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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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INTRODUCTION

The title of this thesis is “The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity”. 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, its political significance has tended to be undervalued, in part due to the physical absence of the Sovereign. But this does not mean that New Zealand is a de facto

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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.
The Crown was, and remains, symbolically and legally omnipresent. 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.

5.The 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\textsuperscript{6}. 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\textsuperscript{7}. 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\textsuperscript{8}.

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\textsuperscript{9}.

\begin{itemize}
\item \textsuperscript{6}Simpson, Alan, \textit{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.
\item \textsuperscript{7}The 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.
\item \textsuperscript{8}See Chapter 9.3.2.
\item \textsuperscript{9}Significantly, 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, \textit{Building the Constitution} (2000).
\end{itemize}
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\(^{13}\). This is particularly important with respect to the Treaty of Waitangi\(^{14}\).

This thesis is not an attempt to assess the advantages or disadvantages of New Zealand becoming a republic\(^{15}\). 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\(^{16}\). 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

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

\(^{14}\)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.

\(^{15}\)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).

\(^{16}\)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. 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. 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.\(^{19}\)

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\(^{20}\), 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\(^{21}\), or to be acknowledged as de facto head of State\(^{22}\), 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”\(^{23}\). 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}.

\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.
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, and by its use as a metonym for government.

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 un-republican.

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


likely. 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), point to the possibility of a significant revision of the constitution in the not too distant future. 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

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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.

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, New Zealand Politics at the Turn of the Millennium (1999) 42-43.

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. 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, 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. Research has been completed on the so-called reserve powers of the Governor-General and the respective powers and influence of the constituent parts of

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

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

36In 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, Approaches to the Study of Politics (1992) 457.

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”\(^{43}\), 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\(^{44}\), and itself be in danger of overthrow\(^{45}\). 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\(^{46}\). 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

\(^{43}\)Chapters I, II, and III.

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


\(^{46}\)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\(^{47}\). 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\(^{48}\). 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

\(^{47}\) Chapters VI, VII and VIII.

\(^{48}\) 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.

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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

\textsuperscript{50} 24 Osgoode Hall LJ 379.
\textsuperscript{51} 41(2) Political Science 51.
\textsuperscript{52} 5 Supreme Court Law Rev (Can) 369.
\textsuperscript{53} 60 Parliamentarian 14.
\textsuperscript{54} 114 Daedalus 127.
\textsuperscript{55} 28 AJPS 56.
\textsuperscript{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\textsuperscript{59}. Legal and constitutional history cannot be left to the lawyers alone, nor to historians\textsuperscript{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\textsuperscript{61}.

\textsuperscript{59}Partington, Martin, “The Reform of Public Law in Britain” in McAuslan & McEldowney, Law, Legitimacy and the Constitution (1985) 192.


\textsuperscript{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.\textsuperscript{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”\textsuperscript{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\textsuperscript{64}. Behaviouralism, generally, is an approach which seeks “hard data”. Analysis of such mysteries as “the State” did not come readily\textsuperscript{65}.

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

\textsuperscript{63}Susser, Bernard, \textit{Approaches to the Study of Politics} (1992) 4.

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

\textsuperscript{65}Susser, Bernard, \textit{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; \textit{The Monarchy and the Constitution} (1995).
\end{flushleft}
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\(^{66}\)) 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\(^{67}\).

Bringing the State- or what passes for the State in the New Zealand system of government\(^{68}\) - 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\(^{69}\).

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\(^{70}\). 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.

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\(^{66}\)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\(^\text{71}\). Legitimacy is more than a question of transient popularity—though opinion polls consistently show a preference for the monarchy\(^\text{72}\). The legitimacy of a regime may be based on a number of different factors\(^\text{73}\), a point to be examined in Chapter II. Opinion polls which explain the reasons for support or opposition to the monarchy have not yet been taken\(^\text{74}\).

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

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

\(^{72}\)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.

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

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

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. It does not have an objective existence, in that it is more than merely individuals and legal structures. It exists in the imagination of those who create it, use it and thus know it. Thus the actions of politicians, judges and public servants provide the key to understanding the constitution.

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


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.

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


80 Neo-liberal, public choice analysis of politics also sees bureaucrats and elected politicians as influential political actors; Dunleavy, P & O’Leary, B, Theories of the State (1987) ch 3.
These indicators of elite opinion\(^{81}\) 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\(^{82}\), 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”\(^{83}\). The percentage in favour of a republic had virtually doubled since the identically worded 1989 survey.

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

\(^{82}\)Figures from 1998 and 1989 respectively were as follows:

<table>
<thead>
<tr>
<th></th>
<th>1998</th>
<th>1989</th>
</tr>
</thead>
<tbody>
<tr>
<td>strongly in favour</td>
<td>18%</td>
<td>5.3%</td>
</tr>
<tr>
<td>more or less in favour</td>
<td>14.2%</td>
<td>10.9%</td>
</tr>
<tr>
<td>neither in favour nor against</td>
<td>24.4%</td>
<td>21.2%</td>
</tr>
<tr>
<td>more or less against</td>
<td>13.4%</td>
<td>34.9%</td>
</tr>
<tr>
<td>strongly against</td>
<td>25.2%</td>
<td>26.4%</td>
</tr>
<tr>
<td>don’t know</td>
<td>4.7%</td>
<td>1.3%</td>
</tr>
</tbody>
</table>

\(^{83}\)Perry, Paul & Webster, Alan, 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%. 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.

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

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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

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\textsuperscript{86} Chapter IX.
\textsuperscript{87} See Chapter 9.3.
\textsuperscript{88} 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


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

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.
In Part One, the “Importance of the Crown”\textsuperscript{1}, the question of the position of the Crown will be addressed with reference to the concepts of sovereignty and legitimacy. It will be argued that the monarchy has evolved in New Zealand to the extent that it is a major source of indigenous governmental legitimacy and authority. It is partly for this reason that calls for its abolition have not received widespread support.

In particular, the legitimacy of the regime derives from two inherited sources, from the legacy of the imperial Crown and Parliament, and from the tangata whenua\textsuperscript{2}. The compact between the Crown and Maori is perhaps the single most important aspect of the New Zealand constitution\textsuperscript{3}.

But the Crown is also established at the heart of the constitution in other ways\textsuperscript{4}. Thus the continuity of government, embodied by the Crown, remains an important source of legitimacy. In this respect, the physical

\textsuperscript{1}Chapters II, III, and IV.
\textsuperscript{3}Though the ramifications of claims of Maori sovereignty are too great to allow more than a cursory examination of these in this thesis.
\textsuperscript{4}Unlike Australia, where the Constitution has been held to be based on popular sovereignty, and is arguably conceptually dominant; \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, 138 per Mason CJ.
absence of the person of the monarch has encouraged consideration of the Crown as a symbolic or conceptual focus for government action.
Chapter I:

THEORY OF SOVEREIGNTY

1.1 Introduction

The Crown is important legally because it holds the conceptual place held by the State in those legal systems derived from or influenced by the Roman civil law. Not only does the Crown provide a legal basis for governmental action, but it provides much of the legal and political legitimacy for such action. Symbolism can be very important as a source of authority, and is not merely indicative of it.

The role of the Crown as a legitimising principle is arguably more evident in New Zealand than in otherwise comparable countries, Australia and Canada. As a signatory to the founding document of the country, the Treaty of Waitangi of 1840, it would appear that the Crown may have acquired a degree of authority which is now independent from its British origins.

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5 Though the term “State” is used in popular (and scholarly) writing, and there are some instances of official use, it has an uncertain legal meaning in New Zealand except as a synonym for the Crown; Goldfinch, Shaun, “The State” in Miller, New Zealand Government and Politics 511-520, 511 (forthcoming).

6 Warhurst, John, “Nationalism and Republicanism in Australia” (1993) 28 AJPS 100. See also Collins, Randall, Weberian Sociological Theory (1986) and Chapter 2.2.
On another conceptual level, the technical and legal concept of the Crown pervades the apparatus of government and law in New Zealand. But at the same time there is a divergence between orthodox constitutional theory and the modern political reality. This is especially important at a time that the traditional structure of government is being challenged, both by calls for Maori sovereignty\(^7\), and by suggestions for the adoption of a republican form of government.

The Crown is not essential to the legitimacy of government in New Zealand, but it does confer some legitimacy upon the existing regime. Some appreciation of orthodox constitutional theory is necessary, so that one of the bases for political legitimacy may be seen.

This Chapter seeks to identify some of these constitutional theories, and place them in their New Zealand context. Firstly, it looks at the role of the Sovereign as legal head of the executive government. In this, the Crown is the functional head of the executive branch of government. This might be called the practical role of the Crown. This section will examine the contemporary relevance of this traditional role. It will be argued that this is important because the Crown retains a practical role as the mechanism through which executive government is conducted.

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\(^7\)The actual meaning of this term is unclear, and seems perhaps to relate more to self-management than to sovereignty in the nineteenth century.
The second section considers the broader concept of the Crown as the focus of sovereignty. In this respect the Crown is a legal source of executive authority. But it is not the Sovereign him or herself who rules; rather they are the individual in whom is vested executive powers, for the convenience of government. This might be called the legal role of the Crown. This is important because it shows that the Crown retains significant legal powers upon which executive authority is based. Thus, the Crown remains useful as a source of governmental legal authority.

The third section examines some aspects of State theory. The absence of an accepted concept of the State in England required the Crown to assume the function of source of legal authority. This tradition has been followed in New Zealand, and this has important consequences, particularly in relation to the Treaty of Waitangi. This might be called the conceptual or symbolic role of the Crown. This is important because the Crown fulfils the function exercised by a State in many other jurisdictions, yet the Crown is not simply a metonym for the State.

European sense; Interview with Sir Douglas Graham, 24 November 1999.
1.2 The Sovereign as legal head of the executive government

New Zealand statutes have tended to use the terms “Her Majesty the Queen” and “the Crown” interchangeably and apparently arbitrarily. There appears to have been no intention to draw any theoretical or conceptual distinctions. This may simply be a reflection of a certain looseness of drafting, but it may have its foundation in a certain lack of certainty felt by legal draftsmen as much as by the general public.

“The Crown” itself is a comparatively modern concept. As Maitland said, the king was merely a man, though one who does many things. For historical reasons the king or queen came to be recognised in law as not merely the chief source of the executive power, but also as the sole legal representative of the State or organised community.

According to Maitland, the crumbling of the feudal State threatened to break down the identification of the king and State, and as a consequence Coke recast the king as the legal representative of the State.

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8 The word “Sovereign” appears in New Zealand statutes only in the Sovereign’s Birthday Observance Act 1952. In the Constitution Act 1986 s 2 “Crown” is defined as “Her Majesty the Queen in right of New Zealand; and includes all Ministers of the Crown and all departments”.

It was Coke who first attributed legal personality to the Crown\textsuperscript{11}. He recast the king as a corporation sole, permanent and metaphysical\textsuperscript{12}. The king’s corporate identity\textsuperscript{13} drew support from the doctrine of succession that the king never dies\textsuperscript{14}. It was also supported by the common law doctrine of seisin, where the heir was possessed at all times of a right to an estate even before succession\textsuperscript{15}.

Blackstone explained that the king:

\textsuperscript{10}``The Crown as a Corporation'' (1901) 17 LQR 131.
\textsuperscript{11}Maitland, Frederic, ``The Crown as a Corporation'' (1901) 17 LQR 131.
\textsuperscript{12}It was as late as 1861 that the House of Lords accepted that the Crown was a corporation sole, having “perpetual continuance”; \textit{Attorney-General v Kohler} (1861) 9 HL Cas 654, 671.
\textsuperscript{13}A corporation is a number of persons united and consolidated together so as to be considered as one person in law, possessing the character of perpetuity, its existence being constantly maintained by the succession of new individuals in the place of those who die, or are removed. Corporations are either aggregate or sole. A corporation aggregate consists of many persons, several of whom are contemporaneously members of it. Corporations sole are such as consist, at any given time, of one person only; \textit{Mozley and Whiteley's Law Dictionary} (1988) 109.
\textsuperscript{14}It was at the time of Edward IV that the theory was accepted that the king never dies, that the demise of the Crown at once transfers it from the last wearer to the heir, and that no vacancy, no interregnum, occurs at all; Stubbs, Rt Revd William, \textit{The Constitutional History of England} (1906) vol ii 107.
\textsuperscript{15}Nenner, Howard, \textit{The Right to be King} (1995) 32.
is made a corporation to prevent in general the possibility of an interregnum or vacancy of the throne, and to preserve the possessions of the Crown entire.\footnote{16}{Bl Com book 1, 470. That Blackstone was at least partly incorrect can be seen in the development of a concept of succession to the Crown without interregnum of the heir apparent. Since this concept had fully developed by the time of Edward IV, this cannot have been the principal reason for the development of the concept of the Crown as a corporation sole.}

Thus the role of the Crown was eminently practical. In the tradition of the common law constitutional theory was subsequently developed which rationalised and explained the existing practice.

Generally, and in order to better conduct the business of government, the Crown was accorded certain privileges and immunities not available to any other legal entity.\footnote{17}{Harris, BV, “The ‘Third Source’ of Authority for Government Action” (1992) 109 LQR 626.} Blackstone observed that “[t]he King is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing, in him is no folly or weakness.”\footnote{18}{Bl Com book 1, 254.}

Mathieson has proffered the notion that the Crown may do whatever statute or the royal prerogative expressly or by implication
authorises, but that it lacks any natural capacities such as an individual or juridical entity may possess\(^\text{19}\).

However, more recently, in \textit{M v Home Office}\(^\text{20}\), the English Court of Appeal held that the Crown lacked legal personality and was therefore not amenable to contempt of court proceedings\(^\text{21}\). But it is precisely because in the Westminster-style political system we do not have the Continental notion of a State, nor an entrenched constitution\(^\text{22}\), that the concept of the Crown as a legal entity with full powers in its own right arose\(^\text{23}\).

\begin{enumerate}
\item[20]\([1992]\) 1 QB 270.
\item[21]However, in the House of Lords, Lord Templeman spoke of the Crown as consisting of the monarch and the executive, and Lord Woolf observed that the Crown had a legal personality at least for some purposes; [1993] 3 All ER 537.
\item[22]That is, one which claims for itself legal paramountcy, and which limits executive and legislative powers in such a way that the constitution itself, rather than any institution of government, becomes the focus of critical attention.
\item[23]See Chapter 1.4.
\end{enumerate}
Although the House of Lords in 1977, in *Town Investments v Department of the Environment*[^24], accepted that the Crown did have legal personality, it also adopted the potentially confusing practice of speaking of actions of the executive as being performed by “the government” rather than “the Crown”[^25]. The practical need for this distinction is avoided if one recognises the aggregate nature of the Crown[^26]. “The government” is something which, unlike the Crown, has no corporate or juridical existence known to the constitution. Further, its legal definition is both legally and practically unnecessary.

In *Re Mason*[^27] Romer J stated that it was established law that the Crown was a corporation, but whether a corporation sole (as generally accepted) or a corporation aggregate (as Maitland argued) was uncertain.

In *Town Investments*[^28] Lord Simon, with little argument, accepted that the Crown was a corporation aggregate, as Maitland had believed.


[^25]: *Town Investments Ltd v Department of the Environment* [1978] AC 359, 380-381 per Lord Diplock.

[^26]: Some writers, following *Town Investments*, have preferred the expression “government” rather than “Crown” or “State”, for example Harris, BV, “The ‘Third Source’ of Authority for Government Action” (1992) 109 LQR 626, 634-635. The government has never been a juristic entity, so in trying to abandon one legal fiction in *Town Investments*, their Lordships adopted a new one; Joseph, Philip, “Crown as a legal concept (I)” [1993] NZLJ 126, 129.

[^27]: [1928] 1 Ch 385, 401.
This appears to be in accordance with the realities of the modern State, although it was contrary to the traditional view of the Crown. Thus, the Crown is now seen, legally, as a nexus of rights and privileges, exercised by a number of individuals, officials and departments, all called “the Crown”.

Maitland believed that the Crown, as distinct from the king, was ancienly not known to the law but in modern usage had become the head of a “complex and highly organised ‘corporation aggregate of many’- of very many”29. In Adams v Naylor30, the House of Lords adopted Maitland’s legal conception of the Crown31. In the course of the twentieth century the concept of the Crown succeeded the king as the essential core of the corporation, which is now regarded as a corporation aggregate rather than a corporation sole32.

The development of the concept of the aggregate Crown from the corporate Crown provides sufficient flexibility to accommodate the

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30[1946] AC 543, 555 (HL).
31 It has also been accepted by the Supreme Court of Canada: Verreault v Attorney-General of Quebec [1977] 1 SCR 41, 47; Attorney-General of Quebec v Labrecque [1980] 2 SCR 1057, 1082.
reality of government, without the need for abandoning an essential legal grundnorm\textsuperscript{33} in favour of a very undeveloped and inherently vague concept of “the government”\textsuperscript{34}. Thus, for reasons principally of convenience, the Crown became an umbrella beneath which the business of government was conducted.

The Crown has always operated through a series of servants and agents, some more permanent than others. The law recognises the Crown as the body in whom the executive authority of the country is vested, and by which the business of executive government is exercised.

Whether we have a Crown aggregate or corporate, the government is that of the Sovereign\textsuperscript{35}, and the Crown has the place in administration held by the State in other legal traditions. The Crown, whether or not there is a resident Sovereign, acts as the legal umbrella under which the


\textsuperscript{33}In Kelsen’s philosophy of law, a grundnorm is the basic, fundamental postulate, which justifies all principles and rules of the legal system and which all inferior rules of the system may be deduced; Hayback, Michael, “Carl Schmitt and Hans Kelsen in the crisis of Democracy between World Wars I and II” (1990) Universitaet Salzburg DrIur thesis.


\textsuperscript{35}A concept which is alive today, in part as a substitute for a more advanced concept of the constitution; Interview with Sir Douglas Graham, 24 November 1999.
various activities of government are conducted, and with whom, in the
New Zealand context, the Maori may negotiate as Treaty of Waitangi
partner\textsuperscript{36}. Indeed, as will be explained in Chapters VI and VII, the very
absence of the Sovereign has encouraged this modern tendency for the
Crown to be regarded as a concept of government quite distinct from the
person of the Sovereign.

\textsuperscript{36}Generally, see Hayward, Janine, “In search of a treaty partner” (1995)
Victoria University of Wellington PhD thesis.
1.3 The Crown as the focus of sovereignty

The Crown is more than just the mechanism through which government is administered. It is also itself one of the sources of governmental authority, as a traditional source of legal sovereignty.

“Sovereignty” put simply, is the idea that there is a “final authority within a given territory”\(^{37}\). Foucault has identified four possible descriptions of the traditional role of sovereignty:\(^{38}\):

(i) to describe a mechanism of power in feudal society;
(ii) as a justification for the construction of large-scale administrative monarchies;
(iii) as an ideology used by one side or the other in the seventeenth century wars of religion; and
(iv) in the construction of parliamentary alternatives to the absolutist monarchies\(^{38}\).

But the old theory of sovereignty has been democratised since the nineteenth century into a notion of collective sovereignty, exercised through parliamentary institutions. The fundamental responsibility for the maintenance of society itself is much more widely dispersed throughout its varied institutions and the whole population. To some degree this


equates to the concept of the aggregate Crown favoured by the more recent jurists\textsuperscript{39}.

But the concept of sovereignty, however understood, is especially important because it has become part of the language of claims by indigenous people, as in New Zealand, where Maori claims are based on the conflicting concept of tino rangatiratanga, or chiefly authority\textsuperscript{40}. The particular problems this causes in New Zealand are examined in Chapter III, but briefly it represents the claims of an antecedent regime to survival despite apparently ceding sovereignty to the Crown in the Treaty of Waitangi.

Indeed, it is significant that most talk of “sovereignty” in the second half of the twentieth century concentrated upon the sovereignty of racial groups, and particularly, the so-called indigenous peoples\textsuperscript{41}.

Sovereignty has assumed different meanings and attributes according to the conditions of time and place, but at a basic level it requires obedience from its subjects and denies a concurrent authority to

\textsuperscript{39}Sovereignty is always limited in some way. Genesis 1: 27-30 makes it clear that God created mankind to subdue the earth and to exercise dominion over it under God; Rushdoony, Rousas John, \textit{The Institutes of Biblical Law} (1973) 448-451.

\textsuperscript{40}McHugh, PG, “Constitutional Theory and Maori Claims” in Kawharu, \textit{Waitangi} (1989) 25; see further Chapter 3.3.2.

\textsuperscript{41}Lauterpacht, Sir Eli, “Sovereignty” (1997) 73(1) International Affairs 137.
any other body. In New Zealand, the Sovereign is responsible for the executive government, and indeed is specifically so appointed by the Constitutions of most Commonwealth countries of which Her Majesty is head of State.

It will be immediately apparent that there is a divergence between abstract law and political reality, for substantial political power lies in politicians rather than the Sovereign. Political orthodoxy also appears to hold that for a constitution to be legitimate it must derive from the people. Yet, our constitution is not apparently based legally on the sovereignty of the people, but rather on that of the Queen-in-Parliament.

It is Parliament, in contrast to the Crown, which is widely regarded as being the focus of political power. Joseph assumes therefore that it is the people rather than Parliament who is sovereign. But it would seem

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43 See, for example, the Barbados Independence Order 1966, the Schedule of which is the Constitution of Barbados. Section 63(1): “The executive authority of Barbados is vested in Her Majesty”.
that sovereign authority is legally vested in the Crown-in-Parliament, politically in the people\textsuperscript{46}.

The authority of government is based upon several sources. Even were authority legally derived from the people, as it appears to now be in Australia\textsuperscript{47}, it is not clear how the position of the Maori can be reconciled\textsuperscript{48}, in particular, the preservation of their tino rangatiratanga, or chiefly authority\textsuperscript{49}. For the Maori retained to themselves at least some degree of political power under the Treaty of Waitangi, power which has its origins in traditional sources rather than the popular will. The Crown also claims some degree of authority based upon traditional sources\textsuperscript{50}.

\textsuperscript{46}In early America, there was no question, whatever the form of government, that all legitimate authority was derived from God. The influence of the classical tradition revived the authority of the people, which historically is equally compatible with monarchy, oligarchy, dictatorship, or democracy, but is not compatible with the doctrine of God’s authority; Rushdoony, Rousas John, \textit{The Institutes of Biblical Law} (1973) 214.

\textsuperscript{47}The Australian Constitution has been held to be based on popular sovereignty, as it was adopted by popular vote; \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, 138 per Mason CJ; \textit{Theophanous v Herald & Weekly Times Ltd} (1994) 182 CLR 104, 171 per Deane J; \textit{McGinty v Western Australia} (1996) 186 CLR 140, 230, 237 per McHugh, J.

\textsuperscript{48}Canada has the same type of conceptual difficulty; Russell, Peter, \textit{Constitutional Odyssey} (1992).

\textsuperscript{49}See Chapter III.

\textsuperscript{50}The Australian Labour Party wanted a republic partly for symbolic nationalist reasons, but partly also to deprive the Governors-General of their association with royal legitimacy; Lucy, R, \textit{The Australian Form of Government} (1985) 17.
There has been to date comparatively little theoretical analysis of the conceptual basis of governmental authority in New Zealand. There has been much discussion focused on the legitimacy of government derived from the Treaty of Waitangi. But there has been little work done towards an understanding of the nature of governmental authority in New Zealand, except by those who argue that there is too much (or too little) involvement of government in individual lives. This dearth of work may be due to apathy, but it could also be influenced by an underlying suspicion of abstract theory which can be traced in British tradition of political thought from the seventeenth century, if not earlier.

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51 Indeed, it has been said that few care for such esoteric matters; Interview with Sir Douglas Graham, 24 November 1999.


53 See, for example, the recent writings on the State; Kelsey, Jane, *Rolling Back the State* (1993), Mulgan, Richard, *Democracy and Power in New Zealand* (1989).

54 As former Prime Minister David Lange believed; Interview with David Lange, 20 May 1998.

55 See Foley, Michael, *The Silence of Constitutions* (1989). The wars of the seventeenth century were, to no small degree, between competing conceptions of the State, and engendered a suspicion for such
But in Canada there have been several major studies of the conceptual basis of government. In particular, in 1985 the Law Reform Commission of Canada released a working paper which called for a re-examination of the concept of the Federal Crown in Canadian law\textsuperscript{56}. The working paper called for the recognition of a unitary federal administration in place of the legal concept of the Crown\textsuperscript{57}. The paper specifically asked:

\begin{quote}

to what extent should Canada retain the concept of the Crown in federal law? Should we replace the concept of Crown with the concept of State or federal administration?
\end{quote}

The Commission briefly described what it termed the chaotic and confusing historical treatment of “the Crown” in English and Canadian law. Historical inconsistencies and contradictions in the treatment of the concept of the Crown cannot and need not be rationalised. Judges, legislators, and writers are not always taking about the same thing. They may mean the Sovereign herself, the institution of royal power, the speculation. It is probable that the long dominance of Whig ideology also contributed to this attitude.


\textsuperscript{57}\textit{Bank voor Handel v Slatford} [1952] 1 All ER 314, 319 per Devlin J:

The Crown is a convenient term, but one which is often used to save the asking of difficult questions. It is a description of the powers that formerly at common law were exercised by the king in
concept of sovereignty, the constitutional head of State, judicial instructions and actors.\textsuperscript{58}

To recognise the political reality the authors of the working paper suggested that the concept of the Crown should be abolished, and the Sovereign relegated to the status of constitutional head of State.\textsuperscript{59} Discarding monarchical terminology and limiting the Crown to its purely formal role would, in the opinion of the Commission “reduce terminological confusion, historical biases, and anti-democratic and non-egalitarian concepts so far as they affect individuals in the relationships between bureaucrats and the majority.”\textsuperscript{60} The Crown would be replaced by the “administration”. The authors of the working paper wanted to recognise the executive branch of the State.\textsuperscript{61} The legal nature of the

\begin{footnotesize}
\begin{enumerate}
\item In this, parallels may be seen with the position of the Crown in New Zealand, in the Maori-Crown context.
\item The King of Sweden, for instance, has been so relegated; Constitution of Sweden (1975). Note the Canadian paper spoke of the Crown as an institution, rather than of the person of the Sovereign, or of their representatives.
\item Cohen, David, “Thinking about the State” (1986) 24 Osgoode Hall LJ 379.
\item In effect a republican form of government.
\end{enumerate}
\end{footnotesize}
Crown or State in Canada has also been considered by others, but the issue is not yet settled.

Cohen believed that the methodology of the working paper itself was flawed because it focused on theoretical and abstract analyses of the State. Essentially, the difficulty is that there is no developed concept of the State or nation in Commonwealth constitutional theory. Moore attributes this to parliamentarian mistrust inspired by the association between civil law and Baconian theory. But it is equally true that

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63 Because Canadians never severed their ties with Britain, they never found it crucial to define themselves in a way which rendered them distinct from the “mother country”; Smith, David, “Empire, Crown and Canadian Federalism” (1991) 24 (3) CJPS 451, 471.


modern theoretical studies of the State have been limited even in Continental Europe\textsuperscript{67}.

In New Zealand executive authority is also, like Canada, formally vested in the Crown\textsuperscript{68}. The government does not require parliamentary approval for most administrative actions; nor need it show popular approval or consent for these actions- though the rule of law and political expediency, and the strictly limited range of powers held by the Crown, prevent authoritarian Crown government\textsuperscript{69}.

The executive authority of a country could be vested in a president, the Governor-General, or the Queen irrespective of the basis of sovereignty. But in our constitutional arrangements the sole focus of legal authority is the Crown-in-Parliament. This institution enjoys full legal sovereignty or supremacy. The Crown itself is allocated executive functions, and, within a limited field, requires no other legal authority than its own prerogative\textsuperscript{70}.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{67}Dearlove, J, \textquotedblleft Bringing the State Back In\textquotedblright{} (1989) Political Studies 521.
  \item \textsuperscript{68}Harris, BV, \textquoteleft{}The ‘Third Source’ of Authority for Government Action\textquoteright{} (1992) 109 LQR 626.
  \item \textsuperscript{69}For an example of the application of such limits on government see \textit{Fitzgerald v Muldoon} [1976] 2 NZLR 615.
  \item \textsuperscript{70}Harris, BV, \textquoteleft{}The ‘Third Source’ of Authority for Government Action\textquoteright{} (1992) 109 LQR 626.
\end{itemize}
\end{footnotesize}
This approach has the advantage of simplicity, leaving broader questions of sovereignty unanswered\textsuperscript{71}. As such it owes much to the British tradition of a constitution as something which evolves, and for which theory is sometimes developed subsequent to the practice\textsuperscript{72}. One aspect of this paucity of theory, if it may be so called, is the weakness- or absence, of a general theory of the State\textsuperscript{73}.

In Canada, problems with the place of the French-speaking minority, and the federal nature of the country, meant that difficult questions of the location and nature of governmental authority had to be addressed. Thus, claims by Quebec for special status within the federation required an analysis of the nature of power exercised by federal and provincial governments. The existence of an entrenched constitution also meant that this could substitute for the Crown, as in the United States of America, as a conceptual focus of government.

\textsuperscript{71}Which suits most political leaders and the general public alike; Interview with Sir Douglas Graham, 24 November 1999.

\textsuperscript{72}By contrast Australia’s Constitution may be described as a social covenant drawn up and ratified by the people; La Nauze, JA, \textit{The Making of the Australian Constitution} (1972).

\textsuperscript{73}The sovereignty of the Crown is not merely a legal fiction, as Bercuson argued, since it has practical consequences, including a measure of public perception as a source of authority; Bercuson, David & Cooper, Barry, “From Constitutional Monarchy to Quasi Republic” in Ajzenstat, \textit{Canadian Constitutionalism} (1992); cf Smith, David, \textit{The Republican Option in Canada} (1999) 18; Interview with Sir Douglas Graham, 24 November 1999.
Clarke argues that in Canada the marriage of the parliamentary form of government to the federal principle makes the determination of legislative authority problematic, at least in part, because it fails to develop an adequate conceptualisation of sovereignty. In the absence of a better understanding authority is described merely in terms of a division of power.\textsuperscript{74}

There have been no technical or practical reasons for these difficult questions of the sources of governmental authority to be answered in New Zealand. To some extent, the asking of such questions was also avoided\textsuperscript{75}. Thus, the existence of the Crown, whilst providing a convenient legal source for executive government, has also acted as an inhibitor of abstract constitutional theorising. As a consequence, in Laski’s view, the Crown covered a “multitude of sins”\textsuperscript{76}. Whilst this might not be desirable, it provides a convenient cover behind which the business of government is conducted, unworried by conceptual difficulties.

\textsuperscript{74}Clarke, Gregory, “Popular Sovereignty and Constitutional Reform in Canada” (1997) Acadia University MA thesis.

\textsuperscript{75}At least, by Pakeha. Maori showed a greater willingness, if only because they saw thereby a means of increasing their share of authority; Interview with Hon Georgina te Heuheu, 7 December 1999.

\textsuperscript{76}Laski, Harold, “Responsibility of the State in England” (1919) 32 Harv LJ 447.
1.4 State theory

The principal reason why the Crown has been regarded as a legal source of executive authority is historical. Not only is the Crown a source of legal authority, it serves to personify the political community. In most political systems the executive power and the State are synonymous\textsuperscript{77}. The State may be classified as that which refers to some or all of the legal administrative or legislative institutions operating in a community\textsuperscript{78}. In the British system, and those derived from it\textsuperscript{79}, it is questionable whether there is a State, and most legal commentators had traditionally given it

\textsuperscript{77}Sir Ernest Barker defined a modern State as:

\begin{quote}

generally a territorial nation, organized as a legal association by its own action in creating a constitution ... and permanently acting as such an association, under that constitution, for the purpose of maintaining a scheme of legal rules defining and securing the rights and duties of its members.
\end{quote}

This is to be distinguished from a nation, which “is a society or community, whose unity is based primarily on space ... and in that common love of the natal soil (or patria) which is called patriotism”; and “on time, or the common tradition of centuries, issuing in the sense of a common participation in an inherited way of life, and in that common love for the inheritance which is called nationalism”: Barker, Sir Ernest, \textit{Reflections on Government} (1942) xv.


\textsuperscript{79}Excepting those countries, such as the USA, which were compelled to address this often difficult issue, because of the republican and federal nature of their government.
little treatment, or simply answered in the negative. Political scientists considered the question from a different perspective.

The character of communities in the central middle ages was rooted and grounded in older traditions than those created by the study of Roman and canon law, which was the basis for much later conceptualisations of the State in continental Europe\(^8\). Nor did the rediscovery of Aristotle, the development of modern government\(^1\), or demographic and economic changes significantly affect them. The traditional bonds of community owed much to ties of kinship, much to loyalties of war-bands, very much to Christianity, and perhaps most strongly, from legal practices and values\(^2\). In these communities the king was representative of the people, to whom his people owed allegiance, and who, in turn, was held responsible for the government\(^3\).

Hobbes, with Bodin, Machiavelli, and Hegel did much to stimulate European State theory, a theory which has not been fully reconsidered in


\(^3\)Dark Age kings were expected to hold fast the territory of their own communities, to master or conqueror their neighbours, and to protect their own people and enable them to live securely; Kantorowicz, Ernst,
the context of the British constitution since Hobbes and his contemporaries. Hobbes’ *Leviathan* (1651) was perhaps the greatest piece of political philosophy written in the English language. Like Machiavelli’s *The Prince* (1532), it offered a dramatic break with the usual apologies for the Christian feudal State of the Middle Ages.

The modern territorial State, the concept of political absolutism, and the principle of *quod principi placuit, legis nabet vigorem*\(^{84}\) spelled the end of the mediæval nexus of rights and duties, counterbalanced powers, and customs. Hobbes excluded religion as a source of morality, and based ethical values, as well as political theory, on the human impulse toward self-preservation\(^{85}\). The reality of early modern government throughout Europe was that it was essentially driven by political realists, who sought the centralisation of power for the good of the country\(^{86}\).

Since the modern States inherited the papal (and imperial) prerogative, it must, then, govern all within the geographical confines of the country. Speculation in France was centred on a sovereign State with

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\(^{84}\)“What hath pleased the prince has the force of law”.


a royal organ to declare its sovereign purposes. This regime collapsed because in eighteenth century France the political and social atmosphere was similar to that which caused such profound changes in England a century earlier.

Inspired by the political changes in England, and in part directed by the theories of such as Rousseau\textsuperscript{87} and Montesquieu\textsuperscript{88}, the French people had become the masters of the State. This example was followed elsewhere in the course of the nineteenth century, though usually with less violence\textsuperscript{89}.

However, for two interrelated reasons, the State never became a legal concept in English law. Most countries have a date at which they can be said to have begun their constitutional existence, but not the United Kingdom\textsuperscript{90}. The need to create (or recreate) a concept of the State

\begin{itemize}
  \item \textsuperscript{87}He argued for a version of sovereignty of the whole citizen body over itself; \textit{The Social Contract and other later political writings} ed & trs Victor Goureatres (1997).
  \item \textsuperscript{88}He outlined what he believed was the equilibrium of the British political system, which he compared to the French- to the disadvantage of the latter; Montesquieu, Charles de Secondat Baron de, “The Spirit of the Laws”, in Lijphart, \textit{Parliamentary versus Presidential Government} (1992) 48.
  \item \textsuperscript{89}Laski, Harold, \textit{Authority in the modern State} (1919) 21-24.
  \item \textsuperscript{90}The United Kingdom can, of course, be dated to the Union with Union with Ireland Act 1800. British constitutional law has been essentially that of England- though not without dispute; Smith, Sir Thomas, “Pretensions of English Law as 'Imperial Law'” in \textit{The Laws of Scotland} (1987) vol 5, paras 711-719.
\end{itemize}
has not been generally felt since 1688\textsuperscript{91}, and even then the feeling was half-hearted\textsuperscript{92}. Nor was there a general reception of the Roman civil law, with its concept of the State. The common law was always happier developing theories to describe the realities of the law, rather than moulding the law around abstract theories\textsuperscript{93}. “The supreme executive power of this kingdom”, as Blackstone knew, was vested in the king\textsuperscript{94}, and there the matter was allowed to rest.

As a consequence of this jurisprudential weakness, if it can be so called, there had been in the Commonwealth (excepting perhaps in Canada) comparatively little thought given to theories of the structure of the State. In particular, there had been little consideration of the theory of government in New Zealand beyond questions of “State responsibility”,

\textsuperscript{91}Though in recent decades there have been some movements in this direction, for legal rather than political reasons; see Jacob, Joseph, \textit{The Republican Crown} (1996).


\textsuperscript{93}Indeed, a Continental observer would find two of the distinguishing characteristics of English law (and by extension that of the common law world) to be its antiquity and continuity, and its predominantly judicial character and the absence of codification; Levy-Ullmann, Henri, \textit{The English Legal Tradition} (1935) xlv-liii.

\textsuperscript{94}s 8: “The Queen’s excellent Majesty, acting according to the laws of the realm, is the highest power under God in the kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil”; see \textit{The Canons of the Church of England} (1969) Canon A7; \textit{Thirty-Nine Articles of Religion} (1562) Art. 37.
and the proper role of the State. Yet, the history of this country, and in particular, the Treaty of Waitangi, make this a curious deficiency.

There has, however, been more consideration given in New Zealand to the more abstract notions of governmental authority since the 1980s.

Inspired by the predominantly neo-liberal market-economy reforms initiated by the 1984 Labour Government, commentators saw a resurgence of the State as a subject worthy of serious study. In the writings of Mulgan and Sharp, for example, are seen the formulation of new conceptions of the State—though not ones which necessarily have much direct influence on politicians or the general public. The disputes

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95 Kelsey, for example, speaks of the State where constitutional lawyers would traditionally speak of the Crown, or some political scientists the government; Kelsey, Jane, *Rolling Back the State* (1993). See also Sharp, Andrew, *Leap into the dark* (1994).

96 Or, perhaps not so curious, given the uncertainty felt by many Maori about the scope of kawanatanga and tino rangatiratanga; Interview with Sir Douglas Graham, 24 November 1999.

97 See, for example, the “Building the Constitution” conference held in Wellington in 2000; James, *Building the Constitution* (2000).


99 For example, in the chapters devoted to the various interpretations of the State in Miller, *New Zealand Government and Politics* (forthcoming).


between neoliberals\textsuperscript{102}, pluralists\textsuperscript{103}, feminists\textsuperscript{104}, Marxists\textsuperscript{105} and others in the 1980s and 1990s\textsuperscript{106} have however begun a process towards developing a comprehensive theory of government.

Few of these studies have considered the Crown as an entity of government. The ideological dominance of neo-liberalism may be in part responsible for this, for whatever its advantages and disadvantages, neo-liberalism is largely ahistorical. Pluralism, at least in its classical form, considers more fully the historical evolution of governmental institutions\textsuperscript{107}, and this is critical to an understanding of the Crown.

Jacob has postulated that the notion of the State has now begun to evolve in Britain, as a consequence of the development of public law in place of an emphasis on Crown immunities. His thesis is that since the

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Franks Report and the consequent Tribunals and Inquiries Act 1958 (UK), judicial activism has developed an embryonic State\textsuperscript{108}.

This has been due, so the argument goes, to the increasingly common platform between those politicians who desired to “roll back the frontiers of the State”\textsuperscript{109}, or at least placed their emphasis on individual rights, and the attitude of judges asserting the inherent power of the common law. It was not fashioned out of a desire for centralised power. It was, according to Jacob, both judicially and politically created in order to limit it\textsuperscript{110}.

Modern Anglo-American constitutional theory is preoccupied with the problem of devising means for the protection and enhancement of individual rights in a manner consistent with the democratic basis of our institutions. In the United Kingdom the focus is on the need for, or the advisability of, imposing restraints on the legislative sovereignty of Parliament.

But it would be precipitant to claim the development of a State in either New Zealand or the United Kingdom. More in keeping with the


\textsuperscript{109} See Kelsey, Jane, \textit{Rolling Back the State} (1993).

tradition of historical development would be an acceptance of the evolution of a new form of aggregate Crown, one in which the distinction between person and office is increasingly great.

Allegedly right-wing elements in New Zealand opposed the use of the term “State”, and sought alternatives, such as the pre-existing concept of the Crown, not because of any attachment to monarchy, but because of opposition to anything evocative of interventionist government. In part because of the neo-liberal attempt to “roll back the State”, there was also a corresponding weakening of the legal status of the Crown in late twentieth century New Zealand. However, there has been some work done on the Crown in its role as signatory of the Treaty of Waitangi, some of which has led to tentative discussion of concepts of

111This evolutionary and legalistic approach has been remarked upon regularly by Continental observers; Levy-Ullmann, Henri, *The English Legal Tradition* trs M Mitchell rev & ed Frederick Goadly (1935).

112A conclusion in accordance with the findings of Hayward, Janine, “In search of a treaty partner” (1995) Victoria University of Wellington PhD thesis.


government. It is in this symbolic role that the modern function of the Crown appears to lie.

In his analysis of the Crown in his own day (1865), Bagehot seriously underestimated its surviving influence. His famous aphorism, that a constitutional Sovereign has the right to be consulted, to encourage, and to warn, can hardly express the residual royal powers of even the late nineteenth century. It may describe the royal powers today, but does not explain why the inherited concept of the supremacy of the Crown should leave the constitution so centred upon an institution lacking real power.

But Bagehot, like Palmerston and Gladstone wanted the monarchy relegated to the status of a museum piece, despite the Sovereign’s “right to be consulted, to encourage, and to warn”. This passive role was not that envisaged by George IV, William IV, Victoria or Edward VII, nor


116 Following the example set by Bagehot, British historians since 1945 have very largely neglected the continuing political influence of the monarchy under George VI and Elizabeth II; Peter Hennessy, “The throne behind the monarchy” Economist 24 December 1994 p 77-79.


that held by the majority of statesmen and text-book writers over this period. The latter felt that the Sovereign’s role as head of State in a popular parliamentary system had still to be satisfactorily defined, and might well be rather wider than that assigned to it be Bagehot\textsuperscript{120}.

Dicey and Anson, the leading authorities of their own day, were inclined to advocate a stretching of the royal discretion, and, to some extent at least, the monarchy appeared to operate at a political level under Edward VII in much the same way as it did under George IV\textsuperscript{121}, though there had been a clear change in the basis of royal authority. This was now almost totally dependent upon parliamentary support. But there has been no study which offers evidence to show that the exercise by the Crown of the rights to be consulted, to encourage, and to warn, has influenced the course of policy\textsuperscript{122}.

The better explanation is that the Sovereign may lack personal power, but the organs of royal government, whether they be Ministers or departments, enjoy the benefit of the residual power of the Crown, as an


\textsuperscript{120}The limitations of the distinction between dignified and efficient, so central to Bagehot’s model, can be seen in Jackson, Laura, “Shadows of the Crown” (1994) University of Chicago PhD thesis.

\textsuperscript{121}Hanham, HJ, \textit{The Nineteenth Century Constitution} (1969) 24.

\textsuperscript{122}Smith, David, “Bagehot, the Crown, and the Canadian Constitution” (1995) 28 CJPS 622. An example of the use of influence through an
institution in which the *maiestas* of law and government is vested. This institution is more important that the person of the Sovereign. The Crown can be seen as a living thing, personified by the Queen and the Governor-General, and distinct from any obscure concept of governmental State. This was the basis of Bagehot's analysis of the British constitution, and it remains important in New Zealand today. The exact definition of the Crown may at times be uncertain, but it has the advantage over the State of being the structure of government which is actually utilised in New Zealand, and therefore somewhat better known if not well understood.

In both Canada and Australia the existence of entrenched constitutions have resulted in at least a partial shifting of emphasis from the Crown to the entrenched written constitution. Indeed, revolutionary necessity required this in the United States of America more than two hundred years ago. But the technical and legal concept of the Crown

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“exchange of views” has been given in Rose, Kenneth, *Kings, Queens and Courtiers* (1985) 92.

123There was a real interregnum between the death of one king and the election and coronation of another. The hereditary right to be considered eventually became the right to be elected. As the conception of hereditary right strengthened the practical inconvenience of the interregnum was curtailed; Maitland, Frederic & Pollock, Sir Frederick, *History of English Law* (1895) vol 1 p 507.

continues to pervade the apparatus of government and law in New Zealand.

No new generally accepted theory of government has been postulated in New Zealand, nor would such a project be likely to attract the attention which it deserves. In so far as such matters have been considered, the focus has been on the sovereignty, or supremacy of Parliament, and the possibility that there may be limits to such sovereignty. For Dicey, sovereignty of Parliament was matched by the rule of law, or supremacy of law.

Political sovereignty may lie in practice with the people, but legally this is less certain, though legitimacy derives principally from the people. Indeed, as a constitution characterised by its uncodified (or

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125 This question has been called “the most puzzling constitutional conundrum of all”; Sharp, Andrew, “Constitution” in Miller, New Zealand Government and Politics 37-47, 40 (forthcoming). Taylor v New Zealand Poultry Board [1984] 1 NZLR 394, 398 per Cooke P.

126 With the courts supervising the exercise of a common law power of government, as in Wolfe Tone’s Case (1798) 27 State Tr 614.


128 Though the Australian Constitution has been held to be based on popular sovereignty, as it was adopted by referendum, and may only be changed by referendum: Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 138 per Mason CJ; Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104, 171 per Deane J; McGinty v Western Australia (1996) 186 CLR 140, 230, 237 per McHugh J.
“unwritten”) nature, the New Zealand constitution cannot be anything but a traditional evolutionary Burkean type\textsuperscript{129}. Yet, whether this remains the basis of the constitution is uncertain, for two major reasons.

The non-Maori population seems, by and large, influenced by basically Lockean ideas of government as a direct compact\textsuperscript{130}. Though they may not directly question the basis of governmental authority, the possibility of such questioning in the future cannot be discounted. This is particularly so given the impetus to reform given by the introduction of proportional voting.

Maori tend to see government, and society, in more evolutionary terms\textsuperscript{131}. Most importantly, however, claims to Maori sovereignty do not rest upon claims to popular sovereignty as such, but upon the cession, or non-cession, of kawanatanga and tino rangatiratanga to the Crown in 1840\textsuperscript{132}. The sovereignty of the Crown, in the context of the Treaty of Waitangi, is more than merely a legal doctrine, it has a continuing political relevance. Merely redefining the location of sovereignty as the

\textsuperscript{129}Edmund Burke saw a constitution as based on a social contract which evolved from generation to generation; Russell, Peter, \textit{Constitutional Odyssey} (1992) 10-11.

\textsuperscript{130}The Prince of Wales was reported as believing that a referendum on the monarchy in the United Kingdom would provide a new and lasting legitimacy for the Crown; “Prince wants British to choose” New Zealand Herald 8 November 1999.

\textsuperscript{131}Awatere, Dona, \textit{Maori Sovereignty} (1984).

\textsuperscript{132}See Chapter 3.3.
people, a reconstituted Parliament, or a president, would not necessarily satisfy the other party to the Treaty, for it would constitute the removal of one party to the Treaty. The difficulty remains to determine what constitutional structures will satisfy both perspectives.


1.5 Conclusion

The Crown in New Zealand is important legally because it holds the conceptual place held by the State in those legal systems derived from or influenced by the Roman civil law. Not only does the Crown provide a legal basis for governmental action, it provides much of the legal and some of the political legitimacy for such action.

This legal legitimacy can be seen through looking at the role of the Sovereign as legal head of the executive government. The Crown is the functional head of the executive branch of government. This might be called the practical role of the Crown. The Crown retains a practical role as the mechanism through which executive government is conducted.

The broader concept of the Crown as the focus of sovereignty is also important. The Crown is a legal source of executive authority. But it is not the Sovereign him or herself who rules; rather they are the individual in whom is vested executive powers, for the convenience of government. This has arguably led to a jurisprudential weakness, a point made strongly in a Canadian report on the legal structure of the federal administration.\(^{135}\)

At the most abstract level, the absence of an accepted concept of the State in England required the Crown to assume the function of source
of governmental authority. This might be called the conceptual or symbolic role of the Crown. This tradition has been followed in New Zealand, as indeed it has everywhere the Crown has been established. This conceptual basis for government is important because the Crown fulfils the function exercised by a State in many other jurisdictions, yet the Crown is not simply a metonym for the State. This has important consequences, particularly in relation to the Treaty of Waitangi, in which it is the Crown which assumed sovereignty or kawanatanga over New Zealand. The traditional authority which the Crown confers upon the government-of-the-day may be relatively slight, but it remains at least symbolically important.

The physical absence of the person of the monarch has prevented an undue emphasis upon personality, and encouraged the development a more conceptual view of the Crown. Whether this conception become equivalent to and subsumed into that of a State remains to be discovered. But it means that the concept of the Crown remains important to the New Zealand system of government, even if not all aspects of its symbolism may not do so. While it remains useful there is little incentive to abandon it in favour of untried and uncertain alternatives.

Chapter II:

THE LEGITIMACY OF THE CROWN

2.1 Introduction

We saw in the last Chapter how the Crown remains an important source of traditional legal, though not necessarily political, authority. Thus, in traditional terms, the Crown is the embodiment of governmental authority, and a focus of legal sovereignty. But the Crown, as distinct from the Sovereign and Governor-General, is also important as a source of constitutional or political legitimacy. This is partly based on traditional, inherited authority. But today a claim that any public institution's authority is in any sense innate will probably fail to convince the majority.

As Lord Devlin has said:

The law, both criminal and civil, claims to be able to speak about morality and immorality generally. Where does it get its authority to do this and how does it settle the moral principles which it enforces? Undoubtedly, as a matter of history, it derives both from Christian teaching. But I think that the strict logician is right when he says that the law can no longer rely on doctrine in which citizens are entitled to disbelieve. It is necessary therefore to look for some other source\(^1\).

The legal crisis is due to the fact that the law of Western civilisation had been in its origins Christian law, but its faith has been increasingly humanist. Traditional legitimacy derived from inherited legal forms is not, in an egalitarian and democratic age, sufficient. The Crown, and any other possessor of legitimacy, has to accommodate itself to a society which has largely ceased to respect tradition, much less to regard it as a source of legitimacy.

The first section of this Chapter looks at what is meant by legitimacy, and its place in the constitutional order. One fundamental political consideration in New Zealand is that epitomised by the Treaty of Waitangi. Since the 1970s the Treaty itself has been identified as a new and powerful source of legitimacy. But the Crown itself is a source of legitimacy, both independently, and through being symbolically linked to the Treaty.

The second section looks at challenges to this legitimacy. Most fundamentally this opposition can come from intellectual dissatisfaction.

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with the form or basis of government. In post-colonial nations such as New Zealand this focuses on the relative positions of indigenous and settler populations. Uncertainty surrounding the legitimacy of traditional bases of government can only be partly assuaged by contemporary majoritarian support.

The third section examines the concept of the rule of law, and how this has influenced the evolution of the constitution. The concept of rule of law has been criticised (particularly in its Diceyan formulation). But it does have use in explaining the institutionalisation of government, and the way in which political and administrative adherence to legal forms helps to explain the legitimacy of government.

Chapter II will seek to show that some part of the legitimacy of the regime is provided by the Crown. This does not mean that the legitimacy of government requires the continuation of the Crown. But it does mean that the Crown provides additional legitimacy to that derived from democratic and other sources, and that fears of undermining the legitimacy of government may deter some from questioning the continued existence of the Crown⁶.

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⁶Indeed, this has been particularly apparent in the Labour Party’s attitude to the monarchy.
2.2 Legitimacy and the constitutional order

It might be said that there are two constitutional imperatives in a democratic country, the government’s legitimacy, and its continuity. Its continuity can be seen in institutional continuity. In the words of a former Governor-General of New Zealand, “continuity of government is more than usually important in New Zealand, because our nation was founded when the Treaty of Waitangi was signed”\(^7\). This continuity is also symbolised by the descent of the Crown through generations of hereditary Sovereigns, from the original party to the Treaty, Queen Victoria\(^8\). This continuity is an important aspect to the legitimacy of the Crown, not simply in New Zealand.

Legitimacy is a more supple and inclusive idea than sovereignty, or of continuity\(^9\). Legitimacy offers reasons why a given State deserves the allegiance of its members. Max Weber identifies three bases for this


\[^8\] There was a strong feeling in Tuvalu that a system which had stood the test of time must have something good about it; Taafahi, Tauassa, *Governance in the Pacific* (1996) 1.

authority- traditions and customs; legal-rational procedures (such as voting); and individual charisma\(^{10}\). Some combination of these can be found in most political systems.

With the dominance of democratic concepts of government, it might be thought that if the people believe that an institution is appropriate, then it is legitimate\(^{11}\). But this scheme leaves out substantive questions about the justice of the State and the protection it offers the individuals who belong to it\(^{12}\). It is generally more usual to maintain that a State’s legitimacy depends upon its upholding certain human rights\(^{13}\).

Three current alternative definitions of legitimacy are firstly, that it involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society\(^{14}\). Second, in the tradition of Weber, legitimacy has been defined as “the degree to which institutions are valued for themselves and


\(^{12}\)Which is illustrated by the study of the application of the model to Mummar Qadhafi’s Libya; Al Namlah, Saleh, “Political legitimacy in Libya since 1969” (1992) Syracuse University PhD thesis.


\(^{14}\)Lipset, Seymour, *Political Man* (1960) 77.
considered right and proper". Third, political legitimacy may be defined as the degree of public perception that a regime is morally proper for a society.

Whichever definition is preferred, all are based on belief or opinion, unlike the older traditional definitions which revolved around the element of law or right. These traditional concepts of legitimacy were built upon foundations external to and independent of the mere assertion or opinion of the claimant. These normative or legal definitions included laws of inheritance, and laws of logic. Sources for these included immemorial custom, divine law, the law of nature, or a constitution.

Legitimacy is sought through the advancing and acceptance of a political formula, a metaphysical or ideological formula that justifies the existing exercise or proposed possession of power by rulers as the logical and necessary consequence of the beliefs of the people over whom the

17In an extreme form, the divine right of kings; Figgis, JN, The theory of the Divine Right of Kings (1914).
power is exercised\textsuperscript{20}. Just what this formula is depends upon the history and composition of a country.

In modern democratic societies, popular elections confer legitimacy upon governments. But legitimacy can also be independent of the mere assertion or opinion of the claimant. This has been particularly important in late twentieth century discussion of indigenous rights\textsuperscript{21}.

There is a tendency to undervalue the Crown, because its legitimacy is regarded as of minimal significance compared with that derived from the ballot box. But, in the view of observers such as Smith and Birch, the most important of the defects of the liberal political model of the Westminster-type constitution- the view of the political theorist rather than the lawyer or politician, is its failure to depict the role of the Crown in the system of government, and the implications of the interrelated independence of the executive\textsuperscript{22}.

The legitimacy of the Crown includes that owed to the established regime. While the modern democratic ethos might regard such a basis of

\begin{itemize}
\item \textsuperscript{19}Arendt, Hannah, “What was authority” in Friedrich, \textit{Authority} (1958) 83.
\item \textsuperscript{20}Tarifa, Fatos, “The quest for legitimacy and the withering away of utopia” (1997) 76(2) Social Forces 437.
\item \textsuperscript{21}See, for example, Lauterpacht, Sir Eli, “Sovereignty” (1997) 73(1) International Affairs 137.
\end{itemize}
authority as weak, it does have its value. In Tuvalu respect for the Crown was regarded as instilling a high sense of respect for whoever was occupying the position of Governor-General, not so much because of the incumbent but rather for the durability of a system which had stood the test of time.

The Crown itself provides some governmental legitimacy, simply because it is a permanent manifestation of authority, a proto-State as some would argue. Smith has suggested that in Canada the Crown provides the necessary underlying structure for government. This is equally true in New Zealand, arguably even more so, since there is no entrenched written Constitution upon which constitutional or political thought may focus.

In Canada, the existence of an entrenched constitution has tended to encourage scholarly examination of the dynamics of the written Constitution, often to the detriment of proper consideration of the Crown

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25 The Treaty of Waitangi might serve a similar purpose, though it is perhaps unlikely that it would achieve this alone, as opinion polls suggest that it lacks the general support of the non-Maori population; see Perry, Paul & Webster, Alan, *New Zealand Politics at the Turn of the Millennium* (1999) 74-75.
as an organising element of government. This is also evident in Australia, where works on constitutional law or politics almost invariably concentrate on an analysis of the document known as the Constitution. This temptation is absent in New Zealand.

In contrast to a common political theorists’ view—which concentrates upon the political actors, official terminology (the view of the administrator) had in the past tended to emphasise the importance of the Crown. Thus the formal role the Sovereign plays in Parliament conveys a totally different view to that of the political realist. It is arguably even more inaccurate, as the Sovereign's legislative role has been largely nominal for three hundred years.

According to Barker, the principal function of the theory of the Crown is to provide a legal person who can act in the courts, to whom public servants may owe and own allegiance, and who may act in all those exercises of authority, such as the making of treaties or the

26 As Smith would describe it; The Invisible Crown (1995).


28 Where, indeed, it is often said, erroneously, that there is no constitution.

29 Note the emphasis in such works as Boston, Jonathan, Levine, Stephen, McLeay, Elizabeth, Roberts, Nigel & Schmidt, Hannah, “Caretaker governments and the evolution of caretaker conventions in New Zealand”
declaration of war, which do not rest upon the legislative supremacy of Parliament

In this view, and in the United Kingdom at least, the legitimacy involved here is quite independent of any popular authorisation, and the idea of the Crown as a legitimising principle is articulated and employed within the personnel of government, but little outside.

To some extent, the constitutional lawyer has held the middle ground. Legal theory gives the Crown an all-pervasive preserve, with powers to match. Within the scope of the royal prerogative the Sovereign had a free hand to act. Yet even these powers are now limited by the legal concept of conventions, and by the rules of administrative law.

(1998) 28(4) VUWLR 629, where the institutional role of the Crown is given relatively little coverage.

30Barker, Rodney, Political Legitimacy and the State (1990) 143-144.

31The seventeenth century view was that the courts would not enquire into the manner of use of an admitted prerogative- at any rate if the holder was not shown to be acting in bad faith; Darnel's Case ("the Case of the Five Knights") (1627) 3 State Tr 1; reaffirmed by Chandler v Director of Public Prosecutions [1962] 3 WLR 694.

32Conventions are similar to legal rules, but they cannot be enforced by the courts; Madzimbamuto v Lardner-Burke [1969] 1 AC 645 (PC); NO 1968 (2) SA 284; Adesebenro v Akintola [1963] AC 614, 630. They are rules of political practice which are regarded as binding by those to whom they apply. Laws are enforceable by the courts, conventions are not; Munro, C, “Laws and conventions distinguished” (1975) 91 LQR 218.

Thus, the Sovereign enjoyed certain powers, but these were to be exercised by Ministers responsible to Parliament.

Much of the legal basis of executive power derives from the Crown\textsuperscript{34}, though this has been downplayed for political reasons. Indeed, in the Commonwealth political independence has often been equated with the reduction of the Crown to a position of subservience to the political executive\textsuperscript{35}. What remains important is the position of the Crown as an organising principle of government (the framework upon which the structure of government is built\textsuperscript{36}), as a source of legitimacy, and as a symbol.

The popular conception of the Crown was often as uncertain as that of the theorists, but tended to focus more on the person of the Sovereign, rather than on the legal institution. This is, of course, precisely what Bagehot meant when he wrote that it was easier to conceive of an individual or family rather than a constitution\textsuperscript{37}.

Where the Sovereign was absent, references to the Crown were fewer- indeed, for most purposes limited to references to the Crown and

\textsuperscript{34}Harris, BV, “The ‘Third Source’ of Authority for Government Action” (1992) 109 LQR 626.


\textsuperscript{36}Recent examples include Crown Health Enterprises.

Maori negotiating Treaty of Waitangi settlements\textsuperscript{38}, and the Crown prosecuting in court. Yet, there has always been a tendency to a clearer understanding of the concept of the Crown in New Zealand than in the United Kingdom, where the risk of confusing the office and the individual is much greater\textsuperscript{39}.

Although legally and administratively ever-present, there was a distinct scarcity of references to “the Crown” in newspaper reports in the 1960s and 1970s. By contrast, prolific use was made of the concept of the Crown from the 1980s\textsuperscript{40}. The latter trend did not indicate an increase in the powers of the Crown, but rather a greater use of the legal concept of the Crown by government, for reasons largely of administrative efficiency\textsuperscript{41}, but also for symbolic reasons\textsuperscript{42}.

\textsuperscript{38}Hayward, Janine, “In search of a treaty partner” (1995) Victoria University of Wellington PhD thesis.

\textsuperscript{39}A distinction should also be drawn between support for a government qua regime and support for the government-of-the-day. But the Westminster model of parliamentary government, with a partial fusion of executive and legislative powers, increases the probability that the average person will confuse this distinction; Kornberg, Allan & Clarke, Harold, \textit{Citizens and Community} (1992) 9.

\textsuperscript{40}Hayward, Janine, “In search of a treaty partner” (1995) Victoria University of Wellington PhD thesis. Whilst there has been a prolific use of the term Crown in New Zealand in recent decades, the term has been used much less frequently in political debate in Canada. Nor has it been used to identify central government, largely because of the federal/provincial divide; Smith, David, \textit{The Invisible Crown} (1995).

\textsuperscript{41}For example, it was easier to restructure government agencies through the use of Orders in Council and other prerogative instruments than by
Not only is the Crown above party politics, it is, to some degree, an independent source of legitimacy in a country, and control of the Crown thereby acts to confer some degree of legitimacy upon the political leadership. This does not mean that a republican regime must always lack legitimacy, but that it would lack the symbolic legitimacy of continuity that the Crown enjoys\textsuperscript{43}.

\textsuperscript{42}See Hayward, Janine, “In search of a treaty partner” (1995) Victoria University of Wellington PhD thesis (the emphasis on the Crown was part of the deliberate revival of the Treaty of Waitangi). One reason was allegedly because right-wing elements opposed the term “State”; Gordon McLauchlan, “Of President and Country” New Zealand Herald 17 February 1995.

\textsuperscript{43}Something of which the Australian Labour Party was acutely aware; Lucy, R, \textit{The Australian Form of Government} (1985) 17.
2.3 The challenge to legitimacy

The extent to which contemporary democratic political systems are legitimate depends in large measure upon the ways in which the key issues which have historically divided the society have been resolved. Not only can regimes gain legitimacy, but they can lose it also\textsuperscript{44}.

As symbolic of the permanent apparatus of government, the Crown represents constitutional continuity and legitimacy. The Crown can exercise powers not specifically conferred upon it to preserve constitutional order\textsuperscript{45}. But time, and fresh elections, can confer new legitimacy upon usurpers\textsuperscript{46}.

If a regime is both legitimate and effective (in the sense of achieving constant economic growth), it will be a stable political system. From a short-range point of view, a highly effective but illegitimate system is more unstable than regimes which are relatively low in effectiveness, and high in legitimacy\textsuperscript{47}. Prolonged effectiveness can give


\textsuperscript{45} As in Grenada in 1983, and Fiji in 1987; Mitchell v Director of Public Prosecutions [1986] LRC (Const) 35; Smart, PSTJ “Revolution, Constitution and the Commonwealth: Grenada” (1986) 35 ICLQ 950.


\textsuperscript{47} The principle of popular sovereignty, hitherto vague, has acquired sufficient determinacy to serve, in a limited range of circumstances, as a basis for denial of legal recognition to putative governments; Roth, Brad,
legitimacy. Yet legitimacy can not be determined solely by majoritarian principles alone, though democratic states tend to emphasise this aspect of their authority.

In normal times it may be hard to distinguish feelings about legitimacy from routine acquiescence. But it has been often said that legitimate authority is declining in the modern State, and all modern States are well advanced along a path towards a crisis of legitimacy. Obedience looks more like a matter of lingering habit, or expediency, or necessity, but no longer a matter of reason and principle, and of deepest sentiment and conviction.

In the long term, if the established order does not sufficiently fulfil the aspirations of the population, the legitimacy of that order may in turn come into question, and itself be in danger of overthrow. But the

“Governmental illegitimacy in international law” (1996) University of California, Berkeley PhD thesis.


See, for example, Tarifa, Fatos, “Quest for legitimacy and the withering away of utopia” (1997) 76(2) Social Forces 437.


Or indeed may never have been accorded. See, for example, Jackson, Moana, “Maori Law” in Young, Mana Tiriti (1991) 19; Wilson, Margaret, "The Reconfiguration of New Zealand's Constitutional Institutions: The Transformation of Tino Rangatiratanga into Political Reality" (1997) 5 Waik LR 17; Booth, Revd Ken, "A Pakeha Perspective
limitations of such legitimacy was shown by the fact that the neutrality and detached nature of the office of Governor-General of Tuvalu was questioned in light of events of 1993-94. The present government of Tuvalu is now committed to a republic.

One main source of legitimacy lies in the continuity of important traditional integrative institutions during a transitional period in which new institutions are emerging. This applies equally where there is a re-alignment of power, as in the development of responsible government, or the granting of economic or political benefits to certain sectors of society, in the New Zealand context, Maori.

Crises of legitimacy occur during a transition to a new social structure, if the status of major established institutions is threatened during the period of structural change, and all the major groups in the society do not have access to the political system in the transitional

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period, or at least as soon as they develop political demands. These transitional periods occur when for example decolonisation takes place without a nationalist struggle, and where interstate conflict is absent- in other words, when a colonial power freely confers independence upon a colony.

A crisis of legitimacy is afflicting all countries whose origins lie in colonial conquest and settlement. This is due in part to the justification for colonialisation being largely discredited. As Mulgan has observed, the critical issue posed by the anti-colonial critique and revisionist history is whether a society and government founded in illegitimate conquest can ever hope to acquire legitimacy.

Challenges to legitimacy from claims for Maori sovereignty are a more serious question than any dangers of authoritarian rule. Ironically, the former may serve to strengthen the case for royal legitimacy, because of the link between Crown and Maori in the Treaty of Waitangi. Brookfield has considered this relationship, and concluded that one and a half

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60 Though claims to Maori sovereignty will be examined in Chapter III, briefly it involves the dispute over precisely what the Maori relinquished in the Treaty of Waitangi with the Crown in 1840.
half centuries of government may have been at least partly legitimated through this relationship\textsuperscript{61}. The authority of the Crown derived from the Treaty of Waitangi will be considered in Chapter III.

A more serious challenge to continued legitimacy comes from the changing popular perceptions of government. A regime which was once legitimate, in that the popular perception was that it was the proper government for that country, can potentially become illegitimate. This might be because it ceases to follow the principles of the rule of law, or otherwise departs from the accepted conduct\textsuperscript{62}. Or, it might be because doubts arise over the suitability or appropriateness of the particular form of government\textsuperscript{63}. In this later case however, dissatisfaction should lead to legal change, not violent change. Only if justifiable attempts at change are unjustly blocked would more extreme measures be justified\textsuperscript{64}.

Such a situation would be unlikely, as a lack of popular (or political) support would result in positive steps being taken to adopt a republican form of government, as in Tuvalu. However, those Maori who


\textsuperscript{62} Thus the German government after 1933, while still adhering to legal form, departed from accepted standards of behaviour and so lost its legitimacy.

\textsuperscript{63} This could perhaps occur in Australia, were a second republican referendum to fail to achieve the necessary overall majority, but enjoy a popular majority nonetheless.
reject the authority of the Crown might well argue that already the Crown lacks legitimacy, because it lacks legal title, since (in this argument) the Treaty of Waitangi did not confer sovereignty, only an uncertain form of oversight.\textsuperscript{65}

The authority of the regime in New Zealand is based, at least in part, upon the assumption of legal sovereignty by the British Crown and Parliament in the middle of the nineteenth century. But clearly legitimacy based upon an act of State by the United Kingdom in 1840 is insufficient of itself to be a basis for modern governmental legitimacy. This authority has been called into question, in particular by those who claim Maori sovereignty.\textsuperscript{66}

Whether the present regime can be called illegitimate depends upon one’s perspective, and the weight which one attaches to European political and legal concepts of authority. As Hayward has said:

\begin{quote}
[T]he Treaty of Waitangi is a fundamental document in New Zealand, because it allowed for the settlement by Pakeha and the
\end{quote}

\textsuperscript{64}See, for examples, Strickland, Matthew, “Against the Lord’s anointed” in Garnett & Hudson, \textit{Law and Government in Medieval England and Normandy} (1994) 56.

\textsuperscript{65}Or even less authority. See, for example, Jackson, Moana, “Maori Law” in Young, \textit{Mana Tiriti} (1991) 19.

establishment of legitimate government by cession (as opposed to by military conquest)\textsuperscript{67}. 

Yet this is only partly true, for legally, the acquisition of sovereignty, and the settlement of this country by Europeans, can be ascribed (in traditional European terms) to an act of State\textsuperscript{68}, though one which was made conditional upon the agreement of the indigenous inhabitants of the islands.

The authority of the Crown was legally imposed by Governor Hobson by proclamation of 21 May 1840\textsuperscript{69}. But this was based to some degree, morally at least, on the Treaty of Waitangi. However, the Maori version of the Treaty gave rather less authority to the Crown than did the English-language version, and retained rather more for the Maori chiefs. Nor did all the chiefs sign the Treaty\textsuperscript{70}.

The post-1840 evolution of Maori-Pakeha relations has been at times difficult. But, even in terms of European legalism, the evolution of the constitution since 1840 has presented problems for its legitimacy. The

\textsuperscript{67}Hayward, Janine, “In search of a treaty partner” (1995) Victoria University of Wellington PhD thesis 2.

\textsuperscript{68}An act committed by the sovereign power of a country which cannot be challenged in the courts. At least, this had been the attitude of the courts from 1877; Attrill, Wayne, “Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand” (1989) Harvard University LLM thesis 39-54.

\textsuperscript{69}For the text, see the despatch of Hobson to the Secretary of State for the Colonies, 25 May 1840, in \textit{Parliamentary Papers} 1841/311, 15, 18-9.
Crown of the United Kingdom having assumed sovereignty over New Zealand by an act of State or cession, the United Kingdom Parliament never formally renounced power to legislate for New Zealand, nor did New Zealand legislate to end this power until 1986. This was due rather to inertia than to any lingering sentiment of imperial unity.

Where a constitution is established by a revolutionary break in the line of authority, it may be easier to see the new regime as autochthonous and its legitimacy based upon an expression of popular will. This is less easy to see in cases where there has been no legal break, though Wade believed that this continuity was merely “window-dressing for a revolutionary shift in power”. If New Zealand has a legal legitimacy separate from that of the United Kingdom, it is not clear when this occurred. This is particularly so in respect of the Crown, which is less readily distinguishable than the respective Parliaments of the United

70See Chapter 3.3.2.
73This is illustrated by Canada’s continued difficulties in identifying its own constitutional grundnorms; Berger, Carl, Imperialism and Nationalism (1969).
75See Chapter IV.
Kingdom and of New Zealand\textsuperscript{76}. Yet it would appear that such concerns have not proven significant, as the Crown has developed distinct identities in the course of the twentieth century\textsuperscript{77}.

It would appear that the concept of the Crown is important simply because of its all-pervasive legal nature. The Crown confers a consistency of identity upon the various bodies described as comprising “the Crown”. It gives legitimacy and authority to the actions and policies of these bodies, though the extent of that legitimacy, and even the identity of the Crown may be disputed. In the absence of a concept of the State, the Crown personifies the permanent apparatus of government.

\textsuperscript{76}Chapters V and VI.

\textsuperscript{77}See Chapters VI and VII.
2.4 The rule of Law

While the acquisition of power may be legitimated by treaty or similar action, its subsequent conduct must also conform to appropriate standards to maintain that legitimacy. This constitutional principle, that of the rule of law, is based upon the practice of liberal democracies of the Western world. It means that what is done officially must be done in accordance with law. In Europe, where an entrenched Constitution is the touchstone for legitimacy of government, there might be a general grant of power to the executive, and a bill of rights to protect the individual. In the British tradition public authorities must point to a specific authority to act as they do. The State sees itself as the source of both law and power. Instead of law, legality prevails.

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79 Arthur Yates and Co Pty Ltd v Vegetable Seeds Committee (1945) 72 CLR 37, 66 per Latham CJ.
81 Entick v Carrington (1765) 19 State Tr 1030 per Lord Camden.
Much of the legitimacy of a political system derives from the impartiality and objectivity with which it is administered. Thus the very exercise of authority legitimates that authority.

Dicey defined rule of law to encompass the liberty of the individual, equality before the law, and freedom from arbitrary government. The scope of the concept is however rather fluid. As Joseph observed, it includes such meanings as government according to law; the adjudicative ideal of common law jurisdictions; a minimum of State intervention and administrative power. It also includes the need for fixed and predictable rules of law controlling government action; standards of common decency and fair play in public life; and the “fullest possible provision by the community of the conditions that enable the individual to develop into a morally and intellectually responsible person”. It also includes the principles of freedom, equality, and democracy. Most writers now distance themselves from Dicey, and believe that his ideas of the rule of law should be subject to reappraisal.

The rule of law is symbolic. It is a transcendent phenomenon in that it is almost always shorthand for some interpretation of the inner

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84Introduction to the Study of the Law of the Constitution (1885).
meaning of a polity. It is highly connotative. In the fifteenth century it meant that the king was always subordinate to a higher law of somewhat uncertain provenance. After the 1688 Revolution, it became clearly associated with the idea of a Lockean ideal State. The old idea of the unity of the State dominated till the classical liberal tradition overtook the older habit of mind in the eighteenth and nineteenth centuries.

The post-Lockean version of the rule of law was associated with the views of the classical liberal theorists, who combined the concepts of legitimacy, legality and legal autonomy. The rule of law was used by the Whigs to confer legitimacy upon their dominance of politics during the eighteenth and nineteenth centuries.

If the rule of law means an absence of arbitrary power, then, as was inherent in the mediæval concept of government, the law, whether human or divine, was pre-eminent. King James I, in *The Trew Law of Free Monarchies* (1598) and the *Basilikon Doron* (1599) outlined a fairly simple assertion of divine right kingship. Legal authority, though vested in the king as it always had been, was founded on long-established religious principles.

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88 Written 1598, collection published 1616.
Theories of divine right were outlined by writers such as Sir Robert Filmer in *Patriarcha* (1680). Hobbes and Filmer argued that the will is the source of all law and the form of all authority. They believed in the necessity of a perpetual and absolute submission to the arbitrary dictates of an indivisible sovereign, and in the impossibility of mixed government. They were criticised by Whig theorists of contract such as Sidney and Locke. It would seem that Locke wrote his *Two Treatises of Government* to refute Filmer rather than Hobbes. Hobbes was politically the least important of the absolutist writers, although his impact as an analytical thinker was profound. Locke, however, succeeded in seriously undermining Filmer’s arguments.

A doctrine which relied heavily upon biblical authority was bound to suffer damage in the Age of Reason. Rarely was theory and practice


91 See, for example, Dunn, John, *The Political Thought of John Locke* (1969) ch VII.

92 Filmer, following Grotius, had interpreted the evidence to show that procreation gave a right of superiority. This was not only bad observation, but contrary to his own first premise, that man is God’s workmanship. Locke, the first systematic ethnologist, made short work of such reasoning; Locke, John, *Two Treatises of Government* ed Peter 1988).
so far apart as in the Stuart monarchy, yet it was the practice which had changed, not the theory\(^\text{93}\), which was neglected.

Ironically, in the absence of a developed constitutional theory, great reliance is placed on legal form as a substitute. Such is the present situation in New Zealand. Certainly, recognising that the acquisition of sovereignty was based on a compact in 1840 would bring this country to a more principled constitutional position, one indeed much discussed in the seventeenth century, that of the compact\(^\text{94}\).

That such a recognition has not yet been fully made is indicative of what Kelsey calls the integration ethic and the self-determination ethic\(^\text{95}\), a desire to accommodate the separateness of Maori culture but also a desire integrate that culture into mainstream Pakeha society. The future direction of the constitution is not clear, but concepts of Western


\(^{94}\)The original compact- the “law of the Kingdom” of Samuel. All political theory in the twentieth century was arguably utilitarian. We must not judge the seventeenth century by our values and standards, any more that we should that of the nineteenth century. See Locke, John, *Two Treatises of Government* ed Laslett (1988); Scott, Jonathan, *Algernon Sidney and the Restoration Crisis* (1991).

\(^{95}\)Kelsey, Jane, “Restructuring the Nation” in Fitzpatrick, *Nationalism, Racism and the Rule of Law* (1995) 185; See also Clark, Bruce, *Native Liberty, Crown Sovereignty* (1990) 191-219. That traditional structures and modern institutions each owe their validity and authority to distinct criteria is obvious. Where a constitution is based on such a pluralistic basis tension is inevitable; Khumalo, Bekithemba Ralph, “Legal
liberalism require at least the resolution of grievances resulting from breaches of the Treaty of Waitangi\textsuperscript{96}.

Brookfield has looked at what he calls the Crown’s seizure of power over New Zealand from 1840, the challenges of Maori, and the establishment of the separate New Zealand Crown. Developing from his earlier writings on law and revolution and on Waitangi matters and indigenous rights, he has examined how a revolutionary taking of power by one people over another may be at least partly legitimated\textsuperscript{97}. This process relies heavily upon redressing grievances and upon the development of new concepts of authority. There is no doubt that, as part of this process, during the 1980s in particular the Treaty of Waitangi was constitutionalised, and, in some views at least, the basis of government is founded upon it\textsuperscript{98}.

\textsuperscript{96}Interview with Sir Douglas Graham, 24 November 1999.


2.5 Conclusion

The Crown, as the legal and, in the person of the Sovereign, the living embodiment of an ancient political institution, confers some legitimacy upon, and represents the continuity of, government. In those circumstances where the authority of government is challenged, it is the place of the Crown, in the person of the Sovereign, their representatives, Ministers, and civil and military officials, to assert constitutional legitimacy.

One possible source of legitimacy is legal continuity, and this may be dated from the signing of the Treaty of Waitangi, if not before. Indeed, the Crown has been profoundly affected by the impact of the Treaty of Waitangi.99

The Crown is important symbolically because it holds the place held by the State in those legal systems derived from or influenced by the Roman civil law. Not only does the Crown provide a legal basis for governmental action, but it provides the legitimacy for such action. In the Australian context, Atkinson has observed that abolition of the monarchy would drive home a fundamental shift of legitimacy which is already underway.100 The wider constitutional issue of legitimacy cannot be

99 See Chapter III.
ignored\textsuperscript{101}. The Australian Labour Party wanted a republic partly for symbolic nationalist reasons, but partly also to deprive the Governors-General of their association with royal legitimacy\textsuperscript{102}.

The legitimacy of the Crown is the legitimacy of inherited legal form. This has now become a New Zealand-based legal form, with the Crown rather than the Sovereign per se the focus of the government. This does not, of itself, imply that the Crown cannot be replaced by a republican form of government. But, both in its own right, and in conjunction with the particular relationship with the Maori population stemming from the Treaty of Waitangi, the legitimacy of the Crown remains important, though perhaps inherently incapable of precise

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\textsuperscript{101} Thompson, Elaine, “Giving ourselves better Government” in Horne,\textit{ The Coming Republic} (1992) 160.

\textsuperscript{102} Lucy, R, \textit{The Australian Form of Government} (1985) 17. Interestingly, were Australia to become a republic, it would be the first of the British colonies by settlement to become a republic since the loss of thirteen of the American colonies in 1776-82.
\end{flushright}
measurement\textsuperscript{103}. It has, however, acted as at least a partial deferent to suggestions of the adoption of a republic of New Zealand\textsuperscript{104}.

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\textsuperscript{103} Though newer generations of Maori may be less concerned with retaining the monarchy per se, and more concerned with finding an effective mechanism for the expression of the Queen’s original function under the Treaty of Waitangi; Hayward, Janine, “Commentary” in Simpson, \textit{Constitutional Implications of MMP} (1998) 235.

\textsuperscript{104} The 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.
Chapter III:

THE MAORI DIMENSION

3.1 Introduction

In the last Chapter we saw how the orthodox legitimacy of the Crown is the legitimacy of inherited legal form. So long as government is conducted in accordance with the rule of law, and meets the aspirations of the majority of the population, the legitimacy of the government based on such a ground is little questioned.

This legitimacy alone is not necessarily sufficient however. Nor does it alone explain the general acceptance of the current regime. There exists a second, potentially potent, source of legitimacy- the Treaty of Waitangi. As the moral, if not legal, authority for European settlement of New Zealand, this 1840 compact between the Crown and Maori chiefs has become increasingly important as a constitutional founding document for New Zealand¹.

As a party to the continuing Treaty, the Crown may have acquired new, and significant, potential source of legitimacy, as the body with

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which the Maori have a partnership. It is also a legitimacy which belongs specifically to the Crown as a symbol of government. The purpose of this Chapter is to examination and assess this source of legitimacy.

The first section of the Chapter looks at the place of indigenous peoples and the Crown. This will evaluate the nature of the relationship established with the Crown during the course of colonial expansion, and its relevance for the native peoples today. In particular it will examine the development of the concept of fiduciary duty.

The second section looks at the New Zealand situation, and specifically at the Treaty of Waitangi. This is evaluated both as a source of legitimacy- as a direct agreement between Crown and Maori tribes, and as a possible cause of questioning of the legitimacy of government, because of its partial fulfilment and lingering uncertainties as to its meaning and application.

The third section looks at the Maori attitude to the monarchy, and in particular, the legitimacy derived from the Treaty of Waitangi. This will seek to bring together the concepts identified in the previous sections and identify some of the factors which Maori have considered important aspects of the Crown-Maori relationship.

Each section is important because it explains a possible source of legitimacy. But each also has its dangers, inherent in analysing political
structures which are founded in disparate cultural histories, Maori and Pakeha.
3.2 Indigenous peoples and the Crown

The Crown has a special role as trustee for the indigenous peoples of Canada, New Zealand, and (to a lesser degree) Australia. In each country the Crown assumed, and still discharges, certain responsibilities for what, in New Zealand, are called the tangata whenua, the “people of the land”\(^2\). As such the Crown occupies a symbolic place distinct from, yet linked with, the government of the day\(^3\). Though the Maori and European populations have become increasingly intermingled, the role of the Crown has remained important as guarantor of Maori property.

In New Zealand the Crown has become distinctly national, in a way which has not occurred in Australia, though there are similarities in Canada. In both New Zealand and Canada the Crown made treaties regulating its relations with the aboriginal inhabitants of the new colonies. These treaties, and the circumstances of settlement, created an ongoing duty on the part of the Crown towards the native peoples of the country.

The Treaty of Waitangi, signed in 1840 by emissaries of the Queen of Great Britain, and many of the indigenous Maori chiefs of New

\(^2\) A term which has strong parallels with that of autochthony.

\(^3\) It has been said that the Crown is increasingly seen by Maori in this light; Hayward, Janine, “Commentary” in Simpson, Constitutional Implications of MMP (1998) 233-234.
Zealand, has long been regarded as this country's founding document. Since its signing, it has been seen variously as an unqualified cession of sovereignty to the Imperial government, or as permitting the settler population to administer their own affairs in consultation with Maori. Its exact legal significance was uncertain. But it seems that the Crown gave implicit recognition to Maori as the indigenous inhabitants of the country\(^4\), both in the Treaty and in its prior and subsequent conduct towards Maori. The acquisition of sovereignty implicit in the Treaty was not acquired in a legal or political vacuum, yet the strict legal effect of the treaty was not as important as its political function. Both the British Government and the Maori chiefs knew that it was the culmination of a process which had begun some decades earlier.

Subsequently, and especially taking the lead from a number of court decisions\(^5\), governments have increasingly sought to apply the concept of partnership. In both Canada and New Zealand this relationship has not always been smooth, but the courts have recognised its

\(^4\)At least, such has been the widespread view, now given the backing of both politicians and courts; see for example, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA). Cf however, *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA), which could be seen as a partial reversal.

\(^5\)Such as *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) per Cooke P.
importance. Government has followed the direction set by the courts\textsuperscript{6}, just as has happened in Canada\textsuperscript{7} and the United States of America\textsuperscript{8}.

### 3.2.1 Canada

The Supreme Court of Canada in \textit{Guerin v R}\textsuperscript{9} acknowledged the existence of a fiduciary obligation upon the Crown towards the Canadian Indians\textsuperscript{10}. It was clearly stated by the court that the exercise of discretion or power over property above and beyond that to which people are normally subject leads to accountability in law\textsuperscript{11}. Since successive governments in Canada have long assumed the right to control, manage and dispose of Indian lands, a fiduciary obligation has rested upon the

\textsuperscript{6}Interview with Sir Douglas Graham, 24 November 1999.
\textsuperscript{8}Searles, Janis, “Another Supreme Court move away from recognition of tribal sovereignty” (1995) 25(1) Environmental Law 209.
\textsuperscript{9}[1985] 13 DLR (4d) 321.
\textsuperscript{10}Bartlett, Richard, “You can’t trust the Crown” (1984-85) 49 Sask LR 367.
\textsuperscript{11}\textit{Hospital Products Ltd v United States Surgical Corporation} (1984) 55 ALR 417 (HCA); \textit{Frame v Smith} [1987] 2 SCR 790 (SCC).
Crown\textsuperscript{12}. This was founded both on imperial practice and upon the Royal Proclamation of 1763\textsuperscript{13}.

The Royal Proclamation, which has the status of an imperial Act of Parliament\textsuperscript{14}, and thus could not be repealed by the Canadian Parliaments until the passage of the Statute of Westminster 1931\textsuperscript{15}, had guaranteed the native North American Indians possession of hunting grounds and the protection of the Crown\textsuperscript{16}. In restricting the alienation of Indian lands, the Crown assumed responsibility for the protection and management of Indian proprietary interests\textsuperscript{17}. In this there are strong parallels with the situation in New Zealand. But the Canadian federal constitutional arrangements saw a more marked division of powers than was possible in a unitary state like New Zealand.

In Canada today the Crown-in-Parliament has sovereignty, but aboriginal peoples have legislative jurisdiction from which non-natives

\begin{itemize}
\item \textsuperscript{13}Royal Proclamation 1763 (repr in RSC 1985 app II No 1).
\item \textsuperscript{14}\textit{R v Lady McMaster} [1926] Ex CR 68, 72, 72, although only because the Crown can legislate by proclamation or order in council for colonies. The general power to legislate by proclamation was rejected in the \textit{Case of Proclamations} (1611) 12 Co Rep 74.
\item \textsuperscript{15}For which see Chapter IV.
\item \textsuperscript{16}Which included the right of pre-emption.
\item \textsuperscript{17}Johnston, Darlene, “A Theory of Crown trust towards Aboriginal Peoples” (1986) 18 Ottawa LR 307, 329.
\end{itemize}
are excluded. In a similar way the federal and provincial governments today are subordinate to the Constitution, and can exercise only the powers delegated to them in the Constitution.

The only government with true sovereignty in the colonial era was the imperial government. But the imperial government, in its dealings in North America, also sought to maintain an “even hand” between the Indians and the colonial governments. Partly for this reason they circumscribed the power of the colonial government and therefore their federal and provincial successors.

Throughout Canadian history from the seventeenth century, the colonial governments were constitutionally bound to respect aboriginal rights, because they were never invested with sufficient legal power to abrogate such rights. These right were later formally based on the Royal

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19 Though there were claims to the contrary by American colonials in the seventeenth and eighteenth centuries. In the chartered colonies the local assembly elected the governor, enacted laws repugnant to English law, declined to recognise Admiralty jurisdiction or appeal rights, neglected to provide their quotas for imperial defence, and encouraged trades forbidden by imperial legislation. In short, they were politically independent, and claimed legal independence also; Keir, Sir David Lindsay, *The Constitutional History of Modern Britain since 1485* (1966) 352.

20 More recently, the courts have observed that, in dealing with the native Americans, “the honour of the Crown is involved and no appearance of ‘sharp dealing’ should be sanctioned” - *R v Taylor* (1981) 62 CCC (2d) 227, 235 per MacKinnon ACIO (Ont CA).

Proclamation of 1763 and the instructions to the governors, the latter of which however the colonial legislature could enact against, in accordance with the Colonial Laws Validity Act 1865.22

The native peoples of Canada enjoyed constitutional immunity, not merely federal immunity. Thus they had certain rights, as of land ownership, which depended not upon federal laws, but upon the constitution.23

Developments in the courts from the 1970s has led to a resurgence of native authority.24 In *Calder v Attorney-General for British Columbia*25 the Supreme Court of Canada assumed that the pre-confederation colonial government in British Columbia was granted, by the imperial government, vice-regal sovereign power sufficient to extinguish the aboriginal rights to the territory the Crown had not

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22Sections 4 and 3 abolished the former theory and practice that colonial legislatures must respect the fundamental principles of English law. See further Chapter IV.

23Such as the 1763 Royal Proclamation. Since 1982 there has been constitutional entrenchment for these rights under Constitution Act 1982 s 35(1).


purchased. But even the federal government powers at confederation were not sovereign.\footnote{Slattery, Brian, “The Independence of Canada” (1983) 5 Supreme Court LR 373, 382 (Canada).}

The courts have led the way to the recognition of a special relationship between Crown and native peoples.\footnote{Interview with Sir Douglas Graham, 24 November 1999); Calder v Attorney-General for British Columbia [1973] SCR 313 (SCC); Guerin v R [1985] 13 DLR (4d) 321; R v Van der Peet [1996] 2 SCR 507; Delgamuukur v British Columbia [1997] SCR 1010; R v Sparrow (1990) 70 DLR (4th) 385.} Following its tentative recognition in Calder,\footnote{Calder v Attorney-General for British Columbia [1973] SCR 313 (SCC).} Guerin v R\footnote{(1984) 13 DLR (4th) 321 (SCC).} has established authoritatively that the Crown may be held accountable for its role in the management and disposition of aboriginal land and resources. Four judges held that a fiduciary obligation only arose if the land was surrendered, three held that a more general obligation to protect the land interests of aborigines existed. The minority were followed in R v Sparrow.\footnote{(1990) 70 DLR (4th) 385.}

Whilst imbued with an ongoing responsibility for the native peoples, the Crown enjoys a special position in the Canadian political system, one which was initially developed by the courts, but which has been followed by successive governments and the Canadian Parliaments.

\footnote{26Slattery, Brian, “The Independence of Canada” (1983) 5 Supreme Court LR 373, 382 (Canada).}


\footnote{28Calder v Attorney-General for British Columbia [1973] SCR 313 (SCC).}

\footnote{29(1984) 13 DLR (4th) 321 (SCC).}

\footnote{30(1990) 70 DLR (4th) 385.
The adoption of a republic in Canada would require a re-evaluation of the relationship between the different peoples of which the country is comprised. To some degree at least, the establishment of Canada was founded on a series of treaties between the Crown and the native American people. The obligations under these treaties have been assumed by the Canadian authorities, but in such a way that the Crown remains symbolically central to the relationship. For the relationship is not between Europeans and natives, though it could be perceived as being between State and natives—provided there was agreement as to the nature of the State.

The general rules of fiduciary obligations have also been developed in the United States of America, though the practical implications of this for the native peoples may be limited. The relationship between the United States of America and the North American tribes within its boundaries followed a similar path to that of Canada.

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31 One rather unusual aspect of this is the existence, since 1711, of Her Majesty’s Chapel of the Mohawk, Brantford, Ontario; Baldwin, David, *The Chapel Royal* (1990) 56-62.

32 Hughes, Camilla, “The fiduciary obligations of the Crown to Aborigines” (1993) 16 Univ NSW LJ 87. These can be traced back to 1832, though the treatment of American Indians by the government until the early years of the twentieth century was frequently brutal, and sometimes at odd with judicial decisions.

But in Canada alone the Royal Proclamation, which has been, like the Treaty of Waitangi, regarded as analogous to magna carta\textsuperscript{34}, secured (at least in theory) Indian rights generally, not only those of title to land\textsuperscript{35}. The courts have been able to say that, in dealing with the native Americans, “the honour of the Crown is involved and no appearance of 'sharp dealing' should be sanctioned”\textsuperscript{36}.

### 3.2.2 Australia

In contrast to Canada, the principles of Crown guardianship of native peoples received little judicial attention in Australia until \textit{Mabo v Queensland (No 2)}\textsuperscript{37}.

Though in an earlier case it had been said that the Crown in right of the Commonwealth of Australia may come under a fiduciary duty\textsuperscript{38}, the judgements in \textit{Mabo} show a more marked inclination to recognise a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{35}\textit{Calder v Attorney-General for British Columbia} [1973] SCR 313, 395 per Hall J (SCC).
\item \textsuperscript{36}\textit{R v Taylor} (1981) 62 CCC (2d) 227, 235 per MacKinnon ACJO (Ont CA).
\item \textsuperscript{37}(1992) 175 CLR 1.
\item \textsuperscript{38}\textit{Northern Land Council v Commonwealth (No 2)} (1987) 61 ALJR 616.
\end{itemize}
\end{footnotesize}
fiduciary obligation in cases where there was actual or threatened interference with native title rights.\textsuperscript{39}

But aboriginal relations have played a lesser part in the Australian republican debate than they have in political debate in Canada or New Zealand, largely because the aboriginal population generally lacked treaties with the Crown\textsuperscript{40}. Suggestions in recent years for such a treaty raise interesting questions about the extent to which Australia could (or would wish to) replicate the situations which have existed in Canada for two hundred and in New Zealand for over 150 years. Ironically, some have suggested that “aboriginality” should replace the Crown in Australian national identity\textsuperscript{41}, thereby in some respects reversing the relationship of settler and aboriginal people. Precisely what is meant by “aboriginality” is not clear, however.

\textsuperscript{39} Acquisition of legal title over Australia was based on settlement, not conquest, with the continent being regarded legally a \textit{terra nullius}, or subject to no legal sovereign; Jennings, Robert & Watts, Arthur, \textit{Oppenheim's International Law} (1992) “Peace”, vol 1, parts 2-4. This was legally true of New Zealand also, but for political and moral reasons this country was treated differently. See Chapter 3.3.1.


\textsuperscript{41} Morton, J, “Aboriginality, Mabo and the Republic” in Attwood, \textit{In the Age of Mabo} (1996) 117, 119-123.
Although the Crown assumed in Australia, as it did in all colonies, the role of protector of the native peoples, the protection thus accorded was limited, because of the absence of written undertakings.
3.3 The Treaty of Waitangi

The situation in New Zealand is much closer to that in Canada than it is to that in Australia. In both New Zealand and Canada the Crown assumed a fiduciary role by Treaty and by its prior and subsequent conduct with respect to the native peoples. The Crown has perpetual responsibilities to native peoples in both countries. But in New Zealand, the one Treaty has paramount significance, in part because there was but the one Treaty with the indigenous inhabitants of the islands.

Orthodox theory holds that the Treaty of Waitangi has socio-political, not legal force, as it was not a treaty recognised by international law. It therefore has effect only so far as legal recognition has been specifically accorded it. However, at some time either the courts or Parliament may have to give the Treaty legal recognition as part of the

42 Molloy, Anthony, “The Non-Treaty of Waitangi” [1971] NZLJ 193. For a contrary view, based on the changing precepts of modern international law, see Klaus Bosselmann, “Two cultures will become one only on equal terms” New Zealand Herald 1 March 1999. However, if the Treaty was not a treaty in 1840, it is difficult to see how it could be one now. It would be preferable to see its importance in domestic constitutional terms. See, Renwick, William, Sovereignty and indigenous rights (1991).

constitution of New Zealand. But already the Treaty of Waitangi, as a principle of the constitution, is now all but entrenched, if only because it is regarded by Maori generally as a sort of “holy writ”. Government agencies therefore apply the Treaty, wherever possible, as if it were legally binding upon them. In this, the growth in what has been called the “myth” of Crown-Maori partnership has been particularly important.

This section will look at the events which led to the assumption of British authority in New Zealand and the process by which this was achieved, the legal basis for this assumption, and the legitimacy derived from the Treaty.

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44Fogarty, John, [1993] NZLJ 212.
3.3.1 Assumption of sovereignty

Scholars continue to differ as to the date of assumption of British sovereignty over New Zealand\textsuperscript{48}. The actual means of obtaining sovereignty is also disputed. Swainson, the Attorney-General at the time in question, thought that sovereignty was partly by cession, and that conquest had not occurred, nor usurpation\textsuperscript{49}. The Colonial Office, in rejecting Swainson’s view, held that the New South Wales Charter of 16 November 1840 was the legal basis of sovereignty\textsuperscript{50}. But the legal


\textsuperscript{50}“Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council”; \textit{British Public Papers} (1970) 153-155.
foundation of New Zealand as a separate colony can be ascertained with some certainty\textsuperscript{51}.

Captain James Cook, Royal Navy, had taken possession of the North Island on 15 November 1769, and the South Island on 16 January 1770\textsuperscript{52}. New Zealand had been held to have been constituted a part of the Colony of New South Wales by an Order in Council in 1786 and the first Governor’s Commission for that colony\textsuperscript{53}, although this is a rather strained interpretation of the actual authority enjoyed by the government in Sydney\textsuperscript{54}.

The Government and General Order Proclamation issued in 1813 by Lachlan Macquarie, Governor of New South Wales, declared that the

\textsuperscript{51}In modern popular mythology, the Treaty of Waitangi is taken to be the foundation of New Zealand. The legal significance of the 6 February 1840 is, however, rather less according to the general and settled imperial law of the mid-nineteenth century: \textit{Wi Parata v Wellington (Bishop of)} (1877) 3 NZ Jur (NS) SC 72. Cf. \textit{R v Symonds} (1847) NZPCC 387 (SC).

\textsuperscript{52}British courts have held that an unequivocal assertion of sovereignty by the Crown must be accepted by a domestic court, even where the claim would not be recognised under international law: \textit{Sobhuza II v Miller} [1926] AC 518, 522-525 (PC).

\textsuperscript{53}Issued 12 October 1786 to Captain Arthur Phillip, Royal Navy, and appointing him “Captain-General and Governor-in-Chief in and over our territory called New South Wales … “. The commission, which was amplified on 2 April 1787, was publicly read at Sydney Cove on 26 January 1788.

\textsuperscript{54}Robson, JL, \textit{New Zealand} (1967) 2; McLintock, AH, \textit{Crown Colony Government in New Zealand} (1958) 9. New Zealand was generally regarded as being included in the territory of the Colony of New South Wales in early years of the development of that colony.
aboriginal natives of New Zealand were “under the protection of His Majesty and entitled to all good offices of his subjects”\textsuperscript{55}.

However, the jurisdiction of New South Wales over the islands of New Zealand was expressly denied by an imperial statute, the Murder Abroad Act 1817. Subsequent enactments repeated that New Zealand was “not within His Majesty’s Dominions”\textsuperscript{56}, but from 1823 did allow the courts of New South Wales to try cases of offences committed in New Zealand by British subjects\textsuperscript{57}. Extra-territorial judicial processes were at this time not uncommon, particularly where British trade was conducted in countries with “non-Christian or barbaric laws”, or no laws at all\textsuperscript{58}. It is likely that nothing more than extra-territorial jurisdiction was in fact intended, certainly not any claim to sovereignty.

But circumstances were to require greater official British involvement in New Zealand. In 1831 thirteen chiefs from Kerikeri petitioned King William IV for protection against the French. As a result

\textsuperscript{55} McNab, Robert, \textit{Historical Records of New Zealand} (1908) vol 1 pp 316-318.

\textsuperscript{56} Australian Courts Act 1828.

\textsuperscript{57} An Act for the better administration of justice in New South Wales and Van Diemen’s Land 1823.

\textsuperscript{58} Such a jurisdiction survived in the Trucal States, now the United Arab Emirates, until 1971; “Exchange of Notes concerning the termination of special treaty relations between the United Kingdom and the Trucal States”, 1 December 1971, Cmnd 4941, UK Treaty Series 34 (1972).
of this, and to curb the conduct of visiting ships’ crews and round up runaway convicts, in 1833 James Busby was appointed British Resident in Waitangi, with the local rank of vice-consul. No magisterial powers were conferred upon him; imperial legislation to increase his powers was contemplated but never passed.

Busby encouraged the Declaration of Independence by 35 northern chiefs in 1835, in an attempt to thwart the move by Charles de Thierry, the self-styled “Sovereign Chief of New Zealand and King of Nuhuhia”, to set up his own government. The Declaration of Independence of the United Tribes of Aotearoa in 1835 may have been “politically unsustainable, practically unworkable, and culturally inconceivable”. But for those tribes who signed, the Declaration meant that henceforth the British king was honour-bound to recognise and protect their independence. This step was followed by the Treaty of Waitangi, inspired as much by internal Colonial Office politics as by a genuine regard for native rights.

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In 1838 a House of Lords committee favoured the extension of British possession over New Zealand. The Colonial Office decided in 1839 to annex New Zealand to New South Wales. On 15 June letters patent were signed which enlarged the jurisdiction of the Governor of New South Wales, by amending his commission to include the New Zealand islands. On 14 January 1840 Sir George Gipps, Governor of New South Wales, swore Captain William Hobson, Royal Navy, as his lieutenant-governor and consul, and signed proclamations relating to title to land in New Zealand. These were published in Sydney on 19 January 1840, and in New Zealand 30 January 1840.

Hobson was instructed to take possession of the country only with the consent of the Maori chiefs. The Treaty of Waitangi was the immediate instrument by which this was to be achieved. The initial signing of the Treaty was on 6 February 1840, although the process of signing copies was not completed till 3 September 1840. As chiefs signed, so local proclamations of British sovereignty were issued, although no formal proclamation of sovereignty over the northern districts was ever issued, as Hobson had to leave for the south in order to

63Adams, Peter, Fatal Necessity (1977) part I.
65Marquess of Normanby to Captain William Hobson, 14 August 1839; Great Britain: Parliamentary Papers 1844, 16/37.
control the New Zealand Company settlers in Wellington\textsuperscript{66}. In the central North Island there was substantial non-adherence to the Treaty by Maori leaders who were well aware of the implications of signing away their independence.

As a result of reports that the New Zealand Company settlers in Wellington (then called Port Nicholson) had issued their own constitution, and had set up a government, Hobson on 21 May 1840 issued two proclamations of full sovereignty over all of New Zealand, which were published in the London Gazette on 2 October 1840\textsuperscript{67}. The first was in respect of the North Island, and was based on cession by

\begin{center}

\textit{And these believed that that there were

very serious doubts whether the Treaty of Waitangi, made with naked savages by a Consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment.}

\textit{-Letter dated 24 January 1843 from Joseph Soames to Lord Stanley, Minister for the Colonies, promoting the Company's claim to 20,000,000 acres of New Zealand. Cited in Anon, “The Effect of the Treaty of Waitangi on Subsequent Legislation” [1934] 10 NZLJ 13, 15.}

The New Zealand Company was not disinterested in this matter, and it was incorrect that Hobson was merely a consul without plenipotentiary power- he had been appointed Lieutenant-Governor and instructed to treat with the natives. Nor was ratification by the Crown necessary. But the essence of the argument remained the Treaty of Waitangi's status at international law.

\textit{British Public Papers (1970) 140-141}

\end{center}
virtue of the Treaty of Waitangi. The second proclamation related to the South Island (then called Middle Island) and Stewart Island.

On 15 October 1840 Hobson sent a despatch to London which collated all the copies of the Treaty, and this despatch was approved 30 March 1841. In it, Hobson indicated that the second proclamation of 21 May 1840 relied on the right of discovery, rather than the Treaty. In this he was acting in conformity with his instructions to extend British sovereignty over the South Island “by treaty, if that be possible, or if not, then in the assertion, on the ground of discovery, of Her Majesty's sovereign rights over the island.”

In the meantime, Major Bunbury proclaimed sovereignty by cession over the South Island on 17 June 1840. The proclamations of 21 May were effective in showing that New Zealand was a colony by act of

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71 British Public Papers (1970) 138

72 Captain William Hobson to the Under Secretary of the Colonial Department (Mr Labouchere), 15 August 1839; Great Britain: Parliamentary Papers 1844, 17/42; Marquess of Normanby to Captain Hobson, 15 August 1839; Great Britain: Parliamentary Papers 1844, 18/44.
State. An act of State must be accepted as legally effective, nor is any special formality required for annexation.

Meanwhile, the government of New South Wales purported to annex New Zealand by the Act 3 Vict No 28, in force on 16 June 1840. This was made in ignorance of imperial plans. New Zealand remained a dependency of New South Wales until letters patent, in the form of a Royal Charter, was signed on 16 November 1840. The letters patent, and a Governor’s commission, were published in the London Gazette on 24 November 1840, and proclaimed in New Zealand on 3 May 1841.

The Royal Instructions to the Governor were issued 5 December 1840.

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Robson thought it was by occupation, but Foden (in the minority viewpoint), thought settlement; Robson, JL, New Zealand. The Development of its Laws and Constitution (1967) 4-5; Foden, NA, The Constitutional Development of New Zealand in the First Decade (1938) 38. In Foden’s view, the letters patent of 15 June 1839 are the fons et onjo of British sovereignty. He would eliminate the humanitarian and idealism prevalent in earlier interpretation of events of 1839-40. cf Rutherford, J, The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand (1949).

Salaman v Secretary of State for India [1906] 1 KB 613.

In re Southern Rhodesia [1919] AC 211, 238.


Adams, Peter, Fatal Necessity (1977) 162.
The Charter was based solely on the authority of New South Wales and Van Diemen’s Land Act 1840, passed 7 August 1840, by which separate colonies were to be established in the territories of the Colony New South Wales and Van Diemen’s Land\textsuperscript{79}.

The assumption of British rule over New Zealand was in some ways inevitable. But it came at a time when modern notions of international law were evolving. But it was clear that the Crown was acting, at least partly, for the good of the Maori. In this they assumed an obligation towards the native peoples which was to outlast the imperial authority, and become a legacy for post-colonial governments.

3.3.2 The legal basis for the assumption of sovereignty

According to constitutional theory, which had evolved since the establishment in the seventeenth century of the first British empire\textsuperscript{80}, colonies must in the mid-nineteenth century be either settled colonies, or

\textsuperscript{79}This statute of course presupposed that New Zealand was by 1840 a part of the Colony of New South Wales, a fact which was sufficiently clear after 15 June 1839. Van Diemen’s Land (renamed Tasmania 1856) itself was, under the same Act, constituted a colony independent of New South Wales, by letters patent 14 June 1825.
conquered or ceded colonies. The basis of the distinction was the stage of civilisation considered to have existed in the territory at the time of acquisition. If there was no population or no form of government considered civilised and recognised in international law, possession was obtained by settlement. If there was an organised society to which international personality was attributable, acquisition was by cession or conquest.

The original relatively clear distinction between deserted and uninhabited territories (which could be settled), and those which were inhabited (which could not), was eroded after the American Revolution. It became accepted that colonies occupied by a tribal society could be 'settled'. New Zealand has been cited as the example per excellence of this trend towards a legal fiction of a *terra nullius*. If this were so, then

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80 See Keith, AB, *Constitutional History of the First British Empire* (1930).

81 *Phillips v Eyre* (1870) LR 6 QB 1; *Lyons Corp v East India Co* (1836) 1 Moo PCC 175, 272, 274; Bl Com book 1, 104.

82 Jennings, Robert, *The Acquisition of Territory in International Law* (1963) 23.

83 *Lyons Corp v East India Co* (1836) 1 Moo PCC 175, 272, 274; *Freeman v Fairlie* (1828) 1 Moo Ind Ap 305, 324, 345 (PC); Bl Com book 1, 104.

84 A land without a settled population, which therefore could have no laws nor legal rights (as of ownership) except that imposed upon the acquisition of sovereignty; McHugh, PG, “Aboriginal Rights of the New Zealand Maori at common law” (1987) University of Cambridge PhD thesis 137-142.
the Treaty of Waitangi could not have been treaty of cession, or so later nineteenth century orthodoxy maintained\textsuperscript{85}. The Treaty of Waitangi had socio-political, not legal force, as it was not a treaty recognised by international law\textsuperscript{86}.

The authority actually exercised by the Crown in New Zealand always exceeded that of a protectorate\textsuperscript{87}, and New Zealand was, from the beginning, administered as a Crown colony\textsuperscript{88}. New Zealand was held to be a settled colony, though not without difficulty\textsuperscript{89}.

From the contemporary British perspective it was a treaty of cession which allowed for settlement and for the purchase of land\textsuperscript{90}. However, because the chiefs actually had little formal law, and because

\textsuperscript{85}Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72.


\textsuperscript{87}Where, for example, the relations of imperial power and local population were regulated by specific treaty arrangements. In practice, the extent to which such countries were treated differently from colonies depended upon the degree of sophistication of the indigenous inhabitants' civilization; Emerson, Rupert, From Empire to Nation (1960).


\textsuperscript{89}See the Report of the Privy Council on the project of a Bill for the better government of the Australian Colonies, dated 1 May 1849; R v Symonds (1847) NZPCC 387 (SC). See also the English Laws Act 1858 and s 5 of the Imperial Laws Application Act 1988.

\textsuperscript{90}Brownlie, Ian, Treaties and Indigenous Peoples (1992) 12.
of the direct proclamation of sovereignty over the South Island, New Zealand was treated thereafter as a settled colony.

But, even if the Maori were not able to make binding international treaties, the Treaty of Waitangi was not a mere nullity. The capacity to make international treaties was also distinct from the existence of an established system of laws, or legal personality. Almost invariably in British imperial practice, the acquisition of territories was by cession, accompanied by treaties in which the inhabitants’ entitlement to the continued occupation of the territory was declared. This practice implied, by definition, that the territorial sovereignty and property rights of the inhabitants were recognised.

There can also be little doubt that the negotiation of the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make some form of internationally valid agreement.

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93 Examples where treaties with native peoples were regarded as binding in international law include those with the Cherrokees, 20 September 1730; Almon, J, A Collection of all the Treaties of Peace (1772) vol 2, p 13.
Moreover, there is evidence that in the decade prior to the conclusion of the Treaty the British Government conducted itself on the basis that relations with the Maori tribes were governed by the rules of international law\textsuperscript{94}, and therefore bound at least morally by the terms of a treaty of cession. The fact that developments in international law doctrine subsequently denied treaty-making capacity to what were described as "Native chiefs and Peoples"\textsuperscript{95} is immaterial.

If the Treaty of Waitangi were a valid international treaty, its very execution served to extinguish the separate legal identity of the sovereign chiefs, and brought questions of its implementation to the plane of domestic law\textsuperscript{96}. New Zealand would then be regarded as a ceded territory, and its pre-existing laws subject to abolition or amendment by the Crown\textsuperscript{97}. If it were not a valid international treaty, its application remained a matter for domestic law\textsuperscript{98}. In both cases it depended upon the


\textsuperscript{95}McNair, Lord, \textit{The Law of Treaties} (1961) vol i 52-54.

\textsuperscript{96}The Privy Council, in \textit{Te Heuheu Tukino v Aotea District Maori Land Board} [1941] NZLR 590, 596-597; [1941] AC 308, 324 (PC) held that the Treaty was not enforceable in domestic law.

\textsuperscript{97}Whether pre-existing indigenous legal rights automatically survived settlement or cession, or were dependent upon Crown recognition was only settled comparatively recently in favour of the continuing legality of native rights; McNeil, Kent, \textit{Common Law Aboriginal Title} (1989) 196.

\textsuperscript{98}The Judicial Committee of the Privy Council in \textit{Te Heuheu Tukino v Aotea District Maori Land Board} [1941] NZLR 590, 596-597; [1941]
good faith of the Crown that the provisions of the Treaty were upheld. This meant that the principal focus was on domestic law, though this was perhaps preferable to attempting to resolve essentially internal problems on the international plane.

It is clear that in the decade prior to the conclusion of the Treaty the British Government conducted itself on the basis that relations with the Maori tribes were governed by the rules of international law, at least in respect of the North Island\(^99\), and therefore bound at least morally by the terms of a treaty of cession.

### 3.3.3 Legitimacy derived from the Treaty of Waitangi

Legally authority over New Zealand was acquired by the Crown by discovery and settlement, as well as by cession. But this acquisition of authority was intended by the imperial government to be with the consent of the Maori chiefs, and the chiefs generally accepted it on that basis.

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This was in conformity with prior colonial practice\textsuperscript{100}, and consistent with the practice of the previous several decades\textsuperscript{101}.

Unfortunately for the Maori, the practice of the colonial government, to whom the Imperial authorities increasingly sought to transfer responsibility, was after 1840 one of widespread disregard for the spirit, if not the terms, of the Treaty\textsuperscript{102}.

The British side thought that the chiefs were making a meaningful recognition of the Queen and of the concept of national sovereignty, in return for the recognition of their rights of property\textsuperscript{103}. In contrast, Williams has argued that the Maori text connoted a covenant partnership between the Crown and Maori, rather than an absolute cession of sovereignty\textsuperscript{104}, though this may be a strained interpretation\textsuperscript{105}. But it is likely that the chiefs did not anticipate that the Treaty would have such far-reaching consequences for them.

\textsuperscript{100} Lindley, Sir Mark, \textit{The Acquisition and Government of Backward Territories in International Law} (1926).

\textsuperscript{101} Interview with Georgina te Heuheu, 7 December 1999.

\textsuperscript{102} Amounting to what Brookfield calls a revolutionary seizure of power; Brookfield, FM, \textit{Waitangi and Indigenous Rights} (1999).


\textsuperscript{105} The \textit{contra proferetem} principle, leads to the conclusion that the Maori version is definitive.
But claims of legitimacy founded in a completely different value system will be so unclear as to be nearly impossible to distinguish. After the treaty the extent of the chiefs' loss became apparent, but too late.

In the absence of a voluntary cession of full sovereignty the legitimacy of colonial rule could only be validated over time through the habit of obedience, or legal sovereignty. This approach is based upon European legal concepts, something which has been criticised by some Maori academics. However, legitimation by effectiveness and durability of even a revolutionary assumption of power is a well understood principle of law, even amongst the early Maori.

Whether or not it had been intended by the signatories, it is now widely assumed that Maori have, under the first article, accepted the

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sovereignty of the Crown, and therefore the legitimacy of the present government and legal system. Indeed, most Maori leaders accept this, and concentrate on the Crown’s failure to keep its part of the Treaty as a failure to protect property rights. It might be said that the government's view of the Treaty has always been that it gave authority to it, whereas in the common Maori view the Crown's protection of Maori property was more important. This pragmatic position has proved most effective, and has led to the successful conclusion of numerous claims for compensation for past wrongs.

The Treaty at least partially justifies or legitimates the Crown and Parliament’s claims to power, though in Jackson’s view only in


113 Indeed, it has been said that it is unrealistic to maintain any contrary argument; Interview with Sir Douglas Graham, 24 November 1999.

114 Mulgan, Richard, “Can the Treaty of Waitangi provide a constitutional basis for New Zealand’s political future?” (1989) 41(2) Political Science 57-59. Though there are some who, whilst decrying alleged Crown breaches of the Treaty, deny that the Treaty conveyed anything more than permission for European settlement; a case of “having their cake and eating it too”; Interview with Sir Douglas Graham, 24 November 1999.

115 Article 1.

116 Article 3.

respect of Pakeha. However, such a resolution presupposes that the original assumption of sovereignty was in some way illegal, itself a proposition open to argument.

It is becoming clear that traditional views of the Treaty must be reassessed, and that the concept (or myth as Chapman called it) of the Treaty as a living document is symbolically important. A republican constitution would allow a fresh start, though at greater potential risk, due to the need to re-evaluate the nature of the relationship between Maori and government, though not all have accepted that the Treaty of Waitangi is a substantial enough basis upon which to built a constitution.

The Treaty occupies an uncertain place in the New Zealand constitution. No Maori law was recognised by the colonial legal

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121 See, for example, the Rt Hon Simon Upton, speaking in his valedictory speech to Parliament, 12 December 2000; Waikato Times 13 December 2000.
122 For the general background to the Treaty, see Buick, Lindsay, The Treaty of Waitangi (1933); Moon, Paul, Origins of the Treaty of Waitangi (1994); Rutherford, J, The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand (1949).
system\(^{123}\) - indeed there was no Maori law as the term is now generally understood\(^{124}\). The New Zealand Parliament has never doubted that they have full authority irrespective of the Treaty. There have been some signs that this orthodoxy may be challenged\(^{125}\), but it is difficult to see how this could be achieved in the absence of an entrenched Constitution and a Supreme Court on the American model\(^{126}\).

Lord Woolf, in his 1994 Mann lecture, subscribed to the opinion, gradually gaining ground, that there are some fundamentals which even the Westminster Parliament cannot abolish, though the traditional doctrine of supremacy of Parliament holds that there is nothing that Parliament cannot do\(^{127}\).

The time may have come for the courts to give judicial recognition to the Treaty of Waitangi, as they have been called upon to do by, among

\(^{123}\)Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72.

\(^{124}\)Tapu, customs and lore fulfilled the functions of laws found in more complex societies.


others, Professor Whatarangi Winiata. There have been clear signs that Lord Cooke of Thorndon, while President of the Court of Appeal, was inclined to reconsider the position of the Treaty. But such a significant step remains unlikely. In the meantime Crown and Maori remain in a form of political or legal symbiosis through their Treaty relationship.

In light of strong Pakeha opposition to Maori claims under the existing Treaty, it would be uncertain whether there would be sufficient support for a simple transference of Treaty obligations to a new regime. More importantly, the Treaty is still seen by many Maori as an obligation assumed by the Crown, and not, therefore, to be seen as having been assumed solely by the political government of New Zealand.

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129 Te Runanga o Wharekauri Rekohu Inc v Attorney-General [1993] 2 NZLR 301, 305 (CA).
130 Interview with Georgina te Heuheu, 7 December 1999.
131 Perry, Paul & Webster, Alan, New Zealand Politics at the Turn of the Millennium (1999).
3.4 Maori attitudes to the Crown

The British Crown, as it was in 1840, had, through a Treaty which was a culmination of a gradually evolving relationship with the native peoples, assumed a measure of responsibility for the Maori, and could be held to this compact, whatever the legal position of the Treaty might have been. Thus, the Crown derives legitimacy from the Treaty and from the conduct which had preceded the Treaty.

The Treaty of Waitangi may legally have ceded sovereignty, but it should be seen as part of the British government's stated intention to take possession of the country only with the consent of the Maori chiefs. Since the 1770s Maori contact with British officers had given them an understanding of the advantages, as well as of the disadvantages, of coming under the Queen's protection. It is clear that, in signing the Treaty of Waitangi, they saw themselves as reinforcing this link with the Queen and her royal predecessors (as well as successors).

Maori deputations to the Sovereign, in 1882 and 1884 to Queen Victoria, and in 1914 and 1924 to George V, to seek redress of

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132 Marquess of Normanby to Captain William Hobson, 14 August 1839; Great Britain: Parliamentary Papers 1844, 16/37.
133 For which, see Walker, Ranganui, Ka Whawhai Tonu (1990) 160-165, 183-184.
grievances under the Treaty, must be seen in this context. The Maori would not have considered that the Queen had signed in any other capacity than the chiefs themselves would have signed. Thus they may not have fully appreciated that although the Treaty was signed on behalf of Queen Victoria, the political capacity of the Sovereign was exercised by her Ministers on her behalf\textsuperscript{134}.

Each of the deputations was referred by the Ministers in the United Kingdom to the colonial Ministers in Wellington, on whose advice the Sovereign was now acting in matters affecting his or her Maori subjects\textsuperscript{135}. Whether this was a correct position to take in the late nineteenth century is doubtful\textsuperscript{136}. It is certain however that today any attempt to seek recourse to the Sovereign personally will be referred to the appropriate New Zealand Minister\textsuperscript{137}.

\textsuperscript{134}Indeed, they were encouraged to see the Treaty as an agreement with the Queen; Interview with Sir Douglas Graham, 24 November 1999.

\textsuperscript{135}In a similar way, efforts were made to seek the involvement of the United Kingdom Parliament on behalf of the Canadian Indians during the 1981-82 patriation process. The courts had to rule that the treaty obligations to natives were now the responsibility of the government and Parliament of Canada; \textit{R v Secretary of State Foreign and Commonwealth Office} [1982] QB 892 (CA); Sanders, Douglas, “Indian Lobby” in Banting & Simeon, \textit{And No One Cheered} (1983) 322-323.

\textsuperscript{136}Brookfield, FM, “A New Zealand Republic?” (1994) 8 Legislative Studies 5.

\textsuperscript{137}Interview with Sir Douglas Graham, 24 November 1999.
The Crown’s obligations under the Treaty of Waitangi are now exclusively the concern of the Crown in right of New Zealand\(^\text{138}\). However, the personal involvement of the Sovereign as a party to the Treaty remains important to the Maori. This is illustrated by the strongly asserted Maori appeal to Her present Majesty Queen Elizabeth, in 1984, to “honour the Treaty”\(^\text{139}\).

Many Maori share a widely and deeply held view of the Queen as the great-granddaughter of Queen Victoria\(^\text{140}\), though the numbers holding this view appear to be in decline\(^\text{141}\).

Sir James Henare, a leading Maori elder, informed the Court of Appeal that:

> it’s a very moot point whether the Maori people do love Governments in New Zealand because of what they have done in the past ... The Maori people really do have no great love for governments but they do for the Crown\(^\text{142}\).

\(^\text{138}\) This is shown in the Canadian context in *R v Secretary of State Foreign and Commonwealth Office* [1982] QB 892 (CA).


\(^\text{140}\) Interview with David Lange, 20 May 1998; Interview with Sir Douglas Graham, 24 November 1999.

\(^\text{141}\) Interview with Georgina te Heuheu, 7 December 1999.

\(^\text{142}\) Affidavit 1 May 1987 referred to in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.
Though this illustrates the confusion over the identity of the Crown\textsuperscript{143}, the existence of such an attitude cannot be ignored. Thus, the apology from the Crown, enshrined in the Waikato Raupatu Claims Settlement Act 1995, and signed by the Queen in November 1995, was symbolically of great importance\textsuperscript{144}. The fact that the apology could not be attributed to Her Majesty personally was widely overlooked\textsuperscript{145}.

The importance of the British connection remains strong for many Maori, who would prefer that the Crown not have an exclusively national identity\textsuperscript{146}. Some value the perceived independence of a trans-national institution\textsuperscript{147}. Indeed, some have continued to see the Treaty as an agreement with the United Kingdom, rather than with the New Zealand government\textsuperscript{148}. Thus, although the Crown may have evolved into the New Zealand Crown, to many Maori this might be actually unwelcome,


\textsuperscript{144}“New Zealand sees new era dawn with Queen’s apology” Daily Telegraph (London) 4 November 1995.

\textsuperscript{145}Interview with Sir Douglas Graham, 24 November 1999.

\textsuperscript{146}Interview with Sir Douglas Graham, 24 November 1999; Interview with Georgina te Heuheu, 7 December 1999.

\textsuperscript{147}Kelsey, Jane, “The Agenda for change” (1995). It was partly for this reason that Maori opposed the abolition of appeals to the Judicial Committee of the Privy Council; Interview with Georgina te Heuheu, 7 December 1999.

\textsuperscript{148}“Historical Brief” Confederation of United Tribes of New Zealand (1999).
if it means the increased subordination of the Crown to the political
government in Wellington.

The legal status in the Treaty of Waitangi is secondary to how it is
perceived by Maori\textsuperscript{149}. Whatever the legal effect of the Treaty of
Waitangi, the chiefs yielded, voluntarily or otherwise, kawanatanga to
the Queen\textsuperscript{150}. It appears to be a widespread Maori belief that the Treaty
was with the Crown, and that this link should not be amended, let alone
severed, unilaterally- Maori would have to be consulted before the
government decided on any change\textsuperscript{151}.

The Treaty disputes settlement process has encouraged
consideration of the system of government, and of the constitution in

\begin{flushright}
\textsuperscript{149}The Royal Commission on the Electoral System concluded that MMP
would obviate the need for Maori seats, indicating a lack of appreciation
of the different perceptions of Maori; \textit{“Towards a better democracy”}
\textsuperscript{150}Though, in some parts of the country this only occurred as late as the
latter years of the nineteenth century.
\textsuperscript{151}Kelsey, Jane, \textit{“The Agenda for change”} (1995).
\end{flushright}
general, by Maori in particular\textsuperscript{152}. The relationship between Crown and the Maori people, is a regular subject of discussion on marae\textsuperscript{153}.

Because the legitimacy of government in New Zealand is based, at least in part, on the Treaty of Waitangi, a commonly held Maori position is that the government has no right to make any change in its constitutional status without the consent of the other party to the Treaty of Waitangi, the Maori\textsuperscript{154}.

There appears to be no more agreement among Maori than there is in the general population about the future direction of government, but there is a concern to preserve any structures or institutions which bolster the economic or social status of Maori\textsuperscript{155}. General constitutional reform must precede or be integral to any move to a republic. This reform should include consideration of tino rangatiratanga and kawanatanga\textsuperscript{156}.


\textsuperscript{153}Tribal meeting houses. This is true of the Ngati Tuwharetoa at least; Interview with Georgina te Heuheu, 7 December 1999.

\textsuperscript{154}Interview with Sir Douglas Graham, 24 November 1999.

\textsuperscript{155}Interview with Georgina te Heuheu, 7 December 1999.

Nor would a move to a republic absolve a future government of its Treaty obligations\textsuperscript{157}, although some have advocated a republic for the purpose of ending these obligations\textsuperscript{158}. There has been a fear expressed that governments could be using republicanism to evade Treaty responsibilities. An example would be by cutting appeals to the Privy Council, which is regarded as an external channel for redress\textsuperscript{159} and formally an appeal to the Crown\textsuperscript{160}. Without specific concurrence from the Maori, as Treaty partner with the Crown, the abolition of the monarchy would appear to lack legitimacy\textsuperscript{161}.

Formerly it might be said that the traditional national identity of New Zealand was of one people with one culture, that culture being


\textsuperscript{158}e.g. Stephen Morris, writing to the Editor of the New Zealand Herald, 21 June 1999. This may also be implicit in the policy of Libertarianz, which advocates “abolish[ing] the institutionalised apartheid that currently exists in New Zealand; LawTalk 527, 20 September 1999, p 24.

\textsuperscript{159}Again, this attitude is not an indication of support for the monarchy, but of appreciation of the advantages of the Crown to a minority; Interview with Georgina te Heuheu, 7 December 1999. Examples of such recourse include \textit{New Zealand Maori Council v Attorney-General (New Zealand)} [1994] 1 AC 466 (PC).

\textsuperscript{160}Judicial Committee Act 1833; Judicial Committee Act 1844 (UK); Judicial Committee Act 1881 (UK).

(predominantly) Pakeha\textsuperscript{162}. This is no longer so, though just what the New Zealand identity is remains uncertain\textsuperscript{163}. Especially since the 1970s, our liberal democratic ethos has generated what Kelsey calls an integration ethic and a self-determination ethic- an attempt to incorporate Maori into the (Pakeha) majority, while preserving their separate identity. These two ultimately may prove impossible to reconcile\textsuperscript{164}.

But both racial groups are linked by the concept of the Crown, as variously understood. The argument that the Crown, as party to the Treaty of Waitangi, is a fundamental postulate of the New Zealand constitution is important\textsuperscript{165}, even if it is exaggerated.

\begin{flushleft}
\textsuperscript{162}Kelsey, Jane, “Restructuring the Nation” in Fitzpatrick, Nationalism, Racism and the Rule of Law (1995) 185. \\
\textsuperscript{163}Interview with Georgina te Heuheu, 7 December 1999. \\
\textsuperscript{164}See also Clark, Bruce, Native Liberty, Crown Sovereignty (1990) 191; Ward, Alan, “Historical Claims under the Treaty of Waitangi” (1993) 28(2) Journal of Pacific History 181. \\
\end{flushleft}
3.5 Conclusion

This Chapter has developed one of the themes of this thesis, that the legitimacy of the Crown is derived, in part, from its partnership with the tangata whenua in the Treaty of Waitangi. This partnership is a major source of non-traditional legitimacy which depends not on popularity but on perception.\(^{166}\)

In a similar way, the establishment of Canada was founded, to some degree at least, on a series of treaties between the Crown and the native American people. The obligations under these treaties have been assumed by the Canadian authorities, but in such a way that the Crown remains central to the relationship. Parallels are less clear in Australia, where the native peoples generally lacked the same treaty relationship.

Retention of the “uncomfortable” idea that the Crown is sovereign avoids the problems inherent in a legal notion of popular sovereignty. Both Maori and Pakeha are under the Crown, which owes a special duty to the Maori as partners in the Treaty of Waitangi.

From the Maori perspective there are perhaps two questions central to any republican debate in New Zealand: who or what is the Crown and,  

more specifically, what is its function under the Treaty of Waitangi? It continues to be, and in fact appears increasingly imperative to Maori, that the Crown is not only something other than the government of the day, but that the Crown is able to function in such a manner as to hold the government to the guarantees made under the Treaty of Waitangi. The Crown is, at the very least, something distinct from the political government. Nor can it (as Treaty partner) be equated with a State or the people, since it involves the preservation of a special relationship with one sector of society.

The legitimacy of the present regime relies, at least in part, on a compact between Crown and Maori, as a basis for the assumption- and continuation- of sovereignty. Whether the Maori can be said to have actually benefitted from this cession to the Crown, and from the subsequent artificial distinction drawn between the Crown and government is problematical. British government would probably have


been extended to New Zealand in any event. But the way in which it was done was important.

The perception nineteenth century Maori had of the Crown was determined by their own cultural heritage, and the way in which they perceived Queen Victoria's role differed markedly from that of the settlers or the British or colonial government. But the perception is more important than the reality.

If the reality is that the Maori must negotiate with governments which owe their authority solely to the general, predominantly European population, then the majority ambivalence or hostility to the principles of the Treaty present real problems for Maori wishing to enforce the Treaty of Waitangi. The result is that for pragmatic reasons alone many Maori remain attached to the concept of the Crown. This is so even though the Treaty of Waitangi may itself be an insubstantial basis for a modern constitution. The Crown may not be essential to the body politic, but its removal would raise questions of the role of Maori in society and government which many, not least of all political leaders, would prefer to avoid.

\[\text{Rt Hon Simon Upton, speaking in his valedictory speech to Parliament, 12 December 2000; Waikato Times 13 December 2000.}\]
Part 2  THE BREAK-UP OF EMPIRE

In Part One the position of the Crown was examined in terms of traditional Western political theory, with reference to wider concepts of sovereignty and legitimacy. In particular, it looked at the legitimacy of the regime derived from the inherited authority of the imperial Crown and Parliament, and compared it with that derived from the Treaty of Waitangi. The former is based on concepts of continuity and the rule of law, as well as the utilitarian role of the Crown as an institution of government. The latter is based on concepts of fiduciary duty and obligations undertaken by the Crown (as distinct from the emigrant majority European population) towards native peoples.

Part Two, “Break-up of empire”, examines New Zealand's movement towards full independence\(^1\). This develops the idea that the Crown may rely on a stronger claim to legitimacy than just that conferred by its own inherited legitimacy and that derived from the Treaty of Waitangi. For the existence of the Crown contributed to this development of independence. The Crown provided the mechanism through which political independence was obtained, and in so doing, shaped the form of that independence. For this reason the Crown remains conceptually important to our form of government.

\(^1\)Chapters IV and V.
It was not that the Crown itself gave independence to New Zealand, for the Crown acted, as it does now, through political leaders. But the existence of the concept of the Crown, and the persons of the Sovereign and Governor-General, facilitated the acquisition of an independence largely won in the conference halls and corridors of imperial politics. Were it not for the imperial link which the Crown embodied, the course of New Zealand's independence might have gone rather differently.

In these Chapters the process whereby New Zealand acquired freedom to change its own constitution, not merely formally, but in its underlying principles also, is examined. In Chapter IV, the development of legislative independence is reviewed, and it is questioned whether this alone can explain the fact of New Zealand's independence, or whether it was the existence of the Crown as symbolic, legal and practical focus of government which was pivotal in this process.
Chapter IV:

DEVELOPMENT OF LEGISLATIVE INDEPENDENCE

4.1 Introduction

Constitutional continuity can be seen reflected in the form and structure of political institutions, and in their operation. But, most importantly from the point of view of the development of an autochthonous or patriated constitution, the existence of a common thread of legal authority can influence, and perhaps restrict, political evolution. A perceived need for constitutional changes to be made in a legally correct way, a legacy of the social dependence upon the rule of law, has had a profound impact upon the constitution, by limiting the scope for substantive changes, and by influencing the direction of such change.\(^2\)

One area particularly affected by apparent constitutional continuity is legislative independence. Legislative independence is based on the freedom of the legislative body of a country to make and unmake laws without being subject to the legislative oversight of the legislative body of another country.

\(^2\)Even revolutionary regimes have felt the need to justify their actions this way; Hirst, D, *Authority and Conflict* (1986); Smart, PStJ, “Revolution, Constitution and the Commonwealth” (1986) 35 ICLQ 950.
The legislative independence of colonial assemblies, and the later Dominions, was limited in this way, and also by technical rules of repugnancy and capacity. Laws which were repugnant to the fundamental principles of the common law of England were held to be invalid, or ultra vires. No assembly could pass legislation beyond its limited legal capacity, a capacity defined by the legislation establishing the assembly.\footnote{Limited, in most instances, to measures for the “peace order and good government” of the territory.}

New Zealand, in common with the other leading members of the Empire, enjoyed local autonomy, including, after 1865, limited power to amend its own constitution\footnote{For Canada, the proviso of the British North America Act 1867 meant that recourse had to be had to the imperial Parliament for much longer for any constitutional amendments.}. However, there is no true independence if there is not complete legislative independence. This required, not only that the rule of repugnancy be ended—though not necessarily that of capacity—but that the continued power of the imperial Parliament to legislate for the country be brought to an end\footnote{Limitations of capacity may be consistent with legislative independence, where it is a necessary pre-condition of the constitution. Thus the nature of a federal State, unlike a unitary State, requires that limits be placed on the respective powers of the central and provincial or state legislatures.}.

As will be seen, this requires a reappraisal of a major constitutional principle, that of the supremacy of Parliament. This reappraisal has been
attempted in both Canada and New Zealand, though with only limited success. There have been several reasons for this lack of success. One has been the relative absence of a tradition of work on general theories of the State\textsuperscript{6}. It is also true that there was comparative little political or popular interest in constitutional theory\textsuperscript{7}.

In this Chapter the development of New Zealand’s legislative independence is examined through the legal process by which this independence was granted. This has been a process which has combined gradually reduced intervention by the imperial Parliament, with the conferral of wider legal powers upon Dominion Parliaments to enact legislation repugnant to British law.

First to be examined is the process whereby the Dominion Parliaments were empowered to legislate contrary to British laws. Second, the introduction of the procedure by means of which alone would future British Acts be applied to the Dominions, the Statute of Westminster 1931, is outlined.

\textsuperscript{6}Cohen, David, “Thinking about the State” (1986) 24 Osgoode Hall LJ 379.

The question of the continuing authority of the United Kingdom Parliament to legislate for the former Dominions is then explored, particularly the conflict between legal principles and political reality.

The most important unanswered question from the viewpoint of this study is whether the conferral of legislative autonomy has resulted in a reappraisal of the traditional rule that these powers must forever remain legally based upon British legislation. For, if this is answered in the affirmative, then it must be questioned whether any New Zealand institution can ever be truly autochthonous.

The principal comparisons are drawn with Canada, which combined political independence with formal legal subordination for an unusually protracted time. In Australia also questions of repugnancy and capacity remained important, as a federal system confers limited legislative authority upon the various constituent parts of its government.
4.2 Limitations on legislative independence

The expression “ Dominion” referred to those former dependencies of the United Kingdom which had obtained complete internal self-government. Although first legally defined only by the Statute of Westminster in 1931, in practice Dominion status had long been accorded to the principal settled colonies (Canada, Australia, New Zealand, South Africa), as well as the Irish Free State, and, for certain purposes, India and Southern Rhodesia also.

While the Dominions were regarded in constitutional law as internally self-governing for most practical purposes, before 1931 they were still legally subject to the control of the United Kingdom in several respects. This control was exercised over executive, legislative and, to a lesser extent and indirectly, judicial functions. This Chapter is concerned with the legislative aspect.

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8For the reasons for the early evolution from Empire to proto-Commonwealth see Seeley, JR, Expansion of England (1883) 25-26.

9The tortuous development of Dominion status is outlined in Wheare, Sir Kenneth, The Statute of Westminster and Dominion Status (1953); Dawson, R McG, The Development of Dominion Status (1937) and Jennings, Sir Ivor, Constitutional Laws of the Commonwealth (1957) vol I chs 1-3.


11According to Montesquieu, there are three types of political power in the State, the legislative, the executive, and what he called the power of judging, now more usually styled the judicial power; Montesquieu,
The development of legislative independence, and the move away from legislatures dependent upon, and limited by, the Parliament of the United Kingdom, occurred at different rates in each of the former Dominions. In each there was a combination of domestic pressure for legislative autonomy, with opposing forces wishing to retain limitations on the legislative freedom of the country.

Sometimes, as in Canada, this development was retarded by domestic political disputes. Canada, with its native Indian population, and the distinct Quebec society\(^\text{12}\), faced problems not dissimilar to those facing New Zealand, where the Maori population enjoyed a treaty relationship with the Crown. The granting of legislative independence to Canada was impeded in part by the difficulties of resolving some of these disputes internally.

But in no instance has the attainment of legislative independence been accompanied by a deliberate break in legal continuity\(^\text{13}\), though this

\text{\footnotesize\begin{align*}
\text{12} & \text{Howe, Paul, “Nationality and Sovereignty Support in Quebec” (1998) 31(1) CJPS 31; Conley, Richard, “Sovereignty or the Status Quo?” (1997) 35(1) JCCP 67.} \\
\text{13} & \text{Though several post-independence constitutions, notably that of Papua New Guinea, suggest that authority is derived solely from the constitution, or a constituent assembly, in all cases the unbroken devolution of legal authority can be traced. In some cases this continuity has since been lost through post-independence coups d'etat.}
\end{align*}}
was considered in Canada\textsuperscript{14} and advocated by some Labour politicians in Australia, especially after the 1975 exercise of the reserve powers of the Crown by the Governor-General\textsuperscript{15}. This proposal was made in the belief that this would prevent a future head of State from challenging the will of Parliament\textsuperscript{16}.

The evolution of legislative independence had been gradual, and often largely influenced by a desire to retain the ties of empire, rather than to break them\textsuperscript{17}. This had been because the evolution of political structures were heavily influenced by a desire to preserve formal legal authority. Whenever the moral authority of a regime may be questioned, as in a post-colonial state, legal authority is emphasised\textsuperscript{18}.

The rule of law itself has played a major part in influencing the substantive development of the constitution. Equally important were the

\begin{flushright}
\textsuperscript{14}As by the Trudeau government in 1980; Smith, David, \textit{The Invisible Crown} (1995) 158. Had a break been imposed by the United Kingdom in the 1920s, Canada would have been forced into autochthony; Wheare, Sir Kenneth, \textit{The Constitutional Structure of the Commonwealth} (1960) ch 4.
\textsuperscript{15}For a brief discussion of this event see Chapter VII.
\textsuperscript{17}As shown in the remarks of the Prime Minister, the Rt Hon George Forbes, in a speech at the Imperial Conference in 1930; Keith, AB, \textit{Speeches and Documents on the British Dominions} (1932) 209.
\textsuperscript{18}See, for example, Al Namlah, Saleh, “Political legitimacy in Libya since 1969” (1992) Syracuse University PhD thesis.
\end{flushright}
principles of the constitution. One of these in particular presented a difficulty, that of the supremacy of the imperial Parliament.

4.2.1 Technical limitations

Technical rules of repugnancy were the first legislative restrictions on the Dominions to be weakened\textsuperscript{19}. And this relaxation came about, not because of political pressure, but in response to judicial activity, in Australia in particular.

In the late 1860s Boothby J in South Australia applied very broadly the principle of the invalidity of colonial legislation repugnant to fundamental principles of English law, to the extent of finding the Constitution Act 1855-6 no 2 (South Australia) itself invalid. This decision was in part responsible for the passage, by the imperial Parliament, of the Colonial Laws Validity Act 1865.

This Act ended the old theory and practice that colonial legislatures must respect the fundamental principles of English law applicable to that colony\textsuperscript{20}. It made it clear that legislation would only be invalid if repugnant to an imperial Act extending to the colony- or any order or

\textsuperscript{19}Though they were to survive for the Australian states until the Australia Act 1986.
regulation under such Acts. For the first time, the rule of repugnancy was clearly restricted to statute law only.

Perhaps most importantly, the Colonial Laws Validity Act 1865 conferred upon all self-governing colonies a clear power to alter their own constitutions. However, by a proviso, the Act required that any laws exercising the powers were to be passed in such manner and form as required by the law for the time being in force, whether that be imperial Act, letters patent, Order in Council, or colonial law. Thus a limitation of capacity remained.

4.2.2 The ending of imperial legal dominance

No longer was the constitutional authority of colonial assemblies defined merely in terms of the statute law of the United Kingdom. Questions of authority were now primarily matters for the local courts, who would determine questions of vires by reference to the local laws alone.

\[^{20}\text{s 3.}\]
\[^{21}\text{s 2, although this was an established rule anyway.}\]
\[^{22}\text{s 5. A right conferred on all those settled colonies not yet enjoying representative legislative assemblies (such as the Falkland Islands), by the British Settlements Act 1887.}\]
This meant the focus of constitutional theory had moved from the United Kingdom, to the Dominion itself. However, so long as constitutional theory was expressed and understood in traditional terms, the consequences of this move were not fully appreciated, and the imperial Parliament still apparently retained its supreme legislative status.

In practice the imperial Parliament rarely, if ever, legislated for the principal colonies after the turn of the nineteenth century, except in matters of wider imperial concern, such as immigration and shipping. Both the Colonial Laws Validity Act 1865, and the residual rule of statutory repugnancy, ceased to have effect for most newer Commonwealth countries at the date of the granting of formal political independence. Thereafter, no new imperial statute would be deemed to extend to those countries. However, for the older states of the Commonwealth, as well as several newer ones, the Act ceased to have effect upon the happening of some other event, often at the request of the Dominion concerned.

Some Dominions had pressed for the removal of the limitation of statutory repugnancy, and following the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation,

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23This effect was confirmed in McCawley’s Case [1920] AC 692 (PC).
1929, and the 1930 Imperial Conference, the Statute of Westminster 1931 was passed, putting this into effect.

South Africa and Eire were excluded from the ambit of the Colonial Laws Validity Act 1865 by s 2 of the Statute of Westminster 1931. Both countries, with political traditions to some extent at odds with the otherwise prevalent imperial tradition, took advantage of the opportunity offered to achieve complete legislative independence. Indeed, it was agitation from South Africa, Ireland and Canada which had led to the passage of the Act, as much as more evolutionary forces. Canada adopted the provisions of the Act so far as its federal nature then allowed. Australia and New Zealand, for different reasons, chose to wait for some years before adopting the statute.

The attitude of the Australian Ministers in 1930-31 was quite unequivocal. The Hon JG Latham, speaking in the House of Representatives, observed of the proposed Statute that:

I would not be prepared, as an Australian and a loyal member of the British Empire, to recognize that it was part of the ordinary function of the Imperial Parliament to legislate on Australian matters. But when I am asked to express that principle in a statute,


25Limitations are inherent where authority is shared, as in a federal system. But in Canada's case further restrictions were necessitated by the absence of the provision for local constitutional amendments.

26Keith, AB, Speeches and Documents on the British Dominions (1932) 264-265.
I must examine carefully and precisely the wording which is suggested.

He continued:

On many political and constitutional matters, the British Constitution, as applied not only to Great Britain but throughout the Empire, has been a success largely because it has been loose and elastic, and has left things to be determined by the common sense of statesmen as emergencies arise, instead of being decided with the precision of lawyers in the interpretation of written documents.

Thus he was reluctant to put into writing that which was customary practice. Yet ten years later, the Statute of Westminster Adoption Act 1942 ended the effect of the Act as far as the Commonwealth government was concerned, on 3 September 1939. The selection of this date- the outbreak of the Second World War, was symbolically important since the question whether Australia was bound to enter the war was an important turning point in the development of executive independence.27

The Statute of Westminster Adoption Act 1942 was a product of the Labour Government of the Hon John Curtin.28 To a great extent the Act merely enshrined in law that which was already practice. But it was

27 See Chapter V.
28 Prime Minister 1941-45.
also symbolic of the often anti-British attitude of the wartime Labour Government\(^29\).

After the development of Dominion status in the first two decades of the twentieth century, the New Zealand Parliament generally acted as if it were independent from any external authority. Even while the Colonial Laws Validity Act 1865\(^30\) remained in force, limitations were few\(^31\).

There was not in New Zealand the same political desire for formal legislative independence as there was in Australia, or in Canada\(^32\). In part this was simply because, as a unitary State, the limitations of repugnancy and capacity were felt less strongly in New Zealand. Even when imperial Conferences led to the extension of the practical scope of independence, New Zealand was often reluctant to embrace it\(^33\).


\(^{30}\) The Colonial Laws Validity Act 1865 has also been preserved in New Zealand, although it has been suggested that this is not strictly necessary; Imperial Laws Application Act 1988; see the *Report of the Justice and Law Reform Committee on the Imperial Laws Application Bill* (1988) Explanatory Material p 64.

\(^{31}\) Principally the need for British legislation to amend the New Zealand Constitution Act 1852.

\(^{32}\) The Canadian situation will be covered in Chapter 4.3.1.

\(^{33}\) Reluctance to act did not necessarily equate to a lack of an independence of spirit. In the context of foreign and defence policy, it was felt to be in New Zealand’s interest to maintain existing alignments and allies; McGibbon, Ian, *Blue-water Rationale* (1981).
New Zealand initially chose not to adopt the Statute of Westminster. The reason for this was given by the Prime Minister, the Rt Hon George Forbes, in his introductory speech at the Imperial Conference in 1930:

New Zealand has not, in any great measure, been concerned with the recent developments in the constitutional relations between the members of the British Commonwealth of Nations. We have felt that at all times within recent years we have had ample scope for our national aspirations and ample freedom to carry out in their entirety such measures as have seemed to us to be desirable. He went on to state that the wish of the New Zealand Ministers was for the Conference to focus on co-operation, rather than status. No action was taken to adopt the subsequently enacted Statute of Westminster 1931 for over a decade. Typical of contemporary official attitudes was that of Carl Berendsen, Secretary for External Affairs from 1928:

We had all the self-government we wanted. We could choose our fellow citizens and do the other things we wanted to do. We didn't see any need for the Statute of Westminster. We were doing all right without it.

34 Keith, AB, Speeches and Documents on the British Dominions (1932) 209.

35 Quoted in Ross, Angus, “Reluctant Dominion or Dutiful Daughter? New Zealand and the Commonwealth in the Inter-War Years” (1972) 10(1) JCPS 43.
The 1935 Labour Government was ideologically more inclined to adopt the Statute of Westminster 1931. Labour wanted to be able to transform New Zealand and did not want to be stopped by a lack of the necessary constitutional powers.\(^{36}\)

During the Second World War the Labour Government considered adopting the Statute of Westminster 1931, but had delayed for fear of such action being misconstrued by Germany.\(^{37}\) Concerns that it could be seen as weakening the Empire were also voiced.\(^{38}\) The time was not yet right.

Finally, the Statute of Westminster Adoption Act 1947 (NZ) ended the application of the Colonial Laws Validity Act 1865 on 25 November 1947.\(^{39}\) The authors of the 1947 White Paper which preceded the Act were at pains to emphasise that their constitutional proposals were not in any way revolutionary. The legislation was intended to confer full

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\(^{38}\) Foss Shanahan (Deputy Secretary of External Affairs) to AD McIntosh (Secretary of External Affairs), 3 October 1946, PM 159/1/5, quoted in McIntyre, David, "Peter Fraser's Commonwealth" in McIntosh, *New Zealand in World Affairs* (1977) vol 1, 1945-1957 p 65.
legislative capacity upon the General Assembly of New Zealand. It was to remove legislative subordination\textsuperscript{40}.

There had formerly been few instances where the Colonial Laws Validity Act 1865, or any other imperial legislation, had presented real limitations on the New Zealand Parliament, and the real effect of the 1947 Act was limited\textsuperscript{41}.

The need to clarify limitations on the legal powers of Parliament to legislate, rather than a desire for greater political independence, was the principal motivation for the adoption of the Statute of Westminster 1931, and the reason for the slowness of its adoption. The 1947 Act was perceived as being more of technical interest, and not as a real independence landmark.

This is shown in the speech of the Prime Minister, the Rt Hon Peter Fraser, on the second reading of the Bill:

\begin{quote}
The nationhood of our country is accepted in common with that of every other British Dominion, and to be represented independently and to express opinion, as far as a Government can construe the opinions of a country on international matters, overseas and at world conferences. It is beyond argument that it is as right of our country. That being so, we have to examine how our laws enable that to be done. Are some of our existing laws opposed to the legal development of that principle\textsuperscript{42}?
\end{quote}


\textsuperscript{41}In practical terms, the scope of the Act’s limitations were confined, as in Canada, to amending the Constitution.

\textsuperscript{42}7 November, NZPD 1947 vol 279 p 532.
He continued:

We can get an amendment to the Constitution Act to-day without adopting the Statute of Westminster, we can apply to the British Government and request the British Parliament to amend our Constitution Act to enable us to have greater say in legislation, that is as far as our own legislation is concerned. Say, for instance, there is a desire to alter or abolish another place ...  

Fraser admitted that that desire (“to alter or abolish another place”\(^44\)) had much to do with the legislation. Indeed, the power to amend the New Zealand Constitution Act 1852, and other constitutional legislation originally passed by the imperial Parliament, was first exercised with the abolition, in 1950, of the Legislative Council\(^45\).

\(^{43}\) 7 November, NZPD 1947 vol 279 p 532.

\(^{44}\) 7 November, NZPD 1947 vol 279 p 532.

\(^{45}\) Brookfield, FM, “A New Zealand Republic?” (1994) 8 Legislative Studies 5; Jackson, Keith, New Zealand Legislative Council (1972).
4.3 Legislative autonomy

The sovereignty of Parliament is perhaps the most fundamental principle of the British constitution. The traditional, Diceyan, theory of parliamentary sovereignty or supremacy was one of continuing sovereignty. Thus the Westminster Parliament, in English law, could continue to legislate for ex-colonies, whatever the Statute of Westminster or any other Act might say.

But the independence of the Dominions was protected by well-established conventions, which held that Westminster would not act without the Dominion following the procedure specified in the Statute of Westminster 1931, that of request and consent. This allowed for post-independence legislation for these countries, legislation which would be equally valid in both United Kingdom and local law.

But since the United Kingdom Parliament is, in English law, supreme, it always has the authority to enact any legislation it wishes, including legislation which ended the independence of the former Dominions.

But the political reality is very different. It is highly unlikely that courts would now accept this traditional view of sovereignty, despite its

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inherent logic, if an alternative were available\textsuperscript{48}. For to do so would be to admit that the legal authority of the country was still subordinate to that of the United Kingdom, and would for ever remain so.

A revolutionary break would be one way for a constitution to become autochthonous, for if there has been a break in authority there can be no dependence upon prior legal authority. But revolutionary actions are contrary to the rule of law, and political tradition in the Commonwealth\textsuperscript{49}. There remains the possibility of an alternative.

The view that Parliament cannot bind its successor, well established as it is\textsuperscript{50}, is not of great antiquity\textsuperscript{51}. The formalisation of the doctrine of the sovereignty of Parliament was largely the work of Oxford

\begin{footnotesize}
\begin{enumerate}
\item See Latham, Richard, \textit{The Law and the Commonwealth} (1949).
\item In August 1998 the Supreme Court of Canada considered the question of the Canadian Constitution being circumvented by a referendum, thereby affirming the sovereignty of the people. But it felt that political institutions draw their legitimacy from the rule of law, which precluded such action; “Breaking New Ground” (1998) 111(135) Maclean’s 18.
\item It was certainly not the common view in the fourteenth century. The Observance of due process of law Act 1368, for instance, enacted that any legislation created contrary to Magna Carta was void.
\end{enumerate}
\end{footnotesize}
theorists, especially Hobbes, Blackstone, and Dicey52. Blackstone, while he had some qualms relating to the lack of limitations on the legislature that logically imposed53, observed that “what the Parliament doth, no power on earth can undo”54.

By 1930 it was generally agreed that the imperial Parliament was a sovereign body, able to enact, repeal or amend any law, including any self-imposed limitations55. One consequence of this view was that the Westminster Parliament could, in English law, continue to legislate for ex-colonies, whatever the Statute of Westminster or any other Act might say. Yet at the same time, the development of dominion-status was lessening the scope of imperial control.

After the adoption by the Dominions of the Statute of Westminster, domestic law apparently ceased to recognise the validity of British Acts in the Dominions, except any passed in accordance with the provisions of that Act. But if the imperial Parliament is alone sovereign, then it would have authority to repeal the Statute of Westminster, and enact legislation for the Dominions. Yet the local courts would not necessarily recognise

52 Heuston, Robert, Essays in Constitutional Law (1964) 1.
53 Thus statutes contrary to the law of God, impossible to be performed or with “absurd consequences manifestly contradictory to common reason” were invalid: Bl Com book I, 91.
54 Bl Com book 1, 161.
such laws. This would suggest that the focus of the constitution had passed from the United Kingdom to the Dominion; had become, at least in some sense, autochthonous.

According to traditional nineteenth century legal theory, Parliament could only abdicate its sovereignty entirely, as by dissolving itself, or by transferring its authority to a new legislative body.\textsuperscript{56} Following Dicey, a new view of sovereignty was developed. This held that Parliament could bind itself as to manner and form of legislation, if not permanently shed a part of that sovereignty.\textsuperscript{57}

A more popular line of reasoning stated that Westminster had abdicated part of its sovereignty, as, for example, in its power to legislate for New Zealand or Canada.\textsuperscript{58} Thus, sovereignty, once conferred, could not be revoked. But the courts remained unconvinced, though in

\textsuperscript{55}Though this has only been established by a series of obiter dicta judicial statements, which may have authority, but are not binding in any other court.


Blackburn v Attorney-General\(^{60}\) the English Court of Appeal did ponder the question of whether an Act of the United Kingdom Parliament implementing the Treaty of Rome would be irrevocable\(^{61}\).

It has often been said that whatever view a British court might take of any post-1986 legislation passed by the United Kingdom Parliament for New Zealand, local courts would ignore it\(^{62}\). But the United Kingdom Parliament itself never purported to abdicate its power to legislate for New Zealand.

In the *Patriation Reference*\(^{63}\) the Supreme Court of Canada took the viewpoint of a British court in the face of legislation emanating from the superior and sovereign Parliament at Westminster. At least until 1982 the imperial Parliament retained undiminished powers over the Canadian legislature\(^{64}\). The reasons for this approach can be seen by looking at the process by which the Canadian Constitution was amended. If this

\(^{60}\)[1971] 2 All ER 1380.

\(^{61}\)[1971] 2 All ER 1380, 1383 per Salmon LJ.


approach is correct, then it might be doubted whether the former Dominions can ever throw off their colonial legislative limitations.

4.3.1 Canada

The powers of the Canadian Parliament are limited. This is due to the federal nature of the Constitution, in which certain powers are conferred upon the provinces and others upon the federal Parliament and government. The legislative independence of Parliament in such a system must always be subject to some limitations. For Canada, these limitations were contained in the British North America Act 1867.

The Statute of Westminster 1931 ended most of the limitations upon the Canadian Parliament. However, because Canadian political leaders, and particularly the leaders of French-speaking Quebec, and Ontario, could not agree upon procedures for future amendments to the Constitution, no general power of constitutional amendment was conferred upon Canada, as it was upon the other Dominions, by the Statute of Westminster 1931.


66s 7(1). The statute also excluded “any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia.
The British North America Act 1867 could not be amended by the Canadian legislature per se, due to the limitations imposed by the federal structure of the Canadian Constitution, so the imperial Parliament was required to act. Thus, although a Canadian court would not recognise a post-1931 Act of the imperial Parliament as part of the laws of Canada, since such an Act would be contrary to the Statute of Westminster, it would recognise an Act purporting to amend the British North America Act 1867, because of the inherent paramountcy of the latter statute, and the absence of any internal amendment procedure.\footnote{Reference re Amendment of the Constitution of Canada [1981] 1 SCR 753.}

The Colonial Laws Validity Act 1865 ceased to have effect in Canada on 11 December 1931, except for amendments the British North America Act 1867,\footnote{Under sections 2 and 7 of the Statute of Westminster 1931. Newfoundland remained a Dominion, latterly under suspension of self-government due to financial collapse, until union with Canada in 1947.} Yet, though it had acquired political independence some time after 1919, and by 1931 at the latest, Canada only achieved full formal legislative independence in 1982\footnote{Madzimbamuto v Lardner-Burke [1969] 1 AC 645 (PC); Reference re Offshore Mineral Rights of British Columbia [1967] SCR 792, 816; R v Secretary of State for the Foreign and Commonwealth Office (1982) 2}
1982 removed the residual repugnancy, allowing Canada to amend the British North America Act 1867.

Until 1982 the Canadian Parliament was incapable, in terms of the statute conferring and defining its powers, of amending the Canadian Constitution. In the absence of this power constitutional amendments were enacted by the British Parliament, although otherwise after 1931 no British legislation applied to Canada. Thus, in 1949 an Act integrated Newfoundland into Canada\(^70\), and in that same year the right to amend the Act in respect of certain internal matters was granted by the British North America Act (No 2) 1949.

In 1982 provision was made for the first time for Canada to amend its own Constitution in its entirety\(^71\). In terms of the 1982 amendments to the British North America Act 1867, now renamed the Constitution Act 1982, the Canadian Parliament alone is competent to alter the Constitution.

There was no doubting the reality of independence before 1982, but short of relying on a deliberate legal break, there was no pragmatic alternative to using the British Parliament. It was not that attachment to

\(^70\)British North America Act 1949, now restyled the Newfoundland Act 1949.
legal form alone required the Canadians to follow the requirements of the
British North Act 1867. Any amendment enacted by a contrary method
would be held by the Canadian courts to be ultra vires.

Since the 1982 legislation, the Canadian courts will probably
recognise only a Canadian statute as able to amend the Constitution,
although its Parliament is still not sovereign, as the Constitution remains
in this essential respect paramount, since a special amendment procedure,
laid down by the Constitution, must of necessity be followed. This is of
course a matter of a limitation on capacity rather than repugnancy.

But questions remain as to whether the United Kingdom retained,
after 1982, the power to legislate for Canada. Political independence was
apparently followed by legal independence in 1982. But this latter is only
real if the United Kingdom Parliament is now incapable of legislating for
Canada.

If the Constitution Act 1982, enacted as Schedule B of the Canada
Act 1982, can bind Canada, cannot subsequent British Acts also bind
Canada? Could not the United Kingdom Parliament repeal the
Constitution Act 1982, thereby returning Canada to the pre-1982
position? The orthodox answer is politically no, and legally perhaps no.
While preserving legal continuity the Canadian Constitution has

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71 This is not quite as restrictive as it may appear, since the constitution is
actually fairly brief and skeletal, with most constitutional legislation not
similarly entrenched.
apparently developed local roots. This is despite the fact that the authority of the Canadian Constitution derives, not from an act of the people of Canada, but ultimately from a British statute.

This is largely because of the established independence of Canada and the autonomy of its legal system; the basic rules underpinning Canadian law; and the extent of the British Parliament’s power to legislate for Canada.

That the answer to the question is qualified is a reflection of the absence of juridical acceptance of a single new theory or model of the Constitution which would reconcile the political reality with orthodox legal theories of the supremacy of Parliament. Politics and law have coalesced in an uneasy amalgam, with orthodox law sometimes at odds with political reality.

The denial of the legal right of the United Kingdom Parliament to legislate for Canada depends upon acceptance of a change in the constitutional grundnorm. The traditional grundnorm is that of continuing parliamentary sovereignty. But, if “freedom, once conferred, cannot be revoked”, then it would seem that whatever a strict view of

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74 Ndhlwana v Hofmeyer [1937] AD 229, 237 (South African CA).
the law may suggest, if the political ground rules change, so will the legal.

By establishing an independent legislature, the United Kingdom was creating a new polity in Canada, capable of outgrowing its original powers, and developing distinct attributes and features of its own.

The newly renamed Constitution Act 1982 attributed to itself a position of legal paramountcy\(^\text{75}\). On the model of the American Constitution there was to be no higher legal authority. This assertion however was not especially significant, as the Constitution Act 1982 clearly held a position of paramountcy as a necessary prerequisite to a federal Constitution. Because authority was shared between the federal and provincial parliaments, there must be some higher authority which determines who shall have what power or responsibility.

This did not necessarily mean, however, that the Canadian Constitution could never be regarded as a truly Canadian document, in the sense of the American Constitution, which is devoid of any legal antecedents. The amendment of the British North America Act in 1981-82 was generally spoken of as patriation\(^\text{76}\), suggesting that it was

\(^{75}\)s 52. There is no single document which constitutes “the Constitution”, though the Constitution Act 1982 (as the British North America Act 1867 was renamed) provides a framework. Most importantly, because of the federal nature of Canada the legal capacity of the parliaments are limited by an enabling Act which is itself entrenched.

\(^{76}\)Or as “re-patriation”, a somewhat mystifying term.
somehow being bodily moved to Canada. But it remains uncertain whether a constitution, whose legal origins may be traced directly to an imperial statute, can ever be fully autochthonous.

There are alternative approaches however. One is simply to ignore the question of legal authority, and introduce a new constitution which was not based on any prior legal authority. Such a deliberate break in continuity was considered by the government in 1980\textsuperscript{77}. But the tradition of legal justification for government action was to prove too strongly entrenched. Indeed, with the rule of law one of the benchmarks of the constitution, and an essential element in maintaining legitimacy, they could scarcely have decided otherwise.

The other alternative is to attempt to rationalise and explain the current position, where the Canadian Constitution is politically, and also legally, supreme.

In one model, Slattery has argued that Canada’s legal independence is based neither on events of 1931 nor of 1982, nor on any decisive legal event, but is “at root a matter of fact”\textsuperscript{78}. In effect he is arguing that legal concepts of authority are essentially meaningless. What counted was the political reality. The acquisition of political independence sometime between 1919 and 1931 had the legal effect of ending the colonial rule of

subordination and replacing it with one of equality. It was therefore
independence and not s 2 of the Statute of Westminster which ended the
relationship of subordination between the Canadian and United Kingdom
parliaments, and ended the latter parliament’s ability to legislate for
Canada. 79

Hogg holds a similar view. However, he concludes that the concept
of autochthony is neither very clear nor very useful 80. In preference he
borrows and slightly modifies Marshall’s test for patriation 81. Hogg asks
whether a legally effective termination of British legislative authority has
occurred 82.

Although s 2 of the 1982 Act appears to be an obvious candidate
for having accomplished this termination of authority, it cannot have
done so on its own, at least in orthodox constitutional theory, because of
the doctrine of parliamentary supremacy.

Hogg argues that the Supreme Court of Canada would not allow an
Act of the United Kingdom Parliament passed after 1982 to extend to

369, 391.

79 Oliver, Peter, “Cutting the Imperial link” in Joseph, Essays on the


Canada as part of its laws\textsuperscript{83}, and that “freedom, once conferred, cannot be revoked”\textsuperscript{84}. But he acknowledges that it is difficult to reconcile this view with parts of the \textit{Patriation Reference}\textsuperscript{85}, which suggested that there had been, at least prior to 1982, no diminution of the legal authority over Canada of the United Kingdom Parliament since colonial times\textsuperscript{86}.

Clearly any attempt by the United Kingdom Parliament to legislate for Canada would be doomed to failure, but no satisfactory theoretical explanation for this has yet been accepted. One possibility is that the view put forward in 1886 by James Bryce, drawing a distinction between legal and political sovereignty\textsuperscript{87}, is a more accurate way of describing the constitution than the traditional, legalist approach.

The practical difficulty is that the law is what the courts say it is, and, to a lawyer, political sovereignty is meaningless\textsuperscript{88}. If the legal theorists cannot agree that a fundamental shift in political power can alter


\textsuperscript{84}Nd\textit{lwana v Hofmeyer} [1937] AD 229, 237 (South African CA).

\textsuperscript{85}\textit{Reference re Amendment of the Constitution of Canada} [1981] 1 SCR 753.


\textsuperscript{87}To a lawyer, political sovereignty is a meaningless concept- in law sovereignty means authority, not might; See also Gray, HR, “The Sovereignty of Parliament Today” (1953-54) 10 University of Toronto LJ 54; For an attempt to bridge this gap see Loveland, Ian, “Parliamentary Sovereignty and the European Community: the Unfinished Revolution?” (1996) 49(4) Parliamentary News 517.
their long held constitutional concepts, then the Canadian constitution can never be seen as autochthonous.

4.3.2 New Zealand

New Zealand differs from Canada in two important respects. Firstly, New Zealand apparently had the unqualified legal right to amend its own constitution from the adoption of the Statute of Westminster in 1947. Secondly, the New Zealand Parliament apparently never suffered from limitations of capacity inherent in a federal structure. Both respects are qualified, as some uncertainty remained.

In New Zealand the delay in accepting legislative independence was due largely to the absence of any great desire for this change. There was little political or public pressure for a reform which was seen as unnecessary, since for most practical purposes New Zealand could amend its own constitution from the mid-nineteenth century.

That political independence is not dependent upon full legal independence is clear. But, without legal independence it is difficult to regard a political system as truly autochthonous. For the New Zealand constitution to be autochthonous, it must have legislative supremacy or

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88Jennings, Sir Ivor, Law and the Constitution (1942).
independence. In New Zealand the advent of legislative independence was not complicated, as in Canada and Australia, by a federal system of government. There was no requirement for the agreement of multiple governments. As a unitary State, there was no need for the constitution to be entrenched, apportioning authority and placing limits on the powers of Parliaments. But this did not mean that it was any easier for there to be a complete break from British-conferred legal authority.

Arguably, as a matter of construction of the law of England, United Kingdom Acts did not extend to New Zealand as part of New Zealand law after 1931, without an express declaration that New Zealand had requested and consented to this enactment. Certainly, the government had assumed that the adoption in 1947 of the Statute of Westminster had ended New Zealand’s subordinate legislative status. However, the sovereignty of the New Zealand Parliament was placed in doubt in 1967 by the case of R v Fineberg.

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89 At this time the special position of Maori was not considered as having any particular significance.

90 Or in the absence of clear words or necessary implication; Copyright Owners Reproduction Society v EMI (Australia) Pty Ltd (1958) 100 CLR 597. A better view is that the statute of 1931 imposes only a procedural bar, at least so far as the law of England is concerned.

91 Explanatory Notes to the New Zealand Constitution Amendment Bill no 57-1.

92 [1968] NZLR 119 per Moller J.
Parliament’s powers were limited by s 53 of the New Zealand Constitution Act 1852 to the “peace, order and good government” of New Zealand. It could not be said that the New Zealand Parliament had the same powers as the United Kingdom Parliament, whose capacity was in no similar way limited. Laws could therefore be challenged as ultra vires\(^93\), and the courts could be called upon to determine whether any given statute was, or was not, for the “peace, order and good government” of New Zealand.

In response to these doubts, s 2 of the New Zealand Constitution Amendment Act 1973 was passed. This amended s 53 of the original 1852 Act, as well as repealing obsolete provisions such as reservation of Bills. Thereafter, the New Zealand Parliament possessed “full power to make laws”, a power not expressly qualified. However, if the original s 53 represented the totality of Parliament’s powers, then it is hard to see how that could have grown into “full powers” without the intervention of the United Kingdom Parliament\(^94\). Capacity, once limited, cannot be enlarged, unless the New Zealand Parliament had somehow become supreme.

\(^93\)However, \textit{R v Fineberg} could itself be criticised, see Joseph, Philip, \textit{Constitutional and Administrative Law in New Zealand} (1993) 402 et seq.

Nor is it clear whether ss 4 and 2(2) of the Statute of Westminster 1931 ended the competence of the imperial Parliament to legislate for New Zealand\textsuperscript{95}. McGechan thought that s 2(2) would permit New Zealand immediately to nullify unwanted imperial legislation. The more important question thus became “whether the imperial Parliament can repeal or annul the Statute of Westminster”\textsuperscript{96}. But the answer to this was given, in the affirmative, as a matter of abstract theory, by the Judicial Committee of the Privy Council in the \textit{British Coal Corporation} case\textsuperscript{97}.

Whether there has been a technical breach, or whether New Zealand’s constitution must remain legally derived from that of the United Kingdom has more than an academic importance. It remains to be seen whether any court in New Zealand would have the strength to hold that such a revolutionary change of grundnorm has actually occurred.

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\textsuperscript{97}[1935] AC 500. This followed orthodox principles of parliamentary supremacy, and found that, since the imperial Parliament could not bind itself, it was free to revoke any such legislation. This view, however logically attractive, did not go completely unchallenged in the Dominions, see \textit{Ndlwana v Hofmeyer} [1937] AD 229, 237 (South African CA). See also Oliver, Peter, “Cutting the Imperial link” in Joseph, \textit{Essays on the Constitution} (1995) 368, 383-384.
\end{flushleft}
The precedent of the Supreme Court of Canada in the *Patriation Reference*\(^98\) suggests that this would be unlikely, though the New Zealand Court of Appeal has frequently shown itself prepared to make profound changes in legal principles\(^99\).

Lord Cooke of Thorndon has examined the possibility, in the New Zealand context, that there may be limits to the sovereignty of Parliament\(^100\), but his views are unlikely to find favour with other, less bold, judges. Nor is it likely to find favour with politicians, who are generally suspicious of excessive judicial independence.

But it has yet to be shown that there has been an evolution in the attitude of New Zealand “judges and officials (and ultimately the people)”\(^101\). Some models have however been suggested by academics.


\(^99\) Lord Cooke of Thorndon, while President of the Court of Appeal, was inclined to reconsider the position of the Treaty of Waitangi; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 305 (CA).

\(^100\) *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 per Cooke P.

4.4 Models of legislative independence

Joseph saw three possible explanations of the apparent continuity of the New Zealand constitution. Firstly, it might be sustained by legal continuity, an unbroken linkage from an historically prior and superior authority. However, he thought that this approach was unattractive, because it had the “unsettling implication” that New Zealand must remain legally derived from the United Kingdom. Joseph also regarded this as being contrary to public perception, despite the Diceyan views expressed by Scott and others. Thus, the popular belief was that New Zealand was politically independent, so it must be legally independent also. This is an echo of the underlying theme of Peter Fraser’s speech in 1947.

The second approach was simply an acknowledgement that there had been a disguised revolution, a technical breach in continuity, either in 1986 with the passage of the Constitution Act, or in 1973 with the

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103 And historically subordinate to it.


105 See Chapter 5.2.

passage of the New Zealand Constitution Amendment Act 1973, but a breach which had passed unnoticed\textsuperscript{108}. The constitution therefore had of necessity to be autochthonous, and the powers of the New Zealand Parliament self-proclaimed by s 53 as amended (or by s 15(2) of the 1986 Act if the breach occurred then)\textsuperscript{109}.

The third approach built upon the first, but concluded in the same manner as the second. Legal continuity was acknowledged, but the historical connection to a superior and sovereign United Kingdom Parliament was not allowed to obscure an evolution in the attitude of New Zealand “judges and officials (and ultimately the people)”\textsuperscript{110}

\textsuperscript{107}On the basis that s 53 was the source of legislative power, and that it could not be used to create “full power”; Joseph, Philip, \textit{Constitutional and Administrative Law in New Zealand} (1993) 121, 408.

\textsuperscript{108}The purpose of the Bill was not in any way revolutionary. This is clear from the speech of the Hon Dr AM Finlay, Minister of Justice, when introducing the Bill into Parliament:

Provisions to be repealed … have lapsed with desuetude for one reason or another and are no longer operative. This Bill formally writes them off the statute book as spent.

-NZPD 1973 vol 384 p 2234.

\textsuperscript{109}Although there was little debate on the specific issue, Doug Graham, MP, for one had difficulty fitting the Bill within the Diceyan framework of his legal education; NZPD 2nd Session, 41st Parliament, 1986 pp 1357-1358. Section 15(2) expressly ended the legal power of the United Kingdom Parliament to legislate for New Zealand.

towards acceptance of the sovereignty of the New Zealand Parliament\textsuperscript{111}. Once the new attitude takes hold, the old grundnorm can be said to have been replaced by the new. The process is evolutionary, but the effect revolutionary.

Like Hogg’s view of the Canadian Constitution, this approach, though attractive and in conformity with political reality, is legally difficult to accept.

Wade thought that independence legislation was merely window dressing for a revolutionary shift in power\textsuperscript{112}, in the case of New Zealand the movement of paramount force from Westminster to Wellington. Brookfield also expressed a preference for a new approach to sovereignty\textsuperscript{113}. But he disagreed with Wade, believing that independence legislation is legally effective in itself\textsuperscript{114}. Like Joseph, Brookfield thought that the Act of 1947 had given full powers to the New Zealand Parliament. However, he doubted the legal efficacy of the 1986 Act\textsuperscript{115}.


\textsuperscript{115}Brookfield, FM, “Kelsen, the Constitution and the Treaty” [1992] 15 NZULR 163. The Rt Hon Sir Geoffrey Palmer, as Minister of Justice, believed that the Constitution Act 1986 had the effect of ending the
As developed, Brookfield’s argument has two aspects. Firstly, s 26(1) of the 1986 Act declared that the 1947 Act “shall cease to have effect as part of the law of New Zealand”, despite the fact that “no power was conferred on the New Zealand legislature, either by the Act of 1947 or any Act of the United Kingdom Parliament, to repeal the Act of 1947 itself”.

Secondly, s 15(2) ended the legal power of the United Kingdom Parliament to legislate for New Zealand. However, Brookfield rejected the idea that s 53, as amended in 1973, included what he had called a “plenary constituent power” of the type he himself identified in 1984. Like Joseph’s second proposed explanation, a legal breach had occurred in 1986.

Legality based on s 15(2) could not be said to be based on an uninterrupted chain of legal processes. Yet its efficacy seems not to have

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117 Brookfield, FM, “Kelsen, the Constitution and the Treaty” [1992] 15 NZULR 163, 171. However, s 2(2) of the Statute of Westminster 1931 can be said to have provided this power; Wheare, Sir Kenneth, The Statute of Westminster and Dominion Status (1953) 161; Wheare, Sir Kenneth, The Constitutional Structure of the Commonwealth (1960) 33.

been doubted at the time. In his first reading speech, the Hon Geoffrey Palmer, Minister of Justice, stated that the purposes of the Bill were to clarify rules relating to the transfer of power after an election, and to bring together in one place important constitutional provisions. But it was also to terminate “the residual power of the United Kingdom Parliament to make laws for New Zealand”\textsuperscript{119}.

Few politicians were involved in the subsequent debate over Parliament’s powers, with the notable exception of Sir Geoffrey Palmer\textsuperscript{120}. Constitutional debate, excepting that confined to such detail as electoral reform, has been largely left to academics\textsuperscript{121}. Two reasons for this might be postulated. Firstly, few except constitutional lawyers cared much for the niceties of legal theory, and secondly, they failed to see any significant practical implications.

Because political leaders have not been particularly involved in any of these academic debates, they have been at a disadvantage, when Maori  

\textsuperscript{119}NZPD 1986 vol 470 p 1344. 
\textsuperscript{120}The development of his political ideas and priorities may be seen in \textit{Unbridled Power} (1987), \textit{New Zealand’s Constitution in Crisis} (1992), and \textit{Bridled Power} (1997), the last co-written with his son Matthew. 
\textsuperscript{121}Among public figures only three advocates of serious constitutional debate stand out; James Bolger, Michael Moore and Sir Geoffrey Palmer; Sharp, Andrew, “Constitution” in Miller, \textit{New Zealand Government and Politics} 37-47, 41, 43 (forthcoming). The Rt Hon Simon Upton, a former
nationalists have sought to engage political leaders in a debate on future directions for the constitution. For to deny claims for Maori sovereignty (however this may be defined\textsuperscript{122}), they must be able to justify and explain the sources of the sovereignty of the existing regime. This divorce of politics and constitutional theory is regrettable.

Oliver’s approach was an attempt to reconcile the legal and historical accounts and to provide a legal explanation for the independence of New Zealand and Canada without any legal break\textsuperscript{123}.

In Oliver’s view, both continuing and self-embracing interpretations of the ultimate rules of a legal system are possible. In the continuing interpretation, the United Kingdom Parliament can be seen to remain perpetually at the apex of the Canadian and New Zealand legal systems. This can be seen as the orthodox view.

But, at the same time, in the self-embracing interpretation, the United Kingdom Parliament itself provided its own replacement as

\begin{itemize}
\item\textsuperscript{122}See Awatere, Dona, \textit{Maori Sovereignty} (1984); Cox, Lindsay, \textit{Kotahitanga} (1993); Jackson, Moana, \textit{The Maori and the Criminal Justice System} (Part 2) (1988); Kawharu, Sir Hugh, \textit{Waitangi} (1989); Melbourne, Hineani, \textit{Maori Sovereignty} (1995) and Chapter 3.3.
\item\textsuperscript{123}Oliver, Peter, “Cutting the Imperial link” in Joseph, \textit{Essays on the Constitution} (1995) 368, 402.
\end{itemize}
ultimate amending procedure. According to this view, the United Kingdom Parliament can simultaneously confer legal validity on the New Zealand Parliament, and, without undermining that validity, disappear from the legal landscape. Thus, legal sovereignty, once conferred, could not be revoked, but legal continuity is preserved.

This argument is not new. Originally the principle of unlimited Parliamentary sovereignty was a distinctively English principle, having no counterpart in the constitutional law of Scotland, and the united Parliament established by the Treaty of Union in 1707 arguably does not have unlimited sovereignty in the matter of altering the provisions of the Treaty. In *MacCormick v Lord Advocate* James Clyde, the Lord Advocate of Scotland, conceded that Parliament could not repeal or alter such of the provisions of the Act of Union 1706 as were stated to be "fundamental and unalterable for all time coming". This was because the new Parliament established after the Act of Union 1706 lacked the full authority of the old, having abdicated in respect of some of its powers.

The Lord President approved this view, and observed that he could not see why the Parliament of the United Kingdom should have inherited

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124 In Canada by the Part V amendment procedures, and in New Zealand by enacting the Statute of Westminster 1931 and the New Zealand Constitution Amendment Act 1947.


126 1953 SC 396; 1953 SLT 255 per Lord Cooper, Lord President.
all the characteristics of the English, and none of the characteristics of the Scottish Parliament. However, no court would have the jurisdiction to hold such legislation invalid. This decision however may, and probably should, be regarded as completely contrary to the whole tenor of English authorities on the point\textsuperscript{127}. Yet, English jurisprudence is not to be regarded as necessarily correct when describing modern Commonwealth constitutions\textsuperscript{128}.

Oliver's continuing yet self-embracing interpretation was especially relevant to New Zealand in 1986\textsuperscript{129}. There was no overt intention in 1986 to create a legal break with the past. There is much evidence to suppose that the Act was intended to restate the law as Parliament saw it\textsuperscript{130}.

Without a conscious attempt to break with the traditional source of authority, it however remains uncertain that an autochthonous constitution can exist. It is perhaps possible that the only true


\textsuperscript{128}The United Kingdom Parliament is now abandoning some of its authority to the European Union, and to the new Scottish Parliament and Welsh Assembly; Brookfield, FM, “A New Zealand Republic?” (1994) 8 Legislative Studies 5; Loveland, Ian, “Parliamentary Sovereignty and the European Community” (1996) 49(4) Parliamentary News 517. The extent to which any country is now truly sovereign is debatable, given the growth in the scope and reach of international law; Lauterpacht, Sir Eli, “Sovereignty” (1997) 73(1) International Affairs 137.


\textsuperscript{130}See Justice, Department of, Constitutional Reform (1986).
independence is that seized by force, or resulting from a deliberate, revolutionary break. This was a course of action which had been considered by some political leaders in Australia, keen to end an apparently permanent dependence upon a British legal legacy, for pragmatic if not theoretical reasons\textsuperscript{131}. But such an approach brings its own risks to legitimacy.

4.5 Conclusion

The growth of legislative independence came about only gradually, in response to specific technical needs. Legislative action was only taken when the legal powers of government were inadequate or had been questioned. The Dominions sought and received legislative independence for various reasons. But all expressed their newly acquired authority in traditional terms, and all relied upon the authority granted by the imperial Parliament.

For similar reasons there was little consideration given in any of the Dominions to esoteric ideas of the source of constitutional authority. In Canada the courts regularly were required to consider the source for legislative or executive actions, but only for pragmatic reasons, and their approach was technical and legalistic.

Whether there has been a technical breach, or whether New Zealand’s constitution must remain legally derived from that of the United Kingdom has more than an academic importance. Oliver’s evolutionary argument is persuasive, but it remains to be seen whether

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132 As in R v Fineberg [1968] NZLR 119 per Moller J.

133 One of the strongest (though often misunderstood) constitutional concepts is that of the rule of law, and this requires public bodies to show a source for their powers and privileges. The inheritance of legal authority from a prior authority is the most common form this authority takes.
any court in New Zealand would hold that such a revolutionary change of grundnorm has actually occurred. The precedent of the Supreme Court of Canada in the *Patriation Reference*\(^\text{134}\) suggests that this would be unlikely, though the New Zealand Court of Appeal has frequently shown itself prepared to make profound changes in legal principles.

Equally, the question of the possible existence of a power of the United Kingdom Parliament to legislate for New Zealand belongs to academia, and therefore has never greatly exercised the minds of members of Parliament. Probably this is a reflection of the reluctance of become involved in technical issues, which has resulted in much constitutionally important legislation being promoted principally by lawyer-MPs\(^\text{135}\).

The New Zealand Parliament may, barring possible enhanced recognition of the position of the Treaty of Waitangi, be the only Parliament which possesses the full authority of Parliamentary supremacy as it has been described as belonging to the British Parliament.

\(^{134}\) *Reference re Amendment of the Constitution of Canada* [1981] 1 SCR 753.

The question of whether these powers must forever remain legally based upon British legislation has exercised constitutional writers. It is not clear whether the New Zealand constitution will remain forever shackled to an imperial legacy, or whether it has acquired local roots. This is not solely- or even principally- a legal question, for it is concerned as much with national identity.

In the absence of a general political and legal consensus about the sources of legislative authority, the traditional Diceyan view of parliamentary sovereignty fails to explain the political reality of New Zealand’s legislative independence. The Crown itself, and in conjunction with the Treaty of Waitangi, rather than Parliament, may be the source of an autochthonous constitutional order.

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136 As Lord Cooke of Thorndon has said, it is a legal conundrum that we have created for ourselves, with no certain answer; Cooke of Thorndon, Lord, “The suggested revolution against the Crown” in Joseph, Essays on the Constitution (1995) 33.
Chapter V:
THE DEVELOPMENT OF EXECUTIVE INDEPENDENCE

5.1 Introduction

In the absence of a widespread political and legal consensus about the sources of legislative authority, the traditional Diceyan view of parliamentary sovereignty\(^1\) would seem to fail to adequately explain the political reality of New Zealand’s independence. A better explanation may be that the Crown, rather than Parliament, and in conjunction with the Treaty of Waitangi, is the source of an autochthonous constitutional order. This is grounded in symbolism and administrative practice, rather than technical rules of sovereignty or authority.

Indeed, it was the flexible application of common law principles concerned with the prerogatives of the Crown, and the operation of constitutional conventions relating to responsible government, rather than the establishment of legislatures per se, that led to the development of

independent states from colonies\(^2\). Practical executive or political independence came before formal legislative and judicial independence\(^3\).

This general observation is as true for New Zealand as it is for the other “old Dominions”. Legal changes tended to follow political changes, and this is seen especially in the considerable distortion which arose between the powers conferred upon the Governor-General by the letters patent constituting the office, and the powers actually exercised\(^4\).

Imperial constitutional law was developed not in the courts so much as in the opinions of the law officers of the Crown. It was the practice that evolved out of these opinions which eventually influenced the courts. They followed, but did not invent, doctrines such as that of colonial legislative territoriality\(^5\).

As a consequence of this process, constitutional writers tended to become distracted by abstract concepts such as the unity of the Crown\(^6\).


\(^3\)The latter is arguably still not achieved, with New Zealand's final court of appeal the Judicial Committee of the Privy Council.

\(^4\)See Chapter VII.


\(^6\)Federated Engine-Divers’ and Firemans’ Association of Australia v Adelaide Chemical and Fertilizer Co Ltd (1920) 28 CLR 1 per Latham CJ; Minister for Works (Western Australia) v Gulson (1944) 69 CLR 338, 350-351, 357 per Rich J.
This was responsible for what Zines called “decades of distorted reasoning, intellectual gymnastics and a blindness to reality”\(^7\).

This Chapter explores the evolution of the imperial Crown, particularly in respect of the right to advise, and the development of the divisible Crown. The position in New Zealand is compared and contrasted with that in other countries, particularly Canada and Australia. It will be shown that the devolution of the Crown was the principal avenue through which independence was conferred upon the Dominions. For independence was, and is, fundamentally a political fact rather than a purely a matter of legal rights.

More importantly this process the constitutional grundnorm appears to have changed. Whereas legislative theory is hindered by continued adherence to concepts of Diceyan parliamentary supremacy, the evolution of the Crown provides an explanation for the political and legal reality of independence.

The first section examines the devolution of the right to advise the Crown. This saw the transfer of political control of the royal prerogative from imperial to dominion Ministers. While the Sovereign was the source of certain prerogative powers the right to formally advise the Sovereign remained important. As a colony, some responsibilities

remained in the hands of imperial Ministers. But with the growth of independence more authority was assumed by the Crown acting on the advice of local Ministers.

Whilst the devolution of this responsibility did not of itself confer independence upon New Zealand, it did more than merely mirror independence already conferred. For the Crown acted as the channel or conduit through which independence was acquired. This process was encouraged by the physical absence of the Sovereign, which had resulted in the theory that the Sovereign's prerogative existed throughout the empire, though they might be absent from a given territory.

The second section considers the evolution of the divisible Crown. The concept of the divisible Crown has come to mean that although the one person is Sovereign of more than one country, they hold legally distinct positions. Historically, the monarch was regarded as being Sovereign of each Dominion because he or she was the Sovereign of the United Kingdom. Now it would appear, at least for some realms, that this contingent relationship no longer exists. The existence of separate legal titles has led to an emphasis upon national identity, as has been seen in the evolution of the oath of allegiance.

This Chapter explores two distinct aspects of the evolving independence of New Zealand. It will be shown that, unlike concepts of
legislative sovereignty, the continuity and evolution of the Crown has led to a widespread acceptance and understanding of independence.

5.2 The right to advise

The executive prerogatives of the Crown include the appointment of Ministers, and those powers which derive from the Sovereign’s position as head of the armed forces and of the civil service. The bestowal of honours and incorporation by royal charter are further examples. The Sovereign’s authority as the sole legal representative of the country is particularly important in relation to foreign relations. In cases of national emergency the Crown is responsible for the defence of the realm, and is the only judge of the existence of danger from external enemies.

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8 *Peerless Bakery Ltd v Clinkard (No 3)* [1953] NZLR 796. The power to create a corporation by statutory mechanism exists side-by-side with, and is not substituted for, the power to create a corporation, which is part of the royal prerogative; *Attorney-General v de Keyser’s Royal Hotel* [1920] AC 508.

9 *Foreign Affairs and Overseas Service Act 1983:* 

s 25(1) Nothing in this Act shall extinguish any power or authority that, if this Act had not been passed, would be exercisable by virtue of the prerogatives of the Crown.

10 *R v Hampden* (1637) 3 State Tr 826.
But the monarch in English law and tradition was never thought of as being absolute\textsuperscript{11}. As Bracton said, the king ruled “under God and the law”\textsuperscript{12}. The prerogative would be politically intolerable if the Crown acted in practice as theory apparently allowed. There were always limitations on the exercise of royal government. Originally this meant what Sir John Fortescue in the fifteenth century called *dominium politicum et regale*\textsuperscript{13}. By this he meant that the king of England made laws only by the consent of his people, and not merely on his own authority.

Later the increasing sophistication of government led to a greater burden on Ministers, and their increasing independence from the Sovereign and responsibility to Parliament. Over time Ministers acquired control of the actions of the Crown. It was generally agreed after 1815 that the Sovereign should be kept out of party politics\textsuperscript{14}. Over the course of the nineteenth century the monarchy moved from sharing government, to having a share in government, to a largely advisory role. In the later

\textsuperscript{11}Locke said nothing revolutionary in the second of his *Two Treatises of Government* (1690), when he observed that absolute monarchy is inconsistent with civil society; Locke, John, *Two Treatises of Government* ed Laslett (1988) II, ch 90.


\textsuperscript{13}Fortescue, Sir John, *The Governance of England* (1979). See also Chapter 1.4.

years of the reign of Victoria the growing importance of organised political parties gave her less room to manoeuvre than her predecessors.\textsuperscript{15}

But monarchy concentrates legal authority and power in one person, even where symbolic concentration alone remains.\textsuperscript{16} This was the logic underpinning the belief in the eighteenth and nineteenth centuries in the unity of the Crown. The imperial Crown was one and indivisible.

“The colonies formed one realm with the United Kingdom”, the whole being under the sovereignty of the Crown.\textsuperscript{17} This sovereignty was exercised on the advice of imperial Ministers.

In his seminal work on the royal prerogative, Herbert Evatt showed how this unity of the Crown was the very means through which separateness of the Dominions was achieved. The indivisibility of the Crown meant the existence of royal prerogatives throughout the empire. The identity of those who could give formal advice to the Crown changed from imperial to Dominion Ministers- and little or no formal

\begin{flushleft}
\textsuperscript{15}Hanham, HJ, \textit{The Nineteenth Century Constitution} (1969) 25.
\textsuperscript{16}“The attraction of monarchy for the Fathers of Confederation lay in the powerful counterweight it posed to the potential for federalism to fracture”; Smith, David, \textit{The Invisible Crown} (1995) 8 relying on WL Morton. Provincial powers grew as the provincial ministries were accepted as responsible advisers of the Crown in their own right.
\textsuperscript{17}R v Secretary of State for Foreign and Commonwealth Affairs [1982] QB 892, 911 per Lord Denning MR.
\end{flushleft}
legal changes were needed for states to change from being colonies to being fully independent\textsuperscript{18}.

By 1919 most of the powers of the Crown abroad were exercised on the advice of local ministries in all the Dominions and self-governing colonies\textsuperscript{19}. That this was not yet a complete transference can be seen by the argument of the New Zealand Prime Minister, the Rt Hon William Massey, at the Imperial Conference of 1921. He maintained the principle that “when the King, the Head of State, declares war the whole of his subjects are at war”\textsuperscript{20}. Dominions might sign commercial treaties, but not those concluding a war. Some external affairs were still a matter for the imperial authorities.

The right to advise the Crown in the exercise of the war prerogative was kept in the hands of British Ministers, and the right to advise the Crown excluded imperial concerns such as nationality, shipping, and

\begin{footnotesize}
\begin{enumerate}
\item Evatt, Herbert, \textit{The Royal Prerogative} commentary by Zines (1987) c1-3.
\item See the Borden Memorandum 1919, in Keith, AB, \textit{Speeches and Documents on the British Dominions 1918-1931} (1932) 13. The position was firmly established by the late nineteenth century that a Canadian Lieutenant-Governor was as much a representative of Her Majesty as the Governor-General was; \textit{Maritime Bank of Canada v Receiver-General of British Columbia} [1892] AC 437, 443.
\item Rt Hon William Massey, 20 June 1921, in Keith, AB, \textit{Speeches and Documents on the British Dominions} (1932) 59-62.
\end{enumerate}
\end{footnotesize}
defence. This was to change however, as the Dominions had been given membership of the League of Nations after the First World War, and came to be regarded in international law as independent countries.

The problem of the remaining limitations on Dominion independence was examined at the Imperial Conference in 1926. The Report of the Inter-Imperial Relations Committee to the Conference included the famous declaration that the Dominions:

are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

There had been uncertainty as to what precisely had been agreed in 1926, though initially most commentators simply assumed that British Ministers would continue to provide the king’s only source of constitutional advice. The former Australian Prime Minister, the Rt Hon William Hughes, distinguished between sources of formal and informal

\[\text{[21] See the Report of the Inter-Imperial Relations Committee,}\ Impe\ \text{rial Conference} (1926)\ \text{Parliamentary Papers, vol xi 1926 cmd 2768.}\]

\[\text{[22] Imperial Conference} (1926)\ \text{Parliamentary Papers, vol 11 1926 cmd 2768.}\]
advice, with the British government providing the former, the Dominion governments the latter. Arthur Berridale Keith thought however that

the suggestion that the King can act directly on the advice of Dominion Ministers is a constitutional monstrosity, which would be fatal to the security of the position of the Crown.

However, the Irish government thought there was now only a personal union of the Crown. It this were so, then imperial Ministers could have no role in advising the king with respect to any matter internal to a Dominion. The Irish may not have reflected the majority view, but theirs made much more logical sense than that, for example, of Hughes.

Once the principle was established that the Dominions were equal with the United Kingdom, it was inevitable that the Dominions should acquire the exclusive right to advise the Crown. This was to be gained in the course of the 1920s and 1930s, and finally settled in the 1940s. As a logical consequence of the doctrine of equality, this was the only possible outcome.

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24 Responsible Government in the Dominions (1928) vol 1 p xviii.

25 Some support for this view can be found in remarks in Roach v Canada [1992] 2 FC 173, 177.
It was the Second World War which finally settled the question of whether there was a complete transfer to Dominion Ministers of the right to advise the Crown, and therefore complete executive or political independence. This may be seen by comparing the practice of the New Zealand government with that of Australia, and the other Dominions.

At the outbreak of the war, the Australian Prime Minister, the Rt Hon Robert Menzies, adhered to the idea that the king was at once at war in respect of the whole empire. Therefore, the only formal steps taken by Australia were publishing a notice in the Commonwealth Gazette recording the fact that war had broken out between the United Kingdom and Germany, and requesting the British government to inform the German government that Australia was associated in the war with Germany.\textsuperscript{26} The limited intention of these actions is quite clear from the words used in the notice recording the fact that war had broken out:

\begin{quote}
It is hereby notified for general information that war has broken out between Great Britain and Germany. Dated this Third day of September, 1939.\textsuperscript{27}
\end{quote}

\textsuperscript{26}A proclamation invoking the wartime provisions of the Defence Act 1903-39 (Australia) was also made. This proclaimed the existence of war, though against whom it did not say; Commonwealth Gazette no 63, 3 September 1939; For a full account see Hasluck, Sir Paul, \textit{The Government and the People, 1939-1941} (1952) 149-151.

\textsuperscript{27}Commonwealth Gazette no 63, 3 September 1939.
Canada and South Africa, however, chose to make separate proclamations of war. Both were able to do so because in those Dominions there had clearly been a delegation by the king to the Governor-General of the prerogative to declare war and make peace\textsuperscript{28}. Ireland, now a republic in all but name, chose to remain neutral, the clearest manifestation of political independence.

But by 1941 the official view in Australia had changed, it would seem largely because of the influence of Herbert Evatt as Minister of External Affairs\textsuperscript{29}. War was declared against Finland, Hungary and Roumania without waiting for the United Kingdom to act\textsuperscript{30}. Because there was no existing mechanism through which the king could declare Australia to be at war, an arrangement was made in 1941 by which the king was advised by telegram, and countersignature by Australian Ministers occurred when the resulting document was received in Canberra some weeks later\textsuperscript{31}.

\textsuperscript{28}In Canada under the Seals Act 1939, and in South Africa, under the Royal Executive Functions and Seals Act 1934 and the Status of the Union Act 1934.

\textsuperscript{29}A man of wide experience, Evatt was a Judge of the High Court of Australia 1930-40, Minister of External Affairs 1941-49, Leader of the Opposition 1951-60, and Chief Justice of New South Wales 1960-62.

\textsuperscript{30}Commonwealth Gazette vol 251, 8 December 1941.

When war was declared against Japan, the Prime Minister instructed the High Commissioner in London to place the advice of the king’s Ministers in Australia before His Majesty. The resulting proclamation was then published in the Commonwealth Gazette\textsuperscript{32}.

The view in Australia was coloured by doubts as to the delegation of the prerogative to declare war, and a lingering belief that “Britain is at war therefore Australia is at war”. New Zealand took a more pragmatic approach. There were separate declarations of war by New Zealand against Germany in 1939, and against Italy in 1940.

New Zealand did not regard itself as automatically bound merely because a state of war existed between the United Kingdom and a foreign power. A distinction was drawn between the moral and legal issues\textsuperscript{33}. In this respect, New Zealand was arguably more advanced than Australia in recognising the consequences of a divisible Crown\textsuperscript{34}, though the position was still not totally free from ambiguity.

\textsuperscript{32}Rt Hon RG Menzies, Commonwealth Parliamentary Debates (House of Representatives, 9 December 1941) vol 169 p 1068-1069; Commonwealth Gazette vol 252, 9 December 1941.

\textsuperscript{33}The question of whether the prerogative to declare war had in fact been delegated was overlooked.

\textsuperscript{34}Brookfield, FM, “A New Zealand Republic?” (1994) 8 Legislative Studies 5.
On 1 September 1939, the Governor-General proclaimed a state of emergency due to the imminence of war. On 3 September he received a telegram from the Secretary of State for Dominion Affairs. This message stated simply that:

War has broken out with Germany. Secretary of State for Foreign Affairs.

To this message the Governor-General replied on 4 September, in a telegram to the Secretary of State for Dominion Affairs, that:

With reference to the intimation just received that a state of war exists between the United Kingdom and Germany His Majesty’s Government in New Zealand desire immediately to associate themselves with His Majesty’s Government in the United Kingdom in honouring their pledged word.

The Hon Peter Fraser, acting Leader of the House of Representatives, and in effect running the government due to the illness of the Prime Minister, the Rt Hon Michael Savage, reported on 5 September 1939 that a state of war had been proclaimed by the

35 This proclamation, under the authority of the Public Safety Conservation Act 1932 was not however published in the New Zealand Gazette.


Governor-General between His Majesty and Germany, and spoke of New Zealand’s:

continued and unshakeable loyalty to His Majesty the King and to our association with the United Kingdom and the other members of the British Commonwealth who have taken up the sword with us\(^\text{38}\).

The Hon Adam Hamilton, Leader of the Opposition, referred to the proclamation of the existence of a state of war between “His Majesty’s Government of New Zealand and the Government of the German Reich”\(^\text{39}\). This proclamation was clear in its tone:

His Excellency the Governor-General has it in command from His Majesty the King to declare that a state of war exists between His Majesty and the Government of the German Reich, and that such a state of war has existed from 9.30 pm, New Zealand standard time, on the third day of September, 1939\(^\text{40}\).

The New Zealand government chose to join the war alongside the United Kingdom “and the other members of the British Commonwealth who have taken up the sword with us”\(^\text{41}\). The king could now potentially be at war with an enemy in respect of one Dominion, and at the same time maintaining peaceful relations with the same country, as king of

\(^{38}\text{NZPD 1939 vol 256 p 20.}\)

\(^{39}\text{5 September 1939, NZPD 1939 vol 256 p 20.}\)

\(^{40}\text{New Zealand Gazette 4 September 1939 p 2321.}\)
another Dominion. Nor need New Zealand necessarily commence hostilities against a common enemy at the same time as the United Kingdom, a fact which was presaged in 1941:

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His Excellency the Governor-General has it in command from His Majesty the King to declare that a state of war exists between His Majesty and the Emperor of Japan, and that such a state of war has existed, in respect of New Zealand, from 11 am, New Zealand Summertime, on the 8th day of December, 1941.

The war prerogative, perhaps the most solemn of the powers of the Crown, had now been divided. New Zealand did not regard itself as legally bound by a decision of United Kingdom Ministers, but chose to follow their political lead. Thereafter there remained few if any aspects of the prerogative upon which the Sovereign acted upon the advice of British Ministers in respect of New Zealand. The right to advise the Sovereign was used as a means of acquiring and manifesting national independence.

Whereas in Australia the telegram was used as a means of advising the Crown, in New Zealand Ministers simply advised the Governor-General to exercise a prerogative formerly exercised only by the king on

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41 Hon Peter Fraser, 5 September 1939, NZPD 1939 vol 256 p 20.
42 New Zealand Gazette 9 December 1941 p 3877.
the advice of British Ministers. The king’s signature was not required, though his prior approval was of course obtained.

Thus, at a time when the legislative independence of New Zealand was still uncertain, its executive, or political independence had been achieved by the division of the royal prerogative. This prerogative, in coming within the exclusive control of New Zealand Ministers, allowed them to exercise the full range of executive powers which the Crown in the United Kingdom enjoyed.

The existence, and division, of the royal prerogative, did not of itself give independence to New Zealand. But it was a principal means by which this independence was established and affirmed. Lacking a distinct independence date, New Zealand, like Canada, Australia and South Africa, owed its independence to a gradual process whose origins lay in the earliest years of British imperial history.

According to orthodox imperial constitutional law, British settlers enjoyed as part of the law of England all their public rights as subjects of the Crown. The prerogative of the Crown towards them was therefore limited. The corollary of this was that migration left these subjects still under the protection of the Crown and entitled to all the legal safeguards which secured the liberties of natural-born subjects.

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43 Pictou Municipality v Geldert [1893] AC 524; Cooper v Stuart (1889) 14 App Cas 286.
Foremost among these was the right to a legislative assembly analogous to the imperial Parliament. But the right to executive independence was not far behind. By the mid-eighteenth century the local assemblies in chartered colonies elected the governor, enacted laws repugnant to English law, declined to recognise Admiralty jurisdiction or appeal rights, neglected to provide their quotas for imperial defence, and encouraged trades forbidden by imperial legislation. In short, they were politically independent. What was reluctantly conceded to the American colonies was freely conferred upon the later empire, without violence and therefore without a break in legal continuity.

But if the prerogative could be divided, could the Crown also be divided? For the existence of a divisible prerogative meant that no longer was the Crown exclusively British. It had become imperial to the extent that it was no longer the exclusive responsibility of the British government.

\[44\] Memorandum (1722) 2 Peere Williams 75 (PC).

\[45\] Keir, Sir David Lindsay, The Constitutional History of Modern Britain since 1485 (1966) 352

\[46\] Parallels may be drawn with the evolution of the Roman Empire after the fourth century. This also was achieved by the division of the prerogative.
5.3 The divisible Crown

Not merely had the right to advise the Crown passed from the imperial government to the Dominions, but in the course of the twentieth century the Crown itself has been said to have become “separate and divisible”\textsuperscript{47}. The single Sovereign has now apparently come to be Sovereign severally over separate and different realms, despite the element of unity and continuity still reflected in the royal styles\textsuperscript{48}. There is a personal union of several Crowns, each in right of a particular realm, but each, apparently, with the same law of succession\textsuperscript{49}. This has both reflected the increasing perceptions of national identity, and (in part at least), aided in the expression of that identity.

The means by which the old unitary Crown with a common allegiance owed throughout the empire has came to be a plurality of Crowns is however something of a mystery\textsuperscript{50}. The mere alteration of the

\textsuperscript{47}R v Secretary of State Foreign and Commonwealth Office [1982] QB 892 (CA).

\textsuperscript{48}See Chapter 6.4.

\textsuperscript{49}Cox, Noel, “The Law of Succession to the Crown in New Zealand” (1999) 7 Waik LR 49. See also Chapter 6.2

royal style cannot of itself affect the nature of the sovereignty legally vested in the Queen\textsuperscript{51} and the style “Her Other Realms and Territories” appears to suggest something other than a division of the Crown. Any division must have been achieved by some other means.

This point is especially important in light of the fact that the constitutions of the different realms are generally so worded as to make it clear that their sovereignty (for what this term is worth) is linked to the Crown of the United Kingdom. This is true especially of the older Dominions, but also of some newer countries.

5.3.1 The identity of the Sovereign

The Constitution of Australia does not expressly state that the head of State of Australia shall be the monarch for the time being of the United Kingdom. But the first recital of the Constitution of Australia Constitution Act 1900 records that certain Australasian colonies had agreed to unite “under the Crown of the United Kingdom of Great Britain

\textsuperscript{51}The style by which a Sovereign is known is legally immaterial. The words "\textit{Supremum caput ecclesiae anglicanae}" were omitted from a writ. However, it was held that the writ was good nevertheless, for this style and title was not part of the Royal name, but only an addition. The word "\textit{rex}" comprehended all the royal dignities and attributes; Anon (1555) Jenk 209.
and Ireland”. However, this is not technically of legal force\textsuperscript{52}, and may be merely descriptive of the formation of the Commonwealth.

However, clause 2 of the Preamble provides that:

The provisions of this Act referring to the Queen shall extend to
Her Majesty’s heirs and successors in the Sovereignty of the
United Kingdom.

This also is not legally enforceable\textsuperscript{53}, but its intent is clearer.
However, s 61 of the Constitution of Australia Constitution Act 1900 provides that:

The executive power of the Commonwealth is vested in the Queen
and is exercisable by the Governor-General as the Queen’s
representative, and extends to the execution and maintenance of
the laws of the Commonwealth.

Read in conjunction with the preamble, it would appear to be clear
that “the Queen” meant “Her Majesty’s heirs and successors in the
Sovereignty of the United Kingdom”. Yet this narrow definition would not necessarily be accepted today. “Subject of the Queen” in s 17 of the

\textsuperscript{52}It may also be read as merely a historical statement, and not limiting the development of the Crown.

\textsuperscript{53}Though the practical relevance of this jurisprudential nicety is slight, as perceptions and beliefs are often of greater importance than technical rules in a Constitution.
Constitution of Australia is now taken to mean subjects of the Queen of Australia\textsuperscript{54}.

The exact status of the succession remains unclear, but it is probable that, were the matter to be litigated, an Australian court would today hold that the federal Parliament is empowered to alter the succession law\textsuperscript{55}.

Other countries have preserved legal forms which appear to presuppose that they share not only the person of the Sovereign with another country, but also, in some respects, the same legal institution.

Section 9 of the British North America Act 1867 provided that:

\begin{quote}
Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom ... The executive government and authority of and over Canada is hereby declared to be vested in the Queen.
\end{quote}

The Canada Act 1982 lacks this preamble, so there is no longer any formal statement in the law of Canada that the king or queen of Canada shall be the same person as the king or queen of the United Kingdom. But there is no indication that there was any actual change intended in

\textsuperscript{54}Street v Queensland Bar Association (1989) 168 CLR 461, 505, 525, 541, 554, 572.

\textsuperscript{55}For the situation in New Zealand see Cox, Noel, “The Law of Succession to the Crown in New Zealand” (1999) 7 Waik LR 49.
1982\textsuperscript{56}. Yet s 9 may also be taken to not necessarily limit the sovereignty
to that of the United Kingdom, were a division to be sought.

Even in more recently independent states it could be argued that
unity of the Crown may still to be presumed. As a matter of statutory
interpretation, references to “Her Majesty” can be taken to mean Her
Majesty in right of the country concerned, which suggests more than
merely a personal union of countries. For example, the Belize Act 1981,
the schedule of which contains the Constitution of Belize, simply
provides that:

The executive authority of Belize is vested in HM\textsuperscript{57}.

“Her Majesty” is nowhere defined in the Constitution, but, as it is
enacted in a British Act of Parliament, the identity of “HM” would
appear to be the Sovereign of the United Kingdom.

Even Papua New Guinea, whose Constitution was strongly
influenced by Australian political thought and native Melanesian
tradition, follows this trend. Indeed, it is quite clear in this respect. The
Papua New Guinea Constitution 1975 states that:

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\textsuperscript{56}Indeed, much evidence to suggest the contrary; McWhinney, Edward, 
\textit{Canada and the Constitution} (1982); Corbett, SM, “Reading the 
Preamble to the British North America Act” (1998) 2 Constitutional 
Forum 42-47.
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\textsuperscript{57}s 36(1).
\end{flushright}
Her Majesty the Queen- (a) Having been requested by the people of Papua New Guinea, through their constituent assembly, to become the Queen and head of State of Papua New Guinea; and (b) Having graciously consented so to become, is the Queen and head of State of Papua New Guinea.\(^{58}\)

Following the Australian example, it continues that this:

...shall extend to Her Majesty’s heirs and successors in the Sovereignty of the United Kingdom.\(^{59}\)

These legal formulas reflect a common belief that the Crown, though separate in each realm, shares some common attributes, and that it is not merely chance which sees the one person Sovereign of a score of countries.

5.3.2 The universality of the Sovereignty

This belief is, of course, the traditional view of the empire. In the late nineteenth century Story J said that “[for] the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered as one and indivisible throughout the empire.”\(^{60}\) An early

\(^{58}\) s 82(1).

\(^{59}\) s 83.

\(^{60}\) R v Bank of Nova Scotia (1885) 4 Cart 391, 405 per Story J.
twentieth century Canadian writer said that “the Crown is to be considered as one and indivisible throughout the empire, and cannot be severed into as many distinct kingships as there are Dominions and self-governing Colonies”\(^{61}\). In *Theodore v Duncan*\(^{62}\) Viscount Haldane observed that “the Crown is one and indivisible”.

Corbett, writing just after the beginning of the twentieth century\(^{63}\), thought that a distinction could and should be drawn between the king as representing one body politic, and the king as representing another. The weight of tradition was to prove too strong however to enable this idea to take hold at that time\(^{64}\).

Yet the divisibility of the Crown was a practical reality within the confines of the Canadian and Australian federations\(^{65}\). Fournier J of the

\(^{61}\)Lefroy, Augustus, *Short Treatise on Canadian Constitutional Law* (1918) 59-60.


\(^{63}\)“The Crown as Representing the State” (1903) 1 Commonwealth LR 23, 56.

\(^{64}\)The Latin tag *nemo agit in se ipsum* (“no one brings legal proceedings against himself”) illustrates the conceptual difficulties involved here.

\(^{65}\)*Bradken Construction Ltd v Broken Hill Proprietary Ltd* (1979) 145 CLR 107, 135-136 per Mason and Jacobs JJ; *Victoria v Commonwealth* (1971) 122 CLR 353, 379 per Barwick CJ. The Crown was however held to be one and indivisible in the case of *Federated Engine-Drivers & Fireman’s Association of Australia v Adelaide Chemical & Fertilizer Co Ltd* [1920] 28 CLR 1.
Supreme Court of Canada, drew a clear distinction between the Queen of Canada and of each province of Canada.\textsuperscript{66}

Within thirty years of the Canadian confederation, the unitary Crown and its prerogatives had fractured and become territorially dispersed. The Privy Council had found land in each province to be vested in the provincial Crown\textsuperscript{67}, and it had allowed provincial legislatures to assume such privileges as they deemed necessary\textsuperscript{68}. Finally, it had pronounced a provincial status equal to that of the central authority, within the Canadian confederation\textsuperscript{69}.

The operation of the Crown in the Canadian provinces reinforced the dispersion inherent in the federal principle\textsuperscript{70}. The major conflict in the post-Confederation years between the provincial and federal governments turned on the status of the provinces in the federation. From Liquidators of the Maritime Bank \textit{v} Receiver General of New

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\textsuperscript{66}Attorney-General of British Columbia \textit{v} Attorney-General of Canada (1889) 4 Cart 255, 263-264.

\textsuperscript{67}Attorney-General of Ontario \textit{v} Attorney-General for Canada (1896) AC 348.

\textsuperscript{68}Fielding \textit{v} Thomas (1896) AC 600.

\textsuperscript{69}Liquidators of the Maritime Bank \textit{v} Receiver General of New Brunswick (1892) AC 437.

\end{flushleft}
Brunswick\textsuperscript{71} onwards the provinces, and especially the provincial executives, were the beneficiaries of judicial interpretation. After a quarter-century long debate over the status of the Lieutenant-Governor, the courts found:

the Lieutenant-Governor ..... as much a representative of His Majesty for all purposes of provincial government as is the Governor-General for all purposes of Dominion government\textsuperscript{72}.

Thus, by the end of the nineteenth century, it could be argued that the Crown had assumed a dual personality- it had, in Canadian fashion, been federalised\textsuperscript{73}.

The evolution of provincial autonomy was not caused by the existence of the Crown, but the Crown was the means through which it was achieved. Thus it reflected autonomy which stemmed from independent historical, economic and cultural factors. But the existence of the Crown meant that each provincial government could claim, and

\textsuperscript{71}(1892) AC 437. The Judicial Committee of the Privy Council held that the prerogative powers of the Crown were divided along the same lines as the legislative powers, by the division of powers set out in ss 91 and 92 of the British North America Act 1867.

\textsuperscript{72}\textit{Liquidators of the Maritime Bank v Receiver General of New Brunswick} (1892) AC 437.

did so successfully, that it was imbued with some of the authority of the Crown.

Within the empire as a whole parallel developments were taking place. The advent of the Statute of Westminster 1931 removed colonial limitations of legislative repugnancy and constitutional incapacity. But this did not itself amount to political independence. This had been established at the 1926 and 1930 Imperial Conferences, with the adoption of the principle that “the Crown is the symbol of the free association of the members of the British Commonwealth of Nations”, and that “they are united by a common allegiance to the Crown”74.

The Balfour formula, given statutory form in the Statute of Westminster 1931, prescribed allegiance to the Crown as one of the conditions then obtaining for membership in the British Commonwealth. But as the Dominions individually entered the international arena75, that common allegiance implied less the unity of the Crown than its opposite, divisibility76.


75 Originally the doctrine was confined to internal affairs, rather than foreign relations, but the second followed almost as a matter of course.

But, whilst the right to advise the Crown was accorded the Dominions, there was still some uncertainty as to the true identity of the Crown. As late as the royal visit to Canada in 1939, the Dominions Office rejected the theory of divisibility:

It is by virtue of his succession as “King of Great Britain, Ireland and the British Dominions beyond the Seas .” that he is King in all parts of his Dominions. In this sense he is King in Canada in precisely the same manner in which he is King in the United Kingdom ... It is one kingship, but the King is in a position to act independently in respect of each or any part of his Dominions.77

But most of the leaders of the Commonwealth in the late 1940s believed that the Balfour formula should not be allowed to put the Commonwealth within a formal strait-jacket. To accommodate India within the new-style Commonwealth, the title of “Head of the Commonwealth” was adopted in the London Declaration at the Commonwealth Heads of Government Meeting of April 1949. In future membership was to be based not on allegiance but on a declared act of will.78


78This title was given legislative effect, in the United Kingdom, by the India (Consequential Provisions) Act 1949. Her Majesty the Queen was proclaimed as Head of the Commonwealth on 6 December 1952; Title of the Sovereign (1953) cmd 8748; de Smith, SA, “Royal Style and Titles” (1953) 2 ICQ 263-274.
As the Crown played the surrogate role of State in the stateless society, so it came to assume a unique role in the empire as well. Keith’s aphorism that “the Crown has always been imperial” had a constitutional significance that only gradually became manifest\(^7^9\). Once the distinction was accepted that the Crown could act in right of another realm, then it was only a matter of time before the division overcame the links between the realms.

### 5.3.3 The Division of the Sovereignty

The 1936 abdication of King Edward VIII strengthened the arguments for the divisibility of the Crown\(^8^0\) and, indeed, proved its validity. Each realm approached the problem of the abdication differently. Some sought to use the opportunity afforded to made manifest their own national identity in a symbolic way, by showing that the choice of Sovereign was theirs alone, and not dependent upon the United Kingdom. Others adopted more traditional approaches. But the trend was set by the former countries, led by South Africa and Ireland.

\(^7^9\)Keith, AB, *Constitutional Law of the British Dominions* (1933) 91.
The South Africa Act 1909 provided that the executive authority of the Union was vested in His Majesty and “His Majesty’s heirs and successors in the sovereignty of the United Kingdom”\textsuperscript{81}. Section 5 of the Status of the Union Act 1934 defined “heirs and successors” as persons “determined by the law relating to the succession of the Crown of the United Kingdom”. However s 2 of the Act said that “notwithstanding anything in any other law contained” no British Act extends to South Africa. His Majesty’s Declaration of Abdication Act 1936\textsuperscript{82} was not therefore part of the laws of South Africa.

It was assumed by the British government that since the royal title was parliamentary, it could only be altered by statute\textsuperscript{83}. However the South African government took the view that the instrument of abdication signed by the former king took effect \textit{proprio vigore}\textsuperscript{84} for all Commonwealth countries when signed by the king.

Subsequent South African legislation therefore served only the purpose of providing for the consequences of the abdication for the

\begin{footnotesize}
\item[80] Bailey, KH, “Abdication Legislation in the United Kingdom and the Dominions” (1938) 3 Politica 1 (pt 1), 147 (pt 2) 149, 153.
\item[81] s 3.
\item[82] Repealed for the purposes of the laws of New Zealand by the Imperial Laws Application Act 1988.
\item[83] A matter of simple interpretation, and, one would assume, unexceptional.
\item[84] By its own force.
\end{footnotesize}
former king and possible heirs of his body. However it is doubtful that the South African view of the matter was correct. Even if the king’s own act was intended to cause an effective demise of the Crown and it is clear from the wording of the Instrument of Abdication that the late king did not assume any such power it does not follow that that instrument alone would be effective in law to alter a statutory succession.

In terms of the Statute of Westminster 1931, the British government asked South Africa for formal request and consent to His Majesty’s Declaration of Abdication Act 1936. South Africa therefore passed His Majesty King Edward VIII’s Declaration of Abdication Act 1937, but enacted that the abdication had taken effect upon the Declaration being signed, rather than upon the passage of the British legislation.

The position of the South African government was deliberately planned, as the succession, according to orthodox theory, would have occurred automatically under s 5 of the Status of the Union Act 1934 upon the passage of the British Act.

85 For the parliamentary power to alter the succession see Cox, Noel, “The Law of Succession to the Crown in New Zealand” (1999) 7 Waik LR 49.
86 Demise of the Crown is the legal term for its transmission to a successor, usually by death, though occasionally, as here, by abdication.
87 His Majesty’s Declaration of Abdication Act 1936 Preamble, Schedule.
This approach conflicted with the developing doctrine of divisibility. Specific South African legislation was politically desirable, to make it clear that it was the Instrument of Abdication which resulted in a change of Sovereign of South Africa. It would be unacceptable to the nationalist party for the new Sovereign to owe his position to being either the next of “His Majesty’s heirs and successors in the sovereignty of the United Kingdom”88, or to a formal request and consent from the United Kingdom.

As the dates of the British and South African Acts differed, for a day the Crown was divided, with Edward VIII reigning one day less in South Africa than elsewhere in the empire.

Ireland also deliberately achieved a division in the Crown in 1936. The Executive Authority (External Relations) Act 1936 provided that Edward VIII remained king in the Irish Free State till 12 December 1936. This Act also restricted the powers of the Crown to signature of treaties and accreditation of envoys. This situation was not to last long however.

On 29 December 1937 a Constitution was adopted which was republican in form, if not in name. It made no mention of the Sovereign, but the government indicated that the Executive Authority (External Relations) Act 1936 would continue in force. The Sovereign was no

88South Africa Act 1909 s 3.
longer the head of the Irish executive, but merely an organ or instrument, authorised by the head of the State, the President of Ireland, to play a specific role in external affairs.

This status ended in 1949, when Ireland officially became a republic, and residual allegiance to the Crown and membership of the Commonwealth ended.\textsuperscript{89}

In Australia consent to the imperial legislation giving effect to the abdication of King Edward VIII was by resolution of each of the two Houses of Parliament on 11 December 1936, before the Westminster legislation was assented to.\textsuperscript{90}

Canada expressed its consent by an executive request and consent under s 4 of the Statute of Westminster 1931. Like South Africa, it also subsequently passed an Act to homologate its actions, although the abdication would have taken effect automatically upon the passage of the imperial Act, under s 2 of the British North America Act 1867.

In New Zealand consent was by executive action only. However, motions to ratify and confirm the assent given by New Zealand Ministers to the imperial Act were recorded in both Houses of the General

\textsuperscript{89}Republic of Ireland Act 1949.
\textsuperscript{90}Commonwealth Parliamentary Debates (11 December 1936) vol 153 p 2892-2896 (Senate) 2898-2926 (House of Representatives).
Assembly\textsuperscript{91}. Like Australia, there was no consideration given to passing local legislation, as it was believed that consent to British legislation was legally and politically sufficient. Unlike in Ireland and South Africa, national sentiment in New Zealand were not averse to the new king owing his title, at least in part, to an Act of the imperial Parliament.

After 1936 there were few overt moves to challenge or question the growing concept of the divisible Crown. The lead taken by South Africa and Ireland showed that a relatively minor and technical rules could have significant symbolic importance. But the evolution of the concept of the divisible Crown remained unsure. Although the earlier authority \textit{Re Ashman and Best}\textsuperscript{92} was badly reasoned and ought not be accepted as authority for a divisible Crown, the more recent \textit{Spycatcher} cases\textsuperscript{93}, in which the Attorney-General of the United Kingdom sought to enforce a secrecy agreement with the Crown, appear to have established that there

\textsuperscript{91}NZPD 1937 vol 248 p 5 (Legislative Council); NZPD 1937 vol 248 p 7 (House of Representatives). The abdication of the former king, and the accession of the new, was also proclaimed; New Zealand Gazette 11 December 1936 pp 2431-2432, 12 December 1936 p 2433.


\textsuperscript{93}Attorney-General for the United Kingdom v Wellington Newspapers Ltd [1988] 1 NZLR 129 (HC and CA).
is indeed now a separate Crown in New Zealand from that in the United Kingdom.

It is submitted however that the authority upon which this conclusion was based was inappropriate. The question of separate Crowns was considered in the Spycatcher cases in relation to the legal relationship between the United Kingdom and Hanover, England and Scotland, which do not constitute good analogies. The Crown is also divisible within the Australian and Canadian federations, but this observation of course risks confusion between jurisdiction and sovereignty. As Re Ashman and Best established, these distinctions can have important consequences.

1714-1837.

King James I failed to achieve a full governmental union between England and Scotland to accompany the personal union of 1603. By 1705 union or complete separation were the only options in the relationship of England and Scotland, whose relations were at a low ebb. Union took effect 1 May 1707.

For example, Mellenger v New Brunswick Development Corp [1971] 1 WLR 604 (CA).


[1985] 2 NZLR 224 (n) per Wilson J.

However, where a constitutional formula which can confer rights is provided, it is only a matter of time before those rights are claimed. If the Crown could be advised by local Ministries, then the Crown was likely to become diffused. The reason for the establishment of divisible Crowns lies not so much in legal formula, but in a changing political paradigm.

As can be seen in the above comparisons between South Africa and Ireland on the one hand, and New Zealand, Canada, and Australia on the other, the concept of a divisible Crown has evolved largely as a consequence of the increasing political independence of the Dominions. Thus South Africa emphasised that the king was Sovereign of South Africa irrespective of his position elsewhere. But it was only in the existence of the office that such a symbolic statement was possible. The United States of America had to create new symbols of national identity after 1776. These already existed in the Dominions, and were to be used increasingly after the 1920s, both symbolically, and practically.\textsuperscript{100}

The 1936 abdication led to acceptance of the practicalities of this right to advise the Crown. If the Crown could receive different advice in each country, the extent to which it could still be regarded as a single entity was uncertain.

\textsuperscript{100}Viz. in the delegation of the prerogative, and in the symbolic manifestations of separate titles.
The relevance to New Zealand was that, although to a great extent this country still looked to the Crown as the symbol of imperial unity, that unity was declining, leaving the Crown (or Crowns) to acquire a new role, or become increasingly marginalised. This new role was to include representing New Zealand, and the special relationship between Crown and Maori.

5.3.4 Allegiance to the Sovereign

One way in which the Crown was seen as a symbol of imperial unity was in the single status of subject. In New Zealand nationality was, until the passage of the Citizenship Act 1977, governed by the British Nationality and New Zealand Citizenship Act 1948, which was modelled upon the British Nationality Act 1948 (UK). As in that latter Act, the principle category was British subjects (who might also be called Commonwealth citizens). British subjects were divided into those who were citizens of the independent nations of the Commonwealth, and citizens of the United Kingdom and colonies on the one hand, and those who were New Zealand citizens on the other. British subjects no longer had to owe allegiance to the Crown, as formerly.
Under the provisions of the Citizenship Act 1977, citizenship is generally acquired by birth\textsuperscript{101}. The term Commonwealth citizen survives, having now completely superseded that of British subject. The Bill, introduced into Parliament as the Citizens and Aliens Bill, was intended to consolidate the British Nationality and New Zealand Citizenship Act 1948, and the Aliens Act 1948. Registration of British subjects, and naturalisation of aliens was replaced by grant of citizenship.

The Act recognised the increasing emphasis on individual citizenship in the Commonwealth, but did nothing to:

\begin{quote}
depart from due recognition of the common code of British subject or Commonwealth subject status. The Bill does, however, also seek to put on a more common footing aspirants for New Zealand citizenship who are on the one hand British subjects, and on the other aliens- this term meaning any non-British subjects\textsuperscript{102}.
\end{quote}

The Act provides that persons granted New Zealand citizenship may be required to take the oath of allegiance, unless exempted\textsuperscript{103}. It was thought that it was desirable that the oath be taken in all cases, but

\begin{flushright}
\textsuperscript{101} All those born in New Zealand after 1 January 1949.
\textsuperscript{102} Hon DA Hight, 10 June 1977, NZPD 1977 vol 410 p 553.
\textsuperscript{103} s 11. Foreigners, and Commonwealth citizens not subject of the Queen, would owe \textit{ligeantia acquisita}, not by nature but by acquisition or denization. Subjects of the Queen in other countries would now have to take the oath of allegiance, unless exempted.
\end{flushright}
administrative complications ruled this out as a practical proposition at that time\textsuperscript{104}.

The form of the oath is prescribed by law. Section 11 and the First Schedule of the Citizenship Act 1977 provides the following oath:

I, [Full name], swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith, and Her heirs and successors according to law, and that I will faithfully observe the laws of New Zealand and fulfil my duties as a New Zealand citizen. So help me God.

This oath is similar to the oath of allegiance now required only from judicial officers- judges, justices of the peace, coroners, and sheriffs, and certain others\textsuperscript{105}. The words in italics were removed by s 2 and the Schedule of the Citizenship Amendment Act 1979. The new form was:

I, [Full name], swear that I will be faithful and bear true allegiance to Her [or His] Majesty [specify the name of the reigning Sovereign, as thus: Queen Elizabeth the Second, Queen of New Zealand,] Her [or His] heirs and successors, according to law, and

\textsuperscript{104}Hon DA Hight, 9 November 1977, NZPD 1977 vol 415 p 4378.

\textsuperscript{105}Oaths and Declarations Act 1957, Part III. Barristers and Solicitors have not been required to take the oath of allegiance since 1983, though they are still required to take an oath of office; Law Practitioners Act 1982 s 46 (2), cf Law Practitioners Act 1955 s 9 (2). Members of Parliament are still required to take the oath, as are military personnel.
that I will faithfully observe the laws of New Zealand and fulfil my duties as a New Zealand citizen. So help me God.

This attempt to provide a form which does not require updating with a change of Sovereign has resulted in clumsy wording. It is also inappropriate that the royal style and titles used in the oath of allegiance should now have departed from the official form. However, it was clearly inspired by a desire to emphasise the New Zealand nature of the oath, though this can only be inferred as the Bill was not debated in Parliament\textsuperscript{106}.

From 1 July 1996 those required to take the oath has included those individuals who were subjects of the Queen in another of her realms, who were formerly exempt from the requirement to take the oath of allegiance in public, and until 1979 completely exempt\textsuperscript{107}.

The move was said to result from a debate on immigration, and to have been promoted by the United Party\textsuperscript{108}. About 3,500 people a year

\textsuperscript{106}It was introduced as part of the Statutes Amendment Bill.

\textsuperscript{107}"The Minister may, in such case or class of cases as he thinks fit, make the grant of New Zealand citizenship conditional upon the applicant taking an oath of allegiance in the form specified in the First Schedule to this Act". Most likely to be affected were immigrants from the United Kingdom, Australia, Canada, and, before 1997, Hong Kong.

\textsuperscript{108}New Zealand Herald 7 June 1996, quoting the Minister of Internal Affairs, the Hon Peter Dunne.
now attend citizenship ceremonies run by local councils\(^{109}\). These ceremonies provided an opportunity for new citizens to make a public commitment to their new obligations\(^{110}\).

Now all people becoming New Zealand citizens, whether or not they were subjects of the Queen overseas, must publicly take the oath of allegiance to the Queen of New Zealand. This has ended another of the remaining symbolic links to an imperial Crown, especially since the oath of allegiance has omitted "Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith" since 1979\(^{111}\), though these remain part of the Queen's official style\(^{112}\).

The emphasis is clearly on New Zealand, and whatever their origins, new citizens swear allegiance to the Queen of New Zealand. Citizenship and allegiance have once again become closely aligned. In a parallel development, "subject of the Queen" in s 17 of the Constitution

\(^{109}\)And a further 9,500 who were formerly required to take the oath annually. All councils receive a small allowance for the entertainment of new citizens.

\(^{110}\)In both Australia and Canada however, suggestions that the oath of allegiance be abandoned, or be rewritten to remove reference to the Sovereign, have been considered. This has been motivated by concerns for national identity, particularly republicanism.

\(^{111}\)The oath of allegiance taken in Australia does not specifically mention Australia; Schedule to the Commonwealth of Australia Constitution Act 1900.

\(^{112}\)Royal Titles Act 1974.
of Australia 1900 is now taken to mean subjects of the Queen of Australia\textsuperscript{113}, rather than of the United Kingdom and Dominions overseas.

\textsuperscript{113}Street v Queensland Bar Association (1989) 168 CLR 461, 505, 525, 541, 554, 572.
5.4 Conclusion

As legislative authority might appear to forever rely upon the prior authority of an imperial Parliament, so the authority of the Crown in New Zealand depends upon the authority of the (formerly imperial) Crown. Whereas the former is a technical issue which has concerned few but constitutional lawyers, the latter is central to the country’s identity, and has been more widely analysed. Indeed, the concept of the divisible Crown is now generally accepted\textsuperscript{114}, and in this concept lies the true political and legal independence of New Zealand.

In the development of legislative independence there was a significant change in authority, but the new powers were evolutionary, inherited powers. With the development of executive independence the change in authority was accompanied by a more potent symbolic and conceptual change. The Crown, rather than being the source of imperial authority, became the source of local authority.

The development of the concept of the divisible Crown came about as the Dominions obtained control of the prerogative. One king, several kingdoms gradually became several distinct kingships. This was not as the result of any conscious policy decision, but merely as a result of the

\textsuperscript{114} Though there remain uncertainties as to the exact consequences of this, see for example, Cox, Noel, “The Law of Arms in New Zealand” (1998) 18(2) NZULR 225.
natural evolution of domestic laws and practices in the absence of an insistence on uniformity by the imperial authorities. Thus in 1936 South Africa asserted its independence by insisting that the king owed his title to local rather than imperial law, and asserted this successfully.

The Crown as an imperial institution has become the property of each of the former imperial possessions. Some countries have chosen to adapt that symbolic institution to their own uses, just as the other institutions of Westminster government have been adapted and modified. In each case however, the first step has been the acquisition of control over the executive, and this caused a partial division of the Crown. The expression national Crown might be preferable to separate sovereignty, in that the former allows the person of the Sovereign to continue to be seen as British, but acknowledges that the institution has in some way been nationalised. This was also expressed through the evolution of citizenship, and allegiance to a national Crown, from the status of British subject.

To cite Evatt again, “through the evolution of the Crown little or no formal legal changes were needed for states to change from being colonies to being fully independent”\textsuperscript{115}.

It was a logical, and probably inevitable step, for the imperial Crown to develop into distinct local Crowns\(^\text{116}\). It followed that in each, though legal continuity might be maintained to an historically prior imperial enactment or prerogative measure, ultimate authority depended upon local laws and constitutional principles. In that respect, at least, the constitution must be seen as autochthonous. Thus, although theories of parliamentary supremacy might be uncertain, it was accepted by the 1940s that the Sovereign was separately head of State of each realm. This concept had not been legislated for, it represented the acceptance of a new grundnorm, or principle of the constitution, one which more closely matched the political realities.

The Crown, in acting as the tool or mechanism through which New Zealand acquired political independence, also became a principal focus of governmental authority. Without an entrenched Constitution, which in the United States of America and to some extent in Canada and Australia also became an alternative symbolic focus of authority\(^\text{117}\), the Crown continued its traditional function as a constitutional focus.

\(^{116}\)Such developments are not, of course, limited to the Commonwealth. Norway became independent of Sweden in 1905 by enthroning a new king, and Brazil’s independence from Portugal was established in 1822 when the senior branch of the Bragança family became Emperors of Brazil; Leiren, Terje, “National Monarchy and Norway” (1978) University of North Texas PhD thesis.

Part 3

THE DEVELOPMENT OF A SEPARATE NEW ZEALAND CROWN

In Part Three, “Development of a separate New Zealand Crown”, the development of a new constitutional model will be examined\(^1\). The hypothetical model, which postulates that the constitution is autochthonous, will be tested by looking at the evolution of the Crown and particularly at the development of the office of Governor-General.

This evolution would seem to suggest that there is now a New Zealand-based Crown in practice as well as in law. In particular, the absence of the Sovereign has led both to the Governor-General substituting for the Sovereign in almost all particulars, and to the development of a distinct national vice-regal office.

Whilst in Parts One and Two emphasis has been largely upon the role and status of the Crown at a conceptual, legal and theoretical level, the emphasis now shifts to the practical and symbolic aspects of the role of the Crown. This begins with an examination of the development of the separate national Crowns.

\(^1\)Chapters VI and VII.
Chapter VI:

A SEPARATE CROWN

6.1 Introduction

The previous Chapter provided an outline of the development of executive independence. The development of the concept of the divisible Crown occurred as the Dominions obtained control of the prerogative. One king, several kingdoms gradually became several distinct kingships. This was not as the result of any conscious policy decision, but as a result of the natural evolution of domestic laws and practices in the absence of an insistence by the imperial authorities on uniformity.

The Sovereign might have lost his or her personal power, but the institution of the Crown continued. The powers of the Governors-General were generally extended at the expense of the Sovereign, though seldom were they exercisable at the Governor-General’s discretion. Rather, they became a significant source of governmental authority, exercised at the behest of Ministers.

The subsequent evolution of this process will be traced in Canada, Australia, and New Zealand. In each country different forces and influences were at work, but each shared certain common aspects. The development of national Crowns depended particularly upon two factors:
the identification of the Sovereign with the individual country, and the
patriation of the office of Governor-General. It is the latter which has
been most decisive, as it has affected the way in which the office of
Governor-General has been perceived. But the former is important also,
as the Sovereign is the ultimate personification of the Crown.

The gradual increase in control over the Crown in the Dominions
led to the adoption of distinct royal styles and titles, and eventually the
acceptance of a separation of the one imperial Crown into many.

National identity did not yet demand abandonment of the Crown,
but did demand that it be a national Crown. Yet this partial unity is still
reflected in elements of the constitutions of many of the realms of the
Queen, including New Zealand.

The first section considers the succession to the throne. This shows
how there is now uncertainty as to the unity of the succession, something
which should have been clarified after the Abdication Crisis in 1936, yet
was only seriously considered more recently. The symbolic and practical

\footnote{See Chapter VII.}

\footnote{Royal Titles Act 1901, Accession Declaration Act 1910, HM
Declaration of Abdication Act 1936, Regency Act 1937, Regency Act
1943, Regency Act 1953, Royal Titles Act 1953 (UK), Royal Titles Act
1953, Royal Titles Proclamation, 28 May 1953, Royal Titles Act 1974.}

\footnote{HM King Edward VIII’s Declaration of Abdication Act 1937 (South
Africa).}
importance of the Sovereign owing their title to national laws, rather than to the laws of the United Kingdom, is very important.

The second section looks at the development of national Crowns. In particular, this compares and contrasts the different approaches to the Crown in the principal realms. As a generalisation, in Canada the Crown has tended to be used as a tool of government (in which its practical importance is paramount), whilst in Australia there has been an inclination to remove the Crown altogether. New Zealand has adopted a middle way, though one which is perhaps inconsistent and lacking in certainty.

The third section examines the changes in the royal style and title. This has evolved as the Crown has evolved. But not only has it reflected changing notions of independence, it may also have been one of the influences which encouraged acceptance of some of the symbolic attributes of independence.
6.2 Legislation affecting the Unity of the Crown

There was formerly a convention that statutory uniformity of laws of succession to the Crown would be maintained in those parts of the Commonwealth that owed allegiance to the Crown\(^5\). This convention was recognised in the report of the 1930 Imperial Conference\(^6\), and was recited in the second paragraph of the preamble to the Statute of Westminster 1931. That Statute itself provided the mechanism of request and consent to maintain the unity of the Crown\(^7\):

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom\(^8\).

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\(^6\)Imperial Conference (1930) Parliamentary Papers, vol 14 1930-1 cmd 3717.

\(^7\)Statute of Westminster 1931, ss 1, 4 (in relation to Canada, Australia, and New Zealand); Republic of Ireland Act 1949, s 3(3); British North America Act 1867, s 1, Schedule, para 48; South Africa Act 1962, s 2(3), Sch 5; Northern Ireland Constitution Act 1973, s (2) (1), (2), Sch 2, para 1.

\(^8\)Preamble to the Statute of Westminster 1931.
The preamble to the Statute of Westminster could not of course be completely effective, as it purported to bind subsequent Parliaments, something which orthodox theory did not allow. The absence of a statement as to concurrence would not invalidate a statute. But the Statute of Westminster procedure was generally followed for some decades.

The Royal Titles Act 1953 (UK) and companion legislation in the Dominions departed from one of the two principles enunciated in the preamble to the Statute of Westminster, namely unity of title. But it may have been constitutionally inappropriate to depart from the second, unity of person. Since 1953 however, the prospect for just such a division has grown, if indeed there was any doubt after 1936.

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9 See Chapter 4.3.

10 British Coal Corporation v the King [1935] AC 500 (PC).

11 As in 1936, see Chapter 5.3.3.

12 The style and title proclaimed for the United Kingdom and its dependencies was: “Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith”; Royal Titles Act 1953 (in effect 26 March 1953).

13 Bogdanor, Vernon, The Monarchy and the Constitution (1995) 269. Bogdanor seems to believe that this is still true today, but this would seem to not necessarily be so, at least for those countries where the succession is not restricted to the British Sovereign; Cox, Noel, “The Law of Succession to the Crown in New Zealand” (1999) 7 Waik LR 49.

14 See Chapter 5.3.3.
The law of the succession can only be understood in the context of the history which formed it, whose roots extend beyond the reach of historical memory\textsuperscript{15}. Although the modern notion of a separate sovereignty would see the Crown as potentially divisible in actuality as well as in law, the only occasion of an actual separation of inheritance occurred in 1936\textsuperscript{16}.

Any alteration by the United Kingdom Parliament in the law touching the succession to the throne would, except perhaps in the case of Papua New Guinea\textsuperscript{17}, be ineffective to alter the succession to the throne in respect of, and in accordance with the law of, any other independent member of the Commonwealth which was within the Queen’s realms at the time of such alteration. Therefore it is more than mere constitutional convention that requires that the assent of the Parliament of each member of the Commonwealth within the Queen’s realms be obtained in respect of any such alteration in the law\textsuperscript{18}.


\textsuperscript{16}See Chapter 5.3.

\textsuperscript{17}Papua New Guinea Constitution Act 1975 s 83.

\textsuperscript{18}Statute of Westminster 1931, preamble; His Majesty’s Declaration of Abdication Act 1936, preamble.
One effect of New Zealand’s adoption in 1947<sup>19</sup> of sections 2-6 of the Statute of Westminster 1931 was that any alteration to the law of New Zealand on the succession to the throne or the royal style should be made by or with the consent of the New Zealand Parliament<sup>20</sup>. But s 26(1) of the Constitution Act 1986 declared that the 1947 Act “shall cease to have effect as part of the law of New Zealand”.

Since the same Act also declared that the Parliament of the United Kingdom no longer had the authority to legislate for New Zealand<sup>21</sup>, legislation by request and consent was also ended. The cumulative effect is that any change to the law of succession in the United Kingdom would have no effect in New Zealand<sup>22</sup>.

Section 5(2) of the Constitution Act 1986 states that every reference in any document or instrument to the Sovereign shall, unless the context otherwise requires, be deemed to include a reference to the Sovereign’s heirs and successors. But it is not immediately clear what precisely is meant by to Sovereign’s successor as determined in

<sup>19</sup>New Zealand Constitution (Amendment) Act 1947.

<sup>20</sup>The right to legislate on the succession contrary to cl 2 of the Constitution of Australia was denied by Sir Robert Menzies in 1936, though conceded as Prime Minister in 1953; Commonwealth Parliamentary Debates (House of Representatives, 11 December 1936) vol 153, pp 2908-2909; Commonwealth Parliamentary Debates (House of Representatives, 18 February 1953) vol 221, pp 55-56.

<sup>21</sup>See Chapter IV.
accordance with the Act of Settlement 1701 and any other law which relates to the succession to the Throne. It would appear, as a simple matter of statutory interpretation, to mean the law of New Zealand, not that of the United Kingdom.

Any change in the law of succession would have to be enacted in each of the Queen’s realms for unity of person to be maintained.

No legislation purporting to affect the unity of person, as distinct from the unity of title, of the Sovereign, has been passed since 1936. However, in London on 27 February 1998, Lord Wilson of Mostyn, Parliamentary Under Secretary of State for the Home Office, announced that the British government supported changing the law of succession to the throne. This came in a debate on a private member’s Bill, sponsored by Lord Archer of Weston-Super-Mare, intended to allow for the

23 Preserved for the purposes of the law of New Zealand by the Imperial Laws Application Act 1988.
24 The 1988 Australian Constitutional Convention recommended the insertion of an additional power under s 51, enabling the Parliament to make laws for “the succession to the throne and regency in the sovereignty of Australia”.
25 Another private members’ Bill, introduced by Lord Forsyth of Drumlean, was refused a first reading in the House of Lords on 2 December 1999; The Times, London, 3 December 1999.

The law of succession is now, in part because of the development of the doctrine of a divisible Crown, but largely because of the Constitution Act 1986, determined solely by the law of New Zealand. Were the United Kingdom Parliament to enact any changes to the law, these would effect a separation of the Crown, as they would be legally ineffective in New Zealand.

But New Zealand political leaders have not yet fully appreciated this situation. In a letter to the author, the Rt Hon Jenny Shipley, Prime Minister (or a member of her staff), wrote that:

> The Government would expect to be consulted, along with other Commonwealth countries, before any changes to the law of succession were made.

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27Bruce Beetham, MP, attempted to introduce a similar Bill into the New Zealand Parliament more than ten years earlier. The Bill was opposed by the government on the grounds that alteration in the law of succession was a matter for the Commonwealth as a whole, and that it was not the New Zealand Parliament to force the issue; NZPD 1982 vol 443 pp 113-117, 164-173.

28David Bamber & Jonathan Petre, “Catholics to regain right to the throne” Daily Telegraph, London, 5 November 2000. The Guardian newspaper has also launched a campaign to challenge the succession, as part of a wider attack upon the monarchy; Noel Cox, “Royal succession campaign curious” New Zealand Herald, 13 December 2000.
Clearly, it was still believed that any changes by the United Kingdom Parliament would be effective in New Zealand law, though this is not the view of the British Government. Some constitutional uncertainties thus remain to be settled, but they are now few. But they illustrate nevertheless the dangers of relying too much on the assertion that Elizabeth II is Queen of New Zealand. She is, but only because she is the British Sovereign. Legal notions of separate sovereignty have practical and conceptual limitations.

South Africa asserted this notion in 1936, but while the person of the Sovereign remains common to all the realms, there appears to be a reluctance to take the divisibility of the Crown to its logical conclusion. It appears probable that this is because although the realms enjoy the benefits of independence, they do not appear to be willing to accept the possibility of a local Sovereign.

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31This would also seem to accord more with the popular perception of the Queen (though not necessarily of the Crown); Interview with Sir Douglas Graham, 24 November 1999.
The division of the Swedish and Norwegian Crowns was a viable option in 1903. But it appears to be an unlikely option for the Commonwealth, given the attitude exemplified by Mackenzie King, that Dominion autonomy was symbolised in the subservience of the monarchical Crown to the local political Crown, that is, the Cabinet. Indeed, one of the arguments raised for the abolition of the monarchy in Australia, perhaps facetiously, was the fear that the Queen and the Royal Family would move en mass to Australia in the event of Great Britain becoming a republic.

The consequence is that, although legally and conceptually the Crown may be divisible, its retention in the realms would appear to be conditional upon the maintenance of a unity of person. Thus the Crown may be legally distinct, but the person of the Sovereign appears to be inherently common to all the realms. But this has not prevented the development of symbolic independence, for the person of the Sovereign is but one aspect of the Crown. The focus has often, therefore, been upon the other aspects of the Crown, whether symbolic or practical.


35 “Why we won't have Charles' by Whitlam”, Auckland Star, 4 March 1981.
6.3 The development of national Crowns

As the Sovereign came to act solely on the advice of the appropriate Ministers, and, at the same time the Governor-General ceased to be an agent of empire, so the Crown extended its role as the legal and symbolic embodiment of each country in turn.

As the doctrine of the divisibility of the Crown developed, so the Crown began to develop distinct features in each of the Dominions and later realms. The Governors-General was chosen from among the people of the country, and represented less the Sovereign than the country itself. Both the symbolic aspects of the Crown, and its practical role, changed.

These developments continue, in the case of Australia, to the point where the Crown may be removed altogether from the constitutional framework of the country, and in Canada, that the focus of the Crown is on the Governor-General, rather than the Sovereign. These contrasting approaches will be compared and contrasted with that in New Zealand.

6.3.1 The Crown as a tool of government: Canada

Although, for Canada, the final legislative links with the United Kingdom were finally removed only in 1982, well before then the British
origins and nature of the Crown were being deliberately symbolically de-emphasised. Though few would have been concerned with the legal niceties of the Constitution, the apparent continuance of the British Queen as the Sovereign of Canada was too obvious for political leaders to ignore.

Yet, what might be thought the obvious conclusion, that Canada become a republic, was not widely advocated\(^36\). Although support for a republic was much more pronounced amongst the French nationalists of Quebec that elsewhere in Canada\(^37\), this did not equate to active steps being taken in this direction by Canada as a whole. Separation from Canada, or recognition of Quebec as a distinct society, were more important to the leaders of the Francophone community\(^38\).

Various reasons might be advanced as to why the Crown has continued to be regarded as a useful tool of government. Trudeau held the pragmatic view that abolition of the monarchy would be more trouble than it was worth\(^39\). Aside from the constitutional pre-occupation with Quebec, Canada’s desire to distinguish itself from the United States of

\(^{36}\) Though certain groups, particularly the French population, were opposed to the monarchy as symbolic of the heritage of English Canada.


America makes it less likely than Australia to abandon the monarchy. Smith would go further, and rejects a minimalist interpretation of the Crown’s position in the polity. He advances the proposition that the Crown as a concept should be taken seriously, and asserts that the Crown is the organising force behind the executive, legislature, administration, and judiciary.

According to Smith, in the Canadian federal structure the Crown exercises determinative influence over the conduct of intergovernmental relations. The result is a distinctive form of federalism best described as a system of compound monarchies.

The Crown played an essential role in converting the highly centralized constitution originally designed by the Fathers of Confederation into the more balanced and decentralized system of today, a system in which the provinces are not inferior, subordinate governments but instead exercise de facto coordinate sovereignty with that of the federal government.

The Crown has also been important precisely because it is the established mechanism through which Canadian government is

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conducted. The Canadian Constitution of 1867 was deliberately unclear in several key areas. This was because, as the Quebec Resolution stated:

The Conference ... desire to follow the model of the British constitution so far as our circumstances will permit ...

and

the Executive authority or government shall be ... administered according to the well-understood principles of the British constitution.\[43\]

Flexibility was important, and this the Crown gave Canada.

Canadian governments benefited from the vagueness of a system of government based upon conventions rather than written rules. But not only the federal government gained, provincial governments benefited also. Thus the practical importance of the Crown lay in the authority which it conferred upon the provincial governments.

The Crown had assumed a dual nature in Canada long before the concept of the divisibility of the Crown was fully developed in the


Dominions\textsuperscript{44}. But the application of this later concept also led to the Canadian Crown changing. Acting only on the advice of Canadian Ministers, and no longer an agent of empire, the Governor-General assumed a position increasingly analogous to that the Sovereign held in the United Kingdom, leaving little room for the Sovereign\textsuperscript{45}.

The symbolism of the Crown was therefore reworked, rather than discarded. In Canada, rather than a call for a republic, there has been to a “separation of the person of the monarch from the concept of the Crown”\textsuperscript{46}. This has however tended to diminish the dignity of the Queen’s person, and may also ultimately diminish the practical role the Crown plays in Canadian government\textsuperscript{47}.

After the return to power of the Liberal Party in 1963, the new government, influenced by the proponents of bilingualism, set out to reform the Crown in Canada as a specifically Canadian institution\textsuperscript{48}.

There was a deliberate rejection of the historic Crown with its anthem, emblems, and symbolism, which made accessible a past the

\textsuperscript{44}See Chapter 5.3, and Attorney-General of British Columbia v Attorney-General of Canada (1889) 4 Cart 255, 263-264 per Jounier J.

\textsuperscript{45}Who did, however, open Parliament in person, for the first time in Canada, in 1957.


\textsuperscript{47}It has also led to the development of loyalty to an indigenous Crown; Lower, ARM, “Origins of Democracy in Canada” in Heick, History and Myth (1975) 26.
government of the day rejected. The new Crown was to be “rooted in the future, not in the past”⁴⁹. This did not mean rejection of the Crown, but moulding it to a new form, one symbolic of multiculturalism and modernity.

The full range of Canadian symbolism was reviewed. The national anthem, *O Canada*, replaced *God Save The Queen* as Canada’s national anthem. The older piece was retained as a royal anthem for use at royal and vice-regal occasions⁵⁰.

The Canadian flag, adopted in 1965⁵¹, replaced an earlier flag of traditional imperial design, of which the most distinctive feature was the Union Flag of the United Kingdom in the canton. A new flag for the Governor-General was adopted in 1981⁵².

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⁵⁰ And includes an official French text, authorised for the Queen’s coronation in 1953.
⁵¹ By royal proclamation 15 February 1965.
⁵² Traditionally the flag used by a Governor-General was of royal blue, with the royal crest, a crowned lion, in the centre, and beneath this a gold scroll with the name of the country in black letters. The flags used in Australia and New Zealand are still of the traditional pattern.

The flag used by the Governor-General of Canada, adopted 23 February 1981, has a blue field, and the crest of the Coat of Arms of Canada surrounded by a wreath of red and white. This design replaced the earlier banner of arms with her royal cypher in the centre on a disc within a chaplet of golden roses. The quarters represented England, Scotland, Ireland, and France, the countries from which Canada was settled. In the base was a red maple leaf for Canada itself.
The Order of Canada in 1967 finally replaced the British honours system, the awarding of which had been the subject of controversy since the first decades of the twentieth century. All of these changes reflected a conscious effort to modernise, but at the same time to preserve some links with the past.

It has been said that Canada has evolved “from constitutional monarchy with full parliamentary supremacy to democracy with sovereignty exercised by the people ... Canada is, de facto, now a republic; the people of Canada are sovereign.”

Whilst this claim appears rather far fetched (in that the Governor-General remains de facto head of State in the name of the de jure head of State), it is true that the paradigm can change. If the perception is that the Crown has no symbolic or practical role to play, then the next step, that

53 In 1919 the Canadian Parliament requested the imperial Parliament at Westminster to legislate to bring an end to the validity of hereditary titles granted to certain Canadian residents on the death of the original holders; Keith, AB, The Dominions as Sovereign States (1938) 86.

54 The Royal Victorian Order, awarded on the personal initiative of the Sovereign, was revived from the early 1970s, and these awards have been published in Canada Gazette from 1983 (backdated to 1972); “The Royal Victorian Order” (1993) Fact Sheet H-5.

of removing the Crown, is that much easier. Certainly, this approach has
been more widely advocated in Australia.

6.3.2 The alternative- Removal of the Crown: Australia

The perception that the Crown has no role to play is well illustrated
by the example of Australia. Sharman argues that Australia, like Canada,
is a compound republic, “in the sense that its institutional design relies
predominantly on the dispersal of power to achieve individual liberty and
governmental responsibility”. Yet, in Canada, it was the dispersal of the
Crown itself which arguably led to greater provincial autonomy, or at
least allowed it to be achieved with less disruption than otherwise might
have been.

While some political leaders in Canada sought to solve the
perceived dilemma of retaining the British Sovereign as head of State by
a “separation of the person of the monarch from the concept of the
Crown”, the Labour Party in Australia sought to remove the Crown

56Sharman, Campbell, “Australia as a Compound Republic” (1990) 25
Politics 1.


58Doubtless comparisons with the history of United States federalism
would be worthwhile in this regard.
altogether. The wider Australian republican movement has however been motivated by concerns about political power rather than merely symbolism, to a much greater extent than in either Canada or New Zealand\(^\text{59}\).

The year 1975 was the first that many people took an interest in Australian constitutional theory. Before that republicanism was more a matter of arguments about egalitarianism, Pacific or Asian destiny, or cultural identity. After 1975 republicans discussed the role of the Senate and the extent of the reserve powers of the Governor-General. The focus became the Constitution itself\(^\text{60}\), at least until the republic referendum process began in earnest in the mid-1990s, when the focus again shifted to symbolism\(^\text{61}\).

The events of 1975- when the Governor-General dismissed the Prime Minister after the government had failed to secure the passage of the Budget in the face of the opposition of the upper house- have been discussed and analysed at great length elsewhere\(^\text{62}\). They will be

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\(^{59}\)The dichotomy between symbolism and substance was highlighted by the 1999 constitutional referendum campaign, which faltered because many voters were unhappy with the model of republic proposed. See Chapter 9.3.1.


\(^{61}\)See Chapter 9.3.1.

examined briefly in Chapter 8.3. As a consequence of these events, the Crown became involved in what was at its heart a political controversy, which had highlighted the peculiar constitutional circumstances of Australia. Whilst republican agitation grew, especially within the Labour Party, efforts were made, particularly after 1977, to emphasise the Australian nature of the monarchy.

Although the Labour Party would have preferred to remove the institution altogether\(^\text{63}\), a compromise saw the Queen losing the last of her right to exercise any royal powers for Australia, unless actually present\(^\text{64}\). Amongst the symbolic changes of this time were the institution in 1975 of the Order of Australia, although the award of British honours on the advice of the Australian state and federal governments only finally ceased in 1990.

Unlike in Canada, in Australia the Crown was not generally seen as a source of authority for the states. The Crown was not generally seen as a source of state authority because the Constitution itself assumed much of this function. It was due to the relative weakness of state government, and in particular, the absence of separatist feeling such as that found in

\(^{63}\) A policy which they formally adopted in 1991, see Chapter XI.

\(^{64}\) Under the provisions of the Australia Act 1986.
Quebec\textsuperscript{65}. However, in the 1970s the Queensland government, in its disputes with the Commonwealth government, sought to rely upon a separate style of the Queen of Queensland\textsuperscript{66}, though with little effect.

The symbolic and practical role of the Crown was less pronounced in Australia than in Canada.

\textbf{6.3.3 The middle path: New Zealand}

In neither Canada nor Australia were governmental agencies overly keen to acknowledge the continued presence of the British Sovereign as Queen. The solution in Canada, the “separation of the person of the monarch from the concept of the Crown” led to the Governor-General enjoying greater formal powers, which were now denied the Queen. But the position of the Crown also suffered from the low standing of the office of Governor-General, for long regarded as the puppet of the

\textsuperscript{65}The separatist feelings of states such as Western Australia are comparatively weak, though not to be dismissed as non-existent.

\textsuperscript{66}Introduced in an amendment to the Constitution by Sir Johannes Bjelke-Petersen; Constitution Act Amendment Act 1977 (Qld). This was removed from the Constitution Act 1867 (Qld) in 1987.
government of the day\textsuperscript{67}. In Australia, the Labour Party sought to achieve the same result by removing the Crown altogether.

New Zealand has not yet had the same emotional or nationalist conflict\textsuperscript{68}. The Governor-General has for long enjoyed effective delegation of the royal powers. The office has not been consciously remodelled as a head of State, partly because New Zealand is less inclined to public display\textsuperscript{69}, and partly because most people appear to be content with the status quo, even if not greatly enthusiastic about it\textsuperscript{70}. Nor was there traditionally the same prospects of political involvement by the Governor-General as was possible in Australia, where there were particular responsibilities apparently incumbent upon the office due to the entrenched constitution and bicameral parliament.

The Crown indeed has become more entrenched (though not necessarily in the legal sense), and the distinction between the Queen and her representative has become blurred. There has been no deliberate separation of the person of the monarch from the concept of the Crown.


\textsuperscript{68}The Maori attitude to the Crown was discussed in Chapter III.

\textsuperscript{69}See Chapter 8.2.

\textsuperscript{70}Interview with Sir Douglas Graham, 24 November 1999.
indeed, the opposite has occurred\textsuperscript{71}. As discussed in Chapter III, the existence of the Treaty of Waitangi and the special relationship between Crown and Maori is an important factor preserving a personal involvement for the Sovereign\textsuperscript{72}.

The Crown has not been used as a source of governmental authority by separate agencies, as it was by the Canadian provinces. But the relationship between Crown and Maori in the Treaty of Waitangi has been critical to the development of New Zealand. The importance of the personal connection with the Sovereign remains strong for many Maori, who would prefer that the Crown not have an exclusively national identity\textsuperscript{73}. It is equally important to them that the Crown remains in some respect distinct from the government of the day\textsuperscript{74}.

The Governor-General has not been encouraged to assume responsibility for the whole of the royal prerogative\textsuperscript{75}. The question of

\textsuperscript{71}Section 13 of the Constitution Act 1986 makes it clear that Her Majesty part of New Zealand Parliament, not just when present in person.

\textsuperscript{72}Assent to Bills is normally given in private, and it is no coincidence that the Queen assented to the Waikato Tainui Raupatu Claims Settlement Bill in a public ceremony in 1995. The last time assent was given by the Sovereign in person in the United Kingdom was in 1854.

\textsuperscript{73}Interview with Sir Douglas Graham, 24 November 1999; Interview with Georgina te Heuheu, 7 December 1999.

\textsuperscript{74}See Chapter 3.4.

\textsuperscript{75}Although the wording of the 1983 letters patent indicate that delegation was intended, in practice certain matters are regarded as being left in the
whether the Sovereign herself could exercise the statutory powers conferred upon the Governor-General was settled by the Royal Powers Act 1953:

s 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 either by Her Majesty in person or by the Governor-General.

(2) It is hereby 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 advice and consent of the Executive Council of New Zealand.

Since the advent of the Royal Powers Act 1953 the powers bestowed upon the Sovereign may be exercised by the Governor-General or by the Sovereign, and powers bestowed upon the Governor-General may be exercised by the Sovereign. Unlike in Australia there was no formal requirement that the Sovereign be actually present\(^\text{76}\).

However, in the 1970s and 1980s a series of statutes affected a considerable alteration in the constitutional arrangements in New Zealand, principally to emphasise New Zealand aspects of the constitution. The first measure was the Seal of New Zealand Act 1977.

\(^{76}\) Australia Act 1986, Royal Powers Act 1953 (Australia).
This provided for the replacement of the Public Seal of New Zealand\textsuperscript{77}, and any British seals which had formerly been used on documents issued by the Governor-General and by the Queen in relation to New Zealand\textsuperscript{78}. Specifically, the Commissions appointing Governors-General had been sealed with the Signet, the principal seal in the custody of the British Secretaries of State, as was required by the 1917 Letters Patent\textsuperscript{79}.

The Seal of New Zealand\textsuperscript{80} is now used on any instrument that is made by the Queen or by the Governor-General, on the advice of a Minister of the Crown, or on the advice and with the consent of the Executive Council of New Zealand\textsuperscript{81}. The practice now is to seal all royal warrants, letters patent and other prerogative instruments in New Zealand\textsuperscript{82}. No longer are any British seals used for New Zealand documents signed by the Queen.

\textsuperscript{77}The earlier seal was, of course, the Public Seal of New Zealand, and a New Zealand Gazette notice dated 29 June 1959 (vol 2 p 1039), signed 28 February. The impression illustrated in the 1977 proclamation was a copy of that appearing in the 1959 New Zealand Gazette, presumably because the new seal was not yet available for photographing.

\textsuperscript{78}s 2(1).

\textsuperscript{79}In practice, the only documents sealed with seals other than the Public Seal were those executed outside New Zealand.

\textsuperscript{80}The specific form of the Seal is prescribed by royal proclamation under the authority of the Seal of New Zealand Act 1977, the Seal of New Zealand Proclamation 1977 cl 4.

\textsuperscript{81}s 3(1).

\textsuperscript{82}Generally, see Brookfield, FM, “The Reconstituted office of Governor-General” [1985] NZLJ 256, 257.
Next, and more significant, were the changes introduced in the Constitutional Provisions Bill. These were enacted as the Royal Powers Act 1983, Administrator’s Powers Act 1983, and the Acts Interpretation Amendment Act 1983\textsuperscript{83}. The opposition Labour Party was fully consulted, and agreed to the provisions, which were designed to remove the last vestiges of colonial status from the constitution. The specific purpose of the Bill was to ensure compatibility between the draft letters patent constituting the Office of Governor-General, and current statute law\textsuperscript{84}.

The Royal Powers Act 1983, which bound the Crown\textsuperscript{85}, stated that:

\begin{quote}
\textit{s 3(1) It is hereby declared that every power conferred on the Governor-General by any enactment is a royal power which is exercisable by the Governor-General on behalf of Her Majesty the Queen, and may accordingly be exercised either by Her Majesty in person or by the Governor-General.}
\end{quote}

\begin{quote}
\textit{(2) It is hereby 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 advice and consent of the Executive Council of New Zealand.}
\end{quote}

\textsuperscript{83}Updating statutory references to the Governor-General.

\textsuperscript{84}The Act was introduced as part of the Constitutional Provisions Bill. As with most other significant constitutional measures, there were no public submissions on the Bill; Hon DMJ Jones, NZPD 1983 vol 451 p 1276.

\textsuperscript{85}s 2. A canon of construction holds that the Crown is not bound by statute in the absence of express words or necessary intention; \textit{Gorton Local Board v Prison Commissioners} (Note) [1904] 2 KB 165, 168.
The only change between s 2(1) of 1953 and s 3(1) of 1983 is that “he” is replaced by “the Governor-General”. Section 2(2) of 1953 is identical to s 3(2) of 1983.

The Constitution Act 1986 was more than a mere consolidation of constitutional legislation. There was no intention to introduce any significant changes. The officials charged with drafting a Bill were given the task of conducting a general review with the object of bringing together in one enactment the most important constitutional provisions in existing legislation. They were not called upon to propose a constitution, and deliberately refrained from attempting to restate constitutional conventions in statutory form.

But the Act was a deliberate attempt to “free our constitutional law from the shadow of our former colonial past”\(^{86}\). The most significant was the attempt, perhaps not entirely successful, to end the residual law-making power of the United Kingdom Parliament\(^{87}\). But the provisions relating to the Crown achieved a more significant object, towards reshaping the Crown as a purely New Zealand institution.

\(^{86}\)Justice, Department of, *Constitutional Reform* (1986) 27.

\(^{87}\)See Chapter IV.
As part of the consolidation- the term codification would be misleading- the Royal Powers Act 1983 was repealed. Section 3 of the 1986 Act stated that:

s 3(1) Every power conferred on the Governor-General by or under any Act is a royal power which is exercisable by the Governor-General on behalf of the Sovereign, and may accordingly be exercised either by the Sovereign in person or by the Governor-General.

(2) every reference in any Act to the Governor-General in Council or any other like expression includes a reference to the Sovereign acting by and with the advice and consent of the Executive Council.

The only significant alteration is that the section, by removing “It is hereby declared”, is less declaratory. It is unlikely however that any further powers are conferred upon the Sovereign as a consequence.

Section 13 of the Constitution Act 1986 makes it clear that the Queen is part of New Zealand Parliament, not just when present in person. It is provided that Parliament comprises “the Sovereign in right of New Zealand and the House of Representatives”. While the Governor-General has always assented to legislation in the name of the Queen, legislation was, before 1986, not formally enacted by the Sovereign but by the Governor-General and House of Representatives.

\(^{88}\) s 28(1).

\(^{89}\) s 3(1).
together called the General Assembly. The Queen could however always assent to legislation personally, under the Royal Powers Acts 1953 and 1983\textsuperscript{91}.

Assent and enactment are now brought into line, with legislation being enacted and assented to by the Queen, or her representative in her name\textsuperscript{92}. The wording of the enacting clause of course has been changed to reflect this. “Be it enacted by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same” was replaced by “Be it enacted by the Parliament of New Zealand”\textsuperscript{93}.

While intended largely as a legislative tidying-up exercise, the 1983 and 1986 Acts did strengthen the emphasis on the Crown as a New Zealand institution. This was also shown in contemporaneous symbolic changes. The first visit to New Zealand by the Queen after the Acts were passed, in 1990, was used as an opportunity to stress the New Zealand

\textsuperscript{90}s 14(1).

\textsuperscript{91}As well as under the New Zealand Constitution Act 1852 (in relation to reserved bills). The Sovereign first personally assented to legislation when the Queen Elizabeth II signed the Judicature Amendment Act 1954.

\textsuperscript{92}The two official copies of the Bill as assented to by the Governor-General state that “In the name and on behalf of Her Majesty Queen Elizabeth the Second I hereby assent to this Act this [xxx] day of [xxx] 2 [xxx]”.

\textsuperscript{93}The original enactment clause dates from the introduction of responsible government in 1854. From 2000 enactment clauses state: “The Parliament of New Zealand enacts as follows”.

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nature of the monarchy\textsuperscript{94}. The British royal yacht was not sent to New Zealand\textsuperscript{95}, and the Queen was said to be “in residence”, rather than merely visiting the country\textsuperscript{96}.

The Queen bears personal standards in several of her other realms, each being distinctive, and usually a representation of the territorial arms of the country concerned. She uses the Royal Standard normally only in the United Kingdom and in non-Commonwealth countries. This is because the banner is of her arms as Queen of the United Kingdom, it being what is technically called a flag of dominion\textsuperscript{97}. In Australia\textsuperscript{98} and New Zealand\textsuperscript{99} the same basic pattern is followed, the national coat of

\textsuperscript{94}This was due in part to Sir Paul Reeves. On her first visit during his tenure of the office the Queen shared Government House, on the second, he vacated Government House for a hotel. Reeves wished to make the point that she was in residence as Queen of New Zealand; Interview with Sir Paul Reeves, 11 November 1998.

\textsuperscript{95}Though economic and operational considerations may have influenced this, and it is quite possible that the New Zealand ban on nuclear armed warships may have had an effect; Cox, Noel, “Royal Yachts in New Zealand” (1997) 11(2) Raggie 6.

\textsuperscript{96}This was also emphasised by the issuing, for the first time in New Zealand, of a Court Circular, detailing the programme undertaken by the Queen.


\textsuperscript{98}A banner with the same device as on her personal standard in the centre, superimposed on a large golden version of the Commonwealth Star. The banner comprises the arms of the six states of Australia marshalled, or grouped together.

\textsuperscript{99}The design bears the shield of the coat of arms with the addition in the centre of a golden crowned Roman “E” on a blue circle within a wealth of golden roses.
arms, with an emblem for the Queen herself. In 1960 the Queen’s Personal Flag was adopted for non-monarchical countries, and now also given wider use in all overseas realms as well.\(^{100}\)

The Crown was now symbolically the New Zealand Crown, the Sovereign, Queen of New Zealand, even if at times this evolution may have tended to follow substantive political evolution. But symbolic and practical connection with the British monarchy survives, even if the legal links with the United Kingdom have gone. This must be seen as inappropriate for an independent country, so the tendency to emphasise the New Zealand aspects of the monarchy accelerated during the 1970s and 1980s.

But there has been in New Zealand no “separation of the person of the monarch from the concept of the Crown”. This would have required a conscious policy choice for which there is little if any evidence. Nor has there been a deliberate government policy of diminishing the symbolic presence of the monarchy.\(^{101}\)

Indeed, in a possible indication of the way in which the Crown may evolve, Helen Clark, Prime Minister, when announcing that The Queen would be visiting New Zealand in 2001, called for the visit and the

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\(^{100}\)The flag consists of the initial E ensign with the royal crown, surrounded by a chaplet of roses. The design is in gold (or yellow) on a blue field and the flag is fringed with gold (or yellow).
celebrations of the Queen's Golden Jubilee to be used as a means of promoting New Zealand to the world\textsuperscript{102}.

\textsuperscript{101}As has become quite pronounced in Australia since the republic referendum of 1999; Philip Benwell to author, 7 November 2000.

\textsuperscript{102}Rt Hon Helen Clark, interview on Radio New Zealand, 24 October 2000.
6.4 The Royal Style and Title

One of the most visible aspects of the Crown is the style and title by which the Sovereign is known. While many rulers enjoyed a multiplicity of titles, reflecting the number of separate territories that constituted their domains, the king of England traditionally enjoyed a simple style. The addition of Ireland\textsuperscript{103}, and the personal union of the English and Scottish Crowns, added new elements to the royal style, but the one essential element remained the single word king\textsuperscript{104}.

The development of political and legal independence of the Dominions in the latter nineteenth century led to a call for a royal style which included these newly emerging countries.

The first step in this direction was when Queen Victoria was proclaimed Empress of India on 28 April 1876\textsuperscript{105}. Gladstone opposed the move, which was advocated by Disraeli, and a vote of no-confidence was promoted in the House of Commons 11 May 1876. Nor was the criticism

\textsuperscript{103}The Union with Ireland Act 1800 empowered the king to establish, by royal proclamation, his royal style and titles, which was accordingly done, see the London Gazette 3 January 1801.

\textsuperscript{104}Anon (1555) Jenk 209; 145.

\textsuperscript{105}Under the Royal Titles Act 1876. The style was abandoned in New Zealand by the Royal Titles Act 1947, which provided for the omission of the words “Emperor of India” and “\textit{Indiae Imperator}”.
solely partisan\textsuperscript{106}. Joseph Cowen pointed out in the House that letters to newspapers were overwhelmingly against the Royal Title Bill\textsuperscript{107}.

Bagehot believed that the adoption of the title might “diminish the magic of the throne by putting a new strain on a reverence which had never failed to answer to the appeal of ancient associations”\textsuperscript{108}. The term “imperialism” at this time referred not to Britain’s foreign dominions but to a style of imperial government in which the masses were enlisted on the side of autocratic rule, as in France\textsuperscript{109}. No further steps were taken to alter the royal style for a generation, by which time imperialism had a newer, more popular, meaning.

In 1901 a series of telegrams passed between the Colonial Secretary, Joseph Chamberlain, and the Governor-General and Ministers of Canada\textsuperscript{110}. The subject was the new royal style to be borne by the new King Edward VII. Chamberlain suggested that to reflect the greater independence and importance of these territories, the phrase “and of Greater Britain beyond the seas” be added.

\begin{itemize}
\item \textsuperscript{106}Williams, Richard, \textit{The Contentious Crown} (1997) 123-126.
\item \textsuperscript{107}House of Commons Debates vol 228 col 501.
\item \textsuperscript{109}Williams, Richard, \textit{The Contentious Crown} (1997) 125.
\item \textsuperscript{110}Governor-General the Earl of Minto, Prime Minister Sir Wilfrid Laurier.
\end{itemize}
This was not favourably received in Canada, as the wording was an innovation, and in turn suggested

King of Canada, Australia, South Africa and all the British Dominions beyond the seas\textsuperscript{111}.

This introduced the problem of whether the smaller Dominions should be enumerated. There was also reluctance on the part of the Colonial Secretary to approve the use of the style king of Canada. He proposed the addition to the existing style of “and of Greater Britain beyond the seas”. The Canadians responded with “king of all the British Dominions beyond the Seas”, or “Sovereign”, to avoid repetition.

The new style finally emerged as

\begin{center}
Edward VII by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith\textsuperscript{112}, Emperor of India\textsuperscript{113}.
\end{center}

\textsuperscript{111}The style “Kingdom of Canada”, proposed first at the time of federation, was again proposed in the Canadian Parliament in 1932; Fawcett, JES, \textit{British Commonwealth in International Law} (1963) 79 fn 13.

\textsuperscript{112}The title of Defender of the Faith dates from 1521, when Pope Leo X conferred upon King Henry VIII the title of \textit{Fidei Defensor}. In spite of its papal origin, the title was settled on the king and his successors in perpetuity by the King’s Style Act 1543. The Sovereign’s office of Supreme Governor of the Church of England is quite distinct.

\textsuperscript{113}London Gazette 4 November 1901.
Something of a compromise, it nevertheless recognised for the first time the constitutional position of the Dominions\textsuperscript{114}.

A generation later, the 1926 Imperial Conference\textsuperscript{115}, strongly influenced by the growing political independence of the Dominions, decided on a change to the royal style and titles. “United Kingdom” was removed and the equality of the Dominions stressed:

George V by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

This was embodied in the Royal and Parliamentary Titles Act 1927\textsuperscript{116}.

\textsuperscript{114}The very fact that it resulted from consultations between London and the overseas territories- not yet called Dominions- ought not to be overlooked.

\textsuperscript{115}Imperial Conference (1926) Parliamentary Papers, vol 11 1926 cmd 2768.

\textsuperscript{116}Proclaimed and published in the London Gazette 13 May 1927. The official Latin form, which was used, inter alia, on the Great Seal of Canada, was given in the proclamation as:

\textit{G Dei Gratia, Magnae Britanniae, Hiberniae, et terrarum transmarinarum quae in ditione sunt, Britannica Rex, fidei Defensor, Indiae Imperator.}

This was a surprising derivation from the agreed form. \textit{In ditione} conveys an idea of subordination totally out of keeping with the accepted principle of equality of status; Kennedy, WPM, “Royal Style and Titles” (1953-54) 10 Univ of Toronto LJ 83, 84.
At the 1930 Conference, General James Hertzog and his supporters argued for a divisible Crown\textsuperscript{117}. The preamble to the Statute of Westminster 1931 said that

\begin{quote}
any alteration in the law touching the ... Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.
\end{quote}

Perceptions of unity of title, and unity of person, had come to be important aspects of imperial evolution. The Statute of Westminster made it clear that the United Kingdom and Dominions recognised the same Sovereign. The Statute stressed allegiance, and the conference stressed equality.

Indeed, it was the requirement of uniformity of succession laws which distinguished the relationship between the Queen’s realms in the Commonwealth from a mere personal union such as existed between the United Kingdom and Hanover between 1714 and 1837- two realms with different rules of succession, Hanover not allowing the succession of a female\textsuperscript{118}.

\textsuperscript{117}Keith, AB, \textit{Speeches and Documents on the British Dominions 1918-1931} (1932) xx, xxiv, 210-212, 245, 246.

\textsuperscript{118}Keith, AB, \textit{The Dominions as Sovereign States} (1938) 104-105; \textit{Re Stepney Election Petition} (1886) 17 QBD 54.
The relationship between the Queen’s realms was not of this latter kind. As the Prime Minister of Canada declared in 1953:

Her Majesty is now Queen of Canada, but she is the Queen of Canada because she is Queen of the United Kingdom and because the people of Canada are happy to recognise as their Sovereign the person who is Sovereign of the United Kingdom. It is not a separate office ... it is the Sovereign who is recognised as the Sovereign of the United Kingdom who is our Sovereign¹¹⁹.

The relationship between the various realms of the Sovereign, therefore, was not merely a contingent one, but inherent in the institution of monarchy as it has developed in the United Kingdom and in the realms of the Commonwealth.

However, changing emphasis had led to the (non-legal) equality stressed by the 1930 Imperial Conference having greater long-term effect than the (legal) allegiance stressed by the Statute of Westminster.

By 1952 Ireland was a republic, as was India¹²⁰. Changing citizenship laws emphasised individual nationality rather than allegiance to a common Crown¹²¹. On the accession of Queen Elizabeth II, the

¹¹⁹House of Commons (Canada) 3 February 1953, p 1566.
¹²⁰Following the 1930 Imperial Conference a new style was adopted:

George V, by the Grace of God, of the United Kingdom of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

¹²¹British Nationality and Status of Aliens Act 1914; British Nationality Act 1948 (UK).
Sovereign was for the first time proclaimed by different titles in the independent realms of the Commonwealth. In New Zealand the style was by the Grace of God, Queen of this realm and of all her other realms and territories, Head of the Commonwealth, Defender of the Faith\(^\text{122}\).

The Crown had apparently become divisible, although in matters of common concern, such as the succession to the throne, it was claimed uniformity to be still required.

The Commonwealth Conference held in London in December 1952 decided that each member of the Commonwealth would adopt its own form of royal style and titles, but that all the forms would contain a substantial common element\(^\text{123}\). These common elements included one designating the particular territory, a statement that Her Majesty was also Queen of Her other Realms and Territories, and that she was Head of the Commonwealth.

The Acts passed by each of the then members of the Commonwealth after the 1952 conference had to reflect the fact that the other members of the Commonwealth were full and equal members with

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\(^{122}\) Royal Titles Act 1947. The accession of the Queen was proclaimed by the Governor-General on 11 February 1952; New Zealand Gazette Extraordinary 8 February 1952 p 195 (proclamation approved); New Zealand Gazette Extraordinary 11 February 1952 p 197 (proclamation published).
the United Kingdom, so that the Queen was equally Queen of each of her various realms, acting on the advice of her Ministers in each realm. The Acts also had to reflect the fact that, since 1949, the Sovereign had a special position as Head of the Commonwealth, symbolising the unity and free association of its members.

The aim of the conference, in the words of the preamble to the Royal Titles Act 1953 (UK) was:

To reflect more clearly the existing constitutional relations of the members of the Commonwealth to one another and their recognition of the Crown as the symbol of their free association and of the Sovereign as Head of the Commonwealth.

The Act provided, therefore, that the diversity of the Commonwealth realms should be recognised by allowing the Queen to adopt a title suitable to the particular circumstances of the country concerned, but also that there should be a common element, symbolising the role of the Sovereign as a unifying factor in the Commonwealth.

New royal titles legislation was no longer to be enacted, as it had been after the Statute of Westminster 1931, by the United Kingdom Parliament with the assent of the other countries. Moreover, the convention of 1931 that the adoption of a separate royal title for any of

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123 Title of the Sovereign (1953) cmd 8748.
124 Title of the Sovereign (1953) cmd 8748.
the Queen’s realms requires the assent of the Parliaments of the other realms, seems now to have lapsed. It has been said however that any change in the Queen’s title as Head of the Commonwealth could be made only with the assent of the Parliaments of all of its members.\footnote{The position of Head of the Commonwealth was discussed at the 1997 Edinburgh Commonwealth Heads of Government Meeting. The consensus was that the title remained annexed to the Sovereign of the United Kingdom.}

The local element reflected the divisibility of the Crown, but the commonality was not ignored. Without the common elements, the link between the various monarchies would have appeared a merely accidental one. These has been a fairly consistency preserved, though, as in New Zealand, the legal form has not always been the style used in the Oath of Allegiance.\footnote{The Citizenship Act 1977 introduced New Zealand citizenship defined with reference to nationality, rather than as a sub-category of British subjects. The Citizenship Act 1979 simplified the royal style in the oath of allegiance to just “Queen of New Zealand”.}

The New Zealand Parliament passed the Royal Titles Act 1953.\footnote{Royal Titles Act 1953; Royal Titles Proclamation 1953.} The obsolete expression “British Dominions beyond the Seas” was replaced by “other Realms and Territories”, and the new style of “Head of the Commonwealth”\footnote{It was agreed that it should be placed on record that the designation of the Sovereign as Head of the Commonwealth did not denote any change in the constitutional relations between members, and, in particular did not imply that the Head discharged any constitutional functions.}. The royal style was now
Elizabeth the Second, by the Grace of God of the United Kingdom, New Zealand and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

In the 1970s further alterations were made to the royal style and title across the Commonwealth\textsuperscript{129}. In 1974

Elizabeth the Second, by the Grace of God, Queen of New Zealand and Her other Realms and Territories, Head of the Commonwealth, Defender of the Faith

replaced the 1953 formula\textsuperscript{130}. The contingent nature of the Crown was de-emphasised, and the Queen’s royal style recast to reflect more clearly Her Majesty’s constitutional status in New Zealand. This move was said to have been positively welcomed by the Queen\textsuperscript{131}.

Before the Bill was introduced the British Prime Minister was informed of the intentions of the New Zealand government. He was said to have confirmed that the change would in no way affect the close

\textsuperscript{129}As in the Royal Style and Titles Act 1973 (Australia).

\textsuperscript{130}Royal Titles Act 1974. The Bill was introduced at the State Opening of Parliament by the Queen in person on 4 February, passed through all its stages the same day, and signed by Her Majesty. See NZPD 1974 vol 389 pp 1-3.

\textsuperscript{131}Rt Hon JR Kirk, NZPD 1974 vol 389 pp 1-3. It is in fact constitutionally improper for a Member of Parliament, even a Minister, to claim royal support for a Bill, on the basis that such support would prejudice the fair consideration of the measure; Erskine May, Sir Thomas, \textit{Parliamentary Practice} ed CJ Boulton (1989).
relationship between New Zealand and the United Kingdom. In accordance with the agreement reached among the Prime Ministers and other representatives of the Commonwealth in 1952, all other members were informed of the change in the royal style.\[132\]

The 1974 Act still reflects a belief in a wider imperial Crown. The preamble to the Act states that:

whereas it is desirable that the form of the royal style and titles to be used in relation to New Zealand and to those other territories [for whose foreign relations Her Government in New Zealand is responsible] be altered so as to reflect more clearly Her Majesty’s position in relation to New Zealand and all those other territories.

Section 2 of the Act stated that:

The royal style and titles of Her Majesty, for use in relation to New Zealand and all other territories for whose foreign relations Her Government in New Zealand is responsible, shall be ...

Yet, according to Matiu Rata, then Minister of Maori Affairs:

[t]he 1974 Act was a critical precursor to the 1975 legislation\[133\] because it established the identity of the Crown in New Zealand by shifting the emphasis away from the Queen in England in the

\[133\]Treaty of Waitangi Act 1975.
Royal Titles while at the same time emphasising the role of the Queen as Queen of New Zealand.\(^{134}\)

Stevens, however, thought that the implications were less far reaching:

The Royal Titles Act 1974 has emphasised the position of the Crown in the sovereignty of New Zealand as being distinct from the UK ... The Crown in New Zealand should not be seen as autochthonous. This new status necessitates an examination of the position of the Crown in the United Kingdom and New Zealand and of the role of the Queen and Her Governor-General in the contemporary government of the country.\(^ {135}\)

The changes in 1974 were significant, in that “Queen of New Zealand and Her other Realms and Territories” replaced “of the United Kingdom, New Zealand and Her other Realms and Territories Queen”. The emphasis is not on equality, but on the Queen’s position as Queen of New Zealand being of primary importance.

The changes in the royal style over time not merely reflected the changing nature of the Crown, but also encouraged the acceptance of this change. Thus the changes in royal style both followed wider political developments and also influenced the direction of these developments. The continued existence of a shared Sovereign encouraged the

nationalisation of the Crown in the various realms. The continued presence of “and Her other Realms and Territories” makes it clear that some form of supra-national or imperial Crown was still (at least partly) envisaged, though it was probably anomalous for the British Prime Minister to be consulted.

With the adoption of the Constitution Act 1986, with its emphasis on the Sovereign as Queen of New Zealand, the process of the evolution of an autochthonous constitution could be said to be all but complete. These changes of symbolism followed, rather than led, the evolving independence of New Zealand, but they helped to emphasise that independence.

6.5 Conclusion

As the ramifications of the development of Dominion status became clearer, so the separate Dominions developed their own concepts of the Crown. The imperial Crown gave way before a multiplicity of national Crowns. This was driven generally by influences beyond the control of New Zealand, such as the abdication of King Edward VIII, and the Statute of Westminster. But New Zealand also took advantage, though often belatedly, of the mechanism which had become available to enhance and symbolise its independence.

While the Queen came to be regarded more and more as Queen of New Zealand, and only incidentally Sovereign of other countries, so a distinct New Zealand Crown evolved\(^\text{136}\). This is reinforced by changes in royal symbolism. The changing royal style and title made this separation even clearer. From the middle of the twentieth century the Sovereign of each realm has enjoyed a separate style and title. Yet common elements remain, and while these remain it remains uncertain just to what extent the divisible Crown is divided.

\(^{136}\text{And, whereas in Canada and Australia the respective entrenched Constitutions could, to some extent, substitute for the Crown, the New Zealand equivalent, the Treaty of Waitangi, would seem to presuppose the continued existence of the Crown, or at least of an analogous symbolic institution.}\)
There remains uncertainty regarding the law of succession to the Crown, which seems to be a result of a reluctance to carry the concept of the divisibility of the Crown to its logical conclusion.

The practical role of the Crown in Canada lay as much in its provincial aspects as in any other. The usefulness of the Crown to the federal government also disinclined many politicians from seriously questioning its continuation. But the Crown has been recast in a more overtly Canadian form, through symbolic changes and through a greater emphasis upon the person of the Governor-General.

In Australia, although the Crown has also been at least partially repackaged symbolically as a national Crown, there has been a more pronounced tendency to remove the symbolism and the Crown. In part this is a product of the republican spirit of the country\textsuperscript{137}. But it also a result of the lesser role of the Crown in the federation.

New Zealand has not seen either of these approaches. There is no question of federal powers, nor does our constitution confer upon the Crown powers which might bring them into conflict with Parliament at least no more than the Westminster parent. Thus the evolution of the Crown in New Zealand has been determined more by ad hoc decisions reflecting changing perceptions of national identity than by deliberate policy.

\textsuperscript{137}See Chapter IX.
Changing the royal style and title do not of themselves change the constitutional position of the Crown, but they help to define it. These changes can reflect a changed view of the Crown, as did the 1953 and 1974 Royal Titles Acts. But they can also lead to a change in the way in which it is perceived. This occurred after the adoption of the Royal Titles Act 1974.

But it would be a mistake to read too much into a mere style and title, as can be seen in an example from Australia in the 1970s, when the Queensland government, in its disputes with the Commonwealth government, sought to rely upon a separate style of the Queen of Queensland. Even more anonymously, in Canada the royal style is still Elizabeth the Second, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

Some of these symbolic changes occurred belatedly, only after substantive change had occurred. Thus, the Sovereign continued to be styled “of the United Kingdom, New Zealand and Her other Realms and Territories Queen” until 1974.

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138 Introduced in an amendment to the Constitution by Sir Johannes Bjelke-Petersen; Constitution Act Amendment Act 1977 (Qld). Now repealed.
But other developments were more advanced, particularly those in the 1930s and 1940. For New Zealand's political independence came through her freedom to exercise the royal prerogative without recourse to Ministers in the United Kingdom. In particular, the development of a uniquely New Zealand conception of the Crown was to occur especially in the 1970s and 1980s, through the Maori-Crown dialogue.\footnote{See Chapter III.}
Chapter VII:

THE GOVERNOR-GENERAL

7.1 Introduction

The last Chapter examined the development of separate national Crowns, from symbolic and practical perspectives. This Chapter will concentrate upon one aspect of the Crown, and examine the process which turned the once imperial institution of Governor-General into a national office, representing a national Crown. In this will be shown one of the ways in which the Crown has acquired a national identity.

The purpose of this Chapter is to test the hypothesis, outlined in Chapter V, that the Crown was a principal agency through which New Zealand independence was acquired or at least symbolised. The attributes of independence were largely seen in those political processes (such as the signing of treaties, and declarations of war) reserved to independent countries. The uncertainty of the process is shown by the inability of commentators to assign a date of independence to New Zealand (or Canada and Australia). This gradual process of conferring independence is illustrated in the office of Governor-General. The Chapter will also explore how the Crown has been used to symbolically reflect this independence.
This Chapter is in three sections. The first looks at the evolution of the office of Governor-General. Once the tool of imperial government, the Governor-General became one of the principal means though which national independence is symbolised. The process again is one primarily of the political executive, with legal changes having generally followed practical or political changes¹.

The second section looks at the choice of people to fill the office of Governor-General, how this has reflected changing social and political cultures, and how it may have also served in some respects to direct the further evolution of the office.

The third section looks at the patriation, or nationalisation, of the office. This will consider the means by which the office acquired a patina of national identity, and effects of the nationalisation of the office of Governor-General upon the evolution of the Crown. In particular, this looks at the way in which the office has come to symbolise national identity, in the permanent absence of the Sovereign.

¹As is shown by the slowness with which the Letters Patent of 1917 constituting the office of Governor-General were updated; see Chapter 3.3.3.
7.2 Evolution

For most purposes the head of State of New Zealand is the Governor-General. But New Zealand is not a de facto republic, but rather a de facto “localised monarchy”\textsuperscript{2}, albeit one which could be characterised as minimalist in nature. The Governor-General derives his or her status from both his or her constitutional position, and their role as representative of the Sovereign. For the concept of the Crown remains administratively and legally potent, even if the incumbent is no longer socially or politically important.

In the near-permanent absence of the Sovereign, the Governor-General has assumed more of the state and powers of the Sovereign, till he or she can be equated with the Sovereign in all but permanence. The Governor-General is de facto king or queen, a true viceroy in practice if not in law.

The Governor-General might be a transient appointee, but the Crown continues. But it remains at least in some aspects linked to the British Crown, sharing not only the person, but many of the symbolic trappings of the British monarchy. To deny the continuing twofold nature of the Crown would be pointless, but the perceived legal division has had

\textsuperscript{2}Ladley, Andrew, “The Head of State” in Miller, New Zealand Politics in Transition (1997) 55.
the effect of gradually altering the nature of the Crown in New Zealand. This can be seen in the evolution of the office of Governor-General.

The structure of imperial government in the nineteenth century relied on governors, men who, appointed by the Crown on the advice of the Minister responsible at that time for colonial affairs, would administer the colonies. These men, and the Governors-General who succeeded them in the Dominions, had a dual role. In matters of domestic concern they were to act on their own initiative (and after the advent of responsible government, on the advice of local Ministers). But in matters which affected imperial interests they were to act on the instructions of the imperial government.

Following the granting of responsible government, colonial executive councils had come more and more to conduct their business

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3 At the relevant times these Governors were all men. The first female Governor was Dame Hilda Louisa Bynoe (Grenada, 1968-74). The first female Governor-General was Dame Minita Gordon (Belize, 1981-83).

4 Cunneen, Christopher, King’s Men (1983) ix. The origins of this may be traced to the Durham Report, which advocated responsible government for the principal settled colonies; Durham, Lord, “Report on the Affairs of British North America” reprinted in Keith, AB, Selected Speeches and Documents on British Colonial Policy (1961) 139.

5 See Cunneen, Christopher, King’s Men (1983) 25-28 and CO 418/10/29263 for an account of the Governor-General’s reaction to the Immigration Restriction Bill (Australia).
without the governor being present. The separation of the dignified from the efficient, to paraphrase Bagehot, proceeded largely without interruption. But these changes were generally accomplished by changes in conventions rather than by formal legal change.

From the 1890s colonial governors were more constitutional sovereigns than administrators, and this was reflected in the types of men then being appointed.

The Imperial Conference of 1911 saw a limited concession of authority to the Dominions in the field of imperial defence and international affairs. This had a significant effect on the role of Governor-General, as the emerging mechanisms of imperial co-operation led to the office being increasingly bypassed.

The governments of the Dominions generally disliked and mistrusted the duality implicit in the role of Governor-General. For this

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6 In the usual arrangement, the Governor chaired the Executive Council. The advent of responsible government saw more decisions being taken in the absence of the Governor.

7 Or in Lowell’s terms, the governmental from the monarchical Crown; Lowell, Colin Rhys, *English Constitutional and Legal History* (1962).


10 Hancock, IR, “The 1911 Imperial Conference” (1966) 12 Historical Studies 306.

11 In later years care was taken that representations on behalf of London were not made public, for fear of criticism of perceived interference in Dominion affairs.
reason they were reluctant to repose full confidence in them, and sought to divest them of their role as agent of the British government\textsuperscript{12}.

The First World War, and the separate involvement of the Dominions in the peace conferences after the war, greatly speeded up the hitherto gradual evolution of Dominion independence. The Governor-General ceased to receive reports from the Foreign Office after 1920\textsuperscript{13}. The opportunity came in 1926 to abandon the duality altogether, and to obtain Dominion monopoly on advice to the Crown, starting with advice to the Governors-General\textsuperscript{14}.

The opportunity came in 1926 to abandon the duality altogether, and to obtain Dominion monopoly on advice to the Crown, starting with advice to the Governors-General\textsuperscript{14}.

The Imperial Conference of that year adopted the report of the Inter-Imperial Relations Committee that:

\begin{quote}
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 HM the King in Great Britain\textsuperscript{15}.
\end{quote}

The adoption of this policy was to have far-reaching consequences. The Conference, and that of 1930, adopted the principal that a Governor-General would in future be appointed on the advice of the Dominion

\begin{flushright}
\textsuperscript{12}Mansergh, Nicholas, \textit{The Commonwealth Experience} (1969) 213.
\textsuperscript{13}CO 418/216/1941.
\textsuperscript{14}Cunneen, Christopher, \textit{King’s Men} (1983) 168. See also Chapter 5.2.
\textsuperscript{15}\textit{Parliamentary Papers}, vol xi 1926 cmd 2768 p 560 para IV (b).
\end{flushright}
rather than the British government. In 1930 it was agreed that Governors-General would be appointed on the advice of the appropriate Dominion Ministers. This did not of course affect the position of Australian state governors, who continued to be formally appointed on the advice of British Ministers until the enactment of the Australia Act 1986.

As a logical corollary of the new policy, Governors-General could now be removed on the advice of Dominion Ministers. De Valera terminated McNeill’s appointment as Governor-General of the Irish Free

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16 Lord Stamfordham, the King’s Private Secretary, believed that the 1926 Conference divested Governors-General of all political power and eliminated them from the administrative machinery of their respective Dominions; Letter to Lord Passfield, 29 March 1930, DO 121/42/30 quoted in Cunneen, Christopher, King’s Men (1983) 175.

17 Parliamentary Papers, vol 14 1930-1 cmd 3717 p 595.

18 Section 7(5) of that Act states that:

> The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State.

Prior to 1986 all state governors were formally appointed on the advice of the British Prime Minister, though informally the choice was made by the state Ministry. The appointment of locally-born governors mirrored the national development, though usually slightly delayed. Thus in Tasmania, for example, the former Governor of Western Australia, General Sir Charles Gairdner (1963-68) was replaced by a former Governor of South Australia, Briton Lieutenant-General Sir Eric Bastyan (1968-73). His successor was the locally-born former Chief Justice, the Hon Sir Stanley Burbury (1973-82). It is now settled practice that the governors will be Australian citizens.
State in 1932 by going directly to the king, as was permitted under the 1930 Conference convention.\textsuperscript{19}

But it was the control of the power of appointment which was seminal. Scullin’s insistence that the responsibility for recommending an appointee to the office after 1930 lay with the Australian Ministers almost completed the process of ending the role of the Governor-General as agent of the British government in Australia.\textsuperscript{20} For if the appointment and dismissal of a Governor-General lay with Australian Ministers, it was incongruous that they should have any independence relationship with the government of the United Kingdom.

New Zealand, and Newfoundland, did not immediately follow the policy change to accept local control of appointment. The Governor-General of New Zealand retained his dual role as representative of the king and as agent of the United Kingdom government, and the New Zealand government's channel of communications with it, until the

\textsuperscript{19}Evatt, Herbert, \textit{The King and his Dominion governors} (1967) 192-197.

\textsuperscript{20}Cunneen, Christopher, \textit{King’s Men} (1983) 188. In Australia the Governors-General were appointed after informal consultation with the Sovereign. Certainly, this was fully observed under Menzies, in the selection of Slim, Dunrossil, De L’Isle and Casey; Hasluck, Sir Paul, \textit{The Office of Governor-General} (1979) 43.
appointment of Sir Cyril Newall in 1941\textsuperscript{21}. Until then appointments to the office in New Zealand continued to be made on the formal advice of a British Minister, rather than of the New Zealand Prime Minister\textsuperscript{22}.

The reasons for this delay in New Zealand are not entirely clear. While the Governor-General remained formally an appointee of the British government it was seen as appropriate for him to continue to also act in some respects as agent of that government. Whether the lack of a desire to control the appointment of Governors-General or a desire to continue his dual role was determinative in the delay is difficult to assess on the surviving evidence. But it would appear that the former is most likely, as New Zealand shared, though to a lesser extent, the Dominions mistrust of the dual role of a Governor-General\textsuperscript{23}.

More likely, the failure to assume responsibility for the appointment of Governors-General in 1930 was due to political

\textsuperscript{21}Brookfield, FM, “A New Zealand Republic?” (1994) 8 Legislative Studies 5. The 1941 appointment of Newall, was countersigned by the Rt Hon Peter Frazer, and was the first opportunity for this to be done since Viscount Galway was appointed in 1935. The commission appointing Galway was apparently not countersigned, though the proclamation of the new Governor-General was countersigned by the Rt Hon JG Coates; New Zealand Gazette 20 February 1935 p 1080 (commission); New Zealand Gazette 12 April 1935 p 1079 (proclamation).


\textsuperscript{23}Mansergh, Nicholas, \textit{The Commonwealth Experience} (1969) 213.
indecision, and a fear of cutting established links. Both reasons were based on historical factors rather than constitutional or theoretical considerations. The Ministers seem to have felt no particular need to have the right to formally advise the Sovereign on the appointment of Governors-General, so it was expect that British appointees would continue to be chosen. If this meant that the Governor-General continued to act as agent of the British government, this too had its advantages.

That the Governor-General did still enjoy a measure of independence prior to 1939 can be seen in the assessment of the office during the inter-war years by Ross. In particular, through a ready access to the Prime Minister, a partial financial independence, and being agent of the British Government as well as personal representative of the king, the New Zealand Governor-General could and did exercise some influence on both his Ministers and on public opinion.

Sir Maurice Hankey, Secretary of the Committee of Imperial Defence, and a man well-placed to compare New Zealand's situation with that of other Commonwealth countries, reported that

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25 Ross, Angus, “New Zealand Governors-General in the Inter-war Years” in Wood & O’Connor, WP Morrell (1973) 221.
The post of Governor-General of New Zealand is especially important because he is the channel of communication between the Government and the United Kingdom. That, I think, in some subtle way gives the Governor-General a position of authority as an interpreter of international affairs. I formed the impression that Lord Bledisloe was exercising greater influence on the Government than any other Governor, and for that reason I informed him very fully of all my own proceedings and hopes.\textsuperscript{26}

The Labour Party, which entered government in 1935, sought a more independent foreign policy, and saw no reason why New Zealand should not take advantage of the rights and privileges available to other Dominions\textsuperscript{27}. In 1939 the first appointment of a British High Commissioner in Wellington was made\textsuperscript{28}, relieving the Governor-General of almost all of his remaining responsibilities as agent of the British government.

With one of the principal rationales for the continued control of the appointment by British Ministers now ended, it was now appropriate for the New Zealand Ministers to assume responsibility for the selection and appointment of the Governor-General.

\textsuperscript{26} Hankey to Sir Edward Harding (Permanent Under Secretary of the Dominions Office), 29 November 1934, CAB 63/78.

\textsuperscript{27} McKinnon, Malcolm, \textit{Independence and Foreign Policy} (1993) 14-36.

\textsuperscript{28} The first appointee was Sir Harry Batterbee, Assistant Under Secretary of State in the Dominions Office. The first appointment of a High Commissioner to Canada was in 1928 (Sir William Clark), to Australia 1936 (Sir Geoffrey Whiskard), though a Representative held office 1931-36 (ET Crutchley).
By the early 1940s the Governor-General had assumed, in New Zealand, as in Canada and Australia, essentially the same function as the Sovereign had in the United Kingdom. They had ceased to represent the British government, or act as a channel of communications with London. Their role had become limited to that of representing the Crown in the Dominion, as had been achieved some ten years earlier in Australia.

Over the half-century following the Statute of Westminster 1931, the Governors-General experienced a process of transition, acquiring a distinct local flavour in each Dominion, depending on the political climate in each. In particular, this was achieved by the appointment of local people to the office, and the abandoning of most trappings of colonial gubernatorial office.\textsuperscript{29}

In general, however, it would be true to say that when they lost their role of representative of the British government they lost the greatest strength they had to resist pressure from local Ministries to become nothing more than a “rubber stamp”. For Mackenzie King at least, Dominion autonomy was symbolised in the subservience of the monarchical Crown to the local political Crown, that is, the Cabinet.\textsuperscript{30}

\textsuperscript{29}See Chapter 7.4.2.
7.3 The appointment of nationals to the office

The choice of candidates for the office of Governor-General both reflected the contemporary political culture, and indirectly, influenced the development of the office. Both the way in which a candidate was chosen, and the particular choice, have been important. While the former has tended to reflect the stage reached in New Zealand's formal political independence, the latter more commonly has reflected official perceptions of New Zealand's identity and its place in the world.

This process can also be seen in Australia, though more precociously. The first Australian Governor-General appointed after the acceptance of new rules in 1926 was Sir Isaac Isaacs, Governor-General 1931-36. His time in office was of seminal importance for the development of the office in that country. The first appointed solely as the representative of the king\(^3\), Isaacs was also the first Australian


\(^3\)Lord Stonehaven, appointed 1925, ceased to be the channel of communications with the British government in 1927. He had, in fact, delayed the appointment of the first British High Commissioner in Canberra because he feared such a position would cause Australian public opinion to press that the office of Governor-General should be filled by an Australian; DO 117/66/D763; DO 35/124/4378.
appointed to the position, and the first appointed on the advice of Australian Ministers.

Isaacs was the fore-runner of a series of appointees who significantly altered the nature of the institution. From being overtly linked with the protection of British and imperial interests, the Governor-General came to be the local personification of the Sovereign. As such, many commentators expected him to be equally circumspect and willing to do whatever the Ministers might wish of him. Their discretion and freedom of action became increasingly limited as the office became more institutionalised. The office increasingly came to fulfil a similar representational role as it does in the United Kingdom.

The appointment of His Royal Highness the Duke of Gloucester almost completed the process of turning the Australian Governor-General from colonial official to viceroy. Although not the first member of the royal family to be a Governor-General\(^3\), the Duke’s arrival early in 1945 reinforced the growing perception of the office as equivalent to that of the Sovereign in the United Kingdom\(^3\).

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\(^3\)Canada had already had two (Queen Victoria’s son-in-law, the Duke of Argyll, 1878-83, and her son, the Duke of Connaught, 1911-16), as had South Africa (Prince Arthur of Connaught, 1920-23, the son of the Duke of Connaught, and the Earl of Athlone, 1924-30, brother-in law of King George V).

\(^3\)The Earl of Athlone was actually the first royal Governor-General appointed after 1926, appointed to South Africa in 1940.
As a member of the royal family, particularly with war-time austerity in force, the new Governor-General consciously limited his role to a social one, one of acknowledging community spirit and public endeavours, but not commenting on, or becoming involved with, anything remotely controversial\(^{34}\).

Subsequent Governors-General of Australia have tended to follow this lead, and encouraged a deliberately low profile for the office. They have also largely abandoned the representational role of the office\(^{35}\). Together these have tended to add weight to the minimalist view of the office of Governor-General.

The move to appointing local candidates as Governor-General was more abrupt in Canada than it was in Australia. Vincent Massey (1952-59) was the first native-born Canadian to hold office, and all his successors have been Canadians\(^{36}\). A politician and diplomat, he was also the first Governor-General appointed since the 1947 letters patent delegated almost all the royal prerogative to the office.


\(^{35}\) See Chapter 7.4.

\(^{36}\) Customarily of French, and non-French background in turns.
Subsequent Governors-General have all been relatively junior politicians or diplomats\(^{37}\), reinforcing the impression that the office was of little importance. At the same time the office has undergone a significant change. The Governor-General has assumed not merely the delegated authority of the Crown, but many of its trappings as well\(^{38}\).

New Zealand Ministers may have first formally advised the Sovereign on the appointment of a new Governor-General in 1941, but the government had been involved in the selection process for much longer. From 1910 New Zealand Ministers made a selection of Governor from a list of three drawn up by the British government\(^{39}\).

Although as a general principal after 1926 Governors-General were to represent the Sovereign alone, no longer be the agent of the British government, and were to be appointed on the advice of local Ministers after 1930, several decades were to pass before non-British candidates were appointed as Governors-General of New Zealand.

In part this delay in appointing New Zealanders was because Governors-General retained a residual function as imperial agent until

\(^{37}\)The sort of person who might, in New Zealand, if a politician, be chosen to be Speaker of the House of Representatives.

\(^{38}\)See Chapter 6.3.1.

1941. The symbolic role of the representative of the Crown as the visible link with the United Kingdom remained important. While representing the Crown, a British Governor-General also expressed, in his person, the British nature of the institution of the Crown.

Sir Cyril Newall, Governor-General 1941-46, the first appointed on the advice of New Zealand Ministers, was something of a transitional figure, at least symbolically, for he was a Governor-General of the traditional, British, type.

Each successive Governor-General emphasised different aspects of the office, but each placed less emphasis upon the British connection. Yet this was influenced as much by the external evolution of the empire into the Commonwealth, as by any domestic considerations.

Lord Freyberg, the first post-war Governor-General (1946-52), although born in London and for many years an officer of the British army, was generally regarded as a New Zealander. As a war hero, and therefore well-known to the ordinary New Zealander prior to his appointment, he was the first of the new type of Governor-General. The focus of the office was becoming more clearly that of a resident head of State, rather than as representative of the Sovereign, or imperial agent.

Although New Zealand Ministers had been formally responsible since 1941 for the selection of a suitable candidate for Governor-General
(and informally for somewhat longer), New Zealand Ministers were generally unfamiliar with many of the men thought suitable for office, so reliance was placed upon the advice of the Sovereign, and the New Zealand High Commissioner in London, whereas once it had relied upon the British government.

When advising on a successor to Viscount Cobham, Sir Keith Holyoake found Her Majesty had compiled her own list of three candidates. Holyoake believed that the selection process was like any other one for a public appointment. Whatever the source of the names, it was his responsibility to advise the Queen which to appoint, though the selection of candidates might be made by the Queen, the incumbent Governor-General, or by the Prime Minister himself.

After seeking suggestions from various sources including the High Commission in London, and Viscount Cobham, Sir Bernard Fergusson was chosen. As a man of relatively slight public profile, Fergusson’s

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40 In Australia in 1952 Sir Robert Menzies suggested to Her Majesty that she should propose three names, and he would do likewise. This procedure was followed for the next three appointments; Menzies, *Afternoon Light* (1967) 253.


42 His army career had brought him into contact with many New Zealanders, particularly in the Middle East and Burma during the Second World War.
own appointment owed much to his family connection with this country\textsuperscript{43}.

Sir Arthur (later Lord) Porritt (1967-72) was the first New Zealand-born Governor-General\textsuperscript{44}, though, like Freyberg, he had spent much of his adult life in the United Kingdom. The appointment of Lord Porritt, did not mark a significant change in the function of the office. But it did emphasise a change in the type of person being appointed\textsuperscript{45}, and this, in turn, affected the office. Each had a different way of interpreting their role and function.

The appointment of Sir Denis Blundell, the first New Zealand-born and domiciled Governor-General in 1972, was publicly and officially seen as “a symbol of nationhood”\textsuperscript{46}. Shortly after taking office in 1975, the government led by Sir Robert Muldoon decided that future Governors-General would be selected from New Zealanders living in

\textsuperscript{43}Brigadier Lord Ballantrae (as he became in 1972) was the younger son of General Sir Charles Fergusson (Governor-General 1924-30), and grandson of Sir James (Governor 1873-74).

\textsuperscript{44}Freyberg was born in London, and although brought up in New Zealand, had spent the greater part of his adult life abroad.

\textsuperscript{45}In Porritt’s case, his links with the Queen were the most significant aspects of his background. He had been a member of the medical household of King George VI and then the present Queen since 1936. But he was much better known publicly as an Olympic athlete.

\textsuperscript{46}Norman Kirk (Prime Minister), quoted in NZPD 1973 vol 382 p 116.
New Zealand, or (possibly) from members of the royal family. No more British noblemen would be appointed. This had the effect of reducing the involvement of the Sovereign, for it was now unlikely that the Queen would be better informed than the New Zealand Ministers with respect to suitable candidates.

Between 1972 and 1983 the convention that the Governor-General would be a New Zealander became well established, though the possibility of a royal appointment was considered in 1979. In response to a parliamentary question addressed to the Prime Minister by Bruce Beetham, the Hon David Thomson told the House that:

> When a Government is considering the appointment of a Governor-General, the availability of a member of the royal family is always explored. Naturally the Government would be delighted for a member of the royal family to be appointed, but my consultation with Her Majesty indicate that, on this occasion, such an appointment would not be possible.

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47 Auckland Star, 12 March 1977. The appointment of a royal Governor-General is at best a remote possibility, either for New Zealand, or elsewhere. While he was in British Columbia in 1990 there was considerable editorial comment that Prince Edward be appointed Lieutenant-Governor of that province; Interview with Sir David Beattie, 15 April 1998.


49 Rumours have circulated that a royal appointment was also considered in 1990; Interview with Neil Walker, 11 May 1999.

Sir Denis Blundell, appointed in 1972, was educated in England, and described himself in *Who's Who* as British. President of the New Zealand Law Society before being sent to London as High Commissioner, he was without strong party political ties.

Both Porritt and Blundell were finding their feet as Governors-General of a new type. They were not British aristocrats, and were not expected to conduct themselves as if they were. But both would have been known personally by the Queen, which served to highlight their representational role.

The appointment of Sir Keith Holyoake, Prime Minister 1957 and 1960-72, was controversial, illustrating the disadvantages of appointing local politicians to the office. It was felt by some in New Zealand that it would be inappropriate to entrust the office to a former party leader or anyone who is closely allied with a political party. This rationale

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52 See Chapter 7.4.2.

53 Though, after his retirement, Porritt was to become a de jure British aristocrat, being created in 1973 Baron Porritt, of Wanganui in New Zealand, and of Hampstead, in the United Kingdom.


appears to have influenced the choices of several of the post-1939 Governors-General, notably the British-based appointees.

Holyoake, perhaps as a result of being a somewhat controversial appointee, took a rather more passive role than his predecessors, and only remained in office for three years (1977-80).

The giving of confidential advice to the Leader of the Opposition of the government’s proposed nominee was introduced in the late 1970s, as a result of the controversy surrounding Holyoake's selection. Now the opposition leader is advised before the Queen’s informal approval is sought, as well as again after the formal offer has been accepted\(^\text{56}\).

Procedural guidelines were adopted for the appointment, in 1980, of Holyoake’s successor. This required the preparation of a short list for the Prime Minister\(^\text{57}\), a Cabinet decision, and advice to Buckingham Palace. A confirmation of the probable availability of the nominee, the obtaining of the Queen’s informal approval, and the acceptance of the candidate followed. A formal offer was then made by the Prime Minister, after which formal acceptance was given. The new appointment was simultaneous announced by Buckingham Palace and the government.

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\(^{57}\)It is believed that this shortlist is communicated to The Queen, so that she may make her views known prior to receiving formal advice; Interview with Neil Walker, 11 May 1999.
This more formal procedure has apparently had the effect of further reducing the prospects of royal discretion such as was exercised in the appointment of Sir Bernard Fergusson.

Retired Supreme Court puisne judge Sir David Beattie began a more active period for the office (1980-85). But it was Sir Paul Reeves and Dame Catherine Tizard who were to make the most of the opportunity for a more pro-active role.

There was little difficulty over Reeves' personal suitability, though there were some difficulties over his clerical status, and the Queen did express concern at some undiplomatic jokes which the archbishop had reportedly made about Australia.

Reeves, as the first Governor-General of Maori ancestry, attracted a great deal of attention, and he used this to advantage. He also attempted to maintain a fairly active constitutional role, and made the most of the

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58 As a bishop, Sir Paul was an unusual choice. No prelate had held high secular office in the United Kingdom since the early eighteenth century, though there had been several examples of lesser clergy. Most recently, the Revd Dr Davis McCaughey was Governor of Victoria 1985-92.

59 Interview with David Lange, 20 May 1998.

60 Reeves himself thought hard before accepting the appointment. As he saw the position, the role of the Governor-General was similar to the role of a bishop, to work on the edges of disunity, encouraging the move to unity. Thus he would be able to fulfil his clerical vocation in the new position; Interview with Sir Paul Reeves, 11 November 1998.

61 Interview with David Lange, 20 May 1998.
limited opportunities which he had to question Ministers about government policy.\(^{62}\)

Tizard, naturally effusive, was also able to increase the public profile of the office, though the day-to-day functions have changed little over the decades since Porritt was appointed.

Rather than representing the Queen, Sir Paul Reeves and his successors were first and foremost *pro tempore* head of State of New Zealand, in the absence of the Queen. This symbolic change was became apparent when New Zealanders began to be appointed Governor-General, but was reinforced with the appointment of Sir David Beattie in 1980, a man the Queen was unlikely to have had any prior personal contact.\(^{63}\)

The choice of both Dame Catherine Tizard and Sir Michael Hardie Boys confirmed this change of focus. Tizard was the type of public figure who could be relied upon to present a forthright face. Hardie Boys was chosen for what Lange called his “transparent inertia and level-headedness.”\(^{64}\), though as the principal role of the Governor-General is

\(^{62}\)Reportedly, somewhat to the annoyance at times of the Prime Minister of that time, though this cannot yet be confirmed. Interview with David Lange, 20 May 1998; Interview with Sir David Beattie, 15 April 1998.

\(^{63}\)Interview with Sir David Beattie, 15 April 1998.

\(^{64}\)Interestingly, Lange believes that the choice of Hardie Boys must have been due to someone with a link to the Palace, rather than to Bolger himself; interview with David Lange, 20 May 1998.
symbolic, choosing a judge, someone who traditionally had cut themselves off from most social ties, may appear somewhat unusual\(^{65}\).

Lange believed that the appointment of retired judges such as Sir Michael Hardie Boys threatened to downgrade the social significance of the office of Governors-General, as such individuals have a natural inclination to take a more passive public profile\(^{66}\). This may be so, and although Sir Michael has done much to educate the public about the constitutional functions of his office one suspects that a more populist figure- one better known before becoming Governor-General, would raise the profile of the office more effectively\(^{67}\).

The appointment of Dame Silvia Cartwright\(^{68}\), although reinforcing the tendency for judicial appointees, may raise the popular profile of the office, as Dame Silvia enjoyed a somewhat higher pre-appointment profile than either Sir David Beattie or Sir Michael Hardie Boys\(^{69}\).

\(^{65}\)Interview with Dame Catherine Tizard, 19 May 1998.

\(^{66}\)Interview with David Lange, 20 May 1998.

\(^{67}\)The constitutional functions of the office are discussed in Chapter VIII.

\(^{68}\)She will succeed Hardie Boys April 2001.

\(^{69}\)Dame Silvia was the first woman High Court judge when she was appointed to the Bench in 1993. Prior to that she was Chief District Court Judge 1989-93, and a District Court judge 1981-89. She rose to prominence in the late 1980s heading an inquiry into National Women's Hospital in Auckland; Press Release, Buckingham Palace, 24 August 2000.
In summary, when New Zealand Ministers assumed formal responsibility for the appointment of Governors-General, they relied upon external advice, particularly from London. But as it became customary for someone with strong New Zealand connections to be appointed, so the role of the Sovereign (and the High Commissioner) was reduced.

With no link with the British government, and a weaker connection with the Sovereign than hitherto, the Governor-General became more obviously a head of State for New Zealand. In the choice of candidates for office, changing perceptions of the national identity of New Zealand were reflected.

In the pre-war era the choice of British noblemen, soldiers and statesmen reflected New Zealand's place within the Empire, independent yet loyal to Britain. In the post-war years the increasing emotional divide between New Zealand and the United Kingdom, and the reduced importance of maintaining strong relations with that country led to the appointment of New Zealanders to the office, and a diminution of the British connection.

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7.4 Patriation

Far from being, as Bagehot presupposed, an easy concept to appreciate, the monarchy (or at least that abroad) required a sophisticated and expansive appreciation of constitutional relationships. While the imperial function of Governors-General withered after 1926, uncertainty continued regarding the proper future role for the office. This was complicated by the basic constitutional relationship between the Crown and Ministers not being expressed in law, but resting on convention. These conventions can and do change over time, sometimes radically.

The Balfour formula, enunciated in the 1926 and 1930 Imperial Conferences, was an attempt to assimilate the position of the Sovereign and the Governor-General. It actually had the effect of making the offices more distinct than they had been before.

The distinction between the Sovereign and her representatives was further complicated in some instances by federalism, as in Canada and

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Australia. While the Sovereign was Queen of Canada, she was also Queen in right of Nova Scotia, Quebec, and each of the other Canadian provinces. From the date of federation this distinction grew in importance.\(^{74}\)

From the beginning of his work on the royal prerogative, Evatt assumed that the powers of the Governor-General are analogous to those of the Sovereign.\(^{75}\) But the position of Governor-General is not exactly analogous to that of the monarch, as the vice-regal office is provided with a combination of delegated prerogative powers and specific statutory authority.

In a colony, the Governor was essentially an imperial official.\(^{76}\) In a Dominion, in contrast, the Governor-General was invested with vice-regal status. A true viceroy is an officer endowed with a complete delegation of the royal prerogative, as Canada has in effect had since 1947.\(^{77}\) Certain powers exercised by the Governor-General of Canada are

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\(^{75}\) *The Royal Prerogative* commentary by Zines (1987).

\(^{76}\) For a general discussion of the position, see Carter, BPC, “The Powers of the Australian and New Zealand Governors-General” (1977) University of Auckland LLB(Hons) dissertation; and Northey, JF, “The Office of Governor-General” (1950) University of Toronto DJur thesis.

exercised as the Queen’s representative rather than as a distinct officer. However, as regards those powers given the Governor-General by the Constitution, it is a statutory office, and the powers are statutory.

In New Zealand, the 1983 Letters Patent Constituting the Office of Governor-General affected an almost complete delegation of the royal prerogative, although both under the letters patent (in respect of prerogative powers) and the Royal Powers Act 1983\(^78\) (in respect of statutory powers) the Queen is entitled to exercise these powers herself. The Queen occasionally does so, although normally only in respect to the approval of royal honours and similar matters\(^79\).

In Australia, a similar general delegation took place in 1984\(^80\). However, under s2 of the Royal Powers Act 1953 (Australia), and the Australia Act 1986, Her Majesty may exercise all the powers bestowed upon the Governor-General, but only when personally present in Australia.

Though these powers were delegated to the Governors-General, this did not mean that their independence was increased. As Cunneen has shown, the history of the office of Governor-General in Australia has

\(^78\)Now embodied in the Constitution Act 1986.

\(^79\)The occasional State Opening of Parliament, and giving assent to Bills in person are, of course, limited to visits to New Zealand.

been one of sure and steady erosion of the small initial deposit of personal initiative and discretion. He felt that in the period 1901-36 the chief function of the office was imperial rather than constitutional\textsuperscript{81}. After the decline of the second of the dual functions of the office, with the establishment of separate channels of communication between London and Australia, the Governor-General was left with the role of representative of the Sovereign.

However, as power actually lay in the hands of Ministers, the real function of the office was symbolic. As events in Australia showed, this had an uncertain place in Australian public life, and early Governors-General soon learnt that they were expected to live without expensive pomp or ostentation\textsuperscript{82}. Similar influences were at work in New Zealand also.

Beginning as agents of empire, only gradually did Governors-General acquire the status as representatives of the Sovereign rather than of the imperial government. But as this was recognised, so the office changed its outward form. Indeed, it gradually became important as a symbol of national identity, both in the actions of the Governors-General, their symbolism, and the symbolism inherent in their very choice.

\textsuperscript{81}Cunneen, Christopher, \textit{King’s Men} (1983) ix.

\textsuperscript{82}Cunneen, Christopher, \textit{King’s Men} (1983) 28-36.
The role of the Governor-General became not so much to represent the Sovereign, but to represent “the nation to the people”\textsuperscript{83}. This has been particularly marked in Australia. While Hasluck openly expressed his appreciation of his role as being to represent the Queen, and exercise on her behalf her powers and functions of Queen in a constitutional monarchy\textsuperscript{84}, Cowen’s speeches were essentially those of an Australian head of State\textsuperscript{85}. Indeed, in the last several decades of the twentieth century, only when presiding over functions attended by monarchist groups did Sir Ninian Stephen purport to represent the Queen in Australia\textsuperscript{86}. At other times, his role was as de facto head of State\textsuperscript{87}.

No longer is it true that the Governor-General of New Zealand is principally the representative of the Sovereign, though, unlike his

\textsuperscript{83}Bogdanor, Vernon, \textit{The Monarchy and the Constitution} (1995) 281. Or, as Sir Paul Reeves sees it, to represent the Queen in her constitutional rather than her personal capacity; Interview with Sir Paul Reeves, 11 November 1998.

\textsuperscript{84}Hasluck, Sir Paul, \textit{The Office of Governor-General} (1979) 10.

\textsuperscript{85}Cowen, Sir Zelman, \textit{A Touch of Healing} (1986).


\textsuperscript{87}This role, performed almost to the exclusion of the Queen, was to form a major element in the campaign by monarchist groups in the 1998 plebiscite in Australia on a republic. They argued that, as the Governor-General was de facto head of State already, there was no need for a president to assume this role; See Chapter IX.
Australian counterpart, Sir Michael Hardie Boys continues, from time to time, to emphasise his role as representative of the Queen as well as of his fellow New Zealanders\(^88\). But he or she is principally seen as representative, or embodiment, of the Crown, a quite distinct role. There has been an on-going process whereby the office of Governor-General, and the position of Sovereign, have increasingly come to reflect a distinctive New Zealand identity\(^89\). Official ceremony began to include more Maori participation, such as a Maori challenge at presentation of credential ceremonies\(^90\).

The role of the Governor-General now more clearly equates to that of a head of State, though not without lingering ambiguities. One of these may be seen in the role of the Governor-General on overseas visits.

Precedents in Canada and Australia established beyond doubt that the Governor-General could travel outside his or her country and be

\(^{88}\)Speech by Sir Michael at the opening of Wharehui Tupai, Martinborough, 25 October 1997. Significantly, this often occurs when meeting Maori people; Interview with Sir Paul Reeves, 11 November 1998.

\(^{89}\)Indeed, to understand the role of the Governor-General one needs to consider the history of the monarchy, the development of the role of Governor-General, and the current role of the monarch; Lipa, JS, “Role of the Governor-General in the Commonwealth” (1993) University of Auckland MJur thesis 1-2.

recognised overseas as fully representative of the head of State\textsuperscript{91}. Official visits originated in Canada, whose Governor-General first paid an official visit to the United States of America in 1928\textsuperscript{92}. New Zealand’s first was to Australia in 1970, and the Australian Governor-General’s first official visit abroad was to New Zealand in 1971\textsuperscript{93}.

Overseas visits by Governors-General have been relatively few, and, in the case of New Zealand, largely confined to those countries with which the country is most closely associated, such as the Cook Islands. But they are becoming more frequent\textsuperscript{94}.

Some countries have avoided receiving the Governor-General as head of State, a matter which is in the hands of the host country, although the Governor-General of New Zealand always receives visitors as the de facto head of State\textsuperscript{95}. These problems arise where the host country has

\begin{itemize}
\item Hasluck, Sir Paul, \textit{The Office of Governor-General} (1979) 24-25; Abbott, Tony, \textit{How to win the constitutional war} (1997) 63-64. The Canadian Governor-General’s first official trip outside North America was to the Caribbean in 1969; Smith, David, \textit{The Invisible Crown} (1995) 47.
\item Massey, Vincent, \textit{What’s past is prologue} (1963) 144-145.
\item Stevens, Donald, “The Crown, the Governor-General and the Constitution” (1974) Victoria University of Wellington LLM thesis 225; Australian Hansard (House of Representatives) 22 February 1972 vol 76 p 75.
\item Indeed, State visits by foreign rulers to New Zealand have also become more frequent, with an average of two to three annually in recent years; Private information.
\item Interview with Hugo Judd, 14 April 1998.
\end{itemize}

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little knowledge and experience of the peculiar constitutional status of a Governor-General\textsuperscript{96}.

To accord a Governor-General full recognition as a head of State elevated him or her to the status of a viceroy, a status that Commonwealth constitutional law has not yet unequivocally accorded them. But in this field of law practice has always been followed by the recognition of legal status\textsuperscript{97}, and it must be anticipated that the Governor-General may eventually be accorded the status of a viceroy, leaving the Sovereign truly \textit{functa officio}\textsuperscript{98} except in respect of the appointment of Governors-General\textsuperscript{99}.

The change in the role and status of the Governor-General of New Zealand has come about as a consequence of the loss of much of the reason for the existence of the office, the imperial role.

As a consequence of the loss of the imperial role, holders of the office have felt the need to assume new roles and responsibilities, not

\textsuperscript{96}Taafahi, Tauassa, \textit{Governance in the Pacific} (1996) 12.

\textsuperscript{97}O’Connell, Daniel & Riordan, Ann, \textit{Opinions on Imperial Constitutional Law} (1971) vi.

\textsuperscript{98}A person who has discharged his or her duty, or whose office or authority has come to an end.

always to the liking of political leaders\textsuperscript{100}. These have included making more provocative speeches than had been customary for a Governor-General to make\textsuperscript{101}, and generally attempting to strengthen the social contacts which the office makes possible\textsuperscript{102}.

\subsection*{7.4.1 An instance of deliberate policy: Canada}

The elevation of the Governor-General over the Sovereign he or she represented was a deliberate policy on the part of successive Canadian governments, and has become more methodical and comprehensive since 1970\textsuperscript{103}.

\footnote{Sometimes even the attempt to maintain good relations can be misconstrued. Dame Catherine Tizard has reported that one political leader had difficulty conceiving any reason for his having received an invitation to lunch at Government House. The politician wanted to know what the Governor-General was hoping to get out of the meeting; Interview with Dame Catherine Tizard, 19 May 1998.}

\footnote{One example is the speech given by Sir Michael Hardie Boys at the opening of the Te Arawa Economic Development Conference, Rotorua, 6 October 1998, which addressed potentially controversial issues of the educational and business failings of the Maori people.}

\footnote{Interview with Dame Catherine Tizard, 19 May 1998; Interview with Hugo Judd, 14 April 1998.}

\footnote{Although this was never publicly stated until the legislation of the Trudeau Government, Bill C-60 of 1978, which would have named the Governor-General “the First Canadian”. It should perhaps be best described as a state of mind.}
The 1947 letters patent made a complete delegation of the Sovereign’s powers to the Governor-General\textsuperscript{104}. This was thought desirable to avoid the exercise in Canada of any authority by Counsellors of State appointed under the Regency Acts of 1937 onwards. However, despite this delegation, it was not until the mid-1970s that the Governor-General actually exercised the royal prerogative in all areas of Canada’s international relations\textsuperscript{105}. And the prerogative relating to the law of arms, admittedly of minor importance, was not delegated until 1988\textsuperscript{106}.

The idea of strengthening the Crown by broadening the responsibilities of the Governor-General and Canadianising the office was shared both by the Office of the Governor-General (in particular, the Secretary to the Governor-General, Esmond Butler) and the Privy Council Office\textsuperscript{107}.

In 1978 a white paper, *A Time for Action*, proposed that the authority of the Governor-General of Canada would no longer derive from prerogative instruments, but would emanate from the Constitution itself. As well, he or she would possess all the prerogatives, functions

\textsuperscript{104}1947 Letters Patent constituting the Office of Governor-General of Canada, effective 1 October 1947 (Canada Gazette, Part I, vol 81, p 3104).


\textsuperscript{106}Letters Patent authorising the granting of armorial bearings in Canada, 4 June 1988.

and authority belonging to the Queen in respect of Canada, and laws would be passed in his or her name, and not that of the Sovereign.

These proposals were incorporated in the Constitutional Amendment Bill (Bill C-60), introduced into the House of Commons in June 1978. From the point of view of constitutional theory, the problem with Bill C-60 was that it attempted to codify government, to make explicit in statutory form what had hitherto rested on convention and custom.

The Bill failed to pass, not through opposition to its principles, or the way in which it was drafted (though there was opposition on both grounds), but because of opposition from the provinces. They successfully challenged the federal government’s assumption that it could implement institutional change of such magnitude through resort to s 91(1) of the Constitution Act 1867. This section, in place since 1949, was intended to allow the federal Parliament to deal with matters of

108 For a non-Canadian view of the Bill see also O’Connell, Daniel, “Canada, Australia, Constitutional Reform and the Crown” (1979) 60 Parliamentarian 5.

109 Forsey and Mallory dissected the bill’s clauses and discovered both contradictions and ambiguities therein: Forsey, Eugene, “Role of the Crown in Canada since Confederation” (1979) 60 Parliamentarian 14; Mallory, JR, “Some Constitutional Implications of Bill C-60”. The difficulties of codification of convention have perhaps been exaggerated. In Australia, Turnbull dismissed as “ludicrous” Gareth Evans’ suggestion that there would never be agreement on codifying the powers.
concern to the federal government only, rather than of federal-provincial concern\textsuperscript{110}.

The 1978 proposals and, more particularly, their failure, testify to the significance of the Crown in Canada. For many there remained an emotional attachment to the Sovereign. But more importantly, the provinces regarded the Crown as an important source of independent authority. There is an appreciation of the advantages of not going too far in Canadianising the Crown, and thereby giving too much power to the federal government\textsuperscript{111}.

In Canada the perceived British nature of the Crown has been partially excised by concentrating attention on the Governor-General as far as possible, reducing the Sovereign’s personal involvement in Canadian affairs\textsuperscript{112}. Thus the Sovereign, although still appointing the Governor-General, does not give personal approval for the award of honours, as is done in all the other realms. Only the Sovereign can create an order of chivalry, decoration or medal, but he or she does so on the recommendation of the Canadian government. Once an honour is created,

\begin{flushright}
\textsuperscript{112} In the past half-century, at least, newcomers [to Canada] were not being asked to accept the \textit{British} monarchy, but a symbol of what made Canada Canadian, or at least, not American”; Martin, Ged, “Freedom Wears a Crown” (1994) 21.
\end{flushright}
the Governor-General exercises all powers of the Sovereign in respect of it\textsuperscript{113}.

For example, the Constitution of the Order of Canada provides that:

\begin{enumerate}
\item Appointments ..., shall be made, with the approval of the Sovereign, by Instrument signed by the Governor-General ... \textsuperscript{114}
\end{enumerate}

However, the letters patent of 1947 allow the full delegation of the prerogative to the Governor-General\textsuperscript{115}, and the Constitution of the Order of Canada continued to say that:

\begin{enumerate}
\item Nothing in this Constitution limits the right of the Governor-General to exercise all powers and authorities of the Sovereign in respect of the Order\textsuperscript{116}.
\end{enumerate}

The Governor-General in actual practice gives the Sovereign’s approval.

\textsuperscript{113}Excepting, of course, the Royal Victorian Order; Fact Sheets H-H20, Information Services, Government House, various dates.


\textsuperscript{115}1947 Letters Patent constituting the Office of Governor-General of Canada, effective 1 October 1947 (Canada Gazette, Part I, vol 81, p 3104).

The provinces have themselves created honours independent of the federal royal honours system\textsuperscript{117}. Each was created by provincial Act or regulation, but awarded in the name of the Queen by the Lieutenant-Governors, further emphasising the growth of the Crown in Canada.

The personal appointment of diplomatic representatives having ended\textsuperscript{118}, there remains very little in which the Sovereign is personally involved unless actually present in Canada. But this has not necessarily reduced the role of the Crown.

\subsection*{7.4.2 Inadvertent movement: New Zealand}

It was established after 1930 that the New Zealand Governor-General would be appointed on the advice of local Ministers, and both the Sovereign and Governor-General would act on advice of New Zealand rather than British Ministers. But the full consequences were not immediately perceived. Governors-General, although no longer agents of the British empire, were still regarded as representing the imperial tradition.

\footnote{These include l’Ordre national du Quebec, the Saskatchewan Order of Merit, the Order of Ontario, the Order of British Columbia, and the Alberta Order of Excellence.}

\footnote{Smith, David, \textit{The Invisible Crown} (1995) 61.}
This lingering attitude was reflected in the speeches of Viscount Cobham, Governor-General 1957-62, and in an article which he wrote on the role of Governor-General\(^\text{119}\). Representing the Queen and the common British heritage shared by New Zealand were frequent themes of his speeches\(^\text{120}\).

Cobham’s successor, Brigadier Sir Bernard Fergusson, the son of Sir Charles Fergusson, Governor-General 1924-30, was less inclined to stress this aspect of his role. But, as a Briton, the perception remained that he represented more than the just the Queen of New Zealand\(^\text{121}\).

Indeed, in formal law, as late as 1972 the Governor-General arguably appeared to be essentially a glorified colonial governor. But those powers, responsibilities, and functions which related to the United Kingdom had in fact long been obsolete\(^\text{122}\).

Once appointed, the ceremonial and community roles of the Governor-General have for a long time been of greater importance than the political or constitutional. The social roles too have changed over time. From the mid- nineteenth century the Governor had a role as leader

\(^{119}\text{Cobham, Charles, Viscount, “The Governor-General’s Constitutional Role” (1963) 15(2) Political Science 4.}\)

\(^{120}\text{Hintz, OS, Lord Cobham’s Speeches (1962).}\)

\(^{121}\text{Governors-General before Blundell normally brought with them British officers as aides de camp. For names see Whitaker’s Almanack (various dates, especially 1945-77 editions).}\)

\(^{122}\text{See Chapter 8.3.}\)
of the small social elite of the colony, but, because of the limited salary and allowance which he received, he was not expected to do much entertaining.

In the office of Governor-General, as elsewhere in the constitution, reforms appropriate to the country's political independence had come about in two ways, first, the exercise by the New Zealand legislature of the general power of constitutional amendment conferred by the United Kingdom Parliament in 1947\textsuperscript{123}; and second, the Queen’s exercise of the royal prerogative. In the context of the office of Governor-General, it was the latter which was most important. Specifically, this was manifested in the choice of candidates for the office of Governor-General, which was examined in Chapter 7.3. Changes in the social and political perceptions of the office were also shown in the symbolism associated with it.

A change in the style of the office of Governor-General can be seen in the changing costumes worn by the Governors-General. They wear, or once wore, special uniforms\textsuperscript{124}. Lord Porritt was the last Governor-General to wear the traditional dark-blue full-dress uniform of a Governor-General. His successor, Sir Denis Blundell wore the white

\textsuperscript{123} Statute of Westminster Adoption Act 1947.

\textsuperscript{124} The full dress uniform is still worn in a few of the smaller realms, including Antigua and Barbuda, and St Vincent. Its use is prescribed in the still current, though obsolescent, official guide to Court dress; Titman, Sir George, \textit{Dress worn at His Majesty’s Court} (1937).
tropical dress uniform, both on military visits, and at the State Opening of Parliament.

Sir Keith Holyoake avoided wearing uniform. However Sir David Beattie wore the white tropical dress uniform of Governor-General’s, and also introduced a series of service dress uniforms for use when visiting military units\textsuperscript{125}. Sir Paul Reeves and Dame Catherine Tizard however both avoided uniforms, for special reasons of their own. Sir Michael Hardie Boys wears a service dress uniform when visiting military units\textsuperscript{126}. Although not specifically colonial, the traditional uniforms were abandoned as overt reminders of a colonial past\textsuperscript{127}.

Arguably, the patriation of the office of Governor-General has resulted in a weakening of the office. The Governor-General is the equivalent of the Sovereign, but lacks the status, and the permanence of the Sovereign. The contrast is less that of absent/present, and more of

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{125}] Interview with Sir David Beattie, 15 April 1998. Hardie Boys would perhaps also have worn the white uniform, except that Government House appears to have adopted the mistaken belief that this was last worn by Porritt; letter from Richard Sweetzer to author, 5 November 1998.
\item[\textsuperscript{126}] Interview with Dame Catherine Tizard, 19 May 1998; Interview with Hugo Judd, 14 April 1998.
\item[\textsuperscript{127}] In a similar symbolic move, the official Government House webpage (http://www.gov-gen.govt.nz/) which, from its establishment in the late 1990s until 2000, displayed the royal arms rather than the arms of New Zealand.
\end{itemize}
\end{footnotesize}
royal/non-royal, each having roles to play in New Zealand\textsuperscript{128}. Politicians, to increase their own status and power, encourage a modesty both of power and of style in a Governor-General\textsuperscript{129}. Nor have Governors-General been inclined to expand their responsibilities. Not enough has been done to follow the Canadian model, which would see an augmentation of the social and symbolic role of the Governor-General.

While the agent of the British government the Governor-General enjoyed the prestige and influence that came from this. As representative of the Sovereign, particularly while it was fashionable to speak of the British connection, the Governor-General represented New Zealand’s links with the wider world, the international monarchy.

As effective head of State, yet not given the status of a true head of State, the Governor-General remains somewhat less than they were. Nor has the relative personal prominence of some of the recent appointees overcome the loss of status which came to them as emissaries of the


\textsuperscript{129}Such as the attempt to deny the Governor-General a customary Guard of Honour at the State Opening of Parliament after the 1984 election. However, the annual State Opening of Parliament was ended solely for reasons of political efficiency- ending the address and reply debates-rather than as a deliberate attempt to reduce the public role of the Governor-General; Interview with David Lange, 20 May 1998.
British (rather than New Zealand) Sovereign\textsuperscript{130}. But the tendency has clearly for the Governor-General to assume more of the attributes of a de facto head of State.

\textsuperscript{130}Wood also believes that a more bold assertion of the Governor-General’s status would have made the office more effective; Wood, Antony, “New Zealand’s Patriated Governor-General” (1986) 38(2) Political Science 113, 130.
7.5 Conclusion

The evolution of a distinct New Zealand Crown went hand in hand with the patriation of the office of Governor-General. Once an office filled by a British appointee, it now is always held by a New Zealander, appointed by the Queen on the advice of the Prime Minister of New Zealand. No longer are British seals used to authenticate legal documents, nor British honours awarded.

But not only does the Governor-General no longer represent the British government, he or she has downplayed the extent to which they represent the Queen. The social function of a Governor-General, on a daily basis so much more important than the constitutional, has allowed great scope for this. Fear, perhaps largely subconscious, of republican criticism of the Governor-General as agent of a “foreign” Queen has accelerated this tendency.

Whereas once Lord Cobham extolled the virtues of loyalty to a common Crown, his successors have preferred to speak of civic virtues, or the need for racial understanding. In part this is because each Governor-General has felt able to make their own personal contribution to the office, but also because, being no longer “sent out” to New Zealand, it requires a large step in the imagination to see them as

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131 Abbott, Tony, How to win the constitutional war (1997).
representing an absentee monarch. In part to solve this dilemma, emphasis came increasingly to be on the Crown rather than the monarch.

As the Governor-General came to represent the king or queen directly, so he or she came to assume patronages and other roles in emulation of the Sovereign. Practically, they were free from formal or informal constraint by the Sovereign, though symbolically representing both her and the wider concept of the Crown. To a great extent, however, it was a case of making whatever one wished of the job, since there were few formal guidelines.

Canadian governments sought to emphasise national independence by emphasising the position of the Governor-General at the expense of that of the Sovereign. New Zealand, treading a path less determined by conscious choice, found itself almost as it were by accident, with a Governor-General empowered to exercise all the powers and responsibilities of a head of State.

The office of Governor-General has not been the means by which New Zealand has achieved independence. But the increasing division of the Crown meant that the Governor-General assumed more of the identity of a head of State. With the delegation of the royal prerogative,

\[132\text{The Governor-General of New Zealand is patron of some 400 organisations; Interview with Hugo Judd, 14 April 1998.}\]
the Governor-General became de facto viceroy. But they were not a de facto president, for they continued to represent, not simply the Sovereign, but the concept of the Crown.

But, unlike in Canada, not enough has been done to clearly establish the Governor-General as a symbol of national identity. The clearer this identification the lesser the prospects for rejection of the system which the Crown represents.

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133 Interview with Dame Catherine Tizard, 19 May 1998.
Chapter VIII:
THE CONSTITUTIONAL ROLE OF THE GOVERNOR-GENERAL

8.1 Introduction

The last Chapter showed how, in the absence of the Sovereign, the office of Governor-General evolved and become a national office. Once the tool of imperial government, the Governor-General became one of the principal symbols of national independence and identity. This is seen particularly in the roles of the Governor-General, the subject of this Chapter.

The Governor-General can be said to have three principal roles, constitutional, ceremonial, and community leadership. Of these, though it is the first which has been the subject of the most intensive study, it is perhaps the third which has greatest day-to-day importance. This role includes commenting on contemporary social trends and virtues. The ceremonial role of the Governor-General is seen as relatively unimportant, due to the lack of a tradition of overt symbolism and ceremony in New Zealand. The varied roles of the Governor-General will be examined in the first section.
The constitutional role of the Governor-General will be considered in the second section. The low profile of the office has encouraged a minimalist perception of the role. Examples from Australia and elsewhere show that this perception is not necessarily accurate. Yet the perception of the office is critical in determining its actual role.

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

Because the Governor-General is the principal personification of the Crown in New Zealand, the importance of the office within that body cannot be exaggerated. An assessment of the current state of the office is therefore made in the fourth section. In particular, this will ask whether the gradual departure from the Westminster model, and the changing relationships within the executive and between executive and Parliament has undermined the position of the Governor-General, or perchance strengthened it.
8.2 The roles of the Governor-General

Dame Catherine Tizard, the former Governor-General of New Zealand, has observed that some aspects of the job are not so readily apparent from the outside, in that “the perspective of an incumbent does differ from that of a constitutional lawyer or political scientist”\(^1\). In her view, legal powers and political theory have little relevance to the way in which a Governor-General conducts him or herself when in office\(^2\).

It is generally accepted however that the Governor-General\(^3\) performs three main types of functions, which might be classified as constitutional, ceremonial, and community leadership\(^4\). The Governor-General is the embodiment of the Crown, the manifestation of the organised community. This role (that of community leadership) is, in all normal circumstances, more important than the constitutional role, where the Governor-General represents legitimacy and the continuity of government.

\[^{1}\text{Tizard, Dame Catherine, Crown and Anchor (1993) 1.}\]
\[^{2}\text{Interview with Dame Catherine Tizard, 19 May 1998.}\]
\[^{3}\text{And the Sovereign when he or she is resident in New Zealand (and to a limited extent even when absent).}\]
\[^{4}\text{See, for example, The Role of the Governor-General of New Zealand (1997) 3.}\]
It is also more important than the ceremonial role, whose place in New Zealand, aside from symbolically representing the highest level of government, is uncertain. There is little tradition of overt symbolism and ceremony in New Zealand. Ceremonial events, such as the State Opening of Parliament, have never played a major part of public life in New Zealand. Indeed, unless the Sovereign herself is present, the State Opening is little advertised and ill-attended by the general public.

Why New Zealand, as a country, is not inclined to public display is uncertain, though it may have its origins in the predominantly Anglo-Saxon ethnic composition of the population. A similar attitude has been observed in Australia, where Governors-General since federation have been criticised at times both for excessive ostentation and for “penny-pinching”.

Like Australians, New Zealanders appear to prefer a Governor-General to live frugally and without state. The size of the vice-regal staff

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6Though reducing the frequency of the State Opening of Parliament was solely for reasons of political efficiency, by ending the address and reply debates, rather than as a deliberate attempt to reduce the public role of the Governor-General; Interview with David Lange, 20 May 1998.

7Reflected in the almost complete absence of reporting in the daily newspapers.

8Cunneen, Christopher, King’s Men (1983).

9See Cunneen, Christopher, King’s Men (1983).
is an indication of this. In 1999/2000, 31 staff and a budget of $3.646m were provided for the New Zealand Governor-General, a mere 18% of the total budget for the Department of the Prime Minister and Cabinet, under whose responsibility it comes\textsuperscript{10}.

This compares with 85 staff and A$9,699,314 in Australia, and some 100 staff in Canada\textsuperscript{11}. In both these latter two countries the staff includes personnel responsible for the honours system, the responsibility in New Zealand of a separate office in the Department of the Prime Minister and Cabinet\textsuperscript{12}. Comparatively low levels of funding for the office in New Zealand have both restricted the scope of its activities\textsuperscript{13}, and reflect an official parsimoniousness apparent from the nineteenth century\textsuperscript{14}.

\footnotesize
\begin{itemize}
  \item \textsuperscript{11}Annual Report, 1994-95, Office of the Official Secretary to the Governor-General of Australia; Public Information Directorate, Government House, Ottawa.
  \item \textsuperscript{12}The Honours Secretariat, itself also notoriously ill-funded, at least formerly.
  \item \textsuperscript{13}The Office is particularly keen for publicity material to be disseminated, but lacks the resources to do so itself; Interview with Hugo Judd, 14 April 1998.
  \item \textsuperscript{14}Several Governors, including the Earl of Glasgow in 1897, resigned (or threatened to do so) because they could not live on their salary. This problem led to the passage of the Governors Salary and Allowance Act under Glasgow’s successor, the Earl of Ranfurly.
\end{itemize}
It is perhaps the inheritance of a British tradition of simple though strong government that has meant that there is little official pageantry in New Zealand public life. What little ceremony existed focused on the Sovereign. Where the Sovereign is absent it focused on their representative- and was but a pale imitation\textsuperscript{15}. This did little to foster a belief that the Governor-General was anything but the slightest of figureheads.

It is perhaps in their community leadership role that the Governor-General is most important. It is Dame Catherine Tizard’s belief that the chief role of the Governor-General is more and more one of affirming moral and social ideas and ideals. She believed that the Governor-General is supposed to generalise, to suggest, to assert and instil civic virtues\textsuperscript{16}. This is achieved principally through speeches, and the occasional written contribution\textsuperscript{17}.

\textsuperscript{15}This certainly would be consistent with the thesis that most British ceremonial is of modern origin, and created to encourage loyalty to the Crown; Hobsbawn, Eric & Ranger, Terence, \textit{The Invention of Tradition} (1983).


\textsuperscript{17}Other recent examples include the Easter 1999 Guest Editorial for the Otago Daily Times, entitled “A Resurrection of Leadership” (emphasied the need for youth leadership); and “Should New Zealand be a dictatorship?” Auckland Club Black Tie Dinner, Auckland 7 September 1999 (calling for people to become deeply involved in the life of our nation, and in our local communities).
One of the former expressions of vice-regal thinking deserves to be quoted, as an indication of the considerations which constantly influence the Governor-General's speeches:\(^{18}\).

I have been asked to speak about “Church and State”: a very general topic, as Mr Logan commented to me. I take it that by “State” is meant government in its wider sense, the body that governs by making laws and administering the affairs of the nation. And that makes it a delicate topic for a Governor-General, perhaps a dangerous one. For it comes close to being political, and the cardinal rule for a Governor-General is never to be political. There are those who think he or she should not even be controversial, but I don’t go along with that. The question “What do we pay you for, then?” that is sometimes the response to my refusal to speak or act politically, would surely be justified if the Governor-General spoke only airy nothings.

I take my lead from my Australian counterpart, who has said that he is entitled to raise questions and to probe issues of social concern but that he becomes political if he proposes solutions; to which I would add this qualification, solutions about which political parties have differing views. It is a fine line indeed, and I shall do my best to tread on the correct side of it\(^{19}\).

It is in their community leadership role that the Governor-General enjoys the greatest freedom, and, potentially risks also. This will depend on how far the incumbent wishes to go in commenting on matters of

\(^{18}\)Speeches are written by the Governor-General him or herself, with the occasional assistance of the Official Secretary; Interview with Hugo Judd, 14 April 1998.

\(^{19}\)“Building a Civil Society”, New Zealand Education Development Foundation’s Seminar on The Family, Community, Church and State, Christchurch, 18 September 1999.
political policy\textsuperscript{20}. It is also a role which has little relation to the political or constitutional role of the office. Yet it is a role which allows them noticeably greater freedom than is enjoyed by the Sovereign in the United Kingdom, as their speeches are subject to less ministerial oversight\textsuperscript{21}.

\textsuperscript{20}The qualification suggested by Sir Michael is consistent with the approach taken by the Prince of Wales. The creation of the Prince's Trust (1976), Business in the Community (1981) illustrate this practical role.

\textsuperscript{21}Interview with Hugo Judd, 14 April 1998.
8.3 The constitutional role

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

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

22 In this respect the Governor-General is regarded by the Australians for Constitutional Monarchy as effectively the head of State of Australia; Abbott, Tony, How to win the constitutional war (1997) 17-18.

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


either the wish or the opportunity to countermand what the Governor-
General had done” 26.

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

The first was in 1932, when James McNeill was dismissed by King
George V on the advice of de Valera, for attending an official reception
at the French legation as a representative of the Crown, of which de
Valera, as a republican, disapproved. Further instances are recorded 27.
None however has occurred in New Zealand 28.

There has been no instance where the advice of a Prime Minister to
dismiss a Governor-General has been rejected, but the Sovereign could
legally do so 29. It is uncertain whether in practice the Sovereign would
always follow such advice, or indeed whether they would revoke the

26 Hasluck, Sir Paul, The Office of Governor-General (1979) 28n.
27 Butler, David, & Low, DA, Sovereigns and Surrogates (1991) 352. Examples since 1991 include St Lucia and Tuvalu.
28 Though several have retired early, including Sir Keith Holyoake, who
had indicated when appointed that he would only serve three years. At
least in part this may have been a concession to criticism of his
appointment; The Holyoake Appointment (1977).
29 Thereby presumably causing the Prime Minister to resign, or ask for a
dissolution of Parliament. Either way, it would drag the Sovereign’s
decision down to the level of party political electioneering.
commission of a Governor-General other than in writing\textsuperscript{30}. It is however unlikely that the Sovereign would act solely on a telephone conversation with his or her Prime Minister\textsuperscript{31}.

The present Sovereign does maintain some involvement with New Zealand, aside from paying periodic visits to this country, during which she exercises as many constitutional functions as can be fitted into her schedule\textsuperscript{32}.

Governors-General send regular letters to the Queen to keep her informed about significant political, economic and other events in New Zealand\textsuperscript{33}. But the primary responsibility for the government always remains in the hands of the vice-regal officer, as was shown by the


\textsuperscript{31}See evidence given to the Australian Constitutional Commission’s Advisory Committee in 1986 by the Revd Mr Haldane-Stevenson (1 October 1986 p 333), citing a 1982 letter from Sir William Heseltine. This is particularly so since the incident in 1995 when Her Majesty mistook a well-known Canadian hoaxter for the Prime Minister.

\textsuperscript{32}As, for example, opening Parliament, assenting to legislation, and receiving diplomatic representatives.

\textsuperscript{33}Similar practises are followed elsewhere- the Governor-General of Australia regularly reported to the Queen that he had appointed new Ministers; Hasluck, Sir Paul, \textit{The Office of Governor-General} (1979) 27n.
response of Buckingham Palace to the Australian crisis of 1975\textsuperscript{34}- where the Governor-General dismissed the Prime Minister and government after they had failed to secure the passage of the Budget against the opposition of the upper house, and the 1987 coups in Fiji\textsuperscript{35}.

In the Australian context, Sir John Kerr has made the point that the action of dismissing Prime Minister Gough Whitlam in 1975 was his and his alone\textsuperscript{36}. Although there was much criticism of Kerr from various quarters, few seriously questioned that, once appointed by the Queen, it was his task, and his alone, to exercise the responsibilities of the office of Governor-General\textsuperscript{37}.

In 1987, Her Majesty made clear on several occasions that she regarded the Governor-General, Ratu Sir Penaia Ganilau, as solely responsible for the government of Fiji for so long as he remained in office, and declined to receive former Prime Minister Timoci Bavadra

\textsuperscript{34}The constitutional convention to act on advice need hardly be questioned yet there remains some uncertainty as to the use of the formal procedure of tendering advice to the Sovereign in situations where the responsible Ministers are seeking to pre-empt threatened action of the Sovereign’s own representative, the Governor-General.

\textsuperscript{35}Wood, Antony, “New Zealand” ch 5 in Butler & Low, Sovereigns and Surrogates (1991) 114-115. That the responsibility of head of State had been delegated was reinforced by the response of the Queen to the call for the Crown to honour the Treaty of Waitangi; Walker, R, Ka Whawhai Tonu Matou (1990) 234.

\textsuperscript{36}Kerr, Sir John, Matters for Judgment (1978). See also Chapter 6.3.2.
after he had been dismissed by the Governor-General on advice of coup leader Lieutenant-Colonel Sitiveni Rabuka38.

Although there has been some criticism of this relative inaction, it must be justified on the grounds that the Queen was not able to form a balanced judgement of the unfolding events, and had to rely on her local representative. Had she had the benefit of an advisory staff in London the response of the Palace might have been more proactive39. In the circumstances was perhaps inevitable that a cautious approach would be adopted40.

Although the Governor-General has primary responsibility for a country, and the Sovereign is rarely involved unless actually visiting, the decision of the 1926 Imperial Conference that the Governors-General of the Dominions were in all essential respects in the same relationship with their Ministers as the king led to a belief that the Governor-General was virtually powerless. The Statute of Westminster 1931 had a similar

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


39 Although the Royal Household numbers some 600 individuals, the Private Secretary, a deputy and an assistant are the only source of advice of a political nature. In contrast the German President’s Office, which numbers only 100 individuals, includes some 20 advisory staff. Governors-General traditionally have also relied upon a sole Official Secretary; Spath, Franz, Das Bundespräsidialamt (1982); private sources.
affect. This was despite the fact that the legal powers of the British Sovereign were no wider than those of a Governor-General\footnote{See also Illingworth, GM, “Revolution and the Crown” [1987] NZLJ 207.}.

Indeed, given that a Governor-General has powers specifically conferred upon him or her by a Constitution, they may have powers not possessed by the Sovereign, as may be the case in Australia\footnote{Sawyer, Geoffrey, “The Governor-General of the Commonwealth of Australia” (1976) 52 Current Affairs Bulletin 20, 25.}. Yet the perception was always otherwise, not because of doubts about legal powers, but of the willingness to use them:

> British Ministers have not doubted the free will of the Sovereign ... but in other Commonwealth countries Ministers have seldom had any real conviction about the free will of the Governor-General\footnote{The Commonwealth of Australia Constitution Act 1900 appears to confer powers additional to those in the Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia 29 October 1900.}.\footnote{Quentin-Baxter, RQ, “The Governor-General’s Constitutional Discretion” (1980) 10 VUWLR 289, 300.}

The Governor-General may for most purposes be said to be in a position analogous to that of the Sovereign, with one significant distinction. They remain, by definition, an official, subordinate to someone else from whom they derive at least part of their legal power,
and much of their social standing. And, as an official, they are relatively transitory\textsuperscript{44}.

This later aspect in particular has led to the office of Governor-General becoming institutionalised, confined, like the Sovereign, to following precedent, but largely unable, because of their impermanence, to alter the conditions in which they find themselves\textsuperscript{45}.

Examples from Australia and Canada illustrate how the real power of the Governors-General has declined over time, as a result of their impermanence and dependence upon politicians. In this decline they have come to more closely resemble the Sovereign, and thereby symbolically reinforcing national independence. But at the same time this has fostered a belief that the office enjoys no real power.

\textsuperscript{44} Though not so transitory as Ministers; Interview with Sir Paul Reeves, 11 November 1998.
Political dominance of the Crown has been described as a natural condition of modern Canadian government\textsuperscript{46}. However, it is the reserve power of the Crown, capable of exercise without the advice of Ministers, that attracts academic attention\textsuperscript{47}. The problem of the reserve power today is not so much how to check the Crown’s use of it as how to prevent the Prime Minister from abusing it\textsuperscript{48}.

The hallmark of the reserve power lies in the Crown’s discretion to use it without advice. In the matter of exercising the prerogative, much depends upon the relationship that exists between the Governor-General

\textsuperscript{45}Even to the extent of feeling a reluctance on the part of domestic staff to alter the way in which afternoon tea is presented; Interview with Dame Catherine Tizard, 19 May 1998.


\textsuperscript{47}This bias tends to eclipse the more commonly exercised prerogatives of the Crown. See Dawson, R MacGregor, Review of \textit{The Royal Power of Dissolution of Parliament in the British Commonwealth} by Forsey (1944) 10 CJEPS 88.

\textsuperscript{48}Smith, David, \textit{The Invisible Crown} (1995) 57. Critics of Bill C-60 had such considerations in mind, for in addition to revising the symbolic form of the Crown, sections of the bill appeared to reduce the reserve power and undermine the Governor-General’s guardianship of the Constitution; Senate of Canada, Special Senate Committee on the Constitution, \textit{Proceedings of the Special Committee on the Constitution} (1978) 9 August 1978, 3:12
and the Prime Minister\textsuperscript{49}. Once the Canadian government had obtained the right to give exclusive advice to the Sovereign, the opportunity was taken, for pragmatic reasons, to streamline the process of government. For reasons of geography it was more efficient for a signature to be obtained in Ottawa than in London. It was also more in keeping with the concept of a national monarchy, though this aspect only developed in later years.

The decline in the status of the Governor-General in the last four decades has been even more marked in Canada than it has been in Australia. To a great extent this has been due to the choice of appointee\textsuperscript{50}. Australia generally had a senior politician or judge. Canadian appointees have been more closely associated with the political party in power, and less able to convey the impression of independence which is necessary to maintain some real independence. Nor was this independence helped by the administrative and legal changes which followed.

The Canadianisation of the Crown in the 1970s saw the transfer of remaining prerogative powers from the Sovereign to the Governor-

\textsuperscript{49}Smith, David, \textit{The Invisible Crown} (1995) 59-60. Though the possible exercise of reserve powers in a constitutional emergency may be assisted by the separate existence of the executive council; see Brookfield, FM, \textquotedblleft Convention, Cabinet and executive council\textquotedblright{} (1986) 12(2) NZULR 204, 206. If this is so, this may tend to counteract the otherwise dominant influence of the Prime Minister.

\textsuperscript{50}Mallory, JR, \textquotedblleft The Appointment of the Governor General\textquotedblright{} (1960) 26 CJEPS 96.
General. Till 1978 the powers of declaration of war, ratification of treaties, and appointment of ambassadors was exercised by the monarch personally. This were ended that year, after consultation between Prime Minister and Monarch. But this did not lead to increased Cabinet participation, nor to an enhancement of the Governor-General’s powers. Rather, the Prime Minister’s influence and discretion was expanded.

Lacking an independent source of advice, compelled by convention to act only on the advice of the Prime Minister, and now endowed with the whole range of royal powers except the power to appoint his or her successor, the Canadian Governor-General has become little more than

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51 A process begun in 1947 with the prerogative; Letters Patent constituting the Office of Governor-General of Canada (Canada Gazette, Part I, vol 81, p 3104).

52 The appointment of ambassadors was always much more frequent than the ratification of treaties (which rarely takes place at head of State level), or the declaration of war, which is all but obsolete.


54 Rather than the advice of Cabinet, which could be difficult in practice in any case due to the traditionally large size of Canadian Cabinets. New Zealand experience has not shown many instances where the Governor-General has acted upon the advice of Ministers against the (informally expressed) wishes of the Prime Minister. But such events have occurred; Interview with Sir David Beattie, 15 April 1998.

55 And even that power may have been delegated, see the discussion of the 1947 letters patent in Chapter 6.3.1.
a significant tool in the hands of the Prime Minister. Thus, it is the Prime Minister who in practice controls the prerogative to dissolve Parliament, and who appoints Ministers.

Like the British Labour Government in the immediate post-World War Two years, successive Canadian governments have appreciated the powers which it can make use of, powers which derive from the Crown. The Crown itself contributed to Canadian political independence, but at a price. The Governor-General of Canada being perhaps the least credible viceroy of the major realms today, in that he or she is expected to be little more than a tool in the hands of politicians.

Thus, it would be unthinkable for a Canadian Governor-General to question appointments made ostensibly by him or her. In new procedures agreed upon in 1976 the Prime Minister was to “consult the Governor General where possible” on the appointment of the Chief Justice, envoys to Washington, London and Paris, Lieutenant-Governors, Judges of the

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56 Arguably the Sovereign holds a similar position in the United Kingdom, but at least she is held in more respect than has been shown to many of her representatives.


58 There was even some discussion about removing the authority of the Governor-General to act without the benefit of advice, something which has been done in the Solomon Islands; Wolfers, Edward, “Discretion, Politics and the Governors-General “ (1977) Australian Quarterly 76.
Supreme and Federal Courts, and Chief of Defence Staff, as well as other important positions including any to which former Cabinet Ministers might be assigned.

The Prime Minister also agreed to “inform the Governor General in advance where possible” of certain other appointments, including senators, deputy Ministers, and heads of important crown corporations and agencies. Informal approval after a decision has been taken does not however amount to effective consultation\textsuperscript{59}.

\textbf{8.3.2 Australia}

Political controversy grounded in differences of party have distorted the perception of the Constitution in Australia. Evatt recognised the political/legal dichotomy of the Constitution\textsuperscript{60} when he wrote that “what is really the appropriate subject for specially trained constitutional


\textsuperscript{60}Arguably, neither constitutional lawyers nor historians- specially trained or not, are properly equipped to understand what is a truly multidisciplinary entity.
lawyers and historians tends to become the hunting-ground of mere political party polemics.\(^6^1\)

Overtly political conflicts have played a much greater role in developing the office of Governor-General in Australia than in New Zealand, and the reasons for this lie in the federal nature of the Australian Constitution, and a somewhat different, perhaps more polarised, political tradition.

The Canadian and Australian constitutions both assigned more formal powers to the Governor-General than was ever exercised by those officers. The Constitution of Australia Constitution Act 1900 provides that:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the laws of the Commonwealth.\(^6^2\)

Similarly, the British North America Act 1867 provided that:

> The executive government and authority of and over Canada is hereby declared to be vested in the Queen.\(^6^3\)

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\(^6^1\) Evatt, Herbert, *The King and his Dominion governors* (1967) 2.
\(^6^2\) s 61.
\(^6^3\) s 9
Both were modelled on perceptions of the contemporary British constitution, a fact expressly stated in the 1867 Act\(^6^4\).

It has been said that there are now three possible models for the exercise of the powers of the Governor-General of Australia. The office can be perceived as being a “rubber stamp”; as having a role assigned by conventions; or as having a role as assigned by the Constitution\(^6^5\). Commentators adhere to one or the other, depending upon the political tradition which they represent.

These traditions are reflected in the ongoing struggle for the office of Governor-General. This has been fought, in part, through partisan appointments to the office. The ongoing debate over the definition of the identity and role of the office continued in a series of articles written by former Governors-General\(^6^6\).


\(^{65}\)See, for example, Mallory, JR, “The Office of Governor-General reconsidered” (1978) Politics 216-217.

The powers given in the Constitution are broad enough to give some plausibility to the argument that the Governor-General was never intended to use any of them\(^{67}\). The Westminster model has no place for a powerful Governor-General, although it certainly does not require him or her to be a “rubber stamp” either\(^{68}\). Even the Westminster conventions tend to confine the power of the Crown to the dissolution of Parliament and the appointment of the Prime Minister. But the existence of a relatively strong upper house of Parliament has meant that there is scope for vice-regal involvement in politics.

The constitutional powers of the Governor-General of Australia are apparently greater than those of the Queen, but he or she lacks a supporting bureaucracy and life tenure, so his or her influence, and real political power, is therefore less\(^{69}\).

\(^{67}\)The Constitution of Australia, and similarly worded constitutions, may have given wide powers to the Governors-General because of a reluctance to admit the reality of party politics.

\(^{68}\)The authors of the Turnbull Report felt that presidential powers, based on those conferred upon the Governor-General, could, if unlimited by convention, risk giving a president “potentially autocratic powers”; Australia, Republican Advisory Committee, *An Australian Republic* (1993) 116.

\(^{69}\)The former Governor of Victoria, Richard McGarvie has argued that both a popularly elected president or a president elected and dismissed by two-thirds vote of Parliament threatened Australia’s established democratic system of government. He felt that it was crucial to democracy that the Governor-General (or president) always be liable to prompt dismissal for breach of conventions; “Our Democracy in Peril” 30 April 1997 p 6.
Although the Governor-General is the Queen’s personal representative in Australia, he or she derives no relevant power from her. His or her powers and functions are derived from the Constitution itself, the power to exercise the executive power vested in the Queen\textsuperscript{70}.

There is one seminal example of the instability inherent in a system which accords greater nominal powers to an office than which will be ordinarily exercised.

In 1975 the Prime Minister, Gough Whitlam, failed to obtain Senate approval for supply, though this had been granted by the House of Representatives, yet refused to resign or ask for a dissolution of Parliament. He was then dismissed by the Governor-General, Sir John Kerr. In the words of Sir Garfield Barwick, the then Chief Justice of Australia, and himself to be drawn into the crisis, “The Crown has an obligation not to retain Ministers who cannot produce supply”\textsuperscript{71}.

Whilst the Governor-General had the formal legal power to dismiss Whitlam, who proposed continuing in government with the use of trading bank overdrafts if need be, it was questioned whether he should have


used that power. Although his actions were vindicated to some degree by the subsequent electoral success of the newly appointed Fraser government, Labour Party supporters at least were unhappy about the use of vice-regal discretion\(^\text{72}\).

It was not necessarily legally wrong for the Governor-General to act as he did on 11 November 1975, using his authority to end the impasse in Parliament and affording the electorate an opportunity to express itself so as to provide a workable legislature. What was arguably wrong was that the Governor-General was placed in the position where he became bound to exercise his authority.

An astute Governor-General will place upon political leaders the onus to resolve a dispute\(^\text{73}\). The necessity for intervention may have been exaggerated by certain protagonists, but the response to the intervention supports the notion that for the Governor-General to be politically active risks destroying the office.

The reaction to the dismissal of the Whitlam government by the Governor-General in 1975 however revived consideration of the Australian Constitution, including the question of republicanism. In


particular, the question of the respective powers of the Governor-General and the Senate were widely discussed. While the circumstances of the events of that year were peculiar, the Labour party in particular felt that the constitutional arrangements had disadvantaged it\textsuperscript{74}. Whether the outcome would have been any different under a republican constitution was uncertain, however.

Whereas the appointment of Governors-General in New Zealand have been influenced by the desire to choose candidates who would be generally acceptable (usually meaning individuals of a non-controversial type, such as judges), in Australia there was a tendency for political factors, particular after 1975, to encourage the appointment of such people. This meant that the type of individual chosen reflected the perception of the Constitution held by the appointing government.

The Liberal government, keen to avoid controversial appointments, nominated Sir Zelman Cowen, and Sir Ninian Stephen, who were both non-political, being a respected academic and a senior judge respectively, as Governor-General. Labour appointed the judge Sir William Deane, in 1996. An exception to the growing tendency towards non-political

appointees, Bill Hayden, Minister of Foreign Affairs, was appointed in 1989. He was, however, to prove relatively non-controversial in office.\(^{75}\)

However, both the British grandees of the early Menzies era, and the later judges and academics, tended to accelerate the decline in the independence and influence of the office of Governor-General. Judges, by the nature of their office and training, do not act precipitously. In their caution to avoid controversial appointments, Liberal Governments chose individuals who reinforced the impression of the office as being little more than a “rubber stamp”\(^{76}\).

Political appointees, such as Casey, Hasluck and Hayden, keen to avoid any hint of political bias, scrupulously limited their actions to a relatively narrow social function, and attempted to avoid all danger of political controversy. After the dispute between Kerr and Whitlam, this fear of controversy has further hampered the scope for independent action by an Australian Governor-General. The Governor-General acts

\(^{75}\)And, indeed, converted from a republican, to a mildly pro-monarchy view.

\(^{76}\)This is ironic given that at times commentators call for a judge to be appointed Governor-General, because they may find themselves in a position requiring them to at least consider acting independently; Morris, Caroline, “Governor-General, the Reserve Powers, Parliament and MMP” (1995) 25 VUWLR 345; Stockley, Andrew, “The Governor-General and MMP” [1996] NZLJ 213.
only with the benefit of the advice of Ministers, and rarely if ever on his or her own initiative\textsuperscript{77}.

Both Cowen and Stephen have written about the role of the office\textsuperscript{78}, but this has done little to counter the widespread public perception that the office has limited real power. Given the nature of the office, these perceptions are of crucial importance, much more significant than any actual legal power.

In an analysis of the lessons to be learnt from the events of 1975, Sir Garfield Barwick concluded that in order to safeguard the federal parliamentary democracy, the status and legislative power of the Senate, and the discretionary powers of the Governor-General should be maintained unimpaired\textsuperscript{79}.

The lesson for New Zealand is that an entrenched Constitution may require a reappraisal of the role and powers of the Governor-General of

\textsuperscript{77}In Papua New Guinea the Governor-General is empowered by the Constitution, which is heavily influenced by Australian academics, to act “only with, and in accordance with”, advice, on the reasoning that otherwise he could do what he like in the absence of advice; Wolfers, Edward, “Discretion, Politics and the Governors-General” (1977) Australian Quarterly 76.


New Zealand, who cannot be seen as simply a simulacrum of the Sovereign.

8.3.3 New Zealand

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

Yet because of the absence of an entrenched constitutional document, and because, unlike both Canada and Australia, New Zealand does not have a federal Constitution, the legal and conventional position of the New Zealand Governor-General is more closely akin to

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80 Letters Patent Constituting the Office of Governor-General of New Zealand, 11 May 1917.
82 Putting aside the problem of the status of the Treaty of Waitangi.
the relationship between the British Sovereign and political structure than is any other realm.

Following the granting of responsible government, colonial executive councils had come more and more to conduct their business without the governor present\textsuperscript{83}. By the 1920s the Governor-General’s relationship with the Executive Council had become largely analogous with that of the Sovereign and the Privy Council in the United Kingdom\textsuperscript{84}.

Even though after 1926 the scope of the Governor-General to act on their own initiative, or contrary to the advice of New Zealand Ministers rapidly declined, from 1917 to 1983 the content of the instruments creating the gubernatorial office and the standing instructions for the exercise of its powers remained virtually unchanged\textsuperscript{85}.

\textsuperscript{83}In the usual colonial arrangement, the Governor had chaired the Executive Council. The advent of responsible government saw more decisions being taken in the absence of the Governor, with the Council becoming a de facto Cabinet. Members of the Executive Council now include all Ministers, whether members of Cabinet or not, and the usual presiding officer is the Governor-General; Interview with Sir David Beattie, 15 April 1998.

\textsuperscript{84}The Privy Council is more than mere the Cabinet meeting in the presence of the Sovereign, indeed, though all Cabinet Ministers will be Privy Counsellors, only a few will attend each meeting, to transact primarily formal business. For the practical role of the Privy Council from the perspective of a former British Minister, see Crossman, Richard, \textit{The Diaries of a Cabinet Minister} (1977).

\textsuperscript{85}For example, the requirement of the Constitution Act that the Governor-General transmit to the Secretary of State a copy of every Bill
As we have seen\(^\text{86}\), in 1983 the legal basis for the office of Governor-General was reconstituted following a lengthy review. Redrafting of the letters patent constituting the office of Governor-General had begun in 1967, with the establishment of an interdepartmental committee. A proposed redraft was prepared in 1972\(^\text{87}\). There was consultation with Buckingham Palace during the process of drafting the new letters patent, and the Queen’s informal approval was sought before the draft was referred to Parliament for debate prior to enactment by the Queen at the request of the Executive Council\(^\text{88}\).

The 1917 Letters Patent and royal instructions were replaced by a new prerogative instrument\(^\text{89}\), which more accurately reflected the contemporary position of the office. Obsolete elements removed included the requirement that a Governor-General’s departure from New Zealand have the formal approval of the British government. Under the new prerogative instrument, the Governor-General is more clearly defined as

\(^{86}\) Chapter 7.3.


\(^{89}\) Letters Patent Constituting the Office of Governor-General of New Zealand, 28 October 1983.

representative of the Sovereign, and in no respect an agent of the British government.


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

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

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

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90cl I. The term “any other person who has been or may be appointed to represent Us in any part of Our Realm” includes the Queen’s Representative in the Cook Islands.
To exercise on Our behalf the executive authority of Our Realm of New Zealand, either directly or through officers subordinate to Our Governor-General\textsuperscript{91}.

It has indeed been questioned whether the Queen retains the right to exercise these delegated powers personally unless actually present in New Zealand\textsuperscript{92}.

The Governor-General today enjoys broadly the same formal powers as his or her predecessor of 1926\textsuperscript{93}. However, their real power is less. In part this is because the powers which remained with the Governor-General as agent of the British government, and which lingered for some years after 1926\textsuperscript{94}, have now gone.

But the perceived powers of the Sovereign in the United Kingdom have also declined since that decade, and the consequences of this have been felt in New Zealand. In particular, this has resulted from the continued debate over the implications of the Glorious Revolution, and

\textsuperscript{91}cl III (a). Clause (b) expands slightly upon this.

\textsuperscript{92}Hardie Boys, Sir Michael, “Speech to the Public Law Class at College House Christchurch 10 September 1997”.

\textsuperscript{93}Excepting some obsolete provisions, such as reservation of legislation.

\textsuperscript{94}The role as channel of communication with London survived to some extent to 1940, see Chapter VII.
perfecting the dynamics of Cabinet government\textsuperscript{95}. Thus whilst assuming “the function of kingship”\textsuperscript{96}, the Governor-General has been both symbolically strengthened and politically weakened, to the advantage of the political executive.

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

\textsuperscript{95}Hodge, William, “The Governor-General” (1988). This paper canvassed the evolution of the office from colonial times to the constitutional reforms of the mid 1980s.

\textsuperscript{96}Dawson, R MacGregor, \textit{The Civil Service of Canada} (1929) 35.
8.4 The advent of MMP

A variety of commentators predicted that the advent of Mixed-Member Proportional (MMP) voting for the House of Representatives in 1996 would result in a more activist Governor-General\(^9\), faced with the need to oversee the formation of a coalition or minority government\(^8\). They argued that the Crown’s reserve powers, hitherto used extremely rarely, if ever, may be used more often, giving the Governor-General more opportunities to exercise control over the incumbent government.

However, as Stockley has observed\(^9\), it is flawed logic to assume that MMP will require a more interventionist Queen’s representative. The Governor-General’s role is essentially non-political, in that they do not seek to involve themselves, nor should politicians seek to involve them,

\(^{97}\)Governors-General have published their own views of these matters; Dame Catherine Tizard, “The Governor-General, MMP and what we want NZ to be” Press 7 July 1993; Hardie Boys, Sir Michael, “The Role of the Governor-General under MMP” (1996) 21(4) NZ International Review 2.


in politics. Political power rests with Parliament and the responsible Ministers drawn from members of Parliament\(^{100}\).

Arguments that the Governor-General can act as a guardian of the Constitution also overstate the case. Unlike in Australia, there is no constitutionally ordained impasse which would require vice-regal intervention\(^{101}\). Like the Sovereign in the United Kingdom, the Governor-General can only intervene to preserve the constitutional order itself\(^{102}\).

In forming governments and dissolving Parliament the Governor-General would have to follow the course of least political risk\(^{103}\). They


\(^{101}\)Unlike in Australia (in one view at least), there is no requirement for the Governor-General to adopt the role of arbiter between two houses of Parliament.

\(^{102}\)Though, indeed, there have been occasions when pressure groups have, rather optimistically, called upon the Governor-General to intervene in certain areas of government policy.

\(^{103}\)That is not to say that there are not occasional calls for this to change, usually by those opposed to the government of the day; see for example, Evans, Harold, *The case for a change* (1979). See, generally, Boston, Jonathan, *The future of cabinet government in New Zealand* (1994).
would seek to leave matters of political choice in the hands of the politicians\textsuperscript{104}.

If an election gives no clear result it should be a matter for the politicians, not the Governor-General, to resolve. Chen suggests that the Governor-General should commission the leader of the largest party to form a government\textsuperscript{105}. But the largest party may be unable to form a government. It is the responsibility of politicians to ensure that the Crown is never without a ministry. The Governor-General should encourage the leaders to reach agreement, but it is their choice (or those of their supporters in Parliament) which determines the composition of a government.

In the event of the political leaders failing to achieve agreement, there is then a limited role for the Governor-General, though as the Governor-General should not prefer any particular form of government, minority or coalition this risks embarrassing the office\textsuperscript{106}. The Clerk of

\textsuperscript{104}Something which Sir Michael Hardie Boys has regularly stressed, and which Sir John Kerr perhaps overlooked to his cost in 1975; Hardie Boys, Sir Michael, “Speech to the Public Law Class at College House Christchurch 10 September 1997”.


\textsuperscript{106}Boston, Jonathon, \textit{The future of cabinet government in New Zealand} (1994). When the Queen chose the Earl of Home (later Sir Alec Douglas-Home) in preference to RA Butler as British Prime Minister in 1963, there was some criticism of the choice; see Bogdanor, Vernon, \textit{The Monarchy and the Constitution} (1995).
the Executive Council, as agent for the Governor-General, liaised with
the Prime Minister over the arrangements for the change to the new
coalition Government in 1996\textsuperscript{107}. But they did not attempt to suggest, let
alone impose, any particular coalition.

While the viability of any minority or coalition government is
dependent on parliamentary support, there is no need to make formal
provision for this, as the conventions are quite clear. MMP reinforces the
importance of Parliament, rather than revives anachronistic Crown
discretion\textsuperscript{108} - anachronistic in that no Sovereign since 1839 has prevented
the formation of a government. Politicians, rather than the Governor-
General, must make the essential choices of selecting a Prime Minister
and determining whether to end the life of a Parliament. In this the
advent of MMP will make no essential difference\textsuperscript{109}.

The task for the Governor-General is to ascertain the will of
Parliament. In the case where parties have publicly formed alliances,
there is no need for advice from the incumbent Prime Minister or any

\textsuperscript{107}Hardie-Boys, "Continuity and Change" 1997 Harkness Lecture,
University of Waikato 31 July 1997.

\textsuperscript{108}Stockley, Andrew, “The Governor-General and MMP” [1996] NZLR
213, 217.

\textsuperscript{109}The task is, as far as possible, to remain out of politics and inherently
political decisions”; Stockley, Andrew, “The Governor-General and
other source. The outcome would be clear. In other cases he or she would have to act as a facilitator (but not arbitrator), providing such assistance as he or she could to bring about the formation of a government.\textsuperscript{110}

There could well be more uncertainty after an election than the nation is used to, perhaps for a period of some weeks. But uncertainty alone is not a problem, so long as there is a clear process for resolving it.\textsuperscript{111} Such short-term uncertainty will have little long-term effect on the constitution. But it does serve to emphasise the role of the Governor-General as \textit{pro tempore} head of State, and of the Crown as a part of the political structure of the country. It is the Governor-General, and not the Queen, that the public, as well as political leaders, would expect to resolve any impasse.

As with most other constitutional alterations since 1986, the advent of MMP may have actually brought the Governor-General more closely into alignment with the position of the Sovereign in the United Kingdom.\textsuperscript{110}


Kingdom\textsuperscript{112}. For, in focussing attention once more upon the reserve powers of the Crown, it has acted as a counterbalanced to the traditional view of vice-regal versus royal free will\textsuperscript{113}, yet it has not gone as far as Australia arguably had.

The advent of MMP may still make a considerable difference to the law and working of the constitution\textsuperscript{114}. But this will perhaps not be in the way commentators suggested. For it may be in the long-term evolution of the constitution that its efforts are most clearly felt. Thus, while the actual role of the Governor-General in the selection of Prime Minister may not have markedly altered, an increased emphasis upon vice-regal reserve powers may encourage a reappraisal of the office.

More significantly, the advent of MMP may have had the effect of encouraging further political change, either because of a desire to avoid the uncertainty inherent in coalition governments, or because of a feeling that reform may not have gone far enough. For it might be said that with increased awareness of the office, so the Governor-General has come some way to overcoming the lack of conviction about the free will of the

\textsuperscript{112}See Chapter VI.

\textsuperscript{113}Quentin-Baxter, RQ, “The Governor-General’s Constitutional Discretion” (1980) 10 VUWLR 289, 300. While an imperial agent the Governor-General's free will was, of course, held in abeyance by the requirement of adherence to imperial policy.

Governor-General\textsuperscript{115}. In this it may be seen as continuing the process exemplified by the Constitution Act 1986, which brought the position of the Sovereign more fully within the constitutional apparatus of New Zealand.

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

8.5 The current state of the Office of Governor-General

Once seen as an instrument of imperial will, the Governor-General is now sometimes seen as a constitutional safeguard against executive despotism\(^{116}\). Sir David Beattie was in no doubt that the Governor-General has extensive and undefined powers to act in times of constitutional crises (such as if a government refused to resign despite lacking parliamentary support) and that he can act in his own right as the Queen’s representative, informing her of his actions thereafter\(^{117}\).

Several instances have shown that the Crown retains a role in special circumstances\(^{118}\), but any action risks destroying the institution. To be politically active risks destroying the office, as nearly occurred in Australia in 1975\(^{119}\). But failure to act would also be criticised. In part because he or she is a representative of the Crown, the Governor-General seeks to minimise the chances of conflict with Ministers, in most


\(^{117}\) Sir David Beattie, interviewed in Council Brief, as quoted in Downey, Patrick, “A constitutional monarchy” [1986] NZLJ 1, 2.

\(^{118}\) *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 25, 90-1 (Grenada CA). The court relied on the doctrine *salus populi suprema lex* (the safety and preservation of the State is the supreme law).

\(^{119}\) Though arguably the problem there was that Kerr overstepped the mark between resolving constitutional impasses (by active measures) and settling political disputes (which should be left as far as possible to politicians).
instances simply by seeking to know the wishes of Ministers and altering their actions accordingly\textsuperscript{120}.

The right of the Governor-General to be consulted, to encourage, and to warn relies upon the maintenance of good working relations between the Governor-General and his or her Ministers. The giving of advice, and the regular flow of communications, are essential to keep the Governor-General sufficiently well informed so that he or she can fulfil their role. This means that they must try to be, in the words of the Queen as reported by Sir David Beattie, “the best informed person in New Zealand”\textsuperscript{121}. How this could be achieved with the minimal support available to the Governor-General remains unclear, though the resources of the whole of government is theoretically available to the Governor-General\textsuperscript{122}.

Both Sir David Beattie, and Hugo Judd, currently Official Secretary to the Governor-General, believed that, although the Governor-General did not receive Cabinet papers, and his or her contact with Ministers was relatively limited, they would be able to obtain any

\textsuperscript{120}For this reason, vice-regal speeches, although not normally shown to Ministers prior to delivery, will always be written with current government (and opposition) policy in mind; Interview with Hugo Judd, 14 April 1998.

\textsuperscript{121}Interview with Sir David Beattie, 15 April 1998.

\textsuperscript{122}See Chapter 8.3.
information from government were it their wish to do so\textsuperscript{123}. However, in the absence of regular meetings with the Prime Minister, it remains uncertain that this is sufficient to enable the Governor-General to really gain an understanding of political developments were it the wish of the Ministry to keep him or her uninformed\textsuperscript{124}.

Some contact is maintained with Ministers on purely social occasions, but the regular contact is limited to the largely formal meetings of the Executive Council\textsuperscript{125}. These meetings have however occasionally led to the Governor-General expressing concerns about draft regulations, latterly under Sir David Beattie\textsuperscript{126}. Some ministers have also sought to offer the Governor-General occasional briefings, as Sir Douglas Graham did at times during his days as Minister in Charge of Treaty of Waitangi Negotiations\textsuperscript{127}.

The effectiveness of the office of Governor-General was limited by a perception of weakness (shared by public and politicians alike), and by

\textsuperscript{123}Interview with Sir David Beattie, 15 April 1998. Interview with Hugo Judd, 14 April 1998.
\textsuperscript{124}It was Dame Catherine Tizard’s impression that most Ministers ignored the Governor-General as much as possible; Interview with Dame Catherine Tizard, 19 May 1998.
\textsuperscript{125}Interview with Sir David Beattie, 15 April 1998; Interview with Sir Douglas Graham, 24 November 1999.
\textsuperscript{126}Interview with Sir David Beattie, 15 April 1998.
the lack of an independent advisory office. Yet, following the advent of MMP, the position of the Governor-General might be strengthened over time, but not in the way usually posited.

As Sir Michael Hardie Boys has made clear, the task of making political choices is not one for the Governor-General. There are two considerations which followed from this. Firstly, that the people should understand that fact (that political decisions are made by politicians), and secondly, that there should be a full and frank relationship between the Prime Minister and the Governor-General (so that the Governor-General knows how he or she can assist the government in making these decisions)\(^{128}\).

If Ministers, and the Prime Minister in particular, were to regard the Governor-General as the one individual, apart from the Queen, in whom they could confide\(^{129}\), then over time the office of Governor-General might be strengthened. There would be no increase in legal powers, but with the perception that the Governor-General, like the Sovereign, enjoyed some discretion, the independence, and ultimately the effectiveness of the office could be enhanced.

\(^{127}\)Interview with Sir Douglas Graham, 24 November 1999.

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

The principal difficulty which faces the Governor-General is the uncertain perception of the office. Although the constitutional function may be better understood now that in past years, the actual role of the Governor-General is still not widely understood\textsuperscript{130}. The office is misunderstood by some politicians, perhaps by most\textsuperscript{131}. To some extent this may highlight a weakness in the Bagehot theory of government, with

\begin{flushleft}
\textsuperscript{129}Even attempts at merely social contact with politicians is apt to be misconstrued by some of the more suspicious types; Interview with Dame Catherine Tizard, 19 May 1998.
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\textsuperscript{130}It is for this reason that Government House would like to see more material published on the office, including a study of past Governors-General, something their own limited budget would never allow; Interview with Hugo Judd, 14 April 1998.
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\textsuperscript{131}Interview with Dame Catherine Tizard, 19 May 1998.
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its somewhat artificial division between dignified and efficient elements of government.

It would seem that this conceptual division may be misleading where the “dignified” element - that which acts as a “disguise for Cabinet government”, is in fact less visible than the “efficient” elements of government - Parliament and Cabinet. The tradition of a relatively low profile has fostered a minimalist conception of the role of the Governor-General, not just in his or her constitutional role, but also in their social role.

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

The position of the Governor-General, and of the Crown, will be determined by the solution chosen. But it will not necessarily mean the abandonment of either, for New Zealand's constitutional structure has for many years been dominated, not by a desire to rid our selves of an alien

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monarchy, but by a desire to resolve historic grievances and by contemporary uncertainties of identity and governance.
8.6 Conclusion

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

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

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133 Interview with Dame Catherine Tizard, 19 May 1998.
134 Hardie Boys, Sir Michael, “The Role of the Governor-General under MMP” (1996) 21(4) NZ International Review 2; Tizard, Dame Catherine, Crown and Anchor (1993); Dame Catherine Tizard, “The Governor-
There may have been an upturn in the status of the Governor-General for purely domestic reasons. Governors-General such as Sir Paul Reeves and Dame Catherine Tizard brought more publicity to the office, but arguably little increase in influence.

In Canada the office of Governor-General has been used to strengthen the political executive, and especially, the Prime Minister. The prerogatives now vested in the Governor-General are generally exercised on the sole advice of the Prime Minister, giving that individual a significant advantage over his or her Cabinet colleagues. This is particularly so with the prerogative of dissolution, and the appointment and dismissal of Ministers, both of which can be used to help manage parliamentary parties.

In Australia, while increasingly dependent upon their Ministers, Governors-General have assumed a more independent position. This has been due, principally to the powers inherent in the Constitution, principally those relating to the resolution of parliamentary impasses. This position is, however, fraught with difficulties, because of the on-

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136 Marshall, Sir John, “The Power of Dissolution as Defined and Exercised in New Zealand” (1977) 58 Parliamentarian 13; Forsey,
going debate about the powers of the office, and its future. This debate is less noticeable in Canada (which has a relatively weak upper house).

While the Governor-General has come to exercise most, if not all of the functions of the Crown in New Zealand, this has not necessarily resulted in a strengthening of the office. For the Governor-General is both strengthened and weakened by his or her position as representative of the Sovereign. They have the moral authority of the Crown, but share the vulnerability to criticism of that ancient office.\(^\text{137}\)

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

As a Governor-General only will occupy the post for some five years, they have felt constrained to follow, to a great degree, the example set by their predecessors. Like the Sovereign, to a significant extent the office of Governor-General has become institutionalised.\(^\text{138}\) It is in their constitutional and political role that this institutionalisation becomes clearest, and most significant. This tendency has been strengthened by

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\(^{138}\)Interview with Dame Catherine Tizard, 19 May 1998.
the advent of MMP, but it has also encouraged a reappraisal of the office as part of the wider system of government. Most importantly, MMP has signalled reawakened interest in fundamental constitutional reform.

The role of the Governor-General is to represent rather than to act, and as such he or she is symbolic of the constitutional order represented by the Crown. Both by strengthening the executive, as seen in Canada, and by the development of a separate kingship, it has promoted independence from a colonial past. The actual political influence of the Governor-General appears to be slight\textsuperscript{139}.

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

\textsuperscript{139}Interview with Dame Catherine Tizard, 19 May 1998; For an illustration of the effectiveness of influence, see Bogdanor, Vernon, \textit{The Monarchy and the Constitution} (1995) 72.
Although the Crown was not used as overtly to gain independence as it was in South Africa, Ireland and Canada, in New Zealand it was one of the principal means through which this was achieved. In so doing it has influenced the development of independence, into a form of national or localised monarchy.
Part 4  REPUBLICANISM

This thesis is not an attempt to assess the advantages or disadvantages of New Zealand becoming a republic. Arguments for and against a republic per se have not been examined, only a possible explanation for the relative conceptual, symbolic or practical strength of the Crown in New Zealand.

Each Part thus far has evaluated factors which integrate the concept of the Crown- if not monarchy\(^1\), into the New Zealand political system. In Part One, the position of the Crown was addressed in terms of traditional Western political theory, with reference to concepts of sovereignty and legitimacy. The Crown remains legally and conceptually useful to government, so its continuation was little questioned. Part Two examined the movement towards full independence, expanding 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. This narrowed the focus from conceptual to symbolic, and showed how the system which the Crown represents remains of practical importance, and therefore not irrelevant. In Part Three we saw the evolution of the office of Governor-General, and the

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\(^1\)One might be categorised as the system the other the symbolism, though such a distinction is quite artificial.
development of a distinctly New Zealand legal and political identity. This brought the focus on the Crown to a more practical level, where its symbolic role remains of some use to government.

It is now necessary to assess the forces which are opposed to the conceptual, symbolic, or practical Crown. In Part Four, “Republicanism”, the evolution of republican sentiment, and pressures opposed to the Crown, will be considered. In so doing, the hypothesis proposed by the thesis, that the absence of the Sovereign has encouraged development of an autochthonous concept of the Crown, will be evaluated.
Chapter IX:

REPUBLICAN SENTIMENT

9.1 Introduction

The Crown symbolises the authority of government in New Zealand\(^2\). But the continuation of this symbolism has been questioned by various groups and individuals, who propose that New Zealand become a republic\(^3\). One reason is the quest for sovereignty by some Maori, another the rejection of the relevance of the symbolism and substance of an inherited form of government\(^4\).

These arguments for a New Zealand republic, although with their own unique elements, stem from a long tradition of political thought, though not one which was markedly strong in New Zealand. It has also been argued that the gradual departure from the original Westminster

\(^2\)This may be said to be so whether founded in legal or political authority; Interview with Sir Douglas Graham, 24 November 1999.

\(^3\)For example, the call by Dave Guerin of the Republican Movement of Aotearoa/New Zealand for New Zealand to become a republic within five years; “Leaders shrug off republican ra-ra” New Zealand Herald 8 November 1999.

model means that the abolition of the monarchy will mark the culmination of our political development\(^5\).

The last century has been particularly marked internationally by a process of modernisation, of abandoning post-medieval political traditions\(^6\). Though criticism of monarchy as a generic form of government is by no means absent in republican literature in New Zealand, the emphasis (and much of the underlying beliefs) is on national identity. Ironically, this means modern Commonwealth republicanism has relatively little in common with traditional republicanism of the eighteenth and nineteenth centuries.

The first section of this Chapter looks at the older, particularly nineteenth century British, republican tradition. This was based variously on democracy, utilitarianism, and expense, depending upon the circumstances of the time.

The second section assesses the republican movement in Australia, and compares and contrasts it with that in New Zealand. In particular,

\(^{5}\)For example, see Bolger, James, “The American Constitutional Experience and Issues of Sovereignty: Lessons for New Zealand” in James, Building the Constitution (2000) 48-57.

although like classical republicanism the Australian variety depended for its intellectual base on sometimes conflicting ideologies, it has come to have nationalism as its principal motivation.

The third section looks at an argument that it would be illegal to abolish the monarchy. Although in the end the continuance of a regime depends upon popular support, if it is legally entrenched this will have an effect upon its stability. In the New Zealand context it would seem to indicate that the adoption of a republic would be more conceptually problematic than it would be in Australia.
9.2 Republican tradition in Britain

It may be thought that a monarchy has no place in a modern, egalitarian society, such as New Zealand’s. Such arguments were echoed, with stronger force, in early Victorian Britain. At that time the Sovereign played a greater personal role than he or she- or the Governor-General does in New Zealand today. What did Victorians, advocates of “progress, political reform, middle-class energy and self-made success”\(^7\), make of the hereditary monarchy?

There is much empirical evidence, and it highlights the growing tendency towards the symbolic (rather than political) importance of the Crown. Colley shows how George III, during the war with Napoléonic France, became the first king since 1688 to be exalted as the patriotic figurehead of the nation\(^8\). Between 1837 and 1887 opinions moved gradually towards the picture of the Crown as politically neutral and virtually insignificant\(^9\). Arguments for the abolition of the monarchy were generally not advanced by the promoters of “progress, political

\(^8\)“The Apotheosis of George III” (1984) 102 Past and Present 94.
reform, middle-class energy and self-made success”, but by the more extreme fringes of advanced political thought\textsuperscript{10}.

One argument used in the late 1840s and 1850s for the abolition of the monarchy was that political reforms, made in increasing acknowledgement of the de facto sovereignty of the people, had rendered it politically negligible\textsuperscript{11}, and that Britain already effectively had a republican form of government: “Our monarchy is only a pretence”, ... the Sovereign ... “only a supernumerary in the pageant”\textsuperscript{12}.

The most outspoken, fundamental criticism of the monarchy 1837-61 was on the grounds of its alleged irrationality, its costliness and luxury. These were largely intellectual criticisms based on utilitarian principles that government should be rational and economical, though not necessarily republican in nature\textsuperscript{13}.

\textsuperscript{10}The Chartist movement was not republican, though some of their leaders were.

\textsuperscript{11}Red Republican 22 June 1850 p 4.

\textsuperscript{12}English Republic (1851) vol 1 pp 355-358. Parallels to this may be seen in Australia: Galligan, Brian, “Regularising the Australian Republic” (1993) 28 AJPS 56. Even Bagehot emphasised the republican nature of the constitution, but he laid greater weight on the symbolic role of the Crown.

\textsuperscript{13}Williams, Richard, \textit{The Contentious Crown} (1997) 10. Indeed, Thomas Wright believed that utilitarianism rather than republicanism was the proper term for the movement; Fraser’s Magazine vol 83 (June 1871) 752.
In the 1860s Gladstone became increasingly concerned at what he called the “royalty question”- “the Queen is invisible and the Prince of Wales is not respected”\textsuperscript{14}. Organised republicanism was inspired by the French revolution of 1870, and working-class resentment of annuities paid to members of the royal family, particularly that to Princess Louise in 1871\textsuperscript{15}. But, unlike those of the 1840s, these latter republicans were inspired less by principle than by emotion\textsuperscript{16}.

It was therefore no surprise that, as Bradlaugh’s official biography records, the brevity of the movement’s life could be attributed to the “want of unity of motive and purpose” among republicans, the rise in the Prince of Wales’ popularity and the weakening of the economic case against the Crown as the cost and corruption of republican government in America and elsewhere became better known\textsuperscript{17}.

It was above all the celebration of royal events which disillusioned republicans, particularly the recovery of the Prince of Wales from serious illness\textsuperscript{18}. The masses actually wanted the monarchy, because it gave them

\textsuperscript{14} Magnus, Sir Philip, \textit{Gladstone} (1954) 207.

\textsuperscript{15} Fraser’s Magazine vol 83 (June 1871) 753; Dilke, \textit{On the cost of the Crown} (1871) 21-2.

\textsuperscript{16} Republican no 11 15 May 1871 p 7.

\textsuperscript{17} John Robertson, in Bradlaugh Bonner, Hypatia, \textit{Charles Bradlaugh} (1895) vol 2 pp 166-167.

something to enjoy and participate in. Abstract concepts of government were not enough.\footnote{This of course is Bagehot’s argument; “The English Constitution” in the \textit{Collected Works of Walter Bagehot}, ed St John-Stevas (1974) vol 5.}

While both principled and emotional republicanism faded, there was no slackening in the economic criticisms of royalty by radical MPs and newspapers\footnote{Such criticism continues, and is indeed rather more restrained than much nineteenth century criticism was.}. But “radicals have something better to do than to break butterflies on wheels”\footnote{Chamberlain, Joseph. \textit{Radical Programme} (1885) 38-40.}. Emphasis shifted to the more immediate social issues of the time.

The popular belief that the political power of the Crown had declined to nothing was identified by George Standring in 1884 as the main reason for the failure of British republicanism\footnote{Republican vol 10 April 1884 p 4.}.

The Times, in regretting Queen Victoria’s apparent withdrawal from government, warned “No reigning House can afford to confirm in its views those who suggest that the Throne is only an antiquarian relic and Royalty itself a ceremony”\footnote{15 December 1864 p 8.}. But by the end of the 1860s it too was acknowledging that the future of the monarchy lay in its ceremonial and
not in its political functions\textsuperscript{24}. Official efforts were made to capture and enhance this perception, as the monarchy was consciously promoted by Disraeli as a symbol of imperial unity\textsuperscript{25}.

This perception was crystallized by Bagehot\textsuperscript{26}. Yet the authority of the Crown overseas was in the hands of Governors-General and Ministers responsible to representative legislatures. The Sovereign was physically absent, so arguments based upon cost or even egalitarianism were largely inapplicable. There, republicans sought inspiration from other, often nationalist, beliefs. How these arguments relate to the concept of a national Crown is the substance of this Chapter.


\textsuperscript{25}See Chapter 6.4.

9.3 Republican movements in the Commonwealth

9.3.1 Australia

Republicanism in Australia has owed more to changing perceptions of national identity (and Irish nationalism), than did the movement in Great Britain\(^{27}\), where indeed the Crown was often regarded (particularly when threatened by external aggressors) as symbolic of an historic national identity\(^{28}\).

The long history of republicanism in Australia is well documented\(^{29}\). Always a substantial but often unrecognised part of Australian political tradition\(^{30}\), in decline after 1901\(^{31}\), it was revived in

\(^{27}\) McKenna, Mark, “Republicanism in Australia” (1996) University of New South Wales PhD thesis. The movement in Ireland is of course a special case, because of its relative antiquity, and its association with an independence movement.


\(^{30}\) Warden, James, “Fettered Republic” (1993) 28 AJPS 83; McKenna, Mark, “Republicanism in Australia” (1996) University of New South Wales PhD thesis. This nascent nationalism was due perhaps to traditions of centralised paternalism, collectivism, the predominance of a “mother community” (New South Wales), and a sense of geographic unity and
the mid-1960s\textsuperscript{32}. Republicanism has meant various things and different times, and has waxed and waned mostly in response to the changes in Australia’s relationship with the United Kingdom, but partly in time with Australian national self-identity.

In the nineteenth century developing nationalism led to “gold rush” republicanism (such as the Eureka Stockade uprising in 1854), and federation republicanism (a more principled advocacy of republicanism as a form of government)\textsuperscript{33}. Later anti-British feeling led to conscription republicanism (at the time of the First World War), and “bodyline” republicanism (inter-war sporting controversy)\textsuperscript{34}—both movements for greater independence, or nationalist, rather than “republican” per se. Much recent republican has arguably been inspired less by true nationalism than by chauvinism\textsuperscript{35}. Once awakened, Keating’s republican belief expressed itself (in the words of one opponent) “in antagonism to


\textsuperscript{32}Hayward, Janine, “In search of a treaty partner” (1995) Victoria University of Wellington PhD thesis 273.

\textsuperscript{33}For these and later manifestations see McKenna, Mark, \textit{The Captive Republic} (1997). As a nationalist issue, changes to the political symbols, such as flag, honours, and national anthem were important; Warhurst, John, “Nationalism and Republicanism in Australia” (1993) 28 AJPS 100.

\textsuperscript{34}Abbott, Tony, \textit{How to win the constitutional war} (1997) 28-29.
the United Kingdom, contempt for his political opponents, and impatience with the past, rather than any great affection for the country”36.

Until the early 1990s republicanism, whatever its ideological basis, remained a minority belief. The response to the Republic Advisory Committee in Australia, established by Paul Keating, surprised Malcolm Turnbull, its Chairman. Audiences across the country were “either strongly royalist or against the Keating republic”37. But the Australian Labour Party committed itself to the establishment of a republic in 199138 and it became the official policy of the Australian Labour Government to introduce a republican form of government39.

The republicanism of the Labour Party leadership had many bases, including fenianism, nationalism, and more moderate motives, and almost as many models for a republic were proposed. In 1995 the Labour Government announced its support for a republican model with a

35 Abbott, Tony, How to win the constitutional war (1997) 106.
36 Abbott, Tony, How to win the constitutional war (1997) 66. This may be seen in his speech on Britain and its defence of Singapore during World War Two; Australian, 29 February 1992, p 1.
37 Sydney Morning Herald 8 September 1993.
38 Abbott, Tony, How to win the constitutional war (1997) 30.
39 Australia, Republican Advisory Committee, An Australian Republic (the Turnbull Report) (1993). Though until after the Turnbull Report republicanism was still characterised by a media offensive by a minority
President elected by two-thirds majority vote of Parliament\textsuperscript{40}. It was felt that this would avoid the politicisation of the office\textsuperscript{41}. The hope was to maximise the chance of successfully persuading the electorate to support a republic by minimising the extent of change\textsuperscript{42}.

In 1995 the Liberal Party dropped active support for the monarchy, though they were not supportive of a republic\textsuperscript{43}. Historically a radical cause, republicanism had now become an establishment cause\textsuperscript{44}, espoused by different groups for diverse reasons.

Unlike early nineteenth century British republicans (who were largely motivated by utilitarianism), Australian republicans in the 1990s of influential individuals who claimed to have the people’s interest at heart; McKenna, Mark, \textit{The Captive Republic} (1997) 249-250.

\textsuperscript{40}“Way Forward” (Questions and Answers) Statement tabled in Parliament, 7 June 1995.

\textsuperscript{41}A president would however most likely be a political animal, as Abbott has argued; Abbott, Tony, \textit{How to win the constitutional war} (1997) 81.

\textsuperscript{42}Abbott, Tony, \textit{How to win the constitutional war} (1997) 43-44. A minimalist model is where the removal of an hereditary basis for office, but little else, is advocated; see Winterton, George, “Modern Republicanism” (1992) 6(2) Legislative Studies 21.

\textsuperscript{43}Abbott, Tony, \textit{How to win the constitutional war} (1997) 47-48.

\textsuperscript{44}See, for example, McGarvie, Richard, \textit{The McGarvie Proposal} (1997) various papers collected by their author, a former Governor of Victoria. To some extent, the Australian Republican Movement may be characterised as constitutional monarchists. They believe in the need for a head of State, though not in the hereditary principle. They accept the need for a unifying symbol; Langer, Albert, “Confound their politics” (1998) 42(5) Quadrant 10.
were largely concerned with a “foreign head of State”\(^{45}\) - national identity\(^{46}\). The details of a republic were, to many advocates, hoping to unite republicans of different ideologies, of secondary importance\(^{47}\).

Although many Australian republicans were concerned with the details of a republican constitution, pragmatism led to this being relegated to second place\(^{48}\).

While focusing on the existence of a “foreign” head of State, the republicans at once downplayed the significant constitutional implications of a republic and the emotional attachment many still felt for the monarchy\(^{49}\). As the Australian referendum campaign developed in the


\(^{46}\)Bogdanor distinguishes between arguments based on the anomaly of an absentee head of State; and (what he regards as perhaps more important), the psychological damage to the Australian sense of nationhood through its dependence upon the symbols of another country; *The Monarchy and the Constitution* (1995) 292-295. These are better categorised simply as a rejection of a foreign head of State. But republicanism in Australia is ultimately a cultural debate.


\(^{49}\)This attitude is clear in the address by James Bolger to the Building the Constitution conference in 2000; “The American Constitutional Experience and Issues of Sovereignty: Lessons for New Zealand” in
late 1990s, advocates of a republic took the initiative. Opponents were branded as “un-Australian”.

Although the focus of much republican sentiment was symbolism, there was also an important undercurrent of republican constitutionalism. The dismissal of Whitlam’s government in 1975 revealed, in the view of Reynolds, that “representative government in Australia was an empty gesture when confronted with viceroy sovereignty”. Because the discretion to dismiss was both legal and operative, responsible government was an ideal rather than a reality. Only by becoming a republic, with sovereignty vested in the people, and with elected representatives given the power to govern, would independence be achieved.

Though seriously flawed—through a misunderstanding of the limitations imposed by convention—this type of argument has been used

James, *Building the Constitution* (2000) 48-57, especially at 53; The emotional trauma felt by many South Africans at the loss of their monarchy in 1961 is often forgotten, but none the less real for that; Interview with Richard Girdwood, 18 September 1999.

50 Despite parallels, some Australian analysts shared the view of many Canadian commentators that republicanism seems to not be an issue in Canada. Aside from the constitutional pre-occupation with Quebec, Canada’s desire to distinguish itself from the USA makes it less likely than Australia to abandon the monarchy; Fennell, Tom, “Royal challenge” (1998) 111(8) Maclean’s 27; Smith, David, *The Republican Option in Canada* (1999) 230. See Chapter VI.
to justify constitutional reform which is actually largely inspired by arguments less amenable to proof, such as those of national identity\textsuperscript{52}, just as opposition to reform was often based on emotion.

The undercurrent of debate as to the constitutional implications of the form of republic chosen became important. Galligan argued that the existing Australian Constitution was essentially republican, only barely disguised by monarchic symbols and forms\textsuperscript{53}. He argued that current republican agitation was based on a misunderstanding of the true character of the regime or an exaggerated emphasis on its monarchic symbols and executive formulation\textsuperscript{54}. Thus, adoption of a republic for reasons of national identity need not have a significant constitutional effect.


\textsuperscript{52}Equally strained is the argument that a republic is inevitable, thereby implying a specious necessity; Hudson, Wayne & Carter, David, “Refining the issues” in Hudson & Carter, The Republican Debate (1993) 31.

\textsuperscript{53}Galligan, Brian, “Regularising the Australian Republic” (1993) 28 AJPS 56.

\textsuperscript{54}“Regularising the Australian Republic” (1993) 28 AJPS 56-59.
However, many commentators believed that introducing a republic would mean a more radical change than Galligan allowed. Atkinson observed that:

[Australia] is a monarchy at a more fundamental level than most people seem to imagine. Monarchy is more than merely royalty. [It is] a living and active conscience at the centre of the State.

Even former proponents of a republic had their doubts. Just three months from the 1999 referendum Peter Reith, a senior member of the Australian government, said he (though a republican) now believed that the republic model on offer was “seriously flawed” and “a third rate compromise” which could threaten Australia’s democracy.

To vote Yes [for a republic] would be the same as giving away blank cheques. It would be folly to vote for change when the consequences of the change are not clear.

The authors of the Turnbull Report felt that presidential powers, if unlimited by convention, could risk giving a president “potentially

autocratic powers. Opinion polls confirmed that the population was concerned by the details of the proposed republic. If they had to have a president, most would prefer one directly elected by the people, rather than appointed by politicians.

In conformity with the popular interest in substance rather than merely symbolism, upholders of the monarchy were often more concerned with the Constitution than the Crown as such, and reflected a pride in Australian constitutional order. In this they actually had much in common with the early nineteenth century British republicans than did the republicans themselves.

The pro-monarchy movement, spearheaded by the Australians for Constitutional Monarchy, sought to rely on constitutional, rather than emotional arguments. They argued that the Governor-General was


60 Abbott, Tony, How to win the constitutional war (1997) 6. A similar position has been apparent in Canada, where from the early decades of the colony prominent Upper Canadians recognised that they inherited a dual world. They were British subjects but they were also North Americans; Errington, Jane, The Lion, the Eagle, and Upper Canada (1987).

61 Indeed, some monarchies are more republican in political theoretical terms than formal republics; Hudson, Wayne & Carter, David, “Refining the issues” in Hudson & Carter, The Republican Debate (1993) 14.
effectively head of State already\textsuperscript{63}. The Queen was the Sovereign, not head of State. The Governor-General reported to Her Majesty, but did not answer to her\textsuperscript{64}. The real choice was not therefore between the Queen and an Australian head of State\textsuperscript{65}, but between the Governor-General and a president\textsuperscript{66}. They argued that the present constitutional system enjoyed widespread support and should not be changed.

Opposition to a republic was largely based on those who supported the pre-existing constitutional balance of power\textsuperscript{67}, and advocates of constitutional monarchy as a political principle or institution\textsuperscript{68}. But it also embraced those wishing to retain links with the British Crown precisely because it is British, and those who opposed the nationalist rhetoric of some republicans, whether on internationalist\textsuperscript{69} or even feminist

\textsuperscript{62}Latterly operating under the name “No Republic”.

\textsuperscript{63}Indeed, the Crimes (Internationally Protected Persons) Act 1976 (Australia) defines the Governor-General as head of State.

\textsuperscript{64}Abbott, Tony, \textit{How to win the constitutional war} (1997) 64.

\textsuperscript{65}It is clear that support for the monarchy as a form of government, rather than support for the Queen or the royal family, was an important factor. See the comments by interviewees to Mark Chipperfield, Sunday Telegraph (London) 1 August 1999.

\textsuperscript{66}Abbott, Tony, \textit{How to win the constitutional war} (1997) 68.

\textsuperscript{67}See e.g. Abbott, Tony, \textit{The Minimal Monarchy} (1995).


grounds. The common refrain was that the onus of proving the necessity for change lies with its proponents.

Perhaps more seriously, it had been said that “abolition would drive a fundamental shift of legitimacy which is already underway.” Observers such as Hugh Stretton detected a paradox in the Keating Government’s determination to assert Australia’s sovereignty over the Constitution (which was never in doubt) at the same time as the government was relinquishing sovereignty over the economy.

In Australia, although the monarchy is part of an entrenched Constitution, it was this very position which threatened the long-term survival of the Crown. Party political controversy has brought the Constitution, and, especially the Crown, into the forefront of political debate.

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70 Hoorn, J & Goodman, D, *Vox Reeeipublicae* (1996) a special edition of Journal of Australian Studies no 47. Although others argued that feminism was hindered by the monarchy; Schaffer, Kay, “Women and the republic” (1999) 25(1) Hecate 94.


74 Even with the failure of the 1999 referendum, it can be expected that a further debate about executive powers will occur. Indeed, given the failure of the minimalist republic proposed, this is all but inevitable; See Sharman, Campbell, “Defining Executive Power” (1996) 12-13.
Though often inspired by nationalism, the republicans shared as many varied perceptions of the Constitution as their opponents. The outcome of the referendum of November 1999 should have come as no surprise. As Hudson and Carter have said, perhaps the debate is not between dependence and independence, but about reforming the polity as a whole\textsuperscript{75}. The lessons for New Zealand are that substance, symbolism, and emotion are all equally important elements in this debate\textsuperscript{76}.

### 9.3.2 New Zealand

Republican sentiment in New Zealand has never been as strong as it has been in Australia\textsuperscript{77}. New Zealand lacks a tradition of republicanism akin to that found in Australia- much of which was founded in Irish fenianism\textsuperscript{78}. It remains the ideal of a minority, though a growing one\textsuperscript{79}.


\textsuperscript{78}McKenna, Mark, “Republicanism in Australia” (1996) University of New South Wales PhD thesis.

\textsuperscript{79}A short-lived New Zealand Republican Movement was formed in the late 1960s. In 1994 a Republican Movement of Aotearoa/New Zealand was created. Its patron is the author Keri Hulme. Lacking significant
But in 1994 the Rt Hon James Bolger, then Prime Minister, proposed that New Zealand become a republic by the turn of the century\textsuperscript{80}. This was presented as a necessary adjustment following the advent of MMP\textsuperscript{81}. The reason given was that “the tide of history is moving in one direction”, towards republicanism as a fulfilment of national identity\textsuperscript{82}. It was associated with the termination of imperial honours\textsuperscript{83}, and moves to end the right of appeal to the Privy Council\textsuperscript{84}.

support, it became dormant until it was re-launched in November 1999 by its new President, Dave Guerin. The Republican Party itself existed only 1995-2000.

\textsuperscript{80}In the view of Lange, Bolger was not personally a republican, and as Prime Minister had always sought more contact with the Queen than had Lange himself; Interview with David Lange, 20 May 1998.

\textsuperscript{81}Opponents argued that the introduction of MMP and subsequent calls for constitutional reform such as a “written Constitution” threaten abandoning worthwhile elements, such as conventions, for no apparent gain; James Allan, “Constitutional sirens should be ignored” New Zealand Herald 27 September 1999.


\textsuperscript{83}See the Prime Minister’s Honours Advisory Committee, \textit{The New Zealand Royal Honours System} (1995). Though the new honours remain royal honours, thereby illustrating the continuing evolution of a distinct New Zealand Crown. The process was completed with the announcement of new bravery and gallantry awards in 1999, and (arguably) the announcement of the discontinuing of knighthoods; Prime Ministers Press Statement 21 September 1999; Prime Ministers Press Statement 10 April 2000; "Does Comrade Clark want us all the same?" New Zealand Herald 12th April 2000 p A19.

\textsuperscript{84}Stockley, Andrew, “Becoming a Republic?- Matters of Symbolism” in Trainor, \textit{Republicanism in New Zealand} (1996) 61. The planned abolition of appeals failed for the time being, however, in part because of Maori
Although Bolger knew what he was proposing did not have popular support, he seriously underestimated the level of opposition to his proposal from within his own party. His call caused considerable consternation among Ministers, three of whom immediately and publicly disavowed any desire to abolish the monarchy. Nor was the response from the Opposition as favourable as he might have wished, in part because those personally in favour of a republic did not wish to be opposition. The abolition of appeals has again become an issue, with the release of a discussion paper by the Attorney-General in 2000.

85 Trainor, Luke, Republicanism in New Zealand (1996) 22. Indeed, it may have been his persistence in advancing this proposal in the face of party opposition which was one of the principal causes of his fall from favour, and ultimately his political demise; Interview with Neil Walker, 11 May 1999. However, cf interview with Sir Douglas Graham, 24 November 1999.


87 John Banks, Simon Upton and Jenny Shipley. Upton in particular pointed to the Irish connections of Bolger; Dominion (Wellington) 4 April 1994. He has continued to publicise his support for the institution; “Monarchy still gives us more than any republic would” Press 16 September 1997.

88 Helen Clark, leader of the Labour Party, and Jim Anderton, leader of the Alliance, both in principle supportive of a republic, were taken by surprise. Nor is the Labour Party dedicated to republicanism; Stockley, Andrew, “Becoming a Republic? - Matters of Symbolism” in Trainor, Republicanism in New Zealand (1996) 65n.
associated with Bolger's initiative\textsuperscript{89}. Republicanism might have seemed to many observers a distraction from more immediate concerns\textsuperscript{90}.

The immediate origins of Bolger's call for a republic belong in the neo-liberalism adopted by successive governments since 1984\textsuperscript{91}. Economic, political and social life had undergone revolutionary change\textsuperscript{92}. The foundations of national identity had been undermined from two directions. The interventionist, centralised welfare State was replaced by the globally diffused, individualised, and unregulated system of economic, social and political power, backed by a selectively coercive residual State\textsuperscript{93}.

Republicanism arguably involves formally cutting colonial ties and creating a post-colonial State. Republicanism is therefore, to some extent,

\textsuperscript{89}Right-wing opposition to the monarchy came from such groups as the Libertarians, who stressed individual “sovereignty” above all ties of government; LawTalk 20 September 1999, p 24.

\textsuperscript{90}A perception echoed several years later by the leaders of the main parties; “Leaders shrug off republican ra-ra” New Zealand Herald 8 November 1999.

\textsuperscript{91}This movement, which emerged in the late 1970s, has played a significant part in policy reforms since the mid 1980s. The emphasis is placed on individual liberty, as both morally desirable and conducive to the well-being of society; Brook Cowen, Penelope, “New Liberalism” in Miller, \textit{New Zealand Politics in Transition} (1997) 341. But Barry Gustafson has suggested that Bolger simply wanted to leave his mark in history; “Republican PM takes troops by surprise”; Sunday Star-Times (Auckland) 20 March 1994.

\textsuperscript{92}Kelsey, Jane, \textit{Rolling Back the State} (1993).

\textsuperscript{93}From Kelsey, Jane, \textit{Rolling Back the State} (1993).
about decolonisation. The wish to bury the colonial inheritance, to embrace multiculturalism, and to locate New Zealand firmly in Asia was a conscious, market-related choice driven by external developments.

New Zealand is a South Pacific nation, with a focus on Asia. Nationhood, what New Zealand stood for, and its feeling of self-respect were also cited as reasons why New Zealand should become a republic.

Most important among the symbolic aspects, and that upon which Bolger relied, was that it was inappropriate for “the Queen of England” “to be Head of State and to have power to appoint a Governor-General to exercise her royal powers on her behalf in New Zealand.” National identity requires a New Zealand head of State.

References:


97 Palmer, Sir Geoffrey & Palmer, Matthew, Bridled Power (1997) 50. It has been suggested that Bolger was not so much an advocate of a republic as determined to promote debate on national identity; Interview with Georgina te Heuheu, 7 December 1999.


99 Though the Queen can be seen as a New Zealand head of State, and it has been observed that there is nothing wrong with a shared head of State in this age of internationalism; Kirby, Hon Mr Justice Michael, “The
were motivated, not because of criticism of the way in which the political system operated, but because of the connection with the British monarchy\textsuperscript{100}.

Sir Geoffrey Palmer has observed that while no doubt the country’s ties with the United Kingdom are not as strong as they once were, as the Queen is Queen of New Zealand, that is not relevant\textsuperscript{101}. But the New Zealand media have difficulty in portraying the Queen other than the way most of the rest of the world view her as the British Queen\textsuperscript{102}. Nor is this surprising, since Elizabeth II’s position as Queen of New Zealand is clearly secondary to her position of Queen of the United Kingdom\textsuperscript{103}.

Ironically this very focus on the British nature of the monarchy was actually part of its appeal to many\textsuperscript{104}, not least many Maori\textsuperscript{105}. New Zealand is part of a wider heritage, one which is not yet entirely

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\textsuperscript{100} These arguments can be seen in such works as Trainor, Luke, \textit{Republicanism in New Zealand} (1996). These parallel attitudes in Australia, though not generally those in Canada; Smith, David, \textit{The Republican Option in Canada} (1999).


\textsuperscript{103} Interview with Sir Douglas Graham, 24 November 1999.

\textsuperscript{104} Interview with David Lange, 20 May 1998.

\textsuperscript{105} See Chapter 3.4.
irrelevant. As a smaller, less cosmopolitan country such perceptions seem to have survived in New Zealand longer than they did in Australia. Increased globalisation may have an important, as yet undefined, influence.

Bolger’s own starting point was allegedly his Irish roots, though he has never publicly confirmed this. However, the perceived linkage between Catholicism and republicanism in Ireland has been criticised as “bad history and theology, and a manifestation of bigotry and ignorance.” Whatever the truth, to the Irish nationalist, the Crown was equated with the occupier, just as to many French-Canadians the Crown represented the victor in the Anglo-French wars of the eighteenth century.

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106 Interview with David Lange, 20 May 1998.
108 Globalisation was strongly emphasised by the Queen (and compared with the traditional diversity of the Commonwealth) in her speech at the opening ceremony of the Commonwealth Heads of Government Meeting, Durban, South Africa, 12 November 1999.
109 On 17 March 1994 John Banks confided to his diary that “for an Irishman to do this on St Patrick’s Day is inflammatory”; Quoted in Goldsmith, Paul, John Banks (1997) 238.
111 Pollock, Carolee Ruth, “His Majesty’s Subjects” (1996) University of Alberta PhD thesis. The same attitude could be detected in the Afrikaans
Such nationalism seems to be largely absent in New Zealand, and the Crown could be seen to be representative of all people. Indeed, to the Maori, it was often seen as an ally against the colonial (and later) government\(^\text{112}\), though there is some Maori republicanism founded on concepts of Maori sovereignty.

Radical liberalisation and globalisation are both conceptually opposed to nationalism\(^\text{113}\). Nationalism should, according to this theory, be in decline, but the reality of national politics prevents this\(^\text{114}\). Thus republicanism founded in nationalism- and even Maori nationalism, still found reasonably fertile ground.

More profound constitutional reasons why New Zealand might consider it appropriate to become a republic include the proposition that the constitutional system ought to rest on firmer constitutional foundations than at present. Parliamentary sovereignty has allegedly been found to be inadequate for protecting individual rights and ensuring the accountability and integrity of governmental institutions. An entrenched Constitution could possibly ensure this, but would not necessarily be

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Concerns have also been expressed about the adequacy of the present position of the Governor-General, particularly the prerogative (and unwritten) nature of many of their powers.

But, unlike Australia, the arguments for a republic based on fundamental constitutional principles are seldom proposed and appear ill-supported. In part this could be because New Zealand shares with Canada an antipathy to abstract political theory. Australia, by contrast, was from even before federation more inclined to radical experiment in government. Yet, the advent of MMP has encouraged consideration of the structure of government in a way which earlier reforms did not.

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118 A common view appears to be that it is the reserve powers that are important, not the title of the resident of Government House; Deane, Roderick, “Globalisation and Constitutional Development” in James, Building the Constitution (2000) 112-117.
120 The 2000 Victoria University of Wellington Institute of Policy Studies conference “Building the Constitution” was largely a consequence of this, and although widely dismissed as pointless or ineffectual, it may have encouraged more serious debate. The proceedings were published in James, Building the Constitution (2000).
The absence of the monarch rendered much of the basis for the traditional British republicanism irrelevant alike in Australia and New Zealand\textsuperscript{121}. Since the monarch had little active role to play, to borrow from nineteenth century republicans “radicals have something better to do than to break butterflies on wheels”\textsuperscript{122}. But it must also be said that there has been little advocacy of monarchy in general\textsuperscript{123}.

Some efforts to instigate the type of republican movement seen in Australia in the 1990s have been made in New Zealand\textsuperscript{124}, but have so far failed to develop in the way achieved in Australia in the same period, largely due to public apathy. Republican sentiment in New Zealand, though held by a not-inconsiderable proportion of the population, has yet to find a common ground or sense of purpose\textsuperscript{125}.

\textsuperscript{121}Indeed, Whitlam has written that a basic flaw in the Australian constitution is that it “enshrines a monarchical system of which the monarch is not a part”; Whitlam, Gough, \textit{The Truth of the Matter} (1979) 185.

\textsuperscript{122}Chamberlain, Joseph, \textit{Radical Programme} (1885) 38-40.

\textsuperscript{123}One paper argues that monarchy might be ‘the surest road to societal well-being and good government in the new millennium’; Mayer, Jeremy & Sigelman, Lee, “Zog for Albania, Edward for Estonia, and Monarchs for All the Rest? The Royal Road to Prosperity, Democracy, and World Peace” (1998) 31(4) PS 771.


\textsuperscript{125}Even the mildly pro-republic attitude of the country’s leading daily newspaper, the New Zealand Herald, has had little if any discernible impact.
It has been said that with the rapidly changing demographics of New Zealand, more people “will find it difficult to see the relevance of colonial links with the United Kingdom”. Few of the growing Pacific Islands and Asian and other ethnic groups “have strong historical or cultural links to the United Kingdom”\textsuperscript{126}.

It is possible that there will be an increase, in early years of twenty-first century, in popular support for a republic. This could occur as the firmer supporters of the monarchy are gradually outnumbered by the less enthusiastic younger generations. The increase in immigration from Asian, and other non-traditional sources could also fuel this change\textsuperscript{127}.

Opinion polls have always shown younger people are more inclined to favour a republic, though this has not led to any significant increase in support for a republic by the population as a whole over the last three decades\textsuperscript{128}. Opinion polls quite clearly show that the number of

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\textsuperscript{127}Miller, Raymond, “God Save the Queen” (1997).

\textsuperscript{128}Polls conducted over this time appear rather to reflect the contemporary media coverage of the royal family. Thus in the 1960s there was comparatively little coverage. But during the early 1980s support for the monarchy grew as (positive) coverage increased. It declined again in the early 1990s, but has since increased.
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people who support the monarchy consistently outnumber those who favour a republic\textsuperscript{129}.

Support for a republic is found most significantly among the more highly educated sectors of society, and among the lower socio-economic groups\textsuperscript{130}. But these arguments are problematic. Support for the monarchy ebbs and flows over time for various, not always predictable reasons\textsuperscript{131}. More importantly, support appears, as in Australia, to be firmer for the system than for the symbolism. Australia adopting the republic system of government could well be a major catalyst for New Zealand to follow suit\textsuperscript{132}—though by no means conclusive\textsuperscript{133}.

\textsuperscript{129}See, for example, National Business Review-Compaq 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\%. A November 1999 New Zealand Herald-Digi Poll survey found 70.1\% for the monarchy and 21.4\% for a republic, with 8.5\% undecided or refusing to say; National Business Review, 5 March 1999, p 16; New Zealand Herald 13 November 1999, p A3.

\textsuperscript{130}This economic/cultural divide was remarked upon in the aftermath of the Australian referendum; Greg Ansley, “Poll exposes a raw nerve” New Zealand Herald 8 November 1999

\textsuperscript{131}Support for the monarchy appears to decline at a time of negative publicity for the Royal Family, and increase in times of positive publicity. Yet the underlying support levels are little changed over several decades.


\textsuperscript{133}Noel Cox, “Neo-liberal republicanism has no place in this country” New Zealand Herald 5 November 1999 p A17.
9.4 Some legal considerations

Apart from considerations of the popular support or otherwise for the monarchy, there is an argument that it might be illegal for New Zealand to become a republic, an argument which also has as its basis the belief that the Crown has evolved as a distinctly New Zealand institution.

In 1993 the then Sir Robin Cooke contributed to Joseph’s Essays on the Constitution some reflections on the legal implications of New Zealand becoming a republic. Lord Cooke of Thorndon felt that the adoption of a republican form of government in New Zealand would not only be a radical change in the system of government, but might even be illegal\textsuperscript{134}.

This proposition claims support from two arguments, one legal, the other political, although perhaps ultimately legal as well. Lord Cooke has enunciated the first (based on an interpretation of the Constitution Act 1986)\textsuperscript{135}, Brookfield the second (which is based on the Treaty of Waitangi)\textsuperscript{136}. The second argument was examined as part of Chapter III\textsuperscript{137}.

\textsuperscript{134}“The Law and the Constitution” (1935) 51 LQR 590.


\textsuperscript{137}Chapter 3.3.2.
The Statute of Westminster 1931 expressly provided that it did not confer any power to repeal or alter the New Zealand Constitution Act 1852 otherwise than in accordance with the law existing before the commencement of the 1931 Act. Thus, in 1947 further imperial legislation\textsuperscript{138} was needed to empower the Parliament of New Zealand to alter, suspend, or repeal, any of the provisions of the 1852 Act\textsuperscript{139}.

However, by s 26 of the Constitution Act 1986, the New Zealand Constitution Act 1852, the Statute of Westminster 1931, and the New Zealand Constitution (Amendment) Act 1947 were declared to have ceased to have effect as part of the law of New Zealand. Reliance can no longer be placed upon the 1852 Act and its amendments for any future constitutional changes in New Zealand\textsuperscript{140}.

The 1986 Act attempted to maintain continuity by providing that the House of Representatives shall be the same body as that referred to in s 32 of the New Zealand Constitution Act 1852. Similarly, s 14(1) provides that there shall be a Parliament of New Zealand. This shall consist of the Sovereign in right of New Zealand\textsuperscript{141}, and the House of

\textsuperscript{138}New Zealand Constitution (Amendment) Act 1947.


\textsuperscript{141}By s 2 of the State-Owned Enterprises Act 1986 “Crown” is defined as “Her Majesty the Queen in right of New Zealand”.
Representatives. This latter is said to be the same body as that which before the commencement of the Act was called the General Assembly\textsuperscript{142}, although it was the Governor-General, rather than the Sovereign, who was part of the General Assembly. Section 15(1) states that the Parliament “continues to have full power to make laws”- without, however, specifying any source for that power. Especially seminal are sections 2 and 3\textsuperscript{143}:

2. Head of State- (1) The Sovereign in right of New Zealand is the head of State of New Zealand, and shall be known by the royal style and titles proclaimed from time to time.

(2) The Governor-General appointed by the Sovereign is the Sovereign’s representative in New Zealand.

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

(2) Every reference in any act to the Governor-General in Council or any other like expression includes a reference to the Sovereign acting by and with the advice and consent of the Executive Council.

While the Sovereign is recognised as head of State, the continued authority of the imperial statutes which established the present structure

\textsuperscript{142}As established by the New Zealand Constitution Act 1852.

of Parliament, consisting of the Queen and the House of Representatives, is ended. This ambivalence led to debate among constitutional scholars as to whether the New Zealand constitution is autochthonous\textsuperscript{144}.

Lord Cooke contended that it is by no means clear whether the mere amendment of sections 2(1) and 14(1) of the Constitution Act 1986 would legally effect the abolition of the monarchy. Although the provisions of the Constitution Act are not entrenched\textsuperscript{145}, and the abolition could legally be effected virtually overnight by a bare majority of the House of Representatives\textsuperscript{146}, the issue is not purely or even mainly a legal one. Put simply, the Queen is one of the elements of Parliament, and cannot eliminate herself without annulling Parliament\textsuperscript{147}.

Daniel O’Connell also has doubted that even a supreme legislature has the authority to change its own structure by abolishing the

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\textsuperscript{145}Whether Parliament can in fact entrench an enactment remains controversial. The Union with Scotland Act 1706 was declared to be entrenched, but has been subject to repeated amendments. Most recently, article 22 was repealed by the Statute Law (Repeals) Act 1993, s 1(1) and schedule 1.

\textsuperscript{146}Although it may be questioned whether the Governor-General could, or indeed should, decline to give the royal assent to such a measure. See Dixon, Sir Owen, “Law and the Constitution (1935) 51 LQR 590.


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monarchy\textsuperscript{148}. Such arguments however have little political force, and would be unlikely to prove a serious hurdle for any Parliament that wished to legislate for a republic.

The monarchy itself can be seen as the cornerstone of the entire edifice, though the position of the Crown in New Zealand is not, unlike in Canada and Australia, protected by statutory entrenchment\textsuperscript{149}.

Section 14(1) of the Constitution Act 1986 provides that Parliament consists of the Sovereign (in right of New Zealand) and the House of Representatives. A republic could be established in New Zealand by the simple expedient of amending this provision to replace the Sovereign with a President, as the section is not entrenched\textsuperscript{150}.

But the courts, relying on the common law, might not recognise any ordinary legislation which purported to establish a republic, in the absence of a referendum. This would depend upon the extent to which

\textsuperscript{148}See “Monarchy or Republic?” in Dutton, \textit{Republican Australia?} (1977) 32.


\textsuperscript{150}Though Lord Cooke has argued that the section may be effectively entrenched, on similar reasoning to that used to argue that the House of Lords is irremovable; 1999 New Zealand Law Conference, Rotorua, 8 April 1999.
the courts felt that a republic constituted a fundamental change in the constitutional grundnorm\(^{151}\).

Minimal change to the New Zealand constitution, by removing the office of the Sovereign, and substituting that of a President, would certainly make the country a republic, but one without any claim to be even partly based on popular sovereignty\(^{152}\). This would require a more fundamental constitutional revision, almost certainly involving an entrenched constitution adopted by referendum.

More importantly, as the signatory of the Treaty of Waitangi, the Crown remains symbolically important in Maori society. Because of the particular importance of the second argument, based on the Treaty of

\(^{151}\)The boldest statement of the common law was by Coke, CJ:

> It appears in our books that in many cases the common law will control acts of parliament and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.

- *Dr Bonham’s Case* (1610) 8 Co Rep 114, 118.

This reflected Coke’s considered opinion at the time, but there is some doubt that it reflected the views of his fellow judges. Lord Ellesmere reacted sharply, saying it was more fitting “that acts of parliament should be corrected by the same pen that drew them than to be dashed in pieces by the opinion of a few judges” - “Observations on Coke’s Reports”, printed in Knafla, LA, *Law and Politics in Jacobean England* (1977) 307.

It seems from Coke’s *Fourth Institute* that on further reflection he himself relented.

\(^{152}\)Brookfield, FM, “A New Zealand Republic?” (1994) 8 Legislative Studies 5.
Waitangi, this was examined in Chapter III, where the position of Maori was examined\textsuperscript{153}. Therefore the option of the minimalist republic, advocated so warmly but unsuccessfully in Australia in 1999, may be more difficult to obtain in New Zealand\textsuperscript{154}.

\textsuperscript{153}Suggestions that the Crown is fundamental to our constitution and a necessary element in the Treaty partnership have been criticised as outdated and no longer tenable, resting as they do upon legal fictions at the expense of constitutional realities; Stockley, Andrew, “Parliament, Crown and Treaty” (1996) 17 NZULR 219.

9.5 Conclusion

The nineteenth century British tradition of republicanism was based largely on opposition to government in the hands of hereditary Sovereigns. As the personal power of the Sovereign declined, so opposition changed to focus on the cost of monarchy, which remains the basis for much of the existing republicanism in Great Britain.\(^{155}\)

Neither argument has much relevance in the realms. The personal power of the Sovereign and his or her local representative is strictly limited, and the cost of the monarchy is borne, to a great extent, by the British taxpayer.\(^{156}\) This leaves nationalism or symbolism as the major factor.

The republican tradition in Australia was grounded in nationalism, a degree of Irish republicanism (which saw the Crown as symbolic of British oppression\(^{157}\)), and a smaller degree of doctrinaire republicanism, whose advocates saw hereditary authority, however attenuated, as inimical to democracy. The result of the 1999 referendum would appear


\(^{156}\)The scale of the vice-regal establishments are comparatively modest, certainly compared with that formerly maintained by the Viceroy of India; Curzon of Kedleston, Marquess, *British Government in India* (1925).

\(^{157}\)A similar perception has influenced French Canadians; Conley, Richard, “Sovereignty or the Status Quo?” (1997) 35(1) JCCP 67.
to suggest that republicanism founded in nationalism is insufficient, and that deeper concerns with the constitutional structure of the country were critical\textsuperscript{158}.

New Zealand, for various reasons, appears to have a less strongly polarised society, and at present lacks the chauvinism seen in much of the republic rhetoric in Australia\textsuperscript{159}. Although present in varying degrees, none of these factors has encouraged the growth of a strong republican movement. Symbolism is important in New Zealand, but it does not necessarily require the abolition of the monarchy to reinforce national identity. Indeed, the symbolism of the Crown has become an important element in Maori-government dialogue\textsuperscript{160}.

The symbolic argument for a republic has failed to gain significant support so far, perhaps because it concentrated overly on the person of the Sovereign. The dangers of this approach were illustrated in the 1999 Australian referendum campaign. Like in Canada\textsuperscript{161}, the Crown is not a

\textsuperscript{158}All states voted against the republic. All divisions voted for the status quo, except those in inner city areas of state capitals, and the Melbourne metropolitan region; Australian Electoral Commission, \textit{Referendum 1999 Results and Statistics} (2000).

\textsuperscript{159}Always excepting the position of those few Maori nationalists of the more extreme variety; Interview with Sir Douglas Graham, 24 November 1999.


\textsuperscript{161}See Smith, David, \textit{The Republican Option in Canada} (1999).
major issue in New Zealand because of the strength of our national identity, not its weakness.

Equally importantly, recent experience with the adoption of a new electoral system is not likely to encourage advocates of short-term change. Popular feeling seems to suggest dissatisfaction with on-going social, economic and political reforms\textsuperscript{162}.

The special position of the Maori people further complicate the situation, and arguably strengthen the Crown, even if only by weakening the case for a republic\textsuperscript{163}. Certainly, the adoption of a republic would require consideration of questions inherently more complex than those faced by the Australian population.

The weakness in support for a republic is not due to enthusiastic support for the monarchy, per se. Now largely divorced from the person of the monarch by a process of nationalisation, localisation or patriation, the Crown it has developed a life of its own. The Crown remains important because of the peculiar system of government which New Zealand has inherited; the monarchy perhaps less so.

Decolonisation or further constitutional evolution need not take the form of republicanism, but rather the remodelling of the Crown in a truly

\textsuperscript{162}Kelsey, Jane, “The Agenda for change” (1995).

\textsuperscript{163}Interview with David Lange, 20 May 1998; The same can be said of New Zealand relationship with Niue and the Cook Islands, for both of which the Crown in right of New Zealand is responsible.
national form. Indeed, in this respect New Zealand would seem to have more in common with Canada than with Australia.

The existence of the Treaty of Waitangi as a focus for indigenous rights has influenced the direction of political theory in this country, and has promoted the identification of the Crown as the principal organ of government. Such a move might have occurred in Canada, but for the federal structure of government.

It never occurred in Australia because an entrenched Constitution and a long-standing minority republican sentiment prevented this. But support for the system of government which the Crown represents does not of itself equate to support for the monarchy.

\[164\text{Indeed, it must be remembered that New Zealand, like Canada and Australia, grew up as colonies of British settlement, with important consequences for their institutions, culture, laws, and monarchies; Smith, David, The Republican Option in Canada (1999) 201.}\

\[165\text{See Smith, David, The Republican Option in Canada (1999) 28-29.}\

\[166\text{See Chapter 3.2.}\

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Part 5  CONCLUSIONS

The Crown was important as the means through which the New Zealand constitution developed. It is symbolically important, but perhaps more important as determinant of the style or process of government. How this style may be changed by MMP is as yet unsure.

Apparent continuity has been the dominant characteristic of the development of Westminster systems of government. Though unprotected, in the case of the United Kingdom and New Zealand, by the legally entrenched Constitutions common to most other systems of government, its institutions have preserved the same general appearance throughout their history. The Crown particularly has retained, in the varied environments in which it has been placed, many of the inherent attributes as well as much of the outward dignity which it maintained in the mediæval world of its origin.

But ancient institutions have been ceaselessly adapted to meet purposes often very different from those for which they were originally intended1. Continuity has not meant changelessness, and it is necessary to interpret evolution with reference to the political and social conditions

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and the currents of thoughts and opinions by which it has been determined\(^2\).

Since 1947 especially the independence of New Zealand has continued to evolve, both legally and politically. The legal anachronisms embodied in statutes of constitutional importance were largely removed by the New Zealand Constitution Amendment Act 1973\(^3\). The anachronistic prerogative instruments regulating the office of Governor-General were replaced in 1983\(^4\). The most important of the remaining prerogative powers were “nationalised” in 1995, by the enlargement of a purely New Zealand-based royal honours system in place of the inherited imperial system\(^5\).

What remains is a legally distinct New Zealand Sovereign and a symbolically distinct New Zealand monarchy, though it is unrealistic to deny that it is not to some extent essentially British. Ironically these changes have occurred at a time when the increasing internationalisation


\(^3\)Chapter 4.3.2.

\(^4\)Chapter 6.3.3.

\(^5\)A process completed with the announcement of new bravery and gallantry awards on 21 September 1999; Prime Minister’s Press Release.
of finance has led to a general reappraisal of sovereignty and independence.6

Whilst the Sovereign has largely withdrawn from any pretence to active participation in government, constitutional changes have reinforced the legal principle that the Sovereign is head of the executive. Legally he or she remains the focus of sovereignty, and a significant source of governmental legitimacy. To a great extent this obviates the need for a State theory, or conversely, in the thesis of Jacob, the Crown itself has evolved into the State7.

In the absence of a developed State theory, the Sovereign-in-Parliament is the location of national authority. This position has been reinforced in New Zealand by the development of an all-embracing concept of the Crown, which confers legitimacy upon manifold aspects of government8.

However, a challenge to this royal legitimacy has been made, both by those promoting the concept of Maori sovereignty, and by those advocating a New Zealand republic. The former might argue that Maori

6The purpose of devolution for the Scots is to be recognised as equal partners in a union with England. This would require a reappraisal of sovereignty; Russell, Conrad, “In Search of the British Constitution” (1997) 4801 Times Literary Supplement, 7 March 1997, p 15.


did not relinquish sovereignty in signing the Treaty of Waitangi\textsuperscript{9}, and the latter that the symbolism of another country’s Queen as head of State of New Zealand is inappropriate\textsuperscript{10}.

But if we are to speak of the legitimacy of the New Zealand constitutional order as a order separate from that of the United Kingdom, we must recognise that gradually over say the last fifty years the basis of authority for New Zealand government, in its legislative executive and judicial branches, has changed from dependence on the United Kingdom Crown and Parliament to acceptance by the New Zealand people\textsuperscript{11}.

However, we can speak meaningfully of a New Zealand Crown, founded in our history, at least in part because of the on-going influence of the Treaty of Waitangi, and the idea of a compact between the Crown and the Maori people. It does not follow that New Zealand, to preserve or restore the legitimacy of our government, must become a republic. The monarchy remains principally British in nature, but the Crown has

\textsuperscript{9}Or, have some have done in recent years, that the Declaration of Independence of the United Tribes of Aotearoa in 1835 somehow gave them sovereignty, which continues to this day. This latter argument completely ignores the Treaty, and is an extreme example of selective interpretation of history for political ends.

\textsuperscript{10}Dave Guerin, President, Republican Movement of Aotearoa/New Zealand, quoted in “Leaders shrug off republican ra-ra”, New Zealand Herald 8 November 1999.

become increasingly greater than that single element. For this reason, among others, calls for a republic have met with relatively little reaction.

Indeed, a change to a republic, especially if unaccompanied by a new compact with Maori, could potentially destroy much of the legitimacy currently enjoyed by the regime. To borrow from an Australian writer, “abolition would drive a fundamental shift of legitimacy which is already underway”12. Fear of this will certainly have influenced many otherwise ideologically supportive of change13.

We have seen that the development of legislative independence, and the development of executive independence both showed how changes of substance have for long been disguised by an adherence to legal form. Unlike the concept of parliamentary sovereignty, with its (to some) uncomfortable notion that the authority of the New Zealand Parliament must forever remain legally derived from the United

12 Atkinson, Alan, _The Muddle-Headed Republic_ (1993) 64. The weakness of this argument, from the Australian perspective, is that a new republican Constitution could point to the legitimacy derived from popular referenda- provided a sufficient majority were obtained (however “sufficiency” might be defined).

13 As when 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.
Kingdom\textsuperscript{14}, the doctrine of the divisibility of the Crown has evolved so that prior legal authority is a relatively unimportant issue.

Executive independence was based upon the right to advise the Crown. But it evolved further, with the principle of the divisible Crown now being accepted. The royal style and titles were the most obvious manifestation of constitutional changes, but were a symptom of change, not its cause. But these were changes not merely in authority, but also its symbolism. This was to prove far more significant, and to have more far-reaching consequences.

Imperial constitutional law was developed not in the courts so much as in the opinions of the law officers of the Crown. It was the practice that evolved out of these opinions which eventually influenced the courts. They followed, but did not invent, doctrines such as that of colonial legislative territoriality\textsuperscript{15}. Administrative practices and political decision-making were both influenced by these opinions, and the perceptions upon which they were based. The courts in effect have had a significant role in developing the constitution\textsuperscript{16}, a role which is


\textsuperscript{15}O’Connell, Daniel & Riordan, Ann, \textit{Opinions on Imperial Constitutional Law} (1971) vi.

\textsuperscript{16}Interview with Sir Douglas Graham, 24 November 1999.
particularly apparent in their development of the Treaty of Waitangi legislation.

In essence, Oliver’s approach to legislative sovereignty can be applied to the Crown. This reconciles the legal and historical accounts and provides a legal explanation for the independence of New Zealand without any legal break\textsuperscript{17}. In this way, both continuing and self-embracing interpretations of the constitution are possible. The Crown can be seen to remain perpetually at the apex of the legal systems. But the Crown is now a distinct legal entity from that of the United Kingdom\textsuperscript{18}, though related to it. As such, it underpins the constitution and is an autochthonous polity.

The imperial Crown became divisible because it was perceived by administrators and political leaders as separable. Popular and official perceptions remain that the Governor-General represents the Crown, but the Crown has a wider meaning that just the Sovereign. At present the perception is perhaps more of a minimalist monarchy than a de facto republic.

\textsuperscript{17} Oliver, Peter, “Cutting the Imperial link” in Joseph, \textit{Essays on the Constitution} (1995) 402.

\textsuperscript{18} In Canada by the Part V amendment procedures, and in New Zealand by enacting the Statute of Westminster 1931 and the New Zealand Constitution Amendment Act 1947.
The Crown as an institution has, to some extent, outgrown its
dependence upon the person of the Sovereign, just as the Crown had
earlier evolved from a colonial Crown. This development has actually
been promoted by the absence of the Sovereign\textsuperscript{19} and the relatively low
profile of the Governor-General, and by its historical legitimacy
enhanced by its compact with the Maori people\textsuperscript{20}.

The extent to which the form of government is influenced by an
intellectual elite appears to be limited in New Zealand. But where
influence is discernible, it has been in the recognition of the unique status
of the Treaty of Waitangi, rather than towards a republican form of
government\textsuperscript{21}. This tendency has strengthened rather than weakened the

\textsuperscript{19}The absence of the Sovereign has been used as an argument for a
republic, but such an argument fails to distinguish between the two royal
bodies, the public and private. The former is ever present, and should not
be undervalued. Hudson, Wayne & Carter, David, “Refining the issues”
in Hudson & Carter, The Republican Debate (1993) 31. See also
Kantorowicz, Ernst, \textit{The King\’s Two Bodies} (1957).

\textsuperscript{20}Australian republicanism focuses more upon the Queen as a “foreign”
head of State, and the Crown itself- not being the source of governmental
powers (as in Canada) or a party to a compact with native peoples (as in
New Zealand) is thereby weakened.

\textsuperscript{21}See such works as Brookfield, FM, \textit{Waitangi and Indigenous Rights}
(1999), and Mulgan, Richard, “Can the Treaty of Waitangi provide a
constitutional basis for New Zealand\’s political future?” (1989) 41(2)
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Crown, though it has also contributed to a gradual, and ultimately profound redefinition of the institution.\footnote{Such an approach has been seen in the United Kingdom, where the monarchy may become an important unifying force with devolution; Bogdanor, Vernon, “Mirror for a multicultural age?” Times Literary Supplement, 31 July 1998 pp 13-14. Such a re-evaluation, and for similar reasons, must occur in New Zealand.}

The modernisation of the constitution has included a gradual recognition of the Treaty of Waitangi as fundamental to the legitimacy of government, though perhaps not entrenched in the sense that they can never be rejected. Whether the Crown is similarly entrenched is legally and politically uncertain. But any future movement for a New Zealand republic must take into account the need to preserve the legitimacy of the regime, for the Crown is more than just a “foreign head of State”.\footnote{Ngai Tahu elder Sir Tipene O'Regan, commenting on the assertion by the Prime Minister, the Rt Hon Helen Clark, that a republic was inevitable in New Zealand- though perhaps 20-30 years away- expressed the view that a greater concern was with "a proper written constitution with a proper developed judicial system and a supreme court"; "Clark says republic here inevitable" New Zealand Herald 7 February 2000 p A5.}

The symbolism of the Crown as a metonym for all aspects of government remains important, and not merely because of a lingering attachment to the Westminster tradition of government. Indeed, it now represents a distinct New Zealand concept of government. Perhaps more importantly the Crown is seen to provide a system of parliamentary democracy which combines a non-politicised head of State with a
relatively powerful executive. It seems that the Australian referendum on the Crown failed because the population were attached to the system the Crown represented, even if they opposed the symbolism.

It might appear logical that the next evolutionary step is either the adoption of a republican form of government, or to adopt a truly indigenous monarchy, with our own Sovereign. The latter is extremely unlikely, though not without some merits. But it would seem that the adoption of a republican form of government would likely be the consequence of a fundamental reappraisal of the New Zealand system of government, rather than a change for merely symbolic reasons. For the existence of the Crown has determined the way in which New Zealand is governed, and its departure without compensatory adjustments could lead to constitutional instability.

Essentially this is a question of identity versus substance. The conceptual, legal, practical and symbolic functions of the Crown have meant that it remains useful as a form of government. For this reason, and for the reason that its replacement would be more trouble than it is worth, it has remained relatively stable.

24 From time to time the suggestion has been made that a member of the Royal Family be designated heir of the New Zealand Crown. This would not be unprecedented in the twentieth century. In 1903 Norway separated from Sweden, by electing a new king.

25 Not least because of the need to review the status of the Treaty of Waitangi.
However, it remains doubtful whether the conceptual and symbolic functions of the Crown will prove sufficient for the long-term survival of the Crown. Recent Australian experience reminds us to be cautious in making predictions where there is a mixture of symbolic and practical issues at stake.
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