Differing conceptions of environmental democracy in New Zealand resource management law

Ceri Warnock UNIVERSITY OF OTAGO

Introduction

Present proposals for law reform in NZ would shift the balance towards greater ministerial decision-making in environmental management and are serving to highlight a tension in the law between competing manifestations of democracy. Principles developed in environmental law tend to promote public participation in decision-making through forms of “participatory” or “deliberative democracy”, whereas underlying common law doctrine can reinforce conceptions of “representative democracy” by isolating ministerial decision-making from public participation. This article explains and explores how divergent legal principles and doctrine can impact public participation and pull in different directions by considering the changes proposed by the Resource Legislation Amendment Bill 2016 (NZ). Fundamentally, this article concludes that this tension in the law is problematic and should be explicitly acknowledged and addressed within the present debate and any future debates concerning environmental decision-making.

Proposed reforms

The Resource Legislation Amendment Bill proposes significant changes to a number of NZ’s environmental statutes, including the Resource Management Act 1991 (NZ) (RMA), the primary planning and environmental Act that governs all land, air and water. Three particular themes are apparent in the Bill:

• the first concerns increased ministerial decision-making;
• the second reduces public participation in both plan-making and individual permitting decisions; and
• the third marks a general shift away from judge-led dispute resolution.

The proposals provide various ways to increase ministerial powers to influence the content of local plans. Regulation-making powers of wide scope and a National Planning Template that could impose specific content-requirements on local authority plans would be introduced. Of particular note however are “streamlined planning” processes that would empower the Minister to make decisions about certain plan changes and have the final say in relation to the objectives, policies and rules in those planning documents. This streamlined process could be triggered to “implement a national direction” or “meet a significant community need” among other things.

Under these “streamlined” processes, ministerial decisions could be made on the papers (considering a summary of public submissions and a cost benefit analysis prepared by the local authority among other things). Both the NZ Law Society and the Parliamentary Commissioner for the Environment have submitted that the proposed changes would override local communities’ autonomy in determining how best to manage their environments.

In relation to reduced public participation, the amendments would empower the Minister to prescribe which parties are eligible to be notified of resource consent applications, preclude public notification of certain activities subject to resource consent, and limit the right to appeal to the NZ Environment Court (NZEnvC) in relation to various activities such as residential development on a single allotment. Two new mechanisms for creating local authority plans also constrain full public participation (which hitherto has been the norm). The explanatory note to the Bill acknowledges that all of these measures serve to reduce public participation and in turn, act to limit the “subject community” of the NZEnvC.

The existing role of the judiciary would also be constrained by the amendments. For example, it would no longer be mandatory that a judge chair boards of inquiries into nationally significant projects. Further, ministerial decision-making in relation to local plans (mentioned above) would not be subject to merits appeal before the NZEnvC or appeals on a point of law before the High Court. At present, the NZEnvC hears disputes concerning local authority plans and its decision may be
subject to point of law appeals to the higher courts. But under the proposals, the only recourse for aggrieved parties would be judicial review.

It is important to convey just how radical a change this latter proposal would be. New Zealand has had a specialist town planning and environmental adjudicative body for 90 years, and the function of hearing and determining objections to planning schemes on the merits, and thus approving final plans, has remained intact throughout.11 In 1953, the original ministerial-led town planning board was replaced by an independent appeal board headed by a legally qualified chair, supported by professionally qualified members. The change reflected the desire for the adjudicatory body to be a neutral arbiter and for public access to justice to increase. At the time, parliament stated the need for a body independent from central government (though guided by it) that could fairly determine the difficult balance between private rights and the public good12 and that could travel around the country to be accessible to communities13 — a body that was “much asked for by town-planning authorities” as:

… they like to feel that if there is a mistake another mind can be brought to bear to correct it … they do not want to feel that they are tyrants.14

The present proposals undermine much of this rationale.

Wider themes

The Environmental Defence Society has submitted that many of the proposals will serve to “politicise” resource management decision-making, while diminishing the ability of the wider public to contribute directly to environmental management.15

Certainly, reducing public participation runs counter to international trends in environmental law,16 the general legal culture of NZ,17 and conceptions of the RMA as a “constitutional document”, providing a framework for public discourse and deliberation.18 But these proposals are not unheralded. Rather, they are part of the consistent ideology of the national government. Moreover, moves towards de-judicialising and politicising environmental dispute resolution reflect a tension that is ever-present, not just in NZ but around the world, that is: who should make decisions concerning the environment?

Interestingly, the present proposals and many of the submissions opposing those proposals are demonstrating two conceptually different political ideas about environmental decision-making and dispute resolution. The government’s proposals are based upon the idea that those entrusted with the tasks of governing possess “a subjective right to public power”.19 This conception concerns “representative democracy” and the dominant idea that “the real guarantee is to be found in the electoral and representative system”.20 The second conception, favoured by opponents to the proposals and reflecting core environmental law principles, concerns “participatory” or “deliberative democracy”. Deliberative democracy suggests that “democracy revolves around the transformation rather than simply the aggregation of preferences” and necessitates:

… collective decision-making by all who will be affected by the decision or their representatives: this is the democratic part … and includes decision-making by means of argument offered by and to participants who are committed to the values of rationality and impartiality: this is the deliberative part.21

Deliberative democracy has become one of the “major positions in democratic theory”22 and accords with an idea of government that is “under the obligation to employ [its] power to organize public service”,23 creating institutional conditions that best facilitate participatory democracy.

Importantly, these divergent political ideologies are reflected in the law. Principles of environmental law suggest the need for “broad, inclusive and democratic decision-making processes” as pre-conditions for substantive forms of environmental justice such as distributive justice and justice as recognition.24 Better environmental decision-making is said to flow from increased participation because:

• it results in the receipt of fuller information (including potential effects);
• enables decision-makers to better determine the “public interest”, particularly in relation to discrete, localised, or novel issues; and
• legitimises decisions and reduces possible future challenges.

As evidenced by Principle 10 of the Rio Declaration on Environment and Development and Agenda 21,25 such reasoning points towards “participatory” and “deliberative democracy”. These principles are well-known and not addressed further in this article, but common law conceptions of natural justice — the procedural standards that a reviewing court would hold a decision-maker to — also have considerable implications for access to environmental justice and should be considered by those debating the NZ amendments. However, these common law foundations tend to reinforce conceptions of “representative democracy”, so pulling in the opposite direction to environmental law principles.

Natural justice implications

While the ability for the public to participate directly in environmental dispute resolution will vary depending upon the relevant legislative regime and specific national
legal culture, common law principles of “natural justice” also seek to establish fair procedures for parties’ roles in dispute resolution. But the specific requirements for natural justice are flexible and context-specific and will depend on the public power in question, the effect of the exercise of its use and the nature of the decision-making body. As the Supreme Court of Canada (SCC) stressed in the Attorney-General of Canada v Inuit Tapirisat of Canada case, the very nature of the decision-making body must be taken into account in determining what procedures would be considered fair and appropriate.

Rigorous standards of natural justice are expected from courts and judicial bodies compared to other forms of decision-making processes. Common law doctrine establishes that there is a right to be heard in judicial proceedings, and a right to challenge facts that are in dispute, including expert or technical evidence. Making submissions requires parties to proffer arguments for their stance based on the facts and aligned with the legal tests, and the presumption is for judicial reasons to be given. In the NZ context, the NZEnvC has the statutory power to establish its own procedures, but the fact that it is a court of record and is judge-led influences the approach taken. As Principal Judge Laurie Newhook reports, although the NZEnvC operates at times “with a little less formality … for [example], rules about hearsay [may be relaxed]”, in general it follows traditional civil court processes but without restrictive locus standi rules.

The same standards of natural justice do not necessarily apply to alternate fora. In relation to ministerial decision-making, reviewing courts are slow “to treat the Executive Council or Cabinet as under any duty to follow a procedure at all analogous to judicial procedure”. Absent any statutory requirements to the contrary, the SCC held that there was no need for the Executive Council to hold any kind of a hearing or even to acknowledge the receipt of a petition, and executive decision-makers are not required to give reasons. The rationale is that administrative decision-making should not be shackled with legal “formalism” taken from adjudication — ministers and administrative bodies have developed different approaches to resolving disputes to those developed by the courts:

Cabinet is not a fact-finding body in the ordinary sense. It is not accustomed to conducting hearings or receiving representations directly from public interest groups or private individuals … [thus] it is inherently improbable that in delegating the power of decision … the [legislature] contemplated the injection of the requirements of natural justice … into the decision-making process.

As stated above, the nature of the claim will influence conceptions of procedural fairness. If individual rights are impacted by decision-making, higher standards of natural justice are expected compared to decision that can be categorised as “policy decisions”, and resource management planning would fall into the latter “policy” category. Even if rights are impacted, there is no common law requirement for an oral hearing before the Minister. At its highest, the test is that the impacted individual should be able to see any evidence placed before the Minister that adversely impacts upon their rights and be able to respond — the Minister should not make a decision in ignorance. In practice, however, this doctrine will be of little use to those wishing to challenge the Minister’s decision on local plans. There are no constitutionally enshrined rights to environmental protection in NZ — those wishing to challenge ministerial decisions that impact upon the conservation of nature, arguing for a more comprehensive role in decision-making, will struggle to do so through a rights-based route. There is the possibility that adversely impacted property rights would found a basis for claiming greater standards of natural justice, but in a “policy-based” scenario, a reviewing court may require evidence of particular and individualised damage over that suffered by the general public.

The quality and type of “evidence” that suffices for ministerial decision-making is also entirely different to court-based adjudication. Absent clear statutory requirements, ministers will not be expected to base decisions on the “best available information”, and even with such a statutory mandate, the NZ courts have been unwilling to impose a high test — rather the Minister retains discretion as to what would be reasonable information to obtain in the circumstances. Further, ministers may rely upon in-house experts. Ministry employees may advise the Minister and there would be no common law requirement to disclose the advice given because knowledge of ministerial officials is deemed in law to be the Minister’s knowledge and “decision makers bear no responsibility to disclose matters that are particular to the decision-maker.” In-house advice may not be objective and may merge factual information, opinion and judgment of the issues, but there would be little scope for challenge. Moreover, confidentiality may apply to any communication between the Minister and external advisers. Legislation in NZ prioritises the need for the free flow of advice between ministers and civil servants, over the desirability of that communication being made publicly available. The Official Information Act 1982 (NZ) protects these communications as privileged — one of the few exceptions to the general purpose to make all official information freely available (although this protection can be overruled by persuasive public interest arguments to the contrary).

Ministers may be under a statutory requirement to “consult” affected persons and a duty under the Treaty of
Waitangi to consult with Maori iwi that are impacted. However, consultation does not equate to negotiation and does not require the consulting body to adopt the views of the other. Rather, the highest formulation of the test means that the consulting party “must keep its mind open and be ready to change … while quite entitled to have a working plan already in mind”. Pre-determination is to be expected with ministerial decision-making, again allowing political ideology to dominate, so providing a sharp contrast to judge-led adjudication.

Deliberative democracy and adjudication

The political scientist Jon Elster has drawn analogies between court-based adjudication and “deliberative democracy”. He argues that the forum or setting for deliberative democracy, “as a set of institutional conditions that promotes impartiality”, is important, and that deliberative democracy (ie, the procedure of debating one another before an audience) is analogous to “adversarial proceedings in the courtroom … the interchanges can serve to weed out falsehoods and inconsistencies and thus enable the [decision-maker] to make a good decision”. Deliberative democracy is said to foster political engagement and to provide “a basis for self-respect that encourage the development of a sense of political competence, and that contribute to the formation of a sense of justice”. Further, the public are said to “prefer institutions in which the connections between deliberation and outcomes are evident to ones in which the connections are less clear”. Judicial views mirror political science thinking about deliberative democracy. Megarry J described “the feelings of resentment” that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result, whereas the UK Supreme Court referred to participation in decision-making as fostering human dignity and the rule of law. In the judgment of the court, procedural requirements that decision-makers should listen to persons who have something relevant to say “promote congruence between the actions of decision-makers and the law which should govern their actions”. The rule of law values identified by the UK Supreme Court — promoting participation and thereby fostering responsive decision-making and respecting human dignity — are normative in environmental justice and promoting greater participatory democracy in environmental management has been a dominant theme in international treaty-making, case law, and the writing of jurists over the last three decades.

Conclusion

Taken in their totality, the present NZ proposals appear to be a contradiction to well-established environmental law principles — principles that promote “participatory” or “deliberative democracy” in environmental management. Importantly, the greater use of ministerial decision-making under the Resource Legislation Amendment Bill will limit public participation. While ministerial decision-making may be subject to judicial review, wider legal doctrine serves to reinforce conceptions of “representative democracy” in that scenario so creating a direct tension with environmental law principles. In conclusion, the importance of the law — and this legal tension in particular — should be expressly acknowledged and addressed in political debates concerning the choice of environmental decision-maker.

Ceri Warnock
University of Otago

Footnotes

2. Above n 1, cl 52.
3. See the new s 80C(2), above n 1, cl 52.
4. Above n 1, new Sch 1, Pt 5, cl 83.
5. Above n 1, cl 151.
6. Above n 1, cll 120–22 and 125.
7. Above n 1, cl 135.
8. Above n 1, new Sch 1, Pts 4 and 5.
9. Above n 1, cl 72.
10. Above n 1, new Sch 1, Pt 5, cl 93.
13. 299 NZPD 689.
14. 299 NZPD 799.
New Zealand has requirements for full participatory democracy at all stages of the law-making process.


Above n 19, p 457.


Above n 21, p 1.

Above n 19, pp 457–58.


Rio Declaration on Environment and Development, above n 16.

R v Secretary of State for the Home Department; Ex parte Daly [2001] UKHL 26; and CREEDNZ Inc v Governor-General [1981] 1 NZLR 172 at 188.


Above n 27.

See R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co [1924] 1 KB 171; and PA Joseph Constitutional and Administrative Law in New Zealand (4th edn) Brookers, 2014 p 1024.


R (West) v Parole Board; R (Smith) v Parole Board (No 2) [2005] 1 WLR 350; [2005] UKHL 1 at [31].


Russell v Duke of Norfolk [1949] 1 All ER 109 at 118.

CREEDNZ Inc v Governor-General, above n 26 at 178.

Above n 27.

Public Service Board (NSW) v Osmond (1986) 159 CLR 656; (1986) 63 ALR 559; BC8601404.


CREEDNZ Inc v Governor-General, above n 26 at 188.


Dagamayasi v Minister for Immigration [1980] 2 NZLR 130.

Treaty of Waitangi obligations may provide some protections to Maori, but this complex issue is not addressed in this article.

See cases stemming from Cooper v Wandsworth Board of Works (1863) 14 CBNS 180.


The only routes to challenge would be via “mistake of fact” or “implied mandatory considerations” arguments.

Above n 46, at [40]-[41].

Carlton v Commissioners of Works [1943] 2 All ER 560; and Bushell v Secretary of State for the Environment [1980] 2 All ER 608 at 613.

Constitutional and Administrative Law in New Zealand, above n 29, p 1050.


For a classic example, see above n 42 at 136–37.

Air New Zealand Ltd v Commerce Commission [2004] 3 NZLR 550; BC200469035.

Official Information Act 1982 (NZ), Long Title and ss 4.

Official Information Act 1982 (NZ), ss 9(2)(g) and 9(1).

Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671 at 675.

CREEDNZ Inc v Governor-General, above n 26; and Back Country Helicopters Ltd v Minister of Conservation [2013] NZHC 982; BC201363487.

Above n 21, p 8 and Ch 4.

Above n 21, p 2.


Above n 60, p 73.


R (Osborn) v Parole Board; R (Booth) v Same [2013] UKSC 61, at [67]-[72].

Above n 63, at [71].

Above n 24.

Above n 24.