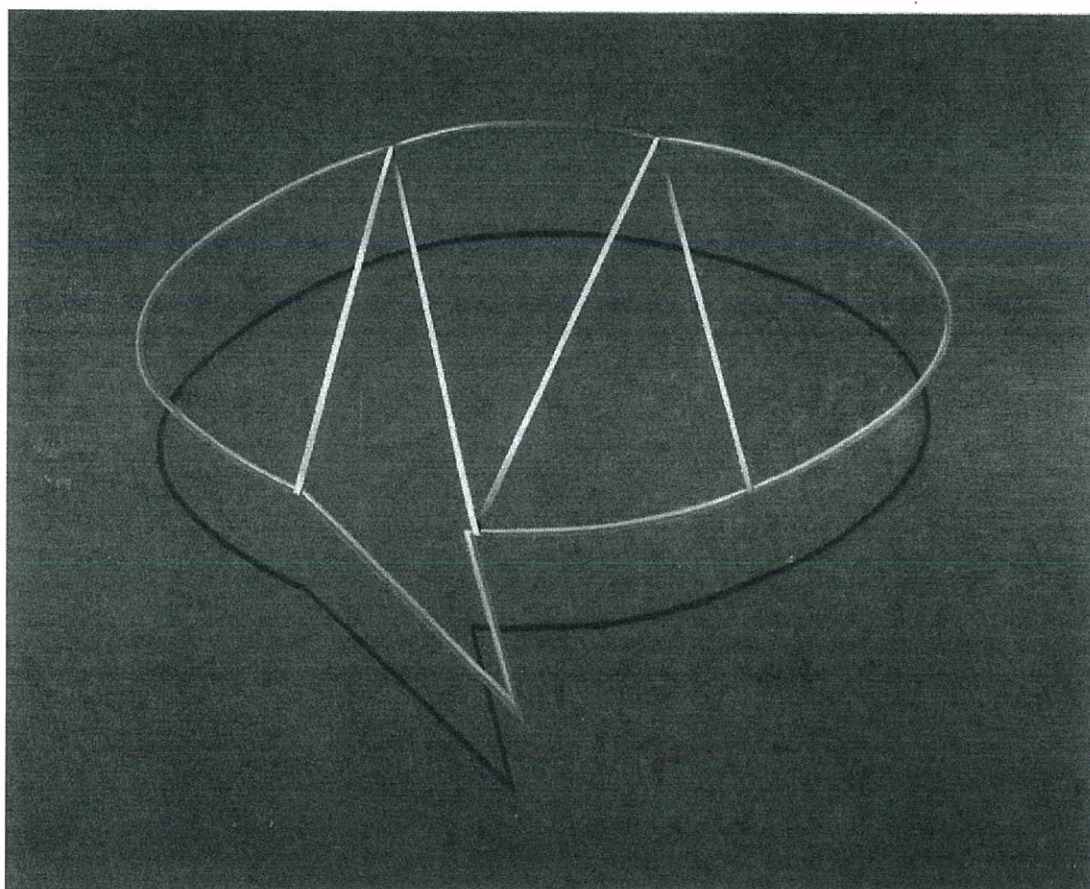


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Indigenous People and New Zealand Law : A Comparative Analysis

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ABSTRACT: This article reviews the legal relationships between the indigenous people of New Zealand (the Maori) and the New Zealand government. Particular attention is paid to Maori land, the Maori Land Court, and to the current process of historic grievance settlement mediated by the Waitangi Tribunal, established in 1975. While the distinctive forms of legal interaction that have developed in New Zealand are deeply embedded in New Zealand history, the Waitangi Tribunal has worked well and may be of some interest to policy-makers in Argentina and other Latin American states. The article also compares the New Zealand situation with that in some other states, including Australia, the United States, and some Latin American jurisdictions.]

1. Introduction

As some readers of this article may lack familiarity with the New Zealand scene, some introductory remarks may be in order. New Zealand is a South Pacific country with a population of about four million.. Most of the population is descended from inhabitants of the British Isles, who migrated to New Zealand in the 19th century and subsequently. The country has a large indigenous population, the Maori people, who number about 450,000 and who are divided into a number of *iwi* (tribes), such as Ngati Porou, Waikato, Nga Puhi, Ngati Kahungunu, Ngati Toa, Ngai Tahu and others. The Maori are a Polynesian people who migrated to New Zealand from central Polynesia about 1,000 years ago and whose Maori language is closely related to the Polynesian languages of Tahiti, Hawaii, the Marquesas and Easter Island². Today there are also significant numbers of New Zealanders who are of Asian descent, or who are descended from newly-arrived migrants from other South Pacific countries such as Samoa, the Cook Islands, Tonga and Fiji, as well as immigrants from Europe, southern Africa, and Latin America.

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²Although New Zealand (known in Maori as Aotearoa) is at the southwestern corner of the 'Polynesian triangle', the Maori language is classified as an eastern Polynesian language, as its affinities are much closer with, say, Tahitian, than they are with the western Polynesian languages of Samoa or Tonga. The Maori language has undergone a revival in recent years and is taught in schools and universities. Nearly all Maori-speakers in New Zealand also speak English.

New Zealand's history as a state began in 1840 with a Treaty between the British government and the Maori chiefs, the celebrated Treaty of Waitangi, which remains an important constitutional standard in New Zealand today³. In the course of the 19th century there were bitter conflicts between the government and some sections of the Maori people, leading to major wars in some parts of the country in which units of the British army were involved. Other Maori tribes, however, stayed neutral in the fighting, or actively supported the government. In 1863 the government confiscated large areas of the land of those tribes deemed to be in rebellion against the British Crown. In 1863 the government also set up a specialist court, the Native Land Court, which individualised Maori titles to land and made it freely alienable. In some respects policy relating to customary lands in New Zealand in the nineteenth century had similarities with developments in the United States, and in some Latin American countries (such as Mexico and Guatemala). The net result of these policies, as in the United States and Mexico, was the disappearance of communally-owned lands and the loss of huge acreages of land to farmers and the government. A difference with Latin America is that no important class of large landowners ever emerged in New Zealand: the norm has, rather, been family-owned dairy farms. Today of course most New Zealanders, including most of the Maori people, live in cities.

Today the Maori people are a thriving community who play a key role in national life. Their position cannot be compared with that, say, of the Aboriginal people in Australia or with Native Americans in the United States. There are many prominent Maori academics, lawyers, judges, politicians, writers, and artists. Nevertheless, Maori as a whole are poorer than non-Maori New Zealanders. Most former Maori land has been lost and now belongs either to the government or to private owners. Many tribes have historic grievances and claims against the government which are only slowly being resolved.

Legally, New Zealand is a Common law country, whose law derives from English Common law⁴. In form the country is a constitutional monarchy with a Governor-General representing the Queen, but in fact the New Zealand

³The leading historical study is Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin, Wellington (NZ), 1997. Leading studies of the annexation of New Zealand by Great Britain are Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832-1852*, Historical Publications Branch, Department of Internal Affairs, Wellington, 1968; and Peter Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847*, Auckland University Press and Oxford University Press, Auckland (NZ), 1977.

⁴On the legal history of New Zealand see Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History*, 2nd edition, Brookers, Wellington (N.Z.), 2001.

political system is republican in everything but name. The Court hierarchy is headed by the Supreme Court of New Zealand, beneath which are the Court of Appeal and the High Court. As in Britain, the doctrine of precedent is applied strictly, and much of the law rests on decisions of the Courts. New Zealand Courts freely borrow precedents from Australia, Canada and the United Kingdom as related jurisdictions, but very seldom from the United States. The fundamental legal principle is that of parliamentary sovereignty, and much of New Zealand law today derives from local statutes, which diverge often in many ways from English law. New Zealand is one of the few countries in the world which does not have a written constitution. The parliamentary system is a unicameral one and there is no upper house or Senate. Democratic traditions are very strong. The electoral system is based on a variant of proportional representation adapted from Germany. Governments are formed from the dominant party in parliament following a general election, and at present New Zealand has a social-democratic government (Labour Party). Maori have a number of seats in parliament guaranteed to them by law, but as well there many Maori members of parliament for ordinary seats as well. The hallmarks of the New Zealand political and legal system are simplicity and flexibility, but this can sometimes be deceptive.

2. The doctrine of Native Title

Some readers of this article will be familiar with the concept of Native title (as illustrated by the well-known decision of the High Court of Australia in *Mabo v Queensland*)⁵, or original Indian title as it is known in the United States, and might assume that this doctrine is also significant in New Zealand. In fact the doctrine of Native title is of little practical importance in New Zealand today.

In contrast to Australia, the property rights of the indigenous population in New Zealand have always been respected, at least to the extent that Maori title to land has been assumed and that such title needed to be extinguished by some kind of specific action recognised by the law. The Treaty of Waitangi provided for the pre-emptive rights of the Crown, in that only the Crown could extinguish the property rights of the Maori people. Mere private acts of extinguishment were of no legal effect. In New Zealand law it is a cardinal principle that private titles to land must follow from a Crown grant, which must in its turn follow from a specific act of extinguishment on the part of the Crown. In this way New Zealand law is basically the same as in the United States and Canada.

⁵(1992) 175 CLR 1; (1992) 107 ALR 1.

The traditional economy of the Maori people was quite different from that of the indigenous people of Australia. The Australian Aborigines were essentially hunter-gatherers who ranged over large areas of territory. The Maori tribes of New Zealand, however, were skilled horticulturalists, as were the people of Hawaii and Tahiti, and who had highly developed concepts of personal and public property. This key socio-economic difference has no doubt played an important role in the legal history of the two countries. When the High Court of Australia decided in *Mabo v Queensland* that Native title was part of the Common Law of Australia, that had enormous significance in that country as fact until the time of the decision the prevailing assumption in Australia was that Native title did *not* apply. In New Zealand the core concepts of Native title were accepted from the commencement of British colonisation in 1840.

There have been some important Native title cases of the New Zealand Courts in recent years which deal with fisheries matters, or the taking of wildlife⁶. With regard to the key issue of title to land, however, the ordinary Common law of Native title has been overtaken by some local statutory developments, as is explained further below. Although there is a great deal of litigation in Courts and Tribunals today in New Zealand relating to the legal rights of the Maori people, these cases tend to be about issues other than Native Title.

3. The Maori Land Court

New Zealand's main divergence from the other Common law countries with regard to indigenous issues lies in the area of indigenous land titles. Here the most important development has been the establishment of a Court of special jurisdiction, the Maori Land Court, and of a particular category of land, known today as 'Maori freehold land'.

⁶For example, *Te Weehi v Regional Fisheries Officer*, [1986] 1 NZLR [New Zealand Law Reports] 680; *Ngati Apa v Attorney General* [2003] 3 NZLR 643. The latter case dealt with the vitally important question of customary title to the foreshore and seabed in New Zealand law, and to some extent dealt with Native Title issues. Principally, however, the case was concerned with the jurisdiction of the Maori Land Court, and whether it was able to issue freehold titles to Maori for areas of foreshore and seabed. The New Zealand Court of Appeal concluded that the Maori Land Court did, in fact, have this jurisdiction. This finding was then reversed by statute law (*Foreshore and Seabed Act 2004*). See generally Richard Boast, *Foreshore and Seabed*, LexisNexis, Wellington (New Zealand) 2005. These events caused a great deal of controversy in New Zealand and substantial Maori protest.

New Zealand's land law derives essentially from concepts of English law, modified to adapt to local conditions⁷. Real property law in New Zealand is also heavily conditioned by a comprehensive system of title registration based on the "Torrens" system which first emerged in the colony of South Australia in the 19th century⁸. Strictly speaking allodial titles do not exist, as titles flow from Crown grants. As in England the highest form of private title to land is known as a 'freehold', equivalent to full private ownership, and in New Zealand law, as in Australia, all freehold titles are required to be registered in an official register. All instruments affecting title to private land, such as mortgages or easements, are required to be notified on registered titles before they have full effect⁹.

Where does land in Maori ownership fit into this system? Firstly, of course, many Maori own ordinary private titles to land which are entered into the land registry system in the ordinary way, just as indigenous people in Argentina might own an apartment in Buenos Aires. But New Zealand law does also provide separately for a special category of land in Maori ownership, known as Maori freehold land. The Maori land system in New Zealand is supposedly subordinate to the "Torrens"-style Land Transfer system. The way in which things were supposed to¹⁰ happen was, broadly this: First, the Maori Land Court would conduct its investigation of title into a surveyed parcel of land that had been brought before it so that the Court could carry out its 'investigation of title'. Following its determination of who the customary owners were, the Court would issue its 'certificate of title' relating to the block¹¹. But that was only

⁷The leading textbook on real property law in New Zealand is Hinde, McMorland, Campbell and Grinlinton, *Hinde, McMorland and Sim: Land Law in New Zealand*, LexisNexis, Wellington (NZ), 2003.

⁸See generally S R Simpson, *Land, Law and Registration*, Cambridge University Press, Cambridge, 1978.

⁹The principal statute relating to the 'Torrens' land registration in New Zealand is the Land Transfer Act 1952. This is one of the most important of all New Zealand statutes to the day to day work of New Zealand legal practitioners, and there is a vast amount of caselaw and academic commentary relating to the Act. Registered titles in New Zealand are said to be "indefeasible" and are largely protected from adverse claims except in the case of fraud.

¹⁰"Supposed to" because, all too often, things failed to work out quite so smoothly. A real problem in New Zealand law is that there is often a mis-match between the unofficial title records held by the Maori Land Court and the information set out on the relevant Land Transfer Act certificate of title. It can also happen that no Land Transfer Act title for Maori land exists, and the only title record is the information held by the Maori Land Court.

¹¹See e.g. Native Lands Act 1865, s 23. This stipulated that the Court "shall order a certificate of title to be made and issued which certificate shall specify the names of the

the first stage of the process. Before the Land Transfer system took root in New Zealand, the successful owners recognised in the court would then, armed with their Native Land Court determination, seek a Crown grant for the parcel¹³. That obtained, the Court-recognised owners became Crown grantees, and the feudalisation of the title was completed. Later, instead of a Crown grant as such, the winners in the courtroom would apply for and obtain a Land Transfer Act certificate of title to the parcel.

Land that has been through the Maori land court and 'feudalised' in this manner is known, as a term of art in New Zealand real property law, as *Maori freehold land*. The current statutory definition is land "the beneficial ownership of which has been determined by the Maori Land Court by freehold order"¹³. This category of land covers about 5% of the country. That may not sound like much, but given that there is virtually no Maori freehold land in the South Island at all (the Maori population was concentrated in the North Island, and Maori title to the South was extinguished by pre-emptive purchase before the establishment of the Native Land Court in 1862), it in fact amounts to about 12% of the North Island. It is not, therefore, an insignificant category of land in New Zealand. Nor is evenly distributed around the North Island, but is in fact concentrated in certain regions, such as the central North Island, the East Coast region north of the city of Gisborne, and in the furthest north of the North Island. In some rural counties Maori freehold is a major land category and can be a problem for local bodies because of endless complexities with land development and management, and the collection of rates.

persons or of the tribe who according to Native custom own or are interested in the land". The provision contained two key provisos, first, "that no certificate shall be ordered to more than ten persons" and second "that if the piece of land adjudicated upon shall not exceed five thousand acres such certificate may not be made in favour of a tribe by name". In fact virtually no tribal titles were awarded by the Court. Section 23 ushered in the period of the "ten owners' rule", which led to numerous frauds, and this was replaced by s 47 of the Native Lands Act 1873, which provided essentially that all the owners were to be placed in the title.

¹²Ibid, s 46 ("On the receipt by the Governor of the aforesaid certificate of the Court made in favor of persons it shall be lawful for him to cause a grant from the Crown to be made and issued under the public seal of the Colony of the lands comprised in the certificate to the persons named therein for the estate or interest therein described or mentioned...")

¹³Te Ture Whenua Maori/Maori Land Act 1993, s 129(2)(b). This can be contrasted with *Maori customary land*, defined in *ibid*, s 129(2)(a) as land "still held by Maori in accordance with tikanga Maori". Such land is, and always was, alienable only to the Crown in accordance with ordinary principles of Native Title law. There is no Maori customary land of any significance remaining in New Zealand today.

Maori freehold land, although subject to the Land Transfer Act, is governed as well by its own particular Act, the successor to the first Native Lands Acts 1862. The current Act, *Te Ture Whenua Maori/Maori Lands Act* 1993 is a notoriously complex statute, and one of the main real property statutes in New Zealand. Maori freehold land is now hedged about by many well-meaning restrictions. There are, for example, complex restrictions on freedom of alienation, both by testamentary disposition and by sale. The Native Land Court set up in 1862 is still in existence, as the Maori Land Court, which has had its own Maori Appellate Court in existence since 1894. The Maori Land Court is a busy institution, which shows no sign of fading away: in fact in recent years its jurisdiction has been widened substantially. Many of the judges are now Maori themselves. A large part of the Court's work in practice is concerned with Maori landowning legal entities, incorporations and various kinds of statutory trusts, set up under the legislation to circumvent the administrative problems caused by endless proliferation of owners' lists. It should be emphasised that the Maori Land Court has nothing to do with the resolution of Maori historic grievances, dealt with separately by the Waitangi Tribunal and by direct negotiations with the government. It is a binding Court of record and an established part of the New Zealand legal system. The law it applies is statute-based Maori land law, not the Common Law of Native Title which is of minor significance in New Zealand law today, it having been largely superseded by statute.

4. Historic Claims and the Waitangi Tribunal

A. The concept of traditional justice

Historic Maori claims in New Zealand are dealt with differently, and are heard by a unique institution known as the Waitangi Tribunal, which was set up by statute in 1975¹⁴. In some ways the Waitangi Tribunal is a typical 'transitional justice' institution, with parallels in South Africa, Guatemala, and a number of other countries. The term 'transitional justice' originates from Professor Ruti Teitel's book published in 2000¹⁵. Ms Teitel, born in Argentina, is Professor of Comparative Law at New York Law School. Her book was concerned with judicial investigations into the past following political transitions from authoritarian regimes to (reasonably) liberal democracies and to (somewhat) open government.. It has to be acknowledged at the very start that any such comparative exercise must be very inexact in the case of New Zealand, in that the country simply is not in 'transition' from authoritarianism to democracy and can hardly be compared meaningfully with politically troubled countries like Guatemala. To Ms Teitel "the problem of transitional justice arises within a

¹⁴Treaty of Waitangi Act 1975.

¹⁵Ruti G. Teitel, *Transitional Justice*, Oxford University Press, New York, 2000.

bounded period, spanning two regimes"¹⁶. Yet the role of the Waitangi Tribunal is nevertheless in a sense *analogous* to such legal institutions as the National Clarification Commission in Guatemala that are typical of periods of "transitional justice", at least in some ways¹⁷.

Guatemala provides a good illustration of a typical judicialised process of the kind Professor Teitel is interested in. As is well-known, that country was and still is characterised by sharp divisions between its large indigenous population, mostly ethnically Maya and speaking various Maya languages, and Ladinos, Spanish-speaking non-Indian Guatemalans. The Maya of the Guatemalan highlands, conquered by the Spaniards and their indigenous Mexican allies by Alvarado and other *conquistadores* from 1524-1540, continued during the colonial period to live in their traditional communities managing their communally-owned lands, protected by Spanish colonial law. In independent Guatemala a political rhetoric developed during the 19th century whereby the culture and values of the Maya people became seen as antithetical to liberalism and economic progress. Communal lands have declined during the twentieth century, although some Indian municipalities have managed to retain their lands to the present day¹⁸. As in nearby Mexico,

¹⁶Ibid. 5.

¹⁷There is now a growing literature on Waitangi Tribunal procedure. See generally M P K Sorrenson, "Towards a Radical Interpretation of New Zealand History: the Role of the Waitangi Tribunal" in I H Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Oxford University Press, Auckland, 1989; E T Durie and G S Orr, "The role of the Waitangi Tribunal and the development of a bicultural jurisprudence", (1990) 14 *New Zealand Universities Law Review* 62; Richard Boast, "The Waitangi Tribunal: 'Conscience of the nation' or just another Court?", [1994] 16 *University of New South Wales Law Journal* 223; Alan Ward, "Historical method and Waitangi Tribunal claims", in Miles Fairburn and William H Oliver (eds), *The Certainty of Doubt: Tributes to Peter Munz*, Wellington, Victoria University Press, 1996; Richard Boast, "Lawyers, ethics, historians and the judicial process", (1998) 28 *Victoria University of Wellington* 87; and Richard Boast, "Waitangi Tribunal Procedure", in Janine Hayward and Nicola Wheen (eds), *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi*, Bridget Williams Books, Wellington, 2004, pp 53-64.

¹⁸For a detailed analysis of developments in 19th and 20th century Guatemala from a somewhat Marxist perspective which focuses on the role of indigenous elites in the process of state formation using the Quetzaltenango (Xela) region as a case study see Greg Grandin, *The Blood of Guatemala: A History of Race and Nation*, Duke University Press, Durham N.C., 2000. (Grandin's book is a useful corrective to the tendency to see developments in Guatemala as a simple indigenous-Ladino conflict: it is that in part, but is much more.)

issues relating to indigenous lands and identity remain important in national politics. Many Indian communities suffered appallingly during an era of governmental repression which was at its height from 1978-1984¹⁹. In the Guatemalan highlands the *Ladino*-dominated military governments instituted a reign of terror against the highland Maya after 1978. Entire communities were massacred and many Maya people were forced to flee to Mexico and the USA, although the Guatemalan situation was not simply a *Ladino*-indigenous collision: not all Maya groups opposed the government, and some of the victims of the period (referred to in Guatemala as *la violencia*) were *Ladino*.

The events of *la violencia* have now been investigated comprehensively by a special truth commission established after the Oslo Accords of 23 June 1994, the *Comision Para del Esclarecimiento Historico* (CEH), which produced a major report (*Guatemala: Memoria Del Silencio*) in 1999²⁰. This report also contains a thorough analysis of the historical background to the *violencia*. The Commission found that the Guatemalan army had destroyed over 600 villages, that around 200,000 people were killed or simply "disappeared", and that many thousands of Guatemalans had fled to Mexico to escape the violence. Most of the violence was state-directed, although some of it was the responsibility of the guerrilla groups fighting the government. The Commission found that a number of provisions of the Universal Declaration of Human Rights, of the International Covenant of Civil and Political Rights, and Convention Against Torture had all been breached. Controversially, the CEH found that while specific acts of genocide had taken place, the government's policy as a whole was not genocidal²¹.

The Guatemalan situation is a clear example of a state in a process of 'transition', a transition moreover that has been achieved in part by international intervention in the creation of a hopefully more just and less repressive legal order. Whether Guatemala will in fact be able to escape the legacy of her history remains to be seen. Whatever happens in the end, we do at least have the monumental text of *Memoria del Silencio* which thoroughly charts the country's recent history and which gives voice and legitimization to

¹⁹ On these events see e.g. Robert Carmack, *Harvest of Violence: The Maya Indians and the Guatemalan Crisis*, University of Oklahoma Press, Norman, 1988 (Carmack is a leading scholar on the archaeology and ethnohistory of the Quiché people of the Guatemalan highlands); Ricardo Falla, *Masacres de la Selva*, Editorial Universitario, Guatemala City, Guatemala, 1992; Victoria Sanford, *Buried Secrets: Truth and Human Rights in Guatemala*, Palgrave Macmillan, New York, 2003.

²⁰ *Guatemala: Memoria del Silencio*, Oficina de Servicios para Proyectos de las Naciones Unidas, Guatemala City, July 1999.

²¹ For a critique of the CEH analysis see Sanford, *op.cit.*, 147-179.

communities who comparatively recently were the victims of their own governments. New Zealand, quite clearly, is not in a transition of that kind. In many instances 'transitional justice' involves criminal prosecutions of officials of the former regime, and the Waitangi tribunal process has no affinities with criminal process (although it does have some affinities with civil litigation against the Crown). Before rejecting entirely the 'transitional justice' model in the strict sense, it does however need to be recognized that New Zealand is certainly working its way through something rather new. There have of course been earlier settlements and negotiations between the New Zealand government and Maori. There were a group of earlier raupatu (confiscation) settlements in the 1930s and 1940s and there have also been statutory settlements relating to the beds of Lakes Taupo and the Rotorua lakes which either have now been, or are now being, renegotiated. The current settlements in New Zealand are, however, much bigger than anything seen before. A feature of the present process is that it entirely lacks any kind of statutory underpinnings and is based simply on various policy statements which the responsible agency, the Office of Treaty Settlements (OTS) evidently feels free to depart from on occasion²².

B. The Waitangi Tribunal as a Transitional Justice Institution

While, as noted, the parallels between the Waitangi Tribunal and 'transitional justice' in the strict sense are inexact and cannot be pressed too hard, a key feature of the judicial institutions that typically accompany such transitions is that they have a much more overtly social and public role than is usual in ordinary civil or criminal cases. The hearings are perceived as being aimed at a wide public constituency which is much more extensive than the parties involved directly. Another feature is that such inquiries are explicitly intended to create an authoritative *record* which will continue to play an educative function and provide a public resource in years to come, an aspiration which is again not typical of ordinary civil and criminal litigation. Thirdly, such proceedings are intended to give voice to individuals who have been affected by the official policies and practices under examination in the judicial forum but who might not be readily able to participate in legal proceedings of a more formal kind. Fourthly, the scope of such judicial inquiries is typically very wide, much wider than is normal with ordinary legal processes, it being essential to the inquiry that general social, political, ideological and historical dimensions

²²The key text is the OTS publication *Ka tika a muri, ka tika a mua: Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Office of Treaty Settlements, Wellington, 2002 (also known as "The Red Book"). This is simply a collection of various policy decisions linked by OTS commentary. Individual claim settlements are however implemented in statute.

of the matters in issue be addressed in evidence and commented on fully in the final report or judgment issued by the Tribunal. Finally, such institutions frequently are directed to review past actions not by the standards of ordinary criminal or civil law but rather according to some higher or 'meta'-law, based either on the norms of international law – such as the Genocide or Torture Conventions – or on higher constitutional doctrines drawn from a state's own legal and political traditions.

All of these objectives are also true of the Waitangi Tribunal's process. The Tribunal hears historic claims on *marae* (Maori ceremonial centres)²³, not in ordinary courtrooms, in an endeavour to bring the process closer to affected groups. Each claim generates a very extensive and carefully documented record of historical and claimant evidence, and the reports themselves are typically lengthy and discursive, far more so than judgments of the ordinary courts. Claimants are encouraged to speak freely to the Tribunal, and funding is available to help claimant communities manage their claims and attend the hearings. The scope of the inquiry process is extremely open-ended, especially in the major regional inquiries in which all aspects of Crown policy from 1840 to the present day are open to investigation. And lastly, but most importantly, the Tribunal's starting point for its inquiry process is not the ordinary civil and criminal law, but rather the that of the principles of the Treaty of Waitangi²⁴. The principles and provisions of the Treaty of Waitangi are not enforceable directly in the ordinary courts²⁵, whereas in the Tribunal they form the framework of commentary and analysis.

Less tangibly, but of real significance, is a particular rhetorical style that typifies the reports of legal processes associated with 'transitional justice'. This

²³ A *marae* or Maori ceremonial centre comprises usually the *whare whakairo* or *wharenui* (a carved and decorated meeting house), the *marae atea* (an open space, or plaza, in front of the meeting house used for formal oratory), and the *whare kai* (kitchen and dining room). Nearby will be an *urupa* (cemetery). Some *marae* have a church, and many now have a *kohanga reo* (literally a 'language nest': a Maori-language kindergarten). *Marae* are normally linked with particular descent groups. There are hundreds of *marae* all over New Zealand, all of them in very active use, and all universities and some schools have *marae* as well. The institution of the *marae* has been a prime factor in the survival of Maori culture and history.

²⁴ See Treaty of Waitangi Act 1975, s 6.

²⁵ The leading case on the point is still *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*, [1941] AC 308, a decision of the Privy Council. It was held essentially that the Treaty of Waitangi, a valid treaty of cession, was not directly – that is to say, of itself, and independently of statute – enforceable in the municipal courts of New Zealand, as is the case for all treaties. Later case law has not significantly changed this fundamental point: see especially the Privy Council's most recent decision (and its last one) on the point: *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

style is quite different from that ordinary judgments of the civil courts. One can take as example the opening prologue of *Guatemala: Memoria del Silencio*²⁶:

Guatemala is a land of contrasts and contradictions, located in the midst of the American continent, washed by the waves of the Caribbean Sea and the Pacific Ocean. Its inhabitants live together in a multiethnic, multicultural and multilingual nation, in a state that emerged from the triumph of liberal forces in Central America. Guatemala has had its periods of beauty and dignity since the beginnings of the Maya culture thousands of years ago; the country's name has been glorified for its science, its creations, its arts and its culture, for illustrious and humble men and women of honour and peace, for the Nobel Prize in Literature and for the Nobel Peace prize. Nevertheless, there have been written in Guatemala pages of tragedy and infamy, ignominy and terror, of grief and weeping resulting from armed conflict between brothers. For more than 34 years, the people of Guatemala lived under the shadow of fear, death and disappearance as part of the daily life of the common people.

A somewhat similar rhetorical style can be found in some of the earlier Tribunal reports, although more recently the Tribunal has moved to a rather more formal, sober and judicial style, summing up the competing submissions of claimants and the Crown and adjudicating between them. That may reflect the rather different approaches of the two chairpersons, E T Durie and J Williams, but is also probably a product of changes in the Tribunal's role.

In an outstanding recent book Dr Michael Belgrave of Massey University, Auckland, has analysed the Waitangi Tribunal's functions, paying particular attention to the evidence led before the Tribunal and the Tribunal's finding, testing his analysis by means of four case studies of the Taranaki, Muriwhenua, Chatham Islands and Ngai Tahu inquiries²⁷. Belgrave is concerned to site the Tribunal in both its historical and its current policy context, and sees the Tribunal's findings in some senses as political texts, related quite closely to the current policy environment. For example, at stake in the Chathams Islands Inquiry was the allocation of extremely valuable fisheries assets under settlement legislation enacted in 1989 and 1992: a matter which the Tribunal could not address directly, but which was nevertheless a highly relevant background factor as all parties were only too well aware.

Belgrave sees deep continuities between the Tribunal process and our legal history more generally. He makes the important point that in a way the

²⁶ *Memoria del Silencio*, Prólogo, p 15 (my translation).

²⁷ Belgrave, *Historical Frictions: Maori Claims and Reinvented Histories*, Auckland University Press, Auckland (NZ), 2005.

Tribunal process is nothing new. A consistent feature of New Zealand history has been engagement between coloniser and colonised in front of courts and tribunals: "the court has been much more important than the battlefield"²⁸. Seen in this way, the Waitangi Tribunal process is just the latest instalment of a lengthy history of court hearings, special commissions of inquiry, parliamentary investigations, royal commissions and so forth. This means that much of the Tribunal's work in any given claim can be taken up with reviewing and commenting on earlier judicial and quasi-judicial investigations. These earlier investigations were to a considerable extent about Maori issues *inter se* as much as they were concerned with Maori engagements with governments. This remains true of the current Waitangi Tribunal process as well, despite its ostensible focus on 'the Crown'. Indeed in some inquiries, Maori issues involving other Maori are as important, or occasionally even more important than interaction with the colonial state. (Examples are the Chatham Islands Inquiry²⁹, and to a lesser extent the recent Northern South Island Inquiry).

While I do not entirely disagree with Dr Belgrave's emphasis on continuity, it must also be emphasised that there are also some aspects of the Waitangi Tribunal process that are wholly new and that do not duplicate earlier inquiries, investigations, and royal commissions. Most importantly, as noted, the Tribunal is directed to evaluate the Crown's actions not by the standards of the ordinary law or general concepts of equity but rather according to the principles of the Treaty of Waitangi. This is a wholly new factor and is one which links the Tribunal more closely with some of the transitional justice adjudicatory bodies already discussed, a key aspect of which is that are typically based on 'higher' and more constitutionalised legal norms than is the case in ordinary cases. Also new is the extraordinarily wide range of the Tribunal's inquiry process, the sheer quantity – and, one hopes, quality³⁰ – of the historical and traditional evidence it receives, and the length and sophistication of the Tribunal's reports³¹. Most important of all is the fact that the Tribunal is a

²⁸Belgrave, *Historical Frictions*, 16-17.

²⁹The Tribunal reported on this inquiry in 2001: see Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands*, Wai 64, Legislation Direct, Wellington, 2001. The key issues in this inquiry revolved around the violent conquest of the Moriori people and settlement of the Chathams by two Maori groups, Ngati Mutunga and Ngati Tama, in 1835.

³⁰I have written a number of research reports for the Waitangi Tribunal myself (as has Dr Belgrave). These can be very elaborate and comprehensive reports, thoroughly referenced, and often book-length or PhD-length in their own right.

³¹A recent example is the Tribunal's *Hauraki Report*, Wai 686, Legislation Direct, Wellington, 2006. The report comprises 3 volumes (1310 pages). The report deals, amongst other things, with pre-1840 land transactions in the Hauraki region, Crown

permanent commission of inquiry which has now been in continuous operation for over twenty years, whereas earlier inquiries were limited, ad hoc, and appointed from time to time to deal with particular issues. The Waitangi Tribunal, uniquely, has been able to develop a style and approach of its own, create a body of self-referencing precedent, and devise comprehensive research strategies, such as its Rangahaua Whanui programme begun in 1993.

C. Negotiation and Settlement of Historic Claims

The Waitangi Tribunal's principal jurisdiction allows it only to make non-binding recommendations to the Crown, and it plays no direct role in the ultimate negotiation and settlement of historic claims or in the fixing of the compensation to be paid. This is done separately, through extra-legal negotiations between representatives of the claimant group and the New Zealand government. The actual settlements vary in size depending on a number of factors, including the seriousness of the government's wrongful behaviour and the size – both in terms of population and land area – of the negotiating group.

At the present time claimants and the Crown³² jointly prepare a document known as a Deed of Settlement, usually a very elaborate text containing lengthy recitals that narrate the history of the negotiations and of the historic events that gave rise to the claim. Such a Deed will also contain very detailed provisions relating to the return and management of various kinds of assets. Before this the government first has to accept that the entity seeking to negotiate a settlement with it is a “large natural grouping” and that it has met the requirements for mandating as set out in the official guidelines. The actual negotiations process, which has some affinities with current processes in Canada, is far too elaborate to be described here, but in brief it involves a sequence of prescribed steps each of which results in a particular type of written agreement: Terms of Negotiation, Agreement in Principle, Deed of Settlement. Each negotiation takes at least several years. The final settlement has to be ratified by the group: the “mandate” insisted on by the Crown at the

pre-emptive purchasing in the region until 1865, the wars and confiscations of the 1860s, goldmining in the Hauraki region (a major focus of the report), timber extraction, the Native Lands Acts, Crown and private land purchasing, land administration and alienation in the 20th century, geothermal issues, rating, the foreshore and seabed, public works takings, water bodies and so on.

³²The Crown agency that deals with the negotiation and settlement of historic (pre-1992) claims is the Office of Treaty Settlements, established in 1995 as a separate entity within the Department of Justice. It reports to and advises the Minister in Charge of Treaty Settlement Negotiations (“MICOTOWN”).

start of the process is a mandate only to negotiate a settlement, not to accept it. The Deeds are then implemented in statute³³. As noted, however, the Tribunal can only produce non-binding recommendations: ultimately, it is the government which makes the final determination.

The settlements are not, and cannot be, full *restitutio in integrum*: how could the government repay to Maori the capital value of the confiscated Waikato region, worth several billions of dollars? But the current settlements are not trifling either. Historic grievance settlements are only one aspect of the current settlement process, as there are also certain fisheries settlements, implemented in the Maori Fisheries Claims Settlement Act 1989, the 1992 Deed of Settlement relating to commercial fisheries, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1991 and the Maori Fisheries Settlement Act 2004. Very substantial sums of money are now finally being paid out to iwi after a decade of inter-Maori wrangling and litigation as to how the commercial fisheries settlement assets should be distributed. The Nga Puhi tribe of the Northland region have for example have just received a fisheries settlement allocation of no less than NZ\$67million. To be eligible for these payments claimant groups need to be a mandated iwi organisation (MIO) and meet the criteria set out in the Maori Fisheries Act 2004.

Some iwi are going to benefit substantially from both processes (historic settlement and fisheries settlement): Ngai Tahu, who are the principal tribe of the South Island, has already done very well in terms of its historic settlement, legislated in place in 1998, and will receive a substantial fisheries allocation under the statutory formulae enacted in 2004 relating to fisheries: \$170 million for historic grievances, \$85 million to come under commercial fisheries. \$255 million is hardly insignificant. Ngai Tahu are already major players in the South Island economy. Some iwi are going to become major commercial forces, or are getting there already. It may not be a 'transition' in terms of the evolution of state, but in terms of Maori economic and corporate development a major transition, arising in part out of legal proceedings in the ordinary courts and tribunals, is definitely underway.

The Courts have had difficulty in characterising the legal nature of a contemporary Deed of Settlement, and given that the negotiations and settlement system itself has no statutory underpinnings³⁴ have confined the

³³E.g., Waikato Raupatu Claims Settlement Act 1995; Ngai Tahu Claims Settlement Act 1998, Ngati Turangitukua Claims Settlement Act 1999, Pouakani Claims Settlement Act 2000; Te Uri o Hau Claims Settlement Act 2002.

³⁴The key text is the Office of Treaty Settlements publication *Ka tika a muri, ka tika a mua: Healing the past, building a future: A guide to Treaty of Waitangi Claims and*

whole negotiation and settlement process to the realm of policy and politics and as such not amenable to judicial review. According to Goddard J in the *Pouwhare* decision (2002)³⁵:

The negotiated settlement process and the development of policy in relation to that is not by its nature amenable to supervision by the Courts. The settlement of Treaty grievances involves the exercise of prerogative power and the enactment of legislation and for these reasons is the provision [sic] of Parliamentary sovereignty. There is ample authority relating to similar attempts to challenge what can only be described as a highly political process.

This conclusion is understandable, given the absence of any statutory criteria on which a judicial review case would normally be founded. The current settlement process operates wholly within the realm of 'policy' and the Courts have retired from the field. It must be admitted that the settlement process is not proceeding very smoothly. More and more of the Waitangi Tribunal's time is being taken up by urgent inquiries into problems arising out of the current rounds of negotiated settlements³⁶.

5. 'Peace on the Frontier': The Legal Status of Agreements with Maori

A. The Treaty of Waitangi

This article has mentioned the Treaty of Waitangi of 1840 a number of times, and the reader is probably wondering what its formal legal status in today's New Zealand legal system might be. This is a reasonable question to ask, but answering it is rather difficult.

In one sense, the Treaty of Waitangi has no formal legal status in the New Zealand legal system at all. It was a treaty of cession, by which, in theory at least, the Maori chiefs in 1840 ceded sovereignty over New Zealand to the

Negotiations with the Crown, Wellington, 2002. This important publication, known as the "red book" (to distinguish it from its predecessor, "the green book") is both a set of guidelines and a summary of various policy decisions already taken at Cabinet level. There is no statute dealing with the negotiation and settlement process, although particular settlements are implemented in statute.

³⁵*Pouwhare and Pryor v Attorney-General, Minister in Charge of Treaty Negotiations and Te Runanga o Ngati Awa*, unreported, High Court, Wellington, 20 August 2002, CP 78/02). Goddard J's decision was unsuccessfully appealed by some of the parties to the Court of Appeal.

³⁶See the Waitangi Tribunal's *Pakākōhi and Tangahoe Settlement Claims Report: Wai 758*, Legislation Direct, Wellington, 2000; *The Ngati Awa Settlement Cross-Claims Report: Wai 958*, Legislation Direct, Wellington, 2002; *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report: Wai 996*, Legislation Direct, Wellington, 2003; *The Te Arawa Mandate Report: Wai 1150*, Legislation Direct, Wellington, 2004; and *The Te Arawa Mandate Report: Wai 1150*, Legislation Direct, Wellington, 2005.

British Crown. In return for this cession, the Treaty contained various kinds of formal guarantees for the Maori people. As is the case with all treaties in the British Common Law tradition, the Treaty of Waitangi is not directly enforceable in the New Zealand Courts in its own right, unless specifically directed by statute. As has been mentioned already, New Zealand lacks a written constitution, and there is no other general statute which has made the Treaty of Waitangi enforceable generally.

The position described in the preceding paragraph is based on the leading decision on the status of the Treaty of Waitangi, this being a decision of the Privy Council in London in 1940³⁷. Numerous other cases have considered the status of the Treaty of Waitangi, but none have deviated significantly from this basic position³⁸.

Yet to say that the Treaty of Waitangi has no status in New Zealand fails to capture reality accurately. Firstly, many statutes in fact do refer to the Treaty of Waitangi, or use various formulations which apply the "principles" of the Treaty. The most important of these statutes is the Treaty of Waitangi Act 1975, which sets up the Waitangi Tribunal and which empowers it to make findings in any given case that acts or omissions of the Crown are "contrary to the principles of the Treaty of Waitangi". Another very important statute which refers to the Treaty is the Resource Management Act 1991, New Zealand's main environmental statute, which deals with the management of natural resources and regulates the system of legal permits relating to land use, coastal management, and the taking and discharge of water (including geothermal water)³⁹. So although there is no general constitutional provision or statute

³⁷*Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] NZLR 590; [1941] AC 308. There is now a large literature on the legal status of the Treaty of Waitangi. See especially Sir Kenneth Keith, "The Treaty of Waitangi in the Courts", (1990) 14 *New Zealand Universities Law Review* 37; P G McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford University Press, Auckland (N.Z.) 1991.

³⁸The most important recent decisions are *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (New Zealand Court of Appeal) and *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513. These cases were however concerned with the interpretation of references to the principles of the Treaty of Waitangi in particular statutes, such as the State Owned Enterprises Act 1986.

³⁹Section 8 of this very important statute states that "all persons exercising functions and powers" under the Act "shall take into account the principles of the Treaty of Waitangi". For a survey of the Act from a comparative stance see Richard Boast and Yves-Louis Sage, "Le New Zealand Resource Management Act 1991: Fondements et Problématique", [2002] *Revue Juridique Polynésienne*, [Tahiti], 257-275.

which establishes the Treaty of Waitangi as a legal standard, it does operate as such in a number of important – but discrete – areas of law.

Secondly, in a much more general sense, the Treaty of Waitangi has become a kind of quasi-constitutional text in New Zealand today. The government sees itself as under a general duty to comply with the principles of the Treaty – even if it does not always do so in reality. Many public authorities, such as universities, have adopted the principles of the Treaty of Waitangi into their various charters and other legal instruments. Public institutions, such as the National Museum of New Zealand in Wellington, have prominent displays and exhibits relating to the Treaty of Waitangi in order to consciously raise its profile amongst New Zealanders. On the other hand it has to be admitted that many members of the public are resistant to the Treaty of Waitangi as a constitutional standard, or actively oppose it, or believe that the state has gone too far in making what they see as unjustifiable concessions to Maori. (Similar debates no doubt occur in Argentina.) The Treaty is an important part of public discourse in contemporary New Zealand, but it is a contested discourse. Moreover there is even less agreement as to what the exact legal and constitutional implications of the Treaty might be for a modern society like New Zealand.

B. Other Agreements: Some Parallels with Argentina

From a legally formalist standpoint, of course, “treaties” are pacts concluded between parties who have legal personality in international law, and from that perspective there cannot be any such thing as a “treaty” between, say, the Crown and the Maori tribes of New Zealand after 1840, any more than the Crown and a tribe could draw up a “treaty” at the present day (although in some ways some groups have in fact done exactly that). The special sense in which “treaties” between Indian nations and the United States are recognised in federal Indian law has no counterpart in New Zealand either, as there is no equivalent body of doctrine in New Zealand that is equivalent to the well-established principles in the United States governing the sovereign status of First Nations. In fact Maori tribes as such have no constitutional or even corporate existence in New Zealand law at all, although there are of course many forms of Maori legal entities, some of which are primarily landholding bodies (land-owning trusts and incorporations) and others not (Maori trust boards). These are not, however, entities that ever entered into any kind of treaty-like relationship with the government; rather, they are themselves creatures of statute⁴⁰.

⁴⁰The issue of Maori governance entities is a vitally important at the present time given the rapid evolution of fisheries and historic claims settlements since 1989 and the need

The position is, in this sense, simple: there are no internal "treaties" between the Crown and Maori within New Zealand as a matter of law. This, if the legal reality, is not, however, the historical reality or any kind of reflection of the actual practice of the colonial state – or, perhaps, the contemporary state. The situation in New Zealand has some similarities with Argentina, as analysed by the Argentine legal historian Abelardo Levaggi. In his study *Paz en la Frontera* (Peace on the Frontier), Levaggi has collected together and analyzed hundreds of agreements entered into between the Spanish Crown and, subsequently, by various post-independence governments of what today is Argentina with the Indians of the Chaco region, of the Pampas and of Patagonia. Given, he notes, the "practical impossibility....of enforcing the submission of the free [Indian] communities to the general law", both the Spanish Crown and the various governments of the Republic of Argentina, "without renouncing their ultimate objective of achieving a complete domination of the [national] territory", had to have recourse to a kind of temporary ad hoc law, loosely based international law rather than the ordinary domestic law of obligations, that relied on the internal treaty as its "fundamental instrument"⁴¹. It is the post-independence republican period in Argentina which most closely parallels the experience of New Zealand, given the contradiction between the government's refusal to accept any kind of sovereignty residing in the various Indian tribes and the practical necessity of concluding treaties with them (this is less true of the colonial era)⁴²:

La conducta del Estado argentino, a diferencia de la Corona española, fue, ciertamente, contradictoria. Por un lado, no reconoció que los indígenas formasen comunidades jurídicas con categoría de nación (no Estados soberanos), y, por el otro, había firmado con ellos tratados de paz, que llevaban

to devise entities that are capable of receiving, holding and managing assets and monies transferred by way of settlement. The Law Commission has released a major report on this problem: See Law Commission/Te Aka Matua o Te Ture, *Waka Umanga: A Proposed Law for Maori Governance Entities*, Report 92, Wellington, 2006. The commission has proposed that a new type of Maori governance body, a waka umanga (meaning something "a vehicle for community affairs") be set up by statute.

⁴¹Levaggi, *Paz en la Frontera*, 19 (my translation). For the context of frontier treaty-making in the later history of the Spanish colonial empire see generally David Weber, *Bárbaros: Spaniards and their Savages in the Age of Enlightenment*, Yale University Press, New Haven and London, 2005.

⁴²Levaggi, op.cit., 563 ("The conduct of the state of Argentina, in contrast with that of the Spanish Crown, was certainly contradictory. On the one hand it did not recognise that the indigenous groups were legal entities of a national character (that is, they were not sovereign states), while, on the other, it concluded peace treaties with them, which carried with them such recognition implicitly." (my translation).

implícito ese reconocimiento

The same can be said of at least some of the Crown-Maori agreements discussed in this article. The fact is that there is a disjuncture between legal theory and actual state practice, both in New Zealand and in Argentina.

The position in Argentina and New Zealand can be contrasted with the status of treaties with indigenous groups in the United States. There are a large number of these texts, which are of varying degrees of relevance in United States law today, some of which were entered into by former colonial powers (Britain, Spain, France, the Netherlands) with the various tribes, and others concluded with the Federal government between 1778 to 1868 (there are over 350 treaties in the latter category alone)⁴³. In the United States, of course, these texts operate within a legal framework arising from the constitutional structure of the United States as a federal system. Equally important is the "Marshall trilogy", the three key decisions of the United States Supreme Court in *Johnson v McIntosh*⁴⁴, *Cherokee Nation v. Georgia*⁴⁵, and *Worcester v Georgia*⁴⁶. In *Cherokee Nation* Marshall C.J. famously characterised "those tribes which reside within the acknowledged boundaries of the United States" as "domestic dependent nations"⁴⁷. Concluding "treaties" with Indian nations even within those "acknowledged boundaries" is not legally problematic as far as American lawyers are concerned⁴⁸. On the other hand, it needs to be recognised that the

⁴³The legal and historical literature on First Nation treaties in North America is colossal. The best general historical overview is Wilcomb E Washburn (ed), *Handbook of North American Indians: Volume 4: History of Indian-White Relations*, Smithsonian Institution, Washington D.C., 1988, especially the chapters by Dorothy Jones, Robert Kvasnicka and Robert Surtees on British, United States, and Canadian Indian treaties (ibid, 185-194; 195-201; 202-210). For a basic collection of key cases and articles see David H Getches, Charles F Wilkinson and Robert A Williams Jr, *Cases and Materials on Federal Indian Law*, West Group, St Paul, Minnesota, 1998, especially pp 73-139. A useful collection of essays dealing with a number of common law jurisdictions, focusing principally on recent agreements is Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shainn(eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Melbourne, 2004.

⁴⁴21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823).

⁴⁵30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831).

⁴⁶31 U.S. (6 Pet.) 515, 8 L. Ed. 483.

⁴⁷30 U.S. (5 Pet.) at 16.

⁴⁸The leading U.S. decision, apart from the Johnson trilogy, is *United States v Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L. Ed. 1089 (1905). On the effect of treaties on fishing rights see especially *United States v State of Washington*, 384 F. Supp. 312 (1974).

treaties negotiated in the United States were based on marked inequality of bargaining power: "[t]he results of treaty negotiations were almost always unsatisfactory to the Indians"⁴⁹.

The legal position in New Zealand has much more in common with Argentina than it does with the United States. According to Professor Levaggi⁵⁰:

In contrast with the United States, where treaties with the tribes have "the same status as treaties with foreign states", according to legal doctrine repeatedly confirmed by the Federal Courts, and where, with some exceptions, it is not contested that the Constitution accords to these treaties the status of supreme law, or, where, in other words, legal pluralism is well-recognised, in the Republic of Argentina, arising out of the search for a national identity that is unified, homogenous, and hostile to any suggestion of legal pluralism, treaties [with indigenous groups] were at first denied the same status as those in North America, and then were subsequently scorned, nullified, were lost and forgotten, as if they had never existed in the first place.

The situation of, say, the Fenton agreement or the Tuhoe agreement is the same. It is as if they have been erased from the nation's legal history. And the explanation in both Argentina and New Zealand is the same: a hostility, at least until recently, to any suggestion of legal and jurisdictional pluralism within the framework of a highly positivist legal culture. In New Zealand even the Treaty of Waitangi itself has won, at best, only grudging acceptance as a constitutional text on the part of Courts and most commentators on constitutional law, to say nothing of other agreements, which seemingly have the status of historical curiosities.

And yet, as Levaggi goes on to argue – which is equally true of New Zealand – such a stance does not accord with historical reality. Writers in Argentina who stress the fundamental constitutional differences between Argentina and the United States as an explanation of the different status of indigenous treaties in both jurisdictions overlook the fact that to a large extent in both North and South America treaty-making with the frontier tribes was an established practice of the Spanish Crown (as well, of course, of the British Crown in North America). In both countries, as well, the practice was inherited by the independent republican regimes once the respective colonial powers,

⁴⁹Charles F Wilkinson and John M Volman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows upon the Earth' – How Long a Time is That?", (1975) 63 *California Law Review* 601, 610.

⁵⁰Levaggi, *Paz en la frontera*, 561 (my translation).

Britain and Spain, had been evicted from the scene. In the United States, Argentina and New Zealand alike, relations between governments and the indigenous tribes were characterized by peace and by agreements as much as they were characterized by war and conflict. The difficulty now lies, however, in jurisdictions such as Argentina and New Zealand in finding some kind of conceptual legal language to characterize such agreements and, perhaps, to give them status. In both countries while formally there is no conception of any kind of plural sovereignty, as a matter of historical practice treaty-like agreements between the government and indigenous tribes was an established state practice.

6. Some conclusions

In general the indigenous people of New Zealand interact with New Zealand law in three different kinds of ways. First, there is the possibility of Native title claims made under the ordinary English-derived Common Law and heard in the ordinary civil courts of New Zealand. While such cases do occur, this is not a significant zone of interaction in New Zealand, and is certainly much less important than it is in Canada or the United States. Secondly, there is the area of Maori land, which is administered by a specialist Court (the Maori Land Court) which is a busy and important part of the New Zealand legal system. This Court deals with disputes over, and with the management of, Maori land, and plays no role in the adjudication of historic claims and grievances of the Maori people. That is dealt with quite separately, by means of a unique body, the Waitangi Tribunal, which operates under its own statute and which makes recommendations to the New Zealand government on Maori historic claims. The claims are then negotiated and settled and compensation paid by the government to the affected groups.

Issues affecting the Maori people are important and prominent in New Zealand, as New Zealand is a relatively small country of only four million people, of which about 12-15% are of indigenous Maori descent. This is a far higher percentage than, say, Argentina or Brasil, although not comparable with strongly 'indigenist' Latin American states such as Ecuador or Guatemala. Perhaps Mexico might be the closest parallel, although there is really no such thing as a *mestizo* New Zealander, as virtually all New Zealanders of Maori descent, no matter how small, tend to regard themselves as Maori. In this sense the 'Maori' percentage of the population is likely to increase significantly, rates of intermarriage being relatively high.

The legal institutions and processes that have evolved in New Zealand that relate to indigenous people are distinctive, and seem to have no exact counterpart elsewhere. Two stand out, the Maori Land Court and the Waitangi

Tribunal. The former is a well-established part of the New Zealand legal system which has been in existence for nearly 150 years, and which makes binding determinations relating to particular categories of land in Maori ownership. The second is a comparatively new institution, the Waitangi Tribunal, set up in 1975 – but which achieved real importance only during the 1980s – which deals with the historic claims and grievances of the Maori tribes. The Waitangi Tribunal has some affinities with transitional justice institutions, and makes non-binding determinations that in turn form part of an extra-legal process of direct negotiation and settlement of claims involving representatives of the tribes and of the government. Although the negotiation and settlement process has not run very smoothly, on the whole the Waitangi Tribunal itself has performed very effectively and its long series of lengthy and scrupulously documented reports embody what is probably the most comprehensive attempt by any state in the world to comprehensively examine its colonial past through a legal process. The Waitangi Tribunal is a model that policy-makers in Latin America might well consider.