Royal Commission on Aboriginal Peoples

Country Study - New Zealand
Indigenous Governance
Substantive Paper
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An Initial Paper (Document 1)
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The second paper (Document 2)
builds on two identified components from
the Initial Paper and deals also with the status
of the Treaty of Waitangi as requested by Dr Cassidy

INDIGENOUS PEOPLES AND GOVERNANCE

NEW ZEALAND MAORI: 1840-1993.

SYNOPSIS

1.0 The issue of indigenous governance in New Zealand has been fundamentally shaped by the outcomes of the Treaty of Waitangi which largely confirmed existing Aboriginal rights in English law. Those Aboriginal rights, however, were rapidly negated by the new settler government which evolved in the forty years after the Treaty signing in 1840. Argument remains over the extent to which the Treaty transformed those rights to legal rights. There is an extensive literature on that subject.

1.1 Historically, the initial degree of governance permitted by the Crown to Maori as a Treaty outcome was limited to areas of regional and strategic importance to the settlers. They were mainly in more heavily populated northern areas where Maori had significant internal political and military strength. In other areas the rate and volume of colonial settlement simply overran the possibility of any effective evolution of indigenous governance.

1.2 By 1880, Maori population decline, combined with settler government dispossession, left the tribes in a powerless political position. The legislative destruction of tribal legal personality and consequent alienation of land and fisheries led to new patterns of Maori response. These emphasised a desire to develop a more unified Maori political presence aimed at the reclamation of Treaty rights and resistance to further alienation. This unified response has traditionally been beset by a contradiction between tribal Treaty interests and the need for concerted political action.

1.3 However, by the turn of the century the evolution of settler government political control had steadily submerged Maori property rights into the area of Article 3 of the Treaty, largely concerned with individual political and legal rights, as distinct from tribal rights which are more concerned with property. Settler political control aimed at undermining tribal resource ownership and control guaranteed to the Maori tribes in Article 2 of the Treaty.

1.4 The Maori political response in the three decades after the 1920s focused away from emphasis on governance towards inequity of distribution to Maori and their exclusion from participation in that distribution. The Treaty-based land claims continued to be voiced in a legal context but with a lower political profile. During the 40s and 50s a more forceful articulation arose, based on distributive equity, as the general Welfare State evolved.

1.5 During the 1960s a Maori view emerged that the Welfare State could not adequately deliver equitable distribution. The solution was clearly that Maori had to control their own economic base as other groups did in the mainstream economy. Emerging demographic patterns, both of Maori and wider society, gave increasing substance to this view. These demographic imperatives continue today.

1.6 The Treaty claim process - a continuous thread through Maori politics since the 1850s - received wider endorsement in the 1970s as the view of a lack of Welfare State capacity for equitable delivery became more widely accepted. Maori control of their own economic base began to feature in the fresh articulation of Treaty claims. The context of governance has been largely confined, conceptually, to autonomous control of the "Maori economy" and a general disposition to participate in the national political spectrum from that position.

1.7 Questions of local and regional territorial governance have been confined primarily to the area of consultation arising from the Treaty rights and representation in society's general political process. There is relatively little pressure from within Maoridom for separate provision of indigenous governance in "mana tangata", or authority over people. Again, the overriding concern is equitable treatment from the wider legal and political process. **[These are seen as Article 3 issues.]

1.8 A clear view has evolved that autonomous control of Maori assets and the repossession of those assets by Treaty settlement is fundamentally linked to participation in the political fabric of society. Maori see this emphasis on control of tribal property rights as the essential expression of governance. They have long viewed representation in the national political process as peripheral. Recent electoral law change, however, may see Maori refocussing some of their energy on the possibility of increased representation in Parliament as a lever to advance greater economic autonomy.

Introduction

2.0 Although New Zealand's social, economic and political culture has its own distinct character, its genesis is not unique. Soon after the new Pakeha culture arrived it began to assert dominance over the indigenous Maori, who were steadily reduced to a subordinate role in all facets of the new nation.

2.1 The seminal act in the creation of the nation was the signing of the Treaty of Waitangi in 1840 between the British Crown and a large number of Maori

chiefs throughout New Zealand. The Crown's position was founded on Normandy's instructions to Governor Hobson to treat with the sovereign and independent tribes of New Zealand. This accommodation by the British with the numerically superior Maori soon faded out of settler consciousness - and conscience - for within four decades the majority of Maori land had moved into settler hands. Settler control of the new nation depended upon the ability to usurp the political authority, and governance, of the tribes. Legitimate sale formed part of the land alienation process but the wounds which remain visible today were caused by military, coercive or fraudulent alienation of large tracts of Maori territory. This alienation is the origin of the present Treaty claim process between Crown and Maori who are trying to reconnect with their economic base so as to sustain their culture in contemporary terms.

2.2 Concomitant to the alienation process was the determination of the settler government to destroy all facets of the Maori ownership and control of their resource base, so strongly rooted in the land. As tribal land ownership, and resource control in fisheries and forests declined so did the social, economic and political base of Maori society.

2.3 There is a direct relationship between asset alienation and reduced Maori governance. Individual property rights, enshrined in Article 3 of the Treaty, form a cornerstone of the dominant Pakeha culture. Maori governance, on the other hand, was linked to tribal asset and resource control, enshrined in Article 2 of the Treaty. The tension between these two articles, and Crown sovereignty in Article 1 of the Treaty, lie at the heart of the wider debate on Maori governance and resource management and control. This tension has been an important focus of contemporary legal concern.

2.4 By the 1870s the colonial government, no longer needing Imperial troops to assert its will, had already begun the entrenchment of its structural dominance over the now subordinate indigenous population. So secure was the dominant culture that it could symbolically - and cynically - include Maori in the political structure. The four Maori seats created last century remain to this day but their ability to deliver substantive political outcomes to Maori has always been circumscribed.

2.5 Maori have effectively been excluded from the polity by the chimera of the politics of inclusion. Maori representation within central government, on terms dictated by the dominant culture, has not delivered the substantive outcomes which the Pakeha society has enjoyed.

2.6 Since last century any mode of Maori governance, whether on a Pan-Maori or tribal scale, has been circumscribed and inhibited by the power of central government. Maori governance, always limited by statute, has never been autonomous. Recent developments, however, especially over the last decade have seen a new Maori determination and ability to reassert management and control over their diminished resource base.

2.7 On a national basis new initiatives in Maori designed health, education and justice schemes are evolving under the shadow of central government. These issues, however, are not related to property rights but to equity of distribution, and resolution implies changes in access to these systems. Once the efficacy of distribution is achieved then these separate systems are likely to atrophy. It could be argued that government response to these initiatives is not so much a belated recognition and understanding of Maori aspirations, as an implicit recognition that existing Eurocentric systems have generated a high social cost which government wants reduced. Although that recognition exists the political willingness to deal with the issues is not sufficient.

2.8 Governance equates to effective participation in the constitutional forms of the polity, and this requires an autonomous economic base to match the whole spectrum of the economy on equal terms. Constitutional representation without an indigenous economic base means a continuing subordinate role in the power structure. This is perceived by the writer as a general principle.

The Limits of Indigenous Governance

3.0 Governance: the action, manner, or function of governing; may be manifest at four different levels of social, economic and political organisation.

i The sovereign right of an independent state, like New Zealand to decide its own future without external interference.

ii Full territorial authority of a group within a sovereign state over all matters, save major issues, such as justice and defence. That is, an enclave or reservation within a sovereign state.

iii Authority over one's own interests, assets and affairs, limited only by

interaction with other similar bodies and the laws of the sovereign state.

iv Participation and representation in the general polity as exercised by citizens to determine who will exercise governance.

3.1 The degree of indigenous governance in New Zealand is irrevocably constrained by historical determinants. The Crown exercises sovereignty over all of its citizens, including the indigenous Maori whose tribal representatives ceded kawanatanga, or governance in Article 1 of the Treaty of Waitangi in 1840. The distinction between governance and sovereignty is a fine one. It is an important component of contemporary discourse on the Treaty. Effectively, however, sovereignty in the full Western sense has been imposed since the middle of last century and government has never entertained the concept of any autonomous political status for Maori beyond political representation. Indigenous enclaves were reluctantly tolerated when short-term military limitations demanded expediency, for example when the King Movement lay territorially behind the Maori-determined aukati line in the Waikato. At the first opportunity in 1863 the colonial government launched a successful war to break that independence. In Taranaki, where the Governor made a wrong decision over the purchase of land from one Chief, against the opposition of his senior, the dispute should have been settled in the High Court. Instead, the Crown resorted to making war. It is an open historical question as to how much the dispute was a pretext or a proper cause of war.

3.2 The prospect of indigenous enclaves has also been restrained by the diversity of Maori groups and the small-scale geographic limitations of New Zealand. Thus, enclave or reservation status for Maori has always been an ephemeral occurrence. The potential is further compounded by the indigenous diaspora, for many Maori now live in urban areas far from their traditional territory. Although there is a recent trend, catalysed by high Maori unemployment, for some Maori to return to their ancestral areas, this is unlikely to substantially alter the national demographic distribution pattern. Paradoxically, in many instances the repatriation of funds from urban Maori has materially strengthened the ancestral provincial or rural base. Often the city dwellers adhesion to their traditional homeland becomes even more powerful. Tribal identity and cultural cohesion become enhanced as Maori look forward to the material gains of the urban Pakeha world, and over their shoulder for the spiritual and community sustenance from the place of their birth.

3.3 Historically all attempts at separate treatment of Maori in law, services and civil rights have failed as issues of particular indigenous rights, but have gained some standing on grounds of distributive justice. It would be mistaken, however, to assume that Government in those cases has been primarily concerned with Maori rights. The policies have been driven more by a pragmatic need for effective delivery of services, rather than recognition of indigenous Treaty rights.

3.4 Maori therefore, have been limited to participation in the third and fourth levels of governance. In the last two decades the level of Maori authority over tribal assets and associated interests has risen markedly, and several tribal authorities have become large trans-sector organisations. They are still regulated, however, by statute, some of which specifically inhibits tribal development as such. A significant part of the revitalised Maori drive for tribal governance over assets is to remove any statutory shackles so that they can participate with Pakeha on equal terms, or on a level playing field, to use the current free market argot.

3.5 The other facet of governance, participation and representation in the general polity, has been in place since 1867 when the four Maori seats were created in Parliament. Yet, even on the rare occasions when the four Maori seats have held the balance of power their grip on that power has proved tenuous. Traditionally the constraints of party allegiance have severely limited the ability of any caucus members, of whatever persuasion, to deter government from its chosen path. The reality in New Zealand politics is that policy has usually been dictated by the executive.

BEFORE COLONISATION

The Treaty of Waitangi (1)

4.0 During 1840 representatives of the British Crown and about 540 Maori chiefs signed the Treaty of Waitangi. Now accorded the status of New Zealand's founding covenant, it has three main parts:

Article 1 the chiefs ceded kawanatanga -@governorship"
or governance to the Crown, subject to English
common law;

Article 2 the Crown guaranteed to protect the chiefs' tribal
absolute authority [te tino rangatiratanga over
whatever land and resources they chose to retain;

Article 3 accorded Maori all of the rights and privileges of British subjects.

4.1 There is a view that the Maori signatories interpreted kawanatanga as nominal sovereignty, encapsulated by the chief Nopera Panakaraeo during debate at Waitangi: "The shadow of the land passes to the Queen, but the substance remains with us". It is likely however, that the Chiefs interpreted kawanatanga as the admission among them of a Governor as Aprimus inter pares@ (first amongst equals) with particular Aportfolio@ functions. History soon demonstrated that nothing less than substantive sovereignty would satisfy the settler government, for rangatiratanga was soon subsumed by kawanatanga.

4.2 Rangatiratanga, from the Maori perspective, implied effective local sovereignty, especially the ownership and management of resources. Some scholars have suggested that the chiefs, familiar with the Bible, may have anticipated a situation analogous with the Middle East at the time of Christ where the local kings maintained their autonomy [rangatiratanga] but ceded governorship [kawanatanga] to imperial Rome. If, instead of kawanatanga, the missionary translators of the Treaty had used the word mana, then very few Maori would have signed, for mana points unequivocally to substantive sovereignty, and future intent would have been apparent.

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(1) *See Appendix 1 for the full text of the Treaty*

4.3 The Treaty introduced the British legal system with its focus on individual rights of citizenship, as well as resource and property rights. It offered Maori the right to participate and be represented in government, as well as other legal and statutory rights. It was not explicit, however, that English law had the potential to intrude on Article 2 rights as much as it had the potential to protect them.

4.4 The Crown's initial overtures to Maori in 1840 were demonstrably predicated on the recognition of tribal sovereignty in Article 2. This recognition vaporised when the settler government effectively captured the Treaty. The settlers viewed the "beastly communism" of Maori tribal society with abhorrence because, among others, its cohesion was the main barrier to their asset accumulation. Equally, individual property rights in land and natural resources were an anathema to the indigenous social fabric, although property in personal items was recognised. Article 3, with its emphasis on individual citizenship rights, provided both the

rationalisation and the mechanism for the withdrawal of recognition of tribal legal personality. Article 1 provided the force and authority for such withdrawal.

4.5 Although Anglo attitudes may have implied a Amission civilatrice@, as the settler government gained political control it was dominated above all else by a desire to shatter tribal authority by changing resource ownership. Asset acquisition was the main raison d'etre; tribal governance was the casualty.

Maori Social Structure: 1840

5.0 Traditional Maori society comprised three related kinship groups in ascending order of size each usually named after an ancestor:

the whanau or extended family, led by kaumatua or senior adults;

the hapu, a clan or sub-tribe composed of a number of family groups, led by rangatira or chiefs; and

the iwi or tribe, a group of clans led by the ariki, a head chief who fulfilled a role comparable to that of constitutional monarch.

5.1 **Three principal factors fostered social cohesion:**

whakapapa or genealogy; Maori cosmogony presents a genealogical continuum from the Gods, through a series of demi-gods, to the people of today. The rank and status of individuals was conditioned by their ancestry, but more generally determined by their ability.

tikanga or tribal custom which controlled both people and resources; Maori life was conditioned by strict adherence to various modes of social control shaped by indigenous equivalents of Western civil law concepts.

mana whenua or occupational history of the tribal territory; attachment to ancestral land, the whenua, is elemental to Maori culture in a manner which Europeans with their notion of tradable individual property rights still find difficult to comprehend.

5.2 Leadership status was both inherited and ascribed. Contrary to popular settler perceptions, Maori society lay much closer to Locke than to Hobbes, for Maori were governed very largely by consent. Although primogeniture formed an important element in determining leadership, rank and birth alone were not sufficient to secure authority. Eldest sons who could not prove their worth would be passed over, usually for a younger sibling. Thus, rank by birth needed to be complemented by other qualities. On the other hand, a person with ascribed qualities but with a weak whakapapa could not aspire to a leadership role, in other than exceptional circumstances.

5.3 As the basic economic unit the whanau held the rights to use resources, as distinct from allocation, within their defined micro-territory. That is, they owned the fruit but not the source. Yet, even at this level, group ownership prevailed and individuals had very few personal possessions, perhaps their clothes, tools and weapons.

5.4 Group ownership was exercised by the hapu which operated as the basic political unit. It commanded resources and made the allocation decisions for extended families within its territory. A conservation responsibility rested with the hapu and restrictive prohibitions of tapu were used to protect resources at appropriate times within the seasonal cycle.

The importance of whakapapa is demonstrated in the God-given institution of tapu, for tapu could be invoked by those of rank whose genealogies showed a descent from the Gods. In effect the institution of tapu served as a substitute for civil law and punishments for breaking tapu, including death, were regarded as fitting.

5.5 The iwi operated as the macro-political unit under the leadership of the ariki who might be viewed as primus inter pares among those of rank within the tribe. In some iwi however, the ariki may have been more elevated. The iwi formed the basis of identity - the group symbol - for its constituent hapu. Because of geographical constraints the iwi would not feature in the everyday life of most Maori, who would tend only to operate on a tribal basis in times of stress or celebration. In particular, the iwi would function as a cohesive unit under threat of attack, or when it was deemed necessary to make war on another iwi. Under these circumstances the role of the ariki would be pre-eminent.

Traditional Patterns of Governance

6.0 Governance operated at the three levels each under the aegis of the higher ranking leader. Kaumatua were presided over at times by rangatira who, in turn, deferred to the ariki. The bloodlines of these leaders were intricately linked, and they were able to trace their whakapapa or genealogies back to common ancestors. For the paramount leaders their source of authority was derived in a direct genealogical line from the Gods who were the genesis of the Maori world.

Inter-personal Governance

6.1 Kaumatua settled issues of interpersonal governance. If an issue was widespread between whanau then negotiation between kaumatua took place under the aegis of the rangatira. In turn, the ariki would preside over disputes between higher ranking leaders. Resolution of inter-tribal disputes by negotiation was common and bonds between tribes were often strengthened by inter-marriage of ranking families. War, of course, became the ultimate act of diplomacy.

Resource Allocation and Conservation

6.2 Harmony within Maori society could not be maintained without successful communal resource allocation. Within hapu, allocation issues were negotiated among kaumatua presided over by rangatira. In turn, the ariki presided over rangatira on resource issues between hapu. An awareness of conservation needs was an integral part of Maori governance patterns, for a failure to protect food sources on a sustainable basis could threaten the existence of a community. As discussed earlier, the institution of tapu lay at the heart of resource protection.

Resource Protection from External Threat

6.3 Encroachment by one iwi into the resources of another was a ready provocation to war. Substantial intrusion by one tribe into the land or maritime territories of another took the form of either invasion and occupation on order to secure long-term resources; or the capture of substantial quantities of processed and stored foods necessitated by New Zealand's seasonal climate.

6.4 The former incursions were usually a matter for the tribe as a whole to "defend the realm" even though only one of its constituent hapu may have been endangered. In the latter case, tribal or hapu retaliation would be

determined by the scale of the intrusion.

6.5 A near constant pattern of retaliatory warfare in traditional Maori society led to developed codes of military obligation which had a powerful effect on defining the roles and functions of the tribe as distinct from its constituent hapu.

COLONIAL POWER AND CHANGES IN MAORI GOVERNANCE

Colonial Detribalisation Pressures

7.0 The traditional basis of governance, the tribe, was systematically destroyed by the colonial government. Various legislation denied any legal standing to tribes which continued to exist but with no legal or political force.

7.1 Throughout the 153 years since the Treaty Maori have made frequent attempts at self-governance on local and national scales but these have always been viewed with contempt and distrust by the dominant culture. None have survived.

7.2 Significant attempts at establishing a political framework within which some indigenous self governance might occur have peppered recent Maori history. All have failed when confronted by the unitary power of the settler state. To some extent their failure has derived from the unwillingness of geographically separate tribes to surrender their local or regional autonomy within a greater collective. The eternal conflict in all polities between centralist and regional elements afflicts Maori too.

7.3 Maori governance may be described as falling into two main categories: attempts to unite tribes in a pan-Maori, multi-tribal body, and attempts by separate tribes to exercise complete autonomy over their territory, often accompanied by strands of millenarian doctrine.

Maori Response: Pan-Maori Governance Movements

The King Movement

8.0 Alarmed at the pace of land alienation, an assembly of some northern chiefs placed their land under the mana of Te Wherowhero, the first Maori king. Many settlers viewed the King Movement as treason - a rebellion against the sovereignty of Queen Victoria - but that view was simplistic and ultimately self-serving, for a perceived act of treason could justifiably be quelled. Wiremu Tamihana, the kingmaker dismissed these accusations by placing two stakes in the ground to represent the Maori King and the Governor. Across these he placed a stick representing the law, and a circle around all three represented the sovereignty of the Queen.

8.1 Other settlers saw the King Movement as a >land league' to prevent further land alienation, a claim which gained substance when a large war party moved south to fight with Taranaki Maori who were fighting to retain their

land.

8.2 The King Movement played a major role in the New Zealand land wars of the 1860s, during which the constituent tribes were defeated and large areas of their territory confiscated. Some historians have concluded that the wars were deliberately provoked by the settler government in order to get land. Subsequent commissions have concluded that the tribes were wrongly "convicted" of rebellion and their lands improperly taken. The Crown has admitted the substance of these claims and the issues are now ones of settlement negotiation.

8.3 The King Movement continues as an overriding unifying component of some North Island tribes, and is seen as having considerable spiritual and cultural mana rather than political or legislative force.

8.4 As a force for indigenous governance it failed because it could only command the adherence of a limited number of tribes. Military defeat and settler occupation of Maori land were the final acts in its demise. Today it remains as a potent unifying focus for its member tribes, but without temporal authority.

Kotahitanga

8.5 Kotahitanga means "to make as one". In 1892 at Waitangi the Kotahitanga arose to represent Maori interests, especially by uniting against land legislation which favoured settler interests. Yet even in 1892 Maori recognised how circumscribed they were by the settler government. Rather than seeking a complete separation from the Anglo culture they sought a confirmation of Article 2 land rights and a degree of autonomy, but still essentially within the new Pakeha polity. However, Pakeha proved impervious to Maori aspirations although in 1900 the Native Councils Act was passed to partially meet Maori pressure for Kotahitanga. The newly established Maori committees worked on issues such as sanitation and housing, but the key element for Maori autonomy - rights exercised over land - was missing and the Act faded by 1910. Characteristically the failure met Pakeha derision on the basis that Maori were unable to help themselves rather than an acknowledgement that they were forced to work under an alien system.

8.6 The Kotahitanga concept has surged politically within Maori society several times in the last 150 years with its most recent expression being the New Zealand Maori Congress. This Congress too, has suffered from an inability to attract the support of all tribes and only the partial support of some major

tribal groupings.

Maori Response: Tribal Governance

Parihaka and Te Whiti o Rongomai

9.0 The land wars were long over by the late 1870s when an attempt at passive resistance to the colonial government presaged Gandhi by 70 years. Having drawn the lesson on the ultimate futility of war against the Pakeha Te Whiti evolved a syncretic ethos which melded Maori custom with his knowledge of Christianity. He established at Parihaka a "New Jerusalem", essentially a reservation within which he proposed fully autonomous governance. Parihaka was crushed militarily and Te Whiti and many of his people imprisoned.

9.1 The injustice and brutality of the state actions against Te Whiti aroused intense debate in the wider society of late nineteenth century New Zealand and Parihaka has become a powerful icon in New Zealand history. However, this status has been largely shaped by the contrast between the non-violent, Christian Maori and the militaristic and authoritarian response from the state.

9.2 In terms of effective indigenous government Te Whiti's movement was crushed and remains today as a spiritual and cultural gathering point without any control over either land or people.

MAORI PARTICIPATION AND REPRESENTATION IN THE POLITY.

The Assimilationist - Separatist Continuum

10.0 A range of attitudes has evolved as to how Maori-Pakeha relations should develop. After the dominant culture realised, near the turn of the century, that Maori were not about to die out they then assumed that over time Maori would become assimilated. They would adopt an increasing degree of Pakeha culture and eventually become absorbed and amalgamated with a complete loss of indigenous culture. In effect they would become "brown Pakeha". As late as 1960 the Hunn Report commented:

Here and there are Maoris who resent the pressure brought to bear on them to conform to what they regard as the pakeha mode of life. It is not, in fact, a pakeha but a modern way of life, common to advanced people (Japanese for example) - not merely white people - in all parts of the world. Indeed some white people, everywhere, are not able to make the grade. Full realisation of this fact might induce the hesitant or reluctant Maoris to fall into line more readily.

10.1 Although Hunn espoused integration of Maori ("the best of both worlds") as the "conventional expression of policy" the central thrust of the report remained conformist and assimilationist **(2)**. The phrase "fall into line" gives scant regard for Maori cultural identity, nor does the following passage:

Integration, as stated, implies some continuation of Maori culture. Much of it, though, has already departed and only the fittest elements (worthiest of preservation) have survived the onset of civilisation.

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(2) *Hunn defined integration as "To combine (not fuse) the Maori and pakeha elements to form one nation wherein Maori culture remains distinct", Appendices of the Journal of the House of Representatives, 1960, "Report on the Department of Maori Affairs".*

10.2 The Hunn Report, perhaps unconsciously, implied that should integration ultimately see the total demise of Maori culture, then few Pakeha tears would be shed. A substantial minority of Pakeha still hold that view quite

explicitly. Their rhetoric usually includes phrases such as "We are all New Zealanders", and rails against "apartheid" whenever Maori are seen to be treated differently or, in their terms, preferentially.

10.3 At the other extreme of the continuum lies the doctrine of total Maori separatism espoused by some Maori radicals. As discussed elsewhere in this paper factors in all facets of society now militate against this proposition. While Maori may yet be treated separately, as Maori, by the state, it is for efficacy of service delivery, rather than preferential treatment of Maori per se.

10.4 Occupying the middle ground is the concept of full Maori participation in the national political and economic arena but with an active maintenance of Maori culture well beyond the concert halls and touring parties. In this model Maori retain, or reclaim in some cases, their Treaty of Waitangi guaranteed asset base and manage and control them in a manner which co-exists with the Eurocentric economic mode. They pay taxes and hold the same article 3 rights of citizenship which promise equal participation in the general distribution of state services. In short, they have a sufficiently effective presence to demand inclusion.

Democratic Participation: The Creation of Maori Seats

11.0 Two major factors appear to have influenced the legislation in 1867 which created the four Maori seats. Individualisation of land title had enfranchised those Maori males who held such title. Fearful of the effect in some general seats with a large proportion of Maori the dominant culture tried to channel Maori political energy into a situation over which it would essentially have control. Another interpretation suggests that the seats were created at the insistence of the British Colonial Office as a condition of Britain's surrender to the New Zealand Parliament of its control over Maori affairs.

11.1 The first few decades of Maori parliamentary participation saw the rise to eminence of several talented Maori men in the Young Maori Party. Debate continues as to whether they were assimilationists, dancing to the tune of the dominant culture, or visionaries who charted the most pragmatic and achievable path for their people in their time.

Of course they were captives of their time and those of us active in contemporary politics need to be aware that fundamental changes have occurred since the first decades of this century, which present us with different, and perhaps enhanced, opportunities and perceptions.

11.2 Whether the post-colonial culture has viewed Maori as relevant members of the polity is debatable. Maori electoral rolls exist for the period from 1908 to the early 1920s but there is no record for the intervening period to 1949. Certainly the dominant culture did not have a clear idea of the Maori roll. Maori on the Maori electoral rolls voted on the day before the general election, by a show of hands. The Crown's indulgent and patronising attitude changed drastically, however, at the outset of the Second World War when conscription and manpower needs were paramount. Under those circumstances the state soon galvanised its effort, but by placing the organisational responsibility in Maori hands. Maori exercised their newly found wartime power of choice by exacting substantial political and economic promises from the Crown. Post-war reality showed, not for the first time, that promises are a far remove from their fruition.

The Ratana-Labour Alliance

12.0 In the late 1930s a new alliance arose when the Ratana Movement, a religious movement which soon won widespread support among Maori, committed itself to the Labour Party. From the 1930s until 1993 the Ratana-Labour alliance delivered four very safe seats to the Labour Party, traditionally the party of the working class and the dispossessed.

12.1 Two principal threads ran through the Ratana Movement. First, a coalescence of interests based on disadvantage. Second, the status of the Treaty. Disadvantage provided a convenient close-fit with Labour policy. The Treaty did not. Labour consequently ignored the Treaty and stuck to its social programme. This tactic brought Labour 50 years of Maori allegiance, but Maori have long since paid their dues and are calling for the rest of the bargain held, until now, in abeyance. Recent developments may prove that Labour failed, at its cost, to heed the call.

12.2 It is arguable whether Labour has repaid this allegiance with equivalent substantive outcomes for Maori, much beyond the outcomes delivered to its non-Maori working class constituency. That is, it has not devoted the same intensity to Maori-specific issues, as it has to working class issues, tending to view Maori as participants in that milieu.

Developments in the 1990s

13.0 The dramatic turn to free-market policies by the Labour Government in 1984 served to alienate many Maori, as well as large numbers of Pakeha working class people. (3) The traditional relationship between the Maori

electorate and Labour became ever more fragile, catalysed perhaps as more Maori saw themselves in political terms first as Maori, and second as members of a particular socio-economic class. Appeals to Maori in working class rhetoric have become increasingly irrelevant as the Treaty assumes a greater reality in Maori consciousness. Ironically the Labour Government was instrumental in helping to consolidate Maori awareness when it passed the Treaty of Waitangi Act in 1975, and more so after it passed the 1985 amendment.

13.1 In the 1993 general election Northern Maori voters, in a seat traditionally regarded as a Labour certainty, punished Labour for its apparent indifference to Maori by voting for a young Maori from the fledgling New Zealand First Party. A not insignificant factor, however, was his family name, Henare, one of the most respected in the North. His grandfather was a member of Parliament two generations earlier, and many other family members have occupied eminent positions within Maori society. In the same election the voters rejected the first-past-the-post system for a form of proportional representation which may well see a re-alignment of many Maori voters away from Labour to parties which are more in tune with Maori aspirations. Some observers note that as well as rejecting the old electoral system Maori voters were giving a clear signal to "yesterday's men" - adapt or perish! Other commentators see as many as 15 Maori seats in the new 120 seat Parliament - a far cry from 4 out of 97.

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(3) *Ironically, when retrenchment hit the, largely Maori forestry workers of Kaingaroa most of them found work as contractors within a few weeks. They are now far better off than when they were employed on wages to the timber companies. The message, missed by society at large, is that, on equal terms with Pakeha, Maori also possess the initiative to make good in apparent adversity.*

13.2 In early December 1993 the three remaining Maori members of Parliament expressed grave disquiet at the removal of Mike Moore, the leader of the Labour Opposition. They considered Moore a man sympathetic to Maori aspirations but his actions after the election, which demonstrated his failure to understand the far-reaching implication of the proportional representation vote, sealed his fate.

Although threatening to leave the Labour Party the three long-serving members may find that they are irrelevant in the new political context.

13.3 Sandra Lee, a member of the Mana Motuhake group within the Alliance Party won Auckland Central for the Alliance from the incumbent Labour Party Minister, Hon. Richard Prebble. It may be significant that the gains for splinter parties, New Zealand First from the conservatives and Alliance from Labour, have been made by AMaori@ candidates in what are essentially mainstream (Pakeha) political vehicles.

13.4 Regardless of their protestations a common perception among many Maori is that the Maori MP's have long been effete figureheads rather than at the cutting edge of change. The traditionally low turn-out of voters on the Maori electoral roll suggests a rejection by many Maori of a system high on rhetoric and low on delivery. Although a vote for the conservative National Party might be unthinkable to many Maori, a vote for a certain, ineffective Labour member could not justify a trip to the polling booth. This interpretation is close to the radical view which would claim that apathy, in the face of dispossession and powerlessness, is the prime cause of low Maori voter turn-out.

13.5 A commonly accepted prediction sees the evolution of a new Maori party. Exactly what form it will take is difficult to tell but the winner is very likely to be the party that encapsulates Maori aspirations for a Treaty-based manifesto.

13.6 As part of the change to MMP a Maori option was exercised in 1994. The Option process, a three yearly one, has been in existence since 1975. At the Option any person of any degree of Maori descent may elect to go on the Roll of one of the 4 Maori seats. In 1994 the Option was extended so the number of Maori seats for MMP would be determined by the number of those electing to go on the Maori Roll. Potentially 12 of the new seats could have been Maori. However, large numbers of Maori opted for the General Roll and only five seats eventuated, one more than at present. That seat will almost certainly be centered on the high northern-Maori population around Auckland.

13.7 Three national Maori organisations went to the Waitangi Tribunal complaining that the Government had frustrated the Option by underfunding. The Tribunal found against the Crown but the Crown refused to alter the situation. Subsequent High Court and Court of Appeal action failed.

13.8 At the time of writing an Appeal to the Privy Council is being touted but the thrust of Maori leadership opinion is against taking the matter further. Most Maori organisations refused to support the legal proceedings from the beginning saying that the Option exercise as carried showed Maori opinion on Parliamentary representation adequately and should be accepted.

TWENTIETH CENTURY DEVELOPMENTS

Maori Governance Under the Aegis of Central Government

14.0 A recurring aspect of Maori governance has been the creation of structures by central government - the handmaiden of dispossession - to ensure that control of Maori remained firmly in the hands of the dominant culture. The Crown has persistently used its Article 1 rights, and the legal process implicit in Article 3, to deny Maori the Article 2 right to manage their resources. Of course the majority of those resources have long been alienated. Yet Maori have not been given the autonomy to develop those resources that remain in their communal ownership.

14.1 Even the occasion where Maori autonomy reached its zenith was yet another response to the needs of the dominant culture, the need to utilise all citizens in the Second World War.

The Maori War Effort Organisation: A Salutary Case Study:

15.0 During the Second World War Maori achieved their highest level of autonomy with the formation of the Maori War Effort Organisation (MWEO). The relatively high degree of self governance proved to be short-lived, for the MWEO was formed in the interests of New Zealand's war effort, not in freeing Maori from government control. As the war drew to a close the government quickly returned to its paternalistic mode of control. Claudia Orange notes:

The history of the Maori War Effort Organisation and its demise... is one of the best examples of the repeated pattern of government failure to allow Maori full freedom to develop their resources, and to give them scope to exercise that autonomy which they believe should be theirs under the promises of the Treaty of Waitangi. ***(4)***

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(4) *Claudia Orange, "An Exercise in Maori Autonomy: The Rise and Demise of the Maori War Effort Organisation" in New Zealand Journal of History, Essays in Honour of Sir Keith Sinclair, 1987, Vol 21, No 2, p157.*

15.1 Attempts by government at conscripting Maori for the First World War were

less than universally successful with many Maori still smarting from the confiscations of the 1860s. In 1941 the Native Department did not have a comprehensive list of Maori adults and there were no Maori electoral rolls. Maori MP Paraire Paikea assumed the task of making the list from his own office, with the aid of army area offices. He proposed a network of tribal committees to assist in recruiting and primary production under the aegis of a Maori Parliamentary Committee. From the outset, tikanga Maori, or Maori values and customs, shaped the activities of the MWEO. Within a short period 315 tribal committees channeled through 41 executive committees were operating across all tribes.

15.2 Although it received no government funding the organisation soon expanded beyond a recruitment role, into housing, vocational training, education, land use and the all-important manpower programme. Orange comments:

For the first time, one organisation had successfully co-ordinated Maori efforts and had brought within its ranks all the accepted Maori leaders. Maori were moving into participation in the mainstream of New Zealand life but on their own terms. ***(5)***

15.3 Paikea soon realised that the organisation was the basis for strong post-war Maori governance on tribal lines. However, by late 1943 the Maori MPs committed to the organisation were defending it against government, including the expanding Native Department which saw its influence in jeopardy. Native Minister Mason proposed reviving Maori Councils established by statute in 1900 and potentially dominated by Pakeha, but this was strongly resisted by the Maori Members of Parliament who correctly anticipated a reduction of Maori autonomy.

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(5) *Orange, ibid, p162.*

15.4 In 1945 the Maori Social and Economic Advancement Act retained the status of the Board and Department of Native Affairs and incorporated the

tribal and executive committees of MWEO into its structure. Although the new Act brought the department into much wider contact with Maori the committees were compelled to deal with Native Department officers at district office level. Maori lost at both ends of the structure: participation at local level was circumscribed and removed from the national network, and Maori leadership at the top level was removed. In 1962 the Maori Welfare Act replaced the 1945 Act and established the existing New Zealand Maori Council - based on regions rather than tribal representation. A report in 1986 noted:

*The years since the 1950s have seen a continuation of institutionalised decisions for the Maori people... Decisions are still centralised although some effort has been made to develop consultation. Consultation, though, is not a substitute for autonomy and tribal responsibility... The Maori Council .. is really just another inappropriate structure persisting in the face of Maori experience. Those structures .. are powerless because they ignore the one real fact in the few historical examples of Maori success - that the base of the Maori world is tribal****(6)***.

The Changing Role of Assets-based Maori Governance

16.0 An increasingly assets-based tribal governance has evolved in the 70 years since the statutory creation of the first Maori Trust Board. Initially Maori Trust Boards were created for the distribution to their tribal beneficiaries of annual compensation payments from the Crown. This compensation formed a part redress for failure of the Crown to actively protect rangatiratanga, Maori Article 2 Treaty rights. The payments, which were small enough when established in 1946, are derisory in current dollar terms because the annual grants were not indexed to inflation.

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(6) Orange, ibid, p172, quoting Puao-Te-Ata-Tu: The Report of the Ministerial Committee on a Maori Perspective for the Department of Social Welfare, Wellington, 1986.

16.1 Most Trust Boards, however, have long since adopted a policy of retaining a part of their annual income to build towards a substantive assets base. For example, since 1953 the Ngai Tahu Trust Board has retained two thirds and disbursed the other third to its beneficiaries **(7)**.

This process of cumulative acquisition has moved the Ngai Tahu balance from $83,000 in 1972 to $10,300,000 in 1993 and to $23,400.00 in 1994. The gross figures indicate asset control. The Ngai Tahu net for 1994 is approx $16,700.00. It should be noted that Ngai Tahu is not wealthy compared to other Iwi. Accumulated assets for most Maori Trust Boards now far outweigh the value of the statutory annual compensation payments.

16.2 Investments at first were confined to relatively conservative investment trusts but as the tribal asset base has expanded trust boards have moved into higher risk investments, particularly through the vehicle of tribal companies. A wide range of economic activities are now based on tribal resources, including forestry, commercial fishing and tourism. It is not surprising that as the tribal assets have increased so has tribal assertiveness and autonomy. In effect the Maori Trust Boards have increasingly assumed the traditional role of the tribe in its relationship with the Crown. Over time, issues of accountability in the increasingly literate beneficial base have challenged the Crown-Trust Board relationship. Trust Boards are now much more focused on their relationship with their beneficiaries rather than the Crown despite their legal responsibilities to the latter.

16.3 A key factor which differentiates Maori Trust Boards and tribal companies from other commercial organisations is the communal ownership of the assets. An important semantic change is also occurring. The Trust Boards began by distributing income to relatively passive beneficiaries, but increasingly members of the tribe are viewed as shareholders, many of whom are actively engaged in the trusts' business activities. The trust boards and tribal companies tend to pay a low dividend but carry out a very high development function in training and employment. For example, from a handful of functionaries in 1970, about 600 people are now actively employed in Ngai Tahu Trust Board downstream activities.

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(7) *Ngai Tahu are the main tribe on the South Island of New Zealand, and traditionally occupied most of the island.*

This is a significant step in a society where the dominant culture expects Maori failure and dependency to be the norm. Yet Maori commercial failure still attracts excessive media attention. Relatively minor commercial failures by Maori businesses caught more derisive media attention than the huge losses incurred by major New Zealand companies during the 1987 crash.

16.4 Over the decades the Trust Boards have assumed an even wider mantle, acting as political and legal representatives of the tribes. In particular they have carried out an increased advocacy role on Maori health and education issues.

16.5 However, for all their increased role the Trust Boards are still creatures of central government, being accountable to the Minister of Maori Affairs. Both sides want that relationship to cease so that the boards are directly accountable to their tribal members. Maori are increasingly determined to exercise autonomy over their assets, and development,

16.6 A Bill currently (1995) before Parliament , Te Runanga o Ngai Tahu Bill, has been promoted by one Maori Trust Board intent on its own demise. This Bill aims to abolish any accountability to the Crown and to transfer absolute authority by the Iwi over its own assets and affairs. In the Bill the only role of the Crown is to recognise the new te Runanga o Ngai Tahu as its Treaty partner.

The Bill arises from findings of the Tribunal. It is widely discussed as a possible model for tribal structures, although it is unlikely that there will be a standard form in future.

Maori Incorporations and Maori Trusts

17.0 Although responsible for the interests of private Maori rather than tribally-owned interests, by their very existence these organisations provide a collective point for wider concerns. Some have been very prominent since 1950 in promoting legislative change across a wide spectrum of Maori society and cultural concerns.

17.1 These Maori-owned commercial institutions are characterised by core assets made up of lands which have survived the historic alienation process. Thus, although they are private commercial entities they are typically regional and tribal in character and are seen as the guardians of heritage assets.

They participate in the general economy on an equal footing with Pakeha enterprises and similarly are usually hostile to regulation and monitoring by paternalistic Crown agencies. Some of these businesses have thus become important foci of the internal autonomy debate. Their relatively narrow legal function has assisted in narrowing the perceptions of indigenous governance.

THE TREATY LIVES

The Waitangi Tribunal

18.0 A renascent Maori consciousness in the 1960s reflected a rejection of the assimilation and integration pressures exerted by the dominant Pakeha culture over the last century. New first generation urban radicals pushed for institutional autonomy and forced Pakeha society to confront the call for substantive biculturalism. Their protests challenged the legitimising myths which obscured the Treaty, and especially drew attention to the underlying root of powerlessness - alienation of Maori land. In the 1970s a 600 kilometre land march to Parliament by a large number of Maori, and lengthy occupations of wrongfully alienated Maori land, kept the issues in the headlines.

18.1 These resurgent Maori aspirations were articulated in Parliament by Minister of Maori Affairs, Matiu Rata. The Labour Government finally responded in 1975 with the ground-breaking Treaty of Waitangi Act:

An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty ***(8)****.*

18.2 Functions of the Tribunal include inquiry into and making of recommendations upon any claim submitted to it by any Maori or group of Maori.

18.3 The Act requires the Tribunal to have regard to the two texts of the Treaty, in Maori and English. For the purposes of the Act the tribunal has exclusive authority both to determine the meaning and effect of the Treaty as embodied in the two texts, and to decide issues raised by the differences between them.

18.4 The Tribunal may, if it thinks fit having regard to all the circumstances of a claim, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

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(8) *Preamble, The Treaty of Waitangi Act 1975, p1.*

18.5 In the Manukau Report the Tribunal, noting the emphasis on the "practical application of the Treaty", implied that it was not required to make final

determinations on particular applications in the manner of most Courts.

The jurisprudential point arising is that although a claim may be well founded according to our interpretation of the Treaty, we have still to consider whether in all the circumstances of the case it is practicable to apply the principles of the Treaty to it.....

The legislative intent is clear. Given that the Treaty has not previously been part of the domestic law, we are to consider what steps might be taken to ensure that domestic laws and policies adequately reflect its general principles or what might be done to remedy or compensate for existing breaches ***(9)****.*

18.6 The Treaty of Waitangi Act 1975 stands as one of the more radical pieces of legislation in New Zealand's history. Whether the Labour government fully anticipated the Act's profound repercussions is another matter. At first the Act may have appeared as just another placebo to appease Maori Treaty demands, for the Waitangi Tribunal could only address Treaty grievances post-1975. Yet the majority of grievances originated well before 1975. The Act proved to have some teeth in 1983 when the Tribunal upheld the Te Atiawa tribe's objection to the Motunui petrochemical outfall onto their traditional seafood reefs. The National government, after first rejecting the finding, was obliged to accept it.

18.7 The 1975 Act proved to be the thin end of the wedge, for the Labour government opened Pandora's Box with the Treaty of Waitangi Amendment Act 1986 which allowed retrospective claims to 1840. The earlier Act pales into significance in the shadow of its radical amendment. Initiated by the constitutionalists within Parliament, the amendment was a further response by the Labour government to Maori aspirations. Maori replied with a flood of 150 claims within the next two years. By November 1993 the Tribunal had reported on 46 Treaty claims on matters including land alienation, sewage disposal, thermal power, fishing, geothermal resources and the Maori language.

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(9) *Waitangi Tribunal, Manukau Report, Wellington, 1985, p64.*

18.8 There is, however, no statutory compulsion for Government to act on Waitangi Tribunal recommendations (See also 22.4 to 22.6). As might be expected the government of the day considers its response after policy

advice from, among others, the Treaty of Waitangi Policy Unit within the Department of Justice. There are, of course, other political realities to take into account: the financial cost to redress past grievances; the widely accepted doctrine that remedy of one injustice should not lead to another injustice; and the political fallout from a dominant culture which is often very unsympathetic to Treaty claims, tending to view any redress in zero-sum terms; that any compensation to Maori must mean an equivalent loss to Pakeha society. New Zealand is a long way from accepting that claim settlement with Maori is a significant investment. Politically, it is seen entirely in financial cost terms.

Treaty Principles

19.0 Decisions from the Courts and the Waitangi Tribunal have changed Treaty perceptions, particularly with their emphasis on Treaty principles. Rather than interpreting the Treaty on narrow literal grounds the inherent principles noted by the Tribunal have achieved greater status:

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga.

19.1 Derived directly from the provisions of articles 1 and 2, the Tribunal has viewed this principle as paramount, describing it as over-arching and far-reaching. In their Ngawha Geothermal Resource Report the Tribunal recognised four integral components to that principle:

* **the Crown obligation actively to protect Maori Treaty rights; that fiduciary duty includes**: the need to ensure that Maori are not unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences; and that the Crown cannot avoid its Treaty duty of active protection by delegation of responsibility for the control of natural resources to local government, so that the duty to actively protect is diminished.

* **the tribal rights of self-regulation**; an inherent element of rangatiratanga, the tribal control of Maori matters.

That control includes the right to regulate access of tribal members and others to tribal resources; and that the right of the Crown to make laws for conservation control and resource protection should not diminish the principles of article 2 or the authority of the tribes to exercise control. Crown sovereignty is limited by the right reserved in article 2.

* **the rights of redress for past breaches**; the Crown is obliged to make redress where it has failed to actively protect rangatiratanga.

* **the duty to consult fully** with Maori before the Crown makes any decisions which may impinge on the rangatiratanga of the tribe or hapu.

The principle of partnership

19.2 The Court of Appeal, in its notable 1987 New Zealand Maori Council judgement, established the principle of partnership as the Treaty's primary principle. It requires Maori and Pakeha to act towards each other reasonably and in good faith. This finding articulated the Maori/Crown relationship in terms appropriate to the relationship between partners in a law practice and established key principles, such as compensation for breach of faith and notions of fiduciary duty.

Principles for Crown Action on the Treaty

20.0 In 1989, Prime Minister David Lange released *Principles for Crown Action on the Treaty of Waitangi* ***(10)***. The Government claimed that these five Crown principles were not an attempt to rewrite the Treaty but to set out how the Government would act when dealing with issues arising from the Treaty, for example recommendations from the Waitangi Tribunal. He claimed that the principles were consistent with the Treaty, and observations made by the Courts and the Waitangi Tribunal.

20.1 **Principle 1:**

The Principle of Government or the Kawanatanga Principle - the Government has the right to govern and to make laws.

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(10) *Department of Justice, Principles for Crown Action on the Treaty of Waitangi, Wellington, 1989.*

20.2 **Principle 2:**

The Principle of Self-Management or the Rangatiratanga Principle - the iwi have the right to organise as iwi, and under the law, to control their resources as their own.

The working out in practice of the balance between the two Articles must depend upon a case by case consideration. Clearly, "te tino rangatiratanga" (or "full chieftainship") will generally take precedence in matters concerning material and cultural resources and taonga which have been retained. Equally, however, where there can clearly be demonstrated a danger to all, or a general need which can only be managed at the level of national action, the Crown must exercise its powers on behalf of all New Zealand citizens ***(11).***

20.3 **Principle 3:**

The Principle of Equality - all New Zealanders are equal before the law.

20.4 **Principle 4:**

The Principle of Reasonable Cooperation - both the Government and the iwi are obliged to accord each other reasonable cooperation on major issues of common concern.

It is cooperation which signals the difference between the distinctive cultural development guaranteed by the Treaty (if desired on the Maori side) and that "apartheid" which has rightly attracted the condemnation of the modern world ***(12)***.

20.5 **Principle 5:**

The Principle of Redress - the Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.

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(11) *ibid, p11.*

(12) *ibid, p14.*
The Crown accepts a responsibility to provide a process for the resolution of grievances arising from the Treaty. This process may involve courts, the Waitangi Tribunal, or direct negotiation ***(13)***.

20.6 The key element of the ACrown Principles@ is that the power of government is constrained by Article 2. Their soundness in terms of jurisprudence is reflected by the Courts which still quote them in decisions. Indeed the

Courts would be seen to be failing in their duty not to have regard to them.

The Constitutional Status of the Treaty

21.0 The findings and recommendations of the Waitangi Tribunal, coupled with those of the Courts have served to raise the profile of the Treaty and underline its legitimacy to the general public. This legitimacy, as might be expected, is still denied by a substantial minority.

21.1 Earlier attempts by the Crown to by-pass its obligations have met with stern rebuke from the Courts. In the benchmark unanimous 1987 Court of Appeal decision the President, Sir Robin Cooke stated:

Unchallenged violations of the principles of the Treaty cannot be ignored. Available means of redress cannot be foreclosed without agreement... An obligation has to be seen to be honoured. The principles of the Treaty have to be applied to give fair results in today's world ***(14)***.

21.2 Sir Robin Cooke also found that where the Waitangi Tribunal had found some merit in a claim and recommended redress, then the Crown should act accordingly unless grounds could be found for a reasonable partner to withhold it. He could not foresee, however, that justifiable grounds were ever likely to arise. The Waitangi Tribunal, commenting on that judgement said:

It would appear to follow from this ruling that failure by the Crown, without reasonable justification, to implement the substance of a tribunal recommendation may in itself constitute a further breach of the Treaty. It could well be inconsistent with the honour of the Crown ***(15)***.

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(13) *ibid, p15.*

(14) *"Tainui People Win Appeal" Evening Post, 3 October 1989, p3.*

(15) *Waitangi Tribunal, Ngai Tahu Report, Wellington 1991, p244.*

21.3 An irony is that the Courts, after more than a century of being one of the main agents of land alienation and diminution of Maori Treaty rights, now offer increasingly firm protection of those rights.

21.4 A growing recognition by the Courts as to facts in Tribunal hearings has seen a reciprocal response from the Tribunal. Because the Courts tend to accept, without question, the factual evidence from the Tribunal, the Tribunal has begun to place less weight on oral evidence from Maori elders and more on the quality of written evidence before it. That is, claimants are

tending to present their evidence to the standards of the High Court. The implicit standing of the Tribunal's findings in the High Court has in turn raised the constitutional status of the Treaty.

21.5 For example, a combination of Waitangi Tribunal findings on the Muriwhenua and Ngai Tahu Sea Fisheries claims was not even challenged by the Crown which moved directly to negotiation and settlement of sea fisheries with Maori. Concession was crystallised in the resultant 1992 Treaty of Waitangi (Fisheries Claims) Settlement Act which stated in section 9 Effect of Settlement on commercial Maori fishing rights and interests:

All claims (current and future) by Maori in respect of commercial fishing.... having been acknowledged... are hereby finally settled; and accordingly

The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Maori in commercial fishing...

21.6 Whereas the preliminary Settlement Deed spoke of extinguishing Treaty rights to fisheries, Parliament, in the ensuing legislation, chose to fulfill, rather than extinguish them.

Since the Treaty of Waitangi Act 1975 the Treaty's status has been enhanced by incorporation into other statutes such as section 9 of the 1986 State-Owned Enterprises Act which provides that nothing in the Act shall permit the Crown to act in a manner which is inconsistent with the principles of the Treaty. Under the Act the Crown proposed to transfer certain Crown-owned land to state-owned enterprises. The New Zealand Maori Council challenged these actions as being inconsistent with section 9 of the empowering act.

In an historic decision the Court of Appeal found in favour of the claimants. The ensuing 1988 Treaty of Waitangi (State Enterprises) Act empowered the Waitangi Tribunal to make binding recommendations for the return to Maori ownership of any land or interest in land transferred to State enterprises under the Act. This, the first occasion where the Tribunal's recommendations were binding, further enhanced the Treaty's constitutional status.

21.7 The Court of Appeal's role in raising the constitutional status of the Treaty is highlighted in legislative repercussions from another judgement, with huge potential beneficial effects for Maori from the harvesting of Crown exotic

forests. The Crown Forest Sales Act recognised that much of the land which the government wanted to sell was under lease from Maori, or under claim at the Waitangi Tribunal. As a result of negotiated settlement with Maori the cutting rights were privatised but a Crown Forest Rentals Trust was created to accumulate rentals paid by the cutters. If the Waitangi Tribunal finds in favour of Maori then the accumulated sum goes to the successful claimants. Again, in this case the Waitangi recommendations are mandatory. Former Finance Minister Ruth Richardson, no Article 2 devotee, made a number of speeches against these protective provisions claiming that they constrain the economic sovereignty of the Crown. The current Act threatens her concept of a finite compensation envelope.

21.8 Treaty sections in other legislation have become more common, but the semantics of those sections often imply a permissive, rather than binding obligation on decision makers. Section 4 of the Conservation Act 1987 states that "This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Other acts are more permissive and require decision makers to "have regard to..." or "take account of..." the Treaty or its principles. Section 8 of the 1991 Resource Management Act states:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

21.9 This act is important in the issue of indigenous governance for it has a direct bearing on the exercise of rangatiratanga. Maori management and control of their resources is strongly influenced by the powers given to local government by the Act.

It would be incorrect to assume that local government officials, in general, are as familiar or sympathetic to Treaty issues as the bureaucrats and central government politicians who shaped the act. A wide gulf in perceptions exists between the two and Maori still find widespread resistance to, and ignorance of, Treaty issues by decision makers in the provinces.

21.10 In its 1993 Ngawha Geothermal Resource Report the Tribunal found that the provision in the Resource Management Act is too permissive and recommended that Section 8 be amended to:

In achieving the purpose of this Act, all persons exercising functions and

powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

21.11 The tribunal argues that decision makers are not currently required to ensure that appropriate standing is accorded to Maori Treaty rights, so that those rights are in danger of being subsumed by other considerations in the Act. That consequence would mean that Maori Treaty rights are not given full article 2 protection.

21.12 The concept of the Crown's duty of fiduciary protection has gained a higher profile in the last decade. As the Crown Principles confirm, the state has a dual and indivisible duty: on the one hand resources must be protected in the national interest; but on the other the Crown must actively protect the Maori interest in that resource. As expressed in the Ngai Tahu Sea Fisheries Report the Crown has an Article 1 duty to protect those fish off the Ngai Tahu coastline in the interests of the nation. However, they have an explicit fiduciary duty to protect the Article 2 Maori interest in that resource. For example, the Crown, as part of New Zealand's international stance on marine mammals, has a duty to protect the whales off the Kaikoura coast. At present Ngai Tahu have the only licenses to conduct very popular whale-watching tours at Kaikoura. Ngai Tahu claim that even though the Crown has the overriding duty to protect the whales, they are Ngai Tahu whales, under Article 2, as long as they are in territorial waters off the Ngai Tahu coast. Not all New Zealanders see it that way.

21.13 In the main Ngai Tahu Treaty claim they argued unsuccessfully that the Crown should be held responsible for damage to mahinga kai - traditional food resource areas - caused by government land improvement schemes. The Tribunal found that an obligation could not rest on the Crown to compensate Maori today for the effects of such damage to mahinga kai. However, the Crown must recognise the damage and take steps to enhance the capacity to give reasonable practical effect to Article 2 rights in present circumstances. For example, the Tribunal said that in any future work on the Opihi River - long degraded by irrigation take-off - the Crown should take active steps to ensure river flows returned to sustainable fish levels. New work on the Opihi is designed to accommodate that recommendation; a restoration of the Maori interest is being built into the ongoing activities. Similar post-Tribunal activities have resulted in the Kaituna River, now cleaner than it has been for 50 years, being restored as a food gathering source.

The Treaty Resolution Process: A Review

22.0 Significant changes in the status of the Treaty in recent years are the result of several inter-related processes:

* legislative action;

* findings and recommendations of the Waitangi Tribunal;

* decisions in Common Law made by the Courts;

* the question of claims settlement after negotiation between Maori and the Crown; and

* final settlement of claims.

22.1 Realising from the outset that their recommendations are not binding on the Crown, the Tribunal has usually evaded recommendations of a settlement outcome. Their preference is for Maori and the Crown to negotiate, after their report, towards a settlement. Similarly, the High Court tends to make its findings on law before sending Maori out to talk to the Crown.

22.2 Treaty resolution is not confined to questions such as, "What is the status of the Treaty?", "What is the Law?", and "What are the facts?" The ultimate question is "What are we going to do about it?". A general acceptance has evolved that final outcomes are located in the political arena, rather than in constitutional or legal areas.

Typically, the Crown accepts findings of these bodies as to facts, but on reaching agreement with Maori usually prefaces the final statement with the qualifier, "... for the purpose of this agreement..". The Crown is consistent in its efforts to avoid precedent.

22.3 The Crown is resistant in the extreme to putting itself in a position where it surrenders its power of decision to the Courts as to settlement of its Treaty obligation. It is prepared to place itself before the Courts as to facts, but not for outcomes. In that sense the constitutional status of the Treaty remains limited by the current degree of political inclination to obey it.

22.4 Three acts, the Crown Forests Sales Act, Treaty of Waitangi (State Enterprises) Act, and Treaty of Waitangi (Fisheries Claims) Act, result from legal proceedings in the Courts. These have each been followed by a negotiated settlement between Crown and Maori. After reaching

agreement, the settlement has been taken back to be endorsed by the Court of Appeal, in respect of which the Court of Appeal has reserved leave to apply. In other words, if the Crown were to break its contract by attempting to by-pass its obligations with new legislation, or other machinations, Maori could have recourse to an immediate return to Court. Given the naturally tensioned relationship in constitutional matters between Parliament, the Executive and the Courts, the Court of Appeal's response could be expected to be thunderous.

22.5 It should be noted that the Crown Forests Sales Act and the Treaty of Waitangi (State Owned Enterprises) Act provide the Tribunal with powers of determination and decision, as distinct from recommendation - its usual authority. The former is potentially capable of forcing very large sums of compensation from the Crown whereas the latter seems more readily overcome by State Companies wishing to dispose of assets.

A major AForest & Act@ case is currently (1995) being mounted by Ngai Tahu. The Crown has informally threatened to statutorily abolish the Act should the Tribunal find against it. That would provoke substantial political and legal disturbance.

22.6 These three Acts are the only Acts relevant to the Treaty where the Crown cannot evade its obligations, if it sought to do so.

However, if the negotiation and settlement process were not able to be properly fulfilled because the Crown used its legislative powers to by-pass its obligations, then the status of the Treaty would be without substance. An essential component of the Treaty's status is the operational capacity to negotiate and reach settlement of claims brought under the Treaty. The weak link remaining is the amount of discretion available to the Crown in this process. As long as this potential Achilles Heel remains, then to some degree the elevated status of the Treaty is illusory notwithstanding political assertion that it is seen as the "founding document of our nation".