

# **The Politics of Indigeneity and Contemporary Challenges to Maori Self-Determination**

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## **Abstract**

Unexpected and dramatic political developments in New Zealand in 2004 have seen populist politics shift indigenous self-determination to the periphery of elite policy thinking. A longstanding and bipartisan cautious acceptance of self-determination has begun to erode as a discourse dismissive of a Maori claim to certain rights on the basis of indigeneity gains popular currency. Maori are not seen as indigenous groups entitled to group rights by virtue of that identity, but as individuals with the same 'needs' as any other individual. Justice is thus realised by addressing 'need' not 'rights'. Notions of indigeneity and the Treaty of Waitangi as politically significant are therefore questioned.

It is around principles of individualism and narrow and limiting conceptions of democracy and justice that has emerged a populist discourse antithetical to self-determination. Yet from a Maori point of view self-determination remains to give theoretical articulation to a politics of indigeneity that counters the re-emergence of assimilation as a subtle although not explicit policy objective. The paper explores this clash of objective - popularly and simplistically expressed in the rhetorical language of 'one law for all' - as the defining characteristic of contemporary Maori policy debate. It argues that a Maori aspiration to self-determination is theoretically legitimate, even though sometimes at odds with interpretations of underlying principles of the democratic pluralist nation state.

## Introduction

In 2004

Maori claims to indigenous self-determination may be fortified by virtue of their status as *tangata whenua*... yet such an assertion invariably clashes with state assumptions of unilateral and undivided authority of all the land. The contesting of these 'duelling discourses' strikes at the core of cultural politics in Aotearoa.<sup>1</sup>

These 'duelling discourses' have been raised in prominence by a Court of Appeal judgement *Ngati Apa and Others v. Attorney General*, (CA 173/01 CA75/02, 19 June 2003) and by a speech by the Opposition Leader Don Brash, entitled *Nationhood*. These events have begun to reshape public debate around issues of self-determination and indigeneity. The *Nationhood* speech's aim was to erode a longstanding cautious political acceptance of self-determination as a legitimate Maori political aspiration. Self-determination's assertion of group rights by virtue of indigenous identity and by virtue of the Treaty of Waitangi's affirmation of those rights was challenged by a position that categorises Maori as individuals with the same 'needs' as any other individual.

Self-determination is a pragmatic response to contestations of power between the successor states of colonising peoples and the indigenous inhabitants of colonised territories. It provides a political and legal framework within which indigenous peoples can assert and realise autonomy to the greatest extent possible, while at the same time allowing states to maintain territorial integrity and to retain ultimate sovereignty. Self-determination is a broad framework within which indigenous peoples

resist colonisation in two distinct ways. First, they struggle against the structure of domination as a whole and for the sake of their freedom as peoples. Second, they struggle within the structure of domination vis-à-vis

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<sup>1</sup> Roger Maaka and Augie Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa," in *Political theory and the rights of indigenous peoples*, ed. Duncan Ivison, Paul Patton, and Will Sanders (Melbourne, 2000), 90. The term *tangata whenua* translates as people of the land. It is the closest Maori word to indigenous.

techniques of government, by exercising their freedom of thought and action with the aim of modifying the system in the short-term and transforming it from within in the long-term.<sup>2</sup>

The claim to self-determination is a claim to human rights. Self-determination asserts the right to a collective identity and to the determination to the greatest extent possible of a cultural, social and economic destiny. For Maori it is especially important that self-determination extends to the right of peoples to be governed by representative government<sup>3</sup> because it is through representative government that full and effective political participation arises and from which emerges

political structures and measures which specifically take into account particular identity and situations of indigenous peoples.<sup>4</sup>

Self-determination is viewed with suspicion because it is the political expression of indigeneity. Indigeneity is inconsistent with the view that public policy most properly deals with indigenous peoples as disadvantaged individuals rather than as members of distinct communities wishing to retain a distinct identity.<sup>5</sup> It is the dismissal of indigeneity that is at the core of contemporary political arguments about how the political order should most properly relate to Maori.

Inasmuch as indigenous claims against the state are articulated by those who demand recognition not as disadvantaged subjects, but as equals with inherent rights to redefine the basis for belonging, a conflict of interest is inevitable and irreconcilable.<sup>6</sup>

In 2004 the legitimacy of the notion of self-determination has come under challenge from both government and opposition political parties. There is no longer a bipartisan consensus on the legitimacy of Maori development as Maori.

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<sup>2</sup> James Tully, "The Struggles of Indigenous Peoples for and of Freedom," in *Political theory and the rights of indigenous peoples*, ed. Duncan Ivison, Paul Patton, and Will Sanders (Cambridge ; Melbourne, 2000), 50.

<sup>3</sup> Caroline E. Foster, "Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples," *EJIL* 12 (2001): 147.

<sup>4</sup> *Ibid*, 148.

<sup>5</sup> Murray Dobbin, "Aboriginal Peoples in Canada: Aspirations for distributive Justice as Distinct Peoples: an interview with Paul Chartrand," in *Indigenous Peoples' Rights in Australia, Canada, and New Zealand*, ed. Paul Havemann (Auckland, 1999), 100.

<sup>6</sup> Maaka and Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa," 96.

The principles of reconciliation expressed in Crown settlements of Treaty of Waitangi breaches are undermined in both the *Nationhood* speech and the *Foreshore and Seabed Bill*. Recent challenges, encouraged by populist political opinion, to the right to Maori self-determination are ultimately challenges to the right to a unique identity. The denial of the legitimacy of exercising a self-defined identity is the denial of the right to exist as Maori - to exist both individually and collectively as free and equal peoples.

***Ngati Apa v. Attorney General and the Nationhood Speech***

In June 2003 in *Ngati Apa v. Attorney General* the Court of Appeal was asked the simple question. Does the Maori Land Court have jurisdiction to consider title to the foreshore and seabed. In simple terms the Court's answer was 'yes', but with the caution that the test for such consideration resulting in fee simple title was high and likely to be granted only rarely. The ensuing political exaggeration of the implications of the decision manipulated Maori into a defensive position. The government's acceptance of that exaggeration is indicative of a prevailing political climate of suspicion, perhaps even hostility, to Maori aspiration to that which is beyond Pakeha conceptions of legitimate individual aspiration. In this way differences in expression of identity are illegitimised.

Prior to the Court of Appeal decision the Crown and non-Maori general public had generally assumed that the foreshore and seabed was owned by the Crown. The Court established that this assumption was not clear in law. Instead the Court held that the High Court and Maori Land Court have jurisdiction, when appropriate legal criteria are met

to declare the foreshore and seabed to be customary land and award it in fee simple. Where customary rights of Maori are found to subsist, those rights will burden the Crown title or, where the rights are sufficiently ample, override or replace it.<sup>7</sup>

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<sup>7</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (2004 cited 25 June 2004); available from <http://www.waitangi-tribunal.govt.nz/reports/generic/wai1071foreshore/>.

The realisation that the Crown did not in fact own the foreshore and seabed was used by political parties to create a fear among non-Maori New Zealanders that their access to the foreshore for recreational purposes would be obstructed. At no stage in the ensuing public debate did Ngati Apa or any other Maori group suggest that this was the objective. Indeed remarks to the contrary have been made by Te Ope Mana a Tai, a national representative body of iwi (tribal groups) with interest in the coastal marine area. 'We will continue to allow public access to the beach for private recreational use'.<sup>8</sup> In a model provided for iwi members to make submissions to the Parliamentary Select Committee considering the *Foreshore and Seabed Bill* the Northland iwi Te Rarawa suggests that the Bill be withdrawn and instead 'the option of legislating to confirm public access... be explored'.<sup>9</sup>

For Maori the pursuit of self-determination does not arise from a belief in a right to a superior form of citizenship. Rights of indigeneity predate those of citizenship and are articulated to enhance a desire for greater control over their lives, culture and resources. In the case of the foreshore and seabed it arises not from a desire for exclusive access, rather from a desire to have the same property rights as individual title holders. The *Nationhood* speech was nevertheless delivered in a climate of exaggerated fear, and the public support that the speech attracted influenced the Government's response to *Ngati Apa*. The Prime Minister's Media Statement announcing the *Foreshore and Seabed Bill* was headed with the provocative phrase 'Access Guaranteed for All New Zealanders'. This choice of phrase was suggestive of the Government accepting, and in effect encouraging, a public discourse of suspicion of Maori. Populist politics prevailed over the Maori claim to self-determination.

The Government's position is that

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<sup>8</sup> Te Ope Mana a Tai, *Discussion Framework on Customary Rights to the Foreshore and Seabed* (Wellington, 2003). 20.

<sup>9</sup> Te Runanga o Te Rarawa, *Submission on the Foreshore and Seabed Bill* (2004 cited 7 July 2004); available from [http://www.terarawa.co.nz/mahi/rm/seabed/Submission\\_template\\_TOMATv2June04%20.pdf](http://www.terarawa.co.nz/mahi/rm/seabed/Submission_template_TOMATv2June04%20.pdf).

full legal and beneficial ownership of the public foreshore and seabed will be vested in the Crown, to preserve it for the people of New Zealand.<sup>10</sup>

At the same time the Government argues that Maori rights will be protected by

a new jurisdiction for the Maori Land Court to enable it to recognise ancestral connection of Maori groups with particular areas of the public foreshore and seabed through a customary rights order. This order recognises an activity, use, or practice, but does not grant an estate or interest in land.<sup>11</sup>

This assertion of Crown authority diminishes the extent to which Maori may exercise self-determination with regard to management and use of the foreshore and seabed. It was that perceived diminishing of customary authority that explained the widespread Maori opposition to the Government's proposals. It was the view of the Waitangi Tribunal that the proposals did indeed diminish authority, breached the Treaty of Waitangi and demonstrated racial prejudice. The Tribunal observed that the policy

removes the ability of Maori to go to the High Court and the Maori Land Court for definition and declaration of their legal rights in the foreshore and seabed... In removing the means by which the rights would be declared, it effectively removes the rights themselves, whatever their number and quality. It removes property rights... taking them away amounts to expropriation.<sup>12</sup>

The Government Bill is a response to public pressure to marginalise collective Maori interests and diminishes the opportunity for self-determination by:

Cutting off the path for Maori to obtain property rights in the foreshore and seabed, the policy takes away opportunity and mana, and in their place offers fewer and lesser rights. There is no guarantee to pay compensation for the rights lost.<sup>13</sup>

The removal of the right to ask a Court to determine whether or not a property right exists and the replacing of that right with the opportunity to ask a Court to

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<sup>10</sup> New Zealand Government, *Foreshore and Seabed Bill* (Wellington, 2004).

<sup>11</sup> Ibid.

<sup>12</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (cited). Mana is translated as authority.

<sup>13</sup> Ibid.

recognise a 'customary interest' limits access to due legal process, which in contrast to conceptions inspiring the populist rhetorical cry of 'one law for all', creates a law for Maori communities that is of a lesser status to that available to individuals. The Bill does this by abolishing certain private property rights. The rights abolished are however only those of Maori. Article 2 of the Treaty of Waitangi is breached because the Bill overrides the guarantee to Maori of

full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and such other Properties as they may collectively or individually possess, so long as it is their wish and desire to retain the same in their position.<sup>14</sup>

The climate of hostility to self-determination is further evident in the Government's unwillingness to consider alternatives to the *Foreshore and Seabed Bill* which were put forward by the Waitangi Tribunal.

The Waitangi Tribunal's recommended options were:

1. The 'longer conversation', to allow Maori and the Crown to 'properly explore the options that are genuinely available.'
2. 'Do nothing'. That is, let the judicial process take its course without political interference.
3. 'Provide for access and inalienability'. That is, provide for public access to the foreshore and seabed and at the same time recognise that 'Maori interests in the foreshore and seabed should be inalienable'.
4. 'Improve the courts' tool kit' by 'providing a greater range of instruments available to the High Court and the Maori Land Court when they come to consider customary title'.
5. 'Protect the Mana' as is the case for example with management of the Orakei Reserve, under hapu title [collective sub-tribal title], which involves both the Crown and hapu.
6. 'Be consistent'. That is, adapt the model which recognises the ownership interests in lake beds of Ngati Tuwharetoa and Te Arawa.<sup>15</sup>

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<sup>14</sup> Claudia Orange, *The Treaty of Waitangi* (Wellington, 1987).

<sup>15</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (cited).

## **'One Law' for All**

The *Nationhood* speech delivered in January 2004 emphasised the notion of 'one rule' or 'one law' for all. It positioned this philosophy in ideological contrast to an alleged Government determination to recognise a Maori 'birthright to the upper hand'.<sup>16</sup> The speech struck resonance with an electorate concerned by perceptions of an overemphasis on the Treaty of Waitangi as a moral and legal guide for relationships between the Crown and Maori. More importantly it struck resonance with an electorate convinced by a fundamentally dishonest interpretation of the judgement of the Court of Appeal in *Ngati Apa v Attorney-General*<sup>17</sup> which maintained that the judgement would deny all non-Maori New Zealanders access to beaches for both recreational and commercial purposes. Given the effect of the *Foreshore and Seabed Bill* the assertion of 'one law for all' is odd:

when one looks at the history of struggle by indigenous people against racial discrimination, it is ironic that a discourse of equality should now be used to lend moral force to the claims of non-indigenous people...<sup>18</sup>

In his speech Brash asserted that social policy be delivered on the basis of need not race.

Maori New Zealanders who are in need are as entitled to assistance as any other New Zealanders who are in need.<sup>19</sup>

An exclusive focus on immediate material need removes attention from the right to address the causes of relative poverty and the right to be part of solutions to related problems. The degree of relative poverty may indeed be increased by diminishing opportunities for certain and effective participation in the democratic process.

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<sup>16</sup> Don Brash, *Nationhood* (An Address to the Orewa Rotary Club, 27 January 2004 cited 24 April 2004); available from [http://www.national.org.nz/speech\\_article.aspx?ArticleID=1614](http://www.national.org.nz/speech_article.aspx?ArticleID=1614).

<sup>17</sup> *Ngati Apa and others v Attorney-General* [2003] 3 NZLR 643.

<sup>18</sup> William Jonas and Margaret Donaldson, "The Legitimacy of Special Measures," in *Indigenous Human Rights*, ed. Sam Garkawe, Loretta Kelly, and Warwick Fisher (Sydney, 2001), 16.

<sup>19</sup> Brash, *Nationhood* (cited).

Brash's assertion is an oversimplification of complicated policy initiatives intended to reduce social and economic disparity between Maori and non-Maori. Brash does not oppose the proposition that such disparities are the proper concern of public policy. But he sees the objective in a very narrow context devoid from the cultural imperative that informs broader Maori aspiration. The speech demonstrated Brash's view that the liberal democratic state's primary concern is with individuals and that it properly struggle with notions of collectivity. Yet it is collective expression that is the primary feature of the politics of indigeneity, given theoretical and practical articulation through the Maori aspiration to self-determination.

A narrow focus on the individual is antithetical to self-determination because the Maori collective identity is one of

'peoples'... whose realities and corresponding entitlements are justified on the grounds of cultural autonomy and territorial groundedness.<sup>20</sup>

The right of 'peoples' to self-determination relates to

rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence.<sup>21</sup>

The Maori desire to live as Maori is the essence of the aspiration to self-determination. Durie therefore argues that the 'dual aims of Maori development' are:

Facilitating Maori access to New Zealand society and economy on the one hand; and enhancing Maori lives, Maori society and Maori knowledge on the other.<sup>22</sup>

This conception of Maori development emphasises that:

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<sup>20</sup> Augie Fleras, "Politicising Indigeneity: Ethno-politics in White Settler Dominions," in *Indigenous Peoples' Rights in Australia, Canada, and New Zealand*, ed. Paul Havemann (Auckland, 1999), 188.

<sup>21</sup> S. James Anaya, "Self-Determination as a Collective Human Right Under Contemporary International Law," in *Operationalising the Right of Indigenous Peoples to Self-Determination*, ed. Pekka Aikio and Martin Scheinin (Turku, 2000), 5.

<sup>22</sup> Mason Durie, "Contemporary Maori Development: Issues and Broad Directions," in *Nga Kahui Pou: Launching Maori Futures*, ed. Mason Durie (Wellington, 2003), 90-91.

Maori want to retain a distinct identity that comes from a unique heritage, common journeys, a familiar environment, and a set of shared aspirations.<sup>23</sup>

Self-determination recognises that

development cannot be prescribed from outside. Direct Maori involvement in planning, policy formulation and priority setting makes it more likely that the direction of development will be consistent with Maori aspirations. It may also mean that the goals of development will be rejected if they have been set without reference to Maori.<sup>24</sup>

There is a populist rhetoric among those who deny a Maori expression of identity, which insists that the politics of indigeneity emphasises a Maori preferential access to health care, to education funding or to exclusive access to the foreshore and seabed. An accurate assessment of the rights claimed in the name of indigeneity indicates that instead Maori insist on the right to participate in decision-making, including the right of access to the judicial system which the *Foreshore and Seabed Bill* limits,<sup>25</sup> a right to receive health care and education services in proper cultural context, and the right to possess land and resources without fear of expropriation by government. Maori seek these rights not out of a belief in a 'birthright to the upper hand', but out of a belief in a 'birthright' to live as Maori.

Self-determination requires Maori to

be accepted as having their own independent sources rather than being shaped for the convenience of the political majority.<sup>26</sup>

The ultimate shaping of Maori for the convenience of the political majority is assimilation. Assimilation is the policy objective subtly but implicitly evident in the *Nationhood* speech. The erosion of Maori property rights under the *Foreshore and Seabed Bill* weakens the Maori cultural and economic base, on which a fuller autonomy might be built.

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<sup>23</sup> Ibid., 98.

<sup>24</sup> Mason Durie, "Parameters, Goals and Outcomes for Maori Development," in *Nga Kahui Pou: Launching Maori Futures*, ed. Mason Durie (Wellington, 2003), 309-310.

<sup>25</sup> New Zealand Government, *Foreshore and Seabed Bill*.

<sup>26</sup> Maaka and Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa," 97.

## Political Participation and Representative Government

There is a connection between representative government and indigenous autonomy because autonomy legitimises identity and establishes 'a formal place for groups in the public world'.<sup>27</sup> Therefore

political participation and representative government also depend on affording freedom to individuals and groups to define and identify themselves.<sup>28</sup>

In contrast to the recognition of group identity and group rights given expression through opportunities for self-determination the former National Party leader Bill English has argued that while guaranteed Maori representation in Parliament was once necessary, this is no longer so because: 'In recent decades, there has been a progressive restoration of Maori rights as citizens.'<sup>29</sup> Secondly, English noted that as Maori comprise about 14% of the population and hold about 15% of the seats in Parliament, the level of representation is fair. Further, English argued, it is necessary to show

that we can offer to each citizen sufficient freedom and integrity that they can be represented, have their say and reach their potential.<sup>30</sup>

That is a positive aspiration, but the inferior Maori socio-economic status indicates that at the present time it still remains that New Zealand does not offer that freedom and integrity to each citizen. Further, while it is true that in the current Parliament Maori are proportionally represented, one must assume an ongoing absence of prejudice if that level of representation is to continue under New Zealand's current electoral system. The political weakening of self-determination in 2004 questions that assumption. If guaranteed Maori representation in Parliament is a privilege it is one made necessary by the fact

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<sup>27</sup> Foster, "Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples," 153.

<sup>28</sup> Ibid, 151.

<sup>29</sup> Bill English, *Address to the National Party Lower North Island Regional Conference* (Solway Park Hotel, Masterton, 4 May 2003 cited 15 May 2003); available from <http://www.national.org.nz/wcontent.asp?PageID=100014891>.

<sup>30</sup> Ibid.

that since parliamentary democracy began, mainstream voters and political parties have included few Maori in Parliament as members representing general seats.<sup>31</sup> This figure is indicative of a reluctance within society to allow Maori a place in government. The inability of Maori to gain election in significant number through the votes of Pakeha electors has itself hindered the advance of self-determination. Guaranteed Maori parliamentary representation ensures that Maori can not be completely excluded from participation in the political process, particularly on matters of immediate and direct relevance to themselves. Although New Zealand offers Maori the legal right to seek election to Parliament, the fact that few, other than those elected from Maori electorates have actually gained election indicates that there are significant societal barriers to Maori seeking election as representatives of predominantly white constituencies. Guaranteed Maori parliamentary representation guards against democracy becoming for Maori, a 'tyranny of the majority' - a likely effect of democratic pluralist systems of government.

The Maori people and their political traditions have so far had little influence on the development of democratic government in New Zealand. Democracy is a product of the Western European tradition.... even the particular characteristics of New Zealand democracy which distinguish it from democracy in some other western societies, for instance its relative populism, are the result of factors within Pakeha New Zealand Society rather than Maori society.<sup>32</sup>

Brash argues that the extension of the right to participation in decision-making to the guarantee of Maori seats in some local authorities is a violation of the democratic principle of 'one person, one vote, one value'.<sup>33</sup> The argument is flawed because the value of a vote cast in a Maori Parliamentary constituency or local government ward is of no greater value than that cast in a general constituency or ward. The issue is instead one of participation, not just as a

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<sup>31</sup> Carol, Gisborne 1893; Austin, Awarua 1975; Couch, Wairarapa 1975; Winston Peters, Hunua 1979 and Tauranga 1984; Ian Peters, Tongariro 1990; Pettis, Wanganui, 1993 and Beyer, Wairarapa 1999.

<sup>32</sup> Richard Mulgan, *Democracy and Power in New Zealand*, 2 ed. (Auckland, 1989). 50.

<sup>33</sup> Brash, *Nationhood* (cited).

function of the rights of citizenship, but collective participation as members of an indigenous community. This is not a greater right to that of other citizens; it is merely a different expression of the same right, which self-determination legitimises.

Anaya identifies 'two normative strains' which exist 'within the universe of values constituting the substantive right of self'.

First, in what may be called its *constitutive* aspect, self-determination requires that the government institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed. Second, and what may be called its *ongoing* aspect, self-determination requires that the government institutional order, independently of processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.<sup>34</sup>

Self-determination is therefore fundamentally at odds with the simplistic 'one people', 'one law for all' interpretation of liberal democracy. It requires some compromise of majoritarian democracy. Most importantly, self-determination denies the notion of a state comprising 'one people'. For Maori, the very notion of 'one people' is alarming because it is a denial of indigeneity; a denial of the legitimacy of the wish to exist and participate in national affairs not under the culturally empty guise of 'New Zealander', but as a distinct cultural group and distinct political community.

In New Zealand the constitutive aspect of self-determination is not fully realised because the system of parliamentary democracy is not even in part the creation of Maori. This has to some extent been offset by the compromise of guaranteed Maori representation in Parliament. Guaranteed representation cannot therefore be seen as a 'racist' privilege. Its purpose is to contribute towards the satisfaction of the constitutive aspect of democracy.

Should the political process remove that representation there remains an obligation under international law to ensure continuing Maori participation in

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<sup>34</sup> Anaya, "Self-Determination as a Collective Human Right Under Contemporary International Law," 9-10.

the processes of government and in decision-making. It is unlikely that a more effective alternative mechanism could be established.

A political climate that would see the removal of guaranteed Maori representation in Parliament is likely to be one that dismisses the assertion that

ongoing self-determination requires a governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis.<sup>35</sup>

Even a narrow conception of democracy which 'equates it with popular electoral control of government'<sup>36</sup> is not compromised by guaranteed Maori representation in Parliament. Maori electors choose whether to enrol to vote in a Maori or general constituency. The number of Maori constituencies is then determined on the basis of the number of electors choosing to enrol in a Maori constituency. All electors may then cast 'party votes' which determine the make up of the House of Representatives. Maori votes are thus equal in value to the votes of other electors. The provision of separate Maori seats cannot therefore be seen as a racist privilege. They simply ensure that the equal votes of Maori electors result in those electors being collectively represented by a person of their own choosing. In this way the obligation to ensure that Maori may participate in the decision-making processes of government is realised. It may be that there are alternative fashions in which that obligation might be met, but by their omission from the *Nationhood* speech and ensuing public debate, it can be suggested that the public mood is not receptive of the notions of group identity and group rights implicit in the guarantee of separate Maori representation in Parliament. Historical experience demonstrates that guaranteed Maori representation in Parliament improves the effectiveness of democracy for Maori. Voters in general electorates have very rarely elected Maori to Parliament to the extent that

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<sup>35</sup> Ibid., 11.

<sup>36</sup> Philip Pettit, "Minority Claims Under Two Conceptions of Democracy," in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton, and Will Sanders (Melbourne, 2000), 199.

the term democracy hides too easily the need to address many of the issues arising every day in respect of how governments and societies function.<sup>37</sup>

Representative government is enhanced where opportunities for autonomy are legitimised.

Autonomy also brings its own benefits in terms of identity, establishing a formal place for groups in the public world, giving further opportunity for them to reinforce the values of the group and to interact with other parts of society as a group.<sup>38</sup>

Autonomy also offers administrative frameworks for the exercise of self-responsibility. Self-responsibility is the ultimate purpose of self-determination. It is the opportunity for communities to make decisions for themselves against their own criteria and in pursuit of self defined goals. Further, it is the opportunity to take responsibility for one's successes and failures and to avoid passive reception of that which is determined by outsiders as best for indigenous communities.

### **Citizenship and Indigeneity**

Durie argues that successive governments have tried to balance fairness to all citizens with the recognition of indigeneity.<sup>39</sup> In fact, there is no need for balance. Citizenship and indigeneity are different but not exclusive. Indigeneity is not concerned with a 'birthright to the upper hand' and citizenship need not be concerned with denying equality to indigenous peoples. Indigeneity is concerned with the right and opportunity to live as Maori: the right of access to language and culture, the right to preserve and develop resources as a community, not just as an individual. Indigeneity goes beyond citizenship and has implications for self-determination, development and progress.

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<sup>37</sup> Foster, "Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples," 152.

<sup>38</sup> Ibid, 153.

<sup>39</sup> Mason Durie, "Universal Provision, Indigeneity and the Treaty of Waitangi," in *Nga Kahui Pou: Launching Maori Futures*, ed. Mason Durie (Wellington, 2003), 264.

Maori progress, whether in commerce, education, or science, could not be accomplished without taking cognisance of Maori values and the realities of modern Maori experience. In other words, Maori development was not solely about making economic progress or reducing state obligations towards Maori; it was also about being able to retain a Maori identity and formulate development according to Maori aspirations.<sup>40</sup>

The viewing of material progress alongside cultural imperatives has particular implications for state education provision. It is in this field that successive governments have been most willing to broaden the parameters of sanctioned practice to allow the limited exercise of self-determination. For Brash this approach to Maori education policy creates a tension between the liberal emphasis on choice as a right of citizenship and the prospect that the Maori exercise of choice might be seen as recognition of that choice arising legitimately from a politics of indigeneity, drawing moral authority from the Treaty of Waitangi.

A National Government will continue to fund Te Kohanga Reo, [Kura] Kaupapa Maori, Wananga and Maori primary health providers - not because we have been conned into believing that this is somehow a special right enjoyed by Maori under the Treaty, but rather because National believes that *all* New Zealanders have a right to choice in education and health.<sup>41</sup>

The balancing of liberal values of choice with a public perception of financial support for schools and health providers based on recognition of indigeneity creates a political problem. The broadening of the focus of Treaty policy to include implications of indigeneity, rather than just material disadvantage, assisted the emergence of a fear that Maori might receive material privilege on the basis of race rather than need, which offends principles of equality and equal individual rights.<sup>42</sup> Yet indigeneity adds a purpose to formal education beyond the equipping of individuals for participation in wider society in the same way

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<sup>40</sup> Ibid., 304.

<sup>41</sup> Brash, *Nationhood* (cited).

<sup>42</sup> Durie, "Universal Provision, Indigeneity and the Treaty of Waitangi," 264.

that all citizens might expect. Indigeneity requires education to contribute to the preparation of Maori to participate in Maori society. This is not an abrogation of responsibility by Maori to the state, rather it is the requesting of the state to legitimise and validate Maori knowledge, values and experience. The state might therefore reverse its former policy of requiring the school to pursue an assimilationist objective.<sup>43</sup>

The public suspicion of self-determination also arises from interpretations of the problematic bicultural discourse which heavily influenced public policy during the 1980s and 1990s.<sup>44</sup> While biculturalism offered limited opportunities to extend self-determination, its definition was imprecise and implementation often ill-conceived, giving exalted status to the Treaty of Waitangi in contexts where its relevance was not obvious. Biculturalism could also be seen as a cultural imposition on Pakeha whose association with Maori people and culture was minimal. That in turn may have created a sense of cultural insecurity among the descendants of British and Irish migrants for whom a clear cultural identity to replace those of their ancestors remains unforged.

It is from that cultural insecurity that there is arguably truth in Brash's claim that

much of the non-Maori tolerance for the Treaty settlement process - where people who weren't around in the 19th century pay compensation to the part-descendants of those who were - is based on a perception of relative Maori poverty.<sup>45</sup>

If tolerance for Treaty settlements is based on perceptions of relative poverty rather than the legitimacy of the claims themselves contrasting conceptions of justice become evident. One of those being inextricably linked with the propriety of self-determination and the other having no regard for it.

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<sup>43</sup> Ranginui Walker, *Struggle without end: Ka whawhai tonu matou* (Auckland, N.Z., 1990).

<sup>44</sup> Dominic O'Sullivan, *Philosophical Foundations of Maori-Crown Relations in the Twenty-First Century: Biculturalism or Self-Determination* (2003 cited 6 July 2004); available from <http://www.utas.edu.au/government/APSA/DOSullivanfinal.pdf>.

<sup>45</sup> Brash, *Nationhood* (cited).

The utility of the Treaty of Waitangi to future relationships between the Crown and Maori has been overstated by some Maori and is overstated by the extent of references to it in contemporary legislation.<sup>46</sup> Nevertheless attempts to reduce its significance altogether legitimately concern Maori. That a fundamental affront to the rights of citizenship, which are guaranteed in the Treaty of Waitangi, is likely to proceed into law in the form of the *Foreshore and Seabed Bill* is but one explanation of the legitimacy of Maori wishing to appeal to the Treaty's moral force. Durie explains that:

While it would be unlikely that finite objectives with specific outcomes had been intended in 1840, there is, nonetheless, substantial agreement on the matters that the Treaty was expected to address... Maori people would not be unfairly disadvantaged by the colonising process and could expect to retain their own social and economic systems. Additional rights, as British subjects, would be extended to all Maori people.<sup>47</sup>

It is ironic that on the one hand the *Foreshore and Seabed Bill* breaches the Treaty of Waitangi, but on the other, the shift in political climate is in part explained by public suspicion of an elite tendency to overstate the significance of the Treaty in public life.

In response to the *Nationhood* speech the government created a position of Coordinating Minister: Race Relations with the mandate of reviewing 'targeted policy and programmes'.<sup>48</sup> The review was cited as a government priority with the objective of giving 'ministers and the public assurance that policy is being developed on the basis of need, not on the basis of race'.<sup>49</sup> The government's admission that although not its intention, there is a possibility that some public welfare funding could in fact be being allocated on a racial basis, was a response

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<sup>46</sup> Brash cites the following as examples: *Environment Act 1986, Conservation Act 1987, Education Act 1989, Resource Management Act 1991, Crown Research Institutes Act 1992, Arts Council of NZ Toi Aotearoa Act 1994, and the Hazardous Substances and New Organisms Act 1996.*

<sup>47</sup> Mason Durie, "The Treaty of Waitangi - Perspectives on Social Policy," in *Waitangi: Maori and Pakeha Perspectives of the Treaty of waitangi*, ed. I.H. Kawharu (Auckland, 1989), 280.

<sup>48</sup> Trevor Mallard, *Terms of Reference: Review of Targeted Programmes* (News Release, 25 March 2004 cited 2 April 2004); available from <http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=19258>.

<sup>49</sup> *Ibid.*

to the extent of public alarm evident in the dramatic response to that assertion in public opinion polls.

### **Conclusion**

In 2004 the political process has created greater space for a clash between citizenship and indigeneity and has encouraged a public perception that indigeneity implies rights superior to those of citizenship. Consequently, the cautious acceptance that self-determination previously enjoyed has been officially sanctioned as a target of public suspicion. A populist discourse has emerged around the principles of individualism favoured by liberal democracy. Yet for Maori the re-emergence of assimilation as a subtly implicit objective expressed in the *Nationhood* speech is theoretically challenged by a politics of indigeneity. It is this clash of objective that is the defining characteristic of contemporary Maori policy debate.

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