PART III

# *THE CENTRAL GOVERNMENT*

CHAPTER 14

# THE MONARCHY[1]

Constitutional law distinguishes between the roles of Head of State and Head of Government. In the United Kingdom the former office is hereditary and the current holder is described as monarch or sovereign. In legal theory (but not in political reality) the executive branch of the state, which in other constitutions has its own legal status and powers, exercises powers which belong to the royal head of state, usually referred to as the powers of the Crown, to distinguish the impersonal executive from the person of the monarch.[2] **14–001**

## Title to the Throne

The title to the Throne is both statutory and hereditary, while a trace of the Anglo-Saxon elective element is still found in the coronation ceremony. The Act of Settlement 1700[3] settled the Throne on Sophia, Electress of Hanover (granddaughter of James I), and the heirs of her body being Protestants. Sophia's son, George I (1714), succeeded Anne under this Act. Any person who is reconciled to or shall hold communion with the See or Church of Rome or shall profess the Popish Religion or shall marry a papist, is excluded from the succession. The successor to the Crown must take the Coronation Oath, in the manner and form prescribed by statute and must sign and repeat the declaration prescribed by the Bill of Rights. Any person who comes to the possession of the Crown must join in communion with the Church of England as by law established. **14–002**

The desirability of amending the Act of Settlement to remove these discriminatory provisions, was raised in the course of 1999.[4] Any such reform would require the members of the Commonwealth to be consulted, at least the "Realms," if not also the Republics in accordance with the convention in the preamble to the Statute of Westminster 1931 that, since the Crown is the symbol of the free association of the members of the Commonwealth, any alteration in the law touching the succession to the Throne requires the assent of the Parliaments of all the "Dominions".[5]

## Accession

When a Sovereign dies his successor accedes to the Throne immediately. The automatic succession of the new monarch is sometimes expressed in the maxim "the King never dies".[6] At common law a person is never too young to succeed to the Throne. **14–003**

[1] V. Bogdanor, *The Monarchy and the Constitution* (1995).

[2] The various uses of the term "the Crown" are discussed later in Chapter 14 and Chapter 33.

[3] The Act of Settlement was amended by the Union with Scotland and Ireland Acts, and by His Majesty's Declaration of Abdication Act 1936. The legitimacy of the succession based on the Act of Settlement cannot be questioned in court: *Hall v. Hall* (1944) 88 S.J. 383 (Hereford C.C.).

[4] A motion to seek the permission of the Queen to debate a Succession to the Crown (Amendment) Bill was defeated in the House of Lords on December 2, 1999.

[5] Perhaps the assent is now required of all independent countries of the Commonwealth that recognise Her Majesty as Queen: *post*, para. 36–021.

[6] *Calvin's Case* (1608) 8 Co. Rep. 1a, 10b.

As soon as conveniently possible after the death or abdication of a Sovereign, an Accession Council meets to acclaim the new Sovereign. An Accession Council is composed of the Lords Spiritual and Temporal, assisted by Members of the Privy Council, with the Lord Mayor and Aldermen of the City of London and the high commissioners of the Commonwealth countries. The new Sovereign takes the oath for the security of the Presbyterian Church in Scotland prescribed by the Union with Scotland Act 1706. Before the first meeting of Parliament or at his coronation he must declare that he is a faithful Protestant, and promise to uphold the enactments securing the Protestant succession to the Throne.[7]

**Coronation**

14–004 Coronation customarily takes place in Westminster Abbey some months after accession, and is conducted by the Archbishop of Canterbury, assisted by the Archbishop of York.[8] Coronation is not legally necessary. Indeed Edward VIII reigned for nearly a year before abdicating, and was never crowned.[9]

The Coronation Oath is based on the Coronation Oath Act 1688, and is obligatory by the Act of Settlement as amended by the Acts of Union. The Oath taken by Elizabeth II was to govern the peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon,[10] and her possessions and the other territories to any of them belonging or pertaining, according to the statutes in Parliament agreed on and their respective laws and customs; to maintain in the United Kingdom the Protestant reformed religion established by law; and to maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline and government thereof in England.

**Abdication**

14–005 There is no precedent for a voluntary abdication[11] before 1936, when Edward VIII was given the choice of abdicating or giving up his proposed marriage with Mrs. Simpson, whom the Prime Minister (Mr. Baldwin) and the Dominion Prime Ministers regarded as unsuitable for a King's consort. The King signed an Instrument of Abdication declaring his irrevocable determination to renounce the Throne for himself and his descendants. He then sent a message to Parliament asking that a Bill should be passed accordingly to alter the succession to the Throne, and issued a commission to signify his assent thereto. His Majesty's Declaration of Abdication Act 1936 accordingly provided that His Majesty should cease to be King and there should be a demise of the Crown, and the member of the Royal Family then next in succession to the Throne should succeed. It amended the Act of Settlement 1700 by excluding King Edward (thereafter Duke of Windsor) and his descendants from the succession to the

[7] Accession Declaration Act 1910.

[8] At the coronation of Elizabeth II in 1953 a minor part was played by the Moderator of the General Assembly of the Church of Scotland. It may well be that future coronations will follow a more ecumenical or multi-faith pattern.

[9] For a description of the coronation ceremony, see A. B. Keith, *The King and the Imperial Crown*, (1936) pp. 20–29.

[10] These were the independent kingdoms or realms in the Commonwealth at that time. India was already a republic.

[11] Following the defeat of James II in battle and his flight from the country, the Declaration of Rights 1688, embodied in the Bill of Rights, asserted that the late King James II had "abdicated the Government" and the Throne was "thereby vacant".

Throne, and exempted them from the provisions of the Royal Marriages Act 1772.

**Royal Style and Titles**

The Royal Style and Titles are altered from time to time by Act of Parliament, or by proclamation issued thereunder. Several changes have been made in the present century to take account of constitutional developments in the Commonwealth. The preamble to the Statute of Westminster 1931 recites the convention that any alteration of the Royal Style and Titles shall require the consent of the Parliaments of all the "Dominions".[12] Events since 1952, however, suggest that such consent is no longer required.[13] On the accession of Elizabeth II, the Sovereign was for the first time proclaimed by different titles in the various independent countries of the Commonwealth. The Royal Titles Act 1953 empowers the Queen to use, in relation to the United Kingdom and all other territories for whose foreign relations the Government of the United Kingdom is responsible, such style and titles as she may think fit having regard to the agreement made between representatives of the member governments of the Commonwealth. The style and titles proclaimed under this Act are: "Elizabeth II by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of her other Realms and Territories Queen, Head of the Commonwealth,[14] Defender of the Faith."[15] **14–006**

**The Royal family**

*The Sovereign.*[16] The Queen Regnant has the same status and powers as a King. She is the Head of the State. The central government of the country is carried on in her name and on her behalf; she is an essential part of the legislature, and justice is administered in the royal courts in her name. But what were formerly the personal prerogatives of the Sovereign have now become largely the powers and privileges of the government.[17] **14–007**

The official duties of the Queen in her capacity as Sovereign of the United Kingdom and of the other self-governing Commonwealth monarchies and the remaining colonial territories, Head of the Armed Services, and Supreme Governor of the Church of England and with her special responsibility to the Established Church of Scotland, include: (i) work arising out of the government such as approving and signing commissions, and reading ministerial, Cabinet, parliamentary and diplomatic papers for several hours a day; (ii) private audiences with ambassadors etc., receiving the Prime Minister and other Ministers, holding a Privy Council and investitures; (iii) attending at state occasions such as the opening of Parliament, Trooping the Colour and religious services; and (iv) exchanging state visits and visiting Commonwealth countries.[18]

The Sovereign's official expenditure is financed mainly out of the Civil List provided by Parliament.[19]

[12] *cf. ante*, para. 7–019.
[13] *post*, para. 36–021.
[14] *post*, para. 36–021.
[15] (1953) Cmd. 8748. See also S. A. de Smith, "The Royal Style and Titles" (1953) 2 I.C.L.Q. 263; and *post*, para. 36–021.
[16] See also *post*, para. 33–015.
[17] *post*, Chap. 15.
[18] *Report from the Select Committee on the Civil List* (1971) H.C. 29, para. 17 and Appendix 13.
[19] *post*, para. 15–013(d) And for the Crown private estates, see *post*, para. 15–009.

*Husband of Queen Regnant.* Prince Philip, Duke of Edinburgh, is granted precedence next to the Queen. He is a Privy Councillor. At common law he has the status of an ordinary subject, and is not protected by the law of treason.

*The Prince of Wales.* The life of the Sovereign's eldest son is protected by the Statute of Treason 1351. When the Sovereign's eldest son is born he immediately becomes by custom Duke of Cornwall.[20] When he succeeds to the Throne, the Duchy of Cornwall immediately vests in his eldest son. The Sovereign may create his of her eldest son Prince of Wales and Earl of Chester by letters patent. Prince Charles was created Prince of Wales and Earl of Chester in 1958, and his investiture as Prince of Wales took place at Caernarvon Castle in 1969.

For the avoidance of doubt, section 6 of the House of Lords Act 1999 provides that for the purposes of that Act "hereditary peerage" includes "the principality of Wales and the earldom of Chester".

*Princes and princesses of the blood royal.* The style of "Royal Highness" is conferred by letters patent[21] on the children of Sovereigns, and on the wives and children of the sons of Sovereigns.

*Royal marriages.* By the Royal Marriages Act 1772 no descendant of the body of George II (other than the issue of princesses married into royal families[22]) may marry without the royal consent signified under the Great Seal and declared in Council, and marriages by these persons without such consent are void (*Sussex Peerage Case*[23]). Further, all persons solemnising such marriages, or who are privy and consenting thereto, commit an offence. If the royal consent is refused, a descendant of George II aged 25 or more may give notice to the Privy Council and may contract a valid marriage at the expiration of 12 months unless Parliament has objected in the interim.[24]

### Regency Acts 1937–1953

**14–008** The common law made no provision for a regency or the delegation of royal functions when the Sovereign was ill or absent from the realm. These matters are now regulated by the Regency Acts 1937–1953.

**14–009** (i) *Delegation of functions to Counsellors of State.* Before 1937 Counsellors of State were appointed under the Royal Prerogative and might include, in addition to members of the Royal Family, dignitaries such as the Archbishop of Canterbury, the Lord Chancellor and the Prime Minister. The Regency Act 1937 authorises the Sovereign to appoint Counsellors of State by letters patent, and to delegate to them such of the royal functions as may be specified in the letters

[20] Duchy of Cornwall Management Acts 1863 to 1982.

[21] *London Gazette*, February 5, 1864.

[22] It has been strongly argued that this exception largely nullifies the Act in modern circumstances: see C. d'O. Farran, "The Royal Marriages Act 1772" (1951) 14 M.L.R. 53), but it continues to be the practice to ask for the royal consent.

[23] (1844) 11 Cl. & F. 85.

[24] It is suggested that the Act should be amended so as to be confined to descendants of George V, and also that a marriage without the royal consent should not be void or punishable, but should merely exclude the parties and their descendants from the succession to the Throne.

patent, whenever he is absent or intends to be absent from the United Kingdom, or is suffering from infirmity of mind or body not amounting to incapacity such as would warrant a regency under the Act. The persons to be appointed to be Counsellors of State are the wife or husband of the Sovereign and the four persons next in succession to the Throne, excluding any person who would be disqualified from being Regent. The Regency Act 1953 includes Queen Elizabeth the Queen Mother among the persons who may be appointed Counsellors of State. This modern practice that only members of the Royal Family should be appointed to the exclusion of United Kingdom Ministers,[25] reflects the significance of the Monarchy to the Commonwealth. The Counsellors may not be given authority to dissolve Parliament otherwise than at the express instructions of the Sovereign—which may be given by telegraph—or to grant any rank, title or dignity of the peerage.

**14–010** (ii) *Regency.* (a) The Regency Act 1937 provides that if *the Sovereign is under 18 years of age* the royal functions are to be performed until he is 18 by a Regent, who shall act in the name and on behalf of the Sovereign. The Sovereign is deemed to accede to the Throne when he attains the age of 18 years for the purpose of taking statutory oaths and declarations. The Regent is to be the person of full age next in succession to the Throne who is a British subject resident in the United Kingdom and who is not disqualified on religious grounds. The Regency Act 1953, however, provides that the Duke of Edinburgh shall be Regent if a child of Queen Elizabeth and the Duke of Edinburgh succeeds to the Throne under the age of 18, or if a regency is necessary in the lifetime of the Queen. The Regent is to take oaths of allegiance, good government and maintenance of the Protestant religion in England and Scotland. He is empowered to exercise all royal functions, except that he may not assent to a Bill altering the succession to the Throne or repealing the Acts for securing the Scottish Protestant religion and Church.[26]

The Act of 1937 also provides for the *guardianship* of the person of a Sovereign under 18 years. Of an unmarried Sovereign his or her mother is to be the guardian; of a married Sovereign the Sovereign's spouse will be guardian. If in the first case the Sovereign has no mother or in the second case the Consort is under age, then the Regent will be guardian.

(b) The Regency Act 1937 further provides for the appointment of a Regent if a declaration is made by certain persons that they are "satisfied by evidence which shall include the evidence of physicians that *the Sovereign is by infirmity of mind or body incapable* for the time being of performing the royal functions", or that they are "satisfied by evidence that the Sovereign is for some definite cause *not available*" for the performance of those functions.[27] The regency will continue until a contrary declaration is made. The persons who may make such declaration are the wife or husband of the Sovereign, the Lord Chancellor, the Speaker, the Lord Chief Justice and the Master of the Rolls, or any three or more of them. It will be noticed that the person who would be Regent is not one of those who make this declaration. The declaration must be made in writing to the

[25] See J. W. Wheeler-Bennett, *King George VI*, (1958) App. A.
[26] *cf. ante*, para. 4–038.
[27] The Sovereign would not be available, *e.g.* if he were made a prisoner of war.

Privy Council, and is to be communicated to the governments of the "Dominions".

### The Sovereign's Private Secretary[28]

**14–011** The post of Private Secretary to the Monarch is comparatively modern. Before the reign of George III the theory was that the Home Secretary was the King's Private Secretary, and it was thought desirable that a person admitted to Cabinet secrets should be a Privy Councillor. George III for many years wrote his own letters, but in 1805, when he was almost blind, he appointed Sir Herbert Taylor his Private Secretary. William IV reappointed Taylor, who had by then become a Privy Councillor. Since the Prince Consort's death in 1861 the office has been regular and officially accepted, its prestige being built up by Sir Henry Ponsonby and Sir Arthur Bigge (Lord Stamfordham), who between them occupied that post from 1870 to 1931, except during Edward VII's reign.

The Sovereign's Private Secretary is always now sworn of the Privy Council. It appears that he informally seeks advice from various sources—governmental, opposition and official—and then briefs the Sovereign. His post is very important[29] as he is concerned with the relations not only between the Sovereign and the British Cabinet, but also between the Sovereign and Governors-General and Commonwealth Prime Ministers.

The publication of an article in *The Sunday Times* on July 20, 1986 which purported to describe the Queen's views on a wide range of political matters provoked, unusually, the Private Secretary to write a public letter denying the accuracy of the report.[30]

### Treason

**14–012** The law of treason is a reminder of the antiquity of much of the Constitution. It dates from a time when an attack on the monarch was likely to be the most effective way to undermine the government of the State.[31]

Treason is a betrayal (*trahison*) or breach of the faith and allegiance due to the Sovereign. Allegiance is correlative to protection. It is owed to the Crown by British citizens wherever they may be; by citizens of other Commonwealth countries and Irish citizens while they are in the United Kingdom[32]; and by aliens[33] while they are in British territory by the Sovereign's licence, express or tacit. It has been held that aliens resident in the Sovereign's dominions may

[28] Wheeler-Bennett, *King George VI* (1958) App. B; Arthur Ponsonby, *Henry Ponsonby, Queen Victoria's Private Secretary*, Chap. 3; Sir Ivor Jennings, *Cabinet Government* (3rd ed. 1959), pp. 343–351.

[29] "Crucial to the working of constitutional monarchy in Britain:" V. Bogdanor, *The Monarchy and the Constitution* (1995), p. 197.

[30] Letter to *The Times*, July 28, 1986; *post*, para. 36–023.

[31] It is worthy of note that even in the case of the most serious terrorist outrages of the last few years prosecutions have not been brought under the law of treason. No doubt that is explicable partly by the wish to avoid the uncertainties of an ancient part of the law but also, perhaps, because it was felt that the execution of persons convicted in peace time would cause undesirable controversy, and provoke further crimes of violence

[32] Citizens of other Commonwealth countries which owe allegiance to the Queen as Queen also owe allegiance by the law of their respective countries.

[33] *Semble*, including civilian enemy aliens who remain at large within the realm by licence, and internees; *cf.* prisoners of war.

continue to owe allegiance even after protection is withdrawn.[34] Foreign diplomatic representatives and members of foreign invading or occupying forces, however, do not owe allegiance.

The earliest statute on the subject is the Treason Act 1351, which was supposed to be declaratory of the common law.[35] The statute is still in force, with amendments, and constitutes the following offences high treason[36]: (i) compassing or imagining the death of the King (or Queen Regnant) Queen Consort,[37] or the sovereign's eldest son and heir; or (ii) violating the King's consort or the King's eldest daughter unmarried or the wife of the king's eldest son and heir[38]; or (iii) levying war against the King in his realm; or (iv) adhering to the King's enemies in his realm, giving them aid or comfort in the realm or elsewhere; or (v) slaying the Chancellor, Treasurer[39] or the King's justices assigned to hear and determine, being in their places doing their offices.

*Compassing or imagining the death of the Sovereign*

**14–013** The words "compass or imagine" import design, which must be manifested by an overt act.[40] The following are overt acts according to Blackstone[41]: providing weapons, conspiring to imprison the King though not intending his death, or assembling and consulting to kill the King.

*Levying of war in the realm*

**14–014** This has been held to include not only levying of war to dethrone the King, but also levying war to reform religion, remove councillors or redress grievances. Resistance to the royal forces by defending a castle against them is levying War, and so is an insurrection with an avowed design to pull down all chapels and the like. In *Damaree's Case* (1709)[42] Damaree and Purchas were convicted of treason for burning Nonconformist meeting-houses, the court being of opinion that the design was a general one against the state, and therefore a levying of war. Blackstone says that merely conspiring to levy war is not a treasonable levying of war, but that it constitutes compassing the King's death where it is pointed at the royal person or government. To enlist men in the realm to go to the aid of the King's enemies abroad is not levying war in the realm, but it may be brought under compassing the King's death and adhering to the King's enemies.

*Adhering to the King's enemies*

**14–015** It is an offence under (iv) above either to give the King's enemies in his realm aid and comfort in his realm, or to give aid and comfort elsewhere to the King's enemies elsewhere. "Enemies" here means public belligerents as understood in international law, and not mere pirates or British rebels; but to aid the latter in the

[34] *De Jager v. Att.-Gen. of Natal* [1907] A.C. 326.

[35] See J. G. Bellamy, *The Law of Treason in E[illegible] and in the Later Middle Ages* (1970); G. P. Bodet, "Sir Edward Coke's *Third Institute*: a primer for treason defendants" (1971) 20 U.T.L.J. 469.

[36] Petit treason under this statute consisted of: (a) the killing of a master by his servant, (b) the killing of a husband by his wife, and (c) the killing of a prelate by his ecclesiastical inferior. Since 1828 these offences have been regarded as ordinary murder.

[37] The consort of a Queen Regnant is not protected by the law of treason.

[38] Allegations of adultery by Diana, Princess of Wales, revived newspapers' interests in this provision of the Treason Act: P. Catley, "James Hewitt, the Princess of Wales and the Treason Acts", [1996] New L.J. 350.

[39] There has been no Treasurer since 1714: *post*, para. 18–007.

[40] *R. v. Thistlewood* (1820) 33 St.Tr. 681.

[41] Bl.Comm. IV, 74 *et seq.*

[42] *R. v. Damaree* (1709) 15 St.Tr. 521.

realm would constitute levying of war. Persons acting under duress as regards life or person cannot be convicted as traitors, provided that they leave the King's enemies at the first opportunity.

In *R. v. Lynch*,[43] where a British subject during the Boer War commanded an Irish brigade on the side of the Boers against the British forces, the court held that the words "adhering to the King's enemies in his realm" did not mean that the "accused person *being in the realm* has been adherent to the King's enemies *wherever they were*", to the exclusion of such a case as that before the court. So narrow a construction not only would enable an Englishman to engage with a foreign hostile power against his own country, so long as he took care to remain abroad, but also ignores the words "or elsewhere" in the same sentence of the section. *R. v. Lynch* also decided that section 6 of the Naturalisation Act 1870 did not enable a British subject to become naturalised in an enemy state in time of war, and, further, that the very act of purporting to become naturalised in those circumstances constituted an overt act of treason.[44]

In *R. v. Casement*[45] it was decided that a subject may "adhere to the King's enemies in his realm" and so be found guilty of treason under the statute of 1351, whether the act complained of was committed within or outside the realm. In that case Sir Roger Casement, a British subject,[46] was found guilty on the ground that he went to Germany when the United Kingdom was at war with that country, and while there endeavoured to persuade Irish prisoners of war (who were British subjects) to join the enemy's forces and thus to assist the liberation of Ireland. The Court of Criminal Appeal had to interpret the statute of Edward III, which was written without punctuation, according to its meaning when it was passed.

**14–016** It was resolved by the judges in 1707[47] that a resident alien, who during a war with his native country returned there and adhered to the King's enemies, leaving his family and effects here, might be dealt with as a traitor: "For he came and settled here under the protection of the Crown; and though his person was removed for a time, his effects and family continued still under the same protection." The principle of this rule was extended by the House of Lords in *Joyce v. Director of Public Prosecutions*[48] to an alien who departed entirely from this country, but who was held in the particular circumstances to have remained under the protection of the Crown.

*Mens rea* is required for treason as for other crimes. In *R. v. Ahlers*[49] the accused was German Consul at Sunderland, and it was therefore part of his ordinary duty to give his compatriots assistance, monetary and otherwise. He took steps on the outbreak of war in 1914 to assist German subjects of military

[43] [1903] 1 K.B. 444; *post*, para. 23–011.

[44] *Quaere* extent of application of this rule to the British Nationality Act 1981 in the light of s.12(4); s.24; s.29; s.30.

[45] [1917] 1 K.B. 98. A. Wharam, "Casement and Joyce" (1978) 41 M.L.R. 681.

[46] An Irishman by birth: at that time the whole of Ireland was part of the United Kingdom.

[47] Foster's *Crown Cases* (3rd ed.), p. 185.

[48] [1946] A.C. 347. William Joyce (popularly known as "Lord Haw-Haw") was brought back from Germany at the end of the last war and charged with high treason in that he, while owing allegiance to the Crown, adhered to the King's enemies elsewhere than in the realm by broadcasting Nazi propaganda. He had obtained a British passport by falsely declaring himself to be a British subject, when he was in fact a citizen of the United States. For criticisms of the decision, see Cobbett's *Cases on International Law* (6th ed., W. L. Walker), i, p. 199; Glanville L. Williams, "The Correlation of Allegiance and Protection" (1948) 10 C.L.J. 54; S. C. Briggs, "Treason and the Trial of William Joyce" (1947) 7 U.T.L.J. 162. See also J. A. Cole, *Lord Haw-Haw, The Full Story of William Joyce*.

[49] [1915] 1 K.B. 616, CA.

age to return home to fight in the German army. A statutory Order in Council limited the time for the departure of alien enemies: of this the accused knew nothing, but he believed he was acting in accordance with international law. His conviction for treason by adhering to the King's enemies was quashed for lack of proof that he was aware that he was assisting the King's enemies.

*Slaying the Chancellor, etc.*

**14–017** As the Lord Chancellor and judges represent the Sovereign in court, Blackstone considered them entitled to equal protection and justified this section of the statute accordingly. However, attempted murder of the Chancellor and judges in court is, according to the same authority, not treason.

*Treason Acts subsequent to 1351*

**14–018** The Treason Act 1495 provided that a subject who obeyed a usurper while he was occupying the throne would not later be charged with treason after the lawful King had regained the throne, but no protection was given to any person who thereafter declined from his allegiance.[50]

Under the Treason Act 1702, endeavouring to deprive or hinder any person next in succession to the Throne under the Act of Settlement from succeeding thereto, and maliciously and directly attempting the same by any overt act, is treason. The Succession to the Crown Act 1707 made it treason maliciously and directly by writing or print to maintain and affirm that any other person has any right to the Crown other than in accordance with the Act of Settlement, or that Parliament has not power to make laws to bind the Crown and the descent thereof. The Treason Act 1708 applied the English law of treason to Scotland.[51]

Judicial interpretation of the statute of 1351 relating to compassing the King's death led to a number of "constructive treasons".[52] Some of these were enacted as treasons by the Treason Act 1795 which covered compassing, imagining, devising or intending the death, wounding or imprisonment of the King, whether within the realm or without, provided such compassing, etc. was expressed in writing or by any overt act. The temporary provisions of the 1795 Act were made permanent by the Treason Act 1817. Both statutes were replaced by the Crime and Disorder Act 1998.

*Trial and punishment*

**14–019** The punishment prescribed for treason was, from 1814 until the coming into effect of section 36 of the Crime and Disorder Act 1998, death by hanging or, under royal warrant, by beheading.[53] Formerly a male traitor was hanged and quartered, after being drawn on a hurdle to the place of execution[54]; a female

[50] *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645, PC; A. M. Honore, "Allegiance and the Usurper" (1967) C.L.J. 214; *cf.* Taswell-Langmead, *English Constitutional History* (11th ed. 1960), Plucknett), pp. 224–225, 446–447.

[51] 7 Anne c. 21. "Such crimes and offences which are high treason or misprision of high treason within England shall be construed adjudged and be taken to be high treason within Scotland."

[52] e.g. *R. v. Hardy* (1794) 24 St.Tr. 199; *R. v. Horne Took* (1794) 25 St.Tr. 1. See further, Stephen, *History of the Criminal Law*, Vol. II; Holdsworth, *History of English Law*, Vol. III, pp. 309–322. For criticism of the use of the term "constructive treason" see A. Wharam, "Treason in Rhodesia" [1967] C.L.J. 189.

[53] Treason Act 1814.

[54] These barbarous practices were gradually discarded and were finally abolished by the Forfeiture Act 1870.

traitor was burnt. Until the Forfeiture Act 1870 conviction was followed by forfeiture and corruption of blood.

Treason or misprision of treason committed abroad is triable in England.[55]

Treason committed within the realm must be prosecuted within three years after its commission, except in the case of designing or attempting the assassination of the Sovereign.[56] Bail cannot be granted by magistrates, but only by the Secretary of State or a judge of the Queen's Bench Division.

*Misprision of treason*

14–020 The Treason Act 1554 created a statutory offence of misprision of treason, punishable by imprisonment for life. Although that statute was repealed by the Criminal Law Act 1967, the common law offence of misprision of treason remains in existence[57] and is an offence punishable by fine or imprisonment at the discretion of the court. It is committed whenever a person knows that another has committed treason and fails to bring this information, or any material part of it, to the attention of the public authorities within a reasonable time.

**Treason-felony**

14–021 By the Treason Felony Act 1848 a person is guilty of felony if, by writing or overt act within or without the United Kingdom, he compasses, imagines, devises or intends to deprive or depose the Queen from the style, honour or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries; or to levy war against Her Majesty within any part of the United Kingdom, in order to compel her to change her measures or counsels, or in order to intimidate or overcome both Houses or either House of Parliament; or to move any foreigner with force to invade the United Kingdom or any other of Her Majesty's dominions. Some of these offences had been enacted as treason by the Treason Act 1795 (*ante*). The Treason Felony Act does not affect the Act of 1795, but provides an alternative remedy in some cases. Its object was partly to cover Ireland, and partly to encourage juries to convict, which they had been loath to do in recent treason trials.

The maximum punishment under the Act of 1848 is imprisonment for life. If a person is indicted for treason-felony and the offence turns out to be treason, he may be convicted of treason-felony.

**Attempt to alarm or injure the Sovereign**

14–022 An attempt to alarm or injure the Sovereign by discharging or aiming or producing a gun, whether loaded or not, at or near the person of Her Majesty was made an offence punishable by imprisonment for seven years by the Treason Act 1842, after an incident involving Queen Victoria.

**Proposals for reforming the law of treason**

14–023 The present law of treason is clearly in need of reform. It is based on the concept of allegiance which has little connection with the modern concept of nationality. It covers a wide range of crimes, of varying degrees of gravity, some

[55] Treason Act 1543.
[56] Treason Act 1695.
[57] See the Law Commission Working Paper No. 72, para. 41 (1977).

of which can appropriately be dealt with by the ordinary criminal law. Proposals for reform were made by the Law Commission in 1977 but they were not acted upon.[58] The Crime and Disorder Act 1998 has, however, as seen above, abolished the death penalty for treason and effected minor changes in the scope of the offence.

[58] Working Paper No. 72, *supra* n. 57. See L. H. Leigh, "Law Reform and the Law of Treason and Sedition" [1977] P.L. 128.

CHAPTER 15

# THE ROYAL PREROGATIVE[1]

## 1. GENERAL NATURE OF THE PREROGATIVE

**15–001** The term "royal prerogative" is not a technical one. It is sometimes used to cover all the powers of the Sovereign, or at least those which the Sovereign does not share with his subjects. Sometimes it refers to the powers of the Sovereign in relation to his subjects, as distinct from "acts of state" done in relation to foreign affairs. More often, and preferably, it is limited to those powers which the Sovereign has by the common law as distinct from statute—in other words, the common law powers of the Crown.[2]

So far as the executive powers of the Crown are concerned (and for practical purposes these are the most important) it should be pointed out at the beginning that in the last 100 years the government of the country has been carried on largely under statutory powers. Further we must remember that, in so far as the Crown does exercise prerogative powers, the exercise is governed mainly by constitutional conventions, especially the doctrine of ministerial responsibility.[3] Nevertheless, emphasis on the prerogative does illuminate the historical basis of the Constitution, and it helps to explain much of the theory underlying the forms taken by governmental action.

The laws of England (and Northern Ireland) may differ from the laws of Scotland on the extent of the royal prerogative.[4] Nonetheless, "As the Constitution of Scotland has been the same as that of England since 1707 there is a presumption that the same constitutional principles apply in both countries."[5] (It remains to be seen whether this presumption survives the enactment of the Scotland Act.)

### Historical introduction

**15–002** The distinction between the natural and politic capacities of the King appears in the sixteenth century.[6] Further subtlety of reasoning led to a distinction in the early seventeenth century between the "absolute" and the "ordinary" powers of the King (*Bate's Case*[7]). By ordinary powers was meant such powers as those involved in the administration of justice, which had long been exercised without discretion in accordance with definite principles and procedure. The absolute powers we should now call discretionary, for example, the direction of foreign

[1] J. Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820); *Hale's Prerogatives of the King* (ed. D. E. C. Yale, 1976); H. V. Evatt, *The Royal Prerogative* (1987).
[2] For "the Crown", see *post*, para. 15–007.
[3] *post*, para. 17–016 *et seq.*
[4] *Glasgow Corporation* v. *Central Land Board* 1956 S.C. (HL) 1; J. D. B. Mitchell, "The Royal Prerogative in Modern Scots Law", [1957] P.L. 304.
[5] *Macgregor* v. *Lord Advocate* 1921 S.C. 847, 848 *per* the Lord Ordinary (Lord Anderson). On appeal, Lord Salvesen said (at p. 853): "It would be anomalous if the liability of a Crown Department in Scotland differed from the liability of a Crown Department in England."
[6] *Case of the Duchy of Lancaster* (1562) Plowd. 212; *Calvin's Case* (1608) 7 Co.Rep. 1a.
[7] (1606) Lane 22; 2 St.Tr. 371; Broom, *Constitutional Law* (2nd ed.), pp. 245 *et seq.*

policy and the pardoning of criminals. There arose also a tendency to regard the absolute prerogatives as "inseparable," so that even Parliament could not detach them from the Crown (*Case of the King's Prerogative in Saltpetre*[8]). One certain principle was that the prerogative was limited by law: "the King hath no prerogative but that which the law of the land allows him" (*Case of Proclamations*[9]). Had not Bracton said in the thirteenth century that the King ought to be subject to God and the law, because the law makes him King?[10] Charles I might dispute the application of this principle in certain aspects of government, such as preventive detention (*Darnel's Case*[11]) and ship-money (*R. v. Hampden*[12]), but the Civil War and the Revolution of 1688 meant that henceforth the Sovereign would accept the limitation of the prerogative by law and its determination by the courts. It is now admitted, of course, that the Sovereign has no powers that are "inseparable"—none, that is, which cannot be taken away by Act of Parliament.[13]

Blackstone says: "By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others."[14] The essential characteristic of the royal prerogative, then, is that it is unique and pre-eminent. It is not "out of the ordinary course of the common law" in the sense of being above the law: it is part of the Common law, but an exception to the principles that apply to citizens generally. Dicey's description of the royal prerogative as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" has been more than once judicially approved.[15] Dicey emphasises the discretionary nature of the prerogative—the word "arbitrary" is misleading—and confines it according to the best usage to common law as distinct from statutory powers. **15–003**

Dicey went on to say "Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative."[16] It has been pointed out that such a definition is much wider than

[8] (1607) 12 Co.Rep. 12. See Holdsworth, *op. cit.* Vol. IV, pp. 202–207

[9] 12 Co.Rep. 74; 2 St.Tr. 723.

[10] (1610) *De Legibus et Consuetudinibus Angliae*, f. 5b.

[11] (1627) 3 St.Tr. 1; Broom, *op. cit.* pp. 158 *et seq.*

[12] (1637) 3 St.Tr. 825; And see Holdsworth, *op. cit.* Vol. VI, pp. 19–30; Broom, *op. cit.* pp. 303 *et seq.*

[13] *Att.-Gen. v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508; *post*, para. 15–010.

[14] Bl.Comm. I, 239. Blackstone in defining the Prerogative referred to Locke who in the *True End of Civil Government*, Chap. 14, wrote: "This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative; for since in some governments the law-making power is not always in being and is usually too numerous and so too slow for the dispatch requisite to execution, and because, also, it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public . . . therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe." See *Laker Airways Ltd v. Dept of Trade* [1977] Q.B. 643, 705, *per* Lord Denning M.R.

[15] Dicey, *Law of the Constitution* (10th ed. 1959), p. 424; approved, *e.g.* by Lord Dunedin in *Att.-Gen. v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508, 526; *Burmah Oil Co Ltd v. Lord Advocate* [1965] A.C. 75, 99, *per* Lord Reid; *C.C.S.U. v. Minister for the Civil Service* [1985] A.C. 374, 416, *per* Lord Roskill.

[16] *Op. cit.* p. 425.

that of Blackstone.[17] Whereas he confined the prerogative to "rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects." Dicey's definition covers all the non-statutory power of the Crown, even those which it enjoys in common with its subjects, such as the power to enter into contracts. The correctness of Dicey's wide definition was assumed by the House of Lords in *Council of Civil Service Unions v. Minister for Civil Service*[18] where, however, there were also dicta that for the purposes of judicial review (which was the issue before the House), it was only of historical interest whether a power of the executive should be ascribed to the prerogative or not.[19]

15–004 The prerogative is a *residue* because Parliament can take away any prerogative and has frequently done so. It is seldom abolished expressly, however, but is impliedly abolished, curtailed or merely suspended (*Att.-Gen. v. De Keyser's Royal Hotel Ltd*[20]). Since the prerogative is part of the common law, the Queen cannot claim that a new prerogative has come into existence.[21] In *British Broadcasting Corporation v. Johns*,[22] where the BBC unsuccessfully claimed that the Crown had a monopoly of broadcasting exercised through the Corporation, and that the Corporation was entitled to Crown exemption from income tax, Diplock L.J. said: "It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative." It can only be the residue at any given time of the rights and powers which the Sovereign had before the days of Parliament.

No new prerogative can be claimed, but to what extent can the prerogative be adapted to meet new situations? Being part of the common law, the prerogative is sufficiently adaptable, for example, to adjust itself to new dimensions and methods of warfare.[23] But the distinction between adapting a recognised prerogative and claiming a new power may be difficult to draw, as in *Malone v. Metropolitan Police Commissioner*[24] where Megarry V.-C. held that the Home Secretary had a limited power to authorise telephone tapping as an extension of the power to open articles sent through the post.[25]

There are dicta to the effect that a prerogative power in some circumstances may be lost by disuse.[26] The question may also arise whether a given prerogative

[17] H. W. R. Wade, *Constitutional Fundamentals* (1980) p. 46; "Procedure and Prerogative in Public Law" (1985) 101 L.Q.R. 180.

[18] [1985] A.C. 374 (The Cheltenham G.C.H.Q. Case).

[19] *post*, Chap. 17 and Chap. 31.

[20] [1920] A.C. 508.

[21] *Case of Monopolies* (1602) 11 Co. Rep. 84b.

[22] [1965] Ch. 32, CA.

[23] See *e.g. Re A Petition of Right* [1915] 3 K.B. 649, CA. (prerogative to requisition property in defence of the realm extended to aerodromes, although aeroplanes a modern invention) *Att.-Gen. v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508, 565 *per* Lord Sumner.

[24] [1979] Ch. 344; *post*, para. 26–014. For the ability of the Crown to carry out lawful activities beyond the limits of the prerogative see B.V. Harris, "The Third Source of Authority for Government Action." (1992) 109 L.Q.R. 626.

[25] *cf.* now, Interception of Telecommunications Act 1985; *post* para. 20–014. In *Att.-Gen. of the Duchy of Lancaster v. G. E. Overton (Farms) Ltd* [1981] Ch. 333; [1982] Ch. 277 an attempt to extend the prerogative right to treasure trove so as to protect items of antiquarian value, whether or not gold or silver, failed; *post* p. 271. See generally, George Winterton, "The Prerogative in Novel Situations", (1983) 99 L.Q.R. 407.

[26] *e.g. per* Lord Lyndhurst and Lord Campbell, C.J. in *Wensleydale Peerage Case* (1856) 5 H.L.C. 958; and *per* Lord Simon of Glaisdale in *M'Kendrick v. Sinclair* 1972 S.C. 25 (H.L.), a Scots case concerning the old action of assythment; see J. M. Thomson, "Desuetude and the Common Law" (1973) 89 L.Q.R. 27.

survived the Bill of Rights 1688.[27] But generally we may say that a prerogative which has long fallen out of use, such as the sovereign's power to refuse the royal assent to Bills passed by both Houses of Parliament, is now bound by constitutional convention rather than by some legal doctrine of desuetude.

A prerogative power is *discretionary*, and, although its existence is determinable by the courts, the manner of the exercise was generally thought to be outside their jurisdiction. Dicta in the *G.C.H.Q.* Case,[28] however, suggest that prerogative powers, like discretionary powers of statutory origin, may be subject to judicial review.

**15–005** The Prime Minister, as Minister for the Civil Service, gave instructions under an Order in Council made, as the House of Lords held, by virtue of the Royal Prerogative, forbidding staff at the Government Communications Headquarters from being members of trade unions. The House of Lords accepted the argument of the applicant unions and staff that past practice had created a legitimate expectation[29] that they would, in the normal course of events, be consulted before a decision affecting the terms of employment of civil servants at the headquarters was made. In so holding all the Law Lords agreed that the scope of judicial review of a Ministerial decision was the same whether it was made under statutory powers—whether Act of Parliament or delegated legislation made under an Act—or under an Order in Council deriving its authority from the prerogative. Lord Diplock, Lord Scarman and Lord Roskill were prepared to go further and were of the opinion that acts done directly under the royal prerogative were subject to judicial review, where the issues involved were *justiciable*.[30] Lord Fraser and Lord Brightman preferred to express no opinion on the point.[31] The House, however, accepted that the Minister had, on the facts, been entitled to issue the instruction without consultation because national security required such summary procedure.[32] (The issue of national security had not been raised at all before Glidewell J. who found for the unions, and only briefly before the Court of Appeal which reversed the first instance judgment).

The Law Lords in the *G.C.H.Q.* Case who asserted the existence of a jurisdiction to review acts done under the Royal prerogative confined that jurisdiction to justiciable acts. As examples of non-justiciable acts Lord Roskill listed, "the

[27] See, *e.g. per* Lord Parmoor in *Att.-Gen. v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508, 570 and *per* Lord Reid in *Burmah Oil Co v. Lord Advocate* [1965] A.C. 75, 99.

[28] [1985] A.C. 374. See the earlier dicta of Lord Denning, M.R. in *Laker Airways v. Department of Trade* [1977] Q.B. 643.

[29] As to "legitimate expectations," see *post* para 31–018.

[30] at p. 407, *per* Lord Scarman; at p. 410, *per* Lord Diplock; at p. 417, *per* Lord Roskil'

[31] at p. 398 *per* Lord Fraser, who pointed out that to permit review would "run counter to the great weight of authority"; at p. 424 *per* Lord Brightman.

[32] The degree of control that the courts can exert over ministerial claims that a matter raises questions of national security is not clear. All the members of the House adverted to the need of evidence to justify such a claim by a minister. Lord Scarman envisaged, even in a case of national security, that the court might conclude that the opinion of a Minister that certain action was required was such that no reasonable minister could reasonably have held: [at p. 406]. Lord Diplock, on the other hand, having adverted to the need for evidence, went on to say that if a question of national security were established, the appropriate action was for the government: "It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves." (At p. 412) *cf. Chandler v. D.P.P.* [1964] A.C. 763. Judicial assertions of boldness in the areas of security and defence very often precede a refusal to upset the decision complained of on some other ground: *R. v. Home Secretary ex p. Ruddock* [1987] 1 W.L.R. 1482; *R. v. Ministry of Defence ex p. Smith* [1996] Q.B. 517, CA.

making of treaties[34] the defence of the realm,[34] the prerogative of mercy,[35] the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others . . . ".[36] Thus there is no reason to doubt that the courts will continue to accept as conclusive Foreign Office certificates relating to the recognition of foreign states and governments,[37] the existence of a state of war[38] and whether individuals are entitled to claim sovereign[39] or diplomatic immunity[40] in the British courts.

**15–006** Lastly, the prerogatives are *legally* vested in the Queen although this is now largely a matter of form. By custom and convention prerogative powers must be exercised through and on the advice of other persons. The necessity of knowing whether or not an executive act is an expression of the Sovereign's will and of making someone other than the Sovereign legally liable for its consequences has given rise to complex rules determining how the Sovereign's acts are to be authenticated. The forms in which the royal will is expressed are generally by: (i) proclamation, writ, letters patent, grant or other document under the Great Seal[41]; (ii) Order in Council; or (iii) warrant, commission, order or instructions[42] under the Sign Manual. The discretionary character of prerogative powers has also given rise to the doctrine of ministerial responsibility, the most important development in modern British constitutional history. There are very few occasions nowadays when the Queen can act without or against the advice of her Ministers; these exceptional cases may include the choice of Prime Minister[43] and the dissolution of Parliament or the dismissal of a ministry.[44]

For some years the Labour Party was committed to abolishing the prerogative so that all government decisions were subject to Parliamentary control. After the election in 1997 it was reported that the new government had abandoned plans to introduce legislation to give effect to this pledge.

### Classification of the prerogative

**15–007** (i) It is still possible to distinguish between *personal* and *political* prerogatives, that is, between those which the Queen has as a person and those which she has as Head of State. The personal, however, have tended to become absorbed by the political and in consequence they have lost most of their constitutional significance.

The political prerogatives are often spoken of as adhering to "*the Crown*". Thomas Paine called the Crown "a metaphor shown at the Tower for sixpence or a shilling a piece",[45] and Maitland said the expression was often used as a cover

[34] *J.H. Rayner (Mincing Lane) Ltd v. Dept of Trade and Industry* [1990] 2 AC 418, HL.
[35] In *R. v. Ministry of Defence ex p. Smith* [1996] QB 517, the Court of Appeal refused to regard the Crown's policy with regard to the treatment of homosexual members of the Armed Forces as non-justiciable on this ground—but went on to refuse to find government policy irrational.
[36] *post* para. 20–004.
[37] At p. 418.
[38] *Duff Development Co v. Government of Kelantan* [1924] A.C. 797, HL; *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* (No. 2) [1967] A.C. 853, HL. See also *R. v. S. of State for Foreign and Commonwealth Affairs, ex p. Trawnik, The Times*, April 18, 1985.
[39] *R. v. Bottrill, ex p. Kuechenmeister* [1947] K.B. 41, CA.
[40] *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149.
[41] *Engelke v. Musmann* [1928] A.C. 433. And *post* para. 15–032.
[42] *ante*, para 8–023.
[43] *e.g.* to colonial Governors, *post*, Chap. 35.
[44] *post*, para. 17–028.
[45] *ante*, para. 8–022.
[46] *Rights of Man* (1791).

for ignorance.[46] In effect "the Crown" is equivalent to the executive or the central government.[47] Each organ of the Government is in law, part of the one, indivisible Crown of the United Kingdom.[48] For specific purposes statutes may, however, distinguish between government departments, for example, the Crown Proceedings Act 1947, s.17 with regard to proceedings under that Act, or the Data Protection Act 1998, section 63(2) which provides that for the purposes of that Act each government department is to be treated as a person separate from any other government department. More precisely it means the Queen in her public capacity, either: (a) in rare cases acting at her own discretion, *e.g.* choice of Prime Minister in exceptional circumstances; (b) acting on the advice of Ministers, *e.g.* opening Parliament; (c) acting through or by means of Ministers, *e.g.* negotiating treaties and pardoning criminals; or (d) Ministers acting on behalf of the Queen.[49] With regard to the last, in modern times many powers are conferred by statute directly on Ministers, *e.g.* to approve town-planning schemes or to acquire land compulsorily; in theory the Ministers act on behalf of the Queen.

In the eyes of the law *the Crown* should probably be regarded as a corporation sole. The suggestion that the Crown has no legal personality[50] is untenable in the light of earlier authorities.[51] In *Re M*[52] Lord Woolf did not think it necessary to express a view on whether the Crown is better regarded as a corporation sole or a corporation aggregate.

Exceptionally individual ministers may be constituted corporations sole by statute in order to facilitate the acquisition and management of property: for example, the Secretary of State for Defence by section 2 of the Defence (Transfer of Functions) Act 1964.

(ii) So far we have spoken of the prerogatives as if they were composed entirely of powers. Another classification shows that this is not so. They can be analysed into: (a) *rights*, *e.g.* the Crown Estate and *bona vacantia* (but these are regulated largely by statute); (b) *powers*, *e.g.* to summon Parliament and to make treaties; (c) *privileges*, *e.g.* to ask for and to receive supply from Parliament; and (d) *immunities*, *e.g.* exemption from statutes imposing taxes or rates unless expressly mentioned, and from being sued or have property taken in execution (*cf.* Crown Proceedings Act 1947). This method of classification is one of analytical jurisprudence rather than constitutional law, but it may sometimes help to a clearer understanding of the prerogative. **15–008**

(iii) The most convenient classification for the present day is according to the branch of government to which the various prerogatives relate, *i.e. legislative*, *judicial* and *executive*. Those which relate to legislation and the administration of justice are mostly "ordinary" prerogatives in the sense used above, while those

[46] *Constitutional History*, p. 418.

[47] See further, Marshall, *Constitutional Theory* (1971), pp. 17–34. *The Nature of the Crown* (Sunkin and Payne eds, 1999).

[48] *Cons of Crown Lands v. Page* [1960] 2 Q.B. 274, C.A. The Crown is, however, divisible with reference to its liabilities and obligations in respect of its various territories and realms: *R. v. Secretary of State for Foreign and Commonwealth Affairs ex p. Indian Association of Alberta* [1982] Q.B. 892, C.A *post* para. 35–005.

[49] *Post*, Chap. 33.

[50] *Re Pan American's Application* [1992] Q.B. 854, 860 *per* Lord Donaldson M.R.

[51] Sir William Wade, [1992] New L.J. 1316.

[52] [1994] 1 A.C. 377, citing dicta of Lord Diplock and Lord Simon in *Town Investments Ltd v Department of the Environment* [1978] A.C. 359.

which relate to the executive are mainly "absolute"[51] or discretionary and regulated by convention.

**Personal prerogatives**

15–009 These consist mainly of immunities and property rights.

(i) "*The King never dies.*" The Common law knows no interregnum. But this theory was of limited effect, because the death of the Sovereign entailed the dissolution of Parliament and the determination of the tenure of offices under the Crown (including judicial offices), until these inconveniences were remedied by various statutes.[52]

(ii) "*The King is never an infant.*" The common law made no provision for the Sovereign being a minor; but the contingency is now provided for by the Regency Acts.[53]

(iii) "*The King can do no wrong.*" The Sovereign cannot be sued or prosecuted in the courts.[56] The significance of this immunity was greatly diminished by the Crown Proceedings Act 1947, which enables the citizen to sue government departments in contract or tort or for the recovery of property, while leaving unimpaired the Sovereign's personal immunity.[57]

(iv) *Crown private estates.*[58] At common law the general rule is that the same prerogatives attach to estates vested in the Sovereign in her natural capacity as apply to estates vested in the Sovereign in her political capacity in right of the Crown. The Crown Private Estates Acts 1800, 1862 and 1873 now regulate to some extent the disposition of such property. These Acts apply to property belonging to the Sovereign at the time of accession, property devised or bequeathed by any persons not being Kings or Queens of the realm, and property bought out of the privy purse. They render private estates subject to taxation in the same way as the property of any subject of the realm. Crown private estates may be disposed of by the Sovereign *inter vivos* or by will unless, like the Duchies of Lancaster and Cornwall (the incomes from which are not subject to income tax[59]), they are settled by charter having statutory effect. If undisposed of at the death of the Sovereign, they descend with the Crown and become lands held in right of the Crown.[60]

**Effect of statute on the prerogative**

15–010 A royal prerogative may be expressly abolished by Act of Parliament, as when the Crown Proceedings Act 1947 abolished the immunity of the Crown from being sued in contract and tort. An Act may be passed covering the same ground or part of the same ground as the prerogative, in which case the prerogative is to that extent by necessary implication abrogated, at least so long as the statute remains in force.

[51] *ante*, para. 15–001.

[52] For Parliament and the demise of the Crown, see *ante*, p. 139; and for judicial tenure, *post*, para. 20–029. And see Crown Proceedings Act 1947, s.32.

[53] *ante*, para. 14–008.

[56] The legend perpetuated by Bracton, that writs lay against the King down to Edward I's time, is refuted by other authorities; see Holdsworth, *History of English Law*, Vol. IX, p. 12.

[57] It would seem that proceedings against the Queen in her private capacity can now be brought (if at all) only by way of the common law (pre-1860) petition of right; *post*, para. 33–015.

[58] (1971) H.C. 29.

[59] *post*, para. 15–013.

[60] *cf.* Crown Estate, *post*, para. 15–013.

In *Attorney-General v. De Keyser's Royal Hotel Ltd*[61] the respondent's hotel was required by the War Office in the First World War. Negotiations broke down over the amount of the rent, and possession was taken compulsorily by the Army Council under the Defence of the Realm Regulations on terms that compensation would be paid *ex gratia*. The respondents gave possession but claimed the right to full compensation under the Defence Regulations. The House of Lords unanimously decided that the statutory Regulations specifying the manner in which compensation was to be assessed must be observed by the Crown. The Crown could not choose, said Lord Sumner, whether or not to act under the prerogative power (assuming that to exist) involving perhaps no compensation or only compensation *ex gratia*: it must act under the statutory power and in accordance with its terms for, as Lord Moulton said, that must be presumed to be the intention of Parliament in passing the statute. Their Lordships expressed various opinions on the question whether, where a statute impliedly covers the same ground as a prerogative power, the statute *pro tanto* abolishes the prerogative or merges it with the statute (Lord Parmoor); or whether, as Lord Atkinson preferred to say, the prerogative is merely in abeyance so long as the statute remains in force.

In *Laker Airways Ltd v. Department of Trade*[62] consideration was given to the effect of the Civil Aviation Act 1971 on the powers of the Crown under the Bermuda Agreement 1946, a treaty between the United Kingdom and the United States covering the grant and revocation of permits for transatlantic air services. The Act set up a Civil Aviation Authority for the licensing of air transport, subject to "guidance" given by the Secretary of State. In furtherance of changed government policy the Secretary of State gave "guidance" to the authority to revoke the licence granted to Laker Airways to operate their "Skytrain" service between London and New York. The Court of Appeal held that the Secretary of State's action was *ultra vires* the Act, which impliedly fettered the use of the prerogative to cancel the designation of the plaintiffs under the treaty.

In *R. v. Secretary of State for the Home Department ex p. Northumbria Police Authority*[63] the Court of Appeal accepted the existence of a prerogative power to maintain the Queen's Peace[64] and held that statutory provisions under the Police Act 1964 which gave local authorities responsibility for equipping police forces did not take away the prerogative power. Hence the Home Secretary could supply equipment which the local authority was unwilling to. This decision may be regarded as an instance where the statute was, as a matter of construction, not inconsistent with the continued exercise of the prerogative power but in reaching that conclusion the Court was influenced by the fact that, contrary to *De. Keyser's Royal Hotel*, there was no question of interference with private property rights. Indeed, the act here was for the public benefit.[65]

The relationship between prerogative and statute arose in unusual circumstances in *R. v. Secretary of State for the Home Department ex p. Fire Brigades* **15–011**

[61] [1920] A.C. 508. See also *Egan v. Macready* [1921] 1 I.R. 265. *Walwin Ltd v. West Sussex C.C.* [1975] 3 All E.R. 604; *Herbert Berry v. I.R.C.* [1977] 1 W.L.R. 1437 (HL); *Manitoba Fisheries Ltd v. The Queen* (1978) 88 D.L.R. (3d) 462 (Can. Sup.Ct.).

[62] [1977] Q.B. 643, CA.

[63] [1989] Q.B. 26, CA.

[64] All three members of the court cited *O. Hood Phillips Constitutional and Administrative Law*. Croom-Johnson L.J. quoted a passage at p. 399 in the 6th ed., in this edition para. 21–001.

[65] In *Bethel v. Douglas* [1995] 1 W.L.R. 794 the Privy Council held that the Governor of the Bahamas retained his prerogative right to appoint a commission of inquiry despite having even more extensive statutory powers to do so.

*Union*."[66] The Criminal Justice Act 1988 had made provision for a statutory scheme for compensating the victims of crimes. The scheme would only come into effect on the making of a ministerial order under the Act. Some years later the statutory scheme never having come into effect, the Secretary of State purported to create a scheme offering less generous compensation in reliance on the royal prerogative.[67] The House of Lords held, by a majority, that the Home Secretary had a continuing duty under the Act to decide whether (or when) to bring the statutory scheme into operation. Parliament could not have intended that he might preclude himself from exercising the statutory powers by acting under the prerogative. The concern of the minority was that the question whether or when the provisions of the Act should be brought into effect was one of a political nature for Parliament not the courts. In the words of Lord Keith, any interference by the courts would be a most improper intrusion into a field lying peculiarly within the province of Parliament. Lord Mustill similarly was unhappy that the House was in danger of overstepping the boundaries of the distinction between court and Parliament established in, and recognised ever since, the Bill of Rights.

## II. The Prerogative in Domestic Affairs

These consist largely of powers, and in theory of some duties.

### 1. Executive prerogatives[68]

15–012 The prerogatives that may be classed as executive, administrative or governmental are a relic of the powers which the King had when he really governed the country. The government at the present day is largely carried on under statutory powers—a subject too vast for discussion in a general book on constitutional law. Prerogative powers nowadays are mainly of importance in relation to the Civil Service, the armed forces, colonial administration, Commonwealth relations and foreign affairs. Moreover, they have to be read subject to the principle of ministerial responsibility. The government does not have to consult, or even to inform, Parliament before exercising prerogative powers. This is convenient, for many matters falling within the prerogative are not suitable for public discussion before the decision is made or the action performed. On the other hand, the government must feel assured of parliamentary support afterwards, especially in a matter like war or where money will be required.

The Sovereign in theory also has duties, but these are not legally enforceable. "The principal duty of the King is, to govern his people according to law", says Blackstone, quoting Bracton and Fortescue to like effect. Blackstone cites the Coronation Oath, but adds that "doubtless the duty of protection is impliedly as much incumbent on the Sovereign before coronation as after".[69] The Sovereign is the general conservator of the peace of the Kingdom,[70] but although the

[66] [1995] 2 A.C. 513, HL.

[67] A scheme based on the prerogative had existed for many years before the 1988 Act: see *R. v. Criminal Injuries Compensation Board ex p. Lain* [1967] 2 Q.B. 864, CA.

[68] *Cf.* J. B. D. Mitchell, "The Royal Prerogative in Modern Scots Law" [1957] P.L. 304.

[69] Bl.Comm. I, Chap. 6.

[70] Bl.Comm. i. 266. *R. v. Secretary of State for the Home Department, ex p. Northumbria Police Authority*, [1989] Q.B. 26, CA.

preservation of the peace is a function of the Crown, police officers are not regarded as Crown servants.[71] In *China Navigation Co v. Attorney-General*[72] it was held that there is no duty enforceable by the Courts on the Crown to afford such protection as was asked for in that case, viz. armed protection against pirates in foreign waters, and the subject is not obliged to pay for such protection; but if the Crown agrees to provide special protection for payment, such payment can be recovered from the subject. And in *Tito v. Waddell (No. 2)*[73] it was held that any obligation by the Crown to pay royalties for the extraction of phosphates from the colony of Ocean Island was governmental, and not a fiduciary duty enforceable in the courts. In *Mutasa v. Attorney-General*[74] Boreham J. held that he had no jurisdiction to enforce the sovereign's duty to protect her subjects at the instance of the plaintiff who claimed that the Crown had failed to prevent his unlawful detention by the illegal Smith regime in Southern Rhodesia.

For our immediate purpose the following is probably the most convenient classification of the prerogatives relating to executive government:

**(a) Appointment and dismissal** of Ministers, other government officials; officers and men of the forces; the appointment and (subject to statute) dismissal of judicial officers and civil servants. **15–013**

**(b) Control of the services.** The Queen is head of the Royal Navy, the Army and the Royal Air Force. The supreme command and government of all forces by sea, land and air, and of all forts and places of strength, is vested in the Crown both by common law and statute. The last Sovereign to exercise the command of the Army in person was George III in 1743 at the Battle of Dettingen. The raising of forces, their discipline and payment are now governed by statute,[75] but the movement and disposition of forces lawfully raised is entirely under the control of the Crown.[76] The control of the Civil Service is similarly vested in the Crown.[77]

**(c) Administration of dependencies.** It is still a function of the Crown to provide for the government of British colonies and other dependencies; and also to make laws for colonies acquired by conquest or cession until Parliament takes over or the colony is granted representative institutions.[78]

**(d) Revenue.** The Norman and early Plantagenet Kings had "ordinary" and "extraordinary" revenues, and this terminology was still used at the beginning of the nineteenth century.[79] The "ordinary" revenues consisted of customary hereditary revenues such as feudal dues,[80] *bona vacantia*, income from Crown lands and other miscellaneous sources of income that are now exchanged for the Civil

[71] *post* para. 21–009.
[72] [1932] 2 K.B. 197, CA.
[73] [1977] Ch. 106 (Megarry V.-C.).
[74] [1980] Q.B. 114. The learned judge quoted with approval the opening sentence of this paragraph from p. 272 of the 6th ed.
[75] *Post*, Chap. 19.
[76] *China Navigation Co v. Att.-Gen.* [1932] 2 K.B. 197, CA; *Chandler v. D.P.P.* [1964] A.C. 763, HL; see *per* Viscount Radcliffe.
[77] *Rodwell v. Thomas* [1944] K.B. 596. *Post*, Chap. 18.
[78] *post*, Chap. 35.
[79] Chitty, *Prerogatives of the Crown* (1820) p. 200.
[80] Most of these disappeared with the abolition of military tenure in 1660.

List (*infra*). "Extraordinary" revenues or "aids" were raised from time to time to meet the needs of war or other public emergency.

The Crown Estate consists of lands which have become vested in the Sovereign "in his body politic in right of the Crown," and include the ancient demesne lands of the Crown and lands subsequently acquired by prerogative right, *e.g.* by escheat or forfeiture, the foreshore and lands formed by alluvion. The Crown Estate is managed by the Crown Estate Commissioners, who are subject to the general directions of the Chancellor of the Exchequer and the Secretary of State for Scotland. Their annual reports are to be laid before Parliament.[81]

*Bona vacantia* include wreck,[82] treasure trove, waifs, estrays, royal mines and royal fish.[83] Land that formerly escheated[84] on failure of heirs goes to the Crown as *bona vacantia* under the Administration of Estates Act 1925. Treasure trove at common law consisted of gold or silver in coin, plate or bullion, hidden in the earth or other secret place, and subsequently found without trace of the owner.[85] It is hidden, and not abandoned, treasure. The finding of treasure trove was determined by a coroner[86] and a jury. Treasure trove went by law to the Crown, and it was an offence at common law to conceal the discovery.[87] The prerogative of treasure trove has been replaced by a statutory scheme designed to protect all ancient items of historic or archaeological interest when found.[88]

It is the privilege of the Crown to demand and receive supply from Parliament for the government of the country.[89] Since the Bill of Rights 1688 taxes can only be raised by authority of Parliament.

*The Civil List.* Since the accession of George III in 1760 it has been the custom for each Sovereign to surrender to the Exchequer for life the hereditary revenues held in right of the Crown, in exchange for an annual payment known as the Civil List. The revenues of the Duchies of Lancaster and Cornwall are excluded from the surrender. The surrendered revenues are paid into the Exchequer and form part of the Consolidated Fund. The main items of expenditure covered by the Civil List, which is charged on the Consolidated Fund, are the salaries and expenses of the official part of the royal household and royal bounty, and the Privy Purse (pensions for employees and the maintenance of Sandringham and Balmoral).[90] Provision is also made towards the expenses of performing public duties by certain other members of the Royal Family.[91] Various government departments meet other expenditure, *e.g.* the Queen's Flight and royal residences

[81] Crown Estate Act 1961.

[82] Regulated by the Merchant Shipping Act 1894. See *Pierce v. Bemis (The Lusitania)* [1986] 2 W.L.R. 501.

[83] For these, see Bl.Comm. I, 290–299; Keith, *The King and the Imperial Crown*, p. 390.

[84] See *Re Lowe's Will Trusts* [1973] 1 W.L.R. 882 (Claim by Crown to the Phoenix Inn, Stratford-on-Avon, arising from death in 1851 of tenant in fee simple without heirs).

[85] *Att.-Gen. of the Duchy of Lancaster v. G. E. Overton (Farms) Ltd* [1981] Ch. 333; [1982] Ch. 277. See generally, Sir George Hill, *Treasure Trove in Law and Practice: from the earliest time to the present day* (1936).

[86] The chief duty of the coroner, whose court dates back to 1194, is to hold an inquest where a person has died in his district and there is reasonable cause to suspect that he died a violent or unnatural death, or where death was sudden and the cause unknown, or where the person died in prison: Coroners Courts Act 1887–1954; Criminal Law Act 1977.

[87] *R. v. Toole* (1867) 11 Cox C.C. 75.

[88] Treasure Act 1996.

[89] *ante*, Chap. 12.

[90] The Queen does not, in fact, draw the money allocated to her Privy Purse and her personal expenditure is paid from her own resources.

[91] *Report from the Select Committee on the Civil List* (1971) H.C. 29.

occupied by members of the Royal Family. The amounts fixed by Parliament on the accession of Queen Elizabeth II in 1952 were increased by the Civil List Act 1972 to offset inflation. Section 6 provides that the Treasury may increase from time to time the financial provision allocated for certain purposes by statutory instrument subject to annulment by resolution of the House of Commons; and the Civil List Act 1975 allows the Treasury to supplement such sums out of moneys provided by Parliament. It is unclear whether the amounts paid by the Treasury and other Departments for the Monarchy exceed the hereditary revenues and income made over by the Queen to the Treasury.[92]

**(e) Ecclesiastical prerogatives.** Elizabeth I was described as the supreme ecclesiastical and temporal "Governor" of the realm by the Act of Supremacy 1558,[93] and the Book of Common Prayer refers to the Sovereign as "our Queen and Governor". The title suggests administrative rather than lawmaking powers: ecclesiastical but not spiritual. "Conceive it thus", says Selden, "there is in the Kingdom of England a college of physicians: the King is supreme governor of those, but not the head of them, nor president of the college, nor the best physician." The Queen nominates bishops diocesan[94] of the Church of England on the advice of the Prime Minister. The Church has not been given the decisive voice in appointing its bishops,[95] mainly because its senior bishops sit in the House of Lords. The current practice is that the Church Commission on Crown Appointments[96] puts forward to the Prime Minister two names for a vacant bishopric, expressing a preference for one of them.[97] In 1998 Mr Blair is believed to have rejected both names put forward for the bishopric of Liverpool. **15–014**

Otherwise, the functions and powers of the Queen in relation to the Church of England are mainly regulated by statute, for example, the calling together and dissolving of the General Synod and the Convocations of Canterbury and York.[98] The Queen in person opened the Second General Synod in 1975. The Clergy Act 1533 requires the Queen's assent and licence for the making of Canon laws and also provides that no Canons may be made which are contrary or repugnant to the royal prerogative or the customs, laws or statutes of the realm. Since the

[92] See further, Bogdanor, *op. cit.*, Chap. 7; A. Tomkins, "Crown Privileges", in *The Nature of the Crown* (eds. Sunkin and Payne).

[93] Repealed, except section 8 by various Acts. The sidenote to that section reads "All Spiritual Jurisdiction United to the Crown." The Act of Supremacy 1534 (repealed in 1554) called Henry VIII the supreme "Head" on earth of the Church of England.

[94] Suffragan bishops are appointed on the nomination of diocesan bishops. The appointment of Deans is on the advice of the Prime Minister.

[95] The prerogative and procedure for confirming the election of bishops were preserved by the Ecclesiastical Jurisdiction Measure 1963, as amended.

[96] Consisting of the two Archbishops, six members elected by the General Synod, and two non-voting members (the Prime Minister's appointments secretary and the Archbishop's appointments secretary). Proposals for reform of the present system, involving less secrecy and the opportunity for clergy to apply for consideration as possible bishops were published in May, 2001, (*Working with the Spirit: Choosing Diocesan Bishops*). The Commission would be renamed the Episcopal Nominations Commission and given an enlarged membership.

[97] A *congé d'elire* (permission to elect) is sent to the dean and chapter of the cathedral of the vacant bishopric (or to the cathedral chapter in the case of "a parish church cathedral" which does not have a dean), accompanied by a "letter missive" containing the name of the nominee. (In the case of the Bishopric of Sodor and Man where there is no chapter at all, nomination is effected by letters patent).

[98] Synodical Government Measure 1969, modifying the Church of England Assembly (Powers) Act 1919 and the Church of England Convocations Act 1966.

Reformation new Canons, or changes in customary or Canon Law, can only bind the laity by authority of Act of Parliament (*Middleton v. Croft*[1]). Forms of service alternative to those prescribed by the Book of Common Prayer may now be authorised by the General Synod, without the need for an Act of Parliament.[2]

15–015 **(f) The "fountain of honour".** The Queen is the "fountain of honour."[3] The creation of peers is done on the advice of the Prime Minister.[4] Most honours in the United Kingdom are also conferred on the advice of the Prime Minister.[5]

Recommendations for *all* honours have, since 1979, been submitted for scrutiny to the Political Honours Scrutiny Committee, a body which was established in the 1920s in the wake of disquiet about the sale of titles by Lloyd George. The Committee consists of three Privy Councillors. If the Prime Minister persists with a recommendation against the advice of the Committee, its adverse view is made known to the Queen which, it has been suggested, must imply that the monarch, in such circumstances, has a discretion to reject the recommendation.[6]

**(g) Miscellaneous prerogatives.** Other prerogatives or former prerogatives relating to coinage, mining of precious metals, administration of charities, guardianship of infants and mental patients,[7] the use of patents and the creation of boroughs, are now largely regulated by statute.[8] The prerogative to issue the writ *ne exeat regno*[9] (to forbid a person to leave the realm) at the instance of a Secretary of State is obsolescent.[10] The right to publish the Bible and the New Testament does not extend to breach of copyright in modern translations.[11] It has

[1] (1743) Cas. T. Hard. 326 (Eccles. Ct.).

[2] Church of England (Worship and Doctrine) Measure 1974 (No. 3).

[3] *The Prince's Case* (1606) 8 Co.Rep. 1a, 18b; Bl.Com. I, 271.

[4] George V in 1924 personally offered Asquith, an ex-Prime Minister, a peerage on the day on which he lost his seat at a general election, when Baldwin was about to succeed MacDonald and the premiership was momentarily vacant; Roy Jenkins, *Asquith*, pp. 505–506.

[5] Some Orders are a matter for the Queen's personal choice; *viz*: awards to the Order of Merit, Orders of the Garter and the Thistle and the Royal Victorian Order. Thus the Queen made the Governor of Southern Rhodesia a K.C.V.O. at the time of U.D.I. in November 1965.

[6] G. Marshall, *Constitutional Conventions* (1984), p. 23. Questions may not be asked of the Prime Minister relating to the grant of honours; Erskine May, *Parliamentary Practice* (22nd ed.), p. 298. The role of the Committee will be affected by the establishment of an Appointments Committee to advise on the conferment of life peerages; *ante*, para. 9–011.

[7] See *R.F. (Mental Patient: Sterilisation)* [1990] 2 AC 1, HL for resort by the courts to their inherent jurisdiction.

[8] The Wild Creatures and Forest Laws Act 1971 abolished the prerogative right to wild creatures (except royal fish and swans), and any franchises of forest, free chase, park or free warren; abrogated the forest laws and repealed the statutes dating back to Edward I. On the coinage see now, Coinage Act 1971; Currency Act 1983. The determining of weights and measures was formerly done by the prerogative: A. Wharam, "The History of the Mile" [1979] N.L.J. 51.

[9] *Ne exeat regnum*: Bl.Comm. I, 265–266.

[10] *Felton v. Callis* [1969] 1 Q.B. 200 (Megarry J.), *Lipkin Gorman v. Cass The Times* May 29, 1985; *Al Nahkel for Contracting and Trading Ltd v. Lowe* [1986] 2 W.L.R. 317. And see J. W. Bridge, "The Case of the Rugby Football Team and the High Prerogative Writ" (1972) 88 L.Q.R. 83; F. M. Auburn, "*Ne Exeat Regno*" [1970] C.L.J. 183, L.J. Anderson, "'Antiquity in Action.'—*Ne Exeat Regno Revived*," (1987) 104 L.Q.R. 246. A similar effect can be achieved by resort to the equitable jurisdiction of the High Court: *Baxter v.A.G. v. Winter (No. 2)* [1986] 1 W.L.R. 497 CA.

[11] *Universities of Oxford and Cambridge v. Eyre and Spottiswoode* [1964] Ch. 736.

been held that there is a prerogative to issue free information, *e.g.* a government pamphlet about the Common Market.[11]

**(h) Emergency and Defence.** The Crown may use such force as is reasonably necessary to put down riot or insurrection.[12] **15–016**

The Crown is responsible for the defence of the realm by sea and land, and is the only judge of the existence of danger to the realm from external enemies (*R. v. Hampden*[13]), although it is not the sole judge of the means by which such danger is to be averted, *e.g.* the imposition of taxation or conscription (Bill of Rights 1688). In time of war the Crown may requisition ships, at least British ships in territorial waters, on payment of compensation (*The Broadmayne*[14]), and may enter upon and use the lands of the citizen near the coast in order to repel invasion (*Case of the King's Prerogative in Saltpetre*[15]). After the danger is over the bulwarks ought to be removed: nothing otherwise was said about compensation in that case. But in modern times the Crown relies in time of war and other grave emergency on statutory powers, such as the Emergency Powers (Defence) Acts of the late war.[16]

Dicey goes so far as to say: "There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which the Government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity."[17] If this is so, the duty of the Crown to protect the realm is paramount. Darling J. in *Re Shipton*[18] construing a Defence of the Realm Act approved *obiter* the old maxim, *salus populi suprema lex* (the safety of the people is the highest law).[19]

The question whether compensation is payable for loss or damage caused by (lawful) exercise of the prerogative was argued for the first time in the House of Lords as a preliminary question of law in *Burmah Oil Co v. Lord Advocate*.[20] The company's oil installations had been destroyed by order of the British commander of the forces in Burmah (then a colony) in 1942, to prevent them from falling into the hands of the invading Japanese forces who would have found them of great strategic value. Their Lordships held by a majority of three to two that, although compensation had never been payable at common law for "battle" damage, whether accidental or deliberate, this was "denial" damage—really economic warfare—and there was no general rule that the royal prerogative can be exercised without compensation. Lord Reid in his majority speech said that there was no precedent of a claim for compensation in such cases not being paid. **15–017**

[11] *Jenkins v. Att.-Gen.* (1971) 115 S.J. 674. "Since all the Crown's subjects are at liberty to issue as much free information as they like ... I offer you this as a choice example of a non-prerogative": H. W. R. Wade, *Constitutional Fundamentals* (1980), p. 49. The Crown's subjects, however, would be using their own money. "Free" information from the government must be paid for by the taxpayer. See further, C. Munro, "Government Advertising and Publicity", [1990] P.L. 1.

[12] See further, *post*, Chap. 19.

[13] (1637) 3 St.Tr. 825.

[14] [1916] P. 64; and see *The Sarpon* [1916] p. 306.

[15] (1606) 12 Co.Rep. 12.

[16] *post*, Chap. 19.

[17] Dicey, *Law of the Constitution* (10th ed. 1959), pp. 412–413.

[18] *Re Shipton, Anderson & Co and Harrison Brothers & Co* [1915] 3 K.B. 676, 684.

[19] The maxim was addressed by Cicero to a military commander. It is found in Bracton, Hobbes, Bacon, Coke, Hale and Hawkins. Sometimes, as in Selden's *Table Talk*, the verb is imperative (*esto*).

[20] [1965] A.C. 75. See A. L. Goodhart, "The Burmah Oil Case and the War Damage Act 1965" (1966) 82 L.Q.R. 97; and note by Paul Jackson in (1964) 27 M.L.R. 709.

and it was therefore payable.[21] Lord Radcliffe in his dissenting speech said the prerogative was so vague and uncertain that he preferred to base his opinion on the idea of necessity: the Crown had as much a duty as a right to do what it did, and it was not a source of profit to the Crown. With logic equal to Lord Reid's he said there was no precedent of such a claim being paid, and therefore it was not payable.[22]

The War Damage Act 1965 abolished retrospectively[23] any right which the subject may have had at common law to compensation from the Crown in respect of lawful acts of damage to, or destruction of property done by, or under the authority of, the Crown during, or in contemplation of, a war in which he Sovereign was or is engaged. The Act thus nullified the decision of the House of Lords in the *Burmah Oil Company* case so far as war damage is concerned. It does not deal with unlawful acts by officers or servants of the Crown,[24] nor the mere taking possession of property (requisition or angary).[25] Any payment of compensation by the government for war damage, whether caused by the Crown in prosecution of a war or by enemy action, must therefore be authorised by Act of Parliament.

### 2. Judicial prerogatives

15–018 These are discussed later in Chapter 20 under "The Administration of Justice."

### 3. Legislative prerogatives

15–019 The prerogatives in relation to the legislature include the power to summon, prorogue and dissolve Parliament, and the giving of the Royal Assent to Bills. These have already been discussed in Chapter 7. It has also been seen that the Sovereign has no prerogative power to legislate within the realm (*Case of Proclamations*[26]). The Crown has a prerogative right to print and publish statutes.[27]

[21] Cited as authority for this proposition in the Privy Council: *Societe United Docks v. Government of Mauritius* [1985] A.C. 585, 600 *per* Lord Templeman.

[22] In *United States v. Caltex* (1952) 344 U.S. 149, a similar case relating to property in the Philippines, the majority of the United States Supreme Court held that no compensation was payable at common law, while the minority thought compensation was payable under the Fifth Amendment to the Constitution (private property not to be taken for public use without just compensation).

[23] Lawyers in both Houses objected strongly to the retroactive effect of the Bill, but: (i) the company had been offered reasonable compensation by successive Chancellors of the Exchequer, and had been warned that if their claim were successful in the courts, legislation would be introduced to indemnify the Crown, *i.e.* the taxpayer; (ii) it is unlikely that the company destroyed the property acting in the belief that there was a common law right to compensation; *cf. Phillips v. Eyre* (1870) L.R. 6 Q.B. 1; (iii) a provision in the American Constitution against *ex post facto* laws is interpreted to refer to penal laws: *Calder v. Bull* (1798) 3 Dall. 386; (iv) by what method, and on what basis, would compensation be assessed? The Japanese captured the site on the day after the installations were destroyed, and the loss was estimated at anything from nil to £100,000,000; (v) by what common law procedure (e.g. petition of right) could compensation have been claimed before the Crown Proceedings Act 1947?

[24] *cf.* Crown Proceedings Act 1947, s.2.

[25] Angary is the power of the Crown in time of war to requisition neutral chattels found within the realm on payment of compensation: *Commercial and Estates Co of Egypt v. Board of Trade* [1925] 1 K.B. 271.

[26] (1610) 2 St.Tr. 723; *ante*, para. 3–003. For prerogative legislation by Order in Council for British dependencies, see *post*, Chap. 35.

[27] Paul Von Nessen, "Law Reporting: Another Case for Deregulation", (1985) 48 M.L.R. 412.

It is a parliamentary custom that legislation affecting the prerogatives or property of the Crown should be preceded by a message from the Crown; and the Speaker must not allow a Bill that affects the prerogative to be read a third time unless the royal consent has been signified by a Privy Councillor.[28]

The Crown is not bound by an Act of Parliament—at any rate, to its detriment—except by express words or necessary implication. It was said in some earlier cases that the Sovereign is bound, even though not named therein, by statutes for the public good, for the preservation of public rights, suppression of public wrong, relief and maintenance of the poor, advancement of learning, religion and justice, the prevention of fraud, and by statutes tending to perform the will of a grantor, donor, or founder.[29] In *Bombay Province v. Bombay Municipal Corporation*,[30] however, the Judicial Committee held that the inference that the Crown agreed to be bound by a statute could only be drawn if it was apparent from its terms at the time of its enactment that its beneficial purpose would be wholly frustrated if the Crown were not bound.

For the court to hold that Parliament intended an Act to bind the Crown there must be either express words to that effect, *e.g.* Crown Private Estates Acts; Crown Proceedings Act 1947; Law Reform (Limitation of Actions, etc.) Act 1954, s.5, Health and Safety At Work etc. Act 1974, s.48 and s.72, or words giving rise to such a strong implication that the court cannot reasonably help drawing it (*Attorney-General v. Donaldson*[31]). Thus it has been held that houses let by the Crown were not protected by Rent Restriction Acts,[32] royal palaces are not bound by the Licensing Acts,[33] vehicles driven by Crown servants were not subject to a statutory speed limit,[34] the Administrator of Austrian Property was not subject to statutes of limitation,[35] and land occupied by government departments does not require planning permission under Planning Acts.[36]

A corollary of that principle is the immunity of the Crown from income tax and rates, which can only be imposed by authority of Act of Parliament. The basis of the *prima facie* exclusion of the Crown from a taxing Act was discussed by the House of Lords in *Madras Electric Supply Corporation v. Boarland*.[37] While Lords Oaksey and Tucker thought it was not necessary to decide whether the Crown's immunity depended on the construction of the Act or arose from the

15–020

[28] Erskine May, *Parliamentary Practice* (22nd ed. 1997) 603.

[29] *Case of Ecclesiastical Persons* (1601) 4 Co.Rep. 14b; *Magdalen College Case (Warren v. Smith)* (1615) 11 Co.Rep. 66b. In *Willion v. Berkley* ((1561) Plowd. 223) counsel argued that the presumption is that the Sovereign "does not mean to prejudice himself or to bar himself of his liberty and privilege."

[30] [1947] A.C. 58. See too *Department of Transport v. Egoroff, The Times* May 6, 1986.

[31] (1842) 10 M. & W. 117; *Gorton Local Board v. Prison Commissioners* (1887) reported in *Cooper v. Hawkins* [1904] 2 K.B. 165 (local byelaws); *Re W. Matua's Will* [1908] A.C. 448.

[32] *Tamlin v. Hannaford* [1950] 1 K.B. 18; *cf.* Crown Lessees (Protection of Sub-Tenants) Act 1952. But tenants of the Crown Estates Commissioners, of the Duchy of Cornwall and the Duchy of Lancaster do enjoy statutory protection: Housing Act 1980, s.73; *Crown Estates Commissioners v. Wordsworth* (1982) 44 P. & C.R. 302, CA.

[33] *R. v. Graham Campbell, ex p. Herbert* [1935] 1 K.B. 594.

[34] *Cooper v. Hawkins* [1904] 2 K.B. 164; for subsequent developments see (1983) 99 L.Q.R. 341 and *post*, para. 33–002.

[35] *Administrator of Austrian Property v. Russian Bank for Foreign Trade* (1931) 48 T.L.R. 37, CA. But see now, Limitation Act 1980, s.37.

[36] *Ministry of Agriculture, Fisheries and Food v. Jenkins* [1963] 2 Q.B. 317, CA; *Campbell (A.G.) (Arcam) v. Worcestershire County Council* (1963) 61 L.G.R. 321. See now Town and Country Planning Act 1984.

[37] [1955] A.C. 667. The Crown is not bound by an admission made on its behalf that a statute applies to the Crown: *Att-Gen. for Ceylon v. A. D. Silva* [1953] A.C. 461, PC.

prerogative. Lord Mac-Dermott regarded it as a rule of construction, Lord Keith of Avonholm offered the questionable explanation that words in a statute capable of applying to the Crown might be overridden by the exercise of the prerogative, and Lord Reid expressed the preferable opinion that the presumption is a rule of construction taking account of the prerogative.

The question who represents the Crown for this purpose was reviewed in *Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property*,[38] where the House of Lords by a majority held that the Custodian of Enemy Property was a servant of the Crown, and that the Crown had a sufficient interest in the disposal of property held by him in that capacity to entitle him to claim exemption from tax on the income. The majority of their Lordships approved of the classification made by Blackburn J. in *Mersey Docks and Harbour Board v. Cameron* (1864)[39] that the immunity extends to: (i) the Sovereign personally; (ii) Crown servants, *e.g.* government departments[40]; and land occupied or funds held for Crown purposes by persons in *consimili casu*, *e.g.* assize courts and judges' lodgings,[41] county courts,[42] police stations[43] and prisons.[44] The difficulty was to decide, first, whether the Custodian of Hungarian Property fell into any of the categories enumerated above, and (if so) whether the property held by him was entitled to Crown immunity. Their Lordships (except Lord Keith) were agreed that the Crown, through the Board of Trade and the Treasury, had sufficient control of him to make him a Crown servant, so that he fell into category (ii).

The general rule is subject to criticism. It has been suggested that the presumption ought to be reversed by legislation, so that the Crown would be bound by statute unless it was expressly declared not to be bound, or public policy required the exemption of the Crown in a particular case.[45]

## III. The Prerogative in Foreign Affairs

### Acts of state

15–021 There is no technical definition of "act of state" in British constitutional law,[46] but the expression, as considered here, is generally used for an act done by the

[38] [1954] A.C. 584.

[39] 11 H.L.C. 443, 465. See also *Mersey Docks and Harbour Board v. Gibbs* (1866) L.R. 1 H.L. 93; and see Holdsworth, *History of English Law*, Vol. X, pp. 295–299.

[40] *R. v. Stewart* (1857) 8 E. & B. 360. And see *Smith v. Birmingham Guardians* (1857) 7 E. & B. 483; *R. v. Kent Justices* (1890) 24 Q.B.D. 181; *Wirral Estates v. Shaw* [1932] 2 K.B. 247.

[41] *Hodgson v. Carlisle Board of Health* (1857) 8 E. & B. 116; and see *Coomber v. Berkshire Justices* (1883) 9 App.Cas. 61, HL.

[42] *R. v. Manchester Overseers* (1854) 3 E. & B. 336.

[43] *Justices of Lancashire v. Stretford Overseers* (1858) E.B. & E. 225.

[44] *R. v. Shephent* (1841) 1 Q.B. 170. And see *Territorial, etc. Forces Association v. Nichols* [1949] 1 K.B. 35.

[45] Glanville Williams, *Criminal Law*, I (1961). And see H. Street, *Governmental Liability* (1953) pp. 143–152; Peter W. Hogg, *Liability of the Crown* (2nd ed., 1989), Chap. 10. In *Cain v. Doyle* (1946) 72 C.L.R. 409, the majority in the High Court of Australia speaking *obiter* did not reject the possibility of the Crown being convicted of a criminal offence, *e.g.* the State as employer. See W. Friedmann, "Public Welfare Offences, Statutory Duties, and the Legal Status of the Crown" (1950) 13 M.L.R. 24.

[46] See Harrison Moore, *Act of State in English Law* (1906); Holdsworth, "The History of Acts of State in English Law" (1941) 41 *Columbia Law Rev.* 1313; E. C. S. Wade, "Act of State in English Law" (1934) 15 B.Y.I.L. 98; P. Cane, "Prerogative Acts, Acts of State and Justiciability", (1980) 29 I.C.L.Q. 680.

Crown as a matter of policy in relation to another state, or in relation to an individual who is not within the allegiance to the Crown.[47] The two parts of this definition are best considered separately. Cases on acts in relation to foreign states usually arise out of attempts by private individuals to enforce contract or property rights *indirectly* accruing, while cases on acts in relation to individuals normally arise out of an attempt to obtain a remedy for a supposed wrong *directly* resulting; and, as will be seen, the class of individuals against whom acts of state may be done is not free from doubt.

A distinct use of the term which Lord Wilberforce identified in *Buttes Gas and Oil Co v. Hammer*[48] relates to cases which are concerned with the applicability of foreign municipal legislation within its own territory and with the recognition of such legislation in the British courts. It is in this context that Lord Millett said, "the Act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state".[49]

1. *Acts of state in relation to foreign states*

Acts of state in this class include the declaration of war and peace; the making of treaties[50]; the annexation and cession of territory; the sending and receiving of diplomatic representatives; and the recognition of foreign states and governments. A claimant whose property or contracts are indirectly affected will be unsuccessful in his attempt to use an act of state as a foundation of an action. Such acts are outside the jurisdiction of British courts in the sense that they cannot be questioned. They are non-justiciable. Nor can a citizen claim to enforce directly any rights to which he may be entitled under them.[51] One view is that they are not properly described as an exercise of the "prerogative" as they are not done in relation to British subjects.[52] (This was the term traditionally used. Its ambit in this context was never precisely defined as is shown by the discussion below of *Nissan v. Attorney-General*[53] In terms of the British Nationality Act 1981 it no doubt includes British citizens[54] and some, or all, categories of Commonwealth citizens[55] and, perhaps, those who under the Act are British subjects[56]). There seems to be no good reason why the term "prerogative" should be limited in this way; indeed, Lord Coleridge C.J. described the making of peace and war as "perhaps the highest acts of the prerogative of the Crown".[57] 15–022

[47] "An act of the executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown": Wade, *op. cit.* p. 103. *Cf. per* Lord Wilberforce in *Nissan v. Att.-Gen.* [1970] A.C. 179, *post*, para. 15–025.

[48] [1982] A.C. 888 (As a general rule such matters are "non-justiciable"; in exceptional cases the British courts may consider the effects of foreign legislation which is confiscatory or contrary to public policy).

[49] *R. v. Bow Street Magistrate ex p. Pinochet Ugarte* [2000] 1 A.C. 147, 269, HL. See further *Fayed v. Al-Tajir* [1998] Q.B. 712, 714 *per* Mustill L.J.

[50] *post*, para. 15–028 *et seq.*

[51] Unless there is a special statutory provision to this effect, *e.g.* Foreign Compensation Act 1950.

[52] *Per* Warrington L.J. in *Re Ferdinand, Ex-Tsar of Bulgaria* [1921] 1 Ch. 107, 139.

[53] [1970] A.C. 179.

[54] s.1.

[55] s.37.

[56] s.30 and s.31.

[57] *Rustomjee v. R.* (1876) 2 Q.B.D. 69, 73.

In *Salaman v. Secretary of State for India*,[58] where a claim was brought to enforce an agreement between the Secretary of State for India and the Maharajah of the Punjab, Fletcher Moulton L.J. said: "An act of state is essentially an act of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal courts." He went on to say that the court must accept an act of state as it is without question; but the court may be called upon to decide whether or not there has been an act of state, and (if so) its nature and extent.[59] Further, the court may have to consider the effect of an act of state on the rights of the government or of individuals. Thus, while the court will not enforce private rights arising under a treaty,[60] it may be concerned if the treaty creates or modifies rights between the Crown and individuals who are, or who thereby become, subjects. For example, the Crown may recover in the courts debts due to it as a result of annexation, and presumably debts can similarly be recovered from it. The Crown decides what rights and obligations it takes over from the government of a state which it has extinguished by conquest and annexation (*West Rand Central Gold Mining Co v. The King*[61]); and so there was no redress where a colonial government declined to recognise concessions made to people who under the law then in force were British subjects[62] by the former ruler of territory that has been annexed (*Cook v. Sprigg*[63]). It will be noticed that in these cases the act of state was not done in relation to "British subjects," although it affected their interests.

**15–023** A declaration of war affects the citizen's trading and contract rights with persons of enemy character, formerly prevented a British subject from becoming naturalised in the enemy state (*R. v. Lynch*[64]), and alters the status in this country of nationals of the enemy state. The court must accept the certificate of the Foreign Secretary as to whether the Crown is at war, or has ceased to be at war, with a foreign country (*R. v. Bottrill, ex p. Kuechenmeister*[65]). The recognition by the Crown of foreign states, Sovereigns and governments may affect the rights of private individuals because of the immunity,[66] from the jurisdiction of the courts which such recognition confers (*Duff Development Co v. Government of Kelantan*[67]). The court must accept the certificate of the Crown as to recognition, although it will examine the declaration in order to see that the proper facts have

[58] [1906] 1 K.B. 613, C.A. And see *Secretary of State for India v. Kamachee Boye Sahaba* (1859) 13 Moo.P.C. 22.

[59] *Forester v. Secretary of State for India* (1872) L.R.Ind.App., supp. Vol., p. 10; *Musgrave v. Pulido* (1879) 5 App.Cas. 102, PC.

[60] *Nabob of the Carnatic v. East India Co* (1793) 2 Ves. 56; *Civilian War Claimants' Association v. The King* [1932] A.C. 14.

[61] [1905] 2 K.B. 391 (South African Republic).

[62] At that time "British subject" meant anyone born within the King's dominions who thereby owed allegiance to the King. Not until the British Nationality Act 1948 was the distinct category of citizen of the United Kingdom and Colonies recognised: *post* Chap. 23.

[63] [1899] A.C. 572 (annexation of Pondoland to Cape Colony).

[64] [1903] 1 K.B. 444. *Quaere* how far this prohibition extends.

[65] [1947] K.B. 41 (CA).

[66] Now limited by the State Immunity Act 1978; *post* para. 15–032.

[67] [1924] A.C. 797, HL. And as to the Commonwealth, see *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149; *Kahan v. Pakistan Federation* [1951] 2 K.B. 1003; *Mellenger v. New Brunswick Development Corporation* [1971] 1 W.L.R. 604, CA. *cf. Sultan of Johore v. Abubakar Tunku Aris Bendahar* [1952] A.C. 318, PC. The practice of recognising *governments* which have come to power by unconstitutional means was abandoned by the British government in 1980. Future certificates will merely indicate what links exist between the regime in question and HM Government so, presumably, leaving the question of recognition to the courts: C. R. Symmons, "United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose by Another Name?" [1981] I.L. 249.

been considered by the appropriate Ministers.[68] Similar considerations apply to the recognition of diplomatic representatives, which confers diplomatic immunity (*Engelke v. Musmann*[69]).

The decisions of the British courts in such cases illustrate according to Lord Wilberforce, the undoubted judicial acceptance of the principle that, "In a matter affecting the sovereignty of the United Kingdom the courts are entitled to take account of the declared policy of Her Majesty's Government. . . . The courts should in such matters speak with the same voice as the executive."[70]

An act of state cannot alter the law administered by British courts. Thus in *The Zamora*[71] the Privy Council held that a prerogative Order in Council authorising reprisals could not increase the right of the Crown to requisition neutral ships and cargo. Although prize courts are said to administer "international law", it is such law—having its source in international law—as is recognised by English law. It may be modified by statute, but not by the prerogative.

2. *Acts of state in relation to individuals*

Acts done under the authority of the Crown in relation to individuals have been held to be acts of state, so as to prevent an aggrieved person from obtaining redress for damage done,[72] in the following classes of case. Where the plea "act of state" is successful, this means that the court declines jurisdiction. In such cases the Crown uses "act of state" as a shield in an action brought by a private individual. **15–024**

(a) An alien outside British territory. In *Buron v. Denman*[73]) the captain of a British warship was held not liable for trespass for setting fire to the barracoon of a Spaniard on the west coast of Africa (not British territory) and releasing his slaves: the captain had general instructions to suppress the slave trade, and his conduct in this case was afterwards approved by the Admiralty and the Foreign and Colonial Secretaries. An act of state in relation to individuals, it was held, may be either previously authorised or subsequently ratified by the Crown. There is probably a prerogative power to exclude aliens from entering British territory, and at any rate aliens have no enforceable right at common law to enter (*Musgrove v. Chun Teeong Toy*[74]).

(b) An enemy alien within that country. In *R. v. Bottrill, ex p. Kuechenmeister*[75] a German national, who had lived in England since 1928 without being naturalised and was interned by the Home Secretary during the war, was unsuccessful in his application for a writ of habeas corpus, detention by the Crown of

[68] *Sayce v. Ameer Ruler Sadiq Mohammed Abbasi Bahawalpur State* [1952] 2 Q.B. 390, CA.
[69] [1928] A.C. 433.
[70] *Re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235* [1978] A.C. 547, *per* Lord Wilberforce. See too, *British Airways v. Laker Airways* [1985] A.C. 58, *per* Lord Diplock.
[71] [1916] 2 A.C. 77; "One of the most courageous of judicial decisions even in our long history": *per* Lord Scarman. *C.C.S.U. v. Minister for Civil Service* [1985] A.C. 374, 404.
[72] Act of state may also be a defence to a criminal charge: see Stephen, *History of the Criminal Law*, II, pp. 61–65. And see *Carr v. Fracis Times & Co* [1902] A.C. 176 (act of state by foreign ruler authorising British subjects to seize British-owned goods in British ships in foreign territorial waters).
[73] (1848) 2 Ex. 167. The case was settled on terms. Captain Denman, the successful defendant, was a son of Denman C.J.
[74] [1891] A.C. 491, PC. The entry of aliens into this country is now regulated by the Immigration Act 1971 and Community Law.
[75] [1947] K.B. 41, CA.

an enemy alien being an act of state. A similar principle applies to the deportation of an enemy alien (*Netz v. Chuter Ede*[76]).

(c) Formerly acts done by the Crown in British protectorates in relation to the local inhabitants were regarded as acts of state, protectorates being technically foreign countries.[77] This principle probably became untenable after the creation of the new status of British protected persons by the British Nationality Act 1948, but the question is no longer of practical importance.[78]

With regard to the defence of "act of state" against British citizens, Commonwealth citizens and British subjects outside British territory, there is no direct judicial authority.[79]

15–025 The Crown must claim "act of state" specifically.[80] But the mere plea "act of state" is not enough: the court can examine the facts in order to decide whether what has been done is an act of state. Thus in an action of trespass against the Governor of Jamaica for seizing and detaining the plaintiff's schooner, it was not enough for the defendant to plead that the acts were done by him in the exercise of his discretion as Governor and as acts of state; he had to show that the acts were done under and within the limits of his commission, or that they were really acts of state policy done under the authority of the Crown (*Musgrave v. Pulido*).[81]

On the other hand, if a wrong is committed by a servant of the Crown against a British citizen and, possibly Commonwealth citizens and British subjects or friendly aliens in British territory, it is no defence to plead "act of state." In *Walker v. Baird*,[82] where the commander of a British warship had taken possession of a lobster factory belonging to a British subject (under the law then in force) in Newfoundland, it was held no defence that the commander was acting under the orders of the Crown to implement a treaty with France. And in *Johnstone v. Pedlar*[83] the House of Lords held that a United States citizen in Dublin (at that time within the United Kingdom) was entitled to claim from the police commissioner money found on him at the time of his arrest for illegal drilling, "act of state" not being available as a defence to an action brought by the citizen of a friendly state for wrongful detention of property in this country.

In *Nissan v. Attorney-General*,[84] Nissan, a citizen of the United Kingdom and Colonies, was lessee of an hotel in Cyprus, an independent republic in the Commonwealth.[85] The hotel was occupied by British troops for several months as part of a truce force under an agreement between the Governments of the

[76] [1946] Ch. 224.

[77] *R. v. Earl of Crewe, ex p. Sekgome* [1910] 2 K.B. 576, CA; *Sobhuza II v. Miller* [1926] A.C. 518 PC; *Eshugbayi (Eleko) v. Government of Nigeria (Officer Administering)* [1931] A.C. 662, PC; *R. v. Ketter* [1940] 1 K.B. 787, *cf. Ex p. Mwenya* ([1960] 1 Q.B. 241, CA, where the petitioner was assumed to be a British subject by virtue of local citizenship laws (Federation of Rhodesia and Nyasaland). *cf.* K. Polack, "The Defence of Act of State in Relation to Protectorates" (1963) 26 M.L.R. 138; L. L. Kato, "Act of State in a Protectorate—in Retrospect" [1969] P.L. 219.

[78] The status of British protected persons is preserved by the British Nationality Act 1981; s.38.

[79] See *Nissan v. Att.-Gen.*, [1976] A.C. 179, HL, *post*.

[80] *Nissan v. Att.-Gen.* [1970] A.C. 179, *post*.

[81] (1879) 5 App.Cas 102, PC.

[82] [1892] A.C. 491, PC. And see the *General Warrant Cases*, *post*, Chap. 24.

[83] [1921] 2 A.C. 262.

[84] [1970] A.C. 179. See J. G. Collier, "Act of State as a Defence against a British Subject" (1968) C.L.J. 102, and note in (1969) C.L.J. 166; S. S. de Smith in (1969) 32 M.L.R. 427; *cf.* D. R. Gilmour, "British Forces Abroad and the Responsibility for their Actions" [1970] P.L. 120.

[85] But not one of Her Majesty's dominions.

United Kingdom and Cyprus for the purpose of restoring peace in the civil strife between the Greek and Turkish communities. The British forces then continued to occupy the hotel for a period as part of a United Nations peace-keeping force, on the recommendation of the Security Council of the United Nations and with the consent of the Cyprus Government. Nissan brought an action against the Crown in England, claiming declarations that he was entitled to compensation for damage to the contents of the hotel and the destruction of stores, on the ground that this was a lawful exercise of the prerogative[86]; and that the Crown was liable in damages for trespass to chattels by the British troops.[87] This case was fought on preliminary issues, in particular, whether the acts of the British forces were acts of state.[88] The House of Lords upheld the Court of Appeal in deciding that the acts of the British forces were not non-justiciable as acts of state. Although the agreement of the British Government with the Cyprus Government to send peace-keeping forces to Cyprus was no doubt an act of state, not all acts done incidentally in relation to individual persons or their property (such as occupying a particular hotel or damaging its contents) in the course of executing an act of state are themselves acts of state. All the Law Lords said it was unnecessary to discuss whether the acts of the Crown were an exercise of the prerogative, although Lord Denning M.R. in the Court of Appeal based the liability of the Crown to pay compensation on the exercise of the prerogative, referring to the *Burmah Oil Company* case.[89]

There are a number of dicta, which are not easily reconcilable, in the various judgments concerning "act of State" and its availability as a defence against British subjects. Their Lordships recognised that the latter term itself was open to various interpretations. Lord Morris wondered, without expressing a final opinion, whether the phrase was equivalent to "those owing allegiance to the Crown?" Lord Pearson was uncertain whether "British subject" extended only to a citizen of the United Kingdom and Colonies or to anyone within the wide definition of section 1 of the British Nationality Act 1948 or even whether, in the context, it had some other meaning. In the light of the British Nationality Act 1981 these doubts may be rephrased to ask: does "British Subject" for this purpose mean "British citizen" or does it include some or all of the following classes, Commonwealth citizens, British protected persons and British subjects (within the meaning of sections 30 and 31 of the 1981 Act)? If Commonwealth citizens *are* included, should a distinction be drawn between citizens of Commonwealth countries which are still realms and those which recognise the Queen merely as Head of the Commonwealth. (In view of the disintegration of the common law throughout the Commonwealth, also, the earlier cases may have to be reviewed on the questions: what is meant by "British territory", "abroad" and "foreign country"?) **15–026**

With regard to the question whether act of state might be pleaded against a British subject, in whatever sense that phrase is used in this context, Lord Reid stated the traditional doctrine that "act of state" is not available as a defence to

[86] See *Burmah Oil Co v. Lord Advocate* [1965] A.C. 75; *ante*, para. 15–017.

[87] Nissan also claimed that there was a contract by the High Commissioner on behalf of the Crown, with the consent of the Secretary of State, that he would receive compensation for occupation of the hotel.

[88] Also on the questions whether there was a contract, express or implied, that he would be compensated (a question of fact left to the trial court); and whether the British troops in the first period were agents of the Cyprus government, and whether in the second period they were agents of the United Nations, the decision as to both periods being "no".

[89] *ante*, para. 15–017.

interference with the rights of British subjects abroad, but Lord Morris, Lord Pearce and Lord Pearson were doubtful.[90] Lord Wilberforce thought that act of state *could* be pleaded; but in his speech he was concerned mainly not with acts *directly* causing harm which if done by a private individual would constitute a tort but non-justiciable acts of the Crown which *indirectly* cause harm. Lord Pearce thought there was an exercise of the prerogative, involving the obligation to pay, as the case was not covered by the War Damage Act 1965[91]; while Lords Reid and Wilberforce doubted whether the principle of the *Burmah Oil Company*[92] case applied to acts done on foreign soil.

**Passports**[93]

15–027 The Secretary of State has a discretion to grant, refuse, impound or revoke passports, which remain Crown property.[94] A passport was defined by Lord Alverstone C.J. in *R. v. Brailsford*[95] as "a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries". It contains a request in the name of Her Majesty to allow the bearer pass freely, and to afford him such assistance and protection as may be necessary. The Crown has a duty to protect its citizens abroad, although this is not legally enforceable.[96] A passport is not legally necessary at common law in order to go abroad, but it is universally used as a certificate of identity and nationality. Other countries may refuse entry without possession of one, and therefore transport companies may be expected to refuse to carry passengers abroad without passports.

The alleged prerogative power of the Crown to refuse or impound passports has been described as arbitrary, objectionable and of doubtful legality. Further, the right of establishment in Community Law means that nationals are entitled to identity cards or passports enabling them to leave and re-enter the country freely, subject to public policy, security and health.

**Treaties**

15–028 The treaty-making power is an executive power which in British constitutional law is vested in the Crown.[97] A treaty is analogous to a contract between states. Its binding force is a matter of international law. The negotiations are conducted

[90] H. W. R. Wade suggests that the test whether "act of state" is a defence to an action for a tort against a British subject should be a matter of geography rather than nationality, e.g. British troops seizing Suez Canal damage house of British subject living in Egypt: *Administrative Law* (5th ed., 1982) pp. 718–719 citing *Cook v. Sprigg* [1899] A.C. 572.

[91] *ante*, para. 15–017.

[92] [1965] A.C. 75.

[93] H. Street, *Freedom, the Individual and the Law* (5th ed., 1982), pp. 291–296; D. W. Williams, "British Passports and the Right to Travel" (1974) I. C.L.Q. 642; Justice, *Going Abroad: A Report on Passports* (1974); J. Jaconelli, (1975) 38 M.L.R. 314; D. C. Turack, "Selected Aspects of International and Municipal Law Concerning Passports" (1971) 12 *William & Mary Law Review*, 805.

[94] *cf. Ghani v. Jones* [1970] 1 Q.B. 693, CA, where the Pakistani passports taken by the police were not the property of the Crown.

[95] [1905] 2 K.B. 730, 745; approved *Joyce v. D.P.P.* [1946] A.C. 347, *per* Lord Jowitt, L.C.

[96] But the obtaining of a British passport, even by an alien, involves allegiance to the Crown: *Joyce v. D.P.P.* [1946] A.C. 347, HL.

[97] *Att.-Gen. for Canada v. Att.-Gen. for Ontario* [1937] A.C. 326, PC, *per* Lord Atkin. The relevant rules of English law are conveniently set out by Lightman J. in *Lonrho Exports v. Export Credits Guarantee Department* [1999] Ch. 158, at p. 178.

by agents of the Crown, *e.g.* the Foreign Secretary or a diplomatic representative, and are usually made subject to ratification by the Crown under the Great Seal. Treaties are acts of state, and do not in general require parliamentary sanction.[98] Where treaties require ratification by the Crown (*i.e.* treaties between Heads of State, but not commercial or technical agreements at official level), it has been the practice since 1924 to lay them when signed before both Houses of Parliament for 21 days before they are ratified ("the Ponsonby Rule").[99] It is open to argument whether this practice may be regarded as a constitutional convention. It has also been described as a "so-called rule ... no more than a self denying ordinance on the part of the government; on occasions it has been waived or modified if expediency requires a treaty to be ratified more hurriedly".[1] On important treaties the government initiates a discussion; otherwise the Opposition may ask for a discussion.

There are, however, three classes of treaty which do require confirmation by Parliament[2]:

(i) *Treaties expressly made subject to confirmation by Parliament.* A treaty expressly made subject to confirmation by Parliament will not come into force, either by international law or by English law, unless an Act of Parliament is passed confirming it; for that is a condition in the treaty itself. Such parliamentary sanctions is sometimes spoken of as "ratification", but that word is properly used of the final authentication by the Crown. **15–029**

(ii) *Treaties involving an alteration of English law or taxation.* Any alteration of English law involved in implementing a treaty, including the imposition of taxes or the expenditure of public money, needs to be authorised by Act of Parliament.[3] The most striking example is the European Communities Act 1972. The courts cannot have regard to the provisions of treaties until enacted by Parliament,[4] except to the extent that they relate to international relations within the "narrow field" where the courts are prepared to defer to the declared policy of Her Majesty's Government.[5] In other cases courts cannot take into account the terms of international agreements, as Lord Fraser emphasised in the *G.C.H.Q.* Case when criticising the Court of Appeal for taking into account I.L.O. Conventions which had not been enacted as part of United Kingdom law.[6] Dicta in some cases suggests that there is one exception to the general principle: the European Convention on Human Rights. In *Attorney-General v. BBC*,[7] for example, Lord

[98] *Att.-Gen. for Canada v. Att.-Gen. for Ontario* [1937] A.C. 326, PC.

[99] H.C.Deb., Vol. 171, ser. 53, col. 2001 (1924). An unsuccessful attempt to subject the treaty-making power to Parliamentary approval occurred in 1996 when Lord Lester introduced in the House of Lords the Treaties (Parliamentary Approval) Bill.

[1] K. Bradshaw and D. Pring, *Parliament and Congress* (1972), p. 401.

[2] *Lord McNair, The Law of Treaties*, Chap. 2; "When do British Treaties involve Legislation?" (1928) B.Y.I.L. 59.

[3] [1937] A.C. 326, 347 *per* Lord Atkin. This is the effect of the *Case of Proclamations* ((1610) 12 Co.Rep. 74) and the Bill of Rights.

[4] *Rustomjee v. The Queen* (1876) 2 Q.B.D. 69 *per* Lord Coleridge C.J. (treaty with China; subject could not claim against Crown share of compensation for loss of trading rights); *Blackburn v. Att.-Gen.* [1971] 1 W.L.R. 1037, CA *per* Lord Denning M.R.; *Littrell v. United States of America (No. 2)* [1995] 1 W.L.R. 82, CA. See D. C. T. Williams, "Prerogative and Parliamentary Control" [1971] C.L.J. 178.

[5] *British Airways v. Laker Airways* [1985] A.C. 58, 85–86, *per* Lord Diplock; *post* para. 20–007.

[6] *C.C.S.U. v. Minister for Civil Service* [1985] A.C. 374.

[7] [1981] A.C. 303. See *post* para. 20–007 for further discussion.

Fraser said that the courts should have regard to the provisions of the Convention "where our domestic law is not firmly settled. But the Convention does not form part of our law and the decision on what that law is for our domestic courts and for this House".

The courts must apply a statute whose terms are clear, irrespective of whether it is alleged to conflict with the terms of a treaty.[8] Where a statute incorporating a treaty into United Kingdom law is ambiguous the courts will interpret its provisions in the light of the treaty.[9]

15–030 (iii) *Treaties affecting private rights.* In *The Parlement Belge*[10] Sir Robert Phillimore said that treaties affecting the private rights of British subjects were inoperative without the confirmation of the legislature. The Crown, therefore, could not by a treaty with Belgium confer on a private ship engaged in trade the immunities of a public ship so as to deprive a British subject of the right to bring proceedings against the ship for damage sustained in a collision. This is really a particular aspect of (ii) above (treaties involving an alteration of English law). It is the reason why the European Communities Act 1972 was needed to cover enforceable Community rights and obligations, and also why Extradition Acts are required to give legal effect to treaties made for surrendering persons accused of crimes committed abroad.[11]

In the exceptional case of treaties providing for any increase in the powers of the European Parliament the Crown cannot even *ratify* a treaty without Parliamentary approval: European Assembly Election Act 1978, s.6(1).[12] (Such approval was given, by section 2 of the European Communities (Amendment) Act 1998, to an increase in powers under the Treaty of Amsterdam.)

By the making of a treaty the Crown may morally bind Parliament to pass any legislation needed to give full effect to it. The negotiation of treaties, which must often be done in secret,[13] is less under parliamentary control than almost any other branch of the prerogative, and Parliament may be met with a *fait accompli*. But there is an increasing tendency to keep Parliament informed and to invite expressions of opinion before the Crown finally commits itself, as was done during the Common Market negotiations in 1962–1971. This is only expedient, as the government relies on the support of Parliament, and especially of the Commons. Where legislation will be required to supplement a treaty, there is probably a convention that Parliament should be consulted in principle before the treaty is concluded. Parliament will also be consulted in very important matters, such as the declaration of war or the conclusion of a peace treaty.

[8] *Cheney v. Conn* [1968] 1 W.L.R. 292.

[9] *Buchanan (James) & Co Ltd v. Babco Forwarding & Shipping (UK) Ltd* [1978] A.C. 141; *Fothergill v. Monarch Airlines Ltd* [1981] A.C. 251.

[10] (1879) 4 P.D. 129, 154. The Court of Appeal (1880) 5 P.D. 197) reversed Sir Robert Phillimore's decision on the ground that the ship in that case was a public ship, but they carefully refrained from expressing disapproval of the principle stated by him, which is regarded as good law: applied by MacKenna J. in *Swiss-Israel Trade Bank v. Government of Malta* [1972] 1 Lloyd's Rep. 497. See also *British Airways v. Laker Airways* [1983] 3 W.L.R. 544, 580 *per* Sir John Donaldson, M.R.

[11] Maitland, *Constitutional History*, (1908) pp. 424–425.

[12] The European Communities (Amendment) Act 1993, s.2 provides expressly that the United Kingdom cannot move to the third stage of economic and monetary union under the Maastricht Treaty without prior Parliamentary approval.

[13] For example, negotiations with China *re* Hong Kong in 1984.

*Treaties of cession and delimitation of maritime boundaries*

Doubt has been expressed whether the Crown can by virtue of the prerogative cede territory, so as to deprive British subjects of their nationality and perhaps property and contract rights.[14] It may be that a distinction should be drawn between the United Kingdom, where the prerogative does not apply, and territories of the Crown overseas. The Crown was persuaded to seek parliamentary approval for the cession of Heligoland to Germany in 1890,[15] and since then it has been the practice to ask Parliament to confirm cessions.[16] Whatever the law may be, this seems to be now the convention. Indeed, convention probably demands that Parliament should be consulted beforehand, as in the case of the cession of Jubaland to Italy in 1927. **15–031**

It has been asserted that the Crown possesses a prerogative to delimit the maritime boundaries of the United Kingdom and, in cases of doubt to provide conclusive certificates for the guidance of the courts.[17] The existence of such a prerogative is, however, open to doubt.[18]

**Sovereign Immunity and Diplomatic representation**

It is part of the royal prerogative in relation to foreign affairs to recognise, or to withhold recognition from, foreign states, their heads and, before 1980, governments.[19] Foreign states, their head, governments and diplomatic envoys recognised by the Crown enjoy certain immunities from the jurisdiction of English courts. **15–032**

The main purpose of the State Immunity Act 1978 is to restrict the immunities of foreign governments and States by bringing the British rules on state immunity into line with the more restrictive rules adopted in other States. The Act lists various circumstances in which civil actions may be brought against foreign states in the British courts. Section 3, for example, gives jurisdiction over commercial transactions as opposed to those entered into by a State in the exercise of its sovereign authority. Section 4 deals with contracts of employment made in the United Kingdom or under which the work is to be performed in the United Kingdom. Other sections relate to personal injuries and damage to property arising from acts or omissions in the United Kingdom (section 5); the ownership and use of immovable property (section 6); patents (section 7) and ships used for commercial purposes (section 10). Entities separate from the government of a foreign state enjoy immunity with regard to acts done by them in the exercise of sovereign authority (within the limits of immunity recognised by the Act (s.14)[20] Important provisions in section 16 ensure that nothing in the Act curtails any privileges conferred by the Diplomatic Privileges Act 1964 or

[14] See Anson, *Law and Custom of the Constitution*, II, ii (4th ed. 1935), Keith), pp. 137–142; Holdsworth, "The Treaty-making power of the Crown" (1942) 58 L.Q.R. 177, 183; Roberts-Wray, *Commonwealth and Colonial Law*, p. 118. *Cf. Damodhar Gordhan v. Deoram Kanji* (1876) 1 App.Cas. 352, PC. And *cf.* Treaty of Paris 1783, recognising the independence of the former American colonies.

[15] Anglo-German Agreement Act 1890.

[16] e.g. Anglo-Italian (East African Territories) Act 1925; Dindings Agreement Approval Act 1934; Anglo-Venezuelan Treaty (Island of Patos) Act 1942.

[17] *The Fagernes* [1927] P.L. 311, CA; *R. v. Kent Justices, ex p. Lye* [1967] 2 Q.B. 153; *Post Office v. Estuary Radio* [1968] 2 Q.B. 740.

[18] W. R. Edeson, "The Prerogative of the Crown to Delimit Britain's Maritime Boundary" (1973) 89 L.Q.R. 364.

[19] *Carl Zeiss Stiftung v. Rayner and Keeler Ltd (No. 2)* [1967] 1 A.C. 853, HL, see *per* Lord Reid (German Democratic Republic).

[20] *Kuwait Airways Corporation v. Iraqi Airways Co* [1995] 1 W.L.R. 1147.

the Consular Relations Act 1968. The Act was successfully relied on by a landlord in an action against the French government to which property had been let to be used as a private dwelling.[21] In *Alcom Ltd v. Republic of Colombia*[22] the House of Lords, reversing the Court of Appeal, interpreted complicated provisions relating to the enforcement of judgments (section 13) as generously as possible in favour of the respondent state to deny jurisdiction in the circumstances to the English courts.

15–033 The privilege and immunities of the heads of foreign states were placed on a statutory basis by section 20 of the State Immunity Act which was the subject of detailed consideration in the prolonged *Pinochet* litigation.[23] Senator Pinochet, the former Head of State of Chile, had been arrested while in the United Kingdom in response to a request for his extradition[24] by the Spanish authorities to face charges of torture. Section 20 equates the position of a head of state to that of diplomats for the purpose of determining the extent of immunity from municipal courts.[25] The latter, while in post as diplomatic representatives, enjoy full immunity from the courts of the receiving State—immunity *ratione personae*—but after the termination of their diplomatic status immunity applies only to acts carried out in the exercise of their official functions—immunity *ratione materiae*. The House of Lords, by a majority, held that a similar distinction applied to former heads of states and that authorising acts of torture could not be part of a head of state's official functions so as to entitle a former head to immunity from prosecution—even although the definition of torture under the Convention on Torture, which became part of United Kingdom law by the Criminal Justice Act 1988, section 134, refers to the infliction of pain or suffering by a public official or other person acting in an official capacity. Lord Goff, dissenting, found the view of the majority contrary to "principle, authority and commonsense".[26]

Statutory recognition of the customary rules of international law regulating diplomatic immunity dates back to the Diplomatic Privileges Act 1708 which arose out of *Mattueof's Case*,[27] in which the Russian Ambassador had been arrested for debt and taken out of his coach in London. The Court of Queen's Bench was uncertain whether the Sheriff of Middlesex and his assistants were guilty of a criminal offence. Peter the Great demanded that they should be punished with instant death. Queen Anne replied that she could not punish any of her subjects except in accordance with law. The Act of 1708, which was largely declaratory, was therefore passed, providing that judicial proceedings brought against diplomatic envoys or their servants should be null and void, and that it should be a misdemeanour to commence such proceedings.[28]

[21] *Intro Properties (UK) Ltd v. Sauvel* [1983] Q.B. 1019, CA.

[22] [1984] A.C. 580; noted, S. Ghandhi (1984) 37 M.L.R. 597.

[23] *R. v. Bow Street Magistrate, ex p. Pinochet (No. 1)* [2000] 1 A.C. 61 (No. 2) [2000] 1 A.C. 119; (No. 3) [1999] 2 W.L.R. 827; J.C. Barker, (1999) 48 I.C.L.Q. 937.

[24] *post* Chap. 23.

[25] The inadequacies of the drafting of the section are considered by Lord Browne-Wilkinson at [2000] 1 A.C. 147, 202–203 845; E. Denza, (1999) 48 I.C.L.Q. 949.

[26] [2000] 1 A.C. 147, 223.

[27] (1709) 10 Mod.Rep. 4; Bl.Comm. I, 255–356; Martens, *Causes Célèbres du Droit des Gens* (1827), Vol. I, p. 47.

[28] The Queen sent an illuminated copy of the Act to Moscow, which appeased the Czar, and the offenders were discharged at his request. It is uncertain how far the 1708 Act covered the bringing of criminal proceedings. There is no record of a prosecution for contravening the Act.

The Diplomatic Privileges Act 1964, giving effect to most of the provisions of the Vienna Convention on Diplomatic Relations 1961, replaces the previous law on the privileges and immunities of diplomatic representatives in the United Kingdom. The Act distinguishes between members of the diplomatic staff, who have full personal immunity, civil and criminal, with certain exceptions; members of the administrative and technical staff, who enjoy full immunity for official acts, but are liable civilly (though not criminally) for acts performed outside the course of their duties[29]; and members of the service staff, who enjoy immunity only for official acts.

Privileges and immunities may be withdrawn by Order in Council from any state that grants less to British missions.

The certificate of the Foreign Secretary is conclusive as to whether a person falls into any (and, if so, which) of the above three classes. No question of diplomatic immunity can arise until a person has been notified to the Foreign and Commonwealth Office as a diplomat.[30]

Members of the diplomatic mission of a Commonwealth country or of Ireland and their private servants are entitled, if they are both citizens of that Commonwealth country or Ireland and also citizens of the United Kingdom and Colonies, to the privileges and immunities to which they would have been entitled if they had not been citizens of the United Kingdom and Colonies.

**15–034** Diplomatic privilege may be waived in any particular case. Where an ambassador or other head of mission is concerned, waiver must be with the consent of his Sovereign (*Re Suarez*[31]); where a subordinate is concerned, waiver must be by head of the mission.[32] Unless the waiver extends to execution, which is unlikely, judgment in such a case cannot be enforced until a reasonable time after the envoy has been recalled.[33]

If a diplomatic envoy commits a breach of the law, the Foreign Secretary may request his government to recall him as *persona non grata*, as was done in the case of the Swedish Ambassador, Count Cyllenburg, in 1717.

Various incidents in the last few years, particularly the killing of a policewoman in April 1984 outside the Libyan People's Bureau in London, have led to calls for the revision of the Vienna Convention on Diplomatic Relations. It is believed that diplomatic premises may be used to harbour terrorists and that guns and explosives are smuggled into countries in diplomatic "bags", *i.e.* officially sealed packages which under the Convention are exempt from examination. Revision of such an international agreement is likely to prove difficult. In the meantime states could act more promptly to expel "diplomats" whose status is open to doubt.[34]

Under the International Organisations Acts 1968 and 1981 immunities and privileges may be accorded to international and Commonwealth organisations of which the United Kingdom is a member, and to persons connected with such organisations. Provision is also made for granting immunities and privileges to

[29] For applications of the Act see *Empson v. Smith* [1966] 1 Q.B. 426, CA noted (1965) 28 M.L.R. 710; *Shaw v. Shaw* [1979] Fam. 92. Whether an act is performed inside or outside the scope of a diplomat's duties is to be determined by the Courts.

[30] *R. v. Lambeth Justices ex p. Yusafu, The Times* February 20, 1985, CA.

[31] *Re Suarez, Suarez v. Suarez* [1918] 1 Ch. 187.

[32] *Dickinson v. Del Solar* [1930] 1 K.B. 376; *Re Republic of Bolivia Exploration Syndicate Ltd.* [1914] 1 Ch. 139.

[33] *Re Suarez, ante.*

[34] J. C. Barker, *The Abuse of Diplomatic Privileges and Immunities* (1996).

judges and suitors of the International Court of Justice, and to representatives of other states attending international conferences in the United Kingdom.

Diplomatic privileges and immunities have been extended to the high commissioners or ambassadors of the independent members of the Commonwealth, Associated States and the Republic of Ireland, their staff, families and servants and to certain representatives of Commonwealth governments and of the Government of the Republic of Ireland attending conferences with the British Government.[35] Diplomatic immunity and privileges may also be extended by Order in Council to any international headquarters or defence organisations set up under an arrangement for common defence, *e.g.* NATO, and the Visiting Forces Act 1952 may be applied to them.[36]

The privileges and immunities of consuls are governed by the Consular Relations Act 1968, which gives effect to the Vienna Convention on Consular Relations; and (as to Commonwealth and Irish consuls) by section 4 of the Diplomatic and other Privileges Act 1971.

[35] Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act 1961.

[36] International Headquarters and Defence Organisations Act 1964.

CHAPTER 16

# THE PRIVY COUNCIL

## I. THE COUNCIL AS AN INSTRUMENT OF GOVERNMENT

### Historical introduction[1]

**16–001** The *Curia Regis* exercised supreme legislative, executive and judicial powers, subject to general feudal customs. From the *Curia Regis* there developed in course of time the most important institutions of English central government, namely, the Exchequer and the Treasury (12th century), the courts of common law (13th–14th centuries) and Chancery (14th–15th centuries), and the House of Lords, *i.e.* the King's Council in Parliament[2] (14th century).

The Privy Council has been generally regarded as a continuation of the *Curia Regis* after these other bodies had separated, but it may be more precise to say that the *Curia Regis* ceased to exist, and that the Council which emerged as a distinct body in the thirteenth and fourteenth centuries was something new. The Council was used as a powerful instrument of government by the Tudors. In Henry VIII's reign the distinction was first drawn between "Ordinary Councillors," a fairly large number of lawyers and administrators, and "Privy Councillors," a select body of nobles who acted as the King's advisers. As the Tudor period progressed the tendency was for Privy Councillors to be drawn from humbler ranks of society.

**16–002** Coke, in his treatment of the courts, deals after the High Court of Parliament with "the Councell Board or Table," and says: "This is a most noble, honourable, and reverend assembly of the King and his privy councell in the King's court or palace: with this councell the King himself doth sit at pleasure. These councellors like good centinels and watchmen, consult of and for the publique good, and the honour, defence, safety and profit of the realm."[3]

Committees composed of some only of the members of the Council were sometimes used by the Tudors for particular purposes or occasions, and temporary or permanent committees were used frequently in the seventeenth century. For various reasons Committees of the whole Council came to be employed in the eighteenth century, and, indeed, most of the Council's work was then carried on in Committee. Some of these committees in their turn became, or transferred their administrative functions to, separate government departments such as the Board of Trade and the former Boards of Agriculture and Education.

The eclipse of the Privy Council as a practical instrument of government came with the development in the eighteenth century of the Cabinet as the policy-making organ and advisory body of the Crown, which is discussed in the next chapter.

[1] Holdsworth, *History of English Law*, Vol. I, Chap. 6; (1860) Baldwin, *The King's Council during the Middle Ages*; Turner, *The Privy Council*, 1603–1784; Dicey, *The Privy Council*; Williamson, *Studies in the Constitutional History of the Thirteenth and Fourteenth Centuries*.

[2] The House of Lords was not so called until Henry VII's reign.

[3] 4 Inst. 53. The official spelling now used is "Counsellor" although, according to the Clerk of the Council "Councillor" cannot be "called wrong." (*Observer*, August 1, 1982).

### The Privy Council at the present day: the composition of the Privy Council[4]

16–003 "The Lords, and others of Her Majesty's most Honourable Privy Council," now about three hundred in number, consist of persons who hold or have held high political or legal office, peers, Church dignitaries and persons distinguished in the services and professions. They are appointed by letters patent, and include the Lord President of the Council, all Cabinet Ministers by convention, the two Archbishops by prescription, and customarily some of the leading Commonwealth statesmen, British Ambassadors, the Speaker of the House of Commons, the Lords of Appeal in Ordinary, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, and the Lords Justices of Appeal.

A new member of the Privy Council must take the oath of allegiance and the special Privy Councillor's oath, which binds him to keep secret all matters committed or revealed to him or that are treated of secretly in council.[5] An affirmation may be made in lieu of oath.[6] The oath or affirmation probably does not add anything to the obligation later imposed by the Official Secrets Acts. The disclosure of such confidential information requires the consent of the Sovereign, which in practice means the Prime Minister of the day. Privy Councillors must be British subjects. They are addressed as "Right Honourable." Since the Demise of the Crown Act 1901 membership of the Privy Council is apparently not affected by a demise of the Crown.

### Functions of the Privy Council[7]

16–004 The Privy Council became too unwieldy as an instrument of government. Owing to the development of the Cabinet and government departments, the Council lost most of its advisory and administrative functions and is today little more than an organ for giving formal effect to certain acts done under prerogative or statutory powers.

*Proclamations and Orders in Council*

16–005 The most important acts done by Her Majesty "by and with the advice of her Privy Council" take the form of proclamations or Orders in Council, the former normally being authorised by the latter. Proclamations are employed for such matters as proroguing, dissolving and summoning Parliament[8] and declaring war or peace—solemn occasions requiring the widest publicity. Orders in Council may be made under the Royal Prerogative or, more commonly, under statutory powers.[9] The nature of an Order in Council may be legislative, *e.g.* making laws for certain overseas territories and Statutory Instruments under a wide range of modern statutes; executive, *e.g.* setting up a new government department, issuing regulations for the armed forces, determining the conditions of employment of

[4] The Union with Scotland (Amendment) Act 1707 provided that there should be one Privy Council for Great Britain. The Union with Ireland Act 1800 provided for the continuance of a separate Privy Council for Ireland. A Council for Northern Ireland was established by the Irish Free State (Consequential Provisions) Act 1922. The Northern Ireland Constitution Act 1973, s.32(3) provided that no further appointments would be made to the Council.

[5] The oath dates back to the time of Edward I. For the modern form of Privy Councillor's oath, see Anson, *Law and Custom of the Constitution* (4th ed.) Vol. II, Pt. I, p. 153.

[6] Oaths Act 1978.

[7] For a descriptive account, see Sir Almeric Fitzroy, *The History of the Privy Council* (1928) pp. 294 *et seq.*

[8] For a specimen, see Anson, *op. cit.* (5th ed. Gwyer), Vol. I, pp. 55–56.

[9] For the form, see Anson, *op. cit.* (4th ed. Keith), Vol. II, Pt. I, p. 62.

civil servants[10] or declaring a state of emergency to exist or to be at an end; or judicial, *e.g.* giving effect to a judgment (technically advice) of the Judicial Committee of the Privy Council.

*Miscellaneous functions*

A Privy Council is also summoned for certain special occasions, such as the acceptance of office by newly appointed Ministers, and the annual "pricking" of sheriffs on Maundy Thursday. **16–006**

## Meetings of the Privy Council

Privy Councillors are summoned to attend at Buckingham Palace, or wherever else the Sovereign may be.[11] The quorum is three. Usually four are summoned, being Ministers concerned with the business in hand. The whole Council has not met (except at an Accession) since 1839, when Queen Victoria's forthcoming marriage was announced.[12] The marriage of the Prince of Wales to Lady Diana Spencer was approved at a special meeting of the Privy Council in March 1981 where those present, in addition to The Queen, the Prime Minister, the Lord Chancellor, the Lord President and other senior ministers, included the Prince of Wales, the Archbishop of Canterbury, the Speaker of the House of Commons, Leaders of the Opposition Parties and Privy Councillors from Australia, New Zealand and other Commonwealth Countries.[13] **16–007**

## Committees of the Council

Any meeting of Privy Councillors at which the Sovereign or Counsellors of State are not present can only be a committee.[14] Apart from the Judicial Committee, which is discussed below, there are advisory or *ad hoc* committees concerned with such matters as scientific research and the grant of charters.[15] **16–008**

An *ad hoc* committee was set up to hear and advise on an appeal to the Visitor of the University of London, the Queen in Council, which led to proceedings reported in *R. v. Her Majesty The Queen in Council ex p. Vijayatunga*.[16]

[10] See, for example, *C.C.S.U. v. Minister for the Civil Service* [1985] A.C. 374.

[11] *e.g.* Balmoral or aboard the Royal Yacht.

[12] *Ante* para. 14–003 (Accession Council).

[13] For a description of a meeting of the Council, see Herbert Morrison, "The Privy Council today" (1948) 2 *Parliamentary Affairs* (Hansard Society), pp. 10, 12–13. See also Dermot Morrah, *The Queen at Work* (1958), pp. 142–144. R.H.S. Crossman, who resented having to travel to Balmoral for meetings of the Privy Council in his capacity as Lord President of the Council (particularly when there was no restaurant car on his train), described meetings as "the best example of pure mumbo jumbo you can find." (*Diaries of a Cabinet Minister*, Vol. 2, p. 44).

[14] This idea dates from the middle of the eighteenth century.

[15] In addition to the *ad hoc* exercise of its power to grant royal charters (and amend their terms) to particular bodies, the Education Reform Act 1988, s.205 required a general revision of university charters, pursuant to the recommendations of statutory university commissioners.

[16] [1990] 2 Q.B. 444, C.A. The Committee consisted of Lord Brightman, Mr Fred Mulley and Mr Mark Carlisle Q.C., M.P. Normally, in the case of universities created by royal charter, the visitor is simply the Queen and her visitatorial duties are discharged by the Lord Chancellor who, typically, appoints a senior judge or law lord to hear any appeal: *Thomas v. University of Bradford* [1987] A.C. 795. On the law relating to Visitors, see H. Picarda, *The Law and Practice Relating to Charities* (3rd ed, 1999) Chap. 42. The role of Visitors in universities was considerably restricted by the Education Reform Act 1988, in relation to disputes about employment of academic staff, and the abolition of their jurisdiction has been proposed.

## II. The Judicial Functions of the Privy Council

### Historical introduction

16–009 Even after the separation of the courts of common law and the Court of Chancery, the King's Council retained some jurisdiction (i) in cases which in some way concerned the state, and (ii) in private cases where the ordinary courts could not provide a remedy. This jurisdiction, especially in the latter element, represented the residue of justice that always lay with the King. In the early Middle Ages the Council was not a court of record; it had no seal, and indeed it was not called a "court" at all.[15]

In the Tudor period most of the Council's jurisdiction relating to state offences and cases in which great men were involved was exercised by the Court of Star Chamber. In this period the Court of High Commission was set up to deal with important ecclesiastical causes, and the Court of Requests as a "minor Court of Equity" to hear the suits of poor persons. It was part of the struggle between Parliament and the King in the early seventeenth century that these courts of an "arbitrary" jurisdiction should be attacked as being closely associated with the royal prerogative. The Long Parliament, in the same year in which it abolished the Court of High Commission, also passed a statute commonly known as the Act for the Abolition of the Star Chamber 1640. Certain other prerogative jurisdictions, such as those of the Councils of Wales and the Marches and of the North, were also expressly abolished. The Act further declared and enacted that neither His Majesty nor his Privy Council have or ought to have any jurisdiction over the land or chattels of English subjects. Although the Court of Requests was not mentioned, it ceased to function almost immediately afterwards.

The ancient judicial powers of the Privy Council survived only in the form of an appellate jurisdiction from the King's overseas dominions, namely, the Channel Islands, the Isle of Man, the colonies (or "foreign plantations," as they were at first called)[16] and, later, India. In the eighteenth century the Judicial Committees formed for this purpose acquired many of the characteristics of courts; they usually sat in public, and reports began to be published in 1829.

Appeals from the ecclesiastical courts, the Court of Admiralty and the vice-admiralty courts of the colonies were given to the Privy Council by statute in 1832. This statutory extension of the Privy Council's jurisdiction necessitated a reorganisation of its constitution.

### The Judicial Committee—composition

16–010 The Judicial Committee Act 1833, passed "for the better administration of justice in His Majesty's Privy Council," constituted a Judicial Committee. The Judicial Committee Act 1844 authorised the Queen by Order in Council to admit

[15] Holdsworth, *History of English Law*, Vol. I; N. Bentwich, *Privy Council Practice* (3rd ed. 1937), Chap. I; P. A. Howell, *The Judicial Committee of the Privy Council, 1833–1876*; J. H. Smith, *Appeals to the Privy Council from the American Plantations*. Viscount Haldane, "The Judicial Committee of the Privy Council" (1922) 1 C.L.J. 143; Sir George Rankin, "The Judicial Committee of the Privy Council" (1939) 7 C.L.J. 2; Lord Normand, "The Judicial Committee of the Privy Council—retrospect and prospect" (1950) C.L.P. 1; Robert Stevens, "The Final Appeal: Reform of the House of Lords and Privy Council 1867–1876" (1964) 80 L.Q.R. 343. Loren P. Beth, "The Judicial Committee: Its Development, Organisation and Procedure," [1975] P.L. 219.

[15] Leadam and Baldwin, Introduction to *Select Cases before the King's Council* (Selden Society Publications).

[16] *Fryer v. Bernard* (1724) 2 P.W. 262.

any appeals to the Privy Council from any court within any British colony or possession abroad, even though such court might not be a court of error or of appeal. Hence appeals lay from the Australian states after federation. It has been questioned whether this Act put the prerogative power on a statutory basis, or merely regulated the manner of its exercise.

As a result of the Act of 1833 and various later statutes,[20] the Judicial Committee is composed of:

(a) the Lord Chancellor; the Lord President and ex-Lord Presidents of the Council (who do not sit)[21]; the Lords of Appeal in Ordinary; and the Lords Justices of Appeal (who seldom sit);

(b) ex-Lord Chancellors and retired Lords of Appeal;

(c) selected senior judges or ex-judges of Australia, New Zealand and other Commonwealth countries from which appeal lies.

The quorum is three.

It will be seen that the composition of the Judicial Committee is wider than that of the House of Lords sitting as a final court of appeal.

**Jurisdiction**

The Judicial Committee was given the jurisdiction of the Privy Council set out above, namely, appeals from the courts of the Channel Islands, the Isle of Man, the colonies and British India, and from the ecclesiastical courts and Admiralty Court, to which were later added appeals from prize courts. **16–011**

Appeals in probate, divorce and admiralty causes (other than prize) were later transferred to the House of Lords. The Judicial Committee also has a limited appellate jurisdiction over the ecclesiastical courts of the Church of England.[22] A number of former colonies and protectorates, as well as India, have become independent members of the Commonwealth, and in most instances appeals from their courts to the Judicial Committee of the Privy Council have been abolished by local legislation.[23]

Modern statutes have given a right of appeal to the Judicial Committee from the tribunals of various professional organisations having power to strike a member off the register.[24]

**A new role**

Until recently the most controversial aspect of the Judicial Committee's work has been the hearing of appeals from overseas against the infliction of the death penalty. **16–012**

The devolution legislation contains provisions likely to provoke controversy of a different kind. The Scotland Act, the Northern Ireland Act and the Government of Wales Act confer wide powers on the Judicial Committee, to advise on the

[20] Appellate Jurisdiction Acts 1876, 1887, 1908; Judicial Committee Amendment Act 1895.

[21] The Lord President, Secretaries of State and other laymen often sat until the middle of the nineteenth century; for example, the Duke of Buccleuch, of whom the future Lord Kingsdown said: "Depend upon it, the natives of India would much rather have this case decided by a great Scottish Duke than by lawyers alone." Stevens, *op. cit.* p. 349.

[22] Ecclesiastical Jurisdiction Measure 1963, s.8.

[23] For appeals to the Privy Council from courts overseas, see *post*, Chap. 37.

[24] *e.g.* Medical Act 1983; Dentists Act 1984; Osteopaths Act 1993; Chiropractors Act 1994.

constitutionality of legislation before enactment, to hear devolution issues referred to it in the course of litigation and to determine appeals on devolution issues arising in courts in the devolved jurisdictions.[24]

It was thought that it would be inappropriate to refer such issues to the House of Lords (although the House has power to decide devolution matters in litigation arising before it.) But in terms of personnel, there is considerable overlap between the House of Lords in its judicial capacity and the Judicial Committee. The role of the Lord Chancellor as a member of the United Kingdom cabinet becomes even more anomalous. Were he to sit in a case involving devolution issues litigants would surely consider challenging his participation under the Human Rights Act 1998 and Article 6 of the European Convention.[25]

Judges from Commonwealth jurisdictions outside the United Kingdom are excluded by the legislation from sitting in devolution cases—thus excluding those judges with experience of constitutional cases which, at least, have a degree of similarity to those likely to arise in devolution litigation.

Questions may arise—will arise—about the composition of the Judicial Committee on these occasions. No doubt every judge is impartial *virtute officii* but the impartiality of an English judge may not be so obvious to citizens of Belfast or Edinburgh. At present the responsibility for determining the composition of the Committee rests with the Lord Chancellor but is delegated to the senior Law Lord. (The gravity of that responsibility is in no doubt after the *Pinochet* litigation.)

In the nineteenth century there had been proposals to merge the Judicial Committee and the Appellate Committee of the House of Lords. Reform of the House of Lords in this century and the introduction of devolution should have provided the opportunity to consider seriously a fundamental reform of the highest courts in the United Kingdom.[27]

It has been suggested that the judicial functions of the Privy Council should be merged with those of the House of Lords, and that the Judicial Committee should become a peripatetic Commonwealth Court.[28] The former idea was often discussed in the nineteenth century. The latter idea is not new, but seems to be no longer practicable in the present stage of Commonwealth development or disintegration.

**Procedure**

16–013 Rules of practice are made under the Act of 1833. Appeals, or requests for leave to appeal, are commenced by petition to the Crown. Usually only one "judgment" is given by the Board. This is in theory a report made to Her Majesty of the reasons why judgment should be given in favour of a particular party; but the Committee is regarded for practical purposes as a court, and the Queen is bound by convention to give effect to its advice, which is done by Order in Council.[29] Indeed, the report is made public before it is sent up to the Sovereign in Council.[30]

[24] For details, *ante* Chapter 5. In the case of Northern Ireland the Government of Ireland Act had provided for seeking the opinion of the Judicial Committee on the validity of legislation. Only one reference was made. *Re a Reference under the Government of Ireland Act 1920* [1936] A.C. 352.
[25] *post*, para. 22–036. See also para 31–014 for the *Pinochet* litigation.
[27] D. Oliver, "The Lord Chancellor, the Judicial Committee of the Privy Council and devolution," [1999] P.L.I.
[28] Gerald Gardiner and Andrew Martin, *Law Reform Now* (1963), p. 16; *post*, Chap. 3.
[29] *British Coal Corp. v. The King* [1935] A.C. 500; *Ibralebbe v. R.* [1964] A.C. 900.
[30] *Hull v. M'Kenna* [1926] I.R. 402, *per* Viscount Haldane.

The advice was formerly required to be unanimous,[31] but an Order in Council in 1966[32] allowed dissenting opinions to be delivered.

**Special reference**

Section 4 of the Judicial Committee Act 1833[33] provides that the Crown may refer to the Committee for an advisory opinion any matter it may think fit. In practice, references under this section are confined to justiciable matters.[34] Thus in 1927 the Committee was asked to give an opinion on the Labrador boundary dispute between Canada and Newfoundland,[35] and in 1924 on the interpretation of the provisions of the Anglo-Irish Treaty of 1921 relating to the settlement of the boundary between Northern Ireland and the Irish Free State.[36] It was called on to advise on the elements of the international crime of piracy in *Re Piracy Iure Gentium*.[37] Its advice has also been sought by the Commons, through the Attorney-General, on whether a member was disqualified from sitting in the House[38] the law relating to Parliamentary privilege.[39] **16–014**

[31] *cf. Cowie v. Remfrey* (1846) 5 Moo.P.C. 232.
[32] Judicial Committee (Dissenting Opinions) Order in Council, 1966.
[33] 3 & 4 W.4, c. 41.
[34] See Sir Kenneth Roberts Wray, *Commonwealth and Colonial Law* (1966), p. 448 *et. seq.*
[35] (1927) 43 T.L.R. 289.
[36] (1924) Cmd. 2214.
[37] [1934] A.C. 584.
[38] *Re Sir Stuart Samuel* [1913] A.C. 514; *Re MacManaway, Re House of Commons (Clergy Disqualification) Act 1801* [1951] A.C. 161.
[39] *Re Parliamentary Privilege Act 1770* [1958] A.C. 352.

CHAPTER 17

# THE CABINET AND THE PRIME MINISTER

## 1. DEVELOPMENT OF THE CABINET[1]

### Origins in the Privy Council

17–001 The seventeenth and eighteenth centuries saw the growth of the practice of withdrawing the discussion and direction of government policy, as distinct from administration, into the hands of a few of the King's *confidential* advisers. The history of this subject is very obscure, owing to the secrecy of the proceedings and the lack of official and connected records, and the fact that during most of this period the practice was unpopular with Parliament and in the country, and was not openly avowed. The historian's difficulty is further increased by the confusing terminology employed by the writers of that time. The better opinion probably is that the body which we now know as the Cabinet should never at any stage in its history be identified with any particular committee of the Privy Council, such as the Committee for Foreign Affairs. No doubt the use of committees helped to crystallise the form that the Cabinet was to take. The process was further assisted by the appointment of regency councils, known as "the Lords Justices," during the frequent absence abroad of William III, George I and George II. In this case the absence of the King made it necessary to commit resolutions to writing, and even to frame rules of procedure.

In the eighteenth century the members of the Cabinet came to call themselves "His Majesty's servants" or "His Majesty's *confidential* servants." The names given to Charles II's group of confidential advisers were intended as terms of reproach. *Cabinet* was a French word then in vogue for a private room set apart for interviews, and the "Cabinet Council" or "Cabinet" was so called because it met literally or metaphorically in the King's cabinet or closet. Similarly *cabal* was a French term for a secret group of advisers.[2]

George I attended Cabinet meetings at the beginning of his reign, but is traditionally said to have ceased attending regularly after 1717, because he was little interested in English affairs, ignorant of the English language and institutions, and unable to influence policy owing to his dependence for support on the Whig leaders.[3] Both George II and George III seem occasionally to have been present at Cabinet meetings for some special reason. The absence of the Sovereign marks a definite epoch in the development of the power of the principal Ministers, although the decline of the royal power was gradual. Kings in the

[1] Turner, *The Cabinet Council*, 1622–1784; A. B. Keith, *The British Cabinet System*, 1830–1938 (2nd ed. Gibbs); D. L. Keir, *A Constitutional History of Modern Britain*; M. A. Thomson, *A Constitutional History of England*, 1642–1801; C. S. Emden, *The People and the Constitution*; Richard Pares, *King George III and the Politicians* (1953); Sir Lewis Namier, *Crossroads of Power* (1962), Chaps. 7 and 8.

[2] Fortuitously appropriate because of the names of the ministers, Clifford, Arlington, Buckingham, Ashley and Lauderdale.

[3] See, however, R. Hatton, *George I, Elector and King* (1979).

eighteenth century still exercised influence from their closet, and were "sometimes near, if not present."[4]

A further process of division took place in the reign of George II, when a distinction was drawn between the "inner," "efficient," or "effective" Cabinet and the "outer" or "nominal" Cabinet. The former, also known as the "conciliabulum," had special access to important state papers, while the latter disclaimed responsibility for acts of the Ministry on which they had not been consulted. The inner Cabinet, which may be regarded as the direct ancestor of the modern Cabinet, was in existence at least as early as 1740.[5] The size of the Cabinet had increased from five to about twenty in George III's reign. Indeed, the Cabinet had become considerably larger than Elizabeth I's Privy Council, which numbered only twelve.

**Opposition of Parliament**

The practice of consulting confidentially a small group of Ministers, which had been intermittent in the reign of Charles I, was habitual in the reign of Charles II, and Parliament objected strongly to the secrecy of the deliberations, for it was difficult to know who were the responsible Ministers and how to enforce that responsibility. In order to put a stop to the practice, and to keep the House of Commons from being contaminated by the Sovereign's influence, Parliament inserted two clauses in the Act of Settlement 1700 to the effect that: (1) matters theretofore discussed in the Privy Council must be dealt with there and not elsewhere, and all resolutions must be signed by the members present, and (2) no person holding a place of profit under the Crown was to sit in the House of Commons. The operation of these provisions was postponed until the death of Queen Anne, by which time they had been repealed, although the second emerged in a modified form in the Succession to the Crown Act 1707.[6] **17–002**

**Growth of political ideas relating to the Cabinet**

Political ideas grow gradually. The party system and the principle of the dependence of the government on the confidence of Parliament, and especially of the House of Commons, were developing in the eighteenth century.[7] The Cabinet often had political unity. Walpole, during his long period of office between 1721 and 1742, was skilful both in holding the favour of the King, partly through his friendship with Queen Caroline, and also in controlling the Commons, largely through bribery. At first the King chose as members of his Cabinet persons whom he liked and could trust. Eventually he had imposed upon him such advisers as Parliament, or the chief Ministers or the Prime Minister, wanted. There was an intermediate stage when the King no longer chose but could obstruct: when he was cajoled into accepting Ministers whom he did not like but to whom he did not profoundly object. This stage is illustrated by the long opposition of George II to the elder Pitt. **17–003**

It was still possible for George III to hold a personal ascendancy during the earlier part of his reign by trading on the lack of political unity among his

[4] Turner, *op. cit.* Vol. II, pp. 92–100.

[5] R. R. Sedgwick, "The Inner Cabinet from 1732 to 1741" 34 *English Historical Review* 290–302.

[6] *Ante*, para. 10–003.

[7] See Sir Ivor Jennings, *Party Politics*, Vol. II, "The Growth of Parties" (1961), for an account of the development of political parties since 1783.

Ministers, manipulating the two Houses, and making use of "honorary" members of the Cabinet. Some time during his reign, however, the Cabinet established the right to consider matters without reference from the King. The normal course had been for departmental matters to go from the Minister concerned to the King, and thence to the Cabinet if the King so willed. It now came to be recognised that, if the King had not actually a duty to consult the Cabinet, he was generally expected to do so. The King consulted Ministers individually in the closet, but they could agree beforehand in the ante-room what they would say. When the Cabinet were all of one party (which was not always so) they sometimes met, not as the King's advisers but as party leaders: and this paved the way for the Cabinet to become the general initiator of policy. The decline of the King's influence after the fall of the North Ministry in 1782 was accentuated by "the mental derangement which afflicted George III, the contemptible personal character of George IV, and the negligible qualities of William IV."[8] The younger Pitt asserted the necessity of having the King's confidence. In 1803 he insisted that it was essential that there should be "an avowed and real minister, possessing the chief weight in the Council and the principal place in the confidence of the King."[9]

17–004 The turning point came with the Reform Act 1832, which soon showed that henceforth a Ministry would depend on the support of a majority in the House of Commons, and ultimately on the electorate. Peel accepted responsibility for the King's action in forcing Melbourne to resign in 1834. The King granted Peel a dissolution, but he was returned with a minority and Melbourne displaced him in office until 1841. In the latter year the Whig Ministry was defeated in the Commons on the budget, but preferred to retain office. Peel moved a resolution that their continuance in office in such circumstances was at variance with the spirit of the Constitution: this was carried by one vote, and a dissolution followed. Nonetheless in 1851, when a Committee of the House of Commons proposed that some precedence be given to Cabinet Ministers at the opening and prorogation of Parliament the House rejected the proposal on the ground that the Cabinet was unknown to the Constitution.[10]

## II. The Cabinet[11]

### Functions of the Cabinet

17–005 The Cabinet system, or system of Cabinet government, was generally agreed to prevail between the wars. The main functions of the Cabinet at the end of the first war were summarised in the following way: "(a) the final determination of the policy to be submitted to Parliament; (b) the supreme control of the national executive in accordance with the policy prescribed by Parliament; and (c) the

[8] Keir, *op. cit.* pp. 381–382.
[9] Quoted, Keith, *op. cit.* pp. 16–17.
[10] G. H. Le May *The Victorian Constitution* (1979), p. 96. The word "Cabinet" first appeared on the order paper of the House of Commons in 1900: Le May, *loc. cit.*
[11] J. P. Mackintosh, *The British Cabinet* (3rd ed., 1977); Sir Ivor Jennings, *Cabinet Government* (3rd ed., 1959); P. Gordon Walker, *The Cabinet* (revised ed., 1972); Harold Wilson, *The Governance of Britain* (1976); Herbert Morrison, *Government and Parliament* (1954); L. S. Amery, *Thoughts on the Constitution* (2nd ed., 1953); R. H. S. Crossman, *Inside View* (1972); *Memoirs of a Cabinet Minister* (3 Vols.); Ronald Butt, *The Power of Parliament* (2nd ed., 1969); Ian Colvin, *The Chamberlain Cabinet* (1971).

continuous co-ordination and delimitation in the interests of the several Departments of State."[12] The Cabinet, giving collective "advice" to the Sovereign through the Prime Minister, was said to exercise under Parliament supreme control over all departments of state, and to be the body which co-ordinated the work on the one hand of the executive and the legislature, and on the other hand of the organs of the executive among themselves. The concept of the "Cabinet system" or "system of Cabinet government" may now need to be revised in the light of more recent developments, such as the predominance of the Prime Minister, the greater use of Cabinet committees and the growing influence of senior civil servants.[13] And the expression "policy prescribed by Parliament" must be read subject to the government's control of its party in the Commons, so that Parliament prescribes what the government wants.

Most important matters of policy are discussed at Cabinet meetings. For security reasons, however, specific Budget proposals (as distinct from the general Budget strategy) are disclosed orally to the Cabinet only a few days before the Chancellor of the Exchequer is to introduce them in the Commons, and for diplomatic reasons it is not always possible to consult the Cabinet before taking action in foreign affairs. Among matters not usually discussed by the Cabinet are the exercise by the Home Secretary of the prerogative of mercy (not of great importance since the abolition of the death penalty),[14] the personnel of the Cabinet itself, the making of appointments and the conferment of honours, which are matters within the patronage of the Prime Minister.

The dissolution of Parliament after 1841 was formerly a matter for Cabinet decision; but in 1918 Lloyd George and Bonar Law, the party leaders in a Coalition Government, alone made the decision, the lapse of time since the last general election in 1910 having caused Ministers to forget what the practice was.[15] Lloyd George consulted a number of Cabinet colleagues about dissolution in 1922 because he had difficulty making up his mind.[16] Mr Heath consulted his Cabinet before the ill-fated dissolution in February 1974, and they unanimously supported him.[17] A Prime Minister consults at least a few colleagues, of course, including the Chief Whip and the Chairman of the party. The principle may be discussed by members of the Cabinet, but the details are left to the Prime Minister.[18] It seems to have been generally assumed that in regard to the timing of the 2001 Election the Cabinet was left in the dark while the Prime Minister relied on advice from a circle of close aides. **17–006**

It has been argued that this supposed convention lacks the essential quality that should mark a constitutional convention, namely the combination of consistent historical precedents and a convincing *raison d'être*.[19] It has been suggested that it is desirable to restore the balance of ministerial power by reverting to the

[12] Report of the Machinery of Government Committee Cd. 9230 (1918), p. 5.

[13] *post*, para. 17–034.

[14] But the decision not to exercise the prerogative of mercy in the case of Sir Roger Casement (1916) was made by the Cabinet for political reasons: Roy Jenkins, *Asquith*, pp. 403–404.

[15] Ivor Jennings, *Parliament must be Reformed* (1941); L. S. Amery, *op. cit.*, p. 23.

[16] Lord Beaverbrook, *The Decline and Fall of Lloyd George* (1963), Chaps. 7 & 11.

Lord Hailsham, *The Door Wherein I Went* (1975), p. 298.

[18] B. E. Carter, *The Office of Prime Minister* (1956), pp. 289–291. Harold Wilson, "Why I chose June," *Observer* March 21, 1971. For a discussion of the request for, timing of, and reasons for dissolutions in the present century, see B. S. Markesinis, *The theory and practice of Dissolution of Parliament* (1972) Pt. II and App. I.

[19] G. Marshall, *Constitutional Conventions* (1984), Chap. 3.

convention that dissolution should be advised by, and granted to, the Cabinet.[20]

The Cabinet may meet anywhere, for example, in the Prime Minister's room in the House of Commons or at Chequers. Most often it meets at No. 10 Downing Street, usually once or twice a week. A summons to a Privy Council takes precedence. There is no quorum for a Cabinet. The agenda is determined by the Prime Minister. The regular items begin with parliamentary business and then foreign and Commonwealth affairs. These are followed by White Papers, which have been processed by committees; statistical reports on such subjects as unemployment and balance of payments. Finally there are current matters from committees, emergencies, etc. Elaborate precautions are taken to ensure secrecy: the Cabinet room has double doors, and a person waiting in attendance outside is brought in by a Cabinet Minister.[21] Every attempt is made to promote unanimity by refraining where possible from formal voting. The Prime Minister "collects the voices" and announces the decision.[22]

### Composition of the Cabinet

17–007 The Cabinet consists of a group of Ministers, normally something over 20 in number, who are agreed to pursue a common policy and who are invited by the Prime Minister to attend Cabinet meetings. Most of them are heads of the chief government departments, for example, the Chancellor of the Exchequer, the Foreign Secretary and the Home Secretary, but a number of heads of departments will be outside the Cabinet, and the Cabinet will include some Ministers whose offices involve few or no departmental responsibilities. These last are free to carry out miscellaneous tasks, such as the co-ordination of policy and administration, responsibility for research, acting as chairmen of Cabinet committees and giving advice as elder statesmen. The "Ministry," "Government" or "Administration" is the name given to the whole body of about a hundred holders of ministerial office, all of whose offices are known to the law,[23] and who are appointed by the Sovereign on the advice of the Prime Minister. Under the standing orders adopted by the Parliamentary Labour Party in 1981 a Labour Prime Minister is required on election to appoint as Cabinet Ministers the individuals who had formerly been elected as members of the Shadow Cabinet.

The Cabinet itself has been mentioned a few times in statutes. The Ministers of the Crown Act 1937 provided additional salaries to "Cabinet Ministers" who held offices at salaries less than a certain amount. The additional salary was made payable "if and so long as any Minister of the Crown to whom this section applies is a member of the Cabinet." The date on which any such Minister ceased to be a member of the Cabinet was to be published in the *London Gazette*, and such notification was to be "conclusive evidence" for the purposes of the Act.[24]

[20] O. Hood Phillips, *Reform of the Constitution* (1970), pp. 44–45, 51–52.

[21] Despite the formal position, inspired "leaks" and the activities of "spin doctors" ensure that the media are not short of accounts of what passed if the parties involved so wish.

[22] For descriptions of a Cabinet meeting, see Morrison, *op. cit.* pp. 4–6; Gordon Walker, *op. cit.* Chap. 6.

[23] They (except the Lord Chancellor) are listed in the Second Schedule to the House of Commons Disqualification Act 1975, as amended.

[24] See now, Ministerial and other Salaries Act 1975, under which additional salaries are payable to the Lord President of the Council, the Lord Privy Seal, the Chancellor of the Duchy of Lancaster, the Paymaster General, the Chief Secretary to the Treasury, the Parliamentary Secretary to the Treasury, and Ministers of State so long as they are members of the Cabinet.

The Parliamentary Commissioner Act 1967, s.8(4) provides that no person shall be required or authorised "by virtue of this Act" to furnish any information or documents or answer any question relating to proceedings of the Cabinet or any Cabinet Committee. For the purposes of the subsection any certificate issued by the Secretary of the Cabinet with the approval of the Prime Minister is conclusive.[25] The Data Protection Act 1998, s.28 entitles a Minister of the Crown to exempt certain information from the provisions of the Act if the Minister is a member of the Cabinet or the Attorney-General or the Lord Advocate. Cabinet meetings and the question of joint responsibility of the Cabinet were referred to by Lord Widgery C.J. in *Attorney-General v. Jonathan Cape Ltd.*[26]

The Cabinet is, then, the nucleus of the Ministry. In choosing the Cabinet the Prime Minister has a number of factors to consider, such as the importance of the various offices, the influence of members in the country, the authority of members in the Commons and their value in debate, the value of members as advisers in Committee, and the representation of the government in the House of Lords.[27] They are not generally experts in the subject-matter of their departments. By custom Cabinet Ministers are made Privy Councillors if they are not so already. Since 1951 the Chief Whip has been invited to attend, so that he may be asked what would be the probable attitude of the party.[28]

*Cabinet Ministers in the House of Lords*

Convention requires that all Ministers must sit in one or other of the Houses of Parliament, in order that their activities may be subject to parliamentary supervision.[29] The House of Commons Disqualification Act 1975 limits the number of Ministers who may sit in the House of Commons: the rest must therefore be peers. The Government in any case will want to be adequately represented in the House of Lords. As regards the House of Lords, the Lord Chancellor will be automatically included,[30] and in a Labour Government he may be the only Cabinet Minister there. It is inconceivable that the Chancellor of the Exchequer should be in the House of Lords, since the Commons have a monopoly of financial affairs. Another office that has raised controversy (apart from Prime Minister[31]) is that of Foreign Secretary. The appointment of Lord Halifax as Foreign Secretary in 1938 provoked some comment.[32] Considerable controversy arose in 1960 when the Earl of Home (now Lord Home of the Hirsel) was appointed Foreign Secretary. In 1979, however, Mrs Thatcher appointed

**17–008**

[25] It has been suggested, (G. Marshall, *Constitutional Conventions* (1984), p. 89) that a Minister may, if he wishes produce such documents or give such information.

[26] [1976] Q.B. 752; *post*, p. 313.

[27] See *The British Prime Minister* (Anthony King ed. 1969), pp. 60–79 (Attlee, "The Making of a Cabinet").

[28] The Chief Whip (Parliamentary Secretary to the Treasury) has recently been included as a member of the Cabinet. It appears that the Principal Private Secretary to the Prime Minister since Mr Macmillan's time sits in at meetings of the full Cabinet and at most Cabinet committees.

[29] A temporary exception to this convention was the appointment of Mr R. G. Casey, an Australian, as Minister of State in 1942, which was presumably made under the Re-election of Ministers Act 1919, s.2. And see as regards Asquith, para. 17–025n; Mr Gordon Walker and Mr Frank Cousins (1964–65) *ante*, para. 7–015.

[30] It was wholly exceptional that in the "caretaker government" formed after the with-drawal of the Labour Party from the National Coalition in 1945, the Lord Chancellor—Viscount Simon, a National Liberal—was not a member of the Cabinet.

[31] *post*, para. 17–033.

[32] He even remained a member of the Cabinet after being appointed Ambassador to the United States.

Lord Carrington to be Foreign Secretary, a post which he held until his resignation in 1982.[33] The Prime Minister in modern times is the overseer of foreign policy, and communicates personally with the heads of foreign governments or states and can answer for foreign affairs in the house of Commons if the Foreign Secretary is in the other House.[34]

There was criticism of Mrs Thatcher's decision in 1985 to appoint Lord Young of Graffham as Secretary of State for Employment. Lord Young had been created a life peer in the previous year and appointed a Minister without Portfolio. To meet the argument that employment was a matter of particular concern to the Commons, the Paymaster General was designated as chief Commons spokesman on employment.

Mr Blair has not hesitated to use the device of life peerages to secure the appointment of individuals to ministerial office, for example, Lord Falconer, formerly Minister of State in the Cabinet Office, currently Minister of State for Housing and Planning, Lord Macdonald, formerly Minister of Transport, currently Chancellor of the Duchy of Lancaster[35] and Lady Morgan of Huyton, Minister of State in the Cabinet Office.

*Size of the Cabinet*

**17–009** The size of the Cabinet varies from time to time. Prime Ministers usually begin by hoping to cut the size of the Cabinet but find it impracticable. Between the wars there "full" Cabinets of over twenty members. After the last war there were "medium" Cabinets of sixteen to eighteen, but Sir Alex Douglas-Home and Mr Wilson had Cabinets of 23. Mrs Thatcher reduced the Cabinet to 22 and in June 1987 to 21. The current figure is 23, which includes the Labour Party Chairman who is Minister without portfolio. During the two world wars there were "small" Cabinets of from six to ten members, although other Ministers were often present, and Chiefs of Staff, Dominion Prime Ministers and others were in attendance. It has been persuasively argued that the large volume of work assumed by the Cabinet is too great to be efficiently performed by a group of Ministers most of whom have heavy departmental responsibilities as well as the duty of constant attendance at the House. One suggestion is that there should be a small policy-making Cabinet of about six, whose members would not be departmental heads.[36] Another is that more use should be made of Standing Committees of the Cabinet to co-ordinate the work of groups of departments

[33] *post*, para. 17–017.

[34] In 1923 Curzon inquired of King George V why, if in the circumstances of the times His Majesty thought that a peer ought not to be Prime Minister he had no objection to a peer being Foreign Secretary: "Because the Prime Minister is responsible for everything you do": Kenneth Rose, *King George V* (1983), pp. 272–273.

[35] In the case of Lord Macdonald there was a period of four months between his appointment as a minister (in August 1998) and becoming a peer at the beginning of the next session of Parliament.

[36] Amery, *op. cit.* pp. 87, 90–93. This would be something like the small war Cabinets in the two world wars, although these were reinforced from time to time by Commonwealth statesmen: Lord Hankey, *Government Control in War* (1945); Winston S. Churchill, *The Second World War*, Vol. II, Chap. 3; Vol. III, pp. 784–786; Vol. IV, Chap. 5 and App. G; Vol. V, App. G; Vol. VI, App. H. Jennings, *op. cit.* pp. 287–291; Keith, *op. cit.* pp. 136–141; *Memoirs of Lord Chandos* (1962) Chaps. 12–14. Several meetings were also held in the first war with Dominion Prime Ministers, and called the "Imperial War Cabinet": D. Lloyd George, *War Memoirs*, Chaps. 38 and 55; Report of the Machinery of Government Committee Cd. 9230 (1918), pp. 4–6. The War Cabinet, Report for the Year 1917 Cd. 9005 (1918), pp. 1–10.

whose interests overlap.[37] Attlee thought 16 the best number. There is difference of opinion on how many members of this supreme policy-making body should be free from departmental duties, the manner in which the work of the departmental (non-Cabinet) Ministers should be co-ordinated, and the way in which Parliament can call Ministers to account.

Churchill's experiment from 1951–1953 of having several Ministers as "Overlords," who without statutory authority supervised groups of other Ministers, was not successful as it degraded the Ministers who were supervised and confused ministerial responsibility. Since 1970, however, Cabinets have included several "super-Ministers" directly responsible for multiple departments formed by the merger of a number of previous departments—for example, the Secretary of State for the Environment embraced for a time the former Ministries of Housing and Local Government, Public Building and Works, and Transport, until a separate Department of Transport was established. In the previous Cabinet Transport was absorbed again by Environment, the Minister, however, attending Cabinet meetings, and the Department's name expanded to Environment, Transport and the Regions.[37a]

Ministers who are not members of the Cabinet may be called in if matters specially affecting their department are under discussion. Civil servants are rarely present, although the Permanent Secretary to the Treasury or the Permanent Under-Secretary of State of the Foreign Office may be summoned. Law Officers may be summoned when legal issues are being discussed and Chiefs of Staff, may be present when military questions are being discussed.

### Shadow Cabinet[38]

It has come to be an accepted part of the working of our Constitution that the Opposition should organise itself on parallel lines to the government. The idea emerged gradually, and the Shadow Cabinet in an inchoate form came into existence by the 1860s. It may be said to have become a convention that there should be a Shadow Cabinet. Statutory salaries are now provided for the Leader of the Opposition and the Chief Opposition Whip in each House. The Shadow Cabinet constitutes an alternative team from which the prospective Prime Minister can choose his senior colleagues, and which provides the electorate with an alternative choice of government. **17–010**

The Conservative Party's Shadow Cabinet is technically its Consultative Committee, and the Labour Party's is its Parliamentary Committee. The Labour Shadow Cabinet since 1923 has been elected annually by the parliamentary Labour Party in the Commons. The Conservative Shadow Cabinet is chosen by the Leader of the Opposition.[39]

Like the Cabinet itself, the Shadow Cabinet observes the convention of collective responsibility—described by Mr Foot, when Leader of the Opposition, in 1981 as a rule accepted by the Labour Party for generations.[40]

[37] Sir John Anderson, *The Machinery of Government* (Romanes Lecture, 1946). See also (1918) Cd. 9230 *cited*; Lord Samuel, "A Cabinet of Ten," *The Times*, September 9, 1947.

[37a] *post*, para. 18–020.

[38] D. R. Turner, *The Shadow Cabinet in British Politics* (1969); Mackintosh, *op. cit.* pp. 259–261, 536–541; Jennings, *Parliament* (2nd ed.), pp. 81–83.

[39] *Quaere*, if a third party were the largest opposition party?

[40] *The Times*, November 14, 1981. For recognition of the principle by Mrs Thatcher when in opposition see D. Ellis, "Collective Ministerial Responsibility and Solidarity" [1980] P.L. 367, 392.

## Cabinet Committees[40]

17–011 Committees of the Cabinet were set up ad hoc in the nineteenth century to expedite government business. An example was the War Committee (1855) at the time of the Crimean War. The first Standing Committee was the Committee of Imperial Defence set up by Balfour in 1903. This was not confined to Ministers, and it used the Privy Council secretariat. During the First World War a large number of committees were set up unsystematically by Asquith and Lloyd George. Between the wars committees came and went, there being on an average twenty ad hoc Committees at any one time. A system of Cabinet committees was developed in the last war. Attlee (Deputy Prime Minister) gave an account of these to the House of Commons in 1940, as did Churchill (Prime Minister) in 1941. Herbert Morrison has also given a full written account of the committees during the last war.[41] The most important of these was the Home Affairs Committee, which was responsible for a major part of domestic policy, such as the Education Bill. A new principle developed that a Cabinet committee had equal authority to the Cabinet, subject to possible reference to the Cabinet.

Attlee was the first Prime Minister to have a permanent committee structure in peace time. The pattern continued during the 1950s and 1960s, ad hoc committees continuing alongside Standing Committees. "The Prime Minister sets up and disbands committees, appoints the chairman and members and sets the terms of reference."[42] Some committees are chaired by the Prime Minister at No. 10, some by other Ministers in the Cabinet Office or at the House of Commons. Mr Wilson raised the authority of Cabinet committees by ruling that a member could only appeal from a committee to the Cabinet with the agreement of the chairman. The recommendations of a committee can be turned down by the Cabinet.

17–012 The existence of a Cabinet committee, the name of its chairman and the terms of reference formerly were not disclosed during the lifetime of a government, because of the principle of the unity and collective responsibility of the Cabinet. Despite the fact that their existence has been well known for many years Prime Ministers as recently as Mr Callaghan in 1978 urged the need for secrecy.[43] In May 1979 Mrs Thatcher announced in the House of Commons the existence of four standing committees of the Cabinet: Defence and Overseas Policy, Economic Strategy, Home and Social Affairs, and Legislation. Paradoxically, we were told most about the Defence Committee from White Papers on Defence.[44] The existence of Cabinet Committees was further recognised by Mr Major and lists of Committees with details of membership are now made public.

The committee system has increased the efficiency of the Cabinet, and enables a great deal more work to be done by Ministers. The Cabinet itself is left free to discuss controversial matters and to make more important decisions,[45] and its business is better prepared. The system also enables non-Cabinet Ministers to be brought into discussions.

[40] Walker, *op. cit.* pp. 38–47; App. (List of Standing Committees, 1914–64); Mackintosh, *op. cit.* pp. 521–529; Jennings, *Cabinet Government*, pp. 255–261; Wilson, *The Governance of Britain*; P. Hennessy and A. Arends, *Mr Attlee's Engine Room: Cabinet Committee Structure and the Labour Government: 1945–51* (1983) (Strathclyde Papers on Govt. & Politics, No. 26); M. Cockerell, P. Hennessy and D. Walker, *Sources Close to the Prime Minister* (1984).

[41] Herbert Morrison, *op. cit.* pp. 19–26.

[42] Walker, *op. cit.* p. 45.

[43] *New Statesman*, November 10, 1978.

[44] *Central Organisation for Defence Cmd.* 6923 (1946); Cmnd. 576 (1958); Cmnd. 2097 (1963).

[45] Mr Wilson thought EEC affairs too important for a committee.

Cabinet committees come and go, change their names and are impossible to enumerate. Modern Standing Committees include (or have included) Home Affairs (currently, Home and Social Affairs)[47]; Future Legislation (principles and provisional priority of government Bills); Legislation (drafting and settling priority of government Bills and important Statutory Instruments[48]); Defence[49]; Economic Policy; Incomes Policy; Public Expenditure Scrutiny (PESC); and Social Services. The first list of Cabinet Committees issued after the 1997 election included new bodies to deal with Constitutional reform policy and Devolution. There is also a long list of miscellaneous committees ("Miscs"). Mr Wilson in 1968 announced the formation of a Parliamentary Committee to co-ordinate the work in Parliament, and to consider the broader aspects of the government's business. In his memoirs he speaks of a Management Committee to hold preliminary discussions on matters of policy, such as the Industrial Relations Bill, before putting the matter to the full Cabinet.[50] Commentators regarded both these as an Inner Cabinet.

The Committee on the South Atlantic which was established at the time of the Falklands crisis in 1982 has been described as a "War Cabinet" although, on the other hand, it has been argued that the need to secure Cabinet approval for major decisions throughout that undertaking helped to re-establish the importance of the Cabinet as a whole.[51]

*"Inner Cabinet"*

Prime Ministers in recent years are said to be in the habit of summoning an "Inner Cabinet."[52] The practice has been ascribed to Neville Chamberlain, Churchill, Attlee and Eden. Mr Wilson's Parliamentary Committee and Management Committee (*supra*) were described as an Inner Cabinet. An Inner Cabinet is supposed to be the efficient part that directs the Cabinet's activities. Lord Gordon Walker, however, calls it a misnomer. According to him it is not a Cabinet or a Cabinet committee. It has no organic or set place in the Cabinet structure. It is merely an informal, small group of friends or confidants of the Prime Minister drawn from members of the Cabinet.[53] It is not formally set up; it has no papers or records; it is not served by the Cabinet secretariat. An Inner Cabinet has as such no power. It does not predigest Cabinet business, although it may among other things discuss questions that are to come before the Cabinet. The practice of different Prime Ministers in this respect varies. The Inner Cabinet, says Lord Walker, is "a loose and informal thing."[54] Similarly, Mackintosh describes an Inner Cabinet as a number of Cabinet Ministers who are **17–013**

[47] The Attorney-General often attends: see Sir Jocelyn Simon in (1965) 81 L.Q.R. 292–293.
[48] The Attorney-General is a member. Civil servants may be present by permission of the Prime Minister or chairman of the committee.
[49] Chiefs of Staff are in attendance: Cmnd. 2097 (1963).
[50] Harold Wilson, *The Labour Government, 1964–70: A Personal Record* (1971).
[51] P. Hennessy, "The Quality of Cabinet Government in Britain," (1985) 6 Pol. Stud. (Part 2), 15. See further P. Hennessy, *The Prime Minister* (Allen Lane, 2000) pp. 416–421.
[52] Walker, *op. cit.* pp. 37–38; Anthony King, *op. cit.* pp. 64, 91, 174, 185–186. Attendance at an Inner Cabinet was referred to in evidence in *Churchill (Randolph) v. Nabarro, The Times*, October 25–29, 1960. P. Hennessy, *op. cit.* p. 506.
[53] Churchill's "cronies" with whom he liked to talk late into the night; they were personal friends, not men of influence. The Prime Minister probably did most of the talking; *cf.* "Kitchen Cabinet," *post*, note 55.
[54] Mr Gordon Walker, together with Mr George Brown and Mr Callaghan, was a member of Mr Wilson's Inner Cabinet that discussed such questions as devaluation and the Bank Rate.

regularly consulted by the Prime Minister, often singly; there is "no clearcut line which separates an inner from an outer ring."[55]

In contrast, Lord Walker talks of a *Partial Cabinet*, which can act for the Cabinet. This is a standing or ad hoc committee, presided over by the Prime Minister, but acting for a time as if they were the Cabinet. Examples are Attlee's group of Ministers who decided to make the atom bomb, and Eden's group who determined the Suez policy.[56]

## The Cabinet Office[57]

17–014 Cabinet minutes were sometimes kept in the reigns of George II, III and IV, but the practice lapsed until the First World War. Ministers were expected to remember what was decided and to carry out those decisions in their departments. The Sovereign was kept informed by a letter from the Prime Minister after each meeting, retailing the topics considered and the decisions taken. It was a confidential letter written in the Prime Minister's own hand, and not shown to other members of the Cabinet.[58] Lloyd George, when Prime Minister, introduced a secretariat in 1916 by borrowing as Secretary of the War Cabinet Sir Maurice Hankey (later, Lord Hankey), at that time Secretary to the Committee of Imperial Defence.[59] Since then minutes of Cabinet meetings have been sent to the Sovereign and circulated to members of the Cabinet.

The Secretariat, which has steadily grown in numbers and influence, serves all Cabinet committees as well as the full Cabinet. It organises the agenda, circulates reports, and records the Cabinet "Conclusions." This record contains not only the actual "Conclusions" or decisions, but also the subjects discussed and the relevant Papers, and a summary of the discussion. The arguments of individual Ministers are not usually recorded, in the interest of both of anonymity and secrecy. The Conclusions are circulated to the Cabinet, unless the matter is one of exceptional secrecy.

17–015 The Cabinet secretariat has always been on the Treasury vote: there is no Cabinet vote. The Secretary to the Cabinet also serves as Principal Private Secretary to the Prime Minister.

Mr Heath in 1970 appointed a *Central Policy Review Staff* (CPRS or "Think-tank"), staffed partly by non-civil servants, to consider long-term and trans-departmental problems and to make recommendations for action.[60] It was located in the Cabinet Office, and a few years later became part of the civil service. The C.P.R.S. was abolished by Mrs Thatcher in 1983. In 1974 Mr Wilson introduced a *Policy Unit* of non-civil servants to help him in his political and administrative

[55] Mackintosh, *op. cit.* p. 542. *Cf.* "Kitchen Cabinet," a body of non-ministerial confidants "giving advice in a sympathetic manner": *ibid.* p. 520. "Kitchen Cabinet" is a pejorative term, most frequently used in recent years in relation to Harold Wilson's circle of intimates: P. Hennessy, *op. cit.* p. 294 *et seq.*

[56] Walker, *op. cit.* pp. 87–91.

[57] R. K. Mosley, *The Story of Cabinet Office* (1969); Walker, *op. cit.* pp. 48–57; Jennings, *op. cit.* pp. 242–245; Mackintosh, *op. cit.* pp. 517 *et seq.* Stephen Roskill, *Hankey: Man of Secrets* (1972).

[58] The Public Record Office contains photographic copies of the 1,700 "Cabinet letters" written by Prime Ministers to the Sovereign from 1868 to 1916. The originals are at Windsor Castle. The letters constitute the only official record of decisions by the Cabinet in that period. There are also in the Public Record Office photographic copies of Cabinet memoranda from 1880 to 1914, and the Committee of Imperial Defence from 1902 to 1914.

[59] Lord Hankey, *Diplomacy by Conference*, Chaps. 2 and 3. See also John F. Naylor, A Man and an Institution: Sir Maurice Hankey, the Cabinet Secretariat and the custody of Cabinet secrecy, (1984).

[60] Cmnd. 4506.

work. The Policy Unit has survived and, under Mr Blair, has been increased from eight to twelve in number. He has also added two further bodies, the Social Exclusion Unit and the Performance and Innovation Unit.

A British Prime Minister has not been thought to need a department, as not only is he briefed by the Cabinet Secretary but also he can call on the Permanent Secretaries of any of the various departments. Since the last War, however, the Prime Minister has had a small "*No. 10 Office*" working as his and serving his personal needs. Under Mr Blair this Office has expanded and, controversially, two members of his staff, although not themselves civil servants, were given authority over civil servants. The newly appointed Secretary to the Cabinet, Sir Richard Wilson carried out a review of the working of the Cabinet Office and the Prime Minister's Office (which has not been published). Unease at the growth in numbers and influence of special advisers at No. 10 has been expressed by the House of Commons Select Committee on Public Administration.[61]

**Ministerial responsibility and accountability**

**17–016** The responsibility of Ministers, as was indicated in Chapter 6, is both individual and collective. The individual responsibility of a Minister for the performance of his official duties is both legal and conventional: it is owed legally to the Sovereign, and also by convention to Parliament. "Responsible" here does not mean morally responsible or culpable, but accountable or answerable.[62] The responsible Minister is the one under whose authority an act was done, or who must take the constitutional consequences of what has been done either by himself or in his department.[63] The traditional method of expressing no confidence in an individual Minister has been to move that his salary be reduced by a nominal sum, though it was pointed out in February 1976 that as ministerial salaries are fixed by statute, legislation would be required to reduce it.[64] A Minister must accept responsibility for the actions of the civil servants in his department, and he is expected to defend them from public criticism, unless they have done something reprehensible which he forbade, or of which he disapproved and of which he did not have and could not reasonably be expected to have had previous knowledge. In the latter case, which is unusual, he may dismiss them.[65] In normal circumstances, then, a Minister acts as a shield for his civil servants who are expected to be impartial and not able to answer public criticism for themselves; though this position is being eroded to some extent by the existence of the Parliamentary Commissioner[66] and Specialist Select Committees of the House.

**17–017** It has been argued that an examination of ministerial resignations in the past century shows that the doctrine of individual responsibility in practice has no punitive effect, because either: (i) the erring Minister who resigns is appointed to another post; (ii) a timely reshuffle of ministerial posts renders resignation unnecessary; or (iii) a Minister who is unpopular with the Opposition is protected

[61] H.C. 293 (2000–2001).

[62] It also connotes a state of mind that acts as may be thought right after weighing the consequences: Amery, *op. cit.* p. 30.

[63] See G. K. Fry, "Thoughts on the Present State of the Convention of Ministerial Responsibility" (1969–70) XXIII *Parliamentary Affairs* 10.

[64] A motion to reduce the salary of the Secretary of State for Industry by £1,000 was carried as the result of a muddled vote, but the cut was restored after another motion a few days later.

[65] 520 H.C. Deb. cols. 1287 *et seq.*: following the Report of the Crichel Down Enquiry Cmd. 9176 (1954).

[66] *post*, para. 34–005.

by the solidarity of his colleagues.[67] Often too the unearthing of incompetence and inefficiency is such a slow process that the minister responsible has long ceased to hold the position in question.[68] The number of resignations in the last 50 years is small. Those that involve personal misbehaviour or alleged immorality do not help establish a principle of accountability for the proper working of a minister's department. Mr Ian Harvey in 1958, Mr Galbraith in 1962, Lord Jellicoe in 1973 and Mr Cecil Parkinson in 1983 resigned as a result of publicity about their private lives.[69] Mr Profumo resigned in 1963 but in his case, in addition to private immorality which was said to involve risks to the national security, there was the added factor of misleading Parliament.[70] Similarly in 1992, David Mellor's resignation was linked to allegations of improperly accepting hospitality without declaring it under the Ministerial Code, although newspapers had amused themselves by recounting stories of his extra-marital sexual activities. Other ministers had been guilty of disclosing Budget proposals prematurely—J. H. Thomas in 1936 and Hugh Dalton in 1947. More remarkable is the list of ministers who have not resigned despite serious errors in areas within their responsibility: Mr Lennox Boyd, the Colonial Secretary, despite the atrocities at Hola Prison Camp in Kenya[71]; Mr Whitelaw, when Home Secretary, despite the defects in police security which allowed an intruder to make his way into the Queen's bedroom[71a]; Mr Prior, when Secretary of State for Northern Ireland, despite the escape of terrorists from the Maze Prison.[72] Mr Howard's two escapes from resignation in 1995 and 1996 are significant because they illustrate the difficulties arising from the semi-independent status of Next Step Agencies.[73] Two examples may seem to support the convention that ministers are ultimately responsible for misjudgment in the performance of their duties or errors of policy in their departments. First, the resignation of Sir Thomas Dugdale in 1954 over the Crichel Down affair where he admitted maladministration in his department although he defended its policy.[74] Secondly, the resignation in 1982 of Lord Carrington the Foreign Secretary, Mr Luce and Mr Atkins who accepted personal responsibility for what in retrospect was found to be the miscalculation by the Foreign Office of the threat posed to the Falkland Islands by Argentina. A possible third example is the resignation of Mr Brittan, Secretary

[67] S. E. Finer, "The Individual Responsibility of Ministers" (1956) *Public Administration* 377. Cf. R. K. Alderman and J. A. Cross, *The Tactics of Resignation* (1967); K. C. Wheare, *Maladministration and its remedies* (1973), Chap. 3; G. Marshall, *Constitutional Conventions* (1984), pp. 61 *et seq.*; A. Barker, "Spreading the Blame", *The Listener* September 13, 1984.

[68] See G. Ganz "Parliamentary Accountability of the Crown Agents" [1980] P.L. 454.

[69] It is possible to add more recent examples to this list—proof, if of anything—that this generation should be more cautious about accusing the Victorians of hypocrisy.

[70] Cmnd. 2152 (1963) (Lord Denning's Report); P. J. Madgwick, "Resignations" (1966–67) *Parliamentary Affairs* 59.

[71] 907 H.C. Deb. col. 248 and 910 H.C. Deb. col. 182.

[71a] Mr Michael Fagan, on July 9, 1982.

[72] H.C. Deb., cols. 1041–1047 (February 9, 1984).

[73] *Ante*, para. 18–023.

[74] Farmland had been compulsorily purchased during the Second World War. The owners from whom it was acquired were given an assurance that they would be given an opportunity to buy it back if the Crown subsequently had no use for the land. In due course the previous owners sought, unsuccessfully, to re-acquire the land. Various allegations were made of inefficiency and shortcomings of various kinds on the part of the civil servants concerned. Sir Andrew Clark Q.C. was appointed to hold an inquiry; he found evidence of muddle, but not faith: Cmd. 9176 (1954). See J. A. G. Griffith, "The Crichel Down Affair" (1955) 18 M.L.R. 557.

of State for Trade and Industry in January, 1986, following the "leaking" of parts of a confidential letter from the Solicitor General by a civil servant in Mr Brittan's Department. That resignation formed part of the remarkable Westland Affair.[75] Apparently Mr Brittan resigned because he accepted responsibility for having authorised an action by a member of his Department which was improper and, as it turned out, inexpedient. At the other extreme the resignation of Ministers as in the case of Sir Samuel Hoare, over the Hoare-Laval Pact concerning Abyssinia in 1935, may be cases of ministers being "thrown to the wolves."

17–018 Such too may be the explanation of the second resignation of Mr Mandelson on January 24, 2001. An earlier resignation related to the failure to disclose a loan by a fellow minister in circumstances where it should have been revealed. The second resignation arose from differing and ultimately unresolved accounts of the role he had played in an application for naturalisation by a wealthy Indian businessman. Mr Mandelson "resigned" first and then the Prime Minister appointed Sir Anthony Hammond to hold an inquiry to establish the facts. The inquiry concluded there was no evidence of any improper conduct and it was impossible to establish the facts in relation to telephone calls which had allegedly been made.

The Scott Inquiry[75a] into the export of defence equipment to Iraq, following the collapse of prosecutions relating to such exports, considered ministerial responsibility and drew a distinction between responsibility and accountability. The former relates to ministerial culpability, for example for an error in policy. The latter relates to the minister's duty to give an account to Parliament of everything that happens in his department or its associated Next Step Agencies, without implying any personal blameworthiness. Thus Mr Howard could successfully argue that he was not *responsible* for operational shortcomings in the Prison Service and had discharged his accountability to Parliament by, in 1995, sacking the Director General of the Prison Service. In the case of the Scott Inquiry, Sir Richard Scott concluded that two ministers had misled Parliament but "without duplicitous intention." Defendants had been prosecuted and only the production of departmental files, for which public interest immunity had been unsuccessfully sought, led to their trials being abandoned. Nonetheless no ministerial resignations were deemed appropriate.

Both Houses subsequently adopted resolutions, now enshrined in the Ministerial Code, which recognise that ministers have a duty to account and be held to account for the policies, decisions and actions of their Departments and Next Step Agencies. They must give accurate and truthful information to Parliament. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister.

17–019 The conclusion must be that while there is no doubt that a minister is responsible in the sense that he is answerable for his department it is not clear in what circumstances convention requires that he resign when his department errs. So long as he retains the support of the Prime Minister he is safe in effect unless his own party is willing to risk bringing down the Government.

[75] For a chronology and comment see G. Marshall, "Cabinet Government and the Westland Affair," [1986] P.L. 184. See further *The Defence Implications of the Future of Westland plc*... Third Report from the Defence Committee, July 1986.

[75a] 1995–96, H.C. 115. For a collection of reactions to the Report, see [1996] P.L.

The doctrine of the individual responsibility of ministers is frequently cited as an important feature of the British Constitution. "The enduring effect of the doctrine of ministerial responsibility has been over the past century or so that powers have been vested in ministers and on a relentlessly increasing scale."[76] The Courts have referred to the doctrine in seeking the intention of Parliament when interpreting statutes.[77] The existence of the doctrine has been invoked to disprove the need for proposed new remedies against abuse of power or maladministration.[78] On the other hand it was derided as "the mere shadow of a name" in 1911 by Farwell L.J. in *Dyson v. Attorney-General*.[79] There is, it may be thought, something unsatisfactory in putting so much weight on such an uncertain foundation.

It should be borne in mind that the Prime Minister may always advise the Sovereign to dismiss a Minister, as in the case of Mr Heffer, a Minister of State who spoke in the House in April, 1975, against continued membership of the EEC, but it is seldom necessary to resort to this expedient, for it is usually sufficient if the Prime Minister invites a Minister to resign.

17–020 The collective responsibility is owed by convention both to the Sovereign and to Parliament. As we have seen in connection with the dissolution of Parliament the Ministry as a whole (including the Cabinet) must retain the confidence of the House of Commons. To the Sovereign Ministers must tender unanimous advice; to Parliament and the nation they should show a united front by vote and speech. Cabinets in the late nineteenth and early twentieth centuries sometimes agreed that certain topics should be treated as "Open Questions" where collective responsibility did not apply and each minister might speak and voted as he pleased.[80] The convention is illustrated by the resignations of dissenting Ministers—Eden in 1938 over the policy of appeasement, Aneurin Bevan in 1951 over National Health Service charges, and Lord Salisbury in 1957 over the release of Archbishop Makarios. Mr Frank Cousins resigned from his post of Minister of Science and Technology in 1966 because he disagreed with the Government's Prices and Incomes Bill: being a trade union leader he could not keep quiet about it. Mr Heseltine resigned as Secretary of State for Defence in January 1986, the first of the two ministers to do so in the course of the Westland affair. To the extent that he resigned because he felt unable to accept the view of the rest of the Cabinet on the matters in issue his resignation illustrates the continued working of the traditional convention. Mr Heseltine himself, however, gave different reasons at different times for his resignation and on one occasion denied that it was required by the doctrine of collective responsibility.[81] Custom allows a dissenting Minister who resigns to make a personal statement in the House.

The principle of collective responsibility is not applied in its full rigour to non-Cabinet Ministers, for they are often not consulted in matters that do not affect their department. In their case the responsibility is passive rather than active. Sir

[76] N. Johnson, *In Search of the Constitution* (1977), p. 84.

[77] e.g. *Liversidge v. Anderson* [1942] A.C. 206; *Raymond v. Att.-Gen.* [1982] 2 W.L.R. 849.

[78] e.g. the need for, and appropriateness of, the Parliamentary Commissioner for Administration, *post*, para. 34–005.

[79] [1911] 1 K.B. 410, 424.

[80] e.g. Catholic emancipation 1812–1820; Women's Suffrage 1884 and 1906–1914; tariff reform 1903–1905.

[81] See Marshall, *op. cit. supra* n. 75.

Edward Boyle, one of the two junior Ministers who resigned from Sir Anthony Eden's Government in 1956 because they disagreed with the Government's intervention in the Suez Canal Crisis, joined the Government formed by Mr Harold Macmillan early in 1957 although the new Ministry confirmed its support for Eden's Suez policy. Technically they were different Ministries, but the policy disapproved of was the same, although it was no longer possible to pursue it.

The convention of the collective responsibility of Ministers, as we have seen,[82] has been weakening in recent years.[83] Mr Wilson in the period 1974–76 had to remind his colleagues several times of this principle, and Mr Callaghan in April, 1976 rebuked the Secretary of State for Energy (Mr Benn) in the House of Commons for abstaining at a meeting of the Labour Party National Executive in a vote concerning proposed cuts in public expenditure. In March–April, 1975 Mr Wilson allowed Ministers as well as Labour back-benchers "in the unique circumstances of a referendum" to advocate, outside Parliament, opposition to continued membership of the EEC, although continued membership was Government policy. Later in a broadcast he said "after June 6 there will be one Cabinet and one Cabinet view."[84] Another episode was that of the European Assembly Elections Bill 1977 to provide for direct elections to the European Assembly, an item of Government policy contained in the Queen's Speech and implementing a Treaty obligation. Mr Callaghan, the Prime Minister, stated that Ministers as well as Labour back-benchers would be free to vote against the Bill on second reading. When questioned by Mrs Thatcher, Leader of the Opposition, Mr Callaghan replied: "I certainly think that doctrine [collective responsibility] should apply except in cases where I announce that it does not."[85] In the event 31 Ministers, including six Cabinet Ministers, voted against the Bill, but it was easily carried with the help of Opposition parties.[86] So long as a Government can keep its majority in the House of Commons, its main concern nowadays appears to be its image amongst the electorate. Dissent in public is allowed if it is thought it will do the party less harm than resignations and press reports of "splits."[87] 17–021

*Confidentiality*

Access to, and use of Cabinet papers is governed by convention.[88] Cabinet and other government papers are, in law, Crown property. In deciding who may have access to such papers the Crown by convention acts on the advice of the Government. It is accepted that, as a general rule, Cabinet ministers may not see Cabinet papers of former ministers of a different party. Nor may they see other papers (with certain exceptions) which contain unpublished views or comments of those predecessors on advice submitted to them. Ministers may normally see 17–022

[82] *ante*, para. 7–017.

[83] Unless Mr Heseltine's resignation can be seen as a strengthening of the convention.

[84] *The Times*, May 12, 1975. Cf. the "agreement to differ" in 1932, when there was a coalition Government, no referendum or general election was involved, and the dissentients in fact soon resigned office: *ante*, para. 7–017.

[85] *The Times*, June 15, 16 and 17, 1977.

[86] Not so basic was the defeat at the Committee stage of the Prime Minister's recommendation of the regional list system of proportional representation for the first direct elections to the European Assembly, in favour of the first-past-the-post system.

[87] Mackintosh, *op. cit.* p. 533. And see R. Brazier, "The Constitution in the New Politics" [1978] P.L. 117.

[88] Lord Hunt of Tanworth, "Disclosure of Government Papers" [1982] P.L. 514; *ante* para. 7–005.

papers of their predecessors of their own party in the course of their duties, with the agreement, where appropriate, of any former Prime Minister. Former ministers may have access to but not retain, any documents which they saw when in office.[87]

A highly unusual exception to the general principle was supplied when a Committee of Privy Councillors was established in 1982 under the Chairmanship of Lord Franks to review the way in which government departments had discharged their responsibilities to the Falkland Islands in the period before the Argentinian invasion.[88] The Committee was given access to departmental papers, Cabinet and Cabinet committee memoranda and minutes, and intelligence assessments which had been prepared for previous governments of both major parties. On a matter of less grave political controversy, in 1986 Mr Callaghan agreed to allow Conservative ministers to examine papers prepared when he was Prime Minister relating to the controversy whether to equip the Royal Air Force with the Nimrod early warning system or the American Awacs system.[89] The decision to adopt the Nimrod system had been taken in 1977, with the support of both the Labour and Conservative parties but the subsequent delay in producing the equipment and the increase in cost had called in question the wisdom of the original decision.

17–023 Cabinet or ex-Cabinet ministers who wished to refer in their memoirs to Cabinet discussions or papers during the period when official documents are protected by statute,[90] were formerly required by convention to obtain the consent of the Sovereign expressed through the Prime Minister, who delegated the vetting to the Secretary of the Cabinet.[91] Convention also required the disclosure of confidential State or official papers or information by Ministers or ex-Ministers to have the approval of the Government of the day, application being made to the Secretary of the Cabinet. Ex-civil servants were expected to apply for such permission to their Department. The legal effect of these requirements was tested in *Attorney-General v. Jonathan Cape Ltd*[92] where the Attorney-General sought to restrain the posthumous publication of volume I of Richard Crossman's *Diaries of a Cabinet Minister*, covering events of about 10 years before. Lord Widgery C.J., declined to grant the injunction. It was conceded by the Attorney-General that there was no breach of the Official Secrets Acts.[93] Lord Widgery held that the court has power on the ground of public policy to restrain publication of information in breach of confidence,[94] but this volume disclosed no details that should still remain confidential.

[87] In 1980 Mrs Thatcher while recognising the convention that Mr Alfred Morris, former Minister for the Disabled, could consult papers prepared by officials while he was minister, refused to agree to allow the photocopying of the papers: *The Times*, February 7, 1980.

[88] *Falkland Islands Review* Cmnd. 8787 (1983).

[89] *Ante*, para. 7–005n.

[90] The Public Records Acts 1958 and 1967 provide that public records in the Public Record Office (including Cabinet minutes) shall not be available for public inspection until they are 30 years old. The period may be extended by the Lord Chancellor if they include information received in confidence or liable to prejudice national security or trade.

[91] Because it is difficult for the Prime Minister to deal with comments about his colleagues or predecessors, and he does not know about the activities of members of opposite parties when they were in office.

[92] [1976] Q.B. 752.

Nor does the Privy Councillor's oath add to the Cabinet Minister's legal obligation.

[93] In its equitable jurisdiction: see, *e.g. Argyll (Duchess) v. Argyll (Duke)* [1967] Ch. 302.

A Committee of Privy Councillors on Ministerial Memoirs under the chairmanship of Lord Radcliffe, whose report[97] came out after the decision in *Attorney-General v. Jonathan Cape*, recommended that ministerial authors should be precluded for fifteen years from publishing information falling within three categories: (i) the requirements of national security operative at the time of publication; (ii) injury to foreign relations; and (iii) destructive of the confidential relationships on which the system of government is based, *i.e.* relations between Ministers and colleagues or their advisers in the civil service or outside. "Government is not to be conducted," said the report, "in the interests of history." The report was accepted by the Prime Minister, Mr Wilson, who said manuscripts should still be submitted for inspection and these working rules of reticence should be accepted as an obligation of honour.[98]

*Influence of the Sovereign*

Since the Sovereign acts on the advice of the Cabinet, tendered through the Prime Minister, and the government is carried on in the name of the Sovereign, the Cabinet is expected to keep the Sovereign informed of any departure in policy, of the general march of political events, and in particular of the deliberations of the Cabinet. The *power* of the Monarch in modern times is confined—in Bagehot's well-known words[99]—to "the right to be consulted, the right to encourage, the right to warn." The *influence* of a Sovereign who has been on the Throne for some years, however, is far from negligible, for his experience will be wider and more continuous than that of most or all of his Ministers. **17–024**

Queen Victoria cannot perhaps be taken as a model for the twentieth century, but George V's reign of a quarter of a century shows a number of examples of the influence exerted by the Throne. By his advice, warnings and encouragement the King helped to bring the parties together in negotiating the Anglo-Irish Treaty of 1921; but he left the conduct of the negotiations entirely to the Prime Minister, Lloyd George, and refrained from any comment or intervention while the conference lasted.[1] In 1923 the King tried unsuccessfully to dissuade Baldwin from a dissolution,[2] and later in the same year he persuaded Baldwin not to resign before meeting Parliament when the Conservatives at a general election had lost their absolute majority but were still the largest party in the Commons.[3] George V took the initiative in the formation of the National (coalition) Government under Ramsay MacDonald in 1931 when the "economic crisis" caused the latter's minority Labour Government to break up. The King consulted the Conservative and Liberal leaders, each of whom had a considerable following in the House, and then entrusted MacDonald with the task of resuming office as the head of a coalition and in spite of the defection of his own Labour Party.[4]

As the Sovereign's influence may be underestimated, so on the other hand it may be exaggerated. Thus Lord Attlee discounts certain incidents given in the

[97] Cmnd. 6386 (1976).
[98] On the security of Cabinet documents, see Report of Houghton Committee Cmnd. 6677 (1976).
[99] Bagehot, *The English Constitution* (World's Classics ed.), p. 67.
[1] Harold Nicolson, *King George the Fifth*, p. 360.
[2] *ibid.* pp. 379–380.
[3] *ibid.* pp. 382–384.
[4] *ibid.* pp. 460–469; G. M. Young, *Stanley Baldwin*, Chap. 16; K. Middlemas and J. Barnes, *Baldwin* (1969), Chap. 23; D. Macquand, *Ramsay MacDonald* (1977), Chaps. 25 and 26. The importance of the King's role is described in Kenneth Rose, *King George V* (1983), pp. 371–379.

official biography of George VI[5] as examples of interference by that King, notably the choice of Ernest Bevin as Foreign Secretary and the holding of a general election in 1951. Attlee later said that the reason for the first was that he, as Prime Minister, wanted to keep Ernest Bevin away from Herbert Morrison; and the reason for the second was that he did not want the King to worry about the precarious position of the Government (majority 6) while he was abroad.[6] It is too early to say what influence, if any, the present monarch has exercised.[7]

The exchange of views between Sovereign and Prime Minister on any matter is strictly confidential between them. It would be improper for the Sovereign herself or for any member of the Royal Household to give public expression to her opinions on political matters.[8] (Conversely the Prime Minister does not answer questions in the House of Commons relating to her relations with the monarch[9]).

## III. The Prime Minister[10]

### Formal position

17–025 The emergence of the position of Prime Minister in the modern sense begins with the Ministries of Sir Robert Walpole (1721–42) and the younger Pitt (1783–1801; 1804–1806), although the former disclaimed the title. It was brought about by a combination of a number of factors, including royal confidence, pre-eminence among Ministers, patronage as First Lord of the Treasury, and especially control of the Commons (not necessarily as leader of the largest party). The authority of the Prime Minister was firmly established during the latter part of the nineteenth century by the outstanding personalities of Disraeli and Gladstone, making use of the effects brought about by the Representation of the People Acts and the development of the party system. As we have seen, the Prime Minister was until recently hardly known to the law: like the Cabinet, he was the creature of convention. He is mentioned in the Treaty of Berlin 1878; a royal warrant of 1905 which gives him precedence next after the Archbishop of York; the Schedule to the Chequers Estate Act 1917, in which Parliament gave effect to the gift of the Chequers estate "as a country residence for the Prime Minister of the day"[11]; the Physical Training and Recreation Act 1937; the

[5] Wheeler-Bennett, *King George VI*.

[6] "The Role of the Monarchy" *The Observer*, August 23, 1959.

[7] Newspapers discussed the possibility (and propriety) of the Queen raising with the Prime Minister the desirability of postponing the date of the local elections and, if appropriate, of the general election, in the days following the outbreak of foot and mouth disease in March 2001.

[8] Letter from the Private Secretary to The Queen (Sir William Heseltine) *The Times* July 20, 1986; *post* para. 36–022.

[9] *Ante* para. 12–025.

[10] B. E. Carter, *The Office of Prime Minister* (1956); Anthony King (ed.), *The British Prime Minister* (1969); Lord Blake, "The Office of Prime Minister" (British Academy Lecture), (1975); Mackintosh, *op. cit.*; Humphry Berkeley, *The Power of the Prime Minister* (1968); P. Hennessy, *The Prime Minister* (Allen Lane, 2000); P. Gordon Walker, *op. cit.* Chap. 5; Jennings, *op. cit.*; Thomson, *Constitutional History of England*, 1642–1801.

[11] *Robertson v. Secretary of State for Environment* [1979] 1 W.L.R. 837 (QBD).

Parliamentary and other Pensions Act 1972; the House of Commons Disqualification Act 1975 ("Prime Minister and First Lord of the Treasury") and the Chevening Estate Act 1959, under which this Kent estate was given on certain trusts as regards occupation, including "any Minister of the Crown nominated by the Prime Minister."[12]

The Prime Minister now invariably takes the office of First Lord of the Treasury,[13] and occasionally some other office as well, such as that of Chancellor of the Exchequer (Gladstone), War Office (Asquith),[14] Foreign Secretary (Ramsay MacDonald) or Minister of Defence (Winston Churchill). The Prime Minister has no legal powers except as First Lord of the Treasury and (since 1968) Minister for the Civil Service (apart from the miscellaneous examples in Acts such as those cited earlier). The office of First Lord of the Treasury down to 1937 provided him with his salary. It places him technically at the head of the most important government department (the Treasury), yet with departmental duties which (apart from patronage) are only nominal, as the working head of that department is the Chancellor of the Exchequer. In the eighteenth and early nineteenth centuries, before the reform of the Civil Service and the parliamentary franchise, the fact that the First Lord of the Treasury exercised a very extensive patronage over many kinds of official appointments meant that the Prime Minister could control departmental appointments, and this helped him to obtain a parliamentary majority for his party. The Ministers of the Crown Act 1937 first provided for a salary to be paid to "the person who is Prime Minister and First Lord of the Treasury." The Ministerial and other Salaries Act 1975 now provides a salary to the "Prime Minister and First Lord of the Treasury," so it is unlikely that these positions will be held separately in future, although the Act does not require them to be held together. The Act of 1937 also provided former Prime Ministers with a pension. The Parliamentary and other Pensions Act 1972, s.26, now provides that any person who has been Prime Minister and First Lord of the Treasury shall be entitled to a pension charged on the Consolidated Fund.

### Functions of the Prime Minister

**17–026** The primary functions of the Prime Minister are to form a government, and to choose and preside over the Cabinet. He gives advice to his ministerial colleagues on matters before they come to the Cabinet, and he is the main channel of communication between the Cabinet and the Sovereign, with whom he has a weekly audience.[15] He advises the Sovereign on a dissolution.[16]

The Prime Minister is normally the leader of his party, having either been chosen as Prime Minister because he is the leader of the largest party or elected leader because he is Prime Minister.[17] He is primarily responsible for the organisation of the business of the House, even if (as is now usual) this work is

[12] See further the National Audit Act 1983, s.1 and the Museums and Galleries Act 1992.

[13] They were last separated when Balfour was First Lord of the Treasury in Lord Salisbury's administrations (1891–92, 1895–1902).

[14] At that time (1914) a member accepting this office had to seek re-election, so that for a time Asquith was Prime Minister without a seat in the House.

[15] Other Ministers may communicate with the Sovereign on matters concerning their department.

[16] Lord Beaverbrook recounts that the decision of Lloyd George and his colleagues in January, 1922 not to hold a general election was induced by the intervention of a parrot: *Men and Power* (1956), pp. 340–341. And see *ante*, para. 17–006.

[17] Lloyd George (1916), MacDonald (1931) and Churchill (1940) were not leaders of their party when appointed Prime Minister, though Churchill soon accepted the leadership.

delegated to the Leader of the House.[18] In the House he is expected to speak in debates, and to answer questions on general government policy, the future business of the House and any residual matters. A Prime Minister is willing to give confidential information to the Leader of the Opposition on such matters as defence, security, the EEC and Northern Ireland.

The Prime Minister has special responsibilities in the areas of Security and Intelligence. A Cabinet Committee of Ministers, chaired by the Prime Minister, supervises MI5, MI6 and G.C.H.Q. A Joint Intelligence Committee (J.I.C.) chaired by a Cabinet Office official, collates intelligence reports and prepares assessments for ministers. Since 1952 the Director General of the Security Service has been responsible to the Home Secretary and not, as formerly, to the Prime Minister. The Director General has, however, the right of direct access to the Prime Minister, as has the Chairman of J.I.C.[19] The decision to refer any matter relating to security to the Security Commission[20] for investigation is taken by the Prime Minister. The Prime Minister alone can authorise the launching of a nuclear attack by United Kingdom forces.[21]

17–027 The Prime Minister sees that Cabinet decisions are carried out by the departments, although, as we have said, the extent to which he supervises the administration varies with different holders of the office. His contact with the affairs of the Foreign Office is often especially close. The Cabinet secretariat is under his control, and consults him in preparing the agenda. He communicates directly with the other Commonwealth Prime Ministers, and presides when they meet in this country.

Many Crown appointments, in addition to ministerial offices, are made on his advice. These include the Lords of Appeal in Ordinary, the Lords Justices of Appeal, bishops and deans of the Church of England, peerages, Privy Councillors and most honours.[22] As First Lord of the Treasury and Minister for the Civil Service,[23] the Prime Minister approves the senior appointments in the Civil Service.

### Choice of Prime Minister[24]

17–028 The Sovereign chooses the Prime Minister. Conventions ensure that in most cases the "choice" is formal, for the Sovereign is expected to send for the leader of the party or group of parties that has, or can control, a majority in the House of Commons. The choice became formal owing to the development of the party system. Thus in 1855 Queen Victoria, who preferred Derby, was constrained to appoint Palmerston; and in 1880 she reluctantly appointed Gladstone when she would have preferred Hartington, though Rosebery was Victoria's choice after

[18] The Leader of the House is responsible for steering the Government's legislative programme through the House of Commons and must also pay regard to the interests of the House as a whole.

[19] See G. Marshall, *Constitutional Conventions* (1984) pp. 122 *et seq.*; G. Drewry, "The House of Commons and the Security Services" (1984) P.L. 70; G. Zellick, "Government Beyond the Law" (1985) P.L. 283, 299.

[20] A non-statutory body, established in 1964, consisting of distinguished public figures, chaired by a senior judge.

[21] Hennessy, *op. cit.*, p. 90 for details of the appropriate procedure.

[22] Recommendations for some honours and decorations are also made by the Foreign Secretary, the Defence Minister, Commonwealth Prime Ministers, and on the Queen's personal initiative.

[23] *Post*, para. 17–022.

[24] See Jennings, *The Queen and the Constitution* (1963), pp. 99–107; Chapman,

Gladstone's resignation. If the government is defeated at a general election the Prime Minister resigns[25] (and with him the other Ministers), and the Sovereign on the advice of the resigning Prime Minister sends for the Leader of the Opposition. The Leader of the Opposition is known, because both the Labour Party and (since 1964) the Conservative Party in opposition select a leader by ballot, and he has a statutory salary. The Leader of the Opposition will accept office if his party commands a majority in the Commons, which it usually will if the Government was defeated at a general election.[26]

If the Prime Minister dies in office or retires on *personal* grounds, such as ill health or old age, the Sovereign has really no discretion in the common case where the government has an absolute majority and one other Cabinet Minister in the Commons is obviously regarded as ranking next to the Prime Minister. In this way Neville Chamberlain succeeded Baldwin in 1937 and Mr Eden succeeded Sir Winston Churchill in 1955.[27] A *retiring* Prime Minister is probably not entitled to proffer advice as to his successor,[28] but he can make his views known before-hand, and anyway the Sovereign is free to consult him and other members of the government party.

There are exceptional circumstances when the Sovereign really has to exercise a personal discretion within limits; and this is perhaps the most important function of the Sovereign at the present day. There may be more than two parties in the House of Commons with no one party having an absolute majority, either as a result of a general election or on a defeat in the Commons of a government that has already been granted one dissolution; and the question arises whether one of the minority parties, and if so which, will be able to carry on the government with the support of one of the other parties, or whether a coalition shall be formed, or the government may break up owing to internal dissension. 17–029

[25] See G. H. Le May, *The Victorian Constitution* (1979), pp. 57–58: "Disraeli created a constitutional precedent after the general election of 1868, when he chose to accept defeat at the hands of the constituencies instead of those of the new House of Commons, and resigned without meeting Parliament. This was a clear example of precedent crystallising about accident. Disraeli had no wish to consolidate the Liberal Party by presenting himself as a common target for its various elements. The party had disintegrated in the previous Parliament, it might do so again, and the chances of that happening would be better if it was not allowed to bind itself together in a vote of censure. In spite of its peculiar origin, the precedent was found to be convenient; it was followed by Gladstone in 1874 and by Disraeli (then Earl of Beaconsfield) in 1880. [Queen Victoria] did not think that immediate resignation ought to become a general rule, 'because it might be a means for a Government, who had committed some grievous fault, to escape condemnation by Parliament, as the adverse party was seldom inclined to attack a fallen Government.' But become a general rule it did, whenever the result of a general election was sufficiently clear to make the carrying of a vote of no confidence a certainty; its adoption may be taken as a measure of the development of party cohesion and solidarity. Gladstone resigned at once after the election of 1886. Salisbury chose to meet Parliament after the election of 1885, as Baldwin did after that of 1923; both were turned out almost at once. In 1929, in conditions roughly similar to those of 1923, Baldwin resigned at once; however obscure the result might be, he said, it showed that the electorate did not want him."

[26] The Leader of the Opposition is not bound to accept office. Disraeli in 1873, when the parties were very even, thought it would be more advantageous if Gladstone carried on for a while.

[27] Partly at least through the influential advice of Lord Kemsley, proprietor of the *Sunday Times* and Lord Woolton, Chairman of the Conservative Party: J. Margach, *The Abuse of Power* (1978), pp. 104–105.

[28] In March, 1955 Churchill said to Mr Eden and Mr Butler: "I am going and Anthony will succeed me. We can discuss details later": Lord Butler, *The Art of the Possible* (1971), p. 176; but he refrained from mentioning to the Queen the question of his successor: J. Wheeler-Bennett (ed.) *Action This Day* (1968), p. 234.

The Sovereign then may consult all interested parties with a view to the formation of a Ministry that can hold a majority in the House. When Baldwin's minority Conservative Government was defeated in the House in 1924 not long after a general election, the King did not seek any advice before sending for Ramsay MacDonald, the leader of the second largest party.[29]

Neville Chamberlain, the Conservative Prime Minister, resigned in 1940 because, although he had not been defeated in the House (his normal majority of about 200 was reduced to 81, a number of Conservatives voting against him or abstaining) he realised that he had lost the confidence of his own party as well as of the Labour Party, which was supporting the Government in the conduct of the war. A coalition government was needed, and Labour members intimated that they would not serve under Chamberlain. The possible choice of a successor lay between Winston Churchill, First Lord of the Admiralty, and Lord Halifax, Foreign Secretary. The Labour Party were willing to serve under Churchill. Lord Halifax expressed the view, in a conference between the three statesmen, that it would be impracticable to try to lead the government from the Lords in wartime.[30] Chamberlain then tendered his resignation to George VI, who accepted it. In an informal discussion as to his successor the King suggested Lord Halifax, but Chamberlain told the King what Lord Halifax had said. "I asked Chamberlain his advice," the King recorded, "and he told me Winston was the man to send for . . . . I sent for Winston and asked him to form a Government."[31]

17–030 The most difficult case is where a Prime Minister dies in office or resigns on personal grounds, such as health or age, leaving no obvious successor. It was wholly exceptional that twice during the last war George VI asked Churchill to advise him on his successor if the Prime Minister should die as a result of enemy action while abroad. George VI objected to Mr Eden being described as Deputy Prime Minister in 1951, as it would imply a line of succession and so restrict the royal prerogative.[32] There have been appointments by both the main parties of Deputy Prime Minister, notably Attlee (Leader of the Labour Party) in the coalition Government during the last war.[33] The title does not imply any right of succession to the Prime Minister,[34] but it is increasingly used, whether to indicate the trust a Prime Minister puts in a valued senior colleague (Mrs Thatcher and Lord Whitelaw) or as a consolation prize designed to mollify the vanity of a colleague perhaps not entirely trusted.

In 1923 Bonar Law, the Conservative Prime Minister, was so ill that he sent his resignation to George V. The choice of successor lay between Lord Curzon, Foreign Secretary and former Viceroy of India, a statesman of brilliant gifts and vast experience; and Mr Baldwin who, although recently appointed Chancellor of the Exchequer, had little political experience and was not well known either inside or outside the House. After the King or his Private Secretary had consulted Lord Balfour (former Prime Minister) and Lord Salisbury (Lord President of the Council) and members of the government party, the King chose Baldwin both on

[29] Nicolson, *op. cit.*, pp. 382–386; *cf.* Sidney Webb, "The First Labour Government" (1961) 32 *Political Quarterly* 9.

[30] Winston S. Churchill, *Second World War*, Vol. I, pp. 523–526; K. Feiling, *The Life of Neville Chamberlain*, pp. 439–441; Earl of Halifax, *Fulness of Days*, pp. 218–220; Earl of Birkenhead, *Halifax* (1965), pp. 453–455.

[31] Wheeler-Bennett, *King George VI*, pp. 438–448.

[32] Wheeler-Bennett, *op. cit.*, p. 707.

[33] See K. Harris, *Attlee* (1982), pp. 192–254.

[34] Butler, *op. cit.*, p. 234; R. Brazier, "The Deputy Prime Minister," [1988] P.L. 76.

personal grounds and because he was in the Commons, although the latter reason was emphasised in breaking the news to Curzon.[35]

When Sir Anthony Eden, Conservative Prime Minister, resigned in 1957 because of serious ill-health, the succession lay by common consent between Mr R. A. Butler (Lord Privy Seal and Leader of the House of Commons) and Mr Harold Macmillan (Chancellor of the Exchequer). All that was publicly known was that the Queen consulted two elder statesmen of the Conservative Party—Lord Salisbury (Lord President of the Council and son of the adviser of 1923) and Sir Winston Churchill, the former Prime Minister—and selected Mr Macmillan. We now know that they both recommended Mr Macmillan, and that only one member of the Cabinet supported Mr Butler.[36] Eden was neither asked for his advice nor did he volunteer it.[37]

In 1963 (after the Peerage Act had been passed) Mr Macmillan became ill, entered hospital for an operation and announced his intention to resign. In accordance with the practice of the Conservatives at that time "soundings" were taken in the party. The result of these soundings was communicated by the Lord Chancellor to the Prime Minister, who then sent a letter of resignation to the Queen, presumably intimating that he had advice to give if requested. The Queen (who is not known to have sought any other advice) visited Mr Macmillan in hospital, and immediately afterwards sent for the Earl of Home and invited him to form an Administration.[38] A day or two later Lord Home informed the Queen that he was able to form an Administration.[39] **17–031**

In 1964 the Conservatives adopted a new method of selecting their party leader. A ballot was taken of the party in the Commons, and the candidate so selected was then presented for election at a party meeting.[40] On Sir Alec Douglas-Home's resignation (after the defeat of his party general election) this led to the election of Mr Heath. A more elaborate procedure was introduced after defeat in a general election in 1974 for filling a vacancy in the leadership, involving consultation with Conservative peers and constituency associations and holding (if necessary) three secret ballots among the party's M.P.s. The candidate elected by the latter is presented for confirmation as leader to a party meeting consisting of M.P.s, peers and parliamentary candidates. The first election by ballot resulted in the defeat of Mr Heath by Mrs Thatcher. Under the

[35] Robert Blake, *The Unknown Prime Minister* (1955), pp. 514–527; Winston S. Churchill, *Great Contemporaries*, pp. 215–220; L. S. Amery, *op. cit.* pp. 21–22; Harold Nicolson, *King George the Fifth*, pp. 375–379; *Curzon, The Last Phase*, pp. 353–355; G. M. Young, *Stanley Baldwin*, pp. 48–49; Keith Middlemas and John Barnes, *Baldwin*, Chap. 8; K. Rose, *King George V* (1983), pp. 266–273.

[36] Mackintosh *op. cit.* pp. 522–525. Lord Salisbury and Lord Kilmuir (Lord Chancellor) sounded the Cabinet Ministers. "What they wanted was a straight answer to the question: 'Who's best—Rab or Harold?' They got it": Lord Egremont, *Wyndham and Children First* (1968), pp. 158–159.

[37] Harold Macmillan, *Riding the Storm* 1956–1959 (1971), Vol. 4, Chap. 5.

[38] "What is certain is that Macmillan ... acted ... with utter determination and dispatch, making a definite recommendation of Home": Lord Butler, *The Art of the Possible* (1971) pp. 247–248. Lord Hailsham says that Macmillan in 1963 favoured him as a leader of the Conservative Party and Prime Minister. Viscount Hailsham (as he then was) did not disclaim his hereditary title until after Home had been appointed Prime Minister: *The Door Wherein I Went* (1975), Chap. 32. Controversy continues over the circumstances surrounding the invitation to Lord Home: see letter from V. Bogdanor, *Daily Telegraph*, March 10, 2001 and riposte from Lady Butler, March 2001.

[39] He forthwith renounced his peerage under the new Act, and (being a Knight of the Thistle) became known as Sir Alec Douglas-Home. He had then, of course, to fight a by-election to get into the House of Commons. See A. Howard and R. West, *op. cit.* Chap. 4.

[40] See Humphry Berkeley, *Across the Floor* (1972).

current rules, two candidates are elected by the party's M.P.s and the final choice is made by the members of the party through a postal ballot.

17–032 The leadership of the Labour Party until 1976 had never changed while the party was in office.[41] The party expressed the view in 1957 that they would not expect anyone to accept office as Prime Minister until he had been elected leader of the parliamentary party. There is much to be said for this practice, which is adopted in Australia and New Zealand.[42] In March, 1976 Mr Wilson, Labour Prime Minister, announced his intention to retire from office and to return to the back-benches when the parliamentary Labour Party had had the opportunity to elect a new leader. A ballot led to the election of Mr Callaghan, and the Queen appointed him Prime Minister. Mr Wilson in the previous December had informed the Queen of his intention, and presumably Her Majesty approved of this course.

It is probable that in future the Conservatives in office would follow the Labour practice of filling a vacancy by electing a new leader, who would then be appointed Prime Minister. In view of the Conservative Party's new system of electing a leader, it would appear that the Sovereign in practice no longer has a discretion in the choice of Prime Minister, at least when the normal two-party system is operating.[43]

### Should a Prime Minister be a peer?

17–033 The question whether it is constitutionally proper for a Prime Minister to be in the House of Lords in modern times was formerly discussed, especially in connection with the resignation of Bonar Law in 1923. No peer has been Prime Minister[44] since Lord Salisbury (1895–1902). Even in the nineteenth century Prime Ministers who were peers found it difficult to control the Commons; but as late as 1921 Cabinet colleagues seriously considered Lord Birkenhead (Lord Chancellor) as Prime Minister to succeed Lloyd George, and in 1922 they offered the position to Lord Derby.[45] Lord Halifax saw the difficulty in 1940, but neither he nor Neville Chamberlain acknowledged a convention. George VI suggested to Chamberlain that Lord Halifax's peerage could be "placed in abeyance for the time being," apparently meaning that legislation should be passed allowing Lord Halifax to speak in the House of Commons.[46] In 1957 Lords Salisbury and Kilmuir considered themselves excluded by virtue of their peerage.[47]

The weight of opinion is in favour of the view that it is undesirable and impracticable for the Prime Minister to have a seat in the Lords. The House of Commons is the centre of interest and influence; it has exclusive control over national finance and, although the office of First Lord of the Treasury is only nominally concerned with financial matters, it would be absurd for the holder of

[41] Since 1981 the Leader is elected by a process in which the members of the Parliamentary Labour Party have 30 per cent of the votes, the constituencies 30 per cent and the Trades Unions 40 per cent.

[42] E. M. McWhinney, "Constitutional Conventions" (1957) 35 Can. Bar Rev. 92, 242, 368, 369.

[43] See also R. Brazier, "Choosing a Prime Minister," [1982] P.L. 395.

[44] Apart from the Earl of Home in 1963 for a period of four days before the renunciation of his hereditary title took effect.

[45] Lord Beaverbrook, *The Decline and Fall of Lloyd George* (1963), pp. [illegible]; Wheeler-Bennett, *op. cit.* p. 381.

[46] Wheeler-Bennett, *op. cit.* p. 444.

[47] Mackintosh, *op. cit.* p. 425. *Cf.* Lord Moran, *Churchill: The Struggle for Survival* 1940–65, where Lord Salisbury is said to have suggested in 1953 that Churchill, who had had a stroke, ought to go to the Lords while remaining Prime Minister—an idea that commended itself to the Queen's Private Secretary but not to Churchill, who was [illegible]

that office to sit in the upper House: it is in the elected Second Chamber that governments are made and defeated: and the Labour Party is under-represented in the Lords, so that the real opposition to a Conservative Government is in the lower House. The question lost much of its importance after the Peerage Act 1963 allowed existing hereditary peers, and persons who later succeed to hereditary peerages, to renounce their peerages within a time limit. It might be said to have become an increasingly unrealistic issue with current attitudes to the role of hereditary peers as expressed in the House of Lords Act 1999.

**Prime Ministerial government?**[48]

Some writers say we no longer have Cabinet government as we used to know it, but that since the last war—if not before—we have had "Prime Ministerial government." Policy is not usually initiated by the Cabinet. Decisions tend to be taken either by the Prime Minister alone or by him after consulting one or two Ministers, or else by Cabinet committees or informal meetings of the Ministers concerned. To these factors may be added the unification and centralisation of an expanding Civil Service under the Prime Minister, who is the only political master of the powerful trinity consisting of the Permanent Secretary of the Treasury, the head of the Civil Service, and the Secretary to the Cabinet. 17–0

Crossman attached great importance to committees of officials or inter-departmental meetings of civil servants, which he described as "the key to the control of the civil service over the politicians."[49] Mr George Brown (later Lord George Brown), Deputy Prime Minister and Foreign Secretary, resigned over an emergency decision for a bank holiday because it seemed to him that the Prime Minister (Mr Wilson) was introducing a presidential system.[50]

In considering the relative positions of the Prime Minister and the Cabinet we have to take note of such factors as the moral authority of his office as Leader in the eyes of the public and his standing in his party; the power of the Prime Minister to appoint and reshuffle Ministers, to determine the scope of the various offices, to control the Cabinet agenda and to advise a dissolution. The Prime Minister has the advantage of knowing more than his colleagues what is going on. It is difficult to overthrow a Prime Minister, because the Cabinet must not only be united against him but agreed on his successor, and backbenchers are not likely to want to precipitate a general election in which many of them may lose their seats. On the other hand, if the Cabinet does not often initiate policy, it co-ordinates. The Cabinet "reconciles, records and authorises."[51] The Cabinet is not the only decision-making body in the central government, but all important matters must go before the Cabinet at some stage. Also, the Cabinet have greater *legal* powers than the Prime Minister.

The relative positions of the Prime Minister and the Cabinet are variable, depending on personalities, not only that of the Prime Minister but also those of 17–03

[48] Richard Crossman, *The Diaries of a Cabinet Minister*; G. W. Jones, "Prime Ministers and Cabinets" (1972) 20 Pol. Stud. 213; A. H. Brown, "Prime Ministerial Power" [1968] P.L. 28, 96; Harold Wilson, "Where the Power Lies," *Listener*, February 9, 1967. And see: Mackintosh, *op. cit.*; Gordon Walker, *op. cit.*; King, *op. cit.*; Hood Phillips, *Reform of the Constitution*, (1970) pp. 42–47, 51–54; G. Marshall, "The End of Prime Ministerial Government?" [1991] P.L.J.

[49] *The Diaries of a Cabinet Minister*, Vol. I, p. 616.

[50] George Brown, *In My Way* (1971), p. 169.

[51] Mackintosh, *op. cit.* p. 630. Mackintosh pictures the form of government as a cone with the Prime Minister at the apex. Beneath him is a widening series of rings of senior Ministers, the Cabinet, its committees, non-Cabinet Ministers and departments. The only one above the level of the civil service that has formal existence is the Cabinet, *op. cit.* p. 543.

his colleagues. A Prime Minister cannot ride roughshod over his Cabinet—even Churchill gave way on occasion, and Mrs Thatcher was finally brought down by her own Cabinet and party. Their positions may also vary in different aspects of policy and administration. The main influence of the Prime Minister tends to lie in foreign policy, defence and national security, and in emergencies, like a general strike, abdication, the Rhodesian U.D.I. and the Falkland Islands crisis. His influence fluctuates in economic policy, and he does not usually intervene in person in such matters as education and housing. Thus the Prime Minister is more powerful than any other Minister, and than most combinations of Ministers, but less powerful than the Cabinet collectively.

Mr Harold Wilson saw the role of the Prime Minister as "if not that of a managing director, as that of an executive chairman." According to Mr Wilson power still lies in the Cabinet, but as the Cabinet must keep the confidence of the House, it is the Cabinet in Parliament. The power-base lies in his party in Parliament. A similar conclusion was reached by Lord Gordon-Walker, who found "the Cabinet in Parliament" to be the central feature of the British Constitution.

Nonetheless under Mrs Thatcher and even more under Mr Blair the importance of the *full* Cabinet has declined, as is evident from a decrease in the number of meetings and their brevity.[52] More significance belongs to the deliberations of Cabinet Committees and ad hoc groups of advisers and others who have the Prime Minister's ear. Nonetheless we cannot say we have "Presidential government."[53] The American Presidential or Congress system is so different from ours that comparison is difficult. The American party system is looser, the President has a fixed term of office and he is not immediately dependent on Congress.[54]

[52] See Hennessy, *op. cit.* pp. 427 and 481.

[53] See Berkeley, *The Power of the Prime Minister*; cf. Max Beloff, "Prime Minister and President" (Hugh Gaitskell Memorial Lecture, University of Nottingham, 1966), who admits, however, that the pull of the American pattern is very strong.

[54] It is only necessary to think of the impeachment proceedings against President Clinton to realise the vast differences between American and the British systems of government.

CHAPTER 18

# CENTRAL GOVERNMENT DEPARTMENTS AND CIVIL SERVICE

## 1. CENTRAL GOVERNMENT DEPARTMENTS

### Offices of state

**18–001** The origin of the great offices of state is to be found in the royal household of the Saxon and Norman Kings. The Saxon King had his chamberlain, steward, marshal and cupbearer, and the Norman King his Lord High Steward, Lord Great Chamberlain, Constable and Marshal. In the process of time these offices became hereditary and honorary. Their public, as distinct from purely personal, services came to be performed by others who duplicated the offices and were appointed from time to time on merit and received a salary.[1] Two of the original offices survive as non-political appointments, namely, the hereditary Earl Marshal (Duke of Norfolk) in charge of styles and precedence, and the Lord Great Chamberlain.[2] Their "doubles," Master of the Horse and Lord Chamberlain (former censor of plays), and the Lord Steward of the Household (who was the "double" of the Lord High Steward who presided over the trial of peers and the Court of Claims which determined the validity of claims to perform honorary services at coronations)[3] used to be political officers. The offices of Treasurer, Comptroller and Vice-Chamberlain of the Household are still often given to members of the House of Commons who, together with the Joint Parliamentary Secretaries and the Junior Lords of the Treasury, act as Government Whips.

As the work of government grew, it became necessary for the King to employ secretaries and other officers to transact state business as distinct from the administration of the affairs of the royal household. The earliest and most important of these was the Lord Chancellor, who, as the King's chaplain, was both an educated "clerk" and the Keeper of the King's Conscience. His name is derived, says Holdsworth,[4] from "the *cancelli* or screen behind which the secretarial work of the royal household was carried on." To him was entrusted the custody of the Great Seal, under which the most important state documents were issued. For more than 400 years the use of the Privy Seal, held by the Lord Privy Seal, was a necessary prerequisite before letters patent under the Great Seal could be passed. Other secretaries were appointed in Plantagenet times, and they also held royal seals for affixing to appropriate documents. There is strictly only one office of Secretary of State, although it may be held by several persons whose

[1] Maitland, *Constitutional History*, pp. 390–394; S. B. Chrimes, *Introduction to the Administrative History of Medieval England* (1952), describes the origins and early history of the royal household; Randolph S. Churchill, *They Serve the Queen* (1953) is a popular account.

[2] This office descends in tail general, daughters, in the absence of a male heir, taking as co-heirs. Since 1779, the office has been vested in co-heirs who nominate a deputy to perform the duties of the office.

[3] Such claims are now dealt with by a Committee of Claims, the office of Lord High Steward having become merged in the Crown in the reign of Henry IV. Trials in the House of Lords were, thereafter, presided over by a peer appointed Lord High Steward, *pro hac vice*; L.W. Vernon Harcourt, *His Grace the Steward and Trial of Peers* (1907).

[4] Holdsworth, *History of English Law* (5th ed.), Vol. I, p. 37.

powers are, with certain statutory exceptions,[5] equal and interchangeable. For the purposes of holding property Secretaries of State may be constituted as separate corporations sole for example the Secretary of State for Defence under the Defence (Transfer of Functions) Act 1964 or under the general provision contained in the Ministers of the Crown Act 1975. They are appointed by the delivery of three seals, namely, the signet, a lesser seal and a small seal called the *cachet*." Since 1964, when the title was conferred on George Brown, from time to time a minister may be designated "First Secretary" to indicate the political importance attached to his role in the government. Since the June 2001 election Mr Prescott has been both Deputy Prime Minister and First Secretary of State, with his own Office as one of the ministers in the Cabinet Office.

**18–002** For the functions of finance and defence the great officers of state were the Lord High Treasurer, the Lord High Admiral, the Lord High Constable and the Earl Marshal. The first office has been in commission since the early eighteenth century, the work being carried on by the First Lord of the Treasury and the Chancellor of the Exchequer, the two most important members of the Treasury Board. Queen Elizabeth II assumed the title of Lord High Admiral in 1964 in order to perpetuate the name of an office dating back 600 years, which would otherwise have been lost on the abolition of the Lords Commissioners of the Admiralty. The Constable and the Earl Marshal issued regulations for the army. A Lord High Constable is still appointed for the coronation ceremony. The courts in which the Constable and Earl Marshal enforced military discipline disappeared soon after the Bill of Rights, giving way to the courts martial which now function under statutory authority. The only vestige is the High Court of Chivalry presided over by the Earl Marshal to try complaints of usurpation of arms. The English law of arms is a civilian jurisdiction.[7] This court was revived in 1954 after a lapse of 223 years.[8]

The Lord President of the Council is in charge of the Privy Council Office, but his departmental duties are light. He is usually a member of the Cabinet entrusted by the Prime Minister with special duties. Since the advent of the Blair Government in 1997 the office has been referred to simply as President of the Council and held with the position of Leader of the House of Commons.

**18–003** The office of Lord Privy Seal was considered important in the Middle Ages, but since the Great Seal Act 1884 the use of the Privy Seal is no longer necessary. The Lord Privy Seal has now no departmental duties. He is generally used by the Prime Minister for special duties, although he is not always in the Cabinet. The same applies to the Chancellor of the Duchy of Lancaster, whose department administers the estates of the Duchy of Lancaster, and who appoints and removes justices of the peace within the Duchy.[9] Both office holders were included in the

[5] An example is provided by the Somerset House Act 1984 which confers powers of leasing part of Somerset House on the Secretary of the State for the Environment.

[6] For an account of these seals and their use, see Anson, *Law and Custom of the Constitution*, (4th ed. Keith) Vol. II, Pt. I, pp. 182–184. See also, F. M. G. Evans, *The Principal Secretary of State* (1923); A. J. C. Simcock, "One and Many—The Office of Secretary of State," (1992) 70 Publ. Admin. 535.

[7] See G. D. Squibb Q.C., *The High Court of Chivalry*.

[8] *Manchester Corporation v. Manchester Palace of Varieties* [1955] P. 133; verbatim report, The Heraldry Society, 1955. The Earl Marshal (Duke of Norfolk) was assisted by his surrogate (Lord Goddard D.C.L.), who delivered judgment, and the officers of arms. Lord Goddard was Lord Chief Justice, but he sat as a Doctor of Civil Law, his robes including a scarlet D.C.L. (Oxon.) gown, white bow tie and bob wig. The comparable Scottish Court of the Lord Lyon has always retained—and retains—an active jurisdiction.

[9] Justices of the Peace Act 1979, s.68.

Cabinet after the re-shuffle of July 1999, the Lord Privy Seal being also Leader of the House of Lords and Minister for Women (Baroness Jay) while the Chancellor of the Duchy of Lancaster was also Minister for the Cabinet Office.

Until recent times some government departments were boards that were once committees of the Privy Council.[10] The last survival was the Board of Trade, dating from the seventeenth century. The post of President of the Board of Trade is now held by the Secretary of State for Trade and Industry. It amused Mr Heseltine to be known by his title of President of the Board of Trade, presumably to distinguish him from the increasing number of ministers known as Secretaries of State.

The Sovereign can create Ministers by virtue of the prerogative: but statutory authority is requisite in most cases, first, because it will usually be necessary for the Minister and his staff to be paid out of money voted by Parliament, and, secondly, because of the statutory restrictions on the number of Ministers who may sit in the House of Commons.

Examples of statutory creation which reflect the increasing range of governmental activities may be found in the Ministry of Agriculture and Fisheries Act 1919, the Minister of Works and Planning Act 1942, the Ministry of National Insurance Act 1944 and the two Acts establishing what is now the Department of Defence: the Ministry of Defence Act 1946 and the Defence (Transfer of Functions) Act 1964.

Statutory provisions which allow for the transfer of functions from one department to another, the dissolution of departments and the change of titles of ministers by Order in Council, without the need for specific legislation, are now to be found in the Ministers of the Crown Act 1975, which re-enacts earlier legislation. Thus, in 1955, the functions of the Ministry of Food were transferred to the newly named Ministry of Agriculture, Fisheries and Food under the predecessor of the 1975 Act. In 1983 the Departments of Trade and Industry were amalgamated. The Department of Education became the Department for Education and Employment in 1995. The Department of the Environment, itself created from Housing and Local Government, Transport, and Public Buildings and Works, became, in 1997, the Department of the Environment, Transport and the Regions. Section 5(5) of the 1975 Act expressly preserves the royal prerogative in respect to the functions of Ministers of the Crown.

### The Ministry

As has been seen in connection with a discussion of the disqualification for membership of the House of Commons,[11] the number of holders of ministerial posts is now about 100, including Cabinet Ministers, Ministers not in the Cabinet and Junior Ministers. The Ministerial and other Salaries Act 1975 provides a salary to the Chancellor of the Exchequer, the Secretaries of State and the holders of the senior ministerial posts mentioned in Schedule 1. Ministers of State are to be paid such an amount (within the statutory limits) "as the First Lord of the Treasury may determine." The same applies to the Lord President of the Council, the Lord Privy Seal, the Chancellor of the Duchy of Lancaster or the Paymaster-General "when not a member of the Cabinet." Parliamentary Secretaries are also provided with a salary. **18–004**

[10] Anson, *op. cit.* p. 160.
[11] *ante*, Chap. 9.

Part V of Schedule 1 to the Act fixes a maximum number of paid Ministers in various classes, namely: holders of the office of Secretary of State; Ministers of State; Treasury Secretaries; Junior Lords of the Treasury; Assistant Government Whips in the House of Commons; Lords in Waiting; and Parliamentary Secretaries.

## Organisation of Government Departments[12]

*Ministers*

**18–005** At the head of each political department or Ministry is the Secretary of State or Minister. The most notable exception until June 2001 was the Minister of Agriculture, Fisheries and Food. In practice, nowadays, the head of a department is a Secretary of State. Every minister is, of course, a member of the government and changes with the Ministry of the day; he may also be a member of the Cabinet.

*Parliamentary Secretaries*[13]

**18–006** Under the Secretary of State or Minister will be one or more Parliamentary Under-Secretaries of State or Parliamentary Secretaries. As their name implies, they are members of one or other of the Houses of Parliament; they are Junior Ministers[14] who change with the government of the day. They assist their chief in the parliamentary or political side of his work, as well as the administration of his department. In the past they were usually chosen from the House in which the Minister did not sit,[15] but since 1945 Junior Ministers, as well as the heads of departments, have been recruited mainly from the lower House.

### The Treasury[16]

**18–007** The Treasury is the department entrusted by the Crown and by Parliament with the supervision and control of national finance. It is regarded as the senior government department. The Treasury was an offshoot of the Exchequer, which in the twelfth century was the *Curia Regis* sitting for revenue purposes. The Upper Exchequer, which audited and managed the King's accounts, developed into the Court of Exchequer; while the Lower Exchequer, from which the Treasury emerged, was concerned with the receipt of the royal revenue. The office of Treasurer, which is described in the *Dialogus de Scaccario* (1177), has been in commission since 1714.[17]

The Treasury Board consists of the First Lord of the Treasury (nowadays invariably the Prime Minister), the Chancellor of the Exchequer (whose office dates from Henry III) and five Junior Lords. Meetings of the full Board became less frequent by the beginning of the nineteenth century, and were discontinued altogether in 1856. The Junior Lords (who act mainly as Government Whips) still

[12] T. Daintith and A. Page, *The Executive in the Constitution* (1999).

[13] These are to be distinguished from Parliamentary Private Secretaries, whose office is unofficial and unpaid: See N. Henderson, *The Private Office* (1984).

[14] Junior Ministers include the Parliamentary Secretaries, Treasury Commissioners (Government Whips) and H.M. Household.

[15] A Minister has not the right—as he has in some constitutions—to address both Houses of the Legislature.

[16] Lord Bridges, *The Treasury* (2nd ed., 1966); H. Roseveare, *The Treasury* (1969); H. Heclo and A. Wildavsky, *The Private Government of Public Money* (1973); J. Barnett, *Inside the Treasury* (1982); J. Thain and M. Wright, *The Treasury and Whitehall* (1995).

[17] Holdsworth *History of English Law* (5th ed.), Vol. I, pp. 42–44.

have certain formal functions, such as signing Treasury warrants.[18] The management of the department is in the hands of the Chancellor of the Exchequer, who is also Under-Treasurer. In addition to his traditional duties with regard to national finance, the Chancellor in recent times has acquired responsibilities relating to economic policy.[19] Under him are a number of ministers. The fact that one of these, the Chief Secretary, has a seat in the Cabinet is evidence of the pre-eminent position of the Treasury.

The Treasury is ultimately responsible for the two tax collecting departments, the Inland Revenue and Customs and Excise. Both bodies are of statutory origin and run not by ministers but Commissioners appointed by the Queen.[20] **18–008**

Until 1968 the Treasury was also responsible for the management of the Home Civil Service. In that year, however, responsibility was transferred to the newly established Civil Service Department. Since 1995 all responsibility belongs to the Minister for the Civil Service, a post held by the Prime Minister, and is exercised through the Cabinet Office.[21]

### Lord Chancellor's Department

The Lord Chancellor's Department in its modern form owes its origin to Lord Halsbury who in 1885 appointed a Permanent Secretary to the Lord Chancellor.[22] Before then the Lord Chancellor had been assisted by three Secretaries, regarded as his personal servants, to the extent that when a Chancellor resigned the Great Seal they destroyed all the files relating to his term of office! The office of Permanent Secretary has, since Lord Halsbury's reforms, been combined with the ancient office of Clerk of the Crown in Chancery.[23] **18–009**

The Department remained small and somewhat out of the mainstream of government activity, concerned largely with judicial and ecclesiastical appointments, until after the Second World War. Two developments since then have turned it into one of the larger spending departments of state: the introduction and growth of legal aid, beginning with the Legal Aid Act 1949, and the coming into effect of the Courts Act 1971 which made the department responsible for the administration of the court system.[24] other than magistrates' courts which are run by local Magistrates' Courts Committees.[25]

In addition to these new responsibilities, the role of the Lord Chancellor himself has increasingly come under scrutiny for various reasons. The procedure for judicial appointments has become the subject of criticism and the coming into effect of the Human Rights Act 1998[26] has strengthened calls for reform and

[18] Treasury Instruments (Signature) Act 1849.

[19] *Control of Public Expenditure* Cmnd. 1432, (1961). And see *Report of the Machinery of Government Committee* Cmd. 9230 (1918), pp. 18–19; S. H. Beer, *Treasury Control: The Co-Ordination of Financial and Economic Policy in Great Britain* (1956); Sir Ivor Jennings, *Cabinet Government* (3rd ed.), Chap. 7.

[20] Inland Revenue Regulation Act 1890; Customs and Excise Management Act 1979.

[21] *post*, para. 18–022.

[22] R. F. V. Heston, *Lives of the Lord Chancellors 1885–1940* (1964, Oxford); *Lives of the Lord Chancellors 1940–1970* (1987, Oxford), 31.

[23] The Clerk of the Crown in Chancery is an officer of the Supreme Court (Supreme Court Act 1981; Supreme Court (Offices) Act 1997) and has an important role in the conduct of general elections under the Representation of the People Acts.

[24] This responsibility is discharged through the Court Service, an executive agency (see *post*, para. 18–023). For judicial unease, see Nicolas Browne-Wilkinson, "The Independence of the Judiciary", [1988] P.L. 44.

[25] See, Police and Magistrates' Courts Act 1994, Part IV.

[26] *ante*, para. 2–020 and *post*, para. 22–036.

highlighted the anomalous position of a judge without security of tenure who is at the same time a Cabinet Minister and the Speaker of one of the Houses of Parliament.[27]

In 1994 a Parliamentary Secretary was appointed to represent the Department in the House of Commons. There are currently two Parliamentary Secretaries in the House of Commons and one in the House of Lords.

**Law Officers' Departments**[28]

18–010 The Law Officers are legal advisers to the Crown and the Houses of Parliament. They hold ministerial posts and therefore change with the government. The Law Officers consist of the Attorney-General[29] and Solicitor-General for England and Wales, and the Lord Advocate and Solicitor-General for Scotland.[30] Advice to the United Kingdom government on Scottish legal matters is given, following devolution, by the newly created law officer, the Advocate-General for Scotland.

The Attorney-General was so called in 1461. The Solicitor-General dates from 1515. Formerly the Law Officers were summoned to advise the House of Lords,[31] and there was some doubt whether the Attorney-General was entitled to sit in the Commons; but his attendance in the Lords is dispensed with except in peerage cases, and his right to sit in the Commons has not been seriously questioned since Bacon's time.[32] The current Attorney-General like his predecessor, is a member of the House of Lords. Neither appointment caused a stir and both cases are presumably a reflection on the calibre of lawyers in the House of Commons, at least on the government benches. The Solicitor-General also became entitled to sit in the Commons during the seventeenth century, although strictly he need not be a member.

18–011 The Attorney-General represents the Crown in civil proceedings in which it is specially concerned. His consent is necessary for the prosecution of certain offences, *e.g.* under the Official Secrets Acts. In criminal proceedings he or the Solicitor-General, or their deputies, prosecute in important cases.[33] It is the practice for the Attorney-General to lead in treason and important constitutional cases. He may intervene in a private law suit whenever it may affect the prerogatives of the Crown. He may at the invitation or with the permission of the court intervene whenever a suit raises any question of public policy on which the executive has a view which it wishes to bring to the notice of the court.[34] The Attorney-General can sue on behalf of the public to enforce public rights. He

[27] The Labour Party's enthusiasm for reform waned after its electoral victory in 1997: R. Brazier, "The Judiciary", in *Constitutional Reform* (R. Blackburn and R. Plant eds., Longman, 1999). See further, G. Dewry and D. Oliver, "Parliamentary accountability for the administration of justice," Chap. 3 in *The Law and Parliament* (D. Oliver and G. Drewry eds., Butterworths, 1998). See also D. Woodhouse, *The Office of Lord Chancellor* (Hart, 2001).

[28] J. Ll. J. Edwards, *The Law Officers of the Crown* (1964) and review by Sir Jocelyn Simon in (1965) 81 L.Q.R. 289; Sir Elwyn Jones, "Office of Attorney-General" (1969) 27 C.L.J. 43. J. Ll. J. Edwards, *The Attorney-General, Politics and the Public Interest* (1984).

[29] Under the Northern Ireland Constitution Act 1973, s.10 the Attorney-General for England and Wales is also Attorney-General for Northern Ireland.

[30] Other Officers are the Attorney-General of the Duchy of Lancaster, the Attorney-General and Solicitor-General of the County Palatine of Durham, and the Attorney-General to the Prince of Wales in respect of the Duchy of Cornwall.

[31] They still are, but they attend for ceremonial purposes only.

[32] Lord Campbell, *Lives of the Chancellors*, III. Chap. 54.

[33] *R. v. Wilkes* (1768) Wilson 322; (1678) 4 Burr. 2829.

[34] *Adams v. Adams* [1971] P. 188, 197, *per* Sir Jocelyn Simon P.

may lend his name to such an action at the instance of a private citizen—a proceedings known as a relator action. If he refuses to consent to the bringing of a relator action, his refusal cannot be questioned in the courts.[35] Owing to the increase in their ministerial work, the Law Officers appear less frequently in criminal cases nowadays. Actions may be brought against the Attorney-General under the Crown Proceedings Act 1947 if there is no appropriate department in respect of matters relating to the Crown in England, Wales and Northern Ireland only; he cannot be sued in relation to matters concerning acts of the Crown in its other dominions.[36] The Law Officers are forbidden by Treasury Minute to engage in private practice, but they receive a salary which takes some account of the loss entailed by being unable to practice. Fees which are paid when they appear in contentious business on behalf of the Crown are set-off against their salaries.

**18–012** The better opinion is that the Attorney-General should not be in the Cabinet because of his quasi-judicial functions with regard to prosecutions, and also because it is desirable to separate the giving of advice from those who decide whether to act on the advice.[37] Indeed it must be open to question in view of his unfettered discretion to refuse to initiate proceedings[38] and his power to terminate criminal proceedings[39] whether the appointment should not be non-political. The Attorney-General (and sometimes the Solicitor-General) is a member of the Legislative Committee of the Cabinet, and he is sometimes a member of (and in any case frequently attends) the Home Affairs Committee.[40] As regards the decision whether or not to institute public prosecutions, the Attorney-General acts in a quasi-judicial capacity, and does not take orders from the government that he should or should not prosecute in particular cases.[41] In political cases, such as sedition, he may seek the views of the appropriate Ministers, but he should not receive instructions. He may consider broad questions of public policy, but he should not be influenced by party political factors. Ministers may not be questioned in the House as to what advice the Law Officers have given, although they may be asked whether they have sought such advice. The fact that the Attorney-General consults informally and selectively, emphasises that both the decision whether or not to prosecute and the responsibility are his alone.[42] This makes his position anomalous in relation to the doctrine of collective ministerial responsibility.

The Solicitor-General is a subordinate of the Attorney-General, and often gives a joint opinion with him on legal matters. His duties are in general similar to those of the Attorney-General, and he usually succeeds to that post if it

[35] *Gouriet v. U.P.W.* [1978] A.C. 435 *post* para. 32–022. On the Attorney-General's right to stop a trial by entering a *nolle prosequi* see *post*, para. 20–003.

[36] *Trawnik v. Gordon Lennox* [1985] 2 All E.R. 368, C.A.

[37] Lord Silkin, a former Attorney-General, has expressed the view that it is desirable that the Attorney-General should normally be in attendance at Cabinet meetings: [1984] P.L. 179, 183. Sir Michael Havers thinks it is better that the Attorney-General attend only on the occasions when his advice is specifically required so that he will be listened to as an impartial adviser: *The Times*, December 6, 1984.

[38] *ante*, para. 18–011.

[39] *post*, para. 20–003.

[40] The Attorney-General is in the Cabinet in some Commonwealth countries, *e.g.* Australia. In other Commonwealth countries the corresponding office is not regarded as a political one.

[41] H.C. Deb., Vol. 600, col. 58 (1959). And see Lord MacDermott, *Protection from Power under English Law*, pp. 25–40; Sir Patrick Devlin, *The Criminal Prosecution in England*, p. 18; Marshall and Moodie, *Some Problems of the Constitution*, pp. 172–180; Jennings, *op. cit.* pp. 236–257. J. Ll. J. Edwards, *The Attorney-General, Politics and the Public Interest*, (1984) Chap. 11.

[42] Sir Jocelyn Simon, *loc. cit.*

becomes vacant. He may deputise for the Attorney-General if the office becomes vacant, or if the latter is absent or ill or authorises him to do so."

18–013 Until recently the Attorney-General and Solicitor-General were, in effect ministers without departments. However, following the report in 1989 by Sir Robert Andrew on government legal services, the Attorney-General acquired responsibility for a number of bodies henceforth known as the Law Officers Departments.

*The Legal Secretariat* is composed of a small group of lawyers and non-legal staff who provide the law officers with essential support and back-up services in their duty of providing legal advice and exercising the discretions vested in them.

*The Treasury Solicitor's Office*,[44] which is staffed by barristers and solicitors, is available to the departments for legal advice and conveyancing. The senior official of this department is H.M. Procurator-General and Treasury Solicitor, who in the latter capacity acts as a solicitor to government departments in litigation. He is also appointed *Queen's Proctor* in connection with proceedings for Admiralty droits and matrimonial causes. The general practice is that departments whose work is primarily the administration of detailed legal rules have their own solicitor's department, while departments whose legal problems are likely to be involved with policy rely on the Treasury Solicitor, whose position is independent of department policy. Since 1996 the Treasury Solicitor's Office has been itself an executive agency[45] while its conveyancing work is undertaken by a second executive agency, the Government Property Lawyers.

*The Crown Prosecution Service* was established by the Prosecution of Offences Act 1985. The head of the service, which has a general responsibility for initiating criminal proceedings, is the Director of Public Prosecutions.[46]

*The Serious Fraud Office* was established under the provisions of the Criminal Justice Act 1987 and is headed by a Director.[47]

### Home Office[48]

18–014 The work of the two Secretaries of State then existing was divided in 1782 into home affairs and foreign affairs. The Home Secretary collaborates with the Secretary of State for Scotland in certain matters affecting that country. He was traditionally the medium of communication between the British Government, the Channel Islands and the Isle of Man but under the reorganisation of departmental responsibilities following the election in June 2001 the relevant minister is now the Lord Chancellor.[49] Formerly, this arrangement extended to Northern Ireland.

The Home Secretary exercises the prerogative of the Queen's pleasure in many ways. He is the channel of communication between the subject and the Queen for addresses and petitions, and he authorises many of the royal commissions set up

[43] Law Officers Act 1944.
[44] G. Drewry, "The Office of Treasury Solicitor," (1980) 130 N.L.J. 753; Daintith and Page, *op. cit.*, 217, *et seq.*
[45] *post*, para. 18–023.
[46] *post*, para. 20–014.
[47] The Parliamentary Counsel Office is not one of the Law Officers Departments but forms part of the Cabinet Office: see *ante*, para. 17–014.
[48] Sir Frank Newsam, *The Home Office* (1954); Report of the Committee on the Machinery of Government Cd. 9230 (1918), pp. 63–78.
[49] See, now, *post*, Chap. 35.

from time to time to examine various matters. He is also the medium of communication between the Church of England and the Queen, its Governor.

Matters connected with the administration of justice which are not dealt with by the Lord Chancellor or the Attorney-General come within the sphere of the Home Secretary. He is ultimately responsible for the maintenance of the Queen's peace, and in this capacity he is in direct control of the Metropolitan Police and indirectly supervises the local police forces, and provides for co-operation between magistrates, the police, special constables and the armed forces. He exercises the prerogative of mercy.[50] He is also responsible for prisons[51] and other penal institutions; the treatment of offenders; the probation and aftercare services and legislation on criminal justice.

The Home Secretary administers the law relating to naturalisation, supervision of aliens, immigration, deportation and extradition.[52]

The Home Office, being the residuary department of state, is concerned with many other miscellaneous matters under various statutes, including the supervision of the fire service; civil defence; community relations; the law relating to parliamentary and local government elections; explosives; fire-arms; dangerous drugs; liquor licensing; betting and gaming; and such other internal affairs of England and Wales as are not assigned to other departments.

**Foreign and Commonwealth Office**[53]

**18–015** The Foreign Office is concerned with the formulation and conduct of foreign policy, and controls the Foreign Service. The Foreign Office combined in 1968 with the Commonwealth Office which (as the Commonwealth Relations Office) had merged with the Colonial Office in 1966. The Secretary of State maintains direct contact with the diplomatic representatives of foreign and Commonwealth states, with foreign and Commonwealth governments, and with the British diplomatic representatives overseas. He is in constant communication with the Queen, the Prime Minister and the Cabinet on all important matters relating to foreign and Commonwealth affairs. The Passport Office is a subordinate directorate. The Permanent Under-Secretary is head of the Diplomatic Service.

The Secretary of State is ultimately responsible for the government of British dependent territories.

**Privy Council Office**

**18–016** As we saw earlier, the (Lord) President of the Council is also, at present, the Leader of the House of Commons. The Lord Privy Seal is also Leader of the House of Lords.

**Scottish Office**[54]

**18–017** Scottish affairs were formerly conducted by the Home Secretary and various other departments. In 1885 a Secretary for Scotland, with a Scottish Office, was

[50] See *post*, para. 20–044.
[51] See *R. v. Home Secretary, ex p. McAvoy* [1984] 1 W.L.R. 1408.
[52] *post*, Chap. 23.
[53] Lord Strang, *The Foreign Office* (1955); Sir Charles Jeffries, *The Colonial Office* (1956); Sir George Fiddes, *The Dominions and Colonial Offices* (1926); J. A. Cross, *Whitehall and the Commonwealth* (1967).
[54] *The Thistle and the Crown: A History of the Scottish Office* (H.M.S.O. 1985). See *ante*, Chap. 5.

created by statute, and in 1926 he was made a Secretary of State. The continued existence of a Secretary of State after the implementation of the Government of Scotland Act 1998 may owe more to political expediency than to constitutional appropriateness.

**Welsh Office**[55]

18–018 A Minister for Welsh Affairs was appointed in 1951, but for some years this office was held by the Minister of another department, usually of Cabinet rank. Since 1964 there has been a Secretary of State for Wales. The continued existence of this office, too, may be questionable, although perhaps explicable in the light of the limited degree of devolution in the case of Wales.

**Northern Ireland Office**[56]

18–019 A Secretary of State for Northern Ireland was appointed in 1972 on the suspension of the then existing system of devolved government. In the ensuing years the position has been one of great responsibility both in terms of attempting to establish a constitutional settlement acceptable to all parties and, in effect, governing the Province through Statutory Instruments passed at Westminster.

**Other government departments**

18–020 The creation and transfer of functions between departments is effected by reliance on both statutory and prerogative powers.[57] The wish to keep the size of the Cabinet within bounds has encouraged the merger of ministries into large departments under the supervision of a Secretary of State.[58] The distribution of functions between departments and their titles also reflect changes in the importance of their activities, changes in the emphasis governments wish to give—or be seen to give—to particular elements in their overall programmes and, even, the need to find an appropriate role for a particular member of the governing party. The evolution of the Department of Defence was mentioned earlier.[59] The Department of the Environment was created from the former Ministries of Housing and Local Government, Public Building and Works, and Transport. In the previous government it became the Department of Environment, Transport and Regions, to reflect the importance of these issues and, no doubt, of the Deputy Prime Minister, Mr Prescott. The Department for Education and Employment was created in 1995 from two separate departments to reflect what are now seen as the obvious links between these two areas. On the other hand, the importance of Health and Social Security is reflected by their currently being entrusted to two separate departments, having formerly been the responsibility of one Secretary of State. The appointment, by Mrs Thatcher, of a Minister for the Arts, located in the Privy Council Office, led to the growth of a department for the National Heritage, under a Secretary of State who is currently styled the Secretary of State for Culture, Media and Sport. The establishment of a Department of International Development in 1997 reflected the importance attached by

[55] See *ante*, Chap. 5.
[56] *ante*, Chap. 5.
[57] *ante*, para. 18–003.
[58] *ante*, para. 18–003.
[59] *ante*, para. 18–003.

the Labour Government to what, as Overseas Development, had been the responsibility of a minister in the Foreign Office.

*Post Election Changes*

Following the election of June 2001 a number of changes were made to the departmental structure described in the preceding sections of chapters 17 and 18. The Department of Environment, Transport and Regions became the Department for Environment, Food and Rural Affairs. The Ministry of Agriculture, Fisheries and Food came to an end, after a period of sustained criticism relating to its handling of such issues as BSE and the Foot and Mouth epidemic in the months leading up to the election. A new Department was established for Transport, Local Government and the Regions. As before, the Minister for Transport, although not a member of the Cabinet, attends Cabinet meetings. The Department for Education and Employment has been renamed Education and Skills, while the Department of Social Security has become the Department for Work and Pensions. The Deputy Prime Minister and First Secretary of State now heads his own office which is located in the Cabinet Office where also are to be found the Chancellor of the Duchy of Lancaster (and Minister for the Cabinet Office) and two Ministers of State.

## II. The Civil Service[60]

**18–021** The detailed administration of the work of a government department is carried out by civil servants. Although, like Ministers, they are servants of the Crown, civil servants are called "permanent" since their appointment is non-political and in practice lasts during good behaviour, as opposed to Ministers and Parliamentary Secretaries who are responsible to Parliament and change office with the government.

The backbone of the department or Ministry is the secretariat under the Permanent Under-Secretary of State or Permanent Secretary. There used to be a hierarchy of administrative, executive and clerical classes; but following the recommendation of the Fulton Report,[61] these classes (up to and including the level of assistant secretary) were merged in one administrative group. Departments with technical functions will also require a number of inspectors, accountants, contract officers, production officers, scientific officers and others with professional or technical qualifications.

### Organisation and Management of the Civil Service

**18–022** The modern civil service owes its origins to the Northcote-Trevelyan Report of 1854 which led to the establishment of a centralised service to which entry was by competitive examination, controlled and operated by the Civil Service Commissioners. The management of the service was in the hands of the Treasury, the Permanent Secretary to the Treasury being also the Permanent Head of the Civil Service. In 1968 control was given to the newly established Civil Service Department and a Minister for the Civil Service, a position, in fact, held by the Prime Minister. The Department was abolished in 1981 and responsibility for the

[60] T. Daintith and A. Page, *The Executive in the Constitution*, Chap. 3.
[61] Cmnd. 3638, (1971).

management of the service was transferred to a Management and Personnel Office in the Cabinet Office. In 1998 the Office was merged into the Cabinet Office. The Prime Minister remains Minister for the Civil Service.

The role and structure of the present day Civil Service have been profoundly affected by two recent developments, the creation of Next Step Agencies which are discussed in the following section and, secondly, reforms to recruitment and management introduced by the Civil Service Order in Council 1995 which find detailed expression in the Civil Service Management Code. Inevitably the coming into effect of devolution will see further fundamental changes.[62]

The legal basis for the operation and control of the Civil Service is the exercise by the executive of the royal prerogative. Almost the only example of statute is to be found in the Civil Service (Management Functions) Act 1992 which provides authorisation for delegation by ministers of powers in relation to the management of the civil service to particular departments or agencies.

### Next Steps Agencies

18–023 Next Steps Agencies[63] have been described as the most significant development in the machinery of government in the last hundred years.[64] They reflect a belief that the provision of services to the public can best be carried out by agencies under the control of chief executives, leaving a greatly reduced central core of civil servants to be responsible for general issues of policy and advice to ministers. Almost three quarters of the civil service now work in agencies which deal with a range of activities whose width can be gathered from a sample of their names: from the Land Registry, the Driver and Vehicle Licensing Agency, the Passport Agency and the Patent Office to the Social Security Benefits Agency. Some, such as the Treasury Solicitor's Department are departments in their own right but the majority remain linked to the department from which they emerged.

In terms of the civil service as a unified service the development of Next Steps Agencies raises questions about the relationship between the central core of the service and the members working in agencies. How unified will the service remain? Will there be a genuine interchange between the staff of the agencies and the central core of civil servants leading to an exchange of their differing skills and experience?

The financial arrangements for next step agencies vary from one to another.[65] The proliferation of such bodies has given significance to the use of trading funds, a device introduced by the Government Trading Funds Act 1973, but initially little used. Since, however, the Government Trading Act 1990 a wide range of agencies has been financed by this method which is used where revenue is generated by the receipt of monies in respect of goods and services provided

[62] The Scotland Act 1998, s.51(2) and the Government of Wales Act 1998, s.34(2) provide that civil servants working in Scotland and Wales remain members of the Home Civil Service but difficulties will arise as questions of conflicting loyalties emerge: *ante*, Chap. 5.

[63] So called from the title of the report, *Improving Management in Government: The Next Steps*, by the Cabinet Office Efficiency Unit under Sir Robin Ibbs, published in 1988. G. Drewry, "Forwards from F.M.I.," [1988] P.L. 505, "Next Steps, The Pace Falters," [1990] P.L. 322; *Parliamentary Accountability, A Study of Parliament and Executive Agencies* (P. Giddings ed., Macmillan, 1995); D Oliver and G. Drewry, *Public Service Reforms* (Pinter, 1996).

[64] Daintith and Page, *op. cit.* p. 37. M. Freedland, "The Crown and the Changing Nature of Government" in *The Nature of the Crown* (M. Sunkin and S. Payne eds.) Chap. 5.

[65] Daintith and Page, *op. cit.* p. 134.

by an agency. The object of the system is to encourage agencies to operate as far as possible like normal commercial undertakings.

In terms of constitutional law the development of Next Steps Agencies raises two issues, the extent to which the *Carltona* principle applies to them and their impact on the convention of ministerial responsibility.[66] 18–024

In *Carltona v. Commissioners of Works*[67] the Court of Appeal recognised that ministerial powers could, in appropriate cases, be exercised on their behalf by civil servants in their department without infringing the legal principle that delegated powers cannot normally be further delegated: *delegatus non potest delegare*. Thus a decision relating to deportation may validly be taken by a senior civil servant in the Home Office, acting as the Home Secretary's *alter ego*: *R. v. Secretary of State for the Home Office, ex p. Oladehinde*.[68] The same principle was applied to the Social Services Benefits Agency in *R. v. Secretary of State for Social Services, ex p. Sherwin*[69] although Latham J. was prepared to consider that ministerial accountability to Parliament for a particular agency might be so attenuated that the *Carltona* principle could no longer apply.[70]

The impact of Next Steps Agencies on the convention of ministerial responsibility to Parliament remains to be fully worked out although it is already clear that it represents a further weakening of a fragile constitutional control. Reference was made earlier to the increasing emphasis on a distinction between ministerial responsibility and ministerial accountability.[71] The development of next step agencies has had a significant role in the growth of this terminology. Ministers are accountable to Parliament for Next Steps Agencies but not responsible for agencies "operational decisions". Where an error occurs at the level of operations as opposed to policy the minister may, for example, discharge his accountability by reporting to Parliament that he has dismissed or disciplined the head of the agency.[72] Whatever it means in practice the principle of accountability for agencies as for departments is explicitly recognised in the Ministerial Code, repeating the language of resolutions passed by the House of Commons and the House of Lords on March 19 and 20, 1997.[73]

**Who is a civil servant?**

A civil servant is one kind of Crown servant, and whether or not a person is a Crown servant depends on the facts of the case.[74] There is no formal definition of "Crown servant," although we may say that generally he is appointed by or on behalf of the Crown to perform public duties which are ascribable to the 18–025

[66] *ante*, para. 17–018; M. Freedland, "The rule against delegation and the Carltona doctrine in an agency context," [1996] P.L. 19.

[67] [1943] 2 All E.R. 560.

[68] [1991] A.C. 254.

[69] [1996] 32 B.M.L.R.I.

[70] The Civil Service (Management Functions) Act 1992 provides for delegation by ministers of powers delegated to them in respect of the management of the civil service—for example, pay and conditions of service. Hence the Act is inapplicable to the typical *Carltona* situation.

[71] *ante*, para. 17–018.

[72] Thus in 1995 Mr Howard, the Home Secretary, dismissed the Director-General of the Prison Service. In 1996 he felt able to discharge his accountability to Parliament by calling for an apology from the Director-General of the Prison Service and an assurance that similar errors would in future be avoided.

[73] 291 H.C. Debs. cols 273–293; 579 H.L. Debs. cols 1055–1062.

[74] *post*, Chap. 33

Crown: usually, but not necessarily, he is paid by the Crown out of the Consolidated Fund or out of moneys voted by Parliament. Modifications must be made for servants of the Crown in overseas territories.[75]

All civil servants are Crown servants, but not all Crown servants are civil servants, for the term is not applied to Ministers, their Parliamentary Secretaries and Parliamentary Private Secretaries, or other holders of political offices, nor to members of the armed forces. Local government officers and the employees of public corporations are not civil servants, although the nature of their work and their conditions of employment bear many similarities. A subordinate engaged by, or working under, a civil servant is himself a servant of the Crown and not of his superior.[76]

Civil servants may be established (*i.e.* entitled to statutory superannuation), non-established or temporary. Civil servants who may render the Crown liable in actions of tort by third parties are those appointed directly or indirectly by the Crown and paid wholly out of the Consolidated Fund or moneys provided by Parliament, or holding an office which would normally be so paid: Crown Proceedings Act 1947, s.2(6).[77]

### The legal status of civil servants

**18–026** Although there has been controversy about the status of the civil servant and the nature of the relationship between the Crown and civil servants,[78] the House of Lords has recently indicated very clearly its view that the employment of civil servants is governed by the royal prerogative: *Council of Civil Service Unions v. Minister for the Civil Service*[79]; *Hughes v. D.H.S.S.*[80]

At common law a civil servant was dismissible at pleasure,[81] even if he was engaged for a definite period that had not yet expired.[82] There was an implied term to this effect, resting on public policy and not on the incapacity of the Crown to bind itself.[83] In such cases no action for damages lay against a superior

[75] H. H. Marshall, "The Legal Relationship between the State and its Servants in the Commonwealth" (1966) 15 I.C.L.Q. 150.

[76] *Lane v. Cotton* (1701) 1 Ld.Raym. 646; *Bainbridge v. Postmaster-General* [1906] 1 K.B. 178; *Town Investments v. Department of the Environment* [1978] A.C. 359.

[77] *post*, Chap. 33.

[78] It has been argued that the civil servant, like the soldier, has a status and is subject to a special kind of law contained in Royal Warrants, Treasury Minutes, etc., and on the other hand that civil servants (unlike the armed forces) are not governed by prerogative; *cf.* L. Blair, "The Civil Servant—A Status Relationship?" (1958) 21 M.L.R. 265; "The Civil Servant—Political Reality and Legal Myth," [1958] P.L. 32; J. D. B. Mitchell, *The Contracts of Public Authorities*, pp. 32 *et seq.*; H. Street, *Governmental Liability*, pp. 111 *et seq.*; R. Watt, "The Crown and its Employees," in *The Nature of the Crown* (M. Sunkin and S. Payne, eds, 1999), Chap. 11.

[79] [1985] A.C. 374.

[80] [1985] A.C. 716, 782 *per* Lord Diplock.

[81] *Shenton v. Smith* [1895] A.C. 229, PC; *Gould v. Stuart* [1896] A.C. 575; *Nobrega v. Att.-Gen.* (1966) 10 W.I.R. 187; *Kodeeswaran Chelliah v. Att.-Gen. of Ceylon* [1970] A.C. 1111, PC.

[82] *De Dohse v. R.* (1886) 3 T.L.R. 114, HL; *Dunn v. The Queen* [1896] 1 Q.B. 116, CA; *Hales v. R.* (1918) 34 T.L.R. 589, CA; *Denning v. Secretary of State for India* (1920) 37 T.L.R. 138 (Bailhache J.); *Terrell v. Secretary of State for the Colonies* [1953] 2 Q.B. 482; Nettheim, "*Dunn v. The Queen* Revisited" (1975) 35 C.L.J. 255.

[83] *Inland Revenue Commission v. Hambrook* [1956] 2 Q.B. 640; *Att.-Gen. for New South Wales v. Perpetual Trustee Co. Ltd* [1955] A.C. 457, PC; *Riordan v. War Office* [1961] 1 W.L.R. 210, CA; *Denning v. Secretary of State for India* (1920) 37 T.L.R. 138; *Rodwell v. Thomas* [1944] K.B. 596; *Thomas v. Att.-Gen. of Trinidad and Tobago* [1982] A.C. 113.

Crown servant[84]; nor, apparently, did an action lie for breach of warranty of authority.[85]

Further evidence of the anomalous legal status of the civil service may be found in cases that doubt, or deny, a right to recover arrears of pay for services rendered, either during the subsistence of his employment or after his employment has been terminated. It was held in an early case that no action lay against the East India Company to recover a non-statutory pension.[86] In *Mulvenna v. Admiralty*[87] it was held that the rule that members of the forces may only claim on the bounty of the Crown and not for a contractual debt applies also to civilians as an implied condition in the terms of their contract. The latter case was followed in *Lucas v. Lucas and High Commissioner for India*,[88] where Pilcher J. held that the salary due to a civil servant was not a debt for the purpose of garnishee proceedings. The decision was much criticised, and in any case it could have been based on another ground.[89] In *Sutton v. Att.-Gen.*,[90] on the other hand, the House of Lords assumed that a civil servant's pay was recoverable, and the only question in that case was, how much was due. The question was regarded as one of the interpretation of an enlistment circular for Post Office[91] telegraphists in the first war. None of the judgments raised the question whether the pay was legally recoverable at all, and counsel for the Crown do not seem to have argued the point. Lord Goddard C.J. expressed the opinion *obiter* in *Terrell v. Secretary of State for the Colonies*[92] that a civil servant who had been dismissed could recover arrears of salary up to the time of dismissal, and in *Inland Revenue Commissioners v. Hambrook*[93] that civil servant (although perhaps not a soldier) could recover for services rendered on a *quantum meruit*. **18–027**

On the question whether at common law there subsists between the Crown and a civil servant a contractual relationship, a contract of service the terms of which are enforceable, the decisions and dicta are conflicting. In *Sutton v. Att.-Gen. (ante)* all the judgments in the Court of Appeal and the House of Lords assumed that there was a contract of employment and that the terms as regards pay were enforceable. On the other hand, Pilcher J. in *Lucas v. Lucas (ante)* based his judgment on the ground that there was no contract the terms of which could be enforced by the civil servant. Further support for the latter view is to be found in

[84] *Gidley v. Lord Palmerston* (1822) 3 Brod. & B. 275; *Worthington v. Robinson* (1897) 75 L.T. 446.

[85] *Dunn v. MacDonald* [1896] 1 Q.B. 555; see also *Kenny v. Cosgrave* [1926] I.R. 517; *Riach v. Lord Advocate*, 1932 S.C. 138; *The Prometheus* (1949) 182 LI.L.Rep. 859, CA.

[86] *Gibson v. East India Co* (1839) 5 Bing.N.C. 262.

[87] 1926 S.C. 842.

[88] [1943] P. 68.

[89] D. W. Logan, "A Civil Servant and his Pay" (1945) 61 L.Q.R. 240. *Cf.* Crown Proceedings Act 1947, s.27(1), *cf. Considine v. McInerney* [1916] 2 A.C. 162, HL; *ex gratia* pension paid to civil servant should be taken into account in fixing the amount of compensation under Workmen's Compensation Acts.

[90] (1923) 39 T.L.R. 294. Considered by the Privy Council in *Kodeeswaran Chelliah v. Att.-Gen. of Ceylon* [1970] A.C. 1111, where dicta of Lord Blackburn in *Mulvenna v. The Admiralty, ante* were strongly criticised as being a *non sequitur* from the Crown's right to terminate a contract of service at will. It was not necessary in *Dudfield v. Ministry of Works and Faithful v. Admiralty* (1964) 108 S.J. 118, to decide whether industrial civil servants could have sued their departments for arrears of pay, because there was no contractual right to receive the negotiated increases that were postponed by a "pay pause."

[91] The Post Office was at that time a government department.

[92] [1953] 2 Q.B. 482, 499.

[93] [1956] 2 Q.B. 641, 654. See further *Neuprega v. Att.-Gen.* (1966) 10 W.I.R. 187; *Kodeeswaran Chelliah v. Att. Gen. of Ceylon ante*.

the G.C.H.Q. Case where "It was common ground before your Lordships, although it was not common ground below, that there was no contractual relationship between the Crown and the staff at the G.C.H.Q."[94]

18–028 As far as third parties are concerned, a contractual relationship may be said to exist between the Crown and a civil servant. The House of Lords in *Owners of S.S. Raphael v. Brandy*,[95] where a stoker on board a merchant ship was injured in an accident, held that the retainer he was paid as a member of the Royal Naval Reserve must be taken into account as earnings under a concurrent contract of service in assessing compensation under the Workmen's Compensation Act 1906. In *Picton v. Cullen*[96] the Irish Court of Appeal held that, where a judgment debt had been entered against a school teacher employed by the Board of National Education, the court could appoint a receiver over an instalment of salary that had actually become due, although there could be no attachment of such future income.

In *Reilly v. The King*[97] the appellant had been appointed a member of a statutory board in Canada for a term of five years, but after two years the board was abolished by a Canadian statute. His office was therefore terminated, and he brought a petition of right for breach of contract. It was held that further performance of the contract had become impossible by legislation, and the contract was therefore discharged. The case is notable for Lord Atkin's dicta[98] because, although they were *obiter*, he was delivering the opinion of a strong Judicial Committee. He said that "in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment on the one hand, and duty to serve faithfully and with reasonable care and skill on the other." Lord Atkin also said: "If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine 'for cause' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded." This statement is difficult to reconcile with Lord Goddard's statement in *Terrell's* case[99] that, where the Crown has the right to dismiss at pleasure, it cannot be taken away by any contractual arrangement made by a Secretary of State or an executive officer or department of state.

The answer seems to be that statute or letters patent creating an office may prescribe a definite term with power to determine "for cause" within that period, excluding the implication of a power to dismiss at will, but no such binding arrangement can be made *ad hoc* between an officer on behalf of the Crown and a prospective Crown servant. In *Riordan v. War Office*[1] Diplock J. gave reason for saying that the Crown might be held bound by other terms in the regulations than length of service or dismissal, and that the civil servant for his part would be bound by the express terms; but this also was *obiter*.

In practice nowadays disputes relating to the employment of civil services will be dealt with by reference to the Codes referred to in the following section and to the statutory rights which, to a large extent, apply to civil servants as to other

[94] *C.C.S.U. v. Minister for the Civil Service* [1985] A.C. 374, 419, *per* Lord Roskill.
[95] [1911] A.C. 413. The Crown itself would have been expressly not liable under the Workmen's Compensation Act.
[96] [1900] 2 I.R. 612.
[97] [1934] A.C. 176, PC.
[98] *ibid.* at pp. 179–180. And see *per* Denning J. in *Robertson v. Minister of Pensions* [1949] 1 K.B. 227, 231.
[99] *Terrell v. Secretary of State for the Colonies* [1953] 2 Q.B. 482, 497–500.
[1] [1959] 1 W.L.R. 1046; [1959] 3 All E.R. 552. And see note by C. Grunfeld in (1960) 23 M.L.R. 194.

employees under the Employment Rights Act 1996 and the Public Interest Disclosure Act 1998.

**Conduct and Discipline**

18–029 The terms and conditions of employment of civil servants continue to be governed by Orders in Council made under the royal prerogative.[2]

Disputes relating to employment matters may be taken to the Civil Service Appeal Board whose decisions were held to be subject to judicial review by the Divisional Court in *R. v. Civil Service Appeal Board ex p. Bruce*.[3] That decision, however, was distinguished in *R. v. Lord Chancellor's Department ex p. Nangle*[4] where the Divisional Court held that disputes relating to the employment of civil servants, whether they should be regarded as employed under contracts of employment or not, did not raise questions of public law.

The constitutional role and importance of the civil service give rise to questions which do not normally arise in the case of other types of employees, or not to the same degree. Issues peculiar to public employment are addressed in the Civil Service Management Code and the Civil Service Code which, *inter alia*, set out the standards expected of civil servants in terms of impartiality, loyalty to the government of the day and confidentiality.

The importance of the impartiality of the civil service—so that a change of government does not, as in some countries, involve a wholesale dismissal of officials and the appointment of replacements—is emphasised in the Ministerial Code which provides for the appointment by ministers of Special Advisers to add a political dimension to the advice available to Ministers while reinforcing the politicians impartiality of the Civil Service.

18–030 The extent of the civil servant's obligation to preserve the confidentiality of information which has come to his notice in an official capacity became a controversial issue as a result of the unsuccessful prosecution of Clive Ponting in 1985 for sending departmental papers relating to the sinking of the Argentinean warship, *General Belgrano* to a member of Parliament.[5] Subsequently a memorandum was circulated by Sir Robert Armstrong, Secretary to the Cabinet and Head of the Home Civil Service. The position is currently dealt with in the Civil Service Code which provides that where a civil servant is unhappy with the propriety or legality of something which has come to his knowledge he should rely on departmental procedures for drawing the matter to the attention of superior officials and, if dissatisfied with their reaction, may refer the issue to the Civil Service Commissioners. The civil servant who does engage in what is now known as "whistleblowing" can claim the protection of the provisions of the Public Disclosure Act 1998.

That there may be circumstances in which a citizen finds himself faced with a moral imperative which is inconsistent with the law of the land was recognised judicially by Sir John Donaldson M.R. in *Francome v. Mirror Group Newspapers Ltd.*[6] But, the Master of the Rolls added, such circumstances must be "very rare." He might have added that they also require the courage to defy the law openly

[2] *e.g.* Civil Service Order in Council 1995. Statutory authority for delegation of powers of management is contained in the Civil Service (Management Functions) Act 1992.
[3] [1988] I.C.R. 649, [1988] 3 All E.R. 686. On the facts the Div. Ct. refused relief and was upheld on that refusal by C.A. [1989] I.C.R. 171, [1989] 2 All E.R. 907.
[4] [1991] I.C.R. 743; [1992] 1 All E.R. 897, DC.
[5] *R. v. Ponting* [1985] Crim. L.R. 318.
[6] [1984] 1 W.L.R. 892, 897.

and accept the consequences. The anonymous informer hardly shows the courage of his moral conviction and by his conduct may well involve others in suspicion.

In a rather different position is the unfortunate civil servant who "leaks" information with the authorisation and approval of his or her minister, as happened during the Westland affair when the Director of Information at the Department of Trade and Industry "leaked" parts of a confidential letter from the Solicitor General with the approval of Mr Brittan, then Secretary of State for Trade and Industry. In theory—and in this case, in practice—the minister is responsible for such wrong-doing and should accept responsibility by resigning. Normally the circumstances of such a leak would not come to light since the minister most closely concerned would have no interest in pursuing the matter. In this instance, however, a full inquiry was undertaken by Sir Robert Armstrong, Secretary to the Cabinet and Head of the Home Civil Service at the request of the Prime Minister. The extent to which pressure from the Attorney-General resulted in the setting-up of the inquiry is unlikely ever to be known fully.[7] Newspaper reports spoke of threats to "have the police into No. 10," if an inquiry were not established.

**Political activities of civil servants**

**18–031** In determining the extent to which civil servants shall be free to take part in political activities, the government has to effect a compromise between two conflicting principles. On the one hand it is desirable in a democratic society "for all citizens to have a voice in the affairs of the state and for as many as possible to play an active part in public life"; on the other hand "the public interest demands the maintenance of political impartiality in the Civil Service and confidence in that impartiality as an essential part of the structure of government in this country."[8]

(i) As we have seen, civil servants are disqualified by statute from sitting in the House of Commons, and by the Servants of the Crown (Parliamentary Candidature) Order 1960 a civil servant must resign his office before standing as a candidate for a parliamentary election.

(ii) With regard to other political activities, civil service regulations issued in 1953 distinguished, first, between three classes of civil servants and, secondly, between national and local politics.[9]

(a) The administrative and professional grades, and those members of the executive and clerical grades who work with them and come into contact with the public, are restricted from taking an active part in national politics. They may be permitted where possible to take part in local government, but most would probably not have time to do so.

[7] For references to the Westland affair, see, *ante*, para. 17–017. To ensure her full co-operation with the inquiry the Director of Information was offered immunity from prosecution by the Attorney-General for any criminal offences which her evidence might show her to have committed: *post*, para. 20–003.

[8] *Report of the Committee on the Political Activities of Civil Servants* (Masterman), Cmd. 7718 (1949).

[9] *Political Activities of Civil Servants* Cmd. 8783 (1953). The merger of the administrative and executive classes following the Fulton report (cmd. 3638, 1971) has not affected these regulations.

(b) The remaining members of the executive and clerical grades may be permitted to take part in national as well as local politics (except parliamentary candidature), subject to a code of "discretion" with regard to the expression of views on governmental policy and national political issues.

(c) The minor, manipulative and industrial grades are free to engage in both national and local politics (other than parliamentary candidature), except when on duty or on official premises or while wearing uniform. They remain subject, of course, to the Official Secrets Acts.

A Committee to review the rules governing the participation in political activities of Civil Servants was set up in May 1976, under the Chairmanship of Sir Arthur Armitage and reported in 1978,[10] recommending the relaxation of the rules then in force. In 1984 the Government agreed that the numbers in the most severely restricted class should be substantially reduced. All but a small part of the restricted class are now subject to the rules governing class (b).

The continued validity of these restrictions is now open to question under the Human Rights Act 1998. Restrictions on the right of freedom of expression under Article 10 may be justified in the case of public servants but the need for such restrictions must be clearly demonstrated and they must be limited to what is necessary: *Ahmed v. United Kingdom*.[11]

[10] (1978) Cmnd. 7057.
[11] (1998) 5 B.H.R.C. 111; H.R.C.D. 823.

CHAPTER 19

# THE ARMED FORCES: EMERGENCIES: THE SECURITY SERVICES AND TERRORISM

**19–001** The first duty of any state or ruler is to protect citizens from violence and threats of violence, whether in the form of external aggression or internal disorder and crime. This may lead to the executive claiming wide powers to use force and other techniques—such as espionage and surveillance—to protect itself and citizens generally. On the other hand, unless the activities of the executive are subject to effective legal and Parliamentary scrutiny they can themselves constitute a threat to individuals' basic freedoms. This dilemma unites the different sections of this chapter and, as will be seen, it exemplifies strikingly the relationship between prerogative and statute, as well as the role of the judiciary.

## 1. THE ARMED FORCES[1]

### Introduction

**19–002** In 2001 the legal situation of the armed forces reflects a mixture of prerogative and statutory powers. Before the revolution of 1688 the legal authority for raising and maintaining an army and navy was the royal prerogative. To ensure Parliamentary control over the arm the Bill of Rights 1688 provided that "the raising or keeping of a standing arm within the Kingdom in time of peace, unless it be with the consent of Parliament, is against law."

It was soon realised, however, that a standing army was necessary for the national safety. The solution was found in the Mutiny Act 1689, which authorised the keeping of an army for one year, and provided that the Act should not exempt any officer or soldier from the ordinary process of law. This force was maintained (except for short intervals) by annual Mutiny Acts down to 1879 and continued by the Army Act 1881, which formed to a large extent a military code. The Act of 1881 was annually renewed with amendments by short Army (Annual) Acts down to 1956. Meanwhile the Royal Air Force was established as a separate force by Parliament in 1917. Authority for this was renewed by Army and Air Force (Annual) Acts down to 1956.

**19–003** From 1955 Parliament, instead of passing annual Acts, gave the Army and Air Force Acts a maximum life of five years, subject to annual renewal by Order in Council. Such Orders in Council must be laid in draft before Parliament and are subject to an affirmative resolution by each House. The current legislation is to be found in the Armed Forces Act 2001.

[1] Clode, *Military Forces of the Crown* (1869); Bl.Comm. I, Chap. 13; Anson, *Law and Custom of the Constitution*, II, ii (4th ed. Keith), pp. 199–222; *Manual of Military Law, Part II, Section 1*; Maitland, *Constitutional History*, pp. 275–280.