In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy
By Elizabeth McLeay
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Reviewed by Andrew Geddis

New Zealand's Electoral Act 1956, and in particular the entrenched (or "reserved") provisions it introduced into the country's legal framework, has long represented something of a constitutional oddity. In reserving certain key aspects of our electoral process, the 1956 Act purported to stop future Parliaments from altering these except by following a particular, and more demanding, process of enactment. In a nutshell, it sought to subject the will of future elected members of Parliament to that of the MPs of 1956, insofar as future representatives could only change the law if they followed the "manner and form" their forebears demanded. These reserved aspects are the length of the term of Parliament; the make-up of the Representation Commission (which determines the boundaries of electoral districts); the way in which electoral districts are to be drawn up; the age at which people may vote; and the method by which votes are cast. That presumption then colours a significant feature of New Zealand's constitutional arrangements; that its Parliament is a fully sovereign lawmaking body, able to make (or unmake) any law on any subject it chooses.

Considered significant enough to be described, by Keith Scott in 1962, as the nearest thing that New Zealand has to a written constitution, the advent of MMP in 1993 then largely occluded the 1956 legislation's importance. After all, the law of 1956 was entirely premised on the idea of individual candidates, supported by two major political parties, battling for election in separate constituencies with the goal of becoming part of a single party majority government. Once a new proportional voting system was in place, heralding an era of multi-party government in which nationwide votes for political parties *qua* parties is the dominant determinant of representation, the earlier legislation's reserved provisions appeared preoccupied with matters now somewhat peripheral to the nation's political life. So, although the reserved provisions were carried forward into the new Electoral Act 1993, they sat in relative obscurity towards that legislation's end, only noted in passing in discussions of the nation's electoral rules. For example, my own text on New Zealand's electoral law devotes less than two pages to discussing the reserved provisions.

Two recent events, however, have refocused attention on the significance of what occurred in 1956. The first was a series of legal challenges brought by a serving prisoner, Arthur Taylor, to 2010 legislation that stripped the right to vote from all serving prisoners.[1] Amidst these challenges was a claim that the prisoner voting ban's passage through parliament failed to comply with the procedural requirements first introduced back in 1956, and so is invalid law. While that challenge ultimately failed because the legislative ban in question did not involve any change to a reserved provision, it attracted the sustained attention of New Zealand's Supreme Court (*Ngaronoa v Attorney-General* [2018] NZSC 123). This represents the first time that the nation's judiciary has been called upon to consider directly how the reserved provisions apply within our legal framework.

The second event is the publication of Elizabeth McLeay's excellent revisiting of the history and significance of the 1956 legislation, *In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy*. In an admirably manageable 180 pages, McLeay explores

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not only what the Electoral Act 1956 set out to do and how its goals continue to reverberate in our constitutional arrangements, but also what led the political actors of that era to engage in this legislative experiment. She situates the development in the context of both the contemporary constitutional understandings of those responsible for drafting the new law and the political disputes that gave rise to a felt need to protect certain aspects of the election process from partisan manipulation. At the risk of oversimplifying what McLeay reveals to be a multilayered story, she summarises matters thus:

> By the mid-1950s adversarial party politics had noisily played out over several electoral and constitutional issues: the weighting of votes, especially considering rural and urban voters; the extent to which electorate sizes might vary in order to respect communities of interest; and the composition of the Representation Commission. Given the recent history of seesaw politics over these electoral issues, each side of politics could rightly fear the actions of their opponents when the other side regained political power.

Faced with these incentives, New Zealand's political actors agreed in 1956 to bind themselves to the mast by first compromising on rules to govern those matters they disagreed on, and then reserving those compromise rules from amendment by a future bare parliamentary majority. The majority of McLeay's book is devoted to uncovering and presenting for the reader the politics and processes involved in this move. In the book's last two chapters, however, McLeay charts the evolution of this second aspect of the political response. Originally, the manner and form requirements were assumed by those who created them to impose no more than a politico-moral impediment to change, on the basis that "it was generally believed that that the courts would not want to become involved if entrenched clauses were not respected by a future House of Representatives". Despite its assumed legally unenforceable status, the impediment nonetheless was uniformly respected, with no Parliament seeking to change a reserved provision other than in accordance with the mandated processes in the subsequent sixty-plus years. And McLeay convincingly argues that the example laid down in 1956 has contributed to a more general constitutional expectation that major changes to other, non-reserved matters of electoral law only will take occur if there is more than bare majority support in the House.

However, the original constitutional assumption that courts would have no role in ensuring the manner and form provisions were adhered to was slowly abandoned, replaced with a view that adherence to such requirements is a judicially enforceable prior condition for valid parliamentary lawmaking. Or, as the Supreme Court recently noted, "the pendulum has swung in favour of enforceability." (*Ngaronoa v Attorney-General* [2018] NZSC 123 at [70]). Exactly how the underlying constitutional assumptions came to rotate a full 180 degrees over half a century is something about which McLeay has a little less to say. She does generally suggest that "the interpretation of parliamentary sovereignty can differ, often quite subtly, through time, and it stimulates much debate and discussion." While this is true, and while McLeay does point to other developments such as "Maori rights under the Treaty of Waitangi 1840 and human rights generally", she presents no particularly fleshed out account of the development. There thus remains a further story to be told about just why and how the originally non-legally binding parliamentary innovation introduced in 1956 came to be considered a hard-law procedural constraint on legislative competence enforceable in the courts.

I conclude this review with a note for comparativist scholars. On McLeay's account, in the 1950's New Zealand's political actors had tip-toed up to the edge of a precipice. Each side of

politics had taken turns in trying to screw the electoral scrum in their own favour. As McLeay notes, the response was to jointly agree not to do this anymore. But this was not the only response available. Another would have been to try and screw the electoral scrum *even more*, in order to entrench current electoral advantage and ensure their opponents would not have an opportunity to act likewise. We have seen the consequences of this approach in the contemporary in the United States, where nakedly partisan gerrymandering, voter suppression and politically appointed administrators are widespread (and, bizarrely, widely accepted) in the electoral process.

Had those responsible for the Electoral Act 1956 not chosen to step away from the precipice and make a collective decision to remove the temptation to seek partisan advantage in changing electoral law, New Zealand too may have plunged into this abyss. McLeay notes that this decision was driven by more than simple recognition of mutual danger. She references shared political values of consensual decision making and government responsiveness as underpinning a constitutional culture that saw such behaviour as quite simply wrong. That cultural commitment, and the actions of those who were guided by it, has helped to preserve New Zealand's strong democratic institutions and fostered a more general ethos of constitutional care amongst political actors. We are, as a country, the better for it.

[1] Somewhat strangely, McLeay's book mentions this litigation trial only once (p. 88) – and then to misstate the outcome of one of the cases in question. She states "the Court of Appeal found against the appellant on the grounds that the [prisoner] disqualification did not infringe his rights under the Bill of Rights Act 1990." In fact, the Court of Appeal reached the opposite conclusion. See *Attorney-General v Taylor* [2017] NZCA 215.

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