Property: some Pacific reflections

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I INTRODUCTION

In previous addresses which I have been privileged to present to your meetings, I have attempted to do two things. First, to offer a little philosophy to offset somewhat the concentration on the mundane but necessary business of reciprocal enforcement of judgments and extradition treaties. Secondly, however, to relate that more academic element to questions likely to come before the distinguished law officers and legal advisers here. I would like to adopt the same approach today in my treatment of the concept of "property". My philosophical part will compare a European and Polynesian theory of property, and will lead to some comment on modern developments in relation to "property". The practical part will analyze the way in which our various constitutions deal with the "protection of property", and will point to an emerging difficulty in reconciling the constitutional protections with the needs of the nation as a collective. I should make it clear that I speak as an independent student of the matters under discussion and not in any representative capacity. The views presented are personal.

II JOHN LOCKE'S VIEW OF "PROPERTY"

John Locke defended the appropriation of things by individuals on the basis that the expenditure of labour on an object by an individual in some way "infuses" that object with the "personality" of the individual. Karl Olivecrona has explained this conception, which draws also on the thinking of Grotius, as follows:[1]

> Thus each individual was supposed to possess, in the state of nature, a sphere of his own. By Grotius this sphere was called the *suum*, that which belongs to oneself.
>
> Grotius here makes use of a natural and common idea. We can observe it in children. When a child has picked some strawberries, they are said to be "his" or "hers". If they are taken from the child by a naughty boy, this is acutely felt, not only because of the loss of the strawberries. The act is experienced by the child as an attack on itself, that is, on its personality. In this way we feel, all of us, with regard to objects that "belong" to us. They are supposed to be joined to ourselves. We have the feeling of our personality being in some inexplicable way extended to encompass the objects we own. Therefore, if anything is taken from us or damaged, we have the experience of an attack on ourselves. The feeling differs, of course, in strength depending on circumstances. It is especially pronounced with regard to cherished things in daily use

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1 K Olivecrona "Locke on the Origin of Property" (1974) 35 Journal of the History of Ideas 211.

> or connected with memories. In the case of land it can rise to a high degree of intensity. If a farmer is deprived of the soil which he and his forefathers have cultivated for generations, he will feel it as a severe amputation.

Olivecrona explains Locke's use of the "*suum*" concept as a basis for the "appropriation" of property:

> Here we have a most unequivocal expression of the idea that the personality is extended to encompass physical objects. The deer that the Indian has killed is *his* in the sense that it is a part of himself. Locke is not encumbered by the notion that *dominium* is a moral faculty against all other men. He only maintains that the object is included within the sphere of the personality, or within the *suum*, as Grotius would have said, by being appropriated. But when the object has been included within that sphere, it will be an injury to the possessor to deprive him of it, for his own person is exclusively his own. "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself." Therefore, an attack on that which belongs to the personality constitutes an injury; and the injured party is licensed to react with violence ...

Locke goes on to explain the concept of appropriation. His idea is that I infuse something of my personality into an object in spending some "labour" on it, "[f]or a man's labour is his own."

The *Encyclopedia of the Social Sciences*, published in 1933, proposed that:[2]

> [Locke's] celebrated doctrine that the right of property ultimately depends upon labour alone had some influence on Adam Smith and subsequent economists and is still an operative force in determining the course of judicial review of the regulation of business in the United States.

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2 *Encyclopedia of the Social Sciences* (Macmillan, New York, 1933) Vol 9, 594.

III TAMATI RANAPIRI'S ACCOUNT OF "HAU"

Marcel Mauss, in his essay *The Gift*, written in 1925, quotes and discusses a statement by a Maori expert, Tamati Ranapiri, which was made available to Elsdon Best. The statement is translated in Mauss' essay as follows:[3]

> I shall tell you about *hau*. *Hau* is not the wind. Not at all. Suppose you have some particular object, *taonga*, and you give it to me: you give it to me without a price. We do not bargain over it. Now I give this thing to a third person who after a time decides to give me something in repayment for it (*utu*), and he makes me a present of something (*taonga*). Now this *taonga* I received from him is the spirit (*hau*) of the *taonga* I received from you and which I passed on to him. The *taonga* which I receive on account of the *taonga* that came from you, I must return to you. It would not be right on my part to keep these *taonga* whether they were desirable or not. I must give them to you since they are the *hau* of the *taonga* which you gave me. If I were to keep this second *taonga* for myself I might become ill or even die. Such is *hau*, the *hau* of personal property, the *hau* of the *taonga*, the *hau* of the forest. Enough on that subject.

Mauss comments on the text in these terms:[4]

> The obligation attached to a gift itself is not inert. Even when abandoned by the giver, it still forms part of him. Through it he has a hold over the recipient, just as he had, while its owner, a hold over anyone who stole it. For the *taonga* is animated with the *hau* of its forest, its soil, its homeland, and the *hau* pursues him who holds it.
>
> It pursues not only the first recipient of it or the second or the third, but every individual to whom the *taonga* is transmitted. The *hau* wants to return to the place of its birth, to its sanctuary of forest and clan and to its owner. The *taonga* or its *hau* - itself a kind of individual - constrains a series of users to return some kind of *taonga* of their own, some property or merchandise or labour, by means of feasts, entertainments or gifts of equivalent or superior value. Such a return will give its donor authority and power over the original donor, who now becomes the latest recipient. That seems to be the motivating force behind the obligatory circulation of wealth, tribute and gifts in Samoa and New Zealand.

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3 See M Mauss *The Gift; Forms and Functions of Exchange in Archaic Societies* (Cunnison trans) (Routledge & Kegan Paul, London, 1966). See also the useful discussion in G McCall "Association and Power in Reciprocity and Requital: More on Mauss and the Maori" (1981-82) 52 Oceania 303. A text in Maori is there recorded, as is a translation by Biggs into English, which differs from the Mauss text. The Biggs translation was prepared for M Sahlins *Stone-Age Economics* (Aldine-Atherton Inc, Chicago, 1972), in which a valuable chapter is devoted to "The Spirit of the Gift". The original account, in Tamati Ranapiri's hand, is to be found in a letter from Ranapiri to Elsdon Best, dated "Manakau, 23 November 1907". The letter is extant in the Polynesian Society's Papers (MS 1187, Folder 127) in the MS Collection of the Alexander Turnbull Library, Wellington.

4 Mauss, above n 3, 9-10.

IV FOUR COMMENTS

There are four things to be said about these two accounts - of John Locke and Tamati Ranapiri. First, that they both employ a similar structure: objects in the world get "injected" with something as a result of the actions of human beings. Secondly, we should heed Levi-Strauss' warning against treating such accounts - whether European or Polynesian - as revelations of the true basis of the institutions which they claim to describe. Rather should we see such accounts as:[5]

> The conscious form in which men in a particular society, where the problem (of exchange) had a particular importance, have grasped an unconscious need the explanation for which lies elsewhere.

The third thing which might be said is that Locke's model, that of Western commercial thought, puts up fences against the world. Ranapiri's model insists on gateways through which benefits are to be shared. Perhaps the "underlying need" - whether "unconscious" or not - is in the one case the protection of individual autonomy, and in the other the preservation of the collective. An American writer has recently contrasted the "absolute" approach to property (which focuses on the isolated independence of the individual) - with a "comprehensive" approach - which would stress that:[6]

> individual autonomy and social context are in fact deeply intertwined. By viewing a collective context as necessary for the definition and exercise of individual rights, the comprehensive approach to property forces us to rethink the relationship between the community and individual rights ...

The fourth and final thing that might be said, is that our accounts point to a difference in cultural perception as to the obligations entailed by the gift. The absolute power to dispose, central to the Lockean model, entails an absolute power to receive. The donee is away free, and entitled to the benefits of the gift. But Polynesian custom, as explained by Tamati Ranapiri, required that the benefits of the gift be shared with the original donor. If we were looking to summarise the feeling of discontent in Maoridom concerning the modern New Zealand outcome, might we not say that there has been a failure to share the benefits of the gift represented by the Treaty of Waitangi - contrary to Tamati Ranapiri's understanding of the requirements?[7]

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5 See the introduction by C Levi-Strauss to *Marcel Mauss: Sociologie et Anthropologie* (Presses Universitaires de France, 1973) xxxix. Translation by the present writer.

6 LS Underkuffler "On Property: An Essay" (1990) 100 Yale LJ 127, 147.

7 The characterisation of the Treaty of Waitangi (1840) as involving gifts was, to the writer's knowledge, first articulated by the Waitangi Tribunal, in the Tribunal's Report of 17 March 1983 on the Te Atiawa Claim in respect of fishing grounds at Waitara (WAI 6). At para 10.2, the Tribunal reported: "That then was the exchange of gifts that the Treaty represented. The gift of the right to make laws, and the promise to do so so as to accord the Maori interest an appropriate priority."

V VATTEL'S CLASSIFICATION OF PROPERTY

When Vattel sought to capture "The Law of Nations: Or the Principles of Natural Law" in 1758, he wrote as to "property" in things:[8]

> Let us now consider the character of the various things embraced in the territory occupied by a Nation and seek to lay down the general principles of the law governing them ... . There are things which of their very nature cannot be appropriated; there are others of which no one claims the ownership and which, after a nation has taken possession of a country, remain common to all as they originally were. The Roman lawyers term them *res communes*, things common; such were, with them, the air, running water, the sea, fish, and wild beasts.

Vattel's analysis treated all things which could be owned as belonging fundamentally to the Nation in the sense that they formed the wealth of the Nation and were subject to its jurisdiction. However, beyond that level, Vattel distinguished between "Public Property" and "Private Property". "Public Property" comprehended three kinds. First, those things which "are reserved for the needs of the State and constitute the *domain of the Crown*". Secondly, those things which "remain common to all the citizens, who make use of them at need or in accordance with laws regulating their use: these Vattel termed "*common property*". Thirdly, things "which belong to some group of persons, or community, and are classed as *joint property*". As against the category of "public property", but of course still subject to the fundamental jurisdiction of the Nation, stood "property belonging to individuals" which Vattel called "*private property*".[9]

VI PRIVATISATION OF PUBLICLY OWNED ASSETS

Vattel would have been surprised to learn that some of what he termed "common property" would, in the late twentieth century, be transformed into "private property". Although it must be acknowledged that the line between state regulation of the use of common property (for example, licences to fish) and the conversion of that common property to private property is a fine one, good indices of private property are the presence of perpetual or very long term exclusive rights, and free transferability.

In a recent article, my friend and former colleague, Matthew Palmer, has admirably stated the rationale for the market economy, and thus for "privatisation" of publicly-owned assets. Palmer states:[10]

> Market prices function as signals to producers about what production and marketing decision to make. Individual producers are motivated by their own positive and negative incentives. It is not necessary that producers or consumers understand the conceptual basis of a market economy. Instead, they merely have to respond to the

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8 E de Vattel *Les Droit Des Gens ou Principes de la Loi Naturelle* (Fenwick trans of the 1758 edition) (Carnegie Inst, Washington, 1916) Vol 3, 94.

9 Vattel, above n 8.

10 MS Palmer "Privatisation in Ukraine" (1991) 16 Yale J of Int L 453, 474.

> incentives created. In theory, these incentives, and the operation of prices that are formed by free markets, induce people and firms to act efficiently.

The problem with the "invisible hand of the market" is that it depends on what Adam Smith explicitly acknowledged to be a *fiction* - namely that individuals invariably act only in their own self-interest. Theoreticians of the allocative efficiency of the market would profit from reading Hans Vaihinger's illuminating work on Fictions, in which that author traces the "ideational shift" from fiction to hypothesis to dogma.[11] We forget that we only *pretended* that people act exclusively in their economic interest to see what principles might be generated *if* the world were really like that. But the world is not really like that, and it is certainly not like that in small Polynesian communities, as anyone who knows them will attest. As Raymond Firth pointed out:[12]

> the emphasis upon the influence of such non-economic motives in the economic behaviour of the Tikopia is necessary as a caveat to the popular tendency in our society to regard the profit-seeking motive as "natural".

Furthermore, it must be said that the property which is created by many privatisations is unlikely to be of the character proposed by Sir William Blackstone in his *Commentaries on the Laws of England* of 1766. Blackstone, in Lockean spirit, had viewed the right of property as:[13]

> The sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

But those who hope to eject the State from the commanding heights of the economy, to reduce it to a policeman in the marketplace, must reckon with the stubborn political fact that if the people come to see, for example, the price of electricity as a political issue, then a political issue it will be. Governments cannot escape from political issues: they will find ways of moderating that "sole and despotic dominion". Professor Sir Kenneth Keith considered the limits of Blackstone's doctrine in his 1988 Cook Memorial Lecture.[14] Sir Kenneth found it to be more bark than bite, because it conceded Parliament's power to derogate by legislation in the general interest.

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11 H Vaihinger *The Philosophy of "As If": a System of the Theoretical, Practical and Religious Fictions of Mankind* (Ogden trans) (Kegan Paul, London, 1924).

12 R Firth *Primitive Economics of the New Zealand Maori* (Routledge & Sons, London, 1929) 360.

13 W Blackstone *Commentaries on the Laws of England*, Vol 2, 2.

14 K Keith "Commercial Law Reform: Processes with a Purpose" 1988 Cook Memorial Lecture.

I would end this first part of my text, which some of you may have found overly abstract, with Sir John Salmond's down-to-earth judgement:[15]

> Ownership is the right of *general* use, not that of absolute or unlimited use. He is the owner of a thing who is entitled to all those uses of it which are not specially excepted and cut off by the law. No such right as that of absolute and unlimited use is known to the law.

VII CONSTITUTIONAL SURVEY IN THE PACIFIC REGION

It is sometimes said that the progenitor of constitutional guarantees of property rights is Magna Carta - the Great Charter of 1215 to which King John set the Great Seal of England. Clause 39 of that document provided that:

> No free man shall be taken or imprisoned, or be disseised of his freehold or liabilities, or free customs, or be outlawed or exiled, or any otherwise damaged, nor will we pass upon him, nor send upon him, but by lawful judgement of his peers, or by the law of the land.

Indeed, it is clear that, whatever some of the more obscure phrases in that promise might mean, it is an acknowledgement that among other things, property interests are protected against arbitrary state actions. The fifth and fourteenth Amendments to the United States Constitution, (inserted in 1791 and 1868 respectively), are derived from that source.[16] The Fifth Amendments provide that no person "shall be ... deprived of ... property, without due process of law, nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law".

The Universal Declaration of Human Rights, proclaimed by the General Assembly in December 1948, although not enjoying binding force, provides in Article 17 that "[e]veryone has the right to own property", and that "no one shall be arbitrarily deprived of his property". On the other hand, the International Covenant on Civil and Political Rights of 1966, which does create binding obligations at international law for signatory states, does not refer to property rights as such, although some provisions of that Covenant may have indirect relevance to issues concerning property.

When we turn to the contemporary Constitutions in our part of the world - the South Pacific - we find protection for property rights in almost all the written Constitutions. Let me survey a few of these.

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15 JW Salmond *Jurisprudence* (10th ed, Sweet & Maxwell, 1947) 425.

16 For a discussion of the link between Magna Carta and the American provisions, see HD Hazeltine "The Influence of Magna Carta on American Constitutional Development" in *Magna Carta Commemoration Essays* (Malden ed) (Royal Historical Society, 1917).

1 *Kiribati* (1979). Article 3(c) secures "protection for the privacy of ... home and other property and from deprivation of property without compensation". Article 8(1) provides that:

> No property of any description shall be compulsorily taken possession of ... except where ... :
> (a) [It is necessary for certain stated purposes], and
> (b) [There is reasonable justification], and
> (c) [There is provision for compensation].

Article 8(2) saves certain takings of property from the operation of the fundamental guarantee. These include taxation, fines lawfully exacted, safety measures, court judgments, etc ...

2 *Nauru* (1968). Article 3(a) protects "the enjoyment of property". Article 8(1) declares that:

> No person shall be deprived compulsorily of his property except in accordance with law for a public purpose and on just terms. [Permitted derogations are specified].

3 *Papua New Guinea* (1975). Article 53 states that:

> Possession may not be compulsorily taken of any property ... except in accordance with an Organic Law or an Act of Parliament and unless [the property is reasonably required for a public purpose]. Permitted derogations are specified.

4 *Western Samoa* (1960). Article 14 provides that:

> No property shall be taken possession of compulsorily ... except under the law ... [which must compensate and allow judicial determinations]. [Permitted derogations relate to taxation, criminal penalties, execution of judgments, health and safety, etc.]

5 *Solomon Islands* (1978). Articles 3(c) and 8 provide that:

> No property of any description shall be compulsorily taken possession of ... except where [certain conditions are met, or in the case of a usual range of permitted derogations].

6 *Tonga* (1875). Article 1, in the "Declaration of Rights" recites that:

> All men may use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will.

Incidentally, a better statement of the classical Lockean model of property could hardly be found! Article 18 requires that:

> If the Legislature shall resolve to take from any person or persons their premises or ... their houses for the purpose of making Government roads or other work of benefit to the Government, the Government shall pay the fair value.

Finally, article 104 explicitly asserts the radical title of the King: "All the land is the property of the King."

7 *Vanuatu* (1980). Article 5(l)(f) guarantees "protection for the privacy of the home and other property and from unjust privation of property". But article 7 seeks to balance the "Fundamental Rights" with "Fundamental Duties". One of these is stated in article 7(g) to be:

> To contribute, as required by law, according to his means, to the revenues required for the advancement of the Republic and the attainment of the national objectives.

8 *Cook Islands* (1964). By 1981 Amendment, article 64(l)(c) declares the:

> Right of the individual to own property, and the right not to be deprived thereof except in accordance with law.

Article 40 also forbids the compulsory acquisition of property except in accordance with law which must compensate in a judicially reviewable manner. Permitted derogations of the usual type are listed.

9 *Tuvalu* (1986). Section 11(1)(h) of the Constitution of Tuvalu declares "protection for the privacy of ... home and other property" to be a fundamental right and freedom. Section 20 forbids deprivation of property except under an Act of Parliament, for a public purpose, with "sufficient reason," and with prompt compensation. The conditions are expressly made subject to judicial review. A list of permissible derogations of the usual type is provided in Section 20(9).

10 *New Zealand.* Although Magna Carta and the common law development upon it no doubt provides a basis of protection against arbitrary deprivation, the New Zealand Bill of Rights Act 1990 deliberately omits property rights from those which Courts are enjoined to give effect to, where possible, in interpreting legislation. This omission reflects the inclination of the New Zealand Act towards "procedural" rights and its adherence to the Covenant on Civil and Political Rights.

11 *Niue* (1974). The Constitution of Niue contains no "fundamental rights and freedoms" such as are found in the other codified constitutions. It would seem that Niue must rely upon Magna Carta and the general common law presumption

against confiscatory legislation. Lord Atkinson expressed that presumption in *Attorney-General* v *De Keyser's Royal Hotel Ltd*:[17]

> The recognised rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

The Niuean position would thus appear to be identical to that pertaining in New Zealand.

12 *Australia* (1901). The Constitution of the Commonwealth of Australia empowers the Federal Parliament to make laws with respect to, *inter alia*:

> The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. (Section 51(31)).

A comprehensive and useful treatment of the significance of this provision is found in Professor Colin Howard's text on Australian Federal Constitutional Law.[18] In general, the Australian jurisprudence appears to give "property" a wide meaning, as is evidenced in the leading case of *Minister of State for the Army* v *Dalziel*.[19] Furthermore, Australian courts have insisted on the reviewability of compliance with the requirement for "just terms," and have developed a test of "fairness" which seeks to balance the interests of individuals with those of the community at large.

IX THE LIKELY APPROACH OF THE COURTS TO PROPERTY PROVISIONS

South Pacific Courts are unlikely to follow the American jurisprudence on the content and limits of the constitutional protection of property. That jurisprudence carries baggage dating from the struggle between FD Roosevelt's "New Deal" legislation and the Supreme Court. Furthermore, as Underkuffler has reported, the American approach has become fragmented into several tests: "the resulting incoherence is profound."[20]

It is more likely that the Commonwealth jurisprudence, gathered and systematised by the Judicial Committee of the Privy Council in its consideration of appeals from West Indian and other jurisdictions, will provide the basis for the approach of courts in our region. A broad view is likely to be taken of the concept "property". It can include "money," as was held in *A-G for Trinidad and Tobago* v *Mootoo*.[21] In the Mauritius

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17 [1920] AC 508, 542.
18 C Howard *Australian Federal Constitutional Law* (3 ed, Law Book Co, Sydney 1985) 441-459.
19 (1944) 68 CLR 261.
20 Underkuffler, above n 6, 130.
21 [1976] 28 WIR 304.

case of *Societe United Docks* v *Mauritius*,[22] the Privy Council had to consider a purported amendment of the Code of Civil Procedure which would have empowered the Attorney-General to object to the enforcement of any arbitration award which was, in the opinion of the Attorney-General, contrary to the public interest. The amendment would also have cut off appeals to the courts. The Privy Council found that the expression "property" in the Mauritius Constitution included "choses in action" and the "right to sue for and recover damages".[23] Their Lordships observed:[24]

> it suffices that the amending Act was a coercive act of the government which alone deprived and was intended to deprive the appellants of property without compensation and this infringed the constitution.

Although "property" is likely to be given a wide ambit, the Privy Council has shown that it will take a realistic view of the right of the state to intervene in economic issues. In *Morgan* v *Attorney-General of Trinidad and Tobago*,[25] a rent restriction Act was before the Privy Council. In upholding the Act, Lord Templeman observed:[26]

> Many societies which pay proper regard to the rights and freedoms of the individual conclude that it is reasonably justifiable to control housing rents without at the same time making any attempts to control other incomes or to control other prices. Landlords have no fundamental right to increases of rent which reflect inflation.

In general, however, it can be expected that the "property provisions" in the South Pacific constitutions will provide a fertile bed for future litigation as governments seek to make business interests - which will often be foreign - responsive to the needs of fragile economies and traditional social systems.

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22 [1985] 1 All ER 864.
23 Above n 22, 877 (per Lord Templeman).
24 Above n 22, 877.
25 [1988] 1 WLR 279.
26 Above n 25, 300.