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Reconstituting the Constitution

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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.

Entrenchment must serve a necessary constitutional purpose. Typical subjects of entrenchment include a country's primary electoral machinery, the separate functions of government, the independence of courts and a bill of rights. The object is to vouchsafe the constitutional system and protect it against ill-intended change. The entrenching procedures under the Electoral Act 1993 are given to that purpose: these procedures place certain key elements of the electoral system beyond the reach of amendment by ordinary government majority. Section 268 stipulates, for amendment of the reserved sections, a 75% majority vote in Parliament or the people's support at a national referendum.

Politically constable policy – the subject of party-political debate – must be distinguished from subjects of entrenchment. Separate Māori representation is a politically contestable issue that does not qualify for constitutional protection. The MMP Select Committee reported in 2001 that it could not reach agreement on whether the seats should be abolished or retained,[36] and that fundamentally remains the position today among the political parties. The National Government under Prime Minister John Key advocates abolishing the seats, although in 2008 Key deferred taking steps to that end until all historic Treaty claims had been settled. The ACT Party likewise advocates abolishing the seats, while the Labour, Green and Māori parties advocate retention.

The issue of separate Māori representation is political, not constitutional. The abolition or retention of the Māori seats involves political judgement over which differing views can be (and *are*) held. Contestable policy issues are the subject of on-going debate and should not be ring-fenced and shielded from political action through constitutional protections. The political judgements of one generation should not seek to claim universal validity for future generations, whatever the circumstances or needs of those generations.

There is, in addition, a practical dimension to this debate which precludes any real consideration of entrenching the Māori seats. 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.[37] The combined voting power of Labour, the Greens and the Māori Party would come nowhere near the 75% majority needed to satisfy this rule. The requirement to pass entrenching provisions by the same majority as is proposed for future amendment counters the moral argument against one Parliament, by bare majority of its members, making it more difficult for a future Parliament to undo its legislation. This requirement mandates, as a minimum, cross-party agreement between the two centrist parties (Labour and National) to entrench subjects of legislation.

There is a way around the standing orders. The standing orders are not law and can be overridden or suspended by ordinary majority resolution of the House. In theory, therefore, the Government could suspend Standing Order 262 (the relevant

[36] MMP Review Committee (2001), pp. 5–6.

[37] Standing Orders of the House of Representatives 2008, SO 262. For commentary see Joseph (2007), pp. 563–564.

standing order) and introduce legislation to entrench the Māori seats by bare majority of its members. However, that scenario would never happen (or, at least, one hopes would never happen). Governments are not disposed to acting in defiance of accepted constitutional procedures, and a government that did would invite electoral retribution.

13.2.8 Cultural Placement of the Debate

When we ask questions about abolishing or retaining the Māori seats, we are forced into making politico-legal judgements. An opinion piece written by a colleague referred to the common use of the adjectives "correct" and "right" when talking about judicial decisions.[38] This usage, he wrote, conjures the false image that "legal reasoning is like mathematics".[39] On the contrary, he observed, legal reasoning involves "complex value judgments relating to unavoidable cultural prejudices".[40] Consequently, the simple application of "correct" and "right" (or their opposites "incorrect" and "wrong") did not do justice to the complexity of what is involved in deciding difficult legal cases. Answering questions about whether the Māori seats should stay or go entails the same politico-legal judgements that we associate with difficult legal cases. No process of pure lineal reasoning can direct us inexorably to the "correct" or "right" answer. These questions connect to deep cultural traditions and tensions, and force us to confront our cultural preferences (or prejudices).

Those who stand on either side of the question over the Māori seats are equally implicated in the cultural divide. No one is immune once the question is asked. Those who argue for retention appeal to bicultural values and the powerful symbolism of the seats, while those who argue for abolition appeal to the negative implications of Māori separatism and legal distinctions based on ethnicity. Ultimately, a judgement must be made as to which of those contesting considerations is the more powerful. As my colleague would say, the judgement would be neither "correct" nor "incorrect" but reached, nevertheless, through a complex cognitive process. That judgement, while neither correct nor incorrect, would not be wholly uninformed but would be the more considered and rhetorically sustainable one. In the end, I believe the more considered and thetorically sustainable judgement is the one supporting abolition and the complete immersion of Māori in the MMP political system.

One commentator contended that my earlier writings on the Māori seats were "driven by deep-seated personal belief".[41] I prefer, as an explanation, the more nuanced contextual placement of the debate, as one that is unavoidably, deeply

[38] Dawson (2010).
[39] Ibid.
[40] Ibid.
[41] Palmer (2008).

culturally driven. This "placement" is infinitely more informative (and informed) than ad hominem responses. Superficial debate over cultural issues almost always reveals an unspoken belief of moral superiority at the expense of intellectual openness and rigor. Reason, not moral superiority, drove my conclusion that general seats were preferable over ethnically-guaranteed seats. It is not necessarily the "correct" or "right" conclusion, although it is the preferable of the options. There need be no "right" or "wrong" answers in matters affecting the political constitution.[42]

13.3 Future of MMP

13.3.1 Electoral Referenda

In practical terms, not much may be gained from second-guessing the fate of the MMP electoral system. That is the question the people will be asked to decide in the referendum (or referenda) on the electoral system. The first referendum is scheduled for 2011.

The Electoral Referendum Act 2010 received the Royal Assent on 20 December 2010. This Act implements the Key Government's policy to hold a two-stage referendum on MMP. The first is indicative and to be held in conjunction with the 2011 general election. Voters will be asked two questions: the first whether they wish to retain the MMP voting system or change to another voting system. Regardless of how they answer that question, voters will also be asked a second question: which system they would choose if New Zealand were to change to another voting system. The question will offer four optional voting systems: FPP, the preferential voting system, the supplementary member voting system, or the single transferable-vote system. If the public mood is for change, a second binding referendum will offer a choice between MMP and the preferred alternative voting system. No date has been set for this referendum (assuming there be one), although the general election following the next has been touted as the likely option.

13.3.2 Criticisms of MMP

Three matters will exercise voters when they pronounce upon MMP.[43] First, it is objected that the party lists are "closed": the parties themselves select their list candidates and allocate their ranking on the list. Closed lists empower the party

[42] See the conclusion to Joseph (2008), p. 21.

[43] See Joseph (2009b), pp. 131–133.

hierarchy at the expense of the electorate, which has no say over the selections and rankings. This has driven the perception that MMP has produced two classes of member of Parliament: elected electorate members and unelected list members.[44] Implicitly, electorate members are accorded a higher standing than list members, who do not need to win the electorate's approval.

Secondly, some see the list system as denying the people the right to vote out of Parliament unpopular electorate members. A member may be decisively defeated as an electorate candidate, only to be returned as a list member. Labour and National party electorate members with high list rankings are inevitably assured of a seat in Parliament. 50 per cent of respondents surveyed in the August 2010 poll disapproved of this feature of MMP, whereas 14% thought it a positive feature.[45] For many people, loss of the positive right to vote out members of Parliament is as disenfranchising as loss of the right to vote in members of Parliament.

Thirdly, many lament that the minor parties wield disproportionate power ("the tail wagging the dog"). MMP was intended to end the electoral duopoly of the Labour and National parties and promote representational diversity through minor party membership of Parliament. FPP had entrenched the centrist parties to the exclusion of third parties, even where they had polled credibly well. During the Muldoon years (1975–1984), the Social Credit party enjoyed widespread electoral support but could not translate that support into seats. At the 1981 elections, the party won 20.65% of the popular vote but entered Parliament with a paltry two seats (East Coast Bays and Rangitikei). Under a proportional system, Social Credit's polling would have translated into 18 seats in a 92 member Parliament (as it then was).

The August 2010 poll records conflicting results on representational diversity under MMP and the influence of the smaller parties. 50 per cent of respondents supported the diversity of representation MMP had brought to Parliament, even if it made it more difficult for governments to take "strong actions".[46] Multi-party representation was preferable to the electoral duopoly that had dominated national politics under FPP elections. The systemic under-representation of minor parties contributed to New Zealand adopting the MMP system.[47] Nevertheless, despite 50% of respondents supporting the increased representational diversity, 41% of respondents believed smaller parties with less than 10% of the vote wielded too

[44] List members are "elected" but by declaration of the Chief Electoral Officer rather than by direct choice of the voters: Electoral Act 1993, s 54(2).

[45] See ShapeNZ (2010), p. 4. Surprisingly, 55% of the respondents disliked entry into Parliament on the party list by persons who could not gain an electorate seat, yet only 50% disapproved of a defeated electorate member being returned as a list member.

[46] ShapeNZ (2010). 31% of respondents opposed the greater diversity under MMP, and 19% did not know.

[47] Other contributing factors were voter disenchantment with the two centrist parties and the perceived unfairness of FPP. At the 1978 and 1981 elections, Labour won a majority of the popular vote nationally but gained fewer seats than National and failed to take the Treasury benches.

much influence.[48] A minor party seldom ever exceeds 10% of Parliament's voting power on its share of the national party vote. Only once, in the 1996 elections, has a minor party won more that 10% of the national party vote.[49] The New Zealand First Party won 13.35% of the party vote, entitling it to 17 members of Parliament.

The power of the minor parties is most visible when the centrist parties (Labour and National) broker coalition or confidence and supply arrangements. In the August 2010 poll, 43% of respondents believed that the compromise needed to form an MMP government was "bad". By comparison, 35% believed it was "good", while 22% did not know. The minor parties also exert on-going influence throughout the parliamentary term, although without the media spotlight that illuminates their positioning in the processes of government formation. All governments from 1998 have been minority administrations relying on the support of one or more minor parties on confidence votes, and negotiating their support on legislative proposals on a bill-by-bill basis. Governments must frequently change the detail and sometimes the architecture of their legislation to build the necessary cross-party support. They may even adopt a support party's legislative proposal, as a condition of the party's support on confidence issues. The repeal of the Foreshore and Seabed Act 2004 was a "bottom line" for the Māori Party when it brokered its support arrangement with the National party, following the 2008 election.[50]

13.3.3 Whither the Referenda Outcomes?

Every electoral system has its imperfections, and MMP is no exception. So what might we expect when the people have their say? The August 2010 poll suggests that the 2011 vote will call for a further, binding referendum on the electoral system. 46.6% of respondents supported a change to another electoral system, while 37.5% plumped for the status quo.[51]

Those poll results suggest a mood for change. Nevertheless, how much reliance should be placed on them? At the 1992 indicative referendum, a massive 85% of voters voted for a further binding referendum on a relatively low voter-turnout of 55%. This suggested an overwhelming mood for change. In the event, voting at the 1993 binding referendum produced "mirror image" results of those in the earlier referendum: only 54% of voters voted for a change to MMP on a relatively high

[48] ShapeNZ (2010). 10 per cent of respondents thought that the minor parties exercised too little influence.

[49] In all MMP elections apart from in 1996 (the first to be held under MMP), the highest polling by a minor party was at the 1999 elections. The Alliance Party won 7.74% of the party vote, entitling it to nine seats.

[50] "Relationship and Confidence and Supply Agreement between the National Party and the Māori Party", 16 November 2008.

[51] ShapeNZ (2010), p. 3.

voter-turnout of 85%. The reversal in the voting trends at the 1993 referendum was attributed to the extensive public education programme on the different electoral systems conducted in the lead-up to the referendum. This is significant because only 36% of respondents in the August 2010 poll felt they were "very well informed, or informed enough to make a decision between MMP and alternative voting systems".[52] 59 per cent of respondents felt they would like to be better informed, while 41% believed they lacked the knowledge required to make an informed judgement.[53]

My instinct is that the people will vote to retain MMP. Here are my reasons: MMP was intended to disperse political power and temper executive dominance. That expectation has not been dashed. The people, I venture, would not want a return to FPP government. Many will recall the voter alienation produced by the three-term Muldoon Government (1975–1984) and the two-term Lange Government (1984–1990). Elsewhere I observed: "Those administrations engendered an overwhelming belief that FPP had created a system of elective dictatorship, regardless of the party in office."[54] The 2010 poll supports that intuition: 38% of respondents believed MMP was a better electoral system than FPP (15% believed "much better"). By comparison, 29% endorsed FPP, 15% believed MMP had made little or no difference and 17% did not know.[55]

MMP can boast several positive features. It has energised national politics, increased the contestability of political decision-making, and engaged a broader range of interests than under single party, majority government.[56] In the August 2010 poll, 50% of respondents approved of the diversity of national politics under MMP.[57] Demographics also support a positive vote for MMP, with proportional representation now bedded in the national psyche.[58] Voters under the age of 36 years have only ever voted in MMP elections and older voters will only-too-readily recall the divisive and unresponsive governments FPP produced.

If we discount FPP, might the people vote for one of the other proportional systems (preferential, supplementary member or single transferable-vote voting system)? I suggest not, in the absence of widespread disaffection with existing political arrangements. In the pre-MMP debates on the electoral system, the persistent fear was that MMP would produce unstable government but this has not eventuated. Only one government – the first elected under MMP – has failed to see out the parliamentary term. The National–New Zealand First coalition government was appointed in December 1996 but collapsed in August 1998, in its second

[52] ShapeNZ (2010), p. 5.

[53] Ibid, p. 1.

[54] Joseph (2009b), p. 134. See Hailsham (1978), Chap. 20 who coined the expression "elective dictatorship".

[55] ShapeNZ (2010), p. 4.

[56] Joseph (2009b), p. 134.

[57] ShapeNZ (2010), p. 4.

[58] Joseph (2009b), p. 134.

year of office. In contrast, the following four MMP elections have produced stable government under successive minority administrations, supported by the minor parties on issues of confidence.

For those reasons, I predict that the people will vote to retain MMP by a similar or larger margin as voted in MMP. In the August 2010 poll, the percentage of undecided voters (11.9%) exceeded the percentage difference (9.1%) between the "status quo" and "change" votes (37.5 and 46.6% respectively).[59]

13.4 Fixed Term Parliaments

13.4.1 Case for Change

Electoral fairness drives the argument for fixed-term Parliaments. The timing of elections is the prerogative of the Prime Minister, who may seek tactical advantage by calling an election at the most propitious time for the government. No law or convention requires the Prime Minister to obtain the consent of the House, or to consult or notify it over the timing of an election. A Prime Minister who retains the confidence of the House may call an election at any time in the electoral cycle. Some believe that this confers an unfair advantage, undermines the integrity of the electoral contest, and fuels public cynicism about the political process.[60]

One naturally has some sympathy for these views. Even under New Zealand's relatively short electoral cycle, Prime Ministers do occasionally go to the country early. They do this, not because they relish electioneering, but because the polls tell them that there would be an electoral advantage. A fixed-term Parliament would pre-empt that choice and place the electoral contest on an even keel. Fixing the period between elections would, in principle, achieve a fairer system, although any fixed-term arrangement would need to accommodate the collapse of a government mid-term. That eventuality cannot be discounted in an MMP environment of minority government. There must always be a safety-valve to allow for an early election where that is the dedicated recourse to ensure the continuity of government.

13.4.2 Safety-Valve

New Zealand has experienced only one government meltdown under MMP. In August 1998, the National–New Zealand First coalition government foundered

[59] ShapeNZ (2010), p. 3.

[60] See Blackburn(1998). See also Royal Commission on the Electoral System (1986), p. 166.

over the sale of the Crown's ownership interest in Wellington airport. The New Zealand First ministers staged a Cabinet walk-out over the issue, forcing the Government's collapse. A little over 2 weeks later, Prime Minister Jenny Shipley announced the composition of a new National-led minority government, and the following day new ministers were sworn in and portfolios allocated. Nearly 4 weeks after the Cabinet walk-out, Shipley was granted leave to move confidence in her new government, which she won by 62 votes to 58. Although her government survived the parliamentary term, the Wellington airport issue reveals the potential for political events to unseat a government.

Most countries with fixed-term arrangements allow for an early election if there has been carried a vote of no-confidence in the government. If such an arrangement were adopted here, the House of Representatives rather than the Prime Minister would become the arbiter for the calling of an early election. A no-confidence vote would trigger the Prime Minister's right under the caretaker convention to request the Governor-General to grant an early dissolution. However, even then, an early election would not be automatic.

The complex parliamentary configurations that typify MMP politics may or may not necessitate an early election. The political factions in the House might realign in a way that allows some other party leader to form a government. If another leader could claim the confidence of the House, that person would be constitutionally competent and entitled to form a government to see out the parliamentary term. Much would depend on the timing of the electoral cycle. If Parliament were well through its term, the parties might consider a general election a preferable recourse to cobbling together a new government. The Cabinet Manual sets out the sequence for resolving the uncertainty, albeit in slightly elliptical language. The caretaker convention obliges a defeated Prime Minister to consult the other parties in the House on the calling of an early election.[61] This is code for: might some other political leader claim the confidence of the House and form a government?

The politicians must resolve a mid-term political crisis without implicating the Governor-General: "The process of forming a government is political, and the decision to form a government must be arrived at by politicians."[62] Having reached a resolution, the party leaders must make "appropriate public statements of their intentions".[63] The Governor-General must not be placed in the invidious position of having to make choices between competing political leaders: for example, where a caretaker Prime Minister advises a dissolution and an opposition leader claims the confidence of the House. The party leaders must resolve the political situation and announce their accommodation to the people and the Governor-General as a fait accompli. The involvement of Government House must be no more than formal and/or ceremonial.

[61] Cabinet Office (2008), para. 6.58.
[62] Ibid, para. 6.37.
[63] Ibid, para. 6.38.

If no credible alternative government emerges, then the only democratic recourse would be an early election. The Governor-General may grant the Prime Minister's request, having established under the caretaker convention that it carries the support of the majority of Parliament. The need for the Prime Minister to engage in cross-party consultations regularises the tendering of advice, even if that person has lost the confidence of the House.[64] On the other hand, the Governor-General would not be obliged to grant the Prime Minister a dissolution if he or she remained in doubt as to the mood of the House. The politicians must resolve the matter publicly and declare to the nation that no alternative government can be formed. Until that possibility has been exhausted, the Governor-General would not be obliged under the caretaker convention to action the Prime Minister's request.

The personal prerogatives of the Crown supplement the obligations under the caretaker convention. The nineteenth century constitutional writer, Walter Bagehot, advised that the Monarch retains the rights to be consulted, to encourage and to warn.[65] These prerogatives establish two things: the constitutional right of the Governor-General to be kept informed of developments, and the correlative duty on a caretaker Prime Minister to keep the Governor-General informed. This latter duty would clearly encompass such developments as to whether or not an early election was required.[66] These prescriptions, coupled with the caretaker convention, avoid the Crown's intervention under the reserve powers. Those powers need not be invoked where the Prime Minister can establish a democratic mandate (the support of the House) for an early election.

One final scenario might be noted: an early dissolution need not always involve a mid-term government collapse. Following a general election, it might transpire that no one could claim the confidence of the House. That situation would be exceptional as the party leaders bear political (and arguably constitutional) responsibility to reach an accommodation that can end the caretaker period. Nevertheless, a post-election impasse is a distinct (if remote) possibility. In that event, Parliament would need to meet before there could be any talk of fresh elections. A request for fresh elections would be premature if Parliament had not had an opportunity to test the issue of confidence on the floor of the House. Under the Constitution Act 1986, Parliament must assemble to meet not later than 6 weeks after the date fixed for the return of the writs for that election.[67]

[64] Ibid, para. 6.58.

[65] Bagehot (1963), p. 111.

[66] See cl 16 of the Letters Patent Constituting the Office of Governor-General of New Zealand, SR 1983/225, titled, "Ministers to keep Governor-General informed". For discussion, see Joseph (2007), pp. 631–632.

[67] Constitution Act 1986, s 19.

13.4.3 Is There a Problem?

It has been suggested that fixing the period between elections would achieve a fairer system. But is the Prime Minister's right to determine the election date a problem that needs fixing? Prime Ministers, historically, under the Westminster system have enjoyed the right to fix the date of elections. For a fixed parliamentary term, legislation would need to do two things: abrogate the Prime Minister's right to choose the election date, and allow early elections where there had been a vote of no-confidence in the Government. The granting of an early dissolution entails an exercise of the royal prerogative which, by convention, is exercised on the Prime Minister's advice. The question is: Should New Zealand adopt such an arrangement?

There appears to be no perception that there is a problem with the status quo. This may be attributable, in part, to New Zealand's short electoral cycle. With a 3-year window, there is not the temporal flexibility to manoeuvre election dates to treat the voters. Exceptions do occur: for example, when National Prime Minister Robert Muldoon sought a fresh mandate and brought forward by 4 months the 1984 elections, and when Labour Prime Minister Helen Clark sought to take advantage of the polls and brought forward by the same period the 2002 elections.[68] The only other early election since the Second World War (1939–1945) was in 1951, following the divisive, nationwide waterside workers' strike. National Prime Minister Sidney Holland condemned the strike as "industrial anarchy" and moved quickly to capitalise on the public mood. He sought a fresh mandate from the people and was returned with an increased majority of seats.

The parliamentary record does not identify a problem that needs fixing. The above exceptions apart, Prime Ministers have been intent to govern for the maximum period permitted by the term of our Parliament. Three years is a challenging term for Governments intent on implementing their policies in time to ready for the next elections. In the post-war era, Holland has been the only Prime Minister to exploit the prime ministerial prerogative. In 1951 Parliament had a full 15 months to run when Holland seized the electoral advantage and went to the country. Muldoon and Clark also manipulated the electoral cycle but only by 4 months. As long as New Zealand retains the 3 year cycle, there is no pressing need to fix Parliament's term.

A caveat is affixed to this advice: the question of a fixed term might be revisited were New Zealand to consider extending its parliamentary term. The temporal flexibility of a 4-year term would inevitably tempt governments to exploit the electoral cycle according to the vicissitudes of the polls. That has invariably been the experience of counties that have 4–5 year parliamentary terms.

[68] In 1984 elections were held on 14 July, not the last Saturday in November as was traditional at that time. The 2002 general election was held on 27 July, also 4 months earlier than was envisaged under the normal parliamentary cycle.