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**ELECTORAL RIGHTS, PARLIAMENT AND THE COURTS: THE  
CASE OF PRISONER VOTING IN NEW ZEALAND\***

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\* Professor, Faculty of Law, University of Otago. I have excerpted parts of the description of how the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 applies and the process by which it was adopted into law from Andrew Geddis, "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] New Zealand Law Review 443.

## Abstract

Thinking about electoral rights, two deeply intertwined questions arise. First of all, what rights must the members of a society enjoy in order for it to be considered a proper or genuinely democratic nation? Second, who gets to decide if a right is necessary, how it ought to apply and what limits on it are permissible? In this paper, I wish to illustrate these deep issues by way of a particular example: that of New Zealand and its experience with the vexed issue of prisoner voting.

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Thinking about electoral rights, two deeply intertwined questions arise. First of all, what rights must the members of a society enjoy in order for it to be considered a proper or genuinely democratic nation? Second, who gets to decide if a right is necessary, how it ought to apply and what limits on it are permissible? These questions are intertwined because of the existence of reasonable disagreement on rights matters. Given this phenomenon, there can be no universally acceptable answer to the question “what (electoral) rights should we have?”, meaning that we always will be driven to consider the “who ought to get to decide?” question. The latter inquiry then raises further questions about comparative institutional competence and legitimacy, as well as basic trust. Simply put, a society has to decide which set of decision makers it thinks will do the best job of deciding amongst various possible understandings of rights and their appropriate application to the electoral realm and allocate to them the final word on the matter. This requirement is universal amongst democracies, which is not to say that it is easily resolved.

In this paper, I wish to illustrate these deep issues by way of a particular example: that of New Zealand and its experience with the vexed issue of prisoner voting. New Zealand traditionally has taken a quite simple approach to electoral rights. The nation’s unicameral Parliament is the institution primarily responsible for prescribing, defining and protecting the populace’s ability to participate in and influence matters at election time through its ordinary lawmaking practices. To be sure, there are a few wrinkles to this basic account. It is sometimes suggested that there is a convention that Parliament will enact electoral legislation on a unanimity (or near unanimity) basis, although if this convention exists it has been breached on numerous occasions. Some particular aspects of the electoral system are *legally* protected by an entrenchment provision, requiring a 75% majority of all MPs or a majority vote at a referendum to change them.<sup>1</sup> And the nation’s courts have been given some “weak form” powers of review of certain core electoral rights under the New Zealand Bill of Rights Act 1990 (NZBORA). These limited exceptions do not, however, displace the general rule: New Zealand’s Parliament, as the directly elected representatives of the people, is able to define, demarcate and even dispense with electoral rights pretty much as it sees fit.

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<sup>1</sup> Electoral Act 1993, s.268. The aspects of the electoral process so protected are the 3-year term of Parliament, the makeup of the Representation Commission and the process through which it determines electorate boundaries, the age at which people may vote and the requirement that the vote be by way of secret ballot.

Consistent with its overarching lawmaking role, New Zealand's Parliament in 2010 voted by a bare majority along party lines to remove the right to vote from all prisoners sentenced after the Act came into force. This resulted in some thousands of individuals losing their right to vote, in spite of the Attorney-General formally noting that doing so was inconsistent with the NZBORA. A long-serving prisoner, Arthur Taylor, recently has mounted something of a personal crusade through the courts to challenge this legislation. That challenge culminated in the High Court issuing a formal declaration that the disenfranchising law is inconsistent with the NZBORA, in that it limits the legislatively guaranteed right to vote in a way that cannot be demonstrably justified in a free and democratic society. Not only is this an important finding in respect of the immediate issue, but it also marks the first time the New Zealand judiciary has provided such a remedy. Both of these features make *Taylor v Attorney-General*<sup>2</sup> a watershed case in New Zealand's public law.

In this paper, I suggest that *Taylor v Attorney-General* also represents a direct challenge to the idea that New Zealand's Parliament is the institution best suited to decide electoral rights matters. Instead, the High Court's declaration indicates a judicial loss of trust in the elected branches' capacity to treat such issues with the respect and attention that they deserve.

### **A Potted History of Prisoner Voting in New Zealand**

Prisoners' entitlement to vote is an issue that traces back to the first introduction of local representation into New Zealand.<sup>3</sup> Along with all women and those men younger than 21 or without sufficient property holdings, the New Zealand Constitution Act 1852 also excluded from the franchise persons imprisoned for "any treason, felony or infamous offence within any part of Her Majesty's dominions".<sup>4</sup> While near-universal suffrage was achieved by 1893, when New Zealand extended the franchise to all adult women, prisoner disenfranchisement actually was widened in 1905 to include any person sentenced to death or a term of imprisonment of one year or more.<sup>5</sup> Fifty years later it was extended still further, with all persons "detained pursuant to convictions in any penal institution" prohibited from registering on the electoral roll (and hence from casting a ballot at election time).<sup>6</sup> This blanket ban on convicted prisoners voting whilst behind bars lasted until 1975, when it was repealed and all prisoners were permitted to vote.<sup>7</sup> However, following a change of government at the 1975 election, the blanket ban on prisoners voting was reinstated in 1977.<sup>8</sup>

This state of affairs lasted until 1993, when New Zealand's electoral laws were overhauled to accommodate the move to a mixed-member proportional (MMP) voting system. When enacting these new electoral rules, Parliament also voted unanimously to relax the restriction on who may cast a ballot while behind bars. Consequently, the

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<sup>2</sup> [2015] NZHC 1706 (hereafter *Taylor (Declaration)*).

<sup>3</sup> The history of prisoner disenfranchisement is discussed in Greg Robins "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand", (2006) 4 NZJPIL 165 at 166-171.

<sup>4</sup> New Zealand Constitution Act 1852, 15 & 16 Vict, s 8.

<sup>5</sup> Electoral Act 1905, s 29(1).

<sup>6</sup> Electoral Act 1956, s 42(1)(b).

<sup>7</sup> Electoral Amendment Act 1975, s 18(2).

<sup>8</sup> Electoral Amendment Act 1977, s 5.

Electoral Act 1993, section 80(1)(d) disqualified from enrolling to vote, and hence from casting a ballot, only:

a person who, under—

- (i) A sentence of imprisonment for life; or
  - (ii) A sentence of preventative detention; or
  - (iii) A sentence of imprisonment for a term of three years or more,—
- is being detained in a prison.

This new three-year-or-more threshold reflected the advice of the Royal Commission on the Electoral System,<sup>9</sup> which addressed the issue of prisoner voting alongside the broader question of which voting system New Zealand should adopt. It concluded that while the existing blanket prisoner disqualification rule could not be justified,<sup>10</sup> disenfranchising those guilty of particularly serious criminal offences was acceptable. Therefore, it recommended that only prisoners currently serving sentences of three years or more be denied the vote, to mirror an already existing rule that New Zealand citizens who remain outside the country for this period of time forfeit their right to vote until they return to the country.<sup>11</sup> When the new legislative framework for MMP was being drawn up in 1992, the Solicitor-General affirmed the Commission's recommendation on the basis that it would help to limit the arbitrary application of the disenfranchisement provision by restricting its effect only to serious criminal offending.<sup>12</sup> Consequently, the Solicitor-General advised that section 80(1)(d) would represent a demonstrably justified limit on the right to vote recently guaranteed by the NZBORA, section 12(a).

The three-year-or-more disqualification rule quietly operated for some 17 years without attracting any particular comment before a backbench member of Parliament from the governing National Party, Paul Quinn, felt the need to propose a Members' bill on the topic. Any member who does not also hold a ministerial warrant can seek to place such bills before the House of Representatives. However, the number of such bills that the House may consider is limited.<sup>13</sup> When a Members' bill is removed from the order paper either by passage through the House or being voted down, its replacement is found by the random drawing of lots. Hence, the House came to consider Mr Quinn's Bill through fortune alone; his number just happened to be the one (literally) pulled from out of the hat.

Mr Quinn's proposal was quite simple. It sought to return the law to its pre-1993 state by changing section 80(1)(d) from disqualifying those prisoners serving a sentence of three-years-or-more to those serving any term of imprisonment. In support of this move, Mr Quinn claimed that the Royal Commission on the Electoral System simply had got it wrong when it recommended only "serious offenders" sentenced to significant terms of imprisonment ought to be disenfranchised. Instead, he claimed that anyone who ended up in prison had thereby demonstrated such contempt for societal norms that they did not deserve the right to vote:

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<sup>9</sup> Royal Commission on the Electoral System *Towards A Better Democracy* (Government Printer, Wellington, 1986).

<sup>10</sup> *Ibid*, at [9.18]-[9.20].

<sup>11</sup> *Ibid*, at [9.21] and recommendation 42. See also Electoral Act 1993, s 80(1)(a).

<sup>12</sup> John McGrath "Opinion on consistency between NZ Bill of Rights Act and restrictions on prisoners' voting rights", 17 November, 1992 at [26] <<http://www.crownlaw.govt.nz/uploads/Prisoners.pdf>>. This advice is discussed in Robins, above n 3, at 170-171.

<sup>13</sup> The House's Order Paper may only list four member's bills for first reading at any time.

[W]e are talking about people who have transgressed against society. They have abused the rights that the community values and that the people who fought in the wars commemorated by the memorials in this Chamber fought to defend. ... I believe that the community has the right to decide when it will no longer provide the protection that it offers when it protects people's right to vote.<sup>14</sup>

With the support of Mr Quinn's National Party colleagues and their Act Party allies in government, the Bill received enough votes to pass through the House on the 8<sup>th</sup> of December, 2010 before receiving the royal assent on the 15<sup>th</sup> of December, 2010.

### **The Blanket Ban on Prisoners Voting: Substantive Problems**

With the passage of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, almost every person who is detained in a prison under a sentence of imprisonment handed down after 16 December, 2010 (along with any prisoner already disqualified under the previous law) is unable to vote as long as they remain behind bars.<sup>15</sup> However, this apparently simple policy objective is achieved by a more complex means. The actual effect of the new section 80(1)(d) was to disqualify sentenced prisoners from having their name included on the electoral roll whilst they remain incarcerated.<sup>16</sup> Therefore, the registrar of electors must remove from the roll the name of any already enrolled sentenced prisoner,<sup>17</sup> while any prisoner not enrolled will be prevented from doing so while in prison.<sup>18</sup> This means of achieving the desired legislative end of stopping prisoners from voting has potential flow-on consequences once a prisoner leaves prison, as he or she will need to take the positive step of re-enrolling before regaining the right to vote. Given that prisoners predominantly come from social groups that are very hard to enroll even once,<sup>19</sup> it is foreseeable that a significant number will not do so again and thus effectively remain disenfranchised.

A second practical point of note is that prisoners only will be removed from the electoral roll after they are *sentenced* to a term of imprisonment. Prisoners remanded to custody, whether before or after their trial, remain eligible to vote. Thus a person convicted of murder who remanded to custody on election day awaiting an inevitable sentence of imprisonment still will be able to cast a ballot, while a person sentenced the day before the election to a week's imprisonment for breach of driving license

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<sup>14</sup> (21 April 2010) 662 NZPD 10339.

<sup>15</sup> However, up to 37 prisoners serving life sentences or terms of preventive detention imposed prior to the amendment Act's passage accidentally were enfranchised by an error in the legislation's drafting; see Graeme Edgeler, "Oops: how some prisoners serving life sentences get to vote", Public Address Blog, 16 September 2013, <<http://publicaddress.net/legalbeagle/oops-how-some-prisoners-serving-life-sentences/>> (accessed 29 October, 2015).

<sup>16</sup> Only validly enrolled electors are eligible to cast a ballot at election time; Electoral Act 1993, s 60.

<sup>17</sup> *Ibid*, s 98(1)(f).

<sup>18</sup> *Ibid*, s 87(1).

<sup>19</sup> In particular, Maori are heavily overrepresented in the prison population. Despite making up only some 12.5% of the general adult population, some 50% of prison inmates are of Maori descent. See Department of Corrections "Over-representation of Maori in the criminal justice system: An exploratory report" September, 2007, at 6 <[http://www.corrections.govt.nz/\\_data/assets/pdf\\_file/0004/285286/Over-representation-of-Maori-in-the-criminal-justice-system.pdf](http://www.corrections.govt.nz/_data/assets/pdf_file/0004/285286/Over-representation-of-Maori-in-the-criminal-justice-system.pdf)> (accessed 29 October, 2015).

conditions will not be able to vote.<sup>20</sup> The fact that disenfranchisement depends purely on whether a person happens to be serving a prison sentence on a particular date will result in further arbitrary outcomes. A serious violent offender who receives a five year term of imprisonment the week after a general election will almost certainly be released on parole in time to re-enroll to vote for the next election. However, a spree-burglar sentenced to one-month in jail the week before an election will not be able to vote in it.

The nature of sentencing also exacerbates the arbitrary consequences of the blanket disqualification provision. A judicial decision to sentence a person to a term of imprisonment depends upon a number of factors other than the seriousness of the offending and the offender's past criminal record. It also takes into account matters such as the ability to make financial reparation for the offence, the support structures that an offender has around him or her, and whether these permit a less restrictive sentencing outcome than imprisonment.<sup>21</sup> In particular, persons who otherwise would be sentenced to a short period of imprisonment (i.e. less than 2 years) may instead receive a term of home detention,<sup>22</sup> provided that the court is satisfied there is a suitable place available in which the offender can serve the sentence. Therefore, two offenders who commit the same crime may be given differing sentences depending on whether they own a house or have supportive family connections. The one with these things may receive a period of home detention, thus retaining her or his right to vote, while the one without may be imprisoned, thus losing it.

#### *Inconsistency with human rights norms*

These arbitrary consequences led the Attorney-General to inform the House, under s 7 of the NZBORA, of his opinion that the original Electoral (Disqualification of Convicted Prisoners) Amendment Bill<sup>23</sup> was inconsistent with the NZBORA.<sup>24</sup> The Attorney-General noted that on its face a blanket ban on prisoner voting limits the right to vote guaranteed to all adult New Zealand citizens by section 12(a), which consequently requires justification under section 5. Whilst “assum[ing], without expressing an opinion, that temporarily disenfranchising serious offenders as a part of their punishment would be a significant and important objective” that may justify preventing some prisoners from voting,<sup>25</sup> the blanket disenfranchisement of all sentenced prisoners cannot meet that justificatory test. In particular;

The disenfranchising provisions of this Bill will depend entirely on the date of sentencing, which bears no relationship either to the objective of the Bill or to the conduct of the prisoners whose voting rights are taken away. The irrational

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<sup>20</sup> As of 15 June 2010, some 219 persons were serving prison sentences of less than 3 years for offences relating to driver licencing and conduct. See Department of Corrections “Initial Briefing for the Law and Order Committee”, 26 June 2010 <[http://www.parliament.nz/en-NZ/PB/SC/Documents/Advice/0/e/8/49SCLO\\_ADV\\_00DBHOH\\_BILL9745\\_1\\_A57309-Initial-Briefing.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Advice/0/e/8/49SCLO_ADV_00DBHOH_BILL9745_1_A57309-Initial-Briefing.htm)> (accessed 29 October, 2015).

<sup>21</sup> Sentencing Act 2002, s 8(g).

<sup>22</sup> *Ibid*, s 15A(1).

<sup>23</sup> The title of the Bill as introduced to the House differed from that of the finally enacted legislation.

<sup>24</sup> Under the New Zealand Bill of Rights Act 1990, s 7, the Attorney-General is required to “bring to the attention of the House of Representatives any provision in [a] Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.”

<sup>25</sup> Attorney-General, above n 2, at [1 ].

effects of the Bill also cause it to be disproportionate to its objective.<sup>26</sup>

The Attorney-General's conclusion echoed the views of the highest courts in Canada,<sup>27</sup> South Africa,<sup>28</sup> Hong Kong<sup>29</sup> and Ireland,<sup>30</sup> each of which had struck down under their relevant constitutional instruments laws that disenfranchise all prisoners. The Australian High Court also had concluded that the blanket disenfranchisement of prisoners is inconsistent with the text and structure of the Australian Constitution,<sup>31</sup> in particular the requirement that Parliament be "directly chosen by the people."<sup>32</sup> Similarly, the European Court of Human Rights had ruled that the United Kingdom's blanket disenfranchisement of prisoners is incompatible with the right to regular, free and fair elections contained in Article One of the Third Protocol of the European Convention on Human Rights.<sup>33</sup> Admittedly, the United Kingdom's Parliament had not acted to change the law in response to this ruling, and the House of Commons even passed a motion supporting the continuation of ban.<sup>34</sup> However, it is unclear how much of this resistance was due to a genuine assessment that banning all prisoners from voting is a legitimate and desirable policy to pursue, and how much was the result of growing political disquiet at the role the Convention and European Court are playing in domestic policy.<sup>35</sup>

Consequently, New Zealand's move from a somewhat targeted disenfranchisement regime (ie only removing the right to vote from those serving three-or-more years behind bars) to the blanket disenfranchisement of all sentenced prisoners put the country at odds with how the right to vote is understood and applied by the great majority of nations with which it usually compares its human rights record. It also meant that New Zealand likely has acted in breach of its commitments under Article 25(b) of the International Covenant on Civil and Political Rights.<sup>36</sup> While the United Nation's Human Rights Committee accepts that a criminal conviction may provide grounds for removing an individual's right to vote, it states: "The grounds for such deprivation should be objective and reasonable."<sup>37</sup> In light of the Attorney-General's

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<sup>26</sup> Ibid, at [15].

<sup>27</sup> *Sauvé v. Canada (Attorney General)* (1992) 7 OR (3d) 481, aff'd [1993] 2 SCR 438.

<sup>28</sup> *August and Another v Electoral Commission and Others* [1999] 4 BCLR 363 (CC); *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)* [2004] 5 BCLR 445 (CC).

<sup>29</sup> *Chan Kin Sum Simon v Secretary for Justice* [2008] HCAL 79.

<sup>30</sup> *Breathnach v Ireland* [2001] IESC 59, [2001] 3 IR 230.

<sup>31</sup> *Roach v Electoral Commissioner* [2007] HCA 43.

<sup>32</sup> Commonwealth of Australia Constitution Act 1900, ss 7, 24

<sup>33</sup> *Hirst v The United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR). See also *Greens and M.T. v the United Kingdom* (60041/08 and 60054/08) Grand Chamber, ECHR 23 November, 2010. For criticism of the Court's decision on this point, see John Finnis "Introduction", in John Finnis, *Human Rights and Common Good: Collected Essays Vol III* (OUP, Oxford, 2011) at 44-45.

<sup>34</sup> (10 February 2011) UKHC Deb c493. The recent debate over prisoner voting in the United Kingdom is outlined in House of Commons Library "Prisoners' Voting Rights" (8 March 2011) <<http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf>>.

<sup>35</sup> Patrick Wintour "Lib Dems thwart Tory hopes of human rights convention withdrawal" *The Guardian* (United Kingdom, 14 March, 2011) <<http://www.guardian.co.uk/law/2011/mar/14/lib-dems-human-rights-convention?INTCMP=SRCH>>.

<sup>36</sup> This reads: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

....

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."

<sup>37</sup> Office for the High Commissioner of Human Rights, "General Comment No. 25: The right to

conclusion about the arbitrary impact of blanket disenfranchisement, it is difficult to see how simply serving a prison sentence on the date of an election can be a “reasonable ground” for denying an individual’s right to vote.

Inconsistency with human rights norms could not affect the legal validity of the disenfranchisement provision. Even if Parliament’s blanket ban on sentenced prisoners enrolling to vote constitutes an unjustified limit on the NZBORA, section 12(a) guarantee of the right to vote, it is clear in its intent and so must be applied by the courts under section 4 of that legislation. The most a New Zealand court might possibly do in response to such an unjustified limit is issue a formal declaration of its existence. As shall be seen below, this was the issue that Mr Taylor asked the courts to grapple with earlier in this year.

### **The Blanket Ban on Prisoners Voting: Procedural Problems**

It was not just the substantive consequences of the decision to disenfranchise prisoners that caused concern. The means by which Parliament adopted this policy also was problematic. Following its introduction and first reading, the Electoral (Disqualification of Convicted Prisoners) Amendment Bill was sent to select committee for further scrutiny. The select committee stage of New Zealand’s legislative process is the point at which MPs are meant to give a bill its closest consideration and most detailed analysis. Almost every bill that passes its first reading automatically receives some form of select committee scrutiny,<sup>38</sup> with this process usually also incorporating the opportunity for the public to make submissions in both written and oral form. After reviewing these submissions, committee members then deliberate on the proposed legislation before reporting back to the House with their recommendation as to whether it should progress, along with any suggested amendments to its content. Such recommendations may be unanimous or by a majority, with the committee’s minority members almost always able to write a dissenting report on the matter. Consequently, the select committee stage is extremely important in terms of allowing the public direct input into the law-making process, scrutinising the rationale for the proposed legislation and ensuring that this proposal will properly achieve that policy goal.

However, the select committee process for the Electoral (Disqualification of Convicted Prisoners) Amendment Bill was faulty from its inception. Rather than send the proposal to the House’s standing Justice and Electoral Committee, which usually considers matters relating to New Zealand’s electoral law, or to the specially constituted Electoral Legislation Committee,<sup>39</sup> the Government chose to send it to the

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participate in public affairs, voting rights and the right of equal access to public service (Art. 25)” (7 December, 1996) at [14].

<sup>38</sup> That is, unless the House agrees to progress a Bill straight to its second reading stage under urgency; Standing Orders of the House of Representatives 2008, SO 280(1). Furthermore, appropriation bills or imprest supply bills do not receive select committee scrutiny as a matter of course.

<sup>39</sup> The House established this special purpose, all-party select committee in 2010 to consider legislation relating to campaign financing and the 2011 referendum on MMP. However, its terms of reference simply state that it is to “examine legislation referred to it and report back to the House with its recommendations on them.” Consequently, there is no formal reason it could not also have considered the Electoral (Disqualification of Convicted Prisoners) Amendment Bill.

Law and Order Committee.<sup>40</sup> Not only do the MPs on this Committee have no prior experience with matters of electoral law, but the officials who advise it are drawn from the Department of Corrections, rather than the Ministry of Justice responsible for administering the Electoral Act 1993. Furthermore, the Chair of the Committee, the National Party's Sandra Goudie, refused a request by opposition MPs to allow Ministry of Justice officials to appear before the Committee and provide advice on the Bill.<sup>41</sup> The net result is that the Electoral (Disqualification of Convicted Prisoners) Amendment Bill received its close and detailed scrutiny from a set of MPs who were not particularly *au fait* with the issues it raises and who received information about the proposal from officials with no day-to-day experience of the particular area of law.

The Law and Order Committee's report back to the House then exacerbated these initial problems.<sup>42</sup> For one thing, the majority (made up of five National and Act Party members) recommended that the Bill progress in spite of receiving fifty-one public submissions opposing the law change and only two favouring it.<sup>43</sup> Amongst those who opposed the move were the New Zealand Law Society<sup>44</sup> and the Government's own Human Rights Commission.<sup>45</sup> However, even after hearing this trenchant criticism of the Bill's fundamental purpose and in the face of the Attorney-General's section 7 notice proclaiming the proposal inconsistent with the NZBORA, the majority report provided no reasons whatsoever for why it believed the Bill's content was justifiable. It merely recommended passage after changing the Bill's title to the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill and amending the wording of the provision that disqualifies prisoners from enrolling to vote whilst incarcerated. Commentary on the justifications for the underlying policy was left to the Committee's Labour and Green Party members, who penned minority reports opposing the Bill's progress and listing the various ways in which it falls short of human rights norms in both domestic and international law.

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<sup>40</sup> Technically, it is the House that determines which of its committees will consider any given bill. However, the Government's numbers in the chamber mean that in practice the Government gets to make this call. Exactly why it chose to send Mr Quinn's bill to the Law and Order Committee is unclear; my personal view is that it did so for purely political reasons. That is, it believed that Committee's members—especially the Government members—would be more sympathetic to the bill's purposes, while excluding officials from the Ministry of Justice from having any advisory role would lessen the critical scrutiny it received.

<sup>41</sup> See Derek Cheng "Upset MPs stage walkout", *New Zealand Herald*, 1 July, 2010 <[http://www.nzherald.co.nz/politics/news/article.cfm?c\\_id=280&objectid=10655608](http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10655608)> (accessed 29 October, 2015).

<sup>42</sup> Electoral (Disqualification of Convicted Prisoners) Amendment Bill (117-2) (select committee report).

<sup>43</sup> One of these supportive submissions was from the bill's sponsor, Paul Quinn MP.

<sup>44</sup> Its submission concluded that the bill "is retrograde legislation, which will erode the free and democratic nature of New Zealand society without justification. It is irrational and arbitrary and unreasonably impairs the right to vote more than is necessary. It is also not in due proportion to the objective of punishment." New Zealand Law Society, "Submission on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010" at [18].

<sup>45</sup> It opposed the bill on the grounds that; "Voting is a fundamental human right and [removing it] cannot be justified either as punishment or as a deterrent. The Bill itself is inconsistent with New Zealand's international commitments and overseas jurisprudence. In the domestic context it contravenes the [New Zealand Bill of Rights Act 1990] and cannot be justified and the disproportionate impact on Maori amounts to indirect discrimination. Perhaps most importantly, however, it undermines the notion of New Zealand as a democracy where everyone has rights and responsibilities." Human Rights Commission, "Submission on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010" at [5].

Not only did the majority's report completely fail to address the need for any change to the law, its proposed amendments to the Bill contained a glaring error. The majority recommended that the Bill be changed to completely repeal the existing section 80(1)(d) that disqualifies prisoners serving sentences of three-or-more years from enrolling to vote, replacing this with a provision disqualifying "a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of [this legislation]". While this change was intended to avoid retrospectively disqualifying current prisoners serving sentences of less-than-three years from registering to vote, the Committee neglected to include a transitional provision that continues to disqualify existing prisoners serving sentences of more-than-three years. Consequently, enacting the Committee's recommended amendment would have allowed any *current* prisoner to enroll to vote no matter how serious the nature of his or her offence or term of imprisonment, whilst preventing all *future* prisoners from enrolling to vote.

Although this potential outcome clearly was an inadvertent mistake,<sup>46</sup> one that was remedied later in the legislative process by way of a Supplementary Order Paper, the fact that it happened at all was not only politically embarrassing<sup>47</sup> but also indicative of a lack of legislative care on this issue. This casual attitude then continued to be exhibited in subsequent stages of the renamed Electoral (Disqualification of Sentenced Prisoners) Amendment Bill's passage into law. At the Bill's second reading following the Law and Order Committee's report, the only Government MP to give a substantive speech in favour of its passage was its sponsor, Paul Quinn. The chair of the Law and Order Committee did not even attend the debate on its report, while her party colleagues gave only one or two sentence "speeches" to the House in support of its recommendations.<sup>48</sup> The reason for the Government MP's minimal contributions was that they wished to speed through the "debate" on the measure, so as to leave sufficient time to complete the second reading of another Members' bill that same evening.

A similar failure to engage in debate was displayed at the Bill's Committee stage. At this point in the legislative process, MPs have the opportunity to examine a bill in detail and debate the wording and effects of particular provisions. However, of the 13 speakers who addressed the Bill's content, only 3 came from the ranks of the National Party. The Act Party, which provided the National Party with the votes needed for a parliamentary majority throughout this legislation's passage, did not even put up a single MP to address the Bill's content. Furthermore, during this debate Mr Quinn made a rather startling admission about his own legislation:

[An opposition Labour Party MP] proceeded to go on and ask what the mischief was behind the bill. Well, *there is no mischief*; this legislation is what the overwhelming majority of people want. ... The overwhelming majority of

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<sup>46</sup> The Bill's sponsor, Paul Quinn, claimed that the error was the fault of the parliamentary counsel who drafted the amendment; see (10 October, 2010) 667 NZPD 14679. However, it should be noted that parliamentary counsel work to drafting instructions provided by the Committee majority.

<sup>47</sup> The Committee's error received a large amount of media coverage, see e.g. Yvonne Tahana "'Stupid' legislation gives killers and rapists the right to vote" *New Zealand Herald*, 21 September, 2010; Radio New Zealand News, "Snag over bill to stop prisoners voting", 20 September, 2010, <<http://www.radionz.co.nz/news/political/57322/snag-over-bill-to-stop-prisoners-voting>> (accessed 29 October, 2015).

<sup>48</sup> (20 October, 2010) 667 NZPD 14679.

the community want prisoners not to be able to vote.<sup>49</sup>

We may put to one side the question of why, if the community really is so strongly opposed to prisoners voting, only one person besides Mr Quinn made a submission to select committee in support of his legislation. The real question instead is whether it is appropriate for an MP to propose legislation that removes the fundamental rights of individuals for no other reason than that it “is what the overwhelming majority of people want.” Or, rather, is it appropriate that an MP do so without being able to cogently explain and defend why “the people” are right to desire this course of action?

The Bill’s final, third reading debate was only slightly better. Although more National MPs did contribute to the debate—five in total, including the Minister of Defence; the sole Government minister to speak during the Bill’s entire passage—none spoke for more than three or four minutes. Mr Quinn opened the debate with a somewhat Freudian slip: “I have listened with care and intent to the arguments—or should I say the lack of arguments—that have been discussed in this House.”<sup>50</sup> Furthermore, the Act Party’s Hilary Calvert gave the following speech setting out her party’s “reasons” for supporting the measure’s passage into law:

I rise to take a call on the third reading of the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill. I cannot pretend this bill is my favourite thing. [Labour MP] Trevor Mallard leaving the House earlier, and not being able to vote while he was away, could count as a favourite thing. Perhaps popping a ping-pong ball in the mouth of the honourable member over there who all day keeps turning his head from side to side with his mouth open could count as my favourite thing. This bill is not my favourite thing. However, Act is supporting National on this bill.<sup>51</sup>

When assessing this last contribution, it should be remembered that while her party’s five votes provided the parliamentary majority necessary to pass the measure into law, none of its members had given a substantive speech explaining the reasons for their support since the first reading debate.

The point of recounting in such detail the process by which this Bill was enacted is to highlight how badly Parliament failed in its lawmaking duty. I do not mean to overstate matters here. The test of parliamentary processes when making law ought not to be perfection, but rather “good enough”. After all, not every parliamentarian can rise to the oratory heights of Cicero, or will carefully frame her or his debate contributions to meet the Rawlsian “how would our argument strike us presented in the form of a supreme court opinion?” test of public reason.<sup>52</sup> If we seek to hold members of Parliament to such standards, then it is unlikely *any* debate on *any* measure will ever suffice to meet them.<sup>53</sup> Nevertheless, where members of Parliament are considering a legislative proposal that affects a fundamental individual right—

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<sup>49</sup> (10 November, 2010) 668 NZPD 5184 (emphasis mine)

<sup>50</sup> (8 December, 2010) 669 NZPD 15961.

<sup>51</sup> (8 December, 2010) 669 NZPD 16002.

<sup>52</sup> John Rawls *Political Liberalism* (expanded edition, Columbia University Press, New York, 2005) at 254.

<sup>53</sup> But equally, it is unlikely any other institution in society would be able to meet such a strict standard. Even courts on occasion issue poorly reasoned, incompletely argued and somewhat superficial judgments—which nevertheless remain binding on the parties to the proceedings and lower courts in the judicial hierarchy.

especially where it affects that right in a way that they have been advised cannot be demonstrably justified in a free and democratic society—we should expect that at a minimum they will engage meaningfully with the issues at hand and take the opportunity to make a genuine effort at spelling out why the measure is nevertheless the right one to adopt into law. We certainly should not expect them to speed through the legislative process in order to get onto the next item of business, or to effectively refuse to take part in the debate at all. Because insofar as they do so, they undermine the reason for respecting their legislative judgments, which ultimately saps legitimacy from Parliament’s claim to be the sovereign lawmaking body for society as a whole.

### **From Parliament to the Courts: The Judiciary’s Response to the Blanket Ban on Prisoner Voting**

Once the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 entered into force and s.80(1)(d) of the Electoral Act 1990 was amended, the law appeared to be relatively clear.<sup>54</sup> If a person is detained in a prison pursuant to a sentence of imprisonment, then she or he may not enroll to vote (and hence may not cast a ballot at election time). Furthermore, New Zealand’s ongoing constitutional commitment to a strong version of parliamentary sovereignty appeared to constrain any possible legal challenges to the law’s effects. With no “higher law” written constitution in place, the courts are precluded from invalidating or refusing to apply parliamentary enactments. Simply put, provided Parliament is clear in its intention, it is able to impose any legal rule upon society that it chooses—even legal rules that prevent individuals from being allowed to take part in deciding who gets to be in Parliament in the first place.

Therefore, matters might well have rested but for the intervention of a long-term prisoner and jailhouse lawyer, Mr Arthur Taylor. In the run-up to the 2014 general election, he gathered a group of serving prisoners and launched a series of separate court challenges to the amended s 80(1)(d). One action sought to injunct the Electoral Commission from proceeding with the election unless prisoners were permitted to enrol to vote. This claim failed as;

“[h]owever constitutionally objectionable s 80(1)(d) might be, Parliament has (for now) spoken. And what Parliament has said is that no prisoner who is serving a sentence of imprisonment and who happens to be incarcerated on 20 September 2014 may vote in this year’s general election. The applicants therefore have no position to preserve and the Court is unable to intervene. The application is dismissed accordingly.”<sup>55</sup>

A second challenge took the form of an election petition questioning the return of the country’s Prime Minister to Parliament on the basis that a failure to allow prisoners to vote constituted an “unlawful election”. It also failed, as Mr Taylor did not possess the standing necessary to bring the petition.<sup>56</sup> Finally, the prisoners’ asked the High Court to formally declare s 80(1)(d) inconsistent with the NZBORA. This last action is the focus of the remainder of this paper. It first considers the background to the

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<sup>54</sup> But see above at note 15.

<sup>55</sup> *Taylor v Attorney General* [2014] NZHC 2225 at [80] (hereafter *Taylor (Injunction)*).

<sup>56</sup> *Taylor v Key* [2015] NZHC 722 at [83]-[93] (hereafter *Taylor (Electoral Petition)*).

remedial claim before looking at how the High Court approached the prisoners' particular request.

### *Declarations of inconsistency under the NZBORA?*

The availability of a declaratory remedy under the NZBORA was mooted quite soon after the legislation first entered into force.<sup>57</sup> Unlike the United Kingdom's Human Rights Act 1998, the NZBORA does not expressly empower the judiciary to issue so-called "declarations of inconsistency". Any such remedy instead must be sourced in the legislation's nature and purpose. In particular, the inclusion of s 5—the "justified limitations" provision<sup>58</sup>—is argued to require that the courts independently assess the rights impact of parliamentary legislation.<sup>59</sup> Section 4 explicitly prevents the courts invalidating or refusing to apply any rights-limiting enactment that cannot be interpreted under s 6 in a way that meets the s 5 justification test.<sup>60</sup> However, the statute is silent as to what else can be done with judicial conclusions reached during the evaluative exercise. In 2000, Justice Tipping, writing for a five member Court of Appeal, was of the opinion that:

"[the] purpose [of s 5] necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. ... In the light of the presence of s 5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder."<sup>61</sup>

Justice Thomas, speaking for himself, already had gone further by proclaiming that "it would be a serious error not to proclaim a violation [of the NZBORA] if and when a violation is found to exist in the law";<sup>62</sup> while in a later case his Honour delivered a minority decision in which he argued for issuing a declaration of inconsistency in regards the facts before the court.<sup>63</sup>

However, in spite of these judicial statements regarding the consequences of applying s 5 to legislation, no formal declarations of inconsistency actually were issued. Indeed, it almost seemed as though New Zealand's judges were determined to find reasons to avoid doing so. As Claudia Geiringer has noted:

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<sup>57</sup> F M Brookfield "Constitutional Law" [1992] *NZ Recent Law* 231, 239; *Temese v Police* (1992) 9 CRNZ 425, 427 (CA) per Cooke P.

<sup>58</sup> Section 5 reads: "Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

<sup>59</sup> P. Rishworth, "The Inevitability of Judicial Review under 'Interpretive' Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?", in G. Huscroft and I. Brodie (eds) *Constitutionalism in the Charter Era* (Toronto: Lexis Nexis Canada, 2004) 233.

<sup>60</sup> Section 6 requires that: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

<sup>61</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20] per Tipping J.

<sup>62</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523, 554 (CA) per Thomas J.

<sup>63</sup> *R v Poumako* [2000] 2 NZLR 695 (CA) at [86]-[107] per Thomas J.

“[a]lthough [the courts] continue to leave open the ultimate question as to whether there is such a jurisdiction [to issue a declaration], [they] place significant hedges around its scope and the circumstances in which it might be exercised, the most significant being its restriction to civil proceedings. More generally, the tenor of this body of case law suggests that, even if a residual jurisdiction to make declarations of inconsistency does exist, it will be exercised only rarely.”<sup>64</sup>

Not only did the courts narrow the range of cases where a declaration is an available remedy, but they also developed a novel way of “indicating” that legislation is inconsistent with the NZBORA without formally declaring it to be so. In *R v Hansen*<sup>65</sup> the Supreme Court concluded that a reverse onus provision in the Misuse of Drugs Act 1975 limited the right to be presumed innocent under the NZBORA in a manner that could not be demonstrably justified under s 5, but as no other “reasonable” interpretation of the legislation was available under s 6 it nevertheless had to be applied by virtue of s 4. Rather than then formally declare the statutory provision to be inconsistent with the NZBORA, the *Hansen* Court instead preferred to allow its reasoning to speak for itself, confident that:

“there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm.”<sup>66</sup>

This *sotto voce* “showing” the nature of a legislative inconsistency rather than explicitly “telling” of its existence by way of a judicial order avoided having to construct a basis for a full declaratory remedy not explicitly provided for in the statute.

For despite the judiciary’s claims regarding the necessary implication of s 5, the Crown denied the courts possess jurisdiction to make declaratory orders under the NZBORA.<sup>67</sup> Opposition is couched in terms of the courts overstepping their appropriate constitutional role:

“the making of a declaration of invalidity (*sic*) and issuing and sealing a judgment effecting the finding is a determination by a Court that in enacting a particular statutory provision Parliament had created circumstances in which the executive would be acting contrary to law and had itself acted unlawfully. To do so, [the Crown argues], would bring the Court into conflict with Parliament contrary to the fundamental principle of comity.

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<sup>64</sup> C. Geiringer, “On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act” (2009) 40 *Victoria University of Wellington Law Review* 613, 623.

<sup>65</sup> [2007] 3 NZLR 1 (NZSC).

<sup>66</sup> *R v Hansen* [2007] 3 NZLR 1 (NZSC) at [254] per McGrath J. This confidence was somewhat misplaced; not only does the provision remain in place today, but Parliament has applied it to a number of new substances since 2007.

<sup>67</sup> See, e.g., *Mangawhai Ratepayers’ and Residents Association v Kaipara District Council (No 3)* [2014] 3 NZLR 85 at [34]; *Taylor v Attorney-General* [2014] NZHC 1630 (hereafter *Taylor (Strike-out)*).

On a more narrow footing [the Crown argues] that the Court would be enjoined to call into question a proceeding in Parliament in breach of article 9 of the Bill of Rights in a matter clearly beyond that contemplated by the House via the enactment of s 5 of NZBORA.”<sup>68</sup>

This determined resistance to the courts formally declaring that a parliamentary enactment contains unjustified limits on individual rights reflects an ongoing Diceyan understanding of Parliament’s role in New Zealand’s constitutional order. The view that Parliament should be able to make law as it sees fit without question from other branches of the government was exemplified by the country’s Deputy Prime Minister in a rejoinder to what he saw as unwarranted judicial challenges to that power; “New Zealand is a sovereign state in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the will of the governed, and the body to which the Government of the day is accountable.”<sup>69</sup> In the face of such vigorous opposition from the nation’s political actors to an expanded judicial role, New Zealand’s judiciary apparently preferred not to press the matter by actually exercising any theoretical declaratory jurisdiction.

### *Prisoner voting and the NZBORA*

Against this background, the prisoners’ claim represented something of a “put-up-or-shut-up” moment for the judiciary. In simple terms, if the courts would not issue a declaration of inconsistency in *this* case, then it is hard to see when one ever would be made. From a procedural perspective, the prisoners’ claim for a declaration avoided the problems that had caused courts to reject earlier applications. It took the form of a civil claim, rather than being raised in the course of a criminal trial.<sup>70</sup> The legislation directly affected the applicants rather than a court being asked to examine the law’s impact in the abstract.<sup>71</sup> Finally, a declaration of inconsistency was the only realistic remedy available to the applicants. Parliament’s clear intention when enacting the bar on prisoners enrolling to vote allowed for only one reading of the relevant provision; that sentenced prisoners may not vote whilst they remain behind bars.<sup>72</sup> Absent a serious issue of statutory interpretation, a court could not take the *Hansen* approach and quietly indicate NZBORA inconsistency in the course of determining the legislation’s proper meaning. And because the limitation on rights was expressly authorised by primary legislation, a monetary remedy in the form of so-called *Baigent* damages<sup>73</sup> for breach of the NZBORA almost certainly would not be available.

The substance of the prisoners’ claim also provided compelling grounds for issuing a declaration. There was no debate as to whether the ban on all prisoners voting is in fact inconsistent with the NZBORA. Not only had the Attorney-General certified this to be the case when the legislation was considered by the House of Representatives,

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<sup>68</sup> *Taylor (Strike-out)* [2014] NZHC 1630 at [40]-[41].

<sup>69</sup> Hon M Cullen “Parliamentary Sovereignty and the Courts” [2004] *New Zealand Law Journal* 243, 243. See also Hon M Cullen, “Parliament: Supremacy Over Fundamental Norms?” (2005) 3 *New Zealand Journal of Public and International Law* 1.

<sup>70</sup> *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at [16]; *McDonnell v Department of Corrections* [2009] NZCA 352 at [123].

<sup>71</sup> *Boscawen v Attorney-General (No 2)* [2009] 2 NZLR 229 at [53]-[54].

<sup>72</sup> *Taylor (Injunction)* [2014] NZHC 2225 at [26]-[31]. See also *Taylor (Electoral Petition)* [2015] NZHC 722 at [72]-[78].

<sup>73</sup> *Simpson v Attorney-General [Baigent’s Case]* [1994] 3 NZLR 667.

but the Crown did not resile from that conclusion following its passage into law.<sup>74</sup> As such, there was no issue as to whether the legislation limited the applicants' rights under the NZBORA<sup>75</sup> or whether any such limitation could be justified by s.5.<sup>76</sup> Second, the right involved was very important and the limitation extensive in nature. The 2010 amendment to s 80(1)(d) completely removed several thousand individuals' right to participate in the foundational moment of a democratic nation's government. Furthermore, the means by which Parliament imposed the limit did not inspire confidence that the legislation's rights-consequences had been carefully and thoughtfully addressed. While it is quite within Parliament's capacity to engage in such debates, as Danny Nicol suggests has in fact occurred in the United Kingdom,<sup>77</sup> that manifestly was not the case in New Zealand.

The High Court then considered the prisoners' claim for declaratory relief on two occasions. The Crown initially sought to have the action struck out on the basis that the courts lacked jurisdiction to provide the remedy sought.<sup>78</sup> As noted above, the Crown's position was that issuing a formal declaration of inconsistency represents an improper judicial intervention into the legislative arena. At most, courts may make *obiter* comments that draw attention to the fact s 4 requires some legislative provision be applied in a NZBORA inconsistent fashion. To do anything more than this would invent a novel judicial power that directly impugns the parliamentary law making process. As such, the courts simply cannot do what the applicants asked.

This strike out application failed. Justice Brown rejected outright the Crown's contention that issuing a declaration of inconsistency would involve a questioning of parliamentary proceedings in breach of Article 9 of the Bill of Rights 1688. Once Parliament has enacted a statute, it is for the courts to say what it means.<sup>79</sup> And if courts may indicate their conclusion that some statute must be applied in a manner inconsistent with the NZBORA, "then it is difficult to see how the making of a declaration of inconsistency could amount to a contravention of article 9."<sup>80</sup> Furthermore, his Honour considered that the principle of comity did not prevent the courts from issuing such declarations. With regards concerns that a declaration might constrain Parliament's law making powers, Brown J claimed "it is now recognised that it is no longer correct to say that Parliament's freedom to legislate admits of no qualification whatever."<sup>81</sup> While the courts may be reluctant to *in practice* expressly declare a parliamentary enactment to be an unjustifiable limit on individual rights, nothing in New Zealand's constitutional order says that they can *never* do so.<sup>82</sup> However, Brown J also warned the applicants that their success "could be a Pyrrhic victory" in light of his Honour's "view of the Court's current jurisdiction to grant declarations of inconsistency is: in theory 'yes' but in practice 'no'."<sup>83</sup> In addition to Brown J's general concerns about the courts being seen to interfere in areas

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<sup>74</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [32].

<sup>75</sup> Compare with *Miller v The New Zealand Parole Board* [2010] NZCA 600; *Seales v Attorney-General* [2015] NZHC 1239 at [151]-[209].

<sup>76</sup> Compare with *Mangawhai Ratepayers'* [2014] 3 NZLR 85 at [95]-[111].

<sup>77</sup> D. Nicol, "The Legitimacy of the Commons debate on prisoner voting" [2011] P.L. 681.

<sup>78</sup> *Taylor (Strike-out)* [2014] NZHC 1630.

<sup>79</sup> *Taylor (Strike-out)* [2014] NZHC 1630 at [57].

<sup>80</sup> *Taylor (Strike-out)* [2014] NZHC 1630 at [59].

<sup>81</sup> *Taylor (Strike-out)* [2014] NZHC 1630 at [73].

<sup>82</sup> *Taylor (Strike-out)* [2014] NZHC 1630 at [79]-[82].

<sup>83</sup> *Taylor (Strike-out)* [2014] NZHC 1630 at [83].

traditionally viewed as Parliament's domain, his Honour specifically warned that "in a case such as the present where the Attorney-General has presented a report specifically on the issue and Parliament has remained unmoved, I consider that a Court would be particularly hesitant to consider the grant of a declaration...."<sup>84</sup>

However, this pessimistic view of the prisoners' ultimate chance of success proved ill-founded. In the substantive ruling on the application for a declaration of inconsistency, Heath J not only echoed Brown J's finding that the High Court has jurisdiction to provide such relief but also exercised his discretion to grant it. On the jurisdictional point, Heath J extrapolated from the Court of Appeal's decision in *Simpson v Attorney General [Baigant's Case]* establishing that monetary damages are an available remedy for (at least some) breaches of the NZBORA. Drawing on that decision and later Supreme Court rulings,<sup>85</sup> Heath J concluded that:

"[t]he general principle is that where there has been a breach of the Bill of Rights there is a need for a Court to fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right. Should the position be any different in respect of the legislative branch of Government? In my view, the answer is 'no'."<sup>86</sup>

Reinforcing the conclusion that declarations of inconsistency are an available judicial remedy, his Honour noted that in 2002 Parliament decided to empower the Human Rights Review Tribunal to declare legislation inconsistent with the NZBORA's s 19 right to be free from discrimination.<sup>87</sup> It would, opined Heath J, be odd for an inferior Tribunal to be able to make such declarations in respect of one particular right under the NZBORA while the superior courts were unable to do so for all the other rights it guarantees.<sup>88</sup>

Having accepted that the declaratory remedy was available in theory, Heath J then turned to consider whether it ought to be provided in the immediate case. It is clear that there is no *right* to a declaration whenever the Court concludes that legislation is inconsistent with the NZBORA.<sup>89</sup> However, Heath J noted that "[t]he authorities emphasise the *desirability* of the Court speaking out to identify cases in which particular legislation is inconsistent with the Bill of Rights."<sup>90</sup> In contrast to Brown J, his Honour did not regard the Attorney-General's earlier notification of the proposed legislation's inconsistency with the NZBORA as providing any reason to be "hesitant" when issuing a declaration.<sup>91</sup> Justice Heath saw a declaration of inconsistency as being of a quite different nature to the Attorney-General's advice and addressed to a quite different audience: "When reporting under s 7, the Attorney's responsibility is to Parliament. When determining questions of public law, this

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<sup>84</sup> *Taylor (Strike-out)* [2014] NZHC 1630 at [86].

<sup>85</sup> *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

<sup>86</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [61].

<sup>87</sup> See, e.g., *Howard v Attorney General (No.3)* (2008) 8 HRNZ 378.

<sup>88</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [64].

<sup>89</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [76].

<sup>90</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [67] (emphasis mine).

<sup>91</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [71].

Court's responsibility is to all New Zealanders."<sup>92</sup> Therefore, the principle of comity should not dissuade the Court from issuing a declaration as it is not an attempt to intervene in or directly influence any parliamentary proceeding.<sup>93</sup>

As a declaration was an available remedy and nothing prevented his Honour exercising his discretion to issue one, Heath J did so. The right at issue was so important and the limit so severe that the occasion warranted providing relief even in the absence of any live controversy between the parties; "if a declaration were not made in this case, it is difficult to conceive of one in which it would."<sup>94</sup> By issuing this declaration, the Court then intentionally sends a message to the New Zealand public regarding the nature of the law that governs them.<sup>95</sup> As far as Heath J was concerned, "[a]ny political consequences of my decision can be debated in the court of public opinion, or in Parliament."<sup>96</sup> It is to those potential political consequences I now turn.

*What effect might a declaration of inconsistency have?*

The value of judicial declarations of inconsistency is thought to lie in their being able to raise the public profile of NZBORA inconsistent legislation, thereby increasing the probability that Parliament will revisit the matter with an eye to rectifying the rights breach. Stephen Gardbaum exemplifies this line of thinking:

"the key problem [with the NZBORA] in my view is that cases in which judges find an inconsistency ... do not receive sufficient attention in the media and elsewhere to ensure that Parliament comes under political pressure to address and resolve the rights issue. Such publicity and attendant raising of political costs is an important structural feature of an institutional arrangement in which the default rule lies with parliament and its affirmative action is needed to affect the continuing operation of the law ... . New Zealand courts need to not *just* find an incompatibility where a statute cannot be interpreted in a rights-consistent manner ... but to *declare* it. Otherwise ... the finding risks being buried beneath the judgment that the claimant loses."<sup>97</sup>

I suspect that this anticipated consequence of a formal declaration reflects an understanding of how the remedy has functioned in the United Kingdom context. We are told, for example, that under the U.K. Human Rights Act 1998; "[i]n practice, declarations of incompatibility have been responded to either through remedial orders or legislation in almost all cases, rendering [political] decisional space quite

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<sup>92</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [77(d)]. See also Tipping J's statement in *R v Hansen* [2007] 3 NZLR 1 (NZSC) at [109]: "Clearly the courts are not bound by the Attorney-General's assessment or by Parliament's concurrence..."

<sup>93</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [69].

<sup>94</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [77(a)].

<sup>95</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [30]; [77(d)].

<sup>96</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [70].

<sup>97</sup> S Gardbaum, "A Comparative Perspective on Reforming the New Zealand Bill of Rights Act" (2014) 10 *Policy Quarterly* 33, 37 (emphasis in the original). See also C Geiringer, "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 *Victoria University of Wellington Law Review* 613, 642.

restricted.”<sup>98</sup> A formal judicial order declaring some enactment to be an unjustified limit on individual rights might therefore be expected to have a similar chastening effect on New Zealand’s lawmakers.

Whether this expectation will be met is, of course, another question. Certainly the political actors’ response to the Court’s declaration has been muted; after taking a couple of weeks to “consider its implications”, the Crown decided to appeal the matter to the Court of Appeal. This decision has the not uncoincidental effect of removing the issue from the public arena for at least another six months. However, setting aside questions as to the ultimate utility of the declaratory remedy, I wish to focus in this final section on just why the High Court felt moved to grant it and what this reveals about the question of who ought to decide if a right is necessary, how it ought to apply and what limits on it are permissible.

In *Taylor*, the right at hand was a “process” one—an individual’s ability to participate in the electoral system—that the Crown accepted had been unjustifiably limited. There really was no substantive disagreement between the Crown and Mr Taylor over the basic status of the Electoral Act provision in regards the NZBORA. Instead, the question was what, if anything, can the courts do about the fact that it imposes unjustified limits on individual rights? Given the nature of the right at hand—“arguably the most important civic right in a free and democratic society”<sup>99</sup>—and the lack of any attempt to argue that the law legitimately abrogated that right, it is relatively easy for a court to see its way clear to issuing a declaration. By doing so, Heath J can see himself as joining in the triumphal march of humanity towards a commonly recognised end goal; “History is replete with stories about the struggle for equal and universal suffrage, whether on grounds of race, gender or otherwise.”<sup>100</sup> His Honour may further be reassured that he is acting consistently with the original “vision” of the NZBORA, as described in the 1985 White Paper:

For the most part [a Bill of Rights] would not control the *substance* of the law and of the policy which would continue to be elaborated in, and administered by, present and future parliaments and governments. Thus the Bill would reaffirm and strengthen the fundamental procedural rights in the political and social spheres—rights such as the vote, the right to regular elections, freedom of speech, freedom of peaceful assembly, and the freedom of association. These rights in a substantive sense can—in terms for instance of economic and social policy—be seen as value free. So they do not attempt to freeze into a special constitutional status particular substantive economic and social policies.<sup>101</sup>

In particular, I suspect that the casual, almost contemptuous way in which a bare majority of MPs stripped the right to vote from all sentenced prisoners reduced the strength of the claim that the Court ought to defer to that decision and refrain from expressing formal disagreement with it. Furthermore, High Court judges are not so

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<sup>98</sup> C Chandrachud, “Reconfiguring the Discourse on Political Responses to Declarations of Incompatibility”, [2014] PL 624, 635.

<sup>99</sup> *Taylor (Declaration)* [2015] NZHC 1706 at [2].

<sup>100</sup> *Ibid* at [4].

<sup>101</sup> Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at 28. See also *Taylor (Declaration)* [2015] NZHC 1706 at [6].

insulated from the political world of Wellington that they cannot accurately assess the chances of MPs deciding to revisit the law governing prisoner voting to remedy the NZBORA inconsistency without some sort of external prompt. The rights of prisoners simply are not a matter likely to gain much traction in the current political climate, unless Parliament is given a reason to care about them. The issuance of a declaration in *Taylor* was an effort to create such a reason. Whether it will be successful only time will tell. But the very fact the High Court felt it needed, and as able, to act in the way it did is a significant development for New Zealand's democratic institutions and practices.