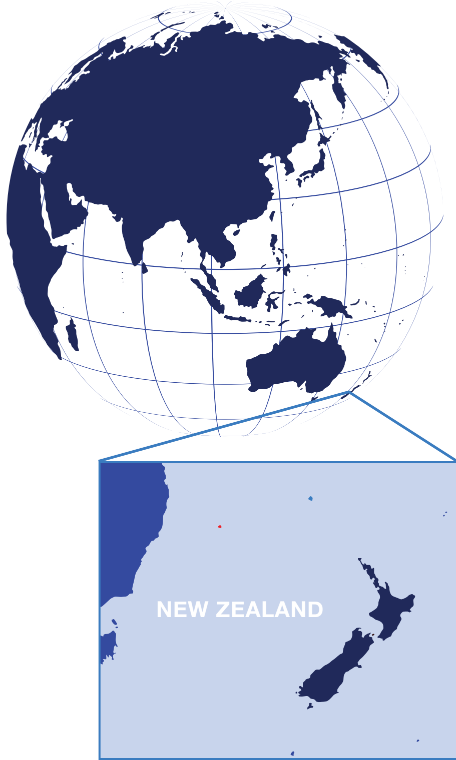

New Zealand

THE STATE OF LIBERAL DEMOCRACY

Andrew Geddis, Professor – University of Otago Faculty of Law
MB Rodriguez Ferrere, Senior Lecturer – University of Otago Faculty of Law

I. INTRODUCTION

New Zealand is one of the world's oldest and most stable liberal democracies. It has held regular triennial elections to its national Parliament since 1855, resulting in repeated peaceful transfers of power between governments. Such elections have special significance in New Zealand's constitutional arrangements due to the nation's lack of any written constitution and ongoing commitment to parliamentary sovereignty. Because Parliament may in theory enact any legislation it wishes and the courts have no constitutional power to invalidate such enactments, the electorate's regular selection or rejection of aspiring members of Parliament (MPs) remains the critical constraint on lawmaking power. New Zealand therefore retains a form of liberal democracy in which popular political control exercised through the electoral process generally is preferred to judicially policed constraints on legislative power.

Within this constitutional framework, a general parliamentary election in September 2017 saw the previously governing National Party replaced by a three-way governing coalition consisting of the Labour, NZ First and Green Parties. This change was enabled by the operation of New Zealand's Mixed-Member Proportional (MMP) voting system. Despite the National Party retaining a substantial plurality of the vote, the Labour, NZ First and Green Parties' combined support provided them with the overall parliamentary majority necessary to govern. Consequently, the new governing coalition does not contain the largest political party in the Parliament, but instead brings together three smaller parties. This arrangement is a somewhat novel development for New Zealand, requiring adjustment to government processes. However, it delivers on MMP's original promise – that parties would be prepared to compromise their policy positions during negotiations to enable majority agreement on who will run the country.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

New Zealand's constitutional commitment to liberal democracy is long standing and deeply held. Elections to a national Parliament first were held only 15 years after the country became a British colony and generally have been accepted as free and fair in practice. Although voting originally was restricted to property-owning males, the franchise progressively was extended to cover all Maori men in 1867,[1] all other men in 1879[2] and all women in 1893.[3] A system of guaranteed parliamentary representation for Māori also has existed since 1868. More recently, in the early 1990s the country decided by referendum to move from a first-past-the-post electoral system to the strongly proportional MMP method of voting. This reform took place only a few years after the rejection of a proposal to replace the doctrine of parliamentary sovereignty with a higher law written constitution permitting judicial enforcement of individual rights guarantees.

Given this history, it is difficult to see how representative democracy could become

[1] Maori Representation Act 1867. Māori are the indigenous people of Aotearoa New Zealand.

[2] Qualification of Electors Act 1879.

[3] Electoral Act 1893.

even *more* embedded in New Zealand's constitutional culture.[4] However, the country has not experienced the sorts of dramatic challenges to liberal democratic principles or practices recently observed elsewhere. While electoral participation has fallen from its mid-twentieth century heights, 79.1% of enrolled voters still cast a ballot at the 2017 general election (representing a 2.3% increase on the previous election). Parliament as an institution continues to command significant respect amongst the general populace: 39% of New Zealanders have "high" or "very high" trust in it, while 29% have "low" trust.[5] None of the parties contesting the 2017 election could be described as extremist or anti-democratic in nature, despite New Zealand imposing minimal legal restrictions on the types of parties that can form or the policies they may espouse. There is thus little evidence of a general loss of faith in liberal democracy as a means of collective governance for New Zealand.

2017 instead involved some minor reordering of New Zealand's version of liberal democracy along two vectors. First, the general election outcome resulted in a novel inter-party arrangement that reordered both governing practices and the electorate's expectations. This development marks the MMP era's coming of age, as three smaller parties with somewhat disparate policy programmes were able to negotiate to form a government that excluded Parliament's largest political party. Second, a decision of New Zealand's full Court of Appeal directly considered Parliament's legislative treatment of prisoners' right to vote and formally declared it to be inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA). While this declaration could not affect the ongoing validity of the relevant enactment, it raises questions about the future relationship between the legislature and the judiciary on matters of individual rights. Each of these matters is considered in turn.

Under New Zealand's Westminster system, MPs from the largest party in Parliament have governed the country since party government first developed in the late nineteenth century. When the country's original first-past-the-post voting system was in operation, this largest party virtually always commanded a parliamentary majority in its own right. Since MMP's introduction in 1996, the largest party still was able to attract the necessary support from other parliamentary parties to govern in some form of multi-party arrangement. It appeared likely this tradition would continue following the 2017 election, as the governing National Party won 44.4% of the party votes (which ultimately determine the overall share of parliamentary seats under MMP). However, following a month-long period of post-election negotiations, the NZ First Party (with 7%) instead agreed to form a coalition arrangement with the Labour Party (with 37%), supported by the Green Party (with 6%).

This outcome is constitutionally significant for two reasons. First, it disproved assertions regarding a general public expectation that the largest party *should* have some role in the country's government. Any such expectation did not reflect formal constitutional convention, which simply requires that a government have majority support in Parliament without saying how that must be achieved. Instead, it was claimed to manifest a mixture of assumption ("this is just what always has happened before") and general notions of fairness ("the most popular ought to get to run things"). The new governing arrangement thus demonstrates an evolution in voters' views as to what form of government is legitimate, with the public generally accepting that a combination of smaller parties able to command a parliamentary majority can govern over the top of a larger party. Such acceptance reveals that, after eight elections under the MMP voting system, the public has grown comfortable with the idea that multi-party compromises on policy matters are a necessary and legitimate part of the government formation process.

Second, the new governing arrangement involves a subtly different structure to previous MMP-era governments. The preferred model has been for one of the major parties (National or Labour) to form a minority government on its own while entering into so-called "enhanced confidence and supply agreements" with a range of other support parties. These enhanced agreements involve the support parties putting their votes behind the governing party (or parties) on key matters of confidence and supply, thereby providing the parliamentary majority needed for the government to enter and remain in office. They also commit to supporting central parts of that government's legislative agenda while the governing party in turn agrees to advance some of the support parties' policies. However, MPs from the support parties do not formally join the government, do not sit in cabinet, and retain the right to oppose and criticise the government on any policy issues that they have not expressly committed to support. Further complicating matters, the leader or leaders of the support parties also receive a ministerial role, thereby gaining some control over executive government decision making in a particular policy field and the enhanced public profile that ministerial office confers.

Following the 2017 election, however, the Labour and NZ First Parties chose to enter into a formal governing coalition, with ministers from each party sitting together in cabinet. The Green Party then entered into an enhanced confidence and supply agreement with this coalition, being granted some ministerial roles in return. Therefore, in formal constitutional terms, the Labour-NZ first government is a minority one, able to hold office with the Green Party's guaranteed support. In practical terms, however, the three parties must manage their respective ministerial portfolios collectively, meaning that the Green Party is a functional part of the governing arrangements. Each party's different formal role is thus more a matter of political positioning; NZ First in particular wishes to be viewed as the dominant partner in government with Labour, and also wants

[4] See Matthew Palmer, 'New Zealand Constitutional Culture' (2007) 22 NZ U L Rev 565, 580-82.

[5] Statistics New Zealand, 'Kiwis perceive high political trust but low influence' (January 29, 2108) < https://www.stats.govt.nz/news/kiwis-perceive-high-political-trust-but-low-influence> accessed 30 January 2018.

to be able to deny it is "in government" with the Greens (with which it has significant ideological differences).

2017's other major constitutional development regarding New Zealand's liberal democratic processes was the Court of Appeal's decision in *Attorney General v Taylor*.[6] This case involved the issuance of a declaration of inconsistency under the NZBORA in relation to legislation that removed the right to vote from all sentenced prisoners. It was significant for two reasons. First, the Court's unanimous judgment from a full bench of five judges delved deeply into the constitutional relationship between the judicial and legislative branches of New Zealand's government. Second, the Court's decision to uphold the grant of a declaration of inconsistency focuses attention on the respective roles of each institution when it comes to defining and protecting individual rights.

The NZBORA guarantees a range of civil and political rights, including the right to vote,[7] against "unjustified limits" by the state.[8] However, in a deliberate affirmation of parliamentary sovereignty, it also prohibits courts from invalidating or refusing to apply any other parliamentary enactment that imposes an unjustified rights limit.[9] It then remained unclear whether in such cases the courts still could issue a formal declaration that an inconsistency exists between the NZBORA and the other enactment. While such a declaration could not affect the other enactment's ongoing application as valid law, it might nevertheless serve to encourage the legislative branch to revisit and amend it.

The matter came to a head through the action of a convicted prisoner, Mr Taylor, who challenged a 2010 statute that removed the right to enroll to vote from all sentenced prisoners whilst imprisoned. Remarkably, the Crown conceded that this measure imposes an unjustified limit on the NZBORA guaranteed right to vote. Nevertheless, it argued that the courts had no remedial role to play as the statutory prohibition on enrollment was clear and so must be applied, while the NZBORA contains no specific declaration-making power. At first instance, the High Court disagreed and granted a declaration to mark the voting ban's rights-inconsistent nature.[10] The Crown appealed on the ground that the High Court was wrong to find any jurisdiction to grant that remedy.

The Court of Appeal thus had to decide whether, in the absence of any specific authorisation in the NZBORA, a court had the power to grant a formal judicial declaration of inconsistency. In doing so it "rehearse[d] some elementary principles about the relationship between the political and judicial branches of government and the role of the higher courts under New Zealand's constitution."[11] While continuing to recognise that Parliament enjoys sovereign law-making status in terms of "mak[ing] or unmak[ing] any law it wishes, unconstrained by any entrenched or codified constitution,"[12] the Court also emphasised the judiciary's independent role in declaring the law (including whether legislation is "enacted law" to which obedience is due).[13] Adopting Philip Joseph's phrase, the Court described its role in this "collaborative enterprise"[14] of governance as "extend[ing] to answering questions of law, and as a general proposition [this] 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."[15]

After finding that a formal declaration of inconsistency is an available judicial remedy, the Court upheld the High Court's decision to grant one. In doing so, the Court expressly cast its actions in terms of fostering a "dialogue" with the political branches of government over the appropriate limits that should apply to individual rights.[16] A declaration of inconsistency, in the Court's view, carries with it "the reasonable expectation that other branches of government, respecting the judicial function, will respond by reappraising the legislation and making any changes that are thought appropriate."[17] This invocation of "constitutional dialogue" then opens up the issue of the proper role for the judicial and legislative branches of government in relation to defining and protecting individual rights in a liberal democracy. Historically, this has been very much the province of New Zealand's Parliament, with rights issues treated as simply another matter of policy for popularly elected representatives to resolve. However, recently there have been calls for greater judicial involvement in considering such matters.[18] Those calls reflect concerns that MPs may fail to properly understand the

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6 [2017] NZCA 215, [2017] 3 NZLR 24.

7 New Zealand Bill of Rights Act 1990, s 12(a).

8 *Ibid*., s 5.

9 *Ibid*., s 4.

10 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

11 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [43].

12 *Ibid*., at [44].

13 *Ibid*., at [55].

14 Philip A Joseph, 'Parliament, the Courts and the Collaborative Enterprise' (2004) 15 KCLJ 321.

15 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [62].

16 *Ibid*., at [149]-[150].

17 *Ibid*., at [151].

18 Tom Hickman, 'Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model' [2015] NZ L Rev 35; Claudia Geiringer, 'Inaugural Lecture: Mr Bulwark and the Protection of Human Rights' [2014] 45 VUW L Rev 367; Geffrey Palmer & Andrew Butler, *A Constitution for Aotearoa*

rights implications of legislation they consider and vote on as well as fears that they will systemically undervalue the rights of particularly unpopular social groups. Simply put, the elected lawmaking institution in New Zealand's liberal democratic constitutional framework may not be fully trustworthy when it comes to deciding how the rights of individuals should be understood.

The ultimate impact of the Court of Appeal's declaration is yet to be seen. The Crown has been granted leave to appeal the decision to the New Zealand Supreme Court,[19] although the strength and unanimous nature of the full Court of Appeal's decision make it unlikely to succeed. The previous National Government, which had enacted the ban on prisoner voting, showed no interest in revisiting the matter in the wake of the Court's declaration while it received scant attention in a parliamentary report on the 2014 general election.[20] However, the new Labour-NZ First-Green Government may be more receptive to the judicial message that a complete ban on prisoner voting represents an unjustifiable limit on the right to vote: two of these parties voted against the legislation when first enacted.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Two further constitutional developments – both relating to Māori but involving very different issues – are worthy of note. The first is the continuance of a trend that sees the giving legal personhood to a natural geographic and/or environmental feature as part of redress from Crown to Māori for the former's historical breaches of the Treaty of Waitangi.

New Zealand blazed this trail in 2014 when, as part of the settlement with the Tūhoe iwi (tribe) for its historical breaches of the Treaty of Waitangi, the Crown recognised the former Te Uruwera national park as being a legal entity with "all the rights, powers, duties, and liabilities of a legal person."[21] The 2017 settlement between the Crown and Whanganui iwi went a step further: legislation declared the Whanganui River and its tributaries (collectively known as Te Awa Tupua) to be a legal *person* with "all the rights, powers, duties, and liabilities of a legal person."[22] The legislation then establishes a new office – Te Pou Tupua – to act and speak for and on behalf of Te Awa Tupua.[23] It comprises two people, one nominated by iwi and one by the Crown.

Such a development was proposed seven years ago by Morris and Ruru as an alternative model to simple legislative recognition of the importance of a river to local iwi.[24] They described the advantage of legal personhood as "tak[ing] a western legal precedent and giv[ing] life to a river that better aligns with a Māori worldview that has always regarded rivers as containing their own distinct life forces,"[25] thereby putting the health and well-being of the river at the forefront of decision-making.[26] Furthermore, the trend is set to continue, with the Crown and Taranaki iwi in December signing "Te Anga Pūtakerongo" – a record of understanding – that Mount Taranaki will also soon gain recognition as a legal, living entity.[27] These developments are not only constitutionally significant for New Zealand but gained international attention[28] as a "disruptive union" of a Western concept with a Māori worldview.[29]

The second major constitutional development was the Supreme Court's decision in *Proprietors of Wakatu v Attorney-General*.[30] A 4:1 majority held the Crown could owe a fiduciary duty to the collective descendants of the original customary title-holders to land, and in doing so struck "a very different pathway for dealing with Māori claims of historical land loss than the systematised

New Zealand (VUW Press, 2016).

[19] *Attorney General v Taylor* [2017] NZSC 131.

[20] Justice and Electoral Committee, 'Inquiry Into the 2014 General Election' (2016) AJHR I.7A 28.

[21] Te Urewera Act 2014, s 11.

[22] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.

[23] *Ibid*., ss 18-19.

[24] James D K Morris and Jacinta Ruru, 'Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?' (2010) 14 AILR 49.

[25] *Ibid*., at p 58.

[26] *Ibid*., at p 57.

[27] Te Anga Pūtakerongo mō Ngā Maunga o Taranaki, Pouakāi me Kaitake / Record of Understanding for Mount Taranaki, Pouakai and the Kaitake Ranges' (20 December 2017) <https://www.govt.nz/dmsdocument/7265.pdf> accessed 30 January 2018.

[28] See, for example, Eleanor Ange Roy, 'New Zealand river granted same legal rights as human being' *The Guardian* (16 March 2017) <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> accessed 30 January 2018; Bryan Rousseau, 'In New Zealand, Lands and Rivers Can Be People (Legally Speaking)' *The New York Times* (13 July 2016) <https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html> accessed 30 January 2018.

[29] Simon Day, 'If the hills could sue: Jacinta Ruru on legal personality and a Māori worldview' *The Spinoff*, (27 November 2017) <https://thespinoff.co.nz/atea/atea-otago/27-11-2017/if-the-hills-could-sue-jacinta-ruru-on-legal-personality-and-a-maori-worldview/> accessed 30 January 2018.

[30] [2017] NZSC 17, [2017] 1 NZLR 423.

and politically negotiated settlements that have predominated since the mid-1990s."[31] That shift in approach made it "one of the most important decisions from a New Zealand court in the last 25 years."[32]

The case was based on the nineteenth century New Zealand Company's approach to purchasing land from Māori as part of its colonisation scheme. That approach saw a tenth of the land being purchased set aside for Māori in addition to any existing land occupied by Māori, which was exempted from the sale. In 1839 the New Zealand Company purchased 151,000 acres of land in the upper South Island from three iwi, meaning 15,100 acres should have been reserved for Māori. After the signing of the Treaty of Waitangi between the Crown and Māori in February 1840, the Crown alone assumed the power to purchase land from Māori, and all pre-1840 sales were reviewed to ensure they were equitable. The sale in question was reviewed and confirmed in 1845 with the land first vesting in the Crown. The Crown would then grant the land to the New Zealand Company on the condition that the 15,100 acres were reserved and held on trust and no areas occupied by Māori were part of the sale.

However, the Crown failed to ensure these conditions were met: only 5,100 acres were reserved and the sale included areas occupied by Māori. Those 5,100 acres were further diminished, so that by the time they were released to the descendants of the original landowners in 1977, only 1,626 acres remained. The claim before the Court was that the Crown held a fiduciary duty to the landowners (and their descendants) to ensure the conditions of the original sale were fulfilled and breached that duty by failing to do so. At both the High Court and Court of Appeal, the Crown successfully resisted the plaintiffs' – the descendants of the original landowners – claim on the basis that as it acted in a governmental capacity, it did not (and could not) incur fiduciary duties. The Supreme Court overturned those decisions and held that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the landowners.

This was a significant departure from the orthodox approach of categorising the Crown's actions as a breach of Treaty of Waitangi obligations and thus a public rather than private law matter. To this extent, it is worth noting that both O'Regan and Arnold JJ held that the relationship between Crown and Māori landowners was not necessarily a "true" or "pure" trust relationship. They instead adopted the Canadian precedent of *Guerin v The Queen*,[33] holding that the Crown's breach of a fiduciary duty would have the same effect as if a trust relationship existed.[34] Regardless, however, the obstacles surmounted by the plaintiffs – issues of standing and limitations to name but a few – made the result remarkable. Although the Court remitted to the High Court the final determination of the extent of the breach of the fiduciary duty and the remedies owed (if any), the decision has significant consequences. While Māori/Crown relationships continue to be fundamentally constitutional in nature, the nature of that relationship will inevitably be altered by the recognition of the kinds of ongoing private law duties found to exist in *Wakatū*.

IV. LOOKING AHEAD TO 2018

The issue of prisoner voting will continue to resonate in 2018. Not only will the Supreme Court decide whether to uphold the Court of Appeal's declaration of inconsistency but it also will hear an appeal that claims the legislation was not enacted consistently with a provision in the *Electoral Act 1993* requiring a 75% majority vote to alter certain aspects of the country's voting rules.[35] Should the Court decide the prisoner voting ban was not so enacted then it may declare the legislation invalid.[36] There also is the matter of whether the government will revisit the issue in light of the judiciary's clear message about the existing law's rights implications. In addition, stalled Māori/Crown negotiations over rights to fresh water may see the Supreme Court asked to rule on whether customary rights of ownership of that resource still exist.

V. FURTHER READING

Margaret Bedggood, Kris Gledhill & Ian McIntosh (eds.), *International Human Rights in Aotearoa New Zealand* (Thomson Reuters, 2017)

Andrew Geddis, '"Declarations of Inconsistency" under the New Zealand Bill of Rights Act 1990' (U.K. Const. L. Blog, 19 June 2017) <https://ukconstitutionallaw.org/> accessed 12 December 2017

Carwyn Jones, New Treaty, *New Tradition: Reconciling New Zealand and Māori Law* (VUW Press, 2016)

Matthew Palmer, 'Lecture: Constitutional Dialogue and the Rule of Law' (2017) 47 HKLJ 505

Alison Quentin Baxter & Janet McLean, *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown* (AUP, 2017)

[31] Carwyn Jones, '*Analysis: Proprietors of Wakatū and Others v Attorney-General* [2017] NZSC 17' *Blog of the IACL, AIDC* (13 May 2017) <https://iacl-aidc-blog.org/2017/05/13/analysis-proprietors-of-wakatu-and-others-v-attorney-general-2017-nzsc-17/> accessed 30 January 2018.

[32] Ibid.

[33] *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321 (SCC).

[34] *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [726].

[35] See *Ngaronoa v Attorney General* [2017] NZCA 351, [2017] 3 NZLR 643.

[36] Andrew Geddis, 'Judicial Enforcement of New Zealand's Reserved Provisions' (2017) 28 Pub L Rev 277.