

# THE WAITANGI TRIBUNAL AND TRANSITIONAL JUSTICE

**Richard Boast**

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## Introduction

The term 'transitional justice' is drawn from Ruti Teitel's book published in 2000.<sup>1</sup> 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. In this paper I wish to site the Waitangi Tribunal process in this context, and to consider whether discussions of 'transitional justice' as that term is understood by Professor Teitel is of assistance in forming a better understanding of the functioning of the Waitangi Tribunal. 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 this country simply is not in 'transition' from authoritarianism to democracy. To Ms Teitel "the problem of transitional justice arises within a bounded period, spanning two regimes".<sup>2</sup> New Zealand cannot be compared in this sense with, say, Guatemala or South Africa. 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 is typical of periods of 'transitional justice', at least in some ways.<sup>3</sup>

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1 Ruti G Teitel *Transitional Justice* (Oxford University Press, New York, 2000).

2 Teitel, above n 1, 5.

3 There is now a growing literature on Waitangi Tribunal procedure. See generally MPK 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); ET Durie and GS Orr "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence" (1990) 14 NZULR 62; RP Boast

Guatemala provides a good illustration of a typical judicialised process of the kind Professor Teitel is interested in. The 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 19<sup>th</sup> 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 20<sup>th</sup> century, although some Indian municipalities have managed to retain their lands to the present day.<sup>4</sup> As in nearby Mexico, 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 1978-1984.<sup>5</sup> In the Guatemalan

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"The Waitangi Tribunal: 'Conscience of the Nation' or Just Another Court?" [1994] 16 U NSWLR 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* (Victoria University Press, Wellington, 1996); RP Boast "Lawyers, Ethics, Historians and the Judicial Process" (1998) 28 VUWLR 87; RP 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) 53-64.

4 For a detailed analysis of developments in the 19th and 20th century in 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 North Carolina, 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.

5 On these events see for example Robert Carmack *Harvest of Violence: The Maya Indians and the Guatemalan Crisis* (University of Oklahoma Press, Norman, Oklahoma, 1988). Carmack is a leading scholar on the archaeology and ethno-history of the Quiché people of the Guatemalan highlands. See also 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).

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 1999.<sup>6</sup> 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, the International Covenant of Civil and Political Rights and the 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 genocidal.<sup>7</sup>

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 legitimisation to 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

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6 Comision Para del Esclarecimiento Historico *Guatemala: Memoria del Silencio* (Oficina de Servicios para Proyectos de las Naciones Unidas, Guatemala City, July 1999) ["*Memoria del Silencio*"].

7 For a critique of the CEH analysis see Sanford, above n 5, 147-179.

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 recognised 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. New Zealand legal history is positively littered with them. 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 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 occasion.<sup>8</sup>

The settlements are not, and cannot be, full *restitutio in integrum*: how could the government repay to *Tainui* the capital value of the confiscated Waikato? But the current settlements are not trifling either. Historic grievance settlements are only one part of it, as there are also the 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. *Nga Puhi* for example have just received a fisheries settlement allocation of no less than \$67 million – to be eligible for this however you need to be a mandated *iwi* organisation (MIO) and meet the criteria set out in the Maori Fisheries Act (2004).

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8 The key text is the publication Office of Treaty Settlements *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 commentary from the Office of Treaty Settlements. Individual claim settlements are however implemented in statute.

Some iwi are going to benefit handsomely from both processes (historic settlement and fisheries settlement): Ngai Tahu 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: \$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. I am unsure whether mainstream Pakeha New Zealand has any idea of the scale of what is going on. It may not be a transition in terms of the 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 in train. On the other hand, 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 settlements.<sup>9</sup>

### **The Concept of Transitional Justice**

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

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

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 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, 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 that of the principles of the Treaty of Waitangi.<sup>10</sup> The principles and provisions of the Treaty of Waitangi are not enforceable directly in the ordinary courts,<sup>11</sup> whereas in the Tribunal they form the framework of commentary and analysis.

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<sup>10</sup> See Treaty of Waitangi Act 1975, s 6.

<sup>11</sup> The leading case on the point is still *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC). 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).

Less tangibly, but of real significance, is a particular rhetorical style that typifies the reports of legal processes associated with 'transitional justice'. This style is quite different from that of ordinary judgments of the civil courts. One can take as an example the opening prologue of *Guatemala: Memoria del Silencio*:<sup>12</sup>

*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 has analysed the Waitangi Tribunal's functions, paying particular attention to the evidence led before the Tribunal and the Tribunal's finding and testing his analysis by means of four case studies of the Taranaki, Muriwhenua, Chatham Islands and Ngai Tahu inquiries.<sup>13</sup> 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

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<sup>12</sup> *Memoria del Silencio*, above n 6, Prólogo, 15 (my translation).

<sup>13</sup> Belgrave *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2005).

environment. For example, at stake in the Chatham 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 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".<sup>14</sup> 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 Inquiry<sup>15</sup> 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

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<sup>14</sup> Belgrave, above n 13, 16-17.

<sup>15</sup> The 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.



which links the Tribunal more closely with some of the 'transitional justice' adjudicatory bodies already discussed, a key aspect of which is they 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 quality<sup>16</sup> – of the historical and traditional evidence it receives, and the length and sophistication of the Tribunal's reports.<sup>17</sup> Most important of all is the fact that the Tribunal is a *permanent* commission of inquiry which has now been in continuous operation for over 20 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.

#### **Inquiry, Settlement and the National Interest**

While the Tribunal is in some ways analogous to institutions of 'transitional justice' in other respects, then, it is significantly unlike them. Moreover, in my view, the public or cathartic aspects of the Tribunal's functions are becoming gradually less significant. This change has arisen from two factors: the interconnection between the Tribunal and the system of historic settlements, and various internal changes to the Tribunal's practice and procedure dictated by the need to inquire into and report into a proliferation of claims while operating on a restricted budget.

While resembling the institutions of 'transitional justice' in some respects, the hearings are also – and are perceived by all parties to be – civil proceedings

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16 I 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.

17 A recent example is Waitangi Tribunal *Hauraki Report: Wai 686* (Legislation Direct, Wellington, 2006). The report comprises 3 volumes (1,310 pages). The report deals, amongst other things, with pre-1840 land transactions in the Hauraki region, Crown 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, and water bodies.

against the Crown leading to a settlement in cash, assets and to certain types of consultative rights that are in addition to those mandated by the general law.<sup>18</sup> In effect, if not in name, the Crown plays the role of defendant in the Tribunal, is represented at the hearings by the Crown Law Office (or by barristers instructed by Crown Law), produces its own historical evidence to contest that led by the claimants, and makes closing submissions. Recent procedural changes adopted by the Tribunal have accentuated the similarities between Tribunal process and ordinary civil proceedings. The hearings are not there *solely* – or arguably even primarily – to create a record or to allow claimants the opportunity to express themselves. At stake, in a very real sense, are 'damages': that is, the eventual negotiation and settlement of the claim, including sometimes the payment of substantial sums of cash. (It needs to be stressed as well, however, that the relationship between the negotiation and settlement system and the Tribunal's inquiries is not at all clear, and is if anything becoming less clear as time goes on: there is a degree of troubling incoherence in the process as a whole.<sup>19</sup>) These realities have had significant implications for the Tribunal's procedure. The process is not only a public, cathartic process, but is also a kind of civil litigation with specific consequences for the parties before the Tribunal, that is those claimants who happen to be participating in the inquiry and the Crown.

The Tribunal's procedure has been in a state of continuous evolution since the hearing of the first major claim in 1983. Originally the Tribunal dealt with its cases on a claim-by-claim basis, and many of its most important reports were prepared under this procedural model (for example *Manukau*, *Orakei*, *Muriwhenua Fisheries*, *Pouakani*, *Ngai Tahu*). *Ngai Tahu*, the biggest of the 'one-offs' was however a regional inquiry in reality, given the size of Ngai Tahu's customary rohe, and also signalled a number of important changes of direction, especially with regard to the role of claimant and Crown counsel and the scale and comprehensiveness of the expert historical evidence. The proliferation of claims (now standing at about 1300) has meant that the Tribunal had to devise new approaches for inquiring into and reporting on

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18 As in, for example, the Resource Management Act 1991.

19 This arises largely from political imperatives. The government wants to complete as many settlements as it can in order to convince the public of its ability to manage and resolve these matters. This often means that the Office of Treaty Settlements will begin negotiations in the absence of a Tribunal report, or while a report is in preparation, which can often lead to difficulties.

claims. The practice that has developed is now a *regional inquiry* by which all the claims in a substantial region ('inquiry district') are required into and reported into at once. The districts are substantial (Gisborne, Whanganui, National Park, Central North Island) and may include a large number of claims which range from substantial iwi or pan-iwi claims down to very small claims relating to particular land blocks. Following the hearings, the Tribunal then reports on all the claims at once. The Tribunal also expects all claimants to be represented by counsel, which has meant in its turn the development of a specialist bar with expertise in Waitangi Tribunal proceedings.

The regional inquiry process was taken a step further in 2000 with the adoption of a more concentrated and speeded-up regional inquiry process known as the 'Gisborne model' (after the inquiry district where it was first applied). The key features of the Gisborne model were set out in Chief Judge Williams' first Gisborne regional inquiry directions of 20 March 2000, which were then restated in detail in the Tribunal's *Guide to Practice and Procedure* of May 2001. This set in train a highly managed approach based on detailed and fully referenced ('particularised') pleadings, early Crown participation, and a much more compressed timeframe for the hearings. The Gisborne model has now been applied in a number of inquiries, including not only Gisborne itself but also in the much bigger Urewera regional inquiry and in a number of others. There has, however, been some variance in practice arising to some degree from the predilections and approaches of the various judges.

Given particular prominence in the Gisborne model was the need for the Crown to file full reply pleadings at an early stage in the claim. This was an innovation. Until this time there was no requirement for the Crown to file a statement of defence to the allegations made by the claimants. In ordinary civil proceedings, of course, a statement of defence is standard practice. It allows the plaintiffs and the court to know which allegations are contested and which are admitted, and thus allows also the issues to be narrowed for the hearings. The fact that a formal response from the Crown was not required at all until a comparatively recent stage in the Tribunal's history indicates a certain perception as to the nature of the Tribunal's inquiry – perhaps even an assumption that the Crown would not necessarily contest the claims but would rather participate in a more collaborative manner in a kind of fact-finding process. The procedural changes adopted with the Gisborne reflect, but also cement into place, the reality that the Tribunal process is now

more or less one of a civil action with the claimants as plaintiffs and the Crown as the defendant.

As the Tribunal has become more efficient and productive, the 'public' dimension of its inquiry process has to some extent become lost. The Tribunal's aim is now much more to assist the particular claimants in front of it in their negotiations with the Crown – the negotiations process itself now having become much more elaborate and highly bureaucratised – rather than in creating an educative text for more general public reflection. The media certainly shows little or no interest in attending the Tribunal's hearings or in commenting on or analysing the Tribunal's reports once released. Although I have not done the necessary surveys to document the point, I think it can confidently be said that the level of media interest in the Tribunal in the late 1980s was far higher than it is today (witness the extensive coverage of the Tribunal's *Muriwhenua Fisheries Report* in 1988 compared with the more or less total silence in the case of two very substantial reports released this year, *Kaipara* and *Hauraki*). This demonstrates certain inadequacies on the part of the media, of course, which lacks people able to succinctly analyse a three-volume complex text such as *Hauraki* and explain it to the public, but which may also be said to show the extent to which the Waitangi Tribunal has settled down into the role of an ordinary part of the national legal system.

I do not want to overstate the point, either by over-emphasising the 'public' aspects of the Tribunal's process at an earlier stage of its history or by insisting that such aspects of the Tribunal's process have been wholly lost. For example, the Tribunal's discussion of the tragic events at Matawhero and Ngatapa in 1868-69 in its recent Gisborne inquiry, and its even-handed condemnation of both as a breach of the principles of the Treaty, obviously was aimed at a wider public and can be seen as a conscious attempt to lay some no doubt very angry ghosts to rest in the interests of national well-being. The comprehensiveness of the Tribunal's inquiry, its careful creation of a very full record, and the efforts it is now making to assist with public access to the research done for particular claims indicates that the Tribunal's process still has some features characteristic of the institutions of 'transitional justice'. But there has certainly been a shift of emphasis.

### **Conclusion**

This paper has been written from the stance of a participant-observer. Since 1989 I have been involved directly in the Tribunal's hearings both as claimant counsel and as an expert witness, and its changing process has never ceased

to fascinate me. Human rights lawyers tend not to be very interested in matters of procedure and judicial style, focusing much more on the substance of legal texts and decisions, but in fact matters of procedure and process are very significant and an important clue to broader shifts of emphasis and approach. I hope that I have shown that considering the Waitangi Tribunal's similarities to, and differences from, the institutions of 'transitional justice' is a useful and fruitful way of analysing this remarkable judicial body.