‘Treaty and Method’ by Bernard Cadogan

This seminar is entitled “Treaty and Method” by way of demonstrating two things. Firstly where New Zealand is with the Treaty compared with other indigenous rights polities; secondly to argue that the question is not so much who and what interprets the Treaty but *how* it is interpreted. The wisest judges and historians, the most experienced statespersons and officials are only as good as their procedures are, for working with the Treaty. And by *how* I refer to the means used to interpret, not the conclusions.

I give fair warning however- I am going to use three words from ancient Greek, used in Law-writing, constitutionalism and political philosophy. I am sorry for that, but it can’t be helped. I would rather make you party to what I am thinking by owning up to what I am borrowing from current discourse, than hide behind synonyms. These terms are:-

Autochthony **Hermeneutics** **Phronesis**

Autochthony and Indigeneity

The first term is *autochthony* or *autochthonous*. It means sprung or derived from the soil of a country. [1]It is used to speak of a state or government (or people) originally introduced to a country by colonization. It does not mean indigenous. I accept the Canadian definitions of indigeneity, that Chief Justice Antonio Lamer made, [2]which the Metis leader Louis Chartrand affirms, [3]that indigeneity is the state of affairs when the state or Crown assumes effective sovereignty over a territory and people in it, thereby crystallizing native title. A settler successor state is never indigenous then.

Some modern states in what became OECD post-British polities did exist that were indigenous in origin, usually from the alliance of unifying warlords and chieftains with traders and missionaries. The Kingdom of Hawaii was overthrown in 1893 by a *coup d’état* after a hundred years. [4]

The Assinoboia state or Red River Colony in what is now Manitoba [5]and the West and East Griqualand states in South Africa [6]attest to how widespread the phenomenon was.

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[1] Greek auto (self) + chthon (soil).

[2] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. note 9 at para. 145.

[3] Belanger, Yale D., *Aboriginal Self-Government in Canada:- Current Trends and Issues ,* Purich Publishing Saskatoon, 2008 p. 149.

[4] American filibusters overthrew Queen Lili’uokalani in 1893, declared a provisional government, defied the attempts of Japan, Great Britain and the United States to restore her in 1894 by proclaiming a republic, which was admitted as a territory to the United States during the Presidency of William McKinley in 1898. The queen formally abdicated in 1895 (under duress).

[5] The Assiniboia state of Louis Riel lasted 1869-70 and was established as a provisional government to negotiate the territory’s terms of admission into Canada, after the Hudson’s Bay Company surrendered its jurisdiction.

But in New Zealand for all intents and purposes an autochthonous state provides government for an indigenous people, among other citizens. The British Colonial Secretary Leo Amery declared in 1927 at the Colonial Office Conference that:-

> *" Each Colonial Government and each Colonial Service has grown up on the spot by a continual process of local evolution from the days of our first historical connection with the Colony, the days of the first Treaty cession, the first conquest, the first original peaceful trading penetration, as the case may be. Each Government and Service, therefore is autochthonous, racy of the soil, adapted to local conditions and in its sympathy with the population it administers."* [7]

While it is impossible to deny that the New Zealand Government has been, to say the very least, deficient in sympathy with Maori, that government is nonetheless autochthonous as it works with deepening New Zealand traditions of law, political thought and of sound political and official practice. "*The monstrous little New Zealand Government*" as Lord Salisbury once called it, [8]has been busy these recent decades responding to the development of a Treaty constitution. We have gone beyond talking about "Treaty Law" as we did 10-20 years ago, to talking about a Treaty constitution, as a way of referring to the interface that has developed between Maori institutions and the New Zealand Government. [9]To say that an autochthonous government negotiates with an indigenous people, is arguably more helpful than making "settler" or "*colon*" antonyms to "indigene" as the postcolonial ideologies of Frantz Fanon [10]or Edward Said did, [11]or else settler-descendants insisting that they too are indigenous because they have been in a country a while. Settlers in 1840 were not the indigenous state of affairs that pertained in New Zealand when the Crown annexed the country.

Autochthony is also a concept used in the best practice constitutional thinking on the post-British polities. K. C. Wheare disseminated it widely throughout legal and constitutional writing in his *The Constitutional Structure of the Commonwealth* of 1960. [12]In Peter C. Oliver's *The Constitution of*

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[6] There were three Griqua states, the first of Adam Kok I, to the north of the Cape Colony, the second West Griqualand founded by Andries Waterboer in the 1810s near what is now Kimberley and the third East Griqualand between the Eastern Cape and KwaZulu-Natal founded by Adam Kok III which ceased to exist in 1874. There was also a state of Philippolis while West Griqualand existed.

[7] Amery, Leopold Stennett (1873-1955) Colonial Office Conference Speech 10 May 1927; in Wight, Martin, *The Development of the Legislative Council* Faber and Faber London 1946, frontispiece.

[8] Roberts, Andrew *Victorian Titan* Weidenfeld and Nicolson London 1999 p. 463.

[9] Palmer, Matthew S.R., *The Treaty of Waitangi in New Zealand's Law and Constitution* Victoria University Press p. 359 :- *"The Treaty of Waitangi is already a constitutional document"* , a statement with which I agree.

[10] Fanon, Frantz, *Les Damnes de la Terre* F. Maspero 1961

[11] Said, Edward *Orientalism* Vintage Books, New York 1979.

[12] Wheare, K.C., *The Constitutional Structure of the Commonwealth* Oxford, at the Clarendon Press 1960.

Independence of 2005 [13]you will find that the word has live and nimble legs in the 21st century, and does not just belong in the florid scented-handkerchief rhetorics of Leo Amery.

Hermeneutics

Hoping to have persuaded you of the utility of the first piece of Greek as at least a "Scrabble" word, I proceed to the second, which is much worse. That word is *Hermeneutics*, which is used to refer to how we philosophically understand the process of interpreting and applying the textual cultures and high civilization of the past to our various presents. It comes from the Greek word meaning to "translate". [14]

Consider how the Treaty was written in two languages 171 years ago as a developed policy instrument; - in an English legal language that was a polished formulaic highly literate and non-oral register, and in a Maori language, recently become a written language, bristling with neologisms, yet intelligible to participants at the time and presumably to modern Maori speakers, in both cases exponents of a high oral indigenous civilization.

171 years before the Treaty, back in 1669, the social, economic and technological conditions in a British colony changed comparatively little between then and 1840 than they were to between 1840 and 2011. As a matter of fact the conditions that prevailed in 1669 gave rise to a major statement of British colonial policy, the Letter of Charles II to the Council of Foreign Plantations of 1670. [15]This is the grandparent of the Treaty. If the Treaty is discernable in the principles of that 1670 Letter, it is recognizable in the Appalachian Proclamation and Protectorate of 1763-1764, [16]and evident in the 1837 *Report of the Select Committee on Aboriginal Affairs*. [17]A process of affiliation brought that about over 171 years:- yet arguably Philip II's *Ordinance of Population and Discoveries of 1573* is the original "Best Practice"-for-empires declaration that Crown agents were to segregate native people from settlers and even from missionaries let alone traders along proclaimed frontier lines. Conditions have changed so much however between 1840 and 2011 that the hermeneutical challenge is greater, a challenge which resembles the American hermeneutical debate over the U.S. Constitution of 1787. Should we be originalist or interpretavist? Should we work *FROM* the original meaning [18](for originalism as a legal method is never fundamentalist unless the Tea Party

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[13] Oliver, Peter C., *The Constitution of Independence* Oxford University Press, Oxford 2005 pp. 103-7.

[14] Greek "hermeneuein".

[15] *Report of the Select Committee on Aborigines (British Settlements)* G.B.P.P. [425] 26 June 1837 p. 4.

[16] Brodhead, John Romeyn, and O'Callaghan, E.B., (eds) *Documents Relative to the Colonial History of the State of New York, Procured in Holland, England, and France* Weed, Albany, New York 1858.

[17] *Report of the Select Committee on Aborigines (British Settlements) Together with Minutes of Evidence* 4 February – 20 August 1836 no 538

Report of the Select Committee on Aborigines (British Settlements) 1837 no. 425.

[18] Valauri, John T., " Interpretation, Critique, and Adjudication:- The Search for Constitutional Hermeneutics" in Francis J. Mootz III (ed.) Gadamer and Law Ashgate, Aldershot Hampshire 2007, pp. 261 ff.

misappropriate it), or should we use Ronald Dworkin's doctrine of "moral fit"? [19]Can we really regard a text as if its framers came alive and had to write it now, as American jurist Benjamin Cardozo proposed? To that, I would suggest that Chief Justice Prendergast would still be Chief Justice Prendergast, brought back from the dead, and we would find him with the Coastal Coalition.

I contend that legal hermeneutics as developed by the Italian jurist Emilio Betti (1890-1968) over 1955-60 [20]and a general philosophy of hermeneutics produced by German philosopher Hans-Georg Gadamer (1900-2002) in 1960 [21]provide well-founded interpretavist strategies for working with documents such as the U.S. Constitution, or the Treaty. I regret the dependence on the Axis powers:- Betti was a fascist, absolved though of political criminal charges, Gadamer lay low and taught at Leipzig, a university with less Nazi permeation than elsewhere. Soviet Occupation authorities in fact appointed him Rector.

If hermeneutics is all a bit much to take in, if you wonder why you haven't heard about it at New Zealand universities, I propose the following. Leaving aside Germans and Italians, some form of hermeneutical turn has been going on in Anglo-American countries since the mid-20th century. Mark Hickford and I are exponents of the Cambridge School of the history of political and legal thought. Great names associated with that are Peter Laslett (1915-2001) Quentin Skinner (b. 1940), and the New Zealander John Pocock (b. 1924). Actually the New Zealand contribution to the Cambridge School actually came out of Otago University c. 1955 where Pocock worked Cambridge his thesis up into his classic work *The Ancient Constitution and Feudal Law*. [22]He is an Emeritus Professor at Johns Hopkins, Baltimore, and was awarded the MNZM in 2002. His eminent New Zealand colleague is the Political Scientist Andrew Sharp (b. 1940). Their contributions made the Treaty essay book *Histories, Power and Loss* of 2001 [23]one of the best collections of Treaty essays ever. The co-editor Paul McHugh though, a Fellow of Sidney Sussex College, preceded Mark and me in Treaty studies with his ground-breaking and seminal work from the 1980s onwards, and as he executed his early 90s "Pocockian turn". There again we can't escape erstwhile enemies from Central Europe, because Skinner was heavily influenced by the latter language theory work of Ludwig Wittgenstein, mediated through J.L. Austin, and Wittgenstein was a veteran of the Austro-Hungarian Empire's WWI.

Phronesis

It might be objected that the Treaty is not the kind of document that can be treated the way the U.S. Constitution can be. Lord Cooke once unfortunately remarked that the Treaty is just an embryo and

[19] Dworkin Ronald, *Freedom's Law:-The Moral Reading of the American Constitution* Harvard University Press, Cambridge Massachusetts,1996.

[20] Betti, Emilio *Teoria Generale della Interpretazione* Giuffre, Milano 1955.

[21] Gadamer, Hans-Georg, *Wahrheit und Method*: *Grundzuege einer philosophischen Hermeneutik* Mohr Verlag, Tubingen 1960.

[22] Pocock, J.G.A., *The Ancient Constitution and Feudal Law :- A Study of English Historical Thought in the 17th Century* Cambridge University Press, Cambridge 1987.

[23] Paul McHugh and Andrew Sharp (eds) *Histories, Power and Loss:- Uses of the Past – a New Zealand Commentary* Bridget Williams, Wellington 2001.

not a well-developed set of ideas. [24]The good news or disturbing news for you is that judges can be wrong. Similarly although "partnership" is a helpful term for what we have been doing since 1987, "trusteeship" in the Burkean sense is rather what British officials meant, by annexing yet another country in 1840. [25]Yet if we all, judges, officials politicians and scholars deploy the third Greek concept I am offering you, "*phronesis"*, all might be well, or at least less bad. *Phronesis* is the word that Aristotle uses in the *Nicomachean Ethics* to describe "practical wisdom", or the wise and pragmatic application of judgment and knowledge. [26]*Phronesis* is especially the state of mind that Gadamer enjoined on those engaged in interpretative i.e. hermeneutical activity. This is the activity that you and politicians are engaged in day after day when you are busy with Treaty negotiations or involved in official business with the Maori Party or Maori iwi authorities.

The Three British Racial Systems

1/ Native Protection and Segregation

What was not understand about the "embryonic " Treaty is that there were just three British systems of racial administration in the 5 centuries between Mary Tudor's first plantations in Ireland in the 1550s, up until the independence of Vanuatu in 1981 and the demolition of apartheid in South Africa by 1994. The first was the Treaty genealogy that I have outlined above, from Philip II, from Charles II, from Appalachia to the Buxton Select Committee Report of 1837 which revived and clarified the policy of native protection and segregation on the very eve of the Treaty of Waitangi and of the British annexation of New Zealand. This was the ideal policy for a mercantilist era. *Campbell v Hall* of 1774 [27]was the King's Bench case that marked the constitutional legal paradigm for that imperial system, while we may accept the classic judgments of American Chief Justice John Marshall as both the terminus and origin of the indigenous rights law of native protection, the

[24] *New Zealand Maori Council v. R*. Court of Appeal 54/86 28 June 1987. For the long and developed British Treaty tradition that Lord Cooke was apparently unaware of in 1987, or misunderstood, see also :-

McHugh, Paul *Aboriginal Societies and the Common Law: - A History of Sovereignty Status, and Self-Determination* Oxford 2004 p. 111.

Bennion, Tom "Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi" 35 *Victoria University of Wellington Law Review* 2004.

[25] Burke, Edmund *Articles of Charge of High Crimes and Misdemeanours against W. Hastings, Esquire, late Governor-General of Bengal, Presented to the House of Commons in April and May 1786*, in *Writings and Speeches of Edmund Burke*, Cosimo, New York 2008 v. IX, (first published 1887).

[25] Burke, Edmund *Articles of Charge of High Crimes and Misdemeanours against W. Hastings, Esquire, late Governor-General of Bengal, Presented to the House of Commons in April and May 1786*, in *Writings and Speeches of Edmund Burke*, Cosimo, New York 2008 v. IX, (first published 1887).

[26] Aristotle, *Nicomachean Ethics* 1140 b, 1141 b- 1142 a.

[27] *Campbell v Hall* 1Cowp 201 (K.B.)

terminus of the British system in the America of Andrew Jackson and the originator of modern indigenous rights. [28]

Far from being a conceptual blastocyst or embryo, the Treaty did constitute a well-developed set of ideas. If that sounds disrespectful to judges, let us recollect that the Treaty Law orogeny uplifted indigenous rights in the 1980s when there wasn't the historiography to support it as there is now (sort of). I particularly refer to the outstanding 1999 Oxford D.Phil thesis of my colleague Mark Hickford on how native title was constituted in New Zealand, [29]in which he refers to the Appalachian protectorate. We may not be economical with the truth or go into the red for the truths that are necessary to prove and support a legitimate and authoritative Treaty process. It is on *authority* not *imperium* that the Crown relies on in Treaty debates. [30]As members of the wider intelligentsia, the Judiciary on Treaty matters should be subject to the same peer review in scholarship and philosophy and to the same critical regard that the Media give to other branches of government. We are all colleagues, and judges belong to an institution that is abyssally sited in fields of interpretation that are wider and deeper than themselves, or any of us.

The advantage of hermeneutics is that we are not thereby caught in a sterile debate between whether the original meaning should prevail, in so far as we may reconstruct it, and the 21st century post-modern reality of how we read into texts and insert meanings into the spaces of a text. Rather a judge or an official or a politician or historian or a political or media commentator applies his or her understanding, arrives at his or her present comprehension in the context of a mediated tradition of readings. 1840 does not ring us up 171 light years away in space straight off and immediately intelligibly. Hermeneutics insists on a tradition of multi-media multi-disciplinary review and not the illusion of immediate communicability. It insists on authorities, not just of judges but of scholars and other creative or decisive interventions. The Maori desire to reserve the right of *contra referentem* readings gives them an investment in the original text. The current application though can only be arrived at through our own time-and culture-bound interpretations. What some juridical commentators have lacked is a plausible language-theory and a declared and demonstrable hermeneutics. "Principles" of the Treaty, recited like a mantra are not enough. We are grown adults. For example the Treaty chapter of the *Treasury Briefing Paper of 1987* queries:-

> *"there was general agreement that the concept of partnership is central to an understanding of the Treaty and that, arising from this concept, is an obligation on both sides to act in good faith. This interpretation is of particular interest as, at first sight, it is not obvious that partnership is the primary theme of the Treaty."* [31]

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[28] *Worcester v The State of Georgia* (1832) 6 Peters 515 at 547 (U.S.S.C.).

[29] Hickford, Mark "Making Territorial Rights of the Natives:- Britain and New Zealand, 1830-1847" Thesis (D.Phil) University of Oxford 1999.

[30] Gadamer, Hans-Georg *Philosophical Hermeneutics* (David Linge trans.) , University of California Press, Berkeley 1976 p. 34.

[31] *Government Management :- Brief to the Incoming Government 1987* v. I (The Treasury, Wellington 1987) p. 323.

The answer to this is that just as Britons and Pakeha went from being subjects to citizens in the course of the 19th century, something of the same occurred for Maori by the mid 20th century, by longer, slower stages, after much wrong was done and Maori had suffered from institutionalized racism. I would describe that what was on the British minds back in London was a federal pact with what the Romans called "*foederati"* (federal spelt with an "o") and they were seeking "barbarian" allies primarily to protect the settler colonies that were being founded. The British also intended humanitarian native protection, a fiduciary relationship which in their minds entitled them to superiority in the relationship. All this has changed into "partnership". But partnership in 1840 English meant just something like a business partnership. Annexation under the Doctrine of act of State did not admit "partners", rather parties or powers or princes or potentates. Similarly not all the things that were on people's minds on both sides in 1840 appear in the usual lists of principles. The right not to become extinct as a nation or people is never mentioned, but isn't that what the New Zealand Wars were about? Isn't that what Maori resistance to assimilation in the 1860s and 1960s was about?

2/ Assimilation

To continue, the second British system was that of the assimilation of indigenous peoples into the settler colony. It is as old as segregationist native protection. It began in Tudor and Stuart Ireland, for Ireland is the ground-zero of British transmarine state-sponsored mass settlement. New Zealand ought to be called New Ireland, rather than the island off P.N.G., because our situation has always felt "Irish" and not at all like a large sandbank off The Netherlands. The poet Edmund Spenser [32]and the Solicitor General Sir John Davies [33]demanded that the Irish be deprived of their indigenous property and legal institutions and be made to live under Common Law, so as to become good neighbours and undertake their part in the economic development of that island that the settlers intended for them. The same scheme was proposed for the Indians of Virginia in 1612, [34]giving rise to a creole tradition of indigenous assimilation, which Thomas Jefferson asserted against the Crown agents in the 1770s. Jefferson was to revise the policy of the United States during his presidency from a native protectionist one, as under the Appalachian Protectorate, to an assimilationist. [35]

Meanwhile the British were drawing conclusions from a policy debate of a similar nature in British India. Was it better as the "Orientalists" argued, to rule Indians with their native languages and religious law, or otherwise impose legal integration upon them, as Utilitarians and the evangelically-minded proposed ? You appreciate the analogy, the Orientalists occupy the same term in this debate as the native protectionists and the Utilitarians as the assimilationists.

This policy debate jumped East India Company policy circles and got into the Colonial Office and its British Empire. A young man of 28 called George Grey was responsible, writing a report on how best

[32] Spenser, Edmund, *A View of the Present State of Ireland* (1596).

[33] Davies, Sir John *A discoverie of the true causes why Ireland was never entirely subdued* etc. printed for Richard Watts and Laurence Flin, Dublin 1761.

[34] Johnson, Richard *The New Life of Virginea* printed for William Welby London 1612.

[35] Jefferson, Thomas *A Summary View of the Rights of British America* printed by Clementina Rind, Williamsburg, Virginia; Reprinted G. Kearsly London 1774.

to civilize Australian aborigines or any indigenous people for that matter, and sending it off from Mauritius in 1840 to Lord John Russell the Colonial Secretary. [36]He was rewarded with the governorships of South Australia (1841-45), New Zealand (1845-53), what is now South Africa (1854-61) and New Zealand again (1861-68). He was even premier of New Zealand 1877-79.

Unfortunately as the 007 of British Assimilation policy, he took his license to kill rather liberally. The Waikato War he unleashed on Waikato Tribes in 1863 was preceded by his atrocious exploitation of the Xhosa cattle-killing and famine in the late 1850s. A third of the Xhosa nation perished behind Grey's cordons. He was determined to exploit indigenous stress whenever it gave him a revolutionary opportunity to consolidate the assimilatory process and take it supposedly beyond the point of no return. New Zealand was uniquely the ground zero for this policy in the later British colonies. Grey's policy was the one for an age of Austinian positivist law [37]and of Free Trade capacitarian Liberalism. [38]The New Zealand 1860s were an Apocalyptic attempt at the consolidation of the native protectorate into the settler colony. The Apocalypse got unstuck however. Some less un-free Maori life breathed through the fractures.

The only thing I can add about such awful events is that Benito Juarez, the President of Mexico between 1858 and 1872, was a Zapotec Indian, who knew no Spanish until the age of 12, trained as a lawyer, became a statesman of the utmost stoicism and honour and probity, yet abolished the autonomous indigenous institutions from the Spanish colonial period, in which he himself grew up. He was the president who had the Emperor Maximilian shot. The lesson is that we are women and men living in every active working generation with a limited stock of ideas. That is arguably all the more reason to canvas and recruit the widest human resources and expertise into such a hermeneutical project, rather than rely upon very few experts to determine things for us.

3/ Indirect Rule

The third policy came about when the British decided that assimilation was rather costly and ineffective. It was evident there was never a right time for Grey's crack-downs. Moreover many settlers in their newly devolved governments were simply too racist for assimilation to work. The Xhosa famine happened right when the Indian Rebellion of 1857 broke out and the Waikato War while the American Civil War was placing incredible strain on the United States' relations with Britain and its Canadian and Caribbean colonies. The new policy was " Indirect Rule". Its legal theorist was Sir Henry Sumner Maine, who disagreed with Grey's argument that culture and native institutions were the enemy. [39]You could work with them, get native chiefs and rulers under varying degrees of

[36] Grey, George "Report" in *Journals of Two Expeditions of Discovery in North-West and Western Australia* T. and W. Boone, London 1841.

[37] Austin, John (1790-1859) The Province of Law Determined, W. Rumble (ed.) Cambridge University Press, Cambridge 1995 (first published 1832).

[38] Rosanvallon, Pierre, *Le Moment Guizot* (Gallimard, Paris 1985).

Kahan, Alan S., *Liberalism in Nineteenth Century Europe:- The Political Culture of Limited Suffrage* (Palgrave, Macmillan, New York, 2003).

[39] Maine, Henry Sumner (1822-1888) *Village-Communities in the East and West*, (Henry Holt, New York, 1889).

autonomy to rule a people for you, who would in effect became a labour pool to be employed on public works, plantations and mines, without any hope of serious civic rights, which even Grey intended for them. Practised by Sir Arthur Gordon and Sir William des Voeux in Fiji, (our part of the world gave rise to two of the three systems?) and identified with Lord Lugard in Uganda and Nigeria , it was taken to its logical conclusion in South Africa.

These three systems, segregationist native protection, assimilation and "Indirect Rule" were paradigms that could mix and match. No autochthonous colonial constitution was not also a system of racial administration. It is wrong to do as mid-20th century white Dominion "Whig" constitutionalists did, to consider constitutions and racial systems separately. In New Zealand all three systems were applied to varying degrees:- the Treaty was native protectionist, Grey was a revolutionary British Empire-wide assimilationist who turned New Zealand into his *Island of Dr Moreau*, while remedies such as Sir James Carroll's Maori Councils Act 1900 belonged to Indirect Rule. And may we say it was Gordon Coates who got the labour pool Maori economy underway in the 1920s, of Maori labour in freezing works and public works and railways etc that prevailed until the 1980s? [40]

Indigenous reaction to Post World War II Human Rights and modernist Assimilation policy

To bring this historical story up to date, I would propose that all these autochthonous states came under the impulse of a second assimilationist wave of humanitarianism, roughly a century after the first one of the 1840s and 1860s. It was the indigenous response to that, which provoked the international indigenous rights movement during the 1960s. By the late 1940s racially-based segregated regimes of native protection or indirect rule no longer seemed credible to Western governments that had fought the racist regimes of Hitler and the Japanese. Universal human rights regimes were the remedy. This kept the US in the morality game against the USSR and against Britain and France and the other colonial powers, The Netherlands, Portugal and Spain.

New Zealand was committed right from the start. Colin Aikman, arguably the true father of many of the constitutional paradigm shifts that New Zealand has undergone since the 1940s, worked on the UN Declaration on Human Rights of 1946. He also promoted new concepts of sovereignty. [41]Influenced by him was Jack Hunn, the Deputy Chairman of the Public Service Commission, whose report on Maori "integration" of 1960 has been much misunderstood. [42]His was a conscientious attempt to remove Maori from paternalist paradigms and to grant full rights of citizenship in keeping with the International Labour Organization *Convention 107 on Indigenous and Tribal Populations* of 1957. Unfortunately "self-determination" was defined in terms of individualised life-choices. Maori were to cease to exist basically as a people in a few generations, after "integrating" within two. They were to vanish into the Sixties "dream kitchen". The report was in various respects Sir George Grey's

[40] Bassett, Michael *Coates of Kaipara* Auckland University Press 1995.

[41] Oliver, Peter C. Ibid p.

[42] Hunn, J.K., *Report on Department of Maori Affairs 24 August 1960*, R.E.Owen Government Printer, Wellington 1961.

centennial party. Maori were not impressed. The Maori Renaissance dates effectively from 1967 as they resisted land conversion policies and a new wave of assimilation. [43]

The same occurred abroad. In the United States an anti-McCarthyite Republican Utah Senator Arthur Vernon Watkins began the "termination" policy to end reservation governments. [44]An opponent of segregation for blacks and Indians, he really intended the best for Indians, while others exploited the policy. It was nonetheless a Republican president, Richard Nixon who began the new wave of indigenous rights in the United States which his *Special Message to Congress on Indian Affairs* of 8 July 1970. [45]That fraught and troubled man must have drawn on his Quaker heritage from William Penn's Indian treaties in Pennsylvania. Canada started the 1960s by proposing full citizenship and removal of Indian institutions. Pierre Trudeau backtracked by 1972, as modern Canadian indigenous law developed out of the courts and as the federal government responded to the developments. [46]In Australia, assimilation supposedly became the norm after 1951, resulting in the "Forgotten Generation". By 1962-68, the confusing franchise laws at federal and state level were amended to permit unqualified aboriginal franchise. The domestic history of New Zealand, Australia and Canada became a list of landmark court cases over Indigenous rights.

Yet to revert to Leo Amery, these systems snapped back into shape from the indigenous reaction to the human rights-era assimilation. Amery commented in 1953 that the British Constitution is not so much flexible as elastic, it bounds back into shape. [47]Is that what Sir Geoffrey Palmer responded to when he hilariously remarked that "sovereignty" is like chewing gum, -it gets chewed and chewed out of shape? [48] Debates over the American and Canadian systems have bounced back to the 1763 Appalachian model. Canada devolves to tribal governments, but these are expected to relinquish aboriginal title in return for accepting governance devolutions, and to come out from under the prerogative order of the *Indian Act* of 1876. [49] First Nations don't usually welcome such terms. The Australians with the *Wik* decision of 1996 have gone back to the first principles and drawing boards of indigenous rights. [50]The territorial and institutional and demographic intermixture of New Zealand, the implication of Maori and non-Maori with one another, does not merely express the reasonableness of New Zealanders in race relations; it rather reflects the incomplete *"smashing of*

[43] Hill, Richard S., Maori *and the State: Crown-Maori Relations in New Zealand/Aotearoa*, 1950-2000, Victoria University Press 2009 p. 158 ff.

[44] Arthur Vivian Watkins (1886-1973) Republican Senator from Utah (1947-59).

[45] Nixon, Richard Milhouse *213- Special Message to the Congress on Indian Affairs* 8 July 1970.

[46] Elliott, David W., *Law and Aboriginal Peoples in Canada* in Canadian Legal Studies Series, Captus Press Concord, Ontario 2005 pp. 30-42.

[47] Amery, Leopold, *Thoughts on the Constitution* (Oxford University Press, Oxford 1953) p. 2.

[48] Palmer, Sir Geoffrey "Where to From Here" in *Victoria University Law Review* 25 2 July 1995 p. 241

[49] Mamdani, Mahmood *Citizens and Subjects:- Contemporary Africa and the Legacy of Late Colonialism*, University of Princeton Press, Princeton 1996 p. 66-67.

[50] Palmer, Matthew *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington 2008) p. 349.

peoples" that the assimilationist policy of Grey and the New Zealand Government inflicted on the country, to use a phrase which the South African historian Mahmood Mamdami has proposed. [51]For despite the failure of assimilation in New Zealand, its asteroid strike has left us inter-penetrated , yet distinct from one another, fractured and yet fused. The autochthonous context that protects indigenous rights is probably decisive.

The Treaty Constitution

That is a grave burden of time which New Zealand must cope with as a small isolated nation-state. We must sustain this as a unitary PR nation-state with scheduled Maori seats and without devolution. It is worse for Maori however seeking justice and their identity as Maori New Zealanders in their own country. I suggest that we shall manage on the Crown side if we avoid the Whig Fallacy that seems inbuilt into much Anglo-American constitutional thought, if we keep practising Treaty interpretation across a wider range of institutions as we do in fact do, than just rely on the *rarae aves* of the judiciary. For the issue is not who or what interprets the Treaty but *how* it is interpreted.

Professor Matthew Palmer proposes a Treaty of Waitangi Court, composed of Treaty law judges and of expert Treatyologists, or Tribunal people that would effectively act like the French *Conseil Constitutionnel*, defining Treaty language and concepts. [52]Where would appeals about the general constitution of New Zealand go? Are disputes over that to be resolved in the Supreme Court, surely a doubling up, or is the entire New Zealand constitution holus bolus a Treaty constitution for the Treaty court to determine? I would suggest that the proponents of a written consolidated constitution would do their cause more good if they renounced the impression that they desire a totalising text , and relied rather more modestly on a "framework". For Kiwis inherit from their Victorian predecessors a profound distrust for what's not just a "framework". The several constitutions of revolutionary and counter-revolutionary France, and the strain and rupture of the United States Constitution between 1832 and 1865 were enough to make the 19th century British swear off the totalising text.

I submit that there is no substitute for working with majoritarian democracy, that the best security for Maori rights lie in meeting the conditions that John Stuart Mill proposes in *On Representative Government* , [53]that people have to accept or at least acquiesce in, institutions, and make them/ let them work, and defend them or allow them to be defended. There is no substitute for the general negotiating practice between politicians and officials, Maori and non-Maori, on marae and at hui, out in community halls, the debates among scholars and jurists, the media, the whole wide field of public opinion on the issue, ranging from the Coastal Coalition to Maori who would accept the anti-colonial thought of Frantz Fanon:- all of these defining concepts in the real use of Treaty, rather than just a Court. Words and political languages have an incremental , vegetable life. We live in an age when we no longer believe as they did in the 18th century that you can sit in an elegant *salon* and determine words with the precision that a star in sidereal time, or coordinates on the Earth's

[51] Mill, John Stuart *On Representative Government* (1861).

[52] Palmer, Matthew *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington 2008) p. 349.

[53] Mill, John Stuart *On Representative Government* (1861).

surface, can be put. It is one of the main thrusts of Gadamer's thought that the Humanities and Law do not arrive at truth by emulating scientific methodology. His magnum opus of 1960 "Truth and Method" argues that what we know is much more than what methodology yields us. Would we really want an *Academie Francaise* adjudicating on Treaty concepts? The truth is, there is no 100% "written" Constitution, there are only more or less written Constitutions. [54]

Interesting as that is, we are grown women and men who should be able to talk through indigenous rights and constitutional issues like adults. We belong to tertiary educated generations and we are surely results of the "Flynn Effect" in IQ development. Gadamer allows for judges to creatively interpret Law by applying statute, [55]but in the case of the Treaty, we are dealing with what was not designed to be Law, yet must be converted into Law and constitutionality if it is to have force at Law. If that should ever come about, we should be aware that what we have set up is something like the Twelve Tables of Ancient Rome, from 461-459 BC, an un-amendable constitutional and legal wellspring that will compel us to interpret and be sensitive to our traditions and previous languages and authorities for hermeneutical purposes. [56]Because note, once the Treaty is enforceable in Law, it can't be amended like the US Constitution or "repealed". Give it force of law by all means, but do so with a clear view of what is involved in interpretation and language theory. In the 18th century ministers undertook the political management as "undertakers" for the constitutionally "Irresponsible" monarch. I would hate to see New Zealand Governments reduced to undertakers for the equally "Irresponsible" Judiciary or a Treaty Court and its policy. There's a divinity that doth hedge a judge, you see.

It would be better if that were in the first instance done on the scale of our current political and public policy spheres and as the sum of our on-going and developmental practices, rather than by Force 9 earthquakes as a Treaty Court undertakes an orogeny of definitions. Surely it is better to work with an established and successful people's democracy in which Maori participate, than rely upon a univocal clerisy imposing a "*Politische Theologie"* upon us. [57]*"If it ain't broke, don't fix it".*

I would rather credit Maori and non-Maori New Zealanders with rich and powerful languages and traditions of political thought that can manage these debates, than attribute to them the meagre pragmatism or brain-deadness that some *de haut en bas* commentators do. It's like a child, - tell an electorate that it's dumb, that it can't cope with ideas, doesn't have any, and you will get the Pauline Hansens and Sarah Palins. I may be idealistic in proposing a strong dose of Lockean "trust" in the electorate and general public and in proposing respect for them. [58]Maori interests are better served

[54] Foley, Michael *The Silence of Constitutions:- Gaps, "abeyances" and political temperament in the maintenance of government* (Routledge, London and New York 1989) p.

[55] Gadamer, Hans-Georg *Truth and Method* (cf *Wahrheit und Method*, 1960) p. 325; in Francis J. Mootz III (ed) *Gadamer and Law* (Ashgate, Aldershot, 2007).

[56] *Duodecim Tabularum Leges* in the Bibliotheca Augustana at http://www.he-augsburg.de/~harsch/augustana.html

[57] Schmitt, Carl *Politische Theologie :-Vier Kapital zur Lehre von der Souveranitat* (Duncker & Humblot, Munich and Leipzig, 1922).

[58] *Wi Parata v Bishop of Wellington* (1877) 3 Jur (N.S.) SC 72 at 78.

this way than by reliance on *ex cathedra* pronouncements or on a *deus ex machina*. It is far more enriching and liberating to be at the table with "Power" than waiting on "Sinai". We are not dealing with lynch mobs or tarring and feathering mobs here, but people who should be regarded as jurors, as James Madison proposed, [59]as Greek choruses of Elders. For the international trend with constitutional cases before Supreme Courts is to encourage the disputing parties to sort it out. Just as the Imperial Parliament and Crown agents such as Sir George Grey and Earl Grey as Colonial Secretary gave us the first *New Zealand Constitution Act*, [60]yet we got on with it and made responsible government work in a New Zealand way, so must we now just get on with it, after the Judiciary's innovative work towards a Treaty constitution over recent decades.

The Whig Fallacy and the evils of "Presentism"

This relies getting rid of the Whig Fallacy on our own side as an intelligentsia of officials and scholars and of scholar-officials and jurists. The three conditions for a viable Treaty-interpretative project in my view are a workable language theory, hermeneutical practice, and a demolition of the Whig Fallacy. The Whig Fallacy is quite a problem in the political thought of British and post-British polities. [61]It is basically the Creationist Argument by Design applied to constitutional development. It is pure teleology. It assesses the past and utilizes the past for a presentist purpose that pretends to moral advantage. That past in this view has been inherently working towards the consummation we are now bringing it to. Facts and events are selected that suit the argument, discarded if they don't. The past is not understood for its own sake, but rather strip-mined. [62]

The reality is that opposition and denial and scepticism have shaped the Treaty along with those decent people who affirmed the Treaty. Chief Justice William Prendergast declared the Treaty a nullity, [63]which is far from how Maori regarded it. Pakeha however received the Treaty back again out of a legal denial, not consigning it to oblivion, but rather preserving it as a metaphor for good faith and racial justice. That was important when South Africa, the American South and Australia segregated the way they did. Similarly Peter Adams and Jeremy Waldron as Treaty-skeptics, have set benchmarks for a convincing and satisfactory Treaty process. Adams' conclusion was that such a document could provide no basis for a constitution, [64]and Waldron's that Treaties have a half-life

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[59] Adams, Peter *Fatal Necessity :-British Intervention in New Zealand 1830-1847* Auckland University Press, Oxford University Press, Auckland 1977.

[60] Waldron, Jeremy "The Half-Life of Treaties : Waitangi, Rebus Sic Stanibus" *F.W. Guest Lecture* Otago University Faculty of Law 11, 2 2006.

[61] McHugh, Paul in *Essays on the Constitution*, Philip Joseph (ed.) Brookers Wellington 1995 p. 346.

Butterfield, Herbert *The Whig Interpretation of History* G. Bell and Sons London 1951.

Butterfield, Herbert *George III and the Historians* Collins, London 1957 pp 151-190.

[62] Foley, Michael *The Silence of Constitutions:- Gaps, "abeyances" and political temperament in the maintenance of government* Routledge, London and New York 1989 p. 80.

and eventually die. [65]The actual practice of the Treaty between the New Zealand Government and Maori answers these objections hermeneutically. Adams' textualism in the 1970s did not conceive of an hermeneutical process. Waldron would be right if it were a mere treaty, whereas in fact it is a covenant, that has become a powerful metaphorical system, beyond the wit of one person or very few, to wield.

Out of the Labyrinth

It is clear that I have led you into an unresolved and indeterminate constitutionalism. But it is the sum of your aggregate and incremental efforts of application and interpretation and negotiation to date. It is the achievement of your high standards of professionalism and moral regard. We understand if we understand at all after the fact. [66]The greatest credit goes to the aggregate *phronesis* of ordinary New Zealand people, who prevented things from going too far in the past. They have lain anchored in an abyssally deep tradition of good sense. Our route is far from un-scoped and unmapped however. The British constitutionalist Michael Foley offers this description that applies as much as to New Zealand as to the United States Constitution:-

> *" The United States has been particularly adept at accommodating the numerous divisions which lie at the root of its constitution. Through universalizing and systematizing its fault-lines into a comprehensive mosaic of multiple abeyances, it probably ranks as the system most able and best equipped to work successfully with abeyances. One could argue that the number and scale of its disjunctions is matched by the effectiveness of its strategy of abeyance, by which it can evade the consequences of what remains unresolved to the depths of the constitution."* [67]

In other words, *phronesis*, practical wisdom makes the U.S. system work. The problem with the Tea Party is that it seemingly won't do *phronesis*. It considers practical wisdom to be shameful compromise. I rather think practical wisdom will win out, in both New Zealand and the United States, - a common denominator, not a rare one.

Next time I hope to talk about another complex system, Canada, and compare it to New Zealand. How has Canada managed over the past 45 years the abeyances and deferrals that have been necessary to hold together two settler nations, three First Nations, ten co-sovereign provinces and 3 territories? For it has only survived by means of its constitution's :-

"*its strategy of abeyance, by which it can evade the consequences of what remains unresolved to the depths. "*

That way we should be able to compare their system of dispersed power to our unitary one.