Restitution as Justice

Historical Redress and Distributive Justice in New Zealand and Other Settler Economies

University of Cape Town

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by

Katherine Fiona MacIntyre

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abstract

In the last half century there has been a proliferation of historical restitution programmes instituted by liberal governments in an effort to acknowledge and placate the demands of politically subaltern citizens. Restitution is what anthropologist Michel-Rolph Trouillot (2000) calls a 'transformative ritual', a simultaneously illocutionary and performative demonstration of repentance by one interlocutor to another, and is intended to mark a clear – if imaginary – line between (contemporarily conceived) repugnant acts of historical injustice, and an immediate, idealised future usually articulated in terms of cultural and ethnic harmony. Drawing upon ethnographic analysis of historical restitution in New Zealand, namely the Treaty of Waitangi settlement process, and framing it with insights into history and redress from other settler economies more generally – particularly the land reform programme in South Africa – I contend that the long-term resolution, even termination, of the suffering and injustices endured by claimants and their ancestors through the contemporary delivery of restitution – while morally admirable – is often fundamentally unattainable.

In support, three key claims are explored: firstly, that rituals of restitution have emerged from a particular series of legal and political processes, which have generated a popular conception that restitution rituals have the power to not only transform and restore victims' dignity, but to reinvigorate their social, economic and political prosperity – ambitions, this research contends, that are too expansive to be easily achievable. Secondly, the contemporary formulation of the distributive justice philosophy is examined in order to understand how a moral and ideological space has contemporarily unfurled in which debate regarding the state's culpability towards its citizens, and a revaluation of the historical record have been able to occur. Claimants, therefore, are free to imagine and frame the resolution of their grievances in terms of restitution, and in the language of justice. Lastly, this research posits that the foundational and philosophical arrangements that undergird many contemporary historical restitution initiatives are flawed. By drawing upon the scholarship of Wendy Brown and Elizabeth Povinelli, this thesis explores how policies of 'tolerance' and 'recognition' form part of a calculated response by liberal governments, who seek to assuage or even deflect those subaltern aspirations for self-determination and political emancipation which challenge the legitimacy of sovereign authority, and the systems of privilege and power that sustain current configurations of capitalism. Historical restitution programmes, therefore, may only offer an illusion of political incorporation and accommodation, and even encourage the resubordination of the subaltern subject.

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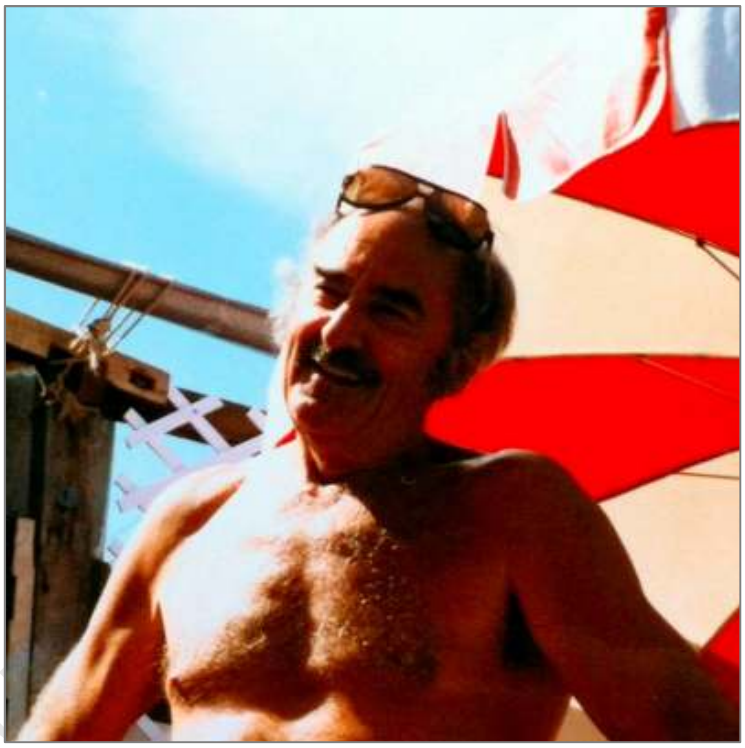
In loving memory of my dear Dad



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chapter one

INTRODUCTION

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Study problems, not peoples, Malinowski advised (Kuper, 2002:161). If you start with a problem or a question, even an intuition, the logic underpinning its associations and connections will inspire ethnographic research. Marcus, too (1995), suggests ethnographers stalk a people, metaphor, story or conflict to the same end; after that, he proposed, the next logical step is contextualisation. The problem that guides this research project – that programmes of historical restitution appear to be constrained by several factors in their ability to deliver the substantive economic transformation and social conciliation that claimants seek – emerged from my professional engagement with the Waitangi Tribunal, a permanent commission of inquiry in New Zealand charged with making recommendations on allegations of prejudicial treatment[1] brought against the New Zealand Crown by indigenous Māori.[2] In my role as researcher and inquiry facilitator for the Tribunal I enjoyed privileged, intimate access to Māori communities and claimant groups, and everyday immersion in the epistemology of the historical restitution process in New Zealand. Over time, however, complex questions arose for me regarding the philosophical and ideological precepts that order the restitution process, and their ability to deliver satisfactory resolution for claimants in terms of restoring social, economic and political equilibrium to disadvantaged Māori individuals and communities.

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[1] In this context 'prejudicial treatment' means that the Crown has historically or contemporaneously breached the Articles of the Treaty of Waitangi, a foundational compact signed in 1840 between autochthonous Māori and the imperial Britain.

[2] The Treaty of Waitangi Act, 1975 preamble declares it is to "provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty".

In New Zealand the notion of historical restitution is not a new one; there have been a variety of regional restitution initiatives implemented around the country over the last century by various governments and commissions, although the investigative parameters and remedial metric offered by these bodies has varied and is no longer considered fair or reasonable by claimants or Crown, especially given the magnitude of the dispossession and injuries suffered by many Māori. However, the national Treaty negotiation and settlement process that is presently underway (of which the Waitangi Tribunal is a crucial component) has been in operation since 1975, and represents one of a slew of national courts, tribunals and commissions that have been instituted in other countries around the world in the last half century. Most often established to investigate the abuse or gross violation of human rights, or the forcible or duplicitous dispossession of claimants' customary holdings by the state and/or its agents, these forums offer claimants a locus where trauma and suffering can be shared and acknowledged. Mostly these entities offer victims restitution in the form of an apology, financial or commercial compensation, or the redistribution of land or other culturally significant property.

In common law the rule of *restitutio in integrum* stipulates, somewhat convolutedly, that the party who unjustly removed the property of another, should return the latter to the condition they enjoyed prior to that property's initial removal (Tong 2007). While this rule arises in private law and the law of delict (where a person can sue for the return of their private property), today the rule of *restitutio in integrum* emerges most often in public law in the context of human rights violations issues, returning refugees and displaced persons, war crimes, territorial conquest, indenture, partition, colonial rule, genocide, forced prostitution, or land claims by indigenous peoples (Rajan, 2000:160; Tong, 2007:16). *Historical* restitution, then, refers to the payment by the state of remedies to victims for injuries perpetrated in the past – and even when victims are no longer living, their descendants may choose to pursue restitution claims on their behalf.

Historical restitution initiatives are most common in post-colonial contexts or following the demise of post-totalitarian regimes, particularly in the second-half of the twentieth century when governments have undergone substantial political reconfiguration following popular protest and political resistance (Moore, 2007:17). The members of anti-colonial and new social movements have often withstood decades of discrimination and dispossession at the behest of imperial or dictatorial orders of power. Political subalterns began to reconfigure the paternalistic acts of civilisational care by the state as instantiations of domination[3], placing

[3] New nation-states gave rise to powerful new writers like Frantz Fanon and Aimé Césaire, for example, who combined anti-racist and anti-colonial arguments with a rejection of European dominance to forge their own systems of thought and action, and create a more positive, liberating identity (Spoonley, 1993:36).

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extreme pressure on the legitimating frameworks of the liberal state, compelling governments to reassess their fiduciary obligations to their citizens, and pledge atonement for maleficent behaviour (Povinelli, 2011:25). Consequently, given that the economic and cultural survival of many subalterns hinges upon the reclamation of control over land and resources, their redistribution and restitution became an essential provision in many political transitions during this time (Fairweather, 2006:3).

Substantial shifts in ideological and philosophical thinking also contributed to the escalation of historical restitution initiatives globally in the last half century. For instance, theorising about human rights, aboriginal proprietorship, the implications of presentist and revisionist history, and the philosophy of distributive justice in national and international contexts, prompted some governments to institute commissions of inquiry or courts to investigate the content of their citizens' grievances. Particularly, historical restitution initiatives proliferated in the 1960s following the United Nations' declaration of the 'First Developmental Decade', and in the 1970s when the World Bank included land reform strategies in the policy packages they offered to newly independent nations like Tanzania and Zimbabwe (Sikor & Müller, 2009:1308).

Several high-profile juridical rulings also contributed to an escalation in the adoption of programmes of historical restitution. In British Columbia, for example, First Nations people who had campaigned tirelessly for more than a century for the recognition of aboriginal title, finally received acknowledgement in 1984 when the Supreme Court of Canada ruled[4] that Canadian aboriginal title was in fact derived from the historic occupation and possession of the aboriginal people of their tribal lands[5] (Fairweather, 2006:98-99). As a consequence, the British Columbia Treaty Commission and treaty negotiations process was established in 1992. In New Zealand, following decades of escalating Māori political protest, the Labour Government promulgated the Treaty of Waitangi Act in 1975 to investigate contemporary Māori grievances against the state, and established the Waitangi Tribunal (a permanent commission of inquiry mandated to investigate breaches of the Treaty of Waitangi). In 1980 the Act was amended to retrospectively extend the Waitangi Tribunal's investigative reach to the signing of the Treaty of Waitangi in 1840, thereby transforming the submission of claims by Māori from a trickle to a torrent.[6]

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[4] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (1984)

[5] Pre-existing aboriginal title, therefore, remained a valid legal right on reserve lands in British Columbia and on traditional tribal lands not alienated in treaties with the Crown.

[6] Only fourteen claims had been lodged by 1984 (Ward, 1999:29). Following an amendment (s6AA) to the Treaty of Waitangi Amendment Act, 2006, the Waitangi Tribunal was no longer permitted to register new historical Treaty claims or historical amendments to contemporary claims submitted on or after 2 September

In Australia in 1992 the High Court formally rejected the doctrine of *terra nullius* in the landmark case *Mabo and Others v Queensland*[7], recognising (amongst other things) that aboriginals had a pre-existing system of law which had remained in force following the arrival of imperial Britain.[8] And in 1994 South Africans overturned institutionalised racial prejudice in their country's first democratic elections, ushering in an ambitious land redistribution and tenure reform programme that aspired to restore property to persons and communities dispossessed after 1913 (the year the *Natives' Land Act, 1913* was instituted). Early this year in his *Statement of the National Executive Committee on the occasion of the 101st Anniversary of the ANC,* South African President Jacob Zuma announced that the 1913 cut-off date will be extended to accommodate claims for historical landmarks and heritage sites for the descendants of Khoi and San peoples who lost their land before 1913 (Zuma 2013).

Historical restitution, therefore, is not inconsequential and could be more accurately perceived as a phenomenon. While its individual institutional characteristics are fascinating fodder for investigation, probing the motivations for instituting national programmes of historical restitution is just as valuable. Arguably, while the ambitions for such initiatives may be morally honourable (restoring dignity to victims and their descendants through rituals of apology and the return of, or compensation for, property) my personal experience of the Treaty settlement process in New Zealand unsettled me about how efficacious the social transformation – the reputed corollary of restitution – actually is. Be it in the form of an apology or financial remedy, restitution is what anthropologist Michel-Rolph Trouillot calls a 'transformative ritual' (2000:174), a simultaneously illocutionary and performative demonstration of repentance by one interlocutor to another. It marks a clear, if imaginary, borderline between the (contemporarily conceived) repugnant acts and events of the past, and an immediate, if idealised, future, usually articulated in terms of glorious potentiality (Foucault, 2003:222). Therapeutic notions of restoration and reinvigoration are therefore, expected attributes of the restitution ritual.

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2008. As at 11 June 2009, 2034 claims had been registered with the Tribunal. They vary in size from claims on specific grievances by individual Māori up to comprehensive claims by one or more large *iwi/hapu* groupings (*iwi*: An extended kinship group, tribe, nation, people, nationality, race – often refers to a large group of people descended from a common ancestor; *hapū:* a kinship group, clan, tribe, subtribe – section of a large kinship group).

[7] *Mabo and Others v Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1

[8] Except where specifically modified or extinguished by legislation or executive action.

AN EMERGING RESEARCH PROBLEM

In 2007 at a regional meeting with Māori claimants to discuss the Waitangi Tribunal's progress on writing a series of historical research reports, I was silenced during my presentation by the impassioned shouting of a number of Māori audience members. As I shall describe more fully in chapter five, these particular claimants felt deeply aggrieved that the Treaty settlement process was not as representative or as fair as it could be, that it took too long to complete (inquiries can often take a decade to reach settlement), and that the remedial outcomes offered by the Crown did not adequately reflect the losses they had individually and collectively suffered. For me, observing firsthand such visceral frustration and resentment, this was an important moment when I began to appreciate that the Treaty settlement process may not be delivering the miraculous and cathartic sense of resolution to claimants that is extolled in restitution rhetoric. Were claimants, for instance, enjoying the full and final resolution of their historical grievances as the Crown contends that they should following settlement? And, are Māori and non-Māori New Zealanders reconciled with their past, and ready to "create a future for two peoples as one nation", as the Waitangi Tribunal alleges (The Waitangi Tribunal n.d.)?

These are the questions my Tribunal colleagues and I often spent time debating; many of them appeared to share my concerns. Memorably, late one afternoon a co-worker offered a rejoinder during a particularly heated discussion:

> "Kate, the reality is, this whole thing [the settlement of Treaty grievance], we're simply paving the way to hell with good intentions."

When asked to elaborate I recall his defence of the remedial ambitions of the Treaty settlement process, but primarily his concern at the limited ability of the restitution ritual to substantially resolve the social, political and economic imbalances and disparities present in New Zealand today as a result of historical discrimination or dispossession. All New Zealanders, and especially Māori claimants, he cautioned, should be careful to manage their expectations in this regard. My ethnographic curiosity was piqued regarding this slippage between popular expectations of the transformative and conciliatory capabilities of the historical restitution ritual, and the corresponding realities of its delivery. If Treaty restitution in New Zealand wasn't facilitating the satisfactory long-term resolution of claimants' grievances, then what motivates the Crown to invest considerable time, energy and expense pursuing historical restitution? And if claimants don't feel that their grievances have been adequately resolved, what does this say about the transformative and conciliatory potential of the restitution ritual, and its broader implications for historical restitution arrangements presently underway in other places around the world?

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This thesis research, therefore, explores this slippage in two ways: firstly, why the ritual of restitution is popularly conceived as an act which has the power to transform and restore social, economic and political equilibrium within a society or country. I argue that this has occurred because acts of restitution are popularly considered to be inherently just, a logic that frames the state's delivery of apology, the payment of compensation, and the redistribution and return of property. By atoning for the repugnant acts they perpetrated historically, the state is also supposedly able to expunge its own guilt, resolve victims' injury and suffering, pull people out of structural impoverishment, and repair torn lives (Povinelli, 2002:160). Restitution, therefore, is lauded as a conveyance for the restoration of victims' dignity and economic, political and cultural prosperity – ambitions, I contend, that are too expansive to be easily achievable.

In New Zealand for example, Māori claimants must sign a full and final settlement clause as part of their final Deed of Settlement with the Office of Treaty Settlements, the Crown's negotiating body. This clause removes the courts' ability to re-open and investigate grievances associated with the settlement. In this context the Crown expects that the delivery of remedies to claimants concludes, even terminates, their grievances because it is fair and equitable (The Office of Treaty Settlements, 2006:11). It is common, though, to hear Māori claimants passionately decry the full and final settlement concept and proclaim that their struggles for recognition and reparation will continue until they feel satisfied that they have "achieved justice".

However, as German philosopher Wilhelm Leibniz observed three centuries ago, "everyone does not agree on the common concept of justice, with the result that everyone does not understand the same thing by the same name, and this is the cause of endless dispute" (Leibniz 1702-3 in A. Sharp, 1997:28). It is a slippery concept, seemingly comprised more of congeries of questions than definitive facts; that its essential character and normative parameters are fundamentally subjective – since many things can be said to be just or unjust, laws, institutions, social systems, actions, decisions, judgements and imputations – it makes attempts to identify a set of reliable characteristics inherently problematic (Mikula, 2001:8063; Rawls, 1971:7). Justice is also conceptually dynamic; popular and philosophical understandings of what constitutes justice and injustice change relentlessly as moral and political thinking shifts. If restitution is conceived *as* justice, then, and Māori and non-Māori have diverging ideas of what constitutes justice and injustice, what does this mean in practice for the resolution of grievance?

I have chosen, therefore, to explore how justice – as a cultural formation that constitutes part of the conceptual toolbox people use to construct and understand their worlds – undergirds

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the systems of meaning that order a society's law and jurisprudence. The language and proceduralism of justice saturate programmes of historical restitution – claimants describe their grievances as injustices; state-sponsored restitution initiatives usually take the form of courts or adjudicatory commissions, and the calculation of 'adequate' redress is commonly described in terms of justness or fairness – a phenomenon I attribute to the spread of the contemporary formulation of distributive justice that rose to philosophical prominence in the 1970s, and which has subsequently created the ideological and political space necessary for historical restitution initiatives to flourish. The restitution-as-justice model can be, I argue, unhelpful for the resolution of historical grievance since it fosters adversarial relationships between interlocutors and amongst claimants, reduces the compensation of loss, trauma and suffering to a remedial metric, and encourages people to imagine and frame restitution in ways that do not necessarily promote catharsis or conciliation amongst claimants and their fellow citizens.

Secondly, this thesis research posits that the foundational and philosophical arrangements that undergird many contemporary historical restitution initiatives are profoundly flawed, born, as Trouillot suggests (2000:185), without the capacity to meet their inherent purpose. Since they are formulated, sponsored and administered by the state, the objectives and structure of the restitution programmes to which claimants appeal are effectively regulated by the same orders of power who perpetrated the original wrongdoings. In fact, many orders of power arguably exist *because* of the very subjugation and dispossession their victims suffered, and the redistribution and divestment of property, power and privilege by the state amongst victims may considerably threaten this arrangement. What, then, motivates governments to institute programmes of historical restitution?

I explore this question by drawing upon the work of contemporary anthropologist Elizabeth Povinelli, and political-scientist Wendy Brown, who variously examine and theorise historical injury and rituals of apology and restitution. I will also contend that the emancipation which claimants pursue of their political, ethnic and cultural identities from the state is, in fact, quite limited, because such liberation threatens to unmask the sovereign authority and legitimacy of the liberal state.

Brown in particular argues that the challenge presented by radical alterity serves to exacerbate the fundamental paradox between the demands of individual liberty (that legitimates liberalism) and the requirements of cultural homogeneity (which fosters political universality). She, and Povinelli, suggest that policies of 'tolerance' and 'recognition' (respectively) form part of a calculated response by governments in the late liberal age to deflect and/or quash the emancipatory aspirations of subaltern antagonists, by offering only

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the *illusion* of liberal incorporation and accommodation within the hegemonic national project. Rather than fundamentally change the structure of state apparatuses (such as law, principles of governance, and national attitudes, for example) to accommodate subaltern discourses, desires and practices, they argue, liberal governments only *adjust* them.

In this sense, then, strategies of recognition and tolerance serve to mask dominant hegemonic interests. It is in this vein that I argue that programmes of historical restitution which focus upon the recognition of past grievance and suffering amongst claimants, and their aspirations for the future, serve to reorient or excise the challenge presented by claimants' desires for self-determination, political autonomy, and/or the emancipation of their cultural identities. I also contend that given this suppression of countervailing tendencies (or, at least those which diverge from the political ideal of the dominant hegemon), the resolution the liberal state can offer to claimants is limited. Lastly, I propose that the deflection of radical alterity may also encourage the renaturalisation and resubordination of the subaltern subject.

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CONTEXTUALISING THE RESEARCH PROBLEM

This research focuses primarily upon the Treaty of Waitangi historical restitution programme presently underway in New Zealand, and concentrates particularly upon the return and compensation of land amongst dispossessed claimants. In New Zealand it is foundational to their historical restitution programme, undergirding its compensatory logic and directing its juridical approach. As discussed further in chapter three, Māori claimants have actively pursued the return of, or compensation for land confiscated or unfairly alienated following the signing of the Treaty of Waitangi, a compact that formalised a political and legal relationship between Māori and the British Crown in 1840.

By 1975 considerable Māori political agitation and protest prompted the New Zealand government to establish the Waitangi Tribunal – a permanent commission of inquiry mandated to investigate breaches of the Treaty of Waitangi – and the Office of Treaty Settlements – a governmental body that negotiates and delivers redress to Māori on behalf of the Crown. While the Treaty settlement process has grown in strength to become a significant force in New Zealand's political and jurisprudential landscape, it is also the focus of tumultuous public debate between Māori, New Zealand's autochthonous population, and non-Māori – mainly Pākehā (please refer to the explanatory note at the end of this chapter for a definition of 'Pākehā') - who comprise New Zealand's dominant demographic majority.

By contrast, in South Africa for example, the return of, or compensation for land alienated or stolen from non-white communities following the institution of the Natives' Land Act in 1913 has come to underscore a national propitiatory strategy that included the institution of a reconciliatory and land-claims commission, and a series of government-lead social assistance schemes and grants, and nationally coordinated education and training systems aimed towards redressing social imbalances resulting from past racial discrimination and legal and political oppression.

Following South Africa's political transition in 1994 from apartheid to representative democracy, the new ANC[9]-led government introduced the Truth and Reconciliation Commission, a deputation which would bear witness and offer recognition for victims of violence and gross violations of human rights in the context of individualised amnesty for perpetrators; and the Land Claims Commission, a three-pronged land reform programme which included a tenure reform scheme, a land redistribution strategy and a restitution initiative. The land reform programme was intended to investigate the past racial injustices in relation to forced removal and land theft which had occurred since 1913, thereby reversing decades of institutionalised racial discrimination and help to relieve poverty and landlessness amongst South Africa's non-white majority (Hall and Ntsebeza 2007; Zenker 2011). The 'success' of the land reform programme, however, has been haphazard and uneven (C. Walker 2007); some government representatives claim that it has attained its goals, while many claimants describe feeling disappointed and dissatisfied by the redress they have received.

Land, therefore, is a fundamental axle in the historical restitution process, around which notions of redress, resolution and ideations of justice are rotated. Accordingly, this research focuses upon land restitution since it provides a conveniently bounded and thereby methodologically manageable way to investigate strategies of historical restitution. Given the extensive scope of this research it has been necessary to straiten the parameters of this inquiry to make it viable for the purposes of a doctoral thesis. Accordingly, therefore, I have chosen to explore historical restitution as it pertains to remedial negotiation and settlement, particularly the return and redistribution of land, and to only speak obliquely about social assistance mechanisms and rituals of apology.

Although rituals of apology and rituals of restitution are often seen as intimately aligned they share different roles in the resolution of grievance. Since this research focuses primarily upon the relationship between the distributive justice philosophy and the apportioning of

[9] African National Congress.

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property and justice amongst claimants, any analysis of apology is included only where my argument touches specifically upon notions of guilt, liability, atonement and forgiveness.[10]

This thesis, therefore, focuses specifically upon the historical restitution of land in New Zealand, and draws ethnographic insights and examples from other settler economies, particularly South Africa. Although these two distinct countries share little in terms of their historical and socio-political trajectories, both have sought to correct the social, economic and political inequalities that have arisen as a consequence of historical land dispossessions and legislative discrimination by providing victims with land or compensation (Moyo in Ntsebeza & Hall 2007:60). It has been useful, therefore, to consider, and sometimes to contrast the legislative and procedural configuration of New Zealand's programme of historical restitution with South Africa's, to explore the ways claimants from each country describe their grievances, and to evaluate how effective remedial compensation has been for claimants. Such an approach is not directly comparative and aligns more to an ethnographic approach which Laura Nader (2013) calls 'loose' or 'discovery' comparison (described in the following chapter).

Furthermore, examples from Australia, British Colombia, and the United States of America are also included throughout this research alongside my South African material in an attempt to garner analytical insight and a breadth of perspective of my New Zealand data specifically, and historical restitution in settler economies more generally.

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CHAPTER OVERVIEW

This thesis is comprised of five central chapters; each covers a particular set of threads, themes or questions that weave together to form an overarching narrative.

Chapter two describes the methodological approach used in the collection and harvesting of data for this project. I describe the range of methods I employed to procure data, including classic ethnographic fieldwork techniques such as participant observation, and formal and informal interviews, and other methods as well as the gathering of data from the online social forum www.reddit.com. The idea of a limited comparative approach that draws upon South African material to augment my ethnographic analysis of the Treaty settlement process in New Zealand, is also developed further. Lastly, I consider the problems I experienced in the field in terms of my own positionality and gaining access to information amongst Māori

[10] For a literary overview on rituals of apology please refer to *Interventions: International Journal of Postcolonial Studies,* Volume 2(2), Special Issue: Righting Wrongs, Re-writing History.

claimants, an exploration that led me to reflect upon the circulation of informants' stories and experiences of suffering, and my responsibilities in terms of sharing and giving 'voice' to their disclosures.

The third chapter is historical and performs two roles: by describing the social and legal context in which historical restitution arose in New Zealand, and the socio-political timeline of events that precipitated the establishment of the land reform programme in South Africa, I show how the social, political and jurisprudential lineaments of each country have contributed to the institution of historical restitution strategies with analogous objectives: the delivery of substantial social, political and economic transformation. It is also a useful way to provide context for readers unfamiliar with one, or both contexts. The overview of New Zealand begins in 1840 with the signing of the Treaty of Waitangi, the date from which the Waitangi Tribunal is mandated to consider historical claims by Māori, while in South Africa my review commences in 1913 following the promulgation of the Natives' Land Act, the cut-off date for that country's historical restitution claims.[11]

Chapter four focuses upon my contention that popular expectations of the efficacy of historical Treaty restitution in New Zealand are premised upon a restitution-as-justice logic. In this context the resolution of historical grievance is framed and enacted in the language and proceduralism of justice. This has arisen, I argue, in response to the suffusion of the distributive justice philosophy, or, to be more precise, its current formulation which, since the 1970s, has come increasingly to inform the rhetoric and ideology of liberal jurisprudence. It has opened up a moral and philosophical space where citizens and their governments can debate and negotiate popular reconfigurations of, for example, history, injury, resistance, resolution, and identity, enabling historical restitution initiatives like the Waitangi Tribunal to take root. This chapter then explores whether Māori claimants feel the New Zealand Treaty settlement process has been efficacious. I describe Crown and claimant definitions of grievance in light of the current distributive justice formulation, before examining what Māori claimants demand, desire, or are seeking to achieve in terms of restitution. I discuss the role of New Zealand's Post-Settlement Governance Entities in the Treaty restitution process, to probe the notion of 'adequate' redress, and then contrast New Zealand's experience with the relative "success"/"failure" of the South African land restitution programme.

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[11] Although, as noted above, South African President Jacob Zuma announced early in 2013 that the 1913 cut-off date will be extended to accommodate claims for historical landmarks and heritage sites for the descendants of Khoi and San peoples who lost their land before 1913 (Zuma 2013).

The fifth chapter examines the role identity plays in the constitution of historical restitution initiatives. The transfer of attributes from individual to collective subjects, for example, such as governments which are ascribed anthropomorphic-like characteristics by claimants, is an instance whereby qualities like morality and culpability become attributable to powerful, faceless institutions. Drawing upon the scholarship of Povinelli (1998, 1999, 2002, 2011), Trouillot (1995, 2000) and Brown (1993, 1995, 2006, 2011), each of whom offers critical insight into questions of injury and the workings of restitution, I explore how the notion of collective subjectivity is enacted in New Zealand amongst Pākehā New Zealanders in the context of settler nationalism, and the ways this impacts upon Māori collective identity. The Pākehā tendency to 'consume' Māori culture and Māori ethnic difference in an effort to legitimise their feelings of belonging in New Zealand is also examined. I then investigate what Povinelli (2011) describes as the 'genealogical' construction of identity amongst Māori claimants, and their corresponding struggle to manoeuvre out from under the imagined projections of others, and enforced conformity to these fictions of identity in order to receive redress from the Crown. Lastly, I investigate the way Māori individuals and social groups have begun to reconfigure their identities as a result of the Treaty settlement process, particularly in terms of the commodification of their indigeneity, and the commercial incorporation of customary social organisations and practices.

Chapter six is mainly theoretical and explores the contention that historical restitution initiatives are fundamentally flawed in their ability to deliver restitution in ways that facilitate substantial transformation and conciliation. I argue that this is because liberal governments seek to deflect and/or quash the challenge presented by radical alterity through tactical strategies of 'recognition' and 'tolerance'. Using examples of historical jurisprudential rulings from New Zealand that are contemporaneously considered morally repugnant and unjust – and augmented with examples from Australia and South Africa – I shall demonstrate how the law, and its interpretation and enactment by the judiciary, assists in the suppression of countervailing tendencies by generating a sort of Then-vs.-Now imaginary, whereby morally repugnant behaviour and injustices perpetrated historically can be abandoned to a conceptual past, thereby liberating and redeeming the nation to embrace a potentially glorious future. I posit that in contexts like historical restitution, strategies of 'recognition' enable governments to manage, firstly, the crisis of legitimacy amongst late liberal orders of power at a time when the liberal subject is becoming "increasingly disinterred" (Brown, 1995:58) from substantive nation-state identification, and secondly, the crisis of how to allow cultures the space to flourish within liberalism without rupturing the core frameworks of liberal justice.

The conclusion summarises the key findings of the thesis.

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CLARIFICATORY ASIDES

Understanding how my informants configure their identities (individually, collectively, nationally, and within the context of the Treaty settlement process), posed challenges to writing about, and operating analytically within these categories. In New Zealand the demographic composition of the country is dominated by 'Pākehā' and 'Māori' peoples, names that emerged following early encounters between European explorers, whalers and missionaries and New Zealand's Māori autochthons. These names, as I explore further in chapter five, reflect the early contrast between first-comers and new-comers, a distinction that has become ossified following their continued everyday reproduction.

The ways in which identity is configured in and through historical restitution processes is significant. Governmental admission to historical acts of wrongdoing and corresponding delivery of restitution, for instance, requires the complex mediation of collective identity throughout time and space. Claimants, too, must imagine or emphasise the genealogical character of collective identity in order to demonstrate their eligibility to participate in the Treaty settlement process. Grasping how groups of people understand their place in the world, therefore, becomes doubly complex once the very process of their identity constitution also becomes a subject of scrutiny, as it is in the investigation of historical restitution in New Zealand, and in South Africa.

In this thesis I speak of 'Māori' and 'Pākehā' individuals and peoples as if each represents a tidily bounded, unitary, coherent *ethnie* (Sharp, 1997:41). However, communities – as Benedict Anderson claims – are imagined, and to use such terms uncritically neglects the complexity inherent in their use and also does my informants a disservice in terms of ethical representation. It is complicated, then, to analytically employ national vernacular without contributing to the essentialisation of national or ethnic groups; to do so makes New Zealand seem as if it is comprised of two (competing) identities, which not only discounts the presence of alternate ethnic groups in New Zealand, but denies the complex ways these identities intersect.

However, in the process of Treaty restitution, Māori claimants seek redress from their Treaty of Waitangi partner, the New Zealand Crown. For those readers unfamiliar with New Zealand parlance, the 'Crown' is often used in place of 'the state'. It refers to the executive branch of the New Zealand government, and stands for the historical authority of the British sovereign as head of state. Today the executive government is comprised of the Governor-General (the Queen's representative), Ministers (of the legislative arm of government), and their departments; the Queen herself has no real or personal authority (Office of Treaty

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Settlements, n.d.:22). By engaging in the Treaty settlement process, Māori, in their role as claimants disputing with the Crown, are placed in a deliberately contradictory position to non-Māori who are themselves represented by the Crown. In this setting the Crown acts as a buffer between Māori and non-Māori, thereby deflecting notions of culpability and liability inherent in the settlement of historical grievance.

Furthermore, the composition of New Zealand's demographic landscape means that the majority of non-Māori New Zealanders are Pākehā. In this research I have elected to use the (sometimes contentious) term 'Pākehā' to describe the group of New Zealand residents who either share descent from the early European immigrants who settled New Zealand in the nineteenth century, or who have migrated to New Zealand in the years since; peoples who might simply be classified or recognised as white or of European descent in other countries. As I explain in chapter five, the name 'Pākehā' often inspires a strong emotional response from some (Pākehā) individuals who revile the term (offense is usually assumed from the alleged derogatory translations of Pākehā, although there is little etymological or linguistic evidence to support such interpretations). I feel, however, that in the context of this research the name accurately reflects the distinctive qualities of this geographically and culturally distinct group. While it has been and continues to be a subject of debate[12] the term is popular amongst Treaty historians and academics, and is used in government publications and Treaty restitution documentation.

It is not difficult to see, therefore, how the Treaty settlement process propagates and reinforces a division between Māori and Pākehā, especially when the Crown, as defendant, must simultaneously represent an ill-defined group of historical, governmental agents, *and* New Zealand's remaining non-Māori citizens. Employing the names 'Māori' and 'Pākehā', then, not only reflects the manner in which individuals in New Zealand choose to describe themselves, but has allowed me to probe the meanings embedded within these names, the ways people choose to manipulate them, and the palpable tension that exists in their relationship with one another. So, while I wish to acknowledge that today New Zealand is comprised of a spectrum of identities, the exacerbation of the Māori/Pākehā distinction in Treaty restitution rhetoric and practice, and the essentialist collectivities propagated in their use, is vital for understanding how categories of individual, collective, ethnic and national identities perform and are exploited in contexts of restitution.

With regards to my South African data, it is difficult to describe or discuss ethnic or cultural groups without resorting to the racialised names and terms conferred upon them historically

[12] See Michael King (1988, 1991, 1999), Angela Ballara (1986), Sydney Moko Mead (N.d.), Ranginui Walker (1990), Richard Mulgan (1989), and Jock Phillips (1987), for example.

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(such as 'black' or 'coloured', for instance). Consequently I have elected to refer to South Africa's land reform claimants collectively as 'African', or, where appropriate, with the nomenclature that was, and is, contextually appropriate to each time and place ('coloured', for example, is the pejorative yet formal label for an ethnic group in South Africa or mixed origins that include Khoisan, African, Malay, and European). Although 'African', like 'Māori' or 'Pākehā', suggests an essential unity of the demands and aspirations of claimants, Africans are comprised of distinct social and ethnic categories, many of which are associated with historicised or racialised terminology. Given the parameters of my thesis and the nature of my data, however, I have devoted a greater proportion of my investigation of identity to the experiences of my New Zealand informants.

Lastly, there are many Māori words and terms used throughout this thesis; I have appended a glossary for the reader.

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chapter two

A RIGHT TO RESEARCH?

THE PERILS OF POSITIONALITY AND OTHER METHODOLOGICAL QUANDARIES

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A significant portion of my knowledge (not to mention my academic interest) regarding the historical restitution process in New Zealand was gained during my employment as a researcher and inquiry facilitator at the Waitangi Tribunal in New Zealand from 2006 to 2008, and subsequent professional engagement with Māori claimant communities. When the opportunity arose to undertake postgraduate study, therefore, I was eager to examine the state-led resolution of historical grievance. Initially my research focus centred upon the fundamental justness or unjustness of the historical restitution enterprise. However, the further I probed its workings in New Zealand and in South Africa, the more the restitution episteme began to unfurl in ever more complicated and elaborate ways, and my appreciation grew of its philosophical, national and international implications. My aim in this thesis is to describe how historical restitution is presently configured in New Zealand, and, with the aid of ethnographic examples from South Africa, and additional discussion regarding historical restitution in Australia, British Colombia and America, to render the jurisprudential and philosophical lineaments of the historical restitution process more visible, and thereby ascertain its capacity to deliver substantive economic transformation and social conciliation.

Comparisons between New Zealand and South Africa, unlike more conventional approximations between New Zealand and Australia or Canada, are uncommon. This may be because, in terms of historical restitution, countries like New Zealand and Canada have a tradition of treaties signed between European imperialists and their autochthons which contemporaneously undergird their restitution programmes, whereas South Africa, as I shall

describe in the following chapter, does not. New Zealand, Australia and Canada have also been intensively compared with one another in terms of their indigenous peoples' struggles to retrieve land lost to the state historically on the basis of aboriginal title and its extinguishment (Everingham & Jannecke, 2006:557). However, as I show below, a 'loose comparison' (Nader 2013) between New Zealand and South Africa is productive of new insights into what have become globalised processes of restitution.

Aboriginal title, also known as indigenous title, or native title in Australia, or as customary title in New Zealand, was first acknowledged in the early nineteenth century, most often in contexts of European imperial 'discovery' or conquest. With the flourishing of indigenous rights movements in the 1970s and 1980s, and the proliferation of the moral rhetoric of restitution, debate about the customary status of land, economic resources and cultural property intensified in countries like New Zealand, Australia, Canada, and the United States. Other places such as Latin America and South Africa which experienced administrative liberation from imperial domination a century earlier, have faced an alternate series of socio-political challenges between first comers and new comers, which haven't always centred as explicitly upon the rhetoric of indigeneity and/or autochthony – some, for example, are home to a significant number of descendants of slaves, a colonial legacy with its own series of socio-political particularities (Barkan, 2000:160).

In South Africa, for example, the advocacy of indigeneity as an imperative of government remains largely neglected – the U.N. Special Rapporteur, Rodolfo Stavenhagen (2005:2), for instance, has lamented the ANC-led government's refusal to constitutionally recognise the country's six self-identified indigenous groups (Goodman 2006). When the country underwent its dramatic political transition to democracy in the early 1990s – an extensive transformation induced by immense domestic and international political pressure – the land restitution and redistribution programme that was subsequently established was not, therefore, instituted explicitly to address the dispossession of land amongst South Africa's *indigenous* peoples. Instead, it was initiated to restore to victims property which had been lost as a result of past racially discriminatory laws and practices since 1913, many of whom comprise South Africa's indigenous nations (The Department of Rural Development and Land Reform n.d.).

At first glance, therefore, New Zealand and South Africa may not appear well suited for analytical comparison; arguably, given the distinctive character of each country's colonisation,

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they share few obvious similarities in terms of their political, legislative and jurisprudential[13] systems, demographic composition and socio-political histories. They are, however, alike in some general ways, namely that the autochthonous populations of each country have experienced political subjugation by powerful imperial forces, and the subsequent imposition of foreign systems of governance and capitalist economies (Maaka & Fleras, 2005:18). Moreover, and crucially for this research, the governments in each country have instituted a programme of historical restitution in an effort to address the claims of those citizens who feel they have experienced, and continue to experience, ongoing prejudice as a result of land dispossession or the promulgation of discriminatory laws in the past.

The inclusion of South Africa within this thesis, represents a comparative ethnographic approach which Laura Nader describes in her 2013 article, *Of Area Studies and Intellectual Boundaries,* as "comparison used as a discovery tool". Also called 'loose comparison', Nader contrasts this ethnographic approach with more classically-conceived 'controlled' and 'cross-cultural' comparative techniques that are most often adopted by anthropologists (Nader, 2013:5). Nader describes the current trend amongst anthropology departments in the United States to teach anthropology courses that focus upon the geography, history, literature, and cultural specificities (kinship, language, religion, etc) of one particular – usually politically circumscribed – area, and suggests that they may constrict the investigative interests of anthropological students by:

> "... limiting the anthropological imagination that might range beyond an area named by outsiders, with the borders of their nation-states after independence set by outsiders" (Nader, 2013:5).

Nader asks whether anthropologists can be both "scholars and comparativists at the same time, and even diffusionists?" (Nader, 2013:5), and contends that her personal experience (and those of her graduate students) with publishers and marketers who are reluctant to publish research that strays from the analytical parameters of a singly-sited space to include another, is concerning given the fundamentally comparative nature of anthropology, and, I would add, the increasingly interconnected world we seek to understand.

Using the comparative approach Nader describes as 'loose', I have endeavoured to extend my investigation outside the bounds of a 'single fieldsite' by including ethnographic examples from other sites such as Australia and British Colombia, and particularly from South Africa. Given the "multilayered, contradictory, translocal ensemble of institutions, practices, and

[13] New Zealand's legal system, for example, is premised on a common law tradition, while South Africa's is a mixed jurisdictional amalgam of civil and common law (specifically Roman-Dutch, English, African customary law and human rights principles) under the umbrella of the Constitution.

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people" (Sharma & Gupta, 2006:6) in an increasingly globalised context, it can sometimes make more sense for anthropologists to focus less upon the particularities of one area than to think more broadly and creatively in terms of the associations, connections and patterns generated by *processes*, as authors like Elizabeth Povinelli (2002, 2011) and Wendy Brown (1993, 1995, 2006) do. I focus upon South Africa, therefore, as part of a 'loose' comparison, in part because New Zealand and South Africa are both presently wrestling with the complexities of settler economies, and in part because reflection upon the historical restitution processes each country has set in place may help to illuminate how the recognition and tolerance of radical alterity seduces analysis away from the core state institutions, and hegemonic narratives that sustain orders of dominance and strategies of subaltern subjugation.

A stricter, controlled comparison would have necessitated a more rigid evaluation of transverse concepts and criteria – a daunting approach given the dissimilitude in the economic, social, cultural and political realities in New Zealand and South Africa. Instead, a 'loose' comparison enables the researcher to probe the specific social formations and institutional phenomena that occur in different societies, and to search for and propose explanations for any variations they discover by framing them within a wide globalised context. Nader's 'loose' comparison, therefore, encourages the investigation and analysis of institutions, sentiments and phenomena outside the confines of political and geographical borders, and to problematise and seek to understand the way such phenomena are constituted as they move across and permeate these borders.

Furthermore, loose, or discovery comparison is an invaluable tool for the 'citizen anthropologist' (Cheater 1987) who remains deeply lodged within the society they study. Focussing upon historical restitution in contexts other than New Zealand, for instance, obliged me to venture outside my own socio-cultural reference system, and to confront the way my identity and understanding of the world impacts upon my research methodology, and upon the conclusions that I have drawn from my analysis. Loose comparison, therefore, can contribute to a greater awareness and a deeper understanding of social reality in different local and national contexts, it can help in the identification of flaws amongst institutional phenomena and their resolution, and it can support anthropologists in their quest to remain reflexive about their own positionality.

By weaving insights from South Africa and other places into my analysis of New Zealand, then, I am not attempting to make grand universal claims, nor am I trying to generate statistical correlations about cultural traits. Instead, the inclusion of contextualised examples from other settler economies similarly grappling with the challenges of the historical

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restitution process is to help, as Adam Kuper (2002:161) suggests, to address and illuminate the particular set of research questions, processes and imaginaries of my primary fieldsite, since "contextualisation will raise fresh questions, suggest references to other observations and reports, and stimulate doubts about the underlying assumptions of the discourse within which it is set".

John Sharp and Emile Boonzaier (1994), for instance, apply a 'loose comparative' approach in their exploration of Nama ethnic identity in South Africa, where they incorporate examples of the Inkatha Freedom Party's ideation of 'Zuluness' to provide critical insight. The authors explore how Zulu identity was crafted and exploited by the Inkatha Party and its leader Mangosuthu Buthelezi in the years leading up to the dissolution of apartheid, incorporating this case-study briefly but succinctly within their paper to lend analytical perspective and critical insight into their exploration of the 'controlled performance' of contemporary Nama ethnic identity (J. Sharp & Boonzaier, 1994:405). New Zealand, therefore, while my central focus, is not my exclusive point of reference; including ethnographic examples from South Africa and other places helps to ask broader questions about the capacity of historical restitution to deliver resolution to many victims, not only Māori New Zealanders.

In fact, if any part of this research project were to be considered strictly comparative, my synchronic investigation of the transformation in socio-political and philosophical thinking that has led to the institution of historical restitution in New Zealand and South Africa would surely fit the bill most closely. This approach, where past is contrasted with present, constitutes a method of comparison well-suited to a world where ethnographers must increasingly concentrate on processes of cultural interconnection rather than cultural distinctiveness (Gringrich & Fox, 2002:16; Kuper, 2002:161). In the following two chapters, therefore, I shall explore the contemporary transmutation of jurisprudential and philosophical ideas in order to demonstrate, firstly, how the establishment of historical restitution initiatives in New Zealand and South Africa have been precipitated by an evolving series of socio-political events, and secondly, how philosophical ideas have changed in specific ways, particularly in the last half-century, to enable the entrenchment of the distributive justice rhetoric in the restitution episteme.

The remainder of this chapter will detail the data-gathering methods I employed while in the field, from classic ethnographic techniques like participant observation to more novel approaches such as the harvesting of digital content from online social forums. I shall then describe the challenges I faced in the field amongst Māori claimants in New Zealand, and how these difficulties were compounded by my own struggle to conduct ethnography in an

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'at-home' context, before concluding with some reflexive considerations regarding my own positionality.

GATHERING DATA

Historical restitution makes a challenging 'site' for analysis since it constrains researchers to observing and analysing how restitution processes operate in adjudicatory settings like courts. Furthermore, the everyday 'lived' lives of participants are not necessarily the best places to acquire data about how they conceptualise notions such as justice and restitution. The bulk of historical restitution data, I contend, lies at the interface between practice and philosophy. In this space researchers can explore the operation and intersection of power in a disaggregated manner by tracing, as Sharma and Gupta (2006:9) suggest in their study of amorphous entities like the state, the everyday administrative operation and adjudicatory functions of institutions like the courts, tribunals and commissions of the historical restitution process.

The investigative parameters of ethnography across two sites, however, required data-collection methods which departed from classic single-sited approaches. Advocates of multi-sited ethnographic methodology like George Marcus suggest that students commencing their first substantial fieldwork assignment frame their research within a 'multi-sited imaginary' before cutting their teeth on a full-blown multi-sited ethnography (Marcus 1998:14). I have focussed, therefore, on charting the chains, paths and threads of justice, identity and restitution through space and time across two contexts, in order to probe the logic that underpins their associations and connections. This approach allowed me to explore the conjunction between the current philosophical formulation of distributive justice (discussed further in chapter four), and its links to wider sites of social relations, and, to paraphrase Gusterson (1997 in Hannerz, 2007:366), the polymorphous engagements that pervade the historical restitution process.

Given that my potential informants were dispersed across geographic space, collecting information by phone, email and interview became as essential as classical ethnographic techniques like participant observation and note-taking. In New Zealand it was vital that I attended the locus of the historical restitution process, the Waitangi Tribunal, where hearings and interlocutory sessions (open to the public) offer opportunities for the collection of raw data. During my New Zealand fieldwork period I attended several Waitangi Tribunal *hui* (a

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gathering or meeting) that formed part of the interlocutory proceedings[14] for the (then) upcoming negotiations for the *Te Paparahi o te Raki* (Northland District) hearings (the interlocutory phase is where the issues for a Waitangi Tribunal inquiry are particularised and refined). This inquiry currently comprises around 370 registered individual Wai-numbered claims (described in the following chapter) brought largely by Ngapuhi, Ngati Whatua, Ngati Wai, Ngati Hine, Patuharakeke, Ngati Rehua and Ngati Manuhiri claimants.[15]

Although hearings are held locally around the district for ease of access for claimants, the Northland hearings I attended were always held in the Waitaha Conference Room of the Copthorne Hotel at Paihia, Waitangi. The Conference room would be brimming with claimants, often elderly, dressed in their 'Sunday best' and frequently wearing large, elaborately carved bone or *pounamu*[16] pendants. Some claimants brought their grandchildren to observe proceedings or accompany them in their *waiata* (a choral song), others with small children attended briefly during the day. Claimants' counsel were seated to one side where they took copious notes and conversed with their clients, while members of the Waitangi Tribunal and their staff sat at a long table at the front of the room.

At the interlocutory hearings which I attended, claimants from across the *Te Paparahi* inquiry district and their counsel delivered their thoughts on how the inquiry was proceeding, and should progress, to the inquiry Chairman Judge Craig Coxhead. Claimants delivered their oratory in English or *te Reo Māori* (the Māori language), or a blend of both, and the Judge was often compelled to draw a claimant engrossed in their impassioned delivery at the microphone back on topic[17]. Members of the audience would growl or cheer the words "*kia ora"* (a greeting – hello! cheers! good luck! best wishes! – an interjection, or a farewell) during speeches in sympathy with the orator, or to encourage or emphasise aspects of their delivery. Fortunately for my research, discussions about justice and fairness were popular themes in the speeches of many claimants.

To augment my notes, observations, and recordings, I endeavoured to interview parties from all aspects of the process, namely claimants engaged in Waitangi Tribunal hearings and *iwi* (a group of extended kinship, a tribe, a nation, people, nationality, race; in this context *iwi* refers

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[14] Interlocutory proceedings usually include the filing of amended statements of claim, determining a Statement of Issues[14] (the Statement of Issues represents the matters that are the subject of agreement between the parties, and those which remain contested), and the identification of research gaps in the inquiry research programme.

[15] For further information please see: http://www.waitangi-tribunal.govt.nz/inquiries/genericinquiries/northland/default .asp

[16] The Māori name for a form of nephrite jade, bowenite, or serpentinite stone found in southern New Zealand.

[17] Amongst Māori the art of oratory is highly valued. Speakers display their mastery of the Māori language, and a competent speaker is able to embellish their speech with imagery, metaphor, and relevant references to ancestry.

to a large group of Māori descended from a common ancestor) negotiators, claimants' counsel, and Crown representatives at the Office of Treaty Settlements. As I shall describe below, I struggled to gain access to Māori claimants. The interviews I did conduct occurred in varying locations around New Zealand's North Island, and involved Māori persons from many different walks of life[18]. One man, for instance, was a young father who had undertaken a role as spokesperson for his *hapū*. We met at a local coffee-shop on a snowy-winter's day where he entertained/admonished his small son in *te Reo Māori* while we spoke in English. Despite his meagre salary he was passionate about his work, and eager to discuss what he saw as the substantial failings of the Treaty settlement process.

At an upmarket restaurant by the seashore several weeks later I met another informant, a high-profile business man employed as a Māori consultant with a regional council. In his private time he worked as a negotiator on behalf of his *hapū*, travelling back and forth to Wellington, New Zealand's capital city, to engage in settlement negotiations with the Office of Treaty Settlements. Another claimant, a delightful Māori woman (or *wahine*), spent several hours detailing her thoughts about New Zealand's programme of Treaty restitution. We met at her local *marae* (the courtyard, or open area in front of the *wharenui*, where formal greetings and discussions take place; often also used to include the complex of buildings around the *marae*), a humble but beautifully appointed complex that had recently been renovated by her son, a young Māori carver. She took me on a slow tour of the *wharenui* (a house, dwelling space, meeting space, building) and detailed its symbolic particularities, noting how the physical repair of the building was akin to the catharsis her *hapū* experienced as part of the restitution process. At another interview a vibrant middle-aged Māori author and I met outside a garden-centre where he extolled the virtues of the restitution philosophy, while lamenting the disinterest many young members of his *hapū* have for their local history. These few examples, therefore, attest very generally to the diversity of claimants' attitudes and worldviews.

In Wellington I coordinated interviews with the (Māori and non-Māori) counsel of a large regional claim in their gleaming new offices in one of the city's newest office towers. Māori patterns were woven into the plush carpets, and beautiful, artistically braided *tukutuku* (woven lattice-work panels) panels adorned the walls in an interesting display of corporate/cultural appropriation. I also sought out (Māori and non-Māori) employees from the Waitangi Tribunal, and the Office of Treaty Settlements (whose offices are similarly

[18] I have chosen not to use my informants' names, or include pseudonyms in this research, in order to protect my informants' identities (New Zealand is a 'small' country with close social networks), but also to lend explicitly emphasis to the content of what they had to say in their roles as participants in the restitution process.

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decorated), as well as (Māori and non-Māori) historians who had either presented evidence as part of a Tribunal inquiry or have written extensively on the subject of Treaty settlement. The perspectives of all these respondents were also diverse.

In South Africa, land claims hearings are conducted at the Land Claims Court in Randburg, Johannesburg[19]. Unexpectedly, their staff stymied my requests for visitation and information; given South Africa's constitutional commitment to open government and transparency (the Bill of Rights, for example, supports several fundamental human rights, including Section 32: the right of access to information; and Section 34: the right of access to courts (Razzano, 2012:3)), however, I was surprised by their uncooperative behaviour. I have since spoken to other academics and several friendly staff from a prominent South African Non-Governmental Organisation who all related similar problems gaining access to Land Claims Court hearings and records, and in their report *Transparency in South Africa*, the Open Democracy Advice Centre observes that "even if entities are able to approach courts to exercise their rights of access to information, the state has displayed a pattern of obstructive resistance" (Razzano, 2012:5). Subsequently I spent time at the Commission of Restitution of Land Rights offices in Cape Town, a grim, dark, poorly-appointed floor of open-plan offices where I spoke to mostly African staff about their experiences working for the Commission and with claimants. One kindly (white) gentleman squirrelled away in a gloomy back-office and hedged-in by towering piles of records and papers was particularly accommodating, and facilitated my first round of claimant interviews.

I also spent time working through the archives at the Legal Resources Centre in Cape Town, a human rights organisation that advocates for marginalised, vulnerable and landless peoples.[20] One friendly, dynamic lawyer allowed me to accompany him to a series of meetings held in Vredendal, a scorching hot, dusty town in the Northern Cape, to observe the operation of a small local restitution negotiation in action. Although the meetings' attendees were bilingual (speaking Afrikaans and English), most meetings were conducted primarily in Afrikaans, which strained my knowledge of Afrikaans, and often left me uncertain as to what was being discussed. During lunch-breaks the attendees and I sat at tables making small talk and they were more than happy to converse with me in English, but on returning to the meeting table reverted to Afrikaans, somewhat diminishing the value of these visits for me.

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[19] Although the Court can hold hearings in any part of the country if the judges think this will make it more accessible.

[20] For more information please refer to: www.lrc.org.za/about-us

I also strove to speak personally with South African claimants. Those whom I interviewed live on the Cape Flats, an expansive low-lying area situated to the southeast of Cape Town's central business district, where many of the victims of Cape Town's forced removals were placed. Comprised mostly of unconsolidated sand, the area remained largely uninhabited until the 1950s when South Africa's National government began developing the land in order to relocate Cape Town's coloured community from the city's central and western suburbs that had been classified as 'white' suburbs under new legislation. Large townships of black Africans also evolved as a consequence of forced government relocations and informal settlements. Although such townships typically consist of 'shacks' constructed from pieces of discarded corrugated iron, cardboard, wood, and plastic, many suburbs in the Cape Flats have modest houses often with small gardens.

The population of the Cape Flats has expanded dramatically in the last half century[21], and the City Council has struggled to supply and maintain basic services like sewerage, electricity, and access to fresh water in many areas. Overcrowding has also contributed to high rates of unemployment, debilitating poverty, an escalation of infectious diseases like tuberculosis and HIV/Aids, and daunting levels of violence and gang activity, drug abuse, and pollution. However, the Cape Flats also has many sports fields, community centres, and schools, and a vibrant civil and religious society – comprised mainly of evangelical Christian and Dutch Reformed church-goers, and Muslim and Rastafarian communities. It also has a lively artistic and musical scene.

The Cape Flats, therefore, is not a place that can be easily classified or described. Although it stretches for many kilometres along the N2 highway, one of the arterial roads that feeds Cape Town city, making it difficult to ignore, the Flats' high levels of violence and poverty make it a place few wealthy or middle-class South Africans choose to visit. Great surprise or concern was always expressed by local people whenever I mentioned that I was visiting the Cape Flats to interview participants in the land reform process; they felt it was unsafe for me to venture into this area because I was white, female, and/or travelling alone. One visit I made to Manenberg (a historically coloured community), for example, engendered such concern by my (coloured) housekeeper that she insisted I bring her (also coloured) boyfriend in the car with me for "protection". Although I enjoyed his company on our ride, my meeting with a pastor in his small, neatly appointed home on a sunny street with small

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[21] According to statistics from the Cape Town City Council the district has an approximate population of 550,000, accommodating 15 per cent of Cape Town city's population, and the second highest rate of unemployment at 31 per cent (City Space: Cape Town City Council, 2012:18). Definitive population figures for the Cape Flats, however, remain difficult to determine given its fluctuating population, overcrowding, and informal refuge for illegal immigrants, not to mention the inclusion or exclusion of various suburbs into statistics (an NGO, for instance, places the Flats total population at 4 million (Rosenbach n.d.)).

children playing nearby, made me feel that my housekeeper's misgivings, while perhaps valid, were somewhat excessive.

Whilst working on my PhD in South Africa, I participated in a University of Cape Town-managed voluntary programme that sent groups of students to primary and secondary schools in the Cape Flats on a weekly basis to carry out after-school literacy, sports and recreational programmes. I spent semesters in Khayelitsha (a mostly black African informal settlement), and Manenberg, and while I was initially very anxious about my personal safety, upon entering each suburb (the former with rickety shacks and fortified kiosks, the latter with rubbish fluttering from the holes of chicken-wire fences, and domestic doors and windows reinforced with serious heavy-duty burglar-bars and grills) I was surprised to find them less scary or threatening than I had imagined, especially once I came to know the children and their families, and the surroundings became more familiar.

All the land restitution claimants I interviewed resided in the Cape Flats. The kindly gentleman from the Commission of Restitution of Land Rights in Cape Town had offered me the names and telephone numbers of a handful of claimants. Once I had made contact and coordinated a time to meet with them I would spend hours deliberating over my roadmaps. Many of the roads in the informal settlements are not marked on official maps, or have had their street-signs and numbers stolen or defaced, which made navigation to my meetings rather fraught. One informant, for example, a lively, cheerful black African woman with a booming voice, lived in Gugulethu in a small RDP (Reconstruction and Development Programme[22]) house across from a large sports field (her road had no street sign and her house no number). She had voluntarily assumed a role as an informal liaison officer with the Commission of Restitution of Land Rights for several thousand local residents, an immense workload that she unconcernedly explained was her "civic responsibility".

I also interviewed another leader of a community claims aggregate, a minister, and the chairpersons of three residents' associations. I met one such chairperson, for instance, at his local church in Mitchell's Plain, a decaying building with crumbling linoleum floors and naked light bulbs. He and the church pastor, charming gentlemen who carried a dog-eared folder of all the important documents (all originals) that involved their residents' association since its establishment in 1970, described their frustrations with the government and South Africa's land restitution process.

[22] The Reconstruction and Development Programme was instituted by the ANC-led government in 1994 to address poverty and landlessness in South Africa.

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As well as gleaning information from newspapers, official and historical documents, popular culture and social media, I also closely monitored the remarks and conversations of friends, acquaintances, politicians, spokespeople and the media, jotting information down in notebooks and taking digital snapshots. In New Zealand, a digitally-savvy friend suggested I post questions about my research on an online social forum and harvest what, if any, results were generated. Soliciting data from such a source had not occurred to me, but the valuable data I managed to collect warrants discussion.

WWW.REDDIT.COM

Founded in 2006, www.reddit.com (or colloquially 'Reddit') is a social news website where registered users (Redditors) can submit content in the form of text or web-page links, and other users place feedback or comments which in turn form 'threads'. Users 'up-vote' or 'down-vote' submissions that piqué their interest based on their own subjective criteria. The greater the number of votes, the longer a post maintains its position amongst the constant flow of new posts; also large numbers of votes also tend to attract greater numbers of readers. Within reddit.com there are sub-forums, or 'sub-reddits', devoted to almost any conceivable subject, to which Redditors can 'subscribe' or 'follow'. The *r/NewZealand* sub-reddit, for example, has over 11,160 subscribers.[23] In order to post or comment, each user must register with a unique 'user-name' (online pseudonym), and aside from this moniker there are no other personally identifying details on the site.[24] Given this implicit anonymity the opinions people express and the perspectives they choose to take are diverse[25], making reddit.com a site ripe for the harvest of raw polemic responses around contentious topics.

In late January 2012 I submitted a post to the *r/NewZealand* subreddit asking whether users felt Māori had "legitimate grievances" with regards to the Treaty settlement process (my use of emotive language was intentional in the hope I might elicit a spectrum of responses). Waitangi Day was only a week away, a contentious public holiday in New Zealand renowned for strong debate over race, the role of the Treaty of Waitangi, and the requirement for a Treaty settlement process. At Waitangi in the far north of New Zealand's North Island, the site of the Treaty of Waitangi's primary signing in 1840, Māori protest and the aggressive

[23] As at January 2013, although these figures continue to grow and change.

[24] One of Reddit's 'Rules' is the non-disclosure of personal information (Reddit.com n.d.). Consequently, questions around the preservation of my Reddit 'informants' identity was already accounted for. However, amongst each subreddit there are often a core number of frequent users who, over time, come to 'recognise' one another, contributing, therefore, to a sense of cohesive subculture.

[25] www.reddit.com is, however, popularly considered to be a disproportionately liberal source of information and opinion.

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heckling of politicians and the media frequently occurs. It represents a particular moment in time each year when the relationship between Māori and Pākehā lies unusually exposed and afforded an ideal opportunity to plumb the sentiments of New Zealand reddit.com users regarding the Treaty settlement process.

Thrillingly, comments began to accumulate almost immediately. Eager to encourage dialogue and debate I initially replied to each respondent, usually with more questions or seeking further clarification of what the Redditor had written. After tending the post in this manner for several hours, however, my input was no longer required as groups of Redditors began debating amongst themselves in tangential threads. Some groups engaged in social and political debates about Māori education or crime statistics, others argued over the ethnic and biological 'authenticity' of Pākehā and Māori persons. Some simply sniped at each other. By the time the thread eventually wound down and comments ceased about two days later (users lost interest as newer postings and links caught their attention) I had captured just over two-hundred responses (nearly thirty pages of data).

The opinions expressed in users' comments were diverse and attested to a breadth of knowledge about Māori grievance and the structure and operation of the Treaty settlement process. Unless a Redditor had directly referred to their ethnic or demographic identity I had no means to tell if they identified as Māori or Pākehā, or were even residing in New Zealand (although many often did given the content of the thread). Some users quoted well-known New Zealand historians or scholars to support thoughtful, engaging arguments while others appeared startlingly xenophobic, racist and paranoid. Also, despite the initial questions I raised in my post, many users meandered off in different (although related) directions and discussed, for example, the socio-economic disparity between Māori and Pākehā , the over-representation of Māori in crime and incarceration statistics, and the seemingly selective/discriminatory admission policies of tertiary institutions or prospective employers along ethnic/racial lines.

Initially I was conflicted about the ethical implications of using data obtained in such a manner (I had not explicitly declared myself as a researcher seeking information, nor had I asked each Redditor's consent to use their responses in my thesis). A principal premise of the anthropology discipline and a strict condition of the University of Cape Town Humanities Faculty's policy on research ethics is a researcher's commitment to protecting and preserving informants' consent before soliciting or using participants' information in their project. This had heretofore been a fairly straightforward process in my interviews: I explained my research intentions, reassured each informant that I would protect their identity and offered to share a copy of our interview transcript for their records. My ethical anxiety

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about using data from an online forum was only allayed once I discovered the reddit.com User Agreement. It stipulates that when a user first registers with the website they agree to abide by the terms of this agreement (whether they read it or not) which describes the public visibility of, and accessibility to all information posted.[26] As long as I didn't reveal a user's online pseudonym, the use of their comments was neither harmful nor deceitful with regards reddit.com or its individual users.

Lastly, the opaque nature of the data made me uneasy about its representative value. Such data is pure and raw in the truest sense since my respondents are liberated from any identifying demographic or geographic information (other than what they choose to share) outside the confines of reddit.com. Unless each individual offered such information, therefore, I can make only one assumption about my respondents: they must have some stake in these issues (emotional, political or personal) that motivate them to participate. Whether their comments were introspective or vituperative, debates about Māori grievance and the Treaty settlement process do appear to mean something to them. I have chosen, therefore, to use select data from my *r/NewZealand* post where it serves to elucidate or support my argument.[27] Redditors' comments have been left grammatically unchanged; in places spelling may be (sometimes intentionally) incorrect.

METHODOLOGICAL DILEMMA: MY OWN POSITIONALITY

Of all the challenges inherent within a research project that straddles two fieldsites, the one factor that had the single greatest impact upon this process was my experience with Māori claimants. On the whole claimants in New Zealand were wary of both my presence in their communities and my research intentions. The interviews I managed to secure took significant effort and time to coordinate, and this prompted a revision of my fieldwork approach that deserves discussion and dissection.

At the beginning of my fieldwork year I was in New Zealand and set about collecting data for my research. Bright-eyed and enthusiastic, I had chosen to focus upon a rugged rural region with a small community, neatly bounded by dramatic, encircling topography. This

[26] "In addition, please be aware that information you disclose in publicly accessible portions of the Website will be available to all users of the Website, so you should be mindful of personal information and other content you may wish to post" (Reddit.com 2012).

[27] In South Africa, given the very small number of reddit.com subscribers to *r/SouthAfrica* (a little over 1,000) and its infrequent use (most posts tend to come from foreign visitors looking for travel information or immigration advice) I elected not to submit a post to this forum.

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community was in the midst of their claims process, having moved from their hearings at the Waitangi Tribunal to negotiations with the Crown at the Office of Treaty Settlements. The content of their claims was very interesting in terms of research, involving rights to state-owned energy-producing assets, the spiritual significance of several topographical features, and extensive political and military engagement with the Crown during the New Zealand Land Wars[28]. I was surprised, however, when my initial volley of chirpy phone calls and polite, formally-worded emails were either rebuffed ('overwhelming work schedules', 'personal commitments'), or simply not returned. Convinced that I would engender more receptive responses from face-to-face solicitation, I travelled to the area and began door-knocking where I met unfriendly faces and curt, dismissive declinations. *Tikanga* (correct procedure, custom, convention) frowns upon unannounced arrivals at *marae*, scuppering any thoughts about approaching a local community meeting I observed uninvited.

Māori disinterest, even hostility, to my requests for interviews or meetings left me somewhat baffled. During my work at the Waitangi Tribunal I had enjoyed a certain intimacy with *te Ao Māori* (literally, 'the Māori world') and privileged access to many *marae* and sites of significance tucked away in remote parts of the New Zealand countryside that were not often visited by non-Māori. We interacted with Māori claimants regularly, prepared research evidence, coordinated upcoming inquiry hearings, and fielded queries. Aside from one notable occasion which I shall describe below, on the whole the Māori claimants with whom I had spent time had been affable and hospitable. As I began to experience difficulty gaining access to Māori claimants, however, I slowly came to appreciate how privileged my admission to Māori communities in the context of the Waitangi Tribunal had been. The high regard in which the Tribunal is held seemed to have afforded me an uncommon admission to *te Ao Māori* which I had taken for granted.

Endeavouring to ignore a looming crisis in my ethnographic confidence, I proceeded on to Wellington, New Zealand's capital city and the institutional home of Treaty restitution (the Waitangi Tribunal and Office of Treaty Settlements are both located there), where I undertook interviews among other participants in the Treaty settlement process: lawyers and counsel for Māori claimants, academics who had presented evidence in past Tribunal hearings, and Tribunal staff with whom I had worked. Generously, several ex-colleagues offered the names and contact details of claimants they knew personally or felt may be sympathetic to my research premise. Each suggested contact resulted in a productive, valuable interview or series of interviews. Frustratingly, however, each time I asked for an

[28] A series of armed conflicts that took place between some Māori and the British Crown between 1845 and 1872; also known as the Māori Land Wars.

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interview referral to another family member or friend my request was, without fail, politely but firmly declined.

Something was amiss and, evidently, I was oblivious. Despite my rigorous observance of the University of Cape Town's ethical guidelines I began to doubt the suitability of my approach. Had I not been polite enough, I wondered? Were my research questions invasive or offensive? Perhaps they felt exploited? Exposed? Over-analysed? Or maybe I mistakenly assumed that claimants would share my sense of altruism and generosity regarding the moral objectives of my research? I was overcome with self-doubt. Then, during a luncheon with a member of a government department related to the Treaty settlement sector, I had a disquieting realisation: the gentleman spent the best part of our lunch hour deriding Māori for their "blatant prejudice" against Pākehā. I was shocked by the virulence of his comments, but his suggestion that Māori had a fundamental problem with me because I was Pākehā was intriguing.

His remarks instantly brought to mind an incident from my time at the Tribunal where my team and I had travelled to a remote rural town to present updates on our research work to a group of claimants. To my surprise we were heckled and shouted at by the claimants; I include the vignette from my research proposal:

The hall was packed with local Māori, young and old. The front row was reserved for the heavily wrinkled kaumatua *(respected elderly men) and* kuia *(female elders) who clutched carved walking sticks, and dog-eared folders of papers and legal documents.*

Each researcher prefaced their presentation with a brief autobiographical introduction. Establishing one's birthplace and connectedness is extremely important to Māori who apportion prestige and respect accordingly. A claim to Māori descent or ancestry generates automatic hospitality. Absurdly enthusiastic and naively over-confident I had never even considered that my South African birth might present a problem.

My introduction was greeted with a low grumble of discontent. As I launched into my report an elderly kaumatua *struggled to his feet, interrupting me by pointing his walking stick at the chairwoman and shouting:*

"What right does this Pākehā have to speak about our people, our country? She's not even from here!"

The audience growled in agreement. People nodded at one another. The chairwoman moved to defend my position, listing my academic qualifications and professional experience.

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"I don't care about all that Pākehā rubbish!" exclaimed the kaumatua. *"Just because she's been to a university doesn't mean she knows about being Māori! How can a foreign Pākehā like her tell the truth about my history?! Māori history!"*

The room erupted with angry agreements and confused shouting.

"Sir..." I attempted to interject.

He abruptly spun around to face me, eyes ablaze, knuckles white. He jabbed his carved stick at me.

"Don't talk to me, little girl! What do you know about us?! What do you know about our history and our struggle?! You know nothing about our life's fight for justice!"

Wide-eyed I took my seat.

Reflecting upon this experience in light of my ongoing frustrations in gaining access to Māori claimants, I began to appreciate how these claimants' reactions were not simply xenophobic, as I had thought at the time. It was more nuanced than that; instead, I concluded, it was my *non*-Māori-ness that was at issue. Despite being born to New Zealand parents and having lived more than half my life in New Zealand (qualities that, to my mind, made me eligible to call myself a New Zealander and implied a unique affinity with its inhabitants), for these claimants my South African birth and/or whiteness besmirched any claim to such membership or relationship, estranging me from the worldview I thought we shared, and thereby prohibiting me from pursuing Māori-centred research.

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A RIGHT TO RESEARCH

Subsequently, as I have read more about the ethical and methodological considerations and approaches for conducting research amongst Māori, my struggle to gain access to Māori claimants during my New Zealand fieldwork has begun to make more sense. New Zealand academics, it appears, are deeply conflicted about the role Pākehā researchers should or may assume regarding Māori-centred research – even whether they have *any* right to participate at all (Tolich and Davidson 1998 in Tolich, 2002:171). Such questions arose, it seems, about the same time Anthropology underwent a substantial disciplinary adjustment (during the 1960s and 1970s), when it turned its gaze (amongst other things) from the exotic and far-flung to the familiar and domestic in a renewed search for alterity (Peirano 1998), and Māori in New Zealand experienced a burgeoning political awareness and cultural and intellectual regeneration (Hill, 2009:149). Just as Pākehā scholars and anthropologists began to focus

their gaze upon Māori with increased intensity, Māori retaliated with a wholesale rejection of Pākehā-centric research paradigms.

Frustrated by the stifling dominance of the Pākehā and Western/North Atlantic epistemologies that had been entrenched in New Zealand since the early ethnographic accounts of nineteenth century colonial administrators and travellers[29], and that had shaped colonial governance, many Māori felt distrustful and resentful of what they perceived as the Pākehā misappropriation, exploitation and commodification of their customary knowledge, behaviour that fostered a pedagogy of oppression (Mead, 1994:2; Tolich, 2002:168). Well-known non-Māori academics such as anthropologist Joan Metge and historian Michael King were ousted from established positions as scholars of Māori; lawyer Atareta Poananga, for example, claimed King was "an academic raider ... who has gone out to make his reputation out of Māori things, got all the credit he wants for it, and then retreated back into his white world" (Milne 1999 in Tolich, 2002:169).

The disciplinary lenses through which New Zealand academics viewed Māori society, many Māori argued, were imported constructs with deep roots in nineteenth century romanticism (Kidman, 2007:52). These "racial optics" (Belich, 1997:357), therefore, not only valorised Māori as noble savages, but typified them either as a dying, inferior race beyond salvation, or a people potentially convertible to whiteness through a range of cultural assimilation procedures (Kidman, 2007:53). These epistemological positions not only perpetuated and rigidified patterns of discrimination toward Māori beliefs and behaviour, but served to fortify Pākehā orders of power and dominance.

Consequently, Māori began challenging the parameters and legitimacy of Pākehā access to Māori customary knowledge and stories. Any such research, many Māori proffered, should benefit their peoples first and foremost, and methodologies should be pursued that encouraged Māori to maintain conceptual design and interpretive control.[30] This model – research by Māori for Māori with Māori (L. T. Smith 1995) – has left little room for independent Pākehā researchers, who, as a result, have became increasingly 'paralysed' by the growing ethical perils of inter-ethnic research (Tolich & Davidson, 1998:172; Tolich, 2002:170). Accordingly, uncertainty regarding the parameters, responsibilities and sensitivities of Māori-centred research has lead to a dearth, even a conscious exclusion (Tolich 2002) of Māori-centric methodologies in social science courses throughout New

[29] Such as, for example, Governor George Grey, Percy Smith, Elsdon Best and Augustus Hamilton.

[30] In South Africa, a similar, albeit less strong precept is contained within the Anthropology Southern Africa's *Ethical Guidelines and Principles of Conduct for Anthropologists* (Anon. 2005).

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Zealand (including those I took while an undergraduate and graduate student in New Zealand).

Confusion, Powick (2002:3) contends, centres upon determining who has the 'power to define' in Māori research. Almost like a scientist observing an insect under a microscope, if the 'ones who are doing the looking' (Smith 1999 in Powick, 2002:3) give themselves the power to define, then the right to conduct research becomes a powerful weapon of discipline and control. In seeking to delimit the ways customary knowledge is acquired and shared, Māori are not only attempting to retain authority over their existing properties, but to regain control of their self-representation and authorship, qualities that were lost following the relentless arrogation of their properties and rights by imperial Britain. Mead, for example, describes Māori as having an essential inseparability between the physical and metaphysical aspects of cultural and intellectual property (Mead, 1994:3). She explains how Māori customary knowledge forms a major component of what Māori describe as the '*mauri',* or life force, of their cultural and intellectual property, and that the misappropriation of customary knowledge is, therefore, indistinguishable from the alienation of physical assets (Mead, 1994:3).

This idea, that a story or narration can be appropriated, reported, and repeated by another, and that once released to circulate publically is often sought for recovery by the narrator (F. C. Ross 2003), draws interesting parallels with 'Western' trends toward the commodification of knowledge. In this sense all dialogue can be conceived as potentially valuable, and therefore, potentially exploitable (J. L. Comaroff and J. Comaroff 2009), and that the value which people acquire for themselves can only be at the expense of another. While this attitude is redolent of eighteenth century notions of proprietorship (whereby a person is the natural owner of themselves and their labour (Garnsey, 2007:149; Strathern, 1987:21)) that has come to pervade the liberal state, it also reflects a deep-seated anxiety amongst Māori to stanch the seeming unremitting expropriation of their properties by non-Māori.

The alternative, Māori scholars suggest, is the institution of a Kaupapa Māori Research methodology, meaning that culturally relevant and appropriate research is *commissioned* by Māori, and undertaken by Māori researchers sensitive to Māori philosophies and principles (Irwin 1994 in Powick, 2002:12). In this approach the hierarchy between the researcher and the research participant is inverted, the former relinquishing ultimate power to the latter (Cram, 2001:42). While some Māori assert that such a model must exclude Pākehā researchers outright (Mead 1996 in Powick, 2002:12), others argue that Pākehā do in fact have an obligation to support Māori research under the obligations of the Treaty of Waitangi (Bishop 1997; Tolich, 2002). Presently there remains no consensus on the role of Pākehā in

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Māori-centred research, although to my mind the very nature of the debate highlights an explicit need for ongoing dialogue around collaborative, rather than one-sided, methodologies.

Regarding my fieldwork, my involvement with the Waitangi Tribunal perhaps prevented me from fathoming just how difficult (for myself and my informants) my presence as a Pākehā researcher within *te Ao Māori* would be once I began pursuing independent research. Upon reflection there were no specific Māori ethics or methodological courses on offer during my time at university in New Zealand; unsurprisingly, then, in the very same unreflexive manner that so many Māori were eager to abolish, I had been unaware of the idea that Pākehā might be *unwelcome* to participate in research amongst Māori. While it seemed logical that Māori should retain authorship of their stories and authority over their customary knowledge, I hadn't envisaged my probing of their experiences as profiteering or exploitative. Although I recognised that injuries occurred amongst Māori in the past, often several generations ago, and that many of their descendants continue to keenly feel the raw pain of these injustices, in attempting to explore the dissatisfaction and frustration that smoulders for many Māori just beneath the formal proceduralism of the Treaty settlement process, I had neglected to adopt the principles of Kaupapa Māori Research.

My research topic, for instance, was personally motivated; however, like Kathy Irwin, a Māori female completing her PhD research in the early 1990s, I had not pursued my topic in an "individualist vacuum ignorant of the educational and political issues facing Māori people or of the historical juncture [Māori] were at as a people" (Irwin, 1994:33). Treaty restitution has been a popular topic of political and social debate for several decades in New Zealand, and warrants further explicit, intensive, and ongoing investigation. My research, however, was not *hapū*- or *iwi*-commissioned as a Kaupapa Māori methodology would insist, and focuses upon aspects of the process which Māori may not feel are relevant or interesting to their communities, nor offer a useful fit in practice (Kidman, 2007:23). Furthermore, my own ideas and theories about the nature of ethnicity, cultural authenticity and customary worldviews, some culturally amassed, others academically acquired, have only become more conspicuous following the close of my fieldwork, in a frustrating if not predictable process of scholastic progression that has directly benefited me more than my informants.

I had also assumed that everyone shares, or at least recognises, the inherent benefits of the pursuit of knowledge. To my mind research is not just a highly moral search for knowledge, but now, following my struggles to gain access to Māori claimants, I appreciate how it is able to reproduce particular social relations of power (Gringrich & Fox, 2002:8; Smith, 2004:6). Such personal appreciation, however, can in and of itself be interpreted as a form of

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exploitation, whereby my thwarted encounters with Māori have afforded me a sort of heightened ethical and methodological consciousness about the researcher/informant relationship upon which I have been able to intellectually capitalise – acquiring, in other words, a "comprehension of the self by the detour of the other" (Caplan 1988 in Macdonald, 2005: 112; Peirano, 1998:109-110).

Furthermore, by conceptualising research and knowledge in these ways, I had uncritically reverted to a Pākehā/Western-centric approach to research and data collection, which automatically subsumed the requirements and desires of Māori within a dominant Pākehā academic paradigm. For example, Kathy Irwin describes the importance of establishing the ritual of the first encounter (Salmond 1975 in Irwin, 1994:36), where the process of *whakawhanaungatanga* forms a crucial part of the research process. Russell Bishop (1996 in Cram, 2001:43) describes *whakawhanaungatanga* as:

> "... the process of establishing whānau relationships literally by means of identifying, through culturally appropriate means, your bodily linkage, your engagement, your connectedness, and therefore unspoken but implicit connectedness to other people".

Irwin explains (1994:37) how the meeting of two groups, in this context researcher and participants, requires a ritual process of removing the *tapu* states (to be sacred, prohibited, or under special protection) of each party so that dialogue can commence. This ritual can include formal introductions, demonstrations of connectedness, and sometimes the sharing of songs. Furthermore, according to *tikanga* (correct Māori custom or convention), when Māori come together as two groups, the *tangata whenua* (the local people) remain in control, retaining the power to stipulate how the *manuhiri* (the visitors) will be included and accommodated in their space (Irwin, 1994:37). In this sense the researcher remains subordinate to the priorities of the informants.

In my research I had approached my informants from a blatantly Pākehā perspective: like Battersby, a researcher whose approach Irwin (1994:36) rejects, I attempted to meet potential informants by initially writing them formal letters or emails. Setting out my academic credentials as a researcher, I explained the aims of my research in precise, earnest terms, a strategy that I now appreciate would not have conveyed the appropriate *turangawaewae* (my connectedness or metaphorical kinship) to the Māori world. Understandably, rather than interpret my solicitations for information as courteous and deferential, many Māori claimants may have identified me with a scholarly world from which they feel they have been largely excluded, and are hostile and distrustful towards; effectively I had adopted a culturally inappropriate methodology which empowered me more as an individual researcher than it

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did Māoridom (Bishop and Glynn 1992, Cameron 1985, Stokes 1985, Jackson 1988, Te Awekotuku 1991, Smith 1991 in Irwin, 1994:36).

I had not felt it overtly necessary to demonstrate my implicit "connectedness" with Māori; instead, I assumed that my status as a "New Zealander" conferred upon me an inherent fraternity with Māori, a unique relatedness predicated on a shared domicile that authorised me to collect Māori stories (I will discuss the fiction of Māori/Pākehā fraternity in following chapters). Completing research as a 'New Zealander', 'at home', however, did not accord me any special legitimacy. Instead of facilitating access to information, my identity as a Pākehā had served to emphasise my status as Other amongst Māori communities. Evidently this is not uncommon; Angela Cheater claims many 'citizen anthropologists' (as opposed to visiting anthropologists) often find themselves alienated from their own social identity, as informants return the reflexive gaze of the 'expert' researcher (Cheater 1987).

The very 'connection' with Māori that I was striving to realise instead served only to emphasise the relentless dominance of the Pākehā epistemological paradigm, and surely left any prospective informants feeling guarded and suspicious about my intentions (Berreman 1962 and Goffman 1982 in Mascarenhas-Keyes, 1987), a concern that was made clear by a prominent lawyer for a large Māori claim when she bluntly remarked during an interview:

> "Kate, you should seriously consider that this is actually just none of your business. You can keep asking all you want, but to be honest I'm not sure they're [Māori] ever going to want to talk to you."

"STRONG WORDS. TRUE WORDS"

For me, the purported distrust of Pākehā researchers amongst Māori was confirmed once I began to review my interview transcripts. Two Māori claimants, for example, the first a cheerful woman from a small *hapū* (a kinship group or subtribe, a section of a large kinship group) in the Bay of Plenty, and the second an elderly gentleman from a *hapū* in the central North Island, declared that:

> "I had to really think about it [speaking with me]. You know? We would rather get on the side of caution, keep our stories to ourselves, than share them out to the Pākehā. You lot might mess around with it otherwise."

> "Pākehā historians seem, well, once they know our histories they seem to think they know them better than us and try to tell us how it went. It's the way they write it. Their words are never strong enough, never true enough. They'll say the Crown had a 'detrimental effect on the people' whereas we would say the Crown had a 'devastating effect' or a

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> 'catastrophic effect'. Strong words. True words. It didn't happen to the Pākehā, so they tend to minimize it".

While I struggled to gain the confidence of the dozen Māori claimants I interviewed for my research, I now faced the dilemma of how to accurately and appropriately include their stories and narratives within my research in a way that did not blight their authorship or exploit their experiences of suffering and grievance, as the above claimants feared. In her exploration of South Africa's Truth and Reconciliation Commission, for instance, Fiona Ross has explored how individual testimonies proliferated outside the control of witnesses through the dissemination of their stories in radio and television broadcasts, and later in transcripts and print and digital media reports and stories (Ross, 2003:327-328). She notes the anxiety that this produced as people felt their 'stories' wrest from them, commoditised and circulating beyond their control. In contexts of violence where victims are particularly vulnerable, Ross asks if anthropologists can (in the process of consensual information appropriation) describe experiences of suffering and trauma that, for example, bring coherency to the incoherent, and still preserve them in their original form, thereby avoiding misappropriation (Macdonald, 2005:108)?

There are, therefore, a series of complex questions circulating within and around this research, regarding power, control and authority over customary knowledge, and the undercurrent of tension that exists between informants and researchers, which stems from each party's identification with, and loyalties to, different (even conflicting) orders of power (Kidman, 2007:8). Following my struggle to gain information from Māori informants, I now realise that some of the greatest challenges in undertaking research for this thesis centre upon a series of complex questions for which there are no clear-cut answers. For example, how should I mediate the demands of those claimants with whom I spoke who want me to use "strong words, true words", with my scholarly desire to employ terminology that I perceive as more impartial or balanced? Who benefits most from the dissemination of this research, either directly or indirectly? And how should Pākehā and Māori researchers continue to debate and conduct research in ways that emphasise the concerns and priorities of the Māori communities in which they work?

These questions represent the methodological weft of this research, interlacing between wider considerations of distributive justice and the restitution-as-justice logic, and their ongoing implications for remedial satisfaction, dramatic economic restoration and social conciliation. Although I have lingered upon the trials I encountered building trust and dialogue with Māori claimants in the field – and my anxiety around the potential for intellectual exploitation inherent in my personal introspection of the fieldwork experience –

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it is important to remember that acts of "transcription, translation, entextualisation, interpretation, analysis and dissemination" (Ross, 2003:337) all form part of the ethnographic experience which is so central to the anthropological task. Anthropology is also about learning; it implies an experience, a form of embodied knowledge, and my engagement with and reflection upon that experience has been every bit as crucial as the data I collected (Melhuus, 2002:73).

Nor were my hard-won lessons squandered. When I came to conduct research amongst claimants in the Cape Flats in South Africa, my experiences from New Zealand were very constructive. I was concerned, for example, that given South Africa's long history of racial discrimination, my 'whiteness' might preclude me from conducting research amongst non-white land reform claimants just as my non-Māori-ness had in New Zealand. I knew better now than to expect that my South African birth and childhood would automatically confer upon me the permission necessary to conduct research amongst people from a place I also considered 'home' (in fact, during my time in South Africa I noted that those South Africans who chose to leave the country ahead of, or around the time of the democratic transition in 1994 (as my family did) are often pilloried by some South Africans, and described as deserters who intentionally absconded at a time when the nation most needed a show of multi-racial conciliation. In fact, on several occasions I have personally been told that my family and I are "traitors" for leaving the country). Given the legacy of institutionalised racial discrimination, 'whiteness' in South Africa continues to popularly infer a sense of privilege and wealth, a factor that – despite what I considered my relatively straitened financial circumstances as a university student – I feared would make claimants from humble socio-economic circumstances feel uncomfortable or hostile to my entreaties for interviews.

Unexpectedly, however, claimants in South Africa – while initially apprehensive – were hospitable and receptive to my research. Following an introductory conversation by telephone to organise a suitable time to meet, claimants welcomed me into their homes, readily sharing their stories and experiences for my dictaphone and notebook. Consequently, I remain uncertain whether my experiences with Māori claimants in New Zealand helped improve the rigour of my ethnographic approach, or if the South African claimants I spoke to simply have a different outlook on, expectations for, and anxieties regarding research and restitution proceduralism from claimants in New Zealand.

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CONCLUSION

Cultural observation and translation, anthropology's stock-in-trade, can involve the complex, often fraught, negotiation of unequal power relations, and include intellectual and political hierarchies that can have a considerable impact upon the sorts of information a researcher is offered by his/her participants/informants/interlocutors (Gringrich & Fox, 2002:8). The data that informs this research, therefore, is not just the product of the ethnographic techniques I used to procure it (or the result of a slow refinement of my methodological approach), but reflects a struggle for power and control – of authorship and authority – between researcher and informant, insider and outsider, autochthon and other.

The quality of the data collected also emphasises one of anthropology's most significant methodological challenges: an ethnographer's ability to practicably afford the conceptual frameworks of one's fellow-citizens (particularly in an 'at home' fieldwork context) not merely the status of rationality (as limited and closed systems that may differ fundamentally from one's own), but that of an equal and alternative reality (Cheater, 1987:173). Such sensitivity to the worldviews and imaginaries of one's informants, and the corresponding comprehension of what they may want and need (often things they are not able or willing to articulate), confers enormous responsibility upon a researcher – an obligation inherent in New Zealand's ongoing debate about the right of non-Māori to conduct research amongst Māori communities, and the ongoing arrogation of their authorship (Strathern, 1987:21).

It is with the greatest care and respect, therefore, that I have proceeded with my investigation of claimants' grievances and their resolution. In so doing I hope to deliver worthwhile findings about the transformative and conciliatory value of historical restitution back to the claimants who so kindly took the time to participate in my research, and to New Zealanders more broadly. I also aspire to facilitate a greater comprehension amongst Māori and non-Māori, especially Pākehā, of each others' aspirations and desires so that the presence of radical alterity appears less threatening, and thereby encourages ongoing and constructive dialogue about political and ethnic identity in New Zealand.

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chapter three

HISTORICAL RESTITUTION IN CONTEXT

NEW ZEALAND AND SOUTH AFRICA

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An exploration of historical restitution in New Zealand necessitates some socio-political context, particularly those jurisprudential events that contributed to the institution of the Treaty settlement process as a practicable recourse for Māori historic grievances. Since it is analytically helpful to consider the historical context of an historical restitution programme from another setting, I shall also examine the forces and process that led to the institution of the South African Land Claims Court. An examination of the social, political and jurisprudential intersections that have contributed to the establishment of historical restitution initiatives in each country is also a useful way of providing historical context for readers unfamiliar with New Zealand or South Africa.

As noted in the preceding chapter, despite their early colonial histories, New Zealand and South Africa do not share a great deal in terms of their historical trajectories; for example, the organisation of New Zealand's present political, social and jurisprudential systems stems from the Treaty of Waitangi, signed in 1840 between Māori and the British Crown, while South Africa's has been moulded by successive waves of imperial imposition, and a programme of institutionalised racial discrimination that characterised state policy throughout the twentieth century. Yet the exchanges that have characterised New Zealand's and South Africa's engagement with Europe have, by and large, resulted in fundamental structural inequalities for autochthons in both places that have festered as a source of grievance. Both countries appear committed to delivering restitution to their aggrieved citizens, either through the redistribution of land or financial redress.

This chapter offers a brief précis of the most significant political, social and legal events that occurred in New Zealand and South Africa since 1840 and 1913 respectively[31], and that have contributed to the contemporary programmes of historical restitution which are presently framed and instituted in each country. I shall then describe the procedural organisation of New Zealand's and South Africa's restitution strategies, and explore the rationale, method and manner of compensation claimants are awarded by the state.

NEW ZEALAND

For Māori, imperial Britain's political and sociological imposition profoundly altered their way of life, a process that was fundamentally shaped by the British legal and jurisprudential worldview at the time of formal colonisation. In Australia, for example, Aboriginal 'backwardness' was considered so extreme by the British in the late eighteenth century that the British claimed justification for colonisation on the argument that the land was empty of a sovereign people. Despite Australia's vast territories being inhabited (albeit sparsely) by Aboriginal autochthons, Britain refused to accord Aborigines the limited recognition of sovereignty inherent in colonisation by conquest or cession (Hunter, 1995:12).[32] By the time Britain chose to annex New Zealand half a century later in the late 1830s, however, European jurisprudential and philosophical thinking had changed and New Zealand's islands were not considered to embody the same legal vacuum as Australia. In 1840 representatives of the British Crown offered Māori a treaty to sign that would 'safeguard' their land from the rapacious designs of private commercial companies[33] and the political manoeuvres of other nation-states, particularly the French, an act that, while contentious, attests to British estimation of Māori society as constituting a body politic. The Crown recognised that substantial Māori consent was a political prerequisite to the annexation of New Zealand as a British territory (Te Puni Kōkiri, 2002:14).

This compact became a critical force in shaping the social interactions and relationships between Māori and non-Māori (particularly Pākehā), and contributed to the formulation of

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[31] These dates represent the cut-off dates for each country's restitution programme and will be discussed in further detail below.

[32] Prior to the United Nations Charter which outlawed the use of force in international relations in 1945, international law permitted the acquisition of territory by treaty; title to uninhabited territory (*terra nullius*), then, was open to all states under the doctrines of discovery and occupation (Hunter, 1995:11).

[33] New Zealand historian Michael King (2003) claims the British government was motivated to protect New Zealand's existing trade with the Australian colonies (the value of New Zealand's exports to New South Wales and Tasmania was around £20,000 by the early 1830s), and to guard the lives and interests of the growing number of British subjects living in New Zealand (including families of Church Missionary Society and Wesleyan missionaries), but was also prompted to action by northern Māori who twice sent letters to the King of England asking for British protection (King, 2003:152).

national and ethnic identities in New Zealand, and its constitutional origins. The Treaty also, at different times and to varying degrees, played an instrumental role in configuring New Zealand's political history and jurisprudential system. Today the Treaty of Waitangi lies at the core of New Zealand's historical restitution process, as I describe below. It remains a controversial agreement, not simply because of questions around its enforceability, debates over the heritability of grievance over time, or the composition of remedy, but because public opinion is so deeply divided over the place the Treaty should hold in New Zealand. Considering the Treaty's brevity it has, and continues to generate, enormous discordance amongst New Zealanders.

THE TREATY OF WAITANGI

Most reliable archaeological, linguistic and physical anthropological evidence indicates that the ancestors of the Māori arrived on New Zealand's shores from northeast Polynesia around 1300AD (Sharp, 1997:3). Māori oral history describes their forebears sailing from a mythical homeland called *Hawaiki* in tropical Polynesia, in large ocean-going *waka* (a canoe – in this instance – or a vehicle or conveyance). Geographically remote from Europe, the Pacific had long remained at the fringes of European awareness and reach until Abel Tasman 'discovered' New Zealand's islands in the seventeenth century. His visit augured the arrival of yet more European explorers; James Cook and Jean-François-Marie de Surville followed in 1769, and Marion du Fresne three years later. Whalers, sealers, missionaries and settlers were quick to follow after their reports of abundant natural resources and prolific marine mammals.

By the 1830s, prompted by aggressive French and commercial English manoeuvres and ever worsening incidences of frontier lawlessness, the British Colonial Office finally recommended the Crown introduce a constituent power over New Zealand's territory, and acquire sovereignty. In 1839 Lieutenant Governor William Hobson was despatched from London to the South Pacific, with orders to take the constitutional steps necessary to establish a British colony in New Zealand. He was instructed to "negotiate a voluntary transfer of sovereignty from Māori to the British Crown, so that there might be no doubt under international law about the validity of annexation that would follow" (King, 2003:156).

By the time Hobson arrived, small European settlements were already established. Marine mammals, timber and flax were abundant and attracted hordes of whalers and sealers eager to secure primary commodities and wealth. Since shelter and fresh supplies were necessary for such work, these expeditions usually settled in semi-permanent, sometimes mixed (Māori

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and non-Māori) communities along the New Zealand coast (Stenson 2004:30). Missionaries too travelled to New Zealand to garner converts and spread Christian ways. They introduced Māori to new methods of gardening and farming, and strove to learn *te Reo Māori* (the Māori language) in order to produce lexicons of Māori words and thereby translate the Bible.[34]

On the 6th of February 1840 at Waitangi, in the far-north of New Zealand's North Island, the Treaty of Waitangi, or *te Tiriti o Waitangi* was introduced for signing; approximately forty Northland Māori chiefs appended their mark (Anon. 2012d). Over the next eight months the originals and copies of the Treaty were taken by Captain Hobson to other Māori communities in the south, mostly in coastal locations (probably because they were easier to reach by ship), for their consideration and signatures. Following much discussion and debate, over five-hundred Māori chiefs appended their signatures or marks to these documents (Anon., 2012; Stenson, 2004:16). Each chief predicated his (or her) decision to sign on a variety of personal and local issues geographically or politically pertinent to them.

In several notable instances a number of chiefs refused to sign, including Pōtatau Te Wherowhero of the Waikato *iwi*, chiefs from Tuhoe, Te Arawa and Ngāti Tuwharetoa. In fact, a number of non-signatory chiefs from the Waikato and central North Island later formed a sort of confederacy, with an elected monarch that became known as the *Kingitanga*, or 'King Movement', and played an important role in the anti-government defiance campaigns during the New Zealand Land Wars (1845-1872).

The Treaty itself is a short document; both English and Māori translations consist of a preamble and three brief articles (a full copy of the Treaty can be found in the appendix, or online[35]). Drafted using the terminology of English property law, the Treaty describes a transaction intended to facilitate an exchange of sovereignty (McHugh, 1991:39). The preamble outlines the purposes and intentions of the Treaty and emphasised Queen Victoria's 'concern' to protect the "just Rights and Property" of Māori ahead of the arrival of more British settlers, and to secure the recognition of her "Sovereign authority" and a settled form of "Civil Government" in New Zealand (Office of Treaty Settlements, n.d.: 6; Te Puni Kōkiri, 2002: 38). Three articles follow, the first invites Māori to cede to the British Crown all the rights and powers of sovereignty, the second (and contemporaneously, the most contentious) guaranteed to Māori the "full exclusive and undisturbed possession" of their

[34] Once a printing press was established in 1834 the Church Missionary Society began publishing Māori translations of biblical passages (Treaty2U 2012).

[35] For more information regarding the Treaty document itself please see: http://www.waitangi-tribunal.govt.nz/treaty/; http://www.nzhistory.net.nz/category/tid/133; or http://archives.govt.nz/exhibitions/treaty

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lands, forests, fisheries and other properties (King, 2003:159; Te Puni Kōkiri, 2002:14). In return, Māori would give the Crown exclusive rights to the sale of any lands or properties they wished to sell. The third article extended the Queen's royal protection and imparted upon Māori all the "Rights and Privileges of British Subjects", and that, having fully understood the provisions of the Treaty, they would accept the "spirit and meaning" of the document and attach their signatures or marks (King, 2003:159).

CONTROVERSY

While there are several versions of the English text of the Treaty, it appears that the original document from which the Māori version was translated has been lost. Consequently neither official text is a direct translation of the other and the differences have given rise to contrasting understandings of the Treaty's clauses and intent (Te Puni Kōkiri, 2002:37-8). Similarly, a lack of precise linguistic and conceptual equivalents for crucial English legal and political terminology in *te Reo Māori* (and vice versa), has also mired the Treaty in interpretive ambiguity. Māori accusations of intentional mis-translation and obfuscation of the Treaty's wording on the part of the British also remains unsettled (Havemann, 1995:75; Hazlehurst, 1995:xix).

As a consequence, considerable debate has arisen over the Treaty's meaning and what Māori chiefs understood by signing. From the Crown's perspective Britain was striving to preserve Māori 'political sovereignty' in return for the chiefs' cession of their 'legal sovereignty'. By the conventions of early nineteenth century international and English common-law, New Zealand's islands could not be annexed by Britain if Māori were considered a legally sovereign people. Such reasoning lay in the events that had flowed from Europe's 'discovery' of the Americas in the fifteenth century which had prompted lawyers, theologians and policy-makers to reconsider and seek more precise definitions of the rights, wrongs, purposes and limits of imperial responsibility and power (Parry, 1966:137-138). Critically, these evolving ideas and policies stipulated that the acquisition of new foreign territories, and the introduction of a government in each region, be treated as separate steps (McHugh 1975 in McHugh, 1991:25).

This distinction was succinctly described in the writings of Victorian jurist A. V. Dicey (McHugh, 1991:16). In observing the tension between the absolute, limitless power embodied by Britain's constitutional monarchy and its [theoretical] constraint by the 'popular sovereignty' of its citizens, Dicey bisected sovereignty into 'legal' and 'political' components. Legal sovereignty, he argued, is vested exclusively in the Crown while 'political sovereignty'

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describes the relationship between the Crown and its subjects (McHugh, 1991:16). Political sovereignty, therefore, is a requirement for the legitimation of legal sovereignty.

In short, Britain could not acquire or impose legitimate legal sovereignty upon a foreign territory outside the British Isles without the 'political' consent of its inhabitants. Also, the Crown could not use its constituent power unilaterally to acquire territory already inhabited by a people with an organised society and their own form of government and law – the strains of impending legal positivism that so effectively transformed the Treaty's legal status in the years following, are already evident in Dicey's formulation (McHugh, 1991:25). Therefore, under English law in the early nineteenth century the *political* encroachment of another people – non-Christians – was considered to be illegal. With the consent of the inhabitants, however, the Crown was free to exercise *legal* power over their territories.

It seems unlikely, however, that the Māori chiefs in 1840 would have separated or conceptualised sovereignty in this manner (or held Eurocentric notions of 'sovereignty' at all). The Waitangi Tribunal, and scholars such as Ross (2003), Kawharu (1989, 2003) and Orange (1989, 2011), have reviewed the historical and anthropological evidence carefully, and conclude that Māori chiefs would most likely have understood that they were retaining their sovereign authority over their people according to their customary law (*te tino rangatiratanga*) (McHugh, 1991:46). Following the Treaty's signing, however, the chiefs' enjoyment of such authority became dependent upon its delegation by the Crown (McHugh, 1991:46). Also, considering that in 1840 Māori had yet to be outnumbered by European settlers thereby experiencing only modest threats to their land and resources, it is unlikely that they would have ceded their 'legal sovereignty' to Britain when they continued to hold the balance of power (Te Puni Kōkiri, 2002:41).[36]

However, given their desire for New Zealand's territory, and with the strictures of their legal system, Britain had little room to manoeuvre regarding the Treaty of Waitangi. For example, according to the English law of the time, a model of divided sovereignty would have been inconceivable in 1840 (McHugh, 1991:46). In America, however, the law stated that American Indian tribes could retain their internal sovereignty as American 'domestic dependent nations', and permitted their exercise of governmental functions over their own peoples and land, albeit not with foreign governments (McHugh, 1991:47). The British Colonial Office, however, roundly rejected any application akin to the American Indian cases

[36] Around this time, there were approximately 125,000 Maori and about 2000 settlers in New Zealand (Anon. 2012e).

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for complex reasons surrounding 'doctrines of discovery'[37]. Furthermore, Britain's practice of establishing 'protectorates' in Africa and the Pacific, where 'internal' sovereignty[38] was left to the inhabitants and Britain effectively conducted foreign relations in order to exclude other European nations from the region, did not come into practice until the end of the nineteenth century, and therefore well after *te Tiriti* was signed (McHugh, 1991:47). Any retroactive application of the 'protectorate' concept was also plainly inconceivable following the violence and bloodshed of the New Zealand Wars that occurred after the signing of the Treaty (1845 to 1872), making any moves toward a shared system of sovereignty unattractive for the Crown.

Despite such legal and political turmoil, however, the Treaty's very existence does testify to Britain's recognition of Māori as a body politic in 1840 (Bennett, 1993:448).[39] The Treaty, then, emerged as a result of two and a half centuries of lively philosophical debate about the specific legal and political requirements for legitimate, lawful government, and the limits of constitutional and popular sovereignty (McHugh, 1991:39), and signalled the formal commencement of Britain's imperial relationship with Māori by marking New Zealand's new status as a colonial territory. Yet although this foundational social contract enjoyed a short-lived period of legal and political recognition in New Zealand for roughly three decades, political and legal pressures saw it eventually succumb to an onslaught of aggressive Positivist jurisprudence, which rendered it legally enfeebled and morally impotent.

R V SYMONDS, 1847

As early as 1847 the Treaty experienced the first formal challenge to its legal validity. In 1845 Sir George Grey arrived in New Zealand to undertake the role of Governor.[40] The political

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[37] Although the 'doctrine of discovery' enabled the Crown unilaterally to exercise a constituent power over a territory, the American Indian analogy was firmly excluded by the Colonial Office before Britain acquired sovereignty in New Zealand since its advisors were "clearly thinking in terms of the absolute, undivided, and indivisible format" (please see McHugh, 1991:47 for further elaboration and discussion).

[38] Meaning inhabitants' exercise of governmental functions over their own people and lands.

[39] In fact even before the Treaty's signing there is evidence that the Crown conceptualised Māori in this way: in 1834 James Busby, an early British Resident, presented northern Māori chiefs with three flags to choose from to aid the identification of 'New Zealand' ships. After a speech by Busby on 20 March one flag was chosen by the chiefs who then declared themselves The United [Independent] Tribes of New Zealand: *He Whakaputanga o te Rangatira o Nu Tireni* (New Zealand History Online 2012). The following year a formal Declaration of Independence was signed by these chiefs and James Busby.

[40] Following two terms as Governor in New Zealand (1845-1853 and 1861-1868) Grey undertook the same role in the Cape Colony from 1854 to 1861 where he attempted to institute a federated political structure, a system (although rejected during Grey's tenure as Cape Colony Governor) that became the basis for the colonial antecedent to South Africa's apartheid policies of separate development (South African History Online n.d.). Grey was a polarising figure and the motivations for his policies are still debated; some, for example, refer to

mood was tense: Māori chiefs had grown increasingly disenchanted with the realities of British rule, while British settlers were becoming more and more restive of the Government's apparent inability to obtain sufficient land for their burgeoning settlements (Hackshaw, 1996:103). Within a year of his arrival Grey received a set of directives from the English Colonial Office containing a raft of incendiary initiatives; for Grey the most alarming directive concerned the new acquisition measures for Māori land (Hackshaw, 1996:104). The Colonial Office proposed that the British Crown claim any Māori lands that were not being used directly for cultivation by designating them as 'waste lands' (*terra nullius*) and thereby relieving Māori of their aboriginal title.

Armed with a personal, on-the-ground appreciation of New Zealand's political reality, Grey was perturbed by the unrest and rebellion that would likely ensue amongst Māori as a result of this thinly veiled plan to dispossess them of their land (Hackshaw, 1996:104). In a circuitous manner Grey set about delaying the promulgation of the Charter by challenging the legality or illegality of pre-emption certificates that had been issued to settlers by the former Governor Robert Fitzroy. In so doing, Grey contrived a case in order to test the judicial interpretation of the meaning of the Treaty of Waitangi and the aboriginal rights of Māori. In 1847 Chief Justice Martin and Justice Chapman presided over *R v Symonds/Queen v Symonds*. They declared that the legalism underpinning Fitzroy's 1844 Proclamation squarely contradicted the provisions contained in the *Royal Instructions* of 1846, which eliminated the need to obtain consent for the alienation of any land that was not cultivated (Hackshaw, 1996:107).

In short, the force of the judgement meant the British Parliament had to suspend the parts of their *Instructions* which ran contrary to it. Crucially, the judgement simultaneously affirmed Māori aboriginal title *and* the legal legitimacy of the Treaty. For now, the Treaty remained in force, but it did not take long before the actions of one judge stripped the Treaty of its legal power.

WI PARATA V BISHOP OF WELLINGTON, 1877

In 1869 a Royal Commission was instituted to investigate the land that had been donated by Māori to charities for the construction of churches and schools. The Commission's report found that very few of these trusts had achieved their intended purpose. In 1877 Wiremu (Wi) Parata, a Western Māori Representative in Parliament, applied to the Supreme Court to

him as 'Good Governor Grey', a man who cared deeply for the welfare of colonial indigenes, while others describe him as a patronising, racist autocrat (King, 2003:200).

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have a block of Porirua land earlier granted to Bishop Selwyn in 1850 returned to his *iwi*, Ngati Toa, since a proposed school had not been built (Hackshaw, 1996:110). In a reserved judgement delivered by Chief Justice James Prendergast, Wi Parata's appeal was dismissed on the substantive ground that Parata and other members of Ngati Toa lacked legal grounds on which to stand their claim. Their private arrangement to grant land, Prendergast CJ declared, was null and void since the right to extinguish native title and grant land was exclusive to the Crown. The judgement declared that the Crown could not recognise what did not exist, and denied that the Treaty of Waitangi imposed any obligation on the Crown (Belgrave, 2005:32).

Although Prendegast CJ's judgement was, in fact, technically 'wrong' – since it was contrary to the findings in *R v Symonds* by departing from existing law – it is likely Prendegast CJ was motivated by the political implications likely to arise if Parata won his claim. A favourable decision for the plaintiff would have opened the floodgates to native demands for the return of every similarly situated trust property (the 1869 Royal Commission report showed that very few of the trusts had achieved their purpose), and resulted in significant political and jurisprudential headache for the Crown (Hackshaw, 1996:110). As a consequence, Prendergast CJ justified his ruling by adroitly resorting to the principles of, then untested, legal positivism, an approach that repudiated the authority of indigenous people as political bodies and denied them sovereign status (Anaya, 2000:19, 26). Prendergast CJ's decision synthesised a number of legal traditions, namely feudal rules of land title mixed with Austinian theory (please see below), and emergent unrepresentative notions of international law (McHugh, 1991:115).

Austin's legal positivism, rapidly gaining influence and popularity in the development of Anglo-Commonwealth law, was premised on the determination of 'law' as the command of a sovereign who was a 'determinate and common superior' and to whom the bulk of the population owed habitual obedience; a society without a sovereign had no law (McHugh, 1991:116). Consequently, without law a society could not have concordant property rights. By proclaiming Māori to have no civil government or settled system of law, Prendergast CJ could deny that Māori constituted a body politic, and could not, therefore, make a legal claim to property. By finding the parties who had signed the Treaty legally unmatched, the compact protecting Māori proprietorship could be declared invalid (a "simple nullity" he called it) (Hackshaw, 1996:112; McHugh, 1991:115). In one succinct move Prendergast CJ abolished Māori customary title to the lands over which Māori roamed and lived (Hackshaw, 1996:111).

Although at the time legal positivism was a simple way to intellectualise the feudal view of property as a sovereign-derived right, the lack of theoretical coherence (and picking and

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choosing between 'loose sets of principles') in judgements like Prendergast CJ's, were typical of how 'true common lawyers' at that time tended to go about their decision-making on the bench as well as in the Colonial Office (Williams, 2011:171). Regrettably for Māori, however, Prendergast CJ's grasp on these principles was superficial at best (McHugh, 1991:115); added to that, the Crown was probably eager to evade the scramble for trust properties amongst Māori that would surely follow had Parata won his case. Consequently, the incorporation of the *Wi Parata* judgement into legislation until 1986 meant the rights conferred to Māori by the Treaty were no longer enforceable by the courts, and the precedent that the Prendergast CJ ruling invoked neutralised the legal power of the Treaty (McHugh, 1991:116; Williams, 2011:226).

It is important to pause briefly at this juncture to examine the reason most often given for the long-term jurisprudential impact of this case: the "simple nullity" statement. It must seem nonsensical that a case contemporaneously deemed so 'wrong' and flagrantly discriminatory could remain uncontested for over a century. In fact it did not: in 1884, just seven years after the *Parata* decision, the *Mangakahia v The New Zealand Timber Company Ltd* decision explicitly rejected the 'simple nullity' comment[41] (Williams, 2011:230-231). The *Parata* case, however, is complicated and contemporary jurisprudence has tended to gloss its more convoluted aspects, instead of focusing obsessively upon Prendergast CJ's "simply nullity" remark as the sole grounds for the arrogation of Māori rights (Williams 2011). Such demonization, *Parata* scholar David Williams (2011) argues, has transformed the case's judgement into something of a notorious fetish, making it a convenient decision with which contemporary Treaty of Waitangi and aboriginal title commentators are able to lambast the repugnant and prejudicial decisions of the nineteenth century jurisprudence (Williams, 2011:231).[42] Instead, Prendergast CJ's decision to obstruct Māori from enforcing their native title rights in the Supreme Court was the central principle that erased Māori customary title (Williams, 2011:231).

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[41] Although it did support the central idea of the *Parata* case, that Māori are unable to enforce native title rights in the Supreme Court. And, in 1938 at the hearing of *Te Heuheu Tukino v Aotea District Māori Land Board* the Court overturned part of Prendergast CJ's 1877 judgement, ruling that the Treaty remained valid in terms of the transfer of sovereignty, reflecting a popular re-emergence of classical-era naturalism (meaning that all humans share an unwritten body of universal moral principles that undergird a set of fundamental ethical and legal norms, and which exist regardless of whether governments recognise or enforce them) in international law (Anaya, 2000:50; New Zealand History Online, n.d.).

[42] The *Parata* decision actually championed the government's duty to act 'as supreme protector of aborigines, of securing them against any infringement of their right of occupancy' – a pronouncement which could have been invoked as a nineteenth century source for the obligation akin to a fiduciary duty imposed upon the Crown in its partnership relationship with Māori, but is frequently overlooked contemporaneously (Williams, 2011:226, 171).

MĀORI 'RENAISSANCE'

It would take until the mid-1950s before the legal significance of the Treaty of Waitangi was formally salvaged. While its value as a document of historical import was increasingly recognised, for many, mostly non-Māori New Zealanders, the Treaty remained largely irrelevant to their everyday social and political lives (Durie, 2011:394). Pākehā tended to discount Māori feelings of discontent, idealising instead a complacent view of New Zealand's race relations, premised on a mythology of racial stability and political consensus (and sporting prowess) (to be discussed further in chapter five) (Hazlehurst, 1988:54). It was not until the late 1960s that these long-held idealisms of racial fraternity evanesced. Around that time a festering sense of injustice amongst Māori grew alongside a fermenting ethnic activism, to become a fully-fledged cultural and ethnic revival popularly known as the 'Māori Renaissance'[43].

However, ahead of this increasingly vocal, visible, cultural and political ethnic resurgence, Māori had been neither idle nor silent. New Zealand historiography tends to neglect the lengths to which Māori went during this time in order to save what remained of their dwindling property holdings, and halt the unremitting erosion of their indigenous authority and increasing social dislocation (Belgrave, 2005:16). In fact Māori spent decades writing to governors, petitioning ministers and appealing directly to the Crown, in wave after determined wave of protest (Belgrave, 2005:17). Māori participation in the Native Land Court alone involved tens of thousands of (mostly) meticulously recorded actions and decisions since its inception in 1862. Taking claims before the courts, and the ensuing commissions of inquiry and royal commissions became almost ritualised amongst Māori in positions of leadership, as consecutive generations appealed against the actions of the Crown; a practice that continues today (Belgrave, 2005:17).

In the late 1960s and 1970s, following a pattern of international decolonisation and the rise of radical action movements, Māori protests took on a renewed energy. A new generation of outspoken young Māori, educated in the cities and members of Māori identity organisations, voluntary activist associations, clubs and societies, began protesting and occupying public lands. They gleaned ideological and organisational insight from a host of other minority groups who had also suffered disproportionately within capitalist political economies such as 'Black Power', American Indian movements in the United States and unionist, anti-racist and feminist movements (Hill, 2009:150). As their indignation mounted, large numbers of Māori

[43] As Hill points out (2009:151), the word 'renaissance' is in some senses a misnomer since it infers that the spirit of Māori-dom had perished or been extinguished, which it had not.

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took to the streets in 1975 in urban centres like Auckland and Wellington agitating against further land loss and they marched on parliament to demand self-determination.[44]

Many Pākehā were startled to discover how deeply Māori felt a sense of betrayal and injustice over their imperial history, and that they appeared not to affiliate with the former's ideations of the country's history as one of optimistic determinism, progress and development. These Pākehā were also alarmed by the increasing political polarisation they saw occurring amongst Maori (Durie, 2011:395). Furthermore, as Māori migration from rural to urban areas grew rapidly following the close of World War II, and escalated between the 1960s and 1980s, Māori became far more 'visible' amongst non-Māori communities, where their protests made their presence and grievances difficult to ignore (The Encyclopaedia of New Zealand n.d.).

THE WAITANGI TRIBUNAL

In 1975 amidst this rising clamour of Māori protest, the third Labour Government instituted the Treaty of Waitangi Act and therein established the Waitangi Tribunal, a permanent commission of inquiry to investigate Crown breaches of the Treaty. Critics argued that the institution of an investigative tribunal was simply an artifice to placate Māori, providing a cheap form of catharsis, and an easy way to avoid, rather than confront, continued Māori demands to 'ratify'[45] the Treaty (Sharp 1990 in Havemann, 1995:88; Sharp, 1997:74). Initially, the Tribunal's official mandate was two-fold: to promulgate a taxonomy of Treaty 'principles', and to identify which of these principles had suffered breach by acts or omissions of the Crown (Havemann in Hazlehurst 1995:75, 90). Later the Tribunal became responsible for examining and reporting on any proposed legislation referred to it by the House of Representatives or a Minister of the Crown, and to make recommendations or determinations in respect of certain Crown forest land, railways land, State-owned enterprise land, or land transferred to educational institutions (Te Puni Kōkiri, 2002:122).

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[44] Protest action even extended to sports; for example, demonstrations regarding the discriminatory treatment of Māori players in the New Zealand rugby team, the All Blacks, by the South African rugby union (and the latter's preferential (discriminatory) selection of their own players by race) saw a proposed South African rugby Union Tour of New Zealand cancelled in 1973. Four years later the South African government relented and permitted a 'mixed-race' (Māori and Pākehā) New Zealand team to tour South Africa. However, as international pressure against South Africa's apartheid regime mounted, New Zealand faced considerable pressure to cease their sporting alliance with South Africa.

In 1981 a South African Rugby Union Tour of New Zealand sparked mass protests and civil disobedience within New Zealand. Although Pākehā dominated the movement, Māori formed a prominent role within it. However, throughout the tour many Māori protestors questioned Pākehā demonstrators commitment to racial equality, accusing them of ignoring racial discrimination and prejudice within their own country (New Zealand History Online n.d.).

[45] In New Zealand the word 'ratify' is often used in relation to the Treaty and refers to claimants' desire that the Treaty of Waitangi be made part of the municipal or domestic law by statute.

By 1985, however, continued pressure from Māori forced the fourth Labour government to extend the Tribunal's jurisdiction to the Treaty's signing in 1840. Furthermore, the Tribunal was also given the ability to commission research and appoint its own research staff (Belgrave, 2005:9). Its membership was expanded to seven, and then to seventeen, following the New Zealand Māori Council's successful legal action against the Crown over the State-Owned Enterprises Act 1986, and then increased again to twenty (the Act also stipulates that half the Tribunal's members must be Māori) (Belgrave, 2005:9). Several Tribunals now sit concurrently, covering more issues and hearing greater numbers of claims. Individual claims also began to be grouped together into larger 'inquiry districts', with research and evidence consolidated into casebooks prior to hearing in order to speed up the (often lengthy) process.

Instead of acting only as a cheap form of catharsis, the Waitangi Tribunal has continued to grow from strength to strength on the back of repeated amendments and administrative improvements, taking centre stage as the institutional focus for a way of thought and action whose "time had finally come" (Sharp, 1997:85). On its website (www.waitangi-tribunal.govt.nz), the Tribunal states that it offers Māori a place to resolve grievances in a legal manner, unlike the land protests of the 1970s and 1980s that took place "outside the law" (Waitangi-tribunal.govt.nz n.d.).[46] Furthermore, the Tribunal asserts that its 'vision' is to reconcile "ourselves" (which presumably means New Zealand citizens) with the past, and to acquire a full understanding of the Treaty of Waitangi in ways that will equip Māori and non-Māori New Zealanders "to create a future for two peoples as one nation" (Waitangi-tribunal.govt.nz n.d.).[47]

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[46] Bastion Point in Auckland, for example, formed a nexus for protest 'outside the law'. In the late 1970s Māori protestors occupied Kohimarama, or Bastion Point, 5.3ha of land that had been alienated in 1886 by the Crown under the Public Works Act (1882) for the purposes of defence. The land was then gifted to the Auckland City Council in 1941 for a public reserve, and in 1976 it announced the planned private sale of the land for high-income housing. In response the Orakei Māori Action Committee organised an occupation of the land to prevent such sale, constructing a *marae*, a collection of temporary dwellings, and growing crops in a peaceful occupation from January 1977 to May 1978 when the New Zealand army and police were called in to forcibly remove protestors (arresting 200 protestors) (King, 2003:486). When the Waitangi Tribunal's powers of investigation were extended retrospectively in 1985 the Orakei Claim, covering the Bastion Point area, was one of the first cases opened for investigation (please visit http://www.waitangi-tribunal.govt.nz/reports/view.asp?reportID=49AF06E3-FBCB-45C5-9E97-2C2044B558C2 to read the Waitangi Tribunal's *Orakei Claim Report* (Wai 9)).

[47] This rhetoric of 'biculturalism' has been popular amongst New Zealand governments since the mid-1980s when the fourth Labour Government adopted official bicultural policies which involved the incorporation of Māori personnel, Māori models of organisation, and Māori social practices and cultural symbolism within the institutions of the state (Barber 1989 in Poata-Smith, 2004:74). Instead, as Poata-Smith (Kelsey in Poata-Smith 2004:74) argues, the state's adoption of such bicultural rhetoric led only to a co-option of Māori elites into state institutions which gave an illusion of 'partnership' and continued to marginalise more radical alternatives for the inclusion of Māori social, cultural and political practices. Notions of cultural homogeneity and state regulation of cultural difference will be further examined in chapter five.

STATE-OWNED ENTERPRISES ACT, 1986

The early 1980s in New Zealand were a challenging time economically. Faced with looming bankruptcy the National government struggled to reignite a stagnating national economy. Consequently the incoming 1984 Labour government embarked on an ambitious programme of liberalisation and swiftly set about corporatising, deregulating and privatising state sector assets. Many Māori felt the Labour Party's actions served only to further erode their customary rights and entitlements and, understandably, experienced strong feelings of anger, dispossession and resentment.

In 1986 following the institution of the State-Owned Enterprises Act, the New Zealand Māori Council submitted a case with the Court of Appeal, asserting that the divestment of state assets to private or international purchasers without establishing whether such transfers were consistent with the principles of the Treaty of Waitangi, was unlawful. Such sales, the Council argued, would further reduce the pool of lands and assets available for return to Māori through Treaty settlement remedies.[48] In what proved to be one of New Zealand's most important twentieth century judgements, the Court of Appeal unanimously found that the 1986 State-Owned Enterprises Act did not give the Crown the power to create state-owned enterprises while acting inconsistently with the principles of the Treaty (Belgrave, 2005:9)[49]; that the Crown's duty toward Māori was not merely passive but extended to active protection of their lands and waters; and that the relationship between the Treaty partners created responsibilities for the Government analogous to fiduciary duties. This judgement was revolutionary; it did more than simply reverse the Positivist legalism that had crippled the Treaty's legal legitimacy following Prendergast CJ's 1877 ruling, it stood as a "monument" to the rejection of the entire 'Treaty is a nullity' approach, and finally elevated its status to that of a morally binding compact between Māori and the Crown (Hackshaw, 1996:116).

The Treaty's legal status and application has, therefore, experienced several revolutions since 1840. Although New Zealand continues to resemble Britain as a unitary state with a representative form of 'Westminster' constitutional monarchy based on a largely unwritten constitution, it does not actually have a written constitution of its own. The 'constitution of New Zealand' consists of a collection of statutes, treaties, Orders in Council, letters patent,

[48] The Treaty of Waitangi Act 1975, s 6(4)(A) stipulates that the Tribunal shall not recommend the return to Māori ownership of any private land (*Treaty of Waitangi Act 1975*).

[49] Section 9 states that: 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'. Section 9 was the subject of the important *Lands* case (1987), in which the Court of Appeal unanimously concluded that 'the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act' (Te Puni Kōkiri, 2002:21).

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decisions of the Courts and unwritten constitutional conventions. It is not codified, or – with the exception of certain electoral law – formally entrenched. Despite the Treaty's status as the founding compact that formally established the political relationship between Māori and the Crown, it has no constitutional legitimacy since it has been neither entrenched nor ratified (instead, as noted, New Zealand's constitutional arrangements are found in a number of key documents[50]) (Te Puni Kōkiri, 2002:14, 16). While there has been a definite paradigm shift in New Zealand's official discourse since the 1980s that amounts to a constitutionalising of the Treaty's principles, critics still assert that as long as the Treaty remains un-entrenched its constitutional value is strictly limited and Māori rights will continue to be sidelined (Havemann, 1995:73).

Consequently, at present the Treaty of Waitangi's articles cannot be directly enforced without statutory incorporation. In other words, unless the Treaty's clauses are given force of law by an Act of the New Zealand Parliament, the Crown is not obliged to implement their corresponding Treaty duties (Te Puni Kōkiri, 2002:15). Since the Treaty of Waitangi cannot limit the law-making capacity of Parliament, then it instead imposes a "moral obligation" upon the Crown ("conscience" and "honour" are also popular terms) (Te Puni Kōkiri, 2002:17). While critics like Mason Durie bitterly proclaim that the Treaty acts only as a moral constraint on Government – a "subliminal twinge of conscience" – the contrary politics of the 1970s and 80s did in fact precipitate a transformation of the Crown's jurisprudential conscience toward Māori (Durie, 2003b:109; Havemann, 1995:80). This adjustment has taken place in the legislature and before the courts, but also in the minds of Pākehā (as I shall describe in the fifth chapter) who demonstrate a growing cognisance of New Zealand's Treaty's obligations to Māori.

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THE CLAIMS PROCESS

The claims process itself is relatively straightforward; a Māori claimant or group enters the process by submitting their claim in writing to the Waitangi Tribunal where the registrars assess it against criteria listed in the Treaty of Waitangi Act 1975. If a claim meets the requirements of the Act it is registered and assigned a 'Wai' Number (short for 'Waitangi Tribunal claim number'), and the Crown is notified. At this stage the Waitangi Tribunal may group related claims together into 'regional' or 'generic' inquiries so they can be heard at the same time, before proceeding to hearings. During Tribunal hearings evidence and

[50] Namely the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, the Electoral Act 1993, the Treaty of Waitangi Act 1975, and Standing Orders of the House of Representatives.

submissions are presented by claimants, followed by the Crown, and finally other parties with interests in the claims. Several months, sometimes even years later, the Tribunal issues a report on the claims with a set of recommendations, although the Crown is not legally bound to implement them. If claimants are satisfied with the Tribunal's report, they proceed with the Crown into a negotiation phase and work to agree upon a set of terms of settlement before signing a Deed of Settlement.[51]

Nearly all Deeds of Settlement require settlement legislation to be passed to take formal effect. Crucially, agreeing to such settlement requires claimants to agree to conditions that remove the ability of the courts and the Waitangi Tribunal to re-open the historical claims or the Deed of Settlement once signed (Office of Treaty Settlements, n.d.:77). The Crown expresses a desire to achieve settlements that are "durable" and "lasting", conflating full and final settlement with satisfactory resolution (Office of Treaty Settlements, n.d.:28). Interestingly, the Office of Treaty Settlements also declares that Crown and claimants must sign the Deed of Settlement only when both parties are satisfied that the conditions are "fair, and the claimant groups agree that their grievances will be finally settled", inferring that the inherent 'fairness' of the settlement and the resolution of claimants' sense of grievance are not necessarily one and the same (Office of Treaty Settlements, n.d.:28).

Some claimants, however, repudiate the ideology of full and final settlement, and openly resolve to continue making claims and agitating for further redress. It is not uncommon for astute claimants (or their counsel) to discover legal 'loopholes' that allow them to submit claims for settled assets in novel ways. For example, a volatile debate regarding customary proprietorship of some of New Zealand's waterways is presently underway following the Crown's proposal to partially privatise three power-generating State-Owned Enterprises: Mighty River Power, Meridian Energy, and Genesis Energy. The Wai 2358 claimants (the New Zealand Māori Council in conjunction with ten co-claimant *hapū* and *iwi*) allege that the imminent sale of shares in these companies could result in irreversible prejudice to Māori interests if they are carried out without first protecting the Crown's ability to recognise Māori rights in water or remedy breaches of those rights (The Waitangi Tribunal/Te Rōpū Whakamana i te Tiriti o Waitangi, 2012:11-12). In a national New Zealand radio broadcast with Kathryn Ryan, the Māori Council's attorney Donna Hall asserted that some tribes who have signed full and final settlement clauses as part of official settlements may have the opportunity to renegotiate some aspects of their original claims, since the New Zealand

[51] Please refer to the Office of Treaty Settlements (http://www.ots.govt.nz/) for more information about this process.

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Māori Council (which purports to represent 'all Māori') constitutes a novel form of representation (Ryan 2012).

The Crown, however, contends that the cash and assets it provides as settlement redress are strictly constrained fiscally and economically, and should not be expected to meet all the needs and aspirations of the claimant group. It asserts that remedy should help "remove a sense of grievance" amongst claimants and contribute, through settlement, to a "platform for future [Māori] development" (Office of Treaty Settlements, n.d.:28, 80). In New Zealand, then, indigenous restitution is conceptualised as both backward- and forward-looking, although the success of the latter is inextricably predicated on the conclusion of the former.

SOUTH AFRICA

By comparison, there is no single over-riding treaty between indigenous residents and representatives of the imperial state that marked the opening of a new political order in South Africa as there is in New Zealand. Instead South Africa's imperial history has been characterised by several critical imperial and political chapters, firstly with the arrival of the Dutch in the Cape in 1652, British annexation in 1806, the formation of Union in 1910, and finally the transition to democracy in 1994. The social, political and legal events around and precipitating these dramatic changes in sovereign power and control were tumultuous, complex and frequently violent. When South Africans went to their voting booths in 1994 and elected their first democratic government, the majority demonstrated a desire to see South Africa's statesmen and legislators reorganise and reconfigure the existing jurisprudential and political system to become more inclusive, and thereby remedy the rampant social and economic inequalities that had come to define their country.

Within the ambit of these ambitions a three-pronged land reform programme was proposed, and a Truth and Reconciliation Commission (TRC) established, to examine the human rights abuses of the apartheid years, and grant amnesties to those who qualified in terms of its criteria. The TRC would focus on instances of violence and gross violations of human rights, while the land reform programme would investigate the past racial injustices relating to forced removal and land theft that had occurred since 1913, and provide restitution (Walker 2008 in Zenker, 2011:16). [52]

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[52] Although the Commission acknowledged that social and political conflict in South Africa occurred prior to apartheid, the TRC's mandated period of investigation only extended from 1960 to 1994 (Department of Justice, 2002:55).

Land is an integral element in the livelihoods of millions of South Africans, as well as a key resource for the country's agricultural, tourism sectors, and mining industries, and was conceived by the ANC and its allies as an obvious and vital component in South Africa's plan for dramatic social transformation (Commission on the Restitution of Land Rights, n.d.-a:7; Moyo, 2007:60). The land reform programme consists of a trio of initiatives: to secure the legal status of occupiers' rights (on state land, communal land and privately-owned land) through a tenure reform programme; to redistribute commercial farmland to the landless majority; and to provide restitution for those who had been dispossessed of their rights to land as a result of past racially-discriminatory laws and practices. This ambitious programme, it was hoped, would also achieve more than the dismantling of South Africa's legacy of racial discrimination; it would be pro-poor and promote gender equality, and, by changing production and investment patterns, start to transform the present sense of racial dualism in agriculture by blurring the lines between the commercial and communal areas of the country (Hall, 2009:1).

Understanding and appreciating the events and circumstances that flow from the history of settlement, conquest, alliance, dispossession, migration and tenure change, therefore, is an important requirement in a project of this size, however, an overview must be more condensed (Walker, 2007:136). Deciding 'where to begin', then, was a difficult decision, one also faced by South Africa's transitional negotiators when considering the date for the 'cut-off' for grievances related to the dispossession of land. Although African conflict over land predates the arrival of Europeans, its dispossession by the latter commenced with the establishment of a Dutch victualing station at the Cape in 1652, and was exacerbated by British and Boer settlement across hinterland areas and the 'frontier wars' that ensued with local peoples (Hall, 2010:18). In their deliberations, the transitional negotiators identified the 1913 Natives' Land Act as the first major piece of segregationist legislation enacted by the Union Parliament, that had heralded the advent of increasingly separatist legislation. In particular, it led to harsh restrictions regarding the occupation and use of space and widespread forced removals. Moreover, the year 1913 is a date embedded within the South African Constitution (helping to contain the obligations of the postapartheid government), and was part of the political pact that made the transition to democracy possible (Hall, 2010:23). It was decided then to extend claims for land restitution to 1913. Following the 1994 promulgation of the Restitution of Land Rights Act, the Department of Rural Development declared their vision:

> "[t]o have persons or communities dispossessed of property after 19th June 1913, as a result of past racially discriminatory laws and practices

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> restored to such property or receive just and equitable redress" (Rural Development & Land Reform 2012a).

While recognising that there have been considerable losses that precede this date, the Natives' Land Act of 1913 seems a suitable and manageable place to begin my review of African land loss.

THE NATIVES' LAND ACT, 1913

Following the foundation of the Union in 1910 a Parliamentary Select Committee promptly proposed legislation that limited African landownership and the number of Africans permitted to squat on white-owned land as sharecroppers (Holland, 2012:29; Oakes, 1989:291). Colloquially known as the 'Squatters Bill', the proposed legislation was bitterly opposed by black Africans, and was eventually withdrawn after pressure from certain white quarters (mostly wealthy property owners) was exerted. The reprieve was short-lived; in April 1913 a far more draconian Bill was rushed through parliament by J W Sauer, the new Minister of Native Affairs, and in less than two months the Natives' Land Act became law (Oakes, 1989:291). The Act was the first major piece of segregationist legislation passed by the Union Parliament, and became a cornerstone in the separate development plans of white politicians prior to and during apartheid (Egerö, 1991:7).

The origins of the 1913 Land Act were the work of the South African Native Affairs Commission (SANAC). Established in 1903, SANAC's primary aim was to create a cheap, controllable African workforce for South Africa's farms and mines (NUSAS 1983 in Egerö, 1991:14). It also sought to crush the growing independent African peasant class, and thereby quash any burgeoning political resistance that might threaten white farming interests (Egerö, 1991:14). Consequently African reserves were classified as legally distinct from white farming areas; title could not be shifted from one area to another, and Africans could no longer purchase land in white areas (Ross, 2008:95-6).[53] Following the Act's promulgation, a staggering 87 per cent of South Africa was classified as white land, almost overnight. Furthermore the act outlawed sharecropping, and resulted in an almost immediate exodus of sharecroppers from districts like the northern Free State where the Act had been promptly applied (Chanock, 2001:367; Ross, 2008:96). In one swift legislative move, the 1913 Act eliminated the embryonic African farmer class and restricted Africans to mere subsistence reproduction in reserve land only (Chanock, 2001:373; Egerö, 1991:14).

[53] Except in the Cape Province, where the Act was disallowed by the courts since it made it impossible for black Africans to acquire the wherewithal to become voters (Ross, 2008:95-6).

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The passing of the Act left black African communities feeling disenfranchised and demoralised. Solomon ('Sol') Plaatje, African author, intellectual and lobbyist, bitterly remarked:

> "If anyone had told us at the beginning of 1913 that a majority of members of the Union parliament was capable of passing a law like the Natives' Land Act, whose object is to prevent natives from ever rising above the position of servants to whites, we would have regarded that person as a fit subject for the lunatic asylum" (Oakes, 1989:292).

Plaatje was not alone in his sense of bereavement and injustice; most Africans condemned the new law because of its fundamental attack on an elemental aspect of African life – land (Feinberg, 1993:70). Amongst Africans there was a growing realisation that following the Act of Union, Britain had renounced any further responsibility for South Africa's future, dashing black hopes that England would eventually extend her liberal tradition in the Cape Colony, where blacks and mixed-race people known as coloureds were able to vote, to the other three provinces (Orange Free State, Natal, and Transvaal) (Holland, 2012:27).

In 1912 the South African Native National Congress, later the African National Congress, had formed and they expressed their dissatisfaction of the 1913 Land Act central in early rallying efforts to attract members, and later as a major theme in their defiance campaigns (Limb, 2010:1). They agitated tirelessly for the removal of racial discrimination in South Africa's parliament, public administration, schools and factories (Holland, 2012:29). In fact, African criticism of the enactment of discriminatory laws, especially criminal law, the labour and pass laws, and land law, remained constant and vocal all through the twentieth century; it was rarely even denied by government, just simply ignored (Chanock, 2001:526-7). Organisations like the African People's Organisation (APO), the Coloured People's National Union (CPNU), and the Coloured People Congress, advanced coloured interests, while the South African Indian Congress (SAIC) supported those of the Indian community, and later the Pan Africanist Congress (PAC) supported broad African interests.

With the passing of the Land Act the seeds of a national African political resistance were sown, and began to grow steadily more militant, as the government enforced increasingly punitive and restrictive legislation (Ross, 2008:119; South African History Online, 2012a). In the years leading up to the institution of formal apartheid, J. B. M. Hertzog's National Party legislation was particularly repressive: pass laws were tightened by the addition of successive clauses, new labour polices excluded blacks from skilled and semi-skilled trades, the Native Taxation and Development Act, 1925 made Africans pay for their schooling, while the Native Administration Act, 1927 brought tribal chiefs under government control as virtual civil servants, who could be dismissed for displeasing white authorities (Holland, 2012:34).

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Politically these legislative measures, and the legal institution of African reserves in particular (between 1913 and 1936), were intended to divide Africans and resuscitate old tribal authority in new forms of indirect rule (Egerö, 1991:15). Such attempts to limit African political expression, however, failed to suppress opposition; as the prohibitions and controls on movement and urban residence became incrementally complicated, African urbanisation and migration increased apace (Chanock, 2001:521).

Large-scale dispossession of land by foreign capital interests in mining also gathered momentum, placing increasing pressure on reserve land (Chanock, 2001:369). As the populations in the reserves began to increase, so did overcrowding; low wages were paid to workers, and the poor quality of available agricultural land, often prone to erosion, was exacerbated by overgrazing; land deterioration and starvation were rampant (Egerö, 1991:15; Feinberg, 1993:70; Ross, 2008:136). Local impoverishment and increasing dependence on the wider South African system of labour migration thereby stabilised the reproduction of cheap labour, a factor upon which South African capitalism had come to depend (Wolpe, 1995; Zenker, 2011:10). Nor did the addition of more land to reserves through the 1936 Development Trust and Land Act (which increased reserve lands to 13 per cent of South Africa's total land area) substantially change living conditions (Egerö, 1991:15). So long as they had had access to land as independent producers, Africans had experienced little need to labour in South Africa's flourishing mines or on farms for meagre wages. But now large numbers of Africans began moving into towns and cities in search of livelihoods to sustain their families, contributing to an ever-expanding African proletariat on the outskirts of South Africa's metropoles (South African History Online 2012a, 2012b).

In the 1930s severe economic depression hit South Africa, accelerating hunger and unemployment especially among Africans (Holland, 2012:34). The ravages of the Great Depression weakened government too, and Hertzog joined forces with Jan Christiaan Smuts of the South African Party in 1933 to form a new coalition, the United Party. Their alliance heralded the formal onset of white solidarity against black advancement, giving Hertzog a two-thirds majority in parliament, and enabling him to alter entrenched clauses in the Act of Union (Holland, 2012:35).[54] With the outbreak of World War II, South Africa's industries experienced boom conditions; African industrial workers were recruited in large numbers to replace white South Africans who were away fighting in the war, prompting further mass migration of black Africans from rural areas (Holland, 2012:36). Consequently, black urban

[54] Most crucial of these clauses was the Cape Franchise (1909) and Hertzog lost no time in campaigning for the removal from the common roll of the eleven thousand black voters (Holland, 2012:34-5).

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dwellers multiplied during this time by over 50 per cent and jobs became scarce, staple food costs soared, and poverty in the reserves worsened still further (Holland, 2012:36).

APARTHEID

While European colonisation overlaid established African identities, ruptured the unity of African civil and political life, and encouraged ethnic division, the institution of apartheid legislation after 1948 had perhaps the most destructive consequences for African ways of life (Limb, 2010:7-8). The separatist ideologies evident in the 1913 Native's Land Act escalated in the ever more stringent, oppressive legislation and jurisprudence of the apartheid regime. In 1948 the National Party finally attained exclusive political power; for the first time in the country's history, an exclusively Afrikaner parliament led the government (Holland, 2012:52). It began by aggressively implementing a series of policies, intended to maintain and extend political and economic control of South Africa by the white minority. However the party took great care to frame its separatist designs in a way that emphasised the recognition and promotion of ethnic *diversity,* rather than simple racial segregation. Their particular brand of nationalist dogma maintained that no single South African ethnic majority existed. Instead, the National Party insisted South Africa was comprised of many ethnic groups; whites, coloureds, blacks, Indians, Malay, Chinese, etc. Black Africans, the National Party contended, belonged to one of ten ethnic groups or 'national minorities' to whom the [white] state would afford political protection to realise their 'divinely ordained national calling' in their own particular 'homelands' (O'Meara, 1996:73).

In order to implement this ethnic 'recognition', the state instituted the Population Registration Act, 1950 and set about classifying every South African, assigning them to a particular 'national' category. This idea – that human populations could be readily divided into a number of relatively discrete, stable groups, each with its own distinctive physical, cultural and intellectual characteristics – was a reversion to the racial ideologies of the nineteenth century (Boonzaier, 1988:59). At that time it had provided Europeans of the slaving and colonial eras with an efficient means to categorise human populations while simultaneously justifying their own 'superior' position (Boonzaier, 1988:59). In fact, it was the Population Registration Act, aided by legislation such as the Mixed Marriages Act, 1949 and the Immorality Act, 1950[55], that effectively ossified each population 'group', making rigid

[55] The Immorality Act, despite its title, was concerned only with what the legislators saw as the immorality of heterosexual intercourse across racial lines.

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the boundaries between them so that any differences in income and status between statutory groups came to reinforce National Party ideology (Boonzaier, 1988:63; Ross, 2008:123-4).

By fostering loyalties to the tribal groups from which Africans supposedly hailed, the National Party hoped to diffuse the burgeoning sense of African nationalism that was flourishing across South Africa. They also hoped to deny – or attempt to reverse – this process of social fusion as Africans from across the country, and even from beyond its borders, migrated in ever greater numbers towards the metropoles (Ross, 2008:136). The National Party's strategy for tidy, bounded, separate ethnic development, however, served only to exacerbate the economic and social gaps between white and black South Africans, entrenching African attitudes of resentment towards whites, and generating an enormous, poverty-stricken agricultural proletariat (Beinart, 1994:210). Assured of the paternal responsibility inherent in their capacity as South Africa's statesmen, however, the National Party continued to execute their brand of social engineering regardless (Barber, 1999:93).

In the lead up to the introduction of 'Grand Apartheid' in the 1960s, National Party policy and legislation became even more repressive. Although apartheid was only just becoming a focussed, hegemonic entity, foundational notions of white supremacy and 'divine right' were already well ensconced (Barber, 1999:140). Franchise was restricted so that white, and particularly Afrikaner, voters retained a monopoly over state power. Next, the National Party enfranchised German- and Afrikaans-speakers in the mandated territory of South West Africa, yielding the National Party six extra seats, ensuring a continued rural bias (likely with a certain amount of gerrymandering), and thereby assuring successive re-election (Ross, 2008:123). The National Party also began to exercise iron control over the supply of black labour, particularly in the mining and farming industries, and over domestic and factory work. Finally, urban and rural space was divided and apportioned by 'race', and its subsequent use and occupation was closely regulated (Ross, 2008:126).

Numerous measures were employed in order to consolidate and extend state control over physical space across South Africa. Racial zoning of residential and business areas was slowly, and then vastly, extended. The Group Areas Act of 1950 was frequently amended, so as to impose country-wide controls on interracial property transfers (O'Meara, 1996:69). This Act allowed the minister to reserve urban residential and business areas for specific racial groups, while obliging other racial groups to vacate such newly proclaimed 'group areas'. The 1951 Prevention of Illegal Squatting Act further empowered the state to resettle 'surplus peasants' (still living in so-called 'black spots') into African reserves, and in 1954 the Native Trust and Land Act of 1936 was further amended in order to limit the number of labour tenants allowed on white farms (O'Meara, 1996:69).

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In 1959, then Prime Minister Hendrik Verwoerd introduced the Promotion of Bantu Self-Government Bill, effectively rubber-stamping the political programme notoriously known as 'Grand Apartheid'. In keeping with Afrikaner nationalism's emphasis on the realisation of ethnic identity (*volkseie*), each African 'ethnic minority' was assigned to one of eight, and later ten, special reserves or 'Bantu Homelands' (more commonly known as bantustans) (O'Meara, 1996:73). Established on the territorial foundations and reserve boundaries imposed by the Land Act of 1913, the bantustans were intended to accommodate approximately 75 per cent of South Africa's population in roughly 13 per cent of its land area (Anon. 2012a). Verwoerd envisaged each bantustan working gradually towards limited self-government and eventual independence as distinct 'nation states'. This Act was seen as the final blow against African political rights in a national context (Egerö, 1991:15). Since the homelands were geographically and politically peripheral to the sources of wealth and power in the state, and as the land on which Africans were allowed permanent habitation was further reduced, the majority of South Africa's population were condemned to a life of poverty (Bennett, 1993:443; Egerö, 1991:5).

With the Promotion of Bantu Self-Government Act, the apartheid state had the political and jurisprudential power and position necessary to effectively regulate the domicile of non-white South Africans, the mobility of African labour, and the pace and thrust of African urbanisation (Hall, 2009:69). Millions of black Africans, coloureds and Indians continued to experience eviction from land zoned as 'white'. Many were ejected from city suburbs from where they travelled to their work in the cities. Some were relocated in new neighbourhoods on the urban periphery; the majority were unceremoniously dumped in remote and primitive 'resettlement areas' where they were expected to adapt or die (O'Meara, 1996:69). Under National Party policy, coloured[56] and Indian groups could not have traditional 'homelands' within South Africa. Considered incipient nations, they were accorded ineffectual parliamentary representation, but even this status did not safeguard their removal from the 'racially mixed' districts in which they lived or worked (Ross, 2008:147). Furthermore, many communities lost land in the name of conservation as large tracts of land were proclaimed 'protected areas' (Hall, 2010:18).

From 1960 to 1983, the apartheid government forcibly moved 3.5 million South Africans to bantustans (Anon., 2012c; Commission on the Restitution of Land Rights, n.d.-a:9). By 1981 four homelands (Transkei, Venda, Bophuthatswana, and Ciskei) were declared 'independent' by Pretoria, and eight million Africans lost their South African citizenship (Anon. 2012a).

[56] Some Khoekhoe and Nama groups were classified as 'coloured' and suffered forced removals and resettled in urban 'locations' or coloured 'reserves' (Erasmus, 2010:82).

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None of these homelands were recognized by any foreign nation-states which determinedly opposed the limiting of African political rights to the homelands.[57] In two of the most well-known instances of forced removal, residents from vibrant, multi-racial Sophiatown in Johannesburg (1955-63, and from District Six in Cape Town (beginning in 1968), watched as government bulldozers destroyed their homes and businesses after these area were declared 'white' by the state (Anon. 2012b). Between 1981 and 1986 a further 200,000 Africans were 'resettled' away from white areas (Barber, 1999:260).

By 1990 South Africa was starkly divided between black and white races; 87 per cent of the land area had been legally designated for exclusive white ownership (Hall, 2009:4). 70 per cent of this land was dominated by sixty-thousand commercial farmers, or those classified as 'white' and who made up only 5 per cent of the population (Hall, 2009:4, 2010:19; Wild Schut & Hulbert 1998:5 in Moyo, 2007:66). By resorting to shrewd legal and jurisprudential design, the state had managed to implement their uncompromising vision of racial segregation, a vision that resulted in the erosion of the rights of millions of non-white South Africans, detrimentally impairing their welfare for decades. Such elaborate and restrictive legislation and regulations were all attempts by the state to cope with the intractability of South African society to the state's immense regulatory ambitions (Chanock, 2001:522). Eventually, however, these harsh administrative regulations would succumb to the groundswell of African political insurrection and resistance and international pressure that brought about democratic transition in 1994.

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RESTITUTION

With the advent of South Africa's first democratic elections in 1994, the nation took bold steps towards redressing social imbalances resulting from past racial discrimination and legal and political oppression. As well as the vital symbolic and cathartic dimensions of the Truth and Reconciliation Commission, a broad reconciliation programme was instituted that included expanded broad social assistance schemes and grants such as, for example, the Further Education and Training Act, 1998 (which provides a basis for developing a nationally coordinated further education and training system, and comprises the senior secondary component of schooling and technical colleges), and the provision of shelter for poor South Africans by the Department of Housing (including the Housing Subsidy Scheme started in 1994; through this scheme the Department of Housing has managed to deliver

[57] In 1986, South African citizenship was restored to people born outside these four "independent" homelands; after 1994 the homelands were reabsorbed into South Africa (Anon., 2012b; Egerö, 1991:12).

about 1,800,000 subsidised houses between 1994 and 2005), the National Housing Finance Corporation, and the National Urban Reconstruction and Housing Agency (Mbuli, 2008:137, 141, 153, 156).

The Black Economic Empowerment (BEE) programme was also launched by the ANC-led government to redress the inequalities amongst previously disadvantaged groups in South Africa by offering these citizens economic privileges not previously available to them, including employment preference, skills development, ownership, management, and socioeconomic development, and preferential procurement. The programme's success continues to be debated (the most significant criticism centres upon the continued use of racialised categories to determine privilege) (Southall 2006).

Social transformation through the reformation of social power structures, in favour of landless groups was also considered one of the Constitution's primary aims (Mbazira, 2009:134; Roux, 2004:518). The provision of services had been so drastically skewed by the apartheid system that dramatic transformation (read 'deracialisation') of South Africa's "historically constructed white countryside" was necessary, and land appeared the most fundamental way of restoring a sense of balance (Mbazira, 2009:133; Walker, 2007:142). Furthermore, the ANC's 1955 Freedom Charter listed that 'land be given to all landless people' as one of its fundamental 'freedom demands' (Wikipedia.org n.d.).

By reversing racial inequalities in land resulting from colonial conquest and the violent dispossession of indigenous peoples of their property, it was anticipated that past racial injustices could be reconciled, and a fair basis for equitable development established (Hall, 2009:1; Ntsebeza, 2007:125). Tenure reform, land redistribution, and restitution, would share space in a wider programme of reconciliation that would correct years of entrenched poverty and economic inequality by delivering a sense of satisfactory justice. In the minds of the transitional negotiators the redistribution and restitution of land was the solution to South Africa's propitious future development.[58]

Consequently, in its election manifesto the ANC detailed its Reconstruction and Development Programme, which identified land reform as the driving force in South Africa's

[58] Interestingly, land restitution had actually begun just prior to 1994 under white rule. In the dying days of apartheid in a last-ditch effort to shore up their ebbing political power, the National Party had begun repealing racist land laws through the Abolition of Racially Based Land Measures Act, 1991 and created an Advisory Commission of Land Allocation (Hall, 2010:19). In their efforts to allay the fears of white South Africans, the National Party excluded private property from restitution (a condition common to national restitution programmes, including New Zealand, and severely curtails the remedial scope of – and governmental commitment to – such programmes) (Fay & James, 2010:54). As a result their approach was limited to the return of unimproved state land only. Since very few potential claims met this criterion, the reforms fell flat and were roundly rejected by the ANC, civil society organisations and would-be claimants (Hall, 2010:19).

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rural development initiative (ANC 1994 in Ntsebeza, 2003:68). The blueprint for the land reform programme was laid down in section 25 of the Constitution of the Republic of South Africa Act 108 of 1996 (as amended) (Department of Land Affairs, 2003:foreword). The subsequent enactment of the Restitution of Land Rights Act 22 of 1994 established the Commission on Restitution of Land Rights (CRLR) and the Land Claims Court (LCC) shortly thereafter.[59]

Under the ANC government, the Commission on Restitution of Land Rights (CRLR) was tasked with driving a new restitution process by assisting claimants, investigating the validity of their claims, and preparing them for settlement and/or adjudication (Hall, 2010:21). Those who had been forced off their lands or received too little recompense, could lodge a land claim with any of the provincial Land Claims Commissioner's offices across South Africa (Anderson, Dodd, & Roos, 2008:50). A year later the Land Claims Court was instituted as a specialist court to approve claims, grant restitution orders and adjudicate disputes on the basis of the investigations presented to it (Hall, 2010:21). The decision to separate the adjudicatory function from that of the Commission, was influenced by the experiences of land tribunals operating in other postcolonial or post-conflict countries like Canada, Australia and New Zealand (Hall, 2010:21).[60]

The period for lodging a claim was relatively short, a mere three years (especially when compared with New Zealand's Waitangi Tribunal for example, where the window for submitting historical claims was twenty-three years) in South Africa the deadline for submission was 31st of December 1998. The time frame for the entire restitution process was set at eighteen years: three for claim submission, five for the settlement of claims and a further ten years for the implementation of all court orders and settlement agreements (Department of Land Affairs, 1997:49).

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[59] In hindsight the Restitution Act may have been enacted too hastily since there have been numerous amendments to it, one each year from 1995-2000, and again in 2002 (Roux, 2004:516).

[60] Such procedural and jurisprudential distinctions can offer a more flexible approach appropriate to the cultural requirements of claimants; in New Zealand, for example, while the Waitangi Tribunal acts as a permanent commission of inquiry it differs from a court in several distinct respects. For instance, a court can make a ruling that binds the parties to whom they relate, whereas the Tribunal has authority to make recommendations only, and these do not have binding powers upon the Crown, claimants, or any other parties participating in its inquiries (Waitangi-tribunal.govt.nz n.d.). Also, the Tribunal's process is more inquisitorial and less adversarial than that followed by the courts, and its process is flexible – the Tribunal is explicitly authorised to follow '*te kawa o te marae*' (the customs or protocol of a *marae*), allowing it to sit all around New Zealand in different contexts and settings (Waitangi-tribunal.govt.nz n.d.).

THE RESTITUTION PROCESS – THE COMMISSION

For a claim to be considered for investigation by the state, an individual claimant or group of claimants had to demonstrate they had suffered dispossession of a right to land after 19 June 1913, as a result of past racially discriminatory laws or practices,[61] and had not been paid just or equitable compensation (The Department of Rural Development and Land Reform, n.d.:no page number). A claimant is defined as a person directly dispossessed of their land, or a direct descendant of such a person, and includes spouses, children or legally adopted children.

The provisions of the interim Constitution Act, 200 of 1993 indicated a preference for the resolution of land claims by way of amicable settlement between parties (Rural Development & Land Reform 2012b). It was intended that each party would enter willingly into negotiations and the Commission would assume the role of mediator, overseeing the claims negotiation and settlement. Such a sober, reasoned approach was always going to experience difficulties however, especially when dealing with emotive issues such as land and forced dispossession. Section 22 of the Restitution of Land Rights Act, 22 of 1994, therefore, made provision for the establishment of the Land Claims Court to manage disputes (Rural Development & Land Reform 2012b).

THE LAND CLAIMS COURT

The Land Claims Court was established in 1996, and declared that its intended role was to interpret and apply 'social legislation', and the primary objective was to transform social power structures in favour of landless groups (Roux, 2004:518). It specialised in dealing with the disputes that arose from South Africa's land reform initiatives.[62] For instance, if a claim before the Commission could not be settled through mediation and negotiation it would then be referred to the Land Claims Court.[63] This Court has the same status as a high court

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[61] Examples of these racially discriminatory laws include: The Black Land Act of 1913; Black Administration Act of 1927; Development Trust and Land Act of 1936; Asiatic Land Tenure Act of 1936; the Group Areas Acts of 1950, 1958, 1966, and 1968; Rural Coloured Areas Act of 1963 and the Expropriation Act, no. 63 or 1975 (Commission on the Restitution of Land Rights, 1999:1).

Labour tenants had until 2011 to lodge claims for land they had lived on or used. If their claim succeeded, the tenant would become the owner of the land and the farmer compensated for the expropriation. Labour tenants who did not lodge claims retained protection from eviction, as did squatters.

[62] The laws that underpin these initiatives are the Restitution of Land Rights Act of 1994, the Land Reform (Labour Tenants) Act of 1996, and the Extension of Security of Tenure Act or 1997.

[63] Direct access to the Land Claims Court is also possible in terms of section 38B(1) of the Restitution Act. If claimants elect this approach it is not necessary for them to lodge a claim with the Commission (Mostert, 2010:63).

but acts in a specialist capacity with an independent adjudicatory function with regard to legal disputes arising from the land reform programme (Commission on the Restitution of Land Rights n.d.; Rural Development & Land Reform 2012b).

In its first years of operation, however, the Land Claims Court handed down several decisions that were considered 'anti-poor', such as the *Macleantown* judgement.[64] As a consequence, section 42D was inserted into the Restitution Act to give the Minister of Land Affairs the power to endorse settlement agreements in consultation with the Commission, essentially legislating the Land Claims Court's role out of the restitution process (Roux, 2004:521). The Land Claims Court, then, hands down very few decisions under the Restitution Act; the overwhelming majority of restitution claims are settled in terms of the powers conferred on the Minister of Land Affairs under section 42D of the Restitution Act (as amended in 1999) (Roux, 2004:516). Any appeal against a decision by the Land Claims Court is referred to the Supreme Court of Appeal, and if appropriate, the Constitutional Court.[65]

Consequently, South Africa's entire restitution programme has moved away from a court-driven process to a more administrative approach. Reframed as a 'fast-track procedure', this process – and a concomitant expansion of the Commission's power and authority – meant claims reached finality more swiftly and efficiently (the Commission's website boasts a "phenomenal and exponential increase in the number of claims settled" following these changes (Commission on the Restitution of Land Rights, n.d.-a:11)).

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COMPENSATION

In South Africa, the remedies made as part of the land reform program centre upon the return of land to claimants, or compensation in lieu (although a 1996 Land and Agriculture Policy Centre Survey found that preference for land was strong amongst claimants, 67% of respondents said they wanted land they could live on and use for production) (Hall, 2009:69-70). Compensation for suffering and loss of opportunity was considered by the transitional negotiators, but perhaps given the complexities of determining and quantifying such loss, restitution was limited to those who had been dispossessed of land.

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[64] Please see Theunis Roux's excellent article 'Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court' in *South African Journal on Human Rights*, (2004) 20: 511-543.

[65] The remainder of the Land Claims Court's workload comprises cases under the Extension of Security of Tenure Act 62 of 1997 and mainly involve urgent applications for eviction and applications to enforce occupiers' or owners' use rights (Roux, 2004:517).

The land redistribution programme focuses on returning land taken from claimants. If the original property cannot be returned, alternate remedy is offered in the form of other available land, financial compensation, government assistance with development and housing projects for a community (either on the land claimed or other available land), alternative relief as the Commission or Minister sees fit, or an amalgam of any of these options (Anderson et al., 2008:50). Preference is always given to the restoration of the original land, but in reality most customary land has undergone significant change to its title and use since the original owners were dispossessed or evicted.

Land restitution centred largely on financial compensation by the government through a provision known as the Standard Settlement Offer. This offer consisted of a 'standardised' amount[66] offered by the Minister of Rural Development and Land Reform, to all claimants who had no desire to pursue land redistribution and sought the full and final settlement of their claims. The Offer was very popular, especially among elderly claimants, who often described having little energy or time to wait for the conclusion of their claims, and among urban and peri-urban claimants who had less desire or need for the return of rural property. The Standard Settlement Offer, then, has enabled the rapid conclusion of a vast majority of claims in the period between 2000 and 2006 (more detailed statistics are included in the next chapter). However, little attention has been given to how this compensation was consumed, or the degree to which cash compensation has affected a sense of redress amongst claimants. Derided as 'chequebook restitution', the offer has been criticised as a superficial quick-fix solution to deep, intractable grievance; considering the transformative objectives of the land reform project, such meagre compensation seems antithetical to its ambitions (Hall, 2009:5, 2011:33). The 'success' of South Africa's land reform programme will be examined further in chapter four.

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CONCLUSION

New Zealand and South Africa, then, both experienced substantive periods of social unrest and political insurrection and resistance during the second-half of the twentieth century amongst those citizens who suffered political marginalisation and/or oppression. Following the anticolonial movements of the 1950s and 1960s, an intensification of the protests by ethnic and indigenous minorities (who, with the help of international human rights discourse, have striven to engage in extensive multilateral dialogue with states, nongovernmental

[66] Offers range between R40,000 and R50,000 in urban areas, but are based on the actual value of the land dispossessed in rural areas.

organisations, and independent experts (Anaya, 2000:56)), and with the support of the international community (particularly in South Africa[67]), Māori in New Zealand and the non-white majority in South Africa, were able to bring significant pressure to bear on their governments to facilitate change. In New Zealand pressure from the burgeoning 'Māori Renaissance' compelled the government to institute a special commission of inquiry premised on the country's foundational legal compact, the Treaty of Waitangi, to investigate Māori grievance, first contemporaneously, then historically. After nearly four decades of operation, the Waitangi Tribunal has become sophisticated and efficient in its processes and methods. The Office of Treaty Settlements, too, follows a streamlined model for negotiation and aims to deliver claimants with comprehensive and satisfactory settlement packages.

In South Africa, the atrocities and pervasive discriminations to which the non-white majority were subjected, resulted in the institution of a commission to hear claimants' stories of suffering, and a separate commission for the restitution of land. The considerable numbers of claimants in South Africa (in comparison to New Zealand) and the content of their grievances, meant that discrete reconciliation and restitution strategies were conceived by the ANC-led government as more practicable in terms of time and expense. Although the Commission on Restitution of Land Rights claims has made considerable progress in resolving claims in the nearly two decades since South Africa's political transition, the social transformation anticipated to flow from restitution and land redistribution has been, to date, slow, haphazard and uneven, a disappointment for impoverished South Africans for whom land is a vital instrument in their economic and cultural survival (Fairweather, 2006:3).

The ambitions of each country, then, are quite distinct when it comes to historical restitution. The New Zealand Crown, for example, places great emphasis on the full and final settlement of Māori claims, conflating remedy with resolution and closure. By contrast, in South Africa land reform and restitution are conceived as part of a wider programme of social transformation and poverty relief; returning property to the landless is seen as the most straightforward way of correcting decades of entrenched racial discrimination. In South Africa, therefore, remedy is equated with restoration and development. While each government's aspirations may seem relatively straightforward, benevolent even, I will argue in the chapters to come that their motivations for instituting domestic historical restitution programmes can be construed as the broad desire of liberal governments to regulate and discipline cultural and political difference (whereby indigenous groups and political

[67] In 1966, the General Assembly labelled apartheid as a crime against humanity (resolution 2202 A (XXI) of 16 December 1966) and in 1984 the Security Council endorsed this determination (resolution 556 (1984) of 23 October 1984).

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subalterns are obliged to participate in the liberal fiction of a politically homogenous independent nation-state). In the next chapter I shall explore the current formulation of distributive justice, reflect upon the notion of grievance amongst Māori claimants, and then evaluate the relative success of New Zealand's historical restitution programme.

chapter four

DISTRIBUTIVE JUSTICE AND GRIEVANCE

HOW MĀORI CLAIMANTS IMAGINE AND DESCRIBE GRIEVANCE AND REDRESS

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Having reviewed the historical and jurisprudential events that contributed to the institution of historical restitution programmes in New Zealand and South Africa, it is now time to explore the philosophical underpinnings of the restitution metric. I shall argue that the resolution of historical grievance tends to be popularly framed and enacted in the language and proceduralism of justice – reasoning, I contend, that has arisen in response to a pervasion of the distributive justice philosophy, or, to be more precise, its current formulation, which has come increasingly to inform the rhetoric and ideology of liberal jurisprudence since the 1970s. I will begin this chapter by briefly charting the evolution of the distributive justice philosophy in order to explain the ideological underpinnings of the restitution-as-justice reasoning, before moving on to consider how efficacious Māori claimants feel the New Zealand Treaty settlement process has been. I shall then describe Crown and claimant definitions of grievance in light of the current distributive justice formulation, and evaluate what Māori claimants demand, desire, or are seeking to achieve in terms of restitution.

JUSTICE: DISTRIBUTIVE OR CORRECTIVE?

The scholarly time and energy that has been expended thinking about justice is considerable; even a brief survey of the literature involved will confirm the diverse conceptions and interpretations involved in its theorising. A concise definition of justice remains surprisingly

elusive, even after several centuries of incisive thinking by some of history's most progressive philosophers. Consequently, in an attempt to break justice into units more suitable for analysis, scholars have sought to bisect justice in varying ways, for example, substantial and procedural justice, active and passive, conservative and reformative, universal and particular. Most commonly, however, justice is conceptualised as distributive or corrective (also known as commutative). The line between the two is nuanced; for instance, distributive and corrective justice can both be identified in programmes of historical restitution.

Unquestionably, the idea of restitution has strong roots in the corrective justice philosophy, particularly in the private law tradition, where courts strive to compensate victims for the harms brought upon them as a result of violation (Mbazira, 2009:104). The philosophy of corrective justice is guided by the vision of libertarianism (Mbazira, 2009:105) and emphasises the rights of private property owners, and rejects the welfare state in favour of a non-interventionist approach by the state. In this context, litigation functions primarily as a vehicle to restore the autonomy of those whose rights have been interfered with. In corrective justice settings, then, the discretionary ambit of a judge is very limited; any remedies must conform to strict principles of liability and causation.

By contrast, distributive justice acknowledges that it is not always possible to restore victims to a position they may have held had they not experienced the initial violation of their rights and/or property, or to identify discrete wrongs, or even a specific wrongdoer with precision (particularly in cases of historical injury) (Mbazira, 2009:113). The distributive justice approach, in the last two centuries particularly, also recognises that free-market mechanisms[68] cannot always facilitate the remedy required to undo decades, even centuries of sustained discrimination and injury, and that large-scale intervention by the state may be necessary to restore victims with their property, wealth or dignity (Bennett, 1993:443). This research, then, focuses upon distributive justice in the context of historical restitution.

While the corrective/distributive distinction extends back as far as Aristotle, contemporary thinking about what constitutes distributive justice is an almost complete inverse of his approach. The idea that justice has a bearing on the distribution of goods is not new – Justinian famously opens his *Digest* with that (now weary) maxim, *suum cuique tribuere*/'to give each his due' – but it is only in the last half-century that the distribution of basic resources by the state amongst its citizens, has been understood in popular discourse as a matter of justice (Fleischacker, 2004:6). This process of moral transformation, however, has not occurred in

[68] Please refer to discussions by Adam Smith, Milton Friedman and Kaushik Basu regarding the 'invisible hand' of Capitalism and the idea that the market has the power to distribute products beneficially and in an egalitarian manner between individuals and communities.

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intellectual isolation. In fact, distributive justice is only one of the 'great integrative, totalizing concepts' (Geertz, 2004:578) that has experienced significant philosophical reconfiguration, following the intellectual, ideological and political tumult of the previous six centuries. This pattern of relentless change, then, is at once responsible for, *and* a direct result of, the way people frame and imagine their world.

Historical restitution represents one such way of imagining – particularly of the past and the behaviour of those who lived through it, and how the choices they made impact those alive today – and has arisen as a direct result of the ways people (scholars, jurists, human rights experts, and philosophers, particularly from 'the West') contemporarily conceive and understand distributive justice. The rise of reparations movement around the world, whether it be for historical injustices perpetrated during the trans-Atlantic slave trade (Biondi 2003), the Imperial Age, or World War II[69], for example, or for the return and repatriation of cultural and symbolic objects to their countries of origin[70], shows that the growing proliferation of historical restitution initiatives is not a random phenomenon, and reflects a

[69] In Germany, for instance, the government and private corporations have paid $65.2 billion to survivors of the death camps and forced labourers of the Holocaust. They also paid reparations to the state of Israel, and redress for injuries that echoed the treatment of African Americans in the United States, although the American government has never authorised an examination of their participation in the enslavement of Africans, and the subsequent segregation and labour exploitation of their descendants (Biondi, 2003:9).

[70] Debate over the repatriation of cultural property is complex and fraught, and centres upon broader questions of ownership and possession, economic worth, political value, and cultural nationalism. For instance, for three decades heated debate has surrounded the return of the Elgin Marbles to the Acropolis Museum, a collection of classical Greek marble sculptures (mostly by master sculptor Phidias and his assistants), inscriptions and architectural members that originally were part of the Parthenon and other buildings on the Acropolis in Athens, Greece. Thomas Bruce, 7th Earl of Elgin and British Ambassador to the Sublime Porte of the Ottoman Empire removed (or stole, according to some accounts) many of the surviving sculptures on the Parthenon before shipping them to England where he sold them to the British Museum in 1816 (and where they are still displayed).

In 1983, the Greek Government, represented by Melina Mercouri, a famous Greek actress and the then Greek Minister of Culture, requested that the Elgin Marbles – the name itself reflects the marbles' appropriation, implying the marbles were Elgin's to sell in the first place (Jenner 2012) – be returned to Greece, an appeal which the British Government refused (Merryman, 2009:24).

Cultural repatriation is also not limited to Europe. In South Africa, for example, at the turn of the new millennium the South African government negotiated with French authorities for the return of Saartjie Baartman's remains, a Khoikhoi woman who had travelled to Europe in the early nineteenth century where she was exhibited and examined as a sexual curiosity (Saartjie Baartman Centre for Women and Children n.d.). And, in the last decade the New Zealand national museum Te Papa Tongarewa has negotiated with museums in Britain and France for the return of the mummified remains of deceased Māori originally collected in the nineteenth century. And, in America the Native American Graves Protection and Repatriation Act (NAGPRA) of 1991 stipulates that American museums are required to publish inventories of the American Indian and Native Hawaiian human remains, funerary objects, sacred objects and objects of cultural patrimony that they hold, and, on request, return them to their cultures of origin (Merryman, 2009:71).

While these examples reflect the acquisitive logic of European imperialists in the 'age of empire' – and the anthropological 'science' and the sociology of knowledge upon which such logic was founded – which sought to value and reify cultural 'otherness', they also demonstrate the contemporary emergence of what the Comaroffs call 'identity economies' whereby subalterns (particularly indigenous minorities) are forcing established orders of power to re-evaluate what counts as property, and the context in which cultural nationalism has the power to represent or alienate such property (Comaroff & Comaroff, 2009:24, 30).

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growing change in popular thinking about notions of ownership, proprietorship and worth. I contend that this change is partly driven by (and drives) changes in philosophical, jurisprudential and scholarly patterns of thought, such as, for example, the most recent formulation of distributive justice which affords an intellectual space whereby long entrenched conceptions of history, culpability and obligation can be debated and reconstituted.

For example, although small-scale restitution initiatives were conducted in New Zealand during the first half of the twentieth century, the extensive, expensive institution of a permanent commission of inquiry (the Waitangi Tribunal), and an agency (the Office of Treaty Settlements), wholly dedicated to the distribution of millions of dollars worth of commercial and financial assets to Māori that is presently in operation, would have been fiscally, philosophically and jurisprudentially inconceivable one hundred, or even fifty years ago. Distributive justice in its contemporary formulation, then – a way of thinking about justice that has only achieved popular currency in the last half-century (Fleischacker 2004) – affords people the intellectual and ideological space to reconsider how they think about the Crown and its obligations to them as citizens, to reflect on their identities as subalterns, claimants, or defendants, and to leverage tangible value in the form of financial and commercial assets from the state. It reflects, therefore, the latest shift in the way many New Zealanders think about themselves, their history and their relationship with the state, and the narratives they weave within and around it all.

This chapter will examine distributive justice as it is presently formulated philosophically, and will then describe the ways Māori claimants describe and imagine justice, grievance, and remedy as a consequence. I shall briefly trace the most significant moments in the philosophical evolution of the distributive justice episteme, through the work of several important thinkers like Rousseau and Kant, who lived and worked throughout some of the most momentous political and moral upheavals of the last six centuries. During these times debates about the significance and role of justice often played crucial roles in the popular, progressive, even subversive attitudes that accompanied the political, social, economic and jurisprudential milieu. By detailing the evolution of distributive justice philosophy I wish to demonstrate why the emergence of historical restitution initiatives in their present configuration has only been possible in the last half century. I shall then describe Crown and claimant definitions of grievance in light of the current distributive justice formulation, before examining the ways the Māori claimants with whom I spoke and observed, described and reflected upon their engagement in the Treaty settlement process. I also discuss the role of New Zealand's Post-Settlement Governance Entities in the Treaty restitution process in

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order to evaluate the notion of 'adequate' redress, and then contrast New Zealand's experience with the relative "success"/"failure" of the South African land restitution programme.

A BRIEF HISTORY OF DISTRIBUTIVE JUSTICE

It was Aristotle who first described distributive justice in *Nicomachean Ethics and Politics* over two millennia ago. For Aristotle, the notion of distributive justice arose from a broader distinction between "universal" and "particular" justice; the former encompassed all 'virtues' and the latter referred specifically to political constitutions and judicial decisions (Barnes 1984). He surmised that distributive and corrective justice were separated specifically by political merit, a virtue implicitly connected in Aristotle's mind with government allotment of honour, political office, money, the ability to vote and hold office, etc. He never wrote about – nor even perhaps considered – the possibility that the state should be required, by a sense of justice, to organise a fundamental distribution of material possessions amongst its citizens (Fleischacker, 2004:20). There is no place in Aristotle's conceptual framework that entitlement should be predicated on need, only that some people *deserved* to receive things more than others.

Building on Aristotle's ideas, a battery of prominent thinkers like Cicero, Thomas Aquinas, Hugo Grotius and Samuel Pufendorf, took up the former's philosophical reigns and augmented his approach with their own perspectives. On the whole, however, their ideas remained premodern in the sense that political philosophy had not yet undergone the major paradigmatic changes in moral and political ideology that produced the contemporary formulation of distributive justice.

Prior to the tumult of the French Revolution (1789-1799), the thinking of a handful of prominent philosophers such as Rousseau, Smith and Kant worked to conceive justice and distribution in terms of mercy. Until then relief for the poor had remained firmly in the hands of the church, which meted out charity conditionally (relief included generous servings of Christian instruction). Their attitude was framed in terms of a divinely ordained social hierarchy: the poor were seen as idle, and thereby unworthy of the wealth of the privileged classes. Relieving the suffering of the poor, therefore, was considered the obligation of meritorious and wealthy individuals. From the mid-sixteenth century, however, poor relief became more and more the responsibility of the state as increasingly powerful monarchs challenged and wrested political power and control from religious institutions. In the Netherlands, for example, Charles V attempted to regularise relief for the poor in 1531,

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Hamburg mandated aid to the disabled in 1529, and Sweden set up a system of poor relief in 1571 (Fowle, 1980:23). In England it was no coincidence that the 'Poor Law' of 1601[71] was instituted at the height of the struggles surrounding the Reformation.

At this time, European attitudes towards the place of the poor represented only one facet of a wider revolution in popular thinking about long-established concepts, especially those that frame the moral and political relationship between the state and its citizens. As mercantilism flourished and populations swelled, territories underwent consolidation by increasingly powerful governments; small absolutist monarchies gave way to larger, more complex political configurations, and ideas about the character and role of the state became increasingly elaborate. During the Protestant and Counter Reformations especially, previously undisputed concepts of civic obedience to divine and religious authority, were undermined by the writings of Enlightenment intellectuals (see Maltern, 1928). Energised by new ways of thinking about property following the 'discovery' of the New World, these philosophers were especially eager to dissect the role of the state, notions of legitimacy, fair acquisition, and the nature of humanity itself.

To test the feasibility of their ideas, many of the Enlightenment philosophers resorted to a popular 'thought experiment' that entailed imagining a fictitious, miserable, pre-state condition called the 'state of nature', in which humankind existed without the presence of law or government. The 'state of nature' experiment contends that in this pre-civic environment individuals are entirely free to do as they wish; they are governed by self-interest alone and remain free to indulge any whim without consequence. Violence, warfare and theft, therefore, are common in this pre-civic realm. When individuals voluntarily elect to enter into a collective 'social contract' they freely give their obedience to a more powerful authority. By agreeing to observe the rules of a binding normative system, individuals choose to sacrifice some freedoms in return for the protection of their remaining liberties (Montada, 2001:8041). The notion of collective consent, therefore, is crucial to this hypothetical experiment: without consent no government could lawfully exist or hold power over a collective, or a state be considered legitimate.

Of course, 'state of nature' and 'social contract' hypotheses are only analogous of a fictionalised historical past, not genuine attempts to reconstruct a viable prehistory (although, arguably they may certainly have started out that way) (Raphael, 2001:196). Akin to Utopias and Golden Age Mythologies, the social contract is a popular way to think about the

[71] The Poor Relief Act 1601 formalised earlier practices of relief to the poor in England and Wales; however, its administrative unit was the parish rather than centralised government policy (for further discussion please refer to Walter Trattner (1994) *From poor Law to Welfare State*. New York: Free Press).

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obligations of the state to its citizens, and particularly its rationale for distributing benefits and burdens. Philosophers like Hooker, Hobbes, Locke, Rousseau, Smith and Kant worked with their own particular versions of the social contract hypothesis; some pursued arguments for popular sovereignty, others, specifically the latter three, sought to reconfigure thinking regarding poverty and the obligation of the state, and thereby facilitate distribution on an egalitarian basis.[72]

Rousseau, for example, was convinced that humankind, not God or nature, was to blame for its own suffering, and that people had the power to resolve instances of social anguish through their own actions (Rousseau 1964). In an attempt to demonstrate how society brought about its own ills, Rousseau employed a 'state of nature' model, and inverted it to contrast the corruption of his social reality with a paradisiacal idyll. Essentially, Rousseau was the first philosopher to champion the essential agency of humankind over its environment; in so doing, he endorsed the power of *all* peoples, not just the privileged minority. Rousseau argued that this model of social equality was tied implicitly to an individual's status as a citizen, and therefore, any distribution of goods by the state should be predicated upon an individual's citizen status.

Writing at roughly the same time, Adam Smith was concerned primarily by the vast gap between the poor and the wealthy. He and his colleague David Hume, were unrelenting in their denigration of private property as a mechanism for sustaining systems of privilege and exacerbating the suffering of the poor. At the time Smith was writing, most Christians believed the existing social hierarchy was divinely ordained, that God had elected to confer positions of wealth and power upon virtuous people, while the inferior and indolent deserved their impoverished, lowly status. Smith's repudiation of these long-entrenched attitudes was controversial, but also influential. Today, scholars consider Smith's 'humanitarian narrative' responsible for almost single-handedly changing the attitudes that underwrote the restrictive, disdainful policies by which the poor were kept poor (Fleischacker, 2004:67). Furthermore, his writings are said to be largely responsible for sparking a shift in the moral imagination of Europe, which led to the modern conception of distribution predicated on need, not desert (Himmelfarb, 1984).

Next, Kant augmented this progressive attitude towards social equality; like Rousseau he resorted to a social contract model to help elucidate his ideas. Kant hypothesised that each individual had an inherent potential that might flourish with adequate support from the state. For Kant, the state was primarily responsible and morally obligated for ensuring that the

[72] Their thinking also contributed to the development of early social-evolutionary ideas amongst late-nineteenth century ethnologists like Lewis Henry Morgan and the social Darwinists Sir Henry Maine and Herbert Spencer.

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political and educational facilities and conditions necessary for its citizens' social fulfilment were provided. To his thinking, then, the state is obligated to provide facilities for its citizens also on the basis of equality and need.

This philosophical momentum found culmination toward the end of the French Revolution, when political agitator and journalist François-Noël ("Gracchus") Babeuf – on trial for his life in 1797 following an abortive coup attempt a year earlier – stridently proclaimed that every individual had a "perfect, strict, enforceable right" to an equal share in all wealth (Fleischacker 2004, 76). Babeuf argued that poverty was an affront and an injury to humanity, and it was the state's irrefutable responsibility to ensure its alleviation. By politicising distribution, Babeuf finally invalidated the idea that poverty was part of a divine order, that certain kinds of people *ought* to live in need and would not work otherwise. In affirming the social and political value of relieving the poor's suffering, Babeuf finally consolidated the notion of justice with fair distribution (Fleischacker, 2004:79).

From this point on, thinking about distributive justice splintered in a variety of divergent directions that do not require description here. Karl Marx, for example, perhaps the most influential figure ever to decry the distinction between rich and poor, and question the distribution of wealth between them, did not in fact couch his critique of capitalism in terms of justice, or distributive justice for that matter. Positivism, too, the major nineteenth century philosophy that championed science and empiricism, and strongly favoured the redistribution of wealth by the state, cast great suspicion on moral talk of all sorts, deriding modes of thinking like morality, ethics, religion and justice as irrational and empty. It is of more use, therefore, to move on to the twentieth century, where the modern notion of distributive justice received its most concise formulation to date.

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THE MODERN FORMULATION OF DISTRIBUTIVE JUSTICE

In his monumental treatise *A Theory of Justice* (1971), author John Rawls worked to develop a comprehensive, rigorous theory of justice, a hugely ambitious task – the very size of the book attests to the magnitude of this undertaking. Picking up where Babeuf left off and borrowing heavily from Kant, Rawls' formulation of distributive justice has become a keystone in twentieth century discourses of political philosophy, law and jurisprudence. He later revised *A Theory* in 1999 before writing *Justice as Fairness: a Restatement* in 2001 shortly before his death.

When Rawls began writing *A Theory*, his ideas were stimulated by the impressive corpus of legal and political philosophy that had amassed in the two millennia previously, and also by the volatile political struggles for independence that were occurring amongst Europe's colonies at the time. With the close of the imperial age and the onset of the First World War, the normative order of European statehood was upended as colonial polities pursued political liberation and self-determination. The violent popular dissension, institutional breakdowns and bloodshed that accompanied the formation of many postcolonial states in Africa, the Middle East, Asia and Latin America, did not deliver the compact, comprehensive political identities and hypostatised peoples that characterised Europe's nation-states (Geertz, 2004:578). These freshly forming states were less flawed imitations of mature Western states, than sprawling new systems of order and domination in a volatile process of reconfiguration (Hansen & Stepputat, 2001:5, 6). Consequently, these messy cultural and political aggregations lurched more often toward chaos than conciliation and accord, and frequently brought entrenched conceptions of the relationship between citizens and their state into question.

Rawls, then, sought to formulate an approach to distributive justice that reflected popular desires for equality and egalitarian distribution. He began by roundly rejecting Aristotle's conception of distributive justice: that merit should be rewarded. An individual, Rawls argued, should be rewarded only for what justice determines they should have, not simply because they deserve to be rewarded (Brighouse, 2004:33). He refutes the notion that environment (geography, climate, economy, political and civil liberties, for instance), biology or talent should have any bearing on the distribution of goods. Why, Rawls asks, should an individual be burdened or rewarded for their socio-economic circumstances or the way they were born? Should an individual with excellent eyesight be rewarded because they can see further and more clearly than their neighbour, for example? Rawls says no. If distribution is to be considered fair, Rawls declares, it must be delivered in a way that all individuals feel is fair and equal.

Rawls strove to establish what he felt represented a more objective, equitable premise for fair distribution. Like the Enlightenment intellectuals before him, he too resorted to a 'thought experiment' to test his ideas. In an effort to discover how groups of individuals come to share a conception of justice, he constructed a hypothetical model where individuals exist in an 'original position'. Akin to the 'state of nature' model, the original position represents a space where individuals live unfettered by their social, cultural, economic and political context, free from the knowledge of each other's distinguishing characteristics (creeds, values, tastes, desires, endowments, history, etc). In such a state, he argued, individuals

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would be free to collectively decide what would be the best 'public criterion of justice', or in other words, what rules and institutions they would establish to ensure fair distribution (Pogge, 2001:8056).

Significantly, Rawls posits that in the original position, individuals would always elect a criterion of justice that optimised the place of those citizens in the worst social position – metaphorically, a higher floor for all, even if it leads to a much lower ceiling (Pogge, 2001:8056). For Rawls, then, distributive justice should fundamentally affirm society's overwhelming concern to protect the interests of each individual citizen if it is to be considered fair. In Rawls' model, then, justice *is* fairness because the precept of need is considered the primary attribute for distribution; moral worth and merit are abandoned in an almost exact reversal of Aristotelian distributive justice (Fleischacker:112, 2004; Rawls, 1971:312). This model of justice, therefore, places an *obligation* on the state to take proactive measures, to ensure its citizens receive a fair distribution of collective wealth in order to facilitate social and political equilibrium.

This formulation of distributive justice, where all citizens are entitled to equal distribution of wealth because it is fair, and thereby just, has made available new ways to think about history. In the context of historical restitution, the events of the past can be reconfigured with the tense of 'justice' and 'injustice', a process that enables claimants to pursue resolution for 'wrongs' that occurred, sometimes several generations past. In New Zealand a perceived prior injustice or historical injury is commonly described by Māori claimants and the Crown as a 'grievance', a term that has wider currency in New Zealand's professional and legal sectors, but a particular valence in the Treaty restitution process. The holding of a grievance implies there is a disputant and a defendant, a binary that reinforces the anthropomorphic role of the Crown (as partner to the Treaty of Waitangi the Crown is conceivably a legal 'person'), as moral arbiter of justice, and thereby capable of assuming liability for past injustice. The contemporary formulation of distributive justice, therefore, enables those citizens who so wish, to reconfigure historical events in the terms of dispute and resolution. Others, like many Pākehā for example, prefer to frame their history in alternate ways, as we shall see in the next chapter, and reconstitute their feelings of victimhood and discrimination in litigious ways.

The following chapters more fully explore notions of resistance and identity, as part of a broader configuration of liberalism. It is important, however, to foreground this research analysis with a discussion of the ways grievance is framed by claimants and the Crown, in the New Zealand Treaty settlement process. From there I shall move on to explore the social

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imaginaries and formulations that unfold from the notion of dispute, particularly the desires of Māori claimants and their response to the redress they receive from the Crown.

WHAT IS A GRIEVANCE?

In New Zealand, the Crown carefully constrains the parameters of what constitutes a Treaty grievance, by controlling the legislative and jurisprudential scaffolding that frames the restitution process. Before a claim can be formally registered with the Waitangi Tribunal, for example, statute stipulates that the claim must be 'well-founded' (it may not be trivial, vexatious, frivolous, or made in bad faith). This means that claimants must only describe their grievances in ways that explicitly chronicle Crown actions or behaviour that has been inconsistent with the principles of the Treaty of Waitangi, and resulted in prejudice to the claimants. The Crown also stipulates what claims may *not* include, such as issues that have already been settled through legislation pertaining to other claims. The Crown specifies the date from when historical grievances will be considered. Although the Waitangi Tribunal was initially mandated to investigate contemporary claims only, continued political agitation by Māori in the 1980s compelled the Crown to expand the Tribunal's investigative powers back to 1840, the year the Treaty of Waitangi was signed.[73]

In contrast, the South African Natives' Land Act of 1913 was adopted as the cut-off point for historical claims there.[74] Autochthonous grievance regarding dispossession by Europeans could easily extend back as far as April 1652 when the Dutch East India Company landed at the Cape of Good Hope, however, since then two significant waves of colonial conquest – one by the Dutch, the other by the British – a combination of wars, and the imposition and collection of hut and poll taxes to stimulate cheap labour for mining industries and farms, have contributed to extensive dispossession of African land and the destruction of their means of production (Tong, 2007:19).

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[73] For many decades in New Zealand there was a popular notion that a group of racially distinct people called the Moriori had inhabited the New Zealand islands prior to Māori (and suffered genocide at the hands of the latter). This fiction, propagated by early amateur ethnologists like Percy Smith and Elsdon Best, has since been discredited by contemporary historians, anthropologists and archaeologists who understand the Moriori to be Māori who settled on the Chatham Islands in the sixteenth century. However, the notion that Māori are simply immigrants (and not autochthons) as evinced by the presence of the Moriori, is an argument sometimes made by Pākehā eager to disqualify Māori from historical restitution. Under the Treaty of Waitangi Act, 1975, however, as partners to the Treaty of Waitangi 1840, Māori are eligible to pursue grievances in relation to acts or omissions by the Crown. Interestingly, given that the Moriori are now considered to have been Māori, their descendants are now eligible to register claims with the Waitangi Tribunal for past grievances.

[74] Although, as noted in the introduction, this cut-off date is presently under review. Please refer to footnote 11.

By establishing a 'cut-off' date for historical claims, however, the South African government has sought to constrain a possible onslaught of conflicting, entangled restitution claims. For example, given the Khoikhoi and San peoples' occupation of much of southern Africa for millennia prior to the arrival of Bantu-speaking Africans, how would the state accommodate their autochthonous status within the volley of contemporary restitution claims by the Black African majority (the precise question generated by the ANC-led government's 2013 proposal to extend the land redistribution and restitution process past the 1913 cut-off date for Khoi and San peoples – please refer to the note in the introductory chapter)? Furthermore, in administrative terms investigating land dispossessions that occurred from the mid-seventeenth century would be an evidential nightmare. The long duration of dispossession would present problems with regard to intergenerational claims, and this would be further compounded by multiple property transactions that have occurred since the original dispossession (Hall, 2011:26).

The notion of historical grievances that extend indefinably into the past, then, is daunting; for example, as a senior colleague at the Waitangi Tribunal once noted during an informal discussion about radical Māori calls for the return of all Pākehā to Europe:

> "If all Europeans must return to where they came from that means that all colonisers would have to return to their places of origin. South Americans would have to return to Spain, Arabs would have to return from everywhere, the Dutch back to Holland, Americans back to Europe. And if one takes 'colonising' back even further than the 'discovery' of America, then Polynesians would have to go back to Europe, Native Americans back to Russia and everyone back to Africa. It's totally unfeasible."

The Crown, therefore, has worked assiduously to regulate and constrain the technical parameters of the historical restitution process in New Zealand in ways that make it affordable and manageable, and gives it ultimate control over the process as a whole (Fay & James, 2011:45). What, then, constitutes grievance for Maori?

The loss of land forms the crux of Māori historical grievance, and remains a vital feature of contemporary claims. The way Māori imagine their world and themselves in it, is fundamentally predicated upon their relationship with the land. In fact, while their Polynesian origins play a prevalent role in their cosmological worldview, the verdant forests and rumpled topography of New Zealand steadfastly remains the vital, tangible and symbolic locus of Māori belonging and identity (Greenland 1991). These lands have provided sustenance and resources, places for homes, locations for battle and spaces for burial. For example, during an interview with a female claimant on the grounds of her *marae*, we stood

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on a dramatic ridge looking over her *hapū's* lands spread out before us. She explained the meaning of her *hapū's* geographic place name:

> "Do you know what our name *Piririākau* means? *Piri* means to hold to something, to hold tight. *Rākau* can be, literally, a tree, so it's really based on the idea of clinging to the trees, but when you talk about those trees, they're on the *whenua*, on the land. It's about holding fast to the land. [...] The *rākau* goes down into the *whenua* and from there it gets its sustenance. And that's like us with our *tūpuna* (ancestors, grandparents), all our history is connected through the *whenua*, our roots feed on all this history and grow strong in terms of nourishment."

For Māori, their indissoluble relationship with the land is also expressed in the way they often describe themselves, as *tangata whenua.* Literally translated *tangata whenua* means 'people of the land', but it simultaneously implies a deep, irrevocable, spiritual and cosmological connection between the two. Furthermore, it implies a distinct relationship akin to custodianship of *Papatuanuku* (Earth Mother) and her natural resources (Greenland, 1991:94). Amongst Māori claimants, then, the loss of land represents physical loss and injury (Kukutai, 2003:20).

To qualify for registration with the Waitangi Tribunal, however, Māori grievances must be framed in terms of Crown actions that were inconsistent with the Treaty. Consequently, claims tend to arise from pre-1840 and pre-emption waiver purchases by the Crown, inaccurate government surveying, excessive force by the Crown (that sparked the armed conflict between competing Māori groups and the Crown in the 1860s and which culminated in the New Zealand Land Wars (1845-1872)), and *raupatu* (the confiscation of land to punish 'rebel' Māori who resisted Crown authority) (Office of Treaty Settlements, n.d.:14-15). Some claims emerge in connection with alleged inadequate provision and protection of reserves for Maori, and for land Māori had gifted to the Crown for the erection of public infrastructure like churches and schools (instead of returning such estates to Māori once they had been fulfilled, the Crown frequently disposed of them privately) (Office of Treaty Settlements, n.d.:15).

Similarly, grievances that arise from injury *associated* with the loss of land must also describe the Crown's failure to fulfil its fiduciary duties to Māori as Treaty partners. These claims centre upon the disintegration of Maori communities, the persecution and loss of the Māori language and customary knowledge, and the disruption of customary social and political structures following the fragmentation of Māori holdings by the nineteenth century Native Land Court, Native land laws and the Public Works Act of 1876 (and all subsequent amendments) (Office of Treaty Settlements, n.d.:15). Claimants also allege that the

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spoliation of food and resources, such as the draining of wetlands and lagoons that has disrupted and destroyed complex ecosystems of plants, birds and fish upon which Māori relied for sustenance, the pollution and "trashing" (Office of Treaty Settlements, n.d.:18) of *wāhi tapu* (sacred sites) and *urupā* (burial grounds) as a consequence of private development, and the expansion of public infrastructure and industry, represents further Crown breaches of its Treaty obligations.

Outside these technical circumscriptions, however, how do Māori describe grievance? During my work for the Waitangi Tribunal, I heard claimants use the *te Reo Māori* term '*take*' when discussing grievance. *Take* can mean several things; in its noun form it can mean the base or foot of something (such as a hill), the origin, root or source of something else, or a topic, subject, issue, concern or a claim (hence its use in the Treaty restitution concept). It is a useful term considering its inclusive definition; however, given that the Treaty settlement process is rigorously litigious, the stricter term 'grievance' has greater popular and legal currency than *take*.

In terms of grievance, the claimants with whom I spoke and observed, all expressed profound feelings of personal, spiritual and emotional loss following the dispossession of their customary lands, even if the original dispossession had occurred a century previously. These feelings tended to manifest as sorrow, anguish, anger, and even shame. A proud professional Māori businessman negotiating with the Crown on behalf of his hapū (which had originally fought the Crown during the nineteenth century Land Wars) declared during an interview that:

> "There was such a sense of shame around our history, you know, the confiscation, the stigma of being rebels. There was a real sense that we had lost our battle against the Crown and we felt dishonourable because of it".

This physiological sense of loss was also described, over and over, as a *burden*, a weight that had passed from one generation to the next, awaiting resolution. The same gentleman also described this strain:

> "It's been such a burden, an ill-feeling carried by all our people, right back to our ancestors. Having the Waitangi Tribunal here, having the opportunity to tell our story and have it recorded, was like finally getting to share the burden. For me that was so important, because often in court settings it's all about the facts, but for us it's about emotion and healing all the hurt of our peoples' parents and their grandparents. It's been such a big part of the healing process."

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This idea, that grievance is like property, able to be bequeathed and inherited, appears to be a fundamental way of thinking about grievance amongst the Māori claimants with whom I spoke and deserves further examination.

IS GRIEVANCE HERITABLE?

Not everyone believes grievance is heritable; the polarities in opinion regarding this idea are tidily outlined in the divergent views of American prominent economist Tyler Cowen, and New Zealand political scientist Jeremy Waldron. Cowen argues against the intergenerational transmission of what he calls 'advantages', and insists that the descendants of victims of injustice cannot require, and should not receive, restitution since they do not have a "full moral right to the resources" in question (Brighouse, 2004:131; Cowen, 2006:25). He asserts that descendants can only lose their *rights* to property and resources that may have been bequeathed to them had the original victim not suffered the initial injustice. Their descendants, then, have been violated only of their right to any bequeathed resources, not the resources themselves.

Furthermore, Cowen argues that grievances cannot be heritable since they do not always manifest in tangible, heritable forms like land or goods. He contends that grievance often manifests as physical injury such as torture where pain/disability ceases with the passage of the victim's generation. Cowen's narrow view of grievance, however, fails to account for intangible grievances like the loss of political freedom, personal liberty, cultural identity and human rights, for example, which can have a lasting inter-generational impact (Barkan, 2000:168). His ideas perpetuate a dogmatic, Eurocentric interpretation of property and property rights, which does not necessarily reflect the ways Māori imagine their world, their relationships and their ideas of proprietorship over natural and cultural resources.

For instance, although it is important not to over-draw the distinction between contemporary Māori collectivism and the individualistic liberal atomism of Pākehā, Māori society has traditionally emphasised the value of the communal group over the individual person (Mulgan in Perrett, 1992:28). Māori identities tend, therefore, to be determined predominantly by a person's inherited status and relationship to a wider social group, membership of which is genealogically determined (hence the use in *te Reo Māori* of the personal pronoun *I* (*au*) to refer to either the individual or their tribe) (Perrett, 1992:29). A sense of common origin and a corresponding fundamental unity, therefore, implicitly emphasises an organic connection to the land, where soil comes to represent a spectrum of material, emotional and cosmological significance (Greenland, 1991:93, 94).

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Conversely, Waldron asserts that resolving the grievances of the descendants of victims is a straightforward notion provided two things can be established, namely, that those claiming in the present are the 'same persons' who suffered the original injustice, and that the entitlements that were violated are entitlements that survive into the present (Waldron, 2002). This idea, that claimants must demonstrate the persistence of their ethnicity, identity or community over time in order to legitimate the heritability of their grievances and, therefore, their entitlement to restitution, brings to mind Clifford's writing (1988) about the complex multi-party lawsuit that occurred in Mashpee, Massachusetts in the late 1970s involving 16,000 acres of land. The suit's purpose was not to settle the question of land ownership, but to determine whether the group calling itself the Mashpee Tribe was in fact an Indian tribe at all, and if they were the same tribe who had lost its land through a series of legislative acts in the mid-nineteenth century (Clifford, 1988:179). Judge Skinner, then, asked a jury to decide whether the Indians of Mashpee had existed *continuously*, and without radical interruption, since the eighteenth century to the date of the suit's filing in 1976 (Clifford, 1988:203).

Despite porous territorial boundaries, intermarriage with non-Indian residents, no surviving language, no clearly distinct religion and no blatant political structure, Clifford noted that the Mashpee Indians did have a distinct character and regional reputation (Clifford, 1988:183). To support the contention that they represented the same organised, coherent ethnic collective who had persisted for a century and a half, the Mashpee plaintiffs presented oral and archival records, anthropological testimony, and genealogical evidence to demonstrate how their story was one of survival and continuity (Clifford, 1988:198). Contradictions in the historical record, however, were quickly exploited by the defense who successfully argued that the Mashpee Indians' story was instead a celebration of slow but steady progress towards full participation in American society (Clifford, 1988:198).[75] In so doing, the defense shrewdly conflated 'progression' towards American citizenship with a loss of indigenous tradition and authenticity; as Clifford neatly surmised: 'life as an American meant death as an Indian' (Clifford, 1988:203).

Clifford's reflections on the Mashpee trial reverberate between Cowen and Waldron's conflicting perspectives. Like the defense in the Mashpee trial, Cowen argued that changes in ethnic identity over time equate to a dilution of ethnic integrity; for example, he aruges that the Navajo today are no longer the same tribe the Navajo were two hundred years ago.

[75] In delivering their verdict the jury, responding to the last of the Judge's questions 'Did the plaintiff groups, as identified by the plaintiff's witnesses, constitute an Indian tribe as of August 26, 1976', answered "No" (Clifford, 1988:199).

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Despite their use of an enduring name, the Navajo's prolific 'interbreeding' – as well as substantial changes to their culture, tribal government and ideas of property rights – had, to Cowen's mind, transformed the character and identity of the tribe entirely, obviating the very notion of persistent tribal identity as the prerequisite for heritability between generations (Cowen, 2006:30). Waldron on the other hand, understands identity as a negotiated, dynamic category that experiences revival and reinvention in response to instances of exchange and pressure. Grievance, then, is one of the ways people make and remake themselves through specific alliances, negotiations and struggles.

Although contemporary Māori may not dress, sound, or even look the same as they did when Europeans first arrived in the eighteenth century, many consider themselves no less Māori than their ancestors. As an elderly white-haired Māori gentleman declared at a Waitangi Tribunal interlocutory hearing, gripping hard onto the microphone:

> "In the people I see here today are the faces of my ancestors, those who – through their own energy and initiative – lived through various Golden Ages and ventures of human endeavour, sailed to New Zealand and settled in places of their choosing, many generations before the founding of colonial England, and then entered the Treaty in good faith".

Many claimants also share a set of foundational cultural beliefs, ideologies and practices that have remained unchanged through time and affirm an inter-generational sense of connectedness. *Utu*, for example, is one of the fundamental organising tenets of Māori life and rests on collective rules of reciprocity and obligation, and governs reciprocal repayment. Although *utu* is frequently cited as pure and simple revenge, it actually aligns with the conventions of *mana* (refers to prestige, authority, status or charisma[76]) and *tapu* (refers to a supernatural condition where a person, place or thing moves from a profane to a sacred status[77]) that structure the reward and transfer of goods and services. *Utu* can involve reciprocation for kind deeds between persons or groups, or the rebalance of social relations that have been disturbed by hostile relationships between parties as a result of insults or physical, mental, or emotional injury (Ministry of Justice 2001). Significantly, the passage of time plays an integral role in *utu*; reciprocation need not be applied immediately, and instead may be exacted many generations later. Responsibility for the implementation of *utu*,

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[76] It is an enduring, indestructible power, inherited at birth, and authorises a person to lead, organise or regulate communal expeditions and activities, or social and political matters. A person or a tribe's *mana* can be increased through successful ventures and similarly diminished by lack of success.

[77] *Tapu* objects, for example, become untouchable and can no longer be put to common use. *Tapu* is an effective way to control how people behave towards one another and their environment. When an object's *tapu* is removed it reverts to a *noa* (common) status.

therefore, is handed down from one generation to the next and rests at all times with the living members of the *hapū* or *iwi* (Perrett, 1992:30).

Intergenerational connectedness, then, is an implicit part of Māori life; negotiators in particular often described how their present work represented an extension of that of their forebears:

> "For Māori it's an intergenerational thing, you know? When my grandfather was carrying the claim for us I was at university, you know, checking out the talent, going to lectures. My priorities were all about what time my shift started at work, or when my next essay was due. I was fully behind [my grandfather]; I just wasn't that involved in what he was doing. Now that's he's gone though, come the turn of the circle, I can feel my grandfather's hand reaching out from the mists of time and grabbing my shoulder!" [Māori negotiator for a far-North *hapū*].

> "The claims, they're about helping to finish a long process. I wanted to be an archaeologist. My whole family are full of teachers; there is a strong education flavour in my family. It's all about a sense of service, a sense of helping out in a developmental way. And so my Mum said to me: 'the *iwi* needs an accountant or a lawyer, which one would you like to be?', and I thought, 'well, I'm not good at numbers' so I chose lawyer! So I reluctantly laid aside my pith helmet and my trowel and went to law school. I've never practised but now I see, as I've got older, why they made those choices, why they asked me to do that. My *tūpuna* [grandparents, ancestors] all helped me and now it's my turn to help those who will come after me" [Māori negotiator for a central North Island *hapū*].

Many contemporary Māori, then, appear to have no ideological difficulty conceiving grievance as heritable (the first claimant's description of 'carrying the claim' implies an intergenerational responsibility evinced in the concept of *utu*), even if the original injustice occurred in the nineteenth century. In fact, the responsibility to achieve resolution for past injury appears to be almost as important as the notion of grievance itself. The state, then, is not the only participant in the historical restitution process compelled to confront their sense of obligation towards claimants; Māori, too, find themselves describing their grievances as a sense of accountability to their ancestors, another burden that impels and energises them to pursue resolution.

However, how is an amorphous, faceless entity like the 'the state' able, or even expected to act as a unique participant in the historical restitution process? Fittingly, debate over the heritability of grievance and remedy also raises questions regarding the nature of collective subjectivity. Michel-Rolph Trouillot has written insightfully about rituals of restitution and apology, and engages explicitly with the process whereby the "properties and attributes"

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(2000:173) of liberal individualism are transferred to imagined collectivities such as states, ethnic groups and nations. Such transferral is a crucial formal requirement for rituals of collective restitution since it allows entities like the state – which has experienced substantial changes in its institutional membership since historical injustices were perpetrated – to assume liability, and even a desire to repent. Simultaneously, the attribution of individual characteristics to collectivities not only allows victims to bequeath responsibility for resolving grievances to their successors, it enables contemporary claimants to seek restitution for injuries committed amongst those long-deceased. Large-scale national restitution programmes, then, encourage the ascription of individual attributes like character, personality, consciousness, will, memory, desire, and moral feelings to imagined collectivities, the last which , crucially, enables entities like the state to assume practical liability for historical wrongdoing (Trouillot, 2000:178).

Trouillot grounds this argument in historical philosophy and examples from the contemporary media, identifying the 'unity of consciousness' assumed by Enlightenment philosopher John Locke as the basis for collective memory of past actions, and discussions such as those by Desmond Tutu and Wole Soyinka of Jane Taylor's play, *Ubu and the Truth Commission*, as contemporary instances of nations being conceptualised as individuals (2000:180). In this formulation, the nation, Trouillot surmises, becomes at once the site of memory-consciousness, and the engine behind both the recognition of past failures and the will to reach a 'higher moral plane' (2000:180). Trouillot is at pains, however, to note that visions of the individual person vary considerably across and within populations, and that his interpretation of the process whereby individual attributes are transferred to collectivities is predicated upon the strict definition of the individual as a *liberal person*. The discourse that contemporary rituals of restitution and apology evokes, he asserts, centres upon a liberalism of rights rooted in the notion of the individual, whereby the ego of psychology and a "memory of past actions yet unburdened" are possible for imagined collectives (Trouillot, 2000:179).

In this way amorphous entities like 'the state' are able to defend and repent for 'its' actions, just as individuals or whole groups of claimants can thereby pursue redress for injuries committed decades, even generations previously. What, then, do Māori claimants want from the restitution process? Is it simply remedial compensation, or are their aspirations more profound? And what do they consider necessary to lift the burden that so many describe shouldering for so long?

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WHAT DO CLAIMANTS WANT?

Although the claimants I interviewed and observed expressed a range of desires regarding their engagement with the Treaty settlement process, my data revealed one particularly significant cleavage in opinion. An author and community leader from a small *hapū* in the central North Island succinctly described this division in an interview over coffee in the weak winter sunshine:

> "You know, people go on and on about the process, and the stories, and the standing up in front of the Tribunal, but, you know, I've been in the process three days a week for three years now and it's so about the money. It just so is. I know the other stuff [hearings, formal recognition, opportunity to speak, etc] is important to some people and we all go on about it, but the people sitting at the table with the Crown are so in there for what they can get, to get the very best deal for their people."

Some claimants felt their participation in Waitangi Tribunal hearings was the most crucial part of the Treaty settlement process. These claimants, often elderly, described their profound desire to share their stories with the Tribunal panel, and to have their histories and their suffering formally recorded in perpetuity. Others, however, felt settlement negotiations with the Crown should be claimants' primary imperative and tended to frame their desires in purely economic terms. For some within this second group, the amount of commercial and financial redress they could leverage from the Crown through negotiation, was considered directly proportional to how much they had managed to 'achieve' in terms of resolution (as I shall explain further below in a discussion about the operation of Post-Settlement Governance Entities). This is not to say the negotiators were compelled by monetary value alone – several of those I spoke with had shrewd, sophisticated ideas for utilising their settlements to benefit their respective *hapū* or *iwi* – only that their approach was divergent to those who emphasised sharing and catharsis.

CATHARSIS AND WELLNESS

The New Zealand Treaty settlement process offers Māori claimants the option to bypass Waitangi Tribunal hearings altogether and proceed directly to negotiations with the Crown. This is often a fundamental source of friction amongst claimant communities, where some members wish to proceed directly to negotiation for redress, so they can establish robust investments for their *hapū* or *iwi*, and others who feel a strong need to share their feelings of suffering and loss with the Crown. For the latter, this opportunity was often framed in terms of 'catharsis', a psychoanalytic term that seems to describe a process of release from the

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burden of the claims they have individually or collectively carried, and an ensuing sense of relief from long-festering resentment that flows from this liberation. In my work for the Waitangi Tribunal I recall a number of claimants, female and male, openly weeping on the stand as they recounted emotional testimonies. My recollections of the specificities of their narratives are not clear, however, so it is more scrupulous to describe claimants' experiences of 'catharsis' from my interviews and fieldwork observations; for example, at a restaurant over lunch a well-dressed Māori negotiator remarked that:

> "You have to understand that we see the Waitangi Tribunal process as totally separate from negotiations with the Crown. To speak in front of the Tribunal, to share, to tell them our story, it was very cathartic".

And, at separate occasions, an elderly Māori woman at a cafe, a young Māori negotiator far from home (his *hapū* live in the far-north of New Zealand's North Island) in Wellington, and a Māori author and community leader each noted:

> "That's what the Waitangi Tribunal does, it sets up a forum for catharsis and then it records it in perpetuity".

> "Our people, they found the process so cathartic, to talk the issues out in a forum like that. [...] We wanted the local issues and stories to be heard, and half of that process is that being heard. But it's also partially to empower the younger generations with firsthand knowledge from what's happened so that they can be well-prepared into the future".

> "Having the [Waitangi] Tribunal here ... we saw as an opportunity for us to tell our story and have it recorded, and then be able to move on into negotiations. Getting to share the burden, to lift the burden. It's a forum for catharsis".

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For these claimants, the importance of official recognition of their grievance cannot be overstated. During one of the interlocutory hearings I attended, for example, a claimant declared that recognition from the Waitangi Tribunal Chief Judge and Minister of Treaty Settlements was not substantial enough for the suffering his people had endured, and requested that the Prince of Wales, a United Nations Special Raconteur on Human Rights of Indigenous Peoples, and the New Zealand Governor General, attend their next round of Tribunal hearings.

Often claimants expressed frustration and disappointment that their grievance had long been ignored and sidelined by the state, sometimes for decades, sometimes for generations. By providing them with a formal opportunity to be heard, Māori claimants often spoke of how they could finally 'move forward', to 'lay their grievances to rest', as a middle-aged Māori gentleman fervently stated during a Waitangi Tribunal interlocutory hearing:

> "The hearings are not just about a stepping stone to settlement, the hearings themselves are an important part of hearing the grievance, letting the grievances be fully understood. ... In that matter, to genuinely consent to settlement, I believe that we must feel we have been recognised, to have our grievances heard! It is vital!"

Or, as a young Māori negotiator expressively described:

> "It's a cathartic experience, beginning to open up about the bad deeds that were done. This group of Māori, they want to lance that boil, and by sharing their stories it's a way of releasing themselves from all that bad history".

In this context, the sharing of grievance and the receipt of official acknowledgement is considered restorative. As one female claimant noted, "[t]he hearings are about wellness for [my *iwi*], the day that [my *iwi*] achieves wellness then we will have won". 'Wellness', unlike catharsis, was not a term I found common in claimant rhetoric so I must assume she was referring to a comprehensive notion of good collective physical and mental health (as opposed to illness), and/or to be in a condition of prosperity and comfort.

Wonderfully, one claimant in particular, the cheerful Māori woman who took me on a tour of her marae, uniquely described the Waitangi Tribunal hearings she had attended as analogous to a traditional Māori meeting house, the *wharenui:*

> "You must remember that we are working on levels of physical, mental, spiritual and the fourth one which is *whānau* (extended family, or family group). They are the four cornerstones. A lot of us feel like we're missing one of those legs; it's the best way to describe it. [...] That's why, if you think about the *whare*, there are four corners, it's fundamental and it's no different to the claims process. It might be a bit simplistic, but it's a good perspective. In *te ao Māori* the *whare* would never be fully standing correctly unless every one of those corner *pou* (a pole or upright) is standing and strong. So we can say that the Waitangi Tribunal, when they listen to us and let us *korero* (to tell, say, speak, read, talk, or address), it helps us to strengthen our spiritual *pou* to bring balance. Our *whare* is starting to be repaired but the *whare* is not fixed totally yet."

Significantly, the *wharenui,* also known as the *whare rūnanga* (meeting house) or *whare whakairo* (the 'carved' house), has strong allegorical associations with the corporeal body, since it is often conceived amongst Māori as a tangible representation of a significant ancestor. Each segment of the building correlates to a particular part of the human body; for instance, the ridge beam symbolises the backbone, the rafters are the ribs, while the gable at the front of the *wharenui* corresponds to the ancestor's head. To recount the resolution of grievance as the symbolic restoration of the *wharenui* is to astutely describe how the sharing of grievance can repair and cure the physical body, be it in the shape of a symbolic ancestor, or, by

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inference, the claimants themselves. As strength is regained balance (even collective 'wellness') is restored. Her description is also intriguing since it exemplifies the way Māori claimants use psychoanalytic terms (like 'catharsis' and 'wellness') and analogies (such as this) to describe the restorative function of the restitution ritual, indicating a renaturalisation of psychoanalytic language in the everyday discourse of the historical restitution process.

COMMERCIAL AND FINANCIAL REMEDY

Alternatively, other Māori claimants with whom I spoke, particularly those negotiating with the Crown on behalf of their respective *hapū* and *iwi*, described financial and commercial redress as their primary imperative for participating in the Treaty settlement process. In New Zealand redress is negotiated through the Office of Treaty Settlements – often over a period of years – where a fair settlement quantum (the total financial, commercial and cultural redress made by the Crown to claimants as part of a Treaty settlement) is transacted. Māori negotiators are responsible for mediating the expectations of their claimant constituency, and to acquire as much redress as the Crown is able to offer and afford. For some claimants, only the return of *all* the land misappropriated by the crown will satisfy their grievance. This attitude does not reflect the perspectives of the majority of Māori claimants, but it is also not uncommon (both attitudes can also be held contiguously, often at an ideological and pragmatic level). One young Māori described this approach amongst some of those in his *whānau*:

> "A few of them just wanted to keep fighting and fighting to get more land, make claims for all the land that they could, land round the harbour bridge [sic][78] in Auckland, stuff like that. Blatantly out for the money. They just want as much as they can get" [r/NewZealand Redditor].

This approach tends to reflect the hard-line attitude of a small number of radical Māori who object to the presence of non-Māori in New Zealand, or of those who don't always wish to acknowledge the litigious, jurisprudential and political strictures of the Treaty settlement process. *Hapū* and *iwi* negotiators, however, tend to be more realistic about the limitations of the process; often well educated and qualified, these claimants tend to have extensive legal or business/professional experience, and have a solid grasp of the legal and political constraints of Treaty restitution. In their interviews they emphasised the limitations and practicability of the settlement process, for example:

[78] The Auckland Harbour Bridge is an eight-lane box truss motorway bridge over the Waitemata Harbour in Auckland, New Zealand.

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> "Finlayson[79] knows that we can never really have back what we actually want. There is a saying in Māori, '*Me haere whenua atu! Me hoki whenua mai*!', which means 'land that was lost, return us our land', and so for us that would be the ultimate, the return of all our ancestral lands, so that we can develop them, create and develop our communities, use them to better our people. But the reality of the situation is, and Chris Finlayson knows, there's no way he can dispossess all the private owners of their land and return it, so we have to just work with what we get I guess" [Māori negotiator for a Bay of Plenty *hapū*].

While the rhetoric of this tall, gentle Māori negotiator was moderate and philosophical, embedded within his pragmatism is also a desire for the return of all the land his people lost. He concludes, however, that such an option is not feasible in New Zealand, where a liberal capitalist government has chosen to protect private property against redistribution as part of Treaty settlement.

Negotiators also tended to construe resolution in far more economic terms than the emotional and spiritual descriptions of claimants in hearings. Two of the *hapū* negotiators with whom I spoke were particularly adroit in the ways they wanted their settlement to benefit their people. All worked in teams of four to eight people on behalf of their *hapū*, and travelled regularly to and from Wellington or hosted Crown negotiators from the Office of Treaty Settlements at their local *marae*. One negotiator wanted his *hapū* to bypass the Waitangi Tribunal process and, once settled with the Office of Treaty Settlements, invest part of his *hapū's* redress assets in tourism as a way to facilitate social development amongst claimants and their families:

> "We want to settle. We don't want to waste our time with the Tribunal, going through that process. It's good at healing but it's toothless. It's about venting their emotions, and if the venting is done correctly the people will heal. But it's a dangerous thing to rely on claims to restore *tikanga* ... I want to move forward with settlement, to grow revenue from our redress.
>
> Kate: What do you propose?
>
> "A whole range of things. Mainly around building tourism ventures so we can grow our capital investment. Then we can develop land trusts and incorporations in the area; get out in the community in a positive way."

Another negotiator had far-reaching ideas for a series of social accords with local, regional and national bodies to give his *hapū* some measure of authority over their own development:

> "Settlement will allow us to have control over our own social development. We are negotiating for a Social and Wellbeing Accord with the Crown. It's around social investment and means we have regular

[79] Hon. Christopher Finlayson is New Zealand's Minister for Treaty of Waitangi Negotiations.

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> meetings with local-level bureaucrats, six-monthly meetings with chief executives, and annual meetings with ministers to actually get buy-in and feedback on projects that we can use ... So, from my perspective, building a relationship with the Crown allows us to really act like Treaty partners, rather than outside looking in ... Co-governance gives you the ability to influence decision-making, it enables us to finally have our say" [Māori negotiator for a far-North *hapū*].

For this negotiator, the notion of being heard was just as critical as it is for claimants in the Waitangi Tribunal hearings. His conception, however, was future-orientated unlike the historically-centred narratives of the latter claimants. Hearings and negotiations, therefore, offer alternate approaches to the same objective: to be heard. The most vital component of this process appears to be the Crown's recognition of how Māori feel about and have experienced the past, *and* of their desires and demands for the future. Historical restitution, therefore, opens up a dialogue between past and present in far more subtle ways than may appear at first, and offers Māori claimants opportunities to decide how they wish to constitute themselves in each context.

REDRESS

In New Zealand Treaty settlement redress typically consists of an "historical account, Crown acknowledgements and apology, collectively known as the Crown apology" (The Office of Treaty Settlements, 2006:43), and an amalgam of financial, commercial and cultural redress. In its official apology to claimants, the Crown formally recognises the wrongs it perpetrated against Maori in the past, summarises the key facts about the relationship between the claimant group and the Crown that gave rise to a breach or breaches of the Treaty of Waitangi and its principles (as agreed between the claimant group and the Crown), and expresses regret for claimants' suffering (Goldstone, 2006:15; Office of Treaty Settlements, n.d.:85). Financial redress refers to the portion of the total settlement a claimant group receives in cash, and commercial redress includes any Crown assets, such as property, that contribute to the total redress quantum. Non-commercial redress – usually the return of sites of sacred significance to claimants – is intended to meet claimants' cultural, rather than economic, requirements, and is made to claimants where the Crown finds it appropriate and possible (Office of Treaty Settlements, n.d.:96).

To date, the total redress paid in Treaty of Waitangi settlements is difficult to quantify. The most recent formal statistics I was able to locate at the Office of Treaty Settlements (from 2008) reported that twenty-three Treaty settlements since 21 September 1992 have exceeded

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one billion New Zealand dollars (Office of Treaty Settlements, 2008:10).[80] At present there are eleven settlements awaiting legislation, with a possible total financial redress amount of approximately NZ$216 million, fourteen agreements in principle totalling more than NZ$220 million awaiting settlement, and a further twenty claims under negotiation with the Office of Treaty Settlements (Anon. n.d.). Combined, these figures would push the total financial redress distributed under Treaty settlement to close to NZ$2.5 billion.

POST-SETTLEMENT GOVERNANCE ENTITIES

Before the Crown distributes settlement remedies, however, it requires claimants to establish a ratified governance entity that will receive the settlement assets, make decisions about how they will be managed, and determine how benefits flowing from their investment will be distributed (Office of Treaty Settlements, n.d.:71). Although claimants are theoretically free to elect any sort of governance entity they wish, the Crown's strict stipulations of fair representation, transparency and accountability means claimants tend to adopt entities in the form of private trusts, subsidiary trusts or companies. Furthermore, given the substantive social and economic disproportion that exists between Māori and non-Māori in New Zealand, Treaty settlement remedies are also expected to be invested in ways that directly benefit Māori.

Such inequalities stem largely from the historical dispossession of customary holdings, and the disruption or destruction of Māori ways of life following the arrival of imperial Britain, and its subsequent impact on the lives of their descendents. In fact Māori are over-represented in many of New Zealand's principal statistics: socio-economic status, young motherhood, domestic abuse and violence, alcohol and substance abuse (particularly amongst adolescents), poor educational participation and attainment, reliance on state welfare, low income, criminal justice, and across almost all poor health indicators (Paper prepared for the WHO Commission on Social Determinants of Health, n.d.:2). As the New Zealand Department of Corrections notes in a report about Māori representation in New Zealand's criminal justice system, these issues have arisen, irrefutably, from the historical events that preceded them (Policy, 2007:38).

Once Treaty redress is transferred to the claimants Post-Settlement Governance Entity (PSGE), the trustees have the power to do as they please with their new assets. The common approach adopted by PSGE trustees has been to establish prudent governance and

[80] Please see http://nz01.terabyte.co.nz/ots/DocumentLibrary/FourMonthlyReportMarch-June2008.pdf

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management structures to process, manage, and grow these assets. Charitable entities either within or outside the PSGE group structure are implemented to distribute 'benefits' (such as *marae* grants, education grants, and community and cultural grants) amongst members or 'beneficiaries'. Claimants have now progressed from a legal status as 'claimants' to 'beneficiaries', a transformation in identity that will be examined further in the next chapter.

Following settlement, the Crown lays all responsibility for the management and development of assets with the PSGE trustees; some, however, have not experienced success with their investment ventures. Early in 2012, for example, news broke that the seven-member Ngati Tama Development Trust (the Post-Settlement Governance Entity for Taranaki *iwi* Ngati Tama) had lost nearly NZ$20 million following a series of high risk investments. Although 1870ha of conservation land was transferred as part of the *iwi's* Treaty settlement quantum, their redress had been largely cash-based. The Development Trust had placed NZ$12.5 million into an Australian-based computer software company, My Virtual Home Ltd, which had subsequently gone into liquidation and had no assets (Maetzig 2012). Other major failed investments include NZ$4.39 million with Tu Ere Fishing Ltd, and NZ$1.19 million with property investment company Open Group Ltd (Maetzig 2012). In the wake of their failed investments Ngati Tama had only a little over NZ$1.5 million of their Treaty redress remaining (Tahana 2012).

The Minister of Treaty of Waitangi Negotiations, Hon. Christopher Finlayson, remarked that the situation was "very sad indeed", but that the Crown would never bail out Māori claimants for losses made post-settlement (Tahana 2012). The Minister felt the Crown had done "enough" to ensure that *iwi* have strong post-settlement arrangements, and to act as guarantor would not only place the Crown in a difficult paternalistic role redolent of its imperial past, it would undermine the settlement clause of the full and final settlement of historical grievances (Tahana 2012).

Amongst claimant groups who have received redress from the Crown, the case of Ngati Tama is unusual; other *hapū* and *iwi* have achieved considerable success with their investments. Ngāi Tahu, for example, the largest *iwi* in the South Island whose settlement with the Crown in 1998 included cash compensation of NZ$170 million, currently has an asset base that includes a substantial property portfolio and equities. Ngāi Tahu Holdings, the *iwi's* investment company, estimates its assets at around NZ$670 million (Anon. 2012c). In a 2012 interview, Ngāi Tahu Holdings chief executive Greg Campbell, declared that the *iwi's* role is to "make the money so that proceeds from the profits can go into cultural enrichment programmes, education, health and environmental programmes" (Anon. 2012c). Similarly, Waikato-Tainui from New Zealand's central North Island, received a mixed cash

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and land settlement valued at NZ$170 million in 1995. Their investment company, Tainui Group Holdings Ltd, have grown their settlement monies to almost half a billion dollars (Durie, 2011:355). The website for the Tainui Group Holdings Ltd[81] claims that dividends from their investments are used for charitable purposes such as education, welfare, health, social and cultural facilities and activities, for the benefit of Waikato-Tainui members.

Commercially, Ngāi Tahu and Waikato-Tainui's investment of their Treaty redress have been very successful. However, there is a disjuncture between the redress received by governance entities and the benefits reaped by individual claimants. When Ngāi Tahu received their substantial settlement redress in the late 1990s, the son of my parents' neighbour, a young Māori man affiliated with Ngāi Tahu proclaimed that he would buy a new car once he received his portion of the settlement. Ngāi Tahu, however, only pays dividends to its shareholder, the Ngāi Tahu Charitable Trust, not to individual *iwi* members. In fact, Toko Kapea, a lawyer who has worked for both *iwi* and the Crown, facilitating Treaty settlements and post-settlement support for Māori, claims that few if any settled *iwi* directly distributed dividends to their members (Kapea n.d.). Instead, wealth is distributed amongst charitable trusts that benefit claimants indirectly, rather than dispensed directly to individuals (Durie, 2011:359).

While groups benefit from interest derived from investments in the form of health insurance, policies for older members, subsidies for *marae*, contributions to programmes for cultural advancement, and educational grants for young people, Kapea states that as far as he is aware, no PSGE pays dividends directly to individual members, and focus instead on "establishing themselves and growing the[ir] balance sheet (and the capacity) to manage the[ir] assets" (Kapea n.d.). This may be a pragmatic approach; as Maetzig noted in his article about Ngati Tama's failed investment ventures, if half the tribe's annual income had been conservatively invested in an asset base of the *iwi,* and half distributed amongst the *iwi's* five thousand members, individuals would have received about NZ$87 each a year (Maetzig 2012). It is little wonder, then, that the Ngati Tama Development Trust chose instead to try and increase their rate of return through high-risk investment.

RESOLUTION THROUGHT REDRESS?

The purpose of the Treaty settlement process, then, is to provide claimants with a sense of resolution of their historical grievances through the delivery of redress. How do individual

[81] http://www.tgh.co.nz/

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Māori claimants feel about the redress offered by the Crown? Amongst the claimants with whom I spoke and observed, opinion was mixed. Some expressed a sense of satisfaction during our interviews, such as the Māori negotiators from a far-North *hapū*, and central-North Island *hapū* respectively:

> "What we got was a very healthy quantum; we've got back a lot of the Crown land, the commercial land that we wanted. We've got back some of those sacred areas – the burial caves, and other places – so for [my *hapū*], we've gone from about 200 hectares of low quality farm land, to having $22 million in our pockets".

> "Chris [Finlayson, Minister of Treaty of Waitangi Negotiations] knows that he can't give us what we want; he only knows he can do what he can around the edges, the standard package of 'natural item', 'commercial item', 'cultural item'. And there's no way we can buy the land back privately from the individual people, not when there's hundreds of thousands of hectares involved, so we must be realistic and satisfied with the return of the ancestral lands that we have".

Other claimants spoke philosophically about the settlements they received from the Crown. A young Māori woman in charge of running her *hapū's* official Facebook webpage declared:

> "Well, the Crown's stance is that our claims are full and final. We have to agree to that clause if we want to settle. I feel though that since the process is so long and it's hard, that most of our people don't actually want the next generation to have to spend time doing this, they want the struggle to finish, to come to a close, so we can all stop fighting".

Or, as the negotiator so determined to win his *hapū* a social accord with the government stated:

> "We want it to be over, to make it good for our *mokopuna* (grandchildren), because by the time they get there we don't want them to have to go through the same scenario as us. Like, my nephew asked me one day, he said 'Uncle, what do you do when you go to all these meetings?', and I said, 'Well, I drink a lot of coffee, they go all day, they're often boring, and a lot of them are arguments. But I spend all day at these meetings so you don't have to go to them when you're a grown up'" [Māori negotiator for a small far-north *hapū*].

And the negotiator for an *iwi* in the central-North island mused:

> "The reality of the situation is, you know, we understand the extent of the harm that's been done to us, we understand the time that it's taken to get to the negotiating table and we understand the loss we've experienced as part of this battle since it's taken so much time. And we've got to make a balanced judgement call and at what point do we say enough is enough. We've got to never forget the injustices that have been done to us here, but we've also got to draw a line in the sand and actually create a future for

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> our people with our own resources. That's what our people want" [Māori negotiator for a central North Island *iwi*].

Unsurprisingly, the Māori negotiators who engaged with the Crown on a regular basis on behalf of their respective *hapū* and *iwi,* had the most sophisticated, in-depth understanding of how the Treaty settlement process works. They shared a nuanced appreciation for the complex ways redress is constrained economically and legally, and, often having fought so hard to win as much redress for their respective *hapū* and *iwi* as possible, they seemed the most resigned to the content of their settlements.

In contrast, some claimants expressed feelings of anger and frustration with their redress. My data demonstrates how these individuals regularly framed this dissatisfaction in terms of the Crown's policy of full and final settlement. Clauses describing claims as "fully and finally settled, satisfied, and discharged" have been included in settlement legislation since the 1990s (when the large regional settlements began to occur) (Belgrave, 2005:24). The *Te Uri o Hau Settlement Act, 2002* s17(1), for instance, states that '[t]he settlement of Te Uri o Hau historical claims to be effected under the deed of settlement and this Act is final, and the Crown is released and discharged from any obligations, liabilities and duties in respect of those claims' (New Zealand Parliament 2002). Frequently in my interviews, claimants repudiated this notion of full and final settlement:

> "I think that our people will never accept that it's full and final because they know that, in our hearts our negotiators know that it's not full and final. Until we get back all the land that was taken or stolen, our claims will never be final. Never" [Māori community leader and claimant from a central North Island *hapū*].

> "Well, we know that getting all the land back that was ever taken or stolen is impossible, but that said, there's no such thing as the end to a claim. Why should we settle when we can get so much more?" [Māori claimant far-North *iwi*].

> "There is absolutely no such thing as full and final, there is no such thing. We're trying to clear the way as much as we can in our time, but we know that we can't clear everything. We are only able to achieve so much. We're ticking things off the list, big tick items, sure, but we also have a long plan, fifty years, a hundred years. Our belief, totally, is that it's never full or final. There is much still to be done, so much to get back. We're just ... in our time; we are taking care of what we can in our time. The process is not fair, and it will never be full and final, those coming in the future, they will go back to the negotiation table I'm sure" [Māori claimant from a Bay of Plenty *hapū*].

> "We lost over 100,000 hectares of land and we're getting back 3,300. So for that odd 100,000 hectares that we're missing out on we're getting a settlement of twenty million bucks and a co-governance agreement [with

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> the Crown]. So if we're talking about justice, and equity, and balance, there's no way that what we're getting is the same as what we lost, let alone what we've lost in terms of productivity of the land since then. So, I mean, in terms of justice, how can we ever be expected to consider that full and final? To be satisfied with that?" [Māori negotiator for a far-North *hapū*].

These claimants appear to feel that the Crown's requirement for full and final settlement doesn't fully account for the full scale of economic loss which claimants feel their respective *hapū* or *iwi* suffered since the original dispossession, and represents an expectation of finality and closure that many don't feel ready to accept. Ngāi Tahu, for instance, assert that the economic losses their *iwi* suffered following the Crown's land purchases in the nineteenth century are estimated to be more than NZ$20 billion (Te Rūnanga o Ngai Tahu n.d.). The Crown's settlement offer of NZ$170 million, then, clearly does not return the *iwi* to the economic position they may have enjoyed had the original purchases not occurred one-hundred-and-fifty years ago.[82] Ngāi Tahu was required, however, to accept a full and final settlement clause as part of their settlement before they could accept redress from the Crown.

Given the impassioned responses (even rejection) of many claimants to the notion of full and final settlement, then, it is possible to discern the slippage that exists between the Crown's assumption that restitution should deliver conclusive resolution, and many claimants refutation of this notion. Was this a disjuncture, I wondered, unique to New Zealand historical restitution, or might claimants in South Africa feel similarly about the remedies they are receiving? And, given that such large numbers of claimants had accepted settlement monies from the state, did this mean South African claimants consider their land redistribution and restitution programme to be 'successful'?

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SOUTH AFRICA

In South Africa, the target of the 1994 Reconstruction and Development Programme (on the advice of the World Bank) was to transfer 30 per cent of white-owned agricultural land to Africans within the first five years of operation (excluding the former bantustans, state land, and urban and non-agricultural land) (Hall, 2007:88, 2009:2). It was envisaged that substantive reform would centre upon a market-led programme where 'willing sellers' sold

[82] Injury and discrimination in other places has also been estimated in purely economic terms as a compensation total; for example, in America, *Time* magazine estimated a monetary compensation for slavery, with $222 billion (on the basis of 244 years of forced labour by 10 million slaves at 25 cents per day), added to another $222 billion (for pain and suffering), with a compounded interest rate of 3 per cent over 134 years since emancipation equalled a total of $24 trillion (Rajan, 2000:167).

land to 'willing buyers' at market price.[83] Where the return of land was unfeasible or impossible, claimants would receive restitution in the form of alternate land or cash compensation.

For several years the total number of land claims was considered a shifting target; the Commission kept consolidating and bisecting claims so that the upward totals had to be revised several times (in 2007 the total number of claims stood at 79,696 (Hall, 2010:29)). In December 1998, of the 63,455 claims lodged, only a tiny proportion had been settled; a year later, however, the pace of delivery had accelerated dramatically following the introduction of the Standard Settlement Offer, and a new administrative approach to claim and dispute resolution (Hall, 2010:29). On 31st October 2009 – the most recent date for available statistics on the Rural Development & Land Reform website[84] – only 4,222 claims were classified as outstanding, the majority of which constitute large rural claims and await settlement (C. Walker 2007).

By resolving over 90 per cent of registered land claims, has the ANC government achieved its targets for land reform? Opinion is mixed; in a purely quantitative sense, appraisals are difficult to make given the lack of reliable empirical information regarding land ownership (the deeds register, for example, no longer classifies land owners according to their race, making it difficult to estimate the actual figure of land owned by non-white South Africans) (Kirsten, 2012:4). Some observers contend that the land reform programme has been a success. Professor Johann Kirsten, from the Department of Agricultural Economics, Extension and Rural Development, at the University of Pretoria, for example, asserts that the criticism levelled at the ANC government for the slow pace of land reform has been unjustifiably harsh. Instead, he claims, the ruling party should "actually be congratulated with the good progress with land transferred from white to black ownership" (Kirsten, 2012:3). He suggests that, from evidence available, South Africa is in fact very close to reaching the government's stated target of distributing 30 per cent of the country's agricultural land by 2014 (Kirsten, 2012:3; Walker, 2007:143). Based on the results of a number of studies on private land transactions, and the recent land reform and land restitution numbers presented by Minister Gugile Nkwinti in his budget speech of May 2012, Professor Kirsten maintains that in excess of 25 per cent of formerly white-owned agricultural land is today black-owned (Kirsten, 2012:3).

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[83] The state would also purchase land directly to restore it to those previously dispossessed (Hall, 2007:88).

[84] http://www.ruraldevelopment.gov.za/DLA-Internet/content/pages/Programmes_Restitution_Statistics.jsp

In a country as large and complex as South Africa, however, such statistical generalisations can be misleading. Undoubtedly, in some areas such as Elliot in the Eastern Cape, and Besters in KwaZulu-Natal, where land acquisitions by the government have been proactive, the proportion of farmland transferred is well within the 20-30 per cent target, but this is not the case for all provinces (Cousins, 2012:3). When the Department of Rural Development and Land Reform (DRDLR) released its last formal statistics in May 2012, however, the government had acquired 7.95 million ha, only 30 per cent of the ANC's original 24.6 million ha target (Kirsten, 2012:4). In purely arithmetical terms, then, the land reform programme has achieved only limited success.

Furthermore, land redistribution statistics don't account for several other key factors, such as claimants' option to elect financial compensation instead, for example. In fact, the settlement of the bulk of individual land claims has been achieved through the government's offer of financial compensation to claimants. Known as the Standard Settlement Offer, this option consisted of a standardised amount of financial redress offered by the Rural Development and Land Reform Minister to all claimants, to achieve the full and final settlement of their claims (to spend as they wished on whatever they deemed suitable to their circumstances).[85] Claimants who accepted the compensation offer tended to reside in urban and peri-urban areas, were elderly, or expressed less desire for land. The offer enabled the rapid conclusion of great numbers of claims; so rapid, in fact, that in 2007, the then-acting director general of land affairs Tozi Gwanya, proclaimed the land restitution programme had been "a big success" (Staff Reporter 2007). Although the Standard Settlement Offer included no land transfer, the Department of Rural Development and Land Reform (DRDLR) still considers these offers as a variant of the land redistribution programme, and seeks to 'translate' the total amount of money paid in compensation into actual hectares of land.

Statistics also do not account for the *private* transactions conducted between white farmers and black purchasers which exist outside the ambit of the state's official land-reform programme.[86] Such transactions though small in number, can most certainly be seen as part of the transition to a non-racial, democratic society, but it raises questions about the state's role in the transformation of property rights, and its institutional ability to facilitate resolution.

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[85] Compensation ranged from between R40,000 and R50,000 (Rugege, 2004:7).

[86] For instance, large tracts of farmland have been purchased from white farmers by many black ANC leaders. While this agricultural land is now in the hands of black owners, it hasn't facilitated the alleviation of poverty amongst low-income black African claimants (Kirsten, 2012:4)

The success of the land reform programme as a whole, therefore, appears to be haphazard and uneven. The 'Willing Buyer Willing Seller' (WBWS) approach is most frequently held to blame, since the market has clearly failed to restore landless South Africans with property. Even the notion that the redistribution of 30 per cent of white-owned land to black ownership would somehow be 'enough' is itself a problematic notion. This figure was never more than an arbitrary political objective and had little historical significance – in fact, if redistribution is reconfigured along demographic lines, for example, a target closer to 80 per cent black ownership would be more appropriate (Lahiff, 2012:5).

What did the claimants with whom I spoke, have to say about the land reform programme? As noted in chapter two, my interviewees were all from modest socio-economic backgrounds; each dwelled in a small home in a different area of the Cape Flats[87]. Each had a particular motivation for pursuing restitution from the state; one black claimant, for example, was pursuing the restoration of all her mother's property, land she claimed had been stolen by the state without compensation. Another claimant, an elderly coloured woman, was patiently awaiting the redistribution of land in a suburb close to the city so she could return to the area from which she and her family had been forcibly evicted four decades earlier. Some claimants had accepted compensation from the government, while others continued to wait for the return of land (be it the original holding or alternative land). All complained about the 'unfairness' of the restitution process, and that the government had acted with incompetence.

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In our interview during a bitterly cold winter's day sitting huddled over her small electrical heater, a female claimant (and self-appointed community leader) explained how:

> "To me the process is not free and fair. It is not free by this way, neé: even then they did not give us information, right then, right back at the beginning. You know the government did not send anyone into our communities to tell us how the process will work. I am very disappointed with the government. I am so disappointed. The government should have employed people to educate our communities. To hold workshops. To help us. To show us the right way, so we are all aware of how to submit our claims. To say you need to do one, two, three, and then they will go and do one, two three, four".

A gentle, deeply religious claimant from Manenburg, a coloured woman who was patiently waiting for her original lands in Bishopscourt (a wealthy residential suburb in Cape Town's Southern Suburbs) to be returned remarked:

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[87] An expansive, low-lying, flat area of land situated to the southeast of Cape Town's central business district appropriated by the government during the apartheid era for large housing projects, which became the new home for many peoples forcibly relocated from their existing properties in Cape Town.

> "The thing is that, I don't see, is that in 1994, the government, they told us they would help us, but no fieldworkers came, there was no one telling us how to lodge our claims. And still there is no one here to educate the community about what to do with our claims. And the people don't know what to do and we feel that we are missing out!"

A coloured gentleman and head of his local residents' association, and his friend, a local pastor, each noted that:

> "They are totally useless to assist me. To assist us. They have not given us justice. They have not given us land. They drag their feet and we must wait. We must wait".

> "We don't trust their restitution. [...] The Commission must be just and honest but they are not. They fail us. The government fail us. I say to those Commissioner's, how do you attend church? Do you get tired of seeing us, so many people here in despair?"

Their words imply a sense of being cheated, that their needs as claimants have not been accorded the significance the ANC government promised, and that the government has failed to shepherd them through a daunting litigation process. Conversely, the South African government has appeared remarkably confident that its efforts have amply delivered satisfactory restitution to the claimant community; in fact most of the Commission on Restitution of Land Rights newsletters, published monthly for the first decade following the democratic transition, brightly extol the successes and achievements of the restitution process.

Why, then, does such a slippage exist between governmental attitudes, and the claimants' feelings of dissatisfaction? From my reading of the available literature, land reform appears to represent a source of considerable political capital for the ANC government, who have felt enormous political and social pressure to deliver on their 1994 election promises. As a consequence, commissioners and ministers may feel pressure to exaggerate the success of the land reform programme and disguise the scale of the remaining task, by emphasising the *quantitative* achievements of land redistribution and restitution (Hall, 2010:28). For example, then-Acting Chief Land Claims Commissioner Advocate W. A. Mgoqi stated that:

> "The year 2001 has seen a continuation of phenomenal progress being made, three years in succession. From 1999 when we lifted settled claims from 41 to 3, 916 by March 2000 and thereafter 12,150 by March 2001 and to date to 12,863 already, against a target of finalising approximately 10,000 restitution claims in this financial year alone, ending March 2002, is no mean feat, by any standards" (Mgoqi, 2001:1).

Those claimants whom I interviewed spoke of two things with regards to cash compensation: firstly, many felt they had had little choice but to accept financial restitution

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from the government; as the local pastor and the head of a residents' association noted, the socio-economic circumstances and age of many claimants obliged them to elect this redress option:

> "Some people are so poor that they can only choose the money, Kate. Most people can't wait for the ground, you see, they can only take the money".
>
> "Some of the claimants, they get tired, and they get old, you know? They just wanted to cash in; they couldn't wait for the land anymore".

Secondly, claimants described how the money – spent clearing existing debts or distributed amongst extended family members – quickly ran out. A black claimant from Gugulethu explained how:

> "We bought a TV, new tyres for the car, things like that; but the money is gone now and what will I do next year when I need new tyres?"

Another black claimant walked me around her house pointing out the renovations she had made with her settlement monies:

> "Some people, they take the money and develop what they've got ... develop their houses. Like me, I put another room on my house. And I gave some to my sons, but now there is no money left".

And a pastor from a large coloured congregation in Grassy Park on the Cape Flats remarked:

> "But after that money is gone, Kate, they've got nothing. Nothing left. Nothing to stand on".

If claimants feel they have nothing to show for the compensation they have received as part of the land reform programme, then can direct financial restitution really be conceived as adequately contributing to social transformation in South Africa? Do those claimants with deep, intractable grievances find a sense of resolution through a process akin to 'chequebook restitution', or does it simply make a mockery of the land reform process and the ANC's aspirations for social transformation (Hall, 2009:5, 2011:33)? As Professor Bernadette Atuahene of Princeton University notes in her report *Paying for the Past: Addressing Past Property* (2011), many South Africans feel that compensation is wasted on claimants since the money doesn't alleviate the poverty of the recipients. In an article for the *Mail & Guardian* she quotes an anonymous official as saying:

> "Financial compensation is not having an effect. We will assist with payment in the morning, and in the evening everyone is in the bottle store. They don't know what to do with the money" (Atuahene 2012).

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Financial restitution to individual claimants, therefore, appears not to have substantially improved the lives of South African claimants in the *long term*. Furthermore, all of the government's stated and implied targets in terms of areas of land transferred, poverty reduction, tenure security, job creation and the revitalisation of the rural economy have fallen short of their 1994 aspirations (Kleinbooi, 2002:1; Lahiff, 2012:4). Economic development and participation have yet to reach the levels many expected following the transition to democracy. In 2011 unemployment sat between 23.6 and 32.5 per cent[88]; economic inequality had deepened (although the composition of rich and poor groups is changing through the emergence of a non-white middle and upper class, disparities in wealth have increased); and public confidence in state institutions and political leadership remained weak (Jensen, 2001:119; Lefko-Everett, Lekalake, Penfold, & Rais, 2010:22).[89] Although further research is required to assess the *qualitative* impact of restitution amongst claimants (Hall, 2011:33), if the substantial alleviation of poverty through the restoration of property rights amongst the dispossessed was the primary imperative of the land reform programme, then cash compensation cannot be considered a 'success'.

South Africa's land reform programme and New Zealand's restitution strategy, therefore, encourage the interpolation of claimants as liberal subjects who conceived as responsible for making rational decisions at once individually and collectively. Although the contexts and proceduralism of each country's processes are different, both restitution programmes appear to be predicated upon, and to produce, discourses of autonomy and rational choice. Claimants' inability to thrive following restitution, therefore, generates further discourse around the notion of 'failure' regarding the liberal subject (Ross, 2010:206), rather than fostering critique of the form and effects of capitalism upon grievance.

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CONCLUSION

This chapter describes how the contemporary formulation of distributive justice which presently undergirds moral and juridical approaches to the distribution of goods amongst some (usually liberal democratic) societies, has opened up a philosophical space whereby popular reconfigurations of identity, obligation, value and history are free to occur. In the context of historical restitution, this means that the state's supervisory role receives renewed

[88] The latter number is the broad unemployment rate that also includes discouraged job-seekers not actively looking for work (Lefko-Everett et al., 2010:15)

[89] Roughly half of all South Africans live in 'poverty'. A number of poverty lines are used to establish this percentage; Woolard et al., for example, report that in 2008, 54% of South Africans lived on less than R515 (~NZ$65) per capita per month (Woolard, Leibbrant, and McEwen 2009).

scrutiny from its citizens, and, consequently, its responsibility to ensure the fair distribution of benefits and burdens amongst citizens – historically or contemporaneously – is often cast in a (overly simplistic) dialectic as just or unjust. Constituted under a distributive justice paradigm, for example, the New Zealand Crown's failure to fulfil its fiduciary duties to Māori in the past can now be interpreted by claimants as a substantive dereliction of the Crown's obligations as sovereign, and historical wrongdoing that can be contemporarily amended through redress.

I have also examined how the ambitions for historical restitution initiatives vary between New Zealand and South Africa. In New Zealand the Crown expects Māori claimants to achieve resolution for historical injury through restitution, be it in the form of a government apology, commercial and financial compensation, or the return of land or sites of significance, remedial acts that are intended to conclude claimants' sense of grievance. Māori claimants receive this restitution collectively and indirectly; monies are transferred to Post-Settlement Governance Entities instead of to individuals – usually powerful trustees focus on growing their compensation remedies through investment, while dividends are apportioned obliquely amongst claimants or 'beneficiaries' in the form of *marae*, education, community or cultural grants.

In South Africa, however, the restoration of property or receipt of cash compensation is aimed at protecting and advancing the socio-economic circumstances of persons who experienced disadvantage as a result of past racially discriminatory laws and practices. The ANC-led government has sought to alleviate poverty and correct significant disparities in wealth through the institution of an expansive three-pronged land reform programme. Cash compensation – paid in small, standardised amounts to individuals – has been very popular amongst claimants who are often so impoverished they feel that they have neither the time nor the means to pursue drawn-out disputes over the redistribution of lost land. Such meagre compensation (in comparison to much larger settlements in New Zealand), is often consumed very quickly, leaving claimants feeling ambivalent about the sense of resolution they either pursued or are expected to have acquired. While the (perhaps unforeseen) mass appeal of cash compensation has quickly 'concluded' the majority of land claims, the slow progress of land redistribution makes the relative 'success' or 'failure' of South Africa's land reform programme difficult to quantify.

This slippage between Crown/government assumptions and claimants' expectations of 'adequate' resolution, then, is a disjuncture that is evident in both New Zealand and South Africa. Claimants from both countries in search of conceptual or material recognition for the losses and injuries they have suffered have described feeling that the

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Crown/government's remedial efforts are not commensurate with the suffering they have, or continue to experience. Instead, many claimants feel the Crown/government is too eager in its desire to discharge its obligations to them as victims, resorting to insubstantial remedial solutions or 'chequebook' restitution. As I shall demonstrate in chapter six, the dramatic transformative and conciliatory capabilities anticipated to flow from the historical restitution ritual, therefore, are not as forthcoming as envisaged since the procedural foundations and philosophical arrangements that undergird the restitution-as-justice logic are fundamentally flawed.

Before considering the explanations contemporary scholarship offers for understanding such flaws, however, it is necessary to comprehend a crucial remaining component of the historical restitution paradigm: collective identity and its persistence through time. The notion that events which occurred historically can be reconfigured as injuries, and heritable grievances passed from one generation to the next, and that their resolution can be achieved through restitution, and also emerges from, and accompanies the contemporary formulation of distributive justice. Configuring notions of collective identity as individual identity (and its persistence through time) is a process that allows present-day claimants to pursue restitution for events that occurred in the past, often generations ago. It means groups of individuals who may look dissimilar to, or enact their social and cultural traditions quite differently from their ancestors are able to assert social, cultural or political continuity through time. In the next chapter I shall explore Pākehā identity in New Zealand and its roots in settler nationalism, before probing how notions of 'Māoriness' are consumed by Pākehā (often intent on fuelling and sustaining their dominant cultural and political hegemony), despite the divergent ways Māori claimants frequently frame and imagine themselves.

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chapter five

/*WI*/KIWI

PĀKEHĀ AND MĀORI IDENTITIES AND RECOGNITION CAPITAL

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An unsuccessful 1997 bid to secure rights for mussel farming in New Zealand's Marlborough Sounds saw eight *iwi* file an application with the Māori Land Court in New Zealand requesting, among other matters, that the foreshore and seabed of the Marlborough Sounds, extending seawards to the limits of New Zealand's territorial sea boundary, be defined as Māori customary land under the Te Ture Whenua Māori Act, 1993 (Hickford n.d.). The case was moved between the Māori Land Court, the High Court and the Court of Appeal; finally, in mid-2003, the Court of Appeal overturned precedent dating back to the 1877 Wi Parata v Bishop of Wellington decision, which had been later affirmed by the New Zealand Court of Appeal in the 1963 Ninety Mile Beach decision. Fundamentally, in the Attorney-General v Ngati Apa 2003 case the Court of Appeal affirmed that the Ninety Mile Beach decision had been wrongly decided, thereby opening the way for the High Court to declare Māori common law rights in the foreshore and seabed still extant, should Māori wish to pursue their interest in this property.

In the wake of the Court of Appeal's decision, the implications reverberated around the political consciousness of popular New Zealand (the majority of whom are Pākehā). Until then New Zealanders had always enjoyed a strong tradition of public access to the country's beaches and waterways as part of the 'Queen's chain', the twenty metre strip above the foreshore and along the edge of coasts, rivers and streams available to the public for recreation. The prospect of Māori receiving title to New Zealand's coastline generated a powerful emotional response amongst non-Māori, predominantly Pākehā New Zealanders,

whose own notions of property and value left them feeling that their way of life was under attack. In an effort to mitigate the political fall-out of the Ngati Apa decision, then-Prime Minster and leader of the Labour Party, Helen Clark, sought to draft legislation that would vest ownership of the foreshore and seabed with the New Zealand Crown, but recognise Māori customary interests and seek Māori consultation regarding matters relating to the foreshore and seabed.

Opposition from all sides was impassioned. The Labour Party's opposition, the National Party, alleged that this proposal still gave Māori too much control over the foreshore and seabed, granting Māori extra rights over and above those enjoyed by non-Māori. Conversely, significant numbers of Māori accused Labour of discrimination against Māori, since the bill would extinguish their ability to establish customary title over the foreshore and seabed, and provided no means of redress for this loss. The Waitangi Tribunal sought to offer an informed opinion and held an urgent hearing, releasing its report in early 2004. The Tribunal declared that the proposed bill not only clearly breached the principles of the Treaty of Waitangi[90], it also failed in terms of the wider norms of domestic and international law that underpin good government in a modern democratic state[91] (www.waitangi-tribunal.govt.nz n.d.). Furthermore the Tribunal's report echoed the concerns of Māori, in that the effective removal of their property rights by the bill without guaranteed compensation, amounted to expropriation by the state. Labour's promised 'opportunities for participation' for Māori in a consultative capacity, was not deemed by the Waitangi Tribunal as a sufficient or satisfactory compromise for the loss of Māori property rights with regards to the foreshore and seabed.

Labour derided the Tribunal's report and recommendations as an implicit rejection of the principle of parliamentary sovereignty, and pushed forward aggressively with its bill. Opposition only intensified; Tariana Turia, a junior minister in the Labour Party, felt compelled to resign following her rejection of the proposed legislation, and in March a *hikoi* (a long march/protest march) travelled south from Northland and arrived at Parliament comprising some fifteen-thousand (mostly Māori) demonstrators protesting the bill and defending Turia's decision to resign. With support from Mana Motuhake[92] leader Willie Jackson and Māori academic Pita Sharples, Turia then established the new Māori Party in parliament. Yet despite this turbulent atmosphere of political discord, in late November

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[90] Specifically, Article 2 and 3 of the Treaty of Waitangi, the Principle of Reciprocity and Partnership, the Principle of Active Protection, the Principle of Equity and Options, and the Principle of Redress (The Waitangi Tribunal, 2004:127-146).

[91] For example, the devaluation of Māori citizenship (the Crown's proposed policy violated the rule of law that determines citizenship) would marginalise Māori in a way that, the Tribunal feared, would threaten the harmony of race relations in New Zealand (The Waitangi Tribunal, 2004:136-7).

[92] A Māori political party established in 1979 by Matiu Rata, and formally deregistered in 2005.

2004 the Foreshore and Seabed Act, 2004, was passed into law following a third and final vote (the tally total stood at sixty-six in favour and fifty-four against).

The new Māori Party, however, maintained considerable political pressure on the government. Consequently, Special Rapporteur Professor Stavenhagen from the United Nations Committee on the Elimination of Racial Discrimination was invited by the New Zealand government to investigate the impact of the Act. In his subsequent report, Professor Stavenhagen noted that while the standard of living of the Māori of New Zealand has improved and is better than that of indigenous peoples in poorer countries, there remains widespread concern that the gap in social and economic conditions is actually growing larger, and an increasing proportion of Māori are being left behind, and he recommended that the foreshore and seabed Act be repealed or significantly amended (Stavenhagen, 2006:17). The government responded by describing Professor Stavenhagen's report as "disappointing, unbalanced and narrow" (The New Zealand Herald, 6 April 2006).

Image 1: **'Beaches: Iwi/Kiwi' Billboard** (courtesy of Nigel Roberts)

In the lead up to New Zealand's 2005 general elections, the National Party sought to capitalise on conservative Pākehā anxiety generated in the wake of the foreshore and seabed debates, launching a campaign with a 'one New Zealand for all' tenor that eschewed what Don Brash, then-leader of the National Party, considered 'special privileges' for Māori. A critical part of their campaign consisted of the party's ingenious electioneering hoardings;

billboards were visually split in two with a dour-looking Helen Clark (from the Labour Party) in a red square, opposite a smiling Brash in blue, over a number of succinct questions or statements about topics politically pertinent to the 2005 election. Brazenly exploiting the recent passage of the Foreshore and Seabed legislation, one hoarding in particular summed up the rhetoric of a particular Pākehā perspective:

The '*Beaches: Iwi/Kiwi'* billboard represented a bold-faced confrontation of popular attitudes toward a socio-political rift that had been exposed following the passage of the foreshore and seabed bill, pitting the interests of Māori and non-Māori against one another. National Party electioneers carefully chose the word '*Iwi*' for the red panel, to suggest that a vote for the Labour Party would reinstate a government who they felt had unfairly and unrepresentatively apportioned extra-special rights and privileges to Māori in an undemocratic move against the New Zealand majority, which, given that Pākehā constitute some sixty per cent of the New Zealand population, infers a Pākehā majority[93]. The political desires of Pākehā are represented by the name 'Kiwi' (discussed further below) in the blue National Party square, plainly conflating the Pākehā majority with a seemingly unthreatening, politically neutral name with strong nationalist connotations. In the context of the Foreshore and Seabed Act, 2004, the '*Beaches'* hoarding implied that a vote for the Labour Party would represent an ultimate and deliberate rejection of the national egalitarian aspirations that underpin New Zealand liberal democracy, and by inference the Pākehā way of life. The beach and foreshore have always stood as potent symbols of identity for Pākehā who, like Māori, have a long tradition of professional and recreational use of these areas. Given New Zealand's expansive coastline, for many New Zealanders the beachscape plays an important role in the way they frame and imagine their surrounding world.

With this polarising proposition the National Party strove to present Māori desires for autonomy and redress as antithetical to those of the Pākehā majority, in order to leverage considerable political capital from Māori alterity. This tension, however, was not manufactured for political exigency alone. Not only did it reflect the attitudes held by many Pākehā, who, as I shall argue in this chapter, often perceive Māori demands for Treaty redress as a rejection of their own cultural and political hegemony, it suggests a more profound Pākehā enmity for Māori difference where it strays outside the former's fantasy of a national, non-racial utopia (this attitude regarding the objectives of historical restitution initiatives in the late liberal age, shall be discussed in chapter six).

[93] Pākehā constitute New Zealand's largest demographic group totalling 2,609,592 people (67.6 per cent of the population) in 2006 (Statistics New Zealand n.d.). Statistical information for New Zealand was last taken in 2006; the devastating 2011 Christchurch earthquake disrupted that year's census. It has been rescheduled for 2013.

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Pākehā individuals, in search of a collective identity that reflects the strong, profound connection they feel with New Zealand, have sought to construct an identity predicated on an incontrovertible right to belong there in order to legitimise their place amongst autochthonous Māori, and this search compels Pākehā to frame and 'consume' Māori identity in ways that fulfil their ambitions to constitute themselves as 'New Zealanders' or 'Kiwis' (names that evade racial or ethnic dissension and historical discordance). Paradoxically, however, the appetite for Māori 'tradition' and ethnic 'authenticity' foists upon Māori the burden of responsibility to satisfy Pākehā desires for multiracial harmony; a challenge that demands Māori demonstrate that their ways of life are compatible with Pākehā incorporative ambitions, and also worthy of the state's conciliatory efforts.

Māori claimants, then, are caught in an impossible dilemma: how to enact 'authentic' identity and traditions in ways that satisfy their individual and collective requirements, *and* to do so in a domesticated, non-conflictual manner so as to engender the reparative goodwill of the state/Pākehā majority. When Māori claimants capitalise upon the recognition offered by the Waitangi Tribunal and Office of Treaty Settlements and begin to constitute themselves in new historical and contemporaneous ways, Māori identities often emerge in ways that challenge Pākehā ideations of what comprises 'authentic' 'Māoriness'. My data suggests, however, that Māori claimants' reconstitution of identity in the terms offered by the Treaty settlement process represent less of a rejection of Pākehā hegemony, than a desire to manoeuvre out from under nearly two centuries of Eurocentric conceptual imposition, liberating them to enact their identities in ways that increasingly suit them, and satisfy the aspirations of their individual *hapū* and *iwi*.

Often Māori ambitions can seem confusing, divergent or contradictory to non-Māori, particularly conservative Pākehā who tend to paint Māori aspirations as an outright rejection of Pākehā ways of life, and as an intolerance of the liberal ideals they feel undergird New Zealand's democracy – an attitude that is itself intolerant. The Treaty restitution process, therefore, often antagonises many Pākehā by promoting a sense of distance between Māori and Pākehā ideological and political geographies, and does not support Pākehā fantasies of a bicultural utopia. Rather than find space to include divergent Māori aspirations within the dominant Pākehā-centric social and political paradigm, however, the latter's intolerance for divergent difference suggests a fervent desire to regulate and discipline what Brown calls 'eruptions of the particular (emerging tribalisms, localism, raging nationalisms, and/or fundamentalism) against the imagined universal' (Brown, 2006:86).

This chapter, then, seeks to explore two central topics; firstly, the hegemony and dominance of Pākehā collective identity in New Zealand, an identity predicated (amongst other things)

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upon an umbilical connection to Europe, nineteenth century notions of settler nationalism and attendant rhetoric of prosperity, technology and 'civilisation', and flourishing twentieth century desires to legitimise their place amongst and alongside Māori. To achieve this, many Pākehā 'consume' specific enactments of 'Māoriness' in a bid for global distinctiveness, and in an effort to defend their ideals and aspirations for bicultural 'harmony' in New Zealand. I explore this process by considering how the Pākehā search for a sense of belonging in New Zealand is reflected in their pursuit of a collective name.

Secondly, I consider how the reconfiguration of Māori identities in the Treaty restitution context can occur in ways that diverge from Pākehā expectations of 'traditional' or 'authentic' Māori performance, making some Pākehā feel embittered or defensive about New Zealand's restitution programme. The Treaty settlement process encourages a configuration of identity that Povinelli (2011) calls 'genealogical' (as opposed to autological), a model whereby Māori claimants are compelled to demonstrate the persistence of their biological and cultural connections with their ancestors through time, in order to legitimise them as the appropriate beneficiaries of historical restitution. For example, when claimants respond to the exigencies of the Treaty settlement process by reconstituting 'customary' hierarchies of social organisation in increasingly commercially-centric ways, some Pākehā interpret such adjustments less as resilience than an attenuation of Māori socio-cultural authenticity.

Lastly, drawing upon the scholarship of Wendy Brown (1993, 1995, 2006), and Elizabeth Povinelli (1998, 1999, 2002, 2011), this chapter foregrounds the following one by introducing its central tenet: that instead of historical restitution facilitating the political and socio-cultural emancipation of historically subjugated subjects in the late modern liberal age, such initiatives may simply represent a new means of re-subordinating the subaltern subject.

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PĀKEHĀ – IN SEARCH OF A NAME

Like Māori, Pākehā are neither a tidily bounded ethnic collective nor a homogenous political unit, although they do share a sense of palpable social and cultural cohesion. The name 'Pākehā' represents an identity comprised of a complex amalgam of competing historical narratives, cultural practices, and divergent, often contradictory ways of imagining life particular to New Zealand. It forms one of a number of terms used in New Zealand (discussed further below) to variously define white, non-Māori people residing in that country. Non-Māori New Zealanders of European descent have no formal definition at

Statistics New Zealand – nor do any other ethnic groups, except Maori[94] (MacIntyre and Gray 2012). In the 2006 New Zealand Census 'Europeans' comprised New Zealand's largest ethnic group, accounting for ~67 per cent (2,609,592) of the population.[95] 'European', 'New Zealand European' and 'Pākehā', therefore, are used to describe the descendants of early European settlers or more recent migrants, who have a cultural or historical affinity with Europe, and are all used officially and unofficially by the Crown, and by Pākehā and Māori.

The majority of early European migrants hailed principally from England, Scotland, Ireland and Wales, initially voyaging to New Zealand in small groups as whalers, sealers and missionaries toward the end of the eighteenth century, and in the decades that followed in larger groups as settlers. They established the agricultural and stock farming infrastructure that, for a time, made these remote island outposts an engine-house of primary production, and they brought with them the English language, British food, and select flora and fauna, in their attempts to duplicate an English way of life in the South Pacific. Until the mid-twentieth century New Zealand common law classified these settlers and their descendants as 'British'. Although New Zealand achieved the status of Dominion in 1907 (giving the country autonomy in domestic and foreign affairs), it was only following New Zealand's ratification of the *Statute of Westminster, 1931* in the late 1940s that New Zealand's Parliament passed the *British Nationality and New Zealand Citizenship Act, 1948,* thereby altering New Zealand's citizenship laws, and making all Pākehā and Māori 'New Zealand citizens' (Department of Internal Affairs 2009).

The length of time it took for the *Statute of Westminster* to appear before the New Zealand Parliament (all the other dominions had ratified the *Statute* earlier, most of them in 1931), indicates the feelings of reluctance many Pākehā had about rejecting their imperial roots

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[94] In 1998 Statistics New Zealand decided that the ideal definition of 'a Māori' ("a person is said to have Māori ancestry if they have any Māori ancestors, no matter how distant") and the operational definition ("a person is said to have Māori ancestry if they claim to have Māori ancestors, no matter how distant") should be combined since there was a continued misunderstanding of the operational definition by data users because it was less precise, and that they should be brought into line with the 1993 Electoral Act and the 1974 Māori Affairs Act (Te Ture Whenua Māori) (Statistics New Zealand n.d.). Both of these acts declared that, "'Māori' means a person of the Māori race of New Zealand; and includes any descendant of such a person". In essence, this definition is the same as the ideal definition contained in previous versions of this Standard.

In determining a Māori person's ethnicity, however, since 1998 Statistics New Zealand has officially classified Māori 'situationally', meaning ethnicity is a self-perceived measure of cultural affiliation, as opposed to race, ancestry, nationality or citizenship. Unofficially, however, their classification continues to affirm the importance of primordial, or biological, classification. If ethnicity were truly 'self-perceived', and therefore self-selecting, any New Zealander could claim to be Māori. Statistics New Zealand, however, define 'a Māori' as any person who can claim "Māori descent" (defined as a member of "the Māori race of New Zealand") or descent from such a person.

[95] Māori are the next largest group with just over half a million people (~14 per cent), closely followed by those of Asian or Pacific ethnicity (~8 per cent (354,552) and ~6 per cent (265,974) respectively) (Statistics New Zealand n.d.)

(King, 2003:422). Following the close of World War II, however, a definite shift in the popular Pākehā consciousness began to occur. The World Wars had effectively inspired a 'double patriotism' (King, 2003:367); Pākehā felt strong loyalty to Britain and Empire as well as a burgeoning sense of comradeship, especially amongst New Zealand troops, their families and their aspirations for the future, following their return from service. The northern hemisphere lexicon of war-and-nation, however, did not always fit the experiences of young New Zealanders who had fought abroad, nor was there yet a confident local voice for the wartime narratives of those who stayed at home (Kidman, 2007:51). Amongst post-war Pākehā intellectual circles particularly, a desire emerged to find a way of speaking about matters of cultural identity and nationhood that no longer relied upon Britain for meaning, an aspiration that reflected a strong sense of connection with their location in the south Pacific (Kidman, 2007:51).

Achievements like Edmund Hillary's triumphant conquest of Mount Everest in 1953 served to strengthen Pākehā convictions that their life and culture in the south Pacific was inherently unique, and becoming increasingly coherent, transforming into a nation with a 'history and a will of [their] own' (King, 2003:409, 414, 381). New Zealand began to experience a profusion of new cultural expressions in the fields of literature, poetry, art, music, film and dance, particularly amongst Pākehā who sought to restyle collections of botanical and cultural motifs and symbols to downplay the potency of their Anglo-Celtic traditions. This gradual uncoupling from the cultural and symbolic trappings of their British heritage, however, also meant that they became an impotent force for recognition, and further compelled Pākehā to constitute their identity from the world that surrounded them (Ashcroft, Griffiths, & Tiffin, 1989:136).

Substantial demographic change was also occurring amongst New Zealand's urban centres at this time as Māori began to move to the cities, altering the ethnic composition of New Zealand's metropoles. Māori, themselves, were undergoing dramatic changes in the configuration of their identities, a process intensified by the political unrest of the 'Māori Renaissance' in the 1970s. During these years many Māori, mostly young politically radical individuals, strove to overturn the entrenched stereotypes of Pākehā, that New Zealand was an idyllic rural paradise where the two groups lived contentedly and in harmony. These radical young Māori found resonance in, and drew inspiration from, Māori authors such as Patricia Grace and Witi Ihimaera[96], and poet Hone Tuwhare, as well as the ideological and

[96] Patricia Grace, Witi Ihimaera, and Hone Tuwhare focussed on new ways of expressing what it was to be Māori, describing characters very different from the ossified stereotypes of colonial-era authors. Liberal New Zealand authors like Frank Sargeson, Roderick Finlayson and Noel Hilliard also helped open up this literary territory.

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organisational structure of minority protest groups like Marxist, unionist, feminist, anti-racist, gay rights and environmental movements (Hill, 2009:150). Māori also began to embrace political alliances internationally, forging connections with indigenous groups in America, Canada, Australia and South America in their efforts to politicise their grievances. Land dispossession and injustice became definitive themes of a burgeoning Māori political identity, predicated on notions of social solidarity, territorial resistance and liberation (Smith, 1988:52).

Simultaneously, Pākehā – many of whom were the offspring of second or third generation (or more) New Zealand citizens – were in pursuit of ways to encompass growing feelings of belonging and connectedness with New Zealand, the only home they'd ever known (King 2003). Britain, the romanticised mother-country, felt increasingly alien; half a world away, it seemed remote from the everyday challenges facing Pākehā in the south Pacific. While Māori clamoured for political recognition, young Pākehā sought to configure a fresh identity that reflected a new status as indigenes, as a people who originated or 'occurred naturally' in New Zealand. Eager to severe their symbolic umbilical connection with Britain, these Pākehā were intent on finding a way to reflect their feelings of profound attachment to New Zealand, one that went beyond notions of 'belonging' and affirmed their eligibility to exist and share a place amongst Māori. They sought, therefore, to leverage meaning from New Zealand's emergent nationalist identity. Although 'New Zealand' and 'New Zealanders' had existed as meaningful categories since the early nineteenth century, the notion of 'New Zealander' in the twentieth century had come to represent more than just geographic residency and had begun colouring citizens' feelings with a sense of belonging akin to indigeneity.

Etymologically, indigeneity represents beginnings, inferring a *natural* belonging to a place, unlike autochthony, a term that literally implies an origin 'of the soil itself' (although, in practice today most autochthony movements are built around a claim to be first-*comer* to the present place of settlement, implying movement) (Geschiere & Jackson, 2006:2, 7; Goldie, 1989:21). Māori alone are eligible to claim autochthonous status in New Zealand given their arrival prior to Europeans, so Pākehā pursued a sociological affinity predicated on modes of meaning-making presently in the service of an emerging nationalist rhetoric: emotional connections to the land and landscapes, a shared history of agrarian and pastoral development, and patterns of inheritance and descent from early settlers (Dominy, 1995:362).

By appropriating the name 'New Zealander', Pākehā were able to capitalise on this growing nationalism by asserting their belonging in a non-threatening, politically- and racially-neutral

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way. Adopting 'New Zealander' enabled Pākehā to evade associations of alien-ness or foreignness inherent within the name 'European', and thereby validate their place in New Zealand's historical and socio-political geography (Ashcroft et al., 1989:136). By commandeering the rhetoric and cultural symbology of New Zealand's emergent national identity, Pākehā could also constitute themselves as a collective in a process akin to Anderson's 'imagined' nations (1983); restyling themselves as 'New Zealanders' permitted Pākehā to simultaneously conceive of each other as a community (even though each individual will never meet or know all their fellow members), and to downplay the inequalities and divergent political aspirations that existed (and continue to exist) between Pākehā and Māori. Notions of indigeneity, then, were brandished by Pākehā like a 'tactical weapon' in their efforts to carve out a space within New Zealand's political landscape (Comaroff & Comaroff, 2009:44).

This process made a formal appearance in the late 1980s when statisticians noted ever increasing numbers of Pākehā writing 'New Zealander' in the '*Other*' category of the census ethnicity question.[97] Statistics New Zealand attributed this trend to the public debates around identity and indigeneity that were thriving throughout the country at the time, largely as a result of debate over the newly instituted Waitangi Tribunal and Treaty settlement process. In 1991 the government introduced a '*New Zealand European*' category into the census with the aim of providing a more acceptable and meaningful response option for those with European ancestry, and with strong generational attachments to New Zealand. When questioned, however, many respondents claimed they felt uncomfortable with the racialised overtones of the word 'European' in the '*New Zealand European*' category, and consequently declined to use it (Statistics New Zealand, 2009:10).

Statistics New Zealand, however, remained reticent about introducing a distinct '*New Zealander*' category (Statistics New Zealand, 2007:3). While the name may have reflected the way many Pākehā felt about their identity, its conflation of ethnic and national identities tended to make it awkward and indistinct in statistical analysis. Statistics New Zealand state that since popular interpretation and sentiment towards ethnicity and identity tends to fluctuate, maintaining the original naming categories to preserve the integrity of their data over time was crucial, especially if they wanted to generate robust comparisons and predictions. In an effort to reflect the incontrovertible changes in identity that were

[97] Other official options available for Pākehā under the 'Ethnic Origin' question included, for example, in the 1981 Personal Schedule Census form, 'Full European or full Caucasian' or 'Other full origin' where the respondent was asked to give their 'particulars' in terms of fractions, for example, 1/8 European; and in the 1986 'What is your ethnic origin' question in the Personal Questionnaire Census form Pākehā were offered 'European', or 'Other' as the only options (details taken from http://www.stats.govt.nz/Census/about-2006-census/2006-census-definitions-questionnaires/forms.aspx (accessed 15 January 2013)).

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occurring in New Zealand, in 1996 Statistics New Zealand sought a procedural compromise by introducing and bracketing the term '*Pākehā'* within the '*New Zealand European'* category.

The scholarly definition of 'Pākehā', however, varies; although it typically describes any person in New Zealand with European ancestry, it simultaneously implies a sense of 'foreignness' and 'whiteness'. Confusingly, its use has actually been popularised by a general resistance amongst Pākehā to the word 'white', and its assumed pejorative connotations. Given its inference of 'whiteness' – and thereby indication of European heritage – the institution of '*Pākehā'* may represent Statistics New Zealand's covert attempt to identify and classify those who would have fit historically within the '*New Zealand European'* category. 'Pākehā', however, inspires a strong emotional response for some Pākehā individuals who often revile the term (Urry, 1990:20); for example:

> "I hate it when Māori call me 'Pākehā', [Pa = village, keha = flea, vermin]. 'Whitey', 'Honky' or 'Redneck' would be better than being named after vermin" [Redditor].

Offense is usually assumed from the alleged derogatory translations of Pākehā – that the word derives from *poaka* (pig) or *keha* (flea) – although there is little etymological or linguistic evidence to support either interpretation. Māori dictionaries today commonly describe 'Pākehā' as a New Zealander of European descent, although the term can also denote something exotic, or originating in a foreign country.[98]

Leading New Zealand historian Michael King (2003) noted that the term 'Pākehā' was employed in the Treaty to refer to Queen Victoria's non-Māori subjects in New Zealand. The term, King claims, was in use amongst Māori in the Bay of Islands by at least 1814, when the missionary William Hall reported that he had been referred to at Te Puna Pa as a '*rungateeda Pākehāa*' ('*rangatira Pākehā*': a European gentleman) (King, 2003:169). Furthermore, King claims, there was no evidence in this or any other instance in early literature that the term was derogatory; it was simply a descriptive word to distinguish Europeans from Māori, and it probably came from the pre-European word *pakePākehā*, denoting mythical light-skinned beings (King, 2003:169). King later declared that in terms of the use of 'Pākehā' in the twentieth century, for him "[being Pākehā] is to be, as I have already argued, another kind of indigenous New Zealander' (King 1999:239). He was careful, however, to express his Pākehā sense of belonging as a parallel, rather than identical, sort of belonging to Māori (Bell, 2004:59).

[98] http://www.maoridictionary.co.nz/index.cfm?dictionaryKeywords=Pākehā&search.x=0&search.y=0&n=1&idiom=&phrase=&proverb=&loan=

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By 2006, 429,429 people (11.1% of the population) were writing 'New Zealander' as one of, or their only response, to the ethnicity question (Statistics New Zealand, 2007:1). Additional popular responses in the '*Other*' category included 'Kiwi', 'Mainlander' (colloquial name for someone residing in the South Island), and 'Fourth- [or other numeric] Generation New Zealander', demonstrating an ongoing resistance to the term '*New Zealand European*' and an ongoing search for a fitting alternative. Analysis by Statistics New Zealand revealed that the respondents most inclined to write 'New Zealander' were born in New Zealand, were less likely to be of Māori descent, had more educational qualifications than average, and lived in rural areas (Statistics New Zealand, 2007:1).

The rural component is particularly interesting; in the mid-nineties anthropologist Michèle Dominy was called on to present evidence as part of the Waitangi Tribunal hearings for the Ngai Tahu claim. In her report, *White Settler Assertions of Native Status* (1995), Dominy examined the way Pākehā respondents who farmed Crown pastoral lease properties in New Zealand's South Island high country, described feelings of belonging and connectedness to the land. Dominy noted how all the farmers and their families, expressed a deep affinity with the land on which they lived and worked, and described feeling emotionally and spiritually nourished by the landscape itself. This bond was chiefly predicated on notions of descent (many were the descendants of families who had farmed their pastoral lease consecutively for four or five generations), but also displayed Lockean conceptions of labour warranting proprietorship. Many farmers described feeling that the agrarian contributions of their family to settling and developing New Zealand had been as valuable as those of Māori, and they were, therefore, as entitled as Māori to call New Zealand 'home' (Urry, 1990:21).

'Kiwi' is the other colloquial alternative most popularly used in place of 'Pākehā' or 'New Zealander'. A kiwi is a small flightless bird indigenous to New Zealand; originally affiliated with New Zealand servicemen fighting in World War One, the symbol of the kiwi quickly grew in popularity. By the 1930s, for example, emblematic representations of the kiwi were formally incorporated into New Zealand's currency (Phillips n.d.). Kiwi iconography and kiwi thematics have since permeated almost all areas of New Zealand life, from food to sport, banking (in 2002 a new government-owned bank was named Kiwibank), and, as we've seen, electioneering. However, while 'Kiwi' does not pertain to Pākehā alone (Māori are also subsumed within this imagined collective and sometimes employ the name themselves), to use 'Kiwi' also invokes notions of political neutrality and cultural homogeneity, and in so doing acknowledges the dominance of Pākehā cultural hegemony in New Zealand.

Pākehā efforts to elect and commit to a name that reflects the aspirations of their collectivity, therefore, reveal their search for an identity that fulfils their political and social ambitions to

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legitimate a status akin to indigeneity in New Zealand. Since the constitution of Pākehā collectivity means that they comprise New Zealand's largest demographic grouping, they also dominate the shape and content of New Zealand's national identity. This hegemony, however, does not strictly exclude Māori; indeed, as Povinelli (1998:580) suggests, the inclusive rhetoric of liberal capitalist societies encourages subaltern subjects to orient their sensual, emotional and corporeal identities toward the nation's ideal image of itself. But while Pākehā actively embrace numerous enactments of 'Māoriness' in their everyday lives, I contend that they do so more in an effort to capitalise upon the distinctiveness and uniqueness associated with Māori cultural traditions and iconography than as a pure celebration of difference.

CONSUMING MĀORINESS

Image 2: '**Rugby World Cup 2011 Opening Ceremony Haka**' (http://www.dailymail.co.uk/sport/rugbyunion/article-2035444/Rugby-World-Cup-2011-Opening-ceremony.html)

The ways that enactments of Māoriness are appropriated and incorporated by Pākehā tend to be selective and highly regulated. For example, the 2011 New Zealand Rugby World Cup Opening Ceremony included and exhibited enactments of Māoriness that presented Māori as

a uniform, homogenous collective who share a set of single, static traditions. Firstly, and perhaps most memorably, Te Mātārae i ō Rehu – winners of the National Title at the 2011 Te Matatini national festival for Kapa Haka (a concert party or performance) and Māori performing arts – were invited to perform a *haka*, a vigorous posturing dance accompanied with actions and rhythmically shouted words, at this ceremony. The Māori men and women of Te Mātārae i ō Rehu, variously adorned in feather cloaks, *piupiu* (a knee length kilt-like garment worn around the waist), feathers and painted *moko* (a tattoo on the face or body), belted out a hair-raising *haka* from the centre of the stadium, while flames erupted theatrically from the sidelines.

Framed as a proud, unashamed celebration of Māori culture and heritage, in many ways this incredibly rousing performance served to present only one very formulaic interpretation of what 'Māoriness' constitutes in contemporary New Zealand. It left me wondering what international visitors must expect from their every-day engagements with New Zealanders outside the pageantry of these events. For example, after conducting an interview about the Treaty settlement process with a staff member at the Museum of New Zealand Te Papa Tongarewa in Wellington, I overheard an American visitor loudly demand that his museum guide (who had Māori physical characteristics) "go and find [him] a *real* Māori guide" to speak to. I can't be sure what the foreign visitor was expecting or inferring by requesting a "real Māori", but I recall wondering if the slick, prescriptive enactment of the *haka* at the Opening Ceremony had contributed to this visitor's expectations.

Secondly, Māori iconography in the shape of a *koru* (a fern root) and a *mangopare* (a hammerhead shark) was incorporated into the branding of the Rugby World Cup tournament. The typography for the tournament logo displays curls and swirls that are stylistically synonymous with Māori moko and wood-carving designs, as seen here in the 'New Zealand 2011' logo at the centre of this screen-shot taken from the tournament's official website www.rwc2011.irb.com. The graphic designs are visible in the blue background:

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This graphic branding was extended to all aspects of the tournament, including, for example, the surface design of the rugby balls used throughout the games:

Image 3: **'Gilbert Rugby Ball, 2011 Rugby World Cup'**
(http://www.stuff.co.nz/sport/rugby/rugby-world-cup/4891828/Maori-design-touch-to-Rugby-World-Cup-ball)

Such cultural demonstrations reflect a strong interest in the symbology and performance of Māori cultural traditions by non-Māori, and a particular desire amongst non-Māori New Zealanders to capitalise upon the ethno-cultural distinctiveness associated with enactments of Māoriness. However, such exhibitions are not limited to instances of sporting performance; the arrival terminal at Auckland international airport, for example, houses a large *tomokanga,* or carved gateway, commissioned as part of a multi-million dollar terminal upgrade in 2008. The dramatic 2.8m wide, 6m high gateway, was carved – the corporate branch of Auckland Airport states – to symbolise a "spiritual portal from one realm to another, a journey from the dark (the outside world) into the light (world of the living)" (Auckland Airport 2008), and is amongst the first objects travellers see upon arriving in New Zealand. I have observed some visitors (I am unsure whether they are New Zealanders or international visitors) passing straight through the *tomokanga,* others touch or knock upon its wooden sides as they march by, and a small number stop briefly to take photos with cell phones or cameras. Following Māori rituals of greeting and welcome onto the *marae,* the *tomokanga* could be construed as a medium for transforming the status of a visitor from *tapu* (to be sacred, prohibited, restricted, set apart, forbidden) to *noa* (to be ordinary or unrestricted). However, without the attendant rituals of *karakia* (chants or prayers) and

whaikōrero (formal speeches), the carved gateway appears like a cultural exhibit, objectified and devoid of context and deeper meaning.

In New Zealand the domestic consumption of Māoriness has become pervasive, particularly since 1986 when the *Report of the Waitangi Tribunal on the Te Reo Māori Claim (Wai 11)* was released. Claimants Huirangi Waikerepuru and Nga Kaiwhakapumau alleged that the Crown had failed to protect the language as required by Article 2 of the Treaty of Waitangi (*te Reo Māori* was, for example, formally and informally suppressed in schools, and children were punished for speaking Māori in the hope that learning English would facilitate their cultural assimilation into European society), and proposed that it be made official for all purposes, enabling its use in Parliament, the courts, government departments, local authorities, and public bodies (The Waitangi Tribunal/Te Rōpū Whakamana i te Tiriti o Waitangi n.d.).

The Tribunal's report recommended, amongst other things, that legislation be introduced to enable any person wishing to use Māori language in courts of law to do so, a supervisory body be established to foster and protect the Māori language, and amends made for the provision of bilingualism in Māori and in English as a prerequisite for any positions of employment deemed necessary by the State Services Commission (the Tribunal did not, however, recommend that *te Reo Māori* be made compulsory in schools) (The Waitangi Tribunal/Te Rōpū Whakamana i te Tiriti o Waitangi n.d.). In 1987 *te Reo Māori* was made an official language of New Zealand.

A great number of Māori words have subsequently entered into the everyday parlance of many Pākehā; newsreaders, for example, are careful in their pronunciation of Māori proper nouns, the New Zealand national anthem (a resoundingly European concept) is now sung in English and *te Reo Māori*, and the Māori informal greeting '*kia ora*'[99] is widely used by (usually younger) Pākehā. New Zealand's governmental departments and ministries also have bilingual names; the Ministry of Justice, for instance, is the *Tāhū o te Ture*, the Ministry of Defence is the *Manatū Kaupapa Waonga*, and the Minstry of Health is *Manatū Hauora*.

These instances of 'consumption' enable Pākehā to augment the nationalist thrust of their collective identity by intercalating enactments of Māoriness in easily digestible, domesticated, and seemingly unthreatening ways. I contend, however, that while some Pākehā are genuinely eager to include Māori iconography, performances, and terminology in their

[99] In 1984 national controversy was sparked when telephone tolls operator Naida Glavish began greeting callers with '*kia ora*'. Her supervisor insisted that she use only formal English greetings, and when Glavish refused, she was demoted. New Zealanders vigorously debated Glavish's demotion, and Glavish herself briefly became an icon, known colloquially as the 'kia ora lady'. Finally, the prime minister intervened in the dispute, and Glavish was allowed to return to her former job (New Zealand History Online n.d.).

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everyday lives, this goodwill is often limited and does not always include a desire for a comprehensive incorporation of Māori systems of meaning, models of organisation or social and cultural practices. Instead, as Poata-Smith (2004a:74) argues, Pākehā hegemonic desires for biculturalism extend purely as far as it suits the exigencies of the Pākehā collective identity, offering instead only an illusion of bicultural partnership and/or inclusion. I recall, for example, during a visit to a Whanganui *marae* for a Waitangi Tribunal *hui*, listening to an elderly Māori man describe how much he disliked Pākehā adopting and using Māori words. His resentment centred upon what he seemed to feel was a fetishisation of Māori words; that the casual, almost indiscriminate appropriation of Māori terms by Pākehā resulted only in an Anglicisation of Māori words. To this way of thinking, then, the Pākehā adoption of Māori terminology may not demonstrate an enthusiasm for *te Reo Māori* as a whole, but is more of a novelty or curiosity.

I shall explore this argument – that liberal capitalist societies have a tendency to formulate national identities premised upon fantasies of harmonious multicultural utopias, but which rely upon the defusion and/or suppression of divergent subaltern cultural and political desires – in the following chapter. For now, however, I shall move to examine the kind of reactions some Pākehā experience when confronted with Māori enactments of cultural and ethnic distinctiveness that do not neatly fit within Pākehā ideals of national or ethnic harmony.

CHALLENGING PĀKEHĀ HEGEMONY – PĀKEHĀ REACTIONS TO DIVERGENT MĀORI ASPIRATIONS

Many Māori claimants engaged in the Treaty settlement process choose to reconfigure aspects of their identities and socio-cultural or political aspirations in ways that appear divergent from the hegemonic ideals of Pākehā, so it is not surprising that large numbers of Pākehā feel embittered or conflicted about Treaty restitution. Like the non-Aboriginal Australians Elizabeth Povinelli (1999:637) describes in her writings about Australia's multicultural ideal, many Pākehā also genuinely desire that their indigenous cohabitants be treated considerately, justly and with respect, publically, juridically, and personally. However, while they may feel truly sorry for the cruelties and injustices perpetrated historically, many Pākehā also express frustration when the (to their mind, 'established') historical record is reinterpreted at Waitangi Tribunal hearings to 'reveal' the perversion of their imperial forebears' patriarchal goodwill. Not only does such historical revisionism work to contradict Pākehā ideals of racial harmony in New Zealand, it can leave many contemporary Pākehā

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feeling uncertain about their individual and collective culpability and liability in terms of remedial compensation to Māori claimants.

As Treaty of Waitangi academic Dame Claudia Orange observed in our interview (28 March 2011), since New Zealand taxes pay for Treaty redress, there is a strong sense amongst Pākehā as the majority tax-paying body that they are 'paying for' the wrongdoings perpetrated by their predecessors.

> "It's [Treaty settlement compensation] government money, tax-payers' money. I'm a tax-payer. Government can't give money back to Māori without insuring that some sort of governance structure is set up. It has to be this way since so many Pākehā feel angry; angry that they are somehow obliged to foot the bill for the injuries done to Māori all those years ago."

The opinions of my non-Māori New Zealand respondents were bifurcated in terms of their support or condemnation of the Treaty settlement process. This was particularly apparent in the responses made to my online reddit.com post where I asked respondents to the r/NewZealand subreddit for their opinions regarding Treaty settlement remedies. Some who held more moderate views of Treaty restitution, described their thoughts thus:

> "Yes. The Māori have legitimate grievances. I feel that the majority of settlements have been completely fair, if both parties have agreed to the outcome, then I would deem that satisfactory. It tends to be the younger people, the ones who have learned about the Treaty at school, who realise that there are legitimate grievances which are at least partly responsible for the poor health, life, education and workforce outcomes that plague Māori. Your average mid sixties citizen who hasn't been educated about what actually happened will tell you that it's all greedy Māori guilting NZ into giving them free handouts ... I think that the claims process is robust and quite fair and that most treaty money gets spent bettering Māori" [Redditor].

> "I'm a white, upper-middle class New Zealander who, when I was younger, thought a lot of it was pandering to them, and was 'special treatment'. Since entering medical school and really learning what went on, and what the treaty actually means, I have a much different perspective. For example, having Māori seats in parliament is not 'special treatment', it's a poor substitute for what the Māori people were promised when they signed the treaty" [Redditor].

> "I respect Māori for having their beliefs, when you know more about their culture it also explains a lot about why they care so much about having their land back" [Redditor].

> "I find it a real mix. There are legitimate and appropriate compensations, but there are still abusers of the legal system. As far as the settlements themselves go, they're usually quite fair as far as legal settlements are concerned. The process is fair, for the most part" [Redditor].

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There appeared to be a prevailing view that the legal complexities of the Treaty of Waitangi and the extent of Māori grievance are not well understood by non-Māori, and those who tend to know more about how the Treaty settlement process works – much like the Māori claims negotiators discussed in the last chapter – seem to be far more supportive of the administrative costs, ideology and methodology undergirding the restitution process as a whole.

Considerable numbers of non-Māori, however, describe feeling ill at ease with how 'established' historical narratives which exalt European contributions to the settling of New Zealand are cast in a seemingly unfavourable light through the Treaty settlement process. In Waitangi Tribunal hearings, Māori are obliged to excavate the historical record in order to substantiate the Crown's wrongdoing, and to describe how the actions and choices of colonial administrators and European settlers affected claimants' ancestors in detrimental ways. For Pākehā, these restyled narratives of the past present a challenging dialectic: on the one hand historical events form a crucial component in Pākehā claims of belonging; on the other hand, however, asserting a strong connection to the past also infers a sense of culpability for historical injustice (since it symbolically links contemporary Pākehā with the early European 'wrongdoers' of the nineteenth century).

Each Pākehā individual draws their own meaning and significance from the historical record in distinct ways; for example, the descendants of early settlers often have different ideas about historical liability than, say, the children of late twentieth century migrants. Some respondents vigorously repudiate what they feel is a sense of personal obligation to rectify past injustice:

> "I'm a Pākehā but neither me, nor any of my ancestors were involved in all of this. No members of my family ever stole their land. I'm not saying bad shit didn't happen to Māori, of course it did. I'm totally in favour of settling the grievances of the past. I just hate being made to feel responsible for it because my skin is white" [Redditor].

> "My great great grandfather was involved in the building for the first schools in New Zealand. But they don't care about that, they just say that because my European lineage gives me white skin that I am guilty for all the bad things that happened" [Redditor].

I was intrigued that these respondents placed so much emphasis upon the way they felt their biological heritage and physiognomy implicated them in the rectification of historical wrongdoing, not only because it signalled a continued affinity with essentially Victorian conceptualisations of racial 'purity', but because it infers that Pākehā and Māori remain

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genetically and ethnically hermetic despite two hundred years of intermarriage and interaction.

I contend, therefore, that it is not actually 'wrong' for these Pākehā to interpret Treaty redress as a 'reward' for an 'undiluted' blood quantum – or for their own liability to be measured in a similar manner – since outmoded nineteenth century ideations of race remain inscribed and embedded within many of New Zealand's legal processes. For example, the Treaty restitution programme is undergirded by the Treaty of Waitangi Act, (*1975*), and entitles Māori to legally pursue redress from the Crown as partners to the Treaty. However, given that the Act describes a Māori individual, and thereby a claimant, as "a person of the Maori race of New Zealand; and includes any descendant of such a person" (*Treaty of Waitangi Act 1975*, S2), a contention arises: that as New Zealand's foundational compact, the Treaty of Waitangi legally inscribed Māori with an identity that was grounded in antiquated, mid-nineteenth century notions of racial classification where people were catalogued in terms of blood quantum and physiognomy. Despite the outmoding of such thinking academically, it continues to pervade New Zealand's popular imagination; the promulgation of the Treaty of Waitangi Act, for instance, was obliged to employ the same litigious tense as the 1840 Treaty if its obligations and duties were to remain valid, further propagating the misguided equation of biology and descent with remedial reward.

Furthermore, the attitudes of these (third Millennium) reddit.com respondents were oddly redolent of the patriarchal attitudes of nineteenth century European imperialists who relentlessly infantilised 'primitive' peoples. In fact, several times in my r/NewZealand data, when respondents made equations of pre-contact Māori with the practice of cannibalism, I assumed this was meant to underscore the essential 'barbarity' of Māori before Europeans arrived to 'improve' their lives. While Māori are widely considered to have practiced cannibalism (Moon 2008), the deliberate, contemporary evocation of the violent and savage behaviour popularly associated with this historical practice is obviously intended to insinuate a sort of inherent ruthlessness, even inhumanity, amongst Māori; for example:

> "They all ate each other! If we hadn't stepped in when we did there'd be none left" [Redditor].
>
> "They're a lot better off now than when they started off, being illiterate and eating each other" [Redditor].
>
> "I'm pretty sure the NZ courts decided that Māori were too savage [cough cannibalism cough] for this common law protection to apply and threw it away" [Redditor].

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By framing pre-contact Māori as cannibals, these respondents are able to restyle European settlers as agents of benevolence and compassion, and their settlement of New Zealand is reconfigured as a compassionate delivery of 'civilisation'. Such reasoning should thereby vindicate Pākehā from any liability for past injustice by inferring that Māori should be *grateful* to Europeans:

> "Without settlers to NZ, these islands wouldn't be as developed as it is today. You might assume we'd be looking at another 3rd world country. New Zealand would probably be more like the few 'underdeveloped' tribes remaining in the Amazon and other parts of South America" [Redditor].
>
> "The Maoris are lucky they weren't utterly destroyed, which they would have been eventually if it weren't for that treaty. Look at what happened to the South Americans. I'd say Māori got a pretty good deal" [Redditor]
>
> "They just need to realise that they are better off now than [when] they were just a warrior race stuck in the bronze age" [Redditor].
>
> "What if instead of treaty's and trying to be sort of decent, the English settlers just decided to go the American way and treat them as something that needed to be removed? Instead of selling them guns and breeding with the locals, they went in and just killed them all? Māori should be grateful" [Redditor].

For these respondents, pre-contact Māori are imagined to have inhabited a 'state of nature' originally described in the writings of the seventeenth and eighteenth century Enlightenment philosophers, as discussed in chapter four. In this way, a narrative of settlement emerges, almost as a battle (King, 2003:381), whereby the rationality and technology of Europe empowered their explorers and settlers to overcome the challenges and dangers of new territories and any unwelcome(ing) inhabitants. This mode of thinking proposes that only the introduction of Māori to a 'civilised' way of life through their collective entry into a social contract would alleviate their inherently savage nature (in New Zealand's case this hypothetical contract actually manifested physically as the Treaty of Waitangi).

Furthermore, this attitude endures in the rhetoric of some Pākehā who often interpret Māori demands for self-determination, autonomy and redress in a narrow, historically-centric manner. Consider, for example, the words of an elderly Pākehā gentleman during an informal conversation about Treaty restitution:

> "I say, if they want to go back to running around in grass skirts killing each other and eating each other we should let them. They wouldn't last a minute. I don't know a single Māori who'd want to live in a *pā* (fortified village) without their Sky Television[100] and their dole[101], you know?"

[100] New Zealand's primary pay-per-view television provider.

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Such ideations of Māori aspirations are of course, utterly misconstrued; while contemporary Māori may want to incorporate symbolic and cultural aspects from the past into their present-day configurations of identity, for these Pākehā to interpret Māori aspirations in such a straitened, inaccurate way indicates they have little appreciation of what Māori are pursuing with regards Treaty restitution. As with the '*Beaches: Iwi/Kiwi'* billboards, because Māori ambitions do not align with Pākehā expectations of what Māori 'should want', Pākehā interpret their demands as fundamentally separatist, and antithetical to the homogenous imperatives of social fraternity that undergird Pākehā identity.

DISCIPLINING DIFFERENCE

For decades many Pākehā struggled to admit that Māori had distinct aspirations peculiar to them historically, ethnically and culturally (Hazlehurst, 1988:54). During the 1970s and 1980s, however, Pākehā popular delusions of bi-racial and political harmony began slowly to evanesce following radical Māori protest and agitation. Throughout these decades Māori political demonstrations, land rights marches and occupations, the militant anti-Springbok tour protests, and the regular, highly visible rallies organised by the Waitangi Action Committee at the annual Waitangi Day commemorations, led to a dovetailing of Māori political and cultural life (Greenland, 1991:92; Poata-Smith, 2004a:73). Young, usually urban Māori worked tirelessly to reinvigorate their *te taha Māori* (the Māori side, or Māori perspective) through the revival of their customary symbology, cosmology, and language (Smith 1981:18 in Greenland, 1991:98), and the dispossession of land came to form a crucial link between everyday practice and ideology, anchoring past and present to one another. The more historical land dispossession became politically emblematic of injustice amongst Māori, inspiring collective allegiance and providing a potent theme around which to rally, the more Pākehā ideals of a bicultural fraternity appeared incompatible with the political aspirations of young Māori.

As New Zealand's dominant demographic, for so long in control of the circuits of power through which recognition and legitimation are realised, many Pākehā still feel confused, distressed even (Hazlehurst 1988), by what they interpret as Māori rejections of an ideal (if imagined) New Zealand 'way of life'. These Pākehā felt Māori had prospered as much as they had from this model, an attitude evident in my r/NewZealand data:

> "They should be happy our ancestors didn't kill the lot of them, they get better chances at just about everything than any other demographic now

[101] Colloquial New Zealand name for the social welfare benefit.

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> and for the most part choose to squander them. Why can't we all just get on with things and be one people: kiwi" [Redditor].
>
> "Most of the country just want to move on and 'be one' but its very difficult when you have glaring separatist things like the Māori party[102], Māori tv[103], Māori scholarships and a multitude of other race based things just for Māori" [Redditor].
>
> "what about the Māori party? where they just want to push their agenda for one race? nz is a melting pot of diversity, especially in this day and age. the Māori party should be abolished so we can all be one people" [Redditor].
>
> "Im sick of hearing it, there should be no differences at all. A beach is a beach, a benefit is a benefit, just stop with all this entitlement shit and live as humans, as one people, not Pākehā and Māori but as New Zealanders" [Redditor].
>
> "We must realise that we need to strive to evolve, to all become one people, New Zealanders/kiwis" [Redditor].

The prevailing theme in the rhetoric of these respondents is a desire for a coherent national identity. However, despite exaltations of egalitarianism and inclusiveness, their unspoken (likely unacknowledged) presumption is that such a bi-, or even multi-cultural ideal is actually predicated upon the sublimation of Māori socio-cultural difference within categories such as 'New Zealander' or 'Kiwi', notions dominated by Pākehā frameworks of meaning and logic. If Māori wish to be included within the Pākehā incorporative project (and thereby engender the conciliatory goodwill of Pākehā in contexts such as historical restitution, for example), they are invited to cohere to these hegemonic categories by enacting their difference in ways which Pākehā consider 'authentic' (novel but unthreatening). Rather than a 'celebration' of diversity, then, this process is more an invitation to absorption (Povinelli 1999: 637).

In *Economies of Abandonment* Elizabeth Povinelli examines the ways settler societies in post- or old colonial contexts like New Zealand interpret notions of difference by 'bracketing' ethnic and cultural alterity in terms of 'autological' or 'genealogical' subjectivity (Povinelli, 2011:13). The autological subject, Povinelli contends, refers to the multiple liberal discourses and practices that invoke the autonomous, self-determining subject – attributes that are particularly evident in the syncretic socialites of settler peoples originally from Europe – and are linked to, although not exhausted in, liberalism's emphasis on freedom and individuality (Povinelli, 2011:27). On the other hand, genealogical society refers to liberal discourses that

[102] The Māori Party are a political party in New Zealand which formed in 2004 in response to the passing of the seabed and foreshore legislation.

[103] Māori Television is a broadcasted television channel in New Zealand. Funded by the New Zealand government, the station began broadcasts in 2004 and has assisted in the revitalisation of *te Reo Māori.*

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stress social constraint in the process of subject constitution, construing subjects as if bound by various kinds of inheritances, historical, ideological or biological (Povinelli, 2011:27).

As the conduits of this particular way of thinking, therefore, settler citizens and their descendants often conceive of themselves as autological subjects, individuals with rational choice, free to operate as they wish in the world, unfettered in their incorporation, imitation and rejection of alternate socialites as they see appropriate or necessary. Subalterns, minorities, or indigenes, however, are obliged to configure their identities under a genealogical framework. This occurs because the dominant hegemon – in New Zealand's case, Pākehā – tend to conceive Māori identity as fundamentally historical, deriving 'authenticity' from a temporal affinity with the past, which legitimates and sustains their contemporary practices and enactments, a conception reinforced by legal classifications such as those used by Statistics New Zealand which determine Māori ethnicity in genealogical terms.

By framing their understanding of their world in this way, Pākehā are able to strategically claim that their settlement in New Zealand in the nineteenth century facilitated the 'beginning' of history in New Zealand, thereby relegating an idyllic notion of Māoriness to a mythical, primordial (pre-European) past. Despite an aversion amongst many Māori to such an interpretation, Māori claimants are still compelled to conform to such fictions in an effort to demonstrate their socio-cultural 'authenticity' to Pākehā in order to achieve recognition for their demands (Poata-Smith 2004b). This obligation, adopting identities predicated on imagined Pākehā ideals of authentic difference, inspires what Povinelli (1999:633) describes as an "impossible desire" amongst subalterns who must bear the burden and responsibility of transporting 'ancient', prenational meanings and practices into the present in exchange for the conciliatory goodwill of Pākehā. Pākehā, then, draw upon and exploit aspects of Māoriness in an effort to legitimise their feelings of belonging, but also to bolster their desires for harmonious national cohesion. By extolling the 'benefits' of their glorious civilising past, and alleging that Māori are 'better off' now than they might have been had they been 'left to themselves' (or colonised by another European nation), Pākehā feel able to justify their ongoing socio-political hegemony.

Despite such stringent stipulations for the performance of 'authentic' identity, however, Māori claimants are far from politically and juridically impotent; in fact consensus over the constitution and parameters of Pākehā identity are vital in the formation of Māori identities. In the following section I shall examine the way the Māori claimants with whom I spoke and observed, described themselves in contrast to Pākehā in the context of Treaty restitution, firstly in terms of the popular notion of a singular, unitary Māori collective, and secondly,

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that their contemporary changes in identity in response to the pressures of Treaty settlement represent new ways of constituting their Māoriness, not inauthentic inventions of cultural and social traditions.

DIFFERENT FROM PĀKEHĀ – THE FICTION OF MĀORI COLLECTIVITY

At a Waitangi Tribunal interlocutory[104] hearing in 2011 an elderly Māori claimant gripped the podium and announced:

> "*Tangata whenua* Māori negotiated a treaty in good faith with a foreign power even though we are now considered a subject people, or flora and fauna, part of the *whenua*, the landscape. We were lied to, we were lied to! Stories told about us that weren't true. Management of our country, our culture, our economy was stolen by an occupying white colonialist culture ... Over the past two centuries, *Nga* [*iwi* name] as a single entity has been lost in a time capsule, a political vacuum. Our behaviour and our lives have been dictated to by a foreign political system not of our choosing. We must use this process to make *tangata whenua* Māori culture intact again."

Like the female claimant in the preceding chapter who metaphorically described the catharsis delivered through Treaty restitution as similar to the physical restoration of a *marae,* this gentleman's sentiments also encapsulate the desire of many Māori claimants who wish to reinvigorate social and cultural institutions and structures that have been lost, disrupted or destroyed following European settlement, an aspiration that exists outside, but relative to, the rewards of financial and commercial redress. It also suggests that many Māori continue to exert considerable energy in their attempts to manoeuvre out from under the encrustations of two hundred years of imperial fiction about them, and thereby reconfigure their identities in ways that suit their requirements *and* fit within the scaffolding of meaning that orders their lives as inhabitants in contemporary New Zealand.

In fact, Māori claimants are particularly percipient and conversant with the labels and expectations foisted upon them by the Crown and by Pākehā; as a middle-aged Māori author and community leader related during a meal, for example:

> "All the young people are telling us not to sign [the settlement agreement with the Crown] but they know nothing about it. They call themselves the

[104] The interlocutory phase is where the issues for a Waitangi Tribunal inquiry are particularised and refined, and the claimant parties and the Tribunal define a set of focused parameters for the inquiry and lay the basis for an efficient process.

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> 'Surrender Rebels', they think it sounds glamorous, but they don't realise that it was the Crown who gave us that title, who gave us that identity".

This gentleman's *hapū* had formed part of a 'rebellion' against the Crown in 1864 when Tauranga Māori fought in two battles (Pukehinahina and Te Ranga) which resulted in the confiscation, or *raupatu,* of large tracts of their customary land by Crown authorities. The months after these battles were an intense time of negotiation between Crown officials and Tauranga Māori as they tried to agree on what land would be taken as punishment for the Tauranga 'rebellion' (The Waitangi Tribunal/Te Rōpū Whakamana i te Tiriti o Waitangi 2004, n.d.). This particular claimant was frustrated that young adults in his community, with little understanding of the historical circumstances of their *hapū's* surrender, were failing to understand their *hapū's* shame and resentment regarding the name the Crown had ascribed to them: the 'Surrender Rebels'. For him this appellation was repugnant, a name he felt served only to underscore the Crown's duplicity – and a label he wished fervently to excise from his *hapū's* history and identity.

The same claimant who expressed concern over researchers' use of 'strong words, true words' in the retelling of her stories, also voiced her frustration regarding her *hapū's* political subjugation under the territorial boundaries generated by colonial administrators and cartographers:

> "The line in the sand or the line on the map was drawn long ago by the Pākehā. It's not the truth, it's too literal. The line on the map is not something we ever wanted, our boundaries are fluid and they move around. We're not all the same people".

In stating that the 'line on the map' is too literal, she is referring to the fact that *iwi, hapū,* and *whānau*, are not hermetic, discrete entities inhabiting exclusive and bordered territories; rather, they are complex networks of lineages woven together by marriage, political alliance, migration and settlement, arrangements not easily encompassed in the prescriptive administrative markings on a map (Poata-Smith, 2004b:172). Lastly, I recall an elderly male claimant at a Waitangi Tribunal hearing angrily taking to the stand, knuckles white at the edges of the lectern, to emphatically announce:

> "The Pākehā, they make us out to be fauna and flora, they think it sounds more polite than 'brown-skinned natives'. But I am not a vegetable! I am human! Don't tell me what and who I am!"

His feelings of objectification as a Māori person evoke nineteenth century European obsessions with cultural novelty and social alterity, when explorers and colonial administrators sought to empirically categorise and explain new worlds.

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In fact, so much of Māori identity has been imposed by non-Māori in an effort to fathom the intricacies and penetrate the complexities of Māori life, that it should come as no surprise to Pākehā when Māori express strong desires to define themselves outside these prescribed idealisations. Contrary to the alarmist reactions of conservative Pākehā, however, such desires by Māori do not necessarily represent a rejection of the former's systems of meaning or ways of life, but suggest a craving for formal acknowledgement from Pākehā as essentially distinct peoples. As one claimant noted:

> "You just can't marry the two, the Māori and the Pākehā worlds, they're too different, really different, and it's just not as simple as making them lace together. Some people think that Māori society is fundamentally incompatible with the European, but I think it's just that Pākehā want us to be like them and we want them to know we are not".

As a Pākehā I too had fallen into this conceptual trap, assuming that Māori proudly thought of themselves as a unitary collective with a homogenous culture, history and cosmological framework, and an innate attachment based on blood – a presupposition that demonstrates how powerful the hegemonic Pākehā way of thinking remains in New Zealand. I was surprised how, when asked to define themselves in our interviews, contrary to my expectations claimants described their connections to smaller units of relatedness, primarily their *hapū* (a kinship group, clan, or, sub-tribe) or *iwi* (an extended kinship group, or tribe who share descent from a common ancestor). For example, the negotiator of a small central North Island *hapū* related how:

> "The term 'Māori' is foreign to us. We still don't even acknowledge ourselves as Māori. We talk about ourselves as *hapū*, as *iwi*, when I talk to Pākehā I want them to understand the difference. It's important to me".

Interestingly, while he conceived of himself and his relatedness in a nuanced, stratified way, this claimant thought of Pākehā as a large, undifferentiated whole. Another claimant, over coffee at a busy central Wellington cafe, described his model of connectedness more in terms of nationalism:

> "You have to think of us like little nations, *iwis* as nations of people with their own internal nationalism. They have a very cohesive identity; they have a leadership, a sense of community. What we're all working to do is have our own flowering of nationalism, to reassert our own independent identities".

And a third Māori claimant, at a morning-tea break during a *Te Paparahi o te Raki* interlocutory hearing, used the Māori language as a metaphor to describe her sense of social distinctiveness:

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> "Look, you can see our distinctiveness when we are together, through our language for example. If any fluent Māori speaker listened to me and then listened to them they'd notice that it's different. Our dialect is different. Our words are different sometimes, our whole language structure".

Just like so many other Pākehā, I had been seduced by the popular fiction of Māori collectivity, and expected them to frame their desires for redress as a clear departure from the imperatives of the Crown. This approach, however, neglects the subtle and nuanced variances of each claimant group, the very attitude that becomes particularly problematic in contexts like Treaty restitution, when government policy and Treaty settlements also downplay regional differentiations amongst Māori, and insist on promoting the most inclusive social formations possible, a process that places considerable pressure on Māori to federate for purpose of redress, thereby rigidifying the fiction of Māori homogeneity (Maaka 2001 in Maaka & Fleras, 2005:66).

While incisive academic contributions to Treaty literature have assisted in eroding such popular fictions by focussing on the multivalence of Māori identities, the Waitangi Tribunal and the Office of Treaty Settlements continue to favour hearings and negotiation with Māori in 'large natural groupings' for speed and administrative efficiency. Unlike the land restitution programme in South Africa where individual claimants were offered the opportunity to receive a small amount of cash compensation for dispossessed land, in New Zealand the genealogical conceptualisation of Māori identity in the Treaty settlement process means that the Waitangi Tribunal and the Office of Treaty Settlements encourage individuals and communities to amalgamate in large 'regional-based' groupings – purportedly for administrative efficiency, but also because Māori are popularly expected to be organised in the same ways socially that they purportedly were two hundred years ago. Although individual negotiations would take significantly longer, the Crown's present approach not only encourages adversarial relationships amongst Māori (*hapū* are forced into larger *iwi* groupings that do not always reflect genuine indigenous social structures), it strays perilously close to archaic imperial attitudes whereby the complex realities of Māori descent systems, systems of connectedness, and structures of authority are dismissed or downplayed (Poata-Smith, 2004b:177).

The assumption that 'Māori' are a tidy homogenous collective is a consequence of their opening engagements with Europeans two centuries earlier. European missionaries, settlers, colonial administrators and amateur ethnologists[105] were all eager to define and categorise New Zealand's native inhabitants so they could determine how to treat them lawfully,

[105] For example, Stephenson Percy Smith and Elsdon Best.

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morally and evangelically. Possibly beguiled by New Zealand's geographic remoteness and encircling ocean, most unquestionably assumed Māori were a homogenous group of people. When challenged, however, Māori defined themselves in terms of their ancestry or what they were not: "[i]f they thought of themselves as a category it was as *tāngata* (people), rather than dogs, birds, *taniwha* (monsters), *patupaiarehe* (spirit people) or *atua* (gods)" (Ballara, 1998:42). The actual word 'māori' means ordinary or common, as opposed to exotic; it was applied by Europeans to Māori people and gained popular currency only after Māori had begun to use the term to distinguish their own normality as people from the exotic or alien newcomers (a process of self-ascription that belies the comments of some claimants) (Ballara, 1998:42).

Māori social systems, for example, received considerable attention from early amateur ethnologists of the late nineteenth century, who sought to present Māori in an analytically simplistic manner but often created interpretive distortions. For instance, Māori were assumed to exist in large neatly bounded 'tribes', or *iwi*, immutable political units that had occupied and defended continuous territories inside strict tribal boundaries for centuries. Each *iwi* was thought to be tidily divided into segmented sections called 'sub-groups' or 'sub-tribes' in English, *hapū* in Māori, and these units further subdivided into *whānau* (extended families) (Ballara, 1998:18). Europeans conceived of this system as an orderly pyramidal hierarchy of structural subordination where small *whānau* groups comprised larger *hapū,* who in turn formed an *iwi,* a model Europeans thought redolent of the monarchical and class structures of Britain (and which came to underpin the model of British indirect rule in Africa (Sissons, 2005:52)). Each *hapū* was presumed to have one chief who also had a place in the tribal hierarchy, the apex of which was the *ariki* or paramount chief (Ballara, 1998:18).

This reductionist rendering neglected to appreciate the complex, fluid dynamics of the socialities settlers encountered. Eighteenth century *iwi*, for example, are now thought to have been more of a conceptual construct than a distinct political unit, and incorporated a wide group of individuals who based their descent on a common ancestor, shared a common sense of identity, and were woven together in complex social networks of marriage, political alliance, migration and settlement (Poata-Smith, 2004b:172). Since Māori descent is ambilineal[106], individuals can also activate their rights to, and connections with the *hapū* and *iwi* of both parents, further stratifying their sense of relatedness to perform various functions for defence and self-management, or to conduct relations with other *hapū* and *iwi* (Ballara, 1998:336; Poata-Smith, 2004b:172). Furthermore, as earlier remarked by a claimant, many Māori conceive of their *iwi* as a discrete nation rather than a smaller segment of a hierarchical whole. Decades of imperial administration and popular retelling, however, ossified truncated

[106] Able to trace descent through either the male or female side (or both).

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stereotypes of Māori social systems, blunting the complex realities of Māori social, political and cultural life (Poata-Smith, 2004a:69,183).

In fact, in terms of Māori collectivity, it is reasonable to assert that a shared notion of pan-tribal Māori identity did not exist until after the New Zealand Land Wars – a series of armed conflicts that took place across New Zealand between 1845 and 1872 over a number of issues, most prominently the sale of Māori land to European settlers – when substantial land confiscations, forced evictions and growing economic marginalisation occurred amongst Māori, encouraging various *hapū* and *iwi* to draw together to form pan-tribal organisations for political and social protection. Such organisations included, but were not limited to, the Māori sections of orthodox churches, the Māori protest religions of *Ringatu* and *Rātana*, culture and sports clubs, family and tribal organisations, benevolent societies, Māori committees, Māori wardens, Māori councils, and the Māori Women's Welfare League (Spoonley, 1993:41; Walker, 1990:199).

These social agglomerations demonstrate the malleable ability of indigenous peoples to transform and mutate to fit the political pressures and requirements of the time. Contemporaneously, the Treaty settlement process provides a space where Māori claimants and claimant groups, are able to challenge and subvert entrenched assumptions and prescriptions about who they are as 'a people'. As a suave Māori negotiator remarked during an interview:

> "In the past so much was written about us, and we weren't party to the changes, we didn't have a chance to go through it. So now, this time around, you know, we correct all those wrong assumptions, in the hearings we have the power to stand up and tell the Crown who we are and what we want".

Sharing and catharsis, then, are not the only rewards for participating in the Treaty settlement process; significantly, Treaty restitution appears to afford claimants the 'power' to reconfigure how they imagine themselves, and thereby challenge and debunk long-held idealisations of Māori identity.

Conversely some critics, like Poata-Smith (2004b:180) for example, feel that the Treaty settlement process has a detrimental impact on Māori social life, by obliging claimants to conform in ways that invite *hapū* and *iwi* to substantiate their rights to the land or resources under claim, and thereby demonstrate their unique proprietorship over these assets. This approach, Poata-Smith argues, compels claimants to adopt a "fortress mentality" that pits *hapū* and *iwi* against one another. I would suggest, however, that what Poata-Smith interprets as a process of Machiavellian social fragmentation is actually an instance of unique

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empowerment, since the restitution process allows claimants to reassert the distinctive characteristics and features they understand their individual *hapū* or *iwi* to embody. For example, the same negotiator in the preceding quote also asserted that:

> "We didn't spend a lot of time talking about how common we all were, so in one sense it turned us into rivals. But the Tribunal process is actually very good at allowing us to celebrate our differences from each other as well, it sort of promotes that".

At one of the Waitangi Tribunal interlocutory hearings, an elderly claimant took to the lectern to declare that he and his *hapū:*

> "... want to take the time to rebuild our hapū, to pick up our *whakapapa*, our *whanaungatanga* (a relationship, kinship, or sense of family connection and belonging). To rebuild who we were before all the disruption. It is desired".

This pursuit of re-growth, renewal and revitalisation amongst Māori social and cultural systems is a common desire amongst claimants, and was frequently described by claim negotiators in our interviews, for instance:

> "I see the role of *Ngati* [*hapū* name] as growing, rebuilding what was. When I was a child there was five marae, now there's fourteen. They've been reinvigorated and rebuilt with our Treaty settlement money ... so, it's like we are forming a whole new *Ngati* [*hapū* name]. The nation of *Ngati* [*hapū* name] within New Zealand, to reclaim our *mana* as the *tangata whenua* of this district".

> "The Tribunal helped us; it gave us the opportunity to come together as a strong group, to deal with these problems. It consciously brought us together, to think about what we wanted".

While Pākehā often essentialise Māori as a single culturally distinct group of people, therefore, Māori claimants repeatedly express their desires to have the nuances that make each *hapū* and *iwi* distinctive, recognised and acknowledged by non-Māori. Treaty restitution provides a space where this recognition can be articulated and begun to be realised; just as claimants in the preceding chapter described a need to have their stories of suffering heard during hearings, and their aspirations for future development acknowledged in subsequent negotiations for redress with the Crown, restitution also appears to facilitate claimants' cravings to constitute themselves in ways that suit them.

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ETHNIC AUTHENTICITY AND THE COMMODIFICATION OF MĀORINESS

As earlier noted, Pākehā tend to hold particular presuppositions about what exactly constitutes 'authentic' Māoriness and enactments of 'genuine' Māoriness. For Pākehā, the empirical scientism inherited from their imperial forebears and made popular by discourses like positivism in the nineteenth century, means that many Pākehā tend to equate ethnic or cultural authenticity directly with notions of genetic or biological purity. Reminiscent of nineteenth century social evolutionist rhetoric, this attitude conceptualises the commingling of genetics as a dilution of ethnic or cultural authenticity (much like Clifford's description of the Mashpee case in the preceding chapter). Amongst Pākehā, pre-contact Māori are often considered to have been more 'authentic' than contemporary Māori, who have 'interbred' with Europeans (and now display a blend of physiological characteristics); for example, as noted earlier, blood quantum and physiology remain popular measurements in the quantification of 'authentic' Māoriness for many respondents to the r/NewZealand subreddit, for example:

> "There is not a single person of 100% Māori descent. Every Māori in New Zealand is genetically 50% or more non-Māori. Saying that someone's European ancestors took your land falls a bit flat when you're at least half European yourself. Don't tell me that I owe Māori for what my ancestors did when every Māori in New Zealand now shares that ancestry" [Redditor].
>
> "There's no pure ones left. Every single Māori in NZ has white ancestors now. Acting like a victim and expecting handouts for wrongs done to your great grandfather is not getting you anywhere" [Redditor].
>
> "The descendants, all who have now bred with the same 'people' who took the land.. making there no real them and us. Just the crown and some ancestors" [Redditor].

These respondents appear to conceive contemporary Māori as 'less' Māori than their forebears, thereby invalidating their entitlement to intergenerational inheritance of grievance or redress. Given that all contemporary Māori now have some degree of non-Māori ancestry, the implications of this attitude are interesting (Butterworth & Mako 1989 in Bromell, 2008:31). Those Māori who also identify with their Pākehā ancestry tend to tack back and forth between the two systems of meaning with relative ease, choosing to exploit one or the other identity that best suits whatever context in which they find themselves. In fact, one could even argue that, as the descendants of ambilineal descent systems and complex tangles of relatedness, Māori are quite familiar at traversing between multiple, often conflicting notions of identity. For Pākehā looking for unbroken, immaculate record of

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genetic and cultural continuity as indicative of cultural or ethnic authenticity – and thereby entitlement – however, Māori abilities to craft their identity in ways that suit the particularities of each individuals' descent tends to be frustrating.

Popular expectations of 'authentic' Māoriness are further complicated by performances of 'traditional Māori culture' by Māori themselves. Take, for example, the *Tamaki Māori Village*[107], a short distance outside Rotorua in New Zealand. Acclaimed as 'New Zealand's Most Awarded Cultural Tourist Attraction', visitors are invited (for a fee) to explore "an authentic Māori village" where "fires blaze", to watch displays of "Māori weaponry", women weaving and making Māori crafts, and *toi moko* (tattooing). Additionally, "villagers" sing, dance, and tell stories of their "ancestors and history", before visitors sit down to enjoy a three-course meal steamed underground in a *hangi*, described as "'authentic" and "traditional". Although the Village is designed primarily for visits by international travellers and passing cruise-ship passengers, it typifies an ideal of Māoriness that contributes to non-Māori expectations of the former's cultural 'authenticity'.

Consider, by contrast, the strong national response to the release of the well-known New Zealand film *Once Were Warriors*. Based on New Zealand author Alan Duff's popular 1990 novel, the film follows a family of urban Māori living outside New Zealand's largest city, Auckland[108], and their struggles with poverty, unemployment, alcoholism, petty theft, gang prospecting, and domestic and sexual violence. It is a brutal, visceral tale where the impoverished Heke family experience a profound disconnection from their 'traditional' roots; pubs replace *marae* as places to meet and socialise, and *whanaungatanga* is achieved through drinking and partying (Rakuraku 2008). Not all urban Māori live in such grim socio-economic circumstances; however, almost all Māori would be able to describe a direct connection to at least once of the films thematic tenets.

The film's release drew considerable reaction from audiences.[109] Forced to confront a national reality far removed from New Zealand's established clichés of sheep and pretty rural scenery (P. S. Ward 2008), and stereotypical portrayals of gentle, convivial Māori in print (such as the popular comic strip *Footrot Flats* animated by Murray Ball), and onscreen (like entertainer and comedian Billy T James' feature film *Came a Hot Friday* (1984)), many Pākehā

[107] http://www.tamakimaorivillage.co.nz/

[108] In Duff's novel the family lived in a fictional town called Two Lakes.

[109] Playwright and broadcaster Maraea Rakuraku claimed that in American, audiences associated the film's main characters with Ike and Tina Turner, while in South Africa former ANC members imprisoned during apartheid "identified with the post colonial subtext" (although strictly post-colonial, New Zealand remains a Dominion) (Rakuraku 2008).

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were shocked and outraged.[110] *Once Were Warriors*, I contend, had broken an implicit Pākehā assumption about their relationship with Māori, hegemon and subaltern, whereby the performance of Māori difference was welcomed, even embraced by Pākehā so long as it was considered neither repellent nor repugnant. Even though the sanitised, domesticated ideal of 'traditional' Māori life presented in the *Tamaki Māori Village* reflects a way of life no longer extant in New Zealand, for many Pākehā it is far more desirable and conceptually digestible than the harsh, grim socio-economic reality offered in *Once Were Warriors* – a way of life for many Māori which, arguably, has arisen largely as an indirect result of imperial domination and customary land dispossession since the nineteenth century.

It is difficult (impossible even), then, for Māori to configure their identities in ways that do not conflict with entrenched Pākehā expectations of what constitutes 'authentic' or 'traditional' Māori performance. Should, for example, the *Tamaki Māori Village* with its performances of 'traditional' weaving, dancing and tattooing be celebrated as an artificial replica of a pre-European way of life, but from which principles of communal and sustainable living can be imparted? Or should it be considered a valuable repository for cultural tradition, where 'living' re-enactments of a life long-gone provide local, contemporary Māori with an income? Should *Once Were Warriors* be regarded as a bleak, but authentic portrayal of Māori impoverishment and domestic violence in New Zealand? Or should it be discounted as a new powerful stereotype of Māori as violent drunkards from broken homes and failed marriages?

From my research, I observed Māori contorting their identities to suit popular expectations of 'authentic' and 'traditional' performance (which, as we've seen Povinelli argue, is necessary if claimants are to win the reparative goodwill of the Crown/dominant hegemon), *and* striving to marry these with a reconfiguration of identity that satisfies the specificities of their individual, and *hapū* and *iwi* requirements. A good example of this process can be found in the Treaty settlement process, where Māori claimants become increasingly commercially incorporated and orientated, a process that transforms some, and reaffirms other, customary social and political hierarchies.

As noted in the preceding chapter, when claimants receive redress from the Crown they are obliged to institute a Post-Settlement Governance Entity (PSGE) to manage the large sums of money (hundreds of millions of dollars in the case of large claims) and assets that flow from compensation deals with the Crown. As a consequence, Māori claimants are

[110] Many Māori, too, were frustrated and aggrieved by the film, but for different reasons; many felt Māoriness was misrepresented in the film, accusing director Lee Tamahori of glamorising gang culture and distorting Māori concepts like *tikanga* (Rakuraku 2008).

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encouraged to adopt commercial models of operation, transforming established social hierarchies and shifting collective power into the hands of a new Māori corporate elite (Poata-Smith, 2004b:75). These managers, directors and executives are becoming powerful agents in the reorientation and articulation of their *hapū* or *iwi's* identity and aspirations, transforming claimants into 'beneficiaries' and 'shareholders' in an increasingly vertical power hierarchy predicated on economic wealth.

Claimant opinion regarding these changes is mixed; some, for example, see PSGEs as a necessary requirement of the settlement process, and conceive the incorporation of Māori social systems as a logical consequence of striving to adapt Māori customary social and political systems to better fit within neo-liberal settlement paradigms. The Māori negotiator from a small central North Island *hapū* described this process of incorporation as beneficial*:*

> "Before we got our settlement our entire community was totally dysfunctional. Culturally, economically, environmentally we had toxic rubbish in our own back-yards, we had no language, people were breaking *tikanga* on our own marae. But now, we have a whole team of people looking after our settlement money and investing it, you know, business-men, they know what they're doing. They are helping us to deal with our problems, to go forward in new ways."

In fact, all the negotiators with whom I spoke described the institution of PSGEs, and the inexorable commodification of Māori identity, as a necessary consequence of participation in an economy that privileges capitalist notions of property rights; for example:

> "Part of the compromise of getting our assets back and participating in the whole process, is that we are getting corporatized, but having said that, hopefully that corporatisation will in turn help to protect the very assets that are being returned. It's all about responding to the changing times" [Māori negotiator for a Bay of Plenty *hapū*].

Other claimants felt that their *hapū* or *iwi* business management teams – whose primary objective is to ensure the profitability of their commercial ventures – were acquiring an unsettling concentration of decision-making control, turning PSGE trustees into powerful, sometimes domineering, full-time tribal executives. Some claimants saw this process as dangerous since it threatens to entrench and institutionalise inequalities of wealth and political power that already exist within and across contemporary Māori societies, without really facilitating substantial beneficial change post-settlement (Poata-Smith, 2004b:61). In an interview a quietly spoken Māori claimant remarked:

> "There's a real tension there because the rights to land gives those at the *iwi* level the revenue and *mana* and status that they never had previously in traditional times; it would have been *hapū* controlling things".

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Still other claimants described the PSGE process as an actual reinvigoration of waning customary social hierarchies and power structures. From their perspective, PSGEs were actually restoring and reanimating roles of authority that were held historically by powerful *ariki*, the paramount chiefs or first-born high-ranking members of a family who enjoyed considerable political control over their respective *hapū* or *iwi,* a position that suffered under the institution of imperial governance; the preceding claimant went on to suggest that:

> "Those senior *ariki* lines that were dying out? They are being reinvigorated, it's already happening, as the chairs of tribal authorities, a new way of governing, of leadership amongst Māori".

The ability to adapt customary social systems to suit the requirements of participation in New Zealand's capitalist economy, however, is not the only way Māori are able to transfigure their identities in order to achieve their aspirations; claimants have also grown increasingly sophisticated in their legal acumen, allowing them to leverage more and more value from the Treaty settlement process.

In the late 1980s, for instance, the Waitangi Tribunal investigated the then ground-breaking Wai 150 case following the passage of the Radio Communications Act in 1989. Heard under urgency, the claimants – the New Zealand Māori Council – alleged that the radio spectrum was a *taonga* (a treasure) that had not been alienated from Māori ownership, and was not, therefore, the government's property to sell. In their report, the Tribunal adjudged that although neither Treaty partner had been aware of the existence of an electromagnetic spectrum when the Treaty was signed in 1840, radio frequencies were a natural resource that had existed since the 'time of creation' (The Waitangi Tribunal/Te Rōpū Whakamana i te Tiriti o Waitangi n.d.). The spectrum, therefore, might not be a '*taonga tuku iho nga tupuna*' (a treasure handed down from the ancestors), but it was a *taonga* nonetheless: if the state wanted to create new property rights for the spectrum, they were in breach of the Treaty by failing to first negotiate with Māori.

This report marked a significant turning point in New Zealand regarding conceptions of customary ownership. In the 1980s the New Zealand government introduced radical programmes of privatisation and corporatisation of state commercial assets in an attempt to circumvent looming bankruptcy, reforms which lead to a nationwide revision of what constituted public, private and customary property (Edmunds, 2004:115). Following the Tribunal's *Allocation of Radio Frequencies* report, a swathe of claims were submitted by Māori for goods hitherto unrecognised as property, including claims for (or shares in) the geothermal fluids at Ngawha, energy, railway infrastructure, kiwifruit exports, the digital spectra (including digital television transmission, and '4G' cellular and wireless broadband

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technologies), the seabed and foreshore, and, most recently, declarations of water 'ownership'.

What originated amongst Māori primarily as a demand for the restitution or redress of lost land, has swelled to include a slew of progressively inclusive notions of 'property'. In 2011, for instance, twenty years after their original claim was submitted, the claimants of the Wai 262 submission finally received their report. The findings of the Waitangi Tribunal's *Ko Aotearoa Tēnei Report* explored notions of customary intellectual property and copyright status (and protection) for New Zealand artists, weavers, carvers, writers, and musicians, and especially Māori rights to, and legal status over *rongoā* Māori (traditional Māori healing) knowledge and practice, and the Crown's existing custodianship and funding of *mātauranga* Māori (protected objects in museums and archives).

Just as historical restitution is a product of a particular way of thinking about the contemporary world, so too are Māori claimants' ability to assert proprietorship over heretofore unrealised resources, and leverage novel further unanticipated value from the Treaty settlement process – the result of new ways of thinking about distributive justice and the transmutation of identity. For example, following the publishing of Rawls *Theory of Justice* (1971), thinkers like economist Amartya Sen, and political philosopher Martha Nussbaum, dissected Rawl's proposal that a particular 'basket of social primary goods' could satisfy an individual's wants. Sen argued that a focus on primary goods did not adequately recognise the heterogeneity of human ends, and that the embodiment of this advantage was to be found in the *relationships* people have with goods, not within the goods themselves (Fleischacker, 2004:118; Sen, 1980:157-158). Will Kymlicka, too, wondered why cultural membership was not included as a 'primary good', an omission that in his mind perpetrated an oversight of *groups* of individuals in the distributive justice paradigm, and disadvantaged minority cultures and indigenous peoples, such as, for instance, victims of the trans-Atlantic slave trade or those oppressed by South Africa's apartheid regime. Kymlicka asserts that cultural membership is such a crucial, elemental good that it can justify special cultural rights and protections that may, at times, even conflict and override standard liberal rights in some instances (Kymlicka 1995).

Although Sen and Kymlicka argued for different things, both were interested in the rewards individuals derived from their relationships with their goods. I would suggest, therefore, that in the case of Treaty restitution in New Zealand, Māori are not purely in pursuit of material wealth, but of the recognition inherent in the return and/or acquisition of these goods. Philosopher James Tully calls this 'recognition capital' – a term he uses to describe the redistribution of 'status, respect or esteem' (2000:470) – is as elemental to the resolution of

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historical grievance as financial and commercial redress. As stated in the preceding chapter, Treaty settlement process enables Māori claimants to achieve recognition of past injustice, and to have their aspirations for the future acknowledged formally by the Crown in negotiations. As the claimants in this chapter have described, Treaty restitution allows them to begin overturning the entrenched attitudes and institutional arrangements that have for so long undermined Māori self-respect and self-esteem, qualities necessary for the empowerment of Māori individuals in their search for autonomy and self-worth. 'Recognition capital', therefore, can enable claimants to frame and imagine themselves in the ways that suit them within the present configuration of social and legal possibilities.

Māori claimants, then, have become very sophisticated at exploiting an identity as plaintiffs to leverage more and more value from the Treaty restitution process, by asserting customary proprietorship over a range of novel resources. As noted, while this ability attests to the ductile versatility of indigenous identity in general, Māori proficiency at reconstituting theirs in ways that suit the litigious requirements of Treaty restitution tends to frustrate some Pākehā who interpret this capability as a *manufacturing,* rather than a perpetuation of identity, and construe commercial Māori identities as contrived and inauthentic. These Pākehā often concieve Māori aspirations for the resolution of their grievances through redress as avaricious, and accuse Māori claimants' demands for justice, as a barely concealed effort to exploit hard-working New Zealand tax-payers. Vitriol on the r/NewZealand subreddit, for example, is commonplace:

> "There is certainly a notion that [Māori] are milking the treaty for all its worth ... our dear friend 'the taniwha' (a water spirit, monster, chief, something or someone awesome[111]) makes an appearance every now and then when the coffers need to be filled. Imagine the scottish having to divert an entire highway because some stark raving lunatic says the lochness monster was seen in the area " [Redditor].

> "Now the greedy on the other end of it are trying to grab something they never had and it's causing a lot of issues that just won't go away.. and they don't want it to. They want all the good stuff that being colonised brought as well as all the stuff they might have had before hand. Cake and eat it too... " [Redditor]

> "The great gravy train, a.k.a the Waitangi grievance Industry, has hopefully nearly finished its work of judging events of 160 years ago through today's eyes and making compensation awards in today's money so now is the time to stop and ask: Do we want a privileged group enjoying special favour for no rational reason, or do we want racial equality in New Zealand with fairness and equal privilege for all?" [Redditor]

[111] *Taniwha* take many forms from logs to reptiles, even whales, and often live in lakes, rivers or the sea. They are often regarded as guardians by those who reside in their territory.

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These respondents assert that Māori redress and compensation is inherently unfair since it enables Māori to capitalise on the commodification of their identity. What these respondents fail to appreciate or acknowledge, however, is that Māori have been undergoing commercial and legal incorporation *since* 1840 when imperial Britain first sought to contract with Māori through the Treaty of Waitangi. The accord worked to downplay the 'primitive', discordant political character of Māori and forge a tidy, homogenous legal collective with which the British could negotiate a transfer of legal sovereignty, and thereby the sale of land. It is, after all, far easier for the state to engage legal entities in complex economic relationships when both parties can be bound contractually, obligations and commitments agreed upon, and the protection of assets assured independently of individual membership (Sautet, 2008:20). Furthermore, it is intriguing that while many Pākehā are engaged in the negotiation and construction of their own identity, they consider contemporary permutations of Māori identity inauthentic.

CONCLUSION

When the National Party launched their *'Beaches: Iwi/Kiwi'* election hoardings around New Zealand in 2005 they sought to capitalise upon a very delicate equipoise which contemporary Māori – especially Māori claimants engaged in the Treaty restitution process – are increasingly compelled to sustain in their relationship with New Zealand's Pākehā hegemon. By framing Māori aspirations as diametrically opposed to the purported popular desire of New Zealand's 'majority', the National Party were able to portray Māori efforts to reclaim (or reassert) customary title over the foreshore and seabed as seditious. Pākehā have struggled, therefore, to understand what Amartya Sen suggested: that claimants are not always intent upon the pursuit of property in and of itself, but also of the *relationships* they enjoyed with particular goods, resources and/or property which have been lost or stolen. Consequently, in this chapter I have argued that while many Pākehā are eager to embrace and include aspects of Māori culture (iconography, cultural performance, *te Reo Māori* terminology, for example) within the ambit of Pākehā identity (a collective subjectivity premised upon Eurocentric settler nationalism), the latter's incorporation of subaltern difference is only endorsed so long as it is not conceived as repellent or repugnant to the egalitarian bicultural ambitions of Pākehā hegemony.

Pākehā, then, have strict criteria regarding the realisation and performance of Māori identities; while Pākehā remain 'free' to pursue autological identities unencumbered by the wrongdoings perpetrated by their forebears, they expect Māori to realise their relatedness,

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aspirations and sense of belonging as a homogenous collective, temporally and genealogically tethered through time to a romantic conception of pre-European history. Furthermore, this model conceives of blood and biology as vital attributes of 'authentic' or 'genuine' ethnic or cultural ascription. In the context of the Treaty settlement process, therefore, where claimants must demonstrate their eligibility to participate in hearings and negotiations, and, ultimately, their entitlement to receive redress from the Crown, Māori claimants walk the finest of lines between conforming to hegemonic expectations of genealogical authenticity (which promulgate entrenched fictions and stereotypes of Māoriness, but which remain necessary if claimants wish to engender the conciliatory goodwill of the state), and aspirations of extrication from such constraint.

Lastly, Treaty restitution, and the institution of Post-Settlement Governance Entities especially, contributes to this dialectic by forcing Māori claimants to confront their identities and aspirations amongst the ever more omnipotent configurations of capitalism which characterise the neoliberal orientation of the global economy. These configurations have begun to draw contemporary liberal democracies like the United States, Britain, Australia and New Zealand towards distributive approaches that oblige claimants to become progressively more commercially incorporated. Jean and John Comaroff note this very process in their book *Ethnicity, Inc.* (2009), where they observe that social and ethnic identities are increasingly mediated through processes of commodification and consumption (Comaroff & Comaroff, 2009:150). This phenomenon, they assert, forms part of a broader trajectory in which a range of social institutions and entities, from states to ethnic minorities like Māori, have begun to define themselves meaningfully in terms of commercial enterprise (Hull, 2010:860). As Māori claimants are compelled to become more and more commercially orientated and de-territorialised (Kukutai, 2003:22; Maaka & Fleras, 2005:66), those Pākehā who idealise subaltern identities as fixed and enduring constructs interpret this adaptability as an attenuation of Māori socio-cultural authenticity, rather than a powerful reinvigoration of indigenous identity.

In the chapter to follow I shall probe the philosophical parameters of the broader question that has woven its way throughout this discussion; namely, do historical restitution programmes provide liberal governments with new ways for deflecting or quashing subaltern difference, and thereby the means for subjugating the subaltern subject anew?

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chapter six

THE CHALLENGE OF RADICAL ALTERITY

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In her 1993 article, *Wounded Attachments*, political scientist Wendy Brown contemplates the contradictory demands that political recognition place upon identity, and the concentration of these demands in liberalism's promise to deliver universal individual freedom. These contradictions, Brown contends, generate a fundamental paradox – also constitutive to liberalism – between the notion of individual liberty that legitimates liberalism, and the cultural homogeneity that liberalism's commitment to political universality requires (Brown, 1993:400). This paradox is particularly evident amongst those liberal state's that have instituted historical restitution initiatives; many are struggling to accommodate instances of difference within the core frameworks of late liberal governmentality without their rupturing the state's fiction of harmonious homogeneity.

With regards to my research, I want to demonstrate how governmental policies of recognition (as discussed in chapters four and five) and tolerance, engender the simultaneous stimulation and suppression of politically significant difference in the context of Brown's paradox. In this chapter, therefore, I shall explore the notion that programmes of historical restitution may form part of the calculated strategies of liberal states to deflect and/or quash the challenge of radical alterity (radical in that it appears divergent from the aspirations of the politically dominant hegemon), strategies that encourage subaltern subjects to formulate their identities in ways that remain prefigured and contained by the very orders of power from whom they seek emancipation.

I shall examine how, in contexts of historical restitution, the law is popularly conceived as an instrument that is able to exonerate national institutions and imaginations from the repugnant and/or discriminatory acts perpetrated historically, especially those executed under the aegis of 'reasoned' jurisprudence. The temporal bisection the law provides between the repellent behaviour of the past, and the glorious potentiality of a future free from prejudice, therefore, is vital for the national performances of repentance and atonement that programmes of historical restitution demand. To demonstrate and defend this contention I shall describe the passage of the *Wi Parata v Bishop of Wellington, 1877* judgement, and the *Māori Council v. Attorney-General* decision made more than a century later in 1987 in New Zealand, and augment my argument with examples from South Africa and Australia. After that I will discuss the challenge radical alterity presents to late liberal governmentality, and explore the idea that the discourse of political recognition and tolerance represent tactical strategies by liberal states in their efforts to renaturalise and resubordinate the radical challenge presented by subaltern difference.

LAW AND THE THEN-VS.-NOW IMAGINARY

In chapter five I discussed the idea that a moral and legal case for redress can only be made through the genealogical construction of identity, and examined Trouillot's assertion that collective subjectivity is a necessary attribute in disputes which span long periods of time, since plaintiff and defendant must each straddle the historicity of a case as simultaneous participants and narrators (Trouillot, 2000:174). In this chapter I shall argue that in the context of historical restitution, courts perform a vital role in the constitution of collective subjectivity because they are popularly accorded the power to adjust the tense and modality that order such historicity (Povinelli, 2002:178). In particular, the judiciary – in its role as the law's authorised interpreter – comes consequently to represent a sort of moral optimism; their reinterpretation of actions perpetrated historically under the auspices of 'reasoned' and/or 'well-intentioned' law as repugnant, enables the judiciary to expunge whole portions of shameful behaviour from a nation's collective memory, and to excise repellent aspects of jurisprudence that have become "cancers on the root good of the common law" (Povinelli, 2002:160).

In this way, the judiciary are licensed to frame historical injustice as an unnatural deformation of the good intentions of the law, the liberal state and its normative citizens, giving the law the power, thereby, to not only repair torn lives by resolving structural impoverishment, but

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to reinvigorate subaltern conviction in a system of law that has been deployed historically in the sanctioning of despicable acts (Povinelli, 2002:160, 163).

WI PARATA V BISHOP OF WELLINGTON, 1877 AND NINETEENTH CENTURY LEGAL POSITIVISM

In chapter three I discussed the *Wi Parata v Bishop of Wellington* case held in 1877 in New Zealand, which involved contestation over a block of land gifted by Māori to a local church for the purpose of building a school. To recap, following the release of a Select Committee inquiry, Wiremu (Wi) Parata applied to the Supreme Court for a declaration that the grant of Porirua land issued to Bishop Selwyn in 1850 be declared void, and that the land should revert back to his *iwi* Ngati Toa. The case's presiding member, Chief Justice Prendergast, dismissed Parata's claim, reasoning that the plaintiff and other members of Ngati Toa lacked legal grounds on which to stand their claim. Prendergast CJ also ruled that whatever the nature of the agreement between Ngati Toa and Bishop Selwyn, it should be considered a legal nullity, reasoning that, firstly, the right to make grants of land in the New Zealand colony was exclusive to the Crown, and secondly, that since Māori had no civil government or settled system of law they could not be considered sovereign, and were thereby unable to treat with the government (Hackshaw, 1996:111).

At the time, Prendergast CJ's ruling was not simply a blow for the Parata family, but marked a distinct departure from the findings in the *R v Symonds* case held three decades earlier which had affirmed Māori aboriginal title and the legal legitimacy of the Treaty. Although the *Parata* decision meant that the rights initially conferred upon Māori by the Treaty were no longer enforceable by the courts, effectively neutralising the legal power of the Treaty of Waitangi, Prendergast CJ defended his ruling with reasoning drawn from legal positivism, a doctrine premised upon scientific and empirical principles.

Legal positivism grew out of the philosophical debates that accompanied the scientific revolution in late medieval and early modern Europe, and matured during the Enlightenment as secular statehood took shape and ideologies associated with theories of natural law and natural right were dispelled (Douzinas & Geary 2005:140).[112] It was the British jurist and Professor John Austin who was responsible for shaping legal positivism into the doctrine that transformed nineteenth century Anglo-Commonwealth law, instituting change that had a

[112] Although the central tenets of legal positivism can be traced back to Emperor Justinian's Sixth Century codification of the law, positivism did not begin to assume substantial form in legal discourse until the middle of the Nineteenth Century when Comte de Saint-Simon and August Comte coined the term 'Positivism' (Roscoe 1995:493-4; Fleischacker 2004:95).

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dramatic impact upon the legal, political and social future of colonised peoples around the globe.[113]

Austin wanted to develop a *science* of jurisprudence in order to simultaneously reaffirm the essence of Roman law and circumvent regional legal inconsistencies and variations, thereby making law more 'accessible' and teachable.[114] Such an empirical approach belies the implicit rationality of Austin's Enlightenment predecessors; by applying a scientific method, Austin hoped to invest the study and application of law with a uniformity and metaphysical order which would reflect the seemingly logical regularities and recurrences he observed in the natural world. Legal positivism, therefore, was understood to propagate justice because it derived authority from politically omnipotent entities like sovereigns, and procured legitimacy from the same empirical principles that ordered science and the natural world.

With regards to the rights of indigenous peoples, Austin reasoned that without any determinate sovereign figure, they could not constitute a civilisation with a legitimate system of law (McHugh, 1991:116).[115] Following Austin's reasoning, Prendergast CJ declared that if Māori had no supreme sovereign (and therefore no collective body politic), logically they could not have a legally recognisable system of property rights or law. The Treaty of Waitangi, then, signed between Māori and the British Crown, could impose no legal obligation on the latter and could be declared legally invalid (Belgrave, 2005:32). Despite his intentional obfuscation of the Crown's promised protection of Māori propriety rights under the Treaty (Hackshaw, 1996:117), at the time Prendergast CJ's decision was considered legally justifiable because it followed the application of legal principles considered empirically and defensibly just (Williams, 2011:226).

It would take until 1987, more than a century after the *Parata* case, for the precedent invoked by Prendergast CJ's ruling to be overturned (McHugh, 1991:116; Williams, 2011:226). Contemporarily, the judgement is construed as erroneous and technically incorrect, and its positivist evaluation of aboriginal title (not to mention the principles of *Ius Gentium* [or *jus*

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[113] During Britain's 'Imperial Century' (roughly from 1815 to 1914) the Crown acquired twenty-six million square kilometres of new foreign territory (and 400 million new inhabitants), and Austin's ideas about legitimating imperial sovereignty though jurisprudence became ever more pervasive.

[114] In 1828 when Austin began delivering his lectures on jurisprudence to the University of London, however, the study and practice of law in Britain was very different from how it is understood today. There were no professional examinations for lawyers, and neither universities nor professional bodies formally taught 'Law'; rather, English lawyers thought of law as something to be learnt by a process of imitation in barristers' chambers and attorney's offices (Hart 1964 in Rumble, 1980:994).

[115] Austin also rejected the opposing argument that the presence of law implied the existence of a sovereign (McHugh, 1991:116). His attitude reflected popular scientific and scholarly supposition about social evolution that typified early ethnographic typologies in the late nineteenth century (especially by Herbert Spencer and Lewis Henry Morgan).

gentium, Latin for the 'law of nations'] which he applied to the acquisition of territory inhabited by people without a [European] system of law) as spurious and unjust (Hackshaw, 1996:113). Considering the long years Prendergast CJ's judgment stood uncontested as "good law" (Williams, 2011:226), however, what had changed in New Zealand's moral and/or popular imaginary to bring about such a dramatic jurisprudential reversal?

MĀORI COUNCIL V ATTORNEY-GENERAL, 1987

The decade before the *New Zealand Māori Council v. Attorney-General* case was heard saw the terms of trade that New Zealand had enjoyed fall considerably following the oil price shocks in the mid-1970s. Prices for agricultural products, for so long on a world-wide high, nosedived, and as inflation rose into double figures the country's healthy trade surplus was transformed into a billion dollar deficit (State Services Commission 1998). As bankruptcy loomed, New Zealand's government struggled to reignite the stagnating national economy. By the mid-1980s, however, following little economic improvement, the incoming 1984 Labour Government felt obliged to embark on a radical programme of liberalisation, and swiftly set about corporatizing, deregulating, and privatising State Sector assets.

In only two years the State-Owned Enterprises Act, 1986 was promulgated to improve the efficiency of government trading operations (such as telecommunications, electricity, postal services, railways, and broadcasting). Registered as public companies, the principal objective of these new State-Owned Enterprises was to operate as successful, profitable businesses (State-Owned Enterprises Act, 1986, s4(1)(a)). As assets were rapidly commoditised for sale to private purchasers, however, the haven of state-ownership – where common property had been popularly considered safe from disposal – began to implode (Frame, 1999:234).

In the last months before the State-Owned Enterprises Bill was passed, the New Zealand Māori Council (on behalf of all Māori) submitted a claim to the Waitangi Tribunal. The Māori Council objected to the transfer of state-owned assets, and alleged that the transfer of ownership of such assets – particularly land – was sure to frustrate any likelihood of their availability for restitution or restoration, upon subsequent recommendation by the Waitangi Tribunal as part of Treaty settlements (McHugh, 1991:248). Furthermore, they were anxious that the Crown would be unwilling or unable to negotiate a purchase back from the State enterprise at a full price, or that the State enterprise might dispose of such land in the course of their own operations (New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641).

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In response to the Māori Council's concerns, the Waitangi Tribunal released an interim report in December 1986, only days ahead of the Bill's promulgation, and, as a direct consequence, the Legislature inserted a section (number nine) into the final Act.[116] Simply, section 9 states that nothing in the Act shall permit the Crown "to act in a manner that is inconsistent with the principles of the Treaty of Waitangi" (State-Owned Enterprises Act, 1986, s 9). Dissatisfied with the inherent ambiguity of this clause, however, the Māori Council sought a judicial review at the Court of Appeal the following year to test and clarify the precise content of section 9. In 1987 the Court of Appeal heard *New Zealand Māori Council v Attorney-General,* and ruled that "the principles of the Treaty override everything else in the State Owned Enterprises Act, and these principles require the Pākehā and Māori treaty partners to act towards each other reasonably and with the utmost good faith" (King, 2003:500).[117]

Crucially, the duty also fell upon the Court of Appeal to determine a set of 'principles'[118] for the Treaty of Waitangi against which the Crown's actions could be measured for inconsistency. Although the Treaty of Waitangi Act, 1975 had exclusively mandated the Waitangi Tribunal to formulate a series of principles in this regard, the Court of Appeal's principles constituted the first set of legalised standards formally drafted to define the relationship between Māori and the Crown (Hayward, 1997:477, 483). The principles represented an acknowledgement by Parliament that the Treaty had not been simply a mechanism for transferring the sovereignty of the country from Māori to the Crown, but that it was now recognised as providing a framework for the present and future relationship between Māori and the Crown as Treaty partners (King, 2003:501). Consequently, references to the Treaty of Waitangi were grafted onto other bills, and amendments made to previous Acts (such as those governing health, education, and conservation, for example), which gave the Treaty an explicit place in New Zealand's jurisprudence for the first time (King, 2003:501).

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[116] Section 27 was also added, but the Māori Council felt its provision (to establish a means by which the Crown could recall transferred land, on the recommendation of the Waitangi Tribunal) had fundamental drawbacks, and offered Māori claimants scant protection from further discrimination and land dispossession (McHugh, 1991:248).

[117] The Court also agreed that the safeguards of section 27 were insufficient, and that the proposed sale of common assets was inconsistent with section 9 (McHugh, 1991:249).

Furthermore, the Court held that the Treaty of Waitangi had created a partnership between Pākehā and Māori which required each to act towards the other reasonably and in good faith, and created responsibilities analogous to [active] fiduciary duties (McHugh, 1991:249).

[118] Dr. Janine Hayward has compiled an excellent overview of the Treaty's Principles. Entitled *The Principles of the Treaty of Waitangi*, Hayward draws together a collection of statements by the courts, the Waitangi Tribunal, and the Government in New Zealand regarding the interpretation and application of the Principles, and can be found on the Waitangi Tribunal's website: http://www.waitangi-tribunal.govt.nz/treaty/principles.asp.

The express incorporation of the principles of the Treaty of Waitangi into the field of New Zealand domestic law following this Court of Appeal judgement, a century-and-a-half after the Treaty of Waitangi was signed, heralded a substantial change in New Zealand's jurisprudential trajectory, particularly as regards the Treaty restitution process. At the time Presiding Judge, Justice Robin Cooke, described the task of defining the principles of a treaty made between representatives of an indigenous people and a colonising power as "perhaps as important for the future of our country as any that has come before a New Zealand court" (Cooke et al., 1987:643). He also described the "big leap in constructive legal thinking" (R. H. S. R. Cooke 1994) that he felt had been necessary to overturn the *Parata* precedent.

What, then, occasioned the dramatic move away from such a long-entrenched jurisprudential precedent? In 1980s New Zealand, legal thinking was far from the only conception undergoing substantive change; as described in the preceding chapter, the Pākehā political hegemon had begun to pursue a national identity predicated upon an aspiration for bi-cultural harmony. The political turbulence of the 'Māori Renaissance' a decade earlier, however, continued to reverberate throughout the 1980s; Māori peoples continued to express widespread dissatisfaction with the policies of New Zealand's major political parties[119] and their legislative proposals (such as the State-Owned Enterprises Bill), scuppering the popular Pākehā myth that New Zealand had the 'best race relations in the world', a claim Pākehā politicians "trumpeted at every possible opportunity" (King, 2003:471).

Unwilling to relinquish their aspirations for an egalitarian, culturally homogenous New Zealand, Pākehā strove to establish the country as an exemplar of Western humanism in the south Pacific, and began to extend themselves politically, domestically and abroad. For instance, in the mid-1990s Parliament introduced a mixed-member proportional system (MMP) like that operating in Germany, allowing a far broader range of political and philosophical views to be represented than had occurred under the first-past-the-post system (King, 2003:494). Increased immigration from ethnically diverse countries was permitted following the promulgation of the Immigration Act in 1986, which removed rules that gave preference to certain countries of origin, and this delivered a visible ethnic diversity to New Zealand's cities. Furthermore, New Zealand's popular anti-nuclear policy[120] had contributed

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[119] This discontent contributed to the formation of the *Mana Motuhake,* or 'Māori self-determination', party in 1980, which advocated (among other things) a modest programme for a greater degree of Māori autonomy (King, 2003:486).

[120] Nuclear-armed or nuclear-powered vessels were forbidden to visit New Zealand, a strategy which emerged from the people's peace movement of the 1970s and 1980s (King, 2003:495), and popular opposition to French nuclear testing in the Pacific.

to strained relations with the country's traditional allies, Britain and the United States, and had negatively impacted New Zealand's trade and defence prospects. Consequently, New Zealand became heavily committed to United Nations-sponsored peacekeeping operations in the Middle East, Africa, Asia, the Balkans, and the Pacific (King, 2003:496-7), where their reputation for being good at specific tasks[121] cultivated the regard of other multilateral organisations during this period.[122]

Concerted moves were also made to acknowledge and address Māori political and social demands; in 1985, for example, the Crown amended the Treaty of Waitangi Act, 1975, to authorise the Waitangi Tribunal to consider claims going back to 1840. The subsequent deluge of Māori resource claims against the Crown which flooded the Tribunal's registrar, further convinced the judiciary that substantive legislative and jurisprudential change was required if New Zealand was to redeem its 'shameful' imperial past and realise its ideal potential. It was amidst this climate of socio-political fluctuation that the *New Zealand Māori Council v. Attorney-General* case was heard in 1987.

MABO AND OTHERS V QUEENSLAND, 1992, AUSTRALIA, AND SOUTH AFRICA'S CONSTITUTIONAL PROTECTION OF PRIVATE PROPERTY RIGHTS

In her article *The State of Shame* (1999), and book *The Cunning of Recognition* (2002), Elizabeth Povinelli recounts a similar jurisprudential watershed in the critical indigenous land rights case *Mabo and Others v Queensland*[123] (*Mabo*) in Australia in 1992. In a six-to-one decision the High Court formally rejected the doctrine of *terra nullius* (a land belonging to no one), and recognised (amongst other things) that indigenous aboriginals had a pre-existing system of law which had remained in force following the arrival of imperial Britain,[124] and that it was no longer tolerable to make sovereignty contingent upon representing native peoples as "so low in the scale of social organisation" that it was "idle to impute to such people some shadow of the rights known to our law" (Bartlett 1993 in Povinelli, 1998:584).

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[121] In particular, mine clearance and training locals to do this work, and for being skilled in interacting with civilians who had been traumatised by their proximity to armed conflict.

[122] The United Nations Security Council, for example, selected a representative from New Zealand to hold one of its rotating seats in the 1990s, elected former Prime Minster Mike Moore to the director-generalship of the World Trade Organisation in 1999, and former Deputy Prime Minster Don McKinnnon as Commonwealth Secretary-General in 2000 (King, 2003:497).

[123] *Mabo and Others v Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1

[124] Except where specifically modified or extinguished by legislation or executive action.

Povinelli contends that by condemning the history of racial and cultural intolerance which ordered Australia's common law, the court's judicial majority were able to use the *Mabo* case to fundamentally alter the grounds of Australian sovereignty by differentiating a 'new' version of justice from an 'older' version of the common law (subscribed to in colonial times) (Povinelli, 1998:584). *Mabo,* then, did not simply represent a lamentation for the villainy of past intolerance and injustice; it symbolised the 'potentiality of an immediate national future' (Foucault, 2003:222). As with the *New Zealand Māori Council* case in New Zealand, by conjuring a conception of a shamed nation whose redemption relies upon the national acknowledgement of past wrongdoings, Australia's High Court was able to create a focal point beyond politics for both their country's non-indigenous hegemon, and the state's indigenous antagonists, whereby the non-Aboriginal Australian fantasy of ethno-cultural intimacy begins to appear possible (Povinelli, 2002:183). By proclaiming Australia's 'national consciousness' as finally and fully aware of its past mistakes (the law was mistaken *then*; *those* justices were enmeshed in a set of social prejudices), the judiciary enables the law to repair the damage wrought historically under its own aegis (Povinelli, 2002:163, 178).

Past judgements like *Wi Parata* in New Zealand*,* therefore, become essential to the transformative ambitions of the historical restitution programme because they are readily available for contemporary reinterpretation as mistaken, intolerant, bigoted, or prejudicial for the purposes of national atonement. Prendergast CJ's decision, for instance, may have conformed to the social, political and jurisprudential mores of his day, his reasoning may have been considered well-intentioned, and his interpretation of the law regarded as consistent with what was then understood to be just and right, and/or aimed at the social good. Contemporaneously, however, these 'erroneous' judgements may be 'eradicated' or 'neutralised' by the passage of 'enlightened' rulings such as *Mabo* or the *Māori Council* case where the coram "breathlessly" (Povinelli, 1998:591) swept away their nations' shameful history of discriminatory jurisprudence.

This phenomenon, however, is not limited to the historical restitution rituals of the south Pacific; in 1994 when South Africa experienced its transition from apartheid to representative democracy, for example, the law was also fetishised as an instrument of substantive transformation, expected to facilitate the liberation of non-white South Africans from the "long nightmare of apartheid" (Klare, 1998:169). Although the law had, for decades, sustained a baroque system of oppression in South Africa which had encouraged institutionalised discrimination, validated systems of racial prejudice and privilege, and justified the heterodox politically and sociologically discriminatory traditions of Afrikaner nationalism (William Beinart & Dawson, 2010:1), the majority of South Africans continued

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to believe that the law had the power to purify and cure the evils of apartheid (Klare, 1998:169). The new constitution, for example, was anticipated to deliver a more "just and equitable" society (Mbazira, 2009:134), while the new legislation governing the three-pronged tenure reform, land redistribution and restitution programme was expected to deliver a deracialised consonance to the historically constructed white countryside (Walker, 2007:142).

To facilitate such dramatic change, South Africa's judiciary – trained and professionally socialised during the apartheid era – were expected to realign their professional sensibilities, habits of mind, and intellectual reflexes with this wholesale legal reformation (Klare, 1998:156). They would be directly responsible for helping to gouge out the portions of South African law suddenly considered discriminatory and unjust, and to relegate them to a temporal and ideological past where they could be safely abandoned. Just like the Mabo and the Māori Council cases, then, the judiciary were able to effectively jettison one juridical temporality and embrace another by implementing a Then-Vs.-Now imaginary.

Such liberation from the 'repugnant past' enables two things to occur: firstly, the Then-vs.-Now imaginary permits subaltern citizens to recuperate lost confidence in the same jurisprudential system that subjugated them historically. However, while these subalterns strive to deploy the law to meet their own objectives, they are also obliged to subscribe to the genealogical subjectivity that Povinelli and Trouillot observed in contexts of historical restitution, where imagined collectives are envisaged as persisting through time despite changes to their individual membership. As argued in the previous chapter, the law and the state do not require all citizens to undergo the same type of public, corporeal cleansing, or psychic and historical reformation of their identities (Povinelli, 1998:590). Only subaltern subjects are ensnared by the contradictory demands of identity and historicity; Māori claimants, for example, are wedged between hegemonic expectations that they enact their socio-cultural 'authenticity' in ways that orient their subjectivity toward Pākehā aspirations of an ideal nationhood, and a desire to satisfy their own individual ambitions and requirements as claimants.

Secondly, the law's Then-vs.-Now bisection of the past disguises the contention (Povinelli 1998, 2002) that in cases of historical restitution, while the law may be wielded as an instrument with the power to liberate a nation from its shameful history, it does not perform the substantive ideological critique or overhaul of the orders of power and/or institutions that perpetrated and sanctioned these shameful actions initially. The same models of citizenship and sovereignty that inform state function, public discourse, and individuals' feelings about what it is right or wrong to demand from the state and its normative publics, are not fundamentally displaced by the passage of radical or 'enlightened' judgements like

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those from the *Mabo* and the *New Zealand Māori Council* cases. Instead, the state continues to reserve the power to discriminate against any social or cultural differences it considers harmful to its sovereign legitimacy (Povinelli, 1998:582), and to safeguard the proprietary, pecuniary or political interests of those citizens who support its sovereign authority – as demonstrated in the last chapter, for example, when the New Zealand Crown retained the right to determine exactly what constituted property, in order to defend its efforts to privatise and corporatize state commercial assets in the late 1980s, and again recently following complex contestations over the ownership of fresh water and the digital spectrum.

In South Africa, for example, despite the terms of the transitional government explicitly prioritising the redistribution of land amongst the historically dispossessed, the Constitution irrefutably protects the rights of existing property holders (Ntsebeza, 2007:120, 121). Section 25(1) of the Constitution of South Africa states:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property (Constitution of the Republic of South Africa, 1996 s25(1))."

This clause is fundamentally contradictory because it simultaneously affirms the rights of both owners and the dispossessed in a way that compromises the delivery of justice (understood in this context as the redistribution of land) to the latter. Given that the bulk of South Africa's land outside the former bantustans is held in private ownership, and thereby safeguarded by the Constitution, this section is antithetical to the ambitions of South Africa's land redistribution policy (Ntsebeza, 2007:121).

Where claimants wish to return to land that the current owners refuse to sell, this ownership has to date trumped historical claims (Hall, 2011:24-5).[125] So, although claimants in South Africa have an enforceable right to restitution, they do not have an enforceable right to the restoration of their original property, and only then on the willingness of current owners to sell at the prices offered by the Commission on Restitution of Land Rights (Hall, 2011:25). Consequently, instead of land restitution facilitating the dramatic reversal of decades of unjust property acquisition, private property owners are able to evade expropriation of their land by the state, thereby constricting the ANC's redistributive aspirations and limiting the inroads it promised to make on rural poverty and land hunger (Berry in Fay & James, 2011:44; Marais, 2009:92; Walker, 2007:143). Likewise, although the Waitangi Tribunal in New Zealand can hear claims concerning private land, under section 6(4A) of the Treaty of

[125] While section25(3) of the Constitution does empower government to expropriate property in the public interest, including for land reform purchases, as of 2008 the government had used this power in only four cases (and in two of those had revoked the expropriation notice to return to the negotiating table) (Hall, 2009:77, 2011:24-5).

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Waitangi Act, 1975 it cannot recommend that land be expropriated from its current owners.[126] Since the restitution of land to Māori is described by claimants as fundamental for the resolution of their grievances, any resolution must be tempered by the legislatively enshrined protection of private property rights (Anon. 2006).

This contradiction between the restitution and the protection of private property, therefore, demonstrates how seemingly morally enlightened transformations of the law (particularly the laws governing indigenous rights), and their corresponding implementation in programmes of historical restitution, have not necessarily induced the substantial resolution of claimants' grievances. As a consequence, the radical restructuring of South Africa and New Zealand's existing systems of property relations that would be necessary to rectify the structural impoverishment that flows from landlessness, has been limited.

To my mind, therefore, judgements lauded as 'landmark' or 'watershed', which appear to have the power to expunge the shame and discrimination of the past, instead obfuscate the fact that the revision and amendment of legislation does not substantively reform entrenched state apparatuses such as law, principles of governance, and national hegemonic attitudes toward the proliferation of political, ethnic and cultural difference (radical alterity), but only adjusts them. Since subaltern discourses, desires and practices are often interpreted by the political hegemon as a challenge to the respective core institutions and values of liberal democracy and the common law, it remains in the interest of dominant orders of power to pursue strategies such as 'political recognition' and 'tolerance', which, as I shall argue, only *appear* to accommodate radical alterity. Herein, therefore, rests Brown's paradox: where the individualism that legitimates liberalism collides head on with the cultural homogeneity that liberalism demands in its pursuit of political universality.

In the next section I shall examine how the challenge of difference generates conditions of extreme torsion for hegemonic orders of power like the state, and explore the possibility that late liberal governmentality, and its 'companion powers', capitalism and disciplinarity, may be in fact encouraging the renaturalisation and resubordination of radical alterity.

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[126] The only exception to this is former Crown owned land that has been passed to State-owned enterprises and then sold to private owners. In these cases, this land is on-sold with a notation, or 'memorial', on the title, so that buyers understand that it may be the subject of a Tribunal recommendation (The Waitangi Tribunal/Te Rōpū Whakamana i te Tiriti o Waitangi n.d.).

RADICAL ALTERITY AND LATE LIBERALISM

'Late liberalism' is a term Elizabeth Povinelli uses in her 2011 book *Economies of Abandonment*, where she explores how alternative social worlds and projects generate new possibilities of life in the context of ordinary and extraordinary acts of neglect and surveillance. Using ethnographic examples from Australia and the United States Povinelli frames her analysis of how social belonging, abandonment and endurance are enunciated and experienced within the conditions of neoliberalism and 'late liberalism', a phrase she feels describes the crisis liberalism (as a broad formation), and liberal governmentality appear to have been experiencing following the United States' "disastrous" war in Iraq, and the emergence of potential market counter-hegemons in China, India and Russia – political players who appear able to resist, and even outright reject the classically-conceived conjuncture between capitalism and democracy (Povinelli, 2011:20). In this sense, Povinelli contends, there is something *late* about liberalism, not in the sense that we are witnessing its 'last hurrah', but rather that it has entered a new era of reflexivity (Povinelli, 2011:25).

This process of reflection appeared following a series of legitimacy crises that arose in the wake of the anticolonial movements in the 1950s and 1960s, and the Islamic and new social movements that have intensified following the close of the Cold War (Povinelli, 2011:25). The challenge liberal governmentality faces from instances of cultural, ethnic and political difference, therefore, has arisen following the emergence of nationalism and the formation of the nation-state (B. Anderson 1983). In the three centuries of struggle and upheaval that transformed Europe from the late medieval checkerboard of Westphalia to the marching nationalities of World War II, European peoples stitched notions of social fraternity, power and temporality together in increasingly corporate ways (Geertz, 2004:578).

Benedict Anderson (1983) posits that the transition from vertically-oriented sacral societies (headed by dynastic authorities), to the horizontally-oriented homogenous peoplehoods (predicated on collective feelings of comradeship circumscribed within finite territorial boundaries), that were necessary to sustain the nation-state was the result of two significant phenomena. Firstly, Europe's 'discovery' of the Americas drove a harsh wedge between established European conceptions of cosmology, history and cultural diversity, as their social and geographic horizons were abruptly widened by the realisation that other peoples existed across the Atlantic (Anderson, 1983:36). While secondly – and crucially for Anderson – the emergence of print media led to a demotion of linguistically diverse socialites organised around proximate face-to-face relations. As imagined notions of political and social collectivity began to flourish, they were initially modularly adopted by popular movements in Europe, and later in the anti-imperial resistances in Asia and Africa.

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Such resistances were often comprised of politically enfeebled and economically impoverished citizens, who increasingly resorted to the lodgement of their demands for the decentralisation of power, autonomy, and/or redress in the language and praxis of the law (Hansen & Stepputat, 2001:2). Unrewarded loyalty, racist attitudes, state violence, and restrictive parameters on the mobility of classes all contributed to popular unrest, particularly in the twentieth century, and the reformulation of new identities along political, ethnic and national lines (Limb, 2010:8, 15). The second-half of the twentieth century in particular witnessed a palpable rupture in the notion of the state as the prime regulator of social life. Amongst Europe's colonies especially, the state as an unchallenged locus of territorial sovereignty and political authority, began to face unprecedented challenges to the frameworks and institutions which legitimised and sustained hegemonic systems of privilege and power (Hansen & Stepputat, 2001:1).

Accusations of injury began to proliferate as subalterns demanded formal recognition and redress for suffering perpetrated by the state (atrocities included, for example, war crimes, indenture, partition, colonial rule, genocide, forced prostitution, and the displacement of peoples) (Rajan, 2000:160). Demands for restitution centred upon apologies for injustices committed, compensation for injury, land restoration for dispossessed properties, political autonomy, the establishment of truth commissions and affirmative action measures, and memorials to the dead. As the clamour for restitution amongst subalterns grew, their governments were increasingly obliged to not only confront these instances of radical alterity and institutionalised exclusion, but to deflect them in ways that would not overwhelm the established institutions and ideologies that sustained their sovereign power.

For instance, as discussed in the preceding chapter, Māori demands for restitution and the redistribution of land presented a considerable challenge to the sovereign authority and legitimacy of the Crown. The Treaty of Waitangi, for example, the foundational compact that established sovereign government in New Zealand, was premised on the notion that two parties entered into a contract on the terms of free and fair cooperation. Those Māori *hapū* and *iwi*[127] who allege that their consent to the Treaty was not given under fair circumstances, maintain that any holdings subsequently gained by the Crown are the result of unjust acquisition and/or transfer, and threaten to unmask the institutional integrity of New Zealand's liberal democracy (Maaka & Fleras, 2005:50).

[127] Several chiefs refused to sign on behalf of their respective *hapū* and *iwi*, and instead formed a kind of confederacy with an elected monarch called the *Kingitanga*, which later became the primary anti-governmental force in the nineteenth century New Zealand Land Wars. A number of other chiefs simply did not have the opportunity to sign, as the Treaty was not delivered to their places where they lived (King 2003).

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In a similar vein, other Māori contest the *te Reo Māori* translation of the English Treaty, and insist that Māori sovereignty was not ceded to the British Crown. Legal academic David Williams (2011) claims that this argument has been relied upon by a significant number of Māori litigants in recent years, and is often advanced in conjunction with the argument that the independent sovereignty of the Confederation of Chiefs declared in 1835[128] subsists to the present (Williams, 2011:232). Paul McHugh (in Williams, 2011:232) has noted some twenty-one cases, mostly unreported, arising between 1994 and 2001 in which Māori litigants have challenged the Crown's sovereignty in respect of a wide range of issues, and argued for the continued existence of an independent Māori sovereignty.

Also, over the past two years the New Zealand government has pursued a review of the country's unwritten constitution, inspiring a debate that centres largely upon the legislative role that the Treaty of Waitangi should play as one of New Zealand's founding documents. In fact New Zealand is one of only three countries in the world without a formal written constitution (the other two are Israel and Britain), and while there has been no significant political or popular upheaval that spurred such debate regarding New Zealand's constitutional arrangements, the most recent review arose in the wake of the political negotiations that followed the general elections in 2008. Under a confidence and supply agreement which emerged from those talks, the Māori Party extracted a commitment from the National Party that a "wide-ranging" review of the constitution would be undertaken (Fresne 2012).

The present Constitutional Review encourages New Zealanders to consider their views on several key topics, namely (but not limited to) the role of the judiciary in enforcing an entrenched constitution, the possible reintroduction of a second legislative chamber (or upper house) in parliament, the role of the British hereditary monarch as New Zealand's head of state, and how the Treaty of Waitangi and its principles should structure the relationship between *iwi* and *hapū* and the Crown. Such topics have tended to inspire vehement responses in many people, particularly regarding the Treaty of Waitangi. New Zealand's leading constitutional scholar, Professor Philip Joseph, recalled the "spectacular failure" of a series of talks in 2008 to discuss the constitution, as each session foundered upon questions around the Treaty: "It was like a vortex pulling everything in" (Fresne 2012).

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[128] In 1834 James Busby, an early British Resident, presented northern Māori chiefs with three flags to choose from to aid the identification of 'New Zealand' ships. After a speech by Busby on 20 March one flag was chosen by the chiefs who then declared themselves The United [Independent] Tribes of New Zealand: *He Whakaputanga o te Rangatira o Nu Tireni* (New Zealand History Online 2012). The next year a formal Declaration in Independence was signed by these chiefs and James Busby. Contemporary debate continues in New Zealand regarding the Declaration's validity, and whether its legal effect was abrogated by the institution of the Treaty of Waitangi in 1840.

Critics of the constitutional entrenchment of the Treaty of Waitangi and its principles, especially, are particularly forthright in the expression of their opinions. Some claim, for instance, that the review and its panel members are unrepresentatively pro-Māori, and are working toward a predetermined outcome (entrenching the Treaty's principles as 'supreme law') (Fresne 2012). Others, such as former right-wing ACT party MP Muriel Newman, have launched campaigns against the review; Newman; for example, claims that a Treaty-based constitution will enshrine Māori privilege and turn non-Māori New Zealanders into 'second-class citizens': "New Zealand would forever be locked into a future of separatism and racial division" (Fresne 2012).

New Zealand's local newspapers are also periodically electrified with debate regarding the review. In Tauranga, for instance, I clipped the Letters to the Editor page of their weekly newspaper, *The Weekend Sun*, as an example of local (presumably non-Māori) sentiment:

> "Our Democracy is at risk here because of this minority group of radicals threatening that and distorting the truth to get what they want. ... This has been the final straw for most of us we do not want to live in a country with apartheid which is what will ultimately happen, not to mention unrest and dissent because of the inequality that will follow. We want Equality for all!" (Humphreys 2013a)

> "The government's constitutional review is taking place now, a real threat to our New Zealand Democracy! ... My submission regarding the New Zealand Constitutional Review is that I want no change to New Zealand's unwritten constitution it has served us well since the 1852 NZ Constitutional Act was passed, our founding document. It may require some alterations in the future, but not a race based Constitution. 'Equality for all, One People One Nation'!" (Humphreys 2013b)

> "New Zealanders need to sit up and be warned about the upcoming constitutional review which is being quietly put together by the Maori Party and is being funded by us, the taxpayers, to the tune of $4 million given to them by the National Party. ... [T]he racially-biased Constitutional Advisory Panel are getting antsy that the half-asleep public may wake up to what is really happening behind the closed door of the Maori Party. ... Overseas experts are warning that the separatist agenda of the review panel will end democracy as it will be irreversible. It will be set in stone – forever! Wake up New Zealand as to what is being secretly planned for your future." (Bishop 2013)

Also, in the opening lines of a website established in an objection to the constitutional review, the New Zealand Centre for Political Research, a web-based 'think tank', declared that:

> "The government's constitutional review is a major threat to New Zealand's democracy. A biased constitutional advisory panel and a consultation process that locks out non-Māori threatens to permanently

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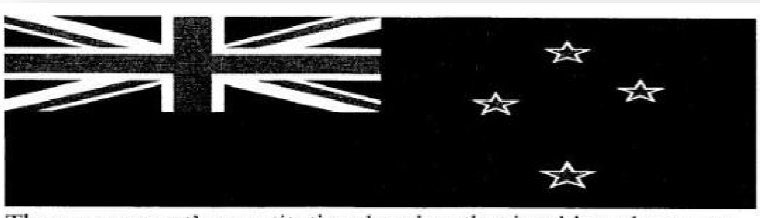
> put power and privilege into the hands of the tribal elite. The urgent threat to our future is quietly building momentum while most people are unaware of what is at stake." (Constitutionalreview.org 2013)
>
> "[T]he relentless incremental transfer of money, power and public resources [to Māori] that goes largely unnoticed by most New Zealanders, who are too busy getting on with their own lives. However, some New Zealanders ... have come to realise that this is all part of a much larger agenda – a drive for the co-governance of New Zealand. How to alert a largely passive public, who are blindingly oblivious to the danger, will be our major challenge next year." (Newman 2012)

Lastly, during a public meeting organised by the Constitutional Review Panel as part of a series of country-wide discussions, and held in Tauranga on the 28 May 2013, my mother picked up this flyer from an audience member:



The government's constitutional review that is taking place now and is a threat to New Zealand's democracy!
Kiwi's you have to act now if you do not want a race based 'written constitution' coming from a biased review committee driven by the 'Maori Party'. You must do something before the 1st July 2013, all submissions have to be in before then.

New Zealand at present has an "unwritten Constitution' made up of a number of Statutes and Acts that have accumulated over time which have served us well? Read the flyers accompanying this flyer. The reason for sending you this as well is so you can also write/email a submission to the review committee:

constitutionalreview@justice.govt.nz
The web site: www.cap.govt.nz

A submission can be short just to let them know your views!

Example:
My submission regarding the NZ Constitutional Review is that I want no change to New Zealand's unwritten constitution it has served us well since the 1852 NZ Constitutional Act was passed. It may require changes but not a race based Constitution
Equality for all, One People One Nation

'GO NEW ZEALAND GO' STAND UP FOR YOUR RIGHTS

Image 4: **'Constitutional Review Flyer'**

In the words of these writers, Māori represent a small, but dangerous group of political dissidents. Their letters underscore the fear many non-Māori feel regarding the threat Māori political and cultural alterity presents to New Zealand's democratic institutions (note the emotive use of the flag in the flyer above, and the repeated conflation of New Zealand-ness with notions of equality and democracy, and Māori-ness with division and racism, rhetoric which echoes the National Party's '*Beaches: Iwi/Kiwi'* hoardings), an anxiety akin to the notion of swart gevaar ('black threat') used by white South African's during apartheid's dark years in reference to the perceived political, social, and cultural threat presented by the black African majority. The writers may speak of a desire for equality, but only so far as the political interests and aspirations of the Māori minority remain in line with the ambitions of the political (non-Māori) hegemon.

The New Zealand government, however, has been very careful in the rhetoric it has used to describe the Constitutional Review, emphasising its bi-cultural focus. At least five of the twelve panel members, for instance, are either Māori or declare strong links with Māori ways of life. And note the use of *te Reo Māori* words in both the website (http://www.cap.govt.nz) for the Review, and its primary information booklet, *New Zealand's Constitution: the conversation so far* (2012):

> "We are committed to ensuring that you – along with your friends, *whānau*, family, colleagues, communities and *iwi* – have an opportunity to tell us what you think" (Constitutional Advisory Panel - Te Ranga Kaupapa Ture, 2012:4).
>
> "The Panel has taken a staged approach to ensuring we hear from as many New Zealanders as possible:
>
> **Stage 1 –** *Whakaoho i te tangata*/Preparing the ground
>
> **Stage 2 –** *Whakamārama*/Understanding
>
> **Stage 3 –** *Wānanga*/Thinking together
>
> **Stage 4 –** *Wānanga*/Deliberation
>
> **Stage 5 –** *Whakapūrongo*/Reporting"
>
> (Constitutional Advisory Panel - Te Ranga Kaupapa Ture 2013)

While the Constitutional Review could be considered to represent an enlightened summons for dialogue regarding New Zealand's constitutional arrangements, the genesis of the review is undoubtedly politically motivated. Since the entrenchment of a written constitution would in fact wrest power *away* from the legislature in favour of the judiciary, it is unlikely that the National Party (in their political alliance with the ACT Party, the Māori Party, and United

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Future under New Zealand's Mixed Member Proportional, or MMP, political system) is definitively committed to such an outcome. Rather, the Constitutional Review could be viewed as a superficial appeasement of the Māori Party's, and wider Māori, demands, much like the Waitangi Tribunal's establishment in 1975.

Consequently, in their efforts to reorient (and sometimes quash) subaltern demands some governments, like New Zealand's for example, have set about instituting 'bicultural' strategies of cultural recognition or cultural 'inclusion' (Poata-Smith 2004a), while others have offered cognate schemes such as Canada and Australia's 'multiculturalism', or South Africa's 'rainbow nation' (Brown, 1995; Povinelli, 2011:25). As Wendy Brown argues in *Regulating Aversion* (2006:82), by the 1980s liberal policies of 'cultural recognition', and its attendant, 'tolerance', had become commonplace instruments amongst hegemonic orders of power in their efforts to divert implacable subaltern challenges to their sovereign authority.

At United Nations' conferences and international human rights campaigns tolerance was enumerated (along with freedom of conscience and speech) as a fundamental component of universal human dignity (Brown, 2006:2). Tolerance was prescribed in Europe, for instance, as the appropriate popular response to the presence of Third World immigrants and Jewish peoples, across the United States as neighbourhoods and schools became ever more racially diverse; and globally as historically-conceived repellent acts like homosexuality have become progressively more normalised and visible. Tolerance discourse, then, with its pacific and non-political rhetoric, has become the ideal instrument for liberal states to deflect the challenge presented by radical alterity, to projects of national coherence, and to the incorporative ideal which sustains liberalism's promise of universal social equality.

At this particular historical moment, then, where the combined effects of globalisation, and the aftermath of the Cold War and colonialism have led to the world erupting in a hundred different scenes of local and internecine conflict (many rooted in identity), strategies of recognition and tolerance have become "appropriate balm[s]" (Brown, 2006:85) for soothing subaltern sensitivities toward their (often long) histories of exclusion by norms of sex, race, ethnicity or religion. However, recognition and tolerance – while undoubtedly transcendental virtues – mask the role the state plays in reproducing the dominance of certain groups and norms (Povinelli, 1998:582-3).

Although the practical enactment of recognition and tolerance through rituals like historical restitution, is intended to ameliorate the demands made by claimants (particularly in their simultaneous and contradictory struggle to resist their political domination, and their desire for an adaptive and harmonious relationship with such orders of dominance), in practise

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recognition and tolerance are only offered on the condition that individuals reorient their socio-political attachments toward the nation's hegemonic ideal of cultural and political homogeneity. Tolerance, then, as Brown (2006:95) argues, appears as both a disciplinary strategy to constrain motley, potentially ungovernable proliferations of political identity and alterity at a time when the liberal subject is becoming increasingly disinterred from substantive nation-state identification and the social effects of twenty-first century economic and political life (Brown, 1995:58), *and* as a restorative strategy capable of relegitimating weakening liberal universalism and "thinning notions of nation-state citizenship" (Brown, 2006:95).

In New Zealand, the institution of the Treaty settlement process by the Crown has accorded Government the power to deflect challenges presented to its sovereign legitimacy by Māori alterity by channelling claimants' dissatisfaction and political resistance into an adjudicatory process which offers recognition of Māori grievances and aspirations – a reality not lost on some claimants, such as the negotiator for a small Bay of Plenty *hapū,* a businessman who remarked that:

> "And so this is when the process becomes imposed ... I always think of it like a farm, and we're the animals and we start off in a big open pasture and then the further we engage with the Crown the more we get herded down little penstocks into different holding pens. This is where it becomes a very foreign process. We're really in the machinery of the Crown. It's very rigid, and it takes a long time."

By controlling the institutional architecture and jurisprudential parameters of the Treaty settlement process, the Crown is able, therefore, to regulate and discipline the challenge presented by Māori alterity, and in lodging claims for restitution under the Treaty of Waitangi Act, Māori claimants are effectively pursuing justice from an order of power which not only licensed their political and cultural subjugation, but continues to occupy, operate within, speak from, and enjoy a position of dominance that sustains such subordination (Rajan, 2000:162; Ward, 1999:8).

Participation in the Treaty settlement process, therefore, means Māori claimants must seek resolution for the wounds of their subordination through state-regulated remedy, and thereby corroborate with and abet the domination and power of the Crown at the expense of the political and ethnic emancipation which they claim to desire (Brown, 2006:28). Consequently, tactical political strategies like recognition and tolerance in the context of historical restitution, may represent the renaturalisation of difference and the resubordination of the radical alterity by the state.

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CONCLUSION

In this chapter, by utilising Elizabeth Povinelli and Wendy Brown's scholarly writings, I have argued that strategies of recognition and tolerance form part of a tactical political response by liberal governments in the deflection and/or quashing of the challenge presented by subaltern cultural, social, ethnic or political difference. Despite the stress that liberalism places upon individual liberty, rather than make or find the space to accommodate instances of radical alterity, it serves the best interests of the liberal state (and the political hegemon who support the state) to mitigate the threat difference presents to the fiction of cultural homogeneity. In this sense, radical alterity is conceived as incompatible with the political or social hegemon's ideal incorporative project of national identity, since the subaltern subject actively resists absorption.

The liberal state, therefore, confers the responsibility to propagate and sustain this fiction upon the judiciary who interpret and enact the law. By proclaiming past judgements to be mistaken or spurious, the law can be contemporaneously conceived as distinct from the discriminatory behaviours and injustices perpetrated historically. The law, then, becomes inscribed with the power to wipe clean the injustices of the past, and thereby redeem the nation's identity and good-intentions, by asserting that strategies of formal recognition inherent in initiatives like historical restitution are morally and jurisprudentially enlightened and inclusive.

As I have argued, however, policies of recognition and tolerance do not necessarily result in substantive resolution for claimants since, firstly, the order of power from which claimants seek the emancipation of their identities is often the 'same' institutional and ideological body that inflicted the original historical injustices from which they suffer, and secondly, because this order of power has often not experienced fundamental transformations or alterations to the institutions and ideologies that have sustained their domination. Consequently, programmes of historical restitution may in fact serve to encourage the ongoing resubordination of the subaltern subject.

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chapter seven

CONCLUSION

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This thesis research emerged from my disquiet regarding the New Zealand Crown's expectations that Māori claimants should accomplish the full and final resolution of their historical grievances following the receipt of restitution. My feelings intensified following the televised broadcast of a protest in Auckland in 2009, where 6,000 (mostly Māori) demonstrators marched through the city's streets decrying the City Council's plan to create a "super-city"[129] but with no special provision for Māori representation. The camera lingered briefly upon one Māori protester, a young man who bellowed across the crowd through a loud-speaker that Māori would *never* give up their struggle for justice in New Zealand, a struggle he claimed that his *mokopuna* (descendants, or grandchildren) and their *mokopuna* would continue to pursue. I remember his conviction, and the way the vehemence of his delivery contorted his face. How, I wondered, could any form of restitution adequately appease a man who appeared to suffer his grievance so profoundly? With the passage of this research project, however, I now appreciate that his declaration was not wholly about finding a solution to resolve the injustices that occurred in his past, but also about articulating the potentiality of his future, and that of his children.

In seeking to fathom the practicability of the New Zealand Crown's full and final settlement clause, given that some Māori claimants feel that their grievances have not been satisfactorily resolved by Treaty restitution, this research has centred upon two principle questions; firstly,

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[129] The proposal recommended combining the functions of the existing regional council and the district's seven previous city and district councils into one "super council" or "super city" governed by one mayor, twenty members of the governing body and 148 members of twenty-one local boards.

how has restitution come to be popularly understood as an act with the power to restore social and economic equilibrium to individuals, communities or whole portions of a society? And secondly, are the fundamental philosophical and procedural arrangements that undergird New Zealand's historical restitution programme flawed – and if so, might this mean that historical restitution initiatives are configured in a way that makes them inherently unable to deliver the substantive economic transformation and social conciliation that they promise?

In exploring these questions I sought to employ what Nader (2013) calls a 'loosely comparative' ethnographic approach in order to frame my New Zealand research within a broader ethnographic context, where other historical restitution strategies form part of a wider engagement with, and management of, the contemporary social and political complexities which order other settler economies. New Zealand and South Africa are each home to an amalgam of autochthonous and settler inhabitants whose identities are colonially ascribed, and affiliations ordered, divided, and reformed under the European rule of law (Meskell, 2005:72). Consequently, both countries are presently grappling with an array of socio-political challenges that have emerged as inhabitants pursue their own interests and ambitions. In particular, when the aspirations of minorities or political subalterns are interpreted by the political or cultural hegemon as profoundly divergent or competing with their own objectives, instances of cultural, political or ethnic difference are often conceived as threatening entrenched ways of life, and tend to engender considerable hostility.

In New Zealand, for example, Pākehā ideals of cultural and racial congruity (and homogeneity) – predicated upon an imagined, shared horizontal fraternity with Māori – began to buckle in the 1970s under the repeated assault of Māori alterity. Unwilling to surrender what little remained of their customary holdings, Māori claimants, particularly young adults, began to pursue land claims with renewed vigour following a cultural and political revival that accompanied the Māori Renaissance. In 1975, for instance, thousands of Māori and their supporters marched on Parliament to publicise the continued loss of Māori land. In a now-famous slogan, marchers demanded that '*Not One More Acre of Māori Land*' must be alienated. The marchers presented the Prime Minster, Bill Rowling, with a Memorial of Rights signed by two hundred Māori elders, and an accompanying petition of more than 60,000 signatures (New Zealand History Online n.d.; Tongarewa n.d.). In response, the Crown established the Waitangi Tribunal as a forum for Māori to pursue their grievances.

The challenge presented by radical Māori political difference resulted in the dramatic rupturing of established Pākehā narratives of national consonance, and, consequently, the

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disciplinary authority and sovereignty legitimacy of the Crown came under intense pressure. Indeed, the challenge of difference was not limited to New Zealand, and appeared "everywhere immanent" (Comaroff & Comaroff, 2004:189); at that time many countries around the world were striving to configure their inhabitants' striated identities in the wake of imperial imposition. Contemporaneously, the challenge presented by difference has expanded, rather than contracted, as hybridized, shape-shifting ethnic, religious, linguistic, racial, regional, and ideo-primordial variation grows (Geertz, 2004:579) as a result of the globalisation of capital and trade, the growing hegemony of the market, the rise of an electronic commons, and the intensified movement of currencies and commodities, and of people as migrants and refugees (Comaroff & Comaroff, 2004:190; Hansen & Stepputat, 2001:1).

However, if difference cannot be abolished, how should it be managed (Geertz 1983)? Historical restitution initiatives emerged, I have contended, as a tactical way for liberal governments to manage the "extreme torsion" (Povinelli, 1998:583) generated by cultural and/or ethnic difference. I have not only sought, therefore, to explore this process of emergence further, I have also endeavoured to show how the historical restitution ritual has become popularly accorded with the power to transform and restore social, economic, and political inequalities within a society.

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FAIR DISTRIBUTION – JUST RESTITUTION

In this thesis I have argued that New Zealand and South Africa's governments have both instituted a programme of historical restitution as a way of addressing contemporary social, political and economic disproportionality amongst their citizens – inequalities that arose historically as a direct or indirect result of state-sanctioned, or executed acts of discrimination. Both governments have identified restitution – through the redistribution of land, or cash compensation – as a method of rectifying such inequalities. This logic, I have maintained, is what underpins the idea that programmes of historical restitution are essentially 'transformative rituals' (Trouillot, 2000:174); simultaneously illocutionary and performative demonstrations of repentance by one interlocutor to another, with regards the resolution of long-standing grievances.

Historical restitution initiatives are particularly popular among states which have experienced imperial imposition in the last two centuries. In such contexts, minorities, autochthons, or the politically subjugated were often coerced or forcibly dispossessed of their lands and resources by colonial administrators. However, since the contemporary economic and

cultural survival of these groups is almost always contingent upon their access to such land and resources (Fairweather, 2006:3), the redistribution of these assets by the state has become an essential provision in the logic that undergirds the transformative ambitions of the historical restitution process. Subsequently, while Māori claimants in New Zealand pursue restitution as a Treaty *right*, the Crown's institution of the Treaty settlement process has only arisen, I have maintained, following the scholarly diffusion of the distributive justice philosophy in the last half century.

This philosophy, or to be more precise, its contemporary formulation, stipulates that the egalitarian division and allocation of resources by the state is a matter of justice (Fleischacker, 2004:6), a notion grounded in the belief that all societies' share an overwhelming desire to protect the interests of each and every citizen. In this interpretation, the precept of need – rather than moral worth or merit – is considered to be the primary attribute that orders the act of fair distribution. In the context of the state, therefore, the government has a moral obligation to take proactive measures to ensure that its citizens receive a fair distribution of available wealth/resources. This formulation – that just distribution is fair distribution (Rawls 1971) – has increasingly come to inform the rhetoric and ideology of liberal jurisprudence since the 1970s, when it began prising apart the moral and political space necessary for political subalterns to challenge, reconfigure, and even overturn their subordinate status through the language and proceduralism of jurisprudence.

As I have argued, therefore, historical restitution is animated by a restitution-as-justice logic which stipulates that claimants should consider the act of restitution – be it the return of land (or alternative land) and/or payment of financial compensation by the state – to constitute fair (and thereby just) atonement by the state for its historical wrongdoings. Accordingly, therefore, restitution has subsequently become popularly conceived as a ritual act with the power to repair torn lives, pull people out of structural impoverishment, and act as a conveyance for the restoration of dignity and prosperity (Povinelli, 2002:160). Expectations of substantive transformation, therefore, are not only elemental to the conceptualisation of historical restitution, the restitution act is also imagined as an emblematic bridge strung between the repellent behaviour of the past, and the glorious potentiality of the future.

Although this subtle relationship underpins historical restitution, it is also easily overlooked by its participants. As I have demonstrated, the resolution of grievance is as much about generating a renewed moral optimism for the future, as it is about achieving a sense of justness for past wrongdoing. How this future is imagined, however, is markedly different amongst participants in the historical restitution process. In New Zealand, Pākehā tend to understand resolution as the termination of a grievance whereby a new form of ethnic, social,

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and political inclusiveness can be instituted and shared. Many Māori claimants, however, conceive of the Treaty settlement process as an instrument capable of bringing state-sanctioned discriminatory behaviour to a close, so that they may enjoy a relationship with the government premised upon the principles of partnership enshrined in the Treaty of Waitangi. Implicit in the rhetoric of each group is a conceptualisation of an ideal future predicated upon resolved historical wrongdoing. However, hostilities often arise between participants because they do not share fundamental interpretations of what constitutes property, ownership, justice, and resolution.

This tension, I have reasoned, between the contested past and an ideal future remains one of the primary reasons why the delivery of substantive transformation through restitution is so difficult to achieve. While many Māori claimants in New Zealand felt philosophical about the financial and jurisprudential considerations that constrict the total restitution the Crown is able or prepared to offer, others fiercely objected to the conditional full and final settlement clause in the settlement deeds tendered by the Crown. Since Māori claimants must agree to this clause before they receive restitution, some claimants felt that their deep, intractable grievances would not be satisfactorily resolved through the restitution on offer. Moreover, the full and final settlement clause terminates claimants' legal ability to pursue further recourse from the Crown for the same grievances; some claimants feel this constitutes a contemporary breach of their Treaty of Waitangi rights, since it limits their potential to pursue further restitution from the Crown. Fundamentally, for these claimants the restitution offered by the Crown has not been substantial enough to alleviate their grievances because it constricts the potentiality of their future.

In South Africa, too, substantive transformation has proved difficult to accomplish and/or calculate. As I have described, this country's historical restitution programme was established to ameliorate the poverty from which so many landless South African's continue to suffer as a consequence of historical discrimination. The transformative 'success' of the land redistribution and cash compensation programmes has been limited. Despite concluding approximately 90 per cent of registered land claims – almost all through standardised cash compensation – those which remain and await settlement constitute large, complicated rural land claims. Amongst the claimants to whom I spoke, those who had elected to receive compensation had either promptly spent their meagre[130] redress, or shared it between their families. Many expressed feelings of dissatisfaction regarding the government's restitution efforts, and described feeling that their economic circumstances had

[130] Offers range between R40,000 and R50,000, about NZ$5 – 6,500 .

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not significantly altered or transformed following the receipt of restitution from the state, and that their ideal future had not been realised.

THE CHALLENGE OF DIFFERENCE

Resolving grievances, therefore, is a complex endeavour. As I have described, some claimants in New Zealand and South Africa found cathartic value in the state's formal recognition of their suffering, others gained satisfaction from the return (or compensation) of land, and others still consider resolution a means to securing the emancipation of their political, ethnic and cultural identities from imperial and/or hegemonic subjugation. In particular, this latterly aspiration has tended to represent a considerable challenge to the sovereign authority and legitimacy of the liberal state, pressure that – as I have demonstrated with the help of Wendy Brown and Elizabeth Povinelli – liberal governments strive to deflect or quash in their efforts to sustain their political omnipotence. As Brown (1993) contends, liberal governments have begun to find themselves increasingly ensnared in one of liberalism's central paradoxes: the basic contradiction between individualism and political university, both traits necessary to sustain and legitimate liberal governmentality. Claimants, however, constitute their identities in relation to the state and the other social identities residing within it, and consequently, their aspirations reflect the "scarring" of this temporal and social difference (Povinelli, 2002:49).

In the context of historical grievance, I have argued that New Zealand's and South Africa's governments have elected to institute restitution solutions that allow their claimants to pursue their own aspirations, but have also constricted the process in ways that mitigate any threats that claimants' emancipatory ambitions may present to the core frameworks of liberal statehood. Principally, these governments have resorted to the tactical application of the law – particularly the interpretation and enactment of judicial precedent – and techniques of political 'recognition' and 'tolerance'. As I described in the preceding chapter, these governments have engaged the law to foster a Then-vs.-Now imaginary in order to abandon the morally repugnant behaviour and injustices perpetrated historically by the state to a conceptual past, and thereby facilitate a temporal and moral distance from such acts. Simultaneously, the cultural and/or political recognition claimants enjoy following their participation in the historical restitution process has enabled their governments to institute 'bicultural' or 'multicultural' schemes of cultural and political tolerance, a strategy that allows the government to retain ultimate control over the determination of acceptable and intolerable difference.

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While these tactics appear liberal and incorporative, tolerance discourse can also be understood as a straightforward disciplinary strategy by the state. It represents an attempt to control the motley and potentially ungovernable aspirations (Brown, 2006:95) of culturally, ethnically, and politically diverse citizens, whose affiliations can threaten the political coherence that the liberal state requires to govern. Tolerance, however, is only offered on the condition that subaltern individuals shift their political attachments and fealty toward the 'inclusive' embrace of the political hegemon. Just like the strategic use of the law, therefore, tolerance enables governments to continue to reserve the power to discriminate against any instance of social or cultural difference that it considers harmful to its sovereign legitimacy, and thereby safeguard the proprietary, pecuniary, or political interests of those citizens who support its sovereign authority (Povinelli, 1998:582).

As I have demonstrated, despite the passing of so-called 'enlightened' judgements in the 1992 Australian *Mabo*[131], and the 1987 New Zealand *Māori Council*[132] cases, a substantive ideological critique and overhaul of the orders of power and/or institutions that perpetrated and sanctioned shameful acts historically has not occurred. In fact, the same fundamental models like citizenship and sovereignty that inform state function, and public discourse about what is acceptable to demand or expect from the state, remain largely unchallenged. By controlling the institutional architecture and jurisprudential circuitry of the historical restitution process, therefore, the New Zealand Crown and the South African government have been able to successfully regulate and discipline the political challenges presented by claimant alterity.

Consequently, while the state wrestles with the paradox of individualism vs. political universality, historically marginalised and/or politically subaltern subjects – in their desire to resolve their grievances, conclude their suffering, and embark in a new socio-political direction – tend to find themselves ensnared by the contradictory demands that the historical restitution process places upon their identity, historicity, and aspirations. For example, in New Zealand claimants must pursue restitution from an order of power which continues to occupy, speak from, and enjoy a position of dominance derived in part from acts of discrimination that generated Māori claimants' grievances and subordination historically (Hoff, n.d.:3; Rajan, 2000:162). They must also tolerate the state's formulation, sponsorship, administration, and determination of the jurisprudential and financial parameters of the restitution process.

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131 *Mabo and Others v Queensland (No. 2)* [1992]

132 *New Zealand Maori Council v Attorney-General* [1987]

Such procedural control by the state has left many Māori claimants feeling trapped by the expectations of the (predominantly Pākehā) political hegemon: obliged on the one hand to enact their socio-cultural difference 'authentically' (in ways that orient Māori subjectivity toward Pākehā aspirations of an ethnically cohesive nationhood), while on the other hand seeking to satisfy a host of ambitions and requirements that are meaningful and important to them as claimants, and often divergent from those of non-Māori. In South Africa, too, although the present government is far removed from that which instituted and maintained apartheid, claimants must engage with an ANC-led government that continues to struggle under, and is constrained by, an inherited dichotomous responsibility splintered along racial lines (Hall, 2009:242).

Accomplishing substantive economic, political, or social transformation, therefore, is difficult to accomplish. Indisputably well-intentioned from a moral standpoint, the historical restitution programmes presently underway in New Zealand and South Africa are not only complicated by the diverse demands, aspirations, and competing interests of their participants (who have divergent understandings of the past and aspirations for the future), they are also significantly constrained by the foundational philosophical logic and procedural arrangements which order each country's restitution process, and are configured in ways that tend to limit their transformative potential. It is for these reasons, I propose, that only concerted dialogue between participants regarding their understandings of the basic tenets and fundamental objectives of the historical restitution process will accomplish substantial, satisfactory, successful transformation, if that is indeed what is desired.

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REASSESSING RESOLUTION

Naturally any expansive state-led effort to facilitate widespread structural change in the social, economic, and political circumstances of considerable numbers of citizens through the redistribution of wealth, cannot logically be expected to satisfy everyone. It is easy to denigrate the operation and restorative scope of New Zealand and South Africa's historical restitution programmes, and while my research demonstrates that the success of these countries' restitution initiatives is difficult to quantify, I am certainly not claiming that they are *without* success. In fact, in the nature of their very existence, historical restitution programmes prove their moral and historical worth; that New Zealand and South Africa's governments have worked, and continue to work, so assiduously to pursue restitution demonstrates, I believe, a custodial intent, and a willingness to engage in dialogue with their disaffected citizens, which is an attitude that has not always been present historically.

Besides, as my father enjoyed reminding me, criticism is unproductive unless there is an alternative to offer, and in the case of historical restitution there is little consensus on workable alternatives. For instance, from time to time during my interviews in New Zealand I asked Māori claimants what alternatives they could envisage for the process as it presently operates. Some shrugged and evaded my question; others stated simply that they would need time to consider what these alternatives might be. Only two (the first, a negotiator) provided an answer, albeit vaguely:

> "What are the alternatives? There's always alternatives, but I think it's just very hard to find a perfect alternative."

> "What are the alternatives? We have to just use this process and get the best out of it that we can. You just have to ensure that it's not the be-all and end-all; claims should never be the be-all and end-all."

The notion of a "perfect alternative" suggests that while the present process has flaws, it is unlikely that any substitution would have less. Perhaps, therefore, it may be more useful to consider a change to the way restitution and resolution are conceived and understood, rather than expend further resources reconfiguring the proceduralism or remedial parameters of the historical restitution process itself. I contend that it would be most beneficial to begin by reconsidering and reframing the utopian thinking that underpins and propels restitution. In particular, I believe the notion of full and final settlement requires revision, whereby the termination of claimants' historical grievances through restitution is considered achievable, and, therefore, that the entire restitution process has the power to accomplish the 'end of history' – the ultimate closure of a repugnant, shameful past, and the commencement of a glorious, cooperative future.

In fact, such a reassessment may already be underway, albeit academically; philosopher James Tully, for example, observed as early as 2000 that those studying political struggles such as historical restitution should not consider disputation, review and revision of the process as failures, but rather as examples of an ongoing democratisation of the restitution process as a whole, and reflective of a dialogue between interlocutors vital to satisfactory resolution (Tully, 2000:478). Such an approach, therefore, suggests that any reassessment of the meanings associated with the foundational notions and terminology which undergirds historical restitution could be understood as a refinement, rather than a drawback, of the process. In this regard, then, instead of interpreting the comments of the second claimant who suggests that Treaty restitution not be considered the "be-all and end-all" (and also of those claimants who vigorously repudiate the Crown's full and final settlement clause) as demonstrations of resistance, hostility, or intransigence, they could be conceived as bids for

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opening a dialogue with the Crown about the meaning of resolution, and the parameters for an enduring partnership.

In New Zealand, for example, the restitution process has facilitated, and is facilitating, a more profound relationship between Māori claimants and the Crown. The institution of the Waitangi Tribunal, for instance, demonstrates an increased parliamentary willingness to incorporate Māori political aspirations and aspects of the Treaty of Waitangi into legislation, and the progressively sympathetic responses from the judiciary toward Māori ambitions is leading to an evolving and dynamic common law on Treaty issues (McHugh, 1991:381). Consequently, the Crown's engagement with Māori grievance forms part of a broader dialogue around New Zealand's constitutional discourse (McHugh, 1991:64), and as noted in the preceding chapter, through which the constitutional foundations and principles are presently being explored and gradually reoriented.

As the predicates of government in New Zealand undergo discussion and possible revision, a truly incorporative form of constitutionalism may well evolve; as McHugh (1991:65) reminds us, tectonic revolutions and reforms such as the Restoration (1660), the Glorious Revolution (1688), the American Revolution (last half of the eighteenth century), and the passage of the nineteenth century electoral reforms and granting of female suffrage, are all outcomes of bygone constitutional debate and negotiation which today are easy to take for granted. Such profound revision, though, requires the intensive and continued reassessment of the foundational conceptions that order and propel processes like historical restitution. The logic and philosophy of restitution, therefore, is subject to the push-and-pull of myriad forces which undergird conceptions around late liberal democracy, citizenship, collective subjectivity, memory, imagination and alterity, for example, which commingle to order the delivery of resolution and transformation, and which generate the questions that propel this type of research.

Restitution and resolution, therefore, generate such impassioned responses from participants and observers precisely because there are no straightforward solutions, only a tangle of complex and challenging choices that require intensive and ongoing negotiation. In conclusion, I propose that the notion of resolution undergo intensive reassessment by all participants engaged in historical restitution processes. In particular, they should take time to reconsider exactly what the concept means to them, the way the past and the future are diffracted through it, and especially, how value can be leveraged from it in ways that are not only solely economic. As Brown (2011:26-7) suggests, "raw economic interest [is] too thin a reed and too crude a principle on which to build both an individual life and a democracy", and while her proposition is easy to make, it is however, far more difficult to execute in

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practice when confronted by hungry, landless peoples in need of immediate material assistance. The value and advantage generated through restitution, therefore, also requires revaluation, in order to better understand the precise ways in which people benefit from their access to, and relationships with, objects of significance. Surely only once all participants in the historical restitution process share an understanding of what constitutes resolution and remedy, can historical restitution initiatives achieve all that they seek to accomplish.

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appendix

THE TREATY OF WAITANGI

WAIKATO-MANUKAU TREATY COPY (ENGLISH TEXT)

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HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant-Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers

of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

(signed) William Hobson, Lieutenant-Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified. Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

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TE TIRITI O WAITANGI

MĀORI TEXT

KO WIKITORIA te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira – hei kai wakarite ki nga Tangata maori o Nu Tirani – kia wakaaetia e nga Rangatira Maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu – na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

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KO TE TUATAHI

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu – te Kawanatanga katoa o o ratou wenua.

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te

Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini – Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(signed) William Hobson, Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

(from: http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text - 14 October 2012)

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THE KAWHARU TRANSLATION OF THE MĀORI TEXT

The following translation of the Māori text of the Treaty was done by former Tribunal member Professor Sir Hugh Kawharu.

Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship[1] and their lands to them and to maintain peace[2] and good order considers it just to appoint an administrator[3] one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands[4] and also because there are many of her subjects already living on this land and others yet to

come. So the Queen desires to establish a government so that no evil will come to Māori and European living in a state of lawlessness. So the Queen has appointed 'me, William Hobson a Captain' in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents[5] to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

THE FIRST

The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government[6] over their land.

THE SECOND

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise[7] of their chieftainship over their lands, villages and all their treasures.[8] But on the other hand the Chiefs of the Confederation and all the Chiefs will sell[9] land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

THE THIRD

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties[10] of citizenship as the people of England.[11]

[signed] William Hobson Consul & Lieut Governor

So we, the Chiefs of the Confederation of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840.

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FOOTNOTES

1. 'Chieftainship': this concept has to be understood in the context of Māori social and political organisation as at 1840. The accepted approximation today is 'trusteeship'.

2. 'Peace': Māori '*Rongo*', seemingly a missionary usage (*rongo* – to hear: ie, hear the 'Word' – the 'message' of peace and goodwill, etc).

3. Literally 'Chief' ('Rangatira') here is of course ambiguous. Clearly, a European could not be a Māori, but the word could well have implied a trustee-like role rather than that of a mere 'functionary'. Māori speeches at Waitangi in 1840 refer to Hobson being or becoming a 'father' for the Māori people. Certainly this attitude has been held towards the person of the Crown down to the present day – hence the continued expectations and commitments entailed in the Treaty.

4. 'Islands': ie, coastal, not of the Pacific.

5. Literally 'making': ie, 'offering' or 'saying' – but not 'inviting to concur'.

6. 'Government': '*kawanatanga*'. There could be no possibility of the Māori signatories having any understanding of government in the sense of 'sovereignty': ie, any understanding on the basis of experience or cultural precedent.

7. 'Unqualified exercise' of the chieftainship – would emphasise to a chief the Queen's intention to give them complete control according to their customs. '*Tino*' has the connotation of 'quintessential'.

8. 'Treasures': '*taonga*'. As submissions to the Waitangi Tribunal concerning the Māori language have made clear, '*taonga*' refers to all dimensions of a tribal group's estate, material and non-material – heirlooms and *wahi tapu* (sacred places), ancestral lore and *whakapapa* (genealogies), etc.

9. Māori '*hokonga*', literally 'sale and purchase'. '*Hoko*' means to buy or sell.

10. 'Rights and duties': Māori at Waitangi in 1840 refer to Hobson being or becoming a 'father' for the Māori people. Certainly, this attitude has been held towards the person of the Crown down to the present day – hence the continued expectations and commitments entailed in the Treaty.

11. There is, however, a more profound problem about '*tikanga*'. There is a real sense here of the Queen 'protecting' (ie, allowing the preservation of) the Māori people's *tikanga* (ie, customs) since no Māori could have had any understanding whatever of British *tikanga* (ie, rights and duties of British subjects). This, then, reinforces the guarantees in article 2.

(from http://www.waitangi-tribunal.govt.nz/treaty/kawharutranslation.asp - 3 June 2013)

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glossary

MÃORI WORDS

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Ariki

Paramount chief, high chief, chieftain, lord, leader, aristocrat, first-born in a high ranking family.

Atua

Ancestor with continuing influence, god, demon, supernatural being, deity, ghost, object of superstitious regard, strange being – although often translated as 'god' and used for the Christian God, this is a misconception of the real meaning.

Iwi

An extended kinship group, tribe, nation, people, nationality, race – often refers to a large group of people descended from a common ancestor.

Hawaiki

Ancient homeland – the places from which Māori migrated to Aotearoa/New Zealand.

Haka

To dance, perform the *haka*, to perform, performance of the *haka*, posture dance – vigorous dances with actions and rhythmically shouted words. A general term for several types of such dances.

Hapū

Kinship group, clan, tribe, subtribe – section of a large kinship group.

Hikoi

Long march, a protest march.

Kapa Haka

A concert party, a performance.

Kingitanga

The King Movement – a movement which developed in the 1850s, culminating in the anointing of Pōtatau Te Wherowhero as King. Established to stop the loss of land to the colonists, to maintain law and order, and to promote traditional values and culture.

Korero

To tell, say, speak, read, talk, address.

Mana

Mana refers to prestige, authority, status or charisma. It is an enduring, indestructible power, inherited at birth, and authorises a person to lead, organise or regulate communal expeditions and activities, or social and political matters. A person or a tribe's mana can be increased through successful ventures and similarly diminished from lack of success.

Marae

Courtyard – the open area in front of the *wharenui*, where formal greetings and discussions take place. Often also used to include the complex of buildings around the *marae*.

Moko

Māori tattoo designs on the face or body.

Mokopuna

Grandchildren.

Pā

A fortified village.

Patupaiarehe

Spirit people.

Piupiu

A knee-length kilt-like garment worn around the waist.

Pou

A pole or upright.

Rākau

A tree, stick, timber, wood, spar, mast, plant.

Raupatu

Conquest, confiscation.

Tāngata

People, men, persons, human beings.

Tāngata whenua

Local people, hosts, indigenous people of the land – people born of the whenua, i.e. of the placenta and of the land where the people's ancestors have lived and where their placenta are buried.

Taniwha

A water spirit, monster, chief, something or someone awesome – *taniwha* take many forms from logs to reptiles, even whales, and often live in lakes, rivers or the sea. They are often regarded as guardians by those who reside in their territory.

Taonga

Property, goods, possessions, effects, treasure, anything prized – applied to anything considered to be of value.

Tapu

Refers to a supernatural condition where a person, place or thing moves from a profane to a sacred status. *Tapu* objects, for example, become untouchable and can no longer be put to common use. *Tapu* is an effective way to control how people behave towards one another and their environment. When an object's *tapu* is removed it reverts to a *noa* (common) status.

Te Ao Māori

Literally, 'the Māori world'.

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Te Reo Māori

The Māori language.

Te Taha Māori

The Māori side, the Māori perspective.

Te Tiriti o Waitangi

Māori name for the Treaty of Waitangi.

Tikanga

Correct procedure, custom, habit, or convention.

Tūpuna or Tīpuna

Ancestors, grandparents.

Waka

Canoe, vehicle or conveyance.

Wai #

Short for 'Waitangi Tribunal claim number'.

Wāhi Tapu

Sacred sites.

Whakapapa

Genealogy, genealogical table, lineage, descent.

Whānau

Extended family, family group.

Whanaungatanga

A relationship, kinship, or sense of family connection – a relationship through shared experiences and working together which provides people with a sense of belonging.

Wharenui

A house, dwelling space, meeting space, building.

Whare Rūnanga

Meeting house.

Whare Whakairo

Carved house.

Whenua

Country, land, nation, state, ground, placenta, afterbirth.

Urupā

Burial grounds.

Utu

To repay, pay, make a response, avenge, reply.

(All Māori definitions from http://www.maoridictionary.co.nz/)

OTHER

Reddit

www.reddit.com – a social news website

Redditor

A registered user of Reddit.com

Sub-Reddit

A forum that forms part of the larger Reddit family and are usually based on a subject. The *r/NewZealand* sub-reddit, for example, includes posts about and relating to New Zealand.

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