

**RESEARCHING THE ARCANE:
THE DUCHY OF CORNWALL AND
HOW A COUNTRY LAWYER WAS RADICALISED**

Dr John Kirkhope¹

Introduction

I don't think it is (yet) a recognised medical condition, I have begun a campaign to change that, but I suffer from what my friends and family have described as 'excessive legal geekery'. (Can 'legal geekery' be other than excessive?) The law has a fascination for me. Not the mundane conveyancing transaction or the writing of wills but Constitutional Law and in particular those dusty corners of our legal system which are often neglected by 'proper' academics. For that reason, by way of example, I became a Notary Public.² I share with you my, if you will, neurosis in order that it is understood I did not embark on my research, some seven/eight years ago, into the Duchy of Cornwall because of some animus towards the present Duke of Cornwall, Prince Charles, who is, I am sure a well-intentioned and sincere man, or indeed his mother the Queen. It was simply that the Duchy of Cornwall is a unique organisation which, unlike the other Royal Duchy, the Duchy of Lancaster, has managed to avoid public scrutiny for much of its 670 year existence. It has accumulated benefits and burdens which are anachronistic and anomalous, whose origins, evolution and contemporary effect have not been explored. I decided that I was just the individual to research a topic which, I concluded, had been shamefully neglected. At the conclusion of my research I admit I am less relaxed about the way our constitution works and the influence of unelected unaccountable individuals. Having described my journey I hope the reasons for my changed perspective will become clear.

Feeding my 'neurosis' has resulted in my being quoted in the Fortean Times (about which I can tell you nothing),³ Al Jazeera⁴ (who managed to combine an article about the funeral of

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² There are some 850 Notary Public's and approximately 120,000 solicitors. For the last 800 years Notary Public have been appointed and authorised by the Archbishop of Canterbury.

³ <http://www.forteantimes.com/forum/viewtopic>

⁴ <http://www.aljazeera.com/category/person/john-kirkhope>

Lady Thatcher and the Queen's attendance and my research), LaRouche Irish Brigade⁵ (see comment regarding the Fortean Times), The Christians.com⁶ (A Journal of Contemporary Christian History) and most disturbingly David Icke.⁷ I also discover I am a hero for some, but not all, Cornish Republicans,⁸ and something of a legend in the Isles of Scilly.⁹ I have received, what may be characterised as more conventional media exposure having been interviewed for the Today Programme on BBC Radio 4, Radio Wales and Radio Devon. Articles have appeared about my research in the *Guardian*, *Sunday Mail*, *The Times* and so on. My research rated a mention in the *Times Higher Education* on 13 January 2013. I even had a telephone call from a journalist from Belgium but Flemish not being my second or even third or fourth language it was not the most productive conversation I have ever had. In addition to the media exposure I have been involved in four legal proceedings resulting from Freedom of Information requests made by me. The Cabinet Office have informed me that I have no idea how much trouble I have caused and I have sat in court and listened to a discussion about whether I was in breach of Parliamentary Privilege and, therefore, whether I should, in theory, be incarcerated in the Palace of Westminster Prison. (There is one, I am told, located below Big Ben.) I have had the gentleman who threw himself into the Thames during the Boat Race, Trenton Oldfield, phone me, literally, in tears because, he thought, he had found a supporter for his campaign against 'elitism'. He invited me to London to give talks at various events he was organising. I explained I was not enamoured of the big city. He said he understood since he had once been to the West Country!

The rules of Parliament have been altered as a result of my enquiries and I have changed, albeit in a small way, the United Kingdom Constitution. Depressingly. I have surrendered all thoughts of receiving an OBE. I am reliably informed my invitation is permanently stuck in the post. I have become a footnote of a footnote as my son would say.

1 The Start of my Researches

I am a small time country lawyer working in a sleepy Somerset town and a part time researcher with no particular desire to take on the establishment so how did this, to me at least, astonishing journey began. Well, my mother was Cornish so I have always passed a

⁵ <http://laroucheirishbrigade.com/tag/john-kirkhope>

⁶ <http://thechristians.com/?q=node/498>

⁷ <http://www.davidicke.com/forum/archive/index.php/t-233597.html>

⁸ <http://thewcornishrepublican.blogspot.co.uk/2013/11/taking-on-the-duchy-by-dr-john-kirkhope>

⁹ <http://www.scillytoday.com/2013/11/01/duchy-claim-to-isles-of-scilly-not-clear-says-author>

lot of time in Cornwall. One day some eight years ago I was driving back from a weekend spent in and around Truro and noticed for the first time the ubiquity of the black and white flag of St Piran. Something I had not seen when I was young. There seemed to be a resurgence of confidence by the people of Cornwall. I was curious and realised I knew very little about the history of Cornwall and decided to remedy my ignorance. I bought a book by Professor Philip Payton entitled *Cornwall – A History*¹⁰ which contained a number of references to the Duchy of Cornwall which I found intriguing. I wrote to Professor Payton and subsequently met him. I wanted to know if he could refer me to any work on the Duchy of Cornwall and more particularly on the Laws of Cornwall. No such work existed he informed me. I thought; I am just the individual to remedy this oversight and thus my journey began. Initially I conducted my research for my own amusement but after a while I concluded that having someone look over my shoulder to act as a guide, to occasionally chastise and often, hopefully, encourage would add weight to what I was trying to achieve. The University of Plymouth agreed to take on this onerous obligation for which I am very grateful.

My initial explorations were unstructured. I googled terms like 'Duchy of Cornwall', 'Duke of Cornwall', 'Cornwall' and so on. I used similar terms on the Amazon website and, yes I know it is despised by some, Wikipedia and the British Library. I ordered books and articles. References I saw in books I pursued to get back to original sources. I wrote to people and arranged meetings. I made a nuisance of myself with Plymouth University Library, who obtained for me a copy of a thesis from Louisiana State University, and North Somerset Library service. I spent a lot of time swimming and cycling reflecting upon the evidence I was accumulating and trying to place it in some sort of coherent narrative.

There are four specific avenues of enquiry which I must mention. The first of these is the EThOS facility which stands for the Electronic Theory Online Service. This is operated by the British Library and means you can enter various search terms and discover what, if any, theses have been written on a topic which is of interest. Many of them are available to download free of charge. The exceptions are those undertaken with Oxford and Cambridge which are not so easily available. Why Oxbridge would choose to be different one can only surmise. I made many enquiries of the Parliamentary Archives who were extraordinarily helpful. My queries were apparently so far out of the ordinary, they informed me, that they

¹⁰ Philip Payton, *Cornwall – A History* (Penguin, 1996).

seemed to be willing, indeed anxious, to travel that extra mile to satisfy my insatiable curiosity.

Next the National Archives: it was serendipity which drove me to this unexpected source of delight. It was a resource which I discovered, to my surprise, had not been mined by any previous researchers in the field and provided material which was unexpected and illuminating. If, unlike most *LCH* readers, you have not physically visited the National Archive at Kew it is well worth the trip. However, you can search the records online which is what I did initially. I entered terms like 'Duchy of Cornwall', 'Duke of Cornwall', 'Cornwall', and 'Isles of Scilly' and had literally thousands of hits. It was then a question of ploughing through them and trying to identify from the very brief explanations those records which seemed most promising. This was not easy. Sometimes a description would seem particularly alluring and yet the file revealed nothing of interest. In other cases prosaic descriptions disclosed unexpected nuggets.¹¹ Having identified a file one could then ask for an estimate for it to be copied and posted or arrange to visit the National Archives and review the papers in person. I remember receiving one quote for copying a file which amounted to over £800 and on the next day a quote for £1,000 for another record. Clearly it was cheaper to travel to Kew in those cases. The evidence provided by the records in the National Archives gave a perspective to my work which, when I began, I could not have anticipated and enabled me to outline the evolution of the Duchy of Cornwall, particularly during the nineteenth century which was illuminating.

2 The Freedom of Information Act

We now come on to my use of the Freedom of Information Act (FOIA). I must say I take no credit for this. I attended a meeting with Dan Rogerson, the Member of Parliament for North Cornwall, who asked if I had utilised the Act. I said I had not but I would think about doing so. Until that meeting I had not considered the possibilities offered by the FOIA. It should be noted that the enquiries I made are no longer possible since the FOIA has been changed.

The National Archives

As I explained I spent a long time damaging my eyesight peering at a screen trying to decide which National Archives files were worthy of further enquiry. I stumbled across one set of

¹¹ A good example of this is TNA:LO3/467 Duchy of Cornwall – Land Tax and Valuation (1913) which is the basis upon which the Duchy of Cornwall has come to enjoy significant advantages.

papers IR 40/16619 – Liability of the Duchy of Cornwall to tax (1960-1962). It was marked closed. I made a FOIA request that it be opened. Clearly I had no idea if it was of interest since it was closed. This is not a trivial point. How do you argue it is in the public interest to open a set of papers when you have not seen them? The National Archive refused my request. I asked for an internal review, which the rules require, which upheld the original decision. I then appealed to the Information Commissioner who supported the decision of the National Archive¹². I decided that I would take the matter to the First Tier Tribunal (Information Rights) (FTT).

Before I continue there are matters which I should explain. To begin with, I never thought there was a realistic chance of my succeeding before the FTT. This was simply a judgement based on my understanding of the law. I proceeded because I was curious to know how the system worked and, frankly, since there were no questions of costs being awarded against me it involved little risk. I anticipated my case would involve a one day hearing, it would be quickly dismissed but it would be interesting, therefore, and this is important, I was casual in my approach. In utilising the FOIA it is necessary to think carefully about your request and frame your question precisely. Next, I did not give sufficient thought to the basis of my appeal. It is essential to be patient and persistent in using the FOIA. From making my first request to the National Archive until the initial court hearing took four years. There were delays and obfuscation at every stage of the process. For example, I remember being asked if I would agree to extend a particular deadline because Prince Charles had to be consulted and he was at that time on a tour in South Africa. Of course I graciously agreed.

We now move on to the court hearing.¹³ The case was set down to last two days and was to be heard in the London County Court. My barrister, legal executive and I arrived in the courtroom which was crowded with people. Excluding the members on the bench there were 22 individuals in the room including the three on my side. Those opposing us included three barristers, including a QC, at least four solicitors, numerous senior civil servants, and others there just to observe including, we discovered later, the solicitor to the Queen. Also in attendance were various witnesses for the other side. In fact the barristers chambers Thirty Nine Essex Street claimed it was a case 'that must hold the record for the largest number of

¹² Information Commissioner Decision Notice FS50348825.

¹³ *John Kirkhope v Information Commissioner* (EA/2011/0185).

the knights of the realm giving evidence.¹⁴ Frankly, seeing the resources marshalled against us I was intimidated and bemused. For about a third of the case my barrister, legal executive and I were excluded from the court. It transpired that two days were not enough and a third court day was required which was to be held three months later. During this final day in court I sat quietly and listened while there was a debate about whether I was in breach of Parliamentary Privilege and could, in theory, be given a custodial sentence.

After the case was over and my barrister and I were talking over a drink he discussed a number of things with me. He pointed out that the QC who had led for the other side, was the First Treasury Counsel who usually appeared on behalf of the Government in cases before the Court of Appeal and Supreme Court. He said, without elaboration, it was surprising, did I not think, that such an august individual should appear before the equivalent of a Magistrates' Court. In addition he knew from contacts he had in the Cabinet Office that the case was regarded as very troublesome and 'people' had expressed surprise that he had chosen to involve himself in such a case. As I had expected from the start, ultimately the decision went against us.

I have spent some time outlining my experience with regard to the National Archive case because of the effect it had on me. I will leave others to calculate the costs involved in 19 lawyers, civil servants, and others being in court for three days not to mention the costs incurred in the preparation for the case. The elephant in the room was the Duke of Cornwall although he chose not to become a party to the case. In any event he bore none of the costs. It was brought home to me very forcefully that if you take on the powers 'that be' they can, and will, bring to bear resources which a private citizen cannot hope to match. After my experience, frankly, I hoped we would lose because if we had won the other side would have appealed until the point was reached where they would win by attrition.

Next, I fully understand in a way which I knew theoretically, but not practically, that there is an 'Establishment.' They are overwhelmingly men wearing smart tailored suits whose names appear only occasionally in the media but who exercise real power and display a breath taking arrogance and complacency in defence of the *status quo*. Watching them defend the indefensible was not edifying particularly to someone like me who you would otherwise expect to protect the system.

¹⁴ Thirty Nine Essex Street Information law update, January 2013.

It is worth noting that not all my FOIA requests to the National Archive ended in failure. The Isles of Scilly for many years enjoyed a uniquely privileged tax situation. Basically, until 1954, the people on the Islands did not pay any. There are two files in the Archive which explored this particular situation both e marked closed.¹⁵ I made FOIA requests in respect of these and they are now open.

Government Departments

It has never been a secret that the Prince of Wales, as the Duke of Cornwall, is asked for consent to Bills. Surprisingly, nobody had researched this issue in detail. Thus while at the same time as pursuing the National Archive case I decided to use the FOIA to make enquiries into this practice. I wrote to every Government Ministry as well as the appropriate officers in the House of Commons and House of Lords asking them how many times the Duke of Cornwall had been asked for consent to Bills over a seven year period up to 2012. I also searched Hansard for the same period. In some cases, the Department of Health for example, the answer was 'none'; in other cases, DEFRA for example, it was four or five times. It has never been possible to establish a definitive list but for the period under consideration some 39 Bills required the Duke's consent. I then chose four Ministries asking for copy correspondence. These were DEFRA, the Department of Communities and Local Government (DCLG), the Department of Transport and the Department of Business Innovation and Skills (BIS).

DCLG produced the papers I requested without any qualms or redactions. The remaining three Ministries refused. As one is bound to do I asked that the initial decisions be reviewed internally and in every case the initial refusal was upheld. I then appealed to the Information Commissioner who, broadly speaking, supported me and said the papers I requested should be disclosed subject to redactions in some cases.¹⁶ While the other two Ministries accepted the decision of the Information Commissioner BIS decided to appeal to the FTT. A compromise was eventually reached and a file was released to me. It is worth repeating something upon which I have already commented. The whole process from making my initial FOIA requests to getting the papers was over two years. The Ministries persistently breached the guidelines in terms of the time they are supposed to take to reply. The reasons

¹⁵ TNA:CUST45/246 – Memorandum on Taxation in Scilly Isles and correspondence on specific cases (1905) and IR40/12106 – Scilly Isles: imposition of income tax; Finance Act 1953 (1952-1954).

¹⁶ ICO Decision Notices FER0380352, FS50381429 and FS50387051.

they gave for refusal were inconsistent and, on occasion showed an ignorance of the constitutional position of the Prince of Wales which was simply astonishing. To succeed you therefore have to be very determined.

Her Majesty's Revenue and Customs (HMRC)

The Duchy of Cornwall enjoys a favourable tax position because, it is claimed, it enjoys Crown Immunity. It is an assertion about which I am dubious, however, be that as it may it dates back to a Law Officer's Opinion of 1913 which is freely available in the National Archives.¹⁷ This Opinion was reviewed in 1921 the records of which are also available in the National Archives.¹⁸ The Opinion of the Law Officers has never been challenged or tested in court. I could not imagine any other taxpayer relying on an untested 100 year old lawyer's opinion to justify continuing considerable tax benefits.

I made an FOIA request to HMRC asking them to advise if the 1913 Opinion had been reviewed since 1921 and if so when and by whom. I was careful to make clear if it had been reviewed I did not want to see a copy of the review, just whether it had in fact been reviewed. My request was refused. I pointed out that the 1913 Opinion was a matter of public record as were the reviews of 1921. HMRC said they should not have been released and despite the fact that information was publicly available they would not respond to my request. I appealed to the Information Commissioner who supported HMRC.¹⁹ I will admit that at this point in my research feeling somewhat weary given my battles with various arms of Government I decided that I did not have the energy to pursue the matter.

The Cabinet Office

Obviously not every potential Act of Parliament requires the consent of the Duke of Cornwall. I was interested to find the process by which it was decided that a Bill did require consent. I wrote to each of the Departments asking them to provide me with copies of any internal guidance by which they determined that consent was necessary. Again replies received were inconsistent and in some cases laughable. However, they were all agreed that if there was any doubt they referred the matter to the Cabinet Office, specifically the Office of Parliamentary Counsel.

¹⁷ TNA:LO3/467 – Duchy of Cornwall – Land Tax Valuation (1913).

¹⁸ TNA:IR40/16546 – Liability of Duchy of Cornwall to tax (1921) and IR40/16549 – Duchy of Cornwall – Law Officer's Opinion (1921).

¹⁹ ICO Decision Notice FS50444734.

I made a FOIA request to the Cabinet Office asking for copies of any booklets, pamphlets, memorandum or other guidance which dealt with the application of the Consent of the Prince and Crown Immunity. The Office confirmed they had such material but were not prepared to provide it to me. They justified this by relying on Legal Professional Privilege as, they claimed, was set out in the *Three Rivers Case (2004)*.²⁰ Frankly I thought their arguments were nonsense. I asked for an internal review and received essentially the same response. Application was made to the Information Commissioner who supported me.²¹ The Cabinet Office chose to appeal to the FTT but eventually they withdrew their application and the documents were produced and are now publicly available.

From the date of my first request to the matter being resolved took two years! That truth should be placed against the fact that versions of the pamphlets released to me were placed on the Cabinet Office website with a comment from the Cabinet Office that this was an example of the commitment to Open Government. The leader of the House of Commons, Andrew Lansley, congratulated the Cabinet Office on their decision to publish. There was no mention of them fighting for over two years to prevent disclosure.

The Duchy of Cornwall and the Duchy of Lancaster

One of my supervisors who formerly worked at the Law Commission, in what connection I now cannot recall, emphasised that he was not given to conspiracy theories. However, even he was forced to pose the question: 'What are the Duchy of Cornwall hiding?' Answering that question would require far more space than I have available but to give some indication of what prompted the question it is worth contrasting the two Royal Duchies.

The Duchy of Cornwall is the oldest Dukedom in England having been established in 1337. The Duke of Cornwall is always the eldest living son of the Sovereign being heir to throne. The Duchy of Lancaster is the second oldest Dukedom having been created in 1351. The Duke of Lancaster is always the Monarch regardless of gender.

The Duchy of Lancaster publishes a Newsletter to which anyone can subscribe. The Duchy also publishes a definitive history of the Duchy written by a distinguished historian, Robert Somerville, which is available to purchase and a booklet which gives a brief history of the

²⁰ *Three Rivers District Council and others v Governor and Company of the Bank of England (2004)* UKHL 48.

²¹ Information Commissioner Decision Notice FS50423025'

Duchy which they will forward to free of charge if asked. They respond to phone calls and e-mails and most important of all their records are held at the National Archive freely available to all.²² By contrast the Duchy of Cornwall does not produce a Newsletter or a Booklet. They do not, in my experience respond to e-mail or phone calls. Most significantly their records are not available and, as it was once pointed out to me, are accessible as a 'privilege and not a right'. The privilege was never extended to me I might add. Why the two royal Duchies should exhibit such radically different attitudes one can only speculate.

Summary and Conclusion: Successes and Failures

As a result of the changes made by the Constitutional Reform and Governance Act 2010 to the Freedom of Information Act 2000 the FOIA enquiries I made are no longer possible. Previously, correspondence with the Prince of Wales was exempt from disclosure under the FOIA but that exemption was subject to a 'public interest' test. There is now no such test so the correspondence now enjoys absolute exemption. A procedure which was previously opaque has, if that is possible, become even more opaque. An individual who has come to occupy a privileged position through birth has the opportunity to give consent to and influence legislation without that position being subject to either Parliamentary or public scrutiny. That simply cannot be justified in a country which claims to be a modern democracy.

Since I began my investigation the rules of Parliament have changed. The 23rd edition of Erskine May stated:

Bills affecting the prerogative (being powers exercisable by the Sovereign for the performance of constitutional duties on the one hand, or hereditary revenues, person property or other interests of the Crown, the Duchy of Lancaster or the Duchy of Cornwall on the other) require the signification of the Queen's consent in both Houses before they are passed. When the Prince of Wales is of age his own consent as Duke of Cornwall is given.²³

The 24th edition now reads as follows:

The Prince's consent is required for a Bill which affects the rights of the principality of Wales, the earldom of Chester or which makes specific reference or makes special provision for the Duchy of Cornwall. The Prince's consent may, depending on circumstance be required for a Bill which amends an Act which does any of these

²² www.duchyoflancaster/about-the-duchy/records-charters

²³ Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd Edition)

things. The need for consent arises from the Sovereign's reversionary interest in the Duchy of Cornwall.²⁴

The revised definition serves to obfuscate and the reason given for the need to gain consent is, to say the least, simplistic.

I take some credit for the fact that the media exposure my research has generated has resulted in two Parliamentary Committees holding enquiries. The Committee of Public Accounts issued a report in November 2013²⁵ which in the event was frankly disappointing. The Political and Constitutional Reform Committee have held an enquiry into the 'Queen and Prince's Consent' but, at the time of writing, has yet to report. I was asked to and have submitted evidence to both Committees.

My struggles with the Cabinet Office have illuminated the attitude of Government to 'Crown Immunity' and the 'Queen and Princes Consent'. The introduction of the Marine Navigation Aids Bill into the House of Lords in 2010/2011 by Lord Berkeley provides an example of how the system used to operate. Lord Berkeley was informed his Bill would require the consent of the Queen and the Prince, as Duke of Cornwall. When he asked why no explanation was offered by the House authorities' he was just told that consent would be needed. If a similar situation arises today then a member of the Houses of Parliament is referred to the pamphlet, previously secret, but now available for reference.²⁶ It is small progress but it is progress. Following a meeting I have agreed and have drafted a Bill for presenting during the next session in Parliament which will remove the need to obtain the Prince's Consent and the Duchy's right to Crown Immunity.²⁷ I have also recently been invited to join a meeting at Clarence House with the chief executive of the Duchy of Cornwall and the Principal Private Secretary to Prince Charles, something I would have never conceived of at the start of this exploration. I have also received an invitation from a postgraduate MA student at the Royal College of Art who been following my work and has based an exhibition on it which I will be intrigued to view.

²⁴ Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (24th Edition) pp.684-688

²⁵ House of Commons – Committee of Public Accounts – Duchy of Cornwall HC 475 (London HMSO, 2013).

²⁶ This explanation was recounted to me by Lord Berkeley.

²⁷ On making further enquiries I have discovered that under a number of Acts of Parliament, for example, the Planning Act 2008, even though the Act may extend to the Duchy if the Duchy acts in breach of the Act no offence is committed.

As for my personal journey I started because of my 'legal geekery' and conclude feeling angry and radicalised. I am confronted with the reality that there is an establishment which is prepared to spend taxpayers' money to defend the privileged position of an individual from the scrutiny of the public. An establishment which will change the rules if the existing rules are no longer convenient. I also discover that a procedure which most thought to be a constitutional nicety was a means by which a personage unelected and unanswerable is given access to law making which was previously unaccountable and opaque and is now even more so. There is also the realisation that Parliament as guarantor of our freedoms, is frankly supine in that it has made no enquiry, until recently, into how the system works in practice and shows no appetite to change it. In 1927 Dr Mary Coates wrote:

There can be few institutions which have so successfully eluded the serious historian as the Duchy of Cornwall...its curious legal relation to the Crown, and to common law...²⁸

Later in 1990 Dr A L Rowse wrote that the Duchy of Cornwall: '...awaits its historian comparable to Somerville's two volumes on the Duchy of Lancaster.'²⁹ I am not a historian but I do take some satisfaction in the fact the Duchy of Cornwall has recently, probably, been subject to more public scrutiny than at any time in its history. In conclusion this country lawyer is not quite ready to lead the movement for change but is certainly prepared to march and wave the banner for those with more energy and time.

²⁸ Mary Coates, 'The Duchy of Cornwall: Its History and Administration 1640 to 1660'. *Transactions of the Royal Historical Society* (1927) p.135.

²⁹ A.L., Rowse, 'Review of "The Duchy of Cornwall" Editor Crispin Gill', *The English Historical Review* 105 (416) (1990), p.721.