

Review Article

Hobson's Choice

Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi. Edited by I. H. Kawharu. Oxford University Press, Auckland, 1989. 329pp. NZ price: \$29.95.

A Question of Honour? Labour and the Treaty 1984-9. By Jane Kelsey. Allen and Unwin, Wellington, 1990. 297 pp. NZ price: \$29.95.

Maori, Pakeha and Democracy. By Richard Mulgan. Oxford University Press, Auckland, 1989. 159pp. NZ price: \$29.95.

The Story of a Treaty. By Claudia Orange. Allen and Unwin/Port Nicholson Press, Wellington, 1990. 80pp. NZ price: \$15.95.

The Waitangi Tribunal. The Conscience of the Nation. By Paul Temm QC. Random Century, Auckland, 1990. 80pp. NZ price: \$24.95.

Healing the Breach. One Maori's Perspective on the Treaty of Waitangi. By Hiwi Tauroa. Collins, Auckland, 1989. 125 pp. NZ price: \$14.95.

THESE SIX books are only part of the recent output of the Treaty industry, the new boom field in New Zealand studies. Their authors require a collective noun — perhaps Treatyists, Treatyologists, in some cases even Treatskyites? Some of the authors under review also require reminding that writing for lay people is not simply a matter of cramming yourself with knowledge and spewing it over the nearest page, and that understanding the present in terms of the past is not the same as its inverse. But on the whole these books represent an encouraging development. They force us to debate across disciplines, confront the contemporary uses of the past, and consider the problem of Maori-Pakeha relations in the future.

By what I hope is coincidence, the only two historians' contributions are the least provocative. This is largely a function of modest aims. M.P.K. Sorrenson's essay in the Kawharu collection gives a lucid account of four findings of the Waitangi Tribunal, with some very brief reflections on their historiographical implications. The words 'Towards a Radical Reinterpretation of New Zealand History' in his title may raise false hopes. Claudia Orange's *Story of a Treaty* is just that: a commendable exercise in taking history to the young. It is clearly-written, well-illustrated, and short. Like her more substantive *Treaty of Waitangi*, it performs an important service in giving the lie to the notion of a

current Maori political renaissance. Maori politics has never died. My only specific disagreement with Sorrenson and Orange is that they provide little to disagree with.

There is plenty to disagree with in Hiwi Tauroa's *Healing the Breach*, a forceful, reasonable, and partly-successful attempt to convince Pakeha of the centrality of the Treaty. Most of my gripes are spelled out in the general discussion below, but I must point out to Tauroa and his copy-editor that Pakeha historians have not identified Te Whiti as a 'renegade and troublemaker' for at least 40 years (pp.6-7); that Sir George Grey was not Chief Justice in 1875 or at any other time (p.27); and that William Apaim should be William Spain (p.39). Many more such errors and Tauroa will rank with Pakeha writers on Maori subjects.

Among the Maori contributors to *Waitangi: Maori and Pakeha Perspectives*, are three dealing with tribal claims to the Waitangi Tribunal. Waerete Norman's essay on the Muriwhenua claim is a superb piece of Maori history, true to itself yet accessible to all. I.H. Kawharu does justice to the terrible Dr Frankenstein story of Ngati Whatua, almost consumed by the monster they helped create: Auckland. Few could doubt the justice of the Ngai Tahu claim after reading Tipene O'Regan's essay. It is the nature of redress that is the problem. Ranginui Walker writes with his usual verve on the long history of Treaty-based Maori protest. He will not expect me to accept his claim (p.270) that, in 1845-6, Governor Grey's 'decisive campaign against Heke and Kawiti pacified the North and brought it effectively under Pakeha hegemony'. Combined with the highly questionable statement that 'the very foundations of Maori society crumbled under the coming of the Pakeha' before 1840 (p.269), this view puts Walker very close to the 'Fatal Impact' camp. Maori can be both tragic victims and resilient resisters, but mixing the two in a short essay can be dangerous. M.H. Durie discusses the Treaty in terms of social policy, with particular reference to the findings of the Royal Commission. His essay is surprisingly succinct for a member of that august body, but the view that a benign British Crown intended to preserve the Maori socio-economic system, in contrast to its settler successors, is questioned below. In a book which often wrongly assumed my knowledge, I was delighted to find leading linguist Bruce Biggs wrongly assuming my ignorance. I too know what 'mome' means! Perhaps Biggs should translate the Treaty in penance, a task for which this tantalizingly brief essay suggests he is supremely well qualified.

Comparing the Maori essays with the legal contributions to *Waitangi* raises doubts about which is the more literate culture. Is the law beyond my powers of comprehension, or is comprehensibility beyond the power of lawyers? I heartily sympathize with Tauroa's invective against legalese after reading these essays. Historians can learn, however, from the internationalism of their approach; the McHugh-Williams debate is an interesting one; and some of the findings are valuable. These authors refer to divine law, natural law, common law, public law, customary law, international law, and customary international law. So much for the naïve assumption that there is only one law. The substance of their arguments, as I understand them, is addressed later. Jane Kelsey's book is doctrinaire, dogmatic, ungenerous, and hectoring. I like it. It has real analytical guts, and this gives its legalese a certain compensating drive. She also takes the trouble to try to understand her victims before dismembering them. She argues that the work of the fourth Labour government, the Court of Appeal, and the Waitangi Tribunal in using the Treaty to benefit Maori is largely a sham in both intent and result. She is unfair about the intent, but she makes a strong case for the result. The last lawyer, Paul Temm — or Mr Q.C. as the title page suggests he prefers to be known — writes well. But he does so to eulogize the

Waitangi Tribunal and his own role in it. There is one nice irony, possibly intended. The Attorney-General told Temm, when appointing him to the Tribunal in 1982, that it would sit only one or two days a year, which gives a good idea of the Muldoon government's expectations of its role. This is a well-intentioned but dangerous book. Temm's title describes the Tribunal as 'The Conscience of the Nation', and he concludes that 'the best thing New Zealand can do about the Treaty at the present time is to leave the Tribunal to get on with its job' (p.129). On the contrary, Tribunal and Treaty are a stimulus to, not a substitute for, our consciences — and our brains.

Richard Mulgan's *Maori, Pakeha, and Democracy* is a classic exposition of the 'soft liberal' (or pluralist social democratic, as he would put it) position on biculturalism. It is an admirable book which carefully distils and applies its political philosophy, usually with a rigorous clarity of both concept and prose. Yet this good book illustrates a frightening problem: not even Mulgan knows what Pakeha are. He normally defines them as European New Zealanders, but sometimes (pp.6,8) excludes non-British Europeans, and his whole conceptualization of the term seems flawed. What would he make of the New Zealand-born children of a black English immigrant?

To a greater or lesser extent, all the authors under review (except Mulgan) seem to skirt around problems with the Treaty of Waitangi itself. One is the inconvenient possibility that control of their Pakeha was among the taonga guaranteed to Maori chiefs. Another is the tension between cession of full sovereignty in the English version and the retention of full chieftainship in the Maori version. This can be handled by preferring the Maori version, which seems but fair and is, coincidentally, also the current drift of international law. A tension *within* the Maori version is less easily resolved. Is the cession of kawanatanga katoa (complete government) really compatible with the retention of tino rangatiratanga (the unqualified exercise of chieftainship)? In *The New Zealand Wars*, I felt that Maori would have seen kawanatanga as no more than 'a loose and vague suzerainty'.¹ Most of the authors under review (including Mulgan) support this view, often noting that the kawana most familiar to Maori was Pontius Pilate, who washed his hands of the great issue of his day. But Judith Binney raises the very real possibility that we were wrong.² Binney points out that Northland Maori were familiar with the governor of New South Wales, who clearly exercised real power in his province. One might add that, though Pilate washed his hands of one responsibility, he chose to do so, and he and other biblical kawana also exercised real power at other times. Positing a Maori understanding of kawana as a mere figurehead no longer seems tenable. Similarly, Tauroa seems over-generous in suggesting that the Pakeha did not understand the full scope of rangatiratanga (p.12), since they had earlier used it to translate 'Maori independence'. On the face of it at least, the cession of full government and the retention of full independence are surely mutually contradictory.

It is partly to circumvent such problems that the Waitangi Tribunal, Court of Appeal, and government now stress the 'intent', 'principles', or 'spirit' of the Treaty, rather than the texts. Kelsey chastises them for this, though she neither fully recognizes nor resolves the contradiction herself. Yet if the intent of the parties to the Treaty is to be taken into

1 James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, 1988, p.20.

2 Judith Binney, 'The Maori and the Signing of the Treaty of Waitangi', in *Towards 1990*, Wellington, 1990, pp.26-27.

account, then we face a contradiction here too. Undoubtedly, it was the Maori intent to preserve their culture, autonomy, and socio-economy as well as their property. While the British Crown and its missionary advisers may have intended to preserve Maori property, they are highly unlikely to have felt the same about the rest. The humanitarianism behind their desire for the Treaty was inextricably linked with evangelism — the desire to convert. They may not have intended assimilation through intermarriage; they may have been prepared from the outset to concede some Maori autonomy during a transition period; and they may have wished to preserve Maori culture as a valued museum piece. But their ultimate purpose was to transform the Maori into White Maori or Brown Britons, as the only alternative to becoming Dying Maori. This was the Maori 'Hobson's choice'. Without Crown control, the missionaries believed, unorganized settlement would lead Maori away from the path of Christ and civilization — spiritual death — or towards physical extinction. Translators of the Treaty, especially Henry Williams, had to weigh this fate for their charges against the deception of softening their White Maori objective by conceding rangatiratanga, without which the Maori would not have signed. They chose the former course. To this extent the Treaty was a trick, and the intent of its parties was contradictory.

A further problem is the possibility that neither the English nor the Maori versions were the 'real' Treaty. In his excellent but inconvenient little book, D.F. McKenzie has pointed out that the great majority of the chiefs who signed were not literate.³ Even if they were, even if they had literate advisers, even if they listened ever so carefully to missionaries reading the Maori text, why should self-confident leaders have aborted the cultural practice of incorporating subsequent discussion into the agreement? Quite properly, in Maori terms, the agreement was hammered out orally. Their signatures were mere souvenirs, a gesture to Pakeha ritual, snapshots of the great event. Perhaps the real Treaty was the third, oral, version. The trouble is, does anyone now know exactly what was in it?

In this situation, it might seem reasonable to attempt to deduce the unknown agreement from its subsequent implementation. For at least 20 years after 1840, most Maori continued to rule themselves, and most Pakeha did likewise. But absolute Maori and Pakeha self-rule were only the poles of a spectrum, which ranged across various regional balances of power and population, and various types of issue. Further along the spectrum, where one people had a majority of population or interest, they exercised overall control. But this was limited, more for pragmatic than moral reasons, and the minority community enjoyed considerable autonomy. At the mid-point in the spectrum, where population in a region or interest in an issue was roughly equal, power was shared roughly equally. These three classes of relationship — sole control, limited control, and shared control — were not alternatives. They successfully coexisted. Obviously, such a summary must be simplified and idealized, but I argue elsewhere that it has a firm foundation in historical reality.⁴ If it were accepted as the 'real' Treaty, it might resolve the tension between kawanatanga and rangatiratanga: Pakeha rulers were called governors or governments, and Maori rulers were called chiefs. It might also render redundant the question of intent:

3 D.F. McKenzie, *Oral Culture, Literacy, and Print in early New Zealand: The Treaty of Waitangi*, Wellington, 1985.

4 James Belich, 'The Governors and the Maori, 1840-1872', in Keith Sinclair, ed., *The Oxford Illustrated History of New Zealand*, Auckland, 1990.

who cares what Maori and British wanted; this is what they got — in the days when both had a choice. This is how 'the Treaty', or 'partnership', or 'biculturalism' actually worked in practice. Of course, this living treaty begs almost as many questions as the written versions, or the various modern 'principles'. But not quite, I think.

One reaction to historical problems with the Treaty might be to abandon it altogether, and write a new one. I do not accept that people who advocate such a course should be burned at the stake. Even the Bible has a New Testament. Mulgan argues that, in effect, we already have a new Treaty, in the form of the 'principles'. He suggests that the Waitangi Tribunal and other authors of the 'principles' should stop the pretence that they are not new, and so reassure anxious Pakeha that the clock is not going to be turned back to 1840. It must be said that Pakeha who think that need much more help. And cogent objections to the idea of a new Treaty are to be found among the Maori authors under review. On a spiritual and moral level, they see 'the' Treaty as a sacred covenant, and show, like Orange, that Maori people have always done so. On a pragmatic level, after 120 years of patient, non-violent, and fruitless protest, the Treaty at last offers hope of redress. Advocating a new treaty, or dismissing the old, seems just another Pakeha attempt to wiggle off the hook. Hence this Pakeha's effort, with the 'third version', to wiggle back on.

Yet accepting the Treaty as a working hypothesis may not be enough for these Maori writers. Along with some Pakeha, such as Kelsey and Temm, they often seem to invest it with an odour of sanctity — to deify it to the point where it is both infallible and omnipotent. This may become the least tractable problem of all. If the Treaty becomes so *tapu* that it cannot be questioned, and Pakeha cannot accept it without questioning, do we have an absolutely irreconcilable clash of two intellectual traditions? I hope not. Tauroa proclaims (pp.85,95) that the Treaty simply 'is', and that it must be 'the one and only document representing the foundation stone of our nationhood'. But he also demands of historians (p.103) that 'if the Maori have been at fault, let them say so'. And we Pakeha have our own sacred cow, or perhaps sacred sheep, in the doctrine of absolute Parliamentary sovereignty, better known as the adages 'only Parliament makes the law' and 'there can only be one law'. It is only very recently that a few scholars, such as Kelsey, have come to question this, and most Pakeha still would not dream of doing so. Both peoples may have to shear their sacred sheep a little.

The notion of the omnipotence of the Treaty, and its instrument, the Waitangi Tribunal, also presents practical problems. Temm and the Maori writers come very close to telling us that there is only one Treaty and the Tribunal is its Prophet. The emphasis on the Tribunal is understandable. The Pakeha-dominated state offers few other mechanisms of redress, and each Maori tribe has its own set of grievances which it wants individually and specifically laid to rest. The Norman, O'Regan, and Kawharu essays in *Waitangi* suggest that these grievances are usually justified. But there seems to be a hope that the settlement of claims through the Tribunal will of itself lead to the elimination of Maori socio-economic disadvantage, to the re-empowerment of the tribes, and to Maori autonomy. So the Tribunal is presented as *the* solution to our key problem: the future of Maori-Pakeha relations. There are practical difficulties with this. Redress through the Tribunal is selective; it inevitably favours those who got their claims in first, who are best organized and have the best access to lawyers and historians, and to whom accidents of evidence have left the clearest evidence of their claims. Furthermore, the Tribunal, even if its

membership is again doubled and redoubled, may well drown in claims. In 1987, the government identified 800 prospective claims; 196 were lodged by mid-1989; and there is apparently some prospect of a further torrent of work from State-Owned Enterprises, which want titles cleared before sale — NZ Post and Government Property Services alone identified 1050 such cases.⁵ Even if the Tribunal conscripted every historian and lawyer in the country, it would take another 150 years to wade through this lot. What happens to Maoridom in the interim?

Kelsey's answer is that Maori must have rangitiratanga guaranteed to them by the Treaty, Tribunal or no Tribunal. She defines *te tino rangatiratanga* (p.1) as 'complete authority over themselves and the country's key resources of land, fisheries, waterways and minerals'. How Pakeha are to be persuaded to accept this she does not say, except to imply that when we realize that we, like Maori, are the victims of a few local agents of international capitalist hegemony, we will be happy to hand back the country to Maori because we do not own it anyway. This, too, may take 150 years. While we wait, we might consider another solution, mentioned by Kelsey (pp.252–3) in passing but rejected, apparently on the principle that its author — the Treasury — is always wrong. The Treasury suggestion, made in 1987, was for a 'grand slam' solution: a package of assets and cash which would both buy off Maori claims and re-establish Maoridom economically. Naturally, Treasury wanted to do this on the cheap — on the basis of need rather than on the value of lost rights and property. This is objectionable to claimants such as Ngai Tahu, as is the prospect of their special grievance not getting specific recognition. Yet a 'grand slam' solution would circumvent the practical difficulties facing the Tribunal, and it derives some support from the following historical consideration.

Nineteenth-century Maori land alienation might be said to fall into two categories: involuntary and voluntary. Involuntary cessions included confiscation and sales involving fraud, deceit, a minority of owners, legal chicanery, and undue pressure. Voluntary sales involved none of these things. In the North Island, before the 1860s, I believe voluntary sales may have been the norm. Maori wanted Pakeha neighbours for the economic benefits they would bring. To get them, they sold land cheaply. But economic and political partnership with the Pakeha communities, which such sales created, was part of the deal — a hundred little treaties. Once Pakeha power grew and Maori power diminished sufficiently, the former broke the deal. Tribes which lost both land and partnership in such transactions would now have difficulty in proving this before the Tribunal, so a whole dimension of injustice is beyond its ambit. Furthermore, this consideration suggests that virtually all Maori land alienation was either unjust to start with, if involuntary, or subsequently became unjust, if voluntary. It is a grand-slam problem. Why not a grand-slam solution?

I turn now to solutions to the problem of Maori rights offered by the legal contributors to *Waitangi*: F.M. Brookfield, P.G. McHugh, David V. Williams, Frederika Hackshaw, and Benedict Kingsbury. All, though Brookfield is somewhat reluctant, seem to agree that from the 1870s New Zealand courts, misled by legal positivism, wrongly assumed that Maori 'aboriginal rights' were not part of the country's law. Aboriginal rights include traditional property title, customary law and, for McHugh at least, *rangatiratanga*, rather narrowly defined. It seems to me that Williams is right in suggesting that the Treaty is not central to this argument, though each writer tries to accommodate it. Hackshaw uses it

5 Statistics from Kelsey, pp.98–99, 104.

least, seeing it as a mere statement of the British Crown's intent to abide by Maori customary law — an intent thwarted by subsequent settler governments. Kingsbury sees it as a valid international treaty of cession, the basis of both Crown and Maori rights, and he asserts that both the Treaty and its newly-extracted principles are part of New Zealand 'public law'. But he places his main emphasis on the way international law buttresses Maori rights.

McHugh sees the Treaty as a social contract, typical of British colonial practice, and implies that these normally had some continuing effect in protecting indigenous rights — an effect subverted in the New Zealand case by naughty settlers and legal positivism, which seems to have a lot to answer for. Again, Williams is correct in disputing that this was exceptional. The history of European Imperialism is littered with broken treaties. Tsarist Russia, which was not big on social contracts, used dozens of them to ease its expansion in Central Asia and the Caucasus. Europeans honoured treaties as long as indigenous power meant they had to, and Britain was no exception. Yet Williams's own suggestion as to how the Treaty can be incorporated into law, based on a single judge's ruling that it could be included in 'the public interest' in a planning permission case, seems rather fragile. McHugh's second attempt is more promising. Both he and Brookfield accept that the Treaty has no standing in strict law, but McHugh distinguishes between legal or formal sovereignty and political or informal sovereignty. The Treaty, he argues, is part of the latter — a convention restricting, but not sharing, parliamentary sovereignty. He goes on to suggest that as part of a general trend towards formalizing political sovereignty, the Treaty should be incorporated into a Bill of Rights.

These legal scholars appear to me to skirt close to the edge of two intellectual traps: a determinism centred on one's own field of expertise, in their case legal, and the retrospective Utopianism of reform by appeal to a mythical golden age. It is not the law itself which is at fault, the argument runs. It was fine until led astray by legal positivism and its agent Prendergast. All we need to do is repair the damage, understand the law better, and it will solve our problems for us. It is true that the law has roots outside contemporary politics, and naturally lawyers like to stress this. But the law is also always under pressure to act as agent of the state, and of the will of the dominant group behind it, in this case the Pakeha majority. To decisively change the law, you have to change the will.

Mulgan alone confronts this key problem of Pakeha attitudes. He rightly traces some of them — perhaps not enough — to their roots in racism. He reassures us that we have nothing to fear from accepting a distinct Maori cultural identity. He encourages us to put aside our paranoia, and wakes us from nightmares about Tipene O'Regan's running away with the South Island. He understands that, for biculturalism to work, Pakeha too must be confident in their culture. One of the ways he reassures Pakeha is by urging Maori to moderate their aims even, some may feel, to the point of emasculating those aims. O'Regan can have only as much of the South Island as corrects his socio-economic disadvantages — any more, and Pakeha become second-class citizens. Mulgan allows little room for Maori institutions in spheres such as education. He stays faithful to the Pakeha sacred sheep by rejecting any degree of Maori legal or political autonomy, at least at the national level.

Elements of Mulgan's recipe for Pakeha self-confidence are also somewhat suspect. He urges historians to find something good about Pakeha history, so as to restore pride in our past, and suggests that, in the context of its time, our good old race relations record

is a promising candidate. Some myths just will not lie down. Pride in one's history does not necessarily arise from seeing it as a matter of goodies and baddies. Mulgan acknowledges that Pakeha use Maori symbols to define themselves, but does not recognize that it may be this use of Maori culture as a crutch which makes Pakeha so reluctant to abandon the 'one people' myth. Without Maori songs, legends, and motifs, without the haka in our rugby games, the koru on our aircraft, and the carvings in our museums, how could we tell the difference between ourselves and Australians? Pakeha do have something to fear — and to gain — from accepting a distinct Maori identity: having to stand on our own cultural feet and define ourselves.

The dilemma here is that Pakeha will not feel culturally self-confident until they let Maori culture go, and they will not let go until they feel self-confident. But what we really have is only the illusion of 'one people', and this is the most telling argument in favour of acknowledging Maori identity: it is there. If New Zealand history proves anything, it is that 'White Maori' or 'one people' solutions do not work. The corrosive agencies of early European contact, the subversive genius of Governor Grey, the armed might of the British Empire, the manifold sticks and carrots of twentieth-century assimilationism — all have failed to destroy or incorporate Maoridom. Our only options about Maori identity are to like it or lump it. This is the Pakeha 'Hobson's choice'.

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