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THE UNSETTLED LEGAL STATUS OF POLITICAL PARTIES IN NEW ZEALAND

Andrew Geddis*

New Zealand's introduction of Mixed Member Proportional (MMP) voting was, in part, a recognition of the central role that political parties play in this country's electoral processes. However, while the fundamental importance of these institutions is now woven into the fabric of the New Zealand voting system, there is no corresponding unanimity over the legal treatment that these institutions ought to receive. This paper examines various arguments about whether political parties ought to be, or ought not to be, subject to particular forms of legal control as to how they may carry out their various activities. It does so by describing how political parties have been regulated in New Zealand until the present day and seeks to demonstrate that two ways of conceptualising the role of political parties have underpinned the legal approach to political parties-as-institutions.

Political parties have dominated New Zealand's electoral scene for the greater part of the last century.¹ New Zealand is hardly unique in this respect; on the global stage, as one commentator has noted, political parties are "the central institutional form through which mass participation in politics is organised and rationalised."² This ascendancy of the

* Senior Lecturer, Faculty of Law, University of Otago. This article is a reworked version of a paper delivered at the New Zealand Centre for Public Law Conference on the Primary Functions of Government: Parliament. I owe a large debt of thanks to Claire McGuinness, whose research informed substantial parts of this article. Further very useful suggestions were provided by an anonymous referee. All problems with the final product, however, remain my fault entirely.

1 For the origins of party politics in New Zealand see Michael King *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) ch 18. The dominance that political parties have established over New Zealand's electoral process is demonstrated by the fact that only one "independent" MP has been elected since 1943 (the exception proving the rule was Winston Peters in a virtually unopposed 1993 by-election, before he went on to form the New Zealand First Party); E McLeay (ed) *New Zealand Politics and Social Patterns: Selected Works by Robert Chapman* (Victoria University Press, Wellington, 1999) 324.

2 Richard H Pildes "The Supreme Court 2003 Term - Foreword: the Constitutionalization of Democratic Politics" (2004) 118 Harv L Rev 28, 101.

political party-as-institution within contemporary democratic politics is attributable to the range of functions it performs in a mass electoral setting:³ generating a recognisable policy platform which it then markets to the voting public; selecting candidates to compete at election time and "branding" them with its endorsement; coordinating its members' activities in an effort to win support for these candidates during an election campaign; monitoring the behaviour of those representatives elected under its banner and disciplining those who stray from the party line. Quite simply, the functions performed by the political party-as-institution are so integral to a representative democracy that it is near impossible to imagine what this system of decision-making might look like in the absence of such institutions. (Or, alternatively, we may say that if such entities did not already exist, it would be necessary to invent them.)⁴

In one sense, therefore, New Zealand's decision to employ the Mixed Member Proportional (MMP) voting system in 1993 as the means of choosing members of Parliament simply formalised the already existing central role of political parties in this country's electoral framework. Although MMP consciously and directly ties entitlement to membership of the House of Representatives to the proportional voting support garnered by each political party, the adoption of this voting system was more a reflection of current political reality than a tectonic shift in the basic electoral role played by political parties.⁵ However, while the fundamental importance of political parties in New Zealand's electoral system has long been accepted as a factual matter – it is now woven into the very fabric of

3 William E Wright (ed.) *A Comparative Study of Party Organization* (Merrill, Columbus, Ohio, 1971); Kay Lawson (ed.) *How Political Parties Work: Perspectives From Within* (Praeger, Westport, 1994); Richard Hofferbert (ed.) *Parties and Democracy: Party Structure and Party Performance in Old and New Democracies* (Blackwell Publishers, Oxford, 1998).

4 Hence the following statement from the Iraqi Coalition Provisional Authority in the aftermath of the overthrow of Saddam Hussein and his one-party Baathist regime: "To preserve and protect individual rights and freedoms, a democratic people must work together to shape the government of their choosing. And the principal way of doing that is through political parties." See <<http://www.cpa-iraq.org/democracy/parties.html>> (last accessed 15 June 2005).

5 The Royal Commission on the Electoral System certainly packaged its recommendation to adopt the MMP voting system in these terms, see Royal Commission on the Electoral System *Towards A Better Democracy* (Government Printer, Wellington, 1986). See also *Lange v Atkinson* [1998] 3 NZLR 424, 463 (CA) Blanchard J for the majority: "In one sense [the move to MMP] may be seen as the law more closely reflecting voters' wishes, since for over 100 years nationwide political parties have in fact been central to the electoral process, the formulation of policies, the selection of candidates and, as a result, the decisions that individual voters make about how to cast their votes." This is not to deny that the move to MMP has not had a significant impact upon a variety of other constitutional issues; see generally Andrew P Stockley "What Difference Does Proportional Representation Make?" (2004) 15 PLR 121; Andrew Geddis and Caroline Morris "All is Changed, Changed Utterly? The Causes and Consequences of New Zealand's Adoption of MMP" (2004) 32 FL Rev 451.

our MMP voting system – there is no corresponding unanimity over the legal treatment that these institutions ought to receive. That is to say, even though it is widely agreed that political parties play a crucial role in our democratic processes, the appropriate approach to take in respect of applying legal regulation to the various activities of these bodies has not finally been settled. Therefore, it remains a live issue whether the nature of these institutions, and the part they play in the electoral system, means that they ought to be, or ought not to be, subject to particular forms of legal control as to how they may carry out their activities.

Discussion of this question is often framed by the familiar "public/private" dichotomy;⁶ that is, whether political parties should more properly be consigned to the category of "public" entities subject to a range of public law controls and oversight imposed from outside of the organisation,⁷ or "private" entities which are entitled to govern their own activities according to those rules the organisation itself chooses to adopt. However, this institutional categorisation approach suffers from the basic problem that political parties combine elements of both the traditional "public" and "private" spheres. On the one hand, they are inextricably involved in the foundational moment of our entire system of lawmaking – the election of representatives to our Parliament and hence the formation of a government and apportionment of state power. Yet political parties are also voluntary membership organisations, consisting of individuals who have chosen to form a common cause on the basis of some shared political ideology which they wish to advance in their own fashion. Therefore, as with certain kinds of optical illusions, observers may view political parties as either fundamentally "public" or "private" in nature depending upon how they focus their attention.⁸ This dual nature of political parties means that any wholesale ascription of these institutions to either the "public" or "private" category is likely to be flawed, as it will highlight only one aspect of their existence and blind us to other features that they share. Consequently, the issue of how political parties-as-institutions should be regulated in any given case instead requires us to undertake a

6 See, for example, Margaret Wilson "Political Parties and Participation" in Alan Simpson (ed) *The Constitutional Implications of MMP* (Dunmore Press, Palmerston North, 1998) 169; Colin James "Commentary on Political Parties and Participation" in Alan Simpson (ed) *The Constitutional Implications of MMP* (Dunmore Press, Palmerston North, 1998) 180-181; Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 1030; Paul Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 275-276.

7 This range of "public law controls" includes judicial review on public law principles of the activities of political parties, and the application of the New Zealand Bill of Rights Act 1990 to these bodies. It also includes special legislative regulation of the actions of political parties; that is, the statutory imposition of duties upon parties by virtue of their "public" status.

8 A point made in more general terms by Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999).

functional analysis of the precise role that these institutions play in the electoral process, rather than attaching some *a priori* label to them.⁹

Such a functional analysis necessitates judgments about the larger purposes of our proportional representation electoral system, the role that political parties should have within that framework and the sphere of democratic politics itself.¹⁰ These judgments will not be value-free,¹¹ but instead reflect what might rather grandiosely be termed "normative visions" of the issues involved.¹² That is to say, it is not a simple matter of mechanically describing what it is that political parties currently do as a matter of fact in our particular electoral environment. We also must consider what value-laden goals we wish our democratic process to serve and how political parties should be permitted to operate within such an environment so as to help achieve these goals. It is only after forming such a view of the "proper" role that political parties ought to play within the electoral process that we can then determine what is the preferable regulatory attitude to adopt towards these institutions.

It should be noted that the present paper has a rather limited aim. Specifically, it does not endeavour to advance a unified argument as to the appropriate regulatory approach that should be taken to political parties in New Zealand. Indeed, such a broad-brush approach would be inappropriate given the functional approach being advocated. As Peter Cane points out, functional judgments about the proper regulatory attitude to be taken to some entity or exercise of power may well differ depending upon the circumstances at hand: "because of its evaluative approach, the functional approach is context-specific."¹³ That is to say, our decision about the appropriate regulatory approach to take to political parties may vary depending upon what aspect of a party's activities is under scrutiny or what precise form of legal regulation is being contemplated. For instance, a conclusion as to whether the actions of political parties when selecting candidates at election time should

9 This functional approach is already a feature of the New Zealand courts' approach when deciding whether a particular decision is amenable to judicial review (see *Royal Australian College of Surgeons v Phipps* [1999] 3 NZLR 1, 11 (CA) Henry, Keith, McGechan JJ, who held that the exercise of some power is judicially reviewable if it is "in substance public" or has "important public consequences"); or whether the New Zealand Bill of Rights Act 1990 applies to a particular entity (see *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233, para 69 (HC) Randerson J).

10 Pildes, above n 2, 106.

11 "[T]he idea of a public function is widely acknowledged to rest on value judgments about the interest that society can legitimately claim in regulating the lives of individual citizens." Peter Cane "Accountability and the Public/Private Distinction" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart, Oxford, 2003) 254.

12 Andrew Geddis "Three Conceptions of the Electoral Moment" (2003) 28 AJLP 53.

13 Cane, above n 11, 254.

be amenable to judicial review on public law principles may not be applicable to their actions when disciplining members of a party faction. And rather than embark here upon a wide-ranging examination of these complex issues, the present paper instead describes how political parties have been regulated in New Zealand up until the present day and seeks to demonstrate that two ways of conceptualising the role of political parties have underpinned this legal approach to political parties-as-institutions. I proceed to outline these two conceptions in the following section.

I WHAT IS THE "PROPER" ROLE FOR POLITICAL PARTIES IN NEW ZEALAND'S ELECTORAL SYSTEM?

The first conception emphasises that political parties are an integral part of civil society – the network of voluntary organisations which enable individual citizens to collectively act to advance their interests and ideals within the framework of formal state power. In this view, political parties act both as a filter and as a conduit for public opinion. The political party exposes its members to the competing viewpoints of other members of the party, forcing each individual to recognise a range of diverse legitimate claims and to amend his or her particular view of how society ought to be in order to reach a fair accommodation with those claims. Having gone through this internal process of policy debate and compromise, political parties then allow individual citizens to unite behind a common platform and advance that claim in the wider public arena, with the aim of gaining the necessary support to enable it to be transformed into law. The political party-as-institution is thus an important element in the free flowing discourse which must be the basis of any legitimate – an equivalent phrase is "properly democratic" – law-making process.¹⁴ In turn, a legitimate law-making process is a necessary prerequisite for the justifiable exercise of coercive state power over individual members of society. Therefore, because the parties' role in formulating policy and advancing their members' common goals is itself an essential part of the justificatory basis for the exercise of coercive state power, parties ought to remain relatively free from controls imposed by the state. Constraining the activities of political parties risks undermining their important function as intermediaries between the various interests and concerns of individual citizens and the organised realm of state power. Simply put, political parties must remain free to make their own choices relating to how they structure their internal decision-making processes if they are to enjoy the sort of independence from the state which is required for them to perform their legitimating function within a properly democratic society.

14 "Parliamentary opinion- and will-formation must remain anchored in the informal streams of communication emerging from public spheres that are open to all political parties, associations and citizens." Jürgen Habermas *Between Facts and Norms* (Polity Press, Cambridge, 1996) 171.

Central to the second conception of the political party is the fact that this institution differs from all other civil society organisations as its very *raison d'être* is to place certain of its members in positions where they can wield coercive state power and to seek to control how those individuals subsequently make use of that power. In order to achieve the internal cohesion required to achieve these ends, a political party requires some form of hierarchical structure, with those in leadership positions holding disciplinary power over the party membership. The power that political parties – more particularly, those in leadership positions within a political party – can wield over public officials elected under their names means that these institutions potentially can serve as conduits not only for their members' legitimate views, but also for illegitimate forms of influence by some particular group upon society's democratic decision-making processes. Therefore, concerns that an individual or group might be able to exercise some form of undue domination over a particular political party has implications for the exercise of coercive state power in the wider social sphere: implications that do not exist in respect of other sorts of civil society groups. If political parties are left entirely to their own devices, then they may become a cloak that allows some interests in society to gain an advantage in the country's general law-making processes that would not be accepted generally were their influence to be widely known to, and subject to debate by, the members of that society.

The two conceptions just outlined are not intended to simply reproduce the public-private division using different language. They instead contain the following additional normative component. All will agree – that is, all who are committed to a pluralistic system of democratic governance – that the first-outlined "civil society" role of political parties serves important societal ends and so should be fostered and protected. Conversely, the second-outlined potential for "illegitimate influence" will be universally rejected as producing undesirable outcomes, meaning that it should be eradicated as far as it is possible to do so. Therefore, it should be accepted as a general proposition that the regulatory scheme within which political parties operate ought to be structured so as to allow those entities to fulfil their civil society role without falling prey to the ever-present danger of becoming conduits for illegitimate influence.

However, despite any broad, high-level consensus on what the proper (or normatively desirable) role for political parties is, and hence what the appropriate end goal for the regulation of these entities should be, there is still room for ongoing disagreement along two vectors regarding how these entities should be regulated in practice. To begin with, a necessarily prior step to deciding how to prevent political parties becoming vehicles for illegitimate influence in the electoral process is to decide just what constitutes "illegitimate influence". It has been noted that parties are hierarchical institutions, meaning that leading party members will be entitled to wield power over the other members, often to the latter's detriment. Whether this power should then be used to resolve some particular dispute

involving the wider party membership may be a controversial question. Furthermore, party politics intrinsically involves deal-making and, just as there is no such thing as a completely free agreement in the realm of contract law,¹⁵ there will always be pressure involved in the formation and implementation of political pacts. It is not self-evident just when this pressure crosses over from being an acceptable, indeed unavoidable, backdrop to political life, to forming an illegitimate kind of influence within the party structure. Equally, some forms of political deals may be regarded as illegitimate per se, irrespective of the amount of pressure applied by one side of the arrangement to the other.¹⁶ The point is that reasonable, well-meaning people will reach different conclusions as to when such matters should pass from the sole concern of those involved in the party's internal procedures to having implications for the integrity of the wider electoral process. Yet the potential issues here are both wide-ranging and important: whether anonymous monetary donations to a party are a form of "corruption";¹⁷ whether political parties should be able to require prospective candidates to sign non-competition agreements;¹⁸ whether offering an official position to a candidate if they withdraw their name from the ballot constitutes an "inducement to procure" the election of another candidate.¹⁹

The second possible ground for ongoing disagreement concerns the most effective means of safeguarding the "civil society" role of political parties against the ever-present possibility of "illegitimate influence", however this may be defined. One way of approaching this issue is to regard the very system of electoral competition, individual freedom of exit and media scrutiny within which political parties exist as constituting a self-regulating scheme that largely renders otiose the need for external legal regulation. If a party which allows itself to become the vehicle for some illegitimate influence suffers a consequent loss of support from both active members and voters at the ballot box, then the problem of illegitimate influence largely takes care of itself. However, as with other kinds of markets, competition for electoral support will contain limitations which prevent it from operating in a fully efficient manner.²⁰ Information inadequacies, unequal bargaining

15 Robert Hale "Coercion and Distribution in a Supposedly Noncoercive State" (1923) 38 PSQ 470, 472.

16 For a discussion of this issue in the Australian context see Graeme Orr "Dealing in Votes: Regulating Electoral Bribery" in G Orr, B Mercurio, G Williams *Realising Democracy: Electoral Law in Australia* (Federation Press, Annandale, 2003) 130.

17 Andrew Geddis "Hide Behind the Targets, in Front of All the People We Serve" (2001) PLR 51, 56-64.

18 *Peters v Collinge* [1993] 2 NZLR 554, 562-566 (HC) Fisher J.

19 *The Bay of Islands Electoral Petition* (1915) 34 NZLR 578 (Election Court) Hosking and Chapman JJ.

20 Robert Baldwin and Martin Cave *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, Oxford, 1999) 9-17.

power and political externalities may all reduce the capacity of the electoral process to prevent illegitimate influence within political party structures. Furthermore, electoral cycles revolve on a three-yearly basis. This can result in a temporal lag between any occurrence of illegitimate influence and the opportunity to correct that failure at the ballot box. Therefore, these various imperfections in the electoral process may provide good reasons to impose particular forms of legal regulation upon political parties.

It is thus possible to view the issue of whether to apply legal regulation to the various activities of political parties as revolving around two questions: first, what constitutes an "illegitimate" form of influence within a political party; and secondly, what regulatory approach will best serve to eradicate such forms of illegitimate influence? While it is impossible to fully disentangle these two questions, the present paper is more concerned with the second question than the first. It has less to say about whether a particular form of inter-party influence is legitimate or not than it does about how various legal institutions have responded when confronted with a claim that such influence requires that political parties be made subject to particular forms of legal control on how they may carry out their various activities. The next section examines the legal status accorded to political parties during the pre-1993 era of First-Past-the-Post (FPTP) elections. The impact of the introduction of a new MMP electoral system is then considered, emphasising the changes in the legal regulation of political parties that accompanied this move. Some reasons to account for the shift in regulatory approach are also explored. The section then examines the Supreme Court's decision in *Prebble v Awatere Huata* and the view of political parties implicit in that judgment, along with some direct comments on the issue made by the Chief Justice. Some concluding thoughts on the possible future treatment of political parties by the courts are then advanced.

II THE LEGAL STATUS OF POLITICAL PARTIES DURING THE FIRST-PAST-THE-POST ERA

Political parties have been exempt from any form of targeted or special legal regulation for most of New Zealand's electoral history. Thus, the FPTP era Electoral Act 1956, in keeping with its forebears, only made ancillary mention of political parties in relation to matters such as restrictions on what campaign material could be publicly displayed on election day²¹ and the ability of certain political parties to make submissions to the Representation Commission concerning electorate boundaries.²² Individual candidates also were entitled (eventually) to include their party association on the ballot paper if they

21 Electoral Act 1956, ss 127(1)(e) (inserted by the Electoral Amendment Act 1990, s 32).

22 Electoral Act 1956, s 15C.

so wished,²³ while the Returning Officer could "require the candidate to produce evidence ... of the candidate's eligibility to claim that accreditation."²⁴ Outside of these fleeting mentions, the legislative schema governing the operation of New Zealand's electoral processes imposed no special substantive legal requirements on the structure or activities of political parties.²⁵ Rather, statutory duties were squarely directed at the individual constituency candidate. For example, spending limits and an obligation to disclose election expenditures were placed upon the campaigns of individual candidates,²⁶ but the political parties remained free to spend at will come election time. Similarly, individual candidates faced pre-election registration requirements, with restrictions placed upon who was entitled to stand for election. No similar legal registration or entitlement rules governed a political party's right to endorse candidates. In this respect the legislative framework reflected the lingering – but quite erroneous – FPTP presumption that the individual candidate was the main focus of the campaign at election time, and regulated these actors accordingly. However, the election-related activities of political parties, which had developed into the principal electoral actors, were allowed to remain virtually untouched by legislative dictates.

This lacuna in the statutory framework governing the election of members of Parliament found a judicial echo in the High Court's decision in *Peters v Collinge*,²⁷ where the legal status of political parties was considered in some detail. The case involved an application by Winston Peters – a then-National Party MP – for judicial review of the process followed by the National Party's executive in deciding whether to re-endorse him as that party's candidate for the Tauranga electorate. Fisher J rejected this challenge on the grounds that the internal workings of political parties were to be regarded solely as a matter of contract between the various members of the party²⁸ and were not amenable to the application of public law judicial review principles.²⁹ Consequently, parties were free

23 This right was granted in 1975 by the Electoral Amendment Act 1975, s 33(1) (introducing a new section 87(2A) into the Electoral Act 1956), only then to be removed by section 31(1) of the Electoral Amendment Act 1980. Section 40(1) of the Electoral Amendment Act 1990 reinstated the right to list a candidate's party affiliation on the ballot paper.

24 Electoral Act 1956, s 87A (as amended by the Electoral Amendment Act 1990, s 40(1)).

25 Parties were, of course, always subject to general legal prohibitions on electoral activities such as bribery and treating.

26 Corrupt Practices Prevention Act 1895, ss 8, 12.

27 *Peters v Collinge*, above n 18.

28 *Peters v Collinge*, above n 18, 557, 575.

29 *Peters v Collinge*, above n 18, 566. This is true at least with respect to a party's decision whether or not to endorse a particular candidate for election, for Fisher J indicated that matters might be different where "an expulsion, disciplinary, or restraint of trade case" was involved.

to adopt whatever rules and procedures they wished for the purpose of selecting candidates for election and for settling any internal party disputes arising from such decisions. In turn, a disgruntled party member could only contest that party's actions – in truth, the actions of the party's leadership, which was seen to speak for the party³⁰ – through legal avenues if those actions breached the party's own rules (or, the terms of the contract the party had formed with the individual party member). Any substantive challenge to the party's rules themselves could only take place through the party's own internal procedures, which the party in turn was free to structure however it so chose. Therefore, an individual member unhappy with how the party was organised (the rules that governed its internal operations) or with how the party was acting (as long as these actions were not a breach of the party's rules) was restricted to trying to change the party from within or to leaving the party in disgust.

It is worth pausing to examine the reasoning behind Fisher J's holding that political parties were not subject to the principles of public law judicial review, at least when deciding who to endorse as a candidate. Although he began by noting that the National Party's status as an "unincorporated society" meant that a member's challenge to its actions *prima facie* fell into the realm of contract law, Fisher J still had to confront the fact that "in some situations a private body may be subject to non-contractual judicial review".³¹ However, the case before the Court was not then thought to present such a situation. Fisher J was at pains to note the fluid and changeable nature of the political realm and emphasised that political parties ought to be able to respond to such developments in the way that they best see fit:³²

Politics is a notoriously volatile, not to say fickle, business. Just as ideas and policies change, so must there be room for changes in allegiance and loyalties ... Whether a political party is so out of sympathy with its Member of Parliament that it no longer wants him as a candidate is something which one would expect the party to be free to decide from time to time with relatively little constraint. It is essentially a political question in which one would expect a robust level of discussion, lobbying and preconception.

Fisher J reiterated this point in somewhat broader terms later in his judgment:³³

30 *Peters v Collinge*, above n 18, 574: "[W]hen it is exercising a power conferred upon it by the rules, the controlling body of a political party must be treated as the voice of the party itself."

31 *Peters v Collinge*, above n 18, 566. Fisher J cited *R v Panel on Takeover and Mergers, ex parte Datafin Plc* [1987] QB 815 (CA) and *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA) for this point.

32 *Peters v Collinge*, above n 18, 568.

33 *Peters v Collinge*, above n 18, 574.

The party must, of course, act in accordance with its own objects and rules. But so long as it does so, the party is legally free to change its mind at any time about anything. This includes the right to change its policies, its allegiances and the individuals which it chooses to support.

The requirements of political flexibility, the need for political parties to respond to a changed political environment as they see fit, thus made it inappropriate for the court to impose any limitations – above and beyond those restraints a party has adopted for itself – on a party's collective freedom to act.

In Fisher J's judgment, political parties are portrayed as filling an important intermediary role between the citizenry and those individuals who occupy elected positions from which they can wield state power: they "assist individuals onto the stage of public life, and offer support and suggestions from the wings while they are there."³⁴ This role requires that the party make judgments about which individuals can best advance the collective interests of the party's membership and adjust those judgments as circumstances are thought to have changed. Fisher J then concludes that imposing external restrictions on how the political parties carry out this function risks damaging this representational role of the political parties. Because a party's endorsement entails its collective assessment that a candidate can be trusted to advance the party's aims and views, a court order that a political party continue to appear to stand behind some candidate unless and until the party follow some judicially imposed, public law standard of procedural fairness in making its decision "would be to deceive the voting public."³⁵ This deception, in turn, would undermine the overall sanctity of the election process. Simply put, Tauranga voters would not necessarily get what they think they are getting when they cast their ballots for a part of the National Party "team".

III THE ADVENT OF MMP AND ACCOMPANYING REGULATORY STEPS

Legislative silence with respect to the internal workings and electoral activities of political parties, combined with Fisher J's declaration "that for legal purposes, political parties are private bodies"³⁶ meant that these entities were basically free of all but self-imposed restrictions in New Zealand's FPTP environment. However, the regulatory approach taken to political parties underwent a sea-change with the introduction of MMP. This section first examines the form that the change took, before advancing some explanation for why this change in regulatory approach took place.

34 *Peters v Collinge*, above n 18, 575.

35 *Peters v Collinge*, above n 18, 575.

36 *Peters v Collinge*, above n 18.

A A New Regulatory Approach to Political Parties

The passage of the Electoral Act 1993 (the 1993 Act), which introduced the MMP electoral system into New Zealand, substantially transformed the legal status of political parties. Following the enactment of this legislation, political parties became subject to significant statutory obligations relating to their formal registration, financial activities and candidate selection processes. Under the 1993 Act, a political party must register with the Electoral Commission before it can contest the crucial party vote.³⁷ Particular criteria must be met before the Commission will register a political party. A party must attest – and, if so required, demonstrate – that it has at least 500 "current financial members" who are eligible to enrol as electors³⁸ as well as make a statutory declaration that it intends to contest future elections.³⁹ Additionally, a political party wishing to register must fulfil various administrative requirements, including supplying the Commission with the name and address of its secretary and auditor⁴⁰ and a copy of the party's membership and candidate selection rules.⁴¹

The financial affairs of registered political parties were the subject of further statutory regulation in 1995 with the passage of amendments to the 1993 Act.⁴² These changes capped the amount that a registered party may spend on "election expenses" during any election campaign⁴³ and required that registered political parties file a return following a general election of all such election expenses incurred during the campaign.⁴⁴ The Electoral Commission has subsequently determined that each party's return must disclose in some detail what these expenses went towards and who received them – a demand that the Court of Appeal has held that the Commission is empowered by law to make.⁴⁵ All registered political parties are also required to file an annual return of party donations, which must list the source and amount of all donations over \$10,000 received in the

37 Electoral Act 1993, ss 62–71.

38 Electoral Act 1993, s 66(1)(b). "Current financial members" are defined in section 3 of the 1993 Act.

39 Electoral Act 1993, s 71A.

40 Electoral Act 1993, s 63(2).

41 Electoral Act 1993, s 71B.

42 See generally Andrew Geddis "Regulating the Funding of Election Campaigns in New Zealand: A Critical Overview" (2004) 10(4) Otago LR 575.

43 Electoral Act 1993, s 214B.

44 Electoral Act 1993, s 214C.

45 *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA).

previous year.⁴⁶ Both a party's donation return and its election expenses return must be independently audited at the party's expense. Furthermore, a party's donation return, its election expenses return and the auditor's reports are all open to public inspection.⁴⁷

Finally, the 1993 Act has imposed controls on the procedures that registered political parties must use to select candidates for election. Section 71 requires registered parties to follow "democratic procedures" when selecting candidates, namely:

[To] ensure that provision is made for participation in the selection of candidates representing the party for election as members of Parliament by –

- (a) current financial members of the party who are or would be entitled to vote for those candidates at any election; or
- (b) delegates who have (whether directly or indirectly) in turn been elected or otherwise selected by current financial members of the party; or
- (c) a combination of persons or classes of persons referred to in paragraphs (a) and (b) of this section.

This section places a substantive requirement on how a registered political party must structure its internal rules and processes, at least in respect of how that organisation chooses who to endorse as a candidate at each election. However, it should be noted that while section 71 places a positive legal duty upon registered political parties, the means of enforcing this provision is somewhat uncertain. The Electoral Commission is not required to ensure that a party's selection rules conform with section 71 before registering the party,⁴⁸ nor does a failure to abide by section 71 provide grounds for cancelling a party's registration.⁴⁹ Therefore, at most the section provides a mechanism by which an aggrieved individual could challenge in court either the party's refusal to endorse him or her as a constituency candidate, or the placement he or she is given on the party list, through a claim that the party's selection method failed to meet the required "democratic procedures" standard.

The combined effect of these legislative requirements is that significant aspects of the political parties' activities now must conform with a set of state-mandated restrictions. Therefore, parties can no longer operate as wholly self-defining entities which choose their own internal rules and procedures – not, at least, if they wish to contest the all-important

46 Electoral Act 1993, ss 214F–214G.

47 Electoral Act 1993, s 214J.

48 Electoral Act 1993, ss 63, 67.

49 Electoral Act 1993, s 70.

party vote under MMP. They must instead abide by a set of prescriptive legal requirements, which demand that organisations meet certain threshold requirements before being able to formally register their existence as political parties, provide certain kinds of information about their internal workings to the public, abide by limits on how much they may spend on contesting an election and follow certain procedures when deciding who to endorse as a candidate come election time. The next section considers why it was felt necessary to legislate for this change in the regulatory treatment of political parties-as-institutions.

B Why Move to Regulate Political Parties?

The obvious, but incomplete, explanation for the move to impose special forms of legal control over political parties is that it was an inevitable consequence of the introduction of MMP. Certainly, it is true the legislative provisions applying to political parties were part and parcel of the 1993 Act establishing MMP as New Zealand's voting system. However, the correlation between the introduction of MMP and the move to impose greater legal regulation on the political parties is not a simple one of cause-and-effect. Even if the switch to MMP provided the opportunity for greater legal regulation of parliamentary representation, it cannot be said to have necessitated such a move in the sense that MMP could not function without those regulations in place. Additionally, while the MMP electoral system gave formal recognition to the primary role the political parties play as the major institutions of representation (via the party vote), it must be remembered that it was not itself responsible for political parties attaining this status. It is rather the case that MMP was adopted because it was judged to better reflect the already existing importance of the parties under the previous FPTP system of elections, a point stressed in the 1986 report of the Royal Commission on the Electoral System.⁵⁰

It is the political parties inside and outside Parliament that in reality present the electorate with a choice of Government. They provide the candidates and prepare the policies between which voters choose ... [T]he principal purpose of elections is now in fact to enable the people to decide in accordance with the electoral law which of the competing political parties will provide the Government.

Therefore, the move to MMP in and of itself cannot be said to have *required* greater legal regulation of the political parties. The decision to impose this regulation at the time MMP was introduced instead reflected concerns about the political parties that predated the change in the electoral system, with that event merely providing the occasion to address those issues.

⁵⁰ Royal Commission on the Electoral System, above n 5, 6.

These pre-existing concerns may be summarised as "a fear of disorder in the electoral process" and "a fear of illegitimate influence in the electoral process". In response to these two fears, specific forms of legal control were imposed as a way of determining the types of groups entitled to participate directly in the electoral race as political parties and to prevent those political parties from becoming conduits through which individuals or factions could exert illegitimate power over the country's law-making procedure. The law was thus deployed as a mechanism to discipline organised electoral interests – to place restraints upon their activities in order to prevent them from posing a potential threat to the process by which representatives are elected into Parliament. It does so by altering the terms of the political parties' existence from a matter solely to be negotiated and resolved by the individual members concerned, to requiring that a party's internal procedures correspond to a mandatory set of pre-established standards before it is entitled to participate directly in the electoral contest.

Therefore, the requirement for political parties to register in order to be eligible to compete for the party vote provides these entities with an official, concrete existence, as opposed to their previous, rather nebulous, status as unincorporated associations.⁵¹ The statutory pre-requisites to the Electoral Commission granting parties this status operate as "gatekeeper provisions" for the electoral process, in that only those groups meeting the threshold requirements may then participate fully in an election.⁵² This aspect of the registration requirement necessarily limits the groups who can take full part to those who can demonstrate the requisite degree of "seriousness" of purpose: attracting 500 fee-paying members; stating a commitment to contest elections; and following the various administrative requirements demanded by the 1993 Act.⁵³ Groups that meet these preconditions and register are then given some quid pro quo benefits above and beyond the right to contest the party vote, in that their names and logos are protected from being appropriated by other political actors and they may share in the broadcasting allocation at election time. But all groups which fail to meet the registration requirements – or which can meet them, but do not wish to register – are prevented from taking part in the contest for the party vote, thereby negating their chances of getting their chosen candidates elected

51 Royal Commission on the Electoral System, above n 5, 266.

52 In addition to qualifying to contest the party vote, only registered political parties are entitled to share in the broadcasting allocation prior to an election, thereby gaining direct access to the electronic broadcast media to promote their candidates at election time. See Broadcasting Act 1989, s 75(1); Andrew Geddis "Reforming New Zealand's Election Broadcasting Regime" (2003) 14 PLR 164.

53 For judicial discussion of whether the state is justified in imposing such a "seriousness of purpose" test on potential political parties, see *Figueroa v Canada* [2003] 1 SCR 912; *Mulholland v Australian Electoral Commission* [2004] HCA 41.

to Parliament.⁵⁴ Therefore, in the MMP environment the registration requirement for political parties has the practical effect of restricting potential membership of Parliament to those candidates who are backed by a group of supporters that is both able and prepared to meet the enacted gatekeeper provisions.

In turn, the act of registering as a political party – and thus becoming entitled to participate fully in the electoral race – requires the registering entity to abide by the financial and candidate selection requirements contained in the 1993 Act. The restrictions upon the financial activities of registered parties were a response to fears about the influence that money can exert on politics. While the Royal Commission recognised that it is important that political parties have the financial capacity to develop and communicate policies to the voters, they also noted that:⁵⁵

It is neither fair nor conducive to an informed electorate if wide discrepancies in access to resources mean some parties or groups are denied the chance to communicate their views effectively. Nor is it fair if some in the community use their relative wealth to exercise disproportionate influence in determining who is to govern and what policies are to be pursued ... So that the electoral process is seen to be fair, and so that the voters may make informed judgments, it is important that the electorate is fully informed both about significant sources of political finance and about the uses to which it is put.

Spending-caps and disclosure requirements were therefore imposed on registered political parties in an effort to maintain an even playing-field at election time. Election expenditure limitations, which already applied to individual candidates, were extended to political parties to minimise the effects of inequalities between groups in the extent to which they can afford to spend money on electioneering.⁵⁶ These spending-caps on the campaigns of political parties were designed to limit the advantage of wealthy interests and prevent "big money" from deciding who will sit in Parliament.

Similarly, the main rationale behind requiring the disclosure of donations was "to limit the potential for corruption by interests with access to substantial funds."⁵⁷ Mandating disclosure dissuades such interests from seeking to trade large contributions for favourable treatment once the party or candidate is elected – the so-called "sunlight"

54 It is true that such groups may still endorse candidates who contest the electorate vote in individual electorates, but the effective chance of a non-registered party having one of their candidates elected to Parliament through this route is likely to be small.

55 Royal Commission on the Electoral System, above n 5, 183.

56 Royal Commission on the Electoral System, above n 5, 190.

57 Royal Commission on the Electoral System, above n 5, 187.

rationale.⁵⁸ These disclosure requirements were considered desirable even in the absence of any evidence that such quid pro quo dealings were actually taking place in New Zealand. Transparency in the financial affairs of parties was thought to enhance public confidence in the electoral process by enabling the voters to see for themselves who a party's major financial supporters are and to match the actions of the party against the interests of those supporters.⁵⁹

The candidate selection requirements contained in section 71 of the 1993 Act seek to combat a fear akin to that underlying the financial duties outlined above. Parliament was again responding to concerns that particular individuals might be able to exercise a disproportionate amount of influence over who is elected to Parliament or over those representatives once elected. However, rather than external donors exerting influence over the parties and their candidates, the relevant fear here was that some individual (or individuals) could exercise illegitimate influence through controlling the internal workings of the political parties when endorsing candidates at election time. Requiring political parties by law to follow "democratic procedures" when choosing their candidates was intended to prevent a party's leadership from insulating itself from the wishes of the grass-roots membership. Candidate selection must be a collective effort which gives an opportunity for the opinions of all party members to be canvassed, rather than an exercise in which a self-selected cabal decides amongst itself which individuals will represent the political party. Placing some legal controls on the political parties' candidate selection procedures was thought to be particularly important under MMP, as its "closed list" system of party representation gives a substantial amount of power to those persons with the power to draw up a party's list of candidates.⁶⁰

C Where Parliament Leads, Will the Courts Follow?

What remains uncertain is the extent to which the imposition of the above statutory duties on political parties might lead to a change in the way these entities are viewed by the courts. As Graeme Orr has observed in the Australian context,⁶¹ statutory requirements for parties to register, along with the benefits provided by such registration,

58 *Buckley v Valeo* (1976) 424 US 1, 67 fn 80.

59 Geddis, above n 17, 60.

60 Royal Commission on the Electoral System, above n 5, 240.

61 Graeme Orr "Of Electoral Jurisdiction, Senate Ballot Papers and Fraudulent Party Registrations: New Developments in Electoral Case Law" (1999) 2(2) *Constitutional Law and Policy Review* 32; Graeme Orr "Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?" (2001) 12 *PLR* 89, 92-93; Graeme Orr "The Law Comes to the Party: the Continuing Juridification of Political Parties in Australia" (2002) 3(3) *Constitutional Law and Policy Review* 41.

provided a gateway for increased judicial intervention in the internal affairs of political parties. He notes that the Australian High Court's holding in *Cameron v Hogan*⁶² – that the internal disputes of political parties are not matters justiciable by the courts – "is now a broken shield",⁶³ with the judiciary increasingly prepared to intervene and rule upon issues relating to membership and candidate preselection.⁶⁴ Similarly, in the New Zealand context, the registration requirements, disclosure provisions and other regulatory measures contained in the 1993 Act – along with the formal role that parties now have in deciding membership of the House – certainly appear to render obsolete Fisher J's observation that New Zealand's political parties should not be subjected to the principles of public law judicial review because they "have no statutory or public duties".⁶⁵ The further question must therefore be whether New Zealand's courts will supplement the enactment of these statutory controls on political party activities with the imposition of further public law duties in relation to matters such as how prospective candidates are selected and how internal party disputes are resolved.

The rationale for any such expansion of judicial oversight of the activities of the political parties would be to prevent individuals within the party hierarchy from abusing their positions of power; or, alternatively, to protect individual members of the party from some form of wrongful treatment by the party leadership. The justification for taking such a step would be that a party's leadership ought to be held to account publicly for the ways in which it makes use of such powers, with the courts taking on a supervisory function to protect the integrity of the institution's procedures. However, taking on such an expanded oversight role will inevitably involve the courts adjudicating between differing claims as to the proper path that the party should follow, claims which will be of a highly politically-charged nature. The interesting question, therefore, is whether New Zealand's courts will be prepared to take a step into the political thicket by subjecting the internal activities of political parties to higher standards of public law review.

62 *Cameron v Hogan* (1934) 51 CLR 358 (HCA).

63 Graeme Orr "The Law Comes to the Party: the Continuing Juridification of Political Parties in Australia" (2002) 3(3) Constitutional Law and Policy Review 41, 43.

64 See *Baldwin v Everingham* [1993] 1 Qd R 210; *Clarke v Australian Labor Party (SA Branch)* (1999) 74 SASR 109.

65 *Peters v Collinge*, above n 18, 575. The change in legislative treatment of political parties has been noted by the Court of Appeal in the *Lange v Atkinson* litigation. "The electoral system now recognises more directly the competition organised by and through political parties for the power of the State exercised through Parliament and the ministry." *Lange v Atkinson* [1998] 3 NZLR 424, 463 (CA) Blanchard J for the majority; see also *Lange v Atkinson* [2000] 3 NZLR 385, para 26 (CA) Richardson P, Henry, Keith, Blanchard and Tipping JJ.

IV THE LEGAL STATUS OF POLITICAL PARTIES FOLLOWING PREBBLE V AWATERE HUATA

The first substantive judgment given by New Zealand's new Supreme Court, *Prebble v Awatere Huata*,⁶⁶ provides some insight into – although not a conclusive answer to – this question. This case centred on the question of when the leader of a parliamentary political party is entitled to use the "party hopping" provisions contained in the 1993 Act to oust from Parliament an MP elected under that party's banner.⁶⁷ These measures were adopted in 2001 following a number of switches of party allegiance during the 1996–99 parliamentary term,⁶⁸ which, it was argued, undermined public trust and confidence in the MMP electoral system.⁶⁹ Parliament's regulatory response was to legislate so that MPs who ceased to be members of the political party for which they had been elected also lost their right to continue to sit in Parliament.⁷⁰ Because the *Awatere Huata* case involved the interpretation and application of these statutory provisions setting out just when an MP's seat is to be declared vacant, it did not involve any review of how a party had conducted its internal procedures. Nevertheless, the way that the Court conducted this interpretative task reveals an underlying view of the role of political parties in the MMP environment. Furthermore, in the course of delivering the main judgment in the case, the Chief Justice, Dame Sian Elias, made some direct (albeit obiter) comments relating to the legal status of political parties. Therefore, the case provides a potentially important indication of the judiciary's future treatment of these institutions.

A The Legal Issue Involved in *Prebble v Awatere Huata*

The central legal issue in the *Awatere Huata*⁷¹ case was whether Mrs Awatere Huata had acted in a manner which "distorted proportionality" as per section 55D(a) of the 1993 Act. The issue was relevant because before a political party's parliamentary leader can use the party hopping provisions to oust an MP from the House, the leader must give the Speaker notice of the leader's "reasonable belief" that the MP concerned "has acted in a way

66 *Prebble v Awatere Huata* [2005] 1 NZLR 289 (SC).

67 Electoral Act 1993, ss 55A–55E.

68 Electoral (Integrity) Amendment Act 2001.

69 See, for example, Neill Atkinson *Adventures in Democracy: A History of Voting in New Zealand* (University of Otago Press, Dunedin, 2003) 227, 229–230.

70 See generally Andrew Geddis "Gen Aft A-Gley: New Zealand's Attempt to Combat 'Party Hopping' By Elected Representatives" (2002) 1 Election Law Journal 557.

71 The factual and legal background to the *Awatere Huata* case is discussed in greater detail in Andrew Geddis "Membership of the House" (2004) NZLJ 30, 32–33; Andrew Geddis "All Power to the Party!" (2005) NZLJ 13.

that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last general election."⁷² Therefore, an attempt to give the Speaker such a notice – and thus to have an MP's seat declared vacant – without having reasonable grounds for such a belief would be ultra vires or, alternatively, irrational and without legal foundation. And Mrs Awatere Huata's basic claim was that she had not distorted proportionality as per these statutory provisions, that she had effectively been kicked out of the Act Party and was still prepared to give it her voting support in the House.

Substantive hearings in the High Court⁷³ and subsequently the Court of Appeal⁷⁴ reached opposing conclusions on whether Mrs Awatere Huata had distorted proportionality. The matter thus was taken up by the Supreme Court, which then took a "membership centred" approach to the central legal issue. Rather than try to create its own bright line test for determining the kinds of conduct by an MP that will meet the statutory language – a task which largely had preoccupied the courts below – the Supreme Court essentially allowed the MP's political party to perform this task. A quite formalistic chain of reasoning was employed to reach this conclusion. Because Mrs Awatere Huata allowed her membership in the Act Party to lapse, the party's internal rules held that she could no longer be a member of its parliamentary caucus.⁷⁵ And once the Speaker was notified that the Act Party had ceased to regard Mrs Awatere Huata as a member of its caucus, Parliament's Standing Orders required that he declare Mrs Awatere Huata to be an independent MP for parliamentary purposes.⁷⁶ Because this declaration meant that Act went from having 9 MPs recognised for parliamentary business to having 8, it automatically distorted the proportionality of Parliament. What is more, Mrs Awatere Huata was held to have caused this distortion through her failure to renew her party membership in a timely fashion. Therefore, according to the Supreme Court's

72 Electoral Act 1993, s 55D(a).

73 *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC).

74 *Awatere Huata v Prebble* [2004] 3 NZLR 382 (CA). See also Andrew Geddis "Privilege, Parliament and the Courts" [2004] NZLJ 302, 303.

75 In point of fact, the Act Party's rules did not state this explicitly. Rule 23.5(e) did require that a person must be a member of the Act Party in order to be eligible to be selected as a candidate for election for the Act Party. However, the rules were silent as to what consequences would follow if an MP once elected failed to remain a member of the Act Party. The Supreme Court nevertheless found that "it is implicit that continued membership of the party is required for membership of the caucus" as "it would be absurd if the obligation to be a member of the party, which is expressly required of its candidates for election to Parliament, ceased once they were elected" – *Prebble v Awatere Huata* (SC), above n 66, para 42 Elias CJ, para 97 Blanchard J.

76 Standing Orders 34(4), 35(1).

interpretation of the statutory framework, the combination of Act's own internal membership rules and the Standing Orders of Parliament made Mrs Awatere Huata's fate under the party hopping provisions a fait accompli.

B The View of Political Parties Underlying the Supreme Court's Decision

Although the Court's ruling largely rests on an analysis of the statutory language⁷⁷ buttressed with a claim that a "membership centred" reading of these provisions best matches Parliament's intent in enacting the provisions,⁷⁸ there is still a particular normative view of the role of political parties involved in the judgment. First, as argued in detail by Keith J, vesting a broad power in each political party to decide who may continue to represent it in Parliament between elections fits with a more general recognition of the importance of these institutions in our parliamentary processes.⁷⁹ Gault J also considered that this factor had been "accorded insufficient weight" in the Court of Appeal.⁸⁰ Under MMP, therefore, the basic assumption apparently ought to be that the system-value of political party unity and discipline trumps that of the dissenting, independently minded MP. Simply put, the Supreme Court thought it better for our system of government to have cohesive party teams subject to the ultimate discipline of expulsion from Parliament, rather than to provide a measure of protection for the individual MP who defies his or her party's leadership on a matter of principle.⁸¹ Secondly, the legislation's inbuilt procedures - requiring that the MP be given an opportunity to answer the leader's claim that he or she has distorted proportionality,⁸² with a two-thirds majority vote by the party caucus then needed to authorise the leader's actions⁸³ - ensure that there is a potential political cost to using its provisions to oust a dissenting voice from the House.⁸⁴ The Court thus placed its faith in the electorate's ability to detect, remember and punish at the ballot box any misuse

77 *Prebble v Awatere Huata* (SC), above n 66, paras 46-54 Elias CJ, paras 65-87 Gault J and Keith J.

78 *Prebble v Awatere Huata* (SC), above n 66, para 51 Elias CJ, para 88 Keith J.

79 *Prebble v Awatere Huata* (SC), above n 66, paras 74-85 Keith J.

80 *Prebble v Awatere Huata* (SC), above n 66, para 63 Gault J.

81 A different position to that adopted by the majority of the Court of Appeal, see *Awatere Huata v Prebble* (CA), above n 74, paras 99-106 McGrath J, para 153 Hammond J. For a discussion of the Court of Appeal majority's approach see Andrew Geddis "Privilege, Parliament and the Courts", above n 74, 303-304.

82 Electoral Act 1993, s 55D(b)(ii).

83 Electoral Act 1993, s 55D(c).

84 *Prebble v Awatere Huata* (SC), above n 66, para 48 Elias CJ.

of the powers given to each political party's leadership under the party hopping provisions. With these safeguards in place, additional judicial protection of those subject to such powers was not then thought to be required.

It need hardly be said, however, that the Supreme Court's choice of a "membership centred" interpretation gives a party's leaders an enormous amount of power over the party's individual MPs. Admittedly, MPs who challenge their party on points of principle have always been vulnerable to forms of retaliation such as suspension or expulsion from the caucus, or deselection as a candidate at the next election. But the Supreme Court's interpretation of the party hopping provisions now augments these disciplinary powers by giving a party's leadership the additional ability to quickly expel a "problem MP" from not only the party itself, but also from the House. For while Mrs Awatere Huata was responsible for the lapse of her party membership, it would appear to make no difference to the Court's reasoning process if the party had terminated her membership through its disciplinary procedures.⁸⁵ Therefore, by tying the application of the party hopping provisions to a party's internal rules of membership, the Supreme Court's interpretation of the legislation effectively gives each party's leadership the power to sack from Parliament any MP whom it considers to be a political liability.

Consequently, how an MP might challenge the extra-parliamentary party's effort to remove his or her membership prior to using the party hopping provisions to expel him or her from the House becomes an important issue. The Supreme Court was not required to address this issue directly - and four of the bench therefore did not to do so - as Mrs Awatere Huata had challenged neither Act's claim that her membership in the extra-parliamentary party had lapsed, nor its refusal to allow her to rejoin the party. However, in obiter comments Elias CJ expressed her belief that the extra-parliamentary party, as an "unincorporated association which exist[s] for political purposes", has "wide freedom in determining [its] internal arrangements, including in the determination of [its] own membership and the achievement of their objects."⁸⁶ This freedom means that "the party is free to leave members behind, if it acts in accordance with its rules of association and if it is willing to wear the political risk of such action with the electorate."⁸⁷ Therefore, in the Chief Justice's opinion, any MP wishing to challenge an attempt to oust him or her from membership in the extra-parliamentary party would have to dispute the application of the

85 *Prebble v Awatere Huata* (SC), above n 66, para 41 Elias CJ. But see *Prebble v Awatere Huata* (SC), above n 66, para 95 Blanchard J: "The position of someone seeking re-admission to an organisation which they have voluntarily left (as by failing to meet its dues) is not to be equated with that of someone whom the organisation is seeking to expel in accordance with its rules."

86 *Prebble v Awatere Huata* (SC), above n 66, para 37 Elias CJ.

87 *Prebble v Awatere Huata* (SC), above n 66, para 50 Elias CJ.

party's broadly drafted, internal disciplinary rules,⁸⁸ which "constitute a contract between the members".⁸⁹ Although the Chief Justice did not directly cite *Peters v Collinge*, her language carries clear echoes of Fisher J's judgment. And as with the holding in that case, reducing the issue to one of the enforcement of a private law contract between the member and the party effectively removes any public law issues: the courts will only look to see if the disciplinary procedures as set out in the party rules (the contract) have been adhered to. Provided that they have been, the party hierarchy is then legally free to remove an MP's party membership for whatever reason it chooses and thereby make that MP eligible for removal from Parliament itself under the party hopping provisions.

There are a number of things to bear in mind regarding the Chief Justice's comments relating to the legal status of political parties. One obvious point to note is that they are obiter. A second is that this case may have only limited precedent value, relating as it does to the interpretation of legislation that expires at the 2005 election.⁹⁰ Furthermore, Mrs Awatere Huata did not present as an overly sympathetic figure, given that her rift with her party was caused by her personal ethical failings rather than a principled stance on a point of policy. It was hard, therefore, to justify as a substantive matter why she as an individual ought to be allowed to remain in Parliament when her entire party wanted her gone. Nevertheless, the Chief Justice's comments do indicate an ongoing presumption that political parties are best viewed as entities entitled to order their internal procedures and rules as they see fit. Even though this may result in the leadership of the party wielding disciplinary power over the wider party membership, including elected MPs, the manner in which this power can be exercised is a matter for the party itself to decide. Disputes about these issues are then a matter to be settled internally, subject to the ultimate sanction of public disapproval as voiced at the ballot box. But the courts, at least in the Chief Justice's opinion, have no place in imposing extra restraints upon a party's leadership above and beyond those collectively fashioned by the party itself.

V CONCLUSION

General agreement on the basic importance of political parties in New Zealand's electoral processes does not yet extend to a consensus on how they ought to be regulated by law. The centrality of these entities to the way in which representatives of our supreme law-making institution are selected, and concerns that they may serve as conduits for some form of illegitimate influence on the law-making process, have resulted in the enactment of

88 For instance, the Act Party's rule 5.6 provides that expulsion is "an appropriate remedy for conduct that the Board considers may bring the Party into disrepute."

89 *Prebble v Awatere Huata* (SC), above n 66, para 36 Elias CJ.

90 Electoral (Integrity) Amendment Act 2001, s 5.

statutory duties on all parties that wish to play a full role in New Zealand's MMP environment. However, the courts have indicated that they believe it is important that political parties be treated as private associations, which remain free to structure their internal affairs as they choose and resolve disputes according to their own preferred mechanisms. I have suggested that this apparently inconsistent regulatory treatment of political parties stems from differing conclusions about the threat of illegitimate influence arising within the party institution and the best means of combating any such illegitimate influence.

However, the apparently stark division in views of the political party between the legislature and the courts may not be as pronounced as the above paragraph suggests. With respect to the courts' view of political parties, the judiciary has only been asked to review these entities in respect of their role in endorsing (or refusing to endorse) elected members of Parliament. This activity is perhaps the most publicly apparent that parties undertake – it attaches the party's collective seal of approval to the individual concerned. Therefore, there may be good functional reasons for allowing political parties a great deal of latitude in deciding how and when to make (or to withdraw) this endorsement, lest voter confusion result from a requirement that parties meet externally-imposed standards before doing so.⁹¹ But what the courts have not yet been called upon to consider are purely internal matters such as the party leadership's actions when disciplining a member (or members) of some internal party faction or when refusing to allow some party faction to participate in the party's annual conference.

It would be very surprising, given the extent to which political matters have become judicialised in other jurisdictions,⁹² if such a challenge was not to come before the New Zealand courts in the near future. In deciding whether or not to become involved in such claims (beyond checking to ensure that the party's own rules have been followed), the courts will have to re-examine their approach to reviewing these entities. Should the courts continue to treat parties as free to structure their internal procedures as they see fit, with all disputes between members a matter for resolution under those procedures? Or should the courts be alert to a party's leadership using the party rules to try to stifle debate over the party's direction, perhaps with the goal of entrenching the existing leadership from challenges to its position of power, and subject its actions to stricter review on public law principles? The way in which the courts respond to this choice in means of review, I would

91 The point made by Fisher J in *Peters v Collinge*, above n 18, see text to above n 35.

92 See Russell A Miller "Lords of Democracy: The Judicialization of 'Pure Politics' in the United States and Germany" [2004] *Washington & Lee L Rev* 588.

argue, will in turn reflect their more basic view of the risk of undue influence occurring within a party's ranks and the best regulatory means of negating any such risk. Quite how the courts will proceed to address these questions is, as yet, unsettled.

