

The importance of the royal prerogative in contemporary governance

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Introduction

In the United Kingdom and the realms – those countries that recognise Elizabeth II as their Queen¹ – there are certain fundamental constitutional principles. One of these is that much of the legal basis of executive power derives from the Crown,² though this has, in the past, often been downplayed for political and other reasons. Indeed, in the Commonwealth as a whole, political independence has often been equated with the reduction of the Crown to a position of subservience to the political executive.³ What remains important is the position of the Crown as an organising principle of government (the framework upon which the structure of government is built⁴), as a source of legitimacy, and as a symbol for permanent government. Executive power, therefore, remains based on the royal prerogative, and the “third source” of authority (the legal powers of the legal natural person, as the Crown is a corporation aggregate), as well as upon statute law.

Within the scope of the royal prerogative, the Sovereign once had a comparatively free hand to act.⁵ Yet even these powers are now limited by the legal concept of convention,⁶ and, more recently, by the principles of administrative law.⁷ The Sovereign enjoyed certain powers, but these were to be exercised (for the most part) by Ministers responsible to Parliament, rather than by the Sovereign personally, without, however, prior authorisation – or subsequent validation – by Parliament.

There has recently been some discussion of curtailing or even abolishing, the royal prerogative, in the United Kingdom,⁸ in New Zealand, and elsewhere. In the United Kingdom

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- ¹ These countries include Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, the Solomon Islands, Tuvalu, and the United Kingdom.
- ² B V Harris, “The ‘Third Source’ of Authority for Government Action” (1992) 108 *Law Quarterly Review* 626. For a definition of the Crown, see Janine Hayward, “In search of a treaty partner: who, or what, is ‘the Crown?’” (1995) Victoria University of Wellington PhD thesis.
- ³ David E Smith, “Bagehot, the Crown, and the Canadian Constitution” (1995) 28 *Canadian Journal of Political Science* 623-4.
- ⁴ Recent examples include Crown Health Enterprises.
- ⁵ The seventeenth century view was that the courts would not enquire into the manner of use of an admitted prerogative – at any rate if the holder was not shown to be acting in bad faith; *Darnel’s Case* (“the Case of the Five Knights”) (1627) 3 State Tr 1; reaffirmed by *Chandler v Director of Public Prosecutions* [1962] 3 WLR 694.
- ⁶ Conventions are similar to legal rules, but they cannot be enforced by the courts; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC); NO 1968 (2) SA 284; *Adesobenro v Akintola* [1963] AC 614, 630. They are rules of political practice which are regarded as binding by those to whom they apply. Laws are enforceable by the courts, conventions are not; C Munro, “Laws and conventions distinguished” (1975) 91 *Law Quarterly Review* 218.
- ⁷ See the *Operation Dismantle Case* (1985) 18 DLR (4th) 481 (SCC); (1983) 3 DLR (4th) 193 (FCA); Clive Walker, “Review of the Prerogative” (1987) *Public Law* 62.
- ⁸ The Labour Government is committed to moving progressively towards replacement of the major remaining royal prerogative powers with statutory authority. See *The Governance of Britain* (July 2007) Cm 7170, and *The Governance of Britain – War Powers and Treaties: Living Executive Powers* (October 2007) CP 26/07. The Conservative Party and the Liberal Democratic Party also favour some reforms: David Cameron, “Modernisation with a purpose” speech launching the Democracy Task Force, 6 Feb 2006; *For the People, By the People* (2007), Policy Paper No 83, paras 5.8-5.8.3.

this call has been particularly associated with the deployment of troops to foreign theatres,⁹ though it can scarcely be called a “groundswell” of public opinion demanding comprehensive replacement of the royal prerogative, as Harris could be inferred to suggest is the case.¹⁰ A draft Constitutional Renewal Bill was published in the United Kingdom in March 2008, containing provisions for the statutory replacement of a modest selection of royal prerogative powers.¹¹ Other steps may follow.

New model

Harris, in a recent article, argued for the eventual replacement of surviving royal prerogatives in New Zealand with statutory authority.¹² His thesis for this is comparatively simple. The common law royal prerogative, statute law, and the so-called “third source” of authority, are the legal bases for executive action.¹³ However, the royal prerogative doesn’t meet the standard of an ideal model (which he proposes); it is less democratic, less certain, less accessible, and less easily understood. This argument, however, involves a paradox; the royal prerogative “as currently perceived” falls short of the ideal model; but the model itself is a conceptual construct which itself can be subject to criticism.

While a more deliberate conceptual design approach to the provision of legal authority for executive action may well be desirable, it has not been established that this necessitates a statutory basis for authority replacing the royal prerogative. It is true that there may be no consistent source for executive powers (though there are only three sources¹⁴), but it is not clear why that should lead to support for the triumph of parliamentary supremacy over the supremacy of the law (or indeed of the Crown). In the event of the adoption of an entrenched written constitution, in either New Zealand or the United Kingdom, the matter might well be different, for in that case the source of all authority could ultimately be the constitution itself, though it would not necessarily be so.

The value of the royal prerogative is that it can be exercised free of parliamentary control; conversely this is what Harris sees as a weakness and would end. There is no clear argument, however, as to why majoritarian representative democracy, operating through Members of Parliament, should necessarily provide a greater mandate for executive government action than the legitimacy derived from the ancient prerogatives of the Crown. Curiously, Harris writes of the “expected role of Parliament as the sole authoriser of executive action”.¹⁵ The democratic mandate is important in the legislative process; but it is less clear that it should be exercised through Parliament, when we are considering actions of the executive. After all, the

⁹ Particularly, according to Harris, the Falkland Islands, Kuwait, Bosnia and Afghanistan; see, B V Harris, “Replacement of the Royal Prerogative in New Zealand” (2009) 23 *New Zealand Universities Law Review* 285-314.

¹⁰ *Ibid.*, 287.

¹¹ *The Governance of Britain – Draft Constitutional Renewal Bill* (Mar 2008), Cm 7342-11, and the *Report of the Joint Committee of the House of Lords and House of Commons on the Draft Constitutional Renewal Bill* (31 Jul 2008), HL Paper 166-I/HC Paper 551-I.

¹² B V Harris, *supra* note 9. A few years earlier, in “The Constitutional Future of New Zealand” (2004) *New Zealand Law Review* 269, 308, Harris speculated that if New Zealand were to adopt a written constitution it could provide for the royal prerogative “to survive, and be relevant to the new institutions of government created under the written constitution”.

¹³ B V Harris, “The ‘Third Source’ of Authority for Government Action” (1992) 108 *Law Quarterly Review* 626; B V Harris, “The ‘Third Source’ of Authority for Government Action Revisited” (2007) 123 *Law Quarterly Review* 225-50.

¹⁴ *Ibid.*

¹⁵ B V Harris, *supra* note 9, at 298.

executive is already totally dependent upon parliamentary support, through the principle of ministerial responsibility, and the need for parliamentary supply.

To overly promote and emphasise one branch of government over the other is weakening of the separation of powers, for this is not the legislature asserting its law-making role; it is the legislature infringing on the role of the executive to make and implement policy. Thus, to address one perceived weakness in the system in this manner is actually creating a new imbalance. The very independence of the royal prerogative from parliamentary control is its strength, not a weakness.

The nature of the royal prerogative

Suggestions for limiting or replacing the royal prerogative are usually based on reasons of principle or pragmatism. There is something to be said for both approaches. But first, it is necessary to understand something of the nature of the royal prerogative that would be affected. There are several views as to what comprises the royal prerogative. Blackstone had a narrow definition. For him, a power held in common with the king's subjects ceased to be a royal prerogative, and was merely a freedom for action not prohibited by law.¹⁶ Dicey had a wider view of the royal prerogative. To him, the royal prerogative was the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.¹⁷ The definition of royal prerogative powers is comparatively controversial,¹⁸ or at least uncertain, but courts have generally accepted Dicey's broad definition of the royal prerogative, though Blackstone is not without his supporters, and is probably to be preferred conceptually.

For the most part, such a distinction is academic, since the courts will review executive action whether it purports to be based upon the royal prerogative, or upon any other basis.¹⁹ However, it may be unclear whether the royal prerogative or a statutory source of power has been exercised, and this may affect whether review is brought – in New Zealand – under the Judicature Amendment Act 1972, or at common law.²⁰

The royal prerogative has been classified as a branch of the common law, because it is the decisions of the common law courts which determine its existence and extent.²¹ This would appear, however, to be true only in the sense that there could be no extraordinary royal prerogative above the law.²² It must be remembered that the royal prerogative applies even in countries where the common law does not.²³ It is, however, in some degree controlled by the common law courts, though only in determining its scope, and not necessarily its exercise.²⁴ The

¹⁶ Sir William Blackstone, *Commentaries on the Laws of England* by E Christian (ed) (New York: Garland Publishing, 1978), vol 1, p 239.

¹⁷ A. Dicey, *Introduction to the Study of the Law of the Constitution* introduction & appendix by E C S Wade (10th ed, London: Macmillan, 1958), 425.

¹⁸ See C.B. Lewis, *Judicial Remedies in Public Law* (London: Sweet & Maxwell, 1971), 13-4.

¹⁹ See B V Harris, "The 'Third Source' of Authority for Government Action", *supra* note 13.

²⁰ See *Re Erebus Royal Commission* [1983] NZLR 662, 666, 667 per Mahon J; [1984] 1 AC 808; [1984] 3 All ER 201 (PC) and *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, 258 (CA).

²¹ *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB); *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).

²² In particular, see S Payne, "The Royal Prerogative", in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1991), 77-111, 106; E C S Wade and G Phillips, *Constitutional Law* (8th ed, London: Longman, 1971), 183.

²³ *Sammut v Strickland* [1938] AC 678 (PC).

²⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

Crown may only exercise a royal prerogative which the common law has recognised,²⁵ and the royal prerogative may be said to consist of “the powers and privileges accorded by the common law to the Crown.”²⁶ No new royal prerogatives can be created,²⁷ though it may be possible to adapt existing prerogatives to new circumstances.²⁸ In many respects the relationship between the common law and the royal prerogative parallels that between the common law and ecclesiastical law,²⁹ or the law of arms.³⁰

Royal prerogative powers are not, however, all of the same nature, and this factor may be important to understanding some of the difficulties (perhaps more apparent than real) which have arisen. Chitty drew a distinction between those royal prerogative powers which he defined as being minor (which were merely local to England), and those others, which were fundamental rights and principles on which the king’s authority rested,³¹ and which were necessary to maintain it.³² Applying these overseas, of the minor royal prerogatives, it was said that they “might be yielded, where they were inconsistent with the laws or usages of the place, or were inapplicable to the condition of the people”.³³ The minor royal prerogatives would apply to the common law colonies (settled and where common law has been applied by royal prerogative or legislative action³⁴), except that they that they may be excluded or modified by local circumstances.

The major royal prerogatives were said to be those that were fundamental, or which other than local, in the words of Story:

In every question, that respected the royal prerogatives in the colonies, where they were not of a strictly fundamental nature, the first thing to be considered was, whether the charter of the particular colony contained any express provision on the subject. If it did, that was the guide. If it was silent, then the royal prerogatives were in the colony precisely

²⁵ See the *Case of Proclamations* (1611) 12 Co Rep 74, 75; 77 ER 1352 (KB); *Entick v Carrington* (1765) 19 St Tr 1029.

²⁶ P Hogg, *Constitutional Law in Canada*, Loose-Leaf Edition (Toronto: Carswell, 1995), 1.9; the *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB).

²⁷ *BBC v Johns* [1965] Ch 32, 79 per Diplock LJ (CA).

²⁸ *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1989] QB 26 (CA).

²⁹ For which see Noel Cox, “The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England” (2001-2) 3(1) *Rutgers Journal of Law and Religion* 1-45, accessible at <www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>.

³⁰ See Noel Cox, “The Law of Arms in New Zealand” (1998) 18(2) *New Zealand Universities Law Review* 225-56. See also Noel Cox, “The Royal Prerogative in the Realms” (2007) 33(4) *Commonwealth Law Bulletin* 611-38.

³¹ Thus, “[e]very where he was the head of the church, and the fountain of justice; every where he was entitled to a share in the legislation, (except where he had expressly renounced it;) every where he was generalissimo of all forces, and entitled to make peace or war”; J. Story, *Commentaries on the Constitution of the United States: With a preliminary review of the Constitutional History of the colonies and states, before the adoption of the Constitution* ed. Melville M Bigelow (5th ed, Buffalo: William S Hein & Co, 1994), Book I, p 170, § 184.

³² J Chitty, *A Treatise on the Law, Classics of English Legal History in the Modern Era* (New York: Garland Publishing, 1978) (reprint of the 1820 edition published by Joseph Butterworth and Son, London, under the title: *A Treatise on the Law of the Prerogatives of the Crown; And the Relative Duties and Rights of the Subject*).

³³ J Story, *Commentaries on the Constitution of the United States: With a preliminary review of the Constitutional History of the colonies and states, before the adoption of the Constitution* ed Melville M. Bigelow (5th ed, Buffalo: William S Hein & Co, 1994), Book I, p 170, § 184.

³⁴ See the *Report of the Privy Council on the project of a Bill for the better government of the Australian Colonies*, dated 1 May 1849; *R v Symonds* (1847) NZPCC 387 (SC). See also the English Laws Act 1858 (NZ) and s 5 of the Imperial Laws Application Act 1988 (NZ); D G Bell, “A Note on the Reception of English Statutes in New Brunswick” (1979) 28 *University of New Brunswick Law Journal* 195; J E Coté, “The Reception of English Law” (1977) 15 *Alberta Law Review* 29.

the same, as in the parent country; for in such cases the common law of England was the common law of the colonies for such purposes.³⁵

The presumption remains that the royal prerogatives applied in the colonies. Blackstone advocated a similar definition to that of Chitty, that of direct and incidental:

The direct are such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace.³⁶

These might be seen as the major royal prerogatives.

But such prerogatives as are incidental bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the Crown, to those general rules that are established for the rest of the community: such as, that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects.³⁷

These could equate to the minor royal prerogatives, now more satisfactorily defined as incidental to normal legal relations. These incidental royal prerogatives, like Chitty's minor royal prerogatives, were indeed generally applied in the colonies. The key point is that neither definition fully explains the nature of the royal prerogative, as applied to the colonies, or generally. But, like the common law, not all the royal prerogative powers that are exercised by Her Majesty in the United Kingdom (or rather, generally, by Ministers in her name) necessarily apply, nor are they necessarily exercised, in all her realms. For example, they do not include the royal prerogatives relating to the established Church of England (a major royal prerogative) – though even here this was not always necessarily the case.³⁸

There are also other royal prerogatives in respect of which the Queen does not take advice³⁹ – but which are nonetheless extant, even if unused. It has been held that disused royal prerogatives are lost,⁴⁰ though it is also said that disused prerogatives may be revived.⁴¹ The latter would seem to be the more historically probable view, and has been followed more recently,⁴² particularly to apply an old royal prerogative to new circumstances.

Whether a particular royal prerogative extends to a country depends upon the category to which it belongs and upon whether the legal system is based on English law.⁴³ Whatever the

³⁵ J Story, *supra* note 33, p 170, § 184.

³⁶ Sir William Blackstone, *supra* note 16, p 232-233.

³⁷ *Ibid.* Interestingly, the definition relied heavily on the distinction between the King's political and private persons; *Ibid.*, vol I p 239 et seq.

³⁸ See, for instance, J Border, *Church and State in Australia, 1788-1872: a constitutional study of the Church of England in Australia* (London: SPCK, 1962); Noel Cox, *Church and State in the Post-colonial Era* (Auckland: Polygraphia, 2008).

³⁹ See Robert Blackburn, "The Queen and Ministerial responsibility" (1985) *Public Law* 361.

⁴⁰ *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL); *South Australia v Victoria (State Boundaries Case)* (1911) 12 CLR 667, 703 per Griffiths CJ.

⁴¹ *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101 per Lord Reid.

⁴² The Crown's ancient power to preserve the peace was revived in *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1988] 1 All ER 556 (CA), though arguably the prerogative was never full disused.

⁴³ Noel Cox, "The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity" (1998-99) 14 *Australian Journal of Law and Society* 15-42, 19, cited with approval in *Black v Chretien*

definition preferred, it is clear that the major royal prerogatives apply throughout the Commonwealth, and are applied therein as a pure question of law,⁴⁴ even in a country, such as Malta, where the common law is not otherwise in force.⁴⁵ Minor royal prerogatives apply in all common law countries, except that they may be excluded or modified by local circumstances.

The royal prerogatives of executive government relating to the three branches of government;⁴⁶ prerogatives in the nature of rights, privileges, or immunities⁴⁷ – which Harris has argued are inappropriately grouped under the royal prerogative,⁴⁸ and the prerogatives personal to the Sovereign,⁴⁹ have all been held to have applied to New Zealand. It has also been said of New Zealand that “the undoubted prerogatives of modern government include the following powers: to pardon criminals; to summon, prorogue or dissolve Parliament; to appoint Ministers, Judges and other Crown officials; to confer honours; to assent to legislation; to conduct foreign affairs; and to control the armed forces.”⁵⁰ Most of these would constitute major or direct royal prerogatives. Incidental royal prerogatives, such as immunities and debt privileges, have also been held to apply. The royal prerogative in New Zealand would appear to be as full as that in England, with the qualification noted above. This provides a full and comparatively comprehensive range of powers for the executive government.

There hasn't been a full systematic analysis of the scope and content of the royal prerogative, in part because of its fluidity. However, as generally categorised, the scope of the royal prerogative includes the foreign relations and defence aspects, including the making of treaties;⁵¹ and the defence of the realm.⁵² It has domestic applications, including keeping the peace;⁵³ dissolution of Parliament (though it has been suggested this may not be so in New

(2001) 199 DLR (4th) 228, paras 27 per Laskin JA (Court of Appeal of Ontario), and *Copello v Minister of Foreign Affairs of Canada* [2002] 3 FC 24, para 61 per Heneghan J (Federal Court of Canada).

⁴⁴ Noel Cox, “The Dichotomy of Legal Theory and Political Reality...”, *ibid*.

⁴⁵ *Sammut v Strickland* [1938] AC 678 (PC). See also *Sabally and N'jie v Attorney-General* [1965] 1 QB 273, 293; [1964] 3 All ER 377, 380, 381 (CA). The prerogative cannot however operate against an alien in an alien land; *Attorney-General v Nissan* [1970] AC 179, 229; [1969] 1 All ER 629, 654 per Lord Pearson.

⁴⁶ Such as the prerogative power of appointment; *Re Commission on Thomas Case* [1980] 1 NZLR 602 (PC).

⁴⁷ Such as the Crown's immunity from statute (more of a presumption than a true immunity); *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 (PC); Interpretation Act 1999 (NZ), s 27.

⁴⁸ B V Harris, *supra* note 9, at 293.

⁴⁹ Such as the notion that the King never dies; In New Zealand, the death of the Sovereign perpetuates the succession under English law but otherwise has no effect under New Zealand law: Constitution Act 1986, s 5(1); Noel Cox, “The Law of Succession to the Crown in New Zealand” (1999) 7 *Waikato Law Review* 49-72. See *Hill v Grange* (1555) 1 Plowden 164, 177; 75 ER 253, 273; *Willion v Berkeley* (1561) 1 Plowden 227, 243; 75 ER 339, 371; and *Wroth's Case* (1572) 2 Plowden 452, 457; 75 ER 678, 685.

⁵⁰ *The Laws of New Zealand* (Wellington: LexisNexis Butterworths, 2003) “Constitutional Law” para 145, from Philip Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, Wellington: Brookers, 2001), 622-45.

⁵¹ *The Parlement Belge* (1879) 4 PD 129; (1880) 5 PD 197; *Blackburn v Attorney-General* [1971] 1 WLR 1037.

⁵² Though the war prerogative has not analysed by the Courts for nearly 300 years; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; *Nissan v Attorney-General* [1970] AC 179 – and it is subject to the statutory prohibition in the Bill of Rights 1688 (1 Wm & M s 2 c 2) (Eng), s 1, preventing the Crown from maintaining a standing army in time of peace without Parliamentary consent; *Marks v the Commonwealth* (1964) 111 CLR 549, 564 per Windeyer J; *Chandler v DPP* [1964] AC 763.

⁵³ *R v Secretary of State for Home Department; Ex parte Northumbria Police Authority* [1988] 1 All ER 556, 564, 573, 576; *Farey v Burnett* (1974) 131 CLR 477; 3 ALR 70; 48 ALJR 161. Police in England and Wales swear to uphold the Queen's peace:

I (NAME) of (TOWN) do solemnly and sincerely declare and affirm that I will well, and truly serve the Queen in the office of Constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof

Zealand now⁵⁴); the appointment of Ministers; the grant of honours;⁵⁵ and “other matters”.⁵⁶ The “other” royal prerogatives – those not yet fully enumerated – will be identified by the courts on a case-by-case basis.⁵⁷

The nature of the royal prerogative is complex, as is its scope and range. They are inherently disparate, but unified in their status as residual unique powers and privileges of the Crown. As such they reflect the ancient recognition by the courts of an independent legal power vested in the executive, separate from the law-making powers of the Queen-in-Parliament.

Legitimacy of the royal prerogative

The royal prerogative may not be based on parliamentary sanction, prior or subsequent, but that does not mean that it lacks its own mandate or legitimacy. Legitimacy offers reasons why a given state deserves the allegiance of its members, but also why the authority of an institution is respected and enforced. Max Weber identified three bases for this authority – traditions and customs; legal-rational procedures (such as voting); and individual charisma.⁵⁸ Some combination of these can be found in most political systems. The first is more relevant with respect to the Crown, but in some respects the others also apply.

In modern democratic societies popular elections confer legitimacy upon governments – though where these processes are disputed legitimacy is threatened. But legitimacy can also be independent of the mere assertion or opinion of the claimant. This has been particularly important in the late twentieth century discussion of indigenous rights.⁵⁹ Thus rights are not dependent or conditional upon public opinion or majoritarian support.

There has been a tendency to undervalue the Crown as a source of legitimacy, because its legitimacy is regarded as of minimal significance compared with that derived from the ballot box. But, in the view of observers such as Smith and Birch, the most important of the defects of the liberal political model of the Westminster-type constitution – the view of the political theorist rather than the lawyer or politician – is its failure to depict the role of the Crown in the system of government, and the implications of the interrelated independence of the executive.⁶⁰ The legitimacy of the Crown is dependent on popular support, but is also independent of it.

faithfully according to law. (Police Act 1996 (UK), Sch 4, as amended by the Police Reform Act 2002 (UK), s 83.)

In New Zealand, the wording is more specific that it is the Queen’s peace which is to be kept:

I, A.B., do swear that I will well and truly serve our Sovereign Lady the Queen in the Police, without favour or affection, malice or ill-will, until I am legally discharged; that I will see and cause Her Majesty’s peace to be kept and preserved; that I will prevent to the best of my power all offences against the peace; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God. (Police Act 1958 (NZ), s 37(1).)

⁵⁴ See Alison Quentin-Baxter, *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand* (Wellington: Prime Ministers Department, 1980), 13-4.

⁵⁵ *The Prince’s Case* (1606) 8 Co Rep 481; 77 ER 496; Sir Anthony Wagner and George Squibb, “Precedence and Courtesy Titles” (1973) 80 *Law Quarterly Review* 352.

⁵⁶ 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, one of the most important, is not reviewable by the courts; *Burt v Governor-General* [1993] 2 NZLR 672 (CA). There is also a prerogative right to conduct inquiries; *Lockwood v the Commonwealth* (1954) 90 CLR 177; 182 per Fullagar J.

⁵⁷ *R v Secretary of State for Home Department; Ex parte Bentley* [1993] 4 All ER 443.

⁵⁸ See Randall Collins, *Weberian Sociological Theory* (Cambridge: Cambridge University Press, 1986).

⁵⁹ See, for example, Sir Eli Lauterpacht, “Sovereignty” (1997) 73(1) *International Affairs* 137.

⁶⁰ David E. Smith, *The Invisible Crown* (1995); Anthony Birch, *The British System of Government* (9th ed, London: Routledge, 1993).

The legitimacy of the Crown includes that owed to the established regime. With the modern democratic ethos it might be possible to regard legitimacy which has such a basis of authority as weak, but it does nevertheless have its value. In Tuvalu, for instance, respect for the Crown was regarded as instilling a high sense of respect for whoever was occupying the position of Governor-General, not so much because of the incumbent, but rather for the durability of a system which had stood the test of time.⁶¹ This was particularly so because the country was linked, by the Crown, with a much larger, world-wide, political entity.

The Crown itself provides some governmental legitimacy, simply because it is a permanent manifestation of authority, a proto-state as some would argue.⁶² Smith has suggested that in Canada the Crown provides the necessary underlying structure for government. This could be true in New Zealand, arguably even more so, since there is no entrenched written constitution upon which constitutional or political thought may focus.⁶³ Although electoral support might suffice for much of the legitimacy of government, this is reinforced by the historical continuity of the Crown.

In contrast to a common political theorists' view — which concentrates upon the political actors⁶⁴ — official terminology (the view of the administrator) had in the past tended to emphasise the importance of the Crown. Thus the formal role the Sovereign plays in Parliament conveys a totally different view to that of the political realist. It is arguably even more inaccurate, as the Sovereign's legislative role has been largely nominal for some three hundred years — except with respect to colonial legislatures, and even here the role has been exercised on the advice of Ministers.

According to Barker, the principal function of the theory of the Crown is to provide a legal person who can act in the courts, to whom public servants may owe and own allegiance, and who may act in all those exercises of authority, such as the making of treaties or the declaration of war, which do not rest upon the legislative supremacy of Parliament.⁶⁵ They are also the legal person who exercises the administrative function of executive government.

In this view, and in the United Kingdom at least, and probably in all the realms also, the legitimacy involved here is quite independent of any popular authorisation, and the idea of the Crown as a legitimising principle is articulated and employed within the personnel and operation of government, though little outside.

Lord Cooke of Thorndon has built upon the views of Sir Owen Dixon, who saw the evolution of constitutional law, both in the United Kingdom, and in the overseas realms of the Crown, as the product of the interplay between three potentially conflicting conceptions. These

⁶¹ Tauassa Taafahi, *Governance in the Pacific* (Canberra: National Centre of Development Studies, Australian National University, 1996), 1.

⁶² Joseph Jacob, *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain* (Aldershot: Dartmouth, 1996).

⁶³ The Treaty of Waitangi might serve a similar purpose, though it is perhaps unlikely that it would achieve this alone, as opinion polls suggest that it lacks the general support of the non-Maori population; see Paul Perry and Alan Webster, *New Zealand Politics at the Turn of the Millennium: Attitudes and Values about Politics and Government* (Auckland: Alpha Publications, 1999), 74-5.

⁶⁴ Note the emphasis in such works as Jonathan Boston, Stephen Levine, Elizabeth McLeay, Nigel Roberts and Hannah Schmidt, "Caretaker governments and the evolution of caretaker conventions in New Zealand" (1998) 28(4) *Victoria University of Wellington Law Review* 629, where the institutional role of the Crown is given relatively little coverage.

⁶⁵ Rodney Barker, *Political Legitimacy and the State* (Oxford: Clarendon Press, 1990), 143-4.

were the supremacy of the law, the supremacy of the Crown, and the supremacy of Parliament.⁶⁶ This interplay has produced the present constitutional structure, whose defining aspects were identified, though perhaps misunderstood, by Montesquieu.⁶⁷ This is the origin and antecedent of both the rule of law and the separation of powers.

The supremacy of the law is an idea we owe to the early Middle Ages.⁶⁸ There was then no concept of the sovereign state, at least in part because everyone had a different lord to whom they owed allegiance.⁶⁹ To many in the seventeenth century the law was the true sovereign. With the Reformation a true theory of sovereignty became possible, because of the vast increase in the powers and activity of the legislature. Judges, as professors of the common law, claimed for it supreme authority. Had this been admitted they would have been the ultimate authority in the state,⁷⁰ as perhaps they are today in the United States of America, where the separation of powers, and an entrenched constitution, ensure a major constitutional role for the judiciary.

By early in the nineteenth century analytical jurists had made parliamentary sovereignty the pivot of the legal system.⁷¹ The constitution depended upon the common law, whose creature it was. The legal expression of the power of the state was always through the Crown. But there is nothing which transcends the power of an Act of Parliament.⁷² Parliament's power to suspend the law was absolute. But this position was reached comparatively recently, and is not necessarily immutable. The law alone remained permanent and ever-present, in a way similar to the later conceptualisation of the Crown.

Oresme argued that legislative power was vested in the people as a whole, since they alone could judge the common good.⁷³ This view was roughly compatible with the English constitutional position in the latter Middle Ages, when Parliament was regarded as the indispensable forum for the production of statute law.⁷⁴ Fortescue arrived at a similar conclusion, though by a very different route. This was a result of his experience in the English law courts, where he concluded that:

⁶⁶ "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 590; Lord Cooke of Thorndon, "The suggested revolution against the Crown" in Philip Joseph, *Essays on the Constitution* (London: Butterworths, 1995), 28-40.

⁶⁷ Charles de Secondat Baron de Montesquieu, "The Spirit of the Laws", in Arend Lijphart, *Parliamentary versus Presidential Government* (Oxford: Oxford University Press, 1992), 48-51

⁶⁸ In England, Reginald Pecock and John Fortescue, and on the Continent, Pierre D'Ailly, Nicholas of Cusa; Pecock, *Donet* (1921), 76; Sir John Fortescue, *In Praise of the laws of England (De Laudibus Legum Angliæ)* ed. S.B. Chrimes (Cambridge: Cambridge University Press, 1942), c 36 p 87; Sir Robert Carlyle and A.J. Carlyle, *A History of Mediaeval Political Theory in the West* (Edinburgh: Blackwood, 1903-36), VI pp 138, 141.

⁶⁹ Frederic Maitland and Sir Frederick Pollock, *History of English Law before the Times of Edward I* (2nd ed., Cambridge: Cambridge University Press, 1895), vol 1 p 182.

⁷⁰ J.N. Figgis, *The Theory of the Divine Right of Kings* (Cambridge: Cambridge University Press, 1914), 230.

⁷¹ See W.E. Hearn, *The Government of England* (London: Longmans, Green & Co, 1887) which was a major influence on Dicey.

⁷² Owen Dixon, "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 593-5. Nor will the courts be eager to question the authority of an Act of Parliament, a principle cited as early as 1455; P 33 Hen VI 17, 8 at 18 per Fortescue, CJKB.

⁷³ Nicole Oresme, *Le livres de Politiques d' Aristotle* ed. A.D. Menut (1970) Transactions of the American Philosophical Society 137-8.

⁷⁴ He followed Masilius, drawing on Roman law and Aristotelian utility; Jean Dunbabin, "Government" in J.H. Burns, *The Cambridge History of Medieval Political Thought c.350-c.1450* (Cambridge: Cambridge University Press, 1988), 507.

The statutes of England ... are made, not only by the Prince's will, but also by the assent of whole realm, so they cannot be injurious to the people nor fail to secure their advantage.⁷⁵

Fortescue's doctrine of English kingship was that it was *dominium politicum et regale*, in contrast with the French *dominium regale*.⁷⁶

Continental rulers ruled on the basis of the civil law of their stronger Roman heritage.⁷⁷ They relied especially on the maxim *quod principi placuit legis habet vigorem*.⁷⁸ English kingship was superior, at least, according to the chancellor in Fortescue's fictitious disputation which comprises the basis of *De Laudibus Legum Anglia*, because the monarchy was limited by the requirement for the assent of Parliament. This was despite the fact that the power of kings was everywhere the same, but authority differed because of differences in their origins. The laws of England were more venerable, and must be deemed to be the best obtainable. This was because they were not enacted at the sole behest of the prince, but by the prudence of 300 members of Parliament.⁷⁹

The Reformation Parliament settled the conventional view of the English constitution so clearly expounded in Sir Thomas Smith's *De Republica Anglorum* (1565) and so hard to find even obscurely stated before 1530s.⁸⁰ As a result of the Reformation, the doctrine of parliamentary supremacy was developed.⁸¹ But a long fight was waged by King Charles I in defence of his prerogative. He was committed to the traditional symbiosis of royal prerogative and law rather than any new theory of the state.⁸²

In the course of time the King-in-Parliament, the legislature, became supreme over the law. On the Continent the lawyers were antagonistic to representative assemblies, and there courts persisted in maintaining the predominance of the law over the authority of such assemblies, and so encouraged the growth of absolutism. In England after 1688 no claim was made that any rule of the common law was too fundamental to admit of change. The course of our constitutional and legal development must have been profoundly different had it been otherwise.⁸³ It is unclear just when parliamentary sovereignty triumphed over the supremacy of the Crown, but Parliament took control of the succession in 1689, and asserted it in 1701.⁸⁴ The

⁷⁵ *Sed non sic Angliae statuta oriri possunt, dum nedum principis voluntate sed et totius regni assensu ipsa conduntur, quo populi laesuram illam efficere requeunt vel non eorum commodum procurare.* (Sir John Fortescue, *In Praise of the laws of England (De Laudibus Legum Anglia)* ed. S.B. Chrimes (Cambridge: Cambridge University Press, 1942), 41.)

⁷⁶ A limited monarchy, in contrast to an absolute monarchy; Sir John Fortescue, *The Governance of England* notes by Charles Plummer (reprint Westport, Connecticut: Hyperion Press, 1979).

⁷⁷ The extent to which the common law resisted the reception of Roman law has been much disputed, though recent research suggests that the mediæval common law, though surviving in an organic sense, actually underwent a substantial reformation in the Renaissance period, especially 1490s to 1540s; See the introduction to *The Reports of Sir John Spelman* (1978) vol II Seldon Society vol 94; Sir John Baker, "English Law and the Renaissance" [1985] *Cambridge Law Journal* 46.

⁷⁸ "What hath pleased the prince has the force of law".

⁷⁹ Sir John Fortescue, *In Praise of the laws of England*, supra note 68, xii-xcviii.

⁸⁰ Sir Thomas Smith was a civil lawyer who stood analytically outside the constraints of the common law tradition.

⁸¹ Sir Geoffrey Elton, *Reform and Reformation, 1509-1558* (London: Edward Arnold, 1979), 199-200.

⁸² Kevin Sharpe, *The Personal Rule of Charles I* (New Haven: Yale University Press, 1992), 930.

⁸³ Owen Dixon, supra note 72.

⁸⁴ See, for example, H.T. Dickinson, "The Eighteenth-Century Debate on the 'Glorious Revolution'" (1976) 61 *History* 28-45; H.T. Dickinson, "The Eighteenth-Century Debate on the Sovereignty of Parliament" (1976) 26 *Transactions of the Royal Historical Society* (5th Series) 189-210.

law remained supreme over all organs of government as well as people, and legislative power (properly expressed) extended over the whole field of law.⁸⁵

The growth of the territorial state brought about the need for one supreme authority. As a consequence came a more modern doctrine, a doctrine embodying a conception that was widely held. This was the supremacy of the Crown as the mystical holder of the sovereignty of the state. Continental Europe found in kingship the state's source of unity and power. This was to remain the lynch-pin of constitutional theory until modern times.

The majesty of the Holy Roman Emperor had spread all over Europe in the thirteenth century. To this doctrine of the divine right of kings, habits of thought of the greatest consequences have been traced. These include a deep sense of the majesty of the law, and the duty of obedience.⁸⁶ When the competing focal points of sovereignty were reconciled in the course of the seventeenth and eighteenth centuries, the splendour of the Crown remained as the legal expression of the sovereignty of the nation. The supremacy of the Crown necessarily had to give way under the inexorable advance of the supremacy of Parliament – but need not necessarily disappear altogether.

The aims of the late mediæval and early modern State were negative and disciplinary. The extreme emphasis on property rights carried with it an emphasis on law – a lawyer's rather than a politician's view of government. By Fortescue's time if not earlier, men felt strong monarchy upheld their rights (a mass of technical rules and practices), rather than Parliament.⁸⁷

*De Laudibus Legum Angliæ*⁸⁸ written 1468-71 was one of the first coherent exercises in comparative law. It was strongly influenced by the French experience of Sir John Fortescue. It had a direct influence on the constitutional thinkers of the seventeenth century. Fortescue's successors in that century argued more precisely that the ancient constitution was Anglo-Saxon – and the royal prerogative was the right of conquest of William the Conqueror.⁸⁹ Fortescue supports the doctrine of constitutional monarchy found in St Thomas, but really his support is derived from his own liberal sentiments and the experience of England.⁹⁰

The contention, most clearly expressed by Aquinas, that the King was not restrained by law because he controlled coercion, was widely rejected in thirteenth century England. Royal jurisdiction depended on co-operation.⁹¹ In both England and France Giles of Rome's view that

⁸⁵ I.R. Christie, *Wars and Revolutions* (Cambridge, Mass: Edward Arnold, 1982), 21.

⁸⁶ J N Figgis, *The theory of the Divine Right of Kings*, supra note 70.

⁸⁷ J R Lander, *The Limitations of English Monarchy in the Later Middle Ages* (Toronto: University of Toronto Press, 1989), 4-6.

⁸⁸ Sir John Fortescue, *In Praise of the laws of England*, supra note 68.

⁸⁹ Robert Brady argued that Parliament and the common law were not part of an ancient and immemorial constitution, but traceable instead to the Conquest and the institution of feudalism; J.G.A. Pocock, *The Ancient Constitution and the Feudal Law; A Study of English Historical Thought in the Seventeenth Century* (2nd ed., Cambridge: Cambridge University Press, 1987), chap 8; Sir James Holt, *Magna Carta and Medieval Government* (London: Hambledon, 1985), 3-8.

⁹⁰ Sir John Fortescue, *The Governance of England* notes by Charles Plummer (reprint Westport, Connecticut: Hyperion Press, 1979), 172.

⁹¹ Jean Dunbabin, "Government" in J.H. Burns, *The Cambridge History of Medieval Political Thought c.350-c.1450* (Cambridge: Cambridge University Press, 1988), 505-6.

“laws are laid down by the prince and established by princely authority”,⁹² was disputed.⁹³ Bracton regarded the magnates as having an essential role in legislation.⁹⁴

Since 1688 Whigs had insisted that the Sovereign was the servant rather than the master of the people, even though the legal forms implied rather more than this. But this still left the extent of the active role of the Sovereign undecided. For most of the nineteenth century the Whigs assumed a “constitutional monarchy” should keep clear of the everyday turmoil of party politics (as Bagehot would have it), and this ultimately became, in the twentieth century, the official orthodoxy.

It was agreed after 1815 that a Sovereign should be kept out of party politics.⁹⁵ Over the course of the nineteenth century the monarchy moved from sharing government, to having a share in government, to a largely advisory role,⁹⁶ and in the later years of the reign of Victoria the growing importance of organised political parties gave her less room to manoeuvre than her predecessors.⁹⁷ Responsible government prevailed, but the source for executive power remained the royal prerogative, whose basis was the law, not parliamentary sanction.

Since then belief in the supremacy, or sovereignty of Parliament has prevailed. But the ancient balance of the constitution depended not merely upon democracy. It rested – and today still rests in all those countries with a Westminster system of parliamentary democracy and the separation of powers imbued with the principle of the rule of law – upon the supremacy of the Crown-in-Parliament, and the survival of a legitimacy which extends well beyond mere majoritarian representative democracy.

Limitations on the royal prerogative

Harris, and commentators in the United Kingdom, are concerned with the legitimacy of the royal prerogative, but they are also concerned with the question of the accountability of the executive for its actions.

It was long maintained that the royal prerogative was generally non-justiciable (or non-reviewable by the Courts),⁹⁸ though it has always been the function of the courts to determine its existence.⁹⁹ The more usual view now is that the justiciability or non-justiciability depends not upon the nature of the power – as part of the royal prerogative – but upon its subject matter.¹⁰⁰

⁹² Giles of Rome, *De regimine principum* (Rome: 1556), I, ii, 10, 1556 fol 44v.

⁹³ Aquinas in particular was not convinced by the Latin tag; St Thomas Aquinas, ed. J. Gilbey et al (London: Blackfriars, McGraw-Hill, Eyre & Spottiswoode, 1964-80), I, IIae, qu. 90, art 3.

⁹⁴ Henry de Bracton, *On the Laws and Customs of England* (“*Henri de Bracton de Legibus et Consuetudis Anglia*”) ed. G.E. Woodbine; trans. S E Thorne (Cambridge, Massachusetts: Belknap Harvard, 1968), vol II, p 21.

⁹⁵ H J Hanham, *The Nineteenth Century Constitution, 1815-1914* (Cambridge: Cambridge University Press, 1969), 30.

⁹⁶ John Cannon and Ralph Griffiths, *The Oxford Illustrated History of the British Monarchy* (Oxford: Oxford University Press, 1988), 530.

⁹⁷ H.J. Hanham, *The Nineteenth Century Constitution*, supra note 95, at 25.

⁹⁸ For example, see *Barton v R* (1980) 147 CLR 75, 90 per Gibbs AC]; *Chandler v DPP* [1964] AC 763; *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB).

⁹⁹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 per Lord Roskill (obiter) (HL).

¹⁰⁰ *Ibid*; *Black v Chretien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario); *Minister for Arts, Heritage & Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 277-278 per Bowen CJ, 280 per Sheppard J, 302-304 per Wilcox J; 75 ALR 218 (FC); *Macrae v Attorney-General of NSW* (1987) 9 NSWLR 268, 273, 277, 281 per Kirby P, 308 per Priestley JA (CA); *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 (CA); *Century Metals & Mining NL v Yeomans* (1989) 40 FCR 564, 587-588; 100 ALR 383; 22 ALD 730 (FC); *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, 509 per King CJ (FC).

This has the potential effect of widened the scope of judicial review, though the Courts show deference to those who discharge royal prerogative powers, in the expectation that they will exercise such powers fairly, reasonably, and in accordance with law.¹⁰¹

Although the courts can now review the exercise of the royal prerogative in certain instances,¹⁰² as where there is a legitimate expectation, there is no general power of review.¹⁰³ Having said that, in general terms, the exercise of royal prerogative powers is subject to judicial review, although there are exceptions – including the honours prerogative.¹⁰⁴ These limits have been held to apply particularly to the exercise of what may be termed the political aspects of the royal prerogative. This was important in the context of *Black's case*.¹⁰⁵

Despite its broad reach, the Crown prerogative can be limited or displaced by statute.¹⁰⁶ Once a statute fully occupies ground formerly occupied by the royal prerogative, the prerogative goes into abeyance. The Crown may no longer act under the royal prerogative, but must act under and subject to the conditions imposed by the statute.¹⁰⁷ The royal prerogative may revive, however, in some circumstances. Equally importantly, it would seem that the royal prerogative is sufficiently flexible that it may be exercised in ways and circumstances different to those traditional to it. All this makes it subordinate to Parliament. This renders the executive accountable to the courts and to the legislature (the latter through ministerial responsibility). The replacement of the royal prerogative with statute-based executive authority – even if this were desirable in principle – would scarcely increase the real degree of parliamentary control over the actions of the executive.

The fate of the prerogative in Ireland

The abolition of the prerogative – or even its codification – can create problems of its own. The Irish experience hasn't been a happy one. From 1922 the situation became complicated, with the Constitution of the Irish Free State remaining silent on the question of the royal prerogative – which was clearly not then transferred to the government of the State, but which probably preserved the royal prerogative in the hands of the King. It seems that the royal prerogative was unaffected by the advent of the Irish Free State – at least until 1937 (or rather 1936, as shall be seen), and the effective creation of an Irish republic.

The royal prerogative was not transferred or assigned to the Irish government in 1936 or 1937. From 12 December 1936 the King ceased to be such for all purposes except signing treaties and accrediting envoys, since Irish citizens remained subjects of the Crown. Whilst we must remember that the notion of the separation of the Crowns was not fully developed at this time,¹⁰⁸ it does show that the transitional period was one in which clear and simple solutions were not always to be obtained.

¹⁰¹ *Burt v Governor-General* [1992] 3 NZLR 672, 683 (CA).

¹⁰² Such as when it relates to the honours prerogative; *Black v Chretien* (2001) 199 DLR (4th) 228, paras 27 per Laskin JA (Court of Appeal of Ontario).

¹⁰³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

¹⁰⁴ As was found in *Black v Chretien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Attorney-General for the United Kingdom v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Commonwealth v New South Wales* (1923) 33 CLR 1, 38 per Isaacs J; *Barton v Commonwealth* (1974) 131 CLR 477, 484 per Barwick CJ, 510 per Mason J; 48 ALJR 161; 3 ALR 70.

¹⁰⁷ *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).

¹⁰⁸ Generally, see Noel Cox, "The control of advice to the Crown and the development of executive independence in New Zealand" (2001) 13(1) *Bond Law Review* 166-189.

The question now becomes, what happened to the royal prerogative in Ireland after 1943 (or rather, 1937, which was the year the Constitution of Ireland came into force, or 1936, when the Executive Authority (External Relations) Act 1936 replaced the King as Sovereign, and retaining the King – as an organ – only for certain limited external purposes¹⁰⁹)?

It has been claimed that State inherited the royal prerogative. Unfortunately this does not seem to be correct. In the case of *Byrne v Ireland*¹¹⁰ the Supreme Court of Ireland categorically established that the Irish Republic did not inherit the royal prerogative.¹¹¹ It was apparently excluded – indeed this occurred in 1922,¹¹² rather than in 1937, or in 1949, when Ireland became officially as well as effectively a republic.

Had the royal prerogative been included in the 1922 constitution, or subsequently assigned to the Irish State, it would have transferred to the new one in 1937; however it is not clear that it was included. No express provision was made for royal prerogatives in the 1922 Constitution.¹¹³ Certain royal prerogatives continued to be exercised by the King until 1936. The royal prerogatives were left with the King after 1922, and not incorporated into the Constitution.

The Executive Authority (External Relations) Act 1936 restricted the powers of the Crown to signature of treaties and accreditation of envoys. The Act itself did more than restrict the powers of the Crown. In an adroitly worded section,¹¹⁴ it was provided that, from the passage of the Act (12 December 1936), the King “cease[d] to be King” for “all other (if any) purposes”, except for those of s 3(1). The King for the purposes of s 3(1) would be the person who would be his successor under the law of the Irish State – the Act provided for the abdication of King Edward VIII. Section 3(1) does not make the “King” King of Ireland, but rather provides that the King of Australia, Canada, Great Britain, New Zealand, and South Africa, had certain limited and defined responsibilities with respect to Irish foreign relations.

On 29 December 1937 a new Constitution entered into force which was republican in form, if not in name. It made no mention of the King as Sovereign, who had effectively been removed as of the precious December by the Executive Authority (External Relations) Act 1936. This Act continued in force. The King as Sovereign was no longer the head of the Irish executive, but merely an organ or instrument, authorised by the Government of Ireland, to play a specific role in external affairs.

Article 49 of the new Constitution provided for the transmission of the powers, functions, rights and prerogatives held by the Irish State before 11 December 1936,¹¹⁵ to the Oireachtas. The crucial elements to note are that the powers that were transferred under Article 49 were those held by the State at that time, and that these powers were transferred to the legislature, not the executive.

¹⁰⁹ Constitution (Amendment No 27) Act 1936.

¹¹⁰ [1972] IR 241 (Sup Ct (Irl)).

¹¹¹ Supported by *Webb v Ireland* [1988] IR 353 and *Geoghegan v Institute of Chartered Accountants* [1995] 3 IR 86.

¹¹² The Constitution of Saorstát Éireann 1922.

¹¹³ Kevin Costello, “The Expulsion of Prerogative Doctrine from Irish Law: Quantifying and Remediating the Loss of the Royal Prerogatives” (1997) 32 *Irish Jurist* 145-94, 164.

¹¹⁴ Executive Authority (External Relations) Act 1936 (Ireland), s 3(2).

¹¹⁵ The Executive Authority (External Relations) Act 1936 (Ireland) provided that Edward VIII remained king in the Irish Free State until 12th December 1936. The effect of Article 49(1) was that none of the royal prerogatives held by King George VI were transferred. There is also an argument in Ireland that since the Irish Free State had not been consulted as to the abdication of Edward VIII he remained king of Ireland until the office was abolished.

Although the Executive Authority (External Relations) Act 1936 had effectively excised the King as of the 12th December 1936, the new Constitution preserved all “prerogatives” held by the Irish State as of the previous day. The question then becomes this: were the royal prerogatives of the King held by the Irish State on 10th December 1936? If they were, then they were inherited, under the 1937 Constitution, by the Oireachtas. If they were held by the King, as distinct from the State – if that distinction could be made – then they were not inherited.

It would be usual to assume that the powers of the King would be counted among the powers of the state. In the 1922 Constitution the King was envisaged as being part of the state.¹¹⁶ Article 2 stated that “All powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland, and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with, this Constitution”. Article 51 provided that “The Executive Authority of the Irish Free State (Saorstát Eireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown.” Together these would appear to suggest that the royal prerogative – which is probably not mentioned in the Constitution because it is regarded as being a distinct type of law – would be a “prerogative of the state”.

The 1937 Constitution stated that “the powers, functions, rights and prerogatives held by the Irish State” before 11 December 1936 were inherited by the new Constitution. Articles 12 and 51 of the 1922 Constitution could be interpreted as embracing the royal prerogative as part of the powers, not of the Constitution per se, but of the King as the person in whom was vested the Executive Authority of the Irish Free State. However, in 1922 the concept of the division of the Crown was not well developed, and it is likely that the royal prerogative was not intended to be patriated in this manner. Indeed, it would seem that the British Government was opposed to a transfer of the office to the control of the Irish Free State because of the concern that this would harm the unity of the Crown and the royal prerogative. This attitude could only be maintained if the royal prerogative is seen as being distinct from the “executive authority” of the 1922 Constitution.

Thus it is not clear whether the royal prerogative was a “prerogative held by the Irish State”, and therefore inherited by that State in 1937. Although it might be a conceptually stronger argument to assert that the royal prerogative was included in the 1922 Constitution, we are bound by the decisions in *Byrne v Ireland*,¹¹⁷ and subsequent cases, that the royal prerogative was not transferred to the Irish State.

The safest conclusion is that the royal prerogative was not transferred to the Irish Government in 1922, or subsequently prior to 11 December 1936.

It would, in principle, be easy to simply enact that the executive powers of the state are vested in the Sovereign – or the President, in the case of a republic. This is actually done in most realms. For example, the Belize Act 1981, the schedule of which contains the Constitution of Belize, simply provides that:

¹¹⁶ Though he was, in the 1922 Constitution, part of Parliament: “All powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland, and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with, this Constitution” (Art 12).

¹¹⁷ [1972] IR 241 (Sup Ct (Irl)).

The executive authority of Belize is vested in HM.¹¹⁸

Similarly s 61 of the Commonwealth of Australia Constitution Act 1900¹¹⁹ provides that:

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

However, the constitutional provision alone is not a satisfactory basis for executive authority, and in all these latter instances the royal prerogative remains. This has proven to be of benefit, as in Tuvalu, where the Governor General was held to have had discretion to act in "his own, deliberate judgement", despite the stricter wording of the Constitution.¹²⁰ Abolition of the royal prerogative presents some difficulties, both in codifying the law, and also in determining precisely what should be covered. Codification, by its very nature, presupposes that it is possible to provide a precise list of the required powers of the executive.

Conclusion

The replacement of the royal prerogative with statutory authority, whether piecemeal or in its entirety, may be justified on that grounds that this would allow greater parliamentary control of the executive. Whilst this might appear logical from the viewpoint of providing a democratic mandate for governmental action, it risks making a significant change to the constitutional balance. Ministerial responsibility already allows Parliament to exercise a considerable degree of control over the executive, including the use of the royal prerogative. But the principle of separation of powers surely requires that the executive ought to be free, at least to some degree, to exercise its proper functions without undue interference from the other branches of government. Already the royal prerogative is largely subject to judicial review, and it is only exercised – with rare exceptions – on the advice of Ministers responsible to Parliament. The independence of the royal prerogative from parliamentary control is its strength, not a weakness.

Perhaps more fundamentally, the royal prerogative already offers a system of legal powers, immunities and privileges with their own legitimacy and authority, well developed, flexible and venerable. While some reforms may be appropriate, in general the royal prerogative is too valuable to be lost, or seriously weakened, merely to confer greater control by majoritarian parliamentarians over the executive.

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¹¹⁸ s 36(1).

¹¹⁹ 63 & 64 Vict. c. 12 (UK).

¹²⁰ *Amasone v Attorney General* (2003) TVHC4 (Tuvalu); *Constitution of Tuvalu* (1978). See also *Billy Hill v the Governor-General of the Solomon Islands* [1994] SBCA 1 (CA of Solomon Islands).