CONSTITUTIONAL VOICES

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This article is about governing the country. It draws in particular on the writing of James Tully and Judith Binney to illuminate how our constitutional framework and national mind-set need not be monoform and narrowly focused, as the Anglo-settler state has tended to suggest. Instead, the Crown has been required to take account of other forces especially Maori demands. This is leading to an emergent "constitutionalism", founded on a willingness to listen to the range of "constitutional voices".

I INTRODUCTION

This article is about what here is being called "constitutionalism", meaning the ways in which the members of a polity think about, talk of and respond to their arrangements of governance. Since "men think by communicating language systems; these systems help constitute both their conceptual worlds and the authority structures, or social worlds, related to these; the conceptual and social worlds may be seen as a context to the other."[1] The individual's thinking is then viewed "as a social event, an act of communication and of response within a paradigm-system, and as a historical event, a moment in a process of transformation of that system and of the interacting worlds which both system and act help to constitute and are constituted by".[2] These speech-acts concerning the character of governance (in our case the Anglo-settler polity of New Zealand) constitute a social and historical formation or "discourse". This discourse is conducted within a public domain with its own set of demands and institutional forms and in that location occurs as a series of interactive speech-acts the form of which is shaped by previous utterances. In their turn those speech-acts affect the character of those which will be made in the future.[3] Thus we can talk of "constitutionalism" as a discourse about the character of governance.

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1 JGA Pocock "Languages and their implications: the transformation of the study of political thought" in *Politics, Language and Time. Essays on Political Thought and History* (Chicago, University of Chicago Press, 1971) 3, 15.

2 Above n 1.

3 See, for example, A Pagden "Introduction" to Pagden (ed) *The Languages of Political Theory in Early-Modern Europe* (Cambridge, Cambridge University Press, 1987) 1. Also JGA Pocock "The concept of a language and the metier d'historien: some considerations on practice", above n 1, 19.

This type of discourse known very generally as "constitutionalism" is based upon an underlying and enduring notion that authority within a political association is limited either customarily or constitutively.[4] The central question of discourse then becomes the location and nature of this limited (constitutional) authority within the polity. The polity which this article considers is the Anglo-settler state of New Zealand wherein the character of the Treaty of Waitangi has become an important matter of political discourse and in respect of which the two most central idioms of that discourse have been "law" and "history".

The discussion is rather composite in character and following this Introduction divides into three major Parts. Part II considers James Tully's important book *Strange multiplicity: Constitutionalism in an age of diversity* (1995) and its critique of "modern" constitutionalism. Drawing mainly on Canadian examples Tully attempts to retrieve a constitutional tradition, which, unlike the "modern" and however suppressed it may have been, welcomes and facilitates constitutional diversity. Tully's description of the contours of "modern" constitutionalism sets the scene for the writer's complementary account, Part III's condensed version of a lengthier working paper I have written entitled "Law, History and the Treaty of Waitangi" and recently presented to the Conference for the Study of Political Thought at Tulane University, New Orleans, in March 1996. That paper in turn is part of an inter-disciplinary project provisionally known as *Encountering Histories*. Part IV of this article will then explore the themes of Parts II and III in the New Zealand setting. In particular, that Part will look at the aftermath of the state enterprise cases in the Court of Appeal now nearly a decade ago and Judith Binney's stunning *tour de force Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki*.

From that discussion the suggestion will emerge that constitutionalism in New Zealand/Aotearoa is today a highly vocalised discourse, the intensity of which is augmented by geographical proximity or, more simply, the fact that New Zealanders must live together in a small territorial space. The political domain has become one where diverse voices (which in larger polities might not be heard) present demands for recognition and accommodation within a polity no longer able or willing to sustain its (legal and historical) fictions of harmony and homogeneity. Maori claims are an obvious example of that pressure upon constitutionalism in New Zealand today, but other features such as the fractionalisation (not to say factionalisation) of the party political system and the introduction of proportional representation are also symptomatic of the constitutional cabin fever from which national discourse is groping for relief. The challenge has become one of finding mechanisms through which diverse voices are heard, their interests and

4 CH McIlwain *Constitutionalism Ancient and Modern* (revised edition, Ithaca, NY, Cornell University Press, 1966) 21-22.

claims weighed and put into the general political calculation. That emergent form of discourse - one highly vocalised and ritualised - is hardly a new phenomenon on these islands. It resembles an indigenous form, one more Maori than Anglocentric in character. That theme of an "indigenization of discourse" will become a speculative conclusion of this article.

Although this article is in a sense composite, its underlying purpose is to explore the epistemic and historiographical properties of Anglo-settler constitutionalism in contemporary New Zealand. This is not specifically an inquiry into doctrine, though that will have much to do with it. Rather, it attempts to identify the processes through which constitutional meaning has been generated and interpreted in the Anglo-settler state of New Zealand in consequence of what has been the singlemost cause for the *fin de siècle* revival of New Zealand/Aotearoa constitutionalism - the claims of the indigenous Maori tribes under the Treaty of Waitangi.

A recurring theme will become plain as this article progresses. It is that New Zealanders have been reared to think in terms of a constitutional Leviathan,[5] the Crown-in-Parliament, an absolutist and singularised if beneficient concept of authority importing the domesticated pacification of the public space and supposing the cultural uniformity of an undifferentiated population. In describing the power of the Crown-in-Parliament as absolute this is only to say that there is in orthodox Diceyan constitutional theory an absence of *legal* limitation upon what Parliament may do. Dicey was quite clear that there were limitations upon what Parliament could and would do but those he described as extra-legal.[6]

James Tully's recent book *Strange Multiplicity* shows that Hobbesian approach to Crown sovereignty is a "modern" view of governance by law and, it will be argued, one which has dominated Anglo-settler constitutionalism for the past century. Indeed so powerful has been its thrall, so warm its comfort, that it remains difficult for those situated within the discourse of the Anglo-settler polity to conceive of governance outside the "modem" form.

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5 So named by Thomas Hobbes in *Leviathan, or The Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (1651, reprint ed, London, Penguin Books, 1961). As for the influence of Hobbes in English constitutionalism see M Francis "The Nineteenth Century Theory of Sovereignty and Thomas Hobbes" [1980] History of Political Thought 517; and in New Zealand A Sharp *Justice and the Maori. Maori Claims in New Zealand Political Argument in the 1980s* (Auckland, Oxford University Press, 1990) 250 and GWR Palmer *New Zealand's Constitution in Crisis - Reforming our Political System* (Dunedin, McIndoe, 1992) 42-4 decrying "the unfortunate influence of Thomas Hobbes".

6 AV Dicey *An Introduction to the Law of the Constitution* (10th ed, London, Macmillan & Co, 1959) 39-85.

Maori claims under the Treaty of Waitangi are a challenge to "modern" constitutionalism. They test its monocultural uniformity and elimination of diversity, or what Tully calls its "monologic" tendency. In asserting *tino rangatiratanga* Maori posit the existence of a legitimate source of authority within a constitutional association or polity independent of the licence of the Crown.

"Modern" constitutionalism, the character of which will soon be amplified, either dismisses *rangatiratanga* (the "old school" approach typical of pre-1980s' scholarship on the Treaty of Waitangi) or struggles with it. The struggle often occurs as a somewhat exasperated demonstration of the incompatibility of *rangatiratanga* with "modern" constitutional form. That demonstration sometimes goes on to become an attempt to paper over the tension between *rangatiratanga* and "modern" constitutionalism by displaying the means through which the latter might adapt as to incorporate if but partially the former. Chapter 2 of *The Maori Magna Carta* is probably the foremost example of an attempt to reconcile *rangatiratanga* with "modern" Anglo-settler constitutionalism. However the argument that Leviathan can be bicultural is never convincing, as that chapter itself shows in revealing the doctrinal difficulties that arise in trying to depict the Treaty of Waitangi as somehow limiting or dividing the Crown's sovereignty over New Zealand.[7] However useful the attempt might be in clarifying the limits of Anglo-settler constitutional orthodoxy, ultimately the juxtaposition becomes a demonstration of modernism's impotence in the face of the diversity to which it can only respond by seeking to silence. *Rangatiratanga* and sovereignty: square peg into round hole.[8]

One response to that stand-off between Anglo-settler constitutionalism's sovereignty on the one hand and *rangatiratanga* on the other has been to project a time when that (present) incompatibility might dissolve. Since doctrinal contortionism cannot perform an act of mutual accommodation, this response speculates that perhaps another generation will succeed in the same exercise. That, indeed, is the prospect offered by *The Maori Magna Carta.*[9]

That argument can be seen in the first place as an apologetic excuse-making tactic which sandbags modernism by a shifting of constitutional responsibility into the future: Leviathan's authority might not now be limited or shared with the Maori tribes, the argument runs, but that may occur in the future as political life moves *de facto* to such a position. Quite apart from its deferral of constitutional responsibility - contestable in

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7 PG McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland, Oxford University Press, 1991) 45-63.

8 Also IH Kawharu "Sovereignty vs Rangatiratanga" (unpublished paper presented to the Waitangi Tribunal during the Kaituna River claim, July 1984).

9 Above n 7, 63-65.

itself -, that argument is straying so far from the modernist compound as to be outside its precincts altogether. It suggests a time in national political life when constitutional authority has been dispersed from its present concentrated, unitary source or, more technically, a time when the *grundnorm* (crudely, the fundamental political fact upon which governance by law is based)[10] describes a limitation and division of Crown sovereignty. The contention is that at some stage the legal system may be required to articulate *de jure* what has already occurred *de facto*.

The modernist (as we will see Tully demonstrating) views fragmented constitutional form as historically retrogressive and fundamentally at odds with the unified and centralised character of sovereignty. Criticism of the "*rangatiratanga* as a constitutional momentum" argument or *grundnorm motile* (as it has been disparagingly termed)[11] reveals modernism's abhorrence of a haemorrhaging of political authority. Defenders of the modernist constitution cannot contemplate a form of sovereignty or means of organising ultimate political authority which is not concentrated and unitary in character.[12] Modernists adopt the position that any change in the location of sovereignty can only be revolutionary and (either) successive or secessive.[13] It cannot be fissionary. In other words, modernists insist political authority once concentrated cannot be (re-)dispersed into the polity so much as replaced or partitioned by a deliberative act of those comprising or opposing the association. *Rangatiratanga* entails neither a usurping of Leviathan nor secession (though extreme Maori rhetoric can go that far)[14], the two means by which Kelsenian modernists conceive movement of the *grundnorm*. A *grundnorm motile* contemplating the dispersal of sovereign power is directly at odds with those vital precepts of modernism.

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10 HWR Wade "The Basis of Legal Sovereignty" [1955] CLJ 172, 187 noting the correspondence of his approach with Kelsen who devised the term *grundnorm* (*General Theory of Law and State* (1945) at 110-24, 131-4, 369-73 and 395-6). Hart's "rule of recognition" differs from Kelsen's *grundnorm* in stressing that what the criteria of legal validity in any legal system are is a question of fact: *The Concept of Law* (Oxford, Oxford University Press, 1961) 245.

11 A Frame *Salmond: Southern Jurist* (Wellington, Victoria University Press, 1995) 66, n 58. Frame's Hobbesian modernism is disclosed by the title of his article "A State *Servant* Looks at the Treaty" (1990-1) 14 NZULR 82 [emphasis added].

12 See A Sharp, above n 5, 270-1 for a similar observation (directed against the author's earlier work which then was standing quite deliberately within the orthodox Diceyan compound).

13 Sir John Salmond is a paradigmatic example: *Jurisprudence: or the Theory of Law* (7 ed, London, Stevens and Haynes, 1893) 154-5 (and cited by Frame *Southern Jurist*, above n 11, 66) although that modernist outlook is tempered in later editions, for instance PJ Fitzgerald (ed) *Salmond on Jurisprudence* (12 ed, London, Sweet and Maxwell, 1966) 83-7. This predicate underlies FM Brookfield "Kelsen, the Constitution and the Treaty" (1992) 15 NZULR 163 (although Professor Brookfield does not comment on the *motile* argument).

14 See Sharp, above n 5, 249-265.

There is a weakness in the modernists' reaction to the suggestion that the political facts underlying the national *grundnorm* may be realigning in response to Treaty claims. That failing lies in modernism's perception of the cultural uniformity of the national polity, something which in New Zealand the continued reality of tribal organisation and *rangatiratanga* itself defies. In other words, Kelsen's model of constitutional change and sovereign identity has no responsiveness to cultural diversity other than to see it implicitly as a competition for dominance waged between self-contained sovereign or proto-sovereign entities within a single (or severable) space.

It can be seen already, then, that the gravitational pull of constitutionalism in New Zealand has been towards a totalising, all-encompassing form founded upon a denial of cultural diversity. That tendency represents the forces of what Tully calls "modern" constitutionalism or what I will later describe as a local offspring from a late nineteenth century collusion of law and history, or, in short, an Anglo-settler Whig apotheosis.

II "MODERN" CONSTITUTIONALISM'S "EMPIRE OF UNIFORMITY": JAMES TULLY'S STRANGE MULTIPLICITY *(1995)*

James Tully's *Strange Multiplicity* echoes with the Canadian background of its author through the examples he most frequently uses, namely the claims of Canadian First Nations and Quebec. However, his view of constitutionalism in an age of diversity holds particular resonance for New Zealand and provides a fine and important means to assess constitutional and political life in the country, most especially (but not only) the significance of Maori claims. It is likely that public law will in the future be taught in New Zealand law schools through this text and its exposition of the means through which Leviathan, or what Tully calls "the empire of uniformity", has maintained its will.

Tully starts from the position that cultural identity is and has always been overlapping, open and negotiated. That is, an individual's sense of who and what they are is never fixed and closed but subject to questioning, contestation and renegotiation. "Modern" constitutionalism, with its notion of identity as fixed and closed, is distinguished from "contemporary" constitutionalism. The former has "a habitual imperial stance"[15] and through its language has acquired a narrow range of normal usage over the course of the past three centuries. That range comprises three "schools" or means of expression, namely liberalism, nationalism and communitarianism. "Modern" constitutionalism has elbowed aside entire areas of the broader language of constitutionalism, Tully argues, but despite constraint those can never be silenced simply because difference is a fundamental human trait. The claims of the Canadian First Nations are given as an example of how "contemporary" constitutionalism is composed of both the dominant modernism as well as

15 J Tully *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge, Cambridge University Press, 1995) 24.

the voices of formerly suppressed or stifled constitutions which are appropriating and reorienting the "modern" language as a means of asserting political identity. Thus "modern" constitutionalism may have an excluding and strangulating tendency but its voice is never (and has never been) wholly exclusive: difference refuses to suffocate.

Tully proceeds to demonstrate how "modern" constitutionalism's three main traditions postulate a culturally homogeneous and sovereign people establishing a constitution as a form of critical negotiation or, in other words, an act of quasi-corporate will. This supposition of cultural homogeneity occurs in any of three ways: as a society of undifferentiated individuals (liberalism), a community held together by the common good (communitarianism) or a culturally-defined nation (nationalism). Be it an association of individuals, a nation or a community the "modern" "constitution founds an independent and self-governing nation state with a set of uniform legal and representative institutions in which all citizens are treated equally".[16] This "empire of uniformity" becomes the desiderata of "modern" constitutionalism and history is conceived as establishing laws of progression towards the "modern" (liberal democratic) form. Thus, Tully says, "the language of modern constitutionalism which has come to be authoritative was designed to exclude or assimilate cultural diversity and justify uniformity".[17]

Tully then identifies the seven features integral to "modern" constitutionalism and its symbiosis of ideology and political practice: "The vision of modern constitutionalism legitimates the modernizing processes of discipline, rationalization and state-building that are designed to create in practice the cultural and institutional uniformity identified as modern in theory".[18] The "empire of uniformity" is thus established upon the premise that the sovereign people who establish the constitutional association are already culturally indifferent members of one society aiming to set up a regular constitutional association with a single locus of sovereignty. Therefore culture is conceived as relative to a stage of historical development, not as various within a society. It is "taken for granted that the unity of constitutional association consists in a centralised and uniform system of legal and political authority, or clear subordination of authorities, to which all citizens are subject in some way, and from which all authority derives".[19]

Having set out the epistemic and foremost historiographic properties of modern constitutionalism, Tully describes contemporary constitutionalism as a resurgence or

16 Above n 15, 41.

17 Above n 15, 58.

18 Above n 15, 82.

19 Above n 15, 83.

"contrapuntal ensemble"[20] of voices which have refused to succumb to modernism's centralising and suppressive monologic universalism. The survival of these hidden constitutions within "modern" societies show that the identity of a polity as much as an individual is - here Tully calls on Wittgenstein - aspectival and dialogic. "Contemporary" constitutionalism thus comprises those hidden constitutions which historically and contemporarily deny "modern" constitutionalism the hegemony which the bravura of its "habitual imperial stance" pretends. Thus, says Tully:[21]

> A contemporary constitution can recognise cultural diversity if it is reconceived as what might be called a "form of accommodation" of cultural diversity. A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity.

Tully then proceeds to look at historical and contemporary moments of this "diverse federalism", as he calls it. Examples he gives includes Sir Matthew Hale, as an examplar of the classical common law,[22] Chief Justice John Marshall's recognition of the American Indian tribes' sovereign status in the Cherokee cases of the 1830s[23] and the Meech Lake Accord (1992) which attempted to resolve the constitutional impasse then (and still today) gripping Canada (the defeat of which the author plainly feels deeply). Tully uses these - and other - examples to show the three conventions of mutual recognition, consent and cultural

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20 Above n 15, 100.

21 Above n 15, 30.

22 Tully tends rather to over-generalise - or at least under-investigate - the Anglo-American common law tradition which he regards as one of the foremost sites of contemporary constitutionalism. In that regard he somewhat neglects the positivisation of the common law and under-estimates the complicity of the imperial common law from the second half of the nineteenth century with modern constitutionalism. The distinction between the common law in its "classical" and "modern" forms would clarify his position towards the role of the common law in the history of constitutionalism: see G Postema *Jeremy Bentham and the Common Law Tradition* (Oxford, Clarendon Press, 1986) and PG McHugh "A Tribal Encounter: The Presence and Properties of Common Law Thought in the Discourse of Colonisation in the Early-Modern Period" in J Lamb (ed) *Voyages and Beaches. Essays from the David Nicol Smith Symposium 1993* (Hawaii University Press, forthcoming).

23 Marshall uses a classical common law technique in these judgments (see McHugh "A Tribal Encounter" above n 22) but later American cases taking a modern constitutionalist approach qualify and undermine his court's recognition of inherent tribal sovereignty by development of a doctrine of Congressional jurisdictional competence (on which see SL Harring *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge, Cambridge University Press, 1994)). Tully adverts to this development - which in New Zealand is signified by the events of 1839-40 on one hand and the judgment in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (OS) 72, 136: "As the settlers gained the upper hand in the nineteenth century, the Aboriginal and common law [dialogic] system was overwhelmed by the theory and practice of modern constitutionalism".

continuity in operation.[24] These, he says, are the conventions of "contemporary" constitutionalism.

Tully provides a vigourous critique of the residual imperialism of "modern" constitutionalism and calls for a "contemporary" constitutionalism as a form of on-going and negotiated dialogue which recognises and affirms rather than extinguishes differentness. Although his examples are anchored in the Canadian context his constant references to the position of the First Nations are as appropriately applied to Maori in the New Zealand. We will come to that recontextualisation in Part IV of this article.

III ENCOUNTERING HISTORIES: LAW AND HISTORY IN THE ANGLO-SETTLER EMPIRE OF UNIFORMITY

A Aspects

Wittgenstein's notion of the inherency of differentness is fundamental to James Tully's account of contemporary constitutionalism. No matter how one might try, Tully says, the terms of constitutionalism are always different to themselves. Moreover as he also stresses,[25] again drawing on Wittgenstein, the view that one holds is always aspectival, a map or route drawn from one's own experience may not coincide with another's.

It follows, then, that James Tully's view of that array of history which with its events and speech-acts have formed "modern "constitutionalism is his own. Readers may note that the text of Part II of this article has reported rather than commented upon the argumentative route of *Strange multiplicity*, albeit as a rather high-flying bird's eye view which does not capture the sophistication and lucid vigour of the author's overland account. As Tully happily and encouragingly notes, it is possible to pass through the same historical landscape with a different aspect. For instance, his perspective is a broader one of Western constitutionalism whereas the view I will offer in this Part is consciously Anglocentric. For as we turn in this Part to pass by another aspect through the "empire of uniformity" it will become plain that there are certain recurring epistemic and historiographic landmarks virtually identical to those related by Tully. Despite its monolithic tendencies "modern" constitutionalism is not an ontological singularity so much as a complex and domineering as well as compendious tradition of organising the historical and contemporary political landscape particularly, as Tully shows, in the myriad contexts of inter-cultural encounter. What is now offered is another aspect, one which is highly complementary and virtually congruent to that given by Tully. To paraphrase Tully's paraphrasing of Wittgenstein, it is

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24 *Strange multiplicity*, above n 15, 116-136.

25 *Strange multiplicity*, above n 15, 181-2.

as though we are to be taken on another tour of the historic cities of Vienna or Cambridge[26] but by a different guide.

B The Encountering Histories Project

Essentially James Tully is concerned with the intellectual processes which underlie prevalent conceptions of non-despotic governance and how that constitutionalism, whosever it is, responds to cultural encounter and diversity. As the title itself discloses, that concern with the intellectual consequences of cultural encounter is also central to the *Encountering Histories* project. This project involves several academics, including Professor RA Sharp and Manuka Henare of Auckland University as well as New Zealand's most eminent scholar in the humanities, Professor JGA Pocock. It looks at the ways in which different "histories", or (to put it another way) culturally transmitted modes or idioms used to relate a polity's existence and experience in time and location, encounter and incorporate the tribal or colonising Other. James Tully's exposition of "modern" constitutionalism gives one view, another complementary guide through similar terrain is now offered.

The *Encountering Histories* project starts from the premise that a polity must and will produce an explanatory history of itself as a not necessarily exclusive but usually authoritative way of locating itself - its people and their social and political organisation - in time and territory. Areas of Anglo-settler state activity and relations, in New Zealand the circumstances of its indigenous people the Maori tribes, have tested the received explanations of its authority over the islands and have necessitated increases in historical awareness and critical ability as a result of efforts to legitimize and understand that state's existence as a continuous political structure.[27] New Zealanders are well aware that those efforts have in the last decade dominated the public space of the polity. It follows that history is written in and for a political context and will be a matter of public attention. Consequently the histories generated by a polity organised as a "nation", "people", "tribe" or "state" as texts and speech-acts say as much if not more of their own contemporaneity as that of the "past" they are purporting to describe. And as - to state the obvious - political circumstances change, so also do the character and method (the historiography) of reporting the past. One can talk of the history of historiography.

The setting of the *Encountering Histories* project is one in which at least two histories encounter, the one Anglo-settler and -centric, the other indigenous and itself probably in a

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26 The choice of Cambridge has a particular resonance as the influential intellectual figures behind this article, Maitland, Wittgenstein, Herbert Butterfield, Michael Oakeshott, Professors Quentin Skinner, JGA Pocock, James Tully and Andrew Sharp and (we will see) Lord Cooke, PC are all Cambridge men. This is a moment, perhaps, to acknowledge my intellectual gratitude to these figures.

27 This paraphrases JGA Pocock "Civic Humanism and its role in Anglo-American thought" in *Politics, Language and Time*, above n 1, 80.

mosaic of the tribal and pan-tribal. If those histories have been and remain in contest then that will be a consequence of the political relations amongst the polities, though the fact of contest will itself require the histories to respond to one another. That response can take many forms, however, including the exclusive: since the purpose of history is to justify the polity in time and place, rival sites of political authority may need historical obliteration rather than confrontation. That certainly was the option which for decades prevailed in New Zealand history as it was written during this century. For the moment we have been talking of history as incorporating law, if only because a country's law is certainly part of its history. Anglo-settler discourse, it will be seen, put history and law on a juridical axis of sovereignty (and property) which denied the fact of political competition within the islands between Crown and tribe(s). At present, however, it is enough to say that *Encountering Histories* is concerned with the political contexts within which aboriginal and Anglo-settler histories have encountered one another and the historiographical consequences of that engagement.

This article - as also the lengthier paper tabled at Tulane University - is interested not only in "history" but its relation to "law". At the end of the nineteenth century and writing virtually contemporaneously, Dicey and Maitland insisted that law and history were separate disciplines. Dicey spoke of lawyers' seeking normative guidance from a world which "is"[28] and, here we turn to Maitland, disclosed by the authority of precedent.[29] Both saw that historians require evidence and are concerned with questions of origin and what "was", matters which do not strictly concern a lawyer. Dicey and Maitland remind us that law and history whilst both being concerned with the past serve different purposes, not least that law is firmly anchored in a problem-resolving present.

The Treaty discourse in New Zealand over the past twenty years has been vigourous exerting strong demands upon its institutions and participants and consequently upon both the "law" and "history" the Anglo-settler polity (and the tribe - but that is another story) has of itself. Though law and history may be separate disciplines, or rather idioms of discourse, they are part of a larger discourse the pre-eminent demands of which require the past to be "practical". In other words the past is frequently and most publicly used in New Zealand today as a means of confronting and resolving contemporary problems of political life: there would be no debate in New Zealand about the meaning of a treaty-signing ceremony in 1840 were Maori today in something resembling parity in their relations with the dominant Anglo-settler culture. When court and tribunal are required to resolve contemporary claims by reference to "the principles of the Treaty of Waitangi" the past is being given a

28 AV Dicey *Introduction to the Law of the Constitution* (10 ed London, Macmillan & Co, 1962) 22.

29 FW Maitland "Why the history of English Law is not written" (1888) in *The Collected Papers of Frederic William Maitland* (3 vols, Cambridge, Cambridge University Press, 1911) Vol 1, 491.

serviceable function in the present. Lawyers and historians may diverge at the point noted by Maitland and Dicey and it is certainly true that the common law is highly ahistorical, able to collapse in the space of a single judicial breath the temporality between two and two hundred years.[30] However there is also a point where law and history reconverge and that is where the past becomes (as it is in New Zealand today), in Michael Oakeshott's term, "practical".

Oakeshott identified three attitudes towards the past: the practical, the scientific and the contemplative. A practical approach understands the past "merely in relation to ourselves and our own current activities":[31]

> The practical man reads the past backwards. He is interested in and recognizes only those past events which he can relate to present activities. He looks to the past in order to explain his present world, to justify it, or to make it a more habitable and less mysterious place. The past consists of happenings recognized to be contributory or non-contributory to a subsequent condition of things, or to be friendly or hostile to a desired condition of things.

A scientific attitude towards the past, on the other hand, is concerned "not with past events in relation to ourselves and to the habitableness of the world, but in respect of their independence of ourselves". This is "history" properly speaking:[32]

> In the "historian's" understanding of events, just as none is "accidental", so none is "necessary" or "inevitable". What we can observe him doing in his characteristic inquiries and utterances is, not extricating general causes or necessary and sufficient conditions, but setting before us the events (in so far as they can be ascertained) which mediate one circumstance to another.

A contemplative attitude towards the past, like the practical, is really a means of living in the present and is illustrated by the so-called "historical novelists" such as Tolstoy with *War and Peace*. This approach is concerned with present events which have been concluded to have taken place. Oakeshott stresses that to remember and to contemplate a memory are two different experiences; in the one past and present are distinguished whereas in the other (contemplative mode) no distinction is made.[33]

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30 W Murphy "The Oldest Social Science? The Epistemic Properties of the Common Law" (1991) 54 MLR 182, esp 200-1.

31 M Oakeshott "The Activity of being an Historian" in *Rationality in Politics and other essays* (London, Methuen & Co, 1962) 137, 147 and 149.

32 Above n 31, 148 and 157.

33 Above n 31, 149.

For lawyers whose profession is problem-solving in the present the past must always be practical[34] whilst for many others in the political arena (including the academy) although not speaking and ostensibly participating in the legal idiom, the past is equally as practical. When a commentator insists that "history should not be permitted to dictate the outcome of current disputes and to determine the substance of the Treaty of Waitangi"[35] he is not speaking of history in an Oakeshottian sense but is objecting to the consequences of others' practical use of the past, the Court of Appeal most especially. This is also the underlying tactic of those whom Professor Andrew Sharp has described as "vulgar historians".[36] Stuart Scott's *The Travesty of Waitangi: Towards Anarchy* (1995) has nothing whatsoever to do with history - or scholarship, for that matter - but it is a crass and unsophisticated text which regards the past as practical in order to nullify its practicality in other hands. The contest is one about the habitability of the present and in that argument the past is a practical tool to be exploited or neutralised.

It is conceivable however and as Professor Pocock has reminded us that there might be forms of history which are self-reflective and unpreoccupied with or at least unresponsive to the demands of the present.[37] Instead of a present instructing or re-educating its past, moulding it to a set of demands, concepts and organising principles unknown to it, it may be possible to listen to the past, learning its uncertainties and doubts, its differences and similarities, its essential though not identical humanity. This form of history - what Oakeshott and Pocock at least would call history - will occur, if at all, within the academy where the past can be removed from the hubbub of its practical role, though its appearance there is neither inevitable nor attention-drawing.[38] But self-reflective history may be difficult if not impossible where the past has such a pressing presence as it does in relation to the Treaty of Waitangi and the political circumstances of New Zealand during the past twenty-five years. "Law" and "history", then, may share a practical attitude towards the past notwithstanding the careful distinction drawn by Dicey and Maitland:[39] apparent differences in method may disguise an underlying similarity of didactive purpose.

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34 Above n 31, 147 where Oakeshott identifies the legal profession as immersed in the practicality of the past.

35 J McGuire "A theory of a more coherent approach to eliciting the meaning of the Treaty of Waitangi" [1996] NZLJ 116, 117.

36 RA Sharp "Politics, rangatiratanga and history in New Zealand-Aotearoa" (paper presented to the Conference for the Study of Political Thought, Tulane University, 23 March 1996).

37 JGA Pocock "The historian as political actor, in polity, society and academy" (paper presented to the Conference for the Study of Political Thought, Tulane University, 22 March, 1996).

38 Oakeshott "The Activity of Being an Historian", above n 31, 159 reminds us that the activity of being an historian "is not a gift bestowed upon the human race, but an achievement"; similarly Pocock "The historian as political actor", above n 1, 17.

39 Oakeshott, above n 31, 157-8 gives Maitland as an example of an "historian".

So from that prolegomenon to *Encountering Histories* let us consider those themes - the relation of law and history, how the political contexts of cultural and racial encounter shape law and histories which explain and legitimate state authority and how those idioms themselves metamorphise as the contexts within which they are produced change. The discourse within which we are located, of course, is that of the Anglo-settler polity.

C *Law and History: Subjugation and Subjecthood*

Questions about the origin and character of state power have dominated New Zealand's political landscape during the past two decades as a result of the claims made by Maori under the Treaty of Waitangi. The Anglo-settler state of New Zealand we know to be embodied in that organising concept of state power - the Crown. The Crown was hardly a Maori contrivance and it is against this entity that their claims have been and continue to be made.[40] Ultimate power is given constitutional expression through the common law's doctrine of parliamentary supremacy - the Crown(in-Parliament) as Leviathan.

Public exploration of the character of Crown sovereignty is hardly a novel experience in the history of Anglo-American political thought. However the urgency of such questions is a function of the political circumstances in which the state finds itself. The New Zealand of the 1970s saw those questions being raised directly: the country faced balance of payments problems which with the oil crisis compromised its highly protected agricultural economy. Britain's entry into the European Community in 1972 unsettled the Anglo-settler state's old, fireside Whig Dream of a tranquil former colony, the cultural clone of a mother country to which its connection had seemed umbilical. Maori claims resurfaced and added to the sense of disturbance being felt by the formerly complacent Anglo-settler state. These claims emerged as a localised civil rights discourse clearly linked to the more internationalised processes of decolonisation and self-determination. The Land March 1975 is often taken as the major activating political event.[41] These political circumstances put before the Anglo-settler state an issue which for the most part of its experience had been neglected - the origin and nature of Crown sovereignty over the country.

Until the mid-1970s it could be said that the orthodox accounts of Crown sovereignty over New Zealand were complacent and apron-strung to an Anglocentric tradition which

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40 The privatisation policies of state management dismantling and hiving off state (Crown) activity to independent bodies suggest a broader concept resembling European Law's "emanations of the state" doctrine may become more suitable for tribal claims rather than an outmoded notion of the Crown. On the notion of an "emanation of the state" see *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 (ECJ) and *Foster v British Gas* [1990] IRLR 353 (ECJ) and on the difficulties of arguing common law aboriginal rights against public bodies not "of the Crown" see *Quebec (Attorney-General) v Canada (National Energy Board)* (1994) 3 CNLR 49 (SCC) (Crown's fiduciary duty did not extend to the National Energy Board but was a "relevant consideration" in their decision-making procedure).

41 Sharp "Politics, rangatiratanga and history", above n 12.

emphasized the growth of the representative institutions of governance.[42] That Whig tradition was itself an historic phenomenon which had been transplanted into a New Zealand setting almost without prethought as part of the epistemic baggage naturally accompanying the colonial Anglo-settler state. That is, the Anglo-settler polity brought with it an explanation or narrative of state power - a way of knowing governance - which was directly associated with mid- to late-nineteenth century English discourse. Dealing with that legacy has become a major theme of contemporary political life in New Zealand.

Through the second half of the nineteenth century law and history, which previously had been woven into a unified tradition of thought, disengaged so that two separate though orthodox and complementary accounts of Crown sovereignty prevailed in the English polity - one an historical explanation, the other legal. That distinction between an historical and legal validation of Crown sovereignty was in the nineteenth century a recent one, as we know from Professor Pocock's work on the ancient constitution.[43] But it was one which was made possible by the consolidation of the political settlements of the late seventeenth and early eighteenth century, symbollised by 1745's bloody farewell to the Jacobite menace when the need to defend the Hanoverian settlement fell off the ideological agenda. More immediately, the late nineteenth century separation of law and history into distinct legitimating accounts of Crown sovereignty was itself a reflection of what was then happening in the professional and academic spheres - a positivising legal practice and a broad, compendious humanities and civics tradition compartmentalising into separate chairs and faculties of the academy.[44] The dominant Whig element of that tradition, itself a loose and variegated dynamic amalgam of *inter alia* law and history, thus left the Crown in England and, by intellectual transplantation, New Zealand with two separate though complementary accounts of its sovereignty. Idiomatically the Crown's sovereignty had its legal and its historical explanations.

The legal account of Crown sovereignty handed down to generations of lawyers by Albert Venn Dicey took distinct features of the common law episteme: an ahistoricised assertion of Crown sovereignty which stressed not only its incontrovertibility but its absolute character. Leviathan's[45] *presence* was always exactly that - unoriginable and

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42 PG McHugh "The historiography of New Zealand's Constitutional History" in PA Joseph (ed) *Essays on the Constitution* (Wellington, Brooker's, 1995) 344.

43 JGA Pocock *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the 17th Century* (Cambridge, Cambridge University Press, 1957).

44 J Kenyon *The History Men. The Historical Profession in England since the Renaissance* (2 ed, London, Weidenfield and Nicolson, 1993) 149-208.

45 For the influence of Hobbes see M Francis "The nineteenth century theory of sovereignty and Thomas Hobbes" (1980) 1 History of Political Thought 517.

deemed always to have been present. That omnipresence was regarded as an attribute of Leviathan's absolute power. Although that legal orthodoxy has been question-marked by commentators ranging from the radical[46] to those soon to become judicial,[47] its predicate – the supremacy of the Crown-in-Parliament – remains part of New Zealand law.

The most notable attempt by a constitutional lawyer to explain the legitimacy of the Anglo-settler polity in relation to Maori remained caught by the predicates of the paradigm. In explaining why lawyers regarded the Crown's sovereignty as always and simply being "there", Professor FM Brookfield echoed Burke in emphasizing the legitimating effect of the passage of time.[48] However in the end this approach no more than reiterated the point that in a modern(ist) episteme and whatever the disturbances of a colonial past, the Crown's sovereignty was legally regarded as beyond refutation. Professor Brookfield's argument was an elaborate if critical circle described entirely within and implicitly reaffirming the very paradigm he seemed to be chiding. The Crown's sovereignty remained beyond any validation by historical proof - "time" (which is but a variant on Burkean immemoriality) had confirmed Crown sovereignty and demonstrably Leviathan's power was there.[49]

The inability of the lawyers to generate a convincing explanation of Crown sovereignty responsive to the political circumstances of New Zealand from the late 1970s was an intellectual legacy of generations of political development in England half a globe away. Small wonder the initiative to construct a more responsive legitimating account of Crown sovereignty belonged to the historians.

The historical tradition with which the historians had to deal in the late 1970s was in many regards also a product of the classical common law in the Burkean sense of immemoriality. Constitutional law and state-centred history had both after all emerged

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46 See the account in Sharp *Justice and the Maori*, above n 5, 249-265.

47 S Elias "The Treaty of Waitangi and Separation of Powers in New Zealand" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Wellington, Brookers, 1995) 206.

48 "The New Zealand Constitution: the Search for Legitimacy" (September 1985) in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland, Oxford University Press, 1989) 1-24. Professor Brookfield has subsequently developed this theme of the legitimating effect of time in "Maori Rights and Two Radical Writers: Review and Response" [1990] NZLJ 406; "Kelsen, the Constitution and the Treaty" above n 15; "The Treaty, the 1840 Revolution and Responsible Government" (1992) 5 *Canterbury Law Review* 59; and "Parliament, the Treaty, and Freedom - Millenial Hopes and Speculations" in PA Joseph (ed) *Essays on the Constitution* (Wellington, Brookers, 1995) 41. Also the comments of the Minister in Charge of Treaty Negotiations, the Hon D Graham to Rotary Clubs, Waikanae, New Zealand *New Zealand Herald* 4 May 1995 citing Professor Brookfield in which the Minister insists the Crown's sovereignty is a legal fact unconnected and unconnectable to the Treaty of Waitangi.

49 For a similar conclusion see Sharp *Justice and the Maori*, above n 5, 268.

from the Whig tradition.[50] The monumental historical accounts of Crown sovereignty in the realm written during the nineteenth century by Macaulay, Stubbs and Hallam stress in various ways the ancientness, the immemorial character of Crown sovereignty.[51] This, of course, is the Whig historical tradition and its governing theme is that of the immortal continuity of English historical experience, the venerability of the Crown's sovereignty most especially. That tradition was re-enacted in the New Zealand setting through the work of such post-War historians as McClintock[52] and Morrell[53] wherein the Burkean mist enshrouding the English polity and its sovereign Crown becomes transformed into an antipodean long white cloud.

Those old Whig histories of the Anglo-settler polity in New Zealand typically use anatomical metaphors in a Truby King report of that polity's historical experience. The tale is one of passage to independent statehood and that is described as one of natural growth. We are told of the "young"/"nascent"/"fledgling" colony "progressing" on to adolescent Dominion status before "maturing" into full statehood with adoption of the Statute of Westminster in 1947. This is a form of history which tells the Anglo-settler polity that if it has a history it is one of a normal, happy childhood or, in other words and as Professor Pocock noted in opening the Conference for the Study of Political Thought, a history in which little has happened (save the predictable growth of the Anglo-settler institutions of representative governance). Here the historian has become the Plunket nurse.

We can see readily today that this old Whig history marginalises Maori and denies the Treaty of Waitangi any foundational status and constitutional presence: it is a "presentist"[54] and self-congratulatory tale of preordained growth wherein the past has no option but to produce Leviathan's glorious adult present. Maori are irrelevant, the problem

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50 See Kenyon *The History Men*, above n 44, 41-87; also JW Burrow *A Liberal Descent: Victorian Historians and the English Past* (Cambridge, Cambridge University Press, 1981).

51 See JW Burrow, above n 50.

52 *Crown Colony Government in New Zealand* (Wellington, Government Printer, 1958).

53 *The Provincial System in New Zealand, 1852-76* (London, Longmans, Green, 1932).

54 "Whiggish history is the characteristic genre of presentist historiography. It characteristically begins by taking an institution or an idea from the present together with the contemporary role, function or purpose presently used to justify that institution or idea, and then describes its historical development *as if* this purpose or role had governed its emergence and transformation right from its origin onwards. Or, if whiggish history deals with something absent in or remote from the present, it does so by accounting for that institution or practice in categories totally foreign to it, *as if* these understandings ideally *should* have been available to the past, were it not for the 'limits of that age', while neglecting the categories used by the agents in that past to describe themselves and their own practices and institutions. Whiggish history hinges on this possibility of re-educating the dead on presumably timeless matters, forcing them to provide answers to questions that are ours." (J Bartleson *A Genealogy of Sovereignty* (Cambridge, Cambridge University Press, 1995) 57). Presentism is the organising tendency of those with a practical approach towards the past.

presented by their cultural difference no more than a hiccup in "national" growth. And so the Maori and Pakeha actors of the past are bound in by the unstoppable, progressive forces of history.

This type of old Whig history of New Zealand with its reassuring fireside tone has other effects beside what we see now as its glaring marginalisation of Maori. Whereas the legal account of Crown sovereignty is an act of emplacement, the historical account is a complementary form of justification for the Anglo-settler state. Law emplaces Leviathan whose continued presence is justified as that of the eternal *pater familias*. This old Whig history thus provides a legitimating account of state power which entirely fills and subdues - colonises - the public space. Its thrall is so complete that history has (in the Fukuyama sense)[55] reached its end as liberal democracy establishes itself in the New Zealand islands, a natural historical culmination of such narrative power that it is impossible to conceive of national history beyond that process.[56] In that way national history remains domesticated, transforming the atomised social setting of Arcadian frontierism of the nineteenth century[57] into the retreat into the suburbia of the twentieth century centralised state.

There is no more poetic example of that than the ending of *The Piano* when Ada (played by Holly Hunter) and Baines (Harvey Keitel) leave behind the turbulence of the colonial frontier - the oppressive weather and seas of mud midst the charred dankness of the colonists' crude slash and burn agriculturalism, the violence, the cultural and sexual contests - for the weatherboarded seclusion of suburban Nelson. The former is too dangerous and life-threatening, whilst the latter is comfortable and reassuring. In this safe domestic space history, so much as one can contemplate it happening, is destined to be tranquil and uneventful. As Ada deliberately falls from a Maori canoe laden with a piano (a graphic metaphor for histories in contest) and drowning contemplates her options, we are left in no doubt that there is a choice - life or death. And life means the domestic, homogenised and sedate, a place where history does not happen, a place from which contingency has been removed:[58] suburban Nelson. But (to continue the cinematic theme) from *Beautiful Creatures* and *Once Were Warriors* we know that this suburbia refuses to be

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55 F Fukuyama *The End of History and the Last Man* (New York, Macmillan, 1992).

56 For instance PA Joseph "Introduction" to *Essays on the Constitution*, above n 48, 24.

57 M Fairburn *The Ideal Society and its Enemies. The Foundation of Modern New Zealand Society 1850-1900* (Auckland, Auckland University Press, 1989).

58 In her opening comments in the notes appended to the published screenplay J Campion *The Piano* (London, Bloomsbury Books, 1993) says at 135: "I think that it's a strange heritage that I have as a *pakeha* New Zealander, and I wanted to be in a position to touch or explore that. In contrast to the original people in New Zealand, the Maori people, who have such an attachment to history, we seem to have no history, or at least not the same tradition. This makes you start to ask, 'Well, who are my ancestors?' My ancestors are English colonizers - the people who came out like Ada and Stewart and Baines."

colonised as the domestic space itself becomes the locus of the contingency eliminated from national history. The Plunket nurse is now a social worker.

The political circumstances of the 1970s ensured that the old Whig historical narrative of the Anglo-settler polity with Leviathan as beneficient *pater familias* discharging a nation from the anxiety of historical contingency would not go unchallenged. If anything, those political imperatives have been magnified over the past decade as Maori claims assumed a more dominant position on the agenda of national life.

It was thus left to history, an idiom much less epistemically hamstrung than law, to address the shortcomings of the orthodox explanations of Crown sovereignty with their complementary themes of incontrovertibility (law) and beneficient patriarchy (old Whig history). Through the 1980s histories were written which sought to give the Treaty of Waitangi the foundational status it so visibly lacked in the old Whig histories. The two most notable and influential examples of that new history were Claudia Orange's book *The Treaty of Waitangi (1986)* and the reports of the first Waitangi Tribunal (1977-1988).[59]

Yet both of these influential new histories were continuations of rather than disengagements from a Whig historiographical tradition. That tradition has at its heart, of course, the explanation and legitimation of state power as exercised by the Crown-in-Parliament (as supplemented by royal prerogative) and that, essentially, was the function of Claudia Orange's and the first Waitangi Tribunal's histories. The "new Whig" histories of the mid-1980s were essentially attempts to re-legitimate Crown authority over Maori and were eminently practical in character.

In these "new Whig" histories of Claudia Orange and the first Waitangi Tribunal the growth of the Anglo-settler polity remains pre-ordained and the narrative centre, but that tale has been transformed into one of guilt rather than self-congratulation. History according to Claudia Orange and the first Waitangi Tribunal has no option other than to marginalise and oppress and to bring Maori to their contemporary lot. That historical law demonstrating the exclusion and mistreatment of Maori also renders the contemporary imperative of state atonement and reparation. Yet atonement and reparation inherently are an affirmation of extant power relations for they cannot become self-obliteration: Leviathan was enjoined to make amends but not so as to jeopardise itself. So with Claudia Orange and, more pronouncedly, the first Waitangi Tribunal's reports one finds presentist, state-centred history bereft of any historical possibilities beyond an outcome which is palpably immanent in a past set into an agenda of an utterly contemporary character. With both Claudia Orange and the Waitangi Tribunal the past is being used practically.

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59 See the account of the first Tribunal's jurisprudence in RA Sharp *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Auckland, Oxford University Press, 1990) 73-85.

What makes these mid-'80s histories so Whig in orientation is also the use of the historiographic fiction of the polity founded in contract. The Treaty of Waitangi becomes not a forgotten precursor to Leviathan's presence, but takes a constitutive and foundational basis to become the deliberative origin of the Anglo-settler state. The first Waitangi Tribunal and Claudia Orange thus step backward in Whig historiographic time from Burke's immortal continuity of the polity to a Lockean contract which becomes the source and ongoing measure of Crown governance.[60] History becomes depicted in terms of the Crown's subscription to or, more usually, its neglect of this contract.

The Claudia Orange and first Waitangi Tribunal histories commanded public attention during the mid- to late-1980s because they caught the political context and mood of the time. The "contract" between the Crown and Maori tribes of which they spoke was not the lawyer's bargain between rational, notionally equal individuals but that of the politicised commentator seeking to explain the vertical relationship of Crown and subject - the very relationship lying at the heart of the Whig tradition. A vertical relationship is one of domination and subjection. In returning to a Lockean contract Claudia Orange and the first Tribunal were taking with them a guilt-ridden liberal Anglo-settler sentiment and, more opportunistically (for fundamentally this was a discourse which remained Anglocentric), Maori. They were attempting to redefine the conditions in and upon which Leviathan's authority over Maori was based, what might be described as a movement from subjugation to subjecthood. This, it should be added, is not to down-grade the importance of Claudia Orange's pioneering and scholarly work for it unsettled the historical complacency of the Anglo-settler population and laid an important basis for the Treaty discourse "to move beyond guilt".[61] But it is to locate her book and its historiography within its own contemporary context - one still dominated by Leviathan's solipsistic and monologic discourse of sovereignty, a downward gazing "empire of uniformity".

The reorientation of the Whig axis of Anglo-settler state historiography which occurred during the mid-1980s might be more simply described as occurring within a political context of Maori claims against the Crown which were formulated within the verticalised context of subjecthood. That context had two related features: first, it encouraged a pan-Maori discourse, a chorus of Maori and sympathetic Pakeha insistence on redress which, secondly, masked other features of Maori political discourse, notably its tribal and competitive aspect. The sound of hammering on Leviathan's door had sufficient unison to obscure the elbowing and jockeying amongst those beating claimant fists.

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60 See also Sharp *Justice and the Maori*, above n 59, 85, on the first Waitangi Tribunal: "What vivified the Tribunal was the idea of reparation for breach of contract".

61 *Waiheke Island Report* at 41.

IV CONSTITUTIONAL VOICES IN NEW ZEALAND

A Crown - Tribe Relations: Constitutionalism from a Verticalised to a Horizontalised Context or from Monologue to Dialogue

During the mid-1980s at the same time as Claudia Orange and the first Waitangi Tribunal were producing their influential though essentially Whig histories, the Court of Appeal issued a series of judgments the transformative effect of which can be gauged more fully now nearly a decade later. The context of those judgments was the Government's proposed corporatisation of state assets, a market-driven economic programme being launched with the State-Owned Enterprises Act 1986. Late in the passage of the legislation s 9 was added as a result of Maori and Waitangi Tribunal protests that the statutory scheme might compromise the availability of Crown assets for the claims settlement process. This section stipulated that nothing in the Act was to be regarded as authorising the Crown to contravene "the principles of the Treaty of Waitangi". The Court of Appeal's interpretation of s 9 effectively suspended the corporatisation programme until Crown and Maori had agreed a formula by which what had been state assets remained available for subsequent claims settlements. That agreement eventuated in the Treaty of Waitangi (State Enterprises Act) 1988.

It is possible to characterise the Court's judgments as no more than an interpretative inquiry into the scope of section 9 and hence bounded by Diceyan orthodoxy. However, their consequences have been considerably further-reaching. Although the Court's language makes references to the verticalised, Diceyan constitutionalism it actually uses that as a means of stepping outside its parameters.

The dominant theme of the judgments is that of "partnership". This involves a commitment to biculturalism as well as a common enterprise involving Maori and Pakeha. Those dual themes require compromise and co-operation between the Treaty partners as the country deals with past breaches and moves on to honour the Treaty in the future.[62] Partnership places a responsibility on both partners to act towards each other reasonably, honourably, and with the utmost good faith.[63] That relationship, which "creates responsibilities analogous to fiduciary duties"[64] requires the Crown actively to protect Maori interests[65] as well as responding reasonably to Tribunal recommendations as part of its duty to remedy past breaches of the Treaty.

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62 [1989] 2 NZLR 513, 530 per Cooke P.

63 [1987] 1 NZLR 641, 664 and 667 (per Cooke P) and 673, 681-2 (per Richardson J).

64 Above n 63, 664 per Cooke P.

65 Above n 63, 664 per Cooke P.

The judgments draw explicitly upon the common law (here taken to include equity) of private obligations. For instance:[66]

> [T]here is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic document as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.

These are principles for the management of an ongoing relationship of notional equality, but they are those of a private sphere consciously transplanted into the public. The court's approach was to require the Crown and Maori to negotiate an arrangement by which the policy of the State-Owned Enterprises Act could be realised with accompanying safeguards for the Treaty claims process. In other words, the court was not making any ruling so much as setting parameters for the relationship between Crown and tribe and leaving it to the parties to manage themselves within that framework. Plainly the court saw that facilitative rather than determinative function as inherent in the nature of the Treaty relationship: partners needs must talk, negotiate and through constant dialogue and adjustment agree the means of living with one another. The court did not impose a settlement on the Crown, and the major settlements eventually reached in the state enterprises, sea fisheries and Waikato-Tainui claims were all given effect by statute. In that regard one must reject the allegation that the court's identification of the "principles of the Treaty of Waitangi" was "political" - a loaded term implying an undemocratic usurpation of power constitutionally located in the executive and Parliament.[67]

The effect of these judgments was to require the Crown to negotiate settlements with the tribes. At the time of the first Court of Appeal decision in 1987 the signs were that Crown settlement of Maori claims would be begrudging and meagre[68] and that the Crown would move at its own slight pace in resolving the claims. The Crown appeared to be content to let the Waitangi Tribunal act as a national conscience, a stance underlined by the Crown's protestation of its non-adversary position in relation to most claims. If that was the Crown's tactic it was unseated by the Court of Appeal judgments. Leviathan's own courts had told it to speak, negotiate and make deals with a group of its citizenry - the indigenous

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66 Above n 63, 682 per Richardson J.

67 J McGuire "A theory for a more coherent approach", above n 35, 118-20.

68 See Parliamentary Commissioner for the Environment *Environmental Management and the Principles of the Treaty of Waitangi: Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-88* (Wellington, Parliamentary Commissioner for the Environment, 1988).

Maori tribes - on a notional basis of equality and partnership. The major settlements of recent years - the state enterprises settlement mechanism, Sealord fisheries agreement and the Waikato-Tainui *raupatu* settlement - have been a direct outcome of the new political environment of equal dialogue created by the Court of Appeal judgments. Similarly when in late 1994 the Crown tried to rein the Treaty discourse by means of a fiscal envelope or financial limit on the sum available for settlement,[69] the tribes responded with a flexing of political muscle inconceivable a few years before: the verticalised politics of domination were shown as obsolete in the new political climate generated by the Court of Appeal judgments. Equality - partnership - once conceded is hard to retract; notions can acquire a self-fulfilling momentum of their own which may be difficult to slow.

A paradox is that this step, the political consequences of which cannot be underestimated,[70] occurred totally within a formalist common law paradigm. The Court of Appeal, like Claudia Orange and the first Waitangi Tribunal, anchored Crown-tribe relations in contract but with a very significant difference. The Court of Appeal's notion of contract in the context of Crown-tribe relations is *not* that of a Lockean, historiographical and *verticalised* type but a legal, ahistorical and *horizontalised* one. The court's implantation of the Treaty of Waitangi into a horizontalised setting replays contractual doctrine's movement during the eighteenth through early nineteenth century. During that period contract went from a verticalised Crown-subject sphere to become a domesticated or horizontalised means of organising relationships between autonomous, rational political beings, namely the post-Vienna European states system of treaty-making and, in Victorian England, the economic liberalism of the common law.[71]

The novelty, then, of the Court of Appeal judgments is the common law's transfer of its domesticated, private form into a public context of Crown-tribe relations. As one would expect with the common law, this does not purport to be an historicised exercise. The court never pretends that words like "partnership" or "fiduciary" were exchanged on the seaside promontory at Waitangi in 1840. However, in transforming the tribal voices from a vertical to a horizontal level beside rather than below the Crown, the court strives towards a balancing of power relations such as that which existed *de facto* in New Zealand a century ago. Leviathan had been made to sit at the table and listen by the same technical means as that through which he (through his courts) makes his subjects listen to and bargain with one another.

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69 See Wira Gardiner *Return to Sender: What really happened at the fiscal envelope hui* (Wellington, Reed, 1996).

70 For instance S Elias, QC (as she then was) comments that the Court of Appeal's judgments diffused a situation which potentially was "almost revolutionary"; see "The Treaty of Waitangi and Separation of Powers in New Zealand", above n 47, 226.

71 PS Atiyah *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979) 39-138.

The House of Lords' judgment in the *Factortame* case suspended or (to use the voguish neologism) "disapplied" an Act of Parliament.[72] The Lords evaded the sovereignty issue by ignoring it.[73] The *Maori Council* cases do virtually likewise despite the occasional aside references to the sovereignty of the Crown-in-Parliament. Sovereignty is kept almost completely out of the picture because it is largely unhelpful and unsuited to the practical requirements of the case. To have kept doggedly to the verticalised view of Crown-tribe relations would have ignored the coherence and strength of the Maori claims and would not have taken their resolution much further in the political process. The court was taking as genuine the Crown's commitment to the claims settlement process which meant sidelining Leviathan's ethos of dominance. As in England, contemporary political reality peripheralised the unhelpful strictures of late nineteenth century sovereignty doctrine.

Not only has the character of Crown-tribe relations been affected by the Court of Appeal judgments but the new political environment of claims settlement has facilitated a reassertion of the tribal element of Maori discourse. That element, of course, has always been there. However it has only become an important element in national politics since the transformative Court of Appeal judgments. The profile which that inter-tribality has obtained itself demonstrates the process of horizontalisation.

Leviathan's monologic empire of uniformity, as Tully would style it, or, by the writer's aspect, the constraints of a vertical relationship allowed a whitened, homgenised view of the national political culture. Even - indeed, most especially - in the "claims culture" of the 1980s that view remained, although the tone of Anglo-settler history had changed from self-congratulation into guilt. But in the new culture of negotiated settlement Anglo-settler discourse can no longer present itself through (modernist) notions of sovereignty in its vigorous encounter with Maori. Instinctively and solipsistically used to seeing the political world on its own fixed and closed terms, the Anglo-settler polity is confused by a discourse of diversity which refuses to fawn when Leviathan taps its sceptre. In other words, Anglo-settler discourse is so used to imprinting its own terms on Maori that it is oblivious to the process in reverse.

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72 *R v Secretary of State for Transport, ex parte Factortame (No. 2)* [1991] AC 603 and see most recently *R v Secretary of State, ex parte Equal Opportunities Commission* [1994] 2 WLR 409.

73 Wade (1991) 107 LQR 1.

Tribal history, we have been told, is based upon the pursuit of *mana* within a highly competitive, tribalised Polynesian society.[74] What we know of tribal historiography seems to reflect that competitiveness. Certainly it is one which animates the history of what appears to be an Anglo-settler institution, the Maori Land Court. Historically this Court has been as important a forum for inter-tribal competition as an instrument for Anglocentric assimilation. The Maori tribes have demonstrated that they have been perfectly capable of appropriating the devices of another culture, the seemingly dominant and by some accounts smothering one, and injecting their own history into it. That this would occur is no surprise in that Maori culture has a highly ritualised and rhetorical sense of discourse and conflict management, a tendency displayed on the *marae* and by their apparent litigiousness today and, historically (we will see) in Judith Binney's *Redemption Songs*.

One senses that Maori discourse, not least the history it has of itself (at least from the mid-nineteenth century), with its sense of competition and conflict contained by ritual, has a robust and pragmatic sense of the opportunistic character of political life, a Namier-like[75] quality alien to Whig history with its narrative momentums, its "tide of events", grand sweeps, normative principles and historical "laws". Recently Maori representatives have talked freely about the fisheries settlement as "a tide that had to be taken at the flood",[76] with an eye towards existent commercial opportunities. They acknowledge an opportunistic element in their relations with the Crown brazenly and unabashedly in a way which Pakeha politicians committed to a rhetoric of "principled" politics and the redemptive state try to avoid. The overt opportunism of Maori claims may make Pakeha bristle. Yet like the rhetoric and litigation it may be no more than a reflection of qualities inherent in Maori political discourse, an expression of the bustle and jockeying character of the competition for *mana*. The Treaty discourse, after all, is one which straddles culturally-specific sites such as the *marae* and the court room and one must expect features intrinsic to

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74 Notably in the work of A Parsonson "The Expansion of a Competitive Society: A Study in 19th Century Maori Social History" (1980) 14 New Zealand Journal of History 45; "The Pursuit of Mana" in WH Oliver (ed) *The Oxford History of New Zealand* (Oxford, Clarendon Press, 1981) 140 as qualified in "The Challenge to Mana Maori" in GW Rice (ed) *The Oxford History of New Zealand* (2 ed, Auckland, Oxford University Press, 1992) 167.

75 Namierite history takes it name from Sir Lewis Namier who argued in hostile opposition to the Whig tradition that the ideas and principles of eighteenth century politicians were merely rationalizations of ambition: see HT Dickinson *Liberty and Property: Political Ideology in Eighteenth Century Britain* (London, Methuen, 1977) 2-10. Namierite history, in its least cynical form, views history as a typology of power; an historiography with similarity to a Maori historiography of the pursuit of *mana*.

76 The phrase used by the Maori negotiators to justify the $NZ150 million Sealord Deal (1992). See J Munro "The Treaty of Waitangi and the Sealord Deal" (1994) 24 VUWLR 389 which analyses the sea fisheries settlement as a pragmatic arrangement incompatible with the judicially and Tribunal articulated "principles of the Treaty of Waitangi". This article highlights the differences in the ethos of settlement from that of the "principled" context of claims.

those sites to filter into the wider, public discourse. Maori leaders such as Tipene O'Regan and Robert Mahuta are canny as well as charismatic men with the sharpness to regain and enhance tribal *mana* as the opportunities arise.

In New Zealand/Aotearoa today we are seeing, it is suggested, the "indigenization of discourse". That Anglo-settler discourse has exhausted its capacity to contain and explain the national political culture is disclosed by feeble Pakeha commentators imagining the country is heading "towards anarchy". Indeed the usually witless Stuart Scott displays unknowing prescience when he blanches at the comment by Temm QC (as he then was) that "as we approach the next century assimilation seems to be the ultimate result, but not the way our grandfathers foresaw it; it is likely that instead of the pakeha assimilating the Maori, it will turn out that the Maori might assimilate the pakeha".[77] What disturbs Scott is not the prospect of anarchy so much as the fear of Maori gaining meaningful political and economic power of the type signalled by the fisheries and Tainui settlements. The "empire of uniformity" has lost dominance and so too has its accompanying and cosy domesticated conjunction of law and history.

We might further consider the character of Treaty discourse during the past two decades by more specific reference to James Tully's antithesis of "modern" and "contemporary" constitutionalism. Using his approach it could be said that the *Maori Council* cases recognise and, indeed, insist upon the three conventions of "contemporary" constitutionalism: mutual recognition, consent and continuity. The Court of Appeal recognises the political status of Maori organised as tribes with legitimate claims against the Crown. Partnership, after all, is a form of mutual recognition and common enterprise. The Treaty relationship becomes seen as one in which relations between Crown and tribe are continually reassessed and negotiated on the basis of consent rather than unilateral imposition. That relation is one which accommodates and facilitates cultural diversity whilst also acknowledging that Maori rights may in some cases have to defer to an overriding national weal (such as conservation). In other (Tully) words, the Court of Appeal formulates the relationship between Crown and tribe(s) as dialogic and aspectival. There is no insistence upon the culturally undifferentiated uniformity implicit in modern constitutionalism and the strict dogma of unitary sovereignty has been put to the periphery. The *Maori Council* jurisprudence represents a form of what James Tully would recognise as "contemporary" constitutionalism. Similarly the fiscal envelope fiasco amounted to an abortive attempt by the Crown to restore modernism to the Treaty discourse.

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77 Quoted in S C Scott *The Travesty of Waitangi: Towards Anarchy* (Dunedin, Campbell Press, 1995).

B *Judith Binney's* Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki[78]

Part I and II of this article showed how law and history have colluded in Anglo-settler discourse to imbue the state with juristic and historical impregnability. Law and history have given the "empire of uniformity" a monologic, solipsistic and self-legitimating voice whatever the character of its tone - self-congratulatory and triumphalist or beratory: Leviathan can neither countenance any form of political association nor conceive any history or law occuring within his territory but his own. However as the historical and continued reality of Maori political organisation demonstrated by Judith Binney's fine book and the Court of Appeal judgments indicate, the fiction of exclusiveness generated by "modern" (late nineteenth century Whig) constitutionalism is exactly that - a fiction. The Court of Appeal judgments over the past decade, including its most recent one on the apportionment of the fisheries settlement income,[79] show a contemporary historiography of dialogue and negotiation. The state (Crown) remains a vital, indeed central player in this new historiography but its function is less the vindication of paramount political power (inherent though that may be in the fact of judgment in the Crown's courts). Rather the Court has facilitated dialogue amongst the political entities - tribes and Crown - in a setting where encounter is inevitable and the terms of mutual co-existence require continual negotiation and reassessment.

Judith Binney's important book *Redemption Songs* gives a view of New Zealand history in the late nineteenth century wherein a similar theme of encounter recurs but that theme is an incidental rather than central element of the book. To have dwelt upon encounter would have transformed Binney's book into something which demonstrably it is not and does not want to be, namely a history of colonialism. The book is concerned with the history of Maori politics in a colonial setting and the centre of its narrative is tribal society rather than the *arriviste* state. Although the book is a biography of Te Kooti Arikirangi Te Turuki its subject is really the character of Maori politics in the central North Island during the late nineteenth century and into the twentieth. In that regard we soon realise that Te Kooti is one of those protean and ethereal characters more revealing in the responses he prompts from others than in his own elusive regard. Moving as effectively as he does across tribal and colonial politics Te Kooti becomes the means for their depiction.

Redemption Songs relates Te Kooti's banishment to Wharekauri (Chatham Island) with the whakarau whose status as political prisoners is clearly established. The prisoners' escape, Te Kooti's attack on the Matawhero settlers in Poverty Bay, the siege of Ngatapa and his subsequent fleeing from the forces of retribution are all described in minute detail.

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78 Auckland University Press and Bridget Williams Books, Auckland, 1995.

79 *Te Runanga O Muriwhenua et al v Te Runanganui O Te Upoko O Te Ika Association Inc* Unreported, 30 April 1996, Court of Appeal, CA 155/95.

Binney is in no doubt that Te Kooti had a *take* (cause of action) which justified his action in Poverty Bay and which in subsequent years he sought to vindicate. In 1873 Te Kooti sought trial in England insisting that only there could a fair trial be obtained. This offer came during his period of shelter under the protection of King Tawhiao in the Rohe Potae of Ngati Maniapoto, a fugitive period which was followed by his eventual pardon and establishment of the Ringatu faith. Throughout this narrative we see Te Kooti as a kind of free agent, admittedly linked by kin and with strong affiliation to particular tribes (Tuhoe most notably). Te Kooti skates across Maori territory in the central North Island and its tribal and inter-tribal politics skilfully negotiating the *mana* of the hereditary chiefs, often by subtly and at times less subtly undermining it, whilst carefully tending and enhancing his own. Indeed the peripatetic lifestyle of Te Kooti and his followers enables Binney to display the political complexities and organisation of Maori society in late nineteenth century Aotearoa. Yet through that minutely related life the character of Te Kooti himself remains enigmatic and almost mystical. This prophet who refused to be photographed and whose image survives from a few rough pencilled drawings acquires an aura but never a personality. What we have is not a political or intellectual biography of a type familiar to western historians but a history of the politics of *mana* in the late nineteenth century.

The charismatic Te Kooti's roaming through the world of Maori politics and the rippling of his prophecies provides a graphic demonstration of the complexity and coherence of Maori political organisation and discourse in this period. Binney also reveals the exceptional literacy of Maori society and its capacity to appropriate and indigenise metaphysical concepts of the Pakeha, the juristic and Biblical most especially. By the early 1880s, some years after the confiscations, the Rohe Potae (encircling boundaries) of Ngati Maniapoto (as also that of the Tuhoe) remained inviolate territory into which Pakeha could not enter without invitation. The government had accepted that exclusion and it was not until a final political settlement was negotiated with Maniapoto and the exiled Tawhiao of Waikato that the main trunk railway was able to continue southward. Te Kooti's pardon in 1883 was part of that package. Yet he had earlier predicted the violation of the Rohe Potae and the devastation it would bring:[80]

> [T]he day will come when the God of the Pakeha will whistle in these places; from far beyond this house ... continuing right down to it, entering right into the porch of the house and coming straight through the back of it, and then at once you will see in lines the signs of the whistling God of the Pakeha along the very lines which stand near this house.

Similarly Te Kooti predicted that the surveying of Tuhoe country would precipitate its loss, although paradoxically and shortly before his death he tried to pacify the dissension sparked by the commencement of the surveying.

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80 *Redemption Songs*, above n 78, 278.

However and as observed earlier, this is not a history of colonialism so much as a rich account of history occurring within a colonial context. The colonial encounter between the Anglo-settler authorities and the tribes never becomes the central thread. We hear the monologic voice of the empire of uniformity (which is how Binney tends to depict Pakeha), most notably in the account of the Pakeha hysteria in Poverty Bay sparked by the prospect of Te Kooti's visit to his home district in the late 1880s. That account, which includes an exploration of *Goodall v Te Kooti*,[81] keeps the theme of encounter muted. At times it is almost as though the *mana* of the Pakeha is being deliberately understated and left to care for itself. That, however, does not diminish the strength of the book so much as emphasise the aspect which Binney wishes to keep firmly within Maori discourse of the period. Yet somehow - and this is a magical paradox of this marvellous book - that gives the colonial encounter added though never dominant sharpness. Through the detail we become aware as never before of the coherence and power of Maori political organisation in this period and why Crown - tribe relations in that period were dialogic in character *ex necessitate*. Given the delicacy of the Crown's sovereignty *de facto* one can well appreciate why in 1877 in *Wi Parata v The Bishop of Wellington*[82] Leviathan's courts were so anxious to deny the tribes any status *de jure*. That picture of contesting and co-existing sovereignties has already been presented in a text dealing specifically with the colonial encounter in the mid- to late-nineteenth century, James Belich's *The New Zealand Wars*. Reading Binney, however, one realises how Belich sets his account of colonialism at so broad and general a level as to weaken the picture which *Redemption Songs* gives less centredly and more powerfully.

Judith Binney's biography of Te Kooti Arikirangi Te Turuki is an extremely important book. Baroque in its architecture, the book is richly ornate and complex in its development of themes and sensitivity to the means by which the past is refracted into the present. Binney is elaborate and careful in creating the settings in which the book's characters - not least, of course, Te Kooti himself - sing their songs into a future which will hear in its own setting and with its own needs. The songs and prophecies swirl through varying contexts within a complex Maori world, acquiring and conferring overlaying and imbricated meaning as they pass through territory and time. This is monumental history of extraordinary richness and highly disciplined passion built on a profound historiographical sensitivity aware that what is being related is not a single history so much as the generation of multivalent histories within late nineteenth century Maoridom. The book - for all the care and lavishness of its fine presentation by editor Bridget Williams - is not an easy read. However its dividends are great. This is history which captures the

81 (1890) 9 NZLR 26 (CA).

82 (1877) 3 NZ Jur (OS) 77.

mystique of the past whilst also demystifying it. *Redemption Songs* is a - one is tempted to call it *the* - major landmark in New Zealand historiography.

Those non-Maori bewildered by the character of contemporary Maori politics should read this book to grasp the sophistication, ritualising processes and subtle calibrations of tribal and inter-tribal discourse. As today Maori politics reassert their presence in the public domain in a variety of forms and ever-shifting contexts - inter-tribal, intra-tribal and pan-tribal - there is no reason to believe that Maori discourse is any the less sophisticated and subtle than the forms of a century ago depicted in *Redemption Songs*. Nonetheless it must be stressed that Binney's past is not a practical one, though her journey with Te Kooti through Maori politics of the late nineteenth century is one which helps us inhabit our own world.

V CONCLUSION

James Tully and Judith Binney in their separate ways demonstrate the possibility of an inter-cultural constitutionalism in which political identity is not closed and fixed but open, negotiable and contested. Whilst giving historical examples, Tully calls this "contemporary" constitutionalism. That possibility is implicit too in the Court of Appeal judgments in the state enterprises cases which were so influential in establishing today's political environment of claims settlement. In many regards the Court of Appeal has created a climate in which Tully's "contemporary" constitutionalism prevails over the stifling "modern" version. The dominant monologic voice of Leviathan is increasingly unable to suppress the difference which historically (per Binney's *Redemption Songs*) and contemporarily refuses to succumb and, which, remains teeming with life despite "the empire of uniformity" tending otherwise. That inability will become more manifest as Maori continue to negotiate substantial settlements which will bring an accompanying growth in economic and political power. And in that regard it is important to remember that tribes, unlike joint stock companies or pressure groups, are primarily *political* rather than economic associations or, to use Michael Oakeshott again, civic rather than enterprise associations.[83]

In their separate ways Judith Binney's *Redemption Songs* and the Court of Appeal judgments in the state enterprises cases also show that it is possible to write and so to experience national history without recourse to the grand, underlying "laws of history" and narrative design which have legitimated the Anglo-settler state. Instead history can be

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83 M Oakeshott *On Human Conduct* (Oxford, Clarendon Press, 1975) 55. For Oakeshott human associations are structured as either prudential or moral practices. The former is an enterprise association where the membership are joined in seeking a common substantive satisfaction, whether it be the profit-maximising goal of a joint-stock company or a change in human behaviour as with pressure groups like Greenpeace. A moral or rule-based association is held together not by reason of a common purpose but through the authority of common practices. See also M Loughlin *Public Law and Political Theory* (Oxford, Clarendon Press, 1992) 71-83.

written through demonstration of the means by which actors faced with the problem of living in their own present improvise and compromise, reimagining their past in order to survive in the present. History then becomes not a seamless tale of a society's progress towards some imagined destination, a fictionalised political Paradise in which the state and its institutions share the domestified bliss of its population, but a very human and more contingent account of continual competition and adjustment. The former type of history, the Whig history of the Anglo-settler state, is that of the "empire of uniformity", the latter history a form of Tully's "contemporary" constitutionalism.

The common law has always been a jurisprudence of process, its notion of "rights" being oriented about procedure[84] rather than a Lockean notion of rights as inherent and substantive and such as one finds in human rights instruments. Listening has been at the heart of the common law's historical development: one might, for example, reduce the principles of administrative law to the essential requirement that a decision-maker should listen genuinely and properly and base their response upon what has been heard. It is doubtless that element of the common law which enables Tully to identify it as a major vehicle for "contemporary" constitutionalism.

Yet listening is hard to do when one is used to dominating discourse and has established the juridical and historiographical means to ensure it. By requiring the Crown to listen to Maori the Court of Appeal has brought about an environment of political engagement which has more to do with *mana* than recourse to the relation of sovereign and subject. The Crown must establish the *mana* of its *kawanatanga* (which must differ from the *mana* of *rangatiratanga*) and that is to be achieved and demonstrated - as the Court of Appeal so astutely recognised - by listening to and acknowledging *mana Maori* under the Treaty of Waitangi. If the emergent constitutionalism in New Zealand/Aotearoa - its law and its history - becomes one of dialogue and compromise founded upon a willingness to listen to these constitutional voices and predicated also upon a realisation of the sheer difficulty of living together on these small islands then the politics of *mana* can be no bad thing.

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84 M Lobban *The Common Law and English Jurisprudence 1760-1850* (Oxford, Clarendon Press, 1991).