

# Modernising Some Final Crown Prerogatives

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*Previous articles have discussed most of the c. 182 Crown prerogatives still existing. This article considers some of the final ones - including those involving the appointment of judges. Also, the exercise of the power to pardon. In particular, in order to ensure the separation of powers, this article asserts that the Lord Chief Justice (LCJ) should be the person who - by means of a signed letter - formally appoints, dismisses (and accepts the resignation of) judges. In this fashion, the sovereign is no longer involved since her role has long been one of being a formal Head of State only. Nor would the Secretary of State for Justice, a politician, be involved. The office of Lord Chancellor (which is now the same as that of the Secretary of State for Justice) can then, safely, be abolished - since such a change ensures the independence of the judiciary from political influence.*

## 1. INTRODUCTION

Nine previous articles have considered the nature of Crown prerogatives ('CPs') and c. 300 pieces of constitutional legislation.<sup>1</sup> They have proposed that all of the same should be consolidated into 6 pieces of legislation, viz. a:

- Crown Act;
- Parliament Act;
- Courts Act;
- Government Act (including material on quangos);
- British Territories & Foreign Relations Act;
- Armed Forces Act.

The first two Acts (and part of the fifth Act) should, then, be consolidated into a **Constitution Act**. The above acts would include c. 182 CP's - save for a large number (c. 85%) which are obsolete and, thus, no longer required. Most of these CPs were discussed by the author in the 9 previous articles - or in other articles by the author referred to in them (for a list, see *Appendix A*). However, a few were not. Thus, this article considers more of these: viz. CPs in respect of the following, the prerogative (privilege) of the sovereign to:

- appoint a Attorney-General ('AG') and a Solicitor-General ('SG');
- franchise the offices of AG and SG;
- appoint a Treasury Solicitor;
- appoint a Lord Chancellor ('LC');
- appoint a Lord Chief Justice ('LCJ');
- appoint a person to other public offices;
- issue a pardon;

<sup>1</sup> See: (a) GS McBain, *Modernising the Constitution - A Crown Act*, (2021) International Law Research ('ILR') (2021), vol 10, no 1, pp 13-100; (b) Ibid, *Modernising the Constitution - A Parliament Act* (2021) ILR, Ibid, pp 101-184; (c) Ibid, *Modernising the Constitution - A Courts Act* (2022) ILR, Ibid, pp 195-248; (d) Ibid, *Modernising the Constitution - Quangos* (2022) ILR, vol 11, no 1, pp 1-61; (e) Ibid, *Modernising the Constitution - A Government Act* (2022) ILR, Ibid, pp 62-116; (f) Ibid, *Modernising the Constitution - British Territories and Foreign Relations Act: Parts 1 & 2* (2022) ILR, Ibid, pp 117-62 & 163-96; (g) Ibid, *Modernising the Constitution - An Armed Forces Act* (2022) ILR, Ibid, pp 197-258; (h) Ibid, *Modernising the Constitution: A Constitution Act* (2022) ILR, vol 11, no 1, pp 259-325; (i) Ibid, *Modernising the Constitution: Crown Estate and Sovereign's Private Estate* (2023), ILR, vol 12, no 1, pp 1-50; (j) Ibid, *Optimising the UK and Commonwealth Constitution*, Journal of Politics and Law (2022), vol 15, no 3, pp 37-53.

- order a public inquiry (inc. a royal commission);
- seize the goods of a pirate.

All these CPs should be abolished and - where still required - placed in the legislation referred to above. Finally, this article considers a ‘false’ CP (i.e. it is not actually a CP). This is the placing of the sovereign’s head on *pre-paid* postage stamps. This requirement was, simply, a tradition and it is now statutory.

***In conclusion, this article asserts that all common law CPs should be abolished (85% are obsolete anyway) with those still required being set out in legislation. Such is not difficult and would greatly assist lawyers, judges and, indeed, the general public.***<sup>2</sup>

## **2. ATTORNEY GENERAL & SOLICITOR GENERAL**

A previous article has considered the CP of the sovereign to appoint an AG and a SG.<sup>3</sup> Halsbury presently states:

The Queen cannot appear in her own courts to support her interests in person, but is represented in England and Wales by her own attorney, who bears the title of Her Majesty’s [HM’s] Attorney General. The [AG] is primarily an officer of the *Crown*<sup>4</sup> and is in that sense an officer of the public. Although he performs to some extent judicial functions both at common law and by statute, he does not constitute a court in the ordinary sense, so that a prohibitory order will not lie against him.<sup>5</sup>

The above states the strict legal fiction - not the factual reality today - since the sovereign’s role is a non-executive (i.e. titular) one and, in reality, the AG and SG are political appointments made by the Prime Minister (the ‘PM’).

- thus, a *Government Act* should reflect this by stipulating that the AG and SG shall be appointed, dismissed (and have any resignation accepted) by the PM (i.e. the same as any minister);
- it may, also, be noted that the AG tends to be a Cabinet member in modern times and it would seem useful for the same to head a Legal Ministry, into which a number of government legal bodies can be ‘folded’, in order to make government departments more intelligible;<sup>6</sup>
- further - as previously noted<sup>7</sup> - the SG is the deputy of the AG. Thus, the title should be changed to ‘*Deputy AG*’, given that the title ‘*Solicitor General*’ is mis-leading (the person does not have to be a solicitor) and it has little meaning;
- finally, the departments of the AG and the SG should be merged - to cut costs and to improve efficiency.<sup>8</sup>

Some other points may be noted:

- ***Salaries of the AG and Deputy.*** A Government Act should stipulate the salaries of the AG and the deputy AG. And, old legislation - the Law Officers Fees Act 1872 - should be repealed;<sup>9</sup>
- ***Attorney-General for Northern Ireland (‘NI’).*** There is a separate AG for NI. The same is appointed (and funded) by the First Minister and the Deputy First Minister acting jointly.<sup>10</sup> This should be re-stated in a *Government Act*, for ease of reference and to make matters more intelligible;
- ***Advocate-General for NI.*** The UK Government is represented by the Advocate General for NI. This office is held by the AG, and the SG may also exercise this post.<sup>11</sup> This should be re-stated in a *Government Act*, for ease of reference and to make matters more intelligible;
- ***Confusing Roles of the AG (and SG).*** At present, the role of the AG is confusing and it can result in a conflict of interest since AG can act for all of: (a) the sovereign; (b) the government; (c) Parliament.<sup>12</sup> While the first role has

<sup>2</sup> A review of all CPs should (best) be undertaken by 2-3 small teams of retired constitutional judges, law commissioners and academics. It would only take 18 mths - 2 years since so many are manifestly obsolete.

<sup>3</sup> See n 1(e)(*Government Act*).

<sup>4</sup> The reference should, actually, be to the ‘*government*’ since this CP was a personal one of the sovereign, which is only formal now given that the power of appointment is held by the PM.

<sup>5</sup> Halsbury, *Laws of England* (5<sup>th</sup> ed), vol 2 (2004 issue), para 273. Ibid, para 576 ‘Appointments of the [AG] and the [SG] take effect from the approval by the monarch of the [PMs] recommendation and are confirmed by letters patent...’ Today, the approval of the sovereign is only formal. It should not be required. See also Cabinet Office, *List of Ministerial Responsibilities including Executive Agencies and Non Ministerial Departments* (Nov 2012).

<sup>6</sup> See n 1(e)(*Government Act*), pp 84-5.

<sup>7</sup> Ibid. See also the Law Officers Act 1997.

<sup>8</sup> Ibid.

<sup>9</sup> Law Officers Fees Act 1872, s 1 ‘All fees payable to or to the credit of any law officer or his clerk...on account of...any gift, grant, or writing under the [UK] Great Seal, or any warrant for the same, or on account of any business in respect of which a salary is for the time being paid to such person and in such manner as the...Treasury may from time to time direct, and shall be carried to the Consolidated Fund.’ The salary of the AG or the SG should now cover this matter, so that no additional fees are necessary.

<sup>10</sup> Halsbury, n 5, para 274. Also, the Justice (Northern Ireland) Act 2002, s 27.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, para 278 ‘The [AG] acts as prosecutor for both houses of Parliament. In the case of offences directly concerning the House of Commons (‘HC’), the house directs the [AG] to prosecute; in the case of offences not directly concerning the house, the house addresses to the Crown a

not proved to be problematic (the sovereign rarely litigates) Parliament should have a distinct lawyer to act on its behalf, to avoid any conflict of interest. Also, it is not appropriate that a government officer act for the legislature. Thus, Parliament should - by legislation - select another lawyer (e.g. an ex A-G or other member of the Bar) to act for it.

- It is also inappropriate for the AG (and the SG) to attend the HL at the beginning of every Parliament,<sup>13</sup> since the AG now is (in practice) a government appointee (and not, as in the past, a servant of the sovereign). Even more so, when the AG now (generally) sits in Cabinet (and, where it may be appropriate for him (her) to be a minister).

Another CP relating to the AG may be noted:

- ***Nolle Prosequi***. A CP which still exists is that the sovereign could order the AG to stay criminal (and, once, civil) proceedings (i.e. *a nolle prosequi*), whether the same were initiated by the Crown or by a private prosecutor. This is now done by the AG at his own discretion, by his *fiat*. This can be done without the the AG being legally required to show cause (i.e. to give reasons) for so acting.<sup>14</sup> It is asserted this CP should be abolished, for the following reasons:
  - *The AG is a political appointment today*. This - rather arbitrary - CP<sup>15</sup> appears inappropriate since, in practice, the AG is a political appointment and not - as in times past - the personal appointment of the sovereign. The circumstances behind this CP have changed, therefore;
  - *Statutory Powers of the DPP*. The power of the AG to exercise a *nolle prosequi* is seldom used due to the power of the Director of Public Prosecutions to discontinue criminal proceedings pursuant to the Prosecution of Offences Act 1985;
  - *Usurps discretion of the criminal judge*. The legal right of the AG to enter a *nolle prosequi* no longer exists in the case of civil proceedings. Nor, in the case of a criminal information. It should be wholly abolished since - in the delicate area of criminal law (which, in the past, has often been influenced by politics) the discretion to stay (stop) criminal proceedings - in the form of an indictment - should be left, not to the AG, but to the *criminal judge* (although the judge can direct - at the request of the AG - that the indictment should remain on the file - which means that it could be re-activated - this is not the same thing).<sup>16</sup>

In short, the CP to exercise a *nolle prosequi* should be abolished - to avoid the risk of political interference. The right of the AG to claim *trial at bar* in civil proceedings affecting the Crown (i.e. a jury trial before two judges) should, also, be abolished. The precise benefit of this CP - when jury trials in civil matters, today, are rare - is unclear. Further, such a right (procedural privilege) is not an appropriate one, legally (that is, any risk of political interference should be removed).<sup>17</sup> Finally, the AG still exercises some *judicial functions*.

- To the extent such still exist they should be removed from him since the AG - a *politically appointed prosecutor* - should not seek - at the same time - to undertake the role of an *impartial judge*. There is a clear conflict of interest between these two roles;
- In particular, in any *peerage claim* (likely, to be more rare in the future)<sup>18</sup> neither the AG - nor the HL - should be involved. The AG should not be involved, being a political appointee. And, the HL should not be involved since judges no longer sit in the HL (having decamped to the Supreme Court). Thus, a *Government Act* should provide that the High Court should have jurisdiction to hear any peerage claim.<sup>19</sup>

***In conclusion, the roles of the AG and SG are out of date. They are no longer personal appointments of the sovereign but political appointments and they should be recognized as such in a Government Act - together with details of their roles and salaries. Further, CP's relating to nolle prosequi and trial at bar should be abolished (avoiding the obvious danger of political interference and the fact that the role of the sovereign is now only a formal one).***

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request that the [AG] be directed to prosecute.' The latter request should not be required anyway since the role of the sovereign is now a formal one only.

<sup>13</sup> Ibid, para 276 'The [AG] for [E&W] and [SG] are summoned, together with the judges, to attend the [HL] at the beginning of every Parliament'.

<sup>14</sup> Ibid, para 277.

<sup>15</sup> 'Arbitrary' in that this CP is not subject to review by the courts. See *R v Comptroller of Patents* [1899] 1 QB 919. Further, a *nolle prosequi* is not an acquittal. Thus, a person could be brought before the courts again.

<sup>16</sup> Halsbury, n 5, para 277.

<sup>17</sup> Ibid. It may be noted that the caselaw is old. Also, it seems, the AG can consult politically before exercising discretion. Ibid, para 280, n 2.

<sup>18</sup> These tended to be brought since the person wanted to sit in the HL as a hereditary peer. This is now not possible, save in 92 cases. And, if the HL is abolished, the prospect of such claims would be even less. See also Halsbury, n 5, para 276 'When a peerage claim is made by a petition it is referred to the [AG]. If he is satisfied that a *prima facie* case has been established, he generally advises the Crown to refer it to the [HL], which refers it to the Committee of Privileges for report. The [AG] attends the hearing before the committee both as assistant, by virtue of his writ of attendance, and as protector of the interests of the Crown as fountain of honour'.

<sup>19</sup> See n 1(b) (*Parliament*), p 103.

### 3. FRANCHISES - AG & SG

The CP to appoint a AG - or a SG - could be franchised and it was. Three such franchises still exist *viz*:

- **County Palatine of Durham.** As noted elsewhere, the county palatine of Durham should be abolished (since it no longer holds any *jura regalia*).<sup>20</sup> Thus, any franchise to appoint a AG (or a SG) should, also, be abolished;
- **Duchy of Lancaster.** There is no need for the duchy to have a distinct AG since the sovereign - although holding the duchy *qua* duke - overreaches the lesser title of duke by virtue of being sovereign.<sup>21</sup> Thus, the AG should also act for this duchy - to prevent unnecessary costs and to clarify things;
- **Duchy of Cornwall.** The same applies to this duchy. However, this duchy can also be held by a subject - the eldest son of the sovereign (as at present, since the Prince of Wales is Duke of Cornwall). However, the AG should, also, act in this case<sup>22</sup> to prevent unnecessary costs. Also, to clarify things (i.e. that the title to the duchy is held by the sovereign in which the duke (a subject) only has a life interest).

***In conclusion, the franchises to create the titles of AG and SG for the county palatine of Durham and the duchies of Lancaster (and, probably, Cornwall) should be abolished. The first is not required, being obsolete. In the case of the second, this role should be assumed by the AG and the SG (save, possibly, where the duchy of Cornwall is held by a subject).***

### 4. TREASURY SOLICITOR

Mention should be made of this office, since it is connected to that of the AG. The Treasury Solicitor ('TS') - once an appointee of the sovereign in person since it was her treasury (*thesaurus*) - is now a statutory corporation sole whose style, and functions, are set out in the Treasury Solicitor Act 1876.<sup>23</sup> The TS's department is part of the AG's office. It is suggested that a *Government Act* should re-state this Act of 1876 (as modernized).<sup>24</sup> Further:

- the TS handles *escheats* and *bona vacantia*, which assets used to pass to the sovereign *in person* since the sovereign had a CP to them. As indicated in a previous article, the common law concept of *escheat* should be abolished (including any CP to the same).<sup>25</sup> Any CP to *bona vacantia* should, also, be abolished and the TS should receive the same directly, the monies going to the treasury (the consolidated fund).<sup>26</sup> Thus, for example, any real property of a deceased person going to the sovereign as lord paramount (being the ultimate heir, in the absence of any other) should, now, go to the TS - saving time and costs;
- the TS, also, acts as the 'Queen's Proctor' (this title is used in the context of matrimonial and civil partnership law). This title should be abolished - being replaced by that of the 'Treasury Solicitor' to simply things. Today, this title tends to be that of 'HM Procurator-General' (a 'proctor' or 'procurator' being an agent acting for another; in earlier times this was the sovereign in person, however, such is a formality now). Consideration should be given to the AG taking over this role since the same, normally, instructs the TS to act anyway;<sup>27</sup>
- finally, as previously mentioned,<sup>28</sup> it would be useful for the AG to be a minister heading up a Legal Ministry - this should include the TS's department.

Elsewhere, it has been suggested that the offices of:

- Lord High Treasurer (a sinecure);
- First Lord of the Treasury (a sinecure held by the PM);
- Second Lord of the Treasury (a sinecure held by the Chancellor of the Exchequer);
- Treasury commissioners (who sat on a Treasury Board, which has not sat since 1856),<sup>29</sup>

<sup>20</sup> See n 1 (a) (*Crown*), pp 27-8. See also Halsbury, n 5, para 135 and GS McBain, *Abolishing some more Obsolete Crown Prerogatives* (2011) Liverpool LR, pp 65-92. (it discusses counties palatine).

<sup>21</sup> If the sovereign didn't, the title would be affected by issues such as minority, mortality and lack of immunity (civil and criminal). It may, also, be noted that the duchies would be subject to the provisions of the Crown Private Estate Act 1800, if they were the *private* property of the sovereign (although they are, clearly, not). See n 1 (i) (*Crown Estate*), pp 34-6.

<sup>22</sup> At present, Halsbury, n 5, para 275, quaintly puts it 'The [AG] of the Duchy of Cornwall is the legal agent [i.e. the private lawyer] of the Prince of Wales'.

<sup>23</sup> Ibid, para 281.

<sup>24</sup> For example, the full title of the TS is 'Solicitor for the affairs of Her Majesty's Treasury'. This could, usefully, be reduced to 'Treasury Solicitor' since HM now longer owns or controls the Treasury, which is a government department. Also, the need for any seal for the TS may be dispensed with.

<sup>25</sup> See n 1, (a) (*Crown*), pp 45-6. There has been a (recent) tendency for law writers to treat *escheat* as a form of *bona vacantia*. However, it is separate.

<sup>26</sup> Ibid. There has been a (recent) tendency for law writers to treat *estray*, wreck, treasure trove and royal fish as a form of *bona vacantia*. However, in earlier times, they were separate CPs. See also JM Kemble, *The Saxons in England* (1876), vol 2, ch 2 (*rights of royalty*).

<sup>27</sup> Matrimonial Causes Act 1973, s 8.

<sup>28</sup> See fn 6.

<sup>29</sup> Thus, the existence of the Treasury board is a legal fiction. See also WR Anson, *The Law and Custom of the Constitution* (4<sup>th</sup> ed, 1935), vol 2, Pt 1 (*Crown*), p 191.

should be abolished.<sup>30</sup> They have little meaning today. So too, the following terms:

- Treasury Board (obsolete since 1856);<sup>31</sup>
- Chancellor of the Exchequer as ‘*Under Treasurer*’ (obsolete since 1509, in reality).<sup>32</sup>

Also, the need for Exchequer seals should be abolished since the Exchequer no longer exists as a separate entity and has not done so since before 1509. Finally, the Chancellor of the Exchequer<sup>33</sup> - whose title might usefully be changed to the Finance Minister, to reduce confusion and get into the 21<sup>st</sup> century - should be the CEO of a corporate board<sup>34</sup> comprising himself and other junior ministers, as well as certain secretaries and civil servants.<sup>35</sup>

***In conclusion, the role of the Treasury Solicitor should be modernized and set out in legislation, with any CP being abolished (as well as obsolete treasury titles and seals).***

## **5. LORD CHANCELLOR**

The office of Lord Chancellor (‘LC’) goes back to Anglo-Saxon times, where there was a chancellor who (probably) physically held the great seal on behalf of (i.e. as agent for) the sovereign. However, today, this office is (effectively) identical with that of the Justice Minister (i.e. the Secretary of State [‘SS’] for Justice). Thus, it is a sinecure and should be abolished.<sup>36</sup> Halsbury notes that the LC is no longer Speaker of the HL. And, that he no longer exercises judicial functions. Also, that this office ‘*is now combined with that of the [SS] for Justice.*’ Further, Halsbury states:

The [LC] means the Lord High Chancellor of Great Britain for the time being. The [LC] is appointed by the monarch on the recommendation of the [PM], and the appointment is made by the monarch delivering the Great Seal of the [UK] into his custody and addressing him by the title of his office. A person may not be recommended for appointment as [LC] unless he appears to the [PM] to be qualified by experience. It is provided by statute that the office may be held by a Roman Catholic.<sup>37</sup>

Even if the office of LC is retained - since it is now a political appointment - as with other ministers, the appointment, dismissal and acceptance of the resignation of the LC, should be made by the PM in writing. Transferring (delivering) *seisin* (possession) by means of a seal is (long) obsolete.<sup>38</sup> Not least, since the sovereign now only exercises a formal role. Also, it is asserted that the following functions of the LC are no longer required now.

### **(a) Visitation & Ecclesiastical Rights**

Because the LC had various visitational and ecclesiastical rights (mainly relating to patronage) in respect of the Church of England (the ‘CoE’) the same could not be a catholic.

- In 1974, legislation provided that the LC could be a catholic and that, where the LC was, the PM or other minister could exercise this function instead.<sup>39</sup> Given this - and the fact that such may not be religious or may, also, be catholic - it is better that these matters return to the CoE;
- Further, there are no good reasons for the LC having religious rights in modern times since the LC is no longer a cleric, as in the distant past.

<sup>30</sup> See n 1(e)(Government), pp 74-9. Also, Halsbury, n 5, paras 263-4.

<sup>31</sup> The sovereign sat as head of this board until 1760. This board no longer sat after 1856.

<sup>32</sup> See also Halsbury, n 5, para 265. Also, Anson, n 29, p 191 ‘The Chancellor of the Exchequer is always one of the Commission of the Treasury, but he is appointed Chancellor of the Exchequer and Under Treasurer by separate patents, and by receipt of the Exchequer seals...The more strictly financial duties of the Chancellor of the Exchequer belong to the post of Under Treasurer, which was connected [i.e. merged] with his office in the reign of Henry VII [1485-1509]....At the present time the Chancellor of the Exchequer...is in fact a Finance Minister.’

<sup>33</sup> ‘*Exchequer*’ is no longer a meaningful reference to the Treasury (it referred to an apartment (room) the *saccarium*, in the time of the Plantagenets (1154-1485)), see n 1 (c) (Government), p 73.

<sup>34</sup> All ministries should have boards, which are legislatively provided for. That is, all ministers should be corporations sole (without the need for any seals) and, when they sit with their board, it comprises a corporation aggregate with the minister as the *head* (the CEO) and the rest of the board as the *body*. This would modernise things and ensure far greater accountability. The ‘old’ Crown created Treasury Board should be abolished as well as the title of commissioner. Instead, those sitting on it would be directors - no different to any company.

<sup>35</sup> See Halsbury, n 5, para 265. As for the various quangos supervised by the Treasury, see n 1 (d)(Quangos).

<sup>36</sup> *Why* it was not abolished was that there was a political kerfuffle when the PM of the time (Tony Blair) proposed it. However, it seems clear that the Constitutional Reform Act 2005 had, initially, been drafted on the basis that the office of LC would be abolished. Therefore, the Act is of poor quality and confusing as a result of amendment having to be made.

<sup>37</sup> Halsbury, n 5, para 256.

<sup>38</sup> As noted in a previous article, see n 1(h), pp 272-4, seals were designed to deal with illiteracy. In olden times they were rings (i.e. signets) and may still be. Their transfer signified a legal act in the case of the sovereign, his temporarily transferring to his servant (his minister) the power to exercise a CP on his behalf, with the return of the ring/seal evidencing the return of such power to the sovereign. Today, this is all formality since the power is irrevocably transferred and the sovereign cannot act as a minister. Such occurred in 1717 (if not before) when the sovereign no longer sat in Cabinet to exercise any CPs. Instead, the sovereign appointed a person (later, called the PM) as well as ministers to do this for him (the same, then, becoming responsible for their acts no longer to the sovereign, but to Parliament).

<sup>39</sup> See Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974. Also, Halsbury, n 5, para 256, n 6.

Thus, these rights - including the LC's role as a Church Commissioner - <sup>40</sup> should be transferred to the Archbishop of Canterbury (or designate). Indeed, the majority of these CoE rights have, already, been transferred from the LC.<sup>41</sup> It may be noted that this function can be transferred pursuant to the Constitutional Reform Act 2005 (since it is not a protected function).<sup>42</sup>

***In conclusion, any rights of the LC in respect of the CoE should be transferred to the Archbishop of Canterbury.***

#### **(b) Judicial Appointments**

The court system was modernized in 1981 with a Central Office, Accountant General and Official Solicitor. Provision is made for the appointment to the latter 2 offices to be made by the LC. It is asserted that the same should now refer to the Justice Minister (i.e. the Secretary of State for Justice). As for judicial appointments, Halsbury states:

As head of judicial administration the [LC] recommends persons to [HM] for appointment as holders of certain senior judicial offices and judges of the Senior Courts, circuit judges, recorders and Senior President of Tribunals. He [the LC] may extend the term for which a recorder is appointed. He also has the power to alter certain judicial titles.<sup>43</sup>

However, as Halsbury also notes, the role of the LC in the above is formal since, in practice, the Judicial Appointments Commission (the 'JAC', established in 2005) vets candidates and recommends appointments.<sup>44</sup> As for members of the Supreme Court, Halsbury notes:

it is the [PM], not the [LC], who makes a recommendation to [HM], but he may only recommend a person selected as the result of a selection commission convened by the LC.<sup>45</sup>

All of this is confusing since the role of the sovereign is purely formal now, being a titular Head of State. Further, the LC and PM are political offices. Thus, they should not be involved in judicial appointments - even in a formal capacity - to avoid any risk of political influence (the position of judicial salaries is different).<sup>46</sup>

- thus, the *formal* appointment, dismissal (and the acceptance of the resignation of) all judges should be transferred to the LCJ who is head of the judiciary (and president of the courts system);
- in this way, an impartial judge who is head of the judiciary deals with this matter, not a politician.
- further, such appointments *etc* should be in writing and signed by the LCJ. Execution under the UK Great Seal (or sign manual) is no longer appropriate since the role of the sovereign is purely nominal *vis-à-vis* appointing judges.

***In conclusion, all appointments (dismissals and acceptance of resignations) to a judicial office should be effected by the LCJ, without any involvement of the LC, the PM or the sovereign. This is to ensure the independence of the judiciary.***

#### **(c) Incapacity & Misconduct**

Halsbury states:

With the concurrence of at least one other senior judge he [the LC] may declare the office of a *judge of the Senior Courts* of [E&W] vacant if he is satisfied by medical evidence that the judge is disabled by permanent infirmity from performing his duties and is for the time being incapacitated from resigning. It is also his [the LC's] responsibility to recommend the removal of such a judge on the grounds of misbehaviour [misconduct] on an address to [HM] presented by both houses of Parliament.

He [the LC] may, with the agreement of the [LCJ], himself remove a *circuit judge* from office on the grounds of incapacity or misbehaviour and a *recorder* on those grounds, or for failure to comply with the terms of his appointment as to the frequency and duration of the occasions on which he is to be available to undertake the duties of a recorder, or other grounds specified in his appointment.<sup>47</sup> (*italics supplied*)

As indicated above, neither the sovereign nor the LC (a political appointee) should be involved in these matters.

<sup>40</sup> Secretary of State for Justice Order 2007/2128, art 4 (3).

<sup>41</sup> Halsbury, n 5, para 256, n 6 'The majority of such [ecclesiastical] functions have in any case now been removed', referring to the Constitutional Reform Act 2005.

<sup>42</sup> Ibid, para 261.

<sup>43</sup> Ibid, para 257.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid. See also, para 129 'Newly created justices[of the Supreme Court] are appointed by the monarch under letters patent, on the recommendation of the [PM], who must recommend the person who is selected as a result of the convening of a selection commission by the [LC], and may not recommend any other person.'

<sup>46</sup> Halsbury, n 5, para 257 'With the approval of the Treasury, the [LC] determines the salaries to be paid to judges of the Supreme Court, the Senior Courts, judges of the Court of Judicature in NI, District Judges (Magistrates' Courts), and circuit judges, and the remuneration and allowances to be paid to recorders.' This function of the LC should be transferred to the Justice Minister.

<sup>47</sup> Ibid.

- thus, it would seem more appropriate that any challenge by a judge to dismissal (for incapacity or misconduct) should be handled *judicially* (i.e. through the court system) to the greatest extent possible. Not least, because the involvement of Parliament in the past was not wholly impartial;<sup>48</sup>
- also, because Parliament (in the HL) no longer has judges present to advise it (they decamped to the Supreme Court in 2009);
- further, the right to apply to the courts preserves the rule of law since judges are entitled - as with any other citizen - to have recourse to the court system in order to defend their rights (against unfair dismissal).

Thus, it would seem more appropriate that:

- the LCJ formally appoints, dismisses - and accepts the resignation of - any judge (including any judge of a Superior Court, circuit judge, recorder, county court judge, magistrate *etc*). This should be effected by a letter in writing signed by the LCJ;
- dismissal should occur for *all* judges (of whatever seniority) in the case of:
  - (a) misconduct in a public office (including failure to perform that office);
  - (b) incapacity.<sup>49</sup>

And, any formal letter of dismissal should be issued by the LCJ.<sup>50</sup>

- any judge should be able to appeal to the Supreme Court if he refuses to resign as a consequence of (a) or (b),<sup>51</sup> save in the case of a *Supreme Court judge*<sup>52</sup> who:
  - may request Parliament to establish a Judicial Commission to opine on the matter to Parliament; and
  - in light of the same, Parliament may dismiss the appellant judge on a free vote.
- as for the *LCJ* - the person who formally dismisses him should be the Justice Minister, who must make an application to the Supreme Court to confirm this (a full bench). The LCJ (if in disagreement) should - then - be able to appeal in the same manner as a Supreme Court judge (see above).<sup>53</sup>

As it is, the present system owes far too much to the sovereign being involved. However, her role is purely formal today and she should not be involved. Nor should the LC or the PM - being political appointees. Also, Parliament being involved harkens back to the days of the now obsolete criminal process of impeachment, the offence of high crimes and misdemeanours *etc*.<sup>54</sup> It does not reflect the modern reality that Parliament no longer act as a court. Thus, Parliament (a political body) should only become involved *as a last resort*. That is, where the judge is a *Supreme Court judge* or the *LCJ* - and where the same refuses to accept a decision to dismiss.

***In conclusion, the dismissal of a judge should be handled by court process to the greatest extent possible - to ensure impartiality and to avoid political decision making (including that of Parliament).***

#### **(d) Custody of the Great Seal**

The LC, in medieval times, retained custody of the Great Seal because the sovereign was, often, profligate (and dishonest).<sup>55</sup> In prior articles<sup>56</sup> it has been argued that both the *UK Great Seal* - and the *privy council* - should be abolished, for three reasons:

- **No Accountability**. In both cases, there is no (or exceedingly little) accountability to Parliament - something inappropriate in a democratic society;
- **No good Reason to Retain**. There is no good legal reason to retain either the UK Great Seal or the privy council. Thus, the privy council has been superceded since c. 1660s by the smaller cabinet and, today, it is no more than a formal body which 'rubber stamps' legal documents. And, matters effected under the UK Great Seal should now be effected by way of SI or under the sign manual or by way of an other signature - saving time, costs as well as ensuring greater accountability to Parliament;
- **Uncertainly as to Use of the Great Seal**. Also, in the case of the UK Great Seal, there is uncertainty as to when it was legally required to be used at common law. Halsbury refers to:

<sup>48</sup> See generally, GS McBain, *Abolishing 'High Crimes and Misdemeanours' and the Criminal Processes of Impeachment and Attainder* (2011) 85 Australian LJ, pp 810-79.

<sup>49</sup> It is suggested that a judge refusing to go would be rare since the same would not want the publicity.

<sup>50</sup> This could be on his own initiative which would seem best. However, in the case of (a)-(b) it could be on the basis of a recommendation by the JAC. Yet, this seems too cumbersome in the case, certainly, of more junior judges.

<sup>51</sup> This provision preserves the rule of law and avoids political interference.

<sup>52</sup> This because there is no further court to appeal to. Notice of dismissal of any Supreme Court judge should be issued by the LCJ.

<sup>53</sup> One should note that, today, dismissing a Supreme Court judge (or the LCJ) is rather unlikely.

<sup>54</sup> See n 48.

<sup>55</sup> See also Halsbury, n 5, para 258 'The [LC] is the custodian of the Great Seal. Unless the Great Seal is in commission, it remains in the custody of the [LC].' As indicated in a prior article, the legislation on the UK Great Seal should be modernised in any case, see n 1 (a). p 41.

<sup>56</sup> See n 1 (a)(*Crown*), p 41 and 1(e)(*Government*), p 83.

- (a) sealing writs to elect MPs and to summon to Parliament;<sup>57</sup>
- (b) *treaties (obs, now covered by legislation)*;
- (c) all public acts, instruments and orders of state which concern the whole of the UK;
- (d) all other matters relating to England in respect of the Great Seal of England was used prior to 1706 (when there occurred the union between Scotland and England).

The problem is that (c) and (d) are particularly obscure<sup>58</sup> However, it is likely that the Great Seal may have been legally required at common law for:

- (a) writs to elect MPs *(the warrant of the HC Speaker is now sufficient)*;<sup>59</sup>
- (b) writs to summon MPs & HL members *(not needed now)*;<sup>60</sup>
- (c) *ratifying treaties* *(no longer so)*;
- (d) conferring titles or dignities *(the sign manual or SI would be sufficient)*;
- (e) creating or transferring franchises *(franchises are not granted now)*;<sup>61</sup>
- (f) creating corporations aggregate.<sup>62</sup> *(a SI is now used)*

However, there is no reason why any one of the above should not be done by a SI or under the sign manual or with the signature of the relevant official (the Justice Minister *etc*). Not least, since the Clerk of the Crown in Chancery (and deputy) are Parliament officers (although formally appointed by the sovereign).<sup>63</sup> Thus, (a) and (b) should be issued on the instructions of the Speakers of the HC and HL in any case - given that the role of the sovereign is only a formal one today.

Similarly, *conferring titles and dignities* should be by way of a SI - to ensure greater accountability - or under the sign manual. *Franchises* are not granted now. However, even if they were, they should be by way of SI to ensure greater accountability to Parliament. So too, the creation of corporations aggregate (indeed, this seems to be the case anyway, see above).

Thus, the LC should no longer have custody of the UK Great Seal (or the Wafer Great Seal) since the same should be abolished. In any case, seals were only used because sovereigns could not read or write. More particularly, the UK Great Seal has been, progressively, used less and less (for example, it is no longer used in the case of treaties).<sup>64</sup> It also involves a complex and bureaucratic process *vis-à-vis* the authority to seal.<sup>65</sup> One which should be obviated, when there is no need.

***In conclusion, the UK Great Seal should be abolished. Transparency and accountability necessitate the use of a SI or the sign manual or the signature of another person (such as the Speaker).***

#### **(e) Various Statutory Functions**

The LC, also, has various statutory functions under the Constitutional Reform Act 2005. These are stipulated in Schedule 7 to the same (it may be noted that a number of the references to the LC have been repealed). The involvement of the LC in many of these functions is eclectic. That is, there is no good reason why the LC should be involved. It is suggested that all these statutory functions should be transferred to other officers - including the Justice Minister (i.e. the Secretary of State for Justice).

#### **(f) Public Records**<sup>66</sup>

The LC is generally responsible for the execution of Public Records Act 1958 and he (she) must supervise the care and preservation of public records. Also, the Master of the Rolls (the 'MR') is responsible for the records of

<sup>57</sup> However, the *fiat* of the LC is sufficient for writs of summons to peers to attend the HL (this should now refer to the Lord Speaker). And, the warrant of the Speaker of the HC is sufficient for writs for by-elections, And, Orders in Council (SIs) are used in the case of summons to a new Parliament. Thus, (a) is not needed as such in respect of a summons.

<sup>58</sup> See generally n 56. Also, Halsbury, n 5, para 310 'Common law grants of real property by the Crown are made under the Great Seal.'

<sup>59</sup> See Halsbury, n 5, para 586, n 8.

<sup>60</sup> In practice, the UK Great Seal (or sign manual) is not required, see Halsbury, n 5, para 586.

<sup>61</sup> With the creation of a civil list and the transfer of hereditary revenues in 1760 there was no need, or incentive, for the sovereign to franchise rights to wreck, *estrays*, royal fish *etc* and, in practice, I am not aware of any such granted *post-1760*. The sovereign empowering governors to reprieve or pardon is not a franchise, but a delegation, of a CP (franchises were granted for money).

<sup>62</sup> See Halsbury, n 5, para 586. Also, para 594 'When the Crown acts on the advice of the Privy Council, as in grants of charters to towns or other bodies, it is said to be necessary that an Order in Council [i.e. a SI] should be made before the issue of the warrant. An Order in Council may itself be sufficient following upon a royal proclamation, as in the case of the issue of writs for a new Parliament.'

<sup>63</sup> *Ibid*, para 595 'The clerk of the Crown in Chancery and his deputy are officers both of the [HL] and the [HC].'

<sup>64</sup> Even in the past, there was concern as to its use since Parliament was not, thereby, not properly informed of matters such as the execution of treaties (for which ministers were impeached), see McBain, n 48, pp 831-2.

<sup>65</sup> See Halsbury, n 5, para 586.

<sup>66</sup> *Ibid*, paras 343-50.



the Chancery of England. However, these are *formal* roles only since there is a Keeper of Public Records who undertakes this in practice.

- thus, the Keeper of Public Records should take over responsibility from the LC and the MR;
- also, it would seem better for the ministry involved to be the Culture ministry (and not the Justice minister). It looks after public museums, libraries, galleries *etc.* The reason why is that it would be able to better exploit the availability of these resources for public viewing, to secure a higher cost recovery.

Finally, where appropriate, public records held in England which relate to Scotland, Wales and NI should be devolved, for the same reason.

***In conclusion, the responsibilities of the LC and MR for public records should pass to the Keeper of Public Records.***

**(g) Conclusion**

The office of LC, today, is - effectively - a sinecure since the role of the LC, in practice, is the same as that of the Justice Minister (i.e. the Secretary of State for Justice). To avoid confusion, therefore, the office of LC should be abolished.

***In conclusion, the office of LC should be abolished.***

**6. LORD CHIEF JUSTICE**

This public office has been considered in a prior article.<sup>67</sup> It has been suggested that the title LCJ be simplified to 'Chief Justice' - just as the title of the 'Lord High Chancellor' has been simplified to that of 'Lord Chancellor'. Also, the LCJ simply has too much on his plate. Halsbury states:

The [LCJ] is Head of the Judiciary of [E&W], and serves as President of the Courts of [E&W]. He presides over the Court of Appeal, the High Court, the Crown Court, the county courts [the county court] and magistrates' courts, and... the family court, and is entitled to sit in any of those courts. As President of the Courts, he is responsible for:

- (1) representing the views of the judiciary of [E&W] to Parliament, to the [LC] and to ministers of the Crown generally;
- (2) the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of [E&W] within the resources made available by the [LC]; and
- (3) the maintenance of appropriate arrangements for the deployment of the judiciary of [E&W] and the allocation of work within the courts.

The [LCJ] may lay before Parliament written representations on matters that appear to him to be of importance relating to the judiciary, or otherwise to the administration of justice.<sup>68</sup>

It is suggested that the role of 'President of the Courts' is unnecessary if the LCJ no longer presides in court (see (a) below; further (1)-(3) above only apply to the judiciary). Instead, this title should be abolished - leaving the Justice Minister to be wholly responsible for the actual running of the courts administratively (i.e. buildings, staff, security *etc.*).

**(a) LCJ to No Longer Preside in Courts - Fixing the Courts & Legislation**

The change in the position of the LC in 2005 has produced 3 problems, the consequences of which, perhaps, were not fully appreciated then. These are:

- Making the LCJ head of the judiciary and president of the courts - as well as the LCJ presiding at court - creates too great a human burden. Such results in exhaustion (burn out). Also, the inability to fully attend to pressing matters concerning justice;
- At present, the entire legal system is 'creaking' (a more forthright expression might be 'in danger of collapsing'). This is mainly due to the fact that the legal system - especially, the court system - has a Victorian structure and it simply cannot manage its current workload;
- The result is delay. Also - in the case of the Crown Court and the Family Court - many victims and litigants may not only not receive justice delayed, but *justice denied*.<sup>69</sup>

A solution would be for the LCJ to no longer preside in court. Instead, the same becomes (as the LC once was) truly head of the judiciary. That is, the person responsible for formally appointing all judges (as well as their dismissal and the acceptance of resignations). More importantly, this would give the LCJ time to hear - and reflect - on the views and concerns of all judges. Also, such would 'free up' the LCJ in order to enable him to adequately deal with points (1)-(3) above with which he is tasked.

*Further, the LCJ would also - then - have time to look at the actual architecture of the legal system and where the problems and log jams lie.* In particular, it would enable the LCJ to issue reports and ensure (with the Justice Secretary) that the following matters which have 'fallen between the stools' are remedied - the urgent need to:

<sup>67</sup> See n 1(*Courts*), pp 221.

<sup>68</sup> Halsbury, n 5, para 128.

<sup>69</sup> For example, there are some 50,000 cases presently pending in the Crown Court.

- abolish obsolete courts - none of which are needed;<sup>70</sup>
- streamline and merge courts;
- reduce the excessive volume of SIs - which is becoming unmanageable;<sup>71</sup>
- *the same* in respect of general legislation;<sup>72</sup>
- ensuring that the huge backlog of obsolete legislation is dealt with;
- *the same* in respect of obsolete common law;
- cut down the absurd volume of procedural rules.

At present, *no one* is dealing with the above.

- for example, the Ministry of Justice is not responsible for overlooking *all* legislation and SI. Or, at least, it does not regard itself as responsible;
- further, the Law Commission, in practice, only deals with a few areas of law (constitutional, commercial, land and criminal) and, even that, with the speed of a snail on strike. Also, the Law Commission (often) does not have law commissioners with an adequate *practical* experience and the skills base to analyse older law.<sup>73</sup>

By freeing the LCJ from sitting in court then - like the LC in *pre-World War II* times - the same can canvass (and represent) all judges to '*deliver the product*' (justice) much better. If not, assuredly, the legal system will start to collapse which it is in real danger of doing.

#### **(b) Head of the Law Commission**

The Law Commission, actually, performs a vital role. However, it needs to be modernized.

- it has little influence on the political stage and its agenda is, too often, dictated by the Ministry of Justice who (understandably) are subject to pressing political issues;
- further, the head of the Law Commission (invariably) tends to be a white Anglo-Saxon male Court of Appeal judge who is well thought and '*will go far*' but who may (actually) have little knowledge of early English law, no no business experience and no knowledge of law reform.

Thus, this role can be a sinecure.<sup>74</sup> Similarly, in the past, law commissioners have (perhaps, too often) tended to be academics without any practical experience (and who seem to spend much of their time editing their own law books). The result is the '*snail's pace*' of law reform.<sup>75</sup> However, is there any need for a Court of Appeal judge to sit as Head of the Law Commission for 5 years? Surely, this is a wasted resource; such would be better off in court. Not least, when there is such great pressure on the court system.

- Thus, to ensure greater productivity - and to ensure that the Law Commission's reports are given the attention that they deserve - the LCJ should be President of the Law Commission. The task would not be onerous.<sup>76</sup> This would enable him to get reports from the law commissioners (as well as up-to-date *data*). Material which the LCJ can, then, use to indicate to the Justice Minister - and to Parliament - where the log-jams are and where resources need to be allocated;
- Further, to help clear the, now, massive backlog of obsolete legislation and common law material that should be dealt with, the Law Commission should employ - on an *ad hoc* basis - retired law commissioners and senior judges who have the relevant *skills base* to help out. The LCJ would be instrumental in persuading them to assist.

#### **(c) LCJ - Corporation Sole**

Since the LCJ has taken over the role of the LC as head of the judiciary, the same should be recognized in legislation as a corporation sole<sup>77</sup> - being the *head* of a corporation aggregate comprising all the judges (being the '*body*').

- in so doing, the LCJ will replicate the position in early times. The sovereign was head of the *Curia Regis*, which body included the judges. After the courts separated out from the *Curia Regis* (which went on to become the smaller privy council - then - the even smaller cabinet) the sovereign was head of the judiciary;

<sup>70</sup> See n 1, (c) (*Courts*), pp 195-6.

<sup>71</sup> As previous noted, see 1 (j) (*Optimising*), there are 30-35k SIs (only 100 of max 800ss each are needed).

<sup>72</sup> Ibid. There were c. 2666 general Acts extant as at end of 2020 when only 75 are needed.

<sup>73</sup> In the area of commercial law this is especially so. The blackletter law is different, nowadays, to actual commercial practice.

<sup>74</sup> It seems today, often, to be used as a stepping stone for the Head of the Law Commission to rise further to the Supreme Court. However, it should be more than that.

<sup>75</sup> Lord Justice Munby (a former Head of the Law Commission and, later, Head of the Family Court) used this expression. He is to be thanked for introducing valuable reforms in that court.

<sup>76</sup> The LCJ need only meet the law commissioners 3-4 times a year for consultation (the actual administration of the Law Commission is carried out by a civil servant).

<sup>77</sup> At present, in law, the LCJ is treated as a *quasi*-corporation sole (see n 1, (h)) (*Constitution*), p 325). The LCJ should be treated as a corporation sole (it is not necessary that he have a seal).

- however, due to the sovereign lacking judicial expertise (including, often, the sovereign being illiterate) the LC was treated as head of the judiciary<sup>78</sup> with the LC holding the Great Seal<sup>79</sup> (there was not a separate seal given to the same by the sovereign to evidence the delivery of *seisin* (possession) of the legal power (Crown prerogative) to act as head of the judiciary). However, although the LC was, technically, head of the judiciary, in practice, the LCJ dealt with the judges (especially, senior judges - who comprised a tiny number of people in comparison with those of today).

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

The role of the LCJ should be re-assessed. Someone needs to represent all the judges as a whole (with their views) as well as deal with the formal appointment, dismissal - and the acceptance of the resignation - of the same. This should not be the Justice Secretary (i.e. the Secretary of State for Justice) which is a *political appointment*. Instead, that person should be wholly independent. One who, also, has the time to undertake this, in order to modernize the legal system. That person should be the LCJ. Requiring the same to also sit in court simply overloads the individual and the office. Thus, the LCJ should no longer preside in court.

### 7. **APPOINTMENTS TO OTHER PUBLIC OFFICES**

As well as public offices previously discussed, in the past, the sovereign made public appointments since the same ran the apparatus of government. Thus, the sovereign personally appointed her ministers (her '*servants*'), her judges, her governors of colonies, her senior officers of the armed forces *etc.*

- however, in the case of ministers - since 1717 - this has been a legal fiction since the sovereign no longer sits in cabinet. Instead, the ministers are appointed by the PM *in lieu*;
- for judges, as noted, this role has long been overtaken by the LC and, now, in practice, by the JAC (or other commission, in the case of the Supreme Court), see **4(b)**;
- for governors of British territories,<sup>80</sup> these are few in number compared to the colonies of old and they are, effectively, appointed by the Foreign Office Minister;
- for the armed forces, the role of C-in-C held by the sovereign has been a formal one since 1793. Thus, armed forces personnel, are - effectively - appointed by the Defence Minister.

However, the legal fiction is preserved that the sovereign formally makes these appointments by delivering seals of office (to some ministers) or by issuing patents or warrants under the UK Great Seal or the sign manual (her signature). It is that asserted all this should be dispensed with as unnecessary administration, given the formal role of the sovereign today. Instead, all the above should be appointed by letter by the appropriate minister (or, in the case of judges, the LCJ). Such would save time, money and superfluous bureaucracy. Analysing the same:

#### (a) **Ministers**

Halsbury states:

The manner in which judicial officers, members of the administration and executive officers generally are appointed by the Crown varies according to the different offices; but the more important posts are conferred directly by the Crown either:

- (1) by delivery of seals of office, as in the case of the *Lord Chancellor, the Lord Privy Seal*<sup>81</sup> and the principal Secretaries of State [i.e. certain ministers];
- (2) by letters under the Great Seal, as in the case of *Treasury Commissioners* and Justices of the Supreme Court, Lords Justices of Appeal and High Court judges;<sup>82</sup>
- (3) by warrant under the royal sign manual, as in the case of the *Paymaster General*,<sup>83</sup> circuit judges and recorders and district judges (magistrates' courts);
- (4) by commission under the sign manual and signet, as in the case of overseas governors; or

<sup>78</sup> Halsbury, n 5, para 16 'The power of doing justice in the courts has been irrevocably delegated to the judges and magistrates, so that the monarch may take no part in the proceedings of a court of justice. Since, in addition, the monarch can no longer without the consent of both houses of Parliament remove any of the judges of the senior courts, and all decisions of inferior courts are subject to review by the senior courts, the monarch has lost all power of influencing judicial decisions.'

<sup>79</sup> The transfer of the Great Seal signified the delivery of legal power (as with all the sovereign's seals). This occurred very early on (and was irrevocable - although the individual changed, the office of chancellor/lord chancellor did not). Thus, it is dubious whether the sovereign ever individually acted as a judge, even in Anglo-Saxon times. True, the sovereign may have sat in court and may have delivered judgment, to emphasise his approval and its coercive effect. However, likely, the sovereign always did this after discussions with his judges ('*law speakers*' in early times) and that, in other cases, he was a mere visitor. See also GS McBain, *Expanding Democracy - Transferring the Crown Prerogative to Parliament* (2014) Review of European Studies, vol 6, n 1, p 9.

<sup>80</sup> That is, the British *domestic* territories (Jersey, Guernsey and Isle of Man) and the 14 British *overseas* territories.

<sup>81</sup> It is asserted these offices of LC and Lord Privy Seal (a sinecure) should be abolished. So too, the title of '*Secretary of State*' (instead, the more intelligible term '*minister*' should be used).

<sup>82</sup> It is suggested the office of Treasury Commissioner (and the Treasury Board) be abolished. For the judges, see **4(b)**.

<sup>83</sup> This is a sinecure. It has been suggested it be abolished, see n 1(e) (*Government*), p 79.

(5) by declaration of the monarch herself in council, as in the case of the *Lord President of the [Privy] Council*.<sup>84</sup>

Halsbury, also, states:

Some ministerial offices, notably those of the Lord Chancellor and Secretary of State [SS] derive from the prerogative...[the SS] and certain ministers in charge of a public department of government who are not members of the Cabinet are corporations sole...Functions may be transferred by Order in Council [i.e. a SI] from one minister to another. The style and title of ministers may be altered, and departments may be dissolved by Order in Council. Statutory authority is required if a new ministerial office is to have corporate personality, except that of [SS].<sup>85</sup>

As previously noted, the above is at variance with reality. In the past, seals were to evidence the transfer (delivery) of *seisin* (possession) of a CP by the sovereign to a specific person for a specific purpose.<sup>86</sup> However, today, ministers (including the Lord Privy Seal, a sinecure) are appointed, dismissed - and have their resignation accepted - by the PM, being members of the government. Thus, employing old modes to evidence the transfer (delivery) of an office - one that can never be taken back by the sovereign (she cannot be a minister to herself) - lacks common sense, wastes time, causes confusion and adds unnecessarily to costs. Thus, a *Government Act* should provide that:

- the PM shall appoint, dismiss - and accept the resignation of all ministers - by means of a letter (it would seem best for this to be in a standard form, simple in format, state the date of appointment and be on Cabinet - or Cabinet Office - notepaper). The same should apply to the AG, the SG and the Lord President of the Privy Council (assuming the Privy Council is not abolished);
- thus, the delivery of all *secretarial seals* - and the need for them - should be abolished. Written notice should be sufficient;
- the offices of Lord Chancellor, Lord Privy Seal, Paymaster General, Treasury Commissioner and others,<sup>87</sup> should be abolished, as sinecures (it may be noted that the privy seal was abolished in Victorian times);
- the term '*Secretary of State*' (which means 'Secretary of the *Crown Estate*')<sup>88</sup> should be abolished and the term '*minister*' used instead;
- all ministers should be corporations sole (but without the need for a seal or signet; signing as a minister should be sufficient);
- all ministers should be able to perform the same function as any other minister;
- the titles (and styles) of all ministers should be capable of change by a SI;
- any ministry should be able to be created, dissolved, have its functions transferred to any other ministry or have its name altered - by means of a SI;
- the Treasury Board should be dissolved as well as the title of treasury commissioner abolished.

***In such fashion, the legal fiction of the sovereign's involvement in all these political appointments is dispensed with and much time - and money - saved.***

#### **(b) Military Appointments**

The sovereign is a non-executive C-in-C and has been since 1793. Halsbury states:

[HM] may, by Order in Council [i.e. a SI], from time to time as the occasion may demand, regulate the grant of commissions in the navy, army and air force and direct that commissions prepared under the authority of the sign manual may be issued without the sign manual but be signed by the [SS] for Defence or by the [SS] and a member or members of the Defence Council.<sup>89</sup>

Given the non-executive role of the sovereign, an Armed Forces Act should provide that all armed forces appointments should be signed by the Defence Minister (i.e. the Secretary of State for Defence) - or such other minister for the armed forces or delegate as the Defence Minister shall direct (or, as may be stipulated in a SI).

***In conclusion, a SI should provide for the appointment of armed forces officers by the Defence Minister (or his delegate), the appointment being made by means of a signed writing. This will save time and money.***

#### **(c) Judges**

At present, the position is, in respect of the appointment of judges (see also **4(b)**);

<sup>84</sup> Halsbury, n 5, para 576. It is suggested the Privy Council be abolished.

<sup>85</sup> Ibid, para 576. All ministers should be corporations sole (it is, legally, illogical to have only some of them so being).

<sup>86</sup> e.g. to the Defence Minister (i.e. the Secretary of State for Defence) to perform CP functions relating to defence only.

<sup>87</sup> See **3**.

<sup>88</sup> '*Estate*' in early times with reference to the Crown meant all the Crown prerogatives (apart from personal prerogatives of the sovereign) - not just Crown land. See also n 1, (*Crown Estate*), p 7 (see Revocation of the Ordinances 1322 (still extant), art 4, it refers to '*l'estat*' of the Crown, which is best translated as '*Crown prerogatives*').

<sup>89</sup> Halsbury, n 5, para 576. See also Officers' Commissions (Army) Order of 23 March 1967 and the Officers Commissions Act 1862. These should be repealed.

- by letters under the UK Great Seal in the case of Justices of the Supreme Court, Lords Justices of Appeal and High Court judges;
- by warrant under the royal sign manual in the case of circuit judges, recorders and district judges (magistrates' courts);
- by an instrument of appointment by the sovereign (on the recommendation of the LC) in the case of district judges.

The problem with this is that it is mere *formality* since the sovereign no longer performs an executive function. Also, there is little reason for making a distinction between different categories of judges. Further, there is no real notification to - or approval by - Parliament. Thus, the appointment of all judges (as well as QC's) should be by a letter from the LCJ (or by means of a SI). This removes the sovereign from being involved in such matters. Also, it prevents a government from procuring a person who is unsatisfactory from being appointed a judge - by having the sovereign 'sign off' on the same - when the sovereign has no executive power to refuse assent.

***In conclusion, a SI should provide for the appointment of judges by the LCJ, such appointment being made by means of a signed writing.***

#### **(d) Governors**

As Halsbury notes, governors (and lieutenant governors and commissioners) are appointed by commission under the sign manual and signet. This involves 3 documents<sup>90</sup> viz.

- an Order in Council (i.e. a SI) - or letters patent - constituting the office of governor;
- instructions under the sign manual (or signet);
- the commission under the sign manual (or signet) appointing the governor to act pursuant to the first two.

Given that there are now so few governors (and lieutenant governors and commissioners) of British territories, all should be appointed by means of a signed letter from the Foreign Office minister or his delegate (being another minister to the Foreign Office).

***In conclusion, a SI should provide for the appointment of governors by the Foreign Minister, such appointment being made by means of a signed writing.***

#### **(e) Other Public Officers**

A *Government Act* should indicate that:

- a SI may regulate the manner of appointment, dismissal and acceptance of the resignation of any person to a public office - listing the public office and the name of the person empowered to appoint (i.e. the appointee);
- in all cases, appointment should be by means of a signed letter indicating the date of appointment.

This will bring clarity and simplicity to matters, since there is little (or none) at present. In particular, the need for the involvement of the sovereign to execute any appointment to a public office should end. This is due to the fact that the sovereign's role is, now, a non-executive one.

#### **(f) Misconduct in a Public Office**

This area of law is opaque and varies as between public officers. However, this is unnecessary. A *Government Act* should provide that all persons holding a public office (including all judges of all courts) should be capable of being dismissed for:

- misconduct in a public office (which includes failure to perform);
- incapacity in a public office;

In older times, various expressions were used such as: 'misfeasance', 'misbehaviour' or the need for a person to exercise 'good behaviour' etc. However, the more modern expression should be 'misconduct'. Halsbury states:

Where an office held during good behaviour is conferred by letters patent, procedure by writ of *scire facias* on the Crown side of the Queen's Bench Division of the High Court or impeachment may, it seems, be necessary in order to vacate the office. Some offices are specially protected by the terms of their appointment.<sup>91</sup>

However, *impeachment* is almost certainly obsolete (not least, since the HL cannot act as a court) and *scire facias* on the Crown side should be abolished as unnecessary. So too, any offices that are *specially protected*,<sup>92</sup> since this is not conducive to the rule of law. That is, the general law on misconduct and incapacity should apply to all public offices in modern society. Further, the AG should have the power to prosecute any public officer (including civil servants) for misconduct and incapacity (save for judges who are dealt by the LCJ). Halsbury states:

Where an office is held during good behaviour subject to the power of removal by the Crown on an address from both houses of Parliament, proceedings may, it seems, be initiated by

a petition to either House of Parliament, praying for an address to the Crown,

<sup>90</sup> See Halsbury, n 5, para 576, n 7.

<sup>91</sup> Ibid, para 577.

<sup>92</sup> e.g. Crown Estate Act 1961, sch 1, para 1(5) (there is no good reason for this special protection).

or by articles of charge presented to the [HC] by a member (though such a proceeding has been so long out of use that it is doubtful whether it is still available);

or proceedings may be originated in either House by a resolution for an address to the Crown to appoint a committee of inquiry into the conduct of the person designated, although preferably they [the proceedings] should be commenced in the [HC] (*wording divided for ease of reference*)<sup>93</sup>

The problem with this (complicated and uncertain) procedure is that it derives from the times of impeachment (*obs*), *scire facias* on the Crown side (*obs*), criminal information (abolished in 1967), high crimes and misdemeanours (*obs*) and the exercise of the inquisitorial and judicial jurisdiction of the HL (*obs*, since judges have now decamped to the Supreme Court).<sup>94</sup> Further, it is likely that the same could only apply to certain senior judges now.<sup>95</sup> As to these, Halsbury states:

Judges of the Supreme Court and the Senior Courts hold their offices during good behaviour, subject to a power of removal upon an address to the Crown by both houses of Parliament. The grant of an office during good behaviour creates an office for life or until retirement age determinable upon breach of the condition. High Court judges, Lords Justices of Appeal and Heads of Division holding office during good behaviour who become incapacitated may have their offices declared to have been vacated by the [LC].<sup>96</sup>

This complex process belongs to another era. A modern process should be such to enable a judge to appeal by means of a court process since this emphasizes the rule of law. Thus, *all* public officers should be subject to dismissal from a public office for: (a) misconduct; or (b) incapacity. And, all this should involve judicial process (to avoid any political interference) - *save for* Supreme Court judges and the LCJ (who might appeal to Parliament).

***In conclusion, the process for appointing and dismissing public officers is badly out of date. It should be simplified and be subject to judicial process, in order to avoid political interference.***

## **8. CONCLUSION - SECTIONS 1-7**

There are c.182 CP's of which it is calculated c. 85% are obsolete and the remainder should be placed in legislation. As to the CPs which have been analysed in this article, the:

- CP to appoint an AG and a SG should be abolished since the sovereign is no longer involved in the same. Instead, the PM should appoint (dismiss and accept the resignation of) the same. And, the SG should be titled a deputy AG;
- franchise of the offices of AG and SG to the county palatine of Durham - and the duchies of Cornwall and Lancaster - should be abolished. The AG and SG should absorb these offices;
- CP to appoint a Treasury Solicitor should be abolished and his role wholly set out in modern legislation (the title of 'Queen's Proctor' should also be abolished);
- office of LC should be abolished;
- LCJ should appoint - as well as dismiss and accept the resignation of - *all* judges. Further, the dismissal of the same for misconduct or incapacity should - in case of an appeal - be conducted through the courts and not by way of Parliament (save only in the case of an appeal by a Supreme Court judge or the LCJ);
- CP to appoint a person to any other public office should be abolished and a SI should set out the title of the public office and the appointees;
- further, all appointments to public offices should be by way of signed writing and the UK Great Seal and other Crown seals abolished, being only required to deal with illiteracy;
- finally, the sovereign should no longer be involved in any appointments since this role is only formal today.

If all the above was done, how much more business-like, common sense and modern things would be! And it would save time and costs. Would anyone complain? Probably, only one or two civil servants with vested interests (certainly, the sovereign would not - since the use of seals in a literate society is pure '*mumbo-jumbo*' anyway).<sup>97</sup>

## **9. CP TO ISSUE A PARDON**

The prerogative (that is, the privilege) of the sovereign to pardon a person when the same had been found guilty of having committed a criminal offence, may be found in Anglo-Saxon law. Indeed, it was legislative. Thus, Kemble noted:

<sup>93</sup> Halsbury, n 5, para 578.

<sup>94</sup> Ibid, para 577. Also, *Barrington's Case* (1830) 62 Lords Journals 599 at 602. Sir Jonah Barrington (1760-1834) was an Irish Admiralty judge who appears to be the only example of a judge being removed on an address to Parliament (for peculation).

<sup>95</sup> Cf. Parliamentary Commissioner Act 1967, s 1 (2), (3). Also, Halsbury, n 5, para 578, n 3.

<sup>96</sup> Halsbury, n 5, para 578.

<sup>97</sup> This was how the use of seals was described by that eminent commercial and international judge (a former law lord), Lord Wilberforce, in 1971. He stated 'Sealing is now a completely fictitious matter...[I] would have hoped that we might of got rid of that *mumbo-jumbo* and aligned ourselves with most other civilised countries.' See Parliamentary Debate on the Powers of Attorney Act 1971. HL Debates, vol 315. col 1213 (Feb 25<sup>th</sup>, 1971). Quoted in GS McBain, *Abolishing Deeds, Specialities and Seals: Part 1*, *Commerical Law Quarterly* (an Australian publication), June-August 2006, pp 12 & 26.

When judgment was pronounced, it appears that in certain cases, at least, the king possessed the power to stay execution and pardon the offender, - an exertion of the royal prerogative which one feels pleasure in thus referring to so ancient a period. The necessary evidence is supplied in many passages of the [Anglo-Saxon] laws.<sup>98</sup>

Thus, for example, reference may be made to the laws (dooms) of king Ine of Wessex (689-726 AD):

If anyone fights in the king's house, he shall forfeit all his property, and it shall be for the king to decide whether he shall be put to death or not.<sup>99</sup>

Also:

If an alderman [ealdorman] let a thief escape, then, he forfeited [control of] his shire, unless the king pardoned him.<sup>100</sup>

The need for a pardon was particularly necessary in the case of Anglo-Saxon England when children over 12 were often put to death for theft.<sup>101</sup> General pardons were, also, given.<sup>102</sup> After the Norman Conquest (1066) the CP of the sovereign to grants pardons was retained.<sup>103</sup>

#### (a) **Coke (1641)**

It is not necessary - for present purposes - to consider the law on pardon in detail down the centuries. However, it may be noted that it was particularly exercised in order to pardon those who had killed - but by accident, due to insanity or in self defence.<sup>104</sup> For his part, by the 17<sup>th</sup> century, Coke (1552-1634), in his *Institutes of the Laws of England* (published in 1641), stated:

A pardon is a work of mercy, whereby the king either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical: all that is forfeited to the king by any attainder *etc* he may restore by his charter...

We call it latin *perdonatio*, and derive it a [from] *per et dono*: *per* is a preposition, and in the Saxon tongue is *for*, or *vor*: as to forgive is thoroughly to remit...

All pardons of treason or felony are to be made by the king, and in his name only, and are either general or special. All pardons either general or special, are either by Act of Parliament...or by the charter of the king...And these again are either absolute, or under condition,<sup>105</sup> exception, or qualification...General pardons are by Act of Parliament...<sup>106</sup>

In conclusion, Coke indicated that pardons were either *general* or *special* (that is, individual). And, that only Parliament issued the former. Further, Coke noted that pardons could be *absolute* or *conditional* (i.e. on terms). However, he did not treat remissions (i.e. mere reductions) of prison sentences as requiring a pardon. Since much of the material on pardons in Coke is obsolete it is not referred to here and, indeed, Blackstone, *Commentaries on the Laws of England* (1<sup>st</sup> ed, 1765-9) is the best summary on the law relating to pardon with regard to the immediate past.

#### (b) **Blackstone (1769)**

Blackstone stated:

<sup>98</sup> Kemble, n 26, pp 49-50.

<sup>99</sup> FL Attenborough (ed), *The Laws of the Earliest English Kings* (1963), p 39. Ibid, p 69, Laws of king Alfred (886-899 AD) 'If anyone fights or draws his weapon in the king's hall, and [if he] is arrested, it shall be for the king to decide whether he shall be put to death, or permitted to live, in [the] case [where] the king is willing to forgive him'.

<sup>100</sup> Ibid, p 49.

<sup>101</sup> Ibid, Laws of king Aethelstan (927-939 AD), p 169 (no one should be killed under the age of 15 unless he defends himself, or tries to escape or refuses to give himself up).

<sup>102</sup> Ibid, p 145 'all humbly thank you [king Aethelstan], their most beloved lord [king] for the favour you have granted to criminals; namely that all criminals shall be pardoned for any crime whatsoever, which was committed before the Council of Faversham, on the condition that henceforth and forever they abstain from all evil doing, and between now and August confess their crimes and make amends for everything of which they have been guilty.'

<sup>103</sup> Thus, the so called *Laws of Edward the Confessor* (1042-66, but (probably written c. 1140) provided, see 'B O'Brien, *God's Peace and the King's Peace* (1999), p 177 'if any offender asks for his mercy from fear of death or loss of limbs because of his offense, he [the king] can pardon him, if it pleases [him], by the law of his dignity [*dignitatis*].' The reference to '*dignity*' meant by reason of the dignity of the office of the king.

<sup>104</sup> For a useful discussion of pardons in the case of homicide, see F Pollock & FW Maitland, *The History of English Law* (2<sup>nd</sup> ed, by SFC Milsom, CUP, rep 1984), vol 2, pp 480-5. See also TFT Plucknett, *A Concise History of the Common Law* (1956), pp 445-6.

<sup>105</sup> As Coke noted, conditional was where something - such as the provision of surety - was required. He referred to 10 Edw 3 c 2 (1336)(relating to purveyance), rep 1863).

<sup>106</sup> E Coke, *Institutes of the Laws of England* (1618-41, see 1817 ed, Clarke & Sons, rep Law Book Exchange), vol 3, pp 233-9. See also T Forster, *Lay-Mans Lawyer...also a discourse concerning Pardons and Remission of Punishment* (1654).

His [the king's] power of pardon was said by our Saxon ancestors to be derived a *lege suae dignitatis*: [i.e. from the law relating to the dignity attached to his office]<sup>107</sup> and it is declared in parliament, by statute 27 Hen VIII c 24 [see s 1, (1535), *Jurisdiction in Liberties*, rep] that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial Crown...the king may pardon all offences merely against the Crown, or the public; excepting.

1. *That to preserve the liberty of the subject, the committing any to prison out of the realm, is by the Habeas Corpus Act, 31 Car 2 c 2 [1679] made a praemunire, unpardonable even by the king.*<sup>108</sup>

Nor, 2 can the king pardon, where private justice is principally concerned in the prosecution of offenders: '*non potest rex gratiam facere cum injuria et damno aliorum*'. [the king cannot confer a favour on one man to the injury and damage of others]<sup>109</sup> ...<sup>110</sup>

Neither can he [i.e. the king] pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine: because, though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offence favours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong. *Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought: for thereby the informer hath acquired a private property in his part of the penalty.*<sup>111</sup>

As to the manner of pardoning: it is a general rule, that wherever it may reasonably be presumed the king is deceived, the pardon is void. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed. ...<sup>112</sup>

A pardon may also be conditional: that is, the king may extend his mercy upon what terms he pleases: and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend: and this by the common law. *Which prerogative is daily exercised in the pardon of felons, on condition of transportation to some foreign country (usually to some of his [HM's] colonies and plantations in America) for life, or a term of years...*<sup>113</sup>

With regard to the allowing of pardons; we may observe, that a pardon by Act of Parliament is more beneficial than by the king's charter: for a man is not bound to plead it, but the court must *ex officio* take notice of it; neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon...

Lastly, the effect of such pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new, credit and capacity.<sup>114</sup> (*italics refer to obsolete material*)

### (c) **Chitty (1820)**

Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), also dealt with pardons. He stated:

The king is, in legal contemplation, injured by the commission of public offences [i.e. crimes]; his peace [i.e. the criminal law] is said to be violated thereby, and the right to pardon cannot be vested more properly than in the sovereign, who is, from his situation, more likely than any one person to exercise it with impartiality, and to whom good policy requires that the people should look, with submissive respect, as the head of the nation, and supreme guardian of its laws...the statute of 27 Hen 8 c 24 s 1 [1535, see above] vests the sole right of pardoning in the king.

This right, or rather prerogative, belongs to a king *de facto*, and not to the king *de jure*, during the usurpation of the former. It is an incommunicable prerogative; except, perhaps, in the colonies, where, by grant from the Crown, it may be exercised by the governor, *etc.* The king's right to pardon and remit the consequences of a violation of the law, is confined to cases in which the prosecution is carried on in [HM's] name, for the commission of some offence affecting the public, and which demands public satisfaction, or for the recovery of a fine or forfeiture, to which [HM] is entitled...<sup>115</sup>

Chitty, then, considered when - and how - the sovereign might grant a pardon. However, many of his examples - such as a pardon after *impeachment* or the *suspension* (or *dispensation*) of a pardon - are obsolete. So too, the

<sup>107</sup> W Blackstone, *Commentaries on the Laws of England* (1765-9), vol 4, pp 389-90 referring to the Laws of Edward the Confessor, see n 103.

<sup>108</sup> This Act, s 111 is still extant. However, the reference to pardon should be repealed since it was comprises a pardon for the criminal offence of *praemunire* and there is no longer such a crime. Anglo-Saxon law also made provision for unemendable (unpardonable) crimes.

<sup>109</sup> Blackstone refers to Coke, n 106, p 236. See also Halsbury, n 5, para 139, n 10.

<sup>110</sup> Blackstone, then, refers to appeals, obsolete after 1819.

<sup>111</sup> Now obsolete. Blackstone, then, dealt with impeachment (now obsolete) in which a pardon at bar could not stop the process.

<sup>112</sup> This tends to be forgotten in modern legal texts, it should be noted.

<sup>113</sup> It is argued that conditional pardons and remissions of sentence, today, should not be treated as such since they comprise only a change in (i.e. the commutation of) a sentence and are not based on a '*miscarriage of justice*' as such (unlike absolute pardons where the general basis is that the person sentenced did not commit the offence). Therefore, only absolute pardons should be treated as such, see (h) above.

<sup>114</sup> Blackstone, n 107, pp 389-95.

<sup>115</sup> J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), pp 89- 90.



*substitution* of a milder form of punishment (which was, often, exercised in the case of high treason or murder). As for a:

- conditional pardon;
- temporary pardon; or a
- reprieve,

these tended to be connected to when the death penalty was imposed. A pardon could only be effected by Act of Parliament or under the great seal.<sup>116</sup> Finally, Chitty noted that a pardon obliterated ‘*every stain which the law attached to the offender*’.<sup>117</sup> That is, the punishment was removed but not the fact of conviction.

**(d) Maitland (1887-9)**

After Chitty wrote in 1820, there was increasing change in this area of law. First, after 1837, the personal involvement of the sovereign in the grant of pardons ended. Thus, Keith stated:

Prior to the advent of Queen Victoria [1837-1903] to the throne, it was still the custom for the sovereign to consider in council the report sent by the recorder or judge at the Central Criminal Court on cases of prisoners sentenced to death and to decide whether they should be executed...The duty was clearly unsuited to a young queen and the practice was changed by statute, so that execution is carried out on the authority of the judge’s sentence.<sup>118</sup>

Maitland, in his *The Constitutional History of England* - a course of lectures he delivered at Cambridge University in 1887-8 which was published after his death - stated:

the royal power of pardon does not extend to civil proceedings...the crown<sup>119</sup> has a considerable control over criminal proceedings. (i) It can pardon any crime before or after conviction. This power is exercised for the king by a Secretary (Home) of State. A may commit a brutal murder, the king can pardon him and so stop any trial. An explanation of this wide legal power may be seen in this, that during the Middle Ages there were two methods of proceeding against a felon - the appeal brought by the person injured by the crime, for instance, the person whose goods were stolen, or the next kinsman of the murdered man - and the indictment, a royal procedure at the king’s suit. The king by pardon might free a man from indictment, but not from appeal. But appeals of felony have long been disused and were abolished in 1819...Thus, the king can completely pardon any crime...<sup>120</sup>

In 1819 - with abolition of criminal appeals - it would have been appropriate to consider whether *pre-sentence* pardons should be abolished. However, impeachment (at least, theoretically) still existed - the last (unsuccessful) case being in 1806 (and, before that, in 1746).<sup>121</sup> By Maitland’s time (1887-8), however, the matter of abolishing *pre-sentence* pardons would have been pertinent and, today, it certainly is. *Why?*

- Today, impeachment is obsolete and only a court - or the AG (*by nolle prosequi*) - should be able halt criminal proceedings. Even in the latter case, this right should be abolished (as well as any trial at bar in the case of civil proceedings), see **1**;
- Otherwise, the rule of law might be subverted for political, or other, motives. Such does not mean that an *application* should not be able to be made by the AG (or by an accused’s lawyers) to the criminal court. However, only a criminal court should terminate (end) the criminal process.

Thus, *pre-sentence* pardons should be consigned to history. Maitland also stated:

The king has no power to commute a sentence. When we hear of sentences being commuted, what really happens is that a conditional pardon is granted, a condemned murderer is pardoned on condition of his going into penal servitude [now obsolete].<sup>122</sup>

This is technically correct. *However, should a conditional pardon be retained today?* After all, it is given when it is not disputed the accused has committed the crime. The issue, rather, is that of a change being made to the form of the punishment. For example, changing a death penalty to one of transportation or penal servitude (neither of which are now possible). Thus, it is argued that a ‘*pardon*’ should not be given in this case. Instead, it should be

<sup>116</sup> Ibid, p 98 ‘A pardon may be effectually granted either by Act of Parliament, or under the great seal, and in general, there seems no other legal mode of obtaining one...A statute pardon is more beneficial to the prisoner than a pardon by the king’s charter, under the great seal.’

<sup>117</sup> Ibid, p 102-3 ‘The king’s pardon, if general in purport and sufficient in other respects, obliterates every stain which the law attached to the offender. Generally speaking, it puts him in the same situation as that in which he stood before he committed the pardoned offence; and frees him from the penalties and forfeitures to which the law subjected his person and property.’

<sup>118</sup> AB Keith, *The Constitution of England from Queen Victoria to George IV* (1940), p 129. See also 4 Will 4 & 1 Vict c 77.

<sup>119</sup> Maitland refers to the ‘*Crown*’, showing the transition from the sovereign making the decision. However, this is not wholly correct since this remains a personal prerogative of the sovereign, at base, albeit she has now instructed one of her servants (a minister) to exercise it on her behalf.

<sup>120</sup> FW Maitland, *The Constitutional History of England* (1950), p 479-80. Maitland, also, mentioned impeachment, now obsolete.

<sup>121</sup> See McBain, n 48.

<sup>122</sup> Cf. ECS Wade & GG Phillips, *Constitutional Law* (1<sup>st</sup> ed, 1931), p 177 ‘A commutation, or conditional pardon, substitutes one form of punishment for another. A capital sentence is usually commuted to penal servitude for life, if the Home Secretary advises an exercise of the prerogative... Remission reduces the amount of a sentence without changing its character, e.g. reduces a sentence of imprisonment from six months to two months, or remits part of a fine.’

left to a court to ‘commute’ the form of the sentence. This, on the application of the person sentenced (or his lawyers) or the A-G.

***In conclusion, today, pre-sentence - and conditional - pardons should be abolished (see below).***

**(e) Halsbury (1909)**

Halsbury, *Laws* (1<sup>st</sup> ed, 1909), indicates how things had moved on from the time of Chitty, writing nearly a century before. Halsbury stated:

The Crown<sup>123</sup> enjoys the exclusive and inseparable right of granting pardons, and this privilege cannot be claimed by any other person either by grant or prescription, though it is usually delegated to colonial governors...

The right of pardon is...confined to offences of a public nature where the Crown is prosecutor<sup>124</sup> and has some vested interest either in fact or by implication; and where any right or benefit is vested in a subject by statute or otherwise, the Crown, by a pardon, cannot affect it or take it away.

Pardons may be either free or conditional, the latter being usually granted where a death sentence is commuted. . Formerly, they were in all cases required to pass under the great seal, but on conviction of any felony punishable with death or otherwise a sign manual warrant, countersigned by a principal Secretary of State, has now, on the discharge of the offender out of custody, or on the performance of the condition in the case of free and conditional pardons respectively, the same effect as a pardon under the Great Seal as to the felony for which it is granted.

A pardon is usually granted on the advice of the Home Secretary, to whose notice the matter is brought either on recommendation to mercy by the judge when passing sentence, or on petition by the criminal himself or his friends on his behalf. On the consideration of any petition for pardon having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted after [18<sup>th</sup> April 1908], the Home Secretary, is empowered, if he thinks fit, at any time either to refer the whole case to the Court of Criminal Appeal, when the case must be heard and determined by that court, as in the case of an appeal by a convicted person, or to refer any point arising in the case, with a view to determination of the petition, to that court for their opinion thereon, and the court must consider the point so referred, and furnish the Home Secretary with their opinion thereon accordingly.<sup>125</sup>

The establishment of a Court of Criminal Appeal was a result of the notorious Adolf Beck criminal case (one of mistaken identity) the effect of which was to reduce the need for pardons in most cases - since a system of appeal against a criminal conviction now existed.<sup>126</sup> It may, also, be noted that - from the end of 19<sup>th</sup> century - a more enlightened policy prevailed in respect of the death sentence for murder and the tendency was to relieve - albeit, sometimes this was actuated it seems (inappropriately) by public sympathy/sensationalism.<sup>127</sup> Thus, no pardon was required to be given.

**(f) DeSmith (1999)<sup>128</sup>**

In his text on *Constitutional and Administrative Law* (1999), De Smith stated:

The prerogative of pardon (exercisable only on the advice of a Secretary of State is used to grant absolute or conditional pardons to persons convicted of criminal offences<sup>129</sup> or to remit part of the sentence of imprisonment or the fine imposed. A conditional pardon substitutes, by commutation, a different penalty for that imposed by the court; whether the person convicted could reject the conditional pardon is a nice question;<sup>130</sup> in the last resort the Crown could, if it saw fit, grant a free pardon. Statutory authority exists for the early release of a prisoner.<sup>131</sup>

<sup>123</sup> This is inaccurate; the reference should be to the ‘sovereign.’ This was a personal prerogative (now, a purely formal one).

<sup>124</sup> Maitland, n 120, p 479, put it more succinctly ‘the royal power of pardon does not extend to civil proceedings’.

<sup>125</sup> Halsbury, (1<sup>st</sup> ed, 1909), vol 6, pp 404.5.

<sup>126</sup> Ibid, p 405. See also Report on the C-ee of Inquiry into the case of Adolf Beck, Parliamentary Paper, Cd 2315, J 1904. Ibid, fn (x).

<sup>127</sup> Keith, n 118, pp 130-1 (reprieves of Mrs Maybrick and Rayner). For the pardon given to Lynch, see Ibid, p 335 (convicted of high treason during the Boer War) he was given a conditional pardon, the sentence of death being reduced to penal servitude, which was imposed in 1903. However, it seems as a result of public sympathy, this commuted sentence was ended in 1904.

<sup>128</sup> See also material in AB Keith, *The King and the Imperial Crown* (1936), pp 332-8 and Keith, n 118, vol 1, pp 129-32.

<sup>129</sup> In a fn, De Smith noted that: ‘It would seem that a pardon may be granted before conviction; but this power is not exercised. The line between pardon before conviction and the unlawful exercise of the dispensing power is thin. A pardon removes all the ‘pains, penalties and punishments’ flowing from a conviction, but in no sense eliminates the conviction itself, according to the Court of Appeal: *R v Foster* [1985] QB 115; see also *R v Secretary of State for the Home Department ex p Bentley* [1993] 4 All ER 442. A statutory right to compensation for those wrongly convicted and sentenced was provided for the first time in 1988.’

<sup>130</sup> S De Smith & R Brazier, *Constitutional and Administrative Law* (8<sup>th</sup> ed, 1998), p 145. Reference was made to Brett (1957) 20 MLR 131. H Barnett, *Constitutional and Administrative Law* (13<sup>th</sup> ed, 2020), p 107 ‘Commutation of sentence is a limited - or conditional - form of pardon. The sentence will be reduced on conditions...’. One would agree. Commutation and conditional pardon are synonyms. Remission and conditional pardon are not. Ibid. ‘Commutation is distinguishable from remission of sentence. The latter reduces the sentence imposed but does not alter its form.’

<sup>131</sup> Ibid. Reference was made to the Criminal Justice Act 1991, Pt 2 (formerly *parole*).

Thus, it may be noted that, by this stage, pardons were - in practice - only issued in respect of criminal offences and these, *post-conviction*. The latter point was disputed by Phillips and Jackson, in their *Constitutional and Administrative Law* (8<sup>th</sup> ed, 2001). In general, they stated:

The sovereign acting in England and Wales by the Home Secretary, may pardon offences of a public nature, which are prosecuted by the Crown. Although it is a personal power of the sovereign, it was described by Lord Slynn as, '*part of the whole constitutional process of conviction, sentence and the carrying out of the sentence*'.<sup>132</sup> Since 1997 the Home Secretary may seek the assistance of the Criminal Cases Review Commission [CCRC] in connection with the exercise of this power; in addition the Commission can suggest to the Home Secretary that he should exercise the prerogative of mercy.<sup>133</sup> A full or free pardon removes all '*pains and penalties and punishments whatsoever*' ensuing from a conviction but does not eliminate the conviction itself which can only be quashed by a court. In addition to a full pardon it is possible to grant a posthumous pardon, to partially remit the penalty imposed, or to grant a conditional pardon whereby a lesser penalty is imposed...

Pardons also used to be granted before conviction in order to guarantee immunity to prosecution to Crown witnesses.<sup>134</sup> *There is no reason to believe that such a prerogative no longer exists.*<sup>135</sup> (*italics supplied*)

The CCRC was established by the Criminal Appeal Act 1995, and came into existence in 1997. It took over the power previously exercised by the Home Secretary to refer possible miscarriages of justice cases back to the Court of Appeal. In addition it has power in certain circumstances to refer cases to the Crown Court (section 13). The CCRC can act on its own initiative or after an application by or on behalf of the convicted person.<sup>136</sup>

Phillips appears to be mistaken with regard to a CP to give a pardon *pre-conviction* since his footnote refers to a statutory power which is not the same as a common law Crown prerogative. Further, according immunity from prosecution is not the same as a *pre-conviction* pardon and to '*synonymise*' the two is inappropriate.

**(g) Bradley (2018)**

In the text, Bradley, *Constitutional and Administrative Law* (17<sup>th</sup> ed, 2018) it is stated:

The Crown may also pardon convicted offenders, though under the Criminal Appeal Act 1995 the Home Secretary may seek the advice of the [CCRC]. Pardons may take three forms -

as a special remission granted after a prisoner has been released early by mistake,<sup>137</sup>

as a conditional pardon to commute a sentence (such as the death penalty to life imprisonment) or

as a free [full] pardon to address a miscarriage of justice. (*wording divided for ease of reference*)

Most recently, pardons (including posthumous pardons for thousands of men convicted of historic homosexual offences) were granted by statute.<sup>138</sup>

Reference may also be made to the Ministry of Justice report, *Review of the Executive Royal Prerogative Powers - Final Report* (2009).<sup>139</sup>

**(h) Halsbury (5<sup>th</sup> ed, 2014)**

Halsbury notes:

The Crown<sup>140</sup> enjoys the prerogative right of granting pardons, a privilege that cannot be claimed by any other person either by grant or prescription. In the overseas territories and commonwealth realms it may be delegated to the Governor or Governor General, although in so doing the monarch does not entirely divest herself of the prerogative.

In general, pardons may be granted before or after conviction; *but no pardon is pleadable in bar of an impeachment by the Commons, and the penalty of imprisonment imposed by statute for committing to prison out of the realm cannot be remitted.* A pardon may be granted posthumously. (*italics supplied in the case of obsolete material*)

<sup>132</sup> OH Phillips *et al*, *Constitutional and Administrative Law* (8<sup>th</sup> ed, 2001), pp 418-20.

<sup>133</sup> *Ibid*, referring to the Criminal Appeal Act 1995, s 16.

<sup>134</sup> *Is this correct?* One would suggest that any immunity given for a crime not yet committed (or a crime committed but where sentence has not yet been imposed) is different from a *pre-sentence* pardon. Cf. Blackstone, n 107, vol 4, p 369 noted that pardons were, often, pleaded in the case of attainders to arrest (i.e. to stop the issue of) a judgment since, otherwise, the attainder and penalty of corruption of blood could only be overturned by Parliament. This is not the same as immunity.

<sup>135</sup> See OH Phillips, n 132, p 420, fn 26. The authors noted 'Prerogative powers are not lost by disuse...Immunity from the risk of prosecution for treason was granted to Bishop Muzurewa and Mr Ian Smith when they attended the constitutional conference on Rhodesia in London in 1979 by the making of the Southern Rhodesia (Immunity for Persons attending Meetings and Consultation) Order 1979 (SI No 820), p 2, under powers conferred by the Southern Rhodesia Act 1965...The Attorney-General has said of the undertaking given with respect to statements of evidence given at the Saville Inquiry into the events of '*Bloody Sunday*' that it is not an immunity...'

<sup>136</sup> Phillips, n 132, p 420.

<sup>137</sup> This is actually a remission of sentence which is not the same as a pardon. It shows how this area of law is becoming confused.

<sup>138</sup> AW Bradley *et al*, *Constitutional and Administrative Law* (17<sup>th</sup> ed, 2018), p 260. The Act was the Policing and Crime Act 2017, s 164.

<sup>139</sup> See pp 15-16.

<sup>140</sup> The reference should be to the '*sovereign*'.

The right of pardon is, moreover, confined to cases of a public nature where the Crown is prosecutor and has some vested interest either in fact or by implication; and where any right or benefit is vested in a subject by statute or otherwise, the Crown, by a pardon, cannot affect or take it away<sup>141</sup> The prerogative to grant pardons extends to ecclesiastical disciplinary offences.

In respect of the above, impeachments are obsolete and legislation should provide for their abolition. Also, in early times, pardons (and reprieve) only applied to serious offences - invariably felonies (which were punishable by death).

- Since there is now an appeal process (the Court of Appeal and the Supreme Court being appeal courts) in which convictions can be quashed (overturned), pardons should be restricted to persons convicted of crimes<sup>142</sup> imposing *life imprisonment only*. Thus, not in respect of the following (which should be quashed instead):
  - summary criminal offences;
  - criminal offences where the sentence was less than life imprisonment;<sup>143</sup>
  - any fine or penalty;<sup>144</sup>
  - Church of England ('CoE') disciplinary offences.<sup>145</sup>
- Also, pardons should not be granted *pre-conviction*.<sup>146</sup> Such can constitute a grave miscarriage of justice;
- Further, pardons should not be granted where there is simply a commutation of sentence (i.e. a conditional pardon) or the remission of a sentence;
- Nor should pardons be granted where the issue is of immunity from prosecution - since such is not the same as a pardon.

The law on pardons should be modernized, therefore. Not least, to recognize the fact that the sovereign is no longer personally involved;<sup>147</sup> also, the role of the CCRC *post-1997*. As Halsbury notes, pardons are now rare (and they should be, if prosecutors and the courts are properly doing their investigative work). Halsbury continues:

A pardon is usually granted on the advice of the Home Secretary, to whose notice the matter is brought either on a recommendation to mercy by the judge when passing sentence, or on petition by the criminal himself or friends on his behalf. The courts may not inquire into the merits of the exercise of the prerogative, but there may be cases in which the exercise is reviewable.<sup>148</sup>

The problem with the Home Secretary being involved is that - since 1837 - it has proved fairly disastrous converting cases of pardon (and reprieve) into '*political footballs*'. This, sometimes, almost constituted a miscarriage of justice in itself. Given this, since the sovereign no longer exercises executive power in this matter, she should no longer be involved. Neither should her servant (the Home Secretary).

- Thus, all petitions should be directed to, and analysed by, the CCRC only. And, then, considered by the Court of Appeal. This avoids politics;
- It, also, avoids the judicial review of a politician's decision. A situation in which there is a danger of a judge simply imposing his (her) own personal view but '*dressing*' it up as a legal point;

<sup>141</sup> Cf. AB Keith, *The Privileges and Rights of the Crown* (1936), p 75 'The Crown also has the right of pardoning any crime of a public character, and by statute it may remit penalties even when part or whole may be payable to some other person, for instance to a public informer under the Sunday Observance Act, 1780 [rep], a power which has recently been exercised.'

<sup>142</sup> This would exclude any form of civil offence, making this clear.

<sup>143</sup> In earlier times, pardons were, usually, restricted to where death was involved (for killing others, high treason *etc*).

<sup>144</sup> The Remission of Penalties Act 1859 should be modernised. Any court should be able to remit (i.e. quash) the payment of any money ordered by a court, whether by way of a fine, penalty or otherwise. See also Halsbury, n 5, para 144. Also, Remission of Penalties Act 1875.

<sup>145</sup> The Ecclesiastical Jurisdiction Measure 1963, s 83(2)(a) provides that nothing in that Measure affects any royal prerogative. This Measure only applies to the CoE. This is unfair to other churches. And, in any case, unnecessary since Synod can apologise for the same (and issue a Measure, which is of a legislative nature) containing such an apology. It may be noted that the CoE has had legislative authority since 1919.

<sup>146</sup> This was much mis-used in the case of *approvers* and *informers*. Also, in the case of *impeachments* - as well as with CPs to *suspend* and *dispense* with legislation (all of which were something akin to '*get out of jail free*' cards issued by sovereigns to enable ministers and others to get themselves off the hook - including in the case of crimes which they might commit). Thus, today, only legislation should be allowed to permit persons to escape from crimes they might commit. As noted, this is (anyway) a form of legal immunity being granted and it should be treated as such. In the case of impeachments, any bar was effectively ignored by pardons being granted *post-impeachment*, see Halsbury, n 5, para 6 (the whole of this area of law is most unsatisfactory and can scarcely be applied today). See also *AG of Trinidad & Tobago* [1995] 1 AC 396 and Halsbury, n 5, para 141 & 142, n 4. In any case, the Crown cannot pardon a public nuisance before conviction while it continues. Nor in respect of any recognisance imposed to keep the peace.

<sup>147</sup> Since 1837, see n 118. Thus, proclamations promising pardons should be abolished (they are also unnecessary). See Halsbury, n 5, para 143 'A proclamation promising pardon does not have the legal effect of a pardon, but following such a proclamation the court will defer execution of sentence and so allow time for the prisoner to apply for a pardon'.

<sup>148</sup> Halsbury, n 5, para 141.

- In short this whole area of law should be a judicial matter only.<sup>149</sup>

Finally, Halsbury states:

Pardons may be  
     free,  
     conditional, or  
     in the form of a remission or  
     partial remission of sentence.

The effect of a free [i.e. full] pardon is to clear the person from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction, but not to remove the conviction.<sup>150</sup> (*wording divided out for ease of reference*)

Over the centuries, the concept of a pardon has (inappropriately, it is asserted) become extrapolated.

- thus, in earlier times, pardons were full pardons. It is only as the law has become more technical and nuanced, that the concept ‘*pardon*’ has been extended to cover *conditional pardons* and *remissions*;
- however, neither of these should be treated as pardons because they are not predicated on the crime not having been committed by the person sentenced. Rather, they are based on the crime not meriting such a severe sentence - given extenuating factors such as the convicted person co-operating with the law authorities (in older parlance, the references tended to be to *approvers* and *informers* or those who ‘turned’ or otherwise co-operated with the law authorities to merit a reduction (or cancellation) of their sentence). Such should not be treated as ‘*pardons*’ today. Rather, as remissions of sentence - the same as the remission of any fine or penalty;
- the reason why is that society (and the courts) are not declaring the person sentenced ‘*innocent*’ of the crime. Rather, the declaration is that the sentence (punishment) imposed should be mitigated. The first is a true ‘*miscarriage of justice*’; the latter is a reduction in the sentence in some fashion.

#### (i) Conclusion - Pardons

The law on pardons is ripe for review and modernization. In particular,

- **Full Pardon.** The Court of Appeal<sup>151</sup> - or the Supreme Court (on appeal)<sup>152</sup> - should grant a full pardon only in the case of :
  - a crime for which a sentence of life imprisonment was imposed;
  - this, on the application of the CCRC only;<sup>153</sup> and
  - the Home Secretary should no longer be involved. Nor, the sovereign.
- Given this, legislative provision should be made for prisoners - and those who have subsequently served a sentence - to appeal to the Court of Appeal, *via* the CCRC, for a full pardon. The issue, then, simply becomes a legal matter (a ground of appeal) and politics and intermediaries are excluded, avoiding the risk of political interference as well as ensuring a reduction in time and costs;
- The standard form of the full pardon (the term ‘*free*’ should be discontinued) should be set out in a SI. Also, the actual pardon should not be by way of any charter, but set out in a SI (i.e. X is hereby granted a full pardon as a result of having been unjustly sentenced at the [ ] court on [ ] for the crime of [ ], which crime the [Court of Appeal has now held in a judgment of [ ] that [X] did not commit.’).

Thus, a full pardon (in the form of a SI) should be issued on the order of the Court of Appeal (or the Supreme Court, on appeal) where a person is found by them (on the basis of new evidence submitted) to be innocent of a crime for which he (she) was convicted, this being a true ‘*miscarriage of justice*.’ Further, any full pardon should be capable of being *reversed* (on an application of the AG) if it is shown that new evidence proves that it was unmerited. For example, a person is pardoned for a murder they claim they did not commit where, later, evidence is found (beyond reasonable doubt) they did so commit it.<sup>154</sup> That is, the cause of justice should be capable of exercise both ways. Finally,

**Posthumous Pardon.** The process should be as above, with an ‘*interested party*’<sup>155</sup> only being able to apply. Further, there should be a limited time period (perhaps 100 years) - given the absence of witnesses, lack of full

<sup>149</sup> For problems relating to judicial review in relation to pardons, see M Sunkin & S Payne, *The Nature of the Crown* (1999), pp 222-6. See also H Barnett, *Constitutional and Administrative Law* (13<sup>th</sup> ed, 2020), pp 107-8.

<sup>150</sup> Halsbury, n 5, para 142.

<sup>151</sup> The Crown Court should handle remissions (and commutations) of sentence and fines etc, but not any pardon.

<sup>152</sup> The CCRC (or a party) should be entitled to appeal to the Supreme Court.

<sup>153</sup> If the CCRC refuse to proceed, then, the applicant should have a right of appeal (not a right of judicial review).

<sup>154</sup> For example, if James Hanratty (1936-62) - executed for the A6 murder in 1962 - had had his conviction quashed and a pardon was given, what would have happened when, in 2002, DNA evidence indicated that he had committed the murder?

<sup>155</sup> This should be limited to family members.

evidence, knowledge of the fact situation *etc.*<sup>156</sup> The history of Acts of Attainder indicate the dangers of posthumous pardons generally;<sup>157</sup>

**General Pardon.** Only Parliament should effect this - the same as Acts of Oblivion in times past.<sup>158</sup> Such should only be issued very sparingly.<sup>159</sup>

As for commutations, remissions *etc* of sentence:

- **Commutations, Remissions.** The following should not be treated as pardons; any: (a) *commutation* in a criminal sentence (also, called a conditional pardon); (b) *remission* in a criminal sentence; (c) *immunity* from criminal prosecution; (d) *pre-sentence* pardon;
- However, legislative provision should be made for prisoners - and for those who have subsequently served a sentence - to appeal to the Crown Court, *via* their lawyer, in respect of (a)-(c). There is no *need* for the Home Secretary - or the CCRC - to be involved in this. This issue, then, simply becomes a legal matter (a ground of appeal) and politicians, the sovereign and intermediaries are excluded - avoiding the risk of political interference and reducing the time and costs. These appeals should not be capable of being posthumous.

***In summary, only the Court of Appeal should issue pardons (and the Crown Court deal with other matters - including commuting and remitting sentences). Further, only full pardons should be issued. And, any application for a pardon should be made by the CCRC. Neither the Home Office minister, nor the sovereign, should be involved in pardons.***

## **10. CROWN PREROGATIVE - TO ORDER PUBLIC INQUIRIES**

The sovereign had a CP to establish royal commissions (committees) to inquire on government matters. However, after 1717, when the sovereign no longer sat in cabinet, this role became nominal since the latter (or ministers) initiated any such process, to which formal assent was accorded. *Post-* WW2 (1939-45), royal commissions have become more rare and, indeed, they have been effectively superceded by the more recent Inquiries Act 2005 which established a detailed statutory regime to enable ministerial inquiries to be established that deal with matters of public concern.<sup>160</sup> Further, royal commissions have, often, tended to be very expensive, achieving little and having a tendency (at times) to preserve the *status quo*, or not to over criticize government.

As it is, the CP to establish a public inquiry should be abolished in light of the 2005 Act. However, provision should be made in a *Parliament Act* for Parliament itself to order a public inquiry in respect of a matter which it believes to be of public concern. Such would be more independent of any Crown (or royal) Commission, in that its source does not derive from such.

***In conclusion, any CP to establish any Crown (royal) Commission should be abolished.***

## **11. CROWN PREROGATIVE - TO SEIZE THE GOODS OF A PIRATE**

Piracy, being robbery on the high seas, was treated as a form of war against human kind. Thus, Blackstone stated:

the crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to sir Edward Coke, *hostis humani generis* [an enemy of the human race].

As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community has a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would

<sup>156</sup> The problem of posthumous pardons (like the posthumous reversal of attainders) is that ascertaining the truth of the matter becomes hugely difficult, in that trial material is lost, witnesses have long died, fact and fiction have become mixed up, attention seekers and politicians adopt the cause (for and against). In short, things can become a '*political circus*', where the truth of the matter is obscured. Further, the underlying motive for reversal may not be a legal one. For example, general Acts of Grace were passed in 1715 and 1745 (see 19 Geo II, c 20) to give a full pardon to those who had fought against the sovereign in the Jacobite risings of 1715 and 1745. However, the underlying motive was, almost certainly, a political one. Not because such persons had not committed treason (they had).

<sup>157</sup> These were Acts of Parliament in which a person was legislatively convicted of a crime (usually treason or felony) the punishment of which was the death penalty (see fn 48). The first case was (possibly) in 1311. The last in England was in 1746 (the last execution pursuant thereto in 1753). Often, there was no trial; and no system of appeal. However, many of these were subsequently reversed. Lander thought the figure for the reversal of Acts of Attainder in the period 1453-1504 was 64% (Ibid, p 868, fn 479). Since attainders were (almost invariably) granted for treason, in some cases, the grounds for reversing the same were legally correct in that the individual had not (in fact) committed treason. However, in other cases, it seems clear they had - but the family had enough money and connections to persuade Parliament to reverse the attainder. Or, a new sovereign was sympathetic to not opposing any Parliamentary initiative. Thus, clearly, some (many) attainders were reversed - even when the individual had, indeed, committed the crime.

<sup>158</sup> See also the Act of Oblivion 1660 (12 Car 2 c 11). Save for certain named individuals, the Act gave a general indemnity for all illegal acts committed during the Interregnum (1645-1660). This was granted as an act of political expediency; not because individuals had not committed crimes. See also Acts of Indemnity. See DM Walker, *The Oxford Companion to Law* (1980)(*Acts of Indemnity*).

<sup>159</sup> Halsbury, n 5, para 139, notes that the Armed Forces Act 2006, s 359 granted a posthumous pardon to servicemen executed for cowardice and certain other disciplinary offences during WWI (1914-8). Also, in 2013, the Secretary of State for Justice announced a posthumous pardon to Alan Turing (a WW2 code breaker) in respect of a conviction for gross indecency. The Policy and Crime Act 2017, s 164 granted posthumous pardons in respect of certain abolished offences relating to homosexual conduct (see also ss 165-72).

<sup>160</sup> Ibid, paras 620-33.

in state of nature have been otherwise entitled to do, for any invasion of his person or personal property... The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amount to felony there.<sup>161</sup>

Thus, pirates were treated as sea robbers. And, it seems clear that the Crown had a CP to the goods of the same. Thus, Coke referred to answers given by judges to a complaint made by the Lord Admiral to the sovereign against the judges of the realm in respect of prohibitions which they had granted against the Court of Admiralty on 11 February 1610. In answer to this complaint, the judges noted, *inter alia*, that:

the lord admiral, his lieutenants, officers, and ministers have without all colour [i.e. legal right] incroached and intruded upon a right and prerogative due to the crown [at common law], in that they have seized, and converted to their own uses good and chattels of infinite [sic] value taken by pirates at sea, and other goods and chattels which in no sort appertain unto his lordship by his letters patent, where in the said *non obstante* is contained, and for the which he and his officers remain accountable to [HM].<sup>162</sup>

However, this common law right appears to have been wholly superceded by the Piracy Act 1850, s 5 (still extant) which provides that all ships, good etc taken from pirates by HM ships or vessels of war are liable to be condemnation (ie. forfeiture, confiscation) as rights (*droits*) of the Crown.<sup>163</sup>

***In conclusion, any CP to the goods of pirates should be abolished since the matter is now statutory.***

## **12. FALSE CP – SOVEREIGN’S HEAD ON PRE-PAID POSTAGE STAMPS**

Finally, there is a certain privilege which might be thought - or said - to be a CP, but which is not. Thus, the first pre-paid (adhesive) postage stamp - the Penny Black - was issued in England by the post office (then, a department of government) in May 1840, being the invention of Sir Rowland Hill (1795-1879). From that date the head of the sovereign has been placed on such stamps. However, this was not a CP as such; more a tradition.

- When Royal Mail was privatized (by 2015, the government had sold all its shareholding in the same) there was a legal requirement made in the Postal Services Act 2011, s 62 for the placing of the sovereign’s head on *pre-paid* postage stamps. This is a statutory provision; not a common law CP. Also, with privatization, any CP franchised to the post office, to permit and administer *pre-paid* postage stamps, would also have ended (if there ever was one);
- The placing of the sovereign’s initials on some English (but not Scots) post (pillar) boxes, which was first instituted in 1852, was (and is), also, not a CP, but a tradition. So too, calling the *Royal Mail*, such. There is nothing to prevent the privatized company from changing these matters, it seems.

## **13. CONCLUSION - SECTIONS 8 -12**

This may be summarized succinctly, the CP to:

- issue a pardon should be abolished. And, matters placed in legislation;
- seize the goods of a pirate should be abolished, this now being statutory;
- order a public inquiry (inc. a royal commission) should be abolished. Statutory provision should be made for Parliamentary inquiries.

### **Appendix A: Constitutional Law (inc Courts)**

#### **Constitutional Law**

- |    |   |  |
|----|---|--|
| 1. | Expanding Democracy - Transferring the Crown Prerogative to Parliament. | (2014) Rev. of European Studies, vol 6, no 1, pp 83-126. |
| 2. | Modernising the Monarchy - in Legal Terms.                              | (2010) King’s LJ (‘KLJ’), vol 21(3), 535-60.             |
| 3. | Modernising the Monarchy - in Legal Terms. Part 2.                      | (2011) KLJ, vol 22(1), 95-118.                           |
| 4. | Abolishing Obsolete Crown Prerogatives relating to the Military.        | (2011) Nottingham LJ, vol 20, 14-37.                     |
| 5. | Abolishing some more Obsolete Crown Prerogatives.                       | (2011) Liverpool LR, vol 32, no 1, 65-92.                |
| 6. | The Religion of the Queen - Time for Change.                            | (2011) Queensland LR, 1-48.                              |
| 7. | Abolishing some Obsolete Constitutional Legislation.                    | (2011) Coventry LJ, vol 16, issue 1, pp 1-18.            |
| 8. | Modernising the Monarchy in Legal Terms - Part 3.                       | (2012) KLJ, vol 23, 1-25.                                |
| 9. | Modernising the Monarchy in Legal Terms - Part 4.                       | (2012) KLJ, vol 23, 285-311.                             |

<sup>161</sup> Blackstone, n 107, vol 4, pp 71-2. See also Coke, n 106, vol 3, p 113. Also, vol 1, pt 2, 391a, a pirate (from the greek) ‘signifies a rover at sea’ See also *Rothschild v Royal Mail Steam Packet Co* (1852) 21 LJ Ex 276 per Pollock CB, pirates ‘certainly take by force and not by stealth’.

<sup>162</sup> Coke, n 106, vol 4, p 136.

<sup>163</sup> See also Chitty, n 115, p 151 ‘the king may by the statute 27 Geo 3 st 2 c 13 [1787, rep] seize goods taken by pirates where the property is unknown, and detain them until proof of property is made; and if they be perishable goods the king may sell them, and, upon proof, restore the value.’

10. Modernising the Monarchy in Legal Terms - Part 5. (2014) *KLJ*, vol 25, 440-66.
11. Liberties and Customs of the City of London - Are there any Left? (2013) *Int. Law Research*, vol 2, no 1, 32-95.
12. Time to Abolish the Duchy of Lancaster. (2013) *Rev. of European Studies*, vol 5, no 4, pp 172-93.
13. Time to Abolish the Duchy of Cornwall? (2013) *Rev. of European Studies*, vol 5, no 5, pp 40-58.
14. Abolishing Obsolete Crown Prerogatives relating to Martial Law, Conscription & Billeting. (2012) *Int. Law Research*, vol 1, no 1, 13-62.
15. Abolishing some more Obsolete Crown Prerogatives: Part 2. (2011) *Liverpool LR*, vol 32, 275-315 (Dec 2011, online).
16. The Case for Abolishing Manorial Franchises and Customs. (2013) *Coventry LJ*, vol 18, no 1, pp 43-68.
17. Modernising the Law of Prize. (2014) *Journal of Business Law*, no 6, 465-83.
18. The Charters of the Cinque Ports - Are they Still Needed? (2013) *Rev. of European Studies*, vol 5, no 2, pp 90-126.

#### **Courts**

19. Abolishing Various Obsolete Courts. (2012) *Coventry LJ*, vol 17, no 1, pp 25-55.
20. Abolishing Obsolete Offices. (2012) *Coventry LJ*, vol 17, no 2, pp 31-60.
21. Modernising the English Court System. (2013) *J of Politics & Law*, vol 6, no 3, pp 17-44.

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