THE CONTROL OF ADVICE TO THE CROWN AND THE DEVELOPMENT OF EXECUTIVE INDEPENDENCE IN NEW ZEALAND

*By Noel Cox**

Introduction

In the absence of a widespread political and legal consensus about the sources of legislative authority, the traditional Diceyan view of parliamentary sovereignty[1] perhaps fails to adequately explain the political reality of New Zealand's undoubted political independence. A better explanation may be that the Crown, rather than Parliament, and in conjunction with the Treaty of Waitangi, is the source of an autochthonous constitutional order. This is grounded in symbolism and administrative practice, rather than technical rules of sovereignty or authority.

Indeed, it was the flexible application of common law principles concerned with the prerogatives of the Crown, and the operation of constitutional conventions relating to responsible government, rather than the establishment of legislatures per se, that led to the development of independent states from colonies.[2] Practical executive or political independence came before formal legislative and judicial independence.[3]

This general observation is as true for New Zealand as it is for the other 'old Dominions'. Legal changes tended to follow political changes, and this is seen especially in the considerable distortion which arose between the powers conferred upon the Governor-General by the letters patent constituting the office, and the powers actually exercised.

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1 See Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957) chs 2-4.

2 See, particularly, Herbert Evatt, *The Royal Prerogative* commentary by Leslie Zines (1987).

3 The latter is arguably still not achieved, with New Zealand's final court of appeal the Judicial Committee of the Privy Council.

Imperial constitutional law was developed not in the courts so much as in the opinions of the law officers of the Crown. It was the practice that evolved out of these opinions which eventually influenced the courts. They followed, but did not invent, doctrines such as that of colonial legislative territoriality.[4]

As a consequence of this process, constitutional writers tended to become distracted by abstract concepts such as the unity of the Crown.[5] This was responsible for what Zines called 'decades of distorted reasoning, intellectual gymnastics and a blindness to reality'.[6]

This article explores the evolution of the imperial Crown, particularly in respect of the right to advise, and the development of the divisible Crown. The position in New Zealand is compared and contrasted with that in other countries, particularly Canada and Australia. It will be shown that the devolution of the Crown was the principal avenue through which independence was conferred upon the Dominions. Independence is fundamentally a political fact rather than purely a matter of legal rights.

More importantly, as part of this process the constitutional grundnorm appears to have changed.[7] Whereas legislative theory is hindered by continued adherence to concepts of Diceyan parliamentary supremacy, the evolution of the Crown provides an explanation for the political and legal reality of independence.

The first section of this article examines the devolution of the right to advise the Crown. This saw the transfer of political control of the royal prerogative from imperial to dominion Ministers. While the Sovereign was the source of certain prerogative powers the right to formally advise the Sovereign remained important. As a colony, some responsibilities remained in the hands of imperial Ministers. But with the growth of independence more authority was assumed by the Crown acting on the advice of local Ministers.

Whilst the devolution of this responsibility did not of itself confer legal independence upon New Zealand, it did more than merely mirror political independence already conferred. For the Crown acted as the channel or conduit

4 Daniel O'Connell and Ann Riordan, *Opinions on Imperial Constitutional Law* (1971) vi.

5 *Federated Engine-Drivers' and Firemans' Association of Australia v Adelaide Chemical and Fertilizer Co Ltd* (1920) 28 CLR 1 (Latham CJ); *Minister for Works (Western Australia) v Gulson* (1944) 69 CLR 338, 350-1, 357 (Rich J).

6 Evatt, above n 2, ch 1-3.

7 In Kelsen's philosophy of law, a grundnorm is the basic, fundamental postulate, which justifies all principles and rules of the legal system and to which all inferior rules of the system may be deduced; Michael Hayback, 'Carl Schmitt and Hans Kelsen in the crisis of Democracy between World Wars I and II' (1990) Universitaet Salzburg DrIur thesis.

through which independence was acquired. This process was encouraged by the physical absence of the Sovereign, which had resulted in the theory that the Sovereign's prerogative existed throughout the empire, though they might be absent from a given territory.

The second section considers the evolution of the divisible Crown. The concept of the divisible Crown has come to mean that although the one person is Sovereign of more than one country, they hold legally distinct positions. Historically, the monarch was regarded as being Sovereign of each Dominion because he or she was the Sovereign of the United Kingdom. Now it would appear, at least for some realms, that this contingent relationship no longer exists. The existence of separate legal titles has led to an emphasis upon national identity, as has been seen in the evolution of the oath of allegiance.

This article explores two distinct aspects of the evolving independence of New Zealand. It will be shown that, unlike concepts of legislative sovereignty, the continuity and evolution of the Crown has led to a widespread acceptance and understanding of independence.

The Right to Advise

The executive prerogatives of the Crown include the appointment of Ministers, and those powers which derive from the Sovereign's position as head of the armed forces and of the civil service. The bestowal of honours and incorporation by royal charter[8] are further examples. The Sovereign's authority as the sole legal representative of the country is particularly important in relation to foreign relations.[9] In cases of national emergency the Crown is responsible for the defence of the realm, and is the only judge of the existence of danger from external enemies.[10]

But the monarch in English law and tradition was never thought of as being absolute.[11] As Bracton said, the king ruled 'under God and the law'.[12] The

8 *Peerless Bakery Ltd v Clinkard (No 3)* [1953] NZLR 796. The power to create a corporation by statutory mechanism exists side-by-side with, and is not substituted for, the power to create a corporation, which is part of the royal prerogative; *Attorney-General v de Keyser's Royal Hotel* [1920] AC 508.

9 *Foreign Affairs and Overseas Service Act 1983* (NZ):

> s 25(1) Nothing in this Act shall extinguish any power or authority that, if this Act had not been passed, would be exercisable by virtue of the prerogatives of the Crown.

10 *R v Hampden* (1637) 3 State Tr 826.

11 Locke said nothing revolutionary in the second of his *Two Treatises of Government* (1690), when he observed that absolute monarchy is inconsistent with civil society; John Locke, *Two Treatises of Government* (1988) vol 2, ch 90.

12 Henry de Bracton, *On the Laws and Customs of England* (1968).

prerogative would be politically intolerable if the Crown acted in practice as theory apparently allowed. There were always limitations on the exercise of royal government. Originally this meant what Sir John Fortescue in the fifteenth century called *dominium politicum et regale*.[13] By this he meant that the king of England made laws only by the consent of his people, and not merely on his own authority.

Later the increasing sophistication of government led to a greater burden on Ministers, and their increasing independence from the Sovereign and responsibility to Parliament. Over time Ministers acquired control of the actions of the Crown. It was generally agreed after 1815 that the Sovereign should be kept out of party politics.[14] Over the course of the nineteenth century the monarchy moved from sharing government, to having a share in government, to a largely advisory role. In the later years of the reign of Victoria the growing importance of organised political parties gave her less room to manoeuvre than her predecessors.[15]

But monarchy concentrates legal authority and power in one person, even where symbolic concentration alone remains.[16] This was the logic underpinning the belief in the eighteenth and nineteenth centuries in the unity of the Crown. The imperial Crown was one and indivisible. 'The colonies formed one realm with the United Kingdom', the whole being under the sovereignty of the Crown.[17] This sovereignty was exercised on the advice of imperial Ministers.

In his seminal work on the royal prerogative, Herbert Evatt showed how this unity of the Crown was the very means through which separateness of the Dominions was achieved. The indivisibility of the Crown meant the existence of royal prerogatives throughout the empire. The identity of those who could give formal advice to the Crown changed from imperial to Dominion Ministers- and little or no formal legal changes were needed for states to change from being colonies to being fully independent.[18]

13 Sir John Fortescue, *The Governance of England* (1979).

14 HJ Hanham, *The Nineteenth Century Constitution* (1969) 30.

15 Ibid 25.

16 'The attraction of monarchy for the Fathers of Confederation lay in the powerful counterweight it posed to the potential for federalism to fracture'; David Smith, *The Invisible Crown* (1995) 8 relying on WL Morton. Provincial powers grew as the provincial ministries were accepted as responsible advisers of the Crown in their own right.

17 *R v Secretary of State for Foreign and Commonwealth Affairs* [1982] QB 892, 911 (Lord Denning MR).

18 Evatt, above n 2, ch 1-3.

By 1919 most of the powers of the Crown abroad were exercised on the advice of local ministries in all the Dominions and self-governing colonies.[19] That this was not yet a complete transference can be seen by the argument of the New Zealand Prime Minister, the Rt Hon William Massey, at the Imperial Conference of 1921. He maintained the principle that 'when the King, the Head of State, declares war the whole of his subjects are at war'.[20] Dominions might sign commercial treaties, but not those concluding a war. Some external affairs were still a matter for the imperial authorities.

The right to advise the Crown in the exercise of the war prerogative was kept in the hands of British Ministers, and the right to advise the Crown excluded imperial concerns such as nationality, shipping, and defence.[21] This was to change however, as the Dominions had been given membership of the League of Nations after the First World War, and came to be regarded in international law as independent countries. In the aftermath of that war, in which the colonies played a significant role, there was an expectation that the major colonies would gain benefits commensurate with their size and importance. The emphasis on nation-states during the redrawing of Europe also served to promote this.

The problem of the remaining limitations on Dominion independence was examined at the Imperial Conference in 1926. The Report of the Inter-Imperial Relations Committee to the Conference included the famous declaration that the Dominions:

> are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[22]

There had been uncertainty as to what precisely had been agreed in 1926, though initially most commentators simply assumed that British Ministers would continue to provide the king's only source of constitutional advice. The former Australian Prime Minister, the Rt Hon William Hughes, distinguished between sources of formal and informal advice, with the British government providing the

19 See the Borden Memorandum 1919, in AB Keith, *Speeches and Documents on the British Dominions 1918-1931* (1932) 13. The position was firmly established by the late nineteenth century that a Canadian Lieutenant-Governor was as much a representative of Her Majesty as the Governor-General was; *Maritime Bank of Canada v Receiver-General of British Columbia* [1892] AC 437, 443.

20 Rt Hon William Massey, 20 June 1921, in Keith, ibid 59-62.

21 See the Report of the Inter-Imperial Relations Committee, *Imperial Conference* (1926) Parliamentary Papers, vol xi 1926 cmd 2768.

22 Ibid.

former, the Dominion governments the latter.[23] Arthur Berridale Keith thought however that

> the suggestion that the King can act directly on the advice of Dominion Ministers is a constitutional monstrosity, which would be fatal to the security of the position of the Crown.[24]

However, the Irish government thought there was now only a personal union of the Crown.[25] If this were so, then imperial Ministers could have no role in advising the king with respect to any matter internal to a Dominion. The Irish may not have reflected the majority view, but theirs made much more logical sense than that, for example, of Hughes.

Once the principle was established that the Dominions were equal with the United Kingdom, it was inevitable that the Dominions should acquire the exclusive right to advise the Crown. This was to be gained in the course of the 1920s and 1930s, and finally settled in the 1940s. As a logical consequence of the doctrine of equality, this was the only possible outcome.

It was the Second World War which finally settled the question of whether there was a complete transfer to Dominion Ministers of the right to advise the Crown, and therefore complete executive or political independence. This may be seen by comparing the practice of the New Zealand government with that of Australia, and the other Dominions.

At the outbreak of the war, the Australian Prime Minister, the Rt Hon Robert Menzies, adhered to the idea that the king was at once at war in respect of the whole empire. Therefore, the only formal steps taken by Australia were publishing a notice in the *Commonwealth Gazette* recording the fact that war had broken out between the United Kingdom and Germany, and requesting the British government to inform the German government that Australia was associated in the war with Germany.[26] The limited intention of these actions is quite clear from the words used in the notice recording the fact that war had broken out: 'It is

23 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 March 1927, 863. cf Edward Jenks, 'Imperial Conference and the Constitution' (1927) 3 *Cambridge Law Journal* 13, 21.

24 *Responsible Government in the Dominions* (1928) vol 1, xviii.

25 Some support for this view can be found in remarks in *Roach v Canada* [1992] 2 FC 173, 177.

26 A proclamation invoking the wartime provisions of the *Defence Act 1903-39* (Australia) was also made. This proclaimed the existence of war, though against whom it did not say: *Commonwealth Gazette* no 63, 3 September 1939. For a full account see Sir Paul Hasluck, *The Government and the People, 1939-1941* (1952) 149-51.

hereby notified for general information that war has broken out between Great Britain and Germany. Dated this Third day of September, 1939'.[27]

Canada and South Africa, however, chose to make separate proclamations of war. Both were able to do so because in those Dominions there had clearly been a delegation by the king to the Governor-General of the prerogative to declare war and make peace.[28] Ireland, now a republic in all but name, chose to remain neutral, the clearest manifestation of political independence.

But by 1941 the official view in Australia had changed, it would seem largely because of the influence of Herbert Evatt as Minister of External Affairs.[29] War was declared against Finland, Hungary and Roumania without waiting for the United Kingdom to act.[30] Because there was no existing mechanism through which the king could declare Australia to be at war, an arrangement was made in 1941 by which the king was advised by telegram, and countersignature by Australian Ministers occurred when the resulting document was received in Canberra some weeks later.[31]

When war was declared against Japan, the Prime Minister instructed the High Commissioner in London to place the advice of the king's Ministers in Australia before His Majesty. The resulting proclamation was then published in the *Commonwealth Gazette*.[32]

The view in Australia was coloured by doubts as to the delegation of the prerogative to declare war, and a lingering belief that 'Britain is at war therefore Australia is at war'. New Zealand took a more pragmatic approach. There were separate declarations of war by New Zealand against Germany in 1939, and against Italy in 1940.

New Zealand did not regard itself as automatically bound merely because a state of war existed between the United Kingdom and a foreign power. A distinction was drawn between the moral and legal issues.[33] In this respect, New Zealand was

27 *Commonwealth Gazette* no 63, 3 September 1939.

28 In Canada under the *Seals Act 1939* (Canada), and in South Africa, under the *Royal Executive Functions and Seals Act 1934* (South Africa) and the *Status of the Union Act 1934* (South Africa).

29 A man of wide experience, Evatt was a Judge of the High Court of Australia 1930-40, Minister of External Affairs 1941-49, Leader of the Opposition 1951-60, and Chief Justice of New South Wales 1960-62.

30 *Commonwealth Gazette* vol 251, 8 December 1941.

31 Sir Paul Hasluck, *The Government and the People, 1942-1945* (1970) 4-12.

32 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 1941, 1068-69 (Rt Hon RG Menzies); *Commonwealth Gazette* vol 252, 9 December 1941.

33 The question of whether the prerogative to declare war had in fact been delegated was overlooked.

arguably more advanced than Australia in recognising the consequences of a divisible Crown,[34] though the position was still not totally free from ambiguity.

On 1 September 1939, the Governor-General proclaimed a state of emergency due to the imminence of war.[35] On 3 September he received a telegram from the Secretary of State for Dominion Affairs. This message stated simply that: 'War has broken out with Germany. Secretary of State for Foreign Affairs.'[36]

To this message the Governor-General replied on 4 September, in a telegram to the Secretary of State for Dominion Affairs, that:

> With reference to the intimation just received that a state of war exists between the United Kingdom and Germany His Majesty's Government in New Zealand desire immediately to associate themselves with His Majesty's Government in the United Kingdom in honouring their pledged word.[37]

The Hon Peter Fraser, acting Leader of the House of Representatives, and in effect running the government due to the illness of the Prime Minister, the Rt Hon Michael Savage, reported on 5 September 1939 that a state of war had been proclaimed by the Governor-General between His Majesty and Germany, and spoke of New Zealand's:

> continued and unshakeable loyalty to His Majesty the King and to our association with the United Kingdom and the other members of the British Commonwealth who have taken up the sword with us.[38]

The Hon Adam Hamilton, Leader of the Opposition, referred to the proclamation of the existence of a state of war between 'His Majesty's Government of New Zealand and the Government of the German Reich'.[39] This proclamation was clear in its tone:

> His Excellency the Governor-General has it in command from His Majesty the King to declare that a state of war exists between His Majesty and the Government of the German Reich, and that such a state of war has existed from 9.30 pm, New Zealand standard time, on the third day of September, 1939.[40]

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34 FM Brookfield, 'A New Zealand Republic?' (1994) 8 *Legislative Studies* 5.

35 This proclamation, under the authority of the *Public Safety Conservation Act 1932* (NZ) was not however published in the *New Zealand Gazette.*

36 'Circular telegram C49, Defence', published in the New Zealand, *Parliamentary Debates*; 6 September 1939, 39.

37 Ibid.

38 New Zealand, *Parliamentary Debates*, 5 September 1939, 20.

39 Ibid.

40 *New Zealand Gazette* 4 September 1939, 2321.

The New Zealand government chose to join the war alongside the United Kingdom 'and the other members of the British Commonwealth who have taken up the sword with us'.[41] The king could now potentially be at war with an enemy in respect of one Dominion, and at the same time maintaining peaceful relations with the same country, as king of another Dominion. Nor need New Zealand necessarily commence hostilities against a common enemy at the same time as the United Kingdom, a fact which was presaged in 1941:[42]

> His Excellency the Governor-General has it in command from His Majesty the King to declare that a state of war exists between His Majesty and the Emperor of Japan, and that such a state of war has existed, *in respect of New Zealand*, from 11 am, New Zealand Summertime, on the 8th day of December, 1941.

The war prerogative, perhaps the most solemn of the powers of the Crown, had now been divided. New Zealand did not regard itself as *legally* bound by a decision of United Kingdom Ministers, but chose to follow their *political* lead. Thereafter there remained few if any aspects of the prerogative upon which the Sovereign acted upon the advice of British Ministers in respect of New Zealand. The right to advise the Sovereign was used as a means of acquiring and manifesting national independence.

Whereas in Australia the telegram was used as a means of advising the Crown, in New Zealand Ministers simply advised the Governor-General to exercise a prerogative formerly exercised only by the king on the advice of British Ministers. The king's signature was not required, though his prior approval was of course obtained.

Thus, at a time when the legislative independence of New Zealand was still uncertain, its executive, or political independence had been achieved by the division of the royal prerogative. This prerogative, in coming within the exclusive control of New Zealand Ministers, allowed them to exercise the full range of executive powers which the Crown in the United Kingdom enjoyed.

The existence, and division, of the royal prerogative, did not of itself give independence to New Zealand. But it was a principal means by which this independence was established and affirmed. Lacking a distinct independence date, New Zealand, like Canada, Australia and South Africa, owed its independence to a gradual process whose origins lay in the earliest years of British imperial history.

According to orthodox imperial constitutional law, British settlers enjoyed as part of the law of England all their public rights as subjects of the Crown.[43] The

41 Ibid.
42 *New Zealand Gazette* 9 December 1941, 3877.
43 *Pictou Municipality v Geldert* [1893] AC 524; *Cooper v Stuart* (1889) 14 App Cas 286.

prerogative of the Crown towards them was therefore limited. The corollary of this was that migration left these subjects still under the protection of the Crown and entitled to all the legal safeguards which secured the liberties of natural-born subjects.

Foremost among these was the right to a legislative assembly analogous to the imperial Parliament.[44] But the right to executive independence was not far behind. By the mid-eighteenth century the local assemblies in chartered colonies elected the governor, enacted laws repugnant to English law, declined to recognise Admiralty jurisdiction or appeal rights, neglected to provide their quotas for imperial defence, and encouraged trades forbidden by imperial legislation.[45] In short, they were politically independent. What was reluctantly conceded to the American colonies was freely conferred upon the later empire, without violence and therefore without a break in legal continuity.

But if the prerogative could be divided, could the Crown also be divided? For the existence of a divisible prerogative meant that no longer was the Crown exclusively British. It had become imperial to the extent that it was no longer the exclusive responsibility of the British government.[46]

The Divisible Crown

Not merely had the right to advise the Crown passed from the imperial government to the Dominions, but in the course of the twentieth century the Crown itself has been said to have become 'separate and divisible'.[47]

The single Sovereign has now apparently come to be Sovereign severally over separate and different realms, despite the element of unity and continuity still reflected in the royal styles. There is a personal union of several Crowns, each in right of a particular realm, but each, apparently, with the same law of succession.[48] This has both reflected the increasing perceptions of national identity, and (in part at least), aided in the expression of that identity.

The means by which the old unitary Crown with a common allegiance owed throughout the empire has come to be a plurality of Crowns is however something

44 *Memorandum* (1722) 2 Peere Williams 75 (PC).
45 Sir David Lindsay Keir, *The Constitutional History of Modern Britain since 1485* (1966) 352
46 Parallels may be drawn with the evolution of the Roman Empire after the fourth century. This also was achieved by the division of the prerogative.
47 *R v Secretary of State Foreign and Commonwealth Office* [1982] QB 892 (CA).
48 Noel Cox, 'The Law of Succession to the Crown in New Zealand' (1999) 7 *Waikato Law Review* 49-72.

of a mystery.[49] The mere alteration of the royal style cannot of itself affect the nature of the sovereignty legally vested in the Queen-[50] and the style 'Her Other Realms and Territories' appears to suggest something other than a division of the Crown. Any division must have been achieved by some other means.

This point is especially important in light of the fact that the constitutions of the different realms are generally so worded as to make it clear that their sovereignty (for what this term is worth) is linked to the Crown of the United Kingdom. This is true especially of the older Dominions, but also of some newer countries.

The Identity of the Sovereign

The Constitution of Australia does not expressly state that the head of State of Australia shall be the monarch for the time being of the United Kingdom. But the first recital of the *Constitution of Australia Constitution Act 1900* (UK) records that certain Australasian colonies had agreed to unite 'under the Crown of the United Kingdom of Great Britain and Ireland'. However, this is not technically of legal force,[51] and may be merely descriptive of the formation of the Commonwealth.

However, clause 2 of the Preamble provides that: 'The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the Sovereignty of the United Kingdom'.

This also is not legally enforceable,[52] but its intent is clearer. However, s 61 of the *Australian Constitution* provides that:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the laws of the Commonwealth.

Read in conjunction with the preamble, it would appear to be clear that 'the Queen' meant 'Her Majesty's heirs and successors in the Sovereignty of the United Kingdom'. Yet this narrow definition would not necessarily be accepted today.

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49 FM Brookfield, 'The Monarchy and the Constitution today' [1992] *New Zealand Law Journal* 438.

50 The style by which a Sovereign is known is legally immaterial. The words '*Supremum caput ecclesiae anglicanæ*' were omitted from a writ. However, it was held that the writ was good nevertheless, for this style and title was not part of the Royal name, but only an addition. The word '*rex*' comprehended all the royal dignities and attributes; *Anon* (1555) Jenk 209.

51 It may also be read as merely a historical statement, and not limiting the development of the Crown.

52 Though the practical relevance of this jurisprudential nicety is slight, as perceptions and beliefs are often of greater importance than technical rules in a Constitution.

'Subject of the Queen' in s 117 of the *Australian Constitution* is now taken to mean subject of the Queen of Australia.[53]

The exact status of the succession remains unclear, but it is probable that, were the matter to be litigated, an Australian court would today hold that the federal Parliament is empowered to alter the succession law.[54]

Other countries have preserved legal forms which appear to presuppose that they share not only the person of the Sovereign with another country, but also, in some respects, the same legal institution.

Section 9 of the *British North America Act 1867* (UK) provided that:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom ... The executive government and authority of and over Canada is hereby declared to be vested in the Queen.

The *Canada Act 1982* (UK) lacks this preamble, so there is no longer any formal statement in the law of Canada that the king or queen of Canada shall be the same person as the king or queen of the United Kingdom. But there is no indication that there was any actual change intended in 1982.[55] Yet s 9 may also be taken to not necessarily limit the sovereignty to that of the United Kingdom, were a division to be sought.

Even in more recently independent states it could be argued that unity of the Crown may still be presumed. As a matter of statutory interpretation, references to 'Her Majesty' can be taken to mean Her Majesty in right of the country concerned, which suggests more than merely a personal union of countries. For example, the *Belize Act 1981* (UK), the schedule of which contains the Constitution of Belize, simply provides that: The executive authority of Belize is vested in HM'.[56]

'Her Majesty' is nowhere defined in the Constitution, but, as it is enacted in a British Act of Parliament, the identity of 'HM' would appear to be the Sovereign of the United Kingdom.

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53 *Street v Queensland Bar Association* (1989) 168 CLR 461, 505, 525, 541, 554, 572.

54 For the situation in New Zealand see Cox, above n 48.

55 Indeed, there is much evidence to suggest the contrary; Edward McWhinney, *Canada and the Constitution* (1982); SM Corbett, 'Reading the Preamble to the British North America Act' (1998) 2 *Constitutional Forum* 42-7.

56 s 36(1).

Even Papua New Guinea, whose Constitution was strongly influenced by Australian political thought and native Melanesian tradition, follows this trend. Indeed, it is quite clear in this respect. The Papua New Guinea Constitution 1975 states that:

> Her Majesty the Queen- (a) Having been requested by the people of Papua New Guinea, through their constituent assembly, to become the Queen and head of State of Papua New Guinea; and (b) Having graciously consented so to become, is the Queen and head of State of Papua New Guinea.[57]

Following the Australian example, it continues that this: '...shall extend to Her Majesty's heirs and successors in the Sovereignty of the United Kingdom.'[58]

These legal formulas reflect a common belief that the Crown, though separate in each realm, shares some common attributes, and that it is not merely chance which sees the one person Sovereign of a score of countries.

The Universality of the Sovereignty

Belief in the universality of the sovereignty of the Crown is, of course, the traditional view of the empire. In the late nineteenth century Story J said that '[for] the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered as one and indivisible throughout the empire'.[59] An early twentieth century Canadian writer said that 'the Crown is to be considered as one and indivisible throughout the empire, and cannot be severed into as many distinct kingships as there are Dominions and self-governing Colonies'.[60] In *Theodore v Duncan*[61] Viscount Haldane observed that 'the Crown is one and indivisible'.

Corbett, writing just after the beginning of the twentieth century,[62] thought that a distinction could and should be drawn between the king as representing one body politic, and the king as representing another. The weight of tradition was to prove too strong however to enable this idea to take hold at that time.[63]

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57 s 82(1).
58 s 83.
59 *R v Bank of Nova Scotia* (1885) 4 Cart 391, 405 (Story J).
60 Augustus Lefroy, *Short Treatise on Canadian Constitutional Law* (1918) 59-60.
61 [1919] AC 696, 706 (PC).
62 Sir William Corbett, 'The Crown as Representing the State' (1903) 1 *Commonwealth Law Review* 23, 56.
63 The Latin tag *nemo agit in se ipsum* ('no one brings legal proceedings against himself') illustrates the conceptual difficulties involved here.

Yet the divisibility of the Crown was a practical reality within the confines of the Canadian and Australian federations.[64] Fournier J of the Supreme Court of Canada, drew a clear distinction between the Queen of Canada and of each province of Canada.[65]

Within thirty years of the Canadian confederation, the unitary Crown and its prerogatives had fractured and become territorially dispersed. The Privy Council had found land in each province to be vested in the provincial Crown,[66] and it had allowed provincial legislatures to assume such privileges as they deemed necessary.[67] Finally, it had pronounced a provincial status equal to that of the central authority, within the Canadian confederation.[68]

The operation of the Crown in the Canadian provinces reinforced the dispersion inherent in the federal principle.[69] The major conflict in the post-Confederation years between the provincial and federal governments turned on the status of the provinces in the federation. From *Liquidators of the Maritime Bank v Receiver General of New Brunswick*[70] onwards the provinces, and especially the provincial executives, were the beneficiaries of judicial interpretation. After a quarter-century long debate over the status of the Lieutenant-Governor, the courts found:

> the Lieutenant-Governor is … as much a representative of His Majesty for all purposes of provincial government as is the Governor-General for all purposes of Dominion government.[71]

Thus, by the end of the nineteenth century, it could be argued that the Crown had assumed a dual personality- it had, in Canadian fashion, been federalised.[72]

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64 *Bradken Construction Ltd v Broken Hill Proprietary Ltd* (1979) 145 CLR 107, 135-6 (Mason and Jacobs JJ); *Victoria v Commonwealth* (1971) 122 CLR 353, 379 (Barwick CJ). The Crown was however held to be one and indivisible in the case of *Federated Engine-Drivers and Fireman's Association of Australia v Adelaide Chemical and Fertilizer Co Ltd* [1920] 28 CLR 1.

65 *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 4 Cart 255, 263-4.

66 *Attorney-General of Ontario v Attorney-General for Canada* (1896) AC 348.

67 *Fielding v Thomas* (1896) AC 600.

68 *Liquidators of the Maritime Bank v Receiver General of New Brunswick* (1892) AC 437.

69 David Smith, 'Empire, Crown and Canadian Federalism' (1991) 24 *Canadian Journal of Political Science* 451.

70 (1892) AC 437. The Judicial Committee of the Privy Council held that the prerogative powers of the Crown were divided along the same lines as the legislative powers, by the division of powers set out in ss 91 and 92 of the *British North America Act 1867* (UK).

71 *Liquidators of the Maritime Bank v Receiver General of New Brunswick* (1892) AC 437.

72 Smith, above n 16, 9.

The evolution of provincial autonomy was not caused by the existence of the Crown, but the Crown was the means through which it was achieved. Thus it reflected autonomy which stemmed from independent historical, economic and cultural factors. But the existence of the Crown meant that each provincial government could claim, and did so successfully, that it was imbued with some of the authority of the Crown.

Within the empire as a whole parallel developments were taking place. The advent of the *Statute of Westminster 1931* (UK) removed, for Dominions, the colonial limitations of legislative repugnancy and constitutional incapacity. But this did not itself amount to political independence. This had been established at the 1926 and 1930 Imperial Conferences, with the adoption of the principle that 'the Crown is the symbol of the free association of the members of the British Commonwealth of Nations', and that 'they are united by a common allegiance to the Crown'.[73]

The Balfour formula, given statutory form in the *Statute of Westminster 1931* (UK), prescribed allegiance to the Crown as one of the conditions then obtaining for membership in the British Commonwealth. But as the Dominions individually entered the international arena,[74] that common allegiance implied less the unity of the Crown than its opposite, divisibility.[75]

But, whilst the right to advise the Crown was accorded the Dominions, there was still some uncertainty as to the true identity of the Crown. As late as the royal visit to Canada in 1939, the Dominions Office rejected the theory of divisibility:

> It is by virtue of his succession as 'King of Great Britain, Ireland and the British Dominions beyond the Seas ..' that he is King in all parts of his Dominions. In this sense he is King in Canada in precisely the same manner in which he is King in the United Kingdom ... It is one kingship, but the King is in a position to act independently in respect of each or any part of his Dominions.[76]

But most of the leaders of the Commonwealth in the late 1940s believed that the Balfour formula should not be allowed to put the Commonwealth within a formal

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73 *Imperial Conference* (1926) Parliamentary Papers, vol 11 1926 cmd 2768; *Imperial Conference* (1930) Parliamentary Papers, vol 14 1930-1 cmd 3717.

74 Originally the doctrine was confined to internal affairs, rather than foreign relations, but the second followed almost as a matter of course.

75 The question whether the Crown was divisible elicited much legal debate in its day. AB Keith, *The King and the Imperial Crown* (1936); Richard Latham, *The Law and the Commonwealth* (1949) reprinted from WK Hancock, *Survey of British Commonwealth Affairs* (1937) vol 1.

76 Enclosure in Stephen Holmes (Office of the High Commission for the United Kingdom) to Shuldham Redfern, 7 February 1939 (Records of the Governor-General's Office, 1988-89/081, vol 133, file 2380).

strait-jacket. To accommodate India within the new-style Commonwealth, the title of 'Head of the Commonwealth' was adopted in the London Declaration at the Commonwealth Heads of Government Meeting of April 1949. In future membership was to be based not on allegiance but on a declared act of will.[77]

As the Crown played the surrogate role of State in the stateless society, so it came to assume a unique role in the empire as well. Keith's aphorism that 'the Crown has always been imperial' had a constitutional significance that only gradually became manifest.[78] Once the distinction was accepted that the Crown could act in right of another realm, then it was only a matter of time before the division overcame the links between the realms.

The Division of the Sovereignty

The 1936 abdication of King Edward VIII strengthened the arguments for the divisibility of the Crown[79] and, indeed, proved its validity. Each realm approached the problem of the abdication differently. Some sought to use the opportunity afforded to make manifest their own national identity in a symbolic way, by showing that the choice of Sovereign was theirs alone, and not dependent upon the United Kingdom. Others adopted more traditional approaches. But the trend was set by the former countries (those which sought to use the opportunity to emphasise their own national identity), led by South Africa and Ireland.

The *South Africa Act 1909* (UK) provided that the executive authority of the Union was vested in His Majesty and 'His Majesty's heirs and successors in the sovereignty of the United Kingdom'.[80] Section 5 of the *Status of the Union Act 1934* (South Africa) defined 'heirs and successors' as persons 'determined by the law relating to the succession of the Crown of the United Kingdom'. However s 2 of the Act said that 'notwithstanding anything in any other law contained' no British Act extends to South Africa. *His Majesty's Declaration of Abdication Act 1936* (UK)[81] was not therefore part of the laws of South Africa.

77 This title was given legislative effect, in the United Kingdom, by the *India (Consequential Provisions) Act 1949* (UK). Her Majesty the Queen was proclaimed as Head of the Commonwealth on 6 December 1952; *Title of the Sovereign* (1953) cmd 8748; SA de Smith, 'Royal Style and Titles' (1953) 2 *International and Comparative Quarterly* 263-274.

78 AB Keith, *Constitutional Law of the British Dominions* (1933) 91.

79 KH Bailey, 'Abdication Legislation in the United Kingdom and the Dominions' (1938) 3 *Politica* 1 (pt 1), 147 (pt 2) 149, 153.

80 s 3.

81 Repealed for the purposes of the laws of New Zealand by the *Imperial Laws Application Act 1988* (NZ).

It was assumed by the British government that since the royal title was parliamentary, it could only be altered by statute.[82] However the South African government took the view that the instrument of abdication signed by the former king took effect *proprio vigore*[83] for all Commonwealth countries when signed by the king.

Subsequent South African legislation therefore served only the purpose of providing for the consequences of the abdication for the former king and possible heirs of his body. However it is doubtful that the South African view of the matter was correct.[84] Even if the king's own act was intended to cause an effective demise of the Crown-[85] and it is clear from the wording of the Instrument of Abdication that the late king did not assume any such power-[86] it does not follow that that instrument alone would be effective in law to alter a statutory succession.

In terms of the *Statute of Westminster 1931* (UK), the British government asked South Africa for formal request and consent to *His Majesty's Declaration of Abdication Act 1936* (UK). South Africa therefore passed *His Majesty King Edward VIII's Declaration of Abdication Act 1937* (South Africa), but enacted that the abdication had taken effect upon the Declaration being signed, rather than upon the passage of the British legislation.

The position of the South African government was deliberately planned, as the succession, according to orthodox theory, would have occurred automatically under s 5 of the *Status of the Union Act 1934* (South Africa) upon the passage of the British Act.

This approach conflicted with the developing doctrine of divisibility. Specific South African legislation was politically desirable, to make it clear that it was the Instrument of Abdication which resulted in a change of Sovereign of South Africa. It would be unacceptable to the nationalist party for the new Sovereign to owe his position to being either the next of 'His Majesty's heirs and successors in the sovereignty of the United Kingdom',[87] or to a formal request and consent from the United Kingdom.

As the dates of the British and South African Acts differed, for a day the Crown was divided, with Edward VIII reigning one day less in South Africa than elsewhere in the empire.

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82 A matter of simple interpretation, and, one would assume, unexceptional.
83 By its own force.
84 For the parliamentary power to alter the succession see Cox, above n 48.
85 Demise of the Crown is the legal term for its transmission to a successor, usually by death, though occasionally, as here, by abdication.
86 *His Majesty's Declaration of Abdication Act 1936* (UK) Preamble, Schedule.
87 *South Africa Act 1909* (UK) s 3.

Ireland also deliberately achieved a division in the Crown in 1936. The *Executive Authority (External Relations) Act 1936* (Ireland) provided that Edward VIII remained king in the Irish Free State till 12 December 1936. This Act also restricted the powers of the Crown to signature of treaties and accreditation of envoys. This situation was not to last long however.

On 29 December 1937 a Constitution was adopted which was republican in form, if not in name. It made no mention of the Sovereign, but the government indicated that the *Executive Authority (External Relations) Act 1936* (Ireland) would continue in force. The Sovereign was no longer the head of the Irish executive, but merely an organ or instrument, authorised by the head of the State, the President of Ireland, to play a specific role in external affairs.

This status ended in 1949, when Ireland officially became a republic, and residual allegiance to the Crown and membership of the Commonwealth ended.[88]

In Australia consent to the imperial legislation giving effect to the abdication of King Edward VIII was by resolution of each of the two Houses of Parliament on 11 December 1936, before the Westminster legislation was assented to.[89]

Canada expressed its consent by an executive request and consent under s 4 of the *Statute of Westminster 1931* (UK). Like South Africa, it also subsequently passed an Act to homologate its actions, although the abdication would have taken effect automatically upon the passage of the imperial Act, under s 2 of the *British North America Act 1867* (UK).

In New Zealand consent was by executive action only. However, motions to ratify and confirm the assent given by New Zealand Ministers to the imperial Act were recorded in both Houses of the General Assembly.[90] Like Australia, there was no consideration given to passing local legislation, as it was believed that consent to British legislation was legally and politically sufficient. Unlike in Ireland and South Africa, national sentiment in New Zealand were not averse to the new king owing his title, at least in part, to an Act of the imperial Parliament.

After 1936 there were few overt moves to challenge or question the growing concept of the divisible Crown. The lead taken by South Africa and Ireland showed that relatively minor and technical rules could have significant symbolic importance. But the evolution of the concept of the divisible Crown remained

88 *Republic of Ireland Act 1949* (UK).

89 Commonwealth, *Parliamentary Debates*, Senate, 11 December 1936, 2892-6, House of Representatives, 2898-926.

90 New Zealand, *Parliamentary Debates*, 1937 vol 248, 5 (Legislative Council); New Zealand, *Parliamentary Debates*, 1937 vol 248, 7 (House of Representatives). The abdication of the former king, and the accession of the new, was also proclaimed: *New Zealand Gazette* 11 December 1936, 2431-2432, 12 December 1936, 2433.

unsure. Although the earlier authority *Re Ashman and Best*[91] was badly reasoned and ought not be accepted as authority for a divisible Crown, the more recent *Spycatcher* cases,[92] in which the Attorney-General of the United Kingdom sought to enforce a secrecy agreement with the Crown, appear to have established that there is indeed now a separate Crown in New Zealand from that in the United Kingdom.

It is submitted however that the authority upon which this conclusion was based was inappropriate. The question of separate Crowns was considered in the *Spycatcher* cases in relation to the legal relationship between the United Kingdom and Hanover,[93] and England and Scotland,[94] which do not constitute good analogies. The Crown is also divisible within the Australian and Canadian federations,[95] but this observation of course risks confusion between jurisdiction and sovereignty.[96] As *Re Ashman and Best*[97] established, these distinctions can have important consequences.[98]

However, where a constitutional formula which can confer rights is provided, it is only a matter of time before those rights are claimed. If the Crown could be advised by local Ministries, then the Crown was likely to become diffused. The reason for the establishment of divisible Crowns lies not so much in legal formula, but in a changing political paradigm.

As can be seen in the above comparisons between South Africa and Ireland on the one hand, and New Zealand, Canada, and Australia on the other, the concept of a divisible Crown has evolved largely as a consequence of the increasing political independence of the Dominions. Thus South Africa emphasised that the king was Sovereign of South Africa irrespective of his position elsewhere. But it was only in

91 [1985] 2 NZLR 224 (n) per Wilson J, discussed in FM Brookfield, 'New Zealand and the United Kingdom' [1976] *New Zealand Law Journal* 458; cf FM Brookfield, 'The Monarchy and the Constitution today' [1992] *New Zealand Law Journal* 438.

92 *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (HC and CA).

93 1714-1837.

94 King James I failed to achieve a full governmental union between England and Scotland to accompany the personal union of 1603. By 1705 union or complete separation were the only options in the relationship of England and Scotland, whose relations were at a low ebb. Union took effect 1 May 1707.

95 For example, *Mellenger v New Brunswick Development Corp* [1971] 1 WLR 604 (CA).

96 *R v Secretary of State for Foreign and Commonwealth Affairs*, above n 17 and *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (HC and CA).

97 [1985] 2 NZLR 224 (n) (Wilson J).

98 FM Brookfield, 'The Monarchy and the Constitution today' [1992] *New Zealand Law Journal* 438; George Winterton, 'The Evolution of a separate Australian Crown' (1993) 19 *Monash University Law Review* 1; Sir Kenneth Wheare, *The Constitutional Structure of the Commonwealth* (1960).

the existence of the office that such a symbolic statement was possible. The United States of America had to create new symbols of national identity after 1776. These already existed in the Dominions, and were to be used increasingly after the 1920s, both symbolically, and practically.[99]

The 1936 abdication led to acceptance of the practicalities of this right to advise the Crown. If the Crown could receive different advice in each country, the extent to which it could still be regarded as a single entity was uncertain.

The relevance to New Zealand was that, although to a great extent this country still looked to the Crown as the symbol of imperial unity, that unity was declining, leaving the Crown (or Crowns) to acquire a new role, or become increasingly marginalised. This new role was to include representing New Zealand, and the special relationship between Crown and Maori.

Allegiance to the Sovereign

One way in which the Crown was seen as a symbol of imperial unity was in the single status of subject. In New Zealand nationality was, until the passage of the *Citizenship Act 1977* (NZ), governed by the *British Nationality and New Zealand Citizenship Act 1948* (NZ), which was modelled upon the *British Nationality Act 1948* (UK). As in that latter Act, the principle category was British subjects (who might also be called Commonwealth citizens). British subjects were divided into those who were citizens of the independent nations of the Commonwealth, and citizens of the United Kingdom and colonies on the one hand, and those who were New Zealand citizens on the other. British subjects no longer had to owe allegiance to the Crown, as formerly. They were now defined in terms of national status, rather than allegiance.

Under the provisions of the *Citizenship Act 1977* (NZ), citizenship is generally acquired by birth.[100] The term Commonwealth citizen survives, having now completely superseded that of British subject. The Bill, introduced into Parliament as the Citizens and Aliens Bill, was intended to consolidate the *British Nationality and New Zealand Citizenship Act 1948* (NZ), and the *Aliens Act 1948* (NZ). Registration of British subjects, and naturalisation of aliens was replaced by grant of citizenship.

The Act recognised the increasing emphasis on individual citizenship in the Commonwealth, but did nothing to:

> depart from due recognition of the common code of British subject or Commonwealth subject status. The Bill does, however, also seek to put on a

99 Viz in the delegation of the prerogative, and in the symbolic manifestations of separate titles.

100 All those born in New Zealand after 1 January 1949.

> more common footing aspirants for New Zealand citizenship who are on the one hand British subjects, and on the other aliens- this term meaning any non-British subjects.[101]

The Act provides that persons granted New Zealand citizenship may be required to take the oath of allegiance, unless exempted.[102] It was thought that it was desirable that the oath be taken in all cases, but administrative complications ruled this out as a practical proposition at that time.[103]

The form of the oath is prescribed by law. Section 11 and the First Schedule of the *Citizenship Act 1977* (NZ) provides the following oath:

> I, [Full name], swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, *by the Grace of God* Queen of New Zealand *and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith, and* Her heirs and successors according to law, and that I will faithfully observe the laws of New Zealand and fulfil my duties as a New Zealand citizen. So help me God.

This oath is similar to the oath of allegiance now required only from judicial officers- judges, justices of the peace, coroners, and sheriffs, and certain others.[104] The words in italics were removed by s 2 and the Schedule of the *Citizenship Amendment Act 1979* (NZ). The new form was:

> I, [Full name], swear that I will be faithful and bear true allegiance to Her [or His] Majesty [specify the name of the reigning Sovereign, as thus: Queen Elizabeth the Second, Queen of New Zealand,] Her [or His] heirs and successors, according to law, and that I will faithfully observe the laws of New Zealand and fulfil my duties as a New Zealand citizen. So help me God.

This attempt to provide a form which does not require updating with a change of Sovereign has resulted in clumsy wording. It is also inappropriate that the royal style and titles used in the oath of allegiance should now have departed from the official form. However, it was clearly inspired by a desire to emphasise the New

101 New Zealand, *Parliamentary Debates*, 10 June 1977, 553 (Hon DA Highet).

102 s 11. Foreigners, and Commonwealth citizens not subject of the Queen, would owe *ligeantia acquisita*, not by nature but by acquisition or denization. Subjects of the Queen in other countries would now have to take the oath of allegiance, unless exempted.

103 New Zealand, *Parliamentary Debates*, 9 November 1977, 4378 (Hon DA Highet).

104 Oaths and Declarations Act 1957, Part III. Barristers and Solicitors have not been required to take the oath of allegiance since 1983, though they are still required to take an oath of office; *Law Practitioners Act 1982* (NZ) s 46 (2), cf *Law Practitioners Act 1955* (NZ) s 9 (2). Members of Parliament are still required to take the oath, as are military personnel.

Zealand nature of the oath, though this can only be inferred as the Bill was not debated in Parliament.[105]

From 1 July 1996 those required to take the oath have included those individuals who were subjects of the Queen in another of her realms, who were formerly exempt from the requirement to take the oath of allegiance in public, and until 1979 completely exempt.[106]

The move was said to result from a debate on immigration, and to have been promoted by the United Party.[107] About 3,500 people a year now attend citizenship ceremonies run by local councils.[108] These ceremonies provide an opportunity for new citizens to make a public commitment to their new obligations.[109]

Now all people becoming New Zealand citizens, whether or not they were subjects of the Queen overseas, must publicly take the oath of allegiance to the Queen of New Zealand. This has ended another of the remaining symbolic links to an imperial Crown, especially since the oath of allegiance has omitted 'Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith' since 1979,[110] though these remain part of the Queen's official style.[111]

The emphasis is clearly on New Zealand, and whatever their origins, new citizens swear allegiance to the Queen of New Zealand. Citizenship and allegiance have once again become closely aligned. In a parallel development, 'subject of the Queen' in s 117 of the Constitution of Australia 1900 is now taken to mean subjects of the Queen of Australia,[112] rather than of the United Kingdom and

105 It was introduced as part of the Statutes Amendment Bill.

106 'The Minister may, in such case or class of cases as he thinks fit, make the grant of New Zealand citizenship conditional upon the applicant taking an oath of allegiance in the form specified in the First Schedule to this Act'. Most likely to be affected were immigrants from the United Kingdom, Australia, Canada, and, before 1997, Hong Kong.

107 *New Zealand Herald* (Auckland, New Zealand) 7 June 1996, quoting the Minister of Internal Affairs, the Hon Peter Dunne.

108 And a further 9,500 who were formerly required to take the oath annually. All councils receive a small allowance for the entertainment of new citizens.

109 In both Australia and Canada however, suggestions that the oath of allegiance be abandoned, or be rewritten to remove reference to the Sovereign, have been considered. This has been motivated by concerns for national identity, particularly republicanism.

110 The oath of allegiance taken in Australia does not specifically mention Australia: Schedule to the Australian Constitution.

111 *Royal Titles Act 1974* (NZ).

112 *Street v Queensland Bar Association* (1989) 168 CLR 461, 505, 525, 541, 554, 572.

Dominions overseas. The United Kingdom itself is now a "foreign" power under s 44(i) of the Australian Constitution.[113]

Conclusion

As legislative authority might appear to forever rely upon the prior authority of an imperial Parliament, so the authority of the Crown in New Zealand depends upon the authority of the (formerly imperial) Crown. Whereas the former is a technical issue which has concerned few but constitutional lawyers, the latter is central to the country's identity, and has been more widely analysed. Indeed, the concept of the divisible Crown is now generally accepted,[114] and in this concept lies the true political and legal independence of New Zealand.

In the development of legislative independence there was a significant change in authority, but the new powers were evolutionary, inherited powers. With the development of executive independence the change in authority was accompanied by a more potent symbolic and conceptual change. The Crown, rather than being the source of imperial executive authority, became the source of local authority.

The development of the concept of the divisible Crown came about as the Dominions obtained control of the prerogative. One king, several kingdoms gradually became several distinct kingships. This was not as the result of any conscious policy decision, but merely as a result of the natural evolution of domestic laws and practices in the absence of an insistence on uniformity by the imperial authorities. Thus in 1936 South Africa asserted its independence by insisting that the king owed his title to local rather than imperial law, and asserted this successfully.

The Crown as an imperial institution has become the property of each of the former imperial possessions. Some countries have chosen to adapt that symbolic institution to their own uses, just as the other institutions of Westminster government have been adapted and modified. In each case however, the first step has been the acquisition of control over the executive, and this caused a partial division of the Crown. The expression national Crown might be preferable to separate sovereignty, in that the former allows the person of the Sovereign to continue to be seen as British, but acknowledges that the institution has in some way been nationalised. This was also expressed through the evolution of citizenship, and allegiance to a national Crown, from the status of British subject.

113 *Sue v Hill* (1999) CLR 462 (HCA). cf. *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (HC and CA).

114 Though there remain uncertainties as to the exact consequences of this, see for example, Noel Cox, 'The Law of Arms in New Zealand' (1998) 18(2) *New Zealand Universities Law Review* 225.

To cite Evatt again, 'through the evolution of the Crown little or no formal legal changes were needed for states to change from being colonies to being fully independent'.[115]

It was a logical, and probably inevitable step, for the imperial Crown to develop into distinct local Crowns.[116] It followed that in each, though legal continuity might be maintained to an historically prior imperial enactment or prerogative measure, ultimate authority depended upon local laws and constitutional principles. In that respect, at least, the constitution must be seen as autochthonous. Thus, although theories of parliamentary supremacy might be uncertain, it was accepted by the 1940s that the Sovereign was separately head of State of each realm. This concept had not been legislated for, it represented the acceptance of a new grundnorm, or principle of the constitution, one which more closely matched the political realities.

The Crown, in acting as the tool or mechanism through which New Zealand acquired political independence, also became a principal focus of governmental authority. Without an entrenched Constitution, which in the United States of America and to some extent in Canada and Australia also became an alternative symbolic focus of authority,[117] the Crown continued its traditional function as a constitutional focus.

115 Evatt, above n 2, ch 1-3; Sir David Smith, 'The Australian Constitution and the Monarchy/Republic Debate' in Gareth Grainger and Kerry Jones, *The Australian Constitutional Monarchy* (1994) 77.

116 Such developments are not, of course, limited to the Commonwealth. Norway became independent of Sweden in 1905 by enthroning a new king, and Brazil's independence from Portugal was established in 1822 when the senior branch of the Bragança family became Emperors of Brazil; Terje Leiren, *National Monarchy and Norway* (PhD thesis, University of North Texas, 1978).

117 Vernon Bogdanor, *Monarchy and the Constitution* (1995) 62.