CHAPTER 2

GENEALOGIES OF THE MODERN CROWN: FROM ST EDWARD TO QUEEN ELIZABETH II

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Introduction

This chapter analyses some key moments in the transition from feudalist royal autocracy to constitutional monarchy in English legal history. It is important because there remain to this day, in all four realms we have studied, significant (though often ill-defined) Crown prerogative and reserve powers. Once the personal powers of a feudal king, they remain in the hands of the sovereign, or vice-regal representatives of the Crown, who are required, by written constitution or convention, to act on the advice of ministers of the Crown. It is often suggested that those who run the executive branch of government are keen to preserve and enhance its powers whilst at the same time avoiding accountability either to parliaments or to the courts. Geoffrey Palmer's career-long efforts to move New Zealand from 'unbridled power' (Palmer 1979) to 'bridled power' (Palmer and Palmer 2004) have focussed on such issues, culminating in his advocacy for a republican written constitution in his most recent books (Palmer and Butler 2016; 2018).

The oftentimes controversial reliance on Crown or royal prerogative powers by those acting in the monarch's service in the executive branch of government is discussed in Chapter 10. Examples include such disparate matters as the dismissal of Gough Whitlam as Prime Minister of Australia by Governor-General John Kerr (1975); the expulsion of Chagos Islanders from Diego Garcia in the Indian Ocean by an Order in Council to make way for a United States war facility (1968–73); the decision of the British Government to authorise the invasion of Iraq prior to support from a House of Commons vote (that was explicitly stated to be purely symbolic and not binding on the government) and without the necessary United Nations Security Council authorisation (2003); the response of the Governor-General of Canada to the request of the Prime Minister, Stephen Harper, to prorogue Parliament when a vote of no confidence seemed imminent (2008); the light shone by the Panama Papers on international tax evasion and offshore banking operations in tiny British Crown colonies

lacking any forms of democratic accountability (2016); and the attempt by the British Prime Minister, Theresa May, to invoke article 50 of the Treaty of Lisbon, thus enabling the United Kingdom to begin exiting from the European Union without the need for parliamentary scrutiny of the Government's decision (2017).

What these diverse examples have in common is a contemporary reliance on Crown prerogative powers that are remnants of absolute powers once vested in divinely ordained medieval English monarchs., which have since developed into a form of government termed constitutional monarchy. An important reason to focus on these residual prerogative powers is that the lack of effective constraints on executive government powers remains a major issue in many liberal democracies. Indeed, Campbell Sharman has argued, that the focus of Australian debates on whether or how to move to a republican constitution entirely misses 'that part of our constitutional structure most in need of change: the limited role of representative institutions in checking the exercise of executive power' (1994: 113).

Crowns

Some of those we interviewed responded initially by identifying the Crown with the material objects on display in the Tower of London. The display there – protected by high-level security – is not 'the' Crown but nine crowns on display in the Jewel House. First and foremost is the St Edward's Crown, crafted in 1661 by Sir Robert Vyner, with later alterations and additions (Keay 2002). The original St Edward's Crown, a medieval relic reportedly dating back to Edward the Confessor, had been melted down on Cromwell's orders along with other regalia in an effort to eradicate symbols of monarchy and replenish the war-depleted coffers of the Commonwealth. When Charles II was restored to the throne, his coronation committee revived the rituals with as much majesty as possible. Chief of these tasks was to 'direct ye remaking such Royall Ornaments and Regalia' to recreate, in the same 'fashion', what had been lost and to 'retain the same names' (Keay 2002: 35). Those who knew better encouraged the pleasing, but unprovable, myth that the St Edward's Crown of 1661 included materials recycled from the original St Edward's Crown – a link in a perpetual chain of sovereignty anchored by a medieval saint (Barclay 2008). Though not invariably used in coronations since then, this was the crown used at the moment of coronation in 1953. It is depicted on the New Zealand Coat of Arms to symbolise Her Majesty as Queen of New Zealand under the Royal Titles Act 1953. Though this crown was recycled from the metals

and stones of previous models, the physicality of a crown has endured for centuries of English history. Ornately fashioned by artifice, it is an enabling ritual object in state ceremonies. For our purposes, however, it is not the qualities of crowns as material objects but the Crown as a metaphor for monarchy itself, and a metonym for the entire the constitutional order in Commonwealth realms. The Crown has evolved into a political symbol of secular constitutional monarchy, combining the distinctive features of the Westminster model of parliamentary governance and representative democracy with the separation of executive, legislative and judicial branches of government.

A Journey of Fits and Starts

The journey towards the modern divisible Crown in Commonwealth nations was not the result of a smooth evolutionary development over the centuries. It is a common conceit that the British constitution can be distinguished from other modern constitutions because it has not been birthed in revolutionary turmoil. Thus a British journalist in 2008 asked, 'Why don't we have a written constitution?' and provided this answer:

> Essentially because the country has been too stable for too long. The governing elites of many European nations, such as France and Germany, have been forced to draw up constitutions in response to popular revolt or war.
>
> Great Britain, by contrast, remained free of the revolutionary fervour that swept much of the Continent in the 19th century. As a result, this country's democracy has been reformed incrementally over centuries rather than in one big bang. For younger countries, including the United States and Australia, codification of their citizens' rights and political systems was an essential step towards independence. Ironically, several based their written constitutions on Britain's unwritten version. (Morris 2008)

'Because of the relative absence of discontinuity here', as British constitutional expert Robert Morris reflected, 'we have kept the apparatus of feudal government' (Morris, Interviews, 2016).

The evolution of English conceptions of the Crown was punctuated by periods of considerable instability fractious interruptions and significant loss of life in civil wars and revolutions. It is just that these violent events occurred well prior to the modern era. The rules of royal succession were by no means clear, and warfare often settled the issue. The contest in 1066 to succeed the saintly, childless Anglo-Saxon king Edward the Confessor, whose name continues to hold a place of primacy in royal regalia, was settled in favour of one of the

two military forces that invaded England that year. It was the Duke of Normandy, William the Conqueror, who seized power and was crowned with St Edward's crown. He introduced a feudal order with Crown ownership of the radical title to all the land of the kingdom. Crown radical title continues as the basis of real property law in common law jurisdictions to this day. The death of William I's son Henry I in 1135 led to a succession struggle between his daughter Matilda and his nephew Stephen. This was initially settled by an invasion and coup d'état in Stephen's favour, but a civil war – sometimes known as 'the Anarchy' – ensued for most of two decades until the Treaty of Wallingford 1153 left Stephen as king, but with Matilda's son as his designated heir. Half a century later John's reign as king was interrupted by civil wars that Magna Carta failed to quell and a period (1216–17) when Louis of France was proclaimed as king in St Paul's cathedral and controlled much of England. The fifteenth century saw utter instability as the kingship alternated from one contender to another in spasms of extreme violence between Yorkist and Lancastrian lineages in conflicts known as the War of the Roses – though its impact in terms of death and destruction was more severe in some regions than others. However insecure the incumbent monarch may have been during many of those conflict-filled decades in the centuries after 1066, the king's legal powers over his barons, bishops, burgesses and subjects were subject to few constraints. Royal absolutism was firmly entrenched with the feudalist form of governance. The king ruled with virtually unbridled power in his own hands.

The Tudor Constitution

The victory of Henry Tudor at Bosworth Field in 1485 ended the War of Roses. Henry VII and the Tudor monarchs who followed him brought peace to the country and bolstered the powers of the state. Yet political and economic earthquakes in the Tudor era led to transformations in how the powers of the Crown came to be exercised and implemented. Henry VIII had been granted the title Fidei Defensor [Defender of the Faith] by Pope Leo X in 1521 as a reward for defending the supremacy of the papacy in matters of faith and Catholic doctrines on sacraments, including marriage. Circumstances changed in the 1530s when the king sought to repudiate both his own marriage and the pope's authority in England. He defied the papacy, declared himself Supreme Head of the Church of England, ordered the dissolution of most monasteries and confiscated their assets resulted in an economic reordering and political transformation of massive proportions. This break from centuries of

fidelity to the most sacred institutions of Christendom in western Europe were for reasons quite different from the religious inspirations of Protestant reformers in other parts of Europe. He needed lawful mechanisms of awe and majesty to legitimate his continuing authority. He found it in the English Parliament.

Parliament was an institution that had played a not overly important role in the constitutional arrangements of the state and occasional law-making from the middle of the thirteenth century. This changed dramatically in the 1530s when Henry VIII turned to Parliament to provide an autochthonous source of legitimation for his repudiation of papal authority, to render lawful his divorce from Queen Catherine and to proclaim himself Head of the Church of England. This was accomplished through the Act of Supremacy 1534. Subsequently Parliament complied with the king's requests – called Bills of Attainder – to condemn to death without trial many of those with whom Henry fell out, including his consort Catherine Howard and his chief minister Thomas Cromwell. Parliament passed acts to alter the rules of royal succession to suit the king's ever-changing circumstances and desires in Acts of Succession 1533, 1536 and 1544. In the preamble to the 1544 Act, Parliament also reinstated 'Defender of the Faith' as one of Henry's titles – in explicit defiance of Pope Paul III's excommunication of the monarch. Oddly, this title remains a royal title to this day – not just for the United Kingdom but also in several Commonwealth realms that have never had an established church. In Canada, for example, the Royal Style and Titles Act 1985 provides that the Queen of Canada is 'Elizabeth the Second, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.'

Decisive Inventions in the Seventeenth Century

The increased role for Parliament in the Tudor constitution was the precursor to even more dramatic constitutional changes in the seventeenth century Stuart era. By the end of that century royal absolutism had been curtailed and replaced by the emergence of a constitutional order within which parliamentary supremacy became the cornerstone. There was a high degree of 'revolutionary fervour' at the time, but those who promoted, argued about and fought for those dramatic changes were inspired by an imagined medieval past rather than a vision of a modern future. An anthropological axiom is that all peoples and communities – and now nations – have myths about their origins and what binds them together (Malinowski

1926, 1944). Some constitutional lawyers too acknowledge the key role that myth and legal fictions play in girding constitutional orders. As barrister and public law specialist Richard Gordon put it, the sovereignty of Parliament, the rule of law and the American Constitution all embrace mythic notions that have become sacrosanct and treated as a 'separate force in society' (Gordon, Interviews, 2016). Origin myths may arise from a slow process of sedimentation, but often they are created consciously as part of a political project to invent traditions (Hobsbawm and Ranger 1983). Political myths, French philosopher Georges Sorel wrote, 'are not descriptions of things, but expressions of a determination to act… A myth cannot be refuted since it is, at bottom, identical with the convictions of a group, being the expression of these convictions in the language of movement' (Sorel 1908 [1999]: 28–29). Myths, particularly political myths, provide charters for action and narratives that legitimise power. They also offer a deep structure that reconciles the eternal problem of ceding authority to a sovereign in order to legitimate organised social control.

Those who write about nations and national identity, therefore, invent and mould stories from the past to explain and justify the present. Aspects of those stories may purport to have their source in historical events – or at least in a latterly revised version of the significance of those events. The myths that will be articulated most persuasively are likely to suit those who are now the governing elite. At various times the myths may be recontested and reframed by wars, usurpations, marriages of royal convenience or inconvenience, witch hunts, pogroms, persecutions, invasions, conquests and such like. Historians, lawyers, politicians and activists remould and recontest myths to suit contemporary conditions and resolve contemporary problems.

In seventeenth century England, political actors contested the powers of the Stuart kings and the extent of Crown prerogatives. In the Ship Money Case (R v. Hampden 1637) the Court of Exchequer Chamber decided (by a narrow majority) that the King's government did have power to impose financial levies on subjects without obtaining parliamentary approval (Keir 1936). As Stephen Sedley, a retired appellate judge, put it: 'It took the rest of the 17th century – a civil war, the king's execution, the implosion of the republic, the restoration of the monarchy and the coup d'état we know as the Glorious Revolution – to establish that government enjoyed no such extra-legal power' (2017: 26). Debates raged, petitions were enacted and members of the House of Commons were imprisoned for indefinite terms by the Court of Star Chamber under prerogative powers exercised by the King's Privy Council.

Civil war broke out twice causing severe devastation in many counties. Though Charles I won the battle in the Ship Money Case, he lost the war that followed. After a trial by the rump of parliamentarians remaining in Westminster – whose authority to sit in judgment on their king he denied – he was executed in 1649 for being a 'tyrant, traitor, murderer and public enemy to the good people of this nation' (Robertson 2010: 186–7).

One of Charles I's sons was restored to the throne (Charles II), but another (James II) lost it in 1688. At that point the Tories – those who had supported the Stuart kings – lost political power to the Whig gentry. Whig parliamentarians invited a large Dutch force to invade England. Following James II's abdication, the leader of the invasion force – Prince William of Orange, son of Charles I's daughter, Mary – became King (reigning alongside his wife, Mary II, a daughter of James II). For the Whigs, though, William III's distinctive merit was not his Stuart connections but that he was a Protestant. In the nature of myth-making, this foreign invasion and unlawful revolutionary seizure of power was transformed in the history books to become the 'Glorious Revolution' and the origin of Westminster constitutional monarchy whereby government is in the name of the king but the executive branch of government is accountable to those elected to parliament. Parliamentary sovereignty had displaced royal absolutism.

Constitutional conventions have enabled incremental evolution in Westminster parliamentary democracies since the seventeenth century. Yet from time to time those in power need reminding about foundational principles of constitutional monarchy established. Thus, in New Zealand in 1975 Robert Muldoon had just led the National Party to a landslide victory in a general election and become prime minister. Immediately after being sworn in, he purported to suspend an Act of Parliament by issuing a press statement promising retrospective legislation to undo the law of a previous government that his party had vowed to overturn. In private litigation before the courts the Chief Justice declared Muldoon's actions to be unlawful. The judge cited just one law to support his decision – the Bill of Rights 1688 – and declared:

> It is a graphic illustration of the depth of our legal heritage and the strength of our constitutional law that a statute passed by the English Parliament nearly three centuries ago to extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country which was then virtually unknown in Europe and on which no Englishman was to set foot for almost another hundred years. (Chief Justice Wild cited in Kós, 2014: 243)

The 'Ancient Constitution' of St Edward

Odd though it may seem, much of the seventeenth century debate about extirpating the abuses of the Stuart kings focussed not on taxes imposed at the time, nor on religion as such, but on an event that took place about six centuries earlier. The year 1066 is a significant date in English history, but was it the date of a *conquest*? It transpired that this question was much more than a matter of mere abstract theory. In the midst of war, rebellion and regicide, enormous efforts in speech-making, litigation and pamphlet writing were devoted to the question of whether the common law could rely upon pre-Norman norms to restrain the prerogative powers of Stuart kings. All agreed that kings were anointed by God to rule. Yet supporters of parliamentary rights and liberties – and, more especially, the members of the House of Commons – who perused the historical record convinced themselves that the notion of a clean constitutional break in 1066 could not be sustained. Many protagonists in the debates were lawyers. A particularly influential advocate of parliamentary rights against the prerogative powers claimed by Charles I was Sir Edward Coke, a former Lord Chief Justice who had been peremptorily dismissed by James I for failing to uphold the King's view of his royal prerogative powers. Judicial tenure at that time was purely at His Majesty's pleasure, and numerous judges were dismissed for failing to support the king. In a previous century Coke might have been executed for treason, as it was he lived to play a major role in challenging royal autocracy.

The myths surrounding 1066 start from the undoubted historical fact that William, Duke of Normandy, entered England with an invasion force to vindicate his claim to the English throne. His common name – William the Conqueror – assumes that this invasion was a clean break from the law and government of the Anglo-Saxon and Danish kingdoms that he and his barons displaced. The French-speaking Anglo-Norman elite created a feudal system. Royal courts developed and judges applied a system of rules that we now refer to as the English common law. This common law – the law common to the entire realm of England – eventually displaced local customs and baronial jurisdictions but not until well after 1066. Yet it was generally taken for granted by its practitioners that the common law had been established from time immemorial. John Baker quotes the words of an English serjeant-at-law in 1470 who maintained that 'the common law had been in existence since the creation of the world.' As Baker observes 'it is not improbable that he believed it literally' (2002: 1). Again, when considering Coke's writings, J. G. A. Pocock noted:

> The English supposed that the common law was the only law their land had ever known, and this by itself encouraged them to interpret the past as if it had been governed by the law of their own day; but in addition the fact that the common law was a customary law, and that lawyers defined custom in a way which heavily emphasized its immemorial character, made even more radical the English tendency to read existing law into the remote past. (1987: 30–31)

In their bitter contest with Charles I, Coke and his colleagues were most determined to undermine royal prerogative powers – such as the alleged rights of the king to prorogue or dissolve parliament at will and to raise revenues without parliamentary assent. If William I once had absolute power over the realm of England by dint of conquest, then all his successors might legitimately claim absolute power as God's anointed, ordained to rule as they thought prudent and just. If, however, kings of England since time immemorial were required to legislate with the houses of Parliament as three coordinate estates in the government of the kingdom – King, Lords and Commons – then matters were rather different. Bracton could be, and was, cited for his views on the bridles on a king's powers:

> For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver. (Thorne 1968: 305)

Presumably Geoffrey and Matthew Palmer had Bracton's metaphor in mind when entitling their books cited above on unbridled and bridled power in New Zealand.

But Bracton was a thirteenth-century writer. It was the canonised pre-1066 figure of Edward, King and Confessor, from whom seventeenth-century advocates for curtailing royal absolutism sought inspiration. St Edward was seen as a poignant symbol of how Anglo-Saxon kings had ruled their subjects with justice in the 'ancient constitution' of England. As Coke was writing his *Institutes* he found it highly convenient to cite a number of texts on the 'ancient constitution' as it had been fashioned by customs that could be said to derive from time immemorial. What he treated as authoritative sources included a number of apocryphal texts such as *Leges Edwardi Confessoris*, *Modus Tenendi Parliamentum*, and what Pocock calls 'the lavishly fantastic' *Mirror of Justices*. There are, Pocock observes, 'few pages of his *First* or *Second Institutes* on which one of these works is not cited' (1987: 43). William Prynne, a pamphleteer commissioned to expound on the legality of the parliamentary cause

during the civil war period in the 1640s, likewise relied extensively on the same sources (Greenberg 2001: 216–217).

Even in Coke's own time some doubted the historicity of these texts. Polydore Vergil expressed doubts that the laws of the last Anglo-Saxon king had been confirmed by the Conqueror and his Norman successors (Pocock 1987: 18–19, 43). Historians now agree that all Coke's 'ancient' texts were latter-day reconstructions. They were not written during the reign of Edward (1042-66) but at least 100 years later and up to 300 years later: 'they were manufactured by clergymen and politicians who backdated them in order to produce the illusion of antiquity' (Greenberg 2001: 9). Doubts about their authenticity were disregarded by Coke, Prynne and others who were determined to demonstrate an 'ancient constitution.' Rights and liberties from Anglo-Saxon times, included in coronation oaths by many monarchs, had circumscribed the prerogative powers of the monarch and acknowledged the role of Parliament in the constitution. This undermined royalist claims that the divinely ordained king had absolute powers:

> Coke not only accepts a legal judgment dating a law from time out of mind as historically valid, but he regards such statements as better historical evidence than those made by chroniclers. Where the courts have adjudged an institution immemorial and a historian alleges that it was set up in such a king's reign, Coke leaves little doubt that we are to think the historian wrong, and he urges the historiographers of his own day to consult a lawyer before making any statement about the history of the law. (Pocock 1987: 40–41)

Coke was adamant that the historical veracity (or otherwise) of the laws of Edward was irrelevant. They were believed to be true, or they were believed in as true principles of an 'ancient constitution', by people taking a leading role in reshaping and inventing an English constitution for the seventeenth century and the future. As J. P. Reid put it, 'ancient constitutionalism was less history than advocacy, more imagination than scholarship, yet real enough to be the basic tool for both constitutional argumentation and for the defence of collective liberty' (1993: 207).

The Role of Magna Carta Then and Now

Advocacy rather than history must undoubtedly be to the fore when assessing Coke's role as a member of the House of Commons who drafted and promoted the passage of the Petition of Right 1627. That Petition required the 'common consent by Act of Parliament' for any

payments or taxes, forbade the imprisonment of freemen who refused to pay royal imposts made without parliamentary consent, and prohibited proceedings by martial law. As the eminent Anglo-American scholar Arthur Goodhart noted, Coke made much of Magna Carta in advocating passage of that Petition,:

> I know that prerogative is part of the law, but 'Sovereign Power' is no parliamentary word. In my opinion it weakens Magna Charta [*sic*], and all the statutes; … Take we heed what we yield unto: Magna Charta is such a fellow, that he will have no 'Sovereign'.

Goodhart then commented:

> It has been said that Coke either intentionally or unintentionally misinterpreted the Charter, … What is true is that Coke did not always distinguish between the original Charter and the Charter as it was understood in later centuries, … but he was not analyzing the technical provisions of an ancient Charter: he was concerned with the principles of a living constitution. (1966: 68)

The laws of St Edward and Magna Carta were and are hugely important elements of a myth of an 'ancient' English constitution. The myths represented an understanding of constitutional norms that eventually did indeed come to be 'true' in a way that a modern legal positivist would understand. They were translated into real laws such as the Petition of Right 1627, the Bill of Rights 1688 and the Act of Settlement 1700. Idealised notions of a constitutional monarchy and of an independent judiciary – unsupported at the time court precedents were handed down by judges subservient to the kings who appointed them – eventually became constitutional facts and accepted legal norms. Myths that began as tools of contested legal debate at the beginning of the seventeenth century were embedded in the English constitution by the end of that century. Moreover, the Imperial Laws Application Act 1988 in New Zealand retains English statutes of high constitutional principle as part of the law of New Zealand to this day.

Tensions between history, myth and law in relation to constitutional principles continue into the twenty-first century. This was particularly evident in the celebrations of the 800th anniversary of Magna Carta in 2015. One member of the United Kingdom Supreme Court, Lord Sumption, sought to demystify Magna Carta in no uncertain terms. His stinging broadside aimed at those who invoke the medieval charter sealed at Runnymede in support of modern political agendas included these comments:

> Now I have nothing against the liberty of the subject, the rule of law, the Human Rights Convention, legal aid, democracy, motherhood and apple pie or even international marketing opportunities for lawyers. But I do have a problem with the distortion of history to serve an essentially modern political agenda. Claims like those which I have just cited are high-minded tosh. They represent the worst kind of ahistorical Whiggism. (2015: 4)

Sumption noted two main schools of thought about Magna Carta. One 'holds the charter to be a major constitutional document, the foundation of the rule of law and the liberty of the subject in England.' The historian's view, on the other hand, 'has tended to emphasise the self-interested motives of the barons and has generally been sceptical about the charter's constitutional significance' (Sumption 2015: 1). An Australian academic described this binary as a contest between 'votaries', who are true believers in Magna Carta as a source of justice and freedom, and 'sceptics', who tend to Krygier's view that 'The cult of Magna Carta is historical nonsense. No wonder Oliver Cromwell called it "Magna Farta".' (2016: 11–16)

Why, then, do so many people regard the Magna Carta as the historical origin of important elements of rule of law, due process and representative parliamentary democracy? Sumption has a simple answer: 'Magna Carta as we know it was reinvented in the early seventeenth century, largely by one man, the judge and politician Sir Edward Coke. A man of prodigious learning and bilious disposition …' (2015: 14). Sumption strenuously argued against accepting Coke's inventions:

> So when we commemorate Magna Carta, perhaps the first question that we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not. (2015: 18)

His severe strictures against myths in legal discourse failed to convince other senior members of the British judiciary. The President of the United Kingdom Supreme Court, Lord Neuberger, quoted with approval the sentiments of Lord Bingham:

> The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality. (Bingham 2011: 12)

Neuberger mentioned Sumption's address, but he arrived at very different conclusions to those of his judicial colleague:

> Magna Carta can claim to be the Bible of our constitution, even if its Biblical role is as much based on myth as it is on reality. I would say that, far from being a disgrace to the nation, it represents the United Kingdom's greatest contribution to the world – the rule of law and democratic government. Both these fundamental features of a modern civilised society can be traced back to a shoddy ineffective compromise in a boggy field between a horrible King and his revolting Barons eight centuries ago. (Neuberger 2015: para. 63)

It is apparent, whether historians like it or not, that judges in the twenty-first century are as capable of finding comfort in convenient invented myths as were parliamentarians of the seventeenth century. How do myths and inventions impact on the role of the Crown in the constitutional arrangements of post-colonial common law jurisdictions which are the objects of our study? What intellectual suppleness is required to account for an indivisible British Crown in the nineteenth century morphing into the multitude of Queen's bodies now to be found in Commonwealth realms? Before discussing that question, a brief constitutional history of New Zealand provides some background for understanding the importance of the seventeenth-century English origins of the system of government, and also the continuing role of Crown prerogative powers in that system.

From Indivisible Imperial Crown to Divisible Constitutional Monarchies

Whilst many Māori hold to a different version of the history and mythology of colonial origins – one recognised and upheld by the Waitangi Tribunal (Waitangi Tribunal 2014) – in terms of imperial law, the territory of New Zealand was annexed to the British Empire in 1840. The English Laws Act 1858, the effect of which continues in force under the Imperial Laws Application Act 1988, stipulated 14 January 1840 as the reception date for the application of English laws in New Zealand though the Treaty of Waitangi was not first signed until 6 February (Williams 1988). In the Crown colony period the Governor held the full powers of government in a manner somewhat reminiscent of the powers exercised by Stuart kings. Governors such as George Grey relished the power, as historian Keith Sinclair put it, 'to govern as a despot' (Sinclair 1990).

A settler-controlled responsible government was introduced following the imperial parliament's enactment of the New Zealand Constitution Act 1852. Under that Act, from 1856 an elected ministry responsible to the General Assembly exercised most governance

powers within the colony. Elected ministers assumed responsibility for all aspects of government during the colonial wars in the 1860s after imperial troops withdrew and Native Affairs was transferred from the governor and the imperial government to become a colonial responsibility (Quentin-Baxter & McLean 2017: 15–22).

The gradual evolution from colonial status to independent nation-state took quite a while. The Colony became the Dominion of New Zealand in 1907 and a member of the League of Nations in 1920. Not until 1946 were government departments instructed to stop using the term 'Dominion' (McIntyre 2002) and the next year the Statute of Westminster 1931 (discussed below) was finally adopted in New Zealand thus creating a separate Crown in right of New Zealand (McIntyre 2007). New Zealand was the last of the Dominions to cut the imperial apron-strings and even so clung to British connections when enacting the British Nationality and New Zealand Citizenship Act 1948. By comparison, the separate Crown in Canada followed immediately upon the enactment of the 1931 Statute. The Canadian identity of the Crown was emphasised when the Canadian Citizenship Act 1946 was passed. At Canada's first citizenship ceremony, with great fanfare, individuals from a wide variety of backgrounds were presented with certificates of Canadian citizenship. Among the recipients was Prime Minister Mackenzie King who received certificate 0001 (Knowles 2000: 66).

The Constitution Act 1986 in New Zealand

After 1947 the parliament of New Zealand was still defined by the 1852 imperial enactment, though its legislative competence was broadened by an Amendment Act in 1973. This swept away the quaint limitation of legislative competence to 'peace, order, and good government.' This was probably a meaningless formula after the imperial Colonial Laws Validity Act 1865 had ceased to apply to New Zealand, following its adoption of the Statute of Westminster. However, for avoidance of doubt about extra-territoriality powers but not until 1973, the New Zealand Parliament bestowed on itself 'full power to make laws having effect in, or in respect of New Zealand … and laws having effect outside New Zealand.'

Eventually the 1852 imperial act was repealed after Robert Muldoon made another contribution to constitutional law at the end of his tenure as prime minister in 1984. He refused to adopt the advice of incoming (but not yet sworn-in ministers) to devalue the New

Zealand dollar (Quentin-Baxter & McLean 2017: 174–176). The new government determined that the constitution should be enacted in New Zealand legislation at last. The Constitution Act 1986, though, is a distinctly bare-bones constitution.

Part 1 of the Act concerns 'The Sovereign.' Of its few sections, section 2 reads:

> (1) The Sovereign in right of New Zealand is the head of State of New Zealand, and shall be known by the royal style and titles proclaimed from time to time.
> (2) The Governor-General appointed by the Sovereign is the Sovereign's representative in New Zealand.

Section 3 provides:

> (1) Every power conferred on the Governor-General by or under any Act is a royal power which is exercisable by the Governor-General on behalf of the Sovereign, and may accordingly be exercised either by the Sovereign in person or by the Governor-General.

Section 5 covers 'Demise of the Crown':

> (1) The death of the Sovereign shall have the effect of transferring all the functions, duties, powers, authorities, rights, privileges, and dignities belonging to the Crown to the Sovereign's successor, as determined in accordance with the enactment of the Parliament of England intituled The Act of Settlement (12 & 13 Will 3, c 2) and any other law relating to the succession to the Throne, but shall otherwise have no effect in law for any purpose.

And that is it. Constitutional conventions developed over the centuries in Westminster-style parliaments since the Glorious Revolution and the Act of Settlement 1700 are noticeable only by their total absence. The 'functions, duties, powers, authorities, rights, privileges, and dignities belonging to the Crown' no doubt includes prerogative powers of the Crown, but they are not defined here.

New Zealand retains perhaps the most 'pure' form of Westminster parliamentary sovereignty anywhere in the world. The Constitution Act 1986 is an ordinary statute without any amending formula granting it protection from amendment or repeal by a simple majority in the House of Representatives. In contrast, the parliaments in Australia and Canada have to operate within the restraints of federal constitutions and judicial review to assess the constitutionality of enacted legislation. As we will discuss further in chapter 11, constitutional amendments are few and far between in those nations. Meanwhile, this chapter concludes with some comment on the divisible and multiple Crowns that emerged in the Commonwealth following the Statute of Westminster 1931.

The Indivisible Crown, It Turns Out, Is Divisible

Writing at the turn of the twentieth century, F. W. Maitland – often regarded as the father of modern English legal history – was content to quote with approval words from the Tudor lawyer Plowden on the metaphysical indivisibility of the king's bodies. The king, he wrote,

> has a body natural adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person and make one body and not divers, that is, the body corporate in the body natural *et e contra* the body natural in the body corporate. So that the body natural by the conjunction of the body politic to it (which body politic contains the office, government and majesty royal) is magnified and by the said consolidation hath in it the body politic. (1901: 135–36)

The indivisible Crown of Tudor England, and of the Whig constitution following the Glorious Revolution, had become an indivisible Crown in which the Queen of the United Kingdom and Her Other Realms and Dominions had also been proclaimed to be Empress of India. As Miles Taylor observed, 'British monarchy was … woven into the fabric of Empire' (Taylor 2016: 43).

As the twentieth century unfolded, however, a multi-polity Commonwealth of Nations emerged. Whilst most Commonwealth member nations rapidly moved to republican constitutions shortly after political independence from 1947 onwards, our focus is on those nations that remained under the Crown – but no longer an indivisible imperial Crown. Even before the imperial conferences of the 1920s the divisibility of the Crown had been recognised in a number of court decisions 'as part of the evolutionary and devolutionary process' from Empire to Commonwealth (R v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta 1982: 928–933). In practice and international law, it was the Balfour Declaration 1926, followed by the Statute of Westminster 1931, that enabled the self-governing dominions of Canada and South Africa and the Irish Free State to obtain full legislative autonomy over their own affairs. With separate personality as independent nations, the formerly indivisible British Crown now comprised several Crowns. Unless abolished by statutory fiat, prerogative powers in each of

the separate Crowns continued to be available to clothe government actions with the cloak of legality.

This evolution of the Crown necessarily complicated Plowden and Maitland's understandings of the king's two bodies. Philosopher Giorgio Agamben (1998) argues that the notion of the king's two bodies is a revelation of sovereignty's defining characteristic: its perpetuity. The twinned metaphors of body natural and body politic mean that in states where the body politic dominates, it will endure over the demise of the natural body. Kantorowicz imagined a doubled body, to grasp the sovereign's 'continuous personality', with a 'virtual identity of predecessor and successor' (1997 [1957]: 402). Consequently, this concept of the uninterruptable body politic articulated 'the cipher of the absolute and inhuman character of sovereignty' (Agamben 1998: 62). The concept of the king's two bodies reveals the ritual and theatrical construction of political power. This abstract, transcendental thinking – with one person embodying kingship's dualities of mortal and immortal, abstraction and corporeal, sacred and banal, *gravitas* and *celeritas* (Sahlins 1985) – is probably unparalleled in the secular imagination (Kantorowicz 1997 [1957]: 4).

Yet now we have multiple versions of the Queen's 'two bodies.' Each of the realms over which Elizabeth II reigns as sovereign is a distinct body politic. Some of those polities have federal structures, and the states or provinces are additional separate and discrete Queen's bodies within one realm (Twomey 2018; McLean 2015). Even the non-federal Realm of New Zealand includes separate self-governing states (Cook Islands and Niue) and dependencies (Tokelau and Ross) under the Queen in right of New Zealand (Quentin-Baxter & McLean 2017: 104–106). Clearly there is just the one physical (very elderly) body of Elizabeth II and one physical (quite elderly) body of her heir apparent, but by stretches of the imagination that medieval thinkers certainly could not have contemplated, there are now a very large number of bodies politic that comprise the other body of the Queen or King.

This necessitates a different perspective on the historical evolution of the Crown from that of leading British scholars. Martin Loughlin identifies three phases of monarchical power in the development of the British Constitution. The first was reached by distinguishing between the public and private aspects of kingship; the second recognised the representative nature of the office of the king – an office held in trust for the common good; the third acknowledged the 'necessity for the institutional differentiation of governmental functions between king's

council, king's court, and king-in-Parliament' (Loughlin 2013: 106). Janet McLean insists that Loughlin's chronology does not describe the New Zealand experience either at the point of formal colonisation or in the present day:

> Not only were all three versions of the Crown – personal, moral and institutional – instrumental at the time of the inception of the colony, but different versions of the monarch have also been instrumental in attempts to redress historical grievances between the Crown and Māori. There is a certain internal logic about this and symmetry in the way in which Imperial techniques have played a role in unravelling and redressing the colonial past. The monarch is simultaneously an individual person, an abstract body vested with a moral personality, and is institutionally distinct from the ordinary Crown in Parliament. She represents statehood and continuity in ways that government, as we typically understand it, does not do. (2015: 195–196)

The important roles of the persons of the monarch described by McLean, and the ideological significance attributed by indigenous peoples in Canada and New Zealand to the monarch and to the Crown (often negatively contrasted with the actions of colonial and post-colonial governments), are explored further in Chapter 4. Next, though, we examine another element of Maitland's seminal thinking – his suggestion that reliance on the idea of the 'Crown' is a convenient cover for ignorance – and then we explore the idea of the Crown as a personification of, or metonym for, the modern state.

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