



# Massey Research Online

## Massey University's Institutional Repository

Massey Author: Gibbs, Meredith

Gibbs, M. (2005). *Justice in New Zealand's Treaty of Waitangi settlement process*. (CIGAD Working Paper Series 2/2005). Palmerston North, N.Z.: Massey University. Centre for Indigenous Governance and Development.

<http://hdl.handle.net/10179/935>



**Justice in New Zealand's  
Treaty of Waitangi  
Settlement Process**

**Meredith Gibbs**



The CIGAD working paper series is designed to allow for the rapid dissemination of research conducted under the auspices of the Centre for Indigenous Governance and Development. The views expressed in this working paper are those of the author(s) and do not represent any official view of the Centre for Indigenous Governance and Development.

Centre for Indigenous Governance and Development  
Level 3, Geography Building  
Turitea Campus  
Massey University  
Palmerston North  
New Zealand

<http://cigad.massey.ac.nz>

CIGAD Working Paper Series 2/2005

Justice in New Zealand's Treaty of Waitangi Settlement Process.

©Meredith Gibbs

ISSN 1176-9025

ISBN 0-9582616-1-X

# Contents

Abstract	ii
Acknowledgements	ii
Biographical note	iii
Introduction	1
The influence of 'culture'	2
A shared standard of justice	2
The Treaty of Waitangi	3
The Treaty as shared justice	3
Constraints flowing from the Treaty as shared justice	4
The influence of 'time'	6
Who's who in historical injustices?	6
The counterfactual and restoration approaches to reparative justice	8
The constraint of moral authority and the counterfactual approach	9
Reparation as reconciliation	10
Contemporary justice concerns	12
Conclusion	15
Notes	17

## Abstract

In this paper I examine how the New Zealand government, through the Treaty of Waitangi settlement process, is providing contemporary reparation for historical injustices against Maori tribes. Because historical injustices involve the interactions of *cultures* over *time*, justice in New Zealand's Treaty settlement process is shaped, and constrained, by two key factors: 'culture' and 'time'. First, I make the case that justice in the Treaty settlement process is only that part of justice that is shared by Maori and the New Zealand Crown and that this shared conception of justice is found in the Treaty of Waitangi (the influence of 'culture'). Following on from this, I show how the Treaty as the shared standard of justice limits the justice in the Treaty settlement process in important ways. Second, I argue that because reparation for historical injustice is made in the present, and works into the future, justice in the Treaty settlement process is not full reparative justice (the influence of 'time'). Rather, although the justice of the Treaty settlement process is by nature reparative, its scope is limited by contemporary, and prospective, justice concerns. I argue, finally, that the Treaty settlement process reflects a reconciliatory approach to reparative justice where the cultural survival of Maori through restoration of the promises of the Treaty is given greater weight than the provision of full reparation for past wrongs.

## Acknowledgements

I am grateful to Nicola Wheen, Janine Hayward, Richard Shaw, Manuhaia Barcham and Paul Spoonley for helpful comments on this and earlier drafts.

## Biographical note

Dr Meredith Gibbs is a lecturer in Environmental Law at Massey University, Palmerston North. Her research specializes in reparative justice, the Treaty settlement process, indigenous rights to natural resources, and the law relating to genetically modified organisms. She has published locally and internationally in these fields and is currently an author for Brookers *Resource Management*. Meredith has worked previously as a lawyer for Blake Dawson Waldron, Melbourne and Hesketh Henry, Auckland.

## Introduction

In 1975 the Waitangi Tribunal was established to investigate Maori<sup>1</sup> claims of prejudice arising from the failure of the New Zealand Crown<sup>2</sup> to honour the Treaty of Waitangi from 1975 onwards.<sup>3</sup> When, a decade later, the Tribunal's jurisdiction was extended back to the signing of the Treaty in 1840, there began the complex task of inquiring into, hearing, and ultimately resolving, all Maori claims of historical injustice.<sup>4</sup> In this paper I examine how the New Zealand government, through the Treaty of Waitangi settlement process, is providing contemporary reparation for historical injustices against Maori tribes.

I argue that because these kinds of historical injustices involve the interactions between two distinct *cultures* over *time*, the justice available in New Zealand's Treaty settlement process is shaped, and at times constrained, by two key factors: 'culture' and 'time'. First, I make the case that justice in the Treaty settlement process is only that part of justice that is shared by Maori and the New Zealand Crown and that this shared conception of justice is found in the Treaty of Waitangi (the influence of 'culture'). Following on from this, I show how the Treaty, as the shared standard of justice, limits the justice in the Treaty settlement process in important ways. Second, I argue that because reparation for historical injustice is made in the present, and works into the future, justice in the Treaty settlement process is not full reparative justice (the influence of 'time'). Rather, although the justice of the Treaty settlement process is by nature reparative, its scope is limited by contemporary, and prospective, justice concerns. To date, settlements reached between Maori and the Crown have included not only apologies, but also substantial financial and cultural redress. I argue, finally, that this reflects a reconciliatory approach to reparative justice where the cultural survival of Maori through the restoration of the promises of the Treaty is given greater weight than the provision of full reparation for past wrongs.

In this paper, the 'Treaty settlement process' refers to a range of formal procedures whereby Maori who claim to have suffered prejudice as a result of Crown breaches of the Treaty of Waitangi reach agreement with the New Zealand government that an injustice requiring reparation did in fact occur, and negotiate appropriate redress to remedy the prejudice suffered.<sup>5</sup> The Crown has accepted that it has a moral obligation to resolve historical injustices for breaches of the Treaty of Waitangi, and 'principles' derived from it.<sup>6</sup> Any individual Maori or group of Maori who claims to be prejudicially affected by breaches of the Treaty may lodge a claim with the Waitangi Tribunal. In most cases, the Tribunal then hears the claim and produces findings and recommendations. Armed with these, the Maori claimant group negotiates with the Crown, typically leading to a Deed of Settlement implemented by legislation.<sup>7</sup> Settlement redress usually includes an apology (both written in legislation and spoken), financial compensation, the return of significant sites and sometimes resources, measures to restore cultural identity and authority, and measures intended to lay the foundations for ongoing just relations between the state and Maori claimant groups.<sup>8</sup>

## The influence of 'culture'

It is clear that both Maori and the New Zealand Crown expect the Treaty settlement process to achieve 'justice'.<sup>9</sup> But in any cross-cultural discourse about 'justice', how can we be sure that the parties are talking about the same thing and are not just talking past each other? 'Justice' is not an object independent of the meanings given to it in different contexts, or against which any translation of the word can be verified in cross-cultural exchanges.<sup>10</sup> When two cultures meet, interact, and speak about justice, each brings its historical and cultural perspective to those interactions, perhaps highlighting certain facets or applications of justice in the process. Those conceptions of justice might be very different. In the New Zealand context, academic Andrew Sharp's comprehensive study of Maori claims to justice shows that the main cultural groups in New Zealand, Maori and Pakeha (Non-Maori New Zealanders, primarily of European descent)<sup>11</sup>, "as a matter of fact ... have separate and often contradictory conceptions of what justice demands".<sup>12</sup> Is there any overlap or agreement between these different cultural perspectives of justice in contemporary New Zealand?

### A shared standard of justice

Sharp suggests that there *is* an agreed or shared justice in New Zealand, sourced in the Treaty of Waitangi.<sup>13</sup>

It is an ancient idea to think that in the absence of widespread agreement on the depth and detail of justice a thinner conception of justice can be constructed by two or more parties. This justice can now be enforced as justice must be if it is to *be* justice and not just an ideal of good conduct. It can be enforced because now justice consists in giving people their rights specified in contract rather than their rights according to the disputed conceptions of what justice is.<sup>14</sup>

Sharp demonstrates that (at least from 1987) Maori made the Treaty of Waitangi a sacred, solemn contract, and the standard of justice between Maori and the Crown.<sup>15</sup> Although Pakeha have undoubtedly lagged behind in accepting the Treaty as the standard of justice, at least by the mid-1980s for the first time there was growing support in government circles for the notion of the Treaty as the standard of justice, breaches of which required reparation.<sup>16</sup> The establishment of the Waitangi Tribunal in 1975, the extension of its jurisdiction to cover historical claims in 1985,<sup>17</sup> and the various ways in which the principles of the Treaty were enshrined in legislation in the 1980s and 1990s,<sup>18</sup> demonstrate the growing acceptance of the Treaty as a standard of just conduct between Maori and the Crown. The jurisdiction of the Waitangi Tribunal, in particular, clearly shows that the Treaty is to be the standard of justice between the Crown and Maori.<sup>19</sup> In practice, therefore, the 'justice' of the Treaty settlement process is found in the shared institution of the Treaty of Waitangi.<sup>20</sup> So what is the Treaty of Waitangi and what does it promise?



## The Treaty of Waitangi

The Treaty of Waitangi was signed by representatives of Her Majesty Queen Victoria and Maori *rangatira* (chiefs) on 6 February 1840, and subsequently.<sup>21</sup> Despite its apparent simplicity—the Treaty consists of a preamble and three short articles—the precise meaning and application of the Treaty has been the subject of sustained debate, not least because it was signed in both English and Maori languages (with many *rangatira* only signing a Maori version) where the English version is not a direct, or accurate, translation of the Maori version. Significantly, in the English version, Maori ceded full ‘sovereignty’ to the Crown, but in the Maori version only ‘*kawanatanga*’, most often translated as ‘governance’, was ceded.<sup>22</sup> From the perspectives of the *rangatira*, ‘*kawanatanga*’ would not have had connotations of sovereignty and thus it seems that Maori chiefs would not have understood the Treaty to cede their tribal authority.<sup>23</sup>

Moreover, in exchange for ceding ‘*kawanatanga*’ to the British, Article II of the Treaty reserved to Maori “*tino rangatiratanga*”, their chieftainship, over their lands, homes and other “*taonga*”, or “valuable possessions and attributes, concrete or abstract”.<sup>24</sup> In the English version, this was worded as reserving to Maori their “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession”. From a Maori perspective, the reservation of ‘*rangatiratanga*’ in Article II would have signalled a guarantee of tribal sovereignty.<sup>25</sup> This crucial tension between the grant of ‘sovereignty’ to the Crown in Article I of the English version and the retention of ‘*tino rangatiratanga*’ in Article II in the Maori version of the Treaty is central to contemporary debates about Maori Treaty rights.

Despite the ambiguities and tensions inherent in, and arising from, the Treaty texts, the British Crown proclaimed its full sovereignty over the islands of New Zealand.<sup>26</sup> In doing so, and in the subsequent colonisation that took place with little or no recognition of Maori rights, the British Crown, and later the Crown in right of New Zealand, took more sovereignty than was ceded under the Treaty.<sup>27</sup> The Treaty was regarded legally as “a simple nullity”<sup>28</sup> for much of New Zealand’s history leading to Maori dispossession, poverty and ongoing disadvantage.<sup>29</sup> After decades of sustained and increasing Maori objections to the Crown for its failure to recognise the Treaty, Maori protests escalated, culminating in thousands of Maori marching on Parliament in 1975.<sup>30</sup> In response to these pressures,<sup>31</sup> the Waitangi Tribunal was established to investigate Crown behaviour, and to make non-binding recommendations to resolve well-founded Maori claims.<sup>32</sup> Over the next fifteen years, the jurisdiction of the Tribunal was increase,<sup>33</sup> further indicating the Crown’s growing acceptance of the Treaty as a source of binding obligations.<sup>34</sup>

## The Treaty as shared justice

The Treaty as shared justice in the Treaty settlement process has allowed “ideas of justice in contract and reparation for breach of contract” to guide the Maori-Crown dialogue of justice in the Treaty settlement process.<sup>35</sup> Despite the difficulties of regarding the Treaty as a contract containing strict rights, the Treaty as shared justice at least enables the Crown and Maori to agree that a breach of the Treaty is an injustice requiring reparation. Clearly, if the standard of justice in the Treaty settlement process is located in the Treaty, then justice

exists in fulfilling the promises of the Treaty. Article II of the Treaty guarantees to Maori *rangatiratanga* over their lands and other *taonga*, which has been interpreted by the Waitangi Tribunal as including a guarantee of tribal *mana* (authority, control, prestige, power), *rangatiratanga* (chieftainship), and *turangawaewae* (literally, a place to stand), albeit adapted in light of the changed circumstances of the contemporary context.<sup>36</sup> In other words, the Treaty guaranteed to Maori their cultural survival. Here we see a combination of the influence of both 'culture' and 'time' on the content of justice in the Treaty settlement process.

However, as already noted, the Treaty itself does not easily lend itself to agreement about its exact meaning. The Treaty has many interpretations: "It has multivalent locutionary force because it is in two languages, in at least five versions in English; and though it is in only one version in *te reo Maori*, Maori is a language which plays on multivalence".<sup>37</sup> It has proved fecund of conflicting interpretations. Perhaps in response to the problems of interpreting the Treaty as a contract containing strict rights,<sup>38</sup> the New Zealand Parliament, the Waitangi Tribunal, and the New Zealand courts, have also viewed the Treaty as a living document that speaks in contemporary contexts,<sup>39</sup> and have emphasised the *principles* of the Treaty, rather than its strict text.<sup>40</sup> The principles are derived from the articles of the Treaty itself<sup>41</sup> and include: the Treaty implies a partnership between Maori and the Crown characterised by a duty to act in good faith and co-operation; the right of the Crown to govern is subject to a duty of active protection of Maori interests, and in particular, *tino rangatiratanga* over resources and *taonga* (treasured possessions), but is not unreasonably restricted; and the Crown has a duty to remedy past breaches of the Treaty.<sup>42</sup> The principles of the Treaty help to define just conduct between the Treaty partners over time, but they too are vague and open to differing interpretations. This ambiguity in the Treaty and its principles, and its practical application, means that all the specifics of reparative justice applied in a particular Treaty settlement must be negotiated. The point, however, should be clear: the Treaty frames the justice of the Treaty settlement process and the dialogue which takes place within this process.

### Constraints flowing from the Treaty as shared justice

There are three important implications of the Treaty of Waitangi being the source of shared justice in the Treaty settlement process. First, the boundaries of the sovereignty arrangements established by the Treaty itself apply.<sup>43</sup> Debate is therefore focused on the relationship between the sovereignty (*kawanatanga*) ceded to the Crown under Article I of the Treaty, and the *rangatiratanga* (authority, chieftainship) retained by Maori according to Article II without questioning the ultimate right of the Crown to govern. For some, this is a severe limitation on the justice which Treaty settlements are able to achieve.

The second major constraint flows from the first. Because the ultimate sovereignty of the Crown is not under question, the Crown has general good governance duties with respect to the wider New Zealand community. It also remains responsible for dispensing justice, albeit through different arms of the state in accordance with the principles of Westminster government. But the Crown is also the wrongdoer in this scenario of historical injustice, and the contemporary entity responsible for making reparation.<sup>44</sup> Australian academic Susan Dodds has suggested that in such situations "there is a genuine question about the authority of the state to encapsulate indigenous people's concerns *within* the state".<sup>45</sup> A similar line is taken by academic James Tully who, focusing

on the North American context, argues, "many of the representative Western theories of property do not provide an impartial conceptual framework in which [Indigenous peoples'] demands for justice with respect to property can be adjudicated".<sup>46</sup> He suggests that a "cross-cultural 'middle ground' composed of early modern Aboriginal and common-law systems of property, and their authoritative traditions of interpretation", is required in such situations.<sup>47</sup> Leaving aside the inherent difficulties of achieving an *impartial* conceptual framework in any case, in New Zealand some of the issues identified by Dodds and Tully are ameliorated by the unique status and operation of the Waitangi Tribunal.

The Waitangi Tribunal embodies bicultural elements and has played a key role in developing a New Zealand-based bicultural jurisprudence.<sup>48</sup> The Tribunal has provided a forum for the greater understanding of the issues at stake for Maori through the re-telling of history from the claimant group's perspective, and has provided an analysis of the effects of past wrongs from within the institutions and value systems of particular claimant groups.<sup>49</sup> To some extent, then, these factors suggest that the Treaty settlement process is a 'cross-cultural middle ground' and they go some way to countering the fact that settlements are, in general, made within a system based on common law principles.

However, the Tribunal's limited ability to bind the Crown diminishes these positive aspects of the Tribunal's work and suggests that the Crown holds most, if not all, of the cards, and can decide whether or not to play by the rules of the game in the Treaty settlement process. For example, the Crown is not bound by the Tribunal's findings of fact and therefore, is not bound by the Tribunal's determination that a breach of Treaty principles has (or has not) taken place<sup>50</sup> or the resulting inference that an injustice requiring reparation has in fact occurred.<sup>51</sup> Moreover, the Tribunal has limited powers to bind Crown action, and has generally only made non-binding recommendations regarding appropriate reparation, leaving the Crown and Maori claimant groups to negotiate just redress.<sup>52</sup> Ultimately, the Crown has the power to dissolve the Tribunal or to restrict its powers.

The merging of Crown roles thus limits the kind of justice that the Treaty settlement process is able to achieve, and the justice of the Treaty settlement process is, in these respects, a negotiated justice.<sup>53</sup> Because the Treaty of Waitangi is full of ambiguity, the specifics of Treaty promises, in any given context, must also be negotiated. This leads to the third implication of the Treaty as shared justice, this time presented by way of a dilemma. If justice means giving each party what is theirs by right, and there is no agreement about the content of those rights (as is the case here where there is no agreement on the content and application of the rights promised by the Treaty of Waitangi), can the results of the Treaty settlement process be called 'justice' at all? Or are they better described as the best deal that can be struck between (often unequal) bargainers?

## The influence of 'time'

In situations of historical injustice, the aim is to put right past wrongs. This is the work of reparative justice. It can be distinguished from distributive justice,<sup>54</sup> which concerns the justice of distributions of resources (and duties) in society<sup>55</sup> and retributive justice, which is concerned with the punishment of wrongdoers.<sup>56</sup> Sharp suggests:

Reparative justice is a reciprocal exchange between two equal parties, recognizing the same standards of right, whereby one party having done wrong to the other, repairs that wrong by restoring the wronged party to his, her, their or its ... position before the wrong. I wrongly take your land; I return it. I arrogate your authority; I restore it to you. I do not benefit from the transaction: your suffering is relieved; balance is restored and justice in transactions is done.<sup>57</sup>

Put simply, reparative justice "consists in having an equal amount before and after the transaction".<sup>58</sup> This notion of justice accords with the Maori principle of '*utu*' meaning "'repayment' or 'compensation' or 'reciprocity', restoring some sort of balance, exacting what is due, or what is demanded by the situation".<sup>59</sup> Significantly, because "*utu* is essentially a mechanism for restoring lost *mana* [tribal authority, power]",<sup>60</sup> it is a core aspect of justice in the Treaty settlement process. Many Maori argue for reparation in this vein: "As land was taken, so land should be returned".<sup>61</sup> However, it is not always so simple. The fact that reparation is made in contemporary contexts gives rise to difficulties that throw doubt on the ability to achieve justice. These dilemmas will now be explored in the context of the Treaty settlement process to determine whether there can be any justice *at all* in Treaty settlements.

### Who's who in historical injustices?

One dilemma raised by situations of historical injustice is *who* ought to pay compensation or make restoration, and to *whom*?<sup>62</sup> Because decades or centuries may have lapsed between the time of the injustice and the present in which reparation is being made, in most cases the individuals involved in the historical situation of injustice are no longer alive. What rights do present-day descendants of the victims have to claim recompense for what was done to their ancestors, and what duties do the current generation owe to make good those wrongs?<sup>63</sup>

Some philosophers have suggested that an individual cannot be harmed by (unjust) events occurring before that individual was conceived,<sup>64</sup> and moreover that present-day individuals may owe their very existence to such events.<sup>65</sup> They conclude therefore, that present-day individuals cannot claim recompense for events occurring before their lifetimes.<sup>66</sup> This reasoning suggests that, in the Treaty settlement process, individual Maori have no moral claim to reparation for breaches of the Treaty of Waitangi suffered by their ancestors. The Treaty settlement process recognises, however, that past injustices may have ongoing effects, and that injustices may persist over time: any Maori who claims to be prejudicially affected by breaches of the Treaty, including breaches going back to the signing of the Treaty, can make a claim to the Waitangi Tribunal.<sup>67</sup>

The ongoing effects of persisting historical injustice do seem to affect communities over time.<sup>68</sup> Present-day communities may well suffer the consequence of past wrongs (for example, in the case of Maori exhibiting low socio-economic status) and therefore, it can be argued that there *is* a moral right to redress persisting injustice over time, despite the death of the individuals *directly* involved in the past wrong. Alternatively, one can reason that because only communities can be harmed by injustices occurring before the time of their individual members' respective conceptions, "the only entities capable of deserving reparations for ancient wrongs are 'communities'".<sup>69</sup> Accordingly, what is important is that the "community",<sup>70</sup> or a "related group of persons",<sup>71</sup> continues to exist.<sup>72</sup> This latter argument is particularly persuasive in the context of the Treaty settlement process because the Treaty of Waitangi, as the shared standard of justice, determines the parties to injustice as the parties to the Treaty.

The parties to the Treaty of Waitangi were Queen Victoria and Maori chiefs. Whilst not envisaged by the Treaty, in 1863, the conventions of responsible government in Maori matters were transferred from the United Kingdom to New Zealand,<sup>73</sup> and "the obligations of Her Majesty, the Queen of England, under the Treaty are now those of the Crown in right of New Zealand".<sup>74</sup> Therefore, the enduring notion of 'the Crown' can clearly be established and the present entity responsible for providing redress for breaches of the Treaty is the Crown in right of New Zealand, in practice the government of the day.

There seems little doubt that Maori collectives have endured "in spite of the mortality of individual members"<sup>75</sup> since the Treaty was signed. Whilst any Maori may bring a claim for breaches of the Treaty of Waitangi,<sup>76</sup> in practice individuals have tended to bring claims on behalf of wider descent groups. Maori society, however, has always been dynamic, and the form and importance of different groupings within Maori society has changed over time.<sup>77</sup> Further, current Maori collectives may be constituted by a variety of legal means including trust boards,<sup>78</sup> incorporated societies,<sup>79</sup> Maori incorporations,<sup>80</sup> and other corporate structures.<sup>81</sup> Careful historical analysis will be needed to ascertain whether an entity making a contemporary claim has historical continuity with the unjustly treated Maori collective in question.<sup>82</sup> There may be questions of degree in particular cases. Certainly this line of argument raises major uncertainties for more recent collectives of Maori, such as the urban collective known as the Waipera Trust, wishing to pursue claims for historical injustices done to Maori generally. For some, this may be a major limitation on the justice the Treaty settlement process can deliver. There is also an unresolved issue where the Crown's breaches were so detrimental that Maori communities fragmented or even dissolved altogether.<sup>83</sup> In the latter situation, the Treaty settlement process offers no justice at all.<sup>84</sup>

Despite these shortcomings, at this stage it is sufficient to accept that there *are* many enduring Maori collectives with historical continuity and so there is a prospect of achieving some kind of justice in the Treaty settlement process. In practice, the New Zealand Crown has provided redress primarily to (historical) Maori collectives such as *iwi* (tribes), sometimes to major *hapu* (sub-tribes),<sup>85</sup> and less often to *whanau* (families),<sup>86</sup> resulting in a constraint on the kind of justice available in the Treaty settlement process. Reparation is not made to individuals, nor to contemporary Maori collectives without direct historical continuity and reparation will only benefit individuals through membership of historically linked, contemporary Maori collectives.

## The counterfactual and restoration approaches to reparative justice

Applying reparative justice in contemporary contexts leads to other difficulties,<sup>87</sup> and resulting constraints on justice. Assuming that the appropriate parties can be established, the first step of reparative justice is to determine that a wrong has been done. In the Treaty settlement process, the Treaty of Waitangi provides this necessary standard of justice. The next step, ideally, is to return the victims to their position before the breach. But how can this be done? The clock cannot be turned back, nor can be erased the fact that generations have lived their lives in conditions of ongoing injustice.<sup>88</sup> Situations of historical injustice involve complex interactions between communities over time where, in addition to numerous isolated incidents of past injustice, there are continuing institutional injustices.<sup>89</sup>

The world we know is characterized by patterns of injustice, by standing arrangements—rules, laws, regimes, and other institutions—that operate unjustly day after day. Though the establishment of such arrangements was an unjust event when it took place in the past, its injustice then consisted primarily in the injustice it promised for the future.<sup>90</sup>

Reparative justice must ameliorate the effects of each past injustice and of ongoing injustice, as well as prevent the repetition of injustice caused by continuing unjust arrangements.<sup>91</sup>

One approach, the 'counterfactual approach', concentrates on ameliorating the effects of past injustice.<sup>92</sup> This approach begins by imagining what the world would be like today if the particular injustice had not occurred. The second step is to provide redress to ensure that the actual situation matches, as far as is possible, the imagined, or counterfactual, situation of no injustice. The victims of injustice will thereby be put in the position they would have been, but for the injustice.<sup>93</sup> In terms of *utu*, the balance is thereby restored.

Another approach, the 'restoration approach', focuses on remitting ongoing injustice. This second approach seeks to restore that which was taken unjustly (for example, property or *mana* (tribal authority)), thereby preventing the continuation of that injustice.<sup>94</sup> Again, there are similarities with the Maori concept of *utu* as a process of restoring lost *mana*.

The counterfactual and restorative approaches are not mutually exclusive and both offer guidance in navigating the complex territory of historical injustice.<sup>95</sup> There are situations where reparation might entail both models: in the New Zealand context it may be appropriate to restore unjustly expropriated land *and* pay compensation to fully reflect the situation the victims would have enjoyed had the expropriation not occurred (for example, to reflect an income stream the land may have generated during the period of expropriation). Further, a counterfactual approach may involve restoration of something denied unjustly where that thing would have been retained but for the injustice. Similar to the counterfactual approach, the restoration approach may require changes to unjust institutional arrangements that perpetuate breaches of the Treaty of Waitangi, to ensure that contemporary and future arrangements reflect the promises of the Treaty. Accordingly, the difference in application between the two approaches is at times subtle.

## The constraint of moral authority and the counterfactual approach

But how can we ascertain what today's world would look like had the relevant injustice not occurred so that reparation might be made to reflect that just, counterfactual, situation? For example, what would today's world look like if the New Zealand Crown had honoured the Treaty of Waitangi? If it is assumed that Maori lands were *not* unjustly expropriated in the past, what would have happened in the intervening years? To what extent can it be said that persons or collectives would have made one choice over others in any given counterfactual situation?

Some events are random or the product of free choice, and therefore do not simply follow from antecedent conditions. Further, according to philosopher Jeremy Waldron, these types of non-deterministic events are exactly the focus of inquiry:

The expropriation of Maori lands, for example, did not take place according to inexorable laws of nature. It took place because certain wilful and greedy individuals decided to seize those lands in circumstances in which they could easily have done otherwise. ... [I]t was a contingency, not a necessity ... .<sup>96</sup>

The fundamental problem lies in the limitations of rational choice theory. Waldron argues: "The thing about freedom [of choice] is that there is no fact of the matter anywhere until the choice has been made. It is the choice that has authority, not the existence as such of the chosen option."<sup>97</sup> Accordingly, how can we be sure of the moral authority of a specific counterfactual constructed for reparation in the Treaty settlement process?<sup>98</sup> And if no moral authority can be found, is there any justice at all?

The Waitangi Tribunal has reasoned that the Treaty of Waitangi "did not see the loss of tribal identity as a necessary consequence of European settlement".<sup>99</sup> Rather, the Treaty guaranteed Maori *rangatiratanga* (the exercise of chieftainship) and therefore, Maori authority, identity and culture. If this is accepted, the Treaty as the shared notion of justice gives moral authority to the proposition that if injustices (Treaty breaches) had not occurred, Maori would now have sufficient land and resources, a *turangawaewae*, from which to exercise their tribal authority: this is the very assurance of the Treaty. On this approach, it is not necessary to know *precisely* what land and resources would have been retained but for the injustice, and the problems of rational choice theory are thereby minimised, if not completely resolved.<sup>100</sup>

Using this approach, justice in the Treaty settlement process requires that the present situation is modified to reflect the counterfactual world in which Maori culture survives and flourishes, and Maori have *rangatiratanga* over natural resources as envisaged by the Treaty. This would involve providing not only apologies for past wrongs, but also financial compensation, the return of tribal lands and resources, measures to restore cultural identity and authority, and measures intended to lay foundations for ongoing just relations between the state and Maori claimant groups. By providing this kind of redress the promises of the Treaty are restored and ongoing injustices remitted, thus indicating an overlap with the restoration approach to reparative justice.

But the *amount* of compensation, *which* tribal lands and resources, and *what* measures to restore tribal authority, are all open to debate and must be negotiated in any particular settlement. Consequently this approach presents,

once again, the problem left to answer in the previous section: if we accept that justice consists in giving people their rights and that there is no agreement as to the *content* of Maori rights under the Treaty of Waitangi, are the results of the Treaty settlement process 'justice' at all, or merely the best deal available in the circumstances? I have argued elsewhere that the *intention* of the parties in the Treaty settlement process is, without doubt, to achieve justice for past wrongs.<sup>101</sup> And intentions *are* important. It matters who makes reparation in situations of historical injustice, and why, because the acknowledgement of a wrong for which the wrongdoer is responsible to make good is one of the characteristics of reparative justice that distinguishes it from distributive justice.<sup>102</sup> In other words, reparative justice depends on the relationship between the wrongdoer and the victim. Here, the New Zealand Crown *has* accepted moral culpability for historical injustices against Maori tribes, and the negotiations that lead to settlements are made in that context. For example, in the Ngai Tahu settlement the Crown made the following apology in both written and spoken form:

The Crown expresses its profound regret and apologises unreservedly to all members of Ngai Tahu Whanui for the suffering and hardship caused to Ngai Tahu, and for the harmful effects which resulted to the welfare, economy and development of Ngai Tahu as a tribe. The Crown acknowledges that such suffering, hardship and harmful effects resulted from its failures to honour its obligations to Ngai Tahu under the deeds of purchase whereby it acquired Ngai Tahu lands, to set aside adequate lands for the tribe's use, to allow reasonable access to traditional sources of food, to protect Ngai Tahu's rights to pounamu and such other valued possessions as the tribe wished to retain, or to remedy effectually Ngai Tahu's grievances. ... [T]he Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the historical grievances finally settled ... to begin a process of healing and to enter a new age of co-operation with Ngai Tahu.<sup>103</sup>

An agreement reached in such a context of sincere apology and intention to achieve justice is not simply a political deal. In such a context, it *is* justice of some kind. So if giving victims of historical injustices what is theirs by right *is* impossible,<sup>104</sup> or presents us with seemingly insurmountable dilemmas, is there another suitable conception of justice in reparations?

### Reparation as reconciliation

Rather than a rights-based approach, Australian academic Janna Thompson argues that in situations of historical injustice (and in particular, instances of colonial domination of Indigenous peoples) "a reconciliatory theory provides a defensible and attractive approach to reparation".<sup>105</sup> She argues:

Those who enter such [reconciliatory] negotiations are likely to have different views about what is just. Reconciliation is a process of mutual accommodation ... Reconciliation is a process involving discourse, in which attempts to reach what Rawls calls 'overlapping consensus': a result that each can endorse from his or her point of view.<sup>106</sup>

According to Thompson, reconciliation is actually achieved:

... when the harm done by the injustice to relations of respect and trust that ought to exist between individuals or nations has been repaired or compensated for by the perpetrator in such a way that his harm is no



longer regarded as standing in the way of establishing or re-establishing these relations.<sup>107</sup>

Here the aim is not to provide full reparation according to rights, but rather to achieve a mutually acceptable accommodation of claims that allows the parties to move forward in a relationship of good faith and trust. In situations where the rights and culture of Indigenous peoples have been denied unjustly in the past, this will likely involve the giving of an apology, at least, and also the provision of substantive redress to restore the victim to a position of strength so that the ongoing relationship between the parties is one of equality or partnership. The Treaty of Waitangi provides the boundaries for negotiating such an “overlapping consensus” in New Zealand’s Treaty settlement process. Further, the counterfactual of ensuring Maori cultural survival sounds very much like Thompson’s reconciliatory approach: by providing reparation (including an apology) to restore the cultural integrity of the tribe, the parties are able to re-establish a relationship of respect and trust. Thus, reparative justice as reconciliation allows us to view the results of the Treaty settlement process as ‘justice’ while accepting that it may be impossible, strictly speaking, to give Maori claimant groups their full rights under the Treaty either because there is limited agreement about what those rights are or it is simply outside the power of the wrongdoer to provide them.

But a reconciliatory approach is still subject to problems arising from providing reparation in contemporary contexts. A theory of reparation as reconciliation must provide, for example, guidance on what the victim can rightly demand by way of redress.<sup>108</sup> To what extent is the present position of the wrongdoer, or the contemporary context generally, relevant to what makes a just demand for redress? Similarly if we use the counterfactual approach we must address the relevance of contemporary justice concerns. For example, there is no *single* correct counterfactual that describes a New Zealand where breaches of the Treaty did not take place and Maori culture survived and flourished, but rather *many possible* ones. In deciding which particular scenario to mimic in reparation, the justice of current or future distributions may guide our choice of counterfactual to replicate in reparation.<sup>109</sup>

But in any case, why be content with a world where the relevant injustice did not occur, when an even better, more just, world could be envisaged?<sup>110</sup> Waldron reasons that, “if *any part* of our concern about justice has to do with the relative size or distribution of people’s holdings independent of their history—then the counterfactual approach to reparation may not be the last word”.<sup>111</sup> This is a live issue in New Zealand debate, where reparative justice is *not* seen as “the sum total of justice and good policy”.<sup>112</sup> For example, the (former) Chief Judge of the Waitangi Tribunal has mused, “Need the resettlement of the landless tribes depend upon proof of some past wrong or is it more equitable to apportion assistance having regard to need? Does the reparation approach in any event create more problems than it solves?”<sup>113</sup> More obviously, if providing particular redress takes us to another situation of injustice, creates a new injustice, or otherwise does not improve our contemporary situation, then what?

## Contemporary justice concerns

Reparation is made in the present. Just as other contextual factors influence the application of justice, so too will the present situation. Whilst reparative justice in situations of historical injustice focuses on the past to identify an injustice and its effects over time, it is not possible to change that past. Reparative justice can, therefore, only work in the present, and into the future, to change the effects of past injustice and to remit continuing injustices.<sup>114</sup> What is required *now* to right past wrongs depends both on the past and the present, and to an extent, on our imagining of the benefits which contemporary reparation will bring in the future. How do these temporal factors shape reparative justice in the Treaty settlement process?

First, the contemporary context limits the application of reparative justice in the Treaty settlement process because any substantive reparation is made with current resources. A thing cannot be restored if it no longer exists.<sup>115</sup> Further, there seems little point in returning something damaged or so changed that it no longer has value, or if a cultural context has changed in the intervening years to an extent where things once important no longer hold particular relevance. Accordingly, the current context influences the kind of solution that is just; the redress provided today must be relevant to today's circumstances.

Second, because providing reparation for past wrongs is an allocation (or redistribution<sup>116</sup>) of current resources, that allocation must be justified, morally, and hence politically, in relation to other competing claims on those resources. Where full reparative justice cannot be justified in the face of other contemporary, competing claims, reparative justice in the Treaty settlement process is likely to be constrained. Waldron argues that claims for full reparation may not always be justified because changes in background circumstances over decades and generations may alter the validity of specific moral claims to land or resources.<sup>117</sup> Any moral duty to restore land and resources unjustly expropriated in the past will be restricted to situations where the claim to those lands and resources survives into the present. Why would changes in background circumstances change such claims?

Waldron suggests that initial entitlements to property may fade with time<sup>118</sup> because the longer the property is out of an individual's possession and control, the less it plays an indispensable role in that person's life.<sup>119</sup> New Zealand's Treaty settlement process, and particularly the evidence given by Maori to the Waitangi Tribunal, has clearly shown just how important land and natural resources are to tribal identity and cultural survival.<sup>120</sup> Moral claims to particular sites and resources integral to aboriginal identity and cultural survival are as valid today as in the past.<sup>121</sup> But it must be recognised that there are "many ways of being harmed that do not involve violations of *property* rights at all".<sup>122</sup> For example:

People who lose their lands to an alien culture bear the additional risk of identity loss and social and cultural impairment. This could not have been more apparent than in the confiscation of Maori land, where the effect was not only to acquire land but to take control of the people and to effect a social reordering. Loss therefore must be assessed not only in terms of individual deprivation and personal suffering but in terms of the impairment of the group's social and economic capacity, the general

distortion of its physical and spiritual well-being, and the flow-on effects of subsequent standards of living.<sup>123</sup>

A moral claim to own and control *sufficient* land and resources to ensure cultural survival, and to restore cultural identity, persists over time and does not diminish because a tribal land base was historically unjustly removed from Maori possession and control. In terms of reparation as reconciliation, it is just for the victim to demand sufficient land, resources and other measures to restore the economic and cultural base of the tribe and to demand changes to institutional arrangements to ensure a just relationship over time. The Waitangi Tribunal has echoed this line of thought arguing, "where the place of a *hapu* [tribe] has been wrongly diminished, an appropriate response is to ask what is necessary to re-establish it".<sup>124</sup> Here both cultural and temporal factors shape the justice of the Treaty settlement process.

However, the argument clearly suggests that a moral entitlement to *all* lands and resources once in the possession or control of Indigenous groups *may not* survive changed circumstances. The immense changes in the world's population in the past two hundred years mean that Indigenous populations can no longer be afforded exclusive control of their former, vast territories, because to do so would be to relegate many others to poverty, and even starvation. Therefore, Waldron argues, in such changed circumstances, an historical injustice "can be superseded, and its reparation trumped as it were, by principles of justice applied directly to present circumstances".<sup>125</sup> But is this to say that rights to reparation are *totally* superseded or trumped in such circumstances? Janna Thompson, amongst others, thinks not:

Changes in circumstances are not by themselves reasons for denying the obligation to make restitution for historical injustices. At best they are reasons for re-negotiating agreements, or compensating for what cannot justly be returned, or for denying that those wronged are entitled to demand back all of what they once possessed.<sup>126</sup>

Further, according to Thompson's reparation as reconciliation model, the victim has a moral responsibility "to take into account present conditions and needs" and not to "impose conditions that would threaten the existence or security or undermine the economic well-being of the other".<sup>127</sup> The Waitangi Tribunal has argued along similar lines:

... the broad object of the Treaty was to secure a place for two peoples in one country, where both would benefit from settlement, and which basically required a *fair* sharing of resources.<sup>128</sup>

Applying this reasoning to New Zealand suggests that not *all* land once in Maori hands should be returned. Full compensation for all land unjustly expropriated may not be justified either, if to do so would bankrupt the Treasury.<sup>129</sup> Justice in the Treaty settlement process will thereby be constrained, but it is not defeated outright. In practice, New Zealand settlements *do* take into account present circumstances, for example by focusing on apology, the restoration of a tribal economic base and the return of significant sites rather than full reparation of all land once in Maori control or the equivalent monetary compensation.<sup>130</sup> Further, an important aim of New Zealand settlements is to lay foundations for future just relations between the parties.

It is important to note, however, that Waldron suggests that contemporary justice concerns should only trump reparative justice claims when full compensation or restitution of historical injustices would “carr[y] us in a direction contrary to that which is indicated by a prospective theory of justice”.<sup>131</sup> In the types of situations of historical injustices under examination here, claims for redress of historical wrongs and claims for fairer distribution of goods will often coincide:

[P]ast injustice is not without its present effects. It is a fact that many of the descendants of those who were defrauded and expropriated live demoralized in conditions of relative poverty—relative, that is, to the conditions borne by the descendants of those who defrauded them. If the relief of poverty and the more equal distribution of resources are the aims of a prospective theory of justice, it is likely that the effect of rectifying past wrongs will carry us some distance in this direction.<sup>132</sup>

Far from taking New Zealand society in a direction contrary to contemporary justice, reparation for Crown breaches of the Treaty of Waitangi, and the rebuilding of the Crown-Maori Treaty relationship, are exactly the imperatives of justice in the contemporary situation.<sup>133</sup> But the influence of contemporary concerns on the application of reparative justice in the Treaty settlement process is restricted. The Waitangi Tribunal has cautioned that “care should be taken to ensure that the level of redress does not become dependent on the contemporary needs of *iwi* [tribes] that are unconnected with the historical wrongs being addressed”.<sup>134</sup> At the same time, the Tribunal has placed a growing emphasis on the restoration of Maori tribes.<sup>135</sup> For example, Tribunal member Orr argues that “[t]he assurance of a more secure future for legitimate tribal objectives may have greater weight” than a “pay off for the past”,<sup>136</sup> and that “[f]ull restoration of the people as a people, may deserve more emphasis than strict legal reparation, even assuming such reparation is possible”.<sup>137</sup> The Tribunal has, on many occasions, pointed out that the Treaty settlement process is not concerned to provide full redress along legal lines, but rather “to compensate for past wrongs and remove the prejudice, by assuring a better arrangement for the future”.<sup>138</sup>

Again, the kind of justice being practiced in New Zealand resonates with reparation framed as reconciliation. When considering what justice requires in relation to the loss of tribal *mana* and *rangatiratanga*, loss of culture, and the more personal psychological effects of continued dispossession and cultural hegemony, the relevance of retrospective justice fades, giving way to current and prospective concerns. Why? Because any hope of restoring conditions to those required by reparative justice are necessarily focussed on how our current arrangements might be changed to allow for the future cultural survival of Maori and for a just relationship between the state and Maori over time. How the Treaty can be given effect to, and how the *mana* of Maori claimant groups can best be restored, changes with changing circumstances, and requires consideration of the contemporary justice of any given situation. The concept of *utu* also encompasses this point, suggesting that Maori concepts of reparative justice also include consideration of contemporary justice concerns, as is shown in the story of Te-rangi-tamau and Moki in which:

Te-rangi-tamau creeps at night into the sleeping hut of his enemy Moki, but does not kill him [in an act of *utu*], leaving his cloak behind instead as evidence of his visit ... Te-rangi-tamau's wife, who has been captured by Moki, is present in the hut. Quietly her husband takes her outside, questions her and discovers that she and his children have been well treated. That is one reason why he spares Moki. Te-rangi-tamau decides

that the offence for which he sought Moki's life has been wiped out by the good treatment of the wife and children. *Utu* is no longer seen to be needed. And the other crucial point is that, while they are indeed engaged in a quarrel, and a serious one at that, Te-rangi-tamau and Moki are kin. This makes a great difference. There is a strong motive for ending the affair peacefully, and indeed this is just what happens.<sup>139</sup>

Thus, *utu*, as a mechanism for restoring lost *mana*, is sensitive to the contemporary contexts in which *mana* must be restored and, in particular, the need for peaceful ongoing relations between the victim and the wrongdoer. Accordingly, we might think of justice in New Zealand's Treaty settlement process being done with one eye on the past, and the other on the present looking forward to a better future—a future where the ongoing relationship between the Treaty partners is respectful and just.<sup>140</sup>

## Conclusion

To conclude, the aim for both Maori and the Crown of the Treaty settlement process is to achieve 'justice'. The kind of justice available in the Treaty settlement process is shaped by two principal factors: 'culture' and 'time'. Justice in the Treaty settlement process is only that part of justice that is shared by Maori and the Crown: this is found in the Treaty of Waitangi. The Treaty, as the shared standard of justice, limits the justice in the Treaty settlement process in two important ways. First, Treaty settlements do not challenge the ultimate sovereignty of the Crown. Second (and following from the first), the Crown is responsible for dispensing justice, and thus both the 'judge', and the historical 'wrongdoer'. As a result, the justice of the Treaty settlement process is predominantly a negotiated justice.

Temporal factors also influence, and constrain, the justice of the Treaty settlement process in important ways. First, only contemporary Maori collectives with a continuous historical link to the groups that suffered past injustices will receive redress from the Crown. Individuals will only benefit from settlements as members of such historically linked collectives. Second, because of the difficulties of providing contemporary redress for historical wrongs, it is necessary to frame reparative justice in terms of the aim of ensuring cultural survival for Maori, which includes a present right to resources sufficient to restore and maintain Maori collectives. This indicates that the influence of both 'culture' and 'time' work together to shape the justice of the Treaty settlement process. It also points to a reconciliatory approach to reparative justice where the cultural survival of the Maori claimant group through restoration of the promises of the Treaty is given greater weight than the provision of full reparation for past wrongs.

Finally, even though justice in the Treaty settlement process is largely reparative in that the aim is to right a past wrong, we do not want to create new injustices in the process. A purely reparative approach to justice in the Treaty settlement process is inappropriate, and at times impractical. The tides of history have changed the shoreline—there is no returning to a situation that once was, nor can we make the world a place where injustices of the past did not occur. At best we can aim to limit the effects of past injustices in today's New Zealand and for the future, and to undertake structural adjustments necessary to remit persisting unjust arrangements to better reflect the justice of the Treaty in contemporary contexts. This paper has not attempted to determine the exact scope of

reparative justice, nor to determine the precise points where contemporary or prospective justice concerns will limit the application of reparative justice. Given that the continued operation and success of the Treaty settlement process depends on the political will of a non-Maori majority, further debate on this issue is urgently required lest the process be perceived by the majority as creating avoidable new injustices and thereby lose political support.

## Notes

---

<sup>1</sup>The Indigenous peoples of New Zealand ('New Zealand'). The word 'maori' means normal, usual, or ordinary. It has been capitalised and used to refer to the Maori people collectively. Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland: Penguin Books, 1990, p. 94.

<sup>2</sup>In practice the government of the day. See Janine Hayward, "In Search of a Treaty Partner: Who, or What, is the Crown?" PhD Thesis, Victoria University of Wellington, 1995, unpublished; Janine Hayward, *The Treaty of Waitangi, Maori and the Evolving Crown*, *Political Science*, Vol. 49, No. 2, 1998; Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Wellington: OTS, 2nd ed, 2002, p. 22; and note the Crown Proceedings Act 1950, s2.

<sup>3</sup>The Treaty of Waitangi Act 1975.

<sup>4</sup>Treaty of Waitangi Amendment Act 1985, s3(1), substituting new s6(1) of the Treaty of Waitangi Act 1975.

<sup>5</sup>For further details see; Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Wellington: OTS, 2nd ed, 2002, p. 25; for details of current negotiations see <http://www.ots.govt.nz>; Meredith K. Gibbs, "Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu settlement and the return of pounamu (greenstone)," PhD thesis, University of Otago, 2002, unpublished, ch 1. This paper focuses on the settlement of historical, rather than contemporary, claims. Generally, a distinction is made between two types of claims. First, there are 'historical' claims, where the Crown acts or omissions occurred after the signing of the Treaty of Waitangi on 6 February 1840 but prior to 21 September 1992. Second, there are 'contemporary' claims, where the Crown act or omission occurred on or after 21 September 1992. This date is an arbitrary cut-off, and reflects the date on which the (former) National Government confirmed its general policy for the settlement of Treaty of Waitangi claims. Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Wellington: OTS, 2nd ed, 2002, p. 27.

<sup>6</sup>Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Wellington: OTS, 2nd ed, 2002, p. 11. In this paper, I do not attempt to examine the moral imperative for making reparations for historical injustices underlying the Treaty settlement process.

<sup>7</sup>Sometimes, where the New Zealand Crown has accepted culpability in advance (e.g. land confiscations) the claimants will negotiate directly with the Crown without the need for a full Tribunal hearing. See Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Wellington: OTS, 2nd ed, 2002, p. 42.

<sup>8</sup>See for example, Meredith K. Gibbs, "Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu settlement and the return of pounamu (greenstone)," PhD thesis, University of Otago, 2002, unpublished; for details of finalised settlements and current negotiations see <http://www.ots.govt.nz> and Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Wellington: OTS, 2nd ed, 2002.

<sup>9</sup>For an analysis of the expectations of the Treaty settlement process see Meredith K. Gibbs, "Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu settlement and the return of pounamu (greenstone)," PhD thesis, University of Otago, 2002, unpublished, ch 2.

<sup>10</sup>Raimon Panikkar, *The Intrareligious Dialogue* New York, N.Y., Ramsey, N.J.: Paulist Press, 1978, p. xxv.

<sup>11</sup>'Pakeha' was a term originally used by Maori to describe the newcomers to their lands. According to Ranganui Walker, the word derives from 'pakepakeha' or 'pakehakeha' "which are defined in William's *Dictionary* as 'imaginary beings resembling men, with fair skins' ". Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland: Penguin Books, 1990, p94. For a discussion of the differences and commonalities between Maori and Pakeha, see Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, pp. 41–69; and Michael King, *Being Pakeha: An Encounter with New Zealand and the Maori Renaissance*, Auckland: Hodder and Stoughton, 1985.

<sup>12</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 1.

<sup>13</sup>Some readers may consider the argument that the standard of justice in the Treaty settlement process is found in the Treaty of Waitangi to be axiomatic. The Treaty of Waitangi Act 1975 determines the jurisdiction of the Tribunal, based on the Treaty as the standard of justice, and thereby sets the parameters of much of what follows in the Treaty settlement process. The point is, however, that the standard of justice *could* be found elsewhere, perhaps resulting in a wider conception of justice than that which the Treaty offers.

<sup>14</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 32 (original emphasis) and see pp. 32–34.

<sup>15</sup>*Ibid*, pp. 73 & 86–103. See also Joe Williams, "Not Ceded but Redistributed," in E. Renwick, ed., *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, Wellington: Victoria University Press, 1991, p. 193. Note, however, some tribes (such as Ngai Tahu) have considered the Treaty as a covenant since it was signed in 1840.

<sup>16</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, pp. 100–102.

<sup>17</sup>The Treaty of Waitangi Act 1975, as amended by the Treaty of Waitangi Amendment Act 1985.

<sup>18</sup>See for example the State-Owned Enterprises Act 1986, s9; Conservation Act 1987, s4 ; Resource Management Act 1991, ss5–8; Crown Minerals Act 1991, s4; Hazardous Substances and New Organisms Act 1996, s8; and the long title of the Environment Act 1986.

<sup>19</sup>See the Treaty of Waitangi Act 1975, s6. The statements of the New Zealand Court of Appeal in the 1987 *New Zealand Maori Council v A-G* case, for example, have also been extremely influential in establishing the Treaty as a source of binding obligations: *New Zealand Maori Council v A-G* [1987] 1 New ZealandLR 641 (CA).

<sup>20</sup>Unless the context otherwise requires, reference in this thesis to 'the Treaty' or 'the Treaty of Waitangi' include references to the principles of the Treaty.



<sup>21</sup>Over 500 Maori chiefs signed the Maori text of the Treaty over a period of seven months as Crown officials gathered signatures from around the country. See generally Claudia Orange, *The Treaty of Waitangi*, Wellington: Port Nicolson Press, 1997; R. M. Ross, "Te Tiriti o Waitangi: Texts and Translations," *New Zealand Journal of History*, Vol. 6, 1972; Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland: Penguin Books, 1990; and Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today*, Wellington: BWB, 1999. Note that prior to the Treaty of Waitangi, some Maori chiefs signed the Declaration of Confederation and Independence of 28 October 1835, declaring the "Independence of our country" and constituted it "and "Independent State", named "The United Tribes of New Zealand". See Frederick M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland: Auckland University Press, 1999, pp. 96–97.

<sup>22</sup>See B. Biggs, "Humpty-Dumpty and the Treaty of Waitangi," in Ian H. Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland: Oxford University Press, 1989, pp. 305–306.

<sup>23</sup>It has been suggested that if 'mana' had been used, few Maori *rangatira* would have signed the Treaty. Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland: Penguin Books, 1990, pp91–93. See also R. M. Ross, "Te Tiriti o Waitangi: Texts and Translations," *New Zealand Journal of History*, Vol. 6, 1972.

<sup>24</sup>B. Biggs, "Humpty-Dumpty and the Treaty of Waitangi," in Ian H. Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland: Oxford University Press, 1989, p. 308.

<sup>25</sup>Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland: Penguin Books, 1990, p93. See also B. Biggs, "Humpty-Dumpty and the Treaty of Waitangi," in Ian H. Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland: Oxford University Press, 1989, p. 310; and Frederick M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland: Auckland University Press, 1999, pp. 100–107.

<sup>26</sup>On 21 May 1840. See Frederick M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland: Auckland University Press, 1999, pp. 97–98; and Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland: Penguin Books, 1990, p97. In the case of the North Island, the proclamation was made on the basis of the Treaty of Waitangi, and in the case of the South Island, on the basis of discovery (thereby assuming that the South Island was *terra nullius*, that is, an empty land). The existence of Ngai Tahu, who inhabited the greater part of the South Island, was largely ignored (although several Ngai Tahu *rangatira* in fact signed the Treaty of Waitangi. Claudia Orange, *The Treaty of Waitangi*, Wellington: Port Nicolson Press, 1997, pp. 77–79.

<sup>27</sup>Frederick M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland: Auckland University Press, 1999. Brookfield calls this a "quiet revolution".

<sup>28</sup>*Wi Parata v The Bishop of Wellington* (1877) 3 New Zealand Jur (NS) 72 (SC). See generally P. G. McHugh (1999) From Sovereignty Talk to Settlement Time: The Constitutional Setting of Maori Claims in the 1990s. In P. Havemann (ed) *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* Auckland, Oxford University Press, p449.

<sup>29</sup>Alan Ward, *The National Overview: Waitangi Tribunal Rangahaua Whanui Series*, a Report Commissioned by the Waitangi Tribunal, Wellington: GP Publications, 1997.

<sup>30</sup>Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland: Penguin Books, 1990, pp210–215; McHugh, *From Sovereignty Talk to Settlement Time*, p456.

<sup>31</sup>Note also the well-known Bastion Point protests.

<sup>32</sup>See generally Eddie T. Durie and Graeme S. Orr, "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence," *New Zealand Universities Law Review*, Vol. 14, 1990; and Richard P. Boast, "The Waitangi Tribunal: 'Conscience of the Nation', or Just Another Court?," *University of New South Wales Law Review*, Vol. 16, No. 1, 1993.

<sup>33</sup>In 1985, the jurisdiction of the Tribunal was made retrospective (Treaty of Waitangi Amendment Act 1985, s3(1), substituting new s6(1) of the principal Act) and in 1988 and 1989 the Tribunal was given powers to make binding recommendations for the return to Maori claimant groups of certain Crown lands (the Treaty of Waitangi (State Enterprises) Act 1988; Treaty of Waitangi Act 1975, ss8A,8HB&8HJ). See also John Dawson, "Remedial Powers of the Waitangi Tribunal," *Public Law Review*, Vol. 12, No. 3, 2001. Although note that the jurisdiction of the Tribunal is progressively decreased with the 'full and final' settlement of Treaty claims. Treaty of Waitangi Act 1975, ss6(7)–6(12). Note also the limitations on the Tribunal's jurisdiction with respect to recommendations relating to private land. Treaty of Waitangi Act 1975, s6(4A).

<sup>34</sup>A further indication of the Crown's growing acceptance of the Treaty of Waitangi is the inclusion of Treaty principles in legislation. See for example, State-Owned Enterprises Act 1986, s9; Conservation Act 1987, s4; Resource Management Act 1991, s8; Crown Minerals Act 1991, s4; and Hazardous Substances and New Organisms Act 1996, s8.

<sup>35</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, pp. 33 & 86–103. For a discussion of why a contractual, reparative approach appealed to both Maori and the Crown see pp. 33–34.

<sup>36</sup>See for example Waitangi Tribunal, *The Waiheke Island Claim Report (Wai 10)*, Wellington: Government Printing Office, 1987; Waitangi Tribunal, *The Orakei Claim Report (Wai 9)*, Wellington: Brooker and Friend Ltd, 1987; Waitangi Tribunal, *The Ngai Tahu Report (Wai 27)*, Wellington: Brooker and Friend Ltd, 1991; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi (Wai 143)*, Wellington: GP Publications, 1996; Waitangi Tribunal, *Te Whanganui-A-Orotu Report on Remedies (Wai 55)*, Wellington: GP Publications, 1998; Waitangi Tribunal, *The Turangi Township Remedies Report (Wai 84)*, Wellington: GP Publications, 1998; Waitangi Tribunal, "Determination of Preliminary Issues—In the Matter of the Muriwhenua Claims (Wai 45 and others)," Chief Judge Durie (Presiding Officer), 1998, unpublished memorandum.

<sup>37</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 133. Added to this, the Treaty of Waitangi was inexpertly and hurriedly drawn up, there is much doubt as to how much, if anything at all, was understood by many signatories. There can, therefore, only be speculation on the parties' exact intentions at the time of signing: B. Biggs, "Humpty-Dumpty and the Treaty of Waitangi," in Ian H. Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland: Oxford University Press, 1989. See also R. M. Ross, "Te Tiriti o Waitangi: Texts and Translations," *New Zealand Journal of History*, Vol. 6, 1972, p. 154; Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 133. Sharp illustrates how

the Tribunal, in its attempt to make the Treaty speak in contemporary contexts, has imputed intentions to the signatories that appear extremely unlikely to have been present in 1840. Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, pp. 135–139 referring to Waitangi Tribunal, *Te Reo Report (Wai 11)*, Wellington: GP Publications, 1986, and Waitangi Tribunal, *The Muriwhenua Fishing Claim Report (Wai 22)*, Wellington: GP Publications, 1988.

<sup>38</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, pp. 131–140 referring particularly to the Tribunal's Reports on the Waiau Power Station, Te Atiawa, the Kaituna River, the Manakau Harbour, Te Reo Maori and Muriwhenua Fishing.

<sup>39</sup>Sharp refers to the development of a "jurisprudence of the *wairua*" of the Treaty. Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, pp. 163–177.

<sup>40</sup>See for example the legislation cited at footnote 18, the Waitangi Tribunal Reports cited at footnote 36, *New Zealand Maori Council v A-G* [1994] 1 New ZealandLR 513 (PC), p517, per Lord Woolf and see *New Zealand Maori Council v A-G* [1987] 1 New ZealandLR 641 (CA), p663, per Cooke P.

<sup>41</sup>The Waitangi Tribunal is required to have regard to the two texts of the Treaty of Waitangi (as set out in the First Schedule to the Treaty of Waitangi Act), and for the purposes of the Treaty of Waitangi Act, the Tribunal has exclusive authority to determine the meaning and effect of the Treaty. Treaty of Waitangi Act 1975, s5(2).

<sup>42</sup>For example see *New Zealand Maori Council v A-G* [1987] 1 New ZealandLR 641 (CA); *A-G v New Zealand Maori Council* [1991] 2 New ZealandLR 129 (CA); *New Zealand Maori Council v A-G* [1992] 2 New ZealandLR 577 (CA); and see for example the following Tribunal reports, Waitangi Tribunal, *The Waiheke Island Claim Report (Wai 10)*, Wellington: Government Printing Office, 1987; Waitangi Tribunal, *The Orakei Claim Report (Wai 9)*, Wellington: Brooker and Friend Ltd, 1987; Waitangi Tribunal, *The Ngai Tahu Report (Wai 27)*, Wellington: Brooker and Friend Ltd, 1991; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi (Wai 143)*, Wellington: GP Publications, 1996; Waitangi Tribunal, *Te Whanganui-A-Orotu Report on Remedies (Wai 55)*, Wellington: GP Publications, 1998; and Waitangi Tribunal, *The Turangi Township Remedies Report (Wai 84)*, Wellington: GP Publications, 1998.

<sup>43</sup>Note Brookfield's analysis, however, which suggests that the Crown took more sovereignty than it was ceded under the Treaty of Waitangi and has effected a 'quiet revolution'. Frederick M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland: Auckland University Press, 1999.

<sup>44</sup>Tipene O'Regan, Settlement negotiator, Te Runanga o Ngai Tahu, Interview with author, November 2000.

<sup>45</sup>Susan Dodds, "Justice and Indigenous Land Rights," *Inquiry*, Vol. 41, No. 2, p. 197 (emphasis added).

<sup>46</sup>James Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground", in E. F. Paul, F. D. Miller and J. Paul, eds., *Property Rights*, Cambridge: Cambridge University Press, 1994, p. 153.

<sup>47</sup>*Ibid*, p154.

<sup>48</sup>Eddie T. Durie and Graeme S. Orr, "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence," *New Zealand Universities Law Review*, Vol. 14, 1990. See also Richard P. Boast, "The Waitangi Tribunal: 'Conscience of the Nation', or Just Another Court?," *University of New South Wales Law Review*, Vol. 16, No. 1, 1993.

<sup>49</sup>Susan Dodds, "Justice and Indigenous Land Rights," *Inquiry*, Vol. 41, No. 2.

<sup>50</sup>Note that the opinions of the Waitangi Tribunal are not binding on the courts in proceedings concerning Acts other than the Treaty of Waitangi Act 1975 (see s5(2) of that Act), but are of "great value": *New Zealand Maori Council v A-G* [1987] 1 New ZealandLR 641 (CA), pp661–662, per Cooke P. Note also that the Tribunal can only inquire into proposed legislation at the request of Parliament, or a Minister of the Crown. Treaty of Waitangi Act 1975, ss6&8.

<sup>51</sup>The Tribunal has noted that the Crown may reject the Tribunal's findings, or not share the Tribunal's view as to the seriousness of any particular breach of the Treaty, both of which may lead to the Crown and the Tribunal having quite different views on appropriate remedies. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wai 84), Wellington: GP Publications, 1998, p. 34. For an analysis of the Crown's responsiveness to the Waitangi Tribunal's early recommendations see Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty of Waitangi: Report on Crown Response to Recommendations of the Waitangi Tribunal 1983–1988*, Wellington: Government Printer, 1988. Note also that the Crown did not agree with the Tribunal's findings on the full and final 1940s settlement of Ngai Tahu's claims regarding Kemp's purchase, but agreed to negotiate with Ngai Tahu anyway. Richard T. Price, *The Politics of Modern History-Making: The 1990s Negotiations of the Ngai Tahu Tribe with the Crown to Achieve a Treaty of Waitangi Claims Settlement*, Macmillan Brown Working Paper Series No 7, Christchurch: Macmillan Brown Centre for Pacific Studies, 2001, p. 7.

<sup>52</sup>See the Treaty of Waitangi Act 1975, ss8A–8HJ. For example in *Te Whanganui-A-Orotu Report on Remedies*, the Tribunal did not make binding recommendations in a number of instances where it could have, preferring instead to leave the matter for settlement between the parties with the option of coming back to the Tribunal if a settlement could not be reached. Waitangi Tribunal, *Te Whanganui-A-Orotu Report on Remedies* (Wai 55), Wellington: GP Publications, 1998, pp. 17 and following. The Tribunal made its first binding recommendations in 1998 in the Turangi Township Remedies decision. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wai 84), Wellington: GP Publications, 1998. However, Dawson suggests that the threat of the use of the Tribunal's binding powers is a great incentive for the Crown to reach settlements with claimant groups. For a detailed analysis of the Tribunal's remedial powers see John Dawson, "Remedial Powers of the Waitangi Tribunal," *Public Law Review*, Vol. 12, No. 3, 2001. Further, in direct negotiations, where the Waitangi Tribunal is not involved at all, the merger of the Crown's roles as 'provider of justice' and 'wrongdoer', and the resulting potential for conflict of interests, is particularly obvious.

<sup>53</sup>Luban suggests that legal negotiation and political bargaining are beset with "the *paradox of compromise*: commitment to a principle means commitment to seeing it realized. But in practice this means compromising the principle (since all-or-nothing politics is usually doomed to defeat)—and compromise is partial abandonment of the principle. Conversely, refusal to compromise one's principles means in practice abandoning entirely the hope of seeing them realized. Morality and its abandonment seem to implicate one another—that is the paradox of compromise". David Luban, "Bargaining and Compromise: Recent Work on

Negotiation and Informal Justice," *Philosophy & Public Affairs*, Vol. 14, No. 4, 1985, pp. 414–415, original emphasis. On negotiated justice see Ian Macduff, "The Role of Negotiation: Negotiated Justice," *Victoria University of Wellington Law Review*, Vol. 25, 1995.

<sup>54</sup>Aristotle, "Nicomachean Ethics" (translated by W. D. Ross 1925), in A. Ryan, ed., *Justice: Oxford Readings in Politics and Government*, New York: Oxford University Press, 1993, p. 35. Western philosophers have suggested various theories to guide the distributions of social and economic arrangements and institutions based on criteria such as need, fairness, equality, complex equality, mutual advantage, reciprocity, impartiality, desert, or rights. It is not the purpose of this paper to examine these debates. See generally B. Cullen, "Philosophical Theories of Justice," in Klaus R. Scherer, ed., *Justice: Interdisciplinary Perspectives*, Cambridge: Cambridge University Press, 1992. Sharp defines distributive justice as "giving to classes of people what is theirs by right, where classes are distinguished by characteristics that call for or generate those good things that can be thought to be demanded for them as of right". Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, pp. 29–30. See also L. MacDonald, "Justice and Maori: Reflections on Contemporary Justice Theory and Justice for Maori," MA thesis, University of Canterbury, 1996, unpublished; and D. Miller, "Introduction," in D. Miller and M. Walzer, eds., *Pluralism, Justice, and Equality*, Oxford: Oxford University Press, 1995. Note also Nozick's discussion of 'current time slice principles of justice'. Robert Nozick, *Anarchy, State and Utopia*, New York: Basic Books, 1974, pp. 153–155.

<sup>55</sup>Aristotle refers to the "distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution". Aristotle, "Nicomachean Ethics" (translated by W. D. Ross 1925), in A. Ryan, ed., *Justice: Oxford Readings in Politics and Government*, New York: Oxford University Press, 1993, p. 35.

<sup>56</sup>See, for example, Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustices*, Cambridge: Polity Press, 2002, p. 38.

<sup>57</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 34. Note that Sharp refers to an 'original' position in the passage quoted. This has been omitted lest it be confused with Rawls' well-known concept of an original position in his theory of distributive justice.

<sup>58</sup>Aristotle, "Nicomachean Ethics" (translated by W. D. Ross 1925), in A. Ryan, ed., *Justice: Oxford Readings in Politics and Government*, New York: Oxford University Press, 1993, p. 38. According to Aristotle, reparative justice involves equalising a wrong whereby the gain from that wrong is taken from the wrongdoer and the loss of the victim is given back. Aristotle, "Nicomachean Ethics" (translated by W. D. Ross 1925), in A. Ryan, ed., *Justice: Oxford Readings in Politics and Government*, New York: Oxford University Press, 1993, p. 37

<sup>59</sup>John Patterson, *Exploring Maori Values*, Palmerston North: Dunmore Press, 1992, p. 117, and see generally pp116–123. See also Raymond Firth, *Economics of the New Zealand Maori*, Wellington: New Zealand Government Printer, 1959 reprinted 1972, pp. 388 & 412–417; Belinda A. Vial, "Finding the Essence of Pounamu: In Search of the Contemporary Value of Pounamu to Kai Tahu," BA (Honours) Research Essay, Massey University, 1998, unpublished, p. 28; and Moana Jackson, *The Maori and the Criminal Justice System A New Perspective: He Whaipanga*, Part 2, Wellington: Department of Justice, 1988, pp. 37–44.

<sup>60</sup>John Patterson, *Exploring Maori Values*, Palmerston North: Dunmore Press, 1992, p. 135.

<sup>61</sup>Douglas Graham, *Trick or Treaty?* Wellington: Institute of Policy Studies, Victoria University of Wellington, 1997, p. 72; Morris T. W. Love, Director, Waitangi Tribunal, Interview with author, April 2000. See also the Waikato-Tainui settlement, stating that this principle guided the settlement reached. Waikato Raupatu Claims Settlement Act 1995, Recital O.

<sup>62</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perrett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992; James S. Fishkin, "Justice Between Generations: Compensation, Identity, and Group Membership", in John W. Chapman, ed., *Nomos XXXIII: Compensatory Justice* New York and London: New York University Press, 1991; Christopher W. Morris, "Existential Limits to the Rectification of Past Wrongs," *American Philosophical Quarterly*, Vol. 21, No. 2; George Sher, "Ancient Wrongs and Modern Rights," *Philosophy and Public Affairs*, Vol. 10, No. 1, 1981; George Sher, "Compensation and Transworld Personal Identity," *The Monist*, Vol. 62, 1979; Samuel C. Wheeler III, "Reparations Reconsidered," *American Philosophical Quarterly*, Vol. 34, No. 3, 1997; and also Robert Nozick, *Anarchy, State and Utopia*, New York: Basic Books, 1974, p. 152 raising the issue.

<sup>63</sup>See also Robert Sparrow, "History and Collective Responsibility", *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000.

<sup>64</sup>Samuel C. Wheeler III, "Reparations Reconsidered," *American Philosophical Quarterly*, Vol. 34, No. 3, 1997.

<sup>65</sup>For example, Christopher W. Morris, "Existential Limits to the Rectification of Past Wrongs," *American Philosophical Quarterly*, Vol. 21, No. 2.

<sup>66</sup>Ibid; Wheeler also reaches the conclusion that the descendants of victims of historical injustice cannot claim contemporary reparation for historical injustices, although by a different logic. Samuel C. Wheeler III, "Reparations Reconsidered," *American Philosophical Quarterly*, Vol. 34, No. 3, 1997.

<sup>67</sup>Treaty of Waitangi Act 1975, s6(1).

<sup>68</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perrett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 167. See also the line of argument developed by David Lyons, "The New Indian Claims and Original Rights to Land," *Social Theory and Practice*, Vol. 4, No. 3, 1977. See also Duncan Ivison, "Political Community and Historical Injustice," *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000.

<sup>69</sup>Samuel C. Wheeler III, "Reparations Reconsidered," *American Philosophical Quarterly*, Vol. 34, No. 3, 1997, p. 303. Wheeler goes on to consider the nature of 'communities' and concludes that they are social constructs that can be "intentional artefacts". When communities are the recipients of compensation for past injustices, this conclusion, Wheeler argues, has two unjust consequences. The first is that because communities, and their members, are self-identifying, groups can constitute identities in order to create moral obligations on others (such as the obligation to restore past wrongs), or alternatively, to avoid moral obligations. Further, individuals can opt in or out of communities according to whether or not it will benefit them. Second, he argues that further wrongs can reduce moral debt, for example by the suppression of the identity or consciousness of a community that would otherwise be entitled to reparations for past wrongs. He therefore concludes that there is no justification for the widespread intuition that the descendants of the perpetrators of injustice should

make reparation to the descendants of the victims of those injustices. Wheeler then proceeds to argue why there are good *reasons*, but not *obligations*, for why this should in fact occur (at p. 305–306).

<sup>70</sup>Ibid, p. 303.

<sup>71</sup>George Sher, "Ancient Wrongs and Modern Rights," *Philosophy and Public Affairs*, Vol. 10, No. 1, 1981, p. 8.

<sup>72</sup>See also Roy Perett, "Individualism, Justice, and the Maori View of the Self," in Graham Oddie and Roy W. Perett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992.

<sup>73</sup>Brookfield describes this division of the Crown as part of a 'quiet revolution', that is not provided for under the Treaty of Waitangi. Frederick M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland: Auckland University Press, 1999.

<sup>74</sup>*New Zealand Maori Council v A-G* [1994] 1 New ZealandLR 513 (PC), p517. See Frederick M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland: Auckland University Press, 1999, p. 126.

<sup>75</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 155.

<sup>76</sup>Treaty of Waitangi Act 1975, s6(1).

<sup>77</sup>For example, historian Angela Ballara suggests that '*iwi*' is a post-colonial political construct, which replaced the *hapu* as the primary political unit in Maori society in the 20th century, or earlier: Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c.1769 to c.1945*, Wellington: Victoria University Press, 1998, p. 336. Ward also makes this point: "It should be recognised that most of the Maori structures above the level of *hapu* clusters are post-colonial in any case." Alan Ward, *The National Overview: Waitangi Tribunal Rangahaua Whanui Series*, a Report Commissioned by the Waitangi Tribunal, Wellington: GP Publications, 1997, Vol. 1, p. 141. See also T. Crocker, "Iwi or Hapu? The Imposition of a Static Structure on a Dynamic Society," BA (Honours) Research Essay, Massey University, 1993, unpublished.

<sup>78</sup>Governed by the Maori Trust Boards Act 1955.

<sup>79</sup>Governed by the Incorporated Societies Act 1908.

<sup>80</sup>Governed by Part XIII of Te Ture Whenua Maori Act 1993.

<sup>81</sup>See for example Te Runanga o Ngai Tahu Act 1996.

<sup>82</sup>See for example, Meredith K. Gibbs, "Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu settlement and the return of pounamu (greenstone)," PhD thesis, University of Otago, 2002, unpublished, ch 8 and Meredith K. Gibbs, "What Structures are Appropriate to Receive Treaty of Waitangi Settlement Assets?" *New Zealand Universities Law Review*, Vol. 21, No. 2, 2004 for discussion of these issues in relation to the Ngai Tahu settlement and the return of pounamu.

<sup>83</sup>The fragmentation of traditional Maori groups, and group identity is a huge problem in the Treaty settlement process, often taking shape as disputes about mandate. The recent events in Taranaki are a good example. See Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report (Wai 758)*, Wellington: Legislation Direct, 2000, especially at p. 28.

<sup>84</sup>Because any Maori, as an individual, can make a claim to the Waitangi Tribunal, the hearing process at least offers the opportunity to state a case against the Crown and to have the Tribunal report on that case. Note also Janna Thompson,

*Taking Responsibility for the Past: Reparation and Historical Injustices*, Cambridge: Polity Press, 2002. pp. 42-43.

<sup>85</sup>For example, the Taranaki settlements.

<sup>86</sup>For example, the ancillary claims included in the Ngai Tahu, Ngati Turangituku and Ngati Awa settlements.

<sup>87</sup>Waldron also raises other problems with a counterfactual approach to reparations, one of which he terms "the *contagion* of injustice". Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 151 (original emphasis). The idea is that unjust market transactions affect the whole market. For example, one fraudulent transaction whereby a purchase of land is made at a drastically reduced price, or expropriated without recompense, will tend to reduce the price of a similar holding, even when acquired justly. This is the work of the free market. If we apply Nozick's principle of justice in rectification and make the world as it would have been had the injustice not occurred, then all holdings affected by the injustice must be adjusted. This approach could call into question *all* present landholdings (at p. 152). One can only begin to imagine the difficulties of undertaking such a task.

<sup>88</sup>Note Robert Sparrow's argument that while we cannot erase past injustices we can alter their significance and transform them. Robert Sparrow, "History and Collective Responsibility," *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000.

<sup>89</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 154.

<sup>90</sup>*Ibid.*

<sup>91</sup>*Ibid.*, p. 145.

<sup>92</sup>*Ibid.*, pp. 146–153. Note the use of counterfactuals by Nozick in his theory of justice in rectification. Robert Nozick, *Anarchy, State and Utopia*, New York: Basic Books, 1974, pp. 152–153.

<sup>93</sup>Sharp notes the difference in legal theory between the remedy in contract law (to restore the wronged party to the position they would have been in if the promise had been kept) and tort law (where the remedy intends to put the victim in the position had the wrong not occurred). Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 35.

<sup>94</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, pp. 146 & 153–159. It must be acknowledged, however, that the damage to the Maori-Crown relationship, particularly the loss of trust, caused by historical injustices will be difficult to heal.

<sup>95</sup>*Ibid.*, p146.

<sup>96</sup>*Ibid.*, p149.

<sup>97</sup>*Ibid.*, pp146–153, quote at p150. The Waitangi Tribunal has noted that the counterfactual approach is problematic because "a host of variables confront the programming of a just calculation [of compensation]; and the assessment of 'what might have been' is highly subjective". Waitangi Tribunal, *The Orakei Claim Report (Wai 9)*, Wellington: Brooker and Friend Ltd, 1987, p. 263.



<sup>98</sup>A related argument is made by George Sher, "Ancient Wrongs and Modern Rights," *Philosophy and Public Affairs*, Vol. 10, No. 1, 1981, particularly at pp. 12–13. In constructing a counterfactual world where an injustice is rectified, we run into problems of the *transferability* of a person's entitlements in the counterfactual world to the real world. Sher suggests that there are two distinct factors at play here: "[Transferability] is limited first by the degree to which one's actual entitlements have been diminished by one's own omissions in this world, and second by the degree to which one's entitlements in a rectified world are generated anew by one's own actions there." (at p. 12). The point is that in constructing a counterfactual world, we assume people will act in certain ways that may bear little resemblance to the real world. For example, we may assume that had victim V's land not been taken unjustly, V would have developed that land and used it to provide a livelihood. But given that V did none of those things in the real world, how can we justify that assumption and, say, compensate V as if he had done these things? What if we know that V's belief would suggest that he would not have developed the land in any manner? Sher suggests, then, that the value that must be compensated is the lost opportunity to develop or otherwise use the land, and not the value of the goods produced by having had the opportunity. He then takes the issue of transferability one step further. Applying this reasoning to historical injustices, he suggests that transferability diminishes over time because the actions and omissions in the real world have a greater and greater effect on V and V's descendants' entitlements acquired in the real world and less and less over time can be attributed to the historical injustice. The argument that the moral weight of injustices may fade over time will be discussed more fully below.

<sup>99</sup>Chief Judge Durie, in Waitangi Tribunal, *The Waiheke Island Claim Report (Wai 10)*, Wellington: Government Printing Office, 1987, p. 41. For other examples see Waitangi Tribunal, *The Orakei Claim Report (Wai 9)*, Wellington: Brooker and Friend Ltd, 1987; Waitangi Tribunal, *The Ngai Tahu Report (Wai 27)*, Wellington: Brooker and Friend Ltd, 1991; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi (Wai 143)*, Wellington: GP Publications, 1996; Waitangi Tribunal, *Te Whanganui-A-Orotu Report on Remedies (Wai 55)*, Wellington: GP Publications, 1998; Waitangi Tribunal, *The Turangi Township Remedies Report (Wai 84)*, Wellington: GP Publications, 1998; Waitangi Tribunal, "Determination of Preliminary Issues–In the Matter of the Muriwhenua Claims (Wai 45 and others)," Chief Judge Durie (Presiding Officer), 1998, unpublished memorandum.

<sup>100</sup>Janna Thompson resolves Waldron's concern about the limitations of rational choice theory differently. See Janna Thompson, "Historical Obligations," *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000, pp. 341-342.

<sup>101</sup>Meredith K. Gibbs, "Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu settlement and the return of pounamu (greenstone)," PhD thesis, University of Otago, 2002, unpublished, ch 2.

<sup>102</sup>Loren E. Lomasky, "Compensation and the Bounds of Rights", in John W. Chapman, ed., *Nomos XXXIII: Compensatory Justice* New York and London: New York University Press, 1991, pp. 27-29; Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustices*, Cambridge: Polity Press, 2002, p. 96.

<sup>103</sup>Ngai Tahu Claims Settlement Act 1998, s6. The apology is recorded in both Maori and English in the Deed of Agreement and the Ngai Tahu Claims Settlement Act 1998. In addition, it was spoken by the then Prime Minister, Jenny Shipley, at Onuku Marae on 29 November 1998.

<sup>104</sup>See Gerald F. Gaus, "Does Compensation Restore Equality?" in John W. Chapman, ed., *Nomos XXXIII: Compensatory Justice* New York and London: New York University Press, 1991 and Thompson's discussion of Gaus' arguments: Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustices*, Cambridge: Polity Press, 2002, pp. 48-49.

<sup>105</sup>Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustices*, Cambridge: Polity Press, 2002, p. 53.

<sup>106</sup>Ibid, p. 52.

<sup>107</sup>Ibid, p. 50.

<sup>108</sup>Ibid, pp. 50-53.

<sup>109</sup>Robert Nozick, *Anarchy, State and Utopia*, New York: Basic Books, 1974, p. 231. Even Nozick, who generally dismisses the right of the state to redistribute resources other than to rectify injustice in acquisitions or transfers in holdings, is unable to separate totally reparative and distributive justice. While Nozick argues that justice is simply historical—the justice of a given situation depends on how it came about—he suggests that there is a role, albeit limited, for distributive justice (at p. 153). Phillips suggests that "rectification to correct earlier injustice might do more than Rawls' theory of justice to redress existing inequalities, and is preferable (morally speaking) to redistribution in the name of equality". David L. Phillips, *Equality, Justice and Rectification: An Exploration in Normative Sociology*, London and New York: Academic Press, 1979, p. 258. Further, in adopting a version of the Lockean proviso that 'enough and as good' must be left to others in initial acquisitions, Nozick concedes that background circumstances may impinge on our conception of justice. Robert Nozick, *Anarchy, State and Utopia*, New York: Basic Books, 1974, p. 174–182. This latter point is also made by Waldron: Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perrett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, pp. 159–160.

<sup>110</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perrett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 152.

<sup>111</sup>Ibid, p. 153 (original emphasis).

<sup>112</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 158. See also Meredith K. Gibbs, "Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu settlement and the return of pounamu (greenstone)," PhD thesis, University of Otago, 2002, unpublished, ch 2.

<sup>113</sup>Waitangi Tribunal, *The Waiheke Island Claim Report (Wai 10)*, Wellington: Government Printing Office, 1987, p. 41.

<sup>114</sup>But see Robert Sparrow's argument that while we cannot erase past injustices we can alter their significance and transform them. Robert Sparrow, "History and Collective Responsibility," *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000.

<sup>115</sup>Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 35. This is not to argue that the Crown can divest itself of resources without regard to Maori Treaty claims. Note the case of *New Zealand Maori Council v A-G* [1987] 1 New ZealandLR 641 (CA), in response to which the jurisdiction of the Tribunal was amended by the Treaty of Waitangi (State Enterprises) Act 1988 giving the Waitangi Tribunal powers to make binding

recommendations for the return to Maori ownership of land transferred to state-owned enterprises under the State-Owned Enterprises Act 1986. Later, the Crown Forest Assets Act 1989 gave the Tribunal powers to make binding recommendations for the return of Crown forest land. The lands that may be subject to the Tribunal's binding recommendations are Crown forest land subject to a Crown forestry licence, or memorialised lands. Memorialised lands are those owned, or formerly owned, by a state-owned enterprise or a tertiary institution, or former New Zealand Railways lands that have a notation on the certificate of title that the Tribunal may order their return to Maori ownership. Treaty of Waitangi Act 1975, ss8A,8HB&8HJ.

<sup>116</sup>In any rectification of injustice in holdings there is necessarily a redistribution of resources in society. David L. Phillips, *Equality, Justice and Rectification: An Exploration in Normative Sociology*, London and New York: Academic Press, 1979, p. 257. The important point to bear in mind is that, as Nozick acknowledges, whether something can properly be described as 'redistributive' depends on the reasons for the redistribution. Robert Nozick, *Anarchy, State and Utopia*, New York: Basic Books, 1974, p. 27. See also David L. Phillips, *Equality, Justice and Rectification: An Exploration in Normative Sociology*, London and New York: Academic Press, 1979, p. 257.

<sup>117</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 156–159.

<sup>118</sup>Waldron refers to the legal doctrines of prescription and adverse possession and the procedural bar of the statute of limitations. He gives two pragmatic reasons for the diminution of historical entitlements over time. The first concerns the difficulties of obtaining accurate evidence of events occurring generations ago. The success of the Waitangi Tribunal in its hearing and research of historical evidence relating to Crown breaches of the Treaty of Waitangi from 1840 up to 1992 indicates the fragility of this argument in the New Zealand context. Second, he argues that people build up structures and expectations around resources actually under their control that would be "costly and disruptive" to disturb in the name of restitution. *Ibid.*, pp. 155–156. This latter point is picked up below.

<sup>119</sup>*Ibid.*, pp157–158. Note that both Waldron and Nozick reject Locke's mixing of labour thesis "as implausible and incoherent": Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p157.

Waldron's view of initial entitlement is, however, not the only one. The initial acquisition of land and resources by Maori in New Zealand can also be viewed as legitimate either according to Maori custom or *tikanga*, or, in accordance with the Treaty of Waitangi as the relevant social contract that established New Zealand society. Jindra Tichy and Graham Oddie, "Is the Treaty of Waitangi a Social Contract?" in Graham Oddie and Roy W. Perett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992; David L. Phillips, *Equality, Justice and Rectification: An Exploration in Normative Sociology*, London and New York: Academic Press, 1979, p. 261. Either way, land and resource dealings between the Crown and Maori should have been conducted in accordance with the Treaty as containing a shared notion of justice. According to the social contract thesis, the persistence of moral claims to land and resources depends rather on interpretations of the Treaty, than on an analysis of whether any particular entitlement can be said to have ceased to play an indispensable role in the life of particular Maori or Maori collectives.

<sup>120</sup>For example see K. R. Wilson, Submission to the Waitangi Tribunal: Ngai Tahu Claim (Wai 27), Doc #H8, p22; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi (Wai 143)*, Wellington: GP Publications, 1996, and comments in Waitangi Tribunal, *The Turangi Township Remedies Report (Wai 84)*, Wellington: GP Publications, 1998, pp. 14–15. See also Harry C. Evison, *Te Wai Pounamu The Greenstone Island: A History of the Southern Maori During the European Colonization of New Zealand*, Wellington and Christchurch: Aoraki Press, 1993. This can be said of most Indigenous peoples. United Nations, Development and Human Rights Section, *The Significance of Land to Indigenous Peoples*, Information Paper (DPI/2068–99 26210), United Nations Department of Public Information, 1999.

<sup>121</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perrett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 158–159. Waldron merely suggests that the return of particular sites integral to aboriginal identity and cultural survival may have "an edge" over claims for the return of land of mainly economic value. In the New Zealand context, these might be *wahi tapu* sites (sacred or burial sites), *mahinga kai* (food gathering sites), or prominent landmarks associated with eponymous ancestors

<sup>122</sup>George Sher, "Ancient Wrongs and Modern Rights," *Philosophy and Public Affairs*, Vol. 10, No. 1, 1981, pp. 8–10 (emphasis added). Waldron's approach gives little consideration to values other than property. Susan Dodds, "Justice and Indigenous Land Rights," *Inquiry*, Vol. 41, No. 2, p. 197. See also Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustices*, Cambridge: Polity Press, 2002 and Janna Thompson, "Historical Obligations," *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000, pp. 342–344.

<sup>123</sup>Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi (Wai 143)*, Wellington: GP Publications, 1996, p. 134. Even in the case of the Ngai Tahu claim, where no land was confiscated but instead the Crown failed to ensure that Ngai Tahu retained sufficient land for their future needs, the results are similar: loss of *mana*, loss of *rangatiratanga*, loss of *turangawaewae*. Waitangi Tribunal, *The Ngai Tahu Report (Wai 27)*, Wellington: Brooker and Friend Ltd, 1991. Justice demands that these wrongs also be righted.

<sup>124</sup>Waitangi Tribunal, *The Muriwhenua Land Report (Wai 45)*, Wellington: GP Publications, 1997, p. 406. Note also John Dawson, "Remedial Powers of the Waitangi Tribunal," *Public Law Review*, Vol. 12, No. 3, 2001.

<sup>125</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perrett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 165 (original emphasis).

<sup>126</sup>Janna Thompson, "Historical Obligations," *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000, p. 343. See also Duncan Ivison, "Political Community and Historical Injustice," *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000.

<sup>127</sup>Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustices*, Cambridge: Polity Press, p. 52. Although note that Thompson argues that claims to retain individual property rights may be weak when compared to the claims of Indigenous peoples to have their lands returned as part of reparation for historical injustices (at p. 92).

<sup>128</sup>Waitangi Tribunal, *The Muriwhenua Land Report (Wai 45)*, Wellington: GP Publications, 1997, p. 406, emphasis added. Note also John Dawson, "Remedial Powers of the Waitangi Tribunal," *Public Law Review*, Vol. 12, No. 3, 2001.

<sup>129</sup>This is implied in the Tribunal's comments in Waitangi Tribunal, *The Turangi Township Remedies Report* (Wai 84), Wellington: GP Publications, 1998, p. 35.

<sup>130</sup>For further details see Meredith K. Gibbs, "Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu settlement and the return of pounamu (greenstone)," PhD thesis, University of Otago, 2002, unpublished. Note also that New Zealand's Treaty settlement process specifically excludes the return of privately owned property: Treaty of Waitangi Act 1975, s6(4A). Thompson argues that the return of private property as reparation is not necessarily unjust. See Janna Thompson, "Historical Obligations," *Australasian Journal of Philosophy*, Vol. 78, No. 3, 2000, p. 344.

<sup>131</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perrett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 166. This is the second of Waldron's two important provisos to his thesis of supersession of historical injustices, and it is these that critics must fully appreciate (at p. 166–167). One critic who has failed to account adequately for Waldron's proviso is Susan Dodds. Susan Dodds, "Justice and Indigenous Land Rights," *Inquiry*, Vol. 41, No. 2. The first proviso for the application of any supersession is that contemporary society is actively and honestly attempting to achieve just future arrangements. In the New Zealand context this is shown by the current Treaty settlement process and also by policies such as the (former) Labour/Alliance Coalition Government's 'Closing the Gaps'.

<sup>132</sup>Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in Graham Oddie and Roy W. Perrett, eds., *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992, p. 167. Note that Phillips also argues along these lines. David L. Phillips, *Equality, Justice and Rectification: An Exploration in Normative Sociology*, London and New York: Academic Press, 1979, chapters 9 & 10.

<sup>133</sup>On the contribution of the Treaty settlement process to reducing Maori-Pakeha social inequality see Meredith K. Gibbs, "Moving Beyond Social Inequality? The Contribution of the Settlement of Historic Grievances," paper presented to the Sasakawa International Forum 2001: Perspectives on Social Inequalities: Issues of Race, Class and Gender, Washington DC, 2001, October 31–November 2, unpublished.

<sup>134</sup>Argument of Crown counsel referred to in Waitangi Tribunal, *The Turangi Township Remedies Report* (Wai 84), Wellington: GP Publications, 1998, p. 15.

<sup>135</sup>Waitangi Tribunal, *The Muriwhenua Land Report* (Wai 45), Wellington: GP Publications, 1997, p. 406. Also referred to in Waitangi Tribunal, *The Turangi Township Remedies Report* (Wai 84), Wellington: GP Publications, 1998, p. 14.

<sup>136</sup>Waitangi Tribunal, "Memorandum Following Eighth Hearing–In the Matter of Ngati Awa and other claims of the Eastern Bay of Plenty (Wai 46 and others)," Tribunal Member G. S. Orr, 1995, unpublished memorandum, p. 11.

<sup>137</sup>*Ibid*, p. 12.

<sup>138</sup>Waitangi Tribunal, *The Muriwhenua Land Report* (Wai 45), Wellington: GP Publications, 1997, pp. 405–406. See also Waitangi Tribunal, *The Orakei Claim Report* (Wai 9), Wellington: Brooker and Friend Ltd, 1987, pp. 263–264; Waitangi Tribunal, "Memorandum Following Eighth Hearing–In the Matter of Ngati Awa and other claims of the Eastern Bay of Plenty (Wai 46 and others)," Tribunal Member G. S. Orr, 1995, unpublished memorandum, pp. 10–11; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wai 143), Wellington: GP Publications, 1996, pp. 15, 312 & 314. Note that Crown counsel in the Turangi Township Remedies hearing accepted that remedies should not be assessed on a damages basis.

Waitangi Tribunal, *The Turangi Township Remedies Report (Wai 84)*, Wellington: GP Publications, 1998, p. 15.

<sup>139</sup>John Patterson, *Exploring Maori Values*, Palmerston North: Dunmore Press, 1992, pp. 120–121. Note that Patterson is discounting the theory that *utu* can involve forbearance.

<sup>140</sup>Sharp suggests that Maori calls for justice were "Janus-faced, looking both ways". Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s*, Auckland: Oxford University Press, 2nd edn, 1997, p. 157.

## The CIGAD Working Paper Series

- 1/2005                    **Indigenous Governance and Development**  
Manuhua Barcham and John Overton
- 2/2005                    **Justice in New Zealand's Treaty of Waitangi  
Settlement Process**  
Meredith Gibbs
- 3/2005                    **Beach Fale Tourism in Samoa: The Value of  
Indigenous Ownership and Control over Tourism**  
Regina Scheyvens
- 4/2005                    **Conflict, Violence and Development in the Southwest  
Pacific: Taking the Indigenous Context Seriously**  
Manuhua Barcham

# Justice in New Zealand's Treaty of Waitangi settlement process.

Gibbs, Meredith

2009-07-17T03:52:10Z

---

<http://hdl.handle.net/10179/935>

20/01/2020 - Downloaded from MASSEY RESEARCH ONLINE