

Republican Sentiment In the Realms of the Queen: The New Zealand Perspective

NOEL COX*

I. INTRODUCTION

IN COMMON WITH OTHER COUNTRIES WHICH CONTINUE to recognise Elizabeth II as their Queen, in New Zealand the Crown symbolises the authority of government.¹ But the continuation of this symbolism has been questioned by various groups and individuals, who propose that New Zealand become a republic.² One reason is the quest for sovereignty by some Maori—the indigenous inhabitants of the country, another, the rejection of the relevance of the symbolism and substance of an inherited form of government.³

These arguments for a New Zealand republic, although with their own unique elements, stem from a long tradition of political thought, though not one which was markedly strong in New Zealand. It has also been argued that

* 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. This paper is the latest in a series which have explored the structure and role of the Crown, most recently: "The Control of Advice to the Crown and the Development of Executive Independence in New Zealand" (2001) 13:2 *Bond L. Rev.* 1–26.

¹ This may be said to be so whether founded in legal or political authority; Interview with Sir D. Graham (24 November 1999) [hereinafter Graham].

² For example, the call by D. Guerin of the Republican Movement of Aotearoa/New Zealand for New Zealand to become a republic within five years; "Leaders Shrug off Republican Ra-Ra" *New Zealand Herald* (8 November 1999) quoting D. Guerin.

³ A. Stockley, "Becoming a Republic?—Matters of Symbolism" in L. Trainor, ed., *Republicanism in New Zealand* (Palmerston North: Dunmore Press, 1996). For the Australian perspective, see J. Warhurst, "Nationalism and Republicanism in Australia" (1993) 28 *A.J. Pol. Sci.* 100.

the gradual departure from the original Westminster model means that the abolition of the monarchy will mark the culmination of our political development.⁴

The last century has been particularly marked internationally by a process of modernisation, of abandoning post-medieval political traditions.⁵ Though criticism of monarchy as a generic form of government is by no means absent in republican literature in New Zealand, the emphasis (and much of the underlying beliefs) is on national identity. Ironically, this means modern Commonwealth republicanism has relatively little in common with traditional republicanism of the eighteenth and nineteenth centuries.

The first section of this paper looks at the older, particularly nineteenth century British, republican tradition. This was based variously upon democracy, utilitarianism, and expense, depending upon the circumstances of the time. The second section assesses the republican movement in Australia, and compares and contrasts it with that in New Zealand. In particular, although like classical republicanism the Australian variety depended for its intellectual base on sometimes conflicting ideologies, it has come to have nationalism as its principal motivation. The third section looks at an argument that it would be illegal to abolish the monarchy. Although in the end the continuance of a regime depends upon popular support, if it is legally entrenched this will have an effect upon its stability. In the New Zealand context it would seem to indicate that the adoption of a republic would be more conceptually problematic than it would be in Australia.

II. REPUBLICAN TRADITION IN BRITAIN

IT MAY BE THOUGHT THAT A MONARCHY HAS NO PLACE in a modern, egalitarian society, such as New Zealand's. Such arguments were echoed, with stronger force, in early Victorian Britain. At that time the Sovereign played a greater personal role than he or she—or the Governor-General—does in New Zealand today. What did Victorians, advocates of “progress, political reform, middle-class energy and self-made success.”⁶ make of the hereditary monarchy?

⁴ See for example, J. Bolger, “The American Constitutional Experience and Issues of Sovereignty: Lessons for New Zealand” in C. James, ed., *Building the Constitution* (Wellington: Victoria University Press, 2000) at 48–57.

⁵ See, for example, A. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press, 1990); J. Jacobs, *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain* (Aldershot: Dartmouth, 1996); A. Boyd, “Catholicism and Republicanism in Ireland” (1995) 266 *Contemporary Rev.* 57; T. Doyle, “The Conservative Mythology of Monarchy” (1993) 28 *A.J. Pol. Sci.* 121.

⁶ R. Williams, *The Contentious Crown: Public Discussion of the British Monarchy in the Reign of Queen Victoria* (Aldershot: Ashgate Publishing, 1997) at 1.

There is much empirical evidence, and it highlights the growing tendency towards the symbolic (rather than political) importance of the Crown. Colley shows how George III, during the war with Napoleonic France, became the first King since 1688 to be exalted as the patriotic figurehead of the nation.⁷ Between 1837 and 1887 opinions moved gradually towards the picture of the Crown as politically neutral and virtually insignificant.⁸ Arguments for the abolition of the monarchy were generally not advanced by the promoters of “progress, political reform, middle-class energy and self-made success,” but by the more extreme fringes of advanced political thought.⁹

One argument used in the late 1840s and 1850s for the abolition of the monarchy was that political reforms, made in increasing acknowledgement of the *de facto* sovereignty of the people, had rendered it politically negligible,¹⁰ and that Britain already effectively had a republican form of government: “Our monarchy is only a pretence, ... the Sovereign ... only a supernumerary in the pageant.”¹¹

The most outspoken, fundamental criticism of the monarchy between 1837 and 1861 was on the grounds of its alleged irrationality, costliness, and luxury. These were largely intellectual criticisms based on utilitarian principles that government should be rational and economical, though not necessarily republican in nature.¹²

In the 1860s Gladstone became increasingly concerned at what he called the “royalty question”—“the Queen is invisible and the Prince of Wales is not respected.”¹³ Organised republicanism was inspired by the French revolution of 1870, and working-class resentment of annuities paid to members of the royal family, particularly that to Princess Louise in 1871.¹⁴ But, unlike those of the 1840s, these latter republicans were inspired less by principle than by emotion.¹⁵

⁷ L. Colley, “The Apotheosis of George III” (1984) 102 *Past and Present* 94.

⁸ Williams, *supra* note 6 at 6.

⁹ The Chartist movement was not republican, although some of its leaders were.

¹⁰ *Red Republican* (22 June 1850) 4.

¹¹ *English Republic* (1851) vol. 1 at 355–358. Parallels to this may be seen in Australia. See B. Galligan, “Regularising the Australian Republic” (1993) 28 *A.J. Pol. Sci.* 56. Even Bagehot emphasised the republican nature of the constitution, but he laid greater weight on the symbolic role of the Crown.

¹² Williams, *supra* note 6 at 10. Indeed, T. Wright believed that utilitarianism rather than republicanism was the proper term for the movement; *Fraser’s Magazine* 83 (June 1871) at 752 [hereinafter *Fraser’s Magazine*].

¹³ Sir P. Magnus, *Gladstone: A Biography* (London, J. Murray, 1954) at 207.

¹⁴ *Fraser’s Magazine*, *supra* note 12 at 753; Sir C. Dilke, *On the Cost of the Crown* (London: G Shield, 1871) at 21–22.

¹⁵ *Republican*, No. 11 (15 May 1871) at 7.

It was therefore no surprise that, as Bradlaugh's official biography records, the brevity of the movement's life could be attributed to the "want of unity of motive and purpose" among republicans, the rise in the Prince of Wales' popularity and the weakening of the economic case against the Crown as the cost and corruption of republican government in America and elsewhere became better known.¹⁶

It was above all the celebration of royal events which disillusioned republicans, particularly the recovery of the Prince of Wales from serious illness.¹⁷ The masses actually wanted the monarchy, because it gave them something to enjoy and participate in. Abstract concepts of government were not enough.¹⁸

While both principled and emotional republicanism faded, there was no slackening in the economic criticisms of royalty by radical MPs and newspapers.¹⁹ But "radicals have something better to do than to break butterflies on wheels."²⁰ Emphasis shifted to the more immediate social issues of the time. The popular belief that the political power of the Crown had declined to nothing was identified by George Standring in 1884 as the main reason for the failure of British republicanism.²¹

The Times, in regretting Queen Victoria's apparent withdrawal from government, warned "No reigning House can afford to confirm in its views those who suggest that the Throne is only an antiquarian relic and Royalty itself a ceremony."²² But by the end of the 1860s it too was acknowledging that the future of the monarchy lay in its ceremonial and not in its political functions.²³

¹⁶ J. Robertson, in H.B. Bonner, ed., *Charles Bradlaugh: A Record of His Life and Work by his Daughter Hypatia Bradlaugh Bonner, With an Account of his Parliamentary Struggles, Politics and Teachings by John M Robertson* (London: T. Fisher Unwin, 1895) vol. 2 at 166–167.

¹⁷ F. Harcourt, "Gladstone, Monarchism and the 'New Imperialism'" (1985) 14:1 J. of Imp. and Commonwealth Hist. 28.

¹⁸ This of course is Bagehot's argument; W. Bagehot, "The English Constitution" in N. St. John-Stevan, ed., *The Collected Works of Walter Bagehot* (London, *The Economist*, 1974) vol. 5.

¹⁹ Such criticism continues, and is indeed rather more restrained than much of the nineteenth century criticism.

²⁰ J. Chamberlain, *The Radical Programme* (London: Harvester Press, 1885) at 38–40.

²¹ *Republican* (10 April 1884) at 4.

²² *The [London] Times* (15 December 1864) 8.

²³ *The [London] Times* (21 October 1869) 6. See also D. Shearman, *Image of Victoria* (PhD. Thesis, Brandeis University 1996). The conscious development of ceremony from late Victorian times has often been remarked; W. Kuhn, *Ceremony and Politics* (PhD. Thesis, Johns Hopkins University 1991), E. Hobsbawn & T. Ranger, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

Official efforts were made to capture and enhance this perception, as the monarchy was consciously promoted by Disraeli as a symbol of imperial unity.

This perception was crystallized by Bagehot.²⁴ Yet the authority of the Crown overseas was in the hands of Governors-General and Ministers responsible to representative legislatures. The Sovereign was physically absent, so arguments based upon cost or even egalitarianism were largely inapplicable. There, republicans sought inspiration from other, often nationalist, beliefs. How these arguments relate to the concept of a national Crown is the substance of this paper.

III. REPUBLICAN MOVEMENTS IN THE COMMONWEALTH

A. Australia

Republicanism in Australia, one of the three "old dominions"²⁵ has owed more to changing perceptions of national identity (and Irish nationalism), than did the movement in Great Britain,²⁶ where indeed the Crown was often regarded (particularly when threatened by external aggressors) as symbolic of an historic national identity.²⁷

The long history of republicanism in Australia is well documented.²⁸ Always a substantial but often unrecognised part of Australian political tradition,²⁹ in decline after 1901,³⁰ it was revived in the mid-1960s.³¹ Republicanism has meant various things and different times, and has waxed and waned mostly in

²⁴ Bagehot, *supra* note 18

²⁵ The others being Canada and New Zealand.

²⁶ M. McKenna, *Republicanism in Australia* (PhD. Thesis, University of New South Wales 1996). The movement in Ireland is of course a special case, because of its relative antiquity, and its association with an independence movement.

²⁷ Colley, *supra* note 7.

²⁸ See for example, J. Arnold *et al.*, eds., *Out of Empire: The British Dominion of Australia* (Victoria: Mandarin Australia, 1993); T. Keneally, *Our Republic* (Victoria: William Heinemann Australia, 1993) at 155–182; A. Taylor, "Republican Ruminations from Down Under" (1995) 45:11 *Hist. Today* 6.

²⁹ J. Warden, "Fettered Republic" (1993) 28 *A.J. Pol. Sci.* 83; McKenna, *supra* note 26. This nascent nationalism was due perhaps to traditions of centralised paternalism, collectivism, the predominance of a "mother community" (New South Wales), and a sense of geographic unity and uniqueness; A. Brady, *Democracy in the Dominions: A Comparative Study of Institutions*, 3rd ed. (Toronto, University of Toronto Press: 1958) at 133 and 150.

³⁰ J. Hirst, "The Conservative Case for an Australian Republic" (1991) 35:280 *Quad.* 13.

³¹ J. Hayward, *In Search of a Treaty Partner* (PhD. Thesis, Victoria University of Wellington 1995) at 273.

response to the changes in Australia's relationship with the United Kingdom, but partly in time with Australian national self-identity.

A significant proportion of the early population of Australia were Irish men and women who were driven, or chose to emigrate to Australia—in many instances to escape the religious, social, political, and economic conditions of their homeland.³² The anti-establishment, anti-British sentiments felt by many of these people—and their descendants—gave rise to the fenianism manifested in Australia (and elsewhere such as the United States of America and Canada).³³ But this was never a clear-cut anti-British or anti-Protestant emotion, for these influences were also widely seen as the main sources of arguments for equity and constitutional rights.³⁴

In the nineteenth century developing nationalism led to “gold rush” republicanism (such as the Eureka Stockade uprising in 1854³⁵), and federation republicanism (a more principled advocacy of republicanism as a form of government in the years preceding the federation of the Australian colonies in 1901³⁶). Later anti-British feeling led to conscription republicanism (at the time of the First World War³⁷), and “bodyline” republicanism (inter-war sporting controversy³⁸)—both movements for greater independence, or nationalist, rather than “republican” *per se*.³⁹

Much recent republican has arguably been inspired less by true nationalism than by chauvinism.⁴⁰ Once awakened, former Australian Prime Minister Paul

³² G. Partington, *The Australian Nation—Its British and Irish Roots* (Kew: Australian Scholarly Publishing, 1994).

³³ McKenna, *supra* note 26.

³⁴ Partington, *supra* note 32 at 65.

³⁵ During which discontented miners and their supporters resisted government forces in a small-scale but politically and culturally significant incident; J. Molony, *Eureka* (Ringwood: Viking Press, 1984); R. Carboni, *The Eureka Stockade* (Melbourne: Melbourne University Press, 1963).

³⁶ For these and later manifestations see M. McKenna, *The Captive Republic: A History of Republicanism in Australia, 1788–1996* (Cambridge: Cambridge University Press, 1997). As a nationalist issue, changes to the political symbols, such as flag, honours, and national anthem were important; Warhurst, *supra* note 3.

³⁷ When latent insularity saw a resistance on the part of some to involvement in a “European” conflict.

³⁸ T. Abbott, *How to Win the Constitutional War and Give Both Sides What They Want* (Adelaide: ACM/Wakefield Press, 1997) at 28–29.

³⁹ Partington, *supra* note 32 at 91. Indeed, Australian radicalism had declined after the 1850s with the advent of self-government, just as British radicalism had declined after 1850 with increased prosperity.

⁴⁰ Abbott, *supra* note 38 at 106.

Keating's republican belief expressed itself (in the words of one opponent) "in antagonism to the United Kingdom, contempt for his political opponents, and impatience with the past, rather than any great affection for the country."⁴¹

Until the early 1990s republicanism, whatever its ideological basis, remained a minority belief. The response to the Republic Advisory Committee in Australia, established by Paul Keating, surprised its Chairman, Malcolm Turnbull. Audiences across the country were "either strongly royalist or against the Keating republic."⁴² But the Australian Labour Party committed itself to the establishment of a republic in 1991⁴³ and it became the official policy of the Australian Labour Government to introduce a republican form of government.⁴⁴

The republicanism of the Labour Party leadership had many bases, including fenianism, nationalism, and more moderate motives, and almost as many models for a republic were proposed. In 1995 the Labour Government announced its support for a republican model with a President elected by two-thirds majority vote of Parliament.⁴⁵ It was felt that this would avoid the politicisation of the office.⁴⁶ The hope was to maximise the chance of successfully persuading the electorate to support a republic by minimising the extent of change.⁴⁷

In 1995 the Liberal Party dropped active support for the monarchy, though it was not supportive of a republic.⁴⁸ Historically a radical cause, republicanism had now become an establishment cause,⁴⁹ espoused by different groups for di-

⁴¹ *Ibid.* at 66. This may be seen in his speech on Britain and its defence of Singapore during World War Two; *Australian* (29 February 1992) 1.

⁴² *Sydney Morning Herald* (8 September 1993).

⁴³ Abbott, *supra* note 38 at 30.

⁴⁴ Australia, Republican Advisory Committee, *An Australian Republic: The Options* (Canberra: Australian Government Publishing Service, 1993). Until after the *Turnbull Report*, republicanism was still characterised as a media offensive by a minority of influential individuals who claimed to have the people's interest at heart; McKenna, *supra* note 26 at 249–250.

⁴⁵ Australia, Parliament, *Way Forward* (7 June 1995).

⁴⁶ Abbot, *supra* note 38 at 81. A president would, however, most likely be a political animal, chosen and promoted by a political party.

⁴⁷ *Ibid.* at 43–44. A minimalist model is where the removal of an hereditary basis for office, but little else, is advocated; See G. Winterton, "Modern Republicanism" (1992) 6:2 *Legislative Studies* 21.

⁴⁸ Abbott, *ibid.* at 47–48.

⁴⁹ See for example, R. McGarvie, *The McGarvie Model: A Republic Equivalent to Our Present System of Democracy*, online: Personal Homepage <<http://www.chilli.net.au/~mcgarvie/>> (last accessed: 2 February 2002). This page consists of various papers collected by their author R. McGarvie, a former Governor of Victoria. To some extent, the Australian Republican Movement may be characterised as constitutional monarchists. They believe in the need for a head of State, though not in the hereditary principle. They accept the need for a unifying symbol; A. Langer, "Confounding Their Politics" (1998) 42:5 *Quad*. 10.

verse reasons. A referendum on the continuation of the monarchy or establishment of a republic was held in 1999.

Unlike early nineteenth century British republicans (who were largely motivated by utilitarianism), Australian republicans in the 1990s were largely concerned with a "foreign head of State"⁵⁰ national identity.⁵¹ The details of a republic were, to many advocates hoping to unite republicans of different ideologies, of secondary importance.⁵² Although many Australian republicans were concerned with the details of a republican constitution, pragmatism led to this being relegated to second place.⁵³

While focusing on the existence of a "foreign" head of State, the republicans at once downplayed the significant constitutional implications of a republic and the emotional attachment many still felt for the monarchy.⁵⁴ As an Australian referendum campaign developed in the late 1990s, advocates of a republic took the initiative. Opponents were branded as "un-Australian."

Although the focus of much republican sentiment was symbolism, there was also an important undercurrent of republican constitutionalism.⁵⁵ The dismissal of Prime Minister Gough Whitlam's Labour government by the Governor-

⁵⁰ See G. Winterton, *Monarchy to Republic: Australian Republican Government*, 2nd ed. (Melbourne: Oxford University Press, 1994) at 1–3 and 18–22. Though such a notion has been criticised as "juvenile"; P. Downey, "Monarchy to Republic" (1988) N.Z.L.J. 10 at 11. There are striking parallels with thinking in eighteenth century America; W. Liddle, *A Patriot King, or None* (PhD. Thesis, Claremont Graduate University 1970).

⁵¹ Bogdanor distinguishes between arguments based on the anomaly of an absentee head of State and, what he regards as perhaps more important, the psychological damage to the Australian sense of nationhood through its dependence upon the symbols of another country; V. Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) at 292–295. These are better categorised simply as a rejection of a foreign head of State. But republicanism in Australia is ultimately a cultural debate.

⁵² Abbott, *supra* note 38 at 59. Indeed, the various elements of the republican movement had little in common; D. Cooke, "First Letter to the Republicans" (1999) *Arena* 15.

⁵³ C. Saunders, "The Australian Experience: Lessons, Pointers and Pitfalls" in C. James, ed., *Building the Constitution* (Wellington: Victoria University Press, 2000) at 276–286.

⁵⁴ This attitude is clear in the address by J. Bolger to the Building the Constitution Conference in 2000; "The American Constitutional Experience and Issues of Sovereignty: Lessons for New Zealand" in *supra* note 4 at 48–57, especially at 53; The emotional trauma felt by many South Africans at the loss of their monarchy in 1961 is often forgotten, but none the less real; Interview with R. Girdwood (18 September 1999) [hereinafter Girdwood].

⁵⁵ Despite parallels, some Australian analysts shared the view of many Canadian commentators that republicanism seems not to be an issue in Canada. Aside from the constitutional pre-occupation with Quebec, Canada's desire to distinguish itself from the United States makes it less likely than Australia to abandon the monarchy; T. Fennell, "Royal challenge" *Maclean's* 111:8 (1998) 27; D.E. Smith, *The Republican Option in Canada, Past and Present* (Toronto: University of Toronto Press, 1999) at 230.

General in 1975 revealed, in the view of Reynolds, that “representative government in Australia was an empty gesture when confronted with viceroy sovereignty.” Because the discretion to dismiss was both legal and operative, responsible government was an ideal rather than a reality. Only by becoming a republic, with sovereignty vested in the people, and with elected representatives given the power to govern, would independence be achieved.⁵⁶

Though seriously flawed—through a misunderstanding of the limitations imposed by convention—this type of argument has been used to justify constitutional reform which is actually largely inspired by arguments less amenable to proof, such as those of national identity,⁵⁷ just as opposition to reform was often based on emotion.

The undercurrent of debate as to the constitutional implications of the form of republic chosen became important. Galligan argued that the existing Australian Constitution was essentially republican, only barely disguised by monarchic symbols and forms.⁵⁸ He argued that current republican agitation was based on a misunderstanding of the true character of the regime or an exaggerated emphasis on its monarchic symbols and executive formulation.⁵⁹ Thus, adoption of a republic for reasons of national identity need not have a significant constitutional effect.

However, many commentators believed that introducing a republic would mean a more radical change than Galligan allowed.⁶⁰ Atkinson observed that:

[Australia] is a monarchy at a more fundamental level than most people seem to imagine. Monarchy is more than merely royalty. [It is] a living and active conscience at the centre of the State.⁶¹

Even former proponents of a republic had their doubts. Just three months from the 1999 referendum Peter Reith, a senior member of the Australian government, said he (though a republican) now believed that the republic model on offer was “seriously flawed” and “a third rate compromise” which could threaten Australia’s democracy.

⁵⁶ C. Reynolds, *Semi-Sovereign Australia* (PhD. Thesis, Claremont Graduate University 1984).

⁵⁷ Equally strained is the argument that a republic is inevitable, thereby implying a specious necessity; W. Hudson & D. Carter, “Refining the issues” in *The Republican Debate* (Sydney: New South Wales University Press, 1993) 31.

⁵⁸ B. Galligan, “Regularising the Australian Republic” (1993) 28 A.J. Pol. Sci. 56.

⁵⁹ *Ibid.* at 56–59.

⁶⁰ A. Atkinson, *The Muddle-Headed Republic* (Melbourne: Oxford University Press, 1993) [hereinafter *Muddle-Headed*]; A. Atkinson, “The Australian Monarchy” (1993) 28 A.J. Pol. Sci. 67 [hereinafter *Australian*]; G. Maddox, “Possible Impact of Republicanism on Australian Government” in G. Winterton, ed., *We, the People* (North Sydney: George Allen & Unwin Australia, 1994) 125.

⁶¹ *Australian, ibid.* at 67 and 70.

To vote Yes [for a republic] would be the same as giving away blank cheques. It would be folly to vote for change when the consequences of the change are not clear.⁶²

The authors of the Turnbull Report felt that presidential powers, if unlimited by convention, could risk giving a president "potentially autocratic powers".⁶³ Opinion polls confirmed that the population was concerned by the details of the proposed republic. If they had to have a president, most would prefer one directly elected by the people, rather than appointed by politicians.⁶⁴

In conformity with the popular interest in substance rather than merely symbolism, upholders of the monarchy were often more concerned with the Constitution than the Crown as such, and reflected a pride in Australian constitutional order.⁶⁵ In this they actually had much in common with the early nineteenth century British republicans than did the republicans themselves.⁶⁶

The pro-monarchy movement, spearheaded by the Australians for Constitutional Monarchy,⁶⁷ sought to rely on constitutional, rather than emotional arguments. They argued that the Governor-General was effectively head of State already.⁶⁸ The Queen was the Sovereign, not head of State. The Governor-General reported to Her Majesty, but did not answer to her.⁶⁹ The real choice was not therefore between the Queen and an Australian head of State,⁷⁰ but between the Governor-General and a president.⁷¹ They argued that the present constitutional system enjoyed widespread support and should not be changed.

⁶² M. Chipperfield, *Daily Telegraph* [London] (3 August 1999).

⁶³ Australia, Republican Advisory Committee, *An Australian Republic: The Options (The Turnbull Report)* (Canberra: Australian Government Publishing Service, 1993) 116.

⁶⁴ The alternatives of election by the people, or by Parliament, are discussed in J. Archer, "The Making of a President" (1998) 74:5 *Current Affairs Bulletin* 4.

⁶⁵ Abbott, *supra* note 38 at 6. A similar position has been apparent in Canada, where from the early decades of the colony prominent Upper Canadians recognised that they inherited a dual world. They were British subjects but they were also North Americans; J. Errington, *The Lion, the Eagle, and Upper Canada: A Developing Colonial Ideology* (Kingston: McGill-Queen's University Press, 1987).

⁶⁶ Hudson & Carter, *supra* note 57 at 14. Indeed, some monarchies are more republican in political theoretical terms than formal republics.

⁶⁷ Latterly operating under the name "No Republic."

⁶⁸ Indeed, the *Crimes (Internationally Protected Persons) Act 1976*, (Australia), Act No. 8 1977, s. 3A(1) defines the Governor-General as head of State.

⁶⁹ Abbott, *supra* note 38 at 64.

⁷⁰ It is clear that support for the monarchy as a form of government, rather than support for the Queen or the royal family, was an important factor. See the comments by interviewees to M. Chipperfield, [London] *Sunday Telegraph* (1 August 1999).

⁷¹ Abbott, *supra* note 38 at 68.

Opposition to a republic was largely based on those who supported the pre-existing constitutional balance of power,⁷² and advocates of constitutional monarchy as a political principle or institution.⁷³ But it also embraced those wishing to retain links with the British Crown precisely because it was British, and those who opposed the nationalist rhetoric of some republicans, whether on internationalist⁷⁴ or even feminist grounds.⁷⁵ The common refrain was that the onus of proving the necessity for change lay with its proponents.⁷⁶

Perhaps more seriously, it had been said that "abolition would drive a fundamental shift of legitimacy which is already underway."⁷⁷ Observers such as Hugh Stretton detected a paradox in the Keating Government's determination to assert Australia's sovereignty over the Constitution (which was never in doubt) at the same time as the government was relinquishing sovereignty over the economy.⁷⁸

Amongst those opposed to nationalist republicanism the feminists presented perhaps the most intriguing views. There are a number of feminist approaches to the State. Liberal feminism sees the State as potentially neutral, non-gendered. The emphasis is upon citizenship and equal rights. Marxist feminists view the State as patriarchal, serving the interests of men.⁷⁹ In both views the establishment of a republic could have been used as a means of reinforcing male political and economic dominance.⁸⁰ Republicanism, and its attachments to na-

⁷² T. Abbott, *The Minimal Monarchy* (Adelaide: ACM/Wakefield Press, 1995).

⁷³ *Muddle-Headed*, *supra* note 60.

⁷⁴ Hon. Mr. Justice M. Kirby, "The Australian Constitutional Monarchy and its Likely Survival" (1993) N.Z.L.J. at 201 and 205; P. Downey, "Monarchy to Republic" (1988) N.Z.L. Rev. at 10 and 11.

⁷⁵ J. Hoorn & D. Goodman, eds., *Vox Reeeipublicae* (1996) 47 J.A. Stud. Although others argued that feminism was hindered by the monarchy [hereinafter *Vox Reeeipublicae*]; K. Schaffer, "Women and the Republic: Dancing to a Different Tune?" (1999) 25:1 *Hecate* 94.

⁷⁶ G. Grainger & K. Jones, *The Australian Constitutional Monarchy* (Sydney: ACM Publishing, 1994).

⁷⁷ *Muddle-Headed*, *supra* note 60 at 64.

⁷⁸ Abbott, *supra* note 72 at 32.

⁷⁹ S. Goldfinch, "The State" in R. Miller, ed., *New Zealand Government and Politics* (Auckland: Oxford University Press, 2001) at 514; B. Roper, "Neo-liberalism: A radical critique" in R. Miller, ed., *New Zealand Government and Politics* (Auckland: Oxford University Press, 2001) at 550.

⁸⁰ R. Du Plessis, "Women, Feminism and the State" in B. Roper & C. Rudd, eds., *The Political Economy of New Zealand* (Auckland: Oxford University Press, 1997); R. Du Plessis & J. Higgins, "Feminism" in Raymond Miller, ed., *New Zealand Politics in Transition* (Auckland: Oxford University Press, 1997); *Vox Reeeipublicae*, *supra* note 75; Schaffer, *supra* note 75.

tionalism, or to a search for unified identity within “a fluid, complex and heterogeneous culture,” is seen as philosophically and politically retrogressive.⁸¹ In some respects at least the Crown is an inherently matriarchal institution.⁸²

In Australia, although the monarchy is part of an entrenched Constitution, it was this very position which threatened the long-term survival of the Crown. Party political controversy has brought the Constitution, and, especially the Crown, into the forefront of political debate.⁸³

Though often inspired by nationalism, the republicans shared as many varied perceptions of the Constitution as their opponents. The outcome of the referendum of November 1999, the rejection of a republic by a clear majority⁸⁴ should have come as no surprise. As Hudson and Carter have said, perhaps the debate is not between dependence and independence, but about reforming the polity as a whole.⁸⁵ The lessons for New Zealand—and for Canada—are that substance, symbolism, and emotion are all equally important elements in this debate.⁸⁶

B. New Zealand

Republican sentiment in New Zealand has never been as strong as it has been in Australia.⁸⁷ New Zealand lacks a tradition of republicanism akin to that found in Australia—much of which was founded in Irish fenianism.⁸⁸ It remains the ideal of a minority, though a growing one.⁸⁹ But in 1994 the Rt. Hon. James Bolger, the then Prime Minister, proposed that New Zealand become a republic

⁸¹ Schaffer, *ibid.* at 94.

⁸² See for example, D. Shearman, *The Image of Victoria: Patronage, Profits and Patriotism* (PhD. Thesis, Brandeis University 1996).

⁸³ Even with the failure of the 1999 referendum, it can be expected that a further debate about executive powers will occur. Indeed, given the failure of the minimalist republic proposed, this is all but inevitable; See C. Sharman, “Defining Executive Power: Constitutional Reform For Grown-Ups” (1997) 56:2 A.J. Public Admin. 1 at 1–7.

⁸⁴ Australia, Australian Electoral Commission, *Referendum 1999 Results and Statistics* (Canberra: Australian Electoral Commission, 2000).

⁸⁵ Hudson & Carter, *supra* note 57 at 21.

⁸⁶ Saunders, *supra* note 53 at 276–286.

⁸⁷ Sir G. Palmer & M. Palmer, *Bridled Power—New Zealand Government under MMP*, 3rd ed. (Auckland: Oxford University Press, 1997) at 49.

⁸⁸ McKenna, *supra* note 26

⁸⁹ A short-lived New Zealand Republican Movement was formed in the late 1960s. In 1994 a Republican Movement of Aotearoa/New Zealand was created. Its patron is the author K. Hulme. Lacking significant support, it became dormant until it was re-launched in November 1999 by its new President, D. Guerin. The Republican Party itself only existed from 1995 to 2000.

by the turn of the century.⁹⁰ This was presented as a necessary adjustment following the advent of Mixed-Member Proportional ("MMP") voting⁹¹ for the House of Representatives in 1996.⁹² The reason given was that "the tide of history is moving in one direction", towards republicanism as a fulfilment of national identity.⁹³ It was associated with the termination of imperial honours,⁹⁴ and moves to end the right of appeal to the Privy Council.⁹⁵

Although Bolger knew what he was proposing did not have popular support, he seriously underestimated the level of opposition to his proposal from within his own party.⁹⁶ His call caused considerable consternation among Ministers,⁹⁷ three of whom immediately and publicly disavowed any desire to abolish the

⁹⁰ In the view of Lange, Bolger was not personally a republican, and as Prime Minister had always sought more contact with the Queen than had Lange himself; Interview with D. Lange (20 May 1998) [hereinafter Lange].

⁹¹ For discussions of the possible effects of MMP on the Crown see B. Robertson, "Governor-General Issue Ignored in MMP Debate" *Otago Daily Times* (6 August 1993) and "MMP Threatens Governor-General's Powers" *Dominion* (3 August 1993); Palmer & Palmer, *supra* note 87; K. Jackson & A. McRobie, *New Zealand Adopts Proportional Representation: Accident? Design? Evolution?* (Brookfield: Aldershot, 1998).

⁹² Opponents argued that the introduction of MMP and subsequent calls for constitutional reform such as a "written Constitution" threaten abandoning worthwhile elements, such as conventions, for no apparent gain; J. Allan, "Constitutional Sirens Should be Ignored" *New Zealand Herald* (27 September 1999).

⁹³ Bolger reiterated his view of the inexorability of evolution in *supra* note 4 at 48–57.

⁹⁴ See Australia, Prime Minister's Honours Advisory Committee, *The New Zealand Royal Honours System: Report of the Prime Minister's Honours Advisory Committee* (Wellington: Department of the Prime Minister and Cabinet, 1995). The new honours, however, remain royal honours, thereby illustrating the continuing evolution of a distinct New Zealand Crown. The process was completed with the announcement of new bravery and gallantry awards in 1999, and (arguably) the announcement of the discontinuing of knighthoods; Prime Minister's Office (Australia), Press Release (21 September 1999); Prime Minister's Office (Australia), Press Release (10 April 2000); N. Cox, "Does Comrade Clark Want us all the Same?" *New Zealand Herald* (12 April 2000) A19.

⁹⁵ Stockley, *supra* note 3 at 61. The planned abolition of appeals failed for the time being, however, in part because of opposition by Maori, some of whom see it as a means of ensuring government compliance with the principles of the Treaty of Waitangi, signed by the Crown and the Maori chiefs in 1840. The abolition of appeals has again become an issue, with the release of a discussion paper by the Attorney-General in 2000.

⁹⁶ *Ibid.* at 22. Indeed, it may have been his persistence in advancing this proposal in the face of party opposition which was one of the principal causes of his fall from favour, and ultimately his political demise; Interview with N. Walker (11 May 1999). However, compare Graham, *supra* note 1.

⁹⁷ Stockley, *ibid.* at 62.

monarchy.⁹⁸ Nor was the response from the Opposition as favourable as he might have wished,⁹⁹ in part because those personally in favour of a republic did not wish to be associated with Bolger's initiative.¹⁰⁰ Republicanism might have seemed to many observers a distraction from more immediate concerns.¹⁰¹

The immediate origins of Bolger's call for a republic belong in the neo-liberalism adopted by successive governments in New Zealand since 1984.¹⁰² Economic, political and social life had undergone revolutionary change.¹⁰³ The foundations of national identity had been undermined from two directions. The interventionist, centralised welfare State was replaced by the globally diffused, individualised, and unregulated system of economic, social and political power, backed by a selectively coercive residual State.¹⁰⁴

Republicanism arguably involves formally cutting colonial ties and creating a post-colonial State. Republicanism is therefore, to some extent, about decolonisation.¹⁰⁵ The wish to bury the colonial inheritance, to embrace multiculturalism, and to locate New Zealand firmly in Asia was a conscious, market-related choice driven by external developments.¹⁰⁶ New Zealand is a South Pacific na-

⁹⁸ J. Banks, S. Upton, and J. Shipley. Upton in particular pointed to the Irish connections of Bolger; *Dominion* [Wellington] (4 April 1994). He has continued to publicise his support for the institution; "Monarchy Still Gives us More Than any Republic Would" *Press* (16 September 1997).

⁹⁹ H. Clark, leader of the Labour Party, and J. Anderton, leader of the Alliance, both in principle supportive of a republic, were taken by surprise. Nor is the Labour Party dedicated to republicanism; Stockley, *supra* note 3 at 65.

¹⁰⁰ Right-wing opposition to the monarchy came from such groups as the Libertarians, who stressed individual "sovereignty" above all ties of government; *Law Talk* (20 September 1999) 24.

¹⁰¹ A perception echoed several years later by the leaders of the main parties; Guerin, *supra* note 2.

¹⁰² This movement, which emerged in the late 1970s, has played a significant part in policy reforms since the mid 1980s. The emphasis is placed on individual liberty, as both morally desirable and conducive to the well-being of society; P.B. Cowen, "New Liberalism" in R. Miller, ed., *New Zealand Politics in Transition* (Auckland: Oxford University Press, 1997) 341. But B. Gustafson has suggested that Bolger simply wanted to leave his mark in history; "Republican PM Takes Troops by Surprise" *Sunday Star-Times* [Auckland] (20 March 1994).

¹⁰³ J. Kelsey, *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Wellington: Bridget Williams Books, 1993).

¹⁰⁴ *Ibid.*

¹⁰⁵ J. Kelsey, "The Agenda for Change—The Effect and Implications of MMP and Republicanism on Treaty Settlement Methods and the Effect on the Treaty With the Crown" (Paper Presented to the Institute for International Affairs, Wellington, 17–18 May 1995) at 11.

¹⁰⁶ Stockley, *supra* note 3 at 21. Jesson located the rise of republicanism in the growth of the global economy; Stockley, *supra* note 3 at 111. But radical liberalisation and globalisation

tion, with a focus on Asia.¹⁰⁷ Nationhood, what New Zealand stood for, and its feeling of self-respect were also cited as reasons why New Zealand should become a republic.¹⁰⁸

Most important among the symbolic aspects, and that upon which Bolger relied, was that it was inappropriate for “the Queen of England” “to be Head of State and to have power to appoint a Governor-General to exercise her royal powers on her behalf in New Zealand.”¹⁰⁹ National identity requires a New Zealand head of State.¹¹⁰ Attacks upon the Crown were motivated, not because of criticism of the way in which the political system operated, but because of the connection with the British monarchy.¹¹¹

Sir Geoffrey Palmer, a former Professor of Law and one-time Prime Minister, has observed that while no doubt the country’s ties with the United Kingdom are not as strong as they once were, as the Queen is Queen of New Zealand, that is not relevant.¹¹² But the New Zealand media have difficulty in portraying the Queen other than the way most of the rest of the world view her—as the British Queen.¹¹³ Nor is this surprising, since Elizabeth II’s position as Queen of New Zealand is clearly secondary to her position of Queen of the United Kingdom.¹¹⁴

Ironically this very focus on the British nature of the monarchy was actually part of its appeal to many,¹¹⁵ not least many Maori. New Zealand is part of a

are conceptually opposed to nationalism, and logically of republicanism founded in nationalism; F. von Hayek, *Law, Legislation and Liberty* (London: Routledge & Kegan Paul, 1982) at 111.

¹⁰⁷ Stockley, *ibid.* at 65.

¹⁰⁸ Palmer & Palmer, *supra* note 87 at 50. It has been suggested that Bolger was not so much an advocate of a republic as determined to promote debate on national identity; Interview with G. te Heuheu (7 December 1999).

¹⁰⁹ P. Shannon, *Becoming a Republic* (LLM. Research Paper, Victoria University of Wellington 1995).

¹¹⁰ Although the Queen can be seen as New Zealand’s head of State, and it has been observed that there is nothing wrong with a shared head of State in this age of internationalism; Kirby, *supra* note 74 at 201–205; Downey, *supra* note 50 at 10–11.

¹¹¹ These arguments can be seen in such works as Stockley, *supra* note 3. These parallel attitudes in Australia, though not generally those in Canada; Smith, *supra* note 55.

¹¹² Sir G. Palmer, *Unbridled Power: An Interpretation of New Zealand’s Constitution and Government*, 2nd ed. (Wellington: Oxford University Press, 1987) at 25–26.

¹¹³ A. Wood, “New Zealand” in D. Butler & D.A. Low, eds., *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (London: Macmillan, 1991) at 116.

¹¹⁴ Graham, *supra* note 1.

¹¹⁵ Lange, *supra* note 90.

wider heritage, one which is not yet entirely irrelevant.¹¹⁶ As a smaller, less cosmopolitan country such perceptions seem to have survived in New Zealand longer than they did in Australia.¹¹⁷ Increased globalisation may have an important, as yet undefined, influence.¹¹⁸

Bolger's own starting point was allegedly his Irish roots, though he has never publicly confirmed this.¹¹⁹ However, the perceived linkage between Catholicism and republicanism in Ireland has been criticised as "bad history and theology, and a manifestation of bigotry and ignorance."¹²⁰ Whatever the truth, to the Irish nationalist, the Crown was equated with the occupier, just as to many French-Canadians the Crown represented the victor in the Anglo-French wars of the eighteenth century.¹²¹ For similar reasons, in Canada support for the Crown is weakest in French-speaking provinces. Although support for a republic was much more pronounced amongst the French nationalists of Quebec than elsewhere in Canada,¹²² this did not equate to active steps being taken in this direction by Canada as a whole. Separation from Canada, or recognition of Quebec as a distinct society, were more important to the leaders of the Francophone community.¹²³

Such nationalism seems to be largely absent in New Zealand, and the Crown could be seen to be representative of all people. Indeed, to the Maori, it was often seen as an ally against the colonial (and later) government,¹²⁴ though

¹¹⁶ *Ibid.*

¹¹⁷ Graham, *supra* note 1.

¹¹⁸ Globalisation was strongly emphasised by the Queen (and compared with the traditional diversity of the Commonwealth); Queen Elizabeth II, speech (Opening Ceremony of the Commonwealth Heads of Government Meeting, Durban, South Africa, 12 November 1999).

¹¹⁹ On 17 March 1994, J. Banks confided to his diary that "for an Irishman to do this on St Patrick's Day is inflammatory"; Quoted in P. Goldsmith, *John Banks, A biography* (Auckland: Penguin, 1997) at 238.

¹²⁰ A. Boyd, "Catholicism and Republicanism in Ireland" (1995) 266 *Cont. Rev.* 57.

¹²¹ C.R. Pollock, *His Majesty's Subjects* (PhD. Thesis, University of Alberta 1996). The same attitude could be detected in the Afrikaner population of South Africa in their 1961 referendum on republicanism; Girdwood, *supra* note 54.

¹²² National Angus Reid/Southam News Poll released 3 February 1996; cited in "Support for Monarchy Rises in Canada" *Monarchy Canada* 21:1 (1996) 14.

¹²³ R. Conley, "Sovereignty or the *Status Quo*?" (1997) 35:1 *J. of Commonwealth and Comparative Pol.* 67.

¹²⁴ R. Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (London: Penguin, 1990) at 234.

there is some Maori republicanism founded on concepts of Maori sovereignty.¹²⁵ Radical liberalisation and globalisation are both conceptually opposed to nationalism.¹²⁶ Nationalism should, according to this theory, be in decline, but the reality of national politics prevents this.¹²⁷ Thus republicanism founded in nationalism—and even Maori nationalism, still found reasonably fertile ground.¹²⁸

More profound constitutional reasons why New Zealand might consider it appropriate to become a republic include the proposition that the constitutional system ought to rest on firmer constitutional foundations than at present. Parliamentary sovereignty has allegedly been found to be inadequate for protecting individual rights and ensuring the accountability and integrity of governmental institutions. An entrenched Constitution—which New Zealand at present lacks—could possibly ensure this, but would not necessarily be republican.¹²⁹ Concerns have also been expressed about the adequacy of the present position of the Governor-General, particularly the prerogative (and unwritten) nature of many of their powers.¹³⁰

But, unlike Australia, the arguments for a republic based on fundamental constitutional principles are seldom proposed and appear ill-supported.¹³¹ In part this could be because New Zealand may share with Canada an antipathy to abstract political theory.¹³² Australia, by contrast, was from even before federation more inclined to radical experiment in government.¹³³ Yet, the advent of

¹²⁵ For a discussion of these issues see F.M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: University of Auckland Press, 1999); C. Archie, *Maori Sovereignty: The Pakeha Perspective* (Auckland: Hodder Moa Beckett, 1995); D. Awatere, *Maori Sovereignty* (Auckland: Broadsheet, 1984); H. Melbourne, *Maori Sovereignty: The Maori Perspective* (Auckland: Hodder Moa Beckett, 1995); Sir H. Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989).

¹²⁶ Hayek, *supra* note 106 at 111.

¹²⁷ J. Kelsey, "Restructuring the Nation: The Decline of the Colonial Nation-State and Competing Nationalisms in Aotearoa/New Zealand" in P. Fitzpatrick, ed., *Nationalism, Racism and the Rule of Law* (Aldershot: Dartmouth, 1995) at 188.

¹²⁸ To place the Treaty of Waitangi and Maori nationalism in a wider context see W. Renwick, ed., *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Wellington: Victoria University Press, 1991).

¹²⁹ G. Winterton, "A New Zealand Republic" in A. Simpson, ed., *Constitutional Implications of MMP* (Wellington: Victoria University of Wellington Institute of Policy Studies, 1998).

¹³⁰ *Ibid.* at 205–207; R. Deane, "Globalisation and Constitutional Development" in C. James, ed., *Building the Constitution* (Wellington: Victoria University Press, 2000) at 112–117.

¹³¹ Graham, *supra* note 1.

¹³² A common view appears to be that it is the reserve powers that are important, not the title of the resident of Government House; Deane, *supra* note 130 at 112–117.

¹³³ Smith, *supra* note 55 at 16.

MMP has encouraged consideration of the structure of government in a way which earlier reforms did not.¹³⁴

The absence of the monarch rendered much of the basis for the traditional British republicanism irrelevant alike in Australia and New Zealand.¹³⁵ Since the monarch had little active role to play, to borrow from nineteenth century republicans “radicals have something better to do than to break butterflies on wheels.”¹³⁶ But it must also be said that there has been little advocacy of monarchy in general.¹³⁷

Some efforts to instigate the type of republican movement seen in Australia in the 1990s have been made in New Zealand,¹³⁸ but have so far failed to develop in the way achieved in Australia in the same period, largely due to public apathy. Republican sentiment in New Zealand, though held by a not-inconsiderable proportion of the population, has yet to find a common ground or sense of purpose.¹³⁹

It has been said that with the rapidly changing demographics of New Zealand, more people “will find it difficult to see the relevance of colonial links with the United Kingdom.” Few of the growing Pacific Islands and Asian and other ethnic groups which form an increasingly large proportion of the population “have strong historical or cultural links to the United Kingdom.”¹⁴⁰

It is possible that there will be an increase, in early years of twenty-first century, in popular support for a republic. This could occur as the firmer supporters of the monarchy are gradually outnumbered by the less enthusiastic younger

¹³⁴ The 2000 Victoria University of Wellington Institute of Policy Studies conference *Building the Constitution* was largely a consequence of this, and although widely dismissed as pointless or ineffectual, it may have encouraged more serious debate. The proceedings were published in C. James, ed., *Building the Constitution* (Wellington: Victoria University Press, 2000).

¹³⁵ Indeed, Whitlam has written that a basic flaw in the Australian constitution is that it “enshrines a monarchical system of which the monarch is not a part”; G. Whitlam, *The Truth of the Matter* (Harmondsworth: Penguin, 1979) at 185.

¹³⁶ Chamberlain, *supra* note 20 at 38–40.

¹³⁷ One paper argues that monarchy might be “the surest road to societal well-being and good government in the new millennium”; J. Mayer & L. Sigelman, “Zog for Albania, Edward for Estonia, and Monarchs for All the Rest? The Royal Road to Prosperity, Democracy, and World Peace” (1998) 31:4 Pol. Sci. and Politics 771.

¹³⁸ Stockley, *supra* note 3.

¹³⁹ Even the mildly pro-republic attitude of the country’s leading daily newspaper, the *New Zealand Herald*, has had little if any discernible impact.

¹⁴⁰ Shannon, *supra* note 109 at 25.

generations. The increase in immigration from Asian, and other non-traditional sources could also fuel this change.¹⁴¹

Opinion polls have always shown younger people are more inclined to favour a republic, though this has not led to any significant increase in support for a republic by the population as a whole over the last three decades.¹⁴² Opinion polls quite clearly show that the number of people who support the monarchy consistently outnumber those who favour a republic.¹⁴³

Support for a republic is found most significantly among the more highly educated sectors of society, and among the lower socio-economic groups.¹⁴⁴ But these arguments are problematic. Support for the monarchy ebbs and flows over time for various, not always predictable reasons.¹⁴⁵ More importantly, support appears, as in Australia, to be firmer for the system than for the symbolism. Australia adopting the republic system of government could well be a major catalyst for New Zealand to follow suit¹⁴⁶—though by no means conclusive.¹⁴⁷

IV. SOME LEGAL CONSIDERATIONS

APART FROM CONSIDERATIONS OF THE POPULAR SUPPORT or otherwise for the monarchy, there is an argument that it might be illegal for New Zealand to become a republic, an argument which also has as its basis the belief that the Crown has evolved as a distinctly New Zealand institution.

¹⁴¹ R. Miller, "God Save the Queen: The Republican Debate and Attitudes Towards the Monarchy in New Zealand" (paper presented to the Australasian Political Science Association Conference, Flinders University, Adelaide, 29 September 1997).

¹⁴² Polls conducted over this time appear, rather, to reflect the contemporary media coverage of the royal family. Thus in the 1960s there was comparatively little coverage. But during the early 1980s support for the monarchy grew as (positive) coverage increased. It declined again in the early 1990s, but has since increased.

¹⁴³ For example, National Business Review/Compaq polls, conducted by UMR Insight regularly since 1993, have shown support for the monarchy at between 50% and 60%. Support for a republic has remained steady at 27–29%. A November 1999 *New Zealand Herald/Digi* Poll survey found 70.1% for the monarchy and 21.4% for a republic, with 8.5% undecided or refusing to say; *National Business Review* (5 March 1999) 16; *New Zealand Herald* (13 November 1999) A3.

¹⁴⁴ This economic/cultural divide was remarked upon in the aftermath of the Australian referendum; G. Ansley, "Poll Exposes a Raw Nerve" *New Zealand Herald* (8 November 1999).

¹⁴⁵ Support for the monarchy appears to decline at a time of negative publicity for the Royal Family, and increase in times of positive publicity. Yet the underlying support levels are little changed over several decades.

¹⁴⁶ Winterton, *supra* note 129 at 205.

¹⁴⁷ N. Cox, "Neo-Liberal Republicanism has no Place in this Country" *New Zealand Herald* (5 November 1999) A17.

In 1993 Sir Robin Cooke, President of the Court of Appeal of New Zealand, contributed to Joseph's *Essays on the Constitution* some reflections on the legal implications of New Zealand becoming a republic. Lord Cooke of Thorndon (as he became in 1996)¹⁴⁸ felt that the adoption of a republican form of government in New Zealand would not only be a radical change in the system of government, but might even be illegal.¹⁴⁹

This proposition claims support from two arguments, one legal, the other political, although perhaps ultimately legal as well. Lord Cooke has enunciated the first (based on an interpretation of the *Constitution Act 1986*),¹⁵⁰ Brookfield the second (which is based on the Treaty of Waitangi).¹⁵¹

The *Statute of Westminster 1931*¹⁵² expressly provided that it did not confer any power to repeal or alter the *New Zealand Constitution Act 1852*¹⁵³ otherwise than in accordance with the law existing before the commencement of the 1931 Act. Thus, in 1947 further imperial legislation¹⁵⁴ was needed to empower the Parliament of New Zealand to alter, suspend, or repeal, any of the provisions of the 1852 Act.¹⁵⁵

However, by s. 26 of the *Constitution Act 1986*, the *New Zealand Constitution Act 1852*,¹⁵⁶ the *Statute of Westminster 1931*,¹⁵⁷ and the *New Zealand Constitution (Amendment) Act 1947* were declared to have ceased to have effect as part of the law of New Zealand. Reliance can no longer be placed upon the 1852 Act and its amendments for any future constitutional changes in New Zealand.¹⁵⁸

The 1986 Act attempted to maintain continuity by providing that the House of Representatives shall be the same body as that referred to in s. 32 of the *New Zealand Constitution Act 1852*.¹⁵⁹ Similarly, s. 14(1) provides that there shall be a Parliament of New Zealand. This shall consist of the Sovereign in

¹⁴⁸ For the remarkable circumstances of the appointment to the House of Lords of a New Zealand judge see N. Cox, "Lord Cooke of Thorndon" (1996) N.Z.L.J. 123.

¹⁴⁹ Sir O. Dixon, "The Law and the Constitution" (1935) 51 L. Quarterly R. 590.

¹⁵⁰ See particularly Lord Cook of Thorndon, "The suggested revolution against the Crown" in P. Joseph, ed., *Essays on the Constitution* (London: Butterworths, 1995) at 35.

¹⁵¹ F.M. Brookfield, "Republican New Zealand" (1995) 3 N.Z.L.R. 316.

¹⁵² 22 Geo V, c. 4 (U.K.).

¹⁵³ 15 & 16 Vict., c. 72 (U.K.).

¹⁵⁴ *New Zealand Constitution (Amendment) Act 1947*.

¹⁵⁵ Cooke, *supra* note 150 at 30–31.

¹⁵⁶ *Supra* note 153.

¹⁵⁷ *Supra* note 152.

¹⁵⁸ Cooke, *supra* note 150 at 31–32.

¹⁵⁹ *Supra* note 153.

right of New Zealand,¹⁶⁰ and the House of Representatives. This latter is said to be the same body as that which before the commencement of the Act was called the General Assembly,¹⁶¹ although it was the Governor-General, rather than the Sovereign, who was part of the General Assembly. Section 15(1) states that the Parliament “continues to have full power to make laws”—without, however, specifying any source for that power. Especially seminal are ss. 2 and 3:¹⁶²

2. Head of State

(1) The Sovereign in right of New Zealand is the head of State of New Zealand, and shall be known by the royal style and titles proclaimed from time to time.

(2) The Governor-General appointed by the Sovereign is the Sovereign's representative in New Zealand.

3. Exercise of royal powers by the Sovereign or the Governor-General

(1) Every power conferred on the Governor-General by or under any act is a royal power which is exercisable by the Governor-General on behalf of the Sovereign, and may accordingly be exercised either by the Sovereign in person or by the Governor-General.

(2) Every reference in any act to the Governor-General in Council or any other like expression includes a reference to the Sovereign acting by and with the advice and consent of the Executive Council.

While the Sovereign is recognised as head of State, the continued authority of the imperial statutes which established the present structure of Parliament, consisting of the Queen and the House of Representatives, is ended. This ambivalence led to debate among constitutional scholars as to whether the New Zealand constitution is autochthonous.¹⁶³

Lord Cooke contended that it is by no means clear whether the mere amendment of ss. 2(1) and 14(1) of the *Constitution Act 1986* would legally effect the abolition of the monarchy. Although the provisions of the *Constitution Act* are not entrenched,¹⁶⁴ and the abolition could legally be effected virtually

¹⁶⁰ By s. 2 of the *State-Owned Enterprises Act 1986*, “Crown” is defined as “Her Majesty the Queen in right of New Zealand.”

¹⁶¹ As established by the *New Zealand Constitution Act 1852*.

¹⁶² Cooke, *supra* note 150 at 32.

¹⁶³ See P. Joseph, *Constitutional and Administrative Law in New Zealand* (Sydney: The Law Book Co., 1993) at 409–417, 486–487; N. Cox, *The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity* (PhD. Thesis, University of Auckland 2001); *Ibid.* at 33.

¹⁶⁴ Whether even the United Kingdom Parliament can in fact entrench an enactment remains controversial. *The Union with Scotland Act 1706* was declared to be entrenched, but has been subject to repeated amendments. Most recently, art. 22 was repealed by the *Statute Law (Repeals) Act 1993*, s. 1(1) and schedule 1.

overnight by a bare majority of the House of Representatives,¹⁶⁵ the issue is not purely or even mainly a legal one. Put simply, the Queen is one of the elements of Parliament, and cannot eliminate herself without annulling Parliament.¹⁶⁶

Daniel O'Connell also has doubted that even a supreme legislature has the authority to change its own structure by abolishing the monarchy.¹⁶⁷ Such arguments however have little political force, and would be unlikely to prove a serious hurdle for any Parliament that wished to legislate for a republic. The monarchy itself can be seen as the cornerstone of the entire edifice, though the position of the Crown in New Zealand is not, unlike in Canada and Australia, protected by statutory entrenchment.¹⁶⁸

Section 14(1) of the *Constitution Act 1986* provides that Parliament consists of the Sovereign (in right of New Zealand) and the House of Representatives. A republic could be established in New Zealand by the simple expedient of amending this provision to replace the Sovereign with a President, as the section is not entrenched.¹⁶⁹

But the courts, relying of the common law, might not recognise any ordinary legislation which purported to establish a republic, in the absence of a referendum. This would depend upon the extent to which the courts felt that a republic constituted a fundamental change in the constitutional grundnorm.¹⁷⁰

¹⁶⁵ Although it may be questioned whether the Governor-General should, or indeed could, decline to give the royal assent to such a measure. See Dixon, *supra* note 149.

¹⁶⁶ Cooke, *supra* note 150 at 35.

¹⁶⁷ See "Monarchy or Republic?" in G. Dutton, ed., *Republican Australia?* (Melbourne: Sun Books, 1977) at 32.

¹⁶⁸ A. Wood, "New Zealand" in D. Butler, & D.A. Low, eds., *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (London: Macmillan, 1991) at 114; Cooke, *supra* note 150 at 33-35.

¹⁶⁹ Though Lord Cooke has argued that the section may be effectively entrenched, on similar reasoning to that used to argue that the House of Lords is irremovable; (1999 New Zealand Law Conference, Rotorua, 8 April 1999).

¹⁷⁰ The boldest statement of the common law was by Coke, C.J. in *Dr Bonham's Case* (1610), 8 Co Rep 114, 118; 77 ER 638, 652:

It appears in our books that in many cases the common law will control acts of parliament and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.

This reflected Coke's considered opinion at the time, but there is some doubt that it reflected the views of his fellow judges. Lord Ellesmere reacted sharply, saying it was more fitting "that acts of parliament should be corrected by the same pen that drew them than to be dashed in pieces by the opinion of a few judges"; "Observations on Coke's Reports" in L.A. Knafla, *Law and Politics in Jacobean England* (Cambridge: Cambridge University Press,

Minimal change to the New Zealand constitution, by removing the office of the Sovereign, and substituting that of a President, would certainly make the country a republic, but one without any claim to be even partly based on popular sovereignty.¹⁷¹ This would require a more fundamental constitutional revision, almost certainly involving an entrenched constitution adopted by referendum.

More importantly, as the signatory of the Treaty of Waitangi, the Crown remains symbolically important in Maori society. Therefore the option of the minimalist republic, advocated so warmly but unsuccessfully in Australia in 1999, may be more difficult to obtain in New Zealand.¹⁷²

V. CONCLUSION

THE NINETEENTH CENTURY BRITISH TRADITION OF republicanism was based largely on opposition to government in the hands of hereditary Sovereigns. As the personal power of the Sovereign declined, so opposition changed to focus on the cost of monarchy, which remains the basis for much of the existing republicanism in Great Britain.¹⁷³

Neither argument has much relevance in the realms. The personal power of the Sovereign and his or her local representative is strictly limited, and the cost of the monarchy is borne, to a great extent, by the British taxpayer.¹⁷⁴ This leaves nationalism or symbolism as the major factor.

The republican tradition in Australia was grounded in nationalism, a degree of Irish republicanism (which saw the Crown as symbolic of British oppression¹⁷⁵), and a smaller degree of doctrinaire republicanism, whose advocates saw hereditary authority, however attenuated, as inimical to democracy. The result of the 1999 referendum would appear to suggest that republicanism founded on

1977) at 307. It seems from Coke's *Fourth Institute* that on further reflection he himself relented.

¹⁷¹ F.M. Brookfield, "A New Zealand Republic?" (1994) 8 *Legislative Studies* 5.

¹⁷² See in particular, Saunders, *supra* note 53 at 276–286.

¹⁷³ See T. Nairn, *The Enchanted Glass: Britain and its Monarchy* (London: Radius, 1988).

¹⁷⁴ The scale of the vice-regal establishments are comparatively modest, certainly compared with that formerly maintained by the Viceroy of India; Marquess G.N. Curzon of Kedleston, *British Government in India: The Story of the Viceroys and Government Houses* (London: Cassell, 1925); Australia, Office of the Official Secretary to the Governor-General of Australia, Annual Report, 1994–1995, *Estimates of Appropriations for the Government of New Zealand 1999–2000*, B.5 vol. III (Ottawa: Public Information Directorate, Government House, 1999) 116.

¹⁷⁵ A similar perception has influenced French Canadians; Conley, *supra* note 123.

nationalism alone is insufficient, and that deeper concerns with the constitutional structure of the country were critical.¹⁷⁶

New Zealand, for various reasons, appears to have a less strongly polarised society, and at present lacks the chauvinism seen in much of the republic rhetoric in Australia.¹⁷⁷ Although present in varying degrees, none of these factors has encouraged the growth of a strong republican movement. Symbolism is important in New Zealand, but it does not necessarily require the abolition of the monarchy to reinforce national identity. Indeed, the symbolism of the Crown has become an important element in Maori-government dialogue.¹⁷⁸

The symbolic argument for a republic has failed to gain significant support so far, perhaps because it concentrated overly on the person of the Sovereign. The dangers of this approach were illustrated in the 1999 Australian referendum campaign. Like in Canada,¹⁷⁹ the Crown is arguably not an issue in New Zealand because of the strength of our national identity, not its weakness. Many Canadian commentators have expressed the view that republicanism is not a major issue in Canada, because of the constitutional pre-occupation with Quebec, and Canada's desire to distinguish itself from the United States of America.¹⁸⁰ Various other reasons might be advanced as to why the Crown has continued to be regarded as a useful tool of government. Trudeau held the pragmatic view that abolition of the monarchy would be more trouble than it was worth.¹⁸¹ Smith would go further, and rejects a minimalist interpretation of the Crown's position in the polity. He advances the proposition that the Crown as a concept should be taken seriously, and asserts that the Crown is the organising force behind the executive, legislature, administration, and judiciary.

According to Smith, in the Canadian federal structure the Crown exercises determinative influence over the conduct of intergovernmental relations. The result is a distinctive form of federalism best described as a system of compound monarchies.¹⁸² The Crown played an essential role

In converting the highly centralized constitution originally designed by the Fathers of Confederation into the more balanced and decentralized system of today, a system in

¹⁷⁶ All states voted against the republic. All divisions voted for the *status quo*, except those in inner city areas of state capitals, and the Melbourne metropolitan region; Australia, Australian Electoral Commission, *Referendum 1999 Results and Statistics* (Canberra: Australian Electoral Commission, 2000).

¹⁷⁷ Always excepting the position of those few Maori nationalists of the more extreme variety; Graham, *supra* note 1.

¹⁷⁸ See Hayward, *supra* note 31.

¹⁷⁹ See Smith, *supra* note 55.

¹⁸⁰ Fennell, *supra* note 55; Smith, *supra* note 55.

¹⁸¹ Smith, *ibid.* at 47.

¹⁸² *Ibid.* at x.

which the provinces are not inferior, subordinate governments but instead exercise de facto coordinate sovereignty with that of the federal government.¹⁸³

The Crown has also been important precisely because it is the established mechanism through which Canadian government is conducted. The Canadian Constitution of 1867 was deliberately unclear in several key areas. This was because, as the Quebec Resolution stated:

The Conference ... desire to follow the model of the British constitution so far as our circumstances will permit ... and the Executive authority or government shall be ... administered according to the well-understood principles of the British constitution.¹⁸⁴

Flexibility was important, and this the Crown gave Canada.

Canadian governments benefited from the vagueness of a system of government based upon conventions rather than written rules. But not only the federal government gained, provincial governments benefited also. Thus the practical importance of the Crown lay in the authority which it conferred upon the provincial governments.

Equally importantly in New Zealand, recent experience with the adoption of a new electoral system is not likely to encourage advocates of short-term change. Popular feeling seems to suggest dissatisfaction with on-going social, economic and political reforms.¹⁸⁵

The special position of the Maori people further complicate the situation, and arguably strengthen the Crown, even if only by weakening the case for a republic.¹⁸⁶ Certainly, the adoption of a republic would require consideration of questions inherently more complex than those faced by the Australian population. In parallels with the New Zealand situation, it can be seen that, to some degree at least, the establishment of Canada was founded on a series of treaties between the Crown and the native American people. The obligations under these treaties have been assumed by the Canadian authorities, but in such a way that the Crown remains symbolically central to the relationship.¹⁸⁷ For the relationship is not between Europeans and natives, though it could be perceived as being between State and natives—provided there was agreement as to the nature of the State.

¹⁸³ Cited in *ibid.* at 184.

¹⁸⁴ See A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991).

¹⁸⁵ Kelsey, *supra* note 105.

¹⁸⁶ Lange, *supra* note 90. The same can be said of New Zealand relationship with Niue and the Cook Islands, for both of which the Crown in right of New Zealand is responsible.

¹⁸⁷ One rather unusual aspect of this is the existence, since 1711, of Her Majesty's Chapel of the Mohawk, Brantford, Ontario; D. Baldwin, *The Chapel Royal: Ancient and Modern* (London: Duckworth, 1990) at 56–62.

The weakness in support for a republic is not due to enthusiastic support for the monarchy *per se*. Now largely divorced from the person of the monarch by a process of nationalisation, localisation, or patriation, the Crown it has developed a life of its own. The Crown remains important because of the peculiar system of government which New Zealand has inherited; the monarchy perhaps less so.

Decolonisation or further constitutional evolution need not take the form of republicanism, but rather the remodelling of the Crown in a truly national form.¹⁸⁸ Indeed, in this respect New Zealand would seem to have more in common with Canada than with Australia.¹⁸⁹ The Crown had assumed a dual nature in Canada long before the concept of the divisibility of the Crown was fully developed in the Dominions.¹⁹⁰ But the application of this later concept also led to changes in the Canadian Crown. Acting only on the advice of Canadian Ministers, and no longer an agent of empire, the Governor-General assumed a position increasingly analogous to that the Sovereign held in the United Kingdom, leaving little room for the Sovereign.¹⁹¹

The symbolism of the Crown was therefore reworked, rather than discarded. In Canada, rather than a call for a republic, there has been a "separation of the person of the monarch from the concept of the Crown."¹⁹² This has however tended to diminish the dignity of the Queen's person, and may also ultimately diminish the practical role the Crown plays in Canadian government.¹⁹³

After the return to power of the Liberal Party in 1963, the new government, influenced by the proponents of bilingualism, set out to reform the Crown in Canada as a specifically Canadian institution.¹⁹⁴ There was a deliberate rejection of the historic Crown with its anthem, emblems, and symbolism, which made accessible a past the government of the day rejected. The new Crown was to be "rooted in the future, not in the past."¹⁹⁵ This did not mean rejection of

¹⁸⁸ Indeed, it must be remembered that New Zealand, like Canada and Australia, grew up as colonies of British settlement, with important consequences for their institutions, culture, laws, and monarchies; Smith, *supra* note 55 at 201.

¹⁸⁹ See *ibid.* at 28-29.

¹⁹⁰ See *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 4 Cart 255 at 263-264 per Jounier J.

¹⁹¹ Who did, however, open Parliament in person, for the first time in Canada, in 1957.

¹⁹² Smith, *supra* note 55 at 25.

¹⁹³ It has also led to the development of loyalty to an indigenous Crown; A.R.M. Lower, "The Origins of Democracy in Canada" in W. Heick, ed., *History and Myth: Arthur Lower and the Making of Canadian Nationalism* (Vancouver: University of British Columbia Press, 1975) at 26.

¹⁹⁴ Smith, *supra* note 55 at 47.

¹⁹⁵ *Ibid.*

the Crown, but moulding it to a new form, one symbolic of multiculturalism and modernity.

The existence of the Treaty of Waitangi as a focus for indigenous rights has influenced the direction of political theory in New Zealand, and has promoted the identification of the Crown as the principal organ of government. Such a move might have occurred in Canada, but for the federal structure of government. It never occurred in Australia because an entrenched Constitution and a long-standing minority republican sentiment prevented this. But support for the system of government which the Crown represents does not of itself equate to support for the monarchy.

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Telephone (204)957-0050 Facsimile (204)957-0840 E-Mail: amt@aikins.com Web Site: <http://www.aikins.com>