THE "PAKEHA CONSTITUTIONAL REVOLUTION?" FIVE PERSPECTIVES ON MAORI RIGHTS AND PAKEHA DUTIES

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I. INTRODUCTION

Between 1975 and 1990 the Treaty of Waitangi 1840, once regarded as a "simple nullity", came to be "constitutionalised",[1] acquiring the status of the basic founding document of the nation. A "constitutional revolution" occurred, a "paradigm shift" within the dominant commonsense of practitioners in the juridical-political system which shattered the tradition-bound conception of Maori rights and Pakeha duties.[2] Similar change in the status of indigenous peoples was evident in Canada during 1982-1990 and is now evident in Australia.[3]

Altered official discourses have yet to change material conditions and halt the impending ethnocide of indigenous First Nation peoples.[4] Social indicator data on education, employment, housing and the justice system illustrate the structural realities of Maori disadvantage. In New Zealand, where 9.5% of the population self-identify as Maori and 3.6% as Pacific Islanders:

* Maori are 3.5 - 4.4 times less likely than Pakeha to attend a university.[5]

* One fifth of the Maori working age population lost their jobs in the two years from March 1987 to March 1989 - a loss four times higher than that for "non-Polynesians".[6]

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1 Attrill, W *Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand* (unpublished LLM dissertation, Harvard Law School, 1989); Havemann, "What's in the Treaty? Constitutionalising Maori Rights in Aotearoa/New Zealand 1973-1993" (forthcoming *Justice and Reform: Cross cultural studies in Criminology*).

2 See Kuhn, T *The Structure of Scientific Revolutions* (1962).

3 Fleras, A and Elliott, J L *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand* (1992) 229; and *Mabo v Queensland (No 2)* (1992) 107 ALR 1.

4 See *Draft Declaration [of the Rights of Indigenous Populations] as agreed upon by the members of the working group at its eleventh session* (1993) Article 7.

5 Pool, I *Te Iwi Maori: A New Zealand Population. Past Present and Projected* (1991) 183.

6 The unemployment rate among Maori increased from 10.8% in 1987 to18.2% in 1990. More recently it has fluctuated between 23.8% to 27.3% (*New Zealand Herald*, 8 October 1993).

* Only 44% of Maori owned their own homes in1986, compared with a national figure of 75%.[7] Maori retain only 5% of freehold land in New Zealand. Moana Jackson estimates that since 1840 Maori dispossession has been "legalised" by over 100 pieces of legislation which breach the Treaty.[8]

* Maori offenders are over-represented in the criminal courts and jails. Of non-traffic adult offenders sentenced to imprisonment in 1991, Maori accounted for 48%, Europeans 43%, Pacific Islanders 7%.[9] Among young people convicted under the Children, Young Persons and Their Families Act 1989, Maori account for 53.4%, Europeans 32.2% and Islanders 6.9%, despite the Act's whanau-oriented family group conference and diversion-based model.[10]

While Labour's social democratic constitutional agenda ostensibly tried to advantage Maori, it was Maori who bore the brunt of Labour's antidemocratic monetarism, *the hegemonic "revolution"* of 1984-1990 which abruptly jolted New Zealand from dependent agricultural Fordism to Post-Fordism.[11]

II. BACKGROUND: A "CONSTITUTIONAL REVOLUTION"

Before being ousted from office for a decade Labour set up the Waitangi Tribunal, under the Treaty of Waitangi Act 1975, to promulgate principles for interpreting the Treaty and for identifying Crown activities inconsistent with those principles. Despite its compromised beginnings, the constitutional revolution began with the creation of the Tribunal.[12] In 1985

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7 Spoonley, P *Racism and Ethnicity* (1993) 23-24.

8 Jackson, M "Land Loss and the Treaty of Waitangi" in Ihimaera, W (ed) *Te Ao Marama 2: Regaining Aotearoa* (1993) 77.

9 Spier, P, Norris, M, and Southey, P *Conviction and Sentencing of Offenders in New Zealand: 1982-1991* (1992) 50.

10 Ibid, 90.

11 Kelsey, J *A Question of Honour? Labour and the Treaty 1984-1989* (1990); Jackson, "Corporatisation, Privatisation and the Treaty: The Ultimate Rejection of Maori Rights" in Neilson, D (ed) *Private Power or Public Interest* (1989); and O'Brien, M and Wilkes, C *The Tragedy of the Market* (1993). Fordism is a term used to describe the political economies of advanced capitalist countries of the post-World War Two period, and is characterised by liberal/social democratic politics oriented to compromise and settlement of class anatgonisms, and legislation designed to promote social goals of equality and employment. Post-Fordism is characterised by market values, competitive individualism and the abandonment of social equity as a goal.

12 Sharp, A *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (1990) 74. Oliver, W H *Claims to the Waitangi Tribunal* (1991) 9-10 says Pakeha "radicals" were quick to identify the Tribunal's ethnocentric mode, citing its use of judges lacking taha Maori, its use of lawyers and common law procedural and evidentiary rules, and its alien venues as incompatible with the Tribunal's mission to

the Fourth Labour Government (1984-90) attempted unsuccessfully to incorporate the Treaty into an entrenched Bill of Rights.[13] More successful was the gradual 1984-90 promulgation of the principles of the Treaty emerging from the reports of the Waitangi Tribunal.[14] These principles have been reaffirmed and complemented in decisions of appellate courts,[15] reinforced by directives issued by the executive,[16] and validated by incorporating recognition of tikanga Maori and the principles of the Treaty into legislation.[17] For the first time since 1840, a set of principles by which disputes about Pakeha duties and Maori rights were to be honourably settled became part of official discourse.

Pakeha analysts, surprisingly unanimous on the radical or "revolutionary" character of this feature of the Fourth Labour Government's term of office, characterise it, for example, as "the most important of the changes wrought by the Labour government",[18] as the "Maori Constitutional Revolution",[19] and as an "intellectual revolution".[20]

Some intellectuals, both Maori and Pakeha - such as Ranginui Walker and Bill Renwick - even described these developments as "post-colonial",[21] while hardly claiming that assimilationist colonialism had gone away. Other writers, though avoiding the term "post-colonial", have foreseen and

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deliver decisions which reflected the "spirit of the Treaty". Some suggested alternatives were later to become Tribunal practice for a time: see especially Williams, D V *Memorandum to Minister of Maori Affairs concerning the Waitangi Tribunal* (1977), and Kelsey, "Te Tiriti o Waitangi and the Bill of Rights" *Race, Gender, Class* (1986) 23-30.

13 Palmer, G *A Bill of Rights for New Zealand* (1985).

14 Renwick, "A Variation of a Theme" in Renwick W (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (1991) 214; and Palmer, G *New Zealand's Constitution in Crisis* (1992) 79.

15 Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty* (1988); Palmer, supra note 13, at 89; Havemann and Turner "The Waitangi Tribunal: Theorizing its Place in the Re-Design of the New Zealand State" (forthcoming *AJLS*); and Oliver, supra note 12. See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 651, *MRR Love v Attorney-General* (unreported, High Court, Wellington, 17 March 1988, Ellis J, C P135/88), and *NZMC & Runanga O Muriwhenua v AG & Ministry of Fisheries* (unreported, High Court, Wellington, 30 September 1987, Greig J, CP 553/87).

16 Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (1989); and MAF, *The Impact of the Treaty on Government Agencies* (1990).

17 Legislation Advisory Committee Report No 6, *Legislative Change: Guidelines on Process and Content,* Appendix D (1991). Tikanga Maori refers to Maori tradition and custom, and includes protocol, ceremony, values and beliefs.

18 James, C *The New Territory: The Transformation of New Zealand 1984-1992* (1992) 122-134.

19 Palmer, supra note 14, at chapter 4.

20 Renwick, supra note 14, at 211.

21 Walker, R *Struggle Without End* (1990) 228.

described in analogous terms the unfolding emphasis on Maori rights and their place in the evolution of an ideology of biculturalism.[22] Colin James speculates that the revolution leading to recognition of the Treaty may, in ideological terms, be the most important act of independence and affirmation of nationhood since New Zealand's reluctant acceptance of legal independence from Westminster in 1947. He argues that this "decolonising" process required the "fashioning of an identity and a wholeness out of a conflict no one else can resolve".[23] If not "post-colonial", the constitutional revolution perhaps represented the first "post-assimilationist" step towards a post-colonial settlement.[24] In this post-assimilationist vision, Pakeha duties and rights and Maori rights and duties were couched in terms of a "re-discovered" bicultural partnership under the Treaty "Made in New Zealand/Aotearoa", not "Made in England".

So what was and is the significance - if any - of the changing constitutional rhetoric? Is it benign or malign? Conflicting theories and assumptions underlie the commentaries of academics, practitioners, and political analysts and activists on the constitutional revolution. This article examines five relatively distinct "paradigms"[25] which emerge out of a review of the literature, distinguished by identifying implicit and explicit perspectives on: (1) the nature of the "ideological work" done by the Waitangi Tribunal and the principles of the Treaty in bringing about the "paradigm shift"; and (2) the scope of rights' strategies - the politics of rights[26] - for bringing about ideological change within the liberal democratic state. The label the "orthodox legal paradigm" is self-inflicted; the others identified here are the Prendergast Paradigm, Te Tino Rangatiratanga Paradigm, the Marxist Paradigm, and the Post-Assimilationist Paradigm.

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22 See Metge, J *The Maoris of New Zealand, Rautahi* (1976); Adams, P *Fatal Necessity* (1977); Levine, H B and Vasil, R *Maori Political Perspectives* (1985); Mulgan, R *Maori, Pakeha and Democracy* (1989); Temm, P *The Waitangi Tribunal* (1990); Ritchie, J *Becoming Bicultural* (1992); and Palmer, supra note 14.

23 Supra note 18, at 123. In 1947 New Zealand belatedly accepted the autonomy bestowed upon the Dominions by the Statute of Westminster of 1932.

24 Assimilation has until very recently been the principal goal of settler policies for pacifying and controlling indigenous populations; post-assimilation respects and promotes separate or parallel governance and self-determination such as authentic biculturalism.

25 Paradigm seems an appropriate term since McHugh in "Legal reasoning and the Treaty of Waitangi" in Oddie, G and Perret, R (eds) *Justice, Ethics and New Zealand Society* (1992) classifies his own work as located within an "orthodox legal paradigm".

26 See Scheingold, S *The Politics of Rights: Lawyers, Public Policy and Political Change* (1974).

III. THE PRENDERGAST PARADIGM

In 1877 a Maori tribe brought an action against the Crown to reclaim unused land they had earlier donated to the Church of England as the site for a School which was never built. They relied on Treaty rights. Prendergast CJ stated that Treaty rights such as aboriginal title were irrelevant unless incorporated expressly into municipal statute. In a judgment redolent with the then-contemporary tenets of Victorian scientific race theory, Prendergast CJ found that the Treaty of Waitangi was: "[a] simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist".[27]

Contemporary writers from the orthodox legal paradigm say that he got the law "wrong",[28] although for the purpose of consolidating settler hegemony it would be an understatement to say that it was a useful judgment. From 1877 to the 1980's, despite its "wrongness" in international law and British colonial practice,[29] it remained the paradigm for understanding the status of the Treaty - it was the "correct" statement of the Treaty's position in New Zealand law, in the textbooks and law journals,[30] and in the hegemonic discourse until the current "constitutional revolution".

One recent, oft-cited piece by an Auckland practitioner, Guy Chapman, challenges the new "revolutionary" commonsense and may represent a significant body of seldom-articulated opinion.[31] Chapman supports his critical position on the post-revolutionary law partly by arguing the continuing correctness of Prendergast's view of the Treaty. He writes that Prendergast's statement "has stood the test of time in its clarity of exposition and basic soundness".[32] Informing Chapman's position appears to be a single static standard of justice, based on equal *treatment* of all, no matter how unequal they may be. This notion of equality is often used to oppose affirmative action of any sort. It usually emanates from majoritarian, neo-conservative politics and appeals to populist egalitarianism. Chapman challenges the contemporary resuscitation of the Treaty because it has endowed it with a "political afterlife" which gives Maori a "never ending,

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27 *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (OS) 78.

28 McHugh, supra note 25, at 113, and Palmer, supra note 14, at 72.

29 Williams, "British colonial treaty policies: a perspective" in Yensen, Helen *et al* (eds) *Honouring the Treaty: An Introduction for Pakeha to the Treaty of Waitangi* (1989).

30 See eg Hinde, G W, McMorland, D W, and Sim, P B A *Introduction to Land Law* (1978) 6; Molloy, "The Non Treaty of Waitangi" [1971] NZLJ 193; and O'Keefe, "Waitangi Tribunal 'Decision" [1983] NZLJ 136-137.

31 Haughey, "A Vindication of Sir James Prendergast "[1990] NZLJ 230.

32 Chapman, "The Treaty of Waitangi - Fertile Ground for Judicial (and Academic) Myth-Making" [1991] NZLJ 228, 231.

exclusive cosy relationship with the Government to which others are not admitted". He condemns "the legally sanctioned preferment of groups" which he argues is inimical to "a modern, pluralist, multiracial democracy" which "will quite simply come apart at the seams if such were to be its prescription".[33] In this paradigm "multi-culturalism" is confined to promoting "cultural diversity in the private domain coupled with equality of opportunity in the public sector".[34]

Condemning the activist judiciary for usurping the position of the legislature by elevating the Treaty to the status of higher law, Chapman says that "Parliament has never given direct legislative force to the Treaty"; there has been "no vote for a judicially created Bill of Rights designed to advantage one section of society..."; and "the principles so-called are judically invented" and have come through the " back door".[35]

Another Auckland lawyer, David Garrett, shares Chapman's perception that the elaboration of "principles" of the Treaty by the courts is anti-democratic, or at variance with parliamentary supremacy and the normal process whereby the common law evolves:

> Parliament has not so much *given* the task of enunciating the meaning of the supposed principles of the Treaty to the courts; rather successive governments have *allowed* the judges, through deliberately or accidentally vague statutory references, to interpret what should be clear statements of rights. These are statements which should be made in parliament by elected representatives facing public scrutiny.[36]

Garrett's critique has an authoritative, Diceyan "Made in England" ring to it. Like Chapman's, however, it is flawed by contradiction and anachronism. The Treaty of Waitangi Act 1975 mandated the quest for the "principles" which judges have "found", and it was the elected Parliament which passed the numerous Acts which incorporated recognition of Treaty "principles" throughout 1984-1991.

Chapman describes the Treaty principles as fixed in time "like it or not" and denies that they bespeak "rights" or "fundamental rights"[37] since at the time the Treaty was framed and signed "modern" concepts of human/fundamental rights were "largely or wholly, unconceived". This is surely an anchronistic

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33 Ibid, 228, 229.

34 Levine, "The cultural politics of Maori fishing: an anthropological perspective on the first three significant Waitangi Tribunal hearings" (1987) 96 Journal of the Polynesian Society 421, 438.

35 Supra note 32.

36 Garrett, "Resources: Treaty Rights and Private Property Rights" in Novitz, D and Wilmott, B (eds) *New Zealand in Crisis* (1992) 103.

37 Supra note 32, at 232-4.

argument, given that the Treaty of 1840 followed the American Bill of Rights (appended to the 1776 Constitution in 1787) and the French Declaration of the Rights of Man and the Citizen 1789, both of which not only employed the symbolism of such rights with vigour but also remain part of the living law of their respective jurisdictions and provide models for modern human rights codes.[38]

Mark Tushnet analyses from an American perspective the key problems of the originalist, textualist or even neutral principles approach to constitutional interpretation implicit in the Prendergast paradigm. Such interpretation, he says, assumes static, shared systems of meaning such that the meanings of rules or words used in the past can be retrieved without distortion.[39] Strangely for a common lawyer, Chapman attacks as "mythical" the depiction of the Treaty as a "living instrument" and the resulting revolution of the principles in the "Spirit of the Treaty": he singles out as "crypto-legal myths" the principles of "partnership" and "the fiduciary duty".[40] It is no coincidence that these are the lynch pins for constructing a bicultural future in the dialectical relationship between affinity and difference in which both Maori and Pakeha have parity of respect.

Chapman astutely recognises the revolutionary scope of the "principles of the Treaty", and the process of constitutionalising Maori rights, for the honouring of prospective claims through the recognition of historical obligations. The material and possibly ideological outcomes of such a "revolutionary" approach are anathema to those whose liberal-conservative Prendergast paradigm is based on nineteenth century liberal assumptions about the virtues of utilitarianism, majoritarianism, individualism, private property and the illimitable sovereign. One can also trace within this ideological framework social Darwinist justifications for selectively applying equality dimensions of the "rule of law", illustrated by Prendergast CJ's use of the "act of state" doctrine to shield executive, legislative and administrative tyranny from judicial scrutiny, for which he was duly chastised by the Privy Council.[41] This paradigm delegitimates the constitutional revolution by selectively using arguments from the orthodox legal paradigm, as McHugh points out.[42]

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38 Waldron, J (ed) *Nonsense on Stilts; Bentham, Burke and Marx on the Rights of Man* (1987).

39 Tushnet, M *Red, White and Blue: A Critical Analysis of Constitutional Law* (1988) 22, 63.

40 Supra note 32, at 233.

41 *Wallis v Solicitor General* (1902) [1840-1932] NZPCC 23.

42 See McHugh, "Constitutional Myths and the Treaty of Waitangi" [1991] NZLJ 316 for a personalised but vigorous rebuttal of Chapman's arguments.

The Prendergast paradigm offers no support for biculturalism, that is, for a politics of affinity and difference based on the mutual understanding, respect and power-sharing or reparative justice implied in the "constitutional revolution". It echoes the nineteenth century liberal conservatism which legitimated the benignly meant but monocultural, Christianising and assimilationist policies which are partially responsible for the ethnocide of indigenous First Nations peoples throughout the Empire.

IV. TE TINO RANGATIRATANGA PARADIGM

Moana Jackson (Ngati Kahungunu, Ngati Porou) and my colleague Annie Mikaere (Ngati Raukawa ki te Tonga), the chief analysts and activists writing from within this paradigm, are both tangata whenua, people of the land. They base their position on this historical ground. Their assertion of Maori rights and Pakeha duties is derived from the concept of Rangatiratanga as understood in Maori, recognition of which was promised in the Maori version of the Treaty. In contemporary Pakeha analytical discourse Rangatiratanga implies self-determination, including recognition of the Maori parallel juridical-spiritual-political order embodied in the sovereign power of the iwi. Iwi as tribal nations were promised control over taonga (treasures) and iwi resources, to ensure justice for iwi members and "to make the world live again through Maori institutions defined and controlled by Maori" as covenanted by the Treaty.[43]

The assertion that the Treaty was a "treaty of cession" by Maori of their sovereignty to the British Crown, resulting in a single *grundnorm* for testing the validity of law, is rejected as a denial of Rangatiratanga promised in Article 2 of the Maori text of the Treaty.[44] Hence "the Treaty guarantees Maori law itself since it is both the source of rangatiratanga and the product of its exercise".[45] The use of the word kawanatanga, "government over their land", in the first Article means that authority to exercise government over settlers on Maori land was granted to the Crown: "for the Maori text to have done more would have been contrary to Maori law, and the rangatira [chiefs] would have been unable to sign".[46]

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43 Jackson, "The Treaty and the Word: The Colonization of Maori Philosophy" in Oddie, G, and Perrett, R (eds) *Justice, Ethics and New Zealand Society* (1992) 9, and see his succinct "Changing Realities: Unchanging Truths" *Commission on Folk Law and Legal Pluralism* (1992) 1-9. See also essays on Te Tiriti in Ihimaera, supra note 8.

44 Mikaere, Book Review (1990) 14 NZULR 97, and Jackson, "Commonwealth Law Conference" [1990] NZLJ 334.

45 Jackson, supra note 44, at 334.

46 Jackson, supra note 43, at 7.

On this interpretation of Pakeha duties and Maori rights, the "constitutional revolution" of 1984-1990 is a distortion and a Pakeha re-definition of Rangatiratanga, the effect of which has been to "freeze Maori cultural and political expression within parameters acceptable to the state".[47] Legal pluralism cannot accommodate Rangatiratanga, whether by recognising aspects of tikanga Maori in the procedural and substantive law, or by incorporating the principles of the Treaty into state law and practice, or by adapting Pakeha political institutions. Such kowhaiwhai (cosmetic) bicultural innovations mask the imposed nature of the common law and constitute a denial of the rights under Treaty. The Treaty is declarative of Maori rights, not constitutive of them, since they are not considered to be dependent upon or subordinate to the legal or political sovereignty of any other nation.[48] But, even though:

> 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-colonialists who neither understand nor respect Maori philosophy or culture.[49]

Reviewing Kawharu's *Waitangi: Maori and Pakeha Perspectives of the Treaty*, an edited collection of essays on the Treaty, Mikaere comments that the word Rangatiratanga and other Maori concepts have been "bandied about... almost as though they were qualified to understand them" by Pakeha judges and other contributors.[50] She is no less damning than Jackson about the Tribunal:

> What then of the Waitangi Tribunal, widely perceived as being essentially Maori... at the very least a bicultural body... The Waitangi Tribunal is not a Maori institution...[it was] established by a Pakeha dominated parliament... [and] exists at the whim of a Pakeha electorate... Any recommendations it makes must always be acceptable to non-Maori voters.[51]

Rejecting the imposed regime of the settler state and critiquing the constitutional revolution, the state, and the politics of social change through enhancing legal rights, the Rangatira paradigm is an expression of Maori nationalism and the quest for cultural survival. Hauraki Greenland suggests that the key themes in this ideology revolve around the land itself and the concept of land: the ideology contrasts Maori and Pakeha values and,

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47 Ibid, 8.
48 Jackson, supra note 44, at 334.
49 Jackson , supra note 43, at 8.
50 Mikaere, supra note 44, at 99.
51 Ibid, 100.

especially, divergent Pakeha and Maori philosophical perspectives on land. For Maori, land represents turangawaewae, the symbolic, spiritual and material place upon which they stand and assert their rights under the Treaty. By contrast, Pakeha dishonesty over land dealings and the tyranny of the state led to the ongoing loss of land rights and the raupatu (wrongful confiscation of land in the 1860's). Maori nationalism as an ideology emphasises attributes of the Pakeha conception of land which are anathema to the Maori way such as acceptance of the commodification and environmental exploitation of land. The assertion of Maori peoplehood through their Treaty-guaranteed kaitiakitanga (guardianship) of the land and other treasures, as Maori understand and value these, is thus the key discourse in the construction of Maori identity and resistance. The politics of difference, rather than affinity, dictate tactics and strategies and explain the rejection of kowhaiwhai biculturalism.[52]

The Rangatiratanga paradigm resembles strands of the Marxist paradigm and the related Critical Legal Studies approach in that it repudiates claims that progress has resulted from the "Maori Constitutional Revolution". But the historical, political and ideological roots of the Rangatiratanga movement are altogether diferent from those of Marxism or neo-Marxism. In my view the conflating of the two paradigms (and consequent characterisation of the tangata whenua as fellow travellers of these valuable though Eurocentric paradigms) by some commentators[53] demeans the legitimacy of the Maori nationalist position.

Those conceptualising the "revolutionary" function of the Waitangi Tribunal and the "principles of the Treaty" through this paradigm fully understand the discursive potential of the official discourse emerging from the Tribunal, and the significant role of the principles in this process. They see the degree to which a discourse of interests is being transformed into a discourse of bicultural rights by the re-defined concept of Rangatiratanga, and they distance themselves from pragmatic Maori leaders who perceive the discourse of bicultural rights as at least offering some purchase on power. Te Tino Rangatiratanga paradigm-based analysts and activists argue that the process "inhibits the development of strategies"[54] to achieve self-determination and that their separate and abstentionist oppositional posture will enhance Maori identity with its symbolism and message.[55]

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52 Greenland, "Maori Ethnicity as Ideology" in Spoonley, P *et al* (eds) *Nga Take: Ethnic Relations and Racism in Aotearoa/New Zealand* (1991) 93-95, 97-98.

53 Supra note 42, at 384 regarding Moana Jackson, and supra note 25, at 98 regarding Annie Mikaere and Moana Jackson.

54 Supra note 43, at 9.

55 Supra note 52, at 105.

V. THE MARXIST PARADIGM

Dr Jane Kelsey of Auckland Law Faculty is the analyst and activist whose articles and books reflect assumptions and models within the Marxist paradigm.[56] This *corpus* of work represents the most sustained and comprehensive analysis of the political economy of the New Zealand juridical-political apparatus 1984-1993 produced to date. Its omnibus coverage is unmatched by work in any other paradigm. Kelsey's thorough and readable work coherently presents a total analysis of the issues of the period, in a way rarely if ever achieved by non-Marxist legal-historiographic scholars. The clarity we gain from the overview is essential to understanding events of the period as a whole.

Since the 1970's, neo-Marxist analysis in many different forms, such as Marxist-Leninism, Gramscianism and Critical Legal Studies (hereafter CLS), including some feminist legal theory, has precipitated an irreversible paradigm shift in liberal, positivist, pluralist scholarship. This shift is especially evident in legal theory and in socio-legal and criminological writing. The CLS movement, with which Dr Kelsey's work is associated by some commentators, is as much a child as a progenitor of this shift.

Kelsey's theoretical framework, while having Gramscian nuances, appears to be primarily based on an instrumentalist view of the nature and function of law. Hunt crystallises the instrumentalist view:

> Law is the instrument of a ruling class which functions directly at the behest and control of dominant economic and political interests as an instrument of oppression and domination. It is all the more successful because of the way it is able to disseminate "false consciousness", for example, spreading the illusion of neutrality and impartiality. Liberals and radicals connive consciously and unconsciously, because in proclaiming the possibility of "using law" they bind the subordinate classes more closely to capitalist values and exacerbate the "feeling of powerlessness". In general the use of law has the effect of increasing the domination of law over peoples' lives.[57]

From the instrumentalist viewpoint the "constitutional revolution" has been myth-making - a "passive revolution"[58] or no revolution at all, leaving the dominant "common sense" unchanged. The jurisdictional expansion, recommendations and findings of the Tribunal, the evolution of the

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56 See *A Question of Honour? Labour and the Treaty 1984-1989* (1990) and *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (1993).

57 Hunt, "The Radical Critique of Law: An Assessment" (1980) 8 International Journal of the Sociology of Law 33-46, 41.

58 Kelsey, "Treaty justice in the 1980s" in Spoonley, supra note 52, at 128.

"principles of the Treaty" in the jurisprudence coming from the Court of Appeal, and changes in government policy and practice associated with changes in media perspectives and public perceptions of Maori/Pakeha relationships, all tend to be analysed as "rhetoric". Behind this rhetoric "Maori remained in essentially the same position they had been in since 1840" and "arguably they were worse off".[59]

An assumption of Marxist/conflict theory is that classes, genders and races with unequal power in a capitalist, patriarchal settler state will be forever locked into super-ordinate/sub-ordinate positions unless capitalism, patriarchy and imperialism are overthrown by armed or ideological revolutions. Reformism is at best a palliative and at worst likely to perpetuate the "false consciousness" of the oppressed which manifests itself in their "passive consent" to a coercive social order. Hence, for instrumentalist analysts, the response of the state, the law and officialdom to challenges to the *status quo* is "inevitable"; social democratic reformism such as the "constitutional revolution" must "inevitably" lose out when the state must choose between the demands of capital and the rights of Maori:

> This was not through some grand conspiracy although there were elements of that, but because the base line of the legal and political structures within which the battle was fought was absolute Crown sovereignty and the protection of a capitalist economy.[60]

Pragmatic, rather than principled, application of the new "principles of the Treaty" jurisprudence, by judges who were merely responding to the climate of the mid-1980's which demanded "flexibility" and sympathy to Maori claims, has won merely "pyrrhic" courtroom "victories". Any sensitivity has been dictated by the internationalisation of concern over indigenous peoples' rights, reflected and reinforced by the re-discovery of the doctrine of common law aboriginal title. Fears of accusations of institutionalised racism, of further entrenching Maori hostility, and of the judgments of their peers in the law who acknowledged Maori grievances have all played a part in bringing about the constitutional revolution.[61]

Addressing a process whereby events have enabled people to shed their "false consciousness", Kelsey concludes that by the end of the 1980's the "allegedly neutral" courts and allegedly "pro-Maori" Waitangi Tribunal are seen "for what they undoubtedly always were - arms of the state".[62]

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59 Kelsey, supra note 11, at 262.
60 Idem.
61 Ibid, 213.
62 Supra note 58, at 128.

The process and outcomes of the "constitutional revolution" are conceptualised as a process of "legitimation", meaning a process whereby "consent" is purchased from the oppressed by means essentially inimical to their interests. Instrumentalist theory influenced by Marxist-Leninism distinguishes reformism from revolution. Reformists serve the system by propping up structures "whose legitimacy depends on the oppression of others" and which will simply "not hand over power".[63] In Lenin's work, particular vitriol was poured on the "compromiser and social democrat" - identified as more of a handicap to the revolution than the class enemy himself. Maori (co-optees),[64] lawyers and academics ("organic intellectuals of capitalism whichever side they are on")[65] are targets of criticism on the same sort of grounds.

The state's intolerance of threats to its dominant position is instanced by the precarious tenure of semi-autonomous state agencies like the Tribunal which dare to challenge the state. Evidence adduced includes the consistent pattern of neglect of, and cutbacks to, the Tribunal's infrastructure and inaction on the Tribunal's recommendations by both Labour and National Governments.[66] Labour's 1989 rewrite of the *Principles of the Treaty for Crown Action* to re-assert Crown sovereignty over Te Tino Rangatiratanga, and the Court of Appeal's assertion that it, not the Tribunal, had authority to determine Principles, are also submitted as such evidence.[67]

As a consequence of such state retaliation the Tribunal's reports can be no more than a resource to be used by the state "to legitimate a fundamental denial of tino rangatiratanga in the name of honouring the Treaty... The Waitangi Tribunal had become a non-threatening but symbolically significant legitimating agent of the state".[68]

The intention of Kelsey's book *Rolling Back the State* is to enhance the "understanding of the structural nature of the crisis affecting each [Maori and Pakeha]", making it possible "to identify points at which contradictions can be exploited and alliances can be formed". But Kelsey claims that "the

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63 Kelsey, supra note 11, at 269.

64 Supra note 58, at 122.

65 Kelsey, "'Rogernomics' and the Treaty of Waitangi - An Irresolvable Contradiction?"(1989) 7(1) Law in Context 66-92, 69.

66 Parliamentary Commissioner for the Environment, supra note 15.

67 Kelsey, supra note 58, at 122, and supra note 9, at 264. To this could be added the Treaty of Waitangi (Amendment) Act 1993, which prohibits the Tribunal from making recommendations affecting land in private ownership.

68 Supra note 58, at 127.

traditional institutions of parliamentary democracy and the courts, and strategies of corporatism and welfarism, are not the way to achieve this".[69]

Kelsey offers little to help "identify contradictions" as such, and, once parliamentary democracy and the courts are abandoned and the traditional forms of social democratic citizen/state settlements such as corporatism and the welfare state are rejected even as interim or defensive positions, few avenues of public activity in the framework of current politics are left. While I acknowledge that instrumentalist theory has had enormous diagnostic value, and that dialectical struggle must occur over the ideological framework and institutional forms and politics needed to address the current fiscal and ideological crises enmeshing New Zealand/Aotearoa, it must also be said that instrumentalist theory tends to disempower those who would attempt to provide practical answers to Lenin's question "what is to be done?"

Other analysts working within the Marxist paradigm who have also sought to identify contradictions in the dominant liberal ideology have not rejected the courts and law as resources to be exploited in the interests of revolutionary change. Marxist historian E P Thompson, for example, writes that "if we assume law is no more than a mystifying and pompous way in which class power is registered, we need not waste our labour studying its history and forms".[70] He comments further:

> If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, and contribute nothing to any class's hegemony. The essential pre-condition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed on occasion, by actually being just.[71]

Thompson has provocatively described the rule of law as "an unqualified human good" to curb the tyranny of the state. According to Hirst, Thompson was reacting against Marxists in his "own camp", "the libertarian anticommunist Left" who conceived law as purely repressive.[72]

Franz Neumann much earlier identified the dialectic between law as repressive and law as beneficial within liberal ideology:

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69 Supra note 56, at 364.

70 Thompson, "The Rule of Law " in Beirne, P and Quinney R (eds) *Marxism and Law* (1982) 136.

71 Ibid, 133.

72 Hirst, "Law, Socialism and Rights" in Carlen, P and Collison, M *Radical Issues in Criminology* (1980) 58, 94. Hirst specifically identifies Taylor, I, Walton, P, and Young, J *The New Criminology* (1973).

> The general character of the law and its presumptions in favour of the right of the individual and against the state play three roles in modern society: a moral [role], in that they guarantee a minimum of freedom, equality and security; an economic [role], in that they make possible a competitive contractual society; [and] a political [role], in that in varying degrees they hide the locus of power.[73]

Kelsey gives no sense of the dialectical nature of politics or law. Her Marxist-Leninist version of the Marxist paradigm emphasises the repressive character of the "constitutional revolution", leaving its beneficial potential unexplored: the "constitutional revolution" is produced and reproduced through a "bicultural" jurisprudence which hides the *locus* of power by purporting to "accommodate the needs of Maori culture" within a "culturally sensitive" common law system which still denies Rangatiratanga. The Pakeha social order after the "constitutional revolution" is at best:

> no different from any other time since 1840 unless it can be forced to address the central issue of economic and political power. In large part the success of resistance will depend on whether Pakeha can be convinced that the successful re-assertion of Te Tino Ranagatiratanga... over Aotearoa is in their interests too.[74]

No indication is given of how Pakeha might be "convinced" or of how alliances might be formed. It is a pity that Gramscian theory - a more empowering version of the Marxist paradigm - is merely nuanced as a framework in Kelsey's work, since it resonates today with a far broader constituency of critical, change-oriented analysts and activists than does instrumentalism.

Ironically, two other commentators on the intellectual and ideological pedigree of critiques of the "constitutional Revolution" - both unsympathetic to Kelsey's approach - have chosen to associate her work with Gramsci's version of neo-Marxism or with CLS.[75] But both associations are misleading. To start with, the label CLS has been over-used, and in McHugh's case has pejorative connotations. These commentators have conflated too many critical "radical" voices under the CLS and Gramscian labels for the labels to mean much.

The American CLS "movement" which emerged during the 1980's is the dominant faction, largely non-Marxist in orientation.[76] Pre-dating the

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73 Neumann, F *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (1
170.

74 Supra note 11, at 269-270.

75 McHugh, supra notes 25 and 42, and Brookfield, "Maori rights and two radical writers" [1990] NZLJ 406.

76 MacCormick, "Reconstruction after Deconstruction: A Response to CLS" (1990) 10, 2 Oxford Journal of Legal Studies 534 -558, 552.

emergence of CLS from the mid-1970's onwards, a significant Anglo-American Marxist, neo-Marxist[77] and anarchist[78] legal scholarship began to evolve, which now overlaps with and may even self-identify with CLS for convenience. Kelsey's instrumentalist, Marxist-Leninist (rather than Gramscian, Foucaldian, post-structuralist or post-modernist) work fits much more comfortably into this Marxist tradition.

What distinctive characteristics of Gramsci's Marxism make it important to use the Gramscian label with care and not conflate it with other forms of Marxist theory? Gramsci took the subject of ideological struggle seriously. He did not see its outcomes as exclusively determined by political and economic interests acting at the behest of capital. Gramscian theory addresses whether the crisis of hegemony is primarily economic or ideological. Whereas Marx and Lenin emphasised the base (that is, economic relations, understanding crises as primarily economic), Gramscian theory does not conceive of the hegemonic ideology as a coherent, economically-determined world view. Nor did Gramsci conceive of counter-hegemonic ideology as a "Trojan horse" of the mind, constructed in some other terrain by the "Party" elite to do battle with the bourgeoisie and capture the state by armed revolution.

Gramsci's theory allows for the influence of ideas on history and for the impact of free will; intellectuals are recognised as working both for and against the dominant bloc. The "masses" are seen, not as the "lumpen proletariat", but as endowed with intellectual qualities which are their source of power to create change.[79]

Gramsci viewed the hegemonic ideology as the site of counter-hegemonic struggle, not simply as coerced nor as evidence of "false consciousness":

> but as exercised as much through popular "consensus" in civil society... especially in advanced capitalist societies where education, the media, the law, mass culture, etc, take on a new role. To the extent that "superstructural" phenomena such as beliefs, values, cultural traditions and myths function on a mass level to perpetuate the existing order, it follows that the struggle for liberation must stress the task of creating a "counter-hegemonic" world view..., a new integrated culture. Gramsci insisted that socialist revolution should be conceived of as an organic *process*, not an event (or series of events), and that *consciousness transformation* is an inseparable part of structural change, indeed that it is impossible to conceptualize them as distinct phenomena.[80]

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77 Eg Taylor, Walton, and Young (supra note 72), Fine, B *et al* (eds) *Capitalism and the Rule of Law* (1979), and Bierne and Quinney (supra note 70).

78 Eg Bankowski, Z and Mungham, G *Images of Law* (1976).

79 Carnoy, M *The State and Political Theory* (1984) 87.

80 Boggs, C *Gramsci's Marxism* (1976) 17 and see chapter 2.

Maureen Cain, a prominent neo-Marxist sociologist of law, highlights significant contradictions in Gramsci's theory but stresses that it is not instrumentalist: monocausal, undialectical and unilinear explanations are not part of Gramscian analysis. From within this version of the paradigm "the revolutionary task in civil society is therefore a struggle for control of the law, that is a struggle to achieve authoritative norm-creating positions in a society based on active rather than passive consent".[81]

Alan Hunt, another prominent neo-Marxist legal theorist, has developed the most contemporary application of the relationship between social movements, rights and counter-hegemonic strategies. Ideological change is presented as the transformation of discourses such as the changed official discourse represented in the "constitutional revolution". Hunt observes that "new discourses are not invented but rather transform already existing elements and it is generally within this context that 'new' or original elements are added and, conversely, old elements are excised".[82] Employing a Gramscian analysis to assess the impact of rights-based counter-hegemonic strategies such as the "constitutional revolution", he cautions:

> it is not a matter of securing some immediate interest... a key feature of any such assessment revolves around their capacity to put in place a new or transformed discourse of rights which goes to the heart of the way in which the substantive issues are conceived, expressed, argued about and struggled over.[83]

Within the instrumentalist paradigm employed in Kelsey's work, the evaluation of the significance of the "constitutional revolution" discounts its counter-hegemonic potential and highlights only its repressive or palliative function. Kelsey claims that "the passive revolution of the 1980s may have provided temporary respite but the prognosis for the 1990s [is] full scale crisis in the dual state".[84] The cryptic reference to the "crisis in the dual state" may perhaps signal that "non-bourgeois uses of bourgeois legality" are possible counter-hegemonic strategies.[85] Lenin identified the dual state as a striking feature of the revolution. He said that "side by side with the provisional government of the bourgeoisie there has developed another

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81 Cain, M "Gramsci, the State and the place of Law" in Sugarman, D (ed) *Legality, Ideology and the State* (1983) 106 and 103.

82 Hunt, A "Rights and Social movements: Counter-hegemonic strategies" (1990) 17 Journal of Law and Society 309, 324-5.

83 Ibid, 320.

84 Supra note 58, at 129.

85 De Sousa Santos, B "Popular Justice, Dual Power and Socialist Strategy" in Bierne and Quinney, supra note 70, at 365.

government, weak and embryonic as yet, but undoubtedly and actually existing and growing government".[86]

Trotsky also saw "dual" power as a distinct condition of social crisis not peculiar to the Russian revolution.[87] Dual power or the dual state is understood in revolutionary Marxism as a temporary transitional phase "interlocking" the bourgeois state with the revolutionary state. It was assumed that such a condition could not last long "since two powers cannot exist in a state".[88]

De Sousa Santos, an internationally known neo-Marxist Portuguese scholar, offers some analysis of "dual power" in an ethnographic study of the Portuguese "revolution" and self-government established by squatters in Rio.[89] He suggests that the concept of dual power might be used "in a weakened but nonetheless valuable form in non-revolutionary situations embodying complementary rather than confrontational powers... to address intra-class conflict at the surface level".[90] The dual state/dual power concept is useful when it is accompanied by recognition of contradictory state forms and class interests, compromises of power and the making of concessions, the plurality of centres of political power, and legitimacy from class power not conferred by the central government, all of which are compatible with Kelsey's concluding visioning about "what is to be done" in *Rolling Back the State.* In the end, though, this strategy requires that some instrumentalist assumptions are challenged.

Marxist-Leninist political strategies were predicated on a nineteenth century European notion of revolution through the self-emancipation of a homogeneous working class. Gramscian theory grappled with fascist populism in the inter-war period. Both, though Eurocentric and metropolitan, have considerable diagnostic utility, but only when employed with great care. For visioning a post-colonial practice of counter-hegemonic struggle in a post-Fordist era, a more empowering paradigm is needed. The Marxist paradigm, like the Prendergast and Rangatiratanga paradigms, clearly acknowledges the "ideological work" represented in the "constitutional revolution", but, whereas in Marxist instrumentalist theory the "constitutional revolution" legitimates the pernicious *status quo*, in the Rangatiratanga paradigm and the Prendergast paradigm the "constitutional

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86 Lenin, V I *Selected Works* (1960) quoted by De Sousa Santos, ibid, 366.
87 Trotsky, L *Basic Writings* (1961) 101.
88 Lenin, supra note 86, at 58-59.
89 Supra, note 85, at 373.
90 Ibid, 368.

revolution" has had a pernicious counter-hegemonic impact - pernicious for very different reasons, of course.

VI. THE ORTHODOX LEGAL PARADIGM

The exponent of the Orthodox Legal Paradigm (hereafter OLP) as a distinctive approach is Paul McHugh, a Pakeha New Zealander educated in New Zealand, Canada and England and author of a substantial *corpus* of work.[91] McHugh's work contributed the historical and comparative doctrinal perspectives which enabled tribunals and courts in New Zealand to view aboriginal title as part of New Zealand's common law. Thus, aboriginal title became a professionally and intellectually respectable doctrine. McHugh's work of the last decade now informs the courts, the Tribunal, government and the academy, not least because its style of presentation and form locates the path of change within the well mapped terrain of the common law.

McHugh explains the workings of the OLP as follows. It consists of:

> (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 definition 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.[92]

The orthodoxy of the method legitimates its discourse in a way that "politically correct" but "technically wrong" work will not do. Hence discourse emanating from the OLP cannot easily be dismissed as politics masquerading as law. The identification of the translation of Maori-defined claims into the Aboriginal rights strategy has indeed been a valuable service.

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91 See eg "Aboriginal Title in New Zealand Courts" (1984) 2 Canterbury Law Review 235, *The Rights of the New Zealand Maori at Common Law* (unpublished PhD dissertation, University of Cambridge, 1987), and *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991). The OLP overlaps in methodology with the post-assimilationist paradigm and shares analysts and activists such as Professor Jock Brookfield, Professor Gordon Orr, Judge E Durie, Sir Geoffrey Palmer, Alex Frame, Sir Kenneth Keith, Sir Robin Cooke and Dr David Williams. See (1990) 14 NZULR, a special Treaty issue edited by Dr Peter Spiller.

92 Supra note 25, at 98.

The OLP's evaluation of the so-called constitutional "revolution" reflects its emphasis on the gradualist approach to understanding law and change and the translator role of lawyers. McHugh states:

> the encounter with Treaty issues has required New Zealand lawyers to reassess and reorient the traditional positivist methodology. The developments I have described have all occurred in the context of orthodox legal doctrine and methodology. There has not been a revolution in traditional legal outlook so much as an organic and very gradual reorientation.[93]

Analysts and activists critiquing the OLP from within the Prendergast (with the exception of Chapman), Rangatiratanga, Marxist, and post-assimilationist paradigms seldom, however, engage with it on the ground of doctrinal strategy. Critics of the OLP have focussed on *what* the political meaning and material impact of changed discourses such as legal doctrine might be. McHugh devotes considerable energy to critiquing his critics in what he over-generalises as the "so-called CLS movement" (including the Rangatiratanga and Marxist paradigms) and in the Prendergast paradigm,[94] but he tends not to theorise about *why* changes such as the "constitutional revolution" have occurred and *what* their political meaning might be, concentrating instead on *how* they can and do occur within legal doctrine. He regards the "reorientation" of the common law achieved through orthodox methods as axiomatically a "good thing": after all, the "wrong approach to international law, contractual principle and British colonial practice",[95] which constituted the dominant paradigm for almost a hundred years of New Zealand legal practice, has been corrected.

Even within the self-circumscribed parameters of the OLP, however, it is hard to see the constitutional developments of 1984-90 as "gradual" (most change having taken place in the decade of the 1980's after a hiatus of almost 100 years) or as "organic". The *volksgeist* did not call for change. The changes were not popular and were indeed handicapped by fear of a backlash. The OLP as a method does not need to contextualise these constitutional developments, but McHugh needs to when engaging his critics on their ground.

The political meaning of doctrinal change needs to be located somehow within a complex process of structuration. This process involved the interplay of traditional and radical Maori leadership, activists in the legal profession and the academy from all paradigms, and institutions such as the media, an activist judiciary and the programmes and policies of biculturally

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93 Idem.

94 Supra note 42.

95 Palmer, supra note 14, at 72; Frame, "A State Servant Looks at the Treaty" (1990) 14 NZULR 83.

committed segments within successive Labour Governments. McHugh's lack of contextuality makes his work vulnerable to critics concerned about the socio-political "meaning" of doctrinal legal change.

Missing the point that his critics have been asking whether such "Treaty justice" is *desirable*, not whether it is *possible* through the OLP, McHugh criticises them for their dismissiveness, which

> hardly deserves description as a critique, for it absolves its proponents from any form of intellectual engagement with the 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.[96]

McHugh complains that:

> [a]ny description, then of change which signifies greater receptivity to the Treaty within the orthodox legal paradigm is treated with scorn. Those who inhabit that paradigm are the "organic intellectuals of Pakeha capital", or depicted as deluded, starry-eyed or short-sighted proponents of a glorious, justice-delivering common law.[97]

As my earlier description and analysis of other paradigms attempts to show, these critical voices, with the exception of the Marxist paradigm, do indeed detect greater receptivity - possibly even a "revolution" - in the paradigm used in the dominant, Pakeha, legal system. They argue, however, about the value of the change.

The OLP method seems compelled to de-emphasise as atypical and politicised significant aspects of legal evolution which have changed the status of the Treaty, if these are not outcomes of orthodox common law evolution. To be internally consistent with its own method, a purist version of the OLP like Austinian positivism and Langdellian orthodoxy[98] permits only rather linear explanations of change.[99] Judges, after all, only "find" the law which originates as "the command of the sovereign backed by threats". Thus, sets of interpretative principles which bespeak the wairua (spirit) of the Treaty are problematic because they have been promulgated both by

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96 Supra note 25, at 98.

97 Idem.

98 The OLP's depiction of the common law and its evolution resonates with this orthodoxy: "Law, considered as a science, consists of certain principles or doctrines. Each of these doctrines has arrived at its present state by slow degrees ... extending in many cases through centuries. This growth is to be traced through a series of cases" (Langdell, C C *A Selection of Cases on the Law of Contracts* (1871) viii, quoted in Twining, W *Karl Llewellyn and the Realist Movement* (1973) 11).

99 Mulgan, R *Maori, Pakeha and Democracy* (1989) 114.

activist appellate courts operating in an almost Americanised fashion and by the Tribunal, a mere commission of inquiry. Both are rather unorthodox modes of adapting Anglo-New Zealand common law.

Perhaps McHugh does not treat the Tribunal and the triangulated political dynamic surrounding it, the courts and the executive, as of central importance for this reason? Yet he tantalisingly describes the nature of his major work, *The Maori Magna Carta*, by stating that "ultimately the topic of this book is the legal framework for the exercise of power within the New Zealand state".[100] Unfortunately, given the encyclopaedic depth and breadth of McHugh's scholarship, he does not attempt to contextualise the legal framework by articulating the nature of either "power" or the "state". An analysis of "power" would have to deal with the socio-political meaning of doctrinal legal change and in such a debate McHugh and his critics in other paradigms would not be talking past each other.

Nigel Jamieson, reviewing this 392-page volume, highlights the modest place occupied by the Tribunal in McHugh's analysis:

> Would it detract from the legal status of the Waitangi Tribunal to recount something of its history in terms of party politics? Thirty four pages on the Treaty of Waitangi Act 1975 subsume all government activity as the work of the Crown - a surprisingly strict legal account for one who opposes conventional legal theory on partisan grounds.[101]

One presumes "conventional legal theory" here means Prendergast jurisprudence?

McHugh concludes about the Tribunal that "as an aboriginal claims forum it is certainly unique in the Australasian and North American experience", that it had achieved considerable mana among Maori, and status and profile among Pakeha, through its eminently reasonable approach, the practical application of principles, shunning of extremism, and avoidance of a strictly reparative approach, focussing on needs rather than on desserts.[102]

McHugh considers neither arguments about power made in the 1960's by "radical" poverty lawyers,[103] nor arguments made in the 1980's by feminist, CLS, First Nations/Indigenous/ Black scholars, that the lawyer/translator frequently if not invariably employs a disabling interpretive monopoly

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100 Supra note 42, at 3.

101 Jamieson, "Books: The Maori Magna Carta - Fact or Fiction, Myth or Reality?" (1992) NZLJ 101

102 Supra note 42, at 330.

103 Wexler, "Practicing law for Poor People" (1970) *Yale Law Journal* 1049.

reflecting the fetishism of rights in liberal legal ideology.[104] McHugh unquestioningly accepts as "given" the validity of the process he describes. Ironically, his own intelligent and thorough, though brief, description of the Tribunal's way of working illustrates how this "unique" body has deviated procedurally and methodologically from the orthodox forensic procedures of courts and tribunals.[105]

Without an analysis of power or the state, the Treaty tends to be reified. It becomes the agent of change, propelled by the inexorable logic of the common law. For example, as the encounter between explorer and indigenous people wrought irreversible change, so "the Treaty encounter has required New Zealand lawyers to re-assess and reorient positivist methodology".[106] McHugh eschews attempts to explain why actors or agencies of the state permit change or paradigm shifts. He states simply that "the advances in legal scholarship on the Treaty have been underpinned by an unwillingness to regard law as a discrete intellectual system removed from the mainstream of other thought and the circumstances of New Zealand society".[107] How does this fit with his earlier defence of the OLP and his repudiation of an American Realist or CLS approach, since the latter *par excellence* examine law in the mainstream of other thought and the circumstances of society? By way of an answer within the parameters of the OLP he states:

> The movement away from the *Wi Parata* mentality by the 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 jurisdictions. Second, an approach examined here rejected late nineteenth century attitudinizing about Maori rights. Instead lawyers have tried to capture or at least to comprehend the intellectual milieu within which British colonial administrators confronted with questions of tribal rights had operated. Lawyers have thus been exposed to a form of intellectual history which challenges dogged positivism.[108]

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104 See Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies and Cultural Differences" (1989-90) 6 Canadian Human Rights Yearbook 3; Karruish, V *Jurisprudence as Ideology* (1991); and Medcalfe, L *Law and Identity: Lawyers, Native Americans and Legal Practice* (1989). Boast, "Treaty Rights or Aboriginal Rights" [1990] NZLJ 32, 33 makes the point that to bring Maori rights in under the resuscitated doctrine of aboriginal title is merely to view them through the monocultural prism of the common law and does not affirm their unique and independent status.

105 Supra note 42, at 309-321. See also Durie and Orr, "The Role of the Waitangi Tribunal and the Development of a Bi-cultural Jurisprudence" [1990] NZULR 62, 79-80.

106 Supra note 25, at 98.

107 Ibid, 92.

108 Ibid, 94.

McHugh seems to be saying that lawyers and legal academics working within an orthodox paradigm are nevertheless the agents of change, somehow motivated by a new rationality based on new knowledge and new methods. Such staunch advocacy for the flexibility of the late twentieth century common law and, implicitly, its inherent capacity to do justice for Maori smacks of the "myth of rights".[109] This is hardly a case of "rights without illusions".[110]

VII. CONCLUSION: FROM A POST-ASSIMILATIONIST PARADIGM TO A POST-COLONIAL ONE?

Most analysts and activists who have promoted and supported the "constitutional revolution" appear to be committed to a post-assimilationist immediate future and the possibility of a post-colonial future in the long term. One presumes that the choice of path to realise this vision is predicated on the assumption that the politics of the twenty-first century will consist of contest and settlement within the dialectic of affinities and difference.[111] There may be recognition that outcomes will be transitory and thus continually under review; that power requires equalising, and that representation and participation in the affairs of the state require voice and choice; and that multidimensional antagonisms on the axes of race, gender, class and region require multidimensional, multicultural and bicultural institutional vehicles and processes to achieve settlements. Hence the interest in institutional re-design, biculturalism and electoral reform, at least since 1985.

The decolonising of assimilationist culture will be slow and difficult as difference is interlocked with affinities and the past with the future.[112] James argues that the acceptance of the Treaty is the most important act of independence and affirmation of nationhood since the reluctant acceptance of legal independence in 1947 when New Zealand recognized the Staute of Westminster of 1932. The new constitution unlike Canada's patriated Constitution of 1982 was made more by accident than design. Nonetheless the now accepted post-revolutionary rhetoric of a bicultural partnership

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109 See Scheingold, supra note 26. Scheingold's monograph significantly predates the CLS movement, though McHugh implies that Scheingold's work is somehow an expression of it (supra note 25, at 101).

110 Supra note 23, at 100.

111 Levine states: "The interests of the tangata whenua which the treaty guarantees necessitate an incorporation of taha Maori in the public sector. It is the nature of the secular, civil culture of the state itself that is being challenged to become bicultural." (supra note 34, at 438).

112 Ashcroft B, Griffiths G, and Tiffin H *The Empire Writes Back; Theory and Practice in Post Colonial Literatures* (1989) 195.

requires the "fashioning of an identity and a wholeness out of a conflict no one else can resolve".[113] James does not assume that the process of "decolonising" will always be progressive. Any counter-hegemonic struggle is shaped by advances and retreats, changes of pace on the shared and hence contested terrain of the dominant ideology. James warns that "there are now no comfortable colonial myths to retreat to", and that "whether they like it or not - and many do not like it - all European New Zealanders now know they live inescapably alongside a South Pacific race and they are inescapably part-defined by that.[114]

The Prendergast paradigm alone has a concrete vision of the future and the means by which settlements will be achieved. This vision consists of the present with a gesture in the direction of cosmetic multiculturalism, without the Tribunal and without an activist judiciary of the variety currently on the bench. The OLP suggests Treaty justice but "justice" to be done by predominantly monocultural means, namely, the common law. The Ranagatiratanga paradigm envisages a splitting of the *grundnorm* emphasising difference rather than affinity. The post-colonial vision embryonically found in the post-assimilationist paradigm explicitly envisages a bicultural future achieved by bicultural means.

A consciousness has evolved in which the nature of identity of all citizens is contested, Maori self-confidence has been significantly increased and re-inforced, official discourse on the Treaty has been radically altered, the history of Pakeha/Maori relations has been re-written, and the Treaty has been constitutionalised. Alongside such developments the momentum for a "counter revolutionary" backlash[115] is building within the hegemonic ideology of the post-Fordist market state, the material circumstances of Maori are largely unchanged and conditions for the rest are worsening. As Kelsey concludes in *Rolling Back the State*, now is the time for cross-cultural alliance building. In my view, such alliance building and the new politics to be created cannot afford to forego the political resources that social rights, parliamentary democracy and citizenship still offer. The "constitutional revolution" has been a necessary but not sufficient pre-condition for the realisation of a post-colonial Aotearoa/ New Zealand.

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113 Supra note 18, at 123.

114 Idem.

115 Vowles, J and Aimer, P *Voters Vengeance :The 1990 Election in New Zealand and the fate of the Fourth Labour Government* (1993)171-4.