

## The sovereign authority for the creation of Orders of Chivalry

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The International Commission for Orders of Chivalry was established at the Vth Congress of Genealogy and Heraldry at its meeting in Stockholm in August 1960, in order to look into the legitimacy of pretended Orders of Chivalry, which had proliferated, especially after the Second World War. The Commission reported to the VIth International Congress of Genealogy, held at Edinburgh in September 1962. A provisional list of authentic Orders was published in 1963, and the Register in 1976.

The Commission outlined what it had concluded were the principles involved in assessing the validity of Orders of Chivalry. These principles were accepted by the Congress. In addition, it was agreed that the International Commission, composed of "high personalities of the Congress, and leading experts in the field of chivalry, nobiliary and heraldic law"<sup>10</sup>, should become a permanent body charged with applying the principles developed in its report<sup>11</sup>. It has continued since then, though its last meeting was in 1985 and the legality of a purported revival by The MacCarthy Mór in 1996 is disputed<sup>12</sup>. The Commission published a new edition of the Register in 1996<sup>13</sup>. This does not differ materially from earlier editions.

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<sup>10</sup>One must be perpetually vigilant against claims as to the legitimacy of new "Orders of Chivalry" based on the opinions of supposed legal experts. As an example, action was taken by Terence Francis MacCarthy, who styles himself The MacCarthy Mór, Prince of Desmond, against Dr Professor Marco Horak, who had challenged his rights to the coat of arms of the Royal House of Munster, and to bestow feudal titles and the dynastic order of the Niadh Nask. The hearing, for which international standing has been claimed, took the form of arbitration before a court of peers, in the Magistrate's Court in Casale Monferrato, Italy.

The judges were "Dr Roberto Messina, Marchioness Dr Professor Bianca Maria Rusconi, Dr Professor Riccardo Pinotti, two Knights and a Dame of Justice in highly respected orders of chivalry and all academic experts". The decisions of such self-appointed "courts" can have no legitimacy. The case and its circumstances are related in *A New Book of Rights: being a complete transcript of the verdicts of the Courts of the Republic of Italy concerning the heraldic rights, status and privileges of The MacCarthy Mór, Prince of Desmond* (Gryfons, Little Rock, 1998); (1999) 70 New Zealand Armorial 24-25.

<sup>11</sup>International Commission for Orders of Chivalry, *Register of Orders of Chivalry- Report of the International Commission for Orders of Chivalry* (International Commission for Orders of Chivalry/Gryfons Publishers and Distributors, USA, 1996) 3.

<sup>12</sup>Memorandum from Eric Wreding of the Commission Internationale Permanente D'Etudes Des Ordres de Chevalerie, 24 May 1996.

<sup>13</sup>Officers of the revived Commission include the Vice-Chairman, The MacCarthy Mór, Prince of Desmond; the Chairman, Major Lord Borthwick; Secretary-General, Lt-Col Baron O'Kelly de Conejera. Members include Gerard Crotty, Michael Egan; David Lumsden of Cushnie (Garioch Pursuivant), The McKerrell of Hillhouse, Zygmunt von Sikorski Mazur, Capt R Mingo Sweeney; International Commission for Orders of Chivalry, *Register of Orders of Chivalry- Report of the International Commission for Orders of Chivalry* (International Commission for Orders of Chivalry/Gryfons Publishers and Distributors, USA, 1996) 2. The only members who survive from the days before the schism are Borthwick, Mingo Sweeney,

The principles adopted by the Commission, and which have been used by it since 1962 to determine the legitimacy of any pretended Order of Chivalry, are as follows:

1) Every independent State has the right to create its own Orders or Decorations and lay down, at will, their particular rules. But it must be made clear that only the higher degrees of these modern State Orders can be deemed of knightly rank, provided that they are conferred by the Crown or by the "pro tempore" ruler of some traditional State<sup>14</sup>.

2) The Dynastic (or Family or House) Orders belonging *jure sanguinis* to a Sovereign House (that is to those ruling or ex-ruling Houses whose sovereign rank was internationally recognised at the time of the Congress of Vienna in 1814 or later) retain their full historical chivalric, nobiliary and social validity, notwithstanding all political changes. It is therefore considered *ultra vires* of any republican State to interfere, by legislation or administrative practice, with the Princely Dynastic Family or House Orders. That they may not be officially recognised by the new government does not affect their traditional validity or their accepted status in international heraldic, chivalric and nobiliary circles<sup>15</sup>.

3) It is generally admitted by jurists that such ex-sovereigns who have not abdicated have positions different from that of pretenders and that in their lifetime they retain their full rights as *fons honorum* in respect of those Orders of which they remain Grand Masters which would be classed, otherwise, as State and Merit Orders<sup>16</sup>.

4) Although, at one time - many centuries ago - private people of high standing could and did create some independent Orders of Knighthood, some among which came, in due course, to gain considerable prestige and obtained formal validity from the Church and the Crown, such rights of creation of Orders have long since fallen into desuetude and, nowadays, Orders of Chivalry as we understand the term must always stem from or be - by long-standing uninterrupted tradition - under the protection of Chiefs or of Houses of recognised sovereign rank<sup>17</sup>.

5) The recognition of Orders by States or supernational organisations which themselves do not have Chivalric Orders of their own, and in whose Constitutions no provisions are made for the recognition of knightly and nobiliary institutions, cannot be accepted as constituting validation by sovereignties, since these particular sovereignties have renounced the exercise of heraldic jurisdiction. The international "status" of an Order of Knighthood rests, in fact, on the rights of *fons honorum*, which, according to tradition, must belong to the Authority by which this particular Order is granted, protected or recognised<sup>18</sup>.

6) The only recognised Order with the style of "Sovereign" existing nowadays is that of St John of Jerusalem, called of Rhodes, called of Malta, whose international headquarters were transferred to Rome in 1834, and whose international diplomatic "status" as an independent non-territorial power is recognised officially by the Holy See and by many other Governments<sup>19</sup>.

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and O'Kelly de Conejera. The appointment of The MacCarthy Mór dates from this time also, but he had not taken up his seat.

<sup>14</sup>International Commission for Orders of Chivalry, *Register of Orders of Chivalry- Report of the International Commission for Orders of Chivalry* (International Commission for Orders of Chivalry/Gryfons Publishers and Distributors, USA, 1996) 4.

<sup>15</sup>ibid 4.

<sup>16</sup>ibid 4.

<sup>17</sup>ibid 5.

<sup>18</sup>ibid 5.

<sup>19</sup>ibid 5.

That a commission was needed to provide some degree of regulation of Orders was self-evident. In the aftermath of the Second World War a considerable number of autonomous and self-styled Orders of Knighthood appeared on the public scene, many of which have continued to subsist until the present day. These bodies, which owe their origins to merely private initiative, often claim some kind of connection with venerable ancient Orders which actually existed and flourished in the course of centuries, frequently under the protection of the Holy See, especially in the heyday of chivalry, but are now completely extinct<sup>20</sup>.

Repeated warnings against such self-styled "Orders" have appeared in *L'Osservatore Romano*<sup>21</sup>.

Since some time one can observe the deplorable phenomenon of the appearance of alleged Orders of Knighthood originating from private initiatives and aiming at replacing the legitimate forms of chivalric awards.

As we have previously pointed out, these so-called Orders take their name from Orders which have in fact already existed but are now extinct since many centuries or from Orders which had been planned but were never realised or, finally, from Orders which are truly fictitious and have no historical precedent at all.

To increase the confusion of those who are not aware of the true history of Orders of Knighthood and of their juridical condition, these private initiatives, which style themselves as autonomous, are qualified by appellations which had reason to exist in the past and which belong exclusively to authentic Orders duly approved by the Holy See.

Thus, with a terminology which is almost monotonous these alleged Orders claim for themselves- in differing degrees- such titles as Sacred, Military, Equestrian, Chivalric, Constantinian, Capitular, Sovereign, Nobiliary, Religious, Angelic, Celestial, Lascaris, Imperial, Royal, Delcassian, etc.

Among these private initiatives, which in no way are approved of or recognised by the Holy See, one can find alleged Orders such as the following:

St Mary or Our Lady of Bethlehem;  
St John of Acre;  
St John the Baptist;  
St Thomas;  
St Lazarus;  
St George of Burgundy or of Belgium or of Miolans;  
St George of Carinthia;  
Constantinian Lascaris Angelic Order of the Golden Militia;  
The Crown of Thorns;  
The Lion of the Black Cross;  
St Hubert of Lorraine or of Bar;  
The Concord;  
Our lady of Peace.

To all these alleged Orders of Knighthood and similar ones, with the adjoining more or less international Gold, Silver and Blue Cross Associations, these Orders must certainly be added which, together with one of the names mentioned above, have taken the titles:

of Mercy;

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<sup>20</sup>Hyginus Eugene Cardinale, *Orders of Knighthood Awards and the Holy See- A historical, juridical and practical Compendium* (Van Duren Publishers, Gerrards Cross, 1983) 231.

<sup>21</sup>For an example, see 14 December 1970.

of St Bridget of Sweden;  
of St Rita of Cascia;  
of The Legion of Honour of the Immaculate;  
of St George of Antioch;  
of St Michael;  
of St Mark;  
of St Sebastian;  
of St William;  
of the historical but extinct Order of the Temple;  
of The Red Eagle;  
of St Cyril of Jerusalem, etc.

So as to avoid equivocations which are unhappily possible, also because of the abuse of pontifical and ecclesiastical documents, once granted for religious purposes or for merely monastic Orders, and to put an end to the continuation of such abuses, entailing harmful consequences for people in good faith, we are authorised to declare that the Holy See does not recognise the value of the certificates and insignia conferred to the above-named alleged Orders<sup>22</sup>.

A further statement was published 24 July 1970 regarding the "Sovereign and Military Order of the Temple of Jerusalem":

Their unqualified behaviour compels us to put on their guard all the members of the Hierarchy in Italy and in other countries ....; in the specific case at hand, the historical vicissitudes of the ancient Order of the Temple (The Templars), suppressed by Pope Clement V (1305-1314) and never again revived by any of his successors, are well known.

It is hence obvious that its contemporary revival, aggravated by the pretended appellation of *Sovereign*, appears to be an evident abuse and is therefore illegitimate<sup>23</sup>.

A later official statement by the Holy See, also carried in *L'Osservatore Romano* of 1 December 1976, continued:

Enquiries have been received from various parties asking for further information regarding the *Sovereign Order of Jerusalem* and in particular regarding how the Holy See looks on this Order.

We are authorised to repeat the clarifications previously published in *L'Osservatore Romano* in this connexion. The Holy See, in addition to its own Equestrian Orders, recognises only two Orders of Knighthood: *The Sovereign Military Order of St John of Jerusalem*, called *The Order of Malta*, and the *Equestrian Order of the Holy Sepulchre in Jerusalem*.

No other Order, whether it be newly instituted or derived from a mediæval Order having the same name, enjoys such recognition, as the Holy See is not in a position to guarantee its historical and juridical legitimacy. This is also the case with regard to the above-mentioned *Sovereign Order of St John of Jerusalem* which assumes, in an almost

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<sup>22</sup>Cited in Hyginus Eugene Cardinale, *Orders of Knighthood Awards and the Holy See- A historical, juridical and practical Compendium* (Van Duren Publishers, Gerrards Cross, 1983) 231-233.

<sup>23</sup>ibid 234.

identical form and in such a way as to cause ambiguity, the name of the *Sovereign Military Order of Malta*<sup>24</sup>.

The municipal laws of a number of countries impose penalties on those seeking personal gain from establishing self-styled Orders of Chivalry<sup>25</sup>. Unfortunately, the laws of most countries do not prohibit the creation of such orders where personal gain is not the motive, and the International Commission for Orders of Chivalry has not been able either to stem the tide. In part, this is because purveyors of fake honours to the credulous, the gullible and innocent and the disreputable, are unlikely to take much notice of a body which lacks enforcement powers.

More seriously, however, it would appear that the principles upon which the work of the Commission has been based since 1962, are seriously flawed. Each principle will be examined in turn.

Firstly, principle one states that:

Every independent State has the right to create its own Orders or Decorations and lay down, at will, their particular rules. But it must be made clear that only the higher degrees of these modern State Orders can be deemed of knightly rank, provided that they are conferred by the Crown or by the "pro tempore" ruler of some traditional State<sup>26</sup>.

This appears to be indisputable. One of the attributes of statehood, or sovereignty, is the right to confer honours upon the subjects of the Crown, or citizens. The British position is typical. The Sovereign is legally and practically the sole fount of titles and awards of honour and dignity<sup>27</sup>, which are awarded by virtue of an exercise of the prerogative, as *fons honorum*.

However, the second part of the principle is more problematic. "[O]nly the higher degrees of .... modern State Orders can be deemed of knightly rank", and only if "they are conferred by the Crown or by the "pro tempore" ruler of some traditional State". Unlike Commonwealth practice, the lowest grades of most foreign Orders are styled "knight". The state or degree of knighthood is effectively extinct in all but the British tradition. In this context, the precise meaning of the principle is uncertain.

It is of interest that nowadays only the countries which derive their honorific traditions from Britain use titular styles for members of orders of chivalry. The French and German styles equivalents to Sir, Chevalier and Ritter are now confined, if used at all, to the hereditary knights of those states, dignitaries approximately comparable to the Baronetage.

To a very great extent this reduction in the use of the style has been due to the abandonment of the practice of using the accolade or dubbing, which in European tradition, and still today in Commonwealth practice, alone creates a knight, although in some cases

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<sup>24</sup>*ibid* 233.

<sup>25</sup>The Federal Republic of Germany imposes up to three months imprisonment and or a heavy fine on those who deceive the public with decorations which could be mistaken for, or give the impression of being, recognised legitimate national or foreign Orders; Hyginus Eugene Cardinale, *Orders of Knighthood Awards and the Holy See- A historical, juridical and practical Compendium* (Van Duren Publishers, Gerrards Cross, 1983) 236.

<sup>26</sup>International Commission for Orders of Chivalry, *Register of Orders of Chivalry- Report of the International Commission for Orders of Chivalry* (International Commission for Orders of Chivalry/Gryfons Publishers and Distributors, USA, 1996) 4.

<sup>27</sup>*Norfolk Earldom Case* [1907] AC 10, 17 per Lord Davey.

letters patent remove the necessity for this, and dispensation warrants allow the temporary use of the style before the accolade is given. A knight is dubbed by the Sovereign, or a duly appointed lieutenant, who however exalted, must himself be a knight- a conscious mirroring of the apostolic succession of the Church.

Foreign knights have not been entitled to any style, appellation, rank, precedence, or privilege appertaining to knights bachelors since 1823. From the end of the eighteenth century the recognition of knighthoods bestowed by foreign rulers declined.

The style 'Sir' was common before the reign of King Edward I (1272). Knighthood however has a somewhat earlier origin, though one which is 'lost in the mists of time'. So far as English tradition is concerned, it is generally supposed that King Alfred dubbed his son Ethelstan a knight. Knights Bachelor, once the lowest grade of knight, and now the only grade created, date from the time of King Henry III (1216-72). Today a man appointed to the highest grades of those orders which are divided into classes is automatically entitled to be knighted- indeed it is doubtful that he can refuse the accolade, unless he is a clergyman<sup>28</sup>.

Because knighthood is a status which is not dependent on membership of an order (although some refer, rather misleadingly, to the Order of Knights Bachelor), its retention is not dependent upon keeping imperial orders. Although for political reasons Canada ceased recommending the creation of any new Canadian knights after 1919 (except for the period 1933-35), and South Africa followed in 1924, Australia retained knighthoods until 1986. In 1980 Barbados created a new honours system including Knights and Dames of St Andrew, entitled to the styles of 'Sir' and 'Dame' respectively.

The status of knights is problematic. But the reference to the "*pro tempore* ruler of some traditional State" presumably means merely that a knighthood, as traditionally understood, can only be conferred by a Sovereign. The first principle however is satisfactory overall, barring some uncertainty of definition.

The second principle states that:

The Dynastic (or Family or House) Orders belonging *jure sanguinis* to a Sovereign House (that is to those ruling or ex-ruling Houses whose sovereign rank was internationally recognised at the time of the Congress of Vienna in 1814 or later) retain their full historical chivalric, nobiliary and social validity, notwithstanding all political changes. It is therefore considered *ultra vires* of any republican State to interfere, by legislation or administrative practice, with the Princely Dynastic Family or House Orders. That they may not be officially recognised by the new government does not affect their traditional validity or their accepted status in international heraldic, chivalric and nobiliary circles<sup>29</sup>.

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<sup>28</sup>In recent decades however, it has become the practice in most Commonwealth countries for clergymen who are appointed to one of the higher grades to accept the accolade and thus be styled 'Sir'. The point cannot be too strongly made that this is incorrect and inappropriate. The denial of the accolade is not, as some suggest, only to clergymen of the Church of England (in England), but is to all 'men of the cloth', and for essentially the same reasons as those which require a woman to use the style 'Dame'. This latter style itself is of course in no way that of a 'female knight'. Some foreign orders specifically provide that clergymen are to be 'members' rather than 'knights', which is the usual style of the lowest grade in these orders- another reason why the titular style itself is denied these 'knights'.

<sup>29</sup>International Commission for Orders of Chivalry, *Register of Orders of Chivalry- Report of the International Commission for Orders of Chivalry* (International Commission for Orders of Chivalry/Gryfons Publishers and Distributors, USA, 1996) 4.

Several difficulties are immediately apparent. Firstly, what is meant by "Dynastic (or Family or House) Orders"?

The distinction between dynastic orders and state orders is virtually unknown in the common law world. The distinction has no meaning known to the common law, and appears to have been applied to those orders which in fact are awarded at the Sovereign's discretion and without the benefit of ministerial advice. To describe the Order of the Garter, Order of the Thistle, Royal Victorian Chain, Royal Victorian Order and Order of Merit as dynastic orders in no way reflects their legal status.

All are created under the royal prerogative as all honours are, and are legally no different from any other orders. Indeed, until 1948 the Garter was only bestowed after ministerial advice was given, so apparently falling into the state orders category used by the committee. There is no way in which these orders are any less "State Orders" than the Order of the British Empire.

Archbishop Hyginus Eugene Cardinale has given what may be called the classic civil law definition of dynastic Orders:

Dynastic Orders of Knighthood are a category of Orders belonging to the heraldic patrimony of a dynasty, often held by ancient right. They are sometimes called Family Orders, in that they are strictly related to a Royal Family or House. They differ from the early military and religious Orders and from the later Orders of Merit belonging to a particular State, having been instituted to reward personal services rendered to a dynasty or an ancient Family of princely rank<sup>30</sup>.

A more meaningful distinction is between the great Orders of Christendom (such as the Golden Fleece and the Garter), the house or family Orders, and the Orders of Merit.

Whilst the existence of such a thing as a dynastic Order in British law is moot, the second principle continues with what can only be called an extraordinary contention. The claim that these Orders "belonging *jure sanguinis* to a Sovereign House ... retain their full historical chivalric, nobiliary and social validity, notwithstanding all political changes" is a far reaching assertion of the divine right of kings.

The first principles of Commonwealth constitutional law hold that sovereignty, that is the absolute right to command obedience, rests with Parliament<sup>31</sup>. This principle of parliamentary supremacy, which is by no means unknown in European and other legal traditions, is completely at odds with this contention.

Any property or legal right belonging *jure sanguinis* (by right of blood) to any individual can be alienated, either by action of the competent legislative authority, or (to a lesser extent) by action of the possessor. It is to be very much doubted that any Order is unalienable, and for the Commission to assert that it is "*ultra vires* of any republican State to interfere, by legislation or administrative practice, with the Princely Dynastic Family or House Orders" is not only unrealistic, but does not reflect the legal position<sup>32</sup>.

Archbishop Cardinale has observed that:

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<sup>30</sup> Hyginus Eugene Cardinale, *Orders of Knighthood Awards and the Holy See- A historical, juridical and practical Compendium* (Van Duren Publishers, Gerrards Cross, 1983) 119. Although his work was subsequently criticised for the many errors which it contained, none of these are of relevance to the present article.

<sup>31</sup> See, for example, Sir Henry Wade, "The Legal Basis of Sovereignty" [1955] Camb LJ 172.

<sup>32</sup> With the exception of natural, or divine law, any human law is amenable to change by competent political authority.

Dynastic Orders of Knighthood are the exclusive property of a Sovereign, and they remain such even if he goes into exile, and are transmissible to his legitimate successor and Head of the Family. Jurists generally believe that even if a Sovereign abdicates of his own free will, he does not renounce his right to the Grand Mastership of an existing Dynastic Order belonging to his Family, unless he does so explicitly. But even then his renunciation will be of a personal character and such as not to involve his successors who have an inborn right to the Grand Mastership and cannot be deprived of it. A Sovereign in exile and his legitimate successor and Head of the Family continue to enjoy the *ius collationis* (the right to confer honours) and therefore may bestow honours in full legitimacy, provided the Order has not become extinct. They cannot however found new Dynastic Orders. No authority can deprive them of the right to confer honours, since this prerogative belongs to them as a lawful personal property *iure sanguinis* (by right of blood), and both its possession and exercise are inviolable<sup>33</sup>.

This is especially true when the Orders in question have been solemnly recognised by the Supreme Authority of the Holy See. No political authority has the right to suppress this recognition, declared by highly official documents, such as Papal Bulls by a merely unilateral act of abolition. So long as the recognition is not revoked by the Holy See itself, the Order cannot be considered canonically extinct. This does not mean however, that the new political authority is not entitled to forbid the public use of the insignia and titles of such Orders according to its own rules in the matter of decorations<sup>34</sup>.

It is not true even in civil law that "[n]o authority can deprive [exiled Sovereigns and their heirs] of the right to confer honours, since this prerogative belongs to them as a lawful personal property *iure sanguinis* (by right of blood), and both its possession and exercise are inviolable". Any property may be sequestered, seized or abolished by legitimate authority-provided that this is done in accordance with the proper legal procedures.

Archbishop Cardinale identified the crux of the position however when he wrote that "[t]his is especially true when the Orders in question have been solemnly recognised by the Supreme Authority of the Holy See. No political authority has the right to suppress this recognition, declared by highly official documents, such as Papal Bulls by a merely unilateral act of abolition. So long as the recognition is not revoked by the Holy See itself, the Order cannot be considered canonically extinct".

So far as canon law is concerned the Order remains in force. But canon law does not overrule the municipal laws of states. Thus, whatever the position of the Papacy, any successor authority may abolish or suppress any Order of Chivalry, dynastic or otherwise. According to international practice, the Holy See recognises legitimately instituted Orders of Knighthood as juridical persons under public law in the various States<sup>35</sup>. However, an Order still recognised by the papacy has canonical validity, even if it lacks validity in domestic law. But it will still lack validity in international law.

There are several Catholic Dynastic Orders of Knighthood which are still being bestowed by a legitimate successor of a Sovereign in exile. Among these, the two most important are the Most Noble Order of the Golden Fleece (Austrian branch) and the Sacred Military Constantinian Order of St George of the Kingdom of the Two Sicilies<sup>36</sup>. Others still

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<sup>33</sup> Hyginus Eugene Cardinale, *Orders of Knighthood Awards and the Holy See- A historical, juridical and practical Compendium* (Van Duren Publishers, Gerrards Cross, 1983) 119.

<sup>34</sup> *ibid* 119.

<sup>35</sup> *ibid* 26.

<sup>36</sup> *ibid* 140.

bestowed, though with doubtful authority since they were suppressed by the successor authorities of the countries concerned, include the Order of the Holy Annunciation and the Order of Saints Maurice and Lazarus, both of Italy.

The position of the Sovereign of an Order of Chivalry, being an incorporeal hereditaments or heritage is a right *in rem* maintainable against anyone within the jurisdiction of creation<sup>37</sup>. However, rights *in rem*, and in particular incorporeal rights *in rem*, only exist within the legal system which created them<sup>38</sup> and which usually protects and enforces the right. Once a right is removed from the legal system which conferred it, it ceases to have any validity under the law of the creator state<sup>39</sup>.

Once out of the jurisdiction in which an Order was created, the rights conferred by the statutes of the Order are unenforceable, unless the country to which it is taken is prepared to recognise the rights *in rem* created by the statutes, under the host country's rules of private international law<sup>40</sup>. These rights are determined by the *lex creatus*<sup>41</sup>, the law of the country of origin, rather than that of the *lex situs*<sup>42</sup>, the country in which the Sovereign may now reside.

Orders of Chivalry are governed by the appropriate *lex creatus*. Claims to Orders and the rights they confer must be directed to the granting jurisdiction where the claim will be decided by the *lex creatus*<sup>43</sup>. It would follow that the Italian state did have the power to abolish or suppress the Order of SS Maurice and Lazarus *under Italian law*. Unless the Order is recognised by another state, the purported abolition must be accepted as valid. The only exception is if the Order has become an independent legal person in international law, a status only enjoyed by the Sovereign Military Order of Malta. Any papal recognition would of

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<sup>37</sup> Agnew of Lochnaw, Sir Crispin, "The Conflict of heraldic laws" (1988) *Juridical Review* 61, 62-3; See Cheshire, GC & North, PM, *Private International Law* eds PM North (10th ed Butterworths, London, 1979) 658; *Salvesen v Administrator of Austrian Property* [1927] AC 641 (a decree of nullity of marriage pronounced by a court of competent jurisdiction is a judgement determining status and is equivalent to a judgement *in rem*. This will be recognised, in the absence of fraud or collusion, unless it offends against British notions of substantial justice).

<sup>38</sup> "The characteristic of a legal right is its recognition by a legal system"- Paton, GW & Denham, DP, *Jurisprudence* (4th ed Oxford University Press, Oxford, 1972) 284 et seq.

<sup>39</sup> Innes of Learney, Sir Thomas, *Scots heraldry* (3rd ed Oliver & Boyd, Edinburgh, 1978) 8

<sup>40</sup> Agnew of Lochnaw, Sir Crispin, "The Conflict of heraldic laws" (1988) *Juridical Review* 61, 63.

<sup>41</sup> Thus claims to Scottish peerages and baronetcies, and probably creations of Great Britain and the United Kingdom with Scottish designations, are considered in Lyon Court or before the Committee of Privileges in terms of Scots Law; Agnew of Lochnaw, Sir Crispin, "Peerage and Baronetcy Claims in the Lyon Court"; *Dunbar of Kilconzie* 1986 SLT 463; *Lady Ruthven of Freeland, Petitioner* 1977 SLT (Lyon Court) 2; *Grant of Grant, Petitioner* 1950 SLT (Lyon Court); Agnew of Lochnaw, Sir Crispin, "The Conflict of heraldic laws" (1988) *Juridical Review* 61, 63.

<sup>42</sup> See Cheshire, GC & North, PM, *Private International Law* eds PM North (10th ed Butterworths, London, 1979) ch XVI "The Law of Immoveables"; Anton, AE, *Private International Law: A treatise from the standpoint of Scots law* (Green, Edinburgh, 1967) ch 17 "Immoveable Property".

<sup>43</sup> Agnew of Lochnaw, Sir Crispin, "The Conflict of heraldic laws" (1988) *Juridical Review* 61, 63.

course confer legitimacy upon the Order, in so far as canon law were concerned, though this would not as such make it an Order of Chivalry<sup>44</sup>.

The third principle states that:

It is generally admitted by jurists that such ex-sovereigns who have not abdicated have positions different from that of pretenders and that in their lifetime they retain their full rights as *fons honorum* in respect of those Orders of which they remain Grand Masters which would be classed, otherwise, as State and Merit Orders<sup>45</sup>.

Firstly, a Sovereign has control of an Order whether or not they are Grand Master, those is merely an officer of the Order. Secondly, this is an assertion that an exiled sovereign remains de facto sovereign for life. The question of loss of de facto authority has been the subject of a number of studies, and no one definitive position can be asserted<sup>46</sup>. Whilst it is likely that an exiled sovereign may retain de facto sovereignty, this is by no means certain in every case.

Referring back to principle two, this means that whilst the sovereign may retain the right to appoint to any prior existing Orders, that right is subject to termination by the proper successor authority.

The forth principle states that:

Although, at one time - many centuries ago - private people of high standing could and did create some independent Orders of Knighthood, some among which came, in due course, to gain considerable prestige and obtained formal validity from the Church and the Crown, such rights of creation of Orders have long since fallen into desuetude and, nowadays, Orders of Chivalry as we understand the term must always stem from or be - by long-standing uninterrupted tradition - under the protection of Chiefs or of Houses of recognised sovereign rank<sup>47</sup>.

This appears to be unquestionable. But "under protection" must be clearly defined, and it is clearly anticipated that it is more than mere registration.

The fifth principle states that:

The recognition of Orders by States or supernational organisations which themselves do not have Chivalric Orders of their own, and in whose Constitutions no provisions are

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<sup>44</sup>Were the legitimacy of an Order as an Order of Chivalry be recognised, then difficulties would exist for subject of The Queen, who may not accept foreign honours without Her Majesty's permission.

<sup>45</sup>International Commission for Orders of Chivalry, *Register of Orders of Chivalry- Report of the International Commission for Orders of Chivalry* (International Commission for Orders of Chivalry/Gryfons Publishers and Distributors, USA, 1996) 4.

<sup>46</sup>See for example, FM Brookfield, "Some aspects of the Necessity Principle in Constitutional Law" (1972) unpublished University of Oxford DPhil thesis; Jonathan Waskan "De facto legitimacy and popular will" (1998) 24 (1) Social Theory and Practice 25-55.

<sup>47</sup>International Commission for Orders of Chivalry, *Register of Orders of Chivalry- Report of the International Commission for Orders of Chivalry* (International Commission for Orders of Chivalry/Gryfons Publishers and Distributors, USA, 1996) 5.

made for the recognition of knightly and nobiliary institutions, cannot be accepted as constituting validation by sovereignties, since these particular sovereignties have renounced the exercise of heraldic jurisdiction. The international "status" of an Order of Knighthood rests, in fact, on the rights of *fons honorum*, which, according to tradition, must belong to the Authority by which this particular Order is granted, protected or recognised<sup>48</sup>.

Firstly, the term supernational is clearly wrong, it surely should be supranational. More importantly, though, the principle as stated goes too far. It is by no means clear that states have "renounced the exercise of heraldic jurisdiction" merely by having no provisions for the recognition of knightly and nobiliary institutions in their constitutions. Nor should heraldry and Orders of Chivalry be combined in such a way, since they are distinct matters. Supranational organisations, unless themselves recognised as sovereign, cannot create Orders of Chivalry.

The sixth principle states:

The only recognised Order with the style of "Sovereign" existing nowadays is that of St John of Jerusalem, called of Rhodes, called of Malta, whose international headquarters were transferred to Rome in 1834, and whose international diplomatic "status" as an independent non-territorial power is recognised officially by the Holy See and by many other Governments<sup>49</sup>.

This is probably true, as the Sovereign Military Order of Malta is generally regarded as sovereign, though its entitlement to this status is questionable, and best explained by the peculiar history and standing of the Order. Suffice it to say that no other Order, however keen its proponent may be, would ever be in a position to lawfully assert a sovereign status. Any existing Orders of Chivalry must be dependent upon a sovereign prince, or be themselves sovereign<sup>50</sup>.

What conclusions can be drawn? Firstly, every sovereign prince (or president or other official in a republican state) has the right to confer honours.

Secondly, an exiled sovereign retains the right to bestow honours, dynastic, state or however styled. This right extends to their lawful successors. Appointments may continue to be made, unless this has been expressly prohibited by the successor authorities, or the Order has become obsolete. Whilst an exiled sovereign may in some circumstances establish a new Order of Chivalry, he may only do so whilst he remains generally recognised by the international community as the *de jure* ruler of his country. His successors will never have this right to create new Orders. Only *de jure* sovereigns (including their republican equivalents) may create Orders of Chivalry.

Thirdly, the international status of an Order of Chivalry depends upon the municipal law of the country in which it was created. There can be no international Orders as such, shorn of dependence upon the municipal laws of a state<sup>51</sup>. The only exception is the Order of

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<sup>48</sup>*ibid* 5.

<sup>49</sup>*ibid* 5.

<sup>50</sup>The Grand Master of the Sovereign Military Order of Malta is regarded as a sovereign prince.

<sup>51</sup>Thus the "Sovereign Order of Saint Stanislaus" created 9th June 1979 by Count Juliusz Nowina Sokolnicki, President of the Republic of Poland (in exile), is not, and never could

Malta, which depends upon its own unique history, and, at least in part, its recognition by the Holy See and secular princes.

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have been, sovereign. By a decree of 15th September 1990 Count Juliusz Nowina Sokolnicki purported to make the Order sovereign, and vested the sovereignty in the person of the first Prince Grand Master- himself, and appointed successors from the House of Nowina Sokolnicki. There are two major obstacles to this Order being legitimate. Firstly, Count Juliusz Nowina Sokolnicki was not generally recognised as the head of the Polish Government in exile, there having been a split in the ranks of the Government. Thus, he could not create any Orders of Chivalry recognised by international law.

Secondly, as he himself lacked legal standing, he could not confer sovereignty upon the Order. Even if he were the legitimate Polish president, conferring "sovereignty" would be meaningless, as the Order can never acquire this sort of independence, without possession of territory.