The Governor General and the Head of State Functions

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In most, though by no means all democratic states,[1] the "Head of State" is a convenient legal and political fiction the purpose of which is to personify the complex political functions of government. What distinguishes the operations of this fiction in Canada is the fact that the functions of head of state are not discharged by any one person. Some, by legislative enactment, are vested in the Governor General. Others are delegated to the Governor General by the Crown. Still others are exercised by the Queen in person.

A survey of these functions will reveal, however, that many more of the duties of the Canadian head of state are to-day discharged by the Governor General than are performed by the Queen. Indeed, it will reveal that some of the functions cannot be discharged by anyone else. It is essential that we become aware of this development in Canadian constitutional practice and take legal cognizance of the consequently increasing stature and importance of the Queen's representative in Canada.

Formal Vesting of Head of State Functions in Constitutional Governments of the Commonwealth Realms

In most of the realms of the Commonwealth, the basic constitutional documents formally vest executive power in the Queen. Section 9 of the British North America Act, 1867,[2] states: "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen", while section 17 establishes that "There shall be one Parliament for Canada, consisting of the Queen, an Upper House, styled the Senate, and the

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[1] The United States constitutes a notable exception.

[2] 30 & 31 Vict., c 3.

House of Commons". Similarly, the Union of South Africa Act[3] sets out that "parliament . . . shall consist of the King, a Senate and a House of Assembly".

It must be borne in mind, however, that section two of the Canadian Letters Patent of 1947[4] authorize the Governor General to "exercise all powers and authorities lawfully belonging to" the Crown in Canada. In the Union of South Africa, a similar functional delegation is effected by the Status of the Union Act,[5] which provides that the executive power formally vested in the Crown may be exercised either "by His Majesty in person or by a Governor General as his representative"

In Australia the formal vesting and the delegation appear together in the Australian Commonwealth Act, 1900:[6]

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative. . . ,

while the New Zealand Act, 1852,[7] surprisingly, takes somewhat less cognizance of the traditional constitutional rôle of the Queen. In the legislative process, for example, the Queen is not formally made a party, it being merely provided, in contrast to section 17 of the British North America Act, that the General Assembly of New Zealand shall consist "of the *Governor*, a Legislative Council and the House of Representatives".[8]

Such minor variations in the formal vesting of head of state functions produce some unique but purely formal consequences. For example, because of the variation in formal vesting of the legislative powers, all statutes of Canada, Australia, Ceylon and South Africa are enacted in the name of "The Queen's Most Excellent Majesty" and the Houses of Parliament, while those of New Zealand merely begin with the words: "Be it enacted by the General Assembly of New Zealand . . .".

There is no lack of uniformity however in the formal vesting of those head of state functions described as "executive".[9] There is some variation in the degree to which the exercise of these functions

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[3] 9 Edw. VII, c. 9, s. 19. The same provision is made in the Ceylon (Constitution) Order in Council, 1946, s. 7: S. R. & O. 1946, p. 2248.

[4] See: R.S.C., 1952, p. 6429.

[5] Statutes of the Union of South Africa, c. 69, s. 4.

[6] 63 & 64 Vict., c. 12, s. 61. [7] 15 & 16 Vict., c. 72.

[8] *Ibid.*, s. 32 (italics mine).

[9] It appears, however, that there are certain head of state functions exercised by the Governor General which devolve on him not as a delegated executive prerogative, but as a delegated legislative function. These merit further consideration later.

may be delegated to the Governors General. It is quite clear, however, that where such delegation occurs, the functions of the Governor General are performed by him, explicitly or implicitly, in the name of the Queen.

While it is thus important to be aware of the terms of the formal vesting of the head of state functions, it is of even greater importance to know who, in fact, is charged with their performance.

Executive Functions Performed by the Queen

The Queen, of course, participates personally in the appointment of the Governors General. Their commissions are issued under the royal sign manual,[10] as are the letters patent creating[11] the office.[12]

Before 1939, the Crown, in its Canadian realm, was personally responsible for the signing and sealing of formal instruments of state. The Seals Act[13] of 1939 altered this cumbersome arrangement so far as the sealing function was concerned:

> Notwithstanding the provisions of any law in force in Canada any royal instrument may be issued by and with the authority of His Majesty the King and passed under the Great Seal of Canada, or under any other royal seal approved by His Majesty the King for the purpose.

A "royal instrument" is defined by section 2 as "an instrument, in respect of Canada, that, under the present practice, is issued by and in the name of the King and passed under the Great Seal of the Realm or under one of the signets". Thus the Great Seal of Canada, which is kept in Ottawa by the Secretary of State, now replaces both the Great Seal of the Realm and the royal signets, which are kept in London by Her Majesty's United Kingdom Ministers.[14]

[10] See: Canada Gazette, Vol. 96, p. 614.

[11] There is no provision for the establishment of the office in the British North America Act, 1867. See: R.S.C., 1952, p. 6429.

[12] It must not, however, be assumed that this procedure casts all acts of the Governor General in the framework of a simple agency any more than the appointment of Lieutenant Governors by the Governor General of necessity creates such a relationship: British North America Act, 1867, s. 58.

[13] 1939 Statutes of Canada, 3 Geo. VI, c. 22, s 3.

[14] At the time of the passage of the Seals Act, 1939, the following instruments were passed under the Great Seal of the Realm:

(a) full powers authorizing the signature of treaties and conventions,
(b) instruments of ratification of treaties and conventions,
(c) letters patent constituting the office of Governor General.

The following royal instruments relating to Canada were issued under the royal signets:

(a) warrants authorizing the issue of instruments under the great seal of the realm,
(b) commissions appointing the Governor General,
(c) instructions to the Governor General,

The Seals Act, however, merely disposes of the need to visit London to obtain a documentary seal. It does not affect the royal signatory functions, in regard to which the procedure is far from clear. The Seals Act[15] merely provides that the decision whether the royal sign manual is required or whether the Governor General's authorizing signature will suffice is in each case to be a matter for the discretion of the Governor General in Council. Strictly, therefore, the exercise of the Crown's signatory function in each case depends upon the signified pleasure of the Govenor General. The formal proclamations of war and of the cessation of hostilities were in Canada issued under the authority of the Governor General's signature. Consular commissions are similarly signed by him. The letters of credence of high commissioners are issued in the same way.[16] On the other hand, instruments of ratification, though sealed by the Great Seal of Canada, are still forwarded for the inscription of the royal sign manual, as are letters of credence (except those for high commissioners) and full powers to negotiate treaties.

Since the issuance of the 1947 Letters Patent, it is open to the government to alter this procedure so as to discharge the Queen altogether from the signatory head of state functions. In this connection[17] Mr. St. Laurent has stated:[18]

> The new powers and authorities conferred by this general clause [upon the Governor General] include among others royal full powers for the signing of treaties, ratification of treaties and the issuance of letters of credence for ambassadors. There will be no legal necessity to alter existing practice. However, the government of Canada will be in a position to determine, in any prerogative matter affecting Canada, whether submission should go to His Majesty or to the Governor General.

It must be observed that in the ratification of treaties the Queen's signature is only required where the instrument is concluded in head of state form—a rare phenomenon in modern diplomacy. Most of Canada's diplomatic undertakings are in the form of agreements, conventions and exchanges of diplomatic notes which are inter-departmental or inter-governmental, rather than between

(d) appointment of Lieutenant Governors of the provinces,
(e) exequators,
(f) appointment of certain officers of the public service of Canada.

[15] S. 4.

[16] High Commissioner in the United Kingdom Act, 1938 Statutes of Canada, c 30, s. 2 See also: External Affairs Act, 1943 New Zealand Statutes, c. 5, s. 6(1)

[17] The reference is to paragraph 4 of the new Letters Patent, 1947, the so-called "general clause" which permits the Governor General to perform all functions for Canada presently still performed by the Queen.

[18] House of Commons Debates, 1948, p. 1126.

heads of state. These are concluded under the authority of full powers signed by the Governor General, and ratified by instruments similarly authorized.

It may be noted that, in the matter of sealing and signing, the Union of South Africa is in a legal position identical to that of Canada. The Royal Executive Functions and Seals Act, 1934,[19] establishes a Great Seal of the Union of South Africa, and leaves to the government the selection of the signatory. In practice, however, the Union has gone farther than has Canada in transferring the discharge of this function to its Governor General.

The other realms of the Commonwealth, including even Pakistan, continue to utilize the royal seal, signets and sign manual. The speed with which world events move to-day has, however, made this time-consuming tradition obsolete and it will inevitably have to give way to the demands of convenience.

This virtually exhausts the heads of state functions which are exercised exclusively by the Queen on behalf of Canada. The British North America Act, 1867,[20] sets out a procedure whereby the Queen "on the recommendation of the Governor General" may direct the appointment of supernumerary senators.[21] Whether the letters patent of 1947 have altered this so as to permit the Governor General to make the recommendation to himself is not clear. Since the British North America Act generally sets out the delegatable head of state functions either in the form "the Governor General shall"[22] or "It shall be lawful for the Queen . . . to authorize the Governor General to . . .",[23] it appears from the failure to utilize this form that it was not intended, in 1867 at least, that this particular function should be exercised by the Governor General.

Another head of state function which is entrusted to the Queen is that of final repository of enacted statute law. In Canada this function, so far as federal legislation is concerned, is set out in the B.N.A. Act,[24] and is properly understood only in the context of the now-deceased royal prerogative of disallowance,[25] which made it

[19] Statutes of the Union of South Africa, c. 70, s. 6(1). The South African legislation creates not only a Great Seal of the Union, but also provides for Union signets which are used in the issuance of instructions and commissions to the Governor General, diplomatic and consular officers. Canada, except for the instructions (which have been abolished), issues these instruments under the Great Seal of Canada, there being no Canadian signet.

[20] S 26

[21] This section has never been used.

[22] Ss 11, 24, 32, 34, 38, 42, 50, 58, 96, 143.

[23] S 14.

[24] S. 56.

[25] For statement of its demise see: Imperial Conference Report, 1930, s 2(9), Cmd. 3717

essential for the monarch and his ministers to keep a critical eye on the acts of the overseas parliaments.

Even after the 1930 Imperial Conference virtually abolished disallowance, the new royal instructions to the Governor General, issued in 1931, still required the forwarding by him of all enacted statute law to Westminster. The provision was finally deleted from the 1947 Letters Patent and the practice has now been discontinued. Section 56 of the British North America Act, however, has not been amended, and, unless the act can be vicariously altered by alterations in the letters patent, the failure of the Governor General to go "through the forms" of remission to the Queen still constitutes a technical violation of the act.

Remission clauses still subsist in the royal instructions to the Governors General of New Zealand[26] and Australia,[27] though a similar provision was deleted from its royal instructions by the Union of South Africa in 1937.

There are very few other head of state functions which are regularly performed personally by the Queen for her "overseas" realms. In Australia, the issue of a dormant commission to an administrator to act in the absence of the Governor General is issued under the royal signet and sign manual.[28] The Governor General is, however, authorized to sign an authorization of a deputy to preside in his place at meetings of the Executive Council.[29]

Finally, the conferment of royal honours is still traditionally within the exclusive function of the Crown. It must be noted, however, that the honours thus conferred are not strictly national, but rather Commonwealth-wide in their effect, and thus the Queen awards them not in her capacity as head of state of any one realm, but as Head of the Commonwealth. Honours of purely national efficacy are in Canada authorized by the Governor General.

A similar instance of a head of state function performed by the Queen for Canada, but in a capacity other than that of Canadian head of state, is presented by the "request and consent" procedure. The Statute of Westminister, 1931[30]—since 1931 for Canada and the Union of South Africa, and since 1942 and 1947 for Australia and New Zealand, respectively—provides that "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as

[26] Royal Instructions 1917.
[27] Royal Instructions 1900 (as amended in 1902 and 1920).
[28] 1944 Commonwealth Statutory Rules, p. 816.
[29] 1949-50 Commonwealth Statutory Rules, p.891.
[30] 22 Geo. V, c. 4, s. 4.

part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof".

In the case of Canada, the "request and consent" procedure has been the traditional method of amending the B.N.A. Act.[31] It takes the form of an address by both houses of Parliament to the Queen, petitioning her to cause a bill to be laid before the United Kingdom legislature.[32] The recipient of the request is, therefore, the Queen acting in a capacity other than that of Canadian head of state.

Thus it is evident that while there are still a few head of state functions performed for Canada exclusively by the Queen, they are very few in number and likely to diminish even further. Most of the functions are now performed exclusively by the Governor General. There are, however, some head of state functions which are "shared"—that is, they are generally performed by the Governor General, but occasionally by the Queen in person.

Executive Functions Occasionally Exercised by the Queen

The vast majority of executive head of state functions in the Commonwealth realms has been delegated from the Crown to the Governors General and has, for all practical purposes, become vested in them. It is hardly possible for any one person to open eight parliaments, to consent to all legislation, and generally to be in eight realms at the same time. Convenience has dictated a sounder solution.

Some functions which are now generally performed by the Governors General are, however, from time to time still exercised by the Queen in person. Among the powers thus exercised "occasionally" by the Crown is the power of proclamation. Thus it was that the royal style and titles acts of Canada, Australia, New Zealand and Ceylon, together with that of the United Kingdom, were all personally assented to and proclaimed by the Queen on May 28th, 1953, having been presented in London for that purpose by the visiting prime ministers. The corresponding acts of the Union of South Africa and Pakistan were, however, proclaimed by the Governors General of those realms. Similarly, King George VI on May 19th, 1939, visited the Canadian Senate Chamber and gave

[31] It is now, of course, of less importance since the enactment of the British North America Act (No. 2), 1949, 13 Geo. VI, s. 81.

[32] On the other hand the Statute of Westminster, 1931, prescribes that in matters of royal style and titles and the royal succession, the "assent" of each of the Dominions is sufficient to make the United Kingdom legislation applicable to them.

his assent to eight bills previously passed by the 1938 session of the Canadian Parliament.[33] All legislation passed during the tour was, however, referred for assent to the Governor General. The Australian Flag Bill, passed by the Commonwealth Parliament on December 3rd, 1953, was reserved for the personal assent of the Queen during the recent tour.

Recently the Crown has personally opened some of the overseas parliaments. During the 1954 tour, the Queen presided at the opening of the New Zealand Parliament, several of the legislatures of Australia, and the Parliament of Ceylon. No similar occasion was arranged during the royal visit to Canada in 1939.[34]

It should also be noted that, although during a royal tour a number of executive functions nominally exercised by the Governor General are momentarily transferred to the Queen for her personal attention, the Governor Generalship is by no means dormant. Indeed, most executive functions continue to be despatched by the Governor General in the usual manner.[35]

Head of State Functions other than the Executive

There is still another group of head of state functions which does not derive from the royal prerogative, but must be, strictly, classified as "delegated legislative powers". These are the powers exercised by "the Governor-General in Council"[36] under a specific parliamentary statute and at the pleasure of parliament.[37]

Unlike the executive functions of the head of state which, though they are frequently delegated to the Governor General, are nonetheless vested solely in the Crown's prerogative, these delegated legislative functions are vested in the Governor General in his

[33] Canada Gazette (Extra), May 19th, 1939.

[34] On January 13th, 1954, the Queen presided over a meeting of her Privy Council in New Zealand. Since, however, the Queen's Privy Council is an imperial rather than a strictly national body, she cannot be said to have performed this function in her capacity as head of state of New Zealand. Canada, which does have a national (Canadian) Privy Council (which never meets as a body), did not call upon the King, during the 1939 visit, to preside over it, or even over its executive committee which is the cabinet.

[35] It is interesting to note, for example, that after supervising the emergency operations in connection with the recent New Zealand train disaster, Prime Minister Holland made his first and formal report to the Governor General, and then reported to the Queen.

[36] Defined by the B.N.A. Act, s. 13, as "The Governor General acting by and with the advice of the Queen's Privy Council for Canada".

[37] This delegation is not uniform throughout the Commonwealth. In New Zealand it is to the Governor-in-Council, as it is in Canada. In Australia, delegation is simply to the Governor General. Ceylon and the United Kingdom dispense with this function of the head of state altogether by vesting the power in issue regulations directly in the minister concerned.

own right.[38] The problems latent in this dichotomy of prerogative (executive) and delegative (legislative) functions did not arise during the 1939 royal tour of Canada because the King did not in fact exercise any delegated legislative functions. However, in New Zealand it was decided that the Queen, during her visit, ought to preside at several meetings of the Executive Council and should authorize the issue of orders in council.[39] To bring this about, the government of New Zealand apparently considered it necessary to pass the Royal Powers Act, 1953, the operative provisions of which are section 2 (1) and (2):

> (1) It is hereby declared that every power conferred on the Governor General by any enactment is a royal power which is exercisable by him on behalf of Her Majesty the Queen and may accordingly be exercised by Her Majesty in person or by the Governor General.
>
> (2) It is further declared that every reference in any Act to the Governor General in Council or any other like expression includes a reference to Her Majesty the Queen acting by and with the consent of the Executive Council in New Zealand.

The fact that this remarkable legislation is cast into declaratory form disguises not at all the strange phenomenon of the legislature delegating to the Queen a function normally belonging solely to the Governor General. It cannot be claimed that the need for this legislation turns upon an interpretation of the unique provisions of the New Zealand Act,[40] for in Australia, where the formal authority of parliament is vested in much the same way as it is in the B.N.A. Act, the legislature passed a similar statute just before the arrival of the Queen.[41]

Thus there is evidence that, in the absence of special legislation authorizing the Queen to share in their performance, there are certain head of state functions which are delegated by parliament to the Governor General exclusively.

The Discretionary Powers of the Governor General

It is not necessary for our purposes to trace the growth of limitations on the discretion of the Governor General in the exercise of his functions. The signing in 1849 by Lord Elgin of the Rebellion Losses Bill firmly set the course towards the destination reached at

[38] For an elaboration of this view, see, The Crown in a Dominion (1944), 20 N.Z.L.J. 111.

[39] See: Statutory Regulations (1954) Nos. 1-5, 11, 13, 15.

[40] See *supra*, footnotes 7 and 8. In New Zealand, unlike the other Commonwealth realms, the Governor and not the Queen is designated as one of the comprising "parts" of parliament.

[41] Royal Powers Act, 1953 (Cth.). For a discussion of this act, see (1954), 27 Aust. L. J. 721.

the Imperial Conference of 1926.[42] The report of that conference defined the Governor General's discretionary power thus:[43]

> It is an essential consequence of the equality of status existing among members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain. . . .

This test, while it affords a general guide to the behaviour of Governors General, does not answer many specific questions, because the constitutional questions which arise from time to time in Canada have no direct parallels in the United Kingdom. The parliament of the United Kingdom is not limited in its power to legislate by the terms of an entrenched constitution. The United Kingdom is a unitary not a federal state. Consequently, areas of interpretative doubt cannot as readily arise to complicate the process of carrying out the head of state functions.

It was just such a problem of interpretation which faced the Governor General of Australia in 1952. The Commonwealth government requested his assent to a double dissolution of both federal houses of Parliament in circumstances in which, on a technical reading of the constitution, dissolution ought probably not to have been granted. In making his decision,[44] the Governor General could not have taken refuge solely in the English precedents.

There are other problems which surround the exercise of discretionary powers. There is, for example, no clear answer to meet the questions raised by the Byng-King incident. Mr. Evatt,[45] for one, believes that the Governor General has a perfect right to refuse dissolution to a prime minister providing he can find another party leader prepared to carry on the government and accept retroactively the responsibility for his action.

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[42] The ship of state did not, however, always remain on course. In 1875, Lord Dufferin, acting within the powers conferred upon him by the royal instructions, but upon his own discretion, commuted the death sentence of Lepine, one of the leaders in the Riel Rebellion. Blake, the Minister of Justice at the time, thereupon promptly had the royal instructions amended to exclude such personal discretion. Again in 1896 Lord Aberdeen declined to make certain appointments to the Senate recommended by Sir Charles Tupper after the latter's party had been defeated at the polls — this even though the Governor General of New Zealand had in 1892 been specifically instructed by the Colonial Office to permit his ministers to "swamp" the upper house of that Dominion. The Byng-King controversy, finally, is best considered in another context.

[43] Imperial Conference Report, 1926, Cmd. 2768, s. 3(b)

[44] He granted the dissolution.

[45] Evatt, The King and His Dominion Governor (1936) p. 62.

It is, however, in the field of "emergency" action to preserve the fundamental democratic "norms" that the problem of the Governor General's discretion looms largest. Again, no exact parallels can be drawn, though one might speculate whether even in the United Kingdom the Queen might not refuse her assent to legislative enactments which purport to sweep away for no good reason all traditional liberties and institutions.

In Canada, if a prime minister were to accept a bribe and then refuse to resign, it is still possible that the Governor General might move to dismiss him. Indeed, in 1935, the Governor of New South Wales did dismiss his prime minister for "unconstitutionally" repudiating the federal debt.[46] Or if a prime minister who had just been defeated at the polls refused to submit his resignation and instead requested the Governor General to dissolve the house again, a refusal might yet be justified.

The problem ought not, however, to be whether or not the Governor General has the "power", but rather whether in each case he ought or ought not to exercise it. In the final analysis, the Governor General must accept the advice of his ministers in all but the most extraordinary circumstances; and if he refuses, as did Lord Byng, then he must find strong support for his position among the opposition. More important, his refusal must have the support of the people, and must be vindicated at the polls. Lord Byng's mistake lay not in insisting on the Governor General's right to a measure of discretion, but in misjudging the mood of the people, who did not think that Mr. King's advice was sufficiently heinous to warrant the intervention of the discretion.

Whether or not the Governor General could, in an emergency, act as the "last line of defence" of constitutionality depends, therefore, to a large extent to-day upon the prestige with which the position is endowed.

Proposed Reforms in the Office of Governor General

Two facts therefore point towards the need for a re-evaluation of the position of Governor General: it is now evident that the Governor General fulfils most—and will probably soon perform virtually all — the functions of the head of state; moreover, in the exercise of some of these functions he still preserves a potentially important

[46] It must be noted, however, that the report of the Imperial Conference of 1926 did not purport to affect the office of provincial lieutenant governor or state governor.

element of personal discretion, which is now dependent almost entirely upon his personal prestige.

In democratic societies, the head of state attains the prestige essential to his position in one of two ways: either through the political support of the majority of the populace manifested at the polls (as in the case of the United States); or else through a strict non-partisanship and complete detachment from politics which places him above factionalism and provides a basis for universal support. This, of course, is the way of constitutional monarchy.

Some countries have attempted to combine the two approaches. The result is unsatisfactory. The President of France is neither elected by the people nor chosen non-politically and the office has lost prestige as a result. In Canada, the governor generalship, since the appointment of a Canadian to the post, is facing a similar danger. A Canadian cannot, if he has risen to any degree of prominence in Canadian public life, be entirely free of revealed political sympathies. Even Governor General Massey, a man of relatively discreet political affiliations, would still be weakened in a constitutional crisis by his political past, however remote it may now appear.

It is a desideratum of Canadian public life that political offices be filled either by election or on a non-political basis. Failing this, they tend to fall into public disrespect.[47] We cannot in Canada emulate the British system of rearing future "acting" heads of state from birth in an atmosphere of complete detachment from partisan politics. We can, however, achieve a similar result and at the same time add to Commonwealth and international understanding by selecting our Governors General from other nations of the Commonwealth. There is no reason why the United Kingdom ought to be the sole reservoir—a free exchange among all the nations of the Commonwealth of prominent senior statesmen to perform the head of state functions would, aside from its political advantages, be a bold and profitable experiment in the "familization" of nations.

The new importance of the Governor General's office also makes it increasingly necessary to secure for him tenure of office. The

[47] Laurier was aware of this problem forty-five years ago: "From time to time in recent years paragraphs have appeared in the press to the effect that at the present stage of Canadian development it would be fitting that a Canadian should be the representative of His Majesty. In this we find the expression of a laudable, but to my mind a misguided expression of national pride. . . . [The] effect of this system of having some high statesman of Great Britain to be the representative of His Majesty . . . is to place at the head of the administration one who by the very nature of things is not connected with our party or political differences."

B.N.A. Act, though it makes frequent reference to the Governor General,[45] fails to provide for the establishment of the office itself or to protect tenure. It has been demonstrated by Prime Minister de Valera in 1932 that the Governor General may be forced out of office at the will of the government:

> When the Imperial Conference of 1930 turned the Governor General into the nominee of the Dominion Government, it destroyed the parallel between the King and his representatives and rendered inevitable the decisive action of 1932, when Mr. de Valera removed the then Governor General from office in order that he should not be in a position to refuse assent to the bills violating the Constitution which the ministry had prepared [49]

If the *de facto* head of state is to exercise his functions properly, he must not be dependent for his tenure solely upon the pleasure of his ministers. A fixed term of office ought to be written into the British North America Act, with a provision for removal or recall only upon a joint address of both houses being submitted to the Queen.

Another factor to be taken into legislative consideration is the immunity to legal action of the Governor General. This particular aspect of the problem of reforming the governor generalship sometimes appears to receive more attention than it deserves. It is true, however, that here too the gap between fact and legal fiction subjects the Governor General to a misleading line of precedents. In the *Bonanza Creek* decision, Lord Haldane, applying the law literally as it pertained to the position in Canada, declared that the Governor General had never been constituted a viceroy and therefore could not be taken to function in *loco regis*.[50] Consequently, the personal legal immunity of the King,[51] which had been held to attach to the Lord Lieutenant of Ireland[52] and which belonged by statutory law to the Viceroy of India,[53] does not attach to the Governor General. The Viceroy is in law the head of state in the place of the Crown, and enjoys the Crown's personal immunity, not merely to action, but to *liability* within his jurisdiction during his tenure of

[45] Note especially his functions as set out in Part III.

[49] Keith, Letters and Essays on Current Imperial and International Problems (1936) p. 59.

[50] *Bonanza Creek Gold Mining Co Ltd.* v. *The King*, [1916] 1 A.C. 566.

[51] "Though the Sovereign may, if he see fit, sue a subject in his own Courts, no suit can be maintained against him in such Courts by a subject. . .": Halsbury's Laws of England (2nd ed.), vol. 1, para. 28.

[52] *Tandy* v. *Earl of Westmoreland* (1800), 27 St. Tr. 1246, *Luby* v. *Lord Wadehouse* (1865), 17 Ir. C.L.R. 618; *Sullivan* v. *Spencer* (1872), Irish Rep. 6 C.L. 173, at p. 177.

[53] Government of India Act, 1935, 25 Geo. V s. 298: "No proceeding whatsoever shall lie in any court of India against the Governor General. . . whether in any personal capacity or otherwise, in respect of anything done or omitted to be done . . . during his term of office".

office.[54] The Governor General, on the other hand, being in law not *in loco regis*, but merely an agent of the Crown, appears still to be governed by the common law applying to imperial civil servants, including colonial governors. If this is so, he would in no case be immune from liability. He would not be immune from suit in either Dominion or British courts for personally-contracted liability,[55] nor to criminal[56] or civil[57] suit for official acts done in contravention or excess of his authority or function.

In addition to leaving the governor unprotected against the commoner actions, this state of the law leaves it open to speculate[58] "as to the legal position of the Governor of a self-governing colony, if, on the advice of his responsible ministers he gave an order which the law would not support, and was sued by a person injured thereby. He does not seem to possess the legal irresponsibility of a sovereign. Presumably he would refuse to act on the advice of his ministers unless the action recommended were so obviously desirable, and his ministers so clearly acting with the good will of the community, that they were certain to pass an act of indemnity."[59]

None of this is particularly disturbing. It is fairly clear that the Governor General is not open to suit for injury which may result from the mere performance of his constitutional functions.[60] Where

[54] Whether the immunity extended also to acts done and sued upon in other parts of the Empire during the tenure of his office is open to doubt, but it appears unlikely that the immunity is extraterritorial.

[55] In *Hill* v. *Biggs* (1841), 3 Mos. P.C. 465, 13 E.R. 189, the Governor of Trinidad, the Rt. Hon. Sir George Fitzgerald, was successfully sued in Trinidad in an action in debt.

[56] *Queen* v. *Eyre* (1868), L.R. 3 Q.B. 487.

[57] *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1.

[58] Anson, Law and Custom of the Constitution (4th ed.), vol. II, pt. II, p. 82.

[59] During a political stalemate in Tasmania, the Governor was induced by the Prime Minister to give the royal assent to a bill which had passed the lower house, but repeatedly failed to pass the upper chamber. A distinction must here be made between acts which are "unlawful" for the Governor General—that is, the doing of something which is ultra vires in the light of the powers of the Governor General as set out in a written constitution such as the B. N. A. Act or the letters patent—and the performance by him of an intra vires function in relation to an act which is ultra vires of the federal government or Parliament. It could hardly, for example, be argued that the Governor General would be liable at law to a person unfavourably affected by legislation assented to by him but later held to concern a provincial matter and therefore ultra vires of the federal government. The Governor General is not expected by the law to set himself up as the judge of the "vires" of the legislation passed by parliament to which he assents. On the other hand, he is by s. 55 of the B.N.A. Act specifically not authorized to assent to legislation not passed by parliament or passed by only one of the houses of Parliament, and for him to do so would in Canada probably be an "unlawful" act for which he might reasonably be held personally liable to persons adversely affected.

[60] See *Sloman* v. *Governor and Government of New Zealand* (1876), 1 C.P.D. 563—an action brought against the Governor to recover payment

he may be asked to perform a function the performance of which is unlawful for him, it is probably desirable that the threat of personal legal liability should serve to deter him from consenting. As for immunity from liability or even from suit for acts done in a personal, unofficial capacity, there is no reason why, in the modern state, he should enjoy protection. Such immunity is not even any longer a necessary attribute of a twentieth-century head of state, much less of his delegates. The Governor General of Pakistan still enjoys the immunities which devolved upon his office with the demise of the viceregency of India. His position in the Commonwealth is however unique, and will probably be shortlived.[61] The Report of the Basic Principles Committee, 1952, of the now apparently dissolved Pakistani Parliament recommended replacing him with a head of state and provided that,[62] "There should be no bar to legal proceedings being taken against the Head of State. . .even during the tenure of [his] office for acts done in [his] personal capacity". India, in providing for its own head of state, declared in the Constitution of India, 1949, that the President[63] "shall not be answerable to any court for any act done or purported to be done by him in the performance by him of his powers and duties" but permits actions as of right in civil proceedings[64] for liability incurred by him in his personal capacity after two months notice of intention to commence the action has been filed with his office.[65] A similar limited liability clause is found in the Ceylon (Constitution) Order in Council (1946).[66]

Even this much immunity is not needed to protect the Governor General in the exercise of his functions. Legislative provision should be made permitting the court to delay the levying of execution, if to do otherwise would interfere with the carrying out of the head of state functions. Similarly, Canadians serving abroad in the capacity of Governor General ought to be protected from action in Canadian courts until after the expiration of their term of office. This much protection the office should have, but no more.

The problem of reform is often approached from the question: Ought the Governor General to be made a viceroy? "He has be-

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on a contract signed by him in his official capacity The court dismissed the action asking, "What is this thing called the Governor and government of New Zealand?"

[61] The sudden assumption of long-latent prerogative powers by the Governor General of Pakistan had given his position a new importance and may have forestalled the adoption of the new constitution.

[62] Article 248

[63] Article 361(1).

[64] Article 361(2).

[65] Article 361(4).

[66] Article 4(2).

come in fact a nominated President", said Sir Robert Borden.[67] "He has become virtually a viceroy" is the opinion of Professor Dawson.[68] The problem is not, however, one of form. It is merely necessary to recognize in law what is already a fact: that the Governor General now carries out a multitude of functions which require that his office be firmly established and firmly protected.

Religion in Legal Education

If a student is to be adequately prepared for the study of law, he should at least be well grounded in the humanities, social sciences, and the scientific method. The social sciences, the physical sciences, the humanities; all of these are essential but all of these without religion are not enough! A curriculum that is merely secular in content fails to provide a truly general education that will lay an adequate foundation for study of law, let alone for wise and effective fulfilment of the responsibilities of professional practice and citizenship. Lack of a systematic knowledge and understanding of the beliefs, principles, and ethics of religion is a grave educational deficiency; yet that deficiency exists in most universities outside the professional faculty of theology.

Less than a month ago, President Sidney Smith declared, with characteristic acumen. "We have gone too far along the road of secularizing institutions of higher learning. There is a lacuna in liberal education; it has been caused by the policy, prevalent in universities throughout the English-speaking world, of evading, ignoring, or even opposing the teaching of religion within their halls. For most of us, the best argument for the teaching of religion is the gain to the individual personality in spiritual terms, or, in other words, the personal values of religion—the enrichment of life through grace and worship, and that service to God which, paradoxically, is perfect freedom. But on intellectual grounds alone, this lacuna in liberal education is both lamentable and inexcusable It is the task of universities to conserve and transmit our cultural heritage, in which the Judaeo-Christian element has been one of the most important strains. And yet, in some faculties of arts, it is possible to learn more about the mythologies of Greece and Rome than about the Christian religion. To the student who knows nothing of theology, much history is meaningless, much philosophy is distorted, and much literature is unintelligible." I would supplement Mr. Smith's remarks by saying that such a student will also find unintelligible much of the historical development of law, much of its present meaning, and much of what should be the motivation of its future growth. Although the highest court of England has expressly held that Christianity is technically not a part of the common law of that country, and hence not a part of the common law in Canada, the principles and ethics of the Judaeo-Christian religion have infused our law in steadily-increasing measure. (Horace E. Read, O.B.E., Q.C., from the Founders' Day Address at Acadia University, October 30th, 1954)

[67] Borden, Canadian Constitutional Studies (1923) p 61.
[68] Dawson, Constitutional Issues in Canada 1900-1931 (1933) p. 66.