

Maori Electoral Option Report

2 - Maori Representation in Parliament: An Historical Overview

2.1 - The Treaty of Waitangi

Chapter 2

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An Historical Overview

2.1 The Treaty of Waitangi

The 1986 Royal Commission on the Electoral System said that the Treaty of Waitangi "marked the beginning of constitutional government in New Zealand. Under the terms of the Treaty, the Crown formally recognised the existing rights of the Maori and undertook to protect them. It is in this sense that Maori people have a special constitutional status" (A1:81). That point was repeated by counsel for the claimants in our hearing (A3:8). In examining the place of Maori in our electoral system, we too must begin with the Treaty.

Relevant principles of the Treaty for this claim will be discussed in the next chapter. Here it will be sufficient to comment briefly on the terms of the Treaty, in the English and Maori texts, in so far as they are relevant to later discussion of this claim.

In article 1 the Maori signatories ceded sovereignty, or, in the Maori text, kawanatanga (governance), to the British Crown. In recent years, the cession of sovereignty has been seen as less than absolute (Ngai Tahu Report [1991] Vol. 2, 236). As Professor Kawharu told the Waitangi Tribunal in 1984:

what the chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death (Kaituna River Report, [1984], 14).

Of course the right to kawanatanga does include the right of Parliament to legislate, as it has done over the years in relation to Maori representation in Parliament.

In the English text of article 2, the Queen guaranteed Maori "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties" However, the Maori text guaranteed somewhat more in that "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa" amounts to more than mere ownership or possession of lands and other properties. It includes chiefly control over those resources and the people they sustained. Taonga, translated as properties in the English text, included more than merely tangible objects, even, as the tribunal pointed out in its Te Reo Maori Report (1986), the taonga of language. This should be read with the Preamble of the Treaty which uses broader language, saying in the English text that the Queen was "anxious to protect their just Rights and Property", and in the Maori text "kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua". The English text promises to protect their just rights and property; the Maori text promises to protect Maori chieftainship and their land, as Professor Kawharu pointed out in a retranslation of the Maori text into English¹. The precise meaning of tino rangatiratanga in the Treaty and its relationship to the kawanatanga that was ceded in article 1 has been much debated.² Some have argued that tino

rangatiratanga was a guarantee of Maori sovereignty; others a right to self-determination; others again a right of self-management. The difficulty is that no one of these English constitutional terms properly captures the Maori meaning - or meanings - of tino rangatiratanga, a term that is eminently adaptable to time and circumstance. But if we look beyond the strict literal meaning of the Treaty to its broader principles, it is clear that the exercise of tino rangatiratanga, like kawanatanga, cannot be unfettered; the one must be reconciled with the other (Ngai Tahu Report [1991], Vol. 2, 237). In constitutional terms this could be seen as entitling Maori to a measure of autonomy, but not full independence outside the nation state that they helped to create in signing the Treaty. This qualified autonomy can take various forms, including separate Maori representation in the New Zealand Parliament.

It is also an article 3 right, as the claimants have argued and the Crown has admitted. In article 3 the Queen, in consideration for Maori acceptance of the previous articles, extended to Maori "Her royal protection and imparts to them all the Rights and Privileges of British Subjects". The franchise, however qualified it might have been in the mid-19th century, was undoubtedly a right and privilege of a British subject. As will be explained below, Maori came to receive this right through the Maori Representation Act 1867.

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2.2 - The Beginnings of Maori Representation in Parliament

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In the early years of the colony neither Maori nor the Pakeha colonists were represented in government. In November 1840, when New Zealand was separated from New South Wales, a Crown colony system of government was established, with a Governor appointed by and responsible to the Secretary of State for the Colonies in Britain, and Legislative and Executive Councils nominated by him and consisting largely of his officials. The colonists agitated for self-government which was conceded, at least in principle, with little delay. In 1846 the British Parliament passed a New Zealand Constitution Act which provided for a complicated three-tier system of government, with elected municipal corporations, two elected Provincial Councils and a General Assembly composed of an elected House of Representatives and a nominated Legislative Council. The franchise was confined to adult males who occupied a tenement and could read and write English. At this time the settler population amounted to some 13,000, about a fifth of the Maori population. But Governor Grey refused to bring the constitution into operation because it disfranchised virtually all Maori. Though many of them were now literate in their own language, very few could read or write English (A2:12). A new, less complicated constitution was introduced under the New Zealand Constitution Act 1852. This provided for a two-tier system of government, with six elected Provincial Councils, each headed by an elected superintendent, and a General Assembly, again with an elected House of Representatives and a nominated Legislative Council. It granted the franchise to all males over 21 who had a freehold estate within an electorate valued at 50 pounds, or a leasehold with an annual value of 10 pounds, or a tenement with an annual rental of 10 pounds in a town or 5 pounds in the country. Adult Maori males were not specifically excluded and in early elections to Provincial Councils and the General Assembly a few voted for European candidates. However, in 1859 the Law Officers of the Crown were asked for an opinion on Maori eligibility and reported that Maori property, being communal, and Maori "tenements", which were impermanent, did not meet the required conditions for the franchise.

By this time the colonists had gained almost complete control of government. The British Parliament had passed a New Zealand Constitution Amendment Act in 1857 which gave the New Zealand Parliament authority to amend all but a few entrenched sections of the 1852 Constitution Act. In the 1860s responsibility for native affairs was gradually transferred from the British to the Colonial Government. One consequence of this was the passage of the Native Land Acts of 1862 and 1865 which abolished Crown pre-emption and provided for individualisation and registration of Maori land titles, prior to alienation to settlers. The legislation also seemed to offer a way out of the franchise dilemma. However, it was likely to be a long time before a significant number of Maori males had registered individual titles which qualified them for the vote, more especially as large parts of the North Island were still in the

throes of war.

It was in this context that Parliament explored other short-term expedients. In 1867 Maori representation was proposed as a way of balancing North Island representation against demands of South Island goldminers for representation. Donald McLean, Superintendent of Hawke's Bay, introduced a Maori Representation Bill that proposed three Maori seats in the North Island and one in the South as "compensation" for two new seats for the Westland miners that were proposed in a separate bill. Both were passed.

The Maori Representation Act 1867 provided for the division of the North Island into three electorates: one north of Auckland, the other two bisected by a line running down the centre of the island. The whole of the South Island, Stewart Island and adjacent islands were included in the fourth seat. This division has remained substantially unchanged except that in 1954 the Southern Maori seat was extended into the south and east of the North Island. The franchise was granted to Maori males 21 and over, including half-castes, but excluding any who had been "attainted or convicted of any treason felony or infamous offence" - a provision that was intended to exclude rebels against the Crown but which gradually ceased to operate. Section 6 of the Act specified that the representatives were to be chosen by and from the eligible electors; in other words they were to be Maori or half-castes. The Act thus allowed an adult male franchise, free of property qualifications, some years before this was allowed to Pakeha. Moreover, Maori who had the required property qualifications could also vote in the general seats where they held that property - and a few did so, until the privilege was abolished in 1896. At this time European men also had dual votes, being entitled to vote in all electorates where they held the necessary property. Although Maori had gained an adult male franchise, they had to exercise this over four electorates. On a population basis some 50,000 Maori had been given four seats, whereas the Europeans, who numbered some 250,000 at this time, had 72 seats. Finally, the Act was to remain in operation for five years. In fact, due to the pressure of Maori members, the Act was renewed for another five years in 1872 and, at the end of that period, it was renewed indefinitely.

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2.3 - Maori in Parliament Since 1868

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It took some time to bring the 1867 Act into full operation. The first election took place in 1868 and, although some 48 polling places were notified, most of these were not used since only two of the seats, Eastern and Southern Maori, were contested, the former being decided by a show of hands at a hui in Napier by 34 votes to 33. But all four of the seats were contested at the next election in 1872 and thereafter the seats were invariably keenly contested (A2:22-4). Another indication of keen Maori interest in elections was the gradual increase in Maori polling stations, usually at the request of local Maori communities. By 1887 over 200 polling places had been established, including some in the remote King Country and Urewera.

In 1872, in response to a motion of a Maori member, two Maori were nominated to the Legislative Council. Thereafter, there were one or two Maori members on the Council until it was abolished in 1950. But in Parliament the Maori members could have little influence. In the early years few of them were competent in English and when they opposed legislation inimical to Maori interests, they were easily outvoted. On the other hand, all four Maori members in the House sat on the Maori Affairs committee, set up in 1872, and here they sometimes had a considerable influence (A2:25-6).

Since the Maori members were often ineffective in Parliament, many Maori thought that they could do better by seeking autonomy outside. Section 71 of the 1852 Constitution Act provided for the setting apart by Letters Patent of districts within which Maori laws, customs and usages not repugnant to general principles of humanity could be maintained "for the Government of themselves, in all their Relations to and Dealings with each other". This could have provided for a form of internal autonomy - which Maori saw as an implementation of the tino rangatiratanga guaranteed to them in article 2 of the Treaty. The Maori King movement sought this form of autonomy in Waikato before the war and in the King Country afterwards. So did the Kotahitanga or "Home Rule" movement which established a separate Maori Parliament in the 1890s. However this was never recognised by the Pakeha Parliament in Wellington, despite efforts by the Maori members to pass an enabling private member's bill. However, Parliament did pass James Carroll's Maori Councils Act of 1900 which gave Maori a very limited form of local government. Even so section 71 of the Constitution Act remained unimplemented; it was finally repealed by the Constitution Act of 1986.

In the meantime Maori had been clinging tenaciously to their representation in Parliament as a last vestige of their lost autonomy - all that was left of the tino rangatiratanga guaranteed to them in the Treaty. In the late 19th and early 20th century better educated, younger Maori entered Parliament. They included James Carroll for Eastern Maori and Hirini Taiwhanga and Hone Heke for Northern, and three university graduates, Apirana Ngata, Te Rangihiroa (Peter Buck) and Maui

Pomare. These men could hold their own with any of the European members, used the parliamentary system with great skill, and most of them attained cabinet rank. They helped to ensure the retention of the Maori seats.

Several other developments during this period also helped to entrench the Maori seats. In 1893 Maori as well as Pakeha women got the vote, thus doubling the Maori electorate. Maori were also given the opportunity, if they were dissatisfied with voting by show of hands, to demand a poll. They could then cast a written vote, if necessary using an interpreter.

In the early years of the 20th century the abolition of the Maori seats was occasionally discussed. There was also some criticism of the primitive system of election, especially voting by show of hands when no poll was demanded, and the consequent lack of secrecy. A Legislative Amendment Act of 1910 abolished voting by show of hands in favour of voting by declaration to a Returning Officer. But this hardly amounted to a secret ballot. Moreover there was not yet any Maori roll. An act of 1914 which provided for the preparation of Maori rolls was a dead letter for 35 years, largely because enrolment remained voluntary. Each time the matter was broached, the Chief Electoral Officer replied that the time was not "opportune" for compulsory registration (A2:37).

It was not until 1937 that the secret ballot, first used for the European seats in 1870, was applied to the Maori seats. Though the government promised to prepare Maori electoral rolls for the 1938 election they were not ready until the 1949 election, largely because of the war. After World War Two the abolition of the Maori seats was discussed from time to time. Labour, dependent on the four Maori seats for a majority in 1946-9 and 1957-60, made no attempt to abolish them. Nor did National. Though it was unable to win any of the Maori seats, National did heed Maori opinion which was solidly in favour of retention. In 1954 the boundaries were changed to give Southern Maori more voters by bringing it into the southern North Island. The boundary changes meant it was necessary to prepare a new Maori roll. Maori on the old roll were sent re-enrolment cards, to be returned within two months. Only half of them replied, demonstrating that a large proportion of Maori voters are unresponsive to mail-outs from the Electoral Office. By this time the Maori roll was failing to reflect the rapid increase in Maori population of recent years.

In 1965, during a debate on a bill to peg the South Island General seats at 25, while providing for an increase of those in the North Island, the member for Southern Maori, E.T. Tirikatene, pleaded for an increase in the Maori seats to five and for the number of Maori seats to be determined by the total Maori population, like European seats. That plea was to be reiterated numerous times in subsequent years. However, an important change was effected in a 1967 amendment to the Electoral Act which allowed Maori to stand for European electorates (and Europeans to stand for Maori electorates). But it was not until the 1975 election that two members of Maori descent won General seats (A2:81).

Just before the 1975 election an Electoral Amendment Act was passed giving Maori voters, not just candidates, the option of choosing between the Maori and General rolls. The Act defined Maori as including anyone descended from a Maori. The option was to be exercised at each census. There was another important change, long requested by Maori, which based the number of Maori seats on total population, calculated on the basis of all Maori on the Maori roll plus their children under 18. This meant that Maori electorates were to have a similar electoral population to the General electorates, and left open the possibility of an increase - or a decrease - in the number of Maori seats.

But following the change of government after the 1975 election, the number of Maori seats was pegged at four, irrespective of how Maori exercised their option after the 1976 census. However, Maori retained their right to opt between the two rolls after each census. That resulted in a gradual shift of Maori voters from the Maori to the General roll, at least until 1986 when there was a slight reversal of that trend which was continued with the 1991 census. According to figures supplied by the Department of Statistics from the 1991 census, there were 126,723 Maori on the General roll, 87,562 on the Maori roll, and 72,965 Maori eligible to vote not on either roll (A5:29). But this large non-enrolment, plus the fact that there was a lower turnout of voters registered on the Maori roll at successive elections compared with Pakeha voters, meant that the Maori seats, despite continued support for them by articulate Maori opinion, were languishing. Since it was generally assumed by both major political parties that the four Maori seats were in the keeping of Labour, canvassers for both parties had been actively encouraging Maori voters to shift over to the General roll, especially in marginal seats. Thus the Maori seats remained as a lacklustre expression of tino rangatiratanga, with no government willing to grasp the nettle by abolishing them, but equally no comprehensive attempt by government or the Electoral Office to encourage Maori to enrol, even though enrolment was by law compulsory.

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2.4 - The Report of the Royal Commission on the Electoral System, 1986 and its Aftermath

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The Royal Commission on the electoral system was required, among other things, to investigate and report on the nature and basis of Maori representation in Parliament. In reviewing the history of Maori representation, the Commission noted the failure to implement section 71 of the 1852 Constitution Act and the "failure of successive Governments to recognise and give effect to the Treaty as a basis of constitutional government in New Zealand" The Commission went on to make an important observation:

Although they were not set up for this purpose, the Maori seats have nevertheless come to be regarded by Maori as an important concession to, and the principal expression of, their constitutional position under the Treaty of Waitangi. To many Maori, the seats are also a base for a continuing search for more appropriate constitutional and political forms through which Maori rights (mana Maori in particular) might be given effect. It is because of this that many Maori who opt to go onto the General roll continue to support the retention of the Maori seats. It is in this context that Maori views concerning the seats should be understood (A1:86). We believe this is an accurate summation of Maori views today. The Commission went on to say that "continued representation in Parliament of Maori rights and interests is essential because of the need to get protective arrangements in place" and that "Maori interests should ... continue to be represented in Parliament by MPs who are also members of the Maori community" (A1:87-8). However, these comments were not an endorsement of the existing separate Maori seats. Rather than endorse the FPP (First Past the Post) system of election, the Commission recommended that Maori representation should become incorporated in a common roll for an MMP (Mixed Member Proportional) system. But under this system the Commission proposed that "there would be no separate Maori constituency or list seats, no Maori roll and no Maori option, " though it did propose to waive the 4% threshold "for parties primarily representing Maori interests" necessary for other parties to gain a proportion of the list seats. Although it did not favour a third system, STV (Single Transferable Vote), the Commission believed that this would offer Maori "more effective representation" than FPP with separate Maori seats (A1:105).

In the referendum on the electoral system in 1992, in response to the first question posed, there was a large majority in favour of changing from the existing FPP system, and, in response to the second part of the referendum, a large majority in favour of MMP from among a range of alternatives. In each case Maori representation was as described or proposed by the Commission. A second referendum was held at the time of the General Election on 6 November 1993 to allow voters to make a further choice between FPP and MMP. Once again, MMP was the preferred option.

In the meantime, however, there had been a change of heart by the Government which, in response to strong Maori pressure, had inserted in the committee stage of the 1993 Electoral Bill provision for the retention of Maori seats - as constituency seats - in the event of MMP being adopted. The Act in effect restored the system briefly in force in 1975 whereby Maori were given the option at each census of enrolling on the Maori or the General roll and the number of Maori seats was to be calculated on the basis of the total Maori electoral population, not just voters on the Maori roll, as with General roll seats. The number of Maori constituency seats could rise or fall, according to the way in which Maori exercised their option. But, since the number of Maori seats had to be calculated before the number of ordinary constituency seats were known, it was necessary for Maori to exercise their option before the next census, due in 1996. The period 15 February to 14 April 1994 was chosen. Though the threshold exemption was now abolished for Maori parties, any that did get beyond the required 4% could also gain list seats.

It was evident that Maori had gained a significant advantage from these concessions - in the event of MMP being adopted. The Maori seats would be assured of a secure place in a new post-MMP constitution, with their number dependent on the number of Maori who opted for the Maori roll and who voted for a Maori party's list seats. If those seats had long been a last vestige of tino rangatiratanga, a substitute for the Maori preferred option of a separate and largely autonomous constitutional arrangement, they were at last accorded a degree of security and permanence. It is perhaps not surprising that the Maori vote for the modified MMP system in the 1993 referendum was somewhat higher than that of voters on the General roll.

References

1. H Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, 1989, p. 321.
2. Bruce Biggs, "Humpty-Dumpty and the Treaty of Waitangi", in Kawharu (ed), pp. 300-312.

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