Reply to Dr Simon Hope

I am indebted to Dr Hope for his courteous and, in part, very laudatory review of my *Waitangi and Indigenous Rights* [2006].[1] Pleased by the praise, I have nevertheless to reply to the sharp criticisms that accompany it. I am glad of the opportunity to do so. I reply to the main ones only.

The reviewer's implicit criticism [181] that I make 'only passing mentions' of 'radical Pakeha views' cannot be reconciled with the book's treatment of writings of the conservatives Kenneth Minogue and David Round [2006; 163-65] or of the Hon Bill English's 2005 Robert Chapman lecture [2006; 207-10].[2]

Hope correctly recognizes the book's emphasis on the rights of Maori under the common law. But he goes astray in inferring an intention on my part to base on those rights a redistribution of political authority in favour of Maori. The error is fundamental and renders much of the review irrelevant. The common law recognized Maori land rights and to that extent rangatiratanga. But, so far as rangatiratanga extends to political authority, I did not argue for a common law basis. I think this is quite clear from the discussion at [2006; 50-51, 117-18]. I accept that the redistribution of political authority must be based not on the common law but on recognition of Maori expectations, not only under article 2 of the Treaty of Waitangi *but also quite apart from the Treaty.* On this the reviewer, the radical writers he defends and I are in agreement.

A constitutional convention of Maori and Pakeha representatives could I hope agree on a compromise understanding of what justice requires to fulfil those expectations and embody it a new constitutional order, by way of a quiet revolution that breaks with the constitutional past [2006; 172-77]. Dissatisfied radicals, believing that there is continuing injustice, might then resort to the alternative of an 'unquiet' revolution that includes a measure of violence or the threat of it. If successfully established, the new revolutionary order achieves legality and then, over time, legitimacy. But that would depend also to a large extent on its winning over the Pakeha majority [2006; 177-81]. There would be an unhappy comparison with Fiji where successive revolutions create effective legal systems but the problems of legitimation remain. I emphasise all this because the considerable analytical element in the book, where I rely in

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1 FM (Jock) Brookfield, Waitangi and Indigenous Rights: Revolution, Law and Legitimation (2006).

2 Other mentions of conservative views contain full references to my previous writings critiquing them.[2006; 256-57]

part on Gramsci (see below), seems to have eluded the reviewer almost entirely.

The reviewer's confusion over the role of the common law leads him to suggest [187] that (on my view) 'no proper mode of legitimation' for mana whenua and rangatiratanga was available to Maori until the arrival of 'common law doctrine'. There is nothing in the book to support that. Tikanga Maori, as the customary legal systems of Maori, in some sense substantially legitimated those things [2006; 86-90, 114-15] until the legal system imposed by the Crown gradually replaced tikanga Maori throughout the country and attained its own degree of legitimacy.

Hope suggests that, prescription, as a source of legitimation in my view, is really a prudential principle that 'trumps or limits moral considerations', in order to maintain stability rather than justice [183]. But then it may also secure rights that have been established over time and that it would be morally wrong to annul. If so it passes muster as a moral principle.

The reviewer sees me as ascribing a further source of legitimation to 'the modern liberal cast of New Zealand's current political and constitutional arrangements' etc [182]. The passage misses an essential part of my argument. I maintain that in important respects the rule of law under the legal system imposed by the Crown was better in some respects than, not merely different from, that under tikanga Maori, notably in the protection of the individual [2006; 141-48, 150, 198-200]. But the book in no way glosses over the evils of the Crown's system and the part it played in hugely damaging a communitarian society.

Summarised, the radical view Hope ascribes to Moana Jackson is that demands for rangatiratanga require no other justification than tikanga Maori provides [186-7]. Tikanga Maori has over the years been presented by Jackson and others virtually as fundamentalist gospel, to be simply recognised as (pace Dr Hope) beyond reasoned argument.

The weakness of this extraordinary claim to moral uniqueness is apparent when one considers an important matter (treated fully in the book [2006; 158-62, 194-98]), that of the Chatham Islands. The revolutionary imposition of tikanga Maori and rangatiratanga upon the Moriori by the invaders of 1835 was followed by the short lived Maori hegemony that neither prescription nor the slight (if any) benefits of Maori rule could legitimate. The Crown's legal system, imposed by a further revolution, can certainly make a better claim to legitimacy than the tikanga Maori and the rangatiratanga it replaced. The moral as well as legal questions that arise when one legal system replaces another by revolutionary change, as on the Chathams and mainland

Aotearoa New Zealand, and in innumerable other instances, are questions the book deals with extensively but from Dr Hope's review no one would know.

Lastly, Hope appears [187] to misunderstand the Gramscian analysis that gets some (non-pejorative) use in the book [2006; 165-66, 264-65, et passim]. I used it partly because of the resort to it in Maori matters by two notable public intellectuals, Professors Jane Kelsey and Ranginui Walker. The Gramscian 'war of position' is waged by them and others, including Maori nationalists such as Jackson and Ani Mikaere, as a stage in the 'counter-hegemonic' struggle against 'the oppressive colonialist state'. Followed through consistently, this struggle would push on to the (possibly violent) 'war of manoeuvre', beyond any quiet revolution of the sort mentioned above unless that had delivered a full revolutionary victory and not, as I visualise, a compromise.

On a related matter, I do not 'attack' identity politics as such [180]. But I do argue (with strong academic support) against resort to it in work purporting to be scholarly [2006; 199].

The book offers material on these matters that would have repaid Dr Hope's closer attention.

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