NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 6 • NUMBER 1 • JUNE 2008

SPECIAL CONFERENCE ISSUE
FROM PROFESSING TO ADVISING TO JUDGING:
CONFERENCE IN HONOUR OF SIR KENNETH KEITH

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UNIVERSITY OF WELLINGTON
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o te Ūpoko o te Ika a Māui

FACULTY OF LAW
Te Kauhanganui Tātai Ture

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

June 2008

The mode of citation of this journal is: (2008) 6 NZJPIL (page)

The previous issue of this journal is volume 5 number 2, December 2007

ISSN 1176-3930

Printed by Geon, Brebner Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

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"CROWN HIM WITH MANY CROWNS": THE CROWN AND THE TREATY OF WAITANGI

Janet McLean*

There are many different understandings of the Crown operating in modern New Zealand legal and political discourse. The usual constitutional explanation has been that it is the political account of the Crown, understood in democratic parliamentary terms, that really matters. This hitherto standard view underestimates the political content of different common law conceptions of the Crown. It is also being challenged by a revivified common law constitution which has partially reconceived the Crown in its relationship to Māori. Some of these common law conceptions have been adopted by Māori for political ends. The result is competing and unstable legal-political conceptions of the Crown that operate differently for the purposes of defining property and authority, and responsibility. There can be no simple answer to the question "who is the Crown?".

I INTRODUCTION

A few years ago, I distinctly remember Mrs Tariana Turia, then the Associate Minister of Māori Affairs and a minister outside of Cabinet, being reported as suggesting that "the Crown" ought to be doing something to fulfil its commitments under the Treaty of Waitangi. It struck me that she referred to the Crown as if it were an apolitical entity quite distinct from Cabinet government and from her own role as Minister. It was not "we" but "it" or "they". At the same time there was always

* Chair of Law and Governance, School of Law, University of Dundee. The title for the written paper was suggested by the Rt Hon Justice Tipping and taken from the Victorian hymn of that name (words by Matthew Bridges 1852). My special thanks go to Claudia Geiringer, Dean Knight and Professor Tony Smith for inviting me to the Wellington conference and to the Law Foundation for its financial assistance. Thanks to Sir Kenneth Keith, Professor Paul Rishworth, Treasa Dunworth, Professor Les Holborow and Dr Mark Hickford for comments on an earlier draft of this article. Thanks also to an anonymous referee for a wealth of valuable references and comments not all of which I have been able to use within time, space and geographical constraints. Thanks to Mary-Rose Russell of the David Law Library, Professors Jeremy Finn and Alex Frame, Dr Mark Hickford and Dean Knight for help with these sources. I am solely responsible for errors and omissions.

It is a great privilege to be invited to write a paper in honour of Sir Kenneth Keith. One of the remarkable things about Sir Kenneth is his ability to read widely and to make connections between different areas of the law. He attempts to see the law "clearly and to see it whole". He combines a deep understanding of

a certain amount of loose talk around the universities about their obligations under the Treaty of Waitangi, as if the universities were, at least for Treaty purposes, part of the Crown. The idea that a university is part of the Crown was as incongruous to me as the suggestion that a minister of the Crown is not — in all other contexts the universities' independence from the Crown has been fiercely argued for and defended. So why should a university be so quick to treat a reference to the Crown under the Treaty of Waitangi as a reference to "we the university" and why should Mrs Turia, then a minister of the Crown, be so reluctant to treat the Crown as a place-holder for "we the government"? Obviously there is something more going on here. Much has been written about the complexities of the Māori side of the relationship.[1] Who is the Crown part of the Treaty of Waitangi relationship? Is it "we" or is it "they"?

The standard account is that both of these examples represent misunderstandings of the New Zealand constitutional position. The Crown in right of New Zealand is represented by the Queen or Governor-General; the Queen or Governor-General only acts on the advice of her ministers who enjoy the confidence of the House of Representatives. It is through this means that the Crown has a democratic mandate and acts on behalf of the people as a whole. It is "we" and "acts for us" in that, somewhat attenuated, sense. Politically speaking the collective Cabinet is as close as we are likely to come to a repository of the will and purposes (the conscious mind if you like) of the Crown. Conversely, on the position of the universities, a constitutional lawyer would quickly direct you to the Crown Entities Act 2004 which characterises universities as a category of "Crown entity"[2] (a statutory term of art). The Crown Entities Act suggests that universities are distinct from the Crown itself but governed by the various reporting and regulatory relationships set out in that Act.

These standard answers, however, do not do justice to the deeper underlying controversies and ambiguities that attach to the Crown and statehood in New Zealand. It is not that Mrs Turia or the universities have somehow "misunderstood" the notion of the Crown. The Crown has long been able to assume a variety of different meanings. It can be used to represent the royal dignity, the government of the day, and the executive understood as an abstract notion approximating the State. It can be used to refer to the Crown in right of the United Kingdom and the Crown in right of New Zealand. The Crown can sometimes be imagined as a concept that embraces "the people" and acts according to their collective will (frequently, though by no means always, represented by the Crown in Parliament) and sometimes as a concept that stands apart from the people and appears to exercise a "will of its own". In other words, it can enjoy pre-democratic and post-democratic meanings —

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international, constitutional and administrative law with a thoroughgoing practical knowledge and experience of how government actually works. In an age of increasing academic specialisation and the proliferation of intellectual silos, he demonstrates a rare ability to make connections across parts of the discipline and a thorough respect for disciplines outside of the law.

1 See K Gover and N Baird "Identifying the Maori Treaty Partner" (2002) 52 U Toronto LJ 39.

2 Crown Entities Act 2004, s 7(1)(e).

sometimes both at the same time. The continuity of the King and Crown as a matter of constitutional *form* helps to obscure the fact that these place-holders for the State are capable of comprehending a variety of different *political* relationships between the State and the people or peoples.

The standard account seeks to neutralise these ambiguities by treating the Crown as an empty legal form, the substance of which is supplied by the political constitution — constitutional convention and political practice. In their first year of law school, generations of New Zealand law students have been taught that political power and legal power are not the same in our constitutional system. The legal constitution is separate from and subordinate to the political or conventional constitution.[3] Cabinet, a body completely unknown to the law, is the real power holder and not the Crown. It is Cabinet that dominates Parliament and that runs the administration despite the legal rules that describe the Queen and the Queen in Parliament as the ultimate repositories of power. Students receive two lessons early in their legal careers: the legal and the political constitutions diverge; and it is political power and the political constitution that matters.

Maintaining the continuity of the legal form but, at the same time, suggesting that the *real* constitution lies elsewhere and in other sources has enabled different political meanings to attach to the Crown, sometimes simultaneously. It is a dynamic process and one which the common law's adherence to form encourages. As Trenchard observed:[4]

> Machiavelli advises anyone, who would change the Constitution of a State, to keep as much as possible to the old Forms; for then the people, seeing the same Officers, the same Formalities, Courts of Justice, and other outward Appearances, are insensible of the Alteration.

While it is true that the Crown has, as a matter of legal form, accommodated shifts in the locus and understanding of political power, the purported subordination and separation of the legal from the political constitution is not as thoroughgoing as the standard account would suggest. The legal or common law constitution has always contained its own political commitments. The "Crown" understood as a common law concept is not merely an empty form. The common law "Crown" meaning the "King in Parliament" within the British realm and the "colonial Crown" in the wider territories of the empire enjoys distinct and specific political content. Older common law meanings of the Crown, and their associated assumptions about the relations between citizens and the State, could be revived and "reattached" to the legal forms when they suited the needs of particular governments and their colonial ambitions. There has been a much more dynamic and complex interaction between the legal and political constitutions than the standard account would usually

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3 The term "political constitution" was given modern currency by JAG Griffith "The Political Constitution" (1979) 42 MLR 1.

4 John Trenchard *Independent Whig* 12 (16 April 1720), quoted in JAW Gunn *Beyond Liberty and Property* (McGill-Queens University Press, Montreal, 1983) 21. Gunn suggests that this is a misattribution of an insight by Tacitus.

acknowledge.[5] The legal constitution itself has political content and has been used to further particular interests in our colonial past.

If governments in the past revived common law meanings of the Crown for political ends then lawyers, judges, and citizens have also used this technique in recent years to challenge the political constitution and its commitment to majoritarian democracy. The recent re-emergence of the common law constitution and its implicit challenge to the dominance of the political constitution gives us a new reason to revisit the standard account of the constitution.[6] The idea of the Crown as fiduciary partner with Māori in the contemporary common law constitution is a good example of the revivified common law's efforts to give new priority to the legal constitution over the political constitution — even if this is mainly by procedural means. In doing so, however, the reinvigorated common law builds on colonial manifestations of the Crown in which the Crown rather than "the people" is the source of political authority, the law-giver and constitution-giver. This is at odds with modern constitutional ideas of "the people" as exercising the original constituent power (or sovereignty) out of which emerges a nation's distinct constitutional forms.[7] What role then for the political constitution and democratic politics?

My purpose is not to suggest that such conflicts as may arise between rival conceptions of the Crown are examples of bad historical method or demonstrate the *misuse* of the common law for political ends. "Presentism" or using history in decontextualised and ahistorical ways, has been extensively criticised as a mode of scholarship.[8] However, the lawyers, judges and politicians who use, revive and adapt these ideas are not practising historical scholarship but are practising law and politics – just like the lawyers, judges and politicians of previous generations. It is that phenomenon that I am investigating. It is a dynamic process and it is one which the common law's adherence to legal form encourages.

In the first part of the paper I shall explore the nature of the Crown as understood by the common law for purposes of power and authority. In the second part, I shall more briefly sketch the contours of another and distinct narrative about how the Crown has traditionally been understood by

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5 One modern commentator, Martin Loughlin, suggests that common law in the courts should be regarded as "a sophisticated form of political discourse": Martin Loughlin *Public Law and Political Theory* (Clarendon Press, Oxford, 1992) 4.

6 Colin Turpin and Adam Tomkins refer to this as "common law radicalism": Colin Turpin and Adam Tomkins *British Government and the Constitution* (6 ed, Cambridge University Press, Cambridge, 2007) 66–74. See further Tomkins' discussion of the liberal legal constitution in Adam Tomkins "In Defence of the Political Constitution" (2002) 22 OJLS 157.

7 See Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Reform* (Oxford University Press, Oxford, 2007).

8 See the discussion in Paul McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, Oxford, 2004) 16–37.

the common law, this time for responsibility purposes. Investigating some of the deeper ambiguities that attend the Crown as a legal concept is a way of explaining some of these so called misunderstandings.

II THE CROWN AS AUTHORITY AND PROPERTY HOLDER

A Separating the Legal from the Constitutional

Let us start with the idea of the Crown as referring to the Queen in her person. Historically we know that Māori considered their relationship with "Queen Victoria and her tribe" to be a very personal one. Different Māori tribes sent emissaries to successive British monarchs over the centuries. It was important to Tainui that it was Queen Elizabeth II herself (rather than her representative) who gave royal assent to legislation apologising for the actions of British colonists.[9] Traditional forms of Māori insult have notoriously been directed at the Queen's personal representative at Waitangi. The idea that the Queen in her person represents the *dignity* of the Crown is not only a Māori idea but also a feudal idea whose traces can still be discerned in the common law.[10]

Feudal understandings, of course, not only located the *dignity* of the State but also its *power* in the authoritative will of the King himself. Tracing how the common law distinguished constitutional power from royal dignity and created the conceptual space through which it could be located somewhere other than in the person of the King, requires much more by way of explanation.

There were many attempts over the centuries to separate the King in his private capacity from the King in his political capacity or office. As with much else in our constitutional law, it was the operation of politics, revolution and (consequent) legislation that effected the cleavage. The crucial political "moment", according to Anson, was wrought some time after 1714. Before then, the King or Queen governed through ministers; after the accession of George I, ministers governed through the instrumentality of the Crown.[11] In reality, the transfer of power from King to ministers was by

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9 Waikato Raupatu Claims Settlement Act 1995.

10 The law of sovereign immunity still refers, at least in part, to this so-called "dignity interest" reposed in the person of the head of State to this day. In the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, para 80 Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, the Judges state: "Under traditional customary law the Head of State was seen as personifying the sovereign State. The immunity to which he was entitled was therefore predicated on status, just like the State he symbolised". The Judges went on to distinguish this rationale from the more functional justifications for extending sovereign immunity beyond the head of State him or herself.

11 Sir William Anson *Law and Custom of the Constitution* (vol II, 3 ed, Clarendon Press, Oxford, 1907) 41, quoted in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365, para 32 Sedley LJ.

no means as thoroughgoing as this account would suggest and the details of the political separation took a great deal longer to work out.[12]

Indeed, it was not until the late 19th century that Sir Walter Bagehot in 1867[13] and Edward Freeman in 1872[14] (neither of whom were lawyers)[15] first drew attention to the disjunction between the legal and the constitutional.[16] Freeman gives the impression that the separation between the legal and the political sites of power represented a recent parting of the ways:[17]

> We now familiarly speak, in Parliament and out of Parliament, of the body of Ministers actually in power, the body known to the Constitution but wholly unknown to the Law, by the name of "the Government." We speak of "Mr Gladstone's Government" or "Mr Disraeli's Government". I can myself remember the time when such a form of words was unknown, when "Government" still meant "Government by King, Lords, and Commons" and when the body of men who acted as the King's immediate advisers were spoken of as "Ministers" or "the Ministry".

Freeman powerfully invokes the idea of the silent constitution: "Our later constitutional history … is mainly a record of silent changes in the practical working of institutions whose outward and legal form remained untouched."[18]

For Freeman, the received system is thoroughly conventional: "… by the side of our written law, there has grown up an unwritten or conventional Constitution".[19] The entire theory of Cabinet and

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12 Elizabeth Wicks, perhaps more realistically, suggests that Sir Robert Walpole's Whig Ministry of 1721–42 "laid the basis for", but did not complete the gradual transfer of executive power from the monarch to the executive minister: Elizabeth Wicks *The Evolution of a Constitution* (Hart Publishing, Portland, 2006) 54.

13 Walter Bagehot *The English Constitution* (HS King, London, 1846).

14 Edward Freeman *The Growth of the English Constitution From the Earliest Times* (Bernhard Tauchnitz, Leipzig, 1872).

15 Bagehot was a journalist and man of letters and Freeman a constitutional historian.

16 This is in contrast to earlier 19th century constitutional texts such as Henry Hallam *The Constitutional History of England From the Accession of Henry VII to the Death of George II* (John Murray, London, 1850); JL De Lolme *The Constitution of England; Or, An Account of the English Government: In Which it is Compared both with the Republican Form of Government and the Other Monarchies in Europe* (Cuthell, Longman and Co, London, 1822). Both are discussed in M Francis and J Morrow *A History of English Political Thought in the Nineteenth Century* (Duckworth, London, 1994) especially chapters 1 and 11; and George Bowyer *Commentaries on the Constitutional Law of England* (2 ed, Richards, London, 1846).

17 Freeman, above n 14, 164.

18 Ibid, 147.

19 Ibid, 153.

Prime Minister, "every detail in short of the practical working of government among us, is a matter belonging wholly to the unwritten Constitution and not at all to the written law."[20]

Lawyers would usually attribute these insights to Albert Venn Dicey whose *Introduction to the Study of the Law of the Constitution*[21] did not appear until 1888, though Dicey fully acknowledged his great debt to Freeman's work of 16 years before.[22] What is remarkable is how long it took for the constitutional lawyers to mark out this separation and how decisive the shift in thinking was once it had been made. Dicey's approach and sources are strikingly different to those used by Hallam, De Lolme and Bowyer in their earlier and historically oriented standard texts on 19th century constitutional law.[23] Importantly Dicey scarcely discusses the Crown or its privileges. It may be that the explanatory power of Dicey's view grew as Parliament became progressively franchised (despite Dicey's own anti-democratic leanings).

So much is commonplace in the now standard narrative of the British constitution: legal and political power need not reside in the same place. My primary concern is a different one: what were the common law background norms concerning the nature of the King and Crown against which these and other political changes took place? (This is a question which Dicey, more than his predecessors, wholly ignored). How much was the common law account able to accommodate (and sometimes even to resist) these and other political changes as the constitution became increasingly democratised? Pre-democratic and even feudal understandings would linger — not only symbolically, but in ways that particularly affected and effected political relationships in the colonies. It is to these questions I now turn.

B How Did the Common Law Conceive of the Crown?

Even in medieval times, the King was not considered to be, or at least not *only* considered to be, a "natural" person. Medieval lawyers attempted to distinguish between King and Crown — between the natural man and the organic symbol of the body politic.[24] The King came to be seen as the head

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20 Ibid, 158.

21 Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan Education, Basingstoke, 1959).

22 Freeman, above n 14. Parts of the work have not stood the test of time and, indeed, involved methods explicitly rejected by Dicey. Freeman suggested that "modern constitutionalism" involved a return to principles and practices that existed prior to "Tudor and Stuart Despotism" and that "we have cast aside the legal subtleties which grew up from the thirteenth century to the seventeenth, and … we have gone back to the plain common sense of the eleventh or tenth, and of times far earlier still": ibid, 168.

23 Ibid.

24 See EH Kantorowicz *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, Princeton, 1957). For a recent and extensive discussion of the different medieval understandings about the legal person of the King and how they were received into the modern period see JWF Allison *The English Historical Constitution* (Cambridge University Press, Cambridge, 2007) chapter 3.

of the corporation (which included Parliament and the judges) that was the State. This idea borrowed from theological writings and drew analogies between God and the King. Authority came not from the people (or from positive law) but from God. Two inseparable bodies were contained within the King's person: he was both a natural man and a representation of the body politic. In his latter role "the king could not die, the king could do no wrong, the king was omnipresent throughout the body politic".[25] It is the latter (corporate) representation that we came later to refer to as "the Crown".

One of the earliest and most pressing practical issues, as far as the common law was concerned, was in relation to property.[26] (Remember too that property in feudal times was the basis of authority). In order to preserve and maintain Crown *property* in perpetuity then, it was necessary to conceive of the Crown as a juristic person in the form of a corporation sole. While the natural person of the King may die there must always be someone to fill the office and to hold the property. Perhaps the most evocative example of this was in relation to the Crown jewels — the ultimate symbol of statehood. As early as 1591, case law reports that the Crown jewels could only descend to a successor in office and not to a personal executor — they belonged to the *office* of the King and not to the natural person.[27] From the 14th century onwards attempts had also been made to separate public debt from private debt of the King. This was not formally given the imprimatur of the judges until 1786, who only then had the opportunity explicitly to recognise this aspect of the revolutionary settlement.[28]

Maitland, the great late-19th century legal historian, warned that we ought not to credit the common law with too much in relation to developing the notion of a corporate Crown. In his view, the medieval year books treated the property of the King for the most part as very much belonging to the King in his own person.[29] In so far as the person of the King had been separated from his office, this had primarily been effected by incremental legislative changes and changes to

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25 Martin Loughlin "Constituent Power Subverted: from English Constitutional Argument to British Constitutional Practice" ["Constituent Power Subverted"] in Loughlin and Walker (eds), above n 7, 30.

26 Kantorowicz, above n 24. See also *Case of the Duchy of Lancaster* (1561) 1 Plow 212, 213: "For the King has in him two bodies, viz., a body natural and a body politic … But his body politic is a body that cannot be seen or handled …". See also *Calvin's case* (1608) 2 St Tr 624: "The King hath two capacities in him: one a natural body, being descended from the royal blood of the realm; and this body is the creation of Almighty God, and is subject to death, infirmity and such like: the other is the politick body or capacity, so called because it is framed by the policy of man; and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy."

27 See *Fulwood Case* (1591) 4 Co Rep 64b, 65a (note A); *Hastings v Douglas* (1632) Cro Car 343, 344.

28 *Macbeath v Haldimand* (1786) 1 TR 172.

29 Frederic William Maitland "Crown as Corporation" in HAL Fisher (ed) *Collected Papers of Frederic William Maitland* (vol III, Cambridge University Press, Cambridge, 1911) 244, 246. He remarked that the repeated demand that the King should "live of his own" does not indicate a trustee relationship.

administrative practice rather than by the common law in the case books.[30] He tells us a lot about the incremental and sporadic impact of the common law relative to (also sporadic) detailed legislative change. The point remains, however, that while medieval theory and practice would not have conceded that King and Crown, man and office could be separated — the two persons existing in the one body — it nevertheless distinguished between these two conceptions. It was the "corporate Crown" that housed the political power. Moreover, in the 17th and 18th centuries these common law ideas enjoyed a life outside of the case law — in administrative practice and in the concepts and language of political debate.[31] Political discussions about the "body politic" had these common law ideas in mind.

C The Ideas Travel …

The common law language and concepts made their way to New Zealand and often by way of Blackstone's *Commentaries of the Laws of England* (1765-1769).[32] It became a standard work for the New Zealand colony in the 19th century. The volumes recommended themselves as much for their portability on long sea voyages as for their quality and comprehensiveness and were used by lay people and lawyers alike.[33]

Blackstone's *Commentaries* discusses what we would think of today as "constitutional law" in Volume One concerning the "Rights of Persons".[34] The substance of constitutional law is comprised

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30 Ibid. He gives the example of 11 Geo II, c 30 preamble and sec I: "… in case such King or Queen so dying was considered as a private person only and not in her or his politick capacity" (ibid, 255). He tells us that George III (1760-1820) had to go to Parliament for permission to hold lands as a man rather than as a King after the King's lands had been made inalienable: 39 & 40 Geo III, c 88 (ibid, 252). Even as late as Queen Victoria's reign it was considered necessary for army commissions to be renewed upon the death of a monarch until legislation resolved the matter. Subsequent legislative practice varied immensely. Sometimes it was explicit in colonial legislation that the King held property *in trust* on behalf of a particular government, dominion or publick. Maitland gives the example of an Act of 1738 under which debt passed to the King but "the Publick" owed it: ibid, 252–265, esp 265.

31 See McHugh, above n 8, 19 fn 46, referring to the work of Pocock and Bailyn.

32 Another important source was Joseph Chitty *Prerogatives of the Crown* (Butterworth, London, 1820) which itself relies heavily on Blackstone.

33 In the early days it was the contents of private libraries that mattered. See for example Mark Hickford's discussion of the American sources available to Justice Chapman in Mark Hickford "'Settling Some Very Important Principles of Colonial Law': Three 'Forgotten' Cases of the 1840s" (2004) 35 VUWLR 1, 13. For a general description of the dilemmas "new settlers" faced in deciding what to bring with them see John Philip Reid *Law for the Elephant: Property and Social Behaviour on the Overland Trail* (Henry E Huntington Library, California, 1997). He tells of whole libraries being discarded: ibid, 45. For a discussion of the holdings of the Otago District Law Society Library, in what was, in the 19th century, New Zealand's largest metropolitan centre, see J Finn "New Zealand Lawyers and 'Overseas' Precedent 1874–1973 — Lessons From The Otago District Law Society Library" (2006) 11 Otago LR 469.

34 William Blackstone *Commentaries on the Laws of England* (vol I, Garland, London, 1978) (reprint of the 1783 edition printed for W Stahan and T Cadell, London) [*Commentaries*].

of those rights that attached to the Person of the King in his political capacity — that is the King and his three estates together forming the great corporation or body politic.[35] Blackstone is careful when he ascribes qualities such as perfection to the King to make clear that he is referring to this "political capacity" rather than to the natural man. For Blackstone, constitutional law is in no way distinct from other law. Nor is it about institutions. Rather it flows out of the legal person of the King and sits alongside discussions about the law of husband and wife, the law of master and servant and other status relationships. The *Commentaries* are, in this sense, very much the work of the earlier 18th century rather than of their own time. The law as it is represented there is still informed by feudal concepts — the State is not yet separate from civil society.[36] Indeed, Dicey considered this section on constitutional law to be antiquated even for its time[37] — a criticism also sometimes levelled at Dicey himself.

And yet these "antiquated" ideas, or traces of them, had remarkable resilience in colonial law, even after they had ceased to have much resonance in the constitutional law of Great Britain itself. They are the source of some of the continuing ambiguities about the Crown in New Zealand. There is no linear chronology about these developments — rather different meanings were attached to the Crown often based on very little by way of decided cases. Common law principles were found that were thought to resolve contemporary problems or respond to contemporary political circumstances. By the 19th century, in Great Britain at least, as a matter of politics, the great body politic that was the State had ceased to be thought of as residing in the King but rather in the King in Parliament.[38] The language of God given authority had long given away to the authoritative claims of parliamentary sovereignty. Parliament, which had been created by, and incorporated with, the Crown, was now able to assume "a power of self-creation" "by invoking the principle of Parliamentary sovereignty".[39] But for most of the burgeoning British Empire this political move was not readily available because the new colonies were only stumbling towards self-governance. They did not have their own or fully sovereign Parliaments. Because of the differing degrees of self-

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35 Ibid, 153.

36 John W Cairns "Blackstone, An English Institutist: Legal Literature and the Rise of the Nation State" (1984) 4 OJLS 318, 345.

37 Dicey, above n 21, 7–8. See Cairns, above n 36, 352.

38 See for example the entry under "body politic" in the *Compact Oxford English Dictionary* (2 ed, Oxford University Press, Oxford, 1991). The "body politic" is itself an ambiguous concept. It has been used to refer to "the State" meaning the governing constitutional organs, as well as to the we of "organised society" and indeed, to refer to *any* corporate body where a group of individuals acts for a common purpose.

39 Martin Loughlin "Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice" in Loughlin and Walker, above n 7, 34.

government throughout the empire the colonial Crown never enjoyed a single uniform meaning.[40] Nevertheless, it is generally true that residual common law notions acquired new importance in the new colonies because the colonial Crown (subject only to the United Kingdom Parliament) remained an important actor. The Crown as law giver and fount of authority came to enjoy a fresh currency.

New Zealand had its own ambivalent interpreter of Blackstone in Sir John Salmond. His work (including his legal practice as Solicitor-General) is complex and has been the subject of recent scholarly discussion and re-evaluation.[41] It is deeply informed by and springs out of the 19th century positivism that separated law and politics.[42] We are particularly concerned with what he had to say about the State and the King or Crown.

John Austin's influence on Salmond is most apparent in relation to how Salmond perceived the distinction between law and politics. Unlike Blackstone, Salmond treated constitutional law as different in degree if not in kind from the rest of the common law. He argued that the constitution existed as a matter of fact (de facto) as well as law (de jure). In his view:[43]

> The constitution as a matter of fact is logically prior to the constitution as a matter of law … constitutional practice is logically prior to constitutional law. There may be a state and a constitution without any law, but there can be no law without a state and a constitution. No constitution therefore can have its source and basis in the law. It has of necessity an extra legal origin, for there can be no talk of law until some form of constitution has already obtained de facto establishment by way of actual usage and operation. When it is once established, but not before, the law can and will take notice of it.

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40 See the discussion of Salmond's resistance to "borrowing" from Crown concepts used in the United States in M Hickford "John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920" (2008) 38 VUWLR 853, 881 fn 134.

41 See Alex Frame *Salmond Southern Jurist* (Victoria University Press, Wellington, 1995). Salmond and his work were the subject of a symposium in 2005, the papers from which have been published in (2008) 38 VUWLR 4.

42 John Salmond's work on jurisprudence played an important role in laying the foundations of legal thought throughout the Commonwealth for the first half of the 20th century: John Salmond *Jurisprudence* (Sweet and Maxwell, London, 1902) 362 [Salmond (1 ed)], and every edition thereafter. The text appeared in 12 editions: John Salmond edited the first seven editions (until 1924), followed by CAW Manning (1930), JL Parker (1937), Glanville Williams (1947 and 1957) and PJ Fitzgerald (1966). Salmond and GW Paton *A Textbook of Jurisprudence* (Clarendon Press, Oxford, 1946) were major teaching texts in jurisprudence including at Oxford into the 1950s. For his experience as a student of such texts see William Twining *Globalisation and Legal Theory* (Butterworths, London, 2000) 37. Twining considers Salmond to have been an acolyte of Austin's while at the same time also one of Austin's critics: ibid, 24.

43 John Salmond *Jurisprudence* (7 ed, Stevens and Haynes, London, 1924) 154 [Salmond (7ed)].

For Salmond, the existence of political or civil power is primarily a matter of fact: it is the *capacity* of "directing the activities of the body politic".[44] Those who possess any share of this civil power are "the agents through whom the state, as a corporate unity, acts and moves and fulfils its end".[45] Like Austin, he emphasised the importance of a monopoly on legitimate force[46] (whether used or only threatened) as a characteristic of statehood, though not without an explicit concession that law without justice presents an incomplete analysis.[47] I am not suggesting that Salmond or, indeed, Austin (who was influenced by utilitarianism) lacked an ethical dimension to their work but that that ethical dimension did not of itself create legal rights and duties.[48]

So much seems fairly straightforward in Salmond's work. Constitutional and political facts and usages and the existence of a "nation politically organised"[49] — all of these things precede constitutional law. Where Salmond is less clear is on the question of the degree to which the law "can and will" take notice of such political facts. When he moves from constitutional law in its political to its *legal* manifestations he resorts to the old legal forms — in a way that is surprisingly similar to the approach of Blackstone. Sir John Salmond uses the King as placeholder for the State as a *legal* (rather than political) entity and perpetuates the image of the entire government apparatus as an extension of the King's intimate household[50] in these terms:[51]

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44 Ibid, 156.

45 Ibid.

46 Alex Frame records a letter Salmond wrote to Lord Bryce in 1920 lamenting the weakness of colonial democratic government: "There is no real force at the back of it, and the State exists not to govern men but to give them what they ask for". See Alex Frame "Salmond, Necessity and the State" (2008) 38 VUWLR 719, 724.

47 See further Paul McHugh "Sir John Salmond and the Moral Agency of the State" (2008) 38 VUWLR 743, 756.

48 Paul McHugh makes the interesting argument that Salmond was attracted to the work of TH Green and the British idealists and that with them he shared a deep concern for the "moral life" of the State: see ibid. In my view, the problem for the idealists generally was that their work lacked a juristic dimension. As Runciman, comparing the work of John Austin with that of the idealist Bosanquet, puts it: "English political thought at the end of the nineteenth century was thus split between two approaches to the subject, one resulting in a juristic conception of order with no moral dimension, the other a moral conception of order with no juristic dimension." See D Runciman *Pluralism and the Personality of the State* (Cambridge University Press, Cambridge, 1997) 78. That is not to say that Salmond, in his practice and his person, may not have combined the two elements. Salmond certainly differed from Green in suggesting that force and not will was the basis of the State: see TH Green *Lectures on the Principles of Political Obligation* (Reprint, Longmans Green, London, 1941) 140.

49 Salmond (7 ed), above n 43, 150.

50 In this treatment of the legal personality of the King as the placeholder for the legal personality of the State Salmond appears to owe more to Blackstone (about whom Austin was extremely critical) and Blackstone's organisation of his discussion of what we would now call constitutional law around the Law of Persons in

> The real personality of the King, who is the head of state, has rendered superfluous any attribution of legal personality to the state itself. Public property … is the property of the King. Public liabilities are those of the King, it is he and he alone that owes the principal and principal and interest of the national debt. Whatsoever is done by the state is in law done by the King … The citizens of the state are not fellow-members of one body politic and corporate, but fellow-subjects of one sovereign lord.

He later clarifies that when he refers to the King here, he really means to refer to the Crown — or, in other words, the King in his public capacity as a body politic. He adds however, that:[52]

> Nevertheless, we must bear in mind that this reference to the Crown is a mere figure of speech, and not the recognition by the law of any new kind of legal or fictitious person. The Crown is not in itself a person in the law. The only legal person is the body corporate constituted by the series of persons by whom the Crown is worn.

So why perpetuate the old legal forms and their medieval personification of the State? One explanation is that Salmond is trying here to avoid the contemporary debates about whether the State as a juristic person is an *artificial* or fictitious person created by law.[53] To admit that the juristic manifestation of statehood is an artificial creation of law may come too close to making a concession that the law is prior to the constitution, and that the law can indeed define the State.[54] If the State is the source of law it cannot depend on law for its legal personality. Salmond reassures us that we already have a *natural* person who has the legal capacity to act on behalf of the State for all practical purposes and do not need artificially to create one. Moreover, the moral features of such a person remain outside of the law.

Volume I of Blackstone's *Commentaries*, above n 34. The feudal language connoting status may also owe something to Blackstone: see Cairns, above n 36, esp 346–348.

51 Salmond (1 ed), above n 42, 362.

52 Ibid, 364–365.

53 Paul McHugh gives this passage a different reading. He suggests that Salmond "barely suppressed [his] impatience" with such a result as it did not accord with reason: see above n 47, 760. That may well have been so. He was certainly concerned by doctrines such as the indivisibility of the Crown which had the consequence that conflicts between the dominions and the United Kingdom could only be resolved by political rather than legal means: see for example *Sloman v Government of New Zealand* (1876) 1 CPD 563. What impatience there may have been was never made wholly explicit — this particular passage remains in all seven versions that Salmond personally edited. And why, if he was concerned about the turn the law had taken, did he not refer to Maitland's work, if not in his first edition, then in subsequent editions?

54 Again the Austinian commitments contained within his view are apparent. As against the sovereign (the determinate body in the habit of obedience) constitutional law has the character of positive morality only and is enforceable only by moral sanctions: J Austin *Province of Jurisprudence Determined* (Weidenfield and Nicholson, London, 1954) 215. Alex Frame finds a reference to the State "as a corporate body whose function is the maintenance of right by might" in John Salmond *The First Principles of Jurisprudence* (Stevens and Haynes, London, 1893) 118. But this description does not seem to have survived in Salmond's later work: see Alex Frame "Salmond, Necessity, and the State", above n 46, 723.

We might wish, as later scholars such as Stoljar have done, to explain the legal position in purely pragmatic terms. The King, as a placeholder for the State, is merely acting here as a *property holding* or *fund holding* entity. What matters is not that the King represents a unity but that the property of the kingdom remains intact and unified. By itself that tells us nothing about the internal rules and relationships that govern how that public property is regulated or managed or about the constitution that constitutes this property holding person or entity. It is these latter matters that explain the important political relationships between government and governed. Reference to the King as legal person here is simply a way to separate the corporate purse from the purse of its members. All those other undoubtedly important questions remain in the realm of political or constitutional fact but need not spill over into the (external) legal identity of the "fund holder".[55]

I suspect these concepts go much deeper for Salmond, however, than a reference to the King as a matter of mere legal form. They *do* represent for him substantive elements of the political relation — in contradistinction to the views of other of his contemporaries about the prevailing political facts and their relationship to law. Salmond must have been aware, if not for the first edition of *Jurisprudence*, then for subsequent editions, of Maitland's critique published in 1901. Maitland viewed the idea of the King having two bodies in one person (or indeed two legal persons in one natural person) as "metaphysiological nonsense".[56] The real target of Maitland's criticism, however, was that the personification (or, as he satirised it, the "parsonification") of the King as a corporation sole (while recognising kingship as an office) captured little of the political and social realities of power.[57] Maitland explicitly sought to reflect and reconcile the sociological, the political and the philosophical in the legal form and sought thereby to bring together social and political thought. He wanted the legal conception of the State to include "the people". He preferred to conceive of the State as a corporation aggregate and argued that this was not incompatible with hereditary kingship: "The King and his subjects together compose the corporation, and he is incorporated with them, and they with him, and he is the head and they are his members".[58] The way in which we imagine the legal relation between the Crown and the people should in some way unite their wills. Common law discourse and political discourse ought to be reunited. This would once again restore congruence between the common law and political thought.

Without directly engaging with Maitland, Salmond is unwilling to go this far. One possible explanation is that he disagreed about what the political facts about the relationship between the people and the State actually were. He is resolute that: "The citizens of the state are not fellow

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55 S Stoljar *Groups and Entities* (Australian National University Press, Canberra, 1973).

56 *Case of the Duchy of Lancaster*, above n 26, 213.

57 Maitland, above n 29, 245.

58 Plowden quoted in ibid, 266. Compare Blackstone's formulation in *Commentaries*, above n 34, 153, where he describes the "King's Majesty sitting in his royal political capacity" together with the Lords spiritual, temporal and commons as together constituting the "great corporation" or "body politic" of the kingdom.

members of one body politic and corporate, but fellow subjects of one sovereign lord".[59] Salmond thought that conceiving of the Crown as a corporation aggregate was incompatible with monarchical government, which form of government *necessarily* relegated citizens to the status of fellow subjects rather than fellow citizens of one body politic.[60] While he conceded that the community of the realm was an organised society (at one place he refers to the people as an incorporate community)[61] he does not view it as capable of being a person or body politic. He sought to mitigate this by referring (rather vaguely as Austin had done) to the King's "trusteeship" over the property and rights of the realm.[62]

This is where the apparently arcane differences in how the Crown is conceived begin to matter. Salmond is not only attracted to the feudal place-holder as a matter of form. For him the relationship between the State and subject is a personal one: "… the bond between a state and its citizens is personal and permanent, instead of merely local and temporary".[63] Citizenship, he argued, has its source in feudal law and is distinct from, though influenced by, Roman law republican notions. This resort to feudal concepts by a lawyer in a far flung part of the empire at the end of the long 19th century is, on reflection, completely understandable: such feudal concepts were essential to the colonial endeavour. It is upon this relationship between King and subject that was founded the idea that British settlers could take the common law with them — it was a personal rather than territorial relationship between King and subject and without any obvious Lockean elements of the people consenting to be so governed.[64] It enabled the colonial Crown to transcend both domestic constitutional and international law — the colonial Crown retained personal power over its subjects wherever they went.[65] The rights and liberties of British subjects did not include a right to inherent

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59 Salmond (1 ed), above n 42, 362. It is significant that this statement was made in 1902!

60 This account remained until at least John Salmond *Jurisprudence* (6 ed, Sweet and Maxwell, London, 1920). See further J Salmond "Citizenship and Allegiance" (1901) 17 LQR 270, 271.

61 Salmond (1 ed), above n 42, 114.

62 Ibid, 363.

63 Salmond "Citizenship and Allegiance", above n 60, 271.

64 Salmond acknowledged that the basis was changing to become a territorial one: see above n 42. Many, if not most, of the early European settlers (who were economic migrants) are unlikely ever to have voted in the United Kingdom — they did not have a political relationship with the King in that modern sense. See further Paul McHugh's extensive and contextualised discussions of the move from jurisdictional to territorial sovereignty, for example Paul McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* (PhD thesis, University of Cambridge, 1987) and Paul McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, Oxford, 2002). See also BH MacPherson *The Reception of English Law Abroad* (Ligare, Brisbane, 2007).

65 Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens, London, 1966) 151: "At Common law British subjects who settle in a country without an organised government carry English law with them; and though the Crown has a constituent power, it cannot make ordinary laws for them. They appear to have

self-government: it was never recognised that unauthorised settlers could establish any form of government except with the authority of the Crown.[66] By article three of the Treaty of Waitangi the British purported to extend this relation between King and subject to include Māori. At the same time this extended obligations of fealty: laws of treason and sedition are premised on these ideas.[67] The disagreement between Maitland and Salmond about whether the people can be incorporated with the Crown is a disagreement about the substance of those *political* relationships: those relationships tended to look different when viewed from the colonies.

Most significant for contemporary New Zealand law was Salmond's approach to the relationship of the King to sovereignty and property. There was nothing insubstantial or merely place-holding about the King in his political capacity maintaining the position as property-holding entity — property holding was *the* political relation connoting sovereignty, including notions of both ownership and governorship. Mark Hickford has established that Salmond viewed the Treaty of Waitangi and not the common law as the source of political or moral claims to rights on the part of Māori.[68] Such rights required legislative implementation to give them effect. He did not view "native usages and customs" as being governed by or able to be governed by the technical rules of English common law or the principles of Roman law.[69] Roman law principles could, however, be used to serve the Crown in the new territory. He understood the Crown's ownership of tidelands to be in a trustee capacity subject to public rights of navigation and fishery (*ius publicum*). Such public rights could not be affected by private law rights unless legislation granted otherwise.[70]

These starting premises have had very real consequences for the legal doctrine. Chief Justice Elias recognises the practical importance of Salmond's commitments for his political and legal practice in *Attorney-General v Ngati Apa* (the foreshore and seabed case).[71] Salmond was not only

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some sort of inherent right to expect the Crown to grant them the means to legislate for themselves, but being unenforceable it cannot be a legal right".

66 See ibid, 155, discussing whether the agreement of March 1840 between the settlers on the New Zealand Company's first ship and the chiefs at Port Nicholson would have been enforceable.

67 See Keith Sorenson "A History of Maori Representation in Parliament" in Electoral Commission "Report of the Royal Commission of Inquiry into the Electoral System" (Government Printer, Wellington, 1986) Appendix B, which shows that some Māori, including women, would have enjoyed voting rights before the Māori seats were created (on the basis of their individual landowning). But Māori did not always enjoy the same political rights as other subjects as Hanna Wilberg's work shows: see Hanna Wilberg "Facing Up to the Original Breach of the Treaty" [2007] NZ Law Rev 527.

68 Mark Hickford "John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920", above n 40.

69 Ibid, 908.

70 Ibid, fn 350, in relation to the Rotorua Lakes proceedings.

71 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, paras 26–27 (CA) Elias CJ.

a jurist but an influential lawyer "largely responsible for drafting the major restatement of Māori land law in the Native Lands Act 1909"[72] and "Solicitor-General in the critical years at the beginning of the 20th century when questions of customary title to lands and fisheries came before the courts".[73] Salmond equated sovereignty with ownership for colonial law purposes. The Crown not only gained sovereignty but dominium: "He considered that the consequence of Crown ownership of all land arose on the introduction into New Zealand of English law with its system of estates derived from feudal land tenure".[74] These were the legal background norms against which Salmond understood that Parliament could enact legislation. This position was consistently argued in litigation by successive Solicitors-General for the Crown (notwithstanding Privy Council views to the contrary) and provided the background rules about legal ownership against which legislation was made throughout the 20th century in New Zealand. It was not until the Court of Appeal's ruling in the *Ngati Apa* case that the common law background rules were decisively restated making Crown property holding *subject to* Māori customary title.[75] This represents a contemporary rethinking of the Crown and its relation to property and authority.

In so far as the common law contained a political philosophy, according to Salmond, however, it viewed the Crown and not the people as the source of authority. If Salmond would have conceded that the people were the *ultimate* source of authority then that would only be true as a matter of prior constituent power outside of the legal sphere.

On Salmond's view of things, the Crown is the source of legal authority. In terms of his understanding, Mrs Turia, while Associate Minister exercising power on behalf of the State, is "we" the Crown, as most of the rest of us are not. That is for the simple reason that, in that office, she enjoyed the capacity of directing the activities of the body politic and was "an agent through which the State acts".[76]

D Reviving Ideas of Trust

Salmond, like Austin, does make some attempt to reconcile his jurisprudential conceptions with a less authoritarian version of constitutionalism by his use of the trust analogy. He imagines the Crown as holding property and otherwise acting *in trust* on behalf of all the people. It is an idea reflected in some early colonial legislation though it was much mocked as an inadequate fiction by

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72 Ibid, para 26 Elias CJ.

73 Ibid.

74 Ibid, para 27 Elias CJ.

75 Ibid.

76 See Salmond (1 ed), above n 42.

Maitland who, as we have seen, wanted greater congruence between the political and legal conceptions.[77]

The idea of the Crown or State as acting in trust at once allows the Crown to exist apart from the people, to exercise a will of its own, and yet requires it to act in the interests of its subjects. Of course, then, as now, the critical questions were "whose interests" and "which people"? How far do trust analogies help us when different interests conflict?

Historically these controversies arose in quite stark ways and tended to privilege the United Kingdom Parliament at the expense of the people of the overseas territories. In colonial law, Roberts-Wray reminds us: [78]

> In all cases, a fundamental difference between independent and dependent countries is that, in the latter, the Queen always acts on the advice of Ministers of the country on which they are dependent. Local Ministers (if such there are) have no access.

These ideas too have been revisited in the contemporary cases in an attempt to redress some of the inequities of the past.

The question of whose interests the Crown ought to represent was exactly the point in issue in the recent case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*.[79] In that case Sedley LJ radically revisits those common law ideas in an attempt to reflect modern sensibilities about political representation. He suggests that the Crown in right of the British Indian Ocean Territory has no power to address the interests of United Kingdom taxpayers who would have to fund the resettlement of the Chagossians or to take account of the defence and security interests of the United Kingdom and her allies.[80] Considerations of security:[81]

> … [lie] beyond the objects whether expressed in terms of peace, order and good government or in terms of the legitimate purposes of colonial governance for which ministers are entrusted by law with the use of the prerogative.

This is an attempt to use common law notions of trust to instantiate democratic norms. The litigation is ongoing at the time of writing. What may be distinct about this use of the trust analogy is that the Islanders enjoy a unity of interest as a separate and identifiable polity. The existence of such a unified polity cannot, however, always be assumed. Where there are rival polities the trust analogy encounters further difficulties and complications.

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77 Maitland, above n 29, 265.

78 Roberts-Wray, above n 65, 81.

79 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, above n 11.

80 Ibid, para 62 Sedley LJ.

81 Ibid, para 69 Sedley LJ. See also ibid, para 85 Sedley LJ.

New Zealand cases have attempted to construct a special relationship of trust — not between the Crown and the polity as a whole, but rather between the Crown and different groupings of Māori (iwi and hapu) by adopting the concept of the fiduciary relationship.[82] Lord Cooke regarded the Treaty of Waitangi as having "created an enduring relationship of a fiduciary nature akin to a partnership"[83] and later, in less direct terms, as providing "major support for such a duty".[84] From a Māori perspective, such a conception relegates the Crown to "they (our treaty partner)" not "we (the State or constitutional forms as constituted by the Treaty)". It re-imagines the respective parties at the moment of founding: reviving and restoring Māori constituent power — rather than a constituted power where everyone is "a King's subject". Of course the purpose of this is to give legal and political priority to Māori claims and to remove these from the realm of political horse trading endemic in our constituted democracy. It is a bold attempt by the courts via the common law to build a new, more pluralist political philosophy. Law, and not the King, becomes the source of authority and constitutionalism.

It is in this sense, of the Crown as fiduciary partner, in which I think Mrs Turia was referring to the Crown as something distinct from her position as Associate Minister of the Crown. She can be taken to be expressing political resistance that is consistent with a normative claim that Māori still possess the constituent power to reassert themselves to unsettle and remake the constituted authority of the State.

In common law constitutional terms this position has a respectable legal and theoretical basis. However, it is unstable because, for reasons I have already explored, it is not clear who exactly is on the other side of this relation. It purports to refer to the constituent power of Māori at the moment of the colonial encounter but ignores the difficulties surrounding how the Crown and its authority are to be conceived. The Crown in right of the United Kingdom Parliament no longer has any legal or political responsibility in these islands. For most purposes most New Zealanders would reject notions of the Crown as the source of authority and law. Instead we would tend to think of the Crown as representative of a democratic polity that includes both Pakeha and Māori. Does *that* polity also retain the power to unmake the constitution — and itself retain constituent power as part of the *political* constitution?

So far, the political constitution has accommodated this experiment, that conceives of the Crown as if it were in a fiduciary relationship with Māori, in the ways in which the executive and

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82 But see the recent case in which the Court of Appeal expresses caution about the applicability of these concepts: *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318, para 81 O'Regan J for the Court.

83 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General (Sealords case)* [1993] 2 NZLR 301, 304 (CA) Cooke P for the Court.

84 Ibid, 306 Cooke P for the Court.

Parliament has processed Treaty settlements.[85] Deeds of settlement between the Crown and different iwi and hapu have been enacted by Parliament without amendment in order to give effect to the common law Crown's obligation to negotiate in good faith with Māori. It is too soon to say whether, and for how long, this will endure. This is a locus of tension between the rival legal and the political constitutions in contemporary Aotearoa / New Zealand.

E The Crown as Source of Property and Authority

I have tried to paint a complex picture of how the Crown was conceived for the purposes of authority and property in New Zealand. Māori were by no means alone in maintaining a personified conception of the Crown, and a personal relationship between the Crown and subject. Salmond, in his writing and practice, retained a place at law for a personified State which resided in the natural person King and which was the source of authority and property. He, unlike some of his contemporaries such as Maitland, does not conceive of the State's legal authority as given by "the people" but rather suggests that the people are subjects rather than citizens. These personal, feudal and potentially authoritarian ideas seem outmoded for their time. It is only his separation of the legal position from political fact, and his position that political fact is prior to constitutional law, that makes it possible for him to adopt these views. Māori claims under the Treaty of Waitangi do not constrain the Crown as a matter of law but require legislation to give them legal effect. They too are part of the political constitution. The political constitution is the product of political morality and is not subject to law (or the business of courts) and hence *need not* be taken in by the common law — completely or incompletely. Moreover, the incremental, episodic, and opportunistic nature of common law reasoning makes this divergence between the common law and political accounts of the constitution even more likely.

Common law writers and practitioners, more generally, showed a remarkable tenacity in perpetuating personal and feudal notions of kingship throughout the 19th and 20th centuries — despite the enormous *political* changes during that period.

These feudal notions were not merely the by-product of British imperial ambition but the British Empire was the very crucible in which these notions were forged (or reforged) in the 19th century.[86] The 17th century revolutionary struggles to remake government by the consent of the people would have to be fought again and quite differently in the colonies.

The idea of the Crown at "home" and of the Crown abroad had long differed and for good reasons. Governments and colonial governments had to tread a very careful path — maintaining the central role of the King in Parliament at home and, for practical reasons, allowing the colonial

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85 See Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law* (Oxford University Press, Oxford, 2006) 128.

86 That is domestic law is similar to international law in this respect — see Antony Anghie *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, Cambridge, 2005).

Crown much broader licence abroad.[87] Ambiguity about the meaning of the Crown was necessary to maintain this careful balance. Having lost the American colony (and seeking to draw lessons from the loss of the Roman Empire), Britain became even more rigorous in defending and strengthening its internal institutions and particularly that of the King in Parliament. For the present it is sufficient to say that the sense of a shared constitutional history throughout the Empire — so much the staple of the modern common lawyers' constitutional imagination — does not bear scrutiny.

In our time we have witnessed a modern revival of some of the pre-democratic versions of Crown authority for the purpose of remedying past wrongs. Instead of using ideas about the Crown's trustee role to defeat the private rights of Māori (as had happened formerly), trust and fiduciary ideas have been revived for the purpose of conferring private rights on Māori. Ironically, the Crown, for these purposes, is conceived of in politically anachronistic terms for the purposes of achieving modern political imperatives. Ambiguities have been exploited once more — this time for different ends.

III RESPONSIBILITY

Up until now we have been discussing the meanings that have been attributed to the Crown primarily for the purposes of *acting* and holding property. An altogether different story needs to be told about how the Crown has been imagined for the purposes of locating legal responsibility. The Crown does have a juristic or legal manifestation for the purposes of property holding, but has up until very recently enjoyed widespread immunities for responsibility purposes. This too has its roots in medieval thought and in the idea that the King's will came from God. Perfection is attributed to the King as a representation of the body politic: the King can do no wrong — or at least the King can do no wrong but his officials can. The meaning of the immunity too enjoys different nuances: it is sometimes understood as "the King, being subject to God, *would not* rather than *could not*, do

87 JAG Pocock *The Varieties of British Political Thought 1500-1800* (Cambridge University Press, Cambridge, 1993) 295 suggests that Britain's constitutional concerns at home had *long* been quite distinct from its interests in its other territories: "When the [American] colonies had begun challenging the omnicompetence of the king-in-parliament, they had been sternly told that the latter's sovereignty was absolute, irresponsible and indivisible; a reply as Tory in their ears as it was Whig in the mouths that uttered it". Great Britain had lost the American colony rather than give way to its claims to self-government by means of some kind of confederation. That would risk the internal unity of Britain's "domestic realm" (as the Scots had learned in 1706). Those who rejected the idea of government without representation by the King in Parliament at Westminster, and argued instead for some kind of confederation, "proposed to separate the King from each of his legislatures in order to make him the sole connection between them all, and it conveyed an alarming message that law, the rights of Englishmen beyond seas and their titles to lands in America emanated from the King's sole person and not from his person in Parliament": ibid, 263. Ironically, as Josiah Tucker was to notice at the time, this created "an interesting affinity between the Lockean arguments colonists were by that time putting forward and a pre-modern or even feudal view of the relations which must arise between men in the state of nature. There was no middle way between asserting the King's purely personal authority over the colonies and casting off that authority altogether": ibid, 265.

wrong".[88] Whichever version one ascribes to, kingly perfection does not sit easily with democratic expectations and at a time when we no longer think of our earthly authorities as divinely authorised. In modern times we expect the Crown to owe not only moral but legal duties to its citizens.

Maitland's attempt to update British constitutional ideas by suggesting that the body politic ought to include the people, however, does not automatically solve anything in respect of issues of responsibility. Even the Levellers resisted the equation of Parliament's will with the will of the people, fearing that if government was regarded as deriving its authority from the people it would be (even) more difficult for the people to control and direct a government that purports to act in its name.[89] The lawyers of the French Republic, also thought that citizens should not be able to sue the State — but for the reason that the State manifests the will of the people and therefore cannot wrong the people.[90] The lawyers of the American Republic, too, successfully argued to retain sovereign immunity — though perhaps for more pragmatic reasons. Imagining the State and the people as an organic whole, as Maitland suggested, ultimately may not resolve the practical issues that arise around holding States responsible. The problem is not necessarily one caused by monarchical government. There are other consequences of thinking of the State as "they" and not "we" generally, for both Māori and Pakeha.

Briefly, the way in which the common law attempted to reconcile these issues with its deeply held conceptions about the Crown was not to locate legal responsibility in the Crown itself but rather in the State in its most disaggregated form — in its officials and other emanations. Tort law developed this first. The structure of judicial review cases, which understands the Crown as enforcing the law against its officials, builds on this conception. Reform, which has come slowly, has come from Parliament and has been incompletely theorised.

So what relevance does this very brief historical discussion have to the issue of the responsibility of the Crown under the Treaty of Waitangi? First, the common law does not have a great deal of experience of holding the Crown qua Crown responsible (by which I mean legally liable) for deliberate wrongdoing. It has tended to ring fence an area of immunity belonging to the Crown understood in a highly abstract way while holding particular agents responsible. The

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88 This is the view that the King is subject to the same obligations as his subjects but is procedurally immune from suit: see J Reinhardt "The Status of the Crown in the Time of Bracton" (1943) 17 Temple University Law Quarterly 242 and the discussion in J McLean "The Crown in Contract and Administrative Law" (2004) 24 OJLS 129, 143–144.

89 Loughlin "Constituent Power Subverted", above n 25, 36. On the Levellers, see Sir Stephen Sedley "The Spark in the Ashes: the Constitutional Ideas of the Levellers in the English Civil War" in Claudia Geiringer and Dean Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008, forthcoming).

90 Leon Duguit *Laws in the Modern State* (Frida Laski and Harold Laski trans, Allen and Unwin, London, 1921) 200 [trans of: *Les Transformations du Droit Public*].

rhetorical stance of the universities to the effect that they have obligations under the Treaty of Waitangi in many ways embodies all that is aspirational and devolved about public power and purposes as *traditionally* understood in the common law. This is how "moral" duties of the State have usually been instantiated. "We" are the Crown for responsibility purposes. In many ways that is a very real expression of hope and good faith.

In important respects the emerging law and practice arising out of the Treaty of Waitangi jurisprudence that seeks to hold the Crown qua Crown responsible is making new ground in the common law. As with the developing law arising out of Bill of Rights damages, lawyers, judges and practitioners are attempting to incorporate rules more akin to international law rules that *do* attribute conduct to the Crown or State. Traditional common law rules would resist the attribution of such conduct and maintain the moral purity of the abstract Crown. The efficacy of these measures depends on the complex internal accountability relationships between and within government — something which common law constitutionalism has routinely ignored or marginalised.[91] To put the point more directly, the obligations of universities under the Treaty of Waitangi should be mandated and paid for by central government. The solutions may well lie in the unglamorous realm of public management rather than in the common law.

IV CONCLUSION

Mrs Turia's reference to the Crown as "they", as if it were something quite apart from her role as Minister, is an act of political resistance. It can be regarded as a claim on behalf of Māori to constitutive power to remake the constituted authority of the State. It refers to the Crown at the moment of entering the Treaty of Waitangi with Māori. As such it challenges the standard account of New Zealand's political constitution according to which the Minister is part of "we the Crown" and acts on behalf of the Crown. This ought not to be dismissed as a simple misunderstanding of the constitution on the former Minister's part. It builds on ambiguities and complexities contained in the common law account of the Crown. But while such an approach may be regarded as a challenge to the political constitution, the political constitution also poses a threat to this and other common law accounts. Under the political constitution "we the people" (meaning Māori *and* Pakeha) also claim to enjoy constitutive power.

Locating legal responsibility in the abstract Crown is still relatively novel where the common law is concerned. The universities' willingness to take "responsibility" is consistent with the traditional common law approach that tended to locate State responsibilities in officials and other emanations. Where the Treaty of Waitangi is concerned the real work needs to be performed in

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91 But see Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, Auckland, 2004) and Geoff McLay's ongoing work into the impact of tort liability on government departments. Sir Kenneth, of course, made a huge contribution to these issues during his time at the New Zealand Law Commission.

translating the responsibilities located in the abstract entity to its distinct emanations — that is by focusing on the internal workings of the constitution where the common law does not tend to reach.

There is no single or simple answer to "who is the Crown generally" or "for the purposes of the Treaty of Waitangi". The common law itself contains distinct and competing versions of the Crown which are often the sites of deep political contestation — and, indeed, of some of the paradoxes inherent in constitutional law itself. The different answers convey different conceptions of the political relations between the Crown and the people. Perhaps it is time once again to attempt to bring the legal and political aspects of these relationships together — but we ought not to oversimplify or to underestimate the enormity of the task or the subtlety required in achieving it.