New Zealand Law in Literature and Legal History: A Survey of Legal References in New Zealand Historical Fiction

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1 INTRODUCTION

The New Zealand Law and Literature Database was completed last year at Victoria Law School. The aim of this database is to provide information for an assessment of legal references in New Zealand fiction including prose, poetry and drama. Legal history is a very common subject in the database and is used by authors to create an historical context for a plot, to provide an apposite analogy or to make a specific comment about the role of law in New Zealand’s history. There are approximately 70 texts out of the 326 texts making up the database that contain references to legal history. Key authors who have combined literature and legal history include Michelanne Forster, Witi Ihimaera, Rachel McAlpine, James McNeish, Maurice Shadbolt and Mervyn Thompson.

When using the term “legal history” this article refers to authors writing about historical topics from a contemporary perspective, for example, in Season of the Jew, Maurice Shadbolt writes in 1986 about the New Zealand Wars of the 1860s. While Children of the Poor by John A Lee is important to legal history in that it looks at the legal system during the Depression, the author did not mean the book as legal history as it was written in 1932 during the Depression. Therefore, Season of the Jew is included in this article on legal history, while Children of the Poor is not.1

The works that include legal history cover a wide range of subjects including the historic relationship between Maori and Pakeha, for example, the Treaty of Waitangi, the New Zealand Wars and recent Maori protests. Other legal history topics include the struggle for female suffrage, industrial action and sensational trials such as the Parker-Hulme trial of 1954 and the trial of Jock Mackenzie.

This article focuses specifically on New Zealand Law in Literature. In an upcoming article I will be placing New Zealand Law in Literature in an international context. This will be very useful for fictional legal history as comparisons can be made between New Zealand works and foreign works such as Arthur Miller’s play The Crucible, Robert Bolt’s play A Man For All Seasons and Harper Lee’s novel To Kill a Mockingbird. All of these works are famous examples of legal history in fiction.

There is of course a huge academic discourse on Law and Literature. Examples can be found of international academics analysing historical fiction with reference to law.2 The aim of this article is to investigate the situation in New Zealand in preparation for analysis in an international context. I have also begun to research legal history

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1 A broader article could include comment on what Children of the Poor can tell us about the 1930s Depression, but this article’s focus is on references to legal history made in works of historical fiction.

2 A recent example is an article analysing the most famous historical novel of all time, Gone with the Wind: Spanbauer, “Scarlett O’Hara as Feminist: The Contradictory, Normalizing Force of Law and Culture” (2001) 5 Law/Text/Culture 45.
references in New Zealand popular media, namely, film and television. As yet, it is unclear how much there is to discover in this area.

When authors write about legal history there are important factors for the Law in Literature scholar to consider. How has the subject of legal history been used to portray certain legal themes? What are these themes and how successfully have they been conveyed? What is the nature of the legal history subject matter? What does the writer tells us about New Zealand’s legal history? Finally, what does the author’s treatment of legal history say about popular views of this subject?³

II THE HISTORICAL RELATIONSHIP BETWEEN MAORI AND PAKEHA

New Zealand authors have been attracted to the complex and conflict-ridden relationship between Maori and Pakeha since European settlement. Writers have focused on issues including the debate over the Treaty of Waitangi, the injustice of early land purchases, the paternalistic and ethnocentric approach of the Pakeha legal establishment towards Maori and differences between Maori and Pakeha perspectives on law. These issues highlight the tension that has existed historically between the two cultures. Present-day New Zealand race relations have been heavily affected by our legal history. Fictional literature can make a special contribution towards increasing our understanding of the past. Writers of fiction have greater freedom to explore emotions and hypothetical situations than writers of non-fiction. Racism in the law can be analysed more liberally in a novel than in a factual historical work.⁴

The Treaty of Waitangi

Several authors have referred to the injustices involved in the signing of the Treaty of Waitangi in 1840. Controversy has surrounded New Zealand’s founding constitutional document since its signing. The Maori version of the Treaty promised that substantive sovereignty would remain in the hands of Maori while the English version clearly states that Maori cede sovereignty to the Crown. There have been continual breaches of the Treaty by the Crown throughout New Zealand history. In recent times, in an effort to avoid the contradictions of the two versions, the focus has been on the principles of the Treaty, rather than the Treaty itself.⁵

Tony Beyer’s poem “Treaty” is sceptical about the nature of Pakeha motives during the Treaty signing process.⁶ The poem questions Maori acquiescence to Pakeha designs,

³ In Moran, “How is Pynchon related to the Law?” (1999) 24 Okla City UL Rev 449, 451 the author puts forward other justifications for studying Law in Literature. These reasons include the production of better lawyers, lawmakers and citizens under the law, the humanisation of the legal system and the encouragement of marginalised voices.

⁴ For example, in a novel such as Shadbolt, Season of the Jew (1986) the primary focus can be on themes such as the racism of law, while attention to historical fact can play a secondary role. In Binney, Redemption Songs: a life of Te Kooti Arikiranga Te Turuki (1995) attention to historical detail must be the primary focus and if legal racism is apparent, it will be dependent on the facts. Both authors are telling the story of Te Kooti but Shadbolt has far more artistic freedom that Binney.


⁶ While poetry about legal history may not be “fiction” as such, because the emphasis is on imagery and theme rather than fact it essentially uses history as the basis for art and should be considered within Law in Literature.
you had to believe
the foreigners
when they rode
their greatbellied beasts
through fog and flax
swamp seeking you
displaying their papered
honesties to claim
your mark or signature.7

This sceptical, suspicious view of Pakeha motives is echoed in C K Stead’s poem “1840 The Treaty” in which he describes in verse the events surrounding the signing of the Treaty,

Five hours the speeches lasted – and more to come.
Does the Governor understand the way of the Maori?
Did Williams translate fairly?
Will the chiefs sign
and know what they sign? Time will make us a story.8

These poets have little faith in the Treaty signing process seeing it as a legal means to a political end. By making arguments through poetry the writers can use imagery to illustrate their views. In Beyer’s poem the reader is made aware of the lack of Maori understanding of the European world by using phrases such as “the foreigners” and “greatbellied beasts”.

The difficulties in interpreting the two versions of the Treaty dominate the Treaty debate. Bernard Gadd’s brief and ambiguous poem “three balls 2001” refers to the great confusion over the meaning of Articles 1 and 2 in the Treaty,

is The Treaty
a pawn shop
where anyone trades in
unwanted Articles?9

The ambiguity concerns whether Gadd is criticising the way in which the Treaty is manipulated by different interest groups for their own ends or whether he is pointing out the limited usefulness of the Treaty due to its contradictory, vague nature. In Roma Potiki’s poem “I try to imagine” a Maori writer despair’s about the continual breaches of the Treaty evident in New Zealand’s history,

Te Tiriti O Waitangi –
still to be upheld
by those who say it is, but is not, legal
those who re-define even their own words
to suit their chosen moments.

those who once saw our end
but now keep us in tow and hopeful with legislation,
possessing all with paper and lawyers, creating confusion.10

Potiki is referring to the uncertain legal position of the Treaty\textsuperscript{11} and attempts by the Pakeha establishment to silence Maori with what could be seen as token and paternalistic legislative gestures such as the creation of Treaty principles.\textsuperscript{12} What might take several pages to say in an academic article on the Treaty principles can be conveyed effectively in two verses of poetry.

The list of writers using literature to criticise Pakeha breaches of the Treaty goes on. Kendrick Smithyman, in his poem “Treaty Talk and Relic” states the case simply:

The Treaty was a fraud.  
When the Maori signed it they believed in it  
but not all of them signed it, did they? 
Some of the pakeha knew it was a fraud too,  
didn’t they make a fuss at Waitangi and over Hokianga 
afterwards? The other fellows though,  
the men in black, they didn’t interpret things right.  
That’s what the fuss was about.\textsuperscript{13}

The “speaker”\textsuperscript{14} in Smithyman’s poem condemns the Treaty signing process as fraudulent using rhetoric common in the Treaty debate. Smithyman goes further than Stead by stating that the missionaries’ translation was misleading, rather than just raising the possibility. Examples of ethnocentrism by the Pakeha Treaty partner pervade the poetry in this subject area.

While many of the references to the historical treatment of the Treaty appear in poetry there are also references in prose and drama. Apirana Taylor discusses the damage caused by historical Treaty breaches in the short story “Whakarongo”\textsuperscript{15}. Mervyn Thompson’s song-play “Songs to the Judges” does not specifically discuss the Treaty but describes the various ways in which Pakeha have used the law to disenfranchise Maori since 1840.\textsuperscript{16}

While most New Zealand poets focus on Treaty injustices, not all write from a perspective sympathetic to Maori concerns. Barry Morrall’s poem “The Maori Activist” attempts to provide another side to the Maori-Pakeha debate.\textsuperscript{17} Morrall lists ways in which European culture has benefited Maori and ways in which pre-European Maori culture was flawed. The poem accuses Maori activists of putting forth baseless arguments,

You would argue ownership of land  
Acquired through tenuous allegiances and  
polygamous marriages  
Or taken by conquest:  
Remember, in those times the vanquished had few rights

\textsuperscript{11} The Treaty of Waitangi itself is not part of New Zealand’s domestic law, but the principles of the Treaty have been incorporated into a number of statutes since 1975.
\textsuperscript{12} Jane Kelsey has argued that the Treaty principles allow the Pakeha legal-political establishment to avoid addressing the issue of Te Tino Rangatiratanga guaranteed in Article Two of the Maori version of the Treaty. See Kelsey, \textit{Question of honour?: Labour and the Treaty, 1984-1989} (1990).
\textsuperscript{14} It cannot always be assumed that the views expressed in a literary work reflect the views of the writer.
\textsuperscript{17} Morrall “The Maori Activist” in Morrall, \textit{Never Alone} (1986) 7.
And land tenure was always precarious.
Though you might not agree
The justice you crave
Is now more moral and more just
Than those ancient times
When only might was right
And when ‘long-pork’ was served at the feast.18

In today’s political environment, it is difficult to read Morrall’s poem without labelling it as an example of reactionary conservatism, especially when the poem makes reference to Maori cannibalism and uses the tired old argument that Maori concerns would be completely ignored in less democratic nations than New Zealand. Despite this, Morrall does provide another perspective that is evident in modern New Zealand politics19 but almost invisible in New Zealand literature.

The Treaty of Waitangi is not the only historical example of the paternalistic and ethnocentric approach of the New Zealand legal system in relation to Maori. Another injustice that is mentioned by several authors concerns the early land purchases made by European settlers during the middle of the nineteenth century. By bringing to life the massive culture clash over perspectives on land, authors can help us better understand the modern debates over land ownership and the Treaty settlements process.

Ray Grover’s novel, Cork of War, details events in the lower North Island during the 1840s. Grover highlights legal inconsistencies arising during the Land Claim hearings of the early 1840s, for example, Pakeha inability to understand the concept of Maori communal land ownership.20 In a similar work, Not So the Land, D M Owen looks at the dubious nature of land claims during the 1830s and 1840s. Owen describes the Wairau Incident and William Spain’s Land Commission.21 These two works show how historical fiction can be used as a context in which to clearly show injustices and legal breaches. In this case, the authors have detailed the imposition of Pakeha views of land ownership on Maori.

The New Zealand Wars

Injustices were also evident during the New Zealand Wars. This conflict that occurred intermittently from 1843 to 1881 saw Maori fighting Imperial and Colonial troops in open and guerrilla warfare. The Maori fighters were eventually overwhelmed by superior numbers and firepower. As is common in times of warfare, the New Zealand colonial government assumed emergency powers, resulting in a number of arbitrary actions and unjust decisions. Authors who have discussed legal themes in the context of the New Zealand Wars include Errol Braithwaite, Harry Dansey, Witi Ihimaera, William Satchell, Maurice Shadbolt and Kendrick Smithyman.

In Errol Braithwaite’s The Needle’s Eye, the story concerns a military trial during the New Zealand Wars. Doctor Harris is being tried on the charge of treason for betraying colonial forces.22 The doctor is also guilty of murdering a Maori. The officer in charge of the trial, Major Williams, is unable to try the man for the murder of a Maori.

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18 Ibid.
19 For example Don Brash’s controversial speech “Nationhood”, delivered as Leader of the National Party to the Orewa Rotary Club on 27 January 2004.
20 Grover, Cork of War (1982) 151-154. Grover also looks at the double standards involved in the early colonial legal system and the manipulation of the justice system by Pakeha leaders such as Governor Grey.
21 Owen, Not So the Land (1965) 177.
as the colonial forces are at war with the Maori. He also struggles with the idea of convicting the accused of treachery and thus dishonestly appeasing Maori by telling them the conviction was for the murder. This plot reveals many important legal themes, including the difficulty of maintaining due process during times of strife and racism in the colonial legal system. This section of the novel closely explores the idea of justice. Major Williams is torn between pragmatism and conscience:

I’m in it up to my neck, now, he told himself. Justice. They all talk so glibly of justice. Yet they’re concerned with one thing only – their own skins. Well, and who can blame them? But justice is justice.23

The novel grapples with the issue of whether justice can be absolute or manipulated to suit political circumstances. During the New Zealand Wars, the later path was often followed by the government, making this historic era a useful context for explorations of injustice.

In Harry Dansey’s play, Te Raukura: The Feathers of the Albatross, Scene VIII involves Governor Grey justifying the Waikato War to the former Chief Justice, William Martin. Grey is portrayed as a paternalistic, ethnocentric imperialist, while Martin is a wise, reasoned humanitarian. Again, the concept of justice is at the heart of the work. Martin and Grey argue over the premise for the New Zealand Wars. Grey speaks of “law and order”. Martin speaks of “justice” arguing, “What I wrote of, and what I speak of, is justice; and justice is indivisible. It must be done impartially to all men, and must be seen to be so done.” 24 The portrayals of Grey and Martin are historically accurate25 but two-dimensional. To clearly point out the pitfalls of imperialism, the author needs Martin to provide a foil to Grey’s paternalistic statements. Making leading historical figures into symbols is an effective literary device in a modern morality play like Te Raukura.

In Witi Ihimaera’s The Matriarch, the New Zealand Wars are used to highlight the oppression of Maori and the near destruction of their society by Pakeha. Ihimaera refers to Te Kooti’s guerrilla campaign on the East Coast of the North Island. One of Te Kooti’s followers, Hamiora Pere, was convicted of treason in a sham trial in 1869. Ihimaera uses Pere’s trial to demonstrate the unjust way in which the Pakeha legal system treated threats from outsiders such as Pere:

Poor, poor Hamiora, you were adjudged guilty even before the sentence was pronounced. You were guilty by association. You were guilty because you had been on the Chathams. You were guilty because Te Kooti’s wife said you were. You were guilty because the Pakeha wanted you to be. You were guilty because you were a Maori.26

Ultimately, Ihimaera concludes that Pere is convicted due to his ethnicity and as a result of racism. Ihimaera’s description of Pere’s fate attacks the corruption of the colonial legal system, accusing the law of passing judgment for political reasons without weighing up the evidence.

23 Ibid at 148. Another New Zealand novel that deals with a military trial during the New Zealand Wars is Satchell, The Greenstone Door (1938). This novel focuses on events occurring in the later stages of the Waikato War, for example, the siege at Orakau.
Many of the legal themes that appear in New Zealand historical fiction are encapsulated in Maurice Shadbolt’s historical novel *Season of the Jew*. It tells the story of the Maori leader, Te Kooti, and his military campaign against colonial forces in the late 1860s. While *Season of the Jew* is not a purely fictional novel, it can be classed as historical fiction with imaginary characters and events being mixed with actual historical figures and factual happenings. The majority of the novel deals with the guerrilla campaign waged by Te Kooti and the efforts by the colonial forces to capture him.

The final chapters of the book focus on legal matters and the trial of Hamiora Pere. As mentioned above, Witi Ihimaera has also focused on this trial as it is an excellent example of an ethnocentric colonial government using the court system for political ends. Shadbolt plays up the political nature of the trial more than Ihimaera. The Pere trial actually occurred and records describing it can be found in the National Archives in Wellington.27

While the novel generally follows the historic reality, it is first and foremost, fiction.28 Shadbolt’s fictional treatment of the trial is an excellent example of the way in which law is treated in literature. The trial contains various stock figures of law in literature including the innocent defendant, the vicious prosecutor, the courageous defence lawyer, the lying witness and the hanging judge. In Pere’s trial, law is a tool of power wielded by the colonial authorities to suppress Maori nationalism.29

The theme of oppression is also apparent in the poem “The Attack on Rangiaowhia” by Kendrick Smithyman.30 This poem describes the betrayal by Pakeha authorities of peaceful Maori in a thriving Maori township in the Waikato region.

The Bishop alien amid their corn prayed his ruth
for a Queen’s queer justice dearly given
by Terry carbines spitting in charity’s mouth.31

The hypocrisy of the European colonial system is an obvious target for poets, playwrights and authors. Pakeha pride in their just and objective legal system is undermined by the ease with which this legal system can be manipulated and corrupted to pursue purely political goals. The sacking of Rangiaowhia has become symbolic of colonial oppression.32

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27 Hamiora Pere File, Justice Department Records, NA J1 73/586, National Archives, Wellington.

28 In Sandy, *Enemy Territory* (1997) 299, the novelist tells the story of a woman in the midst of a mid-life crisis who investigates a case from 1872 in which she believes a Maori man was wrongly sentenced to death. As a legal historian analysing a work of fiction, it is important to focus primarily on the art rather than the historical accuracy. That said, accurate historical detail does improve a work. The controversial case mentioned in *Enemy Territory* is supposed to have been conducted in Auckland by Chief Justice James Prendergast in 1872. In fact, Prendergast was not appointed to the bench till 1875 and then he served in Wellington rather than Auckland. While this is not particularly important to the overall success of the novel it does show the frustrations in analysing historical fiction from the perspective of an historian.

29 Some of the key legal topics that are covered in the novel include injustice, racism, the fledging New Zealand legal system, crime and punishment, legal advocacy and trial by jury. This novel is discussed in-depth in my conference paper “Imagining the Past: Law in Literature Jurisprudence and Legal History in New Zealand”, presented at the 23rd Annual Conference of the Australia and New Zealand Law and History Society, July 2004, Perth, Australia.


31 Ibid.

32 Other symbols of this oppression that appear in New Zealand fictional literature include Chief Justice James Prendergast, Governor George Grey, the Native Land Court, Parihaka and Bastion Point.
The final chapter of the New Zealand Wars has certainly captured the imagination of New Zealand authors, namely, the invasion of Parihaka in 1881. The decision by the New Zealand Government to destroy Te Whiti and Tohu’s Taranaki village was riddled with legal manoeuvring and official hypocrisy. Various authors have used Parihaka as a symbol of passive resistance against the oppressive power of “The Law”. Novels about Parihaka include John Hinchcliff’s *Parihaka* and Edmund Bohan’s *The Matter of Parihaka*. Mervyn Thompson’s song-play “Songs to the Judges” uses Parihaka to symbolise the way in which colonial law disenfranchised Maori.

Parihaka is used in different ways by the various authors. Edmund Bohan uses it as a literary context in which to place a murder mystery. John Hinchcliff closely details the political and legal machinations behind the scenes allowing the reader to observe the harsh colonial justice meted out during the late nineteenth century. Hinchcliff also tells the story from two perspectives; both Maori and Pakeha. Mervyn Thompson looks at Parihaka as an example of Maori resistance, colonial repression and non-violent protest. Thus a controversial historical event has become the backdrop for different literary genres. Novelists need to use historical events that are well-known and evocative. Few of these exist in our history, making Parihaka all the more precious.

There have been many poems written about this pivotal event, including Barry Mitcalfe’s “Te Whiti and the Pakeha”, Kendrick Smithyman’s “Trial”, Jessie Mackay’s “The Charge at Parihaka” and “Twelve Little Poems About Parihaka” by Elizabeth Smither. The poems about Parihaka are almost exclusively written from a viewpoint that is sympathetic to Maori and fiercely critical of the colonial forces. Parihaka has become an excellent example in New Zealand history and literature of a “black and white” historical moment. As such, heroes and villains are easy to identify, symbols are plentiful and the story can be used as a didactic lesson. The way in which the legal system was manipulated in order to facilitate the invasion, and the “kangaroo court” trials of Maori that followed, provide the author of fiction with excellent ammunition with which to critique the nineteenth century New Zealand legal system.

Works that look at the historic New Zealand culture clash often take a view sympathetic to Maori. The blossoming of New Zealand fiction from the 1970s occurred at the same time as New Zealand history was being revised. Authors such as Michael King, James Belich, Claudia Orange and Judith Binney wrote groundbreaking works emphasising the oppression faced by Maori since European contact. This revisionist trend directly influenced historical fiction. In a recent *Listener* article, Philip Steer surveyed the growing number of novels featuring the New Zealand Wars. He observed that:

They are united by the fact that their moral weighting of history differs markedly from their predecessors, reflecting the increased prominence of Maori culture and the questioning of

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36 Symbols include the white feather as an emblem of peace, John Bryce as a symbol of colonial arrogance, Te Whiti as a symbol of inspired leadership and Maori conduct as a symbol of non-violent protest.
Pakeha identity occurring in wider society. For a start, more often than not their heroes are Maori and right is on their side.\(^{37}\)

This is definitely true of historical fiction concerned with the law.

**Recent Maori Protest**

While much of the fictional literature relating to legal history is focussed on the nineteenth century, there are also many references to twentieth century events. Leading Maori authors have explored recent legal history to find stories of Maori protest, for example, protests at Waitangi Day, the Land March of 1975 and the occupations of Bastion Point and Moutoa Gardens. These recent protests have arisen from historical grievances as well as from contemporary issues such as unemployment, loss of Maori identity and the mono-cultural approach to education. In the renaissance in fiction written by Maori authors over the last 35 years, many have explored the pivotal role of history in shaping modern New Zealand race relations.

Perhaps the most famous example is Witi Ihimaera’s *The Matriarch*. In this landmark work Ihimaera creates a memorable character, the eponymous Maori woman who has lived through the great events of New Zealand’s history.\(^{38}\) Events such as the 1975 Land March are brought to life and the reader is clearly shown the depth of Maori despair over the loss of their land and culture.

And in the evenings, the marchers would meet with the tangata whenua in the meeting house to debate the purpose of the march and the need for the Maori to be as one people, unified against the Pakeha in the fight for the land….It was all for aroha, and it was all in sadness. And as had been commanded, not once did the pouwhenua touch the ground that it was carried over.\(^{39}\)

The work merges fiction and non-fiction but is always focused on the injustices inflicted upon Maori by Pakeha. A sense of intense frustration and bitterness is evident in the novel.\(^{40}\) Ihimaera’s play, *Woman far walking*, shares many similarities to *The Matriarch* and traces the same defining historical events.\(^{41}\)

Literature has accompanied recent Maori protest as a tool with which to display deeply held emotions. In *Thousand-Eyed Eel: A Sequence of Poems* from the Maori Land March 1975, Graham Lindsay, constructs an entire book of poems based on one protest event. The emotions displayed in literature such as Lindsay’s is often very raw and passionate. Lindsay, writing in the year following the Land March expresses the high emotions of the time,

Sold down the drain!  
Maoris sold down the drain again!  
Resign Hohepa!  
We’re not waiting another hundred & thirty-five years!  
Tall men with strong faces black berets  
Shaking fists upheld shouting Sell Out\(^{42}\)

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\(^{38}\) Ihimaera, supra note 26.  
\(^{39}\) Ibid at 236.  
\(^{40}\) Ihimaera also discusses modern Maori politics in Ihimaera, *The Dream Swimmer* (1997). This book is also heavily based on actual historical events.  
Unlike much of the fiction included in this paper, Lindsay’s poem is almost contemporary to the actual event that he is writing about. The poetry of protest is one-sided by its very nature as it seeks to promote a specific cause, in this case, Maori autonomy. A dry, academic weighing up of both sides of an issue often makes for uninspiring protest rhetoric, while catch-phrases and emotive one-liners such as “Sell Out!” can simplify complex issues for potential followers.

The importance of protest in Maori life is reflected in the work of modern Maori authors such as Witi Ihimaera and Apirana Taylor. In his novel, He Tangi Aroha, Taylor tells the story of a young Maori activist re-discovering his cultural roots and learning about the injustices of the past. Similar issues can be found in the various works about Maori protest. In He Tangi Aroha, Atarua dwells upon some of them, “Times were changing. No doubt about that. And no doubt some people welcomed change and many hated it. Waitangi…education…land rights…racism…unity.”

The characters created in He Tangi Aroha do not pull their punches. Taylor allows Kohimarama, the Maori activist, to voice the anger and frustration of Maori towards Pakeha law:

> If we look at many of the Acts passed by Parliament over the past one hundred and fifty years it would be polite to say that they were passed by Pakeha who misunderstood Maori. But the truth is that their attitude has often been one of arrogance and blatant racism.

While Taylor may or may not agree with his character’s views, Kohimarama is a realistic character, a person who could be easily found in modern New Zealand. The legal system is a primary focus for Maori activism as it has been instrumental in facilitating the loss of land, culture and language. In this way, He Tangi Aroha is a reflection of its times and provides a helpful mirror in which to analyse our society, and in particular, Maori society.

Mervyn Thompson also writes of Maori protest in his song-play, “Songs to the Judges”. In “The Raglan Golf Course Dispute” he has used Eva Rickard’s 1978 protest as the subject of a Gilbertian scene in which a judge paternalistically deals with the Maori “trespassers”. In “Songs to the Judges”, the law is seen as an instrument of control used by Pakeha to oppress Maori and acquire their land. The judiciary are portrayed as pompous and corrupt. In “The Raglan Golf Course”, the Judge clearly sides with the Pakeha land-owners seeking to protect the golf course from Maori occupiers, “You are charged in this court with wilful trespass On the golf course of my dreams….You are charged in this court with bringing irreverence To Raglan’s sylvan putting greens.” Satire and farce are potent weapons in the hands of authors and Thompson directs both at the New Zealand legal system.

The legal relationship between Maori and Pakeha in New Zealand’s history is easily the most common legal history topic in the Law and Literature database. Approximately half of the legal history works cited in the database feature this subject in some way. The works predominantly focus on the conflict and tension evident in the Maori-Pakeha relationship. Disputes over land, sovereignty and the Treaty itself form the basis of the subject matter. The writers tell us of the suffering of Maori at the hands

43  Lindsay’s poem can be distinguished from Children of the Poor though (see text accompanying supra note 1) as Children was written during the Depression. Lindsay’s poem was written after the Land March. This does raise the perennial issue as to how long we must wait after an event has taken place before it can be classified as “history”.

44  Taylor, supra note 15, 35.


46  Thompson, supra note 16.
of the colonial legal system. Only one work out of approximately 30 is written from a perspective that could clearly be described as unsympathetic to Maori.47

The subject of Maori and Pakeha legal relations over time reveals a key legal theme, namely, the injustice, oppression, ethnocentrism and hypocrisy shown by the Pakeha legal system towards Maori since 1840. These themes are conveyed with a sense of anger. This is not surprising, considering that New Zealand race relations have been, and still are, a very volatile subject. It is impossible to read the works in this area of legal history without being made aware of how poorly Maori have been treated by the legal system. Not all the works have a specific message about legal history. Some merely use the historical legal relationship between Maori and Pakeha as an interesting backdrop for a story.

This critical view of New Zealand’s legal history is shared by many, but is probably not as widespread as one would guess from the literature. Recent political events have demonstrated that a large percentage of Pakeha New Zealanders do not sympathise with Maori concerns to the extent that New Zealand authors do.48 When attempting to gauge the impact of the works in this section on the New Zealand public one has to wonder how many New Zealanders have read even a few of the works cited.49 Those who have read the works may also not form a particularly representative cross-section of New Zealand society.

III THE STRUGGLE FOR FEMALE SUFFRAGE

New Zealand authors have been fascinated by the experience of the underdog in the nation’s legal history. Whether the underdog status is based on ethnicity, gender, wealth or religion, most of the greatest legal tales involve an outsider battling “The System”. In the corpus of New Zealand historical fiction there is a strong emphasis on the male experience. However, several New Zealand authors have written about women’s historical involvement in the legal system, and in particular, their involvement in the suffrage movement. Some of these writers have been male, reflecting the disproportionately large amount of male authors featured in New Zealand’s literary history.

Rachel McAlpine’s novel, Farewell Speech,50 details the struggle for female emancipation during the 1890s. The novel features the pivotal players in the passing of the 1893 Electoral Act and weaves a story of political intrigue and principled activism. Mervyn Thompson touches on this struggle in his play, O! Temperance,51 which focuses primarily on the Temperance movement in late nineteenth century New Zealand. In Gilbert Ward’s The League of the Brown Skirts,52 the author dreams up a future in which women take over the country and set up a female police state.

McAlpine and Thompson both focus on issues such as the patriarchal nature of the legal system and discrimination against women through the law. In Thompson’s play,
Kate Sheppard states the case for women, highlighting the hypocrisy involved in denying the vote to women.

KATE: Does the law concern women?
WOMEN: Yes! When they are required to obey it! No! When they ask to have a voice in the representation of their country!53

Fictional literature focusing on women’s issues is plentiful in New Zealand and it surprising to note how little fiction has been written about the historic relationship between women and the law.

On a lighter note, The League of Brown Skirts is a humorous novel by Gilbert Ward, written during World War II. Ward imagines a society subject to a revolt by women. A Marriage Act makes husbands the chattels of their wives, effectively reversing coverture. Eventually the female revolt fails and the would-be women revolutionaries happily retire to domestic life. In the words of the author, “Which all goes to prove that a girl can “get her man” by the good old fashioned methods without requiring the aid of Clause Two of a new Marriage Act”.54 Either the author is assuming that the main goal in a woman’s life is to find a husband or he is just making a joke. Whatever conclusion one reaches, the law is portrayed as the instrument through which women could potentially achieve power. This is somewhat prophetic, as legislation has been pivotal in transforming the role of women in modern New Zealand society.55 One wonders what Ward would have made of New Zealand in 2005, when women now hold many key constitutional roles.

The subject of women in legal history has been barely touched by New Zealand fiction writers. While social historical novels such as Jenny Patrick’s The Denniston Rose56 and Deborah Challinor’s Tamar57 have been recent bestsellers, New Zealand women’s historical struggle for recognition in the legal system and for legal equality have not captured the imagination of the writing community in this country.58 The Law in Literature database features many examples of works about women and the law, but few that address the issue in relation to history. The suffrage campaign is vitally important but is ultimately only one legal struggle amongst the many that New Zealand women have been engaged in over the past two hundred years.

The key theme emerging from this area of literature is the discrimination shown in the New Zealand legal system towards women. That said, none of the works mentioned comprehensively deals with this rich theme. The role of women in New Zealand society has been one of the most popular topics amongst New Zealand readers.59 Therefore, the dearth of writing in this area is surprising.

IV INDUSTRIAL ACTION

53 Thompson, supra note 51, 30.
54 Ward, supra note 52, 139.
57 Challinor, Tamar (2003). These two works, amongst others, are discussed in a recent Listener article: Janet McAllister “Petticoat Junction” (26 June 2004) NZ Listener, 60-61.
58 A very broad definition of legal history could see elements of social history eg marriage, care of children as ‘legal’, even though they are not discussed in relation to the law.
59 Or at least amongst 50% of them.
This theme of the heroic underdog, fighting the ethnocentric, patriarchal, capitalist New Zealand legal system is apparent in fictional works that focus on industrial action. In Mervyn Thompson’s play, *Coaltown Blues,*60 the plot features famous incidents of industrial action throughout New Zealand’s history including the Waterfront Strike of 1951. Law is used by the Holland National Government to destroy the lives of workers, as “The Emergency Regulations make it a crime to distribute pro-strike literature or feed and clothe the kids of strikes.”61 Thompson looks at the devastating effect of the 1951 Emergency Regulations on the families of striking workers. The fictional author can successfully portray the operation of law during a specific historical period by focusing on key characters and revealing how law impacts on their everyday lives.

In Peter A Smith’s *1951,*62 the Waterside Strike Emergency Regulations are again the focus. The reversal of key tenets of natural justice, such as “innocent until proven guilty”, occurred under the draconian regulations. The novel includes an interesting look at industrial law and, amongst a varied cast, includes a “hero” lawyer in the character Frank Haigh.63 The imprisonment of Jock Barnes on the charge of criminal defamation of a constable is portrayed as a trumped-up charge engineered by a corrupt legal system (which it could well have been).64 The law is often on the wrong side of justice in the works of New Zealand writers of historical fiction.

In Kendrick Smithyman’s poem “1912”, the poet focuses on the Waihi Miners’ Strike of that year. Basic human rights and the laws of natural justice are breached by the government in its quest to break the strike. Smithyman personifies the authority figures as “Justice” and employs irony to criticise the ruthless actions of the State.

Conflict is the basis of drama which is why writers are drawn to controversial issues such as industrial action. Like the court trial, the strike is an excellent literary tool. There are heroes (usually the strikers) and villains (usually the government and “scabs”). These forces clash over picket lines, creating tension. As with a trial, there is always a climax. Either the strike will succeed or be crushed. Famous strikes form part of the folklore of New Zealand history and inform the reader of the struggle for workers’ rights over the decades. The key legal themes include breaches of natural justice, authoritarianism and the use of the law as a tool wielded by capitalists to suppress the working class. Several of the legendary strikes in New Zealand history

60 Thompson, *Coaltown Blues* (1986).
61 Ibid at 38.
63 Ibid at 233. The tradition of the hero lawyer can be seen in characters such as Atticus Finch (in Lee, supra note 49), Thomas More (Bolt, *A Man for all Seasons* (1962)) and Sidney Carton (Dickens, *A Tale of Two Cities* (1859)). “Hero” lawyers can be contrasted with “demon” lawyers such as James Prendergast in Shadbolt’s *Season of the Jew.*
64 Smith, supra note 62, 272-273.
have had successful novels written about them, proving that the public are interested in this area of Law in Literature.

V SENSATIONAL TRIALS

The Parker-Hulme Trial

Beyond social activism, New Zealand Law and Literature offers a fairly limited amount of legal history. A few cause celebre cases have captured the imagination of authors, for example, the Parker-Hulme trial in 1954. On 22 June 1954, Christchurch teenagers Pauline Parker and Juliet Hulme battered Pauline’s mother to death with a brick. Rumours abounded regarding the nature of girls’ relationship, namely that they were lesbians. The trial was a major sensation. This case has captured the imagination of several New Zealand authors. In Tom Gurr and H H Cox’s Obsession and Michelanne Forster’s Daughters of Heaven, the authors have devoted whole works to this controversial subject. Both works provide accurate and exhaustive historical detail about the trial based on the actual transcripts. In this sense the works are useful both as entertaining fiction and as historical depictions.

In Obsession a number of intriguing legal themes are raised including the prurience of the public, the role of the media and the relationship between young people and the law. Leading figures from New Zealand’s legal history appear in the story, for example, the defence counsel Terrence Gresson. The authors are keenly aware of the historical importance of the trial, “Crown Prosecutor Cole got to his feet, placed his right foot firmly on the seat of his chair and, in beginning his cross-examination of Alexander Colin McIvor, launched one of the most tense battles in legal history over the minds of the murderers.” Crown Prosecutor Cole knew “…that this trial was to become probably the most gripping exploration in legal history into the minds of two killers.”

Many of the legal references in New Zealand fiction are related to court scenes. It seems that authors, and probably the public, see “The Trial” as the most compelling aspect of our legal system. It is also possible that many authors and readers are unaware that the overwhelming majority of legal work is done outside the courtroom. “The Trial” has been easily the most popular aspect of the legal system to be used by authors over the centuries. In Obsession and Daughters of Heaven, the trial is the focal point of the work and all action revolves around the court. The trial is a classic dramatic construct, a forum for dispute and resolution. It will always have opposing sides, the telling of stories and an inevitable climax. The Parker-Hulme trial also had violence, sexual controversy and unlikely culprits.

Historical fiction accounts of the trial are all written from different perspectives. Obsession focuses on the trial itself, the counsel’s arguments, the leading witnesses and the defence of insanity. Peter Jackson’s Heavenly Creatures, focuses principally on the

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66 For example, Smith, supra note 62, Pearson, Coalflat (1963) and Beardsley, Blackball 08 (1984).
67 Gurr and Cox, Obsession (1958).
69 Ibid at 8.
70 Gurr and Cox, supra note 67, 196.
71 Ibid at 162.
72 For example, Sophocles, Antigone (1912), Shakespeare, The Merchant of Venice (1600, 1623) Gilbert, Trial by Jury (1875) and Kafka, The Trial (1925).
intense relationship between the two girls.\textsuperscript{73} *Daughters of Heaven*, falls somewhere in between, including excerpts from the court trial and also private scenes between Juliet and Pauline. Forster has successfully achieved a balance between the legal and social aspects of the case. Jackson’s film is of very limited use to Law in Literature, while Forster’s play is a key work of New Zealand legal fiction. This is principally because Jackson does not look at the legal aftermath of the murder.

The general literary distrust of the legal system is particularly evident in Forster’s work. The narrator, Bridget, mocks the blind faith of judges and lawyers in “British justice”. The Crown Prosecutor, Brown, states the case for jury objectively,

You may pity the dead woman, the mother of the girl Parker, who was brutally done to death, or you may feel pity for the accused in the dreadful situation they find themselves in today. These things have nothing to do with this trial at all. Sentiment and emotionalism have no part in British justice.

Bridget replies “British justice. Hah!”\textsuperscript{74} This stereotypical “British” denial of the human element of law by the Brown does not sit well with authors of fiction, who by the nature of their work are fascinated by sentiment and emotion. The modern generation of New Zealand authors have a reflexive distrust of our English legal heritage.\textsuperscript{75}

Legal philosophy is present within many of the works in the Law and Literature canon. In *Daughters of Heaven*, Bridget is the voice of “Everyman”. During a court scene the Crown Prosecutor and an important witness are arguing as to whether or not the girls knew that murder was against the law or whether, in fact, they even recognised the law as a binding code. Bridget rhetorically addresses the audience, “But the law is the law. Like God is God. You can’t remake the universe to suit yourself. The universe is, and you fit into it. Isn’t that so?”\textsuperscript{76} This quotation addresses the most basic question in Jurisprudence, What is Law? It also raises the issue of positivism versus naturalism in law. A positivist would agree that “the law is the law” so long as it is passed by the proper procedure. A naturalist would argue that a law is only a law if it reflects a higher code. A classical naturalist could re-phrase Bridget’s quotation as “The law is God’s law”.

In *Daughters of Heaven*, the playwright has actually taken courtroom testimony and evidence from the court reports as reported by the Christchurch *Press* and the Christchurch *Star Sun*. This is another example of the historical fiction writer merging fact with fantasy.

**The trial of Jock Mackenzie**

This heady mixture is also apparent in James McNeish’s two novels, *Mackenzie: A Novel*\textsuperscript{77} and its sequel, *The Mackenzie Affair*.\textsuperscript{78} As with the Parker-Hulme trial, the story of Jock Mackenzie captured the imagination of New Zealand with its uniqueness and sheer unbelievability. James McKenzie was born in Scotland. During the 1840s he travelled to Australia and in the early 1850s to New Zealand. In 1855, approximately

\textsuperscript{73} *Heavenly Creatures*, directed by Peter Jackson, was released in 1994. It is an adaptation of Michelanne Forster’s *Daughters of Heaven*.
\textsuperscript{74} Forster, supra note 68, 19.
\textsuperscript{75} As opposed to the early generations of New Zealand fiction writers who revered Britain, for example, the poet Mary Ursula Bethell (1874-1945).
\textsuperscript{76} Forster, supra note 68, 77.
\textsuperscript{78} McNeish, *The Mackenzie Affair* (1972).
1000 sheep went missing from the Rhodes Family’s South Canterbury farm, the Levels. The sheep were eventually located in a previously undiscovered basin, now known as the Mackenzie Country. James McKenzie was found with the sheep. After a controversial trial he was imprisoned, but was pardoned soon after and return to Australia. McKenzie became a folk hero for his embodiment of the “Man Alone” stereotype – resourceful, rural, self-sufficient and suspicious of authority. His sheep dog was credited with magical powers.

In McNeish’s second book on the Mackenzie saga, The Mackenzie Affair, the author brings to life the trial of the famous shepherd. As in Maurice Shadbolt’s Season of the Jew, McNeish uses figures from history as literary tools to create a classic trial scene. Justice Sidney Stephen is the trial judge and representative of British power and oppression. Mackenzie is the common man, ill-equipped to deal with the complexity and hypocrisy of the legal system. Seager is the policeman with sympathy for Mackenzie. Seager allows us to hear his internal monologue as he ruminates on the farcical nature of the trial. In the trial, the quality of mercy is indeed strained, and Mackenzie is sentenced to five years’ hard labour. Like many of the novels featuring historical trials, the accused is often portrayed as a victim of the harsh and ineffective New Zealand legal system.

Cause celebre trials are obvious fodder for writers of fiction. Not only is the trial a perfect forum for dramatic tension, when famous people are involved, the celebrity factor increases the drama. New Zealand’s legal history does not have a large amount of cause celebre trials, but there are some that are obvious targets for writers, especially playwrights. The key themes involved in the works on the Parker-Hulme and Mackenzie trials include the unforgiving nature of “British” justice, the importance of good advocates to argue one’s case and the fascination that the public have with high-profile court trials. Above all, these works are written to entertain, rather than as didactic prose. High-profile trials are almost guaranteed to achieve this objective.

VI CONCLUSION

New Zealand authors of fiction have looked to legal history for inspiration. While our history is full of momentous events and fascinating developments, a limited number of major topics occupy the minds of our authors. The most prominent by far is the historical relationship between Maori and Pakeha. The injustices that have permeated this relationship for 165 years are perfect fodder for the poet, the novelist and the playwright. Whether it is the breaches of the Treaty of Waitangi, the imposition of British law, the defeat and subjugation of Maori in and after the New Zealand Wars or recent ethnocentric governmental actions, the themes of injustice, oppression, institutional racism and legal discrimination are dominant.

McNeish, supra note 78, 126-144.
McNeish is not the only New Zealand writer to focus on McKenzie. John Martin’s “A Ballad of the Deep South” in Martin, The Eye of King Cat (1992) 35-37 tells the famous tale through poetry.
This has been evident recently in the massive news coverage of trials such as those involving O J Simpson, Slobodan Milosevic and Michael Jackson. Historically, the trials of Socrates, Thomas More and Nazi leaders at Nuremberg, to name a few, have become iconic.
Writings on this subject reveal the level of anguish apparent in Maori and liberal Paheka circles. The law is seen as a tool of oppression used by the ruling class.83 Not all authors use the Maori-Pakeha relationship as an example of injustice, some like Edmund Bohan use it as a backdrop for a certain genre, for example, murder mystery. The sheer amount of literature on the Maori-Pakeha relationship mirrors the massive amount of non-fiction historical writing on this subject.84

Other areas of social activism that have occupied the attention of New Zealand authors include the struggle for female suffrage and industrial action taken to improve the conditions of workers. While a number of works look at these two areas, it is a small amount of literature compared with the Maori-Pakeha relationship. Most of the fictional literature concerning women and the law (and it is a large amount) is written in a contemporary setting. The themes of legal injustice and discrimination dominate works in these areas, though the law is also portrayed as a possible tool to effect change. The “cult of the underdog” is not limited to New Zealand Law in Literature. Some of the most famous works of international Law in Literature are essentially stories of the underdog, for example, To Kill of Mockingbird by Harper Lee and The Trial by Franz Kafka.

It is indisputable that the vast majority of New Zealand authors writing fictional works about legal history have approached this subject from a liberal perspective. Perspectives during the late twentieth-century were generally more socially liberal than during earlier historical eras. That said, the liberal voice in New Zealand historical fiction is almost completely dominant and at times, radical.85 The key concerns have been the legal oppression of Maori, women and “blue-collar” workers over the decades.

Interestingly, the majority of authors writing about these subjects have been well-educated Pakeha men. From Hamiora Pere to Kate Sheppard, from Jock Mackenzie to Jock Barnes,86 New Zealand authors have championed the underdog. The “persecutors” of these New Zealand icons have inevitably been cast as villains; James Prendergast, Richard Seddon, Sidney Stephen and Sidney Holland are all portrayed as Establishment figures87 dedicated to the extinguishment of difference. It not at all clear that the liberal viewpoints of most New Zealand authors reflect popular views in New Zealand society. That said, the limited amount of New Zealanders who read a wide range of New Zealand fiction are sometimes stereotypically portrayed as educated liberals. If there is some accuracy in this stereotype, then there is a relatively small, but receptive audience for the works discussed in this article.

Beyond topics of general social conflict, authors have latched upon our most high-profile and controversial court trials. Whether the trial concerns lesbian teenagers accused of murder or a mysterious Scots drover accused of secretly stealing thousands of sheep, the courtroom drama makes for perfect literary material. The court trial is a literary device widely used by New Zealand authors.

New Zealand historical fiction is a major part of our Law in Literature corpus, contributed to by writers of different backgrounds, genres and eras. Reasons for this could be the interest value of legal history and the importance of historical context to explain present events. Legal history can be high drama, as in the Parker-Hulme trial, or

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83 Very similar to the role of law in orthodox and neo-Marxist theory.
84 This non-fiction historical literature has increased dramatically as a result of Waitangi Tribunal’s work as reports detailing historical background are issued for each claim heard.
85 The legal history fiction works of authors such as Mervyn Thompson and Witi Ihimaera are radical in that they openly challenge established views and could be seen as works of protest.
86 The leading characters from the following novels (respectively): Shadbolt, supra note 4; Thompson, supra note 51; McNeish, supra note 78; Smith, supra note 62.
87 In these examples, judges, lawyers and politicians.
it can be fairly dry. One thing is certain though, New Zealand authors of fiction have a deep distrust of our legal system and its ability to offer justice to disadvantaged social groups. When looking back over the complex tapestry of our nation’s history, the law is most often seen, not as the hero of stories, but as the villain.

88 Not surprisingly, the “dry” sections of New Zealand legal history rarely get mentioned by authors of fiction, resulting in a somewhat distorted view of our nation’s history.