Justice and Maori

Reflections on Contemporary Justice theory and Justice for Maori

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In Memoriam
Grandad 'Church' (1916-91) William Alan Pyatt CBE,
Bishop of Christchurch 1966-83.

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Abstract

The thesis investigates the political philosophy of justice for Maori in New Zealand. The recent communitarian critique of liberalism undermines a normative approach to the investigation. Therefore, the critique, as it is presented by Michael Sandel and Alasdair MacIntyre and the liberal reply, as represented by John Rawls and Brian Barry, is explicated in Chapter One and a new normative approach to justice is outlined. This new approach is, in the main, the result of Brian Barry's three theorems of justice: justice as mutual advantage, as reciprocity, and as impartiality. The resulting sketch of the conditions of justice is then applied to five major New Zealand writers on justice for Maori.

The five writers are examined first for their coherency of political argument, and second for the theories of justice at work in the texts. Then, with the help of the critiques explicated in chapter one, the writer's theories of justice are judged as to their ability to meet the conditions of a just agreement.

The conclusions to be drawn from the thesis are twofold. First, a new liberal approach is possible to defend against the communitarian claims. Second, the New Zealand writers use theories of justice which are likely to produce agreements that are unstable, and need, therefore, coercive enforcement agencies to keep them in place.

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Introduction

During the 1800s Maori watched as their land and their way of life was overwhelmed by an influx of Europeans and European thought. The historical process of this imposition of Europe onto a small South Pacific group of islands has its parallels in many places around the globe, and has come to be called colonisation. From India to Alaska the impact of similar European colonisation of already occupied land has produced strong opinions on the meaning of justice for those hurt by colonisation. However, these ideas on justice and the prescriptions set out for the rectification of past injustice do not fit easily within much contemporary justice theory.

The arguments surrounding justice for indigenous peoples combine two ideas which sit uneasily together: history and moral argument. Another problem also arises because these confused arguments have to be presented in a political arena.

In New Zealand the moral arguments for justice draw upon a history of Maori grievances over events that occurred in the last 160 or so years. Over this time sixty five million acres of New Zealand land were acquired by Pakeha, leaving Maori with around 1 million.[1] This type of colonisation does not sit easily with most intuitions and notions about justice, nor with any recent attempt to construct a 'fair' justice theory.[2] Even Nozick's justice theory – with its extreme notion of liberty – could be interpreted to frown

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[1] Shonagh Kenderdine, "Legal Implications of Treaty Jurisprudence", *Victoria University of Wellington Law Review,* vol. 19, Nov 1989, p. 348.

> **Estimates in 1986 set the figure of 1.18 million acres of 'Reserved, vested and other categories of land'[*NZ Maori Council v Attorney General* [1987] NZLR 641, per Cooke P at 653] which did not account for the general land in Maori ownership. There are 66, 235,209 acres of land in New Zealand. It is also useful to look at the statistics of raupata (confiscated) lands to see what passed out of Maori hands under the various expropriating statutes[NZ Settlements Act 1863. NZ Settlements Amendment Act 1864; NZ Settlement Amendments and Continuance Act 1865; NZ Settlements Acts Amendment Act 1866] of the 19th century.**

Areas in Acres, source Litchfield, "Confiscation of Maori Law", *Victoria University of Wellington Law Review*, vol. 15, 1985, p. 335-355.

[2] For example John Rawls, *A Theory of Justice*, Oxford University Press, Oxford, 1971 and *Political Liberalism,* Columbia University Press, New York, 1993.

upon the way in which New Zealand was colonised.[3] Consequently, one can summarise the historical actions involved in colonising New Zealand as a morally bad thing, an atrocity, or even gross stupidity, under any contemporary theory of justice. Yet, one would still not have a moral prescription, let alone a political agenda, to render 'justice'.

This thesis investigates those writings on the subject which have attempted to find that prescription: how justice relates to New Zealand Maori. New Zealand is not a large country, and only a small number of professional writers comment on justice for Maori. Necessarily, this thesis reaches across large gaps which would not exist in another hermeneutic field such as literary theory. Having embarked upon the study, I discovered that the writings in the strict field of political theory were so disconcertingly few on the ground that a wider approach was needed. Also, to leave out books, or authors which have gained wide currency within the University system, even though they lacked sophistication in terms of political theory, seemed unduly dismissive. Whether these contributions are well-informed and well-argued or not, they do, in fact, play a significant role in guiding debate.

By bringing together a seemingly alien international academic dispute and these New Zealand texts the level of the debate, I hope, will be raised beyond the polemical. Of course, to encourage the use of international academic ideas could be seen as the imposition of yet another imperialism. However, just as easily, avoiding the larger context of international thought would be tantamount to perjury, to lying about the origins of ideas in New Zealand political thought.

Many of the concepts covered within these writings, such as 'sovereignty', 'democracy', 'rights' to name but a few, fall under the rubric of political theory or philosophy. All must define the problem of Maori grievance, and most often it is in terms of 'difference'. Different cultures, different peoples, different races have all been ways of conceiving of Maori and Pakeha in texts studying justice and Maori. The only agreement that one can find within this topic is a concern for justice within such differences. Therefore this thesis concentrates on justice for Maori, leaving aside what one group or

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[3] Robert Nozick, *Anarchy, State and Utopia*, Basic Books, New York, 1974; Nozick's theory – setting out a minimal government charged with protecting people's property rights – could only frown upon the wholesale taking, fraudulently or otherwise, of Maori land.

another conceive of as the differences between Maori and Pakeha. It will become clear in the first chapter that this avoidance of defining Maori and Pakeha difference is done not to avoid the difficulties of such a large issue. Rather, a definition of difference and identity is assumed to flaw a just agreement. That is, since such concepts are thought to be integral to justice, to define them prior to negotiations over justice is to define part of the final agreement itself. This thesis is not then a prescription so much as an examination of what would be the conditions for securing justice.

The debate, though always present as grievance on the Maori side, has only arisen within the state's institutions since the break down of a liberal–egalitarian Pakeha political culture that dominated New Zealand politics throughout most of the twentieth century. That is to say, the issue of justice for Maori has gained standing only because New Zealand's political culture could admit there existed difference amongst its members. As Mulgan puts it, the problem is to reconcile these differences.

> **How can two people with different histories and cultures live together in peace with justice? This is the fundamental constitutional issue facing New Zealanders as we celebrate the 150th anniversary of the Treaty of Waitangi and consider the legal and political institutions which will take us into the 21st century.**[4]

This parallels a debate within contemporary political philosophy that is usually named the 'communitarian critique of liberalism'.[5] One perspective of this critique argues that liberalism excludes difference in a community. Liberalism, according to this critique,

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[4] Richard Mulgan, *Maori Pakeha and Democracy*, Oxford University Press, Auckland, 1989, p. 1.
[5] The main figures being Michael Walzer, *Spheres of Justice : A Defence of Pluralism and Equality*, Blackwell, Oxford, 1983; Michael Sandel *Liberalism and the Limits of Justice*, Cambridge University Press, Cambridge, 1982; Alasdair Macintyre, Whose *Justice? Which Rationality?*, University of Notre Dame Press, Indiana, 1988. For a general overview see Stephen Mulhall and Adam Swift, *Liberals and Communitarians*, Blackwell, Cambridge, 1992; Georgia Warnke, *Justice and Interpretation*, MIT Press, Cambridge, 1993; Allen Buchanan, "Assessing the Communitarian Critique of Liberalism", *Ethics*, vol. 99, 1989, pp. 852-82.;Simon Caney, "Liberalism and Communitarianism; A Misconceived Debate", *Political Studies*, vol. XL, 1992, pp. 273-289; Amy Gutmann, "Communitarian Critics of Liberalism, *Philosophy and Public Affairs*, vol. 14, 1985, pp. 308-22; Will Kymlicka, "Liberalism and Communitarianism", *Canadian Journal of Philosophy*, vol. 18, 1988, pp. 181-204; Patrick Neal and David Paris, "Liberalism and the Communitarian Critique: a Guide for the Perplexed", *Canadian Journal of Political Science*, vol. , no. 3, Sept 1990, pp. 419-39; For an indication of the trouble that this debate gives to those wishing to describe its workings see the exchange in *Political Studies*; Simon Caney, "Liberalism and Communitarianism: A misconceived Debate", *Political Studies*, vol. 15, 1992, pp. 273-289; Stephen Mulhall and Adam Swift, "Liberalisms and Communitarianisms: whose Misconception?", *Political Studies*, vol. 41, 1993, pp. 650-6; Simon Caney, " Liberalisms and Communitarians: A Reply", *Political Studies*, vol. 41, 1993, pp. 657-660; For collections of the articles developing the various communitarian ideas see Shlomo Avineri and Avner de-Shalit (eds.), *Communitarianism and Individualism*, Oxford University Press, Oxford, 1992; Michael Sandel (eds.), *Liberalism and its Critics*, Basil Blackwell, Oxford, 1984.

defends a justice system of unqualified egalitarianism and, therefore, cannot deal with difference. Challenging a supposed liberal difficulty with different identities means that there are many points of connection between those who can be called communitarians, and those arguing for particularist forms of justice for Maori. It would be relatively easy to link this larger philosophical context to the New Zealand example by a simple parallel between the communitarian critique and those seeking justice for Maori. However, this contextualisation would lead to few ideas, as it would seem too early to demand highly coherent theories on either side of debate within New Zealand.

More appropriately, Chapter One will explore the cogency of the liberal argument in the face of communitarian criticisms. For the questioning of liberalism at the level of its individualistic assumptions is asking a very important question: has liberal justice theory the potential to provide a foundation for Maori and Pakeha to reconcile their differences within New Zealand?

To answer this question, Chapter One will outline two of the central communitarian attacks on liberalism. These attacks, however different in perspective, both contend that the base of liberal philosophy – its axiomatic individualism – is logically and morally flawed. Another similarity between the two is their use of Rawls's construction of liberal political philosophy as the founding statement of modern liberalism. This is not surprising in itself, as Rawls's book, *A Theory of Justice*, resurrected contemporary political philosophy and is, therefore, the defining text of recent times against which theorists examine many, if not all, ideas. Also, as a Kantian liberal, whose arguments often attack other political theories – their conceptions of knowledge, and therefore the conception of the self – at their root, Rawls is the touchstone for liberal critics.[6] A little more surprising is the communitarians seeming reluctance to engage with political philosophers, who have developed Rawls's theory in light of its obvious flaws, such as Brian Barry. Chapter One shall show that this was a regrettable omission in the communitarian argument; for as Barry modifies Rawls 'justice as fairness' to a new

[6] Though it is often fallacious to use all the articles and books of a single author as a continuous argument (eg. JS Mill), it would seem that Rawls's publications since *A Theory of Justice,* very much follow a progression of ideas. Indeed, his introduction to *Political Liberalism* (p. xv-xvi) show that he is writing on concepts first expounded in *A Theory of Justice,* Oxford University Press, Oxford, 1971.

theory, 'justice as impartiality', he also denies purchase to the most stringent of the communitarian critiques.

By outlining the liberal reply to communitarian concerns, the more relevant issues for New Zealand within the liberal–communitarian debate can be brought forward. The first chapter will concentrate, therefore, on the communitarian critique of liberal argument, starting with an examination of some of the wider problems in the debate. Then Sandel's analysis of the liberal individual will be detailed. In fairness to Rawls, the arguments in his latest book *Political Liberalism* which attempt to refute Sandel's – amongst other's – criticism will then be covered. Unfortunately, in outlining Rawls's new work, it will be seen that Rawlsian liberalism, in order to maintain its concept of the individual, in the face of the communitarian critique, has retreated behind a veil of ignorance. Like Papageno in Mozart's opera, *Die Zauberflöte*, Rawls's liberalism has had its mouth sealed because it has lied about its courage in the face of adversity. The communitarians used in this thesis, Sandel and MacIntyre, convincingly show that Rawls's theory cannot produce an individual, a self that is applicable to any person wanting to live in a stable society: it is apparent then that Rawls's liberalism fails at the very point from which it first sets off. At this juncture, the dilemmas facing liberal philosophy will be clear. This will provide the opportunity to show how 'justice as impartiality' – Brian Barry's development of Rawls's theory – can solve these dilemmas. Like Papageno, the liberalism can move on from some mistakes, and find what it seeks; a justice theory that solves the problem of impartiality and different identities. Brian Barry's consummate statement of liberalism's contemporary aim outlines his attempt to construct a theory of justice which moves on from the failures of Rawls's concept of 'justice as fairness'.

> **My subject, then, is the rules of justice. I define these as the kind of rules that every society needs if it is to avoid conflict–on any scale from mutual frustration up to civil war. Ideally, rules of justice assign rights and duties to people in their personal and official capacities in such a way that, in any situation, it is clear what each person is entitled or required to do. These entitlements and requirements should fit together harmoniously; we should not find for example, that *A* is entitled to demand a certain thing from *B* but**

that *B* is not under a duty to supply it to *A*.[7]

The rules or conditions for justice developed in Chapter One through the study of the liberal-communitarian debate, and its extension by Barry, sets out a framework for Chapters Two through Six. The framework is used to examine the arguments of several of the more prominent texts in the debate over justice and the Maori. Unfortunately much of the language within claims of justice for Maori is rhetorical. The purpose of the five chapters is to examine how strongly that rhetoric holds together as structured, logically valid argument. The basic framework to be used is Brian Barry's summary of the three types of justice theory explicated in Chapter One; justice as mutual advantage; justice as reciprocity; and justice as impartiality. There is an obvious criticism to be made at this point. The theoretical framework is overtly liberal, and hence Western in its orientation. There is, then, a fair accusation that Western thought is colonising a problem within New Zealand which was created by Western settlers. However, there is no sense in which this thesis is concerned with illiberal argument, given how liberalism will be defined below. Therefore this thesis takes – from the texts themselves – the axiom that New Zealanders wish to have 'reasonable agreement' over the issue of justice for Maori. More importantly and pragmatically, the liberal base of this thesis is an attempt to reconcile the Western tradition of political thought with justice for indigenous people in a small example, New Zealand.

As this thesis will show, it is not 'just' to describe a culture, or how two cultures can work together, from the view point of one justice theory such as individual rights, or the rule of law, or customary indigenous 'law'. No one idea of justice, or way of describing peoples can be anything but an arbitrary imposition which helps one or other party to establish political support. Such impositions have little to do with establishing a just and stable agreement which is reasonable. Therefore, this thesis tries to find those ideas of justice apparent in the texts which may limit perspective and discourage a diversity of opinions. That such a project is necessary does not indicate an unwillingness in New Zealand to accept a diversity of ideas. Rather, the project is necessary because many of the theories of justice prevalent in the debates between Maori and Pakeha are

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[7] Brian Barry, *Justice as Impartiality, Clarendon* Press, Oxford, 1995, p. 72.

held without deep investigation, and subsequently often have results which are not intended. That is to say, many of the theories of justice used in the debates will not fulfil the functions that are asked of them.

The liberal base of this thesis is therefore an attempt to integrate the political thought of Pakeha culture, and hence the political discourse of Pakeha, with the criticism that has accused it of oppression, racism, and injustice.

CHAPTER ONE

Contemporary Justice Theory

The Communitarian Critique and the Liberal Reply

In the spirit of our time, it's either Anna or Karenin who is right, and the ancient wisdom of Cervantes, telling us about the difficulty of knowing and the elusiveness of truth seems cumbersome and useless.

Milan Kundera ,*The Art of the Novel*[8]

Communitarian critics have charged that the theory of liberal individualism, and in a more detailed way, Rawls's conception of justice as fairness, contains fundamental flaws. The critique takes two forms. The first is methodological, and argues that the premise of liberalism, rational individual choice, is wrong or false. Instead, one must argue from the individual's social, cultural and historical contexts when producing political philosophy. The second part of the communitarian critique asserts that the base of individualism gives rise to "morally unsatisfactory consequences".[9] The main concern of this thesis however, is the communitarian attack on the liberal sense of the individual. This attack, fully explicated by Sandel and MacIntyre, argues that the liberal concept of a person is fitting only for an individual coming from a Western culture. That is, the communitarians argue that liberalism is not neutral between conceptions of the good. Therefore Maori, with a taonga (cultural heritage) that draws upon a different history should not be able to find their place within liberalism.[10] The argument, in brief, states that by not focussing on the community, by not taking community conceptions of justice

[8]Penguin, London, 1988, p. 16.

[9] Shlomo Avineri and Avner de-Shalit, "Introduction", Shlomo Avineri and Avner de-Shalit (eds.), *Communitarianism and Individualism*, Oxford University Press, Oxford, 1992, p. 2.

[10] However this thesis will not explicitly delineate the different cultural histories to avoid being drawn into a debate on the cultural differences between Maori and Pakeha. With this approach it is hoped, not to avoid the similarities or differences, but to allow for the many positions that must exist given that each group is made of individuals with different relations to every other individual around them.

into account, liberalism excludes from a polity those communities and cultures which place greater emphasis on collective political and social arrangement. Therefore, they maintain, minority cultures are left little within a polity where liberalism is the dominant political discourse. New Zealand, with its liberal political culture, should therefore overpower the social arrangements of the "minority culture", whether they are called the indigenous people, the tangata whenua, or simply Maori. However in the last twenty to thirty years Maori have found many arenas in which to exert political influence. This minority group has had, or found, ways to protect itself within a dominant political culture, even though – according to the communitarians – it has been denied use of its own culture.

The etymology of the word communitarian is almost the clearest indication of how the 'communitarians' are linked together. Put simply – and superficially – the communitarian attack disputes the individualism of liberalism, and declares that the idea of the community needs rejuvenating. Much has been written on the communitarian critique – and its difficulties – but it is still somewhat of a mirage, as there is little that joins the attackers of liberalism, except the attack itself. Even then, there is a difficulty in defining communitarian by its attack on liberalism, as there is a clear differentiation between the recent communitarian attacks and those of Marxism, conservatism, and feminism. For this thesis, and its concern with justice theory, there can be little else to do except focus on the idea of the individual. For it is here that liberal theory is based, and so it is at the liberal conception of the individual which the most decisive attacks have been aimed. Furthermore, it is the individual's relation to the 'other' within liberalism that is under threat: is the self still autonomous, or is it a mere filter for others, notably the community's, ideas? As Amy Gutmann has noted, from a historical perspective the recent communitarian attacks are Hegelian inspired, as opposed to the earlier communitarian attacks of Marxist based scholars.

> **The Hegelian conception of man as a historically conditioned being informs... Michael Sandel's rejection of the liberal view of man as a free and rational being.**[11]

[11] Amy Gutmann, "Communitarian Critics of Liberalism", *Philosophy and Public Affairs*, vol. 14, 1985, p. 308.

The explicit aim of this type of communitarian critique is to suggest that an individual does not function without the many other relations to other individuals which liberal theory, apparently, denies are important. As Gutmann notes, the society which the communitarians advocate is 'one of settled traditions and established identities."[12]

Communities and cultures – such as Maori – therefore need to be acknowledged as the originators of ideas that guide the individuals that comprise these groups. These ideas, that is, should inform the conceptions of political morality that the group uses to order society. The communitarians argue this theory against a supposedly liberal position that, in all areas, it is a completely individual choice as to the way one leads one's life ; that individuals can, and should, be regarded as the originator of their choices. Hence, conceptions of political morality should focus on the individual, rather than the group. The communitarian critique is then an attempt to meaningfully question the individualism of liberalism. The main force of their argument is that the freedom of choice promised to individuals by liberalism is a mirage; as individuals, we are not completely free to chose our own ends.

Instead, communitarians argue, individuals are situated in a network of personal and social relations, which control their reactions to choice. Our choices as individuals are affected by our "embeddedness in communal practices"[13]. As individuals, that is, we are defined by our relations with others. As Kymlicka paraphrases, the communitarian argues that,

> **[e]ven if liberals have the right account of individuals capacity for choice, they ignore the fact that this capacity can only be developed and exercised in a certain kind of social and cultural context. Moreover, the measures needed to sustain that context are incompatible with liberal beliefs about the role of the individual rights and government neutrality.**[14]

At this point one can introduce the critical difference between liberals and communitarians: the communitarian wants cultural relations to affect the way in which we construct our conceptions of political moralities such as justice, whereas liberalism argues that such relations should not be part of such constructions. So, for the purpose of this thesis the

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[12] *Ibid.*, p. 309.
[13] Will Kymlicka, *Liberalism, Community and Culture*, Clarendon Press, Oxford, 1989, p. 47.
[14] *Ibid.*, p. 2.

contrast drawn by Neal and Paris is probably the clearest differentiation that one can make without losing the important differences that make for such a confusing debate.

> **Liberalism may be linked to a what we shall call a conception of *contingently* shared relations, while communitarians may endorse what we shall call a conception of *essentially* shared relations.**[15]

One can find the beginnings of this debate in the Rawlsian wish to construct separate 'political' and 'social' spheres so that all groups, doctrines and ideologies can, at the very least, cooperate long enough to prevent violent conflict. He argues that a democratic regime needs a conception of justice that is amiable to a plurality of moralities, philosophies and general lifestyles, if it is to have the support of its people. Therefore it must avoid placing any one doctrine above another.

> **The distinguishing features of a political conception of justice are, first, that it is a moral conception worked out for a specific subject, namely the basic structure of a constitutional democratic regime; second, that accepting the political conception does not presuppose accepting any particular comprehensive religious, philosophical, or moral doctrine: rather that political conception presents itself as a reasonable conception for the basic structure alone; and third that it is formulated not in terms of any comprehensive doctrine, but in terms of certain fundamental intuitive ideas viewed as latent in the political culture of a democratic society.**[16]

From this quote it would seem that liberalism – *per* Rawls – and the communitarians do share some common ground. The communitarians want to place within conceptions of justice the shared understandings of society. Rawls, agrees with them; his aim is to provide a conception of justice whose "content is expressed in terms of certain fundamental intuitive ideas seen as implicit in the public political culture of a democratic

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[15] Patrick Neal and David Paris, "Liberalism and the Communitarian Critique", *Canadian Journal of Political Science*, vol. 23, September 1990, p. 425. If the idea is not immediately obvious, the definitions below may help.

> **A *contingently* shared relation is a relationship between two or more antecedently defined separate selves which, however much it may affect heir attitudes and behaviour, does not penetrate the identity of the separate selves to the point that identity of each becomes partially or wholly constituted by the relation itself.**
>
> **An *essentially* shared relation penetrates this deeply; when two selves essentially share a relation, the identity of each is partially or wholly constituted by the relation.**

For further explanation - beyond the realm of this thesis - see Neal and Paris, *ibid.*, pp. 425-30.

[16] John Rawls, "The Priority of Right and Ideas of the Good", *Philosophy and Public Affairs*, vol. 7, no. 4, 1988, pp. 252.

society."[17] However, his theory of justice is designed to achieve this state by presenting a forum in which these understandings can be found. In a sense then, he is merely providing the procedure for agreeing on the content of justice theory within a society. However he does not wish to place in that conception any bias towards a certain good.[18] When viewed from a Rawlsian perspective the communitarians bias the conceptions of justice, or at least exclude the possibility of being able to design a concept of justice that contains no bias against others in society. To reverse the point of view, liberals such as Rawls admit that it is entirely impossible to divorce an individual's personal life from their political views; the personal cannot be separated from the political. However, they argue that personal views should not be allowed to easily affect others in case this should create violent conflict. Some process of negotiation should be set out so that disputes can be dealt with according to the rules of society, not by one person, or group, within society. Therefore Rawls is searching for a procedure, and the communitarians are offering substantive theories of justice. The communitarians, Rawls agrees, are right to argue that it is difficult to exclude all bias from conceptions of justice, or to be objective about justice. The liberal reply to this questioning of an impartial conception of justice, is that to include what 'society' may see as a 'good' within justice is to exclude much that is necessary. For example, including an overt 'good' in a conception of justice precludes the idea of a dynamic society.

When change occurs, a 'good' that was once thought an essential part of justice, may obtain a currency which the uncontestable conception of justice cannot stop. Domination by a fixed conception of justice often ends in the oppression of one group by another. The use of one antique communitarian conception of justice ended, because of its failure to stop the effects of one person affecting millions of others, in the Stalinist purges. For the liberal mindful of a tendency to violence within people, whatever change

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[17] John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993, p. 3; it is a paraphrase from his article "The Priority of Right and Ideas of the Good", *op. cit.*, pp. 252

[18] An argument can be advanced at a meta-theoretical level that the setting of procedural conditions is, in itself, to enact a bias towards Western rationalising. While that meta-theoretical contention may be intriguing, it is more valuable for this thesis to see the argument at a slighter lower level. That is, canvassing Sandel's criticism - as is done later in this chapter - against Rawls's individual can show how to correct liberal argument, while meta-theoretical concerns grant little in the way of solutions. Happily, Rawls's individual is the starting point for his argument for procedural conditions, so both the meta-theoretical question of Western bias, and the more conclusive proof of his logical flaw can be found.

occurs it is necessary that the idea of justice can move with it and still settle the disputes that must arise within a society.[19]

In summary, the attempt to include a society's shared understandings of the good within justice begs two questions that have been at the root of political theory for many years. They are the simple problems of how to decide what is the 'good' that society wishes to pursue, and who is to decide the form of that 'good'. Even the critical theory which gave birth to the recent communitarians, questions its own progeny at this point.[20] For example, a disciple writing on Foucault's critique of liberalism indicates the bind in which the communitarians must surely find themselves; the communitarians need to place themselves in a position outside society. Yet, this positioning is their central criticism of liberalism.

> **Even communitarians theories, which allegedly articulate the principles underlying the practices of their communities, rely on extra-communal knowledge. Communitarians must decide who belongs to the community and who should be excluded ,which would require extra-communal knowledge of its boundaries.**[21]

The communitarians ask – and the liberals show, with a process, how to find the answer – the question which, at base, is the perennial Lockean question ; who has the right to rule? Or the question that has puzzled so many readers of Rousseau ; how does society find the general will? They are questions which go to the heart of society. As Foucault notes,

> **[t]he [liberal] suspicion that there is always too much governing is tied to the question : why is it necessary to govern at all? With this interrogation, the liberal critique is hardly separable from the problematic of society.**[22]

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[19] This unmoving concept of justice is especially concerning where culture and identity are involved. The communitarians, while not dealing with this issue explicitly, seem to defend unmoving conceptions of justice through their highlighting of settled culture. One example of a 'good' preserved in the name of justice, that was actually grossly unjust, was the Apartheid policy - only recently reformed - of South Africa was defended by Whites in the name of preserving group identities 'as the most important dimension of human rights'.
H Adam, "The Failure of Political Liberalism", in *Ethnic Power Mobilized: Can South Africa Change?*, H Adam and H Giliomee (eds.), Yale University Press, New Haven, 1979, p. 288.

[20] Richard Rorty, "Postmodernist Bourgeois Liberalism" in *Objectivity, Relativism and Truth*, vol. 1, Cambridge University Press, Cambridge, 1991, pp. 197-202.

[21] Jon Simons, *Foucault and the Political*, Routledge , London,1995, p. 53.

[22] Michel Foucault, "Foucault at the Collège de France II; A Course Summary", in *Philosophy and Social Criticism*, James Bernauer (intro. and trans.), vol. 8, no. 3, Fall 1981, p. 355.

Ironically then, questions that liberalism poses are interchangeable with those the Maori demand be answered. Eddie Durie, Chairman of the Waitangi Tribunal asks, "should there be a more fundamental and constitutional protection for the indigenes' interests?"[23] Liberalism has been found wanting in its treatment of Maori, but it is still within a liberal language that Maori demands are made.

The recent communitarians are not alone as contemporary critics of liberalism. As an ideology, liberalism is often understood to be strongly individualist in its perceptions, in that it denies important collectivising impulses of societies in its bid to find universal principles.[24] More simply, it is seen by critics as trying to transcend "historical, social, and cultural differences"[25] that are viewed as integral to the explication of a worthwhile political understanding. This perception of liberalism as a political philosophy which ignores differences between communities is one of the incendiary devices which sparked the recent communitarian attacks. Liberalism, is perceived as a colonising and racist ideology wiping out the traditional norms and behaviour of non-Western societies. MacIntyre puts it best by suggesting that liberal morality grew from a specific time and place. As he states the trouble with "the moral rules that they were attempting to justify had originated in a historical and cultural context within which their social function was very different from that imagined by those who had inherited the rules but lived in a very different environment."[26] However, the liberal such as Rawls is trying only to protect the individual, as a member of one group, in society against the attacks of another group. Indeed, Rawls virulently defends himself against the charge of universalism, and in doing so implicitly rejects the charge of racism. The charge is mounted because within liberal political philosophy, the individual can be seen as a *tabula rasa*. The individual of liberal philosophy, can be anyone in a liberal society; any individual is seen as the liberal self. In this sense liberalism can include all, or be applied to all, members of a society. Therefore, when liberalism is identified with the West, its all encompassing nature is taken as another

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[23] Edward Durie, "Justice, Biculturalism and the Politics of Law", in *Justice and Identity*, ed. Anna Yeatman and Margaret Wilson, Bridget Willaims Books, Wellington, 1995, p. 39.

[24] David Goldberg, *Racist Culture*, Blackwell, Oxford, 1993, p.5. Goldberg defines Liberalism, in part, through the canonical texts. He looks back to Hobbes, Locke and then through Kant to Rawls.

[25] *Ibid.*

[26] Stephen Mulhall and Adam Swift, *Liberals and Communitarians*, Blackwell, Cambridge, 1992, pp. 77-8.

form of dominance, or Western colonisation. Rawls rejects this charge of colonisation. There is not, he argues, an extreme form of individualism because it does not answer questions of substance about an individual's relation to others. Only the relations of the individual to a society's institutions are set out by liberalism. It proposes that those questions about societal relations are best left to the society itself.

This suggests that the form of individualism under attack, then, is a form which hopes to leave out any substantive ideas of how individuals should behave in a state. This individualism focuses more explicitly on procedural matters. These procedural questions, once answered, can make possible a state in which the individuals can cooperate, thereby finding the answers to substantive questions posed by the society in which they exist. Inherently therefore, normative political theory, such as liberalism, argues that substantive matters of its concepts – such as liberty, justice, or equality – must be left to groups of individuals to work out. Its emphasis is on finding the best form of procedure to enable society to find agreement on these substantive principles. This procedure, in the classical liberalism of Hobbes or Locke, is created through an objective view. Both use an imagined pre-social stage of human development in order to create a objective procedure.

However, it would be a mistake to conclude that this means that recent liberal political philosophy constructs the procedural theory in isolation, with objectivity as a goal. As Rawls writes,

> **[t]he aim of political philosophy, when it presents itself in the public culture of a democratic society, is to articulate and make explicit those shared notions and principles thought to be already latent in common sense; or, as is often the case, if common sense is hesitant and uncertain and doesn't know what to think, to propose to it certain conceptions and principles congenial to its most essential convictions and historical traditions.**[27]

It is not then that liberal political philosophy wishes to find abstract principles by standing outside society, but that it wishes to find only a theory of justice that can include all members of a society within its concepts.

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[27] John Rawls, "Kantian Constructivism in Moral Theory", *Journal of Philosophy*, vol. 76, no. 9, 1980, p. 518. In *Political Liberalism*, Rawls moves slightly away from this statement. "By contrast political liberalism supposes that there are many conflicting reasonable comprehensive doctrines with their conceptions of the good, each compatible with the full rationality of human persons, so far as that can be ascertained with the resources of a political conception of justice." *Political Liberalism*, *op. cit.*, p. 135.

> **Political liberalism looks for a political conception of justice that we hope can gain the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by it. Gaining this support of reasonable doctrines lays the basis for answering our... fundamental question as to how citizens, who remain deeply divided on religious, philosophical, and moral doctrines can still maintain a just and stable democratic society.**[28]

The political liberalism that Rawls advocates is in some sense a reaction to the communitarian critiquc.[29] Therefore it has explicitly re-affirmed the removing all the social understandings from the realm of justice.[30] First and foremost, then, it is concerned with a political conception of justice, and how it attempts to transcend other ideas of organising a society, in order that all may live together in 'just and stable society". It aims, in other words, at a conception of the political as distinct from the social. Rawls readily admits that a political conception of justice, though not encompassing all social relations, cannot escape being a moral conception. However, it is a moral conception for a "specific kind of subject, namely for political, social and economic institutions."[31] This then is his definition of the political: the "basic structure" of a society. On the definition of this concept he states,

> **by the basic structure I mean a society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next.**[32]

The language of the split between the political and the social is portentous and nebulous. Yet, it nods its head at an idea which shall surface later in this chapter, which has been named 'justice as impartiality'. It is the idea, already noted above, that to take into consideration the social world in attempts to configure the political world, there is no longer any material difference between the two. The political world can no longer remain

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[28] John Rawls, *Political Liberalism, op. cit.*, p. 10.
[29] *Ibid.*, pp. 10-11.
[30] There may be some confusion, here and later in the chapter, over what exactly is meant by social. This confusion is most compelling when Rawls includes in his political structure of a society the "social institutions". However, the political world, to Rawls's, is most obviously that which all can agree to abide by. As the quotes above indicate the social world would, at times, seem better defined as a cultural world. Basically, the social world refers to a domain which can produce a metaphysical, or epistemological reason for its existence. Rawls's political world excludes such "comprehensive doctrines" on principle.
[31] *Ibid.*, p. 11.
[32] *Ibid.*, p. 11.

the site for the negotiation of conflicts in its social counterpart. Pettit writes of this in his reply to the communitarian critiques of liberal thought.

> **To the extent that character is formed by the social environment, the family, the neighbourhood, the local community usually matter. These need not be, and typically are not, political communities. When political questions arise, they often do because of conflicts among these antecedently individuated communities and persons - among these already existing identities. Undoubtedly many of those who grow up in any community will acquire political commitments. The liberal demand is that, in political argument, such commitments or attachments be left behind... Such commitments may lead us into politics, but they cannot deliver us from it.**[33]

Again, there is a clear assumption here that political philosophy can separate the political from the social; that what is named the political is the arena for solving social conflicts that find their base in antagonistic values. Sandel notes that this is a serious response to the communitarian reply, and aptly names this argument "the procedural republic".[34] The procedural republic is a variant of Rawls's liberalism that has become stronger as it has moved away from some ideas contained in *A Theory of Justice*.[35] However, this republic is not the most robust theory that liberalism can provide in rebuttal to the communitarian critics. That distinction belongs to Barry's theory of 'justice as impartiality'. Before turning to an examination of justice as impartiality it is important to discover where and why the previous liberal arguments failed to reply convincingly the communitarians. The reasons for this failure, after all, explicate much of this debate by detailing liberalism's logical flaws.

Sandel argues that the procedural republic is a pragmatic liberal theorem; that is, a theorem which is used by those who argue that the communitarian ideal of "expansive self-understandings that could shape life" is unrealistic within politics.[36]

> **It says, in short, that I am asking too much. It is one thing to seek constitutive attachments in our private lives; among families and friends, and certain tightly knit groups, there may be found a common good that makes**

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[33] Philip Pettit and Chandran Kukathas, *Rawls*, Polity Press, Cambridge, 1990, p. 109.

[34] Michael Sandel, "The Procedural Republic and the Unencumbered Self", in Shlomo Avineri and Avner De-Shalit, *Communitarianism and Individualism*, *op. cit.*, pp.12-28.

[35] Notably, Rawls wants to move away from the idea that justice as fairness is a "comprehensive moral doctrine". See John Rawls, *Political Liberalism*, *op. cit.*, p. xvi.

[36] Michael Sandel, "The Procedural Republic and the Unencumbered Self", *op. cit.*, p. 24.

> **justice and rights less pressing. But with public life – at least today, and probably always – it is different. So long as the nation-state is the primary form of political association, talk of constitutive community too easily suggests a darker politics rather than a brighter one; amid echoes of a moral majority, the priority of right, for all its philosophic faults, still seems the safer hope.**[37]

However strong Sandel finds the 'procedural republic', he goes on to argue that the separation it invokes is without humanity, for the basis of this theory is a separation within the individual of social and political moralities. Sandel concludes that citizens of the republic become unable to form relations, because their political morality does not allow the good life, only the choice to have it.

> **Not egoists but strangers, sometimes benevolent, make for citizens of the deontological republic; justice finds its occasion because we cannot know each other, or our ends, well enough to govern by the common good alone.**[38]

The cleavage of the political and social in an individual means that an individual's social relations are forcibly removed. The self is left without a social construction, and hence without any guides to moral behaviour. Presumably therefore, a self is created who, by the logic of liberalism, has no attachments that are prior to its sense of justice. For if the self can be applied to any person within a society, then that self must be free to choose any social relations, and those relations' moralities.

> **[It is] as though the unencumbered self pre-supposed by the liberal ethic has begun to come true- less liberated than disempowered, entangled in a network of obligations and involvements unassociated with any act of will, and yet unmediated by those common identifications or expansive self-definitions that would make them tolerable.**[39]

That is, Sandel denies that an individual, a self, can find moral principles for life within the liberal project even when it is purely political.[40] Or, to change the vantage point, he denies that a fissure between the social and the political can exist within an individual.

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[37] *Ibid.*, p. 24.

[38] Michael Sandel, "Justice and the Good", *Liberalism and its Critics*, Michael Sandel (ed.), Basil Blackwell, Oxford, 1984, p. 175.

[39] Michael Sandel, "The Procedural Republic and the Unencumbered Self", *op. cit.*, p. 28.

[40] Why the political should win against the social - or why the individual should choose to lose their social construction - when presented with the choice to opt out is never explained. Indeed, this implicit assumption is curious of itself, in that it presents the communal ties as restraining human nature. This assumption of constraint would seem to have an implication that the fundamental human nature is antagonistic to the community, which is not a very communitarian conclusion.

> **What is denied to the unencumbered self is the possibility of membership in any community bound by moral ties antecedent to choice.**[41]

The passage above points to Sandel's most detailed and far-reaching criticism of liberal argument. He makes an assumption; that moral choice, within liberalism must be posited within the individual, first and foremost.[42] Taylor agrees with this sense of the liberal individual. He argues that individuals construct their sense of justice from relations with those around them. In what has come to be called his social thesis, Taylor argues that to suppose that an individual can break with her or his personal intuitions of justice – to suppose the procedural republic – is to suppose a society that prioritises justice like liberal theory itself.

> **In other words, the free and autonomous moral agent can only achieve and maintain his dignity in a certain type of culture.**[43]

Caney, in commenting on Taylor's criticism, points out that many liberals are only too willing to endorse the position of the socially embedded individual.[44] Therefore some liberals, such as Barry, are integrating two propositions which the communitarians see as mutually exclusive. They hold both with the idea of the socially embedded individual and with the idea of the separation of the political and the social within the individual. Before examining how it is possible to hold these ideas simultaneously, it is best to detail the theoretical argument against such a position.

As we have seen through Rawls and Sandel, it has been almost axiomatic for liberal theory that its conception of justice divides its individual's political and social relations within society. From this basic point Sandel argues that Rawls's conception of the person must be a metaphysical picture of the self in order to justify the moral primacy of justice. Sandel is able to make this leap by asking what motivates the self to separate its social and political relations. Rawls puts forward the idea that selves are motivated by the desire to reach a fair agreement.

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[41] Michael Sandel, "The Procedural Republic and the Unencumbered Self", *op. cit.*, p.18.
[42] However large in scope that liberalism might be defined.
[43] Charles Taylor, "Atomism", in Shlomo Avineri and Avner de-Shalit (eds.), *Communitarianism and Individualism*, *op. cit.*, p. 44.
[44] Simon Caney, "Liberalism and Communitarianism: A misconceived Debate", *Political Studies*, vol. 15, 1992, p. 279.

> **[S]ince persons can be full participants in a fair system of social cooperation, we ascribe them two moral powers connected to the elements in the idea of social cooperation...namely, a capacity for a sense of justice and a capacity for a conception of the good.**[45]

Therefore a self will bind itself to agreements reached within the political sphere; that sphere will necessarily produce fair agreements, since given primary motivation of its participants is to produce "an agreement under conditions that are fair."[46] Of course, within Rawls's theory a much more complicated process is involved than that described above. It has individuals placing themselves in an 'original position'. In this position the individuals are behind a hypothetical veil – 'the veil of ignorance' – , where every individual is alike by dint of obscuring their social identities. However, for the purpose of this thesis, a description of this process is unnecessary since the conclusion and its methodology are one and the same. To recapitulate, the self transcends its social relations in order to produce fair cooperation. In order, that is, to find a conception of justice that can produce a stable society. Therefore, the individual in Rawls's theory represents any individual in a Rawlsian society of different value systems. The individual can be anybody, so long as that person is willing to work within a system of fair cooperation.

Sandel's argument against this theory, put simply, states that the liberal self has a complete morality chosen before it can make a choice regarding its moralities; the 'right' that Rawls makes prior to the 'good'. Rawls is overt about this choice; he wants to ensure the reader of *A Theory of Justice* is clear on the reasons for this prioritisation. The 'right', Rawls's states, is the moral primacy of justice. The 'good', in common liberal idiom, is "'leading the good life, in having those things that a good life contains."[47] Rawls, according to Sandel, has unfortunately missed that justice prioritised over the 'good' (of) life is a moral judgement in itself. The individual, to have choice in leading the good life, must first chose the priority of justice. But, Sandel argues, the individual cannot make that prioritisation, if they have not first chosen a good life, and with it a set of political moralities. That, of course, is exactly the communitarian's Commandatore to the liberal's

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[45] John Rawls, *Political Liberalism, op. cit.*, p. 19.
[46] *Ibid.*, p. 24.
[47] Will Kymlicka, *Liberalism, Community and Culture*, Clarendon Press, Oxford,1989, p.10.

Don Giovanni; after a little attempt at escaping, liberalism is proved to be a complete moral system and, like 'the Don', cannot escape its own logic. Don Giovanni, in Mozart's opera of the same name, is bound by his values to accept the hand of the Commandatore who will drag him into the pits of hell. Likewise, the communitarian can pull the liberal – with the complicity of justice derived from community values – into the pits of its own Hell, because liberalism has nothing to repent, nothing to give the community, if it is only another competing set of moralities. Liberalism must accept the hand of communitarianism and join its critique in its own version of hell.

This moral primacy of justice comes about in Rawls's liberalism due to the absolute primacy it grants the individual as an autonomous chooser of her/his own ends. That is, if the liberal self can be any individual with an idea of fair cooperation, the self must know that it has a choice of aims, before it has any knowledge of those aims.

> **The priority of the self over its ends means that I am not merely the passive receptacle of the accumulated aims, attributes, and purposes thrown up by experience, not simply a product of the vagaries of circumstance, but always an active, willing agent, distinguishable from my surroundings, and capable of choice.**[48]

Therefore, argues Sandel, the individual, the subject, must be prior to his or her own ends. Hence Rawls's theory, if Sandel is correct, must have a substantive conception of the person ; an individual that can choose between different goals for itself. There is then an "epistemological requirement"[49] that the individual has the ability to choose. However appealing this form of human nature is from an intuitive moral standpoint, one has to admit that it is a view of the good. Rawls, though trying to grant primacy to the right, can achieve this only by forcing a conception of the good into the base of his theory, the individual.

Rawls has tried to defend himself against Sandel's critique. He does this by arguing that the original position is a hypothetical device which is a thought experiment.

> **When...we simulate being in the original position, our reasoning no more commits us to a particular metaphysical doctrine about the nature of the self than our acting a part in a play, say of MacBeth or Lady MacBeth, commits**

[48] Michael Sandel, *Liberalism and the limits of Justice*, Cambridge University Press, Cambridge, 1982, p. 19.
[49] *Ibid.*, p. 20.

> **us to thinking that we are really a king or queen engaged in a desperate struggle for power.**[50]

The thought experiment which Rawls proposes helps us very little, however, for it tells us nothing about the motivations for a fair agreement over justice. It may appeal to an individual's intuitions to agree that, given no information about the personal identity, society would cooperate fairly. However, Sandel is arguing that a person will act like a Rawlsian individual only if they grant a primacy to the right to choose their ends, over the ends themselves. An individual can cooperate fairly only if they have the ability to choose. If, as a person, the individual does not have that choice, then the agreement to cooperate fairly is voided, as only an individual with a conception of justice prior to their ends would wish to be bound by an agreement which obliterates those same ends. An individual, unless justice is the motivating factor, would seem to have no need to heed a moral requirement that would not agree with their fundamental understandings of themselves. The moral primacy of justice within society is granted only by a conception of the individual that also grants justice this absolute position. To sum, Rawls's doctrine of the priority of the good over the right depends for its validity upon a view of the good, a good which defines humanity as the ability to choose life plans that grant pride of place to justice.

In claiming that contemporary liberalism uses a metaphysical picture of the self, Sandel strikes at the heart of the liberal project; liberalism becomes one more truth claimant among many.[51] No longer can liberalism try to construct a negotiating procedure to bind a society together when truth claims are furiously defended. After all, one would find it hard to construct a procedure to negotiate between metaphysical claims of truth when one is bound by such a picture already. If Sandel's claim is true the liberal project becomes, almost ironically, "a simple nullity"[52] by its own criteria. That is, Sandel's

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[50] John Rawls, *Political Liberalism, op. cit.*, p. 27.

[51] An important distinction should be recognised here between 'contemporary' and historical liberalism. Contemporary is used because, as Brian Barry points out, those writers within a history of liberal thought, such as "Thomas Jefferson, JS Mill, TH Green, and LT Hobhouse (to take a few obvious names) would all have said (if the terminology had been explained to them) that they had a conception of the good", and did not deny a metaphysical picture of individuals was placed in their work. Barry, *Justice as Impartiality*, Clarendon Press, Oxford, 1995, p. 126.

[52] *Wi Parata v The Bishop of Wellington and the Attorney-General* (1877) 3 NZ Jur (NS) SC 72, per Prendergast J at 78.

critique is most telling in that it lets liberalism convict itself. He takes liberalism's highest principle – the individual is unencumbered by any political biases within its theory – and points out that it is unsustainable.

Sandel's critique, if taken as a critique of philosophical liberalism, is rather devastating. It would insist that our actions, of themselves, had no value. Only the choice to make those actions would define us as individuals. Moralities, localities and any other source to self-understanding would give no guide to our actions. Instead, only the ability to choose between those items would fulfil us as human beings.

However, it is not Rawls's aim to provide a defence of philosophic liberalism and consequently to free society, or individuals, from their moorings, from their self-understandings. He is not attempting to present a metaphysical explanation of the self. This, he contends, is better left to the views of the socially-situated individual.

> **Just institutions and political virtues would serve no purpose – would have no point – unless those institutions and virtues not only permitted but also sustained ways of life that citizens can affirm as worthy of their full allegiance.**[53]

Rawls sees the task of political philosophy not in terms of explicating the social understandings of societal groups, but in finding ways in which those groups can function together, to find those understandings. His concept of the individual is not one which frees the self from that which informs his or her actions. Instead the socially-situated individual can join with those with differing views of the good to provide some understanding of what society views collectively as the good.

Admittedly there is a substantive idea within this conception of the individual; it is the idea that to find social understandings one individual must be able to negotiate with another when they have differing views. Yet this is not a comprehensive doctrine, nor is it an innate morality which subscribes to any one view of life. It is merely a political notion. As Rawls states,

> **[t]he priority of right does not mean that ideas of the good must be avoided; that is impossible. Rather it means that the ideas used must be political ideas.**[54]

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[53] John Rawls, "The Priority of Right and Ideas of the Good", *op. cit.*, pp. 251-2.
[54] *Ibid.*, p. 271.

So, the priority of the right over the good does not depend for its validity on Sandel's unencumbered self. Rawls makes it clear that the individual is very much part of his or her own cultural sphere. Nevertheless, a separation between the social and political within the individual is still necessary for Rawls's larger political theory. The political element, however, is not particularly large and perhaps the communitarians would agree with its definition : that the individual be prepared to negotiate, rather than take more drastic action, when facing other individuals who disagree with them.

Perhaps, then, Rawls's political conception of justice holds against the communitarian critique because it acknowledges their view of the individual, and moves on from it. They can see the self only as constituted through the its social spheres, whereas Rawls takes it for granted that in most Western countries at least, this kind of cohesion is no longer possible. There simply are no longer deeply held and shared social understandings of any kind that can amalgamate a country, and there is certainly no one concomitantly moral and territorial community, if such a community ever existed.

Rawls, in claiming that there is no singular moral community within which one can construct a theory of justice, is self-contradictory at an elementary level. He still needs all individuals to desire social cohesion over the complete atomisation of society. That is, even if one can defend Rawls against Sandel's critique, the individual subject has been corrupted as a mere political palimpsest. No longer can liberalism expect the individual to remain fully within his or her social understandings, and to embrace a liberal polity. Sandel has shown that liberalism will remove the visible, but underlying moralities of the individual, and replace at least some of these moralities with its own conception of the good.

Yet one must accept part of Rawls's defence of the right over the good. In a more detailed manner, one must accept that a member of a community agrees to negotiate – pacifically – rather than resort to violence. That seems, to use a Rawlsian adjective, 'reasonable'. However, it also sounds suspiciously like the reason that Hobbes gave for accepting the Leviathan as the absolute ruler. Rawls argues, with a logic strikingly similar to the Hobbesian theory, that due to the moral relativism of individuals, a society must have a mechanism to sort out the disputes that will obtain.

To delineate Hobbes's position is relatively simple. First there is a principle of the moral relativism to be found among men (sic.) in the state of nature. From that idea, follows the second point, the political solipsism of the state of nature. That political solipsism, or atomisation, describes a society without cooperation between individuals, where no authority structures exist except where one person has created them through brute strength. It is a condition where cooperation amongst any collectives would soon be plagued by dissension, as the passions of individuals would soon be raised, and fighting would ensue over any materials. It is, in short, based on the belief that no individual can know about another, and that this complete relativism gives a society which is a free-for-all to get advantage over all others. Hobbes's own language is a little more prosaic, if describing a no less frightening place.

> **In such condition, there is no place for industry; because the fruit thereof is uncertain : and consequently no culture of the earth; no navigation, ...no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is the worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.**[55]

Hobbes is suggesting that because of the self-interested egoism evinced by individuals cooperation is not possible. Individuals, in a Hobbesian state of nature, cannot agree on a set of rules to govern themselves. A rule of law, where people obey a law agreed on by all is therefore untenable. The difference in the interpretation of God's law between individuals is too great among individuals for them to ever agree on a law. A sovereign body – "a human being or assembly of human beings"[56] – must force the law on individuals.

At a material level this means that each individual, within their own sphere, their own family, or self is – without a polis – in a continual war because of the need to defend their own way of life, and the objects in that life that are important to them. The human condition in this state of nature is "a condition of Warre of every one against every one".[57] Each individual's reason is equal, since there is no set of rules to judge whose

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[55] Thomas Hobbes, *Leviathan*, ed. and intro. C.B.Macpherson, Penguin Books, London, 1985 reprint of 1968 edition, chap. 13, p. 113.
[56] Jean Hampton, *Hobbes and the Social Contact Tradition*, Cambridge University Press,Cambridge, 1986, p.99.
[57] Thomas Hobbes, *Leviathan*, *op. cit.*, p. 190.

reason is correct. Given, also, that there are no rights existing in this state of nature, Hobbes declares that every individual has a right to everything that they can take, even another's life.

It is the in the manner of solving this continual war that Hobbes and Rawls part company with giant strides. Hobbes argues that there would never be any agreement between individuals in a state of nature over a the laws which should govern them; if there were agreement there would be no need for civil government.[58] The individuals, he maintains, might perhaps agree on simple rules, but if there were any advantage in not holding to rules or laws they would break them, given their self-interest. Reason[59] can give only a prescription, from a Hobbesian state of nature, that individuals must obey a single sovereign, who can enforce any particular conception of the laws. Only this complete positivism – where there is only one code of rules, the sovereign's will – can ensure that individuals will have peace, and rest from continual fear of death.

Rawls, on the other hand, argues that the conflict between free and equal – that is, Hobbesian – individuals, could reach an agreement point. He starts with the question that he thinks is asked by a Kantian conception of justice; what principle of justice would free and equal persons agree on if they thought of themselves as living a the good life in a continuing society? He argues that the answer to this question, the agreement individuals would come to, is the most likely to specify the appropriate principles of freedom and liberty. These principles in turn specify the principle of justice which all individuals would agree on, given that they were free and equal moral persons thinking about the future of their society.[60]

The exposition of the theoretical origins of Hobbes and Rawls should convey some sense of their similarities. The difference between the two is the type of polity that each wishes to support. Hobbes constructs a human nature which he uses to support authoritarian rule[61] through positive law, while Rawls – applying the same contextual

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[58] *Ibid.*, p.225.
[59] *Ibid.*, p.188
[60] Jean Hampton, *Hobbes and the Social Contact Tradition, op. cit.*, pp.517-8.
[61] Glenn Burgess, "Contexts for the writing and Publication of Hobbes's *Leviathan*", in *History of Political Thought* , vol. 11, no. 4, Winter 1990.

paradigm and his own statements – is supporting the possibility of democratic rule. As Istvan Hont suggests, Hobbes's work was the 'classic formulation' of

> **the modern doctrine of sovereignty which claimed that ensuring the survival and greatness of a political community required the designation of an ultimate decision-making agency within it, whose task was to devise policies which could meet challenges from outside and to stop divisive infighting at home.**[62]

This doctrine of sovereignty, then, aimed at bringing together disparate cultural groups, and even nations. It achieved this by creating indirect authority, the Leviathan, whose unitary will was "all-encompassing" and "marked the idea off from any strong theory of kinship which conceived the country as the monarch's hereditary estate."[63] This formulation of Hobbes's work, even allowing for the modern and perhaps anachronistic interpretation, bears close resemblance to Rawls specific aim to find "a political conception of justice that we hope can gain the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by it."[64]

Sandel's critique of Rawls takes on greater strength in the light of the Hobbesian comparison. Rawls cannot escape the criticism by simply arguing that it is reasonable to suppose that individuals would rather negotiate than fight, because to do so they privilege the right over the good. The conception of human nature as rational and self-interested clearly biases the theory from the start. The end result is that Rawls must put too much emphasis on individuals holding to the agreement. He lacks, in his conception of justice, a reason for keeping to the agreements. Barry states, that "the crucial problem lies in the lack of fit between the specification of Rawls's original position and his objectives in constructing it."[65] Those individuals in Rawls's original position are to pursue their own good life, or 'conception of the good'. Therefore, they are acting out of self interest in entering the original position. As seen above, the original position creates a conception of fair rules of justice. So there is a dichotomy created between the motives for entering the original position, and for obeying the principles of justice as created. The motive for complying with the principles of justice is fairness. But the motives for obtaining these

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[62] Istvan Hont, "The Permanent Crisis of a Divided Mankind", *Political Studies*, 42, 1994, p. 184, but see especially fn 30, p. 185.
[63] Istvan Hont, "The Permanent Crisis of a Divided Mankind", *op. cit.*, p. 184
[64] John Rawls, *Political Liberalism*, *op. cit.*, p. 10.
[65] Brian Barry, *Justice as Impartiality*, *op. cit.*, p. 57.

principles in the first place – that is, entering the original position – is mutual advantage. Mutual advantage as a motive creates agreements reflecting the bargaining power of the parties. So the agreement, while the parties will comply, is not capable of earning free assent. It is only the best possible solution given the original positions status as the basis of fairness. Justice as reciprocity is the result of the original position; one baseline of fairness which individuals and groups must accept if they are not to be forced to accept the worse solution of justice as mutual advantage. The baseline of fairness is any settlement that all parties to the agreement find fair. The fairness of the agreement becomes, in itself, an inducement to holding with the agreement. In this way, the motive for keeping an agreement is the baseline of fairness. If individuals do not accept the Rawlsian baseline of fairness, then the agreement becomes one which reflects only the bargaining power of the parties.

To change perspective, it is not that Rawls lacks reasons for individuals keeping the agreements. It is just that if his theory is read, against his explicit wishes[66], to give individuals a sole motivation of self-interest he has not moved in any interesting way beyond Hobbesian egoism. That proved, one is left with a choice, either Rawls imports a notion of fairness into the individual of his theory and thereby negates its non-metaphysical properties; or the individual is trapped in an antique Hobbesian world, where agreement is based purely on self-interest. This second type of agreement is untenable because, as Barry points out, it is inherently unstable. To secure that stability Hobbes needed a complete rule of law by the sovereign to ensure compliance.

Barry makes two objections to self-interest alone controlling justice. He names this self-interest theory of justice, 'justice as mutual advantage'. His two internal critiques of justice as mutual advantage, argues that it is inherently unstable. First, because there seems little that ensures compliance with rules that would be "mutually advantageous if generally observed."[67] An individual has no reason, and self-interest as the only motivation, for obeying the rules agreed upon if those same rules obstruct his self-interest in an unforseen circumstance. The second critique argues that it would seem nigh

[66] John Rawls, *Political Liberalism*, *op. cit.*, p. 16.
[67] Brian Barry, *Justice as Impartiality*, *op. cit.*, p. 148.

impossible to achieve an agreement given the "constant struggle for positional advantage"[68] that justice as mutual advantage would entail. Parties to the agreement would, under conditions of simple self-interest be attempting to get the best possible rules for their conception of the good.

However, a recent examination of Hobbes political works argues that the Hobbesian agreement is tenable. Hampton's recent interpretation of Hobbes political theory undermines the normative conclusion of an agreement being unstable when based on self-interest. Rawlsian Liberal's may be offered an escape hatch through which to dive to flee the effects – seemingly unshakeable given a position in an already existing society – of the ultimate flaw; a view of human nature that is substantive beyond mere self-interest, and hence advocates a good life.

Hampton argues engagingly that Hobbes does not need an absolute sovereign to enforce order.[69] The Leviathan is unnecessary given individual's self-interest in forming a community to escape continual war. That the sovereign is unnecessary is only of secondary importance to this argument. Nevertheless, its importance should be noted for two reasons. First, relieving the Leviathan's position makes possible a defence of democratic society on Hobbesian grounds.[70] Hence, Rawls's democratic society is not an impediment to using a Hobbesian defence. Second, the removal of the sovereign makes necessary a re-evaluation of the agreement that springs from the state-of-nature. The agreement, and the following peace, are where Rawls theory seems comparable with Hobbes. Both theorists use self-interest to justify the agreement.

When describing the formation of the commonwealth, Hobbes, as Hampton views his theory, faces the problem of convincing self-interested people to alienate their power to the sovereign. As Hobbes wrote "of the voluntary acts of every man, the object is some *Good to himselfe*."[71] According to a simple prisoner's dilemma game,

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[68] *Ibid.*, p. 148.

[69] Jean Hampton, *Hobbes and the Social Contact Tradition*, *op. cit.*, p.104; Hampton notes it is a reformulation of - but with the addition of a crucial point on pp.200-1 - a thesis put forward in I.Wilkes, 'A Note on Sovereignty', in *In Defense of Sovereignty*, W.Stankiewicz (ed.),Oxford University Press, 1969, pp.197-205.

[70] This is an important point to note given Sharp's use of a Hobbesian model for the New Zealand polity. See Chapter Two.

[71] Thomas Hobbes, *Leviathan* , *op. cit.*, p. 192.

individuals can see the short-term benefits of abdicating their power, if the sovereign can enforce peace. However, Hampton questions where this power to enforce the peace is to come from. An appeal to the covenant does not solve this problem as the covenant does not guarantee that the individuals shall obey the sovereign unquestionably, if it is not in their interest to do so. To assume this would be to contradict the nature of the Hobbesian individual and hence the state of nature.

> **And Covenants, without the Sword are but Words, and of no strength to secure man at all.**[72]

This is the crux of Hampton's argument against using the agreement to create a commonwealth as a 'social contract', and the position of weakness that a contractarian theory necessitates. The appeal to the contract does not mean that the sovereign is immediately instituted, and given power. If it is not in their interest to obey the sovereign then individuals will not obey. The sovereign must be able to force his or her subjects to comply with the laws he or she issues. To make the point clearer an example will be used. To enforce his rule the sovereign must use subjects. However, if these subjects are going to have to risk their lives in doing so, they will decide not to enforce the sovereign. An appeal to the contract, will not make these subjects change their mind. Only a calculation of rational self-interest that places the peace of the commonwealth above their lives will ensure that the subjects enforce the sovereign. Hampton argues that an individual will obey a sovereign's command to enforce the peace, because it is in the individual's interest to do so. There need be, nor can be, an appeal to a contract. Instead, a simple self-interested calculation by the individuals enforcing the peace, will suffice. Either, they do so and consequently they have a peaceful commonwealth, or they do not enforce the peace and there is a return to the state of nature. For example, if a group is ordered to capture a dangerous individual, then they have two choices.[73] First, they can refuse to obey, and by doing so force a return to the state of nature, in which their lives will be in constant danger. Second, the individuals can realise that capturing this criminal is less dangerous than a return to nature – which would be imminent if they refused – and so

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[72] *Ibid.*, p. 223.

[73] This example is taken from Gauthier's paraphrase of Hampton's argument. Jean Hampton, *Hobbes and the Social Contact Tradition*, *op. cit.*, pp.176-86; David Gauthier, 'Hobbes Social Contract', in *Noûs*, vol. 22, 1988, pp. 75-6.

obey the command. In this way it is an appeal to self-interest, or a self interested agreement that institutes and maintains a sovereign. An appeal to the contract alone, offers no incentive to individuals to obey a sovereign, unless it is in their interest to do so. If this is the case, the individuals will have already agreed to obey the sovereign. In essence, given Hobbes construction of his state of nature, an appeal to the social contract is completely unnecessary, and always pre-empted by an appeal to self interest.

So, individuals, given a state of extreme relativism may fashion a society out of sheer self-interest. Hampton is relying on an assumed part of human nature – self interest – to keep a society of different values together. Rawls too, must rely on this aspect of human nature to construct his theory of justice.[74] Self-interest, it would appear, could create the idea of justice in a society. Or, one could construct a theory of justice which utilises only self-interest.

> **The idea of social cooperation requires an idea of each participant's rational advantage or good. This idea of good specifies what those who are engaged in cooperation, whether individual, families, or associations, or even the governments of peoples are trying to achieve, when the scheme is viewed from their own standpoint.**[75]

However, without a fear of the complete atomisation of society, self-interest alone cannot construct a theory of justice. For example, a party to an agreement can act in a self-interested manner by pursuing a greater share of the goods involved in that agreement, and in many instances, will not suffer unduly by doing so. The other party may suffer, and this would seem unjust, but if the greedy party was not to suffer because of their appetites, then there would seem little that can be done with self-interest as the only guide. With Hobbes, the nightmare of the state of nature is supposed to check injustice such as this. In other words, brute fear will stop injustice. Oakeshott's reading of Hobbes is very clear on this point. The very reason that constructs Hobbes civil society is a logic bought about by fear.

Reason, Oakeshott states, is not some "arbitrary imposition" that Hobbes placed on human nature. Instead it is generated by fear. Fear, Hobbes thought, provoked a

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[74] John Rawls, *A Theory of Justice*, *op. cit.*, p. 455.
[75] John Rawls, *Political Liberalism*, *op. cit.*, p. 16.

certain eye to the future, not merely "a disposition to retreat"[76]. Natural appetite created the condition of anxiety. Once the individual in a Hobbesian world possessed, or wanted to possess certain items, there existed the dread of those objects being taken forcibly away. Reason was the answer to this fear as it suggested ways to escape its continual anxiety . Given that the ultimate fear was of death, reason led to the renunciation of violence. The two, reason and fear, were in this way the creators of the *civitas*. Hobbesian individuals were compelled by the fact that peace can be achieved only in "the mutual recognition of a common enemy (death) is to be achieved only in a condition of common subjection to an artificially created sovereign authority."[77] Within Hobbes's theory fear creates the need for reason, and reason in turn shows the way to peace. Rawls, on the other hand, is not so unequivocal on this point. The individual, instead of fear will have reasonableness.

Reasonable individuals will all agree to certain principles of justice in order that they are treated equally. Society, rather than degenerating into a 'condition of Warre', will simply be rather unequal, unfair, and therefore unjust. As Barry has noted, there is clearly a tremendous amount of weight placed on the concept of 'reasonable' in the position Rawls advocates. Hobbes promoted reason through man's innate fear, but Rawls has no recourse to such a wide-reaching consumer nature. One can read Rawls – if one cares to – as using a weaker version of the Hobbesian argument. Individuals will feel the need for agreement not out of fear, but from a motive of reasonable self-interest.

To put it in a slightly different light, Barry argues that Hobbes theory of self-interest has a flaw; it needs a conception of fairness. His explanation has already been seen in the discussion of justice as mutual advantage. Compliance with the rules is not generated by the rules themselves. Individuals must have a conception of fairness to keep obeying the rules. Otherwise, acting out of self interest, the first time it was possible to further one's own conception of the good by breaking the rules, one would. Even if the rules that one accepted "would advance eveybody's conception of the good [including

[76] Michael Oakeshott, *Hobbes on Civil Association*, Basil Blackwell, Oxford, 1975, p. 86.
[77] *Ibid.*, p. 87.

one's own] if generally complied with"[78], there is still no good reason not to break them the first time it would serve one's own good more advantageously to do so. As Barry states,

> **[t]he question is : why does [the general good] give you a reason for complying with the rules on an occasion when you believe that you could advance your conception of the good more effectively by breaking the rules?**[79]

Of course, there is a relatively simple answer to the question Barry poses; to act in a way contrary to the agreement would be to break the rules and would therefore be to act in an *unfair* manner. However, this is Barry's point, self-interest alone will not bring about a rule of justice.[80] Therefore, Barry's criticism of justice as mutual advantage is correct. Justice as mutual advantage fails on logical grounds, for self-interest alone gives no reason for individuals to hold to an agreement.

Yet where does that leave one? Sandel's critique remains as strong as ever, for not even a self with only self-interest can be used to construct a theory of justice that agrees with basic intuitions such as fairness. There must be, as Barry has shown, in even a simple theory of 'justice as reciprocity' two goods within the individual; first, a degree of self-interest, and second, a knowledge of fairness.

Barry's answer to this quandary that liberalism finds itself in – the necessity, but duplicity of a priority of the right over the good in the individual – is justice as impartiality. However, in order to show how Barry pacifies the communitarian argument with this theorem of justice another theorist must be introduced. This theorist is Alasdair Macintyre. The thesis has so far dealt with Sandel in order to make clear that the communitarian critique has a very detailed criticism of liberal thought. MacIntyre's communitarian critique, on the other hand, is a wider ranging argument which uses the same basic materials. Sandel is criticising the liberal individual, where MacIntyre attacks the whole liberal system. In doing so MacIntyre, according to Barry, puts forward the most persuasive case that liberalism is fraudulent. The fraud is the one already made explicit above in the discussion of Sandel.

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[78] Barry, *Justice as Impartiality, op. cit.*, p. 33.
[79] *Ibid.*, p. 33.
[80] *Ibid.*, p. 33. This theory of justice, that uses self-interest, and fairness, Barry names 'Justice as Reciprocity', see pp. 46-51 of his *Justice as Impartiality*, for a complete overview.

> **Liberal individualism... [has]... its own broad conception of the good, which it is engaged in imposing politically, legally, socially, and culturally wherever it has the power to do so.**[81]

To cast Sandel's case in MacIntyre's language, it is the idea that to achieve justice individuals must be 'rational' in the Enlightenment sense of the word.

> **Rationality requires... that we divest ourselves of allegiance to any one of the contending theories and also abstract ourselves from all those particularities of social relationships in terms of which we have been accustomed to understand our responsibilities and our interests. Only by doing so ... shall we arrive at a genuinely neutral, impartial and, in this way, universal point of view, freed from the partisanship and the partiality and onesideness that otherwise affect us.**[82]

Only by being rational in this sense can we achieve true impartiality. The argument detailing exactly how such a conception is forced into liberalism has already been explained using Sandel. As he points out the rationality called upon to prioritise the right over the good is not at all value free. MacIntyre concludes the argument by showing that the 'right' is the Enlightenment view of the 'good'.[83] Liberalism stands accused, in MacIntyre's argument, of offering an impartial way of justice between groups of people, only to be subversively making sure its idea of the good is to obtain. That 'good' – a prioritising of the right over the good – can be seen as the valuing of a rational Western discourse, the valuing of its conception of 'rational' over other conceptions. In other words, the right over the good is a display of Western arrogance. The right is simply another 'good', another comprehensive moral doctrine, that competes with other such doctrines. Therefore, there is a biased conception within this supposedly vacuous liberal individual, that automatically fulfils the liberal notion of the self. Worse, this means that this notion of the self is in deep trouble when applied to those selves whose ideas are not

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81 Alasdair MacIntyre, *Whose Justice? Which Rationality?*, University of Notre Dame Press, Indiana, 1988, p. 360.

82 Alasdair Macintyre, *op. cit.*, p.3. Quoted in Brian Barry, *Justice as Impartiality*, *op. cit.*, p. 120.

83 The use of 'Enlightenment' here is somewhat difficult. This thesis, to save a lengthy debate over its use follows both the communitarians and the liberals in the use of the word to denote a Kantian rationalism. For example Barry states that the normative approach to political philosophy, "which calls on people to detach themselves from their own contingently given positions and take up a more impartial standpoint is, of course, a product of the Enlightenment, and everyone who follows it acknowledges a debt to Kant. By far the most significant contemporary figure in the tradition is John Rawls, whose monumental *A Theory of Justice*, is...a work of major and enduring significance.", Brian Barry, *Theories of Justice*, University of California Press, Los Angeles, 1989, p. 8.

derived from the Enlightenment. Following MacIntyre, Goldberg argues that this liberal pretension to a vacuumed self – based on reason – is responsible for vast racism.

> **As MacIntyre makes clear concerning the Enlightenment, this insistence [on Reason's universality] more problematically denies or refuses to acknowledge the particularistic cultural embodiment necessary to reason if it is to make sense or convince within a form of social life. In this denial or refusal, 'universalist' Reason veils its capacity to dominate, to repress, and to exclude.**[84]

To sum, liberal justice privileges a liberal self, over a non-liberal self, within a liberal system of justice.

A recent example of New Zealand writing shows where this theory takes us. The liberal self, it is claimed, has used the rationality of liberalism to push for equality of the population in a most inhumane way. In comparing New Zealand and Australia to the Balkan War, Anna Yeatman states that many Yugoslavs might now "harbour nostalgia" for the assimilationist nationalism of Tito.[85] She states,

> **[o]f course, an egalitarian-assimilationist national culture depends no less on a premise of identity. As Maori and Australian Aboriginals would tell us[?], this particular form of the premise has produced its own distinctive practices of ethnic cleansing.**[86]

Yeatman goes on to relate how in the early days of 'assimilation' Maori children were often beaten for speaking in Maori, even outside the classroom. These examples, she says, show how identity claims are often 'inimical' to justice. The implicit judgement Yeatman is making is that individuals, even within a liberal policy framework such as New Zealand – as opposed to the civil war in the Balkan states – can act in unjust ways if identity claims are concerned. Yeatman is therefore attempting to find a theory of justice which can deal with different identities – read cultures, races, ethnicities etc. – and not obliterate either identity in doing so. She finds it, by identifying reciprocal respect as fundamental to the theory, at least where identity is concerned.

> **Identity claims can be made in ways that develop this relationship between selfhood and otherness as a *just*, or as an *unjust*, relationship. A just**

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84 David Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning*, *op. cit.*, p. 119.

85 Anna Yeatman, "Justice and the Sovereign Self", in Anna Yeatman and Margaret Wilson (ed.), *Justice and Identity*, Bridget Willaims Books, Wellington, 1995, p. 195.

86 *Ibid.*, p 195.

> **relationship between selfhood and otherness is when claims to self are made so that there is a reciprocal respect for such claims between this self and its others.**[87]

She notes that this is very similar to a Lockean position, and moves to further refine a test for just claims.

> **This test is simply: is my claim to identity made in such a way that it carries reciprocal respect for yours?**[88]

Another two tests are added, but they need not be pursued here as they are "further specifications of this criteria".[89]

Yeatman has been introduced because she is looking at the prioritising of the liberal self over the situated, or non-liberal, self. She is questioning whether "sovereign selfhood...is... reconcilable with justice" because "the claim to sovereign selfhood is often made in ways which appear to deny reciprocal respect for that same claim on behalf of others."[90]

> **What if the structure of sovereign selfhood necessarily works to exclude a range of differently positioned subjects from the rule of reciprocal selves?**[91]

That is, returning to the question posed at the start of this chapter through the communitarians, what if liberalism is fundamentally biased against those traditionally excluded from public politics, such as women or indigenous peoples in colonial states? That Yeatman resolves the dilemma by returning to liberalism in its conception of justice as impartiality is all the more interesting, therefore, given her questioning of its workings. She asks for respect between selves as a test for a theory of justice. 'Respect' here, is used as a synonym for fair and equal treatment, without the historical notions of liberal thought that such treatment usually engenders. The identities of the selves are not questioned by the theory, nor are their claims tested (except against other claims). In structure, reciprocal respect seems to differ little with Rawls 'justice as fairness'. The individuals are to be self-interested and have a knowledge of fairness. There seems little difference between that and the basis of human nature in the procedural republic designed

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[87] *Ibid.*
[88] *Ibid.*, p 196.
[89] *Ibid.*
[90] *Ibid.*, p 197.
[91] *Ibid.*

by Rawls. Yeatman's test asks for equal and reasonable agreement over the rules of justice, by individuals. Yeatman's test, it is true, is unlike Rawls's veil of ignorance in that the individuals can, and indeed must, know their social identity. However, the conditions of Rawls's veil of ignorance are infamous for their inexactitude, and *per* Barry, the Scanlonian alternative allows, at a minimum, for knowledge of social identity.[92] This supplement to Rawls theory of justice by Scanlon can be shown to be a theory of justice, or at least test for a theory of justice, which should satisfy atomists and communitarians alike.[93]

The 'Scanlonian alternative' is Barry's name for what he sees as a way of dealing with the crucial failings within Rawls construction of 'justice as fairness'. As stated earlier, the main concern in this first chapter is to escape Sandel's critique that Rawls unwittingly presupposes a sense of justice in the individuals, a prioritisation of the right over the good. As Barry puts it, Rawls cannot derive the principles merely from self-interest. Even Rawls disclaims wanting to do so and disassociates himself from the "Hobbesian ambition of creating stability among egoists"[94]; the members of a society, he says, are to "have a strong and normally effective desire to act as the principles of justice require".[95] However, Rawls's original position must still be close to justice as reciprocity, or the attainment of mutual advantage in an agreement where some common morality has set the initial starting point.[96]

> **Justice is therefore, according to Rawls, about the sharing out the gains from cooperation. However the baseline from which gains are to be calculated must itself be fair, and Rawls takes a fair baseline to be an equal one. Thus, the theory cannot be a self-contained theory of justice as reciprocity, because it requires the importation of an ethically driven baseline, and the rationale for that cannot come from the idea of reciprocity itself.**[97]

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[92] For instance, Rawls' veil does not include gender. Therefore, individuals in the original position may construct an unfair division between female and male roles in society. The idea that issues of justice found through the veil could pivot around difference in sex, but not religion, seems odd given Rawls attempt to provide the rules of justice for 'free and equal individuals'.

[93] Thomas Scanlon, "Contactarianism and Utilitarianism", *Utilitarianism and Beyond*, Amartya Sen and Bernard Willaims (eds.), Cambridge University Press, 1982, pp. 103-22.

[94] Brian Barry, *Justice as Impartiality, op. cit.*, p. 63.

[95] John Rawls, *A Theory of Justice, op. cit.*, p. 273. Quoted in Brian Barry, *Justice as Impartiality, op. cit.*, p. 63.

[96] Brian Barry, *Justice as Impartiality, op. cit.*, p. 60.

[97] *Ibid.*, p. 59.

That is, self-interested selves – without other moral ideas – will not necessarily produce the justice Rawls thinks would obtain. In the original position, surrounded by the veil of ignorance, self-interest will produce the Rawlsian principles, that much is true. Barry points out, however, that the individuals require a reason to enter the original position before the principles can be thought about. As he states,

> **[t]here is a gap between acknowledging that some rule, universally adhered to, would advance one's conception of the good and having a motive (based on nothing but the pursuit of one's conception of the good) for adhering to the rule.**[98]

Barry's point is that no theory of justice will work unless the right is prior in some manner over the good. Whether that 'right' is defined in the subverted terms of Rawls's original position, or more clearly in such as schema as the Scanlonian alternative is immaterial, at least to the communitarian critics who argue that such a priority gives birth to an illegitimate self. In the end, to produce a theory of justice one must obtain some degree of cooperation. If there is simply no way of negotiating peacefully, then there is no workable theory of justice. Barry's argument, therefore, fails if universality is required of a theory of justice; as he states,

> **My pretensions fall short of universality... because my argument presupposes the existence of a certain desire : The desire to live in a society whose members all freely accept its rules of justice and its major institutions.**[99]

Therefore, the legitimacy of the institutions central to society are based on how they "conform to the demands of justice as impartiality."[100] Expanding this notion, if the agreement motive – the desire to live in a society whose members all freely accept its rules of justice and its major institutions – is held to be true then each individual voluntarily accepts the institutions that mediate pursuit of the good.

The problem posed then, is to use the liberal theory as a procedure to find a defensible theory of justice, while avoiding that same theory's mistakes, as pointed out by the communitarians. At a basic level this means producing a theory of justice using

98 *Ibid.*, p. 45.
99 *Ibid.*, p. 164.
100 *Ibid.*, p. 164.

individuals as the starting point of a procedure, while not presupposing a morality for those individuals. This is exactly what justice as impartiality hopes to do.

Justice as impartiality takes leave of Rawls's theory at the original position. Two issues immediately arise. First, the individuals need a reason for adopting the original position as even a hypothetical test for justice, since it has become clear that self-interest alone does not give a reason for entering, or holding to, an agreement made by Rawls's own conception of the original position. Second, Sandel and MacIntyre have made clear that the original position is biased at a fundamental level toward a certain good, usually regarded as an Enlightenment conception of individuals. That bias, too, must be removed. Both these issues are resolved under Scanlon's reformation of Rawls's original position.

Individuals, in the theorem of justice as impartiality are aware of their own identity, and therefore of their interests. So, self-awareness of an individual's interest is integral to the original position, as under the Rawlsian construction. However, it is not a self-interest based merely on maximising one's material goods (though it could be, if an individual felt that way). Instead all interests of the individual are taken into account in considering where the agreement point could be reached. Social understandings, family values, and even 'comprehensive doctrines' can be taken into account. Therefore, there is no over-arching bias affecting the construction of a theory of justice, or the content of that theory, save for the input of the individuals who are party to the agreement.

Scanlon's actual theoretical statement on agreement over a theory of justice is set out in the terms of strictly moral philosophy.

> **An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement.**[101]

The language used by Scanlon is clearly of a different tone to that used so far in this chapter, so some explanation shall follow. First, individuals – who know their identity – are motivated by "the desire for reasonable agreement". While 'reasonable' agreement may seem a weak construction, and the desire for it even weaker still, it is stronger than it first appears. For, reasonable agreement can be seen as merely the desire to live in a

[101] Thomas Scanlon, "Contactarianism and Utilitarianism", *op. cit.*, p. 110.

society. Of course, there is very little coercive power within the construction on its surface. However, coercion – from an individual to a state level – is inimical to the theorem of justice as impartiality. An agreement is just only if no party 'would reasonably reject it'. Second, some kind of procedure has a large part to play in determining the use of this conception of justice within politics. 'Unforced' and 'informed' agreement is clearly hard to obtain at times of moral conflict, and it is often at these times that justice is most needed. However, both these clauses point to the most important point of Scanlon's paragraph; that justice is a morality, and therefore to share meanings of justice is to share a common morality. If there is no desire to find a reasonable agreement, there is no possibility of sharing a morality, of sharing an idea of justice, let alone a theory of justice to be used in politics. Ultimately justice must be found by individuals who are motivated by the "desire to find principles which others similarly motivated could not reasonably reject."[102]

At this point in the chapter, it should be made clear that the theorem called 'justice as impartiality' is about theories of justice. That is, it does not set out one particular frame of reference to answer all particular moral problems. Instead, it sets out the conditions that need to obtain for a situation to be called just. For instance, it does not set out – though undoubtedly it could work through such a situation – a material distribution within a society that could be called just. Justice as impartiality sets out how one could call a situation 'just'. That is, justice as impartiality gives the conditions for justice; not justice itself.

To return to Barry's initial concern, the rules of justice. To recap he defined these as

> **the kind of rules that every society needs if it is to avoid conflict-on any scale from mutual frustration up to civil war. Ideally, rules of justice assign rights and duties to people in their personal and official capacities in such a way that, in any situation, it is clear what each person is entitled or required to do. These entitlements and requirements should fit together harmoniously; we should not find for example, that *A* is entitled to demand a certain thing from *B* but that *B* is not under a duty to supply it to *A*.**[103]

[102] *Ibid.*, p.116, fn. 12.
[103] Brian Barry, *Justice as Impartiality*, *op. cit.*, p. 72.

The theory of justice as impartiality states that these rights would occur within a system of rules 'which no one could reasonably reject.' However, unlike the descriptions of contemporary liberalism that have been outlined by the communitarians, the individuals making choices – to reasonably reject or not – are not purely self-interested. That is, the individuals are not making such choices within a strict Enlightenment rationality, or any other comprehensive mode of thought. As Barry illustrates, if one imagines a group would suffer burdens under a rule "that under an alternative feasible rule nobody need bear"[104], then they could reasonable reject that rule. But, he argues, that group could also sacrifice themselves – by accepting the rule – if it was to the tremendous benefit of other groups. In that case, they would be acting altruistically, but not unreasonably.[105]

The point of the example is to prove that the individuals, within the construction of justice as impartiality, can use any system of morality, of social understandings. The individuals can have any justification for agreeing (or disagreeing) with the system of rules under scrutiny. The construction of justice as impartiality does then escape the prioritisation of the right over the good. It does not promote one conception of the good life, choice of lifestyle, over any other, because individuals are free to behave in their own interests. Individuals are not, as in Rawls's original position, forced to choose behind a veil of ignorance which precludes their social understandings and relationships.

In a larger or more practical sense, justice as impartiality works because it is based on a reasonable agreement to live in society. That is, it does not promote justice as a coercive force, but as a cohesive force. It, rightly argues that a just agreement – one which every individual could agree on – cannot be reached while people are fighting. Of course, procedure built on the conditions of justice as impartiality, such as a court, may have a right to settle conflict by describing solutions which all accept; that is the hope for justice as impartiality.

At the same time this need for peaceful negotiation is a strength of justice as impartiality. The individual, groups or nations must talk, rather than fight, to get a just settlement of a problem. They must agree with each other on the solution. In this sense

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[104] *Ibid.*, p. 69.
[105] *Ibid.*, p. 70.

Barry's conception of justice is much stronger than Rawls's because the parties themselves must agree to the justice of the issue, not merely be coerced into accepting the principles those in the original position see as the most beneficial.

To conclude the chapter, one more distinction needs to be drawn. That is, a reply needs to be made to the communitarian critics who say that justice as impartiality, as witnessed in liberal thought, disregards individual's relations with their cultures, their personal relationships, and with their social understandings. The more detailed reply – to Sandel – has already been made, through the Scanlonian alternative. However, the larger portrait of liberalism alienating individuals from their social environment – drawn by Taylor and MacIntyre – still looms over justice as impartiality. Barry names these communitarian critics 'the anti-impartialists', and characterises their position as one that argues "that there would be something crazy about a world which people acted on an injunction to treat everybody with complete impartiality."[106] Writing on the motives of liberal – self-interested – individuals Sandel, to recap, stated that they would be "not egoists but strangers" because they "cannot know each other" or their "ends, well enough to govern by the common good alone."[107] Justice as impartiality seems to resolve this issue by allowing full flight to the reasoning of the individuals themselves. Its construction is specifically not for everyday issues – where other considerations, such as personal affection or love, would usually come into effect –, it is for a societies rules of justice. Justice as impartiality, is then, about setting standards for the whole of society, on which everybody can agree to abide by. As Barry states on the anti-impartialist – or communitarian – critique, and his liberal reply,

> **[w]hat the supporters of impartiality are defending is second-order impartiality. Impartially is seen here as a test to be applied to the moral and legal rules of a society: one which asks about their acceptability among free and equal people. The critics are talking about first-order impartiality-impartiality as a maxim of behaviour in everyday life.**[108]

These anti-impartialists, Barry suggests, think that a construction such as justice as impartiality means impartiality in all individual dealings. However, since his construction

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[106] *Ibid.*, p. 194.
[107] Michael Sandel, "Justice and the Good", *op. cit.*, p. 175.
[108] Brian Barry, *Justice as Impartiality*, *op. cit.*, p. 194.

is about a 'system of rules for the general regulation of behaviour' it should not – unless the parties to the agreement want it to – affect their everyday personal relationships. The communitarian critique is concerned that liberal individuals are asked to be impartial when making choices about the way they live. But this kind of choice would be first order impartiality. Barry's construction of justice as impartiality, does not ask for this type of impartiality. Instead, individuals only need be 'impartial' when the choice regards a system of rules for all society ; and impartiality in this situation means to chose 'reasonably'. The individual is not removed, by Barry's concept of impartiality, from their environment, be it cultural, ethnic, social, familial or otherwise. The communitarian's attack stated that,

> **[w]e cannot justify our political arrangements without reference to our common purpose or ends, and that we cannot conceive our personhood without reference to our role as citizens, and as participants in the common life.**[109]

The liberal reply is quite simply that one does not need to use such a justification. One can have anti-impartial views, and still have impartial justice.

While this distinction seems superfluous within this chapter, given the Scanlonian alternative's solution to the quandary of the individual trapped in a prioritisation of the right over the good, it is necessary. For, without some larger caricature of the debate, its use in New Zealand literature is negligible. This is because, in a practical sense it is often hard to separate the communitarian view from the liberal. Especially given their agreement over absorbing all views, once the problem of the individual has been solved. One must have an entrance point to the texts and the anti-impartialist criticism of a single idea of justice[110] often grants such a point to the reader. However, the anti-impartialist or communitarian view point has still been used to justify some exceptionally anti-liberal viewpoints. Therefore it is useful to keep in mind Barry's comment; that second order impartiality can be separated from first order impartiality, and that this is necessary for a peaceful society which contains different moral systems.

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[109] Michael Sandel, *Liberalism and its Critics*, *op. cit.*, p. 5.

[110] This, it should be noted, is not an implicit criticism of a plurality of legal systems. Indeed justice as impartiality could easily support such a system given 'informed and unforced reasonable agreement'.

CHAPTER TWO

Justice and Sovereignty

Andrew Sharp

Andrew Sharp's *Justice and the Maori* was the first attempt to explicate the theoretical arguments dividing Maori and Pakeha in New Zealand. Sharp was also the first to catalogue the 'Maori claims to justice', and their historical basis.[111] Throughout the history which he delineates, Sharp's overall thesis is one based on the inability of a conception of justice to provide a framework for the problem: Instead, Maori and Pakeha turned to sovereignty to answer the claim of justice for the Maori.

This chapter argues that Sharp's analysis is logically flawed. Indeed, it is an unworkable fiction that is derogatory to Maori and Pakeha because it allows neither community a conception of a bi-cultural state where there is agreement on the fundamental issues of society. However, that is not to say there must be agreement on the fundamental issues of society. It is merely that Sharp's conclusions do not allow either Maori or Pakeha arguments the ability to coincide at any level of abstraction. However, if one is to discount the framework which Sharp provides for understanding the history which he details in his book, then one must provide an alternative. Hence, the second part of the chapter suggests a conception of justice that can more accurately accommodate the vagaries of the political debate over Maori claims for justice. The proposed conception of justice, 'justice as mutual advantage' relies strongly on Brian Barry's exposition of the subject in *Theories of Justice*.[112] As *Justice and the Maori* was published prior to Barry's examination of justice Sharp had no recourse to the help it may have afforded him. Therefore the method of the chapter is a little unfair on Sharp's argument. However, it

[111] Andrew Sharp, *Justice and the Maori*, Oxford University Press, Auckland, 1991.
[112] Brian Barry, *Theories of Justice*, University of California Press, Los Angeles, 1989.

will be seen that Sharp's model is quite inappropriate for his historical material whether or not one refers to Barry.

A major part of Sharp's book deals with the topic of sovereignty. This is unsurprising in itself, as much material on the subject of Maori claims has dealt almost wholly with this topic. The Maori claims, the Courts, and academics have all maintained sovereignty as a central concern.[113] Therefore, Sharp correctly identifies issues of sovereignty as an integral part of the debate within New Zealand in the 1980's. In his view this centrality stems from the contentious and ultimately impassable nature of justice when dealing with the Maori claims. The impasse meant that sovereignty – as the final arbiter of justice in New Zealand – became the focal point of discussion.

> **In the face of that failure to create a new conception of justice the inevitable happened: appeals were made to sovereignty.**[114]

Sharp's discussion of sovereignty is not then surprising in itself, instead it is the content that is difficult to understand. Sharp uses the highly restrictive notion of Hobbesian sovereignty to provide the background to his examination of this subject. This is mistaken in two ways. First, the use of a Hobbesian notion of sovereignty to explain the machinations of New Zealand politics is at best helpful only in the law[115] which New Zealand uses today. This criticism will not be dealt with fully, as it needs a less theoretical approach than this thesis can accommodate. However, evidence will be given in the substantive section of the second criticism. This evidence will follow from the idea that in a Hobbesian state one cannot accuse the sovereign of being unjust, and yet in New Zealand, the Maori continually claimed exactly that. Second, and more importantly, within the context of justice, and just claims against a sovereign state, sovereignty becomes an impractical and a nonsensical concept. One appeals to 'sovereignty' to help solve a problem which justice has shown to exist. It is not something that one turns to after justice has been deemed impossible to find. To use a simple linguistic example ; it

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[113] For example; Donna Awatere, "Maori Sovereignty", *Broadsheet*, 'Part 1', June 1982, pp.38-41,'Part 2', Oct. 1982, pp.24-9, 'Part 3', Jan-Feb 1983, pp. 12-9; J.G.A.Pocock, "Law, Sovereignty and History in a divided Culture: the Case of New Zealand and the Treaty of Waitangi", an Irdell Memorial Lecture presented at Lancaster University, 10th Oct, 1991;Waitangi Tribunal Report, *Ngai Tahu Sea Fisheries Report*, Brooker and Friend, Wellington, 1992.

[114] Andrew Sharp, *Justice and the Maori*, *op. cit.*, p. 1.

[115] See J.G.A.Pocock, "Law, Sovereignty and History in a divided Culture: the Case of New Zealand and the Treaty of Waitangi", *op. cit.*.

would be nonsense to debate the sovereignty of justice. One might well discuss the sovereignty of a justice system, or a theory of justice, but no one can possibly lay claim to a sovereignty over justice *per se*. Quite simply people will disagree over conceptions of justice, as the New Zealand case amply shows and Sharp adequately demonstrates. Hobbes, realising this from his theory of moral relativism, created an absolute sovereign whose will was the only justice, simply because that sovereign had the power to enforce it. However one can debate the justice of a sovereign's actions, whether it be in a legal or moral claim, or the perennial Lockean problem of "who heir?"[116]

The linguistic example provides only a surface examination of the argument. To unpack Sharp's argument further one must examine the technicalities of his use of Hobbesian sovereignty theory, and the theory of justice that it produces. Hobbes's theory, as put forward in *Leviathan*, creates a state through the institution of a sovereign. The state, or commonwealth, relied for its continued existence on the sovereign, and his all-embracing power. The sovereign is therefore granted complete control of all parts of his state, by his subjects. Hence, Hobbes's state was one in which there was no possibility of a subject accusing the sovereign of injustice. There could not be, as the sovereign's rulings, actions, and other legal forms, were just. There was then, in the Hobbesian state no injustice. Hobbes, in essence, created a society whose legal and moral positivism were extreme. Hobbes was bound by his own theory of individual egoism to support this strong positivism. To have not done so would have been to weaken the position of the absolute sovereign, and this would have meant a collapse of society. That is Hobbesian individuals were so self interested that only an *absolute* sovereign could stop the commonwealth returning to a state of nature.

That Hobbes's argument is somewhat circular is to be expected, for he wanted to present a sovereign who reigned supreme.[117] Therefore, the state of nature had to be so intolerable as to make it rational for individuals to desire to alienate their power to a ruler who could bring about an escape from such a hopeless situation. The sovereign must, in

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[116] John Locke, *Two Treatises*, W Carpenter (ed. and intro.), J.M.Dent and Sons, London, 1924, Chap 11.

[117] "Hobbes conceived *Leviathan* as a contribution to the Royalist cause." Glenn Burgess, "Contexts for the writing and Publication of Hobbes's *Leviathan*", in *History of Political Thought*, vol. 11, no. 4, Winter 1990, p. 682.

order to keep society at peace – and thereby stop a regression to a state of nature – have complete control over all decisions of the commonwealth. In essence, the positivist position of Hobbes stems from his relativism. That is, there must be only one final arbiter on all issues, as "no commonly interpreted or accepted body of moral laws exists or can be established through agreement or cooperative practice".[118] More than one authority will send society back to a state of nature. This is because individuals will ultimately fight over outcomes if there is more than one choice. To solve this problem of human nature Hobbes posits that only one final arbiter who has the power to enforce all their decisions can rule a commonwealth. Therefore, a sovereign must have two abilities to keep his commonwealth from returning to a state of nature. First, the sovereign must be the final authority on all decisions. Second, the power to enforce these decisions must lie solely with that same sovereign.

Sharp acknowledges that the Hobbesian state was "incapable of 'injustice'" to its 'subjects'.[119] However, he does not see the implications of this theory, as he goes on to mistakenly assert that this "harsh" Hobbesian sovereignty was that which was "accepted by the legal and political leaders of New Zealand in the 1980s".[120] Combining these statements leads to the factually incorrect idea that the legal and political leaders of the 1980s could not claim that an injustice had been perpetrated against the Maori. By using Hobbes's theory of sovereignty Sharp has placed himself in the awkward position of being unable to determinate that any injustice had been done. For, if the Hobbesian state – or more accurately the sovereign – was incapable of injustice towards its subjects, and New Zealand was the model of a Hobbesian state, then the Maori would not be able to claim that they had been the victims of injustice. The sovereign state does not allow for injustice, as Hobbes writes,

> **[e]very Subject is by this Institution Author of all the Actions, and Judgments of the Sovereign Instituted; it followes, that whatsoever he doth, it can be no injury to any of his Subjects; nor ought he to be by any of them accused of *Injustice*.**[121]

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[118] Jean Hampton, *Hobbes and the Social Contact Tradition*, Cambridge University Press, Cambridge, 1986, p. 104.
[119] Andrew Sharp, *Justice and the Maori, op. cit.*, p. 250.
[120] *Ibid.*, pp. 251-2.
[121] Thomas Hobbes, *Leviathan* , C.B.Macpherson (ed. and intro.), Penguin Books, London, 1985 reprint

One assumes this is why Sharp argues continually that "in conditions of biculturalism, strict justice is actually impossible"[122], and that therefore "justice for the Maori in New Zealand/ Aoteroa...can never be done."[123] However, his book is "an analysis of recent demands for justice made against the Pakeha people and Government of New Zealand by and on behalf of the descendants of the country's aboriginal inhabitants, the Maori."[124] At the same time Sharp writes,

> **[t]hough we speak of the 'Courts of Justice', the 'Minister of Justice', even of the police as the 'arm of justice', we know that all these are capable of injustice...**[125]

Clearly Sharp should not be using a Hobbesian theory of sovereignty as a part of a framework for this analysis, as that theory would not allow a claim of injustice. Nevertheless, to sustain his conclusions Sharp must appeal to a Hobbesian doctrine of sovereignty; one in which the sovereign decides all claims of justice.

> **Both the Maori and the Crown had recourse to the idea of sovereignty at the points at which they disagreed. They each needed to claim an authority to create and sustain the distributions of the things they saw as just.**[126]

The sovereign is the authority who will "create and sustain" the distributions. Sharp, in essence, is arguing that the claim for justice by the Maori was unsustainable given New Zealand's legal positivism. Therefore the claims, and the resulting debates centred on the control of New Zealand's sovereign, and the power to define justice that this control entailed. This is an illogical interpretation of the 1980s' debates. Sovereignty was important, but the claim for sovereignty by the Maori was based upon a justice argument. An argument in which sovereignty was claimed because of the injustices of the Pakeha sovereigns. The conceptual confusion that is generated by this idea, and to which Sharp succumbs, is highlighted by an investigation of his idea of sovereignty. Sharp's theoretical sovereign is a Hobbesian sovereign with the legal and moral positivism that this incorporates. Of course, Sharp presents the multiplicity of sovereigns that were conceived of within the New Zealand political debates and this somewhat obscures his

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of 1968 edition, p. 232.

[122] Andrew Sharp, *Justice and the Maori*, *op. cit.*, p. 23.

[123] *Ibid.*, p. 285.

[124] *Ibid.*, p. 1.

[125] *Ibid.*, p. 28.

[126] *Ibid.*, p. 285.

overarching view. However, his concluding paragraphs outline his view of sovereignty in New Zealand, and necessitate the view that his is a Hobbesian interpretation of the state. He views an absolute legal sovereignty of the state as essential in the face of such debates as New Zealand has witnessed.

> **As to absolute legal sovereignty of the state: whatever cross-cultural disagreements there are, it is *not* culturally-specific argument to say that sovereignty is justified by reference to its essential role in adjudicating on disputes a to rights and then enforcing them where they must be enforced.**[127]

Given that this is Sharp's view on sovereignty, one wonders where his conception of justice falls. After all, one cannot, as shown above, use this theory of sovereignty and have a non-legal conception of justice. Either, the New Zealand state is not a *Leviathan* and thereby can be accused of injustice, or, it is such a creature and whatever havoc it wreaks it can never act unjustly.

Clearly, either choice is a woefully inadequate way of describing New Zealand in the 1980s. First, the state remained the legal sovereign – in the guise of the crown – even while Maori claims of past injustice by that same institution were being rectified within Parliament and the courts.[128] Second, the Maori could, and did, claim that the sovereign of New Zealand had been unjust, and eventually these claims made it possible, in Pocock's phrase, "to speak of a [Maori] contestation with law within the law".[129]

Sharp's model of the interplay of sovereignty and justice is therefore inadequate in describing the political arguments of the 1980s. However, Sharp's history of this period does show that sovereignty became the major concern for those involved in these debates. So, a framework to explain this in the larger context of justice is needed if Sharp's model is to be discarded. Brian Barry's theory of 'justice as mutual advantage' can achieve this. In using this theory of justice as a replacement to that which Sharp presents, there is a slight duplication. That is, Barry's theory of justice as mutual advantage, utilises elements within Hobbesian theory. It is at this conjuncture that one can see why Sharp erred in his construction of a framework. To explain, Sharp saw that the during the 1980s the Pakeha

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[127] *Ibid.*, p. 287.
[128] *Ibid.*, p. 281.
[129] J.G.A Pocock, "Law, Sovereignty and History in a divided Culture: the Case of New Zealand and the Treaty of Waitangi", *op. cit.*, p.31.

Leviathan, at a superficial level, had control of all elements of the state. He observes that New Zealand as a whole accepted the Hobbesian view of sovereignty, where the state has complete control over justice.

> **New Zealanders certainly believed that ultimately all legal power came from the state and could be recalled by it.[130]**

Therefore, Sharp concludes that the debate over sovereignty became the more important issue, with the insolvable debate over justice neglected because of its complexity. However, what Sharp neglects – and where Barry's theory is more effective – is that claims can made that a sovereign state is 'unjust'. Sharp in fact does note that many New Zealanders did claim just this. At the start of his book he divides the concept of sovereignty in two in order that this apparent quandary is dealt with. He argues that on the one hand, legal sovereignty within New Zealand was uncontestable, but that the other type of sovereignty, moral sovereignty of the state was non-existent. That is, legally, the operation of the New Zealand Crown closely follows the theory of government set out by Hobbes. However, morally, one cannot argue that this Crown ruled absolutely.

> **The argument [between Maori and Pakeha] was about moral sovereignty and the moral right to say what was just.[131]**

However, he turns these claims into debates over legal sovereignty.

> **In brief, it was about moral sovereignty, and its tendency was to convert moral into legal sovereignty.[132]**

Indeed, many of these writings were advocating radical positions on sovereignty. Yet, they were written on the premise that the positions they advocated were because of the Pakeha sovereign's injustice, as Sharp admits.

> **The movement in [Maori] thought towards absolutism could have gained momentum only in positions where gross and persistent injustice was felt. The doctrine of absolute Maori sovereignty was the response to justice denied. In reclaiming rangatiratanga and Maori motuhake and fusing them into a new doctrine of a state, the doctrine was built on the idea that reparations were due and had been denied.[133]**

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130 Andrew Sharp, *Justice and the Maori*, *op. cit.*, p. 251.
131 *Ibid.*, p. 1
132 *Ibid.*
133 *Ibid.*, p. 253.

Another advantage of using Barry's justice as mutual advantage is that the conception of justice of all parties to the debate need not be taken into consideration. That is, justice as mutual advantage dictates that decision is made using the self-interest of the parties, not on an agreed set of principles called justice. Therefore, Sharp's discussion of the difference between Maori and Pakeha conceptions of justice can be jettisoned.[134] After all, if we are to follow Sharp's Hobbesian model, his discussion of the differences over conceptions of sovereignty and justice, must be – logically, at least – inane since New Zealand already calls itself a sovereign state. A sovereign state where Hobbesian reasoning dictates such differences could not exist for two reasons. First, the sovereign already installed had complete control of the legal system. Second, and related to that point, there could be no claims against the sovereign or his justice precisely because that same sovereign had complete control over legal system. Clearly, however, there were great differences in views of New Zealand sovereignty and justice. In an attempt to deal with this problem Sharp states that where there are these differences the superior option is legal positivism.

> **I conclude for myself with some abstract reflection on how – where there is no agreement among the persons on the content of justice – a sovereign state's enforcing an artificial, merely legal, justice is the best that can be done.**[135]

The gain of justice as mutual advantage is that these differences, or disagreements are unimportant. Justice as mutual advantage is more concerned with the idea that an agreement be found, and in achieving that agreement the benefit for all parties is maximised. Barry hypothesises that this can be achieved by allowing all parties to the dispute to try and maximise their self interest. Justice, under this theory becomes an agreement that allows for the relative bargaining power of each party to manifest itself in any agreement that they make. Barry starts his explication of justice as mutual advantage by discussing simple conflicts between two parties over a single issue. In the context of New Zealand, and this essay, let the two parties to the conflict be the Pakeha and the Maori. The single issue is a debate over whether the Pakeha has been unjust.

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134 *Ibid., chap.* 3.
135 *Ibid.*, p. 25.

> **The idea of justice as mutual advantage is that the just outcome should represent for both parties a gain over what they would have acquired from a continuation from a continuation of the conflict.**[136]

So, according to Barry's framework, one must establish that both the Pakeha and the Maori benefited from the outcomes of their agreement for justice to have been done. That the Maori has benefited from cooperating with the Pakeha it would be hard to dispute. They have gained money and land. The Pakeha, in return, found a rhetoric – of injustice – in which there could be redistribution to a part of their population that had been "victims of relative deprivation".[137] Though this may seem to be specious reasoning it has to be fair to claim that the deprivation of the Maori was creating problems for the Pakeha state, problems which could be solved only by a redistribution of material goods. For example fifty percent of the jail population was Maori, and as the Hunn Report of 1961 illustrated this was only one area in which the Maori was disadvantaged.[138] In 1988, the Royal Commission on Social Policy detailed much the same levels of inequality. As Sharp states,

> **It was not so much the precise statistics that mattered. It was rather that they showed what everyone conceived to be important inequalities, not easily justifiable (if justifiable at all) and therefore to be addressed in some way.**[139]

Both parties, then, profited from a non-continuation of the conflict over the justice of the Maori claims. One can see from the example given that there are two parts to justice as mutual advantage. Barry postulates that the process first needs a nonagreement point. A point at which both parties will arrive at in the absence of an agreement. In the case of New Zealand, the government reports highlighted the non-agreement point; relative deprivation for the Maori, and the continuing problems that this deprivation would cause for the Pakeha. So, there is a non-agreement point, and from this the parties must move to form an agreement in which both gain. Both parties must gain, because otherwise there is no reason for them to keep the agreement.[140] In this sense then, the parties are utility

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[136] Brian Barry, *Theories of Justice, op. cit.*, p.10.

[137] Andrew Sharp, *Justice and the Maori, op. cit.*, p. 6.

[138] JK Hunn, *Report on the Department of Maori Affairs with statistical supplement*, Government Printer, Wellington, 1961.

[139] Andrew Sharp, Justice and the Maori, op. *cit.*, p. 184.

[140] Hampton, in her discussion of the viability of Hobbes's social contract discusses this point at some length. Of particular interest to this thesis is her already demonstrated conclusion that the Leviathan does

maximisers. They have a range of outcomes which are deemed better than the outcome at the non-agreement point. By bargaining with the other party, they find the outcome which is in the range of both parties. Clearly this allows for the strategic advantages of each party to play a part in deciding the outcome agreed upon. However, the point of justice as mutual advantage is not to exclude these strategic concerns, but to allow for them. The underlying idea here is that in the absence of an agreement about what justice is, a just outcome can be achieved only by allowing the parties self interest to motivate them in forming an agreement. Therefore, the parties advantages and disadvantages must be taken into account. In New Zealand, the disagreements over what was conceived as 'just' necessitated an agreement where such self-interest was the primary motive. The technicalities of Barry's discussion of those theorists who have tried to capture "unequal bargaining power formally" will not be dealt with here, as trying to achieve any precise measurement of the Maori or Pakeha bargaining power would seem to be a fruitless task.[141] However, one notion about the relative strengths does need dismissing. This is the notion that the sovereign had complete control of the legal system, and therefore could always enforce whatever it decided. The sovereign from this point-of-view had a distinct lack of motivation in keeping an agreement with the Maori. The crown, as the sovereign with control of the legal system, could simply enforce its will on Maori. However, as seen in Chapter One, Hampton has pointed out that within the confines of a self-interested agreement, whether a party can dominate the other through force is immaterial.[142] The reason being that each party has no interest in using force, and thereby disrupting the agreement. The self-interest of the parties has already dictated that they want to keep that agreement. Therefore, the fact that the Maori were negotiating with a sovereign who had complete legal control, becomes a non-issue. Theoretically therefore, the problem of sovereignty will not arise in justice as mutual advantage. For the Crown to use its power

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not need to enforce his commands. Individuals will comply so that they remain in society, and out of a state of nature. Therefore, if one views the non-agreement point as a state of nature, that one does not need an enforcement agency for the agreement to hold. Jean Hampton, *Hobbes and the Social Contact Tradition* , *op. cit.*, chap. 6.

[141] Brian Barry, *Theories of Justice*, *op. cit.*, p. 14.

[142] As Barry states "the unavailability of even approximately veridical estimates of utility makes all this appearance of exactitude quite misleading...We can say simply that rational parties will look for a formula that gives each of them as much as could have been expected from direct bargaining (allowing for the possibility of nonagreement)..."; *ibid.*, p.24.

to enforce pre-existing law would have disrupted the agreement, and therefore, this strategic advantage was no advantage at all. That is, the debate on sovereignty in the 1980s under justice as mutual advantage is seen as part of the wider movement from the non-agreement point to an agreement between the Maori and the Pakeha on a fair distribution. This is made more explicit if one examines the Maori claims. For example, the Maori claimed ownership of large parts of the New Zealand's fisheries. The negotiations that then ensued between the Crown and the Ngai Tahu established an agreement point. An agreement point at which both parties deemed themselves to have maximised their self-interest to the greatest extent possible without endangering the cooperative venture.[143] The issue of sovereignty over the state is therefore negligible. Indeed, this is true within the Maori claims for justice.

> **The cession by Maori of sovereignty to the crown was in exchange for the protection by the Crown of Maori rangatiratanga.**[144]

The Maori claims for justice, therefore, should not be seen as a debate over sovereignty, and hence a debate about the content of justice. Instead justice, in terms of the political arguments of the 1980s, was much more concerned with two self-interested parties negotiating an agreement. An agreement that fulfilled the maximum gain that either could expect from the other. As Sharp states,

> **[t]here is enough political community between the *ethine* for justice to be negotiated..**[145]

This essay has argued that one should not see the debates surrounding the Maori claims for justice as issue of sovereignty. Even when those debates became very difficult to solve sovereignty never replaced the main concern of the Maori and Pakeha; that justice be done.

The above use of justice as mutual advantage should be seen as a better background to the history of political arguments Sharp catalogues. However, given the

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[143] As evident in *The Press* , 1/10/1993, p. 12, editorial. "Hopes that unrestricted Maori fishing could begin today have been realised. Reaching this point has been debilitating for Maoridom. The Court of Appeal was asked to stay a High Court order that would allow the leasing of fish quota under the *compromise* worked out by the Treaty of Waitangi Fisheries Commission." emphasis added.

[144] Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, Brooker and Friend, Wellington, 1992, p. 269; Where "rangatiratanga embraced protection not only of the Maori land but of much more, including fisheries."

[145] Andrew Sharp, *Justice and the Maori*, *op. cit.*, p. 287.

framework established *per* Barry in Chapter One, it also indicates a possibility that Sharp's approach is unduly pessimistic. If, as argued above, the arguments used by Sharp fit neatly within the conception of justice as mutual advantage then they correlate neither to stability or tolerance; both of which are necessary for his vision of bicultural sovereignty.[146] For justice as mutual advantage does not even have the agreed upon baseline fairness like justice as reciprocity. It is, as we have seen, a conception of justice based on pure self-interest, and consequent to that is highly unstable. Also justice as mutual advantage exists because of the inability of the parties to the agreement being able to cooperate with each other. The cooperation it exacts is only for the furthering of goals of each party independently.

At the end of *Justice and the Maori*, Sharp states that sovereignty is necessary because there must be a ultimate power that negotiates between arguing parties.

> **[I]t is *not* a culturally-specific argument to say that sovereignty is justified by reference to it essential role in adjudicating on disputes as to rights and then enforcing them where they must be enforced.**[147]

If such a negotiating power is necessary, Sharp only can be evincing a conception of justice as mutual advantage. There is no baseline fairness, or balancing of powers in this portrayal of the sovereign. Maori and Pakeha merely compete to hold certain rights in what only can be called a politically 'realist' perspective.

In Chapter One justice as mutual advantage was outlined as being unstable. The agreement would break if one party thought that such a break would further their goals. However this is of no concern for Sharp as the *Leviathan* of the state then creates agreement. If Maori or Pakeha break an agreement the state enforces the rules.

Yet, this type of justice is most open to the communitarian critique. For justice as mutual advantage, within a system of political institutions, is really justice as reciprocity. Morally conceived, Sharp's talk of a negotiation between Maori and Pakeha is justice as mutual advantage. However, within the political institutions of New Zealand, the moral notion becomes justice as reciprocity. The difference between the moral notion, justice as mutual advantage, and the political notion, justice as reciprocity, is a 'baseline of

[146] *Ibid.*
[147] *Ibid.*

fairness'. This baseline is an acceptance of the governing political institutions of New Zealand that Sharp states must negotiate when there is a disagreement between Maori and Pakeha. This certainly fits with Sharp's declaration that the New Zealand political institutions remain sovereign throughout the Maori claims.

Sharp's conception of political justice could be justice as reciprocity. If this is the case, then it also true that Sharp's conception of justice deals inadequately with individuals who do not agree with that baseline of fairness. Sharp, in this interpretation of his argument, is open to the communitarian critique. That is, Sandel's critique of Rawls has the same potency against Sharp's argument.

Rawls's conception of justice unravels because Sandel shows that individuals within the original position only can be those that prioritise the right over the good. Rawlsian individuals must, as seen in Chapter One, make justice the first priority over personal commitments. Sharp like Rawls, makes the right prior to the good in his theory of justice. Sharp makes the state's justice take priority over the individuals personal commitments. Worse still, Sharp then lets the state set the agenda for justice by stating that when there is no agreement the state dictates; as final arbiter the state is forced to decide when there is agreement. The state is the baseline of fairness. The assumption that Sharp must make to adopt this conception of justice is that the individuals will have greater attachment to the state than to their personal relations. As earlier suggested, the individuals are made 'unencumbered selves', with only political attachments. This is not justice, but dictatorial power unleashed in the modern state in the name of an antique theory of positivist justice.

CHAPTER THREE

Justice and Culture

Richard Mulgan

> **[I]f a dispute arises, then this mean that those more constructive emotions and passions which might in principle help to get over it, reverence, love, devotion to a common cause, etc., have shown themselves incapable of solving the problem.... There are only two solutions; one is the use of emotion, and ultimately of violence, and the other is the use reason, of impartiality, of reasonable compromise.**
>
> Karl Popper, *The Open Society and Its Enemies*.[148]

As suggested in the last chapter, to attempt a concomitant examination of sovereignty and justice within New Zealand leads to confusion over both concepts. One can put the cart before the horse and discuss the justice of sovereignty. Alternatively, one is merely lost in ever-decreasing circles crossing the two concepts together. In the latter case justice is sent to find the nature of the governmental beast, only to find itself redefined and seeking policy for the beast at a later stage. One cannot revile the Leviathan's justice, only to use that same justice to question Leviathan's position. Sovereignty cannot be at issue, for justice cannot be discussed without much agreement on the nature of the sovereign and *vice versa.* A variety of views of sovereignty cannot be discussed without agreement on the central themes of justice.

Against this approach Sharp asserts that sovereignty theory was used within discussions of the Maori-Pakeha relations because justice was thought to be too amorphous to indicate resolutions and points for negotiation. That is, New Zealand looked for agreement on either of the concepts, in order to fix on the other. Like Sharp,

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[148] Routledge and Kegan Paul, London, 4th edn., 1962, vol. II, pp. 234 and 236. Quoted in Brian Barry, *Justice as Impartiality*, Clarendon Press, Oxford, 1995, p. vi.

Mulgan, in *Maori, Pakeha and Democracy*, tries to sort the political ideas of Maori-Pakeha into a more manageable and less polemical language. However he looks at the issue of Maori and Pakeha relations from a different point of view. He argues that the use of justice and sovereignty theory has taken the relations to a point where they threaten to "polarise the country as Maori seek to recover lost power and land, and as Pakeha become increasingly intolerant of what they see as unrealistic and impertinent demands."[149] Instead Mulgan wishes to Maori calls for justice within a democratic[150] framework. The result might well have been a valuable, and sorely needed project; the location of a democratic process which negotiates cultural difference.

> **How can two people with different histories and cultures live together in peace with justice? This is the fundamental constitutional issue facing New Zealanders as we celebrate the 150th anniversary of the Treaty of Waitangi and consider the legal and political institutions which will take us into the 21st century.**[151]

Save for the rhetoric – and hence the avoidance of 150 years of close contact between Maori and Pakeha – the question posed is one of political theory.[152] However, at the outset there is an injunction added to the project, which seems a little out of place within the schema of democratic thought to date. Mulgan specifies from the outset that he is working from an assumption of a bicultural New Zealand. Perhaps this is a just assumption, and perhaps it is not, but the reader is not given arguments for either side of the debate. In effect, Mulgan presents us with a *fait accompli* of a bicultural New Zealand which exists separately to the political life of the country. Whatever the justice of biculturalism in New Zealand, it is not an assumption which democratic theory, as outlined by Mulgan, can accommodate. Only when Mulgan adds nebulous theories of

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[149] Richard Mulgan, *Maori Pakeha and Democracy*, Oxford University Press, Auckland, 1989, p. vii.

[150] I am taking *democratic* in its widest possible meaning here – ie. its etymological sense (Greek=demokratia, from demos=people and krateein=rule) – as opposed to de Tocqueville's sense of *Tyranny of the Majority*, representative democracy, and New Zealand's inherited 'liberal democratic' political institutions.

[151] Richard Mulgan, *Maori Pakeha and Democracy, op. cit.*, p. 1.

[152] Note the similarity in Rawls phrasing of his basic question in *Political Liberalism*, Columbia University Press, New York, 1993 p. xviii.

> **[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical, and moral doctrines?**

Also, as Istvan Hont makes clear, the question of more than one peoples living under one sovereign, or in one territorial block, has been central to the formation of the Western concept of the state. Istvan Hont, "The Permanent Crisis of a Divided Mankind", *Political Studies*, 42, p. 184 and esp p. 185, fn. 30.

justice, public policy, and cultural dynamics to his democratic framework does there emerge an answer to the question he first poses. Or at least, these are the theories which Mulgan is inclined to use to support his conclusions.

These conclusions rest on statements about the worth of biculturalism for New Zealand's national life, supported for the most part by arguments proclaiming its political efficacy in terms of symbolism, avoidance of severe racial conflict, post-colonial justice, liberal democratic thought, human rights, and the Treaty of Waitangi.[153] Neither these conclusions, nor their supporting arguments will be examined here, as there is little to be gained from examining intuitive statements about how New Zealander's should think on various issues relating to Maori-Pakeha relations within this thesis. That is, the question put by Mulgan is concerned with the political institutions of New Zealand, not with the behaviour of the people who use them. Therefore this chapter will concentrate on his concept of New Zealand as bicultural democracy, and avoid his more rhetorical 'oughts' about New Zealand life.

> **Biculturalism also requires that each of these two peoples be guaranteed the resources to maintain and develop their own culture. Given the particular pressures on the Maori as an aboriginal minority, there will be a particular need to provide them and their culture with special protection."**[154]

The rhetoric which Mulgan uses is derived from a programme to achieve peace between Maori and Pakeha. His wish is to see a "just and harmonious future" for New Zealand.[155] This is a good intention, but one needs more than good intentions to have moral weight in a political argument.

Also, this chapter will show that Mulgan's view of biculturalism, as seen above, necessitates an attempt to define Maori and Pakeha cultures. This attempt is contrary to his democratic theory, and the conditions of justice identified in the first chapter. To remind the reader, the failure of Rawls's original position was in its presupposition of the morality of an individual. The individual was presumed to choose the right over the good. In much the same way, individuals within Mulgan's bicultural democracy must choose

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[153] Richard Mulgan, *Maori, Pakeha and Democracy*, *op. cit.*, Chap. 6, pp. 149-52.
[154] *Ibid.*, p. 149.
[155] Richard Mulgan, *Maori, Pakeha and Democracy*, *op. cit.*, p. viii.

culture over their self-knowledge of the good. Mulgan's democratic framework is biased toward culture and is therefore riddled with theoretical contradictions.

This importation of culture into democratic thought illustrates how Barry's differentiation of justice as impartiality can be a useful explanatory tool within the issue of justice for Maori. That is, the second order impartiality of Mulgan's framework clearly contradicts his first order impartiality when arguing for biculturalism. His biculturalism represents justice as impartiality in use everyday, and can therefore appeal to certain intuitive ideas about justice. Yet, in Chapter One this first order impartiality was not a political conception of justice. It cannot be because it does not obey a set of rules which everyone accepts as a informed and unforced reasonable agreement. The biculturalism is not then a fully cogent argument of justice for Maori. Instead it is a description of a forced agreement between two peoples. However, this line of reasoning is clearer with a thorough critique of Mulgan's argument in his language; a language of 'politics' and 'culture'.

The problem with the arguments of *Maori, Pakeha and Democracy* can be found at the very heart of the ideas it presents. It is the confusion, rampant in most work on Pakeha-Maori relations, between the cultural and political. This is a difficult distinction to make in political decision making. Especially where it appears as an almost direct correlation. In health policy, for instance, special considerations are made for Maori in the budget to ensure the execution of much preventive work. This can be discussed in various political discourses; special treatment for a minority, a saving in later funding made possible by good cost-benefit analysis, or simply a response to a particular interest group. That is, it can be discussed as an issue of individual equality, as public policy, or as a government initiative to head off public embarrassment. Some of these arguments will use culture as their basis, while others merely acknowledge it in passing. The point here is that there is only one continuous element in all these ways of seeing a special initiative for the Maori; government controlled action or, in other words, politics. Culture is largely superfluous in either interest group politics, or in benefit-cost analysis. The Maori in these models is simply another group which can be dealt with as such by a government using statistical methods, when it has a need to do so. Politics that deal with Maori are not then

exclusively based on cultural arguments. Culture, after all, is a dynamic force. One may capture examples of culture by observing a political process, or be able to interpret a change in law as motivated by a cultural rather than economic, or social forces. Yet that would be in hindsight, rather than predicting what impact a culture should have on a political process. It would seem ironic to mark a Maori culture with "special recognition" so that it may grow, when less than seventy years ago it was marked in the same way so that it could die.[156] So for now it can simply be stated that culture and politics can be treated as separate entities.

They do intertwine at various points, yet neither are bound to each other inseparably, nor beholden the one to the other at any point. While this may seem an obvious point, it is made because Mulgan's attempt to find arguments supporting a bicultural democracy are at odds with this split of the political and cultural. At times Mulgan seems to let the political dominate cultural the in much the same way as Rawls lets the political dominate the social. That is, Mulgan insists that his bicultural vision be a political concept.

Before examining the confusion generated by bicultural democracy, Mulgan's definitions of the two concepts need explicating as they are confusing in themselves.

The definitions offered by Mulgan of culture or politics do not help the reader to decide whether he supports – or negates – the idea that culture is an integral part of the political process. At most, he offers a defintion of culture that nods its head at politics. "culture,..., is primarily a social phenomenon, relating to people's shared beliefs and behaviour".[157] To be more precise he takes culture

> **to mean the entire way of life of a group of people, a way of life which is learned and transmitted from one generation to another. In this sense it is much wider than its other more familiar meaning 'the arts; or 'high culture'; the former includes many different aspects of social behaviour, such as language, family life religion, entertainment, sport , politics, law and so on.**[158]

So one could suppose that he uses a wide socially constructed, rather than narrow politically constructed defintion. This view of culture certainly makes sense given his

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156 Alan Ward, *A Show of Justice*, Auckland University Press, Auckland, 1973.
157 Richard Mulgan, *Maori Pakeha and Democracy*, *op. cit.*, p. 7.
158 *Ibid.*, p. 3-4.

earlier pronouncement that Captain Hobson's auspicious statement "we are now one people" could have been be better expressed as "we are now one nation".[159] That is, New Zealand should be thought of as one body politic, which brings together different peoples, or cultures.[160] However, this purely social view of culture is at odds with his statement that,

> **[g]eneral well-meaning statements of the value of a bi-cultural society will not in them selves bring about a bicultural polity... They concern the nature of the political system itself.**[161]

So culture may not be regarded as a primarily social phenomena, but one which effects the political, and hence other groups "beliefs and behaviour".

At one point Mulgan points to the conundrum which he faces. 'Culture', in the twentieth century is increasingly seen as a spring board from which one bounces to nationalism and onwards to the right of self-determination.

> **A group which considers itself to be a separate people could press for separate political identity. This is the basis of the theory of nationalism which came to prominence in nineteenth century Europe and, this century, spread around the world : each people or race (or nation) with its own history and culture should have the right of self-determination in its own sovereign state, the nation-state.**[162]

One could perhaps argue that in the twentieth century the cultural has become – or has been recognised – as purely political. One could then locate Mulgan's approach within the communitarian critique of liberalism. Whether one argues that this critique has caricatured liberal theory, it has certainly focused on the depths to which contemporary 'liberal-democratic' politics excludes different cultures from its polity. That is to say, within political theory there is a far ranging debate over the connections between culture and politics, and it would be unfair to hope that Mulgan would solve the dilemma. However, within *Maori, Pakeha and Democracy* there needs, by dint of the question he peruses, to be some workable compromise between the two concepts; Unfortunately there is not. There are assumptions provided, but they are as soon rescinded.

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159 *Ibid.*, pp. 6-7.
160 *Ibid.*, p. 6.
161 *Ibid.*, p. 133.
162 *Ibid.*, p. 5.

> **As we have seen, there is a strong presumption that a people, a group with its own culture and sense of identity, should also be a nation and have a right to seek political identity through self determination.**
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> **In the case of New Zealand, separate nationhood for the two peoples, even if it were desirable, would not be practicable.**[163]

This presupposition of the strength of one polity within New Zealand is argued for in jurisprudential language of legitimacy.

> **Given the passage of time, there is now no practical possibility of removing colonial settlement an the government it brought. The question of legitimacy turns on whether the government of the day operates according to the principles of justice and equal rights. It is this which turns *de facto* into *de jure* power.**[164]

The arguments provided by Mulgan against separate nationhood, therefore, entirely depend on Western political theory.[165] Culture is overridden by completely political concerns, and the rhetoric of a cultural base to a polity seems useless and cumbersome in comparison to the robust political theory. The springboard of culture seems to be made of balsa wood when the elephant of legitimacy jumps up and down. So when concerned about legitimacy, Mulgan jettisons his ideas of politics integrated with culture; biculturalism is gone. Yet it is hard to find a thorough going examination of exactly how legitimacy gains such weight. As Mulgan states "*de facto* becomes *de jure*. The process is never clear, nor is it entirely consistent in logic."[166]

However he goes on to indicate where this fog of irrationality is, for a moment, lifted.

> **This [the non-logical transformation of *de facto* into *de jure* power] is recognised in the jurisprudence of international law which is forced to recognise two inconsistent maxims between which a course must be steered : *ex injurai jus non oritur*, law does not arise out of wrong, or might does not**

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[163] *Ibid.*, p. 23.

[164] *Ibid.*, p. 54.

[165] It needs noting that Mulgan recognises this, but justifies through a claim of universalising Western thought, and the apparent logical dissonance in Maori claims against colonialism – stated with democratic language – and against imposition of Western values, when not accepting Western values. That is conquest, if Western values are not accepted must be taken as read. It seems that Maori, once again, find themselves in a catch-22 where Western values take priority either way. Richard Mulgan, *Maori, Pakeha and Democracy, op. cit.*, p. 55.

[166] Richard Mulgan, *Maori, Pakeha and Democracy, op. cit.*, p. 52.

> **make right ; and *ex factis jus oritur*, law arises out of facts, or, in effect, might can make right.**[167]

Perhaps, then, legitimacy is granted when law or might, or both, have the last word. But then granting culture "special recognition" within political institutions would change little when the legal fact of land dispossession remains. There is still less for Maori to challenge, as he goes on to state that political legitimacy has come to mean consent by the people. That is, consent of the general population grants the Crown legitimacy. This logically means that the population has been largely responsible for much of the injustice towards Maori. A point which Mulgan makes in a different way.

> **As a small minority, the Maori will always face the problem of how to influence institutions in which the Pakeha are the majority.** [168]

So, on one strictly political level Maori in Mulgan's view have few chances for justice. Nevertheless, his ideas of a bicultural polity suggest Mulgan may have another view of Maori claims to justice.

The ambiguity noted above in Mulgan's work may be explained if his methodology is considered. Mulgan is using different definitions of culture at different time. Perhaps he is representing an ambiguity in the meaning of 'cultural' present within New Zealand's public rhetoric. Given this problem, he would be trying to fashion unambiguous definitions out of common speech in order to provide a cogent argument on the issue of Maori and Pakeha relations – within the commonly used language – within New Zealand. This being the case, Mulgan is using an Aristotelian method.

> **We must, as in all other cases, set the phenomena before us and, after first discussing the difficulties, go on to prove, if possible, the truth of all the reputable opinions about these affections or, failing this, of the greatest number and most authoritative; for if we both resolve the difficulties and leave the reputable opinions undisturbed, we shall have proved the case sufficiently.**[169]

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[167] *Ibid.*, p. 52.
[168] *Ibid.*, p. 139.
[169] Aristotle, *Nicomachaen Ethics*, Book VII, 1145bI-7. Quoted in Aristotle, *The Politics*, Stephen Everson (ed. and intro.), Cambridge University Press, Cambridge, 1988, p. xiii.

So, perhaps, Mulgan is examining culture not as an abstract theory, but its meaning when used in New Zealand. Throughout the book, and not just with culture, it would appear that this is indeed what he is attempting to do. As he states at the opening of the book,

> **much of the discussion that follows will centre on the use and abuse of words - bicultural, people, democracy, indigenous, self-determination, partnership, and so on.**[170]

Unfortunately, this methodology still requires conclusions that do not clash, it requires in other words internal consistency. As Everson has pointed out, Aristotelian method is concerned that the "beliefs which people hold are likely to conflict and it is such conflict which requires the philosopher to investigate where the truth lies."[171] Even if we forego the rather daunting idea of finding a *truth*, it is still reasonable that an argument should be internally consistent. Especially, if that argument is trying to "resolve the difficulties" of commonplace ideas. The trouble with Mulgan's use of the Aristotelian method is that these difficulties are not resolved.

As shown above, there is a great tension between the concepts of 'culture', and 'politics' and that it is in this conundrum that Mulgan's arguments flounder. In essence, culture is excluded from what he considers 'the political', and then adapted via "biculturalism" to influence the policies made by the political. To achieve this he defines "culture" as a social concept[172], as a concept that is extra-political. The political is then defined as "democracy" with certain principles that conflict with Maori culture. Leaping across the gulf that this use of the concepts has created is biculturalism.

> **Biculturalism implies the recognition of two indigenous cultures, Maori and Pakeha, as being of central importance to the national life of Aotearoa-New Zealand.**[173]

Defined from cultural, "biculturalism" is nevertheless used to identify the congruence between New Zealand politics, and Maori culture. More than that, it is used as a platform

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[170] Richard Mulgan, *Maori, Pakeha and Democracy*, *op. cit., p.* 3.
[171] Aristotle, *The Politics,* Stephen Everson (ed. and intro.), *op. cit.*, p, xiv.
[172] I think culture is used, on balance, as a social construct. The fact that Mulgan uses it occasionally as part of political theory is an indication of the difficulty which he faced in trying to place his idea of Maori political claims within a democratic framework. see Richard Mulgan, *Maori, Pakeha and Democracy, op. cit.*, chap. 1, and pp. 97-100, 112-124, 132-134.
[173] Richard Mulgan, *Maori, Pakeha and Democracy*, *op. cit.*, p. 149.

from which can spring guiding principles of justice for the Maori. Mulgan views biculturalism as a "reasonable agreement" between ideas of Maori culture, and theories about the New Zealand constitution. The Western ideas, in Mulgan's view, graciously give special protection to something called Maori culture.

> **Biculturalism should be seen as based on a general agreement about democratic values and human rights for all citizens of Aotearoa-New Zealand. Special protection of Maori culture and identity can be seen as entailed by a commitment to such values and rights.**[174]

Hence, theories of democracy and culture are combined to produce this bridging concept. However, as with bridging finance, the penalties that are paid are rather large; losing important aspects of both theories, the necessary re-invention of a political morality, and a confusion of terms.

To demonstrate the failure of Mulgan's bridge of biculturalism, one only need look at the confusion within the concept itself. His defintion of culture, as a dynamic social grouping, has already been examined. 'The political', in *Maori, Pakeha, and Democracy* is harder to isolate.[175] It is, in one sense, New Zealand's laws and government. They are 'the political' because they legitimately govern the country. Mulgan confirms this legitimacy with a simple syllogism of governing principles. The litmus test of a democratic regime is "whether the government of the day operates according to principles of justice and equal rights"[176]. According to Mulgan, the present government of New Zealand does operate on these principles and is therefore democratic. Hence, 'the political' is the legitimate governing procedure; and only democratic procedure is legitimate.

However, this distinction between the political and the cultural is quickly blurred. As Mulgan himself states, "the main of aim of this book has been to establish the basic principles of bicultural democracy."[177] So, it appears that integrating culture and politics was an explicit aim. Unfortunately, if one uses this interpretation, then one must also be

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[174] *Ibid.*, p. 151.

[175] However, in earlier book Mulgan states "All communities require some mechanism for making decisions...and larger communities or nations all depend on permanent, elaborate institutions for this purpose. Politics, the activity concerned with these institutions is, ..., impregnated with theory". *Democracy and Power in New Zealand* , Oxford University Press, Auckland, 2nd ed., 1989, p. 7.

[176] Richard Mulgan, *Maori, Pakeha and Democracy, op. cit.*, p. 54.

[177] *Ibid.*, p. 122.

prepared to follow the arguments to their logical extensions. Therefore, one must at once pin down both cultures in definitions which are able to be connected intimately with the governing of the body politic. Mulgan's assertion that cultures, are "constantly changing"[178] has already decreed that this type of definition is difficult. Also, this interleaving of culture and politics begs the question of what should happen when Maori and Pakeha clash over governing rules.

A disagreement over the system of governing rules between Maori and Pakeha is not difficult to produce. One such example of this clash is within *Maori, Pakeha and Democracy*. Maori rights guaranteed under the Treaty are often thought to be negated by a Pakeha with equal rights.

> **The principles of democracy require that all citizens be accorded equal human rights. Bicultural democracy has the additional implication that there are two peoples and two cultures which are to be recognised as central to the life of the country.**[179]

Mulgan is certainly right to assert the equality of citizens within democracy. However, it begs the question; what has this principle to do with cultural recognition? Democracy, according to Mulgan is about equal human rights. Not about special recognition for any one, or more, cultures. A simple escape for Mulgan from this seeming contradiction would be to claim the human right to one's own culture. However, within democratic theory such as Mulgan's, it would still be hard to justify having only two cultures "recognised as central to the life of the country".[180] Also, recognition would seem to be a little patronising, where recognition should be taken for granted, and such recognition goes only a little toward solving the grievances.

This pursuit of a culturally sensitive democracy seems especially anachronistic given Mulgan's own version of the history of democracy. The evolution of democracy, as he describes, is the attempt to rid politics of the bias of privilege.

> **Representative government responded to pressure for greater equality and became associated increasingly with the concept of democracy as it came closer to a form of government by the people or at least government elected by the people. the franchise was progressively widened from male property**

[178] *Ibid.*, p. 13.
[179] *Ibid.*, p. 122.
[180] *Ibid.*

> **holders to all adults, female as well as male; greater equality was introduced... 'One person, one vote; one vote, one value' is now recognised as the guiding principle for democratic electoral systems.**[181]

It is then, using Mulgan's version of democracy, for the New Zealand voter to endorse biculturalism within the democratic procedure. Mulgan only can present reasons as to why the New Zealand voter, and hence the government, should choose this as a substantive policy option. Yet, given this view of democracy it would seem somewhat backward for those same voters to place a bias on a democratic system. Yet, as quoted above, Mulgan does make this attempt; he proposes that biculturalism should influence the principles of democracy.

Furthermore, the principles of his democratic procedure pointedly obscure a socially engendered bias. For this reason, he can state that a even majority-rule is not necessarily democratic.

> **There are certain fundamental political rights which all citizens must possess in a democracy; these are the democratic rights...such as the right to vote, free speech, free association, and so on. Without these basic civil and political liberties democracy cannot function and they are not to be taken away from anyone, even by a majority.**[182]

It would, in other words, go against Mulgan's own representation of New Zealand's democracy, for a bicultural democracy to exist in procedural form. It would be similar to advocating a monocultural democracy, in that the guiding principles of democracy – such as the equality of citizens – would be undermined by value judgements about the worth of culture.

In summary, by confusing the political with the cultural, Mulgan has created concepts which only serve to give strength to themselves. His sense of democracy, garnered from an Aristotelian methodology, makes it nigh impossible that cultural concerns be addressed as more than a social concern. In a sense, it is the methodology which creates the problem. By asking, in accordance with Aristotle, about the political beliefs of New Zealanders, and then finding where there is internal consistency, there may be a solution. However Mulgan, after examining many of the beliefs surrounding the

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[181] *Ibid.*, p. 60.
[182] *Ibid.*, pp. 77-8.

notions of democracy, and Maori, leaves consistency behind for rhetoric. A final example will suffice to indicate that this is the result of moving out of democratic theory, and into 'politicking'.

> **The claim that we are all New Zealanders and should all be treated alike, with no special recognition of the rights of Maori or the difficulties they face, *is in fact a licence to ignore the rights of the Maori.*[183]**

This is an example of the results of Mulgan's confusion over the political and the cultural. For while it may well be that Maori rights have been glossed over by the use of individual rights rhetoric, it is not a logical argument against the claim that New Zealander's have the equal rights. This claim of equal rights is strictly within democratic theory, and Mulgan's conception of the political. The second claim, that Maori rights have been ignored in practice under the rhetoric of equal rights, is a practical claim. A claim that can be rectified within the procedural elements of democratic theory.[184] The point is somewhat easier to make if the language of citizenship is used. The paragraph can then be given two interpretations. The interpretation above is that the Maori have had citizenship rights denied to them. These rights are easily seen as creating corresponding obligations with which to rectify the situation. The second interpretation, is that the Maori have special citizenship rights. However, this is a rather difficult topic that is left largely undiscussed within *Maori, Pakeha and Democracy.* Undeniably, there are special legal rights concerning some use of natural resources for the Maori.[185] However, they are the exception, rather than the rule and they are granted through due legal process. Mulgan, if we are to take him as advocating special group rights for the Maori, is advocating a situation which is opposed to the democracy he outlines; a democracy situated in equality of individual rights. That is, if Mulgan is indeed advocating special group rights inside democratic thought he is advocating a position which needs far more explication within that canon. He needs to produce an argument as to why culture, and hence group rights, should become part of a procedure within a democratic polity. In lieu of this argument he states that the

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[183] *Ibid.*, p.151. emphasis added.
[184] A claim that has been substantiated often, and with force by the Court of Appeal, the Waitangi Tribunal, and by the last Labour and National Governments *vis.* The Sealord Deal.
[185] For example, fisheries rights. See *Te Weehi v Regional Fisheries Officer* (1986) 6 NZAR 114.

> **democratic principles...are compatible with special recognition of Maori rights...because the Maori are a disadvantaged minority suffering from many of the difficulties generally experienced by pre-colonial aboriginal peoples, they and their culture need special protection against the majority culture.**[186]

This reasoning does not grant group rights a place in democratic thought, but juxtaposes Pakeha against Maori voters. That is, Mulgan's own interpretation of democracy is strongly opposed to his views of justice. His history of democratic thought is premised on the injustice of bias entering the procedures that democratic thought outlines . Yet, the ideas of justice that Mulgan uses presuppose a bias of democratic thought in the creation, and solution of Maori disadvantage.

His Aristotelian methodology is therefore incomplete, as Mulgan does not cohere the political with the cultural. He starts from an attempt to identify how two cultures should live together, and ends by stating that it is possible simply by recognising that there are two cultures, within a democratic framework. Unfortunately, this is not locating the Maori-Pakeha relationship within a democratic framework, but subjecting both cultures to a series of statements about how they should behave within a democratic polity. In essence, he attempts to dictate culture, and how it should relate to New Zealand politics, rather than satisfying either culture's political ideas.

If one considers Barry's conditions for justice, one can understand Mulgan's failure. Within Barry's conditions, one needs a system of rules which apply to every citizen. This is the political system. Rules, or laws, are only to be included in that system if they are reasonably agreed to by all citizens. As he states, special privileges must be accepted by all as

> **this still leaves it open that inequalities may be legitimated; but it rules out immediate claims to advantage based on, for example, high birth, ethnicity, or race. For although you would benefit from a principle establishing your skin colour (say) as a basis for privileged treatment, you cannot reasonably expect this to be accepted by those who stand to lose form the operation of such a principle.**[187]

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[186] Richard Mulgan, *Maori, Pakeha and Democracy*, *op. cit.*, pp. 87-8.
[187] Brian Barry, *Justice as Impartiality*, *op. cit.*, p. 8.

Of course, under justice as mutual advantage, special rights to Maori could accrue as a result of some self-interested bargaining. However, this is not stable justice, and so not the 'just and harmonious' future which Mulgan looks toward. Even justice as reciprocity could not produce special privileges, given its baseline fairness; unless cultural recognition was that baseline. However, all parties to an agreement with a baseline of cultural agreement would have to accept that baseline. But for stable justice, a culturally based agreement will not hold as it presupposes individual's sense of self. Also, as Barry notes, if reasonable agreement is sought, special rights cannot be accepted.

> **The underlying assumption here ie that claims to special advantages based simply upon membership of a certain bloodline, ethnic group, or race are too transparently self-serving to form a basis of agreement that others can seriously be asked to assent to.**[188]

Perhaps there are arguments which show that Maori should have special rights. Chapter One put forward the idea that special rights could exist in a conception of justice as impartiality, if they were accepted by a system of rules which everyone had agreed upon in an unforced, and informed manner. As the next chapter will show, it is possible that special Maori rights can be defended through justice as reciprocity, if not justice as impartiality. However, Mulgan gives no reason for accepting culture as a basis for justice.

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188 *Ibid.*

Justice and Aboriginal Rights

Paul McHugh

Paul McHugh has been writing on the jurisprudence of Justice for the Maori many years. He has produced a book, *The Maori Magna Carta,* that is one of the standard texts, in the field and contributed at least one article a year since 1985, specifically examining the affect changes in New Zealand public law have made on Maori. For several years now he has been writing from Cambridge University, where he is a lecturer and a tutor of Sidney Sussex College.

To search in McHugh's writings for a set of principles, or a cogently argued theory, of justice for Maori is to look for what is not there. This lack of a theory of justice may seem remarkable, but it is not. As one commentator has noted, McHugh "unquestioningly accepts as 'given' the validity of the process he describes."[189] He does not need a theory of justice – in the sense used above – to achieve justice for the Maori. His approach is to stay within the confines of New Zealand law, and not to seek for a morality that steps beyond this legal system.

McHugh's tendency to avoid outright statements regarding justice for Maori does not hint at a suspicion of an underhand agenda. Instead, it is merely the result of working within the strict limits of procedural justice.[190] Also, avoiding these theoretical justifications means that he need not deal with the problematics of New Zealand jurisprudence. It is almost as if he has taken to heart the statements made by Goldberg

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[189] Paul Havemann, " 'The Pakeha Constitutional Revolution' Five Perspectives on Maori Rights, and Pakeha Duties", *Waikato Law Review*, vol.1, 1993, p. 75.

[190] Though Critical Legal Studies scholars argue that a neo-Marxist analysis of Pakeha Law does suggest an underhand agenda implicit in the New Zealand legal system. Pakeha hegemony is kept, even while a constitutional revolution occurs to place Maori rights within the law. See Jane Kelsey, *A Question of Honour? Labour and the Treaty 1984-89*, Allen & Unwin, Wellington, 1990, p. 262 .

concerning the racism inherent in liberal thought; the thought that underwrites the New Zealand legal system.[191] Goldberg insists, along with the communitarians, that the liberal theory of justice – exemplified, for him, as liberal individualism – excludes on the basis of race and culture.

> **Thus, in spite – indeed, in the name – of its universality, reason expresses racializes exclusion. This should come as no surprise. The standards of Reason in modernity emerged against a backdrop of European domination and subjugation of nature, and especially of human nature.[192]**

Western reason, as Sandel shows in his critique of liberalism can be biased against non-western conceptions of the good. McHugh gives practical examples of Goldberg's theory by showing the logic of the injustice toward Maori. First as a legal theorist, and lately as a legal historian he has attempted to show Maori exclusion from the legal system on a systematic basis. This chapter will focus on two points. First, McHugh's attempt to undermine Maori exclusion from certain rights. Second, that this attempt can be placed in a more thorough theory of justice

Central to McHugh's advocacy of the existing legal system is the assumption that it can and will serve Maori interests. There is an insistence throughout his work that the Maori claims will be given a fair hearing, with or without parliamentary, or even public support. While most theories of justice for Maori invoke moral arguments to assuage the need for recourse to strictly legal interpretation of Maori rights, McHugh believes that; "judge-made law recognises that the Crown has a fiduciary duty to its tribal subjects irrespective of Parliamentary concession."[193] He goes on to state that this allows Maori rights as recognised by the courts to be enforced by the Crown without recourse to moral arguments.

At the moment, the Crown can choose to allow a claim that Maori rights have been denied to be heard and rectified through the Treaty of Waitangi Tribunal. The new recognition of the fiduciary duty by the Crown could mean that it would simply have to obey the courts.

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[191] See Paul McHugh, "The Historiography of New Zealand's Constitutional History", *Essays on the Constitution*, Philip Joseph (ed.), Brookers, Wellington, pp. 344-367.
[192] David Theo Goldberg, *Racist Culture: Philosophy & the Politics of Meaning*, Blackwell, Cambridge, Mass., 1993, p. 119.
[193] Paul McHugh, "The role of Law in Maori Claims", *New Zealand Law Journal*, Jan. 1990, p. 17.

> **This might seem like an unremarkable conclusion to you; however its consequences are enormous. At the moment historic claims are channelled through the Waitangi Tribunal which hears, reports and makes non-binding recommendations to the Crown. The Crown is not constitutionally obliged to follow the Tribunal's recommendations. Tomorrow through Parliament it could repeal the Tribunal's empowering legislation. But the Crown is obliged to heed the declarations of its Courts and would invite a constitutional crisis if it were to respond otherwise..**[194]

The claims of Maori for denial of right have a legal core which McHugh takes as nigh indestructible. The core stems from a two pronged attack on commonly held notions of the constitutional position of Maori within New Zealand. The first is within the common law, and is an argument concerning Maori land rights. The second, is the idea of Crown liability for its acts of misconduct. That is, McHugh argues that the Crown can no longer avoid its obligations, under law, to Maori.

The argument concerning Maori land rights stems, like all of McHugh's work, from traditional legal ideas.[195] However, while his logic may be traditional it is convincing; if a legal system is the producer of property rights, it is central to Maori claims for justice that the legal system negotiate Maori land rights.

> **Property rights are a pure legal creation. Lawyers traditionally speak of property as a 'bundle of rights'– a person has a particular property right because the rules of the legal system will recognise and if needs be enforce it. The legal system of a society is the fount of property – it creates, nourishes and transmits. Law plays the pivotal role where the present issues on Maori property rights are concerned - their restoration, retention, and /or compensation for their loss.**[196]

This is as close as McHugh gets to producing a coherent theory of justice for Maori. That is, his theory of justice for Maori is based entirely within the legal system. To

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[194] *Ibid.*, p. 18.

[195] Mai Chen & Geoffrey Palmer give a general defintion of the legal rights that these Maori land rights spring from. Traditional Maori rights are

> **rights of use and occupancy in lands and waters which continue as a recognized legal interest after conquest, discovery or cession until they are extinguished by the colonising power. As customary rights, or aboriginal title doctrine as it is sometimes known, is a rule of common law, it can be enforced in the ordinary courts without the need for statutory recognition. Customary rights have been repeatedly recognised in United States law and are also a feature of Canadian and Australian law.**

Mai Chen & Geoffrey Palmer (eds.), *Public Law in New Zealand*,Oxford University Press, Auckland, 1993, pp. 302.

[196] Paul McHugh, "The role of Law in Maori Claims", *op. cit.*, p. 16.

him, Maori have had legal rights ignored and he is trying to convince others that his has occurred. He is not trying to create a morality from outside the legal system. The cogency of justice for Maori, as a moral argument is beside the point for his argument. That is, McHugh can suggest ways in which the courts might decide an issue, given that the issue addressed is presented to the court in the same manner.

However, within the *Realpolitik* of Maori claims in Courts, Parliament and Tribunals such issues are constantly changing, and – needless to say – are not arranged in an adversarial debate; even whether the Crown (as representative of the New Zealand political institutions) can be held as sovereign has been questioned.[197]

So McHugh's program is hard to isolate. However there are certain points that can be made with ease. First and foremost is the conclusion that Justice for the Maori can be achieved through a Pakeha-originated system of justice; a system focussing on precedent, statute, and equity. Related to this ideology, which has been named the orthodox legal paradigm, is the second point; that out of this pakeha legal system can be fashioned a uniquely New Zealand constitutional law which grants Maori justice substantively – or historically – , but also through a known – if extended – procedure.[198] Of course, within New Zealand, substantive and procedural justice play upon each other. That is, the procedure now allows Maori to contest the justice of crown acquisitions of land. This challenges the traditional doctrinal procedure of Crown sovereignty and infallibility. To allow this difference in procedure, is –as far as McHugh predicts – to allow substantive justice also. Maori may regain land, or have substantive justice, through the change in procedural justice.

Substantive justice, in the form of rights of Maori to land, can be achieved through the court-made doctrine of aboriginal right. McHugh notes that aboriginal rights have re-entered New Zealand law after a turbulent ride. His definition of aboriginal rights state that they are

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[197] See especially Donna Awatere, *Maori Sovereignty*, in *Broadsheet*, "The Death Machine", June 1982, pp.38-41; "Alliances", Oct. 1982, pp.24-9; "Beyond the Noble Savage", Jan-Feb 1983, pp. 12-9. For a contemporary rebuttal of Awatere's and following literature see Geoffrey Palmer's "Treaty Claims: The Unfinished Business", speech at the *New Zealand Institute of Advanced Legal Studies*, Wellington, 10/2/1995

[198] Paul Havemann, " 'The Pakeha Constitutional Revolution' Five Perspectives on Maori Rights, and Pakeha Duties", *op. cit.*, pp. 53-77.

> **the corpus of common law principles governing the effect of British annexation upon pre-existing tribal property rights. The doctrine ultimately derives from consistent practice of the Crown wherein tribal property rights were treated as 'legal' as well as 'moral' in character.**[199]

By acknowledging these rights the Crown became the sole institution able to nullify aboriginal title. This created a monopoly for the Crown to buy from the aboriginals the land it annexed. This monopoly came to be known as the pre-emptive right. This was the early practice of the Crown, to annex and then buy aboriginal – in this case Maori – land.

Ultimately, McHugh sees the problem of Justice for the Maori from a lawyer's point of view; he advocates throughout his work – and with increasing clarity through his later writing – the idea that the land claims and their legal basis are axiomatic to Maori in their search for justice.[200] Therefore, aboriginal title becomes very important to Maori claims for justice, in the form of rights.

Aboriginal title in New Zealand was extinguished in the notorious case *Wi Parata v The Bishop of Wellington and the Attorney-General.*[201] However, a revisitation of aboriginal title,

> **upends the *Wi Parata* approach, holding, instead, that one must screen local statutes for an extinguishment rather than a recognition of tribal property rights.**[202]

The idea of aboriginal rights has grown, in McHugh's argument, against the doctrine of statutory incorporation. This doctrine, has set the precedent for all courts that aboriginal or Maori rights can be recognised only where a statute definitively outlines them.

> **The greatest difficulty in enforcing the Treaty of Waitangi however remains the rule of statutory incorporation....That rule, established in 1941, states that the Treaty is only enforceable to the extent that it is incorporated into statute.**[203]

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[199] Paul McHugh, "Aboriginal title returns to New Zealand Courts", *New Zealand Law Journal*, Feb. 1987, pp. 39-40

[200] I call them land claims, but in truth many of the Tribal claims before the Waitangi Tribunal cover other resources, such as fishing (though supposedly extinguished by the Sealords deal), the seabed, coastal areas, rivers, and in one particular case, the airwaves (though this was a general claim brought by the Maori Council, see *NZ Maori Council v Attorney-General* (1992) 2 NZLR 576).

[201] (1877) 3 NZ Jur (NS) SC 72.

[202] Paul McHugh, "Aboriginal title returns to New Zealand Courts", *op. cit.*, p. 39.

[203] Mai Chen & Geoffrey Palmer, *Public Law in New Zealand*, *op. cit.*, p. 342.

McHugh argues, as seen earlier, that save for this rule and its subsequent incorporation in Acts of Parliament,[204] there would be an easy path for Maori to follow in suing the Crown directly. That is, Maori could sue for breach of Fiduciary duty.

Fiduciary Duty is part of common law and arises from unextinguished aboriginal title. It has been recognised in North American courts[205], and recently in the much hailed Australian 'Mabo' case.[206] McHugh summarises this duty as, "a standard of accountability incumbent upon those who have a regulatory and discretionary (including, perhaps, the legislative) power over assets subject to an aboriginal claim".[207] That is, in the New Zealand courts, a claim could be bought by Maori against Crown for an "alleged violation" of aboriginal title where the assets in question were obtained through some illegal manner (partially or wholly). The claim could be issued against the Crown, because, it was the crown that had "initially and constitutionally" the only right to purchase Maori land. Following this path, common law recognises not only its own precedents, but also the symbolism of the Treaty of Waitangi, as the following *ratio decidendi* from the 1987 case reflects. However, one should note, that the ruling was possible only through a statutory incorporation of the Treaty.

> **The choice by Parliament of the expression "inconsistent with the principles of the Treaty of Waitangi", in s9 of the Act, was deliberate. It reflects that the English and Maori Texts in the first schedule of the Treaty of Waitangi Act 1975 are not translations the one of the other and do not necessarily convey precisely the same meaning. *The Treaty signified a partnership between the Pakeha and the Maori requiring each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties.* The**

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204 It is true that the original sections of the Maori Affairs Act 1953 , (ss 155-59) , which prevented actions against the crown for its dealings in relation to Maori land sales have been repealed, but the replacing act, the Te Ture Whenua Act 1993 (ss. 360-1) prevents contemporary Maori suing for the breach of Fiduciary duty. For a full exposition of the 'hollowness" of the repeal of the 1953 Act, see McHugh, "A new role for the Maori Court in the resolution of Waitangi Claims", *New Zealand Law Journal*, June 1993, pp. 229-32. especially p.231.

205 *R v Guerin* (1984) 13 DLR (4th) 321: & *R v Sparrow* (1990) SCR 1075: (1990) 4 WWR 410 ; but only eleven years before this case, a Canadian Court had found (though 3 dissenting out of 6) that aboriginal title could still be extinguished completely, without recourse to fiduciary duty. See *Calder v Attorney-General for British Colombia* (1973) 34 DLR3d) 145 (SCC).

206 *Mabo v Queensland* (1992) 175 CLR 1; 66 ALJR 408. For an examination see Robert Blowes "Governments: Can You Trust Them with Your Traditional Title?" in *Essays on the Mabo Decision*, The Law Book Company, Australia, 1993, pp. 134-47.

207 Paul McHugh, "A new role for the Maori Court in the resolution of Waitangi Claims", *op. cit.*, p. 231.

> **duty of the Crown is not merely passive but extends to active protection of the Maori people in the use of their lands and waters to the fullest extent practicable. The duty is not a light one and is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured..**[208]

This is McHugh's justice for Maori; Changing the New Zealand legal system so that it recognises Maori rights dating from before the Treaty. However, McHugh's own explanation of how this change might come about is not outlined using justice theory. He places the change in the rejection of the late nineteenth century racism, and that racism's lack of logic.

> **The movement away from the Wi Parata mentality by that legal community of this country was accomplished by two methods. First orthodox case analysis exposed the internal contradictions of the *Wi Parata* approach and its incompatibility with other cases from Anglo-American cases. Second, an approach examined here[the orthodox legal paradigm] rejected late nineteenth century attitudinizing about Maori rights.**[209]

The change of which McHugh speaks, is a practical revolution. Palmer is correct, for practical reasons, to call it a 'Maori constitutional revolution.' However, it is not truly a constitutional revolution.

It is a practical revolution because the doctrine of Parliamentary sovereignty could be limited by a practice upon which that very doctrine is based. To explain, McHugh views the English law that New Zealand inherited as growing around the protection of property, and this has been carefully nurtured in New Zealand's separate constitutional growth. The ultimate protection of property lay in the Crown's absolute radical sovereignty over land. However, the 1987 SOE act placed a limit on the Crown through a recognition of its fiduciary obligation.

This is not a revolution in legal theory concerning the rule of law. To explain, the process which McHugh advocates, whereby Maori property rights are recognised within New Zealand courts, is a basic 'rule of law' practice. He has shown that the rulings, and Acts, stemming from the *Wi Parata* case were based in an arbitrary abuse of power. The

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208 *NZ Maori Council v Attorney General* (1987) NZLR 641, 642.emphasis added.
209 Paul McHugh, "Legal Reasoning & the Treaty of Waitangi", in Graham Oddie & Roy Perret (eds.), *Justice, Ethics and New Zealand Society*, Oxford University Press, Auckland, 1992, p. 94.

rights of Maori were dismissed on wrongful grounds. The practice of the rule of law is the recognition of an arbitrary abuse of power toward Maori. "In this sense", wrote AV Dicey, "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[210] Dworkin shows how rights are linked to this conception of the rule of law, by stressing the difference between rights in, and outside, the legal system.

> **Citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It [the rule of law] insists that these moral and political rights be recognized in positive law so that they may be enforced *upon the demand of the individual citizens* through courts or other judicial institutions.**[211]

McHugh's construction of his legal methodology parallels Dworkin's account of legal rights in the rule of law. The rights stemming from the Treaty, are part of the basic political rights of Maori as New Zealand citizens. That is, Maori property rights are, in McHugh's scheme part of the common law.

> **(1) the definition of a Treaty claim or right and (2) the translation of that articulated Treaty right into the vocabulary of the legal paradigm. Step (1) is an exercise which legal method leaves to the plaintiff.... The lawyer must perform (2), informing the claimant of the way the law responds to his (*sic*) articulated claim... In the context of Treaty claims the process of definition is clearly a task which only Maori can perform, whilst lawyers must tackle the second step of translation. The translation of a Treaty right is not the definition of a right. There may be a wide gulf between the defintion and the translation of a particular Treaty right. Revelation of the gulf and provision of strategies for narrowing it is one of the most valuable tasks performed by orthodox legal methodology be it in legal articles or court judgements.**[212]

Having seen that McHugh's legal reasoning fits within a rule of law, a question is begged about the justice of that rule of law. As already outlined in Sharp, there is a contestation of the sovereignty of the Crown, and therefore the rule of law. One notorious commentator who disagrees with McHugh is Moana Jackson. He argues that using the rule of law to gain Maori rights is to accept Pakeha dominance of Maori. The

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[210] AV Dicey, *Introduction to the study of the Law of the Constitutions*, 9th ed., Macmillan, London, 1948, p. 188.

[211] Ronald Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge , Mass., 1985, pp. 11-12.

[212] Paul McHugh, "Legal Reasoning & the Treaty of Waitangi", *op. cit.*, p. 98.

constitutional revolution, in his view, is a Pakeha re-defintion of the Rangatiratanga promised in Article 2 of the Treaty of Waitangi.[213]

> **Pakeha judges, and institutions such as the Waitangi Tribunal, no longer dismiss the concept of Rangatiratanga, they simply redefine it as a limited property right... Pakeha academics frame the whole discussion of Maori rights in a bi-cultural jurisprudence of the wairua that is consistent with the common law. Those who pursue such views are neo-colonists who neither understand nor respect Maori philosophy or culture.**[214]

Under Dworkin's account of the workings of the rule of law, Jackson is quite correct. The legal system modifies, and in McHugh's phrase 'translates' individual moral rights into its common law. The question of the justice of this system is Jackson's main point. He clearly does not reasonably agree with the rule of law for Maori. McHugh on the other hand readily accepts this process, and castigates commentators such as Jackson whose work,

> **hardly deserves description as a critique, for it absolves its proponents from any from of intellectual engagement with the [orthodox legal] paradigm except through what is usually superficial and selective scholarship based on a weak to non-existent historical method tailored to reveal the conspiratorial character of Pakeha law and governance.**[215]

McHugh misses, to a certain extent, the question that Jackson is posing: is justice for the Maori to be found in the legal system?

Within this thesis, the answer cannot be provided. However, it is possible to see what conditions of justice that legal system meets. The first, and most important condition – if justice as impartiality is the guide – is that no one can reasonably reject the legal system, in an informed and unforced agreement. This condition cannot be met, because the legal system is ensured of compliance by enforcement procedures. That is, the rule of law cannot be negotiated. It exists through enforcement of the rights and duties it grants. As such, the legal system must be a theory of justice of some kind as it grants rights and duties.

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213 Moana Jackson, "Commonwealth Law Conference", *New Zealand Law Journal*,1990, p. 334.
214 Moana Jackson, "The Treaty and the Word; The Colonisation of Maori Philosophy", in Graham Oddie and Roy Perret (eds.), *Justice, Ethics and New Zealand Society*, Oxford University Press, Auckland,1992, p. 8.
215 Paul McHugh, "Legal Reasoning & the Treaty of Waitangi", *op. cit.*, p. 98.

> **Ideally, rules of justice assign rights and duties to people in their personal and official capacities in such a way that, in any situation, it is clear what each person is entitled or required to do. These entitlements and requirements should fit together harmoniously; we should not find for example, that *A* is entitled to demand a certain thing from *B* but that *B* is not under a duty to supply it to *A*.**[216]

This is certainly a valid description of the legal system. However, like justice as reciprocity, the legal system has no cogent moral backing. Individuals must simply accept its prioritisation of justice over the good. Like the Rawlsian original position, the rules of justice that the legal system obtains, are predicated by its conception of the a 'legal person'. The legal system is the baseline fairness of an agreement. In McHugh's view, Maori must simply accept this agreement, as there is no other way to realise justice for the Maori.

Justice as reciprocity is not accepted by Barry because the motives for acting justly and its criterion for a just set of rules are different. Under justice as reciprocity the motive for acting justly is self-interest. However, the just set of rules is an arbitrary imposition – such as Rawls priority of the right over the good– and therefore the conception of justice is not strong enough to hold everybody in agreement. Some individuals will disagree with the set of rules established.

Justice as reciprocity would seem to explain much of McHugh's argument. There is a baseline fairness appealed to by him in his reconstruction of aboriginal legal right. He does not attempt to produce a cogent moral theory, as under justice as reciprocity, there is only the arbitrary baseline upon which one can treat for justice. Unfortunately, under this conception of justice the arbitrary nature of the baseline means that those not accepting it – those who do not find it in their self-interest to agree with it – can undermine the agreement. That is to say, it is not a stable justice agreement because not all citizens are included.

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[216] Brian Barry, *Justice as Impartiality, Clarendon* Press, Oxford, 1995, p. 72.

CHAPTER FIVE

Justice and Maori Rights

Chief Judge ET Durie

> **'Right' has multiple meanings, and they are so deeply entrenched in both ordinary and technical usuages that *the best one can hope for is to keep the various meanings distinct and see to it that the distinctions are attended to.***
>
> LC Becker, *Property Rights; Philosophic Foundations*[217]

The subject of Justice for Maori has a discourse of rights which seems to be as dark a hole as that which Hobbes' *Leviathan* creates for historians of political thought. This chapter will discuss Edward Durie's use of right theory to promote justice for Maori.[218] Barry suggests that the aim of a theory of justice was to produce a cogent defence of rights. McHugh seemed to feel that since the rights he used were within the legal system he had no need of a theory of justice. Standard theoretical defences of the legal system will do for McHugh. Durie, is not so clear on the theories which he brings to bear in his polemic.

He has entered this maelstrom from an enviable and well-informed position. He is Chief Judge of the Maori Land Court[219], and therefore also chairperson of the Waitangi Tribunal. Many credit him, almost solely, with bringing that institution into a position of some power by careful use of the law. Sharp, for instance, states that

> **[w]hen...ETJ Durie became Chief Judge of the Maori Land Court, the Tribunal found itself in the hands of not only a Maori, but of a very capable judge, a brilliant and subtle advocate, and a man of marked political skill.**[220]

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[217] Routledge & Kegan Paul, London, 1977, p. 7.

[218] BA LLb (honoris causa) Wellington, Chief Judge of Maori Land Court, Chairperson of the Waitangi Tribunal.

[219] From 1981.

[220] Andrew Sharp, *Justice and the Maori*, Oxford University Press, Auckland, 1991, p. 77.

Recently however, there is some evidence that the Tribunal is veering from its brief, vague though it is.[221] Indeed the recent Court of Appeal case regarding broadcasting assets[222] showed that the Courts would not accept Tribunal recommendations on Treaty principles in all cases.[223]

Yet, however much knowledge Durie may have of his subject, there is much within his extra legal writing that fails to acknowledge movement in justice theory since the time of natural right. That is Durie does not create a cogent argument for Maori rights. His argument uses natural right to defend legal rights, and this leaves the rights without a theory of justice, because his defence of natural rights for Maori is unsound.

Maori rights are to become – in Durie's vision – part of the legal fabric of New Zealand. The rights will create a justice for Maori that grants them a place in the constitution.

> **Ultimate justice for indigenous peoples depends on political power sharing through constitutional reform.[224]**

This emphasis on rights could be either a useful philosophic exercise or a damning legal case. Unfortunately it is neither. Instead, the impracticability of his approach necessitates a less than rigorous concept of rights which he does little to elucidate and less to define. Yet, there is still much in his writing that can be taken as a statement of the Maori position within the governing institutions of New Zealand.

The predominant thrust of his argument is that Maori rights – especially as guaranteed in the spirit of the Treaty of Waitangi – have been denied. This chapter shall examine whether such an argument strengthens or weakens the larger issue of justice for Maori. Ultimately, it is the phrase 'rights denied' around which this chapter must concentrate. For that particular phrase is the linchpin of his argument. If the rights can be set out, and then shown to have been neglected, then they strengthen the argument of justice for the Maori. In law, it would mean that a duty to restore was incumbent on the

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221 To make non-binding recommendations to government "relating to the practical application of the Treaty [of Waitangi]". Treaty of Waitangi Act 1975, s6.
222 *The New Zealand Maori Council v Attorney-General* (1992) 2 NZLR 576.
223 Palmer reads this case as a "retreat from the outer limits of Treaty jurisprudence" (*Crisis in the Constitution*, John McIndoe, Dunedin, 1992, p.73, n.13.), but equally it is a failure of the Tribunal to find ways around the doctrine of statutory incorporation.
224 Edward Durie, "Justice, Biculturalism and the Politics of Law", in *Justice and Identity*, Anna Yeatman and Margaret Wilson (eds.), Bridget Willaims Books, Wellington, 1995, p. 33.

party which denied the rights of the Maori; namely, the Crown. Even if the rights could not be set out legally, then at least in moral terms, they could add weight to a political argument of justice for Maori. Unfortunately, his argument strengthens neither the moral, nor legal case. This is a great shame – given his guiding role in the Treaty of Waitangi settlements – because his approach to "justice, biculturalism, and the politics of difference in New Zealand"[225] is in need of good theoretical support.

To set out Durie's argument for the moral rights for justice for Maori is relatively simple. However, it is complicated somewhat by his use of 'law' to describe systems of rules that are either recognised, or not recognised with the courts, and by Parliament. He uses 'law' to mean either Tikanga Maori, or the rules set out by the New Zealand legal system.

Durie's guiding axiom is the view that prior occupancy of land gives special rights. He argues that this is because the 'law' within lands – colonised by Europeans – already existed within the indigenous people.

> **It seems to me no Canadian, Australian, United States or New Zealand constitution would be valid that does not reflect the reality that our countries were settled on lands already owned, and *that as part of the natural order, there were pre-existing rights of property and society that existed, and still exist, amongst the original people.* Those rights cannot in justice be removed, and thus the status of the indigenous peoples as special constitutional entities. The question is not whether they should be recognised as such, for that is what they are. The question is how formal recognition should be.**[226]

Durie's claim of injustice visited upon the Maori, outlined above, haunts the archaic vision of natural rights. The legal rights are mere extensions of these godlike motifs.[227] In modern light these natural rights are now, *sub* Durie, aboriginal rights.[228]

> **What is law but the enacted or customary rules of a community? And what communities must qualify most for national recognition of their laws than those who are a nation's founding peoples? *Maori in this context, are not***

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225 *Ibid.*, p. 34.

226 Edward Durie, Address at Session on "Self-Determination", at Conference on *The Position of Indigenous People in National Constitutions, Constitutional* Centenary Foundation and Council for Aboriginal Reconciliation, Canberra, 4-5 June 1993, p. 4. Emphasis added.

227 Godlike in that they require a large "leap of faith" in order that one may see practical use in them.

228 Edward Durie sometimes means moral aboriginal rights, but they can also be legal or natural. Often there is a combination of meanings in his use.

> ***simply a race, or a cultural group but a people with constitutional status arising from prior occupancy.***[229]

One should note that these rights, "cannot in justice be removed". This puts the cart rather before the horse, because if those rights had not 'been removed' then there would be no question of justice. But saving the reader from a repetitive cliché, is there a defence for these rights? To answer simply, no. For in a sovereign state such as New Zealand, there are no natural rights, only those rights enforced by the sovereign. More precisely, one can erect a defence for many kind of moral rights, including natural rights. However, unless these are rights guarded by the legal institution, under orders from the Crown, they have little political force. For instance Durie states,

> **[m]aori Law is... the original *lex situs*; It springs from the earth. Other races depend for the recognition of their law upon some valid importation.**[230]

This could well be a valid anthropological claim and heartfelt by many numbers of Maori. At the same time however, New Zealand's legal system barely recognises Tikanga Maori. Perhaps the legal system should recognise Tikanga Maori, but it is not a particularly strong argument to say that Tikanga Maori should be included in New Zealand common law or statutes because some of the population feel it should. Durie needs to explain how legal rights are created. That is, the issue Durie implicitly raises in the above quote is not one of Maori rights, or even justice for the Maori, but the origin of legal systems. In a sense, to even follow Durie's logic to this extent is indication of the excess of rhetoric contained within his work. For, his argument is premised on the idea that Tikanga Maori has an obvious right to sovereignty[231] over New Zealand. Theoretically, the exclusion of the Maori rights of which he speaks from the New Zealand legal system is to conflate two wholly autonomous concepts.

Maori law, as Durie has characterised it above, is not the same conceptual beast as the rights which the New Zealand legal system offers to its citizens. Maori law is largely unenforced on Pakeha, and he grants it justification through the land. There is no need for

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[229] Edward Durie, "Justice, Biculturalism and the Politics of Law", *op. cit.*, p. 34. Emphasis added.
[230] *Ibid.*, p. 34.
[231] His use of sovereignty is somewhat ill-defined and given the difficulty of translation between Maori and Pakeha political terms, this cannot be held against Durie. However, here there are certain parallels with the Crown's sovereignty of New Zealand. ie land held under absolute radical ownership by the crown, and complete control of the legal system.

the courts or Parliament when invoking rights or obligations through law to justify it by reference to its origins. Often, of course, the legislation which creates these rights is justified in this manner. Perhaps in a parliamentary debate or in wider New Zealand the rights are justified by recourse to historical material in the same manner as Durie uses above. However, once legislated these rights simply exist. There is no underlying substratum which keeps the legal system existing. New Zealand for all intents and purposes uses a positivist approach to law. Durie needs to show then that these Maori 'rights' should become law. However, to simply state that they exist seems of little use. It is as if a Christian were crying 'unfair' when placed in the lions den at the height of the Roman Empire.

Durie also makes use of another two conceptions of 'right' stemming from the quasi-legal (almost established within New Zealand jurisprudence) fiduciary duty incumbent on the crown to protect Maori customary title. This conception clearly entails a recognition of the sovereignty of the Crown, and its legal system. Without such recognition, these rights have no institutions to enforce them.

This conception demands full reparation for all illegalities. Durie argues that the lack of legal Maori land rights must be remedied.[232] However, leaving detail aside, he states that this argument is actually extra-legal, and disowns the very rights upon which his argument is based.

> **Although Maori have consistently sought recourse to some independent judicial authority for the resolution of their outstanding claims, having been denied that in the past, changed circumstances have made any full redress all but impossible.**[233]

Durie's claims for legal redress are left floundering alone without supporting argument. In essence, Durie has started from the proposition of injustice done to the Maori. A conception of rights have been used in order to prove this injustice. Then, when rights have demarcated the lines of the dispute, the parties involved, and shown what needs to be rectified, they are deemed to be no longer useful; the injustice having been made obvious, and the parties already under negotiation to resolve the issue. Yet, within

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[232] Edward Durie, "Waitangi; Justice and Reconciliation", *Second David Unapion Lecture*, School of Aboriginal & Islander Administration, University of Adelaide, 10/10/1991, p. 11.
[233] *Ibid.*

the legal system of New Zealand, to renounce the rights which are granted by law is certain death for the Maori land claims.

Durie rescinds the argument of the legal rights because New Zealand could not possibly make good a full repayment for the rights denied within the law.[234]

> **The issue is not then legal reparation when an exact allowance cannot be given. The issue is fair re-allocation of the country's resources between the aboriginals and the country at large, according to strategies that provide equitably between the two contenders and between the aboriginal groups themselves.**[235]

Therefore Durie advances from his axiomatic statement – of Maori rights denied – to a point where these rights become nonsensical. They become nonsensical because Durie is rescinding the initial statement. Durie's founding postulate of Maori legal rights arising from prior occupancy is, following McHugh's interpretation, extra legal at this time in New Zealand history. There is some reason, as the chapter on McHugh showed, to believe that there may be some move towards including rights concerning only Maori in the common law. However, Durie's argument should not be hurt by the non-legality of the rights which he first uses. It is because he baulks at their becoming legal that hurts his argument. Without legality the rights contribute nothing to justice for the Maori; they are mere rhetoric. This, at least is the logical conclusion one must come to following Durie's argument. "The political wing" he states, "is ultimately determinate."[236] In the speech where this appears, he makes no clear argument for a superiority of a political solution save for a minor questioning of an unfair legal system. He argues that since aboriginal rights are not recognised, the legal system "should not be seen as incompetent to deal in the area of humanity."[237] This strange conclusion occurs because as his argument moves towards its end, the rights change their status, and he has to drop his founding postulate of natural rights. The law will always look incompetent to those who defend natural rights. It does cannot call upon a value system which parallels the surety of belief of

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[234] This is not an uncommon belief. For its supposed theoretical difficulties. See Sharp "The Impossibility of Global Reparation in Aoteroa/New Zealand", in Sharp, *Justice and the Maori, op. cit.*, pp. 108-124.
[235] Edward Durie, "Self-Determination", *op. cit.*, p. 6.
[236] Edward Durie, "Waitangi; Justice and Reconciliation", *op. cit.*, p. 17.
[237] *Ibid.*, p. 15.

natural right followers. Law is an institution which continually refines its process of practice, and is therefore always changing. Natural rights are simply beliefs. Against belief, practice must look uncertain and incompetent since it is based on a multiplicity of beliefs that all call for attention. Law must answer to the many beliefs of society in order that it may survive, natural rights only to those who immediately believe in them.[238]

The circularity of this method speaks volumes for Durie's optimism regarding the clarity of Maori claims. Nevertheless, it is also clear that one cannot invoke Maori rights to flesh out the claim of justice for the Maori, only to withdraw those same rights as they begin to flounder. To solve the rhetorical nightmare of a lost logic another form of rights is introduced, but it is one which requires a far greater upheaval in the jurisprudence of New Zealand. Durie, while muddling with justifications for Maori legal rights, advocates a "re-arrangement" of the polity of New Zealand that will "reflect the constitutional status of the aboriginal people".[239] This status only can be seen as a result of certain rights that the Maori are imbued with by grace of being 'aboriginal'.

> **Maori are a domestic constitutional entity entitled to special recognition... Tikanga Maori or Maori customary law is included, has been here since time immemorial and, in my view, has legal status, even without parliamentary recognition. It is part of the law because it has always been. It grew from out of this earth.**[240]

It is at this point that Durie's idea of achieving justice for the Maori becomes a little compromising to his goals. Clearly, he does tie this granting of special rights to the earlier issue of denial of rights when he states that "resource reallocation must be politically empowering of aboriginal groups"[241]. However, within this schema of distributive justice, the concept of rights becomes especially confused as there are three different strands within that one claim. First, there are the principles of Aboriginal natural right, then the corresponding legal rights. Finally there is the implicit claim that those two rights combine at all. Clearly it is the concept of rights that is central to Durie's thesis, yet the definition he provides is a little lacking in clarity. Aboriginal natural right from prior

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238 Jean Hampton, "Democracy and the Rule of Law", *The Rule of Law, Nomos 36*, Ian Shapiro (ed.), New York University Press, 1994, p. 41.

239 Edward Durie, "Self-Determination", *op. cit.*, p. 7.

240 Edward Durie, "Justice, Biculturalism and the Politics of Law", *op. cit.*, p. 34.

241 Edward Durie, "Self-Determination", *op. cit.*, p. 7.

occupancy could give way to a legal right. That right would stem from the fiduciary obligation on the Crown to protect the aboriginal property right, especially through the Treaty of Waitangi. However, without a deeper theoretical investigation of the Treaty it is impossible to assign these *fiduciary duties*, and their correlative rights[242], a place within this essay. In any event, Durie makes little attempt to use the Treaty as any more than a "talisman" of the Maori claims so we shall leave the jurisprudence of the Treaty for the moment. As he states,

> **[t]he Treaty does not extend Maori rights beyond those due to Aboriginals generally.**[243]

Durie comes closest to a homogenous concept of rights when he discusses the resolution of justice for the Maori in the terms of equity; a concept which takes his Maori rights into opposition with strict legal positivism and apparently unable to be dealt within the strictures of Statute and Common law.

> **The issue [of justice for the Maori] is how to resolve more quickly and more fairly the legacy of competing equities.**[244]

The competing equities are, to simplify, the interests of the Aboriginals, and the country at large. Of course, by taking this path, Durie forfeits the strength of Maori rights in the legal sense. In place of Maori rights he puts equity, and equity relies on a notion of fairness. Unfortunately Durie is not even talking of legal equity, where a court decides an issue not only with case law, but with certain principles of equity or fairness. Instead Durie is talking of distributive justice. As he says,

> **[t]he issue is not who did what to whom and when and why, whose rights were extinguished and whose were not, or who may now bring an action and who is out of time. Nor should the matter depend on who can prove a case after this lapse of time, where the lawyers profit more than the litigants...**[245]

So, after using rights to claim justice for Maori, Durie leaves them behind for distributive justice. Maori "Political empowerment" and "resource re-allocation" through direct

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[242] Ronald Dworkin, *Taking Rights Seriously*, 2nd ed., Duckworth, London, 1978, pp. 90-4, 364-8.
[243] Edward Durie, 1993, *op. cit., p.* 4.
[244] *Ibid.*, p. 6.
[245] *Ibid.*, p. 6.

government negotiation are products of this distributive justice or equity.[246] This can be argued from his writings in two ways.

The first argument is from the legal position. As we have seen, the Maori can claim either customary or citizenship rights have been denied to them. Nevertheless, Durie contends that justice based on these rights is unworkable. That is, the basic property and social rights that appear defendable from are legal point of view are swept away because the logical conclusions of the theory are so far reaching.

> **Reparation cannot depend on proof of wrong and on legal process alone. We would need a vast economy to make full amends in accordance with law.**[247]

Much has already been written on why the Maori do not trust the courts[248], but in this case it would seem that this is not why they are avoided with such rigour. Durie appears to be wiping away the idea that Maori rights of any kind are defendable from a legal angle merely because the consequences of a supportive finding are dire for New Zealand. In essence, because he sees it as impossible that the courts could not balance the legal rights of Maori and the country at large. Perhaps, the shying from a claiming of full legal rights is also due to the problematic nature of indigenous rights in law. To be more precise, it is the problem of whether the Maori people have specifically Western legal rights of total ownership by virtue of being part of New Zealand when it was declared a sovereign state. In an important Canadian case, it was decided that the indigenous people's right to the land was capable of being over ruled by the sovereign power.

> **Whatever property right [of the indigenous people] may have existed, it had been extinguished by the properly constituted authorities in the exercise of their sovereign powers.**[249]

However, as explicit as this would seem as to the status of pre-existing legal rights of indigenous peoples, three of the six judges dissented and stated in their judgement that,

> **[o]nce Aboriginal title is established it is presumed to continue until the contrary is proven and when the predecessors of the appellants came under**

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[246] *Ibid.*, p. 6.
[247] *Ibid.*, p. 6.
[248] See especially Moana Jackson, *The Maori and the criminal justice system. A new perspective*, 2 vols., Department of Justice, Wellington, vol. 1 1987, vol. 2 1988.
[249] *Calder v Attorney-General for British Columbia* (1973) 34 DLR 3rd 145.

> **British sovereignty they were entitled to assert their Indian title as a legal right.**[250]

The legal position on Indigenous rights, then, is somewhat ambiguous[251], though it would appear that "the Crown...could pass clear legislation ending or 'extinguishing' aboriginal title, or parts of it."[252] Unfortunately, for the Maori, this extinguishment was carried out in the 1909 Native Land Act. So it would seem that Durie is correct in avoiding the use of indigenous legal rights as a theoretical argument *viz* justice for the Maori. Yet, as has been noted, this invalidates his next argument; that justice for the Maori must be found in 'equity'. One cannot, after all, produce injustice from a rights-based argument, only to ask that when negotiating a resolution that the rights be dismissed. In essence, one must have some substance of argument with which to decide the finer points.

One further complexity in setting forward an argument for these rights is that they are to be used to defend a claim for justice by a group, not an individual. Individual rights have a long been defended as natural rights from Locke through to Nozick. However, as useful as these theorists have been in defending the basis of individual legal rights – natural rights theory – they are hopeless in the theory of Aboriginal right.[253] Aboriginal property rights are already within the New Zealand legal system. However aboriginal rights as a whole mean little to existing law. Therefore they are political rights for a group. This is a very difficult problem within Western theorems of right as 'rights' take much of their power from their application to all citizens. As Hart has noted; within this tradition of philosophy,

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250 *Ibid.*,146.

251 How ambiguous is shown in Lord Denning's altogether open ended statement that aboriginal rights should not be interfered with "except when necessary in the interests of *peace and good government*". (emphasis added) *R. v Secretary of State for Foreign & Commonwealth Affairs, Ex Parte Indian Association of Alberta & Ors* (1982) All E.R. 118 per Lord Denning at 123.

252 "Statement of Claim and Opening Submissions", *Ngai Tahu Claim before the Waitangi Tribunal*, Ngai Tahu Trust Board, 1987, p. 17.

253 One Locke scholar points out that far from being helpful, Locke's contribution to rights, and in particular natural aboriginal rights, can severely hurt the aboriginal case. His approach is contextual, and he argues that Locke conceived of Aboriginal right in order that it could be taken away by political right. Locke was one of a few organising the colonisation of America so it was vital that dispossessing the Indians was justified in moral rhetoric. See James Tully, "Rediscovering America; the Two treatises and Aboriginal rights", *An Approach to Political Philosophy : Locke in Contexts*, Cambridge University Press, Cambridge, 1993, pp. 137-176.

> **[t]he concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules.**[254]

Hart therefore concludes that the invoking of an individual right, is simply a claim "of the equal right of all men to be free".[255] Where Hart's self-interpretation of this phrase[256] is shown to be defensible, and enshrined in the governing institutions of Western Law, it is questionable whether it helps or hinders the case of aboriginal rights. On the one side, it can be argued that individual rights are impinged upon by group rights such as those held up by Durie. For example, rights for Maori which allow them – as a single group – to take shell fish out of season seem to undermine the equality of political rights for New Zealanders[257]. However, writers such as Kymlicka would argue that to maintain a Maori individual's right to act as a citizen, they must have special Maori rights.

> **We can defend aboriginal rights as a response, not to shared choices, but to unequal circumstances. Unlike the dominant...cultures, the very existence of aboriginal cultural communities is vulnerable to the decisions of the non aboriginal majority around them. They could be outbid or outvoted on resources crucial to the survival of their communities, a possibility that members of the majority cultures simply do not face. As a result, they have to spend their resources on securing the cultural membership which makes sense of their lives, something which non-aboriginal people get for free. And this is true regardless of the costs of the particular choices aboriginal or non-aboriginal.**[258]

Kymlicka's argument, however, takes the issue of rights into grounds which Durie did not contemplate; The Liberal-Communitarian debate. Within that debate, as the introduction showed, Maori natural rights – as defended by Durie – would fall into a

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[254] HLA Hart, "Are there any Natural Rights", in AI Melden (ed.), *Human Rights*, Wadsworth, California, 1970, p. 63.

[255] *Ibid.*, p. 75.

[256] "By saying that there is this right I mean that in the absence of certain special conditions which are consistent with the right of being equal, and adult capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restraint against himself save to hinder coercion or restraint (2) is at liberty to do (ie, is under no obligation to abstain from) any action which is not one coercing or restraining or designed to injure other persons." HLA Hart, "Are there any Natural Rights", *op. cit.*, p. 61.

[257] See *Te Weehi v Regional fisheries Officer* [1986] 1 NZLR 680 (High Court) where shellfish were collected out of season, but due to a technicality (the prosecution did not prove that Te Weehi did not have a right to take the shell fish) about the nature of Maori fishing rights in the fisheries statutes.

[258] Will Kymlicka, *Liberalism, Community and Culture*, Clarendon Press, Oxford, 1989, p. 187

communitarian argument. They would be defended upon the different shared practices of Maori, as opposed to Pakeha. For those rights to be translated into legal protection of special Maori rights, Pakeha would necessarily have to support them. However for Pakeha to accept that there was a case for special protection of Maori culture, they would have to have a baseline of fairness. That is, the rights would be defended under a theory of justice as reciprocity. For justice as mutual advantage is automatically ruled out if some idea of fairness is introduced. The notion of fairness would necessarily be a prioritising of the right over the good. The baseline fairness here would be some concept of the right of self-determination.[259] The use of this concept would also create the need for New Zealand law to categorise Maori taonga and tikanga. More importantly, the priority of the right over the good is a weak theory. Durie's notion of rights creates, with its justification of prior occupancy is prioritising the right of Maori, over any particular lifestyle choice or 'good'. When he rescinds these rights to call for distributive justice, he is doing little more than recognising their inadequacy in the face of a Pakeha majority. The arbitrariness of Durie's baseline – prior occupancy – may seem as unfair to Pakeha, as their baseline – equality – seems like a colonial imposition to Maori.

[259] This would not be out of place given the interpretation given the Maori text of the Treaty. That is, article two of the Treaty of Waitangi guarantees 'te tino rangatiratanga', or unqualified exercise of chieftainship.

CHAPTER SIX

Just Principles and Just Policies

Rt. Hon. Sir Geoffrey Palmer

The government's policy caused a political maelstrom, but it was one driven by a fundamental principle of justice.

Geoffrey Palmer, *New Zealand's Constitution in Crisis*[260]

The Rt. Hon. Geoffrey Palmer is one of the most eminent academics and politicians who has worked towards his conception of justice for Maori. From either inside the political system or studying the public law that surrounds the question, he has been a leading advocate for a settling of the land disputes. He was the architect of the government response to Maori calls for justice as Attorney-General, Deputy Prime Minister and then as Prime Minister during the time of the Fourth Labour Government.[261] From his legal and Parliamentary experience Palmer argues that Maori claims for justice should be removed from the political setting into the Courts. This chapter examines the reasons he gives for this move, and attempts to understand the principles of justice which underwrite these reasons.

In setting out Palmer's argument this chapter will necessarily reiterate some of legal matters included in Chapter Four. However, the material should not be too repetitive as Palmer and McHugh argue from different orientations. McHugh's argument utilised the common law, and its ability to limit the New Zealand Parliament. Palmer's argument moves in the opposite direction. He gives reasons for limiting Parliament in order that Maori can claim justice within the common law.

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260 John McIndoe, Dunedin, 1992, p. 82.

261 He also has been MP for Christchurch Central 1979-1990, Leader of the House, Minister for the Environment. All of these positions clearly have necessitated a thorough understanding of Government responses to Maori calls for justice.

Palmer argues that part of the Government revolution during the 1980s involved a new response to the call of justice for Maori. In the most basic outline this revolution resulted in the placing of the Treaty of Waitangi – more precisely its principles – in the forefront of the public mind, and more substantively in public law[262]. This was achieved by implanting a proviso within a new piece of legislation. The proviso meant that the legislation and the rules it created, procedural or substantive, could not be contrary to the principles of the Treaty of Waitangi.[263] The piece of legislation was the State-Owned Enterprises Act 1986. The proviso it contained and the resulting Court case made the courts consider the exact meaning of "the principles of the Treaty", and more importantly allowed the courts to set precedents that incorporated the quest of Justice for Maori within common law.[264]

While Palmer might a be constitutional law expert, he admits his government had no idea that including the proviso would create such precedents in New Zealand law. The radical nature of the legislation had overshadowed the changes that the inclusion of the Treaty would bring about.[265] Before 1987 the lack of Act's of Parliament that incorporated the Treaty[266] meant Maori had little ability to question the legality of land sales or the promises made to them in the Treaty save for the Maori Land Court.

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262 "The Treaty was restored to legal centrality", Colin James, *New Territory, New Territory; The Transformation of New Zealand in the 1984-92*, Bridget Williams Books, Wellington, 1992, p. 124.

263 The *Waitangi Tribunal* had issued an interim report stating that, given the government was transferring land to the SOE(State Owned Enterprises)s which was under claim in the Tribunal, the Act might be contrary to the Treaty (see *Interim Report to the Minister of Maori Affairs on the State-Owned Enterprises Bill, 8 Dec 1986* reproduced in the *Report of the Waitangi Tribunal on the Muriwhenua Fishing claim* (Wai-22) 289. Therefore an amendment had been made to the State-Owned Enterprise Bill; s*9. Treaty of Waitangi-* Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

264 See *NZ Maori Council* v. *Attorney-General* (1987) 1NZLR 641 (Court of Appeal).

265 The State-Owned Enterprises Act 1986 was part of a huge swing in Crown fiscal policy brought about by the Fourth Labour Government. The SOE Act was one of the corner stones in its attempts to take New Zealand government from a heavily regulated social welfare state to a decentralised, de-regulated state. The Act was to turn many of the governments departments (post office, mining, telecommunications, electricity) into businesses that were run as such, with the government only holding majority shares.

266 The number of Acts that mentioned the Treaty is indicated by the fact that they can be listed here;
Commission of Inquiry Act 1908
Education Lands Act 1949
Fishing Industry Board Act 1963
Treaty of Waitangi Act 1975 (setting up the Treaty of Waitangi Tribunal)
Waitangi Day Act 1976
Higher Salaries Commission Act 1977

The Treaty had no legal effect whatsoever, unless it was incorporated into Statute. This was because of the doctrine of statutory incorporation. The doctrine was confirmed at the highest level in 1941. The Privy Council made clear that the Treaty of Waitangi had to be included in legislation before it had any legal power whatsoever.[267] This followed from the precedent set by the 1847 of *R. v. Symonds*.[268] The ruling in the *Symonds* case decided that customary rights for indigenous people were recognised within the common law, but also stated that they could be extinguished by legislation. Hence parliamentary sovereignty was established as absolute against Maori Land claims. The New Zealand Parliament had extinguished any customary land claim in 1909 and 1953[269], and so Maori had no appeal to the courts for justice. The Treaty of Waitangi had become – as stated in 1877 – "a simple nullity"[270] in law. Customary land rights bowed to the doctrine of parliamentary sovereignty and Parliament excluded any examination within the courts of transfers of land between Maori and Pakeha.

> **The net effect of the state of the law as it had developed in New Zealand was that, apart from the specialised jurisdiction of the Maori Land Court, Maori had nowhere to go for the redress of grievances except by making political and parliamentary arguments.**[271]

Therefore all options for Maori to appeal for Justice in the courts were negated. That is until 1987, and the SOE Act.

The SOE Act and the resulting court case (*NZ Maori Council* v. *Attorney-General* [1987]) are important not only because it thrust the Treaty into NZ common law. Indeed, given the Treaty's instability as a guiding document[272], it seems somewhat illusory to

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[267] The definitive finding that the Treaty of Waitangi is not part of domestic law unless legislated for is in *Hoanui Te Heu Heu Tukino v Aotea District Maori Land Board* (1941) AC 308 (Privy Council).
[268] *R. v. Symond* (1847) [1840-1932] NZPCC 387(Supreme Court).
[269] Native land Act 1909 (No customary claim allowable in a court, against the Crown).
Maori Affairs Act 1953 (No customary claim allowable in a court, against the Crown, Minister of the Crown, any person employed by a department of State acting in the execution of his office).
[270] *Wi Parata v The Bishop of Wellington and the Attorney-General* (1877) 3 NZ Jur (NS) SC 72., per Prendergast J at 78.
[271] Geoffrey Palmer, *Constitution in Crisis*, *op. cit.* p. 74.
[272] As with all texts the Treaty of Waitangi is open to numerous interpretations, as is all too clear over the last 150 years. It has been "a simple nullity" in *Wi Parata v The Bishop of Wellington and the Attorney-General* [1877] 3 NZ Jur (NS) SC 72, per Prendergast J at 78 and " has to be seen as an embryo rather than a fully developed and integrated set of ideas" *NZ Maori Council* v. *Attorney-General* (1987) 1 NZLR 641, per Cooke P at 663. In 1990 Cooke P stated that the Treaty "simply the most important document in New Zealand's history" in RB Cooke, "Introduction- Waitangi special edition", *NZLUR*, vol. 14, p. 1.

celebrate its prominence as a help to Maori. Instead of celebrating the import of the Treaty to common law, it is perhaps more helpful to celebrate the import of Maori people to common law. The Treaty is, after all, only a small and – by itself – ill defined text. Maori, on the other hand, are a people who have claimed that this common law left them without the state's protection.[273]

The suggestion put forward above is that a revolution occurred in the 1980s; finally, Maori calls for justice were to be heard in the courts of New Zealand.

> **Maori issues were moved into the mainstream of court business, where they had never been before.**[274]

Palmer, as central figure in this revolution could be assumed to have easily defined views on the subject of Justice and Maori. Unfortunately this is not so. He titles a chapter the "Maori Constitutional Revolution"[275], and discusses the vast changes that he oversaw as a top Crown minister, but he attends little to any idea of justice and Maori. However, through his assumptions, one can invoke a theory of a simple and not altogether unworthy strategy for Maori to achieve justice.

His major thesis is that given a choice, the courts rather than the legislature are the best place in which to find justice. This issues from his experience of the civil rights fight in America. He states,

> **[c]ourts, and the methods of the law, were more reliable in providing racial minorities with true equality than legislatures were. Legislatures responded to political stimuli not to principle. Legislatures reflected the views of the dominant group, not that of the minority. That being the case legislatures themselves could be active in denying the minority their equal rights....The Supreme Court of he United States began examining and subjecting to strict scrutiny legislation from majoritarian legislatures which exhibited 'prejudice against discrete and insular minorities'.**[276]

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[273] At the opening of the largest case to appear before the Waitangi Tribunal, The Ngai Tahu claim, the opening speaker, Rakiihia Tau stated,

> **[t]his Marae, this wharenui has heard ..., the non fulfilment of the contractual agreement between the Maori and the Crown, within the Treaty of Waitangi and the Southern Deeds. That is why we appear before you so that the liabilities can be assesses as to what was intended, and to address the remedies so that we can truly say that justice was done.**

The Waitangi Tribunal, *The Ngai Tahu Report* (Wai 27), Brooker and Friend, Wellington, 1991, p. xvi.

[274] Geoffrey Palmer, *Constitution in Crisis, op. cit.*, 1992, p. 99.

[275] *Ibid.*, chap. 4, pp. 70-102.

[276] *Ibid.* p. 76: In the last line of the paragraph Palmer is quoting from the judgement of *Unites States v Carolene Products Co* [1938] 304 US 144, fn 4, 152-3.

He notes that without a constitution New Zealand could not possibly achieve similar results with the same method. However, if the legislature – Parliament – addressed the problem it would run into a conflict with its majoritarian nature. That is, Parliament would have to support a minority, Maori, over the Pakeha majority. Therefore, he reasons, New Zealand needs a legislative base from which the courts can solve the complexities of the grievances.

> **Obviously in the New Zealand Constitutional context it is not possible to divorce entirely the issues form the Parliament and the government, but it is wise to move as much of the substance from the politicians as possible. If this is not done the questions will not be addressed, the grievances will smoulder and could ultimately develop into burning resentment.**[277]

Though parallels can be drawn between the movements *vis-à-vis* the relative social and cultural deprivation of the American Negroes and the New Zealand Maori, the political movements cannot be compared with much success since there is the lack of an advanced Pakeha civil rights movement.[278]

Perhaps Palmer's analogy between the US and New Zealand can be tested with ease. For instance, given that New Zealand courts can operate in a similar way to that of the American courts during the civil rights battles, the question is begged; why has this not happened within the New Zealand Courts? The answer is simple; Maori are not allowed to contest, or hold the crown responsible for any loss of land according to the Maori Affairs Act 1953, and its later counterpart, the Te Ture Whenua Act 1993.[279]

However wrong the analogy may be, Palmer's emphasis on taking the problematics of justice for Maori from Parliament to the courts has certainly created a dialectical process whereby solutions may be found. Even if justice for Maori is not fully rendered in their terms they can, at least question New Zealand courts about the legality of

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[277] *Ibid.*, 1992, p. 76.

[278] The resulting political programs may be favourably compared, however, may be compared in their concentration on legal pragmatism;" Nevertheless, many blacks at the time found legal reform the most 'viable pragmatic strategy ... confronted with the threat of unbridled racism on the one hand and cooptation on the other'.";Kimberle Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law", *Harvard Law Review 101*, vol. 7, May 1988, p. 1335 (pp. 1331-87) quoted in David Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning*, Blackwell, Cambridge, Mass., 1993, p. 215.

[279] See Chapter 4, fn .14

land sales. In Palmer's own words the Treaty can now be "regarded as part of the fabric of our constitution" and hence "cannot now be removed from New Zealand law".[280]

Palmer's theory of Justice for Maori, then, is posited on a simple dualistic model; the courts deal with principles, and the legislative deals with policy. Palmer has lobbied for, and believes that Maori grievances should be dealt with in the Courts. The question that remains, and one to which he notably gives no answer is; why does he believe that Maori grievances are issues of principle, not policy? The answer is elided in *Constitution in Crisis* by his observation that majoritarian legislatures are not good at serving minority interests.[281] However, this is a practical answer to a theoretical question; Parliament will not address Maori issues because Maori are only a small minority. Parliamentarians worry about popularity, and the Judges do not. Therefore the courts shall be used to avoid the need for a popular solution. The trouble with this practical answer is that the courts cannot be relied upon to uphold minority interests over the rest of New Zealand. To rest the protection of Maori within the courts alone is surely a short term solution given New Zealand's parliamentary sovereignty. Parliament could legislate that protection away over time – "violently unconstitutional"[282] as that action might be – given enough public support. However Palmer is not advocating the courts as a resolution process for Maori grievances merely on these practical grounds. Instead, he advocates the courts for theoretical reasons. The courts, his theoretical model states, deal with principles.

Palmer clearly thinks that Maori will not find lasting success in their call for justice within the realm of policy. Dworkin suggests that the courts are relied on above policy because they do not have to tug the forelock to the common good.[283] Maori, in other words, need not defend their case as beneficial to the whole of New Zealand. Instead, they need merely prove they were wronged.

Palmer already considers Maori to be a wronged people. He states that, as to the question regarding the Crown's duty to treat Maori as full citizens of New Zealand,

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[280] Geoffrey Palmer, Constitution in Crisis, *op. cit.*, p. 98.
[281] *Ibid.*, pp. 75-76.
[282] *Ibid.*, pp. 89-90.
[283] Ronald Dworkin, *Law's Empire*, Harvard University Press, Cambridge, Mass., 1986, p. 244.

> **[t]he truthful answer is that expressed by the Queen in her speech at the Waitangi commemorations of 1990, the obligations have been imperfectly observed.**[284]

Given this is Palmer's opinion on Maori claims, it would seem that he is advocating the courts not only settle the question of justice, but present a *fait accompli* to other New Zealanders. In effect, he is assuming that a ruling in the courts favourable to Maori will grant their case a legitimacy in the wider public's opinion.

The simple model that Palmer presents – policy is legislation, principle comes from the courts – to the reader is, then, based on an assumption that the general public will accept a court ruling far more readily than a decision by Parliament. The general public being those not directly affected by reparative justice towards Maori.

This presumption by Palmer of court led public opinion is a vague notion indeed, and coexists with the political expediency of letting the courts, rather than politicians, deal with an issue that is highly divisive for New Zealand.

Palmer's simple model also assumes that the lines he draws between the courts and parliament are clear, and that the courts would see that Maori have on principle been treated unjustly. This separation of the courts and Parliament echoes de Tocqueville's separation of the powers doctrine. However, Palmer seems to avoid the idea that many American court decisions force policy. For example, the decision on segregation within schools[285] created the need for the controversial policy of busing. So his distinction between Parliament as the policy producers, and courts as the principle producers is not quite clear.

On a theoretical level the distinction between parliament and the Courts is heavily influenced by the American idea of the "judiciary as properly a lonely institution continuously engaged in a struggle to keep the political branches true to the constitution."[286] The idea being that only the courts, because they protect rights, will engage in this protection of the constitution. While within New Zealand one cannot

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[284] Geoffrey Palmer, *Constitution in Crisis*, *op. cit.*, p. 72.

[285] *Brown v. Board of Education* 347 US 483 1954.

[286] Robert F. Nagel, "Interpretation and Importance in Constitutional Law : A Re-assessment of Judicial Restraint", in *Liberal Democracy, NOMOS XXV*, J Roland Pennock and John W. Chapman (eds.), New York University Press, New York, 1983, p.198.

discuss legal rights from a written constitution, protection of such rights is still quite within the boundaries of the courts. Indeed, some would argue that New Zealand courts in fact protect a constitution, an 'unwritten' constitution.[287]

Ultimately, however, one must accept that Palmer's theory of the Parliamentary/Court split is too simple. It is a simple theory springing from the doctrine of the separation of powers. The legislative, judiciary and executive should be separated to avoid a concentration of power which could be abused.

> **If any one of them [the separated powers] carried out all three tasks...we would live in an autocracy.**[288]

The above critique of Palmer's argument is more explicit if Barry's justice framework is used. Palmer is granting no motivation for the population of New Zealand to accept justice for Maori. He merely assumes, appositely, that popular opinion will not easily part with tax dollars. From this simple majoritarian model, it would appear that the public is not just unwilling, in Palmer's opinion, to see justice for Maori, but actually opposed to it. However, he argues that a Court ruling in favour of Maori compensation would be accepted – for some inexplicable reason – by this self-interested populace as a fair arbitration. This solution to the issue resembles justice as reciprocity. Remembering that this form of justice was motivated by self-interest, and had a baseline of fairness, it is a close fit with Palmers solution. The court-made law is the baseline of fairness in this comparison. In Rawls language, the courts provide the population with their rights, which are prioritised over their ability to choose their good life. Therefore, the population must accept, in Palmer's argument, Court rulings on Maori claims in order to safeguard their own rights. This tacit assumption of the priority of the right, without the use of a motivating force is clearly similar to the greatest exponent of justice as reciprocity. Again, the communitarian argument is forceful at this particular point. There is no reason to expect the courts to provide a reason to Pakeha as to why they should accept justice for Maori. If Pakeha choose to ignore the courts, for example through a Parliamentary majority creating legislation, there is only constitutional convention to stop them. Constitutional convention has been already played loose and fast in this issue.

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287 Geoffrey Palmer, *Constitution in Crisis*, *op. cit.*, pp. 3-4
288 Geoffrey Palmer, *Unbridled Power*, 2nd edn., Oxford University Press, Auckland, 1987, p. 5.

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It is not a full justice that is obtained by Palmer's model, but one that relies heavily on Pakeha granting, like Sarastro at the end of *Die Zauberflöte*, a graciously fair offering. It is not a reasonable agreement, unforced, and informed, but an agreement using a theoretically unsound, and unstable arbiter named 'fairness' which seems to exist independently, and must be accepted by all for the agreement to even be called justice. Maori, under Palmer's principles of justice, have to accept the principles of the common law. A recent speech indicates the way in which Palmer sees the issue. He argues that the use of sovereignty is moribund. This is because sovereignty has been used to achieve so much that it is now is too large a concept to be useful or effective.

> **[T]he idea that sovereignty should be given to Maori at a time when the notions of sovereignty are collapsing all over the world seems to me to be ludicrous. Far from being the indivisible omnipotent concept that Hobbes made it in *Leviathan*, sovereignty is more like a piece of chewing gum. It can be stretched and pulled in many directions to do almost anything. Sovereignty is not a word that is useful and it ought to be banished from political debate.**[289]

Following Palmer's argument, Maori are just too late to make use of the word sovereignty to achieve political goals. This seems a little to close to the political *fait accompli* that the Te Ture Whenua Act 1993 presented for Maori. New Zealand law, inherited from England, can accommodate Maori grievances. However, it cannot move beyond to accommodate Maori society. The priority of the right – in the form of the New Zealand legal system – triumphs once more over any – Maori ambitions for political – goods.

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[289] Geoffrey Palmer, "Treaty Claims: The Unfinished Business", speech at the *New Zealand Institute of Advanced Legal Studies*, Wellington, 10/2/1995, p. 6.

CHAPTER SEVEN

Conclusion

Justice for Maori?

He Aha te meanui o Te Ao ?
He takata, he takata, he takata.[290]

The conclusion to this thesis cannot, unfortunately, be a simple *quod erat demonstrandum*. This thesis did not set out to establish a prescription for justice for Maori so neither can it conclude with one. Instead an attempt was made to set out the major arguments put forward by writers in the field against the backdrop of contemporary theories of justice. It was an attempt at finding the principles of justice at work within New Zealand texts on justice for Maori.

The first chapter asked whether contemporary normative or liberal political philosophy could set out the conditions of justice for Maori. The overall aim of this approach was to discover if liberalism could deal with the problems of identity within its theories of justice. Identity, and its related concept, difference, seem very important within New Zealand given the resurgence of Maori tikanga, and identity. For instance, Maori culture is often said to be different from Pakeha culture in a fundamental and overt way. Maori culture is often imagined as a community centred project, with Pakeha culture imagined to be its opposite, individually centred. In Richard Mulgan's *Maori, Pakeha and Democracy*, this difference was seen as something to be incorporated within the New Zealand polity.

The first chapter indicated that some contemporary writers argue that liberalism, as a Western – and in New Zealand, as a Pakeha – theory cannot deal with problems of

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[290] A Maori proverb,in its Ngai Tahu rendition. "What is the most important thing in the world? The people, the people, the people."

identity, because of its concern for the individual above the group. These writers, known as communitarians, are suggesting that liberalism's concentration on the individual excludes from society those persons, in a theoretical and practical sense, who perceive themselves to exist in a group such as a culture, race, ethnicity or religion. Basically, communitarian theory – with its concern for the community, culture and shared understandings – maintained that liberalism could not set out the conditions for justice where there existed different moralities, because liberalism is in fact one of those competing moralities.

Liberalism, especially of a contemporary kind, has been seen by its defenders as a theory that can rise above other competing ideas of societal organisation. It is almost as if liberalism, as a political philosophy, had become a value-neutral idea and thereby inclusive of, and superior to, all moralities, cultures, races and other ways of organising individuals. Liberalism in this grand – and grotesque – imagining is a philosophy which explains how to resolve the conflicts between differing moralities. Rawls's concept of political liberalism, and its genesis, *A Theory of Justice*, are the clearest examples of this liberal grand narrative. In Chapter One of this thesis, Rawls conception of justice was seen to be based on an idea of individual choice. By making individual choice axiomatic to society, Rawls argued that a political conception of justice would be found that gained the support of all society, because this theory would only use ideas which were solely concerned with producing agreement. This conception of justice was, to Rawls, separate from individual's social ideas of justice. It was a conception for political institutions. This invoked a split in Rawls's theory between the social and political world.

Sandel argued that this split leaves an individual in a conception of justice without humanity, for the individual's social relationships are removed. His criticism showed that Rawls's political conception of justice is deeply flawed at two connected levels. First the liberal individual cannot exist as imagined by Rawls. Second, the collapse of the liberal individual destroys Rawls's conception of justice .

The individual in Rawlsian liberalism is imagined to be a *tabula rasa.* This means that the liberal individual can be imbued with any set of beliefs can be held by a person in society. Yet the individual, in Rawlsian society, is also supposed to value choice over all

other goods in life. This is Rawls's famous priority of the right(to choose) over the good(way of life). The flaw is that the two ideas, an individual with no particular idea of the good life, and an individual wanting the ability to choose that good life, are logically incongruous. The ability to choose is a particular good, or set of beliefs and values. Sandel showed that the liberal individual has a metaphysical picture of the self and could therefore conclude that the individual, in the liberal schema, has been ripped forcibly from the society which fosters them. Another interpretation of this flaw in liberal thought is proposed by Alasdair MacIntyre.

Macintyre suggested, albeit in a different language from Sandel, that the right is prior to the good in order that the society imagined by Western rationalism can be prioritised over different types of social organisation. He pointed out that Western political thought is particularly damaging to social philosophies more concerned with the responsibilities of social relationships. In this way, MacIntyre suggested, liberal individualism can impose its own conception of the good – individual choice – on societies.

The communitarian critique shows that liberal justice is a self-fulfilling prophecy. The liberal individual can have live within a society governed by a political conception of justice because that is its own conception of justice. Not to accept political justice as axiomatic to life, in Rawls's conception of society, is not to accept liberal society itself. In other words, to accept a liberal conception of justice, an individual must accept a liberal premise of political choice over the obligations of the social world. The liberal flaw is then the presupposition of at least part of an individual's morality. In Chapter One, three responses to the flaw were proposed. The first was Hampton's reinterpretation of Hobbes's *Leviathan*; the second was Yeatman's attempt to find a liberal strategy which truly allows for any individual to use a liberal schema of justice; and the third response was Barry's critique of Rawlsian liberalism.

Hampton's interpretation of Hobbes's social contract was used to point to the similarities between the ideas of Hobbes and Rawls. Both use the moral relativism of individuals to justify a society which must have a strong cohesive force. Ultimately both must use self-interest as this cohesive force. Hobbesian individuals are willing to adopt a

certain principle of justice, arbitrary though it will be, in order to escape death. However, Rawlsian individuals are not provided with such a motivation to join society. They are merely assumed to want a stable society with fair cooperation. Unfortunately this is a presupposition of the liberal individual, and if an individual does not agree with Rawlsian morality they will opt out of the society, and thereby its agreements on conditions of justice. So Hampton's re-interpretation only showed more clearly the weakness in a liberal conception of justice; the presupposition of a morality for its individual.

Yeatman's theory of reciprocal respect, on the other hand, was an example of liberalism's enduring appeal as a framework upon which to pull together a conception of justice. She considered a condition of justice to be reciprocal respect between selves where questions of identity were concerned. This test is similar to the original position a Rawlsian individual enters to consider ideas of justice. It was important for Yeatman, as for Rawls, that the individual's conceive of themselves as equals, receiving fair treatment. However Rawls's original position disregards questions of justice for individuals in social relationships, because the individual is – mistakenly – divorced from his or her personal identity.

The third response to the communitarian critique was from Barry who categorised the ideas of justice into three general theorems. The first, based on a Hobbesian idea of justice was called justice as mutual advantage. This theorem of justice was driven purely by individual's self-interest. The best possible outcome for each party in an agreement was the resolution of any conflict, and therefore the agreement reflected differences between the parties in bargaining power. However this agreement was also inherently unstable, since a party could at any time find it more advantageous to break the agreement if it was to their benefit.

The second idea of justice identified by Barry was justice as reciprocity. As before, this conception of justice utilises self-interest as the primary motivation. However, equality is introduced by the idea of a 'fair baseline'. This fair baseline stops individuals using their bargaining power in an agreement. Instead, to enter the agreement at all, one must accept the fair baseline and its rules regarding the limits of the agreement. In the first chapter, the example of fair baseline was Rawls's original position. This

original position made every individual much the same by taking away the identity of each individual. In this sense the fair baseline is a morality. Sandel and MacIntyre pointed this out by proving that the original position and its priority of the right over the good hides a tacit morality. This morality can exclude individuals from the agreement, since it presupposes a certain set of values and beliefs. In much the same manner, Barry showed that justice as reciprocity – his example was Rawls's theory of justice – is a flawed theorem because it is not a self-contained theory; it needs the importation of an ethically driven baseline. This importation would not be a problem in a homogeneous society, given its likely agreement over a singular set of moral principles. However, if any conflict emerged over moral principles there is little reason to believe that an agreement based on a set of rules imposed upon the society would continue to hold. As Barry pointed out, there is no reason to believe that an individual will obey a rule because, if it is universally obeyed, it will advance his or her interests. The question of this arbitrary imposition of a set of rules, or fair baseline ultimately returns to the question posed in Chapter One. It is the question of who has the right to set the rules of fairness? Or, to rephrase it, how does society find the general will?

The last theorem of justice Barry put forward subverted these questions by suggesting that they cannot be not answered by asking how to create legitimated rules or laws –the general will –, but by finding rules and laws, as it were, already legitimated. Citizens of a polity, Barry suggested, would be best at deciding upon what is just. An agreement to accept rules laid down by a legitimated procedure was not, *a priori*, likely to be just. The legitimated procedure would ensure justice under a theorem of justice as reciprocity, but not necessarily complete justice. Therefore Barry moved to correct the flaws in Rawls's theory of justice.

Like the communitarians, Barry saw that Rawls's split between a social and political world is an unwieldy theoretical device. Further, the split, according to Barry, could not produce legitimated rules given its exclusion of personal identity from an agreement. The split is the product of a presupposed morality of justice, the priority of the right over the good. That priority of the right creates a need for the split between social and political life, by creating a morality for society that does not allow for personal

relationships. That is, this morality takes it as axiomatic that choice of a good life is more important than the good life itself. Therefore, individuals in this morality must ignore their social relationships in favour of retaining the ability to enter or exit such relations. Clearly, citizens of a polity cannot adopt this strategy in personal life. Therefore, there must be two moralities at work. One morality, the right as prior to the good, creates a society which is fair, stable, just. All individuals are equal, since they have an equal right to choose their good life. The second and subservient morality is confined to the social world, and is created by socially situated individuals.

It is this second morality that is sorely missing from justice as reciprocity, for it is this morality which truly provokes the motivation for holding to an agreement, and thereby creates a just and stable society. As Chapter One pointed out, self-interest alone cannot produce a stable agreement, even with an arbitrarily installed fair baseline. The split between the political and social morality is evidence of this because an individual, finding the political world unrewarding, has no motivation for following its rules.

Using this critique, Barry moved to break down any difference between the social and political worlds in liberal thought. He therefore adapted Rawls's theory of justice to promote a conception of justice which did not place any particular morality over another. Justice as impartiality, as Barry named this adaptation, set out the conditions which needed to be met to be able to name any agreement 'just'. An agreement could be called just if it set out or abided by a system of rules which everyone reasonably approved of in an unforced and informed manner. In this manner Barry denied purchase to the communitarian critics who claimed liberalism could not produce a socially situated theory which also gave the conditions of justice for a diverse society.

Against the theoretical setting, this thesis has shown that the justice for Maori imagined by the commentators is one of Barry's inferior theorems of justice; justice as reciprocity. That is, justice created by self-interested individuals whose main aim is to preserve the baseline of fairness which prevents further conflict. To agree on a baseline morality – or conception of the 'good' – both parties must accept the same hierarchy of values, and ultimately the same idea of the individual. In Rawls's theory of justice the resulting agreement over individual morality, the right as prior to the good, is the

communitarian's – via Sandel and MacIntyre in this thesis – strongest criticism. On a large canvas MacIntyre can paint liberalism as a deceptive ideology, which eulogises choice but only within the strict parameters of Western thought. Western morality, as in the priority of the right over the good, is the fair baseline of Rawls's theory. Individuals in Rawls's conception of justice , according to MacIntyre must therefore accept Western morality, or find themselves outside justice in a Rawlsian society. However, justice as reciprocity in Barry's theory can be applied to any unequivocal baseline, be it Western morality, fundamental religious laws, or cultural heritage. Basically, justice as reciprocity is about setting a morality of justice that does not necessarily include all society within its boundaries. Yet justice as reciprocity has an enduring appeal because it allows coercion. Individuals can coerce others into accepting the rules of the fair baseline because society calls these rules the 'principles of justice'. The justice of the actual baseline does not need to be investigated as long as the agreement holds. Those breaking the rules of a society based on justice as reciprocity may be coerced by others into acceptance because it is in the self-interest of those others to make the agreement hold.

New Zealand texts on justice and Maori fall into justice as reciprocity all too often. A baseline agreement is established, and the logic of the argument is neatly mapped out from that point. For instance Sharp simply modelled the Crown and its laws on a Hobbesian theory of sovereignty.

Sharp's use of a Hobbesian model for New Zealand was seen to be flawed. It leads justice for Maori to an inequitable point. Barry shows in his examination of justice as mutual advantage that Hobbesian theory is marred by its inherent unsuitability. Even with the help from Hampton's stronger re-interpretation of Hobbesian theory, without individuals fearing immediate death, there is no ensuring they will obey the rules set by the agreement. For a Hobbesian model of justice to describe New Zealand, Maori and Pakeha would have to have to fear that the punishment for breaking the rules set by their agreements would mean imminent death. In spite of the lack of this motivating factor in most New Zealanders, Sharp's argument was for justice as mutual advantage, because he saw New Zealand as a place of complete moral relativity. From this he deduced that Maori

and Pakeha were to compete for advantage and find agreement through a stalemate of this competition, rather than through agreement over morality.

In a political sense, Sharp's argument became justice as reciprocity because he decided upon an arbitrary baseline which was to settle all Maori and Pakeha differences. The Crown's political institutions become the baseline of fairness for this conception of justice. Under Barry's theory of justice as impartiality this imposition of a baseline seems inequitable, given the necessary condition of reasonable and unforced agreement. The inequity arises from the use of the Crown as the baseline of fairness. Maori have had little input into the creation of this collective entity of the Executive and its agencies, and given their loss of lands, it is imaginable they would reject the imposition of the Crown as it has placed what they might consider an unreasonable burden on their economic base. Further, the imposition of the Crown by Sharp closely follows Rawls's prioritising of the right over the good. It is at once an imposition of a Western morality and a falsehood. That is, the Crown, in Sharp's model, promises the equality of all its citizens, but that equality is based on a Hobbesian conception of an individual, and so prescribes a morality for Maori and Pakeha alike which may not agree with their intuitive notions of justice. Perhaps Maori and Pakeha might reasonably agree to the Crown's rulings, but since the Crown has complete control over force, one must imagine that there is little choice and much coercion for those individuals who find that their morality does not fit within the prescribed rules. Justice as reciprocity evokes the need to coerce those individuals into accepting the rules of the agreement, in order that the agreement survives. Those with the same morality as the fair baseline can then decree justice is done, since those acting outside the agreement act unjustly. In essence, wherever New Zealand political institutions are involved, unforced agreement is quite out of the question when one remembers the positivism of the rule of law, and its ability to use force to ensure its survival.

Palmer and McHugh use arguments that very closely parallel Sharp's idea of justice. Both utilised a conception of justice as reciprocity. McHugh fits snugly into this categorisation as he actively seeks a baseline of fairness: the legal system. In his argument, the legal system was seen as a legitimate institution and purveyor of morality.

However, he does argue that as a fair baseline the legal system has failed Maori in many ways. He accepts that the system is the baseline of an agreement between Maori and Pakeha, but demands that it change to protect Maori and Pakeha property rights equally. His case that there has been much unfairness toward Maori is very strong, but he also accepts that this treatment can change within the law. The very basis of the legal system as a just institution is not questioned. Perhaps the New Zealand legal system and the agencies that protect its laws are a strong form of justice as reciprocity since the law which is the baseline – and therefore the agreement – is absolutely ensured through enforcement agencies. However, because of that strength, the argument McHugh outlines can never meet the conditions of justice as impartiality since an unforced agreement is never to be found. Once a law is set it is the agreement, and to disagree and violate that law, even acting under a 'reasonable' morality is to act unjustly according to the positivism of New Zealand law. Different moralities are not allowed to exist in conflict with the law, and so reasonable agreement, in an unforced and informed manner is inaccessible.

Palmer attempted much the same argument as McHugh, except that he gave reasons for a move from justice as mutual advantage to justice as reciprocity. Pure self-interest, Palmer argued, as witnessed in the New Zealand Parliament, will not create justice. Politicians, reacting to the demands of public self-interest will see no reason to give money to a minority of the population at the expense of the majority, unless to avert large-scale social conflict. This is a clear example of the theorem of justice as mutual advantage. If an agreement were formed between Pakeha and Maori, where their relative bargaining powers were taken into consideration, the result Palmer decided, would be inequitable. The principle upon which he judged this inequity is left unstated. However, that there is some principle at work is obvious given the next step in his argument. Given the politicians powerlessness at the hands of the public's self-interest, Palmer argued that the courts, with their principles, will be better equipped to deal with justice for Maori. Why the courts would be only concerned with matters of principle is left unstated. Likewise, why Palmer thought the issue of justice for Maori is a matter of principle is left unspoken. Leaving aside those questions, Palmer's simple model of justice for Maori

relied heavily on the idea of Law as the baseline for a agreement within justice as reciprocity. All within New Zealand must accept the rulings of the court. Otherwise, the fair baseline of the agreement upon which the morality of justice is built, the law, collapses into conflict. The procedurally defined conflict over the law becomes a moral conflict once the law's procedures and rulings – the fair baseline – are no longer strictly enforced. The assumption here is that a resolution to a moral conflict is nigh impossible to find, whereas the procedures set down can resolve an issue, to the satisfaction of most individuals. Therefore, self-interest as a motivation acts to preserve the agreement, even when one particular court decision adversely affects a majority of the population. This is the principle upon which Palmer, this thesis suggests, based his idea of court-led public opinion. If a court finds Maori have been treated unfairly, then the other individuals in New Zealand must abide by that decision and its ramifications, even at the cost of those individual's tax dollars. For, to ignore the court's decision would be to undermine the law's protection of all other decisions, and hence to undermine all other rights to which each individual feels accustomed.

Mulgan was also using a theorem of justice as reciprocity. Yet, his idea of a fair baseline was opposed to Palmer and McHugh. Security of culture, as opposed to the existing legal system, is taken as the baseline upon which Pakeha and Maori should negotiate justice. Perhaps this is not any more, or less, unreasonable than making New Zealand's political institutions that baseline. However, as the coherency of Mulgan's argument testifies, it is harder to identify the agreement points of that baseline. That is, the political institutions and especially the legal system are easy points of reference for an agreement. The agreement is clear cut, either one accepts a court ruling or one does not. With that clarity, the conception of the individual is also easily defined. The self acts either legally, or illegally; rightly or wrongly; and therefore either in or out of an agreement. Within a cultural argument it is somewhat harder to find the points from which to negotiate. Statements must be made about what is 'Maori', and what is 'Pakeha'. Through Barry's differentiation of first and second order impartiality one can even question the validity of such statements as a part of justice. One condition of justice as impartiality is that 'no one can reasonably reject' the agreement. To define Maori and

Pakeha in order to grant Mulgan's special rights, one must define them in such a way as to avoid 'reasonable rejection'. The attempt at defintion is seeking first order impartiality, or impartiality as part of everyday life. This attempt at defining Maori and Pakeha cultures through their everyday appearance is averse to justice as impartiality because it pre-supposes the 'good' life for Maori and Pakeha individuals. If any individual can reasonably feel that their culture has been misrepresented then the agreement can no longer be called justice as impartiality. Similarity of cultures may be used as an agreement point, but Mulgan's argument showed that this can occur only where discrete cultures exist. That is, one must be able to define Maori and Pakeha cultural similarities with the same accuracy as the political institutions define their laws, to establish culture as the baseline. If that accuracy is not achieved, the baseline will not reflect the common morality of those individuals involved in the agreement. Without that common morality there is no agreement, since it is in an individual's self-interest to break that agreement when it conflicts with their morality. Culture, as a baseline, for a just agreement within the theorem of justice as reciprocity would be very hard to produce, as it would require the agreement of all individual's everyday moralities. Or to put it differently, to use culture as a fair baseline would require the wiping aside of cultural difference, if cultural difference means different moralities in any way.

Durie's polemics, though confusing at times, can be read as the most clear example of the justice as reciprocity. In one part of his argument, earlier occupancy simply grants priority over other, later, occupants. Timing of the occupancy of land is therefore the baseline of fairness. While this may seem unfair, it is no less logically secure than the approach adopted by Sharp, where priority is granted to the New Zealand political institutions where they exist through the use of colonial force.

None of the commentators looked for reasonable agreement. All were more concerned to upset other doctrines or arguments than to find reasonable agreement. Perhaps this is indicative of general level of the debate on justice for Maori. That is, justice as reciprocity is clearer and simpler than the complexities evoked by justice as impartiality. Justice as impartiality demands that participants to agreements be informed and unforced. None of the commentator's proposals can cope with both of these

demands. Palmer, McHugh, and Sharp have agreements that will always be forced, because they wish to use the legal system to find justice for Maori. That legal system is an example of justice as reciprocity, and that theorem can survive only as a coercive form of justice. The subjects of this example of justice as reciprocity must endure a complete positivism of law in order to ensure that this fundamentally unstable theory of justice survives. Durie and Mulgan do not claim that their agreements are informed. Instead they claim a principle of justice to which all must agree. The unforced nature of their prescriptions for justice depend on everybody agreeing to those principles.

Justice as reciprocity is perhaps the practical answer to a question of justice for Maori. In this light, it is a simple agreement, with a clarity which all can understand. However for all in New Zealand to accept the agreement, all must accept the principles on which it is based. This is not a just solution, but a principled halt to moral conflict. That is to say, justice as reciprocity may postpone the conflict over Maori claims, but eventually these claims will resurface. They will resurface because one cannot arbitrarily impose standards of morality on people, and expect that imposition to hold. Ultimately, people's own intuitions must create the morality which is called justice.

In conclusion, the only continuous fibre that threads through the New Zealand texts this thesis examined is their use of a dismal theory of justice to create justice for the Maori. Though entirely different in their conceptions of desirable outcomes, those polemics advocated a single procedural form of justice – which will always depend on the enforcement of a compromise – rather than an agreement which has the assent of all concerned. However pragmatic that single form of compromise, justice as reciprocity, may look it will not weave an autochthonous political morality of justice for Maori and Pakeha which will remain stable and sustainable.

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