Environment Canterbury legislation

Philip Joseph, the University of Canterbury finds the legislation a constitutional affront in a paper written for the NZLS Rule of Law Committee

This article documents four rule of law issues raised by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act). These concern provisions of the Act which:

- are ad hominem;
- apply retrospectively to the detriment of affected individuals and organisations;
- deny individuals and organisations the right of access to the Environment Court for protection of their rights or interests; or
- authorise statutory regulations that suspend sections of the Resource Management Act 1991 (the RMA) that regulate activities of regional councils.

The article raises four additional concerns that also broach rule-of-law issues. These additional matters compound concerns over the ECan legislation.

RULE OF LAW STANDARDS

The concept of the rule of law prescribes the formal requirements of legal norms. The law should: be general and prospective in operation; be relatively stable, certain and accessible; and apply equally to all. These requirements are defining criteria of a just and efficacious legal system, "distinguish[ing] law as an autonomous body of rules that command the general obedience of the people": Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed), Wellington, Thomson Brookers, 2007, at 147. Each of the above characteristics is a defining criterion of legal norms. However, the two re-eminent requisites are that law be general and prospective in operation.

AD HOMINEM LEGISLATION

The Act fails the first requirement that law be general in operation. Part 2 of Sch 2 to the Act is ad hominem, not general. Part 2 is titled, "Hurunui WCO application". Clauses 6-15 under Part 2 are specifically directed at the application for a water conservation order (WCO) over the Hurunui River. Clause 6 defines "Hurunui WCO application" as meaning "the WCO application in respect of the Hurunui River made under section 201 of the RMA on 30 August 2007 jointly by the New Zealand Fish and Game Council, and the New Zealand Recreational Canoeing Association". Furthermore, it defines "Hurunui report" as meaning "the report on the Hurunui WCO application by a special tribunal under section 208 of the RMA dated 14 August 2009".

Clause 7 of Part 2 compounds the rule-of-law objection. Clause 7 is retrospective in effect and denies access to the Environment court for the resolution of environmental protection matters. It reads:

> "7 Jurisdiction of Environment Court removed in relation to Hurunui WCO application
>
> Despite anything in the RMA or any other enactment, on and from the commencement date, the Environment Court does not have jurisdiction to conduct, or to continue to conduct, an inquiry in respect of the Hurunui report."

The RMA prescribes quite elaborate procedures for processing applications for WCOs (ss 201-217). Any person may apply to the Minister for the Environment to initiate the process for making a WCO. The Minister, after making such inquiries as may be necessary, must appoint a special tribunal to hear and report on the application. Public notification must be given and submissions called for. The tribunal must conduct a public hearing at which the applicant (or applicants) and submitters may be heard and present evidence. The tribunal must take into account certain matters and, as soon as reasonably practicable, prepare and notify a report recommending that the application be granted or declined. A recommendation to grant the application must include a draft WCO. The applicant(s), the submitters, the Minister, the relevant regional or territorial authority, and any other person granted leave, has then the right to make a submission to the Environment Court on the tribunal's report (RMA, s 209). The Court must conduct a public inquiry into the report and the submissions on it, and report to the Minister recommending that the tribunal's report be accepted (with or without modifications), or rejected. A WCO is made as a statutory regulation on the recommendation of the Minister.

The Hurunui WCO application is singled out for special treatment. Clause 7 and the associated provisions of Part 2 oust the above procedures for the Hurunui application, notwithstanding that much of the statutory process for making a WCO had been completed. The combined functions of the special tribunal and the Environment Court are now placed in the hands of the appointed ECan commissioners, who replaced the elected councillors. They — not the tribunal and the Court — must conduct the hearing into the Hurunui WCO application (or revised application). The applicants and persons who made submissions to the special tribunal (but no other person or body) are granted a right of hearing. The commissioners must then report on the application, either granting or declining it. A report granting the application must include a draft WCO. Under this arrangement, the Environment Court is relieved of any independent review function.

Governments resort to ad hominem legislation when expedience speaks loudest ... Such legislation may be vigorously defended politically but it does nothing to promote respect

for the law" (Joseph, at 213). Part 2 of Sch 2 of the Act overrides the due process of law by prescribing special procedures for a named WCO application. It withholds rights to be heard by a special tribunal and the Environment Court, and is avowedly ad hominem. Such legislation denies the equal protection of the law, and is constitutionally repugnant.

The applicants (the New Zealand Fish and Game Council, the North Canterbury Fish and Game Council, and the New Zealand Recreational Canoeing Association) might rightly feel aggrieved, that they have been deprived of their legal rights and protections. So, too, might the parties who made submissions to and appeared before the special tribunal and have since been preparing for appearance before the Environment Court. They might be forgiven for believing that the legislation had callous intent. These persons and organisations committed considerable resources to preparing and presenting their cases to the tribunal, all for nought.

The ECan Act fails the first and also the second requirement of the rule of law; that law be prospective in operation.

Part 2 of Sch 2 is either gratuitous or disingenuous. Why was it considered necessary? The Hurunui WCO application (or any other WCO application) is unrelated to the statutory purpose. The Act was passed under urgency to rectify systemic governance issues affecting water allocation in the Canterbury region (s 3(b)). Regional councils, however, have no role in deciding WCOs. The decision-making process reserves to them, at most, a minor, residual role. They may exercise a right to be heard and make submissions in any Environment Court hearing on a WCO application, which, if granted, would affect their region (RMA, s 211).

RETROSPECTIVE LEGISLATION

The ECan Act fails the first and also the second requirement of the rule of law; that law be prospective in operation. The pith of the Act is to make the substituted procedures for ECan decision-making retrospective. This is so for decision-making on the Hurunui WCO application, and generally for decision-making on Ecan's regional policy statement and regional plans.

Ad hominem legislation is usually reactive and almost always retrospective. Part 2 of Sch 2 dealing with the Hurunui application is wholly retrospective in overriding the statutory procedures for WCOs. The applicants lodged their WCO application in August 2007. The application was supplemented by further information provided to the minister in March 2008. In August 2008, the minister appointed a special tribunal to hear and report on the application. In November 2008, the tribunal publicly notified the application and called for submissions. The submission period closed in February 2009. Directions concerning the pre-circulation of expert evidence were served on the applicants and the hearing commenced in March 2009. The applicants and submitters presented their evidence and submissions, and the tribunal completed and forwarded its report to the minister, the applicants and submitters in August 2009. From then until the passage of the ECan Act on 12 April 2010 (the assent date), the parties had been preparing for the Environment Court hearing.

The retrospective and ad hominem modus operandi extends beyond the Hurunui WCO application to embrace the entire policy functions and decision-making of the regional council. Schedule 1 to the RMA prescribes detailed procedures for the preparation and making and/or amendment of a regional policy statement and plans. These procedures address: public notification of proposals, rights of consultation, the making of submissions, the requirements of a hearing, the making and notification of a decision, appeals to the Environment Court, and public notification of an approved policy statement or plan. These procedures promote public participation in local government in accordance with the democratic mandate of elected regional councils. They apply throughout all the regions of New Zealand, except Canterbury, where they are now ousted.

Sections 64–69 of the Act confer new decision-making functions and powers on the ECan commissioners. The exercise of these functions and powers excludes all recourse to the Environment Court. Decisions on Canterbury's Regional Policy Statement (RPS) and regional plans lie with the commissioners, who exercise all the powers of regional government. The RPS provides an "overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region" (RMA, s 59), while regional plans "assist a regional council to carry out its functions to achieve the purpose of [the RMA]" (RMA, s 63(1)). Where hearings have been concluded on proposed changes to Canterbury's RPS or regional plans, the commissioners can make decisions without calling for further submissions or granting a further hearing.

The introduction of a new legal test compounds the absence of a right of rehearing before the Environment Court. In matters of regional government, the commissioners must have regard to the "vision and principles of the CWMS" (ECan Act, s 63). The "CWMS" means the non-statutory Canterbury Water Management Strategy developed by the Canterbury Mayoral Forum as a framework for water management in the region. Now, submitters have only an attenuated right of appeal to the High Court on questions of law (ECan Act, s 66). Formerly, the right of appeal to the Environment Court was on the merits, with the proceeding constituting a rehearing on the evidence de novo.

Retrospective, ad hominem legislation can be justified in certain limited situations (see Burrows and Carter, *Statute Law in New Zealand* (4th ed), Wellington: LexisNexis, 2009, at 586-590). This is not one of them. The ECan Act offends against the rule of law and basic principles of good administration. For Friedrich Hayek, *The Road to Serfdom*, London: Routledge, 1944, p 72, the rule of law meant that:

> [G]overnment in all its actions [must be] bound by rules, fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

To stop a statutory process after it has been commenced breaches Hayek's imperative that the law must be "fixed and announced beforehand". Section 18(1) of the Interpretation 1999 codifies the usual expectation where a statutory process is put in train:

> The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.

Section 18(2) makes explicit what is implicit in subs (1):

> A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

The rule-of-law imperative that statutes should be given prospective effect is rooted in the common law presumption that, in the absence of clear statutory language to the contrary, Parliament does not intend its legislation to apply retrospectively. This rule of statutory interpretation "rests on a presumption of commonsense in a well-ordered and civilised society" (*Barber v Pidgen* [1937] 1 KB 664 at 678 per Scott LJ). That observation throws into sharp relief the retrospective orientation of the ECan legislation.

HENRY VIII CLAUSE

Section 31 of the Act is a form of Henry VIII clause for according primacy to subordinate (delegated) legislation over primary legislation. Under these clauses, Parliament may turn on its own supremacy and abdicate to the political executive. With apologies for quoting my own words (Joseph, at 503):

> Dicey observed it was the law that no person or body may override or set aside the legislation of Parliament. His statement was in oversight of "Henry VIII clauses", which accord primacy to subordinate legislation over Acts of Parliament. Parliament may abdicate to the political executive by empowering the delegated authority ... to make regulations suspending, amending or overriding primary legislation.

Section 31 authorises statutory regulations made by Order in Council on the recommendation of the minister. Regulations made under this section enable the minister to pick and choose what law will (or rather will not) apply to the commissioners. These regulations may suspend the operation of specified provisions of the RMA which regulate the functions and powers of regional councils. Such regulations need not be of transitional effect only, as the title of the section ("Transitional regulations") suggests. Section 31 regulations may be made "for a specified period of time or in specified circumstances" (s 31(b)(1)).

Henry VIII clauses are constitutionally permissible where they are used as transitional measures to cover unforeseen contingencies. They may facilitate consequential adjustments to the parent Act or other Acts where teething problems in legislation are encountered. Such clauses have pragmatic justification when used in this way. However, Henry VIII clauses are constitutionally objectionable where they are used for general legislative purposes.

The objections to according primacy to subordinate legislation have long been noted. In 1932 a United Kingdom Committee on Ministers' Powers (the Donoughmore Committee) reported it could not "but be regarded as inconsistent with the principles of parliamentary government that the subordinate law-making authority should be given ... power to amend a statute which has been passed by the superior authority" ((1932) Cmd 4060 at 59). In *Reade v Turner* [1959] NZLR 996 at 1003 (CA), Turner J described such a power as a "blank cheque" for ratifying in advance whatever the executive should choose to do by regulation. The Muldoon Government (1975-84) exhibited an unhealthy interest in Henry VIII clauses, using them as a "blank cheque" for perfecting Muldoon's commitment to govern by regulation (see Joseph, at 504).

The Muldoon Government (1975-84) exhibited an unhealthy interest in Henry VIII clauses

The Legislation Advisory Committee exercises a watching brief over the processes and content of legislation. Its general guidelines for legislation recommended that Henry VIII clauses might be used only in "exceptional circumstances" (*Guidelines on Process and Content of Legislation* (2002 ed, with 2003 supplement, para 10.1.2). The Committee recorded the situations that might justify their use but the ECan Act fits none of those situations. The legislation is fraught law, exacerbated by the speed and lack of consultation with which it was passed into law.

ACCESS TO THE COURTS

Access to justice is a fundamental precept of the rule of law and a right deeply ingrained in the common law. Lord Woolf condemned a legislative attempt to tamper with the right of access under a privative clause, as being "fundamentally in conflict with the rule of law" (Lord Woolf, "The Rule of Law and a Change in the Constitution" [2004] CLJ 317, 328).

The ECan Act removed access to the Environment Court for proposed changes to the RPS and regional plans and applications for WCOs in the Canterbury region. Environmental sustainability and resource management in New Zealand are grounded in the right of access to this court. An Environment Court appeal is in the nature of a rehearing on the evidence de novo (RMA, ss 276(1A), 290 and 290A). No onus of proof applies to a party on appeal and there is no presumption in favour of the decision appealed against (*Leith v Auckland CC* [1995] NZRMA 400; *Hibbit v Auckland CC* [1996] NZRMA 529). The appeal is a merits-based inquiry and the Environment Court has the same powers as the body from which the appeal is made. The right of appeal is critical to the resolution of environmental and resource management issues but the appeal is no longer an option for Canterbury and its regions. The Act replaced Environment Court appeals with a right of appeal to the High Court that is restricted to questions of law.

The right of access to the courts is one of the fundamentals of a civilised society under the rule of law. Lord Cooke commented that the legal system was "built on two complementary and lawfully unalterable principles: the operation of

a democratic legislature and the operation of independent courts" (R Cooke, "Fundamentals" [1988] NZLJ 158, 164). He doubted whether even Parliament could restrict the principle of judicial independence or deprive citizens of their right of access to the courts. In *NZ Drivers' Association v NZ Road Carriers* [1982] 1 NZLR 374, 390 (CA), he stated (delivering the judgment of the court):

> Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights.

The Environment Court is the specialist body tasked with adjudicating in cases under the RMA. It is this body which dispenses justice in environmental and resource-management matters. But Cantabrians are no longer deserving of access to the Court in matters affecting their region. The quality of justice meted out might seem slightly strained.

Why was it necessary or desirable to foreclose access to the Environment Court? That Court is the linchpin of environmental sustainability and resource management in New Zealand. Why should citizens in the Canterbury region be forced to accept lesser rights of local government than other citizens? Simply to pose the question reveals the objection to the legislative scheme.

OTHER ISSUES

Legislative speed

Twenty years ago, Burrows and Joseph warned about the "unseemly haste" of governments hell-bent on getting their legislation enacted (JF Burrows and PA Joseph, "Parliamentary Law making" [1990] NZLJ 306). They considered it "disturbing" to find how frequently urgency was taken on legislation. Little has changed. The ECan legislation had the element of surprise because it was introduced under urgency and forced through all three readings in the one sitting.

In the first edition of *Unbridled Power?*, Wellington: OUP, 1979, at 94, Geoffrey Palmer described law-making as a "solemn and deliberate business" (an observation Palmer carried through in later editions). Law-making ought to allow, he wrote, time for "reflection and sober second thought". There was no evidence of reflection and sober second thought with the ECan Act. Rushed legislation invariably unravels around the margins. The rule of law issues canvassed here indubitably speak to that observation.

Democratic decision-making

Democratic decision-making in local government is ingrained in the national psyche and a legitimate expectation of the citizenry. Its suspension in Canterbury for a period in excess of three and a half years is, itself, a rule of law issue. Representative democracy and independent courts are the twin pillars of the legal system. The abrogation or suspension of the former, even at local government level, has menacing implications. The suspension of local body elections in Canterbury until (at the earliest) October 2013 is a period longer than the maximum term of Parliament fixed at three years (Constitutional Act 1986, s 17(1)). In the past, the New Zealand public has unreservedly voted down referenda proposals to extend Parliament's life beyond three years, which compounds the gravity of the situation under the ECan Act.

Disproportionate response

The legislative response to Environment Canterbury's governance issues seems disproportionate and excessive. Here are three illustrations: first, decision-making over WCOs in Canterbury is now vested in the ECan commissioners. But regional councils have no function in WCO decision-making. They have only a right of appearance before the Environment Court to make submissions. Secondly, the Act denies citizens access to the Environment Court over changes to Canterbury's RPS and regional plans. Only rights of access to the High Court on questions of law remain. Thirdly, all regional governance and decision-making is now vested in the commissioners. This legislative response far exceeds the concerns that prompted the government intervention.

The impetus for government intervention concerned water issues and a lack of a water-management strategy in the region. These concerns could have been addressed in a measured and proportionate way. The Act specifically identifies the legislative purpose: "to address issues relevant to the efficient, effective, and sustainable management of fresh water in the Canterbury region" (s 3(b)). Consequently, each of the legislative responses outlined in para 35 would resoundingly fail the proportionality test that is used under the New Zealand Bill of Rights Act 1990 to justify reasonable limits on the rights affirmed. For a legislative response to be reasonable and proportionate, it must impact on rights or interests no more than is reasonably necessary to achieve the desired social objective. A proportionate response to concerns about Environment Canterbury would have been to remove water issues from its brief, establish a separate authority to develop a Water Management Strategy, and leave the elected councillors to attend to their other regional-council tasks.

Subterfuge

There are elements of subterfuge in the drafting of the Act. Its title contains reference to "Temporary Commissioners", suggesting that the current arrangement is transitional and temporary. But it is not. The arrangement will remain in force for longer than the life of any one Parliament. Furthermore, s 31 of the Act is titled, "Transitional regulations", but there is nothing overtly transitional about them. Section 31 authorises regulations "for a specified period of time or in specified circumstances". These regulations may suspend sections of the RMA applying to regional councils for the duration of the current arrangement ("in specified circumstances").

CONCLUSION

What should be done about the legislation? Repeal it and start again. Reinstate the elected councillors and, if needs must, establish a separate authority to oversee water allocation within the region. Reinstate the right of appeal to the Environment Court for regional decision-making and return to the status quo for WCOs. These would be the preferable outcomes but they are not going to happen. The political decision has been made and will not be revisited. The die is cast. But we should not be blinded to the cost of the government intervention. The two lasting implications will be the negative impact on local government democracy and the rule of law. □