Waitangi, Morality and Reality

Kenneth Minogue

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FOREWORD

Throughout New Zealand there is growing concern with the direction of the Waitangi process. The hope that it would lead to a mutually acceptable and enduring settlement is receding. Professor Kenneth Minogue has presented a scholarly and timely review of the process. It benefits from his being able to do this from a distance.

Not everyone will agree with his views. Many Maori will view with scepticism any suggestion that the welfare of Maori figured prominently at any stage of the British colonisation. But his discourse on the realities – what the process means now and what it might mean for most New Zealanders in the long term – is worthy of careful study.

While the powers and functions of the Waitangi Tribunal are unique to this country, Minogue points out quite rightly that our reviewing of past injustices was but part of a worldwide movement to a liberal and moralist philosophy providing for a recognition of aboriginal rights. This philosophy began and spread in the second half of the present century. He warns too against the dangers inherent in measuring the actions of another time against the generally accepted morality of our time. Many will concur with his concern at the efforts of lawyers and the judiciary to extend their role beyond an interpretation of the law and to promote a legal responsibility for policy formation.

Of special interest is Minogue's view on what the process might mean for Maori in the long term.

While the Tribunal rulings may help to satisfy historic injustices, they will not in themselves overcome the current Maori social disparity – indeed they may act to simply widen the gap between Maori and non-Maori. 'One off' cash payments are a powerful incentive to retribalise and will encourage some Maori to seek equality from a new role as rentiers. Minogue points out that reductions in the social disparity of the Maori people as a whole will only come about from the energy and initiative of individuals.

There is, too, a danger that with the current aversion to paternalism, the government will see its role as ended with the handing over of the cheque. But as Minogue points out, "stringless money often ends up in odd pockets". The virtual absence of any legitimate Maori organisation makes that danger all the more real.

It remains to be seen whether Waitangi settlements will do much to benefit the majority of ordinary Maori. But if they do not, and if other

avenues to Maori advancement are not opened up, then we are bound to revisit the process again some time in the next century.

Sir Peter Tapsell
Former Member of Parliament for Eastern Maori and
Speaker of the House of Representatives

PREFACE

Waitangi, Morality and Reality aims to set the work of the Waitangi Tribunal, along with wider issues of ethnic relations in New Zealand, in a broader perspective than the viewpoint of the actual participants, who are, of course, the entire population of the country. My argument will not appeal to all; indeed, it may not appeal to anyone, but I have tried to open up some of its less obvious dimensions for examination and discussion.

I am enormously indebted to those who have made comments on earlier drafts, thus saving me from even more egregious errors than will no doubt be found in the completed version: among others Michael Bassett, Agnes-Mary Brooke, Graham Butterworth, David Caygill, Greg Dwyer, Richard Epstein, Stephen Franks, David Henderson, Jack Hodder, Roger Mackey, Bernard Robertson, Barrie Saunders and Bryce Wilkinson. I am particularly grateful to Sir Peter Tapsell for his kindness in agreeing to write a foreword.

It is conventional to say that none of the people acknowledged should be blamed for my mistakes, but, given my distance from the heat in the kitchen, the warning is doubly relevant. It may in this case, however, be unnecessary. Any connoisseur of the Waitangi scene will recognise that these people, as distinguished contributors to public discussion, disagree enough among themselves to be innocent of any charge that they may be entangled in my attitudes.

My greatest debt is to Roger Kerr and the New Zealand Business Roundtable, who have made immersion in these important issues a great pleasure.

Kenneth Minogue
London, February, 1998

1 How to Analyse the Waitangi Process

INTRODUCTION

In 1985, New Zealand's Labour government under Prime Minister David Lange adopted the remarkable policy of attempting to wipe clean historic injustices suffered by the Maori population since the signing of the Treaty of Waitangi in 1840. The aim was said to be "justice for Maori". The government at that time expanded the powers of the quasi-judicial Waitangi Tribunal established by the Labour government in 1975 so that the Tribunal could investigate the facts and recommend to parliament appropriate forms of redress. This policy was remarkable not because it was unique, for similar policies towards indigenous peoples were being implemented in Canada, Australia, the United States and other places, but because it is an adventure in the politics of moral idealism. Our concern is thus with a case study in a completely new kind of politics. As such, it is of worldwide significance.

Like all complex human events, the emergence of the Waitangi Tribunal can be understood in other ways than this. It may be seen, less heroically, merely as redress for longstanding breaches of contract that had taken place in the relations between the Crown and Maori. From this point of view, its only unusual feature – but a highly significant one – would be that present restitution would have to be made for the grievances of people long dead. This unusual feature has provoked nervous attempts by the government to circumscribe the activities of the Tribunal, by means such as fixing a time limit on advancing claims or a financial limit (the 'fiscal envelope') on the quantity of reparation. The idea of justice (if that alone were at issue) resists such limitations, and these circumscriptions are, at least for the moment, in abeyance.

Again, the Waitangi Tribunal might be seen, perhaps a little cynically, merely as a response to the threat of disorder posed by longstanding Maori agitation. Essentially political responses are often cast in the moral idiom of a rectification of injustices, provoking opponents to talk of 'blackmail'. Seen thus, the Waitangi Tribunal would simply be one more device thrown up in the endless improvisations of national politics. These and other possible descriptions of what is happening make it easy, for those who disagree, to talk past one another.

These are problems at the level of description, but even before one wades into a discussion of ethnic relations in New Zealand one faces decisions about names and points of view. The broad intention of many actors in these events is that the Tribunal should deal with longstanding injustices and, as a consequence, should reconcile the people of New Zealand to one another once and for all. It is thus a new kind of response to conflict, which is a perennial feature of civic life. Hence the established term for what is going on is the 'reconciliation process'. This name amounts to taking the success of the process for granted. Let us therefore begin by specifying our subject as neutrally as possible. Let us call it simply 'the Waitangi process'.[1]

A huge literature has already grown up around this development. It colours many aspects of New Zealand life and arouses strong passions. My interest in it is that of a political philosopher whose early years were spent in New Zealand. I cannot hope to equal the deep and instinctive understanding displayed by those who live with this process. I hope, however, to succeed in sketching a framework in which the conflicting realities of reconciliation may be brought into a single focus of understanding.

METHOD: AGAINST ABSTRACTION

The philosophical focus referred to above requires an explicit method. Let me explain, for those with a taste for such things, what framework I am using. Others may skip.

The expression 'New Zealand' refers to the concrete doings of more than three and a half million people and their forebears over at least the last two centuries, but the way in which we generally understand this complex entity is by using a set of familiar abstractions. Each abstraction has a coherence of its own, but what is true in one not infrequently contradicts what happens in another.

New Zealand is, from one point of view, a *state*, or civil society, composed of subjects and citizens living according to law as periodically changed by a democratically elected government. Thinking in terms of an active citizenry suggests that a democratic political will can solve

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[1] The very use of the term 'Maori' (rather than 'Maoris') has been contested by Andrew Sharp as taking an activist stance for granted because it assumes a unity among Maori which is quite unreal, and the contrast is with Whites, but the Maori language usage of not expressing a plural through the addition of an 's' has become standard. For a discussion of the naming problems, see Andrew Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s*, Auckland: Oxford University Press, 2nd edn 1997, pp 12–20.

basic questions. Politics is the arena in which public decisions are thrashed out and enforced, and it encourages the fantasy that power can solve all problems. This is why it is necessary to invoke other aspects of human association.

The *economy*, for example, is the structure in which those subjects and citizens appear as consumers and producers, wage-earners and entrepreneurs. The decisions of government often contradict very powerful economic tendencies (one cannot quite call them 'laws'.) Price control imposed by governments in the interests of fairness has notoriously perverse conquences – a point now so familiar that governments have largely abandoned it, often preferring more sophisticated ways of controlling markets which can also have perverse effects.

But humans do not live by power and bread alone and, for many other purposes, New Zealand is a *society* whose members pursue their own ideas of happiness, often by combining together in religious or economic organisations, in clubs and crowds, or living together in towns and suburbs, or on a marae. This kind of association is so all-embracing that people are often tempted to regard it as fundamental, treating 'society' as if it were a single agent whose will is always expressed by the state. In social life, men and women constantly arrange and rearrange ('negotiate') their affairs, which has suggested to some that goodwill and negotiation might solve all problems.

From yet another point of view, New Zealand is a *culture*, or perhaps two cultures, or perhaps more, in which these people find the words, gestures and rituals with which to express what they are, and to say what they wish to communicate to one another. The idea of 'culture' happens at the moment to be a runaway success in our thinking about practices, but it must be treated with caution, partly because it is vague, and partly because (as we shall see) it has at least one well-known fallacy virtually built into it.[2] But in the Waitangi context, the term cannot be avoided.

The reason public policies often have perverse effects is that what makes good sense in economic terms, for example, may have unwelcome social consequences; or something which is thought to be culturally desirable is politically impossible. Nor do these abstractions exhaust the

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[2] The fallacy (which is also frequently perpetuated by people's use of the notions of 'society' as well as 'culture') consists of people confusing the question of whether culture is what we determine (as when people say 'we must change the culture of ...') or whether it is something that determines us. The managerial sense of the term 'culture' is the commonest, but that merely makes it an instrument of our desires, and devalues the term.

field. Citizens, producers, associates and artists are also moral and sometimes explicitly religious agents, and these elements of human life have often come into conflict with other elements. Each abstraction is capable of generating desirabilities, indeed often imperatives, which may have unwelcome consequences in some other part of the social forest.

To analyse a complex situation in these terms is to follow impulses as they move from their original source to their ripples in other aspects of the inclusive thing we call 'society'. In the case of the Waitangi process, the origin of policy is pretty clear. It arises within the ambit of law and morality. The initiating demand is for justice. Moral policies exert a powerful force because doing the right thing generally trumps doing any other kind of thing. *Fiat justicia, ruat coelum*, as the classical tag has it: Let justice prevail, though the heavens fall. Many people, however, would understandably prefer a bit of injustice to the fall of the heavens, or even a fall in prices. Morality may trump politics, but politics often has extra cards up its sleeve. Again, law is powerful in Western societies because it has been our experience for centuries that behaving in an orderly lawful way is the essential condition of a civilised and prosperous life. When laws produce anomalies, as they inevitably will, it is generally better to stick with the law rather than embark on the endless and usually impossible task of finding the perfect rule. Any policy which commands the legal high ground in this way will drag everyone along in its wake because it is difficult to take up positions which challenge 'doing the right thing' as judges have interpreted it. But in politics, and economics, the right thing is not always the wise thing. Everyone ought, in moral terms, to be paid what we currently regard as 'a living wage' or what in medieval times was 'the just wage', for example, but modern governments which try to institutionalise this policy have generally achieved poverty and stagnation along with fairness.

My aim, then, is to take a bird's eye view of the Waitangi process, in the hope that what I lack in tactile grasp of its realities may be balanced by the illumination of a framework.

Two general sources of error may be found within this framework. The first is that judgments can get locked into one or other abstract aspect of human life (moral, social, cultural etc) and produce contradictions, which will lead to perverse results. Politics is notably an arena of illusions, and political realities change rapidly. The unthinkable and the impossible (certain levels of unemployment, for example) can turn into tomorrow's things taken for granted.

Thus the second source of error is when we succumb to the parochialism of our own time. We imagine that we have corrected the errors of times past and have arrived at the truth, when all the time we are merely entertaining what we find to be a more interesting error. Even in science we are often the victims of what 'the latest research' seems to have demonstrated, yet we know that even later research will modify most findings. The area in which this error is most devastating is that of morality. The moral attitudes of our ancestors (indeed, often, even those of our grandparents) can seem so remarkable that we find it hard to refrain from patronising them. But we ought to control dogmatism with the realisation that we shall be patronised in our turn.

The question is, then, how does the Waitangi process look if it is considered from a critical and philosophical point of view? How does it look if considered in terms of the philosophers who have given our civilisation the gift of self-understanding?

THEME: MORALITY AND REALITY

The key concept of the Waitangi process is justice – justice for Maori. Plato formulated the classic definition of justice as giving people their due – and the rest of his *Republic* (circa 380 BC) is devoted to explaining what that might possibly mean. Justice was central to the inhabitants of the classical republics, but the significant fact is that modern political philosophers until quite recently have tended to play down justice because they judged that it was a formula for endless trouble. In *Leviathan* (1651) Thomas Hobbes defined the word 'just' as meaning simply "Hee that in his actions observeth the Lawes of his Country".[3] Hobbes took the view that peace was threatened if anyone's private opinion about justice could be set up, in a clash of absolutes, against the judgment of the sovereign power. Contemporary democratic states are a good deal more resilient than Hobbes imagined; moral controversy is their essence. They do not easily fall apart. But Hobbes' view is a useful warning against moral dogmatism focused on the term 'justice'. The warning is not less pertinent because (as we shall see) Hobbes is in bad odour with some New Zealand writers.

It is by no means irrelevant to the Waitangi process to observe that our present *fin de siècle* is, in the Western world, a time in which moral arguments have come to play a larger than usual part in public debate. The first half of the century was dominated by many versions of realism.

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[3] Thomas Hobbes, *Leviathan*, edited by Kenneth Minogue, London: JM Dent (Everyman), 1994, Ch 4, p 15.

Political activists at that time rather despised utopianism and worked for the seizure of power by revolution. Students in universities were taught to distinguish between facts and values – the doctrine known as 'positivism'. Facts were respectable because they were testable, while values were commonly thought to be merely subjective, matters of taste.

In the second half of the century, such is the power of fashion, morality has made a comeback, a change of mood influenced most notably by the publication in 1972 of *A Theory of Justice* by John Rawls. Rawls argued that justice was not so much equality, or giving people their due (which might mean what they had inherited, for example), as fairness, which turned out to mean distributing the benefits of society as equally as was compatible with freedom and prosperity.

Such a conception of social justice is the dominant moral criterion of our time, and it must be distinguished from the claim to historic justice on which the Waitangi claims are based. The correction of a historic injustice is in principle a once and for all matter, while the response to social injustice (however understood) is likely to be a continuing commitment. Some New Zealand politicians with whom I have discussed the matter seem indifferent to this crucial distinction; they consider that the actual ground on which Maori get the transfers they need is not particularly important.

This is not a confusion shared by Douglas Graham, the minister charged since 1991 with the government's response to the Waitangi process. We now have the benefit of his reflections on the whole question of reconciliation and, though we shall later comment critically on some aspects of his argument, we may say at once that it is the *locus classicus* of the purely moral view of what is happening. To say this is not to condemn it as merely utopian. As a practical politician, Graham knows that it takes two to negotiate, and that it is necessary to set limits to the terms of any settlement due to the fact that the government is responsible to the whole country. His basic thesis is simple and hard to contest: the Crown has in the past failed to honour its clear obligations and, until the resulting injustices (as they are objectively) and grievances (as they are felt by Maori) have been remedied, New Zealand cannot (as he puts it, in the upbeat language of politicians) "meet the challenges of the future without the baggage of the past".[4] And we need to distinguish between injustices and grievances, because the way moralists deal with injustices is far from being the same as the way politicians deal with grievances.

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[4] Douglas Graham, *Trick or Treaty*, Institute of Policy Studies: Wellington, 1996, p ix.

The basis of the Waitangi process is, then, that injustice must be remedied. This is the soundest moral proposition there is. But morality is simply one aspect of life. Reality sets limits to it. The criminal who ought to be punished may be out of our jurisdiction, or dead. The victims may no longer be alive to be compensated. Doing the right thing may have large, perhaps unbearable costs. And of course 'injustice' itself is an abstraction, for as Hamlet remarks, "Use every man after his desert, and who should 'scape whipping?". Politics has ever been the arena of moral ambiguity and the most evident problems with the Waitangi reconciliation are the limits it may encounter in political reality.

The point is most vivid with an absurd example: some Maori construe the basic injustice as the very arrival of non-Maori in New Zealand, and *their* demand for justice is a demand for the subordination or removal of all non-Maori. This is an absolute moral and political position, and sheer demographics make it an unreality.

Philosophers argue endlessly about reality, but these metaphysical controversies need cause us no anxiety in this context, for I shall be using the term merely to point to facts about New Zealand which can be judged independently. Like any other important issue, the Waitangi process has become obfuscated by bureaucratic terminology, wishful thinking, and limited perspectives. There is no other way to cut through these confusing appearances than to appeal to reality. It will not save us from controversy, but it does help us to know where we are.

2 The Context of the Waitangi Process

What does the Treaty mean?

In order to grasp what is at issue in the Waitangi process, we must make a dangerous foray – dangerous because passion lurks at every step – into the context of the Treaty. New Zealand is a special case of the wider pattern in which Europeans during the modern period colonised much of the world. Even in the sixteenth century, Europeans worried about the right way to treat the peoples they encountered in their colonising adventures. The Bible dealt with both nature and society. Christians were charged to exploit the resources of nature, and bring the word of God to the heathen. The initial instincts of the actual adventurers were generally ruthless, but from the middle of the sixteenth century, when Spanish natural lawyers debated the responsibilities of the *conquistadores*, the process acquired an often shadowy, moral aspect. The slave trade was a major exception to this generalisation, but elsewhere it was felt that the indigenous people could not be used merely for the conveniences of the newcomers. The result was that Western societies were, in the nineteenth century, the first in human history to abolish the practice of slavery – an activity often found among the indigenous peoples themselves. Aboriginals had to be recognised as fellow human beings to whom some duties were owed. In the Western world, this moral attitude sometimes led to treaties between settlers and locals. And in New Zealand, the same cast of mind in 1840 generated the Treaty of Waitangi.

The Treaty was designed to solve problems of disorder in the country renamed as New Zealand in which Europeans were becoming an important though not yet the dominating factor, and its terms reflected, among other things, a characteristic concern by the authorities in London that the Maori should not simply be plundered and exploited by Europeans. Thus the instructions to Captain Hobson by Lord Normanby, the Colonial Secretary of the time – words quoted with approval on p 385 of the Muriwhenua Land Report – included (among much else) the following caution:

> The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves.

Some Maori have demanded that Normanby's instructions should be incorporated in the current understanding of the Treaty as a guide to government policy, but these very words alone make clear how limited was their significance. Changing markets, tastes and technology would necessarily determine the meaning of what could be alienated without "serious inconvenience". The Normanby instructions clearly refer to a moment in a situation which was changing very fast; the words obviously cannot be set in stone as determinants of life in later centuries. Yet many involved in the Waitangi process have attempted to do just that, advancing the Treaty and its context as a moral utopia to guide New Zealand public policy. The element of utopia lies in a kind of pastoral idyll expressed in the Maori belief that "land is the father of money".[1] But land is not, of course, the father of money, for money requires cultivation and a sophisticated economy. But this pastoral dream crops up often in Maori thought, as when we learn, for example, of a tribe which, although not involved in the war, lost 130,000 acres, on which the Taranaki Land Report comments: "It is hardly surprising Ngati Tama are not a numerous tribe today, for there was no land to sustain them".[2]

What these remarks reveal is that the issue of historic injustice is almost inextricably tied in with assumptions about the protection of a static world of subsistence farming. It is also tied in with a tribally organised world, and thus requires the protection (as we shall see in Chapter 3) of a Maori culture which is distinct from, yet also cannot be separated from, that of Europeans. The demand for reparation, taking the form of a demand for the return of land, thus inhabits a curious shadow world, not quite that of 1840, but also not that of a modern society. The demand by some Maori to incorporate Normanby's instructions to Hobson as part of the understanding of the meaning of the Treaty itself would merely draw Maori even further into these unreal assumptions.

The problem is that the Treaty itself consists of three brief clauses which accord sovereignty over New Zealand to the Crown, confirm the rights and properties of the Chiefs and Tribes and grant them protection

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1 See the first epigraph to Chapter 10 of the *Taranaki Land Report*, Wai 143.

2 Wai 143, p 284. Compare, for a comparably static understanding of economics, Sir Robert Mahuta remarking that "before 1840, Maori controlled all the country's resources" in "Tainui, Kingitanga and Raupatu" in Margaret Wilson and Anna Yeatman (eds), *Justice and Identity: Antipodean Practices*, Wellington: Bridget Williams Books, 1995, p 18. "Resources" is a term whose meaning depends on available technology, and the "resources" of Maori in earlier centuries were limited by technological capacity.

and the "Rights and Privileges of British Subjects". It was signed in February 1840 by many but not all of the tribes. In international law, the Treaty had no significance, and it was only in May 1840 that Captain Hobson, the Lieutenant-Governor, extended British dominion to the South Island, which he did on the basis that it was "by discovery".

The Treaty of Waitangi is thus a fragment, and its significance might be contested on many grounds. It was not the result of any deep thoughtfulness on the part of those concerned, but was hastily assembled as a response to circumstances which were changing rapidly. Certainly no one conceived of it as a form of constitution. In the later nineteenth century it was often judged of no legal significance, though earlier it had been used to discourage Maori from supporting the King Movement. It is not until recent years that it has more commonly – although still only occasionally – been referred to in statute law. Nevertheless, it has come to be accorded the status of a founding document and scanned for 'implications'. These have grown more extensive with the passage of time.

The Treaty recognised two classes of person: "the great number of Her Majesty's Subjects who have already settled in New Zealand" on the one hand, and "the confederated and independent Chiefs of New Zealand" on the other. The basic effect of the Treaty is to turn all the inhabitants of New Zealand into subjects of the Crown, and Captain Hobson is said to have remarked, after the signing, that "we are now one people".[3] All became, as it were, New Zealanders. This was long taken to be the basic meaning of the Treaty, but an alternative construction, popular of late, is that the Treaty recognises the two sets of people – Maori and (in this interpretation) Pakeha – as 'partners'.

'Partners' is here a metaphor, and there are at least two problems about its use: first, collectivities are unusual partners and, secondly, partners generally come together to pursue some specific enterprise, whereas the situation in New Zealand in 1840 was one in which Maori tribes (very far at that time from constituting one people) white traders, missionaries,

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[3] This famous, and salutary, remark is a good example of building interpretation of the Treaty and its context on slim foundations. Thus Douglas Graham construes the remark by distinguishing between the senses of 'matou' (us as opposed to you) and 'tatou' (us together) in Maori. Out of this linguistic sophistication he extracts a denial of the idea that Hobson meant we are "one homogeneous nation" and affirms that Hobson meant "that we are one nation made up of at least two distinct peoples, with room for more". This would have made Hobson, no fluent Maori speaker, a remarkable prophet. See Graham, *op. cit*., p 88.

officials and others were engaged in a great variety of enterprises of their own choosing. What they sought was not some common object but a shared condition – that of peace.

Lawyers have stretched the metaphor, as they have stretched much else in this area. They have taken it to involve a commitment to good faith in the relationship between the two peoples. Such a commitment might well be thought a universal obligation towards humanity except in conditions of war and uncertainty. The good faith involved here would almost seem to mean that the Treaty signified that Maori had handed over some of their resources to Europeans to be managed in trust for Maori which, of course, they had not. And lastly, in this fast tour of some of the Treaty issues which we shall have to consider later, there is the protection accorded to the "Lands and Estates Forests Fisheries and other properties which they [Maori tribes] may collectively or individually possess so long as it is their wish and desire to retain the same in their possession". The term "properties" in the Maori version is taonga or treasures, and has been greatly stretched to accommodate the new circumstances of the late twentieth century.

But it is the issue of "their wish and desire to retain" these estates which raised the most immediate issues. The incoming settlers wanted land, and could often find some Maori who could be persuaded to sell. Quite what such a transaction actually meant was a highly contentious question. The Maori relationship to land was collective rather than individual. Who had the right to sell? Who should share in the proceeds? Might not Maori sell away their birthright, like Esau, for some merely dazzling bauble? These conventional if sentimental questions don't point to the realities of a situation in which Maori had by this time a very acute sense of what they wanted from Europeans. One thing they particularly wanted was muskets which they used in conflicts with one another. Still, these concerns were certainly in the minds of officials at the Colonial Office. Anticipating trouble, the Crown reserved to itself the exclusive right to buy land from Maori in order to protect the interests of Maori. The settlers' passion for land, however, soon led to cases where the transfer was of dubious title. In any case, many Maori soon realised that the whole balance of life was changing in ways they did not like, leading tribes to resist selling land in the Waikato, and eventually to the wars of the 1860s which were still unsettling some parts of the country until the 1880s. The first aim of the settlers on achieving self-government in the 1850s had been to get the power to regulate land transfers out of the hands of London and into their own.

The essence of the problem lies in the ambiguities of New Zealand history. We may clarify it in terms of extremes. The non-Maori settlers who came to New Zealand might be seen as guests, as conquerors or as fellow citizens. The early traders had something of the character of guests who came to trade and stayed for mutual advantage. The Treaty of Waitangi seemed to unite these guests with their hosts in one shared civil association, thus creating the framework that became New Zealand. The wars of the 1860s and beyond cast these newcomers in the role of conquerors. It is even possible to interpret these events as a revolution. Thus Professor FM Brookfield cites the Colonial Secretary in 1843 ruling the question of justice out of a discussion of policy on the ground that the Crown had simply decided the matter, and he continues:

> Stephen's words [Sir James Stephen, Under Secretary for the Colonies] make the point most sharply. Revolution rests upon what is done not what is legal, or necessarily moral or just. In effect the two Ministers were asserting for the Crown a revolutionary seizure of power over the whole of New Zealand, in which the customary legal orders of the Maori were to be effectively overthrown and replaced. And of course the assertion would stand not only against the non-signatory iwi but against any claim that something less than absolute sovereignty had been ceded by those who had signed.[4]

The problem lies in the fact that no general characterisations quite fit the complexities of New Zealand history, but each of them today has its seductiveness for different groups in different moods. Something like the clear, clean conquest analogy was the background (though seldom expressed) to the received view of history up until about the 1960s. It was plausible because the military conquest was overlaid by the realities of technological superiority. The conquest was seen almost as a friendly rugby match, and as expressing a kind of manifest destiny. Conquest was, in any case, an idea that Maori had no difficulty in understanding, for their own inter-tribal conflicts could exhibit a ferocity equal to anything that happened between Maori and Pakeha. In any case, as Charles de Gaulle once remarked, "blood dries quickly". Out of conquests of this kind often emerge unified peoples (as in the waves of invaders who came to England between the end of the Roman occupation and the arrival of the Normans). All political unity emerges ultimately from conquest, and conquerors are not saints. The political problem is that these valuable unions of peoples are usually brutal to create and all too easy to destroy.

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[4] FM Brookfield, "Parliament, the Treaty, and Freedom – Millennial Hopes and Speculations" in Philip A Joseph (ed) *Essays on the Constitution*, Wellington: Brookers Ltd, 1995, p 43.

But the conquest theme in New Zealand history was always rhetorically subordinated to the guest and fellow-citizen theme, now consolidated into the idea of partnership. This is clearly the dominant paradigm of the Waitangi process, and it gains its plausibility not only from the Treaty and the rhetoric which has recently developed around that document – though only if that document is seen in isolation from the realities of the British takeover of New Zealand. Even the succession of fitful endeavours by colonial and early New Zealand authorities to review land purchases and to protect Maori interests gives little support to the partnership idea because the basic assumption is that of a single set of inhabitants of the country, all with rights under the Crown. The main evidence for this way of construing the past is, however, less the benevolence of the new regime than the fact that from the beginning it opened up its culture and its opportunities to Maori, and that Maori did in fact take up these opportunities in a variety of ways.

This guest/fellow-citizen theme is certainly today the dominant paradigm of New Zealand self-understanding. Indeed, symbolic acts are performed so as to erase the conquest paradigm. Thus the settlement with the Ngai Tahu involved a kind of rights minuet: "to recognise the critical importance to Ngai Tahu of Aoraki/Mount Cook, the Crown agreed to transfer the mountain to Ngai Tahu who would immediately retransfer it to the Crown as a gift to the people of New Zealand".[5] This is not quite a matter of "back to square one", however, since what is appropriate to a gift is gratitude, and it is not impossible that this moral point will become important a generation or so hence.

There is, however, one absolutely central unreality in the guest-fellow citizen theme: namely, that if this understanding of Maori-British relations had always been clear to the historical actors, New Zealand would never have been created in anything like its present form. Settlers would have been limited to a small and peripheral role in a Polynesian state.

History as the record of the past may be illuminated by these paradigms, but history as the march of events is not. The point is that year by year in those early times the situation changed, and the multiplicity of actors responded according to what they imagined their situation to be, leaving, as we all do, our descendents to clean up the mess we leave behind. Our generation finds a reality created by a kind of conquest, and an array of grievances and injustices understood in terms of the guest/fellow-citizen paradigm. It is this conjunction which

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[5] Graham, *op. cit.*, p 84.

makes the problem so complex, expensive and intractable. Maori activists and the many non-Maori supporters of the Waitangi process focus their emotions on this paradigm, while many others feel impatient on the basis of the conquest paradigm, as softened into the view that moral and technological superiority has *inevitably* led to the present situation. The present generation finds itself facing the moral, legal and financial price tag not only for things done by its ancestors, but for those things interpreted in ways it does not fully recognise.

New Zealand thus has in an acute form the problems resulting from the confusion between treaty and conquest which has marked the spread of European settlement throughout the New World. Conquest first, treaty later is a familiar sequence in human affairs. Treaty first, conquest later is not, and it led to entrenching in Maori a sense of grievance which bubbled away, often merely on the margins of national politics, until the 1960s when international events gave it the following wind which led to the establishment of the Waitangi process. Meanwhile, other New Zealanders got on with creating what they took to be the very model of an enlightened liberal democracy in which Maori were accorded a place, and some Maori did indeed find considerable success. The common belief during the first half of the twentieth century was that race relations were good, and the average non-Maori took pride not only in what seemed exotic about Maori, but also in the courage and resourcefulness they had displayed in resisting European encroachment. Though intermarriage was never offically encouraged, from the time of the whalers in the 1830s onwards many Maori women took European partners. Some partnerships were only temporary arrangements but many enjoyed long-term relationships and some formally married. The result was that by the mid-twentieth century the majority of Maori had European ancestry. Maori distinguished themselves in war, sport, crafts and the performing arts particularly. One nation, two self-understandings. Such seemed to have been the pattern of the first century and a half of the nation's history.

HISTORICAL INJUSTICES

The initial Maori response to the arrival of the British was one of welcome. European technology was useful in conflicts between tribes, the new access of firepower being taken up with such enthusiasm as to lead to a disastrous Maori population decline in the 1820s. Europeans also brought with them seductive forms of food, drink and tools, attractive especially to a population low on sources of meat and

agricultural variety. Their ships opened up the world to the Maori imagination, and Maori took to Christianity with such enthusiasm that they were soon creating their own heresies. Maori-European relations soon constituted an economy. The British did not at first seem to threaten Maori, and after the internecine wars of the 1820s their suzerainty offered Maori a release from self-destructive tribal conflict.

The rush of settlers seeking to make a fortune led to rapid disillusion, and as the Maori population declined, from a variety of causes including disease, the non-Maori population increased till by 1860 the numbers were about equal to those of Maori. Maori resistance to land sales was difficult to organise because it was seldom entirely clear who had the authority to sell, or to block a sale. Indeed, the Maori idea of what it was to own land differed from that of the British, though the Maori eventually learned what Europeans understood by ownership. Immigrants occupied vacant land, as in Taranaki, without much scruple as to who might own it. On the other hand, until about the 1880s there were still stretches of the North Island which were virtually autonomous zones of Maori life. It has been argued that at the lowest fortunes of the settlers – when leaders like Te Kooti and Titokowaru were in the ascendant – the more pessimistic settlers abandoned the basic conviction that they were destined to take over the whole of the North Island and began to think of it as "a British periphery co-operating economically with a much larger Maori hinterland".[6] The same writer takes the view that the Maori wars were basically less about land than a kind of reflex of the idea of empire: that imperial control was the destiny of the whole of New Zealand.[7]

The result of the wars of the 1860s was extensive confiscation of the land of some 'rebellious' tribes, and also in some cases even of tribes that had fought with the British. It is these confiscations which caused particular resentment. But the current idea of historic injustice is not just about the taking of land. Its meaning has expanded to include the use of resources such as fish, the destruction of tribal custom, the invasion of rights, and ultimately a kind of dishonour. The current number of claims based on such injustice before the Tribunal has reached more than 600, though many of these are overlapping claims to the same assets. The Muriwhenua claim refers back to events before the Treaty itself and

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[6] James Belich, *Making Peoples: A History of the New Zealanders: From Polynesian Settlement to the End of the Nineteenth Century*, Auckland: Penguin Books (NZ) Ltd, 1996, p 256.

[7] *Ibid*, Ch 11.

asserts bad faith on the part of the Crown. One argument which rests on the view that Maori had a different culture from Europeans suggests that Maori assumed that foreigners, rather than acquiring the exclusive title of European land law, would be incorporated in the community only "for so long as the newcomers, like Maori, contributed to the community to the best of their ability and were committed to the community's best interests".[8] This rather flexible condition would hardly constitute a transfer of ownership at all. As a portrayal of the attitude of the time, it patronisingly attributes an unlikely degree of naivety to Maori, but the report itself goes on to argue that the Maori misunderstanding is less important than the breach of good faith by the government which had undertaken, by the Treaty, to be the guardian of the interests of Maori. "The importance of such a fiduciary role could not have been overstated … Fiduciary responsibilities and Maori understandings were ignored in favour of a policy of total extinguishment of native title."[9] These agreements about land were unjust because there was no real meeting of minds: "… while the Government could see only a land sale, a land sale was least on Maori minds, for Maori saw only a plan for settlement, where they would be partners with the Governor and substantial beneficiaries in a new economic regime".[10] The use of the term "partner" here is merely one sign of a distorting anachronism.

The Muriwhenua Land Report expresses a powerful sense of grievance, but it pales beside the Taranaki claim of pain and suffering over land going back to 1841. Taranaki had been almost depopulated because (as one historian puts it) "in the twenties, after many of the local Maoris had migrated to Otaki and Cook Strait, the Waikato tribes had killed or enslaved almost all the rest".[11] Hobson's successor as Governor, Robert Fitzroy, agreed with the judgment of William Spain, a lawyer sent from London to determine the validity of land purchases by the New Zealand Company. Spain thought that the Taranaki purchases had been fair and not detrimental to Maori interests. But Maori came drifting back from the south to find Europeans in possession of their land. Governor Fitzroy, facing a Maori rebellion in North Auckland and anxious not to increase his problems, reversed the Spain award leaving the settlers with insufficient land and a strong sense of grievance. The situation remained

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8 *Muriwhenua Land Report*, Wellington: Waitangi Tribunal, Ch 1, p 4.

9 *Ibid*, p 5.

10 *Ibid*, p 181–182.

11 Keith Sinclair, *A History of New Zealand*, Auckland: Penguin Books (NZ) Ltd, 1991, p 78.

tense with Maori refusing to sell land apparently as a result of an inter-tribal combination. To this economic injury was added internal feuds among the Ngati Awa that intruded into European areas. These tensions led to a decade of fighting from 1860 to the final defeat of the most talented of all Maori war leaders, Titokowaru, in 1869. The climax of the Tribunal's report is the invasion of Parihaka in 1881. The report, however, ignores the earlier inter-tribal history. Its account of the events in Taranaki is a story of unrelieved bad faith and manipulation.

Such stories refer to past events as constituting a present grievance. Unlike the injustices which may have been suffered by individuals, these are not extinguished by death, or by legal limitation, and they offer powerful incentives for the human propensity to generalise. In other words, attention directed to so-called historic injustices cannot but poison relations between present groups, because these events will inevitably be taken as evidence of the bad character of the group committing the alleged injustice. Legal and political desirabilities thus come into conflict: the legal desirability of reparation conflicts with the political desirability of forgetting. The Waitangi process challenges this conflict with the belief that only reparation can lead to forgetting.[12] One unavoidable consequence has been for Maori and others to focus attention on the least admirable, to the detriment of the more admirable, acts of their fellow New Zealanders.

SETTING UP THE TRIBUNAL

Let us now turn to the mechanics of the process. The Waitangi Tribunal was established by the Labour government in 1975. There were many reasons why it was set up, some to be discussed later. It responded to a continuing agitation by Maori dissatisfied with their situation, and the Bill was taken through the House by the late Matiu Rata, then minister for Maori affairs. There was not, at the time, great political interest in the Bill, but there was already developing among non-Maori politicians that sense of the moral necessity of reparation which Douglas Graham, later the minister most directly associated with the Waitangi process, came to represent. Some Maori were unreconciled to how New Zealand had developed, and dealing with these grievances was thought to be the only path to reconciliation.

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[12] This was not the only time these events had surfaced as an issue of public policy. According to Wai 143, the 1927 Sim Commission agreed that the confiscated land in Taranaki had been wrongly taken, and "proposed that compensation should be paid for the wrong done and that, by making annual payments forever, the wrong should not be forgotten". The yearly payment was to be £5000.

The plausibility of this view, which was highly controversial among some non-Maori New Zealanders, could be supported by the fact that by many social indicators Maori were prospering less than other New Zealanders. Their rate of unemployment was higher, more were in prison, fewer university educated, and so on. It might well be argued that part of the reason for this gap in achievement between the two sets of New Zealanders was disadvantages long entrenched in the nation's history. From the mid-1980s, New Zealand governments, first Labour then National, embarked on major reforms of the economy which diminished the range of government interventions. This change of direction was an important part of the Waitangi context. Quite what the non-Maori majority of New Zealand felt about the Waitangi process is not a precise enough question to be answered; but we may hazard the judgment that most were prepared to go some fair distance with any plausible policy that would actually extinguish Maori grievance, and that many for some time gave it little thought.

Whatever the truth of the matter, the powers of the Tribunal were in 1985 notably strengthened and widened. From 1985, they were extended to cover claims going back as far as the 1840 Treaty itself.

The next twist of the story illustrates how developments in unrelated areas of modern life can come together to produce a quite new direction of events. We may brutally simplify by looking at the issue of fish. The government had decided, on conservation and other grounds, to control the exploitation of fish by way of allocating Individual Transferable Quotas for certain species of fish. Such rights – ITQs – were a form of property. In December 1986, Judge Durie, as chairman of the Tribunal, wrote to the minister warning that the new system was a denial to Maori of fishing rights which were recognised in clause 2 of the Treaty of Waitangi. This clause had promised Maori "undisturbed possession" of their fisheries. Maori were generally part-time fishers whose activities had not seemed relevant to a quota system. To ignore Judge Durie's point might well make the government liable for compensation claims arising from this denial of rights. The government made no response to this approach, and in 1987 several tribes obtained High Court interim injunctions blocking any extension of the quota system to other species of fish. The ground of these injunctions, however, was not the Treaty of Waitangi but section 88 (2) of the Fisheries Act 1983 to the effect that "nothing in this Act shall affect any Maori fishing rights".[13]

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[13] My account of these events is heavily indebted to Andrew Sharp, *op. cit.*, pp 81ff.

It might seem that the government could solve this problem by simple legislative *fiat* but, for a number of reasons, this way out was blocked. One reason was that any such solution would violate the emerging coherence of the government's policy of reconciliation. But that reconciliation must be seen in the context of broader changes in both moral and legal thought about the position of indigenous peoples, especially in Western countries.

Some of these changes arose from new legal doctrines about common law rights. As one commentator put it, the law had, stimulated in part by the claims of indigenous peoples, begun to move away from the "traditional case- and statute-bound approach".[14] This approach was associated with the doctrine of legal positivism, advanced by the nineteenth century jurist John Austin, and had been dominant in Anglo-Saxon law for more than a century. Law on this view issued from the sovereign power, and found expression either in statute or in the principles emerging from common law. The important implication of this view of law for the Antipodean situation was that mere customary usage had no status, from which it further followed that New Zealand had been, when the British arrived, a kind of legal, though obviously not a moral, *tabula rasa*. In Australia, the corresponding implication was that the whole continent had been *terra nullius*. The Australian *Mabo* decision in the High Court was the denial of this earlier conception of law and, correspondingly, the recognition that indigenous rights and customs predating the arrival of Europeans had not only moral but also legal force.

In New Zealand, this change of direction was already developing. The initial involvement of the courts with the Treaty, however, resulted from clause 9 of the State-Owned Enterprises Act 1986 which declared that "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". No one quite knew what this meant, except that it was an invitation to the judges to determine the matter, but what was unmistakably clear was that it must involve recognition of the rights Maori already had at the date of the Treaty.

In New Zealand in 1987, then, there appeared to be a formal recognition that Maori had fishing rights which predated the Treaty of

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[14] PG McHugh, citing Sir Robin Cooke, in 'Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches' in Graham Oddie and Roy W Perrett (eds), *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992.

Waitangi. It might have seemed that the new development would have strengthened the persistent Maori claim that the Treaty was the founding document of New Zealand, that it should be accorded direct constitutional status and that Maori fishing rights should be recognised on this basis. What in fact happened was different. The High Court took the view that Maori fishing rights dated back to the time before the British came. It was not entirely clear what they were, but they had been recognised in earlier Acts regulating fisheries (the Fish Protection Act 1877 for example). This was clearly not the time for a clumsy use of parliament's sovereign powers of abolition.

As Andrew Sharp explicates the situation, this challenge to the quota system constituted a problem for all the relevant parties. The non-Maori population was unhappy with any idea that Maori had specific rights of their own. Maori did not like the fact that the judgment came from the common law rather than from a direct application of the Treaty. And the government faced the prospect of a frustrating delay and the expense of litigation in implementing its fishing policy. The solution was to hand the problem over to the Tribunal which had at this point a record of taking a pragmatic approach to Maori claims, and to seek a negotiated settlement.

The story of the Waitangi Tribunal is, then, one in which a somewhat ugly duckling of an institutional device came to be increasingly courted by people who found themselves entangled in one aspect or another of the Waitangi process. That process itself responded most directly to Maori activism. The 1975 Tribunal – sometimes referred to as "the first Waitangi Tribunal" – had relatively circumscribed powers. The 1985 extension of its powers and range is thus thought of as a second Tribunal, while in 1988–89 a new Act increased the Tribunal's membership to 16, five to be women, eight to be Maori.[15] Its resources for research were increased, and it could now split into three to hear a wider range of cases. At this point, it came to be referred to as the third Waitangi Tribunal. Judge Durie, Chief Judge of the Maori Land Court, became its second chairman in 1980 and continued throughout these changes.

It remained, indeed, largely though not quite exclusively advisory. It would make recommendations to parliament, which must take the next step. Yet it had rapidly acquired what Professor Sharp calls a "strategic place in the New Zealand system of law and government", and he argues that this was partly the result of the general tact and discretion of its

[15] Sharp, *op. cit.*, p 81.

early operations. Such, at least, was a judgment still possible in the 1980s, but as we shall see the tone of many of its proceedings became increasingly rancorous. Still, although notionally based on demands for reparative justice relating to claims going back to 1840, its actual procedures necessarily recognised limits in terms of the existing distribution of rights, and it tended to emphasise future equity rather than past reparation. To repair one injustice by the creation of another was explicitly rejected.

The Tribunal did, however, seek tenaciously to construct a form of jurisprudence out of what was sometimes called "the spirit of the Treaty". Since the Treaty is a mere three clauses long, there's not much flesh to sustain a spirit. One of the more notable generators of "spirit" has been the commitment made by the Crown to protect the "properties" (taonga) of Maori signing the Treaty. It is clear enough that land and fish might well come into this class. What is remarkable is how much else has at one time or another been included under this term – in one instance, a land free of pornography, for example. The Tribunal itself has generally stuck to tangible assets. But the most controversial item among the protectable treasures of Maori has been (as we shall consider in Chapter 3) its language and culture.

LEGAL DEVELOPMENTS

I have noted above that among the many currents of thought affecting the reconciliation process was a change in legal thinking. The idea of "new developments in law", however, is not something to be taken uncritically, as if it were analogous to the development of new technologies. Law is closely related to government and administration, and lawyers are valuable simply because they have been trained in a sense of legality, a talent for advocacy, in the technical business of construing legal texts and in adjusting circumstances to precedent. Their task is to make rules which are both broadly predictable, yet also responsive to changing circumstances.

The developments in law so far discussed – the recognition of aboriginal rights – can plausibly fit into this formula. It can be argued that earlier lawyers simply made a mistake in regarding indigenous custom and law as being of no legal force. The business of law must be to supply a continuity of legal framework which bridges not only circumstances but also regimes, as when British law came to dominate New Zealand.

So far so good. But this development also happened to coincide with much broader changes in the law whose significance the layperson need not take on trust. This subject is very large, and we must focus on it in terms of the Waitangi process.

The crucial historical event has been the diffusion among New Zealand lawyers of a set of ideas originating in the United States as 'legal realism'. Legal realism broadens the scope of law by dissolving it into its political and social context, thus breaking down the traditional distinction between law and politics. The legal realist denies that 'law is neutral' and this marvellously ambiguous current proposition has been found liberating by lawyers. What it means, quite simply, is that the lawyer is liberated from the technicalities of statute and precedent and turns into a policy expert. This mind-blowing experience is clearly recorded by Sir Geoffrey Palmer, a central player in the process, who studied in the United States and discovered that Dicey's established view of the constitution, which kept law separate from politics, was "arid". The consequence was clear: "Law is a political instrument, using the word 'political' in its broadest sense".[16]

Sir Geoffrey's conception of the lawyer thus becomes that of the fixer. No more poring over archaic volumes in dusty offices: the lawyer is off to talk to officials and parliamentarians, to deal with state affairs. Lobbying becomes an important part of lawyers' work. Their business is to get things done. Law is an instrument of policy, a way of changing things. But then so too is politics, and the interesting question arises as to who should do the changing. Should it be the busy lawyer composing clauses and formulae and buzzing around the appropriately named 'Beehive' in Wellington? Or should it be the politicians who put their proposals periodically on the line at election time? The democratic answer clearly points to the politician, with the lawyer as a subordinate technician formulating the words by which the ambiguous intentions of politics become the agreed rules of practical life. But this division of labour is to ignore constitutional rules and, above all, the things called 'rights' which have been morally liberated from the vulgarities of elections and appropriated by lawyers who, newly persuaded by the doctrines of legal realism that *everything* is politics (in the broadest sense, as Sir Geoffrey carefully remarks), can become nothing less than social movers and shakers.

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[16] Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System*, Dunedin: John McIndoe, 1992, p 24.

The proposition that parliament is sovereign remains basic to the constitution, but the government is subject to legal checks. The executive must clearly act within the terms of the law it is implementing, but even the legislature is subject to judicial review that can invalidate elements which conflict with natural justice. The doctrine of 'legitimate expectations' has been used to qualify the power of an executive to act in accordance with existing law.[17] And judges can, as we have seen, bring policy issues into their decisions on specific cases.

These developments have in part been a response to the sheer complexity of modern government as it has continuously involved itself in all aspects of social life. The temptation to despotism in an executive disposing of the discretion available in delegated legislation has persuaded everyone that judicial review is a safeguard of our freedom. And so indeed it has been. But it is not by accident that the ancient Greeks used the same term, *pharmacon*, for both medicine and poison, and that which safeguards us in one generation can become less benign in another. In particular, judicial ambition can push out its domain of competence beyond the mere construction of actually existing law and become speculation about practicalities.

For example, one major issue in the Waitangi process has been the question of Maori language. Maori have claimed that language is one of the taonga or cultural treasures protected by the Treaty. One possible way of halting the decline in Maori speaking would be by further provision of radio and television facilities for broadcasts in Maori. In the 1990s, the government was seeking to privatise radio and television in New Zealand, only to be challenged by the argument that this would put the media beyond government control, thus making it difficult to allocate such facilities to Maori if parliament should think this course of action desirable. It might thus be a derilection of the claimed Treaty obligation to protect Maori culture.

In a recent decision, McGechan J decided that there was in law no ground to block the sale of publicly owned media assets, but what is more interesting about the case is the discussion in which this decision is encased.

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[17] For example, *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*, 7 April, 1995, High Court of Australia. As the Ministry of Justice's post-election briefing paper issued in October 1996 notes, international pressures on New Zealand law require that "legitimate expectations are met" (p 31). The impulse to extend the power of judges comes from many directions.

The judge had no doubt of "the compelling necessity to protect a recognised taonga in the form of the Maori language ... ". As he concluded his judgment, he remarked that:

> I do not clear the Crown from assertions of past Treaty breach in respect of Maori broadcasting. As stated in the course of this decision, there are strong grounds for considering the Crown has not done sufficient in recent years.[18]

Further, in reviewing previous Court decisions on this issue, he made the point that in earlier hearings he had taken into account the fact that public resources were straitened, whereas at the time of the 1995 decision he was currently declaring, economic conditions had improved. He even discussed the question of how New Zealanders might be further encouraged to use Maori. Would it help to have "compulsory mainstreaming outside iwi and Maori networks?" The judge's view was that this proposal – presumably to have programmes in Maori slotted in between English programmes on the popular channels – would not work: "The realities are that one cannot force a non-Maori audience to listen to the Maori language". He went on to talk about the risk of backlash. "It is simplistic to speak in terms of capacity, compulsion and incentives ... "

It is striking in this and many other cases that judges have come increasingly to pronounce with confidence upon issues of public policy, the opinions of the electorate, and economic feasibility. It is indeed true that New Zealand opinion on the question of Maori reparations has been strikingly responsive to economic feasibility. The annuities due to be paid to Taranaki Maori as compensation for confiscated land as a result of recommendations by the Sim Commission of 1927 were overtaken by an economic downturn which made them a matter of renegotiation for several decades afterwards.[19] Nonetheless, these are not legal questions and pronouncing on them has been taken as the spread to New Zealand of judicial activism.

Indeed, even in this McGechan judgment, which upheld the Radio New Zealand Act (Nos l and 2) 1995, there are clear signs of tension between parliament and the judiciary. The Crown had submitted that since parliament itself had taken into account Treaty considerations, the Order in Council that was needed to bring the No 2 Act into force was part of "primary legislation" and not sufficiently discretionary to be open to review by the court on an administrative law basis (p 10 of the decision). Mr Justice McGechan outlined a number of hypothetical

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[18] The oral transcript of McGechan's judgment, p 21.

[19] See *Taranaki Land Report*, Wellington: Waitangi Tribunal, p 297.

circumstances which would invalidate this submission, and concluded: "The courts will not lightly infer an exclusion of jurisdiction" (p 11). No indeed!

WHAT DOES THE TREATY MEAN? (REVISITED)

The effect of these legal developments is to introduce a new uncertainty – or should one perhaps call it 'flexibility' – into public life. Aboriginal rights and 'the spirit (or the principles) of the Treaty' both constitute whole new continents of law for Maori to use and judges to play with.

And 'play' is perhaps the *mot juste*. We have seen that the Treaty is a simple document, part but only a part of the complex process by which non-Maori settled in New Zealand. Relegated on technical grounds to the position of "a simple nullity" by the Chief Justice of New Zealand in 1877, it has become notably bloated in our time. It has generated the idea that New Zealand is a 'partnership' between distinct races rather than one nation living under law. Although there is no mention of specific rights in the Treaty, highly specific rights have been discovered in it. Most striking of all is 'the spirit of the Treaty'. Thus Cooke P in *New Zealand Maori Council v Attorney-General* (1987):

> What matters is the spirit. This approach accords with the oral character of Maori tradition and culture.

This is not only to turn the Treaty into something it is not – an oral agreement – but to bias that misinterpretation against any alternative legal reading. Again, Cooke P in *Tainui Maori Trust Board v Attorney-General* (1989) remarks that:

> The principles of the Treaty have to be applied to give fair results in today's world.

All law must, of course, be adapted to circumstances; that is its point. But there is adaptation and adaptation, and it is clear here that the search for 'the spirit' of the Treaty is creating a jurisprudence of the ineffable, which is another way of saying that decisions are emerging from unpredictable and arbitrary political judgments of the judges thus liberated from the tedious business of interpreting texts. Again, the Waitangi process puts lawyers and judges in the way of exhibiting the virtue of generosity with the wealth of other people. It is true that parliament must implement such generosity, but parliament is in a weak position to argue with specialist bodies speaking for justice. The danger is that the process may generate a species of activist operating (if we

may put it vulgarly) according to the principle: squeeze the Treaty and listen for the sound of the cash pouring forth. This is evidently not how the serious exponents of the Waitangi process think, but without prudence it may come to be what the Treaty will mean to the non-Maori majority. And that way will lie political trouble.

I do not wish to weary the reader by excessive quotation of lawyers speaking in tongues, but if I am right in thinking that law and politics have got themselves into a serious tangle in this area, then a dangerous situation will certainly develop. It is typical that Sir Ivor Richardson in the Maori Council case already cited should have observed that "popular discussion" of the Treaty had falsely assumed that simple and straightforward answers were possible, which (of course) he denied, continuing, in a much admired passage:

> The way ahead calls for careful research, for rational positive dialogue and, above all, for a generosity of spirit. Perhaps too much has at times been made of some of these differences and too little emphasis given to the positive and enduring role of the Treaty. Whatever legal route is followed the Treaty must be interpreted according to its principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise.[20]

Broad interpretations of legal documents increasingly approach a licence to legislate. Where, one wonders, amid so much broadness, is the need for "careful research"? And whose generosity is being called into play? It is well known that the *obiter dicta* of judges are commonly indulgences allowed as compensation for the muscular work of close interpretation, but a continuous stream of *obiter dicta* in the Waitangi cases gives the irresistible impression that a new power is stretching and flexing its muscles. And that that power is explicitly disdainful of "popular discussion", *alias* democracy.

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[20] Quoted and discussed in Sir Geoffrey Palmer and Dr Matthew Palmer, *Bridled Power: New Zealand Government under MMP*, Auckland: Oxford University Press, 1997, p 282.

3 The Cultural Question

The International Dimension of the Waitangi Process

We have so far focused on the New Zealand sources of the Waitangi process. But it is important to realise that the history of Maori in the second half of the twentieth century would have been significantly different if a movement of opinion throughout the Western world had not given the process both a language in which to express itself and a strong sense of moral inevitability. As the Taranaki Land Report remarks in its conclusions:

> A century and a half after the Treaty of Waitangi was signed, the world's indigenous minorities sought a United Nations declaration to define their rights in relation to national states. Following 12 years of intensive study and discussions with indigenous peoples and governments, an independent and distinguished group of experts, the United Nations Working Group on Indigenous Populations under Mme. Daes of Greece, produced the Draft Declaration on the Rights of Indigenous Peoples. It was introduced for consideration by various organs of the United Nations in 1994, when the General Assembly proclaimed the International Decade of Indigenous Peoples. The draft declaration expresses with particularity several principles that flow naturally from the Treaty of Waitangi.[1]

We need not enter into the details of this draft declaration, except to observe that it sets indigenous peoples up with a protected status that includes providing the "ways and means for financing" their autonomy, and that it affirms the right of indigenous people "to engage freely in all their traditional and other economic activities". "All" traditional activities would sometimes include slavery and cannibalism, and would certainly raise interesting questions for the UN declarations of the rights of women, another area of notably ambitious abstract desirabilities. Groups of experts, especially if they are "distinguished", are free to create what Edmund Burke called "paper plans of government"; sovereign governments, such as that of New Zealand, are rather more circumscribed.[2] They have the disadvantage of being democratically

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1 *Taranaki Land Report*, Wellington: Waitangi Tribunal, Ch 12, p 307.

2 The issue of sovereignty to which New Zealand lawyers are sometimes strongly hostile will be discussed in the concluding chapter of this book. We shall see that legal and political circles in New Zealand tend to accept international declarations rather uncritically.

elected, and they are accountable for the laws they pass in a way that distinguished international committees are not.

The idea of the rights of indigenous peoples is one element in the vogue for expressing moral and political demands as rights. It dates, in its contemporary form, from the end of the Second World War, and UN declarations are the most powerful way in which this manner of thinking has been disseminated. It has led to vast changes in the position of indigenous peoples in Canada and the United States, and of Aborigines in Australia. These changes resemble what has happened in New Zealand.

We have already discussed justice as the underlying concept of this mode of thought, and we might add, provocatively, that justice has become modish. To say this is not frivolous; it is merely to point up the contrast between justice as the absolute standard in human relations, and justice as a contemporary moral fashion in Western societies. The content of the concept varies, often wildly. Recognising the element of fashion is important because exponents of the Waitangi process often suggest that our current moral judgments are the final happy culmination of moral enlightenment. Referring to the *Mabo* case in Australia, for example, Judge Durie talks of "50 years ago when our eyes were still dimmed". This suggests that current beliefs about justice are set in stone. Experience, on the contrary, tells us that this can never be the case. We need not doubt that justice is a cardinal virtue of human societies, and it seems unlikely – but unlikely rather than impossible in all conditions – that the Western abolition of slavery as unjust, for example, will ever be reversed. But the colour and content of what is meant by 'justice' or 'rights' certainly changes, and it will change in unpredictable and sometimes highly unwelcome ways.[3]

The point is important because it is an elementary principle of prudence that one should rely on one's own strength rather than be dependent on others. Justice for Maori in this context, whatever view one takes of it, certainly creates a flow of benefits from the Crown, *alias* the New Zealand economy and its taxpayers, to Maori, whose entitlement

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[3] Those who doubt this might reflect upon the fact that support for integrating Black and White pupils in American schools following the Supreme Court's decision in *Brown v Board of Education* (USA) was overwhelming, especially among Blacks. "Separate but equal" was thought to be a contradiction in terms. The NAACP seems now to be abandoning support for integration efforts, especially busing. The assumption that Black pupils need non-Black to do well is being taken as 'demeaning'. *New York Times*, 23 June, 1997.

to these things relies on certain moral recognitions which must necessarily be susceptible to political change. This is a form of dependence. The moral recognitions were certainly not those prevalent a century ago, and they are by no means uncontested today. What opinions will be current a century hence we do not know, though we can say with certainty that they will be very different from those of the present. And it would be a misfortune for Maori to become dependent upon a supply of goods which could prove unreliable.

There is no doubt that these international currents of opinion, about rights, justice, colonialism, race, struggle and so on, fanned the flames of Maori resentment from about the 1960s onwards. With the end of the period of wars between settlers and Maori, from about 1880 onward, New Zealand had embarked on a vigorous project of constructing a modern nation in the South Pacific. Between 1880 and 1960, New Zealanders of European origin thought of themselves as essentially British, and consecrated this identity with their involvement in wars in Africa, in the two World Wars, and – together with the United States – in Korea and (a little later) Vietnam. The attention of New Zealanders was directed outward, and questions arising from the place of Maori in New Zealand public life became marginal. The common belief (now consigned by critics to the status of a 'myth') was that the coming together of Maori and other New Zealanders had been a great success. Maori enjoyed a recognised part in public life, and a high profile in military and sporting activities. A great deal of quiet assimilation went on. Sir Geoffrey Palmer is now moved to distance himself from the beliefs he had acquired growing up at this time:

> I was taught quite deliberately and firmly that New Zealand was different from other countries. We did not discriminate against people on racial grounds. Maori were in every respect as good as pakeha. There were no racial problems in New Zealand … [4]

This inherited view he now sees as the problem of "complacency about race relations". It was certainly not a view that Maori themselves always took. Maori grievances were not forgotten during this time, and it may even be the case that sporadic attempts made to deal with them (such as the Sim Commission, and attempts at financial settlement interrupted by the Depression and the War of 1939 to 1945) merely served to keep

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[4] Palmer, *op. cit.* in Ch 2 note 14, p 75. Let me add that I acquired the same set of beliefs at school in Auckland.

grievances alive. But Maori grievances were not usually at the forefront of the national mind.

The attack on colonialism was an important source of a new-found Maori sense of power. Maori could construe themselves as a colony within a colony; they could latch on to ideas of black pride and they could formulate, in the wake of decolonisation, a variety of demands for greater autonomy, up to and occasionally including demands for complete independence. The Treaty of Waitangi became increasingly the focus of the specific Maori claim that they had suffered not merely conquest and domination but actual bad faith, that Maori rangatiratanga had been illicitly overridden by the Pakeha in general and the Crown in particular.

The international dimension of the Waitangi process was vividly illustrated by the turbulence of the South African rugby tour of 1981. The violent scenes at and around football grounds, with police against protesters, and rugby fans not infrequently in lively contestation with protesters, gave the impression of "a street revolution".[5] From an outside point of view, it seemed absurd for New Zealand to be tearing itself apart over the politics of a remote country. Quite what provoked these passions is a complex question, and no doubt much of it was directed against the Muldoon government, but part of it was certainly that the discontents of Maori had fused with the liberal idealism of many Pakeha, and the result was that New Zealand's problems had been projected on to those of South Africa. Such a transposition turned New Zealand politics into a moral melodrama. It is perhaps ironic that this campaign, which was directed against white dominance rather than the principle of racial separation, should have focused on the term apartheid, or separate development – ironic because separate development, autonomy, even sovereignty, is just what some exponents of Maori autonomy sought. There are, of course, obvious differences between apartheid as practised in South Africa and any proposed scheme of Maori autonomy – the proposed Maori world of separation would not be ordained by law – yet it could only be sustained by some degree of coercion preventing the strong tendency of people in all such doctrinally separated groups to 'defect' to the wider world.

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5 Sinclair, *op. cit.*, p 318.

THE ACADEMIC AND INTELLECTUAL DIMENSION

These international currents of thought became widely disseminated in New Zealand through the expansion of higher education. The 1960s were a watershed in Western cultural life because higher education expanded, and an early consequence was the emergence of a new class of activist which was highly sensitive to abstract ideas. And two sets of ideas are especially notable.

The first is Marxism, which construed the lives of most people as forms of proletarian oppression. The original proletariat consisted of the working class, who were destined to make a revolution that would overthrow capitalism. A Marxist revolution happened in Russia in 1917, and after 1945 many countries became subject to Communist rule. But by the 1960s, this kind of pure Marxism as the blueprint for violent revolution had given way to far more amorphous versions of romantic disenchantment with prosperous Western life. Intellectuals constructed a variety of new proletariats, such as women, homosexuals, people with disabilities – and, of course, indigenous peoples. Further, the aim was no longer revolutionary overthrow but ethical and political transformation of Western life – an aim that led to the jurisprudential developments already mentioned, as well as to such fashions as 'political correctness'. The universities soon came to be bracketed with the churches as the institutional custodians of the moral criticism of society. They were expected to engage in protest. Indeed, this remarkable addition to the responsibilities of scholarship and scientific research was solemnly enshrined by the New Zealand government in a statute. Thus Sir Kenneth Keith, now a Court of Appeal judge, has remarked that the Education Act 1990 "emphasises research and learning, knowledge and expertise, and the exercise by the members of the institution of a role as critic and conscience of the society".[6] The idea that scholars are morally superior to practical people is a rather counter-intuitive piece of current fashion, but universities do indeed contain large numbers of people with confident opinions on social and political issues. Academic opinion has thus become an important strand in the story of the Waitangi process.

Less well known to a wider public than Marxist ideas are the developments in normative political philosophy which we mentioned

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[6] KJ Keith, 'A Legal and Constitutional View', in *One Nation, Two Partners, Many Peoples*, Porirua: Whitireia Publishing, 1996 (a speech delivered at the Whitireia Community Polytechnic Ten Year Birthday Celebrations, 1 March, 1996).

briefly in Chapter 1. Values came to be fascinating entities which could be tested against the coherence of our moral intuitions and, in the process, moral intuitions began to play a larger part in the Western sense of its own identity.

This cast of mind disposed students subject to it towards moral relativism and political realism. Some critics, such as the philosopher RG Collingwood, thought that it promoted immorality. Certainly it paved the way for the moral relativism which has come increasingly to colour the Western mind. The remarkable thing was, however, that a theoretical moral relativism could be, and has been, combined with the moral dogmatism of the activist. Many of the educated young have managed to convince themselves *both* that moral judgments are purely a function of culture, *and* that there are absolute standards of right and justice which ought to regulate relations between peoples. It was in pursuit of this latter belief that political philosophers sought to generate by pure reason the essential structure of a just society. Much political theory since Rawls – certainly all *normative* political theory – amounts to little more than a footnote to his *A Theory of Justice*. Rawls created a highly sophisticated framework within which people concerned about the unequal distribution of goods might investigate the issue of redistribution. To bring these high philosophical speculations down to earth would not be easy. Indeed, logically speaking, it was impossible; in any case, there was no agreement even upon the basic principles of social justice generated by this literature. Nevertheless, these endeavours provided powerful background support for the whole idea of rights which, as the American legal theorist Ronald Dworkin put it, "trump" all other bids in politics.

The remarkable thing is that out of a relativist intellectual atmosphere should come what looks like the apparently absolute imperatives of social justice. Rawls himself was cautious and complicated in his reasoning; he understood the limits of philosophy. It is clear, however, that Western thought was, in the second half of the twentieth century, providing Maori activists with two claims on the moral attention of the rest of society: first, the idea of the historic injustices which indigenous peoples had suffered, and secondly the idea of social justice, in terms of which Maori might be construed as an oppressed proletariat. Theories of oppression are currently referred to as 'the politics of identity' or 'the politics of difference', and are part of what North Americans have been calling 'the culture wars'. These ideas assume Maori to be a *culture*, and this has turned out to be the fundamental concept of the process.

Culture in this case, whatever its explanatory validity, is a concept useful in politics and negotiation because it constitutes Maori as a mystery. There is nothing mysterious about the culture of Europeans because it is constantly subject to publicity and discussion, but Maori have a fluid repertoire of beliefs and sensibilities, little known outside the culture, which can on occasion be used to put Europeans on the wrong moral foot. A notable explorer of this arcane world of opaque Maori sensibility has been Douglas Graham himself, who recounts many moving moments when he has been present at Maori receptions of restoration and reparation.[7] Maori culture is, no doubt, complex and mysterious in some respects, and in some uses must constitute a problem in New Zealand politics. To parody Abraham Lincoln, how long can a country live half transparent, half mysterious? Maori themselves, of course, usually have a fluent understanding of the Western culture in which they find themselves.

THE QUESTION OF CULTURE

The centrality now placed on the idea of culture reinforces dramatically our argument about the role of intellectual fashion in political controversies. Nineteenth century progressive thinkers believed that mankind was a collective enterprise moving onwards towards the higher form of civilisation being forged in Europe. Empires were often justified as raising indigenous cultures to this higher form. Throughout the century, however, a countercurrent which valued the uniqueness of each nation or culture could be detected, and it grew progressively stronger in the twentieth century. One oddity of these intellectual currents was that enlightened opinion tended to reject nationalism as aggressive and selfish, but to revere cultures (by analogy with evolutionary species) as things to be preserved. A related oddity was that, in pursuit of this sentiment, Western liberal secularists who were often contemptuous of Christian religious belief became remarkably solicitous of the myths and fables of tribal peoples. But the most remarkable fact about these international currents was that the assimilationist universalism of the beginning of the century has dramatically given way to the particularistic separatism of the late twentieth century. Each particular culture, no matter how small, has been accorded its own rights of recognition and support. Some measure of how rapid and dramatic this change has been

[7] See for example Ch 8 ("Settlements") in Graham, *op. cit.*

may be gathered from the 'stolen children' commission which reported in Australia in 1997. The policy of fostering Aboriginal children, especially those of mixed blood, seemed sensible for many reasons to the parents and grandparents of those Australians, but many of them have now been persuaded that it was a form of 'genocide'. The chairman of the commission arguing this very conclusion was himself in earlier life involved in decisions of the condemned kind.

The reaction that set in against assimilationism affirmed the unique and irreducible qualities of a culture. People who were conservative in little else became determined that all existing species, and all existing cultures, must be preserved. The term 'culture' was thus a way of respecting indigenous peoples while evading the unwelcome implications of nationalism, and became the new, minimal form of collective identity for a people. It made a more flexible relationship to the state available to sets of people whose claim to be 'nations' was not a serious option. It is worth noting, incidentally, that the intellectual pattern in which a universalist doctrine is challenged by an aggressive particularism has happened at least once before, in the eighteenth century. In Western civilisation, oscillation between the universal and the particular has tended to be extremely volatile. But there is no doubt that the dominant fashion in the latter part of the twentieth century is a particularist cherishing of the uniqueness not only of every species thrown up by evolution, but also of every culture which human beings have evolved.

Maori, then, as an indigenous[8] people, were a culture, and the basic proposition of this new particularism has been that no culture can be (morally, aesthetically, etc) judged validly by another. Since we all have a culture of our own, this might mean that no judgment of others is possible, and something like this prohibition of disapproval is currently affirmed against the errors of 'judgmentalism'. Such cognitive abstemiousness is, of course, unreal: none of my readers is likely to hesitate in condemning female circumcision or footbinding – but the doctrine that cultures are absolutely valid in their own terms has appeared on the periphery of the Waitangi process. Thus Judge Durie has remarked that:

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[8] 'Indigenous' is another tricky term in this rhetorical field. All peoples are immigrants if one goes back far enough, and Maori arrived in New Zealand within historic time. But 'indigenous' has now become a technical term in the 'rights' vocabulary of international politics. Serious claims are made in terms of it, and there is no doubt that Maori qualify. See below.

> … one culture should not be judged by the standards of another; each must be appreciated on its own terms. Resolution of cross-cultural conflicts requires, therefore, either fair negotiations with equality of bargaining power, or a biculturally competent adjudicatory body.[9]

Later in the same essay, he regrets that "the monocultural background" of some judges "may prevent a rounded view".

The idea of Maori as a primitive people destined to be absorbed into modern Western society, a view sometimes held by Europeans in previous generations, has thus been rejected in favour of recognising Maori as a distinct culture, co-ordinate in all respects with Pakeha, and not, as Judge Durie makes clear, to be criticised from any outside point of view. This conception in turn generates the idea of New Zealand as a bicultural state, and its essence as a 'partnership' between Maori and non-Maori. Each of these elements of the supposed assumptions behind the Waitangi process would have been regarded as highly implausible by most New Zealanders between 1880 and some time in the 1960s. The idea of biculturalism would certainly constitute a remarkable transformation of national self-understanding, but it is, of course, very far from universal, either in theory or in practice. The basic point is that each Maori is for most purposes and in law a member of the single and unified civil society called 'New Zealand', sharing the rights and duties, and indeed the benefits, of other New Zealanders. The Waitangi process, however, has sought to equip Maori with an additional, collective dimension. To make sense of this, one would have to take Pakeha as having a similar collective dimension, but in fact this is entirely null. Non-Maori New Zealanders simply do not think of themselves as a collectivity of this kind. Maori as a collective is a legal fiction, remote from real life, whose main use in this context is to sustain the redistribution of wealth ordained by the Waitangi Tribunal. The abstract singular "Maori" (which I use because of its currency) is itself a linguistic token sustaining this fiction.

These remarks are intended to clarify the significance of the idea that Maori constitute a culture, the concept which has led many Maori to support Judge Durie's view that cultures cannot be criticised. But the very idea of 'culture' is a mare's nest of tempting confusions. One of these is vividly present on the very surface of the judge's remarks. It is the assumption that a culture is a single, coherent, self-contained entity

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[9] ET Durie, 'Justice, Biculturalism and the Politics of Law' in Wilson and Yeatman, *op. cit.*, p 33.

distinct from others of its kind. If 'Maori' and 'Pakeha' were in fact terms standing for entirely self-contained forms of life, they could not even communicate with each other, much less criticise each other. If that were actually the case, then the hope that some judges might have what Durie calls "a rounded view", or his demand for "fair negotiation with equality of bargaining power", would not be difficult, nor even impossible. It would be meaningless. The fallacy consists in assuming *both* that cultures are totally distinct, yet also, inevitably, assuming that they can interact. All interaction entails judgment.

To analyse these confusions further would merely be academic in the pejorative sense; nor is it necessary. For the valuable point Judge Durie makes is not one of truth and logic, but of morals and manners. People ought always to be treated with respect, and we ought to recognise that all cultures have value as being responses to specific circumstances. Groups of humans all over the world have evolved languages and customs which deserve not only study but understanding. This is why we today regard as ridiculous figures those missionaries whose response to life in the South Pacific islands was not only to try to convert the indigenous people to Christianity but also to impose Western dress codes upon them. A cynic might well suggest, of course, that Westerners are still trying to impose their moral attitudes on the rest of the world. They merely care less about uncovered breasts, and more about human rights, child labour and the condition of women. Judge Durie is far from being the only thinker who is all over the place in trying to persuade us that "one culture should not be judged by the standards of another".

Indeed, if this principle were taken strictly, it would invalidate the entire Waitangi process, which depends upon a transcultural recognition of a universal idea of what is just. It also depends upon the idea that one culture ought to respect the practices of another, an idea some might find difficult to attribute to pre-European Maori because of their limited experience of transcultural contact. Indeed, given the inter-tribal conflict within broadly the same culture, we may guess that respect for other cultures might not be won easily from Maori.

There is a further asymmetry concealed behind talk of Maori and Pakeha bicultural partnership. It lies in the fact that there is open season in criticising 'Pakeha', while outsiders tip toe around Maori sensibilities as if in fear of committing a solecism. The point is that European New Zealanders belong to a 'culture' of constant mutual criticism; it is part of their way of life, and a game for all players, including outsiders. In earlier generations, Europeans made their opinions clear to everyone,

and various Maori practices, such as slavery, were not only criticised but abolished. Cultural conflicts, of course, remain. An interesting question is what attitude outsiders should take to the sensational Maori form of insult, the trousers being lowered and the naked rear presented at the party to be insulted, or alternatively, what attitude Maori should take to the common practice of Europeans resting their bottoms on tables from which food is partaken. Whatever the answer, it is a matter of practical judgment, of morals and manners, and no pseudo-philosophical principle about the logic of the term 'culture' will be much help.[10]

The reality of New Zealand is that Maori and European cultures are closely intertwined – so closely, in fact, that much of the concern with biculturalism is less a statement of some essential cultural equality than a somewhat desperate attempt to prevent one culture from swallowing the other. Culture can in some degree be destroyed by state action (as the history of European nation states shows) but it can seldom be long sustained by it. The symbols by which people express themselves cannot be forced – not even, indeed, by the deliberate conscious resolution of the people themselves.

CULTURAL POLITICS?

At a cultural level, the basic Maori claim is that Maori have been oppressed. 'Historic injustice' thus passes beyond economic and political grievances to a foundational claim: that Maori are oppressed as a people. At its most extreme is the claim that the British colonised the Maori mind. Inconsistencies in educational policy towards Maori are taken not as varying judgments about what might be best for Maori in different circumstances, but as a consistent attempt "to stifle Maori education".[11] Thus missionary policy restricting instruction in literacy to the Maori language kept students from access to "knowledge which had made the

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[10] In April 1997 a British pop group called the Spice Girls performed their version of a haka, provoking a Maori Language Commission member to say: "It's a denigration of our culture. It's like the Maoris thumbing their noses and making a mockery of Rule Britannia … For women to do this is not acceptable" (the (London) *Times*, 29 April 1997). One might perhaps say that mockery is part of Western culture. And we shall await the emergence of female haka groups. It is not merely the past that is a foreign country. The future is, too.

[11] Ranginui J Walker, 'Maori People since 1950' in Geoffrey Rice (ed) *The Oxford History of New Zealand*, 2nd edition, Auckland: Oxford University Press, 1992, p 499.

European great". But after 1867, 'native' schools did teach only in English, but focused only on practical subjects; thus, so the criticism goes, consigning Maori to the status of an underclass. The current aim is to 'liberate' Maori from educational subjection, and particularly from exclusive instruction on practical subjects. But education in practical subjects is exactly what is needed if more Maori are to get jobs. Ranginui Walker argues that the urbanisation of Maori, especially since 1945, increases knowledge of the dominant Pakeha culture, and this knowledge (he quotes the Brazilian revolutionary Paola Freire) "leads to transforming action resulting in a culture which is being freed from alienation".[12] This presumably means that Maori increasingly become political activists. The doctrine of salvation by politics dominated the anticolonial movements of the midcentury. It did not turn out to be a path to either stability or prosperity.

A more flamboyant version of a similar doctrine may be illustrated by Moana Jackson discussing "The Treaty and the Word: The Colonization of Maori Philosophy".[13] Jackson's target is "a cultural and racist arrogance" which he attributes to what he calls "colonialism" and which he thinks still persists, though now "cloaked in the newspeak of bicultural rhetoric". He continues: "To oppress a people, to set in place the bloody success of colonization, it is necessary to destroy the soul".

We do not need Franz Fanon to be cited on the last page of Jackson's remarks to recognise what is paradoxical about this, namely, that although its purported subject is the uniqueness of Maori law and thought, it actually expresses an identikit international anticolonialism. Talking of the 'pain' and 'hurt' of Maori reflects perfectly the ideology of Western victimisation. There is nothing distinctly Maori about such sentiments.

Indeed, one might well say that they are distinctly un-Maori. When Europeans arrived they found a world of divided tribes often engaged in deadly quarrels that could lead to death and enslavement. The very idea that all the original inhabitants of the present New Zealand constituted a single people called 'Maori' is itself, of course, a response to the arrival of strangers. What Europeans found was a set of people whom they recognised as vigorous, courageous, intelligent, resourceful, and intrepid. The other side of the coin is that they also regarded Maori as savage, deceitful and primitive – in other words, your average human

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[12] *Ibid*, p 506.

[13] See Oddie and Perrett, *op. cit*.

interaction between two sets of people of very different kinds. Slavery and defeat were among these tribes familiar facts of Maori life, and there is no doubt that they would not have formulated their reactions to such misfortunes in the contemporary self-pitying terms of 'the alienation and self-negation' of the Maori soul.

Yet it is precisely this alien intellectual sophistication which has been picked up by many who currently narrate the New Zealand past. Ranganui Walker, who has been reading Gramsci and Foucault, and taking these theorists as guides to New Zealand reality, talks of "the vociferous, multiple, counter-hegemonic discourses of Maori leaders that characterise the postmodern era".[14] Accounts of the fortunes of Maori over the last two centuries are now unmistakeably grievance-focused. Non-Maori are judged to have behaved as masters in a land where they ought to have considered themselves guests. Their numerical and technological dominance after 1860 led to the marginalisation of Maori, most of whom found themselves in backward rural circumstances; and dramatic incidents, such as the clearing of the settlement at Parihaka have become the stuff of legend. There is an obvious connection between the developing tone of grievance in accounts of the Maori past and the rhetoric of compensation in the Waitangi process. Thus the Taranaki Land Report says:

> As to the quantum, the gravamen of our report has been to say that the Taranaki claims are likely to be the largest in the country. The graphic muru of most of Taranaki and the raupatu [confiscation] without ending describe the holocaust of Taranaki history and the denigration of the founding peoples in a continuum from 1840 to the present.[15]

These remarks grabbed attention, understandably, when the Report was published in 1996. The combination of absurdity and insouciance in using to construe dispossession and unjust imprisonment the word which these days is virtually reserved to refer to the deliberate gassing of European Jewry under the Nazis suggested that the moderate good sense which commentators had justifiably praised in the earlier judgments of the Waitangi Tribunal was giving way to the melodramatic emotionalism of a grievance 'culture'.

Here then is another area in which we may invoke our basic principle that New Zealand reality is being subjected to a distorting process of

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[14] Ranganui J Walker, 'Politics of Contestation of Power and Knowledge in Culture', in *One Nation, Two Partners, Many Peoples*, *op. cit.*, p 39.

[15] *Taranaki Land Report*, Wellington: Waitangi Tribunal, 12.3.3, p 312.

abstraction. Grievance is no doubt a universal feature of the human condition, but it is only ever one part of the picture. No human being is essentially and nothing else but a sufferer. Human beings act, and both their actions and the events in which they are embedded are extremely various. This is why historians can in each generation find new ways of understanding the past. The New Zealand past has been understood as a triumph of social democracy and race relations. The materials of this interpretation have now been pushed aside by a focus on grievance and historic injustice. It is understandable that many people imagine that we have at last arrived at the truth of the matter, but this is but one more example of how people can become fatally entangled in the ideological fashions of the moment. It is important to realise that there are many ways of telling this complex story, many yet to be worked out.

Certainly the Maori story can contain far more positive features than those on which this depressing grievance literature has chosen to focus. Thus GV Butterworth has written:

> After an initially disturbed phase between 1840 and 1880, Maori society essentially reinvented itself between 1880 and 1930. Maori found a new economic basis cultivating their lands or working as rural labourers. 'Maori' costume was evolved for the concert party and Maori communities found a new centre in the marae which, under the influence of Apirana Ngata and the Young Maori Party, became a complex of church, carved meeting house, dining hall, adjacent Church and rugby football fields. A vigorous social and cultural life centred on them. This is what people mean by traditional Maori society. It reached its apogee during the period from 1935 to 1955 and then declined with the rural economy and the migration to the towns. Maori history from 1770 to 1870 is a story of wholesale social and economic change and if this was understood and propagated by Maori leaders instead of an anachronistic Platonic ideal of an unchanging Maori society, Maori would be better able to meet the challenges of the modern world. They would see themselves as change masters, not merely victims.[16]

One important aspect of the story is that an advanced technological society, intent on expanding its operations, collided with a culture which was vigorous but without similar technological resources. The resultant mixture of misunderstanding and wilfulness produced (among much else) some tragic consequences. For tragedy is, classically, the collision of right with right, and there is a great deal of 'right' on both sides. The British and then the New Zealand authorities of earlier times often had

[16] Private communication.

ideas we no longer share, and sometimes behaved badly, but they also exhibited idealism and considerateness on various occasions, and made a space in their world so that Maori could participate in it. And since their world was the modern world, the Maori might well consider that some such destiny as they suffered could not in fact have been avoided. Indeed, it is very close to the universal pattern of history. There was simply no possibility that Aotearoa would have been left alone to enjoy its (not entirely idyllic) culture into an endless future. In these terms, the issue might well be not so much: what bad things did the British do to the Maori? but rather: among the possible encounters with modernity, inevitable in the globalisation of the nineteenth century, are there others which would have been notably preferable?

Present passions impede our understanding of past acts. It is now a cliché of the literature that New Zealand was 'complacent' about its race relations, and that the story of the New Zealand wars as a rather romantic conflict between two mutually respecting opponents, followed by handshakes and getting on with life, is what journalists these days call a 'myth'. We need not doubt that it leaves much out. But the Waitangi process has replaced one partial account of the past with another. The story of New Zealand as a grievance story is not only unbalanced, but relegates Maori to a status as miserable victims. Such a story does no justice at all to their evident vitality and resourcefulness, nor to their rich contribution to the history of recent centuries.

CULTURE AND MORALITY

These considerations must lead us to recognise that it is a mistake to construe even the Waitangi process itself as an encounter between Maori and Western cultures. Culturally, the whole episode is an exclusively Western phenomenon. The common description of it as a 'reconciliation process' is itself an expression of the power of Western ideas. It is a version of those 'peace processes' which have become the favourite Western device for dealing with conflict. In all cultures, of course, there must be ways of dealing with conflict and forms of reconciliation, but tribunals, lawyers, historians, parliaments, press and all the other equipment of the process are exclusively Western. Unless we are clear about this, we shall merely be blind to one unmistakeable reality of what is going on: the way in which some Maori activists work the system.

We may open up this complex question by contrasting two models of moral conflict. We are all familiar with the case in which *A* is so insensitive as to offend *B* without even realising it. Some instances of

this undoubtedly occurred when European met Maori, commonly but not invariably in the direction of Europeans misunderstanding Maori sensibility. Those who discuss this question have no doubt that Europeans have a duty to try to understand Maori; they do not always impose the same duty on Maori.

Much less familiar is the case in which *A* thinks he/she has done something unforgiveable to *B*, and apologises for it, but *B* has not even realised an offence had been committed, since in *B*'s culture such things were taken as normal. In these circumstances, an opportunistic *B* would soon recognise that he/she had stumbled upon a moral advantage and would, human nature being what it is, find it hard to resist the temptation to exploit such an advantage. And indeed, as time went by, *B* might enthusiastically adopt a morality which turned out to be so signally advantageous.

Since the practice of public apology has become so widespread during the last decade, it is important not to misunderstand some of its relevant conceptual features. The demand for a public apology as an instrument of converting a misfortune into a political advantage has in itself merely limited power. The reason is that, with either individual or collective fault, once the aggrieved party has received the apology, he/she or they must signify acceptance of the apology, and consequent forgiveness, on pain of seeming resentful and intransigent. The 'apologee', as it were, is now on the defensive because he/she must accept the apology and cancel the grievance. The polite form of such acceptance, in the minor transactions of life, is something like 'don't mention it'. But this situation is transformed when the demand for an apology is linked, as it always is in these public cases, to restitution or reparation, for then the grievance-ending acceptance of the apology depends on whether the reparation is judged to be adequate. This is why the demand for an apology is often merely the prelude to a demand for compensation, and the adequacy of the compensation can then be advanced as a test of the 'sincerity' of the apology.[17] Public apologies, by contrast with private, may thus be very long drawn out indeed. It is to block this outcome that in the Waitangi process the Crown required that

> At the point of settlement there will be public and authoritative acknowledgment by the Crown and the Claimants that the Crown has acted

[17] After the Commission reporting on the so-called 'stolen children' issue in Australia had reported, the prime minister John Howard was widely, though disingenuously, attacked for his inability to utter the simple word 'sorry' to the Aboriginal community. But the issue was obviously much less moral than fiscal.

> honourably and reasonably, that the historical grievances are resolved, and that the settlement is to their mutual satisfaction.[18]

This requirement is thus one of the many devices by which the New Zealand government has sought to establish the finality of the results of the Waitangi process. It is hard to see, however, that in such a collective drama, in which the participants change with the generations, *any* formula would definitively block a new generation from reviving the issue and arguing that those signing the present settlements had been betrayed.

Our abstract model points up our recognition that there are times when it is the apology that creates the grievance rather than the grievance that calls forth the apology. Moral judgment depends upon descriptions; how we judge depends on how we construe. More specifically, if we lose according to the rules of war, we respond differently from the case in which, within a settled community, we suffer from an invasion of rights. Wars are finished by settlements, and life carries on. Invasions of rights within settled communities are injustices requiring judgment and reparation. In contemporary Western thought, sentiments of collective guilt for ancestral actions are currently powerful, and it would require superhuman delicacy for potential beneficiaries not to take advantage of this situation, especially given the fact that this moral sensibility is unlikely to last.

The odd situation of such Maori activists in the Waitangi process is, then, that they are operating within a fully Westernised system of thought and practice, but can only fully take advantage of their situation by denying this fact – by setting up, that is to say, a rigid bifurcation between Maori and Pakeha as cultures. For it is certainly true that Maori experience was entirely familiar with conquest and defeat, not to mention slavery. The Waitangi process has no precedent in the tribal wars that preceded the arrival of Europeans. In the 1820s, war between Maori tribes newly equipped with Western firepower wiped out an estimated 20,000 people – about a quarter of the entire Maori population.[19] As an incident in relations between iwi, this gives rise to no claims about historic injustice, partly because it was a game played by all, and partly because, to put it crudely, there would be no 'payoff' from such a move. The 'payoff' from the Waitangi process is clear for all to see.

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[18] Douglas Graham, *op.cit.*, p 57.

[19] James Belich, *op. cit.*, p 157.

The process thus involves us in a subtle and complex moral situation. The concern with justice is important, but it touches merely one side of the process, obscuring others. Injustice comes in all shapes and sizes, and depends on context.[20] In some borderline cases, injustice depends on construing ambiguous events *as* injustice. People vary in the seriousness with which they cultivate an awareness of their own sufferings, and there is a strong case for saying that those who play down or reject feelings of grievance are less damaged by what happens to them than those who cultivate such feelings. The North American black scholar Glenn Loury has attributed the decline of race relations in the United States to the excesses of the 1960s, remarking: "We learned too well during the upheavals of that decade how to be America's pre-eminent victims".[21] In the Maori case, large numbers of Maori have now moved to the cities where, like other New Zealanders, they pursue individual destinies; many becoming successful in politics, in the professions or in business. The individual connection of these Maori with the grievances of Waitangi is tenuous. There are, of course, social problems involving urban Maori, but these are issues familiar in the wider society, and have little relation to the specific historic grievances from which the Waitangi process arises. What keeps those grievances alive is the collective historical memory of the iwi sustained through those Maori who have retained their relationship to it. The consequence illustrates another of those causal impacts across abstract categories which our method points up: the moral project of justice for Maori also turns out to constitute a piece of social engineering in which Maori are retribalised.

Such a retribalisation helps to make plausible the premise that Maori are a separate people from other New Zealanders, a premise whose plausibility had been declining decade by decade. The cultural argument is at the root of what is found most baffling by outside critics of the Waitangi process. Maori can only claim reparation for historic injustice in their capacity as members of the civil association called New Zealand, yet the beneficiaries of this claim are a vestigial social unit, the set of iwi, whose claim to be distinct from other New Zealanders in part depends upon the very success of the Waitangi process itself.

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[20] Andrew Sharp supplies an excellent philosophical analysis of what the concept involves, in the New Zealand context. See *Justice and the Maori*, *op. cit.*, Chs 2 and 3.

[21] Quoted by Robert H Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline*, HarperCollins: New York, 1996, p 227. Loury had been writing on "Black Political Culture After the Sixties" in *Second Thoughts: Former Radicals Look Back at the Sixties*.

KEEPING MAORI CULTURE ALIVE

The concept of 'culture' is what sustains the Maori claim to historic injustice, and what it assumes is that Maori and Pakeha live in two distinct and all-encompassing worlds. There are only two possibilities: either that Maori have tended to assimilate to Western culture, in which case the historic injustices become increasingly irrelevant because there ceases to be any distinct class of person to be the vehicle of them, *or* Maori, in spite of blurring at the edges, remain a distinct people in New Zealand, and as a result, the society is bicultural. We have seen that the Waitangi process is incompatible with the idea of Maori as a distinct political class. The question is whether they constitute a distinct cultural class.

In one sense, obviously yes. Yet the fact is that Maori have tended to assimilate. They have assimilated racially in that very many Maori are partly European by descent. They have assimilated culturally by going to live in the cities, where their ways of life (what they eat and drink, how they spent their time, the education they get, the language they speak and the customs they follow) tend to become assimilated into those of other New Zealanders. And, as we have seen, even the activists leading the claim for historic reparation have assimilated the rhetoric and moral views of the international West. Maori are thus in a position no less equivocal than that of other national minorities whose leaders have acquired nationalist beliefs: the political claims take for granted the idea that Maori is a self-sufficient culture, whereas political and financial support is being demanded in order to sustain what is assumed to be there in the first place.

The decisive issue is language. At most, 4 percent of the New Zealand population speak Maori with any fluency, yet over the last decade or more projects of social engineering have attempted to restore New Zealand to the bilingual condition that prevailed in the nineteenth century. Hundreds of kohanga reo or 'language nests' have been created for young children, especially Maori, so that they might be immersed in Maori. The state has a language policy, and migrants coming to New Zealand are solemnly told that "At school your children may be taught the Maori language, Treaty issues and bi-cultural values".[22] Immigrants are further told that "you have a responsibility through the Treaty of Waitangi to protect the social, political, cultural and spiritual rights of the Maori people". The absurdity of this is that these are rights everybody

[22] Pamphlet on the Treaty of Waitangi issued by the New Zealand Immigration Service, NZIS 464.

enjoys by the laws of New Zealand, themselves descended, as it happens, from a tradition and in an idiom going back not to the waka but to Magna Carta and beyond.

The unreality in this stares one in the face: Maori appear in biculturalism as a set of equals who nonetheless need special protection, suggesting how very unequal in fact they are. The underlying fallacy is one of equivocation: 'Maori' and 'Pakeha' refer both to a set of individuals, and to distinct collectivities. As individuals, Maori are on the same footing as other New Zealanders; it is only as collectivities that these unrealities become apparent.

The basic inequality lies in the fact that Maori and English as languages of practical importance to New Zealanders are ill-matched. Behind all these confident moral assertions of equality, in fact, lies a policy of patronising the minority – but in the worst possible way: they are being patronised by being set up as a privileged class.

To describe Maori as privileged will seem implausible only to those who, by current linguistic corruption, think that a privilege is always a benefit. For reasons we shall come to, it is not. A privilege is a right in law which is not available to all. Maori have privileges in relation to some tourist sites, school uniforms, entrance to universities, in fishing and in other places. What this amounts to in substance is various: to the average Maori, probably not very much, but it is enough to irritate many non-Maori New Zealanders.

They will not be less irritated to have been told by the foremost exponent of the Waitangi process, the minister for treaty negotiations in the Coalition government, that "(T)he sooner they (non-Maori New Zealanders) realise that there are laws for one and laws for another, the better".[23] The minister appears to have been referring merely to property rights being accorded to the Ngai Tahu, which is not really a case of separate laws; however, his generalising of this fact to a conclusion about Maori and non-Maori living under separate laws concedes to the process of reconciling Maori possibilities which would threaten the unity of the New Zealand state.

What certainly did irritate many New Zealanders was the ruling by Judge Andrew Becroft that Maori did not need a licence to fish for trout in their own tribal areas.[24] It seems to have been this decision which led Te Runanga O Ngati Toa Rangatira executive director Mat Rei to claim

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[23] 'Pakeha told Maori law is separate' by Audrey Young, *New Zealand Herald*, 31 May, 1997.

[24] See 'Free parking in Wellington "postively a treaty right" ', *The Press*, 8 March, 1997.

that customary land rights could mean Maori being exempt from paying parking fines. Another claim was that Maori-owned dogs, being a taonga protected by the Treaty of Waitangi, did not need to be registered. Since Mr Rei also remarked that his ancestors parked their waka on the Wellington foreshore without having to pay, he had his tongue in his cheek. But these claims, even the teasing by Maori who are by no means excessively solemn except where they have absorbed Western ideological pomposity, have led, according to Dr Rajen Prasad, the Race Relations Conciliator, to an increase in "the number of complaints to my office, the number of very irritable and irritated callers … ".[25]

We may also count as privilege a variety of rules about Maori culture. Nurses, particularly, must now spend a reported 20 percent of their training time learning 'cultural sensitivity' which, in part, is a matter of how not to offend Maori patients. The Waitangi process is the specifically New Zealand version of a tendency to flood education with attitudinal engineering.

Proposals have been made requiring bilingual skill in certain classes of civil servants. We have seen a judge floating (though rejecting) the idea that Maori television programmes might be 'mainstreamed', and the threat of channel surfing might be met by making *all* national channels go Maori at certain fixed times. In all these suggestions, the power of the state would be used to impose a cultural policy on people who would not voluntarily act in the required manner.

A culture in an iron lung not only has few prospects of survival; it is no longer a real culture at all, and experience abroad suggests that it is likely to degenerate into a life support system for a professional minority.[26] Here is one of the points where justice meets reality head on. It might, in some sense, be a cultural injustice that Maori, once spoken by all members of the race, has now reached its current low point, but the fact of its precarious survival is now the point from which political judgment must start. Sheer enthusiasm for the revitalisation of Maori culture could perhaps spontaneously become part of what has been described as 'the Maori renaissance' of the past generation but, if that were to happen, subsidies and compulsion would be a minor element in the revival. On the other hand, cultural identities are made up of many things, and language is but one of them. Languages emerge and dis-

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[25] *Newztel News*, 12 March, 1997.

[26] For a vigorous and witty treatment of the projects of linguistic conservation, see Christie Davies, 'Minority Language and Social Division: Linguistic dead-ends, linguistic time bombs, and the politics of subversion' in Gerald Frost (ed) *Loyalty Misplaced*, London: Social Affairs Unit, 1997.

appear over long periods of time, and sometimes disappear altogether, as Cornish has in Britain, without the cultural identity itself disappearing.

Unless linguistic revival were to happen *spontaneously*, backed not by subsidy and compulsion but by Maori provision from what were genuinely Maori resources, then New Zealand would be doomed to be afflicted by the kind of moral feebleness found in the idea of political correctness. Maori would be subsidised, privileged and patronised by the much larger non-Maori population – and inevitably resented as a consequence. It is notable how careful those who write about the Treaty of Waitangi are to seem respectful of Maori while being uninhibitedly critical of European conduct – this, indeed, is the basis of the new grievance legend of New Zealand history. A sophisticated figure such as Sir Geoffrey Palmer will mildly complain of the complexities of negotiating with Maori, but can talk about critics of the process in terms of "Maori-bashing" and "rednecks". Grievance has given Maori the high moral ground, but it is a vulnerable elevation, and the more it is exploited, the more powerful will become the resentment that will sweep it away.

CULTURE AND FINALITY

It will already be evident that the issue of culture not only underpins the Waitangi process, but also adds to it a slightly baffling ambiguity. One of the standard contrasts between tribal cultures and Western life is that tribes live amid flexible arrangements and have little sense of the rigid, rule-based arrangements on which Western economies are founded.[27] Tribes are these days presented as great negotiators, and the implication is that more people will get what they want if life is continuously negotiated than if it is subject to constitutional rules. The most obvious example is property, which Europeans conceive of as an individual possession giving definite and permanent rights of exclusion. The Maori view is different. Law, we are told by Moana Jackson, is something one lives *with* rather than lives under. So far, this is not

[27] For a sophisticated argument in favour of multicultural treatment of these questions, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press, 1995. It should be noted that Western societies are dynamic *because* they live under law. Tribal societies change all the time, no doubt, but they are not progressive in the Western sense, and the reason must in part be because continuous negotiation locks the participants into current beliefs, tastes and assumptions. Rules force subjects to be ingenious.

actually very different from the European sense of law, which is for the most part highly internalised. The real difference is that Maori radicals reject the idea of individual freehold in favour of communal property, an institution whose validity is said to depend on what is thought to be for the common good. As we shall see, such collective ownership is difficult to combine with a modern economy. It is partly for this reason that a distinguished Maori figure, Sir Peter Tapsell, a former Speaker of the House of Representatives, has remarked that the "reversion to tribalism" in Maoridom disappointed him. He went on to remark that, while it was proper to review Maori land claims, the accompanying reversion to tribalism would be recognised in 20 to 30 years as a "tragic mistake".[28]

The ultimate problem presented by cultural ambiguities in New Zealand life is that Maori, as purely and culturally Maori, have no conception of the one thing the entire process depends on – namely that reparation constitutes a 'full and final settlement'. In earlier generations, payments have been made in settlement of Maori claims but, seen through the wrong end of an inflationary telescope, these settlements now look painfully inadequate, and the claimants have returned for more. Suggestions have already been made that the recent (unratified) Whakatohea settlement and the Tainui settlement might both have to be reopened. New Zealand is now seen as being richer, and it is claimed that compensation payments can be assessed on a much more generous scale. The absolutes of justice are thus locked into the relativities of economic performance.

The problem is obvious. Are we dealing here with a set of culturally distinct tribes and activists who operate on different assumptions from their European fellow citizens? Or, alternatively, are cultural differences now in fact very largely outmoded by the evident familiarity Maori have with Western ways? Are these cultural differences anything more than a negotiating lever in a process which is in form terminable (because reparation wipes out injustice) but in substance endlessly repeatable (because in a flexible tribal world nothing is ever permanently settled, and the wealth of the New Zealand economy encourages each generation to return to the negotiating process)? And if the process is endless, one consequence is that New Zealand will sink into chronic racial conflict, and another is that the destiny of the Maori iwi is to become a race of rentiers. It is to the implications of these possibilities that we must now turn.

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[28] NZPA, 31 December, 1996.

4 Political and Other Realities

THE ARGUMENT SO FAR

The Treaty of Waitangi Act 1975 was designed to provide a remedy for a limited set of Maori grievances but, like the familiar genie let out of the bottle, it has grown to colour many aspects of New Zealand politics. All departments of state and many civil institutions, including universities, have been affected. A whole new class of servants of the process has come into existence. The Waitangi process has now given rise to one of the most significant vested interests in New Zealand life.

The specific grievances to be addressed by the first Act soon expanded into those covered by the 1985 Act and its 1988 amplification. It became clear that at least three classes of problem had become inseparable.

The first consisted of the historic injustices, especially over land confiscation and the invasion of fishing rights. But the tone of the Tribunal's reports makes it clear that two further types of grievance, distinct in character but arguably causally linked, had become prominent.

The second source of grievance is social deprivation, which the Tribunal commonly sees as a direct consequence of the historic injustices. Maori earn less money (on average), are less well educated, are more commonly in prison than Europeans, and so forth.

The third source of grievance, which underpins the others, is that of cultural alienation. The viability of the traditional Maori way of life in modern times is a complicated question, but the tendency of the Waitangi process to increase its scope and scoop up all floating discontents[1] suggests that the decline of a purely traditional Maori way of life resulted from historic injustice rather than (what is undoubtedly part of the explanation) the brute realities of the modern world.

These three sets of problems may be understood, as we have seen, either objectively or subjectively. Objectively, the land confiscations are unjust in terms of the Treaty, and some people are persuaded that the second and third problems are instances of social injustice, and as such ought to be corrected by the government. Subjectively these

[1] Among the more than 600 claims before the Tribunal are those from Maori women, Unitec students and urban Maori that they have been disadvantaged by government policies (*New Zealand Herald*, 21 December, 1996). Many of these claims cover the same ground; the Tribunal has so far, however, concentrated on claims arising from iwi and hapu.

understandings constitute a powerful sense of Maori grievance. The relation between the objective (but inevitably disputable) issue of justice and the subjective sense of grievance is highly contingent. Slight injustices can lead to powerful feelings of grievance, large injuries (such as those resulting from war) may be construed as part of the conditions of life, and may give rise to little or no sense of grievance at all. The actual response depends on the character of the people involved and the ideas they acquire about their situation.

The aim of the Waitangi process is reconciliation. Little problems are more easily reconciled than big problems, but the size of problems depends largely upon how people learn to think about them. We need not doubt that in the moral context of the modern world, New Zealand had no alternative but to deal with these problems in one way or another. The challenge for the government is to address these grievances while preventing them from getting out of hand. Doing the right thing (whatever precisely that may involve, and there is no definitive understanding of it) solves the objective issue. Whether it affects the subjective sense of grievance is another question.

To gain a perspective on this complex situation, we must revert to asking a simple but fundamental question: What is New Zealand?

WHAT IS NEW ZEALAND?

It is important to begin from the evident reality: New Zealand is a successful, working modern society in which more than three and a half million people, quite prosperous by world standards, are living the usual mixture of satisfactory and unsatisfactory lives. But how are we to understand this society. What *is* New Zealand?

As a state, the answer is obvious. New Zealand is a civil society composed of individuals living under law. As such, it derives from European, and more specifically British, traditions. But in the course of the Waitangi process, another answer has surfaced: New Zealand is a state composed of the interaction – the 'partnership' – between two peoples. We have seen that the Waitangi process is morally predicated on the assumption that the Treaty created *one* people. That is one difficulty with this view. A further difficulty is, on the bicultural hypothesis, how to characterise these two peoples. Maori at least have an agreed name, and are treated as one of the two peoples, but Maori are in fact remarkably heterogeneous, ranging from rural peoples living in some degree traditionally to urban people many of whom are indistinguishable from any other sort of New Zealander. The other set

of people might be called White, but this suggests an unfortunate racial distinction; or 'Pakeha', but some of them resent being subsumed under a Maori name; or British, but this refers to a historical connection becoming diluted by destiny and demography; or European, but this is to ignore the fact that some of them come from the Middle East or Asia. One might, I suppose, distinguish the two as founding people and newcomers. This certainly appeals to Judge Durie,[2] but it locks New Zealand into international assumptions about the rights of indigenous peoples, whereas Maori may be rightly recognised as significantly different from most other such peoples.

The term 'culture' isn't much help. New Zealand is often described, almost indifferently, as 'bicultural' and 'multicultural'. The use of 'bicultural' has in practice become a way of privileging Maori, whose cultural distinctiveness is a difficult question, and it leaves out Pacific Island peoples and Asians. And 'multicultural' doesn't capture a reality in which there are various colours, religions, forms of life and tastes in New Zealand, but in which everyone is equally involved as elector, producer, consumer, believer or non-believer and so on, in a single civil community. In other words, 'multicultural' is a politically loaded term only justified by giving a dubiously fundamental character to an element of variety which has always been found in modern civil societies.

One might try to give this classificatory question a little modish significance by saying that the New Zealand identity is a contested one, but for the most part it is only intellectuals who worry much about their own 'identity'. Most people have a repertoire of usable identities and just get on with living their lives, and so do most New Zealanders. These questions and answers can help us clarify our argument, but only if we realise that what is at stake in the Waitangi process is less a matter of identity than a matter of claims and interests of a fairly, almost brutally, specific kind.

There is a sense in which all politics is a competitive bid for attention, violence being the ultimate weapon in making other people take notice. The Waitangi process is a successful bid for attention, partly by Maori, but more importantly by people who claim to speak for them. Neither Maori numbers nor their economic significance would justify the current dominance of Maori issues in New Zealand politics; their only claim, *as* Maori, for such extensive attention by their fellow New Zealanders is the moral issue of the demand for justice. And that demand could only

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[2] See the essay in Wilson and Yeatman, *op. cit.*, p 34: "Maori … are a people with constitutional status arising from prior occupancy".

have succeeded to the extent that it has because it calls up an echo in the current sensibilities of other New Zealanders. To the extent that these injustices are manageable, which is to say capable of being settled and relegated to history, the present focus on Waitangi makes good sense; to the extent that they are not, that focus must begin to seem like a form of social pathology, something positively morbid. And, to an outsider, the whole thing sometimes looks like a successful society trying to talk itself into a nervous breakdown.

THE SILENT MAJORITY

Let us turn our attention now to the non-Maori – the people some of whom Sir Geoffrey Palmer in moments of irritation can call "red-necks".[3] They constitute about 85 percent of the population. They find themselves collectively charged with guilt for the rough conduct of their ancestors (though many of them arrived in New Zealand quite recently). They will largely be the ones to pay both the reparations that will be awarded and also the continuing welfare charges which disproportionally involve Maori. And it is on this point perhaps important to warn against a not uncommon misunderstanding: namely, that where two sets of people vary in wealth, the poor are poor *because* the rich are rich. The simple point is that European wealth is based upon European culture, which turns nature into resources for use. By contrast, none of the Polynesian cultures to which Maori belong is rich. It may be, of course, that they are better off that way, and that only the self-seeking acquire wealth. But that would not be an argument that could be used by Maori seeking material reparation for past injustices. All parties to the Waitangi process agree on the charm of money.

The situation is, then, that justice will mean that the rich, largely though not exclusively non-Maori, will have to give up significant amounts of *extra* money ('extra', that is to say, to the imbalance of welfare distribution) to Maori. Some have suggested that this money might in part be offset against welfare payments, since the recipients of awards will thereby forfeit, at least in the short run, the poverty that qualifies them for benefits and social services. But there remains a large, open-

[3] Thus on the acceptance of the view that state-owned enterprises could not be transferred from the government to private hands to the exclusion of Waitangi claims, Sir Geoffrey, who is not averse to self-contradiction within the same paragraph, writes: "That method of handling the problem turned out to be satisfactory to everyone. It caused a great fuss and the red-necks had a field day on the issue … ".

ended reparations commitment to be funded, and one suggestion for getting the genie back into the bottle was to declare in advance the sum of money that might ultimately be paid. In terms of bureaucratic reality, this would simply ensure that whatever the justice issue, claims up to at least that amount would be made. In fact the proposed 'fiscal envelope' caused outrage on the ground that justice could not be arbitrarily capped in this way. Justice must be done whatever it costs. But no one can tell just how high the cost might rise.

Many non-Maori have thus come to regard Maori grievances as a kind of cargo cult, in which they are expected in each generation to pay out for a renewed trawl through the history of grievances. Significant, indeed increasing, numbers of New Zealanders are likely to lose patience with this particular game. Attitudes do indeed vary greatly. At one extreme, Douglas Graham, closely involved with managing this process in government, is passionate about accommodating Maori claims; at the other, there are New Zealanders who dislike even being called 'Pakeha'. This divergence constitutes a rock around which the Waitangi process must navigate, and some see the discretion of the Tribunal in at least its earlier operations as an intelligent response to this fact.

On the other hand, there are those who regard the Tribunal cynically, as merely a concession to social peace, the warding off of threats by Black Power who surface in the occasional mass protest. But this is a policy of appeasement, and recalls Kipling:

> If once you have paid him the Danegeld,
> You never get rid of the Dane.

Worse than this, the Waitangi process interpreted in a strict moral sense entails, as we have seen, nothing less than a lack of legitimacy in New Zealand as a state. For there is no doubt what the consequences of an entirely just evolution of the relations between Maori and Pakeha would have been. The policy of not selling land to Europeans would rapidly have prevented the European population of New Zealand from increasing beyond the marginal status of a small minority in the country. One might argue, of course, that this would have been altogether preferable; some Maori certainly would. But it would certainly have entailed the non-existence of both Douglas Graham and the present modern New Zealand economy. At the root of the Waitangi process there is thus a basic contradiction between rectifying historic injustice, on the one hand, and recognising the legitimacy and the identity of New Zealand in its present form. Nietzsche argued that forgetting was an

important aspect of the psychic health of nations, and remarked of a German confusion of a similar kind: "He wants the flower without the root and stem".[4]

The Old Testament has it that when the fathers eat sour grapes, the children's teeth are set on edge. But it is also true that the vices of the parents are sometimes the source of the benefits of the children. The origin of states is usually some indefensible act of violence. From the killing of Remus in ancient Rome to the foundation of the British monarchy by William's Normans suppressing the Saxons (themselves the expropriators of Celts, etc) history is (as Voltaire had it) one long story of crimes and follies. We have noted Professor Brookfield arguing that the British coming to New Zealand has the character of a revolution, and he has remarked of the specifically legal context of the Waitangi process, "effective assertion of power (whether by conquest or internal revolution) and the passage of time have, in countless instances through history, legitimated the Constitutions and legal order which have been based upon them".[5] Authority ultimately stems from power, and Brookfield shows that the achievement of British authority in New Zealand, as a *fait accompli*, had features which render fine distinctions (such as which tribes did or did not sign the Treaty) irrelevant. It is only in our time that a generation has taken upon itself the rectification of the acts of its predecessors. Closed questions have been reopened. We have paid some attention to the moral ambiguities of this situation. The political issues are no less complex.

ASSIMILATION: HOPE AND NIGHTMARE

To pose what is emerging from our argument as 'the New Zealand question' is to recognise that the Waitangi process is based upon a partial truth: namely, that Maori and British-descended New Zealanders are two distinct sets of people, two distinct cultures co-existing within a single state. 'Bicultural' stands for this presumed truth, 'partnership' for the aspiration about how these two notionally separate peoples ought to be related.

The reality is that very large numbers of New Zealanders are both mixed by descent and united by a single, urbanised form of life. Many New Zealanders who seem entirely white are in fact proud of Maori

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[4] 'On the uses and disadvantages of history for life' in *Untimely Meditations*, translated by RJ Hollingdale, Cambridge: Cambridge University Press, 1983, p 119.

[5] FM Brookfield, *op. cit.*, pp 46–47.

ancestry. There has clearly been a lot of interaction between the two peoples, and during several generations in which Maori were out of the political limelight, a great deal of informal assimilation took place.[6] What in fact has been happening might be seen as the emergence of a new race and culture in the South Pacific, and obviously a vigorous and talented one. The issue might well be posed as being whether one ought to look back to separation or forward to fusion.

Maori themselves are in two minds about this basic fact of New Zealand life. Some believe that it is the best thing that could have happened, because there is really no alternative except to adapt to the modern, technologically advanced world. Such an assimilation involves thinking in an individualistic rather than a collectivist way, and one problem here is that individualism is sometimes confused with mere selfishness. This is, of course, quite wrong. The individualism of modern Western societies demands that the individual should make *responsible* choices and sustain a variety of obligations to family, friends and (what most distinguishes the modern West from other civilisations) also to strangers. Individualism is as much a set of duties as of rights, as we may see from the fact that it is only the individualistic societies of the West which have ever engaged in large-scale international charitable giving. Quite apart from government aid, very large numbers of individuals contribute from taxed income to good causes in far-away lands – a moral fact about Western society too often taken for granted. Many Maori have been absorbed into this way of life, and the index of this absorption is their use of the English language. Many are Christians, and their dress and diet is little different from that of other New Zealanders. It was developments of this kind which led New Zealanders of an earlier generation to think that they were in all respects growing into being what Captain Hobson described as an aspiration, and what modern states require: one people.

In recent times, however, such assimilation has come to be regarded by some activists with horror. In a context of ideas which makes the conservation of every existing culture an imperative, assimilation has been identified with, of all things, genocide. The Nazis got rid of Jews and gypsies by putting them in gas chambers, while New Zealanders get rid of Maori by teaching them English and seducing them with beer and rugby – and, of course, by marrying them. Assimilating the phenomena of gas chambers and free cultural mixing to a single

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[6] See GV Butterworth, *The Maori People in the New Zealand Economy*, Palmerston North: Massey University, 1974, pp 13–14.

pejorative is absurd – but not so absurd that it does not have United Nations status as a definition of 'genocide'. It puts the white teacher in a Maori class on the same level as Adolf Eichmann. It is evident, as we have seen, that the Waitangi Tribunal itself is not beyond the range of this kind of hysterical concept-stretching.

The unreality of this line of thought lies in the fact that the modern culture of New Zealand is not at all a 'culture' in the same sense as that of Maori. Western civilisation, with written roots going back several thousand years, composed of a variety of richly varied languages each with a written literature of its own and with a repertoire of both theoretical and practical activities, is inevitably a different kind of thing from the culture of tribal peoples. The very use of the term 'culture' serves to obscure basic differences. To say this is not at all to deny the value of Maori culture, nor even to deny its equivalence as a satisfying form of life, but it is to recognise that today in New Zealand it is virtually impossible to live the traditional Maori life of past centuries, and as a simple matter of fact nobody does. European tools and tastes are ubiquitous, and to attempt to set up mechanical parallels – to talk, as some have done, of 'Pakeha' science as a contrast with Maori science is to live a fantasy.

One aspect of the fantasy is to identify the original Maori culture with virtues which the Western world is thought to have lost. Maori are plausibly taken to be more communally minded than Westerners, with the implication that they are less grasping and self-seeking than their fellow New Zealanders. Sometimes the past lack of technology in Maori life is identified with environmental virtue. There are familiar reasons why these characterisations merely idealise what is imperfectly known, but we may content ourselves with observing that the moral level of human beings is roughly the same across cultural divides. Rousseau's 'noble savage' was an eighteenth century fantasy, and should be left there.

The most important group of people who cultivate ideas of this kind are to be found in governmental bureaucracies or in schools and universities. It is in these essentially Western institutions that a future of collectivist entrapment is administered for Maori.

UNIVERSITIES, POLITICISATION AND BOUNDARIES

The Waitangi process is made up of many voices – some sweetly rational, some aggrieved and some rather baffled. Some are heard out loud in the political process, or in media contributions to political debate. Some

of them – for example, many of the utterances of the man or woman in the street – are hardly heard at all. But there is an intermediate class of 'voice' which is off centre-stage but nonetheless highly influential, and which ought to be kept clearly in focus because it often eludes both appropriate criticism and democratic response.

This is the academic contribution to the debate, and it is the point at which the substantial historic grievances of Maori fuse with the ideological grievances advanced in the name of abstract categories such as women, blacks, homosexuals, people with disabilities and whoever else comes to mind. But let us concentrate on the feminist case, because the grand alliance between Maori activism and feminism has, as the journalists say, 'punched above its weight' in much Waitangi discussion. The alliance is slightly eccentric because traditional Maori culture has never been particularly emphatic about the rights of women, but part of the reason for its success would seem to be that at least one university has inserted biculturalism into the heart of the mission laid out in its charter.

It has been in pursuit of this aim, and in general of the bicultural understanding advanced by "those of us committed to justice"[7], that the departments of Law and Women's Studies at the University of Waikato have sought to expand their activities against two forms of resistance. The first was against "the government's agenda for universities, which would require them to become more commercial and competitive entities"[8] and the second was against traditional academic attitudes. Thus (as Margaret Wilson expounds the problem):

> The regular parts of a university, those identified with the so-called "scientific" inquiry, continue to attract the lion's share of university funding and to control the most powerful university committees … There is a vicious circle here: the most powerful academic voices are those least able by training and inclination to respond imaginatively and intelligently to the issues posed by feminist, bicultural and multicultural demands on justice.[9]

Professor Wilson is a powerful advocate of biculturalism and the foundational role of the Treaty of Waitangi, and the University of Waikato is required to pay special attention to the educational needs of Maori. The first is (though we may disagree about it) an entirely legitimate political cause to promote and the second is an appropriate task for an

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7 Margaret Wilson, 'Introduction' in Wilson and Yeatman, *op. cit.*, p ix.

8 *Ibid*, p ix.

9 *Ibid*, p xiii.

educational institution to set for itself. The problem is: what are the two things doing together?

A university is not a place for political advocacy, but rather for the study of the world as it is. I recognise, of course, that this remark will be greeted with derision by many people in social science circles in universities. These are the people who believe that only one thing ever is going on in the world, namely the essentially political issue of the struggle against oppression. They conclude that it is mere mystification to think that academic study can stand aside from the struggle, or can be (to use the chosen word) 'neutral'. The issues raised by this opinion can only be glanced at here, but no treatment of this subject can entirely duck them. In my view, the opinion that everything is political reduces the useful specifying word 'political' (which distinguishes one area of activity from, say, astronomy or cake making) to a ubiquitous vapour covering everything. The logical issue, by contrast with the semantic, is that any doctrine of the form 'Everything is X' (eg everything is political) must immediately come back to earth by recognising that some things are X in a different way from others. Hence, even if scholarship and academic inquiry are thought to be political, they are certainly political in a very different way from what goes on round the Beehive.

Those interested in the Waitangi process should forgive this brief excursion into what may seem to be academic irrelevance, because what is taught in universities has a long-term effect upon wider opinion. It is therefore worth characterising, even briefly, this off-stage voice in the Waitangi controversy. Professor Wilson is, remotely, an intellectual descendent of European thinkers (such as Marx and Nietzsche) who have been appropriately called 'philosophers of suspicion' – appropriately, because they were much given to unmasking ideals and other widely admired features of European life as concealing something unpleasant, namely power. Oppression is everywhere. The relevance of this to the Waitangi process is that New Zealand was for long untouched by these alien passions. For most of its history, it was a relatively harmonious small country in which people took each other at face value. No doubt they often suspected that others were 'up to something', but most had not then been taught to do so in abstract categories, such as that employers were invariably exploiters, men the oppressors of women, and a variety of other category struggles imported by intellectuals from the different conditions of central Europe.

Professor Wilson is a notable exponent of this cast of mind. She stands, we have seen, for justice, while everything that frustrates her desires is

power, such as the powerful committees on which those scientists are entrenched. Her distaste for them is such that they are merely 'so-called' scientists, and even her reference to them as scientific cowers behind sneer quotes. Alas, these "powerful academic voices" are the sort of people "least able" to "respond imaginatively and intelligently" to the issues posed by "justice".

Justice against power is strong rhetoric. If we accept it, then there's no contest. Justice must win. On the other hand, Professor Wilson is quite grateful to accept the help of power when it is usefully enshrined for her purposes in the Education Amendment Act of 1990. That Act contains an invocation to biculturalism, and also "acknowledges" (as she puts it, using a significant achievement word) the university's role as that of "critic and conscience of society". Now this is very strange, partly because a government officially according a moral role to an independent institution is unusual in a free society, and partly because universities have proved as eccentric in their moral judgments as any other fallible human institution. From the heresy hunts of earlier centuries to the academic apologias for totalitarian regimes in this century, universities have the kind of patchy moral record which makes it a bit odd that they should have been singled out in this way. The reason can only be that some partisan in government thought that they were an influential lever more to be relied upon than the "society" of which they were to act as critic and conscience. In democracies, people usually do this kind of thing for themselves. We are all "critic and conscience of society". In other words, we have here one of those tiny telltale signs of elite mistrust of the New Zealand population which have ramified throughout the Waitangi process.

There is, then, an academic literature on the Maori question (we have already encountered some forms of it) which assimilates New Zealand into an analysis of oppressions understood in terms of abstractions. In this understanding, the past is all grievance, the future all aspiration. It is not the kind of writing that comes trippingly off the tongue. It is full of 'posts'. New Zealand is something called a 'post-colonial society', and we can find even fancier variations, as when Paul Spoonley writes of the "post-monetarist Aotearoa of the 1990s". It is all done in a highly technical vocabulary. Thus Spoonley quotes S During:

> [Post-colonialism] may be thought of as turning on a desire to enter the otherness which will allow postmodernism to be recognised not as decentred, but as centred. They [post-colonialists] wish once and for all to name and disclaim postmodernism as neo-imperialist. … Post-colonialism then is the

> name for products of the ex-colonies' need for an identity granted not in terms of the colonial power, but in terms of themselves.[10]

This rather opaque prose may suffice to illustrate the profundities in which wider New Zealand issues are being discussed in some academic areas. This kind of thought – I am not sure what to call it, but it is, even if parodic, closest to a kind of philosophical sociology – does not allow of testing against experience, and it is certainly remote from the way in which ordinary New Zealanders, of all kinds, understand one another. For that very reason, it is dehumanising, and could not in its own terms enter into actual politics. Its natural habitat is that of bureaucracies and commissions working behind the scenes, and what it facilitates is a totalitarian control of life according to some nominally egalitarian programme.

That New Zealand must, according to this line of thought, be transformed is clear even from more lucid exponents of the same academic line of analysis. Thus Jane Kelsey tells us that, despite the uproar over the 1981 Springbok tour, "Pakeha lacked a strong history of class struggle, resistance to external domination, or militancy on which to call". The main unity in New Zealand life, she thinks, was sport: "The dream of high performance, or just the comradeship and adrenalin of the match, provided an escape from people's daily lives". The assumption in Professor Kelsey's pages is a utopia of true human fulfilment which ordinary New Zealand life frustrates. It is a not uncommon, and perhaps not an entirely ignoble, vision, but it ought not to be wrapped up in pseudo-academic analysis. And it has nothing to do with the texture of New Zealand life. For when Kelsey writes that "Most academics did their post-graduate training overseas, which tended to perpetuate dependence on theories and perspectives developed in quite alien contexts" she is – unwittingly it seems – performing an accurate piece of self-analysis which can stand for this entire genre.

The broader problem raised by this particular 'voice' in the Waitangi process is that of the breakdown of boundaries in New Zealand life as the result of partisan enthusiasm. We have been dealing here with the breakdown of the distinction between politics and the academic. A similar erosion is undermining the distinction between law and politics. We have earlier discussed one kind of threat to the distinction between law and politics, but this particular threat comes from another direction.

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[10] See Paul Spoonley, 'Constructing Ourselves: The Post-Colonial Politics of Pakeha' in Wilson and Yeatman, *op. cit.*, pp 96–97.

As its general rubric, consider Professor Wilson's comment that it "is a commonplace to assert that the law reflects the relations of power, especially political power, within the state, and that the law is part of the construction and reconstruction of those relations".[11] Whoever believes this has disconnected the law entirely from the concept of justice, and proceeds to judge the rightness or wrongness of verdicts entirely in terms of how they cohere with the judge's own partisanship. It is precisely the doctrine to which Hobbes attributed the civil war in England in the 1640s. The intellectual point is that the metaphor of 'reflection' is a thin little image with which to understand the complex relationships involved. But we might illustrate the breakdown of boundaries by a famous recent case.

In 1985, the question arose of a rugby tour of South Africa, only four years after the turmoil of 1981. The government did not act, and opponents of the tour had recourse to the courts. As Jane Kelsey describes this event:

> The judiciary were being asked to show nerve and creativity where politicians were not prepared to do so – and where the courts themselves had failed to act in 1981, with disastrous consequences. Their public credibility was on the line.

To stop the tour on what were essentially public policy grounds the court would have to treat a private organisation, the New Zealand Rugby Football Union, as if it were a quasi-state body. It did. In the process, Justice Casey stretched legal doctrine to, and some would say beyond its formal limits. But the decision was handed down to a receptive political and public climate. No matter how legally unorthodox or doctrinally outrageous the decision, it was likely to be greeted with relief by the majority of politicians, the media and the public.[12]

Professor Kelsey's judgment is no doubt right. It got people off the hook, and there are perhaps occasions when formal indiscretion is the better part of valour. But an actual *habit* of ignoring boundaries whenever convenient is the road to despotism. The boundaries we inherit are the result of an almost fanatical devotion to institutions and distinctions – Socrates to philosophy, English parliamentarians to limited constitutional separation, American founders to a constitutional principle, and so on. The independence and autonomy of our institutions of civil society are

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[11] Wilson in Wilson and Yeatman, *op. cit.*, p 7.

[12] Jane Kelsey, *Rolling Back the State*, Wellington: Bridget Williams Books, 1993, p 205.

not in fact the result of the struggle so beloved of ideological melodramatics, but sometimes they do have to be defended at the cost of life and fortune. They are easier to throw away than to establish in the first place. Samuel Johnson was emphatic that people need more often to be reminded than to be informed. It is so in this case.

The academic world is thus an important off-stage actor in the Waitangi process. And its significance lies partly in its influence on advisers, policy makers, civil servants, teachers and others who have a role that is partly public and partly professional. One might almost call it the 'academico-bureaucratic complex'.

BUREAUCRATIC COLLECTIVISM

In January 1991, a Ministerial Planning Group was set up by Winston Peters, then minister of Maori affairs in the National government, and its report was called *Ka Awatea*. It involved, according to Denese Henare, both a process and a vision, and it gives a striking picture of perhaps the dominant conception of Maori progress found among the makers of governmental policy towards Maori.

The basic problem Maori encounter is assumed by civil servants and advisers to be a lack of 'social equity', a lack evidenced in the statistics of Maori underachievement. The problem is widely discussed in Maori circles, and the Hui Taumata, for example, advocated in 1984 that resources should be (as it was delicately put) "released" (by government), that the closing of the gap in social equity between Pakeha and Maori should be planned, "strategically targeted and well organised". It proposed that the gap should be closed in 10 years.

This proposal suggests two questions. The first is whether a rural life based on the iwi could ever generate the statistics that would demonstrate that 'social equity' had been achieved. The second is that if Maori are in fact a quite separate culture, any such test of equity would be irrelevant, since different indicators are appropriate to different forms of cultural life and self-expression. What ministries envisage in these projects is no doubt Maori living together in a largely rural setting but with about the same resources, in the form of household equipment, living space and disposable income, as their fellow New Zealanders. In fact, the required social equity could only happen if many Maori moved to the cities, lost contact with their tribes, and prospered; and some have. That some Maori have moved to the cities without prospering is, of course, also true, and a social problem, but one far from being exclusively

Maori. The iwi-based conception of Maori progress towards social equity which planners envisage could not possibly succeed. Tribal ruralism is no route to economic prosperity. But the inevitable failure of centrally planned projects is not altogether an unhappy outcome, for it is precisely what keeps planners in business.

Social equity, then, hasn't been achieved, and the bureaucratic jargon hasn't much improved either. Denese Henare writing about these initiatives[13] is concerned with the "search for new structures and solutions" to address this problem. She has three notable aversions in her search for solutions. The first is that the government, as it shuffles ministries and advisory groups, might be guided less by "empowering Maori" than by "a hidden agenda to deliver these services on the cheap". A second aversion is to something called "paternalism" which seems to be the ministry leaning over the shoulders of iwi and other collectivities and telling them how to spend the cash. And the third is called "assimilation" which is contrasted with the newly rediscovered "biculturalism", to which is often joined the idea of partnership.

Connoisseurs will no doubt immediately recognise the symptoms of bureaucratic defence of patch, but the more important point is to recognise that the very language used in these discussions[14] serves to sustain an element of fantasy. Maori are essentially construed as clients of a ministry, while the point about any Maori who assimilates to Pakeha is that he or she will exit such a role. An economically self-sufficient Maori is no use to a protective ministry: such people make their own decisions and dispose of their own resources. But what *is* assimilation? We have already seen that virtually all Maori have in fact already assimilated to the extent of using the English language rather than Maori, though no doubt some use it in a distinctive fashion. They have assimilated in acquiring many Pakeha tastes as well. Some, such as Dame Kiri te Kanawa, have aquired world fame in these pursuits, and are far from being candidates for "empowerment" by the ministry. For a reason we shall come to almost immediately, it would be impossible to define precisely what the limits of assimilation (by contrast with bicultural distinctiveness) would be. Certainly few discussions show much evidence of thought on this question.

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[13] Denese Henare, 'The *Ka Awatea* Report: Reflections on its Process and Vision' in Wilson and Yeatman, *op. cit*.

[14] See also Brenda Tahi on 'Biculturalism: The Model of *Te Ohu Whakatupu*' in Wilson and Yeatman, *op. cit*.

Ms Henare regards the *Ka Awatea* report as a move away from a policy of assimilation to one of biculturalism, and in an interesting hypothetical she continues:

> If the politics of difference means a political commitment to achieve not just Pakeha biculturalism – that is, being sensitive about how you treat Maori – but Maori biculturalism, which requires a real partnership in terms of a trust to control resources and development, then this commitment has not yet been achieved.

Jargon here can hardly conceal what is unreal about such a complaint. Like all New Zealanders, Maori do in fact have complete control over those resources they earn for themselves. The only resources they do not fully control are what they have been given by other people for specific purposes of development. And here the issue is obviously not *Maori* control, but rather *who* controls whose cash, and for what purpose?

Whether "the politics of difference" (which is the term describing the surface froth justifying these policies) is an appropriate policy for New Zealand is a question worthy of political attention. Biculturalism, which may or may not be quite the same thing as a form of benign apartheid, has a considerable head of opinionative steam behind it. But what we do see unmistakeably when it is being discussed is a relationship of dependence (namely subsidy and pension) being passed off in quite different terms as "a real partnership in terms of a trust to control resources and development … ". The relationship between Maori and Pakeha in New Zealand, when discussed in these terms, invokes irresistibly the relation between the First and the Third Worlds in the 1960s, when post-colonial African states were demanding aid and subsidy and loftily insisting that there should be "no strings attached".

They often got it and, as we know, it was not a success. Stringless money often ends up in odd pockets.

The fundamental issues, however, lie elsewhere. The first point is that the accounts of governmental policies designed to help Maori make virtually no reference to individuals. Again, a single entity, Maori, is assumed to be homogeneous and to have a single interest. Its opinions are to be canvassed in collective discussion. Collective discussion is not difficult to manipulate, and it is said that urban Maori and young people do not much participate in marae processes. Whether what emerges from such consultation might be characterised as 'democratic' or closer to Leninist 'democratic centralism' is not something I can judge, but in either case little attention is being paid to the individual Maori, especially those living in the cities. And the real progress of Maori towards 'social

equity' or (as Denese Henare puts it) "the objective that Maori reach socio-economic power and parity with non-Maori" will depend not upon governmental policies but upon the specific virtues in individuals which are conducive to the success of a modern economy. Nor, of course, should it be assumed that a bureaucratic concept such as (statistical) parity should be the criterion of Maori success. For this test suggests that, as we have seen, Maori and Pakeha are precisely the same, and thus contradicts the assumptions about two cultures. It is remarkable how often a little thought about these issues unearths contradiction.

There is, then, a pervasive fog of collectivism as well as bureaucracy which separates the way in which many of the official representatives of Maori understand these questions, on the one hand, from the evident complexity of actually lived Maori experience today, on the other.[15] Now collectivism is a system of thought which, as we might colloquially say, takes the heat off the individual. Or, more precisely, by not demanding that individuals should be *self*-moving, it makes them tools of the collectivity (which as a lot of recent experience has taught us may not be a pleasant situation). We are thus brought to an absolutely central question which is systematically obscured by the entire Waitangi rhetoric: What are the duties of Maori?

The question has two aspects: what are the collective duties of Maori in this process and, secondly (to be discussed later), what are the duties of individual Maori?

So far as collective duties are concerned, it is all very relaxing for Maori. If justice is seen in terms of an exchange, then the payment in Maori suffering was largely done in the past, and all that contemporary Maori need now do is relax and enjoy the benefits. In reality, of course, some at least of the money paid out in reparation will go to provide resources for Maori improvement: much of the Tainui settlement in 1995 was reported to have been invested in Maori schooling. But as we shall see, the Maori assumption that land is the father of money disposes many activists towards the attitude of the rentier who believes that wealth flows from the control of resources rather than from work and ingenuity. Assets without action (not to mention technology) are valueless.

And an aspect of this is that while endless demands are made upon the government for money, and upon Pakeha for sensitivity, nothing at all is said about the duties of Maori. The history of Maori shows a people

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[15] It is perhaps notable that the maiden speeches of some recently elected members of parliament are less prone to this kind of *déformation professionelle*, perhaps most notably that of Donna Awatere Huata on 19 February, 1997.

ready to embrace opportunity, but much in the way they are officially treated blocks the incentive to take it. The underachievement of Maori is thus far from inexplicable. It might be thought to derive in part from what educationalists call "low expectations".

CAN BENEFITS BE SELF-DEFEATING?

This may be part of the answer to a probing question asked by a former cabinet minister in June 1995: "Why is it that the efforts of governments over the last decade seem only to have made matters worse?".[16] He focused particularly on two points. The first was that the process had become entangled in legal procedures. Lawyers complicate situations and they slow processes down. They are also ingenious, with the result (argued Michael Bassett) that whole new types of grievance unimagined in 1985 were beginning to flood into the work of the Waitangi Tribunal. Such an ingenious expansion of types of claim illustrates the fact that the Tribunal is clearly an instance of that special kind of political illusion in which some new project is recommended as a once and for all removal of an evil but turns into an inextinguishable department of state. *Ce n'est que le provisoire qui dure* as the French say: it's only the provisional that lasts.

Bassett's other point was that the reconciliation process will do little for most Maori, who are urban and remote from their tribal origins. Some Maori take the view that the whole reconciliation process is reactionary in the sense that far from benefiting Maori, it will re-tribalise them, and thus distance them further than at present from the opportunities of the modern world. Bassett's point is slightly different: it is that the Tribunal's focus on land is merely distracting attention from "the problems of cot death, bad parenting, poor education, poor health, excessive crime and ultimately underachievement … ".

Social problems there certainly are, but it is the point about tribal organisation which raises the long-term issues. The iwi has so far been the basic unit of Waitangi thinking, but this has not prevented discontent with the results from spreading, not only in conflict between different tribes but within tribes as well. Questions about the appropriate allocation of benefits (as between coastal and non-coastal tribes where fishing resources were concerned), about who might represent the iwi, and about the place of women in consultation have surfaced and sometimes become acute. The *Fisheries Settlement Report* remarks:

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[16] Michael Bassett, 'The Waitangi Tribunal: Some Reflections', a speech given at the Auckland Rotary Club on 26 June, 1995.

> Traditionally, it appears to us, Maori society was essentially anti-state and egalitarian. Sections regularly split off to stand alone and form new hapu following leadership or other struggles.[17]

But both these characterisations – anti-state and egalitarian – are Western terms, and there can be no doubt that, quite apart from Maori traditions, the free and easy practices of association among non-Maori have had an important influence on Maori conduct. Western associations, however, are composed of individuals; they can be formed and reformed according to need. The danger is that these new creatures of reparatory advantage may take on tribal rigidity. What these conflicting entities certainly do is to suggest to many Maori that the road to wealth is not through work and enterprise but legal and political. In other words, the Waitangi process bids fair to present Maori with a misleading idea of the process of economic advancement. An economy depends upon individuals and firms having incentives to produce and use wealth properly. Where those incentives are entirely confused (as they were, for example, in the communist states of this century) then it is not merely that the economy suffers, but moral degradation is a further price to be paid.

An important reality is the conflict between the Maori activist on the one hand and the rest of the population on the other. Many New Zealanders have little contact with Maori and want largely to get on with their lives without the complications which the government seems bent on imposing on them. These are the people who are sometimes referred to by exponents of the Waitangi process as "rednecks". Bassett quotes a Radio New Zealand-MRL poll of May 1995 which found that 81 percent of New Zealanders did not believe that the Treaty of Waitangi afforded any special rights to Maori, and only 25 percent thought Maori should be able to claim compensation for past loss of land. Such figures tell us nothing, of course, about law or rights, but they do tell us about popular attitudes. It is clear, then, that the "rednecks" far outnumber the activists. When the then prime minister responded to these figures with the hope that parliamentarians, as they continued with the Waitangi process, would "give a lead" in changing popular attitudes, he was in fact revealing that we have here another familiar political phenomenon: an elite project running into popular resistance. It's the sort of situation which leads intellectuals to espouse democracy when they have the majority on their side, and denigrate populism (or 'redneck' attitudes) when they don't.

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[17] See the additional chapter in the second edition of *Justice and the Maori*, *op. cit.*, and especially Ch 16 section IV, for a discussion of what Sharp calls "problems of Maori agency", from which the quotation is taken.

The question of what this process actually does for race relations in New Zealand is hard to answer. Poll results – the nearest to evidence that we have – taken in 1995 recorded that 57 percent of respondents thought that race relations had got a lot worse in the preceding two years. In February 1997, this figure had dropped to 51 percent. On the other hand, a similar poll in February 1996 suggested that only 48 percent of respondents (down from 52 percent the previous year) thought that the Treaty of Waitangi should be an important factor in the decisions of government. Maori recorded the higher figure of 75 percent (as against 45 percent for non-Maori), but it is clear that not all Maori think the same way.[18]

There is, however, plenty of room for a middle course, because poll results do not reveal what we have seen to be one political presupposition of the whole process: namely, that non-Maori New Zealanders will go quite some distance with a reconciliation process they think might be final, and that they have no problem in regarding Maori as an important and valuable element in New Zealand life. The problem arises when these issues are taken in hand by lawyers, bureaucrats and academics. These are among the classes of person who, as the old joke has it, if laid end to end would never reach a conclusion – or should one say, in this context, "a full and final conclusion"? Any successful resolution of the problem must depend on the state.

HOW TO GET RICH

It will be evident that I have taken a view of the reconciliation process which pays particular attention to what, in other contexts, have been called "significant silences". We have seen that any concern with the question of the duties and obligations of Maori responding actively to their situation is one of those silences. It is paid little or no attention amid the clatter of bureaucratic strategies, policies, visions, structures and all the rest. Nor do we find much concern with the question of divisions within Maori: not simply the division between iwi and hapu but between differently situated Maori – urban and rural, rich and poor, professional and unemployed, and so on. 'Maori' generally stands in this literature for an undifferentiated and victimised collectivity. This does little justice to the realities. Even so prominent a Maori politician as the late Matiu Rata, the very figure who revolutionised the Maori situation

[18] See *New Zealand Insight*, Vol 6 No 1, March 1997.

in the 1970s, found himself repudiated in the 1990s by his own Muriwhenua people.[19] Uproar among Maori followed the Confederation of Chiefs of the United Tribes of New Zealand landing seven tons of fish outside the quota in January 1998. Many have commented on the problems arising when customary fishing rights are exercised with modern hi-tech fishing equipment. Again, when the Treaty of Waitangi was cited as justifying a hangi which violated fire safety regulations, a Maori elder protested, saying "this Treaty business has gone far enough".[20]

There is an even more fundamental question which seldom gets asked, perhaps because it is so remarkably naive, indeed almost presumptuous, about Maori and the Waitangi process. Do Maori actually benefit from reparation and subsidy?

No doubt in a simple sense having money is better than not having it, though this rather depends on the inevitably contested question of *who* actually gets to spend it. Further, at least some of the reparations money already paid has been spent on Maori education from which long-run benefits may be expected to flow. Again, Brenda Tahi talks of the Maori Women's Group seeking to encourage female Maori entrepreneurs, and one can imagine that such a programme might well, at the margins, bring benefits. Nonetheless, the reparations money coming to Maori has the look of a lottery win, encouraging not so much enterprise as the very kind of relaxed attitude to the economy which has failed to help anyone in the past.

It is obvious that significant numbers of Maori regard the Treaty of Waitangi as a milch cow, not only (as we have seen) as the source of fantasy exemptions from fines and fees, but as a potential source of continuing benefits flowing from the economy. Since this three-clause Treaty is a remarkably ethereal cow, the real source of the milk is the taxpayer, by way of Crown legislation, and, as Bob Henare, then chairman of the Coal Corporation of New Zealand, remarked in March 1993, "legislative provisions have further constrained Maoridom and increased its dependence on the government". He went on to diagnose a vicious circle by observing: "This perverse result then forms the basis for yet further Maori demands for compensation and increased support because they are constrained by legislation from acting in any other way".[21]

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[19] See David McLoughlin, 'Trick or Treaty', *North and South*, 1996.

[20] *New Zealand Herald*, 13 January, 1998.

[21] Bob Henare, 'Business and Biculturalism: The Legislative Trap', IIR Conference on the Treaty of Waitangi, 18 March, 1993.

One striking example of perverse effect in this area is that section 145 of the Maori Land Act 1993 provided that Maori customary land could not be sold. Such protection against careless future alienation – learning, no doubt, a lesson from the past, but a wrong lesson – would also render the land economically sterile, unable to be used, for example, as collateral for a loan. This proposal reveals the connected presence of a number of other significant illusions to be found in discussing projects of reconciliation. One of these we have seen to be the belief that wealth emerges from natural resources; that *land* is the father of money. The argument is that Maori are poor because their land was appropriated from them in the last century, and that becoming rich again will follow from getting back the land. The truth is that wealth basically depends upon enterprise. The world is full of prosperous economies (Japan, Singapore, Hong Kong, even Switzerland) which have negligible natural resources (including land), and resource-rich countries which are poor, especially in Africa.

Indeed, it is important to realise that all the talk about resources in New Zealand, talk which suggests that they are there merely for the taking, ignores the fact that New Zealanders struggled for years to find profitable exports. Gold, of course, was an early source of wealth, but it was not until the 1890s that meat, butter and wool became the basis of prosperity, and turning the land into an asset was an epic struggle against rabbits, erosion and reversion to the bush. Given such struggles farmers did not want leasehold land. It took emerging technology in the 1930s to bring New Zealand fully into the promised land of scientific agriculture. Very few of those involved in the Waitangi process have experience of this basic reality only a couple of generations or so back.

These illusions can be summed up by saying that the dream of a rentier existence underlies a great deal of official Maori thinking about this issue. Maori groups appear to have made a number of claims, some successful some not, to control of tourist sites in New Zealand, ranging from the Treaty House at Waitangi, bequeathed to the nation by Lord and Lady Bledisloe in 1932 and now subject to a $5 entrance fee, to the Taiaroa Head Albatross Colony in Otago. In many areas it looks almost as if Maori were claiming, on the basis of first possession, control of all the natural splendours of New Zealand, letting the Pakeha get on with the dreary work of producing the wealth. It is obviously an attractive option, especially to Maori belonging to tribal corporations. Its long-run benefits are more doubtful.

ECONOMY AND CULTURE

These considerations reveal the importance of bringing into focus the various abstract forms of social understanding we described in Chapter 1, especially the relation between economics and culture. For 'culture' is an expression which belongs with terms like 'society' and 'community' in that it conveys a soft, warm, feel, while 'economy' is nasty and harsh, something studied only by specialists in a dismal science. Work is the immemorial curse of mankind, but it is among the main sources of wealth. We thus face a notable dilemma whose horns we have been circling round through several recent sections: the aim of preserving Maori culture on the one hand, and the aim of achieving social equity (ie statistical parity with Pakeha) on the other. The basis of the contradiction lies in a well-recognised finding of political science:

> The cultures of virtually all pre-industrial societies are hostile to social mobility and individual economic accumulation.[22]

What is at issue in this remark happens to be the medieval world, or despotic empires like the Chinese. The principle applies, however, even more strongly to pre-metallic cultures such as those of the Polynesians.

Now this cultural impediment to wealth creation would not matter if it were the case that Maori were so locked into their culture that they could live contentedly in their own world the way some very determined religious sects have managed to do over several generations. Maori are not like that. Their appetite for the material good things available in the Western world is no less robust than that of their fellow New Zealanders. This is how the contradiction gets its purchase on reality. There is a problem for Maori in combining prosperity *and* identity – or at least, combining these things as they are currently defined.

Language is crucial here, and there is an important division between the elite and the mass of Maori. The elite is very keen to turn back the decline of Maori usage, while the masses have voted, as it were, with their tongues. They speak English, and most have forgotten what little Maori they knew. Now the prosperity problem is that significant numbers of Maori are not achieving at school, and this leads on to problems in the employment market. To have to learn another language is, academically speaking, an *additional* task. It would seem to have an opportunity cost: namely that less time and effort would be available

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[22] J Granato, R Inglehart, D Leblong, "The Effect of Cultural Values on Economic Development: Theory, Hypothesis, and Some Empirical Tests", *American Journal of Political Science*, 40:3, 1996, pp 607–631.

for other subjects. Compelling the learning of Maori would seem to be a burden, and marginal pupils would become even more marginal if it were added to their tasks. Common sense suggests that there is a direct contradiction between the emphasis on cultural identity, especially in the form of language as supposedly required to make a reality of biculturalism, on the one hand, and all those policies, strategies and structures brooded on by bureaucracy as devices for closing the economic gap between Maori and Pakeha.

One might certainly query this judgment. A popular opinion based on some special cases suggests that the very exhilaration of an identity-enhancing immersion in Maori could carry over into enhanced performance in other subjects. Black children in Chicago slums, it has been reported, were taught Latin, and their performance improved across the board. The problem in understanding these questions is: What actually causes what? The famous Hawthorne experiment in the United States in the 1920s sought to discover the effect of factory lighting and other environmental conditions on the productivity of the workers. It was found that productivity went up whatever was changed: the workers in question were simply stimulated by being the objects of investigative attention. One suspects that a similar sense of being special enhanced the energies of those Black children in Chicago. The problem with romantic theories of education is that what works for a few cannot validly be universalised. In the case of Maori, it does seem that what facilitates educational advancement, namely concentration on skills for employment, might well be incompatible with enhancement of a traditional Maori identity.

Reality itself, of course, contains no contradictions. They result from policy and formulation. What we currently have in New Zealand is a variety of groups and individuals following different policies and ignoring one another. Many Maori biculturalists dream of the brilliant computer engineer fluent in both the English needed for prosperity and the Maori needed for cultural identity. But this is to conceive cultural identity as a kind of commodity, a possession, a static thing apart from active life itself. Identity cannot in fact be packaged in this way. The current vogue for talking about identity in intellectual circles obscures the fact that we *are* very much more than we are conscious of. Some aspects of our identity are things we can decide, such as names and some of our habits, but other aspects are constituted by the way other people respond to us. The Welsh are still Welsh, though most of them speak

English and can no longer understand the language of Cymru. A Maori is both what is changed and what does the changing.

Once tribal peoples come in contact with the West, they lose a certain innocence of tradition, and what remains to them is a heap of cultural artefacts among which they choose (like Westerners) according to their convenience. Identities are in just one respect like tools: we greatly admire highly specific tools which can do one job and no other, but we more commonly use serviceable tools which are versatile enough to tackle many tasks. Maori were once grand and impressive people full of the dignity of their limited situation. They have lost much of this in coming to resemble other modern peoples, and perhaps it is sad that the modern world has no place for what has been lost, but there is no real alternative, simply because there is no one who is prepared to go back to that earlier condition and actually live it for a (generally short and ill) lifetime. And forcing tongues to stumble over unfamiliar Maori words cannot reproduce that world.

There is, then, no contradiction in reality. But there is certainly a contradiction between policy and the way Maori actually live. The government wants both to encourage Maori cultural revival *and* to bring Maori up to Pakeha economic status. It is the driver of a vehicle planting both feet firmly on the brake and the accelerator at the same time.

5 Conclusion

The clash of the abstractions

Our method in looking at the Waitangi process was, it will be remembered, to rub abstractions against each other in order to bring out the extent to which solving problems in one area led to problems in another. This is the main reason why good intentions often lead to bad results. The Waitangi process has plenty of good intentions, but only a little analysis is needed to see that many of its solutions drag quite serious problems along in their wake. 'Justice for Maori' (whether seen either in reparative or welfare terms) collides with rising resentment from the remaining 85 percent or so of the population, those who will have to pay and are in any case increasingly impatient with bearing the guilt for past events they had nothing to do with. Rhetorical attempts to separate guilt and shame from the payment of reparations, such as have recently been made, are unlikely to persuade many. The project of reviving the culture of Maori (and especially language) clashes with the aim of making Maori economically more self-sufficient. Again, Maori conceptions of what the Waitangi process involves often clash directly with what non-Maori believe. The shower of benefits on some Maori may well create a perverse incentive structure. Further, the covert assumptions of the Waitangi process are incompatible with a full-blooded acceptance of New Zealand as it now is.

What is certainly true is that the Waitangi process has raised the temperature of New Zealand public life. Some of this was a response to questions that demanded attention, and some results from the fact that the process is often conceived in terms of moral absolutes such as justice. My concern, like that of the policy makers, is not to adjudicate moral opinions but to take them as a datum of policy. It is quite widely agreed that beyond the broadest moral issues of justice, the discussion must focus on political solutions. This is entirely sensible. Unfortunately, many people believe that enough negotiation – sitting round the table – will generate the solution to all political problems. In fact it is of the essence of political solutions that they must ultimately be imposed by the use of the state's authority.

Negotiation, as a *mêlée* of interest, principle and competing descriptions, cannot generate a determinate solution to any complex problem. Each step in negotiation changes the terms of the problem, suggesting to the various parties both new possibilities of advantage and

new fears of disadvantage. Unless the authority of the state stands in the background, ready to let the process work itself out yet making it clear that a solution must be reached at some determinate point and will be enforced, then the jockeying for advantage need never end.

According to the 'justice as absolute' view of the Waitangi process, the Crown has committed itself to Maori land equity, which was denied in the past and must be accorded now, by restoration or reparation. This is a question of honour. Such a view is notably espoused by Douglas Graham, the minister at the centre of the process. But like other participants he is eager to shift the real discussion on to political feasibility, understandably because some Maori claimants seem to regard their rights as impossibly high. In any case, the absolute of justice may collide with another potential absolute insisting that to tax one set of people to cover reparation for alleged injustices committed a century or more ago is totally unjust. Many but not quite all of the participants agree that political pragmatism (which is of course not at all unprincipled) must trump the absolutes. But one person's pragmatism is not another's. In whatever direction one moves, the state has to become the decisive actor.

It certainly remains true that politicians in New Zealand must face up to the quite morbidly swollen role of the Treaty of Waitangi in contemporary politics. It is merely a treaty, and treaties are not only not part of law but may be revoked at sovereign will. The wars of the 1860s would probably have been an opportunity to do so, had it not been for the fact that legal opinion at that time took the view that the Treaty was not a relevant document. Its real place in New Zealand life is somewhere between this dismissive view and its current inescapability.

Few things in politics are purely moral, and the revival of concern with the Treaty is unmistakably the work of vested interests seeking to profit from it, in alliance with current moral opinion in the Western world. The attempt has been made to turn it into the equivalent of a constitutional convention. But it cannot possibly serve this purpose for several evident reasons.

The first reason is that it says almost nothing that bears directly upon the New Zealand that has developed since 1840. Indeed, the whole point of its revival is to try to render irrelevant everything that has happened in New Zealand since 1840, except for the explosion of wealth. Its vacuity on substantive questions is what has licensed bold operators to invent its 'spirit'.

The second reason is that, even taken at face value, the Treaty was not signed by all the relevant tribes. In any case we have seen that it was not the basis of British sovereignty in New Zealand. As Alan Ward writes:

> British sovereignty was deemed to have been established throughout the whole country in 1840, by formal act of state, and whether they [the tribes] had signed the Treaty or not the Maori were all British subjects. Their claim to be able to make peace or war with one another at their own choosing could not therefore be admitted.[1]

Reparations must be based on something else – and for reasons I shall come to in the next section, 'the spirit of the Treaty' won't do.

The third reason is that hardly any of the forebears of the current population were present at the Treaty and had no chance of stating their position. One might conclude that, for this reason, the Treaty cannot be treated as a form of law because it violates an elementary principle of natural justice: one party (far from the least important one) had no chance to be heard. But it is this very fact, of course, which makes the Treaty so attractive to those who seek to make the Waitangi process an alternative to the political process. It bypasses democracy and can, to some extent, by an operation not far removed from bluff, be made to generate the results some parties desire.

Nonetheless, serious politicians have advanced the idea of entrenching the Treaty as a constitutional provision. Mike Moore, for example, speaking for the Labour Party in Auckland on March 7, 1997, deplored the way communal relations were going and thought he could see a solution: "The Treaty of Waitangi process is vital for the peace, progress and tranquillity of New Zealand". Later, he argued that the Treaty might help to answer the question about what kind of a nation we wish to be.[2]

This line of thought takes abstraction to its limits. Top-of-the-head notions about the identity a country wishes to be have exhibited about the same solidity as new year's resolutions in the case of individuals. They would be the worst possible guide to reality. And it is precisely such superficial aspirations which underlie the worldwide fashion for entrenching current admirations in constitutional rules. The point of constitutions is to put the forms of politics beyond the easy control of

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1 Alan Ward, *A Show of Justice*, Auckland: Auckland University Press, 1974; 1995, p 62.

2 Mike Moore, "Multi-racial constitution for NZ", *The Dominion*, June 11, 1997.

politicians – and electorates. This is the legal equivalent of dogmatism, the insistence that one is so right in one's convictions that ordinary political processes must not be allowed to interfere with them. The sad fact is that constitutionalism and rights in the contemporary world have become expressions of mistrust of democracy. The classic constitutions, such as that of the United States, owe their success to the seriousness of the crisis that brought them forth and the wisdom of those who wrote them. Today's proposals for constitutional entrenchment (of declarations of rights, for example) do not respond to any mind-focusing crisis, and the calibre of those involved gives little confidence of surpassing wisdom.

These considerations apply particularly to any proposal to entrench the Treaty of Waitangi. It was an occasional document barely adequate to its own circumstances, and its current fame rests upon the fact that it sustains the Waitangi process, a process which must expire in the next few years. It rests, too, upon the creativity of judges in extracting the 'spirit' of the Treaty. Entrenchment would move the basic power in New Zealand politics away from the electorate towards the judges, and it is to the legal world we must now return.

LEGAL DEVELOPMENTS RECONSIDERED

In Chapter 2, we recounted, under the heading: 'What does the Treaty mean?', the changes in jurisprudence which have generated the legal absolutes on which the Waitangi process basically rests. It is now time to look at them a little more critically.

We noted that two tendencies were widespread in English-speaking jurisprudence. The first was the recognition that native rule and custom could not be taken to have been totally banished by the arrival of Europeans in places such as Canada, Australia and New Zealand. Short of regarding colonisation of these territories as conquest pure and simple, some recognition had to be given to the existing way of life into which Europeans inserted themselves. It is entirely legitimate to regard this as a new form of 'jurisprudence'. The rights and customs of Maori must, on this ground, be given proper recognition. On the other hand, such recognition must stop well short of taking that normative structure as binding, for this would be an implicit denial and repudiation of the real New Zealand that now exists – a logical as well as a political absurdity.

The second tendency in law was the extension of judicial review as a check on liberal democratic legislatures. In principle, such legislatures are supreme within our constitutions, because they are taken to express the will of the *demos*, but it has come increasingly to be felt that even a

democratic majority cannot override certain basic rights of natural justice. This is a highly controversial area, partly because it may lead to an irresolvable conflict between the legislative will and the judicial response. Many feel that judges have seized upon their much-respected powers to shackle an overmighty executive or a thoughtless legislature and exploited them as an opportunity for usurpation. They are suspected of seeking to become unelected legislators. And there has certainly been resentment of judicial activism in New Zealand. Whether this second legal tendency represents a legitimate development of law or the intrusion of politics where it does not belong is a hotly disputed question, but certainly many academic and practising lawyers would regard such 'activism' as a legitimate form of jurisprudence.

We may further distinguish a third legal novelty which has begun to emerge in the Waitangi process. It is worth distinguishing from activism, even though its effects may be a very similar amplification of judicial power. It is a soft activism, justified in terms of ineffables. As pure a statement of this position as any was the passage quoted from Sir Ivor Richardson in Chapter 2, under the heading 'What does the Treaty mean?', which spoke of the necessity for "a generosity of spirit" and "a broad interpretation" which must be "capable of adaptation to new and changing circumstances as they arise" – words which provoked one exasperated media comment: "is there to be no end to this kind of thing?".

The basic point here is that Sir Ivor's "generosity of spirit" translates rapidly into the Waitangi Tribunal's generosity (at one remove) with cash, and the power of the purse is not usually thought a judicial prerogative. The cash that comes ultimately from judges, though it may have to pass through a pretty formal process of parliamentary approval, is a new kind of thing in constitutional states. The underlying theory of this new jurisprudence can be gathered from Sir Geoffrey Palmer, who has a distinct aversion to the Hobbesian theory of sovereignty, and especially to AV Dicey who construed the British constitution as a version of Hobbes. Sir Geoffrey thinks that the Hobbesian sovereign is absolute, which is true, and unlimited, which it is not. The result is that Sir Geoffrey misunderstands the point of sovereignty. He believes it to be naked power, and therefore dangerous stuff. The point of constitutional thought, it follows on this interpretation, must be how to control it. Sir Geoffrey's ideal, as he explains it in his recent book, is "bridled power". The more the bridle, the better the country, would summarise his position. In these matters, however, power is seldom dispersed; more often it is merely transferred, and here it ends up with the judges. What

this argument pushes into the background is the fact that electorates vote governments in so as to make, and to unmake, laws and to protect the common interest. That they should do so lawfully is important. That they should be shackled by judges is not at all the same thing.

We thus find the curious situation that serious practical matters in New Zealand government are at the mercy of highly disputable theoretical convictions about the relation between law and government. Hobbes in *Leviathan* (1651) devoted a lot of attention to the concepts of justice and sovereignty because he thought that one important reason the English had been killing one another was muddle over these ideas.[3] It is clear that they remain a cause of mischief. The point is that what sovereignty means is not so much power as the authority, to be found in any civil constitution, which permits a rule to become a law. Sir Geoffrey Palmer is right to think that Dicey is an unreliable guide to sovereignty, for Dicey thought that sovereignty must have a single institutional location, and in Britain he located it in the Queen in parliament. This apparent piece of realism did a lot of harm to the concept of sovereignty, for the question it provoked was: Where can sovereignty be found in federal states? It turns the constitutional arrangements of, for example, the United States into something of a mystery. As a notable philosopher explicates the issue:

> Sovereignty belongs to the USA as a state with an independent constitution; its sovereign authority is exercised in different ways by different organs of government, according to the rules of that constitution. The United Kingdom's constitution enables sovereign authority to be exercised in a peculiarly direct and simple way through legislation; other states have more complicated rules, but the sovereignty is the same in every case.[4]

It is this very word "sovereignty" which these days seems to cause tremors of terror to run through New Zealand legal circles. Judge Durie has remarked that he supports "most of what I understand of Maori sovereignty, but not the language used nor the tactics implied". He prefers the word "autonomy" and goes on to remark:

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[3] See Thomas Hobbes, *op. cit.*, especially Ch 15. For Hobbes' views on the causes of the civil war, see *Behemoth*, ed Ferdinand Tonnies, introduction by MM Goldsmith, London: Frank Cass, 1969.

[4] Noel Malcolm, *Sense on Sovereignty*, London: Centre for Policy Studies, 1991, p 22.

> Aboriginal autonomy is about conciliation by empowerment. It assumes that peace between peoples depends not upon the aggregation of power but its just distribution.[5]

Judge Durie's view was echoed by Sir Kenneth Keith soon after Durie had spoken in this sense. Again, the view advanced by Sir Kenneth suggested that "sovereignty" was a rude word. It did not correspond to realities, Sir Kenneth argued, for two reasons. First, much of our law now comes from international treaties. In other words, it is made by foreigners, sitting in remote committees which New Zealanders cannot call to account. Sir Kenneth is indeed reporting the current reality, and many people find that reality a good deal less enchanting than Sir Kenneth does. Professor Jane Kelsey, for example, was unhappy at the way in which the GATT agreements were imposed on New Zealand during the 1980s. She regards it as part of the "deep infiltration of the New Zealand economy by international capital".[6] Her objections may result from the partisan particularities of her position on New Zealand's new economic direction, but the general point is valid: international agreements can be imposed on New Zealand or acquire force merely by the external power to adhere to treaties. The real issue lies in the lack of thorough parliamentary scrutiny. But these realities do not affect the issue of sovereignty. New Zealand may choose to incorporate such agreements in its law, but it does so in form as a sovereign state. Sir Kenneth's enthusiasm for international law is one of the most alarming elements in the whole situation. International law has, no doubt, an important place in the deliberations of all civilised states, but some international bodies, especially the United Nations and its offshoots, must be treated with circumspection. For one thing, much international judgment is influenced by states which are much less liberal, democratic and mature than New Zealand; for another, universal categories (such as 'indigenous peoples' in particular) are far from universally applicable to the specific circumstances of New Zealand.

Sir Kenneth's second point was that many activities in modern society are "self-regulating" or (what he took to be equivalent) are "people-based". He also remarked that "power can be seen in a bottom-up way". His remarks are not altogether easy to interpret, but he seems to think

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5 Speech at the Waitangi Day celebrations in Wellington, February 1996.

6 Jane Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?*, Auckland: Auckland University Press, 2nd edn, 1997, p 355.

that the less the New Zealand government (= national *sovereignty*) makes law, the better. This might be the salutary point that the more citizens are left to decide things according to their own discretion, the better – something which Hobbes described as "the silence of the law". But if we are concerned with actual law – that is to say, with rules having authority because parliament has declared them to be law – then it is not at all clear that "bottom up" power is to be preferred. For an individual Maori to be subject to tribal laws may be desirable, or it may not. Liberty can be threatened from many directions, and the open and regulated processes of democratic government are by no means the worst of threats.

We may take a good deal of this as the coughing and shuffling of feet that comes from embarrassment. Our knightly lawyers belong to a generation which seems to be deeply embarrassed by the fact that Maori are (both in practice and by the famous Treaty) New Zealand subjects and citizens, and yet also that some of them seek collective autonomy. Maori want both to benefit from 'the spirit of the Treaty' yet demand freedom from its clear meaning that they have become subjects of the Crown. Some want a kind of realm or half-realm of their own, and many lawyers want to accommodate this sentiment by euphemistic language about autonomy and self-regulation. Both parties here were deeply imprinted by exciting 1960s ideas of social possibility.

As a kind of jurisprudence, none of this makes much sense. It is, rather, a *political* accommodation in legal garb. But it is not difficult to see what it all rests upon: namely, the belief that the best and most civilised way of dealing with conflicts in society is by quasi-legal negotiation. So long as people go on talking and negotiating, with at the end of the talk an agreement which can be given a certain amount of legal stiffening, then conflict can be avoided. But there are obviously costs to this rather narrowly based conviction, which prevails among an elite which is covertly mistrustful of popular opinion. Meanwhile, out in the wider community, resentment builds up. The shortest way to make the point is to quote newspaper columnist Frank Haden writing in November 1996 of the $170 million awarded to what he calls "trace-element 'Maori' people": "Just who does approve of the Maori settlements?" is his question, and the significant contrast as he asks around is between lawyers, academics and people in the media on the one hand, and the people he talks to in the street on the other. Earlier, we saw the evident relish with which Sir Geoffrey Palmer seeks to find

a way round democratic prejudice. His thought illustrates the declension: I am a democrat, you are a populist, he is an extremist.

That the Waitangi process is an elite project with a clear mistrust of democracy is a realisation that forces itself slowly on the awareness of anyone who looks carefully at the way it is treated. It is perhaps necessarily so, because it is self-consciously high-minded, and the *demos* tends towards bread and butter issues. This element of elitism is the reason that the process is so pre-eminently legal, and it can also be seen in Douglas Graham's account of some of the problems he has faced. His basic question is: "How could we better inform the public of the facts?" – the facts in question being the Crown's derelictions over the last century and a half. He takes up the question as he looks to the future at the end of his book. What is the attitude of non-Maori New Zealanders to the process? It turns out that these people are bewildered … confused … infuriated … feel uncomfortable … annoyed and angry. In other words, the minister has to deal with passionate and uninformed people. "It has been my experience that as people become better informed, attitudes change."[7] But of course this is not necessarily true. There are plenty of people who are very well informed indeed but who are sceptical about the process. But Mr Graham prefers to correct mistaken passions rather than to meet arguments that might sideline his central moral convictions.

The Waitangi process has, then, been strongly influenced by two more or less legitimate changes in legal thought and practice, but it has brought forth quite separately a form of political and moral opinion whose claim to legal respectability is a masquerade. Jurisprudence in any serious sense it is not. Earlier, we saw how the past has been distorted by historical and international comparisons. The further into understanding the Waitangi process one gets, the more it seems that New Zealand is being seriously damaged by dubious law, and by advocacy passing itself off as history.

NEW ZEALAND IN DANGER

It is now a standard view, we saw, that the image of New Zealand as having a race relations record to be proud of was a 'myth'. Perhaps. Whether it was a myth or not, it contributed to the fact that New Zealand for more than a century has been a prosperous and peaceful country which has not been torn apart by civil dissension, and this has benefited everyone, including Maori. Indeed, it is a remarkable achievement,

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7 Graham, *op.cit.*, pp 44, 86–88.

because all the talk about overcoming racism obscures one simple reality of modern life: that those societies which contain several visibly distinct parts of their populations have tended to collapse into civil dissension. Dramatic cases are to be found all over Africa, in Sri Lanka and elsewhere. Indeed, we may drop the condition of "visibly distinct" and invoke Yugoslavia, the Soviet Union and even (closer to our own experience) Canada. Sustaining the unity of a civil society must be recognised as a very difficult business. And nothing in politics is more dangerous than taking difficult achievements for granted.

Indeed, let us introduce a little historical perspective on this question: *every* political unity has been the result of violence. Britain became unified over the resistance – the dead bodies even – of the English, Welsh, Scots and so on. Canada was unified by British conquest. France was created by expansionist kings with large armies. The general principle is clear: unity comes only from blood, but once it has been achieved, it benefits everyone. The whole point of nation states, when they are constitutional liberal democracies, is that they can combine civil unity with cultural plurality. The point, correspondingly, of cultural uniformity is that it would allow one conception of a culture to be imposed on all.

This is evidently true of New Zealand. Its unity, typically enough, emerged from a mixture of force, fraud and accident, but it did achieve unity, and unity meant peace, as well as opening up wider opportunity for all New Zealanders. New Zealand somehow created a notably civilised state in which individuals as citizens enjoyed a freedom and security rare in human history. That there are discontents, and that it is not ideal, ought not to obscure from any rational consideration the immense value of what has been achieved, and which the present generation holds, rather gingerly, in trust. This kind of civil unity is, then, only to be achieved by force, but it is remarkably easy to let slip from one's grasp. I do not think it seriously controversial to say that the most important task for any New Zealand government must be to preserve this achievement.

The Waitangi process in its beginnings had some claim to be aimed at exactly that result. It was intended to heal grievances that had long divided the country. It responded to genuine and entrenched Maori feeling on the one hand, and to almost irresistible invitations to activism coming from across the seas on the other. It sought to re-create one people, but it soon got caught up in self-contradictory projects of Maori autonomy (*alias* sovereignty) and biculturalism. The moral and legal imperative of justice turned out to be the political entrenchment of grievance against, and exploitation of, the non-Maori part of the state.

The government faced demands which mixed moral rhetoric about idealism with political threat.

The result, in my judgment, is that New Zealand is in a somewhat perilous position, for it has ethnic divisions not altogether dissimilar from those which have degenerated into civil strife in other countries. What the government must recognise is that talk and negotiation, legal claim and counter-claim, constitute an endless round of grievances which could increasingly erode the social fabric of the country. And it should never be forgotten that countries can slide into anarchy quite suddenly, and for reasons which, in retrospect, no one can fathom.

New Zealand has always so far enjoyed a basic civic unity in which being a New Zealander overrode all the many other ways in which the population was diverse. There have, by contrast, been some countries in which civil unity was so fragile that the state had to be understood as essentially composed of different cultural segments. Belgium, divided between Fleming and Walloon, is one example, Lebanon, with its ethnic and religious communities, another. Cultural differences in time came to assume such importance that countries could only be governed through recognition of conventions, and sometimes constitutional entrenchments, which distributed power and privilege according to cultural importance. Political scientists call these arrangements "consociational", and how they have developed is a warning to New Zealand about what it risks if it politicises cultural differences, as they are currently understood, to the point of entrenching them (whether by incorporation of the Treaty of Waitangi constitutionally or by other devices) so as to force their recognition on future generations. Cultural diversity is an immense strength to any country – but only so long as governments refrain from giving it special recognition. We should not forget that the Treaty was signed before democracy in its modern form had emerged, and the Treaty's current vogue is associated with undercurrents mistrustful of democracy. And we should remember that there are no serious grounds for distrusting the wisdom of the New Zealand electorate.

The Waitangi process may well turn out to be the brave and honest facing up to moral problems which its promoters expect. Clearing the air and righting wrongs to the extent that such a return to innocence is now possible, it will remove the Treaty as a source of grievance from New Zealand politics. That remains, just, the most likely outcome, but there can be no doubt that it will only happen if these issues are laid to rest finally and decisively. Douglas Graham refers to the extended

jurisdiction of the Tribunal as the opening of Pandora's box.[8] It will be remembered that what Pandora's box contained was all the evils – old age, sickness, labour, insanity, vice and the like – to which mankind is subject. And all that remained to mankind with which to respond to these evils was delusive hope. The danger that what has been unleashed cannot be mastered is the fear of many who think about these things.

A fable: There are marriages in which a fall from grace on the part of one partner justifies a life-long tyranny exercised by the other. In the Waitangi process, a moral fault, as understood by one of the parties, seems incapable of ever being resolved owing to what is claimed to be the culture of the other. For unless "full and final settlement" means just that, the Waitangi process will continue until it infallibly tumbles over into civil strife.

RECOMMENDATIONS

(1) The government ought, as a matter of urgency, to make clear the temporal (and probably also fiscal) limitations on the Waitangi process, in the name of its authority as the custodian of the interests of all New Zealanders.

Comment

(a) The process in itself lacks a natural conclusion, and vested interests will not cease to find new themes for negotiation.

(b) Time limits and fiscal envelopes are not costless devices but they would no doubt be part of any winding down.

(c) Only authority itself can decide *when* and how the process should be wound down, and whether to do so in stages or in one final act. But without the steerage of government, the process will begin to produce intolerable strains on New Zealand society.

(d) Recent constitutional adventures in New Zealand (themselves perhaps an expression of the current mistrust of the electorate) have not made it easier for the government to exercise leadership in this area; coalitions in proportional representation systems find it hard to take decisive action. A coalition facing an activist court is not in an altogether happy position. But there is no doubt what must be done.

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[8] Graham, *op. cit.*, p 39.

(2) Proposals for *constitutional* change generated by the Waitangi process and recognising New Zealand as culturally heterogeneous (including constitutional entrenchment of the Treaty of Waitangi) should be resisted. They will merely entrench the current mischiefs for the distraction of future generations.

Comment

(a) Political prudence dictates that nations should be parsimonious about constitutional rules. Such rules are hostages to constantly changing circumstances. Shorter constitutions are better than longer, and longer are generally inappropriate devices for dealing with rising mistrust.

(b) The worst way to generate constitutional change is to ask: What sort of a country is New Zealand? What sort of a country ought it to be? These questions provoke top-of-the-head responses which will certainly conflict with what over three and a half million New Zealanders turn out to want to do, and to be, now and in the future.

(3) Maori as corporate associations (by contrast with Maori as individuals) should be entirely self-governing, and government subsidy and involvement in Maori affairs should incorporate 'sunset clauses'.

Comment

Subsidy to Maori *as* Maori (by contrast with social provision for all New Zealanders falling under some administrative rubric) merely produces perverse incentives to prefer political action to wealth creation.

(4) Social, cultural and economic policy in New Zealand should be subordinate to the basic recognition of a common New Zealand citizenship and allegiance. All else is privilege, and divisive.

Comment

Social, cultural and economic policies are in many cases merely an indulgence of governments, extending their power and interfering in what people better arrange for themselves. The consequences of governments trying to improve social life, culture and the economy in our century have often been unhappy. But to the extent that these policies are justifiable, they should at least start from the basic premise of the civil unity of New Zealand life.

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