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The Effect of the Advent of the Mixed-Member Proportional Voting System Upon the Role of the Governor-General of New Zealand

Abstract

[extract] While the Governor-General has come to exercise most, if not all of the functions of the Crown in New Zealand, this has not necessarily resulted in a strengthening of the office. For the Governor-General is both strengthened and weakened by his or her position as representative of the Sovereign. They have the moral authority of the Crown, but share the vulnerability to criticism of that ancient office.

In this respect they came to represent the concept of the Crown in a way which the Governor-General never could whilst remaining an imperial official.

As a Governor-General will occupy the post for only some five years, they have felt constrained to follow, to a great degree, the example set by their predecessors. Like the Sovereign, to a significant extent the office of Governor-General has become institutionalised. It is in their constitutional and political role that this institutionalisation becomes clearest, and most significant. This tendency has been strengthened by the advent of MMP, but it has also encouraged a reappraisal of the office as part of the wider system of government. Most importantly, MMP has signalled reawakened interest in fundamental constitutional reform.

Keywords

New Zealand, role of Governor-General, Mixed-Member Proportional voting system, MMP, constitution

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THE EFFECT OF THE ADVENT OF THE MIXED-MEMBER PROPORTIONAL VOTING SYSTEM UPON THE ROLE OF THE GOVERNOR-GENERAL OF NEW ZEALAND

Noel Cox[1]

Introduction

The Governor-General can be said to have three principal roles, constitutional, ceremonial, and community leadership. Of these, though it is the first which has been the subject of the most intensive study, it is perhaps the third which has greatest day-to-day importance. This role includes commenting on contemporary social trends and virtues. The ceremonial role of the Governor-General is seen as relatively unimportant, due to the lack of a tradition of overt symbolism and ceremony in New Zealand. The varied roles of the Governor-General will be examined in the first section.

The constitutional role of the Governor-General will be considered in the second section. The low profile of the office has encouraged a minimalist perception of the role. Examples from Australia and elsewhere show that this perception is not necessarily accurate. Yet the perception of the office is critical in determining its actual role.

A major factor at present impacting upon the constitutional role of the Governor-General in New Zealand, and therefore the function of the Crown is the on-going impact of the introduction of the Mixed-Member Proportional (MMP) voting system. MMP could alter the balance of the constitution, thereby possibly endangering the position of the Crown. The possible effects of MMP are evaluated in the third section. Whether MMP has weakened the office of Governor-General is yet to be determined, but it may be that the effects are more pronounced in the long-term than they may appear now.

Because the Governor-General is the principal personification of the Crown in New Zealand, the importance of the office within that body cannot be exaggerated. An assessment of the current state of the office is therefore made in the fourth section. In particular, this will ask whether the gradual departure from the

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Westminster model, and the changing relationships within the executive and between executive and Parliament has undermined the position of the Governor-General, or perchance strengthened it.

The roles of the Governor-General

Dame Catherine Tizard, a former Governor-General of New Zealand, has observed that some aspects of the job are not so readily apparent from the outside, in that 'the perspective of an incumbent does differ from that of a constitutional lawyer or political scientist'.[2] In her view, legal powers and political theory have little relevance to the way in which a Governor-General conducts him or herself when in office.[3]

It is generally accepted however that the Governor-General[4] performs three main types of functions, which might be classified as constitutional, ceremonial, and community leadership.[5] The Governor-General is the embodiment of the Crown, the manifestation of the organised community. This role (that of community leadership) is, in all normal circumstances, more important than the constitutional role, where the Governor-General represents legitimacy and the continuity of government.

It is also more important than the ceremonial role, whose place in New Zealand, aside from symbolically representing the highest level of government, is uncertain.[6] There is little tradition of overt symbolism and ceremony in New Zealand. Ceremonial events, such as the State Opening of Parliament, have never played a major part of public life in New Zealand.[7] Indeed, unless the Sovereign herself is present, the State Opening is little advertised and ill-attended by the general public.[8]

Why New Zealand, as a country, is not inclined to public display is uncertain, though it may have its origins in the predominantly Anglo-Saxon ethnic composition of the population. A similar attitude has been observed in Australia,

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2 Dame Catherine Tizard, Crown and Anchor; *The Present Role of the Governor-General in New Zealand* (1993) 1.

3 Interview with Dame Catherine Tizard (19 May 1998).

4 And the Sovereign when he or she is resident in New Zealand (and to a limited extent even when absent).

5 See, for example, *The Role of the Governor-General of New Zealand* (1997) 3.

6 Sir Denis Blundell, 'Some Reflections Upon the Office of Governor-General in New Zealand', 10 *VUWLR* 198 (1980).

7 Though the reduction of the frequency of the State Opening of Parliament was solely for reasons of political efficiency, by ending the address and reply debates, rather than as a deliberate attempt to reduce the public role of the Governor-General; Interview with David Lange (20 May 1998).

8 Reflected in the almost complete absence of reporting in the daily newspapers.

where Governors-General since federation have been criticised at times both for excessive ostentation and for 'penny-pinching'.[9]

Like Australians,[10] New Zealanders appear to prefer a Governor-General to live frugally and without state. The size of the vice-regal staff is an indication of this. In 1999/2000, 31 staff and a budget of $3.646m were provided for the New Zealand Governor-General, a mere 18% of the total budget for the Department of the Prime Minister and Cabinet, under whose responsibility it comes.[11]

This compares with 85 staff and A$9,699,314 in Australia, and some 100 staff in Canada.[12] In both these latter two countries the staff includes personnel responsible for the honours system, the responsibility in New Zealand of a separate office in the Department of the Prime Minister and Cabinet.[13] Comparatively low levels of funding for the office in New Zealand have both restricted the scope of its activities,[14] and reflect an official parsimoniousness apparent from the nineteenth century.[15]

It is perhaps the inheritance of a British tradition of simple though strong government that has meant that there is little official pageantry in New Zealand public life. What little ceremony existed focused on the Sovereign. Where the Sovereign is absent it focused on their representative- and was but a pale imitation.[16] This did little to foster a belief that the Governor-General was anything but the slightest of figureheads.

It is perhaps in their community leadership role that the Governor-General is most important. It is Dame Catherine Tizard's belief that the chief role of the Governor-General is more and more one of affirming moral and social ideas and ideals. She believes that the Governor-General is supposed to generalise, to

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9 Christopher Cunneen, *King's Men: Australia's Governors-General from Hopetoun to Isaacs: Australia's Governors-General from Hopetoun to Isaacs* (1983).

10 Ibid.

11 Estimates of Appropriations for the Government of New Zealand 1999-2000 (1999) B.5 vol III, 116.

12 Annual Report, 1994-95, Office of the Official Secretary to the Governor-General of Australia; Public Information Directorate, Government House, Ottawa.

13 The Honours Secretariat, itself also notoriously ill-funded, at least formerly.

14 The Office is particularly keen for publicity material to be disseminated, but lacks the resources to do so itself; Interview with Hugo Judd (14 April 1998).

15 Several Governors, including the Earl of Glasgow in 1897, resigned (or threatened to do so) because they could not live on their salary. This problem led to the passage of the Governors Salary and Allowance Act under Glasgow's successor, the Earl of Ranfurly.

16 This certainly would be consistent with the thesis that most British ceremonial is of modern origin, and created to encourage loyalty to the Crown; Eric Hobsbawn and Terence Ranger, The Invention of Tradition (1983).

suggest, to assert and instil civic virtues.[17] This is achieved principally through speeches, and the occasional written contribution.[18]

One of the former expressions of vice-regal thinking deserves to be quoted, as an indication of the considerations which constantly influence the Governor-General's speeches:[19]

> I have been asked to speak about 'Church and State': a very general topic, as Mr Logan commented to me. I take it that by 'State' is meant government in its wider sense, the body that governs by making laws and administering the affairs of the nation. And that makes it a delicate topic for a Governor-General, perhaps a dangerous one. For it comes close to being political, and the cardinal rule for a Governor-General is *never* to be political. There are those who think he or she should not even be controversial, but I don't go along with that. The question 'What do we pay you for, then?' that is sometimes the response to my refusal to speak or act politically, would surely be justified if the Governor-General spoke only airy nothings.
>
> I take my lead from my Australian counterpart, who has said that he is entitled to raise questions and to probe issues of social concern but that he becomes political if he proposes solutions; to which I would add this qualification, solutions about which political parties have differing views. It is a fine line indeed, and I shall do my best to tread on the correct side of it.[20]

It is in their community leadership role that the Governor-General enjoys the greatest freedom, and, potentially risks also. This will depend on how far the incumbent wishes to go in commenting on matters of political policy.[21] It is also a role which has little relation to the political or constitutional role of the office. Yet it is a role which allows them noticeably greater freedom than is enjoyed by the Sovereign in the United Kingdom, as their speeches are subject to less ministerial oversight.[22]

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17 Tizard, above n 2, 4.

18 Other recent examples include the Easter 1999 Guest Editorial for the Otago Daily Times, entitled, 'A Resurrection of Leadership' (emphasied the need for youth leadership); and 'Should New Zealand be a Dictatorship?' (Auckland Club Black Tie Dinner, Auckland 7 September 1999) (calling for people to become deeply involved in the life of our nation, and in our local communities).

19 Speeches are written by the Governor-General him or herself, with the occasional assistance of the Official Secretary; Interview with Hugo Judd, above n 14.

20 Building a Civil Society, (New Zealand Education Development Foundation's Seminar on The Family, Community, Church and State, Christchurch, 18 September 1999).

21 The qualification suggested by Sir Michael is consistent with the approach taken by the Prince of Wales. The creation of the Prince's Trust (1976), Business in the Community (1981) illustrate this practical role.

22 Interview with Hugo Judd, above n 14.

The constitutional role

As the Sovereign is normally absent, the Governor-General is the personification of the Crown in New Zealand.[23] The extent of the Sovereign's involvement in New Zealand is limited by the simple facts of geography, and by her being concurrently Sovereign of a score of other countries.[24]

The Sovereign may potentially be involved in instances of the active exercise, or failure to exercise, of the reserve powers of the Crown (as distinct from gubernatorial powers), as in the Fiji crisis.[25] But evidence would appear to show that the Governor-General, once appointed, is regarded by the Queen as being entirely responsible for the conduct of her government.[26] Sir Paul Hasluck observed that he would 'find it hard to conceive any situation in which the Sovereign would have either the wish or the opportunity to countermand what the Governor-General had done'.[27]

There have however been a number of occasions where a Governor-General, or the Governor of a colony enjoying responsible government, has been dismissed or has retired prematurely under political pressure.

The first was in 1932, when James McNeill was dismissed by King George V on the advice of de Valera, for attending an official reception at the French legation as a representative of the Crown, of which de Valera, as a republican, disapproved. Further instances are recorded.[28] None however has occurred in New Zealand.[29]

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23 In this respect the Governor-General is regarded by the Australians for Constitutional Monarchy as effectively the head of State of Australia; Tony Abbott, *How to Win the Constitutional War and Give Both Sides What They Want* (1997) 17-18.

24 In the course of a nearly 50 years reign, the present Queen has visited New Zealand nine times. Given its relative size and distance from her home, New Zealand has done well compared to Canada and Australia, which have had 20 and 14 respectively; Ronald Allison & Lady Riddell, *The Royal Encyclopedia* (1991) 614-616; private information.

25 FM Brookfield, 'The Fiji Revolution of 1987' (1988) *NZLJ* 250; GM Illingworth, 'Revolution and the Crown' (1987) *NZLJ* 207.

26 Andrew Ladley, 'The Head of State' in Raymond Miller (ed), *New Zealand Politics in Transition* (1997) 53-55.

27 Sir Paul Hasluck, *The Office of Governor-General* (1979) 28n.

28 David Butler and DA Low, *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (1991) 352. Examples since 1991 include St Lucia and Tuvalu.

29 Though several have retired early, including Sir Keith Holyoake, who had indicated when appointed that he would only serve three years. At least in part this may have been a concession to criticism of his appointment; Auckland District Law Society Public Issues Committee, The Holyoake Appointment (1977).

There has been no instance where the advice of a Prime Minister to dismiss a Governor-General has been rejected, but the Sovereign could legally do so.[30] It is uncertain whether in practice the Sovereign would always follow such advice, or indeed whether they would revoke the commission of a Governor-General other than in writing.[31] It is however unlikely that the Sovereign would act solely on a telephone conversation with his or her Prime Minister.[32]

The present Sovereign does maintain some involvement with New Zealand, aside from paying periodic visits to this country, during which she exercises as many constitutional functions as can be fitted into her schedule.[33]

Governors-General send regular letters to the Queen to keep her informed about significant political, economic and other events in New Zealand.[34] But the primary responsibility for the government always remains in the hands of the vice-regal officer, as was shown by the response of Buckingham Palace to the Australian crisis of 1975,[35] where the Governor-General dismissed the Prime Minister and government after they had failed to secure the passage of the Budget against the opposition of the upper house, and the 1987 coups in Fiji.[36]

In the Australian context, Sir John Kerr has made the point that the action of dismissing Prime Minister Gough Whitlam in 1975 was his and his alone.[37] Although there was much criticism of Kerr from various quarters, few seriously

30 Thereby presumably causing the Prime Minister to resign, or ask for a dissolution of Parliament. Either way, it would drag the Sovereign's decision down to the level of party political electioneering.

31 FM Brookfield, 'The Reconstituted Office of Governor-General' (1985) *NZLJ* 256, 260.

32 See evidence given to the Australian Constitutional Commission's Advisory Committee in 1986 by the Revd Mr Haldane-Stevenson (1 October 1986) 333, citing a 1982 letter from Sir William Heseltine. This is particularly so since the incident in 1995 when Her Majesty mistook a well-known Canadian hoaxer for the Prime Minister.

33 As, for example, opening Parliament, assenting to legislation, and receiving diplomatic representatives.

34 Similar practices are followed elsewhere- the Governor-General of Australia regularly reported to the Queen that he had appointed new Ministers; Hasluck, above n 27.

35 The constitutional convention to act on advice need hardly be questioned yet there remains some uncertainty as to the use of the formal procedure of tendering advice to the Sovereign in situations where the responsible Ministers are seeking to pre-empt threatened action of the Sovereign's own representative, the Governor-General.

36 Antony Wood, 'New Zealand' in David Butler and DA Low (eds) above n 28, 114-115. That the responsibility of Head of State had been delegated was reinforced by the response of the Queen to the call for the Crown to honour the Treaty of Waitangi; R Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (1990) 234.

37 Sir John Kerr, *Matters for Judgment: An Autobiography* (1978).

questioned that, once appointed by the Queen, it was his task, and his alone, to exercise the responsibilities of the office of Governor-General.[38]

In 1987, Her Majesty made clear on several occasions that she regarded the Governor-General, Ratu Sir Penaia Ganilau, as solely responsible for the government of Fiji for so long as he remained in office, and declined to receive former Prime Minister Timoci Bavadra after he had been dismissed by the Governor-General on advice of coup leader Lieutenant-Colonel Sitiveni Rabuka.[39]

Although there has been some criticism of this relative inaction, it must be justified on the grounds that the Queen was not able to form a balanced judgement of the unfolding events, and had to rely on her local representative. Had she had the benefit of an advisory staff in London the response of the Palace might have been more proactive.[40] In the circumstances it was perhaps inevitable that a cautious approach was adopted.[41]

Although the Governor-General has primary responsibility for a country, and the Sovereign is rarely involved unless actually visiting, the decision of the 1926 Imperial Conference that the Governors-General of the Dominions were in all essential respects in the same relationship with their Ministers as the king led to a belief that the Governor-General was virtually powerless. The Statute of Westminster 1931 had a similar affect. This was despite the fact that the legal powers of the British Sovereign were no wider than those of a Governor-General.[42]

Indeed, given that a Governor-General has powers specifically conferred upon him or her by a Constitution, they may have powers not possessed by the Sovereign, as may be the case in Australia.[43] Yet the perception was always otherwise, not because of doubts about legal powers, but of the willingness to use them:[44]

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38 The Speaker of the Senate had in fact called for the Queen to dismiss Kerr, but Buckingham Palace responded that the Queen would only do such a thing on the advice of her Prime Minister.

39 Brookfield, above n 25, 250.

40 Although the Royal Household numbers some 600 individuals, the Private Secretary, a deputy and an assistant are the only source of advice of a political nature. In contrast the German President's Office, which numbers only 100 individuals, includes some 20 advisory staff. Governors-General traditionally have also relied upon a sole Official Secretary; Franz Spath, 'Das Bundespräsidialamt' (1982); private sources.

41 See also GM Illingworth, above n 25.

42 Geoffrey Sawyer, 'The Governor-General of the Commonwealth of Australia' (1976) 52 *Current Affairs Bulletin* 20, 25.

43 *The Commonwealth of Australia Constitution Act 1900* appears to confer powers additional to those in the Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia (29 October 1900).

44 RQ Quentin-Baxter, 'The Governor-General's Constitutional Discretion', 10 *VUWLR* (1980) 289, 300.

> British Ministers have not doubted the free will of the Sovereign ... but in other Commonwealth countries Ministers have seldom had any real conviction about the free will of the Governor-General.

The Governor-General may for most purposes be said to be in a position analogous to that of the Sovereign, with one significant distinction. They remain, by definition, an official, subordinate to someone else from whom they derive at least part of their legal power, and much of their social standing. And, as an official, they are relatively transitory.[45]

This latter aspect in particular has led to the office of Governor-General becoming institutionalised, confined, like the Sovereign, to following precedent, but largely unable, because of their impermanence, to alter the conditions in which they find themselves.[46]

New Zealand

In New Zealand, as in Australia, formal legislation gives the Governor-General considerably wider authority than it would have been accepted that they would exercise if merely a simulacrum of the Sovereign. Both the New Zealand Constitution Act 1852 and the Letters Patent of 1917 constituting the office of Governor-General[47] gave considerably more power to the Governor-General of New Zealand than was ever exercised, or indeed was ever likely to be exercised.[48]

Yet because of the absence of an entrenched constitutional document,[49] and because, unlike both Canada and Australia, New Zealand does not have a federal Constitution, the legal and conventional position of the New Zealand Governor-General is more closely akin to the relationship between the British Sovereign and political structure than is any other realm.

Following the granting of responsible government, colonial executive councils had come more and more to conduct their business without the governor present.[50] By

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45 Though not so transitory as Ministers; Interview with Sir Paul Reeves (11 November 1998).

46 Even to the extent of feeling a reluctance on the part of domestic staff to alter the way in which afternoon tea is presented; Interview with Dame Catherine Tizard, above n 3.

47 Letters Patent Constituting the Office of Governor-General of New Zealand (11 May 1917).

48 Ladley, above n 26.

49 Putting aside the problem of the status of the Treaty of Waitangi.

50 In the usual colonial arrangement, the Governor had chaired the Executive Council. The advent of responsible government saw more decisions being taken in the absence of the Governor, with the Council becoming a de facto Cabinet. Members of the Executive Council now include all Ministers, whether members of Cabinet or not, and

the 1920s the Governor-General's relationship with the Executive Council had become largely analogous with that of the Sovereign and the Privy Council in the United Kingdom.[51]

Even though after 1926 the scope of the Governor-General to act on their own initiative, or contrary to the advice of New Zealand Ministers rapidly declined, from 1917 to 1983 the content of the instruments creating the gubernatorial office and the standing instructions for the exercise of its powers remained virtually unchanged.[52]

In 1983 the legal basis for the office of Governor-General was reconstituted following a lengthy review. Redrafting of the letters patent constituting the office of Governor-General had begun in 1967, with the establishment of an inter-departmental committee. A proposed redraft was prepared in 1972.[53] There was consultation with Buckingham Palace during the process of drafting the new letters patent, and the Queen's informal approval was sought before the draft was referred to Parliament for debate prior to enactment by the Queen at the request of the Executive Council.[54]

The 1917 Letters Patent and royal instructions were replaced by a new prerogative instrument,[55] which more accurately reflected the contemporary position of the office. Obsolete elements removed included the requirement that a Governor-General's departure from New Zealand have the formal approval of the British government. Under the new prerogative instrument, the Governor-General is more clearly defined as representative of the Sovereign, and in no respect an agent of the British government.

In New Zealand, the Governor-General exercises most of the royal powers in terms of the Constitution Act 1986 and the Letters Patent of 1983. The Constitution Act 1986, re-enacting the effect of the provisions of the Administrator's Powers Act

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the usual presiding officer is the Governor-General; Interview with Sir David Beattie (15 April 1998).

51 The Privy Council is more than mere the Cabinet meeting in the presence of the Sovereign, indeed, though all Cabinet Ministers will be Privy Counsellors, only a few will attend each meeting, to transact primarily formal business. For the practical role of the Privy Council from the perspective of a former British Minister, see Richard Crossman, *The Diaries of a Cabinet Minister* (1977).

52 For example, the requirement of the *Constitution Act* that the Governor-General transmit to the Secretary of State a copy of every Bill assented to ceased only in 1947; Brookfield, above n 31, 256.

53 Alison Quentin-Baxter, Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand Report [2] (1980).

54 See Wood, above n 36.

55 Letters Patent Constituting the Office of Governor-General of New Zealand, (28 October 1983).

1983, and the Royal Powers Act 1983, and made the statutory role of the Governor-General clear. Section 2 (2) provided that:

> The Governor-General appointed by the Sovereign is the Sovereign's representative in New Zealand.

Any powers conferred by statute on the Governor-General or on the Sovereign might be exercised by either.

The Letters Patent Constituting the Office of Governor-General of New Zealand had a similar effect in respect of prerogative powers. Since 1983 there has been a general delegation of the prerogative, rather than a series of specific delegations.[56] Specifically, these powers and authorities are:[57]

> To exercise on Our behalf the executive authority of Our Realm of New Zealand, either directly or through officers subordinate to Our Governor-General.

It has indeed been questioned whether the Queen retains the right to exercise these delegated powers personally unless actually present in New Zealand.[58]

The Governor-General today enjoys broadly the same formal powers as his or her predecessor of 1926.[59] However, their real power is less. In part this is because the powers which remained with the Governor-General as agent of the British government, and which lingered for some years after 1926,[60] have now gone.

But the perceived powers of the Sovereign in the United Kingdom have also declined since that decade, and the consequences of this have been felt in New Zealand. In particular, this has resulted from the continued debate over the implications of the Glorious Revolution, and perfecting the dynamics of Cabinet government.[61] Thus whilst assuming 'the function of kingship',[62] the Governor-General has been both symbolically strengthened and politically weakened, to the advantage of the political executive.

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56 cl I. The term 'any other person who has been or may be appointed to represent Us in any part of Our Realm' includes the Queen's Representative in the Cook Islands.

57 cl III (a). Clause (b) expands slightly upon this.

58 Sir Michael Hardie Boys, (Speech to the Public Law Class at College House, Christchurch, 10 September 1997).

59 Excepting some obsolete provisions, such as reservation of legislation.

60 The role as channel of communication with London survived to some extent to 1940.

61 William Hodge, The Governor-General: The Evolution of the Office (1988). This paper canvassed the evolution of the office from colonial times to the constitutional reforms of the mid 1980s.

62 R MacGregor Dawson, *The Civil Service of Canada* (1929) 35.

As symbolic representative of the Sovereign the Governor-General is seen as having limited powers (a parallel which may be inapplicable in Australia). At the same the low profile of the office fosters this perception. Countervailing influences are few. But the advent of MMP may be one.

The advent of MMP

A variety of commentators predicted that the advent of Mixed-Member Proportional (MMP) voting for the House of Representatives in 1996 would result in a more activist Governor-General,[63] faced with the need to oversee the formation of a coalition or minority government.[64] They argued that the Crown's reserve powers, hitherto used extremely rarely, if ever, may be used more often, giving the Governor-General more opportunities to exercise control over the incumbent government.

However, as Stockley has observed,[65] it is flawed logic to assume that MMP will require a more interventionist Queen's representative. The Governor-General's role is essentially non-political, in that they do not seek to involve themselves, nor should politicians seek to involve them, in politics. Political power rests with Parliament and the responsible Ministers drawn from members of Parliament.[66]

Arguments that the Governor-General can act as a guardian of the Constitution also overstate the case. Unlike in Australia, there is no constitutionally ordained impasse which would require vice-regal intervention.[67] Like the Sovereign in the

63 Governors-General have published their own views of these matters; Dame Catherine Tizard, 'The Governor-General, MMP and what we want NZ to be', Press (7 July 1993); Sir Michael Hardie Boys, 'The Role of the Governor-General under MMP', 21 *New Zealand International Review* 2 (1996).

64 This, and other viewpoints, have been covered in Bernard Robertson, 'Governor-General Issue Ignored in MMP Debate', *Otago Daily Times*, 6 August 1993 and 'MMP Threatens Governor-General's Powers', *Dominion*, 3 August 1993; Sir Geoffrey Palmer & Matthew Palmer, *Bridled Power- New Zealand Government Under MMP* (1997); Keith Jackson & Alan McRobie, *New Zealand Adopts Proportional Representation* (1998).

65 Andrew Stockley, 'The Governor-General and MMP' (1996) *NZLR* 213.

66 See, for examples, Jonathan Boston, Stephen Levine, Elizabeth McLeay & Nigel Roberts, 'Experimenting with Coalition Government: Preparing to Manage under Proportional Representation in New Zealand' 35 *JCCP* 108 (1997); Jonathan Boston, Stephen Levine, Elizabeth McLeay, Roberts Nigel & Hannah Schmidt, 'Caretaker Governments and the Evolution of Caretaker Conventions in New Zealand', 28 *VUWLR* 629 (1998). Both papers place primary emphasis upon political actors, and make few references to the Governor-General.

67 Unlike in Australia (in one view at least), there is no requirement for the Governor-General to adopt the role of arbiter between two houses of Parliament.

United Kingdom, the Governor-General can only intervene to preserve the constitutional order itself.[68]

In forming governments and dissolving Parliament the Governor-General would have to follow the course of least political risk.[69] They would seek to leave matters of political choice in the hands of the politicians.[70]

If an election gives no clear result it should be a matter for the politicians, not the Governor-General, to resolve. Chen suggests that the Governor-General should commission the leader of the largest party to form a government.[71] But the largest party may be unable to form a government. It is the responsibility of politicians to ensure that the Crown is never without a ministry. The Governor-General should encourage the leaders to reach agreement, but it is their choice (or those of their supporters in Parliament) which determines the composition of a government.

In the event of the political leaders failing to achieve agreement, there is then a limited role for the Governor-General, though as the Governor-General should not prefer any particular form of government, minority or coalition this risks embarrassing the office.[72] The Clerk of the Executive Council, as agent for the Governor-General, liaised with the Prime Minister over the arrangements for the change to the new coalition Government in 1996.[73] But they did not attempt to suggest, let alone impose, any particular coalition.

While the viability of any minority or coalition government is dependent on parliamentary support, there is no need to make formal provision for this, as the conventions are quite clear. MMP reinforces the importance of Parliament, rather

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68 Though, indeed, there have been occasions when pressure groups have, rather optimistically, called upon the Governor-General to intervene in certain areas of government policy.

69 That is not to say that there are not occasional calls for this to change, usually by those opposed to the government of the day; see for example, Harold Evans, The case for a change: in which the author argues that the public interest requires a democratically selected Governor-General or Head of State, and that the people can and should now insist upon it. With an open letter to all Members of the House of Representatives (1979). See, generally, Jonathan Boston, *The Future of Cabinet Government in New Zealand* (1994).

70 Something which Sir Michael Hardie Boys has regularly stressed, and which Sir John Kerr perhaps overlooked to his cost in 1975; Sir Michael Hardie Boys, above n 58.

71 Mai Chen, 'Remedying New Zealand's Constitution in Crisis', (1993) *NZLJ* 22.

72 Boston, above n 69. When the Queen chose the Earl of Home (later Sir Alec Douglas-Home) in preference to RA Butler as British Prime Minister in 1963, there was some criticism of the choice; see Vernon Bogdanor, *The Monarchy and the Constitution* (1995).

73 Sir Michael Hardie-Boys, 'Continuity and Change' (1997 Harkness Lecture, University of Waikato, 31 July 1997).

than revives anachronistic Crown discretion,[74] anachronistic in that no Sovereign since 1839 has prevented the formation of a government. Politicians, rather than the Governor-General, must make the essential choices of selecting a Prime Minister and determining whether to end the life of a Parliament. In this the advent of MMP will make no essential difference.[75]

The task for the Governor-General is to ascertain the will of Parliament. In the case where parties have publicly formed alliances, there is no need for advice from the incumbent Prime Minister or any other source. The outcome would be clear. In other cases he or she would have to act as a facilitator (but not arbitrator), providing such assistance as he or she could to bring about the formation of a government.[76]

There could well be more uncertainty after an election than the nation is used to, perhaps for a period of some weeks. But uncertainty alone is not a problem, so long as there is a clear process for resolving it.[77] Such short-term uncertainty will have little long-term effect on the constitution. But it does serve to emphasise the role of the Governor-General as *pro tempore* head of State, and of the Crown as a part of the political structure of the country. It is the Governor-General, and not the Queen, that the public, as well as political leaders, would expect to resolve any impasse.

As with most other constitutional alterations since 1986, the advent of MMP may have actually brought the Governor-General more closely into alignment with the position of the Sovereign in the United Kingdom. For, in focussing attention once more upon the reserve powers of the Crown, it has acted as a counterbalance to the traditional view of vice-regal versus royal free will,[78] yet it has not gone as far as Australia arguably has.

The advent of MMP may still make a considerable difference to the law and working of the constitution.[79] But this will perhaps not be in the way commentators suggested. For it may be in the long-term evolution of the constitution that its efforts are most clearly felt. Thus, while the actual role of the Governor-General in the selection of Prime Minister may not have markedly

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74 Stockley, above n 65, 213, 217.

75 'The task is, as far as possible, to remain out of politics and inherently political decisions'; Stockley, above n 65, 213 (1996).

76 Boston, above n 72; Elizabeth McLeay, *The Cabinet and Political Power in New Zealand* (1995); Boston, et al, above n 66, 108; Boston, et al above n 66, 629.

77 Hardie Boys, above n 63.

78 RQ Quentin-Baxter, above n 44, 300. While an imperial agent the Governor-General's free will was, of course, held in abeyance by the requirement of adherence to imperial policy.

79 Andrew Sharp, 'Constitution' in Raymond Miller (ed) *New Zealand Government and Politics* (forthcoming) 37-47, 38, 41-42.

altered, an increased emphasis upon vice-regal reserve powers may encourage a reappraisal of the office.

More significantly, the advent of MMP may have had the effect of encouraging further political change, either because of a desire to avoid the uncertainty inherent in coalition governments, or because of a feeling that reform may not have gone far enough. For it might be said that with increased awareness of the office, so the Governor-General has come some way to overcoming the lack of conviction about the free will of the Governor-General.[80] In this it may be seen as continuing the process exemplified by the Constitution Act 1986, which brought the position of the Sovereign more fully within the constitutional apparatus of New Zealand.

In the short term the advent of MMP has not had a marked effect on the office; in the longer term it may strengthen it, if only because it may have strengthened the emphasis upon the office of Governor-General as part of the constitutional framework. In this it may have achieved what the 1975 crisis in Australia did, focussing attention upon the constitution and the role of the Governor-General.

The current state of the Office of Governor-General

Once seen as an instrument of imperial will, the Governor-General is now sometimes seen as a constitutional safeguard against executive despotism.[81] Sir David Beattie was in no doubt that the Governor-General has extensive and undefined powers to act in times of constitutional crises (such as if a government refused to resign despite lacking parliamentary support) and that he can act in his own right as the Queen's representative, informing her of his actions thereafter.[82]

Several instances have shown that the Crown retains a role in special circumstances,[83] but any action risks destroying the institution. To be politically active risks destroying the office, as nearly occurred in Australia in 1975.[84] But failure to act would also be criticised. In part because he or she is a representative of the Crown, the Governor-General seeks to minimise the chances of conflict with

80 Quentin-Baxter, above n 44, 300.

81 Auckland District Law Society Public Issues Committee, The Holyoake Appointment 7 (1977).

82 Sir David Beattie, interviewed in Council Brief, as quoted in Patrick Downey, 'A Constitutional Monarchy' (1986) *NZLJ* 1, 2.

83 *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 25, 90-1 (Grenada CA). The court relied on the doctrine salus populi suprem lex (the safety and preservation of the State is the supreme law).

84 Though arguably the problem there was that Kerr overstepped the mark between resolving constitutional impasses (by active measures) and settling political disputes (which should be left as far as possible to politicians).

Ministers, in most instances simply by seeking to know the wishes of Ministers and altering their actions accordingly.[85]

The right of the Governor-General to be consulted, to encourage, and to warn relies upon the maintenance of good working relations between the Governor-General and his or her Ministers. The giving of advice, and the regular flow of communications, are essential to keep the Governor-General sufficiently well informed so that he or she can fulfil their role. This means that they must try to be, in the words of the Queen as reported by Sir David Beattie, 'the best informed person in New Zealand'.[86] How this could be achieved with the minimal support available to the Governor-General remains unclear, though the resources of the whole of government is theoretically available to the Governor-General.

Both Sir David Beattie, and Hugo Judd, currently Official Secretary to the Governor-General, believed that, although the Governor-General did not receive Cabinet papers, and his or her contact with Ministers was relatively limited, they would be able to obtain any information from government were it their wish to do so.[87] However, in the absence of regular meetings with the Prime Minister, it remains uncertain that this is sufficient to enable the Governor-General to really gain an understanding of political developments were it the wish of the Ministry to keep him or her uninformed.[88]

Some contact is maintained with Ministers on purely social occasions, but the regular contact is limited to the largely formal meetings of the Executive Council.[89] These meetings have however occasionally led to the Governor-General expressing concerns about draft regulations, latterly under Sir David Beattie.[90] Some ministers have also sought to offer the Governor-General occasional briefings, as Sir Douglas Graham did at times during his days as Minister in Charge of Treaty of Waitangi Negotiations.[91]

The effectiveness of the office of Governor-General was limited by a perception of weakness (shared by public and politicians alike), and by the lack of an independent advisory office. Yet, following the advent of MMP, the position of the Governor-General might be strengthened over time, but not in the way usually posited.

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85 For this reason, vice-regal speeches, although not normally shown to Ministers prior to delivery, will always be written with current government (and opposition) policy in mind; Interview with Hugo Judd, above n 14.

86 Interview with Sir David Beattie, above n 50.

87 Ibid. Interview with Hugo Judd, above n 14.

88 It was Dame Catherine Tizard's impression that most Ministers ignored the Governor-General as much as possible; Interview with Dame Catherine Tizard, above n 3.

89 Interview, above n 86; Interview with Sir Douglas Graham (24 November 1999).

90 Interview, above n 86.

91 Interview with Sir Douglas Graham, above n 89.

As Sir Michael Hardie Boys has made clear, the task of making political choices is not one for the Governor-General. There are two considerations which followed from this. Firstly, that the people should understand that fact (that political decisions are made by politicians), and secondly, that there should be a full and frank relationship between the Prime Minister and the Governor-General (so that the Governor-General knows how he or she can assist the government in making these decisions).[92]

If Ministers, and the Prime Minister in particular, were to regard the Governor-General as the one individual, apart from the Queen, in whom they could confide,[93] then over time the office of Governor-General might be strengthened. There would be no increase in legal powers, but with the perception that the Governor-General, like the Sovereign, enjoyed some discretion, the independence, and ultimately the effectiveness of the office could be enhanced.

The advent of regular coalition government, and the decline in Cabinet collective responsibility - the one the consequence of MMP and the other largely unrelated, have both increased the possibility of the Governor-General becoming embroiled in party politics. But while the impression remains that the Governor-General is a 'nodding automaton', politicians are likely to continue to seek resolution of political problems through regular political channels, rather than recourse to the Governor-General.

The principal difficulty which faces the Governor-General is the uncertain perception of the office. Although the constitutional function may be better understood now than in past years, the actual role of the Governor-General is still not widely understood.[94] The office is misunderstood by some politicians, perhaps by most.[95] To some extent this may highlight a weakness in the Bagehot theory of government, with its somewhat artificial division between dignified and efficient elements of government.[96]

It would seem that this conceptual division may be misleading where the 'dignified' element- that which acts as a 'disguise for Cabinet government', is in fact less visible than the 'efficient' elements of government- Parliament and Cabinet. The tradition of a relatively low profile has fostered a minimalist

92 Hardie Boys, above n 63.

93 Even attempts at merely social contact with politicians is apt to be misconstrued by some of the more suspicious types; Interview with Dame Catherine Tizard, above n 3.

94 It is for this reason that Government House would like to see more material published on the office, including a study of past Governors-General, something their own limited budget would never allow; Interview with Hugo Judd, 14 April 1998.

95 Interview with Dame Catherine Tizard, above n 3.

96 Walter Bagehot, 'The English Constitution' in Norman St John-Stevas (ed), *The Collected Works of Walter Bagehot*, Vol 5, (1974) 203.

conception of the role of the Governor-General, not just in his or her constitutional role, but also in their social role.

New Zealand constitutional development since 1840 has been one of the adoption and then gradual departure from the Westminster model of parliamentary monarchy. The abandonment of the first past the post electoral system is arguably just one step in this process. The final direction which constitutional evolution will take will probably depend upon the solution of the most intractable problem in post-colonial New Zealand, the position of Maori.

The position of the Governor-General, and of the Crown, will be determined by the solution chosen. But it will not necessarily mean the abandonment of either, for New Zealand's constitutional structure has for many years been dominated, not by a desire to rid ourselves of an alien monarchy, but by a desire to resolve historic grievances and by contemporary uncertainties of identity and governance.

Conclusion

The decline in the Governor-General's powers over the last seventy years is a reflection of changing conventions. The formal powers of the Governor-General in 1983 were not greatly different from those in 1926, but the means by which they were exercised has changed fundamentally. In 1926 the Governor-General was an agent of the British government, thereafter he became solely the representative of the Sovereign in New Zealand. While an agent of the British government, the Governor-General was expected to exercise a personal discretion, and to refer contentious issues to the British government. As representative of the Sovereign in New Zealand he or she was assumed to have a role limited in the same way as that of the Sovereign.

Successive Governors-General have not sought to question this minimalist view of their role, which has been both emphasised by, and resulted in, a low profile, and have generally contented themselves with social and community activities.[97] Unlike in Australia, there has been, until recently, relatively little commentary on the office from former Governors-General.[98] It is clear however that they have not suffered from any misapprehensions about the limitations of the office.

There may have been an upturn in the status of the Governor-General for purely domestic reasons.[99] Governors-General such as Sir Paul Reeves and Dame Catherine Tizard brought more publicity to the office, but arguably little increase in influence.

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97 Interview with Dame Catherine Tizard, above n 3.

98 Hardie Boys, above n 63; Tizard, above n 2; Tizard, above n 63; Blundell, above n 6; Viscount Cobham, Governor-General's Constitutional Role, 15 *Political Science* 4 (1963).

99 Hodge, above n 61.

While the Governor-General has come to exercise most, if not all of the functions of the Crown in New Zealand, this has not necessarily resulted in a strengthening of the office. For the Governor-General is both strengthened and weakened by his or her position as representative of the Sovereign. They have the moral authority of the Crown, but share the vulnerability to criticism of that ancient office.[100]

In this respect they came to represent the concept of the Crown in a way which the Governor-General never could whilst remaining an imperial official.

As a Governor-General will occupy the post for only some five years, they have felt constrained to follow, to a great degree, the example set by their predecessors. Like the Sovereign, to a significant extent the office of Governor-General has become institutionalised.[101] It is in their constitutional and political role that this institutionalisation becomes clearest, and most significant. This tendency has been strengthened by the advent of MMP, but it has also encouraged a reappraisal of the office as part of the wider system of government. Most importantly, MMP has signalled reawakened interest in fundamental constitutional reform.

The role of the Governor-General is to represent rather than to act, and as such he or she is symbolic of the constitutional order represented by the Crown. Both by strengthening the executive, as seen in Canada, and by the development of a separate kingship, it has promoted independence from a colonial past. The actual political influence of the Governor-General appears to be slight.[102]

At the same time, the evolution of the office of Governor-General both encouraged and mirrored changes taking place in the constitution, particularly the development of an increasingly national Crown. Thus the symbolic change in focus has both directed and been driven by more substantive changes. Thus, the division of the prerogative, established in the 1930s and 1940s, and the division of the Crown itself, illustrated in 1936, were seminal developments which established national independence. The subsequent evolution of national monarchies not so much enhanced independence- which was already a political reality- but made it manifest.

Although the Crown was not used as overtly to gain independence as it was in South Africa, Ireland and Canada, in New Zealand it was one of the principal means through which this was achieved. In so doing it has influenced the development of independence, into a form of national or localised monarchy.

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100 Gareth Grainger, *Australian Constitutional Monarchy and the Future in The Australian Constitutional Monarchy* (Gareth Grainger & Kerry Jones eds., 1994) 163.

101 Interview with Dame Catherine Tizard, above n 3.

102 Interview with Dame Catherine Tizard, above n 3; For an illustration of the effectiveness of influence, see Vernon Bogdanor, above n 72.