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## The dichotomy of legal theory and political reality: the honours prerogative and imperial unity

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### Introduction

In the various realms of the Crown, and particularly in Canada and Australia, there has been a separation of the person of the monarch from the concept of the Crown. The Crown has been depersonalised (even "de-monarchised"). This growing separation between Crown and monarchy is of practical importance, for the Crown as theoretical principle still integrates the polity.

Nor should the Crown as a symbol should not be allowed to cloud the truth that the Crown is an integral part of a practical form of government, and as such has a direct and substantive part to play.<sup>1</sup> Monarchy is a distinct form of government, and one which has certain differences from, and perhaps, advantages over some other systems. As Smith put it, "hard-headed calculation" and not "conventional loyalty" explained the choice of the monarchical principle by the Fathers of Canadian Confederation.<sup>2</sup>

The advantages to government of the Crown as a theory of government do not necessarily equate to popular support for monarchy as a form of government. Nor will political support for this system necessarily continue if the distinction between Crown and monarchy become too wide. A general acceptance of the idea that New

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<sup>1</sup> D Smith, *The Invisible Crown: The First Principle of Canadian Government*, Toronto, 1995, pp 25-6.

<sup>2</sup> See also W L Morton, "The Meaning of Monarchy in Confederation" (1963) *Transactions of the Royal Society of Canada*, 1 series 4, p 271; J L McNairn, "Publius of the North: Tory republicanism and the American Constitution in Upper Canada, 1848-54" (1996) 77 *Canadian Historical Review* 504-36.

Zealand, or any of the other realms, as a de facto republic, will lead, in time, to a rejection of the symbolism of monarchy<sup>3</sup>.

The transplantation of the Crown abroad has led to some technical and practical difficulties.<sup>4</sup> The belief that New Zealand is a de facto republic has arisen as a consequence of our history, the visible absence of the Sovereign. There were, and are, similarities and differences between the role of the Crown in the United Kingdom, and in the realms. The Sovereign has a place in local life that is quite different from that in the United Kingdom.<sup>5</sup> Yet in some respects the relationship between the Queen and her subjects is a much more personal and direct one in New Zealand than it traditionally was in the United Kingdom.<sup>6</sup>

The arrangement of power in Australia, Canada, New Zealand and the other of the Queen's realms, recognises as head of State a non-resident monarch. Undoubted domestic independence is combined with the retention of the most visible remnant of the colonial past. Since few people are interested in constitutional metaphysics, the usual way of dealing with these contradictions is to dismiss them as more apparent than real, in other words, to depreciate the significance of monarchical government and, by inference, the role of the Crown, even though the Governor-General remains its permanent representative.<sup>7</sup>

The Sovereign may be absent, but the Crown is ever-present. Although there is an almost complete delegation of the royal prerogative to the Governor-General, and the Queen retains but a minimal involvement in the New Zealand constitution,<sup>8</sup> the important symbolic role of the Crown remains. Almost inevitably, the concept of the Crown has undergone an evolution until the point has been reached that the Crown is arguably more significant than the person of the Sovereign.

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<sup>3</sup> Which raises the question of why this argument has often been put by those in Australia who argue against the republican movement there.

<sup>4</sup> Nor are the difficulties of transplantation unique to the Crown, see for example L B Hill, "The International Transfer of Political Institutions: A Behavioural analysis of the New Zealand Ombudsman", 1970, unpublished Tulane University PhD thesis.

<sup>5</sup> Smith, above, n 1, p 6.

<sup>6</sup> The so-called walk-about was originated by the Australian-born Rt Hon Sir William Heseltine, Press and later Private Secretary to the Queen, and first used in Australia and New Zealand in 1970.

<sup>7</sup> Smith, above, n 1 p ix.

<sup>8</sup> The Sovereign can also exercise every power conferred on the Governor-General by any enactment; Cabinet, *Cabinet Office Manual* (1988) para A.1.8; *Constitution Act 1986* (re-enacting the effect of the provisions of the *Administrator's Powers Act 1983*, and the *Royal Powers Act 1983*).

The Governor-General has little personal contact with the Queen, except on appointment, and usually on a royal visit to New Zealand. Normally, in a mid-term break, the Governor-General will visit the Queen. Correspondence is limited to discussion of royal honours, and a personal letter sent by the Governor-General from time to time.<sup>9</sup> The Sovereign gleans information on New Zealand from her staff, newspapers and broadcasts, the Governor-General's letters, and periodic visits to the country. When about to visit New Zealand she would receive additional advice from High Commission staff in London.<sup>10</sup>

But, while the Sovereign has some constitutional role to play, for the most part the government of the country is conducted in her name, by local Ministers, nominally responsible to the Governor-General.

There is therefore a dichotomy of legal theory and political reality. The constitutional grundnorm is based upon the concept of the Crown. Yet there has been a growing separation between Crown and monarch, or rather a redefinition of the Crown in such a way that the Governor-General is almost as full a personification of the Crown as the Sovereign is. The Governor-General has become a de facto, a viceroy, empowered to exercise a general delegation of the royal prerogatives, and entrusted by the Sovereign with complete responsibility for the government of New Zealand.

With the exception of the honours prerogative, which has remained in the hands of the Sovereign, largely for symbolic reasons, the royal prerogatives are now all exercised by the Governor-General on behalf of the Sovereign.

Difficulties remain with regard to legislation affecting the unity of the Crown. The concept of the divisibility of the Crown has yet to be fully developed. Some anomalies remain, and it is clear that the Queen remains, at least in some respects, legally the one person throughout her realms. What effect this has upon the legitimacy of the Crown in New Zealand has, as yet, received little analysis outside the writings of dedicated republicans.

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<sup>9</sup> Interview with Hugo Judd, 14 April 1998. Beattie wrote every two months or so, former practice was every three months- the Governor-General's Quarterly Report. Prior to 1926 this was sent to the Secretary of State; Stevens, "The Crown, the Governor-General and the Constitution", 1974, LLM thesis p 19 fn 14.

<sup>10</sup> Interview with Sir David Beattie, 15 April 1998.

### Delegation of the imperial prerogatives

Settled colonies, whose inhabitants took the common law with them, took only those laws which were applicable to their new situation and to the condition of a new colony.<sup>11</sup> Blackstone's statement that "colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of the infant colony"<sup>12</sup> is, like so many of his generalisations, misleading.

It would have been nearer the truth had he said "colonists carry with them the great majority of English law, both common law and statute, except those parts which are inapplicable to their own situation and the conditions of the infant colony". What became applicable was far greater in content and importance than what had to be rejected. It also always included the royal prerogative.

It is a judicial rule that the prerogative is as extensive overseas as it is in the United Kingdom.<sup>13</sup> A principle of the common law may be extended by local circumstances beyond its limits in England.<sup>14</sup>

The prerogative in the realms may be less secure than in the United Kingdom. In the United Kingdom, Bills which affect the royal prerogative, hereditary revenues, personal property or interests of the Crown, or the Duchy of Lancaster require the Queen's consent, or the Prince of Wales's consent for Bills affecting the Duchy of Cornwall. These consents are customarily given, and do not imply actual approval of the proposed measure. This principle is less scrupulously followed overseas.<sup>15</sup>

There are several views as to what comprises the prerogative. Dicey had a wide view of the royal prerogative. To him, the prerogative was the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.<sup>16</sup> Chitty defined prerogative powers as being minor (which were merely local to England), and those others, which were fundamental rights and

<sup>11</sup> *Kielley v Carson* (1824) 4 Moo PCC 63; 13 ER 225; *Lyons Corp v East India Co* (1836) 1 Moo PCC 175; 12 ER 782; *Phillips v Eyre* (1870) LR 6 QB 1; *Sammut v Strickland* [1938] AC 678 (PC); *Sabally and N'Jie v Attorney-General* [1965] 1 WLR 273.

<sup>12</sup> Blackstone, *Commentaries on the Laws of England* ed Christian, 1978, book I para 107.

<sup>13</sup> *Lyons Corporation v East India Co* (1836) 1 Moo PCC 175; 12 ER 782; *Nyali v Attorney-General* [1956] 1 QB 1; *Re Bateman's Trusts* (1873) LR 15 Eq 355; 42 LJ Ch 553; 28 LT 395; 37 JP 484; 21 WR 435; 12 Cox CC 447.

<sup>14</sup> *Nana Atta II v Nana Bonsra II* [1958] AC 95 (estoppel by *res judicata*).

<sup>15</sup> Erskine May, *Parliamentary Practice*, 1989, pp 237, 561.

<sup>16</sup> Dicey, *Introduction to the Study of the Law of the Constitution* introduction & appendix by ECS Wade, 1950, p 424.

principles on which the King's authority rested, and which were necessary to maintain it.<sup>17</sup> Blackstone advocated a similar definition, that of direct and incidental.<sup>18</sup>

The royal prerogative is generally non-justiciable (or non-reviewable by the Courts),<sup>19</sup> and includes the making of treaties;<sup>20</sup> defence of the realm (though the war prerogative has not been analysed by the Courts for nearly 300 years);<sup>21</sup> to keep the peace;<sup>22</sup> grant of honours;<sup>23</sup> dissolution of Parliament (though this may not be so in New Zealand now);<sup>24</sup> the appointment of Ministers; and "other matters".<sup>25</sup>

The royal prerogative is a branch of the common law, because it is the decisions of the Courts which determine its existence and extent.<sup>26</sup> The "other" prerogatives will be identified by the Courts on a case-by-case basis.<sup>27</sup>

Whatever the definition, it is clear that the major prerogatives apply throughout the Commonwealth. These are applied as "a pure question of English common law" even in a country, such as Malta, where the common law is not in force.<sup>28</sup> Minor prerogatives apply in all common law countries except that they may be excluded or modified by local circumstances.

<sup>17</sup> J Chitty, *Treatise on the law of the prerogatives of the Crown and the relative duties and rights of the Subject*, London, 1969.

<sup>18</sup> Interestingly, the definition relied heavily on the distinction between the King's political and private persons; Blackstone, above, n 12, vol 1, pp 239ff.

<sup>19</sup> Though their extent is; *case of proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB).

<sup>20</sup> *The Parlement Belge* (1879) 4 PD 129; (1880) 5 PD 197; *Blackburn v Attorney-General* [1971] 1 WLR 1037.

<sup>21</sup> *Burmah Oil Co v Lord Advocate* [1965] AC 75; *Nissan v Attorney-General* [1970] AC 179.

<sup>22</sup> *R v Secretary of State for Home Department; Ex parte Northumbria Police Authority* [1988] 1 All ER 556, 564, 573, 576.

<sup>23</sup> *The Prince's Case* (1606) 8 Co Rep 481; 77 ER 496; Sir Anthony Wagner & George Squibb, "Precedence and Courtesy Titles" (1973) 80 LQR 352.

<sup>24</sup> See Quentin-Baxter, *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand*, 1980, pp 13-14.

<sup>25</sup> Generally, see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 per Lord Roskill (obiter, HL). The royal prerogative of mercy is not reviewable by the courts; *Burt v Governor-General* [1993] 2 NZLR 672 (CA).

<sup>26</sup> *Case of proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB).

<sup>27</sup> *R v Secretary of State for Home Department; Ex parte Bentley* [1993] 4 All ER 443.

<sup>28</sup> *Summut v Strickland* [1938] AC 678 (PC).

Whether a particular prerogative extends to a country depends upon the category to which it belongs and upon whether the legal system is based on English law.

A Governor or Governor-General, although representing the Sovereign, does not automatically have authority to exercise the royal prerogative,<sup>29</sup> since he or she possesses only those powers conferred on him or her.<sup>30</sup> In each case the question must turn upon the constitution or statute law of the country concerned or the terms of the delegation by the Sovereign. A viceroy, in contrast, is *in loco regis*,<sup>31</sup> in which case there is a general delegation of the prerogative. Such appointments were rarely made.

The Governor-General of New Zealand has only those prerogative powers conferred upon him or her by the letters patent constituting the office. Even the 1917 letters patent "authorised, empowered, and commanded to do and execute all things that belong to his office". It is clear that even without express delegation the office today includes all prerogative powers of the Crown, except so far as they are the subject of a specific delegation, or have been expressly or impliedly retained by the Sovereign.<sup>32</sup>

Recent general delegations of the prerogative elsewhere have been of two forms. One is found in Canada, where by letters patent the Governor-General is empowered "to exercise all powers and authorities lawfully belonging to Us in respect of Canada".<sup>33</sup> This formula appears to mean that there is no royal power or authority in respect of Canada which cannot be exercised by the Governor-General, including the revocation of the Governor-General's own commission, the appointment of his or her successor, the grant of leave of absence from Canada, and the revocation or amendment of the letters patent themselves.<sup>34</sup>

The 1947 Canadian letters patent<sup>35</sup> were issued in the belief that new powers and authorities were thereby conferred. These included the power to sign treaties and appoint ambassadors, hitherto exercised personally by the Sovereign.<sup>36</sup> With the

<sup>29</sup> Though in *Nyali v Attorney-General* [1956] 1 QB 1 he had.

<sup>30</sup> *Chun Teeong Toy v Musgrove* (1888) 14 VLR 349.

<sup>31</sup> *Tandy v Westmoreland* (1792) 27 St Tr 246.

<sup>32</sup> Quentin-Baxter, above, n 24, p 5.

<sup>33</sup> 1947 Letters Patent constituting the Office of Governor-General of Canada, effective 1 October 1947, Canada Gazette, Part I, vol 81, p 3104, cl 2.

<sup>34</sup> Quentin-Baxter, above, n 24, pp 7-8.

<sup>35</sup> 1947 Letters Patent, above, n 33.

<sup>36</sup> Prime Minister's Press Statement, 1 October 1947.

single exception of the exercise of the royal prerogative of granting armorial bearings, exercised by the College of Arms on the Queen's behalf, all prerogatives were exercised by the Governor-General thereafter.<sup>37</sup>

In contrast, newer Commonwealth constitutions delegate prerogative powers in terms which make it clear that powers expressly or impliedly retained by the Sovereign are exempted from the delegation.<sup>38</sup> Thus, they appear to reserve the appointment and recalling of a Governor-General- a logically more satisfactory situation. It also seems customary, when the prerogative constituent power is exercised, expressly to reserve the Sovereign's power to revoke, alter, or amend the relevant instrument.<sup>39</sup>

By clause III, the 28 October 1983 Letters Patent Constituting the Office of Governor-General of New Zealand provided that the Governor-General was authorised and empowered, except as may be otherwise provided by law:

- (a) To exercise on Our behalf the executive authority of Our Realm of New Zealand, either directly or through officers subordinate to Our Governor-General; and
- (b) For greater certainty, but not so as to restrict the generality of the foregoing provisions of this clause, to do and execute in like manner all things that belong to the office of Governor-General including the powers and authorities hereinafter conferred by these Our Letters Patent.

There is no statement of general delegation of the royal prerogative, although the prerogative of mercy is specifically delegated.<sup>40</sup> The qualification, "except as may be otherwise provided by law" is necessary to avoid the impression of purporting to dispense with laws by a mere exercise of the prerogative.<sup>41</sup> The definition of the powers is in fact circular.

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<sup>37</sup> This aspect of the prerogative has since been transferred, for Canada, to the Canadian Heraldic Authority; 1988 Letters Patent authorising the granting of armorial bearings in Canada, 4 June 1988. This example has not yet been followed in New Zealand. For the position of the Law of Arms in general see Cox, "The Law of Arms in New Zealand" [1998] 18 NZULR 225-256.

<sup>38</sup> Quentin-Baxter, above, n 24, p 8.

<sup>39</sup> This is not legally necessary, and could be a response to *Campbell v Hall* (1774) 1 Cowp 204; 20 State Tr 239; 98 ER 1045.

<sup>40</sup> cl. XI.

<sup>41</sup> *Thomas v Sorrel* (1674) 3 Keb 143; 84 ER 642; *Godden v Hales* (1686) 11 State Tr 1165.

It is clear that in the years following the implementation of the 1983 letters patent the delegation of the royal prerogative to the Governor-General of New Zealand became virtually complete. A single significant exception is for the conferment of Royal Honours, which are approved personally by the Queen. The general delegation of the prerogative has been deemed to exclude a delegation of the power to approve honours solely because this power is conferred on the Queen in the statutes of these honours.<sup>42</sup>

Such an interpretation is always subject to change, as was done in Canada. The Governor-General could also, if it were desired, institute new awards, but the practice to date has been to reserve these tasks for the Sovereign.<sup>43</sup>

In Australia in 1954 there was an express delegation to the Governor-General of the power to appoint ambassadors.<sup>44</sup> It was assumed this power has not been conferred upon the Governor-General by s 6 of the Constitution of Australia Constitution Act 1900,<sup>45</sup> nor included among the powers conferred by the 1900 Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia, 29 October 1900.

If this view were correct, then the right to make appointments was retained by the Sovereign of New Zealand as a matter of law until 1983.<sup>46</sup>

According to Alison Quentin-Baxter, the Queen attached considerable importance to continuing to sign letters of credence and recall of ambassadors. First, she desired to perform some formal acts as Queen of New Zealand, and second, she feared foreign heads of State receiving credentials signed by the Governor-General and not by the Queen herself might be disposed to question them. As a matter of propriety, it was felt such documents should be signed by the Sovereign.<sup>47</sup>

<sup>42</sup> Quentin-Baxter, above, n 24, p 7.

<sup>43</sup> The delegated power to confer certain awards on servicemen for gallantry in Vietnam was conferred in 1968 on Australia and New Zealand; Cable from Governor-General to Secretary of State for Commonwealth Relations 4 November 1968, and the Queen's approval in a cable Secretary of State to Governor-General 5 November 1968, cited in Stevens, "The Crown, the Governor-General and the Constitution" (1974) LLM thesis 325-326. But there has been no delegation of the honours prerogative comparable to that in Canada.

<sup>44</sup> Commonwealth Gazette, 12 July 1956, p 2083.

<sup>45</sup> 63 & 64 Vict c 12 (UK).

<sup>46</sup> Quentin-Baxter, above, n 24, p 38. See also Cabinet, *Cabinet Office Manual*, 1996, para 1.8; Lumb & Ryan, *The Constitution of the Commonwealth of Australia Annotated*, 1981, 63; Aikman & Robson, introduction in Robson, *New Zealand* (1967) 1; Keith, *Responsible Government in the Dominions*, 1928, part V ch XI.

<sup>47</sup> Quentin-Baxter, above, n 24, p 36.



Until 1989 letters of credence and recall of ambassadors were signed by The Queen personally.<sup>48</sup> Whether the right to make appointments was retained by the Sovereign of New Zealand as a matter of law, the 1983 letters patent confers a general delegation upon the Governor-General, entitling him or her to exercise even this function. The form of letters of credence is now:

In the Name and on Behalf of  
**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.

**Michael Hardie Boys**  
Governor-General and Commander-in-Chief in  
and over New Zealand.<sup>49</sup>

The letters patent constituting the office of Governor-General, themselves prerogative instruments, provide that the Governor-General is authorised and empowered to "exercise on Our behalf the executive authority of Our Realm of New Zealand".<sup>50</sup> This authority is to be exercised according to the tenor of the letters patent and any commission as may be issued, and such laws as are in force.<sup>51</sup> Such restrictions amount to a general delegation of the prerogative, but also allows for the retention of certain personal discretion in the exercise of the royal prerogative. By contrast, the 1917 letters patent and instructions accorded only specific delegation of authority.<sup>52</sup>

Since 1983 few prerogatives remain in the hands of the Sovereign. Almost all are exercised in her name by her representative, the Governor-General. As the Queen regards her representatives as wholly responsible within their own countries, the

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<sup>48</sup> The draft Letters of Credence (for non-Commonwealth Presidents TX 205, and Sovereigns TX 200A) and Letters of Commission (for Commonwealth republics TX 217, or indigenous monarchies) followed a standard form for all the Queen's realms, and were designed to be signed by Her Majesty personally. Letter of Introduction (for realms) are addressed from Prime Minister to Prime Minister; Letter from Peter Hyde, for Acting Secretary of Foreign Affairs and Trade, to author, 13 July 1998.

<sup>49</sup> Draft Letter of Credence; Letter from Peter Hyde, for Acting Secretary of Foreign Affairs and Trade, to author, 13 July 1998.

<sup>50</sup> cl 3 (a).

<sup>51</sup> cl 4).

<sup>52</sup> 1917 Letters Patent Constituting the Office of Governor-General of New Zealand, 11 May 1917 (UK); 1917 Royal Instructions to the Governor-General of New Zealand, New Zealand Gazette, 1919, p 1213.

legal source and practical exercise of these prerogative powers have become almost completely separated.

Whilst legally the representative of the Sovereign, the Governor-General has, for most purposes, to look to New Zealand legislation, primary and secondary, for his or her authority to act, and to New Zealand Ministers for advice. Some prerogatives and other powers exercised personally by the Queen still remain, and when present in this country the Queen has full powers to exercise all the royal powers.

### Honours prerogative

From time to time doubts have been expressed about the legal status in New Zealand of imperial honours. It is said that because the proper procedures were not followed as New Zealand became independent, the Statutes of the British Orders of chivalry were not incorporated as part of the law of New Zealand. They were not, for example, listed in the schedules to the *Imperial Laws Application Act* 1988, which preserved imperial legislation in force in New Zealand.<sup>53</sup>

It followed, so the argument goes, that if the Statutes had no legal effect in New Zealand, any precedence they ascribed would be nugatory. Thus the precedence accorded under the Statutes of the Queen's Service Order was "an empty privilege" as it was defined in terms of the Order of the British Empire, that was not recognised by the law of New Zealand.<sup>54</sup>

There are two major objections to this contention. First, the law regulating precedence and royal honours is the prerogative, not statutory law, and therefore was not affected by the *Imperial Laws Application Act* 1988. Second, the prerogative extends throughout the realms of the Queen, even though the Crown has become to some degree divisible. Acts under the prerogative extend to all of the Queen's realms however they may be enacted, unless that particular prerogative has been ended in that realm.<sup>55</sup> Therefore an Order originally created by the Sovereign in the United Kingdom is equally valid in New Zealand. The same would hold for an Order established by the Queen in right of Australia.

The so-called imperial honours are under the authority of prerogative instruments issued by the Sovereign on the formal advice of British Ministers. Thus the George

<sup>53</sup> Macaulay, "False Assumptions and Missed Opportunities" (1998) 67 *New Zealand Armist* 16; "The NZ Order of Merit" [1996] *NZLJ* 457-8; "Honours and Arms" (1994) 5 *Cantaur LR* 381.

<sup>54</sup> See, for example Macaulay, above, n 53, at 457-8.

<sup>55</sup> *Sammut v Strickland* [1938] AC 678 (PC).

Medal is administered in New Zealand under a royal warrant of 30 November 1977, countersigned by British Prime Minister James Callaghan. This was published in the *New Zealand Gazette* on 9 March 1978.<sup>56</sup>

New Zealand originated honours are governed by prerogative instruments which are issued under the Seal of New Zealand, on the advice of New Zealand Ministers. Thus, the warrants establishing the Order of New Zealand and the Queen's Service Order were both sealed with the Seal of New Zealand, and countersigned by David Lange and Wallace Rowling respectively.

The actual means of authentication of prerogative instrument is immaterial to its legal validity, unless there is some statutory or regulatory requirement that a particular method be used.<sup>57</sup> Therefore a warrant signed on the advice of a British Minister can still apply to New Zealand, if this was intended.

Normally in both the United Kingdom and New Zealand royal warrants will be countersigned by a Minister, thereby signifying that ministerial advice had been given. Even this is not a prerequisite, and Sir David Beattie (as Governor-General) countersigned the 1981 amendment to the Statutes of the Queen's Service Order. Absence of evidence of ministerial advice does not invalidate a warrant.<sup>58</sup>

While the Queen's Service Order and the Order of New Zealand are self-evidently Orders of the Crown in right of New Zealand,<sup>59</sup> it is also clear the royal warrants establishing the various British Orders are of equal application in New Zealand. They are therefore also legally part of the New Zealand honours system.<sup>60</sup> Each of these orders, decorations and medals was created in the exercise of the royal prerogative, which is applicable in all the realms of the Queen.

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<sup>56</sup> SR 1978/43.

<sup>57</sup> The Seal of New Zealand is now to be used on any instrument that is made by Her Majesty or by the Governor-General, on the advice of a Minister of Her Majesty's Government in New Zealand, or on the advice and with the consent of the Executive Council of New Zealand (s 3 (1)). They are not, however, invalid if they are not so sealed, unless the use of the seal is expressly required by an enactment (s 5 (1)).

<sup>58</sup> Nor must the Sovereign, as fount of honour, necessarily have to act always only with the benefit of ministerial advice. This was evidenced by the decision in 1948 that the Orders of the Garter and the Thistle would, in future, be conferred by the Sovereign personally, without formal advice from the Prime Minister.

<sup>59</sup> Being created by royal warrant under the Seal of New Zealand, and published in the *New Zealand Gazette* in accordance with the *Regulations Act* 1936; Macaulay, above, n 53, at 381, 388.

<sup>60</sup> In the same way that a royal warrant signed by the Queen of New Zealand would be of legal force in the United Kingdom.

The Statutes or other prerogative regulations establishing or amending an imperial honour is a part of the law of New Zealand whether or not it is published in the *New Zealand Gazette*, though it may well be so published.<sup>61</sup> For example, the royal warrant establishing the Queen's Gallantry Medal was countersigned by British Prime Minister Harold Wilson on 12 June 1974, and subsequently published in the Statutory Instruments series in New Zealand as SR 1974/248. This warrant has no greater or less authority in New Zealand than the Statutes of the Most Excellent Order of the British Empire, the latest version of which were countersigned by British Home Secretary Douglas Hurd on 27 March 1986, but never published in New Zealand.

All British medals which were conferred on New Zealanders have now been replaced, either by local medals of the same design, or by new medals. An example of the former is the New Zealand Army Long Service and Good Conduct Medal.<sup>62</sup> This replaced the old Medal for Long Service and Good Conduct (Military), which was created by royal warrant of 23 September 1930. New Zealand regulations were signed by Viscount Cobham, countersigned by Phillip Connolly 29 September 1959, were published in the *New Zealand Gazette* 8 October 1959.<sup>63</sup>

The practice of issuing local versions of imperial medals in New Zealand, or local regulations to administer medals created by British warrants, is not recent. Indeed it dates from the latter part of the nineteenth century.

The *Imperial Laws Application Act 1988* did not undermine the legal validity of prerogative instruments. The application of that Act is limited to imperial subordinate legislation.<sup>64</sup> Subordinate legislation is defined in the Act as any Order in Council, regulation, or other legislative instrument made under any imperial enactment. Imperial enactment means any Act of Parliament of England, Great Britain, or of the United Kingdom. There has never been any requirement for prerogative instruments to be published in New Zealand.<sup>65</sup>

<sup>61</sup> The Statutes of the Order of the British Empire was enacted under the Seal of the Order, and orders usually provide for the abrogation or amendment of their statutes by a notification under the sign manual of the Sovereign of the Order, rather than by the Sovereign of the Realm.

<sup>62</sup> Royal Warrant signed 6 May 1985, countersigned by David Lange, published in the *New Zealand Gazette* 16 May 1985 (SR 1985/90).

<sup>63</sup> SR 1959/155.

<sup>64</sup> s 4.

<sup>65</sup> See the *Acts and Regulations Publication Act 1989*, replacing the *Regulations Act 1936*. Section 3 of the earlier Act did not require prerogative instruments to be published, only printed and sold by the Government Printer. Section 2 of *Acts and Regulations Publication Act 1989* defines regulations in terms of s 2 of the *Regulations (Disallowance) Act 1989*. This includes "Rules or regulations made under any Imperial Act or under the

The common law of England, subject as always to local variations, continues to apply in New Zealand.<sup>66</sup> New Zealand prerogative measures are preserved by s 5 of the Act.

The *Imperial Laws Application Act 1988* was not intended to institute, or even to recognise, the concept of a divisible Crown. At the turn of the twentieth century New Zealand was a British colony, owing allegiance to the British Crown. Today, although the paths of development have at times been tortuous, there clearly exists a distinct New Zealand Crown. It does not follow that Orders instituted by the Crown of the United Kingdom have no legal status in New Zealand. For though distinct, the two Crowns remain linked to some degree.

In the Statutes of the Most Excellent Order of the British Empire<sup>67</sup> it is stated the "Kings or Queens Regnant of Our Said Realm, are and for ever shall be Sovereigns of this Order...",<sup>68</sup> yet by "Our Said Realm" it is clearly meant the various realms, not merely the one in which the Order was established, namely the United Kingdom. In contrast, the Statutes of The Queen's Service Order<sup>69</sup> provided that "We, Our Heirs and Successors, Kings and Queens Regnant of New Zealand, are and forever shall be Sovereigns of this Order".<sup>70</sup> This clearly confined the scope of the Order to New Zealand, though not perhaps as unequivocally as the wording might suggest.

The wording for the Queen's Service Order was followed in the Statutes of the next New Zealand Order to be established. The Order of New Zealand<sup>71</sup> provides that "We, Our Heirs and Successors, Kings and Queens Regnant of New Zealand, are and forever shall be Sovereigns of this Order".<sup>72</sup> Similarly, the Statutes of the New Zealand Order of Merit<sup>73</sup> provide that "We, Our Heirs and Successors, Queens and

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prerogative rights of the Crown and having force in New Zealand". All regulations made after the passage of the Act are to be forwarded to the Chief Parliamentary Counsel (s 5), who shall arrange for the printing and publication of the regulations, and of reprints (s 4). All regulations so printed and published are to be published in the *New Zealand Gazette*. There is no legal requirement that prerogative instruments issued before 1989 be published in the *New Zealand Gazette*. Most regulations governing the so-called imperial honours were not so published, though few if any warrants were issued after 1989.

<sup>66</sup> s 5.

<sup>67</sup> Signed 27 March 1986, countersigned by Douglas Hurd, Home Secretary; Privately printed 1986.

<sup>68</sup> cl 3.

<sup>69</sup> Royal Warrant (SR 1975/200).

<sup>70</sup> cl II.

<sup>71</sup> Royal Warrant (SR 1987/67).

<sup>72</sup> cl 3.

<sup>73</sup> Royal Warrant (SR 1996/205).

Kings Regnant [sic]<sup>74</sup> of New Zealand, are and forever shall be Sovereigns of this Order".<sup>75</sup>

In no case does the territorial reference necessarily limit the scope of the Orders, any more than did the reference to "Kings or Queens Regnant of Our Said Realm" in the Statutes of the Order of the British Empire. None of these statutes presupposes that the Queen was Sovereign only of the country for which the Order was being created, whatever some constitutional theorists might say about the implications of the divisible Crown. This is made clearer if one looks at the provisions for membership of these Orders.

In the Statutes of the Most Excellent Order of the British Empire it is stated: "Additional members include those former foreigners appointed honorary members, "who become subjects of Our Crown, and in respect of whom the relevant Government shall so desire....".<sup>76</sup> Persons eligible for appointment to the civil division of the Order are those who "have rendered important services to Our United Kingdom, to those Members of the Commonwealth overseas of which We are Queen... to Our Colonies, to Our other Territories, or to the Territories under Our Protection or Administration".<sup>77</sup>

Foreigners can only be honorary members,<sup>78</sup> the definition of foreigner being clearly restricted to persons who are not subjects of the Queen. The Statutes clearly presuppose a single Crown, though with multiple national Governments.

The Statutes of the first distinctly New Zealand Order, the Queen's Service Order,<sup>79</sup> were in conformity with this approach. They originally provided that membership was confined to "Our faithful subjects under Our Protection in a civilian capacity within Our Realm of New Zealand".<sup>80</sup> "Foreign Persons and Citizens of countries within the Commonwealth of which We are not Queen" were honorary members.<sup>81</sup>

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<sup>74</sup> A King Regnant is of course a physical and logical impossibility, the result, no doubt, of sloppy drafting and an ignorance of Latin.

<sup>75</sup> cl 4.

<sup>76</sup> cl 19.

<sup>77</sup> cl 6.

<sup>78</sup> cl 7.

<sup>79</sup> Royal Warrant (SR 1975/200).

<sup>80</sup> cl V.

<sup>81</sup> cl VIII.

In 1981 the Statutes were amended, and now reads "Our faithful subjects under Our Protection in a civilian capacity within Our Realm of New Zealand, *or in other Realms and Territories of which We are Queen*".<sup>82</sup> This made it clear that subjects of the Queen's other realms were eligible for the award, something which was not the case with the original wording, probably through an oversight, rather than deliberate design.

The Statutes of the Order of New Zealand, the next New Zealand Order to be established,<sup>83</sup> followed the same pattern. These provided that "Persons to be admitted as Ordinary Members of this Order shall be subjects of Our Crown",<sup>84</sup> and that "Persons to be admitted as Honorary Members of this Order shall be citizens of Commonwealth Nations of which We are not Queen or citizens of Foreign States".<sup>85</sup> Appointments were to be published only in the *New Zealand Gazette*,<sup>86</sup> rather than also in the *London Gazette*, as was the case with the Queen's Service Order.

Between 1987, when the Order of New Zealand was instituted, and 1996 and the ending of the conferment of imperial honours, the idea that the Crown still meant an imperial Crown, rather than exclusively the Crown of New Zealand, appears to have been reconsidered to some degree. But this appears to have been more due to an appreciation of drafting difficulties which were apparent in earlier Statutes, than any desire to recognise a separate Crown.

The Statutes of the New Zealand Order of Merit<sup>87</sup> in 1996 provided that "persons to be admitted to the Order shall be such persons, being citizens of New Zealand or citizens of Commonwealth Nations of which We are Sovereign".<sup>88</sup> "Persons who are not New Zealand citizens or citizens of nations of which We are Sovereign are eligible to be admitted to this Order [as honorary members]".<sup>89</sup>

Honorary members who subsequently become naturalised New Zealand citizens, or a "citizen of a Commonwealth Nation of which We are Sovereign" shall be eligible

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<sup>82</sup> new cl V (SR 1981/288).

<sup>83</sup> Royal Warrant (SR 1987/67).

<sup>84</sup> cl 7.

<sup>85</sup> cl 8.

<sup>86</sup> cl 14.

<sup>87</sup> Royal Warrant (SR 1996/205).

<sup>88</sup> cl 6.

<sup>89</sup> cl 7.

to be reclassified as an Additional Member.<sup>90</sup> Thus the qualifications for both members and honorary members of the New Zealand Order of Merit are defined solely in terms of citizenship, rather than in terms of both citizen and subject. And the expression "Our Crown" is avoided, probably to avoid the difficulties which had been experienced with the Queen's Service Order between 1975 and 1981.

It is now made clear that the Sovereign may be Sovereign of more than one realm, but it does not necessarily suggest, as the Statute of the Order of New Zealand appeared to do, that this meant there was but one imperial Crown. The degree of connection between the Crowns is left uncertain, probably deliberately so.

It is clear that the royal warrants establishing the various British Orders are still applicable in New Zealand. Her Majesty remains head of the various Orders in terms of their respective constitutions. Whilst she remains Sovereign of New Zealand her British (or, for that matter, Australian, and Canadian) Orders remain equally valid in New Zealand.<sup>91</sup>

This is clear when one looks to those honours awarded on the personal initiative of the Sovereign. Awards of the Royal Victorian Order were, and remain, at the sole discretion of the Sovereign. Although in the early years the Order was conferred on persons whom the Sovereign personally wished to honour, today it is used to reward personal services to the Crown, and to members of the royal family. Although unaffected by the decision to end the award of other British honours, these royal awards are only distinguishable by the absence of British ministerial advice.<sup>92</sup>

Governors-General have normally been appointed Knights and Dames Grand Cross of the Royal Victorian Order (GCVO). Most recently Dame Catherine Tizard, Governor-General 1990-96, was appointed in 1995.

The peerage is generally regarded as restricted in application to the United Kingdom. Yet British-born Governors-General of Canada all received peerages, the very last, Earl Alexander of Tunis, as recently as 1952. Similarly Viscount Slim, the penultimate British Governor-General of Australia, was made a peer. The last

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<sup>90</sup> cl 8.

<sup>91</sup> Though they may not be accorded official precedence.

<sup>92</sup> The distinction between "British" and "dynastic" Orders, initiated by the Prime Minister's Advisory Committee on honours has no other basis in law or practice.



British-born Governor-General, Viscount De L'Isle, had already been elevated from the rank of baron prior to his appointment.<sup>93</sup>

In New Zealand also most Governors-General were made peers until Lord Porritt, the last British-based appointee, though he was New Zealand-born. These peerages were specifically awarded for services to the Queen, and to New Zealand, rather than to the United Kingdom.<sup>94</sup>

Although it might have been thought that the time was long past that a New Zealander would be raised to the peerage, in 1996 Sir Robin Cooke was so elevated.<sup>95</sup> Although the New Zealand government was consulted, and raised no objections to the creation,<sup>96</sup> constitutionally the appointment was solely on the basis of advice from British Ministers to the Queen.

There remains another, more significant, situation in which British Ministers play a role in advising the Queen on bestowing honours upon New Zealanders.

The appointment of Ministers to the Privy Council is regarded as part of the Royal Honours system.<sup>97</sup> Appointments have not ended with the adoption of the recommendations of the Prime Ministers Committee on the Royal Honours System,<sup>98</sup> even though the Privy Council's role is purely ceremonial. On 21 May 1998 four Ministers and former Ministers, as well as three Court of Appeal judges, were appointed to the Privy Council.<sup>99</sup> Whilst the most recent previous judicial appointment had been in 1996, and might be expected to continue whilst appeal rights to the Judicial Committee are retained, the latest political appointments (the first since 1992), were perhaps more of a surprise.

<sup>93</sup> Sir Ninian Stephen, Governor-General 1982-89, was born in the United Kingdom, but spent most of his life in Australia.

<sup>94</sup> Cox, "Honours conferred at the personal initiative of the Sovereign on New Zealanders and those with direct New Zealand connections" (1997) 64 *New Zealand Armorialist* 9-12.

<sup>95</sup> See Cox, "The British Peerage" [1997] 17 *New Zealand Universities Law Review* 378-401.

<sup>96</sup> Press Release by the Prime Minister, the Rt Hon James Bolger, 27 November 1995.

<sup>97</sup> Cabinet, *Cabinet Office Manual*, 1988, para A.2.13.

<sup>98</sup> Prime Minister's Honours Advisory Committee, *The New Zealand Royal Honours System* (1995). See also Cox, "The Review of the New Zealand Royal Honours System" (1997) 75 *New Zealand Numismatic Journal* 17-21.

<sup>99</sup> Jenny Shipley (Prime Minister), Winston Peters (Deputy Prime Minister), Doug Graham (Attorney-General), Paul East (former Attorney-General), and Sir Kenneth Keith, and Justices Peter Blanchard and Andrew Tipping: *New Zealand Herald*, 22 May 1998.

These political appointments follow a long tradition, eleven colonial premiers having been appointed Privy Counsellors in 1897. The Prime Ministers of all the countries of which the Queen is Sovereign are still customarily appointed to Her Majesty's Privy Council.<sup>100</sup>

New privy counsellors unable to attend the next Council after their appointment is announced, for the purpose of being sworn of the Council, are appointed by Order in Council. This is a survival of the exercise of a prerogative power having application in New Zealand through a British political organ, if the Privy Council in this role can be so regarded.

The prohibition in the *Act of Settlement* 1701 (Eng) that none "born out of the kingdoms of England Scotland or Ireland or the Dominions thereunto belonging shall be capable to be of the privy council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military" is the subject of some consideration in the *Report of the Justice and Law Reform Committee on the Imperial Laws Application Bill*.<sup>101</sup>

The Committee believed membership of the Privy Council was best left uncertain, in the light of changing citizenship laws and the evolution of the Crown. Yet the practice has been for subjects of Her Majesty overseas to be appointed to British offices. The only solution is that the expression "the Dominions thereto belonging" must be interpreted in light of the *Statute of Westminster* 1931.

Section 6 (1) (a) (i) of the *Imperial Laws Application Act* 1988 provides for the continued validity of British Orders in Council under the preserved British legislation governing appeals to the Privy Council. It is also technically possible for the Privy Council to make Orders in Council under the prerogative, which have application in New Zealand. The Privy Council is not normally regarded as being an advisory body of the Crown of New Zealand, and Privy Counsellors naturally have no role or function in relation to New Zealand, unless they are members of the Judicial Committee.<sup>102</sup>

From time to time the position of Lord President of the Council, who is responsible for the business of the Council and is normally a British Cabinet Minister, may be filled by a Minister of the Crown from a realm other than the United Kingdom.

<sup>100</sup> Apart from Canada (where the practice ceased after 1968) and Australia (the practice ended with John Howard in 1996, though Labour Party leaders had declined appointment since 1967).

<sup>101</sup> 1988, Explanatory Material p 58.

<sup>102</sup> Compare Macaulay, above, n 53, at 388.

In 1995 the Rt Hon James Bolger, Prime Minister of New Zealand, was appointed acting Lord President, by declaration in Council, for the meeting of the Council held in Wellington on 7 November of that year. Marie Shroff, Clerk of the Executive Council and Secretary of the Cabinet, was acting clerk of the Council.

The Queen has in fact regularly presided over meetings of the Privy Council in New Zealand, since her first in 1954. That was the first held by the Sovereign outside the United Kingdom, although in 1920 Edward Prince of Wales held a Council in Wellington to swear in the Earl of Liverpool as Governor-General.

These regular meetings suggest that the Privy Council is regarded as something more than an honorary body, as there is no equivalent meetings of the various Orders of Chivalry in New Zealand, though these are regular events overseas. This would seem to be indicated by the continuing practice of appointing Prime Ministers from the various realms to the Council.

Precedence is another area where problems have arisen, though of a different sort. Precedence is a matter of law, not custom. In the absence of statute law, it is a matter for the royal prerogative, rather than the common law.<sup>103</sup> New Zealand has its own order of precedence approved by Her Majesty.<sup>104</sup>

There are several difficulties with this list. To start with, there is no mention of the royal family. The precedence of the Sovereign is established by custom, and in the United Kingdom by the House of Lords *Precedence Act 1539* (Eng). That Act defines the order of precedence in the House of Lords and in certain other conferences and assemblies. The Act of 1539 serves no necessary or useful purpose here and was repealed as part of the law of New Zealand by the *Imperial Laws Application Act 1988*.<sup>105</sup>

A table of precedence is, by its nature, more of a guide than precise rules. The precedence of only the Governor-General is absolute, subject to the over-riding precedence of The Queen. It follows that the relative precedence of members of the royal family should be assigned in accordance with long-standing custom in the

<sup>103</sup> Section 10 of the *Civil List Act 1979* formerly allowed the Governor-General to determine the order of precedence of Ministers. This section, which was repealed by s 27 of the *Constitution Act 1986*, was a re-enactment of s 11 of the *Civil List Act 1950*. The precedence of Ministers was a question of political precedence within Government, and not of general precedence.

<sup>104</sup> This was approved 9 January 1974, published 10 January 1974- *New Zealand Gazette* 1974 vol 1 p 5 and 1981 vol III p 2575. An amendment of 10 September 1981 was published 17 September 1981 p 2575.

<sup>105</sup> Though it is not entirely certain that it ever formed part of the law of New Zealand in the first place.

United Kingdom, at least as far as the immediate family of the Sovereign is concerned.

Whether it was appropriate for New Zealand to continue using imperial honours until 1996, the legality of such a practice is clear. The continued use of the honours awarded at the personal behest of the Queen is also quite appropriate. It should be for Her Majesty herself to decide what honours she will confer upon her New Zealand subjects.

With the cessation of the awarding of British-based honours in 1996, appointments to the Privy Council and personal appointments to royal honours remain the only links to the British monarchy, other than the Sovereign herself. Yet, further legal links would appear to exist, chief among them the law of succession, which determines who shall be the next Sovereign. This law is common to all those countries of which the Queen is Sovereign, and it remains unclear what procedures would have to be followed to alter the substance of that law.

### Legislation affecting the Unity of the Crown

The law of the succession can only be understood in the context of the history which formed it, whose roots extend beyond the reach of historical memory. Although the modern notion of a separate sovereignty would see the Crown as potentially divisible in actuality as well as in law, the only occasion of an actual separation of inheritance occurred in 1936.

There was formerly a convention that statutory uniformity on these subjects would be maintained in the parts of the Commonwealth that continued to owe allegiance to the Crown. This convention was recognised in the report of the 1930 Imperial Conference, and is recited in the second paragraph of the preamble to the *Statute of Westminster* 1931. The Statute provided for the mechanism of request and consent to maintain the unity of the Crown:<sup>106</sup>

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation

<sup>106</sup> *Statute of Westminster 1931* (UK), ss 1, 4 (in relation to Canada, Australia, and New Zealand); *Republic of Ireland Act 1949* (UK), s 3 (3); *British North America Act 1867* (UK), s 1, Schedule, para 48; *South Africa Act 1962* (UK), s 2 (3), Sch 5; *Northern Ireland Constitution Act 1973* (UK), s (2)(1), (2), Sch 2, para 1.

to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.<sup>107</sup>

The preamble to the *Statute of Westminster* could not of course be completely valid, as it purports to bind Parliament. The absence of a statement as to concurrence would not invalidate a statute.<sup>108</sup> But it was generally followed.

Alterations in the royal style and titles reflected the development of separate sovereignties. Governors-General grew in stature as representatives of distinct national Crowns. But while the *Royal Titles Act* 1953 (UK)<sup>109</sup> and companion legislation in the other Dominions had departed from one of the two principles enunciated in the preamble to the *Statute of Westminster*, namely unity of title, it would then have been constitutionally inappropriate to depart from the second, unity of person. Since 1953 the prospect for just such a division have grown<sup>110</sup>.

Any alteration by the United Kingdom Parliament in the law touching the succession to the throne would, except perhaps in the case of Canada and Australia, be ineffective to alter the succession to the throne in respect of, and in accordance with the law of, any other independent member of the Commonwealth which was within Her Majesty's Dominions at the time of such alteration. Therefore it is more than mere constitutional convention that requires that the assent of the Parliament of each member of the Commonwealth within Her Majesty's realms be obtained in respect of any such alteration in the law.<sup>111</sup>

The Constitution of Australia *Constitution Act 1900* records that certain Australasian colonies had agreed to unite "under the Crown of the United Kingdom of Great Britain and Ireland". This is technically not of legal force. Clause 2 of the Preamble does provide:

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<sup>107</sup> *Statute of Westminster* 1931 (UK).

<sup>108</sup> *British Coal Corporation v The King* [1935] AC 500 (PC).

<sup>109</sup> The style and title proclaimed for the United Kingdom and its dependencies was: "Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith"; *Royal Titles Act* 1953 (in effect 26 March 1953).

<sup>110</sup> In the conflict between England and Scotland at the beginning of the eighteenth century over the proposed Treaty of Union Scottish politicians more than once threatened to change the law of succession as a means of political leverage.

<sup>111</sup> *Statute of Westminster* 1931 (UK), preamble; *His Majesty's Declaration of Abdication Act* 1936 (UK), preamble.

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.

The Constitution of Canada, since the passage of the *Canada Act* 1982 (UK), has lacked a similar provision which was formerly contained in its preamble.

Perhaps following Australia's example, the *Papua New Guinea Constitution* 1975 provides that executive authority:

...shall extend to Her Majesty's heirs and successors in the Sovereignty of the United Kingdom.<sup>112</sup>

There is no comparable provision in New Zealand. One effect of New Zealand's adoption in 1947<sup>113</sup> of sections 2-6 of the *Statute of Westminster* 1931 was that any alteration to the law of New Zealand on the succession to the throne or the royal style should be made by or with the consent of the New Zealand Parliament.<sup>114</sup> Section 26(1) of the *Constitution Act* 1986 declared that the 1947 Act "shall cease to have effect as part of the law of New Zealand". Since the same Act also declared that the Parliament of the United Kingdom no longer had the authority to legislate for New Zealand, legislation by request and consent was also ended. The cumulative effect is that any change to the law of succession in the United Kingdom would have no effect in New Zealand.

A similar difficulty arose with the question of regency. A *Regency Act* 1910 (UK) provided for the contingencies of the time, but, until 1937 English law generally made no special provision for a regency. Nevertheless, previous methods of resolving the problem had been unsatisfactory and had, on occasion, led to controversy. When King George VI came to the throne in 1936, his two daughters both being minors, he sought to put the matter on a sounder, statutory basis, so as to obviate the need for *ad hoc* legislation designed to meet a particular contingency.

<sup>112</sup> s 83 *Papua New Guinea Constitution* 1975.

<sup>113</sup> *New Zealand Constitution (Amendment) Act* 1947.

<sup>114</sup> The right to legislate on the succession contrary to clause 2 of the Constitution of Australia was denied by Sir Robert Menzies in 1936 when Attorney-General, though conceded in 1953 as Prime Minister; Commonwealth Parliamentary Debates (House of Representatives, 11 December 1936) vol 153, pp 2908-9; Commonwealth Parliamentary Debates (House of Representatives, 18 February 1953) vol 221, pp 55-6.

The 1937 *Regency Act* repealed the *Lords Justices Act 1837* (UK), which had formerly provided for the absence or incapacity of the sovereign.<sup>115</sup>

In the *Regency Act 1937* (UK), as amended by two further acts in 1943<sup>116</sup> and 1953<sup>117</sup>, provision was made for the minority (defined as being under eighteen years of age), incapacity<sup>118</sup> and the temporary absence from the realm of the Sovereign.<sup>119</sup> In the case of minority or incapacity, a regent would exercise the royal functions, the regent being that person of full age next in line of succession to the throne, being a British subject resident in the United Kingdom and not disqualified by reason of religion.<sup>120</sup>

The *Regency Acts 1937-53*<sup>121</sup> provide that on assuming office a regent makes the necessary oaths before the Privy Council. The regent thereupon assumes responsibility for the exercise of the royal prerogative despite the legal fiction that the Sovereign in their official capacity is not subject to incapacity for infancy. As was observed in the *Duchy of Lancaster Case*,<sup>122</sup> the Sovereign's body natural is:

a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age and to the like defects that happen to the natural bodies of other people.

*Calvin's Case*<sup>123</sup> makes it clear that the body natural and politic of the Sovereign may be distinguished, and the later is not subject to any natural infirmity. The Sovereign's mother, if living, remains guardian of his or her person. In the event of their death the regent becomes guardian.<sup>124</sup>

<sup>115</sup> This practice began with William III after the death of Mary, who had been given power by statute to exercise the royal prerogative whenever William was abroad- 2 Will III & Mary st 1 c 6 (Eng). It was not used after 1821.

<sup>116</sup> 7 Geo VI c 42 (UK).

<sup>117</sup> 2 Eliz II c 1 (UK).

<sup>118</sup> Incapacity is defined as of mind or body.

<sup>119</sup> Provision is made for a situation where the Sovereign is "for some definite cause not available for performing royal functions". This could encompass situations where the Sovereign is a prisoner of war or is abroad. The new Act repealed the obsolescent *Lords Justices Act 1837* (UK).

<sup>120</sup> A Regent can also be appointed where the Sovereign is "for some definite cause not available for performing royal functions". This provision has never been invoked in the event of the Sovereign's absence abroad, and, indeed, would scarcely be necessary today, with the availability of modern means of communications.

<sup>121</sup> 1 Edw VIII & 1 Geo VI c 16 (1937) (UK); 1 Eliz II (2 Eliz II c 1) (UK).

<sup>122</sup> (1561) 1 Plowd 212 as 213; 75 ER 325, 326.

<sup>123</sup> (1608) 7 Co Rep 1a; 77 ER 377h.

<sup>124</sup> s 5 (a).

Before a regency comes into effect, formal notice must be given to the Commonwealth countries of which the Queen is Sovereign, before the declaration of a regency is made, and, as a matter of courtesy, notice would also be given to other Commonwealth countries in virtue of the Queen's position as Head of the Commonwealth. In the case of a minority no declaration is needed. A regency lapses on a new declaration being made, on the demise of the Crown, or of the infirmity ending.

In fact, the problem of a regency does not arise in the same way in other Commonwealth countries of which the Queen is head of State, since the functions of the Queen in those countries are undertaken by a Governor-General, except on some occasions when the Sovereign herself is present.<sup>125</sup>

There is a potential difficulty which could occur if the Sovereign died leaving a minor heir (despite a British regent). This concerns the question of who would exercise the royal prerogative not assigned to the Governors-General.<sup>126</sup> The most important of these, and the only one which is not assigned to the Canadian Governor-General, is the appointment of Governors-General. It would be invidious if the absence of the proper mechanisms resulted in the Governor-General being irreplaceable, except by death or resignation, and even then only to be replaced by an administrator. Since the Sovereign never lacks capacity despite being an infant, presumably the child himself might, however tender of age, appoint a new Governor-General.

As a matter of construction of the law of England, United Kingdom Acts did not extend to New Zealand as part of New Zealand law after 1947, without an express declaration that New Zealand had requested and consented to this enactment.<sup>127</sup> It is therefore thought that it is highly doubtful if the *Regency Acts* 1937 and 1943 originally extended to New Zealand despite their subject matter and the failure of New Zealand to have adopted the *Statute of Westminster*.<sup>128</sup>

<sup>125</sup> The letters patent constituting the office of Governor-General of Canada, effective 1 October 1947, provide for the exercise by the Governor-General of "all powers and authorities" lawfully belonging to the Sovereign with respect to Canada; see (1948) 7 *Univ of Toronto LJ* 474.

<sup>126</sup> A much wider range of functions still exercised by the sovereign in Australia and New Zealand and the other realms, than in Canada, whose Governor-General more closely reflects a true vice-regal appointment.

<sup>127</sup> Or in the absence of clear words or necessary implication- *Copyright Owners Reproduction Society v EMI (Australia) Pty Ltd* (1958) 100 CLR 597. A better view is that the *Statute of Westminster 1931* imposes only a procedural bar, at least so far as the law of England is concerned.

<sup>128</sup> Justice, *Constitutional Reform* (1986) 28.



Any doubts have been removed by s 5 of the *Royal Powers Act* 1983, which negates the application in New Zealand of the *Regency Acts*.<sup>129</sup> This was re-enacted in the *Constitution Act* 1986 s 4 (1):

4. Regency- (1) Where, under the law for the time being in force in the United Kingdom, the royal functions are being performed in the name and on behalf of the Sovereign by a Regent, the powers of the Sovereign in right of New Zealand shall be exercised in the name and on behalf of the Sovereign by that Regent.

Section 5 (1) of the *Constitution Act* 1986 deals with the demise of the Crown:

The death of the Sovereign shall have the effect of transferring all the powers, authorities, rights, privileges, and dignities belonging to the Crown to the Sovereign's successor, as determined in accordance with the *Act of Settlement* 1700 and any other law which relates to the succession to the Throne, but shall otherwise have no effect in law for any purpose.

Section 5 (2) states that every reference in any document or instrument to the Sovereign shall unless the context otherwise requires be deemed to include a reference to the Sovereign's heirs and successors. The effect of the *Demise of the Crown Act* 1908 was similar, and this had been designed to maintain imperial consistency, and exclude the operation of the provision in relation to property held by the Sovereign in a private capacity. Its provisions were unnecessarily elaborate for a general principle. But the *Constitution Act* 1986 goes further. If death has no effect in law then the Sovereign in a private as well as their public capacity is immortal in New Zealand.

Be that as it may what precisely is meant by to Sovereign's successor as determined in accordance with the *Act of Settlement 1701* (Eng)<sup>130</sup> and any other law which relates to the succession to the Throne? It would appear, as a simple matter of statutory interpretation, to mean the law of New Zealand, not that of the United Kingdom<sup>131</sup>.

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<sup>129</sup> s 5.

<sup>130</sup> Preserved for the purposes of the law of New Zealand by the *Imperial Laws Application Act* 1988.

<sup>131</sup> The 1988 Australian Constitutional Convention recommended the insertion of an additional power under s 51, enabling the Parliament to make laws for "the succession to the throne and regency in the sovereignty of Australia". No steps to implement this recommendation have yet been taken.

No legislation purporting to affect the unity of person, as distinct from the unity of title, of the Sovereign, has been passed since 1936. In London on 27 February 1998, Lord Wilson of Mostyn, QC, Parliamentary Under Secretary of State for the Home Office, announced that the British Government supported changing the law of succession to the throne. This came in a debate on a private members' Bill sponsored by Jeffrey Lord Archer, intended to allow provide for the succession of the eldest child of the Sovereign regardless of sex.<sup>132</sup>

Any change in the law of succession would have to be enacted in each of Her Majesty's realms, requiring detailed consultation to avoid the possibility of error. Such a proposal should be discussed in private first, not announced by the British Government almost as a *fait accompli*. Any move to change the law would be seen as defensive, an attempt to counter criticism. Yet criticism has never focused upon the fundamental nature of succession to the Crown.

The law of succession is now, in part because of the development of the doctrine of a divisible Crown, but largely because of the Constitution Act 1986, determined solely by the law of New Zealand. Were the United Kingdom Parliament to enact any changes to the law, these would effect a separation of the Crown, as they would be legally ineffective in New Zealand.

But New Zealand political leaders have not yet fully appreciated this situation. In a letter to the author, the Rt Hon Jenny Shipley, Prime Minister, wrote that:

The Government would expect to be consulted, along with other Commonwealth countries, before any changes to the law of succession were made.<sup>133</sup>

Clearly, it was still believed that any changes by the United Kingdom Parliament would be effective in New Zealand law.

### Conclusion

There appears to be, in New Zealand, a dichotomy of legal theory and political reality. The constitutional *grundnorm* is based upon the concept of the Crown. Yet there has been a growing separation between Crown and monarch. The Governor-

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<sup>132</sup> Bruce Beetham, MP, introduced a Bill into the New Zealand Parliament more than ten years earlier. The Bill, which failed to secure sufficient support, was opposed by the Government on the grounds that alteration in the law of succession was a matter for the Commonwealth as a whole, not the New Zealand Parliament alone.

<sup>133</sup> Letter from the Rt Hon Jenny Shipley, Prime Minister, to author, 20 May 1998.

General has become a *de facto* viceroy, empowered to exercise a general delegation of the royal prerogatives, and entrusted by the Sovereign with almost complete responsibility for the government of New Zealand. With the exception of the honours prerogative, which has remained in the hands of the Sovereign, largely for symbolic reasons, the royal prerogatives are now exercised exclusively by the Governor-General on behalf of the Sovereign. There is in fact no conflict between law and fact, since the definition of the Crown in New Zealand now encompasses much more than the Sovereign.

Since 1996 all honours awarded have been of New Zealand creation, except for the personal awards of the Sovereign, and appointments to the Privy Council. The latter remain as a link with the constitutional structure of the United Kingdom, and are made on the advice of the British Prime Minister.<sup>134</sup> The former remain symbolically linked to the British monarchy.<sup>135</sup>

Some other imperial links remain, despite the doctrine of the divisibility of the Crown. Governors-General still receive appointment as a Knight (or Dame) Grand Cross of the Order of St Michael and St George (GCMG). Clearly, the Queen, or at least those who advise her,<sup>136</sup> still believes in the concept of a unity of the Crown, to some degree at least, and this is reflected in the royal instruments instituting honours, at least until very recently.

Further difficulties remain with regard to legislation affecting the unity of the Crown. This will present some potential problems in view of the announced intention of the current British Government to promote changes to the law of succession. Clearly, the New Zealand Government, in so far as it has considered the matter, regards the law of succession as a matter for the British Parliament. This is a curious abdication of responsibility, if not indicative of more serious constitutional ignorance.

The concept of the divisibility of the Crown has yet to be fully developed. Some anomalies remain, and it is clear that the Queen remains, at least in some respects, legally the one person throughout her realms. This situation can probably only be

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<sup>134</sup> The Prime Ministers of all the countries of which the Queen is Sovereign are still customarily appointed Privy Counsellors, apart from Canada and Australia.

<sup>135</sup> These difficulties are not confined to New Zealand. There can be little question but that Sir Edmund Hillary, as a Knight Companion of the Most Noble Order of the Garter, is a member of an English Order of Chivalry. Yet this English Order is regarded as fully a part of the honours system of the United Kingdom, and of New Zealand.

<sup>136</sup> These advisers being the permanent advisers in the Queen's own office, and the permanent civil servants of the Cabinet Office.

brought to an end by having different Sovereigns in each realm, in accordance with different succession laws, or by the adoption of a republican form of government.

Until either of these occurs the Sovereign must remain symbolically a link with the United Kingdom, however complete the delegation of the royal prerogative and royal powers may be. This potentially weakens the position of the Crown in New Zealand. Honours which have their origins in the United Kingdom can no longer be conferred upon New Zealanders, but the Sovereign herself remains indubitably a British individual.

Paradoxically, there is also some strength to be gained from the fact that the Sovereign, if not the Crown, is a British individual. As a living link with a colonial and imperial past they also are a reminder of the continuity of the institution, and of the constitution itself.