

Past the Last Post? Time, Causation and Treaty Claims History¹

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In a recent article, historian Peter Gibbons suggested that ‘[p]erhaps historical writings dealing with cultural matters that do not take postcolonial perspectives and problematize the presence of Pakeha run the risk of being considered as parts of the colonizing process’ (2002: 15). While Gibbons’ attention was focused on the texts produced by Pakeha cultural nationalists (versifiers, ethnologists, botanists and the like), his argument is applicable to other kinds of texts, such as the published historical narratives produced by the Waitangi Tribunal. For the past quarter century, the modern New Zealand Treaty claims process has provided Maori with a forum for the recognition of and restitution for numerous historical injustices. The process has been successful for some, yet painstakingly slow for others. This present-minded exhumation of the past has also witnessed the emergence of a new form of public history and genre of history-writing — Tribunal history. Yet this type of history is distinguished from other forms of history-writing by its strong postcolonial tendencies and highly present-minded approach toward the past.

Since 1975 (and especially since 1985), the Waitangi Tribunal has heard claims by Maori against the Crown for alleged breaches of the Treaty of Waitangi: a treaty signed in 1840 between Maori tribes and representatives of the British Crown in Aotearoa New Zealand. Much of this is now fairly well known. It is less well recognised, however, that there are two distinct types of narratives produced for and by this

claims process: ‘Treaty history’ and ‘Tribunal history’. The term ‘Treaty history’ defines the extensive archive that includes *all research* conducted to substantiate or challenge a claim before the Waitangi Tribunal.² On the other hand, ‘Tribunal history’ refers more specifically to the published reports of the Waitangi Tribunal, especially those addressing historical claims. These reports include the Tribunal’s interpretation of the main issues of any given claim (or group of claims), the distillation of a vast amount of evidence, and the findings of the Tribunal on the strength of the claim when tested against Treaty principles.³ It is important to acknowledge that while different ‘tribunals’ are constituted to hear particular claims (and groups of claims), I am treating ‘the Tribunal’ as the corporate author, since the reports are published under the name of that collective entity.⁴ The term ‘Tribunal history’ presupposes that the Tribunal is in the business of writing history: yet it has never admitted its history-writing role. Some historians have also queried just how ‘new’ this type of history actually is (Sorrenson 1987, Belgrave 2002: 92–3).⁵ Nonetheless, it is now fairly well accepted that the published reports of the Tribunal constitute a distinct type of historical narrative (Sorrenson 1987, Oliver 2001, Sharp 1997a, 2001). Tribunal history must, however, be seen within the particular contexts and constraints of the legalised and highly adversarial environment in which it is produced. The prevailing opinion seems to be that history is simply ‘used’ by the Tribunal, in much the same way that other evidence is drawn upon for the purposes of any judicial or semi-judicial enquiry. However, the overwhelming emphasis on judicial process as the principal means of revising and revisiting the past has led to the formation of what has been referred to as ‘juridical history’, history ‘told as if to a judge in a court of law’ (Sharp 2001: 31).⁶ This is a way of representing the past so as to make it available for legal and quasi-legal judgment in the present. In the New Zealand Treaty claims process, juridical history has assumed a dominant status as the main method of determining the authenticity of past (as well as present) injustices suffered by Maori through Crown breaches of the Treaty partnership.

As noted above, the Treaty claims process currently underway in New Zealand relies on the discourses of law and history, and on the intersection, convergence, and to some extent, conflict of these two discourses. A close reading of the published historical reports produced by the Waitangi Tribunal therefore offers a useful case study of how law and history function in such a context. This article argues that the primary objective of Tribunal history (as evidenced through its published reports) is distinctly political and clearly postcolonial: Tribunal history aims to destabilise colonial structures and narratives, and to dismantle the inheritance of those structures and narratives.⁷ It also suggests that the reports of the Waitangi Tribunal have real currency in, and serious implications for, both the present *and* the future. This can be seen in the Tribunal's treatment of the concepts of time and causation, to which this article is chiefly addressed.

This article suggests that the genre of history-writing known as Tribunal history, through its present-minded approach to the concepts of time and causation, is strongly postcolonial. The term 'postcolonialism' requires brief definition. Postcolonialism is often mistakenly defined as the assumption that we have left the colonial past behind. Superficially at least, the term seems to intimate that colonisation is finished, 'post' denoting a period after, marking an identifiable break with the past. Put simply, postcolonialism implies that colonisation is dead. However, it is more useful to see postcolonialism not as a finite period, but as a critical engagement with the aftermath of colonisation. In other words, postcolonialism is an attitude, rather than an epoch. It is a perspective that critiques, and in a political sense, seeks to undermine the structures, ideologies and institutions that gave colonisation meaning. Claims to postcolonial status ('postcoloniality') are often motivated by the desire of the colonised (as well as the descendants of the colonisers) to restore cultural and political integrity, granted not by the colonial power, but on their own terms. Postcolonialism therefore engages with ideas of plurality and the co-existence of multiple discourses. Moreover, postcolonialism should not be confused with decolonisation, or vice versa. While decolonisation

signals that the colonisers have left and relinquished their authority, postcolonialism implies a continuation of that power. Postcolonialism is a part of the process of decolonisation: it does not stand in opposition to decolonisation, but complements and even progresses it (Said 1993: 259–60).

This article also considers the implications of Tribunal history having a postcolonial status, and asks: if Tribunal history is indeed postcolonial, what does this mean? Is postcolonialism empowering and liberating, or disabling and neo-colonialist? While postcolonialism may be useful as a discursive and rhetorical tool, or as a political statement, postcolonialism has severe limitations in reality. Postcolonialism has, for instance, been compared with processes of globalisation. As indigenous scholar Linda Tuhiwai Smith has argued, ‘[p]eople now live in a world which is fragmented with multiple and shifting identities, that the oppressed and the colonized are so deeply implicated in their own oppressions that they are no more nor less authentic than anyone else’ (1999: 97). Implementing the aims of postcolonialism represents a challenge for the heirs of the colonisers too. The attempt to ‘unpick’ or disentangle the effects of colonialism, and its impact on the present, is motivated by the desire to restore the integrity of the colonised. How then are those who are a part of the colonising group (or descendants of the colonisers) to define themselves in opposition to a process in which they too are potentially complicit? This is especially acute in New Zealand, most notably for those Pakeha who seek justice for and recognition of Maori Treaty rights in the face of overwhelming public opposition.⁸

Postcolonial critiques can, therefore, make positive political interventions if the proponents of these critiques are aware of the limitations of this type of enquiry — for example, the reliance on one type of evidence, or the constraints imposed by a particular process. Postcolonialism can be useful *exactly because* it is self-aware and includes a kind of reflexivity, an acknowledgment of its own limitations. Furthermore, postcolonialism engages with, and therefore recognises, the ambivalence, contradiction and the hybrid nature of colonisation

(Thomas 1994: 60). Postcolonial history is, by definition, concerned more with the present (and possibly even the future) than with the past. This is where postcolonialism is particularly relevant to Tribunal history: the charge of ‘presentism’, or present-mindedness, might not be so problematic. Here it is more fruitful to consider Tribunal history as part of the local postcolonial project, where it seeks to create a continuous engagement with the effects and aftermath of colonisation, rather than a complete break with the past. Tribunal findings have clearly sought to restore the integrity of Maori, their institutions, practices and values. These findings are inevitably politically-orientated and present-driven findings, and hence, strongly postcolonial. While Tribunal reports may have weaknesses as historical narratives, they are still much more than simply legal findings: they are significant historical moments and important textual monuments. The published narratives authored by the Waitangi Tribunal are powerful discursive sites, cultural products that eventually go on to have lives of their own, especially among claimant groups.

Time and Tribunal histories

Traditional common law methodology involves a retrospective incorporation of selected pieces of historical evidence which will then serve the needs of the present. Legal and historical approaches to the notion of ‘time’ are, however, distinctly different, and reflect the philosophical tensions between the two. The law, or legal methodology, tends to see time as immortal and immutable, where the common law especially, exists outside time. Writing of the ancient constitution, J G A Pocock noted the myth of ‘immortality’, or timelessness surrounding the constitution, which he defined as ‘the distribution by law of powers of declaring and applying the law’ (1972: 209). This, Pocock argued, rested on three main assumptions: first, that all the law in England might be termed common law; second, that this common law was common custom, which originated in the usages of the people, and was declared, interpreted and applied by the courts; and third, that all custom was by definition immemorial, or had been usage and law since ‘time out of

mind'.⁹ These suppositions formed the basis of an entire interpretation of history, based on 'record, axiom and judgment' rather than the written records of chroniclers, and turned on the assumption that law was immemorial. Pocock maintained that it therefore became possible to believe that the whole body of English law had in fact existed from the very beginnings of English history: that legal history was itself a series of declarations regarding the immortality of the law (1972: 209).

The suggestion that legal discourse is characterised by qualities of timelessness has been considered in relation to the New Zealand Treaty claims process. Writing about Claudia Orange's *The Treaty of Waitangi* (1987), Paul McHugh described the book as representing 'a form of ahistoricity, but one different from the lawyers' abeyance of temporality. It was the (Whig) time *before* as opposed to a (common law) time *without* history.' Orange's book, McHugh declared, was constrained by its own textual limitations. 'The history of Orange's state,' he argued, 'originated with the Treaty of Waitangi. The Treaty thus became the Anglo-settler state's historical beginning: a beginning in contract' (McHugh 1997: 45). Criticisms of Orange's book notwithstanding, the assumption that the law exists *outside* time is important.

Historical time is fundamentally different. As Peter Munz has pointed out, historical time is not the same as temporal succession, and '[t]ime by itself does not provide the connecting link between the events listed by the historian'. This means that the historian is not just a recording machine, whose task is simply to transcribe events in their chronological order (Munz 1977: 28). Historical time may therefore be a construction, an abstract category invented by the historian to understand and make sense of past events. Johannes Fabian, Nicholas Thomas and Dipesh Chakrabarty have also considered how certain societies are located quite literally 'out of time', and that time itself can be seen as a Western cultural construct (Fabian 1983, Thomas 1991, Chakrabarty 2000).¹⁰ Non-European concepts of historical time have their own internal structure and logic that do not always conform to the linear model. As Judith Binney has explained, within the Maori oral tradition, there is 'a continuous dialectic' between past and present, where the past is

reordered and the present reinterpreted (Binney 1987). The cycle of traditions about the people, land and events is dynamic, not static, where the words of the ancestors ‘exist still in memory, wrought into oral tradition, and they themselves can be encountered as they appear to the living’ (Binney 1987: 17). Moreover, to reconfigure this epistemology, or to assimilate it into Western notions of history and historicity, would be to destroy it (Binney 1987: 17, Smith 1999).

So how does Tribunal history consider time? First, it takes the view that while the Treaty of Waitangi was an historical document, its principles are timeless. Many Tribunal reports collapse the temporal distance between past and present into a single entity. In the *Manukau Report*, for example, the Tribunal concluded that ‘[t]he act of omission began last century with policies that led to war and the confiscation of tribal territories. It was continued in this century by a failure to give adequate protection to or recognition of Maori rights’ (1985: 74). It therefore took the view that the application of Treaty principles, like the Treaty itself, is timeless. In the *Muriwhenua Fishing Report*, the Tribunal made similar appeals to the notion of timelessness in concluding that ‘the Treaty speaks across all ages’ (1988: 192–4).¹¹ In the *Ngai Tahu Sea Fisheries Report*, the Tribunal unambiguously declared the timeless nature of the Treaty compact:

It does not follow that Ngai Tahu Treaty fishing rights were frozen for all time within the range of 12 miles or so. Implicit in this is the recognition of the Treaty right to make use of a new sea fishing technology is a right to take full advantage of it. ... Ngai Tahu as a Treaty partner are entitled to a reasonable share of the new fisheries (1992: 256–7).

Later reports have expanded on this theme. In the *Allocation of Radio Frequencies Report*, the issue of time (and its antithesis, timelessness) was very significant. At the heart of this claim was the issue of whether or not the claimants could prove their Treaty rights to taonga and possessions which had changed over time. In its findings on this claim, the Tribunal concluded that ‘in its widest sense the Treaty promotes a partnership in the development of the country and a sharing of all resources so that it is consistent with the principles of the Treaty

that the language and matters of Maori interest should have a secure place in broadcasting' (1990: 4).¹² In this particular inquiry, the Tribunal concluded that Treaty principles and obligations were above and beyond historical time, declaring that 'the Treaty affords iwi the continuing protection of a right of access to broadcasting resources' (45). In the *Ngai Tahu Report*, the Tribunal further developed the view that Treaty principles were timeless. 'The Treaty itself,' the Tribunal stated, 'is a remarkably brief, almost spare, document. It was not intended merely to regulate relations at the time of its signing by the Crown and the Maori, but rather to operate in the indefinite future when, as the parties contemplated, the new nation would grow and develop' (1991: 222–3). Similarly, in the *Te Whanganui-a-Orutu Report*, the Tribunal described the Treaty as 'a charter, or a covenant ... for a continuing relationship between Crown and Maori, based upon their pledges to one another. It is this that lays the foundation of the concept of partnership' (1995: 102). More recently, in the *Whanganui River Report*, the Tribunal acknowledged that 'New Zealand society has changed since 1840, but the Treaty principles do not change' (1999: 347).

As noted above, this emphasis on the timelessness of Treaty principles and the attendant obligations of those principles means that the Tribunal often merges the past into the present. This is most frequently expressed in terms of the continuity of the Maori struggle for redress for alleged historical injustices. In the *Taranaki Report*, for instance, the Tribunal stated this in the most explicit manner. 'For Maori, their struggle for autonomy ... is not past history. It is part of a continuum that has endured to this day. The desire for autonomy has continued to the present day in policies of the Kingitanga, Ringatu, the Repudiation movement, Te Whiti, Tohu, the Kotahitanga, Rua, Ratana, Maori parliamentarians, the New Zealand Maori Council, Te Hahi Mihingare, iwi runanga, the Maori Congress, and others' (1996: 19).¹³ Likewise, in the *Muriwhenua Land Report*, the Tribunal declared that '[t]he Government's policies and practices should be seen in the light of the standards of the day. ... however, they must also be assessed by the principles and standards for settlement established in the Treaty of Waitangi.

... The canons of justice and protection apply to all ages' (1997: 385). In the *Whanganui River Report*, the Tribunal echoed its earlier findings when it admitted: 'We were dealing not with a dry record of past habitations but with evidence that is lived. ... The claim, in short, was a living claim, despite the references to the past, for the people then are the same people today' (1999: 3).¹⁴ In these three reports especially, the insistence that Treaty principles are 'out of time' and apply to 'all ages' is made very clear.

The timelessness of the past is also revealed in the Tribunal's definition of the Treaty as an evolving and developing social contract. In the *Motunui-Waitara Report*, the Tribunal observed that '[t]he spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place' (1983: 47–9).¹⁵ Four years later, in the *Orakei Report*, the Tribunal reiterated this sentiment, declaring that 'the essence of the Treaty of Waitangi transcends the sum total of its written words and puts narrow or literal interpretation out of place' (1987: 136–7).¹⁶ Then in the *Te Roroa Report*, the Tribunal elevated the Treaty above temporal and worldly concerns, to a quasi-religious status. It described the Treaty not only as 'a contract or reciprocal arrangement between two parties', but as 'a sacred covenant entered into by the Crown and Maori', where 'both parties have a common moral duty to abide by the Christian and traditional Maori values it embodies' (1992: 30). The implication was that moral duties and obligations superseded human notions of time.

The Tribunal, through its published reports, also shows a strong tendency to project back on to the past constructions that may well have been quite unfamiliar to 19th-century Crown officials and politicians. In doing so, it views past events from the standpoint of the present, where present-minded concerns shape the questions as well as many of the conclusions. In the *Taranaki Report*, the Tribunal offered an extraordinary ahistorical comparison between the pacifist policies of Te Whiti O Rongomai, Mahatma Gandhi and Martin Luther King (1996: 200).¹⁷ It also stated that '[f]or the Taranaki hapu, conflict and struggle have been present since the first European settlement in 1841.

... The real issue is the relationship between Maori and the Government. It is today, as it has been for 155 years, the central problem' (1).¹⁸

While the Tribunal projects back onto the past, it also extends forward into the future. Through its narratives, and the findings contained in those narratives, the Tribunal looks for solutions not as they are, but *as they might be*. This means that it has created a jurisprudence primarily concerned with detailing the histories of past injustices that claimants have suffered along with the reparations that will address those injustices. After all, this was what claimants have requested: that past wrongs should be righted, and that the Tribunal should do as much as it could to resolve grievances, albeit within limited legal boundaries. The Tribunal has made findings and recommendations in its earlier reports, but in the 1990s especially, it withdrew from issuing recommendations about reparations or remedies. Instead, it suggested that its findings provided the claimants with the basis upon which to enter into negotiations with the Crown. The Tribunal has made this intention obvious in many reports. In the *Manukau Report*, it declared: 'We consider it timely that Government consider affirmative action to fund and assist tribal authorities to establish a new economic base for their people' (1985: 88). In the *Orakei Report*, the Tribunal further built on this premise, arguing that '[t]he broad and general nature of its [the Treaty's] words indicates that it was not intended as a final contract. It follows that there is room for movement and scope for agreement between the Crown and the Maori people which involves a measure of compromise and change' (1987: 136–7).¹⁹ In the *Fisheries Settlement Report*, the Tribunal clearly saw its role, as well as that of the Treaty, in future-oriented terms. 'Most especially,' wrote the Tribunal, 'it needs to be appreciated that any settlement of this nature has two essential goals, not just to pay off for the past, but also to buy into the future. The Treaty, it must be understood, is primarily concerned with the latter. It is not the extinguishment of rights that is essential but the affirmation of them' (1992: 21–2).

The Tribunal has also been at pains to point out that in the past, land transactions were clearly designed with the future in mind. In this

respect the Tribunal has followed a traditionally Maori perspective of land sale and acquisition. In the *Mangonui Sewerage Report*, where the Tribunal refused to make the recommendations sought by the claimants, it wrote that '[l]and transactions were seen in the Maori view as the first step in a long-term personal relationship between the tribe and the purchaser, where both would have continuing obligations toward each other through subsequent generations' (2000: 19–20).²⁰ In the later *Taranaki Report*, it went even further, arguing that:

the Maori parties cannot be presumed to have understood the transaction in terms of the deed. It is likely they did not. It is well known now that not only was the sale of land unknown to Maori but it invoked concepts antithetical to their worldview. ... Maori, like others, sought arrangements to secure Pakeha, but these arrangements were to strengthen the tribe, not to sell the land (1996: 34–6).

Again, in the *Muriwhenua Land Report*, where numerous pre-1865 land transactions were at stake, the Tribunal argued that both private and official land transactions between Maori and Europeans were actually contracts for long-term social relationships (1997: 1).²¹

Tribunal history therefore deals with time on two different levels. First, it recognises historical time as a concept that underpins and 'holds together' the lineal development of a chronological narrative. Here time is a useful and convenient ordering device. The Tribunal's reliance on this idea of historical time has produced histories that tend towards the 'grand narrative' variety: broad and sweeping chronicles that, while focusing on Crown–Maori relationships, also aim to paint a much wider picture of Maori–Pakeha relations. While aiming to be comprehensive, these grand narratives cannot hope to ever recover the totality or complexity of the past. On another level, Tribunal history adopts the idea that the principles of the Treaty are 'timeless' or 'out of time', where it projects both backwards and forwards for present-minded purposes. This makes the Tribunal's historical narratives an essentially hybrid form of historical explanation: a type of history that is more interested in respecting the law, and in this case Treaty principles, than adhering to scholarly historical standards, principles and rules of practice.

Tribunal histories and the problem of causation

Tribunal history can also be considered postcolonial in its approach to the concept of causation. A cause may be defined as an event, action, or even an omission, without which the whole subsequent course of events would have been significantly altered: it is the event or situation without which the effect would not have happened. Although it is tempting to identify the passage of time with causation (to consider that event A that precedes event B is the *cause* of event B), the temporal sequence is not necessarily the same as the cause and effect chain (Munz 1977: 28). In other words, just because two events are temporally sequential this does not mean that they are causally connected. Take for instance, the following passage from the Tribunal's *Pouakani Report*.

Relationships between Pakeha settlers and the tribes of the Kingitanga confederation became more strained. War erupted in Taranaki in 1860 over the government purchase of a block of land at Waitara. Te Heuheu Iwikau maintained a policy of neutrality in the Taranaki fighting in which Waikato and Maniapoto tribes participated. The whole concept of a separate system of Maori government in a district outside of the control of British colonial administrators and military was unacceptable to the majority of Pakeha. Tensions increased and conflict became inevitable. In July 1863 British imperial troops, led by General Duncan Cameron, crossed the Mangatawhiri stream ... the northern boundary of the Kingitanga. The "Waikato Campaign" had begun. There was a series of fights as the troops progressed up the river, reaching Ngaruawahia in early December (1993: 51).

In terms of historical accuracy, each of these eight sentences could stand alone, or be rearranged — but their sequential presentation here implies that one event simply led to the other — thus, 'conflict was inevitable'. In the *Taranaki Report*, the Tribunal stated its belief in the 'inevitability' of certain cause and event sequences. 'In our view,' the Tribunal stated, 'it is a truism that conflict, even war, is inevitable when the freedom of a people is denied. Denied in this case was the freedom of hapu to make their own decisions, form their own policy, manage their lands and affairs in their own manner, and form pan-tribal associations' (1996: 81).

So how does the Waitangi Tribunal deal with the concept of historical causation in its published narratives? The Tribunal's historical methodology, indeed, its entire philosophical approach towards the past, rests on the assumption of Crown culpability: after all, this is the basis upon which the claims and hearing process is predicated. The Tribunal narratives address Crown culpability in two main ways: first, in terms of treating the Crown as a single entity; and second, finding responsibility for past injustices towards Maori in the acts and decisions of particular Crown agents and representatives. There are numerous examples of collective Crown culpability in the Tribunal reports, but a small sample is sufficient to illustrate this point. In the *Orakei Report*, it wrote of the Crown's 'planned programme to dispossess Ngati Whatua from their lands at Orakei' (1987: 158). In the *Ngai Tahu Report*, the Tribunal showed a particular concern for past governments' inability or unwillingness to provide social services for Maori. 'Money for Maori purposes was spent grudgingly by the settler politicians, who in the 1850s conveniently forgot that Maori provided the majority of the country's customs revenue. Assigning Maori concerns to those of social welfare was in the nineteenth century the very next thing to real neglect' (1991: 926).²²

Crown culpability is also identified by the Tribunal in the Crown's failure to adequately provide for Maori. This is evident in the Tribunal's criticism of the Crown's provision of inadequate reserves. In the *Ngai Tahu Report*, the Crown was seen as culpable with regard to numerous delays in completing Crown purchases and in the lack of protection it gave to mahinga kai [food gathering areas] (1991: 113, 146, 663–4, 810). The emphasis placed by the Tribunal on the Crown's fiduciary duty — the obligation to recognise Maori interests specified in the Treaty and to actively protect them — also means that the onus of responsibility is on the Crown.²³ In the *Waiheke Island Report*, the Tribunal wrote that '[t]he language employed [in the second article of the Treaty] casts a wide responsibility on the Crown, indicating a fiduciary trust. ... [and emphasises] ... the Crown's parental or protective role' (1987: 39). In the *Muriwhenua Fishing Report*, the Tribunal went even further, describing

the fiduciary undertaking of the Crown in much broader terms; an assurance that despite European settlement, Maori would survive, and moreover, that because of it, they would also progress (1988: 194). In the *Ngati Rangiteaorere Report*, the Tribunal suggested that ‘the duty of the Crown is not merely passive but extends to active protection of Maori in the use of their lands and water to the fullest extent practicable’ (1990: 30–1). Later reports, including the *Ngawha Geothermal Resource Report* (1993), the *Te Arawa Geothermal Report* (1993), the *Turangi Township Report* (1995) and the *Muriwhenua Land Report* (1997) have stressed, in various ways, the duty imposed on the Crown under the Treaty to actively protect Maori interests.

Furthermore, the Crown has also been found guilty by the Tribunal of failing to provide sufficient lands for Maori, and neglecting to retain a sufficient endowment of lands. This has been noted at some length in the *Mangonui Sewerage Report* (2000: 2, 21), the *Ngai Tahu Report* (1991: 333, 339, 825–6, 907) and the *Ngai Tahu Ancillary Claims Report* (1995: 24, 276, 359, 370).²⁴ In both the *Taranaki Report* (1996) and the *Muriwhenua Land Report* (1997), the Tribunal went beyond its previous interpretations of the Crown’s duty, describing the Crown’s responsibility to provide Maori with sufficient lands in much more emotive terms. In the *Taranaki Report*, for example, it described the Government’s ‘macabre buying spree’, and stated that ‘the Treaty is to be read as imposing on the Government a duty to protect Maori in the ownership of their land and to ensure that the tribes maintain a sufficient endowment for their foreseeable needs’ (1996: 309, 288). In the *Muriwhenua Land Report*, the Tribunal similarly concluded that ‘[t]here could be no hope that Maori would share in a new agrarian economy if there were no plans that Maori should retain an essential land-base. Few things would have provided as much for equity and future participation in the economy as a fair share of the land. ... It is a little late in the day to suggest that the Government was not obliged to ensure that Maori kept sufficient land’ (1997: 327–8).

In terms of Crown purchases too, successive Tribunal findings have found the Crown’s case seriously deficient. In the *Ngai Tahu Report*,

the Tribunal criticised the Crown, arguing that ‘it is implicit in the notion of consent that the Maori owners knew with reasonable certainty the area of land they were being asked to sell. The onus unquestionably lay on the Crown to ensure this. The duty of active protection required no less’ (1991: 241).²⁵ In fact in this report, the Tribunal went even further in attributing Ngai Tahu’s grievances directly to Crown culpability. ‘The Crown ... failed in its Treaty duty to protect Ngai Tahu’s rangatiratanga over their lands and other valued possessions, including pounamu. This failure lies at the heart of their many grievances’ (825). The *Turangi Township Report* also emphasised the duty of the Crown to consult with its Treaty partner, citing Richardson J’s statements in the *New Zealand Maori Council Case* (1995: 287–8). In the later *Muriwhenua Land Report*, the Tribunal admitted that it did ‘not see the statutory framework as relieving the Government of the burden it would otherwise have had to account for the performance of its Treaty duties. As part of its protective responsibility, the Government must demonstrate the probity of its conduct’ (1997: 391). The more recent *Whanganui River Report* equally admonished the Crown for its failure to protect the Atihaunui people’s rangatiratanga over the Whanganui River, and declared this failure contrary to Treaty principles (1999: 338–9).²⁶

The Tribunal’s secondary interpretation of causation as revealed in its published reports relies on finding fault and laying blame with particular individuals: that is, the designation of personal culpability and responsibility (Oliver [n.d.]: 16). There is also evidence that the Tribunal has proceeded on the assumption that the Crown always had other choices: that the actions (and hence the omissions) of Crown agents were the result of decisions they freely made. On this basis, therefore, the Tribunal can safely conclude that Crown officials were individually responsible because their choices caused prejudice to Maori. Taken together, culpability and prejudicial effect constitute a ‘Treaty breach’. As W H Oliver has argued, this type of judgmental reasoning is a form of counterfactual thinking (Oliver [n.d.]: 16). If indeed individuals *could have* acted differently in a given situation, and those other options *might have* led to better results, then we could say that a person was possessed of a poor sense of judgment, or make some such similar

conclusion. On the other hand, because some individuals did make 'good' choices, they are subsequently judged as being strong and capable individuals. But making the 'right choice' implies that other options were available. This way of looking at the past judges the actions of historical agents and actors not only by what they did, but what they *could have* done. In this way, individuals can be used to make judgments in history. The Tribunal's reliance on the possibility of other choices, therefore, binds it to a view of historical causation which, to the near exclusion of everything else, emphasises the agency of individual actors.

There is extensive evidence in the Tribunal's reports that its understanding of causation can be, at least in part, attributed to the role of individual responsibility. Judges of the Native Land Court, while not Crown agents, have been regarded by the Tribunal as individuals who may be considered personally culpable of injustice towards Maori. This is evidence of the Tribunal clearly pushing the boundaries of its own jurisdiction, for strictly speaking, the actions of courts are beyond its scope. In the *Orakei Report*, for instance, the Tribunal wrote of Chief Judge F D Fenton that he 'held strong views on what native land laws should be. They led him into lasting conflicts with Government officials ... As both Chief Judge and a Crown agent he promoted the division of Maori lands for European township settlements' (1987: 34–5). In this report, the Tribunal described Fenton as 'ambitious, conceited and fractious', and noted that '[a] contemporary politician warned that Fenton "may neutralise the best Act that can be passed if it does not originate in his brain"'. A brother judge asserted that the Native Land Court tended to ask "not what it is right or is constitutional but what does the Chief Judge say" and a Native Court Assessor complained "it would appear, when a block was going through the Native Land Court, as if the land was owned by the Court itself and not by the litigants" (1987: 34–5).²⁷ This Tribunal was at pains to point out that despite his role as a member of the judiciary, Fenton nonetheless acted *as if he were* an agent of the Crown, hence his behaviour (and not his position) singles him out for rebuke.

In the *Ngai Tahu Report*, individual culpability was discussed at some length, especially with reference to the appointment and operation of a Protector (1991: 270). ‘The duty of the protector,’ the Tribunal judged, ‘was to prevent Maori from entering into any contracts which might be injurious to them, and no land was to be bought from them that was essential or highly conducive to their comfort, safety, or subsistence. These instructions clearly heralded the need to protect Maori from the highly adverse effects of settlement’ (xvii). The Tribunal also noted in this report how ‘[i]n their single-minded commitment to the purchase of Ngai Tahu’s vast estate, the respective Crown purchase agents, with the connivance or clear endorsement of the various governors of the day, very largely ignored Ngai Tahu’s rights as a Treaty partner’ (838). The cause of Ngai Tahu’s grievance, according to the Tribunal, lay with the Crown’s agents. ‘The tragedy is that the Crown’s agents failed to make such provision for Ngai Tahu,’ the Tribunal concluded. ‘The Crown derived immense advantage from Kemp’s purchase; [while] Ngai Tahu suffered grievous loss’ (495–6).²⁸

Individual culpability is evidenced in other Tribunal reports. In the *Orakei Report*, the Tribunal wrote of less-than-transparent Crown purchasing policy conducted under Donald McLean (1987: 21). McLean came under further criticism in the *Te Roroa Report* (1992) and the *Te Whanganui-a-Orutu Report* (1995). In the latter of these, the Tribunal noted that: ‘McLean’s purchases of the Waipukurau, Ahuriri, and Mohaka Blocks in November and December 1851 were accomplished largely by personal influence. ... He respected Maori rank and protocol but, like Grey, was a paternalist who could be deliberately calculating in achieving his goals. He had an imposing, dignified presence, and unlimited patience’ (*Te Whanganui-a-Orutu Report* 1995: 37). In the *Muriwhenua Land Report*, the Tribunal found that ‘the appointment of a Resident Magistrate ... in 1848 ... marks the introduction of British rule to Muriwhenua. However, it is with hindsight only that the significance of the appointment could have been apparent to Maori. If [William Bertram] White was important to anyone in Muriwhenua at the time, it was probably mainly to himself’ (1997: 186). In the *Whanganui*

River Report (1999: xviii) and the *Ngati Awa Raupatu Report* (1999: 6), the Tribunal assigned the blame for many injustices directly to the Governor. The point here is that it was the person of the Governor and the actions taken by him, rather than the policy *per se*, that was considered to be most at fault.

The theme of individual liability has been most clearly articulated by the Tribunal in the *Taranaki Report*, when in writing of the circumstances leading up to the outbreak of war in Taranaki in 1859, it noted that '[t]he causes of the war are many. In this case, however, they point generally to the conclusion that the Governor started it. Most especially, he disregarded Maori law and authority. ... the Governor's actions, which caused the war, were contrary to the Treaty' (1996: 78–9). The Tribunal continued to make the case against the Governor, and especially, for his personal role in the outbreak of hostilities. 'The wars, in our view, were not of Maori making,' the Tribunal asserted. 'The Governor was the aggressor, not Maori, and in Treaty terms it was the Governor who was in breach of the undertakings made in the name of the Queen. Of the numerous Treaty breaches, we believe none was more serious than the Government's failure to respect Maori authority' (8). Further, in this report, the Tribunal assumed that there were other choices open to the Governor. 'It is clear,' it continued, 'that at all material times the Governor was obliged to negotiate for Maori land on the basis of the incidents ordinarily accruing to native title, but he did not do so, despite being informed of them' (79).²⁹ The onus of responsibility thus lay fairly and squarely with the person of the Governor, especially in his having 'disregard' for other possible alternatives.

The implications of postcolonial history

On a theoretical level, a postcolonial reading has potential difficulties. As a master narrative of crisis, postcolonialism has a tendency to universalise, to subsume difference rather than celebrate it, leaning toward a transcendent theoriser, assumed to be outside time, space and power relations (Thomas 1994: 58–60, 105–6, 171). Postcolonialism also suggests an emancipatory ideology of precolonial, colonial, postcolonial periods that homogenises different societies and the differences within

them. It has also been questioned why such theories, that threaten to become hegemonic themselves, should emerge at a time when various groups are asserting their claims to political and cultural autonomy.³⁰ Most importantly, the reassessment of colonial discourses cannot be a matter of simply inverting the imperial dichotomy, depicting colonists as one-dimensional agents of imperialism and colonial peoples as victims, for to do so does not do justice to either party. The crisis of postcolonialism, therefore, is that there are continuities, as well as discontinuities, between colonial and postcolonial narratives, and that these should (as Gibbons points out (2002)) be acknowledged.

Postcolonial critiques may well have the moral high ground, but some critics have seen postcolonialism simply as an extension of colonisation, and a form of intellectual recolonisation (Graham 1995: 45–63, Gilroy 1991: 187–8, Ballara 2001: 123).³¹ So, if postcolonialism is just another ‘ism’, and if Tribunal history is postcolonial, does this mean it is simply perpetrating colonisation? Is it colonisation in disguise? If applying this criteria, then the answer is most certainly yes. Given that for all its bicultural procedures and efforts to reflect a ‘Maori point of view’, the Waitangi Tribunal still operates within western legal parameters and its view of history is largely articulated along these lines. However, postcolonial critiques also have the potential for liberation. In a practical sense, the Tribunal is empowering for many Maori claimants, in that it provides them with a forum to publicly articulate their grievances, and for these grievances to be heard, acknowledged, and past wrongs to be addressed. The Tribunal hearing process therefore offers an opportunity for a sort of social and cultural catharsis. It has given a concrete focus for recovering and re-presenting Maori versions of the histories of Maori–Crown relations, and for situating the impact of colonialism within Maori world-views and value systems (Smith 1999: 168–9). The Tribunal has also been telling Maori stories to non-Maori audiences, and in a sense, popularising notions of biculturalism and pluralism. In this way, the Tribunal may be gradually dismantling existing assumptions about white settler domination in New Zealand. In addition, it has, at least in part, given currency to the idea that while there is one past, there are many histories.

This article has argued that the texts produced by the Waitangi Tribunal ('Tribunal narratives') are distinctly postcolonial texts: yet questions remain as to just how politically liberating or empowering these narratives can actually be. The article has also proposed that while law and history have different roles in Tribunal narratives, these roles frequently overlap, challenge and contradict one another. The principal tensions between legal and historical discourses in Tribunal narratives are manifest in their treatment of the concepts of time and causation. Ultimately, these tensions prove that in this arena, history cannot be apolitical, or divorced from present-minded concerns. Consequently, the type of history that appears in the Tribunal's published narratives is overwhelmingly presentist, both in terms of its methodology and outcome. This is not to suggest that there is some sort of equilibrium between the two discourses. On the contrary, the participation of history in the highly legalised arena of the Tribunal's deliberations, and the narratives produced from those deliberations, has given rise to the increasing judicialisation of history.

To return to the question posed at the beginning of this article: if the Waitangi Tribunal is writing postcolonial history, then are Tribunal reports merely the handmaidens of colonisation? Applying Gibbons' typology, they may well be. But in another sense, in a tangible 'real world' context, this does not really matter. The Treaty claims process has been in operation in New Zealand for well over 25 years and there is little reason why it should not continue for another quarter century. The 'Treaty juggernaut' has created its own momentum and every serious political party in New Zealand now has its own 'Treaty policy', ostensibly addressing the existence (as well as the duration) of the Treaty claims and settlement process. The Tribunal, while charged with remedying past injustices through making provisions for the future, also operates in a fickle political environment: it remains a creature of statute without full legal or constitutional protection. This means that future governments could potentially retract or severely curb the Tribunal's limited powers and therefore further erode the momentum of the settlement process.

Future historians might well puzzle over the current surge of interest in ‘Treaty-related’ issues. It would be fair to say that in recent years there has been more written about the Treaty of Waitangi, and its aftermath, than at any other time in our history. In a broader sense too, the history and inheritance of the European ‘unsettling’ of New Zealand, have in recent years, assumed a new urgency for many New Zealanders — both Maori and Pakeha. The status of the Treaty of Waitangi and the existence of the modern Treaty claims process remain high on this agenda of public interest. In this current climate of uncertainty, it is tempting to see postcolonial perspectives as convenient antidotes to the excesses of colonisation. But successful postcolonial critiques should be fracturing and unsettling comfortable and orthodox narratives of the past. As a critical engagement with the effects of colonisation, postcolonial interpretations should acknowledge that colonisation still exists in various social, political, economic and cultural manifestations. As Gibbons has also reminded us, ‘colonization is not just an early morning fog that dissipates mid-morning as the bright sun of national identity comes out’ (Gibbons 2002: 17).

Notes

- 1 This article is based on research conducted for a book to be published by Oxford University Press, forthcoming May 2004. I wish to thank Cathy Coleborne, Nan Seuffert and two anonymous readers for their comments on this article. Special thanks are also due to Stephen Hamilton for his assistance.
- 2 The category of ‘Treaty history’ might be further expanded to include a range of other texts (both scholarly and popular) on the Treaty.
- 3 The term ‘distillation’ is used here as a direct reference to the Tribunal’s own admission that its role is to ‘distil’ matters relating to a claim. See *Taranaki Report* 1996: 200.
- 4 It should also be pointed out that because *most* of the reports cited here were written while Chief Judge Edward Durie was Chairperson of the Waitangi Tribunal, they do display some coherence.

- 5 The two historians cited here are both closely connected with the Tribunal, the former as a long-serving member of the Tribunal and the latter as a former chief historian.
- 6 Sharp has also commented elsewhere that: ‘While the historian looks backwards to the past with no disciplined hope of acting on what she sees, the traditionalist looks backwards with every expectation that he will find what he needs to find for present purposes. What the traditionalist does, it should be added, is what the discipline of law demands: that the practitioner goes to the past not to find change, but to discover authorisation and warrant for present action’ (Sharp 1997b: 160).
- 7 Wayne Rumbles has recently proposed a much more sceptical reading of Treaty claims narratives, arguing that ‘the texts produced from the Treaty negotiation discourse can be viewed as postcolonial fiction ... [and] that the Treaty settlement discourse and its related practices are masks that excuse the white public from taking responsibility for its own racism and colonialism’ (Rumbles 2001: 226).
- 8 For further discussion of these anxieties, see Johnson 2002.
- 9 Pocock went on to say that ‘any declaration of law, whether judgment or (with not quite the same certainty) statute, was a declaration that its content had been usage since time immemorial’ (Pocock 1972: 209).
- 10 Chakrabarty has also argued that ‘[h]istoricism thus posited historical time as a measure of the cultural distance (at least in institutional development) that was assumed to exist between the West and the non-West’ (2000: 7).
- 11 The Tribunal adds further that ‘the Treaty is relevant to all ages’ (*Muriwhenua Fishing Report* 1988: 212).
- 12 See also *Allocation of Radio Frequencies Report* 1990: 42–3.
- 13 The Tribunal continued: ‘It is a record matched only by the Government’s opposition and its determination to impose instead an ascendancy, though cloaked under other names such as amalgamation, assimilation, majoritarian democracy, or one nation’ (*Taranaki Report* 1996: 19).
- 14 See also *Whanganui River Report* 1999: 338–9.
- 15 See also *Waiheke Island Report* 1987: 39–40.
- 16 See also *Muriwhenua Fishing Report* 1988: 188–9, 192–4.

- 17 While King's civil rights efforts were conducted in a very different context, both Te Whiti and Gandhi were engaged in non-violent resistance to colonial rule.
- 18 See also *Taranaki Report* 1996: 18.
- 19 The Tribunal qualified this position by describing its own mandate with regard to the Treaty, adding that: 'Our function is to determine whether persons are prejudiced through Crown actions contrary to the Treaty and if so, the action that might be taken to compensate for or remove that prejudice' (*Orakei Report* 1987: 185–6).
- 20 See also *Manukau Report* 1985: 76 and *Ngai Tahu Report* 1991: 204.
- 21 See also *Muriwhenua Land Report* 1997: 12–3, 54, 56, 64, 66–7, 68–9, 73, 74, 76, 77, 87, 89, 106–8, 392.
- 22 See also *Ngai Tahu Report* 1991: 51, 375, 381, 968, 969, 972–4.
- 23 As the Tribunal stated in the *Manukau Report* (1995) 'the omission to provide that protection is as much a breach of the Treaty as a positive act that promotes those rights' (*Manukau Report* 1995: 70). Similar statements are made in the *Orakei Report* 1987: 149.
- 24 See also *Taranaki Report* 1996: 189–288 and *Muriwhenua Land Report* 1997: 327–8.
- 25 See similar comments in the *Ngai Tahu Report* 1991: 975.
- 26 See also *Whanganui River Report* 1999: 347–8.
- 27 See also *Orakei Report* 1987: 153–4.
- 28 See also *Ngai Tahu Report* 1991: 502–3.
- 29 The Tribunal goes on to criticise the actions of the Governor. 'The disregard of customary tenure, institutions, and process occurred despite the advice of the Board of Native Affairs. In that respect, the Governor's actions were contrary not only to the Treaty but also to principles of law' (*Taranaki Report* 1996: 79).
- 30 See further Graham 1995. In response to this problem, there have been calls for more recognition of historical specificity, with the suggestion that attention be 'occupied with the relations of authority which secure professional, political, and pedagogical status through the strategy of speaking in a particular time and from a specific place' (Bhabha 1991: 57).

- 31 Linda Tuhiwai Smith gives the example of Aboriginal activist Bobbi Sykes, who, at an academic conference on postcolonialism, asked ‘What? Postcolonialism? Have they gone home?’ (Smith 1999: 24).

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