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Reconstituting the Constitution

 Springer

Although MMP ensures that voters' party preferences are proportionally reflected in the party composition of Parliament, ultimately, the demographic characteristics of Parliament are determined more by the political parties themselves through their choice and ranking of candidates.⁷⁹ The role of the voter should not be underestimated either. By encouraging the electoral participation of ethnic minorities such as Māori and Pacific Islanders, who have traditionally had lower rates of voter turnout in New Zealand's voluntary voting system, there is considerable potential for these groups to increase their representation in Parliament.

There is other evidence that both voters and politicians are becoming more sophisticated in dealing with MMP as time goes by. Although some degree of instability in voting patterns and party affiliations is to be expected during times of electoral reform, an increased level of stability is likely as New Zealand further adjusts to its new electoral system. So far New Zealand's experience has been consistent with this.⁸⁰ Despite a shaky start to MMP, marked by disagreements and stand-offs between National and its New Zealand First coalition partner, there is evidence that politicians are learning from their mistakes and coming to grips with managing the new parliamentary environment.⁸¹ Patterns of coalition management indicate that parties are adapting to more consensual arrangements, and innovations such as the "agree-to-disagree" clause in coalition agreements, pre-election coalition pacts between parties, and explicit arrangements on "confidence and supply" have reduced the likelihood of coalitions collapsing mid-term.⁸² An initially high rate of party defections has also dropped off significantly, and if the German experience with MMP is anything to go by, they should continue to drop further in the future.⁸³

Trends in vote wastage and vote splitting support indicate that New Zealand voters are progressively learning how to make MMP effectively work for them also. In 2005, "wasted" party votes, or votes cast for parties that receive no seats in Parliament, were less than a quarter of the 1996 level, while the wastage of electorate votes over the same period was halved. There was a big increase in the wasted party vote in 2008, presumably owing much to the failure (just) of the New Zealand First Party to reach the 5% threshold or to win a seat so as to make all of its party votes count. All other trends were consistent, however.

This evidence is consistent with the experiences of other countries with similar electoral systems such as Germany, where it was found that over time voters learnt not to waste their votes, and the level of disproportionality dropped close to zero.⁸⁴

⁷⁹ Goldstone and Wilson (2005), p. 5.

⁸⁰ Levine et al. (2007), p. 462.

⁸¹ James (1999), p. 28.

⁸² Boston (2006).

⁸³ Levine et al. (2007), pp 468–472.

⁸⁴ Ibid, p. 471.

12.6 Conclusion

As New Zealand moves further into its new electoral era, and calls are being made for MMP to be reviewed, it is instructive to consider the changes that have resulted from having a proportionally representative electoral system. After 14 years, it is undeniable that the move to MMP has resulted in an increase in the representation of different groups and interests in New Zealand's legislative chamber, leading to record numbers of women, Māori, Pacific Island and Asian MPs. This has almost certainly occurred more quickly than it would have if the voting system had not been changed. Public trust and confidence in the country's political system has also improved. MMP has also changed the policy environment in New Zealand, with different patterns of representation resulting in the need for greater consultation and negotiation, the strengthening of parliamentary select committees, and a more complicated policy environment slowing down the legislative process. MMP has evolved significantly since its adoption in 1996. I hope it will be allowed to continue to do so, and not simply because of its potential to make the House of Representatives truer to its name.

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Chapter 13

The Future of Electoral Law

Philip A Joseph

13.1 Introduction

This session is titled: “The Future of Electoral law (including Māori seats, MMP, fixed term, term of Parliament, and campaign finance)”. I will address the first four topics (the Māori seats, MMP, fixed term, and the term of Parliament) but not the last one (campaign finance). Campaign finance is a complex issue warranting undivided examination in its own right. For the topics I examine, I will flag the issues and arguments for discussion rather than attempt a deliberative examination of them. This conference is intended to stimulate an exchange of views to ascertain whether a consensus can be reached on proposals for reform.

In this paper, I make certain predictions about the future of our electoral laws. A recent poll, ShapeNZ Survey, conducted by the New Zealand Business Council for Sustainable Development, throws into question two of those predictions.¹ These concern the future of Mixed Member Proportional (MMP) representation as the method of electing our Parliaments, and the prospect of extending Parliament’s term to 4 years. I predict the retention of both MMP and the current 3-year parliamentary term but these polls suggest otherwise. These polls suggest that the voting public would be receptive to a new electoral system and an extended parliamentary term.

These poll results throw up two questions: Were they “rogue” results? Was the poll scientifically conducted? One cannot be certain as to the first question but can

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¹ ShapeNZ (2010). The poll was conducted during the period 20–30 July 2010. The full poll results are available from the website of the New Zealand Business Council.

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be reasonably confident as to the second: the poll appears to be statistically sound based on the standard criteria. An independent research company verified its methodology as complying with the standard criteria for producing optimal or reliable poll results.² Consequently, readers must make an informed choice whether to plump for predictions based on instinctive judgement or statistical predictive data. Are the latter (statistical predictive data) necessarily more accurate or reliable than the former instinctive judgement? A Prime Minister once famously quipped, “Bugger the pollsters”, when the elections failed to deliver what the polls had promised.³ The results of the New Zealand Business Council poll are recorded below in examining the prospects of MMP and the 3-year parliamentary term, and in discussing further aspects of the MMP system.

13.2 The Māori Seats

13.2.1 *Origin of the Seats*

I propose the abolition of the Māori seats.⁴ Four separate seats were introduced in 1867 as a temporary expedient to enfranchise Māori.⁵ That arrangement was intended to last for 5 years under a statutory sunset clause. The object was to allow the Native Land Court to convert communal Māori land tenure into Crown grants that could satisfy the property qualification for the right to vote. But the freeholding of Māori land proved more intricate and time-consuming than expected, and the four seats were retained for a further 5 years,⁶ then indefinitely.⁷ The seats were to remain in existence until the General Assembly determined they should go.

Through neglect and indifference last century, the seats became a permanent feature of the electoral landscape. One commentator wryly commented that separate Māori representation “stumbled into being”.⁸ The Māori electorate seats were retained under each successive electoral Act and are currently constituted under the

²The research company, Tasman Research and Consultation, PO Box 10–111, Auckland 1446, verified the polls conducted by the New Zealand Business Council (including the poll (ShapeNZ 2010)). The research company’s first report on the polls was dated 26 March 2008; its second report was undated. Both reports are available on the New Zealand Business Council’s website.

³Former National Prime Minister, Jim Bolger, on election night following the November 1993 general election. The polls had predicted a comfortable victory for the incumbent National Government but, at the elections, it won just 50 of the 99 seats in Parliament.

⁴Joseph (2008); Joseph (2009a); Joseph (2009b), pp. 124–129.

⁵See the Māori Representation Act 1867.

⁶See the Māori Representation Act Amendment and Continuance Act 1872.

⁷See the Māori Representation Acts Continuance Act 1876, which provided that the 1867 Act would remain in force until expressly repealed by Act of the General Assembly.

⁸Ward (1995), p. 209.

MMP statute.⁹ That Act now provides for the number of Māori seats to increase or decrease following each census, depending on the number of Māori who register on the separate Māori roll. The Māori seats increased to five in 1996, to six in 1999, then to seven in 2002.

13.2.2 Symbolic Significance

What is the case for retention of the Māori seats? Some see in the seats an enduring symbolism anchored to the concept of biculturalism and the constitutional position of Māori as tangata whenua. Co-leader of the Māori Party, Tariana Turia, criticised the recommendation of the Royal Commission on the Electoral System when it proposed that the Māori seats be abolished if New Zealand adopted the MMP electoral system.¹⁰ For Turia, the commission's recommendation cynically discounted the symbolic power and significance of the seats.¹¹ The separate seats were "synonymous with the indigenous voice [of Māori], and a legitimate means of meeting the Crown's treaty obligations".¹² This view comported with the observation of the Royal Commission, that Māori regarded the separate seats as "an important concession to, and the principal expression of, their constitutional position under the Treaty".¹³

For many, the seats have symbolic significance as expressions of biculturalism and entitlement under the Treaty of Waitangi. However, what significance should we take from this? Symbolism is the disembodied voice of the body politic. When argument of national significance is mounted on symbolism, national discourse has no necessary starting and finishing points (book ends neatly containing national conversations). Symbolism appeals to individuals' or groups' emotions and personal predilections and biases. It has little or nothing to do with logic or reason and cannot be used to substantiate arguments of national significance. A more clinical approach is needed to address the logic of the argument about the retention of the seats.

13.2.3 Abolition of the Seats

The case for abolition can be reduced to four propositions: the seats are anachronistic; they institutionalise Māori separatism; they undermine the effectiveness of Māori representation in national politics; and they skew MMP proportionality

⁹ Electoral Act 1993, ss 45 and 269 providing for Māori representation and the compilation of the Māori roll following each census.

¹⁰ Royal Commission on the Electoral System (1986).

¹¹ Turia (2009).

¹² Ibid.

¹³ Royal Commission on the Electoral System (1986), p. 86.

through “overhang”.¹⁴ The seats are an electoral leg-iron for Māori. They guarantee a Māori presence in Parliament but thwart real and effective Māori representation through the MMP political system.¹⁵ Māori participation in national politics would be better served through integration of Māori members of Parliament in the political mainstream. More electoral energy should be directed at Māori candidates standing for the general electorate or list seats, rather than separate, numerically-capped Māori seats.

In my earlier research, I concluded that the Māori seats were unnecessary under MMP to secure the effective representation of Māori.¹⁶ This conclusion mirrored the finding of the Royal Commission, which had recommended MMP as the electoral system to replace first-past-the-post (FPP).¹⁷ It recommended that, under the proposed list system, Māori would achieve effective representation in Parliament without need of the Māori seats. The Commission predicted that MMP would encourage all parties to compete for Māori votes by placing able Māori candidates high on the party list.¹⁸

The Royal Commission emphasised utilitarian reasons for ending separate Māori representation. These reasons were aimed at bringing “Māori” issues into the mainstream of national politics. The separate seats had had deleterious effects: namely, ring-fencing Māori issues, isolating Māori members within Parliament and marginalising Māori representation within the numerically dominant culture.¹⁹ Abolishing the seats, the commission believed, would increase the number of Māori members of Parliament holding general seats (list and electorate) and would encourage political parties to promote Māori interests, as part of the national political agenda.

MMP created a further reason why separate Māori representation should be abolished: the seats cast a blight on the principle of proportionality. The Māori seats lead to “overhang” of Parliament’s membership through vote-splitting in the Māori electorates. On experience to date, the Māori Party will continue to win more Māori electorate seats than it would be entitled to under its share of the national party vote. In the Parliament elected in 2008, there are 122 members, not 120 as envisaged by the legislation. The Māori Party won five of the seven Māori electorate seats on a party vote that entitled it to three seats.²⁰ In the previous Parliament (2005–2008), there were 121 members, with the Māori Party winning four Māori electorate seats

¹⁴ Joseph (2008). “Overhang” is the term used when a party wins more electorate seats than its share of the party vote entitles it to, giving the party a “disproportionate” number of seats and Parliament an inflated overall membership.

¹⁵ For discussion of the issues, see McGuinness (2010).

¹⁶ See Joseph (2008); Joseph (2009a); Joseph (2009b), pp. 124–129.

¹⁷ Royal Commission on the Electoral System (1986).

¹⁸ See Wallace (2002), p. 734. Sir John was a member of the Royal Commission that recommended the abolition of the Māori seats in an MMP environment.

¹⁹ Royal Commission on the Electoral System (1986), pp. 90–91.

²⁰ See Joseph (2009c), p. 520.

on a party vote entitlement of three seats.²¹ Overhang undermines the integrity of MMP as a proportional electoral system. A party that wins a disproportionate number of electorate seats retains the seats for the duration of the Parliament. The success of the Māori Party in the Māori seats is likely to institutionalise this feature of the electoral system.

13.2.4 *The Utilitarian Argument*

At the 2000 conference, *Building the Constitution*, one participant rejected the Western political ideal of “one person, one vote, one value”, and claimed, as a general proposition, that political participation under universal suffrage had repressed Māori aspiration.²² That participant defended the Māori seats, as a backstop against further erosion of the voice of Māori in national politics. Let us unpack that proposition, because in 1986 the Royal Commission recommended to opposite effect. It resolved that the Māori seats had inhibited Māori over a long period of time, and that Māori would gain more effective representation through full engagement with the opportunities MMP offered. Nearly quarter of a century on, the literature confirms those views. An extensive study on Māori representation, published in July 2010, recorded that the seats compromised the effectiveness of Māori political representation and operated as a numerical cap on the seats Māori might hold. The following two paragraphs encapsulate the study’s conclusions:

Separate seats perpetuate a perception that Māori representation is something to be addressed within the Māori electorate seats, and is therefore of less relevance to general roll electors and political parties that do not campaign heavily in the Māori electorates. It is clear, however, that policy outcomes that benefit Māori are relevant to all New Zealanders, as positive outcomes for Māori ultimately benefit the nation as a whole (e.g. through reduced inequalities, a richer culture and improved social outcomes).

Any minority party which solely campaigns for the Māori electorate vote inherently limits the maximum level of representation they may gain in the House of Representatives. This is based on the assumption that the number of Māori electorate seats will operate as a cap on the number of seats such a party may win.²³

13.2.5 *Voter Behaviour*

The separate seats are ritually lauded as promoting Māori representation in Parliament when the evidence is to opposite effect. It is very likely that removing the seats would change voter behaviour and promote the electoral prospects of the

²¹ See Joseph (2006), p. 125.

²² See Joseph (2007), pp. 79–80.

²³ McGuinness (2010), p. 109.

Māori Party in particular, as the distinct voice for Māori in the MMP Parliament. At the 2008 elections, 78% of voters of Māori descent on both rolls gave their party vote to a party other than the Māori party.²⁴ The electoral incentives encouraged that behaviour. Voters split their party and electorate votes knowing that the Māori Party would gain representation through the separate seats. However, removing the seats would place in issue the party's survival. Without the seats, the incentives for vote-splitting would be removed and Māori voters would be encouraged to give their party vote to the Māori Party. If the Māori Party campaigned on the party vote, I believe it would broaden its electoral base and win more seats in Parliament than the numerically-capped Māori seats could offer.

The 2010 study quoted above endorsed those predictions. A common assumption is that removing the Māori seats would reduce Māori representation in Parliament and disadvantage the political voice of Māori. However, the 2010 study concluded otherwise. In the current Parliament, 20 members are of Māori descent, representing 16.4% of Parliament's membership. This percentage is roughly equivalent to the proportion of the national population who identify as Māori. The study concluded that, if the Māori seats had been abolished, there would still have been at least 20 Māori members elected in the general seats (list and electorate).²⁵ The study predicted that removing the seats would change the voting behaviour of Māori voters, who would be incentivised to ensure continuing Māori Party representation in Parliament. Voters would no longer split their vote and gift their party vote to another party.

Removing the seats would likely alter the electoral calculus in another way also: the full integration of Māori members of Parliament would assimilate issues of particular concern to Māori within the national political agenda. Māori representation would be enhanced in qualitative ways, beyond a simple head-count of members of Parliament who identify as Māori. Under the current system, national politics tend not to embrace specific concerns to Māori unless they are specifically mandated under confidence and supply arrangements. The repeal of the Foreshore and Seabed Act 2004, for example, was made an issue of national importance under the support agreement that the Māori Party negotiated with the Key Government, following the 2008 elections. The repeal of this Act was the condition on which the Māori Party pledged its support for the National Government on confidence votes.

13.2.6 The Treaty Argument

Contrary to some assertions, no argument for retention of the seats can be mounted on the Treaty of Waitangi. Some arguments advance the concepts of fiduciary duty, utmost good faith and active protection, as establishing the justification for separate

²⁴ Ibid, p. 109.

²⁵ Ibid, p. 109.

Māori representation. These concepts are now commonly associated with the principles of the Treaty as expounded in the landmark *Lands* case.²⁶ The Waitangi Tribunal, in particular, has promoted the concept of active protection as justification for the separate seats. The principles of the Treaty, the Tribunal observed, “could be seen as entitling Māori to a measure of autonomy, including separate Māori representation in the New Zealand Parliament”.²⁷

Those views are representative of many who argue that separate representation is a constitutional entitlement. But does the argument withstand scrutiny? Closer examination of the Tribunal’s reasoning reveals there are problems with it. The Tribunal proffered the following:

[T]he Crown is under a Treaty obligation actively to protect Māori citizenship rights and in particular existing Māori rights to political representation conferred under the Electoral Act 1993. This duty of protection arises from the Treaty generally and in particular from the provisions of Article 3.²⁸

What does it mean to state that the duty of protection arises “from the Treaty generally”? What does “the Treaty *generally*” mean? That the Treaty has meaning and significance beyond its text and purpose? If that is what was intended, then the Tribunal should have said so. The Treaty might be manipulated, manoeuvred or twisted to promote whatever political cause one might advance. Reasoning of this nature is disingenuous and unconvincing. One might properly acknowledge the inherent ambiguity and uncertainty that characterise the Treaty text and jurisprudence that has developed around it. Legal formalism cannot substitute for the politico-legal judgements that distinguish this complex and evolving area of law. But there is ultimately a starting point to discussions about the Treaty, and that is the Treaty text itself. The text ultimately anchors the meanings we may bring to its clauses. To refer to the Treaty *generally* does not elucidate the Treaty’s meaning; it is a vague allusion and arm-waving exercise. The Tribunal claims the imprimatur of the Treaty but does not engage its provisions or draw any nexus from them.

Nor does the second string to the Tribunal’s bow support its case. The duty of protection, the Tribunal said, arises *in particular* under Art. 3. How might this be? Article 3 reads: “Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection and imparts to them all the Rights and privileges of British Subjects.”²⁹ Article 3 inveighs against, not in support of, separate electoral representation based on ethnicity. Sir Tipene O’Regan termed Art. 3 the

²⁶ See *New Zealand Māori Council v A-G* [1987] 1 NZLR 641 (HC & CA) (the *Lands* case), which pronounced for the first time the principles of the Treaty of Waitangi. See Joseph (2007), pp. 70–73.

²⁷ Waitangi Tribunal (1994), Chap. 2.1.

²⁸ *Ibid*, Chap. 5.1.

²⁹ Under the separate and divisible Crown, the term “British subjects” translates as meaning “New Zealand citizens”. See Joseph (2007), pp. 586–591 for the evolution of the separate and divisible Crown in right of New Zealand.

Treaty's "equity package".³⁰ It gave Māori, he wrote, "no greater and no lesser rights in social and legal terms than [were] available to the general populace".³¹ Electoral rights are Art. 3 rights. Such rights are rights of New Zealand citizens, which include Māori. Māori have the right to participate fully in the electoral process ("no lesser rights") but on no more favourable terms ("no greater rights"). Professor Sir Hugh Kawharu endorsed this interpretation of Art. 3 in his translation of the Māori text of the Treaty. He read Art. 3 as conferring on "all the ordinary people of New Zealand . . . the same rights and duties of citizenship as the people of England".³²

The Treaty does, in terms, mandate the duty of active protection owed by the Crown to Māori. But this duty arises under Art. 2, not Art. 3 as the Tribunal claimed. Article 2 guarantees Māori customary property rights, not electoral rights. It guarantees Māori "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties". In the *Lands* case, the Court of Appeal identified the Crown's duty as extending to "active protection of Māori people in the use of their lands and waters to the fullest extent possible".³³ If one were to transpose the duty of active protection from Art. 2 to Art. 3, then the Treaty might furnish a justification for separate Māori representation under the universal franchise. But no transposition is possible; it is 170 years too late to rewrite the Treaty.

13.2.7 *The Entrenchment Argument*

Some have proposed entrenching the Māori seats as a hedge against their future abolition. The Māori Party and the Green Party have each endorsed this proposal, although the Māori Party has said it will not pursue the matter during the current parliamentary term (citing its confidence and supply agreement with the National party).³⁴ In the 2001 select committee review of MMP, several submitters claimed special sanctity for the seats and recommended they be protected under the reserved sections of the Electoral Act 1993.³⁵ Similar proposals may be expected at this conference but the argument for entrenchment can be answered quite simply.

For ascertaining legitimate subjects of entrenchment, lawyers draw a rudimentary distinction between constitutional process and contestable policy. The former may be legitimately the subject of constitutional entrenchment, the latter not.

³⁰ O'Regan (1995), p. 178.

³¹ Ibid, p. 178.

³² Translation as reproduced in *New Zealand Māori Council v A-G* [1987] 1 NZLR 614, 662–663 (CA).

³³ *New Zealand Māori Council v A-G* [1987] 1 NZLR 614, 664 per Cooke P.

³⁴ McGuinness (2010), p. 83.

³⁵ MMP Review Committee (2001), p. 24.