PROPERTY AND THE CONSTITUTION

Property and the Constitution

Edited by
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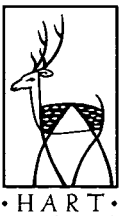

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Foreword

by

Lord Cooke of Thorndon

Baroness Thatcher would not enjoy this book. It may be inferred that none of the dozen contributors would for a moment entertain seriously her dictum that there is no such thing as society. Without immediate access to *The Downing Street Years* or *Woman's Own* I cannot comment on whether the severity of that apparently simplistic view was convincingly qualified by the context. By contrast, however, no contributor could conceivably be accused of over-simplification and all are concerned throughout with the *social role* of the concept of property.

A range of points are tellingly made. Some of the more accessible ones might be roughly summarised as follows, with their principal proponents identified. But these are only starting points leading to much more developed theses to which a foreword cannot attempt to do justice.

'Property' can loosely be used to mean that which is the subject of property but, more accurately, the term denotes a relationship between a person and an asset, carrying rights in that asset on the strength of which it can reasonably be said that the person owns it or shares in its ownership. While the details of these rights within particular states obviously vary and may be of great complexity (Geoffrey Samuel), the recognition and preservation of substantial rights of this kind is a necessity of civilisation (J. W. Harris). A division into public and private property is artificial. Property may be used not merely as a restraint on government, but as an instrument of government, by attaching certain public obligations to private control; and it is socially dangerous to assume that governments have a natural right to privatise everything (Janet McLean). The limitation of property rights is as important as their recognition (Kevin Gray and Susan Francis Gray, in a particularly informative paper highlighting North American jurisprudence on the rise of privately-controlled shopping malls and residential estates).

Although property as such was deliberately omitted from the New Zealand Bill of Rights 1990 because of a fear of generating disputes, there are advantages in constitutionalising property: then it is revealed as a right standing alongside others and requiring to be reconciled with them. It is not something precedent to all other human rights, as the common law is sometimes seen to suggest (Gregory Alexander and Andre van der Valt). Thus family rights may influence the scope of property (Tom Allen). And I cannot resist the thought that the majority decision of the House of Lords in *Hunter v Canary Wharf Limited*[1] may be less defensible in the light of the incorporation of the

[1] [1997] 2 All E.R. 426.

European Convention on Human Rights into United Kingdom domestic law.

Some of the papers have a special New Zealand significance. Jeremy Waldron, a distinguished New Zealand expatriate academic lawyer based at Columbia University, warns against trying to redress unjust acquisitions of property in the past by redistributions working equal injustice in the present; but he draws a rejoinder from M. M. Goldsmith to the effect that this is no excuse for leaving an established wrong untouched. In more specific terms Alex Frame points to the paradox that the catalyst for the current resurgence of Maori communal property was the vogue for privatisation of assets previously held by the Crown; while John Dawson in an account of the Ngai Tahu settlement demonstrates how dramatic has been that resurgence. Already Ngai Tahu and Tainui have become major players in the New Zealand economic scene. And the Maori share of fishing quota is solid testimony to a genuine, if belated, acceptance of the fiduciary duty owed by a colonising power to an indigenous people.

In the main the contributors represent various shades of liberal opinion, but Michael Robertson argues for a frankly socialist approach. If anything is missing from this collection, it is an unrepentant and unqualified market philosophy of property. The most vivid phrase in the book comes from a non-contributor, Jeremy Bentham, who is quoted by Jeremy Waldron: '... our property becomes part of our being, and cannot be torn from us without rending us to the quick'. It was this truth that led the Privy Council, in a case which I had forgotten but has been unearthed by Tom Allen, *Fok Lai Ying v Governor in Council*[2], to hold that a right to full compensation does not prevent a compulsory acquisition from being arbitrary. As to what justifies a compulsory acquisition or a limitation of rights, perhaps in the end it is all, as lawyers like to say, a question of fact and degree—though philosophy such as is expounded here may help to shape solutions.

Janet McLean, with the indispensable financial support that she acknowledges in her preface, succeeded in assembling at a conference in Wellington a select team of specialists, mainly from outside New Zealand (Durham, Cornell, Exeter, Cambridge, Greenwich, Oxford, Kent, New York, South Africa). This was something of a triumph of logistics, but it was more. Having written a number of forewords to New Zealand law books, I can say that what distinguishes this one is that it presents the carefully considered and thought-provoking work of authors whose professional lives are centred, at least in part, on examining concepts in depth. I congratulate Janet McLean on her initiative. It has led to a compilation appropriate in quality and the subject matter to the emphasis traditionally placed by this University on constitutional study. The book will be enduring evidence of her outstandingly constructive service as Director of the New Zealand Institute of Public Law.

Law School,
Victoria University of Wellington
May 1999

Robin Cooke

[2] [1997] 3 L.R.C. 101.

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Preface

The papers in this collection, were presented at a conference held in Wellington on 17 and 18 July 1998 under the auspices of the New Zealand Institute of Public Law at the Faculty of Law, Victoria University of Wellington. Geoffrey Samuel and Tom Allen made their contributions to the topic after the event.

Bringing people from different parts of the globe together for a couple of days is often a difficult and demanding task. In this, I was fortunate to have the financial assistance of the Victoria University Foundation and the New Zealand Law Foundation, and accommodation and support from the Law Faculty at Victoria University. I was the happy recipient of encouragement and advice from Michael Taggart, Stuart Anderson, the Rt Hon. Justice Keith, Dr Alex Frame and Alison Quentin-Baxter. Thanks also go to Victoria Russell and Fiona Stuart for their help in preparing the papers for publication, and to the law libraries at Victoria and Otago Universities. Most of all, I am grateful to Denise Blackett, the administrator of the Institute, for the characteristically thoughtful, efficient and committed way in which she contributed to the organisation of the conference and to the preparation of the papers for publication.

The contributors have, without exception, been supportive of and enthusiastic about this project—and in many cases had to come thousands of miles to attend the conference. I thank them, and Lord Cooke of Thorndon for agreeing to write the Foreword.

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Stevenson *v.* Beverley Bentinck [1976] 1 WLR 483 57
Stranahan *v.* Fred Meyer Inc. 958 P2d 854 (1998) 27, 28, 30
Street *v.* Mountford [1985] AC 809 68
Streeter *v.* Brogan 274 A2d 312 (1971) 28
Streetwatch *v.* National Railroad Passenger Corp. 875 F Supp 1055 .....20, 27, 28, 31
Sutherland *v.* Southcenter Shopping Ctr Inc. 478 P2d 792 (1970) 25

Taranaki Fish and Game Council *v.* McRitchie [1997] DCR 446 237
Tate & Lyle Industries Ltd. *v.* Greater London Council [1983] 2 AC 509 167
Te Runanga o Muriwhenua *v.* Attorney-General [1990] 2 NZLR 641.....230
Te Runanga o Muriwhenua *v.* Te Runanganui o Te Upoko o Te Ika Association [1996] 3 NZLR 10 214
Te Runanga o Wharekauri Rekohu Inc *v.* A-G [1993] 2 NZLR 301 .....212, 223, 230
Te Runanganui o te Ika Whenua Inc Society *v.* Attorney-General [1994] 2 NZLR 20 230
Te Waka Hi Ika o Te Arawa *v.* Treaty of Waitangi Fisheries Commission 4/8/98 HC Auckland, Unreported 214, 220
The Queen in Right of New Brunswick *v.* Fisherman's Wharf Ltd. (1982) 135 DLR 3d 307.....110
The Queen *v.* Committee for the Commonwealth of Canada (1991) 77 DLR (4th) 385.....5, 13, 28, 29
The Queen *v.* Symonds (1847) [1840-1932] NZPCC 387 232
The State of New South Wales *v.* The Commonwealth (1992) 177 CLR 106.....131, 132, 133
The State of South Australia *v.* The Commonwealth (1996) 187 CLR 416 ...131
The State of Victoria *v.* The Commonwealth (1996) 187 CLR 416.....131
The State of Western Australia *v.* The Commonwealth) (1996) 187 CLR 416 131
Tillman *v.* Distribution Systems of America Inc. 648 NYS2d 630 35
Tock *v.* St. John's Metropolitan Area Board (1989), 64 DLR (4th) 620 (SCC) 166, 167
Toms *v.* Tiger Lanes Inc. 313 So2d 852 (La Ct App 1975), cert den 319 So2d 443 27
Transvaal Agricultural Union *v.* Minister of Land Affairs 1996 (12) BCLR 1573 135
Treaty Tribes Coalition *v.* Urban Maori Authorities [1997] 1 NZLR 513 ...214
Trustee of the Estate of Eric Bowe (A Bankrupt) *v.* Bowe (1994) [1998] 2 FLR 439 .....163, 164
Union of India *v.* The Metal Corporation of India Ltd. AIR (54) 1967 SC 637.....121
Uston *v.* Resorts International Hotel Inc. 445 A2d 370 (NJ 1982).....27, 28
Vajravelu Mudaliar *v.* The Special Deputy Collector for Land Acquisition, West Madra AIR (52) 1965 SC 1017.....121, 122
Velosa Barreto *v.* Portugal Ser A no. 334 (1995) 156
Waitaha Taiwhenua o Waitaki Trust *v.* Te Runanga o Ngai Tahu 17/6/98 HC Christchurch, Unreported 220
Walker *v.* Georgetown Housing Authority 677 NE2d 1125 35
Washington First *v.* United Kingdom, filed 30 October 1998 24
Waverley Borough Council *v.* Fletcher [1996] QB 334 58
Wet Gravel case (Naßauskiesungsentscheidung) 108

Wheeler *v.* J J Saunders [1996] Ch 19 166
White's Case (1558) 2 Dyer 158b, 73 ER 343 28
Wilhoite *v.* Melvin Simon & Associates Inc. 640 NE2d 382 (1994) 21
William G Mulligan Foundation for the Control of First Aid Squadders and Roving Paramedics *v.* Brooks 711 A2d 961 34
Wills' Trustees *v.* Cairngorm Canoeing and Sailing School Ltd. 1976 SLT 162 13
Wilmington Parking Authority *v.* Land With Improvements, 521 A2d 227 (Del 1986) 39
Wolin *v.* Port of New York Authority 392 F2d 83 (1968) 28
Wood *v.* Leadbitter (1845) 13 M & W 838, 153 ER 351 ..... 14, 27
X Ltd. *v.* Morgan Grampian Ltd. [1991] 1 AC 1 58
X *v.* The Netherlands (1971) 14 Yearbook 224 148
X *v.* UK (1970) 13 Yearbook 892 148

1

Property as Power and Resistance

JANET McLEAN*

I. INTRODUCTION

Property has always had a public dimension in at least two separate and related senses—as a means to distribute power; and as a means of resistance against governmental power. That is, property can be regarded both as a method of conferring authority and as a counterpoise against such authority. Many of the essays in this collection will focus on the latter, evaluating the various rationale (in terms of both positive and negative liberty) for the constitutional protection of private property and deriving therefrom the proper constitutional limits of government authority over such property. Among these explanations of the constitutional role of private property, for example, is the view that property offers a means of resistance against a tyrannical democratic majority, and also confers on people the independence necessary for proper citizenship. In this introductory chapter I want to relate the idea of "property as authority" to "property as resistance" in a slightly different way. Property regarded as resistance, as defining a private zone of autonomy, tends to dominate contemporary discussions. But what of the use by governments, or their agents, of property as a means of exercising authority: pursuing public policy objectives by divestment or conferring property on "private" bodies as partial agents for the state? Should the *Crown* as *owner* be able to enjoy property both as a means of exercising authority and as creating a zone of autonomy or means to resist interference? Under those circumstances, what is the proper analysis of the governmental/proprietary distinction? And what does it mean for property to enjoy the epithet "public"?

The Romans traditionally separated *imperium* from *dominium*—the former being the power to govern, and the latter being the power of ownership.[1] Such a distinction resonates with the much later Lockean understanding of property as a neutral de-politicised instrument detached from obedience to a sovereign.

* Thanks to Michael Robertson, Michael Taggart, Tim Mulgan, Stuart Anderson, Ingo von Münch and the students in my 1998 honours seminar at Victoria University of Wellington. My theme is taken from the discussion in Geoffrey Samuel, *The Foundations of Legal Reasoning* (Antwerp, Maklu, 1994), p. 246.

[1] Geoffrey Samuel discusses how the Roman conception was modified by English customary law in Chapter 3, below.

Imperium is a public matter and *dominium* a private one. The distinction accords too, with classical Austinian understandings about governance by legislated command and delegated authority. In modern constitutional law terms we thus consider the sovereign's power to regulate to be a public law matter and the Crown's power to hold property to be defined by private law—the Crown having the same powers in this regard as a natural person.[2]

But there are other strongly competing visions of governance. The struggle of ownership and ruler-ship to free themselves of each other is one of the great themes of Medieval English legal history. Medieval views about property thoroughly conflated property and authority. The Crown was sovereign over the whole of England because, according to the fiction, it had once owned all the lands.[3] The tenure system had the effect of emphasising social, economic and thus political relationships between persons and property. Even as late as the eighteenth century, Crown Charters would not distinguish between grants of property and delegated public powers—or even speak in those terms: property itself was the instrument of governance. And later the statutory (mainly utility) corporations of the early nineteenth century would be referred to as "little Commonwealths" or "little Republics" using "private" property to further the work of governments.[4]

The separation of *imperium* from *dominium* then, was never complete. It is equally difficult to sustain in the modern state. Governments pursue their goals through the use of economic instruments, by contracts, and by imposing conditions on the distribution of government largess.[5] Property settlements between governments and indigenous peoples restore particular titles and rights to property and at the same time quite deliberately raise expectations that something like sovereignty is being conferred or restored.[6] The increasing interpenetration between public and private institutions and capital,[7] has obscured both the question of "who" governs and "how" they govern with consequences for the operation of democratic values.[8] And it gives rise to a tension: when *imperium* and *dominium* are located in a single institution—how can one reconcile property as authority and property as resistance? Why should governments, or their agents, enjoy property protections (a zone of autonomy) designed to protect property holders from governments?

[2] Such a doctrine is not uncontroversial among public lawyers—a matter to which I shall return.

[3] K. McNeil, *Common Law Aboriginal Title* (Oxford, Clarendon Press, 1989), p. 108.

[4] M. J. Horwitz, *The Transformation of American Law 1870–1960* (New York, Oxford University Press, 1992), p. 65; G. S. Alexander, *Commodity and Propriety* (Chicago, University of Chicago Press, 1997), p. 198-199.

[5] C. Reich, "The New Property", (1964) 73 *Yale L J* 733. See also G. S. Alexander, "The Concept of Property in Private and Constitutional Law: the Ideology of the Scientific Turn in Legal Analysis", (1982) 82 *Col L R* 1545; T. Dantith, "Regulation by Contract: The New Prerogative", (1979) *Current Legal Problems* 41.

[6] See Chapter 10 below by John Dawson, and Chapter 11 below by Alex Frame.

[7] The expression is Carol Harlow's: see, "'Public' and 'Private' Law", (1980) 43 *Mod L Rev* 241, 257.

[8] See in particular Chapter 12 below by Michael Robertson, and Chapter 2 below by Kevin and Susan Gray.

Let me introduce some of the issues by a more detailed illustration. New York City was founded in a series of pre-revolutionary charters from the Crown which granted it title to land and special franchises.[9] In the eighteenth century it governed not so much by the income from such property but by cajoling and enticing others to build city amenities by way of land swaps, special licences and other tagged grants. Most lucrative were the grants of water lots given in exchange for restrictive covenants, affirmative obligations and special responsibilities (such as to construct wharves and public spaces in addition to streets at front and rear). Such a method was risky, inefficient and likely corrupt—but it avoided the need for public financing, a public bureaucracy, the raising of taxes, or direct regulatory powers. There was a certain reciprocity—"public" institutions had private rights and so private individuals had public obligations. And, importantly, New York City enjoyed autonomy. Its power to dispose of its estate was not a delegated one, nor dependent on state grant—it held rights against the State of New York and the Federation. As such it inhabited an intermediate zone between what we would now consider to be public and private—an idea to which I and others shall return.[10]

The "new governance" sweeping much of the globe, is oddly, if not wholly, reminiscent of this era. The political difficulties of raising taxes, a profound sense that governments are not good at "running things" (that central agencies do not have the information or skills to manage such services), and an urge to deregulate (to retreat from the use of *imperium*—at least of a command and control type) have led to the widespread use of some of the same techniques. Modern governments also resort to persuasion, consultation and other informal methods of achieving their goals. And, as in the eighteenth century, property held by governments is not so much important for the revenue it might earn, but for the ways it might be deployed to achieve policy outcomes. In this political context, the widespread use of powers of eminent domain to further majoritarian interests at the expense of a few or individual property-holders seems unlikely.[11] More likely is that governments will *divest* themselves of property to further their policy goals, or delegate the power of eminent domain to other private entities which have lost their "public" hue. Similarly, governance by delegated command is less likely than contracting out functions and encouraging self-regulation. Legislative activity will often involve the creation of *new* forms of rights by establishing trespass rules and exclusive rights of user—and calling these "*property*"—for example, pollution rights, tradeable fishing rights and the

[9] For a fascinating study see H. Hartog, *Public Property and Private Power: the Corporation of the City of New York in American Law*, 1730–1870 (Chapel Hill and London, University of North Carolina Press, 1983). See also the review by C. Rose, "Public Property, Old and New", (1985) 79 *Nw ULR* 216.

[10] See in particular Chapter 2 below by Kevin and Susan Gray which refers to "quasi-public property".

[11] Except in cases involving historical injustice—see the discussion of the South African constitutional property clause in Chapter 6 below by Andre van der Walt and Chapters 8 and 9 below by Jeremy Waldron and Maurice Goldsmith, respectively.

like.[12] Significantly, the last of these strategies, potentially creates rights (resistance) against the state. Now, as in eighteenth century New York City, the view that governments themselves should do little but make others do what they ought, is the prevailing public policy requiring active governmental intervention of a particular kind.[13]

The comparison between eighteenth century New York City and "the new managerialism" is, however, incomplete. In its new incarnation, there is no acknowledgement of the essential exchange which was the fulcrum of the old—special privilege for public obligation. Indeed, governments resile from the notion that they grant privileges, for that would be to admit of governmentally created competitive advantage at a time when governments are striving to appear neutral. Such privilege has too much of a feudal quality. In modern times we tend to think of property as resistance, not as privilege or as a means of achieving sovereign will. Nevertheless such privileges do exist either *de facto* or *de jure*, and often can be found in the details. In New Zealand, for example, (where there is little or nothing by way of utility regulation) private utility companies jealously defend the interests of their shareholders as the sole focus of their endeavours against charges of social irresponsibility. However, under complicated provisions of resource management law, the same companies enjoy powers of eminent domain.[14] These provisions confer the status of "government work" on certain activities by specified bodies, providing, for example, for the construction of roads and transmission lines. Among other things, such provisions would seem to indicate that serving the public interest is a core function of such "network utility operators" rather than an incidental or additional one. The habit of strictly distinguishing between *imperium* and *dominium* and public and private does not leave conceptual space for such a middle ground of activity, either for publicly or privately-owned bodies. As Stuart Anderson has suggested, a return to an ambiguous hybrid category of institutions—such as that which the Victorians understood—may help in an analysis of today's new agencies.[15]

[12] See J. W. Harris, *Property and Justice* (Oxford, Clarendon Press, 1996), Part I.

[13] See for a discussion of the Canadian context, H. Arthurs, "'Mechanical Arts and Merchandise': Canadian Public Administration in the New Economy", (1997) 42 *McGill LJ* 29. Such types of intervention, he suggests, encourage the growing tendency to "see ourselves as rights-bearing individuals rather than members of a community, as operating at odds with the state rather than as its beneficiaries, as seekers of personal redress through litigation rather than as agents of social improvement through political activity" (at 45).

[14] The Resource Management Act 1991, s. 166 confers network utility operator status on certain utility providers. By s. 186, approved "requiring authorities" are empowered to apply to the Minister of Lands to compulsorily acquire property. If successful, the project has the status of "government work" for the purposes of the Public Works Act 1931. Though the criteria in the Resource Management Act 1991 do not specifically include a public purpose test, the Public Works Act definition of "government work" does.

[15] S. Anderson, "Municipal Corporations go to Market", unpublished commentary. See also H. Schieber, "Public Rights and the Rule of Law in American Legal History", (1984) 72 *Calif L Rev* 217, 225.

Public lawyers have responded to these developments in a number of ways: by extending the law of judicial review to certain private bodies, by suggesting that there should be a separate public law of tort and contract, by extending human rights and information privacy protections to private bodies, by the proliferation of new complaints mechanisms, and by the statutory imposition of social goals on otherwise commercial enterprises (the latter with mixed success).[16] At the core of much of this debate is the question of what difference, if any, it makes for property to be privately rather than publicly owned. What exactly are the limits of autonomy of action in this "private" zone? It is to this question I would presently like to turn. Let us begin with the first part of that comparison. What is the situation of the Crown as owner?

II. THE CROWN AS OWNER

So strong is the private property paradigm, that one typical response is that the government's proprietary rights are in no way different from those of a private owner.[17] Some property indeed appears to be closely analogous to private property, giving rise to similar powers of exclusion in the owner or its agents. A Minister of the Crown, for example, is able to exclude people as trespassers from her offices at Whitehall much the same as any other corporate officer.[18] Indeed, in early medieval times the Crown's property was regarded as private property belonging to the King and so could be dealt with according to his wants and appetites. The risk of kings alienating vast tracts of territory to raise funds, however, soon became apparent.[19] Concern about such alienations threatening the basis of sovereignty itself eventually resulted in two related distinctions: between the King and Crown; and between Crown property which is alienable and that which is inalienable. By the later middle ages the "Crown" was taken as something separate from the king and as representing the "body politic".[20] Hence the King's "personal" property could be conceived as separate from the property of the realm. Pollock and Maitland describe "Crown property" as the "original endowment of the kingship" so designated at the time "settlement of the Conquest was completed and . . . registered in the Domesday Book".[21] These

[16] See generally, M. Taggart (ed.), *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) and especially, M. Taggart, "State-Owned Enterprises and Social Responsibility: a Contradiction in Terms?", [1993] *NZ Recent L Rev* 343; J. McLean, "Contracting in the Corporatised and Privatised Environment", (1996) 7 *PLR* 223.

[17] See the discussion of Justice La Forest's comments in *The Queen* v. *Committee for the Commonwealth of Canada* (1991) 77 D L R (4th) 385, 402 by Gray and Gray, pp. 28–29.

[18] The example is from Jim Harris, above n. 12, at p. 104.

[19] e.g., Richard II was alleged to have acted in dishersion of the Crown of England by alienating the Isle of Oleron.

[20] Sometimes the "Crown" was taken to personify the Crown estate itself as it passed from father to son. See further, E. H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, Princeton University Press, 1957).

[21] F. Pollock and F. W. Maitland *History of English Law* 2nd rev. edn. (1968) pp. 383–384.

properties, they considered to be permanently annexed to the kingly office and as such inalienable.

In this they reflected the now often unfashionable idea that a core of Crown property is the basis of government.[22] A modern restatement of such a view is captured in the German basic law guarantees governing recent privatisations. The Federal Republic cannot divest itself of property so as to deprive itself of the ability to achieve the basic agreed ends of government. Such a core might be considered "public property" in its broadest sense.

The German government then, has encountered *constitutional* impediments to privatisation programmes.[23] Constitutional amendments were required for the vesting of the postal and telecommunications services in private companies and even of the federal railways in a state-owned corporation.[24] This approach has no counterpart in the British or New Zealand constitutional arrangements in relation to privatisation. There are no timely processes (parliamentary or otherwise) with which to assess the prices offered for state assets, or to ensure that the proceeds of such sales are applied for declared purposes such as to retire debt.[25] There are no legal means or processes with which to assess the ends of government or the strategic assets needed to perform those functions—except, that is, as defined by the government of the day in legislation, or simply by the exercise of the prerogative.[26] The process of divestment, at least in common law jurisdictions, is not troubled by any transcending notion of "the state". The democratic deficit should be obvious.[27] Tyrannous majorities may divest as well as acquire property. In this area of "Crown property" at least in British or British-derived constitutions one might be forgiven for thinking that private property is indeed strongly analogous to Crown property. Such an asymmetry between controls on acquisition as opposed to divestment may become all the

[22] The idea has not been lost by Maori in New Zealand—see especially Chapter 10 below by John Dawson.

[23] See further on the German Constitution, Chapter 5 below by Gregory Alexander.

[24] See for example G. Püttner, "Constitutional Limitations on Privatisation" in E. Riedel (ed.), *German Reports on Public Law* (Baden-Baden, Nomos Verlagsgesellschaft, 1998), pp. 66–76. In both cases guarantee clauses were introduced (Arts 87e and 87f I Basic Law). The latter requires the Federation to ensure a basic supply of post and telecommunication services throughout the whole country. See for a comparison of the British and French experiences of privatisation, C. Graham and T. Prosser, *Privatising Public Enterprises* (Oxford, Clarendon Press, 1991).

[25] See, for example, M. Taggart, "Book Review" of C. Graham and T. Prosser, *Privatising Public Enterprises* (Oxford, Clarendon Press, 1991), (1993) 4 *PLR* 271, 273. He relates that French politicians were required by statute to retire debt whereas in New Zealand between 1984–1991 of the $9.7 bn raised from asset sales, only an estimated $450 million was applied to reducing long-term debt.

[26] For example, in 1989, the New Zealand government's policy of selling Crown assets including land, necessitated the publication of a legal opinion as to whether the Crown was required to have legislative approval to do so (see Legislation Advisory Committee, *Departmental Statutes*, Report No. 4 (Wellington, Ministry of Justice 1989) Appendix 2). The opinion concluded that with the exception of certain lands acquired by the government under a particular enactment, the Crown in its corporate capacity could sell land without legislative authorisation. As it transpired, many asset sales required an incidental legislative act such as repeal or amendment of related legislation.

[27] See T. Dantith, "The Executive Power Today: Bargaining and Economic Control" in J. Jowell and D. Oliver, *The Changing Constitution* (Oxford, Clarendon Press, 1985), pp. 174, 177–182.

more exaggerated given collective action problems and the normative resilience of property which Jeremy Waldron discusses later in this volume.

There are then, no grand constitutional principles to help us think about the nature of Crown property, but there is some guidance to be found in the details of the common law. Not only did it consider that the Crown owned a sovereign core of property, but (and this may be a different thing) that the Crown also held property in a default sense: all property must be owned by someone and in the event that no particular person or group has a stronger proven claim, that "someone" is the Crown or sovereign.[28] The common law defined what the Crown could grant of these properties, in effect limiting what could be owned, and distinguishing between the Crown's property holdings as proprietor and as regulator or protector of the public.[29] *Imperium* and *dominium* can be distinguished even within a property concept. The case of navigable rivers is illustrative.

Limitations on Crown powers in the Magna Charta[30] evolved into the principle that the sovereign holds title to lands under navigable waters in two capacities—as the governmental authority charged with protecting the rights of the public and as the proprietary owner of subjacent land with the right to grant to individuals any private property interest which did not interfere with public rights.[31] That is, whether the subjacent lands were owned by the king or a private person, the public's right to navigation applied to all tidal waters.[32] The effect was that what normally the king could grant for his personal interest or profit, could not in this case be granted free of paramount public rights. In America the idea that some state-owned property is held in trust for the public as beneficial owner would later evolve into the public trust doctrine.

The doctrine has always been controversial[33] and I do not mean to go into the details here except to make a few general points.[34] First, there is a dispute about whether the doctrine proscribed alienation of subjacent land altogether. In some

[28] See also Arts 399 and 400 of the Civil Code of Lower Canada.

[29] This distinction is explored in Chapter 10 below by John Dawson in relation to property settlements with indigenous people.

[30] These dealt with the removal of fishing weirs which obstructed upstream fishing rights and navigation.

[31] M. L. Rosen, "Lands Under Navigable Waters: The Governmental/Proprietary Distinction", (1982) 34 *U Fla L Rev* 561, 566.

[32] Sir Matthew Hale confirmed this view in *De Jure Maris* 1716 cap IV and extended such rights to non-tidal waters , see above n. 31, at 568–569.

[33] Both before and after Elizabeth I declared the Crown *prima facie* owner of the shore to the high-water mark there were contested claims to exclusive property rights over navigable waters; see e.g. *A-G* v. *Emerson* [1891] AC 649.

[34] See further H. Schieber, above n. 15; M. Selvin, "The Public Trust Doctrine in American Law and Economic Policy 1789–1920", [1980] *Wisconsin L Rev* 1403; C. Rose, "The Comedy of the Commons; Custom, Commerce, and Inherently Public Property", (1986) 53 *U Chi L R* 711; G S Alexander, above n. 4, at pp. 271–277; L. Butler, "The Commons Concept: An Historical Concept with Modern Relevance", (1982) 23 *Wm & Mary L R* 835; J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", (1970) 68 *Mich L Rev* 471; R. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine", (1986) 71 *Iowa L R* 631.

American states the English common law doctrine was interpreted as restricting ownership of subjacent land to the state governments. Such a view is not surprising given that in early times the governmental and proprietary concepts were not commonly distinguished.[35] To enforce public rights over private land, by *jus publicum*, or dominion (now often referred to as the "police power") would have been, and still is, a risky business. If a state actively governs by means of its own property, sooner or later it will encounter conflicts between its uses of property and the uses of others. It may have suited governments then, for political reasons, to accept impediments on their own property ownership—and hence more easily impose similar impediments on private owners. Lazarus suggests that the public trust doctrine was the public property analogue to private property concepts such as "qualified property" and "property affected with a public interest". As itself an impediment on Crown's use of property, it provided "the sovereign with a ready answer to claims of the sanctity of private property rights at a time when governmental power was itself rooted in its own property holdings".[36] The private property analogues to the public trust doctrine are matters to which I shall return.

Secondly, there is dispute as to whether the prohibition on alienation applied to the legislature as well as the king. A number of scholars have contended that while the king could not alienate such land free of its subordination to public trust rights of navigation and fishing, the legislature could do so.[37] One explanation was that the legislature (unlike the Crown) is "the same thing as the public itself".[38] There is a sense here that the commons (such as the air, running water, navigable rivers) is conceived not as a system of "no ownership" (which the Crown holds in default), but rather of joint ownership (which the Crown holds as representative for the body politic) with a requirement for agreement about its management.[39]

Thirdly, the doctrine suggests that the common law envisages a concept of non-exclusive ownership which could be applied to both publicly and privately

[35] There was a tendency to obscure questions of jurisdiction and proprietary right.

[36] Lazarus, above n. 34, at 701.

[37] In his 1826 treatise on tidelands, for example, Joseph Angell discussed the Crown's ownership of waterway "trust" lands and comes to this conclusion (see the excellent discussion in C. Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Boulder, Westview, 1994), pp. 119–122). Lazarus concurs with this view, above n. 34, at n. 20, as does Sax, above n. 34, at 476. Cf. *Arnold* v. *Mundy* 6 NJL 1 (1821) to the effect that even the legislature may be limited in its power to dispose of Crown lands.

[38] For the difficulties of conceiving of the legal personality of the Crown see J. McLean, "Personality and Public Law Doctrine", (1999) 49 *U Toronto LJ* 123 reviewing D. Runciman, *Pluralism and the Personality of the State* (Cambridge, Cambridge University Press, 1997).

[39] See G. A. Cohen, *Self-ownership, Freedom and Equality* (Cambridge, Cambridge University Press, 1995). As Cohen asks (at p. 83): "Why should we not regard the land, prior to A's appropriation, as jointly owned, rather than, as Nozick takes for granted, owned by no one? When land is owned in common, each can use it on his own initiative, provided that he does not interfere with similar use by others: under common ownership of the land no one owns any of it. Under joint ownership, by contrast, the land is owned by all together, and what each may do with it is subject to collective decision". (I am grateful to Tim Mulgan for this reference.)

owned property.[40] Even subjacent land which *has* been granted to private ownership is affected by public rights under the state's protection.[41] And while it is a matter of further controversy whether the public trust doctrine could be enforceable by the public at large, other common law actions were available to protect rights of common pasture, fishery and rights of way.[42] Indeed, title to lands subject to common use was usually vested in private parties because prescriptive rights could be acquired more readily over private than over public land (where possession of the Crown was presumed).[43]

To return to the original question, does it matter whether property is publicly or privately owned? Crown or state property does not by definition constitute "public property". Some state-owned property is closely analogous to private property, with similar elements of exclusivity. The older common law understanding that there is a core of state property essential for governance and which cannot be alienated is not clearly reflected in the English constitution. However, there is common law authority to the effect that in certain circumstances the state's rights over property as owner are restricted by its responsibilities to protect the public. The Crown does not hold such property as a "natural person" might do, but must (according to Lord Hale's view of the *publici juris*) offer "the public" the same protection as vested rights holders. Moreover such public rights attach to both publicly and privately-owned property. It is to the private property analogue of the public trust doctrine I would now like briefly to turn.

III. PRIVATE PROPERTY WITH PUBLIC PURPOSES

Public rights over private property have been able to be acquired by a number of different means: by grant, implied grant and prescriptive use. According to the common law then, restrictions on the uses of private property could be imposed from above (the state, or organised public) and below (the unorganised public). My present concern is the former types of restrictions. How should we analyse the situation in which government actively pursues its policy by conferring privileges on privately-owned entities, and the like, to do the government's work? Should that use of private property enjoy full property protections? Should the manner of regulation (by the use of a property regime) immunise the activity from public controls?

[40] See Harris, above n. 12, at p. 109 n. 27.

[41] The doctrine is said to have its antecedents in the concept of *res communes* which Bracton introduced into the common law in the mid-thirteenth century. He considered the shores of the sea as common to all and inalienable, which view was later confirmed by legislation. In Roman law there were four types of non-exclusive ownership: *res universitatis* (belonging to corporate bodies); *res sacriae* or *religiosae* (sacred buildings); *res publicae* (common to all people such as rivers, ports); and *res nullius* (belonging to no one). See further D. R. Coquillette, "Mosses From an Old Manse: Another Look at Some Historic Property Cases About the Environment", (1979) 64 *Cornell L R* 761, 801.

[42] For example, the writs of praecipe and questus est to protect rights of use and the assize of novel disseisin for the invasion of rights on common land (see Coquillette above n. 39, at 806).

[43] McNeil, above n. 3, at pp. 94, 105; L. Butler, above n. 34, at 860, 861.

Before such activities commonly became nationalised, the common law said no. It considered certain businesses to be affected by the public interest. This private law analogue to the public trust doctrine was originally used to protect the privileges of corporate interests. Grantees of exclusive interests, according to the doctrine, do not hold them merely for their own benefit, but also for the benefit of the public and trade. The doctrine would attach to *de jure* and *de facto* monopoly situations: where there was one facility licensed by the Crown, or there was only one facility available which enjoyed a dominant position. The doctrine included public utilities, common carriers and railways; traditionally regulated businesses such as inns cabs and mills; and industries which although not public at their inception, had become such.[44]

The doctrine later became a justification for legislative price-fixing (which I am not advocating here). What I think is useful and interesting about it, is its classification of certain property as hybrid. It effectively separates the elements of *dominium* and *imperium* even within privately-owned property—thereby creating the kind of quasi-public property which Gray and Gray will discuss.

IV. CONCLUSION

Many of the doctrines which I have briefly traversed have fallen into decline and disuse over a period in which much of the relevant property has been publicly-owned. Certain public expectations and intuitions about the "public" nature of certain property have remained. It is telling, for example, that in New Zealand, claims by Maori under the Treaty of Waitangi have mainly been successful over property which could be described as *res communes*.[45] Empowering Maori to manage access to and the use of such resources under the terms of the settlements exploits the ambiguous nature of the governmental/proprietary distinction—such ambiguity as has itself been encouraged by the programme of privatisation.

I am far from certain whether these doctrines as formerly stated will properly serve modern needs. I wish merely to raise the prospect that hybrid categories of property may be useful in thinking about regulation and accountability given the prevailing the techniques of governance. Down-sized governments, deregulation, and use of eighteenth century techniques to govern, shift the focus for public lawyers from the *ultra vires* doctrine and traditional command and control techniques for expressing sovereign will to the nature of property regimes and their uses in pursuing public policy. Public lawyers like myself have much to learn from others in this regard—as the chapters which follow will demonstrate.

[44] See further, M. Taggart, "Public Utilities and Public Law" in P. Joseph, *Essays on the Constitution* (Wellington, Brookers, 1995); P Craig, "Constitutions Property and Regulation", [1998] *PL* 538, and Chapter 2 below by Gray and Gray.

[45] See Chapters 10 and 11 below by John Dawson and Alex Frame respectively. Jeremy Waldron (Chapter 8) and Maurice Goldsmith (Chapter 90are more concerned with questions which arise, for example, in relation to the disposal of 99- year renewable leases held by private owners from Maori, over high country sheep farms.