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Environmentalism versus Constitutionalism:

A CONTEST WITHOUT WINNERS

Suri Ratnapala

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ABOUT THE AUTHOR

Suri Ratnapala is Professor of Public Law, TC Beirne School of Law, University of Queensland, Brisbane, Australia; Director of the Centre for Public, International and Comparative Law, University of Queensland, Brisbane, Australia; and a Fellow of the International Centre for Economic Research, Turin, Italy.

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EXECUTIVE SUMMARY

This essay is about two threats to society. One is to the environment that, if unattended, will endanger our way of life. The other is to constitutional government and to the economy that arises from ill-advised responses to the challenges of environmental protection. The latter threat, if unaddressed, will not only endanger our way of life by diminishing freedom and prosperity but, in the end, will also defeat our good intentions about the environment.

The prosperity that New Zealanders enjoy is not simply the result of the country's resources and good fortune. There are countries that are more richly endowed that languish in poverty. The difference between those countries and the countries that have prospered can be explained best by noticing the difference between their respective institutions. The prosperous countries tend to display a high degree of personal safety, property rights and contractual certainty under the rule of law. The stagnant economies are generally found where these things are not secure and the rule of law is feeble.

There is no other way to account for the economic disparities between North Korea and South Korea, Hong Kong and pre-reform China, Mexico and Southern California, Communist Europe and Western Europe. There is also no other way to explain the rapid economic growth of India and China that followed their transition to market economies based on greater economic freedom and property rights. Compelling evidence of the causality between freedom under the rule of law and the economic well-being of nations is provided by the annually compiled Fraser Institute Economic Freedom Index and the Heritage Foundation/*Wall Street Journal* Index of Economic Freedom (Berggren 2003). I am not talking here about democracy but the rule of law, property and contract. Democracy is a means of safeguarding these things in the longer term, but it can also harm them if people are not informed and vigilant and if demagogues, zealots and rent seekers dominate the decision-making process.

The advantages of a strong market economy are evident. It creates wealth and moves people from poverty to prosperity. However, one advantage often overlooked by critics concerns the role of markets in helping societies to overcome problems that nature and human activity create, whether they are famine, pestilence, war, terrorism or environmental harm. Markets help in at least three ways. First, as a general rule, the freedom that underlies markets creates open societies where information is freely exchanged and theories are vigorously debated. It is worth remembering that there was no Greenpeace or WWF in the Soviet Union or in Eastern Europe during communist rule. Second, the wealth that is created by markets makes possible innovation and new technology that deliver solutions. Third, as many have argued, market-based instruments (MBIs) provide mechanisms that are superior to command and control systems in addressing problems like environmental degradation (Rhinehart and Pompe 2005; Bratland 2005; Sharp 2002; d'Auria 1999; Markandya 1998).

It is therefore ironic that many governments in industrialised democracies have chosen the path of command and control to address environmental issues in ways that threaten the institutional foundations of their market economies. It would be tragic if, as the sceptics in the environmental debate fear, the apocalyptic message of extreme environmentalism ends up harming the environment by reducing our capacities to deal with real threats.

There are some environmentalists (hopefully not many) who believe that a pristine environment is a goal to be achieved regardless of the cost to human communities. As a proposition of faith, it cannot be proved or disproved. But we are entitled to ask what these believers mean by a pristine or ideal environment, this Garden of Eden. In Australia, the ideal is supposed to be the condition of the continent before European settlement. The trouble is we do not know what it was like and, more importantly, whether it was very nice by whatever standard that we use.

There are other environmentalists who associate environmental protection with human well-being. This is a utilitarian approach that seeks to address problems at the local, national and global levels. The proposition that a healthy environment is essential for human well-being is not at issue. The debate is about what the threats are, the sources and degrees of the threats, and what measures, if any, can and should be taken to address them. The environmental movement's aims and projects stretch across a wide range of concerns including: climate change, biodiversity conservation, pollution, waste disposal, resource depletion, land degradation, nuclear energy use and genetically modified food. My aim in this paper is not to contest the positions of the environmentalists in these areas of concern. I leave those debates to the scientists. My intention is to highlight the ways in which environmental law and policy as currently developed impact negatively on constitutional government, the economy and ultimately the capacity of nations to find the most appropriate responses to environmental problems.

This paper is in three parts. In Part 1, I discuss aspects of the current environmental debate as background for considering the legal and policy issues that I go on to address. This is not a scientific paper, and I make no claim for the validity of any opinion I express on the relevant science. All I wish to do in Part 1 is highlight a specific impediment to the discussion of the issues, namely, the perception that the debate is over as regards the existence and scale of the threats to the environment, and that we have no choice left but to embrace the command and control agenda. In Part 2, I undertake three tasks. First, I discuss the central ideas of constitutionalism and their relevance to the challenges posed by environmental concerns. Second, I discuss in this context the state of the law in New Zealand and elsewhere with respect to the regulation of property use and the question of compensation. Third, I address criticisms of the classical view of constitutionalism that are made by those who support robust regulation and the subordination of property rights to other interests. In Part 3, I consider the ways in which current resource management laws, including the New Zealand Resource Management Act 1991, affect property rights, the rule of law and constitutionalism.

Part I

Mirage of consensus: The politics of command and control

I do not doubt that if there is consensus today about an imminent environmental catastrophe, most people would agree on drastic measures and accept their economic and political costs. What use is liberty and wealth if we all perish? The problem is that there is no consensus, even among experts, on what threats we face and what we can and should do about them. The perception of consensus is a major driver of environmental policies and regulatory systems that are seriously at odds with the principles of constitutional government. Let us consider as an example the hottest environmental debate today – climate change. Contrary to what appears in the media, experts disagree on the rate of climate change, its consequences, how much of climate change is caused by human activity, the appropriate responses and the costs and benefits of proposed responses. There is a body of literature that disputes the alleged consensus by contesting the science behind climate change pessimism (see discussions in Lomborg 2001; Bailey 2002; Michaels 2005).

On 1 May 2006, a group of New Zealand climate scientists announced the formation of the New Zealand Climate Science Coalition (*New Zealand Herald*, 1 May 2006). This is a group of sceptics who think that expert panels should be established to test and, if necessary, challenge the public announcements and warnings that issue from the UN Intergovernmental Panel on Climate Change (IPCC). The coalition's secretary, Terry Dunleavy, views the formation of the group as "a significant development in opening up the debate about the real effects of climate change and the justification for the costs and other measures prescribed in the Kyoto protocols". He added that the coalition aimed to provide a balance to "what is being fed to the people of New Zealand".

On 6 April 2006, 60 Canadian experts "in climate and related scientific disciplines" wrote an open letter to the Canadian prime minister, Stephen Harper, urging a balanced and comprehensive public consultation process to examine the scientific foundation of the federal government's climate change plans. They stated that: "Global climate changes all the time due to natural causes and the human impact still remains impossible to distinguish from this natural 'noise'" (*National Post*, 6 April 2006).

On 18 April 2006, an opposing open letter was published by 90 pro-Kyoto climate experts in Canada (CBS News, 18 April 2006). So it was 90 to 60 against the sceptics, but the numbers on each side (admittedly a straw poll) show that there is nowhere near a consensus on climate change among Canadian experts. In its 2005 report, *The Economics of Climate Change*, the House of Lords Select Committee on Economic Affairs stated that the committee had "some concerns about the objectivity of the IPCC process, with some of its emissions scenarios and summary documentation apparently influenced by political considerations" (House of Lords 2005: 6). The committee also reported that

“there are some positive aspects to global warming and these appear to have been played down in the IPCC reports” and it urged the British Government “to take the lead in exploring alternative ‘architectures’ for future Protocols, based perhaps on agreements on technology and its diffusion” (*ibid*).

What is the worst-case scenario of climate change? The IPCC’s 2001 report forecasts that the range of mean temperature change will be 1.4 to 5.8°C by the year 2100. The Hadley Centre of the UK Meteorological Office currently predicts a 3°C rise by 2100 on a business-as-usual scenario (Hadley Centre 2006). There are serious questions about the figures and methods used by the IPCC. These estimates are based on separate independent evidence and therefore some argue that they must be combined with the Bayesian theorem to generate an overall estimate of climate sensitivity. When this is done, we have a sensitivity prediction of 3°C (Worstell 2006). The forecast is also critically influenced by the rate of gas emissions projected by the *Special Report on Emission Scenarios* (SRES), which employs a series of economic models to predict how the world will develop in the next one hundred years. These scenarios are used to estimate the tonnage of greenhouse gas emissions that will occur.

Ian Castles (former head of the Australian Bureau of Statistics) and David Henderson (former Chief Economist of the Organisation for Economic Cooperation and Development) question the use in the SRES of market exchange rates to compare relative levels of wealth between rich and poor countries as opposed to the more realistic basis of purchasing power parity. Because the SRES models assume convergence of the rich and poor countries, the application of market exchange rates rather than purchasing power parity would make a significant difference to the scenarios. It leads to the prediction (even in the lowest emission scenarios) that, by the end of this century, Americans will be poorer on average than South Africans, Algerians, Argentines, Libyans, Turks and North Koreans (Castles and Henderson 2003). The IPCC and other supporters have been compelled to concede this error, although they challenge the significance of the difference.

Even if climate change over the next century is assumed to be at the upper end of the predicted range, say 5° to 5.8°C, how should we deal with it? Even if Kyoto is implemented by all countries including the United States and an emissions reduction of 1 percent per annum is achieved from 2010, it is estimated that the difference made to the global temperature increase by 2100 will be 0.3°C (Wigley 1998: 2285–2288). The total cost of global warming could be as much as US\$5 trillion. Yet, as Bjorn Lomborg in his controversial book *The Skeptical Environmentalist* points out, some of the solutions suggested could cost the world trillions and even tens of trillions of dollars over and above that figure (Lomborg 2001: 318). This is money that in the form of investment could raise billions of people out of poverty and drive their societies to levels of prosperity that make environmental improvements affordable. Lomborg is no libertarian capitalist ideologue. He is a left-leaning statistician whose thesis is uncompromisingly grounded in data that even WWF, Greenpeace and the Worldwatch Institute largely accept. When he speaks of the bias in the environmental debate, it is worth listening. He asks why global warming is not discussed with an open attitude but with a fervour befitting preachers. He thinks that the answer is “that global warming is not just a

question of choosing the optimal economic path for humanity, but has much deeper, political roots as to what kind of future society we would like" (*ibid*: 319).

The Kyoto regime is one of targets and penalties. The House of Lords Select Committee on Economic Affairs, in its report *The Economics of Climate Change*, recommends that the way forward is through technological development and diffusion (House of Lords 2005: 68–69). This is exactly the alternative vision espoused by the recently established Asia-Pacific Partnership on Clean Development and Climate (APPCDC). The partner nations, the United States, India, China, Japan, Australia and South Korea, account for 50 percent of the world's greenhouse gas emissions, energy consumption, gross domestic product and population. The protocol allows each nation to tailor its own targets but commits them to cooperation in technology development and to seek ways to engage the private sector in these endeavours.

I have presented these sceptical views not for the purpose of refuting the pessimistic scenarios but to question the great weapon in the environmentalists' armoury – the claim of consensus. The debate on climate change is not over as a majority of environmentalists, media people and politicians claim. It is more likely that we are seeing the beginning of the first serious public debate on the subject. Similar differences of opinion exist in the scientific community over a wide range of environmental issues, including those concerning biodiversity, native vegetation, genetic modification of crops and nuclear energy. It is not in the interest of science or humanity to silence the alternative points of view on these issues. Unfortunately, there is a danger that environmental law will do just that.

The precautionary principle as trump

In the face of scientific uncertainty, environmentalists retreat to what is known as the precautionary principle (PP). The precautionary principle was first articulated in the 1990 Bergen Declaration on Sustainable Development that followed a UN-sponsored conference of European environment ministers. It states that "where there are threats of a serious or irreversible environmental damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation". It is now repeated in modified forms in UN declarations on environmental issues.

Many national policy documents incorporate PP in various formulations, and it has found its way into the Australian and New Zealand planning statutes in different ways. The principle, as stated in the Bergen Declaration, is an exercise in circular reasoning that contributes little to good science or public policy but serves as a powerful rhetorical weapon in swaying public opinion. In its wider sense, PP demands the disregard of scientific uncertainty when there is a threat of serious and irreversible harm. But scientific uncertainty is mostly about the existence of threats and the nature and extent of the harm. If so, the principle makes little sense. Other questions arise. Would a slight threat call for action? How serious must the damage be? In an evolving system like the environment, irreversible change occurs naturally. Must we respond to all changes at whatever cost? Is a cost and benefit analysis justified in taking or postponing measures? Uncertainty attends all science.

Scientific theories about physical phenomena are falsifiable. In every case, we must make a pragmatic decision whether or not to rely on a given theory. We are more cautious in adopting a theory when the evidence is weak and the stakes are high and we are less so when the stakes are low. The precautionary principle, if it means anything, is nothing more than common sense that most people employ in risk management. In going about life, we look at what is at risk and the extent of risk. At the community level, risk assessment is a matter of political judgment. However, in the more expansive interpretations urged by conservation lobbies, it can serve as a trump against human activity whenever there is risk of harm to the environment of an unspecified degree. If indeed this becomes legal doctrine it will introduce a new form of uncertainty to the law that will further destabilise property rights and, by its arbitrariness, harm the rule of law.

Precaution against the precautionary principle

As discussed below, PP is not a common law principle. But it is increasingly used in the advocacy of policy at international and national levels, in relation to the preparation and adoption of regional and local planning schemes and in proceedings for various consents and licences under planning and resource management statutes. There is a strong effort by environmental advocates to elevate PP to a legal standard that displaces common sense caution in environmental matters. So far, this has met legislative and judicial resistance. Even international instruments have introduced important qualifications to PP, most significantly to recognise the need for cost-benefit assessment of measures.

The 1992 Rio Declaration on Environment and Development restates PP as: “full scientific certainty shall not be used as a reason for postponing *cost-effective* measures to prevent environmental degradation”. The EU *Guidelines for the Application of the Precautionary Principle* state (among other things) that: “Measures . . . must not be disproportionate to the desired level of protection and must not aim at zero risk” and that they should follow an “examination of the benefits and costs of action or lack of action” (*EC Commentary*, 2 February 2000). The danger in allowing PP to be used as a trump is reflected in the cautious manner that governments and planning courts have embraced the principle. Justice Pearlman in the NSW Land and Environment Court explicitly rejected PP as trump. He construed PP as follows:

The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent: it does not require that the greenhouse issue should outweigh all other issues. (*Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1994) LGERA 143, 155.)

Justice Talbot in the NSW Land and Environment Court observed, “the so-called precautionary principle” added “nothing to the consideration that the Court undertakes by applying common sense” (*Alumino (Aust) Pty Ltd v Minister Administering the Environmental Planning and Assessment Act*, unreported, Land and Environment Court, 29 March 1996). Justice Stein in *Leatch v National Parks and Wildlife Service and Shoalhaven City Council* called PP “a statement of commonsense” whose premise is that “where uncertainty or ignorance exists concerning the nature or scope of environmental harm

(whether this follows from policies, decisions, or activities), decision makers should be cautious" ((1993) 81 LGERA 270, 282).

The New Zealand Environment Court has taken the view that it is not necessary to import international definitions of PP because the relevant principle is embodied in section 3(f) of the Resource Management Act 1991 (RMA), which provides that: "In this Act, unless the context otherwise requires, the term 'effect' includes . . . (f) Any potential effect of low probability which has a high potential impact" (*Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66). This approach has been confirmed in *Clifford Bay Marine Farms Ltd v Marlborough District Council* C131/2003 and *Golden Bay Marine Farmers v Tasman District Council* W42/01.

In *Land Air Water Association v Waikato Regional Council* the New Zealand Environment Court made it clear that the RMA does not endorse a 'no risk' regime (A110/01). In *Bleakley v Environmental Risk Management Authority*, the New Zealand High Court considered the requirement in section 7 of the Hazardous Substances and New Organisms Act 1996 that the authority "take into account the need for caution in managing adverse effects" where there is "scientific and technical uncertainty about those effects". The appellants, who were objecting to the approval of field testing of a genetically modified variety of cattle, argued that the words of section 7 imported the precautionary principle. The Court found no assistance "from the suggested importation of the (somewhat uncertain) international concept of a 'precautionary principle' whether such is expressed in terms of the Rio Declaration or otherwise" noting further that "Parliament deliberately avoided that concept, even to the point of adopting the word 'approach' rather than 'principle'" ([2001] 3 NZLR 213, 96–97).

The Integrated Planning Act 1997 (QLD) shows similar caution in its definition of PP as "the principle that, if there are threats of serious or irreversible environmental damage, careful evaluation must be made to avoid *wherever practicable* serious or irreversible environmental damage including, if appropriate, assessing risk weighted consequences of various options". The qualification "wherever practicable" and the requirement of risk weighting constitute a clear invitation to planning authorities and the courts to take account of all factors, including the economic.

When PP is qualified in these ways, it is nothing but a restatement of the common sense caution that guides human behaviour. Yet it continues to be a powerful rhetorical weapon and is urged in its more stringent forms in planning tribunals, courtrooms, policy forums and media. Its elevation to a legal doctrine with the force of a trump will be a major blow to constitutionalism.

Determining goals: apocalyptic, utopian and evolutionary views of the environment

Public policy is influenced by public opinion and public opinion by the theories and stories that dominate public discussion. Two points of view have been prominent in public discussion on the environment – the apocalyptic and the utopian, often in conjunction.

According to the apocalyptic vision, we are at the 'tipping point' of environmental destiny. If we do not turn back now there will be no escape from a catastrophic chain of events. It is announced in prime time news coverage by respected journalists as established truth. World leaders endorse it. Academics teach it. The utopian vision associates the good environment with a past, pristine condition of the Earth. The more extreme among them would pursue this dream, even at the expense of humanity. The Gaia Hypothesis formulated by James Lovelock in the mid-1960s has encouraged this view, although Lovelock made no such inference from his theory. The hypothesis proposes that our planet functions as a single organism that maintains conditions necessary for its survival. This theory, though unproven, has become the inspiration of the romantic and radical elements within the environmental movement. As a hypothesis about the nature of the complex system that is Earth, it is interesting. The problem lies in its deification.

Elected governments are constrained by public opinion from embracing apocalyptic or utopian visions. It is difficult to persuade electorates to make large present sacrifices for uncertain future risks. Governments therefore subscribe publicly to the policy of sustainable development. The World Commission on Environment and Development, in its 1987 declaration *Our Common Future*, defined sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs". The New Zealand RMA declares as its purpose the promotion of "sustainable management of natural and physical resources"(section 5(1)). Section 5(2) of the Act offers as a definition the statement that sustainable management means:

. . . managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The definition is, in effect, circular and leaves the question of the meaning of 'sustainable' unanswered. Jerry Taylor's observation captures the central problem of any concept of sustainable development.

How can we reasonably be expected to know, for example, what the needs of future generations will be? Imagine the economic planner of 1890 attempting to plan for the needs of today. Whale oil for heating, copper for telegraph wires, rock salt for refrigeration, and draft horses for transportation and agriculture would all be high on the list of scarce resources he would worry about sustaining 100 years hence, whereas petroleum, on the other hand, would not appear on that list at all, since oil was not an economic resource at the time (Taylor 2001).

There is another way of looking at nature which is informed by evolutionary theory and the science of emergent complexity. This approach does not condone wilful or negligent environmental harm and recognises the need to prevent harm that is

preventable. The critical difference is that, according to the evolutionary viewpoint, there is no preordained ideal state of nature. The environment is a dynamic process that is unfolding in response to endogenous forces, including the endeavours of human beings to better their lives. As Jennifer Marohasy observes, “competition, adaptation and natural selection, sometimes against a backdrop of catastrophic climate change, have driven the evolution of life on earth” (Marohasy 2004: 29–30).

All of this does not mean that we cannot or must not prevent harm that is preventable. What it means is that we should be aiming to have a healthy environment as against the pursuit of an imaginary, unachievable pristine state at the cost of all other interests. The removal of technological civilisation from the ecological equation (as some environmentalists would have it) would produce dramatic reactions throughout the world that would be hard to predict and impossible to control. Nature is dynamic, not static. Ecosystems, the organic world, human societies and culture itself are emergent complex systems. They are adaptive and, from the evolutionary viewpoint, they have no teleological or preordained ideal states. The planet itself has no ideal state.

Because natural systems are dynamic, it is not possible to hold the landscape in some sort of precautionary stasis. For example, prohibiting land management and tree clearing can result in forest encroachment and woodland thickening that will impact on biodiversity and surface water run-off. Some experts think that the full implementation of the vegetation management laws of Queensland is likely to be general woodland thickening across approximately 50 million hectares of Queensland (Burrows *et al* 2002: 769–784). Burrows speculates about the consequences for biodiversity:

The dense woody plant communities that will result will be resistant to natural disturbances such as fire. We will take from them the one widely accepted element in the distinctive evolution of our flora and fauna – except for rare and grossly destructive holocaust fires! This is not precautionary – it is challenging nature. Our greenies are figuratively putting out the flames with napalm (Burrows 2004).

Part 2

Constitutionalism and resource management

What is a constitution and what is constitutional government?

Constitutionalism is the preference for constitutional government. Constitutional government is a remarkable achievement of civilisation that has been gained at a great price. Constitutional government enthrones the rule of law in the sense of the supremacy of known, general and impersonal laws over rulers and subjects alike. Millions of people around the world have died in the establishment and defence of constitutional government. This is not an exaggeration when the human costs of the seventeenth century constitutional struggles in England, the American Revolution, the American Civil War, the two World Wars, the uprisings against fascist and communist rule and present day democracy movements in China, Burma, Zimbabwe and elsewhere are aggregated. Constitutional government is hard to win but not so hard to lose. It is always under pressure from seen and unseen opponents.

The term 'constitution' was once synonymous with constitutional government that meant a particular type of political order in which the authority of rulers, including their legislative power, was limited through appropriate institutional devices, and both rulers and citizens were subject to the general law of the land. However, the term is so debased that the most widely read encyclopaedia, the *Encyclopaedia Britannica*, informs its readers that in its simplest and most neutral sense, every country has a constitution no matter how badly or erratically it may be governed (*Encyclopaedia Britannica* 1986: vol 16, 732). A constitution in this simple sense refers to the official description of the constitution or the paper constitution.

There is another more realistic sense in which the word 'constitution' is used. It refers to the constitution as it actually operates. This is the constitution that lives in the experience of the people, the living constitution that economists sometimes call the 'economic constitution'. The constitution in this sense deviates from the paper constitution, sometimes for the better but often for the worse. New Zealand's Constitution Act 1986 reposes absolute power in a single chamber parliament. Yet New Zealand enjoys a much greater degree of constitutional government than most countries with elaborate written safeguards. The United Kingdom has a robust democracy and an outstanding record on human rights without a document that can be called a constitution. (The United Kingdom's constitution, shaped by common law, convention and historic statutes such as the Magna Carta and the Bill of Rights, remains susceptible to change by parliamentary legislation.) As against these shining examples, we find many countries failing to secure a semblance of the constitutional order proclaimed in their official constitutional instruments.

There is a third, philosophical, sense in which the term 'constitution' is used. It is the classical idea of a constitution, the *Politeia* of Aristotle (Aristotle 350 BC [1932]: 304–305). It is the *Rechtsstaat* of German jurisprudence. It is what Hayek termed the 'constitution of liberty' in his famous work bearing that name. In *The Constitution of Liberty*, Hayek set out to present a restatement of the principles of a free society (Hayek 1978). This restatement was completed in the three volumes that constitute the monumental intellectual defence of the rule of law and individual freedom, *Law, Legislation and Liberty* (Hayek 1982). These treatises together explain the logic and the institutional framework of the political order that sustains human freedom. At the heart of the constitution of liberty is the supremacy of general laws over all authority, public or private. Its modalities include the rejection of sovereign authority, even of elected assemblies, the effective separation of the executive, legislative and judicial law-making powers, and the geographical dispersal of power through federal arrangements. The constitution in this classical sense is a response to a perennial problem of human existence – that of creating power to coordinate collective action to secure essential public goods while restraining the repositories of power from abusing it.

The bedrock of the classical idea of a constitution is a particular conception of the rule of law, namely the subordination of all public and private power to general norms of conduct. It is said that the rule of law is a necessary condition of freedom, but not a sufficient one. This proposition sounds logical inasmuch as certain laws may diminish the liberty of all while ostensibly remaining faithful to the rule of law ideal. For example, prohibition of alcohol consumption in some countries limits the choice of everyone. But on reflection, it is evident that such laws eventually defeat the rule of law. Unreasonably restrictive laws are likely to be kept in place only by derogations from the rule of law in other respects.

Typically, prohibition laws are maintained by privileging certain religious or moral opinions as against others. It is also claimed that abhorrent institutions, such as apartheid and slavery, can be implemented consistently with the rule of law provided that the disabilities they impose are not the result of arbitrary discretions of authorities. This claim is much more problematic. In such cases, the legislators themselves are acting arbitrarily in both establishing and maintaining the institutions. The rule of law's prescription against arbitrary determinations applies equally to the legislature and to constituent bodies. Such laws are general only in a very perverse sense. Thus, in countries where there is cultural diversity, the constitutional privileging of particular religions or languages creates serious problems for the rule of law. It is true that people's lives are more predictable where discrimination results from pre-announced rules rather than from the momentary will of officials. Much depends on the extent to which the discrimination diminishes the life chances of the group discriminated against.

The rule of law is maintained in the longer term not by coercive power but by the people's fidelity to the law. Hence constitutions and laws that preordain selected groups to lasting deprivation may lead to constitutional instability due to the loss of fidelity. Where this happens, political authority can be maintained only by increasingly arbitrary projections of coercive power that subverts the rule of law.

A constitution that is not purely a fiction is one that exists in the experience of the people. No amount of lofty ideals proclaimed in formal enactments and no amount of inspiring judicial exposition will bring a constitution into existence if a society lacks the material conditions that can sustain a constitution. I have argued elsewhere that a nation needs four conditions to secure and maintain constitutional government. They are:

- (1) prevalence of the philosophical conception of constitutional government as a dominant ideology;
- (2) an official constitution in written or customary form that adopts this conception of constitutional government;
- (3) an institutional matrix that sustains the official constitution and translates it into the experience of the people; and
- (4) a healthy economy that supports the institutional foundation of constitutional government (Ratnapala 2003: 5–26).

These conditions are interdependent. In particular, economic performance depends critically on sound institutions and, conversely, when economic conditions decline, institutions of constitutional government are imperilled.

How can we explain the strength of the constitution of New Zealand? The formal constitution reposes sovereign power in a unicameral legislature that is usually under the control of the ruling party or coalition. According to the orthodox positivist theory of sovereignty, the New Zealand parliament could extend its life indefinitely, abolish political parties, socialise all private property, disenfranchise people of Scottish descent and replace the common law with Sharia law. Yet, we know that this can only happen in positivist fantasy. The reason why none of this is remotely possible is that the living constitution of New Zealand is not what is sketched in the Constitution Act, although that Act is an important part of it. The living constitution of New Zealand is made up of a web of interdependent and mutually supportive norms reflecting legal, political, cultural, moral and economic constraints that secure New Zealand's rule of law, basic liberties and democracy. Economists call these constraints institutions. Their existence cannot be taken for granted but needs to be protected and nurtured. They tend to flourish in conditions of economic prosperity and come under severe pressure in times of hardship. I will return to the subject of these constraints. For the moment, it should be noted that our chief concern in this discussion is with this living constitution as distinguished from the notional sovereignty of the New Zealand parliament. Parliament's sovereignty ultimately rests on these institutions and on public opinion. My principal argument is that the regulatory trends in environmental protection are posing threats to the constitution that really matters in the lives of the people.

Constitutionalism, common law and the problem of externalities

The English system of common law is, by nature, in harmony with constitutional government. One does not have to employ theological or Blackstonian natural law theory to explain this harmony. The relationship between common law as classically practised

and constitutional government can be explained in utilitarian and epistemological terms. It is not an accident of history that England became the birthplace of modern constitutionalism. While in continental Europe the feudal kingships gave way to absolute monarchies, the English royalty never acquired absolute power or the *voluntas principis* that identified the law with the will of the ruler. When the Stuart kings claimed this power, they were opposed and defeated by the coalition of common law judges and parliament leading to the reaffirmation of the supremacy of the law over executive power. The post-revolution English Constitution (theoretically rationalised by Locke and Montesquieu) provided the guiding principles for the construction of the American Constitution.

Hayek, more than any other scholar, helps us to understand the constitutional significance of the common law method (Hayek 1982: vol 1, 35–46, 94–101). The common law, as he explained, is an instance of spontaneous order. It consists of rules of conduct that have emerged in consequence of the coincidence of behaviour on the part of actors pursuing their private ends. Common law is an outstanding example of what the eighteenth century Scottish philosopher Adam Ferguson spoke of in his memorable observation that “nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design” (Ferguson 1966 [1767]: 122). The practice of promise keeping is the result of accumulated experience, habit meshing and shared expectations and not of the command of a ruler or sage. Certain kinds of promises are enforced as contracts because people have learned to rely on these practices and breach of contract defeats their reasonably held expectations. The common law judge ideally upholds these grown rules and only makes incremental adjustments in the process of applying them to novel cases. In one sense, they create law in recognising and giving effect to these rules but in another they are articulating rules that are crystallising within the community. Historically, common law courts have not always lived up to this ideal. However, it is fair to say that the courts, when they function properly, do not impose their arbitrary will on the law and the courts that do so will soon lose public confidence and, before long, their authority.

From the constitutional standpoint, the common law has three outstanding virtues. First, the rules that are distilled from accumulated experience and commonly held expectations are general and negative in character. It is impossible to universalise fundamental laws against the violation of person and property as demands for positive action. If the rule is to apply to all persons it must take the form of ‘thou shall not’. Thus, the common law represented the supremacy of general law over private and public power. (This of course changed after the revolution of 1688 when parliament began to assert its supremacy in matters of law.) Second, there is no place within the common law system for capricious interference with rights. The common law judge, as just explained, lacks the arbitrary powers of elected and unelected rulers. Third, the common law has shown a remarkable capacity to internalise externalities by allocating responsibility for harm.

The common law is not a system of unbounded freedom, but one where individual autonomy is limited by the rules of justice. A society of unbounded freedom is a contradiction in terms. The unlimited freedom of one must come at the expense of the

freedom of others. The rules of justice upon which a liberal society is based are fundamentally concerned with the externalities that result from the exercise of freedom by individuals. They enjoin individuals from conduct harmful to others and require wrongdoers to make reparation to the persons harmed. Often, the wrongfulness of the conduct is clear and visible as in murder, robbery, arson, rape, harmful negligence and so on. Sometimes, though, persons may cause harm to others by conduct that may not immediately be recognised as contrary to the fundamental rules of justice. Consider the case of pesticides used by a farmer causing damage to properties downstream or teenagers playing loud music in a quiet neighbourhood or a religious sect refusing to be immunised against a deadly virus. It might seem at first that the actors are merely exercising their rights within the rules of just conduct. Yet, from the standpoint of the victims, they are straightforward cases of the violation of their rights not to be physically, monetarily or psychologically harmed by the wilful or negligent conduct of others. These are the types of externalities that invite state action and test the limits of tolerance in a liberal society.

The common law as an evolving and adaptive system has shown remarkable capacity to internalise externalities by developing rules for apportioning responsibility for harm. The common law tort of nuisance, for example, seeks to uphold the principle of 'give and take' and defines the obligations of neighbourliness (Fleming 1992: 409). The polluting landowner and the teenagers may be judicially enjoined for causing private nuisance. The sect members who refuse immunisation on grounds of conscience may face actions for damages if they contract and communicate deadly diseases. The common law by nature is not proactive but responds mainly to claims made after injury. However, where harm to person or property is imminent from trespass (intentional injury to person, land or goods) or nuisance, the courts have authority to restrain by injunction the harmful activity, especially when damages will not provide adequate reparation (Fleming 1992: 48, 445).

Admittedly, the common law does not provide perfect protection. Injunctions can be sought only by those whose rights are under threat from unlawful action and they are not always effective as remedies. It is easier to stop chemical and noise polluters than to compel parents to inoculate children. The liability rules and the remedies developed at common law and equity cannot prevent all externalities and nor should they if the society is to remain liberal. The goal of perfect safety and convenience is abandoned by liberals as unachievable in the real world. The attempt to eliminate all minor risks entails the creation of major risks. This insight is an important part of the epistemological case for liberalism.

Consider a law that prevents a potentially life saving drug from being sold until there is 100 percent safety. Millions of people may die while producers and regulators argue about risk level. At a recent conference I attended, Warren Mundine, a highly respected leader within the Australian Aboriginal community and the current national president of the Australian Labor Party spoke of the devastation that minimum wage laws (combined with new technologies) produced in remote Aboriginal communities. The minimum wage was applied universally. Some Aboriginal communities that enjoyed 100 percent employment in local mining operations found themselves overnight with 100 percent unemployment and total dependence on government welfare. The examples are endless.

What the common law cannot do well

As the famous insight of Ronald Coase suggests, in a world of zero transaction costs, the law's allocation of rights would hardly matter (Coase 1960). If the law allows me to pollute my neighbour's land with smoke, my neighbour can pay me to use cleaner fuels, re-tool my factory or even close it down. If the law prohibits me from polluting my neighbour's property, I can buy from my neighbour the right to pollute. Either way, we will bargain to reach the most efficient arrangement under which the activity that is valued most will continue. All that is needed are clear and secure property rights, freedom of contract and effective remedies in contract and tort. In theory, the common law backed by sound institutions can provide these. However, the real world is not cost free. The law might not let the bargain be struck. Or it will be frightfully difficult to enforce if either party dishonours it. Again, the pollution might harm not just my neighbour but all persons residing within a large area and it is impossible to strike bargains with all of them. The problem may be caused by the cumulative effect of emissions from many factories and motor vehicles, making bargaining even more difficult. In the absence of contractual arrangements, victims must seek relief under the law of torts. These are kinds of harm that the common law is ill adapted to mitigate.

Where the alleged harm is to the public and the causes of harm are uncertain or the harm results from the cumulative effects of natural and human causes, the common law does not provide effective remedies. There are two major reasons for this. First, the common law remedies are granted to successful plaintiffs against one or more defendants. If there is no defendant there is no case for the court to decide. Hence, the common law cannot be invoked to claim damages unless the loss or damage can be causally connected to the acts or omissions of identified persons. If residents of a city suffer ill health because of the emissions of one or more factories, the factory owners may be held responsible at common law to persons who suffer ill health. But if a similar hazard results from too many motor vehicles on city streets, those who suffer ill health cannot successfully sue all motorists. When pollution is the cumulative effect of emissions from various sources, it is impractical to apportion responsibility among individual motorists, even if the requisite causal nexus between emissions and ill health is established. (It is extremely unlikely that such a claim would even succeed against vehicle manufacturers.) A second reason is that even if a causal nexus can be established between harm and the actions of known persons, if the act was perfectly legal at the time it was done and the harm could not have been reasonably foreseen, the common law will not hold the actor responsible. The common law rule of strict liability applies only in rare circumstances.

In clear cases of harm resulting from a state of affairs for which particular persons are not responsible, there may be some justification for proportionate legislative responses. Legislative solutions must be espoused with great caution (the precautionary principle in reverse) and measures must be crafted with utmost care, taking costs and benefits into account. A law-governed society will ideally respond in the following manner. A new prospective, clear, general, observable and reasonable rule of conduct will be enacted that will limit the previously legitimate activity but only to the extent reasonably

required to avert the harm to the public. The law will also make provision to compensate persons whose property is taken or diminished in consequence of the new rule.

The constitutional importance of compensation

Given that certain environmental objectives are worth achieving, the question arises as to who should bear the costs involved in their achievement. The common law principle is that those who cause damage to others must pay for reparation but, beyond that, if individuals are asked to sacrifice property for the benefit of all society, the cost of that sacrifice must be borne by society as a whole. This is an important principle that lies at the heart of constitutional government and the case for environmental laws that depart from this principle needs to be rigorously tested.

The most fundamental proposition of the common law and of constitutional government is that no one, whether official or citizen, must violate the person or property of another without the authority of the law. Justice Kirby described this principle as expressing “an essential idea which is both basic and virtually uniform in civilised legal systems” (*Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513, 659). The immortal words of Lord Chief Justice Camden in *Entick v Carrington* are worth repeating:

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment ((1765) 19 Howell’s State Trials 1029, 1066).

In some countries, like Australia and the United States, there are constitutional prohibitions against the taking of property without paying just compensation. The New Zealand parliament is not so constrained and may authorise the taking of private property. However, there is a strong common law presumption that, in the absence of express words, parliament does not intend to deprive persons of their property without just compensation. In *Burmah Oil Co Ltd v Lord Advocate* Lord Hodson recognised that as “far as the common law is concerned . . . there is a natural leaning in favour of compensation in the construction of a statute” ([1965] AC 75, 139). In *Belfast Corporation v O D Cars Ltd*, Lord Radcliffe described the common law presumption as a “general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place” ([1960] AC 490, 523).

The presumption is well established in Australian law. As Williams J explained in *South Australian River Fishery Association and Warrick v South Australia*, “legislation should not be treated as empowering the removal or impairment of a vested property right without compensation unless the legislation contains a clear statement of this intended authority” ((2003) 84 SASR 507, 551). The New Zealand courts recognise this presumption. In *Westco Lagan v Attorney-General*, Justice McGechan reaffirmed the orthodox view that parliament can enact laws expropriating property without compensation but acknowledged that “authorities illustrating that the courts lean against taking without compensation and international norms advanced [by the plaintiff] are undeniable in their own right” ([2001] 1 NZLR 40, 54). In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, the Court of Appeal acknowledged that “there is an assumption that, on any extinguishment of the aboriginal title [of Maori] proper compensation will be paid” ([1994] 2 NZLR 20, 24). This comment was made in the context of a decision which held that property rights under Maori law subsisted under common law principles. The court was thus applying the general common law principle of compensation to takings of Maori property. What is good law for Maori property is good law for all property in New Zealand.

New Zealand’s constitutional principles are drawn from the country’s common law heritage. Accordingly, the Legislation Advisory Committee *Guidelines on Process and Content of Legislation* direct that drafters of New Zealand law address the questions of whether the legislation complies with fundamental common law principles, whether vested rights have been altered (if so, is that essential, and if so, have compensation mechanisms been included), and whether pre-existing legal situations have been affected, particularly by retroactivity (if so, is that essential, and what mechanisms have been adopted to deal with them (Legislation Advisory Committee 2001: chapter 3). The Attorney-General also has a duty under section 7 of the New Zealand Bill of Rights Act 1990 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 set out in the Act. However, the Act provides little protection for private property against arbitrary state interference.

Regulatory takings and compensation

Planning and resource management laws, as a general rule, fail to provide compensation for the loss of property value that results from the restriction of land use. If the law is designed to prevent private or public nuisance no compensation is owed in common law because no one has a right to cause nuisance to others. This is the well-known nuisance exception to the principle of compensation for takings. The prevention of nuisance in its various forms falls within the traditional police function of the state. However, the nuisance exception can be a serious threat to the rule of law unless it is grounded in traditional notions of right and wrong with respect to property use. My neighbours have a right that I do not pollute their property by emissions or noise. They may also have an easement that I do not block their only source of light by structures that I erect on my land. But they have no right that I refrain from building a shed in my back yard that blocks their scenic view. If they wish my back yard to be left vacant for their pleasure they should offer to buy the land or an easement over it. Members of the

public stand in the same position. If they want me to sacrifice my use of land for their pleasure or benefit, it is reasonable that they pay for it.

The RMA departs from this principle. Section 6 authorises the regulation of property use to protect “outstanding natural features and landscapes from inappropriate subdivision, use and development” and “areas of significant indigenous vegetation and significant habitats of indigenous fauna”, and section 7 obliges authorities to have regard to “intrinsic values of ecosystems”. The RMA’s mandate is not limited to the prevention of nuisance or even to the scientifically supported conservation goals. Even so, it denies compensation to property owners who are asked to sacrifice their enjoyment of property for officially determined public benefits that may have nothing to do with nuisance prevention or reasonable demands of conservation.

The duty to compensate owners for property taken for public purposes is a principle that Lord Justice Bowen described as “part and parcel of natural justice” (*London & Northwestern Railway Co v Evans* [1893] 1 CH 16, 28). Even so, there is a rebuttable counter presumption in common law that regulation of property use does not amount to taking. The presumption can be rebutted. There are judicial indications that regulation may reach such intensity that an acquisition is the actual result. In *Trade Practices Commission v Tooth & Co Ltd*, Stephen J referred in this regard to the “universality of the problem sooner or later encountered wherever constitutional regulation of compulsory acquisition is sought to be applied to restraints, short of actual acquisition, imposed upon the free enjoyment of proprietary rights” (1979) 142 CLR 397, 415). Canadian jurisprudence recognises that regulation can reach the point where it is a de facto expropriation without compensation (*Alberta (Minister of Public Works and Services) v Nilsson* (2002) 220 DLR (4th) 474; *Steer Holdings Ltd v Manitoba* (1993) 2 WWR 146). The European Court of Human Rights holds a similar position (*Banér v Sweden No 11763* (1989) 60 DR 128). The critical issue is to determine the point at which regulation becomes a taking. If it is a taking, in the United States and Australia, the owner has a constitutional right to compensation. In New Zealand, the owner has a common law right to compensation unless the authorising statute has expressly denied compensation. Thus, in *Smale v Takapuna Council*, the extinguishment of a right to sea access and the use and sale of sand and shells gave rise to a right to compensation ((1931) NZLR 35). This question has become particularly important where environmental laws enacted in the presumed interest of the community as a whole are, in many cases, drastically limiting land use and land management and causing a steep decline in land value. The conceptual difficulty concerns the notion of taking or acquisition. Is the government taking property when the law commands an owner to limit the use of their property?

In *Minister of State for the Army v Dalziel* ((1944) 68 CLR 261), the court held that the taking of possession and use of ships for defence purposes was an acquisition of property. In the case of land use regulations, there is no obvious taking – only a restriction of the owner’s proprietary rights. When the question arose in *Commonwealth v Tasmania (Tasmanian Dam Case)*, only four of the seven judges addressed the issue, the other three judges finding it unnecessary having decided the case on different grounds. Justices Mason, Murphy and Brennan thought that the restriction of land use, though

limiting Tasmania's ownership rights, did not result in the Commonwealth acquiring any property. Justice Deane, on the contrary, found that the absence of a material benefit for the Commonwealth did not prevent the conclusion that there was an acquisition and determined that, in such cases, the property acquired was the benefit of the prohibition ((1983) 158 CLR 1, 286–287).

In *Newcrest Mining (WA) v Commonwealth*, the majority comprising Brennan CJ, Toohey, Gaudron, Gummow and Kirby JJ (McHugh J dissenting) found that the legislative cancellation of Newcrest's rights to extract minerals under its existing lease was an acquisition of property within the meaning of section 51(xxxi) of the Commonwealth Constitution, although the Commonwealth did not physically take any property. The cancellation of the rights under the National Parks and Wildlife Conservation Amendment Act 1987 followed the extension of the boundaries of Kakadu National Park in the Northern Territory, which swallowed part of the land leased to Newcrest by the Crown. Section 7 of the Act stated that: "Notwithstanding any law of the Commonwealth or of the Northern Territory, the Commonwealth is not liable to pay compensation to any person by reason of the enactment of this Act".

The Act was made under section 122 of the Commonwealth Constitution that gave parliament powers to legislate in respect of the Territories. Newcrest claimed that the National Parks and Wildlife Conservation Amendment Act was unconstitutional for denying it just compensation as required by section 51(xxxi) of the Commonwealth Constitution. The claim failed because the majority were unprepared to overrule *Teori Tau* that had previously decided that section 51(xxxi) did not apply to legislation made under section 122. But all justices, except McHugh J, rejected the Commonwealth's contention that it had not acquired any property. As to the property taken, Chief Justice Brennan explained: "The property consisted not in a right to possession or occupation of the relevant area of land nor in the bare leasehold interest vested in Newcrest but in the benefit of relief from the burden of Newcrest's rights to carry on 'operations for the recovery of minerals'" ((1997) 190 CLR 513, 530). Importantly, Gummow J clarified that: "There is no reason why the identifiable benefit or advantage relating to the ownership or use of property, which is acquired, should correspond precisely to that which was taken" (634; see also Kirby J, 639–640).

In *Commonwealth v Western Australia*, the High Court considered whether Commonwealth authority to carry out defence practice on land within the state amounted to an acquisition of property in the minerals reserved for the state ((1999) 196 CLR 392). The Commonwealth legislation prohibited entry into a designated defence practice area whenever an authority was issued to conduct practices. Hence, no exploration or mining could take place at these times. The majority held that frequent or prolonged authorisations would conceivably amount to an acquisition of property in the minerals but dismissed the appeal on the ground that there was no evidence of the frequency of the authorisations.

Justices Callinan and Kirby, on the contrary, considered the frequency of authorisation to be irrelevant and held that there was an acquisition of property. In so deciding, Justice

Callinan stated that: “The Declaration (made in this case) may be compared to a restrictive covenant; if one person (for his or her own reasons) wishes to sterilise or restrict the usages of another person’s land, the latter, in a free market place, would demand recompense and the former would be expected to pay it” ((1999) CLR 392, 488).

Given the disposition of the majority to treat prolonged deprivation of land use as a compensable taking there is a real prospect that land use limitation, at least in the more extreme forms, may attract the just terms clause. Apart from authority, there is a strong logical argument that the restriction of land use is an acquisition. The government is taking away a property right for its purpose. This need not be direct material use of the property. Take the case of land-clearing limitations. In sequestering the trees, the government is sequestering carbon that offsets the carbon emissions by other groups of industrialists and consumers. The government acquires the carbon rights to the trees that are saved by the land-clearing prohibition that it then tacitly passes on to others.

The US Supreme Court has taken the Fifth Amendment ban on uncompensated takings much more seriously. Justice Holmes in his much discussed opinion in *Pennsylvania Coal Co v Mahon* stated:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

... The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking (260 US 393, 413 (1922), 415).

The question then is how far is too far? Epstein argues that the proper question to ask is: “Would the government action be treated as a taking of private property if it had been performed by some private party?” (Epstein 1985: 36). This, in my view, is a rational answer. The often made claim that a duty to compensate for regulatory takings will prevent regulation altogether owing to the enormous cost of administering the law turns out to be exaggerated. Takings within the police power are not compensable. Nor are regulatory takings under which property owners benefit more than they lose as when building restrictions enhance the property values of a neighbourhood. As Epstein points out, “if, in fact, the government is well organised, the kind of large number takings we are talking about will generate benefits to all members of society that are equal to or greater than the actual harms imposed” (Epstein 2004: 8–9).

Under recent US judicial doctrine, to avoid the obligation to compensate, a restriction must bear an essential nexus to a legitimate public interest and be roughly proportionate to achieve the end. In *Lucas v South Carolina Coastal Authority*, the Supreme Court struck down a construction ban on a Carolina barrier island (202 US 1003 (1992)). In *Nollan v California Coastal Commission* 483 US 825 (1987), the Supreme Court held unconstitutional a condition in a building permit that made the permit subject to the grant of a public

easement over the land, and in *Dolan v City of Tigard* 512 US 687 (1994) the Supreme Court struck down a requirement that the owner dedicate parts of the land to flood control and traffic improvements.

The just terms clause in section 51(xxxi) of the Australian Commonwealth Constitution is not binding on the Australian states. However, if a state, in acquiring property, is acting as the agent of the Commonwealth to execute a Commonwealth purpose (such as observing the Kyoto targets as a matter of foreign policy), it is conceivable that the just terms requirement will apply, particularly if the Commonwealth is granting funds for this purpose under section 96 of the Commonwealth Constitution (*Pye v Renshaw* (1951) 84 CLR 58, 83).

It is true that US and Australian constitutional jurisprudence is not binding on New Zealand courts. However, it is relevant to ask of New Zealand statutes whether they effect regulatory takings. On this question, the US, Australian and other Commonwealth decisions are of great value. If the answer is affirmative, two consequences follow. The New Zealand courts will inquire whether the denial of compensation is expressly authorised by parliament. If it is not so authorised, the court will award compensation for the taking. If the court holds that no compensation is owed under the statute because of clear language, the public is informed that parliament, though acting within its sovereign power, has abused that power in violation of one of the most basic constitutional values that sustains New Zealand's liberal democratic system of government.

The RMA pre-empts claims to compensation by reason of a plan implemented under the Act. Section 85(1) states: "An interest in land shall not be deemed to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act". It is an implied recognition that certain land use limitations under the RMA can amount to takings but for section 85(1). However, for the deeming provision to apply, the plan must be lawful. A plan can be challenged if it is likely to result in the land being incapable of reasonable use and the restriction places an unfair and unreasonable burden on the owner. Reasonable use is defined as use that has no significant environmental effects or effects on other persons. As Wilkinson highlights, the relief that the Act offers is the deletion of the offending provision or rule (Wilkinson 2001). If a rule is struck off no question of compensation arises because there is no taking by that rule. However, the other rules in the plan or the plan as a whole may effect a regulatory taking but for section 85(1). Does the language of section 85(1) unambiguously deny compensation? In *Falkner & Ors v Gisborne District Council*, Justice Barker found that the: "Act contains no such unequivocal intention" but observed that the statute "deliberately sets in place a coherent scheme in which the concept of sustainable management takes priority over private property rights" ((1995) NZRMA 462, 478). His Honour contrasted the RMA's equivocation with the clear compensation provisions in section 19 of the Coast Protection Act 1949 (UK) and stated:

I commend this section to those responsible for revising the Resource Management Act as offering some resolution of the residents' understandable concerns at the prospect of losing their homes without compensation and without the ability to erect coastal protection works ((1995) NZRMA 462, 479).

Section 185 of the RMA grants a very limited form of compensation to owners and others having interests in lands that are made subject to 'designations' and 'requirements'. The situation arises when properties are designated or required for public works. In such instances owners may apply to the Environment Court for an order obliging the requiring authority to acquire the land. The amount of compensation payable for an estate or interest in land ordered to be taken is assessed "as if the designation or requirement had not been created" (section 185(7)). Despite Justice Barker's doubts, the RMA seems to override the common law presumption except to the extent recognised in section 185.

Economic argument for compensation is also a constitutional argument

There is not much argument that if the state takes property it must pay compensation. It is possible for parliaments, such as those of New Zealand and the Australian states that are unconstrained by constitutional limitations, to enact laws that authorise takings without the payment of compensation. However, a government that systematically takes property in this manner risks public backlash, particularly if the takings affect significant sections of the population. If not, it will bring democracy to a hasty end.

If the government pays compensation at market value for all takings, it may soon be bankrupt. The government may also not wish to acquire a property if it means having to bear the costs of maintaining the property in the desired state. Take the example of a parcel of privately owned land that the government wishes to dedicate to the cause of biodiversity. One option is for the government to buy the land by negotiating with the owner and if the owner resists to acquire the property and pay compensation. The government will then bear the costs of compensation and the maintenance of the land indefinitely, perhaps as a nature reserve or national park. However, if it wishes to convert many private lands from agricultural, industrial or residential uses to conservation it has to find another way that will be cheaper and not cause widespread outrage.

The ready solution is to regulate the way the owner can use the property. The costs of the taking and the future maintenance of the property in the desired state of conservation are thereby transferred to the owner. The true cost is hidden from the public view by the illusion that no taking has taken place and no burden has been placed on the property owner. The situation is analogous to a fiscal illusion of the type that Italian economist Amilcare Puviani revealed in his 1903 treatise. Puviani used a model of an authoritarian state where the ruling class employs fiscal illusion to make exactions palatable to subjects. Buchanan argues that the theory is equally applicable within a modern democracy (Buchanan 1999). An illusion makes the state of something appear different from what it really is. The public under fiscal illusion may accept measures even if the total social cost actually exceeds total social benefit (Guerin 2003: 5).

It is a different argument if the persons from whom property is taken are among the direct beneficiaries from the public work that results. In that case, the amount of compensation can be reduced to reflect the owner's gain. Wilkinson's proposition that compensation may be denied where the costs of identifying and assessing rights to

compensation exceed the benefits of paying it, where benefits accrue to the same persons who bear costs, and where the taking is restricting a firm's exercise of market power while allowing an investor to obtain (*ex ante*) the risk-adjusted return on capital seems logical (Wilkinson 2001: 192–193; Epstein 1993: 203).

The denial of compensation eliminates the discipline that the price mechanism brings to decision making. A government that need not compensate owners has less reason to 'get it right' than a government that must. One does not have to be an economist to know that in conditions of scarcity free goods and under-priced goods are over-consumed or over-accumulated. If regulators have no price to pay they are likely to regulate more. The uncoupling of power and financial responsibility usually allows governments to seek short-term political dividends at the expense of facts and science.

Why is this a constitutional problem as much as it is an economic problem? Uncompensated takings where social benefits exceed costs epitomise arbitrary interference in the rights and liberties of the citizen. Fiscal illusion further subverts the rule of law by concealing the arbitrariness of regulatory taking. It is facile to say that there is no constitutional issue because a New Zealand court will not invalidate a law that clearly authorises a taking and expressly denies compensation. The extreme view of parliamentary sovereignty is not as fashionable as it once was. Lord Cooke of Thorndon, a major judicial critic of the notion of unbridled sovereignty, puts it this way: "The question of whether Parliament is sovereign cannot receive any affirmative now or probably ever. It reflects a common illusion, tidy but superficial". (Cooke 2004: 44. See also on this question Joseph 2004 and Wilkinson 2001: 146–147.)

But let us, for the purpose of argument, assume the extreme view. Even the most ardent supporters of parliamentary sovereignty will concede that if governments use their majorities systematically to abrogate the rights and liberties of citizens, at some point the implicit constitution as we know it will cease to exist. Their position is that majoritarian democracy is a sufficient safeguard against such a fate. The danger in established democracies though is not dramatic constitutional collapse but constitutional erosion in ways insensible to the electorate.

In majoritarian parliamentary systems the electorate is asked to choose between policy packages presented by parties. These packages are designed strategically to appeal to a sufficient number of diverse interests that would deliver victory on the election night. The process is further complicated in New Zealand under the mixed-member proportional system of election (MMP). The system frequently fails to produce a clear majority for any party. When this happens, a party can form a government only by striking deals with one or more minor parties on terms that may compromise the policies and programmes that it offered to the electorate in return for votes. In theory, the electorate will punish the promise breakers at the next election. The problem with this theory is that it overestimates the capacity of the electorate to audit and adjudge a government's term of office in the context of a bargaining democracy.

Most governments during their terms of office disappoint the expectations of some groups and fulfil those of others. Although the record in office is an important factor, a

government may still win with the aid of a new or modified coalition of interests. Coalition building happens before the election and, in the case of MMP systems, also in the aftermath of the poll. Except when major errors or abuses are committed, elections are decided by the ongoing bidding process that allows parties to recoup lost support with new promises to the disaffected groups or to alternative groups. The accounting process is further undermined by the fact that a great deal of governmental activity cannot be monitored because it happens outside parliament within bureaucratic structures that elude parliamentary and judicial scrutiny. These actions affect individuals who have no bargaining power at the ballot box. The electoral process has little to offer individual victims of arbitrary power. The end of constitutional government is not the maintenance of the rule of the majority but the achievement of the rule of law. The former is valued to the extent that it serves the latter. Uncompensated takings constitute a direct breach of the rule of law that majoritarian democracy has failed to restrain.

Parliamentary systems based on proportional representation, for example, MMP, reduce the occurrence of absolute majorities and may weaken the executive dominance of parliament. However, these arrangements do not necessarily promote the rule of law and, in fact, may undermine it further because of the unprincipled bargaining that usually follows elections as parties try to form a government. A government so formed is also susceptible to political blackmail by minor parties and independents, whose cooperation the government needs to stay in office.

Objections to compensation based on questionable notions of property

The arguments against compensation for regulatory takings generally focus on the question of whether there is a taking at all and on the impossibility of compensating every property owner who is injuriously affected by regulations made in the public interest. As discussed previously, judicial opinion and economic theory unite in the view that regulation can reach the point of taking and that owners by right (under US and Australian federal constitutional law) or by defeasible presumption (New Zealand and Australian states) have a right to just compensation. However, we must consider another line of argument that questions the case for compensation by challenging the traditional liberal conception of property. The argument is that property, by its very nature, is something that exists subject to law and there is nothing unusual in limiting its use in the public interest. Hence, by implication, there is no case for compensation for takings authorised by law (Barton 2002: 19–23). Barton, in the pages just cited, argues at length against the notion of legally unrestricted property rights. Laura Underkuffler makes a similar case against “the idea of property as fixed, unyielding, bounded and protected” (Underkuffler 2004). These statements reflect lazy arguments against straw figures. No serious liberal scholar, not even the most passionate natural rights theorist, will argue that property ownership means rights to unconstrained use of property. Yet, to draw from the premise that property is liable to legal regulation the conclusion that legal takings need not be compensated is to make a giant unfounded leap. From the evolutionary point of view, the institution of property results from emergence of rules

of just conduct toward others. Property is natural, not in the sense of a divine inflexible right, but in the sense of an institution that is the natural consequence of persons respecting others' spheres of personal autonomy. As Hayek observed:

In our efforts to improve the principles of demarcation we cannot but build on an established system of rules which serves as the basis of the going order maintained by the institution of property . . . where the boundary ought to be drawn, however, will not usually be a decision which can be made arbitrarily (Hayek 1982: vol 1, 109).

Property is inseparable from rules of just conduct and property cannot be abolished without also repealing the fundamental rules of social life. Property is inseparable from personhood and individual aspiration. The common law liability rules have evolved over time, shaping the content of property rights. Common law judges have traditionally sought to uphold legitimate expectations, not defeat them. Changes in common law, in theory, reflect changes in expectations. When they defeat legitimate expectations the legislature may have to step in to provide statutory remedies to those who are affected retrospectively – as the Australian parliament did after the decision in *Wik Peoples and Ors v State of Queensland and Ors* (1996) 141 ALR 12. The traditional confidence in the common law method has been eroded in recent times by judges who arrogate to themselves the licence to remake the law in the manner of Plato's philosopher kings. Yet, the expectation remains that common law courts will not deliberately defeat reasonably held expectations without compensating conditions. If courts routinely defeat these expectations they will surely and rapidly lose the public confidence upon which their political authority ultimately rests.

The question is not whether property use can be limited (as Barton suggests) but what principles should guide limitations. Barton makes the extraordinary statement that, although economic forces are useful tools in addressing environmental problems, "our judgment about how to reach that end should not be clouded by an excessively high presumption that economic forces are to be preferred . . . If regulation has a better chance of producing the results that we as a community need, then we should be willing to use it even if no economic rationale can be produced" (Barton 2002: 17). The idea that we have a choice of accepting or not accepting economic forces is quite staggering but it is all too prevalent in the discussion of social policy. Whether we adopt *laissez faire*, command and control or mixed strategies, we cannot eliminate economic forces. Perhaps Barton meant to say that command and control should be preferred where it proves more efficient than MBIs. Most economists would agree. If command and control is more efficient, it provides its own economic rationale. But how do we find out whether command and control works better if we disregard costs and benefits and otherwise banish economic considerations? Barton does not give us an answer.

Institutions, good governance, good science

Economic science since Adam Smith has paid attention to the role of institutions in helping individuals and societies to achieve their desired ends. Institutions, in the economic sense, include all the formal and informal constraints that give structure to social life. Institutions range from constitutional rules, statutory provisions and common

law, to the more informal constraints of custom, culture and morality (North 1990: 3). Institutions are not independent and self-sustaining but exist as parts of a complex web of interacting constraints. Constitutional rules work when they are supported by numerous other constraints, including those of legal culture and political morality. This is the reason why the constitution works reasonably well in New Zealand and operates dismally in Zimbabwe. Institutions help us cope with the uncertainties of a world of imperfect information and emergent complexity.

The role of institutions in economic performance is now widely appreciated but their importance in matters of science has not been widely discussed. We admire science for its culture of dispassionate inquiry, scepticism, theory construction and rigorous testing. The strengths of science owe much to the institutions of scientific communities comprising the legal, moral and cultural norms that promote openness, objectivity, competition and constant review. No science is perfectly objective or exact but historically the natural sciences have insulated their methodologies from emotive debate better than other disciplines, although not without their own struggles. But scientists are not angels and their institutions are not invulnerable. It is said that science and politics do not mix well. Politics tends to intrude on science when political decisions depend heavily on scientific theories and findings. Environmental law and policy are no exception. The integrity of science is apt to be compromised at two levels. First, it can be compromised at the level of investigation by bias that is hard to suppress when findings have direct consequences for social policy. Second, and more commonly, science can be compromised by policy makers through misunderstanding or misuse of scientific knowledge.

Where public policy must be informed by good science, disregard of the important safeguards of due process can produce distortions. The first requirement of due process is hearing all sides of a dispute. There is a danger that in environmental policy making this may not always be happening. The economic side of the story often gets neglected. There is a danger that, even on the science, not all views will be equally heard. The House of Lords Select Committee on Economic Affairs in its report, *The Economics of Climate Change*, expressed three major concerns about the IPCC process. One is the concern about the way experts were chosen to do the work. The committee reported:

. . . It seems to us that there remains a risk that IPCC has become a 'knowledge monopoly' in some respects, unwilling to listen to those who do not pursue the consensus line . . . We are concerned that there may be political interference in the nomination of scientists whose credentials should rest solely with their scientific qualifications . . . (House of Lords 2005: 58).

A second concern arose from the apparent downgrading in the 2001 Report of the economic dimension. The committee observed: "At the moment, it seems to us that the emissions scenarios are influenced by political considerations and, more broadly, that the economics input into the IPCC is in some danger of being sidelined" (*ibid*: 59). A third concern was in regard to the preparation of "policy-makers' summaries" of the technical chapters. The summaries are drafted by the experts who write the chapters but they require line-by-line approval of government representatives. The committee had this to say:

We can see no justification for this procedure. Indeed, it strikes us as opening the way for climate science and economics to be determined, at least in part, by political requirements rather than by the evidence. **Sound science cannot emerge from an unsound process** (*ibid*: 57).

The dismissal or neglect of regard to alternative scientific views and neglect of cost-benefit considerations seems common in many jurisdictions including those of Australia and New Zealand. The 2004 report, *Impacts of Native Vegetation and Biodiversity Regulations*, produced by the Productivity Commission in Australia highlighted the following serious defects in the current regulatory systems:

- The poor quality of data and science on which native vegetation and biodiversity policy decisions are based.
- Inadequate use of the extensive knowledge of landholders and local communities in the formulation of policy and regulations.
- The failure to take account of regional environmental characteristics and agricultural practices in imposing across-the-board rules, particularly in relation to native vegetation re-growth.
- Serious impediments to private conservation measures including tax distortions and regulatory barriers to efficient farm management.
- The imposition on landowners of the cost of wider conservation goals demanded by society (Productivity Commission 2004: XLVII).

Part 3

Resource Management Act: The wrong way

Apart from the question of compensation, the RMA has drawn persistent criticisms from lawyers, economists, academics and industry representatives with respect to the planning and consent processes (Fisher 2003; Kerr 2002; Joseph 2003; Sharpe 2002; Guerin 2002). The complaints cluster around two basic problems. One is the vagueness of criteria that apply to planning and consent decisions. The other relates to the delays and distortions that the RMA procedures admit. I will add my thoughts on the latter problem before turning to the more fundamental question of legal uncertainty.

RMA and procedural law: dangerous departures

The RMA radically departs from the common law procedural model. There are three principal types of decisions that occur under the Act: legislative acts at national level (including the setting of environmental standards and polices), planning and rule making at regional and district level, and decisions on consent applications. It is necessary to have wide public consultation at the legislative end of the regulatory system. It is another matter entirely when decisions are made at the judicial or quasi judicial end of the process, which is where consent applications are determined.

The common law system of adjudication has been honed by experience and provides important safeguards of procedural and substantive justice. It is not perfect and it displays its share of contradictions, irrationalities and inefficiencies. Yet, the core principles of the system are hardly disputable. The requirement of standing and the rules concerning the burden of proof, costs and vexatious litigation grew out of the demands of natural justice. So did the rules of evidence. They apply equally in private law and public law. Under common law rules of standing, a citizen can sue or intervene in an action to vindicate a private right – that is, a right that the person has over and above the right that every member of the public has (*Australian Conservation Foundation v Commonwealth (ACF Case)* (1979) 146 CLR 493, 526–527). In the past, an action to vindicate a public right had to be prosecuted by the Attorney-General or by a citizen granted special standing by the Attorney-General's fiat. More recently, the House of Lords has indicated that a citizen who shows a prima facie case or reasonable grounds for believing that there has been a failure of public duty should be given leave to invoke the supervisory jurisdiction of the superior courts (*Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, 641). New Zealand courts have embraced this principle, which is hard to question. However, under the RMA, busybodies, vexatious litigants and political activists have unlimited licence to intervene in consent proceedings without the need to show that the tribunal has acted in breach of a public duty. The liability to pay costs discourages persons from commencing or intervening in a case without reasonable

cause. These are not trivial precautions but basic safeguards of natural justice. The basic interest served by the rules of natural justice and procedural fairness is to give a fair and unbiased hearing to persons whose rights are affected by a proposed determination. Where a judicial or quasi judicial hearing becomes a 'free-for-all contest', persons whose rights are affected have less notice of the case they have to answer and less opportunity to make their own case. At the same time, the hearing increases scope for opportunistic intervention by others, sometimes on questionable motives. Objectors may be motivated by the 'not in my backyard syndrome' that does not always produce good environmental outcomes or by commercial opportunism. It is worth noting that, in reality, decisions on consent applications are often made by elected politicians who are strongly influenced by constituency opinion.

By some estimates, resource consent proceedings take on average 24 months from the date of application to the final court decision (Fisher 2003: 5). More recent estimates suggest that the average has been reduced to 15 months, a significant though insufficient improvement. Kerr observes:

Newspapers have documented many cases over the years of absurd and anti-competitive, opportunistic or near-extortionate behaviour resulting from the RMA. A December 2001 report [Wilkinson, *op cit*] for the Business Roundtable catalogued over two dozen such cases. One supermarket project in Auckland has now been held up for 12 years. The RMA is unquestionably a deterrent to investment in New Zealand and thereby economic development and prosperity. It was identified as a major problem area in last year's ministerial review of business compliance costs (Kerr 2002: 6).

RMA and substantive law: command and control and the fusion of law and policy

The most fundamental defect of the RMA concerns the legal uncertainties that result from the command-and-control system that it installs. Joseph, Kerr, Sharpe, Wilkinson, Guerin, Fisher and others have made important contributions in highlighting the constitutional implications and economic costs of the system. In his ground-breaking work, *Rules and Order* (republished as the first volume of *Law, Legislation and Liberty*), Hayek drew attention to the long-neglected distinction between two types of order that figure in the social universe. They are spontaneous order, known in classical Greek thinking as *cosmos*, and made order, or organisation, known as *taxis* (Hayek 1982). Spontaneous order is dynamic, non-linear and emergent. These types of order are adaptive systems that change through endogenous pressures generated by individual elements adjusting their behaviour to local conditions. Reliance on spontaneous order (subject to judicious interventions) is appropriate when we do not have complete command of relevant knowledge as regards ends and means. Organisations and organisational methods are appropriate when we have specific ends to achieve and we have the requisite knowledge and control of resources to pursue these ends. Command-and-control systems are essentially organisational systems.

In the real world, social systems are neither purely spontaneous nor wholly organised. There are designed elements in spontaneous systems such as language, morals and

markets. In fact, spontaneous order in human affairs is never free from design inputs. Likewise, spontaneous features are inevitable in the behaviour of organisations. Just consider the emergence of internal cultures within government departments and large corporations. Even so, it is important to know when and to what extent we should employ organisational methods and when to allow the dynamism of spontaneous order to provide solutions to human problems.

The environment is a complex system of which human habitation is an integral part. Current environmental policy and law in New Zealand (as in most other countries) are founded on a conception of the environment as a condition that is malleable to human design. I do not argue that we should leave matters concerning the environment solely to the people's good sense and chance. I do not say that there is nothing we can do to improve or protect the environment. As discussed previously, there is much that the common law has done to limit environmental harm. Legislation can and should strengthen and supplement the evolved framework of rules to take account of environmental threats. The problem with the RMA is that it imposes a command-and-control system that takes little account of the complex and evolutionary nature of the environment and hence reduces the potential for endogenous solutions to emerge. The whole system is premised on the unarticulated assumption that the minister, aided by advisory committees and regional and district planners, collectively possess sufficient knowledge to manage the environment through resource allocations and control of specific human activities. It is the kind of synoptic delusion that Hayek attributed to central planners.

An effective environmental strategy must address two challenges. It should aim to reduce depletion of scarce environmental resources and seek to limit externalities that result from human activity. Market processes based on property rights and the law of contract have proved superior to command and control as mechanisms for the efficient allocation of scarce resources. The law of tort supplemented by statutory rules has been the traditional means of dealing with externalities. There may be good reason to modify these institutional settings in some circumstances. Market processes, for example, cannot work without a framework of legal rights and duties. With respect to environmental resources such as water and air, markets may not work without a regime of property rights and trading rules. Such a regime may have to be constructively developed if it has not spontaneously emerged. As regards externalities, the liability rules may have to be strengthened and remedies adapted to new realities. However, it is common sense that we must not abandon proven institutional arrangements without compelling reasons. Hence, it is reasonable to expect the government to do the following:

- Identify the need for statutory supplementation. What are the harms that need to be addressed and why is the common law inadequate for this purpose?
- Once the need for legislative supplementation is established, the government should identify precise, non-contradictory and achievable objects of the legislation.
- Next, it should choose the most appropriate and cost-effective devices to achieve the objects. Are there simple rules that will achieve the desired object? For example, a prospective ban on belching motor vehicles. Is there scope for MBIs that are more

efficient than a command-and-control system? Would modification of common law rules, improvement of remedies, and simplification of judicial procedure suffice? In other words, is radical change needed as opposed to measured piecemeal reform that mimics the common law and minimally destabilises the ongoing order?

- The government should test legislative devices against constitutional values. Does the chosen scheme meet the basic requirements of the rule of law? These are, in Fuller's classic formulation: generality, prospectivity, clarity, consistency (no contradictory demands), publicity (notice to those affected), constancy (reasonable stability), observability (possibility of compliance) and congruence of law and official behaviour (Fuller 1969: ch II). We should add that the principle of compensation rescues a law that authorises coerced taking from the defect of arbitrariness.

How does the RMA measure against these standards? The Act departs radically from the common law approach to establish a command-and-control system for resource management. The evolving but predictable rules of conduct under common law are replaced by a control system that is a mixture of indeterminate rules, discretions, overarching policies and unstable judicial law generated by the breadth of discretion bestowed on the court. The RMA leaves little room for MBIs. The minister's functions under section 24(h) of the Act include:

The consideration and investigation of the use of economic instruments (including charges, levies, other fiscal measures, and incentives) to achieve the purpose of this Act.

Section 32(3) requires the minister and other authorities to evaluate:

- (a) the extent to which each objective is the most appropriate way to achieve the purpose of [the] Act, and
- (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

These provisions are simply directive principles that do not establish a legal framework for MBIs to be used for generating environmental services. Section 134 precludes tradable land use consents by attaching them to land, hence limiting transfer only to successors in title or occupation. Therefore, it leaves no room for trading in emission or pollution rights. Sections 135, 136 and 137 limit the transfer of coastal rights, water rights and discharge rights to persons other than owners and occupiers, unless expressly allowed by the regional plan or a consent authority. In the case of water consumption, the transfer is allowed only within the catchment area, and in the case of air pollution only within the same air-shed or region. Markets develop only where traders have secure rights in the things traded and there are clear rules of the marketplace. A system of discretionary plans and consents creates an unlikely setting for MBIs to be used in the service of environmental protection. Sharpe observes that the use of MBIs, even within the severe constraints of the RMA, is further impeded by the command-and-control culture prevailing within regional government (Sharpe 2002: 57).

There are many law-making authorities under the RMA but parliament is not the principal source of law. The Act designates law making, discretion wielding and

adjudicating authorities, defines their powers in the broadest possible terms and establishes a system of penalties for violating the Act and the commands made under it. The powers are extremely broad and guided only by vague aspirational statements. The RMA sets out a truly amazing smorgasbord of legislative purposes in sections 5, 6, 7 and 8. They concern sustainable management, a list of matters of national importance, other matters including 'intrinsic value of ecosystems' and the principles of the Treaty of Waitangi. The provisions are striking in two respects. First, they expand rather than constrain legislative discretion. This empowerment deepens the constitutional problem given that it is the Governor-General in Council, the minister and the local councils and not parliament that make the law under the RMA. Second, the purposes of the Act stretch well beyond sustainable management, howsoever that concept is understood. The notion of 'intrinsic value of ecosystems' invites subjective and utopian judgments to be made on what is to be preserved and in what form to preserve it.

The competence to set national environmental standards and to determine national policy statements confers on the minister enormous discretionary power over resources, industry and economic activity. In fact, 'national environmental standards' is a misnomer because they not only allow the minister to set standards but also to intervene in specific activities, and even to make orders directed at specified individuals or firms (section 43A (1)). National environmental standards may prohibit or limit activities conducted by individuals and may allow activities otherwise prohibited by regional or district rules. The various policy statements at national and regional level are actually statutory instruments that have controlling force over regional and district plans and rules (sections 67(3), 75(3)). The rules themselves have the force of regulations (section 68(2)). The regulations, policies and rules do not have to be approved by parliament and there is no evidence that the Regulations Review Committee has paid any particular attention to the subordinate legislation made under the RMA. Under Standing Order 315(2), the Regulations Review Committee must draw regulations to the attention of parliament when they, among other things, "trespass unduly on personal rights and liberties" or "contain matters more appropriate for parliamentary enactment". Such processes are futile because the parent Act (the RMA) authorises the makers of regulations, policies and rules to do exactly that – trespass on rights and liberties and usurp the role of parliament. The 2005 amendments to the RMA granted the minister additional powers to dictate the actual content of regional and district plans (sections 25A).

The RMA devolves on the executive branch at the central, regional and district levels the powers to determine matters of national policy and to make law that intrudes on fundamental rights and liberties. In a law-governed democracy such weighty questions should be left to the judgment of the national legislature. The RMA confers precisely the kind of delegation of power that provoked Lord Hewart of Bury, Lord Chief Justice in 1929, to publish his sensational essay, *The New Despotism*. The Donoughmore Committee on Ministers' Powers appointed to investigate Lord Hewart's concerns endorsed the unwritten rule of parliamentary democracy that parliament must not delegate wide law-making authority to the executive, particularly authority to determine the policy and principle of the law (UK Parliament 1932: 30–31). This constitutional principle was overwhelmed by the tide of executive law making that accompanied the

construction of the modern welfare state. However, the principle of constrained delegation has seen a strong revival in countries such as Australia and New Zealand. In Australia, state and Commonwealth governments have enacted special Acts for the making of subordinate legislation and, in New Zealand, the concern with unrestrained executive law making motivated the establishment of the Regulations Review Committee under Standing Orders of parliament and the enactment of the Regulations (Disallowance Act) 1989. Notwithstanding these reforms, it is hard to find a statutory scheme that devolves law and policy making on the scale of the RMA. The Act places agriculture, industry, property development and private land use within the reach of the vast powers of the minister and the regional and district councils.

National policy statements follow public consultative processes specified in sections 47 to 52 (engaging the service of a board of inquiry) of the RMA or a similar process devised by the minister. These are useful devices but they fall way short of the political check that parliamentary scrutiny provides. Sound policy making requires reliable fact-finding, identification of strategic choices and evaluation of the costs and benefits of available options. Boards of inquiry may be helpful in these respects but the power to convert policy into law must remain with parliament if the principle of representative government is not to be compromised. The RMA grants the minister the power to bypass parliament in making law under the guise of policy formulation. The policy statements under the Act are, in fact, legislative instruments.

The importance of the distinction between law and policy for the rule of law needs stressing. Policy underlies all statute law. However, in the common law constitutional tradition, once the law is made policy recedes to the background to be summoned by courts only on rare occasions when it can be of assistance in interpreting ambiguous provisions of a statute. This is a principle of statutory construction that has an important role in maintaining the rule of law. It promotes clarity and certainty of the law and upholds the supremacy of the legislature in matters of law. The RMA defeats this constitutional principle by elevating policy statements to the status of superior norms. This is reminiscent of the communist states, where law and policy were undifferentiated and political committees were final arbiters of people's rights. Currently, there is only one national policy statement, the New Zealand Coastal Policy Statement. However, others are being prepared including statements on "the protection of rare and depleted indigenous vegetation, electricity transmission and electricity generation" (Ministry for the Environment 2005). These policy statements are likely to extend and strengthen the command-and-control regime of environmental regulation and accelerate the erosion of the rule of law in New Zealand.

Conclusion

The RMA stays true to its title by making provision for a system of micro-management of the environment. Human habitation and human activities are aspects of the environment. The RMA therefore is also a system of management of human affairs. There is an inevitable tension between managerial methods and governance according to law. Management requires command and control and ad hoc intervention.

Governance according to law is very different. As Locke observed, government under law is government “by established standing laws promulgated and known to the people and not [government] by extemporary decrees” (Locke, 1698 [1970]: 371). Qualities such as generality, constancy and publicity that Fuller identified with the inner morality of law are not necessary attributes of good management but they are essential for the rule of law. The RMA’s grant of virtually unconstrained discretionary power to the executive represents a calculated departure from the rule of law standard and the principle of parliamentary democracy in favour of command and control. The problem is that the care of the environment is not like the prosecution of a military campaign. The challenge of identifying and responding to environmental problems requires much more knowledge than is available to a ministerial commander in chief, even one aided by committees and local councils. In general, the requisite knowledge is harnessed more effectively by allowing individuals to go about their lives within a framework of clear and fair rules.

The law in liberal societies has traditionally been concerned with the prevention of harm to persons. The law prohibits damage to things only when damage harms persons. In the absence or serious risk of harm there is no moral justification to limit the freedom of people. This is essentially John Stuart Mill’s ‘harm principle’. Liberal democratic societies entrust the assessment of harm and risk to democratic legislatures and independent courts guided by objective standards. The RMA fails the people of New Zealand by replacing this cardinal function with an inherently arbitrary system of environmental management.

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