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(Jamieson, N. J., 2004: 113)

TALKING THROUGH THE TREATY – TRULY A CASE OF *POKAREKARE ANA* OR TROUBLED WATERS

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Dans cet article, l'auteur, un historien du droit, se donne pour mission de redonner au Traité de Waitangi, signé en 1840, son sens original, lequel semble malheureusement avoir été remis aujourd'hui en question autant par les autorités que par certains mouvements populaires. Il dénonce en particulier ce qu'il perçoit comme une tentative d'attribuer à un document purement historique une dimension contemporaine pour des motifs ultérieurs. Selon lui, le principe fondamental sur lequel Pakeha et Maori s'étaient entendu à l'époque était he iwi tahi tatou: «nous sommes maintenant un seul peuple». Toute interprétation révisionniste va à l'encontre de la volonté exprimée par les émissaires britanniques et les chefs des tribus Maori lors de la signature du Traité.

The author uses hypothetical jurisprudence to redetermine the original meaning of the Treaty. The apparently dynamic effect of today's Treaty is a hoax, instituted both at the highest governmental as well as at the lowest popular levels. The Treaty is really now static – a symbol of national idolatry. The genuine faith that first moved the Treaty has been lost from sight. It is the province of the legal historian to expose the falsehood of today's Treaty, the regression from freedom of contract to ritualistic status, and to restore the first authentic purpose of the Treaty. The need for such a resurrection of authentic values can be confirmed by comparative jurisprudence, since the substitution by historical revisionism of false for true values is a global phenomenon. The first principle of the authentic Treaty, despite all governmental engineering to the contrary, is still – as first stated by Pakeha and enthusiastically accepted by Maori – he iwi tahi tatou – we are now one people.

From a little land with no history,
(Making its own history, slowly and clumsily
Piecing together this and that, finding the pattern,
solving the problem,
Like a child with a box of bricks), …
My people have had nought to contend with … .

Katherine Mansfield, *To Stanislaw Wyspianski*

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The failing grace of New Zealand's legal history is that none of it is ancient. For any Spengler or Toynbee concerned with the wide sweep of history, 1840 is the most modern of times. Even if our pre-history were recorded, its time-span would be barely medieval. Without any more remote past to worry about, modernists might see this lack of ancient law as New Zealand's saving rather than failing grace, but legal historians would beg for greater depth and a wider perspective to avoid parochialism. A study of the Sumerian legal system during its two thousand years of innovative development would put us to shame.

As we leisurely reflect on the limited text of South Pacific legal history, Saddam Hussein has been busily rebuilding Hammurabi's Babylon, against which resurgent world power of almost four thousand years President Bush of the United States and Britain's Prime Minister Blair have completed their long fore-warned pre-emptive strike. The resulting Second Gulf War has ostensibly been undertaken first to search out and decommission weapons of mass destruction and second, without these so far being found, to defend and extend forever Eastwards the concept of Western democracy on which law, order, and good government are believed to be founded. What will it mean to say, as so often already said, that mighty Babylon has fallen? Not surprisingly when one culture confronts another culture and one civilization another civilization, the resulting conflict – in this case of the Second Gulf War – drags on to the detriment of much deeper and more significant issues. Will a four thousand year old Babylon cede her government to the United States, or will the United States, by assuming responsibility for law and order in today's Iraq, fall heir and thence victim to the continuing rôle of Babylon in world affairs?

Which will it be – law or laws, culture or cultures, civilisation or civilisations? We can also ask the same question for legal system or legal systems. These are big issues, but there are more specific ones for contract or contracts, or for tort or torts, which are the same issues in principle for these smaller fields of legal interest. The singular stands for an idea, the plural for a set of facts or data. Historians tend either to be singularly Platonic or pluralistically Aristotelian, idealist or empiricist, in their view of history. History at ground level must have data, but to soar ethereally must discern ideas. Without ideas, one cannot transcend time and space. This is especially true for legal history, as Maitland[1] concluded in his essay when writing of Anglo-Saxton England before the Norman Conquest.

Little more than fifty years ago, NA Foden, the now relatively forgotten father of the first distinctively legal history of New Zealand, wrote that "a good deal of inaccurate matter has been written about the Treaty of Waitangi". Foden's own response was to add to his *Constitutional Development of New Zealand in the First Decade (1839-1849)* a chapter on the legal status of that much misunderstood Treaty.[2]

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1 F W Maitland, *Domesday Book and Beyond* (Cambridge, 1921) 356.

2 (Wellington, 1938) Ch XIII.

The term "status", particularly when used in relation to any legal document, has a legal meaning. To overlook that legal meaning is to confuse legal status with social status, or worse still, by mistaking a claim for a right, to confuse politics with law. We began a little earlier to write about international conflict, even risking our status as legal historians to write about the continuingly current affair of the Second Gulf War, but international treaties such as our own Treaty of Waitangi are expected to pre-empt conflict and secure peace.

The legal status of the Treaty has become far too thorny an issue since Foden's time for any writer to tidy up the topic in one short chapter. This paper is more about methodicity – or the lack of it – in legal dealings with the Treaty – than it is about the status or even about the substance of the Treaty. This paper is about failure in the due process of law. The status of the Treaty nevertheless remains a definitively legal issue. Attempts to confuse and conflate the legal status of the Treaty with that of any other rigorously determined legal concept, such as that of "partnership", lack all jurisprudential foundation. All such attempts are at odds with historical accuracy. When coming from the Bench, this lack of jurisprudential rigorousness is disarmingly disingenious.

As with Magna Carta,[3] the general historian may teach the lawyer more than just a thing or two about the Treaty – and this the lawyer would be wise to learn – but since without history there can be no jurisprudence,[4] the failure of most law schools to require the rudiments of general, never mind legal and constitutional history, leaves a jurisprudential vacuum among lawyers, not only at the Bar but on the Bench.

"So many errors are to be encountered in works dealing with New Zealand history" wrote Foden,[5] "that I shall be happy to help any reader engaged in the pursuit of historical accuracy." As a result of grave deficiencies in our legal education today, it is no exaggeration to say how few "engaged in the pursuit of historical accuracy" – the *sine qua non* for jurisprudence – are to be found at today's Bar or on today's Bench. The same lack of historical accuracy at a comparative level spills over into the domestic law with the difficulties arising from well-intentioned but basically ignorant borrowings of legal transplants from exotic sources. The failure of our educational system to keep its sights on "the pursuit of historical accuracy", skews our legal system to substitute a political correctness for jurisprudential rigour – and this never more so than on the topic of the Treaty.

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3 "The true meaning of the Charter has been distorted by the uncritical interpretation placed upon it in modern times . . . what is not historically true can profoundly affect the course of history: the myth was greater than the reality in the conditions of a later age . . . medieval folk gave [the Charter] its adjective 'great' simply because of its length, and not for its importance . . . a feudal document . . . since the Charter was the product of a feudal age and of a feudal opposition" GO Sayles, *The Medieval Foundations of England* (2 ed, London, 1950) 399-400.

4 "*Sine historia caecum esse jurisprudentium*", to quote Balduinus.

5 Above n 2, iii.

We opt for "talking through" rather than "writing on" the Treaty because the ground or *turangawaewae* on which the Treaty stands (which ought in legal terms to be the text of the Treaty) has currently grown so disputatious and unfirm as to debilitate the power of the written word. Instead of relying on historical accuracy to give legal precision, all literary and even legislative effort on the topic of the Treaty is either reduced to the level of clichéd conversation or raised to the level of highly provocative debate. This state of unstable equilibrium has come about by a radical revolution in legal no less than in literary values. Text has given way to context, primary to secondary source, documentary to circumstantial evidence, and data to opinion.

By concentrating on the Treaty's context instead of on the Treaty's text – more often to promote political change instead of to sustain the authentic and original value of the text, the Treaty loses rather than gains legal standing. Rather than be reactionary, however, we shall be content to critique the current preoccupation with context for its anachronistic ambulatoriness, for its lack of historicity, and for its legal relativism, subjectivity, and lack of certainty. By our dealing solely with context, there is a certain paradox in our being mistaken for simply following suit; but because the Treaty has lost rather than gained in legal assurance through the uncertainty and equivocality introduced by this revolution in legal values, the travesty of jurisprudence by which this revolution is achieved on all three fronts of legislative, judicial, and administrative law threatens to bring down not just the Treaty but the entire legal system.

It is the text, and the text alone, that constitutes a legal, if not also a literary document. To admit of context, certainly for any legal document, is to disenfranchise the text. As the context of concern for the Treaty takes over more and more from the text, the Treaty correspondingly distances itself from reality. The Treaty ceases to be authentic. As parties to the Treaty, neither the Crown nor the Confederation can maintain any *turangawaewae* or place on which to make a true stand. Already the distance of the Treaty from reality is so great that in our critiquing the context of concern presently given to the Treaty, the reader must – as if sounding out musical notation – listen for the hidden voice of the legal historian throughout this chapter. Just as it would take more than a hundred years for Bach to supplant Telemann, when Legality and History have each lost their own voice it is as if one is left in the resulting vacuum of values with only the plaintively opinionative voice of the legal historian to gainsay the day.

Three things strike the legal historian forcibly about current Treaty-talk. In the writer's opinion, each one of these three things dishonours the Treaty. The first is the disregard for historical truth. The second is the disregard for legal authority. And the third, underlying both of the former, is a lack of regard for people. It is the disregard for *nga tangata*, whether such folk be *tanga* or *tangata whenua*, *pakeha* or *maori*, *toi whenua, tauiwi, manuhiri, nga tihore*, or simply *tauhou* or *turuhi*, that explains both the talking past each other and the risk of resorting to violence to make oneself heard.

Legal argument, like recorded history, relies on detailed specificity for its general conclusions. If all law is history, as Maitland said, then law, like history, is a means of memorialising the past. Therein lies the forcefulness of precedent. By authorising, authenticating, and legitimating the

historical record through statutes, case decisions, and executive administration, the law is obliged to observe its own inner morality. Others may refer to this morality as legal science or jurisprudence. Falsify history through legal means and you not only corrupt the legal system but subvert society. The degree of corruption is directly proportional to the official status given to untruth by the system. Done hiddenly through the law, as with Hitler's Third Reich or Stalin's Soviet Union, the object is to subvert one culture and replace it with another – invariably an open with a closed society.

This inner morality, legal science, or jurisprudence of the law corresponds to the emphasis on historiography by which the historical record is judged. The legal historian is sometimes advantaged, sometimes disadvantaged by having more than one methodology, and varying categories of primary sources, by which to research, discern, reveal, and evaluate – not only the past – but the currently accepted version of the past.

This past is but a conceptualised version of what was once the present, but to recapture that past with truthful validity for both past and present, requires both a detailed specificity concerning the past as well as a high measure of inductive expertise in arguing from particulars to general conclusions about the past for the present. The future depends upon it.

What then are the most blatant but specific examples of historical untruth, or specific examples of failures of jurisprudence concerning the Treaty which have been purportedly authenticated and legitimated by our legal system? By the *Maori Council Case*,[6] although completely contrary to all principles of statutory interpretation and constitutional law, our courts accepted evidence on the Treaty from a quasi public servant as to what the legislature intends by enacting a statute. By the Ngai Tahu Claims Settlement Act 1998, the legislature elevates mere myths, fables, proverbs, rumours, and unproved allegations to the level of law.[7] By a process (running to 636 pages) of

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6 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 651 where evidence on affidavit was accepted from the Deputy-Chairman of the State Services Commission, Mr DK Hunn, that "the rationale behind corporatisation [under the State-Owned Enterprises Act 1986 in relation to the Treaty] was that the Crown owned huge resources which were inefficiently managed within the traditional departmental framework". Apart from this strange self-indictment of the State Services Commission in its management of "the traditional departmental framework", there is the constitutional breach by President Cooke of the New Zealand Court of Appeal in allowing any such interpretative evidence of legislation to be given by a member of the executive. Here is a breach of the long-established doctrine of the Separation of Powers – the sort of elementary mistake that would fail any beginning student in legislation or public law – and which, in the context of many more just as heretical *ex cathedra* and *ex curia* statements, can only be attributed to the increasing hubris of the New Zealand judiciary.

7 See section 206 and Schedules 14-77. In *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] NZLR 641, 655-656, the Court – heretically at odds with every avowed purpose of drawing up a legal document – considers the Treaty to be a living and constantly evolving instrument – ongoing, ambulatory, and adjusting itself to all the nuances of present day life – instead of a precise historical record of what was agreed on at the time. What then is the point of reaching agreement, of making and dating any document, if the document may be taken by the judiciary to mean whatever one or other of the parties later claims of the document by virtue of some changed meaning? As Chief Justice Gleeson wrote in *The Rule of Law and the*

legislative philibustering never before encountered in our statute book, the legislature engages in a verbal war of attrition by which to silence all further investigation and exhaust any further opposition. Yet as jurisprudence and the history of law conclusively demonstrate nothing could be more provocative of the reverse, nor in the long run less final of its well-intentioned affirmative action than the fabled history, fudged logic, and dubious drafting of the Ngai Tahu Claims Settlement Act.

Claims settlement legislation, as borne out by its own continuing history of failed final settlements, perpetuates a psychology of victimisation. There are many Acts which, like the English Laws Acts (1858-1908) freely admit doubts and so effectively resolve them, but steam-rolling history by any legislature – which for democracy relies on informed obedience – is not an option. Today's apparent victory but again tomorrow's defeat of Ngai Tahu, whether rightly meant or wrongly done, and whether sufficiently substantiated in terms of what must be seen in the Act as doubtful data, is textualised for monetary reward in terms of ongoing statute law. The truth will out once again, repetitiously at the expense of legislative finality, and to the persistent dishonour of the Treaty.

So too with purely academic research, whether legal or otherwise concerning the Treaty, grave failures and deficiencies in historical scholarship dishonour the Treaty. The current fashion is to deplore Dicey's Rule of Law,[8] and to dismiss much traditional legal history, as well as constitutional law and jurisprudence as "Whig" ideology.[9] One might just as well support the views of anti-Whig historians solely for their being Tory!

Sometimes legal systems fail through factionalism. Sometimes they are tainted by patronage and personal favour. Because the whole point of law is to translate policy into clearly administrable rules, a sure mark of any legal system's decline is its rising level of politicisation. This makes for arbitrariness just as a disregard for historical accuracy, by undermining precedent, makes for uncertainty. When foundational, autochthonous, or classical values are arbitrarily or whimsically

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Constitution (Sydney, 2000) "there is a point beyond which [judicial] discretion cannot travel . . . if a judge is unable in good conscience to implement the law he or she may resign". For the sake of the law, as well as maintaining the judicial oath to administer justice "according to law", we would say, as of any judge unfit to be a judge, that he or she *must* resign.

8 See "the clammy spectre of Dicey", to use Sedley's dismissive phrase in his preface to Taggart's *Province of Administrative Law* (1997); and Cooke, "Fundamentals" [1988] NZLJ 158, for whom "it is necessary to get Dicey out of the way".

9 Dicey's *Law of the Constitution* (London, 1885) even though founded on Coke and Blackstone's sovereignty of parliament under the Rule of Law, is now scoffed and mocked at for being a Whiggism. This *ad hominem* disparagement of the Rule of Law for being a Whiggism (as by McHugh, *The Maori Magna Carta* (1991) pp 16-19, 35-64, and seriatim) has no more scholarly forcefulness than the polemic of Robert Burns on the same subject. Awa, Whigs, awa!/Awa, Whigs, awa!/ Ye're but a pack o' traitor lowns/Ye'll do noe good at a'. – which one can at least read to enjoy, without scholarly pretence, as verse.

rejected by judges, legislators, or administrators merely for being unfair, out of date, or in need of change, then metaphysical speculations and personal reflections substitute for judicial reasoning, political purpose clauses masquerade as legislation, and unfettered discretions pass for administration.[10] Corollaratively, the anachronistic support of what is new (corresponding to the current rejection of what is old) is just as suspect in satisfying ancient claims. Claims to current recognition or compensation under the Treaty for communication technology based on radio waves, and for plant patent rights based on intellectual property belong to the Theatre of the Absurd. There is no case to answer, but even just to argue the case establishes there being a case. As Maitland[11] wrote of all such anachronisms, one might as well think of Hengist and Horsa invading Britain with machine guns or picture the Venerable Bede correcting proofs for the press as to think of Kupe making contact with Hawaikii by shortwave!

History relies on accuracy, so a disregard for history promotes untruthfulness. Law relies on authority, so a disregard for authority brings about conflict and disorder. A disregard for people provokes selfishness in the short-run and may bring down governments, whole nations, and entire civilisations in the long run.

This current disregard for history, law, and people is displayed at all levels. Some of the deepest disregard for law proceeds at legislative, judicial, and administrative levels. Some of the deepest disregard for history manifests itself at the highest academic level. Some of the deepest disregard for people is voiced at the greatest governmental level.

The measure of all such disregard is twofold. First, by way of being the most forthright response to rejection of whatever is old and arguably obsolete, is the resultant controversy over the Treaty. By trying to resolve such controversy the legal system is stretched to its limits. Second, there is the enforcement of political correctness, a soporific exercise in public relations, by which we are all led to pretend that no real problems exist. By his parable on finding a successor to King Rex, Fuller[12] makes it clear that public relations provides no substitute for the decision process of law.

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10 In debating the continued existence of the Law Lords, for example, Lord Cooke formerly President of the Court of Appeal, dismisses Locke and Montesquieu, Bagehot and Bentham (and only excepts Blackstone and Hale) as "historical irrelevancies": "The Law Lords: An Endangered Heritage" (2003) 118 LWR 49, 52-54. See the symposium 'Certainty and the Law' (2000) 9 Otago LR 601-741. For uncertainty in legislation see I H Williams, "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago LR 673; for uncertainty in adjudication see John Smillie, "Certainty and Civil Obligation", (2000) 9 Otago LR 633; and for uncertainty in administration see David Round "Judicial Activism and the Treaty: The Pendulum Returns" (2000) 9 *Otago Law Review* p 653.

11 Above n 1.

12 Lon L Fuller *The Morality of Law* (Yale, 1964, 1969) 38. Fuller foresaw that "psychiatrists and experts in public relations" would substitute political correctness and spin-doctoring for the failures of legal system.

Here then is today's metaphysics, a not-so-subtle form of spin-doctoring, by which successive governments attempt sometimes to talk up and sometimes to talk down the Treaty. Controversy and conformity are the coexisting opposites by which we are asked to keep the so-called Treaty partnership in homeostatic balance. The Treaty thus emerges as a *taniwha* or monster. It does so by becoming the measure of untruthfulness with which we disregard its history, the measure of disobedience to authority by which we disregard long-established law, and the measure of self-promotion and aggrandisement (settlement handouts for Maori and big-business tourist enterprises for Pakeha) to which we are each expected to conform to in terms of Treaty-talk.

For those who mistake the present *po* or time of darkness for *ao*, the daylight or dawn of the Treaty, there is every incentive to scatter *pahorehore*. The only prospect of standing together and talking *tutata* is to discern fact from fiction correctly through the gloom by admitting to this present darkness or *po* of the Treaty. Things are not, especially concerning the Treaty, as anyone, and everyone would want and expect them to be.

What alternatives do we then have to the darkness, the present lack of wisdom in our Treaty–talk? By striving for historical accuracy, by recognising the authority of law, and by recommitting ourselves to the priority of people, there are several alternative means by which we may proceed to talk through the Treaty together. Lawyers and other *kaumatua*, who must perforce be historians since all law is history, and historians who before the days of social history were required to be lawyers and *kaumatua* in order to understand the rules by which history identified itself with the pursuit of good government, both have the same speculative means of hypothetical argument to fill the vacuum denoted by the failure of recorded fact.

Such hypothetical argument, paralleling the function of fiction in literature, is founded on the philosophy of "as-if".[13] In black-letter law this philosophy forms the basis of the legal fiction. In hypothetical jurisprudence it follows the Aristotelian principle[14] of ascertaining what something is by identifying what it is not. In practical terms of discovering what the Treaty really means, we are called to discern what the Treaty is not. In other words, what if the Treaty had never been? This is a

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13 Hypothetical argument, to be distinguished from categorical, conditional, and disjunctive forms of argument is long accounted for in terms of ascertaining its logical validity. See J N Keynes *Formal Logic* (Cambridge, 1894) 211-229 and 300-311 and Angus Sinclair, *The Traditional Formal Logic* (London 1937, 1951) 64-73; see Hans Vaihinger *Die Philosophie des Als Ob* (4 ed, 1920) *The Philosophy of As-if* (London 1965); Lon Fuller, *Legal Fictions* (Stanford, 1967). For a recent exercise of hypothetical jurisprudence by a New Zealand scholar see Sandra Petersson "Darwin's Voyage Through the Province of Jurisprudence: A Beguiling Hypothesis" (2001) 32 VUWL.R 643 as if (instead of living next-door to Jeremy Bentham) the jurist John Austin had lived next-door to Charles Darwin with consequences for Austin's *Province of Jurisprudence Determined*.

14 Derived from the so-called Laws of Thought – that a thing is what it is, cannot both be what it is and what it is not, but must either be this thing or else be some other thing.

question that can be accurately answered only by the legal historian since the Treaty, having a legally formulated text, purports to be a four-cornered legal document.

For the philosophy of "as-if" however, the context is as vital as the four-cornered document. This is where the general historian as distinct from the legal historian comes in. What exactly was the context in which the legal text of the Treaty purported to transcend the context of its own time and time-bind the Treaty parties into their agreement signified by the text?

For over twenty years, and by several Acts of Parliament Britain had recognised New Zealand as an independent sovereign State. In 1831, Britain, still smarting from her loss of the American Colonies, had refused overtures from thirteen Maori Chiefs for colonisation here. De facto settlement had gone ahead, traded for by axes and muskets, nails, tobacco and blankets. We scoff at such pioneering paraphernalia now, all of which traded to the natives then would nevertheless be equivalent to space-age technology now for us. Cholera and typhoid were rife in Britain. The failed Reform Act 1832 had by 1839 fueled the Chartist movement to the point of outright rebellion and civil war. Rounding the Horn or the Cape, with sometimes an attempt at both, faced settlers and their cargo with huge risks, and the shortcut through the Magellan Straits, with the masts of sunken wrecks breaking the sea's surface was a ships' graveyard. Britain sent Busby to educate the natives in good government and jurisprudence in 1832. De Thierry, with French backing and pursuant to a perfectly good Deed of Sale, was already *en voyage* by 1835. Under Busby's direction, the Confederation of Maori Chiefs executed the New Zealand Declaration of Independence the same year. Continuing French interest in the Pacific raised fears among both Maori, as well as those English who well remembered the Napoleonic Wars. Not for nothing would New Zealand's eventual capital be named Wellington. But on the eve of Waitangi, Queen Victoria was marrying Prince Albert, and no doubt had thoughts only for her future husband. On the sixth (Hobson thought the fifth) of February 1840 the Treaty of Waitangi was signed. Two separate proclamations declared British sovereignty over New Zealand – that for the South Island being claimed on the ground of Cook's discovery and so having no relation whatsoever to the Treaty.

The Maori of the same period, barely having survived its own period of *pa* warfare, still widely ensconced in slavery, and avidly practising cannibalism, had already sold Akaroa and much of the rest of New Zealand, sometimes three times over. Nevertheless the Victorian world-view, spoken later by the Prince Consort in relation to the opening of his Great Exhibition was of this "period of most wonderful transition, which tends rapidly to accomplish that great end to which all history points – the realisation of the unity of mankind."

This view of *brithers a'* (as Albert may have heard the same policy of Kropotkin's mutual aid put in the Doric around Balmoral) is of course now denigrated as one of imperialism, colonialism, and paternalism. By some strange irony of fate, however, it is on this Victorian world view that modern Maoridom most depends for Pakeha fulfilment of the Treaty. Some might argue that the present capture and enslavement of Pakeha values together with the continued cannibalism effected

by applying New Zealand's limited resources towards fulfilling current expectations of the Treaty make for no real change in South Pacific tribal values.

Hobson, with his *he iwi tahi tatou*, and Prince Albert, with his *unity of mankind*, were voicing the same ideology, although the Treaty can also be seen as a purely pragmatic response of Maori–Pakeha mutuality to the threatened invasion of the French. Once that threat is removed, however, *he iwi tahi tatou* is no more a self-evident principle for the South Pacific than *e pluribus unum* remains viable for the New World.

The world depression of the 1840s provokes political upheavals, revolutions, and social unrest throughout Europe. Marx and Engles voice their Communist Manifesto in 1848. Despite the Treaty of Waitangi, a thinly-veiled French threat still operates in the South Pacific. This is voiced through the break-away Yankees, to whom the French will give the Statue of Liberty to celebrate the defeat of the British in the American War of Independence. Likewise, Hone Heke is given the American Ensign to fly from his war canoe by the breakaway American colonists. The same flag is also hoisted from the American Consul's residence, just as it is flown from several American ships in port shortly before the fall of Kororareka. This fact will be suppressed by the British for reasons of international polity,[15] giving further reason to believe that the so-called Maori Wars were a put-up job by the predecessors of the CIA in using Hone Heke as the first proverbially loose cannon.

What then if there had been no Treaty? The current misconception of the British Empire (overlooking the crisis of the American Colonies, the Napoleonic War, besides the social unrest, public ill-health, and political instability of late Victorian England) is to disparage all aspects of colonisation as unmitigated colonialism. It is true that by the end of Victoria's reign, there would be several attempts on her life, and the British would be so bored by the monarchy as to be promoting republicanism in clubs up and down the so-called United Kingdom. What if there had been no Treaty, no Empire, no Commonwealth? This very potted or barebones history ought to jolt many of those who so parochially oversimply and categorise today's issues of the Treaty into dispossessed black and colonialist white.

In 1932 (some six years before the publication of Foden's *Constitutional Development* and thirty-three years before the publication of his epoch-making *New Zealand Legal History*[16]), Their Excellencies the Governor-General Lord Bledisloe and Lady Bledisloe purchased the historic house built by James Busby, British Resident at the Bay of Islands and draftsman of the Treaty. It was upon the lawn of this house, now known as the Treaty House, that the Treaty of Waitangi was signed in 1840. This historic site, together with almost a thousand acres of surrounding land, was presented by the Bledisloes to the New Zealand public as a national monument. As reported by the

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15 See James Cowan *The New Zealand Wars – A History of the Maori Campaigns and the Pioneering Period* (Wellington 1922, 1983) vol I, p 21 who first lifted the veil on this episode.

16 (Wellington, 1965).

New Zealand Herald of 11 May 1932, Their Excellencies expressed the hope "that the transfer to the public of this, the cradle of New Zealand history as a civilised state, may develop a sense of nationhood and national solidarity on the part of its inhabitants".

Throughout his term of office Lord Bledisloe was a stickler for accurate press reporting so that we may be assured that this is exactly what he said and exactly what he meant. His formula was but a more explicit paraphrase of Hobson's *he iwi tahi tatou* of almost an hundred years before.

The *he iwi tahi tatou* principle, inherent in all three articles of the Treaty, reaches its zenith in the Treaty's third article conferring "all the rights and privileges of British subjects" on New Zealand natives and extending the Queen of England's "Royal protection" to them. Nobody much bothers with this third article now, any more than they did when stripping the New Zealand native of British citizenship under the Statute of Westminster Adoption Act 1947.[17] With the demise of the Crown,[18] with the substitution of government by coalition for that fragile balance of parliamentary power held between Her Majesty's Government and Her Majesty's Opposition, and with the sell-off by successive and theoretically opposing governments of public assets,[19] it is no wonder that the concept of *tinorangatiratanga* or sovereignty comes most into conflict with *kawanatanga* or governance, and that this conflict should centre on real estate as being the closest concept, in terms of territorial jurisdiction, to that of maintaining any sort of national identity.

Quite recently, a young New Zealand-born member of my family felt affronted at being charged ten dollars to enter the Treaty House – which, after all, was the Bledisloes' gift to the nation. Inside the House, my journalist daughter felt even more affronted to be shown a video which, among other culturally sensitive if not slanted material, portrayed Pakeha as "Goblins".[20] The catchcry of

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17 This stripping of British citizenship in consequence of the Statute of Westminster Adoption Act 1947 was done without the slightest reference being paid to Article 3 of the Treaty. See the series of lectures given by Victoria University College *New Zealand and the Statute of Westminster,* ed Beaglehole (Wellington, 1944) which, given amazingly during wartime and much against popular opinion, pushed for political and legal severance from Britain.

18 See NJ Jamieson, "The Demise of the Crown" [1989] NLLJ 329.

19 See Jane Kelsey *The New Zealand Experiment – A World Model for Structural Adjustment?* (Auckland, 1995); but compare Deborah Coddington, *Turning Pain Into Gain – The Plain Person's Guide to the Transformation of New Zealand 1984-1993* (Auckland, 1993).

20 It is true that in terms of oral history, Horeta Taniwha, then ninety years of age, is on record, both in White's *Ancient History* vol V p 888 and in a transcript of a conversation with Governor Wynyard (as quoted by William Pember Reeves *The Long White Cloud* 79-81) as saying that the crew from Cook's *Endeavour* were first taken for goblins. The cross-cultural reasoning for this conclusion, that by their rowing backwards only goblins could see through the back of their heads, makes this conclusion credible. Even if the word "pakeha" were to be derived from "pakepakeha", and that purely as a matter of speculative or hypothetical etymology, the word "pakepakeha" does not denote a "goblin"; nor does telescoping over sixty years of history, from Cook's exploration to the end of Busby's Residency, make the story apt by which to celebrate Waitangi.

cultural sensitivity does not apparently extend to Pakeha. One may even hear and read that Pakeha are devoid of culture. Moreover, the Waitangi National Trust Board Act 1932 does not authorise admission charges. The charges are accordingly illegal.

Originally, of course, the Treaty House was seen as Busby's Folly. It is hardly likely that one can reclaim the true spirit of the Treaty at the same time as dismissing Busby's draftsmanship of both the Declaration and the Treaty as rank amateurism.[21]

Debating the drafting is no more likely to resurrect the spirit of the Treaty than one can uphold the Treaty House as an icon of national stability and ethnic harmony at the same time as disparaging Busby's efforts to forge a nation as being "without nous".[22] After all, it was Busby who built, first lived, and (being shot at) came close to dying in the Treaty House, yet our history still portrays Busby as a clown. With an ear-trumpet, hawk-like, bald, and obsessed with the rights of the dispossessed writes Claudia Orange[23] of Busby (more than somewhat *ad personam*) in our most recent "official history".[24] Achieving nationhood is always defeated by split-mindedness, just as any house divided against itself – especially over its own heritage – never stands.

Many New Zealand historians today, never having read any more deeply of Foden than of Bede or of Herodotus, would dispute the fatherly influence of these figures for our South Pacific history. This probably accounts for the fact that since Foden came to the reluctant conclusion that "a good deal of inaccurate matter has been written about the Treaty," a further half-century of inaccuracy has more than overwhelmed our *whare wananga*. It is not just the case that whole libraries could be written to identify the inaccuracies, but that whole libraries of new and old inaccuracies exist by which to substantiate Foden's claim. These inaccuracies exist at all levels – from Waitangi Tribunal

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21 "Fragmentary", "hastily assembled" and "cobbled together" are epithets variously used of the Treaty. For a more serious discussion of the Treaty's drafting see NJ Jamieson, "Different Styles of Statutory Expression (1995) 8 *Otago Law Review* p 351 at pp 369-370.

22 Most of these misunderstood legal points encapsulated and caricatured by our "official history" of purely popular opinion have been countered by Foden in his *Legal History*. See also NJ Jamieson, "The Charismatic Renewal of Law in Aotearoa" [1986] NZLJ 250.

23 *Dictionary of National Biography* vol I 1769-1869 (Wellington, 1990) 61-62. "Obviously intended to be descriptive", as Nelson, Gamertsfelder and Evans categorise such statements in their *Elements of Logic* (Iowa, 1957) 17, there is something decidedly odd and beside the point with such minimalist reportage, no less than with their quoted example of the philosopher "Kant [being] delicate, undersized, flatchested, with one slightly deformed shoulder."

24 Apart from constituting its own history of officialdom, one really must doubt as to whether "official history" can have any claim to being considered history at all. For example, most people assume that *Hansard* reports *verbatim* on Parliament – but such is not the case. Once such projects as parliamentary reporting, court reporting, and writing up national history become institutionalised, a series of conventions come into operation by which the truth can be severely compromised. Institutionalised scholarship is not immune; nor, as the former Archbishop of Canterbury, Dr Carey has said (*Alpha News 2002*) "institutionalised religion".

Reports, Appeal Court Decisions and Land Settlement Statutes, to polemics on the shame of being white[25] and on the travesty[26] (after travesty) of being the Treaty. One could spend a lifetime, and in the face of such a huge issue probably a very unproductive lifetime, in merely identifying and responding to such inaccuracies. There is not just a history of the Treaty that is much misunderstood, but also a much misunderstood history of the literature on the Treaty. For example, in contributing to our "official history" by way of the government-sponsored *Dictionary of New Zealand Biography*,[27] our one-time Minister of Education, Russell Marshall, writes that no Pakeha paid much attention to the Treaty before 1934. Not so – apart from Colenso's classic eye-witness account of 1890[28] (itself published to correct existing inaccuracies) we have the Rev. Henry Hanson Turton writing and publishing lithographic facsimiles of the Treaty[29] as early as 1877. T Lindsay Buick's *Treaty of Waitangi – How New Zealand Became a British Colony*[30] ran to three editions and several reprints from its first edition in 1914. Its third edition, running to 393 pages in 1936 and reprinted in 1976, is still a standard text.

Treaty provisions were incorporated into legislation as early as the Land Claims Ordinance 1841 and the Native Rights Act 1865. The history of literature on the Treaty is no less complex and no less controversial than that of the Treaty's own history. We all too often conflate the literary with the real history. Legal historians are especially at risk of doing this with statutes, commentaries, and case decisions, just as legislators, instead of evoking obedience, provoke controversy and rebelliousness by mistaking *nomos* for *physis*.[31] That is to mistake status for capacity and word for deed, although by declaring itself to be an enactment, every statute is taken to be a deed.

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25 Angela Ballara *Proud To Be White*? (Auckland, 1986). In purporting to provide by its subtitle *A Survey of Pakeha Prejudice in New Zealand* this work demonstrates how difficult it is to identify and deal with prejudice without revealing and reaffirming one's own.

26 Stuart C Scott *The Travesty of Waitangi* (Christchurch, 1995); *Travesty After Travesty* (Christchurch, 1996).

27 Vol IV 1921-1940 p 67.

28 The classic account of Treaty negotiations is that recorded, purportedly word for word, by Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (1890, reprinted 1971) still adhered to by Orange *The Treaty of Waitangi* (1987); but Buick, *The Treaty of Waitangi* (1914), besides giving a blow-by-blow report of the debate at Waitangi, deals with conflicting evidence given by different eye-witness accounts. Despite conflicting accounts, there is no historical dispute over Heke and Patuone's identification of the Treaty with the New Testament. This is followed through consistently from Colenso to Orange.

29 Reprinted, Wellington 1976.

30 Appendix II is valuable for setting out the documentation of the Bledisloe's gift of Waitangi and the creation of the National Trust.

31 See Gavin Ardley *Aquinas and Kant* (London, 1950) 5-14, 60-69.

No more prolonged or fiercely controversial issue has beset and even rent New Zealand society in recent times – at least since the Vietnam War – than what to make of the Treaty of Waitangi 1840. Perhaps, if history indeed repeats herself, we are witnessing yet another round of the Maori, Land, or New Zealand Wars, although these are now being fought with legal rather than military means. The white man's musket has been traded up for the dialectic of the law courts, but both of these are still the white man's weapons. The native New Zealander learns fast, as Marsden, Williams, Busby and Grey had always believed he would, but the native New Zealander, as borne out by the increasingly political correctness of that insistently drawn distinction, still remains the white man's burden in terms of political, social, health, educational, land, employment, welfare, and of course Treaty claims.

The humanist may continue to shoulder these burdens uncomplainingly. Still carried, now by the *mokupuna* of supportive settlers on behalf of the less technologically advanced and less socially adaptable of *tangata whenua* among indigenous cultures, affirmative action attempts to implement the Treaty principle of *he iwi tahi tatou* by bridging the culture-gap and overcoming the culture-shock. Nevertheless, the do-gooding and condescending naivity with which humanist ideals are frequently implemented at law, the shame of once-were-warriors in accepting compensation for however wrongful but overwhelming defeat, the stigma of receiving social welfare, health, educational, and unemployment benefits, the sense of inferiority and perceived injustice in being taken for lower-class citizens, and the risk of reverse discrimination to others brought about by the original affirmative action soon take their toll in wrecking havoc with the principle of *he iwi tahi tatou.*

For all these and other reasons there is bound to be some response – either apathy or activism – to so-called Treaty issues. Emanating from both Maori and Pakeha, today's often activist response is almost equally matched. This equality of response is most apparent in radio talkback and in the popular press. There, expressions of political activism, whether by way of reportage, correspondence, cartoons and leading articles appear to be about equally balanced in favour of either party. In the academic press, however, the position is strangely different.[32] Academia either goes with the flow and so conforms to politically correct Treaty-talk or else becomes apathetic. As with all schools and universities, the debate is more governmentally controlled by way of curricula, charters, community service, finance, patronage, and promotion. The less-equally matched debate in academia looks likely to be determined, as at the highest governmental level, by the prevailing legal activism. Despite both the most questionable forms of legislation and the most radical exponents of judicial activism, most law schools go with the flow. They fail both to critique or redress the imbalance of argument. Apart from the scepticism of some rare (more often ignored

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32 See Simon Leys "Do We Need Universities? — Things That Must Not Be Said in Public" in *The Angel and the Octopus* (Sydney, 1999); William E Drake, *Betrayal On Mount Parnassus* (New York, 1983).

than controversial) individuals, academia has no bone to pick with the prevailing political correctness.[33]

Who will redress the argument as to the conflict between historical truth and political correctness, or critique the radical and often heretical transformation of government achieved by legislative lobbyists, by judicial activists, and by public Bills shoddily drafted – sometimes other than by parliamentary counsel under the Statutes Drafting and Compilation Act 1920? Will the prevailing bubble of political correctness in New Zealand eventually burst, as a similar bubble recently burst in Australia with the publication of *The Fabrication of Aboriginal History*[34] whose author and formerly Marxist historian, Keith Windschuttle, finds the primary sources explode the present (and formerly his own) anti-colonialist position as a myth "designed to create an edifice of black victimhood and white guilt"?

New Zealand, whether settled and developed by Kupe or Wakefield, Wirimu Kingi or King Dick, has never been short of political activists. Ours is still, as Kupe reported back to Hawaikii, a vibrantly new nation. The forcefulness of legal history is seen to prevail over political history only as we recollect the long-established rule of Rome or of Westminster, but political history is still the *forte* of our much younger country. In other words, our form of government is much less settled, our Rule of Law much less recognised, our notion of what constitutes "peace, order, and good government" much less clear.

Whether Maori or Pakeha, political activists are likely to rub up and manipulate all sources of provocation without much regard for constitutional law or the conventions of government. Even our present prime minister, as Her Majesty's chief adviser for New Zealand, expressly promotes republicanism.[35] Yet our remarkably quick turnover of party-leaders and government ministers demonstrates the extent to which, by provoking this dispute or promoting that cause, they will as often deceive themselves as advance their own agenda. Thus the Hon Bill English MP "misreads section 71 of the New Zealand Constitution Act 1852", and as pointed out by Professor Jock

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33 A new outspokenness against historical revisionism may be gradually prevailing. See Sarah A McClelland, "Maori Electoral Representation: Challenge to Orthodoxy" (1997) NZULR 272, which attacks current orthodox dismissal of Maori representation for its "flawed perception of history". Are we witnessing, among academics as well as politicians (vide English and Franks — below n 36) a return to serious scholarship and common sense, or only a vote-catching swing in the still prevailing political correctness of Treaty-worship?

34 (Sydney, 2003). See too his *Killing of History* (Sydney, 1994). "Windschuttle's Way" *Education Review*, Jan 23-29, 2002, and "A Dispute Over Mistake Creek" *The Economist*, Dec 14, 2002.

35 "We are an increasingly secular society", said our Prime Minister Helen Clark to justify and explain her omission to say grace at the State Banquet for Her Majesty the Queen in 2002. That our PM sat down to the meal while the Queen still stood has not been explained any more than our PM wore a check jacket with trousers, and bowed instead of curtsied to Her Majesty who was dressed, as one would expect for a State Banquet, in evening gown and tiara.

Brookfield in his paper on "Politicians and the Treaty",[36] both English and Stephen Franks MP "overlook the problem of the *hapu* whose chiefs did not sign" the Treaty.

The same equation of high turn-over and self-deception operates for Maori as for Pakeha leadership. Legal history and political history are more at odds in this former colony than the way in which they are expected to work in tandem for the Old Country. This lack of appreciation for legal history entails a higher risk of personal failure at a public level. It also makes for a vacuum in self-government. This vacuum has radical consequences for the legislature, for the executive, and for the courts. It also has radical consequences for the professional political activist who waits around in the wings, to use Gorbachev's expression, before stepping in to fill the vacuum. There is no point in expecting legal history to provide all the answers which the Treaty poses when political history holds sway. The political activist already holds the Treaty of Waitangi tightly in his grip no less than the Scottish Nationalist held tight its British counterpart – the Treaty giving rise to the Act of Union between England and Scotland of 1707. Yet even after devolution there is no final settlement for the Scots, as Professor Noreen Burrows demonstrates by her paper, as much complaining as proclaiming, "This is Scotland's Parliament; Let Scotland's Parliament Legislate"[37] For the perhaps momentarily dis-United Kingdom, no less than for the satellites of the former Soviet Union, that newborn child of countless treaties – the European Union[38] – is fast filling and overflowing whatever political vacuum has been left by Scottish as well as Soviet devolution – and this at a time when the devolution of Maori law and government is being avidly canvassed and governmentally financed in New Zealand. Perhaps such costly and sophisticated research at the University of Waikato and the Law Reform Commission into handing back Maori *tinorangatiratanga* (or will it remain merely *kawanatanga*) is intended more as a trivial diversion from our country's failing economy, lowered standard of living, and increasingly external control, than to draw any fundamental baseline. Throwing money at academics, no less than throwing money at Maori, is surely meant to pacify no less than to deactivate them.

From 1814 through missionary zeal, and from 1831 through Busby's instructions (from Bourke) to inculcate the natives into the jurisprudence of good government.[39] the prevailing issue on these shores, as opposed to the contemptuous *hei aha* – what does it matter! – of the sly-grogger, the land

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36 [2002] *New Zealand Law Journal*, 357.

37 (2002) Juridical Review 213.

38 Maurizio Lupoi, *The Origins of the European Legal Order* (1994, Cambridge) p 16, where Lupoi claims the Roman Empire never to have finally fallen, but now, presumably by way of legal fiction, to be restored in the new European Union.

39 ". . . by the aid of your counsels, some approach may be made by the natives towards a settled form of government, and that by the establishment of some systems of jurisprudence among them, their courts may be made to claim the cognizance of all crimes committed within their territory . . .": Sir Richard Bourke, KCB, to James Busby, Esq., British Resident, New Zealand, 13th April 1833.

shark, and the purveyor of shrunken heads, was education, education, and still more education. Our unique history of indigenous education – typified as much by those Maori women signing their names to marriage registers (whereas their illiterate Pakeha husbands could only place a cross) as by the continuingly-high colonial expenditure on religious education[40] must be side-stepped as reluctantly as the legal status of the Treaty is sacrificed for being too big an issue for any one paper.

Among all the more flamboyant exploring, whaling, sealing, trading, and other self-interested exploits which provide so many tourist-oriented artifacts and mementos of our early pioneering days, our educational, no less than our spiritual, social, literary, intellectual, and inventive heritage by which to explain the context of the Treaty lies largely overlooked and mostly long forgotten. Few now read Foden – as few, possibly, as stay tuned to the jurisprudence of a Salmond[41] – and so fail to recapture the sense of excitement with which Foden proclaimed the need for "an Austin or a Maine"[42] to recount New Zealand's "Grand Experiment" in jurisprudence.

The increasing litigiousness with which indigenous claims are made in New Zealand, and the lawyerlike success with which they prevail upon the legislature and courts, all point to Marsden, Williams, Busby and Grey being right in their conclusion that the native New Zealander would be a very ready learner. The paradox, insofar as the willing pupil now outstrips his teacher, is that the native New Zealander has made himself more than master of the white man's tricks. The threat as felt by many Pakeha to the principle of *he iwi tahi tatou* is that the Maori has thus become the white man's master. The paradox of pursuing equality has been to promote inequality.

To some extent, by being both light-hearted and laughable, this is poetic justice. To the extent that both cultures profess to be poetic, *mangai nui* or advocacy matters a lot. When based on a deep sense of grievance, however, the risk lies in this country's return to utu, the reintroduction of the *lex talionis*, and the revertion to *taua tutu*, the Maori equivalent of the Old English but murderous bloodfeud.

What then stands in the way of re-establishing *he iwi tahi tatou* as the first principle of the Treaty – apart, most obviously, from the fact that in its published *Principles for Crown Action on the Treaty of Waitangi*,[43] the New Zealand Government, focusing on its own preoccupation with sovereignty and soft-soaping the transition of Maori from being "British subjects" to "New Zealand citizens", completely overlooks and omits this first and foremost principle of *he iwi tahi tatou*?

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40 ". . . not [to] exceed one twentieth part of the estimated revenue of the colony, or province . . ." in any year: article 9, Education Ordinance, 1847.

41 A New Zealand jurist and scholar of international reputation. Salmond's life and works are recounted by Alex Frame, *Salmond: Southern Jurist* (Wellington, 1955).

42 N A Foden *New Zealand Legal History*, 27.

43 Department of Justice (Wellington, 1989).

This principle, far transcending equality, cooperation, and redress, is one of mutuality. Kropotkin's[44] philosophy of mutual aid is deeply entrenched in both Maori and Anglo-Saxon cultures – *nau te rourou, naku te rourou ka ora te manuwhiri* – no less than the commonality of hundreds that made up the Anglo-Saxon shire, and those shires that in turn made up strongly tribal kingdoms.

The eventual unification of Anglo-Saxon society, from seven separate warring kingdoms into one by their acceptance of the Gospel of Jesus Christ, is convincingly recorded by the Venerable Bede[45] in England's first and longest surviving history book. The concept of belonging to God's family as realised by eighth century England turns out to be not much different from the principle of *he iwi tahi tatou* which we refer to in Aotearoa-New Zealand. Haeckel's famous formula for phylogeny recapitulating ontogeny – that the biological development of the individual repeats, recreates, and traverses through the various (most embryological) stages of life's evolutionary history – may be seen to operate in the social sphere as well as in the biosphere.

The unification of Anglo-Saxon society, as recorded by Bede, flows only from the Gospel. Progress through the Middle Ages, slight though it seems to moderns, kept pace with Christendom until 1453 when the catastrophic Fall of Constantinople opened up Modern Times. From the Islamic East, European eyes first turned westward and finally southward. Tasman's instructions are explicitly issued and timed to celebrate the discoveries of Vespucci and Columbus. Tasman withdraws, and Cook takes over the search for the fabled Terra Incognita Australis.

New Zealand's brief entry into Europe (1840-1947), via Britain instead of via France, incorporates European and British history into New Zealand's history just as it incorporates New Zealand history into British and European. By approximately fifty, sometimes one hundred, and at other times explicitly one-hundred-and-fifty year leaps, from 1453 to 1492, from 1492 to 1642, from 1642 to 1768, and from 1768 to 1840 (and beyond as recorded more exactly by a legislative history of land settlements), South Pacific legal history serendipitously marks an oceanic ebb and flow of European exploration, discovery, conquest, cession, settlement, and as frequently retreat, while synchronously the Hebraic legal concept of the Jubilee effectuates either a token or real return of the land to its original inhabitants.

British history of the so-called United Kingdom, politically vulnerable as always through the Celtic faction to ecclesiastical breakdown, is correspondingly marked by the flowering, fading, and sometimes reflowering of the *ecclesia*. Both Britain's political and legal history are intimately

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44 Prince Alekseevich Kropotkin *Mutual Aid Among Animals* (1896).

45 Bede, *Historia Ecclesiastica Gentis Anglorum The Eccelsiastical History of the English People* (731AD). Sherley-Price, Bede's current translator, records "the foundation of all modern English historical writing [as being] well laid long ago by [this] Father of English History and the reading of his unique work . . . [is] a valuable groundwork and prelude to anyone who wishes to read and appreciate history today": Introduction to *A History of the English Church and People* (1955) 31.

pegged into church history, and for as long as they remain so, the *nomos* of law prevails over the *physis* – the physical forcefulness of politics.

The same ecclesiastical equation recapitulates that much overlooked but most fertile period of New Zealand's legal history, namely the missionary period beginning with Marsden in 1814 and still considered by at least the *ecclesia* to be open-ended. As an issue of hypothetical jurisprudence pursued to determine the significance of the Treaty, we shall again ask "What if there were no Treaty?" This issue is not as remotely speculative as first appears, since, simply without the missionaries, there would have been no Treaty.

What does one hope to find by applying hypothetical jurisprudence to the Treaty? One hopes to rediscover the initial impact of the Treaty and to reclaim its original meaning. The apparently dynamic effect of today's Treaty turns out to be a hoax, instituted both at the highest governmental as well as at the lowest popular levels. The Treaty is really now static - a symbol of national idolatry. That idolatrous symbol alone provides the Treaty's present apparently historical standing. The genuine faith that first moved the Treaty, and which began with Marsden's mission to New Zealand long before our present purely secular concern, has been lost from sight. In its place, and counter to all codes of legal conduct for the ascertainment of documentary evidence,[46] the meaning of the Treaty is up for grabs.

What was the original climate of opinion, established beliefs, and clearly evidenced values in which the Treaty was born? For almost three-quarters of a century, the Treaty has been measured up by general historians (and now by New Age jurists) not in terms of its text as a primary source, but in terms of what was expected of its text as a secondary source. Condliffe and Airey in their *Short History of New Zealand*, serving the secondary school curriculum through several editions analyse the Treaty[47] in terms of feelings and expectations. As opposed to the science of hermeneutics,[48] or to the lawyer's long established rules for documentary evidence, this could well be called *wananga whakaaro tumanako* – "the school of wishful thinking".

Note that this move of historians from construing the primary text to speculating about the context of expectation has been legitimated by the courts. The same move, which defeats the whole purpose of drawing up legal documents, now continues at a curial level. The recent heretical

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46 *Macdonnell* v *Evans* (1852) Common Pleas, 138 ER 742 in which it was decided that the best evidence, *viz*, the instrument itself, must be produced, especially as in *R* v *Elworthy* (1867) LR 1 CCR 100, where there is a question as to its contents or terms. See too Burrows, *The Interpretation of Documents* (London, 1943) reminding us that statutory interpretation is but a branch of documentary interpretation.

47 JB Condliffe and WTG Airey *A Short History of New Zealand* (Wellington, 1960) 92.

48 See Leyh et al *Legal Hermeneutics – History, Theory, and Practice* (1992); Eskridge, *Dynamic Statutory Interpretation* (1994) *seriatim*; N J Jamieson, "Legal Hermeneutics or Statutory Interpretation – What's in a Name?" [1995] NZLJ 26.

introduction of extrinsic aids and parliamentary history to legislative interpretation[49] makes for uncertainty and subjectivity, thus undermining the authority of the law and the formality and authority of the written word. Worse still, however, is the temporal partiality of the process leading to the politicisation of law. There is nothing worse for the legal process than the judicial activism[50] by which wishful thinking is substituted for the rigorously historical process of determining the law.

The context of the Treaty, as seen by today's prevailingly secular and materialistic society is correspondingly materialistic and (despite a pagan resurgence of *taniwha, tohunga*, and propitiatory *karakia* to *papatuanuku*) also correspondingly secular. Insofar as today's secular spirituality allows for *mauri, wairua, mana whenua*, and *whenuatanga*, secular spirituality is not just a contradiction in terms but a hoax. Today's perceived context of the Treaty including much of the support given to it by the Churches, is a gross anachronism. Nothing could depart further from the truth of the Treaty's text than this wishful thinking for a return to paganism. And insofar as logic bears some relationship to sanity, nothing could be more harmful to mental health than the self–contradictoriness of secular spirituality.

The prevailing context of signing the Treaty in New Zealand could not have been undertaken without the missionaries. In terms of its context, (from which even lawyers now discern its content) the Treaty of Waitangi 1840 is paramountly a spiritual, not a secular document. Secular spirituality is used to fudge, confuse, and eventually contradict the original and authentic purpose of the Treaty.

The Treaty of Waitangi 1840 is most misunderstood when viewed by governments and society alike as a purely secular document. Not for nothing does the text of the Treaty declare itself to be entered into in *o to tatou Ariki* or "the year of Our Lord". Today's formalists may think to shrug off that phrase, but not without falsifying the authentic purpose, evidenced both by text and context, of the Treaty in 1840.

In the Treaty we have something that was understood by the Maori (if not indeed presented to them as such by the missionaries) as *kawenata tapu* – a sacred covenant. In advocating acceptance of the Treaty on this level, both Heke and Patuone compared the Treaty with *Te Kawenata Hou* – the New Testament. Whether this be literally true or only figuratively speaking, this Third Covenant would be understood to complement both Old and New Testaments and so provide a

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49 The heretical decision of *Pepper* v *Hart* [1992] 3 WLR 1032 introducing *travaux preparatoires* into the Common Law (perhaps part of the Europeanising preparedness for the European Union) sparked off a spate of copycat judicial activism across the so-called autonomously sovereign and independent former colonies by which European and Continental drafting ousts that of Common Law and sets the world scene.

50 Dyson Heydon, "Judicial Activism and the Death of the Rule of Law" *Quadrant* Jan-Feb 2003, pp 9-22. This is the text of an address given to a *Quadrant* dinner in Sydney on 30 Oct., 2002 by Mr Justice Heydon, a judge of the New South Wales Supreme Court and Court of Appeal. See also Tom Campbell, "Judicial Activism – Justice or Treason?" [2003] 10 Otago LR 307 and David Dyzenhaus, "Judicial Independence, Transitional Justice and the Rule of Law" [2003] 10 Otago LR 345.

direct revelation of God's grace to Maori.[51] Both Heke and Patuone were strongly mission-educated. Their claim was allowed to stand, and even encouraged if not initiated by the missionaries. In principle, the claim is not unlike that made by the Church of the Latter– day Saints in the Book of Mormon[52] by its professing Another Testament of Jesus Christ to the North American Indians as a remnant of the House of Israel. Whether British Israelite, North American Indian, or Antipodean Maori, those who feel left out or rejected seek their own covenant with God.

There are of course treaties with Noah (Genesis 6:18), with Abraham (Genesis 15:17), with Israel (Exodus-Deuteronomy), with David (2 Samuel 7; Psalms 89:132) – all of which are sacred covenants. Without backtracking on our decision to avoid the thorny issue of the status of the Treaty, the concept of a covenant being needed to effect an irrevocable joining still operates, at a municipal level for individuals in marriage, and as between nations at international law. This does not mean that covenants cannot be broken, but simply that the consequences of any such breach, as with Hitler's breach of the Molotov-Ribbontrop Pact, are likely to be enormous. Some lawyer-historians hold the Treaty of Waitangi to have been broken and thus rendered invalid by the subsequent Maori Wars.

As seen by the missionaries, however, the Battle for the Treaty is not one of flesh and blood any more than it is one for land settlement claims and monetary compensation. Instead, it is a battle between those strongly spiritual forces that were arrayed against each other from the start of the missionary period and are testified to both by the text and context of the Treaty.

In arguing pedagogically from parables, as Christ extended God's Kingdom by preaching to, and making disciples of ordinary folk, the missionary-minded will traverse trajectories that are in themselves parabolic. Disclaiming their own strength, the missionary-minded will do so just as the *rongo pai* or Good News of Jesus Christ must be empowered by the Holy Spirit to traverse a parabolic path between Heaven and Earth. Cannibalism, human sacrifice, abject slavery, and internecine tribal warfare are only worldly manifestations of an other-worldly opposition to the *rongo pai.*

One might expect such reasoning from spiritual trajectories to be dismissed by our secular society today as being merely mythopoeic. One dare not dismiss Maoritanga as make-believe today, however, without engaging officialdom. Some belief systems, notably those of the Pakeha (if not already *mate a moa*) are dying away, whereas those of the Maori are in the ascendant. There are more Maori myths being made up about the Treaty today, and being given explicitly legal recognition by the courts and legislature than any other text gives rise to legal fiction. In place of the Bible, the Treaty has come to have scriptural authority. For New Zealand, it has come to have

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51 Despite conflicting accounts, there is no historical dispute over Heke and Patuone's identification of the Treaty with the New Testament. This is followed through consistently from Colenso to Orange.

52 *The Book of Mormon*, Church of Jesus Christ of Latter-day Saints, (1830) Introduction to the 1981 edition.

scriptural authority in both Church and State. How very, very peculiar that so many of those who play down the Bible and scoff at the *ecclesia* (without which the Treaty would never have come into existence) demand others to voice as much religious faith as their own in a solely secular and materially advantageous Treaty!

Foremostly, and with respect for the historical accuracy of its original concept, the principle of *he iwi tahi tatou*, instead of being divisive, unites together and constitutes one single, uniquely New Zealand identity. It constitutes a "love-day", as the Anglo-Saxons would say, between what otherwise would remain two and many more separately warring factions. Being Maori or being Pakeha, or being Pakeha-Maori in whatever proportions one cares to recognise, thus becomes a secondary instead of a previously primary characteristic. Without this equation of essence with existence, or *haecceitas* as Duns Scotus[53] would say of what it is to be a New Zealander, the Treaty will always remain something very much less than fundamental.

What could be seen today to stand in the way of reasserting this first and fundamental principle, *he iwi tahi tatou*, of the Treaty? We hear so much of claims for Maori reparation and see so little responsibility taken by the Crown for Pakeha that the principle of equality if not the Treaty itself is torn to tatters to support a solely indigenous grudge industry. Might not even *tupua* or goblins have feelings?

Could it be historically true that Pakeha were peeved by way of Maori being permitted and authorised to maintain their "laws, customs and usuages", as under article LXXI of the 1852 Constitution, whereas Pakeha attempts at *rangatiratanga* by way of the Kororareka Association and the Port Nicholson Constitution (what our own present Government paradoxically calls "self-management" under the second article of the Treaty) were immediately suppressed and outlawed by the Crown? Could it be historically true that Pakeha were peeved at having to prove good title to their land – even that bought before 1840 – and to pay fees to do so before the Land Tribunals, whereas Maori native title could be held initially on simple say-so, or as was prophetically foretold by the Ngatipiko of the Tuhourangi, on the basis of such barefaced lies that an earthquake would come and swallow that tribe up (as it surely did)? Could it be that de Thierry's Deed of Purchase, like the Busby, Wentworth and Webster claims, were all arbitrarily but conveniently ignored and dismissed by the Crown until upheld by litigation or by international arbitration, whereas under the current principle of redress which the Government purports to derive from the Treaty, Maori (but not Pakeha) are positively protected? Could it be historically true that Pakeha are just peeved outright by the Treaty, because it gives Maori all the rights and privileges of being New Zealand citizens, but dumps all the responsibilities of citizenship on Pakeha? Maybe the time has come for

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53 John Duns, variously know as Duns Scotus (aka *doctor subtilis* or the sharp-thinking doctor) equated the *haeceitas*, ie, the 'thisness', or essence of anything at its most fundamental and autochthonous level, with the self-same existence of the thing; and by claiming *falsum est quod esse aliud ab existentia* – propounded the fallacy of distinguishing between essence and existence.

Pakeha to take a page from *te pukapuka Maori* and so to start hammering the New Zealand Government with their Treaty grievances!

Maybe Pakeha are far more peeved by the Treaty than first appears. Maybe Pakeha are peeved because Maori males had individual suffrage and were entitled to vote under the Maori Representation Act 1867 – some 12 years before Pakeha males acquired individual suffrage. Until 1889, Maori could vote in both Maori and Pakeha electorates, and for several decades Maori Representatives in Parliament were disproportionately greater in relation to their electorate than Pakeha Representatives. Such can be the idealistic edge to colonial law administered in favour of natives against settlers pursuant to the notion – "idealism rampant" as McLintock[54] called it – of the benign ruler and the noble savage.

Most of New Zealand's legal history in relation to the Maori remains permeated by the same nineteenth century idealism. Governments see themselves as being modern through their liberal–minded indulgence of indigenous races, whereas Pakeha are called more rigorously to account. The Crown, by being repressively medieval towards Pakeha yet currently indulgent to Maori, may yet pay the ultimate penalty in consequence of breaching its own principles of equality and cooperation under the Treaty.

There is no doubt that many Pakeha early settlers were mightily peeved, and some even ruined by the Treaty. Could this feeling of frustration, intensified by such affrays as the attack on Boulcott's Farm and the Gilfillan Massacre, be fanned still more recently by way of *te reo Maori* (but not the Queen's English) receiving statutory recognition as an official language of New Zealand under the Maori Language Act 1987? Could it be continuously current by way of constantly renegotiated claims – for example, not less than four – the first in 1868, again in 1887, then 1944, and most recently by the Ngai Tahu Claims Settlement Act 1998, each for "full and final settlement" of historic Maori grievances? Could it be contemporaneous by way of reserving large areas – of the sea – *taiapure* to be managed by local Maori under the Maori Fisheries Act 1989, the Sealord Deal under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and creating *mahinga mataitai* for customary fishing rights along the coastline – exclusively for Maori? Could it be by way of privileged educational entry to law and medical schools, and lowered tax rates for Maori enterprises? The specific list could go on and on.[55] From the Maori Purposes Fund Act 1934– 35 to the Maori Purposes Act 1993 there are more than twenty Public Acts that are expressedly Maori – but not a single explicitly Pakeha Public Act on the New Zealand Statute Book!

To quote the words of a tribal leader, Sir Tipene O'Regan – admittedly out of context of his engaged dispute with urban Maori – this twentieth century catalogue of retributive justice against

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54 A H McLintock, *Crown Colony Government in New Zealand* (Wellington, 1958) Ch II, pp 31-54.

55 Eg Ngai Tahu were paid $1.52 million to support Contact Energy's bid for resource consent on Clutha hydroelectric project: *Otago Daily Times*, 23 October, 1, 24 October 2002, p 1.

the Pakeha smacks of "suntanned welfarism".[56] Making Pakeha pay with compound interest for the misdeeds, and sometimes only alleged misdeeds of history, but letting Maori go scot free from whatever their forebears might have done, does nothing to promote the first principle, *he iwi tahi tatou* of the Treaty.

Our legislature obliges both the executive and the courts to apply principles in their dealings with the Treaty. At last count, upwards of fifty statutes are to be administered in accordance with the principles of the Treaty. This is instead of directly incorporating the Treaty into municipal law.

There is a long legal history of legislative compromise by which the direct incorporation of the Treaty into municipal law has been fudged. Even the Waitangi Tribunal is the result of compromise – an alternative to incorporating the Treaty by Kirk's Labour Government in 1975. The politics lying behind that legislative compromise are remembered now by only a few surviving parliamentary counsel, but like the legal status of the Treaty are too contrapuntally complex to be included in this paper.

Principles in place of statutory rules, advisory reports (as from the Waitangi Tribunal) in place of judicial decision, and arguing from context, parliamentary history, or *travaux préparatoires*[57] instead of from the text (in accordance with the established rules of documentary evidence) all provoke a revolution in South Pacific jurisprudence. Ours, both indigenous as well as Anglo-Saxon, has hitherto been derived from immemorial custom, from tribal, kingly or parliamentary rule, and from priestly, juridic or curial decision. The emphasis, as in any customary legal system, is always on due process of law. That those failures to keep this due process sooner or later expose themselves for what they are shows them to be the exception to the rule of due process that proves the rule.

On the other hand, principles are abstract, intellectual, and often highly idealistic constructs. They are seen by the Common Lawyer to verge dangerously on the political, but when properly understood, relate most intimately to the logical and metaphysical. Principles demand a very different jurisprudence from that which deals with rules. They have a far different heritage than that of the rules understood by the Common Lawyer. The first principle of the Treaty in terms of that heritage would be to share a common citizenship under British rule in a professedly Christian country.

The Common Law system to which we belong has been described as the most exhaustive system of rules. Rules are realistic, or so the Common Lawyer is taught to think in terms of their

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56 David Round *Truth or Treaty*? (Canterbury UP 1998) 138.

57 *New Zealand Maori Council v Attorney-General* (above n 6) 682, 692, 714-715 per Richardson, Somers, and Bisson JJ. See J F Burrows, *Statute Law in New Zealand* (Wellington, 1999) 2 ed, 307; and as to the incompatibility of *travaux preparatoires* under the *Droit Administratif* with the Rule of Law see A V Dicey *The Law of the Constitution* (London, 1885, 10 ed, 1959).

evaluation and administration, but principles are idealistic. Common lawyers know how to deal with rules. Principles are rarely understood by other than Civilians or Chancery Lawyers. Even the fusion of Common Law and Equity, which New Zealand prides herself on since the Supreme Court Ordinance of 1841 has done little to develop but more to confuse equitable principles with common law rules. The fact is that the Common Lawyer, as demonstrated by current levels of curial decision both in a Europeanised Britain and increasingly multi-culturalised South Pacific, has so very little expertise in dealing with principles that they serve only to cloud what little clarity remains of the Common Law.

Here is a fast learning curve for the legal profession in New Zealand. From a law teacher's point of view it is one which promotes shallow learning and a precocious response to the prevailing political correctness of the moment. Whole-year courses succumb to semester papers and semester papers to summer school credits. The whole curriculum, although focused from kindergarten to post-doctoral training on the Treaty is geared to the short attention-span of the fast learner no matter what subsequent and long-term problems this may make for the legal system at large, and for the continuance, autonomy, and authority of the legal profession in the long run.

It is the province of the legal historian, in substantiating the history of the present Treaty's degeneracy, in its moving backwards from freely entered covenant to ritually regarded status, to resurrect the first authentic purpose of the Treaty. The need for such resurrection of authentic values can be confirmed by comparative jurisprudence, since the substitution by historical revisionism of false for true values is a global phenomenon. The first principle of the Treaty, despite all governmental engineering to the contrary, is still – as first stated by Pakeha and enthusiastically accepted by Maori – *te iwi tahi tatou* – we are now one people.

For the purposes of rational and not just rhetorical debate it is important to identify exactly what is meant by historical revisionism and political correctness. There are different species of political correctness. For the former Soviet Union it would have been Lenin's Collected Works, as looked after by the Institute of Marxism-Leninism. Leninskii Prospects would proliferate throughout the Soviet Union where statues would testify to Leninism as the State religion. In a not dissimilar way, the Waitangi Tribunal supervises the Treaty of Waitangi in New Zealand where 'honouring the Treaty' in every school, church, and university becomes the State religion.

As with the Institute of Maxism-Leninism, the Waitangi Tribunal's advisory jurisdiction extends both prospectively and retrospectively. Just as Hebraic history is the province of prophets, so our own recorded history has a strange way of attempting to alter the past. Modern history is so much a contradiction in terms that we have yet to see how forcefully Gorbachev's historical revisionism contributed to the collapse of communism.[58] We began as we shall end this chapter by merely

58 See N J Jamieson, "The Last Indian Summer of Soviet Law Reform" [1995] *Statute Law Review* 68-89, 125-143.

talking through the Treaty. We hold this to be an apt expression for much of the purely linguistic debate over what the Treaty-words mean, and in place of those words used, what ought to have been employed in the document's drafting. Such argument as to the meaning of words can rarely, if ever be definitive in the context of descriptive usage rather than prescriptive definition as a standard of linguistic analysis. As for the legal status of the Treaty and its fudged incorporation into municipal law, we have likewise side-stepped all textual exegesis of the Treaty's terms. Since Wittgenstein, Whorf, and Ogden and Richards, the prevailing view is one of Humpty-Dumptyism by which words may be taken to mean no more nor less than what one choses to mean by them.[59] Nevertheless if there are those for whom "talking the treaty" is too imprecise and overly generalised for scholarly endeavour, they may also care to consider whether their own level of precision, by way of debating such words as *kawanatanga, tinorangatiratanga, taonga* and *mana* may not be overly-precise, deadeningly detailed, and perplexingly particularised. Lacking the prescriptive authority of a Johnson or a Chambers, whose dictionary definitions determined usage rather than popular usage determining definition, the linguistic debate over what constitutes *tinorangatiratanga, kawanatanga, taonga* and *mana* is bound to be never-ending, and the protean although anachronistic way by which concepts such as *taonga* can suddenly extend themselves to include plant-patents and radio waves at least tragi-comical for scholarship if not farcical by way of legal claims.

It was Aristotle who, in his *Nichomachean Ethics*,[60] warned against the dangers of seeking over-precision and excessive particularity. It is this insistence on precision and particularity that reduces many Treaty claims to comic opera. Foden, once wishing for an Austin or a Maine to give rightful honour to our early experiments in South Pacific jurisprudence, would now need a Gilbert and a Sullivan to laugh off the unmitigated pretentiousness of many Treaty claims. Such strictures as have been introduced by Whorf, Wittgenstein *et al* on the written as well as the spoken word leave only one alternative to talking through today's Treaty – that of explaining how clearly impossible it is to attempt any serious legal history of a topic so overcome by politics at the present time.

We end by deploring the prevailing political correctness by which claims are equated with rights, by which history is revised to accord with wishful thinking, by which literary skills of textual exegesis give way to polemics, by which political principles are legislatively substituted for rules of law, and by which long established rules of documentary evidence fall victim to judicial activism. We end also by deploring the failure of our schoolmen and of our churchmen to keep alive the full measure of that autochthonous faith which first outlawed cannibalism, slavery, human sacrifice and

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59 See NJ Jamieson, "Semantics and Jurisprudence" [1964] NZLJ 15; "Towards a Systematic Statute Law" [1976] Otago LR 543; "Linguistics and Legislation" [1997] *Loophole – Newsletter of the Commonwealth Association of Legislative Counsel* 17.

60 " . . . we must be content if we attain as high a degree of certainty as the matter of [the subject] admits." Ch III trs JAK Thomson (Penguin Classics) 27.

internecine warfare from these once-called Cannibal Isles, and which taught history, especially legal history by its emphasis on ideas rather than on events, as transcending both space and time.

By way of mitigation, we plead the loss of universal absolutes – those concepts of Law, Justice, Morality, Culture, and Civilisation (as once again capitalised) – to explain our overly introspective preoccupation with indigenous culture. Ours is a pre-occupation which arises in many cases to fill the vacuum left by one's own diminishing culture. We plead our own parochial ignorance of the world at large whereby indigenous values are exaggerated by the paucity of interactive and corroborative evidence from other cultures. We plead the temptation to conform and advance by governmentally instituted programmes of political correctness which substitute indigenous for universal values despite such programmes being dangerously subversive of schooling and scholarship.

Whether you agree or not with this assessment of the situation, the conclusion of our critique by way of examining the context of current concern rather than the text of the Treaty is obvious if not self-evident from this country's pre-occupation with the Treaty. The Treaty of Waitangi 1840 has become an *idée fixe* for New Zealand. A similar pre-occupation with a single topic – the rise of Hitler's Third Reich – threatens today's study of history in British schools with 'Hitlerisation'[61] just as past generations were threatened with 'Napoleonism'. Today's threat to history here in New Zealand lies with 'Treatification'. For any individual, but much worse so for any nation, the phenomenon by which the social sciences, the humanities and the legal system all submit themselves to the same *idée fixe* of the Treaty manifests a seriously pathological condition.

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61 *NZ Educational Review* Feb 19-25, 2003, 8.