

The Subtle Science:- by Bernard Cadogan

Born, - made, - or just coming about, - constitutions depend on the *Subtle Science* of constitutional interpretation. It makes no difference whether they come in totalising constitutional documents, - as soon as they are off the press, they must be ratified and amended. "Soft" and flexible constitutions can be amended softly, softly, and flexibly.

As the young photo-journalist Dan Eldon (1970-93) put it:-

The Journey is the Destination. ¹

In the first lecture *Treaty and Method* I argued our own autochthonous process in New Zealand manages race-relations bi-laterally with reference to the Treaty of Waitangi. Treaty interpretation, constitutional interpretation, I argued, is done by means of *application* to current circumstances, though with reference to the original texts, with considerable regard to them. ² This can be a provisional process, the sum of compromises and accommodations. We are involved in a long haul conversation in New Zealand, one side of which - Maori, defend and promote Maori rights as guaranteed by the Treaty, while the other side, - the Crown - assesses the justice and reasonableness of Maori positions, defends its duty to govern, and in as much as it seeks to acknowledge and accommodate the rights of Maori, also watches out for the general rights of New Zealanders and for the general government of the country.

For New Zealand democracy is not only one of the world's first in the modern age, it is the best, the freest, the least trammelled, the least checked and balanced, one of the most progressive and responsive. We are able to do this because of the strong civic culture of New Zealanders - a culture nourished by Sport, by community feeling, by pubs and clubs and fellow-feeling and by quiet modest community service, rather than grand theories, though it is not un-nourished by books; - not un-nourished either by thoughtful editorials and columns and programmes from a media that has on the whole remained civic, persisted with its role as tribunes for all the people and not gone irresponsibly tabloid or stratified itself into class segments like in the UK.

Any New Zealand Government regards this democracy of ours as exemplary, with pride even, - definitely with respect, unless it's lost the plot. We are second to none for the quality of this democracy. The Treaty constitution in fact strengthens it, doesn't weaken or compromise it. The duty of Government is to preserve this democracy as our common *taonga*. Evils were done by limited men and women in colonial New Zealand trapped by the prejudices of the time, carried away by the power they thought they had. We have had a long debate in this country on how to rectify this and move on. We sustain self-correcting legal and political cultures. I would be interested if anyone could show me how this country is

¹ Eldon, Dan *The Journey is the Destination:- The Journals of Dan Eldon* Chronicle Books, San Francisco 1997.

² Gadamer, Hans-Georg *Truth and Method* Sheed and Ward London 1975 p. 163, p. 274. In Latin this was known as the *subtilitas applicandi*. There were three such "subtilities" the *subtilitas intelligendi*, the *subtilitas explicandi* and the *subtilitas applicandi*, knowing, explaining and applying.

in fact less democratic now because of the Treaty constitution of New Zealand, than it was in 1975 when Muldoon campaigned on “*New Zealand- the Way You Want It*”. I contend is that the converse is true, our democracy is as good as ever, if not better, - **that in fact we now have the opportunity to attain at long last a genuine, plural, liberalism in one country, under common government.**

In the second lecture *Oh Canada* I offered a highly sophisticated example of a modern state system managing a solar system of pluralisms, sharing the same British pedigree, the same sort of History of Infamy - that is, I tried to show how Grand Constitutionalism could only take the debate so far, yet how small “c” communitarian constitutionalism, of First Nations, the Prairie provinces and Quebec, has delivered Canada’s post-modern *modus operandi*. A lesson I wanted to draw from the experience of CPOC’s development and rise to power and its tenure in office, is that anti-minority populist parties find themselves excluded from the Treasury benches unless that party modifies as CPOC did and become responsible constitutional parties.

In this third lecture *The Subtle Science* I consider New Zealand’s credentials and opportunities as a truly Liberal pluralist state, considering how we non-invasively manage constitutional issues. I am concerned with accounting for the current process, rather than with theorizing. Constitutional exercises are not utopian or futurological. Revolutions are. **Constitutional exercises are mundane practical frameworks, not the ecstatic frenzies of a know-it-all Dr Strangelove, or a race to be up on a Kiwi Mt Rushmore.**

We are starting our Bicentenaries in 2014. Not only is 2014 the date for the conclusion of historic claims, but it marks the 200th anniversary of permanent European settlement among Maori in New Zealand, with Samuel Marsden’s foundation of the Bay of Islands mission. In 2040, I doubt that, if the world goes on as we know it, we will find that *Thunderbirds* has hit us and that we will be in a constitutional future-scape. Invasive solutions are the result of huge crisis and great trauma, and they often don’t stick. Just as we are right now over the road from where Sir George Grey lived in a bungalow where the Beehive now is, or just as we tower at this moment above where the shabby office was, in a rough and tumble hotel stood on Lambton Quay, that he did business from, and are now five floors above where the old flagstaff in this town stood for flag signals, so should the business of government and the basic roles we play, and the principles we apply, recognizably go on.

Our modest tasks are to be aware of the best global thinking, understand our age in the macro, and what our local NZT and the sum of our practices developing among us, amount to, for an autochthonous, New Zealand-rooted constitutionalism.

You will be aware of the strange companions I have on the lectern with me. They are a Russian doll and a slinky. Katushka here represents a weakness of generic constitutional thought in the British tradition – the teleological habit of the Whig Fallacy, which I think has flawed, can flaw, Treaty thinking, has rendered it not as intellectually and rationally stable as it could be. The slinky doesn’t have a name, but stands for the corrective I propose, hermeneutics, which is simply a non-teleological non-determinative way of understanding the processes you all practice and work on anyway with great professionalism, with political care and prudence, and with marked statesmanship, stateswomanship. **The steel spring will be used to explain how Lord Cooke’s doctrine of the “living Treaty” should be**

considered, that is in an interpretivist, hermeneutical way, and not in a Russian doll, teleological way.

I shall now tell you a wee story.

Once upon a time there was a little government. Those who did not like it, gave it the full style of:-

*“the monstrous little New Zealand Government.”*³

People like Lord Salisbury, the British Prime Minister, that is, who graced our Wellington shores on a 19 year old's gap year in 1851, then kept a jaundiced eye on us for the next 52 years.

The little government was extraordinary. It operated constantly in emergency mode. Its first decades were panic. **It was more vociferous than a scream-queen, yet as deadly as any irredentist state of the period, like Prussia, or Piedmont, Paraguay, Chile, or the expansionist United States.** It was aggressive and ambitious. It sent militias marching into the forests. It became a medallist weight-lifter at hoisting massive debts. It terra-formed a country 12,000 miles from home base, importing half a million people, the technology and capital to make it work. It ended up the only show in town by the 1890s. No wonder *The Lord of the Rings* and *Prince Caspian* were filmed here – we were acting out that past.

Yet it was set up originally as a proper liberal government in conditions of the separation of powers. The Whigs at their most classical liberal phase, between the 1830s and 50s, saw to this. Our first enacted constitutional statute, the *New Zealand Constitution Act 1852*, was the Greys' constitution for New Zealand. The 3rd Earl Grey and Governor Sir George Grey planned it as an exemplary liberal division- of-powers, yet assimilatory and homogenizing constitution. Then along came some Tory boys, during a fly-by-night government in 1852, who tagged and vandalized it a bit, plunking a life- appointed upper house on us, and trying to prevent us from becoming Britain's first federal constitution, but the doughty settlers and colonial patriarchs persisted in trying to make it work as federally as they could.

Separation of power was nonetheless an inbuilt principle. Multiple authorities provided checks and balances. Central Government and provincial governments of broad competence coexisted. A separate system again of government existed for the indigenous inhabitants of New Zealand on their lands under indigenous title. Government of Maori was still the Imperial Crown's responsibility, exercised by the Governor, though as the revenue for that was raised by the General Assembly, unstable diarchy characterized the division of power there. In the absence of party government, provincial leaders formed the nodes of power and influence as they rotated offices. 1850s-70s New Zealand was a rare instance of a form of government that can be called **constitutional caciquismo**. A *cacique* in Spanish and Portuguese is a regional political “boss”. The equivalents of US state governors sat in the House of Representatives. The country was run like a sports club, more or less, on the boards and committees of which, those colonial leaders sat who had the time and money and leisure to govern. It operated out of strange rickety sheds and honky-tonk hotels and salon bars. There was just one *cafe chantant* in Auckland where the Britomart Centre is, in

³ Roberts, Andrew *Salisbury: Victorian Titan* Weidenfeld, London 1999 p. 463.

1864 (that's a night-club or cabaret) while the Members and Ministers having nothing else to do with their time during Sessions regaled themselves there.

The little government though like a gremlin broke its bounds. In the 14 years 1861-75 the small ogre rearranged the country to its liking. First it plotted to have a war. It plotted a confiscation of Maori land. Cabinet mutined into maturity because ministers wouldn't discuss Maori policy with the Governor in Executive Council. It was deceitful and lacked British good faith and plain-dealing. It bent over backwards to overcome the division of powers. It got its war and turned itself into a war government. Ministry after ministry held office on the basis of who handled the war best. War, and then the stand-off from it, consumed all of two decades.

New Zealand statism begins with the nationalization of Maori lands (and their disposal in "asset sales") . The greedy monster didn't stop at that. It consumed the provinces with the *Abolition of Provinces Act 1875*. It created a myriad of local bodies instead. The Governor with the permission of the British Government gave it responsibility for Native Affairs over 1862-63. It set up a much trumpeted machine of racial assimilation that turned out to be just a harvester of land. Like a weir it stood still. Maori lay in the stagnant backwater and didn't move while their lands went fast over the top. Assimilation did not work as it was touted to, because forms of cultural segregation and non-violent strategies of Maori resistance and negotiation persisted right until the 1960s at least. After all these "triumphs", this Government assumed an astonishing burden of debt. **What snow was to the White Witch's Narnia, debt has always been to New Zealand.**

The war in New Zealand might have cost Britain 5 million pounds. During the 1870s the New Zealand Government raised 18,450,000 million pounds on the London markets for infrastructure development and immigration. New Zealand doubled its population over the next decade and developed its harbour works, road and rail and telegraph systems. The costs of colonization had gone through the roof as the British colonies shifted mid century from 18th century economies, into competing with one another for credit and immigrants and resources. ⁴

The New Zealand Government's behaviour has been put down to **pragmatism**. David Hamer ⁵and Mark Francis ⁶and Matthew Palmer ⁷have said so. What's pragmatic however

⁴ Belich, James *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* Penguin 2007 pp. 358-359.

⁵ Hamer, David *The Liberals: The Years of Power 1891-1912* Auckland University Press 1988 pp. 37-38.

⁶ Francis, Mark *Governors and Settlers:- Images of Authority in the British Colonies 1820-1860* Canterbury University Press, Christchurch 1992.

⁷ Palmer, Matthew *The Treaty of Waitangi in New Zealand's Law and Constitution* Victoria University Press 2008 p. 300.

McHugh, Paul "The Historiography of the New Zealand's Constitutional History" *Essays on the Constitution*, Philip Joseph (ed) Brookers 1995.

about fighting a war against an armed indigenous people who have deep forests and rugged mountains to fall back? What pragmatic about obliging a reluctant Great Britain to send an army at the height of the American Civil War and during extreme tension between the US and UK , to sort out the King Movement ? What's pragmatic about shipping 150,000 people out here at public expense in just 10 years, thereby doubling the population when independent immigration is taken into account, and trapping those people out 12,000 miles from home? They would have been just as happy in Australia or Canada.

Surely the pragmatic thing for a colony of this kind would have been to stick to the beaches and plantations and great farms inland, and with much less effort, let a planter or run-holder or business Ascendancy rule a more mixed race society. New Zealand could have been more like a planter colony. There was no land border for settlers to walk over like between New South Wales and Queensland. If you want a “pragmatic” settler colony, go to Western Australia or Natal.

Impressive and dreadful as it is at the same time, what was pragmatic about emigrating, when as there were abuses and injustices in the UK and Ireland, - surely the most pragmatic thing would have been to sort the issues out, rather than clear off? And what's been pragmatic about all the utopianism since?

What did States do in those days? The “powers” were foreign-policy or markets driven. Stock Markets and the Chancelleries drove them. Domestic policy is now the main driver in so far as monetary supply allows it. For British colonies, back then, economic development - “Growth” – was the main thrust. Like business companies, a colony was an enterprise in rivalry with others. It had to get the labour force it required and obtain the credit to develop itself. It was all a race to the future. Warfare was over economic resources, whether mines or pastures.

The New Zealand Government though very early on concentrated on domestic issues, Welfare, Education, Health, Eugenics and the like. New Zealand was to become a Utopia. The use and misuses of untrammelled executive power in New Zealand against Maori made it the ideal *social laboratory*. The powers were there, and the country, once established, had to justify itself teleologically. This is why our anthem intones :-

Guide her in the nations' van,

Preaching love and truth to man,

Working out Thy glorious plan,

God defend New Zealand

Teleology is political Creationism. Maori were “conquered” and forests were felled because God had a plan for New Zealand, and such a fast-forward colonization and act of concentrated violence surely had to be for some purpose or *telos*? And that was to be a lighthouse, a *pharos*, a social laboratory, a policy test-site.

The ogre became an ameliorative state that sought to make people better and healthier. But on a scale of pragmatism, colonial New Zealand rather rates up there with Fitzcarraldo winching a steamer up a mountain-side, rather than with Queensland or Texas or the Afrikaner republics. Let's not kid ourselves that we are merely pragmatic then. We have

been an ideas-haunted and ideas-driven people. “Ideas” are like Horror Movies for us, and we rush out of cinemas screaming our heads off at them.

Thus began the nation-state that produced the New Zealanders whom Sir Keith Sinclair called the “*Prussians of the South Pacific*”. Even the All Black colours are the Prussian black and white, a rare colour scheme for any country. Thus a liberal capitalist enterprise state with a native protectorate and multiple governments became a unitary consolidating statist entity. Military training and military service was a fact of life for men between 1840 and 1971. Sport reinforced it. What was intended to be a Jeffersonian agrarian republic of homesteaders, citizens and militiamen, turned into a State-driven society propelled by a *Heath Robinson* debt- engine. Civic modesty and egalitarianism flourished. We lived under an incredible social discipline. James Belich reminds us of the repressive behaviour that New Zealanders resorted to.⁸ When I stayed in East Germany in 1986 I was reminded in part of 1960s New Zealand.

Freedom and personal liberty were not the value for us that it was in the United States. This is an insight as old as Leslie Lipson.⁹ Solidarity and civic discipline and propriety prevailed instead. The Kiwi clobbering machine and the tall poppy syndrome were all cultural expressions of what Montesquieu discussed in the *Esprit des Lois*- the necessity that democracies and classical republics have had to impose egalitarian conditions and social restraint on citizens.¹⁰

Prime Ministerial deaths provoked squalls of national mourning, because the poor blighters – Ballance, Seddon, Massey, Ward,¹¹ Savage and Kirk - worked themselves to death for us. People opted out by reverting to the beachcomber lifestyle of the original white settlers, or else lived in deep networks of secrecy and silence. The 1960s manifested a great revolt from all of that as oppressed minorities of all kinds sought a break from the homogenizing discipline of the South Sea’s Workers’ Paradise.

Yet not all about Prussia was bad. Christopher Clark’s book *The Iron Kingdom*¹² shows Prussia to have been a conscientious and enlightened state, (at times) far removed from the barbarities and crimes of Nazism. There was along with the discipline a powerful sense of personal freedom and civic morality that amounted to radicalism. The anti-war movement there was the strongest in Europe. The revolutionary movement in Prussia put up such a

⁸ Belich, James *Paradise Reforged: A History of the New Zealanders* Penguin 2001 pp. 157 ff.

⁹ Lipson, Leslie *The Politics of Equality : New Zealand’s Adventures in Democracy* (Jon Johansson ed) Victoria University Press 2007.

¹⁰ Montesquieu, Baron de, Charles de Secondat *De L’Esprit des Lois* Book V Chapters 3 and 4, Book VII Chapter 2.

¹¹ Sir Joseph Ward died 3 weeks after resigning from office in 1930 but virtually counts as a “canonical” “death in office” Prime Minister because of how John A. Lee used him in his “*Psychopathology in Politics*” pamphlet against Michael Joseph Savage.

¹² Clark, Christopher *Iron Kingdom :-The Rise and Downfall of Prussia 1640-1947* Penguin, London 2007.

fight over 1848-49 that not even Bismarck dared wind back the clock. It incentivized his welfarism.

Nor was everything about monstrous Lilliputian New Zealand, awful and wrong, ludicrous, pompous and impractical. The difference with Prussia was that New Zealand did what it did with reference to a democracy. That democracy however was solidarist, Trade Union *solidarist*, Maori *solidarist*, British Empire *solidarist*, Protestant *solidarist* or Catholic. Even the intelligentsia was solidarist, like a card-carrying school of synchronised swimmers. John Mulgan's *Man Alone* exemplified the individual who lived apart from such solidarities. Metropolitan and liberal urban individualism found it hard to make a footing. But even the solidarism of an indigenous people was politically expressible.

And that brings us to our local habits and traditions of constitutionalism and our rich repertoire of political languages. Unitary New Zealand did not erode political initiative or produce a bureaucratized monoculture. The levelled and flattened plains from the fast eroded liberal constitution did not result in an infertile heap of alluvium. Rather, fault-lines persisted, old Maori faults, old British faults, old settler faults. Rather a variety of versions of the constitution developed in reaction against proceedings in Government Buildings over the road. I owe this concept to Daniel Hulsebosch, Professor of Law at the New York University who demonstrates that there were *versions* of the New York colonial and state constitution between 1664 and 1830.¹³ There were farmers' and merchants' and seafarers' and artisans and labourers' constitutions. The same was the case here. Farmers and unionists and Maori and lawyers and civil servants developed their own variations of the same theme.

So far from the New Zealand constitution being locked in an Ark of the Covenant, - The Queen, the Treaty, Parliament, the Constitution Act and other statutes, - *constitutions* are already out there, still out there in the food courts, on the blogosphere, in the pubs and clubs and on marae. There is a farmers' and Business version of the constitution, there is a Social Democrat constitution, there is of course a Maori constitution expressed in relation to the Treaty, there is a lawyers' and jurists' constitution. There is a "high" register constitution of Her Majesty and the Governor General. There is a demotic constitution of public meetings and people resorting to the popular media.

Many New Zealanders feel nostalgic about the alleged certainties of that last age of unchallenged white dominion New Zealand. This nostalgia is reflected in traditional constitutional values. The Queen, the bells and whistles, control-panel Prime Minister, the MP you can ring up, the public meetings you can hold at little notice, the media personalities whom people resort to for redress, the security that the State provided from cradle to grave, right down to explanations for life the Universe and everything, and "grief counsellors attending the incident" as the newspapers say.

The world got more complex in the 1960s as minorities asserted themselves for their civic rights, and as economies were restructured. Although we have seen Welfarism in high tide and ebb-tide, Monetarism rushing in and eddying in massive Bay of Fundy tides, the truth is

¹³ Hulsebosch, Daniel *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World* University of North Carolina Press, Chapel Hill 2005.

that the civic and political flora and fauna on the mud flats and sea beds have greatly altered since mid 20th century solidarities. Our basic constitutional values and habits haven't, - at least not that dramatically - and that is a strength I would suggest to our political order, not a weakness or an out-datedness.

We face the challenge though, ducked by our long tradition of Statism, of becoming genuinely liberal, like we were originally supposed to. The "deep magic" of New Zealand to resort to Narnia again, is for it to be a **liberal** state. The Treaty is instinct with the fact that this was going to be a British liberal state, that acknowledged Maori rights, recognized them as a nation to come under British government, and alienate their lands as and when they wished. Take away the assimilatory teleology, and it's still an attainable deal.

The Treaty redeems us, we redeem the Treaty.

The New Zealand Government developed the habit of forming para-constitutions or strap-on constitutions with sectors it could not immediately control. When it struck a live political fault-line, it stopped and set up a negotiating system. The two prominent examples of this were Race Relations and Industrial Arbitration. New Zealand had the world's first compulsory industrial arbitration legislation, the *Industrial Conciliation and Arbitration Act 1894*. Between 1894 and 1991 New Zealanders lived under a regime of constitutionally organized labour. When I first entered the workforce, you had to belong to a union and one had to strike, in what was a form of second citizenship. Similarly such negotiating structures were set up with Maori through the *Maori Representation Act* and other institutions. "Maoridom" was a separate world like "Wales" except that it wasn't primarily territorial, it had its own department of state, like the Scottish Office or Welsh Office or Duchy of Lancaster. **"Labour" and "Maoridom" encompassed domestically what the State *had* to negotiate with.**

The white dominion New Zealand that this 20 stone tum-tum bird's-nest bearded State served, has died. It died sometime between 1972 and 1984. No one has signed the Death Certificate yet. The alternatives are not clear. The democracy though survives and thrives. No one has yet "imagined" a New Zealand republic.

The white dominion "*Jeez-just-why -can't-we-all-be-the-same*" view of New Zealand basically defines "New Zealand" and "Kiwi" by definitions that the Greek historian Herodotus offered before 425 BC. ¹⁴A nation consists according to him of a people who:-

- Share common kinship (ie race)
- Language
- Religion
- Customs

Herodotus was a settler. He hit upon definitions that British settler peoples could find to say about themselves until the 1970s. A white British Protestant hegemony no longer exists of the kind that retained its character until the mid 20th century, of the kind we had, that

¹⁴ Herodotus *Histories* VIII.144.

Montesquieu talked about, based on modesty and classlessness and “sameness”.¹⁵ **The abiding goodness of that State has lain in its democracy, its civicism and self-correction.**

Whose country is it, then? It belongs to everyone, and no one.

Whose constitution is it? The People’s. Where’s the apostrophe in that? That no longer means a British-descent settler people. No longer the Asian-excluding, Maori- patronising, British neo-Hellenic democracy that W.P. Reeves exalted. It is probably an impediment to both Australia and New Zealand that their respective nationalisms are so archaic, so Edwardian, so much the white dominion progressivist kind of a 100 years ago.¹⁶ What other OECD nations have such pre-WWI notions of their nationhood?

What we have been describing as New Zealand’s classic state was a profoundly democratic, civic, unitary **state**, - not a genuinely *liberal* one, though, of the kind we were set up to be and which I think we are still destined to become. I think the choices are between a *totalitarian Liberalism*, a homogenising Liberalism, which is what New Zealand with its assimilatory system was originally designed to be, but didn’t become, and a *plural Liberalism*. A genuine liberalism though since the 17th century and John Locke, has been a response to religious and cultural diversity, it is a government of *toleration* that can cope with toleration even in the public sphere and not just in the private.¹⁷ A genuinely liberal and secure government in the 21st century would **not** seek to homogenize the political order and rely upon a single totalising constitutional text. It can cope with ambiguity and discretion. It is comfortable **not** being a *Le Corbusier* design or a *Mondrian* painting of abstract “Human Rights”. It is evident that we are citizens in plural circumstances. To quote the Australian political philosopher Chandran Kukathas :-

*Liberalism is a doctrine about human freedom responding to a world of diversity and disagreement.*¹⁸

We no longer live in white dominions. That means certain short-cuts and efficiencies that are possible from common cultural values no longer pertain. People in plural societies cannot second-guess one another so easily. We could once biff a lot of our start-up baggage overboard because we were a lost white tribe that had found a wonderful new land, and didn’t require the formalities of checks and balances. It is harder to agree on common constitutional texts when plural communities must comprehend one another. It is almost a miracle that the Americans achieved what they did between 1787-89, living as they did in 13 states dating back as far as 180 years with very different societies and religions, and very little knowledge or experience of one another, unless they belonged to political elites or were

¹⁵ Montesquieu, *ibid* Book V Chapters 2-6.

¹⁶ Schreuder, Deryck and Eddy, John *The Rise of Settler Nationalism: Australia, New Zealand, Canada and South Africa* Allen and Unwin Sydney 1988.

¹⁷ Locke, John *A Letter Concerning Toleration* London 1689.

¹⁸ Kukathas, Chandran *The Liberal Archipelago:- A Theory of Diversity and Freedom* Oxford University Press, Oxford 2003, p. 39.

merchants or seafarers. As we know they had to pass on the issue of slavery, a deferral that was to cost at least 618,000 lives in the American Civil War.

Liberalism that arises from politics in plural societies requires accommodations and compromises. **Teleology** is what the classic assimilatory homogenizing Liberals of colonial New Zealand thought they had on their side. This was their mission statement, as surely as the Spanish conquistadors had to make Catholics out of the Incas and Aztecs. It was God's plan, or an inexorable social law or rationally unfolding organic process that British constitutionalism was the best on earth and that Maori were to be assimilated.

Hermeneutics, or the interpretivist process is what we plural Liberals do instead.

Katushka and the Steel Spring

I have here on the lectern, Katushka the Russian doll and a slinky. Katushka the teleological doll discloses a rational sequence of development as we open her up and disclose the series. You will appreciate that just as we may look back on constitutional developments teleologically, - in Whig Fallacy terms - so is it only in retrospect that we see the doll unfold.

¹⁹We don't build her up with the same unfolding degree of surprise and order that starting with the smallest doll (ie a real beginning) would allow. Notice how our minds anticipate the development of the series and read into it. History and political thought are not like that. They are far more contingent, hit and miss affairs. Darwin destroyed teleology in Natural History with the *Origin of Species*. **To believe in the Whig Fallacy is to believe in a political form of Creationism.** If you want to argue that a Humanities or Social Science or Law project may be teleological because those disciplines aren't pure empirical sciences, then I would be interested in what the Germans would call a *Methodenstreit* between the Whig Fallacy teleology and Hermeneutics, in which teleology has a snow-ball's chance in Hell.

As for the slinky, notice that it is an open-ended indeterminate series into which nothing can be read. You can't even anticipate what I am going to do with it, drop it, stretch it, throw it, twist it, snap it. I offer it as a model for the **interpretative process**, which is an ongoing process of hermeneutical circles - the circular process by which interpretation and application occur in relation to the texts that found such conversations. Nor is interpretivism permissive and "play-way". The *Subtle Science* makes calls. Hermeneutics demands reference to the original text in the light of contemporary conditions and problems. We may not, for example, interpose what the Italian jurist Emilio Betti described as "substitutions" or *sostituzione*. ²⁰ You will recall in my first lecture my criticism of Lord Cooke reading "partnership" into the state of affairs in 1840. While this is definitely the case now, **trusteeship** was a better description, up until the League of Nations period.

¹⁹ Butterfield, Herbert *The Whig Interpretation of History*, G. Bell, London 1931

²⁰ Betti, Emilio, *Teoria Generale della Interpretazione* v. Il Giuffrè Milan, 1990. p. 802 "Ma la massima (quando non sia trovato per intuito divinitorio) e do ricavare mediante un processo interpretativo che ha carattere, non già di ricognizione intransitiva o di sostituzione, ma di concorrente complementarità."

I also offer this slinky as a model for the state itself. The Cambridge political thinker Michael Oakeshott (1901-1990) characterized the state as content-neutral. ²¹ Politics is a craft like piloting a ship. He refused to see it as purposive or teleological. Cambridge is also where Herbert Butterfield attacked the Whig Fallacy. I would consider myself a Cambridge School historian. ²² Like Kukathas I would not go so far as to say I agree with Oakeshott, though the austerity of his position appeals to me. I agree with Kukathas though:-

Yet the state may be an altogether different, and more ambivalent, kind of experience – one in which the different tendencies do not find a final resolution. ²³

It is that “state of affairs” which the slinky represents.

So to cut to the chase, to consider a question that relates directly to Liberalism, what do I think about Will Kymlicka? – I find I myself agreeing with his diagnoses and rejecting his conclusions.

For example , it is a helpful observation of his that:-

“ But even where there is a good match between targeted form and targeted content, as in the case of the UN’s indigenous rights track, the result may still be unstable if this targeting exists in isolation from a more general framework or understanding of the role and function of targeted rights. To date, targeted norms have emerged in an ad hoc fashion, and are often presented as unique contributions and are often presented as unique exceptions to the rule of generic minority rights. But this sort of mono-targeting – isolating one particular type of group for distinctive legal rights, while according all other groups only generic minority rights – is unlikely to be stable. “ ²⁴

The diagnosis here for example is entirely spot on. That basically sums up our sense of what people say about the situation here, when they get critical. We have experienced difficulties with the politics of Treaty settlement and indigenous rights in New Zealand precisely because of “mono-targeting” Maori, while others lie under the rubric of “*generic minority rights*”.

Otherwise Kymlicka is the “*Man with the Midas Touch*” as in the James Bond song. He would concretize, crystallize, mineralize whatever he touches. Kymlicka’s answer is to make everyone a minority, and to go about culturally-engineering people’s identities and imagined communities so that their rights can be targeted, and so that there is a broad range of such

²¹ Oakeshott, Michael *Rationalism in Politics and Other Essays* Liberty Fund Indianapolis 1991, p. 60.

²² Though “Oxford” in my Political thinking as Hobbes, Harrington and Locke are my constant interest, and because I relate to Oxford’s age-long involvement with Italian schools of thought, from Alberico Gentili (1552-1608) to R.G. Collingwood’s (1889-1943) take-up of Benedetto Croce (1866-1952) and Norberto Bobbio (1909-2004).

²³ Kukathas, *ibid* p. 267.

²⁴ Kymlicka, Will *Multicultural Odysseys:-Navigating the New International Politics of Diversity* (Oxford University Press 2007) p. 301.

rights rather than just for one minority culture in relation to a majority. Back to the *milletts* like I suggested last time?

Nor, once we have a lumpy field of groups, are they going to be easily equalised because , as Corinne Lennox insisted in 2006, indigenous groups and national minorities are :-

“rooted in a particular time and space”.²⁵

Maori rights are contemporary but also rooted in a New Zealand history of the Treaty and Treaty-repudiation and of warfare.

As should be evident by now, I have much sympathy for Chandran Kukathas at ANU not least because I might align other thinkers who interest me, with him, such as Nico Krisch²⁶ and Michael Oakeshott - and of course Gadamer²⁷ and Paul Ricoeur²⁸ the arch-*hermeneuticists*. Kukathas is a prominent critic of Kymlicka. **Kukathas has his own version of Liberalism which is that freedom of association is based not on autonomy or “identity” but on freedom of conscience.** This means that for religious- cultural-intellectual reasons, people may opt for a community of interest of their own choosing. Being Maori is not just an essentialist identity – rather the result of choices made to live as Maori in the ways that one can be Maori.

Kukathas imagines society as an archipelago of associations that coexist often on different levels, but shouldn't be considered as hierarchically or taxonomically organized.²⁹ As we New Zealanders live on an archipelago in “Oceania” this metaphor is not as counter-intuitive to us as it would be to some of the Aussies he lives and works with.

It is obvious what this metaphor entails. Archipelagoes in Oceania like Hawaii, Samoa, the Galapagos, Tahiti, Fiji and New Zealand are :-

- a continuum of islands
- have variable relief and extent.
- share flora and fauna in micro-climates

²⁵ Lennox, Corinne “The Changing International Protection Regimes for Minorities and Indigenous Peoples : Experiences from Latin America and Africa” Annual Conference of *International Studies Association*, San Diego 2006.

²⁶ Krisch, Nico *The Case for Pluralism in Postnational Law* LSE Law, Society and Economy Working Papers 12/2009, London School of Economics 2009.

²⁷ Gadamer, Hans Georg *Truth and Method* Sheed and Ward London 1975.

²⁸ Ricoeur, Paul *Hermeneutics and the Human Sciences* trans John B. Thompson Cambridge University Press, Cambridge/ Editions de la Maison des Sciences de l'Homme 1991.

²⁹ Kukathas *ibid*.

- Culturally such island chains have considered themselves monocultural, either indigenously or through colonization; or are a state of affairs that is contested by diversity in the modern era.

They have an underlying geology that accounts for each of them. This is very far from formica-surface homogenous constitutionalism. The state umpires between these associations. Negotiations and compromises characterize the relationships between associations and between them and the State. The State pretends to no competence to judge right and wrong, it is not a purpose-driven state, like utopian New Zealand was, but rather an ambiguous state, if not quite the empty category state that Michael Oakeshott proposed.³⁰ In other words what Michael Foley described for constitutions, that they depend greatly upon convention and abeyances and deferrals,³¹ is what the Liberal Archipelago is.

The classic liberalism then of the revolutionary and Political Economy era is giving away to a plural liberalism. But is it new? Well the liberalism Kukathas proposes is one that David Hume and Alexis de Tocqueville and Lord Acton would recognize:-

*The solution it presents to the problems posed by diversity is not a theory of the many can be made one, but of how the many can coexist.*³²

It upholds norms of toleration not because it values autonomy but because it recognizes the importance of the fact that people think differently, see the world differently, and are inclined to live – or even think they must live- differently from the way others believe they should.

If patriotism is the refuge of scoundrels, to quote Dr Johnson,³³ Liberalism is **not** the refuge of majoritarian minorities or lost white tribes angry at losing their white dominions and dismayed at losing apparent hegemony.

It follows from this archipelagic model that these different zones of association aren't at all at the same height and depth. Not only is the civic plane **not** flattened and undifferentiated with minorities invisible but these associations present different reliefs from one another and are rooted in time and law in different ways. New immigrants don't have the same depth in this country as Maori. But one can imagine people making conscientious objections to aspects of "Kiwi", or global "Western" popular culture by opting for these associations.

Where does the monarchy fit in a liberal pluralist order? What's its semantic mass on the political Periodic Table? What does monarchy explain in Australia and New Zealand? What would a republic mean in Australia? I won't answer that. That is for Australians to do. I am not Richard Butler, the Tasmanian State Governor who had to resign in 2004 because he

³⁰ Oakeshott, Michael *The Politics of Faith and the Politics of Scepticism* Yale University Press, New Haven 1993.

³¹ Foley, Michael *The Silence of Constitutions: Gaps, "abeyances" and political temperament in the maintenance of government* Routledge London 1989 p. 9.

³² Kukathas, Chandran *The Liberal Archipelago:- A Theory of Diversity and Freedom* Oxford University Press 2003 p. 39.

³³ Boswell, James *The Life of Samuel Johnson LL.D* 7 April 1775.

wouldn't stop talking about his personal theories. Still whatever Head of State they have over there, hunting down Governors and Governors General has been a blood sport since Captain Bligh was overthrown in a officers' coup in 1808. I can name Hollingsworth, Butler, Kerr, Strickland, off-hand. They will do the same to their presidents when they get them. They've even twice shot at princes. Such is their political culture - a change of format won't alter that.

But *that* it does mean something is beyond dispute. A republic is a profound imagining in the Australian psyche that has been in their political DNA since the 18th century. Sorry about the mixed metaphor but Australia has that effect on me. It's bewildering they can't attain it. It has however been the "genius" of the British parliamentary constitution that, like this slinky, it has satisfied almost all of the demands of classic republicans. British constitutionalism is flexible, not rigid, noted A.C.Dicey, and has delivered us the goods our ancestors desired. Arthur Clough's poem *The Bothie of Tober-Na-Vuolich* of 1843 ends with young Chartists selling up and emigrating to New Zealand and the prophetic lines:-

There will be Democracy upon New Zealand ! ³⁴

Indeed there was in quick time, but it was **Queen in Parliament** that gave us that, not a barricade or a coup or tricolour-waving of the kind that Delacroix painted. **What we have imagined is "the State" and a just society, not a "republic"**. Christchurch's suffering underlies how much we do need the State, but we no longer chiliastically imagine it as New Zealanders did from Richard John Seddon to James K. Baxter. ³⁵In *Crossing Cook Strait* Baxter imagines this veritable chimaera of Seddon and Mickey Savage and Dionysus (and Lenin) and blokes brawling in bars addressing him in the dark. If we envisage the State, it is to down-size it. We do have expectations of our society, and those have to do with the lifestyle we want to live and with our strong civicism.

In New Zealand at the moment, the monarchy explains quite a bit. It explains the Treaty. It explains how Maori fit in while remaining themselves. As I argued in the first lecture the Treaty as a compact explains how a "foederal" relationship (spelt with an "o" like in the 18th century spelling, or in "Foederal Theology") came about. And what it doesn't explain, it decently covers as Walter Bagehot argued. ³⁶It signifies the zones of abeyances and deferrals and compromises and accommodations that make up this country. I would define the Royal Prerogative as the natural law and custom of the Crown in so far as it has not been positivised or been estopped by the Treaty. Max Weber observed -

³⁴ Clough, Arthur *The Bothie of Tober-Na-Vuolich* IX; at http://en.wikisource.org/wiki/The_Bothie_of_Tober-Na-Vuolich/IX

³⁵ Baxter, James K., *Crossing Cook Strait*.

³⁶ Bagehot, Walter *The English Constitution* (1867).

“Natural Law has thus been the collective term for those norms which owe their legitimacy not to their origin from a legitimate lawmaker, but to their immanent and teleological qualities.”³⁷

The Crown marks the spot where teleology and *jus gentium* still inhere, a bit like Milton’s “Chaos”.³⁸ It is the reliquary that preserves the splinter of the True Cross of the Treaty. I think it was this that Sir Michael Hardie-Boys was referring to in 2000, when he stated that the Crown reserved its right to go to Waitangi, in response to Helen Clark’s announcement that the Government wouldn’t go. It is our “dunno” basket, our “where angels fear to tread” repository, and it is vested in the highest dignity we can muster. I can only imagine that in present circumstances a republic in New Zealand would be either the result of either hyper-rationalization, or a white Rhodesian repudiation of race relations responsibilities. It is a blessing that the anti-Treaty brigade are still monarchists.

So the monarchy coheres as well as inheres. Its responsibilities have been sustained with tremendous dignity, care and attention by Her Majesty. Whatever Head of State we may have in 2040, we must start by respecting the New Zealand Head of State we are fortunate to have at this moment. Since her first Royal Visit over 1953-54, Queen Elizabeth II has been the unfailing benchmark of not only for the conduct of a Head of State but especially for Treaty relations. I also acknowledge the Governors General, since Lord Bledisloe, who have developed a New Zealand way, - British, Pakeha, Maori and Asian-descent, - of representing the monarchy and Treaty to the country.

To give an example of how the Monarchy **comprehends** our problems, if not our solutions, I again refer to Max Weber, who says that “Sovereignty” is the “*chance*” of finding obedience (and agreement) in a human group based on the possession of economic goods, and upon authority (which can be *mana*-based or be derived *from kawanatanga*).³⁹

I suggest that if we ponder upon that, we may find a way out of the perennial circle in which we chase one another, like cats, arguing for the Crown’s sovereignty and Maori sovereignty. Considered with care, I suggest, this definition applies to both government and Maori institutions distributively. Is this not a wise and rational formulation of what is called “late Sovereignty” these days? ⁴⁰Weber and Gadamer are examples of powerful thinkers who think multi-dimensionally and not in one-dimensional geometric ways, who were unafraid to *think* and structure round the abeyances and deferrals that Michael Foley talks about, - where our current reason, like Shackleton, reaches its *furtherest South*.

³⁷ Weber, Max *Natural Law* p. 287-288.

³⁸ Milton, John *Paradise Lost* Book II.

³⁹ Weber, Max, *Economy and Society* p. 212. Or -

Weber Max, *Wirtschaft und Gesellschaft* (Tuebingen 1972) - “*Herrschaft soll heissen die Chance, fuer einen Befehl bestimmten Inhalts bei angebbaren Personen Gerhorsam zu finden.*” (p. 28); and see pp. 122 ff for the economic basis of this.

⁴⁰ Adler-Nissen, Rebecca “Late Sovereign Diplomacy” *The Hague Journal of Diplomacy* 4 (2009) pp. 121-141.

And we already have a republic if we haven't noticed. A republic is something we do - not some style we assume or some magic spell we utter and presto, we have entered a new era, like a *Tux Wonder Dog* bursting through a hoop. A republic is a polity in which the state belongs to the people, and in which a turbulent contention and rivalry and competition of equalized persons and interests prevails. A Rugby club is a republic. A university should be a republic. The Bar is a republic, so is the Medical Profession. A Chamber of Commerce is a republic. Our first republics were the turbulent little provincial governments and their militias. "Can I shoot him, Pa?". Little Taranaki, goading for war, in the 1850s and 60s, was as much a republic as the Afrikaner states. By 1900 anyway, the British were congratulating themselves on their world union of "crowned republics". "The Commonwealth of Australia" is more reminiscent of the Renaissance word for a republic than Cromwell's.

Pros and cons of a "written" constitution.

A written New Zealand constitution exists in several documents, which may be consolidated, but it would be a smaller and much more meagre thing than the myth of constitutionalism relayed to us by the American and French or Irish revolutions. A Prime Minister should still be in the Beehive in 2040 and someone like Sir Anand Satyanand or Dame Sylvia Cartwright in Government House. We would not feel any awe or fall down and worship it or place our hands on our hearts and sing something like:-

"O say can you see by the dawn's early light".⁴¹

In the 21st century, there is no language theory that can deliver us the consensus of meaning and understanding and the precision and structure of semantics that political elites could take for granted in the classic age of constitutionalism. There can be no totalising text to which some Dr Strangelove may wire up the Treaty then throw the switch, simply because the political capital, in the absence of some motivating emergency, will elude us. The New Zealand public are an electorate with deep civicism, a strong sense of public space, they have an instinct and deep prudence of how far to go with anything. We have a complex situation of past and present accommodations or unfinished business, that the British constitutionalist Michael Foley characterises as "deferrals" and "abeyances". A constitution is always a work in progress and for the long haul.

Cons

- We don't know enough about our constitution, nor do we need to.
- We don't have the language resources of a confidently *classical* era.
- If we include the Treaty in such a totalising document, it presents a semantic and hermeneutical abyss in the otherwise level statutory language of such a document. We already have the Treaty *singularity*, but we needn't think that we can tame and define it for a written constitutional exercise, pervading as it does all New Zealand's

⁴¹ "The Star Spangled Banner".

political institutions. What we have in the Treaty is a situation like the Twelve Tables of ancient Rome or the Torah and Talmud in relation to the State of Israel.

- We don't have the political capital, or the public attention or interest.
- There is no obvious emergency or revolution to motivate such a constitutional exercise. We had no war or revolution, we have not been occupied or had a dictatorship.
- Would the document adequately constitutionalize for Maori? Maori will take great care that nothing affects their claims to sovereignty, dominion and other rights and forms of property.
- The result would be very whoop-dee-do. At best the proverbial mountain will labour and give birth to a mouse. At the worst, Nico Krisch warns from the Canadian and EU experience that such formal constitutional exercises create stress for minority nationalities.⁴² It can stress apparent "majorities".
- A referendum or an election system is an information system, a constitution is an information system. When it comes to popular ratification the history of ratification of complex documents like this is dire. We lack the deference to educated elites that characterized the American ratification process over 1788 and 1790. Electorates work best with ayes/noes on simple propositions.
- Are we to ratify it with equal votes for both the general roll and the Maori as separate blocks? For Maori ought really to have a separate vote as a nation of their own on this.
- A written exercise could be teleological if it anticipates developments too much or if it reads it into the past.
- Amendment will require considerable political capital.
- We need to figure out how we can actually think and talk about this.

The arguments **against** leaving well alone are:-

Pros

- It is the natural culmination and trend of our present practices.
- We would like predictability and certainty in our legal and political arrangements.
- We could rationalise the system and perhaps get ahead of outstanding issues before we fly into mountains on them like we did with Foreshores and the extinction of aboriginal title.

⁴² Krisch, Nico ibid p. 12.

- We could bind ourselves for the future against what might tempt us. For example the Japanese in chapter II of their 1947 Constitution renounce war as an instrument of their policy.⁴³
- It has definitely been the trend in Public Law to legally motivate all government actions.
- Most countries have written constitutions. But the paradox is that we are actually more up to date with the incoming pluralist and interpretivist constitutional norms doing what we have always done, - negotiate and see what we can do.

Regardless though of the pro and cons, the process of constitutional negotiation, constitutional design, would have to be hermeneutical anyway.⁴⁴

It is at such a cross-roads that I finally pay tribute to Lord Cooke, who delivers us from teleology to free and rational Treaty hermeneutics, if only we understood.

It is high time to explain what did Lord Cooke mean in *The Maori Council v the Attorney General* case of 1987⁴⁵ when he described the Treaty as “*the living Treaty*”?

In the first place we can understand what he meant as “interpretivist”. The Treaty is not a dead text. It is not a relic. Nor is it to be construed in an **originalist** way only in terms of what its original words and languages meant to anyone in 1840. We are therefore entitled to re-read it and apply it for contemporary purposes. What is missing in this description of “the living Treaty” is an explicit sense of where the original texts fit in. Are they redundant? Are we in the position that both pro-Treaty jurists and the Treaty-rejecters and Treaty-sceptics agree that the original texts of the Treaty are nullities?

I do not think it is at all in the way of a substitution such as Betti warned against, or make-believe however, to propose that what Lord Cooke meant when he said the Treaty is a “living Treaty”, is the **Lex Animata** doctrine from the Ancient World and from Medieval and *Ancien Regime* Law.⁴⁶ The Lex Animata is the *Living Law*. It’s in Plato. It’s in Aristotle. It’s in the Emperor Justinian’s Law Code, of 534 AD, the only major historical codification until

⁴³ *The Constitution of Japan* (1947) <http://history.hanover.edu/texts/1947con.html>

⁴⁴ Burge, Tyler *Origins of Objectivity*, Clarendon Press, Oxford 2010 p. 116 :-“ *The hermeneutical tradition concentrates on language and human history as sources of the objectivity it acknowledges. Where it does not give up on objectivity altogether, I believe that it continues and radicalizes the individual (or social) representationalist themes that I have been outlining.*” This, from one of the world’s leading philosophers of epistemology and perception, drawing on the latest advances of neuroscience and cognitive psychology and linguistics.

⁴⁵ *New Zealand Maori Council v Attorney General* [1987] NZLR 641.

⁴⁶ Kantorowicz, Ernst H., *The King’s Two Bodies:-A Study in Medieval Political Theology* Princeton University Press, Princeton 1957 pp. 127- 137.

Justinian, - Flavius Petrus Sabbatius Justinianus *Augustus Novels* 105.

Napoleon. It's from Justinian's updates of his Code, the *Novels*, we get a definition of the Lex Animata that broadcasts like a star out in space 1500 light years away at a persistent frequency throughout the legal universe. This is the doctrine of the interpretative legislator.

Maybe it was just an accident that Lord Cooke came up with the phrase? Maybe he just hit upon it?

There are no accidents in Law and in constitutional writing. Such phrases echo and are recognized much as "*To be or not to be*" is recognized by people who have never watched or read *Hamlet*. I inhabit an intellectual terrain in which rock-falls like "*the living law*" reverberate down the chasms of time. "*Liberty is the slow fruit of ages*" for example is a phrase that rolled down from Livy to Henry Hallam and Emerson to Lord Acton. Emerich de Vattel's one-liner definition of what a constitution is, drops from the Swiss Alps in 1758 and rolls into Professor Matthew Palmer's text of 2008.

Vattel said that a constitution is

*Le reglement fondamental qui determine la maniere don't l'autorité publique doit être exercée.*⁴⁷

Reglement in French means a settlement, rules or a governance regime. Some form of ordering. Leaving aside Corsica's written constitution in those days, we can translate this to say a constitution is the fundamental law (not necessarily in the positive sense) that determines the manner by which public authority must be exercised. **It refers to the basis by which one regulates.**

Mathew Palmer (2008) says :-

*A Nation's constitution expresses and determines who exercises public power and how they exercise it.*⁴⁸

The Palmer definition has Vattel's DNA all over it.

So after demonstrating *that* Lord Cooke did this, I shall now construe what he might have meant by it.

The living law is the text made alive. The words are not dead on a text. A legislator makes it come alive. That can be a sovereign legislator or a legislature. Or it can be a judge understanding the text, by applying it to the circumstance, through the *subtilitas applicandi*. The interpreter recovers the *idea* in a text and applies that legal idea for our own times and in so far we can understand it.

The *living* Treaty is an axial concept that structures the entire system.

The Treaty can do this, the reasoning may go because it is agreement between two sets of sovereign partners in *jus gentium* conditions. That discussion between real persons and sovereigns "stands" as current speech not in the past tense, and is a dialogue still going on

⁴⁷ de Vattel, Emerich, *Droit des Gens, ou Principes de la Loi Naturelle appliqués a la Conduite et aux Affaires des Nations et des Souverains* (1758) v.I pp. 31-138.

⁴⁸ Palmer, Matthew *The Treaty of Waitangi in New Zealand's Law and Constitution* p. 18.

by virtue of the partnership in upholding the Treaty and interpreting it. The process is durative, and it conducted by means that I have described as hermeneutical.

Interpretivism started off in the United States Judicial System teleologically in the 1910s and 1920s. Woodrow Wilson in his avatar as a Princeton Professor of the U.S. Constitution, Oliver Wendell Holmes as Chief Justice and the law academic Howard McBain promoted early Interpretivism ⁴⁹in a Social Darwinist way. Because it was Social Darwinist, it was teleological. Social Darwinism is a un-teleological Natural History applied teleologically to the Social Sciences and Humanities. You don't have to have experienced Hitler to know what this means. Sir Robert Stout and Sir Truby King were our eugenicist dose.

Interpretivism comes to us now delivered hermeneutically, thanks to Betti, Gadamer, and Ronald Dworkin.⁵⁰ Lord Cooke in his mature thought was definitely Interpretivist in the hermeneutical way. There is no place for the Whig Fallacy in the Treaty constitution or any constitution.

Basic hermeneutical rules I propose for working with past authorities are the following:-

- **We aren't bound by authority and tradition.**
- **We needn't reinvent the wheel however**
- **Whether we like it or not we work in "cultures" (what Gadamer calls "traditions") with their own lore and skill-sets.**
- **We must test authority to find out how good it is for us.** We do inherit power information systems from the past that act as search engines, filter and resolve and pre-package many issues for us; and we need to exercise discernment about what we accept or reject.
- **We are free to initiate new trends of thought** so long as we respond to rival established systems.
- **We are to resist teleological "Whig Fallacy" habits.**

To conclude we are all in a space, the Canadians, the European Union, the British with the Devolution Settlements, New Zealand, that can be characterized as plural. We live in a post-modern OECD state, possessed of rational and interpretivist techniques, thanks to the *Subtle Science*, that accommodates the pluralism that modern political thinkers talk about as our necessary condition. The thinkers I have offered you are Betti, Gadamer and Ricoeur, Kukathas, Michael Oakeshott, and finally Nico Krisch. I have proposed an agnostic and modest even humble state, before the complexity of constitutional exercises.

⁴⁹ McBain, Howard *The Living Constitution, a consideration of the realities and legends of our fundamental law*, by Howard Lee McBain Workers' Education Bureau Press 1927.

⁵⁰ Dworkin, Ronald *Law's Empire*, Harvard University Press, Cambridge MA 1986 ;-

" Objectivity and Truth: You'd Better Believe It" *Philosophy and Public Affairs* 25.88 1996.

I close with Nico Krisch's LSE paper, *The Case for Pluralism in Postnational Law* :-

*“ For not only does a pluralist order have considerable strengths in terms of its adaptability, of the space for contestation that it opens up, of the checks and balances between different polities that it creates by leaving the relationships between legal systems undefined. Pluralism is closer to foundational ideas of political order – namely public autonomy- than rival approaches: the plural divided identities, loyalties and allegiances that characterise society today are better reflected in a multiplicity of orders than in an overarching framework that implies ultimate authority.”*⁵¹

I take back only the final clause of that sentence. The New Zealand Government and the Judiciary are the ultimate authorities, granted *kawanatanga, imperium* by the Treaty. Kukathas insists on the eminent umpiring role of the state above the archipelago. But thanks to the original (and ongoing) negotiation between British officials and Maori, thanks to the exemplary democracy and state-architecture that Pakeha created, our great *taonga*, our gift to everyone else, in the white dominion years, and thanks to the Treaty process we have been engaged upon since 1975, we are on the verge of attaining a genuinely Liberal pluralism, **it we don't get atavistic about it.**

I quote the great American poet Wallace Stevens (1879-1955) to finish with lines that are relevant to constitutional projects:-

If ploughmen, peacocks, doves alike

In vast disorder live in the ruins, free,

The charts destroyed, even disorder may

So seen, have an order of its own, a peace

*Now to be perceived yet order's own.*⁵²

⁵¹ Krisch, Nico *ibid* p. 44.

⁵² Stevens, Wallace, "Owl's Clover" IV. (1937).