Fixing Settlement: An Analysis of Government Policy for Settling Tiriti Grievances

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Maranga mai
Te iwi ohoake ra
Tauiwi tahuri mai e

Whatungarongaro
Toitu te whenua e.[1]

I: INTRODUCTION

This article is underpinned by a brief analysis of the rights reserved by Maori under Te Tiriti o Waitangi.[2] Principally this discussion focuses on tino

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1 Conclusion of a waiata for the Waitangi Tribunal, first sung at the Muriwhenua hearing at Te Hapua in December 1986; reprinted as the tauparapara to Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) vii.

It is translated as:

Maori people rise and be vigilant;/Tauiwi/The time is now to face each other./As the light of the eye and the life of things living/fade from sight,/only the land is seen to remain,/constant and enduring.

2 This is the first of a series of notes intended for overseas readers. Te Tiriti o Waitangi or The Treaty of Waitangi was signed in 1840 between the British Crown and a number of representatives of different Maori iwi. There are two principal versions, one each in Maori and English. With respect to the English version it: (i) sought to formalise the relationship between the Crown (and its subjects) and signatory Maori rangatira (and the iwi they represented); (ii) asserted the desire to establish a civil government along British colonial models and sought Maori acceptance of that assertion; (iii) guaranteed rights of collective and individual possession by Maori of lands, resources and treasures; (iv) attempted to regulate for the settlement of Aotearoa by Europeans; (v) regulated land sales in that the Crown had first option of purchase; (vi) granted Maori the rights normally accorded to British subjects at that time. The Maori text records similar objectives although, as will be shown in this article, the emphases are different - especially in relation to the strength of the British form of colonial government established in Aotearoa and the antithetical strength of authority and governance retained by signatory rangatira. The references to "te Tiriti" should be taken to refer to the Maori text and those to "the Treaty" to the English text unless this is in a quotation or the surrounding text makes it clear otherwise.

rangatiratanga, and proceeds from a presumption of the centrality of the Maori text to the issue at hand. Therefore, it does not attempt to engage in debate surrounding the translation of terms between the Maori and English versions. Succeeding that is an introduction to recent Government policy on Treaty settlement.[3] This is followed by two parts which undertake a brief analysis of that policy against the platform of Maori rights reserved under te Tiriti. Part III deconstructs the form of autonomy which is asserted to be the philosophical core of Government policy. Part IV looks to the policy regarding the practical model for settlement. The notion of a fixed settlement is added to the Government's commitment to a full and final settlement of grievances. These three concepts (fullness, finality, fixedness) form the basis for the analysis of policy in Part V, which considers one of the major potential problems which emerges from a clash between Government policy and the rights reserved. It is argued that this ideological conflict creates important and serious difficulties because it undermines the stated position of the Government and contradicts the expectations and aspirations of Maori claimants. Finally, the Afterword situates the arguments made regarding the current New Zealand policy in a wider context by noting the contemporaneous situation of First Nations peoples in Canadian jurisdictions. This is intended to assist readers to consider the significance of the New Zealand Government's settlement initiatives within the global context of indigenous peoples' struggles for self-determination.

II: RIGHTS RESERVED BY MAORI UNDER TE TIRITI O WAITANGI

Key rights reserved by Maori, confirmed and guaranteed by the Crown, are contained in Article II of te Tiriti. This confirms that Maori rangatira and hapu may exercise "te tino rangatiratanga o ratou wenua o ratou kainga me o ratou

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In 1975 the Waitangi Tribunal was established by The Treaty of Waitangi Act introduced by the third Labour Government. Its role was to investigate claims brought by Maori against the Crown alleging breaches of the terms of the Treaty since 1975. The fourth Labour Government extended its investigatory authority to include retrospective claims (to 1840) by an Amending Act in 1985. It should be noted that the Tribunal is hitherto merely an advisory body in terms of making recommendations to Government but, at the same time, its reports are often widely read and its status within the country is superior to other recommendatory bodies. (Any reference made in the text or notes of this article to "the Tribunal" should be taken to refer to "the Waitangi Tribunal".)

Again for the benefit of readers from overseas, a brief glossary of Maori terms and phrases is included at the end of the article.

3 In keeping with the distinction drawn in the Taranaki Report (Wai 143 1996) the term "Government" rather than "Crown" is used to refer to Parliamentary Government in this article.

taonga katoa."[4] This phrase serves as confirmation of a bundle of rights centred around a principle of authority: rangatiratanga or chieftainship. Bruce Biggs notes that the word "rangatiratanga" occurs several times in *Nga Mahi a nga Tupuna,* "always meaning 'that which defines a chief, ennobling features, chiefliness'".[5] Rather than a bald statement of this condition, however, the text of te Tiriti includes two important modifiers: tino and ratou. "Tino" connotes an attribution of truth or genuineness; Sir Hugh Kawharu notes that it carries the sense of being "quintessential".[6] The second modifier, "ratou", is a third-person plural pronoun which, with the possessive article "o", confirms a sense of connection between rangatira and hapu and *their* rangatiratanga, lands, villages and taonga. Hence, in his direct and literal translations of te Tiriti into English, Kawharu assesses the phrase "te tino rangatiratanga" to translate as "the unqualified exercise of their chieftainship".[7]

Central to tino rangatiratanga is mana; Sir Apirana Ngata, for example, coined the aphorism "'te mana te rangatiratanga'".[8] This fundamental concern is repeated by the Waitangi Tribunal in declaring "'Rangatiratanga' and 'mana' are inextricably related words".[9] The oral assurances given prior to and during the signing of te Tiriti at the Treaty House that neither mana nor rangatiratanga were to be compromised by it certainly convinced many of the signatories. Ranginui Walker, for example, notes that "most would have signed because of the guarantee of rangatiratanga over land" and that they would not have signed had the claims for the Crown in Article I "been translated as *mana whenua*".[10] This connectedness is also noted in the Waitangi Tribunal's Orakei Report, wherein it found that te Tiriti "conveyed an intention that the Maori would retain full authority over their lands, homes and things important to them, or in a phrase, that they would retain their mana Maori".[11] Similarly, in the Te Atiawa (Motunui-Waitara) Report the Tribunal considered that: [12]

> [T]he Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance

4 The English version records this as "the full exclusive and undisturbed possession of [the Chiefs and Tribes of New Zealands'] Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession".

5 Biggs, "Humpty-Dumpty and the Treaty of Waitangi" in Kawharu, supra at note 1, at 310.

6 Supra at note 1, at 316, 319 n 7.

7 Ibid, 319 and 321.

8 Supra at note 5, at 310. Biggs notes that the publication of Ngata's contraction is missing either a comma between the clauses (placing mana in apposition with rangatiratanga) or the conjunction "me" (to connote "together with"): ibid, 312 n 27.

9 Te Atiawa (Motunui-Waitara) Report (Wai 6 1983) 51.

10 Walker, "The Treaty of Waitangi as the Focus of Maori Protest" in Kawharu, supra at note 1, at 269, 264.

11 Orakei Report (Wai 9 1987) 134.

12 Supra at note 9, at 51.

with their own customs and having regard to their own cultural preferences.

Moreover, Hikaia Amohia suggested to the Tribunal during those hearings that Maori "'accepted the Treaty relying on the honesty and honour of the Queen and her representative, believing that *Chieftainship* of their properties was guaranteed to them unreservedly and with no hidden conditions or reservations.'"[13] Much the same conclusion may be drawn from the English version of the Treaty, which speaks of "full exclusive and undisturbed possession".

What this suggests is that Maori explicitly reserved sovereignty when they reserved tino rangatiratanga. Sovereignty is one of the most controversial issues raised in discussions of the Treaty. That it is most often made controversial by Pakeha commentators suggests that it is a particular interest for those whose analysis presupposes the validity of indivisible sovereignty.[14] This is discussed briefly in Part IV of this article, it is important to raise potential problems concerning sovereignty in this context. Although it is evident from the preceding paragraphs that there is no cession of sovereignty in te Tiriti, there may be a clear qualification of tino rangatiratanga. "The complete government," as Kawharu translates "te Kawanatanga katoa,"[15] does not reveal the extent of successive colonial governments' repudiation of the rights reserved by Maori. Nor does it afford an interpretation that the phrase might connote an equivalent for mana whenua or sovereignty to be vested in the Crown. Nevertheless, these deficiencies do not mean that there was absolutely no qualification of mana Maori contained in te Tiriti.

It is well known that the word "kawanatanga" derives from the biblical description of the administration of Judæa by Pontius Pilate (certainly less "sovereign" than Cæsar) is well-known.[16] Walker, for example, relies on this to assert that "[a] governor is merely a satrap who rules on behalf of the sovereign."[17] This "confirms" an assertion that governors (James Busby or William Hobson for example) wielded minimal sovereign authority. More recently however, James Belich has suggested that Maori understanding of kawanatanga was not restricted entirely to the somewhat hapless biblical administrative model. In relation to te Tiriti, he observes a tension within the text not confined merely to its translation from the English. Having noted that there exists a tense conceptual relationship between kawanatanga katoa and tino

13 Ibid.

14 Brookfield, "The New Zealand Constitution: the search for legitimacy" in Kawharu, supra at note 1, at 1; McHugh, "Constitutional Theory and Maori Claims" in Kawharu, supra at note 1, at 25; McHugh, "The Lawyer's Concept of Sovereignty, the Treaty of Waitangi, and a Legal History of New Zealand" in Renwick (ed), *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Wellington: Victoria University Press, 1991) 170.

15 Supra at note 1, at 321.

16 Rangatiratanga was also confirmed by its biblical usage as a translation of kingdom as in Mark 4:26, Luke 23:42 (supra at note 5, at 310) or the Lord's Prayer.

17 Supra at note 10, at 264.

rangatiratanga he argues:[18]

> [One] way around this is to believe that most Maori signatories saw governorship as the loose and vague suzerainty of a nominal head, with Pontius Pilate and James Busby as precedents, and this may have been true of some. But hundreds of Maori had visited Sydney before 1840, and they are likely to have made their kin fully aware that the governors of New South Wales exercised real power in their province. After all, chiefs had been seeking gift-exchange relations with Australian governors since the 1800s on precisely the basis that they were powerful and important European chiefs. Especially in Northland, Maori are likely to have realised that signing the treaty implied agreement to a big increase in settlement and in the power of the British state in New Zealand.

While this still denies that Maori surrendered sovereignty it does raise the theoretical possibility that those same Maori understood that the rights they reserved would have been modified by the operation of colonial governorship. Indeed, the Tribunal's Taranaki Report proceeds with a similar sense of qualification. It states:[19]

> [The] international term of "aboriginal autonomy" or "aboriginal self-government" describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, *within minimum parameters necessary for the proper operation of the State.* Equivalent Maori words are "tino rangatiratanga", as used in the Treaty, and "mana motuhake", as used since the 1860's.

Finally in respect of this point, one might compare te Tiriti to He Wakaputatanga o te Rangatiratanga o Nu Tireni (A Declaration of the Independence of New Zealand) of 1835. To declare the sovereign authority of rangatira and their refusal to permit any alternate legislative authority to exist in the territory, the Declaration uses the expression "ko te Kingitanga ko te mana" which is translated in the English version as "all sovereign power and authority". Both of these concepts (kingitanga and mana) are conspicuously absent in te Tiriti. Although this absence can therefore be used to confirm that sovereignty is not ceded, it still complicates the issue of kawanatanga. The second clause of the Declaration anticipates te Tiriti's translation of government as kawanatanga. Such government is presented as a second arena (the first being legislative authority) subject to the authority of the signatory rangatira. The relevant section reads: "me te tahi Kawanatanga hoki kia meatia i te wenua o te wakaminenga o Nu Tireni" and is translated as "nor any function of government to be exercised within the said territories". What is pertinent to this article is that the restriction on kawanatanga reserved in the 1835 document was exercised

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18 Belich, *Making Peoples: A History of the New Zealanders: from Polynesian Settlement to the End of the Nineteenth Century* (Auckland: *Penguin Press*, 1996) 194-195.

19 Supra at note 3, at 5 (emphasis added).

by rangatira as part of the authority concomitant with their declared independence. This concomitance recognises two vital issues with respect to sovereignty and government. First, there is a clear separation of sovereignty from government, which is the most important Maori claim with respect to te Tiriti. Secondly, it suggests that there was a very real understanding in 1835 that kawanatanga could impute the exercising of substantive rather than nominal power - this could be one reason why it was specifically restricted in the Declaration. It is reasonable to assume that such an understanding remained five years hence and was recognised in te Tiriti.[20]

Nevertheless, autonomy remains a significant feature of an exercise of chieftainship, making for a third point in a triangular relationship with rangatiratanga and mana. Each is a reflection of and a buttress for the other. As such, it is an important feature of the rights reserved by Maori under te Tiriti, especially in Article II. Eddie Durie supports this conclusion unequivocally. First, as an academic commentator, when he summarises the Treaty with alacrity: "[three] short articles secured governorship for the Crown, autonomy for Maori, and citizenship for all."[21] Secondly, as the chair of the Waitangi Tribunal which, in the Taranaki Report, states: [22]

> Maori autonomy is pivotal to the Treaty and to the partnership concept it entails. Its more particular recognition is in article 2 of the Maori text. In our view, it is also the inherent right of peoples in their native territories.

In this way, the Tribunal positions signatories of te Tiriti as reserving or confirming a right of autonomy which already existed in February 1840 and which carries te Tiriti into the present.

That autonomy is exercised over physical things and non-physical manifestations of Maoritanga and is exercised for all. Explicitly reserved in Article II are lands, villages and taonga. The latter of these covers a wide range of valued items and concepts - as evinced by the 1986 Te Reo Maori claim[23] and the current Wai 262 claim concerning intellectual property, biological and cultural heritage rights or claims for Resource Management Rights.[24] Thus, when the Taranaki Report records that "[because] of the independence Maori had shown in the [Taranaki] war, the Government made efforts to deprive Maori not

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20 It should be noted that this argument is intended to complicate the impact of kawanatanga on an understanding of te Tiriti and cannot be said to adopt the line of reasoning that kawanatanga necessarily enjoyed and enjoys superiority over tino rangatiratanga.

21 Durie, "The Treaty in Maori History", in Renwick, supra at note 14, at 156.

22 Supra at note 3, at 5. See *R v Sparrow* [1990] 1 SCR 1074.

23 Te Reo Maori Report (Wai 11 1986).

24 Williams, "Dealing with 'Maori Interest' in Assets for Transfer", unpublished paper to the Institute for International Relations Conference on the Commercial Implications of the Treaty of Waitangi, Auckland 1993.
The numerical reference (Wai 262) is used because the claim in question is still being heard by the Tribunal at the time of writing. The numerical system refers simply to the order in which claims are lodged.

only of their land but of all by which their traditional autonomy had been sustained,"[25] the Tribunal finds a direct correlation between the confiscation of land and other resources and an assault on tribal autonomy. Furthermore, the fact that tino rangatiratanga was and is a collective right is salient. As the Tribunal noted in its Orakei Report:[26]

> Te Rangihau took the view that there was no such thing as a chief in Maori terms, insofar as the concept of "chief" was an English concept, suggesting rangatira above and the people below .... In his opinion that which distinguished the true rangatira was the quality of commonality. In other words the rangatira has the ability to bring himself [sic] to the same level as those who recognise him [sic] as their leader. So it was not uncommon to hear the rangatira address his [sic] people "e aku rangatira", thereby acknowledging that all his [sic] people are rangatira .... It is this element of commonality and the part it plays in recognising that every person is a rangatira that highlights the importance of the people component in the concept of rangatiratanga, confirming the view that the authority embodied in the concept is also the authority of the people.

This important factor of reciprocity is reflected in the wording of te Tiriti insofar as it reserves such rights "ki nga Rangatira ki nga hapu, ki nga tangata katoa o Nu Tirani".[27] In this respect, both the wording of the document and the understanding of Maori in making such a reservation anticipated the growth of collective rights asserted in, for example, the United Nations Draft Declaration of the Rights of Indigenous Peoples of 1993.[28] Clearly, such rights are autochthonous in nature and, therefore, pre-date their formal reservation in treaty form.

In their assessment of the impacts of and remedies for confiscation after the Taranaki conflict, the Tribunal wrote of "measures necessary to *re-establish* Maori units as viable, self-governing authorities".[29] The context of the Taranaki Report confirms those measures as being commensurate with the rights reserved in te Tiriti. In the introduction to the chapter of the Report dealing with

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25 Supra at note 3, at 7.

26 Supra at note 11, at 133.

27 The English version records this as "to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof".

28 Collective rights are so-called "third-generation" human rights. This generational metaphor for the development of human rights as conforming to the declaration of the French Revolution ("*liberté, égalité, fraternité*") was coined by Vasak (ed), *Dimensions Internationales des Droits de l'Homme* (Westport, Conn: Greenwood Press; Paris, France: Unesco, 1982). Their theoretical development in the last twenty years parallels the activity of newly independent and so-called "developing" countries. They remain controversial as rights *per se* among conservative commentators because one of their core characteristics is that they mount a critique of *laissez-faire* neo-liberalism - both in their assumption of collectivity (an assault on individualism) and response to the established capitalist economic order (asserting rights to self-determination, development and aid and assistance, for example). In this context, therefore, the collective rights of Maori may be interpreted as being conceptually antithetical to the libertarian basis of the Common Law.

29 Supra at note 3, at 135 (emphasis added).

Parihaka,[30] for example, the Tribunal repeat their contention regarding the importance of autonomy for te Tiriti analysis:[31]

> [Autonomy] was guaranteed in the Maori text of the Treaty of Waitangi. It is also plain that no Maori would have agreed to the Treaty had Maori autonomy been taken away or Maori status reduced. Nor could anything less have been expected in return for the gift of settlement than that autonomy and partnership were agreed

In light of this it becomes apparent that autonomy is not only a goal for the future but one clearly drawn from the textual past before us.

III: GOVERNMENT POLICY FOR SETTLING TIRITI GRIEVANCES

Produced in 1989, in the aftermath of *New Zealand Maori Council v Attorney-General*,[32] the Fourth Labour Government's document "Policy for Crown Action on the Treaty of Waitangi" enumerated five principles by which it would administer Treaty grievances and settlements, namely, Kawanatanga, Rangatiratanga, Equality, Cooperation, and Redress. The notion of a policy based on "principles" or "spirit" may be sourced immediately to the preamble of the Treaty of Waitangi Act 1975, which establishes the Waitangi Tribunal to:

> [M]ake recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

However, such a focus is older than the legislation. Jane Kelsey, for example, notes that a focus on "principle" had been a long-time strategy for Maori prior to the passing of the Act, a time when they sought to overcome the

30 Parihaka was an important site of resistance to the colonial Government in the latter part of the nineteenth century (see Scott, *Ask That Mountain: The Story of Parihaka* (Auckland: Heinemann/Southern Cross, 1975)). It is situated in South Taranaki, a region in which hostilities between the colonial Government and Maori lasted from 1846 to the 1880s. One of its leaders and prophets, Te Whiti o Rongomai, announced 1869 to be the year from which would commence a programme of freedom from pakeha authority ("te tau o te takahanga"). He is arguably more famous for his initiation of a strategy of disengagement and passive resistance to Government aggression as a part of his overall programme. This strategy, which he named "pakanga", clearly anticipates Mahatma Gandhi's adoption of satyagraha in the struggle for an independent India and its subsequent adoption by the African American Civil Rights leader the Rev Martin Luther King Jnr.

31 Ibid, 199.

32 [1987] 1 NZLR 641.

legal unenforceability of the text of the Treaty.[33] This "principles-based" approach soon became the *sine qua non* of Treaty analysis. President Cooke summarised its significance thus:[34]

> [The] courts and the Tribunal alike, and Parliament itself in deciding to refer to principles, have placed in the forefront the need to get at the spirit and underlying ideas of the Treaty, to apply them as realistically and reasonably as possible in current circumstances.

Six years on, the Office of Treaty Settlements produced a document entitled "Crown Proposals for the Settlement of Treaty of Waitangi Claims" for the second term of the Fourth National Government. These Proposals shifted the ground somewhat, establishing a particular emphasis on the desirability of direct negotiation, one of the options under the earlier Principle of Redress. Although it certainly retains the Waitangi Tribunal as an avenue for settlement, this later policy was introduced on the back of a perceived need to settle the "Maori question" by the turn of the century. The principles which informed (and inform) this settlement policy are:[35]

1. [T]he Crown explicitly acknowledges historical injustices;
2. in attempting to resolve outstanding claims the Crown should not create further injustices;
3. the Crown has a duty act in the best interests of all New Zealanders;
4. as settlements are to be durable, they must be fair, sustainable, and remove the sense of grievance;
5. the resolution process is consistent and equitable between claimant groups;
6. nothing in the settlements will remove, restrict or replace Maori rights under Article III of the Treaty, including Maori access to mainstream government programmes; [and]
7. settlements will take into account fiscal and economic constraints and the ability of the Crown to pay compensation.

The policy document consigns injustice to the position of an historical phenomenon and proceeds to inscribe a sense of the need for equality and equanimity into the settlement process - hence the reiteration of an over-arching "fairness" in principles two through six. These are neatly framed by an acknowledgment of past wrongs and an insistence that economic rationalism will constrain settlement.

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33 Kelsey, "Rogernomics and the Treaty", unpublished doctoral thesis (University of Auckland, 1991) 721.

34 Cooke, "Introduction" (1990) NZULR 14, 3. The Review was in its sesquicentennial year.

35 Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals (Wellington: Office of Treaty Negotiations, Department of Justice, 8 December 1994) 6.

At the time, this set of principles was accompanied by a settlement cap of one thousand million dollars, announced in December 1994. Collectively these were termed "The Fiscal Envelope". Much derided in a series of hui which followed the announcement of the policy, the idea of the fiscal cap was soon withdrawn - at least nominally. The current Coalition Government[36] has shown little will to abandon the policy as inherited from one of the Coalition partners (the National Party). One of the new régime's fundamental objectives is:[37]

> [To] continue to settle as expeditiously as possible, in a spirit of goodwill and integrity, outstanding Maori claims and grievances, having regard to the nature of Treaty Settlements already made and to respect the spirit and letter of the Treaty of Waitangi as a founding document in New Zealand.

Although this might appear a laudable aim, there is little evidence of this intention elsewhere in the Coalition Agreement. With respect to Treaty Settlements, for example, the Agreement states the Government's policy is to:[38]

> Adequately resource Waitangi Tribunal.
> Ensure proper trusteeship obligations (with full accountability to and voting rights for beneficiaries) to Treaty settlement assets.
> Discontinue the fiscal envelope on the basis that:
> - there is respect for the settlements already effected, which would not be reopened,
> - the Parties confirm that the Crown will endeavour to settle claims on their merits using the settlements already effected as benchmarks, and
> - be fiscally responsible.

Obviously adequate resourcing of the Waitangi Tribunal is a positive move, but given that the "fiscal implications" of the policy are sidelined with the note "[all] funding proposals subject to being considered within agreed spending policy parameters" rather begs the question of whether this simply acts as a stop-gap to cuts in funding for the Tribunal and, as such, is a neutral policy rather than one which actively benefits Maori. This confirms that the on-going centrality of fiscal responsibility is firmly entrenched - its determination here echoes back to Lord Cooke's comment regarding realism and responsibility, quoted earlier.

In point of fact, the realities of settlement management in the eighteen

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36 The Coalition Government was formally dissolved on 25 August 1998 and was succeeded by a minority National Government. The Coalition is referred to in the present tense. As this article argues that settlement policy was largely driven by a previous National Party initiative, this change in the membership of government does not render the analysis anachronistic. Nevertheless, the change does register the shifting, unsettled nature of the negotiation and settlement of Tiriti grievances which may reveal the contingent quality of some parts of the analysis presented here.

37 Coalition Agreement between New Zealand First and the National Party (December 11, 1996) 4.

38 Treaty Settlements, Maori Policy in Schedule A, ibid.

months following the Coalition's formation suggest that the policy structure of the Fiscal Envelope has not been discontinued. The benchmarking of claims, for example, means that the settlement of almost $170 million in the Fisheries, Ngai Tahu and Tainui/Waikato (Raupatu) claims means that they will remain the standard by which all other claims are assessed. Ironically, in the terms of settlement for both iwi claims there is an assertion that each settlement represents 17% of total Maori claims, squaring precisely with the old Fiscal Envelope limit. Even in terms of the basic financial management of settlements deductions are still made under the former policy's criteria. Instead of costs offset against 'the Envelope', the Crown offsets the same costs excluding the one-off Fisheries settlement of $170 million, against settlement to whit:[39]

- the full net cost of land and resources acquired for each claim;
- the current market value of assets owned by the Crown that are transferred to claimants;
- compensation to claimants under the Crown Forest Assets Act 1989, resumptions exercised under the Treaty of Waitangi (State Enterprises Act) 1988, and any other such compensation to claimants;
- costs of land (and other resource) banks transferred to claimants (including net holding costs whether the properties are transferred or not);
- claimants' research, negotiating and technical assistance costs as reimbursed by the Crown.

As an example of this in action, consider the Whakatohea claim. If it is settled, deductions will be made against a possible $30 or $40 million settlement for: parcels of land returned; the transferal of State assets such as the Opotiki Police Station to the iwi; research and related costs. Other features of the former policy retained by the Coalition include: the broad assumption that the Conservation Estate is best administered by the Government (Crown Proposal two); the refusal to negotiate with Maori on ownership interests in natural resources (Crown Proposal three); retention of the negotiation process structure (Crown Proposal five); Representation (Crown Proposal six); and claimant accountability (Crown Proposal seven). In terms of the last two of these, the Whakatohea Claim is again a sobering example because of the difficulties of precise definition of the hapu and whanau which "make" the iwi and the problems which have emerged in the management of that claim by the iwi representatives

39 Supra at note 35, at 9.

and claim managers.[40] Despite the expectations which might have come with a Coalition Government (particularly one including a party with such a commanding Maori presence as New Zealand First[41]) the core concepts underpinning the previous National Government's policy on claims settlement remain largely intact.

Although this could just as neatly be termed a "development of principle", in practice the Coalition Government's settlement policy represents an inversion of the rights reserved under te Tiriti. Whereas tino rangatiratanga is central to Maori Tiriti reservation, fiscal responsibility has overleaped it as the core tikanga of Government policy and represents a normalising of Government policy under the general caveat of "fiscal accountability". At the Hirangi hui called by Tuwharetoa rangatira the late Sir Hepi Te Heuheu in January 1995, Mason Durie urged rejection of the Fiscal Envelope on the grounds that: [42]

- Maori were not consulted in drafting the proposals.
- The proposals are too rigid on issues such as natural resources and the $1 billion cap.
- The proposals were not based on treaty of Waitangi or principles of justice.
- The proposals are a threat to the position of Maori under the Treaty.

Maori consultation in the drafting process of settlement policy is still minimal. The policy retains the tight restriction on returning resource management to Maori and retains an effective "total allowable putea" by

40 Note also the damaging splits which have occurred in Maoridom as a result of the scramble for settlement moneys. Both the Fisheries and Ngai Tahu Settlements have resulted in litigation in which the courts are being expected to be able to fashion definitions of what constitutes an iwi. In the case of the former, the recent decision of the High Court in *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* (HC Auckland, CP 395/93, CP 122/95, CP 27/95, M 1514/94 & M 734/95, 4 August 1998, Paterson J) has been to refuse the argument that organisations of urban Maori constitute a single discernible iwi. Both the Wellington and Manukau Urban Authorities have stated their intention to appeal this decision ("Waitangi fishing decision appeal", *New Zealand Herald* 18 August 1998, A10; "Urban Maori ready to appeal over fish" *New Zealand Herald* 26 August 1998, A 4). It would seem that this position has been adopted by other iwi, with a collection of Maori Urban Authorities from the Auckland region lodging documents in appeal against the decision (National Radio News, 30 August 1998). With respect to the latter settlement, the people of Waitaha are in the process of considering whether to seek a declaration that the Ngai Tahu settlement does not involve the separate claim which they have against the Crown, thereby separating themselves from Ngai Tahu in terms of legal definitions of iwi membership and ensuring that their claim is not subsumed within the general rubric of that agreement. This problem was given as a reason given by the Opposition Labour Party for its not supporting aspects of the Ngai Tahu Treaty Settlement Bill ("Labour pulls back from supporting Ngai Tahu bill", *The Dominion*, 21 August, 1998, 7).

41 During the Coalition Government's collapse, several New Zealand First Members broke with the party and remained in the House as independents. These included four of the five Maori constituency Members - there were five Maori-only electorates in the 1995 election all of which were won by New Zealand First.

42 Report of a speech by Mason Durie at the Hirangi hui, January 1995, reported by King, "Too rigid, no consultation", *Evening Post* 1 March 1995, 7.

benchmarking key settlements. It also gives effect to the drift from core Tiriti terms under the guise of satisfying "principles" of the Treaty. These refusals by the Government continue to undermine tino rangatiratanga. Call it "fiscal envelope" call it "fiscal responsibility", by naming the word which controls the settlement policy the Government has named the world delimited by that policy.[43]

It is, therefore, disquieting to note Maori response to that policy. Indicative of responses from the "Fiscal Envelope hui" is the first resolution from the Hirangi hui. It states:[44]

> [Because] the Crown's proposals for the settlement of Treaty of Waitangi claims represents another fundamental breach of tino rangatiratanga this hui rejects the proposals for the settlement of Treaty of Waitangi claims including the fiscal envelope in its entirety.

Three years on, that categorical rejection has transformed into general acceptance as many iwi and hapu have settled or are about to settle on terms dictated to them by the Government. Whilst Mason Durie's concerns still have currency and continue to demand response from the Government, in the clamour to secure settlement uncritical Maori claims managers contribute to the Government's evasion of those concerns.

The Coalition's Treaty settlement policy does more than simply repeat the specifics of its immediate predecessors. Importantly, it is based on the same structural assumptions. It is alarming to note, therefore, that tino rangatiratanga is not simply avoided in the Policy Documents or Coalition Agreement, it is entirely absent. In its place lies a unilateral declaration of what may, and what may not, control the settlement process. Doubtless apologists would call this the Government's kaupapa for the settlement of Treaty grievances but it will be obvious from the policy's failure to recognise (let alone endorse) concepts such as tino rangatiratanga that this is a wholly inappropriate descriptor. Indeed, at the cost of Article II rights the policy asserts the primacy of Article I (interpreted as the Government's unassailable right to govern) and Article III (interpreted as fairness and equality for all New Zealanders). Assumptions such as these create significant theoretical problems in terms of the assessment of the overall policy strategy and for the manner of its implementation. These are considered briefly in the following two sections.

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43 This betrays a pertinent link to the pedagogical analysis undertaken by Freire in *Pedagogy of the Oppressed* (New York: Herder & Herder, 1970).

44 Nga Whakaritenga o te Hui i Hirangi: The Hirangi Resolutions (January 29, 1995).

IV: AN ASSUMPTION OF SOVEREIGNTY: "HE IWI TAHI TATOU"

Governor Hobson's repeated aphorism at the Waitangi signing of the Treaty established what was to become the touchstone of subsequent pakeha assumptions regarding the relationship then entered into.[45] More than an assumption about the nature of the power relationship between the signatory parties, the notion of "one people" underpinned assimilationist policy and practice from soon after the cessation of hostilities in the mid-nineteenth century. From then on it persisted as the primary objective of successive governmental race relations policies - barely removed from the "colonisers"[46] assumption of a "civilising" influence. Nearly 100 years later, for example, the Hunn Report[47] assumed that inter-marriage and other cultural phenomena would necessarily result in the demise of a specific Maori identity and the emergence of one uniquely of this place (ignoring the fact that Maori identity explicitly meets this aim already). Rather than interrupt this presumption, the recognition of grievances, both before but especially after, the Treaty of Waitangi Act was passed created for Pakeha Governments "a 'moral imperative' to make the practice in race relationships fit the 'one people' ideal - paradoxically the very position which many Maori have continued to challenge since the nineteenth century."[48] Indeed, the current policy to "extinguish the sense of grievance"[49] is predicated on the assumption that this will enable the country to move forward as a nation united.

Justification for this assumption is drawn from the Treaty itself. Article I reserved for the Crown "all the rights and powers of sovereignty" which, to reconcile this with Kawanatanga in the Maori text, is treated as conveying "complete government". As quoted by Richardson J in *New Zealand Maori Council v Attorney-General*, Kawharu seems to confirm such a conclusion. In a paper submitted in evidence by the Maori Council he states that "'Maori acceptance of the first article in the Treaty gave the Crown sufficient authority to set about making and administering laws and regulations and eventually to establish constitutional government in New Zealand.'"[50] Put more baldly, Cooke P (as he then was) states categorically that "[the] Treaty signified a

45 Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987) *passim*.

46 This term for historic and contemporary colonial administrators and settler citizenry is part of an analysis of the psychological effects of colonialism on both "colonisers" and "coloniseds" (indigenous populations and those communities other to the ones structurally attached to the colonising power) undertaken by Memmi, *Portrait du Colonisé; précédé de Portrait du Colonisateur* (Paris: Gallimard, 1985). He argues that physical violence is matched by persistent and brutal psychological violence.

47 *Report on the Department of Maori Affairs* (1961) (Hunn Report).

48 Supra at note 45, at 226.

49 Supra at note 35, at 44.

50 Supra at note 32, at 682.

partnership between races" - a conclusion made possible by his earlier assertion that to decide the case "[the] *principles* of the Treaty are to be applied, not the literal words".[51] Commenting after the case had been heard, Kawharu suggests, and not without irony, that it was remarkable:[52]

> [F]or a call from the Court to balance right against obligation, and for the Crown on one side and the Maori on the other to act "reasonably" and with "good faith" towards each other. And so, by an inspired stroke of a judicial pen, the Treaty of Waitangi acquired a halo effect: the Crown and the Maori became "partners". Furthermore, those Maori people still struggling with the lessons of history might well have been diverted from any scepticism about partnership by the encouraging view of the court that the Crown really did have an active "fiduciary" role towards them and towards their heritage. It was a simple, compassionate proposition, though far from simple to enact.

Not only is partnership difficult to enact, it is also very difficult to determine what is meant by such a construct.

A significant problem emerges when this concept of "partnership" is considered in light of sovereignty. In the Westminster system (indeed, in any Eurocentric system of government) the effective exercising of government is considered necessarily to derive from the notion that state sovereignty is indivisible. The Coalition's settlement policy draws on this fundamental assumption, explicitly stated as "the Crown's *sole right* to regulate for the common good under Article I of the Treaty".[53] Rather than a partnership or a dialogical constitution of governance, this assertion of singular authority renders tino rangatiratanga the subordinate of kawanatanga at a stroke—a flagrant reversal of the text of te Tiriti.

What is revealed in this act of subordination is a cynical inter-play between Treaty principles and Treaty provisions. "Sole right of regulation" is an explicit provision of the English text of Article I. Reconciliation of this with the Maori text is achieved by diminishing tino rangatiratanga to a Treaty principle — which is to say it is a malleable rather than a fixed concept. The same is not true of Maori provisions, as the Coalition Government's Policy Statement on Resources illustrates. Asserted after the Sealord's settlement, the Government proposed that "Article II interests in natural resources are use and value interests and, therefore, it does not intend to negotiate Treaty claims based on Maori ownership in natural resources". Those limited interests connote the following:[54]

> Use Interest. This means a person has certain defined uses of a resource but not all the potential uses.
> Value Interest. This refers to a spiritual or cultural interest in a resource even if it

51 Ibid, 664 and 662 (emphasis added in both cases).

52 Kawharu, supra at note 1, at xii.

53 Supra at note 35, at 18 (emphasis added).

54 Ibid, 18.

is owned or controlled by someone else.

In this context, the declarations of the present Government are a means of asserting that Maori have neither ownership nor regulatory interests in resources, irrespective of those which Tiriti provisions make explicit. Kelsey argues that, alarmingly, "[the] scope of tino rangatiratanga and sovereignty became negotiable through the concepts of *principles* and *spirit* of the Treaty".[55] Such is the situation with respect to Maori interests in natural resources, where the exercise of an Article II provision is countermanded by the principle that Maori need to be "reasonable". The right conferred by tino rangatiratanga is modified into the significantly lesser usufructuary right of the 'value interest'. In addition, it is an excellent example of the distinction Paul McHugh notes between legal and political sovereignty—tino rangatiratanga being an example of the latter only.[56] What this suggests is that although the notion of a policy based on principles is allegedly sourced in the Treaty text it is also a means of averting particular provisions of that text—provisions on which Maori are more likely to rely.

"Reasonableness" is implicit in the notion of partnership. As Cooke P developed his discussion of partnership:[57]

> [T]he duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

In the context of the Government's settlement policy, reasonableness is held to be synonymous with giving up claims to resources which might otherwise be effectively administered by the Government or a State Owned Enterprise — it is a surrender of economic and regulatory autonomy. The sting of partnership arises from the assumption that "[the] concept of a partnership whereby sovereignty is shared between the Crown and Maori was untenable under common law." Kelsey goes on to note that in practical terms "[all] Acts which recognised Maori rights were themselves exercises of state sovereignty."[58] So too is the assumption of the Government's fiduciary obligations to Maori.[59] Similarly, in *R v Sparrow* the Canadian Supreme Court "reminded the government of its fiduciary responsibility to native people and argued *inter alia* that: 'Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without

55 Supra at note 33, at 741.

56 McHugh, "Constitutional Theory and Maori Claims" in Kawharu, supra at note 1, at 42.

57 Supra at note 32, at 664.

58 Supra at note 33, at 741.

59 For a discussion of the development of a fiduciary relationship in New Zealand, refer: Lanning, "The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship" (1997) 8 Auckland U L Rev 445.

clear intention nor, in itself, delineate that right.'"[60] This still reserves the possibility of an extinguishment of rights—which the current Government is pursuing in its policy of full and final settlement of claims. In this respect, any degree of Maori autonomy is theoretically granted only because of the undiminished legal sovereignty which Parliament commands.[61]

The underlying presumption in this is that Maori are unable or unwilling to manage or regulate for the common good. An excellent example of how this policy is played out is in respect of the conservation estate. The policy begins with the principle that "the conservation estate is held by the Crown on behalf of *all New Zealanders,*" and continues, "existing public access and recreation rights will not be reduced (except to protect the natural and historic values)".[62] Importantly, the principal Treaty obligation named in the policy is under Article I, the Government's obligations to the public. Maori claims are thereby restricted to discrete sites of special significance (topuni) such as wahi tapu sites or particular sites of importance, as, for example, Ngai Tahu's access to pounamu. Claims may be resolved in one of three ways: Vesting title (with or without encumbrances) in Maori; statutory revesting of land; and transfer of a management role to Maori but with title still held by the Government.

This signifies that ownership is far from the sole goal of the policy — indeed it may well come with significant restrictions imposed by the Government. In reality, only a limited number of topuni and nohoanga reserves have been created or are anticipated under the current settlement policy and no large tracts of the conservation estate have been made over to Maori management. An exception to this has come with the Waitangi Tribunal's Ngai Tahu Ancillary Claims Report of 1995 — although the return of Taiaroa Head is a discrete parcel and remains subject to existing conservation trusts and management.[63]

Barely disguised in this is the perception that the granting of any significant level of national management authority to tribal groups is a fundamental threat to national security and identity. In this assumption the shift of responsibility is given a similar analysis as the activities of as the evaluation of so-called "Maori radicals". A decade ago Orange commented that Maori protest "has been regarded as a challenge to the nation's special identity."[64] In the same vein, the Waitangi Tribunal noted in the Taranaki Report that Maui Pomare's work in the 1910s tried "[to] deflect opinion that Maori protesters were intent on dividing the nation" and comments that this is "a prejudice that still survives".[65] The furore two years ago over the Minister for Treaty Negotiations the Hon Doug Graham's comments regarding the possibility of two laws (one specifically for Maori

60 Fisher, "With or Without Treaty: Indian Land Claims in Western Canada" in Renwick, supra at note 14, at 49, 65 (quoting R v Sparrow, supra at note 22).

61 McHugh in Renwick, supra at note 14.

62 Supra at note 35, at 13 (emphasis added).

63 *The Maori Law Review* (May 1995) 2, 4.

64 Supra at note 45, at 226.

65 Supra at note 3, at 292.

customary rights) is indicative of the backlash against contemporary Maori aspirations for some level of autonomy.[66] Importantly, these comments were in relation to the development of nohoanga reserves for Ngai Tahu, which are essentially usufructuary. Nevertheless, the negative comment surrounding such an idea indicates an unwillingness among conservatives to accommodate pluralist legal or constitutional analyses. Instead, the focus on a singular (pakeha) national identity remains tightly drawn.

It is a repeating feature of the epistemic violence leveled against indigenous populations in colonies or former colonies that their attempts to exercise any degree of self-determination repeatedly result in their being derided as "the enemy within", unable or unwilling to "live together in harmony" with settler populations. By this construct are indigenous peoples' aspirations erroneously declared to be counter to the interests of the "wider community" (which is formally encoded as settler hegemony). By contrast, the systems and structures inherited from colonial history and entrenched by contemporary colonisers remain the normative assumption which cannot be challenged — Parliamentary sovereignty is central among these. In the classic text of black liberationist writing *Peau Noire, Masques Blancs*, Frantz Fanon identifies the dominant pathology which is at the heart of Euro-American culture: the persistent denial of difference.[67] Colonisation itself, for example, is an enterprise that seeks to establish the same pattern of government as the colonial centre (either in its direct exercising from that centre or in the echo of it in provincial and dominion capitals). Splits or multiplicities within systems of governance, which are a necessary feature of self-determination, prove fatal to the assumed correctness of colonial structures because they expose the lie of sameness: they declare the concept of an overarching national unity to be void. This is one reason why it is crucial to those who disavow the possibility of Maori autonomy to repeat the need for a singular centre of sovereignty and a population unified under it. As Orange remarked, "[to] accede to Maori demands for autonomy would indeed be proof that the goal of 'one people' has not been achieved."[68]

V: ASSUMPTIONS OF SETTLEMENT PRACTICE: FULLNESS, FINALITY, FIXEDNESS

On the face of it, an attempt at a full and final settlement of Treaty grievances might seem commendable. As the Minister for Treaty Negotiations noted after reading the Tribunal's Taranaki Report, "'[it] provides further evidence that race relations in New Zealand are unlikely to settle as long as these matters

66 *Evening Post*, 16 June 1997, 9.

67 Fanon, *Peau Noire, Masques Blancs* (London: Macgibbon & Kee, 1968).

68 Supra at note 45, at 226.

remain unaddressed.'"[69] Such a response is, perhaps, underscored by Article III of te Tiriti, with its guarantee of equal rights for all citizens. In the context of settlement policy, though, this can be double-edged. As noted earlier in Part III, the policy assumes a set of principle plateaux which are unilaterally declared to be derived from Article III (Crown Proposals two-six quoted earlier). This unilateral declaration is matched by an intention that the settlements reached using policy mechanisms will be full and final. These policy objectives are now analysed in light of the rights reserved by Maori under te Tiriti identified in Part II of this article.

1. Fullness

One might be forgiven for expecting the term fullness to connote a generous, broad and unquibbling approach to settlement policy from Government. Certainly this was noted by the Waitangi Tribunal in the Taranaki Report as both a fair expectation and a means of restoring the Crown's honour. Nevertheless, such an understanding does not square with the supervening condition of settlement: fiscal responsibility. Assessing the purely financial aspects of the Taranaki claim the Tribunal noted:[70]

> [Some] billions of dollars would probably result were loss based only upon the value of the land, when taken with compound interest to today, leaving aside exemplary damages or compensation for loss of rents and the devaluation of annuities. It may be necessary to have some constraints on account of economic exigencies. It could also be that the historic claims of peoples should not be treated as lawsuits for the recent losses of individuals, because historical values have interposed. Whatever the case, it seems to us that a full reparation based on usual legal principles is unavailable to Maori as a matter of political policy.

In addition to these factors, the social and economic performance and cultural well-being of the hapu of Taranaki have been serious effected by their losses. This has resulted in profound destabilisation for iwi and hapu in the region: from the confiscation of land; from the brutal invasion of Parihaka; from the individualisation of land tenure at the instigation of the Native Land Court; from the continual attacks against the region by the colonial Government; and from much else besides. Nor is this destabilisation exceptional, for it is the experience of every iwi and hapu in the country, an experience stemming from the assaults by successive governments on tino rangatiratanga.

This begs the question: how, then, may these experiences be *fully* compensated for? The succinct answer is that they cannot, for any moderate figure will fall far short of making full compensation and any large figure is

69 The Hon Doug Graham, quoted by Keene, "Damning report endorses claims", *The Press*, 15 June 1996, 1.

70 Supra at note 3, at 314.

simply a matter of wild speculation ("How much for Taranaki? $1 thousand million? 5? 25? 50?"). Even where a figure is asserted it is raised almost as a rhetorical point. The Heads of Agreement for the Waikato/Tainui (Raupatu) Claim, for example, notes the settlement will contain: "[a] public apology from the Crown for confiscating Waikato-Tainui land, and an estimate of the claimants that the raupatu (confiscated) lands have *a minimum modern value of $12 billion*". Outside of alternative options for settlement such as leasing land to the Government, deferred payments, annuities (some of which were effected in the eventual enacting of the Sim Commission recommendations of 1927[71]) it seems not so much fiscally irresponsible to make full reparation as fiscally impossible. At the same time, it ought not to be assumed that the generosity of claimants thus far in not pressing either Government or the Crown for their word will continue indefinitely.

One way of achieving a full settlement is to shift the manner in which the payment and return of lands and other taonga is perceived: settlement by way of utu. In advancing this it is acknowledged that this mode of settlement would carry the most obligations for the Government. Nevertheless, this could achieve a re-think of the policy and a substitution of just settlement for full settlement (remarkably, justice is not an explicit objective of the Policy as it stands). As Joe Williams noted, the ideology of Maori claims is a response to a complex pattern of disempowerment and discrimination and is informed by three things:[72]

- Maori seek to use the claims process to secure the just settlement of historic wrongs. Usually historic wrongs are argued to have grievously injured the cultural and economic wellbeing of the tribe.
- Maori seek to use the claims process to protect and enhance their cultural base. That is to affirm and enhance the Maori sense of separate identity.
- Maori seek to use the claims process as a means to participate in mainstream economic activity. The aim is to secure an economic base to benefit Maori collectively and to ensure their survival as a distinct people.

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71 Emphasis added. Authorised by then Prime Minister and Minister of Native Affairs the Rt Hon Gordon Coates, the Reform Government's Royal Commission to Inquire into Confiscation of Native Lands and Other Grievances Alleged by Natives was established in October 1926. (Known as the Sim or Raupatu Commission). Its terms were to investigate whether the confiscation of land in the Waikato and Taranaki during the nineteenth century "exceeded in quantity what was fair and just" with respect to the legislation of the 1860s and it had the power to recommend an award of damages, if appropriate. Importantly, however, there was no possibility that the legality of those confiscations could be questioned. The Commission reported to the House in July 1927. It found that the confiscations of land had been excessive and set about establishing limited methods of redress for aggrieved Maori including the annuities of £5,000 to Taranaki Maori and £3,000 to Waikato Maori through Trust Boards. Taranaki Maori settled the ruapatu claim considered in the Report in 1944, as did Ngai Tahu and Tainui in 1946—these settlements were on the back of a political alliance founded in 1936 between Maori leaders of the day and the First Labour Government: Appendices to the Journals of the House of Representatives, 1928, G-7: 1 fol.; and Hill, *Enthroning Justice Above Might?: The Sim Commission, Tainui and the Crown* (Wellington: Treaty of Waitangi Policy Unit, Department of Justice, 1989).

72 Supra at note 24.

Furthermore, a full settlement is not one which simply hands over a sum of money and then abandons the settlement process. Rather, it demands, in the words of the Tribunal, that Government "take those steps necessary to remove outstanding prejudice and prevent similar prejudice from arising; for the only practical settlement between peoples is one that achieves a reconciliation in fact."[73]

2. Finality

In response to the impossibility of fullness of compensation in the Taranaki claim, the Tribunal landed the most serious blow yet to the philosophical basis of the Coalition Government's settlement policy. Noting the political policy reasons asserted as grounds rendering full compensation impossible, the Report continues:[74]

> [I]f that is so, Maori should not be required to sign a full and final release for compensation as though legal principles applied. How tribes can legally sign for a fraction of their just entitlement when they have no further option is beyond us. To require Maori leaders to sign for a full and final settlement in these circumstances serves only to destabilise their authority.

The evasion of these issues by the Government reveals its refusal to accept that Tiriti grievances are on-going, that the costs of the losses are not merely material and that no settlement will work unless it addresses the causes of injustice as opposed to concrete examples of it. The difficulty for the Government is that this type of analysis introduces truly important questions into the settlement process. Yet a fundamental mistake of historical analysis has been made insofar as the Government has assumed colonisation to be an event with a finite time-frame which has already passed and which has resulted in a limited series of discrete problems. As Moana Jackson argues, the reluctance of Governments to engage with this type of analysis stems from two assumptions:[75]

> 1. That the only dispossession of Maori which requires redress is that which results from identifiable and specific acts of wrongdoing by the Crown or its agents: dispossession brought about by the total process which permitted those acts, that is colonisation, is not remediable.

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73 Supra at note 3, at 315.

74 Ibid, 314.

75 Jackson, "Return to Sender—An Analysis of the Fiscal Envelope: Proposals for Settlement of Treaty Grievances" (Wellington: Nga Kaiwhakamarama i nga Ture; Wellington Maori Legal Service, 1995).

> 2. That the injustices created by the Crown in the past were the [sic] result of a wrongful exercise of its legitimate sovereign power over Maori.

The obvious difficulty with these questions is that they introduce issues for which the only true finality would be Maori self-determination. For a policy founded on a "one people/one nation" philosophy this is untenable.

Instead, the current Government makes finality of settlement the single most important feature of the settlement policy. Entry by claimants into the negotiation process is made conditional upon their "agreeing to negotiate a final settlement covering all of their claims unless the Crown makes an explicit exception".[76] Many of the procedures adopted by both administrations in power since the Fiscal Envelope was announced have been interpreted as revealing a take-it-or-leave-it stance. Finality of settlement is wholly consistent with this appraisal as it implies that consultation and negotiation is simply a *pro-forma* exercise rather than an exhibition of the will to reach a just settlement. In addition, the policy fails to recognise, for example, the collective and negotiation-focused approach adopted by Maori in political discussion and dispute resolution. Instead of these processes, the policy assumes the need to negotiate claims in one go and with the objective of an outcome of certainty.

Indeed, the invitation to negotiate is predicated on performative duties for claimants which may only be described as onerous. Without significant resources and highly skilled researchers it is extremely difficult for some iwi and hapu (especially the smaller ones and/or ones with complex claims) to develop a comprehensive claim.[77] Michel Foucault's influential work in such texts as in *L'Archéologie du Savoir* and *L'Ordre du Discours*[78] is pertinent in this context. The central relevant issue is his investigation of the essential connection between *savoir* (knowledge) and *pouvoir* (power). With respect to this example, there is the very real threat that one powerful negotiating party, the Crown or a large, well organised iwi, has significantly more resources and more opportunity to fully research any given claim than smaller iwi or hapu, which are swamped by the particular needs of discovering facts pertaining to claims and presenting them in negotiation. A settlement process founded on such disparate power relationships (themselves based on and exacerbated by disproportionate access to relevant legal knowledge and resources as well as unequal familiarity with the structures and procedures of Direct Negotiation) clearly advantages powerful, knowledgeable parties. The flip-side of this is that disadvantaged parties may be easily coerced or even excluded from the process altogether. Indeed, this has been a key threat made by the Government to iwi who do not settle immediately (and

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76 Supra at note 35, at 29. An example of specific exclusions would be those settlements which include Ratchet Clauses.

77 This focus participates, moreover, in the marginalisation of any aspects of grievance other than those involving property — one might be able to know that a particular parcel of land was lost contrary to Tiriti rights but it is difficult to anticipate all of the consequences (economic, social, cultural) of the loss of that parcel of land.

78 Foucault, (New York: Pantheon Books, 1972); Foucault, (Paris: Gallimard, 1971).

finally) regardless of the fact that they may in fact still be researching their claims.

This raises another crucial feature for understanding the impact of finality: that these preconditions for negotiation are coupled with the assertion in the Policy Document and Coalition Agreement that claims which have been heard may not he re-heard. The former of these papers declares that jurisdiction is curtailed over historical claims subject to Deeds of Settlement entered into after September 21, 1992. The latter simply asserts that settlements effected up to the signing of the Coalition Agreement will be respected. The combination of these factors makes it a requirement of iwi and hapu that they "get it right" the first time: it leaves no room to manœuver.

The stated reason for the finality requirement of the policy is that it will achieve a sense of completion.[79] The Government sees this as a fundamental policy aim, one which will have "Maori and the wider community shift their focus away from grievances toward the growth and development of Maori potential."[80] Apart from the implication that Maori exhibit some sort of grim fascination with a morbid past predicated on death and revenge (a nineteenth century construction of tikanga Maori), the gall of this statement is that it asserts that Maori have not always been seeking redress in order to achieve maximum growth and development. Secondly, it mistakes a healthy sense of what might be owed for a fixation on grievance—the very term echoes with the ambivalence of the *Oxford English Dictionary's* definition: "real or *fancied* ground of complaint".[81] In this respect, the policy insists that the institutional framework for dealing with historic claims be wound back; which is to say the Waitangi

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79 See supra at note 71. It will be clear from an earlier note concerning the Sim Commission's Report of 1927 and the settling of claims in response to it in the mid Forties that claims have, indeed, been revisited, re-negotiated, settled again and thereby brought up-to-date. That this is so, however, may create an environment whereby they cannot be said to have been finally lain to rest and, therefore, remain open to costly (both financially and socially) ongoing negotiation and the threat of new requirements for settlement. The erasure of the basis for making further claims on matters already settled is an important feature of both the deeds of settlement and the enactments resulting from the current negotiation process.

In addition, the Government's timetable is at risk in this area not from Maori but from those who perceive there to be a "grievance industry". The right-wing opposition party Act New Zealand has been attempting to attract conservative National voters on the back of this perception. An Act M.P. (and former National Cabinet Minister) Derek Quigley is hoping to present a private member's bill to the House entitled the Treaty of Waitangi (Final Settlement of Claims) Bill. It was reported that if the bill makes the ballot to be debated it will provide that "all claims would have to be lodged by January 2000. The Waitangi Tribunal would have five years to research the claims and to make recommendations. The Crown would have another five years to make settlements, which would be full and final." John Armstrong, "Act to push firmer line on grievances", *New Zealand Herald*, 23 July 1998, A 5.

Although directed at the Tribunal rather than direct negotiation the proposed bill reflects precisely the types of concerns conservatives express with ongoing settlement that have been canvassed in this article. It does not contradict Government policy, merely establishes a finite time-frame.

80 Supra at note 35, at 50.

81 *Oxford English Dictionary* (emphasis added).

Tribunal will cease to have jurisdiction to hear claims. Although nominally concerning both Tribunal and judicial rôles in reviewing claims, the policy explanation focuses on the Tribunal. It states:[82]

> [The] Crown proposes that the Tribunal's jurisdiction should be progressively curtailed as claims are settled (which was the approach adopted for the Sealord's settlement). This would assist the durability of settlements by ensuring that the tribunal cannot be used simply to keep grievances alive. Even if the tribunal dismisses a subsequent claim, the very lodging and hearing of the claim may disturb the healing of the grievance, and the sense of conclusion for the wider community.

What this means is that Pakeha fear or anger regarding claimants overrides the need for just settlements. The very idea that claimants should forfeit recourse to judicial or Tribunal review of claims is anathema to the notion of settling grievances. As Andrea Tunks suggests, it represents "a comprehensive cleaning of the slate"[83] — an erasure.

3. Fixedness

Related to the Coalition Government's fixation for closure, but perhaps of greater concern, is its attempt to freeze claimants into a particular time frame. Talal Asad terms this "'synchronic essentialism'"[84]—a situation whereby the colonised people is declared to inhabit a fixed, static and knowable cultural condition in opposition to the declaration of the colonising culture as forward moving, heterogeneous, diachronic. The policy traps Maori in a single point of resource development set at 1840. Hence it allows for the "natural" development of existing use rights but not to the development of new ones, as if Maori were scientifically and technologically moribund. This results in a deliberate strategy of making "traditional" methodologies and/or rights appear anachronistic. In relation to fresh-water fishing, for example, the Policy Document states that:[85]

> [A] use interest in fishing in a river encompasses the use of new fishing techniques and possibly rights to commercially profit from fishing but not rights to the hydro-electric potential in the river.

The cruel irony of such an inflammatory example aside, as Maori customary use of rivers on and tributaries to the national grid have been seriously affected by

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82 Ibid, 50.

83 Tunks, unpublished lecture on the Whakatohea Claim at the University of Auckland, August 27, 1997.

84 Asad, "Two European Images of Non-European Rule" in Anthropology and the Colonial Encounter (1975) quoted in Said, *Orientalism* (London: Penguin, 1995) 240.

85 Supra at note 35, at 21.

hydro-electric development, there are two major problems with this argument.

First, and most obviously, Maori did not anticipate the technological development of the next 160 years. As the Court of Appeal noted in *Te Runanganui o Te Ika Whenua v Attorney General*: [86]

> [H]owever liberally Maori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840.

This may be true but the marked inconsistency of logic in this extract is that the fact that although neither Maori nor pakeha prophesied hydro-electric generation only Maori are debarred from claiming it as a taonga. Both the policy and the decision it relies on assume that such developments naturally accrue to the Crown, or any future owner of the resource. This is clearly out of step with international development, such as the reservation of development rights in, for example, the Draft Declaration of the Rights of Indigenous Peoples. Conversely, the Waitangi Tribunal reveals a subtlety lacking in the Government's policy. In its Radio Frequency Report, for example, it advocated a sliding scale of protection for ancient taonga from those more recently prized.[87] This reveals an attitude that affords contemporary relevance to "traditional" concepts such as the possession and use of taonga.

The second trap to come from this freezing of Maori resources is that just as the beneficial outcomes of cross-cultural contact were unknown, so too the negative impacts of that contact were not anticipated in 1840. Maori did not predict the treachery of colonial Governments nor foresee the invasions of Waikato or of Taranaki nor prophesy the advent of the Native Land Court, or the passing of the Suppression of Tohunga Act of 1907.[88] Further, Maori did not know that their children would not be permitted to speak their own language at school, nor that their youth would form disproportionate statistical proportions of the unemployed or the imprisoned. In short, Maori did not anticipate either the extent or the grievousness of colonialism in Aotearoa.[89] What they did anticipate was the need to reserve their mana which, in the terminology tino rangatiratanga, they did. In this way, returning to the mindset of 1840 is revealed as a dangerous strategy because it revisits a level of Maori authority which the

86 [1994] 2 NZLR 20; quoted in Crown Proposals, supra at note 35, at 22.

87 Williams, "Maori Claims to Energy resources", Paper to the Energy and Natural Resources Law Association Conference on Maori claims and rights to natural resources (1997).

88 Tohunga are carriers of indigenous knowledge, notably but not exclusively in fields such as medicine and traditional belief systems; a tohunga whakairo is an expert carver, for example. The specific importance of the 1907 Act was that it had the effect of making illegal the expression and dissemination of Maori traditional knowledge because to suppress the activities of tohunga was to seriously delimit the ability of Maoritanga to be self-determining.

89 Fanon, *Les damnés de la terre* (Harmondsworth: Penguin, 1961 trans Farrington). In this work, Fanon analyses the psychological and economic degradation of colonised peoples.

Government is continually attempting to deny may have relevance in the new millennium.

The persistent effect of the current policy is to try to re-establish a year zero for race relations between tangata whenua and immigrants. This time around, however, the "partnership" is pre-paid, with the Government securing sovereignty for a quick series of apologies and full and final payment of something in the order of one thousand million dollars. It is not without irony, then, that one might recall that 1840 was the year Hobson repeated to each Maori signatory at Waitangi: "he iwi tahi tatou".

4. An Unsettling Ideology

The apparent successes of the Ngai Tahu and Waikato/Tainui Settlements notwithstanding, recent Governments' Treaty settlement policies fail to confirm or even to recognise the rights reserved by Maori under te Tiriti o Waitangi. Underpinned by the new treaty ideology, as Kelsey usefully describes the policy assumptions which emerged in the late Eighties,[90] it assumes economic constraints to be a given and assumes this in substitution for principles which were more closely related to Tiriti provisions. The most serious casualty of this approach is tino rangatiratanga, which is accorded no formal status in the policy, despite its central importance to Maori—as much now as in 1840. This ideology assumes that fiscal responsibility is in the best interests of all citizens of the country and, therefore, squares with the Government's philosophical conceit that those citizens make one people. It is most clearly manifested in the declared aspiration for a comprehensive series of full and final settlements. Yet fullness of settlement as Maori might claim it is allegedly unavailable and both finality and fixedness run the very real risk of creating new grievances. What the Coalition Government has seemingly underestimated in the policy is that the framework may easily work against its stated aims—the paradox of a new round of grievances arising from the attempt at settlement.

The alarming conclusion to be drawn from this is that unless there is a radical overhaul of not only the policy for settlement but also re-confirmation of the status of te Tiriti and the rights reserved under it there can be no lasting settlement of any kind. It is a significant concern, therefore, that not only will the land outlast this policy (as it certainly shall) but that real, unacknowledged and in some cases, new grievances will also survive it. In this respect, its legacy

90 Supra at note 33, at 740.

may well be a struggle without end.[91]

VI: AFTERWORD

The fundamental conundrum which emerges from this analysis of policy concerns the separation of legal and political sovereignty. This is an issue as yet largely unresolved but urgently requiring further analysis. Speaking in relation to the continued litigation of the *Delgamuukw Case*,[92] for example, Patricia Monture-Angus suggests it is a symbol of the inequity of negotiation and/or litigation that at all times indigenous sovereignty issues (such as aboriginal title or aboriginal rights) are available for negotiation but that the sovereignty vested in the Crown (or national or provincial governments) is never similarly available.[93] She notes that in the judgment in the *Calder Case*[94] a clear, unequivocal statement regarding provincial sovereignty may be contrasted with a long, eloquent description of aboriginal title at the same time as it is denied that such title has any legal right attached to it. This reveals the extent to which the sovereignty attached to colonising structures is presented as a given whilst parallel indigenous structures are presented as mutable, especially if this means squaring them with the assumed pre-eminence of Eurocentric modes of governance. Monture-Angus argues that if full and frank negotiation is to take place in which core indigenous concepts and political structures are to be put up for review at the negotiating table then the same must occur with respect to settler assumptions of sovereignty, legislation and other structures of law. In the

91 It has become increasingly apparent in the time that this article has been prepared for publication that disputes within the settlement process refuse to be neatly and finally settled. For example, on August 11, 1998, the *New Zealand Herald* ("Ngapuhi women to speak" A4) and National Radio ("Morning Report") both featured a story regarding the relationship between the Sealords settlement and the persistent claim by Ngapuhi of their exclusive rights on all kaimoana. This claim emerges out of their analysis of tino rangatiratanga and its relation to customary fishing rights. The Ministry of Fisheries, however, claims that these rights were signed away by the chair of the iwi's council when he signed the agreement. Some iwi members dismiss the assertion that he signed on behalf of all members, a position which seems to rely on the need in local tikanga for full and on-going negotiation within Ngapuhi. By contrast, the Ministry's position is indicative of Government's elevation of the need to finalise settlement on this issue and will brook no retreat by iwi on agreements signed by their senior members and/or settlement negotiators. In this way, the sharp distinction my be drawn between a fluid settlement capable of multiple revision in order to keep abreast of contemporary developments, and a fixed one, signed and sealed to protect against subsequent alteration. This binary construct reflects a fundamental philosophical attitude concerning te Tiriti and whether it should be interpreted as constantly speaking or as a document silenced and superseded by the settlements reached under the current Government's policy.

92 *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185.

93 Monture-Angus, "Aboriginal and Treaty Rights in Canadian Law: Retracing colonial patterns", unpublished lecture at the University of Auckland, July 28, 1998.

94 *Calder v Attorney-General of British Columbia* (1970) 74 WWR 481, affirmed [1973] SCR 313.

absence of this, the culture of one-sided settlement presumes to set limits to the integrity of distinctive indigenous cultures.

Whilst Monture-Angus' arguments clearly square with core philosophical position of this article, there is room for a certain ambivalence in considering this conundrum and it is important that this should be noted. One needs to question, for example, whether or not the orthodox stance of sovereignty as essential to the single rule of law is in fact an example of *Realpolitik* analysis, for it is simply an incontrovertible fact that different peoples with radically different philosophies, structures and systems now inhabit the same nation states—this is the shared legacy of colonisation. On the other hand, it seems reasonable to suggest that the solutions which are uncovered can and should be specific to each situation, for as much as the fundamental relationship of colonialism is shared among indigenous and settler communities, each region has experienced it in subtly different ways, New Zealand, for example, by a formal treaty document which is far from the typical experience of indigenous peoples around the world. Of equal importance is the need to reflect on the way in which the different experiences of colonisation shaped and shapes the relations within colonised and coloniser populations as much as between them (the experience of the subaltern is not that of the industrial labourer, for example).[95] As opposed to a set of simple or single relationships, then, it is necessary that any analysis of this global problem takes cognisance of the fact that sources of grievance and desires to settle emerge from a complex matrix of relationships and experiences. Equally important is the requirement that colonisation is placed in its appropriate historical context which is to say that it cannot be consigned to the annals of history and its impact declared to have been fully determined. There are two principal reasons why this is so. First, the notion of *an* history is itself a problematic concept and this is especially true of colonisation in which there are many conflicting histories of the same events and policies.[96] Secondly, the sum total of colonisation's effects remains unknown and, to some extent, unpredictable which means that the idea of consignment is unavailable. It is in this context that Walter Benjamin's observation is prescient:[97]

> [The] tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight.

The shared assumptions of the Canadian courts and the New Zealand

95 For discussions of issues of identity in colonial and postcolonial contexts, see: Bhabha, *The Location of Culture* (London: Routledge, 1994); Spivak, "Can the Subaltern Speak?" in Nelson and Grossberg (eds), *Marxism and the Interpretation of Culture* (Basingstoke: Macmillan Education, 1988) 271; Young, *Colonial Desire: Hybridity in Theory, Culture and Race* (Bloomington: Indiana University Press, 1995).

96 Young, *White Mythologies: Writing History and the West* (London: Routledge, 1995).

97 Benjamin, "Theses on the Philosophy of History" in *Illuminations* (New York: Harcourt, Brace & World, 1968) 257 (trans. Harry Zohn).

Government reveal how difficult it is to reconcile the discursive problems facing the inheritors of colonisation's most obvious phase.[98] It is crucial to the possibility of re-establishing a sense of justice, however, that those involved in settlement processes attain a conception of policy that is in keeping with the experiences of colonised peoples and is not merely the determination of colonisers. In so-doing, the realisation may be had that a covenant of settlement is not a commitment to a series of full, final and fixed agreements but a commitment to a dynamic and dialogical relationship. It is a commitment to the establishment of a just partnership.

Glossary of Maori Words and Phrases:

Aotearoa: New Zealand
hapu: sub-tribe; collective of extended families
he iwi tahi tatou: we are one people
hui: meeting; gathering
iwi: tribe
kaimoana: seafood
kaupapa: rule; principle; basic idea
kawanatanga: government
kingitanga: kingly authority
mana: power; influence; authority
mana whenua: temporal authority over land
Maoritanga: Maori culture
nohoanga: habitation
pakeha: non-Maori; Caucasian New Zealander
pounamu: greenstone; nephrite
putea: fund
rangatira: chief
rangatiratanga: chiefly authority
raupatu: confiscated land
tangata whenua: Maori; (lit.) people of the land
taonga: treasured possession (tangible or intangible)
tauiwi: foreigner
tauparapara: opening statement
te reo Maori: the Maori language
Te Tiriti o Waitangi: The Treaty of Waitangi (1840)
tikanga: custom; rule; principles; obligations
tino rangatiratanga: exercise of chieftainship
tohunga: expert; specialist; priest
topuni: specific sites of special significance
utu: costs; revenge
wahi tapu: reserved ground
waiata: song
whanau: extended family

98 Which I take to be from the Battle of the Nile (1798) to post-War decolonisation in Africa and South Asia.