The Role of Negotiation: Negotiated Justice?

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Disputes and all the cultural baggage - institutional, ideological, behavioural, political, even legal - that surrounds them are important to us because they are important to them, to the people doing the disputing. Everyone - judges, disputants, and the watching community as well - brings into the arena of disputing understandings about all sorts of things: what a person is, what legally cognizable beings inhabit the world, what harm is or what can cause it, what emotions are, how emotions relate to reason and behaviour, and more: understandings that predicate other, more recognizably "legal" understandings like liability or contract. We need to attend to the ideology as it is operationalized, to the processes by which meanings are linked to actions. Of course these understandings are resources in meaning construction and of course these constructed meanings are going to be mobilized in contests, not just contests of power and privilege, but contests of identity, contests of belief that are undertaken because they are about things that matter to conceptions of the self and the world one inhabits. Disputing is not just about my rights and your obligations, it is about who I am and what we are. Disputing is cultural behaviour like kinship and marriage, like politics, like art, like poetry. If it is an arena for contestations of power and dominance, then so are kinship, politics, art, and poetry. If kinship, politics, art, and poetry are arenas for meaning construction, then so is law. If there is a legal consciousness, then it is a segment of cultural consciousness.[1]

I

In this paper, I would like to comment on just a couple of aspects of the role of negotiation, in general and as it might apply in the area of Treaty claims. I want to do this too in the framework established by the quotation given above, in the awareness that negotiation, dispute resolution, bargaining, are not only practical and instrumental activities but also cultural, meaningful acts. If this is the case we bargain not only about material things about tangible results, but also about identity.

Before doing so, I want to comment on three of the issues on the Treaty claims and settlement process that have been raised in the discussion at this conference as a way of framing the comments I will make on negotiation and bargaining.

First, a question of language: the discussion surrounding the issue of the settlement of Treaty claims and the Government's "fiscal envelope" is expressed in terms of both "negotiation" and "consultation". It is also likely - though not always clear - that what is involved is also "debate". As a preliminary point, the issue is simply one of

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1 P Just "History, Power, Ideology and Culture: Current directions in the Anthropology of Law" (1992) 26 Law and Soc Rev 373, 407-408.

clarifying what the expectations of all of the participants are in taking part in this process. At the very least, negotiation or consultation may raise different expectations as to the level of participation in setting the agenda and shaping the outcome of discussions.

Second, in thinking about the outcome of negotiations, it is useful to distinguish between the levels of what might be expected by way of agreement. Where policy is to be implemented, or where disputes are going to be claimed to be resolved, or where grievances are assumed to be healed, it is at least useful for participants to know whether the outcome - for all parties - is either acquiescence, agreement, or commitment.[2] In this case in particular, what may not yet be clear is the expectation of either party, the Crown or Maori, as to whether mere acquiescence in the settlement proposals will suffice or whether what is sought is the kind of settlement that forms the basis for a more active commitment to the result.

Third, much of the debate about the "fiscal envelope" has been in terms of the acceptability or not of the proposals contained in the Crown documents on the settlement. The effect of this is that the debate is largely about the *solution* to issues of settlement. As I hope to suggest a little later, it is typically useful in contentious issues, especially those where the parties are widely separated in their expectations of acceptable outcomes, to shift the debate away from the solutions and to return to thinking about the *process* - to bargaining about how we will bargain in the first place. To focus on competing and preferred solutions will, in most cases, accentuate the gap between the participants. Yet this has been the tone and focus of much of the debate, notwithstanding the expectation that there will continue to be "consultation" on the features of the settlement proposal at a series of regional hui.

II

Each of the brief points above arises out of the current discussion on the details of the settlement proposals. Each of them also points to some of the ways in which it is useful to think not only about the proposal but also about how best we can engage in the negotiation and dialogue about the resolution of Treaty claims. The overall point I would like to make in this paper is that, in the absence of agreed and shared protocols, the process of dialogue does not always look after itself. Given the right kind of attention to agreement on procedure, the chances of a better settlement tend to improve. What may be involved here, then, is not just an exercise in bargaining about the details of a settlement but also the creation of a culture of bargaining, between the Crown and Maori, which will possibly improve the outcome. It cannot be assumed that we know how best to negotiate with each other, domestically or politically, even after living together for some time.

What this also means is that when we strike blocks in the negotiation process, those blocks are not only - or sometimes not at all - about the *details* of what one or

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2 I am grateful to my colleague Rhonda Pritchard for originally pointing out this distinction.

other proposes but rather about the manner in which the negotiation is being conducted. This may be especially the case if, as suggested earlier, there are different and undisclosed assumptions about whether this is negotiation, consultation, debate, or something quite different.

Four brief points can be made here to emphasise the idea that what is often at issue is not only the content, the proposal, but also the manner of its being proposed. First, without going into detail, what typically lies behind the manner in which we negotiate with each other is an adversarial culture. This is seen most obviously in the law itself and also in popular culture in the priority of the resolution of difference through winning, the ethic of there being "no prizes for second place". The difficulty arises when that adversarial culture - which even pervades the way in which we think about "winning" in dialogue and settlement - invades negotiations which are intended instead to settle differences, repair damage, and heal grievances.

Second, in the background paper to this conference, Chief Judge Durie referred to the question as to how Maori and the Crown might develop a claims resolution policy.[3] I read this as referring not only to the need to have a clear policy on claims resolution but also to the need to pay attention to the process of the joint and equal development of such a policy. It cannot be assumed in this setting that a resolution policy is something solely within the province of government, within which the parties will subsequently negotiate on matters of implementation and interpretation. The difficulty in this, at the outset, may be that so far we have limited experience of genuine bargaining, of dialogue, in our political and intercultural lives.

Third, the concept and expectation of negotiation is clearly central to the Crown's presentation of the proposals for the settlement of Treaty claims. The proposals appear to hinge upon the pursuit of a clearly established process of negotiation. Yet the potential difficulty here is that not only is the substantive core of the settlement terms apparently determined, the process by which the agreement to and implementation of those terms is also settled. In both substantive and procedural terms, this looks to be an example of the familiar "decide-announce-defend" process of law-making.

Fourth, the discussion - and defence - of the Crown's proposals is usually accompanied by the suggestion that these will be pursued unless and until a better alternative is suggested. As indicated earlier, the risk here is that the parties to the negotiation will get locked into the presentation and defence of preferred outcomes, with the further risk of positional bargaining. This, of course, is a familiar pattern of the kind of bargaining where all that is at stake is an eventual agreement on price and each knows by some kind of convention that the "right" price is somewhere less than is demanded and more than is offered. But that kind of bargaining does not readily carry over into the negotiation setting where something more than a commodity is at stake. The demand for the "better alternative" reason for shifting from a position tends also to be an aspect of debate rather than of negotiation.

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3 Chief Judge Durie, "Background Paper" (1995) 25 VUWLR 109.

III

The implication of each of these points is to suggest just one thing: that while the outcomes of the negotiations on the Treaty claims are clearly important and are the purpose of the exercise, what seems equally important - both in terms of the outcomes and with a view to the ongoing relationship of the negotiating parties - is the protection and management of the process of the negotiations. There seems to be two key issues here: one is the general one, that in this setting as much as in any other, negotiations do not look after themselves; the other is that there are clearly special issues that need attention where there are differences in the cultural needs and priorities of the parties. It cannot be assumed that, for all that we have lived together for some time, we speak the same negotiation language, rely on the same protocols, or expect the same things from negotiation. The political traditions of the Westminster style of government do not provide extensive experience for genuine and substantive *negotiations* with government (though there is experience of lobbying and comparable political activity); and the cultural traditions of Maori and Pakeha have not yet given us the protocols for negotiations, especially where the subject-matter of the negotiation is, in part at least, cultural survival.

In thinking about what we know about negotiation, it seems that there are two aspects of negotiation to consider. The first is perhaps the more familiar field for negotiation: dispute resolution and the settlement of "deals", contracts and so on. The second is an emerging and promising area for negotiation, and one which is hinted at in the very idea of the policy-making behind the Treaty settlements: negotiated rule-making, or more broadly, "negotiated justice". I will deal with each of these in a little more detail in the next section of the paper. The main point at this stage is to suggest that in relation to the first aspect of negotiation, the tasks are predominantly those of developing and maintaining the skills and tools of negotiation and dispute resolution, especially those skills of intercultural communication. In relation to the second, the potential may lie in the development of institutional - perhaps constitutional - frameworks which will facilitate the extended level of participation in policy- and rule-making through bargaining.

In relation to each aspect of negotiation, the concern here, too, is to determine those features of the process and structure of negotiations that are essentially shaped by cultural values and expectations, and to recognise, as the quotation at the head of this paper suggests,[4] that negotiation itself is a cultural activity. Far from being a culturally neutral extension of the adversarial processes of the application of rules, or an expression of some assumed common language of negotiation practice, our skills, practices and institutions of bargaining are richly cultural events. We do ourselves and the quality of the results of bargaining a disservice if we assume some degree of neutrality or universality of language, style, values, and expectations in negotiation.

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4 Above n 1.

IV

In discussing these two uses of negotiation, I want to highlight a few features of each, recognising also that, the more we know about conflict, bargaining and negotiation, the richer they become. At the very least, we recognise that we negotiate all the time, we may not always do it very well, but we do so because there are things that we cannot achieve by ourselves or that we would prefer to do with others, because we need to find ways of working and living together, because without negotiation we may not consider other and better options to the proposals that one side has in mind, and because we need to find ways to heal differences.

The clear advantages of being able to negotiate the resolution of conflict or the settlement of contractual or other relations, are those of participation in the design of solutions by the parties themselves. The main impetus for the development of "alternative" dispute resolution came from a critical view of law, to the extent that the legal processes effectively excluded disputants from the management and settlement of their own disputes, and typically did so in expensive, adversarial and not always understandable ways. The current wave of interest in mediation, negotiation and bargaining carries on that expectation, that disputants will be better placed to design their own solutions, even if they do so with the assistance of a third party mediator.

This key expectation is certainly not challenged in current thinking and practice in negotiation, except to the extent that the practice is modified to ensure that these procedural and political goals of participation are more likely to be achieved. The ideals of participant-designed solutions are questioned only in the sense that it cannot be automatically assumed that mediation or negotiation will overcome historical, political, or economic inequalities, and differences in power, skills, and confidence. The ideals themselves are not diminished or doubted. On the contrary, they gain strength in a modern environment of political accountability and citizen participation.

On that point alone, the expectations that are raised in relation to the negotiation of Treaty claims are those of active and influential participation, not merely in the implementation of policy, but in the design of solution and the development of appropriate policy. This idea of negotiation here carries with it a certain promise about the process that will be used, and not just about the prospects of a settlement of historical grievances.

Two main features of negotiation in conflict resolution can be identified, both of which shape the quality of participation in the definition of the problem to be solved and the design of solutions. The first is that this type of negotiation has been described as "bargaining in the shadow of the law".[5] What is meant by this is that, while we might be able to bargain about the solutions to conflicts or about the shape of our contracts, we still do so within a framework of established rules and policies which mark out the boundaries to what can, in the end, be negotiated. Negotiations are, of

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5 R Mnookin and L Kornhauser, "Bargaining in the shadow of the law" (1979) 88 Yale LJ 950.

course, never completely unfettered in that they will reflect the values, standards and expectations of the parties. Those constraints are more formal - and less negotiable - when they are contained in statute, case law, policy announcements or the formal requirements of Maori law and protocol.

In the setting of the current proposals for the negotiation of Treaty claims, it is clear that the formal framework that casts its shadow over the negotiations is the Treaty itself. In this respect, the shadow is rather more a benign and sheltering umbrella than a dark cloud. It is also clear that, as the proposal currently stands, the scope for negotiation is limited by the terms of the Crown's proposals.

In this respect - as in most other areas of negotiation - it becomes necessary to know what the formal, legal, constitutional boundaries of the negotiation might be - and also to ask whether some of these boundaries are themselves negotiable. It is also necessary to know whether the establishment of those boundaries to negotiation are an indication of the unequal bargaining power of the parties, especially where the limits to what can be bargained are established by one party in terms of a set of non-negotiable policy issues. This might not necessarily mean that negotiations cannot be entered into, but it will mean that the parties need to be fully aware of what the limits are to what can be achieved in negotiation.

The second feature of dispute resolution through negotiation relates to an earlier point about the nature of our adversarial culture. The point is simply that it is a familiar experience that we decide on preferred solutions too soon in the bargaining process, we become locked into positions from which it becomes difficult to extricate ourselves. Bargaining in this kind of setting tends to be less a matter of genuine dialogue about the problem, the options, the principles for settlement and the ideal solution, than a movement of compromise towards a position of acceptable discomfort for each of the parties. To the extent that we adopt or announce positions about our negotiation expectations, we risk locking ourselves into positions that are hard to relinquish without appearing to capitulate to the demands of the others. All that does is reinforce the sense of bargaining as a competitive activity which is either won or lost.

The growing interest in mediation and negotiation in western legal systems reflects in part at least a disillusion with the "zero-sum" outcomes of competitive, adversarial bargaining and a preference for those procedures which might lead to mutual gains. The consistent thread in all of this is the emphasis on developing a range of skills in communication and interaction, in developing processes for negotiation that facilitate "positive-sum" outcomes, and in promoting the values and principles of constructive bargaining. If there is one practical point to take from this for current purposes, it is that the effective negotiator is as much concerned with finding an outcome that the other party can agree with as she or he is with promoting or protecting a preferred solution.[6]

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6 A practical solution to the question raised by Dr David Williams at the conference concerning the moving of the Crown from its non-negotiable stance on the fiscal cap, is to begin to identify alternative outcomes which the Crown can live with at the same time as, first, protecting its fiscal responsibility and, second, answering to a

How this can be done is a matter for discussion in other settings: the immediate point is that the "negotiation" genuinely only becomes one when the parties are doing more than bartering with each other, haggling over the details of a price or a product, rather than going to the core of what it is that separates - and connects - them in the first place.

When looking at the negotiation and settlement of disputes, the other practical aspect that has to be addressed - and can only be touched on here - is the need to develop the skills and tools of intercultural communication. All of the previous points about dealing with the boundaries of negotiation and developing processes of non-positional bargaining rest, in this case at least, on an essential core of understanding the culturally shaped ways in which, and values by which, we negotiate. Only in that way will we, in Dame Joan Metge's terms, stop talking past each other.

V

The same core cultural and procedural points apply also to the other use of negotiation - the negotiation of rules and policy themselves. Instead of bargaining in the shadow of the law, this is bargaining about the shape of the law. Apart from the conventional means of influencing political decisions, through voting, referenda, submissions to select committees, petitions, lobbying of MPs and the like, this aspect of negotiation emerges as an extended agenda for negotiation and a new theory of the nature of participation in law-making. The idea of "negotiated justice" extends the familiar concept of justice as a matter of fairness and equality under the law and the consistent application of rule of law. None of that, of course, need change; none of this is an argument against the principles of legality and the rule of law. All that is suggested here is that there is at least some growing experience in the United States that, where rules and policy directly affect the lives of citizens - perhaps in fairly narrowly defined areas - then there may be scope for a more active participation in the settling of those rules and policy.

There is also a more critical foundation to this development in the recognition that the argument for the justice of equality under the law fails to acknowledge the possibility of the unjust nature of the law itself. The last couple of decades of critical jurisprudence, especially influenced by feminist and critical-race theory, has underlined the absence of the "voice" of women and minorities and indigenous peoples in the framing of those laws which are then to be equally and impartially applied.

There are two main results of this critical perspective that can be suggested. The first has been a call for a more "responsive" law, which is a call for law makers in some way to take more effective account of the pluralist needs of a complex society. The Crown's current calls for consultation on Treaty settlement issues is an example of this. The second is a more critical and activist call for dialogue within the legal system, for a recognition and active participation in the framing of rules and policies as they directly affect those subject to them.

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wider constituency of voters who will look for signs of weakness or concession in the Crown's position.

The experience of this to date tends to be in areas such as environmental policy and the siting of hazardous waste disposal systems. What this suggests is that the idea of active participation in - the negotiation of - rules and policies is at least more acceptable in relatively new areas of law, where perhaps there is not a long common law or legislative tradition of law making or where the principles are not firmly grounded. It could equally be argued that where the rules and policies so clearly affect the traditions, culture and lives of identifiable groups - indigenous peoples, Treaty peoples - and where the traditions of formal rule making have been, to say the least, tainted by a history of inadequate consultation, there is scope for developing the tools for and jurisprudence of negotiated justice.

One aspect of this is alluded to in Chief Judge Durie's discussion paper referring to the limits of conventional legal processes for indigenous peoples. That reference to the problems of the adversarial processes of the courts will apply with equal strength to indigenous people's experience of their voice not being fully heard in the law making processes.

Two main points can be made in respect of the idea of negotiated justice, the negotiation of the rules themselves. The first is a general one, that the idea of justice, rules and policy being negotiable reflects a sense of the importance of dialogue in modern political systems. Increasingly, this is discussed by jurists, political scientists, philosophers and others in terms of the emergence of a "discursive politics". Take away most of the complexity of the language that is used and the point is that those whose voices have largely been silenced in the political structures are looking for and claiming ways of having their stories heard in the setting of the rules for social ordering.

The second point is the institutional one and one which does require more extended discussion. It is the question as to what kind of institutional or constitutional frameworks might be necessary or at least useful in order to give some kind of shape to this participation in policy making. On a relatively small scale, local consultation and town hall meetings may well suffice. As yet we do not have the political or legal tools for much more by way of genuine and effective participation, except for the tools of referenda and select committees. These political tools are also designed to deal with one-off issues, to provide the government with feedback and policy guidance in respect of narrowly framed issues. What is at stake in the ongoing relationship of Crown and Maori extends beyond the provision of advice on separate issues, to the development of established frameworks for Maori policy making on Maori issues.

In this respect, the issues of the negotiation of Treaty claims become inseparable from the wider questions of self-determination and active participation in rule-making. The discussion of these is beyond the scope of this paper, except to say that, if the parties are genuinely to be engaged in substantive negotiations, these will involve not only the narrowly framed settlement of claims but also the more wide-reaching and substantive framing of the rules and policies that shape the claims and their settlement.

This becomes all the more the case when, as it appears from the public discussion to date, the parties are entering negotiations about different agendas. On the one hand,

there is an apparent Crown perception of a retrospective settlement of historical grievances, with a focus primarily on the issues of settlement. On the other hand, there is the more broadly framed Maori perception that the settlement of claims is inseparable from wider issues of the hearing of the Maori political voice in more enduring and substantial ways. The negotiation of justice here, then, requires a wider dialogue on what the nature of the Treaty partnership means in terms of creating the boundaries of the settlement and of just what is negotiable in this political relationship.

VI

The implications of all of this can be briefly stated. In the resolution of disputes and negotiation of claims the tasks are those of developing tools and skills for intercultural dialogue. In the negotiation of rules and policy the issue is that of determining the scope of and structure for Maori participation in the setting of those rules and policies.

More widely, three main points can be made by way of conclusion on the role and scope of negotiation. The first is the recognition that, in this area of negotiation more than any other, what is at stake is not simply the issues of economic rationality in the determination of settlement figures, but also, and more importantly, the issue of *identity*. To the extent that one party stresses the priority of fiscal settlement and the other talks in terms of the stake Maori have in their own future, there exist two different agendas. When, as appears to be the case, the substance of the negotiation turns on the nature of the value attached to the medium of settlement - land - it is clear that the negotiation involves a more complex agenda than is suggested by the preliminary proposals.

Second, whatever the process and outcome of this exercise, it highlights the importance of dialogue at the heart of the political system - a dialogue which is not seen to exclude or marginalise those who are most directly affected by the outcomes. The tone of current political and philosophical writing suggests that our political lives are likely to be enhanced by this kind of conversation, by the reinvention of political and moral ideas in public life. In this respect, the point I have sought to make is that negotiation is not just about the settlement of narrowly defined claims and conflict, but also about the enduring qualities of the relationship of the parties. This is certainly the case when, in domestic issues, the "unfinished business" of a relationship is struggled with in counselling or mediation. All the more so, perhaps, when what we are dealing with is an abiding political and cultural relationship.

Third, and finally, an occasion such as this provides the opportunity to ask what the principles of our negotiation will be. Will they be principles of efficiency, the priority of formally framed rules, of utility and expedience, or will they be principles of participation, dialogue and, in the end, commitment to the results.

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DAVID WILLIAMS

Kia ora koutou. E nga mana, e nga reo, e nga karangataha maha. Tena koutou, tena koutou, tena koutou. Ka hui mai tatou i tenei wa, nga Iwi Maori, nga Iwi Pakeha i raro i te maru o te Tiriti o Waitangi.

The question for you Ian is about how to begin a negotiation process in the shadow of an existing constitutional balance of power which is not based on negotiation. And the main power holder may be willing to negotiate on some major grievance issues, for example Raupatu or something like that. But I'll just give you the one little example that I've been dealing with recently. It involves a small hapu with a claim to a block of land which is specifically mentioned in a claim before the Tribunal and which was at the time of the claim a Lands & Survey block of land. It is now owned by a company called Landcorp Farming Ltd and that company has instructed another company called Landcorp Realty Limited to sell that farm. Ministers of the Crown when approached say that those companies are "nothing to do with them". There are two shareholding Ministers but they are not those shareholding Ministers, and they will not intervene. Now I know the Privy Council did say in the *Maori Council (Broadcasting Assets)* case that the State-Owned Enterprises are presumably amenable to direction by the Crown. But the Crown is not willing to make those sorts of directions in a small case like this. So how do you get into negotiation when the main power holder is not even willing to look at the question?

IAN MACDUFF

Thank you David. I was hoping you wouldn't ask that question. The question is not unlike the position I remember being in years ago in Auckland. In the District Court there was a Judge who whenever you sought to present evidence, responded, "don't want to hear it. This is a little bit tricky, don't want to hear it".

My response to that one, your question David is limited in the sense that my experience is predominantly in dispute resolution rather than in policy formation. It is particularly a problem, as you recognise, that where one party doesn't recognise the need to negotiate or doesn't acknowledge that they are in a negotiating position such as the shareholding Ministers, then you've actually got to get them to the table.

I avoided making any substantive suggestions in the paper partly out of timidity and partly out of respect for the fact that the process of dealing with those kinds of questions hasn't yet begun. Because what we have to do is in fact to try and find ways, and I'm lost for an answer on this one at the moment I have to admit. It's actually changing the culture of politics in this respect, where we actually need to in some way, and you'll know this as well as I do David, create a sense where Parliament or Government is rather more accountable than at present.

My guess is that it depends in part upon the mana of people like Chief Judge Durie, and the recommendations that come from the Waitangi Tribunal. Not specific suggestions coming from people like you or me because we're in a position where we can be thoroughly ignored. There may well be a role for those like you or me within

universities to write and speak. But the risk, of course, is that we can be completely ignored about these things. But my guess is that it does depend on people of the status on either side of me. It's not something that is going to happen I suspect by simply coming up with some immediate suggestions for Crown representatives. That's a nice evasive response isn't it? I don't know. Not yet.

JOHN MARSHALL

I'm John Marshall. I'm also interested in mediation. I'm a member of the lawyers group that Ian Macduff referred to. And I'm also interested in the Australian situation and I heard the Chief Judge this morning saying that we should be looking at Australia and perhaps learning from them.

Now in Australia the Native Title Tribunal, which I think has some similarity to the Waitangi Tribunal in that it hears and decides on questions of land claims in particular, in Australia by Aboriginal people, is essentially a mediation tribunal. And all claims must first go through a mediation process, a process of negotiation. And I wonder whether the time is coming in New Zealand where we should perhaps look at changing the process, and I know that some claims are mediated at the moment and one or two Tribunal claims have gone off for mediation in a kind of unofficial way.

I wonder whether we should look at changing the system and the process so that claims go first to mediation in New Zealand and only if they aren't resolved by that process of mediation they go to the Tribunal for a formal hearing. I'd be interested in any comments from Ian Macduff and the Chief Judge on that.

IAN MACDUFF

Thank you John. Can I make a brief comment because I think the Chief Judge is the one most likely to respond to that one? It's a continuation I think of the question raised by David a few minutes ago. As I understand the position from talking with Judge Durie, it is certainly the case that cases can be taken from the Tribunal to mediation. But it also seems to be the experience that, if the Crown refuses to be involved in mediation, then there's not much you can do about it.

So the suggestion that within the current framework we implement a form of mediation is hampered by the kind of problem that David alluded to, which is that if one party doesn't want to play then there's not much you can do. In the same way that we find in tenancy disputes that if one party will not be involved in mediation then you end up going to the tribunal.

So there are problems with seeking to implement just as such a form of mediation. Perhaps in response to your question, and coming back to David's question, what we may be looking at is not simply suggesting that mediations are a good idea, which I'm bound to think they are, but rather, if negotiation is to be a genuine part of the ongoing process, looking at creating entirely new constitutional political structures such as those which Judge Durie referred to earlier, as is now the experience in Australia. And if we

have that kind of institutional structure and may be negotiation with Crown agencies, indeed mediation becomes a more realistic option.

JUDGE DURIE

I think you were quite right to refer the question first to Ian. He doesn't seem to have left me much to say. That's precisely right as I see it, that there is no point in having a mediation system if the Crown doesn't wish to participate. The Crown has participated in mediations in the Tribunal but usually in cases where the issues have been specific and rather small. I think one would have to say that the negotiation process has subsumed the mediation role of the Tribunal. The Crown runs all matters by its negotiation system.

The Native Title Tribunal in Australia is mediatory although that hasn't been so with some of the State Land Tribunals. But a major difference that you have in Australia is that, with the exception I think of Western Australia (there's been exceptions about every respect over there) the different groups are rather well funded to present their claim. Certainly that's so in the Northern Territory where the funding comes from a percentage of the mining royalties. The Land Councils have whole teams of lawyers, anthropologists and the like investigate a case.

It does seem to us that, with the complexities that exist in Waitangi Tribunal claims, there really needs to be a solid factual base established by research before you could get into a mediating position. And the major problem that we are often facing is that the tribes don't have the funding to get to that research position. So they mediate from a position of darkness.

IAN WILLIAMS

It seems to me that the one thing which turns the public off very rapidly in this process is the whole idea that monies which are generated by the transaction process, the negotiation process, the settlement process, are not finding their way to where they belong. Images of a trough, and feet in the trough and so on come to mind. The question I have then, particularly for Ian Macduff, is, do you think that greater transparency in the disbursement of these payments would in this context be helpful?

IAN MACDUFF

Yes. But, slightly more extended, I'm not sure if that question is really in my line of business anyway, Ian. But if I pick up on some of the points that I wanted to make earlier, I think negotiation is about a much more open and participatory form of government and rule-making, and that's consistent with arguments about transparency.

If I can allude also to one of the points that you just made about 'feet in the public trough', observations have been made earlier today about the unique capacity of the legal profession to engage in that activity as well. And in many respects negotiation is in fact a cost saving exercise rather than spending time and a lot of money in litigation. So not only may we argue for the kind of transparency you suggest but I think we may

look for the kind of settlement, a negotiated settlement which in the end is more efficient and cost effective.