

“Declarations of Inconsistency” under the New Zealand Bill of Rights Act 1990

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As in the United Kingdom, the question of whether prisoners should be permitted to vote has generated considerable constitutional interest for New Zealand. Largely that is due to the efforts of a long term prisoner and “jailhouse lawyer”, Arthur Taylor, who has mounted something of a one-man campaign against 2010 legislation that stripped the right to vote from all sentenced prisoners. In Mr Taylor’s latest sortie, *Attorney General v Taylor* [2017] NZCA 215, the New Zealand Court of Appeal has upheld a High Court decision (*Taylor v Attorney General* [2015] NZHC 1706) to issue the following formal declaration:

Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990 and cannot be justified under s 5 of that Act.

(Section 80(1)(d) reads: “The following persons are disqualified for registration as electors ... a person who is detained in a prison pursuant to a sentence of imprisonment imposed after [16 December 2010].”)

Not only is this an important judicial statement on the substantive issue of whether prisoners should be entitled to vote, it was issued despite the New Zealand Bill of Rights Act (NZBORA) containing no express power to make such formal “declarations of inconsistency” (as they are termed in New Zealand). It thus represented a significant development in New Zealand’s constitutional arrangements.

However, the Crown vigorously opposed this change. It did not disagree with the High Court’s substantive analysis of the underlying issue. The Crown has never attempted to justify removing the NZBORA guaranteed right to vote from all sentenced prisoners; indeed, back in 2010 the

Attorney General explicitly notified the House of Representatives under the NZBORA, s 7 that no such justifications existed.

Nor was the Crown worried about the declaration's effect on prisoners' ability to vote at subsequent elections. The NZBORA, s 4 is clear; where another enactment is inconsistent with its rights guarantees, that other enactment remains valid law. No (additional) prisoners could vote as a consequence of the formal declaration of inconsistency.

Instead, the Crown's complaint was that the High Court had provided a remedy (a formal declaration of inconsistency with the NZBORA) that simply does not exist. It took that point to the Court of Appeal, where the Speaker of the House of Representatives intervened with concerns about the High Court's treatment of parliamentary proceedings when issuing its declaration.

It is a measure of the appeal's importance that it was heard by a five-member bench instead of the usual three. And it is a measure of the strength of the Court's views that it unanimously ruled against the Crown on (virtually) all matters, as well as rejecting the Speaker of the House's concerns that the ruling in the High Court improperly intruded into parliamentary terrain.

Jurisdiction to grant a declaration of inconsistency

First, the Court of Appeal rejected the Crown's claim that New Zealand courts lack the inherent power to grant a declaration of inconsistency, as this involves no question of law and Parliament has not expressly empowered the judiciary to issue such remedies absent any question of law. The Court simply was having none of that:

[62] In conclusion, judicial power in New Zealand can be traced through the New Zealand Constitution Act 1852 to a political settlement that distributed authority

among the branches of government. The judicial function extends to answering questions of law, and as a general proposition it does not require express legislative authority. Inconsistency between statutes is a question of interpretation, and hence of law, and it lies within the province of the courts.

There is an important, deeper point at work here. The Crown's position, in essence, was that the judiciary only has a prescribed and limited sphere to work within, and only Parliament is able to authorise it to do anything beyond that zone of authority. The Court vigorously pushed back on that claim; the judiciary's functional role is just as broad (and as important) as the parliamentary one (at [50]-[51]). Indeed, it extends to deciding whether a given parliamentary enactment is a valid law (at [54]-[57]).

Second, the Court also rejected the Crown's suggestion that, even if a power to issue declarations of inconsistency lies within the courts' grasp, the judiciary ought to refuse to take it up because doing so would result in little good and possibly some harm. It would, said the Crown, unnecessarily burden the courts' time, bring the judiciary and political branches into potential conflict, and achieve little in the end because there is no institutional means to make parliament listen to what the courts have to say (at [68]).

However, the Court viewed these only as reasons to restrict the range of cases in which declarations of inconsistency are granted in practice, not to refuse to ever give that remedy at all. And the Court simply was not going to forswear a power that lies within its role as declarers of the law, and which might be appropriate to use in certain cases, on the basis of gloomy predictions alone (at [70]-[76]).

Third, the Court looked at its role under the NZBORA in order to determine if declarations of inconsistency are an appropriate remedy under that legislation. This question required the Court to decide what exactly the NZBORA is there to do. I recently have suggested that:

By issuing declarations of inconsistency the judicial branch is using the NZBORA as a vehicle to explicitly critique parliamentary legislation that it believes fails to show adequate concern for individual rights, reflecting a constitutional assumption that the rights instrument should operate as a functional restraint on legislative power.

(A Geddis & MB Rodriguez Ferrere, “Judicial Innovation Under the New Zealand Bill of Rights Act: Lessons for Queensland?” (2016) 35 *University of Queensland Law Journal* 251 at 281.)

And I think the Court’s analysis bears that analysis out. The rights in the NZBORA simply are so constitutionally important that remedies need to be attached even if Parliament’s clearly enunciated intent is that an unjustifiable rights infringement occur (at [79]). Permitting such rights infringements to take place scot-free (in legal terms) would be to undermine the very point and purpose of the rights instrument itself. Consequently, for the Court the declaratory remedy emerges from the very nature and function of the NZBORA itself.

Declarations of inconsistency and parliamentary privilege

The second challenge to the High Court’s decision came from the Speaker of the House of Representatives, who had been granted leave to intervene. He did not contest the general existence of a declaration of inconsistency remedy; indeed, he proclaimed himself agnostic on that matter (at [112]). Rather, the Speaker was concerned that the High Court had made inappropriate use of parliamentary proceedings when deciding to grant a declaration, thereby breaching parliamentary privilege.

In particular, the Speaker was concerned about the High Court’s apparent approval of the reasons contained in the Attorney General’s s 7 notice to the House that the legislation unjustifiably limited

the right to vote. That apparent approval then was claimed by the Speaker to amount to a “questioning” of proceedings in Parliament (at [137]).

However, the Court did not accept that this had occurred. Although the High Court certainly had quoted the s 7 report at some length and then come to conclusions about the legislation that mirrored its findings, the Court concluded that the High Court had done so purely to note the report’s existence in fact. The High Court’s decision to issue a declaration of inconsistency was then based on its own independent assessment that an unjustifiable breach of NZBORA rights existed (at [143]). Consequently, no breach of privilege had occurred in the immediate case.

However, the Court did note that the Speaker’s intervention raises deeper issues regarding how the courts may in future reference events in parliament when deciding whether a legislative limit on a NZBORA guaranteed right can be “demonstrably justified” as per s 5. If the Crown argues that a legislative limit on rights is justified, how can the courts draw on parliamentary papers, debates and votes to assess the reasons for imposing such a limit?

The answer seems to be, only with extreme care:

[146] We have sought to clarify the use that may be made of parliamentary proceedings in incompatibility proceedings, recognizing the Speaker’s concern that by their very nature such proceedings may risk breaching privilege. Courts must be sensitive to that risk and refrain from making any finding, whether by approval or criticism, on Parliament’s treatment of the subject matter. Because Parliament speaks through legislation, courts may not need to go beyond the words of the statute, or orthodox statutory interpretation materials, in search of policy or justification. Seldom if ever will it be relevant to refer to the way in which members of Parliament voted on a bill, and to do so is to risk questioning proceedings in Parliament.

This general warning that the way in which a legislative limit on rights is enacted should not form part of assessing that limit’s overall justification then differs from how limits imposed by the executive branch are assessed. As the Court of Appeal stated in *Child Poverty Action Group Inc. v Attorney General* [2013] NZCA 402 at [108]:

... the presence or absence of a good process prior to implementation is always relevant. Its absence will be significant, for example, in considering the leeway to be afforded a particular choice. Its presence will often be helpful for government. It is one of the relevant factors.

When it comes to a parliamentary implementation of a rights infringement, however, “the presence or absence of good process” apparently is *not* a relevant factor when deciding if that limit is demonstrably justified in a free and democratic society. Indeed, it is not a factor that may be considered at all.

The NZBORA and “dialogue theory”

Having concluded that a declaration of inconsistency lies within the courts’ inherent powers, emerges from the NZBORA’s fundamental constitutional status and can be issued without breaching parliamentary privilege, the Court turned to look at how that remedy fits within New Zealand’s broader constitutional arrangements. To do so, it expressly adopted a “dialogue” metaphor, whereby the declaration would form a part of a conversation between the judiciary and elected representatives about a particular rights question (at [149]-[150]).

However, any such conversation requires two parties to proceed. And whether the political branches of the New Zealand Government are prepared to engage with the judicial views put forward in a declaration of inconsistency is questionable. The Government’s reaction to the original High Court declaration was muted, with Minister of Justice simply stating that there are “no current plans to introduce legislation allowing prisoners to vote.” Similarly, the response of New Zealand’s Prime Minister to the Court of Appeal’s ruling is somewhat dismissive: “If they raise significant policy issues we’d look at them, but up until now we haven’t seen a reason to change the law.”

Whether the extra authority given to this declaration by a unanimous five-strong Court of Appeal provides a sufficient reason to at least re-examine that position remains to be seen. For unless the political branches view a declaration of inconsistency as being something to be responded to in a serious and considered fashion, then hopes that it may further some form of inter-institutional “dialogue” on rights matters look somewhat forlorn.

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