The Legitimacy of government and the normative influence of the Crown on a political construct

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Abstract

The Crown 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 some of the legal and political legitimacy for such action. The first section of this paper looks at what is meant by legitimacy, and its place in the constitutional order. The second section looks at challenges to this legitimacy. The third section examines the concept of the rule of law and the normative effect of the Crown, and how this has influenced the evolution of the constitution.

Introduction

Within the constitutional structure of those countries which have retained the form and theory of British constitutional monarchy the Crown is important legally because it holds the conceptual place held by the State in those legal systems derived from or influenced by the Roman civil law.¹ Not only does the Crown provide a legal basis for governmental action, but it provides much of the legal and political legitimacy for such action. Symbolism can be very important as a source of authority, and is not merely indicative of it.²

The Crown remains an important source of traditional legal, though not necessarily political, authority. Thus, in traditional terms, the Crown is the embodiment of governmental authority, and a focus of legal sovereignty. But the Crown, as distinct from the Sovereign and Governor-General,³ is also important as a source of constitutional or political legitimacy, which

¹Though 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; Shaun Goldfinch, ‘The State’, in NEW ZEALAND GOVERNMENT AND POLITICS 511, 511 (Raymond Miller ed., 2001).
³Who is appointed by and represents the Sovereign, and who equates to Head of State in most respects.
supplements that conferred through more directly democratic processes. This is the legitimacy derived from continuity, and acquiescence. This is partly based on traditional, inherited authority. Obedience looks more like a matter of lingering habit, or expediency, or necessity, but no longer a matter of reason and principle, and of deepest sentiment and conviction. But today a claim that any public institution’s authority is in any sense innate will probably fail to convince the majority.

As Lord Devlin has said:

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

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

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The first section of this paper looks at what is meant by legitimacy, and its place in the constitutional order. One fundamental political consideration in New Zealand is that epitomised by the Treaty of Waitangi, signed in 1840 by emissaries of the Queen of Great Britain, and many of the indigenous Maori chiefs of New Zealand.\(^9\) Since the 1970s the Treaty itself has been identified as a new and powerful source of legitimacy. But the Crown itself is a source of legitimacy, both independently, and through being symbolically linked to the Treaty.

The second section looks at challenges to this legitimacy. Most fundamentally this opposition can come from intellectual dissatisfaction with the form or basis of government. In post-colonial nations such as New Zealand this focuses on the relative positions of indigenous and settler populations. Uncertainty surrounding the legitimacy of traditional bases of government can only be partly assuaged by contemporary majoritarian support.

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

This paper will seek to show that some part of the legitimacy of the regime is provided by the Crown. This does not mean that the legitimacy of government requires the continuation of the Crown. But it does mean that the Crown provides additional legitimacy to that derived from democratic and other sources, and that fears of undermining the legitimacy of government may deter some from questioning the continued existence of the Crown.\(^10\)

**Legitimacy and the constitutional order**


\(^10\) Indeed, this has been particularly apparent in the Labour Party’s attitude to the monarchy.
Legitimacy is a more supple and inclusive idea than sovereignty, or of continuity.\textsuperscript{11} 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.\textsuperscript{12} 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.\textsuperscript{13} But this scheme leaves out substantive questions about the justice of the State and the protection it offers the individuals who belong to it.\textsuperscript{14} It is generally more usual to maintain that a State’s legitimacy depends upon its upholding certain human rights.\textsuperscript{15}

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.\textsuperscript{16} Second, in the tradition of Weber, legitimacy has been defined as “the degree to which institutions are valued for themselves and considered right

\textsuperscript{12}RANDALL COLLINS, \textit{WEBERIAN SOCIOLOGICAL THEORY} (1986).
\textsuperscript{13}Penelope Brook Cowen, \textit{Neo Liberalism, in New Zealand Politics in Transition} 341, 341-349 (R Miller ed., 1997).
and proper”.\textsuperscript{17} Third, political legitimacy may be defined as the degree of public perception that a regime is morally proper for a society.\textsuperscript{18}

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.\textsuperscript{19} These traditional concepts of legitimacy were built upon foundations external to and independent of the mere assertion or opinion of the claimant.\textsuperscript{20} These normative or legal definitions included laws of inheritance, and laws of logic. Sources for these included immemorial custom, divine law, the law of nature, or a constitution.\textsuperscript{21}

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.\textsuperscript{22} Just what this formula is depends upon the history and composition of a country.

In modern democratic societies, popular elections confer legitimacy upon governments. But legitimacy can also be independent of the mere assertion or opinion of the claimant. This has been particularly important in late twentieth century discussion of indigenous rights.\textsuperscript{23}

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.

\textsuperscript{17}Robert Bierstedt, \textit{Legitimacy}, in \textit{A DICTIONARY OF THE SOCIAL SCIENCES} 386 (J Gould & W Kolb eds.,1964).

\textsuperscript{18}Richard Merelman, \textit{Learning and Legitimacy} 60(3) \textit{AMERICAN POLITICAL SCIENCE REVIEW} 548, 548 (1966)

\textsuperscript{19}In an extreme form, the divine right of kings; \textit{JOHN NEVILLE FIGGIS, THE THEORY OF THE DIVINE RIGHT OF KINGS} (1914).


\textsuperscript{22}TARIFA, \textit{supra} note 7, at 437.

\textsuperscript{23}See, for example, E Lauterpacht, \textit{Sovereignty}, 73(1) \textit{INTERNATIONAL AFFAIRS} 137, 137 (1997).
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. In New Zealand, 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.

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

It is Parliament, in contrast to the Crown, which is widely regarded as being the focus of political power. Joseph assumes therefore that it is the people rather than Parliament who is sovereign. But it would seem to more closely match the constitutional and legal reality to observe that sovereign authority is legally vested in the Crown-in-Parliament, politically in the people.

25See, for example, the Barbados Independence Order 1966, the Schedule of which is the Constitution of Barbados. Section 63(1): “The executive authority of Barbados is vested in Her Majesty”.
28In early America, there was no question, whatever the form of government, that all legitimate authority was derived from God. The influence of the classical tradition revived the authority of the people, which historically is equally compatible with monarchy, oligarchy, dictatorship, or democracy, but is not compatible with the doctrine of God’s authority; RUSHDOONY, supra note 6, at 214.
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,\(^{29}\) it is not clear how the position of the Maori can be reconciled,\(^{30}\) 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.\(^{31}\)

There has been to date comparatively little theoretical analysis of the conceptual basis of governmental authority in New Zealand.\(^{32}\) There has been much discussion focused on the legitimacy of government derived from the Treaty of Waitangi.\(^{33}\) 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

\(^{29}\)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 at 138 per Mason CJ; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171 per Deane J; *McGinty v Western Australia* (1996) 186 CLR 140 at 230, 237 per McHugh, J.

\(^{30}\)Canada has the same type of conceptual difficulty; *PETER H. RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* (1992).

\(^{31}\)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; *RICHARD LUCY, THE AUSTRALIAN FORM OF GOVERNMENT* 17 (1985).

\(^{32}\)Indeed, it has been said that few care for such esoteric matters; Interview with Sir Douglas Graham, in Auckland, New Zealand (Nov. 24, 1999).

of government in individual lives. This dearth of work may be due to apathy, but it could also be influenced by an underlying suspicion of abstract theory which can be traced in British tradition of political thought from the seventeenth century, if not earlier.

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

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.

This approach has the advantage of simplicity, leaving broader questions of sovereignty unanswered. As such it owes much to the British tradition of a

34 See, for example, the recent writings on the State; JANE KELSEY, ROLLING BACK THE STATE: PRIVATISATION OF POWER IN AOTEAROA/NEW ZEALAND (1993), R MULGAN, DEMOCRACY AND POWER IN NEW ZEALAND: A STUDY OF NEW ZEALAND POLITICS (1989).
35 As former Prime Minister David Lange believed; Interview with David Lange, in Auckland, New Zealand (May 20, 1998).
36 See MICHAEL FOLEY, THE SILENCE OF CONSTITUTIONS: GAPS, ‘ABEYANCES’ AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT (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.
38 For an example of the application of such limits on government see Fitzgerald v Muldoon [1976] 2 NZLR 615.
39 HARRIS, supra note 37.
40 Which suits most political leaders and the general public alike; Interview with Sir Douglas Graham, in Auckland, New Zealand (Nov. 24, 1999).
constitution as something which evolves, and for which theory is sometimes
developed subsequent to the practice.\textsuperscript{41} One aspect of this paucity of theory,
if it may be so called, is the weakness – or absence, of a general theory of the
State.\textsuperscript{42}

There have been no technical or practical reasons for these difficult
questions of the sources of governmental authority to be answered in New
Zealand. To some extent, the asking of such questions was also avoided.\textsuperscript{43}
Thus, the existence of the Crown, whilst providing a convenient legal source
for executive government, has also acted as an inhibitor of abstract
constitutional theorising. As a consequence, in Laski’s view, the Crown
covered a “multitude of sins”.\textsuperscript{44} Whilst this might not be desirable, it
provides a convenient cover behind which the business of government is
conducted, unworried by conceptual difficulties.

Legally authority over New Zealand was acquired by the Crown by
discovery and settlement, as well as by cession.\textsuperscript{45} But this acquisition of

\textsuperscript{41}By contrast Australia’s Constitution may be described as a social covenant
drawn up and ratified by the people; \textsc{John Andrew La Nauze}, \textit{The Making
of the Australian Constitution} (1972).

\textsuperscript{42}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; David J. Bercuson & Barry Cooper,
\textit{From Constitutional Monarchy to Quasi Republic, in Canadian
Smith, \textit{The Republican Option in Canada, Past and Present} 18 (1999);
Interview with Sir Douglas Graham, in Auckland, New Zealand (Nov. 24,
1999).

\textsuperscript{43}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, in Auckland, New Zealand (Dec. 7, 1999).

\textsuperscript{44}Harold Laski, \textit{Responsibility of the State in England} 32 \textit{Harvard Law
Journal} 447, 447 (1919).

\textsuperscript{45}Frederika Hackhsaw, \textit{Nineteenth Century Notion of Aboriginal Title, in
Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi} 92, 92 (I.H. Kawharu ed., 1989). See \textsc{Mark Lindley}, \textit{The
Acquisition and Government of Backward Territories in International Law: Being a Treatise on the Law and Practice
Relating to Colonial Expansion} (1926); E Evatt, \textit{The Acquisition of
Territory in Australia and New Zealand, in Studies in the History of the
authority was intended by the imperial government to be with the consent of
the Maori chiefs, and the chiefs generally accepted it on that basis. This was
in conformity with prior colonial practice, and consistent with the practice
of the previous several decades.

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

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

There is a conflict of views as to exactly what the Maori chiefs ceded to the
Crown by the Treaty of Waitangi. The kawanatanga ceded by Article 1

LAW OF NATIONS (CH Alexandrowicz ed.,1968) Grotian Society Papers No
16, pp 16-45.

46 LINDLEY, supra note 45.

47 Interview with Georgina te Heuheu, in Auckland, New Zealand (Dec. 7,
1999).

48 Amounting to what Brookfield calls a revolutionary seizure of power; F.M.
BROOKFIELD, WAITANGI AND INDIGENOUS RIGHTS: REVOLUTION, LAW AND
LEGITIMATION (1999).

49 CATHERINE TIZARD, COLONIAL CHIEFS, 1840-1889: GIPPS, HOBSON,
FITZROY, GREY, BROWNE, GREY AGAIN, BOWEN, FERGUSSON, NORMANBY,

50 David V. Williams, The Constitutional Status of the Treaty of Waitangi: an
(1990)

51 The contra proferentem principle, that a document is to be construed
against the party who drafted and put it forward, leads to the conclusion that
the Maori version is decisive. This is also shown by the rule ei qui affirmat,
non ei qui negat, incumbit probatio (“the burden of proof lies upon the
person who affirms and not on the person who denies”).
rests uneasily with the tino rangatiratanga 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:

[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.

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.

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. Whatever the Chiefs believed, it is unlikely that they had any conception of the unlimited parliamentary sovereignty which was imposed upon them.

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55 Mulgan, supra note 33, at 53, 56.
56 Indeed, a major difficulty for later scholars has been to disentangle the different contemporary perceptions of the Treaty; Interview with Sir Douglas Graham, in Auckland, New Zealand (Nov. 24, 1999).
But claims of legitimacy founded in a completely different value system will be so unclear as to be nearly impossible to distinguish.\textsuperscript{57} After the treaty the extent of the chiefs’ loss in practical terms became apparent, but too late.

In the absence of a voluntary cession of full sovereignty the legitimacy of colonial rule could only be validated over time through the habit of obedience,\textsuperscript{58} or legal sovereignty.\textsuperscript{59} This approach is based upon European legal concepts, something which has been criticised by some Maori academics.\textsuperscript{60} However, legitimation by effectiveness and durability of even a revolutionary assumption of power is a well understood principle of law\textsuperscript{61}, even amongst the early Maori.\textsuperscript{62}

Whether or not it had been intended by the signatories, it is now widely assumed that Maori have, under the first article, accepted the sovereignty of the Crown,\textsuperscript{63} and therefore the legitimacy of the present government and legal system.\textsuperscript{64} Indeed, most Maori leaders accept this, and concentrate on the Crown’s failure to keep its part of the Treaty as a failure to protect

\textsuperscript{57}\textsc{tizard}, supra note 49 at 10.
\textsuperscript{60}Annie Mikaere, Review of \textit{Waitangi} (1990) 14 New Zealand Universities Law Review 97, 98.
\textsuperscript{64}Indeed, it has been said that it is unrealistic to maintain any contrary argument; Interview with Sir Douglas Graham, in Auckland, New Zealand (Nov. 24, 1999).
property rights.\textsuperscript{65} It might be said that the government’s view of the Treaty has always been that it gave authority to it,\textsuperscript{66} whereas in the common Maori view the Crown’s protection of Maori property\textsuperscript{67} was more important.\textsuperscript{68} This pragmatic position has proved most effective, and has led to the successful conclusion of numerous claims for compensation for past wrongs.

The Treaty at least partially justifies or legitimates the Crown and Parliament’s claims to power, though in Jackson’s view only in respect of Pakeha.\textsuperscript{69} However, such a resolution presupposes that the original assumption of sovereignty was in some way illegal, itself a proposition open to argument.\textsuperscript{70}

The difficulty is that Pakeha New Zealand has no such cession, or declaration of constitutional authority. As a consequence, the basis and nature of constitutional authority remains uncertain. It tends to be sidelined by the clearer and more immediate (though perhaps limited) authority vested in the Crown by the Treaty of Waitangi, and that conferred upon the Parliament by regular elections.

The extent to which the authority of government can be seen as derived from inherited legal sources, exclusive of the Treaty of Waitangi, remains uncertain. It is, however, little questioned, perhaps in part because it is of comparatively limited scope (major legislative provisions can be justified purely or principally by reference to the parliamentary representative democracy). However, the Treaty of Waitangi itself is an inherited source of legal authority.

\begin{itemize}
\item \textsuperscript{65}MULGAN, \textit{supra} note 33, at 57-59. Though there are some who, whilst decrying alleged Crown breaches of the Treaty, deny that the Treaty conveyed anything more than permission for European settlement; a case of “having their cake and eating it too”; Interview with Sir Douglas Graham, in Auckland, New Zealand (Nov. 24, 1999).
\item \textsuperscript{66}Article 1.
\item \textsuperscript{67}Article 3.
\item \textsuperscript{68}See David Williams, \textit{Te Tiriti o Waitangi, in HE KORERO MO WAITANGI} 1984 (A. Blank ed., 1985).
\item \textsuperscript{69}JACKSON, \textit{supra} note 54, at 19.
\item \textsuperscript{70}F.M. Brookfield, \textit{Parliament, the Treaty, and Freedom, in ESSAYS ON THE CONSTITUTION} 41, 41, 43-46 (Philip A. Joseph, 1995).
\end{itemize}
The Crown provides some element of legitimacy for government, through the Treaty of Waitangi, and through vaguer notions of legal and historical continuity. This itself influences the form of government, specifically the preservation of the concept of the Crown.

The challenge to legitimacy

The extent to which contemporary democratic political systems are legitimate depends in large measure upon the ways in which the key issues which have historically divided the society have been resolved. Not only can regimes gain legitimacy, but they can lose it also.\(^\text{71}\)

As symbolic of the permanent apparatus of government, the Crown represents constitutional continuity and legitimacy. The Crown can exercise powers not specifically conferred upon it to preserve constitutional order.\(^\text{72}\) But time, and fresh elections, can confer new legitimacy upon usurpers.\(^\text{73}\)

If a regime is both legitimate and effective (in the sense of achieving constant economic growth), it will be a stable political system. From a short-range point of view, a highly effective but illegitimate system is more unstable than regimes which are relatively low in effectiveness, and high in legitimacy.\(^\text{74}\) Prolonged effectiveness can give legitimacy.\(^\text{75}\) Yet legitimacy

\(^{74}\)The principle of popular sovereignty, hitherto vague, has acquired sufficient determinacy to serve, in a limited range of circumstances, as a basis for denial of legal recognition to putative governments; Brad Roth, *Governmental Illegitimacy in International Law* (1996).
can not be determined solely by majoritarian principles alone, though
democratic states tend to emphasise this aspect of their authority.\textsuperscript{76}

In normal times it may be hard to distinguish feelings about legitimacy from
routine acquiescence. But it has been often said that legitimate authority is
declining in the modern State, and all modern States are well advanced along
a path towards a crisis of legitimacy.\textsuperscript{77} Obedience looks more like a matter
of lingering habit, or expediency, or necessity, but no longer a matter of
reason and principle, and of deepest sentiment and conviction.\textsuperscript{78}

In the long term, if the established order does not sufficiently fulfil the
aspirations of the population, the legitimacy of that order may in turn come
into question,\textsuperscript{79} and itself be in danger of overthrow.\textsuperscript{80} But the limitations of
such legitimacy was shown by the fact that the neutrality and detached
nature of the office of Governor-General of Tuvalu was questioned in light
of events of 1993-94.\textsuperscript{81} The present government of Tuvalu is now committed
to a republic,\textsuperscript{82} though this has yet to eventuate and is not regarded as a
priority.

One main source of legitimacy lies in the continuity of important traditional
integrative institutions during a transitional period in which new institutions
are emerging.\textsuperscript{83} This applies equally where there is a re-alignment of power,
as in the development of responsible government, or the granting of

\textsuperscript{76}A PASSERIN D’ENTRÊVES, THE NOTION OF THE STATE: AN INTRODUCTION
TO POLITICAL THEORY 141 et seq. (1967).
\textsuperscript{77}See, for example, TARIFA, supra note 7.
\textsuperscript{78}SCHAAR, supra note 4, 104-106.
\textsuperscript{79}Or indeed may never have been accorded. See, for example, JACKSON,
supra note 54, at 19; Margaret Wilson, The Reconfiguration of New
Zealand’s Constitutional Institutions: The Transformation of Tino
Rangatiratanga into Political Reality” 5 WAIKATO LAW REVIEW 17, 17
(1997); Ken Booth, A Pakeha Perspective on Te Tino Rangatiratanga, in
\textsuperscript{80}BROOKFIELD, supra note 71, at 5.
\textsuperscript{81}TAUAASA TAAFAHI, GOVERNANCE IN THE PACIFIC: THE DISMISSAL OF
\textsuperscript{82}Statement of Government Policy, SPEECH FROM THE GOVERNOR-GENERAL
para. 11 (Government of Tuvalu 1996).
\textsuperscript{83}LIPSET, supra note 75, at 89-90.
economic or political benefits to certain sectors of society, in the New Zealand context, Maori.

Crises of legitimacy occur during a transition to a new social structure, if the status of major established institutions is threatened during the period of structural change, and all the major groups in the society do not have access to the political system in the transitional period, or at least as soon as they develop political demands.\textsuperscript{84} These transitional periods occur when for example decolonisation takes place without a nationalist struggle, and where interstate conflict is absent – in other words, when a colonial power freely confers independence upon a colony.\textsuperscript{85}

A crisis of legitimacy is afflicting all countries whose origins lie in colonial conquest and settlement. This is due in part to the justification for colonisation being largely discredited. As Mulgan has observed, the critical issue posed by the anti-colonial critique and revisionist history is whether a society and government founded in illegitimate conquest can ever hope to acquire legitimacy.\textsuperscript{86}

Challenges to legitimacy from claims for Maori sovereignty are a more serious question than any dangers of authoritarian rule. Ironically, the former may serve to strengthen the case for royal legitimacy, because of the link between Crown and Maori in the Treaty of Waitangi.\textsuperscript{87} Brookfield has considered this relationship, and concluded that one and a half centuries of government may have been at least partly legitimated through this relationship.\textsuperscript{88}

A more serious challenge to continued legitimacy comes from the changing popular perceptions of government. A regime which was once legitimate, in that the popular perception was that it was the proper government for that country, can potentially become illegitimate. This might be because it ceases to follow the principles of the rule of law, or otherwise departs from

\textsuperscript{84}Id., at 88-90.  
\textsuperscript{85}COLLINS, supra note 12.  
\textsuperscript{86}MULGAN, supra note 33, at 53, 53-54.  
\textsuperscript{87}Claims to Maori sovereignty involve the dispute over precisely what the Maori relinquished in the Treaty of Waitangi with the Crown in 1840.  
\textsuperscript{88}BROOKFIELD, supra note 11.
the accepted conduct.\textsuperscript{89} Or, it might be because doubts arise over the suitability or appropriateness of the particular form of government.\textsuperscript{90} In this later case however, dissatisfaction should lead to legal change, not violent change. Only if justifiable attempts at change are unjustly blocked would more extreme measures be justified.\textsuperscript{91}

Such a situation would be unlikely, as a lack of popular (or political) support would result in positive steps being taken to adopt a republican form of government, as in Tuvalu. However, those Maori who reject the authority of the Crown might well argue that already the Crown lacks legitimacy, because it lacks legal title, since (in this argument) the Treaty of Waitangi did not confer sovereignty, only an uncertain form of oversight.\textsuperscript{92}

The authority of the regime in New Zealand is based, at least in part, upon the assumption of legal sovereignty by the British Crown and Parliament in the middle of the nineteenth century. But clearly legitimacy based upon an act of State by the United Kingdom in 1840 is insufficient of itself to be a basis for modern governmental legitimacy. This authority has been called into question, in particular by those who claim Maori sovereignty.\textsuperscript{93}

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

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

\textsuperscript{89}Thus the German government after 1933, while still adhering to legal form, departed from accepted standards of behaviour and so lost its legitimacy.

\textsuperscript{90}This could perhaps occur in Australia, were a second republican referendum to fail to achieve the necessary overall majority, but enjoy a popular majority nonetheless.

\textsuperscript{91}See, for examples, Matthew Strickland, \textit{Against the Lord’s anointed, in Law and Government in Medieval England and Normandy} 56 (G Garnett & J Hudson 1994).

\textsuperscript{92}Or even less authority. See, for example, J\textsc{ackson}, \textit{supra} note 54, at 19.

Pakeha and the establishment of legitimate government by cession (as opposed to by military conquest).\textsuperscript{94}

Yet this is only partly true, for legally, the acquisition of sovereignty, and the settlement of this country by Europeans, can be ascribed (in traditional European terms) to an act of State,\textsuperscript{95} though one which was made conditional upon the agreement of the indigenous inhabitants of the islands.

The authority of the Crown was legally imposed by Governor Hobson by proclamation of 21 May 1840.\textsuperscript{96} But this was based to some degree, morally at least, on the Treaty of Waitangi. However, the Maori version of the Treaty gave rather less authority to the Crown than did the English-language version, and retained rather more for the Maori chiefs. Nor did all the chiefs sign the Treaty.

The post-1840 evolution of Maori-Pakeha relations has been at times difficult. But, even in terms of European legalism, the evolution of the constitution since 1840 has presented problems for its legitimacy. The Crown of the United Kingdom having assumed sovereignty over New Zealand by an act of State or cession, the United Kingdom Parliament never formally renounced power to legislate for New Zealand,\textsuperscript{97} nor did New Zealand legislate to end this power until 1986. This was due rather to inertia than to any lingering sentiment of imperial unity.\textsuperscript{98}

\textsuperscript{94}Janine Hayward, \textit{In search of a Treaty Partner: who, or what, is the Crown?} 2 (1995).

\textsuperscript{95}An act committed by the sovereign power of a country which cannot be challenged in the courts. At least, this had been the attitude of the courts from 1877; Wayne Attrill, \textit{Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand} 39-54 (1989).

\textsuperscript{96}For the text, see the despatch of Hobson to the Secretary of State for the Colonies, 25 May 1840, in \textit{Parliamentary Papers 1841} Vol. 311, 15, at 18-19.


\textsuperscript{98}Brookfield, \textit{supra} note 71, at 9.
Where a constitution is established by a revolutionary break in the line of authority, it may be easier to see the new regime as autochthonous and its legitimacy based upon an expression of popular will. This is less easy to see in cases where there has been no legal break, though Wade believed that this continuity was merely “window-dressing for a revolutionary shift in power” – the acquisition of independence. If New Zealand has a legal legitimacy separate from that of the United Kingdom, it is not clear when this occurred. This is particularly so in respect of the Crown, which is less readily distinguishable than the respective Parliaments of the United Kingdom and of New Zealand. Yet it would appear that such concerns have not proven to be especially significant, as the Crown developed distinct identities in the course of the twentieth century.

It would appear that the concept of the Crown is important simply, at a practical level, because of its all-pervasive legal nature. The Crown confers a consistency of identity upon the various bodies described as comprising “the Crown”. It gives legitimacy and authority to the actions and policies of these bodies, though the extent of that legitimacy, and even the identity of the Crown may be disputed. In the absence of a concept of the State, the Crown personifies the permanent apparatus of government. But the functions and powers of this apparatus must be conducted in accordance with certain norms in order to retain legitimacy, and this includes the concept of the rule of law. At a practical level this relies on the Treaty of Waitangi, both to legitimate government action vis-à-vis Maori, and – almost by default – with the general population.

The rule of Law

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-

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99 This is illustrated by Canada’s continued difficulties in identifying its own constitutional grundnorms; Imperialism and Nationalism, 1884-1914: A Conflict in Canadian Thought (Carl Berger ed., 1969).
100 H.W.R. Wade, The Basis of Legal Sovereignty, 172 Cambridge LJ, 190 et seq. (1955)
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”.\textsuperscript{102} 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.\textsuperscript{103} This continuity is an important aspect to the legitimacy of the Crown, not simply in New Zealand.

There is a tendency to undervalue the Crown, because its legitimacy is regarded as of minimal significance compared with that derived from the ballot box. But, in the view of observers such as Smith and Birch, the most important of the defects of the liberal political model of the Westminster-type constitution – the view of the political theorist rather than the lawyer or politician, is its failure to depict the role of the Crown in the system of government, and the implications of the interrelated independence of the executive.\textsuperscript{104}

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.\textsuperscript{105}

The Crown itself provides some governmental legitimacy, simply because it is a permanent manifestation of authority, a proto-State as some would argue.\textsuperscript{106} 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

\textsuperscript{102}CATHERINE TIZARD, CROWN AND ANCHOR; THE PRESENT ROLE OF THE GOVERNOR-GENERAL IN NEW ZEALAND 7-8 (1993).
\textsuperscript{103}There was a strong feeling in Tuvalu that a system which had stood the test of time must have something good about it; TAUASA TAFAHI, GOVERNANCE IN THE PACIFIC: THE DISMISSAL OF TUVALU’S GOVERNOR-GENERAL 1 (1996).
\textsuperscript{105}TAFAHI, supra note 81, at 1.
Constitution upon which constitutional or political thought may focus.\textsuperscript{107} 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.\textsuperscript{108} This is also evident in Australia, where works on constitutional law or politics almost invariably concentrate on an analysis of the document known as the Constitution.\textsuperscript{109} This temptation is absent in New Zealand.\textsuperscript{110}

In contrast to a common political theorists’ view – which concentrates upon the political actors,\textsuperscript{111} 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

\textsuperscript{107}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 New Zealand Politics at the Turn of the Millennium: Attitudes and Values about Politics and Government 74-75 (Paul Perry & Alan Webster eds., 1999).

\textsuperscript{108}As Smith would describe it; Smith, supra note 104.


\textsuperscript{110}Where, indeed, it is often said, erroneously, that there is no constitution.

\textsuperscript{111}Note the emphasis in such works as J Boston, S Levine, E McLeay, N Roberts & H Schmidt, Caretaker governments and the evolution of caretaker conventions in New Zealand, 28(4) Victoria University of Wellington Law Review 629, 629 (1998), where the institutional role of the Crown is given relatively little coverage.
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.¹¹²

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.¹¹³ Yet even these powers are now limited by the legal concept of conventions,¹¹⁴ and by the rules of administrative law.¹¹⁵ Thus, the Sovereign enjoyed certain powers, but these were to be exercised by Ministers responsible to Parliament.

¹¹²Rodney S. Barker, Political Legitimacy and the State 143-144 (1990).
¹¹³The 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.
¹¹⁴Conventions are similar to legal rules, but they cannot be enforced by the courts; Madzimbamuto v Lardner-Burke [1969] 1 App. Cas. 645 (PC); Adegbenro v Akintola [1963] App. Cas. 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; Colin Munro, Laws and conventions distinguished, 91 Law Quarterly Review 218, 218. (1975)
Much of the legal basis of executive power derives from the Crown, 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. 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), as a source of legitimacy, and as a symbol.

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

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, 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.

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

118Recent examples include Crown Health Enterprises, since renamed District Health Boards.
120HAYWARD, supra note 94.
121A 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 D. CLARKE, CITIZENS AND COMMUNITY — POLITICAL SUPPORT IN A REPRESENTATIVE DEMOCRACY 9 (1992).
the 1980s.\textsuperscript{122} The latter trend did not indicate an increase in the powers of the Crown, but rather a greater use of the legal concept of the Crown by government, for reasons largely of administrative efficiency,\textsuperscript{123} but also for symbolic reasons.\textsuperscript{124}

Not only is the Crown above party politics, it is, to some degree, an independent source of legitimacy in a country, and control of the Crown thereby acts to confer some degree of legitimacy upon the political leadership. This does not mean that a republican regime must always lack legitimacy, but that it would lack the symbolic legitimacy of continuity that the Crown enjoys.\textsuperscript{125}

While the acquisition of power may be legitimated by treaty or similar action, its subsequent conduct must also conform to appropriate standards to maintain that legitimacy. This constitutional principle, that of the rule of law, is based upon the practice of liberal democracies of the Western world.\textsuperscript{126} It means that what is done officially must be done in accordance with law.\textsuperscript{127} In Europe, where an entrenched Constitution is the touchstone for legitimacy of government,\textsuperscript{128} there might be a general grant of power to the executive, and a bill of rights to protect the individual. In the British tradition public authorities must point to a specific authority to act as they

\textsuperscript{122}Hayward, supra note 94. Whilst there has been a prolific use of the term Crown in New Zealand in recent decades, the term has been used much less frequently in political debate in Canada. Nor has it been used to identify central government, largely because of the federal/provincial divide; Smith, supra note 104.

\textsuperscript{123}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.

\textsuperscript{124}See Hayward, supra note 94 (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, The New Zealand Herald, Feb. 17, 1995 at 12.

\textsuperscript{125}Something of which the Australian Labour Party was acutely aware; Lucy, supra note 31, at 17.


\textsuperscript{127}Arthur Yates and Co Pty Ltd v Vegetable Seeds Committee (1945) 72 CLR 37 at 66 per Latham CJ.

and in some respects the government in such a system has little more inherent formal authority than do individuals. The State sees itself as the source of both law and power. Instead of law, legality prevails. Thus the emphasis lay on formal, objective, laws rather than subjective justice. Procedure rather than substance dominates.

The notion of the rule of law is important in the concept of the Crown because the Crown, as a concept, forms a constitutional model, a proto-State. This “Crown in Treaty” derives at once political legitimacy in a post-colonial environment, as well as technical authority, both prerogative and otherwise. The executive government cannot act except with some identifiable authority, which is derived, in this model, at least in part from the Treaty of Waitangi.

Much of the legitimacy of a political system derives from the impartiality and objectivity with which it is administered. Thus the very exercise of authority legitimates that authority.

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

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129 *Entick v Carrington* (1765) 19 State Tr 1030 per Lord Camden.
130 HARRIS, *supra* note 37.
131 RUSHDOONY, *supra* note 6, at 61.
132 HARRIS, *supra* note 37.
democracy. Most writers now distance themselves from Dicey, and believe that his ideas of the rule of law should be subject to reappraisal.

The rule of law is symbolic. It is a transcendent phenomenon in that it is almost always shorthand for some interpretation of the inner meaning of a polity. It is highly connotative. In the fifteenth century it meant that the king was always subordinate to a higher law of somewhat uncertain provenance. After the 1688 Revolution, it became clearly associated with the idea of a Lockean ideal State. The old idea of the unity of the State dominated till the classical liberal tradition overtook the older habit of mind in the eighteenth and nineteenth centuries.

If the rule of law means an absence of arbitrary power, then, as was inherent in the mediæval concept of government, the law, whether human or divine, was pre-eminent. King James I, in The Trew Law of Free Monarchies (1598)\(^\text{137}\) and the Basilikon Doron (1599)\(^\text{138}\) outlined a fairly simple assertion of divine right kingship. Legal authority, though vested in the king as it always had been, was founded on long-established religious principles.

Theories of divine right were outlined by writers such as Sir Robert Filmer in Patriarcha (1680).\(^\text{139}\) Hobbes and Filmer argued that the will is the source of all law and the form of all authority. They believed in the necessity of a perpetual and absolute submission to the arbitrary dictates of a indivisible sovereign, and in the impossibility of mixed government. They were criticised by Whig theorists of contract such as Sidney and Locke. It would seem that Locke wrote his Two Treatises of Government to refute Filmer rather than Hobbes. Hobbes was politically the least important of the absolutist writers, although his impact as an analytical thinker was profound. Locke, however, succeeded in seriously undermining Filmer’s arguments.\(^\text{140}\)

\(^\text{135}\)Philip A. Joseph, Constitutional and Administrative Law in New Zealand (1993).
\(^\text{136}\)Hardin, supra note 128, at 3.
\(^\text{137}\)Written 1598, collection published 1616.
\(^\text{138}\)HM King James I, Basilikon Doron (Scolar Press, 1969).
\(^\text{139}\)Robert Filmer, Patriarcha and Other Writings (Johann P. Sommerville ed., 1991).
\(^\text{140}\)See, for example, John Dunn, The Political Thought of John Locke: An Historical Account of the Two Treatises of Government ch VII. (1969).
The post-Lockean version of the rule of law was associated with the views of the classical liberal theorists, who combined the concepts of legitimacy, legality and legal autonomy. The rule of law was used by the Whigs to confer legitimacy upon their dominance of politics during the eighteenth and nineteenth centuries.

A doctrine which relied heavily upon biblical authority was bound to suffer damage in the Age of Reason. Rarely was theory and practice so far apart as in the Stuart monarchy, yet it was the practice which had changed, not the theory, which was neglected.

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

That such a recognition has not yet been fully made is indicative of what Kelsey calls the integration ethic and the self-determination ethic, a desire

141 Hardin, supra note 128, at 30-32.
142 Filmer, following Grotius, had interpreted the evidence to show that procreation gave a right of superiority. This was not only bad observation, but contrary to his own first premise, that man is God’s workmanship. Locke, the first systematic ethnologist, made short work of such reasoning; John Locke, Two Treatises of Government (P Laslett ed., 1988).
144 Tizard, supra note 102, at 7-8.
145 The original compact – the “law of the Kingdom” of Samuel. All political theory in the twentieth century was arguably utilitarian. We must not judge the seventeenth century by our values and standards, any more that we should that of the nineteenth century. See Locke, supra note 142; Jonathan Scott, Algernon Sidney and the Restoration Crisis, 1677-1683 (1991).
146 Jane Kelsey, Restructuring the Nation, in Nationalism, Racism and the Rule of Law 185, 185 (Peter Fitzpatrick ed., 1995); See also Bruce Clark, Native Liberty, Crown Supremacy – the Existing Aboriginal Right of Self-Government in Canada 191-219 (1990). That traditional structures and modern institutions each owe their validity and authority to
to accommodate the separateness of Maori culture but also a desire integrate that culture into mainstream Pakeha society. The future direction of the constitution is not clear, but concepts of Western liberalism require at least the resolution of grievances resulting from breaches of the Treaty of Waitangi.\textsuperscript{147}

Brookfield has looked at what he calls the Crown’s seizure of power over New Zealand from 1840, the challenges of Maori, and the establishment of the separate New Zealand Crown. Developing from his earlier writings on law and revolution and on Waitangi matters and indigenous rights, he has examined how a revolutionary taking of power by one people over another may be at least partly legitimated.\textsuperscript{148} This process relies heavily upon redressing grievances and upon the development of new concepts of authority. There is no doubt that, as part of this process, during the 1980s in particular the Treaty of Waitangi was constitutionalised, and, in some views at least, the basis of government is founded upon it.\textsuperscript{149}

**Conclusion**

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

One possible source of legitimacy is legal continuity, and this may be dated from the signing of the Treaty of Waitangi, if not before. Indeed, the Crown

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\textsuperscript{147} Interview with Sir Douglas Graham, in Auckland, New Zealand (Nov. 24, 1999).

\textsuperscript{148} BROOKFIELD, *supra* note 11.

has been profoundly affected by the impact of the Treaty of Waitangi, though being continually “reinvented” in the course of Treaty discourse.\textsuperscript{150}

The Crown is important symbolically because it holds the place held by the State in those legal systems derived from or influenced by the Roman civil law. Models of government moved from Germanic kings as tribal leaders, through English corporation sole and corporation aggregate.\textsuperscript{151} The model of the Crown-in-Treaty, as distinct to the earlier concept – still valid – of the Crown-in-Parliament, is compelling.

Not only does the Crown provide a legal basis for governmental action, but it provides the legitimacy for such action. In the Australian context, Atkinson has observed that abolition of the monarchy would drive home a fundamental shift of legitimacy which is already underway.\textsuperscript{152} The wider constitutional issue of legitimacy cannot be ignored.\textsuperscript{153} The Australian Labour Party wanted a republic partly for symbolic nationalist reasons, but partly also to deprive the Governors-General of their association with royal legitimacy.\textsuperscript{154}

The legitimacy of the Crown is the legitimacy of inherited legal form. This has now become a New Zealand-based legal form, with the Crown rather than the Sovereign per se the focus of the government. This does not, of itself, imply that the Crown cannot be replaced by a republican form of government. But, both in its own right, and in conjunction with the particular relationship with the Maori population stemming from the Treaty of Waitangi, the legitimacy of the Crown remains important, though perhaps inherently incapable of precise measurement.\textsuperscript{155} It has, however, acted as at

\textsuperscript{150}HAYWARD, supra note 94.
\textsuperscript{151} See Town Investments Ltd v Department of the Environment [1978] AC 359; M v Home Office [1992] 1 QB 270 (CA); [1993] 3 All ER 537 (HL).
\textsuperscript{152} ALAN ATKINSON, THE MUDDLE-HEADED REPUBLIC 64 (1993).
\textsuperscript{154} LUCY, supra note 31, at 17. Interestingly, were Australia to become a republic, it would be the first of the British colonies by settlement to become a republic since the loss of thirteen of the American colonies in 1776-1782.
\textsuperscript{155} Though newer generations of Maori may be less concerned with retaining the monarchy per se, and more concerned with finding an effective mechanism for the expression of the Queen’s original function under the
least a partial deterrent to suggestions of the adoption of a republic of New Zealand.\textsuperscript{156}

\textsuperscript{156}The Rt. Hon. Jenny Shipley (then Prime Minister) noted that “New Zealand was still decades away from even debating [a republic]” ... and the Rt. Hon. Helen Clark (then Leader of the Opposition) and Hon. Jim Anderton (then Leader of the Alliance) agreed that turning New Zealand into a republic would be difficult because of the Treaty of Waitangi, representing as it did a partnership between Maoridom and the Queen; Leaders shrug off republican ra-ra, \textit{The New Zealand Herald}, 8 November 1999, at 1.