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THE CROWN-MĀORI RELATIONSHIP AND THE IMPLICATIONS OF MMP

LL.M. RESEARCH PAPER
ADVANCED PUBLIC LAW (LAWS 509)

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CONTENTS

I INTRODUCTION

The relationship between the Crown and the Māori people of New Zealand/Aotearoa has evolved over the past two centuries into a sophisticated and multi-faceted association. Clearly, the relationship does not exist in a vacuum. It is influenced by, amongst other things, the wishes of the electorate at large, the increasingly globalised environment New Zealand finds itself in,[1] and the political and legal environment. Of those influences, perhaps the most significant in the short to medium term is the adoption of a mixed member proportional system of representation ("MMP"). It is therefore important to understand the implications of the new electoral system for Crown-Māori inter-action.

This paper seeks to identify the various impacts that MMP will have on Māori and the Crown, and to explain the evolving relationship between them. I will first define the two parties of the relationship for the purposes of the paper. Then I will examine briefly the nature of the MMP political system; after which I shall examine the specific implications of MMP for the Crown and for Māori. The potential of the new relationship Māori will enjoy with Parliament will then be considered, before addressing the role of the courts in an era of MMP. I shall conclude by examining the evolving relationship between the Crown and Māori.

I will argue that the relationship between the Crown and Māori is no longer simply dyadic. The parties to the Treaty are not strictly speaking partners in any meaningful sense, although the relationship is demonstrably one of good faith and mutual obligation, and is at the heart of our constitutional arrangements. To cast the relationship into the form of a partnership, to the exclusion of Parliament, risks losing sight of the opportunities that MMP represents.

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[1] Law Commission NZLC R34 *A New Zealand Guide to International Law and its Sources*, 1.

I will argue further that the evolution of the relationship will be influenced very heavily by new, powerful factors. First and most importantly, Parliament will emerge as the primary forum for Māori to pursue their strategic aspirations. Secondly, the new electoral system will have significant implications for the Crown, Māori, Parliament and the electorate at large, the nature of which we can guess at, but not accurately discern.

Not all of the changes which will appear over the next decade or so are attributable to MMP. Some would have occurred regardless. Yet the new electoral system will without doubt play a crucial part in the further development of New Zealand's constitutional arrangements.

II DEFINITION OF "THE CROWN"

When Lieutenant-Governor Hobson signed the Treaty in February of 1840 he did so on behalf of "Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland".[2] The British Crown thereby entered into an enduring relationship with the Māori people of this country. The concept of the Crown is central to that relationship and to the constitutional debate concerning the Treaty of Waitangi. The concept of the Crown is, however, not capable of precise definition.

The notion of the Crown is a term of art in constitutional law.[3] Joseph identifies two distinct personae - one identifiable (the determinate personae), the other amorphous (the indeterminate personae). The determinate personae is the Sovereign, as head of state, his or her representative in the form of the Governor-General, the ministers of the Crown, the Executive Council, and the core public service. In the absence of a concept of the state in British constitutional law the Crown may even be used to

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[2] The Māori text read "Ko Wikitoria, te Kuini o Ingarani".

[3] *Town Investments v Department of Environment* [1978] AC 359 at 398 per Lord Simon of Glaisdale.

represent the state itself. The indeterminate personae may be defined to include the unifying, symbolic nature of the Crown as an ambiguous and indeterminate entity.[4]

In Treaty discourse, however, the Crown bears a broader connotation. Both the Labour Government of 1984-1990 and the subsequent National Government embraced the concept of the Crown in advancing their proposals for the settlement of Treaty claims.[5] In this context the Crown represents executive government. In the Public Finance Act 1989, for example, "Crown" is defined to mean Her Majesty the Queen in right of New Zealand and includes all Ministers of the Crown and all departments, but does not include Officers of Parliament (the Parliamentary Commissioner for the Environment, the Office of the Ombudsmen and the Audit Office), Crown entities or state owned enterprises.[6] In short, "the Crown" is the legal personification of the state and of central government itself.[7]

That is not to say that the concept of the Crown is exclusive of Parliament. In New Zealand, as in other Westminster jurisdictions, the executive and legislative branches of government are partially merged. Not only is the Governor-General a constituent element of Parliament, cabinet ministers must be Members of Parliament also.[8] The executive will continue to consist of those members of Parliament who have the support of the House to govern.

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4 P Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney) 1993, 490.

5 Primarily this appears to be in recognition of the basic fact that the Crown is a party to the Treaty, yet it may also serve to present government policies in a way that appears to transcend partisan political debate.

6 Section 2. "Department" is defined to mean any department or instrument of the Government, or any branch or division thereof. The Constitution Act 1986 provides in section 2 that the Sovereign in right of New Zealand is the head of state, and that the Governor-General appointed by the Sovereign is the Sovereign's representative in New Zealand. In a strict sense the Crown is simply the Queen and the Governor-General as her representative in New Zealand.

7 P Joseph "The Crown as a legal concept (I)" [1993] NZLJ 126 at 128.

8 See also the discussion on the constitution of New Zealand by Sir Kenneth Keith in the forward to the *Cabinet Office Manual* (Wellington, 1991).

Equally significant in the context of the Treaty is the symbolic nature of the Crown. For many Māori the Crown is far more than simply the members of the government of the day and their departments. The Chief Judge of the Waitangi Tribunal, Chif Judge Eddie Durie, has observed that Māori have historically held the Crown and the government to be separate entities. His Honour concluded that "...the Crown, for many older Māori meant simply 'the perfect law - the one that would come and put everything right'".[9] The Crown symbolises the non-Māori party to the relationship created by the Treaty, and may include not only the incumbent government but its predecessors, successors and even the Sovereign herself. The Crown in this sense is more than merely a party (or partner), it is a trustee and source of justice.

Clearly, however, the concept of the Crown conceals deep ambiguities. As Boston observes:[10]

> One of the problematic features of the New Zealand system of government has always been the role of the Crown. This has proved awkward with respect to Treaty of Waitangi issues, almost from the outset, and has been an element in thinking about constitutional change in recent times.

The Crown means different things to different people. A number of terms are used to refer to the supreme authority within the community, such as the Crown, the government, the state and the Sovereign. Joseph refers to the terminological trap of

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[9] *Te Manutukutuku* (newsletter of the Waitangi Tribunal) March 1996, 3.

[10] J Boston S Levine E McLeay N Roberts *New Zealand Under MMP - A New Politics?* (Bridget Williams, Auckland, 1996), 37. For an examination of the nature and ramifications of what is meant by the term 'the Crown' see J. Hayward, "In search of a Treaty partner - who or what is the Crown?", PhD dissertation, Department of Politics VUW 1995.

attributing legal personality to "the government" rather than "the Crown" or "the state".[11]

> The Crown is, legally and in fact, the embodiment of executive government. It is an historical emanation from kingship that has evolved in accordance with (as Lord Simon put it [in *Town Investments v Department of the Environment* [1978] AC 359 at 397]) "the contemporary situation". But it is "the Crown", not "the government", that has legal existence.

Those ambiguities will have significant implications for a constitutional system where Parliament is more important than it has been before. There is a temptation for the concept of the Crown to become linked solely to the government of the day, rather than to the New Zealand state.[12]

The importance of distinguishing the Crown from the government, or cabinet, lies in the new prominence of Parliament, and in the fact that the Crown is an ongoing fiduciary party to the Treaty relationship in a sense that transcends the political motives and agenda of the government of the day. This is not to down-play the very real sense in which the government represents the Crown in its dealings, but instead recognises the ongoing nature and responsibilities of the Crown as the legal personification of the state and the community itself.[13]

As will be seen below, the composition of governments elected under a MMP electoral system will be different to first-past-the-post ("FPP") elected governments. Further, in an environment where the composition of governments may become more

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[11] P Joseph above n 7, 129. See also Dr D L Mathieson QC "Does the Crown have human powers" (1992) 15 NZULR 117.

[12] M Mahuika makes the point that "[to] a large extent the obligation incumbent on the Government (whether the Crown or the State) are roughly the same in each case. From different perceptions of the way that the relationship between the Government and indigenous people has been conceptualised, is derived a common underlying theme. That theme is the necessity to protect the interests of indigenous people": "The Crown as a fiduciary in its dealings with indigenous peoples", LL.M. research paper, VUW, 1994.

[13] P Joseph, above n 7, 128.

fluid than in the past, the integrity and continuity of a concept of the Crown which is inclusive of Parliament and embodies the state and central government has much to recommend it.

III DEFINITION OF MĀORI

The English text of the Treaty provided that the Māori signatories were the "Chiefs of the Confederation of the United Tribes of New Zealand". The Māori text read as follows: "Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani". The parties to the Treaty in 1840 were the British Crown and the *hapu* (sub-tribes).[14] There is only one use of the word *iwi* in the Treaty itself, a reference to the subjects of the Queen already living in the country and of others yet to immigrate.[15] It would, however, be inaccurate to consider the present relationship to be one between the Crown and hapu alone. The modern relationship between the Crown and Māori is significantly more complex.

The Treaty of Waitangi Act 1975 defines "Māori" for the purposes of the Act to mean "a person of the Māori race of New Zealand; and includes any descendant of such a person". Section 6 empowers the Waitangi Tribunal to consider claims "[w]here any Māori claims that he or she, or any group of Māoris of which he or she is a member" is affected prejudicially by certain conduct inconsistent with the principles of the Treaty.[16] The Treaty of Waitangi Act contemplates not only a

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[14] For an examination of Māori social organisation in the nineteenth century see J Belich *Making People - A History of the New Zealanders* (Penguin, 1996), 83-86.

[15] *Te Runanga o Muriwhenua and ors. v The Treaty of Waitangi Fisheries Commission and ors.* (the urban Māori fisheries allocation case.), C.A. 155/95, 30 April 1996 at 28 per Lord Cooke of Thorndon.

[16] The Government has proposed an amendment to the Treaty of Waitangi Act to allow the Waitangi Tribunal to decline to hear claims not mandated by hapu or iwi: *Crown Proposals for the Settlement of Treaty of Waitangi Claims - Detailed Proposals* (Office of Treaty Settlements, Wellington, 1994) 33. The submissions received on this issue were "mixed". Some favoured the proposal as protecting majority interests, others regarded it as inconsistent with the Treaty and a bureaucratic imposition. *Report of Submissions* (Ministry of Justice, Wellington, 1995), 92-93.

relationship between groups of Māori, such as the whanau, hapu and iwi, and the Crown but between individual Māori and the Crown also.[17]

For the purposes of this study I shall use, unless the context requires otherwise, a "cultural" definition of "Māori" to represent those people who consider themselves to be Māori and who are generally recognised as so being by other people. I do so on the basis that, notwithstanding definitional difficulty, the definition is consistent with both social reality and popular usage.[18]

IV THE NATURE OF THE RELATIONSHIP

A Manifestations of the Relationship

The relationship between the Crown and Māori is both complex and dynamic. Māori enjoy a special relationship with the Crown, in addition to their rights and responsibilities as New Zealand citizens. Māori may for example elect whether to register on the general electoral roll, or on the Māori roll for electoral purposes. An obvious manifestation of this special relationship is the substantial number of statutory or government-created bodies established to provide services to, and promote the interests of, Māori. These include Te Puni Kokiri (the Ministry of Māori Development), the New Zealand Māori Arts and Crafts Institute, the Māori Land Court, the Māori Language Commission, the Māori Purposes Fund Board, the

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[17] For an examination of the various definitions of "Māori" and their apparent ramifications see J McGuire "Reflections on the formal definitions of Māori" [1995] NZLJ 168.

[18] See R Pool *Te Iwi Māori* (Auckland University Press, Auckland, 1991) for a considered examination of the difficulties involved in attempting to determine who is a Māori.

Māori Trust Office, the Māori Appellate Court and the Waitangi Tribunal.[19] There are also many Māori interest groups which deal with the Crown.

The relationship is capable of expression at a number of levels, ranging from the dealings of individual Māori with state agencies (such as schools and hospitals for example) to negotiations between the government and pan-Māori organisations, iwi and hapu. The matters which may be at issue between the parties are equally diverse and cover the whole spectrum of the state's activities.

B The Treaty of Waitangi

1 The academic literature

The Treaty of Waitangi has been acknowledged by the courts, Māori, academics and successive governments as the foundation document of New Zealand. The meaning, import and implications of the Treaty are at the very heart of the relationship between the Crown, Māori and all New Zealanders and will, without doubt, continue to be of great importance in the era of MMP.

I do not, however, propose to traverse those issues in this paper other than to recognise the fundamental importance of the Treaty and refer the reader to sources where the issues have been discussed in far more detail than the constraints of this paper allow.[20] As I have stated above, this paper seeks to consider the impacts that

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19 In addition to these entities, there are a large number of quangos, committees and other bodies which focus on Māori issues. For example, the New Zealand Māori Council, the Māori Education Unit of the Education and Training Support Agency, the Māori Ethnological Research Board, the Māori Health Advisory Committee, the Māori Health Group of the Ministry of Health, the Māori Heritage Council and the Māori Group of the Ministry of Education. *The Directory of Official Information*, (Ministry of Justice, Wellington, 1995).

20 See for example: R Boast "The Waitangi Tribunal - Conscience of the Nation or Just Another Court?" (1993) 16 Univ NSW LR 223; E Durie "The Tribunal and the Treaty" (1995) 25 VUWLR 97; E France "Administrative Law Duty or Treaty Obligation? - the Present Landscape", paper for AIC conference, April 1996; Sir Kenneth Keith "The Roles of the Tribunal, the Courts and the Legislature" (1995) 25 VUWLR 129; C Trotter "The Struggle for Sovereignty" *New Zealand Political Review* (May 1995); C Archie *Māori Sovereignty - A Pakeha Perspective* (Hodder, Auckland, 1995); J Belich *Making Peoples - A History of the New Zealanders* (Penguin, 1996); R Boast "The Law and Māori" in Spiller P Finn

MMP may have on Māori and the Crown, and to examine the evolving relationship between the Crown and Māori. An examination of issues of sovereignty and self-determination falls beyond the scope of this work.

2 *The "fiscal envelope"*

The Treaty has assumed a new prominence since the mid 1980s with the attempts of governments to settle Treaty of Waitangi claims. This has been, in my view, the most important facet of the Crown-Māori relationship in recent years. The National Government's release of the Crown's proposals for the settlement of Treaty of Waitangi claims (the so-called "fiscal envelope")[21] on 8 December 1994 was greeted with a hostile response from Māori. That hostility was articulated by Māori throughout the country at the consultative regional hui which followed in the autumn of 1995.[22] Māori were critical of the Government's lack of consultation, the amount which had been set aside for the resolution of claims, the policies which motivated the proposals and the substance of the proposals themselves.

J and Boast R *A New Zealand Legal History* (Brooker's, Wellington, 1995); P Cleave *The Sovereignty Game* (VUW, Wellington, 1990); Sir Hugh Kawharu *Waitangi - Māori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1992); J Kelsey *A Question of Honour?: Labour and the Treaty* (Allen & Unwin, Wellington, 1990); J Kelsey *Rolling Back the State* (Williams, Wellington, 1993); C Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987), P G McHugh *The Māori Magna Carta* (Oxford University Press, Auckland 1991); H Melbourne *Māori Sovereignty - The Māori Perspective* (Hodder, Auckland, 1995); R Mulgan *Māori, Pakeha and Democracy* (Oxford University Press, Auckland, 1989); Sir Geoffrey Palmer *New Zealand's Constitution in Crisis* (McIndoe, Wellington 1992); W Renwick *The Treaty Now* (GP Books, Wellington, 1990); R Vasil *Biculturalism - Reconciling Aotearoa within New Zealand* (VUW, Wellington, 1988); A Sharp *Justice and the Māori* (Oxford University Press, Auckland, 1990); P Spiller, J Finn, and R Boast *A New Zealand Legal History* (Brooker's, Wellington, 1995).

[21] The fiscal envelope (or, more correctly, the 'settlement envelope'), was merely part of a series of detailed proposals which dealt with issues of claimants and their representation; the negotiations process, the protection mechanism for surplus Crown land, redress and issues concerning the conservation estate, natural resources, gifted lands, the settlement process and Crown expectations. The envelope itself was a funding device, intended by the Government to ensure that the $1,000 million was acceptable to the community, affordable for the Government, durable in terms of settlements and viable or sufficient for claimants.

[22] For an account of the background to the exercise by the then Chief Executive of Te Puni Kokiri see W Gardiner's *Return to Sender* (Reed, Auckland, 1996).

The debate generated by the fiscal envelope indicates the depth of feeling that the Treaty evokes in New Zealanders, both Māori and pakeha, the intractability and complexity of the issues, and their ability to dominate the political agenda. Further, the exercise showed in a very powerful way the difficulty of attempting to disengage issues of sovereignty, self-determination and the status of the Treaty from the resolution of Treaty grievances. The satisfactory resolution of individual Treaty of Waitangi claims will not result in a shift of focus away from Treaty issues.[23] Nevertheless, the settlement of Treaty claims will, for the first time, enable the parties to the Treaty to deal with issues of self determination, kawanatanga and rangatiratanga without the painful and debilitating distraction of unresolved grievances.[24]

3 The settlement of Treaty claims under MMP

One of the most interesting aspects of the MMP era will be the way in which Treaty settlements are dealt with. The settlement of Treaty claims under FPP has essentially involved only the Crown and Māori, with Parliament having but a peripheral role to play, to the extent that it was involved at all. The actual negotiation of the settlements on the part of the Crown will continue to be an act of the Executive. Nevertheless, under MMP the settlement of Treaty grievances will be much more dependent on the support of Parliament and, as a result of the proportionality of the new electoral system, the electorate at large.

In the past the government was able to rely on dominance in caucus and in Parliament to ensure that any legislation necessary for the resolution of Treaty claims proceeded smoothly, and that the necessary funds were supplied. Further, the government chaired the Māori Affairs, Justice and Law Reform, and Finance and Expenditure select committees which considered the legislation implementing

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[23] I am grateful to Dr Matthew Palmer for bringing this point to my attention.

[24] It is notable that claimants continued to engage the Government in negotiations throughout the fiscal envelope exercise and afterwards, while nonetheless rejecting the proposals or substantial elements of them.

settlements, such as the Waikato Raupatu Claims Settlement Act 1995, and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, or legislation which referred to the Treaty or its principles, and reviewed the relevant budgetary arrangements.

Not all settlements require legislation, although the larger and more complex settlements, such as Tainui, have done. Those which do will be subject to the shift in the legislative initiative to Parliament and to the potentially more rigorous role of the select committees. Those settlements which do not require legislation will still be subject to the scrutiny function of the committees. In my view the continued viability of meaningful efforts to resolve Treaty grievances is no longer dependent on the policies of the government. Instead, they will be subject, for better or worse, to Parliament and the electorate its members represent.

In a more basic sense the initiative and boundaries for the settlement of Treaty claims and the debate of Treaty issues may shift. The orthodox view of the Crown's constitutional relationship with Māori, as set out in a paper for the National Cabinet in September 1995 below, is subject to change.[25]

> Any constitutional discussion with Māori will lead to the subjects of sovereignty and political representation. ...[However] there is no justification or benefit in demands that the sovereignty of Parliament be weakened in response to claims of te tino rangatiratanga under the Treaty of Waitangi. The view of the Waitangi Tribunal and the Court of Appeal is that the Treaty does, however, justify specific involvement of tangata whenua in responsibility and control of their own affairs in concert with the Crown.

The Crown, represented by the government of the day, might no longer be the predominant actor in Treaty issues. MMP-elected Parliaments have the potential to

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[25] CSC(95)159 - *Crown/Māori Governance Issues*. Released by Te Puni Kokiri to the writer under the Official Information Act on 28 June 1996. For details of the policy behind the Crown's proposals see *Policy Papers for Crown Proposals for the Settlement of Treaty of Waitangi Claims*, released generally by the Office of Treaty Settlements under the Official Information Act on 3 March 1995.

become the focus, not for the settlement of individual claims, but for issues of generic Treaty policy and, perhaps broader debate upon issues of sovereignty and self-determination. In the words of Sir Geoffrey Palmer:[26]

> The relatively greater importance of Parliament compared to the Executive that may exist under MMP compared with what the recent experience has been could well alter the balance on Māori issues, and do so in a way that we have yet to properly discern.

C Partnership

The relationship created by the signing of the Treaty may be expressed in many ways, Undoubtedly the most evocative and influential expression of the relationship is to be found in the judgment of Cooke P, as he then was, in the decision of the Court of Appeal in *New Zealand Māori Council v Attorney-General.*[27] His Honour held that:[28]

> The Treaty signified a partnership between the races, and it is in this concept that the answer to the present case is to be found. ...
>
> What has already been said amounts to an acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties.

Within a short time of the decision having been issued the concept of partnership became inextricably linked to discussions concerning the Treaty. Kawharu observes that, unlike the catchwords of the past (such as assimilation, biculturalism and integration), the concept of Treaty partners and partnership was distinguishable for

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[26] Correspondence with the writer, 27 August 1996.

[27] [1987] 1 NZLR 641.

[28] Above n 27, at 664.

being tied directly to the Treaty itself and being based on "a dyadic relationship" of good faith, honour and mutual obligation.[29]

The decision of the Court of Appeal in the first *Māori Council* case remains instructive in any consideration of the nature of the relationship. Richardson J referred to the relationship as follows:[30]

> ...there is every reason for attributing to both partners [the] obligation to deal with each other and with their Treaty obligations in good faith. That must follow from both the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi.

Somers J referred to the principles of sincerity and good faith, and held that it was upon those principles that the Crown entered into the Treaty. His Honour said that each party owed the other a duty of good faith, like the kind of duties civil law parties owe *inter se*.[31] Casey J described the relationship in similar terms:[32]

> I have spoken of what I perceive to be a relationship akin to a partnership between the Crown and Māori people, and of its obligation on each side to act in good faith.

The President of the Court of Appeal subsequently employed the concept of partnership in numerous decisions.[33] Nonetheless the use of the word "partnership"

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29 I H Kawharu *Waitangi - Māori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1992) xii.

30 [1987] 1 NZLR 641, at 682.

31 Bisson J preferred to describe the relationship between the Crown and Māori as that of parties to the Treaty rather than partners, above n 30, at 714.

32 Above n 30, 704.

33 See for example: *NZ Māori Council v A-G* [1989] 2 NZLR 142 at 152; *Tainui Māori Trust Board v A-G* [1989] 513 at 527 and 529; *Te Runanga o Muriwhenua Inc v A-G* [1990] 2 NZLR 641 at 654; *A-G v NZ Māori Council* [1991] 2 NZLR 129 at 132; and *Te Runanga o Wharekauri Rekohu v A-G* [1993]

can be misleading. The judgments of the Court of Appeal do not envisage a full relationship between the Crown and Māori as equals.[34] The relationship between the Crown and Māori is *a relationship in the nature of a partnership*, rather than a partnership per se. The decisions are careful to qualify the "analogy" (as Cooke P described the notions of partnership and fiduciary obligation in *Te Runanga o Muriwhenua v A-G*[35]). The judges of the Court of Appeal have, for example, sought to describe the nature of the relationship in the following terms: "signified a partnership"; "the kind of duty which civil law partners owe each other"; "a relationship akin to a partnership"; and the use of the term "parties" rather than "partners".[36] The Court of Appeal neither explicitly recognises nor, as I see it, envisages, any form of shared sovereignty between the parties.

From the perspective of the Crown, partnership appears to involve incorporating Māori input into decision making, both at a local and a national level, and, importantly, devolution of responsibility for the delivery of government services to Māori. Recent governments have shied away from addressing Māori political issues and ambitions such as sovereignty and self determination, and have sought instead to address issues of Māori development and dependency. The return of resources to Māori was intended not only to settle Treaty claims, but to enhance the opportunities for Māori enterprise. It was believed that the return of resources to Māori would reduce the level of Māori reliance on state support; lead to savings in health, education, welfare and housing; and foster greater participation by Māori in the economy as a whole.[37]

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2 NZLR 301 at 304.

34 See for example the dicta of Cooke P in *NZ Māori Council v A-G* [1989] 2 NZLR 142 at 152 and *Tainui Māori Trust Board v A-G* [1989] 513 at 527.

35 [1990] 2 NZLR 641 at 655.

36 I am grateful to the Hon Douglas Graham M.P. for sharing with the writer his conceptualisation of the nature of the Treaty relationship.

37 J Kelsey *Rolling Back the State* (Williams, Wellington, 1993) p 260. See also M Horton "The Rise of Māori Capitalism" New Zealand Monthly Review, November-December 1993, 14-16.

For the fourth Labour Government, the enactment of the short lived Runanga Iwi Act 1990 was an attempt to both recognise the traditional importance of iwi and empower them to contract with the Crown for the delivery of government services to iwi. It was envisaged that the Crown and iwi would be contractual partners, reflecting to some extent the Māori view of rangatiratanga. The National Opposition attacked the bill on the basis that the mechanism for the delivery of partial independence to iwi was flawed, setting tribe against tribe, and that it represented a paternalist and socialist approach.[38]

The Runanga Iwi Act was repealed by the incoming National Government within months of taking office. The National party manifesto of 1990 contained a promise to settle all proven Treaty of Waitangi claims by the turn of the century. The Bolger Government took what can perhaps best be described as a pragmatic approach to achieving its ends, dealing with pan-Māori organisations, trust boards, iwi, hapu and even individual whanau.[39]

For Māori, however, talk of devolution and Crown principles missed the point. The relationship created by the signing of the Treaty was no less than one of full sharing of power and resources. Whereas previously Māori had been dependent on what they could receive from the goodwill of the Crown and pakeha, the recognition of the Treaty in the mid-1980s required the fulfilment of all their guaranteed and inherent rights flowing from it. Devolution based on the governmental control of iwi was seen to be both repressive and to smack of paternalism.[40] Yet in barely a decade Māori had moved from the margins to the mainstream. While the relationship was demonstrably not one of partnership, both parties were at least evaluating the nature and ramifications of the relationship as they had not had cause to do before.

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38 NZPD, 1989, Volume 503, 14228-14244.

39 The latter in relation to the settlement of the Waimakuku claim of the Baker whanau in December 1995.

40 A Fleras and J Elliott *The Nations Within - Aboriginal State Relations in Canada, the United States, and New Zealand* (Oxford University Press, Toronto, 1992) 204-218.

If nothing else, the debate arising from the judicial recognition of the Treaty has revealed the relationship between the Crown and Māori to be robust and enduring, yet dependent on the good faith and participation of both sides.

V THE NATURE OF THE MMP POLITICAL SYSTEM

A Components of the Political System

The decision of New Zealand electors in the spring of 1993 to move from a first past the post electoral system to a mixed-member proportional electoral system has significant ramifications for the operation of government and for the development of public policy. Before considering the likely effects of an MMP environment on the parties to the Treaty it is helpful to consider briefly the broader consequences of electoral reform.

It is important to remember at the outset that the electoral system is just one constituent element of the political and governmental environment. Equally important are the other related components: the form of the constitution; the role of the courts; the procedures of Parliament; the operation of the Executive; and the political parties. The changes which emerge after the first MMP election (and those discernable before then, in the conduct of the forty-fourth Parliament) are not all simply the result of the Electoral Act 1993. Many factors influence the workings of a political system, of which the form of the electoral system is but one.

Colin James, writing before the referendum and general election in 1993, argued that:[41]

> Moving to MMP [is] an important constitutional change. But there have been more important ones in the past five years: the elevation of the Treaty of Waitangi to constitutional status and the "founding document of our nation" is the most

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41 C James and A McRobie *Turning Point - the 1993 Election and Beyond* (Williams, Wellington, 1993) 136.

> profound; the Reserve Bank Act in 1989, handing over the control of inflation to the Reserve Bank, was a very important shift of power. Some argue that the reforms of the state sector have profoundly altered the way Government business is done.

Without wishing to diminish the significance of the changes to which James refers, I consider that he underestimates the importance of the adoption of an MMP electoral system. The changes resulting from MMP will be prove to be much more fundamental. The move to MMP has become more than simply an issue of how Members of Parliament are elected. It represents broad political reform of a magnitude which is rare in this country.[42]

Some changes are the result of trends which in all likelihood would have continued to occur even without a change to the electoral system. While it is useful to attempt to distinguish the direct effects of the move to an MMP electoral system, it would be misleading to disengage MMP entirely from broader social and political trends. For example, as the New Zealand electorate became more polarised and pluralistic in the last two decades there was already evidence of a trend away from a parliament dominated by two large parties. Not even the constraints of FPP were sufficient to prevent politics taking an increasingly multi-party shape. Even so, MMP is more than merely a consequence of other factors, it "will generate outcomes of its own".[43]

B Political Culture

The move to a system of proportional representation marks a turning point in New Zealand's development as a Westminster-descended democracy based on the FPP electoral system. The most dramatic change will be in the composition of the House of Representatives itself. In recent decades Parliament has been dominated by two

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[42] But not unprecedented. It may fairly be compared with the election of the Liberal Government of 1893, the early years of the first Labour Government of 1935-1949, and the reforms of the fourth Labour Government and the subsequent National Government of 1990-1996. Changes to the voting system were also made in 1908 to require a second ballot if no candidate in the first ballot received more than 50% of the vote. It was changed back in time for the 1914 election.

[43] J Vowles et al *Towards Consensus?* (Auckland University Press, Auckland, 1995) 195.

large parties, with minor parties holding only a very small number of seats. In an MMP-elected Parliament a greater number of parties, perhaps 4-7,[44] may be expected to be represented on a regular basis. As will be seen below, coalition governments are more likely.

It is less certain whether the changes to the way in which Parliament and the government operate will be accompanied by a change in the political expectations and behaviour of the electorate. The form of the electoral system itself influences the type and nature of parties seeking representation, the way in which the parties inter-relate, how they select their candidates and the expectations electors have of them.[45] Electors, both Māori and pakeha, may well take some time to recognise and adapt to the exigencies of the new environment, and re-visit their expectations.

Under FPP electors could vote a party into government and hold that party directly accountable for its performance. MMP makes representation the central issue, with the demarcation and distribution of power flowing as a consequence of the distribution of representation.[46] Under MMP electors will in effect vote for the legislature, which will itself determine the executive, instead of effectively voting for the executive directly as under FPP.[47] Electors will retain the ability to express their dissatisfaction with that allocation of power at a subsequent election, although in my view the direct link between the electorate and the Government through the ballot box will be weakened. In the final analysis, the stability and evolution of the political system is dependent on the conduct of members of Parliament and, most importantly, of the electors they represent.

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[44] Above n 41, 201.

[45] R Mulgan "Political culture" in G Hawke (ed.) *Changing Politics - the Electoral Referendum 1993* (Victoria University of Wellington, Wellington, 1993) 43.

[46] P Cowen et al *An Analysis of Proposals for Constitutional Change in New Zealand* (New Zealand Business Roundtable, Wellington, 1992) 3.24.

[47] A Bollard *The Economic Consequences of Electoral Reform* Discussion Paper No. 38 (NZ Institute of Economic Research, Wellington, 1993) 13.

C Economic Consequences

The relationship between the Crown and Māori does not exist in a vacuum. It is influenced by a number of external factors. One of the most significant of those factors is the economic environment the parties find themselves in. It has been postulated that the choice of an MMP electoral system may have marked economic consequences, which in turn would have repercussions for the parties to the Treaty, particulalrly the Crown.

One likely consequence of MMP is an increased number of coalition governments. It may be more difficult for coalition governments to exercise rigorous 'fiscal responsibility'. This is because individual parties to the coalition are likely to represent groups or constituencies with distinct sectoral interests. This may hamper the government's ability to make difficult budgetary decisions in respect of those interests, with a consequential effect on the budget as a whole and the financial position of the Crown.

Similarly, cooperative outcomes reached by coalitions may be less durable where the coalition arrangement is unstable. It has also been argued that Westminster systems are more likely to link spending decisions with revenue decisions than proportional systems. Yet there is no proven nexus between a lack of fiscal discipline and the form of a country's political system. International comparisons may well be inappropriate for New Zealand in light of the enhanced transparency which has been brought to the budgetary process by the Public Finance Act 1989, the Fiscal Responsibility Act 1994, and the national accounts' conformance with Generally Accepted Accounting Practices set by the Accounting Standards Review Board.[48]

Another clear consequence of MMP is that interest groups, including those concerned with Māori issues, should enjoy improved access to the decision making process. Lobbyists will have greater opportunities to influence the outcome of policy, either

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[48] State Services Commission *Working Under Proportional Representation - A Reference for the Public Service* (SSC, Wellington, 1995) 56-57.

by way of select committees, the Opposition, or a government coalition member.[49] It is less clear whether the greater number of parties represented in Parliament under MMP will cause a change to traditional patterns of negotiation and compromise over policy. Even so, it is unlikely that there will be a radical change to the fundamentals of economic and fiscal policy. Indeed it may well be that the reforms of the late 1980s and early 1990s are "locked in". As Roger Kerr has observed, electoral systems have rarely been a factor of over-riding importance in the economic history of most countries. Changes in economic thinking and experience, and the choices of countries about the role and scope of government have been much more important.[50]

VI THE IMPLICATIONS OF MMP FOR THE CROWN

A The Form of Government

MMP will effect notable change on the formation and characteristics of government in New Zealand. For decades single party majority governments have dominated New Zealand politics. But they are not the only form of Cabinet government, as overseas experience reveals. Governments may be categorised according to whether they have the support of a majority or minority of the members of Parliament, and whether they represent one party or a coalition of parties. There are accordingly four types of government possible:

(i) single party majority government;

(ii) multi-party (or coalition) majority government;

(iii) multi-party minority government;

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[49] A Bollard, above n 47 , 25-27.

[50] Roger Kerr "*Public Policy Making Under MMP*" speech to the IIR Conference on Public Affairs and Lobbying, Wellington, 21 February 1995. See also, Roger Kerr "*Vision 20/20: Directions for New Zealand - Reflections on Electoral Reform*" NZ Business Roundtable, Auckland, 22 June 1993, 9-10.

(iv) single party minority government.

It is improbable, but not impossible, that a single party would win more than 50% of the vote in the current political environment.[51] A party need not necessarily win 50% of the vote in order to obtain a majority in the House, as some parties will not achieve the 5% threshold. At least 46-47% of the list vote would still be necessary in order to secure a majority in the House - levels of support which are historically uncommon in this country.[52] It is therefore most likely that future governments will either be coalitions, either majority or minority, or single party minorities.

At this point one should be careful to distinguish between the four types of government referred to above. Minority governments, whether coalitions or not, have been found to be less durable than other forms of government, and are often found in political systems where parties are fractionalised. Whether parties in this country will move towards a new consensus, become even further atomised, or settle down into several broad groupings is the subject of speculation. The Cabinets which result from minority governments can be unstable and less effective in comparison with majority governments. This is because they are more exposed to the risk of defeat in the House and lack the authority and weight of support needed to tackle contentious issues.[53]

Nonetheless, minority governments are common in other jurisdictions (especially in Scandinavia) and can operate effectively. The successful operation of minority governments requires experience on the part of those who operate under them. Where minority governments are rare they are less likely to perform satisfactorily.

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[51] Before the National-United coalition of 1996 (and the previous arrangements entered into by the Bolger Government and former National MPs) there had not been any form of coalition government in New Zealand since that of Peter Fraser during the Second World War, and no true coalition since 1928-1935.

[52] J Boston"The future of cabinet government in New Zealand: the implications of MMP for the formation, organisation and operations of the cabinet" (VUW Graduate School of Business and Government Management, Wellington, 1994) 3.

[53] Above n 47, 16-17.

Similarly, coalition governments have been thought to be "unhealthy and ineffective". Additional pressures are exerted where a government consists of a coalition of various parties. The convention of collective responsibility in particular can be strained by the normal debate involved in developing policy between different parties in coalition. Coalition governments are normally careful to ensure that such debate is not perceived to be divisive or de-stabilising.

While it is very difficult to predict the future composition of New Zealand governments elected under a mixed-member proportional electoral system, it appears likely that coalitions will become more common. In the debate before the two referenda on proportional representation MMP became almost synonymous with government by coalition. It is yet to be seen whether this will be borne out in the years ahead. What is clear is that the way in which the Crown, as the executive, governs will be influenced profoundly by the way in which it is composed. The Crown can no longer be assumed to command the dominant position that it has enjoyed in recent decades. As will be seen, this is liable to have significant implications for the nature and conduct of the relationship between the Crown and Māori.

Strom summarises his research into the track records of minority and coalition governments in office as follows:[54]

> The analysis of minority government performance leaves us with a surprisingly favourable impression of these cabinets. To be sure, undersized governments tend to be somewhat less durable than majority coalitions and the participating parties are more likely to be replaced in subsequent cabinet transitions. On the other hand, minority government enjoy substantial advantages in electoral success and are less likely to resign in traumatic circumstances. Clearly, minority governments are in most respects inferior to single party minority cabinets...

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[54] K Strom *Minority Government and Majority Rule* (Cambridge University Press, Cambridge, 1990) 129.

However, he continues:[55]

> Majority coalitions should be preferred only by parties that are strongly office motivated. Policy-seeking and especially vote-seeking parties might well find minority governments to be a more attractive option. The more government stability a potential governing party is willing to trade off for policy effectiveness and electoral advantage the more inclined it will be to opt for a minority cabinet.

Regardless of the actual form of governments elected by MMP, Parliament will have much greater potential to determine the composition, and perhaps less directly, the operation of the government.

B The Role and Function of Cabinet

The role of the Cabinet will be affected by a Parliament elected on the basis of proportional representation. Cabinet government will remain, but its nature and operation could change. Any such changes are important to Māori, as they directly affect the ability of the Crown, in the form of the Cabinet, to formulate and advance its policies. Boston observes that a move from a single party majority government to a minority government would fetter the ability of the Cabinet to pursue policies which would not be supported by parties holding the balance of power in Parliament. This would lead to much more consultation over policy between the parties than has previously been the case.

But the internal operation of the Cabinet itself may be largely unaffected.[56] Cabinet will remain the pre-eminent decision-maker. It should be remembered that not all policies require legislation to be implemented. The search for non-legislative solutions to issues of public policy, and equally for issues of concern to Māori, will intensify.

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[55] Above n 54, 130.

[56] J Boston, above n 52, 7.

The representation of minority groups might be enhanced. Boston makes the point that:[57]

> ... it is likely that the party leaders in a coalition government would use their influence to ensure that the cabinet's overall composition is suitably representative. There may also be increased pressures under MMP for the inclusion of Māori and perhaps Pacific Island MPs in the cabinet.

If the government consists of a coalition matters are complicated by the need to allocate Cabinet positions to the members of the coalition and to reconcile their various different perspectives within the bounds of collective responsibility. If, for example, a party were to emerge which promoted "pro-Māori" policies, it might wish to be allocated the position of Minister of Māori Affairs in return for supporting a coalition government. The roles of the various Cabinet committees[58] could change and the trend towards an inner Cabinet consisting of the members of the powerful Cabinet Strategy Committee could weaken. There may be a relaxation in the unanimity and confidentiality of Cabinet also. The danger would be if the convention of collective responsibility were to break down and members of a coalition government were to find political expediency in disowning or second guessing contentious decisions made by the coalition Cabinet.[59]

Harris and McLeay observe that most ministerial decisions will continue to be unilateral ones, as a government cannot function unless ministers have a considerable degree of discretion to make the large number of decisions which arise in their portfolios. They add that the convention of collective responsibility may in fact be strengthened in coalition Cabinets, as to ignore it would be to cast doubt on the

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[57] J Boston, above n 52, 125.

[58] Of which there were roughly a dozen under the Bolger Government (APH, CIE, CIS, CSC, ECR, ETE, IPR, LEG, TOW, SDE, SPC, STA, and WAG).

[59] A Bollard *The Economic Consequences of Electoral Reform*, above n 47, 27 and 30.

viability of the government itself. In some European countries disagreements on issues of policy can be referred to a special Cabinet committee for determination.[60]

The danger of the convention of collective responsibility breaking down may be mitigated by the establishment of new coordination mechanisms, to complement the existing bureaucratic ones. For example, in Germany and Ireland senior coalition MPs meet every week to identify and address potential difficulties before Cabinet meets. Political coordinators based in the Department of the Prime Minister and Cabinet or the Office of the Prime Minister (or the Deputy Prime Minister) could perform a similar role. It will no doubt take some time for such procedures to develop in New Zealand, and their shape will depend entirely on the nature of the government in question.[61]

C The Relationship with Parliament

As in the past, the relationship between the Crown and Parliament will continue to be of great importance when considering the Crown's relationship with other parties. The primary instrument for the execution and implementation of the decisions of government is legislation. It follows that the ability to enact policy has been the key test of government authority. In the past governments have taken their legislative pre-eminence very seriously. The move to MMP presages a shift in the legislative initiative from the executive to the legislature.

The direct changes to Parliament as a result of MMP will perhaps be less significant than the changes to the composition and operation of the government. The functions

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60 P Harris and E McLeay "The Legislature" in G Hawke (ed) *Changing Politics - The Electoral Referendum 1993* (VUW, Wellington, 1993) 119-120.

61 State Services Commission *Working Under Proportional Representation - A Reference for the Public Service*, above n 48, 18.

of Parliament will remain largely the same,[62] although the ability of Parliament to perform those functions is likely to improve with the greater number of MPs available to service select committee and the extra time that list MPs in particular will have to attend to their parliamentary duties.[63]

Once the government has introduced legislation it will be subject to keener consideration by Parliament. While most legislation is uncontroversial, those bills which are politically contentious can expect to be examined more rigorously. This will be a test for minority governments in particular.

If a minority government does not secure some form of support agreement from the other Parliamentary parties it must arrange a majority in the House for any bills it wishes to see proceed. Indeed, it may be obliged to attempt to secure the support of different groups of MPs for each bill it introduces, depending on the issue in question. Nor could any government assume that a bill will necessarily emerge from the House in a recognisable form to that which was introduced. The price of the improved ability to scrutinize and alter legislation while a bill is in the House is certainty.

The ability of MPs to promote members' bills will be enhanced. The greater use of members' bills by non-government members is likely to be a notable feature of an MMP-elected Parliament. Whereas in the past members' bills which have lacked government support have languished before government-chaired select committees, they are now liable to find a more favourable environment as the control of the select committees is proportional to the representation of parties in Parliament. Bills must also be reported on within six months of being referred to a committee (unless the

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[62] That is, to grant supply to the Government; and to scrutinise the activities of the executive. The legislative and scrutiny functions are now quite evenly balanced, with select committees spending roughly half their time considering legislation: *Report of the Standing Orders Committee on the Review of Standing Orders* (1995) AJHR 1.18A, 39.

[63] There may also be fewer bills in the House than was previously the case, allowing more time to spent on non-legislative work. Conversely it may allow legislation to be examined more thoroughly.

House grants an extension).[64] If Māori MPs are not represented on the Treasury benches the use of members' bills by Māori MPs to advance their policies may be expected to increase.

Similarly, the scrutiny functions of the House will be improved as select committees exert their new-found independence from government control. The desire of the committees to have greater access to information and advice, not only from government sources, will increase with the committees' desire to ensure greater accountability of Ministers, their departments, state-owned enterprises and other Crown agencies.[65]

The new standing orders are of particular importance for their effect on the procedures of the House and its committees. They will have some impact on the uneasy relationship between governments and the House. Chen argues that the new standing orders:[66]

> ...are likely to result in a lessening of executive control over the content of legislation passed by Parliament. The executive is likely to be forced to negotiate more about the content of legislation before it is introduced and parliamentary input into legislation may be higher than in the past. It is also likely that less legislation will be passed in MMP Parliaments than the large amounts of legislation passed in recent Parliaments. But there will be greater opportunities for what legislation is passed to be better scrutinized.

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64 SO 284.

65 State Services Commission "Working Under Proportional Representation" above n 48, 44. See also, Chen "The Introduction of MMP in New Zealand - the Implications for Lawyers" (1994) 5 PLR 104 at 110.

66 M Chen "Parliament and Law-making under MMP: the New Standing Orders" papers of the NZ Law Society conference in Dunedin, April 1996. See also "Parliament: Changing the Rules of the Game", in J Boston et al, above n 10, 67-91.

The Crown's relationship with Parliament has substantial ramifications for Māori. One of the continuities of the relationship between Māori and the New Zealand state is, in the words of Richard Boast:[67]

> ... the predominance of statute. The massive changes to Māori land tenure in the 1860s were brought about by statute. The status of the Treaty of Waitangi always has been, and still is, dependent on the extent to which it is recognised in statute. The Waitangi Tribunal, too, is a creature of statute. One basic principle which has dominated the situation is not the common law of aboriginal title but, in fact, the principle of Parliamentary sovereignty. There have been no fetters on Parliament's ability to pass legislation affecting Māori people, and as a result Māori land has been caught up in a jungle of statute for more than a century.

Given the "predominance of statute" at the heart of the relationship between the Crown and Māori, the nature of interaction between the Crown and the legislature is of obvious importance. If a government, or any other MP for that matter, wishes to change statutory provisions which govern a certain aspect of the relationship a legislative amendment will be required. Similarly, if a government wishes to alter the jurisdiction of the Waitangi Tribunal or Māori Land Court, or implement a Treaty settlement through an Act of Parliament,[68] it will need the consent of a majority of MPs. If the relationship between the Crown and Parliament is to change in the ways that some commentators have posited there will be very significant implications for the way in which the Crown and Māori interact.

D Comment

It is important for each of the parties to the Treaty to understand the ways in which the other will change as a result of the new political environment. For the Crown the principal changes will be to the formation, organisation and operation of the

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[67] R Boast "The Law and the Māori" in Spiller, Finn and Boast, *A New Zealand Legal History* (Brooker's, Wellington, 1995) 172-173.

[68] As in the case of the recent Waikato Raupatu Claims Settlement Act 1995.

Cabinet, and in the Crown's relationship with Parliament. These changes will in turn influence the Crown's relationship with Māori. The Crown will no longer dominate Parliament as it seemed to do in the past, nor will it operate in entirely the same ways. Where the Crown wishes to pass a bill which has implications for Māori, Māori will have a greater opportunity to influence the policy of the bill than has previously been the case.

The trend in recent years of increasing openness and consultation can be expected to continue. Māori might better identify with the consultative or consensual approach to the development of policy envisaged by the proponents of MMP, than to the more explicitly polarised political environment of the past. The Crown will no doubt wish to involve Māori in the development of proposals before their introduction in order to maximise the chances of the bill being passed.

In addition to increased representation in Parliament itself, discussed below, Māori will be able to lobby members of select committees, other MPs, as well as Opposition, government and coalition members. It should not be assumed, however, that improved access will necessarily result in more satisfactory outcomes for Māori, as other factors (such as the strength of the government's commitment to the measure, the differing views of other interest groups and MPs themselves, for example) will continue to influence the process. Nor should it be forgotten that the increased opportunities for involvement, however desirable and worthwhile, will be costly for Māori to exploit. I consider the Crown, as a fiduciary under the Treaty, to be subject to a duty to assist Māori in their participation in the new environment. How that duty ought best to be given effect to is an important issue of governance for the Crown.

Where the Crown is uncertain of its ability to pass legislation without substantial amendment it will focus on the implementation of its policies by administrative rather than legislative means. By no means all policies affecting Māori require empowering legislation. While the Crown will still be subject to judicial review and to the

inquiry functions of select committees, it will undoubtedly seek to operate as autonomously as possible.

Nonetheless, I have no doubt that Parliament has the potential to emerge as the primary forum for Māori to pursue and articulate their strategic aspirations.

VII THE IMPLICATIONS OF MMP FOR MĀORI

A Kotahitanga

At the same time as the Crown adapts to MMP, equally significant changes are in prospect for Māori. Politicians, officials and others have often voiced a desire for a single body to represent Māori and to consult with on issues arising from the relationship created by the Treaty. The election of MPs on the basis of an MMP electoral system may provide impetus for Māori to develop structures to take maximum advantage of the new opportunities which MMP presents.

The search for Māori political unity, or a national representative body of some kind, is not a new one. In 1831 northern iwi formed the "United Tribes" in order to petition King William IV, which evolved into the "Confederation of United Tribes" four years later. The subsequent deterioration in relations with the settlers encouraged the creation of the Kingitanga movement in the Waikato in 1858.[69] The early 1860s saw the establishment of hundreds of district runanga as a form of government regulation of Māori activity. One of the most significant developments in moves towards Māori unity was the holding of *kotahitanga*, or unity, "Parliament" (Paremata Māori) in Waipatu in Hawke's Bay in an attempt to respond to the policies of the colonial Parliament.[70] Developments in the early twentieth century include the centrally coordinated district councils provided for by the Māori Councils Act 1900,

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[69] The Rev Marsden had suggested the concept of a Māori king as far back as June 1842.

[70] C James and A McRobie *Turning Point - The 1993 Election and Beyond* (Williams, Wellington, 1993) 110.

and the Ratana movement of the mid 1920s which preached a movement away from tribalism towards unity as a people.[71]

More recently, the Māori Women's Welfare League (Te Ropu Wahine Māori Toko i Te Ora) was established by Awhina Cooper[72] in September 1951. The League now has more than 220 branches and represents some 3500 Māori women. The League aims to address the social disadvantages of Māori women, increase their involvement in the community, promote health and parenting, develop Māori culture and contribute to the inclusion of their perspective in the development of government policy.[73]

The New Zealand Māori Council was established in 1962 and consists of 13 district councils and a national council of 42 members. Its role is to promote Māori culture and the economic and social well-being of Māori, and is partly funded by government. While the Council has been a prominent and vigorous party in Treaty litigation, some Māori are unsupportive of the organisation and distrust it for being identified too closely with the government.[74]

The most recent attempt at a pan-Māori representative forum is the Māori Congress (Te Whakakotahitanga o Nga Iwi o Aotearoa), which was established in 1990 as a forum for iwi to promote autonomous Māori development in the tradition of the kotahitanga movement. The Congress aims to foster Māori self-determination, monitor the activities of the Crown and articulate Māori views on a range of issues.

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[71] L Cox *Kotahitanga - The Search for Māori Political Unity* (Auckland University Press, Auckland, 1993) 110.

[72] Later Dame Whina Cooper.

[73] The League is politically influential and is seen as "a powerful proactive voice in both Māori and national affairs": L Cox. above n 71, 114.

[74] J King "*Who speaks for Māori*" Evening Post 28 February 1995, 16.

The Congress consists of 45 mainly North Island iwi and is perceived to be independent of the Government. It has yet to realise its full potential.[75]

The search for a voice to represent Māori has taken many paths. One path, signified by the United Tribes Movement, was to pursue unity based on the structures of the tribes. A second approach was the development of iwi-derived structures imposed by the government (an example of which was the Māori Councils Act 1900). A third approach emphasised the development of pan-Māori movements which focused on particular sectoral issues and non-tribal goals. Cox observes that such pan-Māori movements are a recent phenomenon, and adds that:[76]

> [w]ith the demographic shift away from rural areas and the resultant diminution of traditional affiliations to ancestral territories, a distinct ethnic perception was developed by Māori. In an urban environment where contact not only by Europeans but also with Pacific Islanders, Asians and other tribal kinsmen is perhaps lessened, Māori can find common cause with other Māori comforting. A clear link, then, between pan-tribal kotahitanga and increased urbanisation among Māori can be hypothesised.

On the other hand, the vision of unity has been described as a "myth".[77] It has been argued, with some accuracy, that Māori society is deeply divided on many issues and on several lines. For example, consider the vigorous debate between conservatives and radicals, urban and rural Māori, the rangatahi and the more senior members of the community and between iwi and hapu themselves.[78]

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[75] Above n 74, 16

[76] L Cox above n 71, 114.

[77] B Easton "Divided issues - how did the myth of the unified Māori originate?" *The Listener* 10 June 1995 58.

[78] Above n 77, 58.

MMP will influence the development and operation of pan-Māori or iwi/hapu-based structures, just as earlier changes to the political environment have influenced Māori over the past two centuries.

B The Chance for Influence

As noted above, the enhanced opportunity for Māori to influence the legislative process may provide impetus for organisational change for Māori groups, and offers the prospect of improved access to decision makers. There are three possible scenarios.

First, iwi or hapu groups may find that it is more advantageous for them to operate independently in dealing with the Crown and Parliament. If one effect of MMP is to improve the access and effect of interest groups then existing iwi-based structures or developments of them may be better suited to negotiating on their own behalf, rather than in pan-Māori organisations. Such an approach is likely to suit the larger iwi which possess the necessary organisational skills and resources to exploit the new opportunities. Those iwi or hapu which are distant from the capital and/or lack the ability to make their presence felt in a productive way would be at a considerable disadvantage.

The emergence of numbers of well-organised iwi representing and articulating primarily their own interests is consistent with moves by the Crown to empower iwi and to devolve service delivery functions. It does not, however, fit easily with the precepts of the kotahitanga movement and would arguably foster a climate of competition between iwi.[79]

A second scenario would see greater emphasis placed on pan-Māori movements which focus on particular sectoral interests or non-tribal goals. This has been seen already in recent years with the trend towards pluralism and volatility in the

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[79] That sense of competition is not necessarily counter-productive, although the strength of existing inter-iwi rivalry should not be discounted either.

electorate as a whole. Pan-Māori or Māori sectoral interest groups are a part of that trend and would be well placed to exploit the opportunities for access to decision makers open to lobbyists in an MMP environment. Māori organisations should have some advantages over other interest groups because there should be more Māori MPs, and parties might be expected to have campaigned on policies which are more sympathetic to Māori aspirations.

Equally, however, it is also possible that parties or interest groups may emerge with policies which represent the feeling of some segments of the electorate that the "Māori renaissance" has gone far enough.[80] If MMP is based on the principle of proportionality it raises the question of what the consequences would be if the unease felt by many non-Māori at the Crown's attempts to meet its moral and legal obligations under the Treaty were to be translated into significant representation in Parliament.

The third, and perhaps most likely, scenario involves the integration of elements of the other two. Those iwi which possess the organisational ability, numbers and resources to operate effectively without substantial external assistance may be expected to prefer a path of autonomy and self-determination where that is consistent with their interests. Where it is expedient for them to deal with the Crown in order to achieve or promote a desired outcome, or if they wish to influence the progress of a legislative measure, those iwi can deal directly with the members and committees of Parliament, and the Crown and its agencies. Few iwi are yet in such a position. Most are, to varying degrees, obliged to deal with the Crown for the provision of social services or resources, or are still in the process of negotiation with the Crown for the settlement of their Treaty claims.

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[80] J McGuire refers to a "growing wave of criticism and resentment" by those who do not receive the "advantages" apparently conferred by the Treaty. He argues that "they base their dissent on what is perceived to be unmerited and unfair favouritism of the state towards Māori", "Reflections on the formal definitions of Māori" [1995] NZLJ 168 at 172. Quare also the influence of revisionist books such as S Scott's *The Travesty of Waitangi*.

There will remain a very important place for a pan-Māori approach to dealing with the Crown. Pan-Māori organisations such as the Māori Women's Welfare League, the Ratana movement and the New Zealand Māori Council have done a great deal to improve the conditions of those they represent, and have made an inestimable contribution to the development of the relationship created by the Treaty. It is unlikely that their roles will diminish in the more transparent and accessible era of MMP. Nor should we lose sight of the fact that even individual Māori can expect greater opportunities to influence the government through improved opportunities to participate in consultative exercises and through the ballot box itself.[81]

C MMP and Pan-Māori Organisations

There will continue to be pressure for the creation of pan-Māori organisations. From the perspective of the Crown a representative and mandated Māori body would lessen the costs and delays involved in undertaking consultation with Māori. Instead of the Crown waiting for Māori to convene a hui, or undertaking a hui or series of hui itself (as in the case of the so-called "fiscal envelope" hui of early 1995) in order to ascertain the views of Māori, there would be a one-stop shop. Variations of this theme have been articulated by the Chief Judge of the Waitangi Tribunal; the Hon Peter Tapsell and the former Labour Cabinet minister and Muriwhenua negotiator the Hon Matiu Rata. It would also arguably carry more weight for Māori than a number of smaller, less representative groups, and would in turn lessen the costs involved in gaining access to decision makers.

By no means all Māori support such proposals. Sir Tipene O'Regan has, for example, criticised proposals to establish a national pan-Māori body as being racist and inefficient. He argues that Māori are no more unified than non-Māori and that

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[81] The importance of the potential influence Māori might have on the media, and thereby on the perceptions of the electorate are beyond the scope of this paper. For an examination of the role of Māori women in this context see T Rangiheuea "The Role of Māori Women in Treaty settlements and Negotiations" (1995) 25 VUWLR 195.

such a body would exist for "the benefit of pakeha settler culture".[82] Attempts by the Crown, however well meaning, to create or encourage such a body have been and will continue to be unsuccessful. Some Māori would argue that not only are such attempts inconsistent with rangatiratanga and self-determination but they are paternalistic and insulting. Iwi may not wish to be recreated along pakeha lines. On the other hand, there has been recognition that governance structures are desirable in some circumstances, particularly in the sharing of resources obtained from the Crown in settling claims under the Treaty.[83]

In order for a pan-Māori body to be taken seriously by a significant proportion of Māori it would have to be wholly independent from the Crown. It could not be created by statute or funded by government in order to preserve that sense of independence. One of the difficulties the Māori Council has faced is that its partial government funding has lead to it being distrusted by some for being dependent on the Crown. On the other hand, the Māori Congress is perceived to be independent yet struggles for financial support. Perhaps the most basic problem faced by a pan-Māori organisation is the tension that would inevitably exist between it and iwi. While some iwi would no doubt support a body representing them in certain matters, other iwi would not wish a pan-Māori body to represent them on any issue. In any event, the creation of a new representative pan-Māori body does not appear imminent. Whether the adoption of an MMP electoral system will provide any stimulus for such a development remains to be seen.

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82 J King "Who speaks for Māori" above n 74, 16. See also C Trotter's elaborate proposal for a "representative and democratically elected National Māori Assembly created by a bi-cultural written constitution", "The Struggle for Sovereignty" New Zealand Political Review May 1995, 20-26. Other related proposals have inclined the establishment of a Māori senate or upper house, a separate Māori Parliament, a Māori Policy Commission, and regional councils which elect a national representative body.

83 See *Crown Proposals for the Resolution of Treaty of Waitangi Claims - Detailed Proposals* (Office of Treaty Settlements, Wellington, 1994) 96-97.

D Urban Māori

The large number of urban Māori[84] can be expected to exert greater influence than they have in the past. The 1991 census of population and dwellings indicated that 30.28% of Māori (some 154,800 people) had no clear or direct tribal affiliation. In the two decades after the Second World War the Māori population displayed one of the most rapid rates of urbanisation in the world. The demographic shift away from the country and the resultant weakening of traditional affiliations has had substantial economic, cultural and social consequences. In the 1990s most Māori live in urban centres, many in multi-generational urban families, and are "over-represented amongst those with low incomes, poor housing and other social disadvantages".[85]

These demographic patterns will influence the development of policy by government for the remainder of the decade and beyond. New organisations could arise or existing structures may develop in order to ensure that those Māori affected by policies are listened to in their formulation. Already there are a number of urban Māori authorities in operation which may be expected to exploit the new environment.[86]

In *Te Runanga o Muriwhenua and ors. v The Treaty of Waitangi Fisheries Commission and ors.* Lord Cooke of Thorndon held that in the context of the fisheries allocation proceedings arising out of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which implemented the Sealord Deal, consultation with

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[84] Which Lord Cooke of Thorndon held to include those urban Māori who have no established connection with a specific tribe, including those who do not know of what iwi they may claim membership by descent or those who may have genealogical connections with more than one: *Te Runanga o Muriwhenua and ors v The Treaty of Waitangi Fisheries Commission and ors.*, (the urban Māori fisheries case), C.A. 155/95, 30 April 1996, (unreported), at 21.

[85] R Pool *Te Iwi Māori* (Auckland University Press, Auckland, 1991) 9 and 14.

[86] Such as the Manukau Urban Authority, the Te Whanau o Waipereira Trust, Te Runanganui O Te Upoko O Te Ika Association and the Te Runanga O Nga Maata Waka, which were parties in the urban Māori fisheries case cited above.

urban Māori was the statutory duty of the Treaty of Waitangi Fisheries Commission. His Lordship, delivering the judgment of the full court of the Court of Appeal, held that:[87]

> Iwi refers, as we have said, to the people of the tribes; and this must include those entitled to be members although their specific tribal affiliation may not have been and even cannot be established. They are among those entitled to benefit from the pan-Māori settlement. Natural justice requires that as far as reasonably practicable they be consulted by the Commission. The most practicable mode of consultation with them is through the Urban Māori Authorities. We are satisfied that the Commission is right in being prepared to consult with them in that way. We hold that in all the circumstances that is the Commission's statutory duty.

Significantly, His Lordship added that:[88]

> This is required by the Treaty of Waitangi and its principles, applied as a living instrument in the light of developing national circumstances, which this court has previously held to be the right approach: see *Te Runanga O Muriwhenua Ins. v Attorney-General* [1990] 2 NZLR 641 at 655.

The judgment is important for providing a precedent that obliges decision makers to at least consider undertaking consultation with urban Māori in the exercise of their statutory decision making powers. While the decision turned on the provisions of the Treaty of Waitangi (Fisheries Settlement) Act, Lord Cooke relied, at least in part, on the principles of the Treaty itself in reaching his conclusion. In my view the decision presages the inclusion of urban Māori authorities into the mainstream of Māori groups with whom the Crown and its agencies may be expected to consult. The authorities have the potential to play at least as important a part in the workings of the relationship with the Crown as the individual iwi themselves. Although, as Kelsey observes, "this sits uncomfortably with the revival of a tribally-centred world,

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[87] Above n 84, at 29.

[88] Above n 84, 29.

and tribally based Treaty settlement policies of which urban Māori legitimately demand a share."[89]

E Comment

The changes which Māoridom has undergone in the last twenty or so years have been considerable. It is difficult to predict what the changes to the Māori party to the Treaty relationship will be in the years ahead, and which of those changes are the result of MMP itself and which are part of broader trends which would in all probability have occurred regardless. One thing is clear: the move to an MMP electoral system will, over the medium term, influence the way in which iwi, hapu, and pan-Māori authorities develop and operate, in the same way as earlier changes to the political environment have influenced Māori since 1840. While the changes to the Crown may be more visible and more immediate (in the composition and organisation of the first MMP-elected government, and the proportional nature of the House, for example) the changes undergone by Māori will initially be more subtle.

In time Māori may find that they enjoy improved access to the Crown and Parliament. Some iwi or hapu may find that it is more advantageous for them to operate independently in their dealings with the Crown, while pan-Māori or Māori sectoral interest groups should be as well placed to exploit the opportunities for access to decision makers as any other lobbyists. The prospects of MMP influencing the creation of a pan-Māori organisation are less clear. Inter-iwi rivalries will remain. Nonetheless, there should at least be a greater opportunity for the voices of Māori to be heard.

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[89] J Kelsey *The New Zealand Experiment* (Bridget Williams, Auckland, 1995) 365.

VIII PARLIAMENT AND REPRESENTATION

A Māori Seats in Parliament

Māori have been represented in the House of Representatives on a permanent basis since 1868. The four Māori seats were first provided for in the Māori Representation Act 1867 in what was intended to be a temporary measure until sufficient Māori men had met the property franchise requirements of the New Zealand Constitution Act 1852. The Māori seats have remained a feature of successive New Zealand Parliaments ever since.[90] The desirability of retaining the seats has been debated many times, most comprehensively by the Royal Commission on the Electoral System in 1986.

The Royal Commission found that the status of Māori in New Zealand's constitutional and legal arrangements could be distinguished from that of other minority interests in three respects. First, Māori are tangata whenua - New Zealand's indigenous people. Secondly, the signing of the Treaty of Waitangi by the Crown and the chiefs in 1840 signified the beginning of constitutional government in this country and afforded Māori special constitutional status. And thirdly, Māori have historically had separate representation since the election of the first Māori MPs in 1868.[91] The Royal Commission also set out a number of principles of Māori representation against which electoral systems could be evaluated:

(a) Māori interests should be represented in Parliament by Māori MPs;

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[90] Special representation had previously been granted to Otago goldminers who had not met the property requirement in 1862 and to Westland miners in 1867. They had been intended as temporary measures also. The Māori Representation Act 1867 was extended for five years in 1872 and made indefinite in 1876. The Electoral Enrolment Act 1975 gave Māori the option of registering on the Māori or the General roll, with the number of seats being set at four by the Electoral Amendment Act 1976.

[91] For an account of the history of Māori representation in Parliament see M Sorenson "A history of Māori representation in Parliament" *Report of the Royal Commission on the Electoral System* (Wellington, December 1986) 89.

(b) Māori electors should have an effective vote, which all political parties compete for;

(c) All MPs should be accountable to Māori electors;

(d) Māori MPs should be democratically accountable to Māori electors;

(e) Political parties' candidate selection procedures should be organised to allow Māori a voice in deciding who their candidates should be.[92]

The Royal Commission found that the advantages of separate representation were that Māori were guaranteed representation in Parliament, which has historically been of considerable importance in keeping issues of interest to Māori alive in an unsympathetic environment, and that the Māori MPs were directly accountable to their electors. On the other hand, the Commission found that the representatives of Māori and non-Māori alike "were ultimately responsible only to the particular community that elected them", which has contributed to the political isolation of Māori and comparative lack of influence of Māori MPs.[93] The Commission recommended that MMP should be adopted as the best means for ensuring the effective representation of Māori, albeit with no separate seats, a common roll and no Māori option.[94]

As the 1988 Inquiry into the Report of the Royal Commission noted, the Royal Commission envisaged that Māori representatives would be more likely to be elected through national lists under MMP. The Commission thought that list MPs would be in the best position to address specific issues of concern to Māori, and alluded to the

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92 Above n 91, 89.

93 Other disadvantages of the Māori electorates identified by the Royal Commission included the unwieldy size of the Māori electorates, the fact that the number of Māori seats was fixed at four and "unsatisfactory administrative arrangements".

94 *Report of the Royal Commission on the Electoral System*, above n 91, 105-106.

likelihood that a separate Māori party would win list seats (particularly if the proposed 4% threshold was waived for parties primarily promoting Māori interests). In addition, the fact that constituency MPs would be retained under MMP meant that electors would continue to enjoy meaningful links with their local MP. The Royal Commission concluded that "in terms of legitimacy, MMP was, and would be seen to be fairer in its representation of political parties, minorities and special interest groups."[95]

Interestingly, the Inquiry into the Report of the Royal Commission rejected the Commission's recommendation that MMP should be adopted as a means of providing effective representation for Māori.[96]

> The [Electoral Law] Committee believed that a Mixed Member Proportional system would not necessarily guarantee to enhance Māori representation in Parliament. Its greatest disadvantage was that although such a system provided the opportunity and incentive for Māori representation, it did not guarantee that there would be any MPs specifically to represent Māori interests... All but one Māori submission received by the Committee did not believe that proportional representation could replace separate Māori representation. They wanted such representation to continue, preferably with a number of seats that represented the population that identified with separate Māori seats for electoral purposes. The Royal Commission also acknowledged that all Māori submissions to it favoured the continuation of separate representation in Parliament...
>
> In the final analysis, it was felt that the Māori people themselves must determine the degree of influence they and their representatives should have in Parliament and the wider political system.

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95 *Inquiry into the Report of the Royal Commission on the Electoral System* (1988) AJHR I.17B, 14.

96 Above n 95, 25,

A majority of the Committee recommended the retention of a minimum of four Māori seats, with the number to be determined by the number of electors of Māori descent, and their children, who choose to go onto the Māori roll.[97]

Section 2 of the Electoral Act 1993 (as amended) provides that the Māori electoral population is determined by first, dividing the total number of persons registered as electors of Māori electoral districts, by the total number of persons of Māori descent registered as electors of either General electoral districts or Māori electoral districts (seats); and secondly, by applying that percentage to the total number of ordinarily resident persons of New Zealand Māori descent as determined by the most recent census. Section 45(3) of the Electoral Act provides for the number of Māori seats by dividing the Māori electoral population by the South Island quota[98] (which is the general electoral population of the South Island divided by 16).

The last Māori Option before the first MMP election, during which time qualified Māori could exercise the option of being registered on the Māori roll or the general roll,[99] was conducted between 15 February 1994 and 14 April 1994. The Option resulted in an increase of Māori on the Māori roll of some 30.93%, to 136,708. When the formula prescribed in the Electoral Act was applied the number of Māori seats for the 45th Parliament was set at five.[100] The next Māori option is to be

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97 The Committee also recommended that a special select committee of Parliament be established, whose composition would "reflect the partnership of the Treaty of Waitangi" to conduct a broad ranging inquiry about the "definition and protection of the political and electoral rights of the Māori people and the recognition of their position under the Treaty of Waitangi".

98 Above, n 91, 27-28. As determined by s 35(2)(b) of the Electoral Act 1993.

99 As provided for in ss 76-79.

100 Hon D.A.M. Graham, Minister of Justice, press statement, 22 April 1994. See also the judgment of the full court of the Court of Appeal in *Taiaroa and ors v Minister of Justice and ors*, CA 201/94, 23 December 1994, at 9 , per Cooke P.

conducted in 1997, which will provide an opportunity for the number of Māori seats in Parliament to be adjusted once again.[101]

B Representation and its Consequences

The new electoral system will offer Māori powerful incentives to re-align the focus of their attention, at least in part, from the Crown to Parliament. The point has been made that if all Māori were to enrol on the Māori roll[102] six or even seven seats could be reserved for Māori, in addition to those which might be held by Māori from the party lists or elected to represent general seats. Nor is it inconceivable that a Māori party could receive 5% of the vote on a national scale,[103] or that an iwi based regional party could successfully contest a general electorate.

Increased representation in Parliament should translate into increased Māori influence of the exercise of the functions of Parliament. The key issue will be whether Māori wish to pursue their aspirations through the predominantly pakeha Parliament or through their own fora based on the concepts of rangatiratanga and self-determination. Some Māori advocate a new emphasis on Parliament. Donna Awatere-Huata, Ian Rikys and Dover Samuels, for example, argue that few Māori can at present rightfully claim to speak for Māori whereas those who have been democratically elected to Parliament have the authority of a mandate. Others have advocated broad-based iwi-derived parties targeting a block-vote from Māori, which

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[101] Section 77(4) and (5) provide that the Māori option is to be held in the year of the census, except in years where the census and the expiry of parliament coincide, in which case the option shall be held the following year.

[102] It is believed that a large number of Māori are not registered on either roll. Estimates range from 12,000 to 60,000: *Taiaroa and ors v Minister of Justice and ors*, CA 201/94, per Cooke P, at 6 (quoting Mr A McRobie, an adviser to the respondents, and Ms Sian Elias QC, counsel for the appellants).

[103] C James "The Stirring Partner" in C James and A McRobie *Turning Point - The 1993 Election and Beyond*, (Williams, Wellington, 1993) 110-111.

could enter into coalition with sympathetic mainstream parties to address universal issues such as employment, health and education.[104]

It should not be assumed that an increased number of Māori MPs will necessarily result in improved outcomes for Māori. It is possible that a vocal group of articulate Māori MPs could polarise other MPs who might find it desirable to exploit the uncertainty and dissatisfaction of other parts of the electorate at the apparent success of Māori in Parliament. While Māori account for some 13% of the population it is possible that a much larger proportion of the electorate might support policies which are unsympathetic to Māori issues and concerns. Palmer makes the point as follows:[105]

> It is unpopular to try to address grievances of Māori. It is the familiar problem isolated by John Stuart Mill, the problem of the tyranny of the majority. ... In New Zealand the argument is most frequently put on the basis that all New Zealanders have equal rights - Māori have those rights - they should be treated no differently in any respect from pakeha. The Treaty is history. From it nothing should spring now, the argument runs. There is a substantial political market for the argument, particularly if Māori politicians make it. Disguised prejudice is never far from the surface in New Zealand, whenever there is debate on Māori matters.

Under FPP a Cabinet that wished to pursue a policy which was ahead of general public opinion could normally expect to do so with little difficulty because of the size of Cabinet in comparison with the Government caucus as a whole and the strict discipline imposed on Government MPs. Arguably both the Labour Government of 1984-1990 and the subsequent National Government pursued Māori-related policies (such as the settlement of Treaty of Waitangi claims) that were ahead of the views of much of the electorate. An MMP Cabinet would not enjoy the same powers as its FPP predecessors. This will be especially so for minority or minority-coalition

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[104] A Heal "Uncivil Disobedience - the Rebirth of Māori Radicalism" *Metro*, April 1996.

[105] Sir Geoffrey Palmer, *New Zealand's Constitution in Crisis* (McIndoe, 1992), 74.

governments, although as noted above, not all policies concerning Māori require legislation in order to be implemented.

There is a sting in the tale for Māori of an electoral system based on a concept of proportionality. It may well be that not only is the voice of Māori given greater weight in a Parliament elected under an MMP electoral system, but that the views of those who neither share nor support pro-Māori policies may be just as influential. It cannot be assumed that Parliament will be pre-disposed to a sympathetic approach to Māori issues, notwithstanding predictions that MMP would usher in a time of consensus.

Whatever the disposition of Parliaments elected by MMP, it is clear that Parliament has the potential, perhaps for the first time in the history of this country, to become the primary forum for issues of importance to both Māori and the electorate at large to be debated and examined. There is potential for a new sense of transparency to be brought to such issues, as viewpoints which have been absent from Parliament, or inadequately articulated in the past for a variety of reasons, are brought to the fore in a contest of ideas.

While MMP will not make Māori an equal Treaty "partner" with the government in the development of policy, it will enable Māori concerns and issues to play a larger part in the legislative policy agenda. In the long run, MMP Parliaments increase the likelihood of Māori gaining an improved negotiating position compared to that which they have experienced historically.

C A New Relationship with Parliament

The new relationship Māori will have with Parliament is manifested in a number of ways. First, and most obviously, there ought to be an increased number of Māori in the House. This is primarily a result of the Māori option exercise adding an extra

Māori electoral district and in the likelihood that the parties will seek to attract Māori votes by featuring Māori candidates prominently in the party lists.[106]

Secondly, the scrutiny function of Parliament will be enhanced by the additional number of MPs dedicated to sectoral select committees, with improved resources,[107] allowing the committees to have a greater influence in their overview of the operations of the government. The Māori Affairs committee in particular may enjoy a new prominence in the eyes of Māori. Thirdly, Māori are likely to discover that Parliament will provide a useful alternative avenue to pursue or influence policies which concern them, rather than having to deal exclusively with the Crown in such matters.

The potential of any re-alignment of power between the Crown and Parliament to result in favourable outcomes for Māori depends on a number of factors. They include the composition of the government (that is, whether it is a minority, minority coalition, or majority coalition, and whether Māori MPs form part of the governing arrangement); the political relationship between the government and the House and its committees; the policies of the parties in Parliament with respect to Māori issues; and, perhaps most importantly of all, the willingness of Māori to participate in the process and exploit the opportunities available.

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[106] As the National Party has done with the high list place allocated to Georgina Te Heuheu prior to the 1996 election.

[107] List MPs will also have more time to devote to the parliamentary aspects of their work, and although they do not represent a constituency they may still perform other roles which link them to the communities they serve.

IX The Role of the Courts

A General

In the fifteen or so decades since the chiefs and the representatives of Queen Victoria gathered at Waitangi in the summer of 1840 it has fallen to the courts on many occasions to determine the ramifications and legality of the Treaty.[108] While a studied consideration of the treatment of the Treaty by the courts is a task beyond the scope of this paper, it would be fair to say that the judicial dicta concerning the Treaty have been spoken in the voices of their times - from Prendergast CJ's nullifying observations in *Wi Parata v Bishop of Wellington*,[109] to the orthodoxy of the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*,[110] and ultimately the decisions of the Court of Appeal in the late 1980s and early 1990s.

There are few significant cases concerning the Treaty prior to the 1980s. That is not to say that those cases have not had substantial consequences. The decision of the Privy Council in *Hoani Te Heuheu's case*, for example, in which their Lordships held that the Treaty had no enforceable status in domestic, or municipal, law remains the position today. This was confirmed by the decision of the majority of the Court of

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[108] For an examination of the much neglected area of Māori law prior to the Treaty see R Boast "The Law and the Māori" Spiller, Finn and Boast *A New Zealand Legal History* (Brooker's, Wellington, 1995) 125-127.

[109] (1877) 3 NZ Jur (NS) SC 72 at 78.

[110] [1948] AC 308. See also C J Duncan *Hoani Te Heuheu v Aotea District Māori Land Board: Māori Land Administration in West Taupo, 1906-41* (LL.B.(Hons) Research Paper VUW, 1994).

Appeal to adopt the ratio of *Hoani Te Heuheu's case* in *NZ Māori Council v A-G.*[111]

Until the last decade the courts have played a relatively minor role in determining the place of the Treaty in the national consciousness. In recent years, however, the courts (adding to the efforts of Māori themselves since the mid 1970s) have given the Treaty a new and lasting prominence in the realms of law and politics, and society at large. I have already referred to the dramatic effect of Cooke P's evocation of partnership.

Yet the ability of the courts to effect major change in this context is limited. Whether, for example, the judicial re-examination of the Treaty would, or indeed could, have occurred without the enactment of the Treaty of Waitangi Act 1975 by the third Labour Government, and the references to the "principles of the Treaty" in legislation enacted by the fourth Labour Government is a moot point. Further, nearly all the major Treaty litigation has concerned statutes which refer expressly to the principles of the Treaty or to Māori interests specifically.[112]

The legislative emphasis of Treaty jurisprudence is a consequence of the finding that the Treaty is not part of domestic law. The role of the courts in the context of Treaty issues is limited largely to interpreting and applying legislation. This emphasises the importance of both the Crown in determining the policies which will be implemented in the legislation, and thereby prescribing the extent to which the Treaty is of application, and Parliament for enacting it. As I see it, the energies of Māori would be better directed at lobbying the executive and the legislature before the legislation is enacted rather than resorting to costly litigation at a later date.

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[111] In which McKay J, delivering a judgment for the majority, held that Treaty rights can only be asserted in the courts where they have been recognised by statute: [1992] 2 NZLR 576, 603. The cases dealing with the Treaty have received careful consideration by Lord Cooke in the Henry Harkness lecture at the University of Waikato of May 1994 - *The Challenge of Treaty of Waitangi Jurisprudence*. For an analysis of the Treaty and municipal law see P Joseph, above n 4, 54-62.

[112] Sir Kenneth Keith "The Roles of the Tribunal the Courts and the Legislature" (1995) 25 VUWLR 129, 132-133.

The tangible results for Māori after nearly twenty years appearing before the courts and the Waitangi Tribunal have not been great. For some, the effects of the massive attention the judicialisation of the Treaty has brought with it have been disappointing. Kelsey makes the point as follows:[113]

> The Māori litigants themselves secured relatively little from the SOEs and privatisation litigation, at considerable financial and human cost. Actual or threatened litigation had improved their negotiating position, enabling Māori to secure promises for the future which might or might not be fulfilled. Those settlements that were secured were generally minimal in terms of the value of the assets and locked into a form that was consistent with the prevailing market ethos. In the process, Māori litigants had conceded the authority of the court to define the Treaty of Waitangi, and to subordinate it to the economic, political and ideological requirements of colonial capitalism.

Similarly, Wainwright argues that there has been little substantive change in the approach of the courts over the last 10 years. The only effective change, in which the Waitangi Tribunal has played a part, has been the enactment of legislation which specifically import the Treaty or its principles into domestic law. The consequence is that the involvement of the courts has been, and remains, "dependent on the willingness of the legislative arm of government to import it into legislation."[114]

That is not to say that the focus on the courts as arbiters on Treaty matters is necessarily inappropriate. The doctrine of the separation of powers, relatively weak as it may be in formal terms in this country, places the courts in a special position with respect to the Crown. The courts represent an alternative avenue of redress for Māori in Treaty issues and serve as a check on executive action. Nowhere, in my

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[113] J Kelsey *Rolling Back the State* (Williams, Wellington, 1993) 284.

[114] C M Wainwright "Lawyer as Lobbyist: Leverage through litigation: the new Māori politics" 1993 NZ Law Conference papers, volume 2, 294 at 312. Previously submitted as an LLM research paper, VUW, 1991.

view, is the potential of the courts to influence government policies more significant than in the context of Treaty jurisprudence.

B The Waitangi Tribunal

The Waitangi Tribunal is constituted under the Treaty of Waitangi Act 1975, and comprises the Chief Judge of the Māori Land Court as the chairperson, and up to 16 additional representatives appointed by the Governor-General on the recommendation of the Minister of Māori Affairs, in consultation with the Minister of Justice, for a term of up to three years. In considering the suitability of persons for appointment to the Tribunal the Minister must have regard to the "partnership between the two parties to the Treaty and shall have regard not only to a person's personal attributes but also to a person's knowledge of and experience in different aspects of matters likely to come before the Tribunal".[115]

The Tribunal is not a court of record. With the notable exception of the Chairperson, the appointees to the Tribunal do not enjoy tenure of office. The traditional separation between the executive and a quasi-judicial tribunal is indistinct in the case of the Tribunal, as the members are appointed for a comparatively short term and the work of the Tribunal may be affected adversely by government-imposed budgetary constraints.[116]

The primary function of the Tribunal is to adjudicate on claims made by Māori that acts or omissions of the Crown arising since 1840 were contrary to the principles of the Treaty of Waitangi.[117] If a claim is held by the Tribunal to be well-founded it

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[115] Section 4(2A) Waitangi Tribunal Act 1975. Roughly a third of the members of the Tribunal in 1996 were Māori.

[116] Although perhaps a more serious practical concern is the comparatively small number of skilled researchers and historians able to assist the members of the Tribunal in their work.

[117] Section 6. See also R Boast "The Waitangi Tribunal - "Conscience of the Nation" or Just Another Court" (1993) 16 Univ NSW LR 223.

may recommend to the Crown that it take steps to provide compensation or remove the prejudice.[118] In addition to recommending monetary compensation or the recovery of Crown land where a claim is upheld the Tribunal may recommend policies for the government to pursue or make binding recommendations in relation to SOE assets and certain Crown forests.[119]

The Waitangi Tribunal process exemplifies the inter-action between the claimants, the government, Parliament and the courts. The claimants will be heard by the Tribunal (as will the Crown, represented by counsel from the Crown Law Office), which will in time issue a report which may contain recommendations for the government. The government may in turn present legislative proposals to Parliament to implement those recommendations. The resulting legislation will then fall to be interpreted by the courts, which will also consider any judicial review proceedings which arise in the course of the process or in the exercise of any statutory powers.[120]

After a quiet start the Tribunal became prominent in the mid-1980s with a series of major reports on a wide range of matters.[121] The Tribunal has been likened to an

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[118] Section 6(3) and (4).

[119] Chief Judge Durie "The Tribunal and the Treaty" (1995) 25 VUWLR 97 at 97. The Chief Judge notes that claims may be grouped into three categories: historical, contemporary and conceptual. Historical claims themselves may be either major or specific and cover the following broad areas: the confirmation of pre-Treaty purchases; Crown purchases prior to 1865; purchases under the Native Land Courts system; confiscations and expropriations; title arrangements and developments under the Native land Court system.
Contemporary claims include the impact of resource management policies; Māori language; Māori land issues; Māori participation in economic development, judicial systems and administrative structures; Crown asset sales; education, immigration; intellectual property issues and so on.
Conceptual claims usually concern the involvement of Māori in the use of natural resources.

[120] Sir Kenneth Keith above n 112, 130.

[121] Such as the *Motunui Report* concerning marine pollution in Taranaki; the *Kaituna River Report* and the *Manukau Report* into river pollution; the recognition of the Māori language claim reports on the *Orakei* and *Waiheke Island* claims; the *Muriwhenua Fisheries Report*; the radio frequencies claim; the *Ngai Tahu Report*, and the interim *Taranaki Report*.

ongoing commission of inquiry - in the words of Lord Cooke it is "essentially an investigatory and recommendatory body".[122] The Tribunal has performed a valuable role in both investigating and publicising issues which had hitherto received little attention. Indeed the educative role of the Tribunal is of great importance. It is through public awareness that public support for policies consistent with the principles of the Treaty will be fostered. That support will be essential for meaningful progress in an MMP environment.

Besides communicating the importance of Treaty issues to the electorate, the Tribunal is a crucial link between the Crown and Māori. It is a forum where issues arising out of the Treaty relationship may be addressed.[123] While the Tribunal is vulnerable to claims that it encourages a "grievance industry", it would be interesting to speculate as to what form those grievances would have been manifested in the Tribunal's absence. The Tribunal is in some respects a safety valve, in the sense that it allows grievances to be explored and worked through in a culturally appropriate manner. Its importance in the years ahead is likely to lie, in my view, in its potential to address grievances, or to facilitate the settlement of claims, constructively and without acrimony. This is because the powers of the Tribunal are essentially recommendatory. A government may elect not to heed the Tribunal's recommendations if it wishes, thereby highlighting the need for Māori to become involved in or influence the policies and decisions of the government. As I have observed above, the move to an MMP electoral system provides significant opportunities for this to occur.

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[122] Lord Cooke of Thorndon, above n 111, 20.

[123] For a less benevolent view of the role played by the Tribunal and the apparent difficulties it has faced see Kelsey, above n 113, 286-290. Kelsey concluded that:

> "Since 1983 the Waitangi Tribunal had provided a crucial weapon of *passive revolution*. It has drawn Māori off the streets and into a state-controlled forum. How much longer it could continue this function was unclear. ... The demise of the Tribunal as an option for effective redress, the recapitulation of the courts on the Treaty, and the widespread espousal of tribal sovereignty, suggested a deepening sense of alienation from a state which saw no obligations to deliver on its historical obligations, and a much more rocky and unpredictable path ahead."

C *Comment*

1 *General*

Māori have resorted to the courts on numerous occasions in recent years when wishing to challenge Government decisions, or the decisions of government departments. The results of the resources expended on those proceedings have been significant, but not dramatic. However, if the opportunities for increased involvement in decision making do materialise in the next few years, new factors will influence the choice of instruments which Māori choose to devote their resources to in order to achieve their goals. The courts were the only arena in which the government decisions affecting Māori could effectively be challenged during the late 1980s and early 1990s.

As Māori representation in Parliament increases and becomes more effective, and as governments adopt a more consultative approach to decision making, the need to resort to the courts should diminish. The courts will remain a crucial backstop, and will continue to be important for reviewing the decisions of decision makers where the principles of the Treaty have not been complied with or been given regard to.

2 *Judicial review*

The possible ramifications of a move to an MMP electoral system have been explored above. A further facet is the likely impact of the new regime on the exercise of the courts' powers of judicial review pursuant to the Judicature Amendment Act 1972. The courts have displayed a willingness in recent years to apply their administrative law powers to proceedings involving Treaty issues. France observes that administrative law duties may arise where there is a statutory duty to comply with Treaty principles; a statutory duty to have regard to or take account of

Treaty principles; or even where there is no statutory reference to the Treaty or its principles.[124]

Chen raises the question of whether the increased representation that MMP will bring to Māori in Parliament, and the improved opportunities that the new electoral system will provide for the involvement of Māori in government and Parliamentary processes, will undermine the basis for the "special protection" of Māori by the courts. Further, "will such groups now have greater access to the political process to protect themselves?"[125]

Regardless of whether the courts are in fact swayed by such considerations, and it is perhaps arguable that they might be, the Judicature Amendment Act allows decisions made pursuant to a statutory power or right, under a constitution, rule or bylaw of any body corporate which affects the rights, powers and privileges of a person to be reviewed. The remedies available to the courts enable them to oversee decisions which have consequences for members of the public. The English Court of Appeal has held in *R v Panel of Takeovers & Mergers, ex parte Datafin plc*[126] that as the power and rights affected become more important, the more likely it becomes that judicial review will be available whatever the source of the power.

3 Privy Council

In my view, the abolition of the right of appeal to the Judicial Committee of the Privy Council will have very little substantive effect on either Māori or the Crown.

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[124] E France "Administrative Law Duty or Treaty Obligation? - the Present Landscape" paper for AIC Conference, 22 and 23 April 1996, 2. See also D Round "De baleanis novitur inventis - the Ngai Tahu whale watching case" [1996] NZLJ 164.

[125] M Chen "The Introduction of MMP Representation in New Zealand - Implications for Lawyers" (1994) 5 PLR 104, 115.

[126] [1987] QB 815. See also P Radich and M Scholtens "Judicial Review" NZLS seminar, July 1995, 3.

As Cooke P has observed,[127] Treaty litigation has primarily been fought out in the Court of Appeal through the case removed procedure, and more recently in the High Court. The impact of the Privy Council on Treaty jurisprudence has not been great - Māori have not been successful in a case taken to the Privy Council since 1904.

Yet many Māori oppose proposals to remove the right of appeal as severing a link between this country and the monarchy, on whose behalf Captain Hobson signed the Treaty. As the Attorney-General, the Hon Paul East QC, put it:[128]

> From a Māori perspective, the Privy Council is seen as a form of access to the Sovereign which is of symbolic importance in relation to the Treaty and should not be interfered with. The Privy Council is also seen as a body which has always sought to protect indigenous rights and has considerable competence and experience in this area.

Nonetheless, the learned Attorney continued that:[129]

> ... abolition of appeals to the Privy Council will not reduce opportunities for Māori to pursue settlement of Treaty claims with the Crown, nor affect the place of the Treaty in our society.
>
> The Treaty may possibly encompass a right to a judicial system with certain core values such as independence and fairness. However the right to these attributes in a judicial system is one that equally applies to all citizens. Any Treaty right does not in my view require retention of access to the Privy Council or to any other external judicial body...

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[127] Lord Cooke of Thorndon, above n 111, 15.

[128] *Lawtalk* 13 May 1996, 6.

[129] Above n 128, 6.

> A first hand knowledge of New Zealand conditions is of special importance and value to a court in Treaty cases and this factor strongly favours ending Privy Council appeals

It is interesting to speculate whether the judicial re-discovery of the Treaty would have occurred had all the proceedings been heard by the law lords rather than the New Zealand Court of Appeal. I agree, with respect, with the views articulated by the Attorney-General. Putting spiritual or symbolic links to one side, the abolition of the right of appeal to the Privy Council should have very little impact on the ongoing relationship between the parties to the Treaty.[130]

X CONCLUSION

The evolving relationship between the Crown and Māori is one of fundamental constitutional and national importance. The nature of that relationship is, however, one of considerable complexity and ambiguity. The complexity arises out of the number of parties interested in the relationship in the politically sophisticated environment of the late 1990s, their aspirations, New Zealand's unique constitutional arrangements, and the role of the Treaty itself. The ambiguity arises from such factors as the concept of the Crown, the unknown potential of the new electoral system, the new influence of Parliament, and the aspirations of, and tensions within, Māoridom itself.

The parties to the Treaty are moving, as I see it, to a 'post-partnership' era. Putting symbolism to one side, the Crown and Māori are not and arguably never have been partners in any meaningful sense.[131] That is not for a moment to deny the crucial

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[130] The New Zealand Courts Structure Bill 1996 was introduced on 18 June 1996. The Bill abolishes the right of appeal to the Privy Council and provides that a re-structured Court of Appeal is the final appellate court in New Zealand. The Bill provides for a commencement date of 1 July 1997. (1996) 19 TCL 23, 14.

[131] Note that the Crown has the responsibility to govern in the best interests of all New Zealanders. This may at times involve a degree of tension between what is in the best interests of Māori and what is in the best interests of the electorate as a whole.

importance of the relationship between the Crown and Māori. It is simply to recognise that to cast the relationship in the terms of a simple partnership is a potentially dangerous over-simplification. A dyadic concept of partnership, exclusive of Parliament, risks missing the very real opportunities that MMP represents.

If one considers the nature of the relationship as expressed by the Court of Appeal, it becomes clear that the Court used the concept of partnership to express and emphasise the fiduciary nature of the relationship. The Treaty *signified* a partnership. Partnership was an *analogy* which illustrated the precepts of good faith and mutual obligation.

Partnership is a subjective term. It means different things to the courts, to the Crown, and to Māori. Further, as I see it, partnership misrepresents the reality. In broad terms, the Crown consists of Ministers and their departments of state, responsible to Parliament. The interests of each of those Ministers, and each department, differ. The Crown is not in this analysis as unified an entity as some might believe. Nor is there a single, unified Māori Treaty partner. Each party to the Treaty has internal divisions and competing interests. For Māori, these interests will find new opportunities for influence and expression in an MMP Parliament.

The impact of MMP defies accurate predication. Nevertheless, it is possible to discern a number of implications for each of the parties to the Treaty.

For the Crown, the most significant implications will be for the organisation and operation of the Cabinet, and in the Cabinet's relationship with Parliament. No longer will the Cabinet be as dominant a force as it once was. Even so, the Cabinet will remain the primary decision maker in our political system, although the way in which it makes those decisions and its ability to implement them might change.

A further impact of MMP for the Crown will be in its relationship with Parliament. As legislation is at the heart of the Crown-Māori relationship, any shift of legislative authority from the Crown to Parliament could well alter the balance on Māori issues. The Cabinet is likely to consist of two or more parties in coalition, or be a single party minority. In either scenario, the Crown's relationship with Parliament will be different to that under a first past the post system. Parliament will assume a new importance.

Equally, MMP has significant implications for Māori. They include the incentives for the formation of pan-Māori organisations and individual groups to participate in government decision making. MMP may encourage pan-Māori kotahitanga movements. In contrast, it may also encourage individual iwi or hapu, or the urban Māori authorities, to participate in the political system on their own behalf. Hapu, iwi and urban Māori authorities have their own agendas and priorities which the inclusive environment that MMP represents will recognise and encourage.

Yet, in my view, the greatest impact of MMP will be on Parliament itself. There are likely to be a larger number of Māori MPs in Parliaments elected by MMP, although they will continue to be members of existing general political parties such as National, Labour, the Alliance, or New Zealand First. It will be some time before Māori political parties are independently represented in Parliament. Māori will, over time, begin to exploit the new opportunities for influence which MMP represents.

Māori may potentially enjoy a new, vigorous relationship with Parliament. With representation goes influence. Māori will find that the partial re-alignment of power to the House will provide a useful counterpoint to Cabinet, and will be a less costly means of influencing favourable outcomes than litigation. That is not to say that the enhanced opportunities will necessarily result in more favourable outcomes for Māori, as the opportunities will be costly to exploit. Further, the proportionality of MMP may prove to be equally encouraging for those parts of the electorate which are unsympathetic to Māori issues. The potential of such groups to operate in a manner counter-productive to Māori interests should not be under-estimated.

The future evolution of the Crown-Māori relationship, and of their respective relationships with MMP Parliaments is difficult to discern. Whether the effects of the new electoral system will be as significant as some people believe cannot be predicted. But one thing is clear. The emergence of a new era will depend on the goodwill and participation of all New Zealanders.

> When Hobson said at the signing of the Treaty of Waitangi, "He iwi tahi tatou" he was not saying we are one homogeneous people but that we are one nation made up of at least two distinctive peoples, with room for more. Our nationhood consists not in either group on its own but in what is generated out of the relation between us.[132]

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[132] Dame Joan Metge "Ko te wero Māori - the Māori challenge" Family Law Conference papers NZLS, 1991, 3.

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WORD LENGTH

The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 16,047 words. There are approximately 20,233 words in this paper in total.