BOOK REVIEW

This Realm of New Zealand: The Sovereign, The Governor-General, The Crown

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I INTRODUCTION

An election year, especially one in which the government changes, is a fitting time to assess the entities that govern New Zealanders, the sources and legitimacy of their powers to do so, and whether they are still fit for purpose.

In *This Realm of New Zealand: The Sovereign, The Governor-General, the Crown*, Alison Quentin-Baxter and Janet McLean provide an accessible account of how New Zealand's constitutional monarchy operates. *This Realm of New Zealand* is simultaneously a historical account, legal text and proposal for reform that comprehensively examines the roles and powers of the three titular entities.

As described in Chapter 1, the text intends to tell New Zealand's constitutional story. Quentin-Baxter and McLean believe there is an "urgent need" to increase New Zealanders' understanding of their constitution and the implications of its reform.[1] The entities, rules and powers detailed in *This Realm of New Zealand* are fundamental to how New Zealand society operates. Yet they are largely mystifying, even to the legally trained. This text explains key aspects of New Zealand's constitutional monarchy by outlining its history, core legal principles and areas where there is potential for change.

II REVIEW OF CHAPTERS

Setting the Scene: New Zealand's Constitutional Origins and Status as a Constitutional Monarchy

In Chapter 2, Quentin-Baxter and McLean chart the British colonial origins of New Zealand's modern constitution. The chapter begins with Queen

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1 Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand: The Sovereign, The Governor-General, the Crown* (Auckland University Press, Auckland, 2017) at 1–2.

Victoria's acquisition of sovereignty and moves to the Treaty of Waitangi and accompanying two Proclamations. The authors then examine how New Zealand became a self-governing colony: from a non-representative government led by a Governor,[2] to a representative General Assembly with the Governor as an executive,[3] and finally to a responsible and representative government.[4] The chapter then focuses on New Zealand's "journey to independence".[5] The chapter considers, importantly, the changing official name of New Zealand from a "Dominion" to a "Realm", and the reduction to eventual cessation of Britain's ability to influence New Zealand's laws.[6] Quentin-Baxter and McLean conclude that New Zealand now has complete constitutional independence from the United Kingdom.

Chapter 3 explains New Zealand's status as a constitutional monarchy. The concept of a 'constitutional monarchy' originates from the United Kingdom gradually reducing the sovereign's influence over the executive. By the time that New Zealand had become a British Colony, the Sovereign's role had evolved; while executive authority remained vested in the Sovereign, this authority is now exercised on the advice of, or directly by, Ministers. Quentin-Baxter and McLean argue that the operation of New Zealand's parliamentary democracy in a constitutional monarchy relies on three concepts. First, formally delegating the authority of the Crown to the Governor-General; secondly, constitutional conventions; and thirdly, conceiving of the Crown as a corporation. Constitutional conventions are described as "indispensable" in allowing a sovereign to exercise legal authority in a constitutional monarchy.[7] Most important is the convention that the Sovereign and Governor-General act on the advice of Ministers.[8] Characterising "the Crown as a corporation" explains how the Sovereign manifests as a legal person in place of the state of New Zealand.[9]

The Sovereign: Constitutional and Personal Roles

Chapter 4 discusses the 'institutional role' of the Sovereign. The chapter begins with Queen Elizabeth II's accession to the throne and the law of succession that enabled her to become the Queen of New Zealand. Quentin-Baxter and McLean then consider the royal styles and titles. The Royal Titles Act 1953 adopted the style and title: Elizabeth the Second, by the Grace of God of the United Kingdom, New Zealand and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.[10] 'Defender of the Faith' is noted to be controversial in that it links the

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2 New South Wales Continuance Act 1840 (UK) 3 & 4 Vict c 62.
3 The Constitution Act 1852 (UK) 15 & 16 Vict c 72, s 32.
4 Despatch from Earl Grey Secretary of State for the Colonies, to RH Wynyard, Officer Administering the Government (8 December 1854) GBPP 1834-5 HC 160 at 39–40.
5 Quentin-Baxter and McLean, above n 1, at 16.
6 At 24–30.
7 At 38.
8 At 38.
9 See 40–48.
10 Royal Titles Act 1953, s 2.

Sovereign to the Church of England. As the authors explain, however, this title likely has a wider meaning in New Zealand and is not linked to the Church of England as English ecclesiastical law was never adopted as part of New Zealand law.[11]After briefly discussing the role of New Zealand in the coronation ceremony, the chapter ends by considering what "allegiance to the Crown" means in New Zealand. Quentin-Baxter and McLean conclude by noting that where in the past the United Kingdom was the model for a monarchical constitution, influence now tends to "flow in either direction."[12]

Chapter 5 considers the personal and working relationships between the Sovereign and office-holders, and the Sovereign and the wider public of New Zealand. The Sovereign and Governor-General enjoy "direct, informal and confidential" communication where the Governor-General can inform the Sovereign of New Zealand affairs.[13] This is said to have assisted Queen Elizabeth II in her role as the Queen of New Zealand.[14] There is a shorter history of direct communication between the Sovereign and the Prime Minister following the Balfour Declaration in 1926. The Sovereign's role is seen to be to "counsel and warn" but not to express views on government acts or policies.[15] The role of Private Secretary to the Sovereign is noted to be particularly important. The Private Secretary ensures that the Sovereign is informed about issues on which their advice may be sought and communicates closely with the Clerk of the Executive Council of New Zealand. This Clerk is responsible for liaising between the executive government and the Sovereign or Governor-General.

Earlier chapters show a general trend of the Sovereign's legal influence over New Zealand lessening over time. However, this chapter makes clear that over this time, the Sovereign's personal relationship with New Zealand has deepened. Ease of travel and communication has meant that Queen Elizabeth II has much closer personal ties with New Zealand than any of her predecessors. The chapter concludes by considering what will happen if the Sovereign becomes ill, incapacitated or dies

The Governor-General: The Sovereign's Representative in New Zealand

Chapter 6 discusses the Letters Patent constituting the office of the Governor-General and Commander-in-Chief of the Realm of New Zealand. The 1983 Letters Patent are summarised as constituting the office, providing for the appointment of, and authorising the exercise of executive authority and other powers by the Governor-General. The Letters Patent also constitute an Executive Council and provide for exercise of the Governor-General's powers

11 *Baldwin v Pascoe* (1889) 7 NZLR 759 (SC).
12 Quentin-Baxter and McLean, above n 1, at 72.
13 At 74–75.
14 At 75.
15 At 76.

where the Governor-General cannot.[16] The current legal status of the Letters Patent is explained as comparable to regulations.[17]

The chapter then considers the Letters Patent's reference to "Our Realm of New Zealand".[18] The present Letters Patent have a territorial reach that includes the Ross Dependency, Tokelau, the Cook Islands and Niue. The Letters Patent do not consistently apply in each country or territory, nor do they preclude each country or territory from having their own representative of the Sovereign. The Sovereign remains titled 'the Sovereign in right of New Zealand' in each country or territory. This is consistent with the general picture that emerges of New Zealand being the "hub of the Realm" in respect of the Letters Patent.[19] Quentin-Baxter and McLean make the important point that the unity of these countries and territories provided by the Letters Patent goes deeper than constitutional or legal ties. In fact, the unity "symbolises the shared experiences and continuing status of the peoples of the Realm".[20] Quentin-Baxter and McLean argue that if New Zealand were to become a republic, this would not change the present relationships between all members of the realm. The reviewer tends to agree with this statement. The New Zealand Ministry of Foreign Affairs and Trade characterises "[o]ur relationship with the Pacific" as "linked by history, culture, politics, and demographics" and emphasises trade, tourism and aid as linking New Zealand to Pacific nations.[21] These links, and multilateral organisations like the Pacific Islands Forum, will continue to maintain close relationships between New Zealand and former members of our 'Realm'.

Having discussed how the office of Governor-General is constituted in Chapter 6, Chapter 7 first considers how appointments are made. A Governor-General is appointed using a "Commission", a legal instrument written in a style similar to the Letters Patent and addressed to "our Trusty and Well-beloved" Governor-General.[22] The chapter makes clear that, despite the Governor-General representing the Sovereign, the responsibility of choosing a Governor-General lies squarely with the Prime Minister "acting with the broad support of the House."[23]

The authors provide their view on what the four key attributes of a Governor-General ought to be. Drawing from the controversial appointment of Sir Keith Holyoake, a then Member of Parliament and member of the Executive Council and Cabinet, the authors argue that the first attribute is political neutrality. Secondly, a Governor-General must be able to represent New Zealand at a head of State level. Thirdly, this "[t]rusty and [w]ell-beloved" individual must be someone "who will enjoy meeting and mixing with all New Zealanders on a wide variety of occasions".[24] Fourthly, they must

16 At 96.
17 At 100–101.
18 At 104.
19 At 112–113.
20 At 109.
21 "Our relationship with the Pacific" New Zealand Foreign Affairs & Trade <www.mfat.govt.nz>.
22 At 128.
23 At 123.
24 At 124.

be "of high personal standing and good character".[25] The reviewer would add a diversity requirement to ensure that the Governor-General is capable of adequately representing all New Zealanders. Given that significant power is — at least technically — vested in the Governor-General, the reviewer also suggests that a Governor-General must have a deep knowledge of the constitutional and legal aspects of their role. Perhaps reading this text would be a good starting point.

The chapter then examines the perhaps lesser-known role of Governor-General as Commander-in-Chief. Finally, the text turns to the Administrator of the Government, the role generally filed by the Chief Justice where the Governor-General is "not readily available to exercise [prerogative and statutory powers] when the need arises".[26] Quentin-Baxter and McLean acknowledge that having a member of the judiciary fill a role that is part of the legislative and executive branches contradicts the separation of powers. While they consider that the position is "not ideal", "it is hard to think of an appropriate and workable alternative".[27]

The Governor-General's Relationships With Other Core Entities of New Zealand's Constitution

Chapter 8 considers the links between the Sovereign, Governor-General and the Executive. The chapter makes the important point that Ministers' authority to govern is only a delegated authority.[28] Authority to govern belongs to the Sovereign and is delegated to the Governor-General before being delegated to Ministers and their officials.[29] The authors note that most New Zealanders will be unaware of this chain of executive authority. Accordingly, they go on to detail the laws and constitutional conventions that make this arrangement less offensive to New Zealander's democratic sensibilities. It is made clear that the governing principle is "the duty to act on ministerial advice".[30] The authors argue that this convention, along with the convention of collective ministerial responsibility, has made the chain of governing authority from Sovereign to Ministers a "modern democratic form of government that New Zealanders enjoy today."[31]

Chapter 9 considers the role of the Governor-General in "[f]inding and [c]hanging" a Prime Minister.[32] Both law and convention play a role here. The power to appoint a Prime Minister and the power to dissolve Parliament are legal powers. The former is recognised as an exercise of the Sovereign's prerogative powers delegated to the Governor-General in the Letters Patent. The latter is sourced in the Constitution Act 1986.[33] The remaining powers of

25 At 124.
26 At 137.
27 At 141.
28 At 142.
29 At 142.
30 At 163.
31 At 164.
32 At 168.
33 Letters Patent 1983, cl 10; and Constitution Act 1986, s 18(2).

the Governor-General in this context are sourced in convention. Discussing these conventions allows the authors to introduce and explain the importance of the Cabinet Manual. The manual is stated to be "an authoritative statement of the relevant constitutional conventions as they are currently understood".[34] The chapter then discusses the steps that follow a general election, covering a range of potential outcomes and their consequences, weaving in historical examples.

Chapter 10 considers whether the Governor-General has any rights or responsibilities relating to the decisions and policies of a government. The chapter first confronts the hypothetical situation of a Governor-General refusing to act on the advice of government ministers. The authors suggest that in the present position, a Governor-General may object to a particular government action if it conflicts with a basic constitutional principle. Such objections should be discussed with the Prime Minister and if the Prime Minister nonetheless maintains the proposed action, the Governor-General should generally leave the matter. The chapter then considers a second hypothetical situation: whether the Governor-General can dismiss a Prime Minister. Drawing from the near dismissal of Sir Robert Muldoon in his final days in office, the authors consider that the Governor-General does have the legal power to dismiss a Prime Minister. They note that pragmatically, however, this course would be unpopular and possibly lead to significant constitutional change.

McLean and Quentin-Baxter propose reforming the working relationship between the Governor-General and the Prime Minister. They argue that a confidential and "direct line of communication" akin to that between the British Prime Minister and the Queen should be established to enable to the Governor-General to express concerns and cause the Prime Minister to pause before acting.[35] The reviewer considers that this proposal may conflict with the authors' suggestion that political neutrality is a key attribute of a good Governor-General. The authors also advocate for clarifying the principles governing the relationship between Governor-General and Ministers in the Cabinet Manual. This includes maintaining the Governor-General's legal power to appoint and dismiss a Prime Minister and to act on Minister's advice unless the Governor-General is required by law or constitutional convention to act otherwise.

Chapter 11 considers the relationship between the Governor-General and the legislature, in particular, how royal assent and consent operate. Historically, statute explicitly referred to a Governor-General's discretion to refuse assent.[36] This is considered to originate from a time where the United Kingdom retained some law-making power in New Zealand and could require the Governor-General to protect Imperial interests by halting the progression of some bills. Parliament later removed reference to this discretion and the Constitution Act 1986 now requires the Governor-General's assent for a Bill

34 Quentin-Baxter and McLean, above n 1, at 171.
35 At 227.
36 See New Zealand Constitution Act 1852, s 56.

to become law. However, the Constitution Act is silent on whether assent may be withheld.[37] This leads the authors to question whether royal assent could currently be used as a constitutional safeguard against government action. The authors note two circumstances where a Governor-General could legitimately withhold consent. First, where a bill has not reached the assent stage using the correct parliamentary procedures; secondly, where "a fundamental premise of democracy is put at risk."[38] The authors, however, consider that using or threatening to use this second power would only ever occur in the "*most extreme* cases".[39] In practice, if a Governor-General were ever to refuse assent, the authors argue that the Government could advise the Sovereign to dismiss the Governor-General. The authors conclude that if the power to refuse assent is a constitutional safeguard, it is an unreliable one.

The lesser-known royal *consent* is required before bills affecting the "rights or prerogatives of the Crown" can proceed in the House.[40] McLean and Quentin-Baxter suggest removing this requirement given the existing protection of the Crown's prerogative in s 27 of the Interpretation Act 1999.

Chapter 12 considers the relationship between the Governor-General and the courts through the prerogative of mercy. The Sovereign's prerogative power to grant mercy is delegated to the Governor-General in the Letters Patent but, as is made clear, the Governor-General has minimal personal influence. The authors explain the current process whereby the Governor-General refers any requests he or she receives to the Ministry of Justice. The Executive Council and Cabinet will then consider the Ministry's recommendation to refer the matter to the Court of Appeal.[41] The Court of Appeal can then hear and determine the issues as in a normal appeal or produce an opinion for the Governor-General to act on when recommended by the Minister of Justice.[42] The authors consider alternatives to the present practice, including a Criminal Case Review Commission like that seen in Scotland, England and Wales and Northern Ireland. The reviewer notes that since publication, on 27 September 2018, Justice Minister Andrew Little introduced a Bill to establish a New Zealand Criminal Cases Review Commission.[43] The operation of the prerogative of mercy may consequently soon change.

Chapter 13 considers the constitutional aspects of the relationship between the Crown and Māori. The chapter first focuses on the Sovereign's symbolic status for Māori as the maker of historic promises. In the preamble of the Treaty of Waitangi (English text), Queen Victoria was said to be "anxious to protect [Māori] just Rights and Property and to secure to them the enjoyment of Peace and Good Order". These sentiments led some Māori to

37 See Constitution Act 1986, s 16.
38 Quentin-Baxter and McLean, above n 1, at 243.
39 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [19.9]–[19.10] as cited in Quentin-Baxter and McLean, above n 1, at 244.
40 Standing Orders of the House of Representatives 2017, SO 313.
41 Crimes Act 1961, s 406(1).
42 Section 406(1)(a) and (b).
43 Criminal Cases Review Commission Bill 2018 (106-1).

view that the Sovereign had honourable intentions and it was her officials who were responsible for the harm suffered under colonial rule.[44] The Crown was viewed to be honourable where the Government was not.

The chapter then considers the centrality of the Crown in more modern attempts to redress colonial wrongs. The Waitangi Tribunal, courts and Deeds of Settlement consider the Crown to be the party who makes redress and acknowledges past wrongdoing. This is so despite many of the historical wrongdoers not being a part of this entity. The authors conclude the chapter by considering the implications for Māori if New Zealand were to become a republic. The Treaty was between Māori and the Crown and the authors consider that significant Māori consent would be required if a new party were to be substituted with the Crown.[45]

In Chapter 14, readers' attention is drawn back to the Governor-General and considers his or her role as 'Head of State'. The chapter makes clear that the Governor-General must act on the advice of the Prime Minister or Minister of Foreign Affairs when acting as Head of State in matters of international relations. The Governor-General has a limited role in international-treaty making which is now mainly done at the Head of Government level. However, the Governor-General still maintains a largely ceremonial role in accepting foreign diplomats to New Zealand. The Governor-General also represents New Zealand on state visits to other countries and at particular overseas events when invited by the Prime Minister.

The chapter then describes the Governor-General's 'programme', that is, the causes that the Governor-General chooses to pursue while in office. The chapter also outlines the Governor-General's role in awarding honours, appointing officers of the armed forces and how far a Governor-General may go in expressing political views.

Republican Reform?

The final section of the book is an afterword, considering the potential for a republican constitution. The authors emphasise the need for consultation and for an accessible written constitution to be produced. Quentin-Baxter and McLean consider that appetite for change stems from a sense of New Zealand identity that is not tied to Britain, rather than a desire for constitutional change.[46] Their proposed reform reflects this. The authors appear to favour executive authority being vested in a Head of State and the exercise of that authority being delegated to the Prime Minister and Cabinet.[47] The Head of State would have a non-political role similar to that of the present Governor-General and would be chosen by Members of Parliament.[48] The chapter briefly considers some of the key changes that a republican constitution would

44 Quentin-Baxter and McLean, above n 1, at 264.
45 At 279.
46 At 311.
47 At 323.
48 At 324–325.

require, including to existing law, Parliament, the Treaty and matters of allegiance. These may include the Speaker or Clerk of the Housing taking on the role of signing Bills into law, amending all existing laws which are inconsistent with a republican constitution, giving a politically neutral Head of State the role of maintaining Treaty relationships and requiring allegiance to "New Zealand", "the Constitution" or "the laws of New Zealand".[49] Quentin-Baxter and McLean's story about the working of New Zealand's present-day constitutional monarchy ends by emphasising the 'living' nature of a constitution and the lessons from history about making a constitution work for the people that live under it.

III CONCLUSION

This Realm of New Zealand is an important contribution to New Zealand public law scholarship. Quentin-Baxter and McLean successfully demystify New Zealand's constitutional monarchy by giving it historical context, explaining the legal concepts at play and interweaving suggestions for reform. *This Realm of New Zealand* makes its often poorly understood content accessible and interesting through the use of real events, examples and detailed explanations. While the reader is at times left desiring more of the authors' perspective and greater detail about proposals for change, the purpose of the text is to educate — a purpose that is successfully fulfilled.

This Realm of New Zealand paints a picture of New Zealand's constitution as a state where many powers are held by the Sovereign or Governor-General, but in reality only exercised on the advice of democratically elected leaders. Where readers inevitably wonder whether these constitutional arrangements are still relevant, *This Realm of New Zealand* simultaneously shows the importance of the Sovereign and Governor-General as constitutional safeguards and the importance of the Crown's role in modern New Zealand.

Quentin-Baxter and McLean leave readers with a comprehensive understanding of the past through to present operation of New Zealand's constitutional monarchy and, crucially, enable them to form their own opinions on its future.

49 At 330–334.