

# THE LEGAL STATUS OF POLITICAL PARTIES UNDER MMP

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*This article discusses a specific, and relatively narrow, issue: Whether the move to a mixed member proportional voting system caused a change in the legal status accorded to New Zealand's political parties. It is argued that there is less of a cause-and-effect relationship between these two developments than might be thought. The fact that the same legal developments have occurred in the United Kingdom and Canada suggests that there are dynamics at play, aside from the nature of the voting system, that determine the form of legal controls placed on political parties. The article concludes with some tentative speculation as to what might explain the change in regulatory approach that has taken place in the last two decades.*

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## **I INTRODUCTION**

It is trite to observe that the move to mixed member proportional representation (MMP) has changed New Zealand's political parties. Most obviously, there are far more of them in existence today than there were in the previous first past the post (FPP) electoral environment. At the 1993 election, for example, four parties successfully returned members of Parliament (MPs), out of the seven that had candidates contesting the election nationally. In 2008, MPs representing seven different parties were elected, out of the 19 registered parties seeking the party vote. The internal organisation and practices of parties likewise have evolved in the MMP environment. Furthermore, as other articles in this journal discuss, the way political parties-as-institutions function (and are recognised) in the legislative and executive branches of government has shifted to meet the demands in the MMP era of coalition government and associated policy deal making. That said, the specific (and relatively narrow) issue this article addresses is whether the move to MMP has changed the legal status accorded to political parties. Alternatively, to rephrase the question, to what extent is the current legal treatment of political parties attributable to New Zealand's decision in 1993 to move to an MMP voting system?

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Perhaps surprisingly, this article suggests that there is less of a cause-and-effect relationship between these two developments than one might think. It is true that the way the law conceptualises and regulates political parties changed alongside the introduction of MMP. However, just because two events take place contemporaneously does not prove causation. Furthermore, we can observe that much the same legal developments have taken place in the United Kingdom and Canada, two nations that provide useful comparisons as they have continued to use an FPP voting system since New Zealand switched to MMP. This convergence in regulatory approach suggests that there are other dynamics at play, aside from the nature of the voting system, in determining the form of legal controls placed on New Zealand's political parties. Indeed, it is arguable that their legal regulation would have looked much the same today even if New Zealand's voters had chosen not to switch to MMP in 1993.

This article commences with a review of the legal status of New Zealand's political parties under its previous FPP electoral system. It then looks at how this legal status changed through legislative intervention at the time of the introduction of MMP, and how subsequent judicial decisions have interpreted that legislation. Whether the move to MMP was the cause of this change, or simply the catalyst for a change that took place for other reasons, is then considered in the context of other countries' experiences. The United Kingdom and Canada have been selected as relevant comparators because, as noted above, they have continued to use FPP electoral systems while New Zealand has moved to MMP. Consequently, if MMP really "caused" a change in how political parties are viewed and regulated by the law, we should expect to see a marked difference in how these three jurisdictions approach the matter. However, given that no such divergence is apparent, there is good reason to question the existence of such a cause-and-effect relationship. The article concludes with some tentative speculation as to what might, instead, explain the change in regulatory approach.

## ***II THE LEGAL STATUS OF NEW ZEALAND'S POLITICAL PARTIES PRE-MMP***

The Electoral Act 1956 provided the legislative framework for New Zealand's electoral process immediately prior to the introduction of MMP. This enactment regulated political parties in only two very minor respects: restricting the campaign material that could be publicly displayed on election day;<sup>1</sup> and specifying which organisations could make submissions to the Representation Commission concerning electorate boundaries.<sup>2</sup> Individual candidates also were entitled (eventually) to include their party association on the ballot paper if they so wished,<sup>3</sup> while a

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

2 Ibid, s 15C.

3 This right was granted in 1975 by section 33(1) of the Electoral Amendment Act 1975 (introducing a new section 87(2A) into the Electoral Act 1956), only to be removed by section 31(1) of the Electoral

returning officer could "require the candidate to produce evidence ... of the candidate's eligibility to claim that accreditation."<sup>4</sup> Beyond these fleeting statutory references, no special legal requirements applied to the structure or activities of political parties (that is, requirements beyond the general civil and criminal law applying to all unincorporated associations).<sup>5</sup>

Statutory regulation of political actors instead focused on the individual constituency candidate. For example, spending limits and an obligation to disclose election expenditures and donations applied to the campaigns of individual candidates,<sup>6</sup> while the political parties remained free to spend at will come election time. Similarly, individual candidates faced pre-election registration requirements, with restrictions on who was entitled to stand for election. No similar legal registration or entitlement rules governed a political party's right to endorse candidates. This legislative framework reflected a lingering – but quite erroneous – presumption that the focus of the campaign at election time was the individual candidate, and regulated these actors accordingly. Consequently, the election-related activities of political parties, which by the early 20<sup>th</sup> century had emerged as the nation's principal electoral actors, remained virtually untouched by legislative dictates.

The approach of the New Zealand judiciary to the internal workings and electoral activities of political parties replicated the legislature's general *laissez-faire* attitude. In the most extensive judicial engagement with the issue before the introduction of MMP, in the case of *Peters v Collinge*,<sup>7</sup> the High Court considered 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 the application 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 party and so were not amenable to the application of public law judicial review principles.<sup>8</sup> Consequently, parties were free to adopt whatever rules and procedures they wished to select candidates for election and to settle 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

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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.

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

5 Therefore, parties (when acting through their individual members and office holders) generally were subject to statutory prohibitions on electoral activities such as bribery, treating and undue influence.

6 Corrupt Practices Prevention Act 1895, s 8, s12.

7 *Peters v Collinge* [1993] 2 NZLR 554 (HC).

8 *Ibid*, 566 (HC) Fisher J. 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.

party<sup>9</sup> – in court if those actions breached the party's own rules (representing the terms of a contract the party had made 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 was in turn free to structure however it wished. 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.

Fisher J's conclusion that political parties were not subject to the principles of public law judicial review, at least when deciding who to endorse as a candidate, sprang from a general concern to respect political parties' right to self-manage. While the National Party's status as an "unincorporated society" meant a member's challenge to its actions *prima facie* belonged in the private law 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".<sup>10</sup> However, Mr Peters' claim did not 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:<sup>11</sup>

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:<sup>12</sup>

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 importance of allowing political parties freedom 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.

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9 Ibid, 574 (HC) Fisher J: "[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."

10 Ibid, 566 (HC) Fisher J. Fisher J cited *R v Panel on Takeover and Mergers, ex parte Datafin Plc* [1987] QB 815 and *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA) for this point.

11 Ibid, 568 (HC) Fisher J.

12 Ibid, 574 (HC) Fisher J.

The combination of legislative silence and judicial reluctance to intervene in internal party conflicts meant that political parties faced no special or targeted forms of regulation in New Zealand's pre-MMP environment. They were, in the eyes of the law, no different to groups such as the Dunedin Country and Western Music Club or the New Zealand Lawn Bowls Association. As purely private entities, questions of representation and policy direction must be answered solely by reference to the party's own chosen rules, with those rules able to take any form that the party as a collective entity wished. This regulatory approach to political parties underwent a sea change alongside the introduction of MMP. The next part examines the form that the change took, before considering why it took place.

### ***III A NEW REGULATORY APPROACH TO POLITICAL PARTIES***

The introduction of the Electoral Act 1993 (the 1993 Act), which instituted the MMP electoral system, substantially transformed the legal status of political parties. Following this enactment's passage into law, political parties became subject to significant obligations relating to their formal registration, financial activities and candidate selection processes. Political parties must register with the Electoral Commission in order to contest the crucial party vote under MMP.<sup>13</sup> The Commission may only register those political parties that meet specified statutory criteria.<sup>14</sup> A party must attest – and, if so required, demonstrate – that it has at least 500 "current financial members" who are eligible to enrol as electors<sup>15</sup> as well as making a statutory declaration that it intends to contest future elections.<sup>16</sup> Parties wishing to register must also fulfil various administrative requirements, including supplying the Commission with the name and address of its secretary and auditor<sup>17</sup> and a copy of the party's membership and candidate selection rules.<sup>18</sup> Finally, the Commission must reject the registration of any party name that it considers indecent or offensive, excessively long, likely to confuse or mislead electors or containing any reference to a title, honour or similar form of identification.<sup>19</sup>

The financial affairs of registered political parties also became subject to statutory regulation in 1995,<sup>20</sup> with more extensive requirements imposed by the Electoral Finance Act 2007.<sup>21</sup> Registered

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13 Electoral Act 1993, ss 62-71.

14 *Ibid*, s 66(1).

15 *Ibid*, s 66(1)(b). "Current financial members" are defined in section 3 of the Act.

16 *Ibid*, s 71A.

17 *Ibid*, s 63(2).

18 *Ibid*, s 71B.

19 *Ibid*, s 65.

20 See generally Andrew Geddis "Regulating the Funding of Election Campaigns in New Zealand: A Critical Overview" (2004) 10 *Otago LR* 575, 578-582.

parties are subject to limits on the "election expenses" they may incur during a "regulated period" and must file a return following each general election of all such election expenses incurred.<sup>22</sup> The Electoral Commission requires that each party's return must disclose in some detail what these expenses went towards and to whom they were paid, a demand that the Court of Appeal has held that the Commission is entitled to make.<sup>23</sup> 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 previous year.<sup>24</sup> Measures first introduced under the Electoral Finance Act 2007 have attempted to close off loopholes previously used by political parties to avoid this disclosure requirement, by limiting to \$1000 the amount that may be given to a party anonymously<sup>25</sup> or via intermediaries without disclosing the original donor.<sup>26</sup> Furthermore, a new restriction has been imposed on political parties receiving donations of more than \$1000 from an "overseas person".<sup>27</sup> Both a party's donation return and its election expenses return must be audited independently at the party's own expense.<sup>28</sup> Furthermore, a party's donation return, its election expenses return and the auditor's reports are all open to public inspection.<sup>29</sup>

Finally, the 1993 Act imposed controls on the procedures that registered political parties must use to select candidates for election. In response to a recommendation from the 1986 Royal Commission on the Electoral System, Parliament enacted section 71.<sup>30</sup> This provision requires registered parties to follow "democratic procedures" when selecting candidates, namely:

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21 The changes wrought by this legislation are discussed in Andrew Geddis "New Zealand's Electoral Finance Act 2007 and its Discontents" (2008) 19 Public LR 215. Even though the Electoral Finance Act 2007 has been repealed, the restrictions on political party donations it implemented have been retained in sections 207 to 210F of the Electoral Act 1993.

22 Electoral Act 1993, ss 206-206R.

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

24 Electoral Act 1993, ss 210-210F.

25 *Ibid*, s 207I.

26 *Ibid*, ss 207C & 207E.

27 *Ibid*, s 207K.

28 *Ibid*, s 210A.

29 *Ibid*, s 210F.

30 The Royal Commission reasoned that: "it is the parties' prior selection of candidates which, especially in safe seats, effectively determines who is to become the electorate's representative. In the same way, political parties also determine which groups in the community will be represented in Parliament and in what number. It can be argued that the voters' power of choice is seriously curtailed by this process and that they should all be allowed a say in the party selection. The Electoral Act could require that party candidates be selected according to certain procedures which would guarantee a degree of public involvement or accountability in the manner of selection, eg, by a meeting which all registered party members or their representatives could attend." Royal Commission on the Electoral System "Report of the Royal Commission on the Electoral System: Towards a Better Democracy" (Government Printer, Wellington, 1986) para 9.24

[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 the persons or classes of persons referred to in paragraphs (a) and (b).

Section 71 thus imposes a substantive restriction on how registered political parties can structure their internal rules and processes, at least in respect of how these organisations choose who to endorse as candidates at each election. The enforcement of this legal duty then lies in the hands of the judiciary, not the Electoral Commission or any other administrative body. An aggrieved individual can 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.

That said, the judiciary's interpretation of the duty imposed by section 71 means it is not particularly onerous in practice. In *Payne v New Zealand National Party*,<sup>31</sup> Panckhurst J refused to grant Mr Payne, a National Party member seeking to become the party's candidate in the Selwyn district, an injunction to halt the party's candidate selection process. Mr Payne alleged that the party leadership's use of its "unfettered discretion"<sup>32</sup> to exclude him from the selection process breached the section 71 procedure, as the leadership's decision did not stem from an appropriately "democratic procedure". However, after fully reviewing whether the National Party's selection rules complied with the requirements of section 71, Panckhurst J concluded that giving an absolute, unfettered veto power to the party's leadership was lawful.<sup>33</sup> His Honour's conclusion, therefore, underscores the minimal nature of the membership participation requirements demanded by section 71. I previously had suggested:<sup>34</sup>

[T]he extent of the safeguard provided by [section 71] is questionable. It prescribes only that "provision is made" for some direct or indirect "participation" in the candidate selection process by the party's wider membership. The party leadership can thus retain the final decision as to the identity of those candidates ...

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(also cited as [1986-87] IX AJHR 1986 H 3). It should be noted that this recommendation for change was not dependent on the Commission's overall recommendation to move to an MMP electoral system.

31 *Payne v New Zealand National Party* [2008] 3 NZLR 233 (HC).

32 This power was given to the National Party's governing board under rule 94(b) of the Party's rules.

33 *Payne v New Zealand National Party*, above n 32, paras 59-65 (HC) Panckhurst J.

34 Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, Wellington, 2007) 80.

Panckhurst J's decision echoes just this view. In his words, "the participatory requirement [in section 71] was, I think, deliberately framed so as to leave scope for the overarching influence of senior officials of the party, provided that they too were democratically elected by the party membership."<sup>35</sup> Consequently, "the requirement to adopt democratic procedures with reference to candidate selection [does not affect] the ability of parties to empower the hierarchy to veto, or filter, the nominations for each electorate."<sup>36</sup>

Panckhurst J's approach to section 71 subsequently was endorsed by a bench of three Justices of the High Court hearing an electoral petition brought by Mr Payne to challenge the outcome of the 2008 election in the Selwyn district.<sup>37</sup> Mr Payne argued that a failure to follow democratic procedures when selecting the National Party's candidate – who had gone on to win the Selwyn seat – meant that the poll in that district constituted "an unlawful election or unlawful return".<sup>38</sup> In the course of deciding this point, the Court reviewed the findings of the Royal Commission on the Electoral System.<sup>39</sup> It also took into account a previous article published in this journal,<sup>40</sup> which discussed the effect that the enactment of section 71 (along with other statutory duties) might have on the judicial approach to political parties' internal activities.<sup>41</sup> Drawing on these resources, the Court concluded that section 71 was not intended to impose a straightjacket on the selection processes of political parties.<sup>42</sup>

[T]he obligation to provide for participation in the selection of candidates is flexible in scope and allows room for a registered political party to meet its obligations by one or other of the defined means or a combination of them. Importantly, the extent of the participation required by the identified groups is left for determination by the political party.

Consequently, the National Party board's veto power was consistent with the obligations set out in section 71, meaning there was no basis for declaring the election outcome to be unlawful.<sup>43</sup>

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35 *Payne v New Zealand National Party*, above n 32, para 52 (HC) Panckhurst J.

36 *Ibid*, para 58 (HC) Panckhurst J.

37 *Payne v Adams* [2009] NZAR 417 (HC).

38 Electoral Act 1993, s 229(1).

39 *Payne v Adams*, above n 38, paras 79-80 (HC) Randerson CJ, Alan and French JJ.

40 Andrew Geddis "The Unsettled Legal Status of Political Parties in New Zealand" (2005) 3 NZJPIL 105.

41 *Payne v Adams*, above n 38, paras 83-91 (HC) Randerson CJ, Alan and French JJ.

42 *Ibid*, para 98 (HC) Randerson CJ, Alan and French JJ.

43 In point of fact, the Court already had ruled that a breach of section 71 could not be used to found an election petition, as "[e]lection petitions under Part 8 ... [must] relate to the processes of the election or returns in each electorate and the existence of any element of unlawfulness which relates to those processes." *Payne v Adams*, above n 38, para 73 (HC) Randerson CJ, Alan and French JJ.



The outcome of Mr Payne's protracted battle for selection as a National Party candidate, then, was not particularly surprising. Nor is it necessarily undesirable. As Raymond Miller points out, rules that give a party's leadership ultimate control over the selection of its candidates can have positive effects in terms of the spread of gender and ethnic representation and the recruitment of candidates with particular qualifications and abilities.<sup>44</sup> Nevertheless, both judicial decisions in respect of Mr Payne contain an express rejection of the assumption in *Peters v Collinge* that political parties are purely "private entities", solely governed by their own rules. Panckhurst J and the three other Justices ruling on the election petition instead accept that political parties in the MMP environment face legal obligations beyond those they set down for themselves through their rules. Indeed, the very existence of section 71 makes the direct application of *Peters v Collinge* inappropriate.

This is not to say, however, that every aspect of a party's activities is open to judicial review and associated public law remedies. Panckhurst J drew on Elias CJ's judgment in *Awatere Huata v Prebble*<sup>45</sup> to note that as long as the minimal statutory obligations set out in section 71 are met, "political parties are ... free to regulate how they will go about the selection of constituency candidates at general elections."<sup>46</sup> In particular, he expressly rejected the notion that the National Party board is bound to follow any special natural justice procedures before vetoing an individual's nomination, as "[t]he question is a political one"<sup>47</sup> and the National Party's own rules specifically exclude such requirements. The bench hearing Mr Payne's election petition seemingly concurred, ruling that, at the very most, the National Party board may have owed Mr Payne an opportunity to respond in writing to any adverse material presented against him.<sup>48</sup> Even this rudimentary natural justice obligation was questionable, however, given the highly politicised nature of the decision the board must take.<sup>49</sup>

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44 Raymond Miller *Party Politics in New Zealand* (Oxford University Press, Auckland, 2005) 101.

45 *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC). For a discussion of the issues involved in this case, see Andrew Geddis "Proportional Representation, 'Party Hopping' and the Limits of Electoral Regulation: a Cautionary Tale from New Zealand" (2006) 34 *Common Law World R* 24.

46 *Payne v New Zealand National Party*, above n 32, para 58 (HC) Panckhurst J. Panckhurst J also approvingly cited Fisher J's observation in *Peters v Collinge* that the decision of a party whether or not to appoint a candidate is subjected to "relatively little constraint" and that "[i]t is essentially a political question in which one would expect a robust level of discussion, lobbying and preconception". *Peters v Collinge*, above n 7, 568.

47 *Payne v New Zealand National Party*, above n 32, para 76 (HC) Panckhurst J. But see Caroline Morris "Political Parties and Natural Justice" [2008] NZLJ 399.

48 *Payne v Adams*, above n 38, para 114 (HC) Randerson CJ, Alan and French JJ citing the observations of Fisher J in *Peters v Collinge*, above n 7, 568 (HC).

49 *Payne v Adams*, above n 38, para 114 (HC) Randerson CJ, Alan and French JJ citing the observations of Panckhurst J, above n 49 and accompanying text.

The point this part aims to establish, therefore, is that significant aspects of political parties' activities now must conform to a set of state-mandated restrictions (even if these restrictions are not unduly onerous in application). Parties can no longer operate as wholly self-defining entities that choose their own internal rules and procedures; not, at least, if they wish to contest the all-important party vote under MMP. They must instead abide by a set of prescriptive legal requirements, which demand that these organisations must: meet certain threshold requirements before being able to formally register their existence as political parties and compete for the all-important party vote at election time; 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 part considers what connection this change in the regulatory treatment of political parties-as-institutions has with the introduction of MMP.

#### ***IV DID MMP CAUSE THE REGULATION OF NEW ZEALAND'S POLITICAL PARTIES?***

An obvious, but ultimately unsatisfactory, 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. Margaret Wilson, for example, has commented that:<sup>50</sup>

The primary importance of MMP for political parties is that it has placed them centre stage. ... It is through MMP that political parties have achieved formal recognition, if not legitimisation, of their role within our constitutional arrangements.

Similarly, Raymond Miller claims that "with the advent of MMP, especially the introduction of a new type of MP, the list member, it became necessary to rewrite the electoral and party rules on candidate selection."<sup>51</sup> Certainly, it is correct that the legislative provisions now applying to political parties were part of the 1993 Act establishing MMP as New Zealand's voting system. It is true also that MMP formally recognises the critical electoral importance of political parties, with the party vote cast directly for the voter's preferred political party being (almost always) the final election outcome's main determinative factor. However, a correlation in time does not prove a cause-and-effect relationship. While the switch to MMP provided an opportunity for greater legal regulation of political party activities, it cannot be said to have necessitated such a move in the sense that MMP could not function without all of those regulations in place.

Furthermore, although it is true that the MMP electoral system provides formal recognition (via the party vote) of the primary representative role that political parties play, it was not responsible for political parties attaining this status. It is rather the case that MMP was adopted because it was

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<sup>50</sup> Margaret Wilson "Political Parties and Participation" in Alan Simpson (ed) *The Constitutional Implications of MMP* (Victoria University Press, Wellington, 1998) 168, 169.

<sup>51</sup> Miller, above n 46, 109.

judged to better reflect the already existing importance of parties, a point stressed in the 1986 Report of the Royal Commission on the Electoral System:<sup>52</sup>

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 the 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, it is strongly arguable that the decision to regulate political party activities at the time of MMP's introduction 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. This analysis is bolstered by comparing New Zealand's regulatory environment with the legal position of political parties in the United Kingdom and Canada, which retain the single member constituency, FPP voting system that New Zealand used pre-MMP.

#### ***A Regulation of Political Parties in the United Kingdom***

Even though the United Kingdom elections nominally remain a battle between individual candidates in each electorate, the combination of a Westminster system of government and national party branding means that almost every candidate's election chances hinge on his or her status as a party's nominee. Simply put, while United Kingdom voters in theory select an individual to represent their geographical constituency at Westminster, most make their choices at the ballot box primarily based upon the party a candidate represents, rather than on that candidate's personal qualities. However, before a candidate may list his or her party endorsement on the ballot paper, the party must be registered with the Electoral Commission under the Political Parties, Elections and Referendums Act 2000 (PPERA). Therefore, while the United Kingdom method of casting and counting votes does not formally recognise political parties in the same way that New Zealand's MMP system does (in that the voters go to the polls to elect individual MPs to represent their local constituencies, not political parties to govern the nation), the true state of affairs is that party registration is just as vital in both nations. The United Kingdom's registration requirements are not unduly taxing, requiring a notification of the party's office holders and filing of the party's constitution and its "financial scheme" (how it will meet the controls on party funding, discussed below).<sup>53</sup> However, the very act of registration opens the party up to further forms of regulation.

All registered political parties face controls on their election fundraising and spending under the PERA. This regulatory regime is actually more extensive than that which applies to New Zealand's parties. For example, political parties in the United Kingdom are prohibited from accepting donations of more than £200 from anyone but a "permissible source" (being, in effect, an identified

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<sup>52</sup> Royal Commission on the Electoral System "Report of the Royal Commission on the Electoral System: Towards a Better Democracy", above n 31, paras 1.8-1.9.

<sup>53</sup> The only substantive limit on registration is that the party must pay a £150 registration fee.

registered elector or a United Kingdom registered organisation).<sup>54</sup> In New Zealand, the limit on direct anonymous donations is \$1000. United Kingdom parties must file quarterly reports of all donations received or loans accepted in excess of £5000 nationally or £1000 locally.<sup>55</sup> New Zealand parties only need disclose annually donations over \$10,000, and only must disclose loans offered on less than commercial terms. United Kingdom parties face a maximum spending cap of £20 million on the "election expenses" they may incur in the 12 months preceding an election, with the definition of "election expenses" being significantly wider than that adopted in New Zealand.<sup>56</sup> Furthermore, mandatory financial disclosure requirements apply to candidates in internal party leadership contests in the United Kingdom.<sup>57</sup> In New Zealand, such matters remain purely an issue for each party to regulate as it sees fit.

Finally, while the PPERA does not impose statutory duties on United Kingdom parties when they select candidates (as does section 71 of the New Zealand 1993 Act) these matters nevertheless have become the subject of increasing legal attention. In a recent article,<sup>58</sup> Caroline Morris recounts various attempts to use United Kingdom employment law to challenge party selection decisions – an avenue of attack seemingly now foreclosed by the House of Lord's decision in *Watt v Ahsan*.<sup>59</sup> Rather than the matter devolving to a simple matter of contract between the party and prospective candidate, however, she advocates that the courts should now adopt a "public law model" of regulation.<sup>60</sup>

Under a public law model, parties would perform their candidate selection activities under the terms of their agreed rules but according to public law standards. ... It would require parties to conform to public law standards of lawfulness, fairness and proper exercise of their discretion in choosing candidates.

Similarly, Keith Ewing has recently proposed that in exchange for increased public funding of their activities, political parties should be required by legislation to adopt a "Charter of Members' Rights" setting out.<sup>61</sup>

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54 Political Parties, Elections and Referendums Act 2000, s 51.

55 Ibid, s 62.

56 Ibid, ss 72-79.

57 Ibid, schedule 7.

58 Caroline Morris "Conceptualising Candidate Selection in the Courts: Where to after *Watt v Ahsan*?" [2008] Public L 415.

59 *Watt v Ahsan* [2007] UKHL 51.

60 Morris "Conceptualising Candidate Selection in the Courts: Where to after *Watt v Ahsan*?", above n 61, 427. See also Morris "Political Parties and Natural Justice", above n 49.

61 KD Ewing *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing, Oxford, 2007) 247-248.

[D]emocratic procedures for policy-making and the selection of the party leader; open and inclusive procedures for the selection of parliamentary and other candidates; internal party elections for all nominations to the House of Lords (so long as seats are to be filled by the nomination of party leaders); and fair disciplinary rules and procedures for those who offend against the party rules and practices.

Consequently, the felt need for external controls on how political parties engage in activities such as candidate selection appears to be as strong in the United Kingdom's FPP electoral environment as it is in New Zealand's MMP one.

### ***B Political Party Regulation in Canada***

As is the case in New Zealand and the United Kingdom, Canada imposes no express requirement to register an organisation as a political party, but this step is practically required of all serious electoral contestants. Unlike New Zealand and the United Kingdom, however, the Canada Elections Act 2000 defines a political party as "an organization one of whose fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election."<sup>62</sup> Any such organisation can register with the Chief Electoral Officer as a "political party" if it has 250 members who are registered electors and it stands at least one candidate in a general election.<sup>63</sup> Registration then requires that the party comply with a number of organisational mandates, including having at least three officers in addition to the leader of the party, a registered agent and an auditor. Registered parties must also provide a range of information to the Chief Electoral Officer, including an audited statement of the party's assets and liabilities within six months of becoming registered, an audited return on financial transactions within six months of the end of each fiscal period and (every three years) the names and addresses of 250 electors and their declarations stating that they are members of the party. A failure to abide by any of these statutory requirements is grounds for removing the party from the register of political parties.

In practice, then, Canada's requirements to register as a political party are significantly more onerous than those of either New Zealand or the United Kingdom. However, failing to register as a party puts any electoral contestant at a distinct disadvantage. Only a registered party may place its name on the ballot paper beside the name of its candidates, while registration also protects the party's name from appropriation by other groups. Furthermore, registered parties enjoy considerable benefits under Canada's system of public financing for elections. A registered party may issue official income tax receipts for monetary contributions, which contributors to that party may use to obtain a tax credit to offset their donation.<sup>64</sup> A candidate endorsed by a registered party may transfer

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62 Canada Elections Act 2000 c 9, s 2.

63 These registration requirements were adopted in the shadow of the Supreme Court's ruling in *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912.

64 Income Tax Act 1985, c 1.

any post-election surplus funds back to the party, while all other candidates are required to remit surplus funds to the state.<sup>65</sup> Any registered party that wins at least 2 per cent of the valid votes cast nationally, or at least 5 per cent of the valid votes cast in the electoral districts in which it endorsed a candidate, qualifies for a refund of 50 per cent of its election expenses paid, as well as an annual allowance equivalent to Can\$1.75 per valid vote obtained.<sup>66</sup> Consequently, registration not only gives an organisation a privileged position in respect of accessing the ballot paper, it also provides it with significant financial advantages.

Offsetting these advantages are the considerable restrictions registered parties face on additional private fundraising for, and overall spending on, their election campaigns. Parties may only accept donations from identifiable Canadian citizens or permanent residents,<sup>67</sup> with a cap of Can\$1100 per year on donations from any one individual.<sup>68</sup> Anonymous donations in excess of Can\$20 are prohibited. It is unlawful for an individual to pass on a contribution on behalf of a person or organisation not permitted to make that contribution directly to the party.<sup>69</sup> In short, the law only allows Canadian political parties to raise funds from individual Canadians, in small amounts, which must be recorded carefully and disclosed annually to Elections Canada. Constraints also apply to political party election spending, with each party subject to an overall spending cap determined by the number of registered voters in those electoral districts in which the party is standing a candidate.<sup>70</sup>

What is more, there are regulatory restraints on how those wishing to become a candidate for, or leader of, a registered political party may finance their campaigns. While there is no specific legislative command as to the method parties must use to select their leaders, a party wishing to hold a leadership contest must inform Elections Canada of the beginning and end dates of that contest. Any person wishing to take part in the contest also must register his or her candidacy with Elections Canada and abide by strict financial reporting rules, as well as limits on fundraising and spending, to win the contest.<sup>71</sup> Equally, the result of any nomination contest or "competition for the selection of a person to be proposed to a registered party for its endorsement as its candidate in an electoral district" must be reported to Elections Canada within 30 days of its completion. Individual

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65 Canada Elections Act 2000 c 9, s 471.

66 Canada Elections Act 2000 c 9, ss 435-435.01. This formula was recently upheld by the Ontario Court of Appeal in *Longley v Canada (Attorney General)* [2007] ONCA 149.

67 Canada Elections Act 2000 c 9, s 404.

68 *Ibid*, s 405.

69 *Ibid*, s 405.2.

70 *Ibid*, s 422.

71 *Ibid*, ss 435.03-435.07.

candidates in the nomination contest must also abide by fundraising and spending limits and make a financial report to Elections Canada.

Beyond the above (and quite prescriptive) registration requirements and controls on party financing, Canadian law is otherwise silent as to how political parties may conduct their activities. The Canada Elections Act 2000 does not contain any provisions governing matters such as how parties must select candidates or develop policy, leaving them free to adopt whatever processes and procedures they wish to deal with these matters. This *laissez-faire* approach recently found a judicial echo in *Knox v Conservative Party of Canada*<sup>72</sup> in which the Alberta Court of Appeal refused to judicially review a political party's selection process. The Court ruled that:<sup>73</sup>

Neither constituency associations nor political parties are given any public powers under the *Canada Elections Act*, S.C. 2000, c. 9. They are essentially private organizations. It is true that their financial affairs are regulated: they may only give tax receipts in certain circumstances, and they may only spend the money they raise in certain ways. However, merely because an organization is subject to public regulation does not make it a public body subject to judicial review. It is argued that the democratic process, elections, and the activities of political parties are of great public importance. That is undoubtedly true, but public importance is not the test for whether a tribunal is subject to judicial review. When arranging for the nomination of their candidate ... [the Party was] essentially engaged in private activities, and [its] actions, in this case, are not subject to judicial review.

Consequently, the only remedy for the disgruntled party members lay in the (quite detailed) arbitration provisions contained in the Conservative Party's constitution, which could in turn only be reviewed on the very limited grounds contained in Alberta's Arbitration Act 2000.

However, the Alberta Court of Appeal also turned its mind to what approach would be appropriate where a party's constitution did not contain such arbitration provisions:<sup>74</sup>

In such cases, the Court might be prepared to infer certain basic procedural protections, and in the absence of any specific remedial procedure, the courts would undoubtedly use their general jurisdiction to provide the relief to which the parties are entitled.

It might, therefore, be the case that the Court's refusal to apply broad judicial review remedies to this internal dispute rested more on its satisfaction that the Conservative Party itself had adopted appropriate protections for individual candidates and members, rather than a general principle that political parties can act however they wish when choosing candidates. In short, parties remain free to structure their dispute settlement procedures as they choose – provided that this choice accords with what the judiciary believes to be "certain basic procedural protections".

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72 *Knox v Conservative Party of Canada* [2007] 286 DLR (4<sup>th</sup>) 129.

73 *Ibid*, paras 26-27, Berger, Watson and Slatter JJ (Alberta CA).

74 *Ibid*, para 63, Berger, Watson and Slatter JJ (Alberta CA).

## V *WHY THE DESIRE TO REGULATE PARTIES?*

The above, admittedly brief, comparison of the legal regulation applied to political parties in New Zealand, the United Kingdom and Canada suggests that any claim that the move to MMP "caused" a change in the legal status of New Zealand's parties is overly simplistic. At the least, such an account fails to explain why political parties in the FPP electoral environments of the United Kingdom and Canada now face forms of legal regulation that have marked similarities to those in New Zealand and which in some cases are far more demanding. This fact suggests that the felt need to impose legal controls over the activities and procedures of political parties appears to have arisen independently of the particular voting system used in each society. It is, then, less the case that the move to MMP in New Zealand made political parties more important in the electoral system and so gave reason to regulate them; rather, that the general importance of political parties in the electoral system, which led to MMP in New Zealand, gives reason to regulate them. What particular factors might lie behind this generalised move to regulate parties through legal means?

A broad-brush answer is that all three jurisdictions have experienced disillusionment with what Bryce Edwards describes as the "civil society" model of political party regulation.<sup>75</sup> This term refers to a reliance on mechanisms such as membership activism, scrutiny by academics and the media and final electoral approval (or disapproval) of particular practices to check or control undesirable behaviour by political parties, without recourse to formal state intervention. Explaining what lies behind each nation's turn away from this model of regulation requires a complete article in itself, investigating the particular socio-political background in which it has occurred. Some salient points in the New Zealand context might be:

- (a) a recognition that political parties-as-institutions have a decisive influence over both which individual candidates will win (or lose) at election time and then form the nation's government (as exemplified by the 1986 Report of the Royal Commission on the Electoral System);
- (b) an increased public mistrust of elected representatives (and the parties they represent) arising from the economic and social reforms of 1984 to 1993;
- (c) a breakdown in conventional understandings between political actors as to what constitutes "appropriate" forms of electoral behaviour;
- (d) the unravelling of the traditional class-based allegiances (and membership bases) underpinning the Labour and National Parties; and
- (e) the uncovering of potentially scandalous forms of behaviour (such as allegations that wealthy business donors funded Labour's 1987 election campaign, then benefited from Labour's subsequent policy of state asset sales).

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75 Bryce Edwards "State Intervention in the Democratic Process" [2008] NZLJ 101, 104.



Beyond these *sui generis* factors, I suggest, lies a common shift in the legal thinking of each nation. In recent years, their legal cultures have become much more suspicious of the existence of unchecked or discretionary areas of public decision-making power. We can see this shift occur in developments such as the expansion of judicial review of administrative decision-making (both in terms of the grounds on which review will be based and the sorts of decisions that will be reviewed); the extension of statutory control over government agencies and public bodies; and the introduction of human rights instruments such as the Canadian Charter of Rights and Freedoms,<sup>76</sup> the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Adam Tomkins describes such developments as a general move towards replacing political forms of accountability and dispute resolution with a "legal constitutionalist" approach in which legal rules and oversight by judicial bodies are seen as necessary to discipline and hold accountable all public actors and institutions.<sup>77</sup> It seems that the political parties in all three countries simply have become caught up in the tide of legal change, in the sense that they are not seen as particularly different to any other nexus of public powers or as "special cases" that should remain free from the law's gaze. One may always query whether this assumption is correct.<sup>78</sup> But for the present, it appears to have become the dominant one.

This article, then, finishes on a questioning note. If it is the case that the decision to regulate (or not to regulate) political parties arises independently of the type of voting system used in a country, then MMP cannot be used as a simple, complete explanation or justification for New Zealand's existing regulatory system. This (admittedly simple) point then suggests two future lines of enquiry, which might prove fruitful for any student of politics or law looking for a postgraduate research topic. The first is to trace more precisely the reasons why New Zealand has adopted its current regulation of political parties and to identify what background socio-political conditions made those reasons seem so pressing. Why has it seemed necessary from the mid-1990s onwards to treat political parties as semi-public entities that require legal constraints on their operation?

The second question of interest is whether the regulatory framework New Zealand has chosen to adopt is appropriate. How does it conceive of political parties and does it properly recognise what these institutions are and how they operate in the contemporary political environment? What impact might the imposition of more extensive forms of legislative regulation have on the operations of political parties or what effect might judicial decisions to treat political parties as quasi-public entities have on their activities? Are such moves to be welcomed as necessary constraints on the otherwise unaccountable nexus of public power or do they threaten an undesirable "juridification" of

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76 Canadian Charter of Rights and Freedoms RS 1982 c C-00.

77 Adam Tomkins *Our Republican Constitution* (Hart Publishing, Oxford, 2005) vii.

78 Edwards "State Intervention in the Democratic Process", above n 80.

essentially political matters?<sup>79</sup> These sorts of questions remain very much alive in the New Zealand context<sup>80</sup> and may become even more pressing in light of the current review of the law relating to political party funding.<sup>81</sup>

These matters are raised with no particular insight into how they might be answered. As is said, others now may wish to take up the challenge.

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79 See Graeme Orr "The Law Comes to the Party: The Continuing Juridification of Political Parties in Australia" (2000) 3 Constitutional Law and Policy Review 41 and Graeme Orr "Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?" (2001) 12 Public LR 89.

80 See Morris "Political Parties and Natural Justice", above n 49.

81 Ministry of Justice, Electoral Finance Reform (accessible at [www.justice.govt.nz/electoral-finance-reform/review-about](http://www.justice.govt.nz/electoral-finance-reform/review-about)).