WORKING PAPER 2

Te Oranga o te Iwi Maori:
A Study of Maori Economic and Social Progress

The Maori Seats in Parliament

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NEW ZEALAND BUSINESS ROUNDTABLE
MAY 2008

National Library of New Zealand Cataloguing-in-Publication Data

Joseph, Philip A. (Philip Austin)
The Maori seats in Parliament / by Philip A. Joseph.
ISBN 978-1-877394-18-8
1. New Zealand. Parliament.
2. Representative government and representation—New Zealand.
3. Maori (New Zealand people)—Politics and government—21st century.
4. Maori (New Zealand people)—Government relations.
I. New Zealand Business Roundtable. II. Title.
III. Te oranga o te iwi Maori.
328.93008999442—dc 22

First published in 2008 by
New Zealand Business Roundtable
PO Box 10–147
The Terrace
Wellington
New Zealand
http://www.nzbr.org.nz
ISBN 978–1–877394–18–8 (print)
ISBN 978–1–877394–19–5 (online)

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Introduction

This essay proposes the abolition of separate Maori representation in parliament. The Maori seats were introduced in 1867 as a temporary measure but soon became a permanent feature of the constitutional landscape. This paper revisits the separate seats 140 years on and finds their justification wanting. The Maori seats survived through indifference and neglect last century after the introduction of the full adult franchise had exhausted their original purpose. The under-representation of Maori in parliament under the first-past-the-post (FPP) voting system provided some belated justification for their retention. However, that justification disappeared, too, when the mixed-member proportional (MMP) electoral system was introduced in 1996. Proportional voting broadened the range of sectional interests represented in parliament and ended the need for separate Maori seats.

This essay advances four propositions: (a) the separate seats are unnecessary to secure effective representation of Maori, (b) the seats entrench a form of historical paternalism that removes Maori issues from the mainstream political agenda, (c) the retention of the seats under MMP represents an insidious form of reverse discrimination and (d) the seats invite 'overhang' and the potential to undermine the expressed will of the people. This paper also examines two arguments that are related to the argument for abolition, that: (a) separate representation for Maori is a right guaranteed under the Treaty of Waitangi and (b) the seats, rather than be abolished, should be constitutionally entrenched and protected from political attack. Neither argument withstands scrutiny. The Crown's duty of active protection under Article II of the Treaty of Waitangi does not embrace political rights, and to entrench the Maori seats would give further legal sanction to a separatist policy founded on ethnicity.

The separate franchise

Four separate Maori electorates were created in 1867, based on an adult male franchise.[1] This arrangement was intended to last for five years while the Native Land Court converted communal Maori land tenure into Crown grants. The aim was to enfranchise Maori under the standard property-ownership qualification that conferred the right to vote. However, the freeholding of Maori land proved more intricate and time-consuming than expected and the four seats were retained for a further five years,[2] and then indefinitely.[3] The four fixed seats remained until the introduction of MMP voting, when they were replaced with a

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1 See the Maori Representation Act 1867.

2 See the Maori Representation Act Amendment and Continuance Act 1872.

3 See the Maori Representation Acts Continuance Act 1876 which provided that the Maori Representation Act 1867 would remain in force until expressly repealed by an Act of the General Assembly.

formula for varying their number in accordance with the Maori electoral option.[4] The seats increased to five in 1996, to six in 1999 and then to seven in 2002.

Several attempts were made to enfranchise Maori before the establishment of the four separate seats. From the outset, the Colonial Office held to the Eurocentric belief that elected Europeans could properly represent Maori. The New Zealand Constitution Act 1852 (UK) introduced representative government and based the right to vote on individual property ownership that excluded almost all Maori.[5] The property qualification was an automatic condition of electoral rights in Britain and the Colonial Office made no exception for the colonies. Only adult Maori males who held a freehold or leasehold estate or tenement of a specified minimum value could exercise the right to vote.[6] However, settler self-interest and Maori entitlement under Article III of the Treaty of Waitangi kept alive the question of Maori representation. To qualify for the franchise, Maori had to 'individualise' their communal landholdings by converting them into Crown grants. In 1859, the settler government sought the opinion of the Crown Law Office in London to clarify whether Maori land tenure could satisfy the property qualification. The Crown lawyers dismissed Maori communal land title and affirmed the need for individualised Crown grants. The opinion resolved:

> Natives cannot have such possession of any Land, used or occupied by them in common as Tribes or Communities, and not held under Title derived from the Crown, as would qualify them to become voters.[7]

The first attempt to enfranchise Maori was in 1862. The member for Ellesmere, James FitzGerald, moved in parliament that Maori be given representation in both Houses of parliament. He proposed three measures: the first for one or more Maori chiefs to be included in the administration of the government, the second for the appointment of Maori nobility to the Legislative Council and the third for a "fair representation in this House of [Maori who] constitute one-third of the population of the colony".[8] FitzGerald's resolution was narrowly defeated by 20 votes to 17.

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4 See the Electoral Act 1993, ss 45, 76–79 and 269.

5 The earlier Constitution Act of 1846 (UK) granted the settlers representative institutions but these were never fully proclaimed in force. See PA Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed), Brookers, Wellington, 2007, pp 105–106.

6 New Zealand Constitution Act 1852 (UK), ss 7 and 42. The qualification of electors for provincial elections was the same as for elections to the lower house of the General Assembly, the House of Representatives (s 42). The vote was conferred on males over the age of 21 years who held a freehold estate to the value of 100 pounds, or a leasehold estate to the value of 10 pounds, or a tenement within a town to the value of 10 pounds, or if not within a town a tenement to the value of five pounds (s 7).

7 (1860) AJHR E-7, p 8.

8 (1861–1863) NZPD 483–513. See SA McClelland, 'Maori Electoral Representation: Challenge to Orthodoxy' (1997) 17 NZULR 272, p 276.

The following year, a select committee on parliamentary representation examined a proposal that two members of European descent be "especially chosen to represent the Natives".[9] It was proposed that the two members would be non-Maori because Maori would be entirely unfamiliar with the work of parliament and "unable to express an opinion".[10] The proposal was to choose "gentlemen who, having an intimate knowledge of the native character, would be able to properly represent them".[11] A bill was introduced and read a first time to implement the proposal but the measure progressed no further.

Two further attempts in 1865 to secure Maori representation proved equally unsuccessful. The member for Newton, George Graham, moved in the House of Representatives that Maori be given a universal male franchise to elect five European members to represent them. However, FitzGerald, who was then minister for native affairs, championed the policy of individualising Maori land tenure and resisted Graham's proposal.[12] Another attempt in 1865 proposed a more radical solution.[13] The Maori Electoral Bill 1865 sought to override the 1859 Crown Law Office opinion by recognising Maori land tenure as a qualifying property interest for the franchise. The bill was intituled:

> An Act to enable Maoris qualified in respect of Maori interests and/or Land to Vote in Election of Members of the House of Representatives and Provincial Councils.

The bill proposed to enfranchise Maori electors who held title to land "according to Maori custom in or to land or a part or share of land within the Colony … of the value of Fifty Pounds". The bill fixed the value of Maori rural land at five shillings an acre and deemed each adult male member of an iwi, hapu, community or family to have an equal share or interest in any communal landholding. The bill provided for a Maori electoral roll, listing Maori who were qualified to vote under the property qualification. It was intended the list would undergo several revisions "for the purpose of forming the first electoral roll of Maori".[14] Some of the bill's provisions mirrored earlier legislation extending the franchise to miners who had flocked to the Otago and Westland goldfields.[15] One writer emphasised the progressive intent of the Maori Electoral Bill and challenged the orthodox view: that the settler community enfranchised Maori simply to accelerate their assimilation in order to safeguard settler interests.[16] The

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9 (1861–1863) NZPD 903.

10 Ibid, p 904.

11 Ibid.

12 NZPD, 1865, 599.

13 See McClelland, above n 8, pp 277–280.

14 See McClelland, above n 8, p 278.

15 See the Miners' Representation Act 1862 and Amendment Act of 1863 and the West Coast Gold Field Provincial Representation Act 1865. As with Maori communal landholders, the miners lacked the standard property qualification to vote.

16 McClelland, above 8, pp 277–279.

writer believed the Weld Government was actuated by humanitarian concerns to redress Maori electoral rights under Article III of the Treaty of Waitangi.[17] However, a clutch of provincial politicians organised around the former native affairs minister, Walter Mantell, successfully opposed the bill.

In 1865, the Weld Government introduced two statutes of relevance to Maori. The Native Rights Act 1865 allayed doubts whether Maori born before the establishment of British rule in 1840 were "natural-born subjects of Her Majesty" and subject to the jurisdiction of the colonial courts. The Act affirmed the status of all Maori within the colony and the jurisdiction of the courts in cases "touching the persons and the property whether real or personal of the Maori people".[18] The second measure was the Native Commission Act 1865 introduced to assist Maori enjoy rights of political representation – the birthright of natural-born subjects. The government accepted it would take time for the Native Land Court to convert Maori land tenure into Crown grants and resolved to grant Maori a temporary franchise. The Native Commission Act 1865 authorised the appointment of a commission to examine how best to confer a temporary franchise, pending the conversion of Maori title. It was proposed that the commission comprise 20 to 35 Maori and three to five non-Maori, with a quorum of 10. FitzGerald, the architect of the legislation, desired a truly representative commission in which settler interests would not dominate. However, FitzGerald lost office before the commission was fully appointed and his successor resolved not to continue it.[19]

Temporary expedient

The passage of the Maori Representation Act 1867 fulfilled FitzGerald's purpose – the establishment of a temporary Maori franchise. The Act's preamble cited the disenfranchisement of Maori under their land tenure system and observed:

> Whereas … it is expedient for the better protection of the interests of Her Majesty's subjects of the Native race that temporary provision should be made for the special representation of such [sic] Her Majesty's Native subjects in the House of Representatives and the Provincial Councils of the said Colony.

The Act established four Maori electorates – three in the North Island and one in the South and Stewart Islands.[20] The statute was to remain in force for five years

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17 McClelland, above n 8, p 279.

18 Native Rights Act 1865, s 3.

19 See MPK Sorrenson, 'A History of Maori Representation in Parliament' in *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, AJHR 1986, H.3, Appendix B, pp 18–19.

20 For the history of Maori representation, see *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, ibid, pp 82–84 (paras 3.7–3.13); Sorrenson, ibid; MH Durie, *Te Mana Te Kawanatanga: The Politics of Maori Self-Determination*, Oxford University Press, Auckland, 1998, ch 4.

– until October 1872 – but the sunset clause significantly under-estimated the task of individualising Maori land tenure. The Maori Representation Act Amendment and Continuance Act 1872 extended the life of the 1867 Act until October 1877, and the Maori Representation Acts Continuance Act 1876 extended its life indefinitely until repealed by Act of Parliament. In 1893, the General Assembly repealed the Maori Representation Act 1867 but incorporated its provisions (with minor amendments) in the consolidating statute. The Maori seats were retained under each successive electoral Act and are currently constituted under the MMP statute.[21] No one had expected that the seats would become a permanent feature of the electoral landscape. Alan Ward wryly commented that separate Maori representation "stumbled into being".[22]

The Maori Representation Act 1867 was a short statute, comprising 12 sections. It defined the boundaries of the Maori electorates and established male suffrage in each (similar to the electoral statutes that enfranchised the South Island gold miners). Adult male Maori or half-caste Maori were conferred the right to vote in the four electorates (Northern, Eastern, Western and Southern Maori).[23] Maori who had rebelled against the Crown (convicted of any "treason felony or infamous offence") were excluded from the franchise and could not vote.[24] The Act provided for the issuing of writs, the alteration of boundaries and the conduct of elections, and authorised provincial legislation to allow for provincial councillors to be elected by local Maori under the Maori franchise.[25] However, no Maori was elected to a provincial council in the nine years that the provincial system remained intact.[26]

Maori political representation under MMP

When the MMP legislation was introduced, it contained no provision for separate Maori representation. The Maori seats were omitted in preference for equal numbers of electorate and list members of parliament. This implemented the proposal of the Royal Commission on the Electoral System, which recommended MMP as the proportional system to replace FPP elections. The royal commission believed Maori and other ethnic groups would achieve fair representation through the party list system and reported that there would be no need for

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21 See the Electoral Act 1993, ss 45 and 269 providing for Maori representation and the compilation of the Maori roll following each census. Electoral Acts consolidated New Zealand's electoral legislation in 1893, 1902, 1905, 1908 (the Legislature Act 1908), 1927 and 1956.

22 A Ward, *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand*, Auckland University Press, Auckland, 1995, p 209.

23 Maori Representation Act 1867, s 2.

24 Maori Representation Act 1867, s 6.

25 Maori Representation Act 1867, ss 7–11.

26 See Sorrenson, above n 19, p 21. The Abolition of the Provinces Act 1875 came into force in November 1876.

separate seats.[27] MMP would encourage all parties to compete for Maori votes by placing Maori candidates high on the party list.[28]

When the final form of MMP was under consideration, Maori leaders convened a hui at Turangawaewae Marae and orchestrated a campaign to retain the seats. Sir John Wallace, a member of the royal commission who attended the hui, lamented that Maori leaders did not convey the significance of MMP for Maori. None of the speeches alluded to increased Maori representation through the list system.[29] Wallace also questioned the government's belief that the views aired represented "nearly unanimous Maori opinion".[30] However, the message that emerged persuaded the government to reintroduce the Maori seats, with their number to increase or decrease under the Maori electoral option. Maori submissions to the select committee emphasised the cultural and constitutional importance of separate Maori representation, and the need to align the seats with the number of voters on the Maori roll.[31] The seats currently stand at seven.

The electoral option Maori have exercised since 1975 acquired new significance. From 1975, adult Maori could enrol on either the general or the Maori electoral role and this choice determined whether they voted in a general or a Maori electorate. Under MMP, however, the electoral option also serves a further purpose: the number of Maori registering on the Maori roll determines the number of Maori seats in the MMP parliament. The Maori electoral option held after each quinquennial census provides the statistical basis for fixing the number. Maori electoral districts are drawn according to the Maori electoral population (MEP). The MEP is obtained by adding the number of voters on the Maori roll, a proportion of adult Maori not registered on either roll (notwithstanding the requirement that registration is compulsory) and a proportion of Maori under the age of 18 years.[32] The MEP is then divided by the South Island's electoral quota to determine the number of Maori seats. The electoral quota is the quotient obtained by dividing the population of the South Island by 16 (the fixed number of South Island general electorates).[33] The electoral quota represents the average population of each general and Maori electorate, taking account of adjustments of the quota within the five percent allowance.[34]

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27 *Royal Commission on the Electoral System: Towards a Better Democracy*, above n 19, pp 51–52, 63 and 81–106.

28 See Sir John Wallace, 'Reflections on Constitutional and Other Issues Concerning our Electoral System' (2002) 33 VUWLR 719, p 734.

29 Ibid.

30 Ibid.

31 See *Report of the MMP Review Committee: Inquiry into the Review of MMP*, AJHR 2001, I.23A, p 19.

32 See the definition of "Maori electoral population" under the Electoral Act 1993, s (1) for the calculation used.

33 See the Electoral Act 1993, s 35(3)(a) and (b).

34 Electoral Act 1993, s 37.

The Royal Commission on the Electoral System recommended strongly against separate Maori representation: "[T]here would be no separate Maori constituency or list seats, no Maori roll, and no Maori option".[35] The party-list system would promote ethnic diversity within parliament, with more Maori gaining seats in the House. There have been four MMP elections – in 1996, 1999, 2002 and 2005. Was the royal commission prescient? The last two general elections would suggest 'yes'. Nineteen members of the parliament elected in 2002 were of Maori descent: nine were list members, seven were elected to the Maori seats and three held general electorate seats. At the 2001 census, New Zealand's resident population was 3,737,277 (excluding overseas visitors present on census night). Resident Maori as an ethnic group numbered 526,281, representing 14.0 percent of the population. The 19 seats Maori held represented 15.8 percent of parliament's membership (1.8 percent above the relative national population of Maori). If the seven Maori seats were subtracted, the 12 general seats held represented 10 percent of parliament's membership (4.0 percent below the (then) relative national population of Maori).

In the parliament elected in 2005, the number of general seats held by Maori reflected more closely the relative national population of Maori. Twenty-two members elected in 2005 were of Maori descent.[36] Fifteen were list members and seven held the Maori seats. At the 2006 census, New Zealand's resident population was 4,027,947 (excluding overseas visitors). Resident Maori as an ethnic group numbered 565,329, representing 14.0 percent of the population (the same percentage as in 2001). The 22 seats Maori held represented 19.0 percent of parliament's membership (121 members because of an 'overhang' of one member at the 2005 election). On these statistics, Maori members of parliament have a 5.0 percent higher representation than the relative national population of Maori. If the seven Maori seats were subtracted, the 15 list seats Maori hold would represent 12.4 percent of parliament's membership (1.6 percent below the relative national population of Maori).

The representational deficit of Maori has closed under the last two elections (2002, 2005). The telling statistic is the representational percentage that is produced when the seven Maori seats are subtracted from the total seats held by Maori members. At the 2002 election, the representational deficit was 4.0 percent below the relative national population of Maori. At the 2005 election, that deficit had shrunk to 1.6 percent. On those figures, the percentage of Maori members holding list or constituency seats in the next parliament will exceed that of the

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35 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, above n 19, p 101 (para 3.74).

36 Information provided by Parliamentary Information Service, Parliamentary Library, Wellington, 2 October 2007 (correspondence with Mr Greg Dwyer). I am grateful to Mr Dwyer for forwarding the updated information on the number of Maori members of the 2005 parliament. Compare the Parliamentary Library's breakdown of the 2005 election result, which lists 21 members of the present parliament who are of Maori descent.

relative national population of Maori. When that happens, the Maori seats will represent a form of reverse discrimination based on ethnicity.

The above statistics vindicate the royal commission when it reported that the Maori seats would be superfluous under MMP. The royal commission predicted "real gains for Maori people in terms of effective representation".[37] Abolition of the separate seats would accelerate the number of general seats held by Maori. Political parties would be encouraged to promote able Maori candidates in both list and constituency seats in order to target voters previously registered on the Maori roll. The royal commission observed that the votes of Maori would become more electorally significant to all political parties:

> There would be active party competition for Maori support and for [party] and constituency votes. We think parties would be compelled to select Maori candidates both for high list places and in winnable constituency seats … We expect Maori political participation would rise under an MMP system … We are certain Maori representation under MMP would be much better than under the plurality system with or without separate Maori electorates.[38]

Under MMP, members of Maori descent holding general seats have more than quadrupled. This contrasts with Maori representation under the plurality system, which was virtually non-existent outside of the four Maori seats. The Labour Party held all four seats from 1943. The National Party had no Maori members of parliament for the next 32 years. At the 1975 election, two National Party candidates of Maori descent won general seats: Ben Couch in Wairarapa and Rex Austin in Awarua. In 1979, the Muldoon National Government gained a third member of Maori descent when Winston Peters won the Hunua seat after a judicial recount and inquiry.[39] This representation palls beside the current Maori membership of parliament. Following the 2005 election, 15 rather than three members held general seats in a parliament enlarged from 99 to 120 members.[40]

Effective Maori representation

A representative democracy must avoid barriers for the representation of minorities. Maori confront no such barriers. Statistically, separate Maori representation is superfluous. In the present parliament, Maori hold 15 general seats, representing 12.4 percent of parliament's membership. Two more general seats would peg Maori representation to the national Maori population (14 percent). The abolition of the separate Maori roll would most certainly

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37 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, above n 19, p 81 (para 3.2).

38 Ibid, pp 101–102, 103 (paras 3.76, 3.77 and 3.79).

39 See *Re Hunua Election Petition* [1979] 1 NZLR 251 (Davison CJ, Speight and Sinclair JJ).

40 The comparison with MMP is based on the membership of the 1975–1980 and 2002–2005 parliaments.

achieve that because it would inflate Maori representation in the list and constituency seats. The retention of a separate roll might also have a corrosive or negative effect. The Royal Commission on the Electoral System reported that the separate seats had historically undermined effective Maori representation.[41] Separate Maori representation implies separate non-Maori representation which has relieved the numerically dominant non-Maori members of parliament of the need to conciliate Maori interests. Under electoral separatism, Maori and non-Maori members of parliament are responsible to the respective communities that elect them. For the royal commission, the system had isolated Maori members and marginalised Maori representation within the numerically dominant culture:

> [T]he Maori MPs are … dependent upon the attitudes of the majority … [S]eparate representation has reinforced the political dependency of the Maori people and their exposure to non-Maori control over their destiny and future … [B]y confining Maori voting power to separately elected seats, separate representation has weakened the influence of the Maori MPs.[42]

The retention of separate seats diminishes the influence of all Maori members of parliament in both the Maori and general seats. The psychology of electoral separatism does not distinguish between the Maori and the general seats over issues of relevance to Maori.

Labour's monopoly over the Maori seats has further eroded their utility. Electoral monopolies do not promote responsive and effective representation. Since 1943, the Labour Party has won all of the Maori seats except on three occasions – in 1993 when New Zealand First candidate Tau Henare won Northern Maori, in 1996 when the New Zealand First Party won all of the Maori seats following the Ratana movement's withdrawal of support for Labour, and in 2005 when the fledging Maori Party won four of the seven seats. Labour's stronghold created a political vacuum that has enervated the political leverage of Maori. The royal commission observed:

> The Labour Party's domination of the Maori seats since 1943 has meant that neither it nor any other party has any real *electoral* incentive to commit resources to the development of policies for the Maori people, or to campaign vigorously for their votes.[43]

MMP has increased electoral competition for the Maori seats and raised the spectre of strategic voting. Voters on the Maori roll might support a Maori Party candidate in the Maori seats and give their party vote to the Labour Party. The Maori Party which formed in 2004 actively courted the Ratana movement, generating electoral competition and winning four of the Maori seats at the 2005 election. On polling since then, the party is intent on winning all seven seats at the 2008 election,

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41 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, above n 19, pp 90–93 (paras 3.37–3.46).

42 Ibid, p 91 (para 3.40). See further pp 90–91 (paras 3.37–3.41).

43 Ibid, p 92 (para 3.44) (emphasis in the original).

irrespective of whether it increases its share of the party vote. That possibility will rankle with the Labour Party and inject urgency into the political campaigning but it will not make Maori representation any more effective overall.

Vote-splitting under MMP increases voter choice but it has limited palliative effect. It cannot bring Maori issues to the forefront of national politics when such issues are discounted under a system of separate representation. A common roll would instil a new electoral psychology, bring Maori into the mainstream of national politics and maximise their voting power. Where elections are based on a common roll, political parties must ply for the people's vote by appealing to all constituencies.

Discriminatory privilege

Is separate Maori representation a discriminatory privilege? Many non-Maori believe the Maori seats contravene the principle of equality, are discriminatory and should be abolished.

Before MMP, the separate Maori seats ostensibly discriminated against Maori: four fixed seats were grossly deficient representation per head of capita. Under the nineteenth-century property qualification, Maori were disenfranchised and could not vote. Without the separate seats, Maori would have had no direct political representation under the plurality system. However, a total of four seats was token representation. In 1867, Maori would have been entitled to around 14 seats based on the electoral quota and national population. The four seats represented a population of approximately 50,000 Maori, whereas the 72 general seats represented a population of approximately 250,000 Europeans. Over the years, Maori pressed for more seats relative to their numbers on the Maori roll.[44] They achieved this when the MMP statute retained the seats and tagged them to the Maori electoral roll.[45] Now, the number of seats increases in accordance with the number of Maori registering on the Maori roll.

The electoral advantage that Maori have reaped under MMP reverses the discrimination. For the Royal Commission on the Electoral System, an unfair advantage or disadvantage constitutes discrimination.[46] In *Telstra Corporation Ltd v Hurstville City Council*,[47] the Federal Court of Australia held that a discriminatory benefit was as unlawful as a discriminatory restriction:

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44 Compare the observations of the Royal Commission, above n 19, p 95 (para 3.54).

45 Under the Electoral Amendment Act 1975, the Kirk–Rowling Labour Government (1972–1975) pegged the number of Maori seats to the Maori roll but in 1976 the Muldoon National Government (1975–1984) returned to the status quo and fixed the seats at four.

46 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, above n 19, p 93 (para 3.47).

47 (2002) 189 ALR 737, p 752 (FCA), upheld on appeal in *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 (HCA).

> [D]iscrimination means differential treatment [denoting] failure to treat all persons equally where there is no reasonable distinction to justify different treatment. The discrimination may be positive, such as by conferring a benefit, or negative, for example by imposing a restriction. Yet in each case there will be discrimination.

The royal commission predicted that MMP would correct the representational imbalance between Maori and non-Maori. However, it did not anticipate retention of the Maori seats or that their number would grow. Seven (or more) dedicated seats plus Maori representation in the general seats has reversed the electoral imbalance, amounting to reverse or indirect discrimination. Under human rights legislation, reverse or indirect discrimination breaches the statutory non-discrimination standard. The discrimination need not be deliberate.[48] Indirect discrimination occurs where a practice or requirement has the effect of treating a person or group of persons differently on a prohibited ground (for example, colour, race, sex, or ethnic or national origin).[49] Discrimination will be established unless there is a justifiable reason for the difference in treatment.[50]

The principle of equality is a preoccupation of the common law. The equal application and protection of the laws is a constitutional guarantee under the American Bill of Rights[51] and a founding precept of democracy and the rule of law.[52] The nineteenth-century English writer AV Dicey identified equality before the law – "the equal subjection of all classes to the ordinary law of the land" – as an essential tenet of the rule of law.[53] "The rule of law requires", observed one judge, "that a person whose factual situation is indistinguishable from another should be given like treatment".[54] For the United States Supreme Court, the terms 'justice' and 'equality' were synonymous. The court observed: "Courts can take

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48 *Talley's Fisheries Ltd v Lewis* 14/6/07, Simon France J, HC Wellington CIV-2005-485-1750, para 52 (discrimination under the Human Rights Act 1993).

49 Human Rights Act 1993, s 65. For discussion see Joseph, above n 5, pp 273–275.

50 See Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218, p 242 (HC).

51 See the fourteenth Amendment to the United States Constitution (adopted 18 December 1865) that declares "… nor shall any State … deny to any person within its jurisdiction the equal protection of the laws". Compare the narrower articulation of that principle under section 19 of the New Zealand Bill of Rights Act 1990, guaranteeing the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

52 See *Matadeen v Pointu* [1999] 1 AC 98, 109 (PC) per Lord Hoffmann.

53 AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed), Macmillan & Co, London, 1959, pp 202–203.

54 *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102, 111 per Baragwanath J. See also *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1988] NZAR 58, 92–95 per Thomas J: "From Dicey to Dworkin, the notion that like should be treated alike has been an essential tenet in the theory of law".

no better measure to assure that laws will be just than to require that laws be equal in operation".[55]

Equality before the law identifies the general axiom of the common law that like cases ought to be decided alike. The Privy Council observed that equality of treatment is a "general principle of rational behaviour" and "one of the building blocks of democracy".[56] Non-discrimination statutes such as the Human Rights Act 1993 deplore unequal treatment as unethical and wrong. The courts hold that the principle of equality is violated if a difference in treatment has no objective and reasonable justification.[57] A discriminatory benefit stands in the same shoes as a discriminatory restriction. "The question", observed the House of Lords, "is whether persons in an analogous or relevantly similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction".[58] Preferential treatment is discriminatory and ethically wrong if it is lacking justification.

The burden of the law is clear: those who defend the Maori seats must establish the objective justification for their existence. What might that justification be? Maori exercise the right of all citizens to vote under a universal franchise and do not need dedicated seats to gain political representation. In the present parliament, nearly one-third of the seats Maori hold (seven of the 22 seats) is by gift of the state. Separate Maori representation is not a Treaty of Waitangi right;[59] nor is it a right or entitlement under the common law doctrine of aboriginal title[60] or under any equitable or fiduciary doctrine.[61] Popular democracy implies that political representation must be won on the hustings, not gifted on grounds of ethnicity. Even under the FPP system, the Maori seats were problematical. In 1960, the Hunn Report on the Department of Maori Affairs concluded that the separate seats conferred both privileges and disabilities on Maori and suggested they should not "endure indefinitely by default".[62] The report called for

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55 *Railway Express Agency Inc v New York* 336 US 106 (1949), 113 per Jackson J.

56 *Matadeen v Pointu*, above n 52.

57 See, for example, *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, para 10 (quoted in *A v Secretary of State for the Home Department* [2005] 2 AC 68, 114–115 (HL)); *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, 242 (HC); *Telstra Corporation Ltd v Hurstville City Council* (2002) 189 ALR 737, 752 (FCA).

58 *A v Secretary of State for the Home Department* [2005] 2 AC 68, 115 per Lord Bingham of Cornhill (HL).

59 See the section following, headed 'The Treaty argument'.

60 For discussion of the common law doctrine, see Joseph, above n 5, pp 91–100.

61 Compare *Guerin v R* (1984) 13 DLR (4th) 321 (SCC); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA); *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20 (CA). The courts in these decisions recognised an equitable duty on the Crown to uphold the interests of native peoples but only in dealings for the surrender of their lands. For discussion see Joseph, above n 5, pp 100–101.

62 JK Hunn, *Report on Department of Maori Affairs*, Wellington, 1960, p 77.

"sceptical scrutiny" of the seats as there were preferable ways of encouraging Maori participation in national politics.[63]

The Treaty argument

Separate Maori representation is not a Treaty of Waitangi right. The Royal Commission on the Electoral System reflected that Maori regard the separate seats as an "important concession to, and the principal expression of, their constitutional position under the Treaty".[64] This belief is flawed, even repugnant.[65] No one – Maori or non-Maori – may claim preferential electoral rights under the Treaty. Both Maori and Pakeha are signatory parties to the Treaty but neither may assert superior political rights under it. Liberal democracies espouse the elemental principle of "one person, one vote, one value" and rail against electoral privilege based on racial or ethnic distinction.

The concepts of partnership and the Crown's duty of active protection define the Treaty relationship[66] but neither concept mandates separate Maori representation. Partnership is a substantively neutral concept. It posits reciprocal rights and responsibilities as between Maori and Pakeha, founded on notions of "reasonableness, mutual cooperation and trust".[67] The concept does not impose normative obligations as would require the Crown to grant rights of separate Maori representation. In the *Radio Frequencies* and *Broadcasting Assets* cases, any substantive obligations the government owed under the Treaty of Waitangi had to be weighed against the Crown's wider responsibilities to the public of New Zealand.[68] In the *Broadcasting Assets* case, the Privy Council disabused the notion that the Crown's obligations to Maori were somehow absolute or unqualified: "This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown".[69] In the *Radio Frequencies* case, the Court of Appeal refused to direct the Crown on matters of executive policy, including the manner in which the Crown

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63 Ibid, p 68. Compare CC Aikman and JL Robson (eds), *New Zealand: The Development of its Laws and Constitution* (2nd ed), Stevens & Sons, London, 1967, p 46 who observed there was then a body of Maori opinion in favour of abolishing the Maori seats.

64 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, above n 19, p 86 (para 3.19).

65 See, for example, Sir Tipene O'Regan, below text corresponding to nn 73–77.

66 See *New Zealand Maori Council v Attorney-General* (the *Lands* case) [1987] 1 NZLR 641 (HC & CA). For commentary see Joseph, above n 5, pp 70–73.

67 *New Zealand Maori Council v Attorney-General* (*Broadcasting Assets* case) [1994] 1 NZLR 513, 517 (PC).

68 *Attorney-General v New Zealand Maori Council* (the *Radio Frequencies* case) [1991] 2 NZLR 129 (CA); *New Zealand Maori Council v Attorney-General* (the *Broadcasting Assets* case) [1994] 1 NZLR 513 (PC).

69 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 per Lord Woolf (PC).

chose to discharge its Treaty obligations: "If the Government, giving due weight to the Treaty principles, elects between the available options reasonably and in good faith … the Treaty is complied with".[70]

Nor does the Crown's duty of active protection to Maori mandate separate representation. The duty of active protection arises under Article II of the Treaty of Waitangi, which guarantees Maori customary property rights, not electoral rights. It guarantees Maori "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 Maori people in the use of their lands and waters to the fullest extent possible".[71] Electoral rights are Article III rights. Article III extends to all New Zealand citizens the Crown's protection and imparts "all the rights and privileges of British subjects".[72] Sir Tipene O'Regan termed this guarantee the Treaty's "equity package".[73] It gave Maori "no greater and no lesser rights in social and legal terms than [were] available to the general populace".[74] Because electoral rights are rights of New Zealand citizens, Maori 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 in his translation of the Maori text of Article III. He read this as conferring on "all the ordinary people of New Zealand … the same rights and duties of citizenship as the people of England".[75]

No appeal to a signatory status under the Treaty can justify an electoral advantage based on race or ethnicity. O'Regan deplored attempts to erect a justification as "fundamentally repugnant".[76] He wrote: "When you take that distinction of race, or mere ethnicity, as a basis for organisation … you are developing an essentially racist base for dealing with your assets and your affairs".[77] He would encourage Maori to engage fully in national elections, based on a common role and numerical equality (one person, one vote, one value).

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70 *Attorney-General v New Zealand Maori Council (No 2)* [1991] 2 NZLR 147, 149 per Cooke P (CA).

71 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 per Cooke P.

72 Under the separate and divisible Crown, the term "British subjects" translates as meaning "New Zealand citizens". See Joseph, above n 5, pp 586–591 for the evolution of the separate and divisible Crown in right of New Zealand.

73 Sir Tipene O'Regan, 'A Ngai Tahu Perspective on Some Treaty Questions' (1995) 25 VUWLR 178, p 178.

74 Ibid.

75 Translation as reproduced in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 614, pp 662–663 (CA).

76 O'Regan, above n 73, pp 188–189.

77 Ibid.

Entrenchment of the seats

In parliament's 2001 select committee review of MMP, several submitters claimed special sanctity for the Maori seats and recommended that they should be constitutionally protected under the reserved sections of the Electoral Act 1993.[78] On the argument essayed here, the Maori seats should be abolished, not entrenched. Section 268 of the Electoral Act 1993 requires the people's support at a national referendum or a 75 percent majority in parliament in order to amend or repeal the reserved sections. When the writer appeared before the select committee to review MMP, a committee member asked why the Maori seats should not receive the same protection. At the committee's request, the writer presented a supplementary submission canvassing the issues and recommended against entrenchment. Separate Maori representation was not critical to the integrity of the electoral system and a legitimate subject of constitutional entrenchment.[79] The select committee also asked whether section 191 of the Electoral Act 1993 should be protected as a reserved section.[80] Section 191 provides for the election of list members of parliament and distinguishes New Zealand's electoral system from other proportional systems. The writer advised that, unlike the provisions securing the Maori seats, section 191 was a key machinery provision of MMP and an appropriate subject of constitutional entrenchment. In the 1993 referendum on the electoral system, the people specifically voted for MMP and the list system over any other proportional system.

The entrenching procedures under section 268 of the Electoral Act 1993 have a constitutional mandate. They protect the integrity of the electoral machinery but do not insulate politically contestable issues from political debate. Separate Maori representation is contentious and contestable. Electoral expert Alan McRobie wrote: "Numerical equality, encapsulated in the expression 'one person, one vote, one value', has long been this country's dominant electoral principle".[81] Public lawyers draw a distinction between constitutional process (which may be entrenched) and substantive legislative policy (which should not be entrenched).[82] Typical subjects of entrenchment include a country's electoral machinery, the separate functions of government, the independence of courts and a bill of rights. In contrast to those subjects, the issue of separate Maori representation is *political*, not *constitutional*. The retention of the Maori seats involves political judgment over which differing views may be held. When the MMP Review Committee reported in 2001, it remained divided over the question whether the seats should be abolished or retained. Its inquiry into the operation of MMP was a statutory requirement under the Electoral Act 1993 in which six parliamentary parties

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78 *Report of the MMP Review Committee: Inquiry into the Review of MMP*, above n 31, p 24.

79 Ibid, p 25.

80 See the Electoral Act 1993, s 191.

81 A McRobie, 'The Electoral System" in PA Joseph (ed), *Essays on the Constitution*, Brookers, Wellington, 1995, 312, p 319.

82 For commentary see Joseph, above n 5, pp 567–568.

participated: the ACT, Alliance, Green, Labour, National and United Parties (the New Zealand First Party declined to take part).[83] Contestable policy issues are the subject of ongoing political debate and should not be shielded from scrutiny through feigned constitutional process. The political judgments of one generation cannot claim universal validity for future generations.

The select committee on MMP was divided on the entrenchment issue. The Labour, Alliance and Green members supported entrenchment, while the National, ACT and United members opposed it.[84] This foreclosed any proposal for entrenchment. Under parliament's standing orders, a proposal to entrench legislation must be carried by the same majority of the House of Representatives as the provision proposes for future amendment or repeal.[85] The combined Labour, Alliance and Green vote fell well short of the required 75 percent majority vote in parliament.

Unexpected effects

Political philosopher Niccolò Machiavelli astutely observed: "Let no man who begins an innovation in a State expect that he shall stop it at its pleasure or regulate it according to his intention".[86] The retention of the Maori seats presages unexpected effects that may distort the equity of proportional representation under MMP. Leader of the United Future Party Peter Dunne has questioned "whether those who voted for MMP really expected the Maori seats to end up being used this way, as a potential permanent veto on who governs".[87] The largest party in parliament following the 2008 election, he observed, might poll over 50 percent of the party vote, yet be unable to govern because of a Maori Party veto.[88]

The erosion of Labour Party support in the Maori seats has produced the potential for 'overhang'. At the 2005 election, the Maori Party won four of the seven seats on a party vote that would have entitled it to three seats. An 'overhang' of one inflated the number of members of the House of Representatives to 121. However, the 2008 election augers a more spectacular overhang. Commentators speculate that the Maori Party might win all of the seven seats without increasing its share of the party vote (an entitlement of three seats).[89] An 'overhang' of four members would reconfigure the mathematical computations that bear on the processes of government formation during post-election party negotiations. The number of

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83 *Report of the MMP Review Committee: Inquiry into the Review of MMP*, above n 31, p 5.

84 *Report of the MMP Review Committee: Inquiry into the Review of MMP*, above n 31, p 25.

85 See Standing Order 267, *Standing Orders of the House of Representatives*. For commentary see Joseph, above n 5, pp 563–564.

86 N Machiavelli, unsourced quotation reproduced in JE Le Rossignal and W Downie Stewart (eds), *State Socialism in New Zealand*, London, Harrap & Co, circa 1912, p 226.

87 Peter Dunne, 'Time to let the people decide', *Dominion Post*, 18 March 2008.

88 Ibid.

89 Ibid.

confidence votes needed to form a government would increase from 61 to 63. A party that garnered 50 percent or more of the popular vote but could not govern would represent an undemocratic outcome and would indubitably arouse deep resentment. Even without that scenario, the inflated representation of the Maori Party through 'overhang' would give the party disproportionate leverage in coalition talks. The influence of the minor parties on the configuration of government has been a recurring criticism of the MMP system. Questions are asked why a minor party, which many see as representing 'cause' or 'fringe' elements of the polity, should be allowed to determine the make-up of government. The distortion that 'overhang' would produce through Maori Party representation would sorely reinforce that criticism.

Conclusion

This essay proposes the abolition of the Maori seats. It has clinically canvassed the arguments and avoided polemical assertions about the rights or deprivations of Maori. Nevertheless, reasoned argumentation must be seen for what it is and may have little impact on the future of the seats. Politics is not a logically ordered world. There is a yawning gulf between reasoned discourse and the real world forces that shape the political constitution.[90] Calls to abolish the Maori seats would immediately excite vociferous reaction, not least from the Maori Party and its supporters. Abolition of the seats would deprive the party of parliamentary representation and a national voice. Removing the party's conduit into parliament would draw cries of racism, breach of the Treaty of Waitangi and even threats of social disorder.

Under the political constitution, warring factions respond to contesting interests in calculated ways. Appeasement, compromise and manoeuvre are standard ploys. It is National Party policy to abolish the Maori seats but party leader John Key has deferred the policy until the Treaty of Waitangi settlements process has ground to an end. That process may take until around 2020–2025.[91] There is no discernible or logical connection between the Maori seats and Treaty settlements (why abolition of the one should depend on completion of the other). Under the political constitution, detached objectivity is not a key driver of public issues or political decision-making. National politics are about securing political advantage, not producing optimal outcomes. These brutish realities weave a web of intricate manoeuvrings and marginalise objective argumentation as a purveyor of political change.

There are four reasons why the Maori seats should be abolished: they are anachronistic, they institutionalise Maori separatism, they represent a form of reverse discrimination and they threaten to manipulate MMP electoral outcomes

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90 See JAG Griffith, *The Politics of the Judiciary* (5th ed), Fontana Press, London, 1997. For an introduction to the political constitution, see C Harlow and R Rawlings, *Law and Administration* (2nd ed), Butterworths, London, 1997, pp 1–4.

91 See Joseph, above n 5, pp 87–88.

through 'overhang'. Under MMP, Maori and non-Maori have equal opportunity to compete for political representation. There are no institutional barriers – only the historical legacy of Maori under-achievement as reflected in educational, health, welfare and prison statistics. The Treaty settlements process that began in the 1990s may be an important determinant in rectifying some of the socio-economic imbalance. The establishment of Maori corporations and trusts to administer Treaty settlements presages a new social and economic pluralism, with some Maori corporations having significant market presence. These developments accentuate the atavism of the Maori seats in the twenty-first century. They were introduced as a temporary measure in 1867 but their reason for being was spent when the full adult franchise was introduced in 1893. The seats have also had a negative impact: they sideline Maori political issues and perpetuate the psychology of dependence that has hampered Maori self-development. A separate electoral roll removes Maori issues to the fringes of the national political agenda and inhibits the political integration and achievement of Maori.

This essay has depicted the Maori seats as a form of reverse discrimination and a symbol of racial separatism. The principle of equality is axiomatic to the rule of law and is a fundamental civil right, "in a substantial sense the most fundamental of the rights of man".[92] No ethnic group other than Maori is guaranteed separate parliamentary representation. The separate seats inflate Maori parliamentary representation (19 percent of the parliamentary seats) relative to the national Maori population (14 percent of the New Zealand population). This imbalance will magnify as the number of Maori seats increases with each Maori electoral option. Reverse discrimination and Maori separatism are reasons why the seats should be abolished but the strongest case for abolition may materialise at the 2008 election. The Maori seats that the Maori Party will win has the potential to thwart proportionality and the expressed will of the people. In the end, Maoridom itself may have to grasp the nettle. Pragmatic acceptance of the need to relinquish the seats may be the catalyst to bring about their abolition.

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92 *A v Secretary of State for the Home Department* [2005] 2 AC 68, 113 per Lord Bingham of Cornhill (HL), quoting H Lauterpacht, *An International Bill of the Rights of Man*, Columbia University Press, New York, 1945, p 115.