PART ONE

THE KING

INTRODUCTION

THE KING AND HIS CROWN

Uneasy lies the head that wears a crown

—William Shakespeare, *Henry IV, Part 2*, (1597), Act III, Scene 1; Henry IV soliloquy.

THE CROWN

'The Crown' has been described as 'a chattel now lying in the Tower and partaking (so it is said) of the nature of an heirloom.'[1] Thomas Paine, passionate and vitriolic propagandist, said that 'the Crown' was '...a metaphor, shown at the Tower for six-pence or a shilling a-piece;...'[2] Lord Penzance said that 'We all know that the Crown is an abstraction.'[3] 'As a matter of fact,' said Maitland, 'we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers.' He went on to remark that 'the crown is a

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[1] F W Maitland, 'The Crown as Corporation', *The Law Quarterly Review*, Vol. 17, 1901, 131, at 139

[2] Thomas Paine, *The Rights of Man*, published 13 March, 1791, in response to Edmund Burke's *Reflections on the Revolution in France*, and dedicated to George Washington (eight editions were published in 1791, reprinted and widely distributed in the United States by the Jeffersonian societies. When Burke replied, Paine retaliated with *Rights of Man*, Part II, published on 17 February, 1792. This quotation nay be found at pp. 314-315 of *Reflections on the Revolution in France and the Rights of Man*, Dolphin Books, Doubleday & Company, Inc., New York, 1961. Paine said : 'In England, this right [of war and peace] is said to reside in a metaphor, shown at the Tower for six-pence or a shilling a-piece: So are the lions; and it would be a step nearer to reason to say that it resided in them, for any inanimate metaphor is no more than a hat or cap.' The aphorism is also quoted by Sir Frederick Pollock and Frederic William Maitland in *The History of English Law before the time of Edward I*, 1895, 2 Vols.; 2nd edn., Lawyer's Literary Club, Washington DC, 1959, at p. 525.

[3] *Dixon v London Small Arms Co.*, L R 1 App. Cas. 632, at 652, quoted by Maitland in 'Crown as Corporation', *art. cit.*, p. 139; Maitland was not as sure of this proposition as was Lord Penzance, noting that the phrase was being used in three or four different though closely related senses.

convenient cover for ignorance: it saves us from asking difficult questions,...'[1]

In 1901, the Commonwealth of Australia was formed as a result of the people in that continent resolving 'humbly relying on the blessing of Almighty God, to unite in an indissoluble federal commonwealth under the Crown of the United Kingdom of Great Britain and Ireland,...'[2]

What was this 'Crown'?

The earliest authoritative commentators on the written Australian Constitution, John Quick and Robert Garran, said of the words 'under the Crown':

> This phrase occurs in the preamble, and is not repeated, either in the clauses creating the Commonwealth or in the Constitution itself. ... It is a concrete and unequivocal acknowledgement of a principle which pervades the whole scheme of Government; harmony with the British Constitution, and loyalty to the Queen as the visible central authority uniting the British Empire with its multitudinous peoples and its complex divisions of political power.[3]

They saw the words not as mere surplusage, but as providing a bulwark against future attempts to amend the Constitution to remove from it references to the Queen, any such eventuality being incapable of imagination 'except in a combination of circumstances and a revolution of ideas and sympathies of which we can now form no possible conception.'[4] They later said :

> The Federal Executive power granted by this Constitution is vested in the Queen. This statement stereotypes the theory of the British Constitution that the Crown is the source and fountain of Executive authority, and that every administrative act must be done by and in the name of the Crown.[5]

To the question *Why* is 'the Crown' the source of executive authority, and why must every

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[1] F W Maitland, *The Constitutional History of England*, A Course of Lectures delivered by F W Maitland, Cambridge University Press, Cambridge, 1st edn., 1908; reprinted 1950; at p. 418.

[2] *The Commonwealth of Australia Constitution Act*, An Act to Constitute the Commonwealth of Australia, 63 & 64 Victoria, c. 12, Royal Assent given on 9 July 1900; Queen Victoria's Proclamation of 17 September 1900, pursuant to s. 3 of the afore-mentioned Act, enabled the 'Federal Commonwealth under the name of the Commonwealth of Australia' (provided for under s. 3) to be established on and after the first day of January 1901, and the written constitution enshrined in s. 9 of the Act also became operative on that day. See Proclamation, Victoria R I, 17 September, 1900, Frontispiece, John Quick and Robert Randolph Garran, *The Annotated Constitution of the Commonwealth of Australia*, Angus & Robertson, Sydney, 1901, reprinted by Legal Books, Sydney, 1976, 1995 (hereinafter, Quick and Garran); Quick and Garran are still looked to as authoritative guides to the meanings of the words in the written Australian Constitution.

[3] Quick and Garran, *The Annotated Constitution, loc. cit.*, § 7, pp. 294-296.

[4] Quick and Garran, *The Annotated Constitution, op. cit.*, § 7, p. 296.

[5] Quick and Garran, *The Annotated Constitution, op. cit.*, p. 702, § 273.

administrative act be done in the name of 'the Crown'? they provide no answer, merely quoting with apparent approval the following extracts:

> We are at the present day so accustomed to think and to speak of the Government of Sir Robert Peel or Lord Russell..., that we almost overlook the Royal Personage whom these Statesmen serve. We forget the Queen for the Minister. The means, as so often happens, obscure the end; the object limited is lost in the limitation. Yet whatever may be our mode of speech, any such indistinctness of thought will effectually exclude all clear views of the Constitution. In our political system the Crown always has been and still is the sun. ...
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> They derive everything from the Crown, and refer everything to its honour and advantage. Nor is this less true of the modern form of our Constitution than it was of an age when the prerogative was exercised chiefly for the King's personal benefit....With us no less than with all our ancestors, ever since England was a nation, the Crown enacts laws; the Crown administers justice; the Crown makes peace and war and conducts all the affairs of State at home and abroad; the Crown rewards them that have done well, and punishes the evil doers; the Crown still enjoys the other splendid prerogatives which have at all times graced the diadem of England.[1]

Elsewhere, Quick and Garran spoke of 'the Crown' as being 'an impersonal or abstract description of the occupant of the throne—commonly called the sovereign', and noted that '(s)ometimes it is used in a wider and more popular sense as representing the majesty and sovereignty of the nation'.[2] But in turn they then said that 'sovereignty' was in fact not a unity, or an entity, but rather a kind of trinity: legal sovereignty (of parliament), political sovereignty (of the people), and titular sovereignty (of the Queen).[3] Confusingly, however, they also saw the words 'Queen', 'Crown', 'Governor-General', 'Commonwealth', and 'State' as 'references to the Crown which may affect the prerogative...'[4], then defining 'prerogatives' as 'residuary fractions and remnants of the sovereign power...'[5]

In fact the crown is, as Maitland and Paine point out, a physical object. It is called the 'Crown of St Edward'; it is part of the English royal regalia, being a copy of the crown which was broken up and sold for the value of its gold (£248/10s) by the parliamentarians during the Interregnum.[6] This crown is placed upon the head of the newly anointed king as the final *indicia* of his prerogatives, after he has been recognised as king by the people, and

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[1] Quoted from W E Hearn, *The Government of England*, London, 1867, pp. 16-17, in *The Annotated Constitution of the Australian Commonwealth*, by John Quick and Robert Garran, 1901; the 1901 edition reprinted by Legal Books, Sydney, 1995, at p. 702, § 273.

[2] See Quick and Garran, *Annotated Constitution, loc. cit.*, p. 321, § 19.

[3] See Quick and Garran, *Annotated Constitution, loc. cit.*, pp. 324 ff., § 21.

[4] See Quick and Garran, *Annotated Constitution, loc. cit.*, p. 322, § 19.

[5] See Quick and Garran, *Annotated Constitution, ibid.*, p. 322, § 19.

[6] Leslie Broad, *Queens, Crowns and Coronations*, Hutchinson, London, 1952, p. 61; and Dr Jocelyn Perkins, *The Crowning of the Sovereign of Great Britain and the Dominions Overseas*, Methuen & Co Ltd, London, 2nd edn., 1953.

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taken his oath of governance. It is this physical object which is touched by those who come to do fealty or homage to the king[1] as an outward and physical metaphor of their internal and incorporeal allegiance.

There is therefore an immediate connection between 'the Crown' and the king, as only a king in Britain is ever crowned. All kings and queens of England (and later, of Britain and the Commonwealth countries) have been crowned at least from the time of Alfred the Great, except Edward Plantagenet, who never ascended the throne and who was allegedly murdered in the Tower of London, and Edward of Windsor, who abdicated.[2]

Kings themselves were the first to use 'the Crown' in a generic or symbolic sense, applying the term generally to the prerogatives of the king. Edward the Confessor in a Charter to Ramsey[3] speaks of 'all the pleas that belong to my crown.'[4] Henry I referred to 'all liberties and dignities and penalties belonging to the king's crown'.[5] Pope Gregory IX noted that Henry III had undertaken at his coronation not to alienate the rights and possessions of the crown[6]. Edward I reiterated that his coronation oath 'astricted' him to maintain the rights

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[1] See Francis C Eeles, *The Coronation Service, Its Meaning and History*, A R Mowbray & Co. Ltd, London, 1952, at p. 39.

[2] Neither of these men was in my view king—for discussion on Edward Plantagenet, see *infra* specifically p. 104, p. 105, p. 106, p. 115, p. 119, p. 235, p. 244, and p. 482 ; generally see *infra*, Chapter 3, 'Richard III—Usurper or Successor?', at p. 105 ff.; and Chapter 6, 'Richard III', p. 234 ff.; and for Edward of Windsor, see Chapter 10, 'The Abdication of Edward of Windsor', see p. 482 ff. I refer to these two men by the names of the houses from which they sprang, but have kept to the conventional but erroneous numbering of the other Edwards, so as to avoid confusion—e.g., Edward VI would in reality be Edward the fifth king of England bearing that name after the Conquest. Similarly, Edward VII would be only the sixth king of England of that name. Edward called the Eighth was (in my view) no king of England.

[3] Note here: I am uncertain whether this Charter is one of the 'Battle forgeries' referred to by George Garnett in his article, 'The Origins of the Crown,' in *Proceedings of the British Academy*, Vol. 89, *The History of English Law, Centenary Essays on 'Pollock and Maitland'*, John Hudson, (*ed.*), printed for the British Academy by Oxford University Press, Oxford, 1996, pp. 171-214. Garnett states that he is unable to find any reference to 'the crown' in the sense used here in Anglo-Saxon documentation, the first such uses which he finds being during the reign of Henry I. But he does not specifically advert to the Confessor's charter to Ramsey. On the other hand, he does appear to suggest that the Charter to Westminster referred to in the next footnote, was a deliberate forgery, designed to ensure that the regalia and the crown of St Edward remained at Westminster Abbey.

[4] *Ealle tha gyltas tha belimpeth to mine kinehelme; omes forisfacturae quae pertinent ad regiam coronam meam.* quoted in Jolliffe, *Constitutional History of Medieval England, loc. cit.*, sourced to charter of Edward the Confessor to Ramsey, from J Earle, *Land Charters*, p. 344. And see Grant by Edward the Confessor to Westminster Abbey, 1056, reproduced in S&M1, pp. 31-32, sourced to Thorpe, *Diplomatarium*, pp. 368 ff., from the Anglo-Saxon (no Old English text given): 'I have granted... free of *scot* and *gafol*, with all things pertaining,...*sac* and *soc*, *toll* and *team*, *infangenepeof*, *blodwite* and *weardwite*, *hamsocn*, *forsteall*, *grydbryce* and *mundbryce*, and all the rights which there belong to me....'

[5] See Garnett, 'The origins of the Crown,' *art. cit.*, pp. 199-200; Writs of Henry I relating to Bury St Edmund's in 1101.

[6] See note 4 at p. 183 *infra*, and discussion there. H G Richardson, 'The English Coronation oath', *Speculum*, XXIV, 1949, pp. 44-79, at p. 51 quotes a letter to Henry III from pope Gregory IX dated 10 January 1233 : '*cum coronationis tue tempore de regni Anglie iuribus et honoribus conservandis ac revocandis alienatis illicite vel distractis prestiteris corporaliter iuramentum.*' [Shirley, *Royal Letters of Henry III*, I, 551; *Cal. Papal Registers*, I, 131]; and a further letter from Gregory of 21 June 1235: '*Cum igitur in coronatione tua iuraveris, ut moris est, iura, libertates et dignitates conservare regales.*' [*Foedera*, I, i, 229; *Cal. Papal Registers*, I, 148.]

of 'the Crown', to protect 'the Crown' against diminution, and to preserve the *status coronae*.[1] In 1301, Edward I's barons wrote to the pope, asserting English sovereignty and stating that they were 'bound by oath to maintain the rights of the Crown...'[2]

'The Crown', then, was the crown of the king, and was both synonymous with and representative of the powers of the king in his prerogatives and sovereignty.

POWER

The king's crown has been perceived as an object of power throughout the centuries. The pursuit of the power of the crown in its physical form saw culmination when Henry Tudor seized it on the fields of Bosworth. The parliamentarians of the 1640s seized the powers of the crown when they decapitated Charles I. The genteel revolutionaries of 1688 purported to appropriate the king's crown and powers and bestow them on someone else. The politicians of the twentieth century deny that the king has any power, and assert that the powers of the crown are theirs to command.

What then are the powers of the king, the powers of his crown, and how does he acquire them?

The powers of a king are the royal prerogatives. The king acquires them when he becomes king. He becomes king when he is crowned. He is crowned only after he has been chosen by the people, and undertaken an oath of governance to the people before God. It is this oath of governance which both bestows and limits the powers of the king. The oath of governance has been called by most writers, the coronation oath.

And see Ernst H Kantorowicz, *The Kings Two Bodies, A Study in Medieval Political Thought*, Princeton University Press, 1957, reprinted by Princeton University Press 1997, with an introduction by William Chester Jordan, pp. 347-358, especially, p. 347 and notes 117, 118, and the authorities cited therein.

[1] See Kantorowicz, *The King's Two Bodies*, 1957, *loc. cit.*, p. 350, nn. 133 and 134; and see H G Richardson, 'The English Coronation Oath', *Speculum*, xxiv, (1949), 44-75, at 50, n. 39; and see H G Richardson, 'The Coronation in Medieval England,' *Traditio*, Vol. 16, 1960, pp. 111-202. And see *Foedera*, 1,2,1011. And see Ernst H Kantorowicz, 'Inalienability,' *Speculum*, Vol. XXIX, 1954, pp. 488-502

[2] Letter of 'seven earls and ninety-seven barons for themselves and for the whole community of the land, and is dated on the 12th of February'—see Stubbs, *Constitutional History*, Vol. 2, p. 159; he sources this in n. 1, p. 160, to 'Foed. i. 926, 927; Parl. Writs, i. 102,103; Rishanger, pp. 208-210; Hemingb, ii. 209-213; Ann. Lanerc. pp. 199, 200; Trivet, pp. 381-392; and M. Westminster, pp. 443, 444.'

The making of a king in this fashion dates in Scotland as far back as the Lords of the Isles (c.600-700 A.D.) who were chosen by the people and swore an oath of governance[1], and in England to the time of the *Bretwaldas*, (c. 700-800 A.D.) who similarly were chosen by the people, and undertook a solemn oath of governance.[2]

The powers and limitations conferred by these oaths have remained basically unchanged down the centuries. They were : to preserve peace to the people and to the church; to forbid rapacity and iniquity; and make judgements with mercy and equity. They can be summed up as imposing an obligation upon the king to maintain the peace and protection of his people, while simultaneously conferring on him the jurisdiction and authority to make laws to secure these ends. In short, ...*a King's Crown is an hieroglyphic of the laws*... [3]

THE CROWN AND THE LAW

It is this capacity to make and enforce laws through the royal prerogative which lies at the heart of the desire to appropriate 'the Crown.'

The 'sovereignty of parliament' has variously been thought to have arisen after the Revolution of 1688, or from when the franchise was extended in 1832, as it is said that from thence it was the people who determined the governance of the realm through elections.[4] The inherent difficulty of any legal precedent of any kind arising from the Revolution of 1688 was pinpointed by Maitland, and highlighted by his conundrum: 'How did William and Mary come to be king and queen?'[5]

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[1] See the Marquess of Bute, *Scottish Coronations*, London, 1902, referred to and summarised in Herbert Thurston, *Coronation*, from the *Catholic Encyclopedia*, the Encyclopedia Press, Inc., 1913; transcribed by Douglas J Potter for the Electronic version, copyright 1997 by New Advent, Inc.

[2] See Pontifical of Echberht, Archbishop of York, c. 732-736, in *Two Anglo-Saxon Pontificals*, edited by H M J Banting, Boydell Press for the Henry Bradshaw Society, London, 1989, from MS Lat. 10575 in the Bibliotheque Nationale, at pp. 1 ff.

[3] Sir Edward Coke, *Calvin's case, the Postnati*, (C.P. 1610) Trin. 6 Jac. 1, 7 Co. Rep. 1a-28b, at 11b; 77 ER (KB) 377-411, at 390; 2 *State Trials*, 575-669. Coke wrote these particular reports as published in the 'sixth year of the most High and Most Illustrious JAMES, King of England, (etc.) the Fountain of all Piety and Justice, and the Life of the Law, etc etc ...' See introduction to Coke's Seventh Reports at 7 Co. Rep. 1a, 77 ER (KB) 377-411, at 377.

[4] See for example, Dawson J's view at note 5, p. 17, and note 1, p. 18 *infra* ; and see Jenning's view at note 1, p. 10, *infra*.

[5] See Maitland, *Constitutional History*, *op. cit.*, pp. 284-285; the conundrum is posed on p. 285.

The fiction of the 'sovereignty of parliament'[1] has spawned numerous other fictions : the 'sovereignty of the people'[2], 'constitutional government'[3], 'government by the people'[4]. A V Dicey wrote of 'the rule of law,' and of 'constitutional conventions' which while not part of the law are taken cognisance of by the law.[5] Dicey also wrote of that strange creature, public opinion, which has come to dominate so much of parliamentarians' decision-making.[6]

The royal prerogatives, particularly those of maintaining the peace and making the law, have purportedly been appropriated by the Ministers of the Crown either alone or in 'parliament', with the king being said to have only 'reserve' or 'residual' powers[7], and in the exercise of any prerogative power remaining to him, he is said to be constrained to act upon the advice of his chief Minister.[8] These 'rules' are a result of 'democracy', since, as

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[1] See discussion *infra* under 'Sovereignty of parliament', p. 16; and under The 'Sovereignty of Parliament', p. 436 ff.

[2] See Edmund S Morgan, *Inventing the People, The Rise of Popular Sovereignty in England and America*, W W Norton & Company, New York, 1987, Norton paperback, 1989. And see Mason, CJ, High Court of Australia—'[the enactment of the *Australia Act*] marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people.' *Australian Capital Television Pty Ltd. v Commonwealth* (1992) 177 CLR 106, per Mason CJ at 138

[3] A tautology.

[4] 'Government by the people has in all countries proved to be a myth', Sir Ivor Jennings, *Parliamentary Reform*, Victor Gollanz Ltd., 1934, p. 1

[5] See A V Dicey, *Introduction to the Study of the Law of the Constitution*, 1885, 10th edn, E C S Wade, Macmillan, 1973.

[6] See A V Dicey, *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century*, [a series of lectures given in 1898 to the Harvard Law School], Macmillan and Co., Ltd, London, 1905; and see note 1, p. 271, *infra*.

[7] Many books and articles have been written on the prerogatives of the king, and they are still the subject of much speculation and contention. In modern times, the only prerogatives allowed by most commentators to the king are those of calling, proroguing and dismissing parliament, and appointing and dismissing a Prime Minister. It is debated whether the king must exercise these prerogatives on the advice of his Prime Minister, or whether he has a discretion. These arguments are not canvassed in this work, except in passing and by implication, being too lengthy for incorporation. The best fundamental works on the king's prerogatives remain in my view the old texts : Sir Matthew Hale, *The Prerogatives of the King*, 1640-1660, D E C Yale (*ed.*), Selden Society, Volume 92, London, 1976; Sir William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769*, with an introduction by Stanley N Katz, University of Chicago Press, Chicago, 1979, in 4 Volumes, *passim*; J Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative duties and Rights of the Subject*, Joseph Butterworth and Son, London, 1820; facsimile copy from British Library copy 514.113; reproduced by Garland Publishing, Inc., David S Berkowitz and Samuel E Thorne, (*eds.*) New York, 1978; More modern and contentious works are : J R Markesinis, *The Theory and Practice of Dissolution of Parliament*, Cambridge University Press, London, 1972; H V Evatt, *The Royal Prerogative*, Law Book Co, Sydney, 1987; H V Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions*, 2nd edn., Frank Cass and Co., London, F W Cheshire, Melbourne, 1967; E A Forsey, 'The Present Position of the Reserve Powers of the Crown', *Evatt and Forsey on the Reserve Powers*, Legal Books, Sydney; for an example of a recent articles, see T R S Allan, 'Law and the Prerogative', Vol. 45 *Cambridge Law Journal*, 305-20, July, 1986.

[8] See Sir Ivor Jennings, *Cabinet Government*, Cambridge University Press, Cambridge, 1936, 1937, 1947; 2nd edn., 1951, p. 302—'The Sovereign must, in the last resort, accept the decision of the Government, but he may have considerable influence on those decisions.'

Jennings says, after 1832 'Governments rested not on the favour of the crown but on the vote of the people.'[1]

But none of these 'rules' are law—they are codes of conduct, and fall within that obscure field of 'political science.'[2] Jennings says:

> Practices turn into conventions[3] and precedents create rules because they are consistent with and are implied in the principles of the Constitution. Of these, there are four of major importance. The British Constitution is democratic; it is parliamentary; it is monarchical; and it is a cabinet system.[4]

But what are the principles of the Constitution? Where do they come from? For Jennings says:

> The Cabinet is the core of the British constitutional system. ...
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> It is a trite observation that there is no such [written] Constitution. With us 'the law' is not an emanation from authorities set up or provided for by a written and formal document. It consists in the legislation of parliament and the rules extracted from the decisions of judicial authorities. The powers of these bodies and the relations between them are the product of history. ...[5]

Is this 'the law'? But an examination of history to find 'the principles of the constitution' and 'the law' consistently returns us to the king, and to his powers. The pre-eminent characteristic of the British constitution is that it is a monarchy. And it is the prerogative powers of the king, that is, the powers of 'the Crown', which Ministers of the Crown exercise.

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[1] Jennings, *Cabinet Government, loc. cit.*, p. 314. This is, of course, a very sweeping and charitable view of the electoral system both then and now. See also discussion *infra*, under 'George IV and William IV', p. 462 ff.

[2] But see Geoffrey Marshall, *Constitutional Conventions, The Rules and Forms of Political Accountability*, Clarendon Press, Oxford, 1984, reprinted with additions in paperback, 1986 and 1993. Space has not permitted an examination of the 'constitutional conventions.'

[3] Cf. S B Chrimes, *English Constitutional History*, Oxford University Press, Oxford, 1948; 4th edn. with new material published as an Oxford University paperback 1967, reprint 1978, at pp. 7-8: '...[Constitutional] [c]onventions are, after all, only rules, usages, or practices commonly recognised by responsible opinion as being the most sensible and reasonable courses to adopt in the circumstances, having regard to the general desire to avoid unnecessary friction and fuss in the working of government. Circumstances frequently recur, and courses found to command general assent on one occasion are usually resorted to again when the same or similar circumstances arise; and so an expedient becomes usage, and usage becomes more or less a rule, the infringement of which would expose a government to the charge of being 'unconstitutional'—a charge which no government will lightly face...'

[4] Jennings, *Cabinet Government, op. cit.*, p. 13.

[5] Jennings, *Cabinet Government, op. cit.*, p. 1.

MODERN WORKS ON 'THE CROWN'

Few constitutional lawyers have addressed the legal position of the Crown, except in passing, as Joseph Jacob has remarked in his recent book, *The Republican Crown*:

> [lawyers] have said very little about the monarchy : throughout their discussion, on the face of everything they have said, there has been a distinction between the monarch in a public and private capacity. This silence is not an accident. The same philosophy that has produced the rationalist whig hegemony in government demands also that the monarchy can be neither the top of a social hierarchy nor a mystical 'living symbol' of the unity of the nation. In a world where the monarchy was still revered, it made tactical sense for those who wanted to reduce the powers of the Crown and to minimise the state, to ignore the features of the monarchy which were central to the national life. The monarchy, both publicly and privately, has been diminished not by a frontal assault but by the undermining of its foundations.[1]

There has sprung up a subliminal preparedness to ignore the king, and a refusal to acknowledge any legal position in him or of him.

Constitutional legal texts these days devote only fragments to the position of the king,[2] and frequently repeat old saws as if they were immutable truths[3], relying also upon the interpretation put upon the monarchy by Bagehot, a nineteenth century journalist. Constitutional lawyers, political scientists and sociologists appear now to see the Queen as some ceremonial edifice worthy of only anthropological study.

Professors de Smith and Brazier have a small section on 'The Crown and the Royal Prerogative' in the seventh edition of their *Constitutional and Administrative Law*[4]; they, however, say:

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[1] Joseph M Jacob, *The Republican Crown, Lawyers and the Making of the State in Twentieth Century Britain*, Dartmouth Publishing Company Limited, Aldershot, 1996, Postscript, p. 370.

[2] See S de Smith and R Brazier, Chapter 6, 'The Crown and the Royal Prerogative', *Constitutional and Administrative Law*, 7th edn., Penguin Books, London, 1994, pp. 121-164; Hilaire Barnett, *Constitutional and Administrative Law*, Cavendish Publishing Limited, 1995, reprinted 1996, Chapter VI, 'The Royal Prerogative', pp. 149-195, and 'The Crown', p. 245; Geoffrey Marshall, *Constitutional Conventions, The Rules and Forms of Political Accountability*, Clarendon Press, Oxford, 1984, reprinted with additions in paperback, 1986 and 1993, Chapter II, 'The Uses of the Queen', pp. 19-44; Ian Loveland, *Constitutional Law, a Critical Introduction*, Butterworths, London, 1996, Chapter 4, 'The royal prerogative', pp. 102-133; Colin Turpin, *British Government and the Constitution, Text, Cases and Materials*, 1985, 3rd edn. 1995, Butterworths, London, 1995, Part II, Chapter 3, 'The Crown and the Government', pp. 137-154.

[3] See particularly de Smith and Brazier, *Constitutional and Administrative Law, loc. cit.*, p. 113; and see discussion *infra* at note 1, p. 362.

[4] See S de Smith and R Brazier, Chapter 6, 'The Crown and the Royal Prerogative', *Constitutional and Administrative Law*, 7th edn., Penguin Books, London, 1994, pp. 121-164.

> The Coronation Service...is attended by picturesque ceremonial, but has no significance in relation to the legal attributes or powers of the monarch.[1]
>
> The Queen is pre-eminently a 'dignified' element in the British Constitution.[2]

Professor Vernon Bogdanor in *The Monarchy and the Constitution* has suggested that the Recognition in the coronation ceremony, is of 'purely symbolic significance'.[3] Professor Peter Hennessy's *The Hidden Wiring*[4] and *Muddling Through*,[5] reveal details of the practical workings of the day to day monarchy, and of the highly discreet cabal(s) of 'chaps' who advise it[6], which could be seen as brief glimpses of the royal power in political action in modern times.[7] But an examination of exactly how the current monarch really does exercise either power or influence will have to wait for the release of papers from the Public Records Office, and the Royal Archives—though some papers already released show Her Majesty The Queen to be acute and not averse to saying no to Her Prime Minister.[8]

Most writers tend to focus on the 'influence' of the king, or the 'conventions' of the constitution pertaining to the manner in which the king is supposed to act. But none of this really tells us anything about the legal basis of the king, *why* he can exercise influence, *why* the prerogatives of the Crown still exist. As Professor Hennessy says:

> It is very hard for the political nation in Britain to discuss the monarchy in sensible terms. By most people and for much of the time it is accepted as simply being there, somewhat like the weather ;...[9]

Sociologists on the one hand (like Edward Shils),[10] and certain historians (like Professor

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[1] De Smith and Brazier, *Constitutional and Administrative Law, loc. cit.*, p. 135.

[2] See de Smith and Brazier, *Constitutional and Administrative Law, loc. cit.*, p. 121

[3] Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995, at p. 43. Professor Bogdanor's views on the coronation oath and the effect of the revolution of 1688 are discussed *infra*, in Chapter 8, Revolution and the Oath, 'The Bill Assessed', under 'Bogdanor's view', p. 401 ff.

[4] Peter Hennessy, *The Hidden Wiring, Unearthing the British Constitution*, Victor Gollancz, 1995, Indigo paperback edition, 1996.

[5] Peter Hennessy, *Muddling Through, Power, Politics and the Quality of Government in Postwar Britain*, Victor Gollancz, London, 1996.

[6] Private information.

[7] See also Peter Hennessy, *Her Majesty's Puzzle : Politics. The Monarchy and the Constitution*, The Johnian Society Lecture, 1997, St John's College, Cambridge, 25 February, 1997.

[8] See PRO, PREM 13/553, 'Possible Visit by Lord Mountbatten to Rhodesia,' 'Note for the Record,' 18 November, 1965, referred to and quoted in Hennessy, *Hidden Wiring, loc. cit.*, pp. 67-68, and notes 93 and 94.

[9] Hennessy, *Hidden Wiring, loc. cit.*, p. 45.

[10] See Edward Shils and Michael Young, 'The Meaning of the Coronation', (originally published 1953) in *Center and Periphery, Essays in Macrosociology*, Edward Shils (*ed.*), University of Chicago Press, London, 1965, pp. 135-152.

David Cannadine)[1] on the other, have tended to look only at the 'ceremonial' or 'ritual' aspect of the monarchy. Professor Cannadine says:

> ...for the sociologist, the 'meaning' of ceremonial in industrial society is inferred from an essentially decontextualized analysis of the ritual itself, evaluated within the relatively historical framework of Marxist or functionalist theory.
>
> This Chapter seeks to rediscover the 'meaning' of such royal ceremonial by employing a rather different methodology, namely of setting it more comprehensively within its historical context.[2]

Unfortunately, he concentrates only upon the period from 1820-1977, and only upon the ceremonial aspects of the coronation, with little reference to liturgical work on the coronation ceremony.[3] Indeed, from the comments made by almost every single commentator, the coronation is seen *only* as a ceremonial, or as some kind of means of 'inventing a tradition' of importance for an otherwise unimportant monarchy, or as some kind of quasi-hysterical mass delusion.

Tom Nairn dismembered the monarchy in *The Enchanted Glass*,[4] however observing acutely that the reflection of the British people in the 'enchanted glass' includes the British monarchy, which he concludes is 'genuinely important for British nationalism.'[5]

Some passing inferences as to the legal position of the king can be made from the

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[1] See David Cannadine, 'The Context, Performance and Meaning of Ritual :The British Monarchy and the "Invention of Tradition", c. 1820-1977,' in Eric Hobsbawm, and Terence Ranger, (*eds.*), *The Invention of Tradition*, Cambridge University Press, Cambridge, 1983, Canto edn. 1992, reprinted 1993, 1994, 1995, at pp. 101-164. And see David Cannadine, 'Introduction: Divine Rites of Kings', in his *Rituals of Royalty, Power and Ceremonial in Traditional Societies*, David Cannadine and Simon Price (*eds.*), Cambridge University Press, Cambridge, 1987.

[2] Cannadine, 'Invention of Tradition', *art. cit.*, p. 104.

[3] Cannadine has written other work on the monarchy, for example, David Cannadine, 'Introduction: Divine Rites of Kings', in *Rituals of Royalty, Power and Ceremonial in Traditional Societies*, David Cannadine and Simon Price (*eds.*), Cambridge University Press, Cambridge, 1987; A L Beier, David Cannadine, James M Rosenheim, (*eds.*), *The First Modern Society, Essays in English History in Honour of Lawrence Stone*, Cambridge University Press, Cambridge, 1989.

[4] Tom Nairn, *The Enchanted Glass - Britain and its Monarchy*, Radius, London, 1988

[5] Nairn, *The Enchanted Glass*, *loc. cit.*, Foreword, p. 9. Nairn's choice of the mirror for his image and title of the book is acute. In this connection it may be observed that historians have noted that the modern conception of self, as articulated by the philosophers of the sixteenth and seventeenth centuries, emerged at the same historical moment that mirrors were becoming more widely available—see Margaret Wertheim, in her Review of Richard Gregory, *Mirrors in Mind*, W H Freeman, 1997, in *The Australian's Review of Books*, December 1997/January 1998, pp. 3-4. It is also interesting in this context, that simultaneously, the idea of the king, and the king's powers, who had previously been identified with the people and the nation, came under challenge. It is possible to speculate that the phenomenon of seeing one's self in a mirror encouraged both self confidence and conceit, and a greater willingness no longer to see the king as a reflection of his people and their aspiration, but rather one's self.

numerous modern biographies.[1] But the modern legal view of the king could be summed up as an antiquated, superannuated shibboleth, useful for raising tourist revenue, and as an unfrequented avenue of checking Prime Ministerial power by merely encouraging and warning.

The legal view of the king among constitutional writers has come to this pass for two reasons. The first is the enduring legacies of the polemics of Walter Bagehot and Sir Edward Coke.

BAGEHOT

Walter Bagehot was a nineteenth century journalist, economist and political analyst, who wrote that 'the sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, and the right to warn.'[2] Bagehot stated this famous aphorism just after quoting one of Queen Victoria's memoranda wherein she threatened to dismiss her chief Minister.[3] Bagehot's felicity with language has apparently blinded many to what he actually was saying. He said :

> The Queen is only at the head of the dignified part of the Constitution. The Prime Minister is at the head of the efficient part. The Crown is, according to the saying, the 'fountain of honour'; but the Treasury is the spring of business.[4]

It was Bagehot who was responsible for Lord Esher's extraordinary advice to George V in the context of the Home Rule crisis of 1913 :

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[1] See for example, Sarah Bradford, *Elizabeth, A Biography of Her Majesty the Queen*, Heinemann, London, 1996; Helen Cathcart, *Her Majesty*, W H Allen, London, 1962; Ben Pimlott, *The Queen, A Biography of Elizabeth II*, Harper Collins, 1996, paperback edition, 1997; John W Wheeler-Bennett, *King George VI, His Life and Reign*, Macmillan & Co Ltd, London, 1958; Frances Donaldson, *Edward VIII*, Weidenfeld and Nicolson, London, 1974; reprinted by Futura Publications Limited, 1976; HRH The Duke of Windsor, *The Crown and the People, 1902-1953*, Funk and Wagnells, London, 1945; *A King's Story:: The Memoirs of HRH The Duke of Windsor*, 1951, Cassell and Co Limited, 1951; Harold Nicolson, *King George the Fifth, His Life and Reign*, Constable & Co Ltd, London, 1952, 2nd impression 1952;

[2] Walter Bagehot initially wrote his Essay on 'The Monarchy' for the journal, *The Fortnightly*, it was subsequently published, together with other essays, in 1867 as *The English Constitution*; the edition of this work referred to hereinafter is Walter Bagehot, *The English Constitution*, with an Introduction by Richard Crossman, Fontana Press, London, 1993. This reference is to be found at p. 113.

[3] Victoria to Palmerston, 1852 ; 'The Queen requires, first, that lord Palmerston will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she is giving her royal sanction. Secondly, having once given her sanction to such a measure that it not be arbitrarily altered or modified by the Minister. Such an act she must consider as failing in sincerity towards the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that Minister.' Quoted by Bagehot in *The English Constitution, loc. cit.*, p. 112.

[4] Bagehot, *English Constitution, loc. cit.*, p. 68.

> In the last resort the King has no option. If the constitutional doctrines of ministerial responsibility mean anything at all, the King would have to sign his own death warrant, if it was presented to him for signature by a minister commanding a majority in parliament.[1]

What Bagehot had said was :

> The Queen has no such veto.[to any Bill put up by the Commons] She must sign her own death warrant if the two houses unanimously send it up to her. It is a fiction of the past to ascribe to her legislative power. She has long ceased to have any. Secondly, ancient theory holds that the Queen is the executive.[He refers to the Americans being 'misled' as to the nature of the British constitution that as a result the framers of the American constitution] did not perceive the British Prime Minister to be the principal executive of the British Constitution, and the sovereign a cog in the mechanism..[2]

Bagehot was an economist and a journalist, but certainly neither a lawyer nor a democrat. His work is filled with internal inconsistencies, and marred by a vaunting and overweening elitism. 'I am exceedingly afraid of the ignorant multitude of the new constituencies,' he said.[3]

Walter Bagehot and Edward Coke share the honour of being quoted not wisely, but too well, to the extent that many of their misconceptions of the law have been perpetuated, for lack of rigorous scrutiny of what they actually said, in relation to the law as it was, and as it is now.

COKE

Sir Edward Coke, a choleric, splenetic, intemperate man, brilliant, erratic and passionate, was adept at cutting his coat to suit his cloth. Coke as Solicitor- and Attorney-General supported the prerogative; as a judge he supported the common law; and as a parliamentarian he opposed both king and common law in favour of his new and better guides, 'Acts of Parliament.'[4] He invented precedents, re-wrote cases, overlooked decisions he did not like, and never allowed mere historical or legal precision to interfere with his

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[1] Lord Esher to George V, quoted from the Esher Papers, III, pp. 126-129, by Jennings in *Cabinet Government*, *op. cit.*, p. 313.

[2] Bagehot, *English Constitution*, *loc. cit.*, pp. 100-101

[3] See Walter Bagehot, *The English Constitution*, 1867; 2nd edn. with an introduction by Bagehot in 1872; published with an Introduction by R H S Crossman, Fontana Press, London, 1993, p. 282; these comments by Bagehot are in his introduction to the second edition, written after the extension of the franchise in 1867. See also his comments at, for example, p. 242.

[4] See speech of Sir Edward Coke, *Five Knights case*, 3 *State Trials*, at pp. 81-82; and see discussion *infra*, at p. 303.

view of the law[1]. Not surprisingly, he intimidated most of his contemporaries[2]—he had 'searched the Fountains',[3] and there was almost immediately 'a tendency not to go behind Coke'[4]; they tended to accept what he said as gospel, and did not test the original sources for themselves. In large measure, this remains the case today.

'SOVEREIGNTY OF PARLIAMENT'

The second reason for the increasing legal invisibility of the king is the unquestioning adoption by both courts and politicians of the doctrine of the 'sovereignty of parliament', as explicated variously by Coke and subsequent politicians developing rules of behaviour to suit themselves; and by Bagehot, with his emphasis on Cabinet Government and the relegation of the king to the mantelpiece. Lord Reid's view could safely be said to represent that of many:

> I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.[5]

Now this is a bit like saying Plato and Aristotle's views no longer have relevance because the society in which they lived has changed. An idea is unamenable to obsolescence. Similarly, it is clear that the British king is not obsolete, because he is still there. Moreover, is it logical to suppose that if there were a law of nature or a law of God, that it would conveniently change in tandem with the changing prejudices of shifting small groups of men over the centuries? Are the laws of God or nature, assuming them to exist, susceptible to obsolescence?[6]

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[1] See for an appraisal of Coke, Samuel E Thorne, *Sir Edward Coke 1552-1952*, Selden Society Lecture, 17th March, 1952, printed by Spottiswoode, Balantyne & Co. for the Selden Society, London, 1957.

[2] 'We shall never see his like again, praises be to God!', said Coke's widow on his death—S E Thorne, *Sir Edward Coke, loc. cit.*, p. 4, n. 1, sourced to BM Harl. MS. 7193, fol. 16.

[3] Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England, concerning the Jurisdiction of Courts*, MDCXLIV (1644) printed by M Flesher for W Lee and D Pakeman in London, facsimile copy of this Fourth Part (508.g.5[2]) in the British Library, by Garland Publishing Inc., New York, 1979, Epilogue, p. 365.

[4] See T F T Plucknett, *A Concise History of the Common Law*, 5th edn., Little Brown and Company, Boston, 1956, at pp. 280-282.

[5] per Lord Reid, *Pickin v British Railways Board* [1974] AC 765, at 782.

[6] The application of the laws of nature, of reason, and/or of God to the establishment of governance and to the position of the king and of the people is not canvassed in this work, except in passing as it impinges upon the election of the king and his taking of the oath of governance. For convenient discussion of these issues, see John Finnis, *Natural Law*

However, as if by some kind of group hypnosis, 'Parliament' has become sacrosanct, and 'legislation' has become 'law.' The politicians and their actions are analysed, and the legislation they propose is dissected, both by opposition parties, commentators, and in the courts, but the role of the king in all this is largely ignored.

Lord Reid's view was endorsed by Justice Dawson in the High Court of Australia[1]. Dawson J referred to Sir Edward Coke's view in *Dr Bonham's case*[2], where Coke held that the common law could adjudge acts of parliament to be 'utterly void'[3] as probably being those views of 'earlier times' to which Lord Reid referred. Dawson J noted that Coke seemed later to have changed his mind in his *Fourth Institutes*, where he described parliament's power as 'transcendent and absolute'.[4] Dawson J then goes on to say:

> But they [cases suggesting courts might invalidate acts of parliament conflicting with natural law or natural equity] are of academic or historical interest only, for such views did not survive the Revolution of 1688, or, at the least, did not survive very long after it. Judicial pronouncements confirming the supremacy of parliament are rare but their scarcity is testimony to the complete acceptance by the courts that an Act of parliament is binding on them and can not be questioned by reference to principles of a more fundamental kind.[5]

and on this strand of the argument concluding :

> ...no non-territorial restraints upon parliamentary supremacy arise from the nature of a power to make laws for peace, order (or welfare), and good government or from the notion that there are fundamental rights which must prevail against the will of the legislature. The doctrine of parliamentary sovereignty is a doctrine as deeply rooted as any

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and Natural Rights, Clarendon Press, Oxford,, 1980, reprinted with corrections, 1982, 1984, 1986, 1990, 1992, 1993; and see also his compendium of articles on the various approaches to and views on natural law in John Finnis, *(ed.) Natural Law*, 2 Volumes, The International Library of Essays in Law & Legal Theory, Dartmouth Publishing Company, 1991; and see Chester James Antieau, *The Higher Laws: Origins of Modern Constitutional Law*, William S Hein & Co., Inc., New York, 1994.

[1] *Kable v The Director of Public Prosecutions for New South Wales* (1996) 138 ALR 577, per Dawson J, as *obiter*, at paragraphs 11-17 of his judgement in FC 96/027 Commonwealth Constitution, 12 September 1996; and see the *dicta* of Brennan CJ at paragraph 12 of his judgement in the same case.

[2] *Dr Bonham's Case*, sometimes called the *College of Physicians case*, (1610) Pleadings and argument at 8 Co. Rep., 107 a ff., Mich. 6 Jac. 1, 77 ER (KB) 638. Report at 8 Co. Rep. 113b, Hil. 7 Jac. 1, 77 ER (KB) 646. And see Harold J Cook, 'Against Common Right and Reason, The College of Physicians versus Dr Thomas Bonham,', *The American Journal of Legal History*, Vol. XXIX, 1985, 310-322.

[3] Per Coke CJ, *Dr Bonham's Case*, 8 Co. Rep., 118 a, 77 ER (KB) 646, at 652, relying on *Calvin's case, the Postnati*, (1610) Trin. 6 Jac. 1, 7 Co. Rep. 1 a, 77 ER (KB) 377 as authority. See the discussion on Sir Edward Coke in the Appendix IV, The Legacy of Sir Edward Coke, *post.*

[4] Coke, *Fourth Institutes* , *loc. cit.*, at p. 36, c. 1. But see discussion at p. 137, *infra.* (Dawson J referred to the 1809 edition at p. 36.)

[5] Dawson J, at paragraph 13 of his judgement in *Kable's case*, 1996, *loc. cit.*, he then refers to the line of cases from *Stockdale v Hansard* (1839) 9 Adolphus and Ellis 1 at 108; 112 ER 1112 at 1153, through *Duport Steel v Sirs* (1980) 1 WLR 142, per Lord Edmund Davies at 164, and per Lord Scarman at 168, to *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 per Kirby J, at 405.

> in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.[1]

Now it is, in my submission, untrue that 'The doctrine of parliamentary sovereignty is a doctrine as deeply rooted as any in the common law.' Dawson J was however indubitably correct to refer to this notion as a 'doctrine', which means 'that which is taught', or 'a particular principle taught or advocated',[2] or a 'belief, dogma [arrogant declaration of opinion][3], or tenet.'[4] It was a view of the world which that grand chameleon, Sir Edward Coke, arrogated to himself and coincidentally to parliament during his parliamentary period[5], and which subsequently grew to mythic proportions after Coke's development of the *Petition of Right*, the publication of William Prynne's *Soveraigne Power of Parliaments & Kingdoms &c &c* [6], the Civil War, the murder[7] of Charles I, and the Revolution of 1688, whereafter it could well be said, (to adapt William Harcourt),[8] 'they were all Whigs then.'

Compared with the history and doings of parliamentarians and of the political parties, the monarchy has received little objective, or indeed, sympathetic, analysis.

Why is this?

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[1] See Dawson J, at paragraph 17 of his judgement in *Kable's case, loc. cit.*

[2] See *Macquarie Dictionary.*

[3] See *Concise Oxford Dictionary*, 5th edn., Clarendon Press, Oxford, 1964 [from the Latin *dogma* based on the Greek, derived from *-atos* (*mat*), opinion, and *dokeo*, seem.]

[4] See *Concise Oxford Dictionary.*

[5] 1620-1626, and 1628 (he had previously been a member of parliament for Aldeborough from 1589-1592 when he became Elizabeth I's Solicitor-General, Speaker of the House of Commons in 1593, and Attorney-General in 1594.)—see A W B Simpson, (*ed.*), *Biographical Dictionary of the Common Law*, Butterworths, London, 1984, and *The New Encyclopædia Brittanica, Micropædia*, 1992.

[6] William Prynne, *The Soveraigne Power of Parliaments & Kingdoms or Second Part of the treachery and Disloilty of Papists to their Soveraignes. Wherein the Parliaments and Kingdomes Right and Interest in, and Power over the Militia, Ports, Forts, Navy, Ammunition of the Realme, to dispose of them unto Confiding Officers hands, in the times of danger; Their Right and Interest to nominate and Elect all needful Commanders, to exercise the Militia for the Kingdomes safety and defence : As likewise, to Recommend and make choice of the Lord Chancellor, Keeper, Treasurer, Privy Seale, Privie Counsellors, Iudges and Sheriffes of the Kingdome, when they see just cause; That the King hath no absolute negative voice in passing publicke Bills of Right and Iustice for the safety peace and common benefit of the People, when both Houses deeme them necessary and just : are fully vindicated and confirmed, by pregnant Reasons and variety of Authorities, for the satisfaction of all Malignants, Papists, Royallists, who unjustly Censure the Parliaments proceedings, Claims and Declarations, in these Particulars,*'; printed by Michael Sparke, Senior, by Order of the Committee of the House of Commons concerning Printing, 28 March 1643. Facsimile copy made from the copy in the British Library (1129.h.6) by Garland Publishing Inc, New York, 1979

[7] This is the phrase used by Professor Maitland at p. 282 of his *Constitutional History*, (*The Constitutional History of England*, Cambridge, 1908; reprinted Cambridge University Press, 1950).

[8] (1827–1904) British statesman, to whom is attributed the statement 'We are all Socialists now.' See Hubert Bland, 'The Outlook', in G B Shaw, (*ed.*) *Fabian Essays in Socialism*, 1889.

Professor Chrimes' observations are pertinent:

> ... the history of the English monarchy as an institution has still to be written. The great length of that history, its extreme complexity, its profound ramifications into the very heart of English evolution—not to mention the parliamentary preoccupations of constitutional historians, and the Whiggish outlook of nearly all historians except the more recent—have seriously militated against its construction, in all its fullness. A great theme—one of very few left—as rich in the play of personalities as in the subtleties of law and the machinations of politics, awaits the exponent; and he will need to be something of a Stubbs, of a Maitland, and of a Tout, all in one.[1]

A further reason lies in the acquiescence by the courts in the House of Commons' view of itself, in the years following the 1688 revolution. This can best be demonstrated by *Paty's case*,[2] where Powell J delivered the majority opinion in holding that the men incarcerated by the Commons were committed under 'another law than we proceed by', the *legem et consuetudinem parlimenti* (one of Coke's inventions),[3] and 'the House of Commons is superior to all courts of law', and therefore the court could not interfere; only Holt CJ brilliantly dissented.[4] He said :

> we must not be frighted when a matter of property [he saw the right to vote as a proprietary right] comes before us, saying it belongs to parliament; we must exert the queen's jurisdiction. My opinion is founded on the law of England...[5]

But the judges were frighted, and as slavish, if not more so, to the desires of the House of Commons as had been an earlier generation of judges to the Stuarts.[6] The fact is that Coke was wrong in many of his assertions, but they have percolated down the ages as if they were tributaries of the eternal fountains of Elysium. If, however, such a thing as the

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[1] S B Chrimes, *English Constitutional Ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936; reissued by American Scholar Publications, Inc., NY, 1965, at p. 2.

[2] See *Ashby v White*, 1702-1704, 2 Lord Raymond, *Report of Cases*, 4th edn., 1790, 938, 3 Ld. Raym. 320, 14 *State Trials*, 695. And see R *v Paty et alios*, 1704, Lord Raymond, *Report of Cases*, 4th edn., 1790, vol. II, 1105. See texts at E N Williams, (*ed.*), *The Eighteenth Century Constitution, 1688-1815*, Cambridge University Press, Cambridge, 1960, reprinted 1965, 1970, pp. 221-232. *Paty's case* is also known as *The case of the Aylesbury men*, in Queen's Bench, 14 *State Trials*, 854, reproduced in W C Costin, and J Steven Watson, (*eds.*), *The Law and Working of the Constitution: Documents 1660-1914*, Vol. I, 1660-1783, Adam & Charles Black, London, 1952, 2nd edn. 1961, reprint 1967, at pp. 279-284.

[3] This law was one of the inventions of Sir Edward Coke—see discussion *infra* at p. 136, and p. 422. Powell J drew solely on Coke's statements in his *First Institutes*. See also *The case of the Aylesbury Men*, 14 *State Trials*, 854, quoted in Costin and Watson, *ed. cit.*, at p. 280.

[4] See discussion *infra* at note 5, p. 422. See Holt CJ's dissent in *Ashby v White*, 1702, 2 Lord Raymond, *Reports of Cases*, 4th edn., 1790, at p. 950, extracted in Williams, *Eighteenth Century Constitution, ed. cit.*, pp. 224-226. And see 14 *State Trials*, 695. And see text in Costin and Watson, *ed. cit.*, pp. 278-279. And see Holt CJ's dissent in *The case of the Aylesbury Men*, 14 *State Trials*, 854, quoted in Costin and Watson, *ed. cit.*, at pp. 281-284.

[5] See *Ashby v White*, 1702, 2 Lord Raymond, *Reports of Cases*, 4th edn., 1790, at p. 950, extracted in Williams, *Eighteenth Century Constitution, ed. cit.*, pp. 224-226. And see 14 *State Trials*, 695. And see text in Costin and Watson, *ed. cit.*, pp. 278-279.

[6] See for example, Maitland's observation in his *Constitutional History*, p. 324

sovereignty of parliament is accepted, or if the notion that the houses of parliament are untouchable by the courts of law is accepted, then the idea of the king fades more into the background. What point is there in the king? It is generally forgotten that no statute can become law without the assent of the king. He is seen as a background cipher.

Later still, the doctrine of the 'sovereignty of parliament' was metamorphosed into 'the sovereignty of the people',[1] following directly upon Whigs' and revolutionaries' acceptance of the philosophical principles of John Locke and Jeremy Bentham,[2] and successfully proselytised by writers such as Thomas Paine.[3] But parliamentarians themselves looked upon this idea of the 'sovereignty of the people' with undisguised hostility, as did some writers, animadverting about 'the swinish multitude'[4] or the 'ignorant multitude of the new constituencies.'[5]

What has happened to the king in all of these developments? The king, at law, has become almost invisible. Indeed, even 'the Crown' is disappearing, 'Crown privilege' being replaced by the term 'public interest immunity', 'The Queen' is being removed from traditional documents,[6] and the King's Peace is becoming 'the public peace.'

THE KING

The King has been disappearing because of the acceptance of the notion of 'the Crown' as

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[1] See Richard Price, *Observations on the Nature of Civil Liberty*, 7th edn. London, 1776, quoted by H T Dickinson in 'The Eighteenth Century Debate on the Sovereignty of Parliament', Read 17 October, 1975, *Transactions of the Royal Historical Society*, 5th series, Vol. 26, 1976, 189-210, at p. 205, and n. 46. And for a general analysis, see Edmund S Morgan, *Inventing the People, The Rise of Popular Sovereignty in England and America*, W W Norton & Company, New York, 1988, Norton paperback, 1989.

[2] 'The sovereignty is in the *people*...', Chapter III, Article II, Jeremy Bentham, *Constitutional Code; for the use of All Nations and All Governments professing Liberal Opinions*, printed for the author and published by Robert Heward, 2 Wellington Street, the Strand, 1830, reprinted by Clarendon Press, Oxford, 1983, F Rosen and J H Burns, (*eds.*), p. 25.

[3] See Thomas Paine, *The Rights of Man*, (I) published 13 March, 1791, and (II), 1792, in response to Edmund Burke's *Reflections on the Revolution in France*, and dedicated to George Washington 1791, *Reflections on the Revolution in France and the Rights of Man*, Dolphin Books, Doubleday & Company, Inc., New York, 1961, *passim*.

[4] Edmund Burke, *Reflections on The Revolution in France*, 1790, published in *Reflections on the Revolution in France* by Edmund Burke, and *The Rights of Man*, by Thomas Paine, Dolphin Books, New York, 1961, p. 92.

[5] Bagehot, *The English Constitution*, *op. cit.*, p. 282.

[6] See the removal of the Royal Command from the Writ of Summons in 1979, and the correspondence in The Times for 14, 17, 18, and 20 December 1979. This removal sparked a controversy, and led to the resignation of R E Ball from his position in protest at this stealthy removal of 'the Queen'—see his Preface to his book, R E Ball, *The Crown, The Sages and Supreme Morality*, Routledge and Keegan Paul, London, 1983.

something that is capable of being owned, or controlled.[1]

But it is the King who wears the crown, and it is the king who has it bestowed upon him after his recognition by the people, and his taking the oath of governance. This occurs in a religious ceremony, called the coronation ceremony. It is the investiture of the king with his name and powers. It is this recognition by the people, and the taking of the oath of governance, that provides the answer to Maitland's conundrum.[2]

Since the Revolution of 1688-1689, the coronation has been treated by almost everyone except the monarchs themselves, and the clergy, as a mere ceremonial occasion. The coronation of a British king consists of :

- The Recognition, where the king is recognised as king by the people, and give him allegiance
- The Oath of Governance (the Coronation or Royal Oath), where the king swears a most solemn oath as to the nature of his governance
- The Anointing, where the king is solemnly anointed with oil and consecrated as king
- The Delivery of the Regalia, including the Crown, which are the symbols of his prerogatives
- The Homage, where the peers and clergy pay homage to the monarch by the swearing of oaths of loyalty and by touching the crown.

Constitutional scholars have tended to ignore the coronation, believing it to have no legal effect.

Why is this so? If in a court of law, evidence taken upon oath is necessary and violation of the oath subject to punishment, why would not the oath of kings be of interest? If in international law, the concept of Recognition is one of the fundamental principles with regard to emerging sovereign states, or to changes in governance of a sovereign state, why is not the Recognition of a Sovereign of legal interest?[1] If the consecration of priests, churches, and land still receives honour among the community, why is the idea of the consecration of the king viewed as trivial? And what, then, does the doing of the Homage by physically touching the crown of the new king denote—mere ceremony?

The coronation oath has been the ghost in the machine of British governance since British

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[1] See discussion *infra*, at p. 104, p. 137, p. 381, p. 384, p. 386, and p. 443,

[2] See Preface, and note 5 at p. 8 *supra*; the conundrum is posed in Maitland at p. 285 of his *Constitutional History*.

governance began. Like an apparition it appears in the histories, legal cases, parliamentary debates, revolutions, murders and executions, depositions and accessions, always at times of crisis, its appearance being remarked upon by observers—and then it vanishes, as if it had never been, or as if the beholder were unwilling to admit the truth of its appearance.

What other single utterance has played such a crucial role in so many legal, philosophical, religious, and political issues, and yet been so ignored by modern writers, especially by historians and lawyers?

Famous lawyers over the centuries before this have not treated the oath of governance with such contempt. Is this disregard due to an idea that the oath is no longer binding? If so, how could this be, when much of the process of justice and the law depends upon the giving of oaths. Judges make oaths,[2] Ministers make oaths, members of parliament make oaths—and all these oaths swear service to the Queen. Are judges, Ministers and members of parliament somehow more important than the Queen? Do their oaths matter but hers does not?

No oath is taken lightly.

It is, when taken by kings, to be taken very seriously—as indeed it has been in every century except ours.

In part I believe this willingness to treat the oath of the king as being irrelevant has sprung

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[1] For example, Louis XIV 'recognised' James II as king in 1688-89, William in 1699 after conclusion of a peace treaty, and James III (the Old Pretender or Chevalier) as king of England in 1701 on James II's death—see *infra* p. 361, p. 409, and p. 410.

[2] See for example the comments by Sir Gerard Brennan, AC, KBE, on his oath, made on his being sworn in as Chief Justice of the High Court of Australia, 21 April, 1995, reproduced in 69 (1995) *ALJ*, 679-681 : '...Today's ceremonies are not empty rituals. This Court's practice is to administer the Oath of Allegiance and Office in public. That is not a matter of formal procedure. It is a public witnessing of the making of two solemn promises for the performance of which the oath taker will be responsible not only to this Court and this country but also to his Creator...'—though Sir Gerard Brennan interprets his oath of loyalty to the Queen as being in effect made instead as 'a promise of fidelity and service to the Australian people', as he conceives that 'ultimate sovereignty of the nation' resides in the Australian people, because the written Constitution of Australia can be amended or abrogated only by the people of Australia. (see *ibid.*, pp. 679-680). He does not advert to any royal assent to any such change. The position of the written Australian Constitution, and of the monarch in relation to it, is not covered in this dissertation. But the view to which this essay comes as a result of an examination of the authorities, is that allegiance can only be given to the monarch, who in turn has been chosen by the people and is bound to them. To this extent, the views of Hobbes are still relevant today—see discussion *infra* at p. 339 and Appendix III, and see also my Conclusion, The Crowned King, p. 467 ff., *passim*.

up from that 'invisibility' and ignorance of the king to which I alluded at the beginning of this essay, which is due to those factors which I mentioned there. It is due also to the concomitant confusion as to the nature of sovereignty—it is seen as parliament's, the people's, the state's, but never the king's, even though he is the only person who bears the name 'Sovereign'. 'Sovereignty' is seen to be 'legal', or 'titular', or 'popular' or 'international' or 'national'—but there is no one clear notion of what 'sovereignty' exactly is.

Trivialisation is the best way to attempt to render something or someone ineffective. This is what has been done to the king. For example, Professor Cannadine's work on the coronation, though perceptive, treats it purely as a ceremonial, a ritual, devoid of any but symbolic, metaphorical, metaphysical, or superficial meaning. And if one is a lawyer, the best way of avoiding difficult issues is never to contemplate them—as Maitland said, 'the Crown' is a 'convenient cover for ignorance: it saves us from asking difficult questions.'

Legal approaches towards 'the Crown' have been focussed in the main upon the royal prerogatives, and their delegated use by the king's Ministers. 'Public interest immunity' and judicial review[1] focus upon the exercise of the delegated powers, but never upon the source. The prerogatives are increasingly referred to as 'the reserve powers' as if by describing them in this fashion they will appear to be less than in fact they are.

These issues are contentious and difficult to pin down, crossing as they do so many fields of law and politics, constitution and 'convention', philosophy and practice. They are also burdened by historical misrepresentation, mythology, fictions, elliptical and selective use of sources, and reiteration of dubious assertions as immutable truths. The best example of this last is the willingness of lawyers today to accept the peregrinations of a 150 year-old journalist on matters of which he had no first-hand knowledge as if they were holy writ.[2]

It is for this reason that I adopted an historical and narrative approach, as it is only in that context that the nature of royal oath, and of the powers and obligations of the king—from whence they come, and whither they are wielded—can be seen.

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[1] Clearly, because of space constraints, again these matters are not dealt with here. But judicial review and the developments in administrative law, do not I believe vitiate my conclusions herein concerning the legal nature of the oath of governance of the British king.

[2] Bagehot, *The English Constitution*, *op. cit.*

It is my hope that my essay in answering Maitland's conundrum will provoke thought and discussion on the underlying issues of the constitution and of the nature of British governance, matters which should be addressed in my view with more care than they have heretofore. It is also, in my view, a mistake for major practical and philosophical matters pertaining to the governance of a country or countries, to be discussed solely in the political arena, or in the graver groves of the academy. In this regard, both Peter Hennessy and Tom Nairn in their different fashions have provided an immense service to the community at large, by exposing issues relating to these matters in an easily understood and comprehensible fashion. The law of how we live, and why we live the way we do belongs to us all, and should be capable of being understood by us all.

'The law', said Maitland, 'is a body, a living body, every member of which is connected with and depends upon every other member. ... Life I know is short, and law is long, very long, and we cannot study everything at once; still, no good comes of refusing to see the truth...'[1]

[1] F W Maitland, *The Constitutional History of England*, 1908, 418, 538-9.