be:
  - (a) less than [6] days
  - (b) from the date the announcement is made.
- (3) Parliament may be prorogued, in any one year, a maximum number of:
  - (a) four times;
  - (b) of no more than 14 days each time; and
  - (c) [56] days in total.
- (4) Any prorogation of Parliament is subject to s 5(1).
- (5) *Prorogation by the HC shall automatically result in prorogation by the HL.*
- (6) The HC may be recalled earlier than the date in (1) (that is, its recess may be shortened) if:
  - (a) the PM so announces in the HC;
  - (b) in which case (2) shall apply.<sup>411</sup>
- (7) Prorogation shall:
  - (a) end the existing session of Parliament; and
  - (b) all Bills before Parliament shall lapse.
- (8) This section is subject to the earlier recall of Parliament pursuant to the Civil Contingencies Act 2004.

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<sup>406</sup> i.e. MPs and peers assembled in their respective chambers ('houses') in the building called Parliament in Westminster Palace.

<sup>407</sup> Alternatively, a proclamation can be used. However, it is suggested that proclamations, an early form of Crown legislation, be abolished.

<sup>408</sup> A summons issued by the Speaker makes it clear that Parliament is in control of the process. It also avoids the problem of an *interregnum*.

<sup>409</sup> The address was never a legal requirement and could be re-located to the same being delivered by the PM after the opening.

<sup>410</sup> See n above, in which case this would not be required.

<sup>411</sup> The period of 6 days could (perhaps) be reduced slightly.

## 7. **Adjournment**

- (1) The HC may vote to adjourn itself, which vote shall:
  - (a) state the date, and
  - (b) place for re-meeting.
- (2) *Adjournment (or recall from an adjournment) by the HC shall automatically result in adjournment (or recall) by the HL.*
- (3) The HC may be recalled earlier than the date in (1) (that is, its recess may be shortened) if the HC Speaker is satisfied it would be in the public interest.
- (4) In the case of (3), the HC Speaker shall issue a notice to MPs [*and members of the HL*]. It shall:
  - (a) state a date for re-assembling which shall not be
  - (b) less than [6] days from the date the notice is issued.

If re-called, a new vote pursuant to (1) is required for any subsequent adjournment.
- (5) The maximum period for which the HC may be adjourned in any year is [165-115] days.<sup>412</sup>
- (6) Any adjournment of Parliament is subject to 5(1).
- (7) This section is subject to the earlier recall of Parliament pursuant to the Civil Contingencies Act 2004.<sup>413</sup>

## 8. **Dissolution**

- (1) Parliament shall be dissolved by means of an announcement made by the PM in the HC. It shall state the date of dissolution.<sup>414</sup>
- (2) On the occurrence of (1), a general election must be held within [30] days.<sup>415</sup>
- (3) Any dissolution of Parliament is subject to s 5(1).

## 9. **Term**

- (1) The maximum term of each Parliament shall be [5] years from the date on which it was opened pursuant to section 4.
- (2) On the occurrence of (1), a general election must be held within [30] days.

## 10. **Qualification**

- (1) A MP *or a peer* must be qualified in accordance with **Schedule 1, Part A** to be able to attend, and sit in, Parliament.

## 11. **Disqualification**

- (1) A MP *or a peer* is disqualified in accordance with **Schedule 1, Part B** from being able to attend, and sit in Parliament.
- (2) On the occurrence of (1), the seat of the MP *or the peer* shall immediately become vacant and **Schedule 2, Part A**<sup>416</sup> shall apply.

## 12. **Privileges**<sup>417</sup>

- (1) The election of a MP must be freely made.
- (2) Freedom of speech and debates, or proceedings, in Parliament shall not be challenged, or questioned, in:
  - (a) any court; or
  - (b) place  
outside Parliament.
- (3) Neither the HC *nor the HL* have the power by any vote or declaration:
  - (a) to create for themselves any new privileges,
  - (b) not warranted by the known laws and customs of Parliament.

## 13. **Resignation**

- (1) A MP may resign from Parliament by giving notice in writing to the HC Speaker:
  - (a) which notice shall take effect
  - (b) [6] days from the date of receipt by the same.
- (2) In the case of (1), the seat shall immediately become vacant and **Schedule 2, Part A** shall apply.

## 14. **Recall**

- (1) A MP shall be recalled pursuant to **Schedule 2, Part B**.<sup>418</sup>

<sup>412</sup> The precise number will reflect s 5(1).

<sup>413</sup> May (in 2019), n 50, p 167.

<sup>414</sup> It is assumed a Crown Act will remove any CP relating to dissolution. Cf. De Smith, n 24, pp 123-4.

<sup>415</sup> The number of days is open to debate. However, the purpose is to prevent undue prolongation.

<sup>416</sup> This will deal with where there is a vacancy.

<sup>417</sup> It is assumed the privilege in respect of arrest and/or imprisonment is abolished.

<sup>418</sup> This will contain the Recall of MPs Act 2015.

**15. Death**

- (1) On the death of a MP, the seat shall immediately become vacant and **Schedule 2, Part A** shall apply.

**16. Taxation**

- (1) MPs and peers shall pay tax according to **Schedule 3**.<sup>419</sup>

**17. General or Local Legislation**

- (1) (*Categorisation*). Bills shall be categorised as:
- (a) General; or
  - (b) Local (including any private Bill).<sup>420</sup>
- (2) (*Passage*). Bills shall be enacted<sup>421</sup> as follows:
- (a) General Bills shall be heard, and passed, three times in the HC and HL houses<sup>422</sup> by vote.
  - (b) Local Bills shall be heard, and passed, twice in the HC and HL houses by vote unless the HC Speaker is satisfied it would be in the public interest for (a) to apply.
- (3) (*Royal Assent*) The sovereign may not refuse assent to a Bill of Parliament otherwise validly passed.<sup>423</sup>
- (4) (*Commencement*).<sup>424</sup> The Clerk of the Parliaments<sup>425</sup> shall endorse on every Act which shall pass, immediately after the title of the Act, the:
- (a) day, month and year when the same shall have passed; and
  - (b) such endorsement shall be taken to be part of such Act; and
  - (c) the Act shall take effect from 12 pm on the date so endorsed; or
  - (d) on a failure to endorse, when the same should have so been endorsed.<sup>426</sup>
- (5) (*Number and Citation*). Chapter numbers assigned to Acts shall be assigned by:
- (a) reference to the calendar year, and not the session, in which they are passed; and
  - (b) any such Act may, in any Act, instrument or document, be cited accordingly.<sup>427</sup>
- (6) (*Short Title*). **Schedule 4, Part A** shall apply.<sup>428</sup>
- (7) (*Evidence in Court*). **Schedule 4, Part B** shall apply.<sup>429</sup>

**18. Prime Minister**

- (1) The sovereign shall appoint as PM the leader of the political party that commands an overall majority of MPs in the HC.
- (2) If a PM resigns while (1) prevails, the sovereign shall appoint as PM the person elected by his political party to be his successor.
- (3) If (1) does not apply (that is, the case of a 'hung' Parliament) the incumbent PM shall remain in office until he tenders his resignation (and that of his government) to the sovereign.
- (4) The incumbent PM may delay tendering his resignation (and that of his government) in (3) until the first meeting of a new session of Parliament, in order for him to determine whether his political party can command an overall majority of MP's in the HC. If the PM:
- (a) cannot command an overall majority of MP's in the HC; or
  - (b) his government suffers defeat [on the address of the sovereign]<sup>430</sup> at the first meeting of a new session of Parliament, the sovereign shall appoint as PM the leader of the largest opposition party in the HC.
- (5) An Acting PM shall act as the PM where there is any delay between the appointment of a successor to the PM in the event of:
- (a) the resignation of the PM in (2);
  - (b) a coalition government;
  - (c) on the death of the PM while in office;

<sup>419</sup> This will contain the Constitutional Reform and Governance Act 2010, s 41.

<sup>420</sup> Alternatively, the term could be 'Private' with the same including local Acts; it does not matter.

<sup>421</sup> This assumes no royal assent, see (3).

<sup>422</sup> This was the older word. Today, 'chamber' may be more appropriate.

<sup>423</sup> This assumes the requirement to give royal assent is not abolished.

<sup>424</sup> See Acts of Parliament (Commencement) Act 1793.

<sup>425</sup> If the HL is abolished, it would be the HC clerk (the underclerk).

<sup>426</sup> These will apply if the royal assent is abolished. This material in (a) and (b) comes from the Acts of Parliament (Commencement) Act 1793.

<sup>427</sup> See Acts of Parliament Numbering and Citation Act 1962.

<sup>428</sup> See Short Titles Act 1896 - with regard to Acts still extant, of which there are now few.

<sup>429</sup> See Crown Debts Act 1801 (the wording needs to be modernised).

<sup>430</sup> Given s 4, this wording may not be appropriate, in which case reference may be made to the 'opening' of Parliament.

(d) on the physical incapacity of the PM while in office;

(e) on the mental incapacity of the PM while in office.

(6) A PM, even if entitled to sit in the HC, shall sit in the HC while PM.

(7) A PM must vacate the office of PM, and leave 10 Downing Street, [3] days after:

(a) his party has lost a general election in the case of (1);<sup>431</sup>

(b) his resignation in the case of (2);

(c) the occurrence of (4)(a) or (b).

(d) the occurrence of (5)(d) or (e).

#### **19. Deputy and Acting Prime Minister**

(1) At his sole discretion, the PM may appoint a Deputy PM.

(2) The PM shall appoint an Acting PM (who may be the Deputy PM).

(3) The Acting PM shall take up the post on the application of s 18(5).

(4) Any Deputy (or Acting) PM shall have no right of succession.

(5) An Acting PM does not need<sup>432</sup> to be a Cabinet Minister.

#### **20. Speakers**

(1) The HC Speaker shall be appointed, and dismissed, by vote of the HC.

(2) The Lord Speaker shall be appointed, and dismissed, by vote of the HL.

(3) Deputy speakers shall be appointed according to **Schedule 5**.

#### **21. Clerks**

(1) The Clerk of the HC shall be appointed, and dismissed, by vote of the HC.

(2) The Clerk of the Parliaments shall be appointed, and dismissed, by vote of HL.

(3) Any deputy or assistant HC clerk shall be appointed, and dismissed, by the HC Commission.

(4) Any deputy or assistant HL clerk (including the Clerk Assistant), shall be appointed, and dismissed, by the HL Commission.

(5) The Clerk of the Court of Chancery shall be appointed by the:

(a) HC Speaker; and the

(b) Lord Speaker.<sup>433</sup>

#### **22. Ombudsman**

(1) **Schedule 6** shall apply to the Parliamentary Commissioner for Administration.<sup>434</sup>

#### **23. Other Officers**

(1) Save for those Parliamentary officers referred to in ss 20 to 22 all other Parliamentary officers and staff shall be appointed and dismissed by the:

(a) HC Commission, in the case of those employed in the HC (including any sarjeant at arms); and

(b) Clerk of the Parliaments, in the case of those employed in the HL (including Black Rod).<sup>435</sup>

#### **24. Parliamentary Constituencies**

(1) **Schedule 7** shall apply to the Parliamentary constituencies.<sup>436</sup>

#### **25. House of Commons Commission**

(1) **Schedule 8** shall apply to the HC Commission.<sup>437</sup>

#### **26. Corporate Bodies**

(1) **Schedule 9** shall apply to the HC and the HL.<sup>438</sup>

<sup>431</sup> This is to prevent him (and his party) clinging on to government, see De Smith, n 24, p 122.

<sup>432</sup> Alternatively, 'does need' to be a cabinet minister.

<sup>433</sup> Alternatively, perhaps, this should be by vote of the HC. At present he (or she) is (technically) appointed by the Crown, see May (2019), n 50, p 127.

<sup>434</sup> This will contain the Parliamentary Commissioner Act 1967.

<sup>435</sup> This could also be by a House of Lords Commission. See also May (2019), n 50, p 121.

<sup>436</sup> See Parliamentary Constituencies Act 1986 and the Parliamentary Voting and Constituencies Act 2011. Presently, there are some 650 constituencies.

<sup>437</sup> See House of Commons (Administration) Act 1978.

<sup>438</sup> See Parliamentary Corporate Bodies Act 1992.

**27. Joint Departments**

(1) **Schedule 10** shall apply to the HC and the HL.<sup>439</sup>

**28. Parliamentary Papers**

(1) **Schedule 11** shall apply to Parliamentary papers.<sup>440</sup>

**29. Costs**

(1) **Schedule 12** shall apply to parliamentary costs.<sup>441</sup>

**30. Standards**

(1) **Schedule 13** shall apply to Parliamentary standards.<sup>442</sup>

**31. Rule Book**

(1) All Parliamentary practices and procedures shall be consolidated into a Parliament Rule Book (the 'PRB').

(2) The PRB shall be:

- (a) set out in as user-friendly a manner as possible;
- (b) comprehensive; and
- (c) updated every 3 years, at least.

(3) A free copy of the PRB shall be:

- (a) given to all MP's and members of the HL;
- (b) provided online.

(4) The PRB shall cover, *inter alia*, the following procedures and processes:

- Sitings (of the HC and HL and in Westminster Hall);
- Order of Business;
- Motions;
- Questions;
- Decisions;
- Debate (including manner of speaking, time and length of speeches, content of speeches, behaviour and enforcement of order by the chair);
- Divisions;
- Passage of Bills;
- Passage of SI;
- *Protests*;
- Personal Interests;
- *Committees of the whole House*;
- Select Committees;
- General and Grand Committees;
- Witnesses;
- *Communications between the HL and the HC*;
- Communications between the sovereign and Parliament (including Addresses by Parliament);
- Petitions;
- Other matters.

**32. Code of Conduct**

(1) Parliament shall issue a Parliament Code of Conduct ('PCC') to regulate the conduct of MPs and members of the HL.

(2) The PCC shall be:

- (a) set out in as user-friendly a manner as possible;
- (b) comprehensive (incorporating any code of behaviour);<sup>443</sup> and
- (c) updated every 3 years, at least.

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<sup>439</sup> See *Parliament (Joint Departments) Act 2007* (this would be unnecessary if the HL is abolished).

<sup>440</sup> See *Parliamentary Papers Act 1840*; *Parliamentary Returns Act 1869* & *Laying of Documents before Parliament (Interpretation) Act 1948*.

<sup>441</sup> See *Parliamentary Costs Act 2006* (it relates to private Bills).

<sup>442</sup> See *Parliamentary Standards Act 2009*.

<sup>443</sup> May (2019), n 50, p 136 'In 2018 the [HC] endorsed a new Behaviour Code governing the conduct of everyone working in or visiting the parliamentary estate.'



- (3) A free copy of the PCC shall be:
- (a) given to all MP's *and members of the HL*;
  - (b) provided online.

### **33. Petitions**

- (1) It is the right of the subject to petition the sovereign.
- (2) All petitions sent to:
- (a) the Crown (including the sovereign); or
  - (b) Parliament (*including to the HC and the HL whether jointly or separately*); or
  - (c) the government (including any Minister of the Crown or any Ministry), shall be sent (or re-directed) to the Petitions Committee in Parliament (the 'PCIP').
- (3) All petitions shall be made online to the PCIP and not in hard copy, to expedite processing.
- (4) There is no obligation on the PCIP:
- (a) to reply to any petition; or to
  - (b) publish the same (or any correspondence); and
  - (c) any correspondence by the PCIP may be made online, to reduce cost.

### **34. Contempts of Parliament**

- (1) All contempts of Parliament and fines payable as a result:
- (a) shall be set out in a SI,
  - (b) which shall be amended from time to time.
- [2] *The fines in (1) may be recovered by an action brought in the name of the:*
- (a) *HC Speaker; or the*
  - (b) *Lord Speaker,*
- (as appropriate) on behalf of Parliament, before the High Court.]<sup>444</sup>*

### **35. Communications**

- (1) *All proclamations in this Act may be in electronic form.*<sup>445</sup>
- (2) All communications between the sovereign and Parliament shall be in:
- (a) writing, save in the case of s 4(2);
  - (b) *not require the UK Great Seal, save where legislation requires.*<sup>446</sup>
- (3) *All communications between the HC and HL shall be:*
- (a) *in writing, save where the same vote otherwise;*
  - (b) *may be in electronic form.*

### **36. Erskine May - Parliamentary Practice**

- (1) Any future edition of the work Erskine May, Parliamentary Practice, shall be:
- (a) put online on a Parliament website; and be
  - (b) accessible to the general public without charge
- (2) Any version in (1) is without prejudice to the issue of a hardcopy version, for which a charge may be made.

### **37. Westminster Palace**

- (1) Parliament shall allocate money to:<sup>447</sup>
- (a) acquire any title (whether freehold or leasehold)
  - (b) in Westminster Palace; and
  - (c) hold the same on behalf of the nation.
- (2) The physical ambits of (1) shall be:
- (a) set out in a SI as amended from time to time; and
  - (b) title to Westminster Palace shall be registered in the name of Parliament.

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<sup>444</sup> It may be that some other sanction should be specified in the SI.

<sup>445</sup> This assumes these are retained for any opening *etc* of Parliament.

<sup>446</sup> This assumes the UK Great Seal is retained.

<sup>447</sup> If this is done, this section need only state: 'Parliament owns Westminster Palace.'

(3) Any title (whether freehold or leasehold) held by the Crown (or the Crown Estate) in Westminster Palace, hereby passes to Parliament, without payment.

(4) Any control held by the Crown (or the Crown Estate) in Westminster Palace, hereby passes to Parliament without payment, including the following:

- (a) Westminster Hall;
- (b) HM's robing room (including the staircase and ante-room adjoining);
- (c) Royal Gallery;
- (d) Chapel of St Mary Undercroft,

without prejudice to Parliament according the sovereign access to (a)-(d) for any state occasion.

### **38. Chequers and Chevening Estates**

(1) **Schedule 14** shall apply to the Chequers and Chevening Estates.<sup>448</sup>

### **39. High Court Jurisdiction**

(1) The High Court shall have jurisdiction in respect of any legal proceedings brought pursuant to this Act.

### **PART 2: The Sovereign**

### **40. Person**

- (1) The sovereign is Queen Elizabeth II and the heirs of her body.
- (2) The sovereign, *ex officio*, is:
  - (a) Head of State (in a non executive role);
  - (b) *Commander-in-Chief of the Armed Forces (in a non-executive role)*;<sup>449</sup>
  - (c) [*Supreme Governor of the CoE. (in a non-executive role)*].<sup>450</sup>

### **41. Style and Title**

- (1) A SI shall set out the style, and titles, of the sovereign for use from time to time in the:
  - (a) UK; and the
  - (b) British Territories.

### **42. Legal Nature**

(1) The sovereign is a corporation sole.<sup>451</sup>

### **43. Privileges and Limitations**

(1) The sovereign shall have the privileges, and be subject to the limitations, in **Schedule 15, Part A**.

### **44. Coronation**

- (1) The sovereign, in the presence of the people assembled at the sovereign's coronation, shall either audibly give (or sign) the declaration in **Schedule 15, Part B** which shall be administered by the:
  - (a) Archbishop of Canterbury; or
  - (b) Archbishop of York; or
  - (c) any other bishop of the realm the sovereign shall appoint.<sup>452</sup>

### **45. Regency**

(1) A regency shall automatically take effect in accordance with **Schedule 16** when the sovereign is a minor.

### **46. Death**

- (1) The death of the sovereign shall not result in the dissolution of Parliament. However, Parliament shall meet immediately, if prorogued or adjourned at the time.
- (2) The death of the sovereign shall not result in the termination of any:
  - (a) Crown office in the UK or elsewhere;
  - (b) office or appointment relating to the principality of Wales or the duchies of *Lancaster*<sup>453</sup> and Cornwall;

<sup>448</sup> This will contain the Chequers Acts 1917 and 1958 and the Chevening Estate Acts 1959 and 1987.

<sup>449</sup> This formal role could, actually, be abolished since the sovereign ended being C-in-C more than 200 years ago (in 1793). Thus, this role is a sinecure.

<sup>450</sup> Consideration should be given to the sovereign no longer being involved with the CoE (or the Church of Scotland). In other words, to stand above religious issues. In such a case, an Act might simply provide that: 'The religion of the sovereign is a private matter for the sovereign.'

<sup>451</sup> The sovereign in the body politic – 'the Crown' – is a corporation aggregate (an individual cannot be a corporation aggregate).

<sup>452</sup> It is dubious whether an oath or declaration is of any worth since it is not legally binding and it is difficult to formulate anything meaningful.

<sup>453</sup> Assuming this continues.

- (c) *membership of the privy council*;<sup>454</sup>
- (d) claims (or legal proceedings) by, or against, the Crown;
- (e) *use of the UK Great Seal or any other public seal, all of which shall continue to be used as the seals of the successor until such shall order to the contrary*.<sup>455</sup>

#### 47. Succession

- (1) On the death of the sovereign, the successor shall become sovereign, that instant (*eo instante*).
- (2) In determining succession to the Crown the:
  - (a) gender of a person born after 28 October 2011 does not give that person (or that person's descendants) precedence over any other person (whenever born);
  - (b) fact that a child of the sovereign (whether born before, or after, the sovereign becomes such) was born outside the UK, is immaterial.<sup>456</sup>
- (3) A person who (when the same marries) is one of the [six]<sup>457</sup> persons next in the line of succession to the Crown must obtain the sovereign's consent before marrying and, where any such consent has been obtained, it must be set out in a SI.<sup>458</sup>
- (4) The effect of a person's failure to comply with (3) is that the person (and that person's descendants) from the marriage are disqualified from succeeding to the Crown.

#### 48. Private Property

- (1) The sovereign, in person, may own property (real and personal), to which the general law shall apply including taxation.<sup>459</sup>

#### 49. Funding

- (1) A civil list shall take effect in accordance with **Schedule 17**.

#### 50. UK Laws

- (1) The laws of the UK are the birthright of the people thereof and the sovereign must act in accordance with the same.

#### 51. Taxation

- (1) The sovereign (*including in right of the duchy of Lancaster*)<sup>460</sup> shall pay income tax at the applicable rate.<sup>461</sup>

### **PART 3: The Crown**

#### 52. Body Politic

- (1) The Crown is the sovereign<sup>462</sup> acting as the head of a corporation aggregate.

#### 53. Crown Jewels, Royal Palaces and Collections

- (1) The following are owned by the nation (*that is, held by the sovereign in the body politic*),<sup>463</sup> the:
  - (a) Crown Jewels;
  - (b) Royal Palaces listed in **Schedule 18**;
  - (c) Royal Collections listed in **Schedule 18**;
  - (d) *Duchy of Lancaster*;<sup>464</sup>
  - (e) Duchy of Cornwall.<sup>465</sup>
  - (f) Crown Estate.

<sup>454</sup> Ibid.

<sup>455</sup> Ibid.

<sup>456</sup> These deal with the Succession to the Crown Act 2013 and the Status of Children Born Abroad Act 1350.

<sup>457</sup> It may be this can be reduced to 4, it being a considerable intrusion on the freedom of an individual to marry. Further, a SI means that Parliament could permit marriage where, in the circumstances, it thinks that such would not be a problem in the instant case despite the view of the sovereign.

<sup>458</sup> This will modernise the present method which is registration in the books of the privy council.

<sup>459</sup> It is assumed the sovereign is currently paying all taxes on private property.

<sup>460</sup> This assumes the duchy is not abolished.

<sup>461</sup> This would be at the highest rate given the wealth of the sovereign.

<sup>462</sup> The sovereign is a corporation sole. It is not the same as Elizabeth Windsor who is an individual (a person in the body natural) not the sovereign (a legal person being a corporation sole).

<sup>463</sup> In this case, the Crown. If all CPs were abolished this legal fiction could be abolished. It means very little today.

<sup>464</sup> This assumes the same is retained.

<sup>465</sup> These are all held in the body politic since they are not part of the Crown Estates Act 1800 (which deals with private property of the sovereign).

**54. Royal Arms, Royal Standard and Union Jack**

- (1) (*Royal Arms*). The royal arms (ensigns armorial) of the UK shall be quarterly. The first and fourth quarters shall be the arms of England, the second quarter shall be the arms of Scotland and the third quarter shall be the arms of NI. The Crown may licence the use of the royal arms;
- (2) (*Royal Standard*). The royal standard is the personal flag of the sovereign. It may only be flown with the licence of the same;
- (3) (*Union Jack*) Save for (2), the union flag (the Union Jack) shall be used in all the sovereign's flags, banners, standards and ensigns. It shall be azure with the crosses saltire of St Andrew and St Patrick quarterly per saltire and countercharged argent and gules. The latter shall be fimbriated of the second quarter (surmounted by the cross of St George) and of the third quarter, fimbriated as to the saltire.

**55. Royal Family**

- (1) The title '*His (or her) Royal Highness*' ('HRH') is restricted to members of the Royal Family;
- (2) Control by the sovereign over the education (and custody) of children who are minors is restricted to those of the Royal Family.
- (3) The following titles (and no others) may be awarded to members of the Royal Family by the sovereign, without the consent of Parliament, under the royal sign manual, the title:
  - (a) 'Prince' or 'Princess' (including 'of Wales');<sup>466</sup>
  - (b) 'Queen' or '*Queen Consort*';<sup>467</sup>
  - (c) 'Prince Consort'.<sup>468</sup>
- (4) The titles in (3) may be removed by the sovereign or Parliament for:
  - (a) misconduct etc;
  - (b) on divorce; or<sup>469</sup>
  - (c) at the request of the recipient.

**56. Royal Household**

- (1) The royal household comprises the senior officials (with their offices and titles) referred to in **Schedule 19, Part A**, as well as other staff.
- (2) *The sovereign may select, with the consent of Parliament, only those senior officials referred to **Schedule 19, Part B**. All other appointments are subject to the review of [ ].*<sup>470</sup>

**57. Royal Notices and Proclamations**

- (1) *Any Crown prerogative to make, and issue, a proclamation is abolished save where such is:*
  - (a) *authorized by legislation;*
  - (b) *to summon or prorogue Parliament.*<sup>471</sup>
- (2) The sovereign may issue factual announcements (*which are not required to be made under the UK Great Seal*)<sup>472</sup> in the case of a:
  - (a) a Royal Event or the
  - (b) grant of (or a change in) a title of honour or dignity.

**58. Peerages**

- (1) **Schedule 20** shall apply to peerages.<sup>473</sup>
- (2) The High Court shall have jurisdiction to hear any peerage claim.

<sup>466</sup> Chalmers, n 15 (in 1922) 'If the King chooses, he can make his eldest son prince of Wales and Earl of Chester by letters patent. The present Prince of Wales was made Prince of Wales by letters patent and a ceremony in addition.'

<sup>467</sup> The latter expression adds nothing legally.

<sup>468</sup> There are difficulties with the title the '*king*' since this had to be enshrined in the Bill of Rights 1688 (William of Orange not being of the bloodline of James I (1603-25); his wife was). See Maitland, n 13, p 343. Strictly, the same applies to the title '*queen*'. See Keith, n 63, ch 3. Are the titles '*Prince*' or '*Princess Royal*' needed? See also Chalmers, n 15, pp 91-3

<sup>469</sup> De Smith, n 24, p 131 'The Queen decided in 1996 that a person who becomes a Royal Highness on marrying into the royal family would lose that title on divorce.'

<sup>470</sup> It would seem better if the sovereign has no control over the employment of the same since, then, there is accountability (albeit, immunity still applies).

<sup>471</sup> It is intended a *Parliament Act* shall have dealt with this matter. Also, anyway, that proclamations be abolished.

<sup>472</sup> This assumes the same is retained.

<sup>473</sup> This will list hereditary peerages and confirm that the sovereign: (a) cannot create any new hereditary peerages; (b) award any hereditary peerages other than to Royal Family members (the current practice). It would be useful to also abolish '*defunct*' hereditary peerages that could apply to the Royal Family (including Earl of Chester, the palatinate being obsolete). Also to provide for any hereditary peerage to be withdrawn from Royal Family members for misconduct. Finally, it would include the statutory form of disclaimer of a hereditary peerage, see McBain, n 1 (*Crown Act*), pp 100-1.

**59. Orders of Knighthood, Decorations and Medals**

- (1) The orders of knighthood, decoration and medals awarded by the Crown shall only comprise those referred to in **Schedule 21** which shall also provide for:
  - (a) their award; and their
  - (b) removal for misconduct.
- (2) Any order, decoration or medal in (1) may be abolished by means of a SI, save for the following, the:
  - (a) Victoria Cross;
  - (b) George Cross;
  - (c) Elizabeth Cross.

**60. Applicability of Legislation**

- (1) The Crown is not bound by legislation unless it is referred to expressly or by implication.
- (2) Reference to the sovereign in legislation includes her successors.

**61. Power to Tax**

- (1) The Crown may not levy:
  - (a) any form of tax or toll; or
  - (b) the same for a longer time (or otherwise as permitted by legislation),without the consent of Parliament.<sup>474</sup>

**62. Royal Signature**

- (1) Execution by the sovereign under the royal sign manual is valid on the subscription of the sovereign's signature.

**63. UK Great Seal**

- (1) *Schedule 22 shall apply to the UK Great Seal.*<sup>475</sup>

**64. Privy Council**

- (1) *Schedule 23 shall apply to the Privy Council.*<sup>476</sup>

**Part 4: Duchy of Cornwall****65. Nature**

- (1) The duchy is an estate comprising the:
  - (a) manors;
  - (b) foreshore
  - (c) river beds; and
  - (d) other real property,referred to in **Schedule 24**.<sup>477</sup>

**66. Ownership**

- (1) The duchy is owned by the nation (*that is, by the sovereign acting as head of a body aggregate*)<sup>478</sup> in which the Duke has a life interest.
- (2) The duchy, and the title 'Duke of Cornwall', are inalienable.
- (3) The Duke is a corporation sole.

**67. Management**

- (1) The duchy shall be managed according to the provisions [a SI].<sup>479</sup>

**68. Succession**

- (1) (*Eldest Child of the Sovereign*). Subject to (2) and (3), the duchy shall automatically pass:
  - (a) on the birth of the eldest son (or daughter) of the body of the sovereign, to the same; or
  - (b) to the eldest son (or daughter) of the body of the sovereign, when the sovereign becomes such.
- (2) (*Eldest Child Dies*). If the eldest child in (1) dies without issue, the duchy shall:

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<sup>474</sup> This assumes any Crown prerogative to do so is abolished.

<sup>475</sup> This assumes the same is not abolished.

<sup>476</sup> Ibid.

<sup>477</sup> It is assumed that the foreshore remains with the duchy. See GS McBain, *Time to Abolish the Duchy of Cornwall?* (2013) Review of European Studies, vol 5, no 5, pp 40-58.

<sup>478</sup> Ibid

<sup>479</sup> This could be placed in a Schedule to this Act. However, a SI enables easier amendment.

- (a) automatically pass to the second son or daughter of the body of the sovereign,
- (b) as if the same were the eldest.

If the eldest child in (1) dies leaving issue, the duchy shall revert to the sovereign.

- (3) (*No Children*). Until the sovereign has children, the sovereign shall hold the duchy.

#### **69. Taxation**

- (1) The Duke of Cornwall (*including in right of the duchy of Cornwall*)<sup>480</sup> shall pay income tax at the appropriate rate.<sup>481</sup>

##### **Part 5: Duchy of Lancaster**

[*This, if retained, will reflect ss 65-7. However, ss 68 & 69 will not be needed in any case*]

##### **Part 6: British Domestic Territories (BDT)**

#### **73. Channel Islands and Isle of Man**

- (1) The Channel Islands and the Isle of Man comprise BDT.

#### **74. Legislation**

- (1) The UK may legislate for a BDT by means of a:
  - (a) UK Act of Parliament which expressly refers to the same;<sup>482</sup> or
  - (b) a SI.
- (2) Legislation passed by a BDT legislature shall only be held void and inoperative if (and to the extent) it is:
  - (a) repugnant to
  - (b) the legislation in (1).

#### **75. Defence and Foreign Affairs**

- (1) The UK is responsible for the defence and foreign affairs of BDT.

#### **76. Responsible UK Ministry**

- (1) The HO is the UK ministry primarily responsible for the relationship between the UK and BDT, including:
  - (a) the drafting of legislation referred to in s 74(1);
  - (b) the appointment, and dismissal, of any Governor.
- (2) The HO may seek the assistance of other UK Ministries in respect of (1).

#### **77. Statutory Instrument**

- (1) A SI may, *inter alia*, provide, in respect of BDT, for the following:
  - (a) their constitution (and any variation, amendment or replacement thereof);
  - (b) any legislature;
  - (c) their government;
  - (d) the establishment of any court;
  - (e) the appointment, and dismissal, of a Governor and the powers of the same;
  - (f) any customs or common duty or tax;
  - (g) any Crown land or Crown revenues.
  - (f) the alteration of any territorial boundaries.<sup>483</sup>
- (2) The power in (1) includes making any incidental, consequential or transitional provisions relating thereto.

#### **78. Appeal to Supreme Court**

- (1) *Any appeal to the JCPC from the BDT shall be to the UK Supreme Court.*<sup>484</sup>

#### **79. Rockall**

- (1) The island of Rockall is a BDT.

<sup>480</sup> If the duchy was held by the nation and this was stated in legislation, this wording would be unnecessary and the Duke would only pay tax on his private assets.

<sup>481</sup> See n 477.

<sup>482</sup> *Implied* application leaves the matter too uncertain.

<sup>483</sup> See Colonial Boundaries Act 1895. Also, Territorial Sea Act 1987 which appears to cover the field *re* territorial waters. See also De Smith, n 24, p 140.

<sup>484</sup> This would not be needed if a *Courts Act* (see n 3) otherwise provides for the abolition of the JCPC and the transfer of its jurisdiction to the UK Supreme Court.

(2) Rockall is part of the UK pursuant to the Island of Rockall Act 1972<sup>485</sup> and, from the date of the enactment of the same, the island (of which possession was formally taken in the name of [HM] on 18th September 1955 in pursuance of a Royal Warrant dated 14th September 1955 addressed to the Captain of HM's ship *Vidal*):

- (a) was incorporated into that part of the UK known as Scotland and formed part of the Western Isles, and
- (b) the law of Scotland applied accordingly.

#### **Part 7: British Overseas Territories (BOT)**

#### **80. BOT**

(1) The territories set out in **Schedule 25** (as the same may be amended by a SI from time to time) comprise BOT, together with the legal form, and date, of acquisition.

(2) All BOT referred to in **Schedule 25, Part A** (*settled territories*) have, from the date of their acquisition, as their law:

- (a) the law of England at the time of acquisition
- (b) as altered (or replaced) by subsequent local legislation; or
- (c) UK legislation.

(3) All BOT referred to in **Schedule 25, Part B** (*ceded and annexed territories*) have, from the date of their acquisition, as their law:

- (a) the law in force in the territory at the time of acquisition
- (b) as altered (or replaced) by subsequent local legislation; or
- (c) UK legislation.

#### **81. Legislation**

(1) The UK may legislate for the BOT by means of a:

- (a) UK Act of Parliament which expressly refers to the same;<sup>486</sup> or a
- (b) SI.

(2) Legislation passed by a BOT legislature shall only be held void and inoperative if (and to the extent) it is:

- (a) repugnant to
- (b) the legislation in (1).

#### **82. Defence and Foreign Affairs**

(1) The UK is responsible for the defence and foreign affairs of BOT.

#### **83. Responsible UK Ministry**

(1) The FCDO (or the MOD in the case of the SBA) is the UK ministry primarily responsible for the relationship between the UK and BOT, including:

- (a) the drafting of legislation referred to in s 81;
- (b) the appointment, and dismissal, of any Governor.

(2) The FCDO (or MOD) may seek the assistance of other UK ministries in respect of (1).

#### **84. Statutory Instrument**

(1) A SI may, *inter alia*, provide, in respect of the BOT, for the following:

- (a) their constitution (and any variation, amendment or replacement thereof);
- (b) any legislature;
- (c) their government;
- (d) the establishment of any court;
- (e) the appointment, and dismissal, of a Governor, and the powers of the same;
- (f) any customs or common duty or tax;
- (g) any Crown land or Crown revenues;
- (h) the alteration of any territorial boundaries.<sup>487</sup>

(2) The power in (1) includes making any incidental, consequential or transitional provisions relating thereto.

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<sup>485</sup> This Act will be repealed.

<sup>486</sup> *Implied* application leaves the matter too uncertain.

<sup>487</sup> See Colonial Boundaries Act 1895.

**85. Appeal to Supreme Court**

(1) Any appeal to the JCPC from a BOT shall be to the UK Supreme Court.<sup>488</sup>

**86. Saint Helena**

- (1) The island of Saint Helena is a BOT.
- (2) Saint Helena (and its dependencies) is a BOT pursuant to the St Helena Act 1833, s 122 and from the
- (a) date of the enactment of the same,
  - (b) the island and all stores and property thereon fit or used for the service of the government thereof, became vested in the Crown.

**87. Admiralty Jurisdiction**

- (1) All BOT civil courts hereby have:
- (a) admiralty jurisdiction
  - (b) if the law of the BOT does not otherwise provide.

**PART 8: General****88. Abolition of Crown Prerogatives**

- (1) Subject to (2) and (8) all common law Crown prerogatives (and any franchise) are abolished.
- (2) In the case where a CP not otherwise abolished in prior Legislation is discovered, the same may be preserved by means of a SI for a period of 6 months, to determine whether it should be:
- (a) abolished; or
  - (b) retained by means of a SI.
- (3) The legal concept of escheat is abolished.<sup>489</sup>
- (4) Subject to (5), all corporations sole existing at common law are abolished
- (5) The following are, hereby, treated as corporations sole:<sup>490</sup>
- (a) the Lord Chancellor;
  - (b) the Lord Chief Justice;
  - (c) Chamberlain of the City of London;<sup>491</sup>
  - (d) all CoE priests.<sup>492</sup>
- (6) All corporations aggregate existing at common law shall become statutory corporations aggregate save where the [Government Legal Department] determines that the same should be preserved for historical reasons.
- (7) A SI may provide for the:
- (a) creation;
  - (b) dissolution;
  - (c) powers of; and
  - (d) all other legal matters relating to,
- a corporation sole or aggregate.
- (8) Any Crown prerogative to create a common law crime (and any punishment therefor) is abolished and:
- (a) all existing common law crimes
  - (b) shall be placed in legislation or abolished.

**89. Repeals**

(1) The legislation in **Schedule 26** is repealed (or amended) as described.<sup>493</sup>

**90. Interpretation**

(1) In this Act:  
'Act' means an Act of Parliament.

<sup>488</sup> This would not be needed if a *Courts Act* otherwise provides for the abolition of the JCPC and the transfer of its jurisdiction to the UK Supreme Court.

<sup>489</sup> This should have been dealt with in a Crown Act.

<sup>490</sup> i.e. treated as statutory corporations sole.

<sup>491</sup> See Maitland, n 13 p 81 referring to *Fulwood's Case* (1591) 4 Rep 65a referring to a case in 1468 (8 Edw 4 f 18 pl 29)..

<sup>492</sup> Probably, CoE priests no longer need to be treated as corporations sole since other religious orders are not.

<sup>493</sup> This will repeal any remaining constitutional legislation not otherwise dealt with by a Crown Act, Parliament Act, Government Act, Courts Act and Armed Forces Act.



‘A-G’ means the Attorney-General.

‘*Armed forces*’ means the Royal Navy, the Royal Marines, the regular army (as defined by s 374 of the Armed Forces Act 2006) or the Royal Air Force.<sup>494</sup>

‘*Bill*’ means a Bill of Parliament.

‘*BOT*’ refers to a British Overseas Territory.

‘*CoE*’ refers to the Church of England.

‘*CP*’ means a Crown Prerogative.

‘*Crown*’ refers to the sovereign in the body politic acting as head of a corporation aggregate.<sup>495</sup>

‘*FCDO*’ means the Foreign, Commonwealth and Development Office.

‘*Governor*’ includes any commissioner or administrator (also, any deputy or person acting for any of the same).

‘*HC*’ means the House of Commons.

‘*HC Speaker*’ means the speaker of the HC.

‘*HL*’ means the House of Lords.

‘*HL Speaker*’ means the speaker of the HL.

‘*HM*’ means Her Majesty.

‘*Legislation*’ refers to any Act (general or local) or SI;

‘*Lord Speaker*’ means the Speaker of the HL.

‘*Minister*’ refers to a Minister of State.

‘*Minister of State*’ means a member of HM’s Government in the UK who neither has charge of any public department nor holds any other of the offices specified in Schedule [ ] or any office in respect of which a salary is payable out of money provided by Parliament under s 3(1)(b) of the Ministerial and other Salaries Act 1975;

‘*Ministry*’ means any department of the UK presided over by a Minister.

‘*MOD*’ means the Ministry of Defence.

‘*MP*’ refers to a member of the UK Parliament.

‘*Parliamentary papers*’ means all documents issued to the public, including: (i) the Journals of the HC and the HL; (ii) Hansard;<sup>496</sup> (iii) Parliamentary returns; (iv) command papers; (v) Act papers.

‘*NI*’ means Northern Ireland.

‘*PM*’ means the Prime Minister.

‘*Royal Event*’ includes: (i) the accession, coronation, marriage, death or funeral of the sovereign; (ii) the birth, marriage, death or funeral of any Royal Family member; (iii) any other noteworthy incident of a factual nature concerning the Royal Family.

‘*Royal Family*’ refers to the: (i) sovereign; (ii) consort of the same; (iii) children of the sovereign and consort; (iv) heir(ess) apparent to the throne.

‘*s*’ means a section and ‘*ss*’ means a sub-section.

‘*SI*’ means a statutory instrument.;

‘*sovereign*’ refers to the sovereign in person (that is, in the body natural).

‘*UK*’ means the United Kingdom.

‘*UK Great Seal*’ refers to the Great Seal of the UK.

#### 91. **Application**

(1) This Act applies to Scotland and NI.

#### **SCHEDULES**

1. Qualification and Disqualification of MPs
2. Resignation, Recall, Death of MPs and any vacancy in the seat of an MP
3. Taxation of MPs and Peers
4. Legislation - Short Titles and Evidence in Court
5. Appointment of Deputy Speakers of the HC and the HL
6. Ombudsman

<sup>494</sup> See Ministerial Salaries Act 1975, ss 1(3) and 9.

<sup>495</sup> This term can be abolished if all CPs are abolished (and any needed are placed in legislation).

<sup>496</sup> This is intended to refer to the Official Reports of Parliament from 1803, see May (2019), n 50, pp 150-2.

7. Parliamentary Constituencies
8. House of Commons Commission
9. Corporate Bodies
10. Joint Departments
11. Parliamentary Papers
12. Parliamentary Costs
13. Parliamentary Standards
14. Chevening and Chequers Estates
15. Privileges and Limitations of the Sovereign and the form of the Coronation Oath
16. Regency
17. Funding (Civil List)
18. Royal Palaces and Royal Collections
19. Royal Household
20. Peerages
21. Orders of Knighthood, Decorations and Medals
22. *UK Great Seal*
23. *Privy Council.*
24. Duchy of Cornwall
25. British Overseas territories (BOT)
26. Repealed Legislation.

**Schedule: Privileges of, and Limitations on, the Sovereign**

**A. Privileges**

1. The sovereign:

- (a) has civil immunity; save when the common law remedy of suit against the AG applies.
- (b) has criminal immunity, save when a sentence of life imprisonment may be imposed.
- (c) is immune from arrest.
- (d) shall not have *laches* (delay) attributed to the same.
- (e) shall not have negligence attributed to the same.

**B. Limitations**

1. The sovereign cannot:

- (a) arrest a person;
- (b) give evidence in a court of law in her own cause;
- (c) act as a Minister;
- (d) hold any public office, besides that of sovereign;
- (e) attend, or sit in, cabinet;
- (f) alter succession to the Crown in her will;
- (g) undertake paid employment;<sup>497</sup>
- (h) create or grant any:
  - (i) royal title other than as stated in s 55(3);
  - (ii) new hereditary peerage;
  - (iii) existing hereditary peerage other than to a member of the Royal Family;
  - (iv) life peerage;
  - (v) order of knighthood, decoration or medal other than as stated in a SI;
  - (vi) rank in the Armed Forces, including to a member of the Royal Family.

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<sup>497</sup> This may be advisable for the future.

### **CORPORATIONS SOLE AND AGGREGATE** <sup>498</sup>

The following refers to *common law* corporations sole and aggregate.

#### **1. Corporations Sole**

As Blackstone pointed out, '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.' <sup>499</sup>

- |  |   |
|--|---|
| 1. The Sovereign                                     | - first corporation sole and origin of the legal concept of a corporation sole                |
| 2. Count Palatine of Chester (1066-87)( <i>obs</i> ) | - created by William I <sup>500</sup> The Earl of Chester is the heir apparent <sup>501</sup> |
| 3. Count Palatine of Durham (1066-87)( <i>obs</i> )  | - created by William I <sup>502</sup>   |
| 4. Count Palatine of Lancaster (1267)( <i>obs</i> )  | - exists as well as the title of Duke of Lancaster which is the greater title <sup>503</sup>  |
| 5. Duke of Cornwall (1337)                           | - when title held by sovereign and when held by heir to the throne <sup>504</sup>             |
| 6. Duke of Lancaster (1351)                          | - title held by the sovereign <sup>505</sup>  |
| 7. Lord Chancellor ( <i>quasi</i> )                  | - cf. statutory corporation sole for certain matters  |
| 8. Lord Chief Justice ( <i>quasi</i> )               | - quasi corporation sole (appears to lack seal)   |
| 9. Chamberlain of the City of London                 | - possibly, since has seal  |
| 10. Various clerics of the CoE                       | - not other religious orders  |

In conclusion, there are very few corporations sole and some are held of the sovereign (4-6).

It is also clear that the sovereign had the right to create corporations sole as early as time of William I (1066-87) since that is what 2 and 3 are - individuals created corporations sole with seals to enable them to exercise extensive legal powers (almost akin to those of the sovereign, but only extending over a limited geographical part of England). Maitland makes no mention of counties palatine.

#### **2. Corporations Aggregate (political only)**

- |  |  |
|--|--|
| 1. The Crown                                 | - first corporation aggregate and origin of the legal concept of a corporation aggregate |
| 2. Great Council ( <i>Magnum Concilium</i> ) | - precursor to Parliament  |
| 3. Parliament                                | - sovereign, HC and HL acting together <sup>506</sup>                                    |
| 4. Royal Council ( <i>Curia Regis</i> )      | - precursor to no 5, the sovereign acting with advisers                                  |
| 5. Privy Council                             | - successor to 4   |
| 6. Cabinet                                   | - successor to 4 and 5   |

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<sup>498</sup> For older texts on corporations see W Sheppard, *Of Corporations, Fraternities and Guilds* (1659), H Cleave, *Law of Corporations* (1907), S Kyd, *A Treatise on the Law of Corporations* (1793-4), J Grant, *Practical Treatise on the Law of Corporations* (1850), CT Carr, *The General Principles of the Law of Corporations* (1905).

<sup>499</sup> Blackstone, n 34, vol 1, p 457.

<sup>500</sup> See generally, GS McBain, *Abolishing some more obsolete Crown Prerogatives* (2011) Liverpool LR, vol 32, pp 65-92 at p 84.

<sup>501</sup> The earldom of Chester has been associated since 1301 with the title of Prince of Wales and it is reserved for the heir apparent to the throne. This palatinate no longer has any *jura regalia* and should be abolished.

<sup>502</sup> See n 500, p 84. This palatinate no longer has any *jura regalia* and should be abolished (at present it is, effectively, re-vested in the Crown for the purpose of asserting foreshore rights)

<sup>503</sup> Ibid, pp 85-6. See also GS McBain, *Time to Abolish the Duchy of Lancaster* (2013) Review of European Studies, vol 5, no 4, pp 172-93. The county palatinate was created by Henry III (1216-72) for his second son Edmund who was made Earl of Lancaster. The duchy itself is not a corporation sole, being owned by the duke, who is a corporation sole.

<sup>504</sup> McBain, n 477, pp 40-58.

<sup>505</sup> Ibid.

<sup>506</sup> May (in 2019), n 50, p 3 'Parliament is composed of the sovereign, the [HL] and the [HC]. Collectively they form the legislature...'