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**A CALL TO MAINTAIN AND EVOLVE THE THIRD SOURCE OF AUTHORITY
FOR GOVERNMENT ACTION**

BV HARRIS

The present unwritten constitutions of New Zealand and the United Kingdom controversially recognise their governments, like natural persons, as having the freedom to do all that is not prohibited by positive law. By way of contrast, Sir Geoffrey Palmer and Dr Andrew Butler have recently advocated that New Zealand should adopt a comprehensive entrenched written constitution that confines the authority for government action to that provided by the Constitution and legislation made under it. This article opposes the abolition of the recognition of the government having residual freedom. The article rather advocates that, while retaining residual freedom, the exercise by the government of such freedom should be potentially subject to judicial review on the ground of irrationality where such ground takes into account the extent to which the action furthers the public good.

**CITIZENSHIP AS HUMANITARIAN RELIEF:
THE CASE OF ROLAND KUN**

CLAUDIA GEIRINGER

The decision of the Minister of Internal Affairs, in June 2016, to grant New Zealand citizenship to Nauruan politician Roland Kun in order to bring to an end his persecution by the Nauruan government was premised on a fundamental change in the Department of Internal Affairs' interpretation of the statutory test governing grants of citizenship in special circumstances. This article outlines and defends that change, and explores the extent of its significance for future applicants.

**CONSTITUTIONAL DIALOGUE:
THE NEW ZEALAND BILL OF RIGHTS ACT AND THE NOBLE DREAM**

LÉONID SIROTA

In its recent decision affirming the courts' power to issue "declarations of inconsistency" between legislation and the New Zealand Bill of Rights Act 1990, the Court of Appeal embraces the notion of a "constitutional dialogue" between the judiciary and Parliament regarding issues of rights. It suggests that, since both branches of government are engaged in a collaborative process of giving effect to the Bill of Rights Act's provisions, Parliament can be expected to take the courts' views on such matters into serious consideration.

This article questions the suitability of the notion of constitutional dialogue to New Zealand's constitutional arrangements. The idea of dialogue, largely developed as a means to alleviate concerns about the "counter-majoritarian difficulty" that arises in jurisdictions with strong-form judicial review of legislation, cannot be usefully adopted to a system of very weak judicial review, such as the one put in place by the Bill of Rights Act. Dialogue may seem to be an attractive way of addressing what might be termed the "majoritarian malaise" caused by a sovereign Parliament's sometimes cavalier approach to the rights of individuals and minorities. Yet meaningful dialogue cannot take place if one of the parties is entitled to ignore the other, which has no resources to impress its views upon an unwilling potential interlocutor.

As others have argued in the context of constitutional systems with strong-form judicial review, there is no need to attribute the positive connotations of the dialogue metaphor to a set of institutional interactions that is, in truth, very far from being a conversation, because the participants may neither understand nor be interested in understanding each other. Indeed, there is a danger that the embrace of the notion of dialogue will serve to obscure the reality that, the Bill of Rights Act notwithstanding, New Zealand's constitutional framework remains one of essentially untrammelled parliamentary sovereignty, which can be, and sometimes is, abused.

**SOCIO-ECONOMIC RIGHTS IN CONSTITUTION
AOTEAROA NEW ZEALAND**

JOSH PEMBERTON

Sir Geoffrey Palmer and Dr Andrew Butler's proposed Constitution of Aotearoa New Zealand (Constitution Aotearoa) includes a supreme law Bill of Rights that would give the courts the power to strike down legislation and exercises of public power inconsistent with certain (largely civil and political) rights. Also included in the proposed Bill of Rights – but only as "non-justiciable principles" to guide Parliament and the government – are a number of socio-economic rights. In their commentary, Constitution Aotearoa's drafters make clear their view that these rights would have moral significance only. This paper argues that this is a significant underestimation. Drawing on contemporary rights scholarship that emphasises the variety of ways in which rights can be "constituted", and on comparable experience in other jurisdictions and in New Zealand under the New Zealand Bill of Rights Act 1990, the paper sketches out the full range of effects that these "non-justiciable" rights could have. Such rights could, for instance, inform the content of directly enforceable rights such as the right to life, shape the common law both in private disputes and in judicial review of administrative action, influence statutory interpretation, and impact upon the lawmaking process. Given, then, that the socio-economic rights included in Constitution Aotearoa would have more than moral or symbolic power, it is argued that this part of the Constitution Aotearoa proposal requires more elaboration. Specifically, the revised version of the proposal that is to be released ought, inter alia, to justify the specific socio-economic rights included and excluded, address several outstanding issues relating to their interpretation, and make more clear the role that such rights would play in the lawmaking process.

**THE DEVELOPMENT OF PROPERTY RIGHTS OVER CADAVERIC TISSUES AND ORGANS:
LEGAL OBSTRUCTIONS TO THE PROCUREMENT OF ORGANS IN AN "OPT-OUT" SYSTEM OF ORGAN
DONATION IN AUSTRALIA AND NEW ZEALAND**

NEERA BHATIA AND JAMES TIBBALLS

Discussions and decisions relating to cadaveric organ donation after a person's death are challenging and complex for all involved: the potential donor, family members and medical teams. Australia and New Zealand have significant shortages of transplantable organs under their "opt-in" systems of donation in which organs are procured only from persons who had consented before their death to donate."

Although a majority of Australians and New Zealanders agree with organ donation, only a minority of Australians register to become donors and consent to donate. New Zealand does not have an organ donor register.

Organ procurement may increase under an “opt-out” system of donation. Such a system of donation “presumes” that every person has consented to donate their organs after death unless they have declared their objection, and their next of kin would be unable to veto organ procurement.

*This system of organ donation is dependent on a long-held legal principle that no property exists in a human corpse (“no property” principle). But an evolving body of case law, beginning with the seminal case of *Doodeward v Spence* in 1908, has demonstrated that tissue extracted after death and preserved by “work and skill” acquires attributes of property. This “work and skill” principle is readily applied to organs procured after death. We contend that organ procurement after death should be subject to the agreement or refusal of the next of kin.*

Despite widespread societal support, legislative reform is improbable. In such circumstances, the common law can be more effective. We argue that common law recognition of property rights of the next of kin in relation of ownership of organs and tissues should be incorporated into current legislation. This would provide greater clarity and certainty to the existing way in which organs are procured. Alternatively, if the political attitude shifts to favour an “opt-out” system of donation, which presumes that all deceased persons agree to donate their organs after death, the current legislation should acknowledge the common law property rights of the next of kin. We suggest that if an “opt-out” system of organ procurement is introduced, express consent of the next of kin should be sought, and they should be recognised as having property rights in the organs and tissues of their deceased.

FREEDING THE LAND BEYOND THE SHADOW OF THE LAW: 20 YEARS OF THE CROWN PASTORAL LAND ACT

ANN BROWER AND JOHN PAGE

In April 2017 the Environment Court called for an immediate moratorium on freeholding Crown land in the South Island high country. The Court was referring to a quiet process called “tenure review” that is governed by the Crown Pastoral Land Act 1998. Tenure review is a two-way split of Crown pastoral land, between freehold and public conservation land. Tenure review affects 10 per cent of New Zealand’s land mass – 2,400,000 hectares (ha) along the eastern slope of the South Island’s Main Divide.

Under tenure review, the Crown has sold freehold title to 436,652 ha to the former leaseholders of over 100 stations; 14 per cent of that has a covenant of some form. Former leaseholders paid the Crown \$65,200,000 for freehold title (averaging \$176/ha). One-fifth (74,000 ha) of that has since been onsold for \$275,000,000. When former pastoral land sells as freehold, the median price is over 500 times the Crown selling price.

At the same time, the Crown bought pastoral leasehold rights to 371,842 ha to shift into public conservation land. The Crown paid leaseholders \$116,800,000 (average \$353/ha).

In this article we examine the Crown Pastoral Land Act 1998 in the light of nearly 20 years of outcomes. We combine the plain text of the Act with the methods of spatial analysis to ask the question: “To what degree does tenure review meet its statutory goals?”

When assessed next to its statutory goals, tenure review outcomes are mixed at best. Tenure review scores well on freeing and freeholding, but less well on sustaining and protecting. Tenure review performs least well on protecting those ecological values that are the most rare and threatened.

An outcome consistent with the clear and plain goals would show more freeing of land without freeholding. The only freeholding would be consistent with hierarchical preconditions of promoting ecological sustainability and protecting ecological values. If tenure review outcomes were consistent with its stated goals, freehold without covenant would be rare. Yet spatial analysis reveals that unshackled freehold is tenure review’s top achievement, despite its position at the bottom of the legislative hierarchy.

Our assessment combining spatial and statutory analyses reveals the curious peculiarity of tenure review. Tenure review implements secondary statutory goals – of freeing land – assiduously. But it implements primary goals – of sustaining and protecting ecological values – half-heartedly.

REFLECTIONS ON THE CONTRIBUTIONS OF LAWYERS TO TAX POLICYMAKING IN NEW ZEALAND

ADRIAN SAWYER

Lawyers play an important part in tax policymaking in New Zealand. This paper briefly reviews New Zealand’s Generic Tax Policy Process, and then focuses on the important contributions legal practitioners and academics can make to tax policy development. Data has been gathered concerning the contributions of New Zealand lawyers who are, or have been, tax policymakers, lawmakers, submitters and commentators. This paper also notes the limited instances where legal and other theoretical approaches to tax policy have been incorporated into tax policymaking design in New Zealand, including novel tax policy design, such as the concept of the Broad Base Low Rate structure. It concludes that lawyers have made a valuable, but not necessarily distinctive, contribution to tax policy development in New Zealand. Also, to provide context, the paper compares the New Zealand approach to tax policy with that of the Republic of Ireland.

BOOK REVIEW

THE PRINCIPLE OF LEGALITY IN AUSTRALIA AND NEW ZEALAND

STEVEN CHURCHES