Book Reviews

Te Wai Pounamu: The Greenstone Island: A History of Southern Maori during the European Colonization of New Zealand, by HC Evison, Aoraki Press, Wellington and Christchurch, 1993.

Reviewed by RP Boast*

Harry Evison is a Dunedin-based historian who has devoted much of his life to recording the history of the Ngai Tahu people of the South Island. In 1952 he received his MA from the University of Otago for a thesis on Ngai Tahu history. More recently he has published a number of short monographs on Ngai Tahu history; since then he has played a signficant role as an expert witness for the claimants in the massive Ngai Tahu case before the Waitangi Tribunal, reported on by the Tribunal in 1991 and 1992. Now, with *Te Wai Pounamu* we have Evison's magnum opus, the product of a lifetime's work and reflection, sumptuously produced by Aoraki Press.

Evison's book marks something of a new departure in historical writing on the impacts of colonisation on Maori. While various tribal histories have been published these tend to be reworkings of traditional history rather than systematic accounts of the impact of colonialism, although some of the great tribal histories, such as Stafford's *Te Arawa,*[1] do carry the story down to the years after the Treaty of Waitangi. Certainly some specialist monographs on particular aspects of Maori regional history have been published, such as Dick Scott and Hazel Riseborough on Taranaki, Peter Webster, Judith Binney et al, and Jeffrey Sissons on the Tuhoe, and Michael King on the Chatham Islands.[2] But nothing quite on the scale and comprehensiveness of Evison's study of the southern Maori has been seen before. One might hope that following his lead we might see from other scholars similar accounts of other key regions such as, say, Hawke's Bay, East Cape, the Waikato or the Far North. The impact of colonialism varied considerably from region to region, and in this reviewer's view it is impossible to fully comprehend the process in the absence of a collection of detailed regional studies.

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* Senior Lecturer, Faculty of Law, Victoria University of Wellington.

1 DM Stafford, *Te Arawa* (Reed Books, Auckland, 1967).

2 Dick Scott, *Ask that Mountain: the story of Parihaka* (Heinemann/Southern Cross, Auckland, 1975); Hazel Riseborough, *Days of Darkness: Taranaki 1878-1884* (Allen & Unwin/Port Nicholson Press, Wellington, 1989); Peter Webster, *Rua and the Maori Millenium* (Price Milburn/Victoria University Press, Wellington, 1979); Judith Binney, Gillian Chaplin and Craig Wallace, *Mihaia: the Prophet Rua Kenana and his Community at Maungapohatu* (Oxford University Press, Wellington, 1979); Jeffrey Sissons, *Te Waimana: the Spring of Mana: Tuhoe History and the Colonial Encounter* (University of Otago Press, Dunedin, 1991); Michael King, *Moriori: A People Rediscovered* (Viking, Auckland, 1989). None of these however are exactly 'regional' history in that they attempt to survey the whole history of the colonial period and its impacts on the Maori people of a defined region.

For the legal historian Evison's book is the most comprehensive account available of the "deed" or "McLean era" transactions which typified land alienation in the period 1840-65, between, that is, the Treaty of Waitangi and the establishment of the Native Land Court. It was of course during these years that most of the South Island was alienated. The process involved government land purchase commissioners who negotiated directly with Maori chiefs and who then drew up formal deeds by which Maori title was extinguished in exchange for a cash payment, a guarantee of reserves and (often) food gathering places and protection of other special places. With the Ngai Tahu transactions there have always been disputes about price, the adequacy of the reserves, and, indeed, what was actually purchased; and all of these controversies are meticulously investigated by Evison and form a substantial part of his book. The circumstances of each transaction, the allocation of reserves and the impacts of the transactions on Ngai Tahu life are covered thoroughly. Other aspects of the complex story are also explained with exemplary care and lucidity, including the complex interplay between Governor Gipps, his Australian political opponents and the Maori chiefs of Te Wai Pounamu in the period immediately before and during the process of accession to the Treaty of Waitangi, and the even more complicated relationships between the British government, the colonial regime and the French and British colonisation companies. Evison's book will appeal primarily to historians, but those interested in the background to the Ngai Tahu case and the current negotiations with the Crown will find that the book will provide all the background coverage they will need, and more. Evison brings his narrative up to date with a full discussion of the two Waitangi Tribunal reports of 1991 and 1992, and of the cross-claim proceedings which resulted in a hearing before the Maori Appellate Court in Christchurch in June 1990 and ultimately an appeal to the Privy Council.[3] Evison has a number of doubts about some of the Waitangi Tribunal's findings, and criticises the Tribunal for its tendency - in his view - to prefer documentary evidence when it conflicts with the oral testimony of Maori chiefs. "The Tribunal", he says, "preferred the official view of the Wairau purchase to the Maori view of it".[4] Although the Tribunal certainly "broke new ground" in its careful inquiry into a huge volume of complex evidence, in its interpretation of that evidence "the Tribunal did not break with the past".[5] Not all will agree with that verdict, of course.

In terms of its structure and approach, the book adopts a straightforward narrative technique. Personally I would have found the book even more interesting and valuable had Evison used the Ngai Tahu material to illuminate some of the contemporary debates among scholars as to why Maori sold so much land in the pre Land-Court era. Evison apparently has little interest in current historiographical debate, and there is no discussion of, for instance, whether Ann Parsonson's "pursuit of mana" thesis is borne out by the Ngai Tahu evidence. The book is written in something of a theoretical and analytical vacuum, with Ngai Tahu placed very much in the role of victims, at least in

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3 Waitangi Tribunal, *Ngai Tahu Report,* (Wai 27) 3 vols (Brooker & Friend, Wellington, 1991); *Ngai Tahu Sea Fisheries Report* (Wai 27), 1992; *In re a claim to the Waitangi Tribunal by Henare Rakiihia Tau and the Ngai Tahu Trust Board,* (1990) 4 South Island ACMB 672.

4 Evison, *Te Wai Pounamu,* 496.

5 Ibid.

the years after 1850. That, of course, may be no more than the truth; still, some discussion of the current issues currently debated by the scholarly community could only have strengthened what is beyond doubt a very readable and extremely useful text.

The book has been published by Aoraki Press, a small independent Maori publisher specialising in southern Maori material. The production is, in a word, superb. *Te Wai Pounamu* is magnificently bound and printed; it abounds in excellent and illuminating maps and illustrations and the documentation and indexing is excellent. The book is a credit in every way to its author and its publishers.

Judicial Politics and Policy-Making in Western Europe edited by Mary L Volcansek, published by Frank Cass, London 1992, price GBP 22.50.

Reviewed by AS Butler*

This collection of 10 essays, which first appeared as a Special Issue in the useful periodical *West European Politics*,[1] is about the point where politics and law intersect in six states of western Europe (France, the United Kingdom, Germany, Belgium, the Netherlands and Italy) and in two supranational European bodies (the European Communities and the European Court of Human Rights). The contributors consider the role of courts in public policy making from a political science perspective rather than a legal viewpoint. That said there is frequent reference to case law, and a number of the contributors are noted constitutional law commentators. In reviewing the book, I propose to split the analysis into two levels: first I want to consider what the collection as a whole has to offer us in terms of conclusions; second, it seems worthwhile to pass comment on some of the individual essays.

The main result of the studies would appear to be that it can no longer be credibly maintained that judges are the mere mouthpieces of the law, devoid of a policy-making role. From the lawyer's point of view this conclusion is rather trite. Lawyers and judges have been admitting for years now (at least in the common law world) that the art of judging involves a measure of public policy-making, in private as well as public law. That the political scientists have not been taking heed of this message is reflected in the usually minor role assigned to judicial impact on politics in many political science texts (outside the United States of America); any development of interest in the role of the courts by political scientists ought to be welcomed, for it is to be hoped that they can provide an extra dimension to the legal analysis of judicial influence on policy issues.

Returning to the conclusion reached in the book, it is clear that in each country, though to varying degrees, the courts have a significant policy-making function to perform. Interestingly, the realisation of the impact which judges have on policy-

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* Lecturer, Faculty of Law, Victoria University of Wellington.

1 Volume 15, no 3 (July 1992).

making is extremely varied from country to country, reflecting, it would appear, the differing degrees of involvement of the judiciary in important policy areas. For example, in her essay on the German situation, Christine Langfried notes the extensive influence of the *Bundesverfassungsgericht* (German Federal Constitutional Court) on matters of public debate and policy formation. So extensive is the Court's involvement in policy debates that often it leads policy formation and has the politicians running to keep up with it.[2] Contrast with this the perception of the judicial influence on policy issues in the United Kingdom, as outlined in Gavin Drewry's essay. Drewry remarks, "In the absence of a codified constitution and in the presence of an 'elective dictatorship', ruling through its control of a sovereign parliament, British judges can do no more than potter around in the foothills of policy-making."[3] Yet even in the United Kingdom the courts do have an impact on the formation of public policy, with Drewry being able to point to administrative review proceedings such as the *GLC Transport Subsidy case*,[4] the *Gillick case*,[5] and others, as representative.

One of the problems identified by some of the commentators, and commented upon by Mary Volcansek in her introductory essay, is the extent to which a rising realisation of the important role of courts in policy formation will have a negative impact on public faith in the judicial system.[6] The assumption which appears to underlie this concern is that, in the main, the judicial role is perceived as being a neutral one, having little to do with the cut and thrust of policy debate. The essays succeed in showing that this is a false assumption to make. Yet it is interesting that the essays provide little evidence of any effort in the individual states (outside of academia, presumably, where efforts have been made) to attempt to establish an alternative perception of the judicial function which accommodates its policy-making role. Whether this is because no such efforts have been made outside of academia, or whether the commentators do not deem it worthy of exploration, is unclear. If the latter then this would be unfortunate, for surely this is the exciting aspect of political scientists' discovery of the importance of the judicial role in policy-making.

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2 Indeed, as I write this review a decision of the Constitutional Court, decriminalising the possession of small amounts of soft drugs for personal use, has sparked debate over the law concerning the laws on drug-dealing and the treatment of hard drugs by the law: see *Die Welt* 17.5.1994.

3 At 25, citation omitted.

4 *Bromley London Borough Council* v *Greater London Council* [1983] AC 768 (concerning claim that the GLC breached its obligations to the ratepayer by subsidising transport costs to an unreasonable level).

5 *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (concerning approval of advice on contraception to persons under the age of legal consent to sexual activity).

6 For example, Volcansek states in the conclusion to her introductory essay (at 7), "Though only mythical, the notion of judges' finding law and exercising no discretion has long sustained the prestige and legitimacy of courts and has lent authority to judicial policies. The paradox, of course, lies in the fact that courts have been agents for change in European society, but, by assuming that role, risk forfeiting the very efficacy that facilitated effective judicial intervention. Judicial politics in Europe, the fictional and the real, balance on that razor's edge."

In addition, the essays show that judicial policy-making is not just a function of those courts empowered to exercise judicial review of legislation. The ability to review administrative processes, and to develop private law doctrine has allowed the courts to shape policy-making strategies, and has in the case of some countries (most notably the Netherlands) contributed to what in effect amounts to legislative delegation of policy-making to the judiciary.

Turning now to the individual contributions, readers will find in particular the contributions of Gavin Drewry on judicial politics in Britain, Alec Stone on the role of the *Conseil Constitutionnel*, Christine Langfried's account of the role of the *Bundesverfassungsgericht,* Peter van Koppen's account of the Dutch *Hoge Raad*, and André Bzdera's essay on the Court of Justice of the European Communities worthwhile. Each of these essays make sustained efforts to investigate the main concerns of the collection, combining comprehensive reference to the main aspects of the country's judicial policy-making, and clear critical analysis.

Drewry's essay provides a useful summary of the debate in the United Kingdom on the politics of the judiciary, including reference to the controversy produced by Professor JAG Griffith's book *The Politics of the Judiciary.* His conclusion that judicial policy-making is peripheral in the overall scheme of things is hard to gainsay.

The essays by Stone and Landfried both demonstrate the extent to which public policy can become dominated by judicial decisions, so much so that parliamentary debate itself becomes filled with arguments over constitutional court interpretations and their application to the bill in question. In the case of France, it is amazing to think that a jurisdiction so traditionally abhorred by the notion of "gouvernement des juges" has so readily accepted the extent of the *Conseil Constitutionnel's* involvement in policy-making. But that this is the case is amply shown by Stone's essay. In addition, Stone's essay underlines the ability of judicial decision-making to come to conclusions diametrically different from those intended by the Framers, yet have them accepted by the political and legal community.[7]

Langfried's article is, more or less, a shortened version of her contribution to a collection of essays which she herself edited in 1988, entitled *Constitutional Review and Legislation: An International Comparison.*[8] Her basic argument is that the *Bundesverfassungsgericht* has become too deeply embroiled in policy-making, cutting down to an inordinate degree the freedom of movement of the legislatures in Germany. Not all German commentators would agree, but certainly a number of the cases she refers to do demonstrate substantial direction by the Court as to the policy to be pursued by the legislatures. Her thesis is that the Court should recognise that there is a difference between decisions as to process and those as to outcomes. In the case of the

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7 Here I have in mind the decision of the *Conseil Constitutionnel* to place the 1946 principles on a lower position vis-à-vis the 1789 Declaration of the Rights of Man, even though the Framers of the 1958 Constitution intended the reverse to be the case: see 37-38.

8 (Nomos Verlagsgesellschaft, Baden-Baden, 1988).

former, a constitutional court has broad competence, whereas in the case of the latter the court's competence vis-à-vis the legislature ought to be much more restricted; and in the case of the latter any judicial interference with legislative choice must pass tests as to commitment to the text of the constitution, rationality of the argument, and compatability with the constitutional system of separation of powers.

Van Koppen's paper on the Netherlands shows that in that country judicial involvement in policy-making is an essential element in the political process, for it allows the political parties to fudge certain controversial issues and leave them to the courts and the justice system to deal with. This is especially necessary in light of the finely balanced system of coalition government prevailing in the Netherlands. While I do not propose that this is the system for New Zealand, the essay offers an interesting new perspective on the role of judges in the political arena. Finally, Bzdera's essay on the reform of the Court of Justice of the European Communities raises interesting questions about the neutrality of a federal court whose main function is to decide upon the powers of the federation vis-à-vis the member states. He critically analyses proposals for reform of the Court made by respected commentators Weiler and Jacqué, and puts forward his own proposals which build on the experience of other federal adjudicative bodies.

In conclusion, this collection of essays provides useful, if sometimes brief and superficial, material upon which to consider issues pertaining to judicial involvement in policy-making. Written broadly with the political scientist in mind, the essays do not always provide the type of analysis or weight of authorities that lawyers are perhaps used to. Nonetheless, as a sign of growing interest by political scientists in matters judicial, this book is welcome.