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**PARLIAMENTARY SOVEREIGNTY AS A BARRIER TO A
TREATY-BASED PARTNERSHIP**

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Abstract

The Treaty of Waitangi has repeatedly been affirmed as New Zealand's founding document, yet our constitutional arrangements rest on the untrammelled principle of parliamentary sovereignty. This paper argues that the doctrine of parliamentary sovereignty is contrary to the sharing of powers provided for in the Treaty, as it concentrates ultimate law-making authority in one body. New Zealand's constitutional history is canvassed briefly, with a specific focus on the Treaty and the basis of British Crown's acquisition of sovereignty over New Zealand. It is noted that the current place of the Treaty within New Zealand's constitution is within the vast powers of parliament - the Treaty can only have legal effect to the extent that Parliament provides for. After looking at examples from statute and common law it is concluded that, rather than limiting parliamentary sovereignty, the current approach ultimately reinforces the absolute and indivisible power of parliament. As such, it is a barrier to a Treaty partnership between the Crown and Maori. To truly give effect to the Treaty a change in the way in which public power in New Zealand is configured and exercised is necessary. Three models for Treaty-based constitutional reform are therefore discussed. The current constitutional review provides Iwi and the Crown with an opportunity to look beyond the confines of the doctrine of parliamentary sovereignty and forge a unique constitutional system that gives effect to the Treaty as New Zealand's founding document.

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The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14,950 words.

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I Introduction

As aptly put by Sir Robin Cooke, "...a nation cannot cast adrift from its own foundations".¹ The Treaty of Waitangi, or Te Tiriti o Waitangi, has repeatedly been affirmed as New Zealand's founding document,² a document of the "greatest constitutional importance".³ Yet New Zealand's constitution rests not on the exchange of promises between two sovereign peoples contained in the Treaty, but on the untrammelled principle of parliamentary sovereignty, which locates ultimate law-making authority in the New Zealand Parliament. Famously conceptualised by Albert Venn Dicey as the unrestricted right of Parliament to "make or unmake any law it sees fit",⁴ the doctrine of parliamentary sovereignty is introduced unquestioned to first year law students and is maintained as the starting point for any constitutional conversation.

The location of absolute and indivisible sovereignty in Parliament sits at loggerheads with the distribution of powers provided for in Te Tiriti o Waitangi (the Maori text of the Treaty) in which Maori ceded the power to govern to the British Crown in return for the protection of their chiefly authority and rights to their lands and other taonga. As argued by some commentators, the Treaty is best understood, not as an agreement for the cession of sovereignty but as a template for a redistribution of powers between the Crown and Maori.⁵ The relationship between the Crown and Maori is described as akin to a partnership.⁶ However, inherent in the notion of a partnership is a balance of powers where decisions are reached through negotiation. Thus in practice, Crown-Maori relations resemble more of a paternalistic relationship, with one party imposing its will on, and making decisions for, the other. Past experience makes clear the inability of people of one culture to develop and implement policies for people of another culture and "get it

¹ *Te Runanga O Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 308-309 [*Sealords case*].

² Constitutional Advisory Panel "New Zealand's Constitution: The Conversation So Far" (Ministry of Justice, Sept 2012) at 35.

³ *New Zealand Māori Council v The Attorney-General* [1994] 1 NZLR 513 at 516 per Woolf LJ [*Broadcasting Assets case*].

⁴ A V Dicey *Introduction to the Study of the Law of the Constitution* (1 ed, MacMillan, London, 1885; 10 ed, MacMillan, London, 1959).

⁵ Joe Williams "Not Ceded but Redistributed" in William Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) at 193 [Joe Williams "Not Ceded but Redistributed"].

⁶ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

right”.⁷ Therefore, as aptly put by Whatarangi Winiata, what New Zealand needs is not more “Pakeha-inspired policies” but a constitutional transformation that “ensures that the two partners can grow within their respective cultures and value systems and can make decisions together as full partners”.⁸

In 2008 the National Party and the Maori Party agreed to establish an independent group to consider constitutional issues, from electoral matters to the nature Crown-Maori relations.⁹ The initial stage of the consideration process began in May 2012 with the establishment of the Constitutional Advisory Panel, charged with preparing and commissioning opinion pieces on the topics in consideration and creating a forum for New Zealanders to share information and ideas on those topics.¹⁰ One of the fundamental questions the Panel endeavors to address is the role that the Treaty of Waitangi or Te Tiriti o Waitangi should have within New Zealand’s constitutional arrangements. Notably absent from the Panel’s background document said to be informing the constitutional conversation was any discussion of the future of parliamentary sovereignty in New Zealand’s constitutional arrangements, despite its seemingly obvious incompatibility with the guarantee of Maori tino rangatiratanga in the Maori text of the Treaty. If parliamentary sovereignty is maintained as the starting point for a constitutional conversation around the place of the Treaty of Waitangi/ Tiriti o Waitangi in New Zealand’s governance structure, the opportunity for any real constitutional transformation is blocked.

With the last of historical claims being settled New Zealand is sailing into uncharted territory – the post-settlement era. A new type of relationship must develop between the Crown and Maori, with the focus shifting from past injustices to future development.¹¹ However, in order to move forward we need to create an environment that is conducive to change. It is argued that the doctrine of parliamentary sovereignty will prevent the development of an effective partnership between the Crown and Maori because it places all the power in the hands of one party (Parliament) at the expense of the other (Maori). As argued by Moana Jackson, the Treaty of Waitangi is the foundation “upon which a proper and just constitutional relationship between [Maori] and the crown was meant to

⁷ Whatarangi Winiata “Reducing the Socioeconomic Disparities in Housing, Employment Health and Education” (1998) TWM < http://homepages.ihug.co.nz/~sai/MSoln_Win.html> at 1.

⁸ At 1.

⁹ Relationship and Confidence and Supply Agreement (16 November 2008).

¹⁰ Consideration of Constitutional Issues: Terms of Reference (May 2012) at 3.

¹¹ Mason Durie “Pae Mana Waitangi and the Evolving State” (Massey University Te Mata O Te Tau Lecture Series 2009 “The Paerangi Lectures” Maori Horizons 2020 and Beyond, 14 July 2009) at 4.

be established in the first place”.¹² To truly give effect to the Treaty, which is primarily about a redistribution of power,¹³ we need to change the way in which public power in New Zealand is configured and exercised. The issues raised are complex and the path to reform may not be smooth sailing, however, the current constitutional review provides Iwi and the Crown with an opportunity to look beyond the confines of the doctrine of parliamentary sovereignty and forge a unique constitutional system that gives effect to the Treaty as New Zealand’s founding document.

Part I of this paper will discuss the nature of the Diceyan conception of parliamentary sovereignty and briefly outline the history of the Treaty of Waitangi and parliamentary sovereignty in New Zealand. In Part II the tension between parliamentary sovereignty and the Treaty and their inability to co-exist will be discussed. Examples from case law and legislation will be canvassed in order to illustrate the inadequacy of the current attempts that seek to give effect to the Treaty within the doctrine of parliamentary sovereignty. The final part of this paper will look at possible options for a Treaty-based constitution with the aim of opening up wider discussion around the area of constitutional reform. There is not necessarily one correct answer, but by first unraveling and removing the concept of parliamentary sovereignty, a way forward is a lot easier to navigate.

II The Treaty of Waitangi and Parliamentary Sovereignty in New Zealand

New Zealand’s constitutional history is unique and by no means straightforward. Knowledge of this history is an essential precursor to an informed constitutional conversation.¹⁴ However, the scope of this essay is necessarily confined to a brief outline of New Zealand’s constitutional history in light of the pivotal issue – the issue of Parliamentary sovereignty.¹⁵

¹² An Interview with Moana Jackson “Constitutional Transformation” Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 325 at 329.

¹³ Joe Williams “Not Ceded but Redistributed”, above n 5 at 190.

¹⁴ See Dr Susan Healy’s contribution to the Constitutional Advisory Panel where she highlights the fact the Panel’s Backgrounder lacks information regarding the history of New Zealand’s constitutional arrangements, ignores the constitutional arrangements of the Maori world and fails to mention the Declaration of Independence. Healy argues this prevents an informed constitutional conversation.

¹⁵ For more information about New Zealand’s constitutional history see Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books Limited, Wellington, 1987), Robert Consedine and Joanna Consedine *Healing Our History: The Challenge of the Treaty of Waitangi* (Penguin Books, London, 2012), Matthew S R Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008), Andrew Sharp *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s* (Oxford University Press, Auckland, 1997).

A The Treaty of Waitangi

The Treaty of Waitangi or Te Tiriti o Waitangi, as the founding document of New Zealand, is the original legal basis on which Pakeha gained the right to live in the country.¹⁶ Given the Treaty's foundational status, it is the proper starting point for any discussion about constitutional reform. The Treaty is perhaps best summarised as an agreement for the distribution of power between the two parties who signed it: the British Crown and the Maori.¹⁷ As such, the Treaty was and is a “blueprint” for a bicultural nation.¹⁸

It is important to highlight at the outset that the Treaty was an agreement between two *sovereign* and independent peoples. In 1835 thirty-four Rangatira signed He Wakaputanga o te Rangatiratanga o Nu Tireni, a Declaration of Independence, restating their inherent independence and reaffirming that “all sovereign power and authority within the territories of the United Tribes of New Zealand” resided “entirely and exclusively in the hereditary chiefs and heads of tribes in collective capacity”.¹⁹ Furthermore, the document provided that the Rangatira:²⁰

...will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.

Charged with instructions from Lord Normanby, Captain William Hobson, a representative of the British Monarch set about acquiring sovereignty over ‘the whole or any parts’ of New Zealand that the Maori wished to cede. The Treaty was compiled in both English and te reo Maori, and the significant differences between the two

¹⁶ Constitutional Advisory Panel “New Zealand’s Constitution: A Report on a Conversation” (Ministry of Justice, November 2013) at 11; Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 14.

¹⁷ Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 1.

¹⁸ Bronwyn Campbell “Te Titiri O Waitangi: A Blueprint for the Future” in Huia Tomlins-Jahnke and Malcolm Mullholland (eds) *Mana Tangata: Politics of Empowerment* (Huia Publishers, Wellington, 2011) 45 at 45 [Bronwyn Campbell “Te Titiri O Waitangi: A Blueprint for the Future”].

¹⁹ He Wakaputanga o te Rangatiratanga o Nu Tireni (A Declaration of the Independence of New Zealand) 1835, art 2.

²⁰ He Wakaputanga o te Rangatiratanga o Nu Tireni (A Declaration of the Independence of New Zealand) 1835, art 2.

translations have been a source of contention. Hobson prepared the English text of the Treaty, which was then translated overnight into te reo Maori by resident missionary Henry Williams and his son Edward, neither of whom were experts in Maori dialect.²¹ It is unsurprising then that historians have referred to the Treaty as being “hastily and inexpertly drawn up, ambitious, and contradictory in content”.²² Around 40 Rangatira (Maori Chiefs) signed the Maori text of the Treaty on the 6 February 1840, and by the end of the year over 500 Maori had signed the Treaty.

Under the English translation of the Treaty, Maori ceded “[A]ll the rights and powers of sovereignty which the... Confederation or individual chiefs respectively exercise or possess, or may be supposed to exercise or possess over the respective territories as the sole sovereigns thereof.”²³ In exchange, the British Crown guaranteed Maori “full, exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties”.²⁴ However, under the Maori text (Te Tiriti o Waitangi) Maori did not cede “sovereignty” to the British Crown. The word “sovereignty” is an English term and has no equivalent in Maori, with the idea of a people being under the control of a single individual being a foreign concept to Maori culture.²⁵ The word “rangatiratanga” (which can be roughly translated in English to chieftainship), as used in He Wakaputanga o te Rangatiratanga o Nu Tireni in 1835 would have been a closer approximation to “sovereignty”. Instead, under article one Maori granted the British Crown “kawanatanga” (governorship), a power that is subordinate to rangatiratanga.²⁶

The translation of article two of Te Tiriti again gives rise to ambiguities. In exchange for kawanatanga, the Maori retain “tino rangatiratanga”. The meaning of tino rangatiratanga is the subject of ongoing debate, but its closest English translation is self-determination.²⁷ This ambiguity becomes relevant when looking at models for constitutional reform – in particular whether constitutional arrangements should be seen as *shaped by* or *flowing from* the Treaty. In the case of the former, the power of kawanatanga would be seen as superior to tino rangatiratanga. Under the latter view, the Treaty established “parallel

²¹ Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books Limited, Wellington, 1987) at 39 [Orange *The Treaty of Waitangi*].

²² Ruth Ross “Te Tiriti o Waitangi: Texts and Translations” (1972) 6 *NZJH* 139 at 154.

²³ Treaty of Waitangi 1840, art 1.

²⁴ Treaty of Waitangi 1840, art 2.

²⁵ Charles Hawksley and Richard Howson “Tino Rangatiratanga and Mana Motuhake: Nation, State and Self-Determination in Aotearoa New Zealand” (2011) 7 *AlterNative* 246 at 250 [Hawksley and Howson “Tino Rangatiratanga and Mana Motuhake”].

²⁶ Te Tiriti o Waitangi 1840, art 1. For English translation of Maori text see IH Kawharu *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).

²⁷ Hawksley and Howson “Tino Rangatiratanga and Mana Motuhake”, above n 25 at 250.

paths of power under a single nation state” with neither party sovereign over the other.²⁸ The translation of article three has not given rise to dispute, it simply provides for the extension of all the rights and privileges of British citizens to Maori.²⁹

Parliament in its sovereign capacity has required the Waitangi Tribunal to have regard to both Treaty texts when exercising its functions.³⁰ However, following the doctrine of *contra proferentum*, the interpretation of any ambiguities in the terms or provisions of a document must be interpreted against the drafter.³¹ Also of interest is a series of decisions from the Supreme Court in Canada in the context of indigenous rights holding that “treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories”.³² The fact that it was the Maori translation that was read out at by Hobson at Waitangi when the first Rangatira signed, and that all but 39 Maori signatories signed this translation further supports Te Tiriti taking precedence over its English counterpart.

Despite heated debate around the differences between the provisions in the Treaty and Te Titiri, one provision has remained virtually untouchable – the right to sovereignty of the British Crown. Thus, right from the beginning it becomes clear that the doctrine of parliamentary sovereignty in the context of New Zealand runs into legitimacy issues. What the Treaty provided for was a redistribution of power – yet what occurred was a complete removal of power from Maori, for that power to then vest in one supreme law-making body, to which Maori were then and are still now subjected. Paul McHugh refers to the story of Crown sovereignty in New Zealand as “one of the struggle to inject a modern sense of historical legitimacy into a set of constitutional arrangements built upon a contrary foundation.”³³

²⁸ Mason Durie “Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination” (Oxford University Press, Wellington, 1998) at 177 [Mason Durie “Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination”].

²⁹ Treaty of Waitangi 1840, art 3.

³⁰ Treaty of Waitangi Act 1975, s 5(2).

³¹ Bronwyn Campbell “Te Titiri O Waitangi: A Blueprint for the Future”, above n 18 at 51.

³² *R. v. Marshall* [1999] 3 S.C.R. 456, *R. v. Marshall* [1999] 3 S.C.R. 533, *Simon v. The Queen* [1985] 2 S.C.R. 387, *R. v. Sioui* [1990] 1 S.C.R. 1025.

³³ PG McHugh “Tales of Constitutional Origin and Crown Sovereignty in New Zealand” (2002) 52 *University of Toronto Law Journal* 69 at 72 [PG McHugh “Tales of Constitutional Origin and Crown Sovereignty in New Zealand”].

If the basis for absolute parliamentary sovereignty cannot be found in the nation's founding document, when exactly did the doctrine drift into New Zealand shores? The next section examines the doctrine of parliamentary sovereignty in more detail and looks for the basis of its application in New Zealand.

B The Orthodox Doctrine of Parliamentary Sovereignty

In line with the orthodox Diceyan formulation, “sovereignty” under English law referred to the absolute, unitary and indivisible authority of the British Crown over its territories.³⁴ The Diceyan conception of parliamentary sovereignty that has gripped those in the legal profession is concisely summarised by Paul McHugh:³⁵

The Crown's sovereignty is regarded as absolute, unitary and unaccountable, the ultimate expression of this supreme power being the enactment of legislation (the Crown in parliament). Being absolute, this sovereignty is viewed as undivided and indivisible—it can never be shared with any other sovereign entity. It is also unaccountable. The Courts will recognise no law-giving power other than the Crown and will not call the sovereign to account for the exercise of its legislative power.

The origins of parliamentary sovereignty have been the subject of some debate – can Parliamentary sovereignty be viewed as the great Leviathan expounded by Hobbes,³⁶ or, as Goldsworthy argued, do the roots of the doctrine go deeper than 17th and 18th century political theory?³⁷ Either way, the tenets of the doctrine are clear: Parliament has absolute, indivisible and unquestionable law-making power.

McHugh argues that, constitutionally speaking, New Zealand has taken the Hobbesian position in which the sovereign power of parliament is viewed as Leviathan, the great sea monster in *Job*, Chapter 41 whom none would ‘dare stir ... up’.³⁸ For Hobbes, the vast rights and powers of the sovereign were ‘incommunicable and inseparable’.³⁹ The people were not ‘citizens’ but ‘subjects’ and they were deemed to have authorised this subjection. Subjects could be treated badly, but could not be treated unjustly, as the word

³⁴ Robert Consedine and Joanna Consedine *Healing Our History: The Challenge of the Treaty of Waitangi* (Penguin Books, London, 2012) at 89-90.

³⁵ P McHugh “The legal and constitutional position of the Crown in resource management” in R. Howitt, J. Connell & P. Hirsch (Eds.). *Resources, nations and indigenous peoples*. (Oxford University Press, Melbourne, 1996) at 302.

³⁶ Thomas Hobbes *Leviathan* (1651).

³⁷ See Jeffrey Goldsworthy “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty” (2005) 3 NZJPIL 7 [Jeffrey Goldsworthy “Is Parliament Sovereign?”].

³⁸ Thomas Hobbes *Leviathan* (1651), quoting Job 41.

³⁹ Thomas Hobbes *Leviathan* (1651).

of the sovereign is the sum of justice – that is the content of the law and the content of justice are one and the same.⁴⁰

According to Goldsworthy however, the doctrine of parliamentary sovereignty has stronger roots in Lockean political theory.⁴¹ For both Hobbes and Locke the existence of a sovereign state was a necessary precursor to a law and liberty and a stable and orderly civil society. However Locke believed that the legislature required the consent of the population to rule, as opposed to Hobbes’ theory, which deemed the people or ‘subjects’ as consenting to the imposition of the states sovereign power.⁴² This authorisation did not import any rights of the subjects against the sovereign power.⁴³ The powers of Parliament derived their unreviewability and indivisibility because the state was there with the consent of the governed.⁴⁴ It then followed that there was no sense in placing limits on its powers.⁴⁵ Although Locke argued that there were limits to what parliament could legitimately do, these limits were moral, not legal and could only be enforced by a popular rebellion dissolving the constitution.⁴⁶ In essence, even following Locke, parliament’s sovereign power is legally unlimited.

Goldsworthy argues that the consensus on Parliament’s legally absolute powers throughout the 18th century rested on the Lockean thesis – that the law should not recognise any limits to its own authority (though there was acceptance of the Whig theory that popular rebellion could be justified on moral grounds).⁴⁷ Such an argument is supported by the fact the British Crown, through the Treaty, sought the consent of the Maori to its government. Whether the Crown believed it needed Maori consent or had simply learnt from past mistakes in colonising other lands is another question. What is clear, following the Maori text of the Treaty, is that Maori did not consent to the Crown having absolute sovereignty over their land and people.

C The Drift of Parliamentary Sovereignty onto New Zealand shores

If parliamentary sovereignty begins with the consent of the population, what then is the basis for the application of this doctrine in New Zealand? With the assumption of legal sovereignty by the British Crown being questioned, New Zealand’s governing structures,

⁴⁰ Andrew Sharp *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s* (Oxford University Press, Auckland, 1997) at 250 [Andrew Sharp *Justice and the Maori*].

⁴¹ Jeffrey Goldsworthy “Is Parliament Sovereign?”, above n 37 at 11.

⁴² At 11-12 and Andrew Sharp *Justice and the Maori*, above n 40 at 250.

⁴³ Andrew Sharp *Justice and the Maori*, above n 40 at 250.

⁴⁴ Jeffrey Goldsworthy “Is Parliament Sovereign?” above n 37 at 11-12.

⁴⁵ At 11-12.

⁴⁶ At 11-12.

⁴⁷ At 11-12.

like those in other colonial nations, are facing a crisis of legitimacy.⁴⁸ The following sections will examine the basis for the assumption of sovereignty over New Zealand by the British Crown. It is noted that the Treaty was an agreement with the British Crown as an imperial constitutional entity. At that stage there was no Crown in right of New Zealand to which the imperial Crown's obligations under the Treaty could have passed. Thus for the sake of clarity the transfer of absolute sovereign power from the British Crown to the Parliament in New Zealand as a separate constitutional entity will also be detailed.

1 Crown acquisition of sovereignty

The acquisition of sovereignty by the British Crown is usually seen as being based on two acts of state: the English text of the Treaty and the proclamations of sovereignty over the North and South Islands of New Zealand by the Crown.⁴⁹ Any analysis that simply ignores the differences between the two Treaty translations and states that article one of the English text as the basis for the Crown's acquisition of sovereignty stands on shaky ground. In fact, many believe that it is "philosophically, legally and culturally" impossible for a Maori chief to cede their mana.⁵⁰ As aptly put by Jock Brookfield in 1993:⁵¹

...it is impossible to believe that any of them consented to the claims of absolute and unlimited power, even over the Treaty itself, which under the doctrine of parliamentary sovereignty, were made by Queen Victoria's Parliament and made by the New Zealand Parliament as successor.

On this view, at the very least the Treaty must be considered a limit on parliament sovereignty, rather than assent to it. As observed by Joe Williams, the signatories did not sign the *Proclamation* of Waitangi but the *Treaty* of Waitangi:⁵²

It was not a document by which English law was *imposed* on the Maori. It was a document which signaled the *acceptance* of English law subject to certain clear and

⁴⁸ Noel Cox "Proposed Constitutional Reform in New Zealand: Constitutional Entrenchment, Written Constitutions and Legitimacy" (2013) 102 Commonwealth Journal of International Affairs 51 at 54.

⁴⁹ At 54.

⁵⁰ Dr Susan Healy "Contribution to Constitutional Review Panel" at 4. See also Susan Healy and others (eds) *Ngapuhi Speaks: He Wakaputanga and Te Tiriti O Waitangi - Independent Report on Ngapuhi Nui Tonu Claim* (Network Waitangi Whangarei, 2012).

⁵¹ FM Brookfield "Parliament, the Treaty and Freedom: Millennial Hopes and Speculations" (Valedictory Lecture, University of Auckland, 1993).

⁵² Joe Williams "Not Ceded but Redistributed", above n 5 at 192-193.

specific terms and conditions. Foremost among these was of course the guarantee of rangatiratanga.

The Treaty texts are thus unable to shed light on the basis for the imposition of absolute Crown sovereignty. The second basis for the acquisition of sovereignty over New Zealand by the British Crown is the two proclamations of sovereignty by Governor Hobson on 21 May 1840. The first proclamation declared sovereignty over the North Island by way of cession.⁵³ The sole foundation for this proclamation was the cession of sovereignty provided for in article one of the Treaty.⁵⁴ However, the Treaty signing process did not finish until October 1840, six months after the Hobson's proclamation.⁵⁵ The second proclamation was issued over the South and Stewart Islands, citing discovery as the ground for the acquisition.⁵⁶ The imposition of British sovereignty was officially published in the London Gazette in October 1840.⁵⁷

In the landmark decision *New Zealand Maori Council v Attorney-General* [1987] (henceforth referred to as the *SOE case*,⁵⁸ the Court of Appeal accepted Hobson's proclamations and the subsequent gazetting of the acquisition as authoritatively establishing Crown sovereignty over New Zealand.⁵⁹ Somers J considered the proclamations and New Zealand's subsequent legislative history put the issue of Crown acquisition of sovereignty beyond dispute.⁶⁰ Sovereignty in New Zealand undoubtedly resided in Parliament.⁶¹

On that account, it appears that the acquisition of sovereignty over New Zealand by the British Crown is a case of "because I said so, so it is". The Crown simply proclaimed sovereignty and so it was. What then of the requirement of consent of the population?

⁵³ Orange *The Treaty of Waitangi*, above n 21 at 84.

⁵⁴ Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 55-56 [Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*].

⁵⁵ Orange *The Treaty of Waitangi*, above n 21 at 85.

⁵⁶ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 54 at 55-56.

⁵⁷ At 56.

⁵⁸ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*SOE case*]. The case is commonly referred to as the *Lands case*, but as the Supreme Court noted in the recent case of *New Zealand Maori Council v Attorney-General* [2013] NZSC 6 at fn 25 the case concerned both land and water rights. This paper will therefore refer to it as the *SOE case*.

⁵⁹ At 671 per Richardson J.

⁶⁰ At 690.

⁶¹ At 690.

Maori who signed the Te Tiriti cannot be said to have acceded to the Crown's acquisition of sovereignty, let alone the many Maori who did not sign either translation. Nor could those 39 who signed the English translation be fairly said to have ceded sovereignty, given that only the Maori translation was read at Waitangi.

A significant discrepancy therefore existed between the sovereignty the British Crown claimed over the whole of New Zealand, and what it could legitimately claim under the Treaty of Waitangi.⁶² To get around this discrepancy Brookfield argues that the sovereignty of the British Crown did not derive from the Treaty but was instead acquired over time through the revolutionary overthrow of the existing political order.⁶³ According to Brookfield the revolution began in 1840 with the seizure of power by the British Crown through the Treaty and subsequent proclamations.⁶⁴ Because a revolution is by definition illegal, its validity rests on its success, rather than whether the means by which it was achieved were legal or moral.⁶⁵ Though a revolution may have been instigated in 1840, it was far from completed as Maori customary law continued to exist in pockets around the country.⁶⁶ Indeed the Court of Appeal commented in 1902 that "the Queen's writ did not run throughout all districts of NZ till long after 1865".⁶⁷ It was not until the end of the 19th century that the British Crown's seizure of power became complete through the employment of warfare or exertion of other pressures.⁶⁸

However, for a significant chunk of the 19th century, another theory of the Crown's acquisition of sovereignty over New Zealand held sway and was adopted by lawyers and historians in the generations that followed. The infamous dictum of Chief Justice Prendergast in *Wi Parata v Bishop of Wellington*⁶⁹ essentially held that the Crown acquired sovereignty over New Zealand through discovery. The Chief Justice denied original Maori sovereignty over New Zealand, despite overwhelming evidence to the contrary.⁷⁰ The Treaty was ruled a "simple nullity" as "no body politic existed capable of

⁶² FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Updated ed, Auckland University Press, Auckland, 2006) at 109 [FM Brookfield *Waitangi and Indigenous Rights*].

⁶³ At chpt 6.

⁶⁴ At 109 and 126.

⁶⁵ At 109.

⁶⁶ At 109 and 114-5.

⁶⁷ *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 at 666.

⁶⁸ At 109.

⁶⁹ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) [*Wi Parata*].

⁷⁰ See He Wakaputanga o te Rangatiratanga o Nu Tireni (A Declaration of the Independence of New Zealand) 1835 discussed on page 7.

making a cession of sovereignty”.⁷¹ The Chief Justice refused to enforce terms of cession of a block of land at Whitireia by its Maori owners as relations between the Crown and Maori were “acts of state” and were therefore not reviewable by any court.⁷² Though the Privy Council overturned much of the precedent in the *Wi Parata* case in 1901 in *Nireaha Tamaki v Baker*,⁷³ Chief Justice Prendergast’s ruling is illustrative of the pervasiveness of the doctrine of parliamentary sovereignty.

The denial of original Maori sovereignty and supposition of original Crown sovereignty can be seen as an attempt by the Chief Justice to provide it with historical legitimacy.⁷⁴ If the validity of Crown sovereignty over New Zealand was conditional on Maori permission, the basis of constitutional sovereignty was not the Crown but the consent of Maori under the Treaty.⁷⁵ Denying original Maori sovereignty rendered the sovereignty of the Crown “absolute and unqualifiable by Maori political forms or claims” thus bringing it in line with Diceyan orthodoxy.⁷⁶ However, McHugh argues, at the time of the judgment the sovereignty of the Crown was more *de facto*, than *de jure* as held by the Chief Justice.⁷⁷ The royal writ had not yet extended to some tribes in the Kingitanga and Tuhoe tribes in the central North Island.⁷⁸ In fact during that period the King Country was “an independent Maori state nearly two-thirds the size of Belgium”.⁷⁹ Thus in reality the Crown’s sovereignty was much “less secure” than *de jure*.⁸⁰ This is consistent with Brookfield’s line of reasoning – the Crown’s revolutionary seizure of sovereignty began in 1840, but was far from complete in that significant sections of the Maori population continued to live in accordance with Maori customary law. Nevertheless, a divided sovereignty approach would have been a more accurate record of Crown-Maori relations in the 1870’s, McHugh argues such a line of thinking was obscured by the “overriding concern with the singularity and absolute character of Crown sovereignty”.⁸¹

⁷¹ *Wi Parata*, above n 25 at 78.

⁷² At 79.

⁷³ (1900-01) [1840-1932] NZPCC 371.

⁷⁴ PG McHugh “Tales of Constitutional Origin and Crown Sovereignty in New Zealand”, above n 33.

⁷⁵ Justice E. W. Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 5 at 35; PG McHugh “Tales of Constitutional Origin and Crown Sovereignty in New Zealand”, above n 33 at 80 and 97.

⁷⁶ PG McHugh “Tales of Constitutional Origin and Crown Sovereignty in New Zealand”, above n 33 at 80.

⁷⁷ At 78.

⁷⁸ At 78.

⁷⁹ J Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 1986) at 306.

⁸⁰ PG McHugh “Tales of Constitutional Origin and Crown Sovereignty in New Zealand”, above n 33 at 78.

⁸¹ At 79.

2 *Development of Crown-in-right of New Zealand*

As noted earlier, the Maori signed the Treaty with the British Crown as an imperial constitutional entity. By constitutional convention, the British Crown's obligations under the Treaty passed to the local New Zealand Government.⁸² These obligations were later transferred in law to the Crown in right of New Zealand as a separate constitutional entity (Parliament). The New Zealand Parliament not only inherited obligations under the Treaty, but also the Diceyan conception of parliamentary sovereignty that had taken root in the United Kingdom. Brookfield views this transfer of sovereignty as revolutionary in that it was not provided for by legislation.⁸³

In 1852, the British Parliament passed the New Zealand Constitution Act, providing for a General Assembly in New Zealand consisting of a Governor, a House of Representatives and Legislative Council. Responsible government initially had several restrictions on it. Under section 53 the legislature could only make laws for the "peace, order and good government of New Zealand" so long as they were not "repugnant" to British law.⁸⁴ The British Crown retained control of land sales and external affairs, and still held the right to disallow legislation under section 58.⁸⁵ Further, the legislature did not have the power to amend the 1852 Act itself. An amendment to the Act in 1857 granted the General Assembly the power to amend and repeal provisions of the 1852 Act, except those dealing with the establishment and powers of the Assembly itself.⁸⁶ Further amendment in 1865 confirmed the power of the New Zealand Parliament to make its own laws, but only so far as they were consistent with British law – thus it was not yet a separate constitutional entity to which the British Crown's Treaty obligations could be transferred.

New Zealand Parliament did not become "sovereign" in its own right until it passed the Statute of Westminster Adoption Act in 1947, giving it the capacity to "make or unmake any law", including its constitution, regardless of whether or not it was consistent with British law.⁸⁷ Brookfield sees this statute as securing the transmission of legal sovereignty, or title to rule, to the New Zealand Parliament as a separate constitutional entity.⁸⁸ The Constitution Act 1986 simply confirmed the revolutionary break that had already taken place, acknowledging the existence of a separate Crown-in-right of New

⁸² FM Brookfield *Waitangi and Indigenous Rights*, above n 62 at 120.

⁸³ At 126.

⁸⁴ New Zealand Constitution Act 1852 (UK).

⁸⁵ New Zealand Constitution Act 1852 (UK).

⁸⁶ New Zealand Constitution Amendment Act 1857 (UK).

⁸⁷ Parliamentary Research Paper "New Zealand Sovereignty: 1857, 1907, 1947 or 1987?" (August 2007) at 7.

⁸⁸ FM Brookfield *Waitangi and Indigenous Rights*, above n 62 at 122.

Zealand.⁸⁹

The Privy Council appears to take a similar view in *New Zealand Maori Council v Attorney-General*, commenting that “the obligations of Her Majesty the Queen of England under the Treaty are now those of the Crown in right of NZ” and as a result could no longer bind the British Crown.⁹⁰ The essence of Brookfield’s argument is then that, although its origins were usurpatory, the passage of time rendered the sovereignty of the British Crown in New Zealand, and later the absolute Diceyan sovereignty of the New Zealand Parliament, legally valid.⁹¹ In other words, though historically illegitimate, Parliamentary sovereignty has become a legal fact.

The original basis for the imposition British sovereignty in New Zealand does not rely on the consent of the governed. The historical and contextual background of the Treaty clearly shows that Rangatira did not consent to the sovereignty of the British Crown. Rather Rangatira that signed the Treaty saw it as a way to protect their tribal prerogative to govern themselves.⁹² Perhaps then it is more fitting to talk of the sovereignty of the British Crown over New Zealand being *imposed* rather than *acquired*. Moreover, the sovereignty that was imposed was the unabridged Diceyan conception of sovereignty: absolute, indivisible and unreviewable.

III Tension between Parliamentary Sovereignty and the Treaty

So, where does the Treaty sit in relation to the doctrine of parliamentary sovereignty, holding, as it does, that parliament’s power is absolute and indivisible? Can the two co-exist? As will be discussed in the following sections, the doctrine of parliamentary sovereignty and the Treaty do co-exist to a certain, albeit limited, degree. For example, certain legislation requires that the “principles” of the Treaty must be taken into account in decision-making. The problem is that the doctrine of parliamentary sovereignty allows Parliament to assert sovereignty over the Treaty itself, thus the Treaty can only have effect to the extent that Parliament says it can. So far in New Zealand’s constitutional history the only place reserved for the Treaty has been within the vast bounds of the sovereign’s power, as illustrated by both statute and common law. The Diceyan conception of parliamentary sovereignty leaves no room for the guarantees of Maori chieftainship over their lands, settlements and personal property contained in Te Tiriti to be fulfilled. The Treaty/ Te Tiriti is essentially at the mercy of Parliament, in which Maori are a minority. In the sections that follow, the current approach of reading the Treaty into the doctrine of parliamentary sovereignty will be discussed, drawing on

⁸⁹ FM Brookfield *Waitangi and Indigenous Rights*, above n 62 at 123.

⁹⁰ *Broadcasting Assets case*, above n 3 at 517.

⁹¹ Andrew Sharp *Justice and the Maori*, above n 40 at 272.

⁹² Joe Williams “Not Ceded but Redistributed”, above n 5 at 191.

examples from legislation and common law. It is concluded that the current approach is inadequate to give any real effect to the distribution of powers provided for in Te Tiriti and therefore we need to look to options for constitutional reform.

A The Treaty and Parliament: Legislative Recognition

1 Early Recognition? Section 71 of the New Zealand Constitution Act 1852 (UK)

Section 71 of the New Zealand Constitution Act 1852 (UK) provided for the creation of self-governing Maori districts in which Maori “laws, customs and usages” could continue to be observed in so far as they were not “repugnant to the general principles of humanity”. Section 71 was one of the provisions that could not be repealed or amended by the General Assembly until 1947 and remained in force until its repeal through the introduction of the Constitution Act 1986 (NZ).⁹³ Though the section does not explicitly refer to the Treaty, the view could be taken that it gives limited effect to the guarantee of tino rangatiratanga found in article two of Te Tiriti. However, the power was only exercisable by the sovereign on the advice of the Governor, leaving Maori at the mercy of the Parliament.⁹⁴ Section 71 was never actually implemented and Maori attempts to realise this autonomy, such as the Kingitanga and the Kotahitanga movements, were not recognised by the government. As a result these movements retained only a de facto status. The section possibly came close to use on two occasions when Governor Grey offered to recognise King Tawhaio’s authority over what was known as King Country.⁹⁵ Whether or not section 71 would have been implemented is speculative as King Tawhaio refused to accept these offers unless confiscated land was returned.

It could be argued that section 71 permitted the continuation of areas of Maori autonomy, however such a view is hard to reconcile with the wording of the provision, which required the issuing of a Letters Patent by the Queen. In reality, section 71 simply reinforced the sovereignty of Parliament and as a corollary disempowered Maori. Maori systems of Tikanga and custom could not exist alongside the Westminster system – they could only exist under it to the extent that Parliament allowed for through the enactment of legislation. Maori systems of Tikanga in so far as they existed outside of that framework remained de facto and received no legal recognition.

⁹³ Section 28 of the Constitution Act 1986 repealed the New Zealand Constitution Act 1852.

⁹⁴ New Zealand Constitutional Act 1852, s 71.

⁹⁵ FM Brookfield *Waitangi and Indigenous Rights*, above n 62 at 118.

2 *Incorporation into domestic legislation*

Although the Treaty of Waitangi is arguably a valid international treaty,⁹⁶ the dualist nature of New Zealand's constitution means that it cannot impose domestic legal obligations unless Parliament, in its sovereign capacity, incorporates it into domestic legislation.⁹⁷ This is the orthodox position that was set out by the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*.⁹⁸ The Treaty was incorporated into domestic law with the enactment of the Treaty of Waitangi Act in 1975, giving it legal status but not full legal force.⁹⁹ The Treaty of Waitangi Act provided for the establishment of the Waitangi Tribunal “to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the Treaty”.¹⁰⁰

Around 30 Acts now require decision-makers to “give effect to”,¹⁰¹ “take into account”,¹⁰² “give particular recognition to”,¹⁰³ or “have regard to”, the principles of the Treaty of Waitangi when exercising public powers. Other Acts contain specific provisions recognising the rights of Maori in certain areas such as participatory rights or rights to be consulted.¹⁰⁴ Further, since July 2013 a statement disclosing the steps taken to ensure consistency with the Treaty principles must accompany proposed legislation.¹⁰⁵

The incorporation of the Treaty into domestic legislation in the form of principles can be viewed as a limit on the doctrine of parliamentary sovereignty. Many submissions to the Constitutional Advisory Panel considered the current limits on Parliament's powers through the incorporation of the Treaty principles into legislation to be sufficient for the

⁹⁶ See discussion about the status of the Treaty of Waitangi in international law, in particular whether it should be regarded as a treaty of cession or a treaty of protection in Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 54 at 154-167. The author concludes that on either analysis the Treaty of Waitangi is a valid international treaty. For a contrary view see also Anthony P Molloy “The Non-Treaty of Waitangi” (1971) NZLJ 193.

⁹⁷ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 54 at 168.

⁹⁸ *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308.

⁹⁹ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 54 at 180.

¹⁰⁰ Treaty of Waitangi Act 1975, long title. Note: The jurisdiction of the Waitangi Tribunal was extended in 1985 to include investigation of historical grievances from the period of 1840-1975.

¹⁰¹ E.g. Conservation Act 1987, s 4.

¹⁰² E.g. Resource Management Act 1991, s 8; Conservation Act 2000, s 6.

¹⁰³ Royal New Zealand Foundation for the Blind Act 1992, s 10.

¹⁰⁴ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 54 at 183.

¹⁰⁵ The Treasury “Disclosure Statements for Government Legislation: A Technical Guide for Departments” (June 2013) at 37.

protection and enforcement of the Treaty.¹⁰⁶ Following this line of thinking, significant constitutional reform is unnecessary as Treaty rights and obligations can be accommodated through the development of existing constitutional arrangements.¹⁰⁷ However, *accommodating* the Treaty within existing constitutional arrangements is not equal to *giving effect to* the Treaty. The doctrine of parliamentary sovereignty causes current constitutional structures to fail to give effect to the Treaty for three reasons that will be addressed in turn.

Firstly, the incorporation of Treaty ‘principles’ as opposed to the Treaty text in legislation does not impose any real limit to Parliamentary sovereignty. One reason for legislation incorporating Treaty principles as opposed to the Treaty text itself is no doubt the differences between the Maori and English translations of the Treaty. However, as argued earlier, the Maori text of the Treaty, in which the Maori ceded not sovereignty but governorship, should be given precedence. The doctrine of parliamentary sovereignty constitutes another likely reason for the incorporation of “principles” as opposed to the text of the Treaty itself. Parliament’s sovereignty is indivisible. To give legal effect to the Maori text of the Treaty would be doctrinally impossible, as it would potentially result in the acknowledgement of two “sovereign” bodies. The principles of the Treaty therefore constitute a lesser alternative to full incorporation of the Treaty and as such do not pose a threat to the doctrine of parliamentary sovereignty.

Secondly, any recognition of the Treaty relies on Parliament incorporating the Treaty principles into legislation. The doctrine of parliamentary sovereignty therefore disempowers Maori by removing any means of self-determination.

Finally, in so far as legislation can be argued to place a limit on Parliament’s sovereignty, any limit is moral rather than legal. Perhaps the clearest example of the unbridled power of Parliament is the foreshore and seabed debacle that culminated in the enactment of the Foreshore and Seabed Act 2004. The saga began in June 2003 when the Court of Appeal released its judgment on the case of *Attorney-General v Ngati Apa*.¹⁰⁸ The case concerned the common law doctrine of Native title, which holds that the property rights of indigenous populations continue after the acquisition of sovereignty by the Crown until they are legally extinguished.¹⁰⁹ The litigation leading to the decision began in 1997 when eight iwi of the northern South Island made an application to the Maori Land Court

¹⁰⁶ Constitutional Advisory Panel “New Zealand’s Constitution: A Report on a Conversation” (Ministry of Justice, November 2013) at 34 [Constitutional Advisory Panel Report].

¹⁰⁷ At 34.

¹⁰⁸ *Attorney General v Ngati Apa* [2003] 3 NZLR 643 [*Foreshore and Seabed case*].

¹⁰⁹ Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (WAI 1071, 2004) at 127-128.

requesting that "the foreshore and seabed of the Marlborough Sounds, extending to the limits of New Zealand's territorial sea" be defined as Māori customary land under the Te Ture Whenua Māori Act 1993.¹¹⁰ The High Court overruled the Maori Land Court finding that it had jurisdiction to consider the case. On appeal, the Court of Appeal held that the Crown had never extinguished Maori customary title over the foreshore and seabed, and that the Maori Land Court had jurisdiction to investigate the title to the land and determine the relevant interests of owners.¹¹¹

The Government swiftly issued a discussion paper announcing its plan to vest title to the foreshore and seabed in the public in order to ensure that public rights of access were not compromised. The proposed policy planned to remove the jurisdiction of the Maori Land Court under the Te Ture Whenua Maori Act 1993 to consider whether the foreshore and seabed is Maori customary land.¹¹² The High Court's jurisdiction to hear claims in relation to the foreshore and seabed based on the common law doctrine of customary rights would also be removed.¹¹³ The Waitangi Tribunal swiftly released a report, concluding that the Crown's policy was unjustifiably in breach of the Treaty principles.¹¹⁴ Specifically, the policy breached the guarantees made to Maori in article two in that it failed to protect Maori tino rangatiratanga, and also failed to honour the rule of law protection of the equal rights of all citizens at law contained in article 3.¹¹⁵

Despite the Waitangi Tribunal report, and knowledge that the proposed legislation was in breach of the plain text of the Treaty and the rule of law, Parliament in its sovereign capacity enacted the Foreshore and Seabed Act on November 18 2004. The Foreshore and Seabed Act had the effect of extinguishing any Maori customary title over the foreshore and seabed by vesting "full legal and beneficial ownership of the foreshore and seabed" in the Crown.¹¹⁶ As proposed, the jurisdiction of the Maori Land Court and the High Court was also removed without providing for any form of redress.¹¹⁷ Thus, the foreshore and seabed debate and subsequent legislation is a prime illustration of the Diceyan conception of parliamentary sovereignty in action. Parliamentary sovereignty

¹¹⁰ *Foreshore and Seabed case*, above n 108 at 95.

¹¹¹ At 96.

¹¹² Cabinet Business Committee "Foreshore and Seabed: A Framework" (17 December 2003) at [85] and [88].

¹¹³ At [267] and [273].

¹¹⁴ Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (WAI 1071, 2004).

¹¹⁵ At 127-128.

¹¹⁶ Foreshore and Seabed Act 2004, s 4(a).

¹¹⁷ Foreshore and Seabed Act 2004, ss 10 and 12.

poses a barrier to any form of meaningful treaty partnership because ultimately parliament can do as it pleases. Parliament decided what it believed to be the best course of action to protect the interests of the majority and then acted on it despite vociferous opposition from Maori.

The legal reality is that the Treaty does not limit Parliament's powers. As evidenced by the Foreshore and Seabed Act, Parliament is free to ignore moral constraints and legislation that is morally dubious is essentially legitimised. It could be argued that moral constraints are adequate. Indeed political,¹¹⁸ and international¹¹⁹ pressures led to the repeal of the Foreshore and Seabed Act in 2011, through the enactment of the Marine and Coastal Area (Takutai Moana) Act.¹²⁰ Although a marked improvement to its predecessor, it is likely that what the Act offers Maori is less appealing than what would have resulted through negotiations with the Crown.¹²¹ Although we can only speculate, had New Zealand had a Constitution that placed the Treaty as opposed to the principle of parliamentary sovereignty at its core it is likely the whole saga would have been prevented.

The Foreshore and Seabed debate highlights the need for change in New Zealand's constitutional structures in order to make way for a true Treaty partnership in which the Maori and the Crown work together.

3 International law and the doctrine of parliamentary sovereignty

For the sake of completeness it should be noted that some commentators have argued that the significance of parliamentary sovereignty is diminishing. There are a number of causal factors for its decline in popularity in the global context. Colonial nations in particular are struggling to instill a sense of historical legitimacy into the acquisition of sovereignty. Further, with most countries having controlled constitutions the sovereignty

¹¹⁸ The National Party formed a minority government based on a Confidence and Supply Agreement with the Maori Party, which was established following the foreshore and seabed debacle in 2004. One of the key tenets of Maori Party policy was that the Foreshore and Seabed Act would be revisited. A Ministerial Review Panel was established in 2009 to review the Act.

¹¹⁹ UN Committee on the Elimination of Racial Discrimination [CERD] released a decision on the Act stating it "appears to... contain discriminatory aspects against the Maori..." See CERD "Decision on Foreshore and Seabed Act 2004" (11 March 2005) Decision 1 (66): New Zealand CERD/C/DEC/NZL/1 at [6]. In August 2007 CERD reiterated its recommendation that renewed conversation between the Crown and Maori in order to find ways to mitigate the Act's discriminatory effects.

¹²⁰ Marine and Coastal Area (Takutai Moana) Act 2011, s 5.

¹²¹ RP Boast "Foreshore and Seabed, Again" (2011) 9 NZJPIL 271 at 282.

of parliament is no longer indivisible or unreviewable.¹²² However, the process of globalisation has had perhaps the biggest impact on the pervasiveness of the concept of parliamentary sovereignty. As highlighted by Sir Kenneth Keith:¹²³

In the present world, made even smaller by technology and many other human and natural forces, no state is fully sovereign in its external relations... no politician or government has real internal sovereignty. What we are seeing is the dispersal of power from so called sovereign states in at least three directions – to the international community, to the private sector, and to public bodies and communities within the state.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is relevant in regards to the dispersal of sovereignty in the international community. UNDRIP recognises the rights of tribal and indigenous peoples’ to determine their own future and identity and the “urgent need to respect and promote the rights of indigenous peoples affirmed in treaties”.¹²⁴ New Zealand, together with Canada, Australia and the United States refused to endorse the declaration when it was first published in 2007. UNDRIP was finally endorsed by New Zealand in April 2010. However, Prime Minister John Key emphasised that the declaration is an ‘aspirational’ document and will only be implemented “within the current constitutional frameworks of New Zealand.”¹²⁵ Although the endorsement is a step in the right direction, it is not legally binding until UNDRIP is ratified and incorporated into domestic legislation. Thus the declaration can only constitute a limit on Parliament’s sovereignty if Parliament decides to incorporate it into legislation. Even then, it is questionable how effective international law will be limiting parliament’s sovereignty.

Nevertheless, the changing global backdrop suggests that the applicability of the doctrine of parliamentary sovereignty should no longer be taken as a given. The time is ripe for review. The current constitutional conversation provides New Zealanders with an opportunity to question the basis for the continuing application of the concept of parliamentary sovereignty their constitution.

¹²² Joe Williams “Not Ceded but Redistributed”, above n 5 at 195.

¹²³ Kenneth Keith “The Roles of the Tribunal, the Courts and the Legislature” in G McLay (ed) *Treaty Settlements: The Unfinished Business* (Wellington, New Zealand Institution of Advanced Legal Studies and Victoria University of Wellington Law Review, 1995) 47 at 129.

¹²⁴ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, 107th plen mtg, (2007).

¹²⁵ (20 April 2010) 662 NZPD 10238.

B The Treaty and Parliamentary Sovereignty in the Courts

Chief Justice Prendergast's denial of original Maori sovereignty in the *Wi Parata* case has since been rejected as incorrect and replaced by the conception of parliamentary sovereignty as limited by the Treaty. The case law concerning the Treaty builds upon the doctrine of parliamentary sovereignty, as the courts' role in relation to the Treaty is largely dependent on legislation. It must be acknowledged that the Courts have played a pivotal part in holding the Executive accountable to its Treaty obligations. However, the following case law illustrates that progress for Maori through the Court is severely restricted by the doctrine of parliamentary sovereignty as the Treaty can only be enforced to the extent that Parliament has provided for in legislation. The majority of major case law surrounding the Treaty has involved statutes that make explicit reference to the Treaty principles.

The large amount of litigation arising out of the transfer of Crown assets to state owned enterprises in the late 1980s and early 1990s is illustrative of the limitation that the doctrine of parliamentary sovereignty places on the courts.¹²⁶ In landmark decision of the Court of Appeal in *SOE case* the panel of five judges, each delivering a separate judgment, unanimously concluded that "the Treaty created an enduring relationship of a fiduciary nature akin to a partnership" between the Crown and Maori.¹²⁷ As such, the relationship placed a positive duty on each party to act in good faith, reasonably and honourably towards each other.¹²⁸ The case concerned section 9 of the State Owned Enterprises Act 1986, which provides that "nothing in [the] Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".¹²⁹ The Court of Appeal granted declaratory relief, holding that the proposed transfer of Crown assets to state owned enterprises from which reparation for Treaty breaches could foreseeably be drawn on the recommendation of the Waitangi Tribunal was inconsistent with Treaty principles.¹³⁰ The Crown was required to put in place safeguards that gave reasonable assurance that lands or waters would not be transferred in a way that could prejudice Maori claims before any assets could be transferred. The parties eventually reached an agreement outside of Court and the declarations were discharged. The Treaty

¹²⁶ *SOE case*, above n 58; *New Zealand Maori Council v Attorney-General* (No. 2) [1989] 2 NZLR 142; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513; *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129.

¹²⁷ As summarised by Cooke P in the *Sealords case* at 304.

¹²⁸ *SOE case*, above n 58 at 661 per Cooke P; 672-3 per Richardson J and 702 per Casey J.

¹²⁹ State Owned Enterprises Act 1986, s 9.

¹³⁰ *SOE case*, above n 58 at 719.

of Waitangi (State Enterprises) Act 1988 incorporated into legislation the scheme for safeguarding Maori claims to land vested in the Crown.

Although the *SOE case* can be counted as a success for the Maori claimants, it must be remembered that the Court was only able to grant relief because Parliament had incorporated the Treaty principles into legislation. Near the end of his judgment, President Cooke stated:¹³¹

[B]ut let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.

Without legislative license from Parliament the Court would be unable to give effect to the Treaty. Section 9 of the State Owned Enterprises Act opened the door to further litigation in the years that followed. The case of *New Zealand Maori Council v Attorney-General* [1989]¹³² resulted from a change in Crown policy regarding the disposal of forest assets. The Court of Appeal affirmed the characterisation of Crown-Maori relationship as akin to a partnership expounded in the *SOE case*. Again in *Tainui Maori Trust Board v Attorney-General* [1989]¹³³ and later in *Attorney-General v New Zealand Maori Council* [1991]¹³⁴, section 9 paved a way for the Court to hold the Executive to its Treaty obligations. Although positive, these common law developments do not come close to realising Maori aspirations for tino rangatiratanga.

Section 9 came before the High Court¹³⁵ and the Supreme Court more recently in *New Zealand Maori Council v Attorney-General* [2013] (*Water rights case*).¹³⁶ The *Water Rights case* concerned the reconstitution of the Crown's ownership in the state-owned enterprise Mighty River Power Limited (MRP) as a mixed ownership model company under Part 5A of the Public Finance Act 1989. The reconfiguration of MRP as a mixed ownership model company allowed the Crown to sell up to 49 per cent of its shares in the company, which was required by legislation to be wholly owned by the Crown.

¹³¹ *SOE case*, above n 58 at 668.

¹³² 2 NZLR 142.

¹³³ 2 NZLR 513.

¹³⁴ 2 NZLR 129 [*Radiofrequencies case*].

¹³⁵ *New Zealand Maori Council v Attorney-General* [2012] NZHC 3338.

¹³⁶ NZSC 6 [*Water rights case*].

Parliament was to enact the Mixed Ownership Amendment Act to bring the proposal into effect, allowing 49 per cent of shares in MRP to be sold to the public. The claimants sought declarations in the High Court that removing MRP from the State-Owned Enterprises Act and the proposed sale of shares was unlawful in light of section 9 of the State-Owned Enterprises Act and section 45Q of the Public Finance Act 1989. The claimant's argued that the reconstitution of MRP was in breach of the principles of the Treaty because it would "materially impair the ability of the Crown to act on recommendations of the Waitangi Tribunal" relating to Treaty breaches.¹³⁷

Justice Ronald Young held that because the proposed sale of shares was to be achieved through an Act of Parliament it was not reviewable for compliance with the Treaty principles.¹³⁸ On appeal, the Supreme Court focused on the Crown's proposal, rather than how it was going to be brought into effect. The Court held that the Crown's proposal was reviewable as Parliament's intention in enacting section 45Q was that the Crown was held under a continuing obligation to comply with Treaty principles when acting under the statutory provisions governing the mixed ownership companies regime.¹³⁹ Section 45Q is identical to section 9, with an additional subsection clarifying that the obligation to act consistently with the principles of the Treaty applies only to the Crown.¹⁴⁰ The Court held that section 45Q carried with it the "heritage of section 9", in particular the decision of the Court of Appeal in the *SOE case*, such being the intention of Parliament.¹⁴¹

By framing their decision in terms of parliamentary intention, and somewhat artificially the review of Crown action rather than parliamentary action, the Supreme Court was able to avoid the roadblock of parliamentary sovereignty faced by Ronald Young J in the High Court. Though the claimant's succeeded on this point, the appeal was dismissed because the Crown's proposal was not found to be inconsistent with the Treaty principles.

The common denominator in the cases arising from the transfer of Crown assets is that the basic arguments of the parties remained within the confines of section 9 of the State-Owned Enterprises Act.¹⁴² Wider questions about the status of the Treaty in New

¹³⁷ At [2].

¹³⁸ *New Zealand Maori Council v Attorney-General* [2012] NZHC 3338 at [194]-[195].

¹³⁹ *Water rights case*, above n 136 at [51].

¹⁴⁰ Public Finance Act 1989, s 45Q(2).

¹⁴¹ *Water rights case*, above n 136 at [59] and [63].

¹⁴² *Sealords case*, above n 1 at 305.

Zealand's constitutional structure were not raised.¹⁴³ The Court reinforced the orthodox position – “neither the provisions of the Treaty of Waitangi, nor its principles, are, as a matter of law, a restraint on the legislative supremacy of parliament”.¹⁴⁴ In delivering the judgment of the Court of Appeal in the *Sealords case*,¹⁴⁵ President Cooke pointed out that any dicta bearing on wider constitutional questions surrounding the Treaty could be no more than obiter, and rightly so.¹⁴⁶ Indeed, it is not for the unelected judiciary to rule on constitutional matters. In the rare instance that they do pass judgment on such matters, it is not binding on the sovereign Parliament.

The *Sealords case* is another illustration of parliamentary sovereignty as a barrier to a Treaty-based Crown-Maori partnership. The *Sealord's case* concerned Maori fishing claims and centered on a Deed of Settlement between the negotiators for various iwi, the New Zealand Maori Council and the National Maori Congress and the Minister and Justice and Minister of Fisheries, both representing the Crown. Decisions of the Courts in relation to Maori fishing rights prior to the *Sealords case* form part of the factual matrix and will be discussed briefly by way of background. The cases began with the introduction of the Quota Management System (QMS) by the government to regulate commercial fisheries in New Zealand's exclusive economic zone. The QMS empowers the Minister of Fisheries to declare certain areas to be quota management areas and to deem certain species of fish in those areas to be subject to the QMS.¹⁴⁷ A total allowable catch for the species in the quota management area is set before an allowance for Maori non-commercial fishing rights is subtracted, leaving the total allowable commercial catch.¹⁴⁸ The total allowable commercial catch is divided into individual transferable quotas (ITQ's), a form of property right to catch and sell a certain amount of fish.¹⁴⁹ Quota holders pay an annual rental fee to the Crown and can trade or lease their property rights.¹⁵⁰

¹⁴³ *Sealords case*, above n 1 at 304.

¹⁴⁴ *SOE case*, above n 58 at 642, per Somers J.

¹⁴⁵ *Sealords case*, above n 1.

¹⁴⁶ At 304.

¹⁴⁷ For an accessible description of the QMS see Justine Munro “The Treaty of Waitangi and the Sealord Deal” (1994) 24 VUWLR 389 at 400-402 [Munro “The Treaty of Waitangi and the Sealord Deal”].

¹⁴⁸ At 400.

¹⁴⁹ Fisheries Act 1983, s 28O.

¹⁵⁰ Fisheries Act 1983, s 28ZC.

The QMS is based on the premise that the Crown, and not Maori, own all fisheries¹⁵¹ and therefore was in breach of article 2 of both the English and Maori texts of the Treaty – the right of Maori to full, exclusive and undisturbed possession of their fisheries and tino rangatiratanga over their lands and taonga. The Crown proceeded with the implementation of the QMS despite warnings from the Waitangi Tribunal that its actions were in breach of the Treaty. Maori sought judicial review of the Minister of Fisheries’ decision to allocate quota under the QMS. The Maori claimants argued that the Minister’s decision was unlawful under section 88(2) of the Fisheries Act 1983 which provided that “Nothing in this Act shall affect Maori fishing rights”. The High Court upheld the claim and issued an interim declaration that the allocations should not proceed.¹⁵²

The decision of the High Court had the effect of forcing the Crown into negotiations with Maori. However when no agreement was reached Parliament decided to legislate for settlement without Maori consent. The Maori Fisheries Act 1989 provided for the transfer of a 10 per cent quota within the QMS framework from the Crown to Maori over three years¹⁵³ and granted \$10 million towards the establishment of Maori Fisheries.¹⁵⁴ The Court of Appeal held that the Act was sufficient, albeit as an interim measure,¹⁵⁵ to meet any ongoing or future Treaty obligations in relation to fishing rights.¹⁵⁶ The problem with the Act however was that it only reflected the Crown’s view on how to best recognise Maori fishing rights.¹⁵⁷ The negotiation process was essentially undermined by Parliament using what could be described as a right of veto and imposing a solution, which although a step in the right direction, failed to respect Maori autonomy.

It was against this backdrop that the *Sealord’s case* came before the Court of Appeal. The opportunity of acquiring Sealords Limited (Sealords), a large company holding 26% of the total quota under the QMS as part of a joint venture between the Maori Fisheries Commission and Brierley Investments Limited came up in June 1992. Negotiations between representatives of various iwi and the Crown took place with a view to the

¹⁵¹ Munro “The Treaty of Waitangi and the Sealord Deal”, above n 147 at 401.

¹⁵² *New Zealand Maori Council and Te Runanga o Muriwhenua v Attorney-General* CP 553/87, 30 September 1987.

¹⁵³ Maori Fisheries Act 1989, s 40.

¹⁵⁴ Maori Fisheries Act 1989, s 45.

¹⁵⁵ *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 649: “The Act does not use the word “interim”, but by leaving s 88(2) and the High Court proceedings in existence, and imposing no bar on Waitangi Tribunal proceedings, Parliament has clearly left it to the courts and the Tribunal to determine how far the Act goes in discharge of any obligations falling on the Crown”.

¹⁵⁶ *Te Runanga o Muriwhenua v Attorney-General* CA 110/90, 28 June 1990.

¹⁵⁷ Munro “The Treaty of Waitangi and the Sealord Deal” at 407.

Crown helping Maori to purchase Sealord. The Deed of Settlement that gave rise to the litigation was executed on 23 September 1992. The Deed provided that the Crown would provide Maori with capital to enter into a joint venture with Brierley Investments Ltd to purchase Sealords.¹⁵⁸ The Crown also agreed to introduce legislation to amend the Fisheries Act authorising 20 per cent allocation of any new quota issued as a result of new species being added to the QMS.¹⁵⁹ In exchange the Maori involved in the negotiations agreed to withdraw all existing litigation,¹⁶⁰ and support the repeal of all legislative references to Maori fishing rights and interests, including an amendment to the Treaty of Waitangi Act 1975 to remove claims related to commercial fishing from the Tribunals jurisdiction.¹⁶¹ Maori negotiators only signed on behalf of those who had authorised them to do so, and the Deed did not purport to bind non-signatories. However, the Deed's enacting legislation provided that the settlement extended to all Maori.

Iwi and groups of Maori who opposed the Deed brought proceedings seeking interim relief by way of injunction or declaration. The applications were declined in both the High Court and the Court of Appeal. The Court of Appeal refused to intervene, citing the longstanding rule of "non-interference by the courts in parliamentary proceedings".¹⁶² Parliament was free to make whatever legislative changes it saw fit.¹⁶³ The Court was cautious to affirm the doctrine of parliamentary sovereignty, concluding, "[p]ublic policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it".¹⁶⁴ Because the Deed was not binding on non-signatories the cause of action was "misconceived" and could not succeed.¹⁶⁵

However, there were hints of judicial creativity in the *Sealords case*. Of particular interest is President Cooke's support for the characterisation of the Crown-Maori relationship as fiduciary one. In the absence of legislative licence, such as that in section 9 of the State-Owned Enterprises Act, it is possible that the judiciary could find a fiduciary duty owed by the Crown to Maori arising from the Treaty. The Supreme Court of Canada in *R v Sparrow* held that unextinguished aboriginal title gave rise to a fiduciary obligation and

¹⁵⁸ "Deed of Settlement between Her Majesty the Queen and Maori" (1992) at cl 3.1.

¹⁵⁹ At cl 3.2.

¹⁶⁰ At cl 4.3.

¹⁶¹ At cl 3.5. and 4.4.

¹⁶² *Sealords case*, above n 1 at 307.

¹⁶³ At 308.

¹⁶⁴ At 309.

¹⁶⁵ At 309.

constructive trust on the part of the Crown.¹⁶⁶ President Cooke stated that the “Treaty of Waitangi is a major support for such a duty”.¹⁶⁷ Nevertheless, any decision of the Court is potentially subject to the overriding sovereignty of Parliament. Further, although the enforcement of fiduciary obligations may offer Maori more protection from the excesses of government, it would not actually give effect to the power sharing arrangement provide for in te Tiriti.

The High Court case of *Huakina Development Trust v Waikato Valley Authority* unfortunately faced the same fate.¹⁶⁸ The legislation involved in the case did not contain a specific reference to the Treaty. Despite the absence of statutory licence, Justice Chilwell held that the Treaty principles, as part of the “fabric of New Zealand society”, should colour the interpretation of the legislation.¹⁶⁹ Though a presumption in statutory interpretation of consistency with the Treaty principles is a promising step towards greater protection of the Treaty, it stops well short of giving effect to the Treaty at law.

The bottom line is judicial activism or creativity in the area of Treaty rights cannot prevent Parliament from doing as it pleases. The courts powers are limited by the doctrine of parliamentary sovereignty – they may only act to the extent that Parliament provides for in legislation. The ability of Parliament to override any decision of the Court with legislation threatens to undermine any gains made from judicial creativity in interpretation. Decisions that served to enhance Maori rights under the Treaty also made them a function of parliamentary sovereignty.¹⁷⁰ Although the Treaty is often characterised as a limit on parliamentary sovereignty, in reality the sovereignty of Parliament is preserved.¹⁷¹

IV Parliamentary sovereignty as an opportunity?

There is a line of argument that holds parliamentary sovereignty out as an opportunity for the enforcement of the Treaty. For example, if New Zealand had adopted a supreme Constitution in 1852 or 1947 it is unlikely that the Treaty would have formed a part of it. Therefore Parliament, being bound by the Constitution, would not be able to give effect to the Treaty. The fact that Parliament has been unable to bind itself in the past means that today it has an opportunity to recognise and incorporate the Treaty. However, this

¹⁶⁶ *R v Sparrow* (1990) 70 DLR (4th) 385 at 406-409.

¹⁶⁷ *Sealords case*, above n 1 at 306.

¹⁶⁸ [1988] 2 NZLR 188.

¹⁶⁹ At 213.

¹⁷⁰ Andrew Sharp *Justice and the Maori*, above n 40 at 274.

¹⁷¹ At 274.

argument is somewhat circular, as it also follows that Parliament is free to completely ignore the Treaty. Further, the absolute and indivisible nature of parliamentary sovereignty means that there is only room for the recognition of the Treaty within the doctrine. As discussed, reading the Treaty into the doctrine of parliamentary sovereignty ultimately preserves and bolsters, rather than limits, the absolute power of parliament.

V Beyond “Sovereignty”

To give a Crown-Maori partnership the best chance at success we need to move past the colonial preoccupation with indivisible and absolute “sovereignty” and look at options for constitutional reform that allow for power sharing. Maori aspirations for their advancement and development as a people are often framed in terms of “Maori sovereignty”. However, Mason Durie argues that framing Maori aspirations in terms of sovereignty threatens to undermine Maori society as inherent in the concept of sovereignty are colonial systems and processes that conflict with the Maori way.¹⁷² “Sovereignty” is a colonial term, foreign to Maori concepts of power and governance.¹⁷³ The absolute vesting of power in one body or person to which everyone else is subject is contrary to Maori decision-making, which aims for “consensus rather than decree”.¹⁷⁴ The growth and advancement of Maori as a people is not going to be attained through simply replicating colonial systems of government.¹⁷⁵ This concern was echoed by the Constitutional Advisory Panel in noting that more consideration should to be given to options for Treaty-based constitutional reform that do not seek to fit the Treaty within the current Westminster system.¹⁷⁶

Te Tiriti did not provide for a Maori Leviathan, nor did it provide for a Pakeha Leviathan. Te Tiriti provides no basis for either party to assert absolute sovereignty over the other. Te Tiriti provided for a redistribution of power between two equal peoples. It is therefore time to look beyond the pervasive notion of sovereignty and look to unique constitutional arrangements based on the Treaty.

VI Options for Reform

The discussion so far has set out the constitutional history of the Treaty and the somewhat shaky foundation for the application of the doctrine of parliamentary sovereignty in New

¹⁷² Mason Durie “Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination”, above n 28 at 219.

¹⁷³ At 219.

¹⁷⁴ At 219.

¹⁷⁵ At 219.

¹⁷⁶ Constitutional Advisory Panel “Report on a Conversation”, above n 106 at 33.

Zealand. The analysis of the Treaty in legislation and in the courts shows some progress in terms of recognition of the Treaty. It also highlights that progress often relies on the good faith of Parliament in the exercise of its sovereign powers. In some instances parliamentary sovereignty has undermined the Treaty and as a result has worked injustice. In the words of Martin Luther King - “[l]aw and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress”.¹⁷⁷ It is argued that although the doctrine of parliamentary sovereignty can be, and has been, used for just purposes, it has failed to deliver justice to Maori on many occasions. As such, parliamentary sovereignty constitutes a barrier to an effective Treaty-based partnership between the Crown and Maori. The Treaty provides a basis for moving forward as a nation, and a pattern for an effective Crown-Maori partnership that enables both parties to develop and prosper. To realise this potential, we need to rethink the position of the doctrine of parliamentary sovereignty as the underlying principle of our constitution.

The following sections will discuss three models for reform and consider the strengths and weaknesses of each model. As a healthy Crown-Maori relationship is an essential element in any constitutional change, the fundamental principles underlying a successful Crown-Maori partnership will be outlined before addressing the models for reform.

A Key elements for an effective Treaty-partnership

The Treaty of Waitangi/ Te Tiriti o Waitangi forms the foundation for the Crown-Maori partnership.¹⁷⁸ It is a “blueprint”,¹⁷⁹ or a “text for the performance of nation”.¹⁸⁰ As summarised by Bronwyn Campbell:¹⁸¹

There is glorious potential within Te Tiriti/ the Treaty to negotiate a better relationship between Maori and Pakeha (and others) that is able to transcend our colonising past, appreciate contemporary challenges of power, authority and position, and to explore new relationships in a way more akin to collaborative synergy.

¹⁷⁷ Martin Luther King, Letter from a Birmingham Jail (16 April 1963).

¹⁷⁸ Constitutional Advisory Panel “Report on a Conversation”, above n 106 at 29.

¹⁷⁹ Bronwyn Campbell “Te Titiri O Waitangi: A Blueprint for the Future”, above n 18.

¹⁸⁰ Philip A Joseph “The Treaty of Waitangi – A Text for the Performance of Nation” (2004) 4 Oxford University Commonwealth Law Journal 1.

¹⁸¹ Bronwyn Campbell “Te Titiri O Waitangi: A Blueprint for the Future” above n 18 at 63.

The principles of good faith, reciprocity, equality and active protection are key elements to an effective Crown-Maori partnership. These principles can be drawn from the Treaty itself. As enunciated by the Court of Appeal in the *SOE case*, the Treaty “signified a partnership between Pakeha and Maori requiring each partner to act towards the other reasonably and with the utmost good faith”.¹⁸² The principle of reciprocity can be distilled from the Treaty text – Maori kawanatanga or governorship (Article 1) and the right of preemption (Article 2) was given subject to the protection and guarantee of tribal authority and control over their resources.¹⁸³ The preamble to Te Tiriti also imports a duty on behalf of the Crown to actively protect Maori people in the use of their lands and waters “to the fullest extent practicable”.¹⁸⁴ The duty of active protection imposes on the Crown an obligation to ensure that Maori have resources capable of providing “comfort, safety or subsistence”¹⁸⁵ as well as assisting in the development of those resources.¹⁸⁶

At a more fundamental level, a successful Crown-Maori partnership will require a shared vision for the future. The responsibility for casting this shared vision falls on the shoulders of Maoridom and the Crown. Vital in this process of establishing a strong vision for the future is a spirit of partnership where negotiation and deliberation are undertaken in good faith, with each partner having an opportunity to speak and to be heard and a corresponding duty to listen and to take on board what the other is saying. The Diceyan conception of parliamentary sovereignty effectively precludes such a process by placing all power in the hands of the Crown and is thus destined to fail in achieving a shared vision.

C Models for Reform

It should be noted that this paper aims to open up discussion around the area of constitutional reform and the place of the Treaty in New Zealand’s constitutional arrangements. As such, the ideas set out should be seen as embryonic, rather than fully formed. Constitutional transformation also requires social transformation.¹⁸⁷ Wider education, discussion and deliberation are needed, between Maori themselves, between

¹⁸² *SOE case*, above n 58 at 642.

¹⁸³ Kerry Davis “Self-Determination and Constitutional Change (2000-2003) 9 Auckland UL Rev 235 at 238.

¹⁸⁴ *SOE case*, above n 58 at 664 per Cooke P.

¹⁸⁵ Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (WAI 9, 1987) at 146.

¹⁸⁶ Waitangi Tribunal *Muriwhenua Fishing Report* (WAI 22, 1988) at 194.

¹⁸⁷ Moana Jackson “Constitutional Transformation” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 325 at 335.

Maori and the Crown, and also amongst all New Zealanders.¹⁸⁸ A considered debate will take time. In the meantime consideration should be given to possible interim measures for protecting the status of the Treaty as New Zealand's founding document.

Constitutionally, Crown-Maori relations are at a crossroad and parliamentary sovereignty is a barrier that must be addressed. Although the significant gains in the area of Crown-Maori relations over the last few decades should not be ignored, there is no room for complacency. New Zealand's approach to constitutional development has in the past been ad hoc. The preference seems to be to react to events if and when they occur. Although such an approach is sometimes pragmatic, it risks damaging rather than enhancing Crown-Maori relations,¹⁸⁹ a prime example being the hasty enactment of the Foreshore and Seabed Act. Piecemeal development is no longer an option if we want to move forward as a nation.

The following sections will discuss options for constitutional reform. The report of the Constitutional Review Panel commented that, although many submitters passionately expressed their visions for the Treaty, detail around how such visions could be achieved was lacking.¹⁹⁰ Ideas that seek to fit the Treaty within New Zealand's current constitutional framework have been "relatively well traversed" but options that begin with the Treaty/ *te Tiriti* have received little attention.¹⁹¹ However, the Human Rights Commission's submission to the Panel did focus on the Treaty as a starting point. It put forward three scenarios for the role of the Treaty within New Zealand's constitution.¹⁹² The first scenario views the Treaty as *part* of New Zealand's constitutional structure, the second views the Treaty as shaping New Zealand's constitutional arrangements (the bicultural model) and the third sees New Zealand's constitutional obligations as flowing from the Treaty (co-existence model).¹⁹³ These three views form the basis for the following discussion.

1 The Treaty as Part of New Zealand's Constitution

The first model proposed by the Human Rights Commission, which views the Treaty as *part of* New Zealand's constitution is not dissimilar to the New Zealand's current

¹⁸⁸ At 333.

¹⁸⁹ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 54 at 298.

¹⁹⁰ Constitutional Advisory Panel "Report on a Conversation", above n 106 at 33.

¹⁹¹ At 33.

¹⁹² Human Rights Commission "Submission to the Constitutional Advisory Panel on the Review of New Zealand's Constitutional Arrangements" at 44-53 [HRC Submission].

¹⁹³ At 45.

approach to giving effect to the Treaty. The principal conception of power remains as parliamentary sovereignty.¹⁹⁴ Maori customary rights provided for in the Treaty would constitute a limit on parliamentary sovereignty.¹⁹⁵ The Human Rights Commission submission does comment that some legal and/or constitutional recognition would need to be given to the Treaty, although it does not traverse what this would look like.¹⁹⁶ Out of the three models, this first model would be the easiest to implement, requiring as it does little change to existing legal and political institutions. However, the model has significant weaknesses that prevent it from creating an environment conducive to constitutional transformation.

Greater legal protection of the Treaty through its incorporation into law or constitution would make no difference to its current position unless it was entrenched. For example, the incorporation of the Treaty into the Bill of Rights would not prevent Parliament from making legislation inconsistent with it or simply legislating over it. Parliament's sovereign powers would remain legally unlimited – it being able to “make or unmake any law”. As discussed earlier, the untrammelled sovereignty of parliament is a barrier to a true Crown-Maori partnership.

Entrenchment of the Treaty/Te Tiriti poses issues of its own. For a start, which text would be entrenched? Or should the principles rather than the text itself be entrenched? If that is the case – whose principles do we entrench? The Courts, the Waitangi Tribunal and the Government each have their own set of Treaty principles. Moreover, the issue of an unelected judiciary striking down legislation in New Zealand's representative democracy is likely to make many New Zealander's uncomfortable to say the least. In 1985 the government issued a White Paper that advocated an entrenched Bill of Rights, and Treaty of Waitangi, elevating them to the status of supreme law.¹⁹⁷ A large proportion of submissions collected after an extensive consultation with the wider public were against the proposed entrenchment. The main objection to the proposal was that entrenchment would “elevate judicial power over parliamentary power, and be anti-democratic”.¹⁹⁸ These issues are not unique to this model of constitutional reform as the option of

¹⁹⁴ HRC Submission, above 192 at [4.65].

¹⁹⁵ At [4.63].

¹⁹⁶ At [4.63].

¹⁹⁷ Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984-1985] 1 AJHR A6.

¹⁹⁸ Paul Rishworth “The New Zealand Bill of Rights” in G Huscroft, P Rishworth, S Optican and R Mahoney (eds) *The New Zealand Bill of Rights* (Melbourne, Oxford University Press, 2003) 7.

entrenching the Treaty/Te Tiriti is not excluded from the bicultural and co-existence models as a means to protect its status.

The bigger issue with this approach is that it does not look beyond the confines of the Westminster system to seek a solution. The constitutional structure remains essentially identical to the colonial model. Though entrenchment would go some way to protect Maori rights and enforce Crown obligations, so long as the principal site of power remains vested in Parliament it would not actually give effect to the Treaty. The model, in seeking a solution fails to reach the heart of the problem. What we need is a constitutional transformation of the way that public power is configured and exercised so that power is not concentrated in Parliament or shared between Parliament and the courts but is instead shared between Maori and the Crown as provided for in the Treaty. Maori would then be freed from reliance on Parliament and the Courts, and would be empowered to determine their future.

2 *The Bicultural Model*

The bicultural model views the role of Treaty/Te Tiriti as one that *shapes* New Zealand's constitutional arrangements. The bicultural model is essentially a framework for power sharing between the Crown and Maori and as such is conducive to an effective Crown-Maori partnership. The constitutional narrative informing the model acknowledges the original independence and sovereignty of Maori, holding that Rangatira granted powers of self-government to the British Crown.¹⁹⁹ Rangatira and the Crown decided to develop a system of law and governance that recognised and incorporated aspects of each other's laws and systems rather retaining co-existing, separate laws and systems.²⁰⁰

The bicultural model goes further than the first model outlined in that it deals with the distribution of powers and governance at a structural level. Unlike the first model, the bicultural model removes the barrier of parliamentary sovereignty as opposed to attempting to mitigate it. The recognition that New Zealand has two founding cultures, not one, is an prerequisite to both social and constitutional change. The Waitangi Tribunal pointed out that unless and until "Maori culture and identity are valued in everything the government says and does; and unless they are welcomed into the very centre" of the running of the country positive change, growth and development as a

¹⁹⁹ HRC Submission, above 192 at [4.70].

²⁰⁰ At [4.70].

nation is blocked.²⁰¹ Following the bicultural model Mana Maori and Crown sovereignty would together form the principal concepts of power and would be shared in accordance with the Treaty, acknowledging the dual cultures.

Exactly what bicultural governing institutions would look like, and how such institutions will be developed is unclear. However, there have been various suggestions for possible frameworks. The Treaty Title Bill, put forward by Professor Alex Frame in 2005 suggested giving the Treaty a legal personality and then establishing bicultural institutions to give the Treaty a voice.²⁰² Such an approach could look similar to arrangements provided for in an Agreement in Principle between Whanganui River iwi and the Crown.²⁰³ The agreement provides for the statutory recognition of the Whanganui River as a separate legal entity with its own legal standing and also establishes a body to act on its behalf.²⁰⁴ However, in so far as it requires statutory recognition the implementation of such a model would be at the mercy of parliament.

The Anglican Church model provides another possibility in terms of implementing a bicultural model. Debate regarding the place of Maori in the Anglican Church of New Zealand led to the establishment of a bicultural commission, tasked with investigating the possibility of a bicultural framework in the future and advising the General Synod on ways in which the church could embody the principles of the Treaty.²⁰⁵ The commission recommended the revision of the constitutional structure of the Church to properly reflect and give voice to Maori and Pasifika culture.²⁰⁶ The revised constitution, adopted in 1986, affirmed the Treaty of Waitangi as the basis on which future government and settlement of New Zealand was agreed and acknowledged that the “Treaty implies partnership between Maori and settlers and bicultural development within one nation”.²⁰⁷ To give effect to this partnership, the constitution established three houses in the General

²⁰¹ Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (WAI 262, 2011) at 2.

²⁰² Alex Frame “Treaty Title Bill” Portion of a presentation by Alex Frame at Capital City Forum Saturday 5th March 2005 at Connolly Hall, Wellington.

²⁰³ HRC Submission, above 192 at [4.75].

²⁰⁴ At [4.75].

²⁰⁵ Bishop Muru Walters “The Anglican Church” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 219 at 224-225 [Bishop Muru Walters “The Anglican Church”].

²⁰⁶ At 224-225.

²⁰⁷ Constitution of the Anglican Church in Aotearoa, New Zealand And Polynesia, cl 6.

Synod: Tikanga Maori, Tikanga Pakeha and Tikanga Pasifika.²⁰⁸ The Bishop of Aotearoa is the head of the Tikanga Maori house, which is divided into five hui amorangi. Maori in the diocese can elect Tikanga Maori or Tikanga Pakeha.²⁰⁹ Bishop Muru Walters believes that the Anglican model for a bicultural partnership could be adopted at parliamentary level with a similar three-house system in Parliament with a Maori House, a Pakeha House and a Treaty House (with a combination of Maori and Pakeha).²¹⁰

One of the strengths of the Anglican Church model is that decisions are reached by consensus of all Tikanga rather than by a majority vote. Bishop Muru Walters comments that this decision-making format has provided an opportunity for all sides to have their say and notes that they are yet to reach a “stalemate”.²¹¹ In the context of the Crown-Maori partnership, with Pakeha comprising around 77 per cent of the total population and Maori only 15 per cent, a tension exists between the democratic principle of majority rule and the protection of minority rights.²¹² It is easy in a representative democracy for the majority to ignore or exploit those who form the minority.²¹³ The Anglican model provides a possible answer to this tension. Equality between Maori and the Crown is a necessity if a true partnership is to be established. However, not all definitions of equality are ‘equal’. The retention of the current liberal democratic definition of equality, with its focus on equality of opportunity, is likely to trample on Maori rights as the majority ‘rules’. A social democratic definition of equality focusing on equality of outcome, like that adopted in the Anglican Church would be more conducive to a bicultural partnership as one “people” would equate to one vote.²¹⁴ Thus the interests of those forming the majority (those represented by the Crown) would not always trump the interests of the Maori minority.

²⁰⁸ Bishop Muru Walters “The Anglican Church” above n 205 at 225.

²⁰⁹ At 225.

²¹⁰ At 228. See also Tama W. Potaka “Legislation and Legislature” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 83 at 95 for a similar model.

²¹¹ Bishop Muru Walters “The Anglican Church”, above n 205 at 225-226.

²¹² Statistics New Zealand “Demographic Trends 2011”

<http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/demographic-trends-2011/national%20demographic%20projections.aspx>.

²¹³ Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution*, above n 54 at 292.

²¹⁴ Kerry Davis “Self-Determination and Constitutional Change” (2000-2003) 9 *Auckland UL Rev* 235 at 237.

The impact of this definition of equality can be seen in the recent debate over water rights culminating in the *Water Rights* case.²¹⁵ The Waitangi Tribunal's interim report on the National Freshwater and Geothermal Resources claim recommended that the Crown further consult with Maori through a national hui in relation to a "shares plus" option before implementing its proposal for the sale of shares in MRP.²¹⁶ The Crown consulted groups with a direct interest in the water resources concerned, but the process was rushed and the issues discussed were narrow. Although the Supreme Court held that the consultation was not shown to be inadequate, the process is illustrative of the importance of an equal footing between parties. Equality of outcome would require meaningful consultation between parties until a consensus is reached. Equality of opportunity still allows for consultation, but it does not require consensus. Thus the more powerful party usually wins. That said, requiring parties to reach consensus could also constitute a weakness. The risk of reaching a stalemate cannot be discounted. More often than not the Crown is operating under time constraints and extensive consultation may not be practical.

Another interesting aspect of the Anglican Church constitution is the inclusion of a Tikanga Pasifika house. A significant proportion of submissions to the Constitutional Advisory Panel viewed the Treaty not only as the foundation for a bicultural partnership but also for multiculturalism. For this grouping the Treaty was not only about the relationship between Maori and the Crown but also about relationships between Maori and all other New Zealand citizens.²¹⁷ Interestingly, Bishop Walters believes that the introduction of Tikanga Pasifika was premature as it has placed strain on the allocation of resources and created friction between Tikanga Maori and Tikanga Pasifika.²¹⁸ New Zealand is an increasingly multicultural country. However, the constitutional foundation of Crown-Maori relations is not, and has never been, based on race.²¹⁹ The Crown-Maori relationship has its base in the Treaty.

It is important to note that a bicultural partnership, as well as requiring reform of the concentration of public power in parliament, will also require reform of law, policies and

²¹⁵ *Water rights case*, above n 136.

²¹⁶ Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (WAI 2358, 2012).

²¹⁷ Constitutional Advisory Panel "Report on a Conversation", above n 106 at 32.

²¹⁸ Bishop Muru Walters "The Anglican Church", above n 205 at 226. This is because Pasifika are said to already have their own tino rangatiratanga in their own countries.

²¹⁹ PG McHugh "Treaty Principles: Constitutional Relations Inside a Conservative Jurisprudence" (2008) 39 VUWLR 39 at 50.

practices across a broad range of areas. For example, areas such as health, education, Maori language, resource management and conservation will need to be adapted to incorporate Maori approaches.²²⁰

There is a sense in which the bicultural model, while removing the barrier of parliamentary sovereignty, seeks to accommodate rather than truly give effect to the Treaty. The Constitution itself, as opposed to the Treaty, is the starting point. The Treaty molds the shape of New Zealand's constitutional arrangements rather than forming the foundation for New Zealand's constitution, from which all constitutional arrangements flow. It follows that the ability of the bicultural model to realise Maori aspirations for self-determination or self-government must be questioned.²²¹ The co-existence model as an alternative approach leaves more room for the power-sharing arrangements signaled by the Treaty.

3 *The Co-existence Model*

The co-existence model views New Zealand's constitutional arrangements as flowing from the Treaty. In this sense, it most closely aligns to the status of the Treaty/Te Tiriti as New Zealand's founding document. Under the co-existence model the two powers – mana Maori and Parliamentary sovereignty exist independently of each other. Each power “has clearly defined spheres of influence and established processes for working together”.²²² The constitutional narrative under the co-existence model is similar to that put forward by Moana Jackson: Maori granted the Crown the right of kawanatanga or governorship over its own people through article one of Te Tiriti and the authority to exercise power over Maori remained with iwi.²²³

Consistent with the right of indigenous peoples to maintain and develop their own decision-making institutions contained in the United Nations Declaration on Rights of Indigenous Peoples,²²⁴ the co-existence model provides an opportunity for Maori to establish their own governing institutions. The Maori desire for self-government has long

²²⁰ Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (WAI 262, 2011) at 205 and 227-228.

²²¹ Mason Durie “Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination”, above n 28 at 232.

²²² HRC Submission, above 192 at [4.76].

²²³ Moana Jackson “Maori Law, Pakeha Law and the Treaty of Waitangi” in Remiri Young (ed) *Mana Tiriti: The Art of Protest and Partnership* (Daphne Brassell Associates Press, Wellington, 1991) at 19.

²²⁴ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, 107th plen mtg, (2007).

been documented. In 1864 Henry Sewell, New Zealand's first Premier wrote of the "inherent rights of New Zealander's to govern themselves according to their usages".²²⁵

More research and discussion would be needed in order to determine what form a co-existence model would take in New Zealand. However, examples of the co-existence model can be drawn from New Zealand history, with the Kingitanga and the Kotahitanga movements. Templates for forms of self-determination can also be found internationally with the Sami Parliaments in Norway, Sweden and Finland.

The Kingitanga movement began in the middle of the 19th century and arose out of the recognition of the need for the unification of Maori interests in light of the continuing loss of land and increasing tribal warfare.²²⁶ After deliberation with major tribes and various summit meetings Potatau Te Wherowhero was consecrated King on 2 May 1858, marking a new chapter in Maori political organisation.²²⁷ The King's role was "to unite the Maori people, to care for Maori interests through Maori principles, by Maori, for Maori, with Maori."²²⁸ Te Wherowhero's successor, Tawhiao, established his parliament known as Te Kauhanganui. Today the Waikato-Tainui Te Kauhanganui Incorporated Society, a body established to administer tribal assets from the Waikato Raupatu Claims settlement is widely recognised as Waikato-Tainui's Parliament.²²⁹

In terms of a model for co-existence the Kingitanga faces serious barriers. The Kingitanga's core followers are made up of the inner circle the Tainui Confederation – consisting of Waikato, Raukawa, Maniapoto and Hauraki Tribes.²³⁰ Although it does have some supporters outside of the Tainui confederate the Kingitanga does not have the support of all Maori people. In fact, a Nga Puhi leader recently challenged the use of the title "Maori King" on the grounds that the king is not the king of all Maori.²³¹ The

²²⁵ Letter from Henry Sewell to Lord Lyttelton regarding The New Zealand Native Rebellion (1864, reprinted Hocken Library Facsimile No 14, 1974).

²²⁶ Tom Roa "Kinigtanga" in in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 165 at 167 [Tom Roa "Kinigtanga"]. For a detailed account of the history of the Kingitanga see "Te Kingitanga: The People of the Maori King Movement: Essays from the Dictionary of New Zealand Biography" (Auckland University Press, Auckland, 1996).

²²⁷ Tom Roa "Kinigtanga", above n 226 at 168.

²²⁸ At 168.

²²⁹ At 171.

²³⁰ At 170.

²³¹ "PM not bowing to pressure over Maori King" *One News/Fairfax* (New Zealand, 2 June 2011) <<http://tvnz.co.nz/national-news/pm-not-bowing-pressure-over-maori-king-4209658>>.

absence of a single unified Maori body politic adds a layer of complexity when examining options for co-existence. However, a separate Maori Parliament, similar to the Kotahitanga movement of the 1890's could operate to unify the Maori population.

Although the Kotahitanga movement was short-lived, it provides a promising framework for mana Maori to exist alongside the Crown's power. The Kotahitanga movement endeavoured to unify Maori in to a single pan-tribal group.²³² The Kotahitanga movement began with the meetings of the Waitangi and Orakei Parliaments in 1889. Both sought the unification of Maori and with this focus in mind each signed a separate pledge of allegiance to the Kotahitanga movement.²³³ These pledges later became a mandate for the Kotahitanga Parliament. Over 39,000 signatures were gained by 1892 when the Kotahitanga Parliament had its first sitting.²³⁴ The Kotahitanga consisted of two houses – a lower house and an upper house. The upper house was made of up 50 members of parliament selected from 96 elected members.²³⁵ The country was divided into districts where tribal groups could vote for members of the Kotahitanga Parliament.²³⁶ The movement ended in 1896 after four failed attempts to gain legal recognition from the New Zealand Parliament.²³⁷

On the international plane, the Sami Parliaments provide an example of semi-autonomous institutions being used to realise indigenous self-determination without threatening the territorial integrity of the state.²³⁸ The Sami people are indigenous to Samiland, an area comprising of the northern-most parts of Norway, Sweden, Finland and Russia.²³⁹ The Sami population, about 70,000 in total, was split when the Nordic countries drew up their national borders.²⁴⁰ From the 19th century to the middle of the 20th century the Nordic states' Sami policy, like the New Zealand government's policy towards Maori, was based

²³² Basil Keane "Kotahitanga" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 175 at 175 [Basil Keane "Kotahitanga"]. See also Ranginui Walker "Ka Whawhai Tonu Matou: Struggle Without End" (Penguin Books, Auckland, 2004) at 165 -174.

²³³ Basil Keane "Kotahitanga" above n 232 at 176.

²³⁴ At 177.

²³⁵ At 181.

²³⁶ At 181.

²³⁷ At 184.

²³⁸ HRC Submission, above 190 at [4.87].

²³⁹ Eva Josefsen "The Saami and the National Parliaments: Channels for Political Influence" (Inter-Parliamentary Union and United Nations Development Programme, Mexico, 2010) at 2 [Eva Josefsen "The Saami and the National Parliaments: Channels for Political Influence"].

²⁴⁰ HRC Submission, above 192 at 136.

on assimilation.²⁴¹ The first Sami Parliament was established in Finland in 1973. The Finnish Constitution recognises Sami people as indigenous people with the right to preserve their language and culture in the Finnish Constitution.²⁴² The Act on the Sami Parliament, adopted by the Finnish Parliament in 1995, sets out the sphere of the Sami Parliament's powers.²⁴³ Under section 5 the Sami Parliament may consider all issues concerning the Samis' language, culture and status as indigenous people".²⁴⁴ The Act also ensures the cultural autonomy of Sami "in matters concerning their language and culture".²⁴⁵

Sami Parliament's were established in Norway and Sweden in 1989 and 1993 respectively. The operation of the Sami Parliament in Sweden is controlled by the state. An Act of the Swedish Parliaments sets out the purpose of the Sami Parliament as being "to monitor issues that relate to Sami culture in Sweden".²⁴⁶ Although their indigenous status is not protected at a constitutional level, the existence of the Sami Parliament implies recognition of their special position.²⁴⁷ The Sami Parliament in Norway does not have a clear constitutional status. Although it is not controlled by the state it is not fully independent. The remit of the Sami Parliament in Norway is arguably the widest of the three Sami Parliaments – allowing it to consider everything that affects the Sami people.²⁴⁸

4 Evaluation

These models each provide a possible way forward for New Zealand's constitutional arrangements. In doing so one might argue that they raise more questions than they answer. However, it must be acknowledged that the constitutional conversation is only just beginning. More dialogue and research is needed before any changes can be made. This next section briefly addresses some issues raised by the models and also poses new questions for further consideration.

²⁴¹ Eva Josefsen "The Saami and the National Parliaments: Channels for Political Influence", above n 239 at 6.

²⁴² HRC Submission, above 192 at 136.

²⁴³ Act on the Sami Parliament (No. 974) 1995.

²⁴⁴ Act on the Sami Parliament (No. 974) 1995, s 5 as cited in HRC Submission, above 190 at 137.

²⁴⁵ Act on the Sami Parliament (No. 974) 1995, s 1.

²⁴⁶ HRC Submission, above 192 at 138.

²⁴⁷ HRC Submission, above 192 at 138.

²⁴⁸ HRC Submission, above 192 at 137.

The differing mandates of the Sami Parliaments raise questions in the New Zealand context. Under the co-existence model, each power (mana Maori and Parliamentary sovereignty) has defined spheres of influence. How exactly would these spheres of influence be defined? Maori in New Zealand could arguably exercise similar powers to those exercised by Sami in Finland within existing constitutional arrangements. Thus the remit would need to be wider than issues concerning Maori language or culture if any meaningful change is to be achieved. Jurisdiction could extend to a parallel criminal justice system like that proposed by Moana Jackson over 25 years ago.²⁴⁹ Whether separate institutions would need to be developed for health, education and other similar issues will also need to be discussed further.

Given that there is no single unified Maori body politic that can be said to represent all Maori, a separate Maori parliament may provide a better vehicle for representation rather than simply having a Maori House in Parliament. The Kotahitanga movement occurred before the “urban drift” of Maori to larger provincial cities. At the time of the Maori Parliament the majority of Maori were still living in rural areas, for the most part in their tribal communities where the predominant language was te reo Maori.²⁵⁰ In contrast, 84 per cent of Maori today live in urban areas.²⁵¹ In order to make the establishment of a separate Maori Parliament a viable option – the exercise of mana Maori must be for the advancement of the total Maori population and not just those operating from an iwi base.²⁵² The current Maori electorate system could be further developed so that, instead of electing representatives for the New Zealand Parliament, representatives are elected to a Maori Parliament.²⁵³

Further, a coexistence model may be in a better position to address the tension between the democracy and the protection of minority rights. As discussed in relation to the bicultural model, the equal weighting of votes at elections in multicultural societies means that ethnic minorities will always be subject to the will of the constant majority. Under the coexistence model Maori will no longer form the constant ethnic minority in Parliament. However, an Indigenous Parliament will not necessarily be free from tensions

²⁴⁹ Moana Jackson *He Whaipanga Hou: Māori and the Criminal Justice System – A New Perspective* (Ministry of Justice, Wellington, 1988).

²⁵⁰ Basil Keane “Kotahitanga”, above n 232 at 176.

²⁵¹ Paul Meredith “Urban Māori – Urbanisation” Te Ara - the Encyclopedia of New Zealand <<http://www.TeAra.govt.nz/en/urban-maori/page-1>>.

²⁵² Mason Durie “Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination”, above n 28 at 228.

²⁵³ HRC submission, above n 192 at [4.85].

between those forming the majority and minorities. Further, when considering the option of a separate Maori Parliament the question of representation of Maori at a national level will need to be addressed to ensure that Maori still have a voice in issues affecting New Zealanders as a whole.

At first glance, the co-existence model can appear separatist and it could be argued that, if the goal is Crown-Maori partnership, the bicultural model is the best fit. However, the Crown-Maori partnership is not the goal in itself – it is a vehicle to achieve a bigger goal - the advancement of Maori as a people. Currently, the Diceyan conception of parliamentary sovereignty operating in New Zealand removes the means for Maori to determine their own future. The bicultural model, although a marked improvement to the existing arrangements, may still constrict Maori self-government. The co-existence model could overcome issues in relation to representation and equality of position faced by the bicultural model and provides more room for Maori to self-govern according to their own systems and Tikanga rather than a mix of both Maori and European systems.

VII Interim Measures

Creating a constitution that gives substantive effect to a Treaty partnership cannot be accomplished overnight. As with all good things it will take time. In the interim it is recommended that measures be adopted in order to protect the status of the Treaty as New Zealand's founding document, and also to prevent damage to the Crown-Maori relationship. Currently, the doctrine of parliamentary sovereignty threatens to undermine any gains made in terms of a Crown-Maori partnership by unilaterally acting in ways inconsistent with the Treaty. Interim measures vary from weaker forms of review – such as the establishment of a Treaty Committee in Parliament to check bills for consistency with the Treaty²⁵⁴ – to stronger forms of review allowing the Court to strike down legislation that is inconsistent with the Treaty. Given the importance of the Treaty to New Zealand's constitution, it is suggested that stronger measures are adopted.

A Treaty Committee in Parliament is likely to operate in the same way as the current section 7 report works where the Attorney-General checks bills for consistency with the Bill of Rights Act 1990. However, the most that can be done if inconsistency is found is to notify Parliament. Parliament can do what it likes with this notification. Thus such a measure is unlikely to be able to protect the Treaty should the need arise.

²⁵⁴ HRC Submission, above 192 at [4.92].

Another option is for Parliament to incorporate both texts of the Treaty/ te Tiriti into legislation with the requirement that all law must be developed consistently with the Treaty.²⁵⁵ Again, such an Act can do nothing to stop the sovereign Parliament from acting in contravention of the Treaty. Making the Treaty supreme law would afford more protection to the Treaty and the Crown-Maori relationship. This option could be achieved by either including a reference to the Treaty in a supreme Bill of Rights (as proposed by in Geoffrey Palmer’s 1985 White Paper)²⁵⁶ or by making the Treaty itself supreme law and thus empowering the courts to strike down legislation that is inconsistent with it.²⁵⁷ Concerns around an unelected judiciary striking down legislation as being undemocratic may mean the first option is more desirable. Rather than striking legislation down the Court can simply declare it inconsistent with the Treaty – meaning that it would have no legal effect.²⁵⁸

VIII Conclusion

The Treaty, as the founding document of New Zealand, is the platform on which constitutional change should be based and the appropriate starting point for any constitutional conversation. As long the starting point for New Zealand’s constitutional conversation is the doctrine of parliamentary sovereignty, we are unlikely to see any constitutional transformation. The absolute and indivisible nature of parliamentary sovereignty operates to prevent any meaningful recognition of the Treaty and as such constitutes a barrier to a true Crown-Maori partnership. The current approach of fitting the Treaty within the doctrine of parliamentary sovereignty not only fails to give effect to the Treaty, but also fails to protect Maori as tangata whenua. Removing the principle of parliamentary sovereignty from the foundation of our constitution could release us from “our inherited belief that sovereignty alone underpins law and liberty” and thereby pave the way for a more meaningful and effective partnership between the Crown and Maori and a more just distribution of power at governance level.²⁵⁹

The aim of this paper is to open up discussion about whether the pervasive doctrine of parliamentary sovereignty should continue to form the foundation of New Zealand’s constitutional arrangements. In concluding that we ought to move beyond our colonial preoccupation with sovereignty, three Treaty-based models for constitutional reform were

²⁵⁵ HRC Submission, above 192 at [4.92].

²⁵⁶ Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984-1985] 1 AJHR A6.

²⁵⁷ HRC Submission, above n 192 at [4.92].

²⁵⁸ At [4.92].

²⁵⁹ Neil McCormick “Beyond the Sovereign State” (1993) 56 MLR 1.

proposed. Each model has its own strengths and weaknesses however the coexistence model is favoured as it places the Treaty at the foundation of any constitutional arrangements. The constitutional debate may benefit from further investigation into frameworks for a coexistence model such as the early Kotahitanga movement in New Zealand and the Sami Parliaments' in Finland, Norway and Sweden.

While the models outlined may create more questions than they can answer, it should be remembered that the constitutional conversation is just beginning. More discussion, deliberation and research is needed. Vital to an informed debate is information regarding the history of New Zealand's constitutional arrangements, including the constitutional arrangements of the Maori world, and the Treaty. The introduction of civic education in schools and more accessible information for the public about our current and past constitutional arrangements should be a focus going forward to enable citizens to fully participate in the constitutional debate.

As we near the 175th year since the signing of the Treaty, the challenge for the Crown and Maori is the establishment of a shared vision for New Zealand's future, a common goal that the nation can work towards. Setting a strong direction for the future could determine whether New Zealand as a nation moves forward into a new era, or whether we spend the next 40 years wandering in the wilderness. The constitutional review provides us with an opportunity to break free from the doctrine of parliamentary sovereignty and forge a unique constitution based on the Treaty.

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