

JESSICA TAYLOR

SEVEN MĀORI SEATS: IS THIS DEMOCRACY?

LLM RESEARCH PAPER  
PUBLIC LAW (LAWS 505)

LAW FACULTY  
VICTORIA UNIVERSITY OF WELLINGTON

2004

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**JESSICA TAYLOR**

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The text of this paper (excluding footnotes, table of contents, footnotes and bibliography) comprises of 14,5685 words.

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RESEARCH REPORT

SYSTEMS RESEARCH IN THE DEMOCRACY

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*The paper concludes that the existence of the Māori seats is consistent with democratic theory and practice.*

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## 1. Abstract

*New Zealand is one of the few democratic nations in the world that incorporates, in its This paper considers whether the existence and operation of the Māori electoral districts is consistent with a general theory of democracy and with the New Zealand experience of democracy. The paper explores the history of the Māori seats and investigates their place in a democratic society. The paper then considers the tension between the powerful, and culturally embedded concept New Zealanders appear to prize of 'one person, one vote' and democratic theory about identity representation. This paper concludes that the existence of the Maori seats is consistent with democratic theory and practice.*

*This paper examines whether this is an accurate criticism by considering the role of the Māori seats in broad democratic theory.*

*The paper first reviews a number of definitions of democracy, as broadly constructed. From those broad definitions a framework is developed that defines the key elements of democracy and which functions as a measure of the democratic nature of forms and practices of government.*

*The paper then examines the history and development of New Zealand's Māori seats in order to understand the cultural and historical contexts of their formation and operation. The paper reviews the development of democracy in New Zealand and the criticisms of the Māori seats in that democracy. Having established what democracy means, what the Māori seats are, and how democracy operates in New Zealand, the paper examines whether the seats are undemocratic by testing them against the framework.*

## 2. *Introduction*

New Zealand is one of the few democratic nations in the world that incorporates, in its electoral system, special provisions for its indigenous people. New Zealand has seven electoral districts that ensure Māori representation in the national assembly, parliament. The Māori electoral districts, also known as the Māori seats, are both geographically and ethnically based electorates.

The Māori seats are controversial. Critics assert that the Maori seats are exclusionary and antithetical to the practices of a liberal state. The strongest and most serious criticism of the seats is that they are undemocratic. In a country that prides itself on its egalitarian character, and being one of the oldest democracies in the world, such an allegation challenges New Zealand's political foundations.

This paper examines whether this is an accurate criticism by considering the role of the Māori seats in broad democratic theory.

The paper first reviews a number of definitions of democracy, as broadly constructed. From those broad definitions a framework is developed that defines the key elements of democracy and which functions as a measure of the democratic nature of forms and practices of government.

The paper then examines the history and development of New Zealand's Maori seats in order to understand the cultural and historical contexts of their formation and operation. The paper reviews the development of democracy in New Zealand and the criticisms of the Māori seats in that democracy. Having established what democracy means, what the Māori seats are, and how democracy operates in New Zealand, the paper examines whether the seats are undemocratic by testing them against the framework.

The notion of the 'one person, one vote' rule and its tension with identity representation is then examined. The 'one person, one vote' rule and identity representation are described and the different arguments around their definitions canvassed and assessed. The Māori seats are contested against the concept and practices of the 'one person, one vote' rules and then finally, the democratic legitimacy of identity representation is examined/

democracy became the norm for governance.<sup>1</sup> The notion of democracy, and what it represents, has acquired a utopian dimension and has been reified as the one true form of governance. In the last half of the nineteenth century democratic theory was claimed to be the only moral system of governing possible. The calls for democracy, as practised in that time, came from the beneficiaries of the industrial revolution who asserted that capitalism and democracy were two sides of the same coin. In some western democratic countries, criticism of democratic theory was and is still, viewed as being contrary to the national interest and unpatriotic. The uncritical championing of democracy means it has taken on a sanctity and fundamentalism that alternatives, such as anarchism or guardianship, are viewed as attacks on human rights and fundamental freedoms.

Commentators have offered many different definitions of democracy and proposed a variety of tests for determining the democracy of institutions. Reviewing the definitions of many commentators suggests that finding a definition of democracy is relatively simple, but that it is the application of democracy into practices and institutions that profound difficulties and inconsistencies arise.

This paper constructs a three level framework that defines the key constituent elements of democracy. Level One sets out fundamental rules; Level Two sets out democratic principles; and Level Three sets out mechanisms necessary for implementing the fundamental rules and the principles.

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<sup>1</sup> Robert Dahl *Democracy and its Critics* (Yale University Press, New Haven, 1989) pp. 13-23



### 3. *Democracy*

While practices of democracy had their origins in classical Greece and Rome, democracy as we believe in it, developed as a popular political theory in the eighteenth century. In the following century, democracy became the norm for governance.<sup>1</sup> The notion of democracy, and what it represents, has acquired a utopian dimension and has been reified as the one true form of governance. In the last half of the nineteenth century democratic theory was claimed to be the only moral system of governing possible. The calls for democracy, as practised in that time, came from the beneficiaries of the industrial revolution who asserted that capitalism and democracy were two sides of the same coin. In some western democratic countries, criticism of democratic theory was and is still, viewed as being contrary to the national interest and unpatriotic. The uncritical championing of democracy means it has taken on a sanctity and fundamentalism that alternatives, such as anarchism or guardianship, are viewed as attacks on human rights and fundamental freedoms.

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<sup>1</sup> Robert Dahl *Democracy and its Critics* (Yale University Press, New Haven, 1989) pp. 13-33

Level One establishes that democracy is a political theory. It is a concept, a philosophy. The first level contains the fundamental rules of democracy. Level One does not explain how democracy is implemented or carried out. That is where democratic principles and mechanisms assist. The constituent elements of democracy can be broken down to a set of democratic principles. Level Two sets out the principles utilised to implement the fundamental rules of democracy,<sup>2</sup> the elements of procedural democracy which are the underlying characteristics of democracy. Level Three sets out the democratic mechanisms, the tools used to ensure fair and representative processes and describes the actual practices that are used.

The framework provides a measure of democracy. An institution is democratic if it meets all the criteria of the framework. Thus it must have intent to adhere to democratic philosophies and principles and then it must implement the theory by using democratic methods and processes.

#### *Fundamental Rules of Democracy*

The Oxford English dictionary describes democracy as “government by the whole population, usually through elected representatives”<sup>3</sup>. John Stuart Mill defined democracy as “the government of the whole people by the whole people, equally represented.”<sup>4</sup> Robert Dahl defined it as all the members governing the institution as political equals.<sup>5</sup> The fundamental rules of democracy are the popular control over public decisions and the equality of citizens to participate in that public control.<sup>6</sup> The underlying premise of democracy is that the majority of people agree how to act on group decisions.

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<sup>2</sup> Robert Dahl *Democracy, Liberty and Equality* (Norwegian University Press, Denmark, 1986), pp. 191-225,

<sup>3</sup> Maurice White (ed.), *The Oxford English Dictionary* (Clarendon Press, Oxford, 1998, 7<sup>th</sup> Edition)

<sup>4</sup> J.S. Mill, *Representative Government* (1861), Chapter VII, “Of True and False Democracy; Representation of All, and Representation of the Majority Only.”

<sup>5</sup> Robert Dahl *On Democracy* (Yale University Press, New Haven, 1998) p.37

The principles of democracy make up Level Two. Institutions that are democratic

In an ideal democracy, people would assemble to discuss important issues and then decide as a collective or by majority how to proceed. Unfortunately, this ideal can only work on a small scale and is impractical on a national level.<sup>7</sup> Accordingly, viable alternatives to group assemblies are necessary for nations to decision make. Representative democracy is on alternative.

Representative democracy is the election of officers, by the people, to make decisions for the people. Representative democracy emerged from assemblies in England during the reign of Edward I from 1272 to 1307.<sup>8</sup> By the eighteenth century, the assemblies had developed into a constitutional monarchy with checks and balances. This is still largely the form of government that is considered democracy today. That is an elected, by the people, body of officers who make decisions for the nation. The officers' powers are fettered by checks and balances, namely by constitutional positioning of a head of state and of the judicial branch of government.<sup>9</sup>

Thus the foundations of fundamental rules can be said to be:

|  |                           |                      |
|--|---------------------------|----------------------|
| <b>Level One<br/>Fundamental<br/>Rules</b> | <b>Political Equality</b> | <b>Majority Rule</b> |
|--|---------------------------|----------------------|

*Democratic Principles*

<sup>6</sup> International Institute for Democracy and Electoral Assistance *State of Democracy: Trends from the Pilot Countries* (International IDEA, Stockholm, 2001 available at [www.idea.int](http://www.idea.int) )

<sup>7</sup> Although, it is argued that due to rapid technological advances, government via referendum is more realistic today than ever before see the Yale Law School study on the impacts of technology on democracy at <http://islandia.law.yale.edu/isp>

<sup>8</sup> Robert Dahl *On Democracy* (Yale University Press, New Haven, 1998) p. 21

<sup>9</sup> Palmer,(2004), pp.55-56, 286-289

The principles of democracy make up Level Two. Institutions that are democratic contain an underlying set of democratic principles. The principles ensure that majority rule and political equality are carried out on fair and just terms. The principles proposed in this paper are: representation; participation; competition and accountability.<sup>10</sup>

The framework for Levels One and Two of democracy:

|  |                           |                    |                       |                    |                      |
|--|---------------------------|--------------------|-----------------------|--------------------|----------------------|
| <b>Level One<br/>Fundamental<br/>Rules</b>     | <b>Political Equality</b> |                    |                       |                    | <b>Majority Rule</b> |
| <b>Level Two<br/>Democratic<br/>Principles</b> | <b>Participatory</b>      | <b>Accountable</b> | <b>Representative</b> | <b>Competitive</b> |                      |

#### *Democratic Mechanisms*

Level Three of the democratic framework comprises the mechanisms needed for implementing the theory and principles. These are the processes and institutions that are utilised to form governments.<sup>11</sup>

|  |                           |                    |                       |                    |                      |
|--|---------------------------|--------------------|-----------------------|--------------------|----------------------|
| <b>Level One<br/>Fundamental<br/>Rules</b>     | <b>Political Equality</b> |                    |                       |                    | <b>Majority Rule</b> |
| <b>Level Two<br/>Democratic<br/>Principles</b> | <b>Participatory</b>      | <b>Accountable</b> | <b>Representative</b> | <b>Competitive</b> |                      |

<sup>10</sup> These principles have been developed and influenced by the writers analysed below see Rustow (1967), Dahl (1986), Powell (1982), Mulgan (1989), and Beethan (IDEA) (2001).

<sup>11</sup> These mechanisms have been developed and influenced by the writers analysed below see Rustow (1967), Dahl (1986), Powell (1982), Mulgan (1989), and Beethan (IDEA) (2001)

|  |   |  |                                 |                                       |
|--|---|--|---------------------------------|---------------------------------------|
| <b>Level Three Democratic Mechanisms</b> | - mechanisms for ensuring participation | - mechanisms for ensuring accountability | - mechanisms for representation | - mechanisms for ensuring competition |
|--|---|--|---------------------------------|---------------------------------------|

All the practical implementation mechanisms necessary to ensure a democratic institution derive from either the two fundamental theories or from the four principles. There is no specific set of mechanisms needed for democracy. All that is required is that the mechanisms operationalise the fundamental rules in accordance with the principles of democracy.

An attempt to establish criteria, without having regard to the principles, results in the creation of instruments that imply the principles but do not state what they are. Instead of establishing the principles first, and then working towards implementing those, commentators seem to use the mechanism in Level Three, as the criteria for testing democracy. What the commentators were really looking at was to see if the principles were being implemented through a set of outcomes based guidelines without acknowledging the existence of the principles.

Thus some commentators have tried to establish tests looking at the *how* democracy is implemented instead of the *why* it is implemented. This makes a leap in logic between the theory (majority rule and political equality) and the implementation of the theory. The missing steps are the principles that the theory creates. The proposed framework shows that it is the principles that are implemented, not the theory.

The next section tests the criteria of democracy suggested by some commentators against the framework proposed in this paper.

The criteria established by commentators can be incorporated into either the two fundamental rules, the four principles or the underlying mechanisms or a mixture of the rules, principles and mechanisms. Some commentators have meshed the

fundamental rules of Level One with the principles of Level Two and the tools of Level Three. The majority of commentators fail to separate Level Two principles from the mechanisms that are used to fulfil the requirements of Level Three. For instance freedom of the press is a part of actualising the principle of competition. Periodic elections are a way of implementing the principle of accountability.

Dankwart Rustow<sup>12</sup> applied four criteria to determine the democracy of an institution. These are the free flow of information and the free expression of opinion; the competition of party programs and candidates for electoral approval; the control of the government by elected representatives; either (a) periodic changes in the composition of the ruling majority or (b) representation of all major electoral trends within it.

Inserting Rustow's work into the framework means separating his assertions about the underlying theory from the mechanisms he uses. In Level One there is majority rule and political equality. Rustow's analysis goes straight to matters in the second and third levels, when assessing the democratic nature of an institution he investigates the procedures of the institution and those surrounding the institution but fails to acknowledge the underlying assumptions.

Analysing Rustow in the light of the second and third levels poses a significant problem. Rustow's criteria are a mixture of principles and mechanisms. For instance the free flow of information and the freedom of expression criteria fall into the principle of competition. Having freedom of information and expression increases political awareness and with increased political awareness comes the likelihood of dissent from the popular regime. Rustow's criteria regarding the competition of party programs and candidates for electoral approval again fall under the principle of competition. His requirement for the control of the government by elected representatives is both inclusive of the first level need for majority rule and the second

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<sup>12</sup> Dankwart Rustow, *A World of Nations: Problems of Political Modernization* (Washington, DC, 1967) pp. 94, 290

level principle of representation. Rustow's requirement for periodic change is a part of the proposed principle of accountability. Periodic change enables voters to change representatives if they did not follow the will of the people during their term of government. Rustow's condition for the representation of all major electoral trends within an institution is incorporated in the representation principle, although from a more consociational democratic angle.

Rustow's criteria can be mapped against the framework as follows:

|  |  |  |   |   |
|--|--|--|---|---|
| <b>Level One<br/>Fundamental<br/>Rules</b>       | <b>Political Equality                      Majority Rule</b> |  |   |   |
| <b>Level Two<br/>Democratic<br/>Principles</b>   | <b>Participatory</b>   | <b>Accountable</b>   | <b>Representative</b>                                     | <b>Competitive</b>  |
| <b>Level Three<br/>Democratic<br/>Mechanisms</b> | - representation of all major electoral trends within it     | - periodic changes in the composition of the ruling majority | -the control of the government by elected representatives | -free flow of information<br>-free expression of opinion<br>-competition of party programs<br>-competitions candidates for electoral approval |

Robert Dahl's criteria for a democratic standard include<sup>13</sup> effective participation – equal and effective opportunities for making views known to others; voting equality – equal and effective opportunity to vote and all votes counted as equal; enlightened understanding – access to information; control over the agenda – choose what is

<sup>13</sup> Robert Dahl *Democracy, Liberty and Equality*, (Norwegian University Press: Denmark, (1986), p. 195

important; inclusion of adults – all adults included. Dahl's criteria assisted greatly in the building of the four core principles, as he tends to state the underlying issue and then move to explain how it is to be implemented. However, this does limit the impact of the principle significantly. For instance Dahl states that effective participation is imperative to a democratic institution, he then states this means equal and effective opportunities for making views known to others. However this definition fails to take into account other methods of participation, for example the duty on the institution to consult with affected parties of a proposed decision or the implied protection of political and civil rights that allow participation in the political process.

Dahl also has a different approach regarding enlightened understanding. Dahl states that enlightened understanding means having access to information. The framework identifies enlightened understanding as an imperative to full participation in the electoral process and is therefore included in the participatory principle. Dahl's implementation of enlightened understanding is having access to information. The framework has having access to public information as part of the accountability measure and access to non-public information as part of the competition principle. This is because the different information of public records and official information insures that the institution is transparent and this leads to accountability. The non-public information, such as access to a critical media, generates varying political ideas and political dissent which garners political diversity and fulfils the competition principle.

Dahl's theory of voting equality – equal and effective opportunity to vote and all votes counted as equal is incorporated into the participatory principle. Dahl raises a significant issue for this thesis, that of all votes are counted equal or apportionment. Apportionment is going to be explained and analysed at depth later in this paper, however it is important to note that apportionment goes straight to the heart of participation principle and is one of the most difficult mechanisms of democracy to maintain.



Dahl's criteria can be mapped against the framework as follows:

|  |   |   |   |   |
|--|---|---|---|---|
| <b>Level One<br/>Fundamental<br/>Rules</b>       | <b>Political Equality      Majority Rule</b>  |   |   |   |
| <b>Level Two<br/>Democratic<br/>Principles</b>   | <b>Participatory</b>  | <b>Accountable</b>  | <b>Representative</b>   | <b>Competitive</b>  |
| <b>Level Three<br/>Democratic<br/>Mechanisms</b> | <ul style="list-style-type: none"> <li>- effective participation</li> <li>- equal and effective opportunities for making views known to others</li> <li>- voting equality</li> <li>- equal and effective opportunity to vote and all votes counted as equal</li> <li>- enlightened understanding - inclusion of adults</li> </ul> | <ul style="list-style-type: none"> <li>- access to information</li> </ul> | <ul style="list-style-type: none"> <li>- control over the agenda</li> <li>- choose what is important</li> </ul> | <ul style="list-style-type: none"> <li>- access to information</li> </ul> |

Bingham Powell established five criteria for democracy,<sup>14</sup> these were the legitimacy of the government rests on a claim to represent the desires of its citizens; the organised arrangement that regulates this bargain of legitimacy is competitive elections; most adults can participate in the electoral process, both as voters and as candidates for important political office; citizens' votes are secret and not coerced; and citizens and leaders enjoy basic freedom of speech, press, assembly, and organisation.

<sup>14</sup> G. Bingham Powell, *Contemporary Democracies: Participation, Stability, and Violence* (Cambridge, MA, 1982) pp. 3, 5

Powell's criteria again assesses democracy with a mixture of principles and implementation tools. He states that participation is a key requirement and then limits participation to voting and standing as candidates for office. In the framework, participation in an institution is wider than having access to electoral tools. Participation includes the right to be educated in the method of the electoral system, and the right to be consulted about decisions if they directly impede on your liberties.

Powell introduces a key element to the democratic principles, that democratic legitimacy requires competitive political elections. This is important because while other commentators have stressed the significance of having periodic elections; Powell adds that it is also necessary for elections to be competitive. That vibrant competitiveness is in itself a cornerstone of a democratic process. Competition is an important element of a democratic institution because it helps insure against corruption; it reiterates the accountability of the governors; it encourages diversity in representatives; and competition also establishes the forms of the electoral process.

Powell's analysis can be mapped against the framework as follows:

| <b>Level One<br/>Fundamental<br/>Rules</b>       | <b>Political Equality                      Majority Rule</b>  |                                  |  |   |
|--|---|----------------------------------|--|---|
| <b>Level Two<br/>Democratic<br/>Principles</b>   | <b>Participatory</b>  | <b>Accountable</b>               | <b>Representative</b>  | <b>Competitive</b>  |
| <b>Level Three<br/>Democratic<br/>Mechanisms</b> | - most adults can participate in the electoral process, both as voters and as candidates for important political office<br>- citizens' votes are secret and not coerced | -competitive political elections | - legitimacy of the government rests on a claim to represent the desires of its citizens | - the organised arrangement that regulates this bargain of legitimacy is the competitive political election<br>- citizens and leaders enjoy |

|  |  |  |  |  |
|--|--|--|--|--|
|  |  |  |  | basic freedom of speech, press, assembly, and organisation |
|--|--|--|--|--|

Richard Mulgan has defined the fundamental democratic principles that form the basis of representative government. These include the right to equal participation, equal power and power sharing, majority rule, freedom of political expression, protection of individual rights, protection of minority right and the right to exercise political power.<sup>15</sup> Mulgan's analysis is more focussed on the rights that democracy provides than other commentators. He states that democracy is inherently a system of rights and that civil and political rights are essential elements in the nature of democracy.

Mulgan's theory approaches democracy in a different way. Analysis of Mulgan's freedom of speech criteria demonstrates his rights based approach. Dahl states that one of the core elements is the opportunities for making views known to others, Mulgan states that freedom of political expression is core. Both are essentially talking about the same element: the right to freedom of speech. However Mulgan defines it as an individual right, separate and distinct from state duties. This approach to democracy is classified a liberal rights theory.

Mulgan's analysis is so compactly interwoven with rights theory that a major assumption must be addressed, that of individual rights instead of group rights. Liberalism assumes that society is made up of individuals. The traditional opposing theory is that society is made up of groups based on different characteristics, for instance gender and ethnicity.<sup>16</sup> This theory will be examined and analysed in detail later in this paper. It is interesting that although liberalist, Mulgan does state that the

<sup>15</sup> Richard Mulgan, *Democracy and Power in New Zealand*, (2<sup>nd</sup> ed. 1989 Oxford University Press, Auckland), p. 16-23

<sup>16</sup> Anne Phillips, *The Politics of Presence*, (1995)

rights of minorities are protected in a truly democratic institution, though this assertion assumedly follows the free market idea in public choice theory.<sup>17</sup>

Due to Mulgan's concentration on the individual rights that democracy bestows, his criterion falls mainly in the participation category. His rights analysis is categorised as fundamentally being the right to participate in political life. With that participation comes certain rights, for instance the civil rights like to be safe from arbitrary search and seizure.

Mulgan's criteria can be mapped against the framework as follows:

| Level One<br>Fundamental<br>Rules       | Political Equality   |  | Majority Rule   |   |
|---|--|--|---|---|
|   | Participatory  | Accountable  | Representative  | Competitive   |
| Level Two<br>Democratic<br>Principles   |  |  |   |   |
| Level Three<br>Democratic<br>Mechanisms | <ul style="list-style-type: none"> <li>- the right to equal participation</li> <li>- protection of individual rights</li> <li>- protection of minority rights</li> <li>-right to exercise political power</li> </ul> | <ul style="list-style-type: none"> <li>-equal power and power sharing</li> </ul> | <ul style="list-style-type: none"> <li>- majority rule</li> </ul> | <ul style="list-style-type: none"> <li>- freedom of political expression</li> </ul> |

The Institute for Democracy and Electoral Assistance (IDEA) utilise tools to do a broadband assessment of the extent of democracy in different countries.<sup>18</sup> IDEA's analysis differs from the method here primarily because its purpose is different. IDEA

<sup>17</sup> The public choice theory is described at length in Andre Reeve and Alan Ware, *Electoral Systems: A Comparative and Theoretical Introduction*, (1992)

are trying to test the democratic nature of whole institutions, this analysis is just simply defining democracy and then later will examine a specific electoral practice. IDEA looks at the minimum requirements that a state needs to be democratic and then works backwards. This analysis is looking at what democracy means and then later investigating whether or not the Māori seats can align with it. Accordingly, IDEA talks about requirements and standards and ways that these can be demonstrated. This paper looks at the underlying theme that democracy is trying to achieve and differentiates that from the mechanisms it uses. The major issue with different commentators' works is the muddling of mechanisms and themes. While IDEA do look at the "values"<sup>19</sup> democracies must obtain, their criteria is too focussed towards testing to be used as part of the definition here.

IDEA's underlying principles are also different from the philosophies used here. IDEA states that the underlying principles of democracy are popular control over public decision makers and decisions; and equality of respect and voice between citizens in the exercise of that control. IDEA's versions of political equality and majority rule are different from the ones proposed here. Their definitions are more about ensuring participation and accountability and less emphasis on representative and competition.

IDEA's principles can fit into the framework as follows:

|   |  |   |
|---|--|---|
| <p><b>Level One<br/>Fundamental<br/>Rules</b></p> | <p><b>Political Equality</b><br/>(equality of respect and voice)</p> | <p><b>Majority Rule</b><br/>(popular control)</p> |
|---|--|---|

*Conclusion and proposed framework*

<sup>18</sup> David Beetham, Sarah Bracking, Iain Kearton and Stuart Weir, *International IDEA Handbook on Democracy Assessment*, The Hague: Kluwer Law International, (2001)

Having investigated the analysis of commentators, it can be seen how the definitions of democracy used by all the commentators can be deconstructed down to the underlying theory and then categorised into four principles. Each commentator's work can be interpreted to show that democratic principles are fundamental to bridging the gap between the theory of democracy and implementation of democracy. This means that there is a three step process; there is the theory of democracy, the principles derived from that theory and the implementation of those principles through mechanisms. The practices of democracy are divided onto the four principles as follows:

|  |  |   |  |   |                      |
|--|--|---|--|---|----------------------|
| <b>Level One<br/>Fundamental<br/>Rules</b>       | <b>Political Equality</b>                              |   |  |   | <b>Majority Rule</b> |
| <b>Level Two<br/>Democratic<br/>Principles</b>   | <b>Participatory</b>                                   | <b>Accountable</b>                                      | <b>Representative</b>                          | <b>Competitive</b>                                  |                      |
| <b>Level Three<br/>Democratic<br/>Mechanisms</b> | <b>- mechanisms<br/>for ensuring<br/>participation</b> | <b>- mechanisms<br/>for ensuring<br/>accountability</b> | <b>- mechanisms<br/>for<br/>representation</b> | <b>-mechanisms<br/>for ensuring<br/>competition</b> |                      |

Some of the mechanisms appear oxymoronic. At first glance it is difficult to ascertain how the protection of free press is weighed against the protection of a civil right like privacy. However, all the aspects of democracy must be looked at together and contested against each other. The theory of democracy, the principles of democracy and the mechanisms of democracy are a complete package. It is imperative to realise that the principles are complimentary and at the same time limiting of each other.

<sup>19</sup> Beethan, (2001), p. 3

#### 4. Democracy in New Zealand

New Zealand is a representative democracy,<sup>20</sup> based on foundations of egalitarianism and equality.<sup>21</sup> New Zealand has a Mixed Member Proportional (MMP) electoral system. Under MMP each voter has two votes, one for a constituency representative and the other for a political party. Each political party gets seats in the House of Representatives proportional to the amount of party votes they receive.<sup>22</sup>

Lijphart considers that New Zealand established one of the first genuine systems of democracy within the first two decades of the twentieth century.<sup>23</sup> Banducci and Karp agree with this and state that New Zealand is one of the oldest modern democracies, having a stable democratic system since full franchise in 1893.<sup>24</sup> Dahl also concurs and rates New Zealand as one of the few countries that has been democratic for over sixty years.<sup>25</sup>

IDEA assessed New Zealand's democracy in 2002 and found that while New Zealand has some issues; its democracy is generally sound.<sup>26</sup> IDEA's criticisms of the state of New Zealand democracy arise from inequalities of minority groups,<sup>27</sup> with the exception of Māori because of the Māori seats. Similarly, the New Zealand Election

<sup>20</sup> Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government*, Oxford University Press: South Melbourne, (4<sup>th</sup> ed. 2004), p.4

<sup>21</sup> New Zealand Electoral Study, *Electoral System Opinion and the Evolution of MMP: A Report to the Electoral Commission*, Foundation for Research, Science and Technology: University of Waikato, (2000),

<sup>22</sup> Palmer, (2004), pp.13-14

<sup>23</sup> Arend Lijphart, *Patterns of Democracy*, New Haven: Yale University Press, (1999), p.49.

<sup>24</sup> Susan Banducci and Jeffrey Karp, *Issues and Party Competition under Alternative Electoral Systems*, Party Politics Vol 8. No.1 pp. 123-141

<sup>25</sup> Robert Dahl, *How Democratic is the American Constitution*, Yale University Press: New Haven, (2001), p. 164

<sup>26</sup> John Henderson and Paul Bellamy, *Democracy in New Zealand: International IDEA Study*, Macmillan Brown Centre for Pacific Studies and International Institute for Democracy and Electoral Assistance, (2002)

<sup>27</sup> Henderson, (2002), p. 27; p. 43; p. 47

Study commented that New Zealand's electoral system "does well" and meets proportional requirements.<sup>28</sup>

These assertions of New Zealand's democracy are supported by an investigation by the Bay of Plenty Regional Council on the constitutional and democratic legitimacy of Māori electorates for local government. The Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001 enabled the Council to establish Māori wards (constituencies) for their local elections. Before the enactment of this legislation, the Council commissioned Judge Trapski of the High Court to investigate whether the seats would be constitutionally and democratically sound.<sup>29</sup> Judge Trapski found that, given New Zealand's particular interpretation of democracy, the proposal for Māori wards in local government was constitutionally sound and democratic. He found the proposed seats would be "in accordance with New Zealand's constitutional principles and law".<sup>30</sup>

The above research and analysis has stated periodically and clearly that New Zealand is a democratic country and the Māori seats are a part of that democracy. The United Nations even refers to the Māori seats as a positive example of a way to protect minorities in democracies.<sup>31</sup>

Regardless of these approvals of New Zealand's democratic nature, criticisms that the Māori seats are not democratic still persist. In the past year, the furrow that raised debate on the issue of the democratic nature of the Māori seats was a speech by Dr Don Brash, leader of the National Party, addressed at the Orewa Rotary Club on 27

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<sup>28</sup> NZES, (2000), p.5

<sup>29</sup> Judge Peter J. Trapski, *The Proposal to Establish a Māori Constituency for Environment Bay of Plenty (The Bay of Plenty Regional Council)*, Report from Hearings Commissioner, (6 August 1998), available on request from Environment Bay of Plenty

<sup>30</sup> Trapski, (1998), p. 9

<sup>31</sup> Dr Fernand de Varennes, "Towards effective political participation and representation of minorities", Working paper for United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Minorities, Fourth session, 25 - 29 May 1998, E/CN.4/Sub.2/AC.5/1998/WP.4



January 2004.<sup>32</sup> Dr Brash stated that he believed that New Zealand should be “moving forward into the new century as a modern, democratic and prosperous nation”. Dr Brash also stated that if elected as Prime Minister he would remove the anachronism of the Māori seats in the House of Representatives, inferring that the seats are not democratic. In his concluding remarks, he stated that New Zealand must build a modern, prosperous, democratic nation with one rule for all, again implying the existence of the Maori seats is evidence that the fundamental principle of one person one vote is being contravened and further, that that is undemocratic.

Politician and academic Wayne Mapp has also criticised the democratic nature of the seats and has stated that the Māori have a privileged constitutional status and that this runs counter to democracy.<sup>33</sup> Commentator David Thornton has stated that the Māori seats blemishes New Zealand’s representative democracy.<sup>34</sup> Politician Winston Peters, when referring to the introduction of Māori wards in the Bay of Plenty, said that the seats were undemocratic and what is needed is “one system of representation for all New Zealanders.”<sup>35</sup>

There are a number of well canvassed arguments against the Māori seats, these include:<sup>36</sup>

- Every member of society should have equal voting power or ‘one person, one vote’;
- Under MMP the seats hold too much power for a minority group and therefore the vote in the Māori electorates have more value;
- MMP should be able to represent minority interests;

<sup>32</sup> Dr Don Brash, *Nationhood*, Speech at Orewa Rotary Club, 27 January 2004, available at [www.national.org.nz](http://www.national.org.nz) or from the National Party National Headquarters, PO Box 1155, Wellington

<sup>33</sup> Wayne Mapp, ‘Time for constitutional clarity’, in *New Zealand Law Review*, LexisNexis (May 2003) p. 148

<sup>34</sup> David Thornton, ‘Another attack on one man, one vote principle’ in *The New Zealand Herald* 28 June 2000

<sup>35</sup> Rt Hon Winston Peters, media release, 24 July 2003, available on [www.nzfirst.org.nz](http://www.nzfirst.org.nz)

<sup>36</sup> Report of the MMP Review Committee, *Inquiry into the Review of MMP*, Order of the House of Representatives: Wellington, (2001), p.20

- Under MMP there has been substantial Māori representation outside the Māori seats; and
- The seats are based on a racial division and this fosters racial disharmony.

The criticisms of the Māori seats fit into the framework:

|  |  |   |  |  |
|--|--|---|--|--|
| <b>Level One<br/>Fundamental<br/>Rules</b>       | <b>Political Equality</b><br>- equal voting power <b>Majority Rule</b><br>- the seats hold too much power for a minority group |   |  |  |
| <b>Level Two<br/>Democratic<br/>Principles</b>   | <b>Participatory</b><br>- The seats are based on a racial division and this fosters racial disharmony                          | <b>Accountable</b>                              | <b>Representative</b><br>- MMP should be able to represent minority interests<br>- Under MMP there has been substantial Māori representation outside the Māori seats | <b>Competitive</b>                           |
| <b>Level Three<br/>Democratic<br/>Mechanisms</b> | <b>- mechanisms for ensuring participation</b>   | <b>- mechanisms for ensuring accountability</b> | <b>- mechanisms for representation</b>   | <b>- mechanisms for ensuring competition</b> |

There are also a number of vocal arguments in favour of the Māori seats, including:

- The seats are guaranteed under Article III of the Treaty of Waitangi<sup>37</sup>;
- The seats hold historical mana;<sup>38</sup>
- Māori will decide themselves, via the Māori Electoral Option, when the seats are no longer necessitated; and
- The seats ensure a Māori voice in Parliament.

<sup>37</sup> Simon Reeves, *To Honour the Treaty*, Earth Restoration Ltd: Auckland, (2<sup>nd</sup> ed. 1996)

<sup>38</sup> Mason Durie, *Te Mana, Te Kāwanatanga, the Politics of Māori Self-Determination*, Oxford University Press: New Zealand, (1998)

This paper is not going to concentrate on the pros or cons of retaining the Māori seats but is going to analyse whether the seats are democratic. While it is acknowledged that there are various rationales for removing and retaining the seats that are outside of democratic critique, those questions will not be examined here.

From the above indicators there are two distinct ways that it has been said that the seats are undemocratic. These are that the seats breach the 'one person, one vote' rule and that non-geographic constituencies are not democratic. The 'one person, one vote' rule can be broken into two different parts: political equality and apportionment. The democratic nature of non-geographic constituencies or 'identity representation' will be analysed separately.

Meanwhile due to the Constitution Act 1852, most Māori were still effectively excluded from the political process. The Constitution Act established vague tentacles of democracy in New Zealand by creating an electoral system with a central assembly.<sup>42</sup> Voters were males over the age of 21 years who had property holdings within an electorate.<sup>43</sup> Māori males were not explicitly excluded under the Act, but because Māori held property communally and it was not registered, they were

<sup>42</sup> Waitangi Tribunal, *WAI 413 Māori Electoral Cases Report*, 1994, Brookers, Wellington.

<sup>43</sup> B. J. Dalton, *War and Politics in New Zealand, 1840-1870* (Sydney University Press, Sydney, 1967).

<sup>44</sup> Waitangi Tribunal, *WAI 413 Māori Electoral Cases Report*, 1994, Brookers, Wellington, p. 5.

<sup>45</sup> Niel Atkinson, *Advances in Democracy: A history of the vote in New Zealand*, University of Otago Press, Dunedin (2003), p. 21.

<sup>46</sup> Atkinson, (2003), p.21.

## 5. *Short history of the Māori seats*

In Article III of the Treaty of Waitangi, Māori were guaranteed the same “rights and privileges” as British subjects. The Waitangi Tribunal has stated that Article III established an obligation on the Crown to protect the citizenship rights of Māori.<sup>39</sup> However in 1840, two distinct and separate nations existed in New Zealand. Although Māori were British subjects, they lived and operated outside of British rule and law, impeding any attempts of British government and control.

However during the 1840s and 1850s when land was traded to the Crown, British control was able to be extended to that land.<sup>40</sup> Therefore the sale of land was, in essence, a cessation of political control. The colonists’ desire for the expediency of the sale of Māori land led to the Native Lands Acts 1862 and 1865. These Acts abolished the Crown’s pre-emptive right to buy land as stipulated in Article II of the Treaty of Waitangi and created individualisation of title upon application.<sup>41</sup> Because when land was traded political control was extended to that land, the colonists’ rapid land accumulation also meant the rapid accumulation of political control.

Meanwhile due to the Constitution Act 1852, most Māori were still effectively excluded from the political process. The Constitution Act established vague tentacles of democracy in New Zealand by creating an electoral system with a central assembly.<sup>42</sup> Voters were males over the age of 21 years who had property holdings within an electorate.<sup>43</sup> Māori males were not explicitly excluded under the Act, but because Māori held property communally and it was not registered, they were

<sup>39</sup> Waitangi Tribunal, *WAI 413 Māori Electoral Option Report*, 1994, Brookers, Wellington

<sup>40</sup> B. J. Dalton, *War and Politics in New Zealand, 1885-1870*, (Sydney University Press, Sydney, 1967)

<sup>41</sup> Waitangi Tribunal, *WAI 413 Māori Electoral Option Report*, 1994, Brookers, Wellington, p. 5

<sup>42</sup> Niell Atkinson, *Adventures on Democracy: A history of the vote in New Zealand*, University of Otago Press, Dunedin (2003), p. 21

<sup>43</sup> Atkinson, (2003), p.23

effectively excluded.<sup>44</sup> This led, among other events, to Māori attempts to create an independent political system during the 1850s and 1860s.<sup>45</sup> Examples of this are the Kingitanga movement and the attempts to form a Māori parliament. However, these endeavours were never recognised by the colonial government and Māori were necessitated to lobby for representation in Parliament.<sup>46</sup> This lobbying, combined with a “thread of idealism”<sup>47</sup> and sense of unfairness eventually led to the Māori Representation Act 1867.

The Māori Representation Act 1867 granted the franchise to Māori men over the age of 21 years. It divided the country geographically into four Māori districts. The preamble of the Act states that the seats were “temporary provisions”<sup>48</sup> to enable special representation of Māori. It was never intended that the seats remain because it was assumed that the individualisation of land would enfranchise Māori over time. Those first seats were not allocated proportionately as 56,000 Māori were represented by 4 Māori seats and 171,000 Europeans were represented by 72 seats.<sup>49</sup>

Even disregarding the malapportionment of the seats, there were serious differences between the European and Māori seats. Māori Members were chosen at hui by a show of hands, there was no registration of voters and the choice of Members was dominated by hapū and iwi preferences.<sup>50</sup> Inside the House, Māori Members did not have a substantive impact on the proceedings of the House. In the Report of the Royal Commission on the Electoral System, Professor Sorenson goes as far to state that the

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<sup>44</sup> M.P.K. Sorenson, ‘A History of Māori Representation in Parliament’, in Royal Commission on the Electoral System, *Towards a Better Democracy*, (1986), AJHR, Appendix B, B-13

<sup>45</sup> Sorenson, (1886), B-15 to B-28

<sup>46</sup> Sorenson, (1986), B-61

<sup>47</sup> Claudia Orange, *The Treaty of Waitangi*, (Allen and Unwin Port Nicholson Press, Wellington, 1987) p. 184

<sup>48</sup> Māori Representation Act 1867, preamble

<sup>49</sup> D. Ian Pool, *The Māori Population of New Zealand 1769-1971*, Auckland University Press, (1977), p. 237

<sup>50</sup> Catherine J Iorns, ‘Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination’, in *Murdoch University Electronic Journal of Law*, Volume 10, number 4 (December 2003)

Māori voice in Parliament was often ineffective and while Māori Members did advocate on Māori issues, little attention was paid to them.<sup>51</sup>

The Act extended the Maori seats in 1872 and then indefinitely in 1876, due to fears that Māori would enrol in general seats and, given their continued population supremacy, put the seats "in jeopardy"<sup>52</sup> by electing Māori in them.

In 1893 Māori women were granted the franchise alongside their non-Māori counterparts. This effectively doubled the constituency of the Māori seats. New Zealand women were the first women in the world to gain franchise, but as equally important and often understated, Māori women were the first indigenous women and 'women of colour' to receive the vote.<sup>53</sup>

The 'one man, one vote' rule for property owners was adopted in the Representation Amendment Act 1889. This meant that property owners with holdings on more than one district had to decide where to cast their vote. This stopped Māori from being eligible for the European roll by virtue of property interests and ended any duality of voting.<sup>54</sup> In 1896, property rights qualifications for voting eligibility were abolished as well, this meant that all citizens were eligible to vote and universal suffrage was established.

This ended what has been termed New Zealand's "semidemocratic"<sup>55</sup> century. These changes implemented equality as being the cornerstone of legitimate democracy in New Zealand and, since that time, being undemocratic has become synonymous with

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<sup>51</sup> Sorenson, (1986), B-25, a significant example of this is Māori Members opposition to the Native Land Acts, which were designed to facilitate European purchase of Māori land.

<sup>52</sup> Sorenson, (1986), B-24

<sup>53</sup> Suffrage Centennial Local History Project, *Maori women and the franchise*, Women's Studies Dept., Victoria University of Wellington, (1993)

<sup>54</sup> Sorenson, (1986), B-30

<sup>55</sup> Leslie Lipson, *The politics of equality : New Zealand's adventures in democracy*, University of Chicago Press (1948) p. 167

being unequal.<sup>56</sup> While the universal franchise and the removal of property qualifications moved New Zealand to a more democratic nation, the malapportionment of the Māori seats was a blemish on this democracy.

These legislative changes also fully “segregated”<sup>57</sup> New Zealand electoral law and cemented the place of Māori in the electoral system. Māori were categorised and classed outside general electoral law.

The most visible symptom of this segregation, apart from the malapportionment, was the difference between Māori and non-Māori voting methods. In 1870 non-Māori voted for the first time by secret ballot,<sup>58</sup> however Māori were voting by a show of hands until 1910<sup>59</sup> and subsequently by declaration to the returning officer, this continued until 1937. Until 1950, Māori also did not cast their vote on election day, but on the day before. Sullivan points out the differences between how Māori and non-Māori cast their votes was not merely symbolic. Sullivan contends that the secret ballot ensures the right to vote without undue influence.<sup>60</sup> The ability to easily influence another directly impacts upon the ability of an institution to practice democracy.

Despite the inequitable apportionment and continual Māori protestations, the number of Māori seats in Parliament remained fixed at four, for over one hundred years.<sup>61</sup>

When considering how it was that the Maori seats remained at four for so long, the fact that from 1943 to 1993, the seats were held by the Labour Party must be taken into account. The Labour Party secured the Māori vote by an alliance with the Ratana

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<sup>56</sup> Lipson, (1948)

<sup>57</sup> Sorenson, (1986), B-30

<sup>58</sup> Atkinson, (2003), p. 55

<sup>59</sup> Ann Sullivan, ‘Effecting Change through Electoral Politics : cultural identity and the Māori franchise’ *Journal of the Polynesian Society*, vol. 112, no. 3 (Sept. 2003)

<sup>60</sup> Sullivan, p. 221

Movement in 1938 after a Labour government introduced the equal treatment of Māori and non-Māori in the welfare system.<sup>62</sup> Unfortunately this alliance effectively meant that Māori were only substantially represented in four Governments between 1938 and 1993, effectively shutting Māori out of policy making decisions.<sup>63</sup> The continued alignment of Māori with the Labour party may have inadvertently voided any possibility of a greater equality and equity in apportionment. However, in 1975 the Labour Party rewarded their Māori supporters. The Electoral Amendment Act 1975 introduced the determination of the number of Māori seats to be done on the number of Māori on the Māori electoral roll. This meant that the number of Māori seats would directly correspond to the number of Māori enrolled on the Māori roll, the same as the non-Māori roll and seats ratio had been operating since 1896.

This victory was short-lived as following a change of Government that same year, the amendments were repealed and in 1976 the number of Māori seats was again fixed at four. This is without one election taking place that included a number of seats proportional to the population.

However other clauses of the 1975 Act remained, including the changes to what it meant to be Māori. Prior to 1975, to be eligible for the Māori roll, a voter would have to be of half or more Māori descent. Voters with half or less descent were on the European roll and “half-castes” could chose to be on either.<sup>64</sup> Also retained was the Māori Electoral Option, which continued to give Māori the option to be on either the General roll or the Māori roll. However, while there was now an element of individual autonomy in making that choice, as the number of Māori on the roll had no bearing on

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<sup>61</sup> John Wilson, “The Origins of the Māori Seats”, Parliamentary Library, Wellington, (2003) available at [www.clerk.parliament.govt.nz](http://www.clerk.parliament.govt.nz)

<sup>62</sup> Ann Sullivan and Jack Vowles, ‘Realignment? Maori and the 1996 election’, *Voters' victory? New Zealand's first election under proportional representation* (1998)

<sup>63</sup> There were 4 Māori Members of Parliament who were not in the Labour Party between 1938 and 1993 as per John Wilson, (2003). The effectiveness of those member in advocating the advancement of Māori has been repeatedly questioned, see Ann Sullivan, “Effecting Change Through Electoral Politics: Cultural Identity and the Māori Franchise”, *Journal of the Polynesian Society*, vol. 112, no. 3 (Sept. 2003) p. 219-237



the number of electoral districts, aside from identity representation, there was little point in Māori being on the Māori roll.<sup>65</sup>

*Key modern events that have shaped New Zealand democracy*

In 1986 the Labour Government established a Royal Commission to do an in-depth investigation of the electoral system as a whole. The Royal Commission on the Electoral System (as it became) was tasked with investigating and reporting on the New Zealand electoral system and making recommendations to Government for changes to the electoral system.<sup>66</sup> The Commission had a broad job description that included Parliamentary and political arrangements and the entire electoral system.<sup>67</sup> One of the tasks of the Commission was to investigate and report on the “nature and basis of Māori representation in Parliament”.<sup>68</sup>

The Commission found that New Zealand’s voting system had “real deficiencies”<sup>69</sup> and that it “denies effective Māori representation”.<sup>70</sup> The Commission recommended that that Mixed Member Proportional (MMP) system be adopted. The Commission also stated that this system would enable the fair representation of Māori and as a consequence the Māori seats would no longer be required to ensure adequate representation.

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<sup>64</sup> Niell Atkinson, (2003)

<sup>65</sup> Donna Durie-Hall, “My reasons for choosing the Māori roll”, a non-published paper prepared for the Māori Congress, 14 January 1994

<sup>66</sup> Royal Commission on the Electoral System, *Towards a Better Democracy*, (1986), AJHR, xiii

<sup>67</sup> Royal Commission on the Electoral System, (1986), p. 1

<sup>68</sup> Royal Commission on the Electoral System, (1986), xiii

<sup>69</sup> Royal Commission on the Electoral System, (1986), 2.56

<sup>70</sup> Royal Commission on the Electoral System, (1986), 2.57 (Report’s italics)

However, the Parliamentary Select Committee Inquiry into the Report of the Royal Commission highlighted the fact that MMP would not necessarily provide any guarantees that Māori participation in Parliament would be enhanced.<sup>71</sup>

After two national referenda choosing a change to MMP, the Government approved its introduction in the Electoral Reform Bill 1992.<sup>72</sup> The original Bill followed the Royal Commission recommendations that if MMP was adopted the Māori seats should be abandoned. During the public submission process the “overwhelming majority of submissions received recommended that the Maori seats be retained until Māori themselves decide whether they should be abolished or changed”.<sup>73</sup> There were few Māori submissions to the Select Committee, so the Committee recommended that a consultation process with Māori should be undertaken. Over the following months, 20 hui were held throughout New Zealand and there was a clear view in them that Māori wanted the seats retained. The Select Committee’s report recommended the continuation of the Māori seats, in spite of the Royal Commission’s recommendations.<sup>74</sup>

The Electoral Act 1993 retained the Māori seats and also reintroduced the 1975 version of the Māori Electoral Option where the number of Māori seats is determined proportional to Māori on the roll. The Māori Electoral Option being the quinquennial ability of Māori to choose to be on either the Māori role or the General role<sup>75</sup>. The current option is based on the original short-lived 1975 version, where the number of Māori seats in Parliament is determined by the number of Māori on the Māori role. This is done by dividing the Maori electoral population by the quota for general

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<sup>71</sup> Inquiry into the Report of the Royal Commission on the Electoral System, (1986), Report of the Electoral Law Committee, New Zealand-House of Representatives (1988) I.17B Report of the Electoral Law Committee on the Electoral Reform Bill, New Zealand-House of Representatives (1993) I.17C

<sup>72</sup> The Electoral Reform Bill was introduced into the House of Representatives on 15 December 1992

<sup>73</sup> Report of the Electoral Law Committee on the Electoral Reform Bill, New Zealand-House of Representatives (1993) I.17C, p. 5

<sup>74</sup> Report of the Electoral Law Committee on the Electoral Reform Bill, New Zealand-House of Representatives (1993) I.17C, p. 5

<sup>75</sup> Electoral Act 1993, section 77

electoral districts in the South Island (currently set at 16).<sup>76</sup> In December 1993 the first option was announced in a notice in the *New Zealand Gazette*<sup>77</sup>. The option was the required two month period running from February 1994.

In January 1994, following resolutions at national hui, a Waitangi Tribunal Claim was brought by Hare Puke on behalf of iwi and Māori authorities (including the New Zealand Māori Council, the National Māori Congress and the Māori Women's Welfare League) regarding the Option. The claim was that the Crown had an obligation under both the Treaty of Waitangi and the Electoral Act 1993 to protect the right of Māori to be represented in Parliament and that this is exemplified in the Māori Electoral Option.<sup>78</sup> The claimants submitted that the Minister of Justice had not provided sufficient opportunity for Māori to exercise their option.<sup>79</sup> Claimant Dr Ngatata Love argued that the Māori Electoral Option was of vital importance because:

“In 1994, after 127 years of a system universally accepted as being ‘not fair’ and ‘not on a proper basis’, actions by Māori have provided an historical opportunity for Māori to have choice on how their electoral representation should be.”<sup>80</sup>

The Waitangi Tribunal found that the Crown is under “an obligation to protect Māori citizenship rights”<sup>81</sup> and Māori rights to political representation. The Tribunal also found that as long as the Crown took reasonable steps in the circumstances to protect those rights, it had fulfilled its Treaty obligations.

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<sup>76</sup> ss 45(30) and 35(3)(b) of the Electoral Act 1993

<sup>77</sup> *New Zealand Gazette*, 22 December 1993

<sup>78</sup> Waitangi Tribunal, *WAI 413 Māori Electoral Option Report*, 1994, Brookers, Wellington, p.1

<sup>79</sup> Margaret Wilson, “Reconfiguration of New Zealand’s Constitutional Institutions, *Waikato Law Review*, (1997), vol 5, p. 18

<sup>80</sup> Submission made by Dr Ngatata Love to the Waitangi Tribunal on the Māori Electoral Option hearing on 27 January 1994

<sup>81</sup> Waitangi Tribunal, *WAI 413 Māori Electoral Option Report*, 1994, Brookers, Wellington, p. 15

The case was taken to the High Court and was determined on the basis of the reasonableness of the Minister of Justice's determination about the resources.<sup>82</sup> The Courts chose to examine the matter as a matter of administrative law and not to inquire into the constitutional validity of the aspirations of Māori tino rangatiratanga.

The inaugural Māori Electoral Option produced five Māori seats. The second Māori Electoral Option was run by the former Waitangi Tribunal claimant Dr Ngatata Love and produced six Māori seats. The last Māori Electoral Option in 2001 produced another seat. The Māori electoral districts in Parliament now make up seven out of 120 districts.

Section 264 of the Electoral Act 1993 required the government to form a Select Committee in 2000 to review the electoral system four years after the introduction of MMP. The Committee was to consider the operation of the electorate boundary setting process, the provisions relating to Māori representation and whether there should be a further referendum on changes to the electoral system. The Committee was instructed to give recommendations in unanimity or near-unanimity.

Unfortunately, the Committee failed to reach agreement on "a number of significant issues".<sup>83</sup> These issues included whether or not the Māori seats should be retained. Regardless of the lack of recommendations the report of the Committee gave an interesting insight into the current state of electoral law. In particular, the public submissions on the Māori seats gave a cross-section of the divided public opinion on their existence. The submissions to the Select Committee advocating for the abolishment of the seats stated:<sup>84</sup>

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<sup>82</sup> *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 and *Taiaroa v Minister of Justice* [1995] 2 NZLR 1

<sup>83</sup> Report of the MMP Review Committee, *Inquiry into the Review of MMP*, 2001, Order of the House of Representatives, Wellington, p. 5

<sup>84</sup> Report of the MMP Review Committee, *Inquiry into the Review of MMP*, 2001, Order of the House of Representatives, Wellington, p.20

- Every member of society should have equal voting power or 'one person, one vote';
- Under MMP the seats hold too much power for a minority group and therefore the vote in the Māori electorates have more value;
- MMP should be able to represent minority interests;
- Under MMP there has been substantial Māori representation outside the Māori seats; and
- The seats are based on a racial division and this fosters racial disharmony.

Despite the numerous attempts since their inception to abolish the Māori seats, they remain and the number of seats grows every time there is a Māori Electoral Option. In 2000 the New Zealand Electoral Study found that public opinion was strongly but fairly evenly divided on whether to retain or abolish the seats. In their survey, 41% of respondents felt that the seats should be abolished and 47% of respondents felt that the seats needed to be retained.<sup>85</sup> However, their popularity or unpopularity aside, the question at the heart of this debate is whether or not the seats are democratic.

<sup>85</sup> NZES, (2000), p. 34

## 6. *One Person, one vote rule*

This paper has looked at the history of New Zealand democracy and at the history of Māori seats position in that system, the question remains whether or not the Māori seats are democratic, that is whether they have democratic legitimacy. The assertions that the Māori seats are not democratic because they breach the 'one person, one vote' rule and because non-geographic representation is not democratic.<sup>86</sup>

The 'one person, one vote' rule is the democratic philosophy of political equality. Lijphart stated that there are three common mechanisms to actualise political equality. These are simply majority constituencies, semiproportional and proportional<sup>87</sup>. New Zealand utilises the semiproportional system Mixed Member Proportionality (MMP) to achieve this equity. Under MMP, voter participation is optimised because the party votes are considered to be of equal weight<sup>88</sup> but the votes still have a direct representative in the form of a constituency representative. Under Part 6 of the Electoral Act 1993, voters get two votes, one for a political party and the other for a candidate standing in their electoral district. Because the criticism of breaches of the 'one person, one vote' theory relates to New Zealand electoral districts and not about the party vote, this analysis concentrates on electoral districts (also referred to as constituencies).

An examination of the definition of 'one person, one vote' leads to two different, but not opposing, definitions. First is the electoral theory definition of 'one person, one vote' and how this relates to the jurisprudence of apportionment. Essentially, the electoral theory definition of 'one person, one vote' is that all electoral districts within

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<sup>86</sup> As per Chapter 3 of this paper, *Democracy in New Zealand*

<sup>87</sup> Arend Lijphart "Proportionality by Non-PR Methods" in Bernard Grofman and Arend Lijphart (Ed.) *Electoral Law and their Political Consequences*, Agathon Press, New York (1994), P. 114

<sup>88</sup> This assertion was made by the Royal Commission when comparing the Mixed Member system against the Single-Transferable Vote system regarding voter participation, see Royal Commission on the Electoral System, *Towards a Better Democracy*, (1986), AJHR, p. 57

a state must contain the same number of voters. The second interpretation of 'one person, one vote' is that all voters are equal. The definition of equality is explored in Chapter 8 of this paper, but essentially it has been previously defined as procedural equality or substantive equality. Procedural equality is treating everyone the same, or like cases alike, and substantive equality is ensuring that the outcomes are fair.

Then the New Zealand experience of electoral district voting will be assessed against the electoral theory definition, in particular examining the Māori seats in light of this definition.

Different commentators have developed different interpretations of 'one person, one vote'. Mill stated that "one man, one vote, one vote, one value"<sup>10</sup> is the cornerstone to democratic process. The underlying theme for this rule is 'one person, one vote' relates to the equality of votes. The 'one person, one vote' apportionment rule is situated in the democratic framework as belonging all three levels. In the first level as political equality; in the second level as both participatory and representativeness, and in the operating third level as the division into equal electoral districts. The three levels are read together: electoral districts enable participation and representation, which in turn enable majority rule and political equality.

*'One person, one vote' in democratic framework*

|   |   |   |
|---|---|---|
| 1 <sup>st</sup> Level<br>Fundamental<br>Rules     | Political Equality  | Majority Rule                             |
| 2 <sup>nd</sup> Level<br>Democratic<br>Principles | Participatory<br>each person contributes equally<br>to decide the representatives | Representative<br>elected representatives |

<sup>10</sup> Quoted in Peter J Taylor, Graham Gudgeon and RJ Johnston "The Geography of Representation: A Review of Recent Findings" in Bernard Grofman and Arnold Lipman (Ed.) *Electoral Law and its Political Consequences*, Agathon Press, New York (1994), P. 195

7. *One person, one vote - Electoral Theory*

This section develops a definition of 'one person, one vote' and then examines the different commentators definitions of 'one person, one vote' to ensure their themes are captured. Then the New Zealand experience of electoral district voting will be assessed against the electoral theory definition, in particular examining the Māori seats in light of this definition.

Different commentators have developed different interpretations of 'one person, one vote'. Mill stated that "one man, one vote; one vote, one value"<sup>89</sup> is the cornerstone to democratic process. The underlying theme for this rule is 'one, person, one vote' relates to the equality of votes. The 'one person, one vote' apportionment rule is situated in the democratic framework as belonging all three levels. In the first level as political equality; in the second level as both participatory and representativeness; and in the operating third level as the division into equal electoral districts. The three levels are read together: electoral districts enable participation and representation; which in turn enable majority rule and political equality.

*'One person, one vote' in democratic framework*

|   |  |  |
|---|--|--|
| <b>1<sup>st</sup> Level<br/>Fundamental<br/>Rules</b>     | <b>Political Equality</b> <b>Majority Rule</b>   |  |
| <b>2<sup>nd</sup> Level<br/>Democratic<br/>Principles</b> | <b>Participatory</b><br>each person contributes equally<br>to decide the representatives | <b>Representative</b><br>elected representatives |

<sup>89</sup> Quoted in Peter J Taylor, Graham Gudgin and RJ Johnston "The Geography of Representation: A Review of Recent Findings" in Bernard Grofman and Arend Lijphart (Ed.) *Electoral Law and their Political Consequences*, Agathon Press, New York (1994), P. 190



|   |                                  |
|---|----------------------------------|
| <b>3<sup>rd</sup> Level<br/>Democratic<br/>Mechanisms</b> | <b>Equal Electoral Districts</b> |
|---|----------------------------------|

Accordingly, for the purposes of this work, 'one person, one vote' is defined here as each person contributes equally to decide the representatives and electoral districts must reflect this.

The operationalisation of the theory is the mechanism used to define electoral districts. Commentators express definitions of the theory, or their version of it, in a variety of different ways. Like the overall analysis of democracy, definitions of 'one person, one vote' fall into different categories. Some commentators define the concept of 'one person, one vote' and some define the mechanisms for it realising the theory. Others use a combination of theory and mechanisms to demonstrate what they mean by 'one person, one vote'.

Lani Guinier asserts that the details of one person, one vote and all votes count is broken down to mean that each constituency contains the same amount of people; each person within the constituency has the same opportunities to vote for someone to represent the constituency; and each representative represents the same number of constituents.<sup>90</sup> Guinier's interpretation is about the mechanisms of ensuring that each person contributes equally to decide the representatives. Her definition assumes that voters are divided into constituencies and that representatives are elected to represent that particular constituency. Guinier's definition mainly concentrates on the mechanisms for ensuring 'one person, one vote'. However, analysis of her mechanisms demonstrates that she is attempting, through defining methods, to achieve equity. By stating that constituencies must be the same size, that everyone has the same opportunities to vote and each representative represents the same number of constituents, Guinier is trying to implement political equality through electoral

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<sup>90</sup> Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, The Free Press, New York (1994), p. 123

mechanisms. The entire point of her mechanisms is to form equity between voters through equal constituencies and representatives. Therefore, for the purposes of this work, Guinier's work is categorised in the third level and is about operations, but the aim of her mechanisms is to enable political equality as per the first level.

Alfred De Grazia<sup>91</sup> states that 'one person, one vote' is the division of a jurisdiction into constituencies, some of whose members are enabled to participate in a designation of officers of the jurisdiction. It is an absolute requirement of representative government. De Grazia's definition does not sit perfectly with the definition being used here. De Grazia is not inclusive of all members of the represented population. It is interesting, given that De Grazia was writing in the 1960s, that his definition of voting entitlement is qualified by stating that only some members are able to vote. While it is acknowledged that some members of society, for instance those under the age of 18 years, are not eligible to vote, contemporary democracy requires that all members of society are enfranchised.<sup>92</sup> This debate is examined in more detail in the analysis of the literal interpretation of 'one person, one vote'. De Grazia's definition does not fit in with the underlying principle at work here, that of equal participation of all members.

New Zealander Richard Mulgan states that in the ballot box each person's vote counts equally with everyone else's.<sup>93</sup> The meaning of Mulgan's definition is virtually the same as the one developed here. Mulgan's definition supposes that universal enfranchisement and equal contribution are vital to 'one person, one vote'. Further, Mulgan states that 'one person, one vote, one vote, one value' are "fundamental assumptions"<sup>94</sup> of the New Zealand political system. Although it should be acknowledged that this writing was done before the introduction of MMP into New

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<sup>91</sup> Alfred De Grazia, *Apportionment and Representative Government*, Frederick A Praeger Inc, New York, (1963), p. 18

<sup>92</sup> For example see Article 25 of the United Nations International Covenant on Civil and Political Rights

<sup>93</sup> Mulgan, (1989), p. 81

<sup>94</sup> Mulgan, (1989), p. 46

Zealand, the workings of electoral districts, except for the number of Māori seats, have not changed since the transference from the first past the post system. *That follow highlight that, in constituency voting, in order to ensure political equality all the* Balinski and Young assert<sup>95</sup> that no man should have a greater voice than any other. This is compatible with the definition used here. Balinski and Young concur that each person contributes equally to decide the representatives. However, their definition expands into the mechanics of actualising this theory. They say that each state should receive a number of representatives in proportion to its population or a party in proportion to its total vote. This goes towards the notion of that equal participation, in constituencies this means that each constituency must be roughly the same size. That the 'one person, one vote' rule is about making a precise allocation of seats to states or to parties. This is core to the electoral theory interpretation of 'one person, one vote', that not only does each voter cast one vote but that the effect of the votes is the same. Balinski and Young argue that this is ensured by having constituencies of a state each holding the same amount of voters.

#### *Application to New Zealand Electoral Districts*

The major source of jurisprudence surrounding the 'one person, one vote' apportionment rule was developed in the Supreme Court in the United States of America, beginning with the case *Reynolds v Sims*, 377 U.S. 533 (1964).<sup>96</sup> In *Reynolds*, the Supreme Court Chief Justice Warren stated that the one person, one vote principle was "...at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people'".<sup>97</sup> *Reynolds*, and the cases following, held that membership numbers of voting districts could severely impact on the expression of the fundamental right to vote; the more unequal the voting districts, the more diluted the representation is. That each constituency contains the same amount of people is

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<sup>95</sup> Balinski and Young (1982), p. 1

<sup>96</sup> For a breakdown and analysis of *Reynolds v Sims* and the following cases see Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore*, New York University Press, New York (2003)

<sup>97</sup> *Reynolds v Sims*, 377 U.S. 533 (1964) p. 568, quoted from Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore*, New York University Press, New York, (2003)

the theory of apportionment<sup>98</sup>. Apportionment states that fair representation must be in proportion to population basis<sup>99</sup>. *Reynolds* and the cases following that follow highlight that, in constituency voting, in order to ensure political equality all the constituencies must contain the same number of voters.

Commenting on the United States cases, Knechtle<sup>100</sup> states that the right to vote for people who make laws is the paramount human right. He continues that 'one person, one vote' concerns apportionment and the prevention of dilution of votes. Knechtle examines the effects of the 2000 United States presidential election on the 'one person, one vote' concept. He states that the Supreme Court case resulting from the Florida elections, *Bush v Gore* 531 U.S. 121 S.Ct 525(2000), extends the 'one person, one vote' from the apportionment cases to include administration of elections. Knechtle demonstrates the assertion made in the level approach, that equal numbers of voters in constituencies is a method of ensuring political equality.

#### *Application to New Zealand Electoral Districts*

In order to determine if the Māori seats do not break the apportionment rule, that is that all constituencies contain relatively the same number of voters, the Māori electoral districts should contain the same amount of members as the general electoral districts. Under sections 36 and 45(7) of the Electoral Act 1993, the Representation Commission (who set electoral boundaries) may fit the boundaries to accommodate certain features, for example geographic features, but the districts cannot deviate more than five percent different from the South Island quota.<sup>101</sup> The South Island quota is

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<sup>98</sup> Michel L. Balinski and H. Peyton Young, *Fair Representation: Meeting the Ideal of One Man, One Vote*, Yale University Press, West Hanover Massachusetts, (1982)

<sup>99</sup> Balinski and Young (1982), p. 95

<sup>100</sup> John C Knechtle, "'One Person, one vote' Magnified', Florida Coastal Law Journal, Vol II:381, 2001

<sup>101</sup> Section 36 of the Electoral Act 1993

rendered by dividing the general electoral population<sup>102</sup> of the South Island by sixteen. In 2002 the South Island general electoral population was 868,923.<sup>103</sup> Therefore the quota is 54,308.

|  |
|--|
| <p>South Island Quota</p> $868,923 \div 16 = 54,308$ |
|--|

The amount of Māori seats is determined by dividing the Māori electoral population<sup>104</sup> by the South Island quota. After the last Māori Electoral Option in 2001, Māori electoral population was 371,690.<sup>105</sup> Therefore the current quota is for the Māori seats is 6.8.

|  |
|--|
| <p>Māori Electoral Districts</p> $371,690 \div 54,308 = 6.8$ |
|--|

Under section 45(3) (b) the fraction is rounded up and the amount of Māori seats is determined to be seven. This formula established the following electoral districts: Te Tai Tokerau; Tāmaki Makaurau; Pare Hauraki-Pare Waikato; Waiariki; Te Tai Hauauru; Te Tai Rāwhiti; and Te Tai Tonga. The population of the Māori electoral districts is:<sup>106</sup>

| Māori Electoral District  | Māori Electoral District population |
|---------------------------|-------------------------------------|
| Te Tai Tokerau            | 51,526                              |
| Tāmaki Makaurau           | 52,390                              |
| Pare Hauraki-Pare Waikato | 52,695                              |

<sup>102</sup> The General Electoral Population is the total resident population (from the last census), excluding the Māori electoral population as per section 3 of the Electoral Act 1993

<sup>103</sup> Statistics are from the Electoral Commission and available on [www.elections.org.nz](http://www.elections.org.nz)

<sup>104</sup> The Māori electoral population is defined under section 3 of the Electoral Act 1993. The Māori electoral population is all the Māori on the Māori roll, a proportion of Māori who are not registered as electors of any electoral district and a proportion of Māori under 18 years of age

<sup>105</sup> Statistics are from the Electoral Commission and available on [www.elections.org.nz](http://www.elections.org.nz)

<sup>106</sup> This information was gathered from Statistics New Zealand and are from the Representation Commission's divisions in 2002, see [www.stats.govt.nz](http://www.stats.govt.nz)

|                |        |
|----------------|--------|
| Waiariki       | 54,344 |
| Te Tai Hauauru | 53,935 |
| Te Tai Rāwhiti | 54,650 |
| Te Tai Tonga   | 52,003 |

The average population of the Māori Electoral Districts is 53,078. This is within five percent of the South Island Electoral quota.

The amount of North Island seats is determined by dividing the general electoral population of the Island by the South Island quota. After the last census the general electoral population of the North was 2,497,596. Therefore the quota is 45.9.

|  |
|--|
| <p>North Island Electoral Districts</p> $2,497,596 \div 54,308 = 45.9$ |
|--|

Accordingly, there are currently 46 electorates in the North Island, these are:<sup>107</sup>

| General Electoral District | General Electoral District population |
|----------------------------|---------------------------------------|
| Northland                  | 54,093                                |
| Whangārei                  | 54,146                                |
| Rodney                     | 52,881                                |
| East Coast Bays            | 56,750                                |
| Northcote                  | 54,684                                |
| North Shore                | 56,035                                |
| Helensville                | 52,288                                |
| Waitakere                  | 51,892                                |
| Te Atatu                   | 53,035                                |
| New Lynn                   | 52,956                                |
| Mt Albert                  | 52,607                                |
| Mt Roskill                 | 52,086                                |
| Auckland Central           | 53,682                                |
| Epsom                      | 54,502                                |
| Tamaki                     | 56,225                                |

<sup>107</sup> This information was gathered from Statistics New Zealand and are from the Representation Commission's divisions in 2002, see [www.stats.govt.nz](http://www.stats.govt.nz)

|                       |        |
|-----------------------|--------|
| Maungakiekie          | 51,903 |
| Pakuranga             | 56,528 |
| Manukau East          | 56,366 |
| Mangere               | 56,823 |
| Manurewa              | 56,847 |
| Clevedon              | 56,157 |
| Port Waikato          | 56,866 |
| Piako                 | 56,518 |
| Hamilton West         | 56,682 |
| Hamilton East         | 55,239 |
| Coromandel            | 53,688 |
| Tauranga              | 52,760 |
| Bay of Plenty         | 52,593 |
| Rotorua               | 53,665 |
| Taupo                 | 52,351 |
| Taranaki-King Country | 53,805 |
| New Plymouth          | 52,204 |
| Whanganui             | 56,081 |
| Waioeka               | 56,643 |
| Napier                | 53,463 |
| Tukituki              | 55,858 |
| Wairarapa             | 52,275 |
| Rangitikei            | 51,859 |
| Palmerston North      | 52,854 |
| Otaki                 | 56,736 |
| Mana                  | 53,662 |
| Rimutaka              | 56,014 |
| Hutt South            | 52,951 |
| Ohariu-Belmont        | 54,226 |
| Wellington Central    | 54,268 |
| Rongotai              | 53,093 |
| Nelson                | 56,038 |
| West Coast-Tasman     | 51,704 |
| Kaikoura              | 52,820 |
| Waimakariri           | 56,636 |
| Ilam                  | 56,999 |
| Wigram                | 56,926 |
| Christchurch Central  | 56,350 |
| Christchurch East     | 56,306 |
| Banks Peninsula       | 56,892 |
| Rakaia                | 54,680 |
| Aoraki                | 52,175 |
| Otago                 | 52,491 |

|                  |        |
|------------------|--------|
| Dunedin North    | 51,740 |
| Dunedin South    | 53,132 |
| Clutha-Southland | 51,905 |
| Invercargill     | 51,672 |

The average population of a General Electoral District (both North and South Islands) is 54,311. The Māori Electoral Districts is 53,078.

|                            |        |
|----------------------------|--------|
| Māori Electorate Average   | 53,078 |
| General Electorate Average | 54,311 |

If these two numbers are compared, there is little over 1000 voters between them. While this is not exact, apportionment does not require “mathematical exactness”,<sup>108</sup> just likeness. The largest variety between electoral districts is between Invercargill and Ilam and the difference is over 5000 voters. Apportionment in New Zealand, and the purpose of the five percent rule, means that a vote for an electoral district candidate cast in Dunedin North should count the same as a vote cast in Te Tai Tonga. This is because the number of voter in Dunedin North is approximately the same as the voters in Te Tai Tonga. The representatives elected for both districts represent the same amount of people. For apportionment purposes, this is the only relevant factor. Apportionment is about the number of people in the constituency, not the amount of people who vote. The constituencies are of relative sizes, so the voters participation is equal.

Comparatively the averages between the Māori and non-Māori districts are nominal. Apportionment is equality of members in a voting district and there is roughly the same amount of members in Māori districts as non-Māori districts. Accordingly, this means the Māori electoral districts do not contravene the electoral theory definition of ‘one person, one vote’ apportionment rule.

<sup>108</sup> *Reynolds v Sims*, 377 U.S. 533 (1964) p.577



8. *One person, one vote – Democratic Theory*

As well as having a specific meaning in democratic processes, 'one person, one vote' has another, separate and distinct meaning when discussing democratic theory. 'One person, one vote' can also be defined as political equality<sup>109</sup> and universal suffrage.<sup>110</sup> As stated earlier, political equality is one of the fundamental rules of democracy, and fits into the democratic framework as follows:

|  |                           |                      |
|--|---------------------------|----------------------|
| <b>1<sup>st</sup> Tier<br/>Fundamental<br/>Rules</b> | <b>Political Equality</b> | <b>Majority Rule</b> |
|--|---------------------------|----------------------|

This theory is statutorily embedded in section 12 of the New Zealand Bill of Rights. Section 12 states that:

“Every New Zealand citizen who is of or over the age of 18 years—  
 (a) Has the right to vote in genuine periodic elections of Members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot;”

In the Bill of Rights the key phrase regarding the 'one person, one vote' rule is *equal suffrage*. This section is derived from Article 25 of the United Nations International Covenant on Civil and Political Rights, which states:

“...to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”<sup>111</sup>

<sup>109</sup> Phillips, (1995), p. 27

<sup>110</sup> Guinier, (1994), p.123

<sup>111</sup> In 1978 New Zealand ratified the International Covenant on Civil and Political Rights (New Zealand reserved articles 10(2)(b); 10(3); 14(6); 20; 22). In 1989 New Zealand ratified the Optional Protocol to the International Covenant on Civil and Political Rights. In 1990 New Zealand ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights. The full text of the Covenants are available at [www.un.org](http://www.un.org)

The terms universal and equal are also addressed by the United Nations in article 5(c) of the International Covenant on the Elimination of all Forms of Racial Discrimination and Article 7 of the Convention of the Elimination of Discrimination Against Women.<sup>112</sup> These articles affirmed rights of equality before the law for everyone, without discrimination on the grounds of gender, race, colour, or national or ethnic origin.

The question for debate surrounding the definition of universal and equal suffrage is axiomatically not about universal suffrage but about what equal suffrage means. Universal suffrage was introduced into New Zealand in 1896<sup>113</sup> and means that every person over the age of eighteen years is entitled to participate in electoral processes.<sup>114</sup>

However the definition of equality is one of the most contested elements of modern philosophy, Dworkin stated that "People who praise it or disparage it disagree about what they are praising or disparaging".<sup>115</sup>

From the debate regarding equality emerge two polar positions on the definition. On one side is the liberal tradition that argues that the law (including electoral law) should be blind to race and ethnicity. That having fair processes and procedures and treating like cases alike are the key aspects of equality.<sup>116</sup> Regarding electoral laws,

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<sup>112</sup> The full text of the United Nations International Covenant on the Elimination of all Forms of Racial Discrimination and the Convention of the Elimination of Discrimination Against Women is also available at [www.un.org](http://www.un.org)

<sup>113</sup> See Chapter 4 of this paper on the History of the Māori seats

<sup>114</sup> This is with the exception of people detained in hospitals under the Mental Health (Compulsory Assessment and Treatment) Act 1992; people being detained for life, preventive detention, or a 3 year term in prison; and people who have been convicted of an electoral corrupt practice as per section 80 of the Electoral Act 1993.

<sup>115</sup> Ronald Dworkin, *Sovereign Virtue: the Theory and Practice of Equality*, Cambridge, Harvard University Press, (2000)

<sup>116</sup> The proposition of "formal" equality was originally promoted by Aristotle see both "Nicomachaen Ethics" and "Politics", *The Complete Works of Aristotle : The Revised Oxford Translation, Volume 2*, ed. Jonathan Barnes, Princeton: Princeton University Press (1984)

commentary in favour of procedural equality argue that specialised jurisdictions bestow special and distinct rights, instead of concentrating on individual rights.<sup>117</sup>

The other competing theory is that equality is about substantive equality. That processes should enable equal outcomes, or near to it, for all affected. Applying substantive equality to electoral laws means that the mechanisms for participating do not have to be procedurally equal but have to ensure equity in the outcomes. This means that political equality needs all votes to have a substantively equitable outcome.<sup>118</sup> For the purposes of the substantive theory, the methodology does not matter as long as the outcome is equitable. As seen earlier, democracy can take many different and distinct forms, however as long as the outcomes enable majority rule and political equality and the mechanisms are in accordance with the principles, it does not matter which mechanisms are used.

#### *Political equality as equal opportunity to participate*

Theorists, who support the traditional liberal assertion that the public sphere should be blind of ethnicity, generally assert that procedural equality is the key factor in political equality. This brand of commentators emphasise individual rights and assert that political and legal systems should be neutral on matters of ethnicity.<sup>119</sup> The trend has focussed on the universality of individual human rights, not on group rights. Individuals are responsible for maintaining and protecting their own ethnicity and values, while cultural membership is protected by freedom of association.<sup>120</sup> Theorists

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<sup>117</sup> David Jonathan Weiner, *Race Lines: The Creation and Development of Maori Seats in New Zealand's Parliament and African-American Majority-Minority Districts in the United States House of Representatives*, A thesis submitted in fulfilment of the requirements for the degree of Master of Literature in Political Science, the University of Auckland, (1998), p. 19

<sup>118</sup> Mulgan, (1989), p. 82

<sup>119</sup> Andrew Heywood, *Political Ideologies*, MacMillan Education Ltd: London, (1992), pp. 18-31

<sup>120</sup> Kymlicka, p. 107

of this kind believe that the free market will ultimately provide the best representation.<sup>121</sup>

In this category, political equality has been described as being the same treatment of everyone equally and without distinction.<sup>122</sup> The key element to understanding this perspective is the use of 'without distinction', meaning that equality means treating everyone the same. However, always treating individuals the same does not enable equality because groups are not positioned equally in society. Not distinguishing between individuals denies the modern reality of having various separate cultures within the same state.<sup>123</sup> Accordingly, treating everyone as if they were the same is, quite simply, to ignore real and practical differences.

Dahl has described political equality as the equal and effective opportunity to vote.<sup>124</sup> However, just because everyone has the right to vote does not mean that everyone is represented. Voting equality is about the ability to "influence",<sup>125</sup> not just about the opportunity to participate and voters should have equal opportunity to vote for a winning candidate.<sup>126</sup> If an individual has the opportunity to participate but has no chance to affect the outcomes, then this is not really participating. The Royal Commission stated that voter participation requires voters to be able to use their votes to choose both their representative and the Government. The Commission used the example of 'safe seats' under the First Past the Post system as an example of non-participation. The Commission stated that the margin between candidates was so large that it made individual votes in those constituencies virtually irrelevant.<sup>127</sup>

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<sup>121</sup> For a description of market liberal theory (and public choice theory) see Richard Mulgan, *Politics in New Zealand*, Auckland University Press: Auckland, (2<sup>nd</sup> ed. 1997), pp.8-9, 13-14,18 and Andre Reeve and Alan Ware, *Electoral Systems: A Comparative and Theoretical Introduction*, (1992)

<sup>122</sup> Mulgan, (1989), pp. 19, 35-36

<sup>123</sup> Paul Spooney, "Citizenship in a post-nation state", *A Journal for Radical Perspectives on Culture*, Spring 1997; p.35:1-19

<sup>124</sup> Robert Dahl *Democracy, Liberty and Equality* (Norwegian University Press, Denmark, 1986), p. 195

<sup>125</sup> See Guinier, (1994), p.90 for a definition of influence

<sup>126</sup> Guinier, (1994), p.122

<sup>127</sup> Royal Commission, pp. 22-23

Accordingly, under FPP, even though voters had the opportunity to participate, they did not have the ability to affect the outcome and hence were not truly participating in the election of representatives and Government.

Rawls states that equality means political equality of opportunity, or the rights of participation in the political process.<sup>128</sup> This is similar to Dahl's argument, however an interpretation of Rawls' difference theory could be extended to apply to political equality as well as social and economic situations.<sup>129</sup> Rawls states that positive discrimination, inequality in favour of a disadvantaged group, is acceptable if it works to the maximum benefit of the disadvantaged.<sup>130</sup> Democratic theorists<sup>131</sup> have said Rawls' difference theory can be extended to include electoral law. That positive discrimination in favour of disadvantaged groups is applicable to representation. Accordingly special seats or other mechanisms are agreeable to the difference theory.

#### *Substantive Equality*

Theorists, who support the assertion that the public sphere cannot be blind of ethnicity because this denies the modern reality of co-existing separate cultures,<sup>132</sup> generally assert that substantive equality is the key factor in political equality. In electoral law, substantive equality is the amount of votes received should be proportionate to the amount of power received to govern.<sup>133</sup>

The major argument in favour of substantive equality is that institutions should not be concerned with procedural fairness but with effectual fairness. Substantive equality can be achieved either through proportional electoral systems that give each

<sup>128</sup> John Rawls, *A Theory of Justice*, Cambridge, Harvard University Press, (1971)

<sup>129</sup> Joshua Cohen, 'Democratic Equality' in *Ethics* 99 (1989)

<sup>130</sup> Rawls, (1971), p. 20

<sup>131</sup> Cohen, (1989), p.729 and Phillips, (1994), p. 12

<sup>132</sup> Paul Spooney, "Citizenship in a post-nation state", *A Journal for Radical Perspectives on Culture*, Spring 1997; p.35:1-19

subculture a share of the seats as proportional to its vote;<sup>134</sup> internal party pre-election processes (for instance gender quotas in political parties);<sup>135</sup> through specific 'identity representation' constituencies or reserved seats;<sup>136</sup> or through consociational arrangements that attempt to fetter and limit political power by establishing *grand coalitions*.<sup>137</sup>

The Māori seats are a version of identity representation and so the examination of political equality, with regard to substantive equality, will be with regard to identity representation. Identity representation is representation on a non-geographical basis, such as gender or ethnicity.<sup>138</sup>

Kymlicka states that there are some groups of individuals that are "unfairly disadvantaged"<sup>139</sup> in contesting political representation and if this unfairness is not addressed it can lead to "serious injustices".<sup>140</sup> Accordingly, traditional liberal principles need to be supplemented by minority rights and equality needs to include justice for minorities, particularly indigenous peoples.<sup>141</sup> Kymlicka states that existing constitutional frameworks are manifestly inadequate and inequitable and, importantly for the context of this debate, that electoral institutions that fail to represent the population are undemocratic. Kymlicka proposes that accommodating differences and

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<sup>133</sup> "Proportionality of PR Formulas" in Bernard Grofman and Arend Lijphart, *Electoral Laws and their Political Consequences*, Agathon Press: New York, (2<sup>nd</sup> ed. 1994)

<sup>134</sup> Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven, CT, 1984)

<sup>135</sup> For debate and examples of party electoral quotas see both Karen Bird, "The Political Representation of Women and Ethnic Minorities in Established Democracies: A framework for Comparative Research", *Working Paper presented for the Academy of Migration Studies in Denmark*, Aalborg, (11 November 2003) and data from IDEA Global databases of Quotas for Women [www.idea.int/quota](http://www.idea.int/quota)

<sup>136</sup> Kymlicka, (1995), pp. 133-134

<sup>137</sup> Robert Dahl *On Democracy* (Yale University Press, New Haven, 1998) p. 192

<sup>138</sup> The concept of 'identity representation' is expanded in Chapter 8, when the paper discusses the rationales for geographical representation

<sup>139</sup> Kymlicka, (1995), p.109

<sup>140</sup> Kymlicka, (1995), p.109

<sup>141</sup> Kymlicka, (1995), p. 5

promoting group rights is true equality.<sup>142</sup> This can be accomplished through either self-government rights (for instance First Nation reservations in Canada);<sup>143</sup> multicultural rights (for example under British law Sikhs are exempt from wearing motorcycle helmets so they can wear turbans as prescribed by their religion);<sup>144</sup> or special representation rights (for instance the Māori seats).<sup>145</sup>

The core rationales for having representation of minority groups is that not having representation of minorities delegitimises the political institution.<sup>146</sup> That having no accommodation of minorities, in particular indigenous minorities, can lead to the “demise of democracy and/or the escalation of ethnic conflict”.<sup>147</sup> Lijphart has argued that multicultural systems that exclude minority representation are undemocratic in nature because of they fail to represent the population and systems need to incorporate power-sharing models.<sup>148</sup>

Guinier supports this argument and contends that systems that exclude (through electoral systems that are purely majoritarian) minorities do not have “genuine democracy”.<sup>149</sup> Guinier argues that political equality cannot mean that power is held exclusively; that in the presence of racial differences, electoral systems that do not provide for identity representation lose legitimacy.<sup>150</sup>

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<sup>142</sup> Kymlicka, (1995), p. 108

<sup>143</sup> Lower Mainland Treaty Advisory Committee, *Democracy and First Nation Self-Government: Considering Rights of Representation for Non-Member Residents in First Nation Jurisdictions*, A Background Discussion Paper to LMTAC First Principle #27, Burnaby, B.C., Canada, (March 2003)

<sup>144</sup> Ramesh Thakur, “In Defence of Multiculturalism”, in Stuart W Grief (ed.), *Immigration and National Identity: One People, Two Peoples, Many Peoples?*, Dunmore Press: Palmerston North, (1995), p.257

<sup>145</sup> Kymlicka, (1995), pp. 26-33

<sup>146</sup> Weiner, (1998), p. 16

<sup>147</sup> Bernard Grofman, and Robert Stockwell, “Institutional Design in Plural Societies: Mitigating Ethnic Conflict and Fostering Stable Democracy”, Conference Paper at the University of Messina Conference on *The Political Economy of Institutional Development*, 14 -17 September 2000, p. 4

<sup>148</sup> Lijphart argues that consociational models are a better form of democracy than majoritarian systems, Lijphart, (1984), pp.22-23

<sup>149</sup> Guinier, (1994), p.6

<sup>150</sup> Guinier, (1994), p.121

Grofman states that conflict in societies stem from either national identity or competition for resources and that both of these issues can be mitigated by political representation of groups and power sharing.<sup>151</sup> Further, those institutional arrangements that ensure minority representation help facilitate political stability.<sup>152</sup>

As seen, political equality can either mean that the procedures for everyone are the same or that the outcomes for everyone are the same. New Zealand, due to international and domestic legal developments like the New Zealand Bill of Rights and the International Covenant on Civil and Political Rights, has a system that many have classed as based on individual rights.<sup>153</sup> However, for the purposes of electoral law, a close examination of New Zealand's system does not necessarily support this view. Since the introduction of MMP, New Zealand has had a system that is focused on ensuring that the outcomes of elections are proportionately representative of the voters. Proportional systems, like MMP, are designed to ensure fair and effective representation<sup>154</sup> that is focussed towards reflecting the amount of votes with the corresponding amount of power in governing.<sup>155</sup> The Royal Commission stated that moving to a proportional system would enhance voter participation and effective representation,<sup>156</sup> accordingly helping to ensure fairer and more effective representation. Kymlicka and Guinier both argue that proportional systems are a fairer electoral model for minorities.<sup>157</sup> At its heart, proportional representation is about ensuring that as many facets of society as possible are represented. The reason for

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<sup>151</sup> Grofman, (2000), p. 3

<sup>152</sup> Bernard Grofman, "Arend Lijphart and the New Institutionalism" in Markus M. L. Crepaz, Thomas Koelble, and David Wilsford, *Democracy and Institutions: The Life Work of Arend Lijphart*, University of Michigan Press: Ann Arbor, pp. 43-74

<sup>153</sup> Palmer, (2004), p. 347

<sup>154</sup> Guinier, (1994), p. 92

<sup>155</sup> Lijphart succinctly defines this objective of proportionality in Arend Lijphart, "Proportionality of PR Formulas" in Bernard Grofman and Arend Lijphart, *Electoral Laws and their Political Consequences*, Agathon Press: New York, (2<sup>nd</sup> ed. 1994)

<sup>156</sup> Royal Commission, pp.45-64

<sup>157</sup> Kymlicka, (1995), pp. 133-134 and Guinier, Lani "The Representation of Minority Interests: The Question of Single-Member Districts" 14 *Cardozo Law Review* 1153 (April 1993)



New Zealand's move to a proportional system has been described as the result of support for equality and fairness for voters.<sup>158</sup>

Defining what the 'one person, one vote' rule means in relation to political equality is difficult, namely because of the debate spanning the better part of a decade on the meaning of equality. However, New Zealand's move to a proportional electoral system has clearly indicated a constitutional bias towards equality meaning equitable outcomes. That bias can be extended to define political equality, in the New Zealand context, as being fair outcomes.

New Zealand's use of a semi-proportional system, 137 years of established identity representation,<sup>159</sup> its particular interpretation of democracy and its constitutional principles and law,<sup>160</sup> steers towards categorising New Zealand's definition of political equality as outcomes based. Accordingly, the New Zealand system, as a whole, is focussed towards *outcomes that are representationally fair*.

Having established that New Zealand constitutional law favours equitable outcomes, the question remains whether Māori are entitled to special recognition and whether the Māori seats actually provide political equality.

Putting aside the liberal arguments of blindness on ethnicity, the basis for Māori status in New Zealand (or indeed whether there is any such status) differs depending on the commentator. However, there are three distinct, and at times overlapping, camps. There is the 'Treaty of Waitangi' category; the 'Māori as an indigenous people' category; and the 'Māori as an underprivileged subculture' category.

The analysis that Māori have a special status because of the protections afforded them under the Treaty of Waitangi can be divided into two parts, first that the Treaty

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<sup>158</sup> Atkinson, (2003), p. 201

<sup>159</sup> In the form of the Māori seats

established a partnership between Māori and the Crown and second that the seats are protected by Article III of the Treaty.<sup>161</sup> The argument that Māori have special status because of their partnership with the Crown has been laid out by the Courts over a number of cases describing the principles of the Treaty.<sup>162</sup> The Courts' have described the Crown/Māori relationship as "akin to a partnership",<sup>163</sup> although not as equals<sup>164</sup> but as partners owing each other duties of reasonable conduct and good faith.<sup>165</sup> According to these principles, Māori have a bilateral partnership under the Treaty, that has led to the development of bicultural policies, that of the recognition of two "cultures and peoples of particular importance".<sup>166</sup>

The second argument under this category is that Māori representation in Parliament is guaranteed by Article III of the Treaty. Article III states that Māori are British citizens, and are afforded all the rights and responsibilities thereof. An argument has been made that Article III confers an obligation on the New Zealand Parliament to power-share with Māori<sup>167</sup> and that it would therefore be appropriate to have an equal numerical divide between Māori and non-Māori in the House of Representatives.<sup>168</sup>

The argument asserting that Māori rights stem from a partnership under the Treaty is a lot stronger than the Article III argument and has been developed and tested by the Courts. Although the Article III argument is an interesting perspective on the Treaty, it needs further development and analysis to build a more substantive case.

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<sup>160</sup> As expressed by Trapski, (1998), p. 9

<sup>161</sup> Simon Reeves, *To Honour the Treaty*, (2<sup>nd</sup> ed. Earth Restoration Ltd, Auckland, 1996)

<sup>162</sup> For a summary of the Courts interpretations of the principles of the Treaty see Te Puni Kōkiri, *He Tirohanga o Kawa kit e Tiriti o Waitangi: A guide to the Principles of the Treaty of Waitangi as expressed by the Courts and Waitangi Tribunal*, Te Puni Kōkiri: Wellington (2001), pp. 74-106

<sup>163</sup> *Te Runanga o Wharekauri Rekohu v Attorney General* [1993] 2 NZLR 301 at 304, referred to as the *Sealords* case

<sup>164</sup> *New Zealand Māori Council v Attorney General* [1989] 2 NZLR (CA) 142 at 152

<sup>165</sup> Te Puni Kōkiri, (2001) quoting Lord Cooke, "Introduction", *New Zealand Universities Law Review*, (1990), p.6

<sup>166</sup> Richard Mulgan, "Multiculturalism: A New Zealand Perspective" in Chandran Kukathas ed., *Multicultural Citizens: The philosophy and Politics of Identity*, The Centre for Independent Studies Ltd: New South Wales, (1993)

<sup>167</sup> Reeves, (1996), pp.3-4, 10

<sup>168</sup> Reeves, (1996), pp. 83-84

The second analysis asserting the significant status of Māori is that Māori have special status as a group in New Zealand because they indigenous;<sup>169</sup> that Māori have certain status in the recognition that they were the first inhabitants and are tangata whenua.<sup>170</sup> This is because indigenous or aboriginal rights applied automatically upon colonisation under British customary law.<sup>171</sup> This argument also stems from Māori being a sovereign nation before colonisation<sup>172</sup> and the rights of self-determination<sup>173</sup> that entails. This recognition of Māori as indigenous people is the basis for New Zealand's biculturalism.<sup>174</sup>

The last category is that Māori are an underprivileged subculture, and as such, need a boost to elevate them to become equal with the rest of society. This is sometimes referred to as 'affirmative action' or compensatory policies. According to this theory, in order for a group to be entitled to rights, it needs to be shown that something occurred, and if that something had not occurred, then the group would be on equal footing with the rest of society.<sup>175</sup> Commentators have suggested that recent Government policies, like 'Closing the gaps'<sup>176</sup> and 'Reducing inequalities', support this version of describing the status of Māori and attempts to elevate Māori to the same position as the rest of New Zealand.<sup>177</sup> This category states that Māori have rights because of their greater numbers; their greater suffering; and their having no

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<sup>169</sup> Paul McHugh, 'An overview of the era of aboriginal self-determination: from rights-recognition to rights-integration and -management' in *Aboriginal Societies and the Common Law*, Otago University Press, forthcoming

name of book, soon to be published

<sup>170</sup> Royal Commission, (1986), p. 6

<sup>171</sup> Professor Brian Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can Bar Re. 272 at 737

<sup>172</sup> Claudia Orange, *The Treaty of Waitangi*, (Allen and Unwin Port Nicholson Press, Wellington. 1987)

<sup>173</sup> Ann Sullivan, 'Effecting Change through Electoral Politics : cultural identity and the Māori franchise' *Journal of the Polynesian Society*, vol. 112, no. 3 (Sept. 2003), p.15

<sup>174</sup> Joe Williams, 'Legal, Technical and Mechanical Issues' in *Treaty of Waitangi Issues- the last decade and the next century*, New Zealand Law Society Seminar, (April 1997), pp.29-30

<sup>175</sup> H. L. A. Hart, 'Are there any natural rights?', *Philosophical Review*, 6 (1995)

<sup>176</sup> Te Puni Kōkiri, *Progress Towards Closing Social and Economic Gaps between Māori and non-Māori*, (1998) focussed on developing policies that tried to equalise Māori and non-Māori in terms of social and economic status.

<sup>177</sup> McHugh, (forthcoming)

alternate homeland.<sup>178</sup> However this theory ignores the position of Māori as the indigenous people and as Treaty partners, as it is based on socioeconomic needs, not on Māori rights as Māori.<sup>179</sup> The affirmative action programmes categorise Māori as a minority, when Māori have special rights as indigenous people and as tangata whenua.<sup>180</sup> While the argument for 'Māori as underprivileged subculture' is based on legitimate attempts to equalise the socio-economic position of Māori with the rest of New Zealand,<sup>181</sup> it ignores the differences and unique status of Māori. Māori are not a 'sub-culture' of the New Zealand dominant culture but are an entirely different culture with rights and responsibilities as such.<sup>182</sup>

The most preferred option for categorising Māori as a group with a special status is an amalgamation of Māori as an indigenous people and Māori as Treaty partners. Māori are the indigenous people who had separate sovereignty over New Zealand, however via the Treaty, Māori ceded that sovereignty, became British citizens, while at the same time keeping their legal status as an indigenous people. Accordingly, Māori rights as a group are not purely as indigenous people and neither are they as Treaty partners. Māori rights are tied to both the Treaty and their indigeneity.

#### *Actually provide equality?*

Having established that New Zealand constitution prefers a system that is outcomes based and Māori have a unique status, it now needs to be determined whether or not the Māori seats are needed to provide for political equality for Māori. This paper argues that political equality means substantially equal outcomes, so in order to meet

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<sup>178</sup> Andrew Sharp, 'Why be bicultural', in Margaret Wilson and Anna Yeatman eds., *Justice and Identity: Antipodean Practices*, Bridget Williams Books: Wellington, (1995)

<sup>179</sup> Hekia Parata, 'The Treaty of Waitangi as a policy framework' in *Treaty of Waitangi Issues- the last decade and the next century*, New Zealand Law Society Seminar, (April 1997), pp. 21-22

<sup>180</sup> Royal Commission, (1986), p. 6

<sup>181</sup> Parata, (1997), p. 22

<sup>182</sup> Matahaere-Atariki, Donna C., *Human Rights and the Treaty: The Ngāi Tahu Experience*, Human Rights and the Treaty Symposium, (31 July 2003), pp. 3-4

this requirement the Māori seats must demonstrate that they enable equitable representation for Māori.

There are eighteen Members of Parliament who identify as being Māori, these are:<sup>183</sup>

|                    |             |                 |
|--------------------|-------------|-----------------|
| Georgina Beyer     | Labour      | Wairarapa       |
| Bill Gudgeon       | NZFirst     | List            |
| Dave Hereora       | Labour      | List            |
| Parekura Horomia   | Labour      | Ikaroa-Rawhiti  |
| Nanaia Mahuta      | Labour      | Tainui          |
| Moana Mackey       | Labour      | List            |
| Ron Mark           | NZFirst     | List            |
| Mahara Okeroa      | Labour      | Te Tai Tonga    |
| Pita Paraone       | NZFirst     | List            |
| Edwin Perry        | NZFirst     | List            |
| Jim Peters         | NZFirst     | List            |
| Winston Peters     | NZFirst     | Tauranga        |
| Mita Ririnui       | Labour      | Wairiki         |
| Dover Samuals      | Labour      | Te Tai Tokerau  |
| John Tamihere      | Labour      | Tamaki Makaurau |
| Georgina Te Heuheu | National    | List            |
| Metiria Turei      | Greens      | List            |
| Tariana Turia      | Māori Party | Te Tai Hauauru  |

Māori make up approximately 15.2% of the population.<sup>184</sup> Māori Members of Parliament make up 15% of the House, this is pretty much the same. If the Māori electoral districts were removed from the equation, Māori Members would make up 9.2% of the House. A considerably lower portion when reconciled against the Māori population. If the Māori seats were completely abolished, under the current figures, there would be a lack of representatives proportional to the Māori population. It is concerning that there are only two elected Māori Members in general electoral

<sup>183</sup> This is sourced from John Wilson, "The Origins of the Māori Seats", Parliamentary Library, Wellington, (2003) available at [www.clerk.parliament.govt.nz](http://www.clerk.parliament.govt.nz), but excludes Jill Pettis, as the Member does not consider herself a 'Māori representative' and accordingly does not attend the Labour Party Māori Caucus, and Donna Awatere-Huata on the basis of her pending litigation with the ACT Party for her removal from the Party and consequentially the House.

districts. If the seats were abolished, Māori representation would essentially rely on political party lists. This may not ensure adequate representation proportional to the population. Also, constituency Members have been perceived to be better or of more value than List Members. List Members have been “referred to as ‘second-class’ by the media, parliamentary colleagues and the public alike”.<sup>185</sup> List Members’ role had been described as the “ideal job- a people’s representative without people to represent.”<sup>186</sup> Whether these criticisms are valid, the public seems to respect electorate Members more than List Members. If Māori did not have Māori electorate Members, then they would have no direct representation. Māori would not have a mandated Member to directly lobby on their behalf.

This potential problem is illustrated by Georgina Beyer’s stance over the Foreshore and Seabed legislation. Beyer had concerns supporting the proposed legislation<sup>187</sup> but after a clear directive from her electorate, she changed her position.<sup>188</sup> Beyer is a Māori Member but elected by a general district. Beyer did not want to vote for a Bill when the policy “violates the rule of law”<sup>189</sup> and was “unfair because it is inconsistent in its treatment of Maori groups”.<sup>190</sup> However, after a series of consultation meetings with her constituency, Beyer supported the Bill. Demonstrating the conflict between the Burkian philosophy of representation and the role as a representative to act as instructed by voters.

|               | Percent of Members | + or - Māori population<br>(15.2%) |
|---------------|--------------------|------------------------------------|
| Māori Members | 15%                | -0.2%                              |

<sup>184</sup> Statistics New Zealand estimates that the Māori population at 30 June 2003 was 609,700 and that the total New Zealand population was 4,009,200, see [www.stats.govt.nz](http://www.stats.govt.nz)

<sup>185</sup> Leigh J Ward, ‘Second-Class MPs? New Zealand’s Adaptation to Mixed-Member Parliamentary Representation’, *Political Science*, 49:125-152 at 127

<sup>186</sup> James Allen, ‘MMP still fails to perform’, *The National Business Review*, (6 November 2003)

<sup>187</sup> Chen, Palmer and Partners, *Wellington Watch*, Issue 2004/16, (2004)

<sup>188</sup> Chen, Palmer and Partners, *Wellington Watch* Issue 2004/12, (2004)

<sup>189</sup> Waitangi Tribunal Report, *WAI 1071 Report on the Crown’s Foreshore and Seabed Policy*, Legislation Direct, (2004), p. 123

<sup>190</sup> Waitangi Tribunal Report, *WAI 1071 Report on the Crown’s Foreshore and Seabed Policy*, Legislation Direct, (2004), 123

|  |      |        |
|--|------|--------|
| Māori electorate Members                 | 5.8% | -9.4%  |
| Māori list Members                       | 8.3% | -6.9%  |
| Māori general electorate Members         | 1.6% | -13.6% |
| Total non Māori electorate Māori Members | 9.9% | -5.3%  |

The Royal Commission's reassurance that MMP would adequately cater for Māori and there would be no need for separate Māori seats<sup>191</sup> but the above analysis has shown that this has not been proved to be the case. But for the Māori seats, Māori would be proportionally underrepresented in the House. At this time, the Māori seats are still needed to retain an adequate level of political equality.

The major argument that the Māori seats should not be abolished is that Māori will decide themselves, via the Māori Electoral Option, when the seats are no longer necessitated.<sup>192</sup> The Māori Electoral Option has a built in benefit of not only enabling to chose whether they want identity representation but also it is a five yearly litmus test of the Māori desire to maintain or abolish separate Māori representation. It is interesting that since the introduction of the MMP system and the MEO, the number of Māori opting for the Māori roll has steadily been rising, as evidence by the rising number of seats. The inaugural Māori Electoral Option produced five Māori seats. The second Māori Electoral Option produced six Māori seats. The last Māori Electoral Option in 2001 produced another seat, taking the total to seven. If this trend continues, then the 2006 Option will see another seat added, bringing the total to eight. Hypothetically, if there was an Electoral Option tomorrow and all Māori chose to go onto the Māori rolled then there would be 11 Māori seats.

Potential Māori Electoral Districts

$$609,700 \div 54,308 = 11.2$$

<sup>191</sup> Royal Commission, (1986), p. 102

<sup>192</sup> Report of the MMP Review Committee, *Inquiry into the Review of MMP*, 2001, Order of the House of Representatives, Wellington, p.20

## 9. Identity representation

Geography is not the only way to divide the populous into groupings. De Grazia states that the population can be divided into constituencies on the basis of territorial surveys; governmental boundaries (for example towns); official bodies; functional divisions of the population; or free population.<sup>193</sup> Further, he states that territorial surveys are the most artificial constructs of these divisions. Guinier advocates that constituencies should be psychological, cultural and/or political.<sup>194</sup> Mulgan canvasses the possibilities that constituencies could be based on occupational groups, gender; age; or ethnicity.<sup>195</sup> There also continues to be modern advocates for the Athenian lottery system.<sup>196</sup>

Incorporating minority views, especially the views of indigenous peoples, is not exclusive to New Zealand. Many different countries incorporate a form of identity representation,<sup>197</sup> including having reserved seats for minorities. Countries that have reserved seats include: Croatia (where seats are reserved for Hungarian, Italian, Czech, Slovak, Ruthenian, Ukrainian, German and Austrian minorities); Singapore (for Malay, Indian and other ethnic communities); Slovenia (for Hungarians and Italians); Jordan (for Christians and Circassians); Pakistan (for non-Muslim minorities); Western Samoa (for non-indigenous minorities); Colombia (for Black communities and indigenous peoples); and the Palestinian Authority (for Christians and Samaritans).<sup>198</sup>

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<sup>193</sup> De Grazia, (1963), p. 20

<sup>194</sup> Guinier, (1994), p. 140

<sup>195</sup> Mulgan, (1989), p. 82

<sup>196</sup> The theory of demarchy advocates that randomly selected groups to work on particular issues is a truer form of democracy than representative democracy, see John Burnheim, *Is Democracy Possible? The Alternative to Electoral Politics*, London: Polity Press, (1985)

<sup>197</sup> Robert Dahl *On Democracy* (Yale University Press, New Haven, 1998) p. 192 categorises minority representation into two categories, electoral arrangements and consociational arrangements.

<sup>198</sup> Bird, Aalborg University, (2003), pp. 3, 25



The history and implementation of the franchise, and its connection to land, explains New Zealand's fixation on geographic representation. Under section 35 of the Electoral Act 1993, New Zealand is divided into general electoral districts. These electoral districts are primarily based on communities of interest, facilities of communications and topographical features. However, the focus on geographical representation was inherited from the English Westminster system,<sup>199</sup> which evolved from feudalism.<sup>200</sup> Originally democracy was focussed in representation of the land and not of people and "it was the land and not men which should be represented".<sup>201</sup> Importation of this into New Zealand can be seen in the criteria for voting in New Zealand Constitution Act 1852, where any male was eligible to register to vote if they owned land or leased of property valued above £10.<sup>202</sup> New Zealand directly imported a system based on land holdings as the cornerstone of citizenship. One of the rationale for the universal male Māori franchise, in the Māori Representation Act 1867, was it was thought unfair that although Māori had large land holdings they were ineligible to vote because the land was communally owned.<sup>203</sup>

This sense of representation of land and not people was further compounded by the English nature of representation. Famously, Edmund Burke said that constituent representation are secondary to the needs of the country as a whole and "Parliament is a deliberative assembly of one nation, with one interest, that of the whole".<sup>204</sup> Members were in Parliament on behalf of the nation as a whole, not of the people they were elected by.

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11 November, 2003

<sup>199</sup> Atkinson, p. 53

<sup>200</sup> Enid Lakeman and James Douglas Lambert, *How Democracies Vote : a study of majority and proportional electoral systems*, London: Faber, (1970)

<sup>201</sup> Lani Guinier quoting A.F. Pollard, *The Evolution of Parliament*, Longmans, Green and Co: London, (2<sup>nd</sup> electoral districts. 1926), p. 164

<sup>202</sup> Royal Commission, "The Electoral Law of New Zealand" Appendix A

<sup>203</sup> Sorenson, (1986), pp. 18-21

<sup>204</sup> Edmund Burke, "In his Speech to the Electors of Bristol following his election as local MP (3rd November 1774" in George Otto Trevelyan *George the Third and Charles Fox* London: Longmans, Green, (1912), vol.2, p. 302

New Zealand transitioned from voting eligibility being determined on economic land status to being determined by citizenship during the 1880s and 1890s. The value placed on association with property qualifications is illustrated by the fact that both Māori and women were franchised before the property qualifications were abolished in 1896.<sup>205</sup> However the idea that franchise was tied to property was not altogether dismissed, when property qualifications were abolished a quota system, to ensure that people living in rural areas were represented, was established.<sup>206</sup>

New Zealand only turned to 'one person, one vote' after the abolishment of the rural quota in 1945<sup>207</sup> and even then the Representation Commission (responsible for setting electoral boundaries) was to take into account "consideration of community of interests".<sup>208</sup> The term "communities of interest" has been carried over in the Electoral Act 1993, and is, along with geography, communication facilities and apportionment (within 5%), the basis for the Representation Commission deciding on electoral boundaries.

The non-geographic constituencies need to be incorporated in the democratic framework by seeing if they breach any part of the framework:

|   |  |                    |                       |                    |
|---|--|--------------------|-----------------------|--------------------|
| <b>1<sup>st</sup> Level<br/>Fundamental<br/>Rules</b>     | <b>Political Equality      Majority Rule</b> |                    |                       |                    |
| <b>2<sup>nd</sup> Level<br/>Democratic<br/>Principles</b> | <b>Participatory</b>                         | <b>Accountable</b> | <b>Representative</b> | <b>Competitive</b> |

<sup>205</sup> Atkinson, (2003), p.103 and B. Ritchie and H. G. Hoffman, 'The Electoral Law of New Zealand: A brief history' in Royal Commission on the Electoral System, (1986), Appendix A- 65-66

<sup>206</sup> The 'country quota' was introduced in the Representation Act 1887, see Ritchie, (1986), A-42

<sup>207</sup> Atkinson, (2003), pp. 156-160

<sup>208</sup> Appendices to the Journal of the House of Representatives, 1946, H.46, p.3 quoted in Ritchie, (1986), A-66

|  |  |  |  |   |
|--|--|--|--|---|
| <b>3<sup>rd</sup> Level Operations</b> | <ul style="list-style-type: none"> <li>- inclusive of all adults</li> <li>- protection of civil and political rights</li> <li>- education</li> <li>-consultation on critical issues</li> <li>-apportionment</li> </ul> | <ul style="list-style-type: none"> <li>- periodic elections</li> <li>- separation of powers</li> <li>- access to official information</li> <li>- non-elected officials accountable to elected officials</li> </ul> | <ul style="list-style-type: none"> <li>- elected representatives</li> <li>- free, open and fair elections</li> </ul> | <ul style="list-style-type: none"> <li>- electoral system</li> <li>- party and candidacy diversity</li> <li>- free press</li> <li>- free association</li> </ul> |
|--|--|--|--|---|

Identity representation is not undemocratic.<sup>209</sup> Non-geographic constituencies allow for political equality and majority rule. Non-geographic constituencies are inclusive of all the identified principles of democracy; they can ensure participation, accountability, representativeness and competitiveness. All of the mechanics of democracy can be done under non-geographic constituencies. Identity representation is primarily concerned with ensuring participation and representation. Assessment against these two principles show that non-geographic constituencies can be inclusive of all adults; protect civil and political rights; enable education and consultation on important issues; and also do not prohibit apportionment. Non-geographic constituencies also allow for elected representatives and for open, free and fair elections. Against this assessment, non-geographic constituencies are democratic.

In Chapter 8 it was established that Māori status in New Zealand stems both from rights under the Treaty<sup>210</sup> and from rights as the indigenous people.<sup>211</sup> For the purposes of identity representation this is an important distinction. Aside from liberalism, one of the strongest arguments against identity representation is deciding which groups are entitled to representation and that allowing one group to be represented would 'open the floodgates' to a multitude of groups clamoring for

<sup>209</sup> Kymlicka, (1995), p. 133 and Mulgan, (1989), p. 82

<sup>210</sup> For a explanation of Māori rights stemming from the principles of the Treaty see Te Puni Kōkiri, *He Tirohanga o Kawa kit e Tiriti o Waitangi: A guide to the Principles of the Treaty of Waitangi as expressed by the Courts and Waitangi Tribunal*, Te Puni Kōkiri: Wellington (2001)

<sup>211</sup> Paul McHugh, 'An overview of the era of aboriginal self-determination: from rights-recognition to rights-integration and -management' in *Aboriginal Societies and the Common Law*, Otago University Press, forthcoming

presentation. However in the New Zealand context, due to the special constitutional status of Māori, this criticism is difficult to make. Māori and Māori alone are the only grouping that is indigenous to New Zealand and they are also the only group to be constitutional partners with the Crown. On these grounds, differentiating Māori from other groups, for instance women or new immigrants, that may seek identity representation is simple because Māori have a unique and special status that is different from the position of any other group.

The theory that constituencies must be based on geography is an historical convenience<sup>212</sup> that has become unquestioned in Western democracies. However, it has been repeatedly contended that geographic constituencies are not fairly representative of minority groups<sup>213</sup> and pure single member majority in multicultural societies are exclusionary and accordingly undemocratic.<sup>214</sup> Identity representation provides an alternative to geographic representation that is more inclusive of disadvantaged groups and minorities.<sup>215</sup> Identity representation is more representative<sup>216</sup> and more encouraging of participation<sup>217</sup> than geographic constituencies. Identity representation also enables those currently excluded from politics to engage more directly in political debate and decisions.<sup>218</sup> For these reasons, it has been argued that non-geographic constituencies are more democratic than their geographic counterparts.

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<sup>212</sup> Mulgan, (1989), p. 82

<sup>213</sup> Guinier, (1994), p. 123

<sup>214</sup> Lijphart, (1984), pp.22-23

<sup>215</sup> Phillips, (1995), pp. 12-13, 35-48

<sup>216</sup> Guinier, (1994), pp.140-156

<sup>217</sup> Phillips, (1994), pp. 31-36

<sup>218</sup> Phillips, (1995), p. 167

## 10. Conclusion

This paper has considered whether the existence and operation of the Māori electoral districts is consistent with a general theory of democracy and with the New Zealand experience of democracy. This paper has found that the existence of the Maori seats is consistent with the New Zealand experience and particular interpretation of democracy. Further that the seats are in accordance with New Zealand constitutional principles and law.<sup>219</sup>

The paper built a framework to define democracy. The framework established three levels of democracy: Level One the fundamental rules of democracy; Level Two the principles of democracy; and Level Three the mechanisms for implementing the fundamental rules and the principles. The fundamental rules of democracy have been determined to be majority rule and political equality. The principles of democracy have been determined to be representation, accountability, participation and competition. There is no specific set of mechanisms needed in Level Three. All that is required is that the Level Three mechanisms operationalise the fundamental rules, in accordance with the principles, to enable democracy. The fundamental rules and the principles sit alongside each other, neither usurping the other. Political equality ensures that there is equity in representation; and majority rule ensures that the will of the people is carried out. The rules and principles mitigate each other to ensure fair and just democracy. Institutions must abide by the rules and principles to be democratic.

The paper explored the history of the Māori seats and investigated their place in a democratic society. The paper considered the tension between the powerful, and culturally embedded concept New Zealanders appear to prize of 'one person, one

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<sup>219</sup> Trapski, (1998), p. 9

vote' and democratic theory about identity representation and then examined whether the seats are undemocratic by testing them against the framework.

'One person, one vote' has been defined to mean both that voters must be apportioned to each other and that voters must be politically equal. Analysis has shown that both Māori and general electoral districts are, for all practical purposes, well apportioned. Whether the seats breach political equality, was a more difficult question to answer, namely because of the debate spanning the better part of a decade on the meaning of equality. However, New Zealand's move to a proportional electoral system has clearly indicated a constitutional bias towards equality meaning equitable outcomes. That bias can be extended to define political equality, in the New Zealand electoral context, as being fair outcomes.

It has been demonstrated that the Māori seats provide equitable outcomes for Māori in the New Zealand House of Representatives.

Identity representation has been analysed against the democratic framework. It has been determined that identity representation does not breach the fundamental rules or principles of democracy and that constituencies can be drawn in many different ways, including geography and ethnicity. In fact, there is a strong argument that identity representation is more democratic than geographic representation. The Māori seats, as a form of identity representation, are not undemocratic.

The Royal Commission was not correct that MMP would provide adequate Māori proportionality in the House, and was therefore also not correct that asserting that the Māori seats would not be needed. Without the Māori seats, Māori would not have had proportional representation in the House since the inception of MMP in New Zealand.

Given the Māori seats are not undemocratic, and in fact enhance New Zealand democracy, and the seats do not interfere with other individuals democratic freedoms, then pragmatically they are a tolerable option at the present time.

Due to chronic Māori disproportional representation during most of the twentieth century, it is vital that proportional Māori representation is ensured during the next century. Accordingly, the seats deserve more constitutional protection than they currently have. The seats are not entrenched, as other significant parts are, in under the Electoral Act 1993.<sup>220</sup> Only a simple majority of Parliament is required to abolish them. Given their high value to Māori,<sup>221</sup> and the need to ensure proportional Māori representation, entrenching the seats should be considered.

It is paradoxical that the electoral feature that New Zealand is internationally most renowned, recognised and praised for is so criticised internally.<sup>222</sup> Countries, for instance Australia,<sup>223</sup> are currently investigating ways to try and provide permanent representation for their indigenous groups. Often these countries point to New Zealand as the example of how to establish and run identity representation for an indigenous population in a democratic way.<sup>224</sup>

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<sup>220</sup> Section 268 of the Electoral Act 1993 contains reserved provisions relating to the term of Parliament, provisions relating to defining electoral districts and the electoral population, quota adjustment, method of voting and voting age. Being a reserved provision means the provision cannot be repealed or amended unless it is by at least 75% of the members.

<sup>221</sup> New Zealand Electoral Study, (2000), p. 35

<sup>222</sup> See Lijphart, (1994), Lijphart, (1984), Varennes, (1998), Guinier, (1994), Kymlicka, (1995), Grofman, (1994)

<sup>223</sup> Both Queensland and New South Wales have recently investigated the viability of having representation specifically for Aboriginal and Torres Strait Islanders see Legislative Assembly of Queensland Legal, Constitutional and Administrative Review Committee, *Hands on Parliament: A Parliamentary committee inquiry into Aboriginal and Torres Strait Islander peoples' participation in Queensland's democratic process*, Report No. 42, (September 2003) and Parliament of New South Wales Standing Committee on Social Issues, *Enhancing Aboriginal Political Representation: Inquiry into Dedicated Seats in the New South Wales Parliament*, Report No. 18, (November 1998).

<sup>224</sup> Parliament of New South Wales Standing Committee on Social Issues, (1998), pp. 21-22 and Legislative Assembly of Queensland Legal, Constitutional and Administrative Review Committee, (2003), pp. 53-54

The Māori electoral districts are not undemocratic. If anything the seats actually enhance New Zealand democracy. Statements about the democratic nature of institutions should be based on an understanding of what democracy is. Accordingly, criticisms of the seats need to be re-evaluated.

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