This article examines the politics in New Zealand arising from the revivification of the Treaty of Waitangi. It considers the legal and historiographical consequences that follow the redefinition of a nation's sovereignty, and treaty relations between differing concepts of sovereignty and history.

The author examines the perceptions of history that are generated by the Common Law, jus gentium, and the understandings of land occupancy and ancestral identity existing among "first nations" in the modern and post-modern world, through a consideration of the Maori people. The author also questions what the roles of the lawyer and historian may be in these circumstances.

Cet article examine les enjeux politiques liés à la revivification du Traité de Waitangi en Nouvelle-Zélande. Il considère les conséquences légales et historiographiques qui découlent de la rédéfinition de la souveraineté de l'État et de la présence de diverses définitions de la souveraineté et de l'histoire.

En considérant le peuple Maori, l'auteur examine les perceptions de l'histoire qui résultent de la common law, du jus gentium, et de la notion d'occupation du territoire et d'identité ancestrale chez les premières nations dans le monde moderne et post-moderne. L'auteur s'interroge aussi sur le rôle du juriste et de l'historien dans ces circonstances.

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Revue de droit de McGill
To be cited as: (1998) 43 McGill L.J. 481
Mode de référence : (1998) 43 R.D. McGill 481
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GLOSSARY

Aotearoa: New Zealand
hapu: subtribe
iwi: tribe
kawanatanga: government
mana: prestige, authority, charisma
manawhenua: traditional authority over land
marae: a meeting ground
pakeha: New Zealander of European descent
rangatiratanga: chieftanship, lordship
tangata whenua: people of the land, indigenous, aboriginal
turangawaewae: a place to stand
waka: canoe, ship; lineage tracing descent from a given canoe
Introduction

The aim of this paper is to introduce a series of explorations of the relations between law and history, considered as activities of the human mind in various states of society. Viewed in such a perspective, "history" is perhaps better renamed "historiography": the writing of history and the consciousness of it as a thing made by human activity, and in the end the making of history and the suffering of it as the consequences of human actions and the processes they have set in motion and cannot always control. Law, I think, can very often be seen in the same way: as the making of judgements, coupled with the attempt to determine how far we can live with the judgements we have made in the past; and this is one reason why law has been so powerful a contributor to the formation of the historical consciousness which characterises our civilisation.¹ Historiography has been, on the one hand, the narrative of human actions, and on the other, the archaeology of human practices seen as constituting the contexts in which the actions have been performed. The codes of law and the records of courts have constituted perhaps the greatest series of archives in which these practices have been conserved, while the practice of jurisprudence itself has furnished a great part of the methods and mentality with which we interpret the actions of the past and connect them with the conditions of the present. There can be no doubt of the intimate connections between jurisprudence and historiography since the two began to assume their modern forms about five hundred years ago.

Yet there are differences between the lawyer and historian in their reasons for approaching the past and in their practices when dealing with it, and among these differences is one which separates the relations between practice and theory in the two disciplines. Lawyers go to the past in search of authority more or less directly applicable in present actions; historians in search of information which they know full well can be converted into authority and which may well be applied to present actions, but which they are capable of treating in alternative manners — such as the study of the past for its own sake. It is a consequence that lawyers regularly study jurisprudence and even the philosophy of law, whereas historians seldom engage in the study of historiography, less still the philosophy of history.

The difference is that lawyers well know that their activity is a practical one, with immediate and drastic effects on the human beings who appear in the courts for judgement, and that there are strong practical reasons why they should use theory to heighten their awareness of what they are doing and allow the consequences of theory to flow back into practice and affect it. But historians are engaged in no such immediate practice, and do not have the same practical reasons for engaging in theory. It is therefore easier for them to believe that the way to write history is to practise the activity, and that no theory of historiography and no philosophy of history exist which can be applied to that activity as theory to practice. They are clearly right for the most part in believing this, not because they are immediate practical actors but because they

are not. The importance of the history of historiography and the philosophy of history is to be sought elsewhere. What historians write has consequences for other human beings because it helps to shape the assumptions and structures, the ideologies, mentalities and discourses, by which social groups define themselves, others and the world, and act in the relations between the entities so defined; who they think they are and what they think has been going on can easily have consequences for themselves and others, and these consequences can easily be disastrous. Thus there are very strong practical reasons for exhorting historians to heighten their consciousness of what they are doing in the world, and what assumptions about the world they are putting into effect; but the relations between reflection and action to which we are exhorting them will be relations less of theory to practice than of criticism to ideology.

This is why there are so many situations in which juristic and historiographic activity are intermingled and imperfectly distinct; in which lawyers are making history and historians contributing to the making of law; and why it is both philosophically interesting and humanly important to study these situations and note in what a variety of ways history is being made in them. I have a case of the kind to examine: one in which the affairs of my own country of New Zealand have become interesting to the lawyer and the historian, the political philosopher and the historian of political thought in ways which, I have to confess, in my younger days I never thought they would be. New Zealanders, somewhat against their inclinations, have come upon interesting times; it is to be hoped they will survive them.

I. Generalisations

In a number of societies created by British and European settlement in the seventeenth through twentieth centuries — New Zealand and Australia, Canada and the United States — there is a political resurgence of the peoples called indigenous because their ancestors lived there before European settlement began, and usually because these ancestors remain of immediate importance to them. In the societies I have mentioned, where language, law and values are in significant measure English in their derivation, these resurgent peoples state their claims in the language and law of the majority culture. They claim right, justice and compensation; they rely on principles of Common Law and jus gentium (a term I shall prefer to “international law”); but at the same time they allege their aboriginality, their status as cultures with an existence antedating European settlement, both as entitling them to make claims which the majority law is bound by its own rules to respect, and as a source of cultural values and usages which must continue to guide them and which the majority law must acknowledge as authoritative even when these are not contained within its structure or its spirit. In a sense, then, they claim to be living by a law of their own, which is separate from the majority law and to which the latter must accommodate itself. However, they commonly do not refer to their own cultural codes by the name of “law”; sometimes because they look on “law” itself as the instrument by which the majority has been dispossessing them of their land, culture and identity; sometimes because the codes, assumptions and vocabulary of Anglo-European jurisprudence are too culturally and economically specific to be appropriate to the aboriginal codes which they recall, re-
discover, or re-invent; sometimes because they are making use of the vocabulary of Western radical dissent, which suits their needs because it presents law itself as an instrument of hegemony in the hands of some race, class, gender or mode of production.

On the one hand, then, a vocabulary which is not that of the majority's law is addressing itself to the courts and legislatures of the majority in search of legal redress, and in some measure accepting the discourse and procedure of majority law by doing so. On the other hand, that vocabulary is being used to claim autonomy from that law and offering itself as an alternative cultural code with the same authority as law, whether it styles itself by that name or not. In the language of European jurisprudence — which our cultural conditioning obliges most of us to accept — the problem which the claims of indigenous peoples present moves between the theaters of Common Law and *jus gentium*. Those peoples are claiming the status of *gentes* or nations — in the early-modern or pre-modern sense in which *jus gentium* uses the latter term — and thereby raising the question of what degree of sovereignty — again in the pre-modern sense known to the classics of *jus gentium* — they possessed at the time of European settlement and may be said to possess now.

This is not merely a question framed by the needs of late twentieth-century debate: it can be found, asked and answered — and has served as the foundation of legal and political arrangements — in the past history of European settlement; so that to ask it is not to re-invent the history of that settlement so much as to review and re-state it as it was constructed by the actors themselves. From the time of the Spanish conquests in the Caribbean, European settlement was conducted by agents living in a universe of *jus gentium* and endeavouring to avail themselves of its rules. It can of course be said that this branch of law took shape largely in response to the needs imposed by the encounter with non-European peoples, and it must be said with great frequency that the ways in which it took shape were often skewed in favour of the invading settlers and directed towards the dispossession of the indigenous peoples. Even that language is suspiciously mild when applied to many of the stories which this history contains. But the invading Europeans did make use of a code of *jus gentium*, even if it was only to legitimate their own behaviour. Their use of that code ensured that in a great many cases treaties were entered into with indigenous peoples, who were therefore treated as competent actors, and indeed capable as possessors of sovereignty, to enter into such treaties as the kind of contracting parties whom that law envisaged. In many instances, these treaties were subsequently disregarded; in many more, they were interpreted as a kind of legal self-annihilation or suicide on the part of the indigenous contractor, so that to enter into a treaty was to lose the right to enforce it and consequently all rights under it. But enough of these treaties have sur-

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vived — in the sense that there are still peoples defined by them and living under them — to make it a common strategy in the politics of indigenous resurgence to appeal to them, claiming not only rights under them but the measure of sovereignty which their status as treaties affirms to have existed then and to be claimable now.

Such appeals and claims necessarily generate debates in the interpretation of history, occasioned in the first instance by the decision to treat an action in the past as possessing authority in the present; a decision taken by lawyers or persons acting as lawyers, which raises questions to be answered by historians or persons acting as historians, but over which lawyer and historian must in the end diverge and go separate ways. The history of how a treaty was drawn up and entered into must be rehearsed in the light of the always contestable question of how they were intended and understood by the original parties, of whom it may be presumed that one was and the other was not European and already familiar with the language of European law. An attempt must be made to reconstruct the mentality of an indigenous society already distant in time; but it must be added that persons in the present, affirming themselves the descendants, representatives or continuators of that society, will be interpreting the acts and intentions of their supposed ancestors, imposing pattern on the past, authority on the present, and interpretation of history on the events and processes between. The heirs of the original European signatories will be doing the same, and their situation will be complicated by the circumstance that they possessed then and probably possess now the upper hand in imposing the categories of European jurisprudence, but now consent to have their position questioned and evaluated, both by the categories of their own law and by the injection into the argument of cultural codes which are not European, but must be reconstructed in a largely (but challengeable) Europeanised present. Two points must sooner or later be reached. At one it will be recognised that alternative histories are contesting for authority; not simply alternative accounts of the same events, but alternative cultural codes which give conflicting accounts of what authority is, how it is generated in and transmitted through time, and how time and history are themselves structured by the authoritative systems set up by humans existing in them. At the other, the historian will have made an appearance, declaring that the enterprise of reconstituting events and processes, mentalities and authority structures, existing or ongoing in the past, has developed beyond the point at which it serves the jurist’s need to find authority there which is applicable in the present. This historian will be operating in bihistorical and bicultural terms, recognising that all parties to the debate are trying to live in two histories simultaneously penetrating one another.

During the establishment of European settlement, many treaties were entered into with tribes — if that is the appropriate term for societies operating a complex kinship structure rather than a state, identifying themselves by means of shared genealogies and mythologies, and living by hunting and gathering and planting rather than by arable cultivation. These tribes were recognised by treaty and *jus gentium* as “nations”

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3 In New Zealand it has been found appropriate to use the Maori word *iwi*, and leave its meanings to emerge through bicultural discourse.
or *gentes*, and endowed with the capacity to exert rights and hold property — often, of course, to no other end than that they should be deemed capable of parting with it or selling it. Many fictions were thereby imposed on peoples who did not always understand them, but had their own ways of understanding themselves and what they were doing when they entered into what the Europeans called treaties — hence of course the European conviction that all men by nature possessed the legal capacity for possession and alienation, compact and confederation.

But it is evident to our historic sensibility that any such treaty was a compact between two discourses, two means of understanding and operating what it was, and the modern indigenous nation has access both to European means of interpreting a treaty and to the modernised form (whatever it may be) of the indigenous discourse by which the treaty may have been understood then and is understood now. If the dominant European culture has remained ethnocentric to the point where it does not understand the indigenous discourse and cannot operate it, that culture does not have access to the bilingual resources open to the otherwise repressed indigenous culture. The latter can therefore (1) claim to be the “nation”, sovereign to the point of ceding some things and retaining others, which the original treaty presumed it to be; (2) operate its indigenous discourse to affirm its customary, traditional, genealogical and mythic identity, and employ this identity in affirming its legal personality under the treaty and claiming rights, or compensation for lost rights, in both treaty and traditional terms. If the dominant culture does not have access to the indigenous discourse — what in New Zealand is called *te reo Maori* — it must choose between allowing that discourse to be used against it, and facing the charge that it is seeking to annihilate the indigenous discourse and the nation that employs it. Often, of course, the dominant culture has been seeking to do exactly that; but we have reached the point of encountering the politics of bilingualism and biculturalism, and of recognising how an indigenously affirmed identity may be both the grounds and the means of conducting a claim simultaneously *in* the discourse of European law and *against* that discourse and law. The appellant comes before the court partly to indict its jurisdiction, and in so doing alleges indigenous history against the history of the law and the treaty. Yet there remains the paradox — which operated for Europeans at the time of settlement — that it is hard in law to indict an opposed authority without at the same time legitimating it.

Treaties *at jus gentium* are entered into by nations, and nations possess both sovereignty at the time of making the treaty and a self-defining history antecedent to its making. This provides the double force behind such words as “indigenous”, “aboriginal”, the Maori *tangata whenua*, and so on. It is crucial to the indigenous group that it should be able to define itself as a “nation”, possessed of both history and legal or rights-bearing personality both before and since the making of the treaty; and in so doing it lays claim to sovereignty — if that term be used to denote the possession of rights and the capacity to alienate and resume them — in both the pre-treaty past and the post-treaty past and present. To the extent that the indigenous group is part of a larger sovereign state, it has now reached the point of affirming that the state’s sovereignty is based on the treaty and is shared among sovereign contracting partners. State and sovereignty rest on the exercise of what Locke called the federative power, the power to form treaties, whether or not the state in question is a confederation. It is
evident to our minds that this is an extremely risky assertion; it is less evident that it entails both pre-modern and post-modern thinking.

Australia is largely an exception to the pattern I have begun to describe, since there it was not typical to enter into treaties with aboriginal groups, which were often too small and mobile to render treaties of much use and could easily be dismissed as in a "savage" condition that rendered them incapable of treaty-making. The United States and Canada are perhaps the most typical, in that they possess political structures which are federal or confederal for reasons of their own, and were not formed by processes in which treaties with indigenous nations played a central part. They can thus recognize the forming of federal covenants with such nations and not feel the exercise of their own federal structure to be threatened. The Sioux or the Mohawk can claim to be sovereign nations in a special treaty relation with the United States; but as the Canadian confederal structure has been laid open to redefinition, there has emerged a "Conference of First Nations" whose adherents claim "inherent rights" — i.e., rights inherent in their structure as nations and antecedent to any Canadian nationality or sovereignty — which entitle them to be consulted and give their consent before any new relations between provinces reconstituting Canada assume a final form.

New Zealand is exceptional for the reason that it is not a confederation but a unitary and sovereign state, whose sovereignty seems to rest upon a treaty — the Treaty or te Tiriti of Waitangi — which preceded and can be said to condition the declaration of the Crown's sovereignty in 1840. Alone among the cases I have been considering, then, the political sovereignty which affirms and defines the national identity can be considered contingent or dependent on the performance or non-performance of a treaty between two cultures or discourses, whose meaning and history can be debated in two languages entailing two understandings of law, culture, sovereignty, and their existence in time. It is potentially a very exciting debate and a very dangerous one; the more so as it comes at a time when New Zealand's identity, sovereignty and national continuity are deeply threatened by the forces of the globalized market. The fact that I am already using the term "sovereignty" on more than one level of meaning lends complexity, both political and historical, to the issues to be discussed.

II. The Historical Circumstances

As part of the process of establishing the Crown's sovereignty over New Zealand in 1840, a treaty was drawn up and signed by the Crown's representative Captain Hobson and the chiefs of a number of independent iwi (tribes) at Waitangi in the north of the North Island. It was subsequently proffered to the chiefs of other iwi, and accepted by most, if not all of them, in both islands. It was not a treaty with the Maori people as a whole, and that people did not then or subsequently form a single unit or confederation for purposes of legal or political action; the word "Maori" was only just coming into general use to distinguish the indigenous Polynesians from the European settlers, and the tribe or iwi remains for most the group of identification. However, since nearly all iwi have entered into the Treaty relationship, it is reasonable to see its
provisions as underlying the relations of Maori to the Crown wherever they can be found.

It can be debated just what role the Treaty has in the establishment of Crown sovereignty in New Zealand. A claim could be made on the grounds of prior discovery, which gave Britain a right not shared with any European nation to pre-empt land from the indigenous inhabitants, and this right of pre-emption has been exercised, in ways often hard to reconcile with the language of the Treaty, to purchase and sometimes confiscate land or dispose of it by legislative or executive action. The Crown’s sovereignty can be defined as an exclusive right to acquire and to dispose of the title to it by sale or grant, and this right is claimed exclusively of other nations on the grounds of discovery. But a series of proclamations, instructions to royal officials, and private memoranda belonging to the period make it quite clear that the Crown had no intention of proclaiming sovereignty without the consent of the inhabitants, and give us a number of clues as to how this consent was to be granted. In written statements by Prime Minister Lord John Russell and Colonial Secretary Lord Glenelg it is confirmed that the inhabitants of New Zealand are not “savages living by the chase” (i.e., not hunter-gatherers with no relation to the soil which is to assign them a fairly advanced place in the scheme of history worked out in the recent Enlightenment), but that they are capable of occupying the land and apportioning it between them. It would be interesting to know whether Russell and Glenelg had been informed, by missionaries or others, that the Maori were turning to agriculture and beginning to plant and harvest cereals, as some of them were; whether they recognised in them some other capacity for occupation and apportionment, such as is claimed and conceded today; or whether the Crown’s intent was to attribute to them a capacity for property as a preliminary to a capacity for alienation. This intention was shared by the agents of several commercial enterprises, including the New Zealand Company, who were making land purchases from Maori and desired to legitimize them.

These documents further state that though the tribes or iwi do not constitute a sovereign state, in the sense that there is no supreme authority which rules them all and can speak on their behalf, they nevertheless possess a “sovereignty” (the word used) which cannot be subordinated to another without their consent; and this appears to state the juridical basis on which the meetings occurred at Waitangi and the Treaty was drawn up and signed. A good deal could certainly be said about the motives of the British ministers in using this language. They were trying to establish a negotiating position in advance of the French (always a prudent thing to do); and if we take the view that their intention already was — as it soon afterwards became — that of investing the Crown with a title to New Zealand land which it might dispose of in parcels to settlers, we can add with much plausibility that their purpose in attributing sovereignty to the iwi was to invest them with the capacity to transfer it to the Crown. Nevertheless their language did attribute to the indigenous people a capacity to enter...
into treaties and to possess land and rights before they began to negotiate it; and we must add that this attributed to them a history, a previous and inherent existence, a past, a present and a future. The language of European jurisprudence had that effect, and it further attributed to the Treaty itself the status of a historical document, a document performing an authoritative act in history, to which reference could be made in the future by actors who saw it as exerting authority in their present arising from their past. Much of the subsequent history of the Treaty recounts the attempts of pakeha jurisprudence to deprive it of that status, and the counter-attempts of contemporary bicultural jurisprudence to restore it.

It would be reasonable to give a Lockean reading to the language used by Russell and Glenelg. A dispersed sovereignty is being attributed to the iwi; having occupied their lands, they possess a right in them, and this right extends to the authority to do, by the law of nature, what is necessary in virtue of their occupancy. They may, for example, make war upon one another — as was certainly their practice at the time — in defence or furtherance of their claims. What is missing from the discourse is the further Lockean principle that one acquires property in land only by mixing one’s labour with it; the iwi are distinguished from hunter-gatherers by their capacity for occupancy, but how far that capacity depends upon one for labour in the form of cultivation is not made clear, and this was to be a source of philosophical difficulty when a Maori perception of occupancy which did not depend upon cultivation and exploitation collided with a pakeha perception which did. However, that was not the issue in the approach to Waitangi. Russell and Glenelg were saying that the iwi possessed sovereignty dispersed among themselves, but had not yet found it necessary — and they may have silently added, had not yet developed the capacity — to transfer that sovereignty to a civil government capable of exercising authority over and on behalf of them all. The language of the British ministers made it plain that this transfer should not occur without the consent of the iwi freely given; but at Waitangi they invited the chiefs there assembled to give that consent, and the necessity for a sovereign civil government did not arise from within Maori history. There was, as it happened, in the islands composing New Zealand, no one like Kamehameha in Hawaii, Cakombau in Fiji, or Tubou in Tonga, capable of conquering and establishing a territorial hegemony which Europeans might consider a kingdom, doing so from within indigenous history and using it to act in the new history imposed by European contact. The program of establishing a central sovereign authority arose out of the activities of the British and French governments, missionary and settler enterprises; and this origin rendered more problematic the business of explaining the program at Waitangi in inter-cultural terms — that is, of speaking out of a European discourse to a Polynesian discourse when the two were framed in discontinuous cultural worlds and had different immediate agenda. The chiefs were not to know the whole of the British reasons for wanting a sovereign government in New Zealand; they had not evolved, or expressed in their own discourse, reasons of their own for conceptualising or wanting one. Nor would the British officers, missionaries, speculators and settlers have been able to see far into the Maori mental world, if they had desired to do so.

Where the minds of the two cultures came close enough to meeting at Waitangi to engender misunderstandings — divergent interpretations of the same events or utter-
ances — was over the conceptualisation of title to land. The British desired sovereignty not just in the form of a protectorate defending control over New Zealand against external or foreign competitors, but in the form of a civil government with authority to effect and regulate the transfer of lands from indigenous occupants to immigrant or settler owners. The iwi so far involved in this process knew that they were effecting such transfers, but did not expect to be dispossessed as a result of doing so; and such language is inadequate in so far as it is too European to express the Maori perception of what the occupancy of land was. The iwi for their part had difficulty in grasping that the Crown was proposing to acquire a pre-emptive sovereignty, a sovereign role for itself in acquiring title to land from indigenous occupants and transferring it to settler owners.

What was at issue was not merely the creation of a Lockean sovereignty with authority to regulate the transfer of lands, but that of a pre-emptive sovereignty with authority to make itself the source of legal title to land. The nature of both possession and sovereignty was being developed along lines well known to the civil law; transitions from usus to dominium and from dominium to imperium were being invoked and brought into the process. The Maori participants were not to know this, since it was not their language; but they had a highly developed language of their own for talking about the occupation of land, the claiming of land, and the passage of land from one control to another. Whether means of translation from one discourse to another were found, whether they could have been found in good faith, and whether they were indeed pursued in good faith, are issues in the historical interpretation of the Treaty of Waitangi.

The Treaty (or te Tiriti) was bilingually conducted and texts were drawn up for signature in both English and Maori. Literacy was developing among Maori and the texts had been orally debated; the issue is not therefore that the chiefs did not know what they were signing, but that no satisfactorily final text existed or ever did. The redactors of the Maori text were themselves pakeha — a term I shall use from now on when speaking of Europeans in the New Zealand bicultural setting — missionaries, with interests of their own not identical with those of the Maori or necessarily of the Crown. They employed what is known as “missionary Maori”, a vocabulary which contains Maori terms adapted or created to express pakeha legal, political and religious concepts. More than one Maori text of te Tiriti exists, and was presented to various iwi for signature after the gathering of Waitangi; these texts are not identical with one another, and philologically exact English translations of them do not always reinforce the official English text recorded by the officers of the Crown. It is therefore possible to understand both the Maori view that te Tiriti is a fraudulent document, and the extreme pakeha view that the Treaty has no binding or legal force. In circumstances I shall presently describe, however, it has attained the status of a fundamental text, possessing authority and open to interpretation; and both the lawyer and historian will recognise the problems in reconstituting a past and assessing its authority in the present which must next arise. Law is being made in a context of disputed authority and disputed interpretation; that is how law is made and history is written. It is less common, though not unknown, for this to happen in a context of bilingual documents and bicultural interpretation.
The crucial area in the several texts has come to be one in which something is ceded to the Crown, which in Maori is termed *kawanatanga* and in English “sovereignty”, and something is retained by the chiefs and *iwi*, which in Maori is termed *rangatiratanga* and in English “full, exclusive and undisturbed possession of their lands and estates.” The passage obviously — at least to European minds — raises the classic issue of the relation of sovereignty to property, but behind that lies the fundamental issue of the Crown’s adoption of a pre-emptive title. What looked like a guarantee of possession to the *iwi* has in practice meant to them the imposition of a greater capacity for alienation than they desired. The Crown has in the past used its *kawanatanga* to determine who the possessors of *rangatiratanga* in fact are, to individualise tribal tenure in order to facilitate the sale of land, and to take into possession and dispose of lands which the *iwi* understood to be theirs by the kind of title which *rangatiratanga* connotes and which, though undefined in 1840, the Crown implicitly recognised them as capable of exercising. Now that the Crown’s title to have done these things is being disputed in terms of a retrospective and retroactive reading on the Treaty, it is important to discuss what was, and what has been, conceded under the name *kawanatanga* and retained under the name *rangatiratanga*.

*Kawanatanga* is missionary Maori, an attempt at a rendering of the English word “government”; similarly, and rather potently, the Treaty itself is sometimes called a *kawanata* or covenant. The English text renders *kawanatanga* as “sovereignty”, by which the Maori signatories may have understood in the first instance something like a “protectorate”, though they would also have understood that the Crown intended, and was being empowered, to maintain this exclusively of other Europeans or Americans who might seek it. What is less clear is how far they understood the extensions of the English word “sovereignty” into the powers of civil government: Was it understood as keeping the peace among the *iwi* and *hapu* (tribes and sub-tribes) or as adjudicating disputes over land between them? It is perfectly clear, however, that they did not think they were conceding to the Crown any ultimate authority over or title to the lands of the two major islands; it is the question of Crown title which has in the end become crucial. On the other hand, the distinction between *kawanatanga* and *rangatiratanga* itself makes quite clear that they were intent on retaining some ultimate authority over land, and were aware of the dichotomy between something which they were retaining and something which they were conceding. One of them is on record as saying “the shadow goes to the Queen, the substance stays with us” but later declaring that he had been wrong and the saying should be reversed; I regret that I am unable to comment on the Maori words he used or their significances.

The crucial term in Maori understanding of *Te Tiriti* both was and has become *rangatiratanga*; in full *te tino rangatiratanga*. This is much nearer being an authentic

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5 Dr. Clive Barlow, an anthropologist of Ngapuhi descent (most of the original signatories of the Treaty at Waitangi were of the Ngapuhi iwi) has asserted that *tino rangatiratanga* is not Ngapuhi, is probably a colonists’ invention, and should be replaced by *arikitanga*. See C. Barlow, *Tikanga Whakaaaro: Key concepts in Maori Culture* (Auckland: Oxford University Press, 1991) at 130. I hope the meanings I have assigned to *rangatiratanga* would survive the alteration, which as of 1998, has not occurred.
Maori term, though it was already capable of missionary usage; significantly, it was being employed as a Christian sacred term, in translating the words “thy kingdom come” in the Lord’s Prayer. Rangatira was the word for a chief, and the suffix tanga gives to English-speakers the word “chieftainship”, which by no means inappropriately suggests that the signatories intended to retain authority as well as possession, dominium as well as usus. Rangatiratanga connotes not only “possession of the land,” but “possession according to Maori ways, according to the structures of authority and value inherent in iwi society.” The chiefs had no intention that they or their peoples should become mere subjects of the Crown, whose possession of the land was protected by Crown law indeed, but only by the kind of law the Crown was accustomed to administer. Rangatiratanga connoted their own authority as rangatira, and at least one of them announced that he would never sign the Treaty for fear of finding himself subject to a power not his own. For these reasons, modern Maori interpretation reads into rangatiratanga the Treaty’s recognition of a right to possession, not of lands, forests and fisheries alone, but of the norms and values, the social structure and culture, inherent in the occupancy of land as the iwi then recognised themselves as occupying it; in other words, the possession of themselves, their identity as people. They claim to have been dispossessed of this identity, contrary to the provisions of te Tiriti; and they claim that the dispossession was unjust, and that the Treaty entitles them to repossess both land and cultural identity (which are inseparable) where repossess is possible, and to compensation and resources to use in building a new identity where it is not. A new problem instantly arises. Claims under a treaty, or under a Common Law, are in principle negotiable; claims to a unique and all-inclusive cultural or spiritual identity easily become non-negotiable. In the terms being used in this paper, the question becomes whether the Maori and the pakeha occupy a single history of interaction, or two histories incompatible with one another; and this problem is occasioned by the fact that kawanatanga and rangatiratanga are each translatable as “sovereignty”, when the word is used on its two levels of Lockean meaning. “Sovereignty” begins to denote the power to constitute one’s own history, on the level of conceptualisation and possession and on that of authority and action. Even to write history may entail a claim to make it; but to what or whom can that claim be addressed?

We encounter here the crucial significance of the term whenua. Its primary meaning is land or an area of land, inhabited by tangata, or people, constituting a hapu or iwi; but it further and simultaneously means placenta, and alludes to the custom of burying the afterbirth in the land as a symbol or a vehicle of unity with the ancestors. Consequently, tangata whenua — a term by which modern Maori distinguish themselves — means both “people of the land” and “people of the birthplace”; it asserts both priority of occupation and a physico-spiritual unity with ancestors and with the land, through one another, which constitutes the identity of the iwi; and the last word now denotes both particular tribes and the Maori people or nation — te iwi Maori — as a whole. These are modern usages, and I do not know how far the phrase tangata whenua was used in the debates at Waitangi in 1840; but the word whenua was certainly present, and carried with it the load of meanings I have been describing, which would pervade the meaning of the treaty term rangatiratanga to an extent which the missionary draughtsmen may not have understood and which would over-
flow the distinctions between sovereignty and property present in the minds of the
Crown’s representatives. The Crown was already in the position of having the chiefs
transfer sovereignty in one sense to it, while having the chiefs retain sovereignty in
another for themselves. This verbal ambiguity mattered only in English, but the trans-
action was vastly complicated by the unacknowledged circumstance that *rangatiratanga* — sovereignty in the second sense — carried with it the psychic and mythic
loads of the term *whenua*.

There was a Maori term — there is little reason to consider it a post-contact in-
vention — for the authority with which an *iwi* could claim occupancy of an area, thus
exercising that capacity for appropriation which in European eyes distinguished
Maori from savages. This term was and is *manawhenua*, an extension of the word
*mana*, with which we are somewhat familiar as denoting prestige, authority, tradi-
tional and charismatic force of personality; we have many words of our own for it. An
*iwi* in the person of its chief or *rangatira* — though chief and people were not so far
distinguished from one another as to require a conscious fiction of representation —
might extend its *mana* over a given *whenua*; but to say so falls short of acknowledg-
ing that it drew its *mana* from the *whenua*, and — to the extent that the ancestors were
in the *whenua* as placenta — that the *iwi* derived its physical and spiritual identity (of
which *mana* was the dynamism) from the *whenua* as land. When one *iwi* subjugated
another and appropriated its *mana* and *whenua*, it absorbed the defeated into its own
substance, occasionally and for specific reasons by methods too direct to be de-
scribed. The ancient community of a people with its lands and ancestors was not al-
ways an idyll; the point is that it all stood, and to some degree still stands, in Maori
eyes as the mode by which they possess not merely land but themselves, and are what
they are. The mystifying thing about Western capitalist society is that we believe
property to be an extension of the self, yet believe that it can constantly be in a state of
transference from one self to another; and it was this mystery that the Crown was
about to impose on the *iwi* at Waitangi. It is a large part of what we mean by the term
“history”.

It has been suggested by more than one modern Maori author that if it was the
Crown’s intention to acquire sovereign authority in the sense of a title to land, a sov-
eign capacity to act in all transfers of property in land from one possessor to an-
other, the term *kawanatanga* as used in the Treaty concealed the reality that what the
chiefs were being induced to concede to the Crown was *manawhenua*. Moreover, this
reality had to be concealed, not merely because they would never have agreed to the
proposal, but because it would have been an unthinkably deep affront even to ask it of
them. The chief who exploded into rage saying he would never sign the Treaty and the
chief who hoped for the moment that they were giving up the shadow and retaining
the substance may have sensed that something of the kind was afoot. But to suppose
that they were being deliberately deceived, we must suppose that the British officers
and missionaries knew what *manawhenua* was, and knew that they dared not ask the
*rangatira* and the *iwi* to give the Crown not merely control over transactions, but
*mana* over the physical and spiritual substance of themselves. They may not have un-
derstood this, and the guarantee of *rangatiratanga* may have meant in good faith that
the *iwi* would be able to sell land and accept the Crown’s jurisdiction over sales, with-
out giving up the essential *dominium* over it; but the implicit concession that the
Maori were not savages does not necessarily mean that the *pakeha* recognised in them
any kind of sovereignty they were going to keep. Extinctions of title, it was believed,
could be justly arranged under the *kawanatanga-rangatiratanga* relationship.

The modern Maori claim is twofold, or rather is being made on two levels. On the
one hand, it is being asserted that many dispossessiones of Maori have occurred which
must be judged unjust in terms of the agreed meanings of the language used in the
treaty. On the other, it is being asserted that the surface meaning of that language is it-
self inadequate, and can be rendered just only when we recognise the implication that
the *rangatiratanga* reserved to the *iwi* both conceals and contains all that is meant by
a multitude of Maori terms from which I have selected *manawhenua* as the most in-
formative. The *Treaty* and *te Tiriti* are therefore unsatisfactory and even fraudulent on
one level, justifiable only by interpretation on another, and this judicial procedure is a
means of recognising and rectifying much that has passed in New Zealand history
since 1840.

We are to recognise here a judicial and historiographical situation of a familiar
type. A document from the past which exercises authority in the present is being in-
terpreted and the thrust of its authority re-assessed, in the light of perceptions exer-
cised in the present. At the same time it is being asserted that these are perceptions of
the historic reality of what occurred in the past and has gone on occurring into the
present, and we are not yet at the point where lawyer and historian must go separate
ways and arrive at positions adopted for separate reasons. It is worth noting also that
historical criticisms which reveal shortcomings, and perhaps dishonesties in the lan-
guage and conduct of the *Treaty* are not being used to subvert it and dismiss its
authority, but rather to reinforce it. By this blend of historical criticism and judicial
interpretation, we offer to render the treaty a better instrument for assessing what has
happened in the past and rectifying the past's consequences in the present. The histo-
rian will add — and the lawyer need not withhold from the addition — that this is
both a way of heightening our understanding of history and a means of enhancing our
capacity to act in it.

III. A Conflict of Sovereignties

To say these things is to utter a series of relatively reassuring statements in the
familiar discourse of the ancient constitution; that is to say, English legal reasoning,
which has long understood the similarities and differences, the complex but not an-
tagonistic relations between judicial interpretation and historical criticism. The situa-
tion becomes much more complex, and perhaps a good deal less reassuring, when we
recognise that the claim made on behalf of the *tangata whenua* entails the statement
that *te Tiriti* both conceals and fails to recognise, and implicitly contains and does rec-
ognise, a complex system of property, sovereignty and culture — of *whenua, mana*
and *tangata* — which is discontinuous with that system built into the historical struc-
ture of English Common Law and European *jus gentium*. It means among other
things that those inhabiting the system inhabit a history which is differently conceptu-
alised, differently based and maintained by different modes of action, from the history
presupposed by English and European jurisprudence. This recognition is thrust upon us once we acknowledge that the claims of *manawhenua* entail, or once did entail, or may be said to have once entailed, the occupancy of the earth by ancestral communities, linked with their ancestors through the earth, and maintaining their identity, sovereignty and mana through this continuity. To live in such a continuity is to live in a different history from that of the *pakeha*. The claim that the *Treaty* guarantees *rangatiratanga* now becomes the claim that *te iwi Maori* possess a treaty right to their own history, have been unjustly dispossessed of their history, and may now justly repossess it or make claims to compensation where this is not possible. Bicultural is bi-historical; the language thus stated implicitly concedes that the Maori have been partly forced out of their history into *pakeha* history, but at the same time calls on the *pakeha* to recognise and restore Maori history, living in relation to it where they cannot live within it themselves. Bicultural jurisprudence becomes a mediation between radically dissimilar perceptions and experiences of history.

It is a premise of this paper that sovereignty, legislative and political, is among other things a mode by which a human community seeks to command its own history: to take actions which shape its policies in the present, and even — since a great deal of history has in fact been written in this way — to declare the shape of the historic past and process out of which it deems itself to be issuing. Neither of these modes of self-determination ever has been or will be in the absolute power of any sovereign community; but this does not prevent us asking what may become of a community's capacity either to make or to write its own history if its political sovereignty should be surrendered to forces from without or radically challenged by forces from within. With respect to the latter possibility, what has happened in recent New Zealand politics may be described as follows. Maori people in part if paradoxically because they were becoming increasingly urbanised, found it proper to emphasize their status as *tangata whenua* in claiming either restitution of their relation to the land or compensation for its loss. Though now a moderate-sized minority of the population, they were able to get attention for their claims, and adopted the strategy of making these claims under the *Treaty of Waitangi*. There has come into being the Waitangi Tribunal, a body judicial in character and even authority, empowered to hear claims by Maori arising out of performance or non-performance of the *Treaty's* provisions. Though its proceedings are judicial in character and distinguished judges — several of the Maori learned in the law — have sat on and presided over it, its findings are not binding at law, but rather take the form of recommendations of such authority — one might say *mana* — that courts and parliament do well to give them attention. This authority derives from the circumstance that the *Treaty* which the Tribunal interprets states the preconditions under which the sovereignty of the Crown, and therefore of courts and parliament, came to be established and New Zealand came into existence and later became a sovereign nation. The *Tribunal* therefore does more than hear cases against the Crown; it investigates whether the Crown has or has not been discharging conditional obligations subject to which sovereignty was transferred to it in the first place. This is why its recommendations cannot be binding at law, but are such that the law is well advised to give them attention; it has, in the last analysis, a real if limited capacity to query the legitimacy of the sovereign's jurisdiction. Clearly, this is a capacity to be
exercised at discretion. In demanding restitution from a sovereign, it is a poor strategy to suggest that the sovereign lacks the authority to make such restitution. This was one route by which the kingdom of England fell into civil war and dissolution of government in the seventeenth century.

Issues brought before the Tribunal may in principle turn upon the relations of kawanatanga to rangatiratanga in the language of the Treaty; that is, upon the questions of how sovereignty was conveyed to the Crown, of whether the Crown has been discharging the conditions under which sovereignty was conveyed to it, and of whether sovereignty, while conveyed to the Crown in one sense (kawanatanga), was retained by the iwi in another sense (rangatiratanga), thus constituting a fundamental condition under which the Crown legitimately exercises its sovereignty. To anyone with an elementary knowledge of English and European history, these are momentous and rather frightening questions. The Treaty of Waitangi has become New Zealand's ancient constitution, its Magna Carta, its fundamental law, its original contract; and all these historical analogies should serve as reminders of how easily a challenge to sovereignty in the name of any of them can become a dissolution of government, an appeal to heaven, and a lapse into civil war and the state of nature. Moreover, not even the Magna Carta and the original contract were presented in the form of treaties between equal sovereign partners, between whom, jus gentium informs us, there must be either the state of treaty or the state of war; and the fundamental law of New Zealand was being presented in the form of a treaty. Finally, the effect of the Treaty was, however you look at it, to transfer title to land into the jurisdiction of the Crown, and all real property in New Zealand, pakeha and for the most part Maori, is now held under a title conferred by the Crown. To press contractual doctrine so far that the Crown's sovereignty ceased to be legitimate would mean that no proprietor was certain of the title under which he held; and what the pakeha of 1628 and 1688 did in the like circumstances is a warning against letting them recur. During 1988 I found myself reminding New Zealand students that all classical pakeha political philosophy was about land rights and sovereignty, and all of it was a remedy for civil war. In 1998, the prospect of New Zealand's following Australia into repudiating the Crown and establishing a republic appears more remote than that of Australia's completing the process.

Happily, in the view of most of us, none of these dire consequences ever looked likely to recur. The Treaty was not represented as a negotiation between equal sovereigns, but as a Lockean process whereby sovereignty in its dispersed form was conditionally converted into sovereignty in a centralised form; so that to remind sovereignty of the conditions under which it has been granted remained a claim against it, and did not become the "appeal to heaven" which is issued when sovereignty is declared forfeit or delegitimised. Nevertheless, the original contract remained as a treaty between two nations, with the difference that one was then possessed of sovereignty only in its dispersed form, while the other possessed it in its centralised form. The Maori were able to contend that their treaty was with the Crown direct, with the consequence that only Maori may bring complaints before the Tribunal, and individual pakeha are debared from doing so on the grounds that their relations with the sovereign are conducted through other channels. There has also occurred a significant retreat from the
position laid down in 1877 by Chief Justice Prendergast in Wi Parata v. Bishop of Wellington,⁴ to the effect that the Treaty was of no legal force because only nations already possessed of legislative sovereignty possessed the federative capacity to enter into binding treaties. What is noteworthy here is that Prendergast's judgement is now seen as resting upon a strongly positivist jurisprudence, which made so much of full political sovereignty as to relegate to the condition of savagery any social form not possessed of it. New Zealand's newly bicultural jurisprudence is now withdrawing from these nineteenth-century presuppositions towards those of the more naturalist jus gentium of the sixteenth through eighteenth centuries, which conceived of the acquisition of property, rights and sovereignty as taking place by stages in the process of history as then conceived. It has to do so if it is to make sense of the Treaty at all; we have seen that this Act was specifically based on the presumption that the Maori were not savages and were sufficiently possessed of sovereignty to be capable of transferring it to the Crown. Whether this means that the Treaty can check the sovereign parliament in its legislative course is a question it may be wise to leave unanswered.

The jurisprudence of the Waitangi Tribunal — which is prudentia juris even more than ratio legis — thus enjoins the pakeha to explore the history of their law retrospectively, moving back in time in search of a perspective in which they can understand the tangata whenua and their own attitudes towards them. The pakeha may thus discover how deeply rooted in their history is their perception of property and sovereignty, with the self-propelled activity of the individual at its centre. However far back one goes in the past of feudal and Roman jurisprudence, one never comes upon the community linked with its ancestors in the whenua as the primary tenant of land; that was left behind in an antiquity so remote that no Western myth declares it plainly. Travelling back through the past of the Common Law, one may indeed come upon a time when statute was rooted in custom and second nature, which may assist in understanding what the tangata whenua have to say about themselves; but one may end convinced that since their Hebraic and Hellenic beginnings, the pakeha have been travelling away from the whenua towards the individualisation of tenure and the conversion of land into commodity and commodity into information, which governs our history today even if Karl Marx said it was going to. In the history of that process, the full and absolute sovereignty which the later jus gentium predicted and the positivists like Chief Justice Prendergast imposed upon history seems to have become an incident. In reverting to a pre-positivist jurisprudence, one reverts to a phase before the absolutism of sovereignty; it is necessary to do so in order to cope with a situation in which sovereignty rests on a treaty and may be contingent upon its fulfilment. But we all live in a world in which it is becoming rapidly contingent upon many more things than that, and is everywhere being subjected to the requirements of the international market; even when confederations break up and sovereignty is claimed by their constituent republics or tribes, that is the effect aimed at or achieved. It is an ideological consequence that the individual finds an identity less and less in membership of any sovereign community, state, nation or iwi; more and more, the individual is commanded by a convergence of forces to think of it as contingent in itself, to be negoti-

⁴ Kawharu, supra note 4 at 110-13.
ated on an allegedly free market of interacting possibilities. Since modern indigenous peoples do not live on reservations which shield them from these constant displacements of personality, one must ask what they are achieving by their characteristic strategies. In what history will they find themselves living, when they claim to be living in the whenua?

IV. A Conflict in History

We have simplified (and perhaps radicalised) the Maori claim to rights under te Tiriti by saying that they claim the guarantee of rangatiratanga to have been a guarantee of manawhenua; that is, a tribe’s occupancy of the land furnishes it with a spiritual substance or continuity (mana), which in turn is extended as power over that land (whenua) and becomes a mode of appropriating it and constituting personality on its foundation (the Maori term for this is turangawaewae, the place where one stands). The personality thus constituted is that of a group whose communion with the ancestors and the land is constantly being renewed, and there is notoriously little room in this image for those creative conflicts between revolutionary groups and individuals which furnish history as the pakeha understand it. There are potent ancestor figures, but one must go back to the demigod Maui to find the Polynesian Prometheus. In the nineteenth century it used to be held that only the European masters of the planet possessed history in the sense of autonomy, self-determination, progress and revolution, and that this was one reason why they were its destined masters. Today the whenua in one form or another is being used to challenge this view of history, and is finding much favourable response from a post-industrial civilisation increasingly tired of its own history. Perhaps conservation is better than revolution; it may not be conservatism to say so. But if jurisprudence is a main source of our sense of history, the use of the whenua in jurisprudence brings up the problem that the whenua’s extension in time may be not history but the dreamtime — to use the invaluable Australian term for the communion with ancestors that may be experienced but is not to be narrated or criticised. What is to happen when the dreamtime is used as a basis for claims at law?

The term tangata whenua, like its homonyms “indigenous” and “aboriginal”, implies two kinds of claim. One is simply a claim to priority of occupation, and need not entail more than a linear sense of time; the other is a claim to the kind of occupancy of space and time implicit in the concept whenua, and entails a relationship with the cosmos so close and exclusive as to contain both space and time within itself. The iwi, the ancestors and the whenua are all, as it were, contained within one another in the self-repetitive scheme whose items reduplicate one another; Adam has not stepped out of paradise into a world he must make and change by his own labour. The dreamtime may thus be contrasted with history, and may contrast itself to its own advantage with the latter’s universe of ends and means, effort and frustration, self-realisation and self-rejection.

The tribunal and the courtroom, whether ethnocentrically Western like Prendergast’s or conscientiously bicultural like the Waitangi Tribunal, are necessarily acting in the world of history; they may respect the dreamtime but cannot submit to it. Their business is with the contestable, and there is no contesting with the dreamtime; this is
painfully apparent when the latter is appealed to, not simply to discomfit the world of the pakeha in the name of the tangata whenua, but to assert contestable claims disputed among the tangata whenua themselves. Sir Tipene O'Regan, a Ngai Tahu activist from the South Island who shrewdly understands both law and history, has distinguished two types of situations in which īwi contest for primacy. In one, both contestants allege genealogy and tradition, surviving in both oral and written forms; dispute is possible between them, each attaches truth-status to the statements it puts forward as history, and the courts are free to decide what kinds of evidence outweigh others. Courts of Common Law have of course been dealing with this type of situation since time whereof the memory of man runneth not to the contrary, and in most cases of this kind they are required to determine only what complainant has last been unjustly dispossessed in a plea of novel disseisin. However the professional historian may evaluate the claims of oral history, the courts are in search only of rules of evidence and testimony acceptable to both parties, and there are times when the historian is out of place in the courtroom: O'Regan warns him how easily the expert witness becomes a hired advocate without knowing it. The prudentia juris governs the situation; nevertheless it is important to remember that the contestant īwi may be not merely staking out claims but affirming their deepest sense of identity. The whenua is not just the tribe's lawful possession; it is the tribe itself.

This is where the second type of situation may arise out of the first. Litigants may appear claiming to represent, or constitute, an īwi more ancient than any other, tangata whenua in the literally aboriginal sense. When asked to substantiate their claims with evidence, they may reply that they have no need to; the voices of their ancestors speak to them in the rocks and trees, and speak to them as they speak to no others. I do not have to remind a readership including lawyers how any court or tribunal is likely to respond to that. It is entirely possible that such claims are fraudulent and put forward in no good faith. Any tribunal will be strongly inclined to think so, since the representation of evidence which cannot be assessed will look like an attempt to mislead the court or derail its jurisdiction. Yet the evidence presented by litigants in the first and more manageable type of situation will contain accounts of times when the ancestors spoke directly to the occupants of the whenua, and the second set of litigants is only expanding and exploiting the kind of testimony offered by the first. The world of indigenous jurisdiction is full of West Banks — O'Regan has described the north of the North Island as “the Lebanon of the Maori world.” Courts may be obliged to deconstruct whenua and dreamtimes in order to render them justiciable (in a sense, that is what has been happening ever since 1840), but the Waitangi Tribunal has been charged with rectifying if not reversing this process. In the universe of jurisdiction statements may be either true or false; it is not so in dreamtime, which is the universe of myth. History, the breakdown of the dreamtime, may be the precondition of judgement, and a dreamtime which comes to court for judgement may destroy itself, win or lose.

The problem before such courts is to treat dreamtimes with respect while regarding them as incidents in contingent reality; the law has faced such problems before, encountering or inventing a "time beyond memory". Here the tangata whenua of New Zealand present a problem less daunting to the pakeha philosopher than that of the aboriginals of Australia. The latter, an inconceivably ancient people, arrived so long ago that no mythic or historic record preserves the memory of the journey from the there to the here; all aboriginal myth is cosmic myth and the only time known to it is the dreamtime. This may well be connected with the fact that at the time of British settlement they were the hunter-gatherers whom Lord Glenelg described as "savages living by the chase" and unable to apportion land as did the iwi of New Zealand.4 They moved long distances across a land surface they did not much cultivate, relating themselves to it as whenua by dreams and songs and sand paintings. Myth or not — and there is now a myth of the aborigine in the Australian imagination — they present the image of a dreamtime so perfectly realised that there was nothing else; and how this is converted into a legal claim to rights must be a fascinating and complex story, perhaps yet to take place.

But Aotearoa — a modern Maori and pakeha term extended to the whole of New Zealand — is a very young whenua in terms of human occupancy, settled between one and two thousand years ago, in comparison with the minimally forty thousand of Australia. The iwi and hapu can name the waka or canoes in which their ancestors arrived, and locate in genealogical and chronological time the names of ancestors who came from other islands to Aotearoa, or from one part of Aotearoa to another. The ability to do so is part of the affirmation of manawhenua; one’s name, one’s mountain, one’s river, one’s ancestor and one’s tribe — and so establishes one’s turangawaewae. The individuals named may be mythical; yet there is an important sense in which those who can name them are living in history rather than myth, and can take their manawhenua with them to court with less fear of losing it. Those who have resorted to the ineffable voices of their ancestors are justly suspect if they cannot name them. How the ancient Australians set about the process of naming is another story, and I would not even dream of suggesting that they did not do it; but I am suggesting that those they named were located in a different sort of time.

From this point it is possible to re-inspect the discourse which divides the inhabitants of New Zealand-Aotearoa into tangata whenua and pakeha, indigenous minority and settler majority. For one thing, the latter is becoming diversified by new waves of immigration — some of them Polynesian and Asian — to the point where the old term pakeha, with its British and Irish connotations, may cease to be comprehensive, and may be replaced (none too satisfactorily) by the new tau iwi for immigrants in general. But to confine ourselves to the two older terms, it is possible in the perspective I have presented to suggest that Maori and pakeha are not simply indigenous and immigrant, but that both may be characterised as tangata waka — peoples of the ship, who have ocean voyages and the discovery of islands in their memory, their language and their history. This argument may well be mistrusted as tending to deprive the tan-

4 See supra note 4.
gata whenua of their priority and aboriginality, but I do not see that it would do that. It would firmly assert that their ancestors were the first human settlers, with a right of priority in that sense unequivocal. As for the wider and more intimate connotations of whenua, mana and rangatiratanga, it would affirm the extraordinary achievements of the ancient tangata waka, who arrived from beyond seas in islands very unlike those they had previously known and set about establishing, by myth, dream, genealogy and all their practices of occupancy and culture, the sort of relations with the environment that made them tangata whenua. The whenua and the dreamtime would thus be situated in history, made the achievements of human beings acting in human time to invent mythic time; it would be like the reduction of custom to statute, of the ancient constitution to historic changes in the patterns of land tenure, proposed to the Common Law in the increasing historical sophistication of the seventeenth century. Whenua and dreamtime would indeed be deprivileged to the extent that they lost any status so sacred that it could not even be discussed, and instead became contestable and negotiable before the tribunals and the courts; but contests for manawhenua between separate iwi, or groups replacing iwi, have ensured that result already, and both Maori marae (or meeting-places) and pakeha law courts are already equipped with complex speech-patterns designed to assign priority between claims to ancient standing. The court can respect the dreamtime, though it cannot abdicate before it.

There seems to be no reason in principle — though there are plenty of alarming difficulties in practice — why the procedures being set up should not be capable of dealing with disputes arising since the Treaty, under the Treaty, and even before the Treaty. The parameters of common law are capable of being expanded to the point where they can recognise and decide to respect the parameters of manawhenua. I see this process as having begun and, if it can be continued, as one of the things being done well and going well in contemporary New Zealand. Even the debate over the ultimate location of sovereignty, implicit and explicit in the appeal to the Treaty, can lead to the definition and renegotiation of sovereignty. But these are propositions about law, constitutional law and jus gentium; and this paper is concerned with the interrelations of law and history. It should not be difficult, and I hope I have not made it more difficult, to see how legal argument, conceived as appeal to past practices and the preconditions of authority, leads to reconstruction and reconstitution of history, conceived as the history of practice and authority, and even to juridical debate between such reconstructions. To this point we are in the world of the lawyer, guided by the purposes of jurisprudence. But once we begin to debate questions of human identity and selfhood, questions of property and personality, whenua and mana, the scene changes; both lawyer and litigant find themselves faced with the preconditions of legal behaviour, the preconditions of who and what they are, and with history as the process of creation and change in those preconditions. If this sounds like an idealist conception of history, I shall reply that we are sometimes necessitated to conceive of history in that way.

I have tried to show that the differences between Anglo-European law and Maori-Polynesian manawhenua are such as to lead to very different conceptions of how human beings live in society and social time, and to that extent in history. By expanding — somewhat beyond the practical necessities of the contemporary New Zealand
situation — the mythic and cosmic implications of the term *whenua*, I have tried to show how the concept of history itself can become the antithesis of another way of conceptualising the continuity of human existence, for which I have used the term dreamtime. It can of course follow that the concept of history is itself a tool of cultural imperialism, and my proposal that there should be two *tangata waka* is quite frankly a programme for bringing the *whenua* and the dreamtime into the domain of human history and subjecting them to contingency, contestability and the sovereignty of human judgement.

I see the entire *Treaty* debate as a negotiation of the term under which that sovereignty is to be exercised. If it is said that this is to give the *pakeha* the advantage, by subjecting the *tangata whenua* to history which is a *pakeha* construct, I shall reply that the *pakeha* has, since his first beginnings as he remembers them, been necessitated to live in history and not in paradise or the dreamtime; Adam, Cain and Nimrod, Agamemnon, Odysseus and Orestes, saw to that at the beginnings of our mythology. Second, I shall reply that the modern *tangata whenua* are living in history when they remind us of what we so much want to hear, that there is an alternative to history. They are not so much living in the time of the ancestors, as reminding us that they were recently and unjustly expelled from it by history, and using the law’s capacity to recognize injustice as a mode of making claims against history and those who have profited by it. They both submit *manawhenua* to the courts, and use *manawhenua* as a challenge to the courts. This is unsurprising to the traditions of Common Law, as well as to the tradition of the Maori marae, a meeting ground where challenge and acceptance are very closely related. It is therefore possible to take a sanguine view, and speak of a contestation with law within the law, and with history within history.

But such sanguine views can themselves be challenged; denounced, for example, as “liberal” by those to the left of liberalism who use “liberal” as a term of opprobrium. The root of this criticism is undeniably strong and deep. It reduces to the assertion that the *pakeha* history which both Common Law and *jus gentium* help define has been from the beginning, and still is, irreversibly set towards individualisation of tenure, towards the conveyance and commodification of lands, towards the dissolution of property into credit — the *whenua* into the cash flow — and towards history as the *pakeha* have conceived it into that unchecked reign of the world market in which some have rather prematurely (but still not imperceptively) discerned “the end of history.” Such criticism urgently warns the Maori against having anything to do with the law of the *pakeha*, on the grounds that it is an instrument designed to dissolve any claim to *manawhenua* the *iwi* might make, and would even dissolve such a claim in the act of seeming to concede it. This, it is said, is precisely what the *Treaty of Waitangi* itself was designed to achieve, and what New Zealand history has been achieving ever since. The issue raised in reply by the whole story I have been discussing is whether the current Maori resurgence is capable of exploiting the law in the name of

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manawhenua and persuading it to certain reversals of the course its history has been taking.

The criticism here outlined has a good deal of substance; it is put forward by surviving Marxists among others. As Marxism recedes into the past as either a system or a programme, we may pick its bones and find there some important critical perceptions. Let me conclude by examining some of its predictions as they may affect the pakeha, rather than the tangata whenua, in the historical context shared by both. We are living in a time when sovereignty is being devolved, debated, deprivileged and consolidated. It is being claimed by some who have not had it before, as political confederations break up, and it is being given away by others whose history has been shaped by it, as new economic communities are formed and acquire governing authority. As a New Zealander, I find it significant that the debate over the Treaty of Waitangi, an investigation and redefinition of the foundations of national sovereignty, was initiated under the fourth Labour government of 1984-1990, which will be remembered in the national history — if the nation survives to have one — as a unique blend of the creative and the radically destructive. I use the adverb to give emphasis to the latter adjective because the other policies initiated by that government are reducible to the rapid and often the forced sale of national assets — those owned by the state to begin with, and then more and more of those which might constitute a national economy — into hands so widely dispersed that their sale amounted to a radical (and not yet a profitable) abdication by the state to a market international or extra-national in character. It is no accident that the Waitangi Tribunal owes much of its authority to an appeal to the Treaty against a decision to transfer lands acquired by the Crown to state-owned enterprises over which the market was to have an authority which the Crown has abdicated; or that it could be asked what meaning there would be to Maori reacquisition of ancestral mana over off-shore fishing grounds if all that could be done with it was to negotiate the sale of fishing rights to operations based in Korea and Taiwan.¹⁰ The iwi found themselves in a world where sovereignty might mean mostly the right to dispose of sovereignty, the reacquisition of rangatiratanga and the renewed abdication of kawanatanga; precisely where they had been one hundred and fifty years before. This time the pakeha — or quite a number of them — shared the same predicament.

Conclusion

I would like to conclude by emphasising the concepts of property and sovereignty in relation to history, as they have stood since they were first formulated in European and English thinking. Property — the capacity to call something one's own — denoted the link between personal and social identity and the material world; sovereignty denoted the capacity to employ membership in a self-governing community to affirm personal and communal self-determination in the taking of political acts which

determined national and international history. Hence, of course, the disastrous German idealist conviction that the state (even the state at war) was the highest expression of freedom of the personality. The link between property and sovereignty was long attacked by socialists on the grounds that it led too rapidly towards the commodification of both property and personality; it is now attacked by free-market theorists on the opposite grounds that it impedes what looks remarkably like the same process. Instead of living in political communities where we were — supposedly — members as individuals of the sovereign which determined its role in history, we are to live in economic communities where our role as self-enacting individuals has yet to be defined as other than that of the consumer. And it is hard to say that consumers determine their own destiny. We may all have to go and live where the market most has need of us — as consumers, by the way, more than as producers. I have heard Sir Tipene O'Regan observe that the problem before both tangata waka is how to avoid becoming boat people.

The history of New Zealand, since and including the Treaty of Waitangi, can easily enough be brought under this paradigm. I have been using terminology both Maori and pakeha in examining an enterprise in renegotiating sovereignty, items which require both te iwi Maori and te iwi pakeha to recognize their identities as historically contingent; to do this can stimulate one's capacity to rethink and regroup. But negotiability and contingency are dangerous grounds. It is no accident that the decay of the sovereign state has been accompanied by a criticism which at time amounts to an assault on the notion of personal identity, which we are enjoined to see as perpetually renegotiated under conditions which can never be other than contingent. To be forever renegotiating one's identity, inhabiting the other's contingent universe as well as one's own, is politically stimulating and morally educative, so long as one retains a self to negotiate with and some allies in negotiation. It is an altogether destructive experience once one lies under the imperative to surrender one's achieved identity to the first comer with a stronger accusation of guilt or greater purchasing power. One of the shrewdest of New Zealand political theorists, Andrew Sharp, has warned against mistaking his conclusion about the irreducibility of Maori and pakeha conceptions of justice for a post-modernist manifesto.11 We cannot always be foxes, he says, negotiating our selves all the time; we must be lions sometimes if we mean to act, hedgehogs sometimes if we mean to think, and the political conclusions are not always irectic.

To put a similar point in my own way, I confess myself tired of being deconstructed and in search of turangawaewae, not so much a place to stand as a means of standing somewhere. As an expatriate from a world of vast seas and small islands, I know about the special significance of making landfalls and setting foot ashore; and the archetype I admire is Ulysses, that man of many wiles who has seen many cities and been captured by none of them, not even Ithaca his home. Ulysses therefore lives in history and not in the whenua; if he has a whenua he can leave it and return; but at

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11 A. Sharp, "Representing Justice and the Maori: Or Why It Ought Not to be Construed as a Post-Modernist Text" (1992) 6 Political Theory Newsletter (Canberra) 27.
the end of the story, he and his son are left remarking that as they have just killed most of the political elite of Ithaca, it is not clear what is to happen next, and we do not quite know what peace Athena makes for them. Political community therefore matters, and so does sovereignty. In the case I have been reviewing, Maori and pakeha have been renegotiating sovereignty even as it is being sold out from under them, and I can imagine conditions in which they both want their rangatiratanga and turanga-waewae back again, and have to begin by deciding whether they are still there to demand them.