



Title	The insolence of office: the coercive jurisdiction of the courts against ministers and officials
Other Contributor(s)	University of Hong Kong. Faculty of Law.
Author(s)	Sedley, Stephen
Citation	
Issued Date	1992
URL	http://hdl.handle.net/10722/54890
Rights	Creative Commons: Attribution 3.0 Hong Kong License

THE INSOLENNCE OF OFFICE

THE COERCIVE JURISDICTION OF THE COURTS AGAINST MINISTERS AND OFFICIALS

STEPHEN SEDLEY, QC



**THE UNIVERSITY
OF HONG KONG**

Law Working Paper Series No 2

Editorial Committee

Albert Chen
Yash Ghai
Linda Johnson

About the author

Stephen Sedley is an English barrister who specialises in public law. He was appointed a Queen's Counsel in 1983 and a Master of the Bench of the Inner Temple in 1989. He is founder of the Public Law Project in the UK which aims to provide access to judicial review remedies to disadvantaged members of the community as well as to promote research in public law. He has chaired various bodies including the enquiry into the death of Tyra Henry 1986-7.

Sedley takes a keen interest in legal academic developments. He has held visiting appointments at Warwick University and Osgoode Hall at York University, Toronto. He was a Distinguished Visitor to the Faculty of Law, University of Hong Kong in January 1992. He has recently edited writings of the 17th century radical John Warr (Verso, 1992).

© Stephen Sedley, QC

UNIVERSITY OF HONG KONG
LIBRARY



*This book was a gift
from*

Faculty of Law, HKU

In this lecture (delivered at the inaugural meeting of the Hong Kong Public Law Group) Sedley takes as the point of departure the decision of the (English) Court of Appeal in *M v Home Minister and Another* (November 1991) in which he appeared for the plaintiff. The case concerned M, a Zairean teacher who had come to the UK in September 1990 seeking political asylum. The Home Office rejected his claim and at the end of April 1991 indicated that he would be removed to Zaire on the afternoon of May 1. When the matter was raised on an application for judicial review shortly before the deportation, the judge adjourned the application on the Home Office's undertaking not to remove M pending the application. However, Home Office officials failed to get him off the plane or to let him return from Paris when the plane stopped over. The judge, told of this, issued a mandatory order directed to the Home Secretary, ordering him to bring M back from Zaire. FCO officials arranged an immediate return flight, but Kenneth Baker, the Home Secretary, countermanded the arrangements and the next day applied (successfully) to the judge to set aside his order on the ground that, though made within jurisdiction, it was irregular because injunctions did not lie against Ministers (relying on *Factortame v Secretary of State for Transport* [1990] 2 AC 85).

Baker's alleged contempt thus consisted in wilfully disobeying an order during its period of currency, notwithstanding that it was later discharged as of right. It therefore raised for the first time the legal question whether a minister of the Crown can be impleaded for contempt committed in office (and indirectly the liability of the Crown itself). The Court of Appeal held that ministers and civil servants were amenable to the court's contempt jurisdiction when acting in the discharge or purported discharge of their official duties, and that the Home Secretary's conduct amounted to contempt.

Yash Ghai

THE INSOLENT OF OFFICE

The coercive jurisdiction of the courts against ministers and officials

STEPHEN SEDLEY, QC

By one of those dramatic ironies which sometimes occur in litigation, on the day in July 1991 when Mr. Justice Simon Brown sat to hear a motion to punish the Home Secretary and others for contempt of court, a visiting member of the French Counsel d'Etat was sitting with him on the bench and a distinguished American constitutional historian was sitting in the public part of the court. Both came from countries which two hundred years earlier had freed themselves from monarchies and had consolidated and redistributed the power of the state by means of written constitutions; though neither country has since solved the problem of high-level state lawlessness, as events from Watergate to the Rainbow Warrior and beyond bear witness. The two visitors were too well-mannered to express any incredulity at the fact that in the dying years of the 20th century it was possible for Treasury counsel to contend that a minister of the Crown who defied an order of the court was beyond the reach of the law.

I say "possible", not "still possible", because I do not believe that such an argument would have been countenanced two hundred or even a hundred years ago in the English courts. When Lord Halifax in his office as Secretary of State issued an illegal warrant for the arrest of the author, printer and publisher of the North Briton, he as well as the King's Messengers

who executed it was made to pay damages to John Wilkes and his colleagues. The case of *Wilkes v Lord Halifax* (1769) 19 St. Tr. 1406 was the last of the North Briton cases to come to trial because Halifax had tried every shift to prevent it, including pleading the privilege of peerage; but at no stage did he claim that his ministerial office under the Crown afforded him protection. Lord Wilmot C.J. told the jury:

"The law makes no difference between great and petty officers. Thank God, they are all amenable to justice, and the law will reach them if they step over the boundaries which the law has prescribed."

The jury gave Wilkes £4,000, and this too is important. The sum was punitive, and Lord Devlin in his seminal speech in *Rookes v Barnard* [1964] AC 1129, 1221-3 recorded it as a precedent for the award of exemplary or punitive damages in tort for arbitrary or high-handed action by the state. Halifax was the holder of one of the great offices of state; but three years earlier in the case of *Benson v Frederick* (1766) 3 Burr. 1845 exemplary damages had been awarded against a military officer — as much an officer of the Crown as a Secretary of State is — who had had a soldier flogged to vex a fellow officer. Both Lord Halifax and Colonel Frederick, moreover, were acting in their capacity as officers of the Crown: but for his office of Secretary of State Lord Halifax would not have had the power or opportunity to sign the illegal warrant; and but for the King's commission and his office as colonel of the Middlesex Regiment Colonel Frederick would have been unable to order Private Benson to be flogged. Both officers of the Crown, in other words, were acting "as such", an apparently arid point to which recent developments will make it necessary for me to return.

In the middle of the next century the powerful Court of Exchequer Chamber, in *Cobbett v Grey* (1850) 4 Exch. 729, held that the Home Secretary, Sir George Grey, was liable in trespass if a person was removed from an authorised to an unauthorised part of a prison under a general order which he had no legal authority to make. When, twenty years later, in *Phillips v Eyre* (1870) LR 6 QB 1 the former governor of Jamaica was sued for torts committed in the course of bloodily suppressing a rising on the island, he shamelessly and successfully pleaded the Act of Indemnity to which he had put his own hand, but he never tried to claim that as the Crown's representative he was otherwise beyond the reach of the common law.

These were private law actions, long before the Crown Proceedings Act 1947 permitted the Crown itself to be sued in tort. Applications for the writ of habeas corpus, like proceedings for modern prerogative orders, would today be classified as public law proceedings. Here too the amenability of officers of the Crown is beyond doubt — or was until recently. Effectively every writ of habeas corpus commands a custodian, usually an official of the state and today generally a prison governor, to show cause why the applicant should not be released. In 1889 a 17-year-old Coventry weaver, William Henry Thompson, had the misfortune to be arrested by a policeman who had somehow formed the view that he was a 24-year-old naval deserter named Floyd. He was given 90 days detention and was then further detained aboard a warship until he managed to issue a writ of habeas corpus. In response to the writ's command to produce the body and show cause for its detention, a Marine officer turned up with William Thompson but without either the writ or any explanation except that Thompson was now allegedly in the custody of the police for what appeared to be a non-existent offence. The two Queen's Bench judges were understandably peeved. "We cannot listen to such nonsense", said Manisty J. "My Lords," said Mr.

Staveley Hill QC, who seems to have had a thin skin for a barrister, "‘nonsense’ is a strong term." This prompted Mathew J to weigh in: "I must say I adopt the expression. It really is nonsense for any member of the Bar, still more for a person in a position of eminence and with the knowledge which counsel ought to have, to come here without the writ and without a return and to tell us that the writ has been left behind." (In fairness, we have all had days like this at the Bar.) The Marine captain was summarily convicted of contempt, gaoled and bailed so that he could swear out a return to the writ. Although the report of the case, *Re Thompson* (1889) 5 TLR 565, is unusually entertaining because it records the whole of the dialogue in court, it is also a crystalline illustration of the exercise of the coercive power of the court over an officer of the Crown.

I have not searched the annals of the old prerogative writs to see when they were first issued against officers of the Crown, but certainly as long ago as 1835 in *Osborne v Angle* (1835) 2 Scott 500 the High Court was prepared to issue a prerogative writ to the governor of a prison if cause were shown. It was also a prison governor who in *Raymond v Honey* [1983] 1 AC 1 was held guilty of contempt by the House of Lords because he had prevented a prisoner from communicating with the court. When the most coercive of the prerogative orders, mandamus, was sought against the Minister of Agriculture in *Padfield's case* [1968] AC 997, counsel for the Minister accepted that the order lay in a proper case and the House of Lords had no jurisdictional reservation about granting it on the facts.

What then is the legal character of disobedience to a prerogative order? Either compliance is a matter of inclination or disobedience is a contempt of court. Whether and how such a contempt can be punished is a different question, to which I shall come. But the occurrence of a true contempt when a minister disobeys an order of the court directed to him is logically

antecedent to and distinct from any question of punishment. Nevertheless, there may well be a judicial reluctance to embark on a course which may one day require the court to pass sentence on a minister: where making an order directed to a minister can be seen as part of the rule of law, enforcing the order against him by penal sanctions begins to look like a breach in the separation of powers. But I hope to suggest that the problem of deference which has now emerged has longer historical roots and a deeper judicial motivation than a sudden loss of nerve.

The judge of first instance in M's case reasoned from what he held to be the historic immunity of the Crown from coercive process to a corresponding protection for ministers. The Court of Appeal, by a majority, differentiated between the two, holding that the Crown is immune but that its officers are not. None of the four judges who have so far adjudicated has approached the issue, as perhaps one should, from the opposite direction. Such an approach might suggest these propositions:

1. What ministers do in office is done in the name of the Crown and hence of the state.
2. The Crown as a symbol of the state possesses legal personality.
3. The state ought therefore to answer to the courts for legal wrongs done by a ministers or other officer in its name.
4. An officer of the Crown who commits a wrong in the discharge of his office is also personally answerable to the courts.

The third and fourth of these propositions are of course complementary, not alternative: they mimic the joint and several liability of principal and agent, and they may also be thought to reflect a measure of legal and political morality. It is a curious feature of the Court of Appeal judgments in M's case that little weight is given in any of them to the powerful constitutional history which has gone to set up the fourth proposition as good law. Simon Brown J at first instance quoted Dicey's famous remark:

"With us, every official from the Prime Minister down to a constable or collector of taxes is under the same responsibility for every act done without legal justification as any other citizen",

and he cited the relatively modern case of *Raleigh v Goschen* [1898] 1 Ch. 73 in which Romer J explained that a minister was liable for torts committed by him not because of but in spite of his office. But Simon Brown J concluded that the very recent decision of the House of Lords in *Factortame v Secretary of State for Transport* [1990] 2 AC 85 made it impossible to distinguish the minister from the Crown: either both were liable or neither was. I will come to *Factortame*, but it is perhaps useful to observe at this stage that there is something wrong with the logic of this approach. If the issue is allowed to be posed as a choice between all and nothing, then a holding that the Crown is immune destroys at a stroke more than two centuries of constitutional law — law which has been the foundation of constitutions and international standard-setting instruments all over the world — establishing that no officer of state is above the law. That is the "nothing" scenario. The "all" scenario — that if ministers can be liable, so must the Crown be — is equally untenable. As the Court of Appeal held, the one does not necessarily follow from the other. What I want to suggest, however, is this: that ministerial responsibility to the law is irreversibly established, as my

final proposition recognises, and that the time is more than ripe for the courts to articulate a parallel responsibility in the state. Hence my first three propositions. -

The first proposition — that ministers act in the name of the Crown and hence of the state — is not problematical in itself. Of all constitutional lawyers, Anson in his 1908 edition of *The Law and Custom of the Constitution* puts it the most succinctly;

"The position of affairs has been reversed since 1714. Then the king or queen governed through ministers; now ministers govern through the instrumentality of the Crown."

The choice of the year 1714 is of course schematic: it is the year of George I's accession to the throne of a country whose language he did not speak, and from which the origin of cabinet government in Great Britain is conveniently dated. But the obituary of absolutist feudal monarchy had been written long before: in the conventional view, by the Glorious Revolution of 1688; in the heterodox view, which I share, by the outcome of the Civil War of the 1640s; but also, and of real interest to lawyers, by the prefigurative conflicts of the early 17th century between the Chief Justice, Sir Edward Coke and King James I, when Coke denied the King the power to sit in his own courts or to set up competing jurisdictions (a battle symbolically won with the eventual abolition of Star Chamber). The separation of powers in Great Britain was not perceived as a self-evident truth in a moment of liberation, as it was in France and the United States: it developed organically as a function of the painful transfer of political power from monarch and landowning aristocracy to parliament and mercantile entrepreneur. British monarchs went on interfering on a diminishing scale in the parliamentary government of the country until, at any rate, the so-called Bedchamber

Crisis of 1839 in which the young Victoria managed to prolong the life of Melbourne's government; and as late as 1879 Parliament thought it worthwhile to debate again Dunning's celebrated motion, first debated in 1780, "That the influence of the Crown has increased, is increasing and ought to be diminished". But by then electoral reform had produced a wide male franchise, and the new career civil service proposed by the Northcote-Trevelyan Report was about to instal the first generation of the Sir Humphrey Applebys by which Britain and its colonies have since been largely governed while governments and ministers have come and gone. The Sovereign had become one thing — an important ceremonial thing at which I want to take a closer look later — and the Crown another. As Lord Diplock finally told us in *Town Investments v Department of Environment* [1978] AC 359 (confirming my theory that the law in general is between thirty and a hundred years behind the rest of society) in the context of public administration the Crown is today simply a synonym for the Government. The same is true, mutatis mutandis, of the Crown in Parliament and the Crown in court. The three separate limbs do not constitute by any means the entire state, but they are its frame. Their relative autonomy is the separation of powers first proposed by Aristotle and without which, in Montesquieu's famous phrase, there would be an end of everything. In Britain for historical reasons the separation, by applying the name of the Crown to all three limbs, has taken a trinitarian form calculated to gladden the hearts of the bishops of the established church but also to put constitutional jurisprudence at risk of a unitarian putsch. Unless the House of Lords is prepared to rethink its position, that putsch, or at least the first signal of it, is the indication in the *Factortame* decision that the unity of the Crown is making a comeback after three centuries. Of this, more later.

The second proposition — that the state has legal personality — received what can inelegantly but accurately be called the bum's rush in the Court of Appeal. I hope, however, that like

its metaphorical counterpart, the argument will dust itself down and try to make a dignified re-entry when the case comes on in the House of Lords. To a blackletter lawyer, not the least powerful basis for the proposition is that there is sound authority to support it. As Maitland's witty essay "The Crown as Corporation" (1901) 66 LQR 131 argued, and as Romer J showed in *Re Mason* [1928] Ch. 385, the historic and seemingly idiotic debate was not whether the Crown was a corporation but whether it was a corporation sole or a corporation aggregate. After all, if the Crown, whether as "Rex" or "Regina" as in the leading case of *Feather v R* (1865) 6 B & S 257 and in every prosecution there is, or as the Department of the Environment in the Town Investments case, or as the minister who is respondent on behalf of his or her department of state to daily applications for judicial review, can take part in litigation of one kind or another without any reliance on the Crown Proceedings Act, it seems a little odd to hold, as the Master of the Rolls does, that "neither the Crown nor the Home Office has any legal personality". Nolan LJ limited his agreement to the area of contempt, but he said:

"The Home Office cannot be subjected ... to a finding of contempt ... because it is not a person in any sense of that word [and] no state of mind whether guilty or innocent can be attributed to it ..."

If other corporations have legal personality, as they do, and if states of mind can be and are attributed to them for a variety of legal purposes including making findings of contempt of court, then the Crown in its embodiment as the executive limb of government is perfectly capable of standing in the same situation in the eye of the law. The proposition requires no innovation — simply that the law should be prepared to recognise that the state is an organisation, or a congeries of organisations, as capable as any other organised body of suing

and being sued or, for that matter, prosecuted. The name in which the state comes or is brought before the court is unimportant: if it is not that of the monarch, whether in Latin or in English, it may conveniently be that of the relevant department of state (in M's case the Home Office) or of the minister who heads it, or it may be that of the Attorney-General whose job, as the Court of Appeal reminded the government in *Dyson's case* [1911] 1 KB 410, is to throw no difficulty in the way of (at least) declaratory proceedings raising serious issues of law against the Crown. So far as impleading the Crown goes, there is nothing new under the sun; and it is only a legal entity that can be impleaded. If the Crown can hold property, as in the *Town Investments* case, and make contracts, as we are now at last told it does with its civil servants (*R v Lord Chancellor's Department, ex p. Nangle* [1991] IRLR 343), it is not easy to see how it can be a legal non-entity. In this connection there are a number of things wrong with the argument that the Crown Proceedings Act had to be passed in 1947 because the Crown was otherwise incapable of being impleaded. By 1947 the impossibility of suing the Crown in tort was the exception, not the rule, and the Act cured an anomaly rather than innovated. How else for example could George Robertson, barrister and fellow of New College, have published in 1908 his book "The law and practice of civil proceedings by and against the Crown and Departments of the Government, with numerous forms and precedents"?

This brings me to my third and crucial proposition — that the state ought to be answerable to the court for wrongs done in its name by ministers or other officers. I say "ought to be" because we are at one of those points of legal history where the courts have a choice, although I hope to suggest that it is a choice which cannot be made negatively without doing serious harm to the rule of law. However, as I have mentioned, we have a discouraging recent indication of how the tide is running in the House of Lords. In *Factortame v*

Secretary of State for Transport [1990] 2 AC 85 the House of Lords refused, unless overruled (as in due course it was) by the European Court of Justice, to grant an interlocutory injunction to stop the Secretary of State enforcing the Merchant Shipping Act 1988 on the ground that the Act violated the Treaty of Rome. In the then state of the law it was possible to refuse the application purely on the ground of the supremacy of Parliament; but the House of Lords deliberately went farther and held that in any case no injunctive relief was or had ever been obtainable against the Crown – or against one of its ministers acting "as such". Lord Bridge, in the leading speech, recognised in passing that the Crown *could* historically be impleaded but not, he held, in proceedings for injunctions. And, he said,

"Officers of the Crown acting as such were likewise immune from suit."

The law report suggests that the point was only briefly argued, and I have said enough, I hope, to suggest that Lord Bridge's proposition is wrong. The implication of it is that it is only by stepping outside their authority that ministers make themselves liable to proceedings. But this is not the test. If it were the case that because no minister ever has authority to break the law, no unlawful act done by a minister is ever done by him "as such" but only as a private citizen, then no injunction could have been granted, as one was granted, as one was granted, by Shadwell V-C against the Prime Minister and Lords of the Treasury in *Ellis v Earl Grey* (1833) 6 Sim. 214 – not, as the Vice-Chancellor stressed, in order to interfere with their general duties or discretions but "to restrain them from doing a mere ministerial act with a view to secure the money for the parties who may be decreed to be entitled to it": in other words, the Lords of the Treasury were enjoined "as such" from disposing unlawfully of public funds. Equally if that were the law no prerogative order could ever be issued against a minister, since the very finding that he had acted unlawfully would mean that he

was not acting "as such" (that is, as a minister) and so was not a proper object of judicial review. The true distinction is between unlawful acts done by officers of state in the purported discharge of their office, and acts done by them as private individuals. The test is closely similar to the test of whether an individual is acting in the course of his employment. It was applied interestingly in a recent case, *Makanjuola v Commissioner of Police for the Metropolis* (1990) 2 Admin. L.R. 214, in which Henry J distinguished between the abuse of his warrant card by a policeman to gain entry to a woman's flat, for which his chief officer was vicariously liable, and torts he committed thereafter in the flat and which the judge held he was committing as a private individual. Just as the act of the tanker driver who lit a cigarette while he delivered a consignment of petrol was held by the House of Lords in *Century Insurance v Northern Ireland Road Transport Board* [1942] AC 509 to have been done in the course of his employment notwithstanding that it was a flagrant breach of his contractual duties, so the classic abuse of his power by the prime minister of Quebec, to block the grant of a liquor licence to a citizen whom he disliked was held by the Canadian Supreme Court to amount to the tort of misfeasance in public office (*Roncarelli v Duplessis* (1959) 16 DLR (2d) 689). In fact the entire existence of that tort, which the English Court of Appeal has now articulated clearly in *Bourgoin v MAFF* [1986] QB 716, is predicated upon the public official acting "as such" — that is to say, in the purported discharge of his office — in the knowledge that what he is doing is unlawful. If it were not so, his misconduct would automatically take him out of the ambit of his office and make it impossible for the tort to exist.

If it is the case, then, that familiar principles of vicarious liability already determine whether a minister's act is such as to make him amenable qua minister to the jurisdiction of the courts, no fresh conceptual apparatus is needed for fixing the state with liability for unlawful

acts done by him with its authority and in its name. With all respect to Lord Bridge, a minister, acting as such, is within the reach of the courts, and with him the state. So perhaps Simon Brown J's "all" scenario was right, but for the wrong reason. It is not because the Crown's acts are justiciable that the minister's are; it is because the minister's acts are justiciable that the Crown's are.

Why should the courts choose to go down this road in preference to the Factortame route? One reason is that the logic of Factortame, if followed, will unravel most of the advances made in the legal control of central executive government over the last quarter of a century. This is chiefly because the civil servants who in practice perform most ministerial acts are also servants of the Crown, and each of them, according to the Carltona doctrine, acts as an alter ego of his or her minister (*Carltona Ltd. v Commissioners of Works* [1943] 2 All E.R. 460). On either ground they must enjoy the same immunities as a Secretary of State. This is the true predicate of Simon Brown J's "nothing" scenario, and its implications for the rule of law hardly need to be spelt out. In *M v Home Office* Nolan LJ adopted this formulation:

"The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is."

A primary characteristic of any effective legal system is that it can if necessary take steps to ensure that its decisions are respected or, failing that, to punish those who disobey. Either the respect of the executive for the courts is voluntary, as the Crown has vigorously argued in *M's* case, or it has to be commanded where necessary by whatever sanctions are at the

court's disposal. This is as true of the prerogative orders as of injunctions directed at ministers in their official capacities. What is there to prevent the courts from going this final step against the executive? Of course the executive cannot be imprisoned; nor can a company for that matter, but it can still be found guilty of contempt.

It may be thought that there are strong reasons why today similar principles should apply to departments of state. A Divisional Court recently ordered the Home Secretary to reconsider the earliest release date set by him for a life sentence prisoner, and to tell the prisoner what notional length of sentence it was based on (*R v Home Secretary, ex p. Walsh*; Times, 18th Dec. 1991). It is not likely that the Home Secretary will perform these tasks in person, but with the assistance of the Carltona doctrine he will be able to perform them by the hand of one or more (probably more) of his civil servants. Their acts will be his acts, and all will be acts of government done in the name of the Crown. Now suppose, to think the unthinkable, that it was later discovered that an entirely perfunctory decision had then been taken in the Home Office to confirm the date and tariff period originally set. Contempt, which is in the nature of a crime, has to be brought home directly, not vicariously, to a legal person. It may well be that the Home Secretary will have had nothing to do with the flouting of the court's order. It may also be — in my experience it is the rule rather than the exception — that although the ultimate decision can be shown to be unlawful, it is impossible to ascribe it to any individual, and equally impossible to ascribe the necessary degree of knowledge and intent to any one or more of the series of individuals responsible for the ultimate decision. And yet the court's order will have been consciously frustrated by a department of state. It would be an attractive solution to let the Carltona doctrine return to plague its inventor by holding that since the hands and minds of his civil servants are in law the Secretary of State's hand and mind, so too is their guilt. But this is to play games with

something as serious as personal liberty. What is both more real and more just is to recognise the corporate character of the institutions of the state and to treat them as institutionally responsible for breaches of court orders. The state's officers, like those of a company, may additionally be liable if evidence implicates them personally.

Another, perhaps not wholly imaginary, instance is suggested by the recent decision of the House of Lords in the seemingly bottomless Spycatcher litigation (*A-G v Times Newspapers* [1991] 2 WLR 550) that to interfere knowingly in the enforcement of an order made between other parties in litigation is a contempt of court. One of the most potent instruments of modern government is the unattributable leak. Most of the press lobby system depends on this conduit for its best information, and ministers regularly use and abuse it in order to put their slant on events or to generate news in their own political interest. The hands may be the hands of the minister but the voice is always that of Sir Humphrey or one of his subordinates. Suppose — and this is perhaps not unthinkable — that use was made of the media through unattributable briefings to plant a story that would circulate a nasty slur on a political opponent of the minister who had obtained an injunction against, say, a newspaper to stop it publishing the same libel. It may not be hard to trace the story to a particular department of state ("informed Foreign Office sources" etc. will often be cited to give authority to the story) or to show that corporately the department knew what it was doing, but it may be very hard indeed to pin down one or more individuals to take the rap for contempt. Institutional responsibility in such a case may well be not only just but the only feasible form justice can take. The words of Farwell LJ in *Dyson's case* come back:

"If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the courts are the only defence of the liberty of the subject against departmental aggression."

Nolan LJ in M's case pointed to the fact that to confiscate the assets of a department of state (it obviously cannot be imprisoned) is to transfer money from one pocket of the state to another. True, nobody supposes that a fine on a department of state, any more than on a large corporation, can do more than mark judicial disapproval of its activities. But, as I have argued, the available forms of sanction cannot determine whether the contempt jurisdiction exists. Even if a fine or sequestration of assets is not a legal or practical possibility against a department of state — though they are certainly regarded as both legal and feasible against local authorities — then the court still has its declaratory power. This is not as idle as it might at first seem. One of the major planks of the Crown's platform in M's case was that ministers are answerable to Parliament alone for what they do in office. Leaving aside the unhelpful fact that ministers do not actually have to be members of either House (within living memory Frank Cousins and Patrick Gordon-Walker were both in this class), it is impossible for Parliament to know whether there has been a contempt for which to call a minister to account until a court has pronounced on it. For Parliament to take on itself the task of adjudication would be as much a contempt of court as the court deciding whether it had confidence in a minister would be a contempt of Parliament. Historically Parliament has claimed its own punitive jurisdiction over errant ministers through the process of impeachment. Although other nations have now written the process into their own constitutions, the last impeachment in Britain was in 1806. Grounds of impeachment seem to have included both political and legal offences, and it is certain that today any attempt by Parliament to impeach for breaches of the law would amount to a contempt of court by

usurpation. So if ministers *are* to be answerable to Parliament for breaches of the law committed in the name of the Crown, and especially if it should be held that ministers acting "as such" stand in the shelter of the Crown, a declaration in such cases would play a necessary role in the Crown's own version of the separation of powers. But to reach this point the Crown has first to recognise the court's jurisdiction over it in contempt.

This is a jurisdiction which the Commonwealth courts have not been afraid to assert and which the Crown has apparently accepted in its dominions. In the early years of the century both the High Court of Australia and the New Zealand Court of Appeal entertained applications for prerogative writs to halt or upset the proceedings of commissions set up by Governors in the name of the Crown, on the ground that their constitution, by trespassing on the territory of the courts, amounted to a contempt (*Clough v Leahy* (1905) 2 CLR 139; *Cock v A-G* (1909) 28 NZLR 405). Ten years ago the Australian High Court held unanimously that the Crown commits a contempt of court if it appoints a commission of inquiry which may interfere with administration of justice, and was divided as to whether the remit of the particular Royal Commission fell into this class (*State of Victoria v Australian Building etc. Federation* (1982) 152 CLR 25). In the same year the New Zealand Court of Appeal entertained a similar application, applying the same principles to it (*Re Royal Commission on the Thomas Case* [1982] 1 NZLR 252). And within the last two years in Canada the conviction of a minister by the Ontario Court of Appeal for contempt in failing to comply with an order to produce documents was upset by the Supreme Court on the facts, but not on any jurisdictional ground (*Bhatnager v Minister of Employment* (1990) 71 DLR (4th) 84).

Why is it that instead of taking this last logical step in establishing the rule of law from the top to the bottom of society, the British courts seem to be prepared to turn tail? In part it may reflect a recent sense that the growth of public law has become too much of a good thing, and that it needs to be kept in bounds. But it is a bad habit of lawyers to seek to explain all legal developments in legal terms, and I suspect that the causes lie much deeper. A sign of them can be found in the dualism of Professor Wade's thesis that while ministers are fully answerable to the courts, the Crown itself is not. So, he argues, the Queen in Council is beyond the reach of the common law. In part this has to do with Wade's Blackstonean view of the prerogative as the residue of acts which only the Crown can perform – making war, for example, but not employing servants, which anyone can do. The courts, however, have cast the meaning of the prerogative much wider, first in *R v Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 QB 864 and then in the CCSU case [1985] AC 318, with the result that in those cases the court had no difficulty in reaching, if not quite getting a grip on, errors of the executive in deploying prerogative powers of the Crown. But they have also adjudicated on decisions of the Queen in Council. In *R v A Committee of Lords of the Judicial Committee of the Privy Council, ex p. Vijayatunga* [1988] QB 322 the Court of Appeal entertained without demur to its jurisdiction a challenge to a decision of the Privy Council sitting in right of the Queen as Visitor of London University. This is perhaps as close as it is necessary to come to the person of the monarch in order to establish the amenability of the whole of the state apparatus, prerogative or not, to justice. It gives a realistic answer, as the separation of powers gives a doctrinal one, to the unitarian concern expressed in *R v Powell* (1841) 1 QB 352 and reiterated by Professor Wade that mandamus cannot lie against the Crown "because there would be an incongruity in the Queen commanding herself to do an act". It is not necessary to go further and ask why, in a constitutional monarchy, the sovereign should not be able to be booked like the rest of us for

speeding. So why is the House of Lords seemingly looking for ways of restoring the Crown to an inviolable unity, and even the rigorous Professor Wade concerned to keep a legal if minimal ring-fence around it?

I left my thumbnail historical sketch at the point, around 1870, where it could sensibly be said that the monarch and the state had become legally and functionally divorced. This was, however, also the point at which the grandeur and ceremony of the monarchy began to be consciously built up as part of Britain's imperial status and claims. Where Byron had been able to write of

"An old, mad, blind, despised and dying king;
Princes the dregs of their dull race who flow
Through public scorn, mud from a muddy spring..."

and William IV had had to be forced to attend his own coronation, and the Musical World had doubted the announcement that at Victoria's coronation the Chapel Royal organist Sir George Smart would play the organ and conduct the orchestra simultaneously, on the ground that he was not capable of doing them separately, historians like David Cannadine and Bernard Cohn have described how from the late 1870s the monarchy was consciously built up into an institution of incomparable loftiness and splendour, both at home in the Golden and Diamond Jubilees and abroad in the great Durbars in India. Every royal occasion, as Cannadine notes, was also made an imperial occasion. In spite of the irreverence of modern political satire, the reverential sense of the monarchy and the Crown which symbolises it are still a central part of British culture. Hamlet's reflection, written by Shakespeare in 1603, "There's such divinity doth hedge a king..." expressed a feudal, unitarian sense of monarchy

which has slept but apparently not died in the intervening generations. Today, it seems, it can still generate in lawyers a degree of deference which inhibits them from taking the last logical step down the road which modern public law, under the stimulus of huge political changes, has travelled in our lifetimes. These gains in the rule of law are not irreversible. In law, as in life, nothing stands still. I have taken the phrase "the insolence of office" as the title of this lecture not only because it reflects that flame of anger at insensitive and inward-looking administration which has helped to light the lamps of modern public law, but also because Hamlet himself uses the phrase in a soliloquy in which, having reached a point of no return, he is reasoning his way to doing nothing further. For us, as for him, to hold back at the critical point may be a mistake for which our generation will not be forgiven.

2905.YG/en

[P] KM563 3 S44

X02887383



X02887383



P KM563.3 S44

Sedley, Stephen.

The insolence of office
: the coercive
1992.

Published by the Faculty of Law
University of Hong Kong

1992

HK\$15.00