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SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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TRANSLATING CLIMATE CHANGE

Gerald Torres*

The article discusses the problems of climate disruption and the strategies some legal advocates have adopted in the United States. In doing so, the author suggests that these strategies are embedded in the United States' deepest constitutional and political commitments and, because they are, they also require us to re-evaluate the state's relationship with the indigenous communities and with the colonial past.

I INTRODUCTION

When I came to New Zealand or Aotearoa, as I have learned to call it, I came, as most Americans do, largely ignorant of the history of the nation and its complex political and natural ecology. I came to talk about the problem of climate disruption and the current efforts in the United States to construct an argument rooted in the public trust doctrine to combat the inaction that has beset most of the public institutions of governance in the face of this looming catastrophe.

The public trust is an old doctrine shared by jurisdictions like those of the United States and New Zealand with legal foundations in Anglo-American traditions. I expected and in many ways found a country that was familiar to me but that was also just different enough to leave me feeling slightly off balance. I had much to learn both from the specific forms the British legal traditions had taken here and from the impact of the indigenous communities on the emerging legal and political institutional culture of the country.

The natural beauty of the islands is disarming. The hills are green and coming as I did from a country that was suffering a drought there seemed to be a wealth that was captured in the abundance of water and life. The flora was sufficiently different to cause me to pause and wonder; just what were those? The coast reminded me of where I was raised in Southern California and the sound and smell of the surf told me all I needed to know about why so many Californians have been attracted to these islands.

* Jane MG Foster Professor, Cornell Law School.

This article is based on a public lecture presented at Victoria University of Wellington in July 2014. The author was a keynote speaker at the "New Thinking on Sustainability" conference held at Victoria University of Wellington in February 2014.

The natural beauty and the similarity in the languages were an easy bridge between our two cultures, as was the shared history of settler colonialism that formed the backdrop of our political culture and the troubled coming to grips with the reality of that history. In the United States we have constructed an elaborate ideological and legal apparatus to deflect the implications of that past from any current political consequences.[1] We have confected a version of trust duties that we use to explain the relationship between the federal government and the tribes, but the control of land and resources remains fraught with tensions both new and old and questions of jurisdiction are flashpoints where sovereign claims are fought out.[2]

This confluence of factors conspired to make my visit rich in ways that I could not have imagined. Not only did it give me perspective on my own country by giving me a place to stand that was outside of it, but it was sufficiently similar that I could see how the paths we had taken were contingent on our own relationship to the period in colonial history from which we drew common roots. Thus, I would be required to translate across epochs, not just across cultures and certainly not just across two cognate cultures, but across multiple and often incommensurable cultures.

While I came to speak to you about the problem of climate disruption and the resistance to addressing the issue in a forthright way that has plagued the politics of my own country, I also hoped to talk to you about how elements of our common legal heritage might give us a lever to move the most obstinate obstacles to progress. What I discovered, however, was that our mutual experience with settler colonialism would complicate the task of defining the commonality of our legal heritage even as it suggested other equally durable connections. Moreover, I have come to realise that these connections are not just suggestive through the tools of analogy, a device every common law lawyer has readily to hand, but through true family connections.

What I hope to do today is to discuss the problems of climate disruption and the strategies some legal advocates have adopted in the United States. In doing so, I want to suggest that these strategies are embedded in our deepest constitutional and political commitments and because they are they also require us to re-evaluate our relationship with the indigenous communities and with our colonial past.

These insights became clearer as I engaged with colleagues here. I mention this to underline the point that the strategies I will discuss are not frivolous or mere stratagems, but are deeply serious and

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1 The entire edifice of federal Indian law as well as the cultural tropes that have minimised the differences between the various tribal nations and softened the reality of conquest is part of this on-going apparatus. See for example Elizabeth Bird (ed) *Dressing in Feathers: The Construction of the Indian in American Popular Culture* (Westview Press, Boulder (CO), 1996).

2 See *United States v Mitchell* 445 US 535 (1980); *United States v Mitchell* 463 US 206 (1983); *United States v Navajo Nation* 556 US 287; and *United States v Jicarilla Apache Nation* 131 S Ct 2313, 564 US ___ (2011) at 2331 per Sotomayor dissenting [*Jicarilla Apache*].

are undertaken in absolute good faith. There will be disputes over remedies and over the extent of the evolution of the doctrine, but that is to be expected. Demanding that the trust obligation be taken seriously is also understood as a challenge to the institutional competency of courts; courts which, for the most part, will be loath to venture into uncharted doctrinal territory. It will be my task to demonstrate that the charts are there. We have had them in our hands all along. We have only to interpret them, like the symbols scratched onto the top of Queequeg's coffin they are written in a language that we should not dismiss merely because we do not initially grasp its significance.[3]

II THE PROBLEM OF TRANSLATION

Before I begin sketching out the linkage between the public trust duty and the responsibility to confront the challenge of climate disruption, I also want to describe the task of speaking across cultures and sovereignties while recognising that the natural processes at work neither respond to nor respect the distinctions people make. Borders and jurisdictions are meaningful to us, but they are only really useful for organising human activity; they are not real in any natural sense. They have legal and cultural significance but we should not pretend they are more than they are. Neither should we pretend they are the only way of organising experience merely because they are the most familiar to us or make the most sense to us.[4] They are places we occupy that can be negotiated, but as Oren Lyons has said, "[y]ou can't negotiate with a beetle"[5] and when we deal with the reality of climate change we have to confront the non-negotiable realities of the physical world.

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3 See Birgid Brander Rasmussen *Queequeg's Coffin: Indigenous Literacies and Early American Literature* (Duke University Press, Durham, 2012). As I will show, many courts have accepted the arguments premised on the public trust doctrine. See Gerald Torres and Nathan Bellinger "The Public Trust, The Law's DNA" (2014) 4 Wake Forest Journal of Law and Policy 281.

4 For example in a fascinating essay about memory and the idea of nostalgia, Professor Linda Charnes noted that:

> [I]n a recent article in the journal Cognitive Science, researchers described an Andean culture that speaks an Indian dialect called "Aymara", a language whose speakers "think differently than just about everyone else in the world. They see the future as behind them and the past ahead of them." … The reason for this reversal is that Aymaran speakers regard what they can know as "what you see in front of you, with your own eyes. The past is known, so it lies ahead of you. … The future is unknown, so it lies behind you, where you can't see it."
> Linda Charnes "Reading for the Wormholes: Micro-periods from the Future" (2007) Early Modern Culture <www.emc.eserver.org>. This is not to suggest, of course, that social constructions do not have real consequences in the world. As the anthropologist Renato Rosaldo once remarked in conversation, though sorcery might be an imaginary construct, the penalty for being a sorcerer is deadly real.

5 Oren Lyons is a Seneca leader who was quoted in Mary Christina Wood *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press, New York, 2013) at 3.

So while I will discuss the problems associated with locating the constituting obligations in our legal traditions, I do not want to forget that the discussion is always in the service of a larger task. That task, of course, is to figure out a way to get action on climate change going. The task is to facilitate with legal argument the goals of the environmental movement that has sought to move policy makers to press the large economic actors to take the appropriate steps to reduce carbon loading in our atmosphere before we have crossed the critical tipping point.[6] Nonetheless, the legal problems are daunting, especially because they also include complex domestic and international political problems. They implicate different world views as well as different priorities. The argument from urgency that climate activists make is that this is a problem that trumps all others; but we should not mistake arguments from power for arguments from legitimacy, even if they are treated as legitimate by those who are subject to them.

Because power is often confused in practice with legitimacy any regime that is attempting to reconcile truly heterodox world views will have to confront the problems of translation. Yet, even in relatively homogeneous societies, class, culture and institutional disjunctions also require confrontation with translation as an issue of legitimacy. The tendency is to repress difference, to force assimilation, to use soft power to elide the real conflicts. Sometimes, I suppose, that works, but in a polity committed to liberal legitimacy such a solution is revealed as illegitimate and so the problem of translation remains.

I have long been concerned with the problem of translation.[7] Anyone who is concerned with the problems of law recognises that legal categories do not describe the reality that most people live, but instead those categories force people who come into contact with the law to conform their understanding of reality to it. There is a kind of violence to this process. The best of those processes reconcile competing versions of meaning. That reconciliation will be reflected in a practice that recognises these differences and uses them to build links to an authority the competing sides can respect and understand. James Boyd White in his book *Justice as Translation* puts it this way:[8]

> Good translation thus proceeds not by the motives of dominance or acquisition, but by respect. It is a word for a set of practices by which we learn to live with difference, with the fluidity of culture and with the instability of the self. It is not simply an operation of mind on material, but a way of being oneself in relation to another being.

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6 See Bill McKibben (ed) *The Global Warming Reader: A Century of Writing about Climate Change* (Penguin, New York, 2012).

7 Gerald Torres and Kathryn Milun "Translating *Yonnondio* through Precedent and Evidence: the Mashpee Indian Case" [1990] Duke L Rev 625.

8 James Boyd White *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press, Chicago, 1994) at 257.

This process is part of the ordinary operation of law. After all, law is about providing a procedure for resolving conflicts. Because the question of what the appropriate authority is and how it is determined is part of the conflict to be resolved, it cannot be decided solely on the basis of power and remain legitimate. Instead, the translation must reconcile competing world views and create a kind of liminal space that is always provisional, but which is settled the moment it is created. This is difficult enough when the parties share basic cultural assumptions but it is considerably more difficult when they do not.

Thus, the very creation of the mythology surrounding colonisation is the first step in providing a way to translate the violence of domination into something else and that something else is the legitimacy of legal forms. One of the apparent differences between New Zealand and the United States is the status of the Treaty of Waitangi and the Treaties between the various tribal nations and the United States. Although the Treaty of Waitangi is often treated as a foundational document in the national history of New Zealand and thus, by some measure, constitutional, there is some dispute over its exact legal status.[9]

There is no such confusion within the structure of treaties in the United States between tribes and the federal government. The lack of confusion is perhaps best explained by the treaties' use as naked tools of conquest overriding their express legal nature, despite their explicit constitutional status.[10] Even if we concede that the existence of the treaties operate as something of a hedge against all extra-legal action, we must also concede that it is also a hedge that exists at sufferance.[11] The grant to the President of the power to enter into treaties with Indian nations always left tribes outside of the constitutional structure of the United States.[12] How tribes and Indian people would be accommodated within the United States or their claims assessed against non-Indians was always a function of the

9 See Lydia O'Hagan "Parliamentary Sovereignty as a Barrier to a Treaty-Based Partnership" (LLM Dissertation, Victoria University of Wellington, 2014).

10 Although the President until 1871 exercised the Constitutional treaty power to regulate relations with the tribes and prior to the existence of the United States the British entered into treaties with the Indian nations they encountered, the status of those agreements have always been a source of conflict. The clearest interpretation of course is that they are what they claim to be: Treaties between sovereigns, agreements between political groups with the power to make those agreements and to bind their members. Francis Paul Prucha *American Indian Treaties: The History of a Political Anomaly* (University of California Press, Berkeley, 1997) argued that these were never treaties in the commonly understood sense and should not be understood that way.

11 See *Lone Wolf v Hitchcock* 187 US 553 (1903).

12 *Talton v Mayes* 163 US 376 (1898).

relative military strength of the parties, despite voices of reason that suggested not only humanitarian but also legal necessities in dealing with Indian nations.[13]

The reason I understand this as a problem of translation is that one of the things I experienced in New Zealand was a sense that the foundational documents did, in some real sense, reflect an aspiration for the construction of the nation.[14] This meant at least two things to the people I spoke with. First, it meant the construction of a polity, that is, a political body that would have the power to decide real issues regarding the distribution of political power and with it the concomitant influence over resource use. Second, it meant the construction of a multicultural society that was consistent with liberal values.[15] These aspirations meant that radically distinct visions of the future had to be crafted within a conception of sovereignty that defined the nation as a whole.[16] The puzzle for indigenous people, of course, is that competing claims of national sovereignty is where all of the action really is. That is why the tug and pull of diplomacy and military engagement are all part of the evolution of domination into legal forms.

In the United States, tribal sovereignty while cabined within the judicially created category "domestic dependent nations"[17] never had any clear Constitutional purchase. Tribes were outside of the constitutional structure from the beginning. Pre-contact the tribes exercised and understood

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13 *Johnson v M'Intosh*, 21 US 543 (1823): "The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed …"

14 The role of international law, states, constitutional formation, treaties, NGOs and other international actors is part of a book length study by Cathal M Doyle *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, New York, 2015). One of the difficulties that I do not address in this paper, but which I will address in another paper I am currently working on is that native people in the United States occupy different juridical positions. For example although tribal Indians who are federally recognised are also indigenous people, their legal position arises by virtue of their Indian category not their existence as indigenous people. Thus the native people of Hawaii, Alaska, and the Pacific Islands have a different legal relationship to the federal government than Indian people, although they all occupy a subordinate legal status.

15 Here I heard fragments of the vigorous debate between James Tully, William Kymlicka and Brian Barry each of whom takes a significantly different position on the relationship of multiculturalism to liberalism and whether it is even coherent to argue that a strong version of multiculturalism is consistent with a strong version of liberalism. Yet, one of the issues that Barry seems to misunderstand in his otherwise excellent book, Brian Barry *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, Cambridge (MA), 2001), is that where groups are making different sovereignty claims their cultural arguments stand on a completely different footing than when groups that are otherwise part of the polity are asking to be excused from generally applicable norms or obligations.

16 Of course, whether the project of national sovereignty as it has historically been known is even worth arguing about is up for grabs. See Philip C Bobbitt *The Shield of Achilles: War, Peace, and the Course of History* (Alfred A Knopf, New York, 2003).

17 *Cherokee Nation v Georgia* 30 US 1 (1831) at 2.

themselves to be exercising what we could now call sovereign power in relation to other tribal groups. And initially they responded the same way to the Europeans.[18] The sovereignty that tribes exercised was military and local and ultimately subject to the power of the armies of conquest.[19] One might trace the jurisprudence of federal Indian law doctrinally as if to make logical sense of it, but there is greater wisdom in tracking it according to the military threat the tribes represented to the emerging nation and the other military, diplomatic or resource imperatives driving the new country. As the frontier changed, as more territory and native people came under the control (if not the jurisdiction) of the federal government, the doctrine was adapted to the changed conditions, but one thing never changed and that was the supremacy of the law of the conqueror.[20]

The colonial process of coming to terms with native people always involved transforming the violence of conquest into the legal and through that mechanism to translate the understanding into a form of legitimate authority. That is what Professor White meant when he suggested that legitimacy required learning to live with difference rather than the mere suppression of difference. It requires a translation across systems of meaning even where it is clear that the systems are rooted in at least some understanding of victor and vanquished and thus agonists; but vanquished does not mean disappeared and the failure of attempts at assimilation mean that the legitimacy of the state has to speak to all of whom it demands allegiance.[21]

What I want to turn to now is this: what is the essence of the obligation of the state that forms the core of its claim to allegiance? It cannot be the mere security of the citizens in a simple police sense. Hanoch Dagan and Avihay Dorfman identify the "two pillars of justice in the liberal state: substantive freedom and equality".[22] Of course, neither freedom nor equality is a simple concept. They are each composed of a variety of elements, but what I want to inquire into is whether, in the process of translating across the agonists in the colonial/treaty/constitutional process, it is possible to come to a point at which it is possible to say that this is the place where the legitimacy of the state is at stake for

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18 See for example Francis Jennings *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from Its Beginnings to the Lancaster Treaty of 1744* (WW Norton & Company, New York, 1984).

19 See Anthony Pagden *Lords of All the World: Ideologies of Empire in Spain, Britain and France, c 1500–c 1800* (Yale University Press, New Haven, 1998).

20 See Walter R Echo-Hawk *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Fulcrum Publishing, Golden (CO), 2010).

21 The assimilationist project was implied even at the beginning: see *Johnson v McIntosh* 21 US 543 (1823). The problem of agonists and translations across competing systems of meaning was one of the main subjects of Jean-François Lyotard's *The Post Modern Condition: A Report on Knowledge* (University of Minnesota Press, Minneapolis, 1984).

22 Hanoch Dagan and Avihay Dorfman "The Justice of Private Law" (Tel-Aviv University, 2015) at 18.

all sides. What is necessary, of course, is to be able to make that claim that without resorting to a trump of power.

Put another way, the general legitimacy of the state has got to rest on a foundation that does not itself resort to an illiberal claim. It is here that I want to re-examine the trust obligation that underlies the relationship of the state to its citizens or to those persons within its jurisdiction. This would require not just taking the public trust seriously in terms of recognising a broad responsibility towards public property that is the fit subject for public regulation but also taking the already recognised trust obligation towards indigenous people seriously as a model for the obligation that the state has towards all.[23]

III INDIGENOUS CLAIMS WITHIN A NATIONAL PROJECT

One of the issues that plagued the negotiations surrounding the United Nations Declaration on the Rights of Indigenous People (UNDRIP) was the fear that any claim of rights on behalf of indigenous people would entail threats to the territorial integrity of the states within which the claims were made.[24] The nature of the declaration precludes direct threats to existing sovereign claims to territory, even those rooted in colonial claims, but a right to culture for indigenous peoples necessarily entails the material capacity to reproduce that culture, so issues of resource allocation must clearly be on the table, although there is no clear path forward because of the thin substantive foundations in the Declaration.

Within the current status of indigenous claims, one of the things that UNDRIP contemplates within the decolonisation project of settler colonial nations is a national project of reconciliation.[25]

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23 See Wood, above n 5. In this sustained study Professor Wood argues that the trust responsibility lies at the core of the relationship between state and citizen. In a series of articles Professor Wood developed a critical analysis of the Indian Trust Doctrine. Her detailed knowledge of that doctrine greatly informed her more fully developed public trust analysis, but, in my view, they come from the same normative foundations.

24 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/RES/61/295 (2007). For example the tension between arts 26 and 46 highlights this problem. See art 26: "1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." Compare art 46(1): "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."

25 There is no reconciliation process required in UNDRIP. What I am suggesting is that the only way to understand the substantive force of the Declaration is that absent an obligatory legal process that would

The meaning of what reconciliation might require is why the idea of translation is so important. What it entails is nothing less than the reconceptualisation of what the nation *is* and whether that unifying conception is consistent with the indigenous and non-indigenous conceptions of nationhood.

While legal pluralism within spheres of specific sovereignty might be consistent with a broad conception of national identity, whether it is functional for those situations in which the contest is for resources that are not local is an open question. These are the places where mere words will be insufficient to work out the exact contours of sovereignty and jurisdiction. Jurisdiction often functions as a proxy for sovereignty, but whether it will be sufficient is part of the test of how the languages of conflicting systems get translated into a consistent legal structure.

We have seen the incompatibility of the effort to link jurisdiction to sovereignty in the doctrinal incoherence of US federal Indian law.[26] This incoherence is compounded by the wild swings of federal policy relating to Indians, put aside indigenous populations. But the fiction of the foundational importance of the Treaty of Waitangi offers some hope for New Zealand if for no other reason than that fictions sometimes matter.

Thus, an indigenous or an Indian project within a national project has got to come to terms with the changing nature of sovereign claims as well as the changing conceptions of the state. The state is just the technological expression of sovereign claims and the legitimate functions of the state are what the sovereign both permits and requires. Because there are multiple sovereign claims (as there would be in any federated polity) at root the question of legitimacy is whether the issue at the national level is the same at every subordinate (or coordinate) level. In coming to terms with a colonial power there are claims of reconciliation that are or must be consistent with the claims that would legitimise the state as an expression of the nation. It is here that the exploration of the trust responsibility that the colonial successor state has to indigenous populations yields insight into the general legitimate

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compel states to comply with each of the provisions of the Declaration and which would have enforcement powers within the member states, the indigenous groups and the states will have to work out the jurisdictional limits consistent with the sovereign conceptions that underlie the United Nations' declaration process.

26 The cases covering the various expressions of the trust responsibility of the federal government towards Indian tribes and Indian people are voluminous. See The American Law Institute *Restatement of the Law: The Law of American Indians: Preliminary Draft No 3* (Philadelphia, 2015) and the cases collected there. The trust duty was recognised from the very beginning in the foundational cases that have come to be known as the Marshall Trilogy (*Johnson v McIntosh*, above n 21; *Cherokee Nation v Georgia*, above n 17; and *Worcester v Georgia* 31 US 515 (1832)) but those cases also recognised what came to be called the plenary power. The duty also differs based on the kind of resource, but the express link between the trust duty, jurisdiction and sovereignty was perhaps nowhere clearer than in *Montana v United States* 450 US 544 (1981). In that case the Supreme Court decided that the Crow Tribe did not have the authority to regulate non-member hunting and fishing on non-Indian fee land within the boundaries of the reservation. It built on the so-called general principle of *Oliphant v Suquamish Indian Tribe* 435 US 191 (1978) where the Court determined that tribes have no jurisdiction over non-Indians, although the case only involved criminal jurisdiction.

obligations of the state, but also into the ways in which the obligations of the declaration might be understood.

Other than its statement of the rights of indigenous people, one of the chief values of UNDRIP is its placement of national projects within an international frame. The project of coming to terms with settler colonialism and the continuing legitimation of indigenous nationhood can now be understood as part of the system of international law. Yet, even phrasing it that way raises issues for how individual national reconciliations might proceed. Linda Smith warns us that the tools we use to understand indigenous people are as likely to lead us into darkness as into light.[27] But law is inherently and self-consciously the language of power. The language of judgment and the language of jurisdiction is performative.[28] What bringing the national processes into the international arena does is to subject domestic expressions of power to international normative critique and discipline.[29]

Each process of reconciliation is going to have a different expression and face different forms of resistance across the world. I suggested earlier in addition to translating across different epochs of colonialism there were different conceptions of modern/colonial divide and with it different legal treatment of the indigenous people who came within the ambit of each colonial project. Thus indigenous people in British North America struggled to remain free of European rule and were able to retain separate cultures, societies and nations beyond the impress of British legal power. But while I am focusing on the United States and New Zealand, the modern/colonial divide also applies to the colonial project of Spain and France in the New World. The principal implication of this epochal disjunction is the division between categories of Indian and Indigenous. That division has continuing legal and political implications.

What UNDRIP has done is it to use the processes of international law and policy to problematise the issue of indigeneity and to create a space where Indianess and its meaning within the modern context can be worked out in all of its complexity. Again, as Mignolo put it in a different context, but

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27 Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, London, 1999).

28 Many institutions and ordinary speech is littered with performative utterances, but law is one institution where their use is so common as to be unnoticed. It is just the way business is done. It is one of the ways that translation through the language processes of law is so fraught. Walter Mignolo puts the problem somewhat differently, but one worthy of consideration as we think about how to proceed. "This tension between hegemonic epistemology with emphasis on denotation and truth, and subaltern epistemologies with emphasis on performance and transformation shows the struggle for power." Walter Mignolo *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press, Princeton, 2000) at 26.

29 Professor Rebecca M Bratspies makes a form of this argument in Rebecca M Bratspies "State Responsibility for Human-Induced Environmental Disasters" (2012) 55 GYIL 175. Of course, we recognise the limitations of using international fora.

it applies here: "Internal and external borders are not discrete entities but rather moments of a continuum in colonial expansion and in changes in national imperial hegemonies."[30]

Thus, the idea of coloniality in UNDRIP is tied to the idea of indigeneity and it leaves the issue of the post-colonial outside of the project of reconciling the sovereignty of indigenous people with the sovereignty of the nation state. Indigeneity is doing a lot of work. It is doing ideological, political, temporal, domestic and international work. Remember, too, that the state can be conceived of as the technology of sovereignty and legitimacy which are now tied to the idea of reconciling coloniality with indigeneity.

One of the important things that the process I have been describing can do is to move the concerns of nations beyond the necessity of understanding the legal and moral requirements of reconciling the sovereign claims of indigenous people within their existing national borders. It can link together otherwise disparate claims and move from the national to the international to the global. In addition, the abstract claim of cultural rights in UNDRIP can precipitate a re-understanding of the trust claims that ground democratic legitimacy and that are not rooted in a single national claim. Thus the specific, not to say unique, expression of the resource or trust claim will be worked out in its particularity from nation to nation through the technology of the state, but the foundations of legitimacy can be tested by access to a trust thesis.

IV THE DEFINITION OF ENVIRONMENTAL RIGHTS

To claim to have a right is merely to assert an interest that is sufficiently strong to trigger a duty in another. Where the right comes from is a question that is too complex and thorny for this slender article. Suffice to say that in the United States many States have passed constitutional amendments guaranteeing a right to a clean or healthful environment and virtually all States have a public trust duty that informs the legislative power regarding the use of public resources.[31] Some who claim a right to a clean environment assert that right as one that is the basis of all other rights.[32]

By 22 April 1970, when the first Earth Day mobilised twenty million Americans to take to the streets to demand action from their government on the environment the idea that a clean and healthful environment was a right was well on its way to becoming conventional wisdom. The early 1970s saw the passage of the Clean Water Act, the Clean Air Act, the Endangered Species Act, the National

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30 Mignolo, above n 28, at 33.

31 See Mary Ellen Cusack "Judicial Interpretation of State Constitutional Rights to a Healthful Environment" (1993) 20 BC Envtl Aff L Rev 173 (see the constitutional provisions and cases cited therein). See also Wood, above n 5.

32 See for example Shari Collins-Chobanian "Beyond Sax and Welfare Economics" (2000) 22 Environmental Ethics 133 at 135.

Environmental Policy Act and the creation of the Environmental Protection Agency. The way agencies did business would begin the change.

Simultaneously, a young scholar at the University of Michigan, Professor Joseph Sax, published a watershed essay: "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention".[33] This essay changed the way students of environmental law and environmental activists thought about the role of courts in providing oversight over the political branches of government. The essence of his essay was the demonstration that there are resources held in common for the people over which the state, although it exercises control, must exercise that control consistent with the general good of the people and that good must be demonstrable, not merely assumed.

The public trust doctrine is a principle that refers to the general fiduciary obligation of government toward its citizens, and to the related, fundamental understanding that no legislature can abdicate or irrevocably alienate its core sovereign powers. The public trust doctrine is meant to protect those resources that have an inherently public character and are not owned in the same way as traditional property. The government does not hold these natural resources in fee simple, but rather holds them in trust for the people and only for purposes that benefit the public interest. The public trust doctrine also embodies the idea that every generation has a temporary right in the resources of the Earth, and those interests are protected by the inherently limited ownership allowed in natural resources. Even those resources that must be consumed to be used must be consumed with future generations in mind.

The public trust is one of those pre-existing principles upon which the legitimacy of the state was constructed. It is a way of talking about what the government is for. What Professor Sax argues is that administrative decisions have got to take into account the impact of government actions on the trust responsibility. But if he were only talking about a principle of administrative law, the public trust doctrine would be of limited, if still important, utility. However, he is clearly suggesting more. What he does not directly address, but what is necessarily an important implication of his work is that the legislative power itself is bounded, not just by the general understanding of the police power or by the express language of the constitution, but that the police power itself is informed by the contours of the obligations of the public trust doctrine. Whether those limitations could accurately be declared an environmental right, they are clearly a form of environmental privilege[34] that is part of the compact of legitimacy that underlies the basic agreement between the people and the nation. The state is the apparatus that mediates and operationalises that basic agreement and where the modern state

33 Joseph L Sax "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Mich L Rev 471.

34 I mean this in the Hofeldian sense where if the people could be said to have the privilege of being free from environmental harm, there is a duty on the state to create the conditions that satisfy that privilege.

incorporates many nations, the argument here is that the fundamental premise for legitimacy, that is the trust duty, remains.

A Indigenous Claims and Environmental Rights

There is plenty of loose talk about rights, but to recur to UNDRIP, Article 29 clearly guarantees to indigenous communities a right to protection of the environment.[35] If the previous analysis is right (or even approximately right) then the translation of the right to culture combined with the right to the protection of the environment as those rights get worked out through the reconciliation of indigenous sovereignty with the various national sovereignties means that the trust duty incumbent on the colonial states will have to reflect not just the responsibility towards the indigenous groups, but will have to be generalised to include both the indigenous and non-indigenous sovereigns. This is where the intersection of the general public trust responsibility and the special trust responsibility toward indigenous people occurs. It will naturally first arise in the struggle over jurisdiction over resources, but there are resources that are res communes and not subject to the sovereign control of any one. The kinds of resources that come within ambit of res communes ought to reflect our understanding of those resources. As our understanding evolves, the kinds of resources subject to this analysis will also change. Thus, the challenge of climate disruption and the increasing carbon loading of the atmosphere suggest that that the air resource represents the kind public resource that is classically res communes and ought to be regulated for the benefit of all the people.

Indigenous people, perhaps even more than any other group of people, have a recognised right to environmental protection. That right, when understood as part of the trust responsibility can illuminate why it is a preexisting right for *all* persons not just tribal groups. Unless this is true, then the trust duty as it relates to indigenous groups is merely a subsidiary responsibility, one that the national states exercise or adhere to as they understand it or see fit. Not respecting any particular trust claim would not be understood to be a challenge to the legitimacy of the authority of the state or the nation, but merely a technical legal issue. This is the current state of the law in the United States where the tribal trust responsibility is largely understood as a gratuity bestowed by the non-indigenous state on Indian tribes and people.[36] That characterisation is the counsel of power not law, and it certainly is not the characterisation that takes the idea of a trust duty seriously.

But if UNDRIP has created a space that has problematised indigeneity and Indianess as well as creating an international recognition not just of cultural rights, but of environmental rights, then the trust responsibility that is at the heart of the original contact has to be reimagined both domestically

35 UNDRIP, above n 24, art 29(1): "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination."

36 See *Jicarilla Apache*, above n 2.

and internationally. What I have been suggesting is that the way to do that is by understanding it through the lens of the public trust doctrine. Unless states are willing to repudiate a fundamental obligation to those over whom their exercise jurisdiction, if not sovereignty, the public trust doctrine remains as a test of the legitimacy of the state's actions with regards to property that is legitimately res communes. There may be additional duties with regard to indigenous communities, but they are in the same family as the *general* public trust.

B The Internationalisation of Environmental Rights

UNDRIP internationalised indigenous rights. Environmental rights have an international dimension as well.[37] The International Environmental Agreements Database Project of the University of Oregon lists over 1,100 multilateral, 1,500 bi-lateral and 250 other international environmental agreements.[38] The problem of climate disruption has led domestic courts and policy-makers to take into account the impact of local decisions on what is a global problem.[39] Just as recently as last week (as of 24 June 2015) the Hague District Court ordered the government to reduce the production of greenhouse gases. The case was summarised as follows:[40]

> The State must do more to avert the imminent danger caused by climate change, also in view of its duty of care to protect and improve the living environment. The State is responsible for effectively controlling Dutch emission levels. Moreover, the costs of the measures ordered by the court are not unacceptably high. Therefore, the State should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts. Any reduction of emissions contributes to the prevention of dangerous climate change and as a developed country the Netherlands should take the lead in this.
>
> With this order, the court has not entered the domain of politics. The court must provide legal protection, also in cases against the government, while respecting the government's scope for policymaking.

One of the interesting aspects of this opinion is that it expressly places domestic policy within the framework of global problems and that it does so by confronting the claim that the court is entering the realm of policymaking rather sticking to its knitting and just deciding legal claims. For purposes

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37 The recent encyclical issued by Pope Francis speaks to both the environment and to the needs of indigenous people. *Laudato Si'* (second encyclical of Pope Francis, 24 May 2015).

38 See the International Environmental Agreements (IEA) Database Project <iea.uoregon.edu>.

39 For example, this is the focus of the litigation that is the central project of "Our Children's Trust" and network building of The Global Cool Cities Alliance. See Our Children's Trust <www.ourchildrenstrust.org>; and Global Cool Cities Alliance <www.globalcoolcities.org>. The litigation initiated by Our Children's Trust explicitly uses the public trust doctrine to push courts into ordering remedies much like that ordered by the Dutch court. Their web site details the state and federal litigation and various levels of success it has achieved.

40 "State ordered to further limit greenhouse gas emissions" (24 June 2015) de Rechstpraak <www.rechtspraak.nl>.

of extending the public trust doctrine to the realm of climate change litigation both of these claims are exactly what activists have been facing and perhaps more to the point of the earlier discussion, it is precisely what tribal and indigenous activists have been facing whenever they have tried to make the State take trust claims seriously.

The reason the application of a robust public trust principle makes people nervous is that it seems like a rudderless assertion of democratic power over the processes of normal politics. Or, put another way, it seems like a means of asserting a kind of constitutional politics into what many would like to imagine are merely ordinary politics. Yet, the constitutional structure derived from British jurisprudence suggests that such moments can and do arise.[41] In addition, they were contemplated in the very structure of the American Constitution itself. Here I am not talking about the formal constitutional amendment procedure, Professor Ackerman addresses that at length. Instead, I am suggesting what some might think of as a more radical claim made by Professor Charles L Black in *A New Birth of Freedom: Human Rights Named and Unnamed*.[42] He makes the claim that the revolution that gave rise to the United States (and implicitly all subsequent democratic republics) turned the idea of legitimacy on its head and there was a reason the princes of Europe feared it. Rather than having a government of unlimited power and a people of limited rights, the legitimacy of the state would now be premised on a government of limited power and a people of unlimited rights. That all of the rights were not yet enumerated was not proof that they did not exist. What mattered was whether there was a legitimate process for their enumeration.

What the public trust doctrine does in the context of climate change litigation is to propose a process for enumerating the obligations of the state to the people. The models are out there and the stated obligations are out there; we see the obligations in UNDRIP and in the numerous international agreements. The background obligations of the public trust form the framework for the state commitments to protect the people from the consequences of climate disruption. The role of indigenous people and Indian people is clear. They are in a specific legal position in relation to the states that make up the successor states of settler colonialists. How that relationship gets worked out can also provide a kind of blue print for moving forward with a fuller articulation of environmental rights through a trust principle.

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41 The most comprehensive and thorough treatment of this process within the context of American Law is the three volume treatise by Professor Bruce Ackerman *We the People Volume 1: Foundations* (Harvard University Press, Cambridge (Mass), 1993); *We the People, Volume 2: Transformations* (Harvard University Press, Cambridge (MA), 2000); and *We the People Volume 3: The Civil Rights Revolution* (Harvard University Press, Cambridge (Mass), 2014).

42 Charles L Black *A New Birth of Freedom: Human Rights, Named and Unnamed* (Grosset/Putnam, New York, 1997).

V CONCLUSION: CAN THERE BE A GLOBAL EXPRESSION OF A TRUST CLAIM?

The basic public trust idea within the contours of a single sovereign entity is easy enough to understand. Cases at the state level in the United States have even suggested that the trust responsibility binds the legislative power of the state (at a theoretical level, the legislative power is supposed to represent the combined power of the people in an institutional setting and the constitutional limitations are a form of pre-commitment limitation on the use of that power).[43] The atmospheric trust litigation begun by Our Children's Trust is premised on the idea that the atmosphere is res communes and thus part of the public trust property. The failure of the various states to protect against its degradation is a breach of the trust responsibility and leads to other serious consequences all of which combine to threaten the well-being of the people the state is charged with protecting. Like the recent Dutch litigation, the public trust litigation asserts that one of the obligations of the state is to enforce the reduction of greenhouse gases. This obligation is not diminished by the reality that climate disruption is a global problem demanding a global response. Instead, that reality may, in fact, increase the obligation to act, especially in the developed countries.

One of the lessons that can be learned from the evolving relationship between settler colonial states and indigenous populations (including the problematising of Indianess within the broader category of indigeneity) is that what seems to be a local problem really has global resonance. It may have local expression, but that should not be misunderstood as isolated expression. Instead, it has to be understood as a particular part of a general phenomenon and thus each effort at engagement can be a lesson for others. One expression of the trust responsibility between the settler colonial state and the indigenous people it is responding to can be a lesson for others. Importantly, it can also be a lesson in how the trust responsibility is expressed legally and institutionally. Those lessons, regardless of how local they might seem can be understood as part of a global process. What global institutional structure evolves from the processes set in motion by UNDRIP as well as domestic struggles apart from the international system are not clear. What is clear is that each will inform the other. Similarly, attention to the evolving trust duties both specific to indigenous people and non-indigenous people will inform our understanding of the general public trust doctrine and its attendant duties. As important, it will also inform our understanding of what constitutes a legitimate state. The trust duty will once again be understood as the fundamental attribute of legitimate authority.

43 See *Marks v Whitney* 491 P 2d 374 (Cal 1971); and *National Audubon Society v Superior Court* 658 P 2d 79 (Cal 1983).

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