Ben France-Hudson

Property Rights versus Environment?

A critique of the coalition government's approach to the reform of the Resource Management Act

Abstract

The coalition government in New Zealand intends to repeal the Resource Management Act 1991 and replace it with new legislation 'based on the enjoyment of private property rights, while ensuring good environmental outcomes'. This article considers the real possibility that the government is intending to place a theory of absolute private property rights at the centre of the new system. It argues that any policy that assumes private property rights should confer absolute rights on owners is a mischaracterisation of those rights and the law of private property. Making policy on a myth of absolute property rights is unlikely to result in good environmental outcomes.

Keywords private property rights, environmental management, Resource Management Act, environmental harm, nuisance

Ben France-Hudson is an associate professor in the Faculty of Law at the University of Otago.

The coalition government has stated that it intends to take a staged approach to the reform of the resource management system, ultimately replacing the Resource Management Act 1991 (RMA) with new legislation which will be based on 'the enjoyment of property rights, while ensuring good environmental outcomes' (Cabinet Economic Policy Committee, 2024). To date, limited details have been provided and it is unclear what perceived problems are driving this policy option. I speculate that, given the RMA is already a private property-focused statute, the idea of property rights that will guide the reforms is likely to be based on a theory of 'absolute' rights that allows individuals to use their property in any way they wish, providing only that they do not cause harm to others (ACT New Zealand, 2022). I argue that this approach would be unlikely to ensure good environmental outcomes and does not have any sound theoretical basis in property law. There is already extensive evidence that unconstrained use of private property rights can contribute to environmental problems, so it is unlikely that an absolute private property rights approach, on its own, can provide an appropriate framework. Potential limits

involving the law of nuisance would not be sufficient to deal with the complex collective actions problems that modern land use gives rise to. Moreover, and perhaps most importantly, the idea of absolute property is a myth. The theory underpinning absolute property rights has never existed in the Western legal tradition New Zealand's law is based on. The reality is that private property is a social institution that confers both rights and obligations. Careful reading of ancient texts and modern judgments makes this clear. This is important because it suggests that it is possible to both harness the great benefits private property can incentivise while also regulating that use for desired goals, such as good environmental outcomes. There are risks in legislating to create an idea of absolute property. Rather, we need a considered debate about how to balance the inherent conflicts that accompany resource use and environmental management. Private property rights are a critical part of this discussion, but mythical interpretations of its function have no place in that debate.

There is a tendency to view the RMA through the lens of administrative law and focus on how decisions are made, who decisions are made by and how individuals and the public can be involved.

What is happening?

Cabinet has agreed to develop 'proposals for legislation to replace the RMA that has the enjoyment of property rights as a guiding principle' (Cabinet Economic Policy Committee, 2024). The minister responsible for RMA reform has elaborated slightly on this in public statements, noting that there are two broad objectives to the work programme. The first is to make it easier to get things done by unlocking development capacity for housing and business growth. The second objective comprises a list of goals, including safeguarding the environment and human health, adapting to climate change and upholding Treaty of Waitangi settlements (Bishop, 2024; Bishop and Court, 2024a). This suggests that the two competing objectives that sit at the heart of the RMA's focus on sustainable development (use and development in the public interest while ensuring good environmental outcomes) are likely to remain drivers of policy development. The most recent comments by ministers, providing slightly more detail about the proposed system, tend to support this view, confirming that 'we need a resource management system that protects the environment not by resisting growth but by setting clear rules so growth occurs within limits' (Bishop and Court, 2024b). What is being presented as new, and yet to be clearly articulated, is the focus on absolute private property rights as the guiding principle to resolve this trade-off. Ministers intend to 'allow people to do more on their property more easily, so long as it doesn't harm others' (Bishop and Court, 2024a).

Private property rights are important because the minister responsible for RMA reform considers that the way the RMA purpose statement (RMA, s5) has been interpreted operates to put protection of the environment above development and other land use. He states that this has established a presumption against land use and requires property owners to prove their case for development or to change activities on their properties; this is contrary to the desire of the original framers of the RMA, who wished to return to the common law position that a use of land is allowed unless there is a rule controlling that use (Bishop, 2024). The minister appears to be saying that the current RMA has not achieved this aim, so it is necessary to refocus the legislation using absolute private property rights as a guide.

What is interesting is that the minister's comments are not specific. Presumably, he is referring to recent judicial decisions that have rejected the 'overall broad judgement' approach which allowed decision makers to stand back at the end of the process and consider whether a proposed use of resources represented sustainable management taking into account all relevant considerations (*King Salmon*, 2014; *Port Otago Ltd*, 2023). The courts have recently concluded that this approach did not give full recognition to the fact that protection of the environment is an element of the sustainable management principle at the heart of the RMA (*Port Otago Ltd* at [81]) and that it is legitimate for planning instruments to prioritise protection over other elements in some circumstances. They have also confirmed that there is a hierarchical scheme of planning documents and that the 'overall broad judgement' approach, which could function to soften environmental protections, should not be used to read down otherwise directive policies (*King Salmon*).

However, the minister does not say this. Rather, he seems to be appealing to a general dissatisfaction with the way the RMA operates. We are left to guess at precisely what he means. What is doubly confusing is that the RMA does preserve the common law position that landowners may undertake activities on their land, unless that activity is controlled by a lawful constraint. This policy is reflected in section 9, which states that any use of land that does not contravene the provisions of a national environmental standard, a regional rule or a district rule is allowed. Section 10 also allows for many 'existing uses' of land to continue indefinitely, even if the rules around that piece of land change. Other sections allow for some types of consent to continue indefinitely (see ss123(a) and (b)). It is difficult to seriously contend that the RMA does not contain a presumption of use.

Of course, the minister is making political statements. Presumably, he is uncomfortable saying that the courts were wrong to endorse the use of environmental bottom lines. Few people would be willing to say that environmental protection should never (or for that matter always) be subordinated to use. Rather, the rhetorical move is to claim that the RMA is broken and appeal to private property rights, as if the RMA were not already intimately concerned with property rights.

There is a tendency to view the RMA through the lens of administrative law and focus on how decisions are made, who decisions are made by and how individuals and the public can be involved. However, this obscures the reality that the RMA is fundamentally a piece of property law in much the same way as the Land Act 1948, the Property Law Act 2007 or the Land Transfer Act 2017. Indeed, its purpose is focused entirely on managing the use, development and protection of natural and physical resources. Property rights are often described as a 'bundle' of legal rights or relations, including, at a minimum, the 'liberal triad' of possession, use and disposition:

> An owner of land characteristically has the privilege of using the land, the right that others not come on it or use it without his permission, the power to alienate it completely through gift or sale ... (Waldron, 2012)

The RMA controls the use of land and resources, almost all of which will be owned by someone. Private property rights are an unavoidable aspect of its purpose. However, Waldron's use of the word 'privilege' here is interesting as it immediately suggests there might be some limits to property rights. The privilege to use may come with some corresponding duties. The RMA's starting presumption of use, protections extended to existing uses and purpose of enabling use and development while ensuing preservation and protection of the environment reflect the (contested) idea that people should be able to do what they want with what they own and that the primary purpose of private property is to give individuals the free choice about how to live life (Babie, 2010b), while also reflecting the need to look after the environment. The position adopted by the RMA gives rise to a tension between the fact that, although Parliament has set a starting presumption of use, this must be balanced by legal restrictions, reached through the planning process. This reflects the reality that modern society relies on a complex approach to resource use that must attempt to balance an individual's rights against environmental imperatives, the rights of future generations and of the community (Barton, 2003). This tension is made explicit by the inclusion of section 17, which states that individuals have a duty to avoid, remedy or mitigate any adverse effects on the environment that arise out of activities they undertake. Recent debates about agricultural emissions or freshwater quality appear to have been driven by a perception that the rules have gone, or could go, too far.

It follows that the minister's position that there is a presumption against land use is a matter of opinion, and as far as problem definitions go it is lacking in any robust evidence. It is clearly shared by some (Wilkinson, 2020). Others disagree, making the point that, contrary to the intention at the time the RMA was passed that the Act would usher in an era of sustainability and increased protection of the environment, this goal has not been achieved (Whiteside, 2022). As noted by the Randerson Review:

> While a major improvement on the previous system, the RMA has not sufficiently protected the natural environment. The RMA had the ambitious purpose of sustainable management of natural and physical resources. However, the Act suffered from a lack of clarity about how it should be applied … Lack of clear environmental limits has made management of cumulate environmental effects particularly challenging. (Resource Management Review Panel, 2020, p.16)

'Absolute' private property rights

Clearly, there are differing views as to how and why the RMA is broken (if indeed it is). The government considers that private property rights can guide the way to improvement. This raises the question of what a new regime based on absolute private property rights as a guiding principle might look like.

The National–ACT coalition agreement appears to be the driving force behind the government's goal of replacing the RMA with new laws ...

The government has yet to give much indication as to its thinking, so any answer must be speculative. The National–ACT coalition agreement appears to be the driving force behind the government's goal of replacing the RMA with new laws (New Zealand National Party and ACT, 2023). Statements made by ACT, particularly pre-election material published by the party, provide some further insights. Simon Court, ACT party MP and parliamentary under-secretary to the minister for infrastructure and the minister responsible for RMA reform, has recently said that:

> Putting property rights at the centre of resource management means ditching rules that invite every Tom, Dick, and Harry to vexatiously object to peaceful use and development of private property. Rules should only restrict activity with material spillover effects on other people's enjoyment of their own property, or on the property rights of the wider natural environment that sustains us. (Bishop and Court, 2024a)

This reinforces earlier statements he made during the third reading of the now repealed Natural and Built Environments Act 2023 that his party believes it is time for a 'radical reset'. To achieve this, ACT would:

> go back to the principles of common law and private property rights. So the presumption should be not that we have to beg for permission from a planning tribunal or from a judge, but instead we have the right to use our land as long as we don't affect our neighbours or discharge to the commons. (Court, 2023)

... the modern environmental movement owes part of its genesis to the observation that our 'Abrahamic' concept of land ownership, conferring rights but no obligations, is a key source of environmental harm ...

This point is elaborated on in ACT's resource management policy document, 'ACT's solutions for building New Zealand and conserving nature' (ACT New Zealand, 2022). This document contains several criticisms of the RMA and sets out ACT's proposed approach to resource management. It notes the challenges of managing peoples' impacts on each other's property, and the common resources such as the air, rivers, oceans and forests. In relation to private property, it notes that the 'principle of resource management should be to preserve the enjoyment of property, with common property accounted for by representative groups such as local regional councils'. This would shift the presumption about how property is used, as '[a]t present the presumption is that people can do what Councils permit'.

In contrast, a property rights approach is said to allow people to do anything that does not harm others' enjoyment of property. This would 'dramatically reduce the range of people who have an interest in someone else's use of their own property'. Environmental protection is to be governed by a specific Act, which would allow people do to whatever they like on their land, unless the Act prohibits it. To the extent that there may be problems, the solution is seen as lying with the 'tried and tested' common law, with reliance placed on the tort of nuisance, which allows 'neighbours to sue their neighbours where their peaceable enjoyment of the land is put in jeopardy by their neighbours' actions, for land pollution-related claims'. The overall remedy for any environmental problem is seen to be either compensation, or a contribution to various clean-up funds.

Of course, ACT is not the first group to advocate for private property as the primary (or only) tool of environmental management. It is well illustrated in the work of the free market environmentalists (Anderson and Leal, 1991, 2001) and others (Libecap, 2009). Free market environmentalists claim that positive environmental results can be achieved if private property rights in natural resources are well-defined and protected by the normal liability rules (i.e., the law of nuisance). They claim that the objective operation of the market should ensure that all negative environmental externalities are internalised, alleviating the necessity of outside intervention (Rose, 1999; Godden, 2010). It can be seen as part of the broader trend beginning in the 1970s among legal and economic scholars to advocate the use of market mechanisms to deal with any manner of different social problems (Rieser, 1999).

Central to this thinking is the belief that 'strong property rights and private contract are the best means to increase overall welfare, with the sole justification for "political intervention" being to "correct market failures"' (Grewal and Purdy, 2014). Property rights are seen as the best mechanism by which autonomy can be protected, allowing individuals to satisfy their individual preferences and in so doing allowing humans to flourish under conditions of scarcity (Williams, 1998; Epstein, 2011). This leverages the happy story that is told about private property, where humans are lazy and disinclined to work, but private property motivates them to do so by rewarding the careful management, development and conservation of resources. Efficient owners can reap the rewards, while lazy or poor owners suffer the costs. By harnessing self-interest, private property also facilitates trade as individuals seek to profit by selling their surplus and more of what others want (Rose, 1995). In turn, this feeds the idea that if some property is good, more property must be better (Rose, 1998b). Importantly, to have this happy effect, it is said, by some, that private property should be an absolute right, limited only by the rights of others and in the public interest in a very limited sense (normally restricted to the duty not to harm other individuals) (Foster and Bonilla, 2011). Applied to the environment, the theory is that if all resources are privately owned with strong property rights, the socially optimal level of environmental use should be reached through the complete specification of private property rights and privately ordered bargaining (Connor and Dovers, 2002).

The problem of property

If this is what the government is anticipating doing, then it is important to note that this theory has never accurately reflected how private property rights operate in law or society. In addition, many disagree that this theory will allow sufficient protection of resources, instead arguing that private property rights can be a key driver of environmental harms (Burdon, 2010). It follows that any move towards enshrining a theory of absolute property rights in law may do more harm than good.

Indeed, the modern environmental movement owes part of its genesis to the observation that our 'Abrahamic' concept of land ownership, conferring rights but no

obligations, is a key source of environmental harm (Leopold, 1949). This is an idea that has often been repeated by a diverse range of people (Taylor and Grinlinton, 2011). The essential point is that, in the absence of regulation, the self-interest at the heart of this idea of property encourages the use of resources by the owner, who is not required to give much, or any, thought to the needs of others, enabling the sorts of behaviour that can lead to extensive environmental harm (Singer, 2000).

This has several consequences. It can lead to a belief that there is a distinction between the people who live on the land and the land itself, which has no intrinsic worth beyond its ability to be exploited. This allows for use in ways that are not ecologically sound and which do not consider the interconnected whole or interests of future generations. Private property rights act as a shield to any kind of accountability (Freyfogle, 2011).

It also makes it very difficult for ecological interests to be catered for, as private property rights find it difficult to account for values that have long-term implications or that are hard to measure (Butler, 2000). Private property rights' bias tends towards consumptive and private uses rather than uses that would benefit ecosystems and the community more generally. Investment and use tend towards certainty and stability over other considerations and struggle to account for environmental systems, which are in a constant state of flux (ibid.).

It also obscures the fact that cumulative, albeit small, actions can have profound environmental consequences. Climate change is perhaps the best example of this. It is the billions of often very small choices made by individuals every day (for example, to take their car or to walk) that are partly responsible for the build-up of greenhouse gases in the atmosphere (Babie, 2010a). What is often not recognised is that these are fundamentally choices about property. The impact of each individual choice can be hard to accurately identify, but in each case it is the ability to make those choices that is cumulatively extremely harmful.

The focus on short-term exploitation for profit also disregards the ability of resources to keep producing over the long term (Grinlinton, 2011). Overall, private property rights can, unless placed within some limits, drive a general neglect of the rights of others, the environment and the public interest.

There are many practical examples. The widespread use of toxic products by industrial landowners is partly driven by weak regulation leaving landowners free to choose to use those products regardless of the effect on others, or the environment generally (Burdon, 2010). As noted, the cumulative everyday choices of individuals as to how we go about our lives are a root cause of climate change, albeit that choices are confined to the options given to us by corporations (Babie, 2010a). New Zealand already has major environmental problems because of dairy farming. In the absence of regulations such as the agricultural intensification rules (the National Environmental Standards for Freshwater 2020 Regulations), there would be nothing to stop us overindulging in our love of cows, leading to a real-world tragedy of the commons,[1] with resulting impacts on nitrogen leaching, methane gas emission, and over-demand for surface and ground water (Baskaran, Cullen and Colombo, 2009).

The response might be that if only we had stronger property rights and an absolute presumption of use, landowners would be incentivised to only carry as many cows as the land can support. However, this ignores the fact that many of the consequences are not borne by the landowner; rather, they are borne by others and the environment itself. The costs are externalised, leading to price signals being distorted and failing to reflect the true price of environmental use (Palmer, 2015).

Critically, it can be very difficult to manage these 'spillover' effects. Indeed, this is something the RMA tries, with varying levels of success, to do. In addition, it is not always easy, or possible, to stop a certain activity and expect things to return to the way they were before the activity started. There is now a large body of work assessing when various 'tipping points' might be reached, particularly in relation to climate change (Global Tipping Points, n.d.). Tipping points are thresholds along a non-linear pattern of system change that, once crossed, move the system to a new state that can be very difficult, or impossible, to reverse (Ruhl and Kundis Craig, 2021). There are grave concerns that we may be approaching tipping points in relation to many important climate-supporting systems, including 'the Western Antarctic ice sheet, glaciers, tropical coral reefs, the Amazon rain forest and the Arctic boreal forest' (ibid.). What might make it all worse is that once reached, a tipping point may set off a cascade of other changes in other natural systems. This work considers the global climatic system, but the point is of general application and operates at smaller scales. It is an important observation, as it undermines the assumption that any 'spillover' damage to the environment can be simply put right or that monetary compensation will be an adequate alternative.

> [Private Nuisance] does not provide a remedy for personal injury to the landowner... Neither does nuisance provide a direct route to controlling harm to air or water.

Private property on its own will not solve any of these problems; indeed, it exacerbates many of them. It is difficult to see why we would trust it with the solutions (Babie, 2010b).

A practical problem

Of course, the government may consider that the 'tried and true' private law of nuisance will provide sufficient limits in a system where the enjoyment of property

rights is a guiding principle. However, private actions in the law of nuisance are hopelessly inadequate to deal with the level of challenge.

Private nuisance protects against the unreasonable interference with a person's right to the use or enjoyment of an interest in land (Atkin, 2019). In other words, it protects against harm to the land itself or to the use or enjoyment of the land by its owner. It does not provide a remedy for personal injury to the landowner ... Neither does nuisance provide a direct route to controlling harm to air or water. This is because any damage to those resources would also need to affect a particular landowner's enjoyment of their land.

The remedy for nuisance is usually an injunction to stop the behaviour and/or damages to compensate for past damage. There are many practical problems. For example, if a defendant's use of the land is considered to be reasonable, then it will not cause a nuisance (there are some activities people just have to put up with). Plaintiffs would also have to overcome barriers in relation to standing, identifying the right defendant, causation and fault, and a range of defences. Of these, the fact that many activities that may give rise to harm are authorised by statute (for example, an activity that has been granted consent under any form of resource management regulation) may be a major barrier to a successful claim (Emmanouil, Popa and Kallies, 2021). Similar problems arise with claims in 'public nuisance', which is a related tort that can provide a remedy where there has been an injury to the public as a whole caused by an interference with a public right. Attempts to use public nuisance are currently being litigated in New Zealand in an attempt to address some of the harms caused by climate change (Bullock, 2022; *Smith v Fonterra*, 2024).

There are also problems with remedies. Court proceedings (and appeals) can be much more costly than the impact of the nuisance itself and take a very long time. An injunction might stop the offending behaviour as between the two relevant parties, but there would be nothing to stop any other neighbour behaving in the same way, except the threat of litigation (a risk they may be prepared to take given the contested nature of each case). Conversely, the impact on one particular property might be quite small, but over a number of properties might be cumulatively quite large. Addressing this would involve all affected landowners taking action, either separately or in concert.

> ... there has never been a period in the Western legal tradition on which New Zealand's law is based when private property rights have been absolute and individuals have been able to do whatever they want with what they own ...

Compensation for damage also requires the cost to the plaintiff to be quantified, which may be difficult. As damage is assessed as the diminution in the value of the plaintiff's land (Atkin, 2019), if the damage occurs in a rising market for land values it may be that the plaintiff has suffered no loss at all, even if the environmental quality of their land has decreased. A group of neighbours may all be undertaking very similar activities and may be quite happy to continue with the status quo, leading to a situation where there is no one with sufficient standing to bring a claim and therefore nothing to stop the harm to the environment from continuing.

Finally, individuals or companies often become insolvent, or simply walk away, meaning that damages cannot be recovered in any event. Overall, nuisance is unlikely to be of much use in stopping harm, nor in restraining land use to ensure good environmental outcomes.

Absolute private property is a myth anyway

Beyond the reality that in some cases private property can already be a root cause of environmental problems, there are further issues with the government's potential policy position if it relies on an assertion that property rights are, or should be, absolute. In particular, there has never been a period in the Western legal tradition on which New Zealand's law is based when private property rights have been absolute and individuals have been able to do whatever they want with what they own (France-Hudson, 2017; Grinlinton, 2023).

A careful reading of famous texts such as Magna Carta, or Blackstone's 16th-century statement that the right of property is a 'sole and despotic dominion' (Blackstone, 1765), reveal extensive qualifications that go beyond the 'normal liability rules' (Rose, 1998a; Babie, 2016a; Grinlinton, 2023). The rights in Magna Carta are subject to 'the law of the land'. Blackstone immediately casts his opening (metaphorical) statement into doubt by querying various aspects of the modes of owning property operating at that time (Rose, 1998a). Blackstone also places his statement within the context that property rights are subject to the law of the land and form part of the residue from time to time that 'is not required by the law of society to be sacrificed to the public convenience' (Grinlinton, 2023, citing Blackstone, 1765). Magna Carta was accompanied by a now almost forgotten 'indispensable' partner, the Forest Charter, which contained a commitment to community and obligations that balanced Magna Carta's commitment to individual rights (Babie, 2016a). Time and again the key sources repeat the point that the use of property can appropriately be controlled by law and obligations that are inherent in private property for the common good.

Of course, property rights are critically important to our culture and our legal system.

There is no doubt that they do provide many of the incentives outlined above. They are partly responsible for our affluence and quality of life (Grinlinton, 2023). However, what becomes apparent on any reading of either ancient texts or modern judgments is that the Western tradition of property is plural and that private property, while always important, is an inherently social institution serving social purposes and has always been subject to other considerations, not simply the desires of the individuals who own it (France-Hudson, 2017; Grinlinton, 2023). As recently noted by the High Court (albeit in the context of gun control):

> The difficulty from The Kiwi Party's perspective in the present case, is that while it has identified values, it does not assert that those values are 'higher law' values, and it is difficult to see that it could properly do so. First, it asserts a right to private property. The right to private property has never been absolute. (*Kiwi Party v Attorney General*, 2019)

This was supported by the Court of Appeal:

> We briefly repeat that Parliament is able to pass whatever legislation it considers appropriate to control the possession, ownership and use of firearms in New Zealand. There is no 'property right' that overrides the supremacy of Parliament. (*Kiwi Party v Attorney General*, 2020)

Many people hold on tight to the myth of absolute private property rights, simple and seductive as it is. However, in many respects the debate has moved on, and one of the contemporary issues in property law is how to better acknowledge the obligations of property (Grinlinton, 2023). Two options have been floated. The first is to look to the common law and judicial method to make the inherent obligations in property more clearly articulated. In this context, the increased recognition in the courts of tikanga Māori as an important source of law may become very important. The other is to look to external measures, such as legislation and regulation (ibid.). However, these options are not mutually exclusive.

The absolute theory of private property rights is accompanied by a view that any interference with those rights by government is illegitimate. This aspect of the story suggests that private property rights act as the boundary between the private and the public and it is almost always bad for government to interfere by attempting to control property's use (Reich, 1964). However, there is a strong line of thought that considers that regulations do not impose potentially illegitimate restrictions on private property owners; rather, they are simply the modern form in which the restrictions inherent in private property are crystallised. As the modern democratic state has evolved, decision making has moved from the judicial to the legislative sphere. In contrast to the early days of planning law, which included the judicial development of the restrictive covenant and private contract, Parliament has stepped in (as it has in almost all other areas of daily life) to provide much more carefully thought-out policy and regulation. Regulation, then, is the way in which the law now mediates the relationships at the heart of private property rights and should, and does, reflect its underlying social function and the choice of different and conflicting priorities:

> because it operates within a network of social relationships that form a community, every system of private property is inherently limited by moral imperatives, duties, and obligations, imposed and enforced by law, so as not only to allow the holder of private property to choose personal preferences, but also to allow the state to prevent outcomes inimical to the legitimate interests of others. (Babie, 2016b)

It follows that restrictions imposed on how individuals can use what they own are not external and illegitimate; rather, they are simply articulating the limits that are already inherent in the private property rights themselves. These restrictions (and the corresponding rights) will change over time.

This observation is critical beyond the relatively narrow confines of environmental management. Regulation is a fundamental part of how we organise our society. Any attempt to control that based on a mythical idea of property should be of concern. Unsuccessful attempts have already been made to pass a Regulatory Standards Bill that would do exactly this. That attempt suggested that legislation should not 'diminish a person's ... rights to own, use and dispose of property, except as is necessary to provide for … [a] right of another person' (Regulatory Standards Bill 2021, cl 6(a)). Any regulation that impairs private property rights would not be possible without consent unless it is in the public interest and coupled with full compensation (Regulatory Standards Bill 2021, cl 6(c)(i) and (ii)). The coalition agreement between National and ACT includes a commitment to 'Legislate to improve the quality of regulation, by passing the Regulatory Standards Act as soon as practicable' (New Zealand National Party and ACT, 2023). However, the points made in this article regarding the inherent limits within private property rights apply equally in this context.

> Legislating for a scheme based on a guiding principle of absolute private property rights that does not exist is unlikely to achieve any degree of consensus either.

Conclusion

Parliament is sovereign. If the government can command a majority, it can legislate to create an environmental management system with an absolute idea of private

property rights at its heart. However, it should pause before doing so. Property rights are powerful and the choices that we make about them fundamentally shape who can access and use resources, and through that use shape the land and environment itself (Graham and Shoemaker, 2022). There can be a marked distinction between the cultural discourse about property and the legal reality. The myth that private property rights are, or should be, absolute can resonate strongly, particularly with those who feel their property choices are being unduly limited. There are, however, very real risks of legislating to bring that myth into reality. If the desire is to balance use with ensuring good environmental outcomes, an absolute right of private property will be unsuccessful. Without recognition of limits, the free use of private property can and does result in very negative environmental outcomes. Once damaged, environments do not necessary heal, and the cumulative effect of many smaller actions can tip a system into irreversible change. The 'tried and true' common law is hopelessly outmatched when it comes to dealing with the scale of land use undertaken today and the immensity of the environmental challenges we are facing.

One of the reasons that the Natural and Built Environments Act 2023 was repealed so soon after its enactment was a lack of political consensus. Legislating for a scheme based on a guiding principle of absolute private property rights that does not exist is unlikely to achieve any degree of consensus either. Recognition of the fact that private property rights on their own hold no answers and that regulation is a key part of ensuring a balance between rights and obligations inherent in owning private property could short-cut this aspect of the debate and get us closer to the solutions we need.

The apparent consensus is that the RMA is broken beyond mending. If true, the answers do not lie in attempting to bring to life a halcyon myth in aid of popular feeling. Rather, it is time for an unrushed, apolitical discussion that acknowledges that the problems that environmental law must solve are dynamic and contested:

> socio-political conflict, polycentricity, interdisciplinarity and scientific uncertainty are not just interesting features of environmental problems to note in passing but are part of the operational reality of the subject. (Fisher, 2013)

Resolving these problems may require us to look at some of our core constitutional and social values from a different perspective to develop responsive institutions that can 'help foster the rule of law in this unusual legal context' (Warnock, 2020). Private property rights properly have an important part in this discussion, but they should not overwhelm it, nor be held out as holding answers they do not provide.

1 It should be noted that Hardin posed two solutions to the tragedy: private property or 'mutual coercion mutally agreed upon' (i.e., regulation). He was agnositc as to which solution should be adopted (Hardin, 1968).

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