Open access • Journal Article • DOI:10.1017/S0008197318000338

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Published on: 01 Jul 2018 - Cambridge Law Journal (Cambridge University Press)

Topics: Doctrine, Constitution and Commonwealth

Cambridge Law Journal, **77(2)**, July 2018, pp. 298–320
doi:10.1017/S0008197318000338

THE OFFICE OF THE CROWN

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ABSTRACT. *A troubling veil of mystery still shrouds the central institution of the British Constitution – the Crown. In this paper, I examine the modern utility of five historical doctrines: the doctrine of the "King's two bodies"; the doctrine that the Crown is a "corporation sole"; the doctrine that the King can "do no wrong"; the doctrine that (high) public offices are "emanations" of the Crown; and the doctrine that the Crown is "one and indivisible". Using some insights from social ontology, the history of office in the Western legal tradition, and the sociology of role and status, I argue that the first four of these doctrines can be refashioned into a conception of the Crown as an office. An office is an enduring institutional entity to which individuals bear a relationship from time to time, but which is separate from any individual incumbent and is to be considered in legal analysis as a separate acting subject. Using the logic of office, official personality and official action, I distinguish between the Queen, the Crown, Her Majesty's Government and the Commonwealth and argue that together they provide a serviceable model of the modern British Constitution. The final doctrine, however, must be abandoned – the Crown is plural and divisible and this must be taken into account when using the Crown to reason about the UK's relationship to other constitutional orders.*

KEYWORDS: *Crown, office, executive government, state theory, Commonwealth, British Empire.*

I. INTRODUCTION

The bedrock of the British Constitution is a conceptual scrapheap: the Crown is perhaps the most important of our political institutions, yet it

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remains one of the least understood.[1] The term is used to refer to the Queen in her private and her public capacity, as well as to the executive branch of government, potentially including the Queen, ministers and civil servants within the administration.[2] There is always a degree of uncertainty about who and what, exactly, the term embraces. For example, the seminal case of *Town Investments v Department for the Environment*,[3] concerned a lease signed by the Minister of Works "for and on behalf of Her Majesty". This prompted the question: "Who was the tenant of the premises?" Treasury counsel (Nicholas Browne-Wilkinson Q.C., as he then was) exhorted the House of Lords essentially to abandon hope: the Crown was an "amorphous, abstract concept", "impossible to define".[4] Lord Diplock observed that "the Crown" had long been used as a metaphor to signify when the monarch was acting in a public, rather than a private, capacity, but that it risked confusion to speak of the Crown doing things "which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself". It was more appropriate to speak of "the Government", which term embraced "all the ministers of the Crown and parliamentary secretaries under whose direction the work of government is carried on by the civil servants employed in the various government departments".[5]

Ultimately, Lord Diplock was correct to focus on the Government as an actor in its own right, but the shortcut he took – of simply speaking of the Government without defining the Crown – causes us to stumble through a cluttered landscape and, in the end, leads us in circles.[6] Only by defining "the Crown" will we understand what "the Government" *means* in our historical Constitution. Indeed, defining the Crown is perhaps more urgent than ever before. First, it is necessary to crack the old chestnuts – whether (and why) ministers and departments are liable for civil servants' wrongdoing, why government debts attach to the public *fiscus*, how the Crown relates to the "People", and how different constitutional orders relate to each other.[7] But, second, it is also necessary to address topical questions such as who contracts in the "contracting state", who exercises the non-statutory powers of the Crown, where those powers come from, and why

[1] D.E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto 2013), ix; see also H.W.R. Wade, "The Crown, Ministers and Officials: Legal Status and Liability" in M. Sunkin and S. Payne (eds.), *The Nature of the Crown* (Oxford 1999), 23.

[2] C. Saunders, "The Concept of the Crown" (2015) 38 M.U.L.R. 873, at 875.

[3] *Town Investments v Department for the Environment* [1978] A.C. 359.

[4] Ibid., at p. 376.

[5] Ibid., at p. 381.

[6] Sir William Wade notes that Lord Diplock's simple equation of the Crown with the Government cannot be right solely by reason of the Crown's historical immunities. Further, as noted by Peter Rowe, simply substituting "Crown" with "Government" is insufficient to explain the position of the armed forces: see Wade, "The Crown" and P. Rowe, "The Crown and Accountability for the Armed Forces", in Sunkin and Payne, *The Nature of the Crown*, pp. 27 and 267, respectively.

[7] See generally J. McLean, *Searching for the State in British Legal Thought* (Cambridge 2012).

judges are empowered to review them.[8] The Crown, I argue, is an *office* – an institution aptly described as a "corporation sole" that endures through generations of incumbents and, historically, lends coherence to a network of other institutions of a similar nature.

We have no shortage of conceptual material relating to the Crown, but it mainly comprises ancient doctrines with a theological cant. In this paper, I take five "dodgy doctrines" and explore whether they still have utility to describe the Crown: the doctrine that the King has "two bodies" (one "political" and one "natural"); that the Crown is a "corporation sole"; that public offices and institutions are "emanations of the Crown"; that "the King can do no wrong"; and that the Crown is "one and indivisible". These heirlooms are logically and historically difficult; they do find modern application, but they do not meet with enthusiastic support and they have not, generally, been put to good use. In *M v Home Office*,[9] for example, Lord Woolf opined that the difference between the Crown and an officer of the Crown was important "in the theory which clouds this subject", but was "in reality" "of no practical significance in judicial review proceedings".[10] With respect, it may not be theory that clouds the subject so much as a lack thereof: Lord Woolf squared the circle by saying that the Crown could "appropriately be described as a corporation aggregate or a corporation sole" without even specifying which one.[11] While some diffidence towards juridical metaphysics is healthy, it is not possible to understand the Crown without deliberately grappling not only with its history, but also its ontology. The alternative – looking at remedies and working our way backwards – has failed to deliver for centuries.

I conclude that four of these five doctrines have some utility; although they cannot be taken at face value, we can cut through the metaphysical nonsense and fuse them into a workable concept of the Crown. Beneath the mediaeval trappings, each hints at something important and most hold an ounce of good sense. Applying some insights from social ontology, I argue that the King's two bodies and the corporation sole are ways of expressing, albeit imperfectly, the idea that the Crown is an office separate from its officeholder. The concept of office can also be used to explain the nature of the ministers, Secretaries of State and civil servants who act in the Crown's name and to explain their relationship to it. This, in turn, provides a framework for the rules of attributing actions to the Crown and liability for official wrongdoing. What emerges is a clearer vision of the Queen, the Crown and Her Majesty's Government – if only we are willing to put the concept of office back into the centre of public law. The notion

[8] See M. Cohn, "Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive" (2005) 25 O.J.L.S. 97.
[9] *M. v Home Office* [1994] 1 A.C. 377.
[10] Ibid., at pp. 406–07.
[11] See Wade, "The Crown", p. 24.

that the Crown is one and indivisible, however, belongs on the scrapheap. This maxim is, in my view, entirely inconsistent with the conceptual nature of the Crown and the role it plays in various constitutional orders, and its application is currently making bad law with regards to the relationship of the UK to the Channel Islands, the UK's dependent territories and the independent states within the Commonwealth of Nations.

II. "Metaphysiological Nonsense"

In *Cross v Information Commissioner*,[12] the First Tier Tribunal had to decide whether the Duchy of Lancaster was a public authority under the Environmental Information Regulations. It was referred to the *Case of the Duchy of Lancaster*,[13] which applied the mediaeval doctrine of the King's two bodies.[14] The Duchy was hived off from the royal demesne by Edward III for his son John of Gaunt. When John's son became Henry IV, the Duchy's separation was confirmed, and Henry retained the private powers of a territorial magnate separate from the rights of the Crown.[15] Like *Town Investments*, the case concerned a lease granted by Henry VIII before his death, renewed by Edward VI, which Elizabeth I then sought to avoid on the basis that Edward VI had been a minor when he renewed the lease. For our purposes, the case confirmed that the Duchy was held by the sovereign reigning from time to time in a discrete capacity: Elizabeth I held certain rights *qua* Duke of Lancaster and others *qua* Queen, and the patrimonies remained separate even though she only held the former status in virtue of holding the latter. The case was decided on the doctrine that the King "has in him two bodies, *viz.* a body natural, and a body politic":

> His body natural (if it be considered in itself) is a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age, and to the like defects that happen to the natural bodies of other people. But his body politic is a body that cannot be seen or handled, consisting of policy and government, and constituted for the direction of the people, and the management of the public-weal, and this body is utterly void of infancy, and old age, and other natural defects and imbecilities which the body natural is subject to, and for this cause what the king does in his body politic cannot be invalidated or frustrated by any disability in his natural body.[16]

Thus, Edward's nonage caused no defect in the lease – the ideal attributes of the King's political body were held to cure acts of his natural body. This

[12] *Case No. EA/2010/0101* (First Tier Tribunal, 21 December 2010).
[13] *The Duchy of Lancaster Case* (1561) 1 Plow. 212.
[14] See E. Kantorowicz, *The King's Two Bodies* (Princeton 1997).
[15] See W. Hardy (trans.), *The Charters of the Duchy of Lancaster* (London 1845), 137.
[16] *The Duchy of Lancaster Case* (1561) 1 Plow. 212, 213.

is a dubious precedent.[17] Nonetheless, the First Tier Tribunal applied the doctrine to hold that the Duchy was "distinctly separate" from the Crown, that the Duchy's powers were "matters of private law" deriving from the relevant charters, and the Duchy was not a public authority under the relevant statutory tests.[18]

When he came to the *Duchy of Lancaster Case*, F.W. Maitland identified the doctrine as the most marvelous display of "metaphysical – or we might say metaphysiological – nonsense" in our law books.[19] Elsewhere he warned his students:

> You will certainly read that the crown does this and the crown does that. As a matter of fact we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers… the crown is a convenient cover for ignorance: it saves us from asking difficult questions… do not be content until you know who legally has the power – is it the king, is it one of his secretaries: is this power a prerogative power or is it the outcome of statute?[20]

Before Maitland, Jeremy Bentham had savaged William Blackstone for grafting the Hobbesian notion of the state as a *persona ficta* onto the doctrine of the King's two bodies.[21] Indulgence in fictions and mysteries, said Bentham, should be avoided; we should focus on powers and the people that exercise them.[22] Bentham and Maitland find echoes in Lord Diplock's speech in *Town Investments*.

The doctrine rests on a problematic organic metaphor and has strongly Christological elements. Most importantly, the early modern judges routinely failed to keep the King's bodies separate.[23] But there is something to the idea that we should distinguish between the Queen's private self and the political role she plays in the constitutional order. Despite Maitland's warning, the doctrine deserves an honest appraisal.

[17] The case concerned the capacities of the Duke of Lancaster – not the King (or Queen) at all. The question boils down to one of rules of attribution and capacity. There is nothing illogical in saying that the acts of a certain person suffering from defects of capacity such as minority, intoxication or insanity will still be attributed to the Duke of Lancaster as a legal actor. However, it is difficult to justify *why* the rules of capacity governing this institution should derogate from the general rule; for this reason, the judges invoked the mystery of the "two bodies" and then proceeded to conflate those bodies.

[18] *Case No. EA/2010/0101* (First Tier Tribunal, 21 December 2010), paras. [30]–[43]. This ruling is also dubious. The First Tier Tribunal held that the Duchy was not a "government department", despite its Chancellor traditionally being *ex officio* a member of Cabinet appointed by the prime minister; nor a "publicly owned company", despite it being a chartered corporation kept for the maintenance of the current head of state; nor a "body that carries out functions of public administration", despite it administering *bona vacantia* within the Duchy and holding palatine courts.

[19] F.W. Maitland, "The Crown as Corporation" in D. Runciman and M. Ryan (eds.), *State, Trust, and Corporation* (Cambridge 2003), 35.

[20] F.W. Maitland, *The Constitutional History of England* (Cambridge 1908), 418.

[21] W. Blackstone, *Commentaries on the Laws of England*, ed. Sharswood (Philadelphia 1893), Book I:7, 241.

[22] See McLean, *Searching for the State*, p. 4; see generally J. Bentham, *A Fragment on Government*, ed. W. Harrison (Oxford 1948).

[23] See Kantorowicz, *The King's Two Bodies*, p. 12; *Willion v Berkley* (3 Elizabeth) 1 Plowden 235a, 238; *Calvin's Case* (1608) 77 E.R. 377.

Many of our public law terms are indeed metaphors, rather than "observable features of the world".[24] But metaphors are only problematic if we forget they are metaphors. Paradoxically, speaking of "the Government" actually *obscures* the difficult questions, because a rational bureaucracy of so many human beings looks so deceptively like a self-evident fact.[25] The Government, however, is an institution with an ontology no less complex than the Crown, and we need to explain how these human beings together act as such. Nouns such as "Crown", "Government", "state", "Parliament" and "People" are all representations[26]; when we look for their referent, we must actually look *past* the human beings to find a set of social practices concerning collective action, organisation, representation and accountability.[27]

Alf Ross put the point with the characteristic starkness of the Scandinavian Realist school. If we say "Peter has signed a contract", it is clear that Peter is both the grammatical and logical subject of our sentence. What is the logical subject where "The state has signed a treaty"?[28] For Ross, "the state" is a mystical entity that should be discarded, and we should look at the rules of the legal order that creates it. The state, along with the Crown, is a denizen of social reality, and so is its Government. As Neil MacCormick so rightly observed, law and its creatures exist not on the level of brute creation, but "on the plane of institutional facts".[29] In my view, the need to construct a respectable account of the Crown forces us to develop a conceptual framework that also explains much about these other institutions.

Ultimately, I think that Lord Diplock, Maitland, and Bentham are correct, and that we should shift our focus to the Government as a corporate actor. But some conceptual back-fill is required if we are to place our concept of the Government on a sounder ontological footing. The proof of the pudding is, after all, in the eating: more than two centuries since Bentham's critique, a century since Maitland's and 40 years since Lord Diplock's, it is simply undeniable that we are no closer to answering "Who is the tenant of the premises?" straightforwardly.

To borrow Lord Diplock's words, the essential notion in the two bodies doctrine is no more and no less than this: we must distinguish between "the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity".[30] But how,

[24] See E. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton 2005), 15.
[25] That is, a Weberian ideal-type bureaucracy: see generally T. Parsons (ed.), *Max Weber: The Theory of Social and Economic Organisation* (London 1947).
[26] M. Loughlin, *The Idea of Public Law* (Oxford 2003), 157.
[27] See A. Passerin d'Entrèves, *The Notion of the State* (Oxford 1961), 19.
[28] A. Ross, "On the Concepts 'State' and 'State Organs' in Constitutional Law" (1957) 5 Scand.Stud.L. 113, at 118, 125.
[29] N. MacCormick and O. Weinberger, *An Institutional Theory of Law* (Vienna 1986), 49.
[30] *Town Investments Ltd.* [1978] A.C. 359, 381.

exactly, do we do this? Lord Simon's speech in *Town Investments* suggests a different tack: "The Crown as an object," he said, "is a piece of bejewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown." "Her Majesty", he continued, is a symbolic phrase "betokening the power, the '*mana*', which is embodied in the person entitled to wear the crown".[31] This approach begins to probe the complex ontology of institutions like Crowns and Governments.

III. Personality, Corporation and Office

The task, then, is to develop a framework within which we can speak of the individual who is Queen acting in two (or indeed more) capacities. We must be able to speak of other individuals – who we refer to as ministers, Secretaries of State and civil servants – acting in a capacity separate from their private selves, such that their actions are attributed to the political capacity of the Queen or to the Crown directly.

Distinguishing between private and public capacity in this manner requires us first to articulate a *logic of action*. This is necessary to explain how I can act separately as a private citizen, as a company director and as a police constable, for example. In all developed groups, some persons acquire the capacity to express in action the will of the group.[32] When I act as a group organ, I act in a sense "outside myself".[33] Recall, in this regard, H.L.A. Hart's example of King Rex "giving private orders to his mistress"[34] and the similar point made by Thomas Hobbes.[35] Returning to the two bodies doctrine for a moment, those things which "appertained" to the Crown and which "appertained" to the Duchy of Lancaster were held by the King "*come auter person*".[36] Thus, although the judges later fudged the line, the basic insight was sound: the King and the Duke of Lancaster are separate rights-and-duties-bearing units in the English legal system. One human being can act, for example by making declarations or promises, as several persons, and (all else being equal) we attribute her act's legal consequences accordingly.

"Personality" has come to connote the full suite of attributes we associate with adult human beings in Western modernity – self-interested rational

[31] Ibid., at pp. 397–8.
[32] W.J. Brown, "The Personality of the Corporation and the Personality of the State" (1905) 21 L.Q.R. 365, 369.
[33] M. Fortes, "Ritual and Office in Tribal Society" in M. Gluckman (ed.), *Essays on the Ritual of Social Relations* (Manchester 1962), 57.
[34] H.L.A. Hart, *The Concept of Law*, revised ed. (Oxford 1982), 68.
[35] "[F]or the King, though as a father of children, and a master of domestic servants command many things which bind those children and those servants yet he commands the people in general never but by a precedent law, and as a politic, not a natural person": T. Hobbes, *Behemoth or the Long Parliament*, ed. F. Tönnies (London1969), 51.
[36] S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge 1936), 352.

agents with freedom of choice and full responsibility for what they choose to do. This, however, developed later in the story of personality,[37] and the classical Roman meaning of *persona* was a guise, from Greek *prosopon* or theatrical mask, in which one (literally) acted. As Bartosz Brozek explains, the Romans did not equate the word *persona* with the word *homo*:

> One man could, from the legal perspective, be many persons. As it was termed: *unus homo sustinet plures personas*. It functioned thus so that *persona* identified (some) legal status of a man, independent of their other statuses. Romans could thus be one person as a Roman citizen, another as *pater familias*, yet other if they performed certain public offices . . . [F]or the law, a man – depending on the legal context – wore different "masks".[38]

Roman law never developed a concept of the true *persona ficta*, which developed later in canon law and, later still, was adopted into the common law of municipal bodies and business organisations.[39] But the salient feature is that one *homo* wore many *personae*, and that his acts *qua* this or that *persona* were treated as distinct in the law. Today, each *persona* I wear (e.g. company director, trustee, Member of Parliament) generates legal consequences that attach to that *persona* and not to any of the other *persona* I wear, including my private self. The boundaries may be ruptured, for example where I abuse an office and expose myself to criminal liability. But communication between the legal position of different *personae* happens according to rules of attribution, not logical causality *simpliciter*.

Given the influence of Romano-canon law on the development of English public law, our jurists adopted an ecclesiastical use of corporate personality – the so-called "corporation sole" – to describe the legal nature of officials.[40] Alongside the "corporation aggregate of many", the corporation sole was the incorporation of a social role or position to solve problems of property ownership and succession. (Thus Maitland quipped that we had "personified" the King.[41]) Speaking of a social role as a "corporation" is a way of expressing the idea that the role itself is an entity,

[37] Brozek explains that many of the permutations were occasioned by the need to reconcile early Christianity's belief in a divine Father, Son *and* Holy Spirit with the monotheistic self-conception it had appropriated from Judaism. See B. Brozek, "The Troublesome 'Person'" in V.A.J. Kurki and T. Pietrzykowski (eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Berlin 2017), ch. 1.

[38] Ibid., at p. 4.

[39] See J. Getzler, "Personality and Capacity: Lessons from Legal History" in T. Bonyhady (ed.), *Finn's Law* (Annandale, NSW 2016), 160, 163; M. Koessler, "The Person in Imagination or Persona Ficta of the Corporation" (1949) 9 La.L.Rev. 435.

[40] See H. Millet and P. Moraw, "Clerics in the State" in W. Reinhard (ed.), *Power Elites and State Building* (Oxford 1996), 179; D. Lee, "Private Law Models for Public Law Concepts: The Roman Law Theory of Dominium in the Monarchomach Doctrine of Popular Sovereignty" (2008) 70 Rev. Pol. 370.

[41] See Maitland, "The Crown as Corporation", p. 33, and also the chapters "The Corporation Sole" and "Moral Personality and Legal Personality'; F.W. Maitland, "Translator's Introduction" in O. von Gierke, *Political Theories of the Middle Age*, trans. F.W. Maitland (Cambridge 1911), xi.

distinct from its bearer from time to time.[42] J.B. O'Hara explains that where a corporation aggregate is lateral in time, treating many contemporaneously as one, a corporation sole is *vertical* in time. Its members are each "one of a series of single persons succeeding one another in some official position". The important feature is not that it incorporates a single person, because "it is really composed of a number of persons who, one after another, hold the same office". The emphasis is on the "series itself and the seriatim succession".[43] Likewise Frederick Pollock described corporate personality as a way of "constituting the official character of the holders for the time being of the same office … into an artificial person or ideal subject of legal capacities and duties".[44]

Joshua Getzler suggests that the corporation sole is a redundant part of our legal history that can be abandoned, as the law has "so many other tools to create right- and duty-bearing groups and entities".[45] In a similar vein, David Heaton argues that we can explain the nature of the Crown without reference to the corporation sole, by using concepts such as "trust, status, or office".[46] In my conceptual scheme, however, this is a distinction without a difference. To say that the Queen acts in an "official capacity" is to say that the office of the Queen is a separate legal personality, tantamount to a "corporation sole". It is preferable to speak of corporate personality, because in my view, it is all too easy to think about directorship or trusteeship merely as a role assumed by a human being from time to time. This understates the *independence* and *endurance* of the office as an entity in its own right, for example through changes of incumbent or even periods of vacancy.[47]

The constellation of Elizabeth Windsor, the Queen, the Duke of Lancaster and the Crown offers an illustration. In the scheme I have presented, "Queen" is itself an office filled by an ordinary human being. The Crown and the Duke of Lancaster are "stacked" on the office of the Queen; Elizabeth acts distinctly *qua* the Queen, and the Queen acts distinctly *qua* Duke of Lancaster and *qua* Crown.[48] (In our legal system,

[42] Maitland thought that the idea of a corporation sole was an oxymoron and preferred to see the Crown as a corporation aggregate embracing the Government and the whole political community. Maitland, however, was perhaps too influenced by the German organic theory of corporations – on the nominalistic view I have presented, there is nothing incoherent about a corporation of one.

[43] J.B. O'Hara, "The Modern Corporation Sole" (1989) 93 Dick.L.Rev. 23, at 25.

[44] F. Pollock, *Principles of Contract at Law and in Equity*, 6th ed. (London 1881), 107.

[45] Getzler, "Personality and Capacity", pp. 169–70.

[46] D.O.F. Heaton, 'The Power of Government to Make Contracts', MPhil thesis, University of Oxford, 2015, 112.

[47] "The office] begins to exist when one has the institution of a permanent *officium* of which the ambassador, provided with a general mandate, is the titulary during his assignment; and when the existence of such an *officium* is not diminished if it should be temporarily deprived of a titulary, such as when a vacancy creates the necessity of nominating a successor": P. Selmi in D.E. Queller (ed.), *The Office of Ambassador in the Middle Ages* (Princeton 1961), 76.

[48] The Queen is *ex officio* Duchess of Lancaster – should Elizabeth II cease to be Queen, she would cease to be Duchess, too.

Elizabeth's private capacity is almost totally eclipsed by the multiple offices she occupies.[49] This is evident in the fact that the Duke of Lancaster is a Duke, regardless of the gender of the reigning monarch.) Similar logic is necessary to explain a personal union of Crowns, and, as I explain below, the British Crown's life in various constitutional orders.

If we combine the sound elements of the two bodies doctrine with the sound elements of the corporation sole, we arrive at a concept of *office*. This conclusion is also drawn by anthropologist Meyer Fortes. According to Fortes, office is a general feature of constituted political leadership, essential to the management of the social relations of persons and groups, and is present in all social systems. Comparing kingship in Western Europe and West Africa, Fortes observes:

> A jurist, I would take it, would say that office is none other than the corporation sole in another guise … [I]n connection with issues that are closely parallel to the conflicts of status illustrated by Ashanti chiefship, [Pollock and Maitland] discuss the difficulties of sixteenth-century lawyers over the king's status. Was he to be regarded as "merely a natural person" or also as an "ideal person", a "corporation sole"? They conclude that the "personification of the kingly office in the guise of a corporation sole" was, in the then state of the law, almost a "necessary expedient". And they refer back to a much earlier state of affairs when there was no clear-cut distinction between the king's proprietary rights as king and those he had in a private capacity.[50]

Our task is to work with the concepts and terminology we have inherited and to use them to craft the most rigorous possible explanation of organisation and leadership in our constitutional tradition. The common law is a chop shop, not a design studio. We should neither take received legal institutions at face value nor shrink from hacking off their useless appendages.[51]

IV. Office in the System of Public Law

The term *officium* is a contraction of *opificium*, "the doing of a work", connoting duty and service attached to a role. During the middle ages, *officium* became the preferred signifier of organisational status as hierocratic theory was used to explain the increasing institutionalisation of political power.

[49] For the ability to act in a corporate capacity, the official "has to forego something of his own liberty of action": Brown, "The Personality of the Corporation", p. 369. For e.g. a company director is unable to undertake certain actions in his own right because of the status, namely he is either prohibited from doing so or is deemed to act *qua* director when attempting to take advantage, say, of a corporate opportunity in his own right. See also *Charles Duke of Brunswick v the King of Hanover* (1844) 6 Beav. 2 725, stating that the King of Hanover acted separately *qua* King of Hanover and *qua* subject of the Queen of the UK.

[50] Fortes, "Ritual and Office", pp. 60–61, citing F. Pollock and F.W. Maitland, *History of the Laws of England Before Edward I, Volume I* (Cambridge 1923), 495, 502–03.

[51] In this I emulate the method of F.W. Maitland, as explained by Joshua Getzler – attempting to master inherited legal concepts by studying their genealogy, to gain some hermeneutic or internal knowledge of archaic legal concepts, and to refashion the institutions, doctrines, and principles we have received to "fit" with the rest of our contemporary legal universe. See Getzler, "Personality and Capacity", p. 154.

Transmitted through the ecclesiastical use of Roman legal institutions, office was used to express the growing separation between the personal attributes of a leader and his organisational function. Originally interchangeable with *dignitas* and *ministerium*, *officium* came to express the nature and powers of those charged with a special role in the institutional life of the group – up to and including the King.[52]

In Fortes's account, office is characterised by six features. First, office and officeholder are seen as distinct; second, offices are perpetual and entail succession (an unoccupied office presents a potentially dangerous rupture in the institutional order); third, offices have outward, visible regalia and insignia, which objectify their powers and their perpetuity; fourth, officeholders must conform to certain modes of behaviour connected with the office; fifthly, offices have a mandate from society, through its other organs and institutions, giving each office a moral and jural sanction to exercise its stipulated function; finally, offices are conferred on individuals by means of ritual, usually involving talismanic objects and symbols.[53] All of these are displayed paradigmatically in the office of the Crown.

We have not, however, developed a modern office-based account of the Crown and its agents because the concept of office has been in retreat since the mid-nineteenth century. Traditionally, offices were regarded as a form of incorporeal property akin to rights of way, advowsons, franchises, dignities, annuities and so forth.[54] Relatively strong, centralised royal power and relative political stability, had allowed a system of local offices to subsist in England well into the early modern period, avoiding the strong feudalism that led to the development (and theorisation) of centralised bureaucratic states in Europe.[55] These offices, however, impeded necessary reform of the English civil service. Sir Norman Chester explains that from 1780 to 1870 the preponderance of ancient offices was suppressed, and most civil servants were moved from an "office" to an "employment" basis.[56] Rather than building on traditional legal controls over officials, therefore – for example by characterising offices as property encumbered by a "public trust" – office was cast off entirely and the new public service was erected on a model of salaried employment and managerial control.[57]

[52] See M. Loughlin, *Foundations of Public Law* (Oxford 2010), 26; P.D. Finn, *Fiduciary Obligations* (Sydney 1977), 8.

[53] Fortes, "Ritual and Office", pp. 58–59; see also B. Schnepel, "Corporations, Personhood, and Ritual in Tribal Society: Three Interconnected Topics in the Anthropology of Meyer Fortes" (1990) 21 Journal of the Anthropological Society of Oxford 1, at 8.

[54] See W. Blackstone, *Commentaries on the Laws of England* (London 1825), Book II:3, 36.

[55] See M. Loughlin, "The State, the Crown, and the Law" in Sunkin and Payne, *The Nature of the Crown*, p. 44.

[56] This entailed restrictions on the performance of official functions by deputy, prohibitions on buying and selling offices and using them for political bribes, abolition of the inheritance of offices in reversion, removal of the "banking" function (whereby officials were entitled to draw on official receipts and retain interest), and replacement of fee income by salaries. See N. Chester, *The English Administrative System 1780–1870* (Oxford 1981), 122, 131.

[57] Ibid., at pp. 12–24; see also P.D. Finn, *Government and Law in Colonial Australia* (Oxford 1987), 15–25.

These reforms were necessary, but employment simply cannot replace office. Despite the reforms to the *content* of public offices, many modern civil servants are still "officials" at a conceptual level.[58] In a seminal anthology on the nature of the Crown, Robert Watt opines that civil servants are employees of the Government, and he claims that "when looked at through the eyes of an employment lawyer", "there seems to be nothing to distinguish [the Crown] from any other large employer" save that some of its employees undertake special functions. Nevertheless, Watt argues that police officers and judges should be seen as a "secular clergy" in light of their special delegation of power from the political community to act for the public good in the absence of an employment contract. Although Watt does not deign even to mention the term "office" in making his extraordinary argument,[59] his analogy is instructive of the continued need for office - even in a civil service built on the employment model.

Office, as I have defined it, explains the special role that an individual assumes within a broader social institution, be it ecclesiastical, eleemosynary or secular. This role enables her to perform actions she could not perform in her own right, exists as an enduring entity distinct from the occupant and serves interests broader than the occupant's own.[60] Floyd Mechem explains:

> The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; – that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit.[61]

It is difficult to determine whether a given civil servant is an official or a "mere" employee,[62] but denying the existence of office as a category does not assist us. Whether an office is considered as "property" is irrelevant to this question, as are the mechanisms of appointment, remuneration and accountability. It is not constitutive of "office" that it be considered, in a given legal system, as an object of property rights, nor that selection be otherwise than meritocratic, nor that it be supported by fees instead of a salary. The permanence and independence of office explains why the early modern law treated offices as property, but being a species of property is

[58] See B. Selway, "Of Kings and Officers – the Judicial Development of Public Law" (2005) 33 Fed.L. Rev. 1, at 27.
[59] See R. Watt, "The Crown and Its Employees" in Sunkin and Payne, *The Nature of the Crown*, pp. 310, 313–14.
[60] See e.g. P.D. Finn, *Fiduciary Obligations*, p. 8.
[61] F.R. Mechem, *A Treatise on the Law of Public Offices and Officers* (Chicago 1890), I, §4, 5.
[62] See also D. Lee, "'Office Is a Thing Borrowed': Jean Bodin on Offices and Seigneurial Government" (2013) 41 Pol.Theory 409, at 419–20.

a contingent property of early modern English offices rather than constitutive property of office itself.[63]

Moreover, the Crown *itself* still needs a conceptual explanation, which only office can provide. Even assuming that *all* civil servants be "employees", who is their employer? We have come, full circle, to a variant of the old chestnut in *Town Investments*.[64] Formally, the employer is the Crown, acting through one of its ministers. Even if we say that the employer is the minister, it is obviously the minister in her ministerial, rather than personal, capacity. Thus, to the extent that the employment paradigm displaces office in the lower echelons of the civil service, it bolsters the importance of office to explain the Crown and its ministers and Secretaries of State. Finally, we need some framework to express the connection between the civil servant, his legal employer and the public, which the employment paradigm cannot do on its own.[65]

It is thus impossible to understand our modern Constitution properly without attempting to understand its historical evolution. As Conal Condren explains, office was a presupposition of early modern political and legal theory.[66] Our modern notions of the administrative state are disjointed to the extent that they exclude it. Early modern attempts to understand office were more sophisticated than we give them credit, and merit modern attention. Blackstone, for example, described incorporeal hereditaments as things "issuing out of a thing corporate" which, not being the thing itself, were "collateral thereto", such as a rent issuing out of lands or an office relating to certain jewels:

> In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses.[67]

In the more modern idiom of John Searle's social ontology, "institutional facts" are created when we represent a brute thing as "counting as" an institutional thing. This is a plausible explanation for something that is everywhere observable in the law, as well as in other conventional systems such as religion. When a community counts a wall as a "boundary", for

[63] See e.g. C. Essert, "The Office of Ownership" (2013) 63 U.T.L.J. 418, describing the flip-side of the medallion.

[64] See e.g. Watt, "The Crown", p. 293; M. Freedland, "Contracting the Employment of Civil Servants – a Transparent Exercise" [1995] P.L. 224, at 230.

[65] See e.g. *Henly v The Mayor of Lyme* (1828) 130 E.R. 995, 1001, per Best C.J.; P.D. Finn, "The Forgotten 'Trust': The People and the State" in M. Cope (ed.), *Equity Issues and Trends* (Annandale, NSW 1995); P.D. Finn, "A Sovereign People, a Public Trust" in P.D. Finn (ed.), *Essays on Law and Government*, vol. 1 (Sydney 1995).

[66] See C. Condren, *Argument and Authority in Early Modern England* (Cambridge 2006), 6, 25ff.

[67] Blackstone, *Commentaries on the Laws of England*, *Book Reviews* II:3, p. 20.

example, the wall starts doing new things – not just blocking intruders physically, but emanating "deontic powers" such as rights, duties, prohibitions and permissions. These phenomena give members of the relevant community desire-independent reasons for action.[68] Consider the *cippi* stones of classical Rome's *pomerium*. They originally marked the extent of defensive walls, but by classical times had become visual markers only. Nonetheless, the *pomerium* emanated important deontic powers – demarcating public from private land, marking where a general lost his *imperium*, where a Magistrate might impose the death penalty, and where Citizens were allowed to bear arms.[69] The ontology of the *pomerium* would be better explained by one of Blackstone's crusty logicians than by many a contemporary legal theorist.

Something similar happens when someone counts as a "member" or a "president", whether of a chess club or a nation-state. It is because President Trump is President, not because he is Trump, that he wields the power, say, to issue executive orders.[70] Searle explains the logico-linguistic operation involved as a declarative speech-act to the effect that "X counts as Y in context C".[71] A woman counts as "Queen" where a community of people recognise the existence of that institution, where they think that she is the person designated by the rules of succession, and where has sworn her oath of office.[72] As a result, Elizabeth can act in the capacity as Queen, and when doing so holds many powers, rights, privileges, permissions – and also duties – that she did not hold as Elizabeth. The Queen (distinct from either Elizabeth or the Crown) also serves in other capacities, such as the Duke of Lancaster, the Queen of Australia and many others.[73] In *R. (Vijayatunga) v Judicial Committee of the Privy Council*,[74] for example, an application for *certiorari* was made (in the name of the

[68] See J. Searle, *The Construction of Social Reality* (New York 1995), 96; G. Fletcher, "Law" in B. Smith (ed.), *John Searle* (Cambridge 2003), 86.

[69] See S.B. Platner, *A Topographical Dictionary of Ancient Rome*, ed. T. Ashby (Oxford 1929), "*pomerium*". Plutarch explains in *Vitae Parallellae* that Remus struck Romulus dead when the latter leapt across the trench, which Remus was digging where his city's wall was to run. Detlef von Daniels observes that, by leaping across the wall, Romulus treated it as a mere wall as not as a sign of a norm, and that this provoked Remus's deadly retaliation: D. von Daniels, "Sources and Normativity of International Law: A Post-foundational Perspective" in J. d'Aspremont and S. Besson (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford 2017), ch. 35.

[70] See S. Shapiro, *Legality* (Cambridge, MA 2011), 75.

[71] In this potted summary I have discussed only John Searle's account, neglecting others such as Tony Lawson's, and I have omitted various complications and disagreements among social ontologists, for reasons of brevity.

[72] Sir Edward Coke held in *Calvin's Case* (1609) 7(5) Co. Rep. 1a, 10, that coronation was only a solemnisation of the royal descent but not part of the "<*Title*>". This principle, concerning the content of the Searleian "C term", was based on a case concerning whether plotters against James I could have committed treason before the coronation had occurred. It I hold generally, or else we would do away with all need for formality. On the other hand, the requirement for a monarch (or other official) to swear an oath of office would appear to be more substantive.

[73] We can use this scheme to model the way that offices iterate, as well. We have said that X (Elizabeth) counts as Y (Queen) in the context C, and that the Queen is *ex officio* the Duke of Lancaster. So we can say that Y_1 (Queen) serves as X_2 in the status function declaration that creates Y_2 (Duke of Lancaster).

[74] *R. (Vijayatunga) v Judicial Committee of the Privy Council* [1988] Q.B. 322.

Crown) against the Visitor of the University of London – which happened to be Her Majesty the Queen in Council. The Court of Appeal managed to find a way through the conceptual difficulties, but more straightforward and logical solutions to such problems would be provided by a logic of official personality and official action.

V. The Queen, the Crown and Her Majesty's Government

Three doctrines remain – that public offices are "emanations of the Crown", that the Crown is "one and indivisible" and that "the King can do no wrong". As Bradley Selway explains, the common law adapted its old stock of remedies to control the new bureaucratic apparatus, but the response was unfocussed and incomplete. Instead of developing a coherent notion of the emerging administrative state and its relation to the historical Crown, nineteenth-century judges built a mess of hokey decisions around these maxims. Today we still have to ask: Is the Crown a corporation sole or aggregate? Does the Crown represent only one office in the Government, or the whole Government or indeed the entire state? How are acts by individuals attributed to the Crown, and when is the Crown liable for wrongs done by officials? These questions compound in difficulty. To answer them, it is necessary to distinguish clearly between the Queen, the Crown and Her Majesty's Government, to reason through the relationship of the Crown to its officers and its liability for their wrongdoing, and to think carefully about what the Crown does and does not represent for our political community.

Legislative reform was not guided by a more coherent logic of office, either. For example, the Pensions (Colonial Service) Act 18 87s. 8 declared that the terms "permanent civil service of the State", "permanent civil service of Her Majesty", and "permanent civil service of the Crown" were to have the same meaning. The judges, for their part, conflated the Queen with the Crown, eclipsed all important offices behind the Crown (under the doctrine of "emanation"), and extended the personal immunities enjoyed by a feudal sovereign to the whole of the modern administration emerging before them.[75] In other, more enlightened cases, the desire to avoid extending

[75] See Selway, "Of Kings and Officers", pp. 22, 31, 50. For example, *Viscount Canterbury v Attorney General* (1843) 41 E.R. 648 held that the Crown could not be liable in tort for the wrongful acts of its officers (on the basis of the then-applicable rules of vicarious liability – see P.W. Hogg and P.J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto 2000), 6); however, the case treated the monarch not as an abstraction personifying the whole of government but as a person with special powers and immunities. *Tobin v The Queen* (1864) 143 All E.R. 1148, on the other hand, held that "that which the sovereign does by command to his servants, cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command". Perhaps most egregiously, *Feather v The Queen* (1865) 122 All E.R. 1191 held that "the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign". See Getzler, "Personality and Capacity", p. 172.

sovereign immunities caused judges to pass on opportunities to develop the nature of office and the relationship between the Crown and its officials.[76]

Traditionally, the special status of the Crown as an ideal entity was reconciled with the rule of law by insisting on the personal liability of officials acting *ultra vires.*[77] As the Crown could do no wrong, it could not authorise wrongdoing, either; ergo the wrong must attach to the official *qua* individual, not *qua* official. As Lord Woolf observed, as long as the plaintiff sued the "actual wrongdoer" personally, he was unable to "hide behind the immunity of the Crown".[78] However, this was not always possible, and in practical terms depended on the Government indemnifying the unhappy official. Conceptually, it led to a conundrum in which official acts, as soon as they appeared unlawful, ceased to be official acts[79] – what Getzler calls a "special kind of *damnum sine injuria*".[80]

What way out of this mess? The administrative state is a "network of offices",[81] and it seems most sensible to characterise this network as a corporation aggregate of so many corporations sole – including the Crown, but also the Queen, ministers, Secretaries of State, and other officials which derive their powers formally (if not always historically[82]) from the Crown.[83] There is no harm in calling this apparatus "Her Majesty's Government", but we do need to be careful that genuflection to historical form does not distort contemporary substance. To think our way out of the inherited confusion, we need to take seriously the corporate nature of the Crown and Her Majesty's Government, and the logic of action inherent in corporate personality.

Legal institutions can only act through human beings – an office without an officeholder is inert. In *Meridian Global Funds Management Asia Ltd. v Securities Commission*,[84] Lord Hoffmann observed that any proposition about a corporation necessarily refers to a set of *rules*. These rules provide

[76] See e.g. *Gilbert v Corporation of Trinity House* (1886) 17 Q.B. 795; *International Railway Company v Niagara Parks Commission* [1941] A.C. 328; *Farnell v Bowman* (1887) 12 A.C. 643.

[77] See Loughlin, "The State", p. 72.

[78] *M. v Home Office* [1994] 1 A.C. 377, 409.

[79] See *Harper v Secretary of State for the Home Department* (*The Times*, 18 December 1954) (Sir Raymond Evershed M.R.), cited in *Merricks v Heathcote-Amory* [1955] Ch 567, 574.

[80] Getzler, "Personality and Capacity", p. 172.

[81] See Selway, "Of Kings and Officers", p. 6; M.J. Braddick, *State Formation in Early Modern England c 1550–1700* (Cambridge 2000), 11, 45.

[82] See Maitland, *The Constitutional History of England*, pp. 39–54.

[83] Lord Morris suggested that ministers, etc., be seen as corporations sole in *Town Investments Ltd.* [1978] A.C. 359, 395. In *Kinloch v Secretary of State for India in Council* (1882) 7 A.C. 619 the Secretary of State was called expressly "a body corporate, or something in the nature of a body corporate", and "not the individual who now happens to fill that office [but] the officer bearing that description" for the purposes of contracting, suing and being sued – but, oddly, not for the purposes of holding property. A fascinating exploration of this question from the late Austrian monarchy, not yet available in English, is E. Bernatzik, *Kritische Studien über den Begriff der juristischen Person und über die juristische Persönlichkeit der Behörden insbesondere* (Berlin 1996 [1890]) (translation: *Critical Studies on the Concept of the Juristic Person and on the Juristic Personality of Public Authorities in Particular*).

[84] *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 3 All E.R. 918 (J.C.P.C.).

that a *persona ficta* shall be deemed to exist and to have certain powers, rights and duties, but also what acts are to count as acts of the corporation. This is as true of a political corporation, such as the Crown, as it is of a private business organisation.[85] There is no "*Ding an sich*", so "[t]o say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the [corporation]."[86]

The powers of a minister are formally derived from the Crown, and they are exercised in its name. We can say "emanation" if we must, but we should not take this to mean that the minister is *actually part of* the Crown. Her Majesty's Government is a complex corporate entity with many parts. Rules of attribution provide that any valid act by a minister shall count as an act of the Crown. But there need not be a relation of identity between the entities, nor perfect symmetry between rules of attribution and liability that operate between them. Again, these questions seem clearer in the mundane light of private law:

> [T]he fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.[87]

Because the Crown acts (and acts only) through its officers (including in rare cases the Queen), wrongdoing under colour of office should attach to the relevant official – either in his personal or official capacity. Perhaps we have reached a stage where it would be better to say that acts of the Crown count as acts of (Her Majesty's) Government, and accord the Crown a place in public constitutional theory commensurate with its actual function. In any case, governmental immunity has been abolished, or at least seriously diminished, for some time,[88] and questions of sovereign immunity can be reserved for those cases *actually* involving the Queen.[89] The matter is truly simplified by recognising the Queen as distinct from the Crown, and recognising each of "Her Majesty's" ministers and Secretaries of State as a corporation, an acting subject separate from the Crown, within Her Majesty's Government.

[85] In fact, the notion that corporations are "private" entities is a modern one, anachronistic to most of the historical cases in which the jurisprudence of corporations law evolved.

[86] *Meridian Global Funds Management Asia Ltd.* [1995] 2 A.C. 500, 506–07 (J.C.P.C.).

[87] Ibid., p. 512.

[88] In the colonial Australian legislation, Finn explains that the question of personal *versus* official liability of government officials turned, mirroring the private law of vicarious liability, on whether the tortious act was authorised by (superior officers within) the Government, done on the Government's behalf, and subject to the Government's control: see Finn, *Law and Government in Colonial Australia*, pp. 141, 152. Again, these are the right questions to ask, but they all assume definitions of Crown and Government and a concept of office.

[89] See Wade, "The Crown", p. 28.

Paul Finn has described parallel developments in Australia, where nineteenth-century colonial legislation enabled claims against the Government as of right, using the device of a nominal defendant to hold the relevant colonial government to account in a corporate capacity.[90] Maitland approved – it was a "wholesome sight to see 'the Crown' sued and answering for its torts".[91] But in Australia, too, legislatures shrank from naming the Crown expressly, instead (pre-empting Lord Diplock) using various formulations incorporating "the Government", and the judges, for their part, construed the statutes "under the shadow of the Crown prerogative".[92] In other words, while the legislation demanded a conceptual effort to theorise the new landscape – in which officers of the Crown were stripped of their historical immunities and Her Majesty's Government entered the "liability calculus" as a player in its own right[93] – these efforts did not eventuate.[94] Nor did they eventuate in the UK following the passage of the Crown Proceedings Act 1947; cases like *Town Investments* and *M. v Home Office* show that "contradictions and loose ends" subsist.[95] Thus, although it is tempting to heed Lord Diplock's advice and simply substitute "the Crown" for "the Government", this manoeuvre actually denies the republican direction of travel in the Constitution.

VI. The Crown and the Commonwealth

The idea that officers of Her Majesty's Government might be held to account in a corporate capacity – and that compensation might be paid from the public purse – leads to some final reflections on the Crown and the abstract concept of the state. Even when defined as one component in a more complex entity called Her Majesty's Government, "the Crown" implies something more than just the political capacity of the monarch. Thus Maitland argued that the Crown, as a corporation aggregate, embraced the whole political community and gave expression to the English concept of a *res publica*.[96] But the suitability of the Crown as a stand-in for a British *Staatsbegriff* is contentious. Martin Loughlin, for example, argues that the attempt to shoehorn the state within the Crown has compromised both concepts.[97] True, the Crown frames the concept of the state, as the unity of a

[90] See Finn, *Law and Government in Colonial Australia*, pp. 141–55.
[91] Maitland, "The Crown as Corporation", p. 142.
[92] Finn, *Law and Government in Colonial Australia*, pp. 145, 148.
[93] Ibid., at p. 153.
[94] See e.g. *Williams v Commonwealth* (2012) 248 C.L.R. 156; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 318 A.L.R. 1 on the legal personality of the Crown in Australia.
[95] Wade, "The Crown", p. 24. The situation, Sir William argued, is even more dire in Scotland where *McDonald v Secretary of State for Scotland* 1994 S.C. 234 interpreted the act as prohibiting certain injunctive relief against Crown officers. On the Scots position see also A. Tomkins, "Crown Privileges" in Sunkin and Payne, *The Nature of the Crown*, p. 174.
[96] See Maitland, "The Crown as Corporation", p. 38.
[97] See Loughlin, "The State".

political community centres on symbols and institutions such as the Crown. It is proper to recognise these symbols and their history in narrating the myths of an imagined community such as a nation-state.[98] But, in my view, it is best to keep the Crown, which is still uncomfortably close to the Queen, distinct from the Commonwealth. The Commonwealth – embracing the organised political community and all its institutions of government – is too large to fit within the Crown. It is preferable to see the Crown as part of Her Majesty's Government, then to reason about the relationship of an executive government to its political community directly, and only then to draw conclusions about the relationship of the Crown to the Commonwealth.

This requires some adjustments to traditional doctrine. Often, the British Constitution appears more clearly from afar than from within these islands. The Crown plays a role in several *res publicae.* The Queen of the UK is, *ex officio*, Queen of Australia and of several other commonwealths. These commonwealths are independent nations, but, unlike in a personal union where one individual just happens to hold the office of a feudal sovereign in two unrelated legal orders, the British Crown binds the UK and these nations into some kind of whole. Further, the UK still has a number of dependent territories (formerly "Crown colonies") bound to it by the Crown, and the Queen of the UK is head of the Commonwealth of Nations, which contains numerous independent states including republics. Already it should be apparent that the Crown serves an important organising role here, but that identifying the Queen with the Crown and speaking of the Crown as "one and indivisible" might lead to confusion.

Our reigning monarch, Queen Elizabeth II, swore in her coronation oath to "govern the peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand and the Union of South Africa, Pakistan and Ceylon, and of [Her] Possessions and other Territories to any of them belonging or pertaining, according to their respective laws and customs".[99] One might be forgiven for thinking that she made this oath to the people of Australia (for example) and to the people of the UK "*come auter person*". But, sadly, recent House of Lords and Supreme Court jurisprudence has pulled us in exactly the opposite direction. The recent case of *R. (Barclay) v Secretary of State for Justice (No. 1)*[100] illustrates the currency of these issues and the lack of clarity that subsists. The Supreme Court assumed jurisdiction to review legislation from the Channel Islands, although the Bailiwicks of Jersey and Guernsey have never formed part of the UK and such matters should properly go to the

[98] See B. Anderson, *Imagined Communities* (Brooklyn 1983).
[99] See M. Kelly, "Common Law Constitutionalism – a Different View", Australian Society of Legal Philosophy Conference, Auckland, 23–25 June 2006.
[100] *R. (Barclay) v Secretary of State for Justice (No. 1)* [2014] U.K.S.C. 54.

Judicial Committee of the Privy Council.[101] Lady Hale, however, established jurisdiction in virtue of the fact that the Bailiwicks enjoyed "a unique relationship to the United Kingdom and the rest of the British Commonwealth through the Crown, in the person of the Sovereign".[102] Yet, in the same breath, she denied that the *capacity* in which the Crown acted was even a relevant issue.[103]

The Crown can be used as a category to reason about the nature of legal orders, and the relationship of legal orders to each other, only once its complex, corporate nature is understood. The notion that the Crown is "one and indivisible" is incoherent and should be abandoned.[104] Lionel Smith observes that the Crown in right of a Canadian federal province can make an agreement or have a dispute with the Crown in right of Canada, and that the Crown in right of Canada can make agreements or have disputes with the Crown in right of Australia.[105] The Privy Council has rightly said that while there is only one Crown, it has multiple "purses",[106] and the Canadian Supreme Court has upped the metaphorical ante to say that the Crown "wears many hats".[107] Maitland cited American opinions treating the states of the US as bodies corporate, noticing that the colonial charters of Connecticut and Rhode Island called them "one body corporate and politic in fact and in name"; he puzzled over why his contemporaries denied that a colony was a corporation: "This seems to be the result to which English law would naturally have come, had not that foolish parson led it astray."[108] The Australian states, he said, did not use the term, but adopted a similar posture in their agreement to "unite in one indissoluble Federal Commonwealth under the Crown". A body politic, after all, "may be a member of another body politic".[109]

The Crown is plural and divisible, and the transition from an imperial to a post-imperial Crown can thus be understood as a change in the capacity in which the Crown is said to act in any given constitutional order. This is broadly consistent with the position taken by the majority of the House of Lords in *R. (Quark Fishing Ltd.) v Secretary of State for Foreign and Commonwealth Affairs*.[110] Unfortunately, that sensible position was

[101] See D.C. Clarry, "Institutional Judicial Independence and the Privy Council" (2014) 3 C.J.I.C.L. 46.
[102] They are vestiges of the Duchy of Normandy; William Duke of Normandy became William King of England in 1066.
[103] *R. (Barclay)* [2014] U.K.S.C. 54, at [6], [34], [36]; see J.G. Allen, "Jurisdiction and Devolution Issues" [2014–2015] UK Supreme Court Yearbook 320, at 326.
[104] P. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto 2011), §10.1.
[105] L. Smith, "Scottish Trusts in the Common Law" (2013) 17 Edin.L.R. 283; see Maitland, "The Crown as Corporation", p. 43. However, on the long quasi-colonial twilight of the Australian states, see A. Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Annandale, NSW 2006), 271.
[106] *Re Silver Brothers; A-G Quebec v A-G Canada* [1932] A.C. 514.
[107] *Wewaykum Indian Band v Canada* [2002] 4 S.C.R. 245, at [96], per Binnie J.
[108] Maitland, "The Crown as Corporation", pp. 43, 46.
[109] Ibid.
[110] *R. (Quark Fishing Ltd.) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 A.C. 529, comprising Lord Bingham, Lord Hoffmann and Lord Hope, Lord Nicholls and Lady Hale in the minority.

abandoned by Lord Hoffmann in *R. (Bancoult) v Foreign Secretary (No. 2)*,[111] and this direction of travel was entrenched by Lady Hale in *Barclay (No. 1)*. Lord Hoffmann was evidently swayed by a working paper written in the wake of the Court of Appeal's decision *Bancoult (No. 2)*,[112] in which John Finnis opined that the UK and its dependent territories form "one realm having one undivided Crown", and that this general principle somehow squares with the principle that Her Majesty's Government in a colony is distinct from Her Majesty's Government in the UK.[113]

Finnis argued that the post-1688 principle of responsible government required, in the context of a dependent territory such as the British Indian Ocean Territory ("BIOT"), that the Crown act in the dependent territory the on the advice of Her Majesty's *United Kingdom* Government, and that that government could give no special weight to the interests of those inhabiting the dependent territory. In effect (to use a somewhat cheeky analogy), if the Crown is a holding company, the Commonwealth of Australia is a subsidiary with its own board and own corporate interests, and BIOT is a mere branch office with no corporate interests of its own.[114] In my opinion, however, Sedley L.J. was right to hold in the Court of Appeal that the Crown had to act in a way that was imputable, at least in theory, to the good of BIOT *as a political community*. The Chagos Island community is distinct, and has very little community of interest with the UK. If history had been otherwise, the UK would have found itself bound by international law to administer the territory on trust for precisely this reason. With respect, Finnis's reasoning rests on a dubious theory of political representation with neo-imperialist implications.[115]

While the Crown can be used to symbolise the unity of a political community living under common institutions of government, and even to describe the relationship of different political communities historically associated with each other under the umbrella of a defunct Empire, our received notions of the Crown are not robust enough to serve as premises of deduction in this manner – no matter how compelling they look in *Halbsbury's*. Talk of the Crown and its realms should really be avoided in preference for talk of Her Majesty's Government and the (relevant) Commonwealth in

[111] *R. (Bancoult) v Foreign Secretary (No. 2)* [2009] 1 A.C. 453, 458.
[112] [2008] Q.B. 365.
[113] J. Finnis, *Common Law Constraints: Whose Common Good Counts?*, Oxford Faculty of Law Legal Studies Research Paper Series Working Paper 10/2008, March 2008, paras. [15], [17], available at <http://papers.ssrn.com/Abstract=1100628> on 10 January 2013. Finnis cites the Fourth Edition of *Halsbury's Laws of England*.
[114] Ibid., at para. [19].
[115] It places the unlucky inhabitants in the position of "virtual representation" – they are deemed to be part of a far-off political community, and have nominal representation in its democratic institutions, but they have no effective voice. Such fictions have presided over the most important fissures between the UK and its erstwhile colonies. See J.P. Reid, "Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge" (1989) 64 N.Y.U.L.Rev. 963.

situations like *Quark*, *Bancoult* and *Barclay*. Otherwise it is too easy to fall into neo-imperialist nonsense. The first step is to accept that the Crown is one of many offices that makes up the Government of many commonwealths; then to identify *which* government and *which* commonwealth is in question; and then to reason through the issues using the logic of office, personality and action in light of the normative commitments of a parliamentary democracy under the rule of law.

VII. Conclusion

In this article, I have attempted to fuse five problematic doctrines into a serviceable, modern concept of the Crown as an office. I have stressed that, despite historical difficulties with the concept of office, a respectable approach exists within contemporary analytical metaphysics to describe the way in which we bestow special roles on individuals, which then assume an existence of their own. An office is an enduring institutional entity that lends stability and permanence to a politico-legal order through successive generations of incumbent. It fosters the development of standards of behaviour demanded of the officeholder from time to time, and allows the community to act externally and internally as a collective whole. Office thus provides a framework in which we can say – without metaphor – that the Crown and its officers are "independent legal entities".[116]

Office, I have argued, provides a disciplined framework for describing the relationship between the political community and its institutions of governance. The nature of an office as an acting subject – a *persona* distinct from its bearer – implies a logic of action that can be used to rationalise the attribution of acts, actually performed by individual human beings, to institutional entities such as the Crown and Her Majesty's Government. Significantly, this allows us to work through questions of personal and collective liability for wrongs done by civil servants by reference to a modern ethics of public service rather than the privileges and immunities of a feudal monarch or the transcendent majesty of "the sovereign state". On the view I have presented, the same logic of action governs the Crown and all the other offices of government. We can distinguish between acts done by a minister in his "private" and "official" capacity, and by reference to the office's rules of attribution and liability we can determine whether the act was a valid official act and, if not, what consequences it holds for the office as such and for the officeholder as an individual. On this basis – without doing undue violence to our historical Constitution – we can work through legacy concepts that have caused so much confusion.

[116] See Chester, *The English Administrative System 1780–1870*, p. 11.

An "official" conception of the Crown is especially important in the so-called contracting state, where the Government uses its capacity as a subject of private law to pursue policy objectives,[117] and in the light of recent attempts to use prerogative power directly for momentous political decisions.[118] It is also necessary to make sense of the role the Crown plays in representing the relations between legal orders associated with the UK. The only doctrine that cannot be repurposed is the doctrine that the Crown is "one and indivisible". When used as a premise, this doctrine leads to unsound conclusions and to a retrograde view of the UK and related constitutional orders.

[117] See T.C. Daintith, "The Techniques of Government" in J. Jowell and D. Oliver (eds.), *The Changing Constitution*, 3rd ed. (Oxford 1994), ch. 8; see e.g. *Williams* (2012) 248 C.L.R. 156.

[118] I have in mind particularly *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.