## KO NGĀ TAKE TURE MĀORI

# *A Problem Shared is a Problem Halved: Tino Rangatiratanga and Power-Sharing in Aotearoa*

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*The signing of Te Tiriti o Waitangi represented a partnership between Māori rangatira and the Crown. This partnership was envisioned to be one of equal power and responsibility between parties. Sadly, this vision was never realised, and racist policies and laws stripped Māori of their land, resources and culture. However, these events did not change the reality that because Māori never ceded their sovereignty, they have the continued claim to self-determination. Recent generations have seen limited attempts to include Māori kaupapa into the current Westminster constitutional system. The current principle of unchallengeable parliamentary sovereignty will never allow for meaningful expression of tino rangatiratanga. This article looks briefly into ways that the current system is insufficient for Māori aspirations. It aims to find and analyse models of power sharing that will allow for the actual expression of tino rangatiratanga. This article examines different constitutional power-sharing and conflict-resolution models in the Scottish devolved system, the Belgian federal system and the European Union. It then demonstrates how parts of these systems may be applied in Aotearoa.*

## I INTRODUCTION

This article examines constitutional power-sharing models in different countries and analyses whether elements of these models could apply in Aotearoa. The models would apply here to allow Māori to express their sovereignty, or tino rangatiratanga. This topic of inquiry was inspired by the work of the Matike Mai Aotearoa group.[1] The group's report does not

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1 Margaret Mutu and Moana Jackson *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation*

attempt to fit an interpretation of Te Tiriti o Waitangi into the current Westminster constitutional system.[2] Rather, the report focuses on why and how we can create a constitution based on tikanga, He Whakaputanga, Te Tiriti and international indigenous rights conventions.[3] The report ends with some potential foundations and underlying principles for constitutional models.[4] The group's work was the first step for constitutional transformation. This article looks at institutional models that could realise the aim of this report.

## Māori Claims to Self-determination

Māori claims to self-determination derive from multiple sources. Before the arrival of Europeans, Māori were not ungoverned.[5] Iwi and hapū worked as functional constitutional entities to create and enforce laws and deal with each other politically.[6] Ariki and rangatira were vested with mana and had the responsibility of decision-making for their people.[7] This mana was sourced from the people and was dependent on a rangatira's ability to respond to and protect the people.[8] Tikanga bound the rangatira. No matter how powerful a leader might have been, he or she did not have the power to give away the sovereignty of his or her people.[9] The Waitangi Tribunal concluded that the signatories of te Tiriti o Waitangi never ceded sovereignty.[10] Instead, they agreed to te Tiriti on the basis that they would be equal partners with different roles and spheres of influence.[11] As sovereignty was not ceded, Māori continue to have the right to claim self-determination. International law recognises the importance of people's right to self-determination under the Charter of the United Nations, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the United Nations Declaration on the Rights of Indigenous Peoples.[12] Regaining tino rangatiratanga remains an aspiration for many Māori.[13]

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(National Iwi Chairs Forum and Te Wānanga o Waipapa (University of Auckland), 5 February 2016).

2 At 7.

3 At 7 and 101.

4 At 68 and 104–105.

5 At 33.

6 At 35.

7 At 34.

8 At 34.

9 At 34–35.

10 Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014) at 529.

11 At 529.

12 Charter of the United Nations, art 1; International Covenant on Civil and Political Rights 999 (UNTS) 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 1; International Covenant on Economic, Social and Cultural Rights 993 (UNTS) 3 (opened for signature 19 December 1966, entered into force 3 January 1976), art 1; and *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 3.

13 Maori Party "Oranga Tangata | Mana Motuhake" (2020) <www.maoriparty.org>; and Ngātiwai Trust Board "Ngātiwai Stand United Against Takutai Moana Legislation" (press release, 28 September 2000).

## These Claims in the Current Constitutional System

Under the current Westminster constitutional system, neither the legal nor political system allows Māori to express tino rangatiratanga.[14] The judiciary and court system are important tools to protect certain minority rights, such as freedom of association. However, these systems are insufficient to protect rights of self-governance and self-determination. It is not the judiciary's constitutional place to question parliamentary supremacy. The courts' analysis starts from the assumption of parliamentary sovereignty and they have not accepted challenges to this entrenched precept.[15] Any recognition of tikanga as an operating system of law has been limited.[16] When courts have decided cases in favour of Māori rights, they have often had to stretch the limits of the law to find a solution.[17]

Similarly, the current Mixed Member Proportional electoral system is not suitable for Māori to express tino rangatiratanga. As of the 2020 general election, 24 of the 120 MPs identified as being of Māori descent.[18] However, MPs do not necessarily represent independent Māori interests or Māori as a people. They primarily represent their parties and electorate. Māori electoral seats potentially mitigate this as they represent Māori electorates, but these seats are still flawed. Māori MPs are incentivised to prioritise their party's agenda,[19] and the electorates are geographically very large.[20] When parties intend to represent Māori, they are a minority and either forced into coalitions and making concessions, or they are outvoted.[21] The Māori Party, for example, did not win any seats in Parliament at the 2017 election.[22] Margaret Mutu argues that the Māori Party lost Māori support due to its coalition arrangement with the National Party, under which it made too many concessions.[23] On the other hand, if it had not formed the coalition it would have been in opposition and essentially powerless.

This brief analysis of the issues in New Zealand's constitutional system leads me to the view that the Matike Mai Aotearoa group report was correct.[24] Māori do not want to take the Westminster system and try to fit Māori principles or tikanga into it. In order to express tino rangatiratanga, a new Māori constitutional system is needed.

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14 Claire Charters "Māori Rights: Legal or Political?" (2015) 26 PLR 231 at 231.
15 At 231.
16 At 231–232.
17 A well-known example of this is the use of the "principles of the Treaty of Waitangi". See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 661–666.
18 Julia Gabel "Election 2020: All eyes on Māori MPs after an impressive battle" *The New Zealand Herald* (online ed, Auckland, 18 October 2020).
19 Tiopira McDowell "Te Ana o te Raiona: Māori Political Movements and the Māori Seats in Parliament, 1867-2008" (PhD Thesis, University of Auckland, 2013) at 321.
20 Stats NZ "Number of electorates and electoral populations: 2018 Census" (23 September 2019) <www.stats.govt.nz>.
21 McDowell, above n 19, at 308–309.
22 Electoral Commission "2017 General Election – Official Result" (2017) <www.electionresults.govt.nz>.
23 Margaret Mutu "Māori Issues" (2019) 31 Contemp Pac 202 at 204.
24 Mutu and Jackson, above n 1.

## II REAL WORLD CONSTITUTIONAL MODELS OF POWER-SHARING

I analyse three constitutional models: Scotland, Belgium and the European Union. My analysis is not exhaustive, but instead limited to major characteristics, processes and institutions that could apply to Māori in Aotearoa. I focus on how power is divided and shared under the different models. With this in mind, there is limited analysis of weaknesses, strengths and context. It should also be noted that although no model escapes the fact of political disagreement, the importance lies in *how* disagreement is dealt with, rather than the disagreement itself.

### Devolved Government: Scotland

Devolution is "the process of transferring power from central government to a lower or regional level".[25] Generally, a devolved government does not share sovereignty with the central government.[26] Scotland has a devolved government and Parliament that have manoeuvred politically to gain more powers over the years.[27] Scotland can be seen as a model of progress towards full independence or a United Kingdom federal system.

Before the creation of a Scottish Parliament, there was dissatisfaction with the devolved administration and its lack of accountability.[28] During this time, a Secretary of State represented Scotland in the United Kingdom executive.[29] There was a separate legal system, but no separate lawmaking body.[30] Commonly, Scottish legislation was amended through sections of United Kingdom statutes.[31] Scots felt that the law created in Westminster did not sufficiently cater to them.[32] Devolution was implemented to decrease this dissatisfaction.[33] The devolution of Scotland "[allowed] for fairer political representation".[34] Devolution allowed for functions, such as economic development and tourism, to be performed at a regional level that was better suited for these functions.[35] A Scottish Parliament provided better scrutiny of legislation.[36]

25 Russell Deacon *Devolution in the United Kingdom* (2nd ed, Edinburgh University Press, Edinburgh, 2012) at 2.
26 At 200–201.
27 A recent example is the negotiation of more powers from Westminster to the Scottish Parliament in the Smith Commission Agreement. This transfer of powers has been implemented through the Scotland Act 2016.
28 Alan Page *Constitutional Law of Scotland* (W Green, Edinburgh, 2015) at [2–04].
29 Deacon, above n 25, at 51.
30 At 50.
31 Page, above n 28, at [1–33]–[1–34].
32 At [2–04].
33 At [2–06].
34 Deacon, above n 25, at 3 (emphasis omitted).
35 At 3.
36 At 4.

### *1 Scottish Parliament and Government*

The Scottish Parliament has proportional representation and is composed of a directly elected constituency and regional MPs.[37] The Scotland Act 1998 (UK),[38] as amended by the Scotland Act 2012 (UK)[39] and Scotland Act 2016 (UK),[40] defines the Parliament's powers, but there is no written constitution. The Scottish Parliament can pass laws and policies for devolved matters. These are generally matters affecting day-to-day life.[41] The United Kingdom Parliament passes laws on reserved matters.[42] In general, these include matters that have a United Kingdom-wide or international impact.[43] Scotland also has representatives in the central United Kingdom Parliament and is overrepresented on a population basis at Westminster.[44]

### *2 What is the Scotland–United Kingdom Relationship Like and How Do They Resolve Conflicts?*

Notably, due to Brexit, the relationship between Scotland and the United Kingdom is undergoing a period of major change and possible upheaval. My analysis is based primarily on these countries' established relationship before Brexit in February 2020. I have briefly included some points on how Brexit has affected this relationship.

Strictly de jure, the United Kingdom Parliament retains sovereignty and control over the Scotland Parliament and government.[45] The devolved Parliament and government's powers are loaned and can be taken back.[46] In reality, the Scottish Parliament has complete authority in day-to-day affairs.[47] If there is no United Kingdom law on the matter, the Scottish law is supreme.[48] While the United Kingdom Parliament retains authority on any issue, whether devolved or not, a convention has developed to the effect that the United Kingdom ought not interfere in devolved matters without the Scottish Parliament's consent.[49] This convention, known as the Sewel Convention, is recognised formally in the Scotland Act 2016.[50] However,

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37 The Scottish Parliament "The Electoral System for the Scottish Parliament" <www.parliament.scot>.

38 Parts 1, 2A and 4A.

39 Sections 1–11, 23 and 25.

40 Sections 1, 2 and 11–13.

41 The Scottish Parliament "What are the powers of the Scottish Parliament?" <www.parliament.scot>.

42 Scotland Act 1998 (UK), sch 5.

43 The Scottish Parliament, above n 41.

44 United Kingdom Parliament "Parliamentary constituencies" <www.parliament.uk>.

45 Scotland Act 1998, s 28(7).

46 Michael Keating and Guy Laforest "Federalism and Devolution: The UK and Canada" in Michael Keating and Guy Laforest (eds) *Constitutional Politics and the Territorial Question in Canada and the United Kingdom: Federalism and Devolution Compared* (Palgrave Macmillan, London, 2018) 1 at 8.

47 The Scottish Parliament, above n 41.

48 Page, above n 28, at [7–01].

49 At [2–22].

50 Scotland Act 2016 (UK), s 2.

this convention is not legally binding.[51] The Scotland Acts are not entrenched legally and do not bind future United Kingdom Parliaments.[52] Instead, these Acts are entrenched politically.[53] This means the "popularity and contribution" of the Scottish Parliament protects these Acts, as no United Kingdom government would be willing to pay the political price of neutralising or removing a Parliament supported strongly by the Scottish people.[54]

The idea of political entrenchment has been supported by the continuing devolution of powers to the Scottish Parliament, and the 2012 independence referendum.[55] Any amendments to the Scotland Act 1988 have been made by the United Kingdom Parliament with the Scottish Parliament's consent.[56] In the leadup to the passing of the Scotland Act 2012, the Scottish government aimed to pass amendments strengthening the Scottish Parliament's powers. The Scottish government was unable to get its more ambitious changes through, though it was able to resist changes it opposed; changes that would have given more power to Westminster. These changes were dropped in order to get Scotland's consent to the Bill.[57]

Generally, the United Kingdom government does not challenge Scotland's devolved powers, partly because there is a clear division of competences.[58] United Kingdom politicians also have little incentive to intervene in Scottish issues.[59] However, this attitude may change as there is now pressure on the United Kingdom government to keep Scotland in a post-Brexit United Kingdom. We have also seen that the United Kingdom government is prepared to go against the will of the Scottish Parliament with regard to Brexit legislation.[60] The relationship between the Parliaments essentially consists of administrative deals between governments.[61] There is no written constitutional relationship between assemblies.[62] Departmental "concordats are agreements between the devolved institutions and [the central government] … concerning their respective roles and responsibilities".[63]A Memorandum of Understanding sets out principles that

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51 *Regina (Miller) v Secretary of State for Exiting the European Union (Birnie)* [2017] UKSC 5, [2018] AC 61 at [148]–[151].
52 Page, above n 28, at [2–17] and [2–20].
53 At [2–20]–[2–22].
54 At [2–20].
55 At [2–22] and [2–27].
56 At [2–23]–[2–24].
57 At [2–26].
58 George Anderson and Jim Gallagher "Intergovernmental Relations in Canada and the United Kingdom" in Michael Keating and Guy Laforest (eds) *Constitutional Politics and the Territorial Question in Canada and the United Kingdom: Federalism and Devolution Compared* (Palgrave Macmillan, London, 2018) 19 at 41.
59 At 40–41.
60 (8 January 2020) Session 5 SPOR col 93.
61 Keating and Laforest, above n 46, at 39.
62 Deacon, above n 25, at 201.
63 At 201.

underpin relations between the administrations.[64] None of these principles are legally binding, but do lay down working rules and political intent.[65]

The Scotland Act 1998 enables the two governments to pursue legal proceedings against each other, but they prefer to negotiate.[66] The 2012 independence referendum illustrates this preference for political solutions over legal. In the lead up to the 2012 independence referendum, the United Kingdom Government questioned whether the Scottish Parliament had the necessary power to authorise the referendum.[67] The United Kingdom Government, however, offered to legislate for the 2012 referendum to prevent any doubt or legal challenges.[68] The Scottish Government was willing to work with the United Kingdom Government but made it clear that it would set the terms and scope of the referendum.[69] The referendum did not pass but helped to eventually move more power to Scotland.[70] The matter, however, is not closed — especially with the tensions of Brexit.

The Brexit vote and negotiations illustrate the limitations of the devolution relationship, especially when supposed powers do not reflect the true power balance between governments. In 2016, a slim majority of voters voted in favour of leaving the European Union.[71] However, a majority of voters in Scotland voted in favour of remaining in the European Union.[72] Before the referendum, the First Minister of Scotland proposed a double majority provision that, to be successful, would require each United Kingdom nation to vote to leave.[73] This proposal was rejected, with a simple majority ultimately all that was required. The referendum provisions have been criticised for ignoring devolution and the rights of devolved administrations entirely — especially considering that, due to the relative size of each electorate, Scotland, Wales and Northern Ireland could not outvote England.[74] Brexit has pushed the current devolution settlement to its constitutional limits, as the devolved administrations do not have the constitutional or legal means to implement the democratic will of the people they represent.[75]

There is also the issue that European Union law affects devolved matters,[76] meaning United Kingdom Brexit legislation will affect devolved matters on which the Scottish Parliament has withheld consent.[77] In 2017,

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64 Page, above n 28, at [19–10].
65 At [19–17].
66 At [19–31].
67 At [2–27].
68 At [2–27].
69 At [2–28].
70 At [2–30]–[2–31].
71 The Electoral Commission "Results and turnout at the EU referendum" (16 July 2019) <electoralcommission.org.uk>.
72 The Electoral Commission "EU referendum results by region: Scotland" (5 September 2019) <electoralcommission.org.uk>.
73 Noreen Burrows and Maria Fletcher "Brexit as constitutional 'shock' and its threat to the devolution settlement: reform or bust" (2017) Jur Rev 49 at 50.
74 At 50–51.
75 At 51.
76 Page, above n 28, at [20–03].
77 Burrows and Fletcher, above n 73, at 51.

the Supreme Court of the United Kingdom found that Scotland had no legal veto on Brexit, as the Sewel Convention had no binding effect.[78] The United Kingdom Government accepted that legislation to implement Brexit affected devolved matters and asked for consent from Scotland.[79] Legislative consent motions on the European Union (Withdrawal Agreement) Bill 2019 were voted on in the Scottish Parliament and consent was withheld.[80] This did not stop the United Kingdom Parliament from passing the Bill and leaving the European Union.[81] Political mechanisms to allow devolved administrations' input for proposals have been limited and severely unbalanced. This shows that when constitutional upheaval occurs, there are no mechanisms for input nor protections in place for devolved governments.[82]

Since the United Kingdom left the European Union and entered a transition period, the Scottish Government has called for another independence referendum, citing a material change in circumstances.[83] The majority of Scottish Parliament members also voted in favour of a referendum.[84] Unlike the 2012 referendum, the United Kingdom Government did not agree to delegate powers to the Scottish Parliament to allow another referendum.[85] The Scottish First Minister has stated that rejection of the referendum request will not be the end of the matter.[86] However, at this point, it is not clear what the United Kingdom and Scotland may arrange to resolve this issue. Brexit allows us to see whether this mostly political arrangement will be sufficient to protect a devolved Parliament and its political will when in conflict with central government. The future is very uncertain; the two governments are set in two irreconcilable positions. At the very least, the threat of departure could provide an opportunity for Scotland to negotiate more devolved powers if it remains in the United Kingdom.

### Federal System: Belgium

Generally, a federal system distributes power between the central body and peripheral bodies. Each is supreme within its own defined area. The division of powers is entrenched constitutionally.[87] This division helps ensure the input of regional and local voices at a national level. For a federal system to

78 *Regina (Miller)*, above n 51, at [148]–[151].
79 Letter from Steve Barclay MP (Secretary of State for Exiting the European Union) to Michael Russell MSP (Cabinet Secretary for Government Business and Constitutional Relations) regarding legislative consent for European Union (Withdrawal Agreement) Bill (18 December 2019).
80 (8 January 2020) Session 5 SPOR col 93.
81 European Union (Withdrawal Agreement) Act 2020 (UK).
82 Burrows and Fletcher, above n 73, at 53.
83 The Scottish Government *Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands* (19 December 2019) at 11.
84 BBC News "Scottish independence: MSPs back new referendum in Holyrood vote" (29 January 2020) <www.bbc.com>.
85 Letter from Boris Johnson MP (United Kingdom Prime Minister) to Nicola Sturgeon MSP (First Minister of Scotland) responding to request for transfer of powers to Scotland (14 January 2020).
86 BBC News "Scottish independence: Johnson rejects Sturgeon's indyref2 demand" (14 January 2020) <www.bbc.com>.
87 Keating and Laforest, above n 46, at 3.

function, the positive incentives holding it together must be greater than those pulling it apart.[88]

Though there are a variety of unique federal systems, I will focus on the dual federalism of Belgium. The failure of its unitary state resulted in the devolution of power to communities and regions, creating a federal system.[89] Belgian politics places a strong emphasis on a willingness to compromise and power-sharing.[90] Belgium's system is complicated, but policy outputs show that it maintains a high quality of life. Importantly, any conflicts between groups have remained strictly verbal, with no major physical violence.[91]

### *1 How are Federal Institutions Set Up and Whom Do They Represent?*

The Belgian Federal Parliament is bicameral and consists of the Senate and Chamber of Representatives. The Chamber of Representatives has 150 representatives elected directly from universal suffrage. They are split into a Dutch linguistic group (Flemish) and a French linguistic group.[92] The Chamber is the only house that can vote on a budget and decide on confidence in the Government. The Senate represents the federated entities.[93] It has limited legislative powers, relating mainly to the organisation and functioning of the federal state, international treaties and monarchy. The Senate is required for changes to constitutional law and special laws.[94] It is also divided linguistically.[95] MPs cannot remain neutral in either house, as they are required to pick a language group.[96]

My analysis will focus on the power-sharing between the linguistic communities within the Chamber and any effect it may have on lawmaking.

#### (a) Federal Lawmaking

Normally, decisions by the Chamber are made by simple majority. At least half of the members of assembly need to be present, and at least half of those present must support the proposal.[97] The French language group is a minority in both the Chamber and the Senate.[98] While Dutch speakers have generally been the larger group demographically, they have not possessed

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88 John Kincaid "Comparative Observations" in John Kincaid and G Alan Tarr (eds) *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press, Montreal, 2005) 409 at 414.

89 Kris Deschouwer *The Politics of Belgium* (2nd ed, Palgrave Macmillan, London, 2012) at 74–75.

90 At 75.

91 At 114.

92 Belgian Constitution [2019], art 43.1.

93 The Belgian Senate "The composition of the Senate" <www.senate.be>.

94 The Belgian Senate "Responsibilities of the Senate" <www.senate.be>.

95 Belgian Constitution, art 43.

96 The Belgian Senate, above n 93; and Kris Deschouwer "Kingdom of Belgium" in John Kincaid and G Alan Tarr (eds) *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press, Montreal, 2005) 48 at 61.

97 Deschouwer, above n 89, at 189.

98 See Belgium Chamber of Representatives "Groupes Linguistiques - Taalgroepen" (9 June 2020, Doc 55 0002/5) at 1 and 3. See also The Belgian Senate, above n 93.

the political power of the French language group.[99] It was not until universal (male) suffrage was introduced that the Dutch language group attained a parliamentary majority.[100]

The use of language groups in the Chamber allows the operation of double majorities. For revisions to the constitution, a two-thirds majority needs to be present and two-thirds of those present need to approve of changes.[101] Changes to the special majority laws require both a two-thirds majority in both houses and a majority from each language group in both houses.[102] Special majority laws are the laws that define the powers of communities and regions.[103]

Another protective device for the French minority is the "alarm bell" procedure. If three-quarters of a language group support a motion explaining that proposal might harm the interests of the language group, then the discussion in Parliament is stopped for 30 days.[104] During that time, the government needs to find a compromise. This procedure can only be used once for each Bill. The procedure has never actually been used.[105] Its existence discourages actions that will clearly go against the interests of one language group. This encourages compromise, which the procedure can enforce if necessary.[106] These safeguards prevent the possibility of political domination by the Dutch demographic majority.

Another important protection is the requirement for a half-French, half-Dutch federal government, and the unspoken rule that government decisions must be made by consensus.[107] While the Dutch group may have a house majority, the Bills being initiated by the government will have the support of both language groups represented. The requirement is one of the most significant safeguards politically and is one reason why it takes so long to create a coalition.

### *2 Relationship Between Language Groups at a Federal Level*

Arguably, Belgium's most important governing principle is power-sharing. There is an obligation to work together at a federal level. As there are only two partners, both with powers of veto, the rules and procedures for decision-making do not allow for anything but consensus.[108] A crucial unwritten rule of government decisions is that they are made by consensus, never by vote.[109] If the parties of the language groups that have house majority work together, then the government will function. If one party or

99 Deschouwer, above n 96, at 49 and 68.
100 At 50.
101 Deschouwer, above n 89, at 190.
102 At 190.
103 At 60.
104 At 190.
105 Deschouwer, above n 96, at 61.
106 Deschouwer, above n 89, at 190.
107 Deschouwer, above n 96, at 62.
108 Deschouwer, above n 89, at 249.
109 Deschouwer, above n 96, at 62.

language group refuses a proposal explicitly, then the government cannot function. The only option is to negotiate again.[110] There is a worry that these groups may eventually hit a crisis out of which they cannot negotiate their way. Generally, if the government cannot resolve the issue, then a coalition party can pull the plug and call for elections.[111] During these periods, a caretaker government is put in place to allow the federal level to function[112] (for example, to pass the budget). This is not unusual and only affects the Federal Government.[113] The communities and regions continue functioning perfectly well. It helps that many areas of the law are under the jurisdiction of the European Union.[114]

The Federal Government of Belgium is always a coalition and must secure a majority in the Chamber.[115] Forming a coalition is difficult as there are two cleavages to bridge: the political ideology of different parties, and differences between the North (Flemish majority) and South (Francophone majority).[116] Due to the complex and complicated nature of power-sharing between communities, government coalition agreements are long and detailed.[117] They are written contracts ensuring each coalition party several guaranteed policies.[118] During the life of a government, party leaders keep an eye on the agreement, and it can be renegotiated and refined if needed.[119]

The complexity of the process and issues can mean that coalition formation can take a long time. From 2010 to 2011, it took 541 days to form a six-party coalition.[120] This process does not cause massive upheaval, as a caretaker government remains in place. The creation of these detailed coalition agreements means there is little room for deviation. MPs are not expected to question, discuss or vote against agreements made between parties in the government[121] — an expectation necessary to maintain the "subtle equilibrium" required to govern a divided society.[122] This situation has brought criticisms against the Belgian Parliament as being reactive, uncritical and unaccommodating.[123] It can be argued that it is at the coalition forming stages that the hard decisions between parties are made. These qualities, however, are simply the price to be paid for cooperation. There are always chances for amendments to be made to Bills by Parliament.

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110 At 62.
111 Deschouwer, above n 89, at 173–175.
112 At 253.
113 At 253.
114 At 253.
115 At 148.
116 At 148–149.
117 At 170–171.
118 At 196.
119 At 196.
120 At 1.
121 At 196–197.
122 At 200.
123 At 197.

### *3 Belgium's Federated Entities*

I will not go into detail on Belgium's federated entities, as these operate as though they were separate countries. There are five federated entities: Flanders, the Walloon region, the Brussels region, the French community and the German-speaking community.[124] Belgium is organised into three communities and three regions.[125] The communities and regions do not often interact, as their powers are exclusive.[126] The autonomy of regions and communities means they do not account to the federal level.[127] Powers of regions and communities are listed in a number of special majority laws, which require a double majority in the federal parliament to change.[128] Communities have powers related to people and regions have powers related to territory.[129] The federal state retains important powers, such as those on justice and finance.[130] The communities and regions each have their own Parliament and their own government.[131]

### *4 Relationship and Dispute Resolution Between Federated Entities*

Both communities have substantial veto powers,[132] requiring the Belgian Government to function using high levels of cooperation. This involves goodwill, as one party refusing to cooperate can lead to conflict and cause the system to crumble. Neither community desires this, and this is one reason Belgian politicians always eventually negotiate a solution.[133] Devolution to regions and communities has been used to avoid deadlock and ongoing conflict at a national level.[134] Devolution allows the federated entities to make their own policies without concessions to the other community.[135] The level of tension between language communities has declined and the Federal Government's stability increased since substantial powers were delegated to federated entities. However, this delegation of powers does leave potential for conflict between groups.[136]

124 At 62.
125 Belgian Constitution, arts 2 and 3.
126 Hughes Dumont and others "Kingdom of Belgium" in Akhtar Majeed, Ronald L Watts and Douglas M Brown (eds) *Distribution of Powers and Responsibilities in Federal Countries* (McGill-Queen's University Press, Montreal, 2006) 34 at 41–42.
127 Deschouwer, above n 96, at 72.
128 Dumont and others, above n 126, at 41.
129 Deschouwer, above n 96, at 60–61.
130 At 61.
131 At 64–65.
132 At 60.
133 At 60–61.
134 At 54–57.
135 At 54–57.
136 At 57 and 64.

### *5 Power-sharing in Brussels*

Brussels is its own region, but belongs to both the Flemish and French communities. This overlap is an example of nonterritorial federalism.[137] They act simultaneously in the same region but are independent. Despite being nestled within the Flanders region, French speakers are the majority. Dutch speakers comprise around 15 per cent of the population.[138]

The separation between groups is solely at an institutional level and institutions are divided strictly.[139] There is no formal division at an individual level. Both language communities offer services and individuals have the right to choose between them. The individual is then subject to the laws of the community running that particular institution.[140] They may make mixed choices. For example, they may send one child to a Flemish school and one to a French school. They are always free to change their choices.[141] Brussels residents do not belong to one language community exclusively.[142]

#### (a) Brussels Institutions

Brussels is the only regional Parliament that operates in two languages.[143] The Brussels Parliament is split into language groups, similar to the Federal Parliament.[144] The Brussels Parliament is unicameral and elected by two separate voter groups that elect their part.[145] Candidates select which list they are placed on and cannot switch lists. Voters are always free to choose and switch which list to vote from, meaning the number of potential voters in each group is not fixed.[146] However, 17 parliamentary seats and two of five ministerial positions are always allocated to Dutch speakers.[147] The large Parliament size is intended to give the Flemish minority reasonable representation.[148]

Many of the federal safeguards can be seen in the set-up of the Brussels Parliament for the Dutch-speaking minority. The Parliament has the same powers as other regional parliaments, with some exceptions.[149] A two-third majority in both houses and a majority of both language groups are required to change how its institutions function.[150] Anything related to the Dutch-speaking minority in Brussels is delegated to the Federal

137 At 56.
138 At 69.
139 Dumont and others, above n 126, at 39.
140 At 39.
141 Deschouwer, above n 89, at 68.
142 Dumont and others, above n 126, at 39.
143 Deschouwer, above n 89, at 199–200.
144 At 57.
145 At 67 and 127.
146 At 68.
147 At 67.
148 At 67.
149 At 67.
150 At 67.

Government.[151] Its laws, called ordinances, can be annulled by the Federal Government.[152] Doing so, however, would be politically unthinkable.

The formation process of the Brussels Government ensures majority support of both language groups. It is a two-step procedure. First, a majority coalition is formed in each language group.[153] These two coalitions then come together to negotiate a coalition agreement and form the government.[154]

(b) Lawmaking Process

The Brussels Parliament issues ordinances on regional matters only. For community issues within Brussels, the Parliament splits into three institutions.[155] The Commission Communautaire Française (COCOF) is composed of the French-speaking MPs. It organises rules and policies for the French community in Brussels. It can issue decrees for matters transferred formally from the French community of Belgium. The Vlaamse Gemeenschapscommissie (VGC) is the Flemish equivalent of the COCOF. It implements the decrees of the Flemish community in Brussels. Finally, the Common Community Commission includes all members of the regional Parliament.[156] It is responsible for certain competences not covered by the other committees.[157]

**European Union**

*1 European Union Institutions*

The European Union institutional framework exists to promote Union policies, values and the interests of member states and citizens.[158] I will focus on the three Union institutions with main roles in lawmaking: the European Commission, the Council of the European Union and the European Parliament. Each institution's role relates to the others'. They exist independently but are required to act together.[159] An important Union principle is the division of power between institutions. These institutions attempt to prevent power from being too concentrated in one place.[160]

The European Commission consists of members appointed by national governments. In most fields, it is the only body with the power to

151 At 67.
152 Deschouwer, above n 96, at 53.
153 Deschouwer, above n 89, at 200.
154 At 200.
155 At 68–69.
156 At 69.
157 At 69.
158 Consolidated Version of the Treaty on European Union [2016] OJ C202/01 [Treaty on European Union] at C202/22, art 13.
159 Damian Chalmers, Gareth Davies and Giorgio Monti *European Union Law* (3rd ed, Cambridge University Press, Cambridge, 2014) at 60.
160 At 60.

initiate legislation.[161] The Commission's purpose is to promote the interests of the Union and work towards that end.[162] Members are appointed by national governments but are independent and must swear a solemn undertaking to fulfil their duties.[163] It is their role to implement European Union law and make sure it is applied correctly. The Commission has limited legislative powers, as well as quasi-legislative powers in specific areas, which I will not detail. The quasi-legislative measures that are exercised are considerable.[164] These powers add weight to the influence the Commission holds.

The Council of the European Union represents the governments of individual member states.[165] It exercises legislative and budgetary functions jointly with the European Parliament.[166] It is perceived as the most important institution in the legislative process, as it has the power of final decision in most Union policies.[167]

The members of European Parliament (MEPs) are elected directly by, and represent, European citizens.[168] The European Parliament originally had no lawmaking powers, only the supervisory and advisory powers.[169] The Lisbon Treaty attempted to strengthen democratic control through a stronger role for the European Parliament and national Parliaments.[170] The European Parliament now has power to amend and veto legislation.[171]

### *2 Lawmaking Process*

There are two main legislative procedures: the ordinary legislative procedure and the special legislative procedure. The legislative procedure applied depends on the policy area.[172] Under the ordinary legislative procedure, Parliament and the Council have equal importance.[173] Under the special legislative procedure, Parliament has a consultative role.[174] The European Union legislative processes are very complicated. For the sake of brevity, I will investigate certain elements of these processes in detail, rather than the processes as a whole.

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161 Treaty on European Union, art 17.1–17.2.
162 Article 17(1).
163 Chalmers, Davies and Monti, above n 159, at 63. See also Treaty on the Functioning of the European Union [2016] OJ C202/156, art 245 [Treaty on the Functioning of the European Union].
164 Chalmers, Davies and Monti, above n 159, at 67–68.
165 At 80.
166 Treaty on European Union, art 16(1).
167 Chalmers, Davies and Monti, above n 159, at 81.
168 At 94.
169 Eeva Pavy "The European Parliament: Powers" (January 2020) European Parliament <www.europarl.europa.eu>; and Udo Bux "The European Parliament: historical background" (February 2020) European Parliament <www.europarl.europa.eu>.
170 "Oh brave new world! Lisbon enters into force" (2010) 267 EU Focus 1 at 8.
171 Chalmers, Davies and Monti, above n 159, at 100–101.
172 Treaty on the Functioning of the European Union, art 289.1–289.2.
173 Articles 289 and 294.
174 Chalmers, Davies and Monti, above n 159, at 123.

### (a) Ordinary Legislative Procedure

The Commission assesses the impact of each policy and puts forward proposals to the Council and Parliament.[175] The Parliament and Council review the proposal and propose amendments if necessary.[176] If an agreement cannot be reached, the proposal goes to a second reading, during which more amendments can be proposed. At the second reading, Parliament can choose to veto the Bill entirely. If the two institutions agree on amendments, the proposed legislation can be adopted.[177] If they cannot agree, a Conciliation Committee tries to find a joint text.[178] Both the Council and the Parliament can block the legislative proposal at this final reading.[179] When a law is passed, the Commission and member states work to apply them.

### (b) Parliamentary Amendments and Veto

Despite being unable to initiate legislation, research from 1999 and 2007 found the level of parliamentary input into legislation was high. In this time, Parliament amended 87 per cent of proposals.[180] Parliament also raised 1567 issues and had success in 65.2 per cent of these cases.[181] Research between 1999 and 2013 found that the rate of veto use was around 0.4 per cent.[182] It was theorised that such low use was because the parties agreed that having no legislation was worse than imperfect legislation, and that the regular use of veto was bad for politics. Parties will not try to negotiate with each other if their positions are inflexible. Regardless of the low levels of use, the threat of the veto helps procure further influence for Parliament in the legislative process.[183]

### (c) Conciliation Committee

The Conciliation Committee is convened if the Council and Parliament cannot agree on amendments after two readings.[184] Half of the Committee is composed of members from Parliament, the other half members from the Council. Their task is to agree on a joint text by a qualified majority of members of the Council and by a majority of Parliament within six weeks.[185] The joint text they create is based on the parties' positions at the second

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175 Treaty on the Functioning of the European Union, art 294.2; and European Union "How EU decisions are made" <www.europa.eu>.
176 Article 294.3–294.6; and European Union, above n 175.
177 Article 294.7–294.9; and European Union, above n 175.
178 Article 294.10–294.12; and European Union, above n 175.
179 Article 294.13; and European Union, above n 175.
180 Chalmers, Davies and Monti, above n 159, at 120.
181 At 120.
182 At 119.
183 At 119.
184 Treaty on the Functioning of the European Union, art 294(8)(b).
185 Article 294(10).

reading.[186] There may be worries that by the time the Committee is convened the parties will be stuck in their position. However, research has found the Committee generally finds a joint text to which both institutions agree.[187] This may be because the Council can be more proactive within the Committee.[188] Alternatively, negotiation is easier, as both parties are aware of each other's positions.[189]

(d) Special Legislative Procedure: Consultation

The consultation procedure revolves around the Council and Commission. Both are executive-dominated. Safeguards for national parliamentary input are limited.[190] The Commission submits the proposal to Council.[191] The Council can adopt the proposal by either a qualified majority vote or unanimity, depending on the field. If the decision requires Council unanimity, then power is in the hands of the most resistant government. Council amendments are difficult, as they also require unanimity.[192] In this process, there is a duty to consult the European Parliament, but its opinion is advisory, not binding.[193] This duty to consult does provide leverage to Parliament, as in some cases the European Court of Justice will strike down legislation passed without consultation.[194] It can use this process to delay the progress of a Bill and force concessions from the Council and Commission.[195] This has opened informal conversation between institutions and enabled Parliament's preferences to be included in the text. Parliament also secures leverage through multi-proposal package deals.[196] Essentially, the Council makes concessions to Parliament in the consultation process to secure preferences from Parliament in the ordinary legislative procedure.

## III APPLICATIONS IN AOTEAROA

My starting point is a system with two independent lawmaking powers. I will call these lawmaking powers the Tino Rangatiratanga Sphere (TRS) and the General Sphere (GS). The role of the TRS would be to represent the democratic will of the Māori people. The role of the GS would be to represent the interests of the general population of Aotearoa. I will look at different possible relationships between these spheres and the scope of their

186 Article 294(10).
187 Chalmers, Davies and Monti, above n 159, at 120.
188 At 120.
189 At 120.
190 At 125.
191 At 123.
192 At 125.
193 At 125.
194 See, for example, Case 179/80 *SA Roquette Frères v Council of the European Communities* [1982] ECR 3623.
195 Chalmers, Davies and Monti, above n 159, at 126.
196 At 126.

powers. Which model a person prefers will depend on his or her values and objectives. My model aims to allow Māori to express tino rangatiratanga and provide peaceful dispute resolution between groups. In analysing elements taken from the institutional models, I will look at whether they accomplish these two aims. I will consider the different cultural circumstances of Aotearoa in comparison to Scotland, Belgium and the European Union.

## Tino Rangatiratanga

Common translations for tino rangatiratanga are unqualified chieftainship or self-determination.[197] It is, however, unclear how tino rangatiratanga would be achieved in our modern multicultural society. I examine how different lawmaking processes and power dynamics can be applied in Aotearoa, and evaluate whether they achieve the aspirations of tino rangatiratanga.

### *1 Lawmaking Process*

I examine three models: a "split territory and split competences" model, based on Belgium and Scotland, a "same territory and split competences" model like that of Brussels and a "joint lawmaking" model based on the European Union legislative procedure and the Chamber of Representatives in Belgium. This will not be a direct comparison of the technicalities of each lawmaking process. Different elements from each of the models will be emphasised. Determining whether these three models help achieve tino rangatiratanga depends highly on the power dynamic between the two spheres. The creation of TRS territories or competences will not achieve actual tino rangatiratanga if their laws are constantly being overridden.

#### (a) Split Territory and Split Competences Model

This model would entail separate territories within Aotearoa, some governed primarily by laws created by the TRS and others by the GS. A factor to consider would be if one of the spheres is central and the other devolved, or if they are both equal partners: a federal model. In a devolution system, we assume some powers would remain with the central government. In a federal system, we assume there would be some competences requiring coordination or joint lawmaking. These assumptions are necessary, as if the territories and competences were entirely separate, we would have essentially created two different countries. It would need to be decided which competences would remain in the central or shared sphere, and how laws would be made regarding these competences. I cover this assessment in my discussion of the next model. The most controversial decisions to be made would be how the territory is divided and the obligations that this may place on an individual.

197 Waitangi Tribunal "Translation of the te reo Māori text" (19 September 2016) <www.waitangitribunal.govt.nz>.

Any split should be on a territorial and institutional level, and not obliging any person to live in a given territory because of their race.

(b) Same Territory and Split Competences Model

Following the Brussels model, we could have a single region of Aotearoa with uniform "regional" laws but two separate "community" governments and Parliaments. Members of each community would elect their respective community Parliaments directly. These would combine to form the regional Parliament. The community Parliaments would legislate on community issues and the regional Parliament would legislate on regional issues. When the regional Parliament is convened, the two community Parliaments could remain as distinct language groups in order to use protections such as double majorities.

Brussels' institutional split is a practical way of allowing the expression of tino rangatiratanga in a meaningful way, whereby Māori can have their own policies without having to separate people by race. This split model allows for equality and freedom of association, and permits non-Māori to use Māori institutions. It would give Māori a choice in deciding what institutions they want. This would help alleviate racial tensions, as it would not put obligations on individuals but rather provide more choices. It may be worth considering more processes and criteria for those who want to run for community Parliaments. In Brussels, voters can select candidates from either group list.[198] Candidates have to decide which group to run for and cannot change sides.[199] Some screening process may better ensure that those running to represent a community genuinely seek the best interests of that group. It may also be worth considering a requirement that candidates must be able to trace at least some Māori whakapapa in order to run for the TRS Parliament.

The use of the Brussels model may be best suited to address racial tensions in Aotearoa. However, its particular division of community and regional competences may not suit Aotearoa's needs. For the division of competences, I argue a mixed model will best address racial tensions. The "same territory and split competences" model is workable in Brussels because the community competences relate to areas of law that tend to concern people, and the regional competences include law related to territory. The federal laws include areas such as justice and finance,[200] which people would generally wish to keep uniform across the country. People can choose to put a child in a particular community school and be under those laws.[201]

However, many Māori issues pertain to the use of resources — for example, the use of the foreshore and seabed, land and freshwater. A

198 Deschouwer, above n 96, at 56.
199 Deschouwer, above n 89, at 67–68.
200 At 61.
201 At 68.

significant part of Māori identity is their connection and history with the land. This connection is apparent in the name "tangata whenua". Any meaningful attempt to express tino rangatiratanga would need to ensure Māori have real input over the use of resources. Māori have also been disproportionately affected by competences that you may see in the federal or relational sphere, such as the criminal justice system.[202] I suggest that if the "same territory and split competences" model is applied, we should ensure joint lawmaking includes meaningful Māori input for the competences that cannot be split between the communities.

Both the "split territory and split competences" and "same territory and split competences" models have the potential for the exercise of tino rangatiratanga. Both models allow room for the TRS to initiate legislation. They also provide an opportunity for the TRS to be supreme in certain areas of law, even if it may need to cooperate in some joint lawmaking. It is important to ask if, and to what extent, TRS legislation would still be subject to approval, amendments or veto from the GS. This would affect the conclusion as to whether the models achieve tino rangatiratanga.

(c) Joint Lawmaking Model

Joint lawmaking over the same territory can be seen in the European Union legislative processes and Belgium's Chamber of Representatives. They each have different protections in place and will, therefore, be examined separately here. However, elements from each can be combined.

Similar to the Chamber of Representatives, Aotearoa could have a single chamber with distinct language groups within it. The number of seats in each language group should be representative of the population and should be entrenched. The use of language groups enables minority protections such as "alarm bell" procedures and double majorities for specific laws such as constitutional laws or those that disproportionately affect Māori. I explain the details of these protections later in this article. They would essentially enable the TRS group to stop prejudicial Bills, or to force the two groups to find a compromise. The TRS group's status as a minority in the Chamber would significantly reduce its ability to initiate and pass legislation that reflects Māori interests and values.

The power to veto would not fit traditionally into the definition of tino rangatiratanga. It might be a sufficient compromise for some Māori that the lawmaking is done through the existing system, if more safeguards were in place to stop discriminatory laws. I argue that the veto power does not reach the threshold of tino rangatiratanga without some way to create policies or institutions that reflect Māori principles. This could be improved, depending on the process for initiating legislation. I do not think the veto power in itself is sufficient due to the current socio-economic position of

202 New Zealand Police *NZ Police Tactical Options Research Report 2018* (November 2019) at 7; and Department of Corrections "Prison facts and statistics - March 2020" (31 March 2020) <www.corrections.govt.nz>.

many Māori,[203] as a result of colonisation and many years of institutional racism.[204] Positive changes need to be made to the system to help correct these inequalities, and this cannot be done simply with a veto. A veto power is important, but must be coupled with proactive lawmaking powers. A veto in general might have some backlash, as people may see a Māori chamber that always stops laws in a negative light. However, a Māori group making laws with positive outcomes might be looked upon more kindly.

Following the European Union's ordinary legislative procedure, we could have separate TRS and GS institutions and require consent from both institutions to pass laws. They would both have powers to propose amendments. This makes the relationship more similar to an equal partnership, whereas the TRS would be the minority in the Chamber of Representatives model.

One option would be requiring the TRS' consent only for laws with overtly Māori interests and giving it a consultative role for other competences. This would possibly be more appealing to those unsettled by a shift towards Māori self-governance. Such an option could be a stepping stone towards more daring models. Whether Māori would accept this would depend on the way competences are divided, whether a consultative opinion had actual weight and any other leverage the TRS, in its consultative role, had to persuade the GS. The European Parliament gives us examples of leverage with its use of delay and multi-purpose package deals.

An important influence in the joint lawmaking process is who initiates legislation. In the proposed model, both institutions could be made able to initiate legislation. Alternatively, that power could be given to a separate sphere or institution. This may depend on how the government is set up, as many Bills on the agenda are government-initiated. The Chamber of Representatives' requirements of a half-French, half-Dutch government, which must act by consensus, protects the interests of both groups. There could be requirements of set ministerial seats for the TRS and that the government be formed via a coalition of language group majorities, like in Brussels. In our mixed model, the governments for the TRS and GS could initiate legislation within their spheres and combine to govern competences for joint spheres. Another option to ensure laws support both groups' interests would be to create a separate institution that initiates laws. That institution would have a requirement of half-GS and half-TRS representatives. Therefore, even if simple majorities were used to pass laws in the main house, the laws would have passed the scrutiny of an institution that represents both groups' interests equally. The use of a separate

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203 Ministry of Health "Socioeconomic indicators" (2 August 2018) <www.health.govt.nz>; and Heather Came and others "Ethnic (pay) disparities in public sector leadership from 2001–2016 in Aotearoa New Zealand" (2020) 13(1) International Journal of Critical Indigenous Studies 70 at 72.

204 Carla A Houkamau and Chris G Sibley "Looking Māori Predicts Decreased Rates of Home Ownership: Institutional Racism in Housing Based on Perceived Appearance" (2015) 10 PLoS One 460 at 3 and 10–11; Ranginui Walker *Ka Whawhai Tonu Matou* (2nd ed, Penguin Group (NZ), Auckland, 2004) at 319–321; Te Kāhui Tika Tangata *Rite tahi tatou katoa? Addressing Structural Discrimination in Public Services* (Te Kāhui Tika Tangata, July 2012) at 48 and 50; and Came and others, above n 203, at 73 and 78–80.

institution, if it were able to successfully represent itself as an institution that advocates for both sphere, could potentially minimise racial tensions more effectively than the other joint lawmaking models mentioned.

*2 Power Dynamic*

From our institutional models, we can create three power dynamics between the proposed TRS and GS.

(a) Devolved System

The first is a devolved system where the GS is the central power and the TRS has devolved powers. A strictly de jure devolved government where TRS laws are easily overridden would not achieve tino rangatiratanga. If competences were split between spheres, there would be a desire to be supreme within one's own sphere. Scotland has continued to have further powers devolved to it and political conventions that protect the integrity of its institutions. I do not think this model would be able to be applied in Aotearoa in the same way it has been in Scotland. United Kingdom politicians generally have not involved themselves in Scottish matters, and the United Kingdom Government did not mind devolving further powers to the Scottish Government. In Aotearoa, many politicians make a platform based on removing Māori rights, such as the Māori seats.[205] Iwi have complained of how the Crown has treated them in treaty settlement negotiations.[206] Scotland's devolved system provides limited legal avenues for protection of a devolved administration. Aotearoa's political attitudes could limit the amount of political entrenchment a TRS devolved government could have. However, devolution provides more self-governance than the current system. If implemented in Aotearoa, I would recommend stronger legal safeguards than the Scottish system to make up for this difference in political cultures.

(b) Federal System

A federal system would have the GS and the TRS as equal powers and, while working together, they would not be accountable to each other. This dynamic would fit a modern understanding of tino rangatiratanga, as the TRS would be supreme within its sphere. A federal system would require decisions to be made with a spirit of cooperation and consensus. Its implementation would be difficult, given the Crown's current attitude towards power-sharing, and there would need to be a written constitution to protect the TRS' power.

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205 See generally Colin James "National Party - Party principles" (20 June 2012) Te Ara – The Encyclopaedia of New Zealand <www.teara.govt.nz>; and on the removal of Māori seats, see Act Party New Zealand "Policies: Citizenship and Government" <www.act.org.nz>.

206 Mutu and Jackson, above n 1, at 84–85.

(c) Federal System with a Higher and/or Relational Sphere

This model is like the previous model, but with a separate higher and/or relational sphere. There are two possible options for this sphere. The first is comparable to a federal government, making laws for competences not devolved to the TRS and the GS. For example, in Belgium the federated entities do not answer to the federal level. The second option is that the sphere has no lawmaking powers itself but instead helps coordinate overlap between the TRS and the GS. It may also resolve disputes. This option would be similar to the Conciliation Committee in the European Union. A relational sphere would be useful in a small country, as divided competences would have areas of overlap. In both options, I recommend the sphere have equal representation from both the TRS and the GS. If seat numbers were more proportional to demographic numbers, then there would need to be strong minority safeguards in place. Otherwise, it could create tension if people thought the sphere favoured either the TRS or the GS over the other.

The power dynamic, wherein the GS and TRS are equal, would be preferable in achieving full tino rangatiratanga. However, even a de jure devolution model would be progress compared to the current system, and hopefully a stepping stone to further devolution.

**Group Tensions within Power-sharing**

Important aspects in ensuring a power-sharing model works are dispute resolution and implementing safeguards for both groups.

*1 Dispute Resolution*

The method of dispute resolution that is most appropriate depends heavily on the power dynamic between the spheres. The history and previous relationship between the two groups must be considered.

(a) Political or Legal Protections?

In setting out the relationship between the spheres, there is a choice between relying on political manoeuvring or enforcing legal rights. The governments I analysed tended to prefer political negotiations as the first step. However, where such negotiations failed, some had legal processes and powers to which they could turn to resolve issues.

Scotland's powers are politically entrenched. This has generally worked well and allowed Scotland's government to control its day-to-day affairs unencumbered. It previously allowed the Scottish government to stop the United Kingdom from implementing legislation with which it did not agree. In light of my earlier comments on Brexit, one can see the limits of Scotland's devolution machinery. When there is a big enough constitutional shock and no legal or written grievance mechanism available, the devolved administration might be overruled on important issues. In this case, despite

the United Kingdom Government opposing a new independence referendum, Scotland arguably still has the political power to walk away from the United Kingdom in the future. I believe the United Kingdom's desire for unity will allow Scotland, if it does not become independent, to negotiate a greater degree of home rule.

In planning Aotearoa's power-sharing model, it is best not to rely on such ultimatums. Belgium's government prefers to find political solutions first. However, due to that government's complexity, it has a written constitution and written government coalition agreements. It manages conflicts through clearly defined provisions in these instruments. It has veto powers which better allow for political negotiations. If one of the government coalition groups, communities or regions were to decide to stop cooperating, they could make the whole system fail. As none of them want that, they work to reach a compromise. They have a political desire to reach a compromise, with legal "teeth" to ensure that outcome.

Historically, Aotearoa's government has always expressed a preference for political solutions to Māori claims.[207] Māori have fought, with some success, for the recognition of rights in the courts. However, due to the unencumbered nature of Parliament's powers, major wins have been overturned.[208] Reliance on political solutions is not realistic for a minority that has been marginalised continually by the majority. Our current legal solutions are imperfect because they are within the Westminster framework. As mentioned previously, the judicial system has been hesitant to question parliamentary supremacy or recognise tikanga as a system of law.[209] Māori continue to be underrepresented in the judiciary.[210] This may mean that judges have limited understanding of the challenges many Māori face.[211] Political manoeuvring can be a good system, allowing our democratic representatives to make our decisions for us. However, I believe the difference between Aotearoa and countries like Scotland and Belgium is that those countries are able to use political manoeuvring because they also have legal avenues or other forms of leverage. In other words, there is not so much of a power imbalance between groups, and groups are treated as equal partners. All possible current avenues for reparation for Māori have been toothless. The Waitangi Tribunal can only offer recommendations. I recommend the TRS and the GS seek political solutions, so long as the TRS has some legal or constitutional teeth for protection.

207 Charters, above n 14, at 232.
208 See, for example, the Foreshore and Seabed Act 2004.
209 Charters, above n 14, at 231–232.
210 Laura Bootham "Messy data on Maori judges" (17 March 2015) Radio New Zealand <www.rnz.co.nz>.
211 Helen Winkelmann "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" [2020] NZ L Rev 175 at 179–181.

(b) Veto and Consensus

The shadow of the veto can be a method of dispute resolution, requiring consensus between groups. If negotiating parties are not equal, then there is no true negotiation. It can be tempting for the more powerful group to adopt a "take-it-or-leave-it" mentality, by which minorities only have their rights recognised if they align with the desires of the majority. The veto functionally takes away the larger group's ability to overpower the other with sheer numbers. Veto and compromise can make processes long and coalitions difficult. It is not rare in Belgium for a coalition to fall apart, requiring renegotiating or an election.[212] However, these are the prices to pay for cooperation, compromise and consensus. Belgium still manages to function to a high standard. Consensus is an important value in Māori decision-making. Achieving consensus would require the legislature to shift its mentality from unquestionable supremacy to compromise and negotiation. Belgium's willingness to compromise to reach consensus may be affected by its history. The Flemish are the larger group but were traditionally not powerful politically. They were never able to use their demographic bulk to push around the French minority.[213] In Aotearoa, meanwhile, the legislature has a history of passing laws to the detriment of Māori.[214] It may be difficult to convince the general population, which is used to getting its way, of the advantages of the veto.

(c) Devolution

If the different lawmaking powers cannot agree at a central level, then they can devolve to the different spheres to pursue their own policies and simply try to coordinate any overlap. This is a dispute resolution tactic that could be applied across a variety of models. The main issues to overcome would be to ensure any overlap is coordinated well and fairly between groups, and that areas devolved or divided between spheres are kept to high standards and receive an equitable division of resources.

(d) Conciliation Committee

A Conciliation Committee could be applied in any model that has joint lawmaking. For negotiations to be meaningful, we would want any committee to be represented evenly, even in a devolved government scenario. Research from the European Union has shown the success of the Conciliation Committee in finding alternatives with which both parties agree.[215] Importantly, both institutions still retain the power to accept or decline the alternatives put forward by the Committee.

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212 Deschouwer, above n 89, at 174.

213 Deschouwer, above n 96, at 49 and 68.

214 Examples include the Foreshore and Seabed Act 2004, the New Zealand Settlements Act 1863, the West Coast Settlement (North Island) Act 1880 and the West Coast Peace Preservation Act 1882.

215 Chalmers, Davies and Monti, above n 159, at 120.

### *2 Safeguards on Power*

The establishment of safeguards is especially relevant in systems where there is an imbalance of power between groups.

#### (a) Political Will and Disdain

While control over political will and disdain is never guaranteed, these attitudes can still effectively work as a safeguard. This safeguard can depend on the history of the two groups and the setup of the rest of the system. The political will or disdain of the group could be expressed as the difference between what is officially represented as the power of each group and those groups' *actual* power. This could also be described as the power the minority group has to enforce its will once all other avenues have been extinguished. Scotland gives us examples of both of these. While a devolved government, the United Kingdom is hesitant to legislate devolved matters without the Scottish Parliament's permission.[216] Following the one case where the United Kingdom enforced its will over Scotland — Brexit — there is now a real possibility Scotland will leave the United Kingdom to remain in the European Union. A similar threat would not be viable in Aotearoa unless the split territory and split competences model was implemented. That said, Māori, throughout history, have used political will and protest to protect their culture and rights, despite strong opposition from governments. Protests such as those at Bastion Point and the Māori Land hikoi are relevant examples. These movements helped power the Māori renaissance. Political will has not been a perfect tool, but it is one of the most powerful available for Māori. Progress has mainly been against overt discrimination and for the protection of Māori culture. Māori trying to obtaining self-governance through the use of political will and disdain has met with very limited success. In most models, this safeguard alone would not be enough to ensure the protection of the Māori minority.

#### (b) Legislative Consent Motions

For legislation affecting Scotland, the United Kingdom Government has tended to respect the Sewel Convention and ask for Scotland's consent. While there is no legal right to veto if consent is withheld, the use of consent motions in a devolved system will hopefully create political weight to protect a devolved government's powers. It is also possible to include some sort of deterrent to prevent the central government from ignoring these motions. A devolved administration entirely blocking the central government would be undesirable. Instead, there could be a requirement for a three-quarters majority from the central Parliament, or a much longer legislation process, if a devolved Parliament's consent is withheld. These

216 Page, above n 28, at [2–22].

processes may help prevent the shortcomings that we have seen with Brexit and Scotland.

(c) Language Groups

The use of language groups allows for the interests of each group to be more clearly represented. While there may be ideological divisions within the language group itself, an MP's responsibilities include representing the interests of that language group as a people. The use of language groups would address the earlier criticism that MPs may be of Māori descent but not represent Māori interests. It also allows better protections like the use of double majorities and "alarm bell" procedures. A clear example of when a double majority should be required would be for any proposed changes to constitutional laws. It would be important to include double majorities for areas where Māori have special interests or will be affected disproportionately. Obvious examples are land, natural resources and the criminal justice system. The use of an "alarm bell" procedure could be used to ensure Māori have input into such areas. This procedure could be more effective than a double majority or a veto in these cases, as it does not stop the Bill in its tracks. It enforces and encourages the principle of compromise. It creates positive action and, therefore, would likely be better received than the regular use of vetoes or double majorities.

(d) Deferral to a Higher Law

In the Brussels Parliament, laws regarding the Dutch minority are under the jurisdiction of the Federal Government, where the Dutch are a majority. In Aotearoa, laws affecting Māori could be subjected to a higher authority: either supreme law, such as a written constitution, or a relational sphere where Māori are represented equally. A written constitution could prohibit laws discriminatory to Māori, or laws that violate certain principles to which both groups agreed. To be effective, a constitutional court would need the power to overturn legislation that violates the constitution. We would not want a constitutional court to mimic our current court system, but instead represent both the TRS and the GS. An alternative option is that laws regarding the Māori minority could be referred to a higher relational sphere. The role of this relational sphere would vary widely depending on the set up of the rest of the system. The important part is that it should be equally representative of both groups. The constitutional court in Belgium and the Conciliation Committee all require equal representation of the groups or institutions they represent.

(e) Veto

I mentioned veto previously as a means of dispute resolution. Where one party is smaller or has less power, however, the veto also protects against abuse of power. The existence of a veto power should mean that those trying

to pass a Bill will not overtly act against the interests of others. As noted earlier, too frequent use of the veto power could create a negative perception of the group exercising it. However, research on the European Parliament's veto powers shows it creates leverage, even without regular use. The most important aspect of the veto is that it would stop the passing of laws detrimental to a minority group like Māori. For Māori, the reality is that racist and abusive laws have been passed against them. There are current laws that continue to disadvantage them in more subtle ways.[217] The veto may make our political system more vulnerable to gridlock, but this is a small price to pay to ensure future laws are fair.

### Constitutional Principles

The Matike Mai Aotearoa group report suggested that a constitution should be underlaid by values.[218] I argue that cooperation, consensus and power balance are values that have contributed to the successful running of the institutional models I have studied. The division of power and principle of power balance in these models illustrate that total parliamentary supremacy is not the only workable model. Such a model may even be considered unreasonable in a multicultural society, especially one where indigenous people have their claim to self-determination. I advocate that tikanga principles and governance methods be used to mould these models to suit Aotearoa's unique circumstances. Finally, I would note a glaring difference between the circumstances of our studied models and Aotearoa — race. The fact that the groups sharing power in the studied models were all white Europeans may have contributed to each group's willingness to cooperate and see each other as equal partners. The colonisation of Aotearoa, meanwhile, was predicated on white supremacy.[219] This idea has infiltrated many aspects of our political and legal system and is still present today. We see this, for example, in the *Wi Parata* decision,[220] as well as in Don Brash's Orewa speech.[221] Racial tension has affected the relationship between Māori and the Crown since 1840. Constitutional transformation would need to address and correct this problem.

## IV CONCLUSION

There are many and varied combinations of lawmaking processes, power dynamics, dispute resolutions and safeguards elements that could be used to

217 Waitangi Tribunal *He Aha I Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at 33–34; and Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 161.

218 Mutu and Jackson, above n 1, at 68.

219 Moana Jackson "The connection between white supremacy and colonisation" *E-Tangata* (online ed, Aotearoa, 24 March 2019).

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

221 Don Brash "Orewa 2004 - Nationhood" (27 January 2004) <www.donbrash.com>.

create a constitutional model that allows the expression of tino rangatiratanga, while handling group disputes fairly. I consider a mixed model, combining a "same territory and split competences" approach with joint lawmaking procedures when necessary, is the best approach to express tino rangatiratanga. This would be a powerful way to allow self-governance by both groups, without imposing excessive obligations on individuals. I would recommend legally enforceable safeguards to protect the Māori minority and to ensure a more balanced relationship between the two spheres.