Distinguishing Elias CJ from 'Radical Maori', with Sophocles' *Antigone* as an Analogical Source

By Richard Dawson*

In 2004, during a speech marking the 150th anniversary of the opening of the New Zealand Parliament, the Hon Michael Cullen, Deputy Prime Minister, identified a resemblance between Elias CJ and those whom he called 'radical Maori'. The resemblance resides in their disposition to challenge the 'settled doctrine that New Zealand is a sovereign state in which sovereignty is exercised by Parliament as the supreme maker of law.'[1] In this article a case is made that the resemblance is superficial and that we will do well to distinguish Elias CJ from 'radical Maori'. Also, it is argued that Cullen's sovereignty-talk deeply resembles that of 'radical Maori'.

In this attempt at reconstituting resemblance and distinction the ancient Greek tragedian Sophocles is called upon. In 2004, Elias CJ quoted this assessment of Sophocles: 'Who saw life steadily, and saw it whole.'[2] Elias CJ spoke of a fellow Judge of the High Court (Neil Williamson) who tried to do so in his life, and she then remarked that 'so should we all'.[3] From this we may take it that lawyers can benefit from reading Sophocles. This article offers a reading of Sophocles' play *Antigone* in combination with a reading of talk concerning sovereignty and so-called 'radical Maori'. To avoid setting up a straw person and to render the length of this article manageable our 'radical Maori' will be one person, Ani Mikaere, who currently holds the position of Director of Maori Laws and Philosophy at Te Wananga o Ruakawa. The reader will have to judge for herself or himself if this selection is appropriate.

A remark about genre blurring is as follows. As a common law lawyer might be expected to appreciate well, texts are always read in relation to other texts that serve as points of reference. Patterns of similarity and difference, that is, the recognition that the text one is reading is like these and not those, establish the reader's sense of genre. Writing within the conventions of a genre allows one to talk with a great deal being left unsaid, for genre establishes a dialogical relationship with other texts and genres.[4] This paper, in the spirit of various contributors to the law and literature movement, seeks to set different genres in dialogue.[5] 'Law is like literature', our various analogical imaginations say. What are the possibilities here?

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1 Hon M Cullen, 'Speech to the 150th Anniversary of the New Zealand Parliament Address to Her Excellency the Governor-General.' (2004) 16 *New Zealand Parliamentary Debates*, 13192.

2 Rt Hon Dame S Elias, 'The Next Revisit': Judicial Independence Seven Years On' (2004) 10 *Canterbury Law Review* 219.

3 Ibid 228.

4 These remarks on genre draw from C A Newsom, *The Book of Job: A Contest of Moral Imaginations* (2003) 16–21.

5 A founding text for this movement is J B White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973).

Why might someone want to use an analogy for talking about law? Why not simply say what the law *is*? Joseph Vining has asked a similar question about the nature of legal analysis. His response reflects a sense of the pervasiveness of analogies:

> We could try to say directly what legal analysis is. But any direct approach would slip rapidly into demonstration. Legal analysis is this, we could say, and run through a course of professional training. Even then we would be only halfway to understanding, because legal analysis would not have been placed in our minds. It would in fact be left at the mercy of the analogies that do lurk there, for nothing in our minds is unplaced, rightly or wrongly.[6]

This paper is intended as a contribution to talk about what the law is. In doing so, it seeks to do some replacing.

Some preliminary remarks on Sophocles' play may be helpful here, especially to those unfamiliar with it. Many readers of *Antigone* have remarked on how key words are sites of struggle, with each of the principal characters seeking to control their meaning. In one introduction to the play, we are informed:

> The play offers conflicting definitions, explicit or implicit, of the basic terms of the human condition: friend and enemy, citizen and ruler, father and son, male and female, justice and injustice, ... and even ... conflicting judgments of what is *anthrôpos*, a human being – powerful or helpless, something 'wonderful' or 'terrible' (both of these, meanings of the same word, *deinon*). Not only are the definitions in conflict, but the terms themselves become ambiguous ... .[7]

Sophocles suggests, through the experiences of his characters, that language is a fluid, inherited resource that undergoes change whilst in use. Characters reconstitute themselves as they remake their languages. Sophocles' sense of language as a shared inheritance has affinities with the work of legal philosopher Thomas Eisele, especially his essay *The Legal Imagination and Language*.[8] 'The language of the law', he writes, 'is established and precedes us, so we grow into it. It is passed on, so it connects us with our future as well as our past. It is our inheritance, so we use it or abuse it to our credit or detriment.'[9] Eisele lives by an organic sense of language, which is associated with a similar sense of the self. At the level of character, a person is what she or he says. What is said is associated with tones of voice. What tones can we tune into and then modify so as to speak for our 'selves'?

We can read *Antigone* as an edifying discourse on the activity of politico-legal judgment as an ethical art. Martha Nussbaum, in her 1986 book *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, suggests as much with this imagery of the spider's wisdom:

> The Sophoclean soul is ... like Heraclitus' image of the *psuche*: a spider sitting in the middle of its web, able to feel and respond to any tug in any part of the complicated structure. It advances its understanding of life and of itself not by a Platonic movement from the particular to the universal, from the perceived world to a simpler, clearer world, but by hovering in thought and imagination around the enigmatic complexities of the seen particular ... , seated in the middle of its web of connections, responsive to the pull of each separate thread ... . The image of learning expressed in this style ... stresses responsiveness and attention to complexity; it discourages the search for the simple and, above all, for the reductive.[10]

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6 J Vining, *The Authoritative and the Authoritarian* (1986) 27.

7 C Segal, 'Introduction' in *Sophocles'* Antigone (R Gibbons and C Segal, trans.) (2003) 6.

8 T D Eisele, 'The Legal Imagination and Language: A Philosophical Criticism' (1976) 47 *University of Colorado Law Review* 363.

9 Ibid 368.

10 M C Nussbaum, *The Fragility of Goodness*: *Luck and Ethics in Greek Tragedy and Philosophy* (1986) 69.

This imagery fits well with the process of what law and literature pioneer James Boyd White has called 'intellectual integration'.[11] This is the putting together of fragments (texts and events) not for the purpose of assimilating them to a single image or a single set of rules but for tentatively contemplating similarity and difference and for engaging with tensions between the particular and the general. Such a process has seemingly obvious pertinence for lawyers and non-lawyers alike who take the pursuit of social unity *and* diversity seriously.

I. Taking Sides: Us against Them

In Greek mythology, following Oedipus' death, his daughter Antigone returned to the city of Thebes, where her brothers Eteocles and Polynices were contesting supremacy. The brothers had agreed to share the rule of Thebes, but Eteocles broke the agreement. Polynices tried to regain this share of the throne by attacking the city. During the battle, Eteocles and Polynices killed each other. Creon, the new king, has to make a judgment on how to treat the two bodies – similarly or differently. His judgment is the departure point for Sophocles' play *Antigone*.[12]

Sophocles has Creon at the outset living by the metaphor of the city as a ship. We hear this metaphor when Creon speaks to the Chorus, which is comprised of Theban elders Creon summoned 'to conference together'.[13] Speaking on 'the practice of authority and rule',[14] he says: 'If I saw doom instead of deliverance / Marching against my fellow citizens, / I would not be silent, nor would I love / An enemy of my land as a close friend – / Knowing that this ship keeps us safe, and only / When it sails upright can we choose friends for ourselves.'[15] Against the background of this imagery, Creon hands down his judgment on the two bodies. Eteocles is to be buried with great honour: 'Eteocles, who fell fighting in defence of the city, / Fighting gallantly, is to be honoured with burial / And with all the rites due to the noble dead.'[16] Polynices, deemed to be an 'enemy' of the polis, is to be treated differently. 'Polynices, / Who came ... to burn and destroy / His fatherland and the gods of his fatherland, / To drink the blood of his kin, to make them slaves – / He is to have no grave, no burial, / No mourning from anyone; it is forbidden. / He is to be left unburied, left to be eaten / By dogs and vultures, a horror for all to see.'[17] The Chorus respond in brief: 'Creon, son of Menoeceus, / You have given your judgment for the friend and for the enemy. / As for those that are dead, so for us who remain, / Your will is law.'[18]

In the prologue, Sophocles presents Antigone as one who considers family connections to be of immense importance in matters of life and death. In an intimate address to her sister Ismene, Antigone says, 'O sister! Ismene dear, dear sister Ismene! / ... Have you heard how our dearest are being treated like enemies?'[19] Antigone invites Ismene to resist Creon, even though 'The punish-

11 J B White, *Justice as Translation: Essays in Legal and Cultural Criticism* (1990), 3–21.

12 In this article the source texts are Sophocles, *The Theban Plays* (E F Watling, trans.) 1947; and Sophocles, *Antigone*, above n 7.

13 Watling ibid 130.

14 Ibid 131.

15 Gibbons and Segal, above n 7, 62.

16 Watling, above n 12, 131.

17 Ibid.

18 Ibid 132.

19 Ibid 126.

ment for disobedience is death by stoning.'[20] In an absolutist tone, Antigone insists that Creon 'has no right to keep me from my own.'[21] Ismene is not persuaded about Antigone's proposed action. She suggests deferring to customs concerning the place of women in politics: 'O think, Antigone; we are women; it is not for us / To fight against men; our rulers are stronger than we / And we must obey in this, or in worse than this. / May the dead forgive me, I can do no other / But as I am commanded; to do more is madness.'[22] Without trying to persuade her to change her mind, Antigone immediately turns against Ismene: 'No; then I will not ask you for your help. / Nor would I thank you for it, if you gave it. / ... Live, if you will; / Live, and defy the holiest laws of heaven.'[23]

Antigone evidently is certain she knows what she wants and how to get it. She does not stop for a moment to explore, through conversation, the complex topic of 'forgiveness' raised by Ismene, a topic that offers to bridge between the simplistic friend enemy dualism.[24] Later, by way of a taunt, Antigone asks Ismene, 'Is not [Creon] the one you care for?'[25] The answer could be a resounding 'yes' without implying that Ismene does not feel the same or any less 'care' for Antigone. The issue at stake is not necessarily one in which Ismene is forced to take one of two sides, with an unbridgeable gulf between them. Antigone treats her sister in the way modern economists commonly model economic actors, namely as machines capable of unequivocally ranking alternatives open to them.[26] But this model is built on a vast set of assumptions about the world, including the existence of 'full information' and a mechanistic view of language with which to name a world of discrete 'things'. These assumptions, perhaps needless to say, are contestable. Antigone talks as if she is omniscient, even knowing the 'holiest laws of heaven'. She does not invite Ismene to converse on what seems obviously contestable.

Antigone is caught in the act of disobedience and she admits to knowing of his decree and to daring to contravene it:

> It was not Zeus who made that proclamation
>
> To me; nor was it Justice, who resides
>
> In the same house with the gods below the earth,
>
> Who put in place for men such laws as yours.
>
> Nor did I think your proclamation so strong
>
> That you, a mortal, could overrule the laws
>
> Of the gods, that are unwritten and unfailing.
>
> For these laws live not now or yesterday
>
> But always, and no one knows how long ago
>
> They appeared. And therefore I did not intend

20 Ibid 127.

21 Ibid 128.

22 Ibid.

23 Ibid 128.

24 M W Blundell, *Helping Friends and Harming Enemies: A Study in Sophocles and Greek Ethics* (1989) 112–14.

25 Watling, above n 12, 141.

26 A C DeSerpa, *Microeconomic Theory: Issues and Applications* (1988) 84–90.

> To pay the penalty among the gods
>
> For being frightened of the will of a man.[27]

What might have been the reaction of the contemporary Athenian audience, or at least Sophocles' ideal audience, to Antigone's claim? One seemingly reasonable answer is as follows. 'Yes, there are indeed unwritten laws of the gods that no mortals can overrule, but what makes Antigone think that she knows what they are better than the polis, and what gives her the authority to claim that Creon's proclamation contravenes them?'[28]

How will Creon respond to Antigone's claim? Who will he become in his interaction with her? What are the possibilities? Will he, for example, try to befriend Antigone, perhaps by adopting a manner resembling the Socratic method? This would mean beginning a conversation with a set of searching questions, with a view to helping Antigone learn that she does not know something that she thinks she knows, to humble her?[29] But this would be to invite a kind of friendship that Antigone, or at least a self within her, might be daunted by.[30] Or will Creon, as the 'enemy' Antigone has defined him in relation to herself, talk to her in the manner she talked to him?

With family connections in mind, the Chorus immediately offers this reading of Antigone's claim: 'She shows her father's stubborn spirit.'[31] But what about the accuracy or legitimacy of her claim about 'the laws / Of the gods'? On this question the Chorus is silent. What are we to make of this silence?

Creon senses before him an obstinate figure: 'Understand that rigid wills are those / Most apt to fall.'[32] Avoiding her claim about the standing of the unwritten laws, Creon turns their dispute into a gender issue: 'First, this girl knew very well / How to be insolent and break the laws / That have been set. And then her second outrage / Was that she gloried in what she did and then / She laughed at having done it. I must be / No man at all, in fact, and she must be / The man, if power like this can rest in her / And go unpunished.'[33] Whilst Creon stresses an essential difference between himself and her, one may sense Antigone's certainty and absoluteness expressed in his speech. Creon does not hesitate to condemn her to death.

Antigone insists that she will have an honourable death, and that she is not alone in believing so: 'All these / Would say that what I did was honourable, / But fear locks up their lips.'[34] Creon invites no discussion about this claim about what others think about the tension between Antigone and himself. Instead, he declares, 'You are wrong. None of my subjects thinks as you do.'[35] Ismene, however, enters to offer support for her sister. Creon dismisses her: 'I do believe the creatures both are mad; / One lately crazed, the other from her birth.'[36] Ismene then raises an awkward

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27 Gibbons and Segal, above n 7, 73.

28 I am paraphrasing here from C Sourvinou–Inwood, 'Assumptions and the Creation of Meaning: Reading Sophocles' *Antigone*' (1989) 59 *Journal of Hellenic Studies* 134, 143.

29 For a discussion on various facets of the Socratic method in the context of the law school, see T D Eisele, 'Bitter Knowledge: Socrates and Teaching by Disillusionment' (1994) 45 *Mercer Law Review* 587.

30 On the challenges of a Socratic friendship in the context of the law school, see T D Eisele, 'Must Virtue Be Taught' (1987) 37 *Journal of Legal Education* 495.

31 Watling, above n 12, 139.

32 Gibbons and Segal, above n 7, 74.

33 Ibid.

34 Watling, above n 12, 139–40.

35 Ibid 140.

36 Ibid 141.

matter of family connections: 'You could not take her – kill your own son's bride?'[37] Ismene here is referring to Haemon, who is betrothed to Antigone. For Creon, however, Antigone is readily replaceable: 'Oh, there are other fields for him to plough.'[38] This harsh agricultural metaphor, perhaps needless to say, devalues women generally and also refuses to acknowledge the particularity of Antigone.[39]

Creon's agricultural metaphor, along with his earlier sailing metaphor, is resonant with the opening of the Chorus' famous *Ode on Man*, a celebration of the civilizing power of human reason:

> At many things – wonders, / Terrors – we feel awe,
>
> But at nothing more / Than at man. This
>
> Being sails the gray– / White sea running before
>
> Winter storm–winds, he / Scuds beneath high
>
> Waves surging over him / On each side;
>
> And Gaia, the Earth, / Forever undestroyed and
>
> Unwearing, highest of / All the gods, he
>
> Wears away, year / After year as his plows
>
> Cross ceaselessly / Back and forth, turning
>
> Her soil with the / Offspring of horses.[40]

'Man', the most wonderful, terrible, awesome of creatures has used 'his' powers to invent sailing, agriculture and animal husbandry to dominate the earth. Creon, we have heard, extends this imagery to women.

Later in the *Ode on Man* there appears to be boasting on language: 'He has taught himself / Speech and thoughts.'[41] Creon, who echoes this secular rationalism, speaks as if the language he uses is a perfect instrument for his own sovereign speech and action, a transparent medium for the pronouncement of laws. Sophocles' *Antigone*, however, offers a different sense of language, a sense that becomes more apparent as the drama unfolds. In the *Ode on Man*, after speaking of the resourcefulness of man, mention is made of one insurmountable obstacle, namely Death: 'Only from / Hades will he not / Procure some means of Escape.'[42] Perhaps Creon will come to learn that his language is in a sense dead, and that there has been a certain deadness in himself?

Haemon enters, and he suggests to his father that he (Creon) should be concerned about the way his own actions will be judged by the larger community: 'On every side I hear voices of pity / For this poor girl, doomed to the cruellest death, / And most unjust, that ever woman suffered / For an honourable action – burying a brother / Who was killed in battle.'[43] With the aid of a chal-

37 Ibid.

38 Ibid 141.

39 A W Saxonhouse, *Fear of Diversity: The Birth of Political Science in Ancient Greek Thought* (1992) 73.

40 Gibbons and Segal, above n 7, 68.

41 Ibid 69.

42 Ibid 69.

43 Watling, above n 12, 145.

lenging sailing metaphor, Haemon suggests that Creon would do well to avoid a quick judgment, lest his capacity for thought is impaired by a commitment to it:

> Father, there is nothing I can prize above
>
> Your happiness and well-being. What greater good
>
> Can any son desire? Can any father
>
> Desire more from his son? Therefore I say,
>
> Let not your first thought be your only thought.
>
> Think if there cannot be some other way.
>
> Surely, to think your own the only wisdom,
>
> And yours the only word, the only will,
>
> Betrays a shallow spirit, an empty heart.
>
> It is no weakness for the wisest man
>
> To learn when he is wrong, know when to yield.
>
> So, on the margin of a flooded river
>
> Trees bending to the torrent live unbroken,
>
> While those that strain against it are snapped off.
>
> A sailor has to tack and slacken sheets
>
> Before the gale, or find himself capsized.[44]

The Chorus, evidently persuaded at least to some degree by this speech, respond by saying, 'There is something to be said, my lord, for his point of view, / And for yours as well; there is much to be said on both sides.'[45] The Chorus thus invites all parties involved to move beyond a mechanistic and authoritarian talk centered on supposedly clear and simple rules. Can Creon acknowledge some complexity in the situation that is before him?[46] Can he speak in a different, conversational voice? Has he listened, really listened, to what has just been said to him?

Creon, apparently completely unmoved by the Chorus and by Haemon's speech, ignores his warning. He images himself as one who has nothing to learn from his son: 'Am I to take lessons at my time of life / From a fellow of his age?'[47] Haemon tries to converse, but cannot do so alone:

> CREON: Would you call it right to admire an act of disobedience?
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> HAEMON: Not if the act were also dishonourable.
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> CREON: And was not this woman's action dishonourable?
>
> HAEMON: The people of Thebes think not.

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44 Ibid.

45 Ibid 145–6.

46 Georg Hegel, in nineteenth century readings of *Antigone*, adopted a similar view. He claimed that both Creon and Antigone are right in principle, but that each of their conflicting principles is of limited validity. For a discussion of Hegel's work, see G Steiner, *Antigones* (1984) 37–42.

47 Watling, above n 12, 146.

> CREON: The people of Thebes!
>
> Since when do I take my orders from the people of Thebes?
>
> HAEMON: Isn't that rather a childish thing to say?
>
> CREON: No. I am king, and responsible only to myself.
>
> HAEMON: A one-man state? What sort of state is that?
>
> CREON: Why, does not every state belong to its ruler?
>
> HAEMON: You'd be an excellent king – on a desert island.
>
> CREON: Of course, if you're on the woman's side –
>
> HAEMON: No, no –
>
> Unless you're the woman. It's you I am fighting for.
>
> CREON: What, villain, when every word you speak is against me?[48]

Creon here fails to sense that there is more to the dispute than simply one 'side' versus another. Creon, who seems unable to imagine Antigone as someone other than a 'woman', lacks a certain capacity for sympathetic understanding, or a recognition of the limits of language, that would enable appreciation that what Haemon means with 'every word' may be at least slightly different from what he himself means. Creon, that is to say, seems unable to read well. Something significant may well be getting 'lost in translation', and Creon fails to question himself and/or Haemon on the fidelity of his own translation. Perhaps Creon does not know how to ask the pertinent questions? Perhaps Creon does not know how to befriend himself and/or Haemon? Creon ultimately has demanded unquestioning loyalty from Haemon (and all others), and as such an authoritarian relationship is established, one in which his son is merely a means to an end, which is some abstract, static social order.

Creon, who at least for the moment is a tyrant, turns to the matter of punishing Antigone. 'I'll have her taken to a desert place / Where no man ever walked, and there walled up / Inside a cave, alive, with food enough / To acquit ourselves of the blood–guiltiness / That else would lie upon our commonwealth.'[49] As Antigone proceeds to her rocky tomb, the Chorus tells her she is 'autonomos'; she 'lives by her own law.'[50] In the context of the play this means that Antigone has put herself 'apolis', outside the city, by not letting the laws of the city influence her action. Such autonomy is a form of hubris. Sophocles' *Antigone* is known for this novel usage of the word autonomy.[51] The roots of the word can be traced back to the vocabulary of interstate relationships – evidently coined by weaker states in the process of attempting to inhibit the arbitrary exercise of force by a stronger state over them.[52] Sophocles applied the adjective to Antigone, using it not to suggest what we today commonly take to be praise but to condemn.

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In the late 1980s, Ani Mikaere was a student at Victoria University School of Law and was about begin a career as a legal academic. After a brief time at the University of Auckland she moved

48 Ibid.

49 Ibid 147.

50 Quoted in B M W Knox, *The Heroic Temper: Studies in Sophoclean Tragedy* (1964) 66.

51 See, for example, P M Lines, 'Antigone's Flaw' (1999) 12 *Humanitas* 4, 10.

52 M Ostwald, *Autonomia: Its Genesis and Early History* (1982) 1.

south to the University of Waikato. Whilst at Waikato, in the spirit of contemporary law school pedagogy that includes narrative and storytelling,[53] she tried to bring together 'the personal' and 'the academic' in a participant observer's reading on the 'bicultural commitment' at Waikato Law School. On her early expectations about Waikato, Mikaere tells her readers:

> [W]hen I came to Waikato, the prospect of being required to give life to an institutional commitment to biculturalism was exciting. While it was not at all clear what this bicultural commitment would mean in terms of our teaching, the prevailing view appeared to be that the school should not only offer specialist courses which focused on Maori concerns, but that it should also strive to include Maori perspectives and content into all of its courses, so that those perspectives would not become marginalised.[54]

This is a 'view' with which Mikaere agreed. She co-taught the core courses Legal Systems and Jurisprudence with such a view, 'consciously developing them to ensure that Maori material and perspectives form an integral part of their content.'[55] Her experience and expectations, however, far from matched:

> Teaching experience in these courses have led me to reassess my view on what a commitment to biculturalism should require from us in our teaching. I have seen that putting Māori and Pākehā students into the same learning environment and then introducing Māori content can create an extremely culturally unsafe situation for Māori students, and for myself ... . Teaching this material to non Māori students may be putting our own knowledge at risk of exploitation and manipulation by those who do not recognise its worth. And there is, of course, the further possibility that in educating our oppressors about ourselves, we simply enhance their ability to oppress us.
>
> I hasten to add that none of what I have said is intended as a personal attack on any member of my classes, nor on any of my academic colleagues. Very few of them, if any, deliberately set out to cause offence. It is just that their life experiences are so far removed from those of Māori that they are blissfully unaware of the implications of what they say, of the damage that they are capable of causing.
>
> Moreover, in view of the genuine difficulties that a number of Pākehā students have with learning about such matters as colonisation I have come to question whether I am the right person to be teaching them such material. As I have already said I cannot relate to their guilt or to their hostility and I do not see it as my job to do so.[56]

With echoes of Antigone's and Creon's world of one 'side' versus another, Mikaere draws a bright line between the 'oppressors' and the oppressed, between 'Pakeha' and 'Maori', and 'them' and 'us'. Are the 'life experiences' of 'Pakeha' and 'Maori' really so different, 'so far removed', from each other? How might Mikaere respond to, say, a self identified Ngai Tahu student whom senses that her or his own 'life experiences' are 'so far removed' from Mikaere's, and as such she or he does not accept Mikaere's talk about how one experiences life as a 'Maori'?

Perhaps Mikaere could have better utilized her analogical imagination in trying to get 'Pakeha' to understand what she was driving at about colonisation? She does not stop to question herself whether 'the genuine difficulties that a number of Pakeha students have with learning about such matters as colonisation' arise not so much from the topic itself but the manner in which she has framed it. Perhaps the 'hostility' expressed by these students was associated not with 'guilt' but

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53 For references see N T Martin, 'Allegory from the Cave: A Story about a Mis-educated Profession and the Paradoxical Prescription' (2005) 9 *Lewis and Clark Law Review* 381.

54 A Mikaere, 'Rhetoric, Reality and Recrimination: Striving to Fulfill the Bicultural Commitment at Waikato Law School' (1998) 3 *He Pukenga Kōrero* 4, 11–12.

55 Ibid, 12.

56 Ibid.

by the relationship she establishes with her students? Does she give her students the same kind of 'autonomy' she grants to herself? Perhaps Mikaere would have done well to illuminate when, in talking about students and colleagues, the terms 'Pakeha' or 'Maori' are irrelevant? When, or which contexts, is the present writer not a 'Pakeha' to her, but a felow human being, jointly involved in the activity of trying to make sense of what it might be to be human? Perhaps Mikaere is tangled up with the term 'Pakeha' and her 'Maori' correlative in a manner resembling Creon with 'woman' and 'man'?

Like Creon and Antigone, Mikaere uses language as if it is a transparent conveyer of meaning, a perfect instrument for expressing what she wants to say. Her own background, however, offers her possibilities for acknowledging the ways in which language entangles and misleads. As a child, Mikaere tells us, she was 'singled out for the attention of every primary school inspector who visited our classroom and told to "keep up the good work".'[57] Later in life Mikaere came to conclude that with this pattern she was being 'held up as an example of successful assimilation.'[58] As a 'further twist' to the story:

> I should add that my academic ability was often attributed to my Pākehā (Australian) mother. The fact that both she and my Māori father were veterinary surgeons who had excelled in their tertiary studies rarely featured in the assumptions that were made about the source of my abilities. Few could see beyond the colour of each of my parents, automatically associating academic success with the white parent.[59]

Why does Mikaere fail to draw attention to the inadequacies of dichotomies such as 'Maori' and 'Pakeha'? It seems to me to be readily imaginable that as a young person Mikaere wondered why a child born of a 'Pakeha' mother and a 'Maori' father, or vice versa, is to be considered 'Maori' rather than 'Pakeha'. Is there a silenced voice within her?

Hearing Mikaere talk about her parents' occupation brings to mind Socrates, or at least Plato's Socrates in the *Theaetetus*.[60] Socrates famously had a mother who was a midwife, and this relationship had some considerable influence on his analogical imagination.[61] Socrates made no claim to be able to give birth to true 'ideas' but he said he could help deliver the ideas of others and then, through a conversation of analogical reasoning, jointly judge, as 'friends', their 'truth'.[62] The Mikaere we have heard differs markedly from this Socrates, for she, at least in my reading of her own account, fails to befriend not only her students but also herself.

Confidently using the inherited binary language, Mikaere came to the 'conclusion' that in order to fulfill the 'bicultural commitment' at Waikato Law School some degree of institutional separation and autonomy is required:

> [F]or some purposes, Māori and Pākehā students would best be taught separately. For example, the material in legal systems on the usurpation of Māori law by Pākehā law should be taught to Māori students by Māori lecturers, and to Pākehā students by Pākehā lecturers. This would enable Māori staff to employ their energies where they are most needed – amongst Māori students. It would also require Pākehā lecturers to take responsibility for Pākehā students' learning, and for helping them through the problems that they, as Pākehā, have with such material. It should not be the job of Māori staff to expose ourselves and our students to Pākehā students' racism and guilt. It should be added that such an approach would not

57 Ibid.

58 Ibid.

59 Ibid.

60 For a discussion of this text see D Sedley, *The Midwife of Platonism: Text and Subtext in Plato's* Theaetetus (2004).

61 See J Tomin, 'Socratic Midwifery' (1987) 37 *Classical Quarterly* 97.

62 See N Melchert, *The Great Conversation* (1999) 61.

> preclude the Māori and the Pākehā streams from coming together for particular topics or even to discuss the topics which they have been lectured on separately. A healthy exchange of views would still be possible, and desirable, and could be factored in through the use of tutorials or regular combined lectures.[63]

What sort of activity might this 'healthy exchange of views' come to resemble? Some educators 'make a distinction between "really talking" and what they consider to be didactic talk in which the speaker's intention is to hold forth rather than to share' views.[64] In didactic talk, each participant may report experience, but there is no attempt among participants to commune to arrive at some new, integrated, tentatively and imperfectly shared understanding. 'Really talking' requires careful listening, and this requires a disposition of openness, without which there is no genuine relationship worthy of the name.[65] Does Mikaere speak about her students as one whom is open to learning from them?

Let us now directly turn to the Treaty. In 1990, when she held a newly created lectureship at the Auckland University Law School, Mikaere wrote a review of the 1989 volume entitled *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, edited by Hugh Kawharu. Her review challenged what she perceived as the 'imbalance' of the 'content':

> Virtually all the contributors either explicitly base their views on the assumption that the signing of the Treaty coupled with the surrounding events resulted in the cession of sovereignty as provided by the Pakeha text, or at very least they appear not to regard it as being an issue. Since this in effect involves a denial of the concept of te tino rangatiratanga as guaranteed by the second article of the Maori text, and considering the crucial role that this guarantee played in securing the agreement of the Maori signatories, the paucity of discussion on this point is extraordinary. Only two writers satisfactorily acknowledge the implications raised by the differences between the two texts. Walker for example notes that the Maori chiefs continued to believe they were sovereign 'notwithstanding the meaning the colonizer chose to read into the Treaty of Waitangi as a transfer of sovereignty.' Williams points out that the English text envisaged 'a transfer of power, leaving the Crown as sovereign and Maori as subjects' while the Maori text was about 'a sharing of power and authority.' [Citations omitted] [66]

What does 'the cessation of sovereignty' mean? Might not this mean a different 'thing' to different people, whether the people are 'Maori' or 'Pakeha' or both or neither? Perhaps Mikaere has absorbed a (colonial?) way of talking about sovereignty as an abstract 'concept', as a 'thing', without being aware of it?[67] Is Mikaere passively accepting an inherited language and thus failing to develop her own voice?

Notice how Mikaere talks about 'the differences' between the two texts as if everyone should be able to see them.[68] Such talk reflects and invites a commitment to a sense that 'the meaning' of the English text is an objective reality and that 'the meaning' of the Maori text is an objective reality too, and the two don't match. If Mikaere were able to resist thingifying sovereignty she would

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63 Mikaere, above n 54, 12.

64 M F Belenky, B M Clinchy, N R Goldberger, and J M Tarule, *Women's Ways of Knowing: The Development of Self, Voice, and Mind* (1986) 144.

65 G C Fiumara, *The Other Side of Language: A Philosophy of Listening* (1990) 28.

66 A Mikaere, 'Book Review' (1990) 14, 1 *New Zealand Universities Law Review* 97.

67 This 'thing' talk is part of the legacy of *Wi Parata* – see R Dawson, *Waitangi, Law, and Justice: A Literary and Conversational Turn* (2006) 59.

68 In doing so she is a participant in a long institution – see R Dawson, ibid, chapter 3; and R Dawson, 'Waitangi, Translation, and Metaphor' (2005) 2 (New Series) *Sites: A Journal of Social Anthropology & Cultural Studies* 33.

be in a position to begin to construct similarities between the two texts.[69] In doing so, she would be beginning a conversation, rather than handing down declarations, as Sophocles' Antigone and Creon did to each other and to others. (In a recent essay Mikaere expresses contempt for the two Treaty composers and for the English text. 'While Williams and Busby must surely have been aware of the differences between the two texts, it seems extraordinary that we should today reward their deceit by paying the English text any attention whatsoever.'[70] With this 'must' Mikaere sounds to me like the unjust Creon when he condemned Antigone to death.)

Mikaere continued her review of the Kawharu collection as follows:

> It is probably not surprising that academic lawyers consider the matter of sovereignty as long since settled, for to regard it otherwise would be to question the legitimacy of the system of which they form an integral part. The possibility of a concept of sovereignty that is different to that known to English law is apparently beyond the comprehension of the legally trained mind. McHugh insists that '[u]nder the rules behind our present constitutional arrangements there can be no such thing as a residual legal sovereignty in the Maori tribes from which any rangatiratanga can be derived.' Inexplicably, it is assumed that tino rangatiratanga can legitimately be defined with reference to English concepts of constitutional law. It is apparently unthinkable that sovereignty as ceded in the Pakeha text should be defined with reference to te tino rangatiratanga, despite the fact that the Maori signatories had no clear conception of the term sovereignty but signed largely on the understanding that in doing so they were ensuring the preservation of their rangatiratanga.
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> It is ironical, though, to find that in these times of so called increased awareness of Treaty issues, the majority of the Maori contributors continue to frame their discussion within the parameters of the debate as defined by 150 years of Pakeha legal thought ... .
>
> ... [F]or any reader seeking a balanced and realistic analysis of the relationship between Crown and tangata whenua which looks beyond the rhetoric of recent government and judicial statements to assess the true nature of political power and who holds it in Aotearoa, this book will be inadequate.[71]

If to 'think like a lawyer' is to accept as an axiom there are at least two 'sides' to every issue or argument, then nothing is ever 'settled', including the meaning of 'sovereignty'. Asking fundamental questions of the kind I am doing here is not to 'question the legitimacy of the system' but to contribute to the evolution of a way of talking; that is, to help make an already open, evolving process better. 'Better' for me includes hearing voices that go unheard, and hearing heard voices with a more discriminating ear, trained by authorities such as Sophocles. Mikaere seems to me to be committed to the view that 'the system', namely 'English law', is an object. In this respect she ironically resembles McHugh, who talks about a system of 'rules' that are 'behind' the 'constitutional arrangements'. This commitment, like the grand claim to be able to look 'beyond the rhetoric' of utterances to see what is 'true', it seems to me, is a conversation-stopper. What can happen when there is no conversation?

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69 For a discussion about the vices of thingifying sovereignty see P M Brennan, 'Against Sovereignty: A Cautionary Note on the Normative Power of the Actual' (2006) 82 *Notre Dame Law Review* 101, 102–4.

70 A Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Maori' in M Belgrave, M Kawharu, and D Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) 330, 340.

71 A Mikaere, above n 66, 98–101.

II. Justice as Integrative Conversation

As Antigone leaves the stage, Teiresias, who is a blind prophet, comes unsummoned to give Creon advice about the present situation in Thebes. 'At my seat of divination, where I sit / These many years to read the signs of heaven, / An unfamiliar sound came to my ears / Of birds in vicious combat, savage cries / In strange outlandish language ... / Full of foreboding then I made the test / Of sacrifice upon the alter fire. / There was no answering flame.'[72] All this Teiresias reads as a mortal sickness in the city, a sickness Creon, its leader, is responsible for. He repeats Haemon's 'advice about taking advice'.[73] Creon's authoritarian, tyrannical self responds: '[A]ll the gold of India will not buy / A tomb for yonder traitor. No. Let the eagles / Carry his carcass up to the throne of Zeus; / Even that would not be sacrilege enough / To frighten me from my determination / Not to allow this burial.'[74] Creon's rigidity reveals his 'self identification with divinity rather than humanity'.[75]

Unheard as an adviser, Teiresias now speaks with a different voice. He speaks in the voice he is known for, as a prophet:

> Then hear this. Ere the chariot of the sun
> Has rounded once or twice his wheeling way,
> You shall have given a son of your own loins
> To death, in payment for death – two debts to pay:
> One for the life that you have sent to death,
> The life you have abominably entombed;
> One for the dead still lying above ground
> Unburied, unhonoured, unblest by the gods below.
> You cannot alter this. The gods themselves
> Cannot undo it. It follows of necessity
> From what you have done ... .
> ... The time shall come,
> And soon, when your house will be filled with the lamentation
> Of men and of women; and every neighbouring city
> Will be goaded to fury against you, for upon them
> Too the pollution falls when dogs and vultures
> Bring the defilement of blood to their hearths and altars.[76]

Creon is responsible for having brought about an awful disintegration of the cosmos, and he is to be punished severely.

When the Chorus reminds Creon that the prophet has always been right in the past, Creon reluctantly yields. He sets out to release Antigone from her tomb.

Meanwhile, Haemon has rushed to Antigone, who has acted with little regard for him or for their relationship, only to find that she has hanged herself, after she experienced self doubt and considered the possibility of being in the wrong.[77] When his father arrives at the tomb, lamenting Haemon spits in his face and unsuccessfully tries to kill his father before killing himself with a sword. Creon is devastated by this loss. We hear cries of woe that are indistinguishable from the

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72 Watling, above n 12, 152–3.

73 P J Euben, *Corrupting Youth: Political Education, Democratic Culture, and Political Theory* (1997) 163.

74 Watling, above n 12, 154.

75 R W Bushnell, *Prophesying Tragedy: Sign and Voice in Sophocles' Theban Plays* (1988) 59.

76 Watling, above n 12, 154–5.

77 F Budelmann, *The Language of Sophocles: Communality, Communication and Involvement* (2000) 178.

cries of female wailing.[78] We then hear self criticism: 'O the curse of my stubborn will! ... . I learn in sorrow. Upon my head / God has delivered this heavy punishment / Has struck me down in the ways of wickedness, / And trod my gladness under foot. / Such is the bitter affliction of mortal man.'[79] The Chorus can only offer simple justice talk: 'You have learned justice, though it comes too late.'[80]

There is more suffering to come. The Messenger has relayed news of Hameon's suicide to Eurydice, Creon's wife. She had turned and left without a word. In trying to make sense of her departure the Messenger says to the Chorus, 'The best that I can hope / Is that she would not sorrow for her son / Before us all, but vents her grief in private / Among her women. She is too wise, I think, / To take a false step rashly.[81] This talk comes from the practice of domesticating female lament, keeping it from flowing into the public, masculine world.[82] The Chorus questions the Messenger's judgment on Eurydice's judgment: 'Yet there is danger in unnatural silence / No less than in excess of lamentation.'[83] Eurydice, Creon learns, has taken a sword to her heart, killing herself. Creon utters a nautical metaphor, which links up with his opening 'ship as state' metaphor at the outset, 'O harbor of Death, hard to cleanse. / Why? Why do you destroy me?'[84] Creon's piloting has steered to destruction, to a harbour choked and contaminated with corpses. For Creon, this is almost beyond his capacity to comprehend: 'Is there no sword for me, / To end this misery?'[85]

What sense are we to make of this tragic ending? What is the 'justice' that Creon is said to have learned? Did the gods' punishment of Creon amount to the vindication of Antigone? It seems to me that these are three of many questions Sophocles invites his audience to ask themselves and one another, to begin a deep conversation. Sophocles makes it impossible for a careful, non imperialistic reader to use key terms such as 'justice', 'law', 'love', 'enemy', 'friend', 'man', 'woman', as though they carried their own meaning. He invites his reader to become a self-conscious composer of meaning, weaving together fragments and threads he has provided in the play. Language, Sophocles defines in part through his own composition, is non-mechanistic, involving interdependencies between words that are complex and contextual. As with a societal constitution, the whole is more than the sum of the parts. The highest art arguably is to compose a temporary and tentative unity given the diverse parts of which it is comprised.

Concerning the Chorus' use of 'justice', I take this to mean a certain kind of equality. Both Creon and Antigone had an equal interest in maintaining a community, and this meant that their thought about what they wanted and who they were must acknowledge their interdependence. This acknowledgment would have led both to think very differently of themselves and other their situation when they met face-to-face to talk about the treatment of Polynices' body. Their interchange could have resembled an activity that in modern times can go by the name 'equality under law'.[86]

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78 Gibbons and Segal, above n 7, 135.

79 Watling, above n 12, 160.

80 Quoted in T G Phelps, 'Narratives of Disobedience: Breaking/Changing the Law' (1990) 40 *Journal of Legal Education* 133, 138.

81 Watling, above n 12, 159.

82 C Segal, *Sophocles' Tragic World: Divinity, Nature, Society* (1995) 126.

83 Watling, above n 12, 159.

84 Quoted in R F Goheen, *The Imagery of Sophocles' Antigone: A Study of Poetic Language and Structure* (1951), 49.

85 Watling, above n 12, 161.

86 Here I draw from White's work in another context, J B White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984) 91.

Here we have an open hearing in which one story is tested against another, with no meta-story that resolves the differences. Doing justice may be said to begin in an integrative conversation.

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In 1995, in an essay entitled *The Treaty of Waitangi and the Separation of Powers*, Sian Elias (as she then was) offered some innovative materials for sovereignty-talk in New Zealand. She directly challenged the supreme conversation-stopper, namely the doctrine of parliamentary sovereignty:

> The Treaty itself is silent both as to the manner of exercise of the Crown's powers of sovereignty or kawanatanga and as to the systems by which it was to perform its Treaty obligations. It is clear that the compact was seen and marketed by the missionaries as a personal one between the Queen and the Chiefs. There was no suggestion that the Queen herself was constitutionally unable to exercise the kawanatanga the Chiefs conferred upon her. The notion of Parliamentary supremacy was not mentioned ... . Theories of Parliamentary supremacy developed in England are grounded firmly in English history and in particular the struggles between King and Parliament of the 17th century, they are not compelled by fundamental legal principle or by logic. On any view, the Treaty of Waitangi is critical in the history of New Zealand and its constitutional development. The application of theories based on historical tradition which is only in part ours should not be assumed.[87]

As Sophocles seemingly understood so well, it is generally harder to sense what is absent than to sense what is present. A vital contribution to Waitangi-talk here, apart from the non-absolutist manner of her talk, is Elias' oral-aural emphasis. To repeat with emphasis added, 'The Treaty itself is *silent* both as to the manner of exercise of the Crown's powers of sovereignty or kawanatanga and as to the systems by which it was to perform its Treaty obligations.' This remark opens up possibilities for a large conversation that until then had been closed, perhaps largely due to unreflective customary practice.

Elias continued her engagement with the doctrine of parliamentary sovereignty as follows:

> It seems to me that it is time to recognise that the notion of arbitrary Parliamentary sovereignty represents an obsolete and inadequate idea of the New Zealand constitution. It fails to take account not only of the place of the Treaty in New Zealand history but also of developing principles of international law. The Treaty requires to be recognised as fundamental to our constitutional system by reason of its status as a compact with the indigenous peoples of New Zealand and because of the vulnerability of the indigenous people and the increasing international concern for their protection.[88]

Absent from Elias' sovereignty-talk are abstract definitions of sovereignty. This silence brings political philosopher Rob Walker to mind when he says, 'the very attempt to treat sovereignty as a matter of definition and legal principle encourages a certain amnesia about its historical and culturally specific character.'[89] As one whom takes historical circumstances seriously, Elias may well have sought to discourage such amnesia.

Elias next turned to the topic of democracy. For her, 'The arguments against judicial review based on democratic considerations seem largely overstated.' By way of expansion:

> Judicial review itself is a check against erosion of democratic values, a function the more important the less controlled the legislature. The judicial process may also serve a democratic ideal not adequately protected by representatives of the majority of the day. Further, the judicial process is itself, or has the potential to be, highly participatory.[90]

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87 S Elias, 'The Treaty of Waitangi and the Separation of Powers in New Zealand' in B D Gray and R B McClintock (eds), *Courts and Policy: Checking the Balance* (1995) 206 at 213.

88 Ibid 224.

89 R B J Walker, *Inside/Outside: International Relations as Political Theory* (1993) 166.

90 Elias, above n 87, 228.

For Elias, as it was for the Warren Court that unanimously judged racial segregation to be unconstitutional,[91] some degree of meaningful political legal social inclusiveness may be thought of as a precondition for a well functioning democracy. Elias evidently could readily imagine the judiciary invalidating legislative action in order to secure the standing of the indigenous peoples, based on claims relating to the Treaty. Such an act would completely undermine the authority of the *Wi Parata* judgment, which deemed Crown acts to be non reviewable, unless the Crown said so or conceded as much in legislation.[92]

In all that she said in her 1995 essay, Elias invites a considerable challenge to our legal cum linguistic-cultural inheritance. She would continue to invite this challenge. In her 2000 Oration *Constitutions and Courts*, Elias, now Elias CJ, talked about 'some reassessment of traditional notions of Parliamentary sovereignty.'[93] Acknowledging that 'some will view this development with alarm, increasingly it has come to be recognised that the notion of arbitrary Parliamentary sovereignty within its area of formal competence represents an obsolete and inadequate idea of the constitutions of both Australia and New Zealand.' She does not stop there: 'Indeed, it is questionable whether it ever represented an adequate idea of even the competence of the English Parliament.'[94] The Sophoclean Elias CJ imagines constitutions as 'living' and as beyond fully capturing in words: 'it needs to be recognised that no written text will capture the constitution as a whole.'[95]

Against this image of a living constitution, Elias CJ offers an image of the possibility of a dead constitution:

> Constitutional brinkmanship between courts and the legislature is dangerous for everyone. It is also … based on an inadequate notion of law as a hierarchy of static precepts. An adequate view of law in the 21st century needs to release us from the conceptual shackles of supremacist theory, so that we may develop a rule of law based upon shared principle, rather than armed stand off.[96]

If Eteocles and Polynices had let go of their supremacy talk, Creon would never have had to decide about burying two bodies – and Sophocles would not have had a tragedy to write.

The matter of how to avoid such a tragedy, as Sophocles knew well, is the material of justice talk. Elias CJ went on to indicate that she takes the word 'justice' that is in her 'Chief Justice' title seriously:

> It seems to me that the role of the courts arises from an authentic and deep-seated view in the community that justice ultimately must be vindicated in actual cases. The thirst for justice springs from a shared ethical value that justice matters. As Sir Stephen Sedley points out, it is impossible to prove *why* it is that justice in this sense matters. What is important is the existence of the 'moral sensibility which says that it does'.[97]

On an intimately related topic, Elias CJ suggested that that which goes by the phrase 'the rule of law' could be, and should be, a pattern of structured and disciplined and open judgments.[98]

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91 *Brown v. Board of Education* (1954) 347 US 483. Elias would later come to talk about the *Brown* case – see Rt Hon Dame S Elias, 'Equality Under Law' (2005) 13 *Waikato Law Review* 1, 1, 2 and 13.

92 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

93 Rt Hon Dame Sian Elias GNZM, *Constitutions and Courts* (2000) 12.

94 Ibid.

95 Ibid 14; quotation omitted.

96 Ibid 16.

97 Ibid 20, quoting Rt. Hon. Lord Justice Sir Stephen Sedley *Freedom, Law and Justice* (1999) 41.

98 Ibid 16-17.

In 2003, Elias CJ revisited the topic of the Treaty and parliamentary sovereignty. She did so as contribution to a series organised by the Institute for Comparative and International Law at the University of Melbourne on *Sovereignty in the 21st Century*. In the opening section of her paper, subtitled 'Another Spin on the Merry Go Round', she suggests that vibrant conversations on the topic require escaping from certain habits of thought:

> I want ... to talk about where our constitutions are today and say something about the way they might be going. I will suggest that a fixation with parliamentary sovereignty and the relative democratic merits of parliament and the courts to the exclusion of a wider perspective is impoverishing our constitutional thinking. I want to avoid the labels of supremacy and activism and protestations of democratic legitimacy. I want to suggest that our own political institutions and community expectations have moved on from a monolithic and obsolete view of the fundamentals of law as a quest for the power that trumps. And I want to suggest that it is time we too moved on to consider our constitutional arrangements without distorting them through the lens of command.[99]

Good conversation, Elias CJ personally suggests (with the repeated use of the pronoun 'I'), requires attention to the limits of an inherited language and to the plurality of lenses for looking at constitutions.

Later in her talk, in a general discussion on sovereignty, Elias CJ suggested that the absolute in law is obsolete. She expressed approval with a British constitutional lawyer who had this to say about legal principles: 'Indeed, the first principle is that no principle should be over stressed or pushed to its limits.' This advice, which readers of the *Antigone* would readily appreciate, translated into the present topic is as follows: 'It is precisely the Royal absolutism of the Renaissance which, renewed and transformed into parliamentary absolutism, has destroyed our capacity for constitutional thought by asking over and over again the same question, who ultimately has the sovereign power? And insisting on an answer.'[100] As has often been remarked, ask the wrong question, you get the wrong answer. This would seem to be the problem with a significant amount of theorizing in constitutional law concerning relations between the branches of government.

It is also a problem with much talk about the Treaty. Here, on the powers of 'sovereignty' or 'kawanatanga', Elias CJ writes:

> This kawanatanga was a transliteration of Governor and was known to Maori from the model of Pontius Pilate in the Bible. In 1861 the retired first Chief Justice of New Zealand, William Martin, suggested that the powers ceded to the Queen by the chiefs were only those necessary for the establishment of settled government and law. 'In return they retained what they understood full well – the "tino rangatiratanga'' (full chiefship), in respect of all their lands.'
>
> On this argument, the sovereignty obtained by the British Crown was a sovereignty qualified by the Treaty. It has not been treated as so qualified as a matter of domestic law. But the elements of our unwritten constitution have never been fully explored to date. We have assumed the application of the doctrine of parliamentary sovereignty in New Zealand. Why, is not clear.[101]

Elias CJ here, echoing her 1995 essay, suggests that the doctrine of parliamentary sovereignty that has come into operation has done so without apparent deliberate thought and against good authority. For her, a key issue that needs to be worked out is the *limits* to the sovereign powers of the Crown in Parliament. Elias CJ's talk, by my reading, is more complex and more integrated than a

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99 Rt Hon Dame S Elias, 'Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round', (2003) 14 *Public Law Review* 148, 149–50.

100 Ibid 150 citing F Mount *The British Constitution Now* (1992) 81.

101 Ibid 153.

great deal of past and present Treaty law talk, which typically is presented in terms of a clash of 'sovereign' rights, each stated *absolutely*, with no evident way to reconcile them. Her talk makes for the possibility for the parties to the Treaty to talk together, and to end much talking past each other, or at least to better understand and live with difference.

Elias CJ expressed a broad, evolutionary and conversational sense of the law at the opening of the Supreme Court on 1 July 2004. In a speech marking this institutional evolution, she spoke of justice not by talking abstractly about law as a system of rules or about judges without biases and preconceptions but by locating the Court in the flow of history and of traditions and by offering insights into the activity of engaging with the past:

> What we should celebrate is the aspiration for the delivery of justice which has prompted the creation of the Court. Those aspirations have been with us from the very beginning. In February 1840 at Waitangi much of the debate was about law and its administration. I doubt whether any country was founded with such expectations of law as ours.
>
> The creation of a final Court of Appeal in New Zealand furthers those aspirations for justice … The Act setting up the Court … identifies a statutory purpose of better understanding of New Zealand conditions, history and traditions. In addition we may hope to obtain greater understanding of the role of courts and some of the constitutional balances referred to in the Act. The obscurity of our appellate arrangements to date has not helped such understanding. Following the establishment of the Court, there are signs of greater interest in engagement on the constitution and the role of the courts in it. And that is very much to be welcomed.
>
> There are then opportunities to be taken and expectations to be met by the Court – and there are shoals to be avoided. It would be wrong not to acknowledge at this time the anxieties that have been expressed about this step. And the sincerity of those views. In the end, they can only be answered by the performance of the Court ... .
>
> Those who worry about upheaval in our law may not understand how conservative judicial method must be even in a common law system. No judgment is isolated from the existing order. A judge must always ensure that a decision fits within it, both to achieve a just solution for the parties and to maintain the order for future cases, which can only be dimly forseen. Judicial decisions must be legitimate. That means they must always be justified through reasons. Only through reasons is fidelity to the judicial obligation to do right according to law demonstrated. Courts cannot have agendas. They respond to actual controversies brought before them by real litigants. And their judgments must be their own vindication. But judgments will not convince if they stray from established doctrine and precedent except for sound reason, laid out for all to assess.
>
> The reference to New Zealand's history and traditions in the statute does not prompt any wholesale reassessment of our law. The history and traditions of the common law are our history and traditions too. So too are the Great Charters of England, such as Magna Carta. In its origin, this history and tradition predates European knowledge of New Zealand by centuries. To that extent it is an inherited tradition. But to a substantial extent English law is not inherited history but part of our own direct history. Sir Kenneth Keith has pointed out that the last volume of Blackstones Commentaries was published in the year Captain James Cook made landfall in New Zealand in 1769 …
>
> In these Islands we have other traditions. Some were shaped by our history as a country already occupied by Maori. Lord John Russell writing to Hobson at the end of 1840 described them as a people in whom 'the arts of government have made some progress … with usages having the character and authority of law' … English law adapted to meet those local conditions and customs.
>
> Other traditions arose from the experiences of our young country. The circumstances of settlement meant that we have always depended heavily upon statute law. As a result we have traditionally paid close atten-

> tion to the context of statutes and have had no difficulty in accepting that both statutes and common law operate within a single legal system and that the task of the courts is to ensure that they work together. A less suspicious, more cooperative approach to legislation than applies in some other common law jurisdictions is our way.
>
> All of these strands of history and memory contribute to a distinctive New Zealand legal tradition. The Supreme Court is set up to operate consciously within it, not to tear it down.[102]

Who is this person speaking? Who are the people she is speaking to? What is the relationship between the communicants? What does the Chief Justice do? What does the Court do? What do other members of her profession do? Where does she place law on the map of human activities?[103]

Elias CJ identifies herself as located in a field of human relations. She speaks on behalf of the Court, a collection of people who will talk certain ways to certain people, authorized to do so by a statute created by the government. A principal goal of the talk, she suggests, is justice, which is concerned with relations between people and between peoples. Courts 'respond to actual controversies brought before them by real litigants', and they seek to persuade, or 'convince', these litigants with reasoned judgments, done with consideration of 'fidelity to the judicial obligation to do right according to law ... .' Litigants are not abstract, isolated actors but people who have emerged from particular 'traditions' and 'customs' and 'experiences' and 'circumstances'. The Courts are, she suggests, something of a meeting-place for people with diverse backgrounds, all of which should be treated with respect by being given a place to stand.

Elias CJ identifies herself as located in the flow of time. Certain dates have particular significance to her: 1215, 1769, 1840, and 2004. A judge, she says, is concerned with the past, with 'established doctrine and precedent', and with the present and the future, with maintaining the existing order 'for future cases'. There is a sense, she suggests here, that past and present and future are tied together, in the sense of being parts of a larger whole. The meaning of the statute setting up the Court, she suggests, is linked to the background against which it was a performance: cutting ties with the Privy Council was a response to changing conditions, of perceived 'obscurity of our appellate arrangements'.

Elias CJ identifies herself as engaged in the pursuit and creation of knowledge. The Act establishing the Court identifies a purpose of 'better understanding of New Zealand conditions, history and traditions.' This involves attuning oneself to a variety of 'experiences' and 'circumstances'. She expresses 'hope to obtain greater understanding of the role of Courts and some of the constitutional balances referred to in the Act.' Courts produce 'reasons' to justify judicial decisions, 'laid out for all to access'; 'their judgments must be their own vindication.' The Supreme Court 'is set up to operate consciously within' various 'strands of history and memory' and thus to reconstitute 'a distinctive New Zealand legal tradition.' Thus the kind of knowledge the Court is concerned with is of a humanistic kind, seeking not the precision and clarity of mathematical thought but a provisional and tentative putting together into wholes of what would otherwise be fragmentary.[104] This is an activity sometimes called integration, which is disassociated from a schema in which the whole is equal to the sum of the parts.

In all of this, Elias CJ, by my reading of her speech, addresses her audience as fellow performers, as conversational partners, involved in the remembering and the reconstituting of a living and

102 Rt Hon S Elias, 'Opening of the Supreme Court of New Zealand' (2004) *New Zealand Law Journal* 291, 291–4.

103 These questions and my response to them have been heavily influenced by K Boulding, *The Image: Knowledge in Life and Society* (1956).

104 This description draws from J B White, *From Expectations to Experience* (1999), chapter 8.

ever changing nation. She engages us as fellow members of a nation on a journey, the destination of which is to be worked out in what is a collective enterprise.

What, may we take from Elias CJ's speech, is the law? It may be thought of as a set of institutions, collections of people talking about certain issues in certain ways, institutions that create 'expectations' for the way officials and citizens act, or ought to act. Courts give attention to texts made by others in the past – treaties, charters, statutes, judicial opinions, classic books, and so on – deemed to be authoritative and to texts and utterances and gestures made by people in the present involved in 'actual controversies brought before them.' Litigants arrange material relevant to a controversy into narratives. Judges listen and respond with a narrative that weaves these narratives together in some way or another. The judgment is a 'performance', one that gives meaning to key terms such as 'fidelity' and 'just' and 'sound reason', a performance that takes the path of the law in one direction rather than another.

The fundamental question of law, in this schema, concerns how all parties may do justice to each other, an activity that requires that all parties take responsibility for giving meaning to justice. This places a demand on a community to somehow integrate a multiplicity of voices without falling apart, which is what happens when, as Sophocles showed so well, some voices go unheard or are not given any or due weight. This activity of integration is the material of a complex conversation, a conversation that we as members of a nation have a vital interest in not just sustaining but enriching.

III. Conversation-Stopping

We now come to the Hon Michael Cullen's speech marking the 150th anniversary of the opening of the New Zealand Parliament, in which he confronted Elias CJ's utterances on parliamentary sovereignty. After giving a brief outline of the evolution of the Colonial Parliament, Cullen went on to talk about the relation between Parliament and the Courts:

> [I]t would now seem to be settled doctrine that New Zealand is a sovereign State in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the will of the governed …
>
> There is an increasing tendency to challenge the exercise of this sovereignty. This comes not just from some radical Māori, who argue that sovereignty has never been legally acquired in New Zealand; it also comes from within the heart of New Zealand's judiciary. Our own Chief Justice has put it …: "we have assumed the application of the doctrine of parliamentary sovereignty in New Zealand—why, is not clear."
>
> There is interesting academic literature that can be used to back such a view … but it is not a view that I accept. In my view, we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty, not just for its own sake but also for the sake of good order and government …
>
> A half-pie Americanisation of our judicial system would serve no one in the long term, even though it might seem attractive to particular groups of litigants in the short term. I certainly hope we do not continue down that track. In a democratic society, politicians may be, and are, dismissed. Their work may be undone as a result of the popular will. Judges, on the other hand, are all but undismissible, and certainly not for the views that they hold or the judgments that they arrive at, or for cleaning up after the consequences of their own decisions …

> Governments, of whatever stripe, do not favour judicial activism. They almost inevitably favour a strict constructivist approach, because it involves far fewer political or fiscal risks.[105]

Cullen here, with his strongly voiced supremacy talk, and possibly with a hint of the brinksmanship that Elias CJ would have us stay clear of, begins by inferring that one of us, namely 'our own Chief Justice', is one of them, namely 'radical Maori'. By the end of his story, we sense that Cullen has failed to engage with Elias CJ's reasoning questioning the doctrine of parliamentary sovereignty, which involved the circumstances of the existence of the Treaty. And he has ignored her invitation to be sensitive to labels such as 'supremacy' and 'activism' and to the different uses to which 'democracy' can be put. Cullen has rejected the activity of conversation. Like Creon, he appears to demand of his audience that they grant authority only to his own declarative utterances.

Cullen offers not even a footnote of reasoning on why he does 'not accept' the 'interesting academic literature' that could stand as an authority for Elias CJ's 'view' on parliamentary sovereignty. His silence reminds me of Nietzsche's talk about reasoning as a weapon of the weak, to be used against people who are strong enough not to give reasons.[106]

Cullen gives us no clue as to why he does not apply the label 'activist' to the judiciary from the 1870s in its reading of the Treaty that contributed to consequences Cullen's administration sees the need to be 'cleaning up' in the present so called Treaty Settlements Process. He gives us no insights as to where his imagination went in the process of coming to his confident conclusion that a 'half-pie Americanisation of our judicial system would serve no one in the long term.' Like Antigone when she scolded her sister for not siding with her against Creon, Cullen suggests that we have the knowledge to unequivocally rank alternatives to us.

Cullen seems to imagine the law as a kind of machine that is made of inter-connected parts. These parts include rules that fit together and work in mechanical ways and that can be talked about with precision. All this assumes, against what Sophocles has offered to teach, that language is another machine, a transparent one that is free of culture, one that enables a 'strict constructivist approach'.

Elias CJ imagines the law differently than Cullen. She is aware that she imagines the law, for she knows that lenses of one kind or another are involved; he talks as if the law is there for all to see, through a flawless glass. As exemplified in her own arguments above, Elias CJ images the lawyer as one who engages in argument of a conversational kind, especially about the meaning of a set of authoritative texts: treaties, constitutions, statutes, judicial opinions, and so on. Cullen offers not conversation but assertions about the way things are. His ideal audience is a collection of subjects who will readily submit to his 'plain' words, like the subjects Creon desired.

Like any human being, a judge cannot avoid being 'activist' in the sense of making choices. These will include classifying and defining, ultimately choosing and remaking a language, which is in constant change along with the culture it is associated with. To suggest or claim that all cases can be neutrally slotted into some fixed set rules is to suggest or claim the unattainable and to promote the masking of value judgments. What goes by the phrase 'the rule of law' could be, and in my view should be, a pattern of structured and disciplined and open judgments.[107] This is the activity Elias CJ has promoted and continues to do so, an activity quite different to an unattainable

105 Cullen, above n 192-3.

106 See E Garver, *For The Sake of Argument: Practical Reasoning, Character and the Ethics of Belief* (2004) 30.

107 See M J Radin 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Review* 781.

mechanistic law in which the judge formally declares what the correct rule is, and thereby stops a conversation.

IV. Concluding Remarks

For the Hon. Michael Cullen, 'sovereignty' evidently is not a term that permits varying degrees. Parliament, for him, can no more be a little bit 'sovereign' than Socrates' mother could have been a little bit pregnant.[108] Ani Mikaere seems to me to also live by some such analogy. Neither Cullen nor Mikaere seem to be aware that they themselves imagine sovereignty this way: they both talk as though sovereignty *is* the way they see it. Elias CJ, on the other hand, seems to me to be aware of the analogy and to be in pursuit of a better one.

By my reading of *Antigone*, its composer Sophocles sought to define and celebrate law as an inherited conversation, one which he sought to enrich with a greater diversity of voices. When are we in the activity of conversation? This activity may be taken to be a communication pattern resembling a dance, one in which the partners are in a reciprocal transformation. Anne Morrow Lindbergh, in her 1955 book *Gift from the Sea*, is the source of this analogy:

> A good relationship has a pattern like a dance …The partners do not need to hold on tightly, because they move confidently in the same pattern, intricate but gay and swift and free, like a country dance of Mozart's. To touch heavily would be to arrest the pattern and freeze the movement, to check the endlessly changing beauty of its unfolding. There is no place here for the possessive clutch, the clinging arm, the heavy hand; only the barest touch in passing. Now arm in arm, now face to face, now back to back – it does not matter which. Because they know they are partners moving to the same rhythm, creating a pattern together, and being invisibly nourished by it.[109]

We witnessed both Antigone and Creon with a possessive clutch and a heavy hand, and this brought not mutual nourishment but mutual destruction. What kind of movements are Cullen and Mikaere and Elias CJ inviting or compelling? Mikaere, who perhaps understandably may fear the continued assimilation of indigene voices, seems griped by a certain kind of self possession and fearful of such conversation. Cullen's unreasoned assertion that 'Parliament may need to be more assertive in defence of its own sovereignty' indicates a similar aversion to conversation. Both Cullen's and Mikaere's respective agendas in sovereignty-talk would seem to render anyone who disagrees with them to be unworthy of becoming a conversational partner. As it stands now, what both of them say about sovereignty, and what they do not say in regard to its limits, seems remarkably similar. One difference between them resides in their respective audiences. Elias CJ can be distinguished from both to the extent that she has issued an invitation to these audiences to converse.

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108 For this pregnancy analogy I am indebted to J N Rakove, 'Making a Hash of Sovereignty' (1998) 2 *Green Bag* 35, 38.

109 A M Lindbergh, *Gift from the Sea* (1955; 1983) 104.