Book Reviews

Justice and Legitimacy in Māori Claims.

Reflections on Jock Brookfield's Waitangi and Indigenous Rights: Revolution, Law, and Legitimation.

Auckland University Press 2006

October 2007 saw the New Zealand police make the quite startling announcement that they had successfully disrupted a home-grown terrorist organisation. In a series of dawn raids, 16 arrests were made under the *Terrorism Suppression Act 2002*. While the police operation was nation-wide, and targeted a mixture of environmental and political groups, police action was most visibly and sensationally concentrated on the small rural Māori community of Ruatoki, which was sealed off by squads of heavily armed police in the early hours of October 15th. Police alleged that revolutionary training camps in the use of explosives and automatic weapons, run by members of the local Tuhoe iwi,[1] had been held in the dense bush of the surrounding Uruwera Ranges. A list of planned assassination targets appearing in the press included senior Maori civil servants, the Prime Minister Helen Clark, and George W. Bush, the President of the United States.[2] Events, fortunately, are unfolding to an undramatic conclusion: on November 8th, the Solicitor-General declared the *Terrorism Suppression Act* 'unnecessarily complex, incoherent, and as a

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1 Māori words are generally followed by a translation in the text. The three exceptions are "hapu", "iwi", and "mana". A hapu is a group of extended families that comprised the core social unit of pre-colonisation Māori society; an iwi is a collection of hapū, linked by genealogy. Iwī are the predominant political units in modern Māori society. "Mana" is a much more complicated concept, but a rough definition would be: a concept closely linked to identity - possessed of individuals, groups, and both natural and supernatural entities - encompassing moral worth and integrity. Also meaning authority and control; also (in a combination of the two meanings) agency.

2 *Sunday Star-Times* newspaper, 21/10/07 A1 and A4.

result, almost impossible to apply' to those arrested, forcing the police to proceed with mundane prosecutions under firearms laws.[3]

Jock Brookfield is among the very best commentators on revolutionary themes in Māori political argument. Revolutionary talk is not a new aspect of Māori political activism - in 1988, for instance, the activist and social worker Hana Te Hemara infamously claimed to have advised Māori prisoners contemplating suicide to 'kill a white and die a hero'.[4] Yet such talk has always been a minority voice in Māori claims against the Crown, and in recent history rare and never followed by action.[5] For a precise, articulate, and level-headed response to such talk, one need look no further than the recent second edition of Brookfield's *Waitangi and Indigenous Rights*. Brookfield's book is both a detailed history of legal and constitutional developments in New Zealand's history, and an elegant and careful rebuttal to those who make the revolutionary claim that Māori need not and should not recognise the New Zealand Parliament and courts as holding jurisdiction over their affairs. Little in the original text (published in 1999) appears changed for the second edition, although a new epilogue has been added. The epilogue relates the original argument to post-1999 events, such as the recent Fijian events, and the massive Māori protests against the *Foreshore and Seabed Act 2004*. Brookfield concludes with a fresh attack on the 'identity politics' that he sees as generating claims that Māori need not recognise the authority of New Zealand law.

As readers of the first edition will be well aware, *Waitangi and Indigenous Rights* is a deeply rewarding book. Brookfield has an encyclopaedic knowledge of legal decisions both at home and abroad; his humanism and his sympathy with Māori claims are deeply evident, clearly deeply held, yet never uncritical; and he weaves these two threads together to create a rich and carefully argued position in favour of a 'quiet revolution', in which constitutional law is reformed through the legal process to confer a much greater degree of tribal autonomy and resource ownership to Māori. These traits are equally manifest in the epilogue to the second edition. Brookfield's book, with its emphasis on the relationship between law and revolution, is invaluable reading for anyone trying to get to grips with Māori political argument, especially the legal plausibility or

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3 *New Zealand Herald* newspaper, 9/11/07, A1.

4 Quoted in: Andrew Sharp, *Justice and the Māori*, 2nd ed (Auckland, Oxford University Press 1997), 25-26.

5 As far as I am aware, the sum total of damage to public property caused by prominent acts of violent Māori activism (as opposed to peaceful land occupation) since 1990 amounted to one Auckland pine tree partially cut down (subsequently felled by the council after further damage by religious protestors), and one sporting trophy damaged (subsequently fixed).

otherwise of any revolutionary claims. But on one point in particular I think the book makes a serious omission: too little attention is given to the wider respects in which legitimacy is not only crucial to law, but to political action generally. I want to draw out this point through, first, an analysis of Brookfield's own position, and then a discussion of Māori and Tuhoe reaction to the "anti-terrorism raids" - and aspects of the Pākehā (New Zealanders of European extraction) reaction to *that* reaction in New Zealand public debate.

Brookfield's Argument

As I read him, Brookfield offers two arguments in *Waitangi and Indigenous Rights*. Interpolating my own labels, these are:

> *The Legality Claim*: The current constitutional arrangements and system of governance in New Zealand are legal. This is despite the fact that the Crown, post-1840, embarked on a revolutionary seizure of more political authority than Māori had been prepared to grant them, either under the Treaty of Waitangi of 1840 or in subsequent interactions.[6]

> *The Legitimacy Claim:* The current constitutional arrangements and system of governance in New Zealand are, by and large, legitimate. Given the Crown's post-1840 seizure of power, the legitimacy of the current legal and political order will be increased by conferring constitutional protection to customary Māori rights and by distributing greater political authority to Māori.[7]

Both these arguments are made primarily with a view to rejecting what Brookfield takes to be the radical Māori position on New Zealand's constitution: that because the Crown usurped power from the Māori first by force and then by colonising oppression, the Crown has no right to rule over Māori. Brookfield also has no time for the equally radical Pākehā argument that Māori were never wronged. He insists that any defence of 'the Lockean view' that Māori had no legal title to their land in the first place is simply a misapplication of property title under British common law;[8] and dismisses Stuart Scott's best-selling presentation of the radical Pākehā view as 'inept'.[9] These views are not, however, those that loom largest on Brookfield's critical horizon. Whereas radical Pākehā views get only passing mentions,

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6 FM (Jock) Brookfield, *Waitangi and Indigenous Rights* (2nd. ed., Auckland, Auckland University Press 2006) see especially Chapters 1, 4, and 5.

7 *Ibid* Chapters 2, 3, 6, and 7.

8 *Ibid* 141; 163-165.

9 *Ibid* 164.

the careful construction and deployment of Brookfield's two arguments is clearly intended as a rebuttal to (what Brookfield dubs) the 'radical' Māori position. The words of Hone Harawira provide an admirably succinct example of this position: 'The Māori text of the Treaty [of Waitangi] clearly reserves tino rangatiratanga [roughly: political authority] to Māori. Whether Pākehā law accepts that is irrelevant to us'.[10]

Brookfield deploys the *Legality Claim* against Māori protestations, occasionally made, that Pākehā law is irrelevant in the sense that it has no jurisdiction over them. For Brookfield, when a court is faced with any change to the legal order made in contravention of that order's procedures, 'it must be the principle of success and effectiveness which will provide the decisive and perhaps the only test' as to whether that revolutionary change is indeed a part of the legal system.[11] However dubious circumstances may have been in which the Crown came to wield supreme political authority in New Zealand, it has and clearly does exercise that authority successfully and effectively. Any Māori (or anyone else) coming before a judge and claiming that the court and its laws did not reach over him or her is bound to be disappointed. While a court may plausibly decide that a revolutionary change is both successful and effective (and therefore has legal validity) after an exceedingly short period of time, a court could *not* do so prior to the change actually occurring. The New Zealand courts therefore have good reason to uphold Pākehā law in the face of any Māori denial of its validity: even if the Crown is an unjust usurper, it satisfies the 'success and effectiveness' test. Any alternative source of authority Māori could offer in claiming that Pākehā law has no jurisdiction over them cannot pass the same test, simply because it ceased to exist at the point where the Crown successfully and effectively ruled alone, and has not yet returned to existence. Brookfield therefore concludes:

> The legal order desiderated by radicals, in which tino rangatiratanga is at least part of the basic norm in a dual Māori-Pākehā or Māori-dominated polity, is likely to be established only as the result of a (probably overt) revolution. If and when it is established... it will in the present matter have the same 'internal logic' as the one it has superseded. Courts sitting under it will inevitably reject any challenges to their jurisdiction based either on the superseded order or one visualised for the future.[12]

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10 Quoted in *Metro* magazine, October 1995, at 18.

11 Brookfield, above n 6, 32.

12 *Ibid* 166-167.

Not only are New Zealand's current constitutional and political arrangements legal, Brookfield argues that they are by and large *legitimate*, although they are certainly less legitimate than they could be. What I am calling the *Legitimacy Claim* therefore has two parts: a defence of the degree of legitimacy the Crown currently has, and an argument as to how its legitimacy could be improved. As I read Brookfield, the legitimacy of a constitutional order rests on three points. Firstly, the fact that the order is legal provides 'a minimal measure of legitimacy, in that some justice according to the law will be done'.[13] Secondly, Brookfield accepts a *principle of prescription*: it is possible that, given a sufficient period of time, an effective revolutionary change to the political order will be accepted as legitimate by most if not all agents under that order. Brookfield insists that this is a principle that 'operates both in morals and in law', although he tends to speak of it primarily as a moral principle.[14] The third of Brookfield's conditions is that a legal and political order must be perceived as just by a sufficiently large number of the agents under it. This third condition may be subsumed under the second, where prescription causes any sense of injustice to fall away over time.

Legitimacy therefore accrues from the effectiveness of the Crown's rule in New Zealand. It also partially accrues under the principle of prescription, although Brookfield notes that we are 'too closely placed in time to the founding revolution for the present order to be completely legitimated by prescription'.[15] Finally, some legitimacy accrues from considerations of justice. Brookfield appeals to the modern liberal cast of New Zealand's current political and constitutional arrangements, which underwrites both a commitment to human rights and a sincere response to (at least some) Maori demands for both a greater share of political authority (tino rangatiratanga) and for reparations for past wrongs.[16]

Regarding justice, Brookfield admits that his book 'is not a study of the nature of justice'.[17] This is something of a shame. As Brookfield clearly holds some objective view of what justice requires,[18] it would have been interesting to see him sketch the abstract idea. His account of the principle of prescription is a good case in point. Why is the idea that the passage of time can remove the wrongness of some act a *moral* principle, and not a *prudential* principle that trumps or limits moral considerations? Prescription

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13 *Ibid* at 34.

14 *Ibid* 35. As Brookfield puts it later, the principle of prescription identifies 'a moral factor' [p. 43]; and makes a wrong 'morally irrelevant' [p. 62].

15 *Ibid* 182.

16 *Ibid* 141-147.

17 *Ibid* 43.

18 *Ibid* 181.

may simply amount to putting a concern with stability ahead of a concern with justice on prudential grounds.[19] How prescription is seen changes how one can respond to Māori claims that the Crown is an illegitimate usurper of Māori authority. Prescription, justified by prudential concerns about the stability of existing political arrangements, will carry little weight with those who deny the legitimacy of those arrangements. Taking a moral rather than prudential line avoids this threatened argumentative impasse, but Brookfield does not say enough about the moral reasons one would address to Māori to justify a principle of prescription.

By combining considerations of legality, prescription, and justice, Brookfield holds that it is simply implausible to maintain that, because the Crown usurped power after 1840, current political and constitutional arrangements are entirely illegitimate. But they are most certainly a shade of grey, 'in that the just expectations of Māori remain to be fulfilled, in particular by the Crown's fulfilling its obligations under the Treaty, modified though they have been by time and circumstance'.[20] After a careful consideration of what, exactly, Māori ceded to the Crown in Article One of the Treaty (the term in the Māori text is kawanātanga) and what they retained in Article Two (tino rangatiratanga), Brookfield arrives at a view similar to that of the late Sir Hugh Kawharu - that neither kawanatanga nor tino rangatiratanga are equivalent to supreme political authority, but that the two together add up to sovereignty.[21] The 'quiet revolution' Brookfield supports would aim to meet Māori demands on two points. Firstly, Māori title to property under the common law would receive greater recognition in law (presumably giving a firmer basis for Māori demands for reparative justice); and sufficient autonomy would be granted to Māori to 'give proper effect to the right, in international law, of Māori as an indigenous people to self-determination'. Such autonomy would consist of local self-government powers to hapu and iwi groups, and some sort of national Māori assembly with at least a consultative - and possibly legislative - role in policy formation.[22] All of this would be constitutionally guaranteed, ideally under a new republican constitution.[23]

I have glossed Brookfield's proposals very briefly, because the point I wish to focus on lies not in the details, but in his evident belief that this

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19 See, for instance, Hannah Arendt, *Crises of the Republic* (New York, Harvest 1972) 62, on the difference between the good citizen and the good man.

20 Brookfield, above n 6, 136.

21 *Ibid* 98-105; compare I. H. Kawharu, 'Tino Rangatiratanga and Sovereignty by 2040' (1995) 1:2 *He Pukenga Kōrero* 13.

22 Brookfield, above n 6, 169-174.

23 *Ibid* 174-179.

'quiet revolution' would completely legitimate New Zealand's constitutional and political arrangements. It has sometimes been argued that responses to Māori demands for tino rangatiratanga under the Treaty and for reparative justice for past wrongs ought to be couched in terms of a more general and abstract account of social justice.[24] Brookfield seems to me to be engaged in a similar sort of project, although it is not easy to tell given the imprecise account of what justice requires. But this is not how Māori themselves, almost without exception, argue their claims - they demand justice without explicit appeal to some abstract liberal (or whatever) conception thereof. If the relationship between legitimacy and justice that Brookfield appeals to in replying to strong Māori demands is to plausibly be put to work, one must first attend to what Māori *do* appeal to.

Legitimacy in Māori Political Argument

While Brookfield is correct to distinguish legality from legitimacy, legitimacy is basically a creature of politics rather than law, and Brookfield leaves the wider political aspects of legitimacy unaccounted for in his argument. One immediately gets a grip on what the wider political implications might be from Quentin Skinner's observation that what one can achieve in politics is a question of what can be legitimated.[25] This observation strikes me as fundamentally correct. If we then look to the means by which legitimacy is sought, the rhetorical conventions by which existing value terms are subtly recast to commend political innovation must be considered chief among the effective means of legitimating one's behaviour or (especially) ideas. Skinner himself provides a useful example. The English capitalists at the turn of the 17th century successfully defended themselves against religious objections to the sins of greed and usury by recasting commerce in religious terms of approval: the early capitalists used the terms "providence" and "religious" to emphasise, respectively, notions of reliable foresight and diligent behaviour that were characteristic of successful commercial activity.[26] Such rhetorical reevaluations must be considered crucial to any account of the concept of legitimacy for the simple reason that, as Garry Runciman has recently observed, no anthropologist has ever or will ever discover a society in which such conventions of redescription are absent. They are a basic feature of human social interaction, of how we present ourselves and justify ourselves to

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24 See, for instance, Robert Goodin, 'Waitangi Tales', (2000) 78:3 *Australasian Journal of Philosophy*; and Jeremy Waldron, 'The Supercession of Historic Injustice', in G. Oddie and R. Perrett (ed.), *Justice, Ethics, and New Zealand Society* (Auckland, Oxford University Press 1992).

25 Quentin Skinner, *Visions of Politics* vol I (Cambridge, Cambridge University Press 2003) 156.

26 *Ibid* ch 8.

others.[27] While we often put such practices to mundane use - "I'm no backseat driver; I was offering helpful suggestions!" and so on - such practices can also have profound political effects, as the early capitalists spectacularly demonstrate.

It is no surprise that practices of rhetorical redescription are an enduring feature of Māori and Pākehā claims and counter-claims. Most notoriously, perhaps, was the attempt by the Labour Government of the 1980s to recast the implementation of a free-market doctrine of the minimal state as a response to Māori demands for autonomy.[28] By and large, Māori have not accepted this particular reinterpretation, but have been particularly adept at offering their own. Rhetorical intention is, for instance, detectable in the prominent Māori commentator Ranginui Walker's insistence in the 1980s that traditionally, Māori rangatira (chiefs) wielded the same authority over their hapū as a medieval king would over his subjects.[29] While circumstances differed from hapu to hapu, there is strong evidence to suggest that Walker's description of traditional Māori leadership was inaccurate.[30] Yet, faced as Walker was then with a much thinner sympathy for Māori claims in all aspects of Pākehā society than currently exists, insisting that traditional Māori notions of rangatiratanga (chiefly authority) equated to readily recognisable notions of kingly power added legitimacy to contemporary demands for Māori sovereignty. To give another example (and to speculate beyond the reach of my expertise), it seems likely that 19th century Māori self-presentations as modern-day Israelites may have been grounded, at least in part, in a similar intention. For instance, Brookfield cites the fact that Ngatimahuta chose to name the tribal organisation they set up to govern their lands in 1859 a 'sanhedrin', and speculates that in doing so, Ngatimahuta 'had in mind the autonomy allowed by Rome to the Jews'.[31] It seems to me equally likely, if not more so, that the elders of Ngatimahuta were choosing in the hope that a 'sanhedrin' would appear to Christian colonials a more legitimate office of authority than a rununga or some other Māori equivalent.

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27 See Garry Runciman, 'Cultural Selection, Axiological Rationality, and Paradiastole', forthcoming in *Archives de Europeennes de Sociologie*.

28 See Sharp, *above n 4*, throughout, and Simon Hope, 'The Roots and Reach of Rangatiratanga', (2004) 56:1 *Political Science* 34-35.

29 Walker's views can be found in Walker, 'Tradition and Change in Māori Leadership' (Auckland, Research Unit for Māori Education 1993); see also his contribution to Hineani Melbourne (ed.) *Māori Sovereignty: Māori Perspectives* (Auckland, Hodder Moa Beckett 1995).

30 See, for instance, the Waitangi Tribunal's *Report of the Tribunal on the Orakei Claim*, (Wellington, the Tribunal 1987) §11.5.

31 Brookfield, *above n 6*, 115.

Attending to the practices of redescription through which legitimation is sought brings to light the possibility of a variety of *modes of legitimation*. In the case of the early capitalists, redescription is used to alter the range of reference of value terms *within* a commonly shared Christian outlook. In my Antipodean examples, redescription is used to alter a concept's range of reference to shift the mode of legitimation itself: free-market devolution becomes tino rangatiratanga, and thus more legitimate in Māori eyes; tino rangatiratanga becomes kingly authority and thus more legitimate in Pākehā eyes, and a rununga becomes a sanhedrin, and thus more legitimate in 19th century Pākehā eyes. So, at least, is the intention in each case. The mode of legitimation is chosen with a specific audience in mind. The 'radical' Māori arguments that Brookfield is primarily responding to in his book must be seen in light of these practices: 'radicals' are not only arguing that the Crown's sovereignty is illegitimate (to which Brookfield responds with the *legitimacy claim*), they are also offering a positive account of the legitimate grounds on which tino rangatiratanga can be claimed, and it is worth attending in more detail to what that account is.

Māori demands for tino rangatiratanga invoke a number of different justifications for why tino rangatiratanga is what it is and resides where it does.[32] Some appeal solely to the Treaty of Waitangi (and more rarely, the 1835 Declaration of Independence signed by northland hapū); others to the United Nations documents on indigenous self-determination; while others claim that tino rangatiratanga resides in Māori tikanga (culture) itself. Two examples of this last approach run as follows: the late Syd Jackson has claimed that if 'we've [Māori] followed the principles of ahi kā and kept the fires burning, as we surely have, then we must accept that what we once had, we should have again'; while the author Witi Ihimaera has lamented that 'we [Māori] lost our potential to retain our tino rangatiratanga. That process was magnified by the urban drift from the country and the disconnection from our roots'.[33] While sharply different in their outlook, both claims clearly illustrate that tino rangatiratanga resides in tikanga Māori.

It is precisely this account of tikanga Māori as the correct mode of legitimation for tino rangatiratanga that Māori commentators of the 'radical' stripe addressed by Brookfield have taken up. Thus Ani Mikaere has insisted that 'the aim of self-determination should be to give life to Māori world views in a contemporary context, to take principles of Māori law and adapt them to suit present day realities'.[34] Moana Jackson has put the point

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32 See further Hope, above n 28.

33 Quoted, respectively, in *Mana* magazine no. 25 (1998), 35; and *Mana* magazine no. 31 (1999) 24.

34 Ani Mikaere, 'Māori and Self-Determination in Aotearoa New Zealand',

in stronger terms in a series of papers. Insisting that any account of the scope of tino rangatiratanga derived from an analysis of the Treaty's three articles favours the colonisers[35] and claiming that Pākehā groundings for Māori rights dismisses the wisdom and value of Māori culture and thought.[36] Jackson has argued that demands for tino rangatiratanga require no other legitimation but that which tikanga Māori provides. Here, for instance, is Jackson on indigenous rights in UN proclamations:

> In general terms, the rights of tangata whenua share the same concerns as those rights which the United Nations affirms ... What makes them specific is the fact that the philosophy from which they have arisen, and the means by which they can be pursued, are not those of international law, but those of the law and culture of indigenous people themselves .... [the right to self-determination] clearly exists and has a validity independent of international law. It is inherent in Māori law, in the concept of rangatiratanga, and in the poetry of our whakatoki or proverbs.[37]

For Jackson, nothing more needs to be said to justify Māori demands for a redistribution of political authority than that such demands are supported by tikanga Māori.[38]

In saying this, Jackson may indeed be insisting that the Crown currently exercises - no matter how successfully - a usurped and illegitimate authority over Māori. But Jackson is not merely denying the legitimacy of the Crown's claims to authority. He is also making a point about the proper legitimacy of Māori claims against the Crown: Māori claims are legitimate because the continued existence (in the face of hostile colonisation) of tikanga Māori is - and should be recognised as being - enough to legitimate claims that tino rangatiratanga resides with Māori. In my view, Brookfield does not give significant consideration to this aspect of the Māori political

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(Waikato University Working Paper 5/2000 2000) 5.

35 See Moana Jackson, 'Research and the Colonisation of Māori Knowledge' (1998) 4:1 *He Pukenga Kōrero* 4:1.

36 See Moana Jackson, 'The Treaty and the Word: the Colonisation of Māori Philosophy', in G. Oddie and R. Perrett (ed.) *Justice, Ethics, and New Zealand Society* (Auckland, Oxford University Press 1992).

37 Moana Jackson, 'The Crown, the Treaty, and the Usurpation of Māori Rights', in *Aotearoa New Zealand and Human Rights in the Asia Pacific Region: A Policy Conference* (Wellington, Ministry of Foreign Affairs 1989), 17.

38 See further Moana Jackson, 'Where Does Sovereignty Lie?', in Colin James (ed.) *Building the Constitution* (Wellington, Institute of Policy Studies 2000), 196.

arguments he dubs 'radical'. He sees such arguments as part of a 'Grammscian "war of position" against the Crown' - that is, as attempts at undermining the legitimacy of current political and constitutional arrangements by seeking popular support for alternative ideas.[39] But the fact that, to Māori such as Jackson, Brookfield's own argument will appear as precisely the same thing – goes unremarked.

The point applies, in particular, to Brookfield's argument that Māori may attain greater control over their lands and greater powers of local self-government through the proper application in New Zealand legislation and jurisprudence of aboriginal rights under British common law. Although it is unwise to generalise too much, it seems to me that Māori are likely to feel that, as a response to their claims, Brookfield's solution is unsatisfactory. The reason it is unsatisfactory is that, if Māori claims of mana whenua - of ownership and rangatiratanga over land - are legitimate *by virtue of* aboriginal title under British common law, then no proper mode of legitimation could have been available to Māori prior to the arrival of common law doctrine in the 19th century. To Māori ears, any such implication will sound not only wrong, but also quite possibly insulting: mana whenua itself is legitimate, traced through whakapapa [genealogy] that connects the mana of the hapu to the land, expressed in tribal pepeha [identifying phrases], and maintained through practices of kaitiakitanga [guardianship] and ahi kā [conservation].[40] This is the point that 'radicals' such as Jackson argue: it is not enough for Pākehā to meet the substance of Māori claims; Pākehā must do so in ways that acknowledge the origins of those claims in tikanga Māori.

Jackson and others are particularly (and perhaps unhelpfully) strident in insisting that unless tikanga Māori is accepted as legitimate, justice cannot be otherwise done.[41] But my point here is simply that Jackson's strident arguments develop a theme common to almost all Māori claims against the Crown: not only the substance of the claim, but also the grounds on which the claim is made, must be considered legitimate. When, say, a hapu claims authority over a stretch of river, they are unlikely to be satisfied with local governance rights on the basis of first occupancy and continued use in accordance with aboriginal rights under the common law. They want

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39 Brookfield, *above n 6* , 166.

40 For more on the idea of mana whenua, see Mason Durie, *Te Mana Te Kawānatanga* (Auckland, Oxford University Press 1995) 229 and following; and Manuka Henare, 'Nga Tikanga Me Ritenga O Te Ao Māori', *The April Report on Social Policy*, (Wellington, Royal Commission on Social Policy 1988).

41 See Hope, *above n 28*, 51-54; see also Hope, 'Self-Determination and Cultural Difference' (2006) 58:1 *Political Science* 2006.

recognition of what the river means to them, of its sacredness as their taonga [treasured possession], of their status as kaitiaki [guardians], and of the river's ancestry to them through whakapapa.[42] Similarly, in insisting that tino rangatiratanga under the Treaty be acknowledged, Māori are also often quick to insist that (in Sir Hugh Kawharu's words) 'rangatiratanga has never needed the Treaty to give it meaning'.[43] Māori would still claim rangatiratanga if the Treaty, or UN documents, had never been signed.

Brookfield may reply that aboriginal rights under the common law simply recognise existing Māori title, rather than creating it. But if that is the case, why appeal to common law at all in defending the *legitimacy* of Māori claims? One can see the advantage of doing so when making the strictly *legal* point that New Zealand's current legal system entails (or, weaker, makes room for) Māori rights that New Zealand legislatures have not seen fit to recognise. But Brookfield's point is wider than this: giving greater legal force to aboriginal rights under common law serves to legitimate Brookfield's 'quiet revolution' on the grounds of offering greater justice to Māori. *That* claim makes it appear as though the injustice to be remedied concerns the violation of Māori common law rights, rather than (as it appears in most Māori claims) the violation of mana and rangatiratanga. Even if the common law simply recognises rangatiratanga and mana whenua, justice appears in Brookfield's argument as only indirectly concerned, *through the common law tradition*, with mana and rangatiratanga. Where Māori insist that the grounds on which they make their claims be considered legitimate, as well as the substance, Brookfield's 'quiet revolution' will lack legitimacy. To justify the *legitimacy claim*, Brookfield must engage with the ways in which Jackson and others have sought legitimacy for Māori claims on Māori terms, and offer reasons as to why legitimacy is best pursued by grounding Māori claims in British common law doctrine.

I want to close with a comment on public reaction to the recent allegations of revolutionary activity in Tuhoe territory. The alleged ringleader of the terrorist camps was the Tuhoe activist Tame Iti, previously most famous in New Zealand for tendering a whakapohane - a traditional Māori insult involving the bearing of one's buttocks - to members of the Waitangi Tribunal. As Iti has a long history of agitating for 'Tuhoe

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42 The interested reader is directed to the exemplary work of the Waitangi Tribunal in recording these claims. See (among a host of examples), the *Whanaganui River Report,* (Wellington,, G.P. Publications 1999) §3.2.6, 71-73; and the *Muriwhenua Land Report* (Wellington, G.P. Publications 1997), §2.2, 15.

43 Kawharu, *above n21* , 19.

independence', it was commonly assumed that he had been plotting some campaign of violence in support of Maori radicalism. Tuhoe's strong tradition of separatism, fuelled by successfully retaining a cohesive (if remote) territory despite massive 19th century land confiscations, is indeed in good health. For instance, Tuhoe of Ngai Tama Tuhirae hapu are currently blockading the road into Waimana Valley near Omuriwaka to keep out tourists and the new owners of local forestry; and have billed the Whakatane district council for NZ$395 billion (later scaled back to NZ $15,000) for their troubles.[44] As one reporter put it, 'If Pākehā law isn't recognised [in the Tuhoe centres of Ruatoki and Taneatua], it certainly isn't up here [in the bush].... Three or four men are said to run this part of the Ureweras, reporting back to a tribal elder with the final say'.[45] Tuhoe historian Tamati Krueger agrees, noting that Tuhoe action 'paints a picture of contempt and disrespect for the Crown and its authority; we question it all the time, we mock it and we jeer it because we don't believe that they have authority in our rohe [borders]'.[46] As one might therefore expect, Māori and especially Tuhoe criticism of the police raids centred around the violation of Tuhoe mana and rangatiratanga - a violation that was quickly likened to violent and unjust Crown interventions in the 19th and early 20th century.[47]

It would be odd to think that Tuhoe felt, or would accept, that legitimacy accrued to their claims due to aboriginal rights under the British common law. That there might be more to be said than Brookfield does say for the 'radical' Māori position of Jackson and others is, however, most clearly illustrated by a significant voice in the Pākehā response to Tuhoe and Māori reaction. Tuhoe were told that 'history is for learning from, not living in'; that 'the Māori need to stop living in the past'; that 'we all now live in the modern world - the past is only good for history lessons'; and that 'everyone else abides by the laws of New Zealand without a gripe. We all pay taxes and contribute to society. This is New Zealand in 2007, not the pre-1840s. Get over your Treaty claims and move on'.[48] Tuhoe were accused of trying 'to load the past onto the present', and of being 'so tunnel-visioned that they cannot see the potential and beauty in this wonderful

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44 NZ Herald, 31/10/07, A3.

45 NZ Herald, 17/10/07, A5.

46 NZ Herald, 20/11/07 B4.

47 See, for instance, Annette Sykes, NZ Herald, 16/10/07 A4; Michael Lane, NZ Herald, 5/11/07 A15; Brown Turei, NZ Herald, 7/11/07 A9; Tuhoe reactions in the NZ Herald, 10/11/07 A4; and Rawiri Taonui in the Sunday Star Times, 18/11/07 A11.

48 Respectively, Peter Catlin (letter), NZ Herald 3/11/07 A24; Adrian Robertson (letter), NZ Herald, 19/10/07 A14; L. Woodruffe (letter), NZ Herald 19/10/07 A14; Mark Fog (letter), NZ Herald 19/10/07 A14.

country. We must all have greivances over things done by our ancestors but what happened centuries ago can never be changed'.[49] Here one not only sees the principle of prescription at work in a way that would no doubt horrify Brookfield, one also sees more clearly the environment in which Māori efforts at gaining legitimacy for their grievances and claims operate. "Identity politics" can be taken too far - when it undermines the offering of reasons to others of different identities with whom one shares the world. Nonetheless, identity cannot be dismissed either: it matters because of its importance to others we need to justify ourselves to.[50] The arguments of Jackson and others, by emphasising the importance to Māori of Māori sources of legitimacy, shed light on just how unacceptable such Pākehā responses are to Māori: Pākehā expressions of outrage when Māori experience contemporary events in light of Māori (and individuated hapu and iwi) history are not only judgments that contemporary Māori claims are illegitimate, they are also denials of that history and of the culture embodied within it.[51] It seems to me that Pākehā incomprehension of exactly what Māori are claiming and why remains the greatest barrier to any sort of 'quiet revolution' that is sympathetic to Māori demands for tino rangatiratanga. Attention to the wider aspects of attaining political legitimacy, as well as the cool-headed legal argument Brookfield provides us with, seems to me essential if one is to offer a plausible and just response to Māori claims.

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49 Respectively Reg Dempster (letter) NZ Herald 30/10/07 A10; H. Morton (letter) Sunday News 18/11/07 A20.

50 See Hope (2006), *above n 41.*.

51 Compare, on this point, Andrew Sharp, 'Why Be Bicultural?', in Margaret Wilson and Anna Yeatman, *Justice and Identity: Antipodean Practices* (Wellington, Bridget Williams 1995) 133.