

DENIAL, ACKNOWLEDGEMENT AND PEACE BUILDING THROUGH RECONCILIATORY JUSTICE

August 2001

ROBERT JOSEPH¹

INTRODUCTION

Attempts to address and settle injustices against Indigenous Peoples are in motion in the Anglo-Commonwealth and elsewhere. Unfortunately post-settlement agreement concerns emerge with growing frequency which indigenous polities are either unprepared for or are unable to effectively resolve. Even more alarming is the fact that little academic attention has been focussed on the complex dynamics of the post-settlement development phase. What emerges is that there is a crucial need for moving analysis beyond the aspirational legal instruments that emerged from negotiations towards an examination of specific aspects of the post-settlement development phase. This article will briefly highlight some post-settlement tensions from the *Waikato Raupatu Claims Settlement (WRCS)*. The politics of denial and its insidious effects in New Zealand and elsewhere will be discussed extensively followed by the notion of reconciliatory justice as a dispute resolution concept, ideal, process and strategy for overcoming the politics of denial and to appropriately resolve some of the inevitable inter- and intra- post-settlement challenges, issues and tensions that emerge.

POST-SETTLEMENT TENSIONS

Implementation Concerns

Henare cautioned that post-settlement implementation and development involve matters that are quite different to those which were of importance during the negotiation of claims and following settlement proceedings.² The successful post-settlement implementation of the WRCS is a complex, long-term project that has not eventuated in one quick government action. Implementation is occurring in stages, providing local communities and

¹ LLB, LLM, *PhD Candidate*, University of Waikato, Hamilton. Ngāti Paretekawa, Ngāti Te Kohera, Ngāti Kahungunu, Ngāti Rangitane, Ngai Tahu and Pakeha. Comments welcome at rajoseph@waikato.ac.nz.

² Henare, D in 'Post Settlement Issues' in *Strategies for the Next Decade* (1997) at 23. Interestingly, an Australian Government report in 1975 listed a number of Indigenous settlement concerns that continue to emerge in contemporary Indigenous politics in Australia, Canada, New Zealand and elsewhere. Australia, *Aboriginal Land Rights Commission* (Second Report, April 1974, The Government Printer of Australia, Canberra, 1975) at 6,7.

neighbours with time to adjust to the realities of new governing structures. There are and will continue to be no assurances that the implementation of the WRCS will run smoothly, and no guarantees that difficulties will not occur within and between the local communities. Implementation is working in many areas and is failing in others. It has entered rapidly in some areas and much more slowly in areas that do not deem themselves ready to undertake new responsibilities.³ Thus, settlement implementation and development is a moving amorphous target.

Leadership Errors

The extensive reliance of the settlement upon multiple tiers of committees has imposed heavy personal and institutional demands on the Tainui infrastructure at the local level. Typically, the implementation of settlements locally carries its share of conflict and criticism. The Tainui governance structures - the Kauhanganui and Te Kaumarua - like all other governments have and will continue to make mistakes.⁴ Occasionally, infighting, adverse options, poor investments, what is perceived as a new stratum of Tainui elite, nepotism and other leadership struggles have and will emerge. When local residents become offended their frustration is directed towards the locus of power only to find it at their doorstep. Thus, with empowerment comes responsibility and it is imperative that the people collectively and individually adjust past mindsets to accommodate the inevitable post-settlement development and implementation tensions. The challenge for the people of Tainui, as I see it, is to adjust entrenched attitudes that hinder personal and collective development. Post-settlement development demands positive change. Nonetheless, these and other post-settlement tensions will continue to emerge both at the inter- and intra-tribal levels.

PERNICIOUS POLITICS OF DENIAL

This article will now discuss the politics of denial to illustrate how it contributed significantly to the protracted raupatu injustice and its subsequent effects but moreover to show how it perhaps contributes to post-settlement injustices. The politics of denial was (and

³ Coates, K *Degrees of Separation: First Nations Self-Government in British Columbia* (University of Waikato, Hamilton, 1996) at 25.

⁴ See for example, Bidois, V 'Mahuta deal axed as tribe seeks cash sale' *New Zealand Herald* (14 August, 2000); Yandall, P 'Tribal council accused of blunders' *New Zealand Herald* (31 July 2000); Taylor, K 'Tainui braces for \$24m claim after court loss' *New Zealand Herald* (23 December 2000); Taylor, K 'Back to square one' *New Zealand Herald* (8 January 2001); 'Tainui in land sale confusion' *New Zealand Herald* (16 January 2001); Taylor, K 'News blacker for Tainui' *New Zealand Herald* (20 February 2001); 'Tainui seeks strategy to satisfy bank' *New Zealand Herald* (3 March 2001) to name a few. Online at <http://www.nzherald.co.nz>.

in many ways continues to be) perhaps one of the most pernicious dimensions of colonial injustices given that it is a significant barrier to actualising justice. Injustices against Maori have been perpetuated through the subtle culture of denial that prevails in New Zealand society. Denial includes various processes by which people block, shut out, repress or cover up certain forms of disturbing information or else evade, avoid or neutralise the implications of this information. Stan Cohen provides an authoritative classificatory framework for analysis of the official and popular discourse about denial.⁵

Content: Literal, Interpretative or Implicatory Denial

Literal Denial - At times, there is a type of denial where it is asserted that something did not happen or is not true. The facts of the matter are being denied: ‘there was no massacre,’ ‘they are all lying,’ ‘we do not believe you.’ Common to all such assertions is a refusal to acknowledge the facts – for whatever reason, in good or bad faith, and whether these claims are true or blatantly untrue. An example of literal denial is the so called ‘revisionist history’ of the annihilation of European Jews, which dismisses the entire event as a hoax or a myth.⁶ An example in New Zealand was the controversy last year over the holocaust denial by Dr Joel Hayward of Massey University in his master’s thesis written at Canterbury University in 1992 where he claimed there was no evidence of the extermination of Jews in Hitler’s Germany; that gas chambers had not existed, and that far fewer than six million Jews died at Nazi hands.⁷ An example even closer to home was the recent controversy at the University of Waikato with the enrolment of the alleged neo-Nazi, Hans-Joachim Kupka.⁸ Professor Dov Bing of Waikato University even delivered two papers at an international conference in Paris last year entitled ‘holocaust denial and New Zealand universities’ and ‘the denial of holocaust denial at the University of Waikato.’⁹

⁵ Cohen, S *Denial and Acknowledgement: The Impact of Information About Human Rights Violations* (Centre of Human Rights, Faculty of Law and the Harry S. Truman Research Institute for the Advancement of Peace, Hebrew University, Jerusalem, 1995) at 19.

⁶ See for example, Schmidt, M & Vojtovic, R ‘Holocaust Denial and Freedom of Expression’ in Orlin, T, Rosas, A & Scheinin, M *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Institute for Human Rights, Abo Akademi University, Turku / Abo, 2000) at 133-158; Lipstadt, D *Denying the Holocaust: the Growing Assault on Truth and Memory* (Penguin Books, 1994) and Totten, S, Parsons, W & Charmy, I (eds) *Century of Genocide: Eye Witness Accounts and Critical Views* (Garland Publishing Inc, New Garland Publishing Inc, New York, 1997).

⁷ See Ansley, G ‘Australian buys a fight using the net for Holocaust denial’ in *New Zealand Herald* (14 October, 2000) and Walsh, R ‘A-plus equals anger for Jewish groups’ *New Zealand Herald* (11 December 2000).

⁸ ‘Varsity student in race crimes probe’ *Waikato Times* (25 July 2000); ‘Holocaust student drops PhD study’ *Waikato Times* (29 June 2000); ‘Holocaust denier case review urged’ *Waikato Times* (6 July 2000). Online at <http://www.stuff.co.nz/inl/index/>.

⁹ ‘Kupka criticism going abroad’ *Waikato Times* (29 July 2000).

Interpretive Denial – More often the raw facts are not being denied, but they are given a different meaning from what seems apparent to others. Thus government officials responding to allegations about injustices to Maori might claim that ‘nothing happened.’ Something did happen but ‘this is not what you think it is,’ ‘not what it looks like,’ ‘not what you call it.’ What happened is the ‘transfer of populations’ not forced expulsion; ‘moderate physical pressure’ not torture. In all cases – by changing words, by euphemisms, by technical jargon – the observer disputes the cognitive meaning given to an event and re-allocates it to another class or event. A further ploy of the revisionist movement with its holocaust denial is a combination of both literal and interpretive denial (‘it did not happen,’ ‘it happened too long ago to prove,’ ‘the facts are open to different interpretations,’ ‘what happened was not genocide’). Referring to the Jewish holocaust, another revisionist, Dr Frederick Toben of Adelaide University, asserted:

Hitler fervently admired National Socialist Zionists and with their agreement tried to transport as many Jews as possible to Palestine where many were killed by religious zealots against the creation of a Jewish state. ... [Concentration] camps such as Auschwitz were in effect transit camps where hospital and similar facilities were provided until the transport system collapsed through Allied bombing.¹⁰

Toben seems to insinuate that Arabs not Nazis killed the Jews and that the Nazi death camps were in fact medical camps and were destroyed by (and so the blame shifts to) the Allies. Dr David Irving another revisionist historian moreover stated that Auschwitz death camp was in fact a ‘Disneyland for tourists’¹¹ which is a rather ludicrous interpretation to say the least.

A further recent example in New Zealand was the national controversy over the use of the term ‘holocaust’ by Associate Maori Affairs Minister Tariana Turia to the Psychological Society conference in Hamilton last year.¹² Turia stated:

‘What seems to not have received ... attention is the *holocaust* suffered by indigenous people including Maori as a result of colonial contact and behaviour.’¹³ [emphasis added].

¹⁰ Ansley, G ‘Australian buys a fight using the net for Holocaust denial’ in *New Zealand Herald* (14 October, 2000).

¹¹ Cited in Walsh, R ‘A-plus equals anger for Jewish groups’ *New Zealand Herald* (11 December 2000).

¹² See for example, ‘Minister hammers colonial holocaust’ *New Zealand Herald* (30 August 2000); ‘Holocaust remarks sets Race Relations office’s phones ringing’ *New Zealand Herald* (1 September 2000); ‘Holocaust MP considered quitting job’ *New Zealand Herald* (13 September 2000); and ‘Turia apologises over ‘holocaust’ statement’ *New Zealand Herald* (5 September 2000); ‘Ministerial psycho-babble’ *New Zealand Herald* (7 November 2000).

¹³ Turia’s full speech can be located in the *New Zealand Herald*, 31 August 2000 online at <http://www.nzherald.co.nz>.

This speech caused a political storm when it was interpreted as comparing Maori experience of colonialism to the Jewish holocaust of the Second World War. However, Mason Durie concluded that although the term holocaust might grate on the New Zealand psyche, when you think the population of 200,000 Maori in 1840 was reduced to 42,000 in 1900, that's pretty close to a holocaust.¹⁴

Implicatory Denial – At other times, there is no attempt to deny either the facts or the conventional meaning they are given. The observer rather denies the psychological or moral implications that might follow from the facts. It might be perfectly clear what is happening but we deny any responsibility as a citizen or neighbour to intervene usually through 'rationalisations:' 'its got nothing to do with me,' 'its worse elsewhere,' 'some one else will deal with it.' In such situations, these assertions may be perfectly justified, both morally and factually, or the denial is more an excuse for doing nothing. The facts are readily conceded but their moral message is denied. We do nothing for a number of reasons ranging from principled justification ('they are getting what they deserve') through to moral indifference ('I know what's happening – but it does not bother me,' 'why should I care?') to various forms of accommodation, tolerance and normalisation ('that's just what happens in places like that').¹⁵ Perhaps a recent example of implicatory denial was when the racially charged areas of the South Taranaki, Stratford and Taranaki Regional Councils refused to participate in the Taranaki Group set up on the recommendation of Race Relations Conciliator, Rajen Prasad, to address racial tensions in the region. The councils said they hadn't been sufficiently consulted or they saw the issue as one for New Plymouth.¹⁶

Organisation: Personal, Official or Cultural Denial

There is an obvious difference between those forms of denial that are personal, psychological and private and those forms that are shared, social, collective and organised which is most significantly the organisation context of the state and official discourse. Cohen states three possibilities:

¹⁴ Cited in Gifford, A *Nga Korero o te wa: A monthly summary of Maori news and views from throughout Aotearoa* (August 31, 2000, Vol 10, No 12) at 3. The chief executive officer of the New Zealand Maori Council, Manu Paul, stated that the banning by Prime Minister Helen Clark of the use of holocaust in a New Zealand context was similar to Adolf Hitler's practice of 'gagging the Jews and burning them off.' He stated that the word holocaust was appropriate to describe some parts of New Zealand history, in which the Maori population declined 80% in a century. Gregory, A 'Clark behaving like Hitler, say Maori' *New Zealand Herald* (8 September 2000).

¹⁵ *Supra*, n. 5 (Cohen) at 25.

¹⁶ Gifford, A *Nga Korero o te Wa: A monthly summary of Maori news and views from throughout Aotearoa* (December 31. 2000, Vol 13 No.12) at 6.

Personal Denial – At times we are talking about what appear to be wholly individual reactions or at least actions that can be studied at the psychological level. For example, spouses suspecting but then putting aside suspicions about their spouse's infidelities, and alcoholic and drug addicts refusing to acknowledge their dependency. These are variations of what may be termed personal denial which are different psychological ways of coping with knowledge.

Official Denial – At the other extreme, there are forms of denial which are public, collective and highly organised. In more totalitarian societies, such official denial extends from particular incidents ('the massacre did not happen') to an entire re-writing of history and a blocking-out of the present. Denial is not a private mechanism; the state has made it impossible or dangerous to acknowledge the existence of past and present realities. In more democratic societies, official denial is more subtle – a twisting of the truth, a setting of the public agenda, tendentious leaks in the media, selective concern about suitable victims—where the whole process of the 'manufacture of consent' is exposed by scholars such as Chomsky.¹⁷ Interestingly, denial here is not a personal matter but built into the ideological fabric of the state. The study of Indigenous Peoples' rights and settlements is simultaneously a study of the official techniques that are used to deny these realities – not just to observers but also often to perpetrators themselves.

An example of official denial in New Zealand was in 1926 when the government finally examined the *raupatu* land confiscations through the Sim Commission.¹⁸ The commission was unfortunately prevented from inquiring into questions of the lawfulness of the *raupatu* and from considering the *Treaty of Waitangi*. Consequently, the Sim Commission found not that the *raupatu* was unjust but that it had been excessive highlighting the large extent of official denial.

Cultural Denial – There are yet other forms of denial, which are neither wholly private nor officially organised by the state and are called cultural denial. Whole societies slip into collective modes of denial not dependent on a totalitarian and hegemonic form of thought control. Without being told what to think about, and what not to think about, and without being punished for 'knowing' the wrong things, societies arrive at some unwritten agreement about what can be publicly acknowledged. People will pretend to believe information that they know is false or fake their allegiance to meaningless slogans and outrageous ceremonies.

¹⁷ Chomsky, N *Necessary Illusions: Thought Control in Democratic Societies* (South End Press, Boston, 1989).

¹⁸ In 1926, the Government established a royal commission to inquire into 'confiscated land and other grievances' under Justice Sir William Sim, Vernon Reed, a legislative councillor, and William Cooper, a Maori of Wairoa. *Appendices to the Journal of the House of Representatives* 1928 at 6,7.

This happens even more in democratic societies.¹⁹ This might be a collective denial of the past, for example, the treatment of Indigenous Peoples in North America, Australia and New Zealand. Or people act as if they do not know about the present: whole societies may be based on forms of discrimination, repression or exclusion, which are ‘known’ about but never openly acknowledged.

The classic case of cultural/official denial was the colonial doctrine of *terra nullius* in Australia. The doctrine advocated that countries without political organisation, recognisable systems of authority or legal codes could legitimately be annexed because the country was without a sovereign recognised by European authorities, and was a territory where no body owned any land at all, where no tenure of any sort existed. Accordingly, Australia was settled based on this malign legal doctrine. This collective cultural denial was not officially challenged until the 1992 High Court decision of Australia in *Mabo v Queensland*.²⁰ In separate opinions the High Court rejected the Crown’s claim because it was based on the premise that the aboriginal lands were *terra nullius* prior to European settlement, despite the presence of Indigenous People.²¹ Brennan J held that the common law should be interpreted in conformity with contemporary values embraced by Australian society:

... it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country ...²²

The High Court thus reinterpreted the Australian common law property regime by ousting the previously relied upon fiction of *terra nullius* and forced Australians to challenge their culture of denial. Unfortunately, as Rangihau has warned you cannot legislate attitudes²³ and the pernicious culture of denial is still endemic in Australia. For example, on the 26 May 1997 Prime Minister John Howard gave a public personal apology to the Aboriginal People for the

¹⁹ Supra, n.5 (Cohen) at 27.

²⁰ *Mabo v Queensland*, (1992) 175 C.L.R. 1. For a good analysis of this case see Reynolds, H ‘The Mabo Judgment in Light of Imperial Land Policy’ in 1*UNSWLJ* (1993) at 16, and Pritchard, S *Indigenous Peoples, the United Nations and Human Rights* (Zed Books, Australia, 1998).

²¹ For an excellent analysis of the *terra nullius* fiction and its legal history in Australia, see Reynolds, H *The Law of the Land* (Penguin Books, Melbourne, 1988); and Reynolds, H *Frontiers: Aborigines, Settlers and Land* (Allen & Unwin, Sydney, 1987).

²² *Mabo v Queensland*, (1992) 175 C.L.R. 1, 41-2 (per Brennan. J).

²³ Rangihau, J ‘Being Maori’ in King, M (ed) *Te Ao Hurihuri: The World Moves On* (Longman Paul, 1981) at 173.

injustices of past generations but then went on to say that Australian history was not one of imperialism, exploitation and racism.²⁴

An example of cultural denial closer to home again was the coverage of Turia's comments on the Maori 'holocaust' and colonisation. She was labelled a 'radical' minister and the Prime-Minister, the Rt. Hon. Helen Clarke, commented: 'this sort of thing which causes all sorts of alarm bells to ring out in middle New Zealand is not helpful.'²⁵ Never mind whether it was true or not. It is interesting to note part of Turia's apology for causing the political storm over her use of the term 'holocaust.' 'I would be happy to take advice on the appropriate words to use for the horrors of my people. Whatever the words are, it will never lessen the degradation we have suffered.'²⁶ Perhaps a further example of cultural denial is the way some attribute contemporary Maori socio-economic conditions and cultural pain that resulted from the consequent land loss and diminution of Maori values to Maori laziness, inability to cope with the 'modern' world, or even to some genetic inferiority.²⁷ Interestingly, cultural denial even exists among Maori. The former Maori Affairs Minister Dover Samuels commented that Turia's speech was 'political and cultural correctness gone *porangi* (mad).'²⁸

Time: Historical or Contemporary Denial

Historical Denial – Historical or contemporary denial is the denial of the nexus between then and now in official and popular discourse. In some instances we are talking about denial of the past. Applying the concept of denial to past injustices, there are phenomena of collective forgetting ('social selective amnesia') and the selective refusal to acknowledge a particular historical record ('social selective remembrance'). Sometimes this amnesia is officially organised by the state. At other times governments do not officially sponsor denial, but it is nonetheless collective and organised. The classic example of historical denial in New Zealand (which was official denial at the time) was in *Wi Parata v Bishop of Wellington*²⁹ where Prendergast CJ held that on the foundation of the colony Maori were found without any kind of civil government or any settled system of law,

²⁴ Reuter 'Cheers, Jeers at Howard Apology' in *New Zealand Herald* (1997) B1, Press, A 'Apologies are just grandstanding' in *New Zealand Herald* (1997) B3.

²⁵ 'Warning to Turia: keep 'holocaust' opinions to yourself' in *New Zealand Herald* (31 August 2000).

²⁶ 'Tariana Turia's apology' Transcript in *New Zealand Herald* (6 September 2000).

²⁷ Jackson, M 'Justice: Unitary or Separate' in Novitz, D & Wilmott, B (eds) *New Zealand in Crisis* (1995) at 251.

²⁸ 'Warning to Turia: keep 'holocaust' opinions to yourself' in *New Zealand Herald* (31 August 2000).

²⁹ *Wi Parata v Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S) S.C. 72.

notwithstanding evidence and case law to the contrary.³⁰ Accordingly, Prendergast CJ held that Maori were ‘primitive barbarians’ with no body politic capable of granting cession. The *Treaty of Waitangi* therefore, was held to be a ‘simple nullity.’³¹ Furthermore, referring to Māori custom in s. 4 of the *Native Rights Act 1865* Prendergast CJ concluded:

as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. ... no such body of law existed.³²

The Chief Justice thus denied the existence of Māori rights under both the established doctrine of aboriginal title and the *Treaty of Waitangi*. The New Zealand judiciary therefore had no jurisdiction to entertain any Maori claims and Māori were institutionally denied justice, identity and citizenship.³³ At the stroke of a pen the ancient *iwi* and *hapu* laws, customs and institutions were extinguished and the *Treaty of Waitangi* disappeared from the legal landscape through this historical denial discourse. The Treaty was not resurrected until the 1970s³⁴ and the SOE cases³⁵ of the late 1980s, which means that this official denial lasted for a century. Hence, any refusal to acknowledge and redress Treaty injustices because it happened so long ago is historical denial.

More often, historical denial is less the result of a planned and conscious campaign than a gradual seepage of knowledge down some collective black hole. There is no need for manipulation to understand how whole societies collude in a shared amnesia in which discreditable historical truths are never talked about. This might occur both within a society and about other societies.³⁶ An example of this type of denial was the past sanctions imposed on South Africa from nations like New Zealand and Australia that criticised South African apartheid policies and yet practiced oppressive policies towards their own Indigenous Peoples. It was not until the decision to allow the South African rugby team to tour New Zealand in 1981 that a large number of New Zealanders stood beside Māori to protest against

³⁰ In *R v Symonds* (1847) NZPCC 387 the Court asserted that whatever the strength of Native title, it is entitled to be respected. Over the next thirty years several New Zealand cases followed the *Symonds* approach including the *Kauwaeranga Judgement* Native Land Court, 3 December 1870. Moreover, in *Re Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41, 49 the Court of Appeal held that the Crown was bound to a full recognition of Native proprietary rights.

³¹ *Wi Parata v Bishop of Wellington* (1877) 3 N.Z Jur. (N.S) S.C 72, 78.

³² *Ibid*, at 72, 79.

³³ This state organised official denial was further reiterated again by Prendergrast C.J in *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235, 238-9. See Frame, A ‘Colonising Attitudes Towards Māori Custom’ in *The New Zealand Law Journal* (17 March 1981) at 109.

³⁴ The *Treaty of Waitangi Act 1975*. This Act signified that the political and legal culture of denial articulated in *Wi Parata* was over at least in official discourse.

³⁵ *New Zealand Maori Council v Attorney-General* [1987] 1NZLR 641.

³⁶ *Supra*, n. 5 (Cohen) at 29.

South Africa and more importantly question New Zealand's own historical and official denial of racism. The protests and ensuing riots pitted New Zealander against New Zealander in front of an international stage. No longer could we deny the historical cultural denial that was endemic to New Zealand. No longer could the world be convinced that ours was a country of equality and harmonious race relations.³⁷

Denial is therefore a basic barrier to actualising justice since in the denier's mind no injustice has been done. Denial thus has a many manifestations and it excuses the failure to acknowledge injury in official and popular discourse and obviates the need for action to provide redress for historical and contemporary injustices³⁸ in order to provide for authentic measures for promoting reconciliatory justice and peaceful co-existence.

RECONCILIATORY JUSTICE

Reconciliatory Justice Conceptually

Reconciliatory justice³⁹ is fundamental to getting to settlement and is intrinsic to the viability and sustainability of Indigenous post-settlement agreement processes that require an ongoing commitment to future peace making and it is to be sustained in deeds and not just words. Reconciliatory justice is a pre- and post-settlement process in terms of overcoming a culture of denial and other barriers in the popular and official discourses of both the dominant and Maori societies. Reconciliatory justice focuses on the building of appropriate relationships by recognising and addressing past grievances and exploring future relationships at the post-settlement governance and grass roots levels. The settlement and post-settlement processes should, to a large extent, empower Maori to create a self-sustaining infrastructure self-determined, self-managed, and self-governed. Post-settlement reconciliation, therefore, involves a long-term commitment to establishing infrastructure and a cultural-political environment across levels of society (both State and Indigenous) that empower the Indigenous Peoples with resources for reconciliation and successful and sustainable development.

³⁷ See New Zealand Collection *1981 Springbok Tour: The Issues in Black and White: A Collection of Clippings* (University of Waikato Library, New Zealand, 1996); Newnham, T (ed.) *By Batons and Barbed Wire* (Real Pictures, Auckland, 1981) and History Department, *Counting the Cost: The 1981 Springbok Tour in Wellington* (University of Victoria, 1982).

³⁸ Havemann, P & Hocking, B *Denial and Co-Existence? Indigenous Peoples in Liberal Social Democracies – The Anglo-Commonwealth and the Nordic States* (Unpublished paper in author's possession, 2000) at 5.

³⁹ See generally Lederach, J *Building Peace: Sustained Reconciliation in Divided Societies* (United States Institute of Peace, Washington, 1997) at 23-37.

PROCESS NOT EVENT

Concretely doing reconciliatory justice can be distilled into seven ‘giant steps.’ Such a process never ends, forgiveness and peaceful co-existence may be achievable, but, as Havemann asserts, ‘to forget the past is to run the risk that the culture of denial will reassert itself and allow history to repeat itself.’⁴⁰ The process and outcome must therefore assist to overcome the politics of denial, to empower the powerless and to establish a new more appropriate relationship. The key steps for accomplishing reconciliatory justice, the promotion of social justice through reconciliation, include:

- Recognition - truth finding and telling of the injustices;
- Responsibility and remorse - acknowledgement and apology for the injustices;
- Restitution - of Maori land and power to determine its use;
- Reparation - for injustices in financial terms recognising that ethnocidal and genocidal harms are really incompensable in this way;
- Redesign - of state political-legal institutions and processes to empower Maori to participate in their own governance and the government of the state.⁴¹
- Refraining - from repeating the injustices
- Reciprocity – the obligation to do unto others as you would have them do unto you; to give as you have been given.

RECOGNITION – Truth Finding and Telling

With Maori grievances and accounts of genocide and ethnocide, understanding these accounts of suffering and systemic injustice should trigger moments of truth. It is during these moments that human beings should begin to understand what justice signifies in view of the injustices of the past. Maori want answers to their questions about what happened, and perpetrators and later denialists need to understand what they have done, to whom and the subsequent effects of the action or inaction. The truth therefore is a fundamental requirement for reconciliatory justice and the reconstruction of society based on peaceful co-existence. The WRCS is the outcome of a long process of truth seeking and telling through various

⁴⁰ Havemann, P ‘Reconciliation and Discrimination: Indigenous Peoples, Colonisation and the State in the ‘Old Dominions’ (Australia, Canada and New Zealand)’ in *A Dialogue on Indigenous Rights in the Commonwealth* (Conference Proceedings, Institute of Commonwealth Studies, University of London, 23 July 1999) at 55.

⁴¹ *Idem*.

petitions and deputations,⁴² the *Sim Commission* 1926, the *Waikato-Maniapoto Claims Settlement Act 1946*, the Manukau Report 1985 of the Waitangi Tribunal,⁴³ and the judgment of the New Zealand Court of Appeal in the *Coal Corp* case.⁴⁴ Commenting on the Preamble of the *Waikato Raupatu Claims Settlement Act 1995*, Solomon noted:

what will be achieved ... is to get into the public record the real history of what happened to Waikato during the years before the wars, the effect of that war on our people and the results of the land confiscations.⁴⁵

RESPONSIBILITY - Acknowledgement

The concept of acknowledgement it is to have the truth acknowledged. Acknowledgement is what happens when private knowledge becomes officially sanctioned and enters into the public discourse. This is what people want in the ‘truth and acknowledgement phase’ of reconciliatory justice – not new information but some public recognition of what is already known.⁴⁶ As Solomon noted ‘our history will now be publicly acknowledged.’⁴⁷ Through acknowledgement, dominant groups are induced to recognise and confirm past and present injustices. Particular negative emotions (guilt, shame, anger) ought to be aroused and steps should be taken to make things right. Indeed, Bettelheim commented: ‘what cannot be talked about cannot be put to rest, and if it is not, the wounds will continue to fester from generation to generation.’⁴⁸ Then comes the linkage stage of empowerment: recognition of the possibility of ‘doing’ justice not just ‘talking’ about it. Finally, the dominant and Maori groups should be willing to do something to change for the better. Unfortunately, denial through techniques of neutralisation emerge when acknowledging that

⁴² To cite some examples, in 1866 Wiremu Tamihana petitioned Parliament to return the confiscated lands to the Maori owners; in 1876 King Tawhiao met with the Native Minister, McLean, to discuss the return of *urupa* which were promised but not enacted for a century under the *Waiuku Native Grants Act*. In 1884, King Tawhiao led an unsuccessful deputation to England to petition Queen Victoria for grievances between Māori and the Crown including the raupatu. The following year Tawhiao appealed to the New Zealand government to establish a Maori Council of Chiefs but was denied any support. In 1907 King Mahuta drafted a petition to King Edward asking that Maori be put on the same footing as Pakeha; and in 1914 King Te Rata visited England requesting Imperial Government intercession.

⁴³ As an institution, the Waitangi Tribunal has played a crucial role in the truth finding and telling stages of Maori claims and has played a major role in the settlement of *Treaty of Waitangi* grievances. Consequently, the Reports of the Tribunal are documents for truth finding and telling addressing legal, cultural and historical matters. See the database of the Waitangi Tribunal and its reports at http://www.knowledge_basket.co.nz//topic/4/waitr.

⁴⁴ *Tainui Maori Trust Board v Attorney-General* [1989] NZLR, 513, 528 (CA).

⁴⁵ Solomon, S *The Waikato Raupatu Claims Settlement Act: A Draft Users Guide to the Act as at 28 October 1995* (Tainui Maori Trust Board, Hamilton, 1995) at 4.

⁴⁶ *Supra*, n. 5 (Cohen) at 29.

⁴⁷ *Supra*, n. 45 (Solomon) at 4.

⁴⁸ Bettelheim, B *Freud and Man's Soul* (Chatto and Windus, London, 1983).

something happened – where people either refuse to accept the category of acts (interpretative and implicatory denial) to which it is assigned (‘genocide,’ ‘massacre,’ ‘holocaust’) or present it as morally justified. ‘Maori weren’t using the land,’ ‘Maori were uncivilised anyway,’ ‘its all part of progress,’ and ‘Maori fought the Crown and lost.’

Although truth telling and acknowledgement may be painful forms of shaming, reconciliatory justice is a process involving re-integration into society on the pre-condition of a commitment to peace building. Accordingly, the preamble of the WRCSA acknowledges the history of the people of Tainui in their quest for justice and it records the detailed steps of the Crown in a litany of unsatisfactory outcomes from the petitions of the 1860s onwards. The Crown acknowledged in the WRCSA that it unjustly invaded the Waikato,⁴⁹ initiated hostilities against the Kīngitanga,⁵⁰ unjustly confiscated approximately 1.2 million acres of land from Tainui *iwi*,⁵¹ and that the effects of the Raupatu have lasted for generations.⁵²

REMORSE - Apology

Receiving an apology for injustices, however long ago, is always an important step in the healing process for reconciliation. Indeed, Nicholas Tavuchis’ definition of a meaningful apology is instructive: ‘To apologise is to declare voluntarily that one has no excuse, defence, justification or explanation for an action or inaction.’⁵³ Hence, one of the most important aspects of the Crown’s settlement offer in the Deed of Settlement and the WRCSA was the formal apology.⁵⁴ The apology, however, must be remorseful to be effective. Accordingly, the person who gives the apology, the wording and even the setting in which the apology is given, are very important when apologising for injustices. Consequently, the wording was given much thought by both parties. The Crown included the formal apology to acknowledge that the people of Waikato-Tainui suffered grave injustices which significantly impaired their economic, social and cultural development. In the apology the Crown expressed profound regret and apologised ‘unreservedly’ for the suffering and hardship caused to the people of Waikato-Tainui. Importantly, the apology confirmed the validity of the Tainui claim which was born by many generations. The Crown sought to atone for these acknowledged injustices on behalf of all New Zealanders and also apologised publicly. On 3 November 1995, Queen

⁴⁹ *Waikato Raupatu Claims Settlement Act 1995*, Clause E, Preamble.

⁵⁰ *Idem*.

⁵¹ *Ibid*, Clause F, Preamble.

⁵² *Idem*.

⁵³ Tavuchis, N in Vicencio, V& Verwoerd, W *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, University of Cape Town Press, 2000) at 74.

⁵⁴ *Waikato Raupatu Claims Settlement Act 1995*, Clause 3.6, Preamble.

Elizabeth II was in Wellington and she signed the Act and thus endorsed (among others things) the apology. Solomon stated that her signing was symbolic because on two occasions Tainui sought help from the English monarchy - Queen Victoria and King George – to acknowledge and settle the raupatu injustice and their grand daughter signed the Act with an official apology.⁵⁵

The apology was in both Maori and English and acknowledged that the Crown acted ‘unconscionably and in repeated breach of the principles of the *Treaty of Waitangi* in its dealings with Tainui. The importance of the apology cannot be overstated given that it is the ultimate course to finally overcoming the political and legal denial, at least officially, that hitherto existed in New Zealand about Tainui. Furthermore, the formal apology goes a long way to restoring harmony after 132 years of pain and injustice. The apology does not, however, mean that the people of Tainui forget the past, but it gives the Crown an opportunity to make amends, and for Tainui and the Crown to move on with the healing process in a new relationship. Official denial has been symbolically overcome but the task of achieving understanding, of overcoming cultural denial, by the settler population and even among some Maori is still to be achieved.

RESTITUTION – of Maori land

Reconciliatory justice involves the restitution of what was taken to right the balance - land for land and power to determine its use. In the Preamble of the WRCSA it states ‘Tainui pursued compensation on the established principle of *‘i riro whenua atu, me hoki whenua mai’* – as land was taken, land must be returned.’⁵⁶ Moreover, the Crown recognised the significance of the ‘land for land’ principle and both parties agreed that the Crown should make full and final restitution to Waikato in respect of the raupatu claim.⁵⁷ The Act further states that the Crown holds only a small portion of the land originally confiscated.⁵⁸ Consequently, the restitution of land amounted to approximately 40,000 acres⁵⁹ with the Crown retaining 50,000 acres of mostly conservation land but with a permanent Tainui representative on the Waikato Conservation Board to assist in managing its use. Despite these shortcomings, the settlement does not restore the Waikato River to Tainui nor have interests in sub-surface minerals been restored.

⁵⁵ Supra, n. 45 (Solomon) at 2.

⁵⁶ *Waikato Raupatu Claims Settlement Act 1995*, Clause O, Preamble.

⁵⁷ Ibid, Clause S (b) and (c), Preamble.

⁵⁸ Ibid, Clause W, Preamble.

⁵⁹ Tainui Maori Trust Board, *Tainui Maori Trust Board Annual Report 1995* (Tainui Maori Trust Board, Hamilton, 1995) at 12.

REPARATION - Compensation

Reconciliation that can lead to a culture and relationship of trust also requires that other reparations and adjustments take place. Reconciliation must include concrete deeds and can therefore never be a cheap word or process. Symbolic reparation is essential including an apology or some other culturally appropriate intervention, but the importance of symbolism does not minimise the need for concrete and financial reparation measures.⁶⁰ It is moreover vital to acknowledge that ethnocidal and genocidal injustices are really incompensable in this way. Accordingly, another guiding principle of the WRCS was *kei te moni hei utu mo te hara* – the money is acknowledgement for the crime.⁶¹ The Crown has acknowledged the raupatu injustice and its subsequent effects and given that a guiding principle for Tainui was land for land which was impossible, compensation was accepted as reparation for these incompensable harms. Redress in financial terms amounted to \$170 million plus interest on the principal sum of the settlement.

RE-DESIGN - of state legal and political institutions

Reconciliation can only come after resolution of the issues. The conflict over issues has to be resolved, the immediate grievances have to be settled amicably and then reconciliation can follow. Once the grievance has been settled, however, it is not the end. Reconciliatory justice is a process not event. Settlements are not solutions but frameworks for a solution because the pain and continuing effects of the raupatu and Treaty injustices do not disappear overnight. For this reason, it is unjust to continue to perpetuate injustices resulting from unjust laws and institutions. A framework is thus required for healing to take place and that framework is institutions that allow all sections to work together. For Tainui, the power to make decisions that affect their lives was paramount.

The WRCS and institutional re-design was intended to give Tainui this power. Moreover, a new relationship between the Crown and Tainui was established based on trust, respect, and dignity. Consequently, state political and legal institutions were re-designed in theory to empower the people to effectively participate in their own governance and the government of the nation-state. The statutory Tainui Maori Trust Board has been abolished and the people of Tainui have collectively agreed on the mode of post-settlement governance

⁶⁰ Orr, W 'Reparation Delayed is Healing Retarded' Vicencio, V& Verwoerd, W *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, University of Cape Town Press, 2000)at 240-1.

⁶¹ *Waikato Raupatu Claims Settlement Act 1995*, Clause O, Preamble.

– the Kauhanganui - drawing on three representatives from each of the sixty-three marae of the settlement.⁶² The significance of this new institution is that the Maori Land Court does not retain jurisdiction over the Kauhanganui, it therefore being accountable to the iwi collectively and not the Crown as in the past.

Furthermore, the settlement vests some of the lands returned in the first Maori King, the late Potatau Te Wherowhero. Under this new tribal land title no individual can succeed to these lands, the lands are vested in three custodial trustees and can be alienated by them only with the agreement of seventy-five per cent of the beneficiary marae.⁶³ Moreover, Te Wherowhero land cannot be alienated under the *Resource Management Act 1991*, nor do the Maori Land Court or the Waitangi Tribunal retain jurisdiction over matters dealt with under the settlement.

REFRAIN - from repeating injustices

It is obviously vital that the Crown and mainstream society refrain from repeating the injustices of the past so that authentic reconciliatory justice and peaceful co-existence can be achieved. In addition, models of institutional design and the norms embedded in these models are intended to prevent the repetition of processes of external domination over iwi affairs.

RECIPROCITY - Utu

Once Maori groups have been through this protracted but empowering process, I argue that there exists a strong obligation for the settlement group – the iwi - to do unto others as they would have them do unto you - to give as you have been given. Often, however, people are reluctant to take on such a responsibility to make right, which is another manifestation of the politics of denial. Both the Crown and the settlement group must seek not simply to restore but to transform. Traditionally, *utu* was an integral part of Maori society which did not include reciprocity or satisfaction of the equivalent but greater in return.⁶⁴ *Utu* was not only for restoring mana but indeed increasing mana! Moreover, there existed and continues to exist a collective rather than an individual responsibility and a sense of direct as well as indirect liability in traditional Maori society. Maori customary law thus embodied ideals, hopes and potential, as well as a longing for harmony and reconciliation which ideals must also be

⁶² *Waikato Raupatu Claims Settlement Act 1995*, sections 27-29.

⁶³ *Ibid*, section 19.

⁶⁴ See Firth, R *Economics of the New Zealand Maori* (Government Press, Wellington, 1959); Walker, R *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, Auckland, 1990); and Salmond, A *Between Worlds: Early Exchanges between Maori and Europeans, 1773-1815* (Viking Press, Auckland, 1997).

incorporated collectively in the post-settlement period as an integral component in the reconstruction of society based on peaceful co-existence.

CONCLUSION

The *Waikato Raupatu Claims Settlement* is an outstanding Indigenous settlement Agreement because it was and continues to be a landmark case globally for overcoming the politics of denial and restoring the balance for reconciliation between the powerful settler state and the powerless Maori. However, the WRCS is not perfect and the post-settlement development phase is waning. Still, it is a step towards achieving reconciliation for past injustices, reversing generations of paternalistic control, administration at a distance, and non-Tainui rule over Tainui peoples' lives. Consequently, I maintain that there is much to learn from the settlement process for the successful post-settlement development and dispute resolution stages. The settlement was and is much more than a commercial transaction. Perhaps the present protracted governance impasse can be overcome through this same process – recognition and acknowledgement of the truth, remorse through an apology, restitution and reparation for harms incurred, redesign of political institutions (including Maori), refraining from repeating injustices and reciprocity. The aim of reconciliatory justice is to make things right between adversaries and in the words of Dworkin, ‘to find the best route to a better future.’⁶⁵ Hence the WRCSA is both revolutionary and evolutionary, and new realities - whether economic, political, cultural or social - require new approaches, patience, commitment, unity, mutual trust, goodwill and hard work. Thus, the challenge in doing justice and making the settlement work has in no way diminished and it is still not too late.

Kia ora tatou katoa

⁶⁵ Dworkin, *D Law's Empire* (Belknap Press, Harvard University, Massachusetts, 1986) at 413.

SELECT REFERENCES

PRIMARY SOURCES

Cases and Statutes

1. *Kauwaeranga Judgement* Native Land Court, 3 December 1870. (NZ).
2. *Mabo v Queensland*, (1992) 175 C.L.R 1, 41-2. (Australia).
3. *New Zealand Maori Council v Attorney-General* [1987] 1NZLR 641.
4. *R v Symonds* (1847) NZPCC 387. (NZ).
5. *Re Landon Whitaker Claims Act 1871* (1872) 2 NZCA 41. (N.Z).
6. *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235, 238-9.
7. *Tainui Maori Trust Board v Attorney-General* [1989] NZLR, 513, 528 (CA).
8. *Wi Parata v Bishop of Wellington* (1877) 3 N.Z Jur. (N.S) S.C 72.
9. *New Zealand Settlement Act 1863*.
10. *Treaty of Waitangi Act 1975*.
11. *Waikato Raupatu Claims Settlement Act 1995*.

SECONDARY SOURCES

Books

1. Belich, J *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Penguin Books, Auckland, 1988).
2. Bettelheim, B *Freud and Man's Soul* (Chatto and Windus, London, 1983).
3. Coates, K *Degrees of Separation: First Nations Self-Government in British Columbia* (University of Waikato, Hamilton, 1996).
4. Cohen, S *Denial and Acknowledgement: The Impact of Information About Human Rights Violations* (Centre of Human Rights, Faculty of Law and the Harry S. Truman Research Institute for the Advancement of Peace, Hebrew University, Jerusalem, 1995).
5. Chomsky, N *Necessary Illusions: Thought Control in Democratic Societies* (South End Press, Boston, 1989).
6. Dworkin, D *Law's Empire* (Belknap Press, Harvard University, Massachusetts, 1986).
7. Frame, A 'Colonising Attitudes Towards Māori Custom' in *The New Zealand Law Journal* (17 March 1981).
8. Havemann, P 'Reconciliation and Discrimination: Indigenous Peoples, Colonisation and the State in the 'Old Dominions' (Australia, Canada and New Zealand)' in *A Dialogue on Indigenous Rights in the Commonwealth* (Conference Proceedings, Institute of Commonwealth Studies, University of London, 23 July 1999).
9. Havemann, P & Hocking, B *Denial and Co-Existence? Indigenous Peoples in Liberal Social Democracies – The Anglo-Commonwealth and the Nordic States* (Unpublished paper in author's possession, 2000).
10. Henare, D in 'Post Settlement Issues' in *Strategies for the Next Decade* (School of Maori and Pacific Development, Waikato University, 1997).
11. History Department, *Counting the Cost: The 1981 Springbok Tour in Wellington* (University of Victoria, 1982).

12. Lederach, J *Building Peace: Sustained Reconciliation in Divided Societies* (United States Institute of Peace, Washington, 1997).
13. Newnham, T (ed.) *By Batons and Barbed Wire* (Real Pictures, Auckland, 1981).
14. New Zealand Collection 1981 *Springbok Tour: The Issues in Black and White: A Collection of Clippings* (University of Waikato Library, New Zealand, 1996).
15. Orr, W 'Reparation Delayed is Healing Retarded' Vicencio, V & Verwoerd, W *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, University of Cape Town Press, 2000) at 240-1.
16. Reynolds, H *The Law of the Land* (Penguin Books, Melbourne, 1988).
17. Schmidt, M & Vojtovic, R 'Holocaust Denial and Freedom of Expression' in Orlin, T, Rosas, A & Scheinin, M *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Institute for Human Rights, Abo Akademi University, Turku / Abo, 2000).
18. Solomon, S *The Waikato Raupatu Claims Settlement Act: A Draft Users Guide to the Act as at 28 October 1995* (Tainui Maori Trust Board, Hamilton, 1995).
19. Stannard, D *American Holocaust – the Conquest of the New World* (Oxford University Press, 1993).
20. Tainui Maori Trust Board, *Tainui Maori Trust Board Annual Report 1995* (Tainui Maori Trust Board, Hamilton, 1995).
21. Tavuchis, N in Vicencio, V & Verwoerd, W *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Zed Books, University of Cape Town Press, 2000).
22. Totten, S, Parsons, W & Charney, I (eds) *Century of Genocide: Eye Witness Accounts and Critical Views* (Garland Publishing Inc, New Garland Publishing Inc, New York, 1997).
23. Walker, R *Ka Whawhai Tonu Matou: Our Struggle Without End* (Penguin Books, Auckland, 1990).

Newspapers

1. *Waikato Times* (Hamilton). Online at <http://www.stuff.co.nz/inl/index/>.
2. *New Zealand Herald* (Auckland, New Zealand) to name a few. Online at <http://www.nzherald.co.nz>.
3. Reuter 'Cheers, Jeers at Howard Apology' in *New Zealand Herald* (1997) B1.
4. Press, A 'Apologies are just grandstanding' in *New Zealand Herald* (1997) B3.
5. Gifford, A *Nga Korero o te wa: A monthly summary of Maori news and views from throughout Aotearoa* (December 31, 2000, Vol 13, No 12). <http://webnz.co.nz/k00/aug00-k/kaug00.html>.