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Common property, Maori identity and the Treaty of Waitangi

Sir Hugh Kawharu

In the terms of the Treaty of Waitangi, New Zealand became a British colony and the Maori people, together with their lands and estates, were given Crown protection as well as the rights and privileges of British subjects. In 1975, the New Zealand Parliament, for the first time since 1840, gave statutory recognition to the Treaty by setting up a tribunal to hear claims by Maori people that the Crown had failed to honour its guarantees under the Treaty. Claims lodged since then have been made mostly by kin-based tribal groups. They depend heavily on recitals of history, tradition and relations with Crown authorities since 1840.

In 1983, the Crown, bearing in mind this 1975 statutory recognition of the Treaty, invited the New Zealand Maori Council to suggest principles which could be used to guide much needed amendments to existing Maori land laws. The Council's response has been instrumental in reaffirming customary relations between tribal (kinship) groupings and ancestral Maori land. It is now the philosophic basis for legislation that was passed in 1993. This is the first matter I shall deal with. The second matter involves the issue of compensation.

Up to 1994, events put the spotlight on the tribe (*iwi*) or sub-tribe (*hapu*) as the valid units to engage in dealings between Crown, Maori,

and the marketplace. However, at the end of 1994, the Crown in considering how best to deal with Treaty claim settlements, decided to propose a financial limit of NZ$1 billion for all compensation. This led in 1995 to a nationwide Maori rejection of the proposal, and at the same time to a call for a Treaty-based constitution as a precondition for considering any claim settlement policy at all. The Treaty has now become the cause of a search for a post-Treaty definition of Maori identity—one, however, that does not at the same time exclude the traditional Treaty definition based on kinship and land. This development recognises that

- the majority (more than 80 per cent) of Maori people no longer live in tribal communities
- many of these people form non kin-based interest groups where they live
- nevertheless, this has weakened neither a sense of tribal identity nor effective tribal groupings throughout the Maori population at large.

It is a matter in which the National Maori Congress has performed a facilitating role.

Finally, I shall offer a comment on the way these events are changing the meaning of a key Treaty-derived symbol of Maori identity. More broadly, the Treaty of Waitangi has once again become the principal charter for Maori identity in the non-Maori world.

The New Zealand Maori Council proposals

The Crown's invitation to the New Zealand Maori Council to propose amendments to the existing *Maori Affairs Act* might well have been received merely as an invitation to join in the periodic ritual of modifying Maori land legislation, parts of which had remained fundamentally flawed for over a century. In the event, the Council saw much more in it than that. By the time they had held three major meetings in different parts of the country there was evidence enough for them to show that no further amendments to Maori land law could be justified without such amendments first being reconciled to the Treaty of Waitangi. No broadly representative Maori organisation, statutory or otherwise, had ever had such an opportunity to present to government views on the interdependence of ancestral land, cultural identity, and the nation's founding document. They took the opportunity and two years later delivered their discussion paper, the *Kaupapa, Te Wahanga Tuatahi.*

In the beginning, the Council subcommittee delegated to prepare a draft paper engaged in some soul-searching. Certainly the Treaty of Waitangi had at last come on to the statute books in 1975, but neither it nor even the Treaty's three articles could be posted as a heading for their views, with relevance simply left to the imagination. The Treaty had never been designed as a banner for protest or as a basis for grievance claims against the Crown. On the contrary, it had been meant as a contract which, from the perspective of those ancestors who had signed it and now those who had inherited it, stated what ought to have been the constitutional relationship between Maori and the Crown and the basis for the preservation of Maori culture and identity. In the end the Council saw no reason to be equivocal. It said plainly that the Treaty was a *quid pro quo*. It was about the granting of sovereign power and the guaranteeing of *rangatiratanga*. It said

> Each of the two parties to the Treaty invested it with expectations about the exercise of power. The Maori expected his '*rangatiratanga*' to be protected; the Crown expected to gain sovereignty over New Zealand. The purpose of the Treaty, therefore, was to secure an exchange of sovereignty for protection of *rangatiratanga*.
>
> In the event, the Treaty was drawn up by amateurs on the one side and signed by those on the other side who understood little of its implications. Yet for both it was a symbol of mana, imbued with the spirit of hope that sovereignty, so simply acquired, would solve all problems of ambition: the Maori would retain their *rangatiratanga*, and the Crown would add New Zealand to its empire.

This unique juxtaposition of bicultural concepts triggered the development of the *Kaupapa*'s thesis, one which resulted in a focus on *rangatiratanga* as the primary theme, with the Crown, in the role of the Maori Land Court, providing a counterpoint. Since the constitutional significance of the Treaty had only recently been uncovered (*Treaty of Waitangi Act 1975*) and the meaning of *rangatiratanga* in government circles was virtually unknown, the Council went to some length to discourse on Maori kinship and tribal cultural values. In doing so several concepts of cardinal importance in addition to *rangatiratanga* were introduced, such as *tangata whenua, turangawaewae, whangai* and *ahi ka* which were not in the Treaty, and others which were, such as *whanau* and *hapu*, all being used in ways designed to illuminate their politico-economic significance. Given the Council's brief, the *Kaupapa* had to focus on land. It said

> The rights and privileges granted to the Maori people in the Treaty apply in the fullest sense to land. The protection afforded by the Crown—the guarantees—are needed as much today as ever.
>
> Maori land has several cultural connotations for us. It provides us with a sense of identity, belonging and continuity. It is proof of our continued existence not only as a people, but as the tangatawhenua of this country. It is proof of our tribal and kin group ties. Maori land represents turangawaewae.
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> It is proof of our link with the ancestors of our past, and with the generations yet to come. It is an assurance that we shall forever exist as a people, for as long as the land shall last.
>
> But also land is a resource capable of providing even greater support for our people—to provide employment—to provide us with sites for our dwellings—and to provide an income to help support our people and to maintain our marae and tribal assets.

It concluded by declaring

> Our objective is to keep Maori land in the undisturbed possession of its owners; and its occupation, use and administration by them or for their benefit. Laws and policies must emphasise and consolidate Maori land ownership and use by the whanau or kin group.

At the heart of this was the principle of reciprocity—rights and duties between kin, between groups of kin, between these groups and the natural world, and, not least, between them all and their ancestors. Rights and duties were couched, therefore, in terms both of the sacred and the profane. Such a system of beliefs constituted the scope of *rangatiratanga*, compressed by the *Kaupapa* into the concept of trusteeship. Trusts and incorporations, it said, should therefore be assisted to expand and become more flexible, more responsive to market opportunity—but never at the expense of being accountable. Accountability in fact epitomised Article 2 of the Treaty for the Council, for here there was a double trusteeship, a double accountability. On the one hand there was the fiduciary role of the Crown towards the Maori people and their *rangatiratanga*, and on the other *rangatira*'s fiduciary role towards his or her kin group. It is in this sense that sovereignty and *rangatiratanga* might be seen in their reciprocal relationship as defined by the idea of exchange: that between the intent of Article 1 and that of Article 2. In a narrow sense, that is, in particular cases, the superior authority of the Court can act as a benign check on the performance of trustees acting in the interests

of their beneficiaries. Equally, the Treaty-prescribed protection of *rangatiratanga*, for example for a *whanau*, *hapu* or perhaps *iwi* to be consulted by the Crown, can serve as check on the latter's legal sovereignty or more simply, on good government.

At all events the Council believed that ancestral land should be seen as a *taonga*, to be retained as such rather than as a personal possession. It was argued that there can be no *rangatiratanga* in respect of land and its *whanau* or *hapu* if they are not all kept together. 'Uneconomic interests', 'multiple interests' and the like were thus terms to be expunged from policy and practice and replaced by *ahi ka* and statutes consolidating ownership by *whanau* and *hapu*. And by this time (1983) the most urgent mode of consolidating *whanau* and *hapu* was *marae*-centred housing. Here again the Council sought a proactive role for the Court in planning and implementing (*papakainga*) housing schemes and subdivisions.

Throughout this remarkable document there is the Council's expectation that the Crown would accept its assertion that 'justice will remain in jeopardy so long as Maori values are not included in that range of values by which the laws of this country are framed and upheld', and accordingly that it would indeed try to come to some understanding of what these values meant. It was an expectation that it was still not too late to put a brake on more than 100 years of individualisation of land and much else besides, and therefore that the emphasis should be returned to those first principles upon which Maori identity was grounded. The Council was to wait exactly ten years for a statute-defined response.

And so it was that in 1993 Parliament passed the *Ture Whenua Maori Act*, and in the preamble to it there is the following

> *Na te mea i riro na te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: a, na te mea e tika ana kia whakautia ano te wairua o te wa i riro atu ai te kawanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: a, na te mea e tika ana kia marama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Maori, a, na tera he whakahau kia mau tonu taua whenua ki te iwi nona, ki o ratou whanau, hapu hoki, a, he whakamama i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mo te hunga nona, mo o ratou whanau, hapu hoki: a, na te mea e tika ana kia tu tonu he Koti, a, kia whakatakototia he tikanga hei awhina i te iwi Maori kia taea ai enei kaupapa te whakatinana.*
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> Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable

that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people, and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles:

BE IT THEREFORE ENACTED by the Parliament of New Zealand —

And in a note on the interpretation to be given to the Act is said

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act. Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho (sacred heritage) by Maori owners, their whanau, their hapu, and their descendants. In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

Thus the Preamble of the Act encapsulates precisely both in Maori and in English the *Kaupapa*'s thesis that, in terms of the Treaty of Waitangi, there was a ceding of sovereignty to the Crown in exchange for the latter's protection of *rangatiratanga*. While amendments had been made to the previous Act at regular intervals since it first came into existence 40 years earlier, none had recognised the Treaty, let alone the values inherent in the Maori version signed by 90 per cent of the Maori signatories. Even ignoring the sanctions of the Treaty, no legislative amendment had ever found a place for such concepts as *wairua, taonga tuku iho, tikanga, ahi ka*, and so forth.

It can doubtless be claimed that Maori Land Courts have always been able to exercise, not only their discretion, but also their initiative in helping owners to achieve their stated goals within the law. The Council's hope, however, was for legislative amendments that would provide firm and more explicit guidelines for the Court, grounded for the first time in Treaty guarantees and some cardinal Maori values. In the last analysis the justification for that hope lay less in the diminution in the per capita ratio of land holding among the Maori

people than in the sheer scale of land loss since 1840 and with it loss of capacity to exercise *rangatiratanga*. Notwithstanding that justification, however, whether any government would ever divest itself of a measure of its sovereign power and allocate it to some pan-Maori authority in fulfilment of its fiduciary obligations under Article 2 of the Treaty is, in my view, the decisive question that remains at the heart of Maori–Pakeha relations today.

The fiscal envelope

I turn now to the Crown's fiscal cap proposal on compensating successful claimants before the Waitangi Tribunal. The following excerpts from the proposal convey something of the intent

> The Treaty of Waitangi is the foundation document of New Zealand.
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> - It acknowledged the Crown's right to govern in the interests of all our citizens
> - It protected Maori interests
> - It made us all New Zealanders.
>
> The spirit of the Treaty required the Crown and Maori to act with the utmost good faith to one another.
>
> Many believe the Crown, in various ways, failed to act with the utmost good faith and that as a result Maori were seriously disadvantaged. Over the past 150 years Maori have sought redress to settle these grievances. Attempts to resolve some of them have been made during that time with varying success, but many grievances remain unanswered.
>
> Later it said
>
> Over the past few years, the Government on behalf of the Crown has attempted to approach the claims in a rational, cohesive and constructive way. It has had to work out what it believes can be done, taking into account its responsibilities to all New Zealanders. This has led to the development of some basic principles
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> - the Crown will explicitly acknowledge historical injustices
> - in resolving claims the Crown should not create further injustices
> - the Crown has a duty to act in the best interests of all New Zealanders
> - as settlements are to be durable they must be fair, achievable and remove the sense of grievance
> - the resolution process must be consistent and equitable between claimant groups

- nothing in the settlements will remove, restrict or replace Maori rights under Article III of the Treaty
- the settlements will take into account fiscal and economic constraints and the ability of the Crown to pay compensation.

And finally, the 'money' bit,

> The Crown has many demands to meet and has to carefully assess how much can be put aside to settle claims. The Crown has accordingly decided to set aside a settlement sum of NZ$1 billion to be available of a period of about 10 years. This has become known as the 'Fiscal Envelope' or the 'Settlement Envelope' and confirms the Crown's commitment to settle claims.

At the first of two major meetings in 1995 held under the patronage of Sir Hepi Te Heuheu and with the National Maori Congress acting as facilitator, the Fiscal Envelope proposal was rejected outright. The report of the meeting said

> The proposal is not explicit on how a sum of 1 billion has been calculated but it is justified as a political decision largely on the basis of affordability and acceptability to the wider community. It is also suggested that the amount should be sufficient to redress claimants sense of grievance. There is an assumption that 1 billion dollars is fair and affordable. However, neither the methodology used to calculate the amount, nor the basis for deciding viability has been disclosed. The cap is simply stated as a given even though most claims have not yet received due consideration while others have yet to be filed.
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> Several submission made at the first hui considered that without a wider contextual backdrop, Government proposals to settle claims simply foster the impression that Treaty matters have become irksome and that a piecemeal consideration of each article will eventually do away with the Treaty altogether. Hui participants agreed that any mechanism for the settlement of Treaty claims will only make sense if it is premised upon a wider Treaty framework and that settlements which purport to be full and final will never be durable unless they are formulated within that wider context. In this sense the Proposal is premature. It should have been preceded by the careful development of a constitutional covenant regarding the Treaty and the position of Maori as tangatawhenua.

Congress then declared its hand on terminology. First, *rangatiratanga* can be said to be about *mana whenua* and *mana rangatira*, namely, the right of *iwi* and *hapu* to exercise authority in the development and control of resources which they own, or are supposed to own, and to interact with the Crown according to their own needs and inclinations.

Second, and to an increasing extent, *rangatiratanga* has relevance to the right of all Maori, individually and collectively, to determine their own policies, to participate in the development and interpretation of the law, to assume responsibility for their own affairs and to plan for the needs of future generations. Such a right reflects a Maori constitutional element which has assumed increasing importance over the past 155 years and especially since post-1945 urbanisation. It recognises that not all Maori are linked to tribal structures and networks, and also takes into account the fact that there are many policies which impact on all Maori people but which are not appropriate or relevant to tribal authorities. Further, because *hapu* and *iwi* are particularly concerned about their own areas of responsibility, they do not always give high priority to issues of broad regional or national importance.

The establishment of a national body which allowed for both *iwi/hapu* and Maori community representation would go some way to providing a foundation for a more coordinated approach to Maori policy, appropriate to the twenty-first century.

The National Maori Congress thus came to the conclusion that there should be a national focus for Maori people which is capable of providing a structure for Maori representation at a national level in order to advance Maori interests. However, it said, enthusiasm for establishing a national Maori organisation is not shared by all Maori. Many *iwi* see it as an unnecessary and undesirable step. They are concerned that the formation of a national Maori voice could undermine the authority of tribes if it began speaking on behalf of the tribes.

On the other hand, it argued, without a broadly representative national body, it would be difficult to agree on national Maori policies or to formulate strategies or Maori development. Essentially *iwi* are concerned about their own interests rather than national Maori interests. Moreover, in the pursuit of *rangatiratanga* Maori people will remain vulnerable if there is no body politic which can represent all their interests at constitutional and political levels. First, energies will be dissipated in several directions with a lack of coordination and a dilution of resources, including human resources. Second, by default as much as anything else, various independent groups will assume the role of a national body even if they do not have a mandate. And third, in the absence of a national body able to articulate a national Maori voice, the Crown will continue to fill the perceived gap by itself making policy for Maori people.

It then considered a number of models for a national Maori body politic. One which it had earlier supported in principle took the form of a National Maori Assembly of 40 to 80 members representing both *iwi* and Maori community interests. The Maori electoral roll would be a starting point for determining eligibility to vote and a formula for representation, taking into account the size of the population, *iwi*, and existing Maori community structures. It assumed that an Assembly would be supported by an infrastructure and that all Maori policy units in the State sector, including Te Puni Kokiri, would be retained as Assembly staff, at least in the initial years. The main functions of the Assembly would be the development of Maori policy, Maori appointments (for instance, to Te Ohu Kaimoana, the Waitangi Tribunal, the Maori Land Court), monitoring Government policies in terms of best outcomes for the people. This, now, is *rangatiratanga* and the catchword is 'self-determination'.

The 'challenges' in the Treaty?[1]

The challenges in the Treaty are twofold. The first lies in the structural disjunction between centralised government on the one hand and tribal and non-tribal groups on the other. I add in parenthesis here that this disjunction is not between urban and rural categories, notwithstanding the process we call urbanisation.

The second challenge lies in the two-sided question facing the Maori people—is national political unity desirable, and if it is, is it achievable?

In addressing this challenge let us consider to begin with the options offered by Council and Congress. The Council has a good track record of representing Maori interests at a national politico-legal level. Perhaps the initial all-embracing issue it tackled was the Prichard–Waetford Commission's report on Maori land and the consequent Maori Land Amendment Bill of 1967, when it organised a national *hui* on these matters and later acted as a clearing-house for submissions to government. One of its more recent and dramatic interventions occurred in 1987 where it sought to negate a government ploy to rid itself of the means to compensate successful Treaty claimants. But, as I have said, it is a statutory body, *pakeha* in structure, lacks clear independence from government and cannot itself speak for one or more tribes or sub-tribes. The lack of a local vested interest could, of course, be seen as an advantage in promoting issues at a national level; but while objectivity

is one thing, authority is another. Furthermore, while it has a formal nationwide structure in place—its hierarchy of committees—it lacks administrative capacity to make it function.

As to Congress, it seems to me that it is still finding its feet. It has profited greatly from the patronage of one who symbolises a quintessential *rangatiratanga*, Sir Hepi Te Heuheu of *Ngati Tuwharetoa*, one who, without promoting either his own or his tribe's view at the expense of others, has provided Congress with an opportunity to bring into being a unified independence for the Maori people. Congress, however, still has to grapple with the conundrum that if for centuries tribal emulation has been the Maori people's strength in peace and war, will that strength be compromised through unification? What has yet to be found for this is that elusive factor, incentive.

And for both Council and Congress there is the added problem of one or the other making themselves relevant to a burgeoning number of non-tribal groups—committees, trusts, clubs and so on. It may be that here the Maori Womens Welfare League (MWWL) which for the past 45 years has organised itself on the basis of family-centred interests such as education, health, and housing rather than tribal-resource based interests, can serve as a catalyst in producing a unified Maori voice.

However, there may be another dimension in all of this, that of scale. In 1840 when the Treaty was signed the Maori outnumbered the non-Maori by at least 50 to 1. Well within two decades, the populations were equal. Today disparate units of the Maori population comprise a mere 10–15 per cent of the country's total (depending on the statistics you prefer). Against that level of discrepancy in numbers (let alone capital assets) there is, nevertheless, a notion of partnership between Crown and Maori engendered by the Treaty and almost codified by a recent edict of the country's Court of Appeal. 'Partnership' is beguiling. On the one hand it suggests equality, but talk of political equality is idle. Yet, talk about equality before the law between Crown and a particular *hapu* or *iwi* on a Treaty grievance is anything but idle, as a few recent multi-million dollar settlements would indicate.

Accordingly, while a pan-Maori body like a national assembly is a logical goal to consider seriously, it may also be that governments and the Maori people can just as well discuss global issues such as justice, health, and land, by means of an established circuit of *hui*: a circuit that would include all groups of whatever persuasion without any

sacrifice of that vital ingredient *mana*. This has been tried a number of times over the past 20 years. While the ineptness of the practice has to a large extent ensured failure of outcome, it has not, in my view, negated the principle.

So much for some options for a unified approach to a sovereign Maori identity. But what more might be said about the *status quo*, over and above Council and Congress? At the moment a small number of tribal and sub-tribal groups are accumulating quite substantial levels of capital assets. This has come about for a variety of reasons: diversification, increasing levels of managerial and entrepreneurial skills, and compensation from the Crown following successful Treaty negotiations, to name a few. And as there are now some 500 Treaty claims waiting to be heard, the present small number may well grow. While individuals in some of these groups have yet to benefit from their group's recently improved economic fortunes, their trustees are understandably protective of their trust estate and loath to risk engaging in enterprises that might threaten their independence. And on the face of it what applies in the economic field also applies in the political. It is not that bilateral or limited regional arrangements cannot work. Rather it is the prospect of total or near total unity that seems remote at this stage. And neither should it be forgotten that many tribes are engaging successfully in joint ventures with non-Maori commercial enterprises thereby adding another imponderable to pan-Maori unification.

Having said that, there are indeed examples of nationwide unity among Maori people—a unity on other than party political, religious, or tribal grounds. I would mention the MWWL and the Kohanga Reo (pre-school Maori language) Movement, both of which operate among tribal as well as non-tribal groups. Another is the ex-28 Maori Battalion Association, a poignant reminder of what might have been. But these fall into a social welfare category where the capital asset is humanity. Unfortunately governments so far have failed to recognise such capital as a fundamental ingredient in the exercise of *rangatiratanga*, and therefore to be seen as a valid potential claim on the Crown in terms of its Treaty obligations. Nevertheless if the tribes were, for that purpose, to set one side their material asset-based enterprises they might well find common cause with one another and with those disengaged from tribal concerns and so force government recognition of a Maori unity. At least all Maori accept the aphorism: What is the most important thing in this world?—I say to you it is

people, it is people, it is people. (*He aha te mea nui i tenei ao? Maku e mea atu ki a koutou, he tangata, he tangata, he tangaga.*)

Conclusion

Does the Treaty of Waitangi have relevance for a Maori political identity today? The best answer given by the limited data I have been able to refer to is

- that the key symbol of identity and unity *vis-à-vis* the Crown since 1840 has been *rangatiratanga*
- that its meaning has been, and still is, 'trusteeship'
- that its referent is the *hapu*
- that at present *rangatiratanga* is also being developed as a demand for self-determination, namely, control over government Maori policy and practice
- that its referent is the Maori nation

Whether, finally, a Maori nation will ever receive practical, let alone constitutional, recognition remains to be seen. At the least the Treaty is providing a context for Maori debate—the outcome of which no New Zealander can ignore. And it is this Treaty context that provides opportunity for a considered response to the question of a Maori identity. If the opportunity is taken with due regard to history it will, I think, ensure an identity viable both in the Maori and in the non-Maori worlds that will satisfy those who need it most.

Notes

1. Before turning to the 'challenges' in the Treaty I should add a word of explanation about the two Maori organisations I have been referring to. The New Zealand Maori Council represents several layers of committees beneath it, which themselves ultimately represent a network of electorates into which the country is divided. The latter were brought into existence with the passing of the *Maori Social and Economic Advancement Act* of 1945 and have a non-party, non-sectarian Maori welfare orientation. The apical body, the Council, was formed and recognised by the *Maori Welfare Act* 1962. Initially it had a mandate from the tribes, but largely due to post war urbanisation that mandate has shifted to the Congress. The National Maori Congress, seems to have acquired its early impetus from an *ad hoc* grouping of relatively well-endowed central North Island tribes in the mid-1980s. At all events since land was, and still is, the major source of tribal wealth and identity, the apparent inability of the Council to represent these interests

resulted in the formation of the Congress in 1990. Its constituency are the 30 or more tribes in New Zealand, and in comparison with the Council it has deliberately abstained from seeking parliamentary recognition. While it has an executive committee and holds general meetings it is more in the nature of a forum than a powerful well-organised pressure group.

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