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INCOMMENSURATE VALUES? ENVIRONMENT CANTERBURY AND LOCAL DEMOCRACY

*Sascha Mueller**

Following years of delayed processing of resource consent applications by the regional council, Environment Canterbury, the New Zealand Parliament passed the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, which replaced the elected councillors with government-appointed commissioners. This raised the question under which circumstances and to what extent Parliament should be able to interfere in local democracy. Local democracy is a vital part of the general democratic health of a constitutional system. It contributes to pluralism and the diffusion of power, and it enables better direct citizen participation in local decision-making. However, an inefficient local authority has adverse effects on the local, and potentially national, economy and well-being. The evaluation of democratic versus economic interests proves to be difficult, as these values are incommensurate: they are founded on mostly unrelated considerations and therefore lack a common foundation on which to base a comparison. Historically, when faced with deciding between these issues, governments have tended to side with the economic interests. That means that democratic considerations are generally mostly disregarded. Due to the importance of democratic structures to the constitutional system, this status quo is unacceptable. In order to better reflect democratic considerations in such decision-making processes, local government institutions must be strengthened, be it by political or constitutional means.

I INTRODUCTION

Local government is an important part of modern governance. Because local government operates on a level that is closer to the local population than central government, it is well-placed to implement policies on local level and to provide services and infrastructure catered to the needs of the local population. To this end, local democracy plays a vital role in effective local governance: through local elections, voters can influence who makes the decisions that affect them locally. This article examines the impact of the Environment Canterbury (Temporary Commissioners and Improved Water

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Management) Act 2010 (ECan Act) on local government. The Act had a variety of constitutionally significant effects: it was *ad hominem*, had retrospective effect, contained a Henry VIII clause and barred access to the Environment Court.¹ But possibly the most severe effect of this Act, and the focus of this article, was the replacement of the elected members of Canterbury's regional council (Environment Canterbury) with government-appointed commissioners.² Parliament thereby effectively suspended regional democracy in Canterbury for years to come.³

The purpose of this article is to evaluate the propriety of the ECan Act, specifically with regards to local democracy. Local democratic mechanisms are an important part of a country's democratic health: they facilitate better representation of the local population, enable more efficient local governance and create a more diverse government. This is only the case, however, if local authorities can act autonomously and without threat of central government interference. Local democracy is weak where a local authority has only little discretion to act in the interest of the local population. Local autonomy is therefore vital for democratic health and should ideally be supported by central government.

When Parliament passed the ECan Act, it severely impinged on Canterbury's local democracy. Even though both Parliament and Environment Canterbury are democratically elected bodies, there is little doubt that within New Zealand's constitutional system Parliament reigns supreme and can therefore dismiss local councillors. It is less clear whether it was appropriate for Parliament to react in this way to the situation in Canterbury. In the mid-2000s, Environment Canterbury had been processing less than one third of resource consent applications within statutory time limits and ideological difference between councillors led to suspicions that the Council was unable to make decisions. An inefficient and ineffective council does not serve its local population well and may warrant central government intervention, despite the importance of local democracy and autonomy. Instead of carefully weighing the situation in Canterbury against democratic values, Parliament chose to ignore the latter in favour of returning Environment Canterbury to efficiency at all costs.

1 These effects have been discussed elsewhere, and will not be the focus of this article. See Philip Joseph "Environment Canterbury Legislation" [2010] NZLJ 193; Geoffrey Palmer "What is Parliament for?" [2011] NZLJ 378; Ann Brower "The ECan Act, parliamentary sovereignty, and environmental law" (2010) 8 BRMB 144; Editorial "Ad Hoc Legislation" [2010] NZLJ 397; Austin Forbes "The rule of law and New Zealand lawyers" [2011] NZLJ 42; and Megan Gall "A Seismic Shift: Public Participation in the Legislative Response to the Canterbury Earthquakes" [2012] 18 *Canta LR* 232.

2 The statutory name is the "Canterbury Regional Council": see Local Government Act 2002, Schedule 2. The Council uses the promotional name "Environment Canterbury", also shortened to "ECan".

3 The ECan Act has been repealed and replaced by the Environment Canterbury (Transitional Governance Arrangements) Act 2016. It provides that, in the 2016 local government elections, seven of the thirteen Environment Canterbury councillors will be popularly elected and that full democracy will be restored to the region by the local government election in 2019.

II BACKGROUND

Most modern countries provide for some form of local government in order to maintain government business on a day-to-day basis on a local level. In New Zealand this is regulated by the Local Government Act 2002 (LGA). It states that the purpose of local government is to enable democratic local decision-making, to provide local infrastructure and public services and to perform regulatory functions.⁴ While central government provides the impetus for general policy decisions, local government implements these decisions with the needs of the local population in mind. It is in a better position to maintain and provide infrastructure and services as it is more familiar with local circumstances and, as it is elected by the local population, it can better respond to the will of the local population. Indeed, Palmer and Butler contend that "some measure of local government is necessary in all properly governed democratic countries."⁵

New Zealand's local government structure consists of territorial and regional authorities, which share responsibilities on local level.⁶ As a regional council, one of Environment Canterbury's roles is to manage the region's water quality and supply within the legislative framework of the LGA and the Resource Management Act 1991 (RMA). The Canterbury region is home to around 70 per cent of New Zealand's fresh water and a substantial part of the country's renewable hydroelectricity is produced there. It also produces around half of New Zealand's grain, seed and fodder crops and has the country's second largest number of dairy cows.⁷ The large amount of water and the high demand for it means that water management is of great significance in the area.⁸

During the 2000s, dissatisfaction was building around the way Environment Canterbury was managing Canterbury's water resource. The 2007/2008 Resource Management Act Survey of Local Authorities revealed that Environment Canterbury performed last out of 84 local authorities in terms of processing resource consent applications within the statutory time limits.⁹ The survey was followed by a letter from the Canterbury Mayors to the Ministry for the Environment in which they voiced their concerns about Environment Canterbury's processing of resource consents, its development of plans

4 Section 10.

5 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 188.

6 Local Government Act 2002, s 21.

7 Wyatt Creech and others "Investigation of the performance of Environment Canterbury under the Resource Management Act & Local Government Act" (February 2010) at i-ii and 5; Dairy NZ "New Zealand Dairy Statistics 2014-15" (2015) <www.dairynz.co.nz> at 13.

8 See for example the First Reading of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Bill: (30 March 2010) 661 NZPD 9927.

9 Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (June 2009) at Appendix 4.

and policies and its administration of water allocation, among other things.¹⁰ In response, the Minister for the Environment, the Hon Nick Smith, and the Minister of Local Government, the Hon Rodney Hide, commissioned a review of Environment Canterbury's performance, under the chairmanship of Wyatt Creech (Creech Report).¹¹ The Creech Report found that the lack of a regional resource management plan was concerning, given the importance and complexity of water management to the region.¹² It also identified a more general "institutional failure" within Environment Canterbury, which led to an inadequate response to the water challenge: it lamented poor working relationships with the territorial authorities and stakeholders, and that the Council over-emphasised environmental protection over economic development. The Creech Report also pointed out that, while councillors were more or less evenly split in terms of environmental and economic interests, they were so politicised and polarised that they were a dysfunctional group.¹³ It concluded that, due to the scale and complexity of Canterbury's water resource, and because the risks and benefits of its management affected not just the region but the entire country, central government intervention was justified.¹⁴

In response, legislation to address the concerns surrounding Environment Canterbury was introduced and passed on 30 March 2010. The main effect of the ECan Act was to replace the elected members of Environment Canterbury with government-appointed commissioners and to provide them with additional powers to address the management of water in Canterbury.¹⁵

From a constitutional perspective, this raises the question whether it is appropriate for one democratically elected body to oust another and, if so, under which circumstances.

III LOCAL GOVERNMENT AND DEMOCRACY

To answer these questions it is necessary to determine the constitutional status of local government in New Zealand and the value of local democracy to local government.

Local government is an important part of constitutional democracies.¹⁶ Due to its proximity to local needs and desires, it is best placed to make decisions locally and should be able to do so independently and autonomously. Central government interference, should generally be unnecessary

10 See Ministry of the Environment, *Briefing Paper: Further options for investigation of Environment Canterbury* (19 October 2009) at [3].

11 Creech and others, above n 7.

12 At 5–6.

13 At 7–10.

14 At 4.

15 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, s 3.

16 Department for Communities and Local Government *Strong and Prosperous Communities: the Local Government White Paper* (26 October 2006) at 2–3.

and kept to a minimum, so as not to undermine the ideal situation of local government.¹⁷ However, when issues with a local authority arise, such as inefficiencies, unwillingness to fulfil its duties or even inability to do so, central government must be able to intervene and correct the situation.

The circumstances and the extent to which central government can intervene in local government business depend on the position local government has within the constitutional system. In New Zealand, territorial and regional authorities are established by the LGA and their elections are governed by the Local Electoral Act 2001. Beyond this, local government in New Zealand has no specific constitutional status. Its existence is not entrenched and there are no fundamental aspects of local government guaranteed outside of legislation. Part 10 of the LGA contains provisions that allow central government to intervene in local government.

Until 2012, central government could appoint a commissioner to perform and exercise the powers and duties of a local authority, or call for an election if one of two requirements were met: either the local authority could not act due to a lack of quorum or the authority requested it.¹⁸ The Minister could also appoint a person to act on behalf of the local authority if the authority refused to perform its statutory duties and this refusal impaired good local government or endangered public health or safety.¹⁹

In December 2012, Parliament amended the LGA and reformed the provisions regarding central government intervention.²⁰ The amendment effectively extends central government's power over local authorities by allowing central government to intervene as soon as it believes that a problem exists. The definition of "problem" within the LGA is broad: it includes circumstances that detract from the local authority's ability to give effect to the purpose of local government as well as an authority's persistent failure to fulfil its functions.²¹ In such cases, central government has a range of interventions at its disposal, ranging from simple information gathering,²² to appointing a Crown

17 Stephen Bailey and Mark Elliott "Taking Local Government Seriously: Democracy, Autonomy and the Constitution" (2009) 68 CLJ 436 at 436.

18 Local Government Act 2002, s 255.

19 Section 256.

20 Local Government Amendment Act 2012, s 31.

21 Local Government Act 2002, s 256. When Environment Canterbury had failed to produce a water management plan and had repeatedly failed to observe statutory time limits for processing consent application, it did not, in the eyes of central government, fulfil its statutory duties as a local authority. This arguably fell within the definition of "problem" and allowed the Minister to intervene.

22 Section 257.

Manager who can direct the local authority,²³ or to calling a general election.²⁴ Ultimately, the Minister can appoint a Commission to take over the duties of the local authority, effectively replacing them.²⁵

By contrast, in some modern democracies certain aspects of local government, such as the existence and democratic election of local government, are constitutionally guaranteed.²⁶ One important reason that New Zealand lacks such constitutional safeguards is its strong adherence to parliamentary sovereignty. Parliament cannot be bound by any form of guaranteed status of local government – it is the supreme law-maker in New Zealand. While other state organs, such as ministers and local governments, can create secondary legislation, parliamentary legislation is always superior and will, if at odds with other law, override it. Parliament can curtail its own powers by way of legislation to an extent, but such curtailment is voluntary and can be rescinded by Parliament at any time.²⁷ For that reason, the LGA can provide for a wide range of intervention mechanisms and Parliament can pass legislation such as the ECan Act, effectively ousting democratically elected local representatives.

A Local Democracy

Does the fact that Parliament acted within its constitutional powers mean that the effects of the ECan Act were democratically warranted?

Democracy is a fundamental part of our constitutional tradition.²⁸ Ousting elected representatives is a gross impingement on democratic norms and, in lieu of constitutional protection of local democracy, such a step should require strong justification. As is discussed further below, local democracy is vital not just for local government, but for the democratic health of the entire constitutional system. Local elections and representation of local issues contribute to pluralism and

23 Section 258D.

24 Section 258F.

25 Sections 259F–258L.

26 For example, both the French and German constitution guarantee the existence and some measure of autonomy of local government, see Constitution of France 1958, art 72; and Basic Law of the Federal Republic of Germany, art 28(1).

27 For example, European Communities Act 1972 (UK); and Human Rights Act 1998 (UK). The only New Zealand examples are rare entrenched provisions, for example in the Electoral Act 1993, s 268. There are some suggestions that Parliament's powers to legislate may be limited fundamental principles, such as the rule of law and human rights. While this may extend to democratic mechanisms, it is unlikely that it would affect Parliament's ability to disestablish local authorities; see Tom Bingham *The Rule of Law* (Penguin, London, 2011) ch 12.

28 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (Oxford University Press, Auckland, 2004) at 5.

the diffusion of power. Local democracy enables more meaningful citizen participation, not just by way of elections, but also through consultation on local issues. And it enables better responsiveness to local needs, due to the focus of local representatives on local issues.

How does local democracy facilitate broader democratic norms? At its core, democracy requires that *all* citizens are involved in all policy and legislative decision-making, as well as in the implementation of policy and law.²⁹ Because such direct rule by the people is not feasible in large societies, decision-making is delegated to representative leaders. In order to prevent these leaders from acting in their own self-interest rather than that of the people, they must be held accountable by way of democratic processes.³⁰ However, John Stuart Mill believed that governments tended to centralise power by attracting a particular class of people and therefore standard democratic mechanisms such as secret elections and freedom of speech may not be enough to prevent this class of people from accumulating political power.³¹ That class would be overrepresented in government, reducing the choice between candidates during elections. The resulting lack of diversity would lead to an increasingly disinterested and ultimately ill-informed citizenry. It would form an unquestioning majority, resulting in a breakdown of government accountability.

John Madison believed that politics is founded in self-interest and that in a majoritarian regime the weaker party is generally sacrificed for the interests of the stronger.³² In a centralised political system any region is always in the minority and considerations of central needs will always outweigh local ones. He therefore advocated a decentralised federal power structure.³³ The wider power is distributed among a variety of institutions and representatives, the lower is the chance of majority tyranny.

In a constitutional system like New Zealand's, this danger is particularly pronounced: a unitary state structure, a single chamber of parliament, an executive that is closely connected to the legislature and parliamentary sovereignty – these features highly centralise and focus power. It is therefore important to foster and further diversity in government. The introduction of the Mixed Member Proportional (MMP) electoral system during the 1990s was such a step. It has led to higher diversity in Parliament. It has led to more accurate representation of political interest, as it distributes seats more proportionally than the First Past the Post (FPP) electoral system did. It also resulted in better

29 Jack Lively *Democracy* (Blackwell, Oxford, 1975) at 30.

30 David Held *Models of Democracy* (3rd ed, Stanford University Press, Stanford, 2006) at 75.

31 At 83 and 84.

32 James Madison "Federalist No 10" in Alexander Hamilton and others (eds) *The Federalist Papers* (Palgrave Macmillan, New York, 2009) 47 at 49–54.

33 Held, above n 30, at 74.

representation of women and Māori: the number of female and Māori Members of Parliament doubled between 1990 and 1996.³⁴

However, the move to MMP has not increased regional representation. Regional interests are represented in Parliament through directly elected Members of Parliament. They function as a link between the local electorate and central government. But New Zealand's political system is heavily reliant on the party system and most Members of Parliament are members of larger parties. These parties are centralised institutions and do not represent any particular region. When it comes to decision-making in Parliament, individual Members are generally bound by party-discipline and have to vote along the party line regardless of whether that decision is in the interest of their electorate.³⁵

Regional representation in Parliament is therefore weak; it does not sufficiently facilitate local democracy. Madison's ideals of decentralisation are more likely to achieve this. While New Zealand does not have a federal structure, power can nonetheless be devolved to elected local government institutions and thus shared among a wider range of representatives. In this way, local governance facilitates and furthers pluralism and diversity, and is beneficial to democratic health of the entire constitutional system.

Decentralisation also has the potential to increase citizen engagement. Local government policy tends to have a more direct and tangible impact on local citizens than central government policy. As such, if local government can act autonomously and has the power to make meaningful decisions then the local voters can see the tangible effects of their vote more directly in the actions of their local authority. This, in turn, can lead to more direct accountability of local government representatives, as voters have a better understanding of how the representative's decision-making affects them. This differs from central government representatives, who often make decisions that do not directly affect any given voter, thus making it harder to evaluate their actions. An empowered local government has the potential to increase the citizenry's participation in local political life, thus increasing interest and creating a better-informed public. This way, local democracy is not just a mechanism for decision-making, but also for people's political self-development.³⁶

B Local Autonomy

However, the benefits of local democracy are only realised if local representation has a meaningful impact on the local population. Providing for an elected local council that has no powers to make and implement decisions is merely paying lip service to the ideal of democracy. The extent to which local

34 Palmer and Palmer, above n 28, at 25–28.

35 At 145.

36 Held, above n 30, at 79; and John Adler "Efficiency, autonomy and local government" (2001) 4(3) JLGL 61 at 64.

government is able to make its own decisions – its autonomy - is a measure of the well-being of local democracy.

Autonomy enables individuals to develop and pursue their nature and interests free from coercive direction.³⁷ Without autonomy, individuals cannot be self-governing. In the context of a modern representative democratic system, governance has been delegated to elected officials, whilst political self-determination has been reduced to casting votes in elections. For the political autonomy of individuals to be preserved, democratic institutions must themselves be autonomous.³⁸ Thus, parliamentary sovereignty is the ultimate manifestation of the people's delegated autonomy to Parliament.

However, the further removed the representatives are from electors, the less individual self-determination is maintained. For example, when central government makes a decision that affects only a region, the decision is not made by the representatives of that region, but representatives from the entire country. The decision is therefore imposed, to an extent, on the local population. Local democracy, in comparison, ensures better individual self-determination regarding local decision-making, as local decisions are made by local representatives.³⁹ When central government interferes with local government business, it reduces local autonomy and diminishes local self-determination.

To this end, the extent to which local government is autonomous depends on its constitutional relationship with central government. Traditionally, New Zealand has closely followed the agency-model of local government, which is characterised by the very limited discretion local government enjoys.⁴⁰ Local government is mainly seen as an extension of central government – as an agent whose role it is to implement central government's will.⁴¹ Its powers are thus derived from central government rather than inherent, and these powers tend to be strictly prescribed.⁴² Under the Local Government Act 1974, local government in New Zealand had clearly circumscribed powers.⁴³ It had to stay within powers conferred by a range of acts with very little discretion.⁴⁴ Section 37K of the

37 Held, above n 30, at 263.

38 Adler, above n 36, at 63.

39 Department for Communities and Local Government, *Communities in control: real people, real power* (9 July 2008) at 13.

40 Palmer and Butler, above n 5, at 189.

41 Bailey and Elliott, above n 17, at 441.

42 Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge (UK); 2009) at 84.

43 Local Government Act 1974, ss 37S and 37T.

44 Prue Taylor "Who Has the Power? Challenging Traditional State Authority to Regulate GMOs in New Zealand" (2006) 8(3) *Environmental Law Review* 175, at 179.

1974 Act explicitly provided that local government delivers public services "on behalf of central government."

This relationship may have changed somewhat with the introduction of the Local Government Act 2002. Today, local government in New Zealand enjoys a so-called "power of general competence": s 12 provides that local authorities have "full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and for [these] purposes, full rights, powers, and privileges." The 2002 Act continues to lay out the broader principles under which local government must operate,⁴⁵ but unlike the 1974 Act, it does not circumscribe local powers beyond these broad principles. It appears, thus, that local government today enjoys a level of discretion and autonomy that goes beyond that of a mere agent of central government. In fact, this shift has been described as a sign of real devolution of power to the local level.⁴⁶

Despite this apparent devolution, the extent to which central government can intervene in local government business, and the ease with which it can do so, speak against a truly autonomous local government in New Zealand. Moreover, the ability of local authorities to pursue local policy goals autonomously is stymied by their limited ability to raise funds.⁴⁷ The majority of local government funds come from local rates, a form of land tax levied by local authorities;⁴⁸ the remainder is made up of service and regulatory fees, investments, and grants and subsidies.⁴⁹ Of particular concern, the implementation of larger policies often requires funds beyond the means of local authorities. They are therefore dependent on central government grants if they wish to pursue those policy goals. If central government agrees to partially or totally fund a local policy, it is able to claim competence to control the service, as it contributed to the funding.⁵⁰ In addition, the definition of "problem" in the LGA specifically mentions a failure to demonstrate prudent management of finances.⁵¹ As local authorities' ability to raise funds is limited, yet their responsibilities are dictated by central government, local authorities tend to find themselves operating within exceedingly strict financial means.⁵² Any innovative policy or project will likely impact on their finances, especially if the authority undertakes

45 Section 14.

46 Taylor, above n 44, at 180.

47 Graham Bush "A Battle Won - or just Begun?" (2003) 39(1) *New Zealand Local Government* 32 at 32.

48 See for example *Local Government (Rating) Act 2002*.

49 "Local government finance and expenditure" (23 June 2017) *Local Government New Zealand* <www.lgnz.co.nz>.

50 Bailey and Elliott, above n 17, at 442.

51 *Local Government Act 2002*, s 256.

52 Palmer and Butler Scott, above n 5, at 189.

it without the aid of central government. It may thus be interpreted to create a problem under s 256 of the LGA, enabling central government to intervene.

Therefore, despite the broad wording of s 12 of the LGA and a power of general competence, local authorities can hardly be said to be autonomous. Although on paper local authorities enjoy vast discretion within the scope of their statutory competency, the lack of independent funding capabilities, coupled with the ease with which central government can intervene, means that local government autonomy is precarious at best. This lack of local autonomy impacts not only on local democracy, but also on the quality of local government.⁵³ Local government may become risk-averse and overly bureaucratic if it is under constant threat of reprimand or correction.⁵⁴ It is less likely to develop complex or wide-ranging policy plans, as parts may be overturned by central government.

IV EFFICIENCY AND THE VICIOUS CIRCLE OF INTERFERENCE

Due to the adverse effects that central government interference has on both local democratic health as well as on how local government acts, interference should only occur where absolutely necessary. Furthermore, the level of intervention should be proportionate to the problem that requires the intervention. The ECan Act's level of intervention was extreme, as it effectively put Environment Canterbury out of local and under central government control.

Of course, the ECan Act was not passed in a vacuum: rather, Environment Canterbury had not been meeting its statutory requirements when processing resource consents and had been slow to devise a water plan. Parliament's reason for ousting the regional councillors, therefore, was lack of efficiency. One of the main functions of local government – better regional service delivery – only applies if local government can act swiftly; an indecisive local bureaucracy is no better than a removed central one. If local government is to be an important part of the constitutional system, it must be able to act effectively and efficiently. Therefore, values of democracy and autonomy must be weighed against the ability of local government to act efficiently.

Efficiency has, at least since the mid-20th century, become a core tenet of all governance.⁵⁵ It frequently drives policy decisions, so as to arrive at a favourable outcome quickly and at as little cost to the taxpayer as possible. This reflects Benthamite utilitarian philosophy, which regards efficient governance as paramount to the welfare of the people; in contrast, democracy played only the role of a legitimation and safety mechanism against tyranny.⁵⁶ From this perspective, efficiency is the

53 Bailey and Elliott, above n 17, at 447.

54 Palmer and Butler, above n 5, at 189.

55 Adler, above n 36, at 64. See also Larry Siedentop *Democracy in Europe* (Allen Lane, London, 2000) chs 5 and 6.

56 Held, above n 30, at 75; and Adler, above n 36, at 64.

primary goal of local governance, which is supported and facilitated through democratic mechanisms. This manifests itself in the agency model of central–local relationships: local government is seen as a tool of convenience employed by central government to better deliver local services. Local democratic structures help by gathering information about local needs and holding local government to account; but considerations of efficiency generally outweigh those of democracy.

As discussed earlier, the LGA provides for a range of ways to intervene in local government: from requiring local authorities to provide information to the Minister to replacing the local council with a government-appointed commission.⁵⁷ They lie on a spectrum from low- to high-impact on local government. This suggests that some form of proportionality between the problem with local government and the associated central government intervention is intended. However, when Parliament passed the ECan Act, it chose to forgo the intervention mechanisms of the LGA entirely in favour of an even more severe intervention with Environment Canterbury. While, within New Zealand's constitutional system, Parliament was free to do so, the question arises whether this was warranted.

A Environment Canterbury's Efficiency

To determine whether such a severe intervention is warranted, it is necessary to evaluate just how inefficient Environment Canterbury was at the time. In his speech during the first reading of the ECan Bill, the Minister for the Environment, Nick Smith, listed the reasons for introducing the ECan legislation. He explained that Environment Canterbury was not able to effectively manage Canterbury's fresh water and associated resource consent applications, that it had not been able to devise a regional water plan since the introduction of the RMA 19 years earlier, and that it was generally a dysfunctional council lacking the support of the wider Canterbury community.⁵⁸ The Minister's words largely reflected the findings of the Creech Report.⁵⁹

Environment Canterbury's response time to resource applications, particularly those relating to water, had been slow during the mid-2000s; many applications had been either processed outside the statutory time limit provided for by the RMA or not at all.⁶⁰ Ministry for the Environment data shows that between 2007 and 2008 Environment Canterbury processed only 29 per cent of consent applications on time, the worst result for any of the territorial and regional councils.⁶¹ There were

57 Local Government Act 2002, Part 10.

58 Nick Smith (30 March 2010) 661 NZPD 9927; these claims were strongly disputed by the opposition during the debate: see for example Kennedy Graham (30 March 2010) 661 NZPD 9955–9957.

59 Creech and others, above n 7, at i–ii.

60 Resource Management Act 1991, s 37.

61 Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (June 2009) at Appendix 4.

several reasons for these results.⁶² A thriving economy during the preceding years had led to a massive increase in rural and urban development, which in turn caused a surge of consent applications. In fact, between 2002 and 2008, the number of yearly applications rose by almost 80 per cent.⁶³ Moreover, Canterbury's water resources were approaching sustainability limits. As the RMA consent application process operates on a "first come first served" system, Environment Canterbury claimed that this caused a rush by applicants seeking to acquire water access before it was too late. The increased number and complexity of applications, coupled with an alleged absence in leadership within the senior management of the Consenting Section of the Environment Canterbury, resulted in low numbers of processed application.⁶⁴

However, the Creech Report also acknowledged that a major contributor to the delays was the fact the Environment Canterbury was under-resourced to deal with the increased consent application workload. By the time of the report, Environment Canterbury had increased staff dealing with resource consents by 60 per cent, which led to a decrease in processing time as well as a reduction of the back-log accrued in previous years.⁶⁵ Consequently, by the time the councillors were replaced by commissioners in 2010, Environment Canterbury was processing over 70 per cent of resource consent applications within the statutory timeframe.⁶⁶

Another indicator of Environment Canterbury's inefficiency and inability to meet its duties as a regional council was the lack of progress in devising a regional water plan. The RMA provides for the possibility of regional councils to create such plans.⁶⁷ Although this is not compulsory, given the importance of water in the region, devising a water plan was widely seen as necessary. Environment Canterbury had been working on its Natural Resource Regional Plan since the early 2000s, but by 2010 its implementation seemed to still be some years off.⁶⁸ According to the Creech Report, this lack of a water plan had "led to uncertainty, increased costs, and time delays not only for resource consent applications, but also submitters, community and environmental groups as well as the public generally."⁶⁹ However, in conjunction with the Canterbury Mayoral Forum and territorial authorities, Environment Canterbury had devised the Canterbury Water Management Strategy in the late 2000s,

62 Creech and others, above n 7, at 27.

63 At 27 and n 7.

64 At 29.

65 At 30.

66 Environment Canterbury *Annual Report 2009/2010* (2010) at 70.

67 Resource Management Act 1991, s 65.

68 Creech and others, above n 7, at 6.

69 At 5.

which was a widely supported strategy intended as a more collaborative approach to water management. Although the Creech Report advised that government support for this strategy was an option for addressing the problems with Environment Canterbury, it had no confidence in its future success.⁷⁰ It said that since the strategy sat outside the RMA, it was difficult to predict how it would relate to local and regional RMA plans. It was also unsure about the future of a collaborative approach in an environment of competing interest and entrenched views. This view has been contradicted by empirical research into ECan's collaborative approach undertaken by Holley and Gunningham in the months immediately preceding the ECan Act.⁷¹ By interviewing local stakeholders made up of residents and non-government groups; industry and farmers' representatives; and government representatives, they showed that ECan's approach was able to achieve highly successful collaboration.⁷² It thus appears that the likelihood that the collaborative success of the Canterbury Water Management Strategy would translate into a successful water plan was significantly higher than the Creech Report predicted.

The concerns around Environment Canterbury were, according to the Report, exacerbated by the perception of many inside and outside of Environment Canterbury that the Council itself was dysfunctional and lacked popular support. The Report based this view on interviews it had conducted with stakeholders and Environment Canterbury staff.⁷³ But Holley and Gunningham's interviews with a wider variety of stakeholders shows a more positive attitude towards Environment Canterbury, albeit within the context of Environment Canterbury's more specific collaborative approach. Surveys conducted in 2008 and 2009 found that voters had a generally positive view of Environment Canterbury: between 60 per cent and 70 per cent of the people polled believed Environment Canterbury's decisions were in the best interest of the community.⁷⁴ However, the Environment Canterbury councillors seemed to be polarised along clear and opposing lines. Indeed, the Creech Report refers to the Council as the "7-all Council," because the 14 councillors were evenly split

70 At 19 and 20.

71 Cameron Holley and Neil Gunningham "Natural Resources, New Governance and Legal Regulation: When Does Collaboration Work?" (2011) 24 NZULR 309.

72 At 321.

73 Creech and others, above n 7, at 8 and 9.

74 Environment Canterbury *Annual Report 2006/2007* (19 September 2007); and Environment Canterbury *Annual Report 2008/2009* (30 September 2009).

between those favouring environmental issues and those favouring economic issues.⁷⁵ This may have been the reason for the slow process of devising a regional water plan.⁷⁶

B Incommensurate Values and the Vicious Circle of Interference

It therefore seems that in the mid-2000s Environment Canterbury was not acting efficiently, particularly with regards to water resource management. The response time to consent applications had decreased to be similar to that of other regional councils, but the importance of Canterbury's water resources and Environment Canterbury's inability to devise and implement a regional water plan was cause for concern. The question is whether this level of local government inefficiency justified the severity of Parliament's intervention and resulting suspension of local democracy. Both democracy and efficiency are important aspects of local government. Neither one must completely dominate the other, as neither an ineffective nor an undemocratic government is desirable. Striking the right balance between these values is fundamental for good local governance.

But as democracy and efficiency are inherently competing, determining the right balance is not easy; it may even be impossible to objectively do so. Adler suggests that the values of efficiency and democracy are incommensurate;⁷⁷ as Raz puts it: "Values are incommensurate if it is neither true that one is better than the other nor true that they are of equal value."⁷⁸ This recognises that concepts to which humans assign value cannot always be rationally ranked on a common scale.

Both democracy and efficiency have their justifications, but these do not form a common basis: democracy represents the desire to include as many people as actively as possible in the decision-making process while efficiency facilitates the practical interest in feasible and swift action. This lack of a common basis makes them unamenable to prioritisation, as neither can be objectively said to be more important than the other. Both values are inherently in conflict with each other, as the involvement of more people will inevitably draw out a decision-making process; but neither can be said to be objectively superior to the other. A constitutional system must therefore accommodate both values as best as it can. This balance will often depend on the current political and economic climate. During tight economic times, efficiency is likely to be prioritised, while in economically steady times or after political turmoil, democratic mechanisms may be favoured (although political turmoil can also have the opposite effect).

75 Creech and others, above n 7, at 50. Interestingly, while the report stated that there was a widely-held perception that this inhibited effective decision-making, it found no evidence that deadlocks occurred on substantive motions.

76 See generally Creech and others, above n 7. The report noted, however, that the Canterbury Water Management Strategy was passed by a majority of 10–2.

77 Adler, above n 36, at 61.

78 Joseph Raz *The Morality of Freedom* (Clarendon, Oxford, 1986) at 322.

Whichever way the current climate leans, one value will be prioritised over the other; and as the values are inherently contradictory, that means that one value will always be sacrificed to some extent.⁷⁹ The danger lies where one value is consistently prioritised over the other. A government under pressure to deliver tangible policy outcomes may be tempted to repeatedly discover that the "right" balance is to prioritise efficiency.⁸⁰ When local government faces criticism or complaints, central government may overly quickly deem local government to be inefficient and intervene, so as not to appear lethargic or apathetic. The adverse effects of such interventions on local government have been mentioned earlier. But constant or significant interference may have another, more fundamental, impact on local government, one which Bailey and Elliot have named the "vicious circle of interference".⁸¹ Local government elections draw significantly less interest from the public and voter turnout in local elections is accordingly lower than that in general elections.⁸² One reason for the lower voter turnout may be that voters consider local government to be less important than central government.⁸³ An impotent local government does not inspire citizen engagement. Even worse, if local government lacks autonomy and therefore cannot facilitate positive change in the community or if it is perceived as overly bureaucratic, frustrated citizens may become resentful towards it. They therefore direct their complaints about local government to central government. Central government, fearing repercussions in future general elections, intervenes in local government business in order to fix its perceived failures. This intervention, however, undermines the authority of local government and makes frustration with local authorities and repercussions for central government more likely. Instead of improving the perceived deficiencies of local government, increasing central control makes matters worse.⁸⁴

To avoid this vicious circle, it is necessary for government not to prioritise efficiency over democracy by default. Instead, it should determine which value to favour based on the pertinent issues at the time. Even though democracy and efficiency do not lend themselves to prioritisation, some believe that rational or objective ways exist by which to balance the two values. Some proponents of deliberative democracy believe that the people can, given the right circumstances, always come to a

79 Adler, above n 36, at 61; see also Guido Calabresi and Philip Bobbitt *Tragic Choices* (Norton, New York, 1978).

80 Adler, above n 36, at 63; see also Siedentop, above n 55, chs 5 and 6.

81 Bailey and Elliott, above n 17, at 450.

82 While voter turnout in general elections has never dropped below 70 per cent, local government election turnout in 2013 fell to 42 per cent: see Ministry of Social Development *The Social Report 2016 – Te pūrongo oranga tangata* (June 2016) at 155–157.

83 Bruce Hayward and others "The 2006 Local Elections and Electoral Pilot schemes" (June 2006) UK Electoral Commission <www.electoralcommission.org.uk> at 17.

84 Bailey and Elliott, above n 17, at 451.

rational decision.⁸⁵ Habermas posits that, in order to enable and maintain the autonomy of both individuals as well as government, any public decision can only claim legitimacy if every person affected can consent to it after participating in rational discourse.⁸⁶ Therefore, any conflict between competing values *can* be resolved as long as the decision results from rational discourse among ideally informed citizens. This does not mean that *every* affected person must be ideally informed and take part in the discourse. As long as a rational discourse between ideally informed persons has come to a conclusion, it can be assumed to be the only rational choice and *anyone* would arrive at the same conclusion were they ideally informed themselves. This is, in a way, a modification of Plato's philosopher king, a wisdom-loving person who will, without self-interest, make decisions based on rational deduction and in the best interest of everyone. But democratic thinkers from Hobbes to Montesquieu to Madison agree that all politics is fundamentally based on self-interest.⁸⁷ While it is conceivable that a group of virtuous individuals may be able to rationally decide between conflicting values without self-interest, it is virtually impossible to guarantee that they will. The way to protect against self-interested political decision-making must therefore be robust democratic processes that first, spread decision-making powers, thus preventing their concentration in a few individuals; and secondly create accountability. In fact, Palmer and Palmer suggest that "democratic procedures, not the law, are the most important element of ... government accountability."⁸⁸

Democratic processes, then, are the foundation of determining priorities between incommensurate values. It is arguable that when Parliament passed the ECan Act, the prioritisation of efficiency over democracy was the result of a democratic process. But as the ECan Act impacted on local autonomy rather than that of the country as a whole, local democratic processes should have taken precedence over central ones. Environment Canterbury is a democratically elected body, and as long as it acts within its competency, central government intervention in its business should only occur in exceptional circumstances. The evaluation of incommensurate values on local level must rest with local government. While that means that local authorities may still "wrongly" prioritise one value over the other, at least this maintains the integrity of the democratic process.

Environment Canterbury did have problems with efficiency and the situation needed to be improved. But the ECan Act seems to be grossly disproportionate to the problem. One of the main reasons for Environment Canterbury's poor consent application response time – the massive increase in applications and corresponding lack of resources – had subsided by 2010 and the Council's responsive record had improved. Although a regional water plan was still in its early stages, the

85 Held, above n 30, at 275–280.

86 Jürgen Habermas "On the Internal Relation between the Rule of Law and Democracy" in Richard Bellamy *Constitutionalism and Democracy* (Ashgate, Burlington (VT), 2006) at 271.

87 Held, above n 30, at 70.

88 Palmer and Palmer, above n 28, at 256.

Canterbury Water Management Strategy was widely accepted to be a stepping stone on the way to the successful implementation of a water plan. And it was far from clear that Environment Canterbury was unpopular among stakeholders and voters; in fact, independent empirical research and surveys appear to show the opposite.

Instead of intervening, central government should have supported Environment Canterbury's ability to make local decisions, both by providing more resources as well as by enhancing its powers to be able to cope with the particular situation in Canterbury. Prior to the ECan Act, many Environment Canterbury staff complained that the regulatory framework of the RMA was a major reason for Environment Canterbury's inability to manage water efficiently.⁸⁹ This seems to be corroborated by the fact that when Environment Canterbury utilised its collaborative approach, which stood outside the RMA framework, it appeared to manage water vastly more effectively.⁹⁰ Although the Creech Report denied that the RMA framework inhibited efficient water management in Canterbury, Parliament apparently agreed with Environment Canterbury: it enhanced the powers of the commissioners by limiting the application of parts of the RMA relating to Water Management.⁹¹ Had the same powers been extended to Environment Canterbury, it may well have been able to remedy its efficiency problems without central intervention.

V CHANGING THE STANDING OF LOCAL GOVERNMENT

The empirical effects of the ECan Act on local government are not entirely certain. In the short term, it may have improved Environment Canterbury's efficiency. By 2011, Environment Canterbury processed 92 per cent of resource consent applications within statutory time limits, a vast improvement over the 29 per cent during the 2007/2008 period.⁹² But Environment Canterbury's processing record had already been improving prior to the ECan Act and may have reached similar results if armed with the same powers as the Environment Canterbury Commissioners were. The effects of the act on local democracy are obvious: by replacing elected councillors with appointed commissioners, local democracy on a regional level was suspended and was only partially re-established in late 2016 when seven of thirteen councillors were elected.⁹³ At the time of writing, full local democracy is planned to be restored by 2019; but since this date has been moved on several occasions in the past, this is not certain. In the long term, this level of uncertainty about the status and competency of local government will likely impact both on the authority of local government and on

89 Creech and others, above n 7, at 9–10.

90 See Holley and Gunningham, above n 71; regarding the popularity of Canterbury Water Management Strategy, see also Creech and others, above n 7, at 19.

91 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, s 46.

92 Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2010/2011* (September 2011) at Appendix 5.

93 Environment Canterbury (Transitional Governance Arrangements) Act 2016.

the way it acts. Prior to the ECan Act, Environment Canterbury had been an innovative council, successfully experimenting with novel approaches to traditionally adversarial problems. Parliament's decision to override these innovations in favour of more orthodox approaches may inhibit similar innovation on local government level in the future. Instead, local councils may become overly bureaucratic in the fear of drawing central government's disapproval and intervention. And Parliament's decision to replace elected councillors, who held substantial support among the populace, may well lead to even more disengaged citizens: after all, if one cannot rely on elected representatives to be able to make decisions, why vote at all? This may also have the effect that local councils lose authority in the eyes of the population, as clearly central government ultimately holds the reins. In a way, this diminishes the accountability of local government to voters.

Generally, central government intervention is detrimental to local democracy and governance. In order for local government to be successful, it requires greater constitutional status so that its competencies are more clearly delineated and it is better protected from the whims of central government.⁹⁴ Bailey and Elliot suggest a concordat or memorandum of understanding between central and local government that the former will respect the principle of subsidiarity: decisions regarding local services and issues should be taken by the elected body closest to the citizens.⁹⁵ They draw parallels to the devolved Scottish and Welsh parliaments, which are also "in the shadow" of central government, but appear to enjoy more of a constitutional status in the United Kingdom than local government does. Apart from a sense of popular consciousness and identity, Bailey and Elliot attribute this to a convention that the British Parliament will not interfere on devolved matters unless the devolved government consents.⁹⁶ Local Government New Zealand, an association representing territorial and regional councils, wants to go beyond political gestures. In a submission to the Constitutional Arrangements Committee, it requested that local government should either be constitutionally recognised or that the LGA be entrenched.⁹⁷ This is echoed in Palmer and Butler's proposed Constitution for Aotearoa New Zealand. Article 110 of the constitution guarantees the existence of local government, as well as the principle of subsidiarity, local autonomy within subject-matters established by law, democratically elected representatives and improved financing, among other things.⁹⁸

Local communities should have the power to take difficult decisions and resolve complex problems themselves.⁹⁹ Central government's role is to provide a framework within which local

94 Palmer and Butler, above n 5, at 190; and Bailey and Elliott, above n 17, at 463.

95 Bailey and Elliott, above n 17, at 470–471.

96 At 455.

97 Taylor, above n 44, at 181.

98 Palmer and Butler, above n 5, at 73.

99 Department for Communities and Local Government, above n 39, at [2].

government operates, rather than to dictate how local government should operate. Central government intervention should support local government, not reprimand it or suppress local policy that is not in the interest of central government. Only when local government asks for assistance or in extreme situations, such as natural disasters that cause local government to be unable to cope, should central government interfere. Neither of these situations existed in Canterbury; the ECan Act was therefore an overreaction to the situation and inappropriate. It has potentially damaged local democracy and governance not only in Canterbury, but all of New Zealand. Constitutional change is necessary to prevent similar central government interference in the future.