THE THEORY OF SOVEREIGNTY AND THE IMPORTANCE OF THE CROWN IN THE REALMS OF THE QUEEN

Noel Cox[1]

ABSTRACT

As a general rule, in those countries which acknowledge Elizabeth II as Queen, the legal and political entity known as the Crown is legally important 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 some of the political legitimacy for such action.

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 it has everywhere the Crown has been established.

The physical absence of the person of the monarch prevented an undue emphasis upon personality, and encouraged the development a more conceptual- if not principled- view of the Crown.

A. INTRODUCTION

The Crown is legally important because it holds the conceptual place held by the State in those legal systems derived from or influenced by the Roman civil law.[2] Not only does the Crown provide a legal basis for governmental action, but it also 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,[3] and the Crown is essentially a symbol of government.

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

On another conceptual level, the technical and legal concept of the Crown pervades the apparatus of government and law in New Zealand, as it has in other similar countries. The

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[1]Lecturer in Law at the Auckland University of Technology, Barrister of the High Court of New Zealand, and of the Supreme Courts of Tasmania, New South Wales, South Australia, and the Northern Territory.

[2]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; S Goldfinch 'The State' in R Miller (ed) *New Zealand Government and Politics* (Oxford University Press Auckland 2001), pp. 511-520, 511.

[3]J Warhurst 'Nationalism and Republicanism in Australia' (1993) 28 Australian Journal of Political Science 100. See also Randall Collins *Weberian Sociological Theory* (Cambridge University Press Cambridge 1986).

Crown pervaded, to a degree, the whole apparatus and symbolism of government.[4] But at the same time there is a divergence between orthodox constitutional theory and the modern political reality, in that the trappings of monarchy do not reflect the reality of political power. This is especially important at a time that the traditional structure of government is being challenged, both by calls in New Zealand for Maori sovereignty or self-government,[5] 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, any more than it is in any other country, but it does confer some legitimacy upon the existing regime.[6] Some appreciation of orthodox constitutional theory is necessary, so that one of the bases for political legitimacy may be seen.

This paper seeks to identify some of these constitutional theories, and, for illustrative purposes, 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. The first section will examine the contemporary relevance of this traditional role. It will be argued that it is important because the Crown retains a practical role as the mechanism through which the daily business of the executive government is conducted.

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, not simply the means through government is conducted. 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 constitutional 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

[4]Although it had also been said, in the nineteenth century, that Great Britain already effectively had a republican form of government: 'Our monarchy is only a pretence', ... the Sovereign ... 'only a supernumerary in the pageant'; English Republic (1851), vol 1 pp. 355-358. Parallels to this may be seen in Australia: Brian Galligan 'Regularising the Australian Republic' (1993) 28 Australian Journal of Political Studies 56. Even Bagehot emphasised the republican nature of the constitution, but he laid greater weight on the symbolic role of the Crown; Walter Bagehot 'The English Constitution' in *The Collected Works of Walter Bagehot* ed Norman St John-Stevas (The Economist London 1974), vol 5.

[5]The actual meaning of this term is unclear, and seems perhaps to relate more to self-management than to sovereignty in the nineteenth century European sense; Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations (Auckland, 24 November 1999).

[6]Wade prefers to uphold the rules legitimated by history, unsatisfying as they may be to political theorists; Sir William Wade 'The Crown, Ministers and Officials: Legal Status and Liability' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 32.

function exercised by a State in many other jurisdictions, yet the Crown is not simply a metonym for the State.

B. 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.[7] There appears to have been no intention to draw any theoretical or conceptual distinctions between the terms. 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 as much by draftsmen and members of Parliament as by the general public.[8]

'The Crown' itself, in British and Commonwealth jurisprudence, is a comparatively modern concept.[9] As Maitland said, the king was merely a man, though one who does many things.[10] 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.[11]

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.[12] It was Coke who first attributed legal personality to the Crown.[13] He recast the king as a corporation sole, permanent and metaphysical.[14]

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[7]The word 'Sovereign' appears in New Zealand statutes only in the Sovereign's Birthday Observance Act 1952. Otherwise the usage is generally such as is found in s 2 of the Public Finance Act, where 'Crown' is defined as 'Her Majesty the Queen in right of New Zealand; and includes all Ministers of the Crown and all departments'. Such confusion is also seen in the United Kingdom; M Loughlin 'The State, the Crown and the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 36.

[8]For this conceptual uncertainty, see J Hayward *In search of a treaty partner* (PhD thesis, Victoria University of Wellington, 1995); Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations (Auckland, 24 November 1999).

[9]M Loughlin 'The State, the Crown and the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 36

[10]'The Crown as a Corporation' (1901) 17 Law Quarterly Review 131.

[11]According to Skinner the formation of the English State has been primarily a political achievement; Q Skinner 'The State' in T Ball, J Farr and RL Hanson (eds) *Political Innovation and Conceptual Change* (Cambridge University Press Cambridge 1989), p. 90 at p. 126 cited in M Loughlin 'The State, the Crown and the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 43. This has also led to a gulf between substance and form; M Loughlin 'The State, the Crown and the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 47.

[12]Or, as Loughlin puts it, rather than adopting a concept of the Crown as a corporation aggregate which could incorporate the idea of the body politic and thus form the basis for the emergence of a modern conception of the State, they appropriated the only single person corporation which canon and Roman law had revised; M Loughlin 'The State, the Crown and

The king's corporate identity[15] drew support from the doctrine of succession that the king never dies.[16] 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.[17] Blackstone explained that the king:

> 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.[18]

Thus the role of the Crown was eminently practical- to hold the executive power in the land. In the tradition of the common law constitutional theory was subsequently developed which rationalised and explained the existing practice, as, for example, in the development of the law of succession to the Crown.[19]

Generally, and in order to better conduct the business of government, the permanent and undying Crown was accorded certain privileges and immunities not available to any other legal entity.[20] 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'.[21]

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the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), pp. 55-56.

[13]F Maitland 'The Crown as a Corporation' (1901) 17 Law Quarterly Review 131.

[14]It was as late as 1861 that the House of Lords accepted that the Crown was a corporation sole, having 'perpetual continuance'; *A-G v Kohler* (1861) 9 HL Cas 654, 671 (HL).

[15]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; ER Hardy Ivamy (ed) *Mozley and Whiteley's Law Dictionary* (10th ed Butterworths London 1988), p. 109.

[16]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; Rt Revd William Stubbs *The Constitutional History of England in its origin and development* (4th ed Clarendon Press Oxford 1906), vol 2, 107.

[17]Howard Nenner *The Right to be King- The Succession to the Crown of England, 1603-1714* (Macmillan London 1995), p. 32.

[18]William Blackstone *Commentaries on the Laws of England* ed E. Christian (Garland Publishing New York 1978), Bk. 1 p. 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.

[19]Noel Cox 'The Law of Succession to the Crown in New Zealand' (1999) 7 Waikato Law Review 49.

[20]BV Harris 'The 'Third Source' of Authority for Government Action' (1992) 109 Law Quarterly Review 626.

[21]William Blackstone *Commentaries on the Laws of England* ed E.. Christian (Garland Publishing New York 1978), Bk. 1 p. 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.[22]

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 sole.[23] In a series of cases in both the United Kingdom and New Zealand we can see the courts struggling to categorise the nature of the Crown.[24]

In *Re Mason*[25] 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. Maitland believed that the Crown, as distinct from the king, was anciently 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'.[26] In *Adams v Naylor*,[27] nearly twenty years later, the House of Lords adopted Maitland's legal conception of the Crown.[28]

Although the House of Lords in 1977, in *Town Investments v Department of the Environment*,[29] 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'.[30] The practical need for this distinction is avoided if one recognises the aggregate nature of the Crown.[31] 'The government' is something which,

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[22]'Does the Crown have Human Powers?' (1992) 15 New Zealand Universities Law Review 118. Contrary case law includes *Sutton's Hospital Case* (1613) 10 Co Rep 23a (CP); *Clough v Leahy* (1905) 2 CLR 139, 156-157 (HCA); *New South Wales v Bardolph* (1934) 52 CLR 455, 474-475 (HCA); *R v Criminal Injuries Compensation Board* [1967] 2 QB 864, 886 (HC); *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 366 (HC); *A-G of Quebec v Labrecque* [1980] 2 SCR 1057, 1082 (SCC); *Davis v Commonwealth* (1988) 166 CLR 79 (HCA).

[23]P Joseph 'Suspending Statutes Without Parliament's Consent' (1991) 14 New Zealand Universities Law Review 282, 287.

[24]To the question 'what is the Crown?' there have been what Wade calls 'some extraordinary answers'; Sir William Wade, 'The Crown, Ministers and Officials: Legal Status and Liability' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 23.

[25][1928] 1 Ch 385, 401 (HC).

[26]F Maitland 'The Crown as a Corporation' (1901) 17 Law Quarterly Review 131.

[27][1946] AC 543, 555 (HL).

[28]It has also been accepted by the Supreme Court of Canada: *Verreault v A-G of Quebec* [1977] 1 SCR 41, 47; *A-G of Quebec v Labrecque* [1980] 2 SCR 1057, 1082.

[29][1978] AC 359 (HL) 400 (Lord Simon).

[30]*Town Investments Ltd v Department of the Environment* [1978] AC 359 (HL) 380-381 (Lord Diplock).

[31]Some writers, following *Town Investments*, have preferred the expression 'government' rather than 'Crown' or 'State', for example BV Harris 'The 'Third Source' of Authority for Government Action' (1992) 109 Law Quarterly Review 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; P Joseph 'Crown as a legal concept (I)' [1993] New Zealand Law Journal 126, 129.

unlike the Crown, has no corporate or juridical existence known to the constitution. Further, its legal definition is both legally and practically unnecessary.

In *Town Investments*[32] Lord Simon, with little argument, accepted that the Crown was a corporation aggregate, as Maitland had believed. 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'.

However, more recently, in *M v Home Office*,[33] the English Court of Appeal held that the Crown lacked legal personality and was therefore not amenable to contempt of court proceedings.[34] But it is precisely because in the Westminster-style political system in the United Kingdom there was no the Continental-style notion of a State, nor an entrenched constitution,[35] that the concept of the Crown as a legal entity with full powers in its own right arose. *Town Investments*[36] must in any event be regarded as the definitive statement of current English law.

The development of the concept of the aggregate Crown from the corporate Crown provides sufficient flexibility to accommodate the reality of government, without the need for abandoning an essential constitutional grundnorm[37] in favour of a very undeveloped and inherently vague concept of 'the government'.[38] Thus, for reasons principally of convenience, the Crown became an umbrella beneath which the business of government was conducted.

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[32]*Town Investments v Department of the Environment* [1978] AC 359, 400 (HL).

[33][1992] 1 QB 270 (HC).

[34]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 (HL). Some commentators have formed the view that *M v Home Office* [1993] 3 WLR 433 (CA) may be the most important case in constitutional law in 200 years; M Loughlin 'The State, the Crown and the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 73 citing Sir William Wade 'The Crown- old platitudes and new heresies' [1992] New Law Journal 1275, 1275; M Beloff QC, The Times, 28 July 1993; R Brazier, The Guardian, 28 July 1993.

[35]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.

[36]*Town Investments v Department of the Environment* [1978] AC 359, 400 (HL).

[37]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; H Kelsen *General theory of norms* ed M Hartney (Clarendon Press Oxford 1991); M Hayback *Carl Schmitt and Hans Kelsen in the crisis of Democracy between World Wars I and II* (DrIur thesis, Universitaet Salzburg, 1990).

[38]For a critique of these propositions generally see P Joseph 'The Crown as a legal concept (I)' [1993] New Zealand Law Journal 126, and P Joseph 'The Crown as a legal concept (II)' [1993] New Zealand Law Journal 179; FM Brookfield 'The Monarchy and the Constitution today' [1992] New Zealand Law Journal 438.

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 by whom the business of executive government is exercised.[39]

Whether there is a Crown aggregate or corporate, the government is that of the Sovereign,[40] and the Crown has the place in administration held by the State in other constitutional traditions. The Crown, whether or not there is a resident Sovereign, acts as the umbrella under which the various activities of government are conducted, and with whom, in the New Zealand context, the Maori may negotiate as Treaty of Waitangi partner.[41] Indeed, in this country the very absence of the Sovereign has encouraged this modern tendency in New Zealand for the Crown to be regarded as a concept of government quite distinct from the person of the Sovereign.[42]

The monarchy does however have a role beyond the symbolic. In his analysis of the Crown in his own day (1865), Bagehot seriously underestimated its surviving influence.[43] His famous aphorism, that a constitutional Sovereign has the right to be consulted, to encourage, and to warn,[44] can hardly express the residual royal powers of even the late nineteenth century.[45] 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'.[46] This passive role was not that envisaged by George IV, William IV, Victoria or Edward VII, nor that held by the majority of statesmen and textbook writers over this period. The latter felt

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[39]Though it has been said that 'the manner in which the concept of the Crown has been utilised borders on the incoherent'; M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 37.

[40]A concept which is alive today, in part as a substitute for a more advanced concept of the constitution; Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations (Auckland, 24 November 1999).

[41]Generally, see J Hayward *In search of a treaty partner* (PhD thesis, Victoria University of Wellington, 1995).

[42]See, generally, N Cox *The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity* (PhD thesis, University of Auckland, 2001). In the subtly different situation in the United Kingdom, it has been observed that the concept of the Crown cannot be disentangled from the person of the Monarch, straining the legal concept; M Loughlin 'The State, the Crown and the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), pp. 58-59.

[43]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; P Hennessy, 'The throne behind the monarchy' Economist 24 December 1994 p 77-79.

[44]'The English Constitution' in the *Collected Works of Walter Bagehot* ed N St John-Stevas (*The Economist* London 1974) vol 5.

[45]F Hardie *The Political Influence of Queen Victoria, 1861-1901* (Oxford University Press London 1935), pp. 23-27.

[46]'The English Constitution' in the *Collected Works of Walter Bagehot* ed Norman St John-Stevas (*The Economist* London 1974) vol 5, 253.

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.[47]

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,[48] 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 comprehensive 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,[49] though instances have been recorded.[50]

C. 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. Not only is government conducted through the Crown- as discussed above- but some governmental authority is derived from the Crown, as the legal focus of sovereignty.

'Sovereignty' put simply, is the idea that there is a 'final authority within a given territory'.[51] But a definition is not enough; an explanation of its role or purpose in a society is arguably more important. Foucault has identified four possible descriptions of the traditional role of sovereignty:

> (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.[52]

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[47]The limitations of the distinction between dignified and efficient, so central to Bagehot's model, can be seen in L Jackson *Shadows of the Crown* (PhD thesis, University of Chicago, 1994).

[48]HJ Hanham *The Nineteenth Century Constitution, 1815-1914* (Cambridge University Press Cambridge 1969), p. 24.

[49]D Smith 'Bagehot, the Crown, and the Canadian Constitution' (1995) 28 Canadian Journal of Political Science 622. An example of the use of influence through an 'exchange of views' has been given in K Rose *Kings, Queens and Courtiers: Intimate Portraits of the Royal House of Windsor from its foundation to the Present Day* (Weidenfeld & Nicolson London 1985), p. 92.

[50]R Brazier *Constitutional Practice: The foundations of British government* (3rd ed Oxford University Press Oxford 1999) ch 9.

[51]F Hinsley *Sovereignty* (Cambridge University Press Cambridge 1986), p. 1; S Krasner 'Sovereignty' (1988) 21 Comparative Political Studies 86.

[52]From M Foucault *The Foucault Effects: Studies in Governmentality* eds G Burchell, C Gordon & P Miller (University of Chicago Press Chicago 1991), pp 97-98, 101-102. See also D Held *Political Theory and the Modern State* (Polity Press Cambridge 1989), pp. 216-225.

Whichever rationale applied to the embryonic English Crown, 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.[53]

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.[54] The particular problems this causes in New Zealand cannot be examined here, 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.[55]

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 any other body.[56] In New Zealand and elsewhere the Sovereign is formally 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.[57]

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, the New Zealand constitution is not apparently based legally on the sovereignty of the people, but rather on that of the Queen-in-Parliament.

In the Westminster tradition, it is Parliament, in contrast to the Crown, which is widely regarded as being the focus of political power.[58] Joseph assumed therefore that it is the people

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[53]Sovereignty is always limited in some way. Genesis 1: 26-30 makes it clear that God created mankind to subdue the earth and to exercise dominion over it under God; Rousas John Rushdoony *The Institutes of Biblical Law* (Presbyterian and Reformed Publishing Los Angeles 1973), pp. 448-451.

[54]P.G. McH 'Constitutional Theory and Maori Claims' in H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press Auckland 1989), p. 25.

[55]E Lauterpacht 'Sovereignty' (1997) 73 International Affairs 137.

[56]D Philpott 'Sovereignty' (1995) 48 Journal of International Affairs 353.

[57]See, for example, the Barbados Independence Order 1966 (SI 1966/1455), the Schedule of which is the Constitution of Barbados. Section 63(1): 'The executive authority of Barbados is vested in Her Majesty'.

[58]See Allan Kornberg and Harold Clarke *Citizens and Community- Political Support in a Representative Democracy* (Cambridge University Press Cambridge 1992); Carol Harlow 'Power from the People?' in Patrick McAuslan and John McEldowney (eds) *Law, Legitimacy and the Constitution: Essays marking the Centenary of Dicey's Law of the Constitution* (Sweet & Maxwell London 1985); JR Mallory 'The Appointment of the Governor General' (1960) 26 Canadian Journal of Economics and Political Science 96.

rather than Parliament who is sovereign.[59] But it would seem that sovereign authority is legally vested in the Crown-in-Parliament, politically in the people.[60] Legally, this can be seen as less than ideal or even confused, but a constitution is more than merely a legal structure.[61]

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,[62] it is not clear how the position of the Maori people of New Zealand can be reconciled,[63] in particular, the preservation of their *tino rangatiratanga*, or chiefly authority. 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, including mystique and continuity.[64]

The origins and nature of constitutional authority, whether in a monarchy or a republic, are important. But although a constitution can say, as does that of Papua New Guinea, that it is derived from the popular sovereignty of the people,[65] this may be confusing legal with political authority. [66] Where the Crown exists, and no formal entrenched constitution has been adopted, difficult questions of the basis of governmental authority can be avoided.

There has been to date comparatively little theoretical analysis of the conceptual basis of governmental authority in New Zealand.[67] There has been much discussion focused on the

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[59]P Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Co Sydney 1993), pp. 284-285.

[60]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; Rousas John Rushdoony *The Institutes of Biblical Law* (Presbyterian and Reformed Publishing Los Angeles 1973), p. 214.

[61]Particularly in respect of what might be called policy legacies; Theda Skocpol *States and Social Revolution* (Cambridge University Press Cambridge 1979), p. 27. Indeed, a constitution exists in the imagination of those who create it, use it and thus know it From Joseph Jacobs *The Republican Crown*: *Lawyers and the Making of the State in Twentieth Century Britain* (Dartmouth Aldershot 1996), p. 6.

[62]The Australian Constitution has been held to be based on popular sovereignty, as it was adopted by popular vote; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (HCA) 138 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR. 104 (HCA) 171 Deane J); *McGinty v Western Australia* (1996) 186 CLR. 140 (HCA) 230, 237 (McH J).

[63]Canada has the same type of conceptual difficulty; Peter Russell *Constitutional Odyssey: Can Canadians become a Sovereign People?* (University of Toronto Press Toronto 1992).

[64]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; R Lucy *The Australian Form of Government* (Macmillan Melbourne 1985), p. 17.

[65]Constitution of the Independent State of Papua New Guinea 1975.

[66]See Harold Laski 'The Theory of Popular Sovereignty' (1919) 17 Michigan Law Review 201.

[67]Indeed, it has been said that few care for such esoteric matters; Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations (Auckland, 24 November 1999).

legitimacy of government derived from the Treaty of Waitangi.[68] 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.[69] This dearth of work may be due to apathy,[70] 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.[71]

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.[72] The working paper called for the recognition of a unitary federal administration in place of the legal concept of the Crown.[73] The paper specifically asked:

> 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?

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

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[68]For example, FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (University of Auckland Press Auckland 1999); Andrew Sharp *Leap into the dark: the changing role of the state in New Zealand since 1984* (Auckland University Press Auckland 1994); Andrew Sharp *Justice and the Maori: the philosophy and practice of Maori claims in New Zealand since the 1970s* (Oxford University Press Auckland 1997); R Mulgan 'Can the Treaty of Waitangi provide a constitutional basis for New Zealand's political future?' (1989) 41 Political Science 51.

[69]See, for example, the recent writings on the State; J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books Wellington 1993), Richard Mulgan *Democracy and Power in New Zealand: A study of New Zealand politics* (Oxford University Press Auckland 1989).

[70]As former Prime Minister David Lange believed; Interview with David Lange, former Prime Minister (Auckland, 20 May 1998).

[71]See Michael Foley *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge London 1989). The wars of the seventeenth century were, to no small degree, between competing conceptions of the State, and engendered a suspicion for such speculation. It is probable that the long dominance of Whig ideology also contributed to this attitude.

[72]Law Reform Commission of Canada *The Legal Status of the Federal Administration* (Law Reform Commission of Canada Ottawa 1985).

[73]*Bank voor Handel v Slatford* [1952] 1 All ER 314 (HC) 319 (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 person, and that latterly have been bestowed by statute on the king in council or on various Ministers.

Sovereign herself, the institution of royal power, the concept of sovereignty, the constitutional head of State, judicial instructions and actors.[74]

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.[75] 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'.[76] The Crown would be replaced by the 'administration'. The authors of the working paper wanted to recognise the executive branch of the State.[77] Others have also considered the legal nature of the Crown or State in Canada,[78] but the issue is not yet settled.[79]

Cohen believed that the methodology of the working paper itself was flawed because it focused on theoretical and abstract analyses of the State.[80] Essentially, the difficulty is that there is no developed concept of the State or nation in Commonwealth constitutional theory.[81] Moore attributes this to parliamentarian mistrust inspired by the association between civil law and Baconian theory.[82] It is equally true that modern theoretical studies of the State have been limited even in Continental Europe.[83] But the modern concept of the State has been described as a critical subject of inquiry.[84]

In New Zealand executive authority is also, like Canada, formally vested in the Crown.[85] The government does not require parliamentary approval for most administrative actions; nor

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[74]In this, parallels may be seen with the position of the Crown in New Zealand, in the Maori-Crown context.

[75]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.

[76]D Cohen 'Thinking about the State' (1986) 24 Osgoode Hall Law Journal 379.

[77]In effect a republican form of government.

[78]N Komesar 'Taking Institutions seriously' (1984) 51 University of Chicago Law Review 366; PW Hogg *Liability of the Crown in Australia, New Zealand and the United Kingdom* (The Law Book Co Sydney 1971); Law Reform Commission of British Columbia *Legal Position of the Crown* (Law Reform Commission of British Columbia Vancouver 1972).

[79]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'; D Smith 'Empire, Crown and Canadian Federalism' (1991) 24 Canadian Journal of Political Science 451, 471.

[80]D Cohen 'Thinking about the State' (1986) 24 Osgoode Hall Law Journal 379.

[81]W Moore 'Liability for the Acts of Public Servants' (1907) 23 Law Quarterly Review 112; W Corbett ''The Crown' as representing the State' (1903) 1 Commonwealth Law Review 23, 45; HT Postle 'Commonwealth and Crown' (1929) 3 Australian Law Journal 109; H Laski 'The Responsibility of the State in England' (1919) 32 Harvard Law Review 447, 472; F Maitland 'The Crown as a Corporation' (1901) 18 Law Quarterly Review 131, 136.

[82]W Moore 'Law and Government' (1905) 3 Commonwealth Law Review 205.

[83]J Dearlove 'Bringing the State Back In' (1989) Political Studies 521.

[84]M Loughlin, 'The State, the Crown and the Law' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 40.

[85]BV Harris 'The 'Third Source' of Authority for Government Action' (1992) 109 Law Quarterly Review 626.

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.[86]

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.[87]

This approach has the advantage of simplicity, leaving broader questions of sovereignty unanswered.[88] 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.[89] 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.[90]

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.

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.[91]

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

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[86]For an example of the application of such limits on government see *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (HC).

[87]BV Harris 'The 'Third Source' of Authority for Government Action' (1992) 109 Law Quarterly Review 626.

[88]Which suits most political leaders and the general public alike; Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations (Auckland, 24 November 1999).

[89]By contrast Australia's Constitution may be described as a social covenant drawn up and ratified by the people; JA La Nauze *The Making of the Australian Constitution* (Melbourne University Press Melbourne 1972).

[90]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; D Bercuson and B Cooper 'From Constitutional Monarchy to Quasi Republic' in J Ajzenstat (ed) *Canadian Constitutionalism, 1791-1991* (Canadian Study of Parliament Group Ottawa 1992); cf D Smith *The Republican Option in Canada, Past and Present* (University of Toronto Press Toronto 1999), p. 18; Interview with Sir Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations (Auckland, 24 November 1999).

[91]G Clarke *Popular Sovereignty and Constitutional Reform in Canada* (MA thesis, Acadia University, 1997).

of such questions was also avoided.[92] 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'.[93] Loughlin also has described the Crown as a poor substitute for the State, because the public and private aspects of the Sovereign's responsibilities.[94] Whilst this might not be desirable it provides a convenient cover behind which the business of government is conducted, unworried by conceptual difficulties.

D. 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. Thus the legal role of the Crown is important at three conceptual levels. Firstly, and most fundamentally, it is a metonym for State. Secondly, it is a source of legal authority. And thirdly, it is the means through which government is conducted. In most political systems the executive power and the State are synonymous.[95] The State may be classified as that which refers to some or all of the legal administrative or legislative institutions operating in a community.[96] In the British system, and those derived from it,[97] it is questionable whether there is a State. Most legal commentators had traditionally given it little

[92]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, former Associate Minister in Charge of Treaty of Waitangi Negotiations (Auckland, 7 December 1999).

[93]H Laski 'Responsibility of the State in England' (1919) 32 Harvard Law Journal 447.

[94]M Loughlin 'The State, the Crown and the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 33.

[95]Sir Ernest Barker defined a modern State as:

> 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.

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': E Barker *Reflections on Government* (Oxford University Press London 1942), p. xv.

[96]D Held *Political Theory and the Modern State* (Polity Press Cambridge 1989); JR Strayer *On the Mediæval Origins of the Modern State* (Princeton University Press Princeton 1970).

[97]Excepting those countries, such as the U.S.A., which were compelled to address this often difficult issue, because of the republican and federal nature of their government.

treatment, or simply answered in the negative. Political scientists considered the question from a different perspective, though not one which was necessarily any more complete.[98]

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.[99] Nor did the rediscovery of Aristotle, the development of modern government,[100] 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.[101] 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.[102]

Hobbes, with Bodin, Machiavelli, and Hegel did much to stimulate European State theory, a theory which has not been fully reconsidered in 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*[103] 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.[104] 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.[105]

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[98]Analysis of such mysteries as 'the State' did not come readily to behaviouralists. Bernard Susser, *Approaches to the Study of Politics* (Macmillan New York 1992), p. 180. In recent decades State-centred theorists sought to bring the State back, arguing that it is more autonomous than society-centred theorists. As Bogdanor found, it is necessary to range across law, politics and history to understand a historic constitution; V Bogdanor, *The Monarchy and the Constitution* (Clarendon Press Oxford 1995).

[99]E Kantorowicz 'Kingship under the impact of scientific jurisprudence' in M Clagett et al (eds) *Twelfth century Europe* (University of Wisconsin Press Madison 1961), p. 89.

[100]JR Strayer *On the Mediæval Origins of the Modern State* (Princeton University Press Princeton 1970).

[101]S Reynolds 'Law and Community in Western Christendom' (1981) American Journal of Legal History 206.

[102]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; E Kantorowicz 'Kingship under the impact of scientific jurisprudence' in M Clagett et al (eds) *Twelfth century Europe* (University of Wisconsin Press Madison 1961), pp. 89-111.

[103]'What hath pleased the prince has the force of law'.

[104]T Hobbes *Leviathan* (Collier New York 1962); Q Skinner 'Conquest and' in GE Aylmer *The Interregnum- The Quest for Settlement, 1640-1660* (Archon Books Hamden 1972).

[105]Typified by N Machiavelli *The Prince* ed Q Skinner and R Price (Cambridge University Press Cambridge 1988).

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 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[106] and Montesquieu,[107] 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.[108]

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.[109] The need to create (or recreate) a concept of the State has not been generally felt since 1688,[110] and even then the feeling was half-hearted.[111] 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.[112] 'The supreme executive power of this kingdom', as Blackstone knew, was vested in the king;[113] 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

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[106]He argued for a version of sovereignty of the whole citizen body over itself; *The Social Contract and other later political writings* V Goureatres (tr) (Cambridge University Press Cambridge 1997).

[107]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; C de Montesquieu 'The Spirit of the Laws' in A Lijphart (ed) *Parliamentary versus Presidential Government* (Oxford University Press Oxford 1992), p. 48.

[108]H Laski *Authority in the modern State* (Yale University Press New Haven 1919), pp. 21-24.

[109]The United Kingdom can, of course, be dated to the Union with Union with Ireland Act 1800 (39 & 40 Geo III c 67). British constitutional law has been essentially that of England- though not without dispute; T Smith, 'Pretensions of English Law as 'Imperial Law'' in *The Laws of Scotland* (Law Society of Scotland/Butterworths Edinburgh 1987) vol 5, paras. 711-719.

[110]Though in recent decades there have been some movements in this direction, for legal rather than political reasons; see J Jacob *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain* (Dartmouth Aldershot 1996).

[111]V Bogdanor 'Britain and Europe' in R Holme and M Elliott (eds) *1688-1988 Time for a New Constitution* (Macmillan London 1988), p. 81.

[112]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; H Levy-Ullmann *The English Legal Tradition: Its Sources and History* M Mitchell (tr) rev and ed F Goadly (Macmillan London 1935), pp. xlvi-liii.

[113]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 *The Canons of the Church of England* (London 1969), Canon A7; *Thirty-Nine Articles of Religion* (London 1562, confirmed 1571), Art. 37.

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', and the proper role of the State.[114] Yet, the history of this country, and in particular, the Treaty of Waitangi, makes this a curious deficiency.[115]

There has, however, been more consideration given in New Zealand to the more abstract notions of governmental authority since the 1980s.[116]

Inspired by the predominantly neo-liberal market-economy reforms initiated by the 1984 Labour Government,[117] commentators saw a resurgence of the State as a subject worthy of serious study.[118] In the writings of Mulgan[119] and Sharp,[120] 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 between neoliberals,[121] pluralists,[122] feminists,[123] Marxists[124] and others in the 1980s and 1990s[125] have however begun a process towards developing a comprehensive theory of government.

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[114]Kelsey, for example, speaks of the State where constitutional lawyers would traditionally speak of the Crown, or some political scientists the government; J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books Wellington 1993). See also A Sharp *Leap into the dark: the changing role of the state in New Zealand since 1984* (Auckland University Press Auckland 1994).

[115]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, former Minister in Charge of Treaty of Waitangi Negotiations (Auckland, 24 November 1999).

[116]See, for example, the 'Building the Constitution' conference held in Wellington in 2000; C James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies Wellington 2000).

[117]S Goldfinch 'The State' in R Miller (ed) *New Zealand Government and Politics* (Oxford University Press Auckland 2001), pp. 516-517.

[118]For example, in the chapters devoted to the various interpretations of the State in R Miller (ed) *New Zealand Government and Politics* (Oxford University Press Auckland 2001).

[119]*Democracy and Power in New Zealand: A study of New Zealand politics* (Oxford University Press Auckland 1989).

[120]*Leap into the dark: the changing role of the state in New Zealand since 1984* (Auckland University Press Auckland 1994); *Justice and the Maori: the philosophy and practice of Maori claims in New Zealand since the 1970s* (Oxford University Press Auckland 1997).

[121]J Morrow 'Neo-Liberalism' in R Miller (ed) *New Zealand Government and Politics* (Oxford University Press Auckland 2001), pp. 521-532.

[122]R Mulgan 'A pluralist analysis of the New Zealand State' in B Roper and C Rudd (ed) *State and Economy in New Zealand* (Oxford University Press Auckland 1993), pp. 128-146.

[123]R Du Plessis 'Women, Feminism and the State' in B Roper and C Rudd (eds) *The Political Economy of New Zealand* (Oxford University Press Auckland 1997), pp. 220-236.

[124]C Dixon, 'Marxism' in R Miller (ed) *New Zealand Politics in Transition* (Oxford University Press Auckland 1997), pp. 350-358.

[125]A Sharp *Leap into the dark: the changing role of the state in New Zealand since 1984* (Auckland University Press Auckland 1994); J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books Wellington 1993); P Moloney 'Pluralist Theories of the State' in R Miller (ed) *New Zealand Politics in Transition* (Oxford University Press Auckland 1997), pp. 317-328.

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,[126] 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.[127] His thesis is that since the Franks Report and the consequent Tribunals and Inquiries Act 1958,[128] judicial activism has developed an embryonic State.[129]

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',[130] 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.[131]

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 tradition of historical development[132] 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.[133]

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

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[126]P Moloney 'Neo-Liberalism: A Pluralist Critique' in R Miller (ed) *New Zealand Government and Politics* (Oxford University Press Auckland 2001), p. 542.

[127]See also M Freedland, 'The Crown and the Changing Nature of Government' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 133.

[128]6 & 7 Eliz II c 66.

[129]J Jacob *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain* (Dartmouth Aldershot 1996). It has also been said that the course of the twentieth century the Crown lost many traditional immunities, particularly as a consequence of the evolution of the concept of public law, through limits on the royal prerogative, and Crown privileges, and the growth of public interest; M Loughlin, 'The State, the Crown and the Law' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), p. 35, 66.

[130]See J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books Wellington 1993).

[131]J Jacob *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain* (Dartmouth Aldershot 1996), p. 24.

[132]This evolutionary and legalistic approach has been remarked upon regularly by Continental observers; Henri Levy-Ullmann *The English Legal Tradition: Its Sources and History* M Mitchell (tr) rev and ed F Goadly (Macmillan London 1935).

[133]A conclusion in accordance with the findings of J Hayward *In search of a treaty partner* (PhD thesis, Victoria University of Wellington, 1995).

attachment to monarchy, but because of opposition to anything evocative of interventionist government.[134] 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.[135] 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 government.[136] It is in this symbolic role that the modern function of the Crown appears to lie.

It may be that the Sovereign lacks personal power, but the organs of royal government, whether they are Ministers or departments, enjoy the benefit of the residual power of the Crown, as an institution in which the *maiestas* of law and government is vested. This institution is more important that the person of the Sovereign.[137] 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,[138] 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.[139] But the technical and legal concept of the Crown 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

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[134]G McLauchlan 'Of President and Country' *New Zealand Herald* (Auckland New Zealand), 17 February 1995.

[135]P Joseph 'The Crown as a legal concept (I)' [1993] New Zealand Law Journal 126; 'The Crown as a legal concept (II)' [1993] New Zealand Law Journal 179. See also J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books Wellington 1993).

[136]See J Hayward *In search of a treaty partner* (PhD thesis, Victoria University of Wellington, 1995); M Wilson 'The Reconfiguration of New Zealand Constitutional Institutions' (1997) 5 Waikato Law Review 17.

[137]There 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; F Maitland and F Pollock *History of English Law before the Times of Edward I* (Cambridge University Press Cambridge 1895) vol 1, 507.

[138]'The English Constitution' in the *Collected Works of Walter Bagehot* ed Norman St John-Stevas (*The Economist* London 1974) vol 5.

[139]Historical continuity characterises the constitutions of the United Kingdom and the 'old dominions'; M Loughlin 'The State, the Crown and the Law' in M Sunkin and S Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press Oxford 1999), pp. 43-44

Parliament, and the possibility that there may be limits to such sovereignty.[140] For Dicey, sovereignty of Parliament was matched by the rule of law, or supremacy of law.[141]

Political sovereignty may lie in practice with the people,[142] but legally this is less certain,[143] though legitimacy derives principally from the people. Indeed, as a constitution characterised by its uncodified (or 'unwritten') nature, the New Zealand constitution cannot be anything but a traditional evolutionary Burkean type.[144] Yet, whether this remains the basis of the constitution is uncertain, for two major reasons.

The non-Maori population of New Zealand seems, by and large, influenced by basically Lockean ideas of government as a direct compact.[145] 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 a system of proportional voting in 1996.[146]

Maori tend to see government, and society, in more evolutionary terms.[147] 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*[148] and *tino rangatiratanga*[149] to the Crown in 1840. The sovereignty of the Crown, in the context of the

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[140]This question has been called 'the most puzzling constitutional conundrum of all'; A Sharp 'Constitution' in R Miller (ed), *New Zealand Government and Politics* (Oxford University Press Auckland 2001), p. 40. *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) 398 (Cooke P).

[141]With the courts supervising the exercise of a common law power of government, as in *Wolfe Tone's Case* (1798) 27 State Tr 614.

[142]H Laski 'The Theory of Popular Sovereignty' (1919) 17 Michigan Law Review 201.

[143]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 (HCA) 138 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (HCA) 171 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140 (HCA) 230, 237 (McH J).

[144]Edmund Burke saw a constitution as based on a social contract which evolved from generation to generation; P Russell *Constitutional Odyssey: Can Canadians become a Sovereign People?* (University of Toronto Press Toronto 1992), pp. 10-11.

[145]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* (Auckland, New Zealand), 8 November 1999.

[146]See Alan Simpson (ed) *The Constitutional Implications of MMP* (School of Political Science and International Relations Victoria University of Wellington Wellington 1998).

[147]D Awatere *Maori Sovereignty* (Broadsheet Auckland 1984).

[148]Kawanatanga could be taken as a distant power of protection against foreigners and other tribes, which would not impinge on the mana of individual chiefs and their own tribes; R. Mulgan 'Can the Treaty of Waitangi provide a constitutional basis for New Zealand's political future?' (1989) 41(2) Political Science 53, p.56.

[149]Reserved by the Chiefs by Article 2. Sir Hugh Kawharu, Professor of Maori Studies at the University of Auckland, in evidence to the Waitangi Tribunal, has observed that:

Treaty of Waitangi, is more than merely a legal doctrine, it has a continuing political relevance. Merely redefining the location of sovereignty as the 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.[150] The difficulty remains to determine what constitutional structures will satisfy both perspectives.[151]

E. CONCLUSION

This paper has examined the thesis that Crown in New Zealand and other countries which acknowledge Elizabeth II as Queen 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. This is because the Crown provides a legal basis for governmental action, and because it provides much of the legal and some of the political legitimacy for such action.

The starting point for the examination of this legal legitimacy is the role of the Sovereign as legal head of the executive government, what might be called the practical role of the Crown. In this the Crown retains a practical role as the mechanism through which executive government is conducted.

But the broader concept of the Crown as the focus of sovereignty is also important, arguably more so since the Crown became increasingly devoid of real political power during the course of the twentieth century.[152] 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

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> [W]hat the Chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death.

Report of the Waitangi Tribunal on the Kaituna River Claim (Waitangi Tribunal Wellinton 1984), p. 14.
The leading Maori lawyer, Moana Jackson, proposes a markedly different view:

> [In Article 1 the Maori granted] to the Crown the right of kawanatanga over the Crown's own people, over what Maori called 'nga tangata whai muri', that is, those who came to Aotearoa after the Treaty. The Crown could then exercise its kawanatanga over all European settlers, but the authority to control and exercise power over Maori stayed where it had always been, with the iwi.

M Jackson, 'Maori Law' in R Young, *Mana Tiriti*: *The Art of Protest and Partnership* (Haeata Project Waitangi/City Art Gallery/Daphne Brasell Associates Press Wellington, 1991), p. 19.
[150]See J Hayward *In search of a treaty partner* (PhD thesis, Victoria University of Wellington, 1995).
[151]J Phillips 'The Constitution and Independent Nationhood' in C James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies Wellington 2000), pp. 69-76.
[152]The increased symbolic role is emphasised in V Bogdanor *The Monarchy and the Constitution* (Clarendon Press Oxford 1995).

weakness, a point made strongly in a Canadian report on the legal structure of the federal administration.[153]

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 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 that the Crown confers upon the government-of-the-day may be relatively slight, but it remains of at least symbolic importance.

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.[154] 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 system of government in the United Kingdom, New Zealand, Canada, Australia and similar countries, even if not all aspects of its symbolism may apply.

[153]Law Reform Commission of Canada *The Legal Status of the Federal Administration* (Law Reform Commission of Canada Ottawa 1985).

[154]N Cox 'Republican Sentiment in the Realms of the Queen: The New Zealand Perspective' [2001] Manitoba Law Journal (forthcoming, copy with author).