JOINT METHODIST-PRESBYTERIAN
PUBLIC QUESTIONS COMMITTEE

Constitutional Reform in Aotearoa

May 1991

Introduction

At the 1990 Methodist Conference the Public Questions Committee was asked to prepare a report on proportional representation. For a number of years our Committee has supported a change to proportional representation. However in recent years our respective churches have also made commitments to the Treaty of Waitangi (Tiriti o Waitangi). We also seriously heeded the Te Runanga call not to vote in the 1990 election. In view of these recent events we have sought to bring a Tiriti analysis to bear on the question of political representation. While many see proportional representation as a much fairer process than our present system, we feel that from a Tiriti perspective it misses the point about tino rangairatanga, or Maori sovereignty.

This paper is divided into two sections. The first deals with a Tiriti analysis of proportional representation. The second section outlines the pros and cons of the first-past-the-post system and proportional representation, and details types of proportional representation.

In the life of the Public Questions Committee we have found that our perspective has changed radically over time on some issues. We encourage the church to be open to change on the issue of constitutional reform and we welcome your comments or queries. Further background reading on the issue of tino rangatiratanga can be obtained from: The Research Officer, Joint Methodist Presbyterian Public Questions Committee, PO Box 9049, Wellington.

A Tiriti Analysis of the Present System of Representation and Proportional Representation

TeTiriti O Waitangi is the primary constitutional document of Aotearoa. The Maori version of Te Tiriti confirmed te tino rangatiratanga over all things Maori. It granted to the Crown kawanatanga, or limited power, for the exercise of control over new settlers. However, on the basis of the English text of Te Tiriti (or their own unilateral proclamation of sovereignty), successive governments have maintained that Maori ceded their sovereignty to the Crown. This has been the basis of which they claim their legitimacy. It is however incorrect, for Maori never relinquished their tino rangatiratanga. Rather it was taken from them. Governments throughout our history have denied Maori their tino rangatiratanga.

The acid test of any constitutional reform in Aotearoa is whether it is Tiriti based, and in particular whether it recognises and confirms tino rangatiratanga. Clearly the present parliamentary system does not. What about proportional representation? The short answer is that it does not. While the advocates of

proportional representation argue that Maori will be better off under proportional representation because they will have more seats in parliament, this begs the question of Te Tiriti and tino rangatiratanga. Under proportional representation the principle of ensuring that there is always a Tauiwi (all non-Maori people living in Aotearoa) majority in control will not be altered. For Maori, proportional representation only means more of the same.

What is needed, and is sought by many Maori, is a Tiriti based system of government. To this end Te Runanga Whakawhanaunga I Nga Hahi (The Maori Ecumenical Council) adopted a 'Don't Vote – Register Te Tino Rangatiratanga campaign at the last election. They have sice called for a Constitutional Conference to discuss Maori political representation in relation to Te Tiriti. A model that is Te Tiriti based and that recognises tino rangatiratanga has been discussed. It advocates dual Cabinets – Maori and Tauiwi. Each makes policy for its own constituency, but they interact at the points of power sharing, dialogue, and Government action.

Given the expressions of commitment to the Treaty of Waitangi made by out churches, we are called to judge the adequacy of proportional representation in terms of Te Triti. When this is done proportional representation is found to be wanting, because it is not Tiriti based and does nothing towards restoring tino rangatiratanga.

First–Past–The–Post vs P.R.

What is proportional Representation?
Simply defined: The parliamentary seats obtained by political parties are proportional to the votes cast for those parties.

Why is there a renewal of interest in proportional representation?
Many people are concerned that governments in New Zealand frequently rush through legislation and have the power to do so because out voting gives them and inflated majority. They argue that the first past the post system clearly fails to provide fair and effective political representation.

The First Past the Post System
The first past the post system is so-named because there are no provisions for second or third placegetters. It is also referred to as the simple plurality system as each elector has only one vote cast in one electoral district. Electorates are therefore called single-member electorates. In a first past the post system there is no stipulation about a winning margin an MP must get. If there are several candidates from different parties contesting one electorate, the winner might (and probably will) get less than 50% of the total votes cast. This can be accummulated over the whole country, with the party having the majority in the House of Representatives not having a majority of votes cast nationwide. For example, in the 1990 election:

National	48.7% votes	69.0% seats
Labour	34.5% votes	29.7% seats
Green Party	6.6% votes	no seats
New Labour	5.2% votes	1.3% seats

Arguments in favour of the First Past The Post System

1. **Simplicity of Voting Procedure**

   Voters are not confronted with a list of complex choices. All they have to do is to tick the candidate they want and this makes it clear fairly soon after the election who has won.

2. **Produces a Clear Stable Majority**
   Because this system usually produces a clear majority in the House of Representatives, it is argued that it will produce strong, stable government and a Strong Opposition.

Arguments Against the First-Past-the-Post System

1. **Produces Minority Government**

As the winning party is often elected with less than 50% of the vote, the majority Parliament is artificial and does not necessarily reflect the majority in the country. The simple plurality system can therefore turn democracy into minority rule.

2. **Broadly Based Minor Parties are placed at a Service Disadvantage**

It is extremely difficult for minor parties to get established in NZ, particularly if they have widespread support eg: attain 20% of votes cast in every electorate in the country. For example:

1981	Social Credit	20% vote	3% seats
1984	Social Credit	8% vote	3% seats
1984	NZ Party	12% vote	no seats

In effect, third party votes are wasted. They face a quota of at least 25% nationwide support before they start to receive fair representation. This is an enormously high quota.

3. **Winning Party has Unbridled Power**
Because the first-past-the-post-system has a winner-takes-all outcome, an elected (minority) government with a large majority can force through legislation leaving Opposition virtually powerless.

Proportional Representation

Under a system of proportional representation, the number of seats gained reflects the number of votes cast. In most PR systems, more than one MP is returned for each electorate and they become what is known as multi-member electorates. Under this system it is probable that there will not often be a clear majority for one party with the most votes can either:

A. Form a minority government
B. Invite another party(s) to form a coalition government

In either case, Parliament takes on its proper role as the arbiter of government policies, instead of being a rubber stampe as it is in the Westminster system.

Types of Proportional Representation

a. **Single Transferable Vote (STV)**
This system is used to elect the parliament in Ireland, the Senate in Australia and the Lower House in Tasmania. This system involves a multi-member electorates of 3-7 members each. Candidates are ranked by the voter in order of preference. However, to be elected a candidate needs a quota of votes e.g if there are 5 candidates to be elected, each one needs at least 1/6th of the vote. The advantages of this system are that at least one of the voter's preferences will have some effect on the result, and it avoids the intervention of parties into the list preparation process. The main disadvantage for NZ is that the population base combined with the large geographical area is too small to sustain multi-member electorates of the proportions required (3-7).

b. **Mixed-Member Proportional System (MMP)**
This system has been used in West Germany since 1953, and was the type of PR recommended by the 1986 Royal Commission on Electoral Reform. Seats are allocated to parties in proportion to their share of the total vote, subject to a basic threshold (the Royal Commission recommended 4%). The 4% threshold ensures against party fragmentation. The Royal Commission also suggested that the number of MPs in New Zealand should be increased to 120. Under MMP there would be two types of MP: 60 local representatives elected by constituencies as at present and 60 members added to give each party representation in proportion to its total vote. Each person has two votes:

   a. the first vote chooses a government – each vote would contribute equally towards the total number of seats held by parties in Parliament.
   b. the second vote chooses a local MP – it allows a voter to support the best local candidate. Independents could be elected in this way.

The party vote is used to determine proportionality. If a party gets 20% of the party vote, but only wins 2 out of the 60 electorates, that party will be entitled to a further 22 seats from the party lists to bring them to a total of 24 seats out of 120, in other words, 20% of all the seats. In this way, the list seats are used to 'top up' the parties to proportionality.

ARGUMENTS IN FAVOUR OF PROPORTIONAL REPRESENTATION

1. **A fairer Process of Political Representation – A Real Choice for the Voter**
   This system would more adequately reflect the diversity of views of the majority of people in NZ. Under proportional representation there would be few wasted votes (in the existing system second and third choices are not taken into account). The composition of Parliament would reflect voting figures.

2. **Fairer Representation of Third and Minor Parties**
   Under PR third and minor parties would not be disadvantaged, subject to a 4% threshold.

3. **Encourages a Spirit of Co-operation and Consultation**
   In a Parliament elected by PR there would be a wider range of debate and greater scrutiny of the executive. This would, in turn, encourage voter participation and reverse the present trend of voter malaise and discernment.

4. **Women Would Benefit under Proportional Representation**
   In many countries that have PR, women are much better represented that under the present first-past-the-post system. In Sweden, almost 40% of all MPs are women. It has been argued that PR is the biggest electoral improvement for women since gaining the right to vote last century.

5. **Less Policy Oscillation**
   In the first-past-the-post system, a minor shift in voter preference can lead to major shifts in policy should a change of government occur. Under PR, minor shifts in voter preference usually lead to minor shifts in overall policy direction.

6. **Independents Can Be Elected Under Proportional Representation**
   An Independent MP could be elected from the local electorate seats because party affiliation of constituency MPs is not as important under MMP as it is under the present system. NZ has not elected an Independent MP since the 1940s.

Arguments Against Proportional Representation

1. **PR Would Produce Excessive Political Fragmentation**
   One fear is that there will be an inability to decide anything on some controversial matters.

   However, the present system encourages political polarisation (commonly known as adversarial politicts). The political process is based on conflict rather than compromiselco-operation. Proponents of PR argue that it would produce a progressive consensus government which would reduce the chance of strong left and right wing governments taking power, as there would be necessary negotiations with minor parties. PR proponents also claim it would produce tolerant government as, either in the case of a minority or coalition government, they would have to spend a lot of time talking, listening and negotiating with parties holding differing viewpoints.

   - **PR Gives Disproportionate Weight to Minor Parties**
     It is often thought that a system of PR will result in a situation where governments are at the mercy of minority groups.

     From overseas experience, it seems that minor parties do not generally try to overplay their hands as this would be to their long term disadvantage.

   - **Coalition Governments are Associated with Instability and Backroom Bargaining**

Italy and Israel have often been cited as cases in point.

Italy and Israel have an effective threshold of less than 1%, and this has led to a multitude of small parties winning representation. This is why the Royal Commission on Electoral Reform recommended a 4% threshold for NZ. Other small countries, like New Zealand, have operated successfully under a system of proportional representation with an approximate 4% threshold in place eg: Norway, and Sweden. West Germany has had a majority since 1953 (over 50% of the vote), although always with two or three parties in coalition. (NZ has not had a majority government since 1951).

- **The Party List Would be Determined by Party Headquarters and therefore Parliament would be Controlled by the Parliamentary Party**

This is seen as unacceptable in a country where many people do not belong to political parties. It is claimed that PR would also change the role of MPs – they would merely become 'mouthpieces' for their party executive.

Candidate selection is a function of the party constitution, not the electoral system. It is problem under any system, PR or first-past-the-post. Te Atatu (Labour), New Plymouth and West Auckland (National) were evidence of this in 1990. The Royal Commission recommended that list candidates be democratically elected to the list either directly by party members or by delegates elected by party members.

What is happening currently with Proportional Representation?
The Government is promising a binding referendum on 'methods of electing' MPs by the end of 1992. However, they are proposing to offer a multi-choice option, where several electoral reform options will be voted on. Anything but a simple choice between the present system and MMP can be seen as an attempt to frustrate change. A simple yes-no choice between MMP and first-past-the-post will give a clear indication of public opinion. A choice between five electoral reform measurers would simply divide and confuse the issue and a majority outcome would not be possible.

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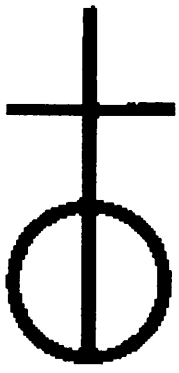
What you can do as a church member to support a Tiriti approach to political representation

- Write to the Prime Minister, the Rt Hon J B Bolger, outlining your position and stating your support Te Runanga Whakawhanaunga I Nga Hahi call for a Constitutional Conference.
- Write to your local Member of Parliament in a similar vein.

For further information contact: The Research Officer, Joint Methodist Presbyterian Public Questions Committee, PO Box 9049, Wellington.



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TINO RANGATIRATANGA

Revised July 1993

This paper discusses tino rangatiratanga which is central to a Maori understanding of the Treaty of Waitangi. It refers to Maori control of all things Maori - Maori sovereignty. Tino rangatiratanga stands in contrast to kawanatanga which Maori have always seen as giving only limited power to the Crown. However history has seen the displacement of tino rangatiratanga by a form of kawanatanga which assumes that the Crown has absolute authority over all people and all matters in this land.

The present National Government like its Labour predecessor has no place for the recognition of tino rangatiratanga in its policies. Both have acted on the mistaken assumption that Maori ceded their sovereignty. The Courts have reflected this view, interpreting the Treaty in a way that upholds Crown sovereignty and rules out tino rangatiratanga The Waitangi Tribunal has found itself bound by the Court of Appeal, with its findings now based on a cession by Maori of their sovereignty. Its powers have also been curtailed by government. Labour redefined the Treaty with its 'Principles of Crown Action on the Treaty of Waitangi. National went further in seeking to ensure these principles were in accordance with its policies. The Ka Awatea policy has been dropped. The Sealord deal has been found sadly lacking. Now the government proposes implementing a policy for settling all Treaty claims, that is a further denial of tino rangatiratanga.

The policies of both National and Labour with their failure to recognise tino rangatiratanga have led to the continued subordination of Maori. This is being increasingly challenged by the assertion of tino rangatiratanga, which continues to be the Treaty issue for the 1990's.

Introduction

In 1989 the Conference of the Methodist Church passed a resolution relating to 'tino rangatiratanga'. The resolution was in two parts. The first expressed "full and unqualified support for 'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa' o nga iwi Maori as expressed in Article 2 of the Te Tiriti o Waitangi (Maori Version)". The second expressed the concern of the Conference at the continued erosion of te tino rangatiratanga by successive governments and the Courts since 1840. Leaders of the Churches in their 'Statement for 1990' said that they accepted the challenge to work in ways which honour the Treaty, including recognition that Maori possess tino rangatiratanga. The Joint Methodist-Presbyterian Public Questions Committee agreed to make consideration of the meaning and significance of tino rangatiratanga a priority in 1990. It has been a priority for its bicultural work group.

The 1993 General Assembly of the Presbyterian Church, affirmed the continuing work of the Committee on te tino rangatiratanga and recommended that parishes continue to address and discuss this issue.

The original paper appeared in September 1990. It was updated in January 1992. Much has happened in this area in the past eighteen months making a further update desirable. In order to accommodate new material without adding unduly to the length of the paper, some of the earlier material has now been presented in summary form.

The Meaning of Tino Rangatiratanga

The word rangatiratanga comes form the word rangatira which is most often translated as chief. Rangatiratanga which refers to chieftainship, approximates to oversight, responsibility, authority, control, sovereignty. It is a word used in the Lord's prayer for kingdom, which is a word very close in meaning to sovereignty. The word tino is an intensive or superlative, meaning variously: very, full, total, absolute. So tino rangatiratanga approximates to total control, complete responsibility, full authority, absolute sovereignty.

The term tino rangatiratanga was used in the Declaration of Independence of 1835 which recognised Nu Tireni (New Zealand) to be a sovereign and independent nation where power and authority rested with the rangatira. The English version of that declaration stated that "all sovereign power and authority resided entirely and exclusively" in the rangatira.

Te Tiriti o Waitangi of 1840 also used the term tino rangatiratanga with the promise that it would be guaranteed to Maori. In the words of the English translation of the Maori version of the Treaty, the Queen agreed to the rangatira and the iwi retaining full chieftainship (tino rangatiratanga) of their lands, their villages and all their taonga including the Maori way of life.

Rangatiratanga and Kawanatanga

The Maori version of the Treaty of Waitangi clearly confirmed tino rangatiratanga or Maori sovereignty over all things Maori (Article 2). It granted to the Crown, kawanatanga, a word which is a transliteration of the word governorship (Article 1). Maori would have been in no doubt as to the meaning of rangatiratanga and, on the basis of its being guaranteed in the Treaty, willing to sign it. In 1840 Maori had no desire and no need to give away their tino rangatiratanga. What they gave to the Crown was limited power, to control new settlers. That power was kawanatanga. In retaining tino rangatiratanga it was clear to Maori that their ability to control their own destiny was not diminished. In granting kawanatanga they saw that they would benefit from limited controlled immigration and the introduction of new technology Article 3 of the Treaty did not make Maori into British subjects. It recognised the continuing right of Maori to enjoy their own laws, customs and lifestyle, just as British citizens enjoyed their own. This was reinforced in Article 4 (unwritten) which stated that the Governor would protect Maori ritenga or custom.

However, the English text of the Treaty which successive governments have relied on to this day for their legitimacy, or their own unilateral proclamation of sovereignty, assumes that Maori gave away all their sovereign power to the Crown. Such an idea would never have been acceptable to Maori. 200,000 Maori had no need whatever to concede any power to just 2,000 settlers. They signed the Maori text because they knew what it meant. Their tino rangatiratanga was retained.

On the incorrect assumption that Maori ceded sovereignty (tino rangatiratanga), successive governments have set about usurping tino rangatiratanga. The denial of the right of tino rangatiratanga since 1840 has been expressed in legislation, decisions of the Courts, and most recently in attempts to rewrite the Treaty in the form of principles.

Tino Rangatiratanga and the Labour Government 1984-1990

The coming to power of the Labour Government in 1984 coincided with a growing call for political and economic autonomy by Maori. This aspiration required the return to Maori of resources of land, forests, fisheries, and waterways unjustly acquired by successive governments in violation of the Treaty. This resulted in a clash with Rogernomics which envisaged the transfer of significant resources of the state to the private sector. The assets to be transferred were often the very ones Maori had a justifiable claim to. The Crown's claim to absolute sovereignty was on collision course with the Maori desire for restoration of their tino rangatiratanga.

The result was that Labour distanced itself from its earlier strong Treaty rhetoric. When Maori objections to the transfer of state assets to the private sector were ignored, Maori went to the courts. This resulted in the government backing right off any commitment to the Treaty. Eventually it repackaged the Treaty in the form of 'Principles for Crown Action on the Treaty of Waitangi'. This unilateral action was designed to ensure the supremacy of Crown sovereignty. The talk was now of the symbolic settlement of Treaty issues with no place for tino rangatiratanga

At the Waitangi Day celebration in 1990 the Bishop of Aotearoa made it clear that Maori grievances remained unaddressed. This was followed by the call from Te Runanga Whakawhanaunga I Nga Hahi at the October general election not to vote but instead to sign a tino rangatiratanga register. Te Runanga also called for a constitutional conference to work towards a Treaty based constitution. This suggestion was dismissed by both the Prime Minister and Leader of the Opposition.

Tino Rangatiratanga and the National Government 1990-1993

The National Government came to power with a weak recognition of the Treaty as New Zealand's founding document, but

with policies that were deeply anti-Treaty. Like Labour it adhered to the view that Maori tino rangatiratanga would not be recognised. All sovereignty was to remain with the Crown.

Upon taking office the Minister of Maori Affairs, Winston Peters commissioned the 'Ka Awatea' report which concerned itself with Maori socio-economic disadvantage, dealing with the effects and not the causes of 150 years of colonisation upon Maori. Maori were to be left dependent on the goodwill of the government. The issue of tino rangatiratanga was ignored. Nevertheless the report received widespread support amongst Maori, being seen as a step in the right direction rather than the final solution, and preferable to the market policies that were the alternative.

'Ka Awatea' did not have an easy ride through cabinet as it promoted a heavily interventionist approach to Maori socioeconomic disadvantage at a time when those at the economic helm were seeking to have government withdraw from its social and economic responsibilities to the disadvantaged. The report's main points of principle survived, but the details of the program were left vague enough for National to proceed with plans to mainstream Maori Affairs and devolve responsibilities but with few resources and powers, to approved organisations.

'Ka Awatea' envisaged programs designed to meet the needs of Maori education, health, employment and economic development. This did not happen. With the dumping of Winston Peters by the Prime Minister, significant aspects of 'Ka Awatea' were also dropped. Refusal to reinstate Winston Peters in response to Maori protests was taken to be a sign that the Prime Minister did not want to take Maori seriously and would listen to them only on a selective basis.

A Ministry of Maori Development was established to replace the existing state agencies for Maori. The enacting legislation for the new ministry focussed on addressing the special needs of Maori while ignoring their Tiriti right to te tino rangatiratanga. Indeed the Tiriti is not mentioned in the legislation. It has done little more than restructure the previous bureaucracies to promote the governments own agenda.

The new ministry did not develop any new programs and those which it inherited were immediately transferred to mainstream government departments. Funding for 'Vote Maori Affairs' was slashed and massive staff lay-offs followed. The ministry is not able to effectively monitor the way in which other government departments seek to meet the needs of Maori. It has been reduced to providing general policy advice on matters affecting Maori.

A Ministry of Maori Development publication commissioned by kaumatua advising the ministry, which dealt with Maori leadership and government decision making, was withdrawn from circulation at the beginning of 1993 on order of the minister, because it was critical of government methods of negotiating with Maori. The activities of the ministry will clearly be reined in unless they reflect the views of the government. The ministry has increasingly been assigned a carefully prescribed role of limited effect and has seriously underspent its budget.

Meanwhile government has been pursuing its reform and restructuring agenda encompassing housing, education, health, welfare, and electricity distribution. Benefit cuts were made unilaterally with a disproportionately negative impact on Maori. Health reform legislation reflects a lack of consultation with Maori. Maori have felt excluded from restructuring in the electricity distribution sector. Bulk funding of teachers has been deemed detrimental to Maori education. Restructuring in the Housing sector has taken it outside the State Owned Enterprises Act with its provision for the Waitangi Tribunal to make binding decisions in the case of disputed assets. Enabling legislation for the reforms typically makes no reference to te Tiriti o Waitangi, much less the Maori right to te tino rangatiratanga.

Early in its term of office government declared a goal of settling all Treaty claims by the year 2000. Late in 1992 the government was presented with a means of putting an end to fisheries claims through the Sealord deal. All Maori claims over commercial fishing are now deemed to be fully and finally settled. No case can be tested either before the courts or the Waitangi Tribunal. So the Sealord deal cannot be challenged. Traditional Maori fishing rights were protected under section 88 (2) of the Fisheries Act which has now been repealed. Such rights will now be the subject of regulations determined by government. Tiriti fishing rights have been redefined to mean a share in a commercial fishing company driven by profit and which might have some trickle down benefit for some iwi, and the right to be consulted over various fisheries management decisions on the government's terms. Consultation will be with persons the government deems appropriate, with the government making up its own mind in the end. The Sealord Deed of Settlement was never the subject of proper consultation with Maori. Much of it was deemed commercially sensitive and therefore unable to be discussed with iwi. The bill finalising the deal was rushed through parliament under urgency, thereby preventing debate before a select committee. Maori have clearly been denied their tino rangatiratanga with regard to fishing.

The latest scheme to achieve the governments election promise involves what are called fiscal envelopes. It is understood the government will divide up the country into regions (not based on tribal boundaries), and set a sum which it is prepared to pay to settle claims in each area. Government and Treasury will be the only ones to know how much is in each envelope. The Government will assess the extent of the grievance of each tribe in each region and offer compensation. So different claimants within each region will be made offers according to what government has in its envelope. Given the make up of the National Cabinet and its commitment to budgetary restraint, Maori claimants will again be asked to accept less than just settlements and to scrap over the crumbs government allocates to each envelope. It is also the governments desire to introduce a claims cut-off date. Claims relating to last century that are not registered with either the Waitangi Tribunal or the Crown by June 1996 will be ignored. Meanwhile the government will claim it has acted in good faith, has demonstrated financial responsibility and has

complied with its election promise. Any failure of the policy will be blamed on Maori. Sealord revisited?

There has been an increasing desire by government to settle treaty claims by direct negotiation. The latest instance is its 'land bank' proposal, whereby surplus Crown properties will be held for use in Maori land claims settlements. Iwi claims on surplus property are to be lodged with a new Crown/Maori Congress working group. Once that property has been placed in the land bank it must be used in settlement of that iwi's land claims. The Treaty of Waitangi Unit within the Justice Department has major input into direct negotiation. The considerable resources at its disposal are in marked contrast to those available to iwi, who are constantly at a disadvantage in the direct negotiation process.

The government has sought to fast track some Maori claims in its own interest e.g. Railways land. Increasingly such negotiations have been held with the Maori Congress to which not all iwi belong. The government with all its resources clearly has the upper hand. The National Government like its Labour predecessor has no commitment to tino rangatiratanga. Crown sovereignty has been deemed to be paramount.

Tino Rangatiratanga and Maori Devolution

The Labour Government's proposal for Maori Affairs devolution started from the premise that article two of Te Tiriti o Waitangi only placed a responsibility on the government to protect Maori interests and where necessary redress grievances. It was proposed that iwi organisations would administer programs for Maori under rules set by government. While Maori supported the devolution of resources and authority to the iwi, they questioned government control of the process. Labour's Runanga Iwi Act was widely rejected as not recognising te tino rangatiratanga.

The National Government dropped Labour's policy and repealed the Runanga Iwi Act. The 'Ka Awatea' report saw devolution as the right to self development. Although falling short of self government, taken seriously this could at least have put an end to the divide and rule approach arising from Labour's policy. However, the government's handling of the Sealord deal together with its fiscal envelopes policy, has dashed that possibility.

Iwi may obtain government funds to deliver and monitor government services to Maori. The Ministry of Maori Development is able to contract with iwi to do this. However, the terms are those deemed appropriate by the government. Maori delivery agencies will always be kept on a string. The danger remains that government schemes will distract iwi from focussing on their Tiriti right to te tino rangatiratanga.

Tino rangatiratanga has not featured in either Labour's or National's devolution proposals.

Tino Rangatiratanga and the Courts

From 1840 till 1988 both the legislature and the Courts had ignored the Treaty of Waitangi. In 1877 Chief Justice James Prendergast declared the Treaty to be a "legal nullity". Since it had not been written into legislation, it was of no consequence to the Courts. This was the position of the Courts for more than a hundred years.

When in 1987 the Labour Government set about passing the State Owned Enterprises Bill, the Waitangi Tribunal drew its attention to the fact that it took no account of the need to address Treaty of Waitangi concerns. As a result a clause was added stating that nothing in the Act shall be inconsistent with the principles of the Treaty. The Bill was then passed.

Subsequently the Maori Council brought a case against the Government. This case and subsequent cases involving fishing, forests and coal, have been acclaimed as victories for Maori. However, their implications for tino rangatiratanga were quite serious. The Court of Appeal avoided the Treaty guarantee of tino rangatiratanga. It seized upon the reference of the S.O.E. Act to the principles of the Treaty which it said involved the 'spirit', of the Treaty (rather than its words) adapted to the present day changed circumstances. Partnership based on reasonableness and good faith, it said, was the essence of the Treaty. The Government was recognised as having sovereign power to govern. While it had a duty to take into account Maori Treaty rights, and if necessary to consult with Maori; the final decision, the Court said, remained with the Government. Further, Maori were to be loyal to the Crown, recognise the Government and be reasonably co-operative. The Court of Appeal confirmed two things: Crown sovereignty and Maori subordination.

When the Government demonstrated reluctance to consult Maori over privatisation of State Forest and Coal Corp, Maori went back to court. While the Court found in favour of Maori, all that Maori secured was a promise to return assets if in the future the Waitangi Tribunal ordered it to do so. The Court stated that partnership did not mean equal division of assets or resources. Later in the case of the Maori Fisheries Act (1989) it was stated that legislation may well provide a sufficient expression of traditional Maori fishing rights in present day circumstances.

The effect of recent Court findings has been to seriously undermine the bargaining power of Maori in negotiations over the

government assets and resources. The Treaty has been reduced to terms compatible with Crown sovereignty. Tino rangatiratanga simply does not have a place so far as the Courts are concerned.

Tino Rangatiratanga and the Waitangi Tribunal

When the Waitangi Tribunal was established it was seen as a source of hope by Maori. However, it was later to become clear that it was established under Crown supremacy, not tino rangatiratanga. It could only recommend solutions to Maori grievances. Maori Treaty rights were still dependent on the goodwill of the Government. Tribunal members were Government selected and they were required to consider not the Treaty but the principles of the Treaty.

In its early years, however, the Tribunal's reports stressed the belief that Maori would never have ceded their sovereignty as successive governments had deemed they had. Kawanatanga was defined as something less than rangatiratanga and the challenge of rangatiratanga to Crown sovereignty was upheld. But following the S.O.E. court case the Tribunal made a dramatic turn around on the crucial question of tino rangatiratanga or sovereignty. The Court of Appeal stated that it would determine what the principles of the Treaty were. While the views of the Tribunal might be of assistance to the Court, they were not binding. Only the Court's findings could be binding and it stated "should be followed by the Waitangi Tribunal as a declaration of the highest judicial tribunal in New Zealand". The Tribunal was now bound by the Court of Appeal's findings.

In its subsequent reports on claims, the Tribunal began to state that a cession of sovereignty had taken place with the signing of the Treaty. By August 1988 the Tribunal was writing about a cession of [Maori] sovereignty and Pakeha settlement rights that cannot now be denied". The Tribunal was now a mechanism to deny tino rangatiratanga and uphold the Court's Treaty principles. The Tribunal had now been pulled back into the mainstream Pakeha legal system. The judiciary had successfully; undermined the work of the Waitangi Tribunal.

In February 1993 the government introduced into parliament the Treaty of Waitangi Amendment Bill which provided that the Waitangi Tribunal shall not recommend that the crown acquire ownership of any land or interest held by any person. This was quite unnecessary as the tribunal can only make recommendations that the Government ~s quite free to ignore, except where a private owner has bought State Owned Enterprises land with full warning of the (remote) risk of resumption if the Tribunal so orders. This action makes it clear that the tribunal is an instrument of the crown that will be reined in should it be seen to threaten crown interests.

Despite protestations to the contrary it is clear the Waitangi Tribunal is being increasingly marginalised by government. The governments desire for direct negotiation with iwi, its land bank and fiscal envelopes policies, together with the suggestion of a cut off point for the lodging of claims, are all evidence of a sidelining of the work of the tribunal. Under the present government the Waitangi Tribunal is struggling to retain a significant role for itself. This is reflected in recent comments by the Chairman of the Waitangi Tribunal. Judge Dune has indicated that the tribunal may have run its course such that direct negotiation between iwi and the Crown may now be the way ahead.

Tino Rangatiratanga and the Principles of the Treaty

In recent years there has been a concerted effort to focus discussion not on the Treaty of Waitangi, but on the principles of the Treaty. The Waitangi Tribunal has always operated on the basis of defining Treaty principles. The Labour Government legislated for principles of the Treaty in the Treaty of Waitangi Act, and in the S.O.E. Act. The Court of Appeal has enunciated its principles of the Treaty which are now binding on all levels of the judiciary. The Labour Government too produced its own set of principles.

In its 'Principles for Crown Action of the Treaty of Waitangi', the Labour Government established a "kawanatanga principle" and a "rangatiratanga principle". The so-called kawanatanga principle reaffirmed the notion of cession of sovereignty by Maori and assumed that they gave up their right to self determination. Both of these have been constantly refuted by Maori. The so-called rangatiratanga principle redefined rangatiratanga as a concept of resource management which excludes ideas of social, economic or political power for Maori. Others of these principles limit rangatiratanga to a power subject to the authority of the Crown, require reasonable co-operation with the Crown and justify the imposition of English Common Law as a basis for equality. In other words, recognition of tino rangatiratanga is strenuously denied.

The National Government decided to rewrite Labour's set of Treaty principles so that they would conform with its policy and be more explicit. Kawanatanga now referred to the governments 'right and responsibility to govern for the common good'. Rangatiratanga became 'restoration of iwi self-management within the scope of the law'. These attempts to restate the Treaty have been part of a process toward the settlement of iwi claims. However, such claims are based on Te Tiriti and not Crown defined principles. The outcome is that te tino rangatiratanga is still strongly denied Maori.

The Need for Constitutional Reform

Attempts to have tino rangatiratanga recognised by the Crown and the Courts have failed. This has enforced Maori dependency. But the struggle goes on. What is required in these days is a process of political or constitutional reform which recognises that Maori have an inherent right to their tino rangatiratanga. To achieve this the supremacy of Crown sovereignty must be relinquished so that we can recognise two co-existing constitutional entices within one nation, one representing tino rangatiratanga and the other representing kawanatanga. These two entities must of necessity exist in a new Treaty based (Maori Version) relationship with each other.

The church leaders have recognised the need for this. In their 'Statement for 1990' they asserted, "We believe there needs to be a political restructuring which recognises Maori as a people possessing te tino rangatiratanga according to the Treaty". In September 1990 Te Runanga Whakawhanaunga I Nga Hahi (the Maori Ecumenical Council) called "to all Maori and to all people of goodwill" not to vote in the October General Election because of 150 years of injustice in denying te tino rangatiratanga. They also stated it would not be difficult to establish a constitutional forum to resolve Treaty issues, such as te tino rangatiratanga, through dialogue and negotiation and indicated that they would be willing to contribute a draft proposal for such a process.

In 1986 the Royal Commission on the Electoral System which recommended a change to proportional representation had urged government to enter into consultation with Maori about the definition and protection of the rights of Maori and their constitutional position under the Treaty of Waitangi. While government has pressed on with a referendum on proportional representation, it has ignored the recommendation on Maori constitutional rights.

Last September's indicative referendum, on electoral reform, resulted in considerable Maori comment. While some skill see proportional representation as offering a better deal for Maori than the present system, it is not based on tino rangatiratanga. For this reason both the Maori Council and the Maori Congress urged a boycott of the electoral referendum. The council's view was that there was nothing in it for Maori. The congress spoke out in favour of self government and a Maori parliament.

The latest round of hui to 'consult' with Maori on electoral reform demonstrated the governments superficial commitment to and expediency in manipulating Maori views on electoral reform. It looked like the Sealord process once again?

A Tiriti analysis suggests that no form of proportional representation reflects Tiriti rights and the guarantee of te tino rangatiratanga to Maori. It remains an expression of kawanatanga. The Methodist Conference of 1992 stated: "believing the September referendum on proportional representation was premature...Conference supports all efforts to hold a constitutional review hui early in 1993." The need for such a hui has become urgent.

As we approach the binding referendum on multi-member proportional representation together with the proposal for an upper house (not fifty/fifty based) as well as voting in the general election, we need to be alert and sensitive to the voice of Maori and any further call they may make.

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JOINT METHODIST-PRESBYTERIAN
PUBLIC QUESTIONS COMMITTEE

Frustration and loss of patience behind Maori land protests

May, 1995

Introduction

Waitangi Day 1995 was the focus of dissent on a scale not seen for some years. A spare of occupations of land and buildings by Maori around the country has followed. The occupation of Moutoa Gardens (Pakaitore Marae) in Wanganui coincided with several other incidents. The occupiers of the disused Tamaki Girls College (Auckland) were evicted but continue to maintain a vigil outside the grounds. In the north some have occupied the redundant Takahue school used occasionally by the army. Another group has occupied the marae of the Arts and Crafts Institute at Whakarewarewa, Rotorua. Yet another group moved in on a Maori Studies building at Waikato University. More recently a hapu of Tainui has occupied a hill behind the Huntly power station. The latter two incidents are linked to the proposed Tainui claims settlement. In Taranaki there have been disruptions to the sales of properties on Maori reserved land. Similar tactics have been adopted to sales of property on Tuhoe confiscated land. Many Pakeha are bewildered by this turn of events. Some are angry, resent what has happened and are calling on government to assert its authority over these Maori protesters.

Each of these occupations has its own distinctive historical background in terms of a Maori land grievance. What they have in common is the reflection of deep frustration and loss of patience at the lack of progress by government in settling Treaty of Waitangi grievances. This paper seeks to outline some of the reasons for the frustration and loss of patience by those taking protest action. (It should be read in conjunction with the Committee's paper *Te Wero!* published late in 1994.) Government mechanisms for the resolution of such claims are simply not working. Its fiscal envelope package for the settlement of all historical claims has been a disaster, meeting with a universal 'no' from iwi Maori.

Disillusionment with Waitangi Tribunal

When in 1985 the Waitangi Tribunal was empowered to hear claims dating back to 1840 it was seen as a source of hope by Maori. However there has been growing disillusionment with the Waitangi Tribunal as a mechanism for settling Treaty claims. This is because in the final analysis it is an instrument of the Crown. All Tribunal members are appointed by Government. Other staff members are appointed by the Justice Department. It is subject to the decision of higher judicial bodies and so has had to modify some of its earlier positions on the Treaty of Waitangi. It only has the power of recommendation and the Government has chosen to ignore the majority of its recommendations. Following a report and findings on a claim, direct negotiation with the Crown on settlement must still take place. At any time the Tribunal's powers can be limited by the legislature.

The Chairman of the Tribunal, Chief Land Court Judge Eddie Durie, has spoken publicly of the limitations of the Tribunal but to little effect. In December 1993 he said the Tribunal's budget ($2.5m) was so small compared with its huge workload that Maori claimants were being denied justice because: important claims were not being given urgency; continuing claims were rarely being heard due to the backlog of historic claims; reports were inconsistent as Tribunal members can only meet together once a year; claimants feel shut out of the process as scarce resources are directed to professional researchers. The chainman suggested the need for the Tribunal to be seen as more independent of the Crown.

In March 1995 Eddie Durie spoke again of the crisis facing the Tribunal. It is swamped by appeals for urgent action to stop

nearly 500 on the books. Requests for additional funding have always been met with the response that the money was needed for developing Crown claims settlement policies for direct negotiation. In reality the Tribunals budget has been cut each year, a cut to the funding for the Justice Department simply being passed on to the Tribunal.

Inadequacies in the landbank mechanism

Surplus Crown properties may be used in claims settlements. Such assets are notified publicly by the Department of Survey and Land information with prospective Maori claimants given 30 days to lodge a claim. This is quite insufficient time for an iwi to research a claim to that land and so may result in further injustice being perpetuated. Evidence now suggests the mechanism has allowed the Crown to fast track the sale of these properties. Recently released figures show that out of 1,066 which have gone through the process, 575 have been cleared for sale. 0nly two have been formally reserved or protected, while the remainder are still being processed. Maori do not play any further part in the process once they have put in a claim and do not know the criteria used in making decisions. This has resulted in calls for a halt to the disposal of surplus State assets.

Rejection of the fiscal envelope

The Government released its Treaty claims settlement package (fiscal envelope) in December 1993. At each of eleven regional consultation hui it was rejected by iwi Maori. Anger was expressed that the proposal was developed unilaterally and in secret, there having been no consultation with iwi Maori. The Treaty of Waitangi has not been included amongst the settlement principles. Reassurances that article 3 (citizenship) rights will be protected are not matched by guarantees of article 2 (tino rangatiratanga) rights. The Maori version of the Treaty is implicitly discounted. Many Maori fear the proposal may be a means to diminish the Treaty and a forerunner to eliminating tino rangatiratanga rights from future Treaty considerations.

Dismay has been expressed at the non-negotiable fiscal cap of $1 billion. This is less than two thirds of one year's defence spending. No rationale has been offered for settling on this figure other than acceptability to the wider community and affordability to the government. The selling of the Kaingaroa Forest claim alone has been assessed at $1.5 - $2 billion. So it should be no surprise that Maori see no justice in the cap. The government has determined that wide ranging costs will be taken out of the envelope reducing the figure to some $600 million.

The effective exclusion of the Crown's most significant landholding, the conservation estate, is a denial of the principle of land returned for land alienated, thus creating further ill feeling. Maori cast doubt on the Crown's ownership of this land, most of which was not legitimately acquired. The Crown also says the Treaty does not give Maori ownership (the exclusive possession of all potential uses of the resource) or management and control rights over natural resources. It only gives a use interest (within defined limits and with no claim to potential uses except those inherent in the current use) and value interests (eg a cultural or spiritual value regardless of who owns, controls or uses the resource). It will only negotiate those rights where they can be shown to have existed in 1840. This effectively rules out claims to use and value interests over resources such as coal, oil or geothermal resources, which is of great concern to Maori.

The Crown is also determined that settlements be final. To this end it proposes the progressive curtailing of the Waitangi Tribunal's jurisdiction. Legislation will be passed to prevent the Tribunal hearing claims that have been 'settled'. This is consistent with the Government's policy to control and marginalise the work of the Tribunal. There is no justice in winding down the work of the Tribunal and preventing it from revisiting a claim. Deeming settlements to be full and final has been seen to deny Maori youth their generational Treaty rights. History says it does not work anyway. Claims that were thought to be settled fifty years ago are having to be revisited now. There can be no justice in deeming a settlement as full and final when one party is controlling the terms of settlement. Maori feel this keenly.

The fiscal envelope became the precipitating factor for Maori protest. It indicated the Government's lack of ability to understand Maori concerns and its unwillingness to work solutions through with Maori. It has become more concerned about the introduction of MMP with its funding and other implications.

Conclusion

Successive governments have not heeded what Maori have been saying. This has created such resentment that we should not be surprised at the occupations of land and buildings that has taken place. Having lost patience and out of a sense of great frustration Maori are now taking direct action in an effort to get their concerns addressed.

Chief among those concerns is the recognition of Maori tino rangatiratanga through a Treaty-based constitutional

rearrangement. In the words of January's hui at Hirangi called by Sir Hepi Te Heuheu to develop a united response to the fiscal envelope proposals:

> "What matters now is not so much the details of a Treaty based constitution or the flow on constitutional arrangements, but a commitment to a constitutional review jointly undertaken by Maori and the Crown for the purposes of developing a New Zealand constitution based on the Treaty of Waitangi, and among other things, fully recognising the position of Maori as tangata whenua. Hui participants discounted the possibility of durable Treaty settlements without fresh constitutional guarantees and a final break with colonial laws and processes."

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