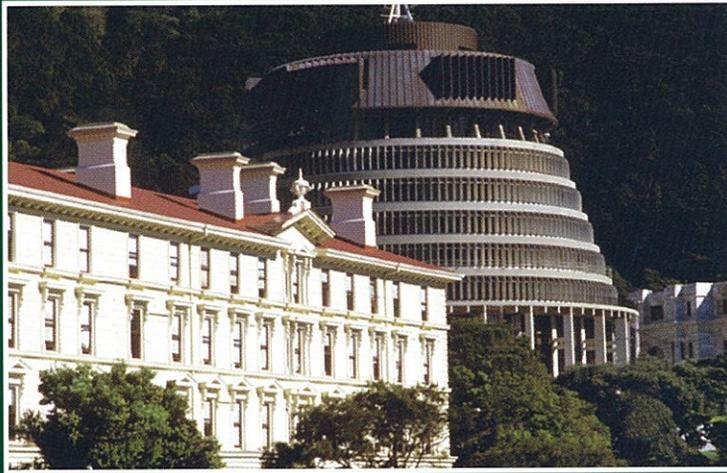


New Zealand Journal of Public and International Law



VOLUME 1 • NUMBER 1 • NOVEMBER 2003 • ISSN 1176-3930

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

K J Keith
Campbell McLachlan
Jeremy Waldron
Petra Butler

David J Mullan
Heike Polster
Holger Wenning
A H Angelo and Andrew Townend

VICTORIA UNIVERSITY OF WELLINGTON

Te Whare Wānanga o te Ūpoko o te Ika a Māui



FACULTY OF LAW
Te Kauhanganui Tatai Ture

© New Zealand Centre for Public Law and contributors

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

November 2003

The mode of citation of this journal is: (2003) 1 NZJPIL (page)

ISSN 1176-3930

Printed by Stylex Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

Foreword	
<i>Matthew S R Palmer</i>	1
<i>Introductory Essay</i>	
Public Law in New Zealand	
<i>K J Keith</i>	3
<i>Articles</i>	
After Baghdad: Conflict or Coherence in International Law?	
<i>Campbell McLachlan</i>	25
Indigeneity? First Peoples and Last Occupancy	
<i>Jeremy Waldron</i>	55
The Assignment of Cases to Judges	
<i>Petra Butler</i>	83
A Comparison of the Impact of the New Zealand Bill of Rights Act and the Canadian Charter of Rights and Freedoms on Judicial Review of Administrative Action	
<i>David J Mullan</i>	115
Gender Identity as a New Prohibited Ground of Discrimination	
<i>Heike Polster</i>	157
Kashmir: A Regional Conflict with Global Impact	
<i>Holger Wenning</i>	197
<i>Comment</i>	
Pitcairn: A Contemporary Comment	
<i>A H Angelo and Andrew Townend</i>	229

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship.

The NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Authors should see earlier issues of the NZJPIL for indications as to style; for specific guidance see the Victoria University of Wellington Law Review Style Guide, copies of which are available on request. Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

The NZJPIL plans to run an annual student writing competition for law students at New Zealand universities. For further information contact the Student Editor.

Contributions to the NZJPIL express the views of their authors and not the views of the Editorial Committee or of the New Zealand Centre for Public Law.

Annual subscription rates are NZ\$95 (New Zealand) and NZ\$120 (overseas).

All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Address for all communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

INDIGENEITY? FIRST PEOPLES AND LAST OCCUPANCY

*Jeremy Waldron**

This paper was presented as the 2002 Quentin-Baxter Memorial Lecture at the Victoria University of Wellington Law School on 5 December 2002. Professor Waldron critically examines two principles invoked in New Zealand and elsewhere in debates about "indigeneity": first occupancy and prior occupancy.

I THE GIST OF THE LECTURE

What exactly does it mean to describe a people as the "indigenous" inhabitants of a land—Maori in Aotearoa/New Zealand, for example? Why is indigeneity important? There are two possible ways of defining "indigeneity": (a) indigenous peoples are the descendants of the first human inhabitants of a land; and (b) indigenous peoples are the descendants of those who inhabited the land at the time of European colonisation. Corresponding to these definitions, we find arguments for indigenous rights based on (i) a Principle of First Occupancy, which gives moral recognition to the fact that a people has taken possession of land without disturbing any other occupants; and (ii) a Principle of Prior Occupancy, that is, a conservative principle that commands us (and should have commanded the colonisers) not to disturb established arrangements. (Some would argue that in New Zealand the two definitions overlap.)

Often there is confusion as to which of these is meant when theorists of indigeneity talk about "an indigenous people's original occupancy of a territory". And once we distinguish the two principles, we begin to see that they have been adopted opportunistically and carelessly by First Peoples movements. This lecture is a philosophical critique of the use that is made of the Principle of First Occupancy and the Principle of Prior Occupancy in trying to explain what is special about indigeneity.

* Maurice and Hilda Friedman Professor of Law, Columbia University; Visiting Professor of Law, Victoria University of Wellington.

The Principle of Prior Occupancy might be used to condemn colonial invasion as disruptive of an existing indigenous order, but, as a conservative principle, it cannot be used now to justify any sort of reversion to the status quo ante. The conservative protection that the Principle of Prior Occupancy offered to the status quo in 1840, it now offers to the status quo in 2002. It condemns historic injustice, but it blocks radically disruptive remedies.

The Principle of First Occupancy seems more promising as a basis for radical remedies, but it is a difficult principle to apply, inasmuch as it makes tremendous demands on our historical knowledge. In the New Zealand context, its application is made particularly problematic by the history of inter-tribal conflict. I will argue that this difficulty cannot be avoided simply by designating Maori *as a whole* as indigenous in sense (a), because the essence of the Principle of First Occupancy—the thing that distinguishes it from the Principle of Prior Occupancy—is that it only protects entitlements that were established without dispossessing anyone else. In any case, the Principle of First Occupancy is problematic in ways that theorists of property have understood for a long time. It legitimises occupancy which is not disruptive of anyone else's occupancy, but it puts too much weight on history and is insufficiently sensitive to subsequent changes in circumstance and to the conditions that face us today.

This lecture is not intended as a critique of indigeneity as such. But it argues that any modern-day importance attaching to indigeneity must be explained on some basis other than these problematic principles.

II AN ABSTRACT QUESTION

I want to begin by apologising for the title that I have given this lecture. The term "indigeneity" is something of a mouthful. You won't find it in the *Oxford English Dictionary*, which insists on "indigenesness" or the ugly "indigenity" (which it describes as rare). Like its near-synonym "aboriginality", the word "indigeneity" forms an abstract noun from a term we use to apply to certain peoples living in the world. The *Oxford English Dictionary* defines "aboriginality" as "The quality of being aboriginal; existence in or possession of a land at the earliest stage of its history".¹ In a similar way, "indigeneity" is derived from "indigenous", which means "Born or produced naturally in a land or region; native or belonging naturally to (the soil, region, etc)", from *indu*, an old Latin root meaning "within" (like the Greek *endon*) and *gignere*, meaning "to beget".²

1 *Oxford English Dictionary* (2 ed, Clarendon Press, Oxford, 1989) vol I 35.

2 *Oxford English Dictionary*, above, vol VII 867. The etymology of "indigenous" is from Late Latin *indigenus*, from Latin *indigena*, n, "native", from Old Latin *indu*, *endo*, "in", "within" and Latin *gignere*, "to beget".

Though it is not in the dictionary – not yet – "indigeneity" is already a term of art in the politics and philosophy of cultural rights and the rights of First Peoples. Though the etymology is fascinating, I am mainly interested in the abstract concept. And I make no excuse for talking about abstractions, because the question I want to ask is about the bearing of this abstract idea of indigeneity on situations that are quite concrete and immediate in relation to our present concerns in New Zealand, and to similar or partly analogous concerns in Australia and North America. With regard to New Zealand, I want to ask: what does it add to our understanding of situations like the one in New Zealand, as between Maori and the Crown, or between particular iwi or hapu and the Crown, or between Maori groups of all sorts and other groups in society (whether they are pakeha or other immigrant groups) – what does it add to describe Maori as the *indigenous* people of these islands?

For example: a large number of New Zealanders maintain that what is plainly a multi-cultural reality in this country should be described, at least for certain legal and political purposes, as *bi-cultural*. In other words, while a sociologist from overseas would have no hesitation in describing New Zealand as a clear and straightforward example of a modern multi-cultural society, with an array of different communities, each with its own traditions and its own problems, interacting more or less loosely in the overall social fabric of the country – immigrant groups, from Asia, from Europe, from the Pacific, the indigenous peoples, as well as the pakeha majority (that is, the descendants of the first two or three generations of white settlers) – it is thought that this plainly multi-cultural reality should continue to be described as *bi-cultural*, for certain legal and political purposes.³ Now, what role does the concept of indigeneity play in the privileging of some groups over others in this plainly counterfactual characterisation? That is one question we could ask about the work that "indigeneity" does in our self-descriptions.

(And we must remember that if we are asking a question about the impact of the abstract concept "indigeneity" – asking what it adds to our description of the situation here in New Zealand – then what it adds ought to be roughly the same as what it adds in other situations – in Australia, for example, or in North America. If you have a society that is ostensibly multi-cultural, comprising communities of many different groups – some the descendants of settlers, a large number of diverse immigrant groups, as well as the descendants of slaves, migrant workers, earlier colonists (Hispanic or French), and so on, and also some communities to which the term "indigenous" can be applied – if you have

3 Bi-national, perhaps, recognising that the polity was founded in the union of two nations (just as the United Kingdom is tetra-national); but why bi-cultural? For a suggestion that "bi-cultural" is just a more popular surrogate for "bi-national", see Augie Fleras "Politicising Indigeneity: Ethno-politics in White Settler Dominions" in Paul Havemann (ed) *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Oxford University Press, Auckland, 1999) 187, 207.

that multi-cultural reality, does the presence of the last of these groups, the indigenous peoples, justify describing the society as bi-cultural rather than multi-cultural? Is that how we should describe Canada, for example, or the United States? And if—as I believe—such a description would be preposterous in North America, then why exactly does the concept of indigeneity make this peculiar difference in New Zealand?)

Similar questions may be asked about our history. In a process where we are currently trying to come to terms with various forms of injustice perpetrated in New Zealand over the past 150 years, how important is it to bear in mind that these were not just any old injustices but injustices perpetrated *against the indigenous inhabitants of these islands*? No doubt the Crown acted oppressively in its dealings with many groups; no doubt it still does. But it is widely believed that injustices perpetrated against Maori, or against particular iwi in particular areas of Aotearoa/New Zealand, are more egregious or in some other sense especially salient, not only on account of their extent and their human consequences, but just because they were perpetrated against *tangata whenua*—the original people of the land.

Or, to shift the focus slightly: the Treaty of Waitangi⁴ has been given a status in our constitution that is plainly superior to the status accorded to other treaties that the Crown has entered into (plainly superior to ANZUS, for example).⁵ In considering the importance of the Treaty after all these years—indeed, well after the normal half-life of most treaties between peoples—how important is it that this was a treaty between the Crown and not just any people but between the Crown and the *indigenous* peoples of this land which the Crown now purports to govern? In the considering the manner in which it is interpreted⁶—a style of interpretation, I might add, that would bring envious tears to the eyes of the most activist liberal on the United States Supreme Court—how important is it that the text of the Treaty is not just any text but one that bears the signature of the chiefs of the indigenous peoples of New Zealand?

4 The Treaty of Waitangi, signed in 1840 between Maori chiefs and a representative of the British Crown, whereby the chiefs ceded sovereignty to the Crown, in return for guarantees of security, respect for their chieftainship, and the protection of their property, their treasures, and their cultural and economic rights. For transcripts and translations, see The Treaty of Waitangi <<http://aotearoa.wellington.net.nz/back/treat.htm>> (last accessed 25 September 2003), and for "official" texts, the Treaty of Waitangi Act 1975, sch 1.

5 Security Treaty between Australia, New Zealand and the United States of America (ANZUS Treaty) (1 September 1951) 131 UNTS 83. The United States suspended its defence guarantees to New Zealand under ANZUS in 1986 as punishment for New Zealand's anti-nuclear policy.

6 See Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207, 209-210.

So that is the sort of question I wish to ask. What is important about indigeneity? And I want to ask also: what principles or legal or political ideas does indigeneity invoke, which explain its importance? One particular idea that I should like to pursue quite closely in this lecture is this: long before people became interested in indigeneity as such, or in the post-colonial situation of indigenous peoples, or in the public morality and constitutional law of settler societies—long before people took an interest in any of that, legal and political thought in our tradition came up with what is known as the Principle of First Occupancy. It is a principle that holds that the first person, or the first people, to take possession of a piece of land acquires special rights over it, so far as property and sovereignty are concerned. Many who *now* talk about indigeneity seem to believe that this venerable principle is key to understanding the importance that attaches to the description of a people as indigenous. It is key, they say, to distinguishing the claims of groups like Maori or Native Americans from the claims of other groups, like immigrant groups or the descendants of slaves, in these modern societies. That is what I want to discuss. My fear is that theorists of indigeneity have taken up this Principle of First Occupancy without sufficient examination: they have taken it up in a relatively uncritical way. I think it needs more careful examination.

Three caveats before I go any further. (1) Though we are gathered here in Wellington, this is not just a talk about New Zealand, but about indigeneity in all the contexts in which the term is employed. (2) It is not an exhaustive treatment of indigeneity. There are aspects of this topic that I will not have time to discuss at all, but which do need discussion. I am thinking particularly of the issue of cultural rights, and of the special concern that a people may have for the preservation of their culture in its original habitat,⁷ which may well distinguish their claims—and distinguish them honourably—from cultural claims put forward by (say) immigrant groups.⁸ I am not going to discuss that here, though I have

7 "The fundamental importance of cultural survival ... is the point of the whole process" (Joe Williams "A Summing Up" in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) 187, 191). See also Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and P G McHugh (eds) *Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 73.

8 There are other also issues about the status and responsibilities of immigrants that distinguish them necessarily from indigenous peoples. Consider this point (put forward originally in a Canadian context): "The Indians, the Inuit and the Metis did not immigrate to Canada as individuals or families who expected to be assimilated. Immigrants chose to come here and to submit to Canadian laws and institutions". (Thomas Berger, as quoted in Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 51 U Toronto LJ 101, 123.)

And there are issues about modes of life—forms of economy that are more subsistence-based, oriented towards living off the land, in contrast with modern urbanised economies; sometimes

written on cultural rights elsewhere,⁹ and this lecture forms part of a larger project in which those issues will be extensively discussed.¹⁰ There are also some further problems with indigeneity that I will not discuss—in particular the notion of descent, as in "indigenous peoples are the descendants of the original inhabitants of a territory". I will not discuss those problems, though I am persuaded by some things that Bill Oliver says in Coates' and McHugh's *Living Relationships* that this too is a difficulty.¹¹ (3) I am conscious that I am not the first to address these issues. Alison Quentin-Baxter is the editor of a substantial volume on the rights of indigenous peoples;¹² and as we shall see two other New Zealanders—Benedict Kingsbury (of New York University)¹³ and F M (Jock) Brookfield¹⁴—have written a great deal on this subject. Brookfield's account I have found particularly stimulating. I see myself in this lecture very much as fiddling with one little piece of a complicated jigsaw. My claim for a specific contribution is this: apart from the work I have done in the past on cultural rights and on the rectification of historic injustice,¹⁵ I have devoted a lot of energy to studying principles like first occupancy,¹⁶

notions of indigeneity pick up on that. See Coates "International Perspectives on Relations with Indigenous Peoples", above, 24–26.

- 9 My publications on this include: "Minority Cultures and the Cosmopolitan Alternative" (1992) 25 U Mich J L Reform 751 (reprinted in Will Kymlicka (ed) *The Rights of Minority Cultures* (Oxford University Press, Oxford, 1995) 93; "Multiculturalism and M \acute{e} lange" in Robert Fullinwider (ed) *Public Education in a Multicultural Society* (Cambridge University Press, Cambridge, 1996) 90; "Cultural Identity and Civic Responsibility" in Will Kymlicka and Wayne Norman (eds) *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) 155; "Taking Group Rights Seriously" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 203; "One Law for All: The Logic of Cultural Accommodation" (2002) 59 Wash & Lee L Rev 3.
- 10 Jeremy Waldron *Cosmopolitan Right* (in draft; under contract to Oxford University Press).
- 11 W H Oliver "The Fragility of Pakeha Support" in Ken S Coates and P G McHugh (eds) *Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 222, 223: "Many of those groups to which the rights are ascribed today have a history of massive and continuing change and a complicated multiple ancestry".
- 12 Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998). It is in memory of Mrs Quentin-Baxter's late husband Professor R Q Quentin-Baxter that this lecture was given.
- 13 Benedict Kingsbury "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 Am J Int'l Law 414; "Competing Conceptual Approaches" (2002) 51 U Toronto LJ 101; "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYU J Int'l L & Pol 189.
- 14 F M Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999).
- 15 See Jeremy Waldron "Redressing Historic Injustice" (2002) 52 U Toronto LJ 135. See also Jeremy Waldron "Superseding Historic Injustice" (1992) 103 Ethics 4. An earlier version of the Ethics

which—as I said—are supposed to explain some of the special importance of indigeneity. I believe those principles are being invoked in this debate opportunistically and carelessly, and I would like to say something to redress that.

I have a particular interest in theories of justice—I grew up philosophically under the indirect influence of John Rawls¹⁷—and have always been intrigued by the way in which the concept of indigeneity is used to transform what would otherwise be a forward-looking discussion of social justice. Let me explain.

We might think in a good-hearted and pragmatic way that a decent society ought to struggle to make things more just, here and now and into the future for all the people and communities who are trying to make a life around here. If the resources of our society are wrongly distributed—if land, wealth, income, and power are wrongly distributed—then distributive justice demands a readjustment. Such readjustment has happened here in the past, with land reform in the late 19th century and quite extensive welfarist redistribution throughout much of the 20th century. Maybe it should happen again. But that is not enough, say some writers and politicians, if the issue is indigeneity. Indigeneity calls for a more radical approach—not just remedial measures to address maldistribution, but a *restoration* to the descendants of indigenous peoples of some or all of the rights—rights of sovereignty, rights of property—that were once held by their ancestors. Thus Duncan Ivison and his co-editors in the introduction to their collection of essays on *Political Theory and the Rights of Indigenous Peoples* are adamant that:¹⁸

[T]he distinctiveness of indigenous claims ... is lost or rendered opaque in discussions of distributive justice. ... Indigenous claims are not just for rights to any fair share of Australian or Canadian resources, but to a particularised share ...

The idea of indigeneity is supposed to transform the discussion from a general debate about justice into a debate phrased in more Nozickian, even Lockean terms, about the priority of certain entitlements and the particular connection of owners or sovereigns to

paper was published as "Historic Injustice: Its Remembrance and Supersession" in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 139.

16 Jeremy Waldron *The Right to Private Property* (Clarendon Press, Oxford, 1988).

17 John Rawls *A Theory of Justice* (Harvard University Press, Cambridge, 1971) and *Justice as Fairness: A Briefer Restatement* (Harvard University Press, Cambridge, 2001).

18 Duncan Ivison, Paul Patton, and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) 10.

particular pieces of land or territory.¹⁹ Ivison, Patton, and Sanders are quite explicit about the privilege and priority that is claimed for these entitlements over and above, say, the grievances and claims of other disadvantaged groups. Immigrants may complain of prejudice and discrimination, African-Americans may seek reparations for slavery, but these demands for justice are different in kind from indigenous claims. The theory of indigeneity, they say, is preoccupied with "the problem of distinguishing indigenous claims from the claims of other kinds of cultural or "societal" groups".²⁰ And throughout their book, they treat it as a point against any putative definition of indigeneity that it may tend to minimise this distinction.

III TWO KINDS OF DEFINITION

So let us review the way in which—or the ways in which—"indigeneity" may be defined. Plainly, it is a relative term—a people may be described as "indigenous" in relation to a certain land or territory, meaning that they are its original inhabitants. Sometimes it is treated as doubly relative, so that a people is called indigenous first in relation to a certain land or territory, and second in relation to some other people, who arrived in the land at a time subsequent to the people now called indigenous. So one might say that the Maori are the indigenous inhabitants of Aotearoa because they were its first human inhabitants. Or, we may say that they are its indigenous inhabitants relative to the Europeans who attempted to settle there as part of the colonial enterprise. (This second definition more or less treats "indigenous" as synonymous with "colonised".)

So there, immediately, you have two styles of definition—which I will call style (A) and style (B). The original definition put forward at the 1975 World Council of Indigenous Peoples was a style (A) definition: it referred to "descendants of the earliest populations living in the area".²¹ But the same organisation offered a style (B) definition in its draft covenant of 1984, referring to the descendants of peoples "who lived in the territory before the entrance of a colonizing population".²²

The two concepts may be co-extensive, as in New Zealand and Australia, where the populations that confronted European colonists are plausibly regarded as the descendants of the first inhabitants of these lands. Still, it is necessary to be aware of these alternative

19 Compare Robert Nozick *Anarchy, State and Utopia* (Basil Blackwell, Oxford, 1974) ch 7; John Locke *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press, Cambridge, 1988) (1689) II ch V.

20 Ivison, Patton, and Sanders *Political Theory and the Rights of Indigenous Peoples*, above, 3.

21 Cited by Benedict Kingsbury "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 Am J Int'l Law 414, 422.

22 Kingsbury "'Indigenous Peoples' in International Law", above, 422.

styles of definition, because indigeneity in sense (B) may ground different sorts of claims from those grounded by indigeneity in sense (A), and it makes a difference which ones we rely on. It makes a difference also because in some circumstances the ideas *will* come apart. In a country like India, for example, if indigeneity is defined absolutely in terms of literal *first* occupancy, we have to try to go way back before the Mughal empire of the 16th century, before the Vedic period on which present Hindu nationalist mythology is presently based, before the Indo-Aryan invasions in the latter half of the second millennium BC, even before the early Harappan period that laid the foundation for the Indus Civilisation; we have to go all the way back to the Palaeolithic peoples who settled the Indian subcontinent as early as the eighth millennium BC. If on the other hand, we are talking about prior occupancy, relative (say) to the wave of European incursions into India that began in the 16th century or the establishment of the British Raj in the 18th century, then we are saying that what commands respect is a complex mosaic of layered titles, claims, and civilisations that just happened to exist there at a particular point in time.²³ Plainly indigeneity in sense (B) is a variable term, depending on which empire or conquering power one is contrasting it with.

Even if you just concentrate on definition (A), there is still considerable indeterminacy. There is a distinction, difficult to pin down but interesting, between being descended from the first inhabitants of a given territory and being descended from people who have inhabited a given territory since the dawn of human history. It would be silly to describe the first European whalers who reached New Zealand's sub-Antarctic Islands²⁴ as indigenous to those islands, even though they are, strictly speaking, the first peoples of those islands in the sense of not having been preceded there by any other human group. But it is not silly to describe the first human inhabitants of Aotearoa as indigenous, even though they came here less than a thousand years ago, with ancestral memories of migration from a quite different homeland. Nor, presumably, should there be any difficulty in applying the same term "indigenous" to the Maori as to the Australian aborigines, even though the ancestors of the latter migrated to Australia perhaps tens of thousands of years before the former sailed to New Zealand. The fact is that humans have been migratory animals since our emergence in Africa more than 100,000 years ago, and it is plain that the application of the term "indigenous" to human populations is always going to be somewhat different from its application to plants, for example. We have not sprung from the earth or evolved within the territories in respect of which we claim to be

23 The Oxford English Dictionary gives this as a second special meaning of "aboriginal": "Dwelling in any country before the arrival of later (European) colonists" (*Oxford English Dictionary* (2 ed, Clarendon Press, Oxford, 1989) vol I 35.

24 The Snares, the Bounty Islands, the Antipodes Islands, the Auckland Islands, and Campbell Island.

indigenous. Usually what is emphasised is that the indigenous peoples have strong ancestral links to the land because they have made a life there for many generations. However, this too is sometimes made relative to other peoples—in a definition (B) sort of way—as in the rather informal definition we find at the beginning of James Anaya's book, *Indigenous Peoples in International Law*. Anaya talks of peoples being "indigenous because their ancestral roots are imbedded in the lands in which they live ... much more deeply than the roots of more powerful sectors of society living on the same lands".²⁵

For type (B) definitions of indigeneity, there are also intriguing riddles on the other side of the equation. If indigeneity means priority over the colonising population, does it imply that the occupation by the colonists has gone on for a relatively short period? Professor Brookfield mentions the case of certain Nordic countries, which have recognised the indigeneity of the Sami peoples despite the fact that the peoples relative to whom the Sami are said to be indigenous have also occupied the lands in question for millennia.²⁶ Type (B) definitions often suggest not just temporal priority—the indigenous peoples were here before the settlers—but also a great disparity between the few generations that have passed since colonisation compared to the millennia in which their indigenous predecessors occupied the territory. (This aspect makes it quite difficult to define indigeneity with regard to certain groups in South Africa.)

These conundrums of definition are very well known in the industry. As Ben Kingsbury observed in 1998, "[t]he development of 'indigenous Peoples' as a significant concept in international practice has not been accompanied by any general agreement as to its meaning".²⁷ The conundrums and controversies have become particularly important in Asian countries where there is considerable resistance to any definition of indigeneity that

25 S James Anaya *Indigenous Peoples in International Law* (Oxford University Press, Oxford, 1996) 3:

Today, the term indigenous refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities, are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western hemisphere, the Inuit and Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the Tribal peoples of Asia, and other such groups are among those generally regarded as indigenous. They are indigenous because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.

26 F M Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) 78, quoting Douglas Sanders "Indigenous Peoples at the United Nations" [1996] 2 CNLR 20, 21.

27 Benedict Kingsbury "Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 AM J Int'l Law 414, 414.

does not refer to colonisation. As Kingsbury notes, "several governments of Asian states argue that the concept of "indigenous peoples" is so integrally a product of the common experience of European colonial settlement as to be fundamentally inapplicable to those parts of Asia [like China] that did not experience substantial European settlement".²⁸ (And again, I guess one can acknowledge that point, but still try to refine an analytic definition in order to see whether indigeneity adds anything to whatever other reasons there are for concern and outrage over the injustices attendant on European imperialism.)

I should say that it is not my intention to make anything of this definitional uncertainty as such. Kingsbury may well be right when he suggests that traditional analytic or positivist modes of definition are inappropriate.²⁹ The Draft United Nations Declaration of the Rights of Indigenous Peoples at present contains no definition at all, and it may be that that is the most sensible course.³⁰ People warn that the experiences and predicaments of First Peoples in various parts of the world are quite different, which, if true, may mean that the term "indigenous" tells us very little.³¹ Ken Coates suggests that the point is to let indigenous peoples define themselves,³² though that of course assumes that non-indigenous peoples under some definition will not muscle in on the act or spoil some implicitly shared sense of what all First Peoples have in common. What I do think is that the definitional uncertainties reflect an instructive ambivalence as to the basis of indigeneity's importance. In international law circles, I think a consensus has moved towards type (B) definitions of indigeneity – that is, definitions like the one in International Labour Organisation Convention 169 of 1989, which talks about people being "regarded as indigenous on account of their descent from populations which inhabited the country ... at the time of conquest or colonization or the establishment of present state boundaries".³³ (Though interestingly this is not a convention that New Zealand has signed.) If that is so, then the points that I would like to make about the moral significance of indigeneity can be made pretty easily; but the case is more complex, though I think no less convincing, when we fall back on a type (A) definition.

28 Kingsbury "Indigenous Peoples' in International Law", above, 418.

29 Kingsbury "Indigenous Peoples' in International Law", above, 457.

30 S James Anaya *Indigenous Peoples in International Law* (Oxford University Press, Oxford, 1996) 185.

31 See Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and P G McHugh (eds) *Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 76.

32 Coates "International Perspectives on Relations with Indigenous Peoples", above, 36–37.

33 International Labour Organisation Convention No 169 (27 June 1989) 72 ILO Official Bull 59, art 1(1)(a) (excerpted in Anaya *Indigenous Peoples*, above, 194).

IV THE SIGNIFICANCE OF INDIGENITY

As I said a moment ago, indigeneity is often said to be of special significance for issues of property and for issues of lordship, sovereignty, political control, and self-determination. We have seen that indigeneity is always defined relative to a given territory and the special relationship to *the land* that is key to most indigeneity claims means that the issue is bound to affect property, the distribution of resources, and resource use policies, as well as issues relating to sovereignty.³⁴

So: those who believe that indigeneity is important believe that its importance consists in the challenge it poses to current patterns of sovereignty and property rights. The logic is quite simple. Indigenous peoples were not just hanging around in New Zealand, Australia, or North America, waiting to be colonised. They were already living and thriving with their own systems of polity, law, and economy. Those systems of polity, law, and economy were *here first*; and they have a continuing status that is secured by that priority. Colonisation disrupted that, often brutally, sometimes (as initially in New Zealand) despite formal guarantees that certain existing structures of property and governance would not be displaced. That brutality, with or without the betrayal of treaty guarantees, establishes the current regime of property and sovereignty as presumptively illegitimate. Now, in some cases where a present regime is judged illegitimate, the appropriate response is to look forward to arrangements that might be more just or appropriate. But with this sort of illegitimacy—the illegitimate disruption of an indigenous regime—the remedy involves looking *back* to *pre-existing* arrangements, and finding a structure now that is more respectful of those *pre-existing* arrangements than the colonial and settler regimes have been to date. Nothing like this, it is said, can be claimed by other minorities. Their claims are no doubt very impressive from a moral point of view, but they are utopian: they look for justice where it has not yet existed. The claims of indigenous peoples are more grounded than that, grounded in *pre-existing* reality. It is, as Australian scholar Julie Cassidy has argued, a matter of *reversion*—she means the international law doctrine of reversion—based on the continuity of *de jure* sovereignty, even under adverse conditions like colonisation.³⁵

34 It is also said to be important for cultural rights and language issues, though there, of course, the precedence that it asserts over other cultural or language-rights claims depends in part on the special significance that it is supposed to have in respect of land, property, territory, and sovereignty. See Joseph H Carens "Democracy and Respect for Difference: The Case of Fiji" in his collection *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford University Press, Oxford, 2000) ch 9.

35 Julie Cassidy "Sovereignty of Aboriginal Peoples" (1998) 9 *Ind Int'l & Comp L Rev* 65, 117. She cites the reversion of Hong Kong to the People's Republic of China in 1997, the resurrection of

The right of an ousted sovereign to have sovereignty restored under the laws governing belligerent occupation is derived from ultimate *de jure* title or territorial sovereignty. Sovereign rights do not inure in a belligerent occupant, much less an occupant whose entry was unlawful (*ex injuria non oritur jus*). The sovereignty of the dispossessed peoples continues, awaiting reversion, despite the loss of territory and even total illegal annexation. ... [W]here people have been forcibly subjugated, their sovereign title continues in abeyance and can later be restored. Even a state which has been totally extinguished can resume its sovereignty when the resurrected "new" state and the old pre-colonization state are identical.

Of course, one seldom hears an argument for complete reversion to the status quo that confronted the earliest European colonisers. What people say is that "[o]bsolete versions of absolute sovereignty are being discarded for indigenous equivalents that emphasise an autonomy both relative and relational",³⁶ or something of the sort. Still the claim to pre-existing entitlements is there in the background, underwriting the widespread belief that governments presently in power in countries where there are indigenous minorities should be pressured to make considerable changes in current arrangements for governance and in current arrangements for land ownership and resource use. The power of the idea

Portugal's sovereignty after the invasion of Philip II of Spain, and—as a rather more problematic example—says (at 118) that:

It is also believed the steps taken by the United Nations towards the establishment of the State of Israel only reinforced the legitimate claims of the Jews to their historical rights. Prior to Israel's re-entry into these territories, it has been suggested the occupants (i.e., Arabian and Jordanian States) were unlawful belligerents, who therefore acquired no legal title to the country, despite its annexation. In line with this suggestion, many in the international community saw Israel's return to be a legitimate assertion of the State's right to exercise full sovereignty over its kindred lands.

In discussing—though not necessarily approving of—reversionary claims, Ben Kingsbury (in "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 U Toronto LJ 101, 118) offers a different set of examples:

Arguments for the revival of a pre-existing sovereignty differ from arguments for self-determination in relying on evidence of the former enjoyment of sovereignty rather than on a general entitlement of modern collectivities to a degree of self-governance. Thus when Estonia, Latvia, and Lithuania broke away from the Soviet Union in 1991, they claimed simply to be restoring a pre-existing sovereignty that had been illegally interfered with by unlawful forcible incorporation into the USSR in 1940-1941, although the attitudes of other states to this juridical claim varied sharply. In New Zealand, the argument is made that Maori were sovereign prior to 1840, that this collective sovereignty was recognized not only by Busby as British Resident but by the British government and was never lawfully surrendered, and that it should now be revived and made operational.

36 Roger Maaka and Augie Fleras "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa" in Duncan Ivison, Paul Patton, and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) 89, 93.

of indigenous entitlement means that it is thought not inappropriate to disrupt current patterns of property and sovereignty—to shake them up and reorganise them in various ways—to reflect the priority of self-determination claims and the economic and proprietary claims of indigenous peoples.

V FIRST OCCUPANCY AND PRIOR OCCUPANCY

A little while ago, I talked about two approaches to the definition of indigeneity. What I called the type (A) definition identifies those whose ancestors were the first to occupy and make a life for their community in the territory in question. The type (B) definition, by contrast, talks about *prior* occupancy, not first occupancy. For this definition it is enough that indigenous peoples occupied and governed the territory at the time of colonisation. For definition (B), it matters not whether the so-called indigenous people were the first to inhabit a land; what matters is that they were the last to inhabit it, or be settled in it, before the catastrophic events of European settlement.

The two types of definition we have been considering correspond to two rather different arguments based on indigeneity. One is an argument based, as I said earlier, on the venerable Principle of First Occupancy; the other is based on a more pragmatic conservative principle of respecting existing arrangements, even if those arrangements were set up only few generations prior to the events—the colonising events—complained of. So we have a Principle of First Occupancy, corresponding to type (A) definitions of "indigeneity", and what I shall call a Principle of *Prior* Occupancy, corresponding to the type (B) definition.

Let me say a little bit about each of these principles. First Occupancy first. The principle holds that the first person or community to take possession of a resource or a piece of land gets to be its owner. Or: the first people or community to take possession of a territory gets to be (or choose) its sovereign. According to this argument, aboriginal peoples gained an entitlement to their ancestral lands by virtue of being the very first human communities to claim them. Of course the Principle of First Occupancy allows that there can be successors in title; first occupancy is not supposed to be inalienable. But it is supposed to secure the starting point of a historical chain of entitlement that may then proceed through principles of legitimate transfer: the first occupant may sell his property or cede its sovereignty to another, on whatever terms they please, and then those to whom the title has been transferred in this way may transfer it again, if they choose, to another person or group, and so on. A theory of this kind has a nice recursive logic to it, which the late Robert Nozick elucidated in his book *Anarchy, State and Utopia*.³⁷ Justice-in-transfer is predicated on the idea that no one can be dispossessed except by his own consent, and the Principle of

³⁷ Robert Nozick *Anarchy, State and Utopia* (Basil Blackwell, Oxford, 1974) ch 7.

First Occupancy respects that too: the reason why the first occupant acquires good title is not because of anything special about *occupancy*³⁸ but because of simple priority. The first occupant, the first person to act as an owner, did not have to disturb anyone else's rights in order to gain his title; but subsequent occupants would have to disturb someone else's rights; and that is why, for second and subsequent occupants, the principle of consent is required.

The Principle of First Occupancy has a long and venerable history in the theory of property and sovereignty. There is a version of it in John Locke's writings on property – though for Locke the elements of labour, cultivation, and perhaps moral desert are crucial, whereas in the pure Principle of First Occupancy, "occupancy" is a neutral term, referring to more or less any way in which a person or community might use or take possession of resources. It can include hunting, gathering, gardening, agriculture, recreation – virtually any form of land use qualifies.³⁹ There is a version of the principle in Blackstone, though, it has to be said, it is a very hesitant version indeed.⁴⁰ And you will find it too in traditional

38 This is a contrast with John Locke's Labour Theory, which is based on something special about *labour*: John Locke *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press, Cambridge, 1988) (1689) II ch V; Jeremy Waldron *The Right to Private Property* (Clarendon Press, Oxford, 1988) ch 6.

39 This is an important contrast. Locke's Labour Theory is based on a substantive moral conviction about the importance of labour and its relation to personality. That conviction may well be controversial; it is certainly unlikely to afford a basis for cross-cultural consensus. In Locke's work, the reference to labour hooked up with an emphasis on cultivation as the only valid means by which land could be acquired initially as property, and this in turn fed his conviction that there were no aboriginal titles to land among what he thought of as the nomadic hunters and gatherers who confronted European settlers in the Americas in his time. See Locke, above, II ch V paras 32, 37, 41. See also James Tully "Rediscovering America: The *Two Treatises* and Aboriginal Rights" in his collection *An Approach to Political Philosophy: Locke in Contexts* (Cambridge University Press, Cambridge, 1993) 137 and Jeremy Waldron *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge University Press, Cambridge, 2002) 164–170.

40 William Blackstone *Commentaries on the Laws of England* II ch 1 *3–4, 8–9:

[B]y the law of nature and reason, he who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular: yet whoever was in the occupation of any determinate spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own.

textbooks of natural law and international law.⁴¹ It even continues to be used in modern treatises about property and economics: in Richard Epstein's work, for example, at Chicago,⁴² and (as I have mentioned) in the late Robert Nozick's work at Harvard.⁴³ It is a

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. ...

[A]s we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the substance of the earth itself; which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting, that this right of occupancy is founded upon a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is from a principle of nature justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else. Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it: for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant.

For an interesting discussion of Blackstone on First Occupancy, see Carol M Rose "Canons of Property Talk, or, Blackstone's Anxiety" (1998) Yale LJ 108, 601.

- 41 See for example Sir Travers Twiss *The Law of Nations* (1884) 194-195: "[A] person may take possession of a thing which has no owner, so as to acquire Rightful Possession of it; and Property is in such a case acquired simultaneously with Possession Such being the Law of Nature in regard to primitive acquisition on the part of individuals, the Law of Nations is in perfect accord with it." Twiss also cites diplomatic practice in this regard: in negotiations between the United States and Great Britain in 1826 over boundary disputes, the American plenipotentiary declared that "[I]t may be admitted, as an abstract principle, that, in the origin of Society, first occupancy and cultivation were the foundation of the rights of private property and of National Sovereignty." (Message of President Adams to Congress (28 December 1827), quoted in Twiss, 202.) I am indebted to Benjamin Ederington "Property as a Natural Institution: The Separation of Property from Sovereignty in International Law" (1997) 13 AM U Int'l L Rev 263, 270 for these references.
- 42 Richard Epstein *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge, 1985). For a discussion, see Eric T Freyfogle "Owning the Land: Four Contemporary Narratives" (1998) 13 J Land Use & Envtl L 279.

powerful and appealing principle, keying in as it does to intuitions we have all known since childhood: "first come, first served", and all of that.

Many texts on indigeneity say that indigenous peoples' claims are based on something called "original occupancy", and that can certainly be read as appealing to the logic of the First Occupancy principle which I have just outlined.⁴⁴ But sometimes the term that is invoked is "Prior Occupancy", and that is something rather different. So we move on to the second of my two principles, corresponding to the type (B) definition.

In the crudest sense, the difference is between first and last, or—to speak more precisely—the difference between first and penultimate. The Principle of First Occupancy looks to the dawn of time, to the moment at which the land in question was first taken peacefully into human use and possession. The Principle of Prior Occupancy looks to what was happening at a moment just before the present, just before the first European ships came over the horizon.

It is not just a matter of time and relativity. The Principle of Prior Occupancy is opposed to the Principle of First Occupancy in a deeper sense. Prior Occupancy is a conservative principle, not a reactionary one. Its aim is to vindicate and preserve an established existent status quo, not delve into tangled historical questions about any status quo ante. It recognises the opacity of the past, and it recognises the dangers of holding existing systems hostage to legitimist inquiry. Irrespective of how an existing distribution came about—whether it is a distribution of property or a distribution of sovereign authority—the Principle of Prior Occupancy gives it a *prima facie* right to be respected and left undisturbed or allowed to develop according to its own dynamic. "To disturb any one in the actual and long possession of territory", said Grotius, "has in all ages been considered as repugnant to the general interests and feelings of mankind".⁴⁵ Prior Occupancy refers to the human interest in stability, security, certainty, and peace, and for the sake of those values it prohibits overturning existing arrangements irrespective of how they were arrived at. Of course it cannot be an absolute principle: there may be compelling reasons for overthrowing and reforming an existing regime. (A regime of slavery, for

43 Robert Nozick *Anarchy, State and Utopia* (Basil Blackwell, Oxford, 1974) ch 7.

44 Compare Roger Maaka and Augie Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa" in Duncan Ivison, Paul Patton, and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) 89, 94: "Indigenous peoples have the right of sovereignty by virtue of original occupancy".

45 Grotius *On the Law of War and Peace* II ch IV para 2. (Grotius also quotes Cicero—that is, Cicero in the second book of his *De Officiis*—asking "what justice there can be in depriving an owner of the land, which he has for many ages quietly possessed?")

example, whether in the United States or the Chatham Islands, cries out for redress, however long it has been established.)⁴⁶

Prior Occupancy is undoubtedly an appropriate basis for condemning the injustice that took place at the time of colonisation. For in the lands that were colonised there *was* an existing social order; there was a flourishing political and customary-legal system; there were established rules of property, recognised titles of sovereignty and governance; there was an order, which had a claim to be respected, not on account of its antiquity, but on account of its existence. European settlers might try to raise questions about the origins of the order they confronted; they might wonder whether the native chieftains had acquired their authority by violence and conquest. They might query whether the existing inhabitants of the land had appropriated their property in strict accordance with Lockean principle. And they might try to take advantage of these doubts to vindicate their expropriations on the grounds of the problematic origins of native title. But the Principle of Prior Occupancy simply prohibits that approach. Never mind its origins, the principle says. The native order existed as a stable and flourishing system when you arrived on the scene, and it was entitled to recognition and respect as such. If indigeneity is supposed to key into these values, then it can make a powerful case for condemning the damage that colonial settlement inflicted.

So there we have two principles: First Occupancy and Prior Occupancy. In the very peculiar circumstances of Aotearoa/New Zealand, it is arguable that both principles apply. New Zealand has been occupied for no more than a thousand years, that is about one per cent of the time that there have been human populations in the world. If we regard Maori as one people and ignore the existence and the significance of the constant territorial warfare between iwi—and I will talk more about that in a moment—if we gloss over such things and regard the Maori as a single people, then we can say that in Aotearoa/New Zealand first occupancy equals prior occupancy. The two things can be run together in some confusion,⁴⁷ and local supporters of indigenous rights may think they do not have to

46 See F M Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) 160. See also Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands: Wai 64* (Brookers, Wellington, 2001) 63. The Chatham Islands (also known as Rekohu) lie several hundred miles to the east of New Zealand. In 1835 they were invaded by people of Ngati Mutunga iwi from the mainland, and their indigenous occupants—called Moriori, a Maori people who had lived there for centuries in isolation from the mainland—were killed and eaten or enslaved, and their lands occupied. The British administration after annexing the islands in 1842 failed to end this slavery.

47 For confusion between the two, see Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 78. Macklem starts by saying that "claims of prior occupancy possess legal significance because they correspond to a commonly invoked principle of distributing rights with respect to land that suggests a prior occupant of land has a stronger claim to that land than subsequent arrivals", but he goes on to confuse the issue (at 78-

choose. But of course they do have to choose because, as I said earlier, the nature of the claim makes a difference to its force, and it makes a difference, too, to the sort of scrutiny it has to be subject to.

VI PRIOR OCCUPANCY: INJUSTICE AND REVERSION

Let us begin by looking at the application of Prior Occupancy. There is an obvious difficulty with using this principle as a basis for remedial or reversionary claims to property and sovereignty by indigenous peoples in the 21st century. The Principle of Prior Occupancy certainly supports the claim that injustices were perpetrated in the 19th century, when the pre-colonial order was disturbed and displaced, and indigenous people were attacked and their property expropriated. But precisely because it is a conservative principle, Prior Occupancy has the characteristic that while it condemns injustice at one particular point in time, it can equally work to vindicate established patterns of settlement that are founded upon that injustice.

I said a moment ago that the Principle of Prior Occupancy is a conservative principle. Based on the human interest in stability, security, certainty, and peace, it prohibits overturning existing arrangements. It deliberately refrains from legitimist inquiry into the past, for it holds that irrespective of how an existing distribution of property or sovereign authority came about, it has a *prima facie* right to be respected and left undisturbed. Of course, it is just a *prima facie* principle—there may be things about the modern situation that require redress or even revolution, in which case the Principle of Prior Occupancy must give way. But that cannot be for historical reasons alone; and that is an important conclusion, because it indicates that a type (B) notion of indigeneity rooted in Prior Occupancy is really incapable of adding anything distinctive to independent justice-based lines of argument for reform and change in the present.

So: though this principle can be appealed to condemn the European incursions, it cannot easily be appealed to some hundreds of years later in order to upset existing patterns of settlement founded on those incursions. The principle which condemned the original disruption is not a principle based on the inherent legitimacy of the established title, but on the fact of its being settled. And so the same principle may be appealed to in order to secure the 21st century status quo, and used as a ground for resisting any claim that we should simply reverse the original injustice.

Elsewhere I have argued that claims based on historical injustice may be overtaken by events which make the distributional situation, which was established by the injustice,

79) by talking in a Lockean or Nozickian fashion about occupancy as a way in which a person or a whole people begins a chain of title by taking possession of hitherto unoccupied land.

now just and appropriate to modern circumstances.⁴⁸ Well, the argument I am making here illustrates a similar point, but in a slightly different way. If the basis of M's complaint of injustice is that M held resources in a stable pattern of established occupancy and P disturbed that pattern, then whether reversion is an appropriate remedy will depend in part on whether P has now established a stable pattern of occupancy, which is entitled to respect upon exactly the same principle as M's was. If the date of the injustice and the date of the claimed reversion are sufficiently close, that may not hold. But where, as in New Zealand, they are separated by a century or two, the application of the Principle of Prior Occupancy to disturb current patterns of resource use or current patterns of sovereignty is problematic to say the least.

(I am not saying there are not other reasons for changing current arrangements. But simply reverting to (say) an 1839 status quo ante on the basis of type (B) indigeneity claims grounded upon Prior Occupancy will not do. The Principle of Prior Occupancy prohibits disrupting current patterns of land use and governance just as it (unsuccessfully) prohibited their disruption in the middle of the 19th century.)

This is not supposed to be a formal argument based on prescription, though that is what it may look like.⁴⁹ It looks as though I am suggesting that an initially unjust regime may acquire a title to respect because of the mere passage of time. The point is not that time, by itself, washes away all crimes.⁵⁰ But the passage of time can establish patterns of expectation. I guess that to the extent that prescription *is* involved, we can say that a prescriptive title that existed in one century cannot really survive to challenge a prescriptive title that exists in a subsequent century. That is the nature of prescription: it is designed to block claims founded in the distant past including claims based on the principle of prescription itself. Formally, however, going down this road would involve us

48 See Jeremy Waldron "Redressing Historic Injustice" (2002) U Toronto LJ 135, and see also Jeremy Waldron "Superseding Historic Injustice" (1992) 103 Ethics 4. The argument may be illustrated as follows:

Imagine two societies living on a large plain, each with its own source of water. One of those societies—from the north—descends in predatory fashion on the other in the south, and insists on using the southerly water supply as well. That is an injustice. But if, subsequently to that, the northerly water source dries up, then the situation that the northerners established by violence now becomes the situation that justice requires. The two societies must now share the same watering hole. So in this case, you cannot move automatically from a finding of historic injustice to anything like reversion as a remedy.

49 See the discussion in Brookfield *Waitangi and Indigenous Rights*, above, 138–139.

50 As Grotius put it (*On the Law of War and Peace* II ch IV para 1), "though time is the great agent, by whose motion all legal concerns and rights may be measured and determined, yet it has no effectual power of itself to create an express title to any property."

in all sorts of controversial issues about how prescription operates in modern international law, which I do not want to get into here.⁵¹

VII WHAT DOES FIRST OCCUPANCY ADD?

If Prior Occupancy—and the type (B) definition of indigeneity that appeals to it—will not support radical disruption of present arrangements, what about the purer and apparently more principled idea of *First Occupancy*? Surely the descendants of the original inhabitants of a land have compelling claims against the present in virtue of being indigenous in sense (A).

I have two sets of things to say about First Occupancy theory, some relating to the principle itself, and some relating to its application.

(i) So far as application is concerned, obviously any notion of indigeneity based on First Occupancy is tremendously demanding on the resources of historical inquiry. (This is something which the Canadian courts have been wrestling with in recent cases.)⁵² It requires us to go back to the dawn of time or at least to the beginnings of human habitation in a particular territory, and determine who were the early occupants of that territory and whether there is any group which took possession of it peacefully, without dispossessing anyone else. In some contexts that is challenging beyond belief—I mentioned India at the beginning of the lecture, where a literal application of the Principle of First Occupancy requires us to go back millennia before the events reported in Hindu mythology and even

51 Julie Cassidy "Sovereignty of Aboriginal Peoples" (1998) 9 *Ind Int'l & Comp L Rev* 65, 84–88 argues that prescription could not justify Australian title as against Aborigines. She says "occupying" states cannot rely on their illegitimate acts of forceful dispossession to invoke a prescriptive title in a manner designed to deny Aboriginal sovereign claims. That a people has long been displaced or oppressed does not convert a lawless act into a lawful one. On the other hand, Cassidy acknowledges that "there are conflicting notions of precisely what the concept entails and what the prerequisites are for creating a prescriptive title" (citing Ian Brownlie *Principles of Public International Law* (3 ed, Clarendon Press, Oxford, 1979) 157–158). For example: Can a prescriptive title can be obtained simply with the lapse of time, supported by possession of the relevant land, in absence of positive signs of acquiescence? (She says that some writers, such as Hall, Moore, Hyde, and Guggenheim, suggest acquiescence is no longer required.) Can prescriptive title originate in occupation secured by force, as some writers, notably Oppenheim, have suggested? How long must the possession persist? Older authorities insisted upon immemorial possession, while other writers specified requisite fixed periods. Most modern commentators, however, believe the length of time required varies depending upon the particular circumstances of each case. On the other side, in resisting the application of prescription, we have to ask whether there is continuity of the right sort, for the purposes of defeating the emergence of a prescriptive title, between modern legalised resistance to colonial titles in the 1980s and 1990s and original violent resistance in the 1860s.

52 See *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

before the emergence of the Indus civilisation. Or just think of trying to apply First Occupancy literally in England, for example.

You may say, "Well, that's just the price of the pedantry of literalism". But that will not do: if we are not working with literal first occupancy, then we are using some other principle like prior occupancy, and that runs into the difficulties I have already described. First Occupancy is an unforgiving theory, and there is no point using it unless you are prepared to embark on literal historical inquiry. That is what I meant when I said that the choice of principles associated with indigeneity is sometimes careless or opportunistic.

You may say, "Well, whatever the case in Europe or India, at least in Aotearoa/New Zealand things are clear. It is well known that the Maori were the first human occupants of these islands, and the literal application of the term 'indigenous' to them, in sense (A), is fairly straightforward".

Is it? I wonder. We know that Polynesian seafarers did not settle Aotearoa *as Maori*, but in distinct groups, which developed into hapu or iwi in possession of various territories, with quite distinct habitats, and often at war—including territorially acquisitive war, wars of conquest—with one another. We speak easily of "the Maori people", but for the thousand-odd years before the arrival of Europeans, Aotearoa was inhabited by diverse descent groups who shared a language perhaps, and to a certain extent a common culture, but did not conceive themselves as one people. These issues—particularly inter-iwi conflict, conquest, and expropriation—may be glossed over for various purposes—and probably they should—but they cannot be glossed over if we persist in relying on a notion of indigeneity that is supposed to hook up with a Principle of First Occupancy. Because of course First Occupancy is *intensely* interested in the history of territorial warfare; it is intensely interested in whether the titles for which vindication is currently sought were established peacefully or by violence. If they were established by war and violence, then First Occupancy has no application. That is the whole point of the principle. That is because of the special moral force with which it is supposed to invest some claims and grievances, with which the Principle of Prior Occupancy (the more conservative, pragmatic principle) cannot invest them. Professor Brookfield puts the point very clearly when he says this:⁵³

[T]he concept of indigenous people, if we confine it to a territory's original occupants, is morally relevant to the extent that their taking possession of an empty land gives legality to their presence (in the sense that their customary legal order becomes operative in the territory) but simultaneously gives full legitimacy as well. After all, there were no rights of prior

53 F M Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) 80–81 (emphasis added).

occupancy requiring to be legally and morally extinguished. *Yet if an indigenous people ... recognizes principles of conquest and seizure of power ... in their inter-tribal relations, the moral relevance of their status as strictly indigenous people in relation to intruders from another culture cannot be great.*

Maybe as a matter of comity between (say) English common law and Maori customary law, principles of acquisition by conquest should be recognised. Maybe we should recognise the custom of acquisition by conquest as a legal principle in what Professor Brookfield calls in a recent article the "miniature international society" which operated among hapu.⁵⁴ Brookfield makes that case in his book, when he says that:⁵⁵

Where the conquest was by one tribal polity over another ethnically the same as the conqueror, it may be (as in Maoridom) that inter-tribal custom was also a legitimating force: the defeat is experienced less as an "intrusion" than conquest from outside the quasi-international society of the tribes of the same ethnicity.

But even if the custom of acquisition by conquest is credited, that does not help at all with the application of the Principle of First Occupancy. The gist of First Occupancy is that special rights may attach to the *peaceful* occupation of unoccupied lands. Recognition of the custom does not license us to pretend that war was peace or that fighting was non-violent.

Of course it is distasteful to bring up these issues of ancient history – inter-iwi conflict and so on – in the context of a good-hearted attempt undertaken at present to make a country like New Zealand more just. But the perspective from which it seems distasteful, the moral perspective from which this sort of historical inquiry seems like a distraction, is not and cannot be a First Occupancy perspective. It is either an entirely presentist perspective, a forward-looking perspective aiming at distributive justice, which most aficionados of indigeneity reject. Or, if it has anything to do with indigeneity, it has to do with indigeneity in sense (B), in which case the same principle of Prior Occupancy – respect for existing settlements, however they were established – that condemns this historical inquiry will also, as we saw, condemn any attempt to replace existing present-day arrangements with structures of property and governance more akin to those that existed in 1839.

54 F M Brookfield "Mori, Maori and the Crown: Reflections on the Waitangi Tribunal's Chatham Islands (Rekohu) Report" (2002) NZ Law Rev 128–129. There are limits on this, of course, which become clear in relation to the events of 1835 in the Chatham Islands, whose Mori inhabitants were plainly "not part of that miniature international society". See Brookfield *Waitangi and Indigenous Rights*, above, 160. See also Waitangi Tribunal *Rekohu: A Report on Mori and Ngati Mutunga Claims in the Chatham Islands: Wai 64* (Brookers, Wellington, 2001).

55 Brookfield *Waitangi and Indigenous Rights*, above, 79.

In other words, my argument here has the form of a dilemma. Either we accept that a First Occupancy inquiry will have to sort through various indigenous claims, putting aside those that rest ultimately on war or conquest. Or we close that line of inquiry down, but only at the cost of also precluding an equivalent inquiry into more recent war, invasion, conquest, and seizure, figuring that if the conservative Principle of Prior Occupancy functions to protect violently established arrangements in 1839, it also functions to protect violently established arrangements in 1939, or 2002.

(ii) In any case, First Occupancy has always been a dodgy principle, and the traditional writers on property and sovereignty, like Blackstone, are right to have been hesitant about it.

The principle accords moral privilege to an occupant, in virtue of that occupant's not having dispossessed anyone else. The title of such an occupant is supposed to have absolute priority over anyone whose occupancy was effected by war or violence. But in relation to territory and resources, violently dispossessing another person or another people is not the be-all and end-all of injustice, and it is not the only basis on which we might raise a moral question-mark over an entitlement. Refusing to share resources with others is also a form of injustice; refusing to modify a holding based on First Occupancy in response to demographic or other changes in circumstances is an injustice. Taking more than you need, or occupying so much that subsequent arrivals have nothing to occupy, is an injustice.

All this has been understood and argued through by theorists of First Occupancy since John Locke's time. We know that Locke felt it necessary to qualify his version of the Principle of First Occupancy with the condition that there be "enough and as good left for others" after the occupation.⁵⁶ And the formulation and reformulation of this "Lockean proviso" has seemed essential in the modern discussion of theories of this sort. No one now that I know of in the theory of property is willing to argue for a First Occupancy principle that is not qualified in this way,⁵⁷ and very few are willing to deny that this

56 John Locke *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press, Cambridge, 1988) (1689) II ch V para 33:

Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all.

57 See especially Robert Nozick *Anarchy, State and Utopia* (Basil Blackwell, Oxford, 1974) 174-182. I have discussed these issues in Jeremy Waldron "Enough and as Good Left for Others" (1979) 29 *Philosophical Quarterly* 319 and *The Right to Private Property* (Clarendon Press, Oxford, 1988) chs 6, 7. See also, as representative of a large literature: J H Bogart "Lockean Provisos and State of

proviso may also call one's holding into question at a later time, when circumstances change.⁵⁸ In brief, it is well understood in the literature on property that First Occupancy cannot stand on its own to legitimate disproportionate possession of land by one people to the exclusion of others who have no place else to go, simply because the former people came on the scene first. And I guess that is my point. This has been thought through, in a complex and important literature, but the bare principle gets seized on opportunistically by defenders of indigenous rights in a way that is completely impervious to these details and qualifications.

What I am saying is that people need to be a little more careful about the type of property theory they implicitly buy into when they privilege indigeneity. Simple slogans like "first come, first served" and "we were here first" have never been particularly attractive sentiments in the history of property theory, and they become no more attractive by being associated with revulsion from historic injustice.⁵⁹ They have often been associated with righteous indifference to others' interests, indifference even to others' needs, as people seek to retain possession of resources purely on the basis of historic priority. Since 1974 we have had the benefit—if that is the right word—of having a fully worked theory in front of us, based on exactly these intuitions, in the forms of Robert Nozick's theory of historical entitlement,⁶⁰ and for more than 10 years after the publication of Nozick's book, the advantages and disadvantages of theories of his kind were comprehensively discussed by social and political philosophers. True, the theory presented in *Anarchy, State and Utopia* was radically individualist in flavour, organised around the idea of absolute *individual* rights, whereas in the present context we are talking about the rights of communities or whole peoples. But as Nozick recognised, the logic is basically the same, and so are the difficulties.⁶¹ In both cases, people who may have an interest in

Nature Theories" (1985) 95 *Ethics* 828; Clark Wolf "Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations" (1995) 105 *Ethics* 791; and Alan Gibbard "Natural Property Rights" (1976) 10 *Noûs* 77.

58 See Nozick *Anarchy, State and Utopia*, above, 179, and Jeremy Waldron "Superseding Historic Injustice" (1992) 103 *Ethics* 4, 21.

59 Compare Waldron "Superseding Historic Injustice", above, 28.

60 See Nozick *Anarchy, State and Utopia*, above, 149–182.

61 Nozick *Anarchy, State and Utopia*, above, 178:

We should note that it is not only persons favoring private property who need a theory of how property rights legitimately originate. Those believing in collective property, for example those believing that a group of persons living in an area jointly own the territory, or its mineral resources, also must provide a theory of how such property rights arise; they must show why the persons living there have rights to determine what is done with the land and resources there that persons living elsewhere don't have (with regard to the same land and resources).

resources, who may need to make use of them, are being excluded or their interest slighted simply because they were not in the right place at the right time. I guess in the end any theory of property is going to have this sort of consequence: property is almost always exclusive in some regard, and the right to exclude is generated along with other property rights by contingent events. But just for that reason, great care needs to be taken in specifying what the contingent events are that give rise to these exclusive rights, and in specifying how they may be conditioned by circumstances. The most plausible theories of historical entitlement do this with some sort of Lockean proviso—but as we have seen that is exactly the sort of device that is likely to cast most doubt on simplistic claims of entitlement based on pure indigeneity.

I do not want to go on too long about this. The details of the philosophy of property are not to everybody's taste. But once we recognise that First Occupancy does raise serious problems of exclusion and that it does have this potential for a curious imperviousness to latter-day circumstances, then we can begin to appreciate the dangers of any simple-minded application of it or of a concept of "indigeneity" founded upon it. Quite apart from the inherent *creepiness* of its underlying legitimism, there are considerable dangers in exposing modern distributions of power and property to the arcane details of recondite historical and prehistorical inquiry. Things are complicated enough *here*, once one begins to look back beyond the 19th century—which is what the Principle of First Occupancy requires. In circumstances more tangled than Aotearoa/New Zealand, an inquiry into First Occupancy may lead to terrible consequences. In India, for example—and this is something that Ben Kingsbury points out:⁶²

[R]ecognition of special rights and entitlements for having been the earliest or original occupants might spur and legitimate chauvinist claims all over India. ... Claims to historical priority already feature in some "communal" conflicts and incipient chauvinist movements abound, as with the pro-Marathis, Hindu-nationalist Shiv Sena party in Maharashtra. In effect, if some people are "indigenous" to a place, others are vulnerable to being targeted as nonindigenous, and groups deemed to be migrants or otherwise subject to social stigma may bear the brunt of a nativist "indigenist" policy.

These dangers are not aberrations. They are part and parcel of First Occupancy inquiries, for that principle itself purports to license some people, on grounds of historical priority, to repudiate and marginalise the claims of others. First Occupancy looks all very well, when one considers only that the very first occupants did not have to dispossess anyone else. But if having established their occupancy, they hold the resources exclusively

62 Benedict Kingsbury "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 Am J Int'l L 414, 435.

against everyone else in a way that is impervious of the needs of newcomers, then there is a very grave moral danger.

VIII IS THAT ALL THERE IS?

It is time to finish. Some will say that the account I have given is excessively analytic—picking apart the notion of indigeneity, and confronting it with this crude dilemma: either a Prior Occupancy claim, which precludes radical remedy, or a First Occupancy claim, which is both inherently objectionable and anyway historically precarious. What could be better proof, my critics will say, of the proposition that the analytic techniques of Western political philosophy are out of place in this area and that "liberal arguments are ... unable to comprehend what is distinctive about indigenous claims to land and self-government"?⁶³

Maybe they are right. Or maybe *I* should appropriate this point, and say that if the discourse of indigeneity really *is* incompatible with the discourses of Western political philosophy, then what are the aficionados of indigeneity doing appropriating principles like First Occupancy and Prior Occupancy from John Locke and Hugo Grotius? You can't have it both ways. If we want to make indigeneity respectable with these venerable principles of natural law, then we have to also be prepared to buy into all their difficulties, and face up to them responsibly.

If, on the other hand, indigeneity is a *sui generis* notion, as the Canadian theorist James Tully has argued, generating a set of claims that, in Tully's words,⁶⁴

do not derive from any universal principles, such as the freedom and equality of peoples, the sovereignty of long-standing, self-governing nations, or [even] the jurisdiction of a people over the territory they have occupied and used to the exclusion and recognition of other peoples since time immemorial

then it is difficult to know what to say. It cannot be that discussion is over as soon as someone mentions the word "indigenous" and associates a set of claims with it. Such claims are not self-justifying. They are supposed to be heard and understood, and subject

63 Duncan Ivison, Paul Patton, and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) 9. And Dianne Otto has said—in "A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia" (1995) 21 *Syracuse J Int'l L & Com* 65, 97—that all this just reflects the tendency of liberalism "to conflate broad human experience into rigid dichotomous stereotypes." She goes on: "To recognize multiplicities would free indigenous peoples from the current imperative to present themselves as a unified category. It would enable a construction of indigeneity that was diverse, multi-layered and shifting."

64 James Tully "The Struggles of Indigenous Peoples for and of Freedom" in Ivison, Patton, and Sanders, above, 36, 46–47.

to reason and criticism and examination, on both sides of the divide, by governments as well as by First Peoples, by Crown as well as iwi, by all of us as citizens.

I am aware that my discussion here is far from exhausting the debatable content of indigeneity; I said that at the beginning. I am aware, too, that the concept does have an ineffable, almost mystical element, which is difficult to fathom. Is it fair to say, as Bill Oliver says, that "[t]he notion of indigenoussness often leads ... to the ascription of a timeless and sacred quality to what was simply prior occupation", a merely "rhetorical heightening of the unexceptionable fact of having been here first"?⁶⁵ It may be an unexceptional fact, but what I have been doing in this lecture is trying to explore some of the principles in our tradition that might make it significant. And the conclusion I rest with is not the mundaneness of the question "Who was here first?" but some sense of its difficulty and danger. There are places in the world—India is one, perhaps Bosnia is another, various places in Africa provide a further and distressing set of examples—places where making *that* the crucial question is a deadly and vicious ingredient in social and political pathology. These frightful situations are too distant, perhaps, to be telling. But there are places closer to home—Fiji, for example—where insistence on that question has also done great harm. The difficulties, the harm and the dangers may be less apparent in New Zealand, but if we are seeking to buy into the *general* discourse of indigeneity, as opposed to solving our problems with our own legal and ideological resources (the Treaty of Waitangi prominent among them), then we had better be aware of the volatile substance we are playing with.

65 W H Oliver "The Fragility of Pakeha Support" in Ken S Coates and P G McHugh (eds) *Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 222, 223.