

REVISITING THE APPLICATION OF STATUTES TO THE CROWN: A HISTORICAL CONSTITUTIONAL APPROACH

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*ABSTRACT. In this article, the evolution in legal thinking of the presumption that statutes do not apply to the Crown is analyzed. The debate across the Commonwealth surrounding the nature of the presumption – as an immunity, a prerogative or a mere rule of statutory interpretation – is analyzed in light of Canadian, Australian and British cases. The evolution and continuity in legal thinking of the rule of construction of statutes as to their application to the Crown encapsulated by Edward Coke and referred to until the second half of the 20th century is analyzed. Changes brought about to the rule throughout the 20th century – notably by Lord du Parcq in his seminal speech in Province of Bombay – are revisited and contrasted with the recent restatement of the rule by the United Kingdom Supreme Court in *R(Black) v Secretary of State for Justice*. In light of 20th and 21st century developments and the resulting inconsistencies with constitutional principles such as the rule of law, suggestions for reform are put forward from a historically informed perspective.*

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KEYWORDS: *statutory interpretation, Crown, rule of construction, presumption, immunity, prerogative, the king can do no wrong*

I. INTRODUCTION

Lord du Parc's speech in *Province of Bombay* stands as authority for the rule of construction of statutes in relation to their application to the Crown. A statute applies to the Crown if it is named in it or – in absence of an express mention – if, by necessary implication, Parliament intended for it to apply to the Crown.¹ The evolution of that rule of construction since *Province of Bombay* has been marked by an ever-increasing tendency to find that statutes do not apply to the Crown, culminating with the modification of the rule in *R (on the application of Black) v Secretary of State for Justice*.² However, the rule of construction of statutes as it has been interpreted and restated in the 20th and 21st centuries is divorced both from constitutional principles and from its development in legal thinking. *Black* and *Province of Bombay* are case studies highlighting the constitutional inconsistencies that can arise from a failure to grasp historical context, as well as the very practical consequences that can ensue (eg smoking in prisons or even hospitals and other Crown premises despite a statutory smoking ban mandated by Parliament and in effect in other public places). A detailed analysis of the reasons given by courts demonstrates that the presumption that statutes do not apply to the Crown, although classified as a rule of construction, has nevertheless the effects

¹ *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58 (*Province of Bombay*).

² [2017] UKSC 81, [2018] AC 215.

of a prerogative understood as an immunity. The presumption shelters the government from the application of the law, including acts of Parliament, and as such acts as an exception to the rule of law.

In the first part of this article, I expose inconsistencies in the current state of the law, as well as the debate surrounding the nature of the presumption. In the second part of this article, I revisit Lord du Parc's understanding of the rule of construction of statutes as to their application to the Crown in his seminal speech in *Province of Bombay*. In the third part, I contrast Lord du Parc's understanding of the necessary implication exception with Lady Hale's new articulation and application of the necessary implication exception in *Black*. In light of a critical analysis of the current rule of construction and the divorce from its contextual and historical underpinning, I revisit, in the fourth part, the evolution and continuity in legal thinking of the rule of construction in relation to the application of statutes to the Crown encapsulated by Edward Coke at the beginning of the 17th century and referred to until the second half of the 20th century. In the fifth part, I offer a historically informed avenue of reform going forward regarding the application of statutes to the Crown.

In my analysis, I adopt a particular methodological approach, that of historical constitutionalism. The approach was elaborated by JWF Allison³ and has its roots in Maitland's approach to constitutional history,⁴ interpreted as the mastery of the genesis of our legal concepts and their intellectual production across time to understand our current constitutional

³ JWF Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 16, 20.

⁴ FW Maitland, *The Constitutional History of England* (CUP 1963) 537–39.

arrangements.⁵ A historical constitutionalist looks to changes and continuity in legal concepts and ideas to enlighten the current state of the law. If the presumption that the Crown is not bound by statutes is understood as historically grounded – courts have claimed that it is “well established”⁶ – the study of the history of the understandings of the application of statutes to the Crown in legal thinking should support that claim.

II. INCONSISTENCIES IN THE CURRENT STATE OF THE LAW

In *BBC v Johns*, the inapplicability of statutes to the Crown was called the Crown’s immunity.⁷ The inapplicability was justified, according to Diplock LJ (as he then was), because the ruler is by her very nature exempt from the application of the laws she enacts for her people:

Since laws are made by rulers for subjects, a general expression in a statute such as “any person” descriptive of those upon whom the statute imposes obligations or restraints is not to be read as including the ruler himself. [...] The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or

⁵ Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012) 1, 12; Joshua Getzler, “Personality and Capacity: Lessons from Legal History” in Tim Bonyhady (ed), *Finn’s Law: An Australian Justice* (Federation Press 2016) 154; John Hudson, “Maitland and Austin, Legal History and Legal Thought in the Late Nineteenth Century”, *Law and Authority in British Legal History, 1200-1900* (CUP 2016) 304, 321.

⁶ *Black* (n 2) [35]; *Province of Bombay* (n 1) 61.

⁷ *BBC v Johns* [1965] Ch 32.

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in respect of property unless the statute says so expressly or by necessary implication.⁸

This passage encapsulates an Austinian understanding of the sovereign being above the law, which is characteristic of the late 19th and 20th centuries but contrary to a long understanding in English legal thinking, dating back to the 13th century, that the king is under the law.⁹ Even Blackstone, who famously defined the prerogative as the “special pre-eminence, which the king has, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity”, did not understand the king as a sovereign above the law, but rather as being entitled to “something that is required or demanded before, or in preference to, all others”.¹⁰ The king is preferred to and sits above others, but like all others, he is also ultimately under the law. In that regard, Blackstone’s views on the king’s status as under the law did not differ from the views found in the 13th century treatise attributed to Bracton.¹¹

Blackstone’s definition of the prerogative shows that he understood the concept as encompassing the privileges the king could claim. Such privileges of the king could be traced to the

⁸ Ibid 78-9.

⁹ I discuss the king’s status as under the law in English constitutional history in Marie-France Fortin, *A Historical Constitutional Approach to the King Can Do No Wrong: Revisiting Crown Liability* (PhD thesis, University of Cambridge, 2019), <https://doi.org/10.17863/CAM.57613>.

¹⁰ William Blackstone, *Commentaries on the Laws of England*, vol 1 (facsimile of 1765-1769 1st edn, Chicago 1979) 232.

¹¹ Bracton also understood the king as being above all others but under the law: Fortin (n 9) 29-30. Bracton wrote: “For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do de jure [...]” and “His power is that of *jus not injuria*”. Henry de Bracton, *Bracton on the Laws and Customs of England*, vol 2 (George Edward Woodbine ed, Samuel E Thorne tr, Harvard 1968) 305-06.

feudal era and were famously indexed by Staunford.¹² Privileges give the king a preferred or exempted status. In that latter sense, a privilege can also be understood as an immunity.¹³ Equally famously, Dicey defined the prerogative as “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown”, emphasising therefore the “powers” and “authorities” dimension of the prerogative.¹⁴ More recently, Hogg integrated both the privileges and powers dimensions of the prerogative by defining it thus: “the powers and privileges accorded by the common law to the Crown”.¹⁵

In addition to debates surrounding the concept of prerogative, there is also uncertainty as to the nature of the presumption that statutes do not bind the crown unless expressly named in it. Should the presumption be understood as a rule of construction, it would then originate in the courts and fall within their interpretive province. Should the presumption be part of the prerogative, it would originate instead in the common law and – although it can be modified or abolished by Parliament – have its roots in royal history.

¹² William Staunford, *An Exposition of the Kinges Prerogative* (Printed in Fleet Street by Richard Tottel 1583). See also Robert Brooke, *La Graunde Abridgement* (Tottell 1573).

¹³ On the classification of prerogatives, privileges and immunities, see and Marie-France Fortin, “Reconcevoir la Pr rogative royale : une approche constitutionnelle historique anglaise” dans Violaine Lemay, Guy Az bov  Tetang, Le Tan Phat et Val ry Dohou Bi, dirs, *Les chantiers de la recherche en droit* (forthcoming 2021).

¹⁴ AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution: The Oxford Edition of Dicey*, vol 1 (JWF Allison ed, OUP 2013) 188. On the prerogative as a source of executive authority, see Alexander Bolt & Philippe Lagass , “Beyond Dicey: Executive Authorities in Canada”, (2021) 3 J Commwlth Law 1.

¹⁵ Peter Hogg, *Constitutional Law in Canada*, loose-leaf ed. (Carswell 1995) 1.9.

The view that the rule that statutes do not apply to the Crown should be conceived of as a rule of construction and not as part of the prerogative was held by Lord MacDermott in *Madras Electric Supply Corporation Ltd*, while Lord Keith adopted the opposite view in the same decision and Lord Reid referred to it as both a rule and a prerogative.¹⁶

In a seminal Canadian case on the application of statutes to the Crown, Justice Dickson, as he then was, wrote that “[t]he doctrine of Crown immunity from statutes is a very old common law doctrine”.¹⁷ Tellingly, the French version reads: “La doctrine de l’immunité de l’État face à l’application des lois est une très vieille doctrine de *common law*.”, which indicates more clearly that the immunity (*l’immunité*) is perceived by Canada’s Supreme Court, as other courts throughout the Commonwealth, as benefiting the whole governmental apparatus (*l’État*) and not solely the king personally. In *Alberta Government Telephones*, Dickson noted, this time as Chief Justice, that the application of statutes to the Crown is a “Crown immunity doctrine”, a “statutory Crown immunity doctrine”, a “presumption of immunity”, and he emphasised “the necessarily deferential approach the courts must take on questions of Crown immunity”.¹⁸ At issue in the *Alberta Government Telephones* case was s. 16 of the *Interpretation Act*¹⁹ and the benefits and burdens exception to the rule that statutes

¹⁶ *Madras Electric Supply Corporation Ltd v Boarland* [1955] AC 667, 684-85 (Lord MacDermott), 686-90 (Lord Reid), 694-95 (Lord Keith).

¹⁷ *R v Eldorado Nuclear Ltd* [1983] 2 SCR 551, 556.

¹⁸ *Alberta Government Telephones v (Canada) Canadian Radio-television and Telecommunications Commission* [1989] 2 SCR 225, 291.

¹⁹ *Interpretation Act*, RSC 1970, c I-23, s. 16, now *Interpretation Act*, RSC 1985, c I-21, s. 17.

do not bind the Crown.²⁰ Section 16 provided at the time that “No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, except only as therein mentioned or referred”.²¹ Alberta Government Telephones, a Crown agency, was attempting to prevail itself of certain benefits of the regulatory framework of the Canadian Radio-television and Telecommunications Commission (CRTC), while also avoiding other burdens it imposed. The implication that the Crown’s immunity is based in the prerogative is not drawn explicitly by the Court. The words “statutory Crown immunity doctrine” appear to point to statutory immunities conferred by Parliament, and not the prerogative-based immunities of the Crown. However, in light of the French translation of Dickson CJ’s words – “la théorie de l’immunité de la Couronne contre l’application des lois” – it appears that it is the latter, prerogative-based, interpretation which the Court adopted. Implicit in the Court’s reasoning is that the prerogative-based immunity of the Crown against statutes (as it was historically misconstrued)²² was continued by Parliament’s successive enactments of the *Interpretation Act*. The codification of the “prerogative” of the Crown immunity doctrine should have entailed the application of statutory interpretation principles, but the Supreme Court of Canada

²⁰ The benefits and burden exception was more fully developed by the Supreme Court of Canada in *Sparling v Quebec (Caisse de dépôt et placement du Québec)* [1988] 2 SCR 1015.

²¹ The language of the *Interpretation Act* points to the original historical understanding of the rule of construction as applying only to the king personally and not governmental administration as a whole, as is further discussed below.

²² The Court, without deciding on the issue, found persuasive Street’s demonstration that precedents in relation to the application of statutes to the Crown were misinterpreted. *Eldorado* (n 17) 556-557; Harry Street, “The Effects of Statutes upon the Rights and Liabilities of the Crown” (1948) 7 UTLJ 357.

instead paid reverence to an immunity doctrine conceived of as rooted in the prerogative.

The High Court of Australia refused to give the rule that the Crown is not bound by statutes a higher status than that of a rule of construction in its landmark decision of *Bropho* and, more recently, in *Baxter*.²³ That statutes do not apply to the Crown should be considered a rule of construction marks a change of mind in the Australian context, where Evatt had listed it as a prerogative.²⁴

Brazier and Cohn consider the presumption of not being subject to the application of statutes to be a prerogative.²⁵ In *Black*, the Supreme Court ruled that it is not an immunity derived from the prerogative but merely a presumption that statutes do not bind the Crown.²⁶ *Black* may appear as putting an end to the debate held across the Commonwealth as to the nature of the Crown's exemption from the ordinary application of statutes.²⁷

However, this recent development might merely be a slight semantic difference. The rule of construction that statutes

²³ *Bropho v Western Australia* (1990) 171 CLR 1, 15; *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, 48-49.

²⁴ Herbert Vere Evatt, *The Royal Prerogative* (Leslie Zines ed, Law Book Company 1987). On this last point, see Anthony Gray, "Immunity of the Crown from Statute and Suit" (2010) 9 *Canb LR* 1; Susan Kneebone, "The Crown's Presumptive Immunity from Statute: New Light in Australia" (1991) *PL* 361.

²⁵ Rodney Brazier, Constitutional Reform and the Crown in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999); Margit Cohn, "Medieval Chains, Invisible Ink: On Non-Statutory Powers of the Executive" (2005) 25 *OJLS* 97.

²⁶ *Black* (n 2) [36].

²⁷ The nature of the inapplicability of statutes to the Crown and whether it can be waived has been the subject of much uncertainty: Adam Tomkins, "Crown Privileges" in Sebastian Payne and Maurice Sunkin (eds), *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999) 171, 173, 180.

are presumed not to apply to the Crown has been elaborated upon by the courts since the turn of the 20th century and, unlike the king's prerogatives, is not rooted in English constitutional history's feudal past. However, the reverence towards the Crown underlying the rule of construction seems to be another illustration of the courts acting as "lions under the throne" in the context of relationships between the judicial, legislative and executive branches.²⁸

In *Black*, a non-smoker inmate, Mr Black, was serving an indeterminate sentence at HMP Wymott and suffering from various health problems exacerbated by tobacco smoke. He complained that the smoking ban enacted pursuant to the Health Act 2006 was not properly enforced in the communal parts of the prison and asked for the NHS smoke-free compliance line to be installed to allow prisoners to report breaches of the law. The Secretary of State replied that Part 1 of the Health Act 2006 does not bind the Crown. Mr Black initiated judicial review proceedings of the Secretary of State's refusal to provide access to the smoke-free compliance line.²⁹ Lady Hale, writing for the Supreme Court, found that the Crown is not bound by Part 1 of the Health Act 2006 and the provisions relating to the smoking ban, including enforcement mechanisms for breaches of the ban. That ruling left not only Mr Black, but also other inmates and guards, as well as all civil servants working in governmental departments throughout the

²⁸ Stephen Sedley, *Lions under the Throne: Essays on the History of English Public Law* (CUP 2015).

²⁹ He was successful in first instance. At trial, Singh J had ruled that the Act binds the Crown and quashed the Secretary of State's decision, but his decision was reversed on appeal. [2015] EWHC 528 (Admin), [2015] 1 WLR 3963; [2016] EWCA Civ 125, [2016] QB 1060. See Alison Young, "The Presumption that Legislative Provisions do not Bind the Crown: Proposed Modification Goes up in Smoke" (2018) 77 CLJ 237.

country and persons visiting them, without the benefit of the smoking ban otherwise applicable in public spaces in the United Kingdom following the adoption of the Heath Act 2006.

Plainly, *Black* is a significant decision. The conclusion that the Crown is not bound by an act of Parliament opens a very wide umbrella to cover all governmental departments and prisons from the application of that Act.³⁰ The effect of *Black* is therefore wide-ranging: when an analysis of statutory provisions leads a court to conclude that the Crown is not bound by an act of Parliament, all central government premises, including the civil servants working therein and members of the public visiting the premises, do not benefit from the application of the Act. For example, the issue in *Black*, as Lady Hale points out at the outset of her speech, touches more than Her Majesty's prisons.³¹ As a result of the Supreme Court's decision in *Black* that the Crown is not bound by Part 1 of the Health Act 2006, *all* Crown premises are exempted from the smoking ban enacted in that Act. The outcome of the case implies notably that neither civil servants working in governmental premises in Westminster, prisons and hospitals, nor members of the public visiting them, benefit from the smoking ban provided for in the Act. In another case on the application of statutes to the Crown, the High Court had reasoned to the contrary: "Moreover, we can discern no coherent, still less cogent, reasons for Schedule 5 applying to the Police, the NHS and private prisons but not binding the MoD,

³⁰ On the notion of "emanation" of the Crown covered by the umbrella, see Lord Denning's reasons in *Tamlin v Hannaford* (1950) 1 KB 18, 22. Lord Denning concluded in that case that the British Transport Commission was not a servant or agent of the Crown and was not comparable to military corps or to the Post Office, the latter being historically a monopoly of the Crown.

³¹ *Black* (n 2) [1].

HMRC or prisons in the public sector; there is nothing whatever to suggest a legislative intention to draw so curious a distinction.”³² The extent to which governmental premises are not covered by the smoking ban in the Health Act is possibly more problematic than foreseen by the Supreme Court in *Black*, especially in light of precedents with regards to the applicability of the smoking ban to NHS hospitals.³³

Black is a significant case in and of itself. But Lady Hale’s speech in *Black* is remarkable on several counts relating to a general matter of high constitutional importance: the application of statutes to the Crown. Lady Hale addresses the long-standing debate as to the nature of the rule and her speech marks a departure from the rule as it was laid down in the seminal case of *Province of Bombay*, as well as from constitutional understandings derived from the 17th century constitutional arrangement.

As I will discuss in the fourth section, as the law stands as a result of *Black*, if the Crown is not expressly named in a statute and if the Crown is deemed capable of voluntarily complying with an Act of Parliament (and we are told in *Black* that we cannot assume that the Crown will not act),³⁴ the intent of the Act is in all likelihood not frustrated and it does not, as a consequence, apply to the Crown by necessary implication. In short, although Lady Hale said in *Black* that the rule of construction that statutes do not apply to the Crown is not

³² *R (Revenue and Customs Comrs) v Liverpool Coroner* [2014] EWHC 1586 (Admin), [2015] QB 481 [48]. As is discussed further below, the issue in *Liverpool Coroner* was the legislative intent in adopting a new statute that would allow coroners to meet obligations flowing from the European Convention of Human Rights.

³³ The Supreme Court’s conclusion in *Black* that the Crown is not bound by Part 1 of the Act calls into question the Court of Appeal’s decision in *R (G) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795 [5].

³⁴ *Black* (n 2) 36.

grounded in the Crown's immunity from liability,³⁵ the effect of the decision is to confer on the Crown what is tantamount to an unreviewable prerogative to take voluntary action or not. Indeed, once a court finds that a statute does not bind the Crown because of an absence of both express mention and of a necessary implication that Parliament wished to bind the Crown, whether the Crown chooses then to comply with the Act or not is a decision for the Crown to make. If the Crown judges that its voluntary cooperation in the sense of voluntary compliance with the statute is not "possible and politic",³⁶ that cannot retroactively change the court's ruling and the statute cannot suddenly become applicable to the Crown as a result of the Crown's refusal to voluntarily comply. In *Liverpool Coroner*, for example, which Lady Hale approved of in *Black*, the High Court rejected the possibility that a coroner be left with the discretion of determining if, on a case by case basis, s. 3 of the *Human Rights Act* (1998) and Art. 2 of the *European Convention on Human Rights* were triggered so that Schedule 5 of the *Coroners and Justice Act* 2009 bound the Crown.³⁷ In the *Liverpool Coroner* case, the obligation of the state under the ECHR to investigate deaths when it might be responsible was found to be determinative, in conjunction with the legislative history and the legal impossibility for the Crown (HMRC in that case) to voluntarily cooperate with the coroner without infringing the confidentiality duties imposed on it in the *Revenue and Customs*

³⁵ *Black* (n 2) [36] ("This is not an immunity from liability, strictly so-called, but a rule of statutory interpretation").

³⁶ *Province of Bombay* (n 1) 62; *Liverpool Coroner* (n 32) [40].

³⁷ The right to life guaranteed by Art. 2 ECHR contains a procedural obligation to investigate deaths, including by what means and in what circumstances, when the state might be responsible. See *McCann v United Kingdom* (1995) 21 EHRR 97; *Jordan v United Kingdom* (2001) 37 EHRR; *R (Middleton) v West Somerset Coroner and another* [2004] UKHL 10, [2004] 2 AC 182.

Act 2005.³⁸ It will be of little consolation to Mr Black and other inmates in similar circumstances that, should their stay in Her Majesty's smoke-filled prisons prove to be fatal to them, coroners will have the power to investigate because the Crown may be responsible for the cause of death.³⁹

To grant the Crown the unreviewable choice not to comply with an Act of Parliament is not without practical consequences. In *Black*, for example, Lady Hale listed the "very significant differences" between an employer's voluntary smoking ban and the one imposed by the Health Act 2006.⁴⁰ The Act provides for enforcement mechanisms, criminal sanctions, duties imposed on employers and managers, as well as the provision that a complainant does not have to bear the burden of bringing proceedings forward. The benefits of these provisions are not available when the smoking ban is only voluntary and not grounded in the Act. In the absence of the legal enforcement mechanisms provided for in an Act of Parliament, it is "unrealistic" to expect that civil servants and other workers who have been adversely affected by second-hand smoke in government premises will bring judicial review proceedings. Apart from their inaccessibility and their expensiveness both in terms of money and in time, judicial review proceedings would not be nearly as efficient as the statutory enforcement mechanism laid down in the Act.⁴¹ Yet,

³⁸ It appears that HMRC used to voluntarily provide such occupational history prior to its change of policies in 2013: *R (Revenue and Customs Comrs) v Liverpool Coroner* (n 32) [7].

³⁹ Perhaps the outcome of *Black* at the UK Supreme Court might have been different if Art. 2 of the ECHR and corresponding provisions of the HRA had been invoked.

⁴⁰ *Black* (n 2) [39].

⁴¹ *Ibid* [40].

despite the review of all the inefficiency and disadvantages caused by the lack of enforcement processes to civil servants and members of the public when only a voluntary ban is put in place, the Court concluded rather surprisingly that “The Crown can do a good deal by voluntary action to fill the gap.”⁴² The Court did not explain how the disadvantages associated with a voluntary ban only, especially as regards judicial review proceedings, could be mitigated. In light of the Court’s own observations as to the inadequacy of a voluntary ban,⁴³ one is left to wonder how the Crown can bridge the gap between a voluntary and a statutory smoking ban.

The issue of whether the Crown can voluntarily comply by adopting regulations subjecting it to the smoking ban when the Act does not contemplate it and does not apply to the Crown was left unaddressed by the Supreme Court. Moreover, criminal offences, fines and sanctions such as those provided for by the provisions of the Health Act 2006 cannot be imposed by the Crown when only voluntary measures are put in place. In *Black*, Lady Hale compared the Health Act 2006 with other statutes where provisions provided expressly for the tailored application of criminal and penal sanctions to the Crown.⁴⁴ The absence of similar provisions in the Health Act 2006 was paramount in Lady Hale’s reasoning that Parliament did not intend to bind the Crown, despite strong legislative history pointing to a different conclusion. As a result of *Black*, the

⁴² Ibid [49].

⁴³ *Black* (n 2) [39-40].

⁴⁴ On the Crown’s liability for criminal acts when Parliament has intervened, see Maurice Sunkin, “Crown Immunity from Criminal Liability in English Law” [2003] PL 716. As to the monarch’s personal immunity from suit for criminal offences, it was vividly illustrated by Dicey: “If (to give an absurd example) the Queen were herself to shoot Mr. Gladstone through the head, no Court in England could take cognizance of the act”. Dicey (n 14) 21.

absence of express language binding the Crown is nearly fatal to a claimant: “First and foremost, it does not say so and it would have been easy enough to do so.”⁴⁵ What is more, Lady Hale’s speech can be read as requiring that special provisions “tailored to the special position of government departments and, indeed, of Her Majesty in her private capacity” be adopted regarding enforcement powers in a statute and “exactly how and to what extent” it is to apply to the Crown.⁴⁶

A historical constitutionalist analysis underscores just how radical *Black* is, demonstrating that the relevant constitutional rules have become detached from their foundations. The Supreme Court opined in *Black*⁴⁷ that the Crown not being bound by statute is a rule of statutory construction – more specifically, a presumption⁴⁸ – and not an immunity from liability understood as a prerogative. However, the effect of resorting to the Crown’s voluntary compliance as an element militating for the conclusion that the Crown is not bound by a statute by necessary implication is tantamount to granting the Crown the prerogative to voluntarily submit itself to the statute or not, without any judicial oversight. Once an Act has been found not to apply to the Crown, the Crown can decide to voluntarily comply with it or not. Like Canadian cases, *Black* points to the prerogative-like nature of the rule of construction understood as a special privilege.

In the realm of judicial review, the view that ministers comply only voluntarily with court orders was said in *M v Home*

⁴⁵ *Black* (n 2) [43]

⁴⁶ *Ibid* (n 2) [44].

⁴⁷ *Ibid* (n 2) [36].

⁴⁸ Since referred to as a “rebuttable constitutional” presumption. Philip Sales, “Legislative Intention, Interpretation, and the Principle of Legality” (2019) 40 *Statute L Rev* 53, 63.

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Office to be contrary to the constitutional arrangement achieved after the Civil War.⁴⁹ In the realm of application of statutes enacted by Parliament, however, the Crown understood as the Government – ministers and their departments⁵⁰ – can choose to comply with them as it wishes when it is not expressly named in them. The presumption that ministers will not be inactive – or, conversely, that they will voluntarily comply with an Act of Parliament – now appears sufficient to exempt them and their departments from the application of that Act. That is so even when their voluntary compliance is unlikely in light of the facts of the case, as in *Black*, where the Secretary of State had refused to comply with the relevant part of the Health Act 2006. The Civil War opposed the Crown and Parliament and the latter won. There is an inconsistency in invoking the constitutional arrangement reached after the Civil War in relation to the application of court orders to ministers of the Crown and their departments, as in *M v Home Office*, but not invoking the same constitutional arrangement in relation to the application of Acts of Parliament to the same ministers of the Crown and their departments.

The rest of this article tackles this strangeness. I highlight how far the courts have moved the rule relating to the application of statutes to the Crown from its foundations in the 17th century. I also make a historically informed case for reform.

III. PROVINCE OF BOMBAY

The issue in *Province of Bombay* was whether the Crown could be bound by the City of Bombay Municipal Act 1888. This statute conferred powers on a municipal authority – the City of

⁴⁹ *M v Home Office* [1994] 1 AC 377, 395 (Lord Templeman).

⁵⁰ See *Black* (n 2) [10].

Bombay – to provide water supply and install water-mains. The City of Bombay wanted to lay down a water-main along a road that belonged to the Provincial Government of Bombay. The Provincial Government was willing to consent, subject to conditions and the imposition of an annual rent to be paid by the City. The City refused and notified the Provincial Government that it would proceed with the works. The courts – the High Court in Bombay and ultimately the Judicial Committee of the Privy Council in London (the “Board”) – thus had to determine whether the 1888 Act applied to the Crown (or, more provocatively, whether a municipal authority could bend the Crown to its will).

In *Province of Bombay*, Lord du Parcq laid down a general rule of construction: no statute binds the Crown unless the Crown is expressly named in the statute. He also added an exception to the rule: in absence of express words, the Crown may nevertheless be found to be bound by necessary implication.⁵¹

The principle of statutory interpretation laid down by Lord du Parcq was simply that the intention of the legislature is to be derived from the words of the statute. Yet Lord du Parcq did not stop at setting out an interpretive principle. In his speech, Lord du Parcq discussed two other matters – the Crown’s voluntary compliance and the frustration of a statute’s beneficent purpose.

In *Province of Bombay*, the High Court had interpreted the necessary implication exception to mean that if the Act could not be applied with “reasonable efficiency” were the Crown not bound then the Crown must be bound by necessary

⁵¹ *Province of Bombay* (n 1) 61.

implication.⁵² Lord du Parcq rejected that new interpretation of the necessary implication exception. He went on to say that even if the High Court's interpretation of the necessary implication exception were to be accepted, the High Court's application of the exception was not adequate. Lord du Parcq reasoned that the High Court had not applied its own "reasonable efficiency" test adequately because it had not paid attention to the possibility that the legislature might have anticipated that the Crown would voluntarily comply with the statute. When Lord du Parcq took this possibility into account, he arrived at the conclusion that the Act would apply with "reasonable efficiency" according to the test laid down by the High Court.⁵³ In short, Lord du Parcq relied on the possibility that the legislature might have considered that the Crown would voluntarily comply to argue that the High Court had not adequately applied its own reasonable efficiency test – a test which Lord du Parcq rejected.

On closer inspection, Lord du Parcq's speech in *Province of Bombay* shows that the possibility that the Crown would voluntarily comply and cooperate with the municipality in that case was not an integral part of the analysis of the necessary implication exception. To interpret – as the Supreme Court did in *Black* – the Crown's voluntary compliance as an integral component of the necessary implication exception is to give it more prominence than it had in the context in which it was alluded to in *Province of Bombay*. Lord du Parcq did not consider the possibility of the Crown's voluntary compliance to be part of the necessary implication exception. He merely used the hypothetical possibility that the legislature might have

⁵² *Province of Bombay* (n 1) 61-62.

⁵³ On the facts of the case, it was doubtful that the Crown was going to comply voluntarily with the statute, as it was imposing conditions for its compliance.

anticipated the Crown's voluntary compliance to refute the High Court's application of its "reasonable efficiency" version of the necessary implication test.

Another aspect of the broader context of the *Province of Bombay* case enlightens the scope of Lord du Parc's speech. At issue was the interpretation of a statute conferring powers on a municipal authority. To Lord du Parc, the legislature might have thought it "unwise" to subject the Crown – the Provincial Government of Bombay – to a local authority beyond the point to which it could cooperate in the public interest.⁵⁴ The fact that that municipal authority – the City of Bombay – would have had powers over the Crown was a crucial element in Lord du Parc's decision that the Act was not intended to bind the Crown, as it was in other cases that preceded it, for instance *Cooper v Hawkins*⁵⁵ – where a Crown servant employed as engine-driver by the War Department's Principal Secretary on behalf of His Majesty was caught speeding in Aldershot contrary to local speed limits; or *Gorton*⁵⁶ – where a local board sought to enforce by-laws adopted under the Public Health Act against the Prison Commissioners; and in cases that came after it, notably *Dumbarton*⁵⁷ – where the Minister of Defense had argued that he did not need to obtain permissions from the local planning authorities to conduct work on a public road. As in *Province of Bombay*, the court was reluctant in these cases to see the Crown subject to the control of a municipal authority.⁵⁸ Reasons for this reticence may have included concerns for

⁵⁴ *Province of Bombay* (n 1) 62.

⁵⁵ [1904] 2 KB 164.

⁵⁶ *Gorton Local Board v Prison Commissioners (Note)*, reported in [1904] 2 KB 165.

⁵⁷ *Lord Advocate v Dumbarton District Council* [1990] 2 AC 580.

⁵⁸ See also *Somerville v Lord Advocate* (1893) 20 R 1050 and *Ministry of Agriculture, Fisheries and Food v Jenkins* [1963] 2 QB 317.

consistency, not only in a British context, but also in an imperial context where different municipalities in different parts of the Empire might have subjected the Crown to differing constraints. Whatever the reasons, it is clear that these foundational cases on the application of statutes to the Crown concerned the ability of local authorities to constrain the Crown's freedom of action. Caution is therefore appropriate in delineating the scope of these precedents.⁵⁹

Lord du Parcq also alluded in *Province of Bombay* to the notion of the beneficent purpose of a statute. To Lord du Parcq's mind, the sole fact that "one object of the legislature is to promote the welfare and convenience of a large body of the King's subjects"⁶⁰ and therefore is beneficent in nature, does not justify the conclusion that the act binds the Crown. Lord du Parcq acknowledged that the "principle" that a statute for the public good binds the Crown was found in old authorities (which are discussed in the fifth section of this article), but he elected to cast aside the old rule. He noted that the apparent intent of the statute is *an element* to be taken into consideration

⁵⁹ The courts' reluctance to subject the Crown to local authorities' by-laws and other enactments is clear from Wills J's reasons in *Cooper v Hawkins* [1904] 2 KB 164, 172:

I cannot help thinking that the fact that the section would, at the will of the local authorities, subject the persons who are engaged in the performance of duties of this kind to liabilities which, at the time this Act was passed, could not be known or foreseen, is a strong argument against the supposition that the Crown consented beforehand to allow itself to be bound by an Act of Parliament which provides for by-laws which may be imposed by local authorities. I do not know that there is any decision on the exact point. I rather think that there is not; but I think that the fact of there being a power in an Act for a local authority to make by-laws is a strong argument—I do not say it is conclusive—there may be other considerations which outweigh it—against holding that the Crown is bound by it.

⁶⁰ *Province of Bombay* (n 1) 63.

in the analysis of the application of statutes to the Crown.⁶¹ He stated that should the *beneficent* purpose of the statute be *wholly frustrated* were it not apply to the Crown, then the court may conclude that the Crown is bound.⁶² Lord du Parcq's view was that if the beneficent purpose of a statute, as appears from its terms, would be wholly frustrated if it were not to apply to the Crown, then the Crown is bound by necessary implication even though it is not named in the statute.

Lord du Parcq's treatment of the beneficent purpose dimension of a statute marks a significant departure from centuries of legal thinking on the application of statutes to the Crown when they are enacted for the public good. Statutes enacted for the public good, as will be further explained below, were thought to apply to the king on the ground that the king is not entitled to do wrong – a significant feature of English constitutional history. Yet Lord du Parcq, instead of considering as a fundamental principle the subjection of the Crown to Acts enacted by Parliament for the public good in interpreting statutes, moved the public good element of statutes to the exception stage of the analysis, under the necessary implication exception.

In summary, the Crown's voluntary compliance was not a central element of the analysis of the necessary implication exception in *Province of Bombay*. The possibility that the Crown could voluntarily comply was raised in the context of interpreting the granting of statutory powers of control to the municipal authority to refute the High Court's "reasonable efficiency" test. As for the "wholly frustrated" element of the analysis, it applied to the statute's beneficent intent and was

⁶¹ Ibid.

⁶² Ibid.

part of the necessary implication exception: the “public good” objective of a statute being wholly frustrated were it not to apply to the Crown was, on its own, a permissible reason to Lord du Parcq to infer that the Crown must be bound by the statute. But his analysis in his seminal speech shows the extent to which mid-20th century courts’ analysis in deciding whether Acts of Parliament bind the executive and the governmental apparatus were disconnected from foundational constitutional principles and legal thinking.

IV. THE RESTATEMENT IN *BLACK* IN LIGHT OF *PROVINCE OF BOMBAY*

Black does not merely “clarify” the test laid down in *Province of Bombay*,⁶³ it modifies it substantially. By taking Lord du Parcq’s words out of their proper context, the Supreme Court effected a substantial modification of *Province of Bombay*. The necessary implication analysis following *Black* stands as follows. First, the frustration – either whole or partial – of any of the statute’s intent were the Crown not to be bound by the statute must now be taken into account following *Black*.⁶⁴ The analysis is not limited to the whole frustration of a statute’s beneficent purpose specifically as in *Province of Bombay*.⁶⁵ This may appear at first glance to be a broadening of the necessary implication exception, the effect of which being to bind the

⁶³ *Black* (n 2) [36]

⁶⁴ *Ibid* [36] (“It is not necessary that the purpose of the legislation would be ‘wholly frustrated’ if the Crown were not bound”, it suffices that “one very important purpose of the Act would have been frustrated”).

⁶⁵ *Province of Bombay* (n 1) 63 (“If it can be affirmed that (...) it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound”).

Crown more often. However, second, the voluntary compliance of the Crown is now an integral element of the analysis following *Black*: “it is permissible to consider the extent to which the Crown is likely voluntarily to take action” and, significantly, the Crown’s inaction “cannot be assumed”.⁶⁶ Following *Black*, if the Crown can voluntarily comply and there is no legal impediment to its cooperation,⁶⁷ the intent of the statute is not frustrated, and the Crown is not bound by necessary implication. The presumption that the Crown will voluntarily comply – inaction cannot be assumed – now undermines the necessary implication exception.

The hypothesis that the Crown will voluntarily comply was merely used as an example by Lord du Parc to refute the High Court’s reasonable efficiency test in *Province of Bombay*. The restatement of the Crown’s voluntary compliance as an element of the necessary implication analysis in *Black* reduces greatly the importance of another element – the frustration of a statute’s intent. Yet a finding that the beneficent purpose of a statute would be wholly frustrated by the Crown’s exemption from the ambit of the statute was an integral part of Lord du Parc’s test for necessary implication.

In short, what were distinct analytical elements in *Province of Bombay* are now merged following *Black*. The merger

⁶⁶ *Black* (n 2) [36].

⁶⁷ Lady Hale in *Black* not only used the Crown’s voluntary compliance as an element of the necessary implication exception, but also enlarged the scope of the notion of voluntary compliance. She explained that the issue of the Crown’s voluntary compliance is not solely to be assessed in light of the legal feasibility of the Crown submitting to a given statute – a legal analysis of what is possible for the Crown to achieve voluntarily – but is also determined by looking to the likelihood that the Crown will choose to act and will take “voluntary action”. *Black* (n 2) [49]. On the legal feasibility test, see *Liverpool Coroner* (n 32) [49]; *R (New London College) v Secretary of State for the Home Department* [2013] 1 WLR 2358, [29] (Lord Sumption). See also *Sunkin* (n 44) 717.

cast away two specificities of *Province of Bombay*. First, the fact that the Crown's voluntary compliance was analysed in the (imperial) context of a statutory conferral of powers to a local authority over of the Crown has been omitted. Second, that the wholly frustrated test applied to the statute's beneficent purpose and was an element that could on its own justify the conclusion that the statute bound the Crown was also abandoned. Lady Hale's merger of the two elements and her conclusion that the Act's purpose is not unfulfilled because the Crown "can do a good deal by voluntary action" is almost tantamount to saying that the Act can work with "reasonable efficiency" even if the Crown is not bound – a twist on the reasonable efficiency test which has been rejected since Lord du Parc's speech in *Province of Bombay*.⁶⁸

The frustration of an important purpose of a statute – any important purpose – is counteracted by the presumption of the Crown's voluntary submission.⁶⁹ The use of the whole frustration of the beneficent purpose of a statute as a stand-alone element to determine if there is an intent to bind the Crown as laid down in *Province of Bombay* was erased. The hypothetical possibility that the Crown will voluntarily submit itself to an Act of Parliament, in conjunction with the presumption that it will take action, can now act as a trump card to the benefit of the Crown in defeating the argument that Parliament's intention would be frustrated were it not to be bound by the Act: "Inaction cannot be assumed".⁷⁰ The effect is to give the Crown what is tantamount to a prerogative to choose to act. The resulting prerogative is all the more surprising in

⁶⁸ *Province of Bombay* (n 1) 62; see also *Liverpool Coroner* (n 32) [46].

⁶⁹ See *Black* (n 2) [49].

⁷⁰ *Ibid* [36].

light of the facts in *Black*, where the Crown had clearly indicated – by way of the Secretary of State’s refusal to accede to Mr. Black’s request – that inaction in relation to the smoking ban and the NHS compliance line was its elected course of action.

V. COKE’S RULE OF CONSTRUCTION

The aim of this section is to offer suggestions of reform to address the inconsistencies and the confusion which are characteristic of the courts’ approach with regard to the application of statutes to the Crown since the early 20th century. Lady Hale’s historical survey of precedents in *Black* relied on Lord Keith’s own analysis of previous cases in *Dumbarton*,⁷¹ and neither goes further back in time than the 19th century. The old rule of construction was briefly alluded to in *Province of Bombay* but it was misunderstood by Lord du Parc and its scope and its deep roots in legal thinking were not addressed.

Lady Hale’s departure from the *Province of Bombay* precedent should perhaps not surprise us: Lord du Parc’s speech itself marked a departure from earlier precedents. The presumption that the Crown is not bound by statutes unless named or by necessary implication does not have a theoretical or historical underpinning.⁷² Craig, for example, has endorsed Street’s demonstration that during the 15th and 16th centuries, the Crown was generally bound by statutes relating to the subject’s property rights and protection and was only excepted from a statute’s ambit if it encroached on the king’s prerogatives, if the statute did not otherwise expressly provide

⁷¹ *Dumbarton* (n 57).

⁷² See James Wolffe, “Crown Immunity from Regulatory Statutes”, [1988] PL 339, 345-46.

for its application to the king.⁷³ Street's conclusion is widely accepted⁷⁴: the law 300 years ago followed the "simple principle" that the Crown was bound by a statute where Parliament intended it.⁷⁵ One possibility, raised by Craig, would be to reverse the presumption that the Crown is not bound by statutes.⁷⁶ This solution was rejected in *Black*, as Lady Hale refused to abolish or modify the presumption, even prospectively.⁷⁷ *Black* can be criticised on this point on normative grounds. But my objective in this section is rather to set out to demonstrate how the law evolved away from the principle as understood and explained by Edward Coke a few centuries ago.

The rule of construction laid down by Edward Coke in the early 17th century was that the Crown is bound by a statute enacted for the suppression of wrong and is bound by a statute unless its "estate, right, title, interest, or prerogative"⁷⁸ are divested from the Crown. Coke's statement of the rule of construction can be found in commentators' texts throughout the 18th, 19th and 20th centuries and in modern cases until *Dumbarton* at the end of the 20th century. The survival of the rule of construction laid down by Coke over such a long period of time allows us to shed a new light on Lord du Parc and Lady Hale's claim that the modern rule of construction that the

⁷³ Street (n 22) 360–63.

⁷⁴ See discussion above (n 22).

⁷⁵ Harry Street, *Governmental Liability: A Comparative Study* (CUP 1953) 143–57; Susan Kneebone, "The Crown's Presumptive Immunity from Statute: New Light in Australia" [1991] PL 361; Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) 883.

⁷⁶ Craig (n 75) 885.

⁷⁷ *Black* (n 2) [34–35].

⁷⁸ *The Case of the Master and Fellows of Magdalen College in Cambridge* (1615) 11 Co Rep 66, 75a.

Crown is not bound by a statute unless named or by necessary implication is “well established”.⁷⁹ The current view of the rule was not widely held until the 20th century and is not historically deeply rooted.

In *Province of Bombay*, Lord du Parcq recounted that “The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, “*Roy n’est lie par ascun statute si il ne soit expressement nosme.*”⁸⁰ To that early rule of construction, Lord du Parcq added an exception to the effect that although not named, the Crown can be bound by a statute by necessary implication. Lord du Parcq was mistaken, however, when he opined that the early rule of construction was to the effect that the Crown is not bound unless named in a statute. The rule that the king is not bound by a statute if he is not named in it was taken from a quote from Jenkins’ reports of cases written in law French,⁸¹ a quote that is misleading on two counts. First, Jenkins took the phrase⁸² from Edward Coke’s opinion in *The Case of a Fine Levied by the King Tenant in Tail* in the early 17th century.⁸³ As was noted by Street, the *Case of a Fine* was a non-judicial opinion given by Coke as Attorney-General to the king following his personal consultation, and is not a binding precedent.⁸⁴ Second, the phrase does not adequately

⁷⁹ *Black*, (n 2) [35]; *Province of Bombay* (n 1) 61. Dickson J, on the other hand, noted that “The conceptual rationale underlying the doctrine of Crown immunity is obscure.” in *Eldorado* (n 17) 558.

⁸⁰ *Province of Bombay* (n 1) 61.

⁸¹ Tomkins (n 27).

⁸² David Jenkins, *Rerum Judicatarum Centuriæ Octo* (Thomas Neale ed, Printed for Henry Seile 1661) 307.

⁸³ (1604) 7 Co Rep 32a.

⁸⁴ Street (n 22) 363–64.

reflect the state of the law, or Coke's thinking on the issue of the application of statutes to the king.⁸⁵

Lord du Parcq correctly, however, identified another "early" rule of construction, according to which "whenever a statute is enacted 'for the public good' the Crown, though not expressly named, must be held to be bound by its provisions and that, as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown".⁸⁶ Lord du Parcq further acknowledged that that early rule that the Crown is bound by a statute enacted for the public good can be found in Bacon's 18th century *Abridgement*.⁸⁷ As is apparent from Bacon's work, the rule of construction as he understood it was two-pronged. First, the Crown was bound by a statute enacted for the public good: "where an act of parliament is made for the publick good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such act, though not particularly named therein".⁸⁸ Second, the king was bound by a general statute unless the king's estate, title, right, interest or privilege were taken away from him in that statute. Even in that scenario, the king could still be found to be bound by the statute divesting him of his prerogative, right, title or interest if the statute was "made by express words to extend to him".⁸⁹

⁸⁵ Coke misconstrued in that instance the case of *Willion v Berkley* on how laws apply differently to the king's body natural and his body politic: 1 Plowden 223, 248 (Brown J). The statute in *Willion* was found to apply to the king's estate, not to the king's person. Yet Coke correctly applied the case in later reports of cases, see below.

⁸⁶ *Province of Bombay* (n 1) 62.

⁸⁷ *Ibid.*

⁸⁸ Matthew Bacon, *A New Abridgment of the Law*, vol 5 (Henry Gwillim ed, 5th edn, Strahan 1798) 559–561; Matthew Bacon, *A New Abridgment of the Law*, vol 6 (Henry Gwillim and Charles Edward Dodd eds, 7th edn, A Strahan 1832) 461–62.

⁸⁹ *Ibid.*

First prong

In the 16th century and the early 17th century when Coke wrote his reports, an important underlying principle guided the construction of statutes in relation to their application of the king. That principle was that *the king can do no wrong*, meaning that the king is not entitled to do wrong. Coke adopted Bracton's 13th century understanding that the king was under the law and was not allowed to do wrong and coined the maxim "the king can do no wrong" to encapsulate that Bractonian understanding.⁹⁰

The king can do no wrong is now associated with different understandings⁹¹ but has in fact maintained a Bractonian understanding over the centuries and even into the 20th century – at least in the realm of judicial review proceedings, as reflected in *M v Home Office*.⁹² For instance Matthew Hale, in the second half of the 17th century, while he exempted the king from the coercive power of the law, subjected him to the directive and invalidating power of the law. Hale thereby retained, on the one hand, the Bractonian understanding that the law does not allow the king to do wrong and reflected, on the other hand, the 17th century constitutional compromise which granted the king personal immunity from suit but subjected his ministers, officers and agents to be liable in his stead.⁹³ Blackstone, in his influential 18th century *Commentaries*, also had a Bractonian understanding of *the king can do no wrong* although, like Hale before him, he relied on a notion of perfection of the king to

⁹⁰ Fortin (n 9) 73-75, 93-98, 132-34. Coke himself referred to the work of Bracton: Sir John Baker, *The Reinvention of Magna Carta 1216-1616* (CUP 2017) 323.

⁹¹ Fortin (n 9) 11-19.

⁹² Ibid 187-88.

⁹³ Ibid 98-101.

explain the latter's immunity from suit.⁹⁴ However, in the trilogy of cases on the petition of right in the 19th century (*Viscount Canterbury, Tobin and Feather*),⁹⁵ *the king can do no wrong* was given a different meaning and became a fiction whereby there can be no wrong in the king.⁹⁶ 19th century courts' interpretation of *the king can do no wrong* was designed to protect the queen personally from suit in the context of petition of rights instituted against her in tort for the negligence of her servants. Nevertheless, their interpretation of *the king can do no wrong* was not meant to allow the monarch to do wrong either personally or indirectly through her servants, in keeping with the 17th century constitutional arrangement.⁹⁷ The Bractonian understanding of *the king can do no wrong* can even be found in the work of Dicey: to Dicey, the king was immune from suit, but he was not allowed to do wrong.⁹⁸

The proposition that the king, because he is not entitled to do wrong, cannot therefore be exempted from a statute which aims to suppress a wrong can be found in Brown J's reasons in the 1562 case of *Willion v Berkley*. The statute at issue in that case, *de Donis Conditionalibus*, aimed to redress a wrong at common law – the frustration of a donor's wish and the reversion of the land – and “to reform the abuse, and to restore the common law in this point to its right and just course”.⁹⁹ Brown J found that even before the statute was enacted, the king could not do the wrong which the statute aimed to remedy, because the king is

⁹⁴ Ibid 124-29.

⁹⁵ *Viscount Canterbury v The Attorney General* (1843) 1 Ph 306; *Tobin v The Queen* (1864) 16 CB NS 310; *Feather v The Queen* (1865) 6 B&S 257.

⁹⁶ Fortin (n 9) 145-51.

⁹⁷ Ibid 180-84, 191.

⁹⁸ Dicey (n 14) 21. Fortin (n 9) 159-64.

⁹⁹ *Willion v Berkley* (n 85) 252 (Dyer CJ).

not allowed to do wrong.¹⁰⁰ Moreover, the purpose of the statute in that case being to redress a wrong at common law, it was found to bind the king even though it was a general statute.¹⁰¹ As the king may not do wrong, a statute which aims to restrain individuals generally from doing wrong cannot be intended to leave the king at liberty to do wrong.

The king can do no wrong then featured in early 17th century cases relating to the application of statutes to the king,¹⁰² and in particular in Coke's work and reports of cases.¹⁰³ *The king can do no wrong* was used by Coke as a justification for applying to the king statutes which aimed at suppressing wrongs.¹⁰⁴ As he had used *the king can do no wrong* to justify the annulment of the king's grants,¹⁰⁵ Coke resorted to *the king can do no wrong* to ensure that statutes applied to the king. In so doing, Coke followed in the footsteps of Brown J and Dyer CJ in *Willion v Berkley*.¹⁰⁶ Coke's rationale was that if statutes suppressing wrongs were to not apply to the king, it would be tantamount to admitting that the king is entitled to do wrong. However, Coke argued, because the king is God's lieutenant, he is only entitled to act lawfully. Since the king is not entitled to do wrong, statutes aiming to remedy wrongs must apply to him.

The king can do no wrong understood as the king is not entitled to do wrong was a deeply rooted principle. Coke's reliance on the king's status as God's lieutenant mirrors the

¹⁰⁰ Ibid, 246 (Brown J), 252 (Dyer CJ).

¹⁰¹ Ibid 248 (Brown J).

¹⁰² *Magdalen College* (n 78) 72a; see also *Standen & al v University D'Oxon & Whitton* (1623) Jones W 17, 21 (82 ER 11).

¹⁰³ Co Litt 19b; 2 Co Inst, 681.

¹⁰⁴ See Baker (n 90) 328.

¹⁰⁵ *The Case of Alton Woods* 1 Co Rep 40b, 44b.

¹⁰⁶ *Willion v Berkley* (n 85) 248.

analysis in Bracton's treatise from the 13th century and, in particular, the reference therein to the king being God's vicar.¹⁰⁷ As Blackstone wrote, quoting Bracton and Finch: "The king hath a prerogative in all things, that are not injurious to the subject; for in them all it must be remembered, that the king's prerogative stretcheth not to the doing of any wrong. *Nihil enim aliud potest rex, nisi id falum quod de jure potest*".¹⁰⁸ Coke also used the king's status as "God's anointed" to mean that the king, holding his office from God, could only act lawfully, such that laws suppressing wrongs must therefore apply to the king.¹⁰⁹ In the *Case of Ecclesiastical Persons*, for instance, Coke's report reads that "all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named"¹¹⁰ and that "The King being head of the commonwealth, cannot be an instrument to defeat the purview of an Act of Parliament made *pro bono publico*".¹¹¹ In 1615 in the seminal case of *Magdalen College*, Coke similarly opined in relation to the application of statutes to the king that "[t]he King shall not be exempted by construction of law out of the general words of Acts made to suppress wrong, because he is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong".¹¹²

Lord du Parc in *Province of Bombay* rejected the public good intent of a statute as a significant element in the

¹⁰⁷ Bracton (n 11) 305–06.

¹⁰⁸ William Blackstone, *Commentaries on the Laws of England*, vol 1 (facsimile of 1765-1769 1st ed, Chicago 1979) 231–32.

¹⁰⁹ *Case of Ecclesiastical Persons* (1601) 5 Co Rep 14a.

¹¹⁰ *Ibid* 14b.

¹¹¹ *Ibid* 15b.

¹¹² *Magdalen College* (n 78) 72a. The notion of public good also appeared in Coke's *Note on Pardon*, 12 Co Rep 29.

interpretation of the application of statutes to the Crown on the ground that all statutes must be assumed to be intended for the public good.¹¹³ But Coke did not refer to the public good in such a broad, abstract way. His concept of the public good must be construed in light of the underlying principle that *the king can do no wrong* – the king is not entitled to do wrong. The issue was not whether the statute was made or not for the public welfare taken generally from a modern perspective, but rather whether the statute was made to suppress a wrong, take away fraud, prevent the decay of religion, provide the subject with a remedy or protect their inheritance. The inquiry was narrower, as was correctly surmised by Scott LJ two years after Lord du Parcq delivered his speech in *Province of Bombay*.¹¹⁴ Viewed in that light, not all statutes would have triggered the principle that *the king can do no wrong* such that the king would have been found to be bound by a general statute in which he was not named or would have encroached on the sphere of policy which was “the preserve of the Crown”.¹¹⁵

Second prong

In *Magdalen College*, Coke found that general statutes bind the king if they aim to suppress a wrong. He then added that a general statute which does not mention the king cannot bind the king if it encroaches on the king’s rights, privileges or

¹¹³ For references to the “public good” and the good of the “commonwealth”, see Henry Finch, *Nomotechnia* (Societie of Stationers 1613) 21–22; Henry Finch, *A Description of the Common Laws of England* (A Millar 1759) 59.

¹¹⁴ *Territorial Auxiliary Forces Association of the County of London v Nichols* [1949] 1 KB 35, 45: “Possibly the words had a meaning narrower than would attach to them today.” As cited in P Jackson, “The Crown and Statute” (1990) 5 Denning LJ 45, 49–50.

¹¹⁵ Street (n 75) 145.

interests: “where the King has any prerogative, estate, right, title, or interest, that by the general words of an Act he shall not be barred of them”.¹¹⁶ Coke then cited to the king’s feudal privileges, such as *quod nullum tempus occurrit regi* and the king’s prerogative to sue in which court he pleases,¹¹⁷ as examples of such prerogatives.

Coke sought to demonstrate that the king was generally bound by statutes which did not directly affect his rights or interests.¹¹⁸ Moreover, the royal privilege at issue had to be one that the king “had before the Act”.¹¹⁹ A statute which conferred an advantage on the king did not constitute a pre-existing privilege, nor did a statute creating a new jurisdiction before the court affect the king’s pre-existing rights.¹²⁰ If the rights or privileges of the king were not pre-existent, the statutes could be found to apply to the king. This became the second prong of the rule of construction of statute as they apply to the Crown set out in Bacon’s *Abridgment*.

In short, in the 16th century and in Coke’s time, the rule of interpretation of statutes in relation to their application to the Crown was that statutes had to be construed in light of the principle that the king was not entitled to do wrong. In particular, the fact that a statute aimed to suppress a wrong led to the conclusion that the Crown was bound by the statute even if not named. The only explicit exception was where the king’s pre-existing estate, right, title, interest or prerogative –

¹¹⁶ *Madgalen College* (n 78) 74b.

¹¹⁷ *Ibid*, 75a.

¹¹⁸ *Street* (n 75) 146.

¹¹⁹ *Madgalen College* (n 78) 75a.

¹²⁰ See eg *Archbishop of Armagh v Attorney General* (1728) 3 Bro PC 507 (1 ER 1463) and *The King v Wright* (1834) 1 Ad & E 434.

understood as feudal privilege – was adversely affected by the statute.

In Coke's thinking, the public good was not understood – as Lord du Parc would later understand it in *Province of Bombay* – as a general concept of public welfare. Bacon's understanding of the "public good" appears to have been similarly circumscribed. To Bacon as to Coke in *Magdalen College*, a generally worded statute cannot bind the king if its effect were to divest the king of his rights, titles, interests or privileges: when "any prerogative, right, title or interest is divested or taken away from the King" as a consequence of a general statute, the King is not bound unless the statute "is made by express terms to extend to him".¹²¹

Adaptation and retention

The two prongs of Coke's rule of interpretation of statutes can be found in Blackstone's *Commentaries on the Laws of England*. Blackstone explained that "the king is not bound by any act of parliament, unless he be named therein by special and particular words" and added that even the "most general words that can be devised (...) affect not him in the slightest, if they may tend to restrain or diminish any of his rights or interests".¹²² Although Blackstone appears to state as a general principle that the king is not bound by a statute unless expressly named, his explanation taken as a whole points to a Coke-like understanding that general words can bind the king, unless his rights or interests are at stake. Relying on Coke's opinion in *Magdalen College*, Blackstone also adopted the prong of the rule of construction relating to statutes enacted for the public good,

¹²¹ Bacon (n 88) 462.

¹²² Blackstone (n 108) 253.

stating that “where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject”.¹²³ Insofar as it related to the notion of public good, Blackstone’s description of the rule followed Coke’s. The rule laid down by Blackstone did not purport to encompass statutes made for the public welfare generally. Rather, Blackstone’s understanding of the rule extended to statutes preserving public rights and suppressing public wrongs, in line with Coke’s understanding of that prong of the rule of construction.¹²⁴

The two-pronged rule of construction found in Bacon’s early 18th century *Abridgement*¹²⁵ can also be found more than a century later in *Comyns’ Digest* of 1822,¹²⁶ in Chitty’s *The Prerogatives of the Crown* of 1820,¹²⁷ and again more than a hundred years later in Broom’s *Legal Maxims* as late as the 10th

¹²³ Ibid 253–54.

¹²⁴ Blackstone also reiterated that the king’s rights and interests must also be “established”, or that the king “had before the Act”, using Coke’s words in *Madgalen College* (n 78) 75a.

¹²⁵ “[T]hat where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express terms to extend to him.” Bacon (1798 ed) (n 88) 559. Bacon’s *Abridgement* is widely recognised as the work of Gilbert, who wrote it before his death in 1726, some forty years before the publication of Blackstone’s magnum opus: Michael Lobban, *Rationalising the Common Law: Blackstone and His Predecessors* in *Blackstone and His Critics* (Hart 2018) 6.

¹²⁶ John Comyns, *A Digest of the Laws of England* (Anthony Hammond ed, 5th edn, Butterworth 1822) 324.

¹²⁷ Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworth & Son 1820) 383.

edition of 1939,¹²⁸ as well as in the 8th edition of Maxwell's *Interpretation of Statutes* of 1937.¹²⁹

In short, the two-pronged rule of construction found in Bacon's *Abridgement* and quoted by Lord du Parcq in *Province of Bombay* in 1947 can in fact be traced back to Sir Edward Coke in the early 17th century¹³⁰ and showed remarkable continuity in legal thinking, as they can be traced in cases and textbooks throughout the 18 and 19th centuries,¹³¹ and well into the 20th century.¹³² This continuity, however, can only be observed when taking a long view in reconstructing the evolution of legal thinking: by the 19th century, the distinction between the two "prongs" was not expressly made in cases and Coke's role in defining the rule generally eluded the courts. The "two prongs" are thereafter referred to as heuristic tools to facilitate the reconstruction of the evolution of the courts' thinking throughout the late 19th and 20th centuries.

With the increase in governmental activity and size of the government apparatus over the course of the 19th century, courts suddenly had to navigate a transitional public law terrain where the monarch was still involved in political

¹²⁸ Where Broom reproduced Coke's rule that if a statute provides a remedy against a wrong, the king is bound, and the rule that the king is not bound if not named applies only if the king's prerogatives or interests are concerned. Herbert Broom, *A Selection of Legal Maxims* (10th edn, Sweet & Maxwell 1939) 38–40; Herbert Broom, *A Selection of Legal Maxims* (Maxwell & Son 1854) 84–85.

¹²⁹ Peter Benson Maxwell, *The Interpretation of Statutes* (Gilbert HB Jackson ed, 8th edn, Sweet & Maxwell 1937) 120.

¹³⁰ And to defendants' counsel in *Willion v Berkley*. Street (n 22) 365.

¹³¹ Namely in *In re Bonham ex parte Postmaster-General* (1879) 10 Ch D 595, 600.

¹³² It is also well known that there was not, in Scots law, a presumption that the Crown was not bound by an Act of Parliament; see JDB Mitchell, "The Royal Prerogative in Modern Scots Law" [1957] PL 304. The (modern) English presumption that the Crown is not bound unless expressly named in a statute was said by Lord Keith to apply in Scotland at the turn of the 1990's in *Dumbarton* (n 57).

decision-making and where the rule of construction of statutes was still conceived of in relation to the monarch herself.¹³³ The “Crown” still meant Queen Victoria herself, at least until the first half of the 19th century.¹³⁴ By the mid-19th century, as the concept of “Crown” slowly became confused – although not consistently – with governmental departments,¹³⁵ Coke’s accurate depiction of the rule of construction was criticized by an author as “surely opening a very uncertain latitude”.¹³⁶

In addition to the confusion surrounding the notion of “Crown”, 19th century English courts also fell victim to the confusion surrounding the import of the then recent, American, concept of “necessary implication”. Street traced the concept back to the 1821 case of *US v Hoar*.¹³⁷ It was subsequently misinterpreted by an English author in the 1830’s¹³⁸ before it

¹³³ See *R v Cook* (1790) 3 TR 519, 521: “Generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect.” See also *Attorney-General v Donaldson* (1842) 10 M & W 117, 124 (Alderson B), cited in Street (n 22) 366–67, where it was said, incorrectly relying on Plowden’s reports, “that laws are made for the subject, and not for the crown”; that view was rightly criticised by Lord Keith in *Madras* (n 16) 694.

¹³⁴ Fortin (n 9) 152-58.

¹³⁵ *Ibid.*

¹³⁶ Richard Wooddeson, *Lectures on the Laws of England*, vol 1 (2nd edn, London, 1842) 84, as cited in Street (n 22) 365. Wooddeson delivered his lectures at Oxford, where he was Vinerian Professor, in the late 18th century, and the second edition of his lectures was edited by William Rosser Williams. The criticism of Coke’s depiction of the rule is probably Williams’ and reflects 19th century (mis)understanding of the rule. Wooddeson himself, in the first edition of his lectures, adopted Coke’s views on the limits imposed on the king’s prerogatives when the subjects’ rights were at issue. Richard Wooddeson, *A Systematical View of the Laws of England: As Treated of in a Course of Vinerian Lectures, Read at Oxford, During a Series of Years, Commencing in Michaelmas Term, 1777*, vol 1 (T Payne 1792) 135.

¹³⁷ (1821) 2 Mason 311.

¹³⁸ Fortunatus Dwarrris, *General Treatise on Statutes*, vol 2 (1st ed, London 1831) 670.

was first referred to in an English case in 1870.¹³⁹ As will be shown, the introduction of the American concept of “necessary implication” into English case law was at first, from the late 19th century up to the middle of the 20th century, inconsistently amalgamated by the courts with either of the prongs of Coke’s two-pronged rule of construction of statutes before the necessary implication exception ultimately eclipsed the two prongs and became the dominant feature in interpreting statutes where the Crown was not expressly named.

In *Cooper v Hawkins* – a case often referred to in more recent cases – the court acknowledged that the Crown may be bound by statutes enacted for the public good, although it refused to consider that a provision enacted by a local authority to limit the speed at which locomotives could be operated within a municipality could fall within that category of “general provisions of a public character which may bind the Crown”,¹⁴⁰ as this was “not one of those enactments of paramount importance to public safety which require that a great public department should be responsible if its servants, in the performance of their duty and acting under orders, should exceed the rate of speed which is provided for”.¹⁴¹ Lord Alverston and Wills J operated a distinction based on the gradation of the importance of the public safety issue at play: a local authority limiting the speed of locomotives was not of a magnitude that corresponded to the public safety aspect of the need for buildings to be inspected by sanitary authorities (as was the case in *Gorton*, reported for the first time in *Cooper v Hawkins*). Although the justices in *Cooper v Hawkins* operated a

¹³⁹ *Attorney-General v Edmunds* (1870) 22 LTR 667, 667; Street (n 22) 367–68.

¹⁴⁰ *Cooper v Hawkins* [1904] 2 KB 164, 170 (Lord Alverston).

¹⁴¹ *Ibid* 172 (Wills J).

gradation in issues of public importance, their analysis did not depart from the principle that statutes enacted for the public good bind the Crown and they did not reject the first prong of Coke's rule.

As to the application of the necessary implication exception to the second prong of the rule of construction, which would have been more in line with the principles underlying the rule, it was not admitted. If the Crown was not named expressly in relation to the encroachment on its rights, duties, privileges, the judges in *Hornsey* mused that it could be divested of such privileges by necessary implication¹⁴² but there was no clear trend in that sense.¹⁴³ In short, at the beginning of the 20th century, judges applied the necessary implication exception to the first prong of the rule, while they discussed its application to the second prong without deciding the issue conclusively.

Necessary implication then slowly became the dominant dimension of the courts' analysis in relation to the application of statutes to the Crown. If a statute was enacted for the public good, then the Crown was not automatically bound anymore: if it was not named, the necessary implication exception was thought to apply so that only the greatest concerns of public safety could lead to the conclusion that the Crown was bound by provisions in a statute that did not expressly name it. This was an entirely novel view of the first prong of Coke's rule and it obscured the underlying principle that the king is not entitled to do wrong. The result also flew in the face of Dicey's understanding of the rule of law in two of its three components: the equality before the law component – including the law

¹⁴² *Hornsey UDC v Hemmell* [1902] 2 KB 73, [1900-3] All ER Rep 392.

¹⁴³ See the discussion of the *Hornsey* case in *Cooper v Hawkins* (n 140).

applying to ordinary citizens and officers of the Crown alike – and the availability of ordinary remedies before ordinary courts even when suing an officer of the Crown.¹⁴⁴ If the king’s locomotive driver is exempt from the application of ordinary law such as local speed limits, for instance, and is therefore not subject to suit before the courts then there is very little left of the Diceyan understanding of the rule of law.¹⁴⁵

The case of *R v Justices of Kent* also exemplifies the rule of law deficit when an act is found not to bind the Crown.¹⁴⁶ In that late 19th century case, a postmaster was also trading as a baker in the same premises as the post office he oversaw. An inspector, acting pursuant to the Weights and Measures Act, 1878,¹⁴⁷ found a scale belonging to the post office on the counter of the shop. He inspected it and found that it was false and gave an incorrect measure, an offence under the Act, and consequently imposed a penalty on the postmaster-baker. The court found that the magistrates below had no jurisdiction over the subject-matter, on the basis that the scale, being the property of Her Majesty’s Post Office, was therefore Crown property, and that the Act did not bind the Crown and did not apply to Crown property. Despite the fact that the court’s reasons emphasised that the Act included a presumption that a scale found in the possession of a person involved in a trade was deemed to be used for the purposes of trade, this was not merely an application of principles of statutory construction. The court discussed neither the two prongs of the rule of

¹⁴⁴ Dicey (n 14) 97–100.

¹⁴⁵ As Jackson recounts, the absurdity of the outcome in *Cooper v Hawkins* led to the adoption of Motor Car Act 1903, s.16 (now s. 183 of the Road Traffic Act 1988). Jackson (n 114) 55.

¹⁴⁶ *R v Justices of Kent* (1889) 24 QBD 181, 17 Cox CC 61.

¹⁴⁷ 40 & 41 Vict, c 49.

construction, nor the necessary implication exception. The judges simply reasoned that the intent of the legislature could not have been to subject postmasters who were also tradesmen to the inspection of government inspectors under the Weights and Measures Act because the Crown and its property was involved. Postmasters who were in possession of Post Office scales, were they to have been bound by the Act, would have been presumed to use Her Majesty's Post Office's weights and scales for their trade. The judges argued that the onus on postmasters to prove that they did not use the scales for the purposes of trade would put to a halt the operation of post offices and lead to the forfeiture of Crown property throughout the country. To Lord Coleridge, the Post Office weights and scales were "kept correct from time to time by government inspectors", a clear indication that government departments were validly subject, in his mind, to a distinct scheme. Dicey, a contemporary to Lord Coleridge, would have frowned upon the idea that officers of the Crown could be exempted from the application of ordinary law and subject to distinct rules. Yet to Mathew J in *Justices of Kent*, it was "clear that the legislature never meant to treat the weights and scales of a government department as being within the scope of the Act" and that that would not "create a difficulty in the prosecution of postmasters who use those scales and weights in their own trade", as "the public are adequately protected by other remedies than those given by this Act".¹⁴⁸ It is clear from Mathew J's reasons that government departments such as Post Offices are the "Crown", and therefore that when the Crown is not bound by a statute, government departments are not bound. Moreover, Crown property was not subject to the Act. However, it was not the

¹⁴⁸ *R v Justices of Kent* (n 146) 185.

property itself but the individuals using it who were liable to use it fraudulently for the purposes of their trade. Yet the exclusion of the scales from the ambit of the Act had as a consequence that postmasters themselves were not to be held liable. Postmasters as officers of the Crown should be subject to ordinary law, but the fact that Crown property was exempted from the application of the Act meant that the individuals who were susceptible to misuse the property were also immune from the imposition of penalties the Act provided for. What is more, the same false scale identified by the government's weights and measures inspector was perhaps not used by the postmaster-baker for his bakery in *R v Justices of Kent*, but the same scale was most certainly used for the purposes of Her Majesty's Post Office. The outcome of the case was that ordinary individuals did not have the benefit of the protection of the Weights and Measures Act, not only in relation to the bread bought at the bakery run by the postmaster-baker, but were also deprived of the protection of the Act as regards letters and parcels they sent from that Post Office. The umbrella of the immunity from the application of the Act covered not only the Crown, Post Offices, and the scales inside them, but also individual officers of the Crown – postmasters – even in their private commercial endeavours. *R v Justices of Kent* is, therefore, also emblematic of the significant encroachments on the rule of law which resulted from the confusion surrounding the notion of Crown from the end of the 19th century.

The rule of construction that an act made for the public good binds the Crown subsisted in parallel with the increase in popularity of the necessary implication exception and was followed in the case of *Attorney-General of the Duchy of Lancaster v Moresby*. There Rowlatt J held that the Courts (Emergency Powers) Act, 1917, bound the Crown as an Act “for the

suppression of wrong”.¹⁴⁹ In that case, the Crown had dispossessed individuals of their premises during the First World War. The Duchy of Lancaster then leased the premises to those same individuals, knowing that they had been unable to receive compensation for the requisitioning of their premises, and chose nevertheless to press its claim for rent against them. The Courts (Emergency Powers) Act, 1917 entitled the courts to alleviate, in the context of the enforcement of contracts, the hardship caused by circumstances arising out of the war, including the fact that the Crown had seized or was using premises. On that basis, Rowlatt J found that it was an act for the suppression of wrong and that it consequently bound the Crown.

The two prongs of Coke’s rule of construction can also be found in *Magistrates of Edinburgh v Lord Advocate*, where it was said that there are some provisions which the Crown would not be bound by without express mention – for instance relating to taxes or fines – but that for “provisions in a statute having for its object the benefit of the public generally, there is not an antecedent improbability that the Crown will consent to be bound”.¹⁵⁰

In the 1940 case of *AG v Hancock*,¹⁵¹ Wrottesley J relied on Maxwell’s *Interpretation of Statutes* and its description of the second prong of the rule of construction to the effect that when a statute divests the Crown of its pre-existing right, interest, estate or privilege, the statute can be found to nonetheless bind the Crown by express mention or by necessary implication.¹⁵²

¹⁴⁹ [1919] WN 69.

¹⁵⁰ 1912 SC 1085, 1912 2 SLT 133, 135 (Lord President).

¹⁵¹ [1940] 1 KB 427.

¹⁵² Maxwell (n 129) 120.

Wrottesley J, in applying the title, right, interest or privilege exception that Coke had referred to in *obiter* in *Magdalen College*, added that the rule had been applied in the last hundred years and was “now well laid down and clear that if an Act of Parliament would otherwise divest the Crown of its property, rights, interests or prerogative, it is not to be construed as applying to the Crown unless the Crown is mentioned either expressly or by necessary implication”.¹⁵³ To Wrottesley J, a general statute which divests the Crown of its rights or privileges can nevertheless be found to apply to the Crown by necessary implication. He reasoned ultimately that it was unnecessary to determine which of “the Crown’s property, interest, prerogative or rights” in particular were diminished by the Courts (Emergency Powers) Act, as they would likely all have been.¹⁵⁴ The absence of detailed reasoning in that regard in Wrottesley J’s reasons may imply that he had in mind a broader conception of the Crown’s rights and privileges than the more limited concept of feudal privileges which Coke had originally referred to in *Magdalen College*.

In short, Wrottesley J’s reasons in *Hancock* on the one hand indicate that the second prong of Coke’s rule of construction in relation to the king’s rights, privileges and interest was “well laid down and clear”. Wrottesley J’s reasons in *Hancock*, on the other hand, show that the courts moved on from the king’s personal exception from the application of statutes to the broader and undefined notion of “Crown”, as well as the American concept of necessary implication. *Hancock* can be taken simultaneously as affirming the second prong of Coke’s rule of construction as well as signalling the courts’

¹⁵³ *Hancock* (n 151) 439.

¹⁵⁴ *Ibid* 438.

increasing deference towards the “Crown” in matters of statutory interpretation.

The second prong of Coke’s rule of construction was notably applied – or found not to apply – in the 1887 case of *Gorton Local Board v Prison Commissioners*,¹⁵⁵ in the 1893 Scottish case of *Somerville v The Lord Advocate*,¹⁵⁶ and in the 20th century in *Hornsey local Board v Hennell*,¹⁵⁷ *Cooper v Hawkins*,¹⁵⁸ *Madras Electric*¹⁵⁹ and *Re Telephone Apparatus Manufacturers’ Application*.¹⁶⁰

The Crown’s exemption from the payment of rates and duties in particular, a feudal privilege of the king, was at issue

¹⁵⁵ The case was reported only years later, in the early 20th century, as a footnote to the report of *Cooper v Hawkins* [1904] 2 KB 164.

¹⁵⁶ 1893 20 R 1050.

¹⁵⁷ The Public Health Act, 1875, provided for limited exemptions from liability and the saving clauses under s 327 provided that local authority were not authorized “to disturb or interfere with any land or other property vested in (...) Her Majesty’s Principal Secretary of State for War for the time being”, which led the appellants in that case to argue that “The rule that the Crown is not bound by a statute unless named in it does not apply where the statute itself specifies who are to be exempt from its provisions, and the extent to which the Crown is to be exempt.” *Hornsey* (n 142) 76.

¹⁵⁸ [1904] 2 KB 164. See the respondent’s argument at 168-69. Both Lord Alverstone and Wills J refused to conclude that the municipal by-law imposing speed limits was regulation enacted for “the paramount importance of public safety”. *Ibid* 171 (Lord Alverstone CJ), 172 (Wills J).

¹⁵⁹ *Madras* (n 16) 685 (Lord MacDermott)(“General words shall not bind the Crown to its prejudice unless by express provision or necessary implication”). See also *ibid* 691-692 (“The immunity derived from the prerogative has not been affected by express words or by necessary implication.”)(Lord Tucker). The prerogative at issue in that case was the Crown’s immunity from taxation.

¹⁶⁰ [1963] 2 All ER 302, [1963] 1 WLR 463, 482-83 (Upjohn LJ). In recounting the respondent’s pleadings, Upjohn LJ noted that “[i]f an Act of Parliament would otherwise divest the Crown of its property, rights, interests or prerogative, it is not to be construed as applying to the Crown”. *Ibid* 479.

in *Rex v Cook*,¹⁶¹ in *Pearson v Assessment Committee of Holborn Union*¹⁶² and in *Hornsey*.¹⁶³ In the latter case, the respondents argued that the Crown not being named in the in the statute of 43rd Elizabeth, it was not liable to pay the poor-rates and that by analogy, it was not bound to pay the local authority for the works it conducted on land held by a military corps. The court concluded in *Hornsey* that “The principle that Acts of Parliament to not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound, is, in our opinion, still applicable”.¹⁶⁴ The court’s reasons show that the necessary implication exception which was introduced in English case law at the end of the 19th century had made its way in the interpretation of the second prong of Coke’s rule of construction. The court in *Hornsey* was willing to entertain the proposition that the Crown could be bound without being expressly named in relation to provisions divesting it of its privileges and exemptions but noted that special provisions in statutes preserving the Crown’s privileges and exemptions were only adopted *ex abundanti cautela* and were not to be interpreted as lifting the Crown’s privileges in other matters.¹⁶⁵

As appears from the cases cited above, the king’s personal feudal privilege to be exempt from rates, taxes and duties in the context of the second prong of the rule of construction of statutes was seamlessly passed on to the Crown

¹⁶¹ (1790) 3 TR 519.

¹⁶² (1893) 1 QB 389.

¹⁶³ (n 142). See also *Coomber v Berkshire Justices*, 9 App.Cas. 61, 76 (Lord Watson).

¹⁶⁴ *Ibid* 80.

¹⁶⁵ *Ibid* 80-81. For a more detailed analysis on the Crown’s exemption from taxes, with an emphasis on the monarch and royal family, see Tomkins (n 27) 176-88.

understood as departments, officers and servants of the Crown. The ambiguity of the notion of “Crown” – which could refer to the king personally but became increasingly used to refer to the Government in the later half of the 19th century – led to the passing of the monarch’s personal feudal privileges (prerogatives and exemptions) to governmental officers, servants and departments.¹⁶⁶ The transition is evidenced in the cases mentioned above on the application of statutes imposing duties and eventually burdens on the Crown understood as the government throughout the 19th century and early 20th century. The courts’ tendency from the middle of the 19th century onward to grant Crown officers, servants and departments’ the king’s personal feudal privileges – especially with regard to provisions providing for the imposition of taxes and the levy of rates on the Crown – is evidence of their omission of foundational principles of English constitutional law. The king’s status as under the law has been an important feature of English constitutional law since the 13th century and although the constitutional arrangement of the 17th century marked the king’s personal immunity from suit, all his “instruments” – in Matthew Hale’s words – remain liable in his stead.¹⁶⁷ Privileges of the king were an exception putting him in a preferred or exempted status but extending them to the Crown understood as officers, servants and, eventually, departments themselves clearly contradicted the outcome of the constitutional struggles of the 17th century and the resulting sovereignty of Parliament. It also flew in the face of the rule of law as Dicey understood it, particularly when viewed from the equality before the law component of the Diceyan understanding of the principle. To

¹⁶⁶ Fortin (n 9) 152-58.

¹⁶⁷ Fortin (n 9) 108-09, 112-14.

Dicey, the notion “that the government, and every servant of the government, possesses, as representatives of the nation, a whole body of special rights, privileges, or prerogatives as against citizens” is “alien to the conceptions of modern Englishmen”.¹⁶⁸

The old principle of statutory interpretation that a statute for the public good binds the Crown was acknowledged by Lord du Parcq in *Province of Bombay*. But Lord du Parcq, instead of relying on the beneficent intent of the statute as a guiding principle, stated instead that a statute’s beneficent purpose must be wholly frustrated for the inference that the Crown is bound by necessary implication to be drawn. Lord du Parcq understood the public good in a very capacious sense as public welfare. He added a further hurdle before the conclusion that a statute for the public good could, on the basis of that statute’s beneficent purpose, bind the Crown: Lord du Parcq offered a reminder – similar to Lady Hale’s in *Black* – that it would have been easy for the legislature to mention the Crown. The uneasiness in applying the old principle that the Crown is bound by a statute made for the public good is apparent in Lord du Parcq’s reasons and can be explained by his understanding of the “public good” as the general welfare of the people – an understanding which would make the exception so broad as to swallow the rule,¹⁶⁹ especially in the mid-20th century as the welfare state came into being. Lord du Parcq’s reasoning exemplifies legal thinking since the 19th century, where the

¹⁶⁸ Dicey (n 14) 103.

¹⁶⁹ Indeed, two years later, Scott LJ reasoned in *Territorial Auxiliary Forces Association of the County of London v Nichols* (n 114) 45, that “[i]t is difficult to suppose at the present day that any public statute is not in theory at least directed to the welfare of the public (. . .) If the ancient rule ever had in fact the wide meaning claimed for it we can only conclude that it has been ‘eaten away’ by exceptions”.

principles underlying the interpretation of statutes as applied to the king were applied to the Crown understood as the developing governmental apparatus, and where the understanding of *the king can do no wrong* marked a significant departure from its 17th century constitutional arrangement understanding.

Lord du Parc's broad understanding of public welfare was followed. In *Department of Transport v Egoroff*, for example, the Court of Appeal found that sections of the Housing Act 1961 did not bind the Crown and had no effect on the leases granted by it, Parker LJ rejected counsel's argument that the Act fell within the *Magdalen College* classification of statutes made to suppress a wrong.¹⁷⁰ Parker LJ relied on Lord du Parc's assessment of the classification as being too general and broad to be meaningful and concluded that the classification of statutes operated in *Magdalen College* had been wholly disposed of on that account in *Province of Bombay*.¹⁷¹

Nonetheless, there were remnants of the second prong of Coke's early rule of construction of statutes in the second half of the 20th century, even in the seminal case of *BBC v Johns*. Lord Diplock's statement of the "modern" rule of construction was to the effect "that the Crown, which today personifies the executive government of the country", "is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication".¹⁷² The idea that the Crown is not bound if the statute imposes constraints on it can be interpreted as a derivative of Coke's rule. The criterion of imposition of

¹⁷⁰ *The Times*, 5 May, 1986; (1986) 1 EGLR 89; [1986] 18 HLR 326, as cited in Jackson (n 114) 50.

¹⁷¹ *Ibid.*

¹⁷² *BBC v Johns* (n 7) 78-79.

“obligations or restraints” was, however, a much broader concept than the restriction of the king’s pre-existing feudal rights, privileges or interest. That it was the “Crown” understood as the personification of the country’s executive government which benefited from the rule in Lord Diplock’s mind, and not solely the king, is other evidence of the broadening of the rule of construction and of the notion of “Crown” since the 19th century.

Any lingering remnant of the old rule laid down by Coke in *Magdalen College* was finally put to rest by Lord Keith in the 1990 case of *Dumbarton*.¹⁷³ Lord Keith rejected the understanding that a statute having been passed for the public good should of itself be sufficient to conclude that the Crown was bound by necessary implication. He therefore rejected Lord du Parc’s reasoning that the beneficent purpose of a statute being wholly frustrated can support the conclusion that the Crown is bound by necessary implication. Lord Keith also thereby rejected, without knowing it, the first prong of Coke’s rule.¹⁷⁴ Lord Keith understood public good as public benefit and therefore – like Lord du Parc before him in *Bombay* – adopted a broader understanding of public good than was expressed by Coke.

Lord Keith also rejected Coke’s second prong of the rule of construction relating to statutes adversely impacting on the estate, title, right, interest or privilege of the king – now the “Crown”. Lord Keith regarded Lord Diplock’s speech in *BBC* as an accurate statement of the law.¹⁷⁵ In fact, while Lord Diplock referred to “obligations or constraints imposed on persons or in

¹⁷³ (n 57).

¹⁷⁴ *Ibid* 598.

¹⁷⁵ *Ibid*.

respect of property” in his dictum in *BBC v Johns*,¹⁷⁶ Lord Keith adopted an even broader notion of “freedom of action”. As Lord Keith remarked, the “very notion” of a statutory provision being binding on a person “connotes that that person’s freedom of action is thereby in some measure constrained”.¹⁷⁷ Lord Keith assumed – not knowing the historical context – that all legislative dispositions are an encroachment on someone’s liberty by the very fact that they bind the individual. That was not what was implied in Coke’s rule of construction as adopted in *Hancock*. There is a distinction between laws encroaching on a person’s liberty generally – in the sense that legislative provisions apply to the individual – and a given provision’s encroachment on someone’s estate, title, right, interest or privilege more specifically.

Lord Keith’s speech in *Dumbarton* twisted the logic of the Cokeian, Baconian and Blackstonian estate, title, right, interest or privileges prong of the rule of construction, which were all grounded in the Bractonian understanding that the king is not entitled to do wrong and is under the law. Lord Keith substituted the notion of the Crown’s pre-existing estate, title, right, interest and privileges – understood as the feudal prerogatives of the Crown – for the broader, more general concept of the Crown’s “lawful freedom of action”.¹⁷⁸ Based on this new concept of the Crown’s lawful freedom of action, Lord Keith shifted the focus from whether the Crown’s pre-existing estate, title, right, interest or privilege are divested from the Crown by statutory provisions to whether the Crown is doing a given act lawfully.

¹⁷⁶ *BBC v Johns* (n 7) 78-79.

¹⁷⁷ *Dumbarton* (n 57) 598.

¹⁷⁸ *Dumbarton* (n 57) 598-99.

To use the concept of the “the Crown’s lawful freedom of action” – as Lord Keith did in *Dumbarton* – instead of determining if the Crown is divested of any estate, title, right, interest or privilege by any given statute is tantamount to arguing that no statute can ever bind the Crown. Given Lord Keith’s view that the “very notion” of a statutory provision being binding on a person “connotes that that person’s freedom of action is thereby in some measure constrained”, the concept of the Crown’s lawful freedom of action divests of any meaning the second prong of the rule that had been laid down by Coke.

VI. SUGGESTIONS FOR AN HISTORICALLY INFORMED APPROACH TO THE APPLICATION OF STATUTES TO THE CROWN

Lord du Parcq rejected the principle that the Crown is bound by a statute made for the public good, on the ground that all statutes must be presumed to be intended to be made for the public good (understood broadly as public welfare).¹⁷⁹ But his suggestion that a statute’s beneficent purpose can lead to an inference that the Crown is bound by the statute provides a helpful starting point for suggestions of reform. In light of Lady Hale’s very incisive analysis of the legislative history prior to the enactment of the Health Act 2006,¹⁸⁰ it is obvious that the Crown knew of the wrong caused by smoking and passive smoking. The beneficent purpose of the Act in providing remedies and the understanding since Bracton’s days that the Crown is not entitled to do wrong would lead to a very different outcome in interpreting statutes. In *BBC v Johns*, Lord Diplock said, in relation to the Royal prerogative power of creating

¹⁷⁹ *Province of Bombay* (n 1) 63.

¹⁸⁰ *Black* (n 2) [5]-[14].

monopolies, that “it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative”.¹⁸¹ Yet that is exactly what courts have done, in the UK and abroad, in relation to the prerogative understood as an immunity from statutes. Lord du Parcq and others after him, by rejecting Coke’s rule of interpretation – without knowing it was his – have broadened the Crown’s immunity from the application of statutes.

First, instead of adopting Lord du Parcq’s test of the beneficent intent of a statute being wholly frustrated, the first prong of the rule of construction could simply be that the Crown is bound by an act enacted to prevent or suppress wrong understood as injury – including the reformation of the common law; to prevent fraud; to provide individuals with a remedy; or to preserve individuals’ inheritance or rights. An act enacted to suppress a wrong could be, for instance, one which prohibits second-hand smoke in public spaces, and which provides a remedy against violations of the statutory smoking ban.

The Crown would therefore be bound by an act enacted for the public good construed in a narrow sense. “Public good” in that context would not refer to Lord du Parcq’s broad concept of securing “the public welfare” or “the welfare and convenience of a large body of the King’s subjects”.¹⁸² A statute enacted for the public good would be construed in light of the principle that the Crown is not entitled to do wrong – or *the king can do no wrong* in the Bractonian and Cokeian sense – and in its 17th century acceptance as only the king is immune from suit, while his ministers and servants remain liable (an understanding reflected in *M v Home Office*). A statute enacted

¹⁸¹ *BBC v Johns* (n 7) 79.

¹⁸² *Province of Bombay* (n 1) 62, 63.

to suppress a wrong could, notably, be understood as a statute which creates a remedy for the individual.¹⁸³ The view that the Crown is bound by a statute which provides a remedy to the king's subject for a wrong can be held regardless of whether the king is named in the statute or not. As the king is not entitled to do wrong, the Crown can be construed as subject to a statute which provides individuals with a remedy.¹⁸⁴

Second, in light of Coke's rule and its continuity in legal thinking well into the second half of the 20th century, it is also possible to conceive of the Crown as bound generally by statutes, except if their effect is to divest it of a pre-existing estate, title, right, interest or privilege. The second prong of the old rule of construction of statutes was held to be good law well into the 20th century. If a pre-existing "estate, title, right, interest or privilege" is divested of the Crown by a statute, the Crown is not bound by that statute, except if it is expressly named or by necessary implication. In keeping with Coke's long-lived rule of construction, the scope of the Crown's privileges in that context would be limited. First, the Crown right at issue must pre-exist. A statute creating a right or modulating a right does not take away a "pre-existing" right of the Crown. Second, the concepts of "estate, title, right, interest or privilege" are narrower than Lord Keith's conception of the Crown's "lawful freedom of action" in *Dumbarton*. Following Coke's rule of construction of statute as it has evolved, the question is not whether the Crown's "lawful freedom of action" is constrained by the statute, but rather whether the Crown's estate, title, right, interest, feudal privilege is taken away by the statute. Third,

¹⁸³ In *Willion v Berkley* (n 85) 248, Brown J reasoned that the king must be taken to have intended to be bound by the remedy which he ordained in the statute.

¹⁸⁴ On the view that the Crown's immunity from suit at common law is not historically accurate, see Fortin (n 9) 191-96.

Coke used the word “devested”. To divest is to deprive or dispossess. A simple encroachment on the Crown’s pre-existing estate, title, right, interest, or privilege would not be enough to trigger the exception. Moreover, borrowing from Wrottesley J’s addition to the exception in *Hancock*, even if the Crown is not named in a statute depriving it of its estate, title, right, interest or privileges, it could nevertheless be found to be bound by the statute by necessary implication.

Implicit in the second prong of Coke’s rule of construction is that the Crown is bound by a statute as a starting point. Adopting the two-pronged Cokeian rule of construction, as it has developed over time with the addition of the necessary implication element, does not, however, amount to a general and automatic reversal of the current presumption. Rather, it is suggested that the Crown be construed as bound by a statute if its estate, title, right, interest or privilege are not taken away by the statute or, if they are, if the Crown is expressly named in the statute or is bound by necessary implication.

What about a case of a statute for the public good that also takes away the Crown’s pre-existing right? If *the king can do no wrong* is understood as the king is not entitled to do wrong, it would follow that the Crown is bound by a statute enacted for the public good and which suppresses a wrong or creates a remedy. The beneficent purpose of the statute – to borrow from Lord du Parc’s speech in *Province of Bombay* – binds the Crown by necessary implication, even if the statute takes away the Crown’s right. To conclude otherwise, to paraphrase Coke and the justices in *Willion v Berkley*, would be tantamount to arguing that the Crown is entitled to do wrong, which it is not allowed to do.

VII. CONCLUSION

The Cokeian two-pronged rule of construction of statutes in relation to their application to the king has known remarkable continuity, having featured in leading textbooks and cases up until the second half of the 20th century. But jurisprudential missteps, most recently in *Black*, have rendered the Cokeian rule devoid of any purpose or meaning. The broad and deferential discussion of the Crown's voluntary compliance in *Black* undermines the rule of construction, leaving the Crown free to choose to act in accordance with the Act as it pleases. As the law stands following *Black*, except in the limited cases where it is not legally feasible for the Crown to voluntarily comply with a statute, the possibility that the Crown will be found to be bound by a statute in which it is not expressly named has never been so illusory.¹⁸⁵

As the Court indicated in *Black*, "It is certainly open to this Court to clarify the test [for application of statutes to the Crown], even if such clarification has the effect of modifying the understanding which some, at least, may have had of it."¹⁸⁶ Lord du Parc's speech in *Province of Bombay* offers a starting point for revisiting the rule of construction of statutes. His reasoning on the beneficent purpose of a statute has deep historical roots. The principle that a statute enacted for the public good binds the Crown can be found in the thinking of Coke, was maintained for centuries in legal thinking, and can be traced, albeit with significant alterations, in *Province of Bombay*. In light of the evolution of the concept, a statute for the "public good" has a more limited meaning than the capacious contemporary concept of furtherance of the public welfare.

¹⁸⁵ Cf *M v Home Office* (n 49) 395 (Lord Templeman).

¹⁸⁶ *Black* (n 2) [36].

Originally, a statute for the “public good” referred to a statute enacted to suppress a wrong or injury, prevent a fraud, provide for the remedy of a wrong or to preserve an individual’s right or inheritance. A statute which divests the Crown of its pre-existing estate, title, right, interest or privilege would not, *prima facie*, bind the Crown unless the statute expressly extends to it or extends to it by necessary implication. Such a two-pronged rule of construction of statutes would be based on the rule encapsulated by Coke and its retention and evolution in commentaries and cases over hundreds of years.

A normative approach may of course lead to other suggestions for (legislative) reform, but it would be disingenuous to suggest that only Parliament can reform an area of the law where the courts still feel that it is “certainly open to [them] to clarify the test, even if such clarification has the effect of modifying the understanding [...] of it”.¹⁸⁷ Indeed, a close reading of the leading precedents, such as *Province of Bombay*, *Dumbarton* and others reveals that they involved the relationship between the Crown and municipalities.¹⁸⁸ As such, historically informed judicial clarification might simply take the form of limiting those cases to their facts,¹⁸⁹ liberating the rule of construction to return to its Cokeian form.

¹⁸⁷ *Black* (n 2) [36].

¹⁸⁸ See above, part 2.

¹⁸⁹ The High Court in *Liverpool Coroner*, for example, noted that *Province of Bombay* involved the subjection of the Crown to municipalities and inferred that that particular context may have played a role in the outcome: “We can well understand the Privy Council’s concern in the *Bombay* case to keep the Crown’s subservience to the municipal corporation within the limits of sensible cooperation”. *Liverpool Coroner* (n 32) [49].