Brennan's book is useful for tracing the vicissitudes of public policy in relation to questions of a treaty, land rights and self-determination during the 1980s. The broken promises, the contradictions and inconsistencies, the lack of commitment make for depressing reading. In a sense this political history of Aboriginal affairs throws into focus Brennan's own political position in relation to reconciliation. There is little doubt of his commitment to a just resolution, but it is a commitment tempered by what can be achieved within the political context of federal governments. This context is politically conservative in relation to indigenous rights. For instance, Brennan alerts us to the point that without clear definitions the stronger term of self-determination becomes synonymous with, and diminished in meaning to the weaker concept of self-management. In the ATSIC legislation the term "self-determination" does not appear at all, it is replaced with "self-management" and "self-sufficiency". Brennan argues that some Aboriginal people definitely want more than these concepts imply and that:

> [E]ven if we do not subscribe to the separate nation idea, we must as a community remain open to allowing the descendants of the traditional owners of this land to determine their future as well as manage their own affairs, to set their agendas, though subject to the Constitution and laws of the Commonwealth.(p48)

There are a number of areas in Brennan's book which could be updated in the light of more recent events. The High Court decision in *Mabo* impacts on Brennan's discussion of the land rights issue. The Council for Reconciliation has been formed and begun its work. The establishment of the Council has seen a return to federal bipartisanship in Aboriginal and Torres Strait Islander affairs. In the international arena the Federal Minister for Aboriginal Affairs, Robert Tickner, has promoted the use of the concept of self-determination, although it is still defined within the limits of the Australian nation. In the domestic scene the Aboriginal Social Justice Commission has been established within the Human Rights and Equal Opportunity Commission. Mick Dodson has been appointed the first Commissioner. Finally the Aboriginal Provisional Government has continued to exert, some would say a growing, influence over the way Aboriginal people have themselves been defining the issues of sovereignty and self-determination.

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THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI, by Paul McHugh, Auckland, Oxford University Press 1991, 392pp, $39.95 ISBN 0195582268

At the recent Folk Law Conference held in Wellington an interesting discussion took place on the "status" of Maori language. Lawyers discussed

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its justiciability in terms of the *Maori Language Act*, and academics queried whether there was a specific right of use. Mere bystanders to the debate were the Maori delegates who sat bemused and hurt as a strange hermeneutic debate swirled about them. Finally a Maori speaker introduced a different perspective and reminded participants that any issue of rights in Maori language was not for the conference or for Pakeha to determine, but for Maori to proclaim.

Reading Paul McHugh's book has prompted in this reviewer a similar feeling of bemusement and a sense of overweening dispossession. For while the book is a well-documented and researched account of current Pakeha legal thinking on the rights of Maori and the need for "Treaty justice", it proceeds from a specific assumption — that the state has authority over Maori because of its sovereignty "which in turn arises from the consent given by the Treaty of Waitangi" (p2). In so doing the book has the same effect on Maori as the esoteric conference debate: it excludes any Maori analysis which may be different or which sees the issue framed within a divergent concept of rights. As such it renders Maori powerless because it denies them the validity of a language in which to articulate their own notion of rights: the only language, the only rights acknowledged, are those consistent with the author's presumption of Crown sovereignty.

McHugh consistently notes that his thesis is based solely within a Pakeha framework, but fails to acknowledge the act of dispossession which that implies. Indeed, his hopes that "a description of law and legal institutions as Pakeha will become ... inapposite (and) a more ... pluralistic legal system will evolve ... " (p383) seem to indicate that he believes such acknowledgement is unnecessary. Legal "realism" seems to require acceptance of the extant Pakeha law without the need to consider the bases of its imposition or the validity of its claims.

This approach occasions bemusement in many Maori because it indicates that contemporary legal theorists such as McHugh peddle the same myths about the cession of Maori authority and the rightness of Pakeha law as did the imperialists of last century. It occasions a sense of dispossession because it perpetuates the hurt engendered whenever another seeks to define who or what one is.

For this book, "set squarely within a Pakeha legal paradigm" (pxiii) is more than a mere legal text or an account of the evolving state of Treaty jurisprudence within Pakeha law. It is also a validation of the political and constitutional structures which underpin that jurisprudence. As such it perpetuates the process of Maori dispossession through which colonisation originally sought to impose its own language of rights, its own rhetoric of legitimacy.

Thus, its explanations of such purely "legal" phenomena as the concept of rights, aboriginal title, or customary law, are actually part of what the native American jurist Robert Williams calls the "discourse of conquest". They are the theories and ideas developed to justify and often sanctify the reality of colonial dispossession: they are the myths which have prevented both an adequate examination of the legal colonising enterprise and an acceptance of any notion of rights or law which was vested in the victims of that enterprise.

Indeed, there is a sad petulance in the closing section of the book where McHugh castigates Maori critics of his work (including this reviewer) as hostile conspirators acting within the Critical Legal Studies Movement

(pp383-85). His ability, or unwillingness, to perceive that Maori criticism may be sourced, not in a somewhat fashionable Pakeha legal theory, but in a Maori concept of rights and sovereign authority, betrays an essential neocolonial monism. It also illustrates that the new age of legal pluralism merely varies the manner, but not the extent, of the law's role in the Pakeha assumption of power over Maori.

By its very nature, the current legal interpretation of Maori rights is an exercise of power, but a power masked by the myth making processes of the law itself. As defined by the institutions of the state (most notably the Courts and the Waitangi Tribunal) the dialectic of Maori rights is foreclosed within a language and through voices acceptable to the state. This type of pluralism does not seek a recognition of voices that are different so much as it seeks to dismiss perceptions which the status quo might find challenging or — destabilising. It ultimately means that the definition of Maori rights, the understanding of what we as a people can do and be, is set not by Maori, but by the state — and that is the same philosophical base which first imposed the broody horrors of colonisation upon Maori.

Yet McHugh argues that the new instrumentalities being developed in New Zealand law are somehow different; that the move away from strictly positivist notions of right by the Court of Appeal and the Waitangi Tribunal somehow marks the end of preeminent Pakeha norms and authority. However, an analysis of the new jurisprudence, and in particular an analysis of the links between its origins and its contemporary manifestation, indicates that nothing has changed. The discourse of conquest remains just that.

McHugh argues that the doctrine of Aboriginal title permits a "modified continuance" of Maori rights within Pakeha law and that the Treaty of Waitangi imposes a specific fiduciary duty upon the Crown to protect those rights (Ch5, pp97-143). The origins of the latter duty, in a sense, lie in the current refinement of the former title by the Courts and Waitangi Tribunal. He rightly argues that Aboriginal title itself is sourced in the much older writings of the Salamanca Divines and other Western theorists concerned about the legal basis of their settlement in lands already occupied by indigenous peoples.

Essentially those theorists agreed that upon the assumption of sovereignty by the Crown in a new land, the Crown acquired the paramount title to the territory (and hence the paramount right to ensure that the writ of its law should run). However, that title is "burdened" or encumbered by aboriginal rights which only the Crown itself has the power to extinguish.

In *R v Symonds* (1847) [1840-1932] NZPCC 387 (SC), the Supreme Court confirmed that these precedents of colonial law (and particularly American law) were to apply in New Zealand, and that Maori retained legal rights in relation to their traditional land. Such consistency with imperial practice was however overturned in the *Wi Parata* case (1878) 3 NZ Jur 72 which held that all property rights derived from a sovereign grant and that therefore no uniquely protected Maori rights could exist. According to *Wi Parata*, the Treaty did not alter this position because Maori lacked the original sovereignty to cede the land to the Crown. In this sense, the Treaty was a "simple nullity".

Although a century of judicial thinking followed this decision, it is regarded by contemporary thinkers as technically flawed and an "aberration" in the context of international aboriginal rights. A new discourse of

co-operation has evolved based upon an elusive sense of Treaty partnership and spirit — what one writer has actually called a "jurisprudence of the wairua" or spirit.

Using specific statutory provisions such as s9 of the *State Owned Enterprises Act* 1986 which provided that the Crown is not permitted "to act in a manner that is inconsistent with the principles of the Treaty", the courts have rediscovered and refined the concept of aboriginal title. It is this refinement which now leads writers such as McHugh to call the Treaty the Maori Magna Carta and to assert that a legal framework is now laid that will vindicate Maori claims. The evolving rules of customary and conventional international law governing the rights of indigenous peoples, and the common law rules of cession, are now interpreted as ensuring that the Crown must honour its fiduciary duty towards Maori.

However, when that duty is synonymous only with a need to "consult" Maori, and when the spirit of partnership recognises the right of the Crown to ignore Maori claims in the exercise of its sovereign authority, Maori see little change. And within the confines of Pakeha law, that is perhaps inevitable since the history of colonisation has determined that any new jurisprudence will merely be a rationalisation of the same Pakeha hegemony which first established its bases and determined its parameters.

What is of concern to this reviewer is that McHugh does not acknowledge that hegemony — indeed, he is dismissive of those who do. Yet if there is to be true "Treaty justice" in this land, it will not come through some collective Pakeha anamnesis. It will only come with the recognition of a discursive concept of rights and authority sourced in the law and truths of Maori. Such recognition does not require McHugh's smug or reassuring nostrums of legal pluralism, but an honest commitment to work through the constitutional and political consequences of the sovereign acts attested to by signature in the Treaty of Waitangi. This book is regrettably a barrier to that process.

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