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Abstract: The article argues that Maori political participation in New Zealand constitutes a positive example of how the current international standards on indigenous political participation can be implemented at the national level. Notwithstanding the weaknesses of the system and the challenges laying ahead, the combination of the Mixed Member Proportional electoral system, dedicated Maori seats and the establishment of the Maori Party have ensured a Maori voice in Parliament and have broadened the possibilities of effective indigenous participation in the political life of the state. Such state practice that implements the 2007 UN Declaration on the Rights of Indigenous Peoples firmly confirms the position of the Declaration within current international law.

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Indigenous Participation in Elective Bodies: The Maori in New Zealand

by

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Introduction

The adoption of the Declaration on the Rights of Indigenous Peoples in September 2007 has intensified discussions on how the rights recognised therein can be realised. Among others, the Declaration recognises the right of indigenous peoples to participate fully in the political life of the state. Although many states have argued that the right to vote ensures equal participation of indigenous peoples in determining the membership of state Parliaments, experience has shown that such a right on its own is inadequate. Indigenous representatives are rarely elected where indigenous peoples constitute numeric minorities within the national whole or in individual electoral districts. Further, political parties and candidates rarely promote indigenous agendas, as they try to gain the non-indigenous majority vote. This minimises, even eliminates, indigenous voices in state Parliaments and leads to the indigenous absence from decisions in matters relevant to them. Alternative measures are often required to address this issue.

In this respect, New Zealand is a positive example.¹ Historical circumstances, political will and certainly Maori struggles have resulted in relatively significant Maori political participation in elective and administrative bodies. An insight into the several factors which ensure Maori participation in the national unicameral Parliament provides interesting ideas for other states with indigenous populations. Maori participation is encouraged by at least

¹ The term positive is meant only in the specific context in which it is used. It does not in any way imply that there are not a number of examples of what Maori would consider unjust public policies.

three important factors: first, guaranteed Maori seats in Parliament in numbers proportionate to the number of Maori choosing to register on the Maori electoral roll; second, a system of Mixed Member Proportional Representation (MMP), which has increased the number of Maori candidates obtaining party selection in winnable positions; and third, the creation of the Maori party, an independent indigenous voice formed in 2004.

In exploring ways to realise the right of indigenous peoples to political participation, this paper will first analyse the nature of that right as it is currently recognised in instruments of international human rights law. Turning to New Zealand, it will present the wider historical and social context of the state and its relationship with Maori. It will then focus on guaranteed seats and the MMP electoral system and record the various steps that led to these positive initiatives. Finally the paper will look at the Maori party, the circumstances of its creation and its significance for Maori political participation.

The right to political participation

After the end of the Cold War, the right to democratic governance was rapidly transformed from a rather vague concept to a system of rules, articulated in a series of documents which were recognised in state practice² as well as in the practice of international and non-governmental organisations.³ The importance of the right has since been validated in many documents, notably by its explicit proclamation in the Organization of American States (OAS) *Inter-American Democratic Charter of the Right to Democracy*;⁴ the acknowledgement in the *Treaty of the European Union* that the Union is founded *inter alia*

² The trend of the 80s and 90s moved 81 states to democratize, yet, only 47 are now considered fully democracies. UNDP, *Human Development Report 2002* (Oxford: OUP, 2002), p. 10.

³ T. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46-91.

⁴ Article 1 of OAS Inter-American Democratic Charter, adopted in Lima, 11 September 2001, 40 *ILM* (2001) 1289.

on the principles of democracy;⁵ the Conference on Security and Co-operation in Europe (CSCE) *Charter of Paris for a New Europe*;⁶ and the 1991 *Harare Declaration of the Commonwealth*.⁷ Democracy entails fair and periodic elections; the right to vote and be elected is included in article 25 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 3 of the *European Convention on Human Rights* (ECHR). Even when they satisfy the multiple standards set by the international community,⁸ mere elections cannot fulfil the democratic element. Unbridled majority rule is inherently problematic for minority participation and minority involvement in the political structures of the nation state.⁹ The numeric minority will seldom ‘win’ in competitive common roll elections; if these are the only way of ensuring democracy, then minorities are left impotent.¹⁰ A formal model of democracy based on the idea that the state’s decisions are taken to please the majority of its population has been proven totally ineffective in Eastern Europe.¹¹ Even deliberative¹² and

⁵ Article 6 (1). Article 7 TEU sets out a procedure for dealing with any serious and persistent breach by the Member State of the principles of article 6.

⁶ According to the Charter of Paris, the Participating States have agreed to ‘build, consolidate and strengthen democracy as the only system of government of our nations’ and to ‘co-operate and support each other with the aim of making democratic gains irreversible’: CSCE Charter of Paris for a New Europe (1990) 30 ILM (1991) 190.

⁷ Among several references to democracy, paragraph 9 of the Harare Declaration pledges the states and the Commonwealth to concentrate on the protection and promotion of democracy and democratic processes.

⁸ See OSCE, *Existing Commitments for Democratic Elections in OSCE Participating States* (Warsaw, October 2003) <http://www.osce.org/odihr/?page=elections&div=standards>

⁹ K. Wassendorf (ed.), *Challenging politics: Indigenous peoples experiences with political parties and elections* (Copenhagen: IWGIA, 2001).

¹⁰ Commission on Human Rights Resolution 2004/38 on ‘The Incompatibility Between Democracy and Racism’.

¹¹ Continuing Dialogue on Measures to Promote and Consolidate Democracy, Report of the High Commissioner on Human Rights submitted in accordance with Commission resolution 2001/41, Commission on Human Rights, UN Doc. E/CN.4/2003/59, para. 28.

¹² Habermas understands democracy as a free association of equal citizens who engage in a rational discussion on political issues, presenting options and seeking a consensus on what is to be done. J. Habermas, *Between Facts and Norms* (Cambridge, U.S.A.: MIT Press, 1996).

consensus democratic models¹³ can be ineffective in resolving conflicts. Consensus is not, in fact, always possible.¹⁴ Indigenous claims for special arrangements are, for example, usually firmly rejected by majority populations. International law has subscribed to a more inclusive model, which requires that government is representative of all people, not just some of the people.¹⁵

It is now widely accepted that indigenous peoples enjoy the protection given in instruments on minority rights as much as instruments on indigenous rights *per se*. Even though indigenous peoples do not have the right to choose unconditionally the modalities of their participation to the public life of the state,¹⁶ they have the expectation that their participation be *effective*, as specified in the United Nations *Declaration on the Rights of Members belonging to National or Ethnic, Religious and Linguistic Minorities*; the declaration also highlights that minorities should be given a significant role in the formulation, passage and implementation of public policies.¹⁷ Effective participation has also been added to article 27 ICCPR by the Human Rights Committee in its authoritative *General Comment 23*. It is also required by the OSCE: the *Flensburg Principles* emphasise that decision-makers must proactively consult members of minorities that are affected by their decisions and must also create opportunities for them to participate effectively in the decision-making process.¹⁸

¹³ A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in 21 Countries* (New Haven: Yale University Press, 1984).

¹⁴ S. Wheatley, 'Deliberative democracy and minorities' (2003) 14 *European Journal of International Law* 507-527.

¹⁵ UN Declaration on Friendly Relations, GA Res. 2625 (XXV) 24 October 1970.

¹⁶ *Mikmaq People v. Canada*, Communication No. 205/1986, Views in A/47/40 (1992). See Turpel, 'Indigenous self-determination'.

¹⁷ Article 2(3) of the United Nations Declaration on the Rights of Members belonging to National or Ethnic, Religious and Linguistic Minorities.

¹⁸ Proposals of the ECMI Seminar 'Towards Effective Participation of Minorities', UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.4 (1999).

Measures to ensure minority effective participation are wide-ranging, as the ‘conduct of public affairs’ is ‘a broad concept which relates to the exercise of legislative, executive and administrative powers... [covering] all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local level’.¹⁹ Some of these measures are mentioned in the (1999) *Geneva Declaration of Experts on Minorities*; they include advisory and decision-making bodies on which minorities are represented; elected bodies and assemblies of national minority affairs; local and autonomous administration; autonomy on a territorial basis, including the existence of consultative, legislative and executive bodies chosen through free and periodic elections; self-administration by a national minority of aspects concerning its identity in situations where autonomy on a territorial basis does not apply; and decentralised or local forms of government.²⁰ The *Framework Convention for the Protection of National Minorities* goes a step further than the above texts: it is the first legally binding document that requires states to ensure the result, namely the guarantee of adequate involvement of minorities in decision-making.²¹

In all the documents on minority rights, the right to participation is recognised as an individual right. The Human Rights Committee has actually juxtaposed the individual nature of the right to participation and the collective nature of the right to self-determination. However, this does not apply to indigenous peoples: the *ILO Convention No. 169* does recognise participatory rights to indigenous peoples as a group. Being one of the main thrusts of the

¹⁹ HRC General Comment on article 25 (1999).

²⁰ For an analysis of some of these see Y. Ghai, ‘Public participation, autonomy and minorities’ in Z. A. Skurbaty (ed.) *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Leiden: Martinus Nijhoff, 2004), pp. 3-45, p. 3.

²¹ M. Weller, ‘Effective participation of minorities in public life’ in Weller (ed.) *Universal Minority Rights* (Oxford: Oxford University Press, 2007) pp. 478-516 at p. 481.

convention, participation underlies many provisions, the most important being article 6 which establishes the duty of states to create measures for the free participation of indigenous peoples to ‘at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them’. The convention also requires the establishment of indigenous representative institutions and their consultation whenever legislative measures are considered which may affect the people directly.²² This article has been used mainly for effective participation in administrative and other bodies, rather than elective bodies. Consultations must be in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. It becomes obvious that the Convention establishes equal participation of indigenous peoples in the institutions of the state, while at the same time it leaves an opening for special treatment²³ and encourages the empowerment of indigenous peoples to develop their own institutions. This is exactly the basis on which the electoral system works in New Zealand: it gives Maori the right to participate in Parliament through the communal general roll, or through their own designated parliamentary seats. The *Declaration on the rights of indigenous peoples* also recognises the collective element of participation. Scheinin applauds the inclusion of a collective element in

²² Article 6(a) states:

In applying the provisions of the Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative measures which may affect them directly.

²³ Swepston, as above, p. 42.

the right of participation. In his individual opinion in *Diergaardt et al. v. Namibia*,²⁴ he noted that

there are situations where article 25 [of ICCPR] calls for special arrangements for rights of participation to be enjoyed by members of minorities and in particular indigenous peoples. When such a situation arises it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation.²⁵

The European Court on Human Rights has pointed out that in a democracy the views of the majority will not always prevail: ‘a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’;²⁶ similar is the spirit of the Inter-American *Democratic Charter* when it notes that ‘promoting and fostering diverse forms of participation strengthens democracy’.²⁷

Trying to achieve such a balance, several states, including Norway, Fiji, the US and New Zealand have taken measures to include indigenous voices in their legislatures.²⁸ However, the same measures would not work in every situation: for example, the guaranteed seats that exist in New Zealand would not work in Maine, US, where indigenous individuals are elected to a parliament of what is considered a separate nation; instead, there, a ‘tribal delegate’ of

²⁴ Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1996, 6 September 2000, para. 10.3.

²⁵ *Ibid.*

²⁶ *Chassagnou and others v. France*, ECHR, Reports 1999-III, para. 112.

²⁷ Article 6.

²⁸ Y. Ghai, *Public Participation and Minorities* (London: Minority Rights Group, 2001).

each of the two largest Indian First Nations in the State joins the national parliament; these delegates there are not elected and are not considered members of the national Parliament.²⁹

At the other end of the spectrum are States that do not even include indigenous individuals on their electoral rolls. In several cases, indigenous individuals cannot vote as they do not enjoy citizenship rights;³⁰ even more often, the policies of extinction, exclusion and forced assimilation have led to anger and rejection of the state by indigenous peoples who do not want to take part in the electoral process. In other cases, indigenous peoples do not have adequate knowledge of the process, as it is alien to their own political systems. In such cases, simple measures to improve the numbers of indigenous individuals on the electoral rolls and to enhance the indigenous understanding of the national democratic processes could go a long way towards enhancing effective participation. Measures to improve indigenous participation in the democratic process include periodic reviews of the electoral system, promotion of a more active indigenous role in political parties, more employment and training opportunities for indigenous peoples in political bodies, veto powers for indigenous communities, indigenous direct input into legislative and policy processes, enhancement of indigenous participation in local government and youth participation in political processes.³¹ The nature of these measures confirms that democracy and participation cannot be separated, as

²⁹ C. Iorns, 'Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation of Indigenous Self-determination' (2003) 10 *E Law- Murdoch University Electronic Journal of Law*, www.murdoch.edu.au/elaw/issues/v10n4/iorns104nf.html accessed on the 15.02.2005.

³⁰ For example, until 2001 many indigenous peoples in Thailand did not have citizenship papers. C. Vaddhanuphuti, 'The Present Situation of Indigenous Peoples in Thailand' in "... *Vines that won't Blind...* ", *Proceedings of a Conference held in Chiang Mai, Thailand, 1995*, IWGIA Document 80, pp. 79- 88 at p. 81. The problem continues in Laos and other Asian states. For artificial barriers to the political rights of minorities, see *Ignatane v. Latvia*, HRC, Communication No. 884/1999, UN Doc. CCPR/C/72/D/884/1999, 31 July 2001, para. 7.4.

³¹ 'Hands on Parliament: A Parliamentary Committee Enquiry into Aboriginal and Torres Strait Islanders Peoples' Participation in Queensland's Democratic Processes' Legislative Assembly of Queensland, Report No. 42, September 2003.

confirmed in the structure of article 25 ICCPR: its first paragraph establishes the right to participation, whereas the next paragraph focuses on elections.

Maori cannot distinguish meaningful Maori political participation from self-determination.³²

It is interesting to note that although at the national level the state has been very careful not to link guaranteed seats to self-determination for fear of additional controversy,³³ in contrast, at the international level many states have been eager to ‘fill’ the meaning of the right to self-determination with democracy and participation, as an attempt to set the external aspect of the right –and possible secession- aside. In 1999, Canada defined self-determination as ‘the right which can continue to be enjoyed in a functioning democracy in which citizens participate in the political system and have the opportunity to have input in the political processes that affect them’.³⁴ The same year Norway favoured a similar understanding of the right as ‘the right of peoples to participate at all levels of decision-making in legislative and administrative matters and the maintenance and development of their political and economic systems’.³⁵ Politics aside, the connection between the right of self-determination and the right of political participation is real, as has been recorded by the Human Rights Committee.³⁶ Unfortunately, although the *Declaration on the Rights of Indigenous Peoples* recognises the right to indigenous self-determination in article 3 and discusses self-government and the establishment of indigenous political institutions in Article 4, it is only later in the text, in articles 18-19, that the declaration recognises the right to participate in decision-making in matters which could affect them ‘through representatives chosen by themselves in accordance

³² Mason Durie (1988), p. 4.

³³ Iorns, ‘Parliamentary seats’, Conclusions.

³⁴ As quoted in C. Foster, ‘Articulating Self-Determination in the draft Declaration on the Rights of Indigenous Peoples’ (2001) 12 *European Journal of International Law* 141-157 at 151.

³⁵ *Ibid.*

³⁶ HRC General Comment on article 25 (1999).

with their own procedures as well to maintain and develop their own indigenous decision-making institutions' (article 18). As much as this distance between the right to self-determination and the right to political participation derives from the different groups these provisions belong to –the right to self-determination to the general and fundamental principles, the participation articles to the more detailed parts of the declaration, a reference to the right of self-determination in the provisions on participation would have been preferred.³⁷

New Zealand and Maori: an overview

A constitutional democracy governed by a unicameral Parliament, New Zealand has been inhabited by Maori for more than 800 years. The first Parliament assembled in 1852, but New Zealand remained a British colony then became a Dominion until accepting full independence in 1947. Today, Maori constitute 15.1% of the total population of approximately 4 million people.³⁸ 84.4% of Maori live in urban areas and are geographically and economically integrated into the wider society; still, they wish to maintain and develop their unique cultural identity. Notwithstanding their geographic and economic integration Maori still face discrimination and relatively harsher living conditions. With lower income and educational levels and higher rates of unemployment, teenage pregnancy, single-parent families and imprisonment,³⁹ they continue to suffer the effects of colonialism.⁴⁰ In some ways they have been disproportionately affected by the negative aspects of the globalising of

³⁷ Foster, 'Articulating self-determination', 151.

³⁸ Statistics New Zealand (2005), *2001-base national ethnic population projections (series 6)* (Wellington: New Zealand).

³⁹ For example, see *15-17th Periodic Report of New Zealand Report to CERD*, UN Doc. CERD/C/NZL/17 of 18 July 2006.

⁴⁰ J. Richie, *Tribal Development in a Fourth World Context* (University of Waikato: New Zealand, 1990).

the New Zealand economy and structural reforms to the state sector from 1984 through to the mid-1990s.⁴¹ However, together with disadvantages, globalisation also had positive consequences, as it ‘released a myriad of political possibilities that Maori grasped with both hands’.⁴² While Maori still have relatively lower incomes, educational attainment and employment levels have increased dramatically since 1999.

New Zealand has signed and ratified most major human rights treaties, including the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*; it has also ratified many ILO conventions, but not *Convention No. 107*, nor *Convention No. 169*. Controversy arose in 2007 when New Zealand was one of the four states that voted against the *Declaration on the Rights of Indigenous Peoples*; since then quasi-independent state bodies such as the New Zealand Human Rights Commission have stated that they will use the Declaration in their work.⁴³ The Commission was established under the *Human Rights Amendment Act 2001*, and is required to provide leadership, advocacy and education in human rights, race relations and equal opportunities.

Te Puni Kōkiri, the Ministry of Maori Development, is the government’s principal Maori policy advisor. It is customarily headed by a Maori Chief Executive who reports to the Minister of Maori Affairs who is customarily a Maori Member of Parliament (although not always a member representing a Maori constituency). Te Puni Kokiri monitors the Maori

⁴¹ L. Te Ata O Tu MacDonald, ‘Globalisation, Neo-Liberalism and the Struggle for Indigenous Citizenship’ (2006) 41 2 *Australian Journal of Political Studies* 209-223 at 210.

⁴² *Ibid.*

⁴³ <http://www.hrc.co.nz/home/hrc/newsandissues/indigenousrightsdeclarationtoguidecommissionwork.php>, last accessed in 13/05/2008.

service delivery of other government agencies, many of which contain Maori divisions, and has a role in building and maintaining relationships between the government and Maori.

Recompense for land alienation is now possible under the *Treaty of Waitangi Act 1975* and subsequent amendments and is given effect in specific tribal context by special legislation such as the *Waikato Raupatu Claims Settlement Act 1995*. Further, the Maori Land Court may hear applications for ‘customary rights orders’ under the *Foreshore and Seabed Act 2004*. There is also legislation requiring governments or local authorities to pay particular attention to Maori needs, rights and aspirations,⁴⁴ whilst Maori concepts have been incorporated into numerous Acts of Parliament.⁴⁵

The Treaty of Waitangi has been especially important in shaping the relationship between Maori and non-indigenous population. The Treaty, negotiated in 1840 between the Chiefs of the United Tribes of New Zealand and the British Crown was signed to give Britain the authority to control antisocial behaviour among its settlers, to strengthen economic interaction and to foster a protective relationship with Queen Victoria to secure authority over their own affairs and counter the possibility of French or American invasion. It assumed existing Maori sovereignty and the return on granting authority to the British administration was that it protected Maori lands, forests, fisheries, other resources and tribal governance over them. But the wider nature and location of authority remain contested and consequent tensions have been the principal characteristics of Maori/Crown political relationships since disagreements over its meaning emerged within months of the Treaty’s signing. In any case, the Treaty of Waitangi ‘has become increasingly important as a constitutional founding

⁴⁴ Examples include the *Maori Representation Act 1867*, the *New Zealand Public Health and Disability Act 2000*, *Te Ture Whenua Maori Act 1993* (Maori Land Act), *Resource Management Act 1991*.

⁴⁵ For example, among several tikanga Maori concepts in the *Resource Management Act 1991* is that of Kaitiakitanga (guardianship). Also, *Te Ture Whenua Maori Act 1993* (Maori Land Act) for example, ‘makes provision for a more collective control of Maori freehold land interests’ by way of land trusts.

document for New Zealand'.⁴⁶ The *Treaty of Waitangi Act 1975* established the Waitangi Tribunal as a judicial body empowered to investigate and recommend redress for contemporary breaches of the Treaty by the Crown. It marked a turning point in New Zealand's political and legal history,⁴⁷ overshadowed only by amending legislation in 1985 giving the Tribunal jurisdiction to hear historic claims dating to the signing of the Treaty in 140. During the 1980s Maori/Crown relationships were heavily influenced by the notion that there are principles of the Treaty that ought to be reflected in public policy.⁴⁸ Unfortunately, the last few years a tendency has been observed to abolish explicit references to the Treaty of Waitangi, something that undermines indigenous rights and causes tension.

Maori Political Participation

The three elements which are most significant to contemporary Maori political participation are the Mixed Member Proportional electoral system; the dedicated Maori seats in the House of Representatives; and the establishment of the Maori party which broadened the possibilities for indigenous representation.

a. Guaranteed Maori Parliamentary Representation

The most significant and enduring mark of Maori political authority and participation is the designated geographic based seats in the House of Representatives. Dedicated Maori seats have existed in New Zealand since the 19th century. When the first New Zealand Constitution

⁴⁶ A. Ladley, 'The Treaty and Democratic Government' (2005) 11 *Policy Quarterly* 21-27; also see N. White and A. Ladley, 'Claims to Treaty and other Rights: Exploring the Terms of Crown- Maori Negotiation' (2005) 12 *Policy Quarterly* 3-9; also see N. Cox, 'The Treaty of Waitangi and the Relationship between the Crown and Maori in New Zealand' (2002) 28 *Brooklyn Journal of International Law* 123- 153 at 123.

⁴⁷ P. Hamer, 'A Quarter-Century of the Waitangi Tribunal' in J. Hayward and N. R. Wheen (eds.), *The Waitangi Tribunal: Te Roopu Whakamana i Te Tiriti o Waitangi* (Wellington: Bridget Williams Books, 2004), p. 6.

⁴⁸ R. Walker, 'The Treaty of Waitangi in the Postcolonial Era' in Begrave, M., Kawharu M., Williams, D. (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, (Melbourne: Oxford University Press, 2005), p. 67

was adopted in 1852, Maori men,⁴⁹ like the British and Irish settlers, were excluded from voting if they did not meet the individual property qualification, even though Maori tribes (*iwi*) continued collectively to control a substantial part of New Zealand. Rising tensions between Maori and non-Maori over land alienation, the Crown's increasing authority and the absence of Maori from Parliament despite their paying taxes and being bound by its laws, initiated changes.⁵⁰

The *Maori Representation Act 1867* fixed the number of Maori seats at 4 regardless of any increase in the number of European (now called general) seats. Conceding 4 seats for 40,000 to 50,000 Maori, compared to 72 seats for 220,000 non-Maori was hardly a fair compromise; still, the Act recognised that Maori were an important minority, a significant financial participant in the colonial economy and major land holders. The seats were intended to be a temporary measure until the imposition of individual title over Maori land would allow Maori to meet the property qualification to vote in European seats. However, as Maori refused to assimilate and amidst concerns about Maori swamping the general seats, Parliament voted to retain the Maori seats for five additional years in 1872 and in 1876 it resolved to keep them indefinitely.⁵¹ Contemporaneously, the Maori seats give effect to the spirit of the *Declaration on the Rights of Indigenous Peoples*: the text recognises rights to participate fully in the wider society, while also enjoying separate rights.

In the following years, Maori repeatedly asked for more seats and for more formalised rules to determine the number of Maori constituencies. However, their parliamentary representation continued to be viewed more or less as second-class. Discussions about the

⁴⁹ Women were extended the franchise in 1893.

⁵⁰ Geddis, 'A dual track democracy?', as above, 351-352.

⁵¹ E. Bohan, *Edward Stafford: New Zealand's First Statesman* (Christchurch: Hazard Press, 1994), p. 325

need for separate Maori seats intensified after the introduction of the Mixed Member Representation system, supported by the Royal Commission, appointed in 1984 to look at the electoral system, and decided after two referenda. As it was believed that the new system would improve the participation of indigenous peoples in the political system, the Royal Commission did not see the need for Maori separate representation. However, Parliament did not eliminate the dedicated Maori seats. On the contrary, the *Electoral Act 1993* changed the total number of Maori seats from 4 to a varying number determined in proportion to the number of Maori choosing to enrol on the Maori electoral roll. Hence, the number of Maori seats depends on how many Maori have been registered to the Maori electorate, rather than the general electorate.

In deciding the future of Maori seats, both the Select Committee⁵² and Parliament agreed that it would be illegitimate to establish a new system without the Maori seats. During consultations, the importance that Maori placed on the seats Parliament became increasingly apparent. For them, these seats represent an important symbol of their distinctive constitutional position as indigenous peoples. Maori, as other indigenous groups around the world, want to distance themselves from minority groups; and the dedicated seats express a particular message about their special status by virtue of first occupancy.

After a deliberative process based on consultation and goodwill the *Electoral Act 1993* provided that if voters chose the MMP system, the Maori seats would be retained with the potential for increases or decreases in number depending on the number of Maori wishing to vote on the Maori electoral roll. Together with increases in the number of Maori seats, a small number of Maori being elected from general seats and party's selecting Maori candidates for winnable list positions to court the Maori vote, Maori parliamentary representation has increased to slightly more than a proportionate level. Now, as the relevant table shows, that figure is 16.5%.

⁵² Electoral Law Reform Committee, 'Report on the Electoral Reform Bill 1993', (1993) *APP. JNL N.Z. HOUSE REPS* 117C.

Currently, the guaranteed seats have once again become an issue of contention as arguments between the position that they are discriminatory compete with the view that they are an essential expression of indigeneity. The positions of political parties vary from unconditional support (Green Party, Maori Party); qualified support until Maori decide otherwise (Labour Party, New Zealand First Party); support for a national referendum on the future of the seats (United Future Party); and outright rejection of their place in New Zealand's electoral framework (Act Party, National Party).

A question often raised is whether it is fair that indigenous peoples have the option of being included in a separate system that guarantees their representation in Parliament, when non-indigenous people, even members of minorities and immigrant groups, do not have this choice. Such arrangement is indeed fair. International law has long accepted special measures as legitimate paths to equality. Even as far back as 1935, the Permanent Court of Justice had, in the case of *Minority Schools in Albania*, advanced the distinction between formal equality and substantial equality. The Court noted that equality in fact 'excludes the idea of a merely formal equality'.⁵³ The Court explained:

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.⁵⁴

Later, in 1966, Judge Tanaka noted in his International Court of Justice dissenting opinion in the *South West African* cases that 'a different treatment is permitted when it can be justified by the criterion of justice (...) [or] reasonableness [as] generally referred to by the Anglo-

⁵³ See Permanent Court of International Court of Justice, *Advisory Opinion on Minority Schools in Albania*, SPCIJ, Series A/B, No. 64, 1935.

⁵⁴ *Ibid.*

American school of law'.⁵⁵ Current international norms favour positive measures in order to push minorities to reach the standards set in general human rights.

In their exercise of their right to participation, minorities and indigenous peoples are protected from discrimination on any ground, including race. This is derived from the general prohibition of discrimination taken on its own as well as in conjunction with article 25 ICCPR. According to ICERD, state parties undertake to eliminate discrimination in all its forms and to guarantee the right of everyone, without distinction, to equality before the law, including in the enjoyment of the right to participate in election, to take part in government as well as in the conduct of public affairs at any level and to have equal access to public service.⁵⁶ In eliminating discrimination, the Convention explicitly encourages special measures 'to ensure the adequate development and protection of certain racial groups and individuals belonging to them'.⁵⁷

Even though article 27 ICCPR does not make the option of positive measures clear, in its *General Comment 18(37)*, the Human Rights Committee has insisted that tolerance and non-discrimination are not adequate measures to fulfil article 27 ICCPR.⁵⁸ Also, in the discussions on State reports, the Human Rights Committee has repeatedly insisted on stressing this option to the States. In 2007, for example, the Committee urged the Georgian government 'to take all appropriate measures' to ensure that minorities have adequate political representation and

⁵⁵ Dissenting Opinion of Judge Tanaka in International Court of Justice, *South West African cases*, Judgement of 18 July 1966, pp. 305.

⁵⁶ Article 5(c) of ICERD.

⁵⁷ Article 1.4 and 2.2 of the Convention.

⁵⁸ *General Comment 18(37)*, United Nations *Human Rights Committee Report A/45/40* (1990), Volume I, 173–175.

participation and to enjoy their languages.⁵⁹ The *United Nations Declaration on Minorities* also allows for positive measures for minorities: article 1 of the Declaration specifically mentions that States shall take all appropriate measures to protect the rights of minorities.⁶⁰

At the same time, international law sets limitations to affirmative action: according to ICERD, special measures must only be taken for the advancement of minority rights; they are temporary in nature until equality is reached; and should not lead to separate rights for different groups.⁶¹ Indeed, it must be acknowledged that not all affirmative measures have positive consequences. Hadden notes that governments have a genuine choice in the measures they can apply when dealing with sub-national groups and outlines the policies states may adopt.⁶² Positive measures can at times have negative consequences. Measures specifically for members of cultural groups focus on the minority element of their identities and separate them on this basis from the rest of the population; apart from ignoring other elements of their identity, these measures can perpetuate their exclusion.⁶³ This concern became obvious, for example, in the 2006 concluding observations of the Committee on the Elimination of All Forms of Racial Discrimination (CERD) to South Africa: although the Committee welcomed the adoption of positive measures by the state, it cautioned that such action may lead to the ‘maintenance of unequal or separate rights for those groups after the

⁵⁹ United Nations, *Concluding Observations of the Human Rights Committee on Georgia*, CCPR/C/GEO/CO/3 of 15 November 2007, para. 17(b).

⁶⁰ *United Nations Declaration on the Rights of Persons belonging to Ethnic or National, Religious or Linguistic Minorities*, adopted by General Assembly Resolution 47/135 of 18 December 1992.

⁶¹ Article 1.4 and 2.2 of the Convention.

⁶² T. Hadden, ‘Integration and Separation: Legal and Political Choices in Implementing Minority Rights’ in N. Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (Dordrecht: Martinus Nijhoff, 2005), p. 188.

⁶³ K. Fierlbeck, ‘The Ambivalent Potential of Cultural Identity’ (1996) 29 *Canadian Journal of Political Science* 3-22 at 21.

objectives for which they were taken have been achieved'.⁶⁴ Positive measures also lead in some cases to more hostile attitudes by the rest of the national population, as such measures are perceived as unfair to them. This can increase the tensions between the communities and the negative perceptions of minorities with negative consequences for their rights. This has been the case to a degree in New Zealand. Any affirmative action will need to take the costs into account; yet, these considerations should not result in the abandonment of affirmative action altogether. As Dworkin concluded in his discussion on American higher education, unless and until a large and sophisticated study proves otherwise, 'we have no reason to forbid affirmative action as a weapon against our deplorable racial stratification, except our indifference to that problem, or our petulant anger that it has not gone away on its own'.⁶⁵

Article 6 of the ILO *Convention No. 169* specifies that indigenous peoples should have 'at least the same rights' of participation in elective institutions as the rest of the population. The term *same rights* does not necessarily imply same *measures*, but measures that guarantee equal opportunities and outcomes. In this instance, Maori have the right to participate in the election of Parliaments in the same way as non-Maori (through the general roll). At the same time though, ILO *Convention No. 169* encourages the recognition of separate measures for indigenous peoples; such measures are recognised by other instruments (f. ex. ICERD article 1.4). By giving the choice of the general or the Maori roll, New Zealand gives control to Maori individuals to decide whether they want to take part in a separate process or if they wish to be part of the same process as the rest of the population. At the same time, the current system sets guarantees that the separate measures will not lead to alienation of Maori from the life of the state: The argument that the Maori seats could effectively disenfranchise Maori

⁶⁴ *Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination*, South Africa, UN Doc. CERD/C/ZAF/CO3 of 19 October 2006, para. 10.

⁶⁵ R. Dworkin, *Sovereign Virtue: The theory and practice of equality* (Harvard University Press, 2000), p. 408.

by removing any electoral incentive for non-Maori MPs to attend to Maori concerns is mitigated by the two-vote electoral system meaning that parties must court the votes of all electors and that Maori who constitute 15% of the national population are too large a group to be ignored. On the other hand, if all Maori shifted to the general roll, they might gain electoral influence at the sacrifice of group solidarity and the risk of losing descriptive representation in Parliament.

Geddis notes that ‘the existence of Maori representation provides a symbolically important recognition of the position of the Maori people as “a Treaty partner” in the enterprise of national government’.⁶⁶ With control being a keyword for ILO *Convention No. 169*, this formula certainly satisfies the requirements of the Convention. The division of Maori voters between the Maori and the General electorates seems to maintain a difficult balance between inclusion of Maori in the general life of the State and recognition of their distinctiveness. Nigel highlights the paradox of the case: Essentially, by allowing indigenous peoples to have their separate systems, the state actually promotes their integration in society, as it ensures equal rights and effective guarantees.⁶⁷ This is a strong argument in the debate on assimilation v. integration.⁶⁸

Dedicated seats in Parliament for representatives of sub-national groups are not a novelty: In India, for example, two reserved seats for members nominated by the President to represent the Anglo-Indian community are included among the 550 members of the *Lok Sabha* (Parliament). Further provisions ensure the representation of scheduled castes and scheduled tribes, with reserved constituencies where only candidates from these communities can stand

⁶⁶ *Ibid.*, 359.

⁶⁷ J. Nigel, ‘What Political Scientists can Learn from the 1993 Electoral Reform in New Zealand’ (1994) 27 *3 Political Science and Politics* 525-529 at 528.

⁶⁸ *Ibid.*, at 527-8.

for election. In Ethiopia, the *Yefedereshn Mekir Bet* (Council of the Federation) includes one member each from the 22 minority nationalities in its membership of 117.⁶⁹ These examples do not, however, fully match the New Zealand example: first, the proportion of Maori seats is larger than the proportion of minority seats in other states (currently 7 out of 121 with the potential of increase); secondly, New Zealand has had these seats for the last 140 years. Thirdly, contrary to the examples above, New Zealand's system does not substantially exclude Maori, formally or in practice.

The question of who should be included on the Maori electoral roll relies on self-identification and personal choice. Under the New Zealand system, any citizen can be enrolled in a Maori electorate by claiming Maori descent; at the same time any Maori can choose to be included on the general roll. This choice can be exercised the first time the person enrolls to vote and can only be changed every 5 years during a 4 month Maori Electoral Option (MEO) period. The choice that the system gives to Maori is a major difference with the majority-minority districts in the United States of America where minorities cannot choose whether they want to be included in the separate representation.⁷⁰ Self-identification is consistent with current standards of international law: Article 1 of *ILO Convention No. 169* prescribes that 'self-identification as indigenous and tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'. Article 9 of the *Declaration on the Rights of Indigenous Peoples* also incorporates such a criterion. Self-identification is a well-recognised principle that applies to

⁶⁹ *Towards Effective Political Participation and Representation of Minorities*, Working Paper prepared by Dr. Fernand de Varennes, UN Doc. E/CN.4/Sub.2/AC5/1998/WP4.

⁷⁰ S. Banducci, T. Donovan and J. Karp, 'Minority Representation, Empowerment, and Participation' (2004) 66 *The Journal of Politics* 534-556 at 536.

minorities as much as indigenous peoples⁷¹ and is rightly followed by the Maori electoral system.

The modalities of the Maori option are very important in ensuring equal treatment and it is no surprise that they have been the subject of claims and proceedings before the Waitangi Tribunal, the High Court, and the Court of Appeal. At times, the claim has not led to substantial changes: for example, the argument that Maori voters in the Tai Hauauru electorate in the 2004 by-election would not receive fair and equal treatment when compared with previous elections, because of the inadequate number of the Maori polling station had a limited success: The Tribunal noted the practical implications of the distance that the voters needed to travel in order to exercise their right to vote. In other cases, though such claims have led to substantial changes: In February 1994 a claim relating to the adequacy of the funding provided to publicise the Maori option was lodged before the Waitangi Tribunal.⁷² The Tribunal found that the level of funding was substantially less than would be reasonably required and noted that ‘if adequate funding is not provided for both a vigorous *kanohi ki te kanohi* [face-to-face] and a targeted mass media programme to ensure that as many Maori as possible are enrolled and exercise an informed choice then Maori will be seriously prejudiced’.⁷³ Cabinet rejected the suggestion for further funding; and the issue went was referred to the High Court and subsequently the Court of Appeal. Both Courts recognised that the government was under the implied duty to ensure that adequate information was made available to all those entitled to exercise their right of choice between General and Maori

⁷¹ P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002); also, M. Sheinin, ‘What are Indigenous Peoples?’ in N. Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (Dordrecht: Matrinus Nijhoff, 2005), pp. 3-13.

⁷² Waitangi Tribunal, *Maori Electoral Option Report* (WAI 413), Waitangi Tribunal Report 7 WTR.

⁷³ *Ibid.*

electorate,⁷⁴ they found that the government's actions passed the test of reasonableness.⁷⁵ Still, the judicial recognition of a duty to publicise the existence of the MEO period led to changes, including the extension of the option period from two to four months, the notification of Maori voters of each MEO period by mail; the better funding of media campaigns; extensive face to face education; and work on encouraging enrolment funded by the Electoral Enrolment Centre and carried out by Maori organisations. It would seem that these initiatives were effective as greater numbers of Maori enrolled to vote and the number of dedicated Maori seats in Parliament rose from 5 at the first MMP election held in 1996, to 6 in 1999, and 7 in 2002 and 2005.

Indeed, since 1993, the total Maori enrolments in the Maori Electoral Option have increased steadily. It is worth noting that registration in New Zealand is compulsory and it is estimated that around 90% of Maori are registered on either roll.⁷⁶ The Electoral Commission has noted that if all Maori were enrolled for the Maori roll, there would be about 13 Maori electorates.⁷⁷ In the first Maori Electoral Option held in 1991, there was a less than 1% increase in those choosing to register on the Maori roll. In the second Maori Electoral Option round held in 1994, enrolment increased from 41% to 51%, resulting in a fifth Maori seat. In 1997, Maori enrolment increased to 54% resulting to a sixth seat at the 1999 election. In 2001, a seventh seat was created following an increase of 4%.⁷⁸

In the 2006 Maori Electoral Option, 21,500 Maori changed the type of electoral roll they were on and 10,280 enrolled in both rolls for the first time. Overall, an additional 14,914

⁷⁴ *Taiaroa v. Minister of Justice (no.1)* unreported, High Court, Wellington, CP No. 99/94, October 4, 1994.

⁷⁵ *Taiaroa v. Minister of Justice (no.2)* 1 NZLR 411, 415 [1995].

⁷⁶ Banducci, Donovan and Karp, as above, 536.

⁷⁷ 2002 Electoral Committee.

⁷⁸ Banducci, Donovan and Karp, 537.

Maori enrolled in the Maori roll (7,914 of that were first time voters) bringing the total number of voters in the Maori roll to 385,977.⁷⁹ A significant increase of close to 50,000 Maori in the overall population growth was noted, an increase from 671, 293 in 2001 to 721, 431 in 2006. Unfortunately, this latest MEO narrowly failed to bring an additional eighth seat for Maori, even after a concerted effort by the Maori Party.

The Mixed Member Proportional Electoral system

In addition to the dedicated seats, Maori benefit from the MMP system introduced in 1993. Since then, the 120 MPs have been elected in two ways: 69 MPs are elected from single-member electorates through a first-past-the-post ballot and the remainder are elected from nationwide party lists. Every voter casts two votes, an electorate and a party vote. Parties gain representation by either winning a constituency seat or by winning 5% of the nationwide party list vote. Members of the Parliament are elected to represent 69 (in 2005 and 2008 62 general and 7 Maori) geographical constituencies, known as electoral districts. Although the two types of electoral district overlap in their geographical coverage, they have separate voting rolls.

Party list MPs are elected from pre-determined party lists according to the nationwide percentage of party votes cast for each party. It is the party vote that determines the final constitution of the House of Representatives on the basis that each party's total representation should roughly correspond to its share of the party vote. So once it has been determined how many constituency seats a party has won, it is allocated additional seats from its published party list to bring its number to the total required to ensure proportionality. In the event that a

⁷⁹ 'Maori Electoral Option 2006' (2006) 15 *Maori Electoral Option e-panui*.

party wins more electorate seats than its party vote entitlement, it is permitted to keep the additional representation and the size of the House of Representatives is temporarily increased, creating an ‘over-hang’.

Following a supportive review of the Parliamentary Select Committee in 2001, the new system now seems secure. The MMP system is the PR variant that retains constituency representation by individual MPs while at the same time producing a high degree of proportionality among parties. The system of MMP in New Zealand incorporates an additional element: a unique system of dual constituencies that guarantees seats for the Maori.⁸⁰ At present the combination of these two systems permits effective cross party Maori parliamentary representation.

Among the other advantages, the Royal Commission argued that MMP systems improve the quality of political representation in various ways. The Commission argued that by retaining electorate representation via single member districts for about half the members of Parliament, the new system would assure effective representation of constituents. Reducing the number of directly elected MPs would increase the size of electorates, but not beyond tolerable limits. Some list MPs would attach themselves to an electorate and provide choices for voters who might want to approach a person from a different party to that of their constituency member. At the same time, the system would guarantee more diverse representation in Parliament, as the MMP system would allow for an enhanced representation of small parties and groups including Maori.⁸¹

⁸⁰ Nigel, ‘Stormy Passage’, as above, pp. 118-144.

⁸¹ *Report of the Royal Commission on the Electoral System 1986* (New Zealand, 1986), see http://www.elections.org.nz/study/researchers/royal-commission-report-1986_plain.html, accessed on 23 July 2008.

After 4 general elections under the MMP system, it has delivered what was predicted: a more representative and diverse Parliament.⁸² Small parties that previously had little or no parliamentary representation have gained representation⁸³ and the number of Maori MPs has steadily increased. In 1993 there were 6 Maori members in a House of 99. After the introduction of the MMP, the number increased from 16 (out of 120) in 1996 and 1999; to 19 in 2002; and 21 in 2005 (out of 121).⁸⁴ As minorities are not often geographically concentrated, when only single member districts exist, the ethnic minority group cannot be independent, as it needs to work with a major party to win some power. In proportional representation this is not necessary, as minority groups also get a piece of the political cake. At the same time, through maintaining single member districts, citizens continue to choose their individual representatives, so MPs continue to have an incentive to serve as local advocates.⁸⁵

Under the former First Past the Post (FPP) electoral system, the Maori percentage in Parliament varied from 5-7.1%. However, immediately after the introduction of the MMP system, the Maori percentage almost doubled to 13.3%, as Maori MPs were elected from the Party lists, as well as the general and Maori Maori constituency seats. Still, even without the lists, the Maori percentage would have increased considerably, as 10.8 of the electorate MPs were Maori. However, within a decade the percentage of Maori MPs elected from the Party

⁸² J. Karp, 'Members of Parliament and Representation' in J. Voweles, P. Aimer, J. Karp, R. Miller and A. Sullivan, *Proportional Representation on Trial: The 1999 New Zealand General Election and the Fate of MMP* (Auckland University Press, 2002), pp. 130-146 at p. 131; also S. Banducci and J. Karp, *Representation under a Proportional System in Voters' Victory? New Zealand's First Election under Proportional Representation* (Auckland University Press, 1988), pp. 135-152.

⁸³ Vowles, Banducci and Karp, 'Forecasting...', at 272.

⁸⁴ 15-17th Periodic New Zealand Report to CERD, UN Doc. CERD/C/NZL/17 of 18 July 2006.

⁸⁵ Karp, 'Members of Parliament and Representation', as above, p. 130.

lists had increased from 16.5% to 25% with the percentage from the electorates remaining the same.

Table 1: The New Zealand Parliament and descriptive representation: Maori percentage in recent elections

	Elections	Lists	Total
SMP			
1987	5.1		5.1
1990	5.1		5.1
1993	7.1		7.1
MMP			
1996	10.8	16.4	13.3
1999	13.4	13.2	13.3
2002	14.5	17.6	15.8
2005	10.1	25.0	16.5

Source: from J. Vowles, S. Banducci and J. Karp, 'Forecasting and Evaluating the Consequences of Electoral Change in New Zealand' (2006) 41 *Acta Politica* 267-284 at 274.

Given the objective of a fair electoral system, there was some concern about the possible overhang that the MMP system could produce. As mentioned earlier in 2005, the Maori Party won 4 of the Maori electorates but many of its electorate voters cast their party votes for the Labour Party contributing to the Maori Party winning 1 more electorate seat than its share of the party vote would have justified. This raised the size of the new House of Representatives to 121.

The number of female Maori MPs has also grown under MMP; currently, there are several Maori women in Parliament. Being victims of double discrimination, as women and as

indigenous individuals, indigenous women rarely play a pivotal role in the political life of a state. New Zealand is an excellent example of how indigenous representation can also increase the visibility and role of indigenous women. It is interesting that Maori female MPs have focussed more on their Maori rather than their gender identity. Tremblay has looked into the role of female representation in New Zealand and interviewed female members of Parliament. When asked whether they felt a responsibility to represent Maori women, the female Maori members 'were unanimous: they represented Maori women, of course, but first and foremost they represented all Maori – women and men'.⁸⁶ It seems that these female Maori MPs viewed themselves as representatives of their cultural identity rather than their gender identity; Interestingly, Garneau has noted a similar pattern in female members of First Nations in Quebec; they too wish to emphasise their cultural, rather than gender identity.⁸⁷ This is perhaps because of the history of oppression that their cultural identity has suffered, more so than their gender identity. In any case, it should not be forgotten that Maori women had leadership roles in the past. Maori women also played a pivotal role in the recent history of New Zealand, although the settlements process in the 70s operated for some to silence and erase the political activism of Maori women.⁸⁸ According to some, it was indeed the colonial cultures that pushed static traditional roles to Maori women. It is ironic that representatives of these cultures ask for a renewed emphasis on the gender element of Maori women. What

⁸⁶ M. Tremblay, 'The Participation of Aboriginal Women in Canadian Electoral Democracy' (2003) *Electoral Insight* in http://www.elections.ca/eca/eim/article_search/article.asp?id=26&lang=e&frmPageSize=&textonly=false accessed 30th June 2007.

⁸⁷ I. Garneau, *Perspective de femmes des Premières nations au Québec sur les chevauchements identitaires : Entre le genre et la nation*, Doctoral thesis (Montreal: Université du Québec et Montreal, 2002), p. 411, as quoted by Tremblay, as above.

⁸⁸ N. Seuffert, 'Race-ing and engendering the Nation-State in Aotearoa/ New Zealand' (2002) 10 *American University Journal of Gender, Social Policy and the Law* 597- 619 at 611.

must also be taken into account is that feminist agendas that come from middle-class white women and their concerns are seen as unrepresentative of Maori women and their concerns.⁸⁹ Contrary to initial hopes, the MMP system has not contributed to the rise of substantial policy responsiveness to Maori issues, apart from issues related to Treaty settlements and to the improvements related to Maori income and employment. It was perceived that since the party list determines the overall allocation of seats in Parliament, parties have an incentive to appeal to Maori voters despite the segregation of their constituency votes. The new system was also expected to promote greater general policy responsiveness among politicians and parties. Under FPP, parties had a strong incentive to appeal to the broadest possible audience to win the most votes. The result was a system often characterised by two large parties sharing often very similar platforms. In a Proportional Representation (PR) system, parties can maintain their ideological stigmas and focus more specifically on their core supporters. This increases the number of parties competing for votes and offers clearer choices to voters. Advocates of the new system also argued that PR would not only be fairer but would also encourage a politics of consensus, requiring cooperation between several parties to achieve effective government, in contrast to the dominance in government of one party, and the resulting adversarial nature of politics under FPP.⁹⁰ The realization of this last point has been obvious by the steps taken to form coalition governments.⁹¹

The MMP system was also hoped to raise voter turnout in elections, both in general and among minority groups. Contrary to expectations and despite the competitiveness of the 2005 general election, the proportion of valid votes cast increased only by 4.4% on an age-eligible

⁸⁹ T. Lindberg, 'Not my sister: What Feminists can learn about sisterhood from indigenous women' (2004) 16 *Canadian Journal of Women and the Law* 342-352 at 349.

⁹⁰ Karp, pp. 129-130.

⁹¹ J. Vowles, 'New Zealand: The Consolidation of Reform?' 19 (2005) *The Politics of Electoral Systems* 295-313.

population; turnout was 80.9% of registered voters, at the low end of New Zealand's participation history.⁹² However, while non-voting amongst Maori in the Maori roll remained largely the same between the 2002 and the 2005 elections (moving from 12% to 11%), non-voting amongst Maori on the general roll fell from 16% not voting in 2002 to 10% not voting in 2005.⁹³ In other words, contrary to initial suggestions, the 'political engagement' argument, which prescribes that minorities are more engaged when they have their members in parliament,⁹⁴ was not fully proven to be correct with respect to Maori in New Zealand. Maybe one should only ask for a gradual improvement in the numbers of Maori voters. Empowerment via descriptive representation should influence participation because the presence of minority representatives creates 'micro-level cues that affect how people perceive the costs and benefits of voting'.⁹⁵ The presence of minority elected officials sends a message to minorities that the benefits of voting outweigh the costs of not voting.⁹⁶ However although the statistics did not show a great difference in Maori numbers taking part in the elections, studies have actually shown that Maori who are represented by Maori electorate MPs are more likely to believe they have a say in government. Maori are also more likely to vote when their representative is also of Maori descent. It seems that minority citizens will vote in those places where minorities hold office. Also, increases in Maori representation through an increase in the number of Maori seats and through PR may enhance the awareness of descriptive representation. Yet, the effects of increased representation are more likely to be

⁹² Geddis, 'General Election in New Zealand', as above, at 811.

⁹³ UMP Research, *Maori Electoral Engagement- A Review of Existing Data*, Supplementary Update (November 2006).

⁹⁴ S. A. Banducci, 'The Impact of Alternative Means of Minority Group Representation', Paper presented at the Annual Meeting of the American Political Science Association, Washington DC, August 31- September 4, 2005.

⁹⁵ Banducci, Donovan and Karp, at 539.

⁹⁶ *Ibid.*

felt by those represented by Maori electorate MPs.⁹⁷ It is interesting that right after the introduction of the MMP system, Maori remained largely alienated from the political process; however, increased Maori participation could only be a gradual process. The lack of immediate rise in Maori numbers may also be attributed to their disillusionment with Labour's limited effectiveness in promoting Maori issues together.⁹⁸

The MMP electoral system has seen most political parties rank Maori candidates highly on their lists in an effort to secure the support of the increasing number of Maori voters. The effect was that in 2005 fourteen Maori were elected from party lists, in addition to the seven constituency members. There were, however, no Maori elected from general constituencies, and indeed, no more than ten Maori have ever been so elected,⁹⁹ suggesting that there remain overwhelming political and social barriers to Maori being fairly represented in the absence of designated seats. This fact highlights the erroneousness of the argument that guaranteed Maori representation is an unnecessary privilege. It is true that in recent decades there has been a progressive restoration of Maori citizenship rights, but the inferior Maori status in all aspects of life indicates that New Zealand is yet to offer Maori effective rights.

In concluding, the change of parliamentary system has increased the participation of Maori in parliament. From having 7.1% of Maori in Parliament, Maori now constitute 15.5% of the Parliament, which is proportionate to their percentage of the total population. Maori representation is not only numerically proportionate; it is also more effective than before. The need for agreement obliges the leading part of the opposition to work towards compromises with Maori. The number female Maori MPs also increased and a stronger more diverse Maori

⁹⁷ See the results of the study in *ibid* at 550-552.

⁹⁸ Karp, 'Members of Parliament and Representation', p. 144.

⁹⁹ D. O'Sullivan, 'The 1996 General Election and the Labour Vote in the Maori Electorates.' (2000) *He Pukenga Korero*.

contribution to parliamentary debates emerged.. It has also brought a gradual increase in Maori participation in the electoral process and gradually more trust and more involvement with the political life of the state.

The Maori Party

The Maori Party, established in 2004, quickly became the most successful Maori political party in New Zealand's history. It followed the Ratana Party established in 1928 and the Mana Motuhake Party in 1980, as the two other Maori political parties of long term significance. The catalyst for its creation was the controversial issue of the *Foreshore and Seabed Act 2004* which attracted severe criticism by United Nations bodies.¹⁰⁰ In 2004, a Court of Appeal decision *Ngati Apa v. Attorney General*¹⁰¹ considered whether or not the Maori Land Court had jurisdiction to grant fee simple title to Maori groups over the foreshore and seabed. The Court answered affirmatively, but cautiously, holding that the legal test was high and likely to be granted only rarely. Many in New Zealand interpreted this decision as restricting access to the seashore and, among a sea of protests Parliament passed the Act to vest ownership of the foreshore and seabed in the Crown. Many Maori saw the legislation as confiscation. After considerable pressure to submit to the party line, a Labour minister in the minority coalition government, and Maori constituency Member of Parliament, Tariana Turia, resigned from her party and Parliament. She contested the ensuing by-election as an independent to seek a mandate for forming a new Maori political party. Turia was re-elected and by the time of the 2005 general election she had become co-leader of the Maori Party,

¹⁰⁰ CERD issued an early warning (Decision 1(66) and criticized the restrictive interpretation of special measures in New Zealand. See *Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand*, UN Doc. A/57/18 of 1 November 2002, paras. 412-434 at para. 430; also see Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen- Mission to New Zealand, UN Doc. E/CN.4/2006/78/Add.3 of 13 March 2006, paras. 43-55.

¹⁰¹ CA 173/01 CA75/02, 19 June 2003.

which contested all seven Maori seats, and won four of them. Pita Sharples, a Maori academic and one of the party's new MPs, who had long advocated a separate Maori political party, became the co-leader of the Party. However, at 2.3%, the Party share of the party vote across the country placed them sixth out of the eight parties in parliament by party vote. One of the main problems the Party faces is the challenge of uniting very many diverse views. Maori do not hold homogeneous opinions and finding a balance between radicals, conservatives and moderates seems likely to prove problematic. Certainly though, small parties can have major policy influence in the new system.

Ethnically based parties have not escaped from criticism. It has been argued that parties based on ethnicity do not encourage an 'ideology of a state of citizens, [but] and ideology of ethnic peoples'.¹⁰² Although not uncommon in the domestic political realities, according to some, ethnic political parties 'infects' the political system and leads to a spiral of extreme ethnic bids that destroy political competitiveness and focuses on ethnic characteristics.¹⁰³ Notwithstanding these criticisms, the Inter-American Court on Human Rights has recognised the importance of such parties for minorities and indigenous political participation and has found that obstacles put by the state to the registration of an indigenous party violates the right to political participation of candidates and potential voters. The court specifically referred to the importance of the particularities of political organisation in indigenous regions, when assessing such parties.¹⁰⁴

Certainly, the Maori Party broadened Maori Parliamentary participation. Its MPs need not be influenced or pressured by non-Maori voters in the ways which restrict the opportunities of

¹⁰² Weller, as above, p. 498.

¹⁰³ K. Chandra, 'Ethnic parties and Democratic Stability' (2005) 32 *Perspectives on Politics* 235-252.

¹⁰⁴ Inter-American Court on Human Rights, *Yatama v. Nicaragua*, Case 12.338, report No. 125/01, Judgement of 3 December 2001, para. 218.

Maori MPs in other parties to pursue policy positions negatively perceived by non-Maori voters. The Maori Party is well placed to ensure that Maori concerns are always on the public agenda. A Maori Party too, can be more effective than individual MPs. Also, apart from the numerical difference, a party specifically looking after Maori rights is able to bring Maori views to all discussions, and pursue them without reference to non-Maori interests and perhaps prejudices which constrain the advocacy options available to Maori MPs in other political parties. On the other hand many Maori positively choose to seek membership of Parliament through these other parties and as a consequence three Maori sit in the Labour-led Cabinet and there are further Maori ministers outside Cabinet including the New Zealand First leader and former deputy Prime Minister Winston Peters who is the Foreign minister. This level of ministerial representation is a positive example of Maori political participation, which is further strengthened by there being Maori MPs in six of the seven parties in the current New Zealand parliament other than the Maori party.

Conclusions

The co-existence of guaranteed Maori seats and the MMP electoral system demonstrates how the provisions of the Declaration on the Rights of Indigenous Peoples on political participation can be realised. It also highlights how the establishment of different mechanisms for indigenous peoples do not have to lead to separation. Thus, Maori are allowed the opportunity to vote on a designated roll, but the system does not compel it and MMP encourages further Maori parliamentary participation. The UN Special Rapporteur on Indigenous Issues has noted that ‘the MMP system, whatever its limitations, has broadened democracy in New Zealand and should continue governing the electoral process in the

country to ensure a solid Maori voice in Parliament and guarantee democratic pluralism'.¹⁰⁵ The MMP system as practiced in New Zealand has served as a model-suggestion for other countries with indigenous peoples and especially Canada.¹⁰⁶ The combination of MMP and the Maori seats has increased and diversified Maori representation in Parliament. MMP alone would not be effective in this regard. It could not, on its own, guarantee proportionate Maori representation making the designated seats an essential part of the representation equation. The seats are also symbolically important as they recognise that, by virtue of first occupancy and internationally recognised rights of indigeneity, Maori are more than just other minority group with no special representational claims against the state.

MMP ensures community level representation as slightly more than half of the members of Parliament are elected from geographical based constituencies, but has also guaranteed more diverse representation in Parliament, benefiting Maori, among other groups. From 7.5% before the introduction of the MMP system, the percentage of Maori in Parliament has increased to 16.5% within 12 years. This percentage marginally exceeds the percentage of the Maori population of New Zealand and is in accordance with the special position that Maori have in the New Zealand history and society. Their large numbers guarantee their 'effective' participation in the democratic life of the state. The MMP system has also ensured that smaller parties can enter Parliament. The Maori Party is among them. After winning 4 constituency seats, the Maori Party is still showing growth potential and the likelihood that it will, in the future, often be essential to the formation of stable governments, thus increasing

¹⁰⁵ *Stavnhagen Report*, as above, para. 17.

¹⁰⁶ For example, see A. Fleras, 'From Social Control towards Political Representation? Maori seats and the Politics of Separate Maori Representation in New Zealand' (1985) 18 3 *Canadian Journal of Political Science* 551-576; also see L. Smith, 'Mending Fences: Increasing Aboriginal Representation in Canada', Paper presented in the 78th Annual Meeting of the Canadian Political Science Association, York University, June 2006.

its political leverage over both the major parties. However, the MMP system has is not a panacea. Contrary to initial hopes, the new system has not always increased the policy responsiveness to Maori issues, even though the Maori parliamentary is significantly stronger. Even though some increase in the percentage of Maori actually voting has occurred Maori still do not vote in the same numbers as the wider population. There are a multitude of reasons for this but the common theme of Maori disengagement from the political process does undermine democracy itself.

Overall, the modalities of Maori representation in the New Zealand parliament constitute a positive example of how the principles included in minority and indigenous instruments can be applied. The system goes beyond formal equality and promotes measures to ensure substantial equality in law and practice. The existing system of both Maori and general electoral rolls ensures that Maori participate in the political life of the state, while at the same time provides them with control over who will represent them. This satisfies current standards of international law to the measure that positive discrimination is promoted without this leading to separation and exclusion of indigenous peoples from the political life of the society they live in. In essence, the political system satisfies the multicultural model by recognising indigenous identity, working towards the elimination of direct and indirect discrimination and at the same time, promoting integration of Maori in the New Zealand political system.

This is not to say that the nature and form of their contemporary political participation is entirely just and unproblematic. The issue of the *Foreshore and Seabed Act 2004* showed the limitations of Maori participation in the decisions of Parliament. Voices for the elimination of the Maori guaranteed seats, aggressive argument against positive measures for the protection of Maori and the negative vote of the state to the adoption of the *Declaration on the Rights of*

Indigenous Peoples project an uncertain future for Maori rights and their representation in elective institutions.

Notwithstanding the challenges laying ahead, the current combination of dedicated seats, the MMP system and the diversification of opportunities for representation as shown by the establishment of the Maori Party, for example, constitute positive examples of indigenous political representation. In these ways, with all its problems, Maori political representation in the electoral system combines ‘stability with experimentalism’.¹⁰⁷

¹⁰⁷ A. Geddis, ‘A dual track democracy? The symbolic role of the Maori seats in New Zealand’s electoral system’ (2006) 5 *Election Law Journal* 347-368 at 347.