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Why honour the Treaty?

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WHY HONOUR THE TREATY?
THE IMPLICATIONS OF TREATY OF WAITANGI
POLICY FOR THE ECONOMIC ANALYSIS OF
PUBLIC DECISIONMAKING

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ABSTRACT

The paper addresses a number of shortcomings of public choice analysis and develops a supplementary public choice theory involving elements of institutional economics and expressive motivations. The theory is then applied to each of the institutions involved in the process of policy formulation and is briefly developed in relation to the role of each in the development of policy in relation to the Treaty of Waitangi between 1984 and 1990.

The text of the paper comprises approximately 14 500 words.

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I INTRODUCTION

A *The Treaty of Waitangi*

The development of public policy in relation to the Treaty of Waitangi in the period between 1984 and 1990 has had a considerable impact on New Zealand society. Viewed purely in fiscal terms, the increased status of the Treaty has conferred substantial benefits on a number of Maori groups while imposing costs on individuals and the country as a whole.

Such partiality of policy is not, of course, unusual; it is an inevitable element of any process of redistribution. Treaty of Waitangi policy may, however, be seen to differ in two significant respects. Firstly, the Maori beneficiaries possessed little economic or political authority.¹ Further, the redistribution occurred at a time when allocation of government resources to interest groups was being largely removed.² Secondly and partly because of this context, it is difficult to identify plausible motives for the adoption of such policies.³

However, although Treaty policy may be particularly obscure in this respect, it is clear that the motivations of much government policy may be difficult to determine, both because of the complexity of many policy decisions and because of the significance of appearances in democratic government and the consequent incentives for pretence.⁴

B *Public Choice Theory*

Public choice theory provides some solution to these difficulties and thus may be seen to offer at least the possibility of deductive and objective analysis of the process leading to the formulation of a particular policy.⁵ Such analyses can serve a number of purposes

¹ A Fleras "The Politics of Maori Lobbying: The Case of the New Zealand Maori Council" (1986) 38 Pol Sci 27, 32.

² D J Smyth & A E Woodfield "Inflation, Unemployment and Macroeconomic Policy in New Zealand: A Public Choice Analysis" (1993) 75 Public Choice 119, 122.

³ R Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin, Auckland, 1990) 266.

⁴ J L Mashaw "The Economics of Politics and the Understanding of Public Law" (1989) 65 Chi-Kent LR 123, 131; B S Frey & R Eichenberger "Anomalies in Political Economy" (1990) 68 Public Choice 71, 76.

⁵ D C Mueller "The Next Twenty-Five Years of Public Choice" (1993) 77 Public Choice 146, 150.

beyond that of providing an explanation for the policy in question. On a positive level, it is possible to extrapolate from the analysis a partial model of the policy formulation process and further to advance general propositions as to the role of different public decision-makers in the policy process. Normatively the analysis may, through its description of the allocation of authority between different decision-makers, provide a basis for determining whether policy decisions reflect the preferences of those involved and more broadly allow an assessment of the efficacy of governmental structures in ensuring such propriety.⁶

Application of public choice theory involves the presumption that the motivations of individuals making "public choices" do not differ from those ascribed by microeconomic theory to "private", or market-oriented, choices.⁷ The presumption may be seen to have two elements: first, that individuals are motivated to maximise their economic self-interest, and secondly, that such motivation is constrained rather than altered by any decision-making process. The effect of these elements is to allow the modelling of decision-making by contrasting the decisions made within the constraints imposed by such processes with those reached by wholly self-interested decision-makers.

Both elements of the presumption are open to considerable criticism. Firstly, the adoption of self-interest as at least the dominant, if not the sole, motivating factor in the public decisions of individuals is highly questionable on psychological and ethical grounds at least.⁸ Secondly, the view that public decision-making processes merely channel rather than alter individual preferences appears sociologically doubtful.⁹ Finally, even accepting both assertions it would appear necessary to recognise the extent to which the institutional structures of public decision-making influence self-interest.¹⁰

⁶ J Buchanan "The Constitution of Economic Policy" (1987) 77 Am Econ Rev 243, 243.

⁷ D C Mueller "Public Choice: A Survey" (1976) J Econ Lit 395, 395.

⁸ G Brennan & J Buchanan "Voter Choice" (1984) 28 Am Behav Sci 185, 200.

⁹ C R Sunstein "Public Choice, Endogenous Preferences" (1992) 12 Int Rev L & Econ 289, 290.

¹⁰ P Dunleavy *Democracy, Bureaucracy and Public Choice; Economic Explanations in Political Science* (Harvester Wheatsheaf, Hemel Hempstead, 1991) 4.

C *Supplementing Public Choice*

In response it is possible that although the public choice model is prone to inaccuracy or artificiality, as is the microeconomic model itself, such inaccuracy might be resolved or at least restrained in several ways.¹¹ The first of these is shared with microeconomic theory: any inaccuracy in the modelling of individual decisions may be regarded as insignificant as the model seeks to describe the process as a whole.¹² The deficiencies of such an approach where public decision-makers are concerned are clear: not only is the inaccuracy arguably systemic rather than the result of aberrance as in microeconomics,¹³ but further many public decisions are made either only once or by single decision-makers, rendering even occasional inaccuracies significant.¹⁴

Secondly, it may be possible to resolve these difficulties by accommodating additional individual motivations within the model.¹⁵ However, such a modification not only fails to address the effect of public institutions, but would also appear to detract from the analytical rigour of the narrowly economic approach.¹⁶ The difficulty arises initially through the difficulty of identifying and modelling such motivations and of comparing them between individuals¹⁷ and ultimately, if the modification is extended, by the reduction of the model to the pointless assertion that individuals act according to their motivations.¹⁸

Thirdly, the difficulties of both of the preceding approaches may be avoided if it is possible to apply economic self-interest while recognising areas of inaccuracy. These areas may be identified by the limits to the pursuit of self-interest in particular decision-making

¹¹ W Niskanen "The Reflections of a Grump" (1993) 77 *Public Choice* 155.

¹² J M Buchanan & G Tullock *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan, Ann Arbor, 1962) 17.

¹³ D L Coursey & R D Roberts "Competition in political and economic markets" (1991) 70 *Public Choice* 83, 89.

¹⁴ J S Dryzek "How Far is it from Virginia and Rochester to Frankfurt? Public Choice as Critical Theory" (1992) 22 *Br J Pol Sci* 397, 400.

¹⁵ M E Debow & D R Lee "Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey" (1988) 66 *Texas* 993, 996.

¹⁶ R A Posner "The Future of Law and Economics: A Comment on Ellickson" (1989) 65 *Chi-Kent LR* 57, 62.

¹⁷ W H Riker "The Two-Party System and Duverger's Law: An Essay on the History of Political Science" (1982) 76 *Am Pol Sci Rev* 753.

¹⁸ D Farber & P Frickey "The Jurisprudence of Public Choice" (1987) 65 *Texas LR* 873, 894; A Downs *An Economic Theory of Democracy* (Harper & Row, New York, 1957) 276.

processes.¹⁹ Although this approach is deficient to the extent that it provides only a partial model of public decision-making, completion of the model is possible through the application of psychological and sociological decision-making. The approach would furthermore appear to place greater significance on the role of institutional structures than is possible through concentration on economic benefits without regard to their relation to such structures.²⁰

The structural analysis of each decision-making institution will provide first a measure of the autonomy of individual decision-makers within institutional constraints and secondly a more conventional public choice assessment of the extent to which self-interest influences the actions of decision-makers.²¹ Through combining these two descriptions it is possible to produce a model of decision-making which indicates the limits of self-interest and therefore the scope for the application of additional types of motivation to complete the model.

The most promising addition to economic self-interest as a motivation in is the theory of expressive returns,²² which are benefits accruing to individuals through the symbolic or ethical benefits sought when self-interest cannot be served by any choice.²³ The greater potential for, and greater observed significance of, ethical and symbolic values in public decision-making renders the theory of such returns particularly applicable in the analysis of policy choice.²⁴

¹⁹ J M Buchanan *The Economics and Ethics of Constitutional Order* (University of Michigan, Ann Arbor, 1991), 8.

²⁰ J M Buchanan "Then and Now, 1961 - 1986: From Delusion to Dystopia", paper presented at the Institute for Humane Studies, quoted in J J Mansbridge "The Rise and Fall of Self-Interest in the Explanation of Political Life" in J J Mansbridge (ed) *Beyond Self-Interest* (University of Chicago, 1990), 21.

²¹ T M Moe "The New Economics of Organisation" (1984) 28 *Am J Pol Sci* 739, 756 (in relation to bureaucratic structures).

²² J A Ferejohn & M P Fiorina "The Paradox of Not Voting: A Decision-Theoretic Analysis" (1974) 68 *Am Pol Sci R* 525, 527 propose that voting is either a consumption benefit or an investment benefit. For a rejection of these alternatives, see R E Goodin & K W S Roberts "The Ethical Voter" (1975) 69 *Am Pol Sci R* 926.

²³ See initially, M Fiorina "The Voting Decision: Instrumental and Expressive Aspects" (1976) 38 *J Politics* 390. For a general justification of symbolic or ethical benefits, see E Aronson *The Social Animal* (2ed Clarendon, Oxford, 1976) 109 - 117.

²⁴ G Brennan & L Lomasky *Democracy and Decision: The Pure Theory of Electoral Preference* (CUP, Cambridge, 1993), 97.

D *Proposal*

The paper seeks to develop a form of public choice analysis supplemented by both institutional analysis which allows the assessment of the respective roles of self-interest and expressive motives. By way of experiment the paper it is then proposed to analyse limited elements of the process of development of Treaty policy. The paper will proceed by addressing each institution involved in the formulation of government policy and determining its capacity to exert policy influence on the basis of its formal powers and institutional characteristics. The limits imposed by external factors will then be addressed to determine the actual authority of the institution. The paper then considers the role of self-interested and expressive motivations in the exercise of such authority before seeking to apply the model thus developed to aspects of the involvement of each institution in the formulation of government policy in relation to the Treaty of Waitangi.

II PARLIAMENT

A *Introduction*

In order to analyse decision-making within the structure of Parliament, it is necessary to recognise three concentric groupings within the legislature which have different levels of authority: the executive, the government caucus and the legislature.

B *The Executive*

1 *Economic analysis of authority*

The executive may be seen as a means by which the information and transaction costs of policy formulation and government supervision are reduced. Members of the executive are able to specialise in certain areas through both membership of Cabinet committees and through the allocation of portfolio responsibilities, and are therefore able to prepare policy in a coherent and confidential manner for submission to Cabinet and subsequently to Caucus.²⁵

The executive can be seen to have three principal strengths: the administrative control and extensive policy advice afforded ministers, the unity in caucus and in policy formulation in general that arises from collective responsibility,²⁶ and the political power provided by the high profile of executive members both within the party organisation and in the eyes of the general public.²⁷

The administrative role of the executive, exercised through the allocation of portfolio responsibilities to ministers, can be seen to afford significant non-legislative authority subject to control principally through administrative law remedies. It is clear that the close connection afforded by the use of portfolios significantly reduces the degree of slack between the formulation and implementation of

²⁵ B Galvin "Some Reflections on the Operation of the Executive" in H Gold *New Zealand Politics in Perspective* (1ed) (Longman, Auckland, 1985) 66, 69.

²⁶ Secretary to the Cabinet *Cabinet Office Manual* (Cabinet Office, Wellington, 1991) § 3A5; J B Ringer *An Introduction to New Zealand Government* (Hazard, Christchurch, 1991) 63.

²⁷ C Bean & A Mughan "Leadership Effects in Parliamentary Elections in Australia and Britain" (1989) 83 *Am Pol Sci Rev* 1175, 1190.

policy.²⁸ Furthermore, the advice and information provided to members of the executive by bureaucratic agencies can be seen to facilitate policy formulation and evaluation.

The unity of the executive may be seen to have a base pragmatic effect: the caucus, and thereby the legislature, are in most instances unable to oppose such a united group. However, the potentially greater effect of cabinet unity may be seen to be that policy compromises reached by members of the executive may be relied upon. The consequence of reliable policy compromise is to increase the capacity of individual members of the executive to pursue preferences through exchanges of support. Where policy preferences are excessively irreconcilable, the relationship within the executive is clearly strained.²⁹

The high profile of the members of the executive, and particularly of the party leader, may be seen to impose considerable constraints upon attempts by caucus members and others to oppose policy decisions or to seek to remove executive members.³⁰

2 *Constraints on authority*

As will be seen below, the caucus possesses considerable formal power to direct the executive but is restricted in its use of them by both political and institutional considerations. It will also be made clear that although the actions of the executive are likely to be the primary consideration of most voters, such control is extremely unsophisticated.

There is therefore little possibility that either of these means will be effective in preventing the executive from pursuing any given policy. Rather it would appear that the constraints are effective only in a much broader sense. It is clear that policies adopted by the executive will be of varied consequence for voters and caucus members. Given the limited opportunities of both groups to control the executive, it would appear possible to postulate a threshold of electoral and

²⁸ J Marshall "Administration and the Changing Constitution" in R M Alley (ed) *State Servants and the Public in the 1980s* (Victoria University Department of Political Studies, Wellington, 1980) 89, 91. Note, however, that the theory of vicarious ministerial responsibility which is seen to support the relationship between ministers and officials is not reflected in reality (J L Roberts *Politicians, Public Servants and Public Enterprise: Restructuring the New Zealand Government Executive* (Institute of Policy Studies, Wellington, 1987) 48).

²⁹ Roberts, above n 28, 40.

³⁰ R Mulgan *Democracy and Power in New Zealand* (2ed, Oxford, Auckland, 1989) 69.

legislative support which the executive must maintain through its policy decisions if it is to retain power.³¹

The effects of such a broad constraint are however unclear. While it is apparent that executive members will consider the reactions of the electorate and the caucus, such reactions may be difficult to determine in advance. Furthermore, there is a clear tension between the policy exchanges made within the executive, which tend to promote more extensive policy development, and the pressures of such concerns.

3 *Self-interest*

The restrictions on pursuit of material gain by members of the executive are stringent and would furthermore appear likely to be easily and rigidly enforced.³² The principal opportunity for self-interest must therefore be seen to arise in the benefits of attaining and holding office. These benefits may be seen to align the self-interest of executive members with the need for caucus and electoral support.

The extent to which caucus is able to withdraw such support is small, as is noted below. Furthermore, it is clear that while the prospect of reelection can be assumed to have considerable significance for most elected representatives, efforts taken to increase that prospect are likely to be tempered by the desire to see policy preferences implemented prior to the next election. Further, it is readily apparent that determination of election prospects presents some difficulty, particularly in relation to specific policies.

In the case of the executive, the capacity to implement policy is, as has been noted, considerable. Executive members are for that reason more likely to make conservative assessments of the adverse electoral consequences of any given policy, and thus while self-interest does act as a broad constraint it is improbable that it will restrict any specific policy.

³¹ B S Frey & L J Lau "Towards a Mathematical Model of Government Behaviour" (1968) 28 *Zeitschrift für Nationalökonomie* 355, 360.

³² See broadly Secretary to the Cabinet *Cabinet Office Manual* (Cabinet Office, Wellington, 1991) § 2H.

4 *Expressive Conduct*

The assumption of expressive conduct on the part of executive members may appear problematic, as it requires the condition of inconsequentiality to be disregarded altogether. It is clear however that while self-interest requires broad attention to be paid to external pressures, members of the executive can be seen to have some latitude in determining the form that such attention will take. Furthermore, it is clearly implausible to suggest that members of the executive seek their positions simply to act as a conduit for such pressures.³³ It would appear more likely that elected officials will seek to act in an innovative fashion, within the broadest possible constraints.³⁴

It would therefore appear likely that there is at least scope for expressive conduct among members of the executive and further that such individuals are likely to have some degree of personal principle which might be given effect by such conduct.

5 *Application*

While the executive may be seen to have supported the expansion of Treaty policy, it is also clear that their willingness to allow such policy to interfere with other policy developments was limited, as the removal of the most stringent elements of the guidelines proposed for recognition of the Treaty in government policy³⁵ in favour of less concrete forms of recognition and consideration of fiscal consequences may be seen to indicate.³⁶ However, that recognition on a general basis

³³ J P Kalt & M A Zupan "The Apparent Ideological Behaviour of Legislators: Testing For Principal-Agent Slack in Political Institutions" (1990) 33 J L & Econ 103, 105.

³⁴ B Grofman "Public Choice, Civic Republicanism, and American Politics: Perspectives of a 'Reasonable Choice' Modeler" (1993) 71 Texas LR 1541, 1581. It is even possible, albeit controversial, that such innovation will typically be of a liberal nature (J L Sullivan, P Walsh, M Shamir, D G Barnum & J L Gibson "Why Politicians are More Tolerant; Selective Recruitment and Socialization Among Political Elites in Britain, Israel, New Zealand and the United States" (1993) 23 Br J Pol Sci 51, 53).

³⁵ The guidelines were as follows: a) to give recognition to the Treaty of Waitangi as if it were part of the domestic law of New Zealand in all aspects of administration and in preparation of legislation; b) to regard the treaty as always speaking and to apply it in circumstances as they arise in such a way that effect is given to its true intent and spirit; c) to consult with the Maori people on all matters affecting the application of the Treaty (cited Treasury "Treaty of Waitangi: Implications of Recognition" (The Treasury, Wellington, 1986) 3).

³⁶ K Hague "Recent Moves by the State" in H Yensen, K Hague, T McCreanor *Honouring the Treaty: An Introduction for Pakeha to the Treaty of Waitangi* (Penguin, Auckland, 1989)113, 119-120.

prevailed at all may be seen to support the assertion of expressive motivation on the part of at least some members of the executive. The commitment was not total as the objection to the inclusion of Treaty provisions in some statutes indicates.³⁷

It is however possible to recognise very considerable responsiveness on the part of the executive to pressure from the courts and the Waitangi Tribunal. For example, the passage of the Treaty of Waitangi (State Enterprises) Act 1988 was in direct response to the *New Zealand Maori Council* decision, while the Maori Language Act *Te Ture o te Reo Maori* 1987 clearly resulted from the at least the same pressures as the *Te Reo Maori Report* of the Tribunal if not from the report itself. The most significant of these responses can be seen to be the addition of ss. 9 and 27 of the State-Owned Enterprises Act 1986 after an urgent recommendation by the Waitangi Tribunal.³⁸

³⁷ Contrast, for example, the replacement of a provision requiring that practical effect be given to the Treaty in the Environment Bill by a reference in the Long Title to the taking account of Treaty principles with the retention of a similar provision in the Conservation Bill. Kelsey (*A Question of Honour? Labour and the Treaty 1984 - 1989* (Allen & Unwin, Wellington, 1990), 76) does not offer an explanation for the distinction. It is plausible, however, that the greater commitment to Treaty recognition of the Conservation minister, the Hon. Russell Marshall, may have been responsible.

³⁸ P A Joseph *Constitutional and Administrative Law in New Zealand* (Law Book, Sydney, 1993) 68. Waitangi Tribunal *Interim Report to Minister of Maori Affairs on the State-Owned Enterprises Bill* (December 1986) reproduced in *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai-22) 289.

B *The Government Caucus*

1 *Economic analysis of authority*

The capacity of the government caucus to influence policy decisions is clearly considerable. First and most simply, the caucus possesses a parliamentary majority, affording it the exclusive right to legislate. Further, the caucus is responsible for the election of the Prime Minister and the Deputy Prime Minister and is therefore able to influence the composition of the executive. Finally, through the select committee process and caucus committees members of the caucus can formulate policy proposals, oversee the passage of legislation and supervise the implementation of policy by bureaucratic agencies.³⁹

It is however clear that the operation of caucus is, at least with regard to broad policy principles, dominated by the executive.⁴⁰ The reasons for such dominance can be seen in the characteristics of the government caucus as an institution. The most fundamental of these characteristics is the dependence of the caucus upon collective action.

In part the need for collectiveness can be attributed to the adverse electoral effect of apparent disunity among members of the same party.⁴¹ It is however clear that significant functional incentives exist for members to cooperate in the caucus process. First, the number of issues which the government must address renders individual participation in policy formulation dependent upon very large amounts of information. The caucus system provides members with a means of economising on such information costs and can be seen to allow members to specialise in particular areas as well as permitting them to perform their other responsibilities.⁴²

Second, and perhaps more importantly, most of the measures by which members of the caucus are able influence policy decisions require some degree of cooperation if they are to be effective. Such cooperation almost inevitably involves compromise among members, as the policy preferences of individual members almost certainly differ, even if only

³⁹ J B Ringer *An Introduction to New Zealand Government* (Hazard, Christchurch, 1991) 66 - 68.

⁴⁰ K Jackson "Caucus: The Anti-Parliament System" in H Gold (ed) *New Zealand Politics in Perspective* (3ed, Longman Paul, Auckland) 231, 239.

⁴¹ G W R Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2ed Oxford, Auckland, 1987) 71.

⁴² See broadly Palmer, above n 41, 106 - 107.

in the priority that each accords particular issues. The making of such compromises is highly problematic in the absence of any structure by which the performance of mutual obligations can be ensured, as there is very limited recourse for members who exchange their support for policy commitments which are subsequently abandoned.⁴³

Within caucus the executive is the most efficient enforcement structure. As has been noted elsewhere, members of the executive are able to have some confidence, at least in the short term, that policy commitments made between members or groups of members will be enforced. While there are a number of other cooperative structures within caucus, notably caucus committees and informal groups of members,⁴⁴ it is clear that both the limited unity and durability of such less formal groups significantly reduces the likelihood that compromises reached among their members will be enforced.

It is however clear that the inefficiencies of enforcement structures do not preclude caucus members from developing policy. Rather such structures may be seen to render the exchange of support for particular policies more difficult. The consequence is that policies will attract support largely as a consequence of the benefits to its supporters inherent in each policy, rather than through exchange. Thus policies that comply with the common preferences of members are likely to prevail while policies of only specific effect are in most instances unsuccessful.

2 *Constraints*

The principal restriction upon the exercise of influence by caucus members is that imposed by the executive through its numerical and organisational superiority as a part of caucus and through its political standing, most notably its collective control over the career prospects of individual members and perhaps more significantly the greater status both within and outside the caucus of executive members. Caucus may also be seen to be subject to constraints of electoral pressure both collectively and on an individual basis.

⁴³ B R Weingast & W J Marshall "The Industrial Organisation of Congress; or, Why Legislatures, Like Firms, are not Organised as Markets" (1988) 96 J Pol Econ 132, 142.

⁴⁴ G W R Palmer "The New Zealand Legislative Machine" (1987) 17 VUWLR 285, 290.

3 *Self-interest*

It is clear that the collective nature of caucus actions together with the inefficiency of exchange structures imposes significant restrictions on the capacity of caucus to act independently of the executive. It is however apparent that these restrictions also limit the role of self-interest except where the common interest of all or most members of caucus is concerned. Instances of such commonality of interest may however be reasonably common as most policy is likely to have some implication for the electoral prospects of the caucus as a whole.

4 *Expressive conduct*

It would appear likely that the lesser involvement in policy formulation enjoyed by members of the caucus who are not also members of the executive renders expressive conduct less likely. Expressive conduct might also be seen to be constrained by the more limited involvement in policy formulation through the reduced capacity of such involvement to balance or outweigh conservative assessments of electoral support.

5 *Application*

The role of the government caucus in the formulation of policy would appear to have been limited in a general sense,⁴⁵ and the participation of the caucus in the decision to enact the Treaty of Waitangi Amendment Act would appear to have been based upon very limited information.⁴⁶ Caucus involvement in relation to s. 9 of the State-Owned Enterprises Act would appear to have been limited by the introduction of the provision at the third reading, while participation in subsequent legislation appears to have been restrained by the executive.⁴⁷ The members representing Maori electorates may

⁴⁵ W H Oliver "The Labour Caucus and Economic Policy Formation, 1981 - 1984" in B Easton (ed) *The Making of Rogernomics* (Auckland University, Auckland, 1989) 11, 29.

⁴⁶ B Jesson *Fragments of Labour: The Story Behind the Labour Government* (Penguin, Auckland, 1989) 96 - 97.

⁴⁷ See NZPD, vol 488, 3972, 5 May 1988 (W Peters) in relation to the Treaty of Waitangi (State Enterprises) Bill and NZPD, vol 494, 8217, 22 November 1988 (W Peters) in relation to the Treaty of Waitangi Amendment Bill.

however be seen to have been responsible for some elements of Treaty policy.

D *The Legislature*

1 *Economic analysis of authority*

While the structure of Westminster government can in most instances be seen to afford the legislature only a very limited role in relation to policy formulation, it must be recognised that both the institution as a whole and its individual members possess some degree of authority over the actions of the executive.

First and most directly, the legislature may be able to exercise influence through the dependence of the executive upon a legislative majority for statutory changes to policy. While the influence that such dependence affords can be seen to be directly effective only where the government majority is unreliable, the legislature may in all instances be seen to create some incentive for unity within the government caucus and to afford less senior members of that caucus some role in policy decisions.

The legislature may be seen to exercise more significant influence by more indirect means, principally through the public criticism of government activity. While such criticism will in most instances have no formal consequence where executive policy is concerned, it is apparent that where public awareness can be raised the electoral cost of unpopular policy decisions can be increased. Legislative publicity or pressure can be seen to have a more substantial effect when applied to the decisions of bureaucratic agencies whether through the select committee process or by less formal means.

2 *Self-interest*

Given the very limited effective authority of the legislature, its capacity to serve its self-interest would appear very slight. However if self-interest is taken to include first the capacity of members of the legislature to increase their chance of attaining or retaining government and secondly the capacity of members to advocate the views of particular interest groups,⁴⁸ the self-interested character of

⁴⁸ W H Riker & B R Weingast "Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislators" (1988) 74 Va LR 373, 396.

what might otherwise be taken to be expressive conduct may become apparent.⁴⁹

In essence the process of debate and division in the legislature, together with accompanying statements outside the House may be taken to alter the eventual electoral cost of legislation by drawing the attention of the public and others to its detrimental, or when undertaken by government members, beneficial effect.⁵⁰ However as the prospect of election is, as has been noted elsewhere, a very vague constraint, there is little incentive on the part of members of the legislature to accord particular importance to one Bill over another: the aim of all such conduct is simply to enhance the electoral chances of the members and parties involved.⁵¹

Where the views of interest groups are concerned there is clearly greater regard for the content of legislation but once again little concern with seeking to do other than to criticise the relevant provisions.

3 *Application*

The involvement of the legislature in the formulation of Treaty policy was, as the foregoing might indicate, extremely slight. The limited role noted on the part of the Caucus may be seen if anything to have had a greater effect on the actions of the legislature. The participation of the legislature in the Treaty debate is perhaps most clearly seen in the comments of one opposition member that the Treaty of Waitangi Amendment Bill 1985 was deficient both in according Maori and the Treaty too little significance and in threatening some form of apartheid.⁵²

III THE JUDICIARY

A *Economic Analysis*

Economic analysis of the role of the judiciary in policy formulation is complicated by the two components of conventional judicial

⁴⁹ Downs, above n 18, 120.

⁵⁰ G Skene "Parliament: Reassessing its Role" in Gold, above n 40, 247, 255.

⁵¹ G W R Palmer *Constitution in Crisis: Reforming New Zealand's Political System* (McIndoe, Dunedin, 1991), 120.

⁵² NZPD, vol 492, 6892 - 6893, 22 September 1988 (Hon. W Peters).

independence. The first of these is the independence of the judiciary from government influence; the second is the personal economic independence afforded by judicial tenure and by strong constraints upon other sources of income.⁵³

The first of these elements can be seen to permit members of the judiciary potentially considerable discretion in reaching their decisions. The second largely prevents such discretion from being used in the pursuit of economic self-interest. The immediate conclusion is that models of decision-making based upon self-interest are broadly inapplicable to judicial decisions.

Such a conclusion is strongly evident in the approach of many public choice theorists to the judicial role. The analyses advanced have had little success even in identifying the incentives of independent judges to perform their tasks with anything beyond a minimal degree of competence, let alone in favouring one policy choice over another.

In the absence of economic motivation, public choice theorists have sought to analyse the role of the judiciary in relation to other bodies which are subject to such motivation. The first such analysis advocates the restriction of the judiciary to the implementation of legislation without any form of interpretation which might afford opportunities for autonomous conduct.⁵⁴ Such an approach is open to a number of obvious objections, most notably that of impracticality. The principal response to such concerns is that the adoption by the judiciary would provide legislators with a strong incentive to produce clearly applicable law, particularly if the response of the courts to ambiguous or unworkable legislation is to refuse to apply it.⁵⁵

A second and more plausible model of the role of the judiciary proceeds from the analysis of the legislative process as a market in which policy decisions are exchanged for electoral support or other benefits. The capacity of the judiciary to interpret legislation providing for such policies can be seen to protect the original exchange from subsequent reinterpretation by the legislature. The legislature will therefore be obliged to modify the relevant policy by legislation, the

⁵³ G M Anderson, W F Shugart & R D Tollison "On the Incentives of Judges to Enforce Legislative Wealth Transfers" (1989) 32 J L & Econ 215, 215.

⁵⁴ J Buchanan "Good Economics - Bad Law" (1974) 60 Va LR 483, 490.

⁵⁵ F Easterbrook "Statutes' Domains" (1983) 50 U Chi L R 533, 547.

cost of which may be seen to increase the dependability of the initial exchange.⁵⁶

Thirdly, it is possible to suggest that the judiciary provides a means by which representatives can avoid the political consequences of unpopular actions.⁵⁷ Such "blame-shifting" allows elected representatives to implement policies which they themselves wish for without suffering electorally.⁵⁸

B *Authority*

The role of the courts in the formulation of policy is potentially considerable. Although it is possible to regard the institutional function of the judicial process as strongly similar to that of the bureaucracy, to the extent that both are concerned with the detailed development and implementation of broader policy directions, the resemblance is almost wholly removed by the near-absence of means of controlling judicial decision-making.

Judicial independence comprises a number of formal and informal protections including the fundamental principle of the rule of law, judicial tenure,⁵⁹ and conventions discouraging legislation overriding the effects of judicial decisions and governmental criticism.⁶⁰ Together these safeguards comprise a broad constitutional principle isolating the courts from influence.

Although it is clear that governments and other institutions are to some extent able to apply pressure to the judicial process,⁶¹ and that in extreme instances a member of the judiciary can be removed from office, it remains that the decisions of members of the judiciary are largely free from external constraint. The process by which members of the judiciary are appointed can however be of some significance,

⁵⁶ W Landes & R Posner "The Independent Judiciary in An Interest-Group Perspective" (1975) 18 *JL & Econ* 875, 879.

⁵⁷ E M Salzberger "A Positive Analysis of the Doctrine of Separation of Powers or: Why Do We Have An Independent Judiciary?" (1993) 13 *Int Rev L & Econ* 349, 359.

⁵⁸ M Fiorina "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process" (1982) 38 *Public Choice* 33, 38.

⁵⁹ SS 23 & 24, Constitution Act 1986.

⁶⁰ Secretary to the Cabinet, *Cabinet Office Manual* (Cabinet Office, Wellington, 1991) §5H. Note that the tradition in New Zealand has not been particularly consistent in this regard (above n 41, 184).

⁶¹ Landes & Posner (above n 56, 885) suggest that possible means may include budgetary harassment and threats to the jurisdiction of the courts.

although without any means of subsequent enforcement.⁶² Through the use of broad statutory interpretation, members of the judiciary can exercise significant influence over the development of policy.

It is true that the discretion of most members of the judiciary is subject to appeal or in some instances to review, but the absence of external accountability may be seen to remain unless it is suggested that the appeal process affords additional opportunities for external pressure to be applied. It would furthermore appear that members of higher courts are less open to such pressure where it is for example exerted through increased caseloads or reduced chances of promotion.⁶³

There are however a number of practical and procedural constraints upon the role of the judiciary in policy formulation. First, the courts are to some extent dependent upon the cooperation of other institutions for the execution of their decisions, although such cooperation is unlikely to be publicly withheld. Secondly, judicial decisions can be made only on the application of litigants, thereby preventing any self-referred decision-making. Thirdly, the capacity of adversarial proceedings to give rise to complex solutions is clearly limited. Fourthly, and perhaps most significantly, the application must disclose a valid cause of action. While any finding of validity is clearly made by the court itself, it may have to be justified on the basis of precedent or statute if the courts are not to be seen to exceed their proper jurisdiction.

It is perhaps this last constraint which may be seen to indicate the true limits of the judicial role. It is elementary that both the protected status and the practical authority of the courts is, in the absence of a mandate or other external support, dependent in large part on the acceptance of the judicial process by other decision-making institutions, principally the legislature and the electorate. While the withdrawal of such acceptance may be seen to be extremely unlikely, it is clear that concern over such withdrawal must restrict both individual judges and perhaps more effectively the judiciary as a whole. The latter may be seen to give rise to the use of peer pressure as a constraint on individual judges.⁶⁴

⁶² M Chen & G W R Palmer *Public Law in New Zealand* (Oxford, Auckland, 1993) 191.

⁶³ M A Cohen "The Motives of Judges: Empirical Evidence from Antitrust Sentencing" (1992) 12 *Int Rev L & Econ* 13, 27.

⁶⁴ R Ellickson "Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law-and-Economics" (1989) 65 *Chi-Kent LR* 23, 54.

The exercise of influence by the courts can thus be seen to be subject to a number of largely formal preconditions and to an ill-defined but effective limitation upon judicial authority in part expressed through such formal requirements.

C *Self-Interest*

The role of economic self-interest in the exercise of judicial authority is not clear, principally as a result of the broad ethical restraints which accompany judicial independence. The effect of these restraints, notably the stringent prohibition of bribery and other improper influences, is to isolate members of the judiciary from any but the most incidental economic consequences of their decisions.⁶⁵ It is possible to identify a limited economic element in judicial activity in the need of individual judges to fulfil at least the minimal requirements of their position in order not to be removed from office and thereby lose their source of income or alternatively, where applicable, through the desire for promotion. The effect of these pressures on the content, as opposed to the production, of judicial decisions would however appear minimal.

D *Expressive Conduct*

The potential for expressive conduct on the part of the judiciary may be seen to be supported by the general principle that courts follow a deontological approach to policy formulation.⁶⁶ The approach would also appear to reinforce perceptions of the judiciary as neutral and apolitical arbiters upon which the status of the courts may be seen to depend. While it is possible to view the emphasis placed upon the role of principle in judicial decisions as pretence on the part of the courts, it would nonetheless appear to be a form of pretence with significant implications for judicial reasoning.

⁶⁵ Landes & Posner, above n 56, 885.

⁶⁶ V Held "Justification, Legal and Moral" (1975) 86 Ethics 1, 10.

E *Application*

The involvement of the courts in the development of policy in relation to the Treaty of Waitangi is very much a chequered history, perhaps most clearly seen in the violent and unprecedented disagreement between the High Court, accompanied by the New Zealand Bar, and the Privy Council over the status of the Treaty as a guarantee of land rights.⁶⁷ Together with a strong perception that the courts did not provide a fair forum for the disadvantaged,⁶⁸ this history may be seen to have deterred Maori from pursuit of Treaty issues through the courts.⁶⁹ By the end of the decade, however, the actions of the Court of Appeal had come to be of enormous significance to the greater recognition of the Treaty.⁷⁰ One commentator proclaimed the decisions of the courts to mark the end of colonial justice.⁷¹

The most significant element of the change effected by the courts is clearly the first *New Zealand Maori Council* decision.⁷² The decisions of the Court of Appeal were clearly founded in the actions of Parliament,⁷³ although this fact would appear to have been overlooked by many commentators.⁷⁴ The Court may however be seen to have sought to overcome these constraints through the application of fiduciary principle to Treaty issues,⁷⁵ to the extent of suggesting that statutory restraint of actions under the Treaty might be ineffective in

⁶⁷ *Wallis v. Solicitor-General for New Zealand* [1903] AC 173 (PC) and, for the reaction of the Court and the Bar see *Protest of Bench and Bar (1840-1930)* NZPCC App p. 730.

⁶⁸ See *Te Whaingā i Te Tika - In Search of Justice* (Justice Department, Wellington, 1986) 3.

⁶⁹ Note the opposition among Maori to the inclusion of the Treaty in the Bill of Rights based upon a general desire to avoid judicial participation; see for example New Zealand Maori Council Submission MA 185/10, *Interim Report of the Justice and Law Reform Select Committee on A Bill of Rights for New Zealand* (1987) AJHR I.8A 31, and E T J Durie "The Waitangi Tribunal: Its Relationship with the Judicial System" [1986] NZLJ 235, 237.

⁷⁰ R Mulgan "Can the Treaty of Waitangi Provide A Constitutional Basis for New Zealand's Political Future?" (1989) 41 Pol Sci 51, 57.

⁷¹ R Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin, Auckland, 1990) 288.

⁷² *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641.

⁷³ See for example NZMC above n 72, 688 per Cooke P.

⁷⁴ R P Boast "New Zealand Maori Council v. Attorney-General : The Case of the Century?" [1987] NZLJ 240.

⁷⁵ P A Joseph *Constitutional and Administrative Law in New Zealand* (Law Book, Sydney, 1993) 72.

preventing a claim for equitable reasons.⁷⁶ Justiciable Treaty rights independent of statutory enactment have also been advanced on constitutional grounds⁷⁷ and on the basis of the significance of the Treaty to New Zealand society.⁷⁸ It is clear, however, that recognition of the Treaty in the absence of statutory provision is open to debate within the Court.⁷⁹

The Court has also indicated, by prompting negotiation among the parties, that its capacity, whether for functional or political reasons, to impose a settlement was extremely limited.⁸⁰ While much critical comment has been directed at the assertion that judicial acceptance was required for any settlement,⁸¹ it must be noted that the statement was accompanied by the view that decision by the courts was to be avoided.⁸² Such reluctance on the part of the Court may be taken to indicate functional rather than constitutional limits. The Court has however noted the need to recognise political reality in its decisions on at least one occasion.⁸³

The approach of the court would appear to support the assumption of expressive motivations. From the first *New Zealand Maori Council* decision onwards, the Court of Appeal placed considerable importance on the profound quality of Treaty obligations and the gravity of the duty of both the Court and the parties,⁸⁴ to the extent that it became the subject of allegations of extremism.⁸⁵ Further, the application of broad legal principle to Treaty issues may be seen as the invocation by the

⁷⁶ *Te Runanga o Wharekauri Rekohu v. Attorney-General* [1993] 2 NZLR 301, 309.

⁷⁷ Above n 76. Contrast, however, the view of the Court in the the 1987 decision above n 72, 655.

⁷⁸ *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 NZLR 188, 210 per Chilwell J; *Ika Whenua v. Attorney-General* [1994] 2 NZLR 20,27 per Cooke P.

⁷⁹ *New Zealand Maori Council v. Attorney-General* [1992] 2 NZLR 576, 603 per McKay J. Palmer (above n 51, 73 n 13) suggests that the more restrictive approach marks "a retreat from the outer limits of Treaty jurisprudence."

⁸⁰ R B Cooke "Fairness" (1989) 19 VUWLR 421, 425.

⁸¹ G W R Palmer, Address to the Wellington District Law Society, 14 December 1989; D Lange (1989) 163 Council Brief 1.

⁸² *Tainui Maori Trust Board v. Attorney-General* [1989] 2 NZLR 513, 529: "In the end onlt the Courts can rule on whether a particular solution accords with Treaty principles. But in this kind of issue judicial resolution should be very much a last resort."

⁸³ *Ngai Tahu v. Attorney-General* [1990] 2 NZLR 500, 510.

⁸⁴ See, for example, *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, 663 per Cooke P.: "what matters is the spirit."

⁸⁵ P J Downey "Absolutes, Politics and Dangerous Courts" [1990] NZLR 185, 186.

Court of the authority afforded by its constitutional position, as may be the reference by the Court and by commentators to international law.⁸⁶

⁸⁶ See *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, 682 (reference to good faith in the UN Charter).

IV THE BUREAUCRACY

A *Economic Analysis*

Bureaucratic agencies may be seen to assist in the process of policy formulation through both the provision of advice to elected officials and the detailed development and implementation of broad policy decisions. It may be seen that both of the bureaucratic functions noted above can be subjected to controls through contestability where advice is concerned and through auditing and other administrative controls in the implementation of policy.⁸⁷ It is however clear that the effectiveness of such methods of supervision is limited in a number of ways.

First, the size and organisational complexity of bureaucratic agencies may be seen to render both internal and external monitoring extremely difficult.⁸⁸ Such monitoring is also hampered by the considerable expertise possessed by the members of such agencies in relation to their responsibilities, and further by both the competence and the motivation of any monitoring body. For these reasons any monitoring is likely both to be partially ineffective and to impose additional costs, and it is therefore clear that agencies and their members possess some degree of autonomy in the exercise of their responsibilities.

Agency autonomy may also be seen to arise in a more limited fashion where agencies or officials are subjected to conflicting pressures which afford some choice in the course of action to be followed.⁸⁹ It is furthermore clear that some degree of discretion is necessary to the performance of most bureaucratic agencies in order to overcome the difficulties imposed on the administrative process by imperfect information.⁹⁰

Bureaucratic agencies are therefore able in many instances to exert influence over policy formulation. Conventional public choice analyses of bureaucratic use of such influence has concluded that

⁸⁷ P Dunleavy *Democracy, Bureaucracy and Public Choice: Economic Explanations in Political Science* (Harvester Wheatsheaf, Hemel Hempstead, 1991).

⁸⁸ W Niskanen *Bureaucracy and Representative Government* (Aldine, Chicago, 1971) 192.

⁸⁹ R Rose "Giving Direction to Permanent Officials: Signals from the Electorate, the Market, Laws and Expertise" in J-E Lane *Bureaucracy and Public Choice* (Sage, London, 1989) 210, 211-213.

⁹⁰ D C North "The New Institutional Economics" (1986) 142 *J Inst & Theo Econ* 230, 233.

agency members will, both on an individual basis and collectively, in order to maximise their economic interest seek increases in their budgets and areas of authority.⁹¹ The accuracy of such analyses is yet to receive adequate empirical support,⁹² and they would appear to be significantly flawed in so far as they apply to individuals.

First, the ability of individual officials to influence policy is likely to be to some extent reflective of the authority that each possesses. While there is some degree of correlation between the level of such authority and the potential for economic benefit, the nature of bureaucratic agencies places clear limits on the availability of such benefits.⁹³ It is also apparent that the exclusivity of such benefits is extremely limited and thus that their public good nature and the likelihood of their underproduction is very considerable.⁹⁴ In essence it may be seen that the individuals most capable of bringing about increases are likely to derive only minimal benefit.⁹⁵

Secondly, while the monitoring of bureaucratic performance may be difficult, control of the pursuit of direct gain, particularly in a non-commercial environment, is likely to be considerably more effective and less costly.⁹⁶ It would furthermore appear that the difficulties inherent in monitoring may be overstated by public choice analyses.⁹⁷

Two reasons may be advanced for such overestimation. The first is the concentration of public choice analyses upon the use of the legislature as a means of control, presumably in response to the significant monitoring role of Senate and Congressional Committees in the United States.⁹⁸ It is true that the role of select committees in Westminster democracies can be seen to be similar to some extent. It must however be noted administrative monitoring also takes place through both Cabinet Ministers, judicial review and specialised

⁹¹ W A Niskanen "Bureaucrats and Politicians" (1975) 18 J L & Econ 617, 619.

⁹² J A C Conybeare "Bureaucracy, Monopoly and Competition: A Critical Analysis of the Budget-Maximising Theory of Bureaucracy" (1984) 28 Am J Pol Sci 479, 486.

⁹³ H Stretton & L Orchard *Public goods, Public Enterprise, Public Choice: Theoretical Foundations of the Contemporary Attack on Government* (Macmillan/St Martins, London, 1994) 161.

⁹⁴ P Samuelson "The Pure Theory of Public Expenditure" (1954) Rev Econ & Stat 387, 388.

⁹⁵ Dunleavy, above n 87, 178.

⁹⁶ Dunleavy, above n 87, 200-201.

⁹⁷ Stretton & Orchard, above n 93, 135.

⁹⁸ See, for example, M P Fiorina & R G Noll "Voters, Bureaucrats and Legislators: A Rational Choice Perspective on the Growth of Bureaucracy" (1978) 9 J Pub Econ 239, 253; Niskanen above n 91, 627.

administrative agencies.⁹⁹ The force of ordinary administrative doctrine, enforced by these means, in controlling bureaucratic discretion must not be overlooked.¹⁰⁰

The second cause of such overestimation, and a possible reason for the disregard of distinctions between Westminster and American administrative structures would appear to be the assumption that instances of bureaucratic inefficiency are entirely the result of deficient monitoring when it would appear that the presence of conflicting demands and the failure of decision-makers to provide for imperfect information is at least in part responsible.¹⁰¹

However, while it is clear that there is little scope for the pursuit of economic self-interest by individual officials, it would appear likely that the members of bureaucratic agencies have a strong incentive to pursue self-interest on a collective basis. This would appear to be particularly true if the allocation of resources and responsibilities within government as a whole is seen to be a competitive process in which the resources afforded both the agency as a whole and its members can be increased or reduced.¹⁰²

B *Self-Interest*

The consequences of self-interest in this context may be unclear. If however it is assumed that the individuals or institutions responsible for resource allocation are themselves motivated by self-interest it would seem clear that bureaucratic agencies concerned with policy implementation will attempt to be seen to benefit that self-interest, possibly in part by contrasting the deficiencies of other government

⁹⁹ B G Peters "The European Bureaucrat: The Applicability of 'Bureaucracy and Representative Government' to Non-American Settings" (Conference Paper, "The Budget Maximising Bureaucrat" University of Montreal, 13 - 15 April 1989) 30. Note also that the majority of public choice theorists would furthermore appear to overlook the role of the Freedom of Information Act and the Administrative Procedure Act in controlling agency conduct. While it is clear that the effect of such measures is not constant, the deterrent posed by the possibility of their use must be of some consequence.

¹⁰⁰ Patrick McAuslan suggests that the concepts of relevant and irrelevant considerations broadly preclude self-interest as a motive in the exercise of delegated authority ("Public Law and Public Choice" (1988) 51 MLR 681, 688.

¹⁰¹ D Houghton "Fundamental UK-US Differences" in W A Niskanen *Bureaucracy: Servant or Master?* (Institute of Economic Affairs, London, 1973) 67.

¹⁰² G Galeotti "The Organisation of Competition in Congressional and Parliamentary Governments" in A Breton, G Galeotti, P Salmon, R Wintrobe (eds) *The Competitive State: Villa Colombella Papers on Comparative Politics* (Kluwer, Dordrecht, 1991) 13, 17.

agencies. The overall effect would appear to be at least the apparent alignment of the activities of bureaucratic agencies with the interests of those responsible for their control. It is however apparent that the ability of agencies either to appeal to such interests or to appear to do so may create distortions in resource allocation. However, bureaucratic agencies may also seek to avoid adverse effects of policy change by producing advice in opposition to proposed change.¹⁰³

It would therefore appear that the influence of self-interest on the conduct of bureaucratic agencies is potentially great, and that the role for expressive and deliberative motivations is correspondingly limited. It is however clear that the effect of economic self-interest can provide a remedy for the difficulties inherent in economic control, albeit subject to the imperfect nature of information relating to the conduct of the agency in question.

C *Expressive Conduct*

It may thus be seen that the potential for self-interest to act as a motive for members of bureaucratic agencies is relatively limited, and that within the area of discretionary authority of such agencies it is of very little relevance. Conversely, the scope for expressive motivations may be seen to be indicated by the existence of ethical and professional standards for the activities of officials which would appear to differ from forms of regulation intended to prevent misconduct.¹⁰⁴ It is furthermore arguable that officials engaged in the provision of policy advice are almost certain to be influenced by some personal principle or ideology, even if purely as a consequence of their involvement in larger social processes.¹⁰⁵

¹⁰³ Galeotti, above n 102, 25.

¹⁰⁴ S Kelman "'Public Choice' and Public Spirit" (1987) 87 Pub Int 80, 94.

¹⁰⁵ B Hindness "Rational Choice Theory and the Analysis of Political Action" (1984) 13 Econ & Soc 255, 276; J Hoogerwerf "De Markt als Metafoor van de Politiek: Een Kritiek op de Grondslagen van de Economische Keuzetheorie" (1991) 5 BLWSchap 107, 130.

D *Application*

1 *Introduction*

The economic analysis of bureaucratic agencies clearly has particular relevance for analysis of New Zealand governmental structures, given the importance of public choice analysis to the state sector reforms undertaken by the Labour government.¹⁰⁶ In the context of these reforms, the capacity of bureaucratic agencies to influence policy decisions was extremely varied.

In part it is possible to perceive a considerable distrust of departmental advice, and further a conviction that the advisory role of departments was to some extent deprived of its significance by the need for rapid change. It is further arguable that the greater transparency of government agencies arising from the reform process limited the capacity to which government agencies could appeal to the interests of politicians.¹⁰⁷

On the other hand the need for assistance in implementing the changes sought clearly produced a demand for highly flexible advice. Such advice may be seen to have been provided through the most competent agencies, most notably or notoriously the Treasury, and through the use of external consultants.

2 *Treaty policy*

It is difficult to discern a broad approach on the part of bureaucratic agencies to the formulation of Treaty policy. It would however appear that most departments were slow in recognising the implications of Treaty developments.¹⁰⁸ The role of Treasury would appear to be somewhat different in this respect. While it may be seen to have regarded Treaty claims and efforts to overcome socio-economic problems among Maori as much the same issue,¹⁰⁹ the Treasury was

¹⁰⁶ J Boston "The Theoretical Underpinnings of Public Sector Restructuring in New Zealand" in J Boston et al. (eds) *Reshaping the State: New Zealand's Bureaucratic Revolution* (Oxford University Press, Auckland, 1991) 1, 2.

¹⁰⁷ C James *New Territory: The Transformation of New Zealand 1984-1992* (Bridget Williams, 1992) 204.

¹⁰⁸ Palmer above n 51, 82 - 83.

¹⁰⁹ *Treasury Government Management: Brief to the Incoming Government* (The Treasury, Wellington, 1987) Vol I, 131.

nonetheless heavily involved in identifying and therefore to some extent influencing the policy consequences of greater Treaty recognition.¹¹⁰ While the role of the Treasury in this regard may be criticised and may further be seen to have limited the development of Treaty policy,¹¹¹ it would appear that its action significantly increased the level of consideration accorded Treaty issues by government agencies.¹¹²

The role of the Department of Maori Affairs would appear to have been relatively limited both by internal difficulties in formulating policy effectively¹¹³ and by its poor relationship with other government agencies. It would also appear to have responded to the growing importance of Treaty issues extremely slowly, establishing a Treaty policy unit only in 1987.¹¹⁴ However, the Department seems to have shared the Treasury concern that any policy change be contained.¹¹⁵

The Justice Department would appear to have foreseen some consequences and sought to impress them on the government before legislation was passed.¹¹⁶ The Treaty of Waitangi Policy Unit of the Department may be seen to have enhanced this role, and arguably the role of bureaucratic agencies in the development of Treaty policy, through the development of the *Principles for Crown Action*,¹¹⁷ which may be seen to have transferred the initiative for policy development from the courts and the Tribunal to the executive and its advisors.¹¹⁸

¹¹⁰ Treasury "Treaty of Waitangi: Implications of Recognition" (Treasury, Wellington, 1986); Treasury above n 109, 322.

¹¹¹ T O'Regan "The Ngai Tahu Claim" in I H Kawharu *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford, Auckland, 1989) 234, 254.

¹¹² Kelsey, above n 37, 65.

¹¹³ Palmer, above n 51, 84.

¹¹⁴ *Report of the Department of Maori Affairs and the Board of Maori Affairs and Maori Trust Office for the Year Ended 31 March 1988* (1988) AJHR E.13, 12.

¹¹⁵ Department of Maori Affairs *Report on Submission on the Treaty of Waitangi Amendment Bill* 20 May 1985.

¹¹⁶ Kelsey, above n 37, 46.

¹¹⁷ Department of Justice *Principles for Crown Action on the Treaty of Waitangi* (Department of Justice, Wellington, 1989). See A Frame "A State Servant Looks at the Treaty" (1990) 14 NZULR 82, 86 - 88, and also *The Direct Negotiation of Maori Claims* (Department of Justice, Wellington, 1990).

¹¹⁸ Palmer above n 51, 92.

V THE ELECTORATE

A *Economic Analysis*

The use of the secret ballot in a democratic society affords voters as a group an unaccountable and unanswerable means of directing government decision-making. However, although the power of voters may be seen to be unlimited in this sense, the ability of individual voters to exercise influence over specific policy decisions is extremely limited.¹¹⁹

These limits may be seen to arise solely as a result of the institutional characteristics of the electoral process, of which the most significant are its scale and its simplicity. The first of these substantially reduces the capacity of individual voters to exercise any direct influence at all. While the determination of the probability that any single vote will influence the electoral outcome is a matter of some debate among statisticians, it would appear clear that individual votes are almost inconsequential. Furthermore, although the number of votes gained by particular candidates may be taken into account by representatives it would appear that such influence is likely to be of limited influence and clarity.

Secondly, the electoral process presents individual voters with an extremely limited choice in contrast to the considerable complexity of the process of government.¹²⁰ The opportunity for expression afforded voters is slight, as is the amount of information that governments can derive from electoral outcomes.

The capacity of voters to exercise influence in relation to a specific policy is further limited by the restricted range of alternatives from which the choice can be made. First, it is clear that the number of candidates for election will be limited to those prepared to incur the costs of campaigning on the basis of either a perceived chance of success or other reasons. For this reason it may not be possible for a voter to select a candidate advocating particular policies.¹²¹

¹¹⁹ J P Kalt & M A Zupan "Capture and Ideology in the Economic Theory of Politics" (1984) 74 *Am Econ Rev* 279, 298.

¹²⁰ A Breton *The Economic Theory of Representative Government* (Aldine, Chicago, 1974) 50.

¹²¹ M J Hinich & P C Ordeshook "Social Welfare and Electoral Competition" (1971) 11 *Public Choice* 73, 81.

Secondly, the range of alternatives is further restricted by the need of rational voters to balance the extent to which candidates accord with their preferences against the likelihood of that candidate securing election. Furthermore, as such likelihood is dependent upon the actions of others, the ability of voters to make such judgments is constrained by their ability to discover the votes that other electors will cast. Where such information is limited, as it normally the case, voters are likely to act in a conservative fashion and thereby further reduce the range of viable candidates.¹²²

The effect of a parliamentary system of government may be seen to create further informational difficulties, as the capacity of voters to secure particular policies becomes dependent upon not only the electoral success of the candidate they support but also of the success of his or her party in attaining government. Voters may seek to resolve both of these issues through the presumption that a particular party or candidate will eventually prevail, although in doing so they necessarily lose the opportunity to select a candidate who will act in their immediate interest.

The ability of voters to influence specific policy decisions under such circumstances is clearly dependent upon the degree of separation between the policies advocated by individual candidates. The extent of such separation between candidates in a single member constituency is in most instances limited by the desire to attract mainstream support.¹²³

B *Self-Interest*

It may therefore be seen that the degree of influence available to voters through the electoral process is very limited. Voters are, however, free to base their choice upon whatever criterion they see fit, including their economic self-interest.

The ability of rational voters to use such discretion in their economic self-interest is however limited. It is clear that in order to identify the policy positions most beneficial to their self-interest, and further to select the candidate most closely aligned with those positions, voters

¹²² R B Morton "An Analysis of Legislative Inefficiency and Ideological Behaviour" (1991) 69 *Public Choice* 211, 219.

¹²³ D K Whyne & R A Bowles *The Economic Theory of the State* (Martin Robertson, Oxford, 1981) 63.

must incur some cost. Further costs will arise in discovering the likelihood of electoral success of that candidate, as well as those involved in determining the viability of the policies advocated and further whether the candidate is likely to act upon them.

Given the slight degree of influence that individual voters can exercise, their capacity to recoup the costs associated with casting an informed vote through securing a beneficial outcome is very limited. The level of cost that voters are prepared to incur is also reduced, and with it their capacity to identify and vote in their self-interest.

It is however possible that self-interest may be better served on those occasions where candidates are visibly divided on a single issue. However, even where such division does occur, the issue must be of sufficient significance that voters are prepared to forego consideration of any other interest than that which is presented by the issue in question.

The extent to which self-interest can be assumed on the part of voters may be seen to be further reduced if the ultimate conclusion of such an assumption is seen to be that rational voters, in addition to seeing little cause to be informed, would be unwilling to incur the costs associated with the act of voting. Such a conclusion would appear to indicate that the very large proportion of people who do vote are not rational in an economic sense.

If the action of voting and that of selecting a particular candidate can be differentiated, it is possible that the latter affords some scope for rational self-interested conduct. The limits to such rational conduct which have been noted above can however be seen to be considerable.

C *Expressive Conduct*

The limited role that self-interest can be seen to have in relation to the decisions of the electorate establishes at least the possibility that voters are motivated by expressive concerns. The significance of personal ethics or principle to voting decisions is indicated on an empirical level, and would furthermore appear to resolve the problem presented by the apparent irrationality of voting noted above.

Further support for such a conclusion is provided by the form of political campaigning, in which voters are rarely offered detailed information. Rather parties and candidate propose broad ideological statements, including that afforded by party identification. It is true that

these statements can be seen to act as approximate indication of the interests favoured by a particular candidate, but such approximations would appear to function only where the electorate can be divided into large groups with essentially uniform interests.

Where such division is not possible, the tone of campaigning is likely to be significantly less informative, although not necessarily less divisive. Candidates seek to associate their policies not with improving the status of those who would vote for them but for society as a whole. Appeals to national pride, moral virtue and other largely undefined qualities are commonplace. Where the focus of campaigning is placed upon party leaders or the personal qualities of candidates, the amount of policy information made available to the electorate is further reduced in favour of more emotive content.

D *Application*

1 *Introduction*

The influence of the electorate over Treaty policy is very difficult to determine, as the informational limitations of the electoral process would indicate.¹²⁴ At the 1990 election in particular there would appear to have been so many other issues of concern to voters, as indicated by the almost uniform swing across all electorates,¹²⁵ that distinguishing Treaty policy is rendered extremely difficult.¹²⁶

It is however apparent that the more restrictive approach of the Labour government from 1989 onwards was at least contemporaneous with party polling indicating discontent.¹²⁷ On the other hand, while it is apparent that Treaty policy was unpopular, albeit significantly less so among traditional Labour voters,¹²⁸ Treaty issues received little

¹²⁴ M Chen "A Lawyer's Perspective on Maori and Gender Issues in the 1990 General Election" in E M McLeay (ed) *1990 General Election: Perspectives on Political Change in New Zealand* 9 (Victoria University Department of Politics, Wellington, 1991) 91, 103.

¹²⁵ A McRobie "The New Zealand General Election of 1990" (1991) 10 *Electoral Studies* 158, 169.

¹²⁶ P Aimer "Discussion on the Issues" in McLeay, above n 124, 105, 107.

¹²⁷ Kelsey, above n 37, 238 -239.

¹²⁸ H Gold & A Watson *New Zealand Values Today: The Popular Report of the November 1989 New Zealand Study of Values* (Massey University/Alpha, Palmerston North, 1990) Table 5.3: 67 % of those surveyed felt that Treaty policy should be reduced or removed altogether, a view shared by only 50 % of voters. The suggestion by the Parliamentary Commissioner for the Environment (*Environmental Management and the Principles of the Treaty of Waitangi*, Parliamentary Commissioner, Wellington,

mention in the 1990 campaigns of any of the major parties and were ranked 11th among voters' priorities.¹²⁹

2 *Maori seats*

The reaction of voters in the Maori electorates is also difficult to determine. In both 1984 and 1987 the Maori electorates do not appear to have been under significant challenge, although it may be suggested that this was in part due to the Labour policy of expanding the jurisdiction of the Waitangi Tribunal.¹³⁰

In 1990, while Labour retained the four Maori seats, its hold on Northern Maori weakened further and support for the Mana Motuhake party increased considerably.¹³¹ Furthermore, the Maori vote would appear to have been significantly limited both by low enrolment and turnout throughout the three elections¹³² and by a concerted campaign against voting in 1990.¹³³

1988) that the pace of change had left the public behind would appear correct, if rather mild.

¹²⁹ J Vowles & P Aimer *Voters' Vengeance: The 1990 Election in New Zealand and the Fate of the Fourth Labour Government* (Auckland University Press, Auckland, 1993) 63.

¹³⁰ C James *New Territory: The Transformation of New Zealand 1984-1992* (Bridget Williams, Wellington, 1992) 128.

¹³¹ H Catt "Landslide by Default: The New Zealand General Election of 1990" (1991) 44 *Parl Affs* 322, 333.

¹³² Vowles & Aimer, above n 129, 50: Maori non-voting increased from 23.8 % in 1984 to 30.2 % in 1987 and 41.5 % in 1990.

¹³³ McRobie, above n 125, 167.

VI INTEREST GROUPS

A *Economic Analysis*

Analysis of the role of interest groups in the process of policy formulation presents a number of questions that do not arise in relation to other public institutions. Foremost among these is that of definition: it is difficult to determine the particular characteristics that indicate the existence of an interest group and further to describe the manner in which a typical group can be said to function.

It is elementary that almost any policy decision will involve some degree of wealth transfer and as such will benefit one section of the community at the expense of another.¹³⁴ The decision to implement such a transfer reflects the capacity of the different interests concerned to influence the responsible individual or institution.¹³⁵ The difficulty is that to define interest groups in terms of such influence leads to a broad pluralist model of the political process¹³⁶ rather than an understanding of the institutional role of such groups.

A functional understanding of interest groups can however be attained through the analysis of government in terms of political competition.¹³⁷ If the process of government is viewed as a market in which costs and benefits are distributed in response to the exercise of political pressure, incentives exist for the collective exercise of influence by market participants.¹³⁸ Although cooperation is in most instances likely to require some degree of compromise between those involved, it is clear that the concentrated influence afforded by collective action will increase the degree of pressure that group members are able to exert and therefore the benefits received.¹³⁹

The effects of such collective action would be slight, however, but for the costs incurred in the exercise of political influence. These costs, which include both the direct costs of political activity in terms of time

¹³⁴ S Peltzman "Towards a General Theory of Regulation" (1976) 17 J L & Econ 211, 213.

¹³⁵ G Brennan & J Buchanan "Is Public Choice Immoral? The Case for the 'Nobel' Lie" (1988) 74 Va LR 179, 181.

¹³⁶ See generally, C Sunstein "Interest Groups in American Public Law" (1985) 60 Stanford LR 29, 48.

¹³⁷ J R Macey "The Theory of the Firm and the Theory of Market Exchange" (1988) 74 Cornell LR 43, 43.

¹³⁸ S Peltzman "Towards a More General Theory of Regulation?" (1976) 19 J L & Econ 211, 215.

¹³⁹ I McLean *Public Choice: An Introduction* (Blackwell, Oxford, 1987) 69.

and other resources and the information cost involved in identifying the effect of a given policy on one's interests, create market distortions, including the rational ignorance of voters noted above, where they outweigh the net benefit of political activity. Interest groups may be seen to avoid and even to take advantage of these market distortions by distributing the costs of activity among their members and thereby pursue their interests more efficiently than can individuals.¹⁴⁰ Such efficiency can extend to the use of methods of influence which would be unviable on an individual basis. The capacity of interest groups to influence policy decisionmaking is thus potentially considerable.

The collective nature of interest groups may however restrict their capacity to pursue the specific interests of individual members; as has been noted, some degree of compromise is likely to be required. Groups may however reduce the need for such compromise by seeking members with very similar interests or by restricting their activities to a small number of issues. In both instances groups will reduce the level of resources available to them through a reduction in membership in the first case and through a reduction in the willingness of members to contribute to group activities in the second. Clearly the problems of compromise must be balanced against the level of resources required if the group is to function effectively.¹⁴¹

The capacity of interest groups to influence policy decisions is dependent upon both their ability to collect resources and the effectiveness with which those resources can be applied to influence the decisions of others. In order for economically rational individuals to contribute to the resources of an interest group, the group must be able to pursue policies beneficial to the interests of individuals more effectively than can the individuals acting alone, as has been noted. Further, the level of contributions that individuals are willing to make is reflective of the level of benefit which will accrue.¹⁴²

A more serious difficulty in attracting contributions is the receipt of benefits by those who are not group members. Such free-rider benefits will reduce the incentive of individuals to incur the costs of

¹⁴⁰ M Olson *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard, Cambridge Mass., 1965) 165 - 167.

¹⁴¹ J Buchanan "Revolutionary Motivation and Rationality" (1979) 9 *Phil & Pub Affs* 59, 65.

¹⁴² D Austen-Smith "Voluntary Pressure Groups" (1981) 48 *Economica* 143, 150.

membership and thereby threaten group viability.¹⁴³ Successful interest groups are therefore likely to be those possessing some means of ensuring participation by all beneficiaries such as the pursuit of benefits which are contingent upon the participation either of all those concerned or of specific individuals.¹⁴⁴

A further and related constraint on the ability of interest groups to influence policy is the difficulty of targeting the benefits of government policy in this manner.¹⁴⁵ More broadly, policies which too obviously seek benefits for group members are unlikely to succeed, given both the possibility of popular rejection and the need on the part of most decision-making institutions for at least an ostensible element of public interest.¹⁴⁶ Such an appearance is particularly necessary where interest groups seek public support.¹⁴⁷ Both of these difficulties, and that of free-riding, can to some extent be overcome where the interest group in question arises from an existing organisation whose membership and public profile are less dependent upon the pursuit of favourable policies. Alternatively such groups may be encouraged to form by political parties where the party interest is aligned with that of a group of individuals.¹⁴⁸

Finally, the influence exerted by one interest group is likely under some circumstances to be opposed by others. While interest group activity is not costless, it is clear that where the policy sought by a group imposes a sufficient detriment on other individuals, the incentive to form an opposing interest group is considerable.¹⁴⁹ However, given the difficulties noted in relation to the viability of interest groups it would appear unlikely that a balanced state of competition will arise.¹⁵⁰

143 G Becker "A Theory of Competition Among Pressure Groups for Political Influence" (1985) 98 Q J Econ 371, 377.

144 Buchanan, above n 141.

145 Breton, above n 120, 142.

146 W C Mitchell & W C Munger "Economic Models of Interest Groups: An Introductory Survey" (1991) 35 Am J Pol Sci 512, 536.

147 Becker, above n 143, 393.

148 J R Macey "The Role of the Democratic and Republican Parties as Organisers of Shadow Interest Groups" (1990) 89 Mich L R 1, 5.

149 Becker, above n 143, 375.

150 Mitchell & Munger, above n 146, 523.

B *Self-Interest*

There would appear to be little scope for motivations other than that of self-interest in the actions of interest groups, although it is clear that external pressures may require such groups to advocate policies which at least appear to be of broader social benefit. The role for expressive or deliberative motivations is therefore likely to be superficial if it exists at all.

However, given the free-rider problems faced by interest groups, particularly at their formation, such groups will form only rarely.¹⁵¹ The large number of interest groups in most democratic societies would appear to indicate the existence of pressure groups that are not motivated by economic self-interest.¹⁵²

The existence of economically unviable interest groups would appear to comply with the broad expressive theory outlined above. It must be noted further that groups that are economically unviable may nonetheless have a significant influence in policy formulation, with the effect that policy may have considerable non-economic content.¹⁵³ It is also arguable that as the motivations of the members of such groups are likely to be less narrowly defined the process by which group objectives are determined is likely to be more open to deliberation.¹⁵⁴

C *Application*

1 *Introduction*

The New Zealand political process involves large numbers of interest groups to the extent that one commentator proclaimed the activities of such groups to be a national pastime.¹⁵⁵ While direct lobbying of individual representatives as a means of exerting influence is limited by party whipping, it is apparent that such groups do exercise influence

¹⁵¹ R D Tollison "Public Choice and Legislation" (1988) 74 Va LR 310, 343.

¹⁵² Becker, above n 143, 375.

¹⁵³ Coursey & Roberts, above n 13, 85.

¹⁵⁴ P Dunleavy *Democracy, Bureaucracy and Public Choice; Economic Explanations in Political Science* (Harvester Wheatsheaf, Hemel Hempstead, 1991) 34.

¹⁵⁵ A D Robinson "The Role of Pressure Groups in New Zealand" in S Levine (ed.) *Politics in New Zealand* (Macmillan, Sydney, 1981) 289, 290. See also B Jesson "Lobbying and Protest: Patterns of Political Change at the Informal Level" in Gold, above n 40, 365, 368.

by a wide variety of methods including institutional structures such as the select committee process and court action and less formally by many means.

However, from 1984 onwards the role of interest groups may be seen to have changed significantly. First, the rejection of special interests may be seen to have been central to government economic policy, as the experience of some would-be lobbyists shortly after the 1984 election would indicate.¹⁵⁶ Conversely however, the Labour administration was strongly committed to principles of open government and consultation. The extensive provision for participation in policy formulation may be seen to have favoured interest groups motivated by expressive rather than self-interested concerns. The expansion of the select committee process may also be seen to have enhanced the opportunity of both forms of interest group.

2 *Treaty policy*

The importance of Maori interest groups to the development of Treaty policy is considerable, as without their continued efforts since the nineteenth century, together with the pressure exerted by the representatives of Maori electorates, it is clear that the Treaty would not exist as an issue.¹⁵⁷ It is furthermore apparent that interest groups, again in company with the Maori members, had for some time prior to 1984 been promoting the place of the Treaty in political debate. It is implausible that such groups were, at least until recently, motivated by economic interest. The conclusion that such groups were motivated by expressive considerations would appear to be supported by their choice of methods, including petitions to the Queen¹⁵⁸ and the marches of 1975 and 1984, and of language that placed great significance on the solemnity and even the sacredness of the Treaty.¹⁵⁹ The effectiveness of methods associated with expressive considerations such as the "politics of embarrassment" in influencing Treaty policy would appear to be considerable.¹⁶⁰ It would also appear that the action of the New

¹⁵⁶ J Vowles "Business, Unions and the State: Organising Economic Interests in New Zealand" in Gold, above n 40, 342, 361.

¹⁵⁷ See generally C Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) 211 - 245.

¹⁵⁸ Orange, above n 157, 216.

¹⁵⁹ Orange, above n 157, 231.

¹⁶⁰ R Mulgan *Maori, Pakeha and Democracy* (Oxford, Auckland, 1989) 146 - 147.

Zealand Maori Council in bringing proceedings under the State-Owned Enterprises Act was directed to this end rather than in any expectation of success.¹⁶¹

It is clear that the increased activity of Treaty-related interest groups under the Labour government was in part due to the expanded provision for participation noted above and more particularly to the institution of participatory processes specifically in relation to Treaty policy, of which the most notable is the expansion of the jurisdiction of the Waitangi Tribunal and the enactment of provisions rendering the Treaty justiciable.¹⁶² It is to be noted that both of these developments were at least in part in reaction to the prompting of interest groups and that they may be seen to have permitted self-interested Treaty groups to become viable.¹⁶³

It must however be recognised that many of those pressing for greater Treaty recognition, such as anti-apartheid groups and most significantly the churches can be seen to possess only expressive motivations.¹⁶⁴ Furthermore, while it is apparent that these groups, together with the Maori Council, have to some extent been surpassed by economically interested groups,¹⁶⁵ there remains a significant role for at least apparent expressive motives.¹⁶⁶ The significance of such apparent motives may also be seen to explain the limited success of pressure groups opposed to Treaty recognition.¹⁶⁷

¹⁶¹ I H Kawharu "Introduction" to I H Kawharu (ed) *Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi* (Oxford, Auckland, 1989) i, xi.

¹⁶² A Sharp "The Treaty, the Tribunal and the Law: Recognising Maori Rights in New Zealand" in H Gold (ed) *New Zealand Politics in Perspective* (3ed, Longman Paul, Auckland, 1992) 123, 130.

¹⁶³ Kawharu, above n 161.

¹⁶⁴ J Boston "Christianity in the Public Square: The Churches and Social Justice" in J Boston & A Cameron (eds) *Voices for Justice: Church, Law and State in New Zealand* (Dunmore, Palmerston North, 1994) 11, 16.

¹⁶⁵ O'Regan, above n 111, 256.

¹⁶⁶ I MacDuff "The Role of Negotiation: Negotiated Justice" (1995) 25 VUWLR 144, 149.

¹⁶⁷ James, above n 130, 131. See, however, P Spoonley "The Political Economy of Racism" in P F Green (ed) *Studies in New Zealand Social Problems* (Dunmore, Palmerston North, 1990) 128, 136-137.

VII PARTY ORGANISATIONS

A *Economic Analysis*

From an economic perspective, it is possible to view parties as instruments by which individuals seek the implementation of policies which will serve their interests. Individuals incur the costs associated with party membership on the basis that the collective representation afforded them by the party organisation increases the effectiveness with which policies beneficial to their interests will be advocated. Parties achieve such increased advocacy through the provision of resources to candidates. They may thus be seen to be concerned both with securing membership and securing political influence.¹⁶⁸

It is possible on this basis to draw several parallels between parties and interest groups. Firstly, the interest of both types of decision-maker is served by applying sufficient pressure through membership and other resources to achieve their stated policies. Secondly, the ability of both to attract the necessary resources is reflective of the breadth or the intensity of support for the policies advocated.

It is however important to note that parties differ from interest groups in at least two basic respects. These distinctions stem from the potential controls arising from the more formal relationship between parties and representatives and from the limitations placed on the exercise of such influence by the differing functions of parties and interest groups.¹⁶⁹

B *Control by Party Organisations*

The relationship between parties and their representatives in government can vary considerably in nature. However, it is clear that in most party systems the connection between party and representative is likely to have some formal element, unlike most relationships with interest groups. It must also be recognised that the different function of parties as is outlined below may be seen to enhance such formality, as the relationship is likely to be of broader effect and of greater duration than that between a representative and an interest group.

¹⁶⁸ J S Coleman "Internal Processes Governing Party Positions in Elections" (1971) 35, 59.

¹⁶⁹ P Mair "Myths of Electoral Change and the Survival of Traditional Parties" (1993) 24 Euro J Pol Res 121, 131.

Through this more formal relationship the party organisation is potentially able to exercise direct influence over representatives and thereby over policy decisions through the use of disciplinary processes to control the actions of representatives.

The capacity of party organisations to control representatives while in office is however extremely limited. Firstly, electoral law accords only very limited significance to party organisations, focussing instead on individual representatives,¹⁷⁰ and thus the measures which parties can employ including the extreme step of expelling a disobedient member from the party cannot of themselves remove the representative from office. It is however open to the party organisation to threaten the chances of reelection of the representative through the appointment of another candidate or the withdrawal of campaign support, albeit at the risk of some electoral cost.¹⁷¹

A second but less formal limit arises from the lack of public recognition of party organisations as distinct from the elected representatives who are party members. While representatives are seen to have received public consent through their election to office, party organisations typically enjoy both lower profile and lower status, and attempts to influence the actions of democratically elected representatives by members of the party hierarchy who do not possess such a mandate may be met with public distrust.¹⁷²

Thirdly, where parties are seeking government under a parliamentary system, the need for party organisations to present a coherent policy platform, as is discussed below, creates a strong disincentive for parties to risk the appearance of disunity which coercive measures may create.¹⁷³

Parties may be more successful in influencing policy by less direct means, such as the selection of candidates and through the preparation of manifestos. A constant limit on the effectiveness of selection as a means of altering policy arises from the weakness of subsequent controls. Further, candidate selection is clearly constrained by the

¹⁷⁰ *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) AJHR H.3 265. See ss 62 - 71 Electoral Act 1993 for some slight change in this respect.

¹⁷¹ M Wilson *Labour in Government 1984 - 1987* (Allen & Unwin, Wellington, 1989) 39.

¹⁷² R Mulgan *Democracy and Power in New Zealand* (2ed, Oxford, Auckland, 1989) 58. See, for example, the comment of the Rt Hon D Lange, then Prime Minister that policy decisions were made by "responsible ministers, not party activists" (Joseph, above n 75, 451).

¹⁷³ Palmer *Unbridled Power* above n 41, 77.

demands of electoral success, although these pressures may be rendered insignificant where such success is largely assured.¹⁷⁴ Finally, where the incumbent is a party member, attempts to appoint a different candidate may give rise to the difficulties noted above in attempts to influence representatives by direct means.

The preparation of policy documents is however a potentially successful means of exercising influence, particularly if the party organisation is perceived by representatives to be better informed as to the demands of their electorate, or in parliamentary systems, of the demands of the electoral support of the party as a whole.¹⁷⁵ Given the limited capacity of individual representatives to acquire such information, the influence exerted by the party organisation in this manner may be considerable. It is however clear that some element of such influence will be guided by at least the apparent preferences of the electorate rather than by the wishes of members.

C *Self-interest of Party Organisations*

The functional distinction between parties and interest groups is clear: while interest groups seek to persuade others to implement their policies, parties are concerned with doing so directly by attaining public office for their members. It is true that the distinction is potentially unclear, and it is furthermore arguable that where the link between parties and representatives is slight, such as in the United States, it need not exist at all.¹⁷⁶

Where, however, the party acts as a united group within the legislature and must either contribute to or comprise a governing majority if its policies are to be implemented, as is the case under the Westminster system, parties are likely to formulate policies in relation to most if not all areas of government. Furthermore, the tendency of plurality electoral systems to result in single-party governments produces an incentive for parties to seek broad electoral support, as without such breadth their chance of attaining office and thereby having the opportunity to implement their policies is reduced.¹⁷⁷

¹⁷⁴ G Brennan & L Lomasky *Democracy and Decision: The Pure Theory of Electoral Preference* (Cambridge University Press, Cambridge, 1993) 122.

¹⁷⁵ Brennan & Lomasky, above n 174, 122.

¹⁷⁶ McLean, above n 139, 39.

¹⁷⁷ Wilson, above n 171, 113.

The need for breadth both in policy and electoral support increase the need for compromise within the party.¹⁷⁸ Such compromise may be seen to produce a tension between the policies advocated by the party as a whole and those sought by its individual members, as the incentive of individuals to incur the cost of membership is clearly reduced as party positions move away from their own.¹⁷⁹

The first consequence of this distinction is that parties are likely to be subjected to greater competition than are interest groups both in attracting members, as a result of the greater potential for dissatisfaction and in achieving political success, given the exclusivity of attaining a majority.¹⁸⁰ Such competition would tend to constrain the ability of party organisations to advocate the positions of current members rather than those of the electorate but also prevent the party from seeking to appeal to too broad a section of the electorate.¹⁸¹

Secondly, parties are more likely to be subject to disagreement over the importance of long-term viability because separate policies advocated by the party may require different lengths of time for their implementation. As more lengthy policies require a greater degree or at least a greater durability of electorate support, parties are still further constrained in the setting of policies. More broadly, party members clearly have an interest in the continuing viability of the party.¹⁸²

Thirdly, the need to acquire broad support and to do so through the electoral process requires substantial resources and, where significant expenditure limits are imposed, large numbers of members. The net effect of this requirement may be difficult to determine, as it indicates a need to balance the contributions of current members against those of members whom more moderate policies might attract.¹⁸³

Finally, the breadth of policy decisions and the diversity of party membership render the provision of economic benefits to party members as a distinct group very difficult, both in practical terms and

¹⁷⁸ Whyne & Bowles, above n 123, 63.

¹⁷⁹ A Ware "Activist-Leader Relations and the Structure of Political Parties: 'Exchange' Models and Vote-Seeking Behaviour in Parties" (1992) 22 Br J Pol Sci 71, 76.

¹⁸⁰ Note the empirical support for the assertion in B S Frey & F Schneider "On the Modelling of Politico-Economic Interdependence" (1975) 3 Euro J Pol Res 339, 354.

¹⁸¹ W H Riker *The Theory of Political Coalitions* (Yale, New Haven, 1962) 164.

¹⁸² A Ware "Activist-Leader relations and the Structure of Political Parties: 'Exchange' Models and Vote-Seeking Behaviour in Parties" (1992) 22 Br J Pol Sci 71, 87; Wilson, above n 171, 36.

¹⁸³ K Strøm "A Behavioural Theory of Competitive Political Parties" (1990) 34 Am J Pol Sci 565, 577.

also in the inconsistency between such specific benefits and the broad support base that parties must attract.¹⁸⁴ While it is conceivable the latter difficulty might be overcome by political rhetoric, the willingness of politicians to act for such purposes would appear limited in light of the limited potential for reciprocal benefits.¹⁸⁵

Furthermore, while members may derive such benefits as members of broader groups benefiting from policy decisions, the greater scale of such decisions is likely to be dependent upon electoral support rather than reflective of party members' interests. A more effective means of conferring individual benefits is through the use of administrative discretion, but such conduct would not appear likely to alter policy decisions and so would not appear relevant here.

D *Conclusion*

It may thus be seen that while party organisations are able to exercise influence over the policy positions of representatives, the dependency of parties upon electoral success suggests that some if not all of this influence is employed in the pursuit of the electoral support upon which implementation of such policy depends.

It is nonetheless possible that a party sufficiently assured of electoral success may be able to pursue policies free from such constraints. The extent to which such policies may be motivated by the economic interests of party members is however limited by the constraints outlined above. A further limit on such policies may arise if they are so unpopular as to jeopardise the electoral support of the party.

Within these constraints the potential for expressive conduct on the part of party organisations is very limited but would nevertheless appear to be greater than the prospect of self-interested activity. The expressive model would also appear to be well-suited to the nature of political party membership. The particular direction of such expressive conduct would also appear likely to incline towards ethical conduct given the moderating effect of policy formulation processes.

¹⁸⁴ A Breton *The Economic Theory of Representative Government* (Aldine, Chicago, 1974) 142.

¹⁸⁵ L A Baker "Direct Democracy and Discrimination: A Public Choice Perspective" (1991) 67 Chi-Kent LR 707, 742.

E *Application*

The role of the Labour Party organisation in influencing government policy between 1984 and 1990 has been recognised as extremely limited,¹⁸⁶ in contrast to a traditionally strong role.¹⁸⁷ The reasons for such limitation would appear to provide an almost exact parallel to those outlined above.

Firstly, the party was clearly unwilling to exercise direct influence over representatives both because of such influence was perceived to be ineffective and for fear of adverse popular reaction. The risk of ineffectiveness may be seen to have resulted both from the presence of united groups within the caucus¹⁸⁸ and further from a perception on the part of both the party organisation and representatives that the caucus enjoyed substantial electoral support independent of their party affiliation.¹⁸⁹ Party concerns over the electorate reaction to direct measures may be attributed to a general belief that the public distrusted the party organisation.¹⁹⁰

Control through candidate selection was also significantly restricted, in part because of party constitutional changes which removed much of the influence of the central party organisation in favour of the members of electorate parties.¹⁹¹ It is also apparent that changes in the nature of electoral campaigning permitted individual members to attain substantial popularity and so to render their removal from office very difficult.¹⁹²

¹⁸⁶ See, for example, C James *New Territory: The Transformation of New Zealand 1984 - 1992* (Bridget Williams, Wellington, 1992) 242; J Vowles & P Aimer *Voters' Vengeance: The 1990 Election in New Zealand and the Fate of the Fourth Labour Government* (Auckland University Press, Auckland, 1993) 11; R Dyson "The 1984-1990 Labour Government: What Happened and Why?" in E M McLeay (ed) *The 1990 General Election: Perspectives on Political Change in New Zealand* (Occasional Paper No. 3, Politics Department, Victoria University of Wellington, Wellington, 1991) 9, 11.

¹⁸⁷ R Mulgan "The Changing Electoral Mandate" in M Holland & J Boston *The Fourth Labour Government: Politics and Policy in New Zealand* (2ed) (Oxford, Auckland, 1991) 11, 12.

¹⁸⁸ See, for example, the proposal in 1987 of the Hon. Roger Douglas, Minister of Finance 1984-1988, that a large part of the caucus should, if opposed by the party organisation, simply establish a new party themselves (Massey University Winter Lecture, 10 July 1992, quoted James above n. 186, 257).

¹⁸⁹ J Vowles "Playing Games with Electorates: New Zealand's Political Ecology in 1987" (1989) 41 *Pol Sci* 18, 33.

¹⁹⁰ Wilson, above n 171, 42.

¹⁹¹ C James *The Quiet Revolution: Turbulence and Transition in Contemporary New Zealand* (Allen & Unwin, Wellington, 1986) 149.

¹⁹² J Boston & W K Jackson "The New Zealand General Election of 1987" (1988) 7 *Electoral Studies* 70, 74.

Finally, the influence of the party organisation over policy formulation was extremely limited for at least three reasons. Firstly, the process by which manifesto positions were negotiated did not produce detailed policy commitments. The initial result of this incapacity may be seen in the very broad terms of the 1984 Manifesto,¹⁹³ and in more extreme form in the decision to contest the 1987 election without any manifesto at all.¹⁹⁴

The absence of formal policy positions appears to have resulted from pressure from representatives to minimise such commitments, which were perceived as restrictive and potentially electorally costly.¹⁹⁵ The inability of the party organisation to resist such pressure can in part be attributed to the independent support for representatives that has been noted above, but also to the unworkability of internal party structures which prevented the formulation of coherent proposals.¹⁹⁶ Reforms made in 1988 through the establishment of policy committees and consultative structures appear to have come too late to alter this position.¹⁹⁷

The party organisation may also be seen to have been substantially constrained by its continuing desire for electoral viability. As has been noted elsewhere, many of the caucus did not regard the risk of electoral defeat as a constraint, while the party organisation by its nature was obliged to do so.¹⁹⁸ The continuing need of the party for campaign workers,¹⁹⁹ funding and perhaps most significantly for the votes of its traditional supporters²⁰⁰ may be seen to have taken priority over any attempt to influence policy towards members' self-interest.

F *Treaty Policy*

Against the backdrop of disagreement between the party organisation and the caucus, Treaty of Waitangi policy appears to be a rare exception.

¹⁹³ Wilson, above n 171, 38.

¹⁹⁴ Mulgan, above n 187, 19.

¹⁹⁵ Wilson, above n 171, 134.

¹⁹⁶ Palmer, above n 51.

¹⁹⁷ G Debnam "Conflict and Reform in the New Zealand Labour Party, 1984 - 1992" (1992) 44 Pol Sci 42, 56.

¹⁹⁸ Wilson, above n 171, 36.

¹⁹⁹ D Denmark "Programmatic Intransigence and the Limits of the Modern Campaign: New Zealand Labour in 1990" (1994) 46 Political Science 22, 31 -32.

²⁰⁰ Wilson, above n 171, 113.

The policy commitments implemented by the legislature were all included in the 1984 Manifesto.²⁰¹

These commitments appear to have arisen from the significance of the Maori electorates to the Labour Party both on a symbolic level²⁰² and also through concerns that party control of the electorates was under threat.²⁰³ It would however appear likely that the willingness of the party organisation to make some provision for the Maori seats was limited, given the subsequent criticism of Treaty policy by traditional Labour supporters.²⁰⁴

It is therefore possible to construe the implementation of Treaty policy as in part driven by the desire of the party organisation for electoral success and in part due to lack of foresight. The role of self-interest in this respect would appear to be concerned almost entirely with electoral success.

²⁰¹ New Zealand Labour Party 1984 *Policy Document* (NZLP, Wellington, 1984) 59.

²⁰² Wilson, above n 171, 140.

²⁰³ B Jesson *Fragments of Labour: The Story Behind the Labour Government* (Penguin, Auckland, 1989) 96; contrast however, R Chapman "Voting in the Maori Political Sub-System 1935 - 1984" in *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) AJHR H.3, B83, B102.

²⁰⁴ Vowles & Aimer, above n 186, 172.

VIII THE WAITANGI TRIBUNAL: A GENERAL ANALYSIS

While the Waitangi Tribunal may clearly be seen to have been central to the development of Treaty policy between 1984 and 1990, it is necessary to recognise that its role was extremely complex, not least because its existence and operation can themselves be seen to be elements of that policy. Furthermore, the influence of the Tribunal may be seen to have extended to virtually all other governmental institutions but the effect of this influence clearly varied considerably.²⁰⁵

These varied effects can be seen to result from the hybrid characteristics of the Tribunal as an institution. First and most obviously, it is in part possible to analyse the Tribunal as a very specialised judicial body, albeit with greater flexibility and sensitivity than the court system and somewhat lesser constitutional status and formal authority.²⁰⁶ In this respect the the Tribunal may be seen to enjoy a form of independence based in part upon the nature of its duties but also upon its possession of only very limited binding authority. The development by the Tribunal of an elementary jurisprudence, together with the adherence of the Tribunal to court rulings,²⁰⁷ relating to Treaty claims indicate a further similarity. Finally, the preference for the negotiation of settlements expressed by both the Court of Appeal and the Tribunal would appear to indicate a common recognition of the institutional limitations of both bodies.²⁰⁸

Secondly, the importance of the research function of the Tribunal may be seen to afford it some similarity with the position of policy agencies in the sense that its findings provide guidance to other decision-making institutions.²⁰⁹ In fulfilling this advisory role the Tribunal is

²⁰⁵ P A Joseph, above n 75, 62.

²⁰⁶ F M Brookfield "Sovereignty: The Treaty, the Courts and the Tribunal" [1989] NZRLR 292, 294.

²⁰⁷ Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wai-9) 1987, 127.

²⁰⁸ A Sharp *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Oxford, Auckland, 1990) 124.

²⁰⁹ W H Oliver *Claims to the Waitangi Tribunal* (Waitangi Tribunal Division, Department of Justice, 1991) 15. See, for example, *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, 662 and the admission of Tribunal reports as evidence in *Te Runanga o Muriwhenua v. Attorney-General* [1990] 2 NZLR 641, 653.

obliged both to emphasise the integrity of its methodology and and to recognise the need for a conciliatory approach.²¹⁰

Thirdly, the Tribunal's lack of binding powers together with the clearly political nature of many of the issues it has sought to address may be seen to have led to its adoption of an advocacy role.²¹¹ It would appear clear that in assuming such a role the Tribunal has acquired some of the characteristics of an interest group, as the efforts of the Tribunal to win the confidence of those it seeks to represent and to influence public opinion indicate.²¹² The assumption of such a partisan role may also be seen to have contributed to the inadequate funding of the Tribunal by government.²¹³

Given this hybrid nature it is difficult to determine the overall effectiveness of the Tribunal in influencing policy decisions. Furthermore, it is apparent from the relative success of some Tribunal efforts and the failure of others that it possesses only a very conditional authority.

There would appear to be some role for self-interest in the actions of the Tribunal, but that role would appear to be concerned principally with its survival as an institution rather than the receipt of benefits by its members. Furthermore, assertions that Tribunal members were acting to their own economic benefit would appear to be ill-founded given the size of the Tribunal budget.

The role of expressive conduct in Tribunal decisions would by contrast appear to be considerable, in part as a result of the nature of the Treaty issues with which the Tribunal was solely concerned and in part because of the significance of such conduct to each of the elements of the role of the Tribunal.

²¹⁰ G W R Palmer "The Treaty of Waitangi - Principles for Crown Action" (1989) 19 VUWLR 335, 337.

²¹¹ E T J Durie "The Waitangi Tribunal: Its Relationship with the Judicial System" [1986] NZLJ 235, 236; S E Kenderdine "Legal Implications of Treaty Jurisprudence" (1989) 19 VUWLR 347, 380.

²¹² See, for example, *Waitangi Tribunal Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai-22, 1988) xxi.

²¹³ *Te Puni Kokiri Post-Election Briefing to the Minister of Maori Affairs* (Te Puni Kokiri, Wellington, 1993) 112; E T J Durie "Background Paper" (1995) 25 VUWLR 93, 103.

IX CONCLUSIONS

A *Implications of MMP*

The next New Zealand general election, which must be held by September of 1996, will be conducted under the mixed-member proportional electoral system for the first time. The probable effects of the change are difficult to determine, particularly in an environment of political uncertainty.²¹⁴ It would however appear likely that the number of parties gaining seats by election will increase and that the number of seats secured by the traditional major parties will be reduced as their respective shares of the vote are more accurately reflected under the proportional system. It is unlikely, although possible, that a single party will achieve a majority.

It is possible to advance two broad scenarios on the basis of these changes. In the first, the inability of one party to achieve a majority on its own leads to minority government. The second scenario is based upon the decision of a minority party to seek a formal coalition with one or more other parties.

The implications of these scenarios for the model developed in this paper are extensive, although perhaps less so than many advocates of proportional systems might wish. Under the first, it is likely that policy decisions implemented by legislation would have to be made in a more inclusive manner and once made would be significantly more open to repeal or modification, increasing the scope for interest group pressure.²¹⁵ It is likely however that the volume of legislation, if not the amount of legislative activity, would decrease.

The capacity of the executive to act in confidence that its decisions would in fact be implemented would therefore be reduced, and it would appear likely that the greater openness of executive activities under minority government would lead to a similar reduction in the formulation of policy. The reduced role of the executive may be seen to have a broader consequence of increasing the significance of both bureaucracy and the judiciary in policy formulation, as a reduction in executive activity would increase both the functional demands made of these institutions and the ability of discretion afforded them.

²¹⁴ F G Castles "The Policy Consequences of Proportional Representation: A Sceptical Commentary" (1994) 46 Pol Sci 161, 162.

²¹⁵ Palmer above n 51, 197.

Under the second scenario the probable changes would appear to be rather more limited. While there would clearly be some electoral incentive for the members of a coalition to appear independent of one another, the incentive is balanced by the capacity of a firm coalition to implement policy efficiently and also, if it endures, by electorate objections to intragovernmental discord. It would therefore appear possible that principal responsibility for policy formulation would to some extent be shared between the caucus and the executive. It would however seem likely that the inclusive nature of coalition government would subject much policy formulation to greater electoral, party, and interest-group pressure. It is impossible to determine whether such openness would favour or ham future Treaty developments.

B *Critique of Model*

The paper has sought to develop a form of economic analysis of government decision-making which incorporates recognition of the limits of economic self-interest as a motive and of the institutional characteristics of different decision-making bodies. The method is intended to provide a means for the objective positive analysis of governmental structure while avoiding the artificiality inherent in much public choice analysis. The effectiveness of expressive theory in this respect is significant, but it is difficult to determine whether deliberative models of conduct, which have been addressed briefly in the paper, may afford a more rigorous method of analysis.

It is clear that the method as developed incorporates elements of other analytical approaches and its objectivity and thus the extent to which its conclusions can be evaluated empirically may suffer as a consequence. On the other hand the identification of the areas of such uncertainty would appear to be preferable to the broader uncertainty of public choice analyses.

It is also apparent that the method remains dependent upon some degree of generalisation, and although this would appear inevitable in relation to any form of analysis, it would appear to render the deductive analysis of specific policies prone to error. On the other hand the model of decision-making institutions which it affords would appear to have some considerable strength, particular in its capacity to incorporate these institutions into a single structure.

C *Treaty of Waitangi Policy 1984 - 1990*

The development of Treaty policy may thus be seen to have resulted from the combined efforts of the Labour caucus and party, the Courts, the Waitangi Tribunal and a number of interest groups. It is clear that the status attained by the Treaty as a result of this policy is very much a compromise of differing interests and as such has been the subject of considerable criticism. It is, however, a compromise that has brought about very substantial change in a relatively short period.

It is submitted that the change is the result of three main factors. First, the Treaty was by its nature able to appeal to expressive motivations and this appeal had been enhanced by legislative and interest-group activity in the decade before 1984. Secondly, the principal statutory developments in relation to the Treaty depended for their implementation upon institutions which were not only driven by such motives but were furthermore largely independent of pressure from interest-driven bodies. Thirdly, the institutions responsible for the implementation of policy possessed, within broad limits, sufficient authority that reversal of their actions was effectively precluded.

It is also apparent, however, that the capacity of government institutions to act upon expressive grounds is limited by functional and political considerations. The move towards a more centralised approach to Treaty policy formulation marked by the *Principles for Crown Action* may be seen as an instance of such limitation.

It remains, however, that a great deal has been achieved. The institutions responsible for the development of policy were clearly driven by different perceptions and priorities, but it is possible to see in them a sentiment first expressed to a unitary sovereign some one hundred and thirty-eight years ago:²¹⁶

"That the law be made one; That the commandments be made one; That the nation be made one ... And that all might enjoy a peaceable life."

²¹⁶ Petition of Ngai Tahu to the Queen, 23 September 1857 (H C Evison *The Treaty of Waitangi and the Ngai Tahu Claim: A Summary* (Ka Roimata Whenua Series No. 2, Ngai Tahu Trust Board, Christchurch, 1988)).

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