JUDICIAL ENFORCEMENT OF NEW ZEALAND’S RESERVED PROVISIONS

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The issue of prisoner voting – or, rather, the issue of prohibiting sentenced prisoners from voting – has been a somewhat unlikely touchpaper for significant constitutional developments in New Zealand. In 2015, the High Court formally declared Parliament’s 2010 decision to remove the right to vote from sentenced prisoners inconsistent with the New Zealand Bill of Rights Act 1990 (NZ) (NZBORA). That decision represented the judiciary’s first use of this declaratory remedy, some 25 years after the NZBORA’s enactment. A full bench of the Court of Appeal subsequently upheld the declaration, while the Supreme Court will rule on the Crown’s further appeal of that decision at some point next year.

The issuance of a declaration of inconsistency marks a formal judicial finding that the legislation at issue limits one of the NZBORA’s guaranteed rights (the s 12(a) right to vote) in a way that cannot be “demonstrably justified in a free and democratic society”. It does not, however, affect the ongoing validity of the legislation at issue; rather, its primary purpose “is to draw to the attention of the New Zealand public that Parliament has enacted legislation inconsistent with a fundamental right,” after which “[a]ny political consequences ... can be debated in the court of public opinion, or in Parliament.” However, running parallel to this declaration litigation is another challenge to the 2010 law that does challenge its validity. It centres on s 268 of the Electoral Act 1993 (NZ), which entrenches certain aspects of New Zealand’s electoral laws by requiring a special, more difficult method of amendment or repeal. While the courts have held that this entrenchment provision does not in fact apply to the specific statutory provision amended in 2010, they did indicate their willingness to uphold its requirements had it done so. Consequently, the courts have telegraphed clearly that failure to comply with a specific enactment procedure set out in legislation provides grounds for invalidating an Act of the New Zealand Parliament.

THE ELECTORAL ACT’S ENTRICHEMENT PROVISION

Section 268 of the Electoral Act 1993 identifies various statutory provisions governing aspects of New Zealand’s electoral process (the “reserved provisions”) and states that these may only be altered by either a vote of 75% of all MPs, or a majority vote at a referendum. This entrenchment provision dates back to 1956, when MPs unanimously agreed that certain matters should be placed beyond a

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4 See New Zealand Bill of Rights Act 1990 (NZ) s 5.


8 Electoral Act 1993 (NZ) s 268(1). The matters identified are the length of the parliamentary term, the makeup of the Representation Commission that establishes electoral boundaries, the formula for determining how many electorates there will be and how many people must be in each, the method of voting and (as shall be seen) the voting age.

9 Electoral Act 1993 (NZ) s 268(2).

10 Electoral Act 1956 (NZ) s 189.
Comments

bare parliamentary majority’s power to change. However, s 268 and its predecessor were not themselves protected by requiring any special amendment procedure. That was because, as the Attorney-General informed Parliament at its passage, then current constitutional theory meant “Parliament cannot bind successive Parliaments, and each successive Parliament may amend any law passed by a previous Parliament.” Consequently, entrenchment originally was seen to impose a purely political/moral restraint on legislative behaviour; if a future Parliament were to alter a reserved provision other than in accordance with the entrenchment provision’s requirements, the resulting legislation nevertheless would remain valid law that a court must apply.

However, views on this matter have shifted in the subsequent 60 years. Courts in South Africa and Australia, as well as the Privy Council, have declared invalid legislation enacted in breach of some particular procedural steps specified by an earlier Parliament. The House of Lords also has indicated it would do likewise. New Zealand’s judiciary likewise has issued obiter statements that they regard themselves as possessing the ability to enforce any procedural requirements Parliament may impose on its own law-making power. But the issue never came squarely before the New Zealand courts, as Parliament acted with a greater than 75% majority on each of the five occasions since 1956 that it amended a reserved provision. No judge in New Zealand had therefore been asked to invalidate legislation on the basis it was enacted inconsistently with s 268 – until now.

THE PRESENT LITIGATION

The challenge to the validity of Parliament’s 2010 ban on prisoner voting was led by a long-term prisoner and self-educated serial litigant, Arthur Taylor, joined by several other inmates. Understanding the nature of his challenge requires some background discussion of New Zealand’s electoral law.

The ability to vote in New Zealand depends on first being enrolled to vote. The right to enrol is conferred by s 74 of the Electoral Act 1993, and extends to all citizens and permanent residents over the age of 18 who have at some point resided continuously in New Zealand for 12 months or more. However, s 81 of the Electoral Act 1993 then imposes a number of disqualifications from enrolling, which Parliament amended in 2010 by a vote of 63–58 to include anyone serving a current sentence of imprisonment. Consequently, the effect of that change to s 81 was that some persons who previously could enrol to vote under s 74 (and so subsequently cast a ballot) no longer could do so until released from prison.

Mr Taylor challenged the validity of this legislative change for being an amendment to a reserved provision without the requisite 75% support from MPs. He relied upon s 268(1)(c) of the Electoral Act 1993:

This section applies to the following provisions (hereinafter referred to as reserved provisions), namely ...

section 74, and the definition of the term adult in section 3(1), and section 60(D), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote.

12 (26 October 1956) 310 NZPD 2839. See Paterson’s Freehold Gold-Dredging Co v Harvey (1909) 28 NZLR 1008 (SC); Ellen St Estates v Minister of Health [1934] 1 KB 590 (CA).
13 (26 October 1956) 310 NZPD 2839–2840; (26 October 1956) 310 NZPD 2852.
14 Harris v Minister of the Interior [1952] TLR 1245 (SCSA).
15 Attorney-General (NSW) v Trehowan (1931) 44 CLR 394 (HCA); Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd (1958) 100 CLR 397; 32 ALJR 306; Attorney-General (WA) v Marquet (2003) 217 CLR 545; 78 ALJR 103; [2003] HCA 67.
According to Mr Taylor, this provision entrenches all of s 74, meaning that a “backdoor” amendment by way of s 81 also could only take place by way of the procedure specified in s 268(2). Against this, the Crown argued that s 268(1)(e) only entrenches s 74 insofar as it permits 18-year-olds to enrol to vote. Consequently, any other change as to who may enrol to vote can still be made via ordinary parliamentary law-making procedures.

This matter first came before the High Court prior to the 2014 general election as an application for an interim relief,19 and subsequently returned for a full substantive hearing20 (from which an appeal went to the Court of Appeal).21 On all three occasions, the courts favoured the Crown’s reading of s 268(1)(e), confining its application to that part of s 74 which establishes 18 as the age at which people may enrol to vote. This interpretation was based upon the legislation’s clear text and purpose, taking into consideration the legislative background to the original enactment. Consequently, Parliament was entitled to prohibit (or allow) sentenced prisoners from enrolling to vote through ordinary parliamentary law-making procedures. Indeed, as the Court of Appeal noted, the effect of this interpretation is that the votes of 91 MPs would be required to permit 16 or 17-year-olds to enrol to vote, but just 61 MPs could in theory disqualify all Mori or other minority group from doing so.22

**WHAT WAS NOT AT ISSUE IN THE LITIGATION**

While Mr Taylor and his fellow prisoners ultimately were unsuccessful in having the 2010 legislation declared invalid, the most important aspect of the challenge lies in what was not argued. At no point was the courts’ power to declare an enactment invalid because of a failure to comply with the s 268 entrenchment provision debated. In a footnote, the High Court summarily dismissed the point as being “trite”,23 while the Court of Appeal simply noted:

Some aspects of the electoral system are considered to be of such fundamental importance that they should not be subject to political whim or partisan attitudes. These provisions are said to be “entrenched” or “reserved”, in that they may only be repealed or amended by a 75 per cent “super-majority” of all members of the House of Representatives, rather than a simple majority. This restriction applies to both direct repeal or amendment and implied repeal through enacting later inconsistent legislation.24

Indeed, the issue was considered to be so uncontroversial that the Crown did not even raise it in their pleadings before any of the three courts, instead accepting that if s 74 were entrenched in its entirety then the inevitable consequence would be that the 2010 amendment was invalid law.

This apparent consensus on the efficacy of legislative entrenchment is perhaps somewhat surprising. As noted above, constitutional orthodoxy at the point of the reserved provision’s original enactment dictated that this move could not legally prevent a future parliament from legislating as it wished. The Court of Appeal’s recent declaration of inconsistency decision (referred to at the start of this comment) echoed the basis for this earlier view:

To say that government is a collaborative enterprise is to recognise, as even Dicey did, that Parliament does not exercise arbitrary power. It experiences constraints of various kinds. Those that concern us are legal in nature. The principal such constraint is the rule that Parliament cannot bind its successors. That is a necessary corollary of Parliament’s continuing supremacy, but it is also a rule of the common law.25

However, that judgment then goes on to affirm that “Courts may also scrutinise legislation to verify that it is ‘enacted law’ to which obedience is due”,26 before approvingly citing Sir William

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Wade's claim that:

"It is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact."

Consequently, the legal facts on the ground appear to have changed. Philip Joseph has noted, prior to Mr Taylor's proceedings, that "the dicta in the New Zealand cases [on the enforceability of entrenchment provisions] are uncluttered and free of the theoretical sparring of the neo-Dicyean/new view debate." Another way of putting this might be that our courts see a job that they think needs doing – monitoring the House of Representative's adherence to legislatively imposed law-making procedures – and have decided that they ought to do it. The Crown has acquiesced with this decision by simply not disputing it in pleadings; and Parliament has not viewed the development as being an unwarranted intrusion upon its constitutional role, as no question of privilege has been raised during court proceedings or referred to the Privileges Committee. Thus it is that New Zealand's constitution has developed and the nature of parliament's sovereign law-making power has been redefined.

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