

Parihaka and the Rule of Law

KATHERINE SANDERS*

I INTRODUCTION

On the fifth of November 1881 more than a thousand volunteers and five companies of armed constabulary¹ invaded Parihaka, its leaders reading the Riot Act to the members of the Parihaka community, seated and silent on the marae. At the head of the charge was the Honourable John Bryce, the Native Minister, mounted on a white charger in full military uniform and carrying a sabre. The Native Minister led the colonial troops in the forced relocation of over 1500 people, the imprisonment of the community's leaders, the looting of taonga, and the destruction of homes and crops.²

The events at Parihaka can be viewed from many perspectives. This article aims to discuss the story of Parihaka in the context of the Rule of Law, assessing both the nature of the challenge posed by the community and the reaction of the state to that challenge. Examining the influence of Diceyan theory on New Zealand's constitutional history and modern jurisprudence, the article begins by considering Professor F M Brookfield's analysis of New Zealand constitutional origins.³ Building on the work of Kelsen and the premise of Parliamentary sovereignty, Brookfield emphasises a fixed dichotomy between legality and legitimacy. The events of Parihaka, particularly the choice of civil disobedience as a form of protest, challenged this dichotomy in 1881 and today challenge the choice to base an analysis of the Rule of Law on this distinction.

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¹ Cave, "Robert Caldwell: A Citizen of Karori, 1880-1918" (1987) 15 *The Stockade* 3, 4.

² Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi - Wai 43* (1996) 206. See also Olson, "An Armed Constable at Parihaka: The Journal of Alfred Fromm" (1992) 12 *Historical Journal* (Otaki Historical Society) 64, 71; Cowan, *The New Zealand War: A History of the Maori Campaigns and the Pioneering Period. Volume II: The Hauhau Wars, 1864-72* (1956) 517-518 for the narration of Colonel W Messenger who took charge of 120 Armed Constabulary at Parihaka. Cowan also describes the invasion at 488; and His Excellency Sir A. H. Gordon to the Secretary of State for the Colonies [1883] *AJHR* A4 13-14.

³ Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (1999).

The points of spiritual, cultural and political difference that drew Te Whiti, Tohu, and the Parihaka community into conflict with the settler government are analysed as examples of the enduring pluralist and ideological tensions within a state where the law-making power of a majoritarian body is without substantial fetters. The protection of the second pillar of the Diceyan constitution, the Rule of Law, seems insubstantial. With reference to the work of Robert Cover and David Dyzenhaus, I question whether a different view of the Rule of Law, which recognises the interplay between legality and legitimacy, may better accommodate the challenge of difference.

So this paper looks at events that have passed and questions the present and future implications of the issues underlying that historical conflict. Like many histories, it cannot escape from the impact which the engagement of the author in the modern world has on the account of things past. It would certainly be open to the criticisms of W H Oliver and Andrew Sharp who view such 'presentist' versions of New Zealand's history as inevitably distorted by the need to answer current problems and seek new remedies.⁴ However, 'presentism' should not, when acknowledged, be fatal.⁵ And, in any event, it is the endurance of Parihaka as a modern focal point for historical, artistic and creative responses which I believe demonstrates the continued pertinence of its challenge.

⁴ Sharp and McHugh, "Introduction" in Sharp and McHugh (eds), *Histories, Power and Loss* (2001) 2; Sharp, "Recent Juridical and Constitutional Histories of Maori" in Sharp and McHugh (eds), 31; Oliver, "The Future Behind Us" in Sharp and McHugh (eds), 9.

⁵ In fact, many of those who played a role in the story of Parihaka were conscious of the judgment of history. For example, Captain Russell a supporter of the Maori Prisoners' Bill said in the House:

In days to come, when historians write the annals of this country, they will view the struggle which has taken place in this country from a very different standpoint from that which we can take who are mixed up in its turmoil and disagreements. The men whom we look upon as rebels will to my mind occupy a brighter page of history than many of those men whom we look upon as faithful and loyal Natives. Though I hold that opinion very strongly, I feel that these men, however good they may be, should not be allowed to interfere with the colonization of this country.

(19 July 1880) 36 NZPD 338 (Captain Russell).

II THE 'PERFECTED LAW'

The people of England were not so fortunate in days of old as are the people of New Zealand now. When they began to frame for themselves laws, they had no example to direct them ... In the present day the Maori is more fortunate. A path has been cleared and opened through the forest: it lies before him: he has but to walk in it. A wise and generous people, the English, have settled in his land; and this people are willing to teach him and to guide him in the well-made road which themselves have travelled for so many generations; that is, in the path of the perfected law

- Land Court Magistrate and speculator Francis Fenton.⁶

The common law constitution, introduced with the assumption of sovereignty in Aotearoa, is the starting point for an analysis of Parihaka and the Rule of Law. The 'perfected law' was an influential ideal but, despite the assuredness of Mr Francis Fenton, the common law constitution was a shifting concept. During the period between 1840 and the events at Parihaka in the 1880s, the doctrine of Parliamentary sovereignty gained in prominence, reaching its apogee in 1885 with the publication of *Introduction to the Study of the Law of the Constitution* by Alfred Venn Dicey.⁷

Dicey viewed the law as rules-based science, separated from the vagaries of history, custom, and politics. He was alive to the charge that he "lacked historical-mindedness", but countered, "researches into the antiquities of English institutions, ha[d] no direct bearing on the rules of constitutional law".⁸ Those rules were presented as legal facts,

⁶ Kelsey, "Legal Imperialism and the Colonisation of Aotearoa" in Spoonley et al (eds), *Tauīwi: Racism and Ethnicity in New Zealand* (1984) 30. Kelsey cites *The Laws Compiled and Translated into the Maori Language by Direction of his Excellency, Colonel Thomas Gore-Browne, C.B., Governor of New Zealand, Auckland 1858, the writings of Francis Fenton*.

⁷ There is no consensus about when the assumption that every legal system must have an absolute sovereign became dominant. See generally Edlin, "Rule Britannia" (2002) 52 UTLJ 313, 322: *History and Philosophy*); Goldsworthy, "The Philosophical Foundations of Parliamentary Sovereignty" in Campbell and Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000) 229-236. Goldsworthy rebuts the claim that Parliamentary sovereignty only "took hold" as late as the 18th and 19th centuries.

⁸ Dicey, *Introduction to the Study of the Law of the Constitution* (10 ed, 1959) 14.

Parliamentary sovereignty in particular spoken of as ahistoric, divorced from its history of struggle and civil war.⁹

Dicey was not alone in his concern to establish a coherent legal science. In this respect he joined a group of legal theorists, among them John Austin and Frederick Pollock,¹⁰ whose project spanned most of the 19th century. This group drew on the work of Thomas Hobbes in developing a theory of sovereignty that secured the separation of law and legitimacy. Hobbes, writing in the context of the English Civil War, had wrestled with the problem of how to avoid anarchy. His solution was the Leviathan: an absolute sovereign established by covenant, representing the reason of all those who transferred their rights to it. The social contract that Hobbes used to justify the absolute power of the sovereign was of course an artificial one. However, for some 19th century theorists even this artificial construct of consent was not considered necessary to establish sovereignty. Austin, borrowing from Bentham, based sovereignty on a “habit of obedience”¹¹ while Dicey preferred to present Parliamentary sovereignty as a matter of “legal fact”.¹² Francis describes this theory of sovereignty as a “notion of government empty of content and without rationale”,¹³ noting that in the absence of a justificatory theory of government:¹⁴

One could never claim that an agreement had been broken, or that a sovereign was not acting in accordance with some original promise. In short, one could never claim that sovereignty was limited nor that it could be disobeyed.

It might be argued that Dicey’s most significant contribution to this discourse was his emphasis on the “rule of law” as a “fundamental

⁹ Ibid 39. See also McHugh, “A History of Crown Sovereignty in New Zealand” in Sharp and McHugh (eds), *supra* note 4, 191; Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 *Harv Int’l LJ* 3, 21-22. Anghie states: “For positivists, consequently, the concepts and classifications they employed could be used to order history and society, but these same concepts and classifications were outside and beyond history. This was one means by which positivism presented itself as universal and eternal, existing in a realm beyond the reach of historical scrutiny. Positivism, in this way, sought to suppress its own past.”

¹⁰ Francis, “The Nineteenth Century Theory of Sovereignty and Thomas Hobbes” (1980) 1 *History of Political Thought* 517, 534-538.

¹¹ Ibid 528. Francis argues (527) that Austin’s selective reliance on Hobbes’ theory allowed him “to detach law from its original justification and to attach it to the authority personally held by the legislator”.

¹² Dicey, *supra* note 8, 39.

¹³ Francis, *supra* note 10, 520.

¹⁴ Ibid 531.

principle of the constitution".¹⁵ This is however, a matter of debate. Though Stapleton argues that the Rule of Law was for Dicey "the foundation and guarantor of all constitutional authority"¹⁶ - a more important branch of the common law constitution than Parliamentary sovereignty¹⁷ - it is Dicey's conception of Parliamentary sovereignty which has captured the modern imagination, providing support for the view that the doctrine of Parliamentary sovereignty is "the most fundamental element of the British legal system" and has long been regarded as such.¹⁸ Dicey may have envisaged that the Rule of Law would play an important role in the common law constitution, but in many cases it seems to be little more than a fig leaf: a principle which serves only to legitimise absolute Parliamentary sovereignty.¹⁹

III A FRAGILE RULE OF LAW

The Queen's writ did not run throughout all districts of New Zealand till long after 1865.

- The Court of Appeal in *Hohepa Wi Neera v Bishop of Wellington*.²⁰

The growing recognition of absolute Parliamentary sovereignty as a "legal fact", free from the demands of a justificatory theory, was significant in the New Zealand context. In the period of colonisation leading to the events of the early 1880s, New Zealand's imported

¹⁵ Dicey, supra note 8, 202-203. Dicey viewed the Rule of Law as bearing three meanings: the absolute supremacy of regular law as opposed to arbitrariness; equality before the law; and the idea that the constitution was the result of the ordinary law of the land, rather than a constitutional code.

¹⁶ Stapleton, "Dicey and His Legacy" (1995) 16 *History of Political Thought* 234, 236.

¹⁷ Ibid 255-256. See also Hibbits "The Politics of Principle: Albert Venn Dicey and the Rule of Law" (1994) 23 *Anglo American Law Rev* 1 where he argues that Dicey's project was underpinned by his fundamental individualism; Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1983) 46 *MLR* 102, 108 (book review) emphasising that "the task of the 'Rule of Law' was to specify the scope and limits of autonomous conduct".

¹⁸ Goldsworthy, supra note 7, 236. Contrast Edlin, supra note 7.

¹⁹ See generally Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467, 470-474 where Craig argues that Dicey gave a formal meaning to the Rule of Law. Unger's view that the Rule of Law is a convenient legitimising mask for substantive injustice is discussed at 474-477. See also Sugarman, supra note 17, 110.

²⁰ (1902) 21 *NZLR* 655, 666. See also "Note to page 130" in *Notes on Sir William's Pamphlet Entitled 'The Taranaki Question' (Revised Copy, Hocken Library)* (1861) where the authors acknowledge that "the existence of British law has been practically a fiction, except in the immediate neighbourhood of the English settlements"; Tate, "*Hohepa Wi Neera*: Native Title and the Privy Council Challenge" (2004) 35 *VUWLR* 73.

constitutional order was weak. The sovereignty claimed by the United Kingdom Parliament was, in many areas of New Zealand, power on paper, not in practice. So in some respects, the discourse of the Victorian jurist was eminently suited to the struggling settler state: the common law constitution provided a sense of ideological stability and the Rule of Law a symbol of moral justice. This constitutional ideal became increasingly important after the move to responsible government²¹ with the development of a “colonial consciousness”²² that focused on the need to maintain the security and stability of the settlement process. But the settler state was no Britannia and, when the rhetoric is considered in light of the reality of conflict, the adoption of the language of sovereignty reveals underlying insecurity.

Brookfield’s analysis in *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* provides a good starting point for study of the early colonial period. Brookfield begins by establishing that the proclamations of sovereignty of 1840 were revolutionary seizures of power.²³ They assumed authority not ceded by the Treaty of Waitangi and, with respect to non-signatories, they amounted to a conquest of the established order.²⁴ Following Kelsen, this revolutionary change is characterised as a process by which a new basic norm or *grundnorm*, that of sovereignty of the Crown in Parliament, became the presupposition upon which all norms within the hierarchy of rule were based. In this ‘pure theory’ of law, the legal validity of the change may be judged by the general effectiveness of the system, irrespective of its moral worth.²⁵

The revolutionary seizure of power set out by Brookfield was, at the time of Parihaka, incomplete in a Kelsenian sense because the Crown lacked effective control of much of the country. In the period between 1840 and the early 1880s, the colonial state would have struggled to meet Brookfield’s requirement that, to be considered in *de facto* control of a territory, a revolutionary government must be “both effective and firmly established with no real danger of being ousted”.²⁶

²¹ The first responsible New Zealand government was formed in 1856. Māori affairs were formally reserved to the Governor until 1864. See Joseph, *Constitutional and Administrative Law in New Zealand* (2 ed, 2001) 103.

²² Tate, *supra* note 20, 98-99 describes how the New Zealand Court of Appeal in *Hohepa Wi Neera* tried to avoid the consequences of the Privy Council’s partial departure from the *Wi Parata* decision in *Nireaha Tamaki v Baker* [1901] AC 561. Tate argues that the judges’ partiality to settler interests reflects a “colonial consciousness”: “a state of mind imbued with a fundamental commitment to settler interests within colonial society”.

²³ Brookfield, *supra* note 3, 15.

²⁴ *Ibid.*

²⁵ *Ibid* 17.

²⁶ *Ibid* 35.

But it was not simply the Crown's control of the polity that was thought to be defective. Brookfield acknowledges that the rightfulness of the Crown claim to sovereignty over New Zealand was questioned, not only by Māori, but also by some of those charged with the government of the new territory.²⁷ However, Brookfield draws a distinction between the rightful claim of a revolutionary legal system and its ultimate success. He emphasises efficacy in this analysis, stating that defects of legitimacy may be cured in part by the passage of time. Any relationship between revolutionary success and legitimacy is not explored.

The success of the Crown's seizure of power and its legitimacy were challenged in the New Zealand Wars. Though focused on questions of land, they were, as James Belich argues, "more akin to classic wars of conquest than we would like to believe".²⁸ The hapū of the Waikato and some in the Taranaki had not signed the Treaty of Waitangi,²⁹ consented to changes in their existing political systems, or been conquered. Arguably, they were not effective subjects of the Queen.³⁰ Brookfield characterises the conflict as a series of Māori counter-revolutions which challenged the legality of colonial authority, judged by a standard of effective territorial control.³¹ Equally though, the hapū of the Waikato and Taranaki staked a political claim that should have been familiar to the coloniser - the right to be governed by consent³² - and if the New Zealand Wars are viewed as a challenge to Crown sovereignty on this basis, it may be argued that the separation of legality and legitimacy relied upon by Brookfield was also challenged.

The colonial government's response to challenges to its authority also supports an analysis of the New Zealand Wars that acknowledges some relationship between legality and legitimacy. David Beetham notes that significant state breaches in legality most often follow the loss of authority created by acts questioning the legitimacy of the state. These acts, referred to by Beetham as "acts of delegitimation", usually occur in an environment where the legitimacy of the constitutional order is weak.³³ Those who claimed ownership of the land

²⁷ Ibid 108.

²⁸ Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (1986) 80. See also Sharp and McHugh (eds), *supra* note 4, 112.

²⁹ See generally Waitangi Tribunal, *supra* note 2, 25. See also Orange, *The Treaty of Waitangi* (1987) 73-77.

³⁰ The relationship of Māori to the Queen was ambiguous. This is discussed, together with the Native Rights Act 1865, by Brookfield, *supra* note 3, 111 - 113.

³¹ Brookfield, *supra* note 3, 107.

³² See generally Anghie, *supra* note 9, 71. Anghie describes consent as "the very bedrock of the positivist system".

³³ Beetham, *The Legitimation of Power* (1991) 211.

at Waitara did not doubt the state had breached self-imposed standards of legality. In a statement to the Superintendent of the Province of Wellington dated July 29 1860 they said:³⁴

We ask this question. What are we, peaceable persons, who are not joining in the fighting, to do when our lands are wrongly taken away by the Governor? Where shall we seek a way by which we may get our lands restored to us? Shall we seek it from the Queen, or from whom? We imagined that it was for the law to rectify wrongs. Up to this time our hearts keep anxiously inquiring. We will say no more. From us, members of *Ngatiawa*, and owners of that land at Waitara.

The former Chief Justice of New Zealand, Sir William Martin, also voiced his opposition in a pamphlet entitled ‘The Taranaki Question’ published in 1860.³⁵ In deploring the deprivation of a claimed right to land without due process, ³⁶ Martin appealed to Article III of the Treaty of Waitangi (the promise to Māori of the full privileges of British subjects). The former Chief Justice described the right to be heard as “a fundamental principle of our English Government”³⁷ and argued that the principle which forbade the Executive Government from exercising its power without “due sanction of Law” was not “the pedantry of a lawyer”, nor the “theory of bookmen”, but “the practical wisdom of the men who built up our English Commonwealth”.³⁸ In Martin’s view, the Rule of Law was no mere fig leaf.

Martin’s conception of the role of the Rule of Law in the common law constitution, or at least its proper application in the New Zealand context, was apparently not that of the decision-makers. The New Zealand government replied in a set of notes first issued in 1860.³⁹ The notes did not have a statement of authorship but have subsequently been attributed to Francis Dillon Bell, Thomas Gore Browne and

³⁴ Hadfield, *The Second Year of One of England’s Little Wars* (1861) Appendix K.

³⁵ Martin, *The Taranaki Question* (1860). In his time on the bench, Martin CJ had joined with Chapman J in *R v Symonds* (1847) NZPCC 387, 388-393 in determining that native title was recognised by the common law as an essential part of the body of principle supporting the “intercourse of civilised nations”. See also Hickford, “‘Settling some Very Important Principles of Colonial Law’: Three ‘Forgotten’ Cases of the 1840s” (2004) 35 VUWLJ 1, for a discussion of a “forgotten” line of cases determined by Martin CJ and Chapman J in the late 1840s.

³⁶ Martin, *supra* note 35, 46-47 and 82. See also Hadfield, *supra* note 34, 26. Archdeacon Hadfield states: “[t]he rights and privileges of British subjects’ must mean at any rate the opposite to despotism. The proceedings of the Government at Waitara were pure despotism”.

³⁷ *Ibid* 46.

³⁸ *Ibid* 62.

³⁹ Notes on Sir William Martin’s Pamphlet Entitled the Taranaki Question [1861] 1 AJHR E2 39-67 [“Notes on Sir William Martin’s Pamphlet”]

Frederick Whitaker collectively⁴⁰ who, at the time of publication, were a Member of Parliament, the Governor of the colony, and the Attorney-General respectively. The authors criticised the distinction drawn by Sir William between the concept of *kāwanatanga* and that of *tino rangatiratanga* arguing that despite the difficulties of translation Māori had clearly “placed themselves under a new and paramount authority” while retaining “whatever rights of property they had in their lands”. If, however, Māori had not understood that the Treaty established a sovereign authority this was “not to be wondered at if the thing represented *had no existence among themselves; but if the thing existed, they knew what they were surrendering or retaining*”.⁴¹ So, even if the words used in the Treaty of Waitangi did not surrender the right of the Chiefs “to exercise dominion over the other members of the tribe” to forbid the sale of land this was “the best proof that it had no existence ‘*as a right*’” among Māori.⁴²

It is clear that the constitutional system introduced by colonisation was by no means ‘perfected’. The nature of the Crown’s claim to sovereignty was contested, and the principles by which the country should be governed were in dispute. On Brookfield’s analysis, the New Zealand Wars demonstrate the struggle of the colonisers to complete the revolution they had begun by extending the Queen’s writ. The conversation between Sir William and his critics would suggest however that the conflicts were of wider significance and that law provided a basis upon which to question the legitimacy of government action. The former Chief Justice viewed the second pillar of the Diceyan constitutional order, the Rule of Law, as an integral and effective part of the common law constitution. He emphasised the Treaty of Waitangi and evoked the rhetoric of consent, of government that reflects the will of the people. Divorced from this context, and the protection of the Rule of Law, Sir William feared the subject would have “no security against the aggressions of the Government”-⁴³ the very tyranny against which Parliamentary sovereignty had historically guarded.

⁴⁰ See *Notes on Sir William Martin’s Pamphlet Entitled ‘The Taranaki Question’*, supra note 20, introductory note.

⁴¹ *Notes on Sir William Martin’s Pamphlet*, supra note 39, 45 (original emphasis).

⁴² *Ibid.* See also Busby, *Remarks Upon a Pamphlet Entitled “The Taranaki Question”, by Sir William Martin, D.C.L., Late Chief Justice of New Zealand* (1860).

⁴³ *Martin*, supra note 35, 46.

IV PARIHAKA - THE RIGHT TO SELF-GOVERNMENT

The land is still lying quiet, and there is no one to say anything about it. The dispute between yourselves and Te Whiti is on the question of your chieftainship or superiority.⁴⁴

There is little doubt that the community at Parihaka posed a significant challenge to the young colonial state struggling to assert its dominance. The very physical presence of the community, drawing members from across the islands, was concrete evidence that the Crown's claim to govern New Zealand effectively was a feeble one. The development of the community seems to have begun with the outbreak of war in Taranaki, which, according to some sources, caused its leaders Te Whiti o Rongomai and Tohu Kakahi to move inland to escape the fighting in the mid 1860s.⁴⁵ A growing group of Māori soon gathered around Te Whiti and Tohu to follow their way of life, which was inspired by a mix of the Christian philosophies that the two leaders had been exposed to at Johann Riemenschneider's mission school⁴⁶ and Māori spiritual teachings. These spiritual beliefs were the foundation for a community characterised by "discipline, faith, organisation and development"⁴⁷ that became both prosperous⁴⁸ and influential. It soon became clear that the leaders of Parihaka commanded allegiance where the colonial government did not. When Charles Brown, the government's Civil Commissioner for Taranaki, suggested that Te Ika, who would later be imprisoned for ploughing, should petition Parliament with his grievances about the land surveys, Te Ika's answer was plain. He said that "he could not acknowledge Parliament without denying the prophet Te Whiti".⁴⁹ Parihaka was indeed a self-sustaining world within the colonial state; a

⁴⁴ Tutahau, Proceedings and Evidence of the West Coast Commission, sitting in Oeo, Friday 20th February 1880. Reports of the Royal Commission Appointed under 'The Confiscated Lands Inquiry and Maori Prisoners' Trials Act, 1879' (*West Coast Commission: Proceedings and Evidence*) [1880] 2 AJHR G2 7.

⁴⁵ Riseborough, *Days of Darkness* (2 ed, 2002) 49-50 ["*Days of Darkness*"]; Keenan, *Te Whiti-o-Rongomai III, Erueti* (2005) Dictionary of NZ Biography <<http://www.dnz.govt.nz>> (at 30 September 2005).

⁴⁶ Smith, *Tohu Kakahi* (2005) Dictionary of NZ Biography <<http://www.dnz.govt.nz>> (at 30 September 2005).

⁴⁷ Waitangi Tribunal, *supra* note 2, 200.

⁴⁸ Olson, *supra* note 2, 68. Alfred Fromm's journal describes riding with the "War Minister Bryce" to Parihaka to "reconnoitre the position there... but instead of finding Maori redoubts as the Colonel had been told, we saw nothing else here but some extra strong fences. The whole area behind the Maori settlement at Parihaka was well-cultivated, miles and miles planted with potatoes and maize".

⁴⁹ Commencement of Survey of Waimate Plains [1878] 2 AJHR G5 1.

status, which while noted extensively by modern historians, was also widely recognised by contemporaries, a visitor of 1881 describing Parihaka as “New Zealand’s Andorra”.⁵⁰ James Cowan, an early twentieth century historian, commented that “[b]y 1879 Parihaka had grown into a little republic, with Te Whiti as the temporal and spiritual president”.⁵¹ It is little wonder that the colonial government was getting nervous.⁵²

The claim of Parihaka and other Māori communities to self-governance was not, however, unfounded in law. The treaty process had been instigated with a view to securing Māori consent, at least notionally, to British rule. Article II of Te Tiriti o Waitangi, reserving tino rangatiratanga, indicated a right to autonomous self-government. Predating the Treaty, the Declaration of Independence of 1835, which recognised the concept of mana, had established that rights to self-government were inherent in the operation of the pre-revolutionary constitutional order.

Section 71 of the New Zealand Constitution Act 1852 also demonstrates that the potential for Māori self-government had been recognised.⁵³ The provision permitted the Queen, on the issue of letters patent, to declare a district of native self-government. This power, exercisable on the advice of the Secretary of State of the United Kingdom, could also be delegated to the Governor.⁵⁴ Delegation occurred at least once, in 1858,⁵⁵ but, despite several requests,⁵⁶ the power to establish a self-governing district was itself never exercised.⁵⁷

Common law precedent may also have been applied to support Parihaka in its claim to self-government. The common law doctrine of aboriginal rights, applied to title to land in *R v Symonds*,⁵⁸ could have

⁵⁰ Sinclair, *Kinds of Peace* (1991) 25.

⁵¹ Cowan, *supra* note 2, 477.

⁵² Riseborough, *Days of Darkness*, *supra* note 45, 51, 154 and 172. Riseborough describes Parihaka as a “haven for the dispossessed”. Estimates of attendance, both visitors and residents, at the September 1881 half-yearly meeting at Parihaka, range from 2000 to 3000 people. By the invasion of Parihaka in November of that year, a community of about 2200 people waited for the troops at the Parihaka marae.

⁵³ There was also a similar provision in the 1846 constitution.

⁵⁴ The power was able to be delegated to the Governor until 1892. See s 79 of the New Zealand Constitution Act 1852.

⁵⁵ The power to establish a self-governing district was delegated to Governor Gore Browne in 1858. *New Zealand Gazette February 11 1858* (1858) *New Zealand Gazette* 21.

⁵⁶ Kingitanga sought to have the King Country so proclaimed and sent delegations representing Kingi Tawhiao and Kingi Te Rata to petition the monarch in London. See Binney, Bassett and Olssen, *The People and the Land. Te Tangata me te Whenua* (1990) 155, 205 and 230.

⁵⁷ See *R v Knowles*, noted in (Dec 1998-Jan 1999) *Maori LR* 1.

⁵⁸ (1847) NZPCC 387. The receptivity of Chapman J in particular to using United States’ legal sources, including the jurisprudence of the Marshall Court, in colonial New Zealand is discussed by

been interpreted to include rights to self-government, as it had been by the Supreme Court of the United States in the 1830s.⁵⁹

These alternative avenues of constitutional development were not acknowledged or explored. Instead, New Zealand jurisprudence took a path exemplified by the judgment of Chief Justice Prendergast in *Wi Parata v The Bishop of Wellington*.⁶⁰ The Chief Justice not only infamously declared the Treaty “a simple nullity” insofar as it purported to cede sovereignty to the Crown, but, in asserting that Māori could not be capable of ceding something which they never had, denied the very existence of Māori as sovereign peoples.⁶¹ McHugh describes the decision as “serv[ing] to eliminate Maori from any doctrinal or historical presence in the constitutional space known as New Zealand”.⁶²

V PROTEST – THE CHALLENGE OF CIVIL DISOBEDIENCE

The land is mine: I do not admit your right to survey it. My blanket is mine: do you think it would be right for you to attempt to drag it from my body and clothe yourself with it? ... You want to cut my blanket in two. It will be too small for me then ... You say, ‘Let me and the Governor sit down on the blanket together.’ The Governor will not do that; he is dragging it all away for himself ... It seems to me, from the way the surveys are being conducted that you wish to take the whole of the blanket and leave me naked.⁶³

The community of Parihaka grew in a climate that was hostile to Māori self-government. A dual logic of self-defence and rapid expansion

Hickford, *supra* note 35, 13-17. Hickford notes however that the use of United States law was contentious in certain areas, especially in relation to questions of Maori property rights and “native title”.

⁵⁹ *Cherokee Nation v Georgia* (1831) 30 US 1; *Worcester v Georgia* (1832) 31 US 515; *Mitchel v United States* (1941) 40 US 52; McHugh, *supra* note 9, 194.

⁶⁰ (1877) 3 NZ Jur (NS) SC 72.

⁶¹ Anghie, *supra* note 9, 39-62. The *Wi Parata* decision highlights Anghie’s thesis that to effect the project of colonisation, it was essential that European states exclude indigenous peoples from the club of sovereign nations and to deny their mechanisms of rule the status of ‘law’.

⁶² McHugh, *supra* note 9, 193. See also McHugh, “Tales of Constitutional Origin and Crown sovereignty in New Zealand” (2002) 52 UTLJ 69, 77-80. Compare Morris, “James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century” (2004) 35 VUWLR 117 and Tate, *supra* note 20, 98.

⁶³ Te Whiti speaking to Mackay. Reports of the Royal Commission Appointed under ‘The Confiscated Lands Inquiry and Maori Prisoners’ Trials Act, 1879’ (Telegram from Mr McKay and Mr Blake to Hon Mr Sheehan on the subject of their visit to Te Whiti at Parihaka) [1880] 2 AJHR G2 Appendix A9, 10-11.

prevailed as the colonial government struggled to effect the seizure of power. Pockets of pluralism were squeezed by the pressure for land and the drive for the enforcement of the Queen's writ. This brought the colonial government into conflict with the people of Parihaka when, in July 1878, the survey of the Waimate plains under the New Zealand Settlements Act 1863 began.⁶⁴ The community's response was a campaign of thoughtful protest, designed to articulate land grievances. More than 600 people were detained⁶⁵ and would later wear the *raukura*, the albatross feather, as a mark of their *mana* and a symbol of peace.⁶⁶

Protest was triggered in May 1879 by the Native Minister Sheehan's failure to mark out promised reserves for Māori⁶⁷ and insistence on sending representatives of lesser standing only.⁶⁸ The protest was begun by a group of unarmed men who ploughed Te Whiti's *moko* into the land at Oakura, where war had originated in 1863.⁶⁹ As the ploughing continued, each site was selected to highlight an unresolved land claim or unjust confiscation. Only people of *mana* were involved, including leaders who had previously been loyal to the Crown.⁷⁰ The pacific nature of the protest was integral. Te Whiti and Tohu counselled against retaliation. Te Whiti was reported to have said:⁷¹

Go, put your hands to the plough. Look not back. If any come with guns and swords be not afraid. If they smite you,

⁶⁴ The proclamation of the Taranaki lands district was promulgated by Order in Council on 2 September 1865: *The New Zealand Gazette September 5 1865* (1865) 35 *New Zealand Gazette* 265. Many argue that the confiscations under the New Zealand Settlements Act 1863 were unlawful: Waitangi Tribunal, *supra* note 2, 9-10, 215; Governor Gordon, Wellington, 29 December 1879, "Confidential despatches and telegrams to the Rt Hon Earl of Kimberley at the Colonial Office 13 February 1870 – 1 June 1886, Wellington 31 January 1880" G, 26/1 [Archives New Zealand/Te Rua Mahara o te Kāwanatanga, Head Office, Wellington]; Cowan, *supra* note 2, 477; (11 December 1879) 34 NZPD 864 (Sir Francis Dillon Bell); Riseborough, *Days of Darkness*, *supra* note 45, 47. A committee of nine prominent chiefs planned to test the validity of the Acts permitting confiscation in the Supreme Court: Volume of documents written by Maori 1879, "Translation of Manifesto Wellington, August 26 1879" MA, 24/20 [Archives New Zealand/Te Rua Mahara o te Kāwanatanga, Head Office, Wellington].

⁶⁵ Waitangi Tribunal, *supra* note 2, 226-228.

⁶⁶ Keenan, *supra* note 45.

⁶⁷ Riseborough, *Days of Darkness*, *supra* note 45, 29 and 45. The Government had stated that, if the land of loyal natives was confiscated, they would be resettled on reserved land.

⁶⁸ Sheehan met with Te Whiti once in March 1879. See *infra* note 80.

⁶⁹ Low and Smith, "Nonviolence at Parihaka during New Zealand's Colonial Period" in Kumar and Low (eds), *Legacy and Future of Nonviolence* (1996) 162.

⁷⁰ Waitangi Tribunal, *supra* note 2, 225-226. The eldest son of Wi Parata was also arrested: Solomon, *Parata, Wiremu Te Kakakura* (2005) Dictionary of New Zealand Biography <<http://www.dnzb.govt.nz/>> (at 30 September 2005).

⁷¹ Waitangi Tribunal, *supra* note 2, 225 n 24. See also Rusden (ed), *Aureretanga Groans of the Maoris* (2000) 92-93.

smite not in return. If they rend you, be not discouraged.
Another will take up the good work.

The second campaign began in June 1880, after roadmakers, who had been greeted on arrival in the plains by gifts of fruit and vegetables,⁷² cut through the fences around cultivations, allowing stock to wander into unprotected fields. The fencers, sent out daily to repair the gaps in the fence, were arrested, the stand-off ending only when the fencers began erecting slip rails.⁷³

The actions chosen by the leaders of Parihaka to articulate their grievance were deliberate, public, and peaceful. However, the significance of accepting the legal consequences of a protest may be interpreted in several different ways. John Rawls views the problem of civil disobedience as arising “only within a more or less just democratic state for those citizens who recognize and accept the legitimacy of the constitution” and identifies the dilemma of the civil disobedient as arising from a conflict of duties: the duty to obey the law made legitimately within constitutional limitations on the one hand, and the duty to obey a moral standard on the other.⁷⁴ This view is similar to that of Dworkin as neither theorist believes that civil disobedience poses a challenge to the fundamental legitimacy of the state.⁷⁵

By contrast, Paul Morris argues the protest demonstrated that “Parihaka threatened an autonomy outside of the encompassing legal and political framework of the state”.⁷⁶ This view captures a tension operating in each choice to plough or fence. Te Whiti and Tohu were willing to acknowledge Pakeha leaders and stopped all ploughing when the Minister and his officials visited the area but, when their own political leadership was ignored, the ploughing resumed.⁷⁷ The community was not involved in the hearings of the West Coast Commission (set up to assess whether the government had reneged on its promises of reserves)

⁷² Bryce wrote of the gifts of food in a telegram to Governor Hercules Robinson on 27 February 1880:

I am not inclined to attach very much importance to the fact of presents being thus repeatedly made, but I should say, upon the whole, the indication is in favour of peace.

“Confidential despatches and telegrams to the Rt Hon Earl of Kimberley at the Colonial Office 13 February 1870 – 1 June 1886, Wellington 31 January 1880” G, 26/1 [Archives New Zealand/Te Rua Mahara o te Kāwanatanga, Head Office, Wellington]. See also despatch of 31 January 1880.

⁷³ Riseborough, *Days of Darkness*, supra note 45, 126-127.

⁷⁴ Rawls, “Civil Disobedience” (1971) in Dyzenhaus and Ripstein (eds), *Law and Morality: Readings in Legal Philosophy* (2 ed, 2001) 521.

⁷⁵ Dworkin, “Civil Disobedience” (1979) in Dyzenhaus and Ripstein (eds), supra note 74, 543.

⁷⁶ Morris, “The Provocation of Parihaka: Reflections on Spiritual Resistance in Aotearoa” in Hohaia, O’Brien and Strongman (eds), *Parihaka: The Art of Passive Resistance* (2001) 113.

⁷⁷ Waitangi Tribunal, supra note 2, 225.

or the Native Land Court,⁷⁸ and when reserves vested in the public trustee were finally leased to settlers, the people of Parihaka refused to accept the proceeds.⁷⁹ Equally, when the Native Minister Sheehan demanded that Hiroki, a man accused of murder sheltering at Parihaka, be surrendered up to be tried at the Supreme Court, Te Whiti replied that the Court could come to Parihaka, where Hiroki could be tried under his direction.⁸⁰

Most importantly, Te Whiti's statements support an analysis of the campaign of civil disobedience that recognises the fundamental nature of the challenge mounted. RS Thompson, a government interpreter working with the survey parties, reported that Te Whiti "said it was supposed that his men were simply sent to plough the confiscated lands but that they were really sent to plough the belly of the Government".⁸¹ This view of civil disobedience contrasts with that of Rawls and Dworkin and foreshadows the powerful spiritual and political protests of the 20th century. Where protest questions the legitimacy of the constitutional order rather than a rule within that system, acts of civil disobedience may aim to provoke change in the basic grundnorm, or draw attention to the limits of allegiance that the law can claim.⁸²

⁷⁸ *Ibid* 224.

⁷⁹ Riseborough, *Days of Darkness*, *supra* note 45, 215.

⁸⁰ This meeting, in March 1879, was the only one that took place between Te Whiti and Sheehan. Though it seemed that the question of reserves was to be on the agenda, the meeting ended quickly after the discussion about Hiroki. See Interviews Between the Hon. the Native Minister and Te Whiti [1879] 1 Session II AJHR G7 1; Riseborough, *Days of Darkness*, *supra* note 45, 237 n 51.

⁸¹ July correspondence 1879, "Telegram to Colonel Whitmore, September 19 1879" LE 1, 1879/135 [Archives New Zealand/Te Rua Mahara o te Kāwanatanga, Head Office, Wellington].

⁸² See e.g. Martin Luther King Jr, "Letter From a Birmingham Jail" in Dyzenhaus and Ripstein (eds), *supra* note 74, 233; Mandela, "Speech from the Dock" (1962) in Dyzenhaus and Ripstein (eds), *supra* note 74, 562-3. See also Korsgaard, "Taking the Law into Our Own Hands: Kant on the Right to Revolution" (1997) in Dyzenhaus and Ripstein (eds), *supra* note 74, 573, 595 where Korsgaard argues, using the writings of Kant, that acts of civil disobedience may be rationalised as part of a revolt against an unjust regime.

VI REACTION – THE COLONIAL GOVERNMENT ACTS AGAINST PARIHAKA

- ... if the Natives plough again arrest them all
- George Grey to Inspector Foster Goring of the Armed Constabulary.⁸³

- ... you take the men and the government will find the law
- Native Minister Sheehan to the Armed Constabulary.⁸⁴

When, on 29 June 1879, Grey bowed to settler pressure to act against the ploughmen,⁸⁵ the crucial choice for a state at a crisis point between concession and repression was made.⁸⁶ The new grundnorm relied upon the notion of indivisible sovereignty and Parihaka endangered the completion of the seizure of power. Te Whiti was an obstacle to “the advance of civilization” on the West Coast, and Parihaka “a problem unsolved, but one which, in the interests of colonisation, had to be solved”.⁸⁷

The first piece of legislation passed, the Maori Prisoners’ Trials Act 1879, postponed the trials of the ploughmen.⁸⁸ This was followed, four months later, by the Confiscated Lands and Maori Prisoners’ Trials Act 1879 which extended the period for which the prisoners could be held without trial and established a Commission “for the purpose of inquiring into all promises and engagements that have been made or are alleged to have been made by or on behalf of the Government of the colony” to the people of the West Coast.⁸⁹ John Bryce, the new Native Minister, reassured the House that the Bill “assumed the validity of the act of confiscation” and berated his colleagues who lingered over discussion of the writ of habeas corpus, arguing that “the honourable gentleman [opposing the Bill] would have proved himself a better statesman if he had not dwelt so much upon mere legal technicalities”.⁹⁰

When the Maori Prisoners’ Trials Act 1879 was set to expire, Parliament passed the Maori Prisoners Act 1880, which, as the short title

⁸³ June correspondence, LE 1, 1879/135 [Archives New Zealand/Te Rua Mahara o te Kāwanatanga, Head Office, Wellington].

⁸⁴ Ibid.

⁸⁵ Riseborough, *Days of Darkness*, supra note 45, 87-88.

⁸⁶ Beetham, supra note 33, 217.

⁸⁷ (16 July 1880) 36 NZPD 284-285 (John Bryce).

⁸⁸ Maori Prisoners’ Trials Act 1879, ss 2 and 3.

⁸⁹ The Confiscated Lands Inquiry and Maori Prisoners’ Trials Act 1879, s 2.

⁹⁰ (8 December 1879) 34 NZPD 797 (John Bryce).

suggests, abandoned any pretence that the prisoners would be tried. The Act provided that “[n]o Court, Judge ... shall ... discharge, bail or liberate the said Natives ... any law or statute to the contrary notwithstanding”.⁹¹ John Bryce was frank in moving the second reading of the Bill:⁹²

This is not a Maori Prisoners’ Bill that I am now proposing. The truth is, it was a mere farce to talk of trying these prisoners for the offences with which they were charged ... If they had been convicted, in all probability they would not have got more than twenty-four hours’ imprisonment, if so much, in addition to the term of imprisonment they had already served ... Now in this Bill we drop that provision in regard to the trial altogether. We consider that to be a mere sham; and what we ask for now is that the Government shall have the power to say whether these men are to be detained in captivity or to be released.

Just two weeks later, The Maori Prisoners’ Detention Act 1880 was passed in response to concerns that the activities of the fencers fell under no criminal offence, and that their arrests may have been unlawful.⁹³ The Act had the effect of rendering the arrests legal *ex post facto*. Fox, the West Coast Commissioner who had sat in judgment on the claims to confiscated lands, refuted claims that the legislation was unconstitutional by stating, “that which the Parliament said was constitutional was no longer unconstitutional”.⁹⁴

The next piece of legislation, The West Coast Settlement (North Island) Act 1880, was passed several months later. The Act claimed to empower the Governor to “take such steps as may be necessary for the final settlement of the difficulties that exist on the west coast”⁹⁵ by providing for arrest without warrant and imprisonment for up to two years for a range of new offences including endangering the public peace by removing survey pegs, wilfully ploughing, or erecting any fence.⁹⁶

It is clear that the removal of the right to trial, the suspension of habeas corpus,⁹⁷ and the retrospective criminalisation of the protestors’

⁹¹ Maori Prisoners’ Trials Act 1879, s 4.

⁹² (16 July 1880) 36 NZPD 285 (John Bryce).

⁹³ Waitangi Tribunal, *supra* note 2, 227.

⁹⁴ (30 July 1880) 37 NZPD 17 (William Fox).

⁹⁵ West Coast Settlement (North Island) Act 1880, Preamble.

⁹⁶ West Coast Settlement (North Island) Act 1880, s 6(2)-(4).

⁹⁷ The right to habeas corpus had been set out in the Habeas Corpus Acts of 1679 and 1816 (Imp), which ceased to have effect as part of the laws of New Zealand on 26 May 2001.

actions breached significant Rule of Law principles and abrogated the right to liberty of the subject, pledged by the Magna Carta in 1297.⁹⁸ It was not however beyond the powers of the settler government to remove these rights by legislation. The Colonial Laws Validity Act 1865 had “abolished once and for all the vague doctrine of repugnancy to the principles of English law as a source of invalidity of any colonial Act”⁹⁹ and had established a broad power to legislate for “peace, order and good government” of the colony. After the 1865 Act, it was widely accepted that the laws of a colony had the “operation and force of sovereign legislation” in controlling its inhabitants¹⁰⁰ and that the words “peace, order, and good government” were intended to “connote ... the widest law-making powers appropriate to a Sovereign”.¹⁰¹ As a result, colonial legislatures could pass legislation that suspended habeas corpus and indemnified all persons for failure to act lawfully in situations of emergencies or insurrections.¹⁰²

The principles of the Rule of Law were however valued by many contemporaries as important legal ideals.¹⁰³ So although it was recognised that the suspension of the right of habeas corpus could be justified as an extraordinary measure necessary for the preservation of peace,¹⁰⁴ many opponents of the government’s treatment of the Parihaka community were unwilling to accept the government’s assurances that it was “indispensable for the peace and safety of the colony that the ordinary course of law be suspended”.¹⁰⁵

⁹⁸ Magna Carta 1297 (Imp). Section 29 of the Magna Carta, providing that there shall be no imprisonment contrary to law, remains part of New Zealand law.

⁹⁹ *Liyanage v R* [1967] 1 AC 259, 284. Their Lordships cite Keith, *The Sovereignty of the British Dominions* (1929) 45 for the proposition.

¹⁰⁰ This statement from *Phillips v Eyre* (1870) LR 6 QB 1, 20 was referred to with approval by Stout CJ in *Huddart-Parker & Co Pty Ltd v Nixon* (1910) 29 NZLR 657, 663.

¹⁰¹ *Ibralebbe v R* [1964] AC 900, 923 per Viscount Radcliffe cited in *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733, 747. See also *Liyanage v R* [1967] 1 AC 259, 272 and Swinfen, *Imperial Control of Colonial Legislation 1813-1865* (1970) 6, 95 and 170.

¹⁰² See generally Clark and McCoy, *Habeas Corpus* (2000) 180, 183-185 for further discussion of habeas corpus in the context of the New Zealand Wars and Parihaka.

¹⁰³ See e.g. Mr Stewart speaking on the Confiscated Lands Inquiry and Maori Prisoners’ Trials Bill (2 December 1879) 34 NZPD 621-622 (Stewart). For Mr Stewart’s discussion of habeas corpus and ex post facto legislation see (16 July 1880) 36 NZPD 286-287 (Stewart).

¹⁰⁴ See Brookfield, *supra* note 3, 131. Parliament had passed such legislation, the Suppression of Rebellion Act 1863, and was advised at the time by the English Law Officers of the Crown that such emergency legislation was justified as “... the laws of England have repeatedly recognised the necessity for exceptional legislation, to suppress a rebellion threatening the existence of the State”.

¹⁰⁵ Maori Prisoners’ Trials Act 1879, Preamble.

For others, the fear of war precluded all consideration of legal principle.¹⁰⁶ Mr Sheehan, speaking at the second reading of the Maori Prisoners' Bill, stated:¹⁰⁷

We have had this question put before us from a legal point of view. We have been told of a writ of habeas corpus, and things of that kind, which, to use a familiar expression, "no fellah can understand." ... Let no morbid sympathy with these people induce the Government of the country to give them a chance of committing crime which will not stop at the Taranaki, but which will spread to the Waikato, and ultimately lead to a war over the whole Island.

John Bryce's fear of the Parihaka community, which he regarded as "a standing danger and a constant menace to the peace of the colony",¹⁰⁸ was equally pervasive. Bryce feared that "the accidental discharge of a gun – many of the guns were at full cock – might have plunged the colony into war".¹⁰⁹

In London, distant from the trauma of the New Zealand Wars, the New Zealand government was challenged by British MP Charles Bradlaugh, who called upon the Colonial Office to take some action on behalf of the Māori prisoners "most unjustly detained ... without trial".¹¹⁰ Kimberley, the Secretary of State, felt inadequately informed about the circumstances of the detention and requested a full report.¹¹¹

The New Zealand Cabinet, conscious of Kimberley's interest in the prisoners, decided that the recently arrived Governor Gordon, a

¹⁰⁶ Ironically, the protestors' arrest was often justified on the basis that the ploughmen risked provoking the settlers to take the law into their own hands. See *Bryce v. Rusden: in the High Court of Justice, Queen's Bench Division, Royal Courts of Justice, Thursday, 4th March, 1886, before Baron Huddleston and a special jury*, 80 ["*Bryce v. Rusden*"]. See also Riseborough, *Days of Darkness*, supra note 45, 87; Riseborough, "Te Pāhuatanga o Parihaka" in Hohaia, O'Brien and Strongman (eds), *Parihaka: The Art of Passive Resistance* (2001) 28 ["Te Pāhuatanga"].
¹⁰⁷ (16 July 1880) 36 NZPD 301 (John Sheehan).

¹⁰⁸ *Ibid* 284.

¹⁰⁹ *Ibid* 285. See also Belich, supra note 28, 307. Belich argues that Bryce's fear is understandable to some extent. Titokowaru was a close ally of Te Whiti and Bryce had not forgotten the disastrous campaign against Titokowaru in 1868, in which he had fought as a young officer. See also (17 October 1879) 32 NZPD 358 (John Bryce) where in his "Native Statement" Bryce says:

Honourable members have very little idea of the state of anxiety in which those settlers live. Many of them are my intimate friends – gentlemen with whom I have been associated in a way that we are not likely to forget; and when I see them being actually ruined before my eyes by this state of things my feelings are really more than I can express

¹¹⁰ Bradlaugh, MP to the Hon Under Secretary of State for the Colonies (1881) 2 AJHR G7 1.

¹¹¹ Right Hon Earl of Kimberley to the Officer Administering the Government of New Zealand, (The Maori Prisoners, their Detention, Treatment etc.) (1881) 2 AJHR G7 1.

liberal Christian humanitarian, should speak with Te Whiti.¹¹² The Government was not prepared for Gordon to go to Te Whiti at Parihaka. Te Whiti would have to travel to Wellington, or at least to New Plymouth, for the meeting. So a letter from the Governor was dispatched to Parihaka. Unfortunately, Gordon's representative was accompanied by a local chief who was loyal to the government and by Charles Hursthouse, author of *New Zealand, the "Britain of the South"* and the government engineer and surveyor who had directed the construction of roads through the confiscated lands. Te Whiti's response to the emissaries was simple: "kua maoa te taewa" - the potato was cooked - and, unless the government was prepared to allow the Governor to go in person to Parihaka, the matter could no longer be discussed.¹¹³

Gordon did not meet with Te Whiti but continued to be active in native affairs- too active for the comfort of the government. In April 1881, Gordon indicated that he would be reluctant to sign further proclamations extending the operation of the Confiscated Lands Inquiry and Maori Prisoners' Trials Act 1879, particularly once Parliament was in session.¹¹⁴ So the remainder of the prisoners were duly released, some after two years of detention. Te Whiti was right however. By now the potato was well and truly cooked.

VII TE RĀ O TE PĀHUA - THE DAY OF PLUNDER

The Queen and the law must be supreme at Parihaka as well as elsewhere.

- W M Rolleston, A Proclamation, given under the hand of Sir James Prendergast, Chief Justice, the Administrator of the Government of her Majesty's Colony of New Zealand, 19th of October 1881.¹¹⁵

The government felt that the question of Parihaka needed to be solved and Governor Gordon's visit to Fiji in September of 1881, which left Chief Justice Prendergast as acting administrator, provided the opportunity. On the night of 19 October, with Gordon heading for

¹¹² Riseborough, *Days of Darkness*, supra note 45, 137.

¹¹³ Riseborough, *Days of Darkness*, supra note 45, 138.

¹¹⁴ Waitangi Tribunal, supra note 2, 205.

¹¹⁵ *The New Zealand Gazette Extraordinary October 19 1881* (1881) 83 *New Zealand Gazette* 1299, 1300.

Wellington through New Zealand's territorial waters,¹¹⁶ the Executive Council and Prendergast met to sign a special proclamation. The proclamation, issuing Te Whiti with a 14 day ultimatum - accept the government's offer of reserves or face further confiscation - was published that same evening in a Gazette Extraordinary.¹¹⁷

On November 5 1881 Bryce and his troops invaded Parihaka and arrested Te Whiti and Tohu. Those who refused to prove their tribal claim to remain in the area were arrested and relocated. Bryce would later admit that the only legal authority for the arrest of Parihaka's inhabitants was the West Coast Settlement Act 1880 and that he "was aware that in some sense the Government [was] exceeding the powers of that Act".¹¹⁸ The government continued to control gatherings at Parihaka after the invasion. A telegram sent from Lieutenant Colonel Roberts to Bryce on the 17th of April 1882 shows the extent of measures imposed:¹¹⁹

Detachment from Pungarehu and Newall Road arrived. Whares now being pulled down. Natives informed that it is in consequence of holding a meeting against your orders. Will destroy about a dozen whares round old marae. Do you wish any arrests made?

After the invasion of Parihaka, Te Whiti and Tohu were held on charges of sedition based on several press reports, which included ambiguous and conflicting translations of speeches made at a monthly meeting.¹²⁰ The government first applied to have the trial moved from New Plymouth,¹²¹

¹¹⁶ Gordon disputed the legality of the proclamation on the basis that he had been within New Zealand territorial waters at the time it was signed with little success: Governor Arthur Gordon, Wellington 22 October 1881, "Confidential despatches and telegrams to the Rt Hon Earl of Kimberley at the Colonial Office 13 February 1870 – 1 June 1886, Wellington 31 January 1880" G, 26/1 [Archives New Zealand/Te Rua Mahara o te Kāwanatanga, Head Office, Wellington].

¹¹⁷ *The New Zealand Gazette Extraordinary October 19 1881*, supra note 121, 1299.

¹¹⁸ *Bryce v. Rusden*, supra note 106, 129. *Bryce v. Rusden* was a claim in libel. Bryce claimed that Rusden had defamed him in *History of New Zealand*, which stated "Bryce earned amongst the Maoris a title which clung to him. They called him Kohuru (the murderer)". Bryce's actions at Parihaka were discussed as evidence that the statement was truthful or an honest opinion.

¹¹⁹ Assembling of Natives at Parihaka on the 17th April, 1882 (Copies of Telegrams relative to the) [1882] 2 AJHR G3 2.

¹²⁰ See generally Riseborough, *Days of Darkness*, supra note 45, 154 for discussion of the various versions of the speech; Cases of Te Whiti and Tohu (evidence taken before the Resident Magistrate's Court, New Plymouth, in the) Depositions of Witnesses [1882] New Zealand Legislative Council & Appendix Number 9 1 for the affidavit of Charles Wilson Hursthouse, surveyor, which also sets out the allegedly seditious speech.

¹²¹ See in support of an application for a change of venue the affidavit of Robert Parris, Resident Magistrate, in "Return to an Order of the House of Representatives dated 14th day of June 1882" LE 1, 1882/150 [Archives New Zealand/Te Rua Mahara o te Kāwanatanga, Head Office, Wellington].

where Judge Gillies, who had made his view of the invasion clear, sat in the Supreme Court.¹²² It then ensured that Te Whiti and Tohu would never come before a judge. The West Coast Peace Preservation Act 1882 was passed, providing, “[t]he said Te Whiti and Tohu ... shall not be tried for the offence for which they now stand charged and are in custody”.¹²³ The Act also stated that “[n]o Court, Judge ... could discharge, bail, or liberate the said Te Whiti and Tohu” on pain of a 500 pound penalty.¹²⁴ In addition, assemblies of fifty or more Māori faced penalties of up to twelve months imprisonment. The Indemnity Act 1882 was passed together with the West Coast Peace Preservation Act. The preamble began:

And whereas, with the object of preventing such meetings and preserving the peace, certain measures were adopted by the Government of New Zealand, and carried out under their authority, some of which measures may have been in excess of legal powers, and it is expedient that the persons acting therein should be indemnified

Te Whiti and Tohu were detained in the South Island where they were treated to a sightseeing tour. Prendergast noted that they had been “taken on visits to various interesting parts of the Southern Island ... inspect[ing] the Christchurch exhibition [and] some of the larger and more interesting factories”.¹²⁵ Their final release from custody came in 1883. The West Coast Peace Preservation 1882 Continuance Act 1883 however ensured restrictions on meetings and travel to and from Parihaka could continue. The Act also provided that Te Whiti and Tohu would remain subject to arrest without warrant, charge, or trial.

¹²² When hearing charges of obstruction against Titokowaru and Rangi, Judge Gillies instructed a jury that the West Coast Settlement Act 1880 required the Governor’s consent to the arrests: the Minister’s verbal authority was insufficient. The Crown was forced to enter a *nolle prosequi* and Gillies was scathing:

[t]hat prisoners should be brought up on a serious charge under a special Act, that they should be kept in prison for six months on that grave charge, and that the Crown Prosecutor should then apply to enter a *nolle prosequi*, seems a very extraordinary proceeding on the part of the Government

See the report of Sir Arthur Gordon to the UK Parliament, cited in *Bryce v. Rusden*, *supra* note 106, 233.

¹²³ West Coast Peace Preservation Act 1882, s 2.

¹²⁴ *Ibid* s 4.

¹²⁵ James Prendergast, Wellington, 15 July 1882, “Confidential despatches and telegrams to the Rt Hon Earl of Kimberley at the Colonial Office 13 February 1870 – 1 June 1886, Wellington 31 January 1880” G, 26/1 [Archives New Zealand/Te Rua Mahara o te Kāwanatanga, Head Office, Wellington].

VIII REFRAMING THE RULE OF LAW – THE LESSONS OF PARIHAKA

These moral questions and practical dilemmas about power go deeper than the question of its legal validity; they concern the justification for the law itself. It is not what the law actually prescribes, but what it ought to prescribe, that here is the central issue of legitimacy.

- David Beetham.¹²⁶

It is clear that the New Zealand Parliament, a series of governments, the residual presence of the British, the Rule of Law, and, in most cases, the courts, failed to prevent, or indeed actively participated in, the unjust use of power against an independent community. Looking back on this injustice, the question should be whether our current legal and constitutional system is any more robust. Given similar majoritarian pressures against an independent community would the modern Rule of Law be capable of preventing injustice? Or is an eternally vigilant community, watchful of the exercise of power, the only protection against the loss of fundamental rights and freedoms? The events at Parihaka suggest that the way in which a society frames the system by which it is governed is also significant. Diceyan theory, with its divorce from history and focus on the indivisibility of sovereign power, facilitated the invasion at Parihaka. The vehemence with which the system moved against Te Whiti and Tohu should highlight, above all, the importance of ideas, the strength of the challenge they may pose and the actions they may justify.

Brookfield's analysis of the revolutionary seizure of power in New Zealand is an example of the continued influence of Diceyan jurisprudence.¹²⁷ He frames the grundnorm separately from any conception of legitimacy. The foundation of this argument is the existence of a single grundnorm, in this case Parliamentary sovereignty coupled with the Diceyan notion of the Rule of Law, which necessarily prevails over all other systems of government within a particular geographic boundary. The Kelsenian approach adopted by Brookfield, like many positivist theories, does not look behind the system or seek to

¹²⁶ Beetham, *supra* note 33, 5.

¹²⁷ See generally Anghie, *supra* note 9, 74-78. Anghie argues that contemporary international law continues to operate within the framework established in the nineteenth century, to the detriment of non-European peoples.

explain its right to be the number one rule.¹²⁸ So, although the grundnorm of Parliamentary sovereignty was grounded and formed by arguments of legitimacy, the positivist tradition does not require that legality and legitimacy continue to interrelate for the effective operation of the rule. And as the tensions inherent in negotiating a right to rule are subordinate to the established system, it becomes difficult for the rule of recognition or grundnorm to shift to reflect new sites of legitimate representation and decision-making in society.¹²⁹

Parihaka highlights the pattern established by Beetham, whereby a system whose legitimacy or claim to rule is insecure breaches self-imposed standards of legality in order to ensure its continued primacy. Brookfield's contention that legality and legitimacy are best considered independently seems less sound when the prevalence of this pattern is taken into account. Yet, the most forceful argument for a view of the Rule of Law which recognises a link between legality and legitimacy, arising from the events at Parihaka, is based on the actions of the Parihaka community. The acts of protest spoke to the relationship between legality and legitimacy. Equally, though the common law constitution maintained the distinction, the settler state used rhetoric claiming the innate legitimacy of the "perfected law". The question then arises whether the dichotomy between legality and legitimacy reflects the way different communities speak about law. If legality and legitimacy are linked, even if only emotively, the power to govern is framed by an expectation that law and the system of law-making should aspire to meet moral and ethical standards. A complete separation of legality and legitimacy then removes the onus from the system to strive to reflect these principles of justice. Like the ahistoric Diceyan view of Parliamentary sovereignty, the traditional positivist divide leaves the ruling system without a way forward and encourages the destruction of other systems of law and governance existing inside the greater legal order.

In *Legality and Legitimacy*, David Dyzenhaus contends that the best view of legal practice presupposes a link between legality and legitimacy. Accepting that in periods of unjust and arbitrary rule it seems that there is no such connection,¹³⁰ he compares the approach of several different theorists writing during the Weimar period to support his argument that "Kelsen's legal positivism ... offered no legal resource

¹²⁸ Ibid 64-69. Anghie argues the ahistoric approach of positivist jurisprudence precludes inquiry into the basis of the supremacy of the state and thus enables the marginalisation of non-European states.

¹²⁹ Contrast Brookfield, *supra* note 3, 19.

¹³⁰ Dyzenhaus, *Legality and Legitimacy* (1997) 1.

which could be used to resist a fascist seizure of power in Germany”¹³¹. The pure theory, in striving to present a scientifically sound account of law, separated legality from the complex and indeterminate questions of legitimacy, leaving no effective tools with which to attack the growth of Nazi influence.

Dyzenhaus contrasts Kelsen’s approach with that of Heller, a socialist, who argued that legality and legitimacy, though inherently connected, should nonetheless remain distinct; enabling society to criticise existing standards of legality on the basis of the principles of legitimacy.¹³² Heller was not engaged in a quest for certainty as Kelsen was, but believed that contradiction was central to legal philosophy as the principles of legitimacy must be sourced from the ethical standards inherent in many different social, cultural and legal practices.¹³³ This view of legitimacy, as a changing and indefinable concept, is very different from that of Dworkin, the leading modern theorist who contends that legality and legitimacy are fundamentally connected. Dworkin’s theory outlines a fixed set of principles that legitimate the exercise of law whereas Heller accepts only that these principles connecting law and morality exist, not that they are capable of lasting definition.¹³⁴ Heller premises his discussion of the moral legitimacy of law on the value of collective self-government, a value he believes law serves.¹³⁵ And, as Parihaka shows, the value of collective self-government cannot be fixed to a system because it is a standard by which we may judge a system.

The challenge posed by the people of Parihaka is expressed in different forms, by many different systems of collective self-government, against a centralised system. It is based, as David Beetham argues, on a view that the legitimate exercise of power proceeds from evidence of consent¹³⁶ and, as consent exists on many different levels in a community - not solely in the pact between Parliament and the people - Parliament is not the only representative body which may claim legitimacy. The doctrine of Parliamentary sovereignty was perceived however to preclude any form of independent self-government. Recognition of the possibility of pluralism would have required an expansion of the accepted concept of ‘law’, and some change in the belief that law is universal and transcends social norms.

¹³¹ Ibid 5.

¹³² Ibid 165.

¹³³ Ibid 166-167.

¹³⁴ Ibid 253.

¹³⁵ Ibid 181, 185-186.

¹³⁶ Beetham, *supra* note 33, 3.

In an essay entitled “Nomos and Narrative” Robert Cover examines the relationship between law and its normative context arguing that “[a] legal tradition is ... part and parcel of a complex normative world”, a nomos, which is “constituted by a system of tension of reality and vision”.¹³⁷ Like Heller, Cover conceives of the discourse justifying law as a contradictory, changing force, the product of an intersection of many different and competing claims of what is right or legitimate. Significantly, because Cover acknowledges that law is a site of tension, his theory frames the law as engaging in an aspirational process and suggests that the law should be capable of asking what ought to be, rather than what is. Cover’s view of legal process can be more accurately described as striving for justice than that adopted by Dworkin, as its search for the ‘best story’ of the law is projected not into the past, but into the future.

Cover identifies two types of nomos which operate as opposing forces within liberal Anglo-American legal systems. The two traditions are distinct because they engage the normative world in very different ways. The first, which Cover calls the sober imperial mode of ‘world maintenance’, seeks to protect the status quo by establishing the legal order around civil society, perceived as a forum where interpersonal bonds are weak, serving only to prevent violence.¹³⁸ By contrast, Cover describes the ‘world-creating’ nomos as seeking to unite members around common ideas, generating commitments through exploration of community principles.¹³⁹ Parihaka fits this paradigm- the community reframed the means by which the common law constitution could be challenged¹⁴⁰ and staked a claim for autonomy based on spiritual commitment and political vision. In comparison, the colonial state can be analysed within the ‘world maintaining’ nomos. Indeed modern theorists like Brookfield who adhere to similar premises also fit this model as their theory of legality is anchored in efficiency, requiring little discussion of common commitment to justice. So applying Cover’s theory, the destruction of the Parihaka community was an imperative of a ‘world maintaining’ system seeking to dominate an alternative nomos. This theory then highlights the obstacle confronting a community that seeks

¹³⁷ Cover, “Nomos and Narrative” in Minow, Ryan and Sarat (eds), *Narrative, Violence and the Law* (1992) 101.

¹³⁸ *Ibid* 106.

¹³⁹ *Ibid* 105.

¹⁴⁰ See generally Hond, “The Concept of Wananga at Parihaka” in Hohaia, O’Brien and Strongman (eds), *Parihaka* (2001). Hond argues at 77 that “[t]he true value of Parihaka is in its historic ability to innovate the assertion of Māori authority” and, in addressing the tension between the Pakeha and Māori world view, create new knowledge.

recognition from a centralist system on the basis of legitimate consensual government. A legal order within a 'world maintaining' nomos will, by its very nature, seek to destroy pluralist alternatives.

One hundred and twenty years after its people were imprisoned Parihaka remains significant in an analysis of New Zealand's modern constitutional system and jurisprudence. It highlights the inability of a legal system based on a dichotomy between legality and legitimacy to respond to challenges that go behind the grundnorm to examine the system's claim to govern. Parihaka also exposes the pluralist tensions inherent in a centralised, majoritarian system where law-making power is vested in an absolute sovereign body. The work of Robert Cover seems to best reflect the tensions of pluralism. Viewed as a meeting of the world creating and world maintaining nomos, the conflict between the colonial state and the community led by Te Whiti and Tohu is placed in a context of cultural and ideological difference. The philosophy of Parihaka is world creating and perhaps its contemporary significance can best be explained in this light, as the protestors' statement of autonomy continues to play a role in questioning the legitimacy of the colonial system. The challenge posed by the community of Parihaka is both a constant and varied demand on a centralist view of the Rule of Law. It is the challenge to a system premised on consent to stand by its claim to legitimacy by accepting alternative structures of rule.