Constitutional Reform in New Zealand?: The Constitutional Arrangements Inquiry

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Introduction

In late 2004 a parliamentary select committee was established to undertake an inquiry into New Zealand's constitutional arrangements. While this was promoted by the leader of the United Future party, the Hon Peter Dunne, it enjoyed support from the principal Government party, Labour, as well as the smaller Green and Progressive parties. It did not however enjoy bipartisan political support, being opposed by the main opposition New Zealand National party, and the New Zealand First party.

Essentially there were a number of reasons for the intensity and uncompromising nature of much of this opposition. Firstly it was said that the inquiry was motivated by party political agendas, secondly that there was no groundswell of opinion in favour of change. There was also concern that the inquiry would have difficulty identifying any common ground for change, or serve a useful purpose, and that it was fatally flawed by being promoted by political parties in the face of opposition from other parties.

Proponents of the inquiry, and in particular Mr Dunne, saw it as an opportunity to gain a clearer picture of the state of the New Zealand constitution, and to identify possible areas for reform. One particular reform which was personally sought by Mr Dunne was the establishment of a New Zealand republic, though his own United Future party did not favour a republic.[1] Recognition that this would be an unpopular change to advocate – and fears that the inquiry could be seen as having a preconceived position, if not a deliberate agenda – led most other parties to avoid close association with the inquiry. Public submissions were however called for, and a disappointing total of 48 were received by the time submissions closed on 14th April 2005.[2]

In this article we will examine the process followed by the inquiry, and consider whether constitutional reform on this model is appropriate or workable in a constitutional environment such as that found in New Zealand.

The procedures followed by the inquiry

The terms of reference for the inquiry were very broad. The committee itself commenced work on two of the terms prior to receiving submissions, partly to accelerate the inquiry process so that work could be concluded before the general election due in mid to late 2005. These terms of reference were to identify and describe

[1]Indeed, opinion polls suggested stronger than average support for the monarchy among United Future voters.

[2]Some additional submissions were accepted late. Few of the submissions received were from political scientists or constitutional lawyers, and mainstream academic scholars appear to have not wished to become involved. There was some criticism of the timeframe of the inquiry, which was widely seen as being unduly rushed.

New Zealand's constitutional development since 1840, and the process other countries have followed in undertaking a range of constitutional reforms. They were covered in an interim report issued in April.

As might be expected given the extremely broad nature of these terms of reference, and the very short time frame available to the committee, the report contained little of any great legal or constitutional significance beyond a cursory summary of the evolution of the New Zealand constitution, and of the processes for constitutional reform adopted in a small range of comparable countries. There were no recommendations as such, but the report indicated (unsurprisingly perhaps) that a referendum or referenda would be required as a precondition to any reform.

The processes which it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future were to be the subject of a later report, after the public submissions, and the responses to the submissions and the interim report (if any), were considered.

Submissions on identifying and describing the key elements in New Zealand's constitutional structure, and the relationships between those elements; and the sources of New Zealand's constitution (the remaining term of reference), were to be considered in preparing the second and final report of the committee. Public response to the submissions, such as there was, was also considered. Oral submissions were also sought in the second stage of the inquiry.

Constitutional reform by political committee

Whilst a political inquiry into the constitution has its uses, there are a number of inherent difficulties and dangers. Firstly, politicians may be perceived (perhaps unfairly) by the wider community as having a vested interest in the system, perhaps in preserving or strengthening their power or influence. Secondly, if the inquiry is supported by some political parties and opposed by others it is in danger of being seen as partisan. No constitutional reform can proceed successfully if it is seen as being partisan, for any such reforms would be in serious danger of lacking popular legitimacy.

Thirdly, and perhaps more significantly, this particular inquiry was by a parliamentary select committee appointed for the lifetime of this Parliament, a period of less than one year. Politicians, almost as an inevitable consequence of their position, must be seen to be achieving something worthwhile or useful, and quickly at that. To impose a tight timeframe for a constitutional review is risky; given the broadness of the terms of reference for this particular inquiry it was potentially suicidal.

It might be thought that identifying and describing New Zealand's constitutional development since 1840, and the process other countries have followed in undertaking a range of constitutional reforms, were scarcely worthwhile tasks for a political inquiry. The interim report would appear to support this belief. The timeline of constitutional development it contained, while not necessarily inaccurate, was bordering on crassness in its simplicity, and was not a worthy basis upon which any reforms might be based. In its defence it might be observed that it was intended to be nothing more than identifying and describing New Zealand's constitutional development since 1840, though it may be asked why this was necessary at all, given that the broad outlines of the development, if not its details, were already common knowledge.

However, it is scarcely surprising that few submissions on the remaining terms of reference were received.[3] A mere list of the key elements of the New Zealand constitution (and the sources of the constitution, curiously a separate term of reference) would be pointless, though the term 'key' might have attractions as a study in its own right. It would be impossible to offer any useful brief analysis of the relationship between the key elements of the constitutional structure — certainly little beyond reiterating common knowledge.

If we use Montesquieu's model — itself derived from his conception of the eighteenth century British Constitution — the constitutional structure may be perceived as divided between the executive, legislative and judicial elements. The executive element is the Crown, but this also extends into the legislative and judicial branches of the constitutional structure, since the separation of powers is not complete in the New Zealand constitution. A much more useful study would be to identify and describe the relationships between those elements. But this would involve, unless reduced to the simple level of first year political studies or constitutional law, consideration of constitutional nuances which even scholars of international stature debate with no certainty.

The result of excessively broad terms of reference was that few members of the public tackled the task of addressing any of them with any degree of comprehensiveness. Equally, few scholars attempted the task, though this might have been through fear of association with a doomed project, or a feeling that the task was simply too complex to be worth attempting in the short time available. This left the committee, composed of politicians, but supported by Professor Matthew Palmer of the Institute of Public Law as its principal adviser, almost alone in developing the final report of the inquiry.

Such an inquiry would inherently reflect, at least to some degree, a combination of technical constitutionalism and the political perspectives of the committee members, however conscientious the committee members and their advisers might do their work. It might be asked whether, in a democracy, constitutional reform can be proposed, let alone imposed, by any political or technocratic elite, in the absence of a popular consensus — or even where it does exist.[4]

The complexity of an evaluation of 'key elements' of the constitution

This article will concentrate upon one key constitutional element — the Crown — and will examine some aspects of its relationship with other elements of the constitutional structure, and the wider body politic. This is to show that a constitution, and especially in a country such as New Zealand, is a much more complex and finely nuanced organism than can be usefully 'identified and described' by a political inquiry in the course of a few months.

The aims of this part of the article are to show some of the ways in which 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

[3]Though it was much better than the nine received by the select committee considering the Bill which became the Constitution Act 1986.

[4]The failure of the Australian republic referendum in 1999, and earlier referenda, may well reflect this popular attitude.

prospects are for the adoption of a republican form of government in New Zealand (thus addressing Mr Dunne's motivation for promoting the inquiry in the first place).

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 (no constitutional change is inevitable, whatever political elites may tell us from time to time). 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.

The Crown has become an integral part of the New Zealand constitution ─ indeed the central element. 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, 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. But this does not mean that New Zealand is a de facto republic. "Republic" has been variously defined, but, for the purposes of this article, 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 the representative of an hereditary Sovereign. The Crown was, and remains, symbolically and legally omnipresent. 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. 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 have barely begun.[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. One of the aims of this article is to determine why the debate has been ill-developed.

The policies of none of the major political parties include republicanism, though many members may be ideologically in favour of a republic. The Rt Hon Jenny Shipley (then Prime Minister) noted that in 1999 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.[6] This appears to reflect acceptance by the party leaderships that republicanism would not, at least at the present time, be a popular option. The correctness of this view was apparently confirmed by James Bolger's failure to inspire support for a republic in the early 1990s.

It seems that other issues have exercised the minds of our politicians, and of the general public. Questions of further electoral reform, and Maori participation in government are presently dominant. 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.[7] 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. 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.

This said, it appears unlikely that a republican form of government will be adopted in New Zealand in the short-to-medium term. 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. The underlying proposition upon which this article 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. Some opponents of a republic argue that a concept of a minimalist

[5]Alan Simpson, *Constitutional Implications of MMP* (1998) 5.

[6]"Leaders shrug off republican ra-ra" New Zealand Herald 8 November 1999, 1.

[7]See Colin James, *Building the Constitution* (2000).

republic is a fallacy.[8] Some of the difficulties of achieving such a change have been illustrated by the Australian referendum of November 1999.[9]

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 importantly, the symbolism of the Crown can be important as a source of authority, and not merely indicative of it.[10] This is particularly important with respect to the Treaty of Waitangi. 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".[11]

The article is based on the proposition that the Crown has become conceptually entrenched in New Zealand to a greater extent than perhaps anywhere else in the Commonwealth outside the United Kingdom, and this for reasons peculiar to New Zealand. The purpose of this article 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 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.[12] 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.[13] 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. This is seen in critics' frequent concentration on the person of the Queen, or on members of the royal family. Some Australian Republican Movement publicity material produced for the 1999 referendum featured the Prince of Wales and the then Camilla Parker-Bowles (now the Duchess of Cornwall), in an attempted "scare tactic".[14]

Though legally the Crown is distinct from that of the United Kingdom, the monarch is still seen, inevitably, as primarily British. It is thus simplistic, in any investigation of the monarchy, to place excessive emphasis on the legal concept of separate sovereignty, which emphasises the division of the Crown.

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[8]Tony Abbott, *The Minimal Monarchy* (1995).

[9]Greg Ansley, "Monarchists Gain Ground" New Zealand Herald 27 October 1999.

[10]John Warhurst, "Nationalism and Republicanism in Australia" (1993) 28 AJPS 100.

[11]Kenneth Ruoff, "The Symbol Monarchy in Japan's Postwar Democracy" (1997) Columbia University PhD thesis.

[12]Judith Aitken, "Control of Executive Powers in New Zealand" (1977) Victoria University of Wellington MPP research paper 64 quoting Sir Denis Blundell.

[13]See Luke Trainor, *Republicanism in New Zealand* (1996).

[14]Greg Ansley "King Charles, Queen Camilla in scare tactic" New Zealand Herald 26 October 1999.

Moves in Canada, Australia and New Zealand to have the Governor-General seen to represent the Crown rather than the Queen, or to be acknowledged as de facto head of State,[15] 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". 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).[16] It is this perceived focus on a "foreign" head of State which would appear to have been the most successful of the various arguments used by the republican movement in Australia in recent years, though not one which has gone unanswered.[17]

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 article 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.[18] 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. Some republicans, and others, would further deny its legitimacy as based on a "foreign" constitutional legacy.[19]

It is the underlying hypothesis of this article 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,[20] and by its use as a metonym for government.[21]

The result is that the symbolism of the Crown has become, for many purposes, more important than the symbolism of the Sovereign. The monarch has become an increasingly less significant element in a wider political entity, the Crown. Yet, at the same time the constitutional structure and symbolism remains distinctly unrepublican.[22]

The importance of this investigation may be seen in the observation that constitutional reform in New Zealand is probably becoming more likely, and the inquiry is intended as a tentative first step in this direction. 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.[23] Popular dissatisfaction in recent years with politicians in general and with the new form of

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[15]See e.g. Tony Abbott *How to win the constitutional war* (1997).

[16]See for an example, Philip Shannon, "Becoming a republic" (1995) Victoria University of Wellington LLM research paper.

[17]Tony Abbott *How to win the constitutional war* (1997). Nor would it appear to be so evident in Canada; David E Smith, *The Republican Option in Canada* (1999).

[18]Rodney Barker, *Political Legitimacy and the State* (1990) 14.

[19]Brian Galligan, "Regularising the Australian Republic" (1993) 28 AJPS 56.

[20]See Philip Joseph, "The Crown as a legal concept (I)" [1993] NZLJ 126; "The Crown as a legal concept (II)" [1993] NZLJ 179.

[21]Janine Hayward, "In search of a treaty partner" (1995) Victoria University of Wellington PhD thesis.

[22]See David E Smith, *The Republican Option in Canada* (1999).

[23]Interview with Sir Paul Reeves, 11 November 1998.

proportional representation or MMP (though this may be only temporary),[24] point to the possibility of a significant revision of the constitution in the not too distant future.[25] 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 symbolism and claims to legitimacy. It should not be considered in isolation.[26] 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.[27]

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. In part this is 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.[28] Research has been completed on the so-called reserve powers of the Governor-General,[29] and the respective powers and influence of the constituent parts of government.[30] Much work has been done on the relationship of the State and the individual, and on the role of the Treaty of Waitangi.[31] 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.[32]

Those studies which have been made to date are generally from principally historical, legal or political perspectives.[33] This article is an attempt to bring together these diverse approaches, in order to better understand the Crown and its place in the body politic.[34] In doing so it may be seen that the constitutional arrangements of New Zealand are much more complex and finely tuned than may be immediately apparent.

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[24]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; Paul Perry & Alan Webster, *New Zealand Politics at the Turn of the Millennium* (1999) 42-43.

[25]In general, see Jane Kelsey, "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.

[26]Janine Hayward, "Commentary" in Simpson, *Constitutional Implications of MMP* (1998) 232.

[27]Terms over whose precise meaning scholars, Maori and Pakeha alike, have been unable to agree.

[28]Theda Skocpol, "Bringing the State Back In" in Susser, *Approaches to the Study of Politics* (1992) 457.

[29]See, for examples, JS Lipa "Role of the Governor-General in the Commonwealth" (1993) University of Auckland MJur thesis; Caroline Morris, "The Governor-General, the Reserve Powers, Parliament and MMP" (1995) 25 VUWLR 345; FM Brookfield, "No Nodding Automaton" [1978] NZLJ 491.

[30]For example, Elizabeth McLeay, *The Cabinet and Political Power in New Zealand* (1995).

[31]For examples, Andrew Sharp, *Leap into the dark* (1994) and *Justice and the Maori* (1997); Richard Mulgan (a pluralist), *Democracy and Power in New Zealand* (1989) and "A pluralist analysis of the New Zealand State" in Roper & Rudd, *State and Economy in New Zealand* (1993); Jane Kelsey, *Rolling Back the State* (1993).

[32]See, for example, Sir Geoffrey Palmer, *New Zealand's Constitution in Crisis* (1992) 7. See however, George Winterton, "A New Zealand Republic" in Simpson, *Constitutional Implications of MMP* (1998).

[33]For example, from a legal perspective, William Hodge, "The Governor-General" (1988); from a political perspective, Sir Michael Hardie Boys, "The Role of the Governor-General under MMP" (1996) 21(4) NZ International Review 2, and Antony Wood, "New Zealand's Patriated Governor-General" (1986) 38(2) Political Science; and from an historical perspective, Dame Catherine Tizard, *Colonial Chiefs* (1985).

[34]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).

The difficulty of constitutional reform promoted by politicians

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".[35] 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.[36] 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.[37] Legitimacy offers reasons why a given State deserves the allegiance of its members. Max Weber identifies three bases for this authority ─ traditions and customs; legal-rational procedures (such as voting); and individual charisma.[38] 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.[39] But this scheme leaves out substantive questions about the justice of the State and the protection it offers the individuals who belong to it.[40] It is generally more usual to maintain that a State's legitimacy depends upon its upholding certain human rights.[41]

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.[42] Second, in the tradition of Weber, legitimacy has been defined as "the degree to which institutions are valued for themselves and considered right and proper".[43] Third, political legitimacy may be defined as the degree of public perception that a regime is morally proper for a society.[44]

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.[45] These traditional concepts of legitimacy were built upon foundations external to and independent of the mere assertion or opinion of the claimant.[46] These normative or

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[35]Dame Catherine Tizard, *Crown and Anchor* (1993) 7-8.

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

[37]Rodney Barker, *Political Legitimacy and the State* (1990) 4. For a general discussion of aspects of legitimacy in relation to the Crown, see FM Brookfield, "Some aspects of the Necessity Principle in Constitutional Law" (1972) University of Oxford DPhil thesis; and FM Brookfield, *Waitangi and Indigenous Rights* (1999).

[38]See Randall Collins, *Weberian Sociological Theory* (1986).

[39]Penelope Brook Cowen, "Neo-Liberalism" in Miller, *New Zealand Politics in Transition* (1997).

[40]Which is illustrated by the study of the application of the model to Mummar Qadhafi's Libya; Saleh Al Namlah, "Political legitimacy in Libya since 1969" (1992) Syracuse University PhD thesis.

[41]John Rawls, *Political Liberalism* (1993); Ted Honderich (ed), *The Oxford Companion to Philosophy* (1995) 477; Matthew Swanson, "The Social extract tradition and the question of political legitimacy" (1995) University of Missouri-Columbia PhD thesis.

[42]Seymour Lipset, *Political Man* (1960) 77.

[43]Robert Bierstedt, "Legitimacy" in *Dictionary of the Social Sciences* (1964) 386.

[44]Richard Merelmen, "Learning and Legitimacy" (1966) 60(3) American Political Science Review 548.

[45]In an extreme form, the divine right of kings; JN Figgis, *The theory of the Divine Right of Kings* (1914).

[46]John Schaar, "Legitimacy in the Modern State" in Connolly, *Legitimacy and the State* (1984) 108; Jonathan Waskan, "De facto legitimacy and popular will" (1998) 24(1) Social Theory and Practice 25.

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.[47]

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 power is exercised.[48] 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.[49]

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.[50]

The legitimacy of the Crown includes that owed to the established regime. While the modern democratic ethos might regard such a basis of 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.[51]

The Crown itself provides some governmental legitimacy, simply because it is a permanent manifestation of authority, a proto-State as some would argue.[52] 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.[53] Although electoral support might suffice for much of the legitimacy of government, this is reinforced by the by the historical continuity of the Crown, particularly in respect of the Treaty of Waitangi, but also as the principal apparatus of government which dates from 1840 – and (more importantly) – for much longer.

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 as an organising element of government.[54] This is also evident in Australia, where works on constitutional law or

[47]Hannah Arendt, "What was authority" in Friedrich, *Authority* (1958) 83.
[48]Fatos Tarifa, "The quest for legitimacy and the withering away of utopia" (1997) 76(2) Social Forces 437.
[49]See, for example, Sir Eli Lauterpacht, "Sovereignty" (1997) 73(1) International Affairs 137.
[50]David E Smith, *The Invisible Crown* (1995); Anthony Birch, *The British System of Government* (1993).
[51]Tauassa Taafahi, *Governance in the Pacific* (1996) 1.
[52]Joseph Jacob, *The Republican Crown* (1996).
[53]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 Paul Perry & Alan Webster, *New Zealand Politics at the Turn of the Millennium* (1999) 74-75.
[54]As Smith would describe it; *The Invisible Crown* (1995).

politics almost invariably concentrate on an analysis of the document known as the Constitution.[55] This temptation is absent in New Zealand.[56]

In contrast to a common political theorists' view ─ which concentrates upon the political actors,[57] 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 declaration of war, which do not rest upon the legislative supremacy of Parliament.[58]

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.[59] Yet even these powers are now limited by the legal concept of conventions,[60] and by the rules of administrative law.[61] 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,[62] 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.[63] 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[64]), 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

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[55]R Lucy, *The Australian Form of Government* (1985); George Winterton, *Parliament, the executive and the Governor-General* (1983); For Canada, see for examples PW Hogg, *Constitutional Law of Canada* (1992); Richard von Loon & Michael Whittington, *The Canadian Political System* (1981).

[56]Where, indeed, it is often said, erroneously, that there is no constitution.

[57]Note the emphasis in such works as Jonathan Boston, Stephen Levine, Elizabeth McLeay, Nigel Roberts & Hannah Schmidt, "Caretaker governments and the evolution of caretaker conventions in New Zealand" (1998) 28(4) VUWLR 629, where the institutional role of the Crown is given relatively little coverage.

[58]Rodney Barker, *Political Legitimacy and the State* (1990) 143-144.

[59]The 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.

[60]Conventions 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; C Munro, "Laws and conventions distinguished" (1975) 91 LQR 218.

[61]See the *Operation Dismantle Case* (1985) 18 DLR (4th) 481 (SCC); (1983) 3 DLR (4th) 193 (FCA); Clive Walker, "Review of the Prerogative" (1987) Public Law 62.

[62]Bruce Harris, "The 'Third Source' of Authority for Government Action" (1992) 109 LQR 626.

[63]David E Smith, "Bagehot, the Crown, and the Canadian Constitution" (1995) 28 CJPS 623-624.

[64]Recent examples include Crown Health Enterprises.

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.[65]

Where the Sovereign was absent, references to the Crown were fewer ─ indeed, for most purposes limited to references to the Crown and Maori negotiating Treaty of Waitangi settlements,[66] 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.[67]

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.[68] 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,[69] but also for symbolic reasons.[70]

If legitimacy, especially in a country whose constitution is unwritten and un-entrenched, is the product of continuity and gradual evolution, reform rather partakes of the piecemeal form. More radical reform, whether desirable or not, rarely occurs on the initiative of political elites, but rather through consensus. It is rather more likely to be as a result of a groundswell of public opinion rather than a top-down imposition.

Conclusion

While the ultimate fate of the parliamentary inquiry into New Zealand's constitutional arrangements is uncertain, it does highlight the difficulties of a political inquiry in a society which seems to prefer to continuity and stability and mistrust the motives of politicians and technocrats. Constitutional reform may be the product of gradual, almost unconscious, evolution. To produce more rapid or radical reform requires caution in a system which is unaccustomed to such reform. Most importantly it must be exercised in such a way which preserves the constitutional legitimacy which is the product of that very evolutionary constitutionalism. Such legitimacy is hard to preserve if reform is rushed, or seen to be promoted by a political or technocratic elite, without the wishes, or even the interests, of the wider community predominating.

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[65] "The English Constitution" in the *Collected Works of Walter Bagehot*, ed St John-Stevas (1974) vol 5 p 253.

[66] Janine Hayward, "In search of a treaty partner" (1995) Victoria University of Wellington PhD thesis.

[67] 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; Allan Kornberg & Harold Clarke, *Citizens and Community* (1992) 9.

[68] Janine Hayward, "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; David E Smith, *The Invisible Crown* (1995).

[69] For example, it was easier to restructure government agencies through the use of Orders in Council and other prerogative instruments than by Act of Parliament, which had been the usual method before the 1980s and 1990s.

[70] See Janine Hayward, "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.

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