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A Challenge To "Inherited" Institutions: A Discussion of a Maori Legislative Body and Constitutional Change

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I INTRODUCTION

In two distinct periods of New Zealand's history calls for the development of a separate Maori legislative body have peaked. The justification for such a body in both periods was predominantly to incorporate the Treaty of Waitangi into New Zealand's constitutional arrangements. Despite this, recent discussion have focused only on incorporating the Treaty into our constitutional arrangements through an entrenched Constitution Act or Bill of Rights Act. There has been near silence on the possibility of altering our constitutional institutions as a way of incorporating the Treaty into our constitution, for example through the development of a separate Maori legislative body.

This essay is a challenge to encourage people to consider the idea of a Maori legislative body as one way of incorporating the Treaty into our constitution. The first part of the essay lays the basis for this challenge. It outlines the significance of the Treaty, our constitutional institutions, past proposals for a Maori legislative body and the low level of comment and debate on the idea up until now. The second part proposes a series of factors which, it is argued, have contributed to the idea of a Maori legislative body failing to attract much comment or debate. The third part looks to the future. It examines how developing a Maori legislative body might become an issue in the future. Also, a direction is suggested for the sort of Maori legislative body we should perhaps be considering, its jurisdiction and the relationships it should have with the existing national Parliament and the Crown.

Although this essay focuses on ideas of developing a Maori legislative body its findings on the lack of consideration in New Zealand of our constitutional institutions have wider significance.

II THE TREATY OF WAITANGI

The Treaty of Waitangi marked the beginning of constitutional government in New Zealand.[1] Successive governments, the Waitangi Tribunal and the New Zealand courts have all recognised the Treaty of Waitangi as a basic constitutional document of New Zealand.[2] It is unlikely that its importance as a constitutional document will decline in the foreseeable future.

As well as having constitutional significance the Treaty has continued to have an ongoing impact on the development and life of New Zealand. The Royal Commission on Social Policy for instance stated that the "Treaty is central to understandings of New Zealand society, its historical development and contemporary realities."[3]

III NEW ZEALAND'S CONSTITUTIONAL INSTITUTIONS: AN OVERVIEW

The new system of constitutional law and government in New Zealand implemented after the signing of the Treaty began with the New South Wales Continuance Act 1840 (Imp.) and the Letters Patent issued pursuant to that Act in November 1840.[4] These enactments acknowledged New Zealand as a

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[1] John Hamilton Wallace (ed) *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) 81 ["*Towards a Better Democracy*"].

[2] Acknowledgment by successive governments of the constitutional significance of the Treaty can be seen in the Fourth Labour Government's Principles for *Crown Action on the Treaty of Waitangi* (1989) (these can be found in P. Harris and S. Levine (eds) *The New Zealand Politics Source Book* (Dunmore Press, Palmerston North, 1994) 30-32.) and also the National Government's *Crown Proposals for the Settlement of Treaty of Waitangi Claims* (see Dept of Justice *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Summary* (Government Print, Wellington, 1994).) The Waitangi Tribunal's perspective is encapsulated well in: Waitangi Tribunal *Motunui-Waitara Report - Wai 6 (2ed)* (Dept of Justice, Wellington, 1989) 45-49. Examples of New Zealand court judgments that have referred to this are *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 and *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

[3] Royal Commission on Social Policy *The April Report vol II: Future Directions* (Government Printer, Wellington, 1988) 76.

[4] Morag McDowell & Duncan Webb *The New Zealand Legal System: Structures, Processes and Legal Theory (2ed)* (Butterworths, Wellington, 1998) 103 ["*The New Zealand Legal System*"].

separate colony and set up some basic constitutional arrangements. Notably the Letters Patent created a Legislative Council with appointed members.[5]

The New Zealand Constitution Act 1852 (Imp.) was the next Act that effectively changed the constitutional institutions of New Zealand.[6] This Act divided New Zealand into six provinces and established a system of provincial government. It also established a bicameral system of central government. This bicameral system consisted of the existing Legislative Council as an upper house and a new General Assembly with elected members as a lower house.

There have been three main changes to New Zealand's constitutional institutions since the New Zealand Constitution Act 1852 (Imp.). Both the Provincial Councils[7] and the Legislative Council were abolished in 1875 and 1950 respectively.[8] This left New Zealand with a unicameral system. The other change was that the Electoral Act 1993 introduced Mixed Member Proportional voting (MMP) which was a move away from the "Westminster style" First Past the Post system (FPP). This change has affected the performance of the legislative and executive branches of government.[9]

Maori did receive special recognition through the creation of four Maori seats in the General Assembly under the Maori Representation Act 1867. However, this was only recognition within the electoral system rather than on a constitutional level. Also this separate electoral representation was not granted as a way of reflecting or honouring the Treaty. Rather, it was intended to be a temporary measure until the individualisation of Maori land tenure made it

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[5] *The New Zealand Legal System* above n 4, 103.

[6] Although the Act of the Constitution of Government in the New Zealand Islands 1846 (Imp.) was passed which was to implement systems of representative government these changes were never put in place. See *The New Zealand Legal System* above n 4, 104.

[7] This was done under the Abolition of Provinces Act 1875, see *The New Zealand Legal System* above n 4, 106.

[8] This was done under the Legislative Council Abolition Act 1950, see *The New Zealand Legal System* above n 4, 108.

[9] Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (Oxford University Press, Auckland, 1997) 3 ["*Bridled Power*"].

practicable for Maori to qualify for electoral enrolment in terms of the European property qualification.[10] The decision to set the number of Maori seats at four was also not based on the Treaty. Although intended to be temporary the Maori seats have been retained and were increased in number to five as a consequence of the change to MMP. This continuance and recent increase were not intended as ways to reflect or honour the Treaty.[11] As Sorrenson notes, there has been little political advantage for any political party in abolishing the seats "in the face of what was bound to be considerable Maori opposition" and so they have remained.[12] Under MMP the number of Maori seats was increased so that the number of seats that Maori received was more proportionate to the number of Maori on the Maori electoral roll.

New Zealand's legislative system therefore derived from and is still very similar to the Westminster system apart from the absence of an upper house. Adaptations that have been made to these "inherited" institutions have not been made to reflect our unique position in relation to the Treaty. The lack of adaptations to these Westminster style institutions has occurred despite the fact that the New Zealand Parliament has had the ability to amend its own constitution since 1947.[13] The ability to develop independently from Britain was made even more apparent in section 16 of the New Zealand Constitution Act 1986.[14] This section removed all remaining power for the British

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[10] Alan D. McRobie "Ethnic Representation: The New Zealand Experience" in Stephen Levine (ed) *Politics in New Zealand: A Reader* (Allen & Unwin, Auckland, 1978) 272.

[11] The number of Maori seats is increasing to six at the next general election.

[12] M.P.K. Sorrenson "A History of Maori Representation in Parliament" in John Hamilton Wallace (ed) *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) B-58 ["History of Maori Representation"].

[13] This power was achieved under the New Zealand Constitution Amendment (Request and Consent) Act 1947 and the New Zealand Constitution (Amendment) Act 1947 (Imp.). Under the New Zealand Constitution Amendment (Request and Consent) Act 1947 the New Zealand Parliament requested and consented to the Imperial Parliament passing legislation that would enable the New Zealand Parliament to amend and repeal its own constitution. This request was agreed to by the Imperial Parliament in the New Zealand Constitution (Amendment) Act 1947 which enabled the New Zealand Parliament to alter, suspend or repeal at any time all or any of its constitutional provisions. See *The New Zealand Legal System* above n 4, 108.

[14] Paul McHugh *The Maori Magna Carta* (Oxford University Press, Auckland, 1991) 64 ["*The Maori Magna Carta*"].

Parliament to legislate for New Zealand. This essay suggests that the lack of adaptations to these "inherited" institutions is because of inertia and an unquestioning attachment to them.

IV RECENT PROPOSALS FOR A MAORI LEGISLATIVE BODY

The early 1980s to mid 1990s was a period in which various groups called for the development of a separate Maori legislative body in an attempt to reflect the principles of the Treaty in our constitution. These calls revolved around the "Three House Model". The Three House Model incorporates two legislative houses - one for Pakeha,[15] one for Maori and a Senate (or "Treaty House", as its proponents call it) with both Maori and Pakeha representation. (See Appendix One)

The Three House Model was developed by the Raukawa Trustees[16] for consideration by a national conference on the Treaty of Waitangi at Ngaruawahia in 1984.[17] It was presented by Ngati Raukawa to the Royal Commission on the Electoral System in 1985 and in 1988 to the Royal Commission on Social Policy.[18] The Raukawa District Council, the Aotearoa Broadcasting System Inc and the New Zealand Maori Council also adopted the Three House Model in submissions to the Royal Commission on the Electoral System.[19]

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15 The use of the word Pakeha in this essay is taken to include all those of non-Maori ethnicity. This is problematic as Polynesians, Asians and those with mixed ethnicity do not fit comfortably within the term, however this is how the term is used in this essay.

16 This body represents Ngati Raukawa ki te Tonga, te Ati Awa ki Whakarongotai and Ngati Toarangatira.

17 A submission by the New Zealand Maori Council to the New Zealand Royal Commission on the Electoral system in *Royal Commission on the Electoral System: [transcripts of the hearings and submissions] vol 7* (reproduced from typescript, Wellington, 1995) submission 793, 22 ["Maori Council Submission"].

18 Mason H. Durie "Tino Rangatiratanga" (1995) 1 *He Pukenga Korero - A journal of Maori Studies* 44, 51 ["Tino Rangatiratanga"].

19 A submission by Whatarangi Winiata on behalf of the Raukawa District Council, the Raukawa Trustees, various other bodies in the Raukawa Region and the Aotearoa Broadcasting System Inc, to the New Zealand Royal Commission on the Electoral System in *Royal Commission on the Electoral System: [transcripts of the hearings and submissions] vol 7*

Much of the detail of the Three House Model has not been worked out. Those in support of the model want the general idea to be accepted, at which stage the detail of the model can be decided.[20] The general idea is that the Maori House and the Pakeha House would both formulate bills. There would be no restriction on either house on the areas in which they could formulate bills.[21] Each legislative house would have its own electoral system and operate by its own rules.[22] For example, the Maori House would be able to operate within tikanga Maori. There would also be scope for the two houses to work together in producing bills.

All the bills produced by the two legislative houses would be sent to the Senate. The role of the Senate would be to check primarily the consistency of bills with the Treaty and probably also that consultation had occurred between the two Houses on each bill. For a bill to be passed by the Senate a majority of the representatives of each Treaty partner (Maori and Pakeha) would need to support it. If the bill was passed it would be sent to the Governor General for royal assent. If not passed the bill would be returned to the two legislative houses for further work.[23]

Partly in response to the submissions discussed above the Royal Commission on the Electoral System made a recommendation that "Parliament and Government should enter into consultations and discussions with a wide range of representatives of the Maori people about the definition and protection of the

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(reproduced from typescript, Wellington, 1995) submission 793; and "New Zealand Maori Council Submission" above n 17.

20 Lecture by Whatarangi Winiata at Victoria University, October 1997.

21 Transcript of a lecture by Whatarangi Winiata at Massey University, 14 March 1996 entitled "Proposal for Parliamentary Arrangements Under the Treaty of Waitangi" 9 ["Proposal for Parliamentary Arrangements"]. (copy in possession of the author)

22 "Proposal for Parliamentary Arrangements" above n 21, 9.

23 Transcript of a lecture by Whatarangi Winiata at the Conference "The Treaty of Waitangi: Maori Political Representation- Future Challenges" held at Pipitea Marae, Wellington, 1-2 May 1997. Arranged by the New Zealand Institute of Public Law, the New Zealand Institute for Dispute Resolution and the New Zealand Institute of Advanced Legal Studies, Appendix 2.

rights of the Maori people and the recognition of their constitutional position under the Treaty of Waitangi."[24] In describing possible approaches to recognising Maori within constitutional arrangements the Royal Commission recognised the possibility that Maori people could be more formally recognised in New Zealand's legislative processes and institutions.[25]

Churches are one identifiable group, apart from various Maori organisations, who have been proponents of the Three House Model. The two denominations that have been most involved in this are the Methodists and the Anglicans. The Methodists were the first church to adopt a constitutional arrangement reflecting principles of the Treaty. The church committed itself to biculturalism in 1983.[26] In decision-making processes now at Methodist conferences Maori and Pakeha members may caucus separately and decisions are made only when both partners can state that they agree.[27] When they do not agree, no decision can be made and further negotiation must take place. The Methodist church has supported national constitutional change to a Treaty-based system of political representation since 1989, reaffirming it at conferences over several years.[28]

The Anglican church developed a separate Maori branch in 1925.[29] A 1984 report suggested that the 1857 constitution of the Anglican Church should be revised so that the principles of the Treaty could be expressed and entrenched within it.[30] In 1992 an adaptation of the Three House Model was formally

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[24] *Towards a Better Democracy* above n 1, 112.
[25] *Towards a Better Democracy* above n 1, 112.
[26] Anon *The Bicultural Journey: Ten Years On*, 1993, 2 ["*The Bicultural Journey*"]. A pamphlet prepared for the Methodist conference on the Tauiwi perspective of the bicultural changes made in the Church. (copy in the possession of Rev. Barry Jones)
[27] *The Bicultural Journey* above n 26, 4-5.
[28] Wellington Bicultural Working Group *Constitutional Change Studies* (Wellington, 1997) Study 1, Sheet 3, 2. (copy in the possession of Rev. Barry Jones)
[29] Bicultural Commission of the Anglican Church, *Discussion Paper on the Treaty of Waitangi*, 1984, 1 ["*Discussion Paper on the Treaty of Waitangi*"]. (copy in the possession of Rev. Barry Jones)
[30] *Discussion Paper on the Treaty of Waitangi* above n 29, 3.

adopted by the church into its constitution.[31] The Bishopric of Aotearoa, Te Pihopatanga o Aotearoa, is currently promoting the Three House Model for a national level.[32]

Recent strong calls for constitutional change from Maori came from three hui held at Hirangi marae in 1995 and 1996.[33] The first hui in January 1995 was attended by nearly a thousand Maori from both the North and South Island.[34] The hui sought to set aside the *Crown Proposals for the Settlement of Treaty of Waitangi Claims* in favour of constitutional change on the basis of the Treaty of Waitangi. A constitutional review process to be undertaken by Maori and the government was proposed. The second hui focused on tino rangatiratanga. A major issue discussed was "achieving constitutional change suitable to Maori".[35] The third hui was attended by approximately 2000 Maori from around the country.[36] It looked at possible options for constitutional change. Included among ten other options was the Three House Model.[37] No preference was made for any option at the hui but a body was established to report on the options. The body was to consider theoretical and practical methods of Maori government drawing on tikanga Maori, pre-colonial systems of iwi/hapu government and relevant indigenous experience.[38] This body has not yet released a report or any recommendations.

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31 *Discussion Paper on the Treaty of Waitangi* above n 29, 3.
32 "Tino Rangatiratanga" above n 18, 51.
33 John Roberts has produced a comprehensive summary of what happened at the three hui. See John Roberts *Alternative Vision: The significance of the Hirangi Hui* (Joint Public Questions Committee of the Methodist Church of New Zealand and Presbyterian Church of Aotearoa New Zealand, Wellington, 1996) ["*Alternative Vision*"].
34 *Alternative Vision* above n 33, 3.
35 *Alternative Vision* above n 33, 11.
36 *Alternative Vision* above n 33, 15.
37 Hui Notes from the Hirangi Hui 1996, 47-50 ["Hirangi Hui Notes"]. (Copy in the possession of the author)
38 "Hirangi Hui Notes" above n 37, 51.

V EARLY CALLS FOR A MAORI LEGISLATIVE BODY

Recent calls for constitutional change through the development of a separate Maori legislative body are not the first of their kind in New Zealand history. In the period from the mid 1880s to the early 1890s two Maori movements, the Kotahitanga and the Kingitanga, both called for Crown recognition of a separate Maori legislative body. Also both the Kotahitanga and Kingitanga movements set up their own parliaments known as the Paremata Maori (Maori Parliament) and the Kauhanganui (Great Council) respectively. Both movements viewed Article Two of the Treaty as one justification for having a Maori parliament.[39] Other justifications were Article 3 of the Declaration of Independence which allowed for a congress to meet annually to make laws and section 71 of the Constitution Act 1852 which provided for separate Maori districts.[40]

A *The Kotahitanga Paremata Maori*

The Kotahitanga movement represented a coalition of iwi from both the North and South Island and as such was highly representative of Maori. However, it did not embrace the Kingitanga movement or Te Whiti and his followers.[41]

The Paremata Maori was established by the Kotahitanga in 1892 and existed for 11 years.[42] Before it was established two iwi affiliated with Kotahitanga had already unsuccessfully petitioned Queen Victoria to establish a Maori legislative body.[43] Nga Puhi in 1882 had requested the establishment of a

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[39]See Lindsay Cox *Kotahitanga*, (Oxford University Press, Auckland, 1993) 58, 69 ["*Kotahitanga*"]; and also part of an interview with Hone Heke in W.D. McIntyre & W.J. Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 163-164 ["Hone Heke"].

[40] *Kotahitanga* above n 39, 58,69 and "Hone Heke" above n 39, 163-164.

[41] *Kotahitanga* above n 39, 70.

[42] J.A. Williams *Politics of the New Zealand Maori: Protest and Co-operation, 1891-1909* (Oxford University Press, Auckland, 1969) 52 ["*Politics of the New Zealand Maori*"].

[43] It is interesting to note that the petitions or deputations to the Queen by groups affiliated with both the Kotahitanga and Kingitanga movements were dealt with not by the Queen but

Maori parliament "which shall hold in check the European authorities who are endeavouring to put aside the Treaty of Waitangi".[44] Then later in 1891, Te Arawa petitioned for "the formation of a representative council, to be elected by your Maori subjects"[45] that was to provide a place where all measures affecting Maori could be clearly reviewed and dealt with. It was planned that the decisions of the council would be forwarded to the Queen and the national Parliament for consideration.[46]

The Paremata Maori had structural similarities to the Westminster system. It had two houses: Te Whare o Raro (the lower house) and Te Whare o Runga or Te Runanga Ariki (the upper house or the Council of Paramount Chiefs).[47] Te Whare o Raro was made up of elected members from electorates based on tribal boundaries.[48] The membership of Te Whare o Runga was chosen by the members of Te Whare o Raro. The chosen members were predominantly ariki.[49] It therefore contained a mixture of both traditional Maori representation and new electoral representation.

The Paremata Maori spent much of its time discussing potential changes which could be made to New Zealand's constitutional arrangements to incorporate their Paremata within them.[50] They also discussed the jurisdiction their Paremata should have and the relationship it should have with both the Crown and the national Parliament. They presented three major petitions to Parliament to have their Paremata Maori recognised.

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by Lord Derby, the then Secretary of State. The groups were all informed that these matters were the domain of the colonial Government not the Queen. See *Politics of the New Zealand Maori* above n 42, 43, 51-52.

[44] Ranginui J. Walker *Struggle Without End - Ka Whawhai Tonu Matou*, (Penguin, Auckland, 1990) 160-161 ["*Struggle Without End*"].

[45] *Politics of the New Zealand Maori* above n 42, 51.

[46] *Politics of the New Zealand Maori* above n 42, 51.

[47] Angela Ballara "Wahine Rangatira: Maori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 *New Zealand Journal of History*, 127, 132 ["Wahine Rangatira"].

[48] *Politics of the New Zealand Maori* above n 42, 53

[49] "Wahine Rangatira" above n 47, 132.

[50] *Kotahitanga* above n 39, 68.

The first submission in 1892 requested that power be given to Maori to make laws for the conduct of Maori, their lands and possessions.[51] There was no apparent response made by Parliament to this submission.

In 1893 the Federated Maori Assembly Empowering Bill was drafted.[52] This Bill was the first detailed statement of what the Paremata Maori wanted. It proposed that the power to govern Maori should be delegated to the Federated Maori Assembly of New Zealand, which was to be identical to the structure of the existing Paremata Maori, on par with the national Parliament and subject only to the Governor.[53] The bill was not debated by Parliament.

In 1894 a Native Rights Bill was drafted which Hone Heke, a Maori MP and dedicated member of the Paremata Maori, introduced into the national Parliament. This Bill provided for a separate Maori legislature that was to enact laws to "relate to and exclusively deal with the personal rights and with the lands and all other property of the aboriginal native inhabitants of New Zealand".[54] However, the passage of the Bill was prevented by MPs leaving during its debate until there was no quorum. Consequently the debate was adjourned. After the lack of quorum in 1894 the Native Rights Bill was sent back to Parliament for a second time. It was rejected by Parliament in 1896.[55]

B ***The Kingitanga Kauhanganui***

The Kingitanga movement initially began in the 1850s as a pan-Maori movement but by the 1870s it was predominantly associated with Waikato iwi.

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[51] *Struggle Without End* above n 44, 167.
[52] *Politics of the New Zealand Maori* above n 42, 55.
[53] *Politics of the New Zealand Maori* above n 42, 55.
[54] The 'Native Rights Bill' presented to the General Assembly by Hone Heke in 1894 in W.D. McIntyre and W.J. Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 164-165.
[55] *Politics of the New Zealand Maori* above n 42, 56.

In 1894 King Tawhiao[56] led a delegation to visit Queen Victoria to ask for consideration of a proposal to establish a separate Maori parliamentary system.[57] Under his proposal, control over land issues would reside with the new Maori Parliament, and a Queen appointee would act as a liaison with the colonial Parliament.[58] As in the case of the Nga Puhi and Te Arawa petitions, Tawhiao's petition was unsuccessful. Tawhiao also presented a proposal in 1886 to John Ballance, the then Native Minister, that suggested the formation of a Legislative Council of Chiefs.[59] Ballance declined this proposal.

The lack of consideration of Tawhiao's proposals prompted him to establish the Kauhanganui in 1892.[60] He planned the Kauhanganui to be a national parliament with wide representation. However, despite invitations being sent to all the iwi in New Zealand, participation remained confined to the inner circle of Kingitanga support.[61] The Kauhanganui met regularly until the 1920s.[62]

The Kauhanganui like the Paremata Maori adopted a Westminster style parliamentary model. It had two Kauhanga (councils) which were the equivalent of houses. One kauhanga was for manukura (nobles) while the other was for matariki (commoners). The Kauhanganui's legislation had to be ratified by King Tawhiao.[63] A constitution enacted in 1894 outlined the functions and structure of the Kauhanganui.[64]

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[56] Tawhiao was the second king of the Kingitanga movement. For more information on the King movement and King Tawhiao see *Kotahitanga* above n 39, 51-53.
[57] *Politics of the New Zealand Maori* above n 42, 43.
[58] *Kotahitanga* above n 39, 58.
[59] *Politics of the New Zealand Maori* above n 42, 43.
[60] *Kotahitanga* above n 39, 59.
[61] *Kotahitanga* above n 39, 59.
[62] *Kotahitanga* above n 39, 59.
[63] *Kotahitanga* above n 39, 59.
[64] A translation published in a Wellington newspaper of the constitution for the Kingdom of Aotearoa adopted by the Kauhanganui in W.D. McIntyre and W.J. Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 165-168.

The Kauhanganui had different political aspirations to the Paremata Maori. The Paremata Maori's goal was to be constitutionally recognised as having jurisdiction over specific areas which concerned Maori. By contrast, after the rejection of Tawhiao's original proposals, the Kauhanganui sought to make all the laws for their distinct geographical area rather than confining itself to laws just relating to Maori issues.[65]

C *Early Maori Constitutional Theories and Practice*

By the 1900s, therefore, groups within Maoridom had developed constitutional theory and gained practical experience on developing a Maori legislative body. No favoured model emerged though for a Maori legislative body which could be incorporated in to New Zealand's constitutional arrangements. Instead various ideas on the jurisdiction such a body could have and its possible relationships with the national Parliament and the Crown existed.

There were two general ideas on what the jurisdiction of a Maori legislative body could be. These ideas were either a Paremata Maori style jurisdiction over specific areas of law that concerned Maori, or a Kauhanganui style jurisdiction over a distinct geographic area. Ideas also differed about the level of control a Maori legislative body would have over either of these jurisdictions. These different ideas are visible through consideration of the various views on the relationship a Maori legislative body could have with the national parliament and the Crown. One view was that a Maori legislative body would formulate legislation but this would require approval from both the national Parliament and the Governor before it was enacted. Effectively, therefore, the body would have very limited power and essentially hold only an advisory role. This moderate view was displayed within the 1891 Te Arawa petition. Another view was that a Maori legislative body would be equal to the national Parliament and subject only to the Governor. This view is visible in

[65] *Politics of the New Zealand Maori* above n 42, 45-46.

proposals of the Paremata Maori and Tawhiao's early petitions. The last and most extreme view was that the body would neither be subject to the national Parliament nor the Governor. Rather, it would be a fully independent legislative body. This view was prevalent in later Kingitanga proposals and actions.

It is unclear whether Maori thought the membership of an officially recognised Maori legislative body and the national Parliament should intersect or be mutually exclusive. In the 1890s some members of the Paremata Maori or Kauhanganui were also members of the national Parliament: for example, Eparaima Kapa, Hone Heke, Wi Pere and Henare Kaihau.[66] They became MPs through the support of fellow Kotahitanga or Kingitanga members. The Paremata Maori spent time considering whether its members should continue within the national Parliament.[67] It may be that if a Maori legislative body had been established it was expected Maori would not sit in that body as well as the national Parliament. In this case the continued Maori participation in the national Parliament in the 1890s could be explained as a mechanism for securing at least some power in a time when their parliaments were not recognised. However, this position is unclear and may be incorrect. Maori may, in fact, have wished to retain a voice within the national Parliament even if they had their own legislative body officially recognised. Therefore, dual membership in the national Parliament and an officially established Maori legislative body may have been an option.

Maori constitutional theories have previously received little attention and been accorded no serious import for the advancement of New Zealand's constitution. This consideration of Maori constitutional theory is based on secondary sources. These secondary sources, however, were essentially constructed as historical accounts rather than to analyse the constitutional ideas

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[66] *Politics of the New Zealand Maori* above n 42, 57, 103.
[67] *Kotahitanga* above n 39, 68.

of Maori. A reconsideration of primary sources such as the minutes of the Paremata Maori and Maori language newspapers is required to achieve a clearer picture of these early Maori constitutional theories.[68]

VI *THE NON-ISSUE OF DEVELOPING A MAORI LEGISLATIVE BODY*

Despite these two periods of calls for a separate Maori legislative body the idea of incorporating a Maori legislative body into our constitutional arrangements to reflect the Treaty has failed to become an issue. Discussion of incorporating the Treaty into our constitution has instead focused on including the Treaty through entrenched legislation such as a Bill of Rights Act or Constitution Act.[69] Research has shown that this is not because the idea of a Maori legislative body has been seriously considered and found to be unfeasible, but rather that it has not been considered seriously at all.

The lack of serious consideration on the development of a separate Maori legislative body is visible in two ways, firstly, through a survey of the published material on the development of a Maori legislative body, and secondly through a critique of the sole model for such a body proposed recently - the Three House Model.

A Published Material

There has only been a small amount of material published that comments on or impacts on the idea of a separate Maori legislative body. Material mentioning this idea falls within three classes, all of which have failed to provide any serious critique or discussion of the idea.

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[68] The Alexander Turnbull Library holds some of this information.

[69] For further details of the debate surrounding incorporating the Treaty of Waitangi within higher law see *Bridled Power* above n 9, 266-270.

The first class of material contains texts that purely provide accounts of movements and groups who have been in support of the idea. These texts provide no comment on the idea itself.[70] The second class of material expresses interest in the idea of developing a separate Maori legislative body or incorporating the Treaty into constitutional institutions.[71] These supporters, however, have not proceeded to discuss potential models or options for how this could be achieved. The third class of material has taken a negative stance on the idea or expressed doubts about its feasibility.[72] However, the reasons provided for the dismissal of the idea are limited to single factors rather than a full critique of the idea.

B The Three House Model

The Three House Model is the sole model for the development of a Maori legislative body proposed recently. In itself the fact that there is only one model provides an indication of the very limited consideration given to this matter. However, an analysis of the Three House Model makes it even more apparent how underdeveloped debate on this matter is. This is because the Three House Model is structurally incomplete, inherently flawed in its method of incorporating the Treaty, and is incapable of providing effective government at a national level. These problems are elaborated on in the following critique of the model. The model is critiqued in three ways, firstly in relation to its compatibility with the Treaty, secondly in relation to criteria commonly considered fundamental to a good constitutional system and finally in relation to its practical detail.

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[70] For example *Kotahitanga* above n 39; *Politics of the New Zealand Maori* above n 42; and *Struggle Without End* above n 44.

[71] For example *The Maori Magna Carta* above n 14, 63-65; and D V Williams "The Constitutional Status of the Treaty of Waitangi: A Historical Perspective" (1990) 14 NZULR 9, 34-36.

[72] For example Geoffrey Palmer "Where to from Here?" [1995] 25 VUWLR 241, 241-244; and Andrew Sharp *Justice and the Maori: Maori claims in New Zealand political argument in the 1980s (2ed)* (Oxford University Press, Auckland, 1990) 318 ["*Justice and the Maori*"].

1 *Does the Model reflect the Treaty?*

As the purpose of the Three House Model is to incorporate the Treaty into New Zealand's constitutional arrangements its construction needs to reflect the meaning of the Treaty. Whatarangi Winiata described the principles of the Treaty incorporated in the model as the "principles of partnership and the fundamental rights of Maori to tino rangatiratanga in relation to the protection of "o ratou taonga katoa"".[73]

The Three House Model creates a partnership where each partner has equal power. This equal partnership is evidenced through the ability each legislative house has to initiate law on any area and the need that each partner's agreement is required for bills to be passed. The Court of Appeal, the Waitangi Tribunal and Governments have all recognised a partnership principle existing within the Treaty.[74] However, the partnership principle which has been recognised is an incoherent one. This is because, although equality is inherent in the idea of partnership, the courts have recognised other Treaty principles which place limitations on an equal partnership existing between the Crown and Maori.[75] An example of this is the principle that the Crown has obligations to actively protect Maori. This "active protection" principle implies a measure of Maori dependence on the Crown. Mulgan advocates that the partnership principle amounts only to the recognition of the separate identity of Maori and the Crown and the mutual obligations that exist between them.[76] Therefore, although partnership is a recognised Treaty principle it is an incoherent

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[73] "Maori Council Submission" above n 17, 28.

[74] The Court of Appeal in *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 and the Waitangi Tribunal in the *Muriwhenua Fishing Report* were the first constitutional bodies to recognise a partnership principle. The government has gone on to use the principle of partnership within government policy see Richard Mulgan *Maori Pakeha and Democracy (2ed)* (Oxford University Press, Auckland, 1989) 109 ["*Maori Pakeha and Democracy*"].

[75] personal comment, Richard Boast, 4 August 1998.

[76] Richard Mulgan "Can the Treaty of Waitangi provide a Constitutional Basis for New Zealand's political future?" (1989) 41 *Political Science* 51, 61 ["Can the Treaty of Waitangi provide a Constitutional Basis"].

principle. This means that the construction of the model around the principle of partnership is problematic.

On top of the principle of partnership being incoherent the actual words of the Treaty do not support an equal partnership. This argument ties into the concept of tino rangatiratanga which was guaranteed to Maori and which is also supposed to be incorporated within the Three House Model. Despite the differences between the Maori and Pakeha versions of the Treaty both display one form of power was ceded to the Crown while Maori retained another form of power. In the English version Maori ceded sovereignty and retained full exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties. In the Maori version the Crown received kawanatanga and Maori retained tino rangatiratanga over "o ratou wenua, o ratou kainga me o ratou taonga katoa". Although royal assent is still required within the Three House Model the Governor General will probably continue the constitutional convention of not refusing assent thus making this sole power distinction between the partners a token one. The notion of an equal partnership embodied within the Three House Model therefore fails to recognise the distinctions between the powers of each partner. It is likely that the Crown will see their rights of sovereignty or kawanatanga to have been limited by the Three House Model and Maori also will see their rights of exclusive possession or tino rangatiratanga to have been limited.

That there are interpretation problems with the Treaty is a truism. For this reason finding a model which meets with everyone's interpretation of the Treaty may be difficult.[77] The interpretation of the Treaty embodied within the Three House Model, however, is one that is particularly limited in the support it would receive. Thus the Three House Model is a very poor attempt to reflect the meaning of the Treaty within New Zealand's constitutional institutions.

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[77] for a discussion of the reasons for interpretation problems existing within the Treaty see *The Maori Magna Carta* above n 14, 3.

2 *Compatibility with Constitutional Doctrine*

(a) The doctrine of Separation of Powers

The problem highlighted by analysing the Three House Model in regards to the separation of powers is that the make up of the Executive Branch is not clear. For example there is no indication of who would be Prime Minister, who would be the members of the Cabinet or Executive Council or even if these positions would continue to exist at all. The creation of an executive within the model, however, would not be impossible. Its uncertainty stems from a lack of detail rather than impossibility.

The essence of separation of powers is not to let one branch of government hold all the power and this could be achieved by the Model.

(b) Parliamentary Sovereignty

The Three House Model would not affect the doctrine of Parliamentary Sovereignty. The parliamentary system created would still have an unequalled, and undisputed law making power. The only change would be in the structure of the parliament that holds sovereignty.

(c) Representative Democracy

Democracy is commonly accepted as the best form of government. Most countries have systems based on representative democracy. In a representative democracy all eligible citizens have the same right to vote for representatives who will make decisions on their behalf. The aim of a representative democracy is for parliament to reflect different groups in society in

approximately the same proportion as those groups exist in the wider population.[78]

The Three House Model follows a "one people, one vote" approach so that Maori and Pakeha "peoples" each receive equal power.[79] In allotting power in this way the Model is incompatible with the concept of representative democracy as every citizen is not given the same right in regard to the power that their individual votes hold. This is because Maori comprise only 16% of the resident New Zealand population and yet their votes would get 50% of the power.[80]

Although, as stated above, representative democracy is the most commonly accepted form of government, it should be noted that it is not the only way to govern. The Three House Model, by not following theories of representative democracy, is not automatically an unfeasible model. Rather, it challenges the ingrained political ideology in New Zealand. New Zealanders are on the whole committed democrats. MMP was accepted because it was perceived as making our system more democratic. The Model's incompatibility with representative democracy, therefore, would be likely to cause public outcry and legitimacy problems for the Model. Mulgan provides support for this stating that while he could accept that in 1840 it would have been very reasonable for Maori to have an equal share of power, today such an idea is impractical and unreasonable. [81] The difference is that in 1840 the bulk of the population was Maori and the mass of resources were in Maori control.

Another problem with the "one people, one vote" principle is that "Maori" and "Pakeha" peoples are perhaps now not the only "peoples" in New Zealand.

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[78] Dr G. Zappala *Four Weddings, a Funeral and a Family Reunion: Ethnicity and Representation in Australian Federal Politics* (AGPS, Canberra, 1997) 4.
[79] "Maori Council Submission" above n 19, 23.
[80] Statistics New Zealand *New Zealand Official Yearbook 1998* (GP Publications, Wellington, 1998) 102 ["*1998 Yearbook*"].
[81] "Can the Treaty of Waitangi provide a Constitutional Basis" above n 76, 61

Although Asians and Polynesians, for example, will receive representation within the Pakeha legislative house, the categorisation of all non-Maori as Pakeha and one "people" is forced. The problem is partly one of terminology. However, the focus on Maori and Pakeha (a term which suggests European) may lead to other ethnic groups within New Zealand not being taken fully into account.

(d) Effective Parliament

It has been said that "MMP adds new, more complicated dynamics to government structures and processes, but because these allow more points of view to be heard, developed and considered in the process of governing, our democracy will be enhanced".[82] The Three House Model would also add new "complications" to our parliamentary system but these would probably not be applauded (save the fact that it would give Geoffrey Palmer the chance to write a book entitled "Too Bridled Power").

Although the production of two bills on the same area will provide a greater consideration of options available there will be many problems created. Clashes will inevitably occur between the content of bills from different legislative Houses. In this situation, if the Senate cannot decide which bill is the best, they will both have to be returned to the legislative houses for further work. It would seem more sensible and less convoluted for either both Houses to work together in the first place or for only one House to be in charge of certain areas as proposed by the Paremata Maori and in King Tawhiao's early proposals. The passing of bills by the Senate from different Houses may also lead to inconsistency and lack of direction in the overall legislative scheme. The ability of both legislative Houses to develop legislation on any area of law therefore seems ineffective and very wasteful of time and resources.

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[82] *Bridled Power* above n 9, 20.

The Model would slow down the passage of legislation by just the extra step of requiring Senate consideration and maybe additional time too if referred back to the legislative houses. In itself this is not objectionable. Many countries have a Senate as a mechanism to improve their legislation. The real problem comes from the Senate requiring both a Maori and Pakeha majority within it to pass bills. The Methodist experience has been that on some issues one partner says "yes" while the other says "no", hence no compromise can be reached. Thus the "whole matter ends up being put in the too hard basket".[83] While the church has been able to defer making decisions, in a national Parliament there has to be a means of reaching an authoritative answer.

The Three House Model, therefore, does not provide a totally ineffective parliament but the requirement of agreement between Maori and Pakeha for any legislation to be passed makes it an unworkable option for a national model.

(e) Political Cohesion

The Model can be seen as politically divisive in the sense that it separates Maori and Pakeha. The aim of a separate Maori legislative house has not, however, been to separate Maori and Pakeha but rather to establish a co-operative partnership between them under the Treaty of Waitangi. The structure of the Model requires each legislative house to get its bills past the Senate so anything either House wants to pass will require a consideration of the other partner's point of view. Although the two partners are separate, co-operation and a respect for the other's point of view would be essential which would ensure the system was cohesive.

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[83] see David Bell's comments in "The price of sharing power" *Crosslink*, Wellington, New Zealand, February 1996, 9.

(f) Legitimacy

People need to feel that the institutions and processes for making practical decisions are by law, custom and moral principle the right and proper ways to make such decisions.[84] Legitimacy of a constitutional system is required for stability and because a referendum will probably be held to change constitutional arrangements the model will need wide support before it is implemented anyway.

The experience of the Methodist church in its adoption of an adaptation of the Three House Model has been that only a minority of church members have really been in support of the model. The bulk of other church members appear to have tolerated it. There is a distinct faction within the church though, who have searched for softer bicultural options, while others have left the church altogether.[85] For a national constitutional system, wider support than exists within the Methodist church will be required. The level of actual support within the church though is probably an indicator of the low level of support the model would also get within the wider community.

Huge legitimacy problems are foreseeable in trying to implement the Three House Model. The reasons for this stem from the problems with the model that have already been discussed. For example, it would not meet with many peoples understanding of the Treaty and representative democracy would probably be seen to be more important than upholding the Treaty in the manner embodied by the Model.

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[84]D. Butler and A. Ranney in Mark Gobbi *The Quest for Legitimacy* LLM Thesis, Victoria University, 1994, 25.

[85] *The Bi-cultural Journey* above n 23, 13-14.

3 Is the Model practicable?

The Royal Commission on the Electoral System rejected the idea of a Senate stating that "we believe that the re-introduction of a satisfactory second Chamber would be very difficult to achieve".[86] The Three House Model involves the introduction of two additional houses. Already this critique has noted many details that will need to be settled before the model can be implemented (for example, the issue of who would be the executive). Other details would also need to be settled to do with what administrative and departmental support each house would receive. Even if all the details of the model could be worked out satisfactorily the Model would be inefficient in both a practical and an economic sense.

4 Overall Feasibility

The Three House Model is clearly an unworkable model for implementation at a national level. The fundamental reason for this is the equal power that exists between the partners. This does not fit with generally accepted interpretations of the Treaty which will lead on to the model not being seen as legitimate. The equal power relationship in the Senate also leaves the possibility open for decisions not being reached thus creating an ineffective parliament. Other factors also, within the Model, aside from those stemming from the equal partnership, make the Model unfeasible. Especially notable is the expense involved in such a complex model.

As discussed above, the incompleteness, incompatibility with the Treaty and flaws within this Model make it unfeasible as a national model. The fact that the sole model proposed recently for developing a Maori legislative body is of such poor quality is an indication of how underdeveloped debate and thought on this matter is.

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[86] *Towards a Better Democracy* above n 1, 282.

VII WHY HAS A MAORI LEGISLATIVE BODY BEEN A NON-ISSUE?

The preceding discussion has shown that there has been only limited support for the idea of developing a Maori legislative body as well as a paucity of thought, comment and debate on it. It is suggested that there are a number of contributing factors for the idea of incorporating the Treaty into our constitution through a Maori legislative body failing to receive broad support or becoming an explored option. These factors can be categorised within the areas of the attitudes of groups, circumstances and academic limitations. Many of these factors were also influential in the Kotahitanga and the early Kingitanga proposals for a Maori legislative body losing support and failing to become an issue.

A Attitudes of Groups

1 Maori

It would be expected that if any group within society was to call for the development of a Maori legislative body to incorporate the Treaty into our constitutional institutions, it would be Maori. Such calls and the support behind them may then act to make the development of a Maori legislative body an issue. However, although some Maori have recently called for a Maori legislative body, as outlined above, this has only been a small proportion of Maori.

There is one main reason why few Maori have called for the Treaty to be incorporated into our constitutional arrangements through a Maori legislative body. The reason is that there are many different understandings of what the Treaty means and how it is relevant today. Not all Maori understandings of the Treaty support the idea of giving constitutional effect to the Treaty through a legislative body. In particular there are many different understandings of

"tino rangatiratanga" which was guaranteed to Maori in Article Two of the Maori version of the Treaty. While there is general agreement that tino rangatiratanga is about greater Maori control over things Maori, there is no general agreement on what level of control Maori should have and at what social level this should exist.[87] For example, tino rangatiratanga, could exist either at hapu level, iwi level, pan-iwi level or a combination of these. For many Maori therefore, the creation of a constitutionally recognised Maori legislative body is incompatible with their understandings of what tino rangatiratanga means and what it should involve today.

Another reason for why few Maori have supported the idea of a Maori legislative house is that it is not seen to fit with tikanga Maori.[88] Adopting a "Pakeha" parliamentary style governance would be contrary to tikanga Maori in many ways. For example, such a house would be adopting legislative procedures unlike those of traditional Maori tikanga.[89] An example of the adoption of Pakeha institutions affecting tikanga Maori is seen in the Paremata Maori's adoption of a Westminster Style Model which because of its exclusively male nature inadvertently excluded Wahine Rangatira.[90]

2 *Government*

Successive governments have not made time nor have they been prepared to discuss the idea of institutional change which has impeded this from becoming an issue. Recommendations for government participation in discussion from the Royal Commission on the Electoral System and the Hirangi Hui have not been followed. There is a sense that governments are blocking the issue, as did

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[87] "Tino Rangatiratanga" above n 18, 45. For interesting comments by Maori about the importance of tribes and how a Maori parliament could lead to fighting among tribes see Stephen Levine and Raj Vasil *Maori Political Perspectives: He Whakaaro Maori Mo Nga Ti Kanga Kawanatanga* (Hutchinson Group, Auckland, 1995) 98-99 ["*Maori Political Perspective's*"].

[88] "Hirangi Hui notes" above n 37, 49.

[89] For a discussion of Maori political processes and methods see *Maori, Pakeha and Democracy* above n 74, 57-59.

[90] "Wahine Rangatira" above n 47, 130-131.

the governments of the 1880s and 1890s. The *Crown/Maori Governance Strategy, Draft 7* displayed a government view that any increase of Maori authority should be done within current constitutional arrangements.[91]

The main reason governments appear to have avoided or dismissed the idea is that they are very protective of the continuance of parliamentary sovereignty. This was displayed in a letter that Jim Bolger sent to Sir Hepi Te Heuheu in 1995 before the second Hirangi Hui. Bolger stated "there is no political will to alter fundamental constitutional arrangements of the nation involving the sovereignty of an elected Parliament. The New Zealand Parliament applies equally to all the people of New Zealand and the sovereignty of Parliament is not divisible."[92] This fixation with parliamentary sovereignty in itself points to a continued subscription to Diceyan principles. This subscription indicates that governments have been mentally locked into, and committed to, traditional styles of government.

In any case the earlier analysis of the Three House Model showed that parliamentary sovereignty need not necessarily be lost in the development of a separate Maori legislative body. Rather, the configuration of the parliament holding that sovereignty may merely change.

3 *The "One Nation" New Zealand Attitude*

Some New Zealanders are not prepared to consider the development of two legislative bodies based on ethnic characteristics as it challenges the idea of New Zealand being a single nation.[93] There is a view among many New Zealanders that any sort of separate representation is wrong because it either provides especially favourable treatment for one group, or, on the contrary it is

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[91] Mason H. Durie *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (Oxford University Press, Auckland, 1997) 232 ["*Te Mana*"].
[92] *Alternative Vision* above n 33, 9-10.
[93] *Te Mana* above n 91, 232.

a form of apartheid. More moderately, it is also claimed that separate representation is socially and politically divisive.[94]

The analysis of the Three House Model however, showed that, although a Maori legislative body does separate Maori and Pakeha, the focus can be on co-operation so that people effectively are more aware and respectful of the other's needs than before. This intention was visible even in the 1891 Te Arawa petition to the Queen which expressly denied the intention to separate the races: it merely wanted to give full effect to the terms of the Treaty.[95]

4 The "Too Hard" and "Not the Right Time" Attitudes

A common set of attitudes is that developing a separate Maori legislative body or even changing our constitutional institutions is either too hard an option to consider or is such a complex matter that it should only be tackled if a constitutional crisis or issue arises which makes it necessary. These attitudes have led to the idea not being explored at all. The idea has effectively been dismissed, and the absence of constitutional crisis or major constitutional restructuring in New Zealand's history has meant discussions have not been necessary.

An example of such a dismissal of the idea of constitutional change involving the Treaty can be seen in the statement of Jenny Shipley that "The Treaty should form the basis of any new constitution of the future - but this would be an "incredibly complex process".[96] Sharp has also put a dampener on the idea in his comment that "To fix the persons who now exist in a constitution

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[94] Elizabeth M. McLeay "Two Steps Forward, Two Steps Back", (1991) 43 *Political Science* 30, 36-37.

[95] *The Politics of the New Zealand Maori* above n 42, 51.

[96] "Maori call for republic debate" *Sunday Star Times*, Auckland, New Zealand, 2 August 1998, A2 ["Maori call for republic debate"].

designed to be a "full and final settlement" of what the relations between them should be, will I suspect be impossible in New Zealand/Aotearoa."[97]

B Circumstances

Calls for change to constitutional institutions increased through the 1980s and 1990s and peaked at the Hirangi Hui. After these hui, however, calls of support decreased rather than increased. This meant that the level of support for the idea did not reach a level which eventuated in it becoming a national issue. Two reasons are suggested for the decrease rather than increase of calls for change.

1 Treaty Settlements

Despite the opposition to the *Crown Proposals for the Settlement of Treaty of Waitangi Claims* groups of Maori became involved once Treaty Settlements were implemented as government policy. This meant that the focus of Maori who were in support of the idea moved from constitutional change towards the settlement process.

Also the settlement process has given groups of Maori who have settled with the Crown the potential to have more control over themselves through the return of resources and monetary compensation. This may have led to support for attaining power at a national level weakening. Parallels are able to be drawn in this respect with the Maori Councils Act of 1900 which Sorrenson gives as one of the factors that led to decrease in support for the Paremata Maori.[98] This Act gave increased power to Maori at a community level.

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[97] *Justice and the Maori* above n 72, 318.
[98] "History of Maori Representation" above n 12, B-29-30.

2 *MMP*

Sorrenson's history of Maori political representation indicates that better Maori political representation in the 1890s was highly influential in the end of the Paremata Maori.[99] It is suggested that better Maori political representation achieved through the introduction of MMP was also influential in calls for constitutional change dying out rather than escalating in the 1990s.

Before the introduction of MMP, Maori representation in Parliament was not very satisfactory. As discussed above, pre-MMP Maori had four seats in Parliament. From 1943 the Labour Party had a very strong hold on all the Maori seats due to an alliance with the Ratana movement.[100] This meant that when Labour was in opposition there was often ineffective Maori political representation.[101] There was also frequent dissatisfaction with the performance of the four Maori members and their low level of accountability back to electorates. This was because, even when Maori members got into Cabinet, Parliament rarely gave full effect to Maori concerns raised and the size of electorates meant it was difficult to maintain contact with the electorate.[102]

One of the major reasons that the Royal Commission on the Electoral System supported the introduction of MMP was that they thought it would benefit Maori.[103] The first MMP election in 1996 definitely displayed a change in the level of Maori participation and representation. A record number of Maori candidates stood for election. These candidates included activists who had in the past advocated the boycotting of elections and constitutional change - for example, Tariana Turia, Tame Iti and Ken Mair. Election Day also saw the largest turnout ever of Maori voters. Most importantly, however, a record number of 15 Maori candidates were elected. This number of MPs provided

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[99] "History of Maori Representation" above n 12, B29-42.
[100] *Towards a Better Democracy* above n 1, 85.
[101] See *Maori Political Perspective's* above n 87, chapter 5.
[102] *Te Mana* above n 91, 96-98.
[103] *Towards a Better Democracy* above n 1, 110.

Maori parliamentary representation in a proportion which matched that of Maori in the total population.[104]

Not only were there more Maori representatives in Parliament after the first MMP election but more political influence and power was gained by Maori. In the period leading up to the coalition agreement between the National party and the New Zealand First party it was apparent that Maori MPs, and behind them Maori voters, held the balance of power. The Cabinet formed by the coalition also displayed a stronger Maori presence than ever before.[105] Furthermore, the National party Cabinet formed after the coalition collapse has retained a prominent Maori presence.[106] The minority National Government is also reliant on the support of Maori MPs. Thus giving Maori MPs a degree of power which may prove crucial in getting Maori issues on to the government's agenda. Maori input into bills affecting Maori interests has also increased, with nine of the ten Maori Affairs Select Committee members being Maori.[107]

C Academic Limitations

As discussed above, some published academic material has referred to the idea of adopting a Maori legislative body into our constitutional arrangements to reflect the Treaty. However, this material does not provide a full critique of the idea, potential models for such a body, nor directions for development of the idea. This lack of published material as a basis for discussion has been

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[104] Anne Sullivan "Maori Politics and Government Policies" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 369.

[105] Winston Peters as Deputy Prime Minister and Treasurer, Tau Henare as Minister of Maori Affairs, Minister of Racing, and Associate Minister for Sport, Fitness and Leisure, and Tuariki Delamere as Associate Treasurer, Minister in charge of the Valuation Department, and Minister in charge of the Public Trust Office.

[106] Tau Henare is the Associate Minister of Education and Corrections as well as the Minister of Maori Affairs while Georgina Te Heuheu is Minister of Courts and Women's Affairs and Associate Minister in charge of Treaty of Waitangi Negotiations. Also, Tuariki Delamere has been an appointed a Minister outside Cabinet. He is Minister of Immigration, Minister of Pacific Island Affairs, Minister in charge of the Public Office, Associate Minister of Finance and Associate Minister of Health

[107] Arthur Anae, Joe Hawke, Manu Alamein Kopu, Sandra Lee, Hon Robyn McDonald, Tukuroirangi Morgan, Dover Samuels (Deputy Chairperson), Tariana Turia, Georgina Te Heuheu (Chairperson), and Rana Waitai.

influential in the idea not becoming an issue. Some of the factors discussed above have led to political scientists and constitutional lawyers not producing work on this idea. Further to these though, are some specific factors relevant to the academic field.

If New Zealand has had any constitutional or political theory it has really been a theory of distrust and a lack of interest in theory.[108] This means there is not a developed political or constitutional theory about the New Zealand constitution. Therefore, the principles and assumptions which underlie our constitutional system have rarely been analysed or criticised and options for changing our constitutional institutions have not generally been considered.[109]

The general practice in New Zealand constitutional law and political science has been to rely or draw on the practice, precedent and theories of other countries. Reliance on precedent is universally a major part of the practice of constitutional lawyers and political scientists. However, in New Zealand, compared with other countries, our size, limited resources and close historical links with Britain have meant that we have nearly exclusively relied on overseas precedent and theorists.[110] We have not faced any sort of national crisis, without precedent elsewhere, which has required original thinking.[111] The effect of this has been that there is a paucity of original New Zealand political and constitutional ideas.

New Zealand's reliance on overseas precedents and theories has predominantly been confined to the British Westminster system and the theories that underpin it. The constitutional situations and innovations of other countries with situations more similar to our own, such as smaller bi-cultural or multi-ethnic

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[108] *Democracy and Power: a Study of New Zealand Politics (2 ed)* (Oxford University Press, Auckland, 1989) 7 ["*Democracy and Power*"]. See also Jack Vowles "Liberal Democracy: Pakeha Political Ideology" (1987) 21 *New Zealand Journal of History* 215, 216 ["Liberal Democracy"].
[109] *Democracy and Power* above n 108, 7-8.
[110] *Democracy and Power* above n 108, 7.
[111] "Liberal Democracy" above n 108, 216.

countries, have not been looked to.[112] Also, theoretical models advocating consideration of different ethnic groups within constitutional arrangements such as Lijphart's consensus model have not received adequate consideration.[113] New Zealand's reliance on British precedent and theory has effectively meant that our unique situation in light of the Treaty and the relationship between Maori and Pakeha has been disregarded.

Two other more specific reasons exist for the idea of a Maori legislative body not being seriously considered by academics. The first is that, of the few New Zealand constitutional lawyers and political scientists who actually specialise on the New Zealand system, even fewer look at Maori issues.[114] This is partly because of the idea that Maori issues are best dealt with by Maori, and particularly by Maori constitutional lawyers and political scientists of whom there are very few.[115] Thus as a whole, Maori, their political traditions and their theories have so far had little influence on political and constitutional academic work.

The second reason is that some constitutional lawyers have not discussed constitutional institutional change as a way of incorporating the Treaty into our constitution because they have their own ideas on what should be being done. Geoffrey Palmer, for example, has stated that ideas of constitutional institutional change are a distraction "from the main business"[116] which is "to make progress under the Treaty of Waitangi to ensure that Maori grievances are addressed and that justice is done."[117] He also has stated that the way any

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[112] For example the constitutional arrangements or the bodies of indigenous people in the Cook Islands, Fiji, Samoa, Canada, Norway, Lebanon and Malta.
[113] Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven, 1984).
[114] Interview with Stephen Levine, Head of the School of Political Science and International Relations, 31 March 1998 ["Stephen Levine"].
[115] "Stephen Levine" above n 114.
[116] "Where to From Here?" above n 72, 242.
[117] "Where to From Here?" above n 72, 243.

constitutional change should occur is through the inclusion of the Treaty in a constitutional document which is higher law.[118]

IIX COULD IT BECOME AN ISSUE?

Theoretically, the idea of a Maori legislative body could become an issue if there is a change in the above factors.

One possible way a Maori legislative body could become an issue then would be if a constitutional crisis arose or if constitutional reconstruction was undertaken. Either of these situations would lead to Maori, Government and academics alike potentially having to evaluate the idea.

An increase in Maori support could also force the idea to become an issue. Maori support could increase because of an injustice (as in the 1880s and 1990s where land grievances and the *Crown Proposals for the Settlement of Treaty of Waitangi Claims* respectively were the catalysts), as Maori look to wider issues again after the Treaty settlement process is completed.[119] or if Maori representation and power in Parliament decreased again.

Government consideration or discussion of the ideas could also lead to it becoming an issue. As well as being pressured into the idea due to Maori or public support for the idea, it is foreseeable that a government coalition partner could put the idea on the agenda for Government discussion.

A rise in academic research, consideration and debate on the idea may also lead to it becoming an issue. Exploration of the idea by academics could raise the interest and/or support of Maori and members of the public. Academic work

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[118] "Where to From Here?" above n 72, 244.

[119] See Georgina Te Heuheu's comment in "Maori Call for Republic Debate" above n 96 "The Treaty plays a role in our society that is much, much more than a mechanism for settling claims and correcting injustice. It is important we understand the settlement of historic claims is not an end, but rather a beginning".

may also be able to dispel attitudes such as the "One Nation", "Too Hard" and "Not the Right Time" attitudes which have hindered the idea becoming an issue. The interest and support that could potentially be raised may even force the Government into considering the idea, especially if academics criticised and removed the government's ability to rely on the argument of a Maori legislative body being against parliamentary sovereignty. In this way, academics could have a vital role in making the idea of a Maori legislative body an issue.

The importance of academic work can be seen in how changing the electoral system from FPP to MMP became an issue. Although there was a level of dissatisfaction about FPP, it was really the work of academics in highlighting FPP's problems and exploring new options that led to change becoming an issue.

The question that remains is: How can the interest of academics be raised so that the idea of a Maori legislative body begins to be addressed? This essay seeks to be one attempt at trying to gain the interest of those who have not considered this idea or perhaps dismissed it too lightly. In this way, as stated initially, this essay seeks to be a challenge.

IX FUTURE DIRECTIONS

The purpose of this essay has not been to construct a model for a Maori legislative body which can be incorporated into our constitutional arrangements. However, to avoid the common fault of past commentators not proposing any actual ideas for a Maori legislative body, a suggestion is given below for a possible future direction for debate on this idea.

It is suggested that the most feasible option for a Maori legislative body in New Zealand today would be a body along the lines of the Paremata Maori and the early proposals of King Tawhiao. It could be a single house with jurisdiction

over specific areas of law relating to Maori and their rights under the Treaty. The existing national Parliament would continue to make general laws for the country. The Maori body could have varying powers with respect to different aspects of law within its area of concern. On some aspects the body could have equal legislative power to the national Parliament and so be subject only to the Governor General. On other aspects the body could be granted regulatory type powers under Acts of the national Parliament. For example, the body could be responsible for the management and creation of regulations under the Maori Fisheries Acts. Regulations made by the body would probably be subject to normal restrictions upon regulations. Lastly, on other aspects the body would play an advisory role to the national Parliament. It could present a Maori position and Maori concerns on areas of general legislation. Maori representation in the national Parliament, despite this advisory function, would continue. No need is seen for the creation of a Senate.

This proposal captures the relationship within the Treaty in a more accurate form than the Three House Model. Maori have a distinct measure of tino rangatiratanga over Maori areas as well as a say within the overall running of the country, while the national Parliament has a form of kawanatanga or general management.

This proposal fits well with the criteria under which the Three House Model was critiqued. The aim of this proposal though is not to provide a definitive description for a model but rather to provide a possible direction for thought. Some people will prefer other directions such as a Kauhanganui direction which would be in line with the worldwide trend among indigenous people, including Maori, to seek self-governance.[120] Others, on consideration of this direction, may think it is unfeasible. What is important and intended here

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[120] See Te Puni Kokiri *Mana Tangata - Draft Declaration on the Rights of Indigenous Peoples 1993: background issues and discussion on key issues* (Te Puni Kokiri, Wellington, 1994). Also Mason Durie notes that by the third Hirangi Hui it was apparent that there was a shift from discussion on constitutional reform for New Zealand to the development of a constitution for a Maori nation see *Te Mana* above n 91, 235.

though, is not to find a permanent or sole direction for future debate but rather for debate to be stimulated. This is the challenge.

X CONCLUSION

The aim of this essay has been to stimulate interest, thought and debate on the idea of a Maori legislative body. A Maori legislative body is one way which the Treaty could be incorporated into our constitutional arrangements.

Up until now, despite our ability to change our constitutional institutions and despite the development of designs for a Maori legislative body since the 1880s, the potential for a Maori legislative body has not been properly addressed. Instead we have preferred to stay closeted within our Westminster style institutions.

Resounding through this essay has been the point that New Zealand has been uninterested and reluctant to discuss our constitution, its uniqueness and its future directions. This inertia and unquestioning attachment to our "inherited" constitutional arrangements is not only significant to the idea of a Maori legislative body but also with respect to other potential forms of constitutional change.

The attitudes of groups, particular circumstances and academic limitations which, up until now, have hindered the idea of a Maori legislative body being seriously considered, no longer need to restrain us. Nor need we wait until circumstances or attitudes change before thought and debate begins. Rather, the examination and exploration of the idea may serve to change attitudes and kindle interest.

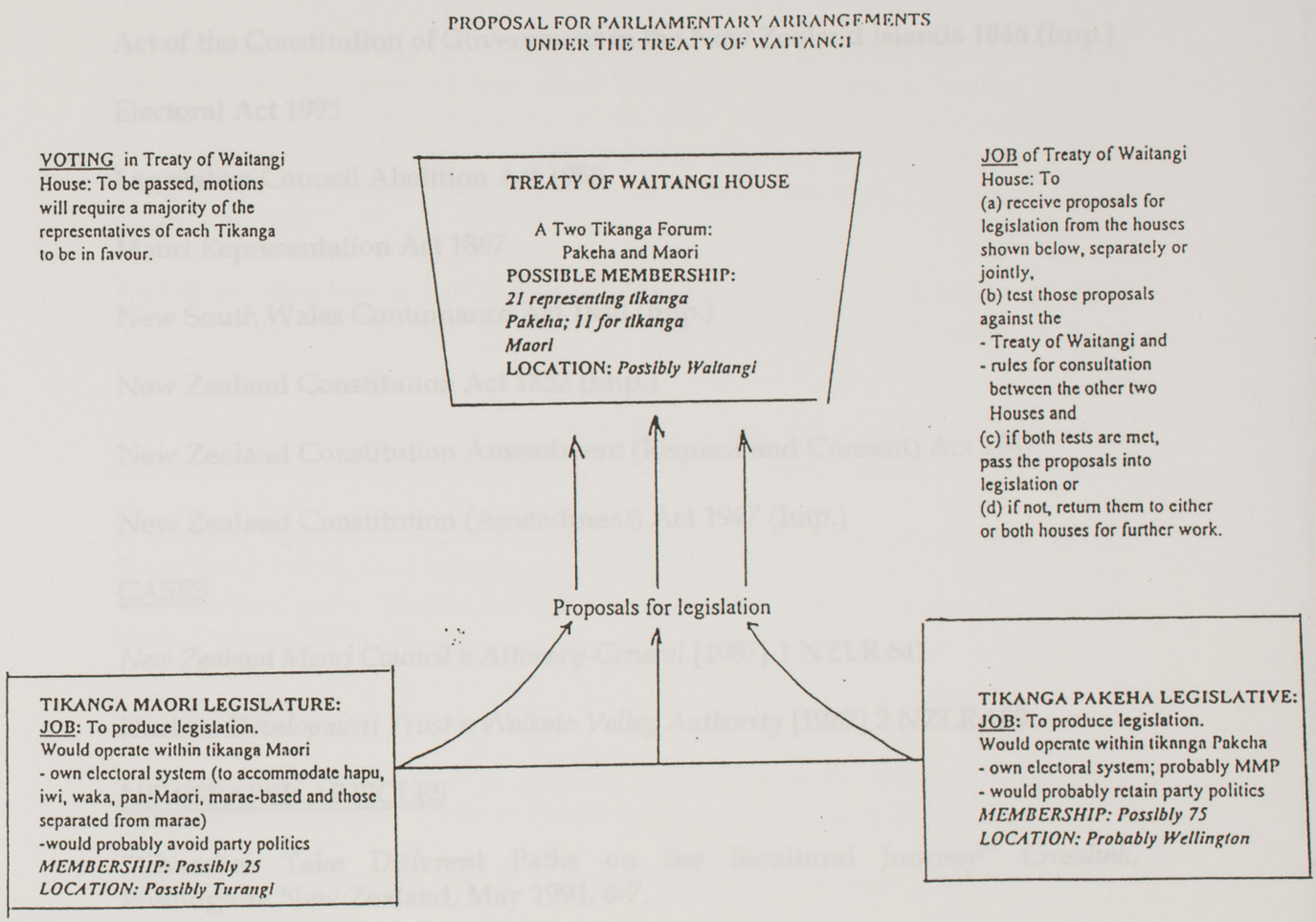
Therefore, we need to begin to see our constitution not as an offshoot of the Westminster system and limited to its precedent and theories. Some guidance

for future constitutional directions could be sought from countries more similar to New Zealand. However, most of the ideas for change should emerge from original New Zealand thought.

It has been proposed that future discussions for the development of a Maori legislative body should follow the direction of the theories of the Paremata Maori and King Tawhiao's early proposals. This essay and this proposal stand as challenges for others to develop or criticise.

APPENDIX ONE

Model of the Three House Model taken from a transcript of a lecture given by W. Winiata at Massey University, 14 March 1996 entitled "Proposal for Parlimentary Arrangements Under the Treaty of Waitangi". (copy in the possession of the Author)



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