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Reconstituting the Constitution

 Springer

Chapter 11

The Future of Electoral Law

Simon Power

This is a transcript of the Minister's speech to the Reconstituting the Constitution Conference held at Parliament in September 2010.

11.1 Introduction

When I came to Parliament in 1999 I would not say it was an electoral crisis, but as part of the vote being counted in Rangitikei in that year, a ballot box went missing, and you might recall that then the new government was about to come into power, and Richard Prebble (I think it was) decided that ACT would require a judicial recount of the entire electorate, to hold up the sitting of the new Parliament under the then Labour-led government. On election night I remember clearly having a majority of 63 votes, but by the time I got to Parliament I had a majority of 289. Now you might think that was slim, but there were three who had slimmer majorities than I did in that Parliament so I felt relatively comfortable heading into the 2002 election.

So ever since that moment I have had a bit of an interest in electoral law, and I want to thank you for inviting me to speak today on the future of electoral law.

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11.2 Electoral and Constitutional Change

Looking back over time, National governments have had a track record actually of making change in electoral and constitutional areas. These have included: the Legislative Council Abolition Act of 1950, the Official Information Act of 1982, the Human Rights Act of 1993, of course the referendums on the electoral system in 1992 and 1993, and introducing provisions for citizens-initiated referenda in 1993. This government is no different in the sense that we campaigned on holding a referendum on the Mixed Member Proportional (MMP) voting system and, all things being equal, will do so in November 2011.

We repealed what I have to regard as the controversial Electoral Finance Act of 2007, and are in the process of replacing it.¹

It has not been widely reported, but we have also quietly achieved the first stage in an amalgamation of electoral agencies, with the cooperation, I might say, of all parties in the House, and for that I am grateful. The new Electoral Commission will be up and running on October 2010, taking over the responsibilities of the Chief Electoral Office and the current Electoral Commission. The functions of the Chief Registrar of Electors will then be absorbed into the Commission in 2012.

And we are continuing to work on the terms of reference for the constitutional review. I am somewhat limited in what I can say about this work programme because the first two measures are currently before a special cross-party select committee, and I get very particular about not discussing things that are before select committees. The details of the constitutional review are yet to be publically announced.² But what I can talk about is the process we have adopted for dealing with electoral and constitutional issues.

11.3 Processes for Electoral Change

Our policy where possible, has been to avoid situations where politicians are too heavily involved in the design of any changes. I have to say I think that only leads to a lack of real engagement and public concerns about the system, and at least the perception that politicians act in self-interest. In short, it is like letting panel beaters design intersections.

In the case of the MMP referendum, this was a policy that was well signalled to voters leading up to the last election. It may surprise many but the government does not actually have a view on which system should prevail. The policy is to give

¹ The Electoral (Finance Reform and Advance Voting) Amendment Act 2010 was passed on 15 December 2010 and came into force on 1 January 2011. The Act makes changes to the electoral campaigning and funding rules in the Electoral Act 1993.

² The constitutional review was announced on 8 December 2010. The initial details of this review are outlined in the Appendix at the end of this volume.

voters, after five elections under MMP, another opportunity to have their say. There continues to be some debate about whether another referendum was actually promised at the time that MMP was introduced. The Electoral Act 1993 provided for a review of MMP by select committee following the second MMP election and, perhaps unsurprisingly, it failed to produce any conclusive recommendations.

So in the absence of a written constitution, an upper house, a federal system or other checks and balances, New Zealanders hold dearly to their right to vote every 3 years. And it follows that the rules for translating those votes into representation should also belong to the people. This government's approach to the referendum has been simply to give the public another say. That is why as far as practicable we have sought to replicate the format used in 1992 and 1993. But one difference is the decision to hold the referendum at the same time as the 2011 and 2014 general elections respectively. This allows enough time to prepare for both referenda, bearing in mind that if a second referendum is triggered, then a whole new electoral system would have to be designed for the run-off vote. It is not widely known that officials began drafting the Bill to implement MMP before the 1992 indicative referendum in anticipation of a particular result, and even then the Electoral Act 1993 had to be substantially amended before the first MMP election.

More importantly, running the referendum alongside general elections maximises the potential turnout of voters in deciding on such an important constitutional matter. We had considered whether a modified version of MMP should be incorporated into the first referendum, but this could have led to the accusation that the government was trying to engineer a particular result. Instead the government's view is that the first referendum should simply ask voters to make a choice about the basic type of electoral system they want. If a majority favours MMP in some shape or form, then the Electoral Commission, not members of Parliament, will investigate whether modifications are necessary or desirable. This allows those who favour a proportional system, but may be irked by a particular aspect of MMP, to avoid so-called "throwing the baby out with the bath-water".

I would add that the government will be making the voting public aware of this contingency, as well as other consequences of the choices they will face, by way of an education campaign next year, which is estimated to cost in the vicinity of just over \$5 million.

Like the upcoming referendum, the repeal of the Electoral Finance Act 2007 was another policy we clearly signalled before the election. It took less than 100 days and the support of all but one party to remove it from the statute books. We had a reasonably strong mandate to get rid of it, but there was not anywhere near the same amount of clarity about what should replace it. To me, what was most important about the new regime was the process we used to construct it. The Electoral Finance Act 2007 was enacted without the broad cross-party support that has historically characterised electoral reform. Without such broad-based support it arguably lacked some legitimacy. In contrast, the process adopted to develop the new electoral finance regime has been the subject of three opportunities for public input, and a number of discussions with parties across the House. Inevitably some have been disappointed that the Bill does not include more radical measures to

either restrain or relax the abilities for parties, candidates and interest groups to participate in a campaign. I am not ruling out further changes, but any amendments must address some identifiable harm that can be recognised across the political spectrum. Perhaps no party will be entirely satisfied with the electoral finance regime that results, but you will forgive my lack of ambition in seeking a Bill that at least no party finds offensive. A process that engages all parties in this way is the path most likely to lead to fair, workable and, most importantly, enduring solutions.

As I said earlier, the electoral system undoubtedly belongs to the people, but it is unrealistic and unwise for political parties to be removed entirely from the reform process. It is only since the introduction of MMP that our constitutional framework has recognised what we have all known for decades: that modern elections are primarily about voting for parties. As what my officials might describe as “key stakeholders”, political parties have to deal with electoral law on a practical level. So I would expect that the select committee will also shape the electoral finance legislation to reflect the realities of campaigning.

11.4 Constitutional Reforms

I want to close by saying a few words about the proposed review of constitutional matters. As you will all know, as part of the confidence and supply agreement between the National Party and the Māori Party, we have agreed to establish a group to consider constitutional issues, including Māori representation. An announcement was to be made in early 2010, but both parties have agreed to take a little bit more time to shape those terms of reference. Discussions have been very positive, and the government hopes to make an announcement in the next month or so.³

The primary consideration of both parties is the need to engage the public in a conversation about constitutional issues. The terms of reference will contain a number of starting points, but these will be neither exclusive nor exhaustive. What I can say is we will give the public sufficient time and space to contribute. That is not to say that the conversation will take place in a vacuum of information. We want to encourage ongoing debate about the future shape of our electoral and constitutional arrangements, and that’s where you and conferences like this come in.

³ See footnote 2.

Chapter 12

A Better Democracy, Thanks to MMP

Charles Chauvel

12.1 Introduction

A country's electoral system has been described as "the most important rule of the political game".¹ It regulates how people vote, whom they vote for, and the way in which votes cast are turned into seats in the legislature.² By loading the dice in favour of the two main political parties, New Zealand's former first-past-the-post (FPP) electoral system created parliamentary majorities where decisions were typically made by governments that more people had, at the time of voting, opposed rather than supported.³ Such a majoritarian system became increasingly unrepresentative of the developing diversity of New Zealand society, and levels of voter trust and satisfaction declined markedly from the late 1970s onward.

The move to adopt a Mixed Member Proportional (MMP) electoral system was a partial attempt to address these problems.⁴ A form of proportional representation,

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¹ Lundberg (2007), p. 473.

² McRobie (2006), p. 303.

³ Boston et al. (2003), p. 18.

⁴ Other reforms included a Bill of Rights Act, new standing orders governing parliamentary procedure (created in two tranches, one in 1986 and the other in 1996) and moves to make the machinery of government more transparent (examples include the implementation of the State

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its application usually results in coalitions, or minority party government. The system requires roughly half of the members of the chamber for which it is used to be elected in single-member constituencies by the plurality method, and the remaining members to be taken from party lists to make the overall composition of the single chamber of the New Zealand Parliament proportional to each party's percentage of the election night vote for particular parties.⁵ To gain representation in Parliament, a party must either win a constituency seat or receive at least 5% of the party vote.⁶ To complement the new electoral system, the size of the House of Representatives was increased from 99 to 120 MPs.⁷ In the New Zealand model of MMP, the House since the 2005 election has comprised 62 general and 7 Māori electorate seats, as well as 51 seats, which are occupied by members drawn from party lists.⁸

Fourteen years after electoral reform, it is apparent that MMP has changed the way politics is conducted and perceived in New Zealand. Through increased proportionality and the representation of a wider range of groups and interests, MMP has led to a revitalisation of New Zealand's legislative branch, allowing it to act as more of a restraint on executive power and decision-making, and increasing the level of public trust in the political system. Increased representation has also had a significant impact on New Zealand's policy environment. By requiring the support of more than one party in Parliament, the advent of coalition and minority government in New Zealand has seen the development of greater consensus over policy decisions. Consistent with the aim of the system, this has slowed the passage of some legislation through Parliament and created a more complex policy

Owned Enterprise model, reform of state and local government structures generally, and central bank independence.)

⁵ Lundberg (2007), p. 476.

⁶ Palmer and Palmer (2004), p. 14.

⁷ Peterson (1999). The size of the New Zealand Chamber is smaller than the lower or single houses of jurisdictions with a similar population size (for example, Denmark, Finland, Norway and Ireland). Exceptions are Israel and Switzerland, which both have fewer MPs per head of population than New Zealand, but which are considerably smaller and (in the case of Switzerland) also have cantonal government. In my view, at least 140 New Zealand MPs are probably needed in order to be able to reduce the size of the largest electorates to a level where they can be manageably represented.

⁸ The number of reserved Māori seats is determined by the Māori electoral option, held every 5 years in conjunction with the census, and which entitles New Zealanders identifying as Māori to choose whether to register as electors on either a 'general' or a 'Māori' electoral roll. The numbers registering on the Māori roll determine the number of Māori seats. There are 122 MPs in the current House because of a phenomenon known as 'overhang' – five of the seven Māori seats were won by members of the Māori Party, which did not receive enough Party votes to justify holding that number of seats. The overall size of the chamber was increased by the independent electoral authorities, consistent with their powers under the electoral legislation, to accommodate the overhang and maintain overall proportionality.

environment.⁹ A further outcome of MMP is that Parliament has become much more diverse in a demographic sense. Although New Zealand's new electoral era is still in its early days, after five MMP elections, the evidence of this seems clear. Some, especially those from the conservative end of the political spectrum who never in any event supported a change to the status quo ante, clearly find these outcomes challenging.¹⁰ I believe that they are to be welcomed, especially in light of the experience of the previous 9 years under the Labour-led government, which demonstrated the stability that can flow from the system if the requisite leadership exists.¹¹

12.2 The Need for a New Electoral System

To understand New Zealand's decision to adopt MMP, it is important to consider the factors that led to that choice. Under the old FPP electoral system, New Zealand was often cited as a "virtually perfect example" of the Westminster model of majoritarian democracy, characterised by a centralised system and the concentration of power in the hands of one of two major parties.¹² Under FPP, with a unicameral Parliament and no formal written constitution, few restraints on the exercise of executive power existed in New Zealand. As the Royal Commission on the Electoral System observed in its 1986 report:

[The New Zealand] constitution places almost no limits on the powers of Governments to carry out their large responsibilities. Parliament has supreme law-making powers; the Government of the day has the support of and general control over the House of Representatives; it has extensive direct powers both in its own right and by delegation

⁹ 'The impact of proportional representation on government effectiveness: the New Zealand experience': Boston et al. (2003), p. 75. 'Support parties' supplying ministers outside of the cabinet who do not regard themselves and their parties being part of the government are evidence of this increased complexity. Currently, in addition to the 20 National members of the cabinet of the National government, three ministers are drawn from the National caucus that sit outside of the cabinet, and then another five (Hon Peter Dunne from United Future, Hon Rodney Hide and Hon Heather Roy from ACT and Hon Tariana Turia and Hon Dr Peter Sharples from the Māori Party) are ministers outside the cabinet are drawn from parties with confidence and supply agreements with the government. These latter parties are not regarded as members of the coalition, but as 'confidence and supply partners' or 'support parties'.

¹⁰ See, for example, NZPA 2008. National Party leader John Key recently announced that if elected to lead a government, National will hold a referendum on MMP in conjunction with the 2011 general election.

¹¹ Henderson (2006), p. 221. The first MMP election in New Zealand in 1996 was followed by a period of instability with disagreements and standoffs between National and its New Zealand First coalition partner, and in 1998 Prime Minister Shipley removed Deputy Prime Minister Peters from office. In contrast, Prime Minister Clark enjoyed significantly more success in managing coalitions and like arrangements.

¹² Banducci et al. (1999), p. 536.

from Parliament; its powers in and through the House are not restrained by a Second Chamber; there are no general legal restrictions, such as might be found in a bill of rights, on the exercise of the Government's powers both in Parliament and outside it; and there is no constitutional decentralisation of power as in a federal system.¹³

Between the mid-1970s and the mid-1990s this concentration of power allowed successive National and Labour governments to enact policies that were contrary to the traditional expectations of their respective support bases, despite widespread dissatisfaction from the general electorate.¹⁴ This had the effect of eroding the nation's confidence in New Zealand's political establishment, prompting a questioning of the country's constitutional arrangements. Voter disenchantment with New Zealand's former system of government is one of the main reasons for the successful adoption of MMP. In a 1979 poll, it was found that 54% of people favoured the FPP electoral system. In 1982, only 4 years later, this number had dropped to 40%.¹⁵ A clear shift in voter attitudes had occurred, placing increased pressure on politicians to promise change as momentum grew.

Another frequently criticised feature of New Zealand's former electoral system was its tendency to produce results that were disproportionate to voter intent. New Zealand's two-party system was at the heart of this:

One of the few "laws" of political science is that the FPP system has a bias toward the existence of two parties. Consequently, one party would have a majority of seats in Parliament. If a voter wanted a say in which party formed the government, there was little point in voting for a third party because only one of the two main parties had a realistic chance of doing this.¹⁶

Because FPP would manufacture parliamentary majorities for the two major parties, decisions were typically made by governments that more people had opposed at the previous election than they had supported.¹⁷ No single governing party has received more than 50% of the votes cast at a general election in New Zealand since National did so in 1951. Despite this fact, the "winner-takes-all" electoral rules of the time meant that the governing party would disproportionately receive a majority of seats in the House of Representatives.¹⁸ Furthermore, it was only the votes in a handful of "marginal" seats, where the fight between the two main rivals was close, which mattered in the end. The outcome of the contests in "safe" seats, where most people would vote either for Labour or for National, was virtually assured.¹⁹ The distortions were such that in the 1978 and 1981 general

¹³ Royal Commission on the Electoral System (1986), p. 5.

¹⁴ Banducci et al. (1999), p. 537; Palmer and Palmer (2004), p. 12.

¹⁵ Boston (1987), p. 106.

¹⁶ Palmer and Palmer (2004), p. 24.

¹⁷ Boston et al. (2003), p. 18.

¹⁸ Levine and Roberts (2007), p. 24.

¹⁹ Palmer and Palmer (2004), p. 24.

elections it was the National Party that formed the government despite Labour winning a larger share of the total vote on both occasions.²⁰

The distortions inherent in the system particularly disfavoured third and minor parties. As confidence in the two main parties fell over the 20 years following 1975, it was accompanied by a rise in support for the smaller parties, which took away votes from the Labour/National duopoly.²¹ These votes, however, usually failed to translate into seats in the legislature. Under FPP, it was possible for minority parties to gain a sizable level of support, but to gain little or no representation.²² This was certainly the case for the Social Credit Party, which secured 16.1% of the vote in 1978 and 20.7% of the vote in 1981. Despite being supported by up to a fifth of all voters, Social Credit gained only one seat in 1978 and two seats in 1981.²³ The Values Party, one of the first Green parties, fared worse, never winning a seat in Parliament despite gaining 5.2% of the total number of votes in 1975. In the penultimate FPP general election in 1990, small parties including New Labour, the Greens, and Christian Heritage received 17.7% of the vote, but obtained only 1% of the seats in Parliament.²⁴ The later FPP elections were thus significant disenfranchisement exercises.

12.3 The Road to MMP

It was a combination of the factors outlined above which led to calls to replace FPP with a new electoral system. The gradual breakdown of public trust and confidence in politicians, Parliament, and the old two-party system set in motion the momentum for electoral change. Prior its election in 1984, as part of a significant programme of promised constitutional reform (much of it actually delivered while in office), Labour had undertaken to establish a commission to review the electoral system. In 1985, a Royal Commission on the Electoral System, chaired by the Hon Sir John Wallace, a High Court Judge and former Chief Human Rights Commissioner, was warranted to review New Zealand's electoral arrangements.²⁵

After assessing the respective merits of a number of electoral systems, the Commission recommended that New Zealand adopt a system of MMP based on the German model of proportional representation used for elections to the Bundestag, or lower house, of the federal legislature.²⁶ This decision was based on the following

²⁰ Boston (1987), p. 106.

²¹ Levine and Roberts (2001).

²² Banducci et al. (1999), p. 538.

²³ Boston (1987), p. 106.

²⁴ Banducci et al. (1999), p. 537.

²⁵ Lundberg (2007), p. 475.

²⁶ *Ibid.*, p. 471.

criteria:²⁷ Fairness between political parties; Effective representation of minority and special interest groups; Effective Māori representation; Political integration; Effective representation of constituents; Effective voter participation; Effective government; Effective Parliament; Effective parties; and Legitimacy.

Although Labour had kept its word in establishing the Commission, the Party was by the late 1980s so riven by factional infighting that its programme of constitutional reform ground to a halt. Casualties included the entrenchment of the New Zealand Bill of Rights Act, and the implementation of the recommendations of the Wallace Commission. National and its core constituency had no great affection for the idea of reform of the electoral system, but the opportunity to embarrass the (by this stage terminal) Labour government was too great, and National made a promise during the 1990 election campaign that it would hold a referendum on New Zealand's electoral system.

Pressure on National to honour this campaign pledge led to a two-part referendum. In 1992, an indicative referendum was held which specified several options for reform, including: MMP, Single Transferable Vote (STV), Supplementary Member (SM), or Preferential Vote (PV), in addition to the option of retaining FPP. An overwhelming 85% of the electors who took part voted to change the electoral system, with over 70% favouring MMP.²⁸ In conjunction with the 1993 general election a second, binding, referendum was held. This time voters were offered two options: MMP or FPP. MMP gained 54% of the vote, and with effect from the 1996 general election became New Zealand's new electoral system.

12.4 Better Representation

12.4.1 *General*

A key motivator behind the Royal Commission's recommendation for New Zealand to adopt MMP was the need for a Parliament that more closely reflected the composition of New Zealand society. In stark contrast to the two-party, winner-takes-all FPP model, which through a complex and conservatising interaction of media, party machines and the requirements of local campaigning tended to control for less conventional candidates, MMP encouraged diversity in Parliament.²⁹ Because list seats are "compensatory" in nature, MMP guarantees proportionality by allocating seats to parties in the legislature according to the nation-wide distribution of the party vote they receive.³⁰

²⁷ Levine et al. (2007), p. 449.

²⁸ Lundberg (2007), p. 477.

²⁹ Levine et al. (2007), pp. 458–459.

³⁰ Karp (2006), p. 715.

Table 12.1 Representation by gender and ethnicity

Year	1990	1993	1996	1999	2002	2005	2008
Electoral system	FPP	FPP	MMP	MMP	MMP	MMP	MMP
(Total no. MPs)	(97 MPs)	(99 MPs)	(120 MPs)	(120 MPs)	(120 MPs)	(121 MPs)	(122 MPs)
No. of women MPs	16	21	35	37	34	39	41
Share of total MPs (%)	17	21	29	31	28	32	34
Share of NZ population (%)	51	51	51	51	51	51	51
No. of MPs of Māori ethnicity	6	7	16	16	19	21	20
Share of total MPs (%)	6	7	13	13	16	17	16
Share of NZ population (%)	12	13	15	15	15	15	18
No. of Pacific MPs	0	1	3	3	3	3	5
Share of total MPs (%)	0	1	3	3	3	2	4
Share of NZ population (%)	5	5	6	7	7	7	7
No. of Asian MPs	0	0	1	1	2	2	6
Share of total MPs (%)	0	0	1	1	2	2	5
Share of NZ population (%)	3	4	5	6	7	9.2	9.3

Parliamentary Library (2008), pp. 8–9

MMP increases diversity of representation in two main ways. The first of these is by having more parties in Parliament, and the second is through the often deliberate use of party lists to bring in under-represented minorities in a way that geographical constituencies cannot.³¹ In New Zealand the number of parties represented in Parliament has almost doubled from four after the last FPP election in 1993 to seven after the 2008 election. Over that same period, even the lists of the more conservative political parties demonstrated an increased willingness to ensure that caucuses contain representation from groups that did not previously feature, or were under-represented in Parliament by reference to the general population. As a result, the first MMP election saw a record number of women elected to Parliament, and an increase in the proportion of Māori, Pacific Island and Asian MPs. As Table 12.1 shows, those trends have continued in the subsequent MMP elections.

The House of Representatives now also contains members whose expressed politics cover a broader ideological spectrum of interests than was previously the case, and includes MPs from a very diverse range of backgrounds. The impacts of MMP on the representation of these groups are described in further detail below.

12.4.2 *Better Representation: Women*

Since MMP was introduced the proportion of women in Parliament has increased substantially. After the final FPP election in 1993, women held 21% of the seats in the New Zealand House of Representatives, but comprised just under 51% of the

³¹ James (1999), p. 33.