CIVILISATION AND CULTIVATION: COLONIAL POLICY AND INDIGENOUS PEOPLES IN CANADA AND AUSTRALIA

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Introduction

Until the middle or late nineteenth century, the prevailing policy towards the indigenous inhabitants of Canada and, to a lesser extent, Australia was one of protection, driven by a belief that Indigenous peoples in the New World could be 'civilised', or raised to the level of the white man. The ultimate aim of such policies was the assimilation of the Aboriginal inhabitants with the European colonisers. In order to become civilised, these peoples required Christianising and educating. This reflected the prevailing views of the time that differences amongst people could be explained in terms of education and environment[1] rather than genetic inferiority.

> [H]uman change and development [was seen as] a unilinear process with possibilities of 'progress' or 'regression' to civilisation or savagery; [Europeans] were convinced that the 'highest' stage reached was to be seen in the civilised European. Given this premise it was arguable that Aborigines could be turned into brown-skinned Europeans if they were stabilised in villages and extensively tutored in the art of being English.[2]

There was, however, an additional element to the notion of civilising the savages, that of teaching them the art of cultivation. Throughout the

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1 See, for example, I. Kant, *On the Various Races of Man*, 1775; and *Definition of the Concept of a Human Race*, 1785.

2 C.D. Rowley, *Aboriginal Policy and Practice*, vol. 1, Australian National University Press, Canberra, 1970, 86.

nineteenth century it was official policy in Canada that the Natives might be civilised by settling them down as farmers. Similar views as to the worth of the art of cultivation as a mechanism for civilising the natives can be observed in early Australian policy. On one level, of course, this reflects the ideals of English rural life and the small Victorian farming community. Only by emulating the colonisers could the Indigenous inhabitants hope to take their place along side them. However, the equation of cultivation and civilisation is too pervasive throughout eighteenth and nineteenth century law and policy to be explained so easily. It informs, for example, not only colonial policy, but also the rules of international law governing the acquisition of territory, particularly as it relates to the concept of *terra nullius*.

Even last century, there were those who wondered why civilisation was equated with farming.[3] The purpose of this article is to describe and consider this aspect of the notion of civilisation, as reflected in colonial law and policy. This is not an attempt to undertake a comprehensive examination of the concept of 'civilisation', but is limited to a consideration of one aspect. Indigenous peoples were continually denied status or protection unless they fitted within narrow categories of political and social organisation and land use.[4] Nor has the law lost its fascination with agriculture. *Mabo v Queensland (No. 2)*[5] is a case in point. There is no doubt that factually the plaintiff's claims were strengthened by the market farming activities of the Meriam Peoples.

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3 See, for example, the observations of Alexandre Tache, the Bishop of St. Boniface, Manitoba, in 1879 that 'farming, although so desirable, is not the sole condition in the state of civilization': Tache to Col. J.S. Dennis, Deputy Minister of the Interior, 29 January, 1879, quoted in O.P. Dickerson, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, McClelland & Stewart Inc., Toronto, 1992, 225. Dickerson also questions the equation of these two concepts.

4 S.J. Anaya, *Indigenous Peoples in International Law*, Oxford University Press, New York, 1996, 19.

5 (1992) 175 CLR 1.

Civilising the Indians: Colonial Law and Policy in Canada

Early British Imperial practice with respect to North America generally, unlike that with respect to Australia, was to deal with the Indians as members of sovereign nations with whom formal treaties and agreements were made. In the United States, at least, this policy was formally adhered to, even if in practice it was not always followed by individual colonies. Imperial policy reflected pragmatic considerations, and was primarily undertaken for two reasons. First, the early assertions of sovereignty were directed at competing European States, not at the Indian nations. As a result of competition between these States for lands in the New World, it was necessary for them to bolster claims by actual occupation rather than mere discovery. Therefore, the claim to European sovereignty was not pressed against the Indians until much later, after Indian nations had lost much of their original power.[6] Secondly, early attempts to seize tribal lands had lead to conflict,[7] and those European powers intent on proving their claims against other Nations could not afford to engage in a prolonged war with the Indians. In addition, Indian tribes were considered valuable military allies against other European States seeking to lay claim to the Continent. The haphazard settlement of North America contributed to the retention of a distinct status by the Indian nations. Charter colonies, proprietary colonies and royal colonies all had different links to the mother country. Consequently, there was no uniform agreement on what law applied in the New World.

The foundation document of British Imperial policy with respect to the Indigenous inhabitants of North America is the *Royal Proclamation of 1763*, by which Britain asserted sovereignty over the colonies and acknowledged its responsibility for Indians throughout that area. It has been described as 'the most significant point of origin of the policy of

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6 W.E. Washburn, 'The Historical Context of American Indian Legal Problems' (1976) 40 *Law & Cont Leg Prob* 12, 13.

7 N.J. Newton, 'Federal Power over Indians: Its Sources, Scope, and Limitations' (1984) 132 *U Pa Law Rev* 195 at 200. *Worcester v Georgia* 31 US (6 Pet) 515 (1832) at 520 per Marshall CJ.

protection'.[8] The *Royal Proclamation of 1763, inter alia*, proscribed all private purchases of lands covered by the *Proclamation*. Any Indians who wished to dispose of their lands situated in those areas were obliged to surrender or sell to the Crown.[9]

Imperial civil administration in North America continued to be dominated throughout the nineteenth century by the perceived need to protect the remaining Amerindians. In order to achieve this, the official position was that the government was under a duty to civilise the natives by settling them down as farmers.[10] In fact, policies to 'civilise the natives' almost exclusively took the form of encouraging the Indians to undertake farming activities. From the early nineteenth century, reserves were set aside *ad hoc* in order to achieve this. These reserves were described as consisting of:

> [an] allotment of lands to the Indians, to be set aside as reserves for them for homes and agricultural purposes, and which cannot be sold or alienated without their consent, and then only for their benefit.[11]

On the establishment of a reserve on the Manitoulin Islands, it was explained to the Indians that on such land:

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8 R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland*, University of Saskatchewan Native Law Centre, Saskatoon, 1990, 10.

9 Imperial policy of purchasing land from the Indigenous inhabitants in North America, however, predated the *Royal Proclamation of 1763*. In 1629, for example, letters of instruction sent to Governor Endicott of Massachusetts required him to purchase title to the lands from the Indians: P.A. Cumming and N.H. Mickenberg (eds) *Native Rights in Canada*, 2nd edn, Indian-Eskimo Association of Canada, Toronto, 1972, 67.

10 Dickerson, *above* n 3 at 225.

11 A. Morris, *Treaties of Canada with the Indians*, Coles, Toronto, 1971, 287–288.

> proper houses shall be built for you, and proper assistance given to enable you to become civilised and to cultivate land, which your Great Father engages for ever to protect for you from the encroachment of the whites.[12]

In general, these reserves were created by treaty or agreement for surrender with the particular tribe involved. The treaties initially provided payment of monies for the surrender of lands. However, as settlers encroached on Indian lands express provision was made for the creation of reserves. Later, land was set aside for by Order in Council under the authority of under general lands legislation.

The reserve policy became the linchpin of Indigenous policy in North America. The importance of the reserve system to the protection of the Indigenous peoples was noted by the 1844 Bagot Commission into Indian Affairs. The Commission's report stressed the need for the protection of reserve lands:

> the settled and partially civilized Indians, when left to themselves, become exposed to a new class of evils. They hold large blocks of land ... which they can neither occupy nor protect against the encroachment of white squatters, with whom, in a vain attempt to guard their lands they are brought into a state of constant hostility and collision.[13]

It should be noted that not all Indigenous groups were against the idea of forming farming communities. Many groups had already adopted agricultural practices in the pre-contact period.[14] The

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12 Bartlett, *above* n 8 at 11.

13 'Report on the Affairs of the Indians in Canada', Provincial Canadian Legislative Assembly, *Journals of the Legislative Assembly of Canada*, 11 Vic, 24 June 1847, s III, pt I, General Recommendations, General Recommendation No 1.

14 The issue of when contact between Europeans and the Indigenous peoples of North America first occured is contentious itself. The Huron and the Five Nations, were all farmer-hunters, and practiced slash and burn agriculture from 800 AD onwards. By the early seventeenth century, the Huron, for example, had 7,000 acres under cultivation. The Huron, who numbered an estimated 30,000, lived in up to twenty five villages, which were concentrated at the centre of Huronia, with cornbelts forming a surrounding belt. Similarly, the League of Five Nations were

Mississaugas, for example, actively sought to adapt to the new ways by adopting farming practices.[15] Model farming villages had been established for the purposes of civilising Indigenous peoples since the late eighteenth century, and the concept received official support in the first two decades of the nineteenth century.[16] These, not surprisingly, were more successful in areas where agriculture had been traditionally practiced. Most, however, had short lives. The best known of these were the Mississaugas village at Credit River, and the Ojibwa settlement on Grape Island. Both of these were counted as successes. Many others lasted only a few years. According to Dickerson, many of the First Nations peoples who participated in the experiments of the model villages were committed to their success, determined to adapt in the face of the disappearance of their traditional subsistence bases.[17] From 1850 onwards, a number of acts set aside land for the exclusive use of the Indians. In 1850, the legislature of Upper Canada passed two acts: *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*[18] and *An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied by them from Trespass and Injury*.[19]

Measures to 'civilise' Aboriginal peoples accelerated throughout the 1800s, particularly after 1850. After the advent of responsible govern-

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also farmers. Again, the primary crop was corn. Although most other peoples of Canada were primarily hunters and gatherers, several were at least partly agricultural, and many relied on the uncultivated crop of wild rice for subsistence. See Dickerson, *above* n 3 at 70–72.

15 *Id* at 224.

16 W. Henderson, *Canada's Indian Reserves: Pre-Confederation*, Department of Indian and Northern Affairs, Ottawa, 1980, 10.

17 Dickerson, *above* n 3 at 236–237.

18 *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada* SC 1850, 13 & 14 Vic c 42.

19 *An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied by them from Trespass and Injury* SC 1850, 13 & 14 Vict c 74.

ment in the Canadian colonies,[20] legislation passed by colonial legislatures clearly reflected the continuing importance of this theme. An example is the 1857 *Act for the Gradual Civilization of the Indian Tribes in the Canadas*.[21] According to the preamble:

> it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such individual members of the said Tribes as shall be found to desire such encourage-ment and to have deserved it.

This Act was the first passed concerning First Nations peoples by a colonial legislature. This Act, whilst maintaining the goal of civilisation and assimilation, changed the focus of that goal by rejecting the previous ideals of farming communities securely situated on reserves, and introduced the ideal of enfranchisement. The process of assimilation was to be escalated by providing for the possibility of enfranchisement, by virtue of which First Nations peoples became entitled to title to twenty hectares of former reserve land. This was based on the assumption that full civilisation of the tribes could only be achieved when Indians had been brought into contact with individualised ownership.[22] Section III of the Act gave individuals the right to apply for enfranchisement, which could be granted if it was determined that the candidate was:

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20 Responsible government was introduced to the colonies in Canada at a similar time to the Australian colonies. It was introduced to the Province of Canada about 1820, New Brunswick and Nova Scotia in 1848, Prince Edward Island in 1851 and Newfoundland in 1855.

21 *Act for the Gradual Civilization of the Indian Tribes in the Canadas* SC 1850, 20 Vic c 6.

22 J.S. Milloy, 'The Early Indian Acts: Developmental Strategy and Constitutional Change' in I. Getty and A. Lussier (eds) *As Long as the Sun Shines and the Water Flows*, University of British Columbia Press, Vancouver, 1983, 58.

> of the male sex, and not under twenty-one years of age, is able to speak, read and write either the english or the french language readily and well, and is sufficiently advanced in the elementary branches of education and is of good moral character and free from debt.

Section IV gave the Superintendent of each tribe the power to enfranchise any male over twenty one who did not meet the above criteria subject to a three year probation period. Section VII contained property and monetary inducements to encourage the Indians to leave tribal society and seek enfranchisement. It was, however, expected that on these twenty five acre lots that the newly enfranchised Indians would generally establish farms. The ideal of cultivation as the road to civilisation had not changed, but communal practices were to be discouraged as it lessened property improvement.[23] It was in fact intended that these lots be used for farming. In general, the recipients were given no choice as to the use to which their land was to be put. Commissioners appointed in 1856 to investigate the failure of various experiments to civilise the natives had stated that in order to encourage economic development:

> we earnestly recommend in all cases in Western Canada [Canada West] where a final location of a band shall be determined upon that each head of a family shall be allotted a farm not exceeding 25 acres in extent; including an allowance of woodland where they may obtain fuel; that for such farm he shall receive a licence giving exclusive occupation of the same to him and his heirs forever on condition of clearing a certain number of acres in a given time.[24]

The result of this report was the *Civilization and Enfranchisement Act* of 1859–60 and the *Management of Indian Lands and Property Act* of 1860.[25]

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23 J. Leslie and R. Maguire, *The Historical Development of the Indian* Act, 2nd edn, Department of Indian and Northern Affairs, Ottawa, 1978, 28.

24 *Id* at 31.

25 *Act Respecting the Management of Indian Lands and Property* SC 1860, 23 Vic, c 151.

Soon after confederation, all laws respecting Indians were consolidated in the 1876 *Indian Act*,[26] which remains substantially unchanged to this day.[27] Despite earlier failures, departmental officials still believed that Indians lacked only the opportunity to become good farmers.[28] Leslie and Maguire note that during the first twenty five years of Canada, the Indian Affairs Department was still guided, despite all earlier experience, by 'a belief in the perfectibility of man'.[29] According to the Department, education and agricultural experience would lead to this goal.

Colonial Law and Policy in Australia

Initially, Colonial Policy in New South Wales did not differ from that applied to other colonies. The Colonial Crown took the same protective stance towards Indigenous Australians as towards their North American counterparts. As is now well known, Captain Cook's instructions were to take possession with the consent of the natives.[30] as was the policy in North America. It was assumed by Colonial authorities that land would be obtained by treaty, as was the policy in North America. the House of Commons Committee on Transportation, for example, asked Sir Joseph Bankes whether he apprehended that 'in case it was resolved to send Convicts there, any district of the Country might be obtained by *cession or purchase*?'.[31]

Congruence with other jurisdictions is reflected in the now famous early instructions given to Governor Phillip of New South Wales by George III, charging him to treat the natives with kindness.

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26 *Indian Act* SC 1876, 39 Vic, c 18.

27 The most recent version of this act is the *Indian Act*, RSC, 1985, c I–5.

28 Leslie and Maguire, *above* n 23 at 51.

29 *Ibid.*

30 Quoted in H. Reynolds, *The Law of the Land*, 2nd edn, Penguin, Sydney, 1992, 52.

31 R.J. King, 'Terra Australia: Terra Nullius aut Terra Aboriginium' (1986) 72(2) *JHAHS* 50, 77. Emphasis added.

> You are to endeavour by every possible means to open an intercourse with the natives and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unneces-sary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.[32]

Despite this, of course, no treaties were ever made with Indigenous Australians. This was primarily due to three factors. First, the Australian Aborigines posed no serious military threat to the colonists. Nor was there any need to form military alliances with them. There were no other European powers seriously contending for the continent. Secondly, early observations made during Cook's voyage of discovery indicated that the Aborigines were not particularly numerous, nor did they cultivate or use the land, unlike the Indians of North America.

> Neither are they very numerous, they live in small parties along by the Sea Coast, the banks of Lakes, Rivers creeks &c. They seem to have no fix'd habitation but move about from place to place like wild beasts, in search of food, and I believe depend wholy upon the success of the present day for their subsistence.[33]

Finally, there were perceived difficulties in the negotiation process. Tribal division and lack of hierarchical authority posed major problems. In many other respects, however, policies similar to those followed in North America were also pursued in Australia. This causes no surprise, as both the colonies in Canada and Australia were under the control of the Colonial Office in London. Although not as wide spread as in Canada, the reserve system, for example, was also a feature of policy in Australia.

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32 Instructions to Governor Phillip, 23 April 1787, *HRNSW*, vol. I, part 2, 52.

33 Cook's Journal, 23 August 1770, in J.C. Beaglehole (ed) *The Journals of Captain James Cook*, Cambridge University Press, Cambridge, 1974, 396.

As in Canada, the prevailing early colonial policies centred around 'civilising' the white man, by raising her or him to the standards of Europeans. In order to achieve this, Indigenous Australians had to be Christianised and educated. Girls, for example, were to be trained as household domestics. One of the first programmes for the civilisation of Aboriginal Australians was launched by Governor Macquarie in 1814. Macquarie attacked the problem of 'civilising the natives' on two fronts. The first was to establish a 'Native Institution' at Parramatta for the purpose of 'educating, Christianising and giving vocational training to Aboriginal children'.[34] Like most attempts to force Indigenous Australians to conform to European ideals, this was a failure, and closed nine years later. The second prong consisted of granting land to Indigenous Australians in order that they could learn to farm. In a dispatch to Earl Bathurst, Governor Macquarie outlined his plans for dealing with 'this Uncultivated Race'.[35]

> I have Also in contemplation to Allot a piece of Land in Port Jackson bordering on the Sea Shore *for a few of the Adult males*, Who have promised to Settle there and Cultivate the land. Such an Example Cannot, I think, fail of Inviting and Encouraging other Natives to Settle on and Cultivate Lands, preferring the productive Effects of their own Labor and Industry to the Wild and Precarious Pursuits of the Woods.[36]

Similarly, this was also a failure. Nevertheless, attempts to teach the arts of civilisation continued. In 1827, for example, Archdeacon Scott proposed to establish institutes, where it was proposed to unite 'Farming occupations with Instruction'.[37]

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34 R. Broome, *Aboriginal Australians*, 2nd edn, Allen & Unwin, Sydney, 1994, 31.

35 Governor Macquarie to Earl Bathurst, Despatch marked 'No 15 of 1814' per ship Seringapatam, *Historical Records of Australia*, vol. VIII, July 1813–December 1815, Library Committee of Commonwealth Parliament, 1916, 368.

36 *Id* at 369–370.

37 Governor Darling to Right Hon W. Huskisson, 27 March 1828, Despatch No 50, per Ship Eliza, Enclosure No 1; Archdeacon Scott to Governor Darling, 1 August 1827, *Historical Records of Australia*, *above* n 35 at 59.

Missionaries in Victoria, at Lake Macquarie, Wellington and Port Phillip, sought to encourage agriculture by appointing a Superintendent of Agriculture to teach agrarian skills to those who lived on the missions. Although a number of Aboriginal men did work as agricultural labourers, the schemes closed quickly for lack of willing students.[38] Despite these failures, the idea that knowledge of cultivation was a step on the ladder to civilisation persisted. To a large extent this was due to the influence of the Colonial Office in London.

In 1835, the Colonial Office came under the control of three members of the Church Missionary Society, Lord Glenelg, the Secretary of State, Sir George Grey, Parliamentary Under-Secretary and James Stephen, Permanent Head, all three of whom had strong ties with the anti-slavery movement.[39] In 1837, a House of Commons Select Committee, chaired by the leading humanitarian of the anti-slavery movement, T.F. Buxton, was appointed to consider 'what measures ought to be adopted with regard to the native inhabitants of the countries where British settlements are made; and to the neighbouring tribes.' The Committee handed down two reports in 1836 and 1837, both of which had a profound influence on colonial policy. Most importantly, however, were several suggestions made particularly for the Australian colonies. It was proposed that increased expenditure be provided for protectors, 'whose duty should be to protect [the Aborigines]'.[40] The protectors should prosecute on their behalf when whites offended against them and should superintend their defence when they were charged by whites.[41] In addition, lands should be reserved to support the Aborigines and to enable them to continue without molestation until 'agriculture ceased to be distasteful to them'.[42]

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38 Broome, *above* n 34 at 33.

39 Reynolds, *above* n 30 at 97.

40 P. Hasluck, *Black Australians: A Survey of Native Policy in Western Australia, 1829–1897*, Melbourne University Press, Melbourne, 1942, 55–56.

41 *Id* at 56.

42 *Ibid.*

By the middle of the eighteenth century, the emphasis on protection of the Aboriginal peoples had begun to wane. The humanitarian zeal of the 1840s and 1850s had come to an end. In addition, the introduction of responsible government in Tasmania, South Australia, Victoria and New South Wales saw the transfer of power over Aboriginal policy from the Imperial government to the states. In those colonies which had not yet achieved responsible government, the formal Instructions to Governors still contained such phrases as 'promote religion and education among the native inhabitants', and enjoined their protection, but there was no insistence on this duty.

The timing of the colonisation of New South Wales was crucial. In Canada, colonial and later Dominion policy concerning Indigenous Peoples was firmly rooted in enlightenment ideals. In scientific circles, monogenism, or origin from a single source (specifically Adam and Eve), had held sway throughout the seventeenth and into the eighteenth century, if for no other reason than that Scripture was to be respected. The ideal of civilising the Aborigines, and converting them to gentlemen farmers, directly taps into enlightenment ideals as exemplified by monogenism. By the time Australia was settled, however, although Darwin had not yet written his *Origin of the Species*, theories such as polygenism, which held that human races were separate biological species, had begun to take hold. Social theorists began to formulate arguments on the primacy of race in human affairs. The idea of innate black inferiority was now propounded. Race became one of the most emotive issues of the 1850s in Britain.[43] In Australia 'social Darwinism' or 'Spencerism' became the dominant racial theory. The 'biologisation' of history in the second half of the eighteenth century provided a ready justification for the segregation of Aboriginal Australians by land hungry colonists. Sociologists such as Spencer applied Darwin's principles of 'natural selection' to society. In light of such new theories, the difficult and unrewarding task of 'civilizing' Aboriginal Australians was easy to discard.

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43 A. Markus, *Australian Race Relations*, Allen & Unwin, St Leonards, 1994, 13.

Civilisation and Cultivation

The intimate connection between civilisation and agriculture is a long one, and provided a major justification for the appropriation of Indigenous lands. Many economic arguments in favour of the benefits to England of colonisation in the New World centred around the importance of opening new land to cultivation. Agrarian activities were seen as the most profitable basis on which to settle new land. Alternative activities, such as mining and grazing, were in fact discouraged by early supporters of colonisation.[44] Further, the Church supported agriculture as a property mode of settlement for North America:

> To the preachers and politicians who supported [settlement], industry meant farming and farming meant tillage, not grazing... as soon as the missionaries were able to establish themselves among the Indians they began to introduce the idea of English style farming ... the official English preference for tillage showed itself every time a new mission was founded.[45]

The writings of two particular individuals contributed to the equation of agriculture and civilisation. The first of these, John Locke, is well known for his *Two Treatises on Government*, and labour theory as a justification for private property. Less well known is his role as Secretary of the Council of Trade and Plantations in which he played an important role in defending and justifying colonialism in the New World. Of equal importance are the writings of the Swiss jurist Emer de Vattel, who helped to shape early international law, particularly as it related to the acquisition of territory. The writings of both of these men are reasonably well known. Although they were not the first to justify

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44 B. Arneil, 'Trade, Plantations and Property: John Locke and the Economic Defence of Colonialism' (1994) 55 *Journal of the History of Ideas* 591, 599.

45 J. Axtell, *The Invasion Within: The Conquest of Cultures in Colonial North America*, Oxford University Press, Oxford, 1995, quoted in Arneil, *id* at 600.

appropriation of Indigenous lands by reference to cultivation,[46] arguably their writings have been the most enduring.

John Locke, Secretary of the Council of Trade and Plantations

One of the most influential figures in the defence of colonialism was John Locke, who was secretary of the Council of Trade and Plantations from 1673 to 1675. Locke is, perhaps, better known for his justifications of private property. As is well known, Locke's justification of private property centres around the notion of labour. Man, by his labour, can appropriate the fruits of the earth as his own. Locke states the origins of property in land thus:

> As Much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labor does, as it were enclose it from the Common.[47]

Locke's *Second Treatise* is littered with references to the land and Indians of North America. Locke clearly believed that land in the colonies would be more valuable if it were to be farmed, rather than left to the Indigenous inhabitants:

> I aske (sic) whether in the wild woods and uncultivated waste of America ... without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land down in Devonshire where they are well cultivated.[48]

Thus, the Devon farmer, and English agricultural methods, exemplify the agrarian ideal. Thus, by contrasting the unproductive occupation of North America by the Indians with the fruitful labour of the Devon farmer, the appropriation of Indian land could be justified in terms of bringing unproductive land into proper economic use '[w]here there

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46 See, for example, T. More, *Utopia*, tr P. Turner, Penguin, Harmondsworth, 1965.

47 J. Locke, *The Second Treatise of Government*, ed T. Peardon, Bobbs-Merrill Educational Publishing, Indianapolis, 1952, para 32.

48 *Id* at para 37.

being more land, than the Inhabitants possess, and make use of, any one has liberty to make use of the waste'.[49]

Even that land, however, that was 'in use' could be appropriated. Locke does not deny that appropriation of private property was occurring in North America: '[t]hus this law of reason makes the deer that Indian's who has killed it'.[50] However, he clearly subordinates hunting and gathering to his preferred agricultural model as a basis for appropriation of property from the commons. Locke directly links the emergence of the Indian from a state of nature into civil society with the agrarian ideal. The Indigenous inhabitants can only exercise their natural rights to property by reason and industry. As Arneil notes:

> Locke argued that it would only be through industry and reason that the American Indian could be converted from natural to civil man. Such a transformation, however, was inevitable. Thus the transcendence of the state of nature by civil society, which is so central to the development of liberal thought, when seen in the colonial context in which it was created, becomes a philosophical justification for both the usurpation of Indian land and the assimilation of 'natural man' into civil society.[51]

Locke, of course, was not the only one to espouse the agrarian ideal. Adam Smith, for example, in his *An Inquiry into the Nature and Causes of the Wealth of Nations*[52] stated that 'to cultivate the ground was the original destination of man'.[53]

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49 *Id* at para 184.

50 *Id* at para 19.

51 Arneil, *above* n 44 at 609.

52 A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations,* ed E. Cannan, University of Chicago Press, Chicago, 1976.

53 *Id* at 338.

International Law and Acquisition of Territory: Emer de Vattel

By the seventeenth and eighteenth centuries, the rules of international law relating to acquisition of territory had begun to take shape. International law was still a fledgling branch of law. However, acquisition of territory, not surprisingly, was one of its first concerns. According to international law, territory which was *terra nullius* could be brought into ownership by occupation. Much of the New World was not, however, truly *terra nullius*. Both Australia and the Americas, for example, had indigenous populations whose existence could not be factually ignored. Legally, however, it could be, provided that there was sufficient justification for such action. Early influential writers had made it clear that land belonging to indigenous inhabitants could not be classified as *terra nullius*, and hence could not be claimed. Of these writers the most influential, and best known were Francisco de Vitoria (1480–1546) and Bartolome de Las Casas (1474–1566). The discovery of the New World, and of its indigenous inhabitants in particular, posed difficult moral questions. De Vitoria, probably the most influential of the early Spanish writers, considered that discovery of the New World did not confer legitimate title on the Spanish. He wrote his influential *De Indis et De Lure Belli Relectiones* barely forty years after the Spanish began their conquest of the New World. As de Vitoria himself stated:

> The whole of this controversy and discussion [on the rights of the Indians] was started on account of the aborigines of the New World, commonly called Indians, who came forty years ago into the power of the Spaniards, not having previously been known to our world.[54]

De Vitoria considered that discovery conferred legitimate title on the deserted regions of the earth. By virtue of natural law and the law of nations such areas became the property of the first occupant. Land with indigenous inhabitants could not be classified as *territorium nullius*.[55]

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54 F. de Vitoria; *De Indis et De Iure Belli Relectiones,* Classics of International Law, 1917, 116.

55 J.S. Davidson, 'The Rights of Indigenous Peoples in Early International Law' (1994) 5 *Cantab LR* 391, 399.

De Vitoria stated that '[discovery] in and by itself ... gives no support to a seizure of the aborigines, any more than if it had been they who had discovered us'.[56]

This is not to imply that de Vitoria did not believe that Indian lands could never be seized. Just war could be waged against the Indians. Such a war could be waged, *inter alia*, if the Indians refused to receive the Christian faith if required to do so by Papal authority.[57] For de Vitoria, as well as others of the period, the rights and status of Indigenous peoples depended on whether they could be classed as rational human beings. De Vitoria concluded that the Indians has 'according to their kind, the use of reason'.[58] Such a view reflected the place of God as a source of legal authority, and the merging of law and theology in writings of the Spanish school. De Vitoria conceived of a normative order higher than temporal authority[59] applying to all levels of human interaction. Indigenous peoples had rights by virtue of their humanity.

Vitoria's work is too complex to thoroughly review here. Importantly, however, is the fact that in the sixteenth century, the concept of *terra nullius* was meant to reflect a literal truth: land could be acquired if it was deserted, in other words if it was truly *terra nullius*. The work of the early Spanish writers, and of de Vitoria in particularly, was enormously influential. Grotius (1583–1685), often known as the founder of international law, adopted de Vitoria's ideas concerning Indigenous peoples, and agreed that lands inhabited by indigenous populations could not be regarded as *terra nullius* and thus were not susceptible to appropriation by European powers.[60]

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56 *Ibid.*

57 For a comprehensive analysis of de Vitoria's views, see J.S. Davidson and G.C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco De Vitoria and Bartoleme De Las Casas' (1992) 13 *Aust Ybook Intl L* 1.

58 De Vitoria, *above* n 54 at 27.

59 Anaya, *above* n 4 at 10.

60 H. Grotius, *The Freedom of the Seas, or the Right which belongs to the Dutch to Take Part in the East Indian Trade*, tr R van D Magoffin, Oxford University Press, New York, 1916, 11–14.

However, by the time middle of the 1700s, rights of Indigenous peoples were on the decline. International law now emphasised the superiority of the Sovereign State, and had undermined the rule of *terra nullius*. Already it had become obvious that land in the New World was not unlimited. White settlers were increasingly encroaching on Indian lands. European powers were rapidly parcelling out the Americas between themselves. International law now recognised a distinction between those territories in which the indigenous inhabitants were 'civilised' and those in which they were 'uncivilised'. European powers could acquired territory inhabited by 'backward peoples' by means of occupation.

Although civilisation was often equated with Christianity, and the existence of a settled system of law recognisable to Europeans, in international law civilisation was also equated with cultivation. The introduction of cultivation into the equation is often accredited to the Swiss jurist Emer de Vattel (1714–1767). De Vattel commenced his writing about twenty years before the beginning of settlement in Australia. His treatise *Droit des Gens ou Principles de la Loi naturelle appliques aux affairs des Nations et des Souverains*, published in 1758, was the most influential book on international law in the nineteenth century.[61] In de Vattel's opinion:

> Every nation is ... bound by natural law to cultivate the land which has fallen to its share, and it has no right to extend its boundaries or to obtain help from other nations except in so far as the land it inhabits can not supply its needs.[62]

Thus, if the indigenous inhabitants of the new territory do not cultivate their land, then when:

> in establishing the obligation to cultivate the earth, [tribes] cannot exclusively appropriate to themselves more land than

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61 M. Koskennieni, *International Law*, Dartmouth, Aldershot, 1992, xii.

62 E. De Vattel, *Droit des Gens ou Principles de la Loi Naturelle Appliques aux Affairs des Nations et des Souvrains*, ed J. Chitty, T. & J.W. Johnson, Philadephia, 1863, 35.

> they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the People of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle, with colonies.[63]

Such views emanate partly from de Vattel's theoretical justification for the State, a justification which owes much to Hobbes and Wolff. According to de Vattel:

> Society is established with the view of procuring, to those who are its members, the necessaries, conveniences and even pleasures of life, and, in general, everything necessary to their happiness, of enabling each individual to peaceably enjoy his property, and to obtain justice with safety and certainty...[64]

Because of this, cultivating land established a greater right to the land than did hunting or fishing. For example, de Vattel distinguished between the 'civilised Empires of Peru and Mexico' and the North American 'peoples of those vast tracts of land [who] rather roamed over than inhabited them'.[65] The conquest of the former 'was a notorious usurpation, [but] the establishment of various colonies upon the continent of North America might, if done within just limits, have been entirely lawful'.[66] The distinction between the two was based on the Lockean natural law duty to cultivate the soil.

> Every Nation ... is bound by the natural law to cultivate the land which has fallen to its share.... Those who still pursue this idle mode of life ... of desiring to live upon their flocks and the fruits of the chase ... occupy more land than they would have need of under an honest system of labor, and they

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63 *Id* at 100.

64 *Id* at 32.

65 *Id* at 36.

66 *Ibid.*

> may not complain if other more industrious Nations, too confined at home, should come and occupy part of their lands.[67]

As did Locke, de Vattel clearly elevates agriculture above other forms of land use, for example grazing, or exploitation of minerals. The criterion of cultivation as evidence of cultivation persisted in International law. In *Mabo (No. 2)*, Brennan J acknowledged that one of the common criteria of civilisation was that of cultivation.

> [The European powers] recognized the sovereignty of the respective European Nations over the territory of 'backward peoples' and, by such State practice, permitted the acquisition of sovereignty over such territory by occupation rather than by conquest. Various justifications for the acquisition of sovereignty over the territory of 'backward peoples' were advanced. The benefits of Christianity and European civilisation had been seen as a sufficient justification from medieval times. Another justification for the application of the theory of *terra nullius* to inhabited territory ... was that new territories could be claimed by occupation if the land were uncultivated, for the Europeans have a right to bring land into production if they were left uncultivated by the indigenous inhabitants.[68]

Thus, 'backwards peoples' became, *inter alia*, those who failed to cultivate the earth. De Vattel's preference for settled societies which cultivated the soil was echoed by Marshall CJ in his famous decision in *Johnson v M'Intosh*,[69] where he described the Indians as:

> fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a

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67 *Id* at 35–36.

68 *Mabo (No. 2)*, *above* n 5 at 32–33.

69 *Johnson and Graham's Lessee v M'Intosh* 21 US (8 Wheat) 543 (1823).

> wilderness; to govern them as a distinct people was impossible.[70]

As a result of so characterising the Indians, Marshall CJ allowed that title to the Americas had been gained by discovery,[71] although that did not mean that the Indians had lost their rights to land or inherent rights of self-government.[72] Similarly, in his highly influential *Commentaries on English Law*, William Blackstone, although he had misgivings as to whether lands occupied by Indigenous peoples could be classified as *terra nullius*, nevertheless accepted the dichotomy between cultivated and uncultivated lands which had been posited by de Vattel.

> Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupation only, by finding them desert and uncultivated, and peopling them from the mother-country, or where, when already cultivated, they have been gained by conquest, or ceded to us by treaties.[73]

Thus, we can trace the emergence of the criterion of cultivation as a determinant of a State's ability to acquire property from Locke, to de Vattel, to Blackstone and Marshall. This begs the question of why such emphasis was placed solely on cultivation, rather than on other forms of land use.

Why Cultivation?

Locke's emphasis on agriculture can be traced directly to its economic value to the colonising power or, more specifically, England. The encouragement of agriculture in the New World had several benefits. In addition to the number of people directly employed, the export of crops

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70 *Id* at 590.

71 *Id* at 591.

72 See also *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831); *Worcester v Georgia* 31 US (6 Pet) 515 (1832).

73 W. Blackstone, *Commentaries on the Laws of England,* Book I, Chapter 4, Strahan, Cadell & Prince, London, 1783, 106.

to England would necessitate the creation of shipping, leading in turn to more employment. In this, Locke was influenced by economic writers, particularly Sir Joseph Child.[74] According to Arneil, Child argues that the best form of plantation is one based on agriculture, rather than on trade or mining, which were the preferred activities of other colonial powers. Child is particularly scornful of the French and Dutch in this regard. Child believed that grazing or raising cattle was unsuitable as it led to intercolonial trade within America, rather than benefiting England. Mining made a few adventurers rich and would not create employment as would agriculture.[75]

These ideas were echoed by Charles Davenport, who was also a defender of plantations. Like Child, he believes that cultivation is the best form of development in the colonies.[76] Agriculture, and the consequent need for trade, fulfilled many purposes: it created needed food supplies; created employment in a number of sectors, and kept the colony dependent on the mother country for many goods not manufactured locally. As noted above, Locke, like Child and Davenport, focuses almost exclusively on agricultural activity in his *Two Treatises*. Arneil argues convincingly that Locke's writings in defence of the economic benefits of plantations, and the cultivation of them, are consistent with their views: views that he was clearly aware of. Locke recognises that the benefits of cultivation and labour are not only the products of the soil, but also the employment that it generates:

> An acre of land that bears here twenty bushels of what, and another in America which with the same husbandry would do the like are, without doubt, of the same natural intrinsic value, but the benefit mankind receives from the one in a year is worth £5, and from the other possibly not worth a penny if all the profit an Indian received from it were to be valued and sold here....

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74 Arneil, *above* n 44 at 598–599.

75 *Ibid.*

76 *Id* at 601.

> For it is not only the ploughman's pains, the reaper's and thresher's toil, and the baker's sweat [that] is to be counted into the labour of the bread we eat; the labour of those who broke the oxen, who digged and wrought the iron and stones, who felled and framed the timber employed about the plough, mill, oven or any other utensils, which are a vast number requisite to this corn, from its being seed to be sown to its being made bread, must all be charged on the account of labor and received as an effect of that.[77]

Locke continues on to list other offshoots of agriculture. In order to produce bread one also needs iron, wood, bricks, coal, pitch, tar, ropes, masts, to name a few.[78]

Essentially, therefore, Locke's views on the importance of cultivation of the soil can be traced to an essentially utilitarian argument about the economic value of agriculture, formulated in a climate of antagonism towards colonisation of the New World. Agrarianism was a fundamental part of English economic life, and those skills could be transported profitably to the Americas. Locke's views are based on economic necessity, rather than an idealised view of agrarian society.

Similarly de Vattel, whose ideas closely parallel those of Locke, are squarely based in necessity. Simply put, according to de Vattel, the human race could not exist without agriculture. As numbers grew, and the need for food increased, agricultural communities had the right to enclose and cultivate land left unexploited by others.[79] Otherwise, it would not be possible for civil society to procure for its citizens the necessities of life. Agriculture is the basis of a nations wealth:

Of all the arts, tillage or agriculture, is doubtless the most useful and necessary, as being the source whence the nation derives its subsistence. The cultivation of the soil causes it to produce an infinite increase; it

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77 Locke, *above* n 47 at para 43.

78 *Ibid.*

79 See T. Flanagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy' (1989) 22 *Can Jnl Pol Sci* 589, 598.

forms the surest resource and the most solid fund of riches and commerce, for a nation that enjoys a happy climate.[80]

Conclusion

Learning the art of cultivation was only one of the steps on the way to civilisation, but it was an important one. Colonial law and policy in North America reflected that ideal for over a century. With its roots firmly entrenched in the enlightenment ideals of the perfectibility of man, the emphasis in Canada on cultivation persisted despite the failure of numerous agricultural 'experiments'. While the same ideal was posited for Australia, it had little time to become entrenched before it withered in the face of growing acceptance in Britain of the innate biological inferiority of 'Indians and 'Blacks'. The emphasis on the art of cultivation in policy and law parallels the views of Locke and de Vattel as to the central importance of agriculture to the New World. While Locke and de Vattel were undoubtedly part of an already existing tradition which espoused the agrarian ideal,[81] they linked that ideal to the New World and the rights of Indigenous peoples. However, for them, cultivation had little to do with idealism, and more to do with economic necessity. The use of cultivation to determine the right of European Nations to appropriate land proved disastrous for Indigenous peoples. The linking of agrarian skills with the notion of civilisation proved no less disastrous.

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80 De Vattel, *above* n 52 at 34.

81 See, for example, More's *Utopia*, *above* n 46 at 79–80, in which he advocated that all members of the Utopian Community be compelled to spend at least two years on agricultural work. More explains that:

> [the Utopians consider] war perfectly justifiable, when one country denies another its natural right to derive nourishment from any soil which the original owners are not using themselves, but are merely holding on to as a useless piece of property.