

The ECan Act: A Staggering use of Legislative Power

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Of the recent changes to Canterbury water governance, sacking the council is the least offensive to constitutional etiquette. The ECan Act shows a breathtaking use of parliamentary power, and could be a game-changer in New Zealand environmental law.

Imagine a situation where a government gives a minister the power to ignore the law without asking Parliament. Government did just that in section 31 of the ECan Act, formally called The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010. Section 31 grants the Minister for the Environment, Hon. Dr. Nick Smith, special powers to decide where and when New Zealand environmental law applies in Canterbury.

Associate Professor of Law Andrew Geddis described this as a “Henry VIII Clause”, by which the minister may disapply the Resource Management Act (RMA) without asking Parliament, (see *The Press* 27/04/2010). This gives Nick Smith the power to let the appointed ECan commissioners ignore inconvenient sections of the RMA, just as Henry VIII beheaded inconvenient wives.

Allowing the Minister for the Environment to summarily avoid applying sections of environmental law in Canterbury until he calls another regional election is so exceptional that it bears no further comment.

Next, imagine a situation where one team changes the rules of the game at half-time because its side might lose. Sections 46-61 do just that to Canterbury Water Conservation Orders, often called the national parks of rivers.

A Water Conservation Order protects outstanding ecological, recreational, cultural, or wild and scenic characteristics of a river, and is affirmed in the RMA. The ECan Act section 46 suspends that part of the RMA until the next regional election in Canterbury; and there are no guarantees when that might be.

Under the Water Conservation Order law that still applies in all other regions, decision makers prioritise the protection of nationally outstanding characteristics before allowing resource use, unless the economic potential was important on a national scale. The ECan Act changes the order, so conservation loses its priority status. In other words, it takes the conservation out of Water Conservation Orders.

The Hurunui Water Conservation Order had been through hearings, and the Environment Court appeal was scheduled to begin 30 May 2010. In other words, it was half-time for the Hurunui. Changing the rules of the game at half-time is as unpalatable to the rule of law as it is to sports. In a case in 2000, His Honour Justice Thomas considered changing the rules at half-time to be constitutionally objectionable because it violates the principle of equal application of the laws.

Finally, imagine a situation in which Aucklanders have the right to appeal their regional government's decisions, but Cantabrians do not. Section 52 of the ECan Act does just that for Water

Conservation Orders and Regional Plan decisions. Until the next ECan election, only the appointed commissioners will hear scientific evidence, and this evidence will never be cross examined. This beheads the Environment Court, but again, only in Canterbury.

The suspended jurisdiction of the Environment Court means those interested in Canterbury water have lost a long-standing right of substantive appeal that citizens of other regions still enjoy. The right to appeal the substance of a decision to a specialist court is very different to, and much broader than, the right to appeal on a point of law.

This selective beheading of the Environment Court seems anathema to the guarantee of natural justice in New Zealand's Bill of Rights Act 1990. Different treatment under the law is just as constitutionally unpalatable, if not more so, than changing the rules when your side is losing.

This is why the special powers of the “Henry VIII clause”, the changed rules for the Water Conservation Orders, and the suspended jurisdiction of the Environment Court raise far more constitutional alarm bells than sacking the regional council.

How can Parliament pass bills that its own Ministry of Justice deems constitutionally unpalatable (see *The Press* 24/04/2010).

New Zealand's Constitution Act 1986 recognises Parliament has “full power to make laws” (s. 15). Professor of constitutional law Philip Joseph describes this power as “unlimited and illimitable.” Illimitable parliamentary power places great faith in what Justice Baragwanath called the “good sense of parliamentarians”. If parliament wishes to violate the Bill of Rights Act, it may, if the actions are “demonstrably justified.”

Whether the ECan Act passes the ‘demonstrably justified’ test is in the eye of the beholder. Because Parliament is sovereign (or all-powerful), it subsumes the beholder's eye. So the beholder is legally irrelevant, but can be politically pivotal.

A grand old theory of politics predicts that, in a battle between irrigators and environmentalists, the relative size and strength of the groups does not matter as much as which side the public takes. The stronger side usually seeks to minimise the scope of the debate so as to engage the public as little as possible. But public engagement is the weaker side's only hope.

When the fight breaks out, the crowd plays the decisive role. Although Parliamentary sovereignty is absolute, what is legally possible might be politically untenable because it attracts the crowd's attention.

But because Parliamentary sovereignty is absolute, Cantabrians lack firm constitutional recourse. Cantabrians are left to sputter that wonderful line from the Australian movie *The Castle*, where in an early courtroom scene the hopelessly inept but ultimately triumphant small-town solicitor summarises his

argument by claiming: “There is no one section, it’s just the vibe of the thing. ... And, uh, no, that’s it. It’s the vibe.”

Whether or not Parliament overstepped its admittedly porous constitutional bounds with the ECan Act, *The Press* reports almost daily on a growing sense of betrayal and unfair treatment among Cantabrians. It seems that the proverbial fight has broken out, and the crowd is taking sides.

Herein lies the irony of the ECan Act. Suspending both regional elections and appeals to the Environment Court clearly minimizes the scope of debate over crucial water issues by eliminating many of the players from the field. However, these actions have attracted attention from many who had never noticed before.

Parliament can do as it pleases. But while parliamentary actions perceived as unfair may escape judicial rebuke, they might attract public opprobrium. This public opprobrium can be more damaging to a coalition government and to the legislation itself, than judicially imposed change. Witness the Electoral Finance Act 2007.

Though the ECan Act might leave a bad taste in the mouth constitutionally, it is legal because parliament is sovereign. But politically, that bad taste might come back to haunt the Government, the ECan Act, and Canterbury water itself.

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*A cairn of stones from South Island rivers in Cathedral Square, constructed by citizens as a protest against the loss of democratically elected regional councillors.
Image taken by Sacha Murray*