The Executive's Contempt for Parliament: It's Uncourtly Behaviour

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1. INTRODUCTION

The closeness of the 2016 federal election highlights the need to locate, exactly, authority and power in parliamentary government. The Australian Constitution differentiates the two, it is submitted. The Preamble founds the Commonwealth "under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established". Under s 1, Commonwealth legislative power vests in a Federal Parliament; the Queen, a Senate, and a House of Representatives. Commonwealth executive power vests in the Queen and is exercisable by the Governor-General as her representative, under s 61. Likewise the Queen is part of most State Parliaments.[1] Yet the authority of the Crown was shown to be differentiated from the power of the monarchical Executive, the parliamentary Executive, and the legislature, in *Jackson v Attorney General*.[2] The supreme court of the United Kingdom, rather than the Executive or the legislature, validated the *Hunting Act 2004* (UK) as an Act of the Crown, even after it had received royal assent. It fell to the Court to independently validate legislation that the monarch had already endorsed. Curial authority was shown to found the sovereignty symbolised by the Crown. Thus, the monarch is distinct from the authority founding the sovereignty symbolised by the Crown in the United Kingdom, a symbol Her Majesty continues to personify. This differentiation indicates that Australian exercises of legislative power under s 1, and executive power under s 61, are also ultimately subject to independent validation if they too are to bear Crown authority. That validation is considered here to be a curial process that includes Parliament. When the sovereignty of Parliament was founded in the seventeenth century, the supreme court of England and Wales was part of "Parliament". The barons and lay peers acted as the supreme court as an ordinary part of their duties. The "High Court of Parliament" was a supreme court and legislature. Specialised and separate supreme courts were established in the nineteenth century in the Australian colonies and the United Kingdom, and at Federation in 1901 in Australia.

This article posits authority in the Crown, identifying it ultimately as a symbol of sovereignty. Parliamentary government founds sovereignty upon the autonomy to define the judicial, executive, and legislative prerogative of the Crown, independently of supreme power, which continues to vest in the Executive, or "the executive power". The Executive can embody rather than exhaust the Crown, on this view, where the Crown can also symbolise the "sovereignty" of Parliament since the bloodless or "Glorious Revolution" of 1688. Parliamentary government differentiates power from authority, since 1688, by requiring that even supreme power act ultimately through an autonomous forum, if the Executive and its supremacy is to be validated or "Crowned" with the legality of sovereign authority. Whereas Dicey posited legislative supremacy as a check for executive power,[3] the proposed view instead vests supremacy with authority, by requiring that it act ultimately through an autonomous forum; a court, ultimately the High Court of Australia.

The argument beings with the differentiation of the Crown from the Executive. The ultimate forum for defining the prerogative, independently of supreme Executive power, has been progressively removed from the executive branch, through a process that included the legislature in 1688 (Part 2). Part 3 contrasts the separation of the judiciary in *O'Connell v R*,[4]

with both the separation of powers and responsible government, by analysing Parliament's exclusive cognisance or "jurisdiction", propounded by the High Court in *Egan v Willis*.[5] It is argued here that excluding the courts deprives the legislature of an independent authority with which to define power. Part 4 propounds a duty upon Australian legislators to act judicially, so that they are required to define and exercise the Crown's prerogative independently of the Executive, rather than just asserting their power as the parliamentary Executive as presently. In short, the forum that originates parliamentary autonomy has become removed from the legislature, ossifying its autonomy until it can be restored to the legislature.

2. THE CROWN'S DIFFERENTIATION FROM THE EXECUTIVE

A parliamentary Executive has replaced the monarchical Executive, yet the nature of the Crown and the authority it symbolises is less clear.[6] Sir William Wade was direct: "'The Crown' means the Queen, whether in her official or her personal capacity".[7] But this view ties the Crown irrevocably to monarchy, as if popular sovereignty and the democratic impulse are essentially alien to the Crown. It suggests that the Crown is increasingly irrelevant to the practicalities of democratic government, as the democratic and parliamentary Executive progressively marginalises the monarchical Executive. Instead it is submitted that the *Case of Prohibitions*[8], the Revolution of 1688, *O'Connell v R,* and *Jackson* form a series, considered shortly, in which the forum for defining supreme power has been recognised as separate and independent from the executive branch.

In *Bodruddaza v Minister for Immigration and Multicultural Affairs*[9] the High Court observed itself to be "the ultimate decision-maker in all matters where there is a contest"[10] under the Australian Constitution. The Court cited an identical holding in *Plaintiff S157/2002 v Commonwealth*,[11] regarding s 75(v) of the Constitution and matters about constitutionality:

> In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.[12]

The manner in which s 75(v) establishes the High Court of Australia as the ultimate forum for making decisions under the Constitution, is extremely similar to the manner in which the Glorious Revolution established the High Court of Parliament as the ultimate decision-making forum in 1688. In each case executive power was required to act ultimately through a forum that is separate from the executive branch, to be independently authorised. The separate vesting of judicial power in the Australian High Court at s 71 reflects a longer differentiation of the Crown from the Executive.

Briefly, in *Prohibitions* the specialisation of the common law courts was held to exclude James I from sitting as a common law judge, despite their being courts of the Crown. Lord Coke also observed that the monarch sat in the judicial House of Lords as a member of the supreme court.[13] It was only in the common law courts that the specialisation of judges precluded James I from sitting. In 1688 therefore, the monarchical Executive could still be presumed to exercise the judicial prerogative of the Crown, in addition to exercising its executive and legislative prerogative. This view accords with the *Case of Proclamations*,[14] where the monarch was required to exercise his legislative prerogative ultimately inside the High Court of Parliament.

Shortly before the Revolution of 1688, Stuart judges upheld within certain limits the monarch's claim to exercise, outside of the parliamentary forum, a prerogative to dispense

with the operation of a statute on religious questions.[15] The new constitutional order instituted following the Revolution, through legislation such as *Convention Parliament Act 1688*, the Bill of Rights 1688,[16] and the *Crown and Parliament Recognition Act 1689*, established that the monarchical Executive now had to act through an independent forum, to validate its supremacy as the lawful prerogative of the sovereign Crown. That independence of the High Court of Parliament, a supreme and legislature, entrenched the separation of that forum, a supreme court and legislature, from the executive branch from which executive power originated. The monarch still exercised the judicial, executive, and legislative prerogative of the Crown, but ultimately in "Parliament", a supreme court and legislature, rather than outside of it. Thus, the autonomy to define the prerogative of the Crown, independently of supreme power, namely the Executive, founded the sovereignty of Parliament. Contrary to Dicey, it was not a political or "legislative supremacy" over the monarchical Executive.

The monarch continued to exercise the Crown's prerogative. An exhaustive description of the prerogative has proved elusive,[17] but the Bill of Rights 1688 included the power to make law, suspend law, and tax, as to be performed with parliamentary consent. The monarchical Executive acted ultimately inside the "High Court of Parlyament", as the *Crown and Parliament Recognition Act* 1689 (England) described the parliamentary forum.

Similarly the Commonwealth of Australia's executive power vests in the Queen and is exercisable by the Governor-General as her representative, under s 61 of the Australian Constitution. Yet as was displayed in *Jackson*, the Executive, even the monarch, no longer exhausts the Crown. The judicature rather than the executive branch or the legislature conclusively validated the *Hunting Act 2004* (UK) as a Crown Act, even after it had received royal assent. It is submitted that the executive power which the Governor-General exercises under s 61 of the Australian Constitution, likewise, does not in itself exhaust the authority founding the prerogative of the sovereign Crown, a symbol the Governor-General personifies in Australia. Instead, *Jackson* and later *Bodruddaza* show that power is subject to validation by an independent court, if it is to conclusively acquire the legality and authority of the Crown upon which the Australian Constitution is founded.

The Crown is ultimately a symbol of sovereignty, founded in 1688 upon the sovereignty of Parliament; the autonomy to define the prerogative independently of supreme power which the Executive bears, by requiring that it act ultimately through the High Court of Parliament. In Australia that autonomy is submitted to vest ultimately in the Federal Supreme Court. Yet the High Court embodies that pre-existing autonomy rather than exhausting it, as was shown when the New South Wales Supreme Court was recognised as exercising Crown authority in *Dalgorno v Hannah*,[18] before the *Judiciary Act 1903* (Cth) constituted the High Court. Thus, the autonomy founding the sovereignty symbolised by the Crown in 1688, can also be described as vesting in the High Court after 1901, to authorise the legislative and executive powers vesting in the monarch under ss 1 and 61 of the Australian Constitution.

It is submitted that the autonomy founding the sovereignty symbolised by the Crown, when the United Kingdom Parliament passed the *Commonwealth of Australia Constitution Act 1900* to establish the Commonwealth, was not exhausted by that Parliament. Instead it is the same autonomy vesting in the Australian High Court to define the Crown's prerogative independently of supreme power in Australia, namely that of the Executive. Further, it founds the "constitutional supremacy" of the Australian Constitution as described by Jennifer Clarke et al, whereby "a constitution enjoys paramount force: i.e., it must be a form of 'higher law' which is supreme not only over people and governments, but also over other rules of the legal system".[19] Without that autonomy founding it, constitutional supremacy could become as great a hindrance to an independent definition of supreme power, as the legislative supremacy of AV Dicey, described above, which emphasises mere political power instead.[20]

Rather, as Professor Anne Twomey remarks, the Commonwealth legislative power has been read down, rather than it allowing bills of attainder for example.[21]

However, the differentiation of the Crown from the Executive, in the United Kingdom and later Australia, requires reference to a further decision. Just as the specialisation of the common law courts was recognised in *Prohibitions* as separating them from the Executive, so too the specialisation of the supreme court was recognised in *O'Connell* in 1844 as separating the judicial House of Lords from the legislature, and therefore from the Executive in the legislature. As at the Revolution of 1688, a parliamentary forum can again define the Crown's judicial, executive, and legislative prerogative independently of the politically supreme Executive, by requiring that it ultimately acts through a forum its does not control, to be authorised there.

Each of *Prohibitions*, the Revolution, *O'Connell*, and *Jackson* established that the autonomy to define the Crown's prerogative independently of the Executive, vests in a court that is separate from a branch of government that originates executive power. That autonomy founds the sovereignty symbolised by the Crown, on the proposed view, rather than Crown authority deriving from an unmediated assertion of political power such as legislative supremacy in itself. Yet the executive power from which *O'Connell* established independence, was the parliamentary Executive, requiring separate analysis.

3. AN EXCLUSIVE JURISDICTION

(a) *Excluding the Executive*

Section 49 of the Australian Constitution provides for parliamentary privilege:

> 49 Privileges etc. of Houses
> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

The privileges of the House of Commons can be traced to its comprising part of the medieval High Court of Parliament.[22] Yet it was Article 9 of the Bill of Rights 1688 that expressly prohibited the extra-parliamentary review of parliamentary freedom of speech, debates, and proceedings. The Bill of Rights provided generally that the Crown's prerogative of making law, suspending law and taxing, for example, was now to be exercised with parliamentary consent, and ultimately in the parliamentary forum therefore. It is submitted that the threat posed by the Stuart courts, above, was not that of a modern supreme court reviewing legislation. The judicial House of Lords itself was the supreme court. More importantly the monarch's executive power did not originate from within the High Court of Parliament itself. The courts posed a political rather than specifically juridical threat to the new sovereignty of Parliament. They could locate an ultimate exercise of Executive power, outside of the parliamentary forum. Doing so would have continued to identify the Crown exclusively with the monarch, and therefore subject it to his definition of it in extra-parliamentary proclamations.[23]

After the Glorious Revolution the sovereignty symbolised by the Crown was not isolated. Sovereignty was reformed as the sovereignty of Parliament; the autonomy to demonstrate that the monarch had no extra-parliamentary prerogative superior to his prerogative inside the High Court of Parliament. Parliamentarians thereby defined the Crown's prerogative independently of the supremacy of the Executive. Parliamentarians were participating in the sovereignty symbolised by the Crown; a Crown that the executive branch no longer

exhausted. Parliamentarians would later go so far as to exercise the executive power itself, as the parliamentary Executive.

Article 9 asserted the exclusivity of parliamentary jurisdiction against the monarchical Executive, a power that did not originate in the "supreme court – legislature". It is submitted that Article 9 asserted a Crown immunity, an immunity from interference by the Executive, because the forum in question is part of the supreme court, from which judicial review is impossible. But the legislature's acquisition of that "Crown-ness" and the true object of its exclusion has been obscured by subsequent developments.

(b) *Responsible Government*

It is submitted that responsible government is a political principle, replacing a monarchical Executive with a parliamentary Executive. It is not a juridical principle that defines the Crown's prerogative independently of supreme power. The establishment of responsible government originated executive power in the legislature, as the "parliamentary Executive". The *Representation of the People Act 1832* (UK) or "the Great Reform Act of 1832" so diminished the power of the rotten and pocket boroughs of the monarchy and aristocracy that the party commanding a Commons majority would now constitute the Executive, elevating the monarch to an increasingly symbolic role.[24] Whereas the Revolution of 1688 had established the sovereignty of Parliament, by demonstrating that the Executive had to act ultimately inside the High Court of Parliament, to have its power independently authorised as the prerogative of the sovereign Crown, responsible government did not provide a new independent forum for defining executive power. Instead it changed that defined power to a parliamentary Executive.

It is submitted that the courts thereupon ceased to be a forum through which the Executive could threaten the parliamentary forum, in the manner defended against by Article 9 of the Bill of Rights. The Executive which previously had purported to exercise a superior prerogative outside of the parliamentary forum, was now drawn from that very forum itself. Since 1832, the legislature appoints the executive power which acts through it. But the cost of this democratic advance has been the legislative authority to validate the Crown's prerogative to make law, suspend law, and tax for example, independently of Executive power, as at the Glorious Revolution. The change to the exclusive jurisdiction still asserted by Article 9 was evident in the decade following the Great Reform Act.

(c) *Excluding the Courts*

The rule of law had been founded in 1688 as the sovereignty of Parliament; the autonomy to define the prerogative independently of supreme power, namely that of the Executive. Responsible government undid that formulation of the rule of law. The legislature itself now originates the Executive. That replacement of the old form of the rule of law, with a new constitutional order founded upon legislative supremacy, renders the *Stockdale v Hansard*[25] and *Sheriff of Middlesex*[26] litigation less surprising than it might otherwise be. In the former decision, as former Judge David Harper puts it extra-judicially,[27] the Court of Queen's Bench held it to be no defence to a defamation, that the defamatory matter is contained in a document laid before the House of Commons by its order. Likewise, in the latter decision the Court acquiesced in the imprisonment of the unfortunate sheriffs, whom the House had imprisoned for contempt for seeking to execute the earlier judgment.[28] Parliament then legislated to confirm the claimed privilege.[29] It was not for the courts to validate or otherwise independently review legislation.

The High Court of Parliament was similarly described as excluding judicial review of its privilege, shortly afterwards. In *Kielley v Carson*[30] the respondent parliamentarian criticised, in the Newfoundland House of Assembly, the hospital which the appellant managed. The appellant rejected the criticisms and added "your privilege shall not protect you".[31] The Privy Council held that a colonial legislature can only protect itself, as by expelling those who

disturb its proceedings. The power of punishing for contempt was exercised by the House of Commons at Westminster, through the House of Lords and Commons having comprised part of the medieval High Court of Parliament.[32] The importance of *Kielley* becomes apparent below, in its propounding the minimalist rule that the powers given to legislatures, outside Westminster, are only those which "are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute".[33]

(d) *A Separation of the Judiciary (not a Separation of Powers)*

Merely two years later, the potential was created to re-establish the constitutional order lost by the advent of responsible government. The specialisation of the supreme court in *O'Connell* separated the supreme court from the legislature, just as the specialisation of the common law was recognised in *Prohibitions* as separating them from the Executive.[34]

The establishment of Australian legislatures, separately from specialist supreme courts, was noted above.[35] In *Jackson* in 2005 it enabled the judicial House of Lords to independently validate legislation passed without the legislative House of Lords. This demonstrated that the autonomy founding the sovereignty symbolised by the Crown vests separately from the Executive, as at the Glorious Revolution. But *O'Connell* has been largely neglected and *Jackson* was not characterised in these terms. The decision continues to be overlooked in Australasia and the United Kingdom, whenever "Parliament" is juxtaposed with the courts without mention of their ancient unity.[36]

(e) *An Exclusive Jurisdiction Today*

The *Sheriff of Middlesex* case has been applied in Australia to exclude the courts' jurisdiction over parliamentary privilege, without mention of *O'Connell*. In *Egan v Willis*, the removal of a Minister from the legislature who refused to table certain Cabinet documents in the Legislative Council of New South Wales was considered. Gaudron, Gummow, and Hayne JJ adopted the view of Dixon CJ in *R v Richards; Ex parte Fitzpatrick and Browne*,[37] considered shortly, that:

> …it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.[38]

Their Honours cited Canadian authority concerning the Nova Scotia House of Assembly, holding that for courts to further examine the content of exercises of privilege "would trump the exclusive jurisdiction of the legislative body".[39] It had been then stated that "(a) particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory".[40] Yet we have seen that Article 9 originally required an exclusive jurisdiction and deference against an executive power that did not originate from within the legislature, when the supreme court was part of the forum that enacted the Bill of Rights. In *Egan v Willis* the High Court then identified the *Kielley* test from 1842 with "reasonable necessity",[41] and subsequently identified what was necessary to the proper exercise of the functions of the Legislative Council of New South Wales. Their Honours turned to responsible government, finding it to be a political system where one party or a coalition ordinarily controls the legislative chamber; at least the lower House.[42] Although flexible, responsible government traditionally encompasses the proposition that Parliament brings the Executive to account, securing governmental accountability that accompanies the primary parliamentary role of passing laws. Thus, s 75(v) of the Australian Constitution and administrative law merely "supplement"[43] responsible government in this respect. The importance of Cabinet confidentiality was also addressed. The Legislative Council lacked the authority to require Cabinet documents but could suspend a member as here. McHugh J similarly cited *Stockdale* as authority for the proposition "that the House should have exclusive jurisdiction to regulate the course of its own proceedings".[44]

It is submitted that the emphasis upon an exclusive jurisdiction that excludes the courts is a minimalist approach. It purports to defend legislative autonomy precisely upon responsible government forfeiting the legislative autonomy to define the prerogative independently of the Executive. But in fact it circumscribes legislative autonomy, by excluding judicial authority while certain legislators assert supremacy as the parliamentary Executive, unmediated by an independent political forum as at the Revolution of 1688. The doctrine of exclusive jurisdiction is a corollary of responsible government. Claims of exclusive jurisdiction conflate legislative autonomy with legislative supremacy, with respect, as does responsible government. As in *Egan v Willis*, a House of the Legislature asserts its independence against the courts, as if that might give it a general independence and hence independence against the Executive, but that political supremacy is already "in the hen house", having been drawn from the legislature itself as the parliamentary Executive.

A more dramatic example of the same exclusivity of jurisdiction occurred earlier in *Fitzpatrick and Browne*, although the phrase was not used. As the reader will be aware, Fitzpatrick and Browne sought habeas corpus following their imprisonment for purportedly defaming federal parliamentarians. Sir Owen Dixon gave judgment for the High Court in a matter whose difficulty was said to be not equal to its considerable importance.[45] First he referred to s 49 of the Australian Constitution, given above.[46] It was only later, in the *Parliamentary Privileges Act 1987* (Cth) that Parliament declared those powers, privileges, and immunities. Dixon CJ stated the English position, that it is for the House to judge of the occasion and of the manner of the exercise of an existing privilege.[47] The separation of powers was held to be secondary to the unequivocal terms of s 49 of the Constitution, rather than context trumping an individual section. Earlier, in *New South Wales v Commonwealth*,[48] context had instead trumped explicit Constitutional provisions at ss 73 and ss 101-104 for an Inter-State Commission.

Instead it is submitted that s 49 was modified by the *O'Connell* separation of the judiciary. In *Kielley v Carson* it was said that the power of punishing for contempt at Westminster was not based on the Commons being a legislature:

> The House of Commons possess this power as a Court of Judicature, Coke's 4th Inst. 23; as part of the High Court of Parliament, the *aula regia*. After the separation of the legislative body into two distinct houses, each retained, to this extent, at least, the power that was common to both…[49]

Parliamentary privilege at large has been associated with each House as a constituent part of the High Court of Parliament.[50] But the separation from the legislature of the specialist parliamentary court in *O'Connell*, immediately upon the creation of that court, indicates that the Commons, in itself, can no longer be presumed to act as a court of any description. Further, Article 9 of the Bill of Rights provided that parliamentary freedom of speech, debates or proceedings "not be impeached or questioned in any court or place out of Parliament". It would be upheld, where it is only the supreme court that was part of the High Court of Parliament in 1688, that is now separate from the legislature and engaged in judicial review of the legislature.

This lack of a curiality in the powers, privileges, and immunities articulated by s 49 is much more reconcilable with the judicial power as articulated in the rest of the Australian Constitution. The differentiation of the Crown from the Executive, through *Prohibitions*, the Glorious Revolution, *O'Connell*, and *Jackson* was described earlier. It was also suggested that the Australian Constitution differentiates authority from power. It vests legislative and executive power in the Queen under ss 1 and 61, yet provides for its authorisation as the Crown separately, through independent courts exercising judicial power under s 71, and constituting the final decision-making forum under s 75(v). Administrators bear a duty to act judicially,[51] on the proposed view, precisely because the Executive can no longer be presumed to act judicially since *Prohibitions* in 1607, and yet it must act through an

autonomous court since the Revolution of 1688, described above.[52] A similar duty upon the Executive in the legislature, and legislators generally, appears necessary for legislators to again exercise the sovereignty of Parliament, since *O'Connell* and the separation of the judicature in Australia in the nineteenth century.

4. A LEGISLATORS' DUTY TO ACT JUDICIALLY

We saw that the Australian Constitution divides power from authority, applying the English differentiation of the Crown from the Executive. Executive power vests in the Queen, and legislative power in the Queen in Parliament. Judicial power, on the other hand, vests in the High Court, with no mention of the monarch. Considered together with *Jackson*, the investiture of executive and legislative power in the Queen under the Constitution falls to be ultimately authorised by independent courts, to become the prerogative of the Crown. The autonomy founding the sovereignty symbolised by the Crown now originates in specialist and independent courts.

It is submitted that s 49 of the Constitution similarly founds legislative power, as differentiated through s 51(xxxviiii),[53] upon the autonomy and authority of independent courts, ultimately the High Court, rather than upon the sheer political power of the legislature or "constitutional supremacy" described above. Further, parliamentary powers, privileges, and immunities are a Crown prerogative, founded upon judicial authority. Since 1688 the Executive has been compelled to surrender the prerogatives of the Crown to the other branches of government, as when Article 9 of the Bill of Rights prohibited courts, through which a monarchical Executive could act, from impeaching or questioning parliamentary speech, debate or proceedings. The High Court of Parliament was to be the ultimate forum where the Crown exercised its prerogative of making law, suspending law, and taxing for example.

On the proposed view a contempt of Parliament would be addressed by the particular House of the Legislature acting as a tribunal. It would not resemble a forum purporting to act judicially and excluding the courts' jurisdiction by acting as a court, especially after the specialisation and separation of the supreme court in *O'Connell*. More routinely, were the facts of *Egan v Willis* to recur, it is submitted that would be for the House to judge the occasion and manner of the exercise of the privilege. Yet as a Crown privilege, the autonomy to define the Crown's prerogative in Parliament would derive ultimately from the courts. That would invite rather than exclude the autonomy, authority and jurisdiction of the courts. It would be an assertion of an outward-looking authority, seeking to further its Crown autonomy to define supreme power, particularly that of the Executive, rather than merely asserting legislative supremacy to protect the historical rights and privileges of the legislature. However, it is submitted that legislators would bear an immunity of the Crown against extra-parliamentary bodies with the power to compel evidence and impose sanctions, such as the Independent Commission Against Corruption and the New South Wales Crime Commission.[54] The *Parliamentary Privileges Act 1987* (Cth) provides similarly as to forensic matters, but uses its legislative supremacy rather than its Crown prerogative, founding its Article 9 rights at s 16 for example upon a juxtaposition of the legislature with the courts and other tribunals, thereby contrasting its legislative and judicial elements that were complementary in 1688. Likewise a decision such as *Attorney-General v Leigh*[55] has liberalised privilege but is open to criticism, with respect, on the ground that it applied a common law rather than statutory test,[56] so far as the duality of the High Court of Parliament, a supreme court and legislature when it enacted Article 9 of the Bill of Rights, was not spelt out.

By recovering the autonomy founding the sovereignty of the Crown, through a duty to act judicially, legislators could once again be characterised as part of an autonomous High Court of Parliament. Presently, it is respectfully submitted, legislators are in danger of acting like

the High Court of Parliament condemned by South African judges in *Minister of Interior v Harris*,[57] where the parliamentary "judges" were the legislators themselves, as in seventeenth-century England.

5. THE RESTORATION OF PARLIAMENTARY AUTONOMY

A duty upon legislators to act judicially is needed to recover the sovereignty of Parliament. Only thus can legislators again participate in the autonomy to define the Crown's judicial, executive, and legislative prerogative independently of supreme power, namely that of the parliamentary Executive, as at the Glorious Revolution. Without judicial review of Executive acts, it is submitted that the parliamentary Executive is merely asserting its supremacy, like James II before it. Parliamentary privilege as articulated at s 49 of the Australian Constitution would be vested with the judicial authority founding the sovereignty symbolised by the Crown, were legislators to bear a duty to act judicially rather than their excluding the courts' jurisdiction. Policy development could occur in the executive branch,[58] yet it should be subjected to parliamentary authority rather than just comprising an unmediated assertion of executive power. Through the duty, and subsequent independence from their own Executive power as described above, legislators could invest parliamentary supremacy with "parliamentary autonomy" and hence a presumption of fairness, by defining the Crown's prerogative independently of the Executive in the legislature. Parliament can recover its sovereignty and restore and enhance its reputation, as the Crown.

[1] Commonwealth of Australia, *Constitution*, s 1; *Constitution Act 1902* (NSW), s 3; *Constitution Act 1867* (Qld), s 2A(1), which s 6 of the *Constitution Act 2001* (Qld) refers to; *Constitution Act 1975* (Vic), s 15; *Constitution Act 1889* (WA), s 2(2). However, Enid Campbell described the Queen as part of the South Australian *Constitution*, through references to presentations of Bills to the Governor, for example (s 8(a), *Constitution Act 1934* (SA)) involving the monarch's assent (Enid Campbell, "Royal Assent to Bills" (2003) 14 *Public Law Review* 9, 10 (n1). Section 10 of the Tasmanian *Constitution Act 1934* (Tas) states: "The Governor and the Legislative Council and House of Assembly shall together constitute the Parliament of Tasmania". The Queen is not stated to be part of the Legislative Assembly, under the *Northern Territory (Self-Government) Act 1978* (Cth) nor the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

[2] (2006) 1 AC 262 ('*Jackson*'). In 2003 Enid Campbell remarked that there have been several requests to Australian courts to restrain presentation of bills for royal assent, but there are few likely cases where courts would consider what occurred after presentation for Royal Assent ("Comments" "Royal assent to bills" (2003) 14 *Public Law Review* 5, 11-12).

[3] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 70.

[4] *O'Connell v R* (1844) 11 Cl & Fin 155 ("*O'Connell*"). Various elements of the proposed emphasis on *O'Connell* are set out in a general relation of jurisdictional error to the sovereignty of Parliament, in Tom Spencer, "An Australian Rule of Law" (2014) 21 *Australian Journal of Administrative Law* 98.

[5] *Egan v Willis* (1998) 195 CLR 424.

[6] See *Sue v Hill* (1999) 199 CLR 462, [67-[97]; Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A legal and political analysis* (OUP, 1999); Nick Seddon, "The Nature of the Crown" (2000) 28 *Federal Law Review* 245; Cheryl Saunders, "The Concept of the Crown" (2015) 38 *Melbourne University Law Review* 873.

[7] H W R Wade and C F Forsyth, *Administrative Law* (OUP, 10th ed, 2009) 39. Also see Sir William Wade, "The Crown, Ministers and Officials: Legal Status and Liability", in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A legal and political analysis* (OUP, 1999) 24.

[8] (1607) 12 Co Rep 63 ("*Prohibitions*").

[9] (2007) 228 CLR 651.

[10] (2007) 228 CLR 651 at [46].

[11] (2003) 211 CLR 476 at [104].

[12] (2007) 228 CLR 651 at [46].

[13] (1607) 12 Co Rep 63, 64.

[14] (1611) 12 Co Rep 74.

[15] *Thomas v Sorrell* (1674) Vaughan 330; *Godden v Hales* (1686) 11 St Tr 1165.

[16] The website for legislation of the United Kingdom Parliament lists the Bill of Rights 1688, not 1689. It is available at: http://www.legislation.gov.uk/all?title=bill%20of%20rights

[17] See e.g. *Williams v Commonwealth* (2012) 248 CLR 156 [22] (French CJ). See also Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action*, (Lawbook, 5th ed, 2013) 114-8.

[18] (1903) 1 CLR 1.

[19] Jennifer Clarke, Patrick Keyzer, James Stellios; *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 9th ed, 2013) 7.

[20] It has previously been characterised as justifying the dismissal of the Whitlam Government in 1975, through a reductionist reading of the Governor-General's powers (Tom Spencer, "An Australian rule of law" (2014) 21 *Australian Journal of Administrative Law* 98, 107-8.

[21] Anne Twomey, "Reconciling Parliament's Contempt Powers with the Constitutional Separation of Powers" (1997) 8 *Public Law Review* 88, 93.

[22] *Kielley v Carson* (1842) 4 Moo PC 63, 89. See also *Erskine May Parliamentary Practice*: *The Law, Privileges, Proceedings and Usages of Parliament* (LexisNexis UK, 23rd ed, 2004) chapter 5.
[23] Even a century later, despite the entrenchment of the *sovereignty* of Parliament, Blackstone would assert that a prerogative would cease to be that of the Crown if it could be held in common with the subject (William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765), Book 1, 232).
[24] See Stevens R, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (Weidenfeld & Nicolson, London, 1979) 23-34.
[25] *Stockdale v Hansard* [1839] 9 A & E 1; 112 ER 1112.
[26] *Sheriff of Middlesex* (1840) 11 A & E 273. See de Smith and Brazier, *Constitutional and Administrative Law* (Penguin, 8th ed, 331-2). As they set out, the House committed for contempt two Sheriffs of Middlesex, as well as Stockdale and his solicitor, following a purported defamation (1840) 11 Ad. And E 273.
[27] David Harper, "Parliament and the Judiciary: Judicial Independence and the Nature of the Relationship Between Parliament and the Judiciary" (2015) 30 *Australasian Parliamentary Review* 8.
[28] David Harper, "Parliament and the Judiciary: Judicial Independence and the Nature of the Relationship Between Parliament and the Judiciary" (2015) 30 *Australasian Parliamentary Review* 8. *Sheriff of Middlesex* (1840) 11 A & E 273. See also de Smith and Brazier, *Constitutional and Administrative Law* (Penguin, 8th ed, 331-2). As they set out, the House committed for contempt two Sheriffs of Middlesex, as well as Stockdale and his solicitor, following a purported defamation.
[29] *Parliamentary Papers Act 1840* (UK).
[30] (1842) 4 Moo PC 63.
[31] (1842) 4 Moo PC 63, 64.
[32] (1842) 4 Moo PC 63, 89.
[33] (1842) 4 Moo PC 63, 88.
[34] In *Dr Bonham's Case*, Lord Coke held that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void" [1572] Eng R 107; [1610] 8 Co Rep 113(a); 77 ER 646. Chief Justice of Western Australia Wayne Martin extra-judicially describes *Jackson* as indicating that Lord Coke's views were not heretical. The supreme court was not yet separate from the legislature, precluding independent judicial review of legislation. A critical judgment could have been appealed to the judicial House of Lords, the membership of which earlier sat as the legislative House of Lords to pass the legislation in question. The concern that the judicial House of Lords might sit as a court to adjudicate upon the Commons' privileges was expressed in *Stockdale v Hansard* (1839) 9 Adolphus and Ellis 1 [112 ER] 1112 [24]. See, also, *Erskine May*, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed, 2004, Wiltshire, 185.
[35] See footnote 1 above.
[36] Interestingly, *British Railways Board v Pickin* (1974) AC 765 raised *Green v Mortimer* (1861) 3 LT 642. Just 17 years after *O'Connell*, Lord Campbell applied *Dr Bonham's Case* [1572] Eng R 107; [1610] 8 Co Rep 113(a); 77 ER 646. Carew's Estate Act 1857, a private Act, could have empowered the courts to make a particular life estate inalienable. Instead at s 46 it empowered the courts to make it inalienable "so far as the rules of law and equity and the jurisdiction and the authority of the court would admit", which in fact they did not admit at all. (Lord Cross of Chelsea, *Pickin v British Railways Board* [1974] A.C. 765 at 802.) In *Green v Mortimer* the Lord Chancellor said the provision was absurd, and the Act must have passed '*per incuriam*'; through carelessness. The order by which the declared intentions of the Act were to be carried out was *ultra vires* of the court, for there could be no power to so qualify the interest in question. "There must be the same power in the defendant to incumber his life-estate *as if the Act had never passed*…" (at 643). (emphasis added).
[37] (1955) 92 CLR 157 at 162 ("*Fitzpatrick and Browne*").
[38] *Egan v Willis* (1998) 195 CLR 424.
[39] *Egan v Willis* (1998) 195 CLR 424 [27]. Their Honours cited *New Brunswick Broadcasting Co v Nova Scotia* [1993]1 SCR 319, 384.
[40] *New Brunswick Broadcasting Co v Nova Scotia* [1993]1 SCR 319, 384.
[41] *Egan v Willis* (1998) 195 CLR 424, [31].
[42] *Egan v Willis* (1998) 195 CLR 424, [38].
[43] *Egan v Willis* (1998) 195 CLR 424, [42].
[44] *Egan v Willis* (1998) 195 CLR 424, [67], citing *Stockdale* (1839) 9 Ad & E 1 at 233 [112 ER 1112 at 1199].
[45] (1955) 92 CLR 157, 161.
[46] (1955) 92 CLR 157, 161.
[47] (1955) 92 CLR 157, 162.
[48] (1915) 20 CLR 54.
[49] *Kielley v Carson* (1842) 4 Moo PC 63, 89. "Aula regis. [The Hall of the King.] After the Conquest this was the King's Court or Curia Regis. From it all the courts of justice have emanated; likewise the High Court of Parliament and the Privy Council". *Osborne's Concise Law Dictionary*, (ed Leslie Rutherford and Sheila Bone) (Sweet & Maxwell, 8th ed, 1993).
[50] *Erskine May Parliamentary Practice*: *The Law, Privileges, Proceedings and Usages of Parliament* (LexisNexis UK, 23rd ed, 2004) chapter 5.
[51] *Ridge v Baldwin* (1964) AC 40. However, the term "duty to act judicially" has been said to suggest a super-added judicial element is necessary before the duty can be imposed, and terms such as natural justice and procedural fairness have taken root instead. See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action*, (Lawbook, 5th ed, 2013) 792-4, [12.150] – [12.170].
[52] It has previously been argued that the adjudicative elements of bodies such as the Inter-State Commission, a Taxation Board of Review, and a Human Rights and Equal Opportunity Commission for example need not be impugned for breaching the constitutional separation of the judicial power. Tom Spencer, "An Australian rule of law" (2014) 21 *Australian Journal of Administrative Law* 98, 114.
[53] Anne Twomey, "Reconciling Parliament's Contempt Powers with the Constitutional Separation of Powers" (1997) 8 *Public Law Review* 88, 93.
[54] See Gareth Griffith, "Parliamentary Privilege: Major Developments and Current Issues" (Background Paper No 1/07, NSW Parliamentary Library Research Service; < https://www.parliament.nsw.gov.au/researchpapers/Pages/parliamentary-privilege-major-developments-and-c.aspx>.
[55] See Privileges Committee Report, *Question Concerning the Defamation Action Attorney-General and Gow v Leigh* (I17A, June 2013).

[56] Philip A Joseph, "Parliamentary Privilege Developments in New Zealand: The Good, the Bad and the Ugly" (2015) 30 *Australasian Parliamentary Review* 115, 123-4.
[57] 1952 (4) SA 769 at 786.
[58] Andrew le Sueur recognises changing levels of engagement between the Executive, legislatures, and the public service in the United Kingdom, through the existence of three disparate, competing models of the constitution; the Crown, Westminster, and multi-level governance: "Constitutional Fundamentals", in David Feldman (ed), *English Public Law: Oxford Principles of Public Law* (OUP, 2nd ed 2008) 31-8.