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THE EVOLUTION OF THE NEW ZEALAND MONARCHY:
THE RECOGNITION OF AN AUTOCHTHONOUS POLITY

Noel Stanley Bertie Cox

A thesis submitted in fulfilment of the requirements for the degree of
Doctor of Philosophy in Political Studies, The University of Auckland,
2001
ABSTRACT

The aims of this thesis are to determine to what extent the Crown remains important as a source of legitimacy for the constitutional order and as a focus of sovereignty; how the Crown has developed as a distinct institution; and what the prospects are for the adoption of a republican form of government in New Zealand.

The imperial Crown has evolved into the New Zealand Crown, yet the implications of this change are as yet only slowly being understood. Largely this is because that evolution came about as a result of gradual political development, as part of an extended process of independence, rather than by deliberate and conscious decision.

The continuing evolution of political independence does not necessarily mean that New Zealand will become a republic in the short-to-medium term. This is for various reasons. The concept of the Crown has often been, in New Zealand, of greater importance than the person of the Sovereign, or that of the Governor-General. The existence of the Crown has also contributed to, rather than impeded, the independence of New Zealand, through the division of imperial prerogative powers. In particular, while the future constitutional status of the Treaty of Waitangi remains uncertain, the Crown appears to have acquired greater legitimacy through being a party to the Treaty. The expression of national identity does not necessarily require the removal of the Crown.

The very physical absence of the Sovereign, and the all-pervading nature of the legal concept of the Crown, have also contributed to that institution’s development as a truly national organ of government. The concept of the Crown has now, to a large extent, been separated from its historical, British, roots. This has been encouraged by conceptual confusion over the symbolism and identity of the Crown. But this merely illustrates the extent to which the Crown has become an autochthonous
polity, grounded in our own unique settlement and evolution since 1840. Whether that conceptual strength is sufficient to counterbalance symbolic and other challenges in the twenty-first century remains uncertain. But it is certain that the Crown has had a profound affect upon the style and structure of government in New Zealand.
ACKNOWLEDGEMENTS

I would like to express my thanks and appreciation to my Supervisor, Dr Raymond Miller, for guiding me through the process of researching and writing this thesis.

Acknowledgement is also due to all those who have assisted me, especially those who gave of their time to discuss various elements of the political and constitutional makeup of this country. Thanks are due particularly to the Hon Sir David Beattie, Professor Jonathan Boston, the Rt Hon Sir Douglas Graham, Hugo Judd, the Rt Hon Sir Kenneth Keith, Dr Andrew Ladley, the Rt Hon David Lange, Associate Professor Elizabeth McLeay, the Most Revd Sir Paul Reeves, the Hon Georgina te Heuheu, and Dame Catherine Tizard.
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<td>AD</td>
<td>Appeal Decisions (South Africa)</td>
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<td>Adelaide LR</td>
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<td>AJA</td>
<td>Associate Justice of Appeal</td>
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<td>AJPS</td>
<td>Australian Journal of Political Science</td>
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<td>CJEPS</td>
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HL       House of Lords
HL Cas   House of Lords’ Cases (UK)
ICQ      International and Comparative Quarterly
ICLQ     International and Comparative Law
Quarterly
IR       Irish Reports
J        Justice
JCCP     Journal of Commonwealth and
Comparative Politics
JCPS     Journal of Commonwealth Political Studies
JP       Justice of the Peace Reports (Eng)
KB       King’s Bench Division, Law Reports (3rd series)
LC       Lord Chancellor
LJ Ch    Chancery, Law Journal Reports (Eng)
LQR      Law Quarterly Review
LR       Law Reports (Eng)
Mich LR  Michigan Law Review
MLR      Modern Law Review
Monash ULR Monash University Law Review
MR       Master of the Rolls (Eng)
NZ Jur (NS) New Zealand Jurist Reports, new series
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INTRODUCTION

The title of this thesis is “The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity”\(^1\). The Crown, it will be argued, has become an integral part of the New Zealand constitution. In so doing it has helped to give New Zealand full legal as well as political independence. It has become, to some extent at least, distinct from its historical origins, and (particularly in the absence of an entrenched constitution) remains an important conceptual basis of governmental authority. It is partly for these reasons that a significant republican movement, such as that in Australia, has not developed in New Zealand.

While the Crown, as an institution of government, retains significant administrative and legal importance\(^2\), its political significance has tended to be undervalued, in part due to the physical absence of the Sovereign\(^3\). But this does not mean that New Zealand is a de facto

\(^1\)Autochthony is the status of being based solely on local sources and not dependent upon the continuing legal or other authority of an outside source; Hogg, PW, *Constitutional Law of Canada* (1992) 44-49.

\(^2\)Which will be covered in Part 2.

\(^3\)As is shown by the relative rarity with which political biographies refer to it, though it might be said that the same scarcity is found in British political works also.
republic⁴. The Crown was, and remains, symbolically and legally omnipresent⁵. Most importantly, the existence of the Crown has determined the way in which New Zealand is governed.

However, the role of the Sovereign and of his or her representative has tended to be downplayed by the mass media, to the extent that the existence of the monarchy is sometimes regarded as being of little or no real significance. With the symbolic beginning of the twenty-first century, and significant republican sentiment expressed in Australia, the New Zealand monarchy may be approaching a crucial turning point. For this reason it is necessary to examine the nature of the contemporary New Zealand Crown, and its function in the wider political and constitutional system.

To date there have been few serious calls for the abolition of the monarchy in New Zealand. The debate on republicanism has been said to

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⁴“Republic” has been variously defined, but, for the purposes of this thesis, a simple definition is preferred. Thus a monarchy is where the head of State is hereditary; a republic is where the highest office is elected or appointed. The fact that the Governor-General is appointed does not make a realm a republic, however, as the Governor-General is representative of an hereditary Sovereign.

⁵The terms “Crown”, “Throne”, “Monarch”, and “Sovereign” are to some extent synonymous. Monarch or Sovereign will however be confined to the person, with Crown reserved for the institution of which the person of the Sovereign is but the permanent living embodiment.
have barely begun. One of the aims of this thesis is to determine why
this is so.

The policies of none of the major political parties include
republicanism, though many members may be ideologically in favour of
a republic. This appears to reflect acceptance by the party leaderships
that republicanism would not, at least at the present time, be a popular
option. The correctness of this view was apparently confirmed by James
Bolger’s failure to inspire support for a republic in the early 1990s.

It seems that other issues have exercised the minds of our
politicians, and of the general public. Questions of further electoral
reform, and Maori participation in government are presently dominant.

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6Simpson, Alan, Constitutional Implications of MMP (1998) 5. Arguably,
this is a pro-republican sentiment. Supporters of the status quo would say
that there is no issue to debate, and that the very failure of Bolger to
stimulate debate proves this.

7The Rt Hon Jenny Shipley (then Prime Minister) noted that “New
Zealand was still decades away from even debating [a republic]” ... and
the Rt Hon Helen Clark (then Leader of the Opposition) and Hon Jim
Anderton (then Leader of the Alliance) agreed that turning New Zealand
into a republic would be difficult because of the Treaty of Waitangi,
representing as it did a partnership between Maoridom and the Queen;
“Leaders shrug off republican ra-ra” New Zealand Herald 8 November
1999.

8See Chapter 9.3.2.

9Significantly, although the “Building the Constitution” conference held
in Wellington in 2000 discussed the question of a head of State, the role
of the Treaty of Waitangi, and questions of the proper relationship of
central and local government, exercised the delegates more; Institute of
Policy Studies, Victoria University of Wellington; James, Building the
But attitudes and priorities do change. The attempts by a former Prime Minister, the Rt Hon James Bolger, to promote a republic in the early 1990s were unsuccessful. But that certainly does not preclude the possibility of the abolition of the monarchy some time in the future\textsuperscript{10}.

This said, it appears unlikely that a republican form of government will be adopted in New Zealand in the short-to-medium term\textsuperscript{11}. The underlying proposition upon which this thesis is built is that the concept of the Crown is symbolically, legally and administratively one of the key elements of the New Zealand political, legal and governmental structure, and that its replacement would be more than a merely superficial change\textsuperscript{12}.

The concept of the Crown has acquired a sufficiently distinctive national identity in New Zealand, and it retains practical as well as symbolic importance. The existence of the Crown has had an important influence upon the way in which New Zealand is governed. Perhaps most

\textsuperscript{10}The very reasons for the failure of Bolger’s initiative can give an indication of the degree of acceptance of the monarchy as an appropriate form of government for New Zealand.

\textsuperscript{11}Any prediction for the long-term must inherently be unreliable, and cannot be made with any degree of certainty, as the influences upon the constitution vary over time.

\textsuperscript{12}Some opponents of a republic argue that a concept of a minimalist republic is a fallacy; Abbott, Tony, \textit{The Minimal Monarchy} (1995). Some of the difficulties of achieving such a change have been illustrated by the Australian referendum of November 1999; Greg Ansley, “Monarchists Gain Ground” New Zealand Herald 27 October 1999.
importantly, the symbolism of the Crown can be important as a source of authority, and not merely indicative of it\textsuperscript{13}. This is particularly important with respect to the Treaty of Waitangi\textsuperscript{14}.

This thesis is not an attempt to assess the advantages or disadvantages of New Zealand becoming a republic\textsuperscript{15}. For this reason arguments for and against a republic are not examined, except relatively briefly in the penultimate Chapter. Nor does it attempt an evaluation of monarchy or republic as alternative forms of government\textsuperscript{16}. It is, however, an attempt to explain the relatively stable position of the monarchy.

The thesis is based on the proposition that the Crown has become conceptually entrenched in New Zealand to a greater extent than perhaps

\textsuperscript{13}Warhurst, John, “Nationalism and Republicanism in Australia” (1993) 28 AJPS 100.

\textsuperscript{14}A similar source of authority may be seen in the post-war evolution of the Japanese monarchy. Though the emperor was stripped of almost all his formal powers by the Americans, he has gained new authority through becoming the “emperor of the masses” rather than the “emperor above the clouds”; Ruoff, Kenneth, “The Symbol Monarchy in Japan’s Postwar Democracy” (1997) Columbia University PhD thesis.

\textsuperscript{15}Such an approach is left for another researcher, or perhaps, if the Rt Hon Michael Moore has his wish, an official Constitutional Convention; “Explanation: New Zealand Constitutional [People’s] Convention Bill 1998” (11 February 1998).

\textsuperscript{16}Arguably such an exercise would be futile in any case, as the merits and demerits of each system have differing importance in each country, depending upon social and historical variables.
anywhere else in the Commonwealth outside the United Kingdom, and this for reasons peculiar to New Zealand. The purpose of this thesis is to propose and evaluate the idea that the Crown has evolved a sufficiently distinct conceptual and symbolic identity that it has acquired some degree of autochthony, and that it is for this reason that calls for a republic have been muted. One of the principal underlying reasons for this evolution, it will be argued, is the physical absence of the monarch.

Some evidence suggests that New Zealanders are not so much emotionally attached to the monarchy (or to the person of the monarch), as appreciative of the system of government which it represents\(^\text{17}\). Indeed, this system is only dimly perceived as monarchical in nature.

But the position of the Crown, however acceptable and useful the system of government may otherwise be, is potentially undermined by the very symbolism which is one of its traditional strengths. Some attacks upon the Crown have been motivated, not by criticism of the way in which the political system operates, but because of the inherent connection with the British monarchy\(^\text{18}\). This is seen in critics’ frequent

\(^{17}\)Aitken, Judith, “Control of Executive Powers in New Zealand” (1977) Victoria University of Wellington MPP research paper 64 quoting Sir Denis Blundell. See also Methodology.

\(^{18}\)See Trainor, Luke, Republicanism in New Zealand (1996). Some have also opposed monarchy as an example of inherited privilege, but this has not been particularly influential in New Zealand, given the physical absence of the Sovereign and the royal family, and the greater immediacy of other arguments.
concentration on the person of the Queen, or on members of the royal family. Though legally the Crown is distinct from that of the United Kingdom, the monarch is still seen, inevitably, as primarily British. It is thus simplistic, in any investigation of the monarchy, to place excessive emphasis on the legal concept of separate sovereignty, which emphasises the division of the Crown.

Moves in Canada, Australia and New Zealand to have the Governor-General seen to represent the Crown rather than the Queen, or to be acknowledged as de facto head of State, have been conscious or unconscious attempts by governments to counter this tendency to see the Sovereign largely or even exclusively as the “Queen of England”. It is this perceived focus on a “foreign” head of State which would appear

19 Some Australian Republican Movement publicity material produced for the 1999 referendum featured the Prince of Wales and Camilla Parker-Bowles, in an attempted “scare tactic”; Greg Ansley “King Charles, Queen Camilla in scare tactic” New Zealand Herald 26 October 1999.

20 For the development of the doctrine of separate sovereignty see Chapter V.

21 See Chapter 6.3.1.

22 See e.g. Abbott, Tony How to win the constitutional war (1997).

23 There is a tendency for those opposed to the monarchy to use the style “Queen of England” rather than of the United Kingdom (or New Zealand), see for an example, Shannon, Philip, “Becoming a republic” (1995) Victoria University of Wellington LLM research paper.
to have been the most successful of the various arguments used by the republican movement in Australia in recent years\textsuperscript{24}. Yet, at the same time, having the Governor-General seen to represent the Crown rather than the Queen has encouraged the development of the Crown as a permanent part of the constitution, one distinct from the person of the Sovereign, and therefore to some extent above criticism based on nationalism alone.

The central focus of this thesis is the retention of political legitimacy. Legitimacy is a major feature of the observable relations of government, and it appears to perform an important function in social life\textsuperscript{25}. Specifically, in the New Zealand context, governmental legitimacy is questioned by those who claim sovereignty for Maori, and thereby would limit, or deny, the sovereignty of the existing regime, and hence reject its claims to legitimacy\textsuperscript{26}. Some republicans, and others, would further deny its legitimacy as based on a “foreign” constitutional legacy\textsuperscript{27}.

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\textsuperscript{24}Though not one which has gone unanswered; Abbott, Tony \textit{How to win the constitutional war} (1997). Nor would it appear to be so evident in Canada; Smith, David, \textit{The Republican Option in Canada} (1999).  \\
\textsuperscript{25}Barker, Rodney, \textit{Political Legitimacy and the State} (1990) 14.  \\
\textsuperscript{26}See Chapter III.  \\
\textsuperscript{27}Galligan, Brian, “Regularising the Australian Republic” (1993) 28 AJPS 56.
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It is the underlying hypothesis of this thesis that the Crown, as an institution, has become much more than merely the person of the Sovereign, just as the New Zealand Crown had earlier evolved from a colonial Crown. This development has been promoted by the absence of the Sovereign and the relatively low profile of the Governor-General. It has also been reinforced by the developing legal conception of “the Crown” as a corporation\textsuperscript{28}, and by its use as a metonym for government\textsuperscript{29}.

The result is that the symbolism of the Crown has become, for many purposes, more important than the symbolism of the Sovereign. The monarch has become an increasingly less significant element in a wider political entity, the Crown. Yet, at the same time the constitutional structure and symbolism remains distinctly unrepublican\textsuperscript{30}.

The importance of this investigation may be seen in the observation that constitutional reform in New Zealand is probably becoming more


\textsuperscript{29}Hayward, Janine, “In search of a treaty partner” (1995) Victoria University of Wellington PhD thesis.

\textsuperscript{30}See Smith, David, \textit{The Republican Option in Canada} (1999).
likely\textsuperscript{31}. Popular dissatisfaction in recent years with politicians in general and with the new form of proportional representation or MMP (though this may be only temporary)\textsuperscript{32}, point to the possibility of a significant revision of the constitution in the not too distant future\textsuperscript{33}. Longer-term dissatisfaction with the adequacy of Maori participation in government processes - or with the very existence of racially separate representation- also suggest this.

Any revision of the constitution should be done only with the benefit of a proper understanding of the operation of the existing governmental structure, and (in some respects more importantly) of its

\textsuperscript{31}An example of the type of reform postulated is Professor Whatarangi Winiata's paper presented to the government by the Anglican Church-led “Hikoi of Hope” march on Wellington in late 1998. This called for separate social, economic and political structures for Maori; Interview with Sir Paul Reeves, 11 November 1998.

\textsuperscript{32}The Prime Minister’s April 1999 proposal for a referendum on MMP met with a none too enthusiastic response; John Armstrong, “Shipley Calls Time on MMP” New Zealand Herald 24 April 1999. In the Third New Zealand Study of Values, 71\% rated the political system as bad, compared with 29\% pre-MMP; Perry, Paul & Webster, Alan, \textit{New Zealand Politics at the Turn of the Millennium} (1999) 42-43.

\textsuperscript{33}In general, see Kelsey, Jane, “Agenda for change” (1995). There was little positive response to Moore’s 1998 proposal for a Constitutional Convention to consider such matters. But the National Party, as an example, did establish a working party to examine these issues, in part to assess the strength of calls for constitutional reform; Interview with Neil Walker, 11 May 1999.
symbolism and claims to legitimacy\textsuperscript{34}. An understanding of the underlying “European” concepts of government as found in New Zealand are as important as an understanding of the parallel Maori concepts of tino rangatiratanga and kawanatanga\textsuperscript{35}, concepts of authority which will be examined in Chapter III.

To date, little has been done in New Zealand towards a study of the Crown as the central focus of government or, indeed, of the theory of the structure (as distinct from the role) of government\textsuperscript{36}. Research has been completed on the so-called reserve powers of the Governor-General\textsuperscript{37}, and the respective powers and influence of the constituent parts of

\textsuperscript{34}It should not be considered in isolation; Hayward, Janine, “Commentary” in Simpson, \textit{Constitutional Implications of MMP} (1998) 232.

\textsuperscript{35}Terms over whose precise meaning scholars, Maori and Pakeha alike, have been unable to agree; see Chapter III.

\textsuperscript{36}In part possibly a consequence of the intellectual dominance of the behaviouralist approach to political studies, which disdained interest in the State as opposed to the process of government; Skocpol, Theda, “Bringing the State Back In” in Susser, \textit{Approaches to the Study of Politics} (1992) 457.

government. Much work has been done on the relationship of the State and the individual, and on the role of the Treaty of Waitangi. But there has been no general analysis of the position and function of the monarchy, and little substantial work on its likely future in New Zealand.

Those studies which have been made to date are generally from principally historical, legal or political perspectives. This thesis is an attempt to bring together these diverse approaches, in order to better understand the Crown and its place in the body politic.

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42 Kelsey has done much to bridge the gap between law and politics, arguably a largely artificial construct in the constitutional field; see, for example, *Rolling Back the State* (1993).
In Part One, “the Importance of the Crown”\textsuperscript{43}, the position of the Crown is addressed in terms of traditional Western political theory, with reference to wider concepts of sovereignty and legitimacy. In the long term, if the established order does not sufficiently fulfil the aspirations of the population, the legitimacy of that order may come into question\textsuperscript{44}, and itself be in danger of overthrow\textsuperscript{45}. In particular, this Part looks at the legitimacy of the regime derived from the inherited authority of the imperial Crown and Parliament, and compares it with that derived from the Treaty with the tangata whenua, the original Maori settlers of this country. The Crown, as an institution of government, is the legal and symbolic focus of such authority. As such, its importance is not simply symbolic, but in part determinative of the style of government followed in New Zealand.

Part Two, “Break-up of empire”, examines the movement towards full independence\textsuperscript{46}. This expands on the thesis that the Crown may rely on a claim to contemporary legitimacy additional to that conferred by traditional inherited authority and the Treaty of Waitangi. For the existence of the Crown as a concept of government contributed

\textsuperscript{43}Chapters I, II, and III.

\textsuperscript{44}Or indeed may never have been accorded. See, for example, Jackson, Moana, “Maori Law” in Young, \textit{Mana Tiriti} (1991) 19 and Chapter VII.


\textsuperscript{46}Chapters IV and V.
significantly to the development of political independence. In these Chapters the process whereby the Crown began to divide, and New Zealand acquired freedom to make fundamental changes to its own constitution, is examined.

In Part Three, “Development of a separate New Zealand Crown”, the progress of this new constitutional order is examined\textsuperscript{47}. This Part looks particularly at the evolution of the office of Governor-General. The development of a distinctly New Zealand legal and political identity - in the patriation of the office of Governor-General, is then examined. The Governor-General is now seen primarily as the nominal head of the executive branch of government - of the Crown as an abstract concept, rather than as representative of the person of the Sovereign. The impact of MMP on the development of the office, and ultimately on the Crown, is also assessed.

In Part Four, “Republicanism”, the evolution of republican sentiment, and pressures both for and opposed to the Crown, are considered\textsuperscript{48}. It will be argued that the republican movement, if indeed it can be so called, is at present weak, and that the Treaty of Waitangi and

\textsuperscript{47}Chapters VI, VII and VIII.
\textsuperscript{48}Chapter IX.
the localisation or patriation⁴⁹ of the Crown as a concept of government are factors which have largely contributed to this weakness.

In Part Five, the Conclusion, the suggested model of the Crown is evaluated, conclusions are drawn, and preliminary predictions made.

In each aspect in which the Crown is important, conceptual, legal, and practical, a determining factor has been the physical absence of the Sovereign. This has led to a focus upon national aspects of the Crown, and upon the development of a concept of a Crown uncomplicated by an undue focus upon monarchical trappings. Whether this is sufficient for the long-term survival of the Crown remains, however, uncertain. Yet it does suggest that any republican model, to be successful, would be more than merely of the minimalist type, for if the symbolism of the monarchy has relatively little place in New Zealand, the monarchy remains conceptually strong as a system.

⁴⁹The expression patriation, unsatisfactory as it might be in other respects, is a more comprehensible word than autochthony. Nationalisation is perhaps a better term.
SOURCES

Resources used in the course of research for this thesis included an extensive range of primary, secondary and tertiary material. Primary sources included first-hand accounts of investigations conducted by other writers, such as articles in professional journals, monographs, and theses. The works of several writers in particular stood out as particularly perceptive or pertinent to this investigation, especially the 1995 thesis by Janine Hayward, “In search of a Treaty partner”. That work emphasised the significance of symbolism in New Zealand politics, and its relevance to the Crown in Treaty of Waitangi-Maori relationships. It however was largely confined to a narrow aspect, the identity of one party to the Treaty of Waitangi.

The inaugural professorial lecture by Jock Brookfield, The Constitution in 1985, was useful in extending the scope of the study suggested by Hayward. Brookfield’s approach was to seek the sources of governmental legitimacy in New Zealand. The approach was that of the legal scholar versed in concepts of legitimacy. His thesis was further developed in Waitangi and Indigenous Rights (1999), in which he asks how a revolutionary taking of power by one people over another may be partly legitimated. His focus is upon the Crown’s acquisition of power
over New Zealand from 1840, and the subsequent evolution both of the Crown and of challenges to the authority of the Crown from Maori.

The 1985 Canadian study by David Smith, *The Invisible Crown*, is an argument for the study of the Crown from a quite different perspective. It was a plea to bring the Crown back into the study of government. It argues that Bagehot did his work too thoroughly in labelling it a dignified element of the constitution, and that the Crown permeates the political system in ways in which political scientists have tended to ignore in favour of the more visible institutions of Cabinet and Parliament. Although much of his argument is applicable to a federal system—which relies upon an entrenched constitution for the allocation of authority—the central tenet remains applicable to New Zealand.

Interviews with some of those closely involved with the operation of the machinery of government formed an important contribution, as did autobiographies of political figures, and the official reports of the courts and of Parliament. The principal interviewees are listed in the bibliography.

Examples of seminal official reports illustrating and shedding light on important political developments included the Department of Justice, *Reports of an Officials Committee* (1986), and subsequent debates on the resulting Constitution Bill (later the Constitution Act 1986), recorded in Hansard. The first gave an insight into official thinking on the
constitution. The latter revealed the views of politicians—at least their publicly held views.


Cohen and Mulgan both addressed wider issues of the structure of the State, in the case of Mulgan suggesting a formal role for the Treaty of Waitangi as a basic constitutional document. Both Galligan and Brookfield considered aspects of republicanism. Galligan suggested that Australia was already a republic in all but symbolism. Brookfield

\(^{50}\)24 Osgoode Hall LJ 379.
\(^{51}\)41(2) Political Science 51.
\(^{52}\)5 Supreme Court Law Rev (Can) 369.
\(^{53}\)60 Parliamentarian 14.
\(^{54}\)114 Daedalus 127.
\(^{55}\)28 AJPS 56.
\(^{56}\)8 Legislative Studies 5.
examined some of the consequences of New Zealand becoming a republic.

Secondary sources were used where appropriate, and included summaries of information from primary sources, including translations, abstracts, and commentaries. Important works included Walter Bagehot, “The English Constitution” (1974) and Dame Catherine Tizard, Crown and Anchor (1993).

Relatively little direct use was made of tertiary sources, in part because few of the issues discussed in the thesis have been the subject of published writings of that length, certainly in New Zealand. It would seem that, except for interest in the role of the State, the monarchy (and republicanism) is regarded as relatively unimportant. This is typified by the comment of Sir Geoffrey Palmer that:

> [t]he monarchy itself ... is not one of the problems of the New Zealand constitution. While there may be a strong republican sentiment in Australia, that does not appear to be the case in New Zealand. So I do not propose to discuss the monarchy further in this book.

From a Commonwealth perspective, David Butler & DA Low, Sovereigns and Surrogates (1991); Bruce Clark, Native liberty, Crown Supremacy (1990); and Christopher Cunneen, King’s Men (1983) gave important insights into the role of the Crown. Butler and Low make a

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comparative study of heads of State, limited however in being restricted largely to formal powers rather than the symbolic importance of the office. Cunneen examined the evolution of the vice-regal office in Australia, and drew some important conclusions, one of which was that the symbolic importance of the office only partly compensated for the decline in its practical political role.

Vernor Bogdanor, in *The Monarchy and the Constitution* (1995), sought to outline a new conception of the Crown in the United Kingdom, as symbolic representative of the country. Although largely confined to particularly British circumstances, Bogdanor’s book highlights the increasing importance of the symbolism inherent in the monarchy.
METHODOLOGY

This thesis involves a critical re-examination of traditional materials from a new perspective. All writing on the constitution is underpinned by some theoretical perspective, however dimly perceived or narrowly conceived\(^{59}\). Legal and constitutional history cannot be left to the lawyers alone, nor to historians\(^{60}\). Neither can the analysis of the contemporary constitution by political scientists exclude consideration of its legal and historical, as well as its political, aspects.

Constitutional lawyers are concerned particularly with legal validity. They may not be especially interested in the normative standing of the power arrangements that the law validates. For this reason legal studies of the reserve powers of the Governor-General, useful though they might otherwise be, have tended to place too little weight on the realities of political life, or on underlying beliefs and assumptions which drove decision-making\(^{61}\).


\(^{61}\)And it has been said that it was precisely because he considered the matter solely from a legal viewpoint that Sir John Kerr came into conflict with his Labour Ministry in 1975. This is, perhaps, one disadvantage of having retired judges as Governors-General.
For example, discussion by legal scholars of the 1975 dismissal of the Australian Prime Minister by the Governor-General have tended to support the position maintained by the latter, yet the animosity aroused by that one action has marked subsequent Australian politics, rendering the value of a purely legal account problematic.\(^{62}\)

Once the study of politics centred on the State, but for much of the twentieth century it had focused on political behaviour and policy-making, with governmental decisions explained as a response to societal forces. This is seen in the growth of behaviouralism, which sought to escape from an “anemic mixture of law, philosophy, and history”\(^{63}\) to a more empirical, quantitative, interdisciplinary approach to the study of politics. This was justified on the basis that traditional studies were essentially non-comparative, descriptive, legalistic, and static.\(^{64}\) Behaviouralism, generally, is an approach which seeks “hard data”. Analysis of such mysteries as “the State” did not come readily.\(^{65}\)

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\(^{62}\)For example, see, Barwick, Sir Garfield, *Sir John Did His Duty* (1983), and Chapter 8.3.


\(^{64}\)For the criticism of the traditional study of political science, see Macridis, Roy, “Major Characteristics of the Traditional Approach” in Susser, *Approaches to the Study of Politics* (1992) 16-21.

\(^{65}\)Susser, Bernard, *Approaches to the Study of Politics* (1992) 180. As Bogdanor found, it is necessary to range across law, politics and history to understand a historic constitution; *The Monarchy and the Constitution* (1995).
In recent decades State-centred theorists sought to bring the State back, arguing that it is more autonomous than society-centred theorists (such as neo-liberals\(^\text{66}\)) have suggested. Recent growth of a “new institutionalism” places the State at the very centre of political science, ironically at a time when the State has arguably become less involved in society\(^\text{67}\).

Bringing the State- or what passes for the State in the New Zealand system of government\(^\text{68}\)- back into the study of politics must necessarily involve bringing the constitution back in, but in ways that avoid the limitations of the constitutional approach and a narrow legalism\(^\text{69}\).

Evidence of legal validity is insufficient to give a meaningful explanation of the Crown, in part because of differing perspectives of legality between Maori and Pakeha\(^\text{70}\). Nor will the moral justifiability of power relations be sufficient, as this downplays the effect legal structures and power relationships have on forming public opinion.

\(^{66}\)For definitions of the different perspectives of the State see Goldfinch, Shaun, “The State” in Miller, New Zealand Government and Politics 511-520, 512 (forthcoming).

\(^{67}\)See, for example, Kelsey, Jane, Rolling Back the State (1993).

\(^{68}\)For the nature of the State, see Chapter 1.4.


A study incorporating the findings of public opinion polls on the monarchy would produce results of only limited usefulness\textsuperscript{71}. Legitimacy is more than a question of transient popularity- though opinion polls consistently show a preference for the monarchy\textsuperscript{72}. The legitimacy of a regime may be based on a number of different factors\textsuperscript{73}, a point to be examined in Chapter II. Opinion polls which explain the reasons for support for or opposition to the monarchy have not yet been taken\textsuperscript{74}.

This thesis does not ask whether, or why, a majority of the population of New Zealand would prefer a monarchy rather than a republic. Rather it seeks to measure the “official” perception of the monarchy through the actions and writings of politicians, judges, and administrators. Courts are particularly important, for it is through the decisions of the courts that much of the contemporary political and administrative importance of the Treaty of Waitangi has been

\textsuperscript{71}Though they can be used to show that support for the monarchy can change with demographic evolution. See Chapter IX.

\textsuperscript{72}See, for example, the National Business Review Consultus polls, conducted by UMR Insight regularly since 1993, have shown support for the monarchy at between 50% and 60%. Support for a republic has remained steady at 27-29%; National Business Review, 5 March 1999, p 16.

\textsuperscript{73}See, for example, Collins, Randall, \textit{Weberian Sociological Theory} (1986).

\textsuperscript{74}Though some work has been done in this direction, see for example Miller, Raymond, “God Save the Queen” (1997).
developed\textsuperscript{75}. It is through the revival of the Treaty of Waitangi that much of the importance of the Crown may be seen\textsuperscript{76}.

These political sources are relied on in the belief that the constitution is a flexible and changing instrument, and that the real constitution is not only created but also only fully known by its actors, those who take part in the day-to-day operation of its institutions\textsuperscript{77}. It does not have an objective existence, in that it is more than merely individuals and legal structures\textsuperscript{78}. It exists in the imagination of those who create it, use it and thus know it\textsuperscript{79}. Thus the actions of politicians, judges and public servants provide the key to understanding the constitution\textsuperscript{80}.

\textsuperscript{75} As in \textit{New Zealand Maori Council v Attorney-General} [1987] 1 NZLR 641 (CA).

\textsuperscript{76} Hayward, Janine, “In search of a treaty partner” (1995) Victoria University of Wellington PhD thesis.

\textsuperscript{77} The differences in perception- and in aspirations- between these actors and the general public can be significant. For an example of this in practice see Cochran, Timothy, “Competing visions of the Canadian Constitution” (1995) University of New Brunswick MA thesis.

\textsuperscript{78} Particularly in respect of what might be called policy legacies; Skocpol, Theda, \textit{States and Social Revolution} (1979) 27.


\textsuperscript{80} Neo-liberal, public choice analysis of politics also sees bureaucrats and elected politicians as influential political actors; Dunleavy, P & O’Leary, B, \textit{Theories of the State} (1987) ch 3.
These indicators of elite opinion\textsuperscript{81} are a more useful gauge of perceptions than opinion polls. This is because the subtleties behind the perception of the Crown makes it all but impossible to gauge the real popular attitude to the monarchy.

This is illustrated by an analysis of the results of the third New Zealand Study of Values. This appeared to show a significant increase in support for a republic over the preceding decade\textsuperscript{82}, which most other opinion polls did not. The 1999 Study of Values showed, in the words of its editors, “very graphic evidence ... shifting toward support for a republic” ... and that “New Zealand is not yet ready to cut its formal ties with the Queen, but that it is most definitely the direction that the thinking of the population is heading”\textsuperscript{83}. The percentage in favour of a republic had virtually doubled since the identically worded 1989 survey,

\begin{table}
\centering
\begin{tabular}{lcc}
  & 1998 & 1989 \\
  strongly in favour & 18\% & 5.3\% \\
  more or less in favour & 14.2\% & 10.9\% \\
  neither in favour nor against & 24.4\% & 21.2\% \\
  more or less against & 13.4\% & 34.9\% \\
  strongly against & 25.2\% & 26.4\% \\
  don’t know & 4.7\% & 1.3\% \\
\end{tabular}
\end{table}

\textsuperscript{81}The formers of elite opinion are also arguably more inclined to be republican; See Miller, Raymond & Cox, Noel, “The Monarchy” in Miller, \textit{New Zealand Government and Politics} 48-60 (forthcoming).

\textsuperscript{82}Figures from 1998 and 1989 respectively were as follows:

\textsuperscript{83}Perry, Paul & Webster, Alan, \textit{New Zealand Politics at the Turn of the Millennium} (1999) 76.
from 16% to 32%, with the greatest increase among the “strongly in favour” category. Opposition to a republic had fallen from 61% to 39%.

The results of most other surveys, including the National Business Review Compaq polls, conducted by UMR Insight regularly since 1993, had shown support for the monarchy at between 50% and 60%. Support for a republic had remained steady at 27-29% \(^{84}\). To reconcile these results with the New Zealand Study of Values, it is necessary to look carefully at the question asked.

The question in the Study was worded thus:

Would you be strongly in favour, more or less in favour, more or less against, or strongly against each of these items? ...

Declaring New Zealand a Republic and no longer having the Queen of England as head of State \(^{85}\).

This actually raises two issues- republicanism, and having the “Queen of England” as head of State. The emphasis on the “Queen of England”, in 1989 perhaps perceived as a slight hurdle, had become a more significant obstacle by 1998. Opposition to the Crown was greatest when the emphasis was on “England”. When the choice was between

\(^{84}\) National Business Review, 5 March 1999, p 16.

\(^{85}\) “The Queen of England” is, of course, not the correct style to use in any case, see footnote 24.
monarchy and republic the results were significantly different. This is consistent with polling in the republic referendum Australia in 1999\textsuperscript{86}.

It would seem to indicate support for the Crown as a symbol or system, rather than for the monarchy as such\textsuperscript{87}. This shows the inherent difficulties in using opinion polls to measure support for an institution about which there are such widely differing (and changing) perceptions.

The method adopted in this thesis is comparative. Dogan and Pelassy have suggested that it is natural for people to think comparatively, and that we do so in order to “evaluate more objectively our situation” as individuals, a community or a nation\textsuperscript{88}.

New Zealand is compared and contrasted with other countries with similar constitutional arrangements and political histories. Principal comparisons are with Canada and Australia, both of which share the same Sovereign with New Zealand. Both are former British colonies. Both have a history of relations with indigenous peoples based to some extent (at least in Canada) on treaties signed with the Crown. Both also have a current national focus, to varying degrees, on the rights of

\textsuperscript{86}Chapter IX.
\textsuperscript{87}See Chapter 9.3.
\textsuperscript{88}\textit{How to compare nations} (1984) 3.
indigenous peoples\textsuperscript{89}. Ireland, South Africa, the United Kingdom, and other realms and former realms are also examined where comparison is pertinent.

Canada and Australia differ from New Zealand in being federal states, which require different technical rules to be followed. Canada’s French-speaking minority\textsuperscript{90}, and Australia’s long minority tradition of Irish republicanism\textsuperscript{91}, and the historically more heterogeneous populations of those two countries, set them apart from New Zealand, where a common popular perception, only challenged in recent decades, was that the country was a model of loyalty to the Crown. Whether New Zealand was actually any more loyal is unclear, but certainly hostility to the Crown was less marked than it was among certain elements of the Australian population.

Each part of the thesis will involve examination of a discrete aspect of the political or legal evolution of the Crown. Each involves an

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\textsuperscript{90}For the origins of which see Pollock, Carolee Ruth, “His Majesty’s Subjects” (1996) University of Alberta PhD thesis.

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examination of the comparable situations in Canada and or Australia (and particularly in the case of the last Part, of the United Kingdom also).

In Part One, “the importance of the Crown”, the relationship between indigenous peoples and the Crown are examined in Canada and Australia, and compared and contrasted with the situation in New Zealand. This is to evaluate the legitimacy of the Crown derived from its relationship with indigenous peoples. It will be shown that the Crown enjoys a special relationship with the Maori people, similar though more significant that the equivalent in Canada, and more profound than that in Australia. The desire to ensure the continuation of this legitimacy has perhaps deterred many from challenging the continuation of the monarchy, while the Crown provides a useful umbrella beneath which government is undertaken.

In Part Two, “Break-up of empire”, the division of the Crown, and the development of legislative independence, is examined. The legislative independence of Canada, for long retarded by domestic political considerations, is contrasted with the early legislative independence of New Zealand (though there were later to be doubts about this). It will be asked whether this legislative evolution was enough, of itself, to explain the independence of New Zealand.
The executive independence of New Zealand through the division of the prerogative is compared with that in Australia, with the focus being upon the acquisition of the right to advise the Crown. It will be shown that, though relatively late in developing, this was more precocious in New Zealand than had hitherto been generally believed. True independence was manifested most clearly in the executive branch of government, that represented by the Crown.

In Part Three, “Development of a separate New Zealand Crown”, the development of national Crowns in Canada and Australia are compared with the New Zealand experience. It will be shown that, whilst strong dogmatic or conceptual beliefs did not greatly influence the evolution of the Crown in New Zealand, this country soon accepted the evolutionary process set in motion largely by events abroad. The process of patriation of the office of Governor-General in Canada, Australia and New Zealand, and the changing constitutional roles of the office, illustrate the development of a separate Crown. This development has been influenced particularly by the physical absence of the Sovereign.

In Part Four, “Republicanism”, the evolution of republican sentiment in New Zealand is examined. This is compared and contrasted with the republican movements in the United Kingdom and Australia. It
will be shown that the republican tradition in the United Kingdom had comparatively little relevance to that in this country. The Australian movement, whilst providing some inspiration for New Zealand republicans, remains steeped in the Australian political and constitutional tradition, and so also has little direct relevance to New Zealand.