

# Immigration and Race Relations

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## I. INTRODUCTION

This article is in three parts. The first considers and critiques arguments for a multicultural nation, focusing on the special status of Maori as a First Nation people and as a reason to prefer biculturalism over multiculturalism.

The second part sets out the legal and political bases that the government of New Zealand uses to justify its exclusive power to make policy decisions in New Zealand, and focuses largely on race relations: arguments by the Crown that assert its exclusive sovereignty over Maori and the Treaty of Waitangi (“the Treaty”) in a legal and political sense. Any policy the government makes regarding immigration is seen as flowing from the Crown’s sovereign powers to make laws and policy decisions, so immigration is not specifically discussed in this part of the article.

Finally, the many and varied ways in which Maori may challenge the assumptions of the Crown are outlined in the third part, which sets out arguments from a Maori perspective regarding sovereignty, *te tino rangatiratanga*, and the Treaty as a moral and political force. Immigration issues are explored in more detail and the Treaty is set out as the basis for a bicultural nation.

## II. A MULTICULTURAL NATION

### 1. Multiculturalism: What is it?

“Multicultural” is a word that is commonly used to describe New Zealand society today.<sup>1</sup> But what does it really mean? The term “multicultural” originated in popular discourse in the United States, and usage soon spread to

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1 See, for example, Bell, *Inventing New Zealand: Everyday Myths of Pakeha Identity* (1996) 187.

Canada and the United Kingdom.<sup>2</sup> The dictionary tells us that “multicultural” means “of, relating to, or constituting several cultural or ethnic groups”.<sup>3</sup> “Culture” is defined as “the customs, institutions, and achievements of a particular nation, people, or group”.<sup>4</sup>

In popular parlance, the phrase “multicultural nation” is imbued with positive connotations. It conjures up images of peoples from many different cultural groups – whether Japanese, Dutch, American, Italian, Maori or Samoan – living together in a mutually enriching existence, learning about each other’s beliefs, values, ways of life, and even styles of dress and art.

Multiculturalism, we are told, makes life exciting and vibrant and it also makes us more open-minded and cosmopolitan in our attitudes. As Clive Matthewson, former leader of the United New Zealand Party, opined in a lecture series run by the Whitireia Polytechnic in 1996:<sup>5</sup>

I like this multiculturalism. I am excited by learning about other cultures, and I like the food. And I really like the diversity and vibrancy which New Zealand has developed over such a short period.

The same positive picture is painted by the Office of the Race Relations Conciliator in its “Agenda New Zealand: A Gift of Positive Race Relations to Future Generations” (“*Agenda NZ*”):<sup>6</sup>

Imagine yourself in the year 2046. As you look out from your bedroom window, you find your neighbourhood now comprises a number of cultures ... [T]he kindergarten your grand daughter attends will be a mini United Nations ... Her favourite foods may originate in a different country, [and] she may speak a number of languages.

The term “multiculturalism” has also been embraced and discussed at length by academic commentators. Kymlicka<sup>7</sup>, for example, defines it thus:<sup>8</sup>

[A] state is multicultural if its members either belong to different nations (a multi-nation state), or have emigrated from different nations (a polyethnic state), and if this fact is an important aspect of personal identity and political life.

## 2. Arguments for a Multicultural Nation

Proponents of multiculturalism argue from the standpoint that all persons are equal and all should, therefore, be treated equally. New Zealand is populated by many ethnic minorities, so our society “can properly be viewed only as a *multi-*

2 See Simpson and Weiner (eds), *The Oxford English Dictionary* (2 ed, 1989), Volume X, 79. This provides a brief history of usage of the word “multicultural”.

3 Pearsall (ed), *The Concise Oxford Dictionary* (10 ed, 1999) 936.

4 Ibid 348.

5 Bell (ed), “One Nation, Two Partners, Many Peoples” (Wellington lecture series, 1996) 9.

6 Office of the Race Relations Conciliator, *Agenda New Zealand: A Gift of Positive Race Relations to Future Generations* (26 March 1999) 1 (“*Agenda NZ*”).

7 Professor of Philosophy at the University of Ottawa and at Carleton University.

8 Kymlicka, *Multicultural Citizenship* (1995) 18.

cultural and *multi-racial society*".<sup>9</sup> Out of simple fairness, the rights of all of these groups must be protected equally. To promote the rights of certain ethnic groups over those of other groups leads society towards disharmony and discontent. Thakur<sup>10</sup> has this to say about the way a multicultural society should operate in practice:<sup>11</sup>

Laws and policies should be neutral between competitors. Facilities available to one group should be equally available to any other group. For example, the Maori people should not have the right to certain state favours qua Maori which are not available to the European, African, Asian or any other Pacific Islander.

This kind of argument proposes that a country should be governed by laws and policies that are "ethnicity-blind". Most proponents of this theory will, however, accept discrimination between people when it is based on criteria such as income levels – for example, most will agree that poorer people should be given income support to meet education and medical costs. However, any "positive" discrimination – for example, affirmative action policies based on ethnicity – is seen as an unacceptable distinction to make.<sup>12</sup>

### 3. Criticisms of Multiculturalism

At first glance, the argument presented above seems innocent enough. Why should Maori be "privileged" over other peoples that live in New Zealand? Surely, equality is something on which all societies should be based?

The first thing we need to recognise is that words like "privilege", "equality" and indeed, as has been shown, "multicultural", are emotionally and politically loaded terms that should never be taken at face value. People who argue for "equality" assume the existence of a level playing field. While it is certainly true that other cultures have much to offer us, multiculturalism can be used in a negative and harmful manner, as an all too convenient argument by which Maori are denied their claims for justice. Many arguments for a multicultural society negate the special status of Maori as a First Nation, or indigenous, people.

The Race Relations Conciliator's *Agenda NZ* policy clearly displays a preference for New Zealand to develop towards a multicultural model. The relationship between Maori and Pakeha is described as an "historical fact". While there are "significant matters still to be resolved", New Zealand is now in "a different place". Maori claims for participation based on the Treaty are insistent but, now that we have been joined by people (immigrants) from many parts of the world, "[t]hings are different".<sup>13</sup>

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9 Vasil, *Biculturalism: Reconciling Aotearoa with New Zealand* (Revised ed, 2000) 1.

10 Professor in the Political Studies Department of the University of Otago.

11 Thakur, "In Defence of Multiculturalism" in Greif (ed), *Immigration and National Identity in New Zealand* (1995) 255, 280.

12 Ibid.

13 *Agenda NZ*, supra note 6.

There are two criticisms that can be made of the above point of view. First, Maori cannot be equated with the other ethnic groups, such as Chinese, Japanese or Indians that have settled in New Zealand. The latter groups are more recent immigrants who do, for the most part, retain links with their communities in their homelands. As Raj Vasil points out, “[t]heir cultures, languages and distinctive identities would not disappear from the collective heritage of humankind if they were not accorded recognition and provided special means for their sustenance in New Zealand.”<sup>14</sup>

Maori do need this special recognition. If Maori culture is not nurtured, it will disappear for good. This is not to say that non-Maori ethnic groups in New Zealand should have no special rights or protection, nor that their voices and opinions are irrelevant. The important point is that Maori are tangata whenua of New Zealand, and that this should not be taken lightly by immigrants who may initially find it difficult to understand why Maori should be afforded special treatment.

Secondly, it is a mistake to describe the relationship between Maori and Pakeha as an “historical fact” that can now be put aside. The Treaty set out a framework for a bicultural nation.<sup>15</sup> As such, the Treaty has created an on-going partnership between Maori and Pakeha.<sup>16</sup> Reparation for grievances is of obvious importance, but the Treaty will not vanish after all grievances are settled – presuming such a thing is possible. The Treaty relationship demands on-going recognition.

The Race Relations Conciliator’s *Agenda NZ* policy, however, implicitly dismisses such a framework in the light of the continuing diversification of New Zealand’s society.<sup>17</sup> Maori claims for equity and participation based on the Treaty are not given sufficient consideration in the *Agenda NZ* policy.

The viewpoint that Maori grievances should be relegated to history has resonances with former governmental policy that Maori grievances have an end-date: that full and final settlement of all Maori claims should be reached within a relatively short number of years. It is interesting to note, however, that the date, originally set for 1996,<sup>18</sup> then 2000,<sup>19</sup> is being continually pushed back as the volume of the claims becomes apparent.

A final point to make about multiculturalism is its use by the image-makers of New Zealand to create a sense of national identity, quite apart from the reality

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14 Vasil, *supra* note 9, 24.

15 The question of what a bicultural nation is, and what exact form it should take, will be dealt with in Part III.

16 See, for example, the Court of Appeal decision in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

17 *Agenda NZ*, *supra* note 6.

18 Ministry of Justice, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Report of Submissions* (December 1995) 41.

19 Research Unit for Maori Studies, *The Fiscal Envelope: Economics, Politics & Colonisation* (Vol 1, 1995) 9.

of the situation. Auckland sociologist Claudia Bell delivers the following warning:<sup>20</sup>

[T]he cultural make-up of New Zealand's population is changing, with a slowly increasing portrayal of New Zealand as multicultural by the image-makers. This does not for a moment mean a redistribution of power amongst diverse cultures. Rather, it can best be read as overt recognition and encouragement of a broader range of consumer groups.

Policies encouraging multiculturalism do not necessarily lead to real change for minority groups in our society. "Image-making" is the attempt by politicians, in conjunction with advertising and marketing ploys, to sell to the ordinary New Zealander an image of who we are and what our place is in the world. Our "image" has changed over time, so that while we were once a European colony with strong links to the United Kingdom, then a Pacific Nation, we are now to consider ourselves a "part of Asia", in line with the potential for economic ties to this region.<sup>21</sup>

Many immigrants have stories to tell of the unexpected barriers they have encountered after moving here. Having been promised jobs and a secure environment, many discover that their qualifications are not recognised here and that there are very few support networks set up to ease their transition into a new culture, and in many cases, a new language.<sup>22</sup> The New Zealand government should think more carefully about the criteria and support structures in place for immigrants. The reality of a new immigrant's situation should be carefully explored as the groundwork for any discussion of multiculturalism. Rhetorical flights of fancy, such as whether we should "embrace the challenge of the new climate and draw on the strengths promised by the acceptance of diversity", should be avoided as unhelpful glamorisation of the situation.<sup>23</sup>

With regard to Maori culture, politicians must be careful of enthusiastically embracing the trappings of Maori culture, while at the same time refusing to make a deeper commitment to the problems faced by Maori. Politicians are not alone in this behaviour. Maori culture is now seen as a crucial part of our identity as "New Zealanders" and, to many Pakeha, it is an important way of distinguishing our culture from that of the United Kingdom. Maori culture has become a part of our "national identity". We greet each other by saying "kia ora"; the All Blacks perform the haka before international rugby games; we can all sing "Po Karekare Ana"; and most of us can count up to four in Maori. We even play stick-games and learn the poi in mainstream schools. Maori words appear in official documentation – for example, a Maori proverb is used at the

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20 Bell, *supra* note 1, 187.

21 *Ibid* 6-8.

22 See, for example, Reid and Sell, "New Deal to Entice More Migrants", *The New Zealand Herald*, Auckland, New Zealand, 12 July 2000, A1; and Reid, "Dreaded Asian Invasion a Myth", *The New Zealand Herald*, Auckland, New Zealand, 12 July 2000, A13.

23 *Agenda NZ*, *supra* note 6.

beginning of the *Agenda NZ* policy of the Race Relations Conciliator. Te Reo Maori is also one of the two official languages of New Zealand.<sup>24</sup>

While Maori culture certainly deserves celebration, it is not acceptable to recognise Maori culture as a crucial and distinct part of New Zealand's national identity on the one hand, while at the same time denying that Maori have special status vis-à-vis any other ethnic or immigrant group.

### III. THE LEGAL AND POLITICAL BASES FOR DETERMINING IMMIGRATION AND RACE RELATIONS POLICY

The power of the Race Relations Conciliator and the government to determine immigration and race relations policy in New Zealand rests on the continuing assertion by the Crown of exclusive sovereignty. An important aspect of sovereignty is the exclusive power to make laws, to set policy on which these laws are based and to make other executive-type decisions. Any power the Race Relations Conciliator has to determine policy is derived from the government. The Race Relations Office can be seen as a tool of the government, with the power, for example, to assist in policy-making decisions, to make recommendations, and to organise consultations, such as the consultation timetable set out in the *Agenda NZ* policy. Final decisions regarding policy rest with the government.

#### 1. The Legal Basis: Sovereignty at International Law and in the Courts

The assertion of sovereignty is historically based. The signing of the Treaty of Waitangi in 1840 provides the basis for Crown claims of sovereignty under the doctrine of acquisition by a treaty of "cession" – a consensus agreement between an Indigenous People and the Crown.

It is common knowledge that there are three texts of the Treaty: an English version, a Maori version, and an English version translated into Maori. Forty-three chiefs signed at Waitangi on 6 February 1840. Signatures were then collected from around the North Island, with 540 chiefs signing in total.<sup>25</sup> Nearly all of these signed the Maori version.<sup>26</sup> However, a number of paramount chiefs

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24 Maori Language Act 1987.

25 Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (1990) 95-97.

26 Orange, *The Treaty of Waitangi* (1987) 39.

did not sign at all.<sup>27</sup> The South Island was declared terra nullius and sovereignty was asserted over it by virtue of the doctrine of discovery.<sup>28</sup>

There has been much argument as to the meanings of the different texts of the Treaty. The Crown has consistently asserted that Maori ceded sovereignty under Article I. Maori contend that kawanatanga (as used in the Maori version), or “governance” was all that was ceded. Maori retained te tino rangatiratanga (sovereignty or independence) and not the lesser “undisturbed possession” given in Article II of the English text. In Article III Maori acquired the rights and duties of British subjects.

The Crown has never backed down from the position that Maori ceded sovereignty by virtue of the Treaty. There is a great deal of proof that rangatiratanga, which was sourced from scripture, was used to refer to the supreme reign of God, and that it was used to signify the concept of independence in the Declaration of Independence 1835.<sup>29</sup> The Crown, however, has never seen it in this way. While Maori believed that power would be shared, the Crown believed that power was transferred, with the result that the Crown is sovereign and Maori are subject.<sup>30</sup>

There is differing opinion as to when exactly Crown sovereignty came into effect. Some argue it was when notice of transferral of sovereignty under the Treaty was gazetted.<sup>31</sup> The “receipt” theory argues that English law did not come into effect until the passing of the English Laws Act 1858.<sup>32</sup> Others argue it came into full effect only after a government was established and New Zealand became a fully-fledged British colony.<sup>33</sup> Still others would have it that the Crown sovereignty was legitimised through the passage of time.<sup>34</sup> To some, the Treaty is incidental; to others it was crucial to enable the application of English law to New Zealand.

To the Crown, it is not relevant when exactly its sovereignty came into effect. The important point is that it was validated in English and in international law. To some extent, the semantic tangles as to which version of the Treaty has precedence is a legal irrelevancy. The Treaty is a reason for the Crown’s assertion of sovereignty, but as a matter of English and international law sovereignty rests upon the assertion, rather than on the Treaty itself. The Crown may accept some moral obligation to have regard to the Treaty, but such an obligation does not exist at law because English common law makes it clear that

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27 For example, Chief Te Wherowhero of Tainui, Chief Te Heuheu of the Tuwharetoa confederation, chiefs of the Te Arawa confederation of tribes in the Lakes district, the Ngaiterangi chiefs at Tauranga and Te Kani-a-Takirau, Paramount Chief of the East Coast: see Walker, *supra* note 25, 97.

28 *Ibid.*

29 Orange, *supra* note 26, 41.

30 Kawharu (ed), “Sovereignty”, introduction to *Waitangi: Maori and Pakeha Perspectives* (1989) xvii.

31 Orange, *supra* note 26, 85.

32 Williams, “The Foundation of Colonial Rule in New Zealand” (1988) 13 NZULR 54, 58-60.

33 Orange, *supra* note 26, 92.

34 Brookfield, “Parliament, the Treaty and Freedom: Millennial Hopes and Speculations” [1994] NZLJ 462, 464-465.

the Treaty has no legal validity unless incorporated into statute. This is the orthodox view of the Treaty's status at law that continues to this day.

Case law in New Zealand has, not unexpectedly, supported the Crown's assertion of exclusive sovereignty.<sup>35</sup> In *R v Symonds*,<sup>36</sup> it was held that the Treaty of Waitangi was a valid treaty of cession. In *Wi Parata v Bishop of Wellington*,<sup>37</sup> the Supreme Court was of the view that the Treaty was a "nullity" because Maori were insufficiently civilised to enter into a binding international treaty. In *Te HeuHeu Tukino v Aotea District Maori Land Board*<sup>38</sup> the Privy Council held that the Treaty is not part of domestic law unless incorporated into statute. In 1987 the High Court stated in *Huakina Development Trust v Waikato Valley Authority & Bowater*<sup>39</sup> that the Treaty could be used as an "extrinsic aid" to interpret unclear legislation. Finally, in the landmark 1987 case of *New Zealand Maori Council v Attorney-General*,<sup>40</sup> the Court of Appeal identified principles of the Treaty that override everything else in the State-Owned Enterprises Act 1986. Obiter statements suggested that the Treaty should be considered a mandatory relevant consideration even if not incorporated into statute. In relation to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 it has been remarked that "fundamental questions of the place of the Treaty in the New Zealand constitutional system remain open".<sup>41</sup> So, while the Courts have been tentatively moving towards stronger recognition of the Treaty, they have been shy of making explicit statements that could encroach on Crown sovereignty.

## 2. The Political Basis: Theories of Sovereignty

In a political sense the New Zealand government has long asserted its right to exercise supremacy over anything said in the Treaty. The orthodox theory of Parliamentary sovereignty is that anything Parliament says is the law, is the law.<sup>42</sup> It does not matter how unjust or harsh the law is. Parliament is unlimited in its law-making powers and is not obliged to have regard to the Treaty.

Another important political principle from Hobbesian theory is that Crown sovereignty is indivisible. The sovereign "cannot operate under conditions in which sub-sovereigns retain autonomous sovereign powers, for in that case the plurality of sovereign judgements is not reduced to that of a single voice".<sup>43</sup> Any suggestion, therefore, that Maori be permitted to determine their own political

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35 The following constitutes a brief overview of Treaty of Waitangi case law.

36 (1847) NZPCC 387.

37 (1877) 3 NZ Jur (NS) SC 72.

38 [1941] NZLR 591; [1941] 2 All ER 93; [1941] AC 308 (PC).

39 [1987] 2 NZLR 188.

40 [1987] 1 NZLR 641; (1987) 6 NZAR 353.

41 Brookfield, *supra* note 34, 465-466.

42 Dicey, *Introduction to the Study of the Laws of the Constitution* (10 ed, 1965) 39-40; quoted with approval in *Fitzgerald v Muldoon* [1976] 2 NZLR 615, 622 per Wild CJ.

43 Davies and Ewin, "Sovereigns, and the Treaty of Waitangi" in Oddie and Perrett (eds), *Justice, Ethics & New Zealand Society* (1992) 41, 48.



status, sovereignty or independence is unacceptable. The Crown, by its very nature, could not contemplate such a thing.

There is a further practical argument put forward by Professor Brookfield, who states that “[r]evolution rests upon what is *done*, not what is legal or necessarily moral or just”.<sup>44</sup> According to this theory, what is important is that the Crown’s sovereignty was validated over time. Maori claims for sovereignty, however based, are irrelevant, because the Crown’s assumption of sovereignty unquestionably succeeded and has lasted.<sup>45</sup> Crown sovereignty rests on its effectiveness and durability.<sup>46</sup>

Finally, putting arguments of Crown sovereignty aside, the government itself can argue that it has the political mandate to determine immigration and race relations policy based on the simple fact that it was voted into power in accordance with our democratic electoral system.

#### IV. MAORI CHALLENGES TO THESE ASSUMPTIONS

It seems clear that it is difficult for Maori to challenge the assumptions of the Crown from a legal basis. Unless the Treaty has been in some way incorporated into statute, Maori do not have a legal basis to bring a claim in the Courts. On the few occasions when Maori have been successful in Court, the claim rested on the fact that the Treaty was incorporated into a relevant Act.<sup>47</sup> Maori, therefore, have long relied on political arguments as the basis on which to challenge the assumptions of the Crown.

##### 1. The Treaty as a Political Imperative

The Treaty can be seen as a political, and not merely a legal, document. Maori arguments that sovereignty was retained, or was at least to be shared by Maori, are inherently political and could not be brought up in Court. Moana Jackson points out that:<sup>48</sup>

It is important to remember that a treaty is a political, not just a legal, document. Treaties are signed between nations – they are about political relationships, political power. If we talk about the ‘spirit of the Treaty’ or the ‘meaning and message of the Treaty,’ we should not lose sight of the fact that it was a practical framework established to govern political relations.

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44 Brookfield, *supra* note 34, 462 (emphasis in original).

45 Graham, “Speech Address to Waikanae/Kapiti Rotary Clubs”, 3 May 1995, 2.

46 Brookfield, *supra* note 34, 463.

47 For example, the Maori case in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, rested on section 9 of the State-Owned Enterprises Act 1986, and the line of cases leading up to the 1992 Sealords Deal relied on section 88(2) of the Fisheries Act 1983. All of these decisions were very important for Maori.

48 Jackson, “Maori Law, Pakeha Law and the Treaty of Waitangi” in *Mana Tiriti: The Art of Protest and Partnership* (1991) 14, 17.

From a Maori perspective, Maori sovereign rights were not ceded, but confirmed. As discussed in Part II, Article II of the Treaty was understood by Maori to guarantee to the chiefs absolute authority over their people. In return, Maori conceded the power of governance to the Crown in Article I. For Maori, there is simply no other way of looking at the Treaty and, in fact, these arguments, with regard to the clear meaning of the words in the Maori text and the historical circumstances in which the Treaty was signed, are difficult to refute from any perspective.

As noted, however, the Crown's assertion of sovereignty rests on the assertion itself rather than on the text of the Treaty. Maori have taken issue with this limited view. There is a strong political basis by which Maori may challenge traditional doctrines of sovereignty. Many commentators have noted that the Hobbesian doctrine of indivisible sovereignty seems outdated in today's world. For example, Sir Kenneth Keith stated the following:<sup>49</sup>

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.

Similarly, Sir Geoffrey Palmer, former Prime Minister of New Zealand, has noted that “notions of sovereignty are collapsing all over the world .... Sovereignty is not a word that is useful and it should be banished from political debate”.<sup>50</sup> Philosopher, Stephen Davies, has observed that if the Hobbesian doctrine of sovereignty is mistaken.<sup>51</sup>

[T]he New Zealand government is morally bound by the Treaty of Waitangi in all things, whether it accepts this fact or not .... And it is bound in a way which it cannot undo by legislation, because legislation of that sort exceeds the legitimate authority that it possesses as part sovereign of New Zealand.

Professor Brookfield's assertion that the Crown's authority was validated over time is simply an unacceptable argument. It does not satisfy justice to put forward the view that “what is, is”. We need only look at events in world history to be assured that no doctrine is irreversible, and that no regime lasts forever.

The moral and political force of the Treaty was apparent in the 1970s, in which there was significant Maori activism in the form of high-profile land marches and demonstrations. The formation of the Waitangi Tribunal in 1975 is seen as a direct response to the Maori land protests, demonstrating the political power of the Treaty to effect change for Maori. The Tribunal exists largely in the

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49 Quoted in Durie, *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (1998) 218-219.

50 Ibid 219.

51 Davies and Ewin, *supra* note 43, 52.

political sphere as an added pressure on the Crown. It has been much criticised by Maori for having mere recommendatory powers.<sup>52</sup> It is also very much the Crown's creation: the Crown chooses who sits on the Tribunal and whether or not the Tribunal's recommendations will be acted upon. Nevertheless, it is a place where Maori may, and do, go to challenge the Crown. The Waitangi Tribunal is positive in so far as it creates a forum for Maori to be heard.

## 2. Immigration and the Treaty

Most of the argument put forward in this article has dealt with Maori-Pakeha relations, with regard to assumptions as to sovereignty and the validity of the Treaty. Because the Treaty text itself is the basis on which Maori challenge the government's immigration policies, it has been necessary to devote the larger portion of this article to arguments that discuss the validity of the Treaty as a basis for Maori claims.

Maori argue that "[t]he original charter for immigration in New Zealand [is stated] in the preamble to the Treaty",<sup>53</sup> whereby the Crown:<sup>54</sup>

[H]as deemed it necessary, in consequence of the great number of Her Majesty's subjects who have already settled in New Zealand, and the rapid extension of Emigration from both Europe and Australia which is still in progress, to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of her Majesty's sovereign authority over the whole or any part of those islands.

In the preamble, Maori give permission to the Crown for immigration to occur from the stated regions of Europe, Australia and the United Kingdom. Any variation of this agreement requires the Crown to consult with Maori as its Treaty partner.<sup>55</sup> Immigration policy has been made without the consent of Maori. When consultation was attempted it was inadequate, and Maori opposition was glossed over.<sup>56</sup>

The Crown has often tried to justify its immigration policy using economic arguments.<sup>57</sup> Such arguments posit that immigrants will promote economic growth and create jobs.<sup>58</sup> Maori have consistently taken issue with this view, pointing out the flaws in the government's screening processes, lack of support

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52 Durie, *supra* note 49, 185-186.

53 Walker, "Immigration Policy and the Political Economy of New Zealand" in Grief (ed), *Immigration and National Identity in New Zealand* (1995) 282, 284-285; see also Tunks, "The Erosion of Tangata Whenua Status by Crown Immigration Policy" (draft, 1998) 10-11.

54 Facsimiles of the Treaty of Waitangi, 1976, 6.

55 Walker, *supra* note 53, 285: "The Human Rights Commission has endorsed this position with its recommendation to the government that the Treaty of Waitangi should be considered in any decisions on immigration policy."

56 *Ibid.*

57 *Agenda NZ*, *supra* note 6, 2.

58 Walker, *supra* note 53, 291.

for immigrants when they arrive and marginalisation of Maori in the workforce due to the influx of immigrants.<sup>59</sup>

### 3. The Treaty as the Basis for a Bicultural State

Maori today argue that provisions of the Treaty “provide a blueprint for defining (reflecting, reinforcing and advancing)” iwi relations with the Crown.<sup>60</sup> The Treaty is seen as providing the basis for Maori-Pakeha bicultural relations. The exact form a bicultural nation should take is still the subject of much debate. There is a wide spectrum of ideas from the “inclusion of Maori values and perspectives within existing institutional structures”, to the more radical notion of Maori rangatiratanga in sovereign partnership with the Crown in a form of shared sovereignty.<sup>61</sup> A separate, or upper, Maori house of Parliament is yet another suggestion that has been mooted, as has the idea of enshrining the Treaty within a written constitution.

Maori commentators have pointed out the dangers of acting from within the Crown’s paradigm. Maori have been in an inferior position to the Crown for many years, and there is much debate as to the worthiness of arguing with the State using the State’s institutions and systems – the Courts and the Waitangi Tribunal. To put it another way: “You can’t use the Master’s tools to dismantle the Master’s house.”

It is a difficult issue with no easy answers, and ought to be borne in mind when thinking of the form a bicultural nation should take, and also when considering the position of Maori politicians who attempt to effect change for Maori from within Parliament itself. Professor Mason Durie points out that sovereignty does not arise from Maori concepts of power, and that it carries with it the full force of “colonial presumption”. He warns against the dangers of presuming that the fundamental issue facing Maori is one of parliamentary control, pointing out that the cultural and economic survival of Maori is not necessarily to be found in a duplication of colonial arrangements for power or governance. Professor Durie states that the essential tasks are for Maori to reach agreement about decision-making within Maori society and for Maori and the Crown to agree on the most appropriate constitutional arrangements that will enhance the standing of both.<sup>62</sup>

## V. CONCLUSION

The issues surrounding multiculturalism, biculturalism, sovereignty, rangatiratanga and immigration, are fraught with difficulties and contradictions. Maori and Pakeha are worlds apart and it is difficult to reach compromises that

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59 See, generally, Walker, *supra* note 53.

60 Havemann (ed), *Indigenous Peoples’ Rights* (1999) 204.

61 *Ibid* 207-208.

62 Durie, *supra* note 49, 219-220.

will fully satisfy both sides. The New Zealand government has been in a position of power compared to Maori for a long time. This makes it difficult for Maori to treat with the government on an equal footing, and is something that needs to change in order for progress to be made.

The public often perceives Maori grievances to be divisive and threatening. Similarly, immigrants often do not understand Treaty issues or history; nor do they feel obliged to recognise that Maori have a special status guaranteed by the Treaty. If the public at large, and new immigrants in particular, were better informed about Maori aspirations, experiences and beliefs, it would become clear that Maori aims are not divisive.

A bicultural nation does not mean a divided nation, nor does it entail the rejection of cultures that are not Maori or Pakeha. Rather, it is about Maori exercising *te tino rangatiratanga*, taking active control over their future.